Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1942.
JANUARY 2, 1943.
JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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Court of Appeals

OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss" and LOUIS CAPONE,
Defendants-Appellants.

Statement Under Rule 234

These are appeals from judgments of the County Court of Kings County, dated December 2nd, 1941, convicting the appellants Louis Buchalter, Emanuel Weiss and Louis Capone of the crime of murder in the first degree and sentencing them to be put to death.

The trial took place before Honorable Franklin Taylor, County Judge of Kings County, and a jury beginning on October 20th, 1941, and concluding on November 30th, 1941. Honorable William O'Dwyer, District Attorney of Kings County, by Burton B. Turkus and Solomon A. Klein, Esqs., Assistant District Attorneys, of counsel, appeared for the People on the trial.

4 *Statement Under Rule 23A*

The appellant Buchalter was represented by Wegman & Climenko and Hyman Barshay, Esqs.: the appellant Weiss by Alfred J. Talley, James I. Cuff and M. M. Kreindler, Esqs.; and the appellant Capone by Leon Fischbein, Emanuel Rosenberg and Sydney Rosenthal, Esqs. There has been no change of attorneys.

5

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Notice of Appeal of Defendant Louis Buchalter

COUNTY COURT

COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

8

LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss" and LOUIS CAPONE, *et al.*,

Appellants.

SIRS:

PLEASE TAKE NOTICE, that the defendant, Louis Buchalter, hereby appeals to the Court of Appeals, State of New York, from the judgment of conviction of the crime of murder in the first degree and the sentence of death thereon, rendered against him on the 2nd day of December, 1941, and entered in the Office of the Clerk of that Court on that day, and from each and every part thereof, including orders denying the defendant's motion for a new trial, and the said defendant hereby appeals from each and every part of the said judgment and sentence, as well as from the whole thereof, and

9

10 *Notice of Appeal of Defendant Louis Buchalter*

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the orders heretofore made and entered on the 16th day of July, 1941, and on the 22nd day of September, 1941, denying motions theretofore made on behalf of the said defendant for an order to transfer the trial of this action from the County Court of Kings County, to the Supreme Court of the State of New York in any county other than those embraced within the City of New York, and

11

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the order or other ruling of the Hon. Franklin Taylor, a Judge of the County Court of Kings County, on August 5, 1941, pursuant to which ruling or order the trial of this action was directed to proceed, beginning on the 15th day of September, 1941, and

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the several rulings made by the said Hon. Franklin Taylor

12 with respect to the fitness and capacity to serve

of those several talesmen sworn on voir dire examination.

Dated: New York, N. Y. December 24, 1941.

Yours, etc.,

WEGMAN & CHIMENKO and
HYMAN BARSHAY,
Attorneys for defendant,
Louis Buchalter,
Office & P. O. Address, 14
60 Wall Street,
New York City.

To:

Hon. WILLIAM O'DWYER,
District Attorney, Kings County

Hon. FRANCIS SINNOTT
Clerk of the County Court of Kings County
County Clerk of Kings County

15

16

Amended Notice of Appeal of Defendant Louis Buchalter

COUNTY COURT

COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

17

LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss," LOUIS CAPONE, *et al*,

Appellants.

SIRS:

PLEASE TAKE NOTICE, that the defendant, Louis Buchalter, hereby appeals to the Court of Appeals, State of New York, from the judgment of

18

conviction of the crime of murder in the first degree and the sentence of death thereon, rendered against him on the 2nd day of December, 1941, and entered in the Office of the Clerk of that Court on that day, and from each and every part thereof, including orders denying the defendant's motion for a new trial, and the said defendant hereby appeals from each and every part of the said judgment and sentence, as well as from the whole thereof, and

Amended Notice of Appeal of Defendant Louis Buchalter

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the orders heretofore made and entered on the 16th day of July, 1941, and on the 8th day of September, 1941, denying motions theretofore made on behalf of the said defendant for an order to transfer the trial of this action from the County Court of Kings County, to the Supreme Court of the State of New York in any county other than those embraced within the City of New York, and

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the order or other ruling of the Hon. Franklin Taylor, a Judge of the County Court of Kings County, on August 5, 1941, pursuant to which ruling or order the trial of this action was directed to proceed, beginning on the 15th day of September, 1941, and

PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Buchalter, appeals from the several rulings made by the said Hon. Franklin Taylor with respect to the fitness and capacity to serve

22 *Amended Notice of Appeal of Defendant Louis Buchalter*

of those several talesmen sworn on voir dire examination.

Dated: New York, N. Y. January 9, 1942.

Yours, etc.,

WEGMAN & CLIMENKO, &
HYMAN BARSHAY,
Attorneys for appellant,
23 Louis Buchalter,
Office & P. O. Address,
60 Wall Street,
New York City.

To:

Hon. WILLIAM O'DWYER,
District Attorney, Kings County

Hon. FRANCIS SINNOTT
Clerk of the County Court of Kings County
24 County Clerk of Kings County

25

Notice of Appeal of Defendant Emanuel Weiss

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

26

EMANUEL WEISS,
Defendant.

SIR:

PLEASE TAKE NOTICE that the defendant, Emanuel Weiss, above named, hereby appeals to the Court of Appeals of the State of New York, from a judgment of conviction of the crime of murder in the first degree rendered against him in this Court on November 30th, 1941 and from the sentence thereafter imposed on the 2nd day of December, 1941, and from an order made and entered herein on the 2nd day of December, 1941 denying defendant's motion to set aside the verdict and for a new trial, and that the defendant appeals from said judgment of conviction and

27

Notice of Appeal of Defendant Emanuel Weiss

from said order and from each and every part thereof.

Dated, Brooklyn, N. Y., December 11, 1941.

Yours, etc.,

ALFRED J. TALLEY
40 Wall Street
New York City

JAMES I. CUFF
99 John Street
New York City

M. M. KREINDLER
51 Chambers Street
New York City
Attorneys for Defendant

To:

Hon. WILLIAM O'DWYER
District Attorney Kings County

Hon. FRANCIS J. SINNOTT
County Clerk of Kings County

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Notice of Appeal of Defendant Louis Capone

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

32

LOUIS BUCHALTER, alias "Lepke",
EMANUEL WEISS, alias "Mendy Weiss",
HARRY STRAUSS, alias "Pittsburgh Phil",
JAMES FERACO,
PHILIP COHEN, alias "Little Farvel",
LOUIS CAPONE,
Defendants.

Indictment No. 23855

33

SIR:

PLEASE TAKE NOTICE that the defendant, Louis Capone, hereby appeals to the Court of Appeals from a judgment of conviction of the crime of Murder in the First Degree rendered against him in this Court on the 2nd day of December, 1941, and from the sentence imposed upon him thereunder, and the defendant, Louis Capone, appeals from each and every part of said judgment of conviction and sentence; and

34 *Notice of Appeal of Defendant Louis Capone*

PLEASE TAKE FURTHER NOTICE that the defendant, Louis Capone, further appeals from the order of Judge Peter J. Brancato of the County Court of this county made and entered the 23rd day of June, 1941, denying the defendant's motion for a severance of the indictment and for a separate trial; and from the order of Mr. Justice Peter M. Daly of the Supreme Court of the County of Kings made and entered on the 1st day of August, 1941, denying the defendant,
35 Louis Capone's motion to transfer and remove the trial of the within indictment from the County Court of Kings County to a term of said Court in another county within the State of New York; and from each and every intermediate order made herein and from the whole and each and every part of said orders.

Dated, Brooklyn, New York, December 27th, 1941.

Yours, etc.,

36

LEON FISCHBEIN,
66 Court Street,
Brooklyn, New York.

EMANUEL ROSENBERG,
66 Court Street,
Brooklyn, New York.

SYDNEY ROSENTHAL,
10 Court Square,
Long Island City.

Notice of Appeal of Defendant Louis Capone 37

To:

FRANCIS J. SINNOTT,
County Clerk, Kings County.

WILLIAM O'DWYER, ESQ.,
District Attorney, Kings County.

The Warden and Agent of Sing Sing Prison,
Ossining, New York.

38

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40

Minutes of Presentment against Defendants Buchalter, Weiss and Capone

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 28th day of May 1940.

Present: Hon Franklin Taylor County Judge.

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The People of the State of New York

against

Louis Buchalter, alias (Lepke)
Emanuel Weiss, alias (Mendy Weiss)
Louis Capone Impleaded

#23855

42

Proclamation made and Court opened.

The Grand Jury comes into Court and presents Indictment against the following named defendants, for the crimes set opposite their names respectively:

Minutes of Presentment against Defendants Buchalter, Weiss and Capone 43

23855 Louis Buchalter, alias (Lepke)
Emanuel Weiss, alias (Mendy Weiss)
Louis Capone Impleaded

Jointly indicted for Murder in the First Degree.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk 44

45

46

Minutes of Arraignment of Defendant Louis Buchalter

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 29th day of May 1941.

Present: Hon. GEORGE W. MARTIN County Judge.

47

THE PEOPLE OF THE STATE OF NEW YORK

against

LOUIS BUCHALTER Alias, "Lepke"

#23855

48 Proclamation made and Court opened.

The following named defendant personally appeared and was advised as to his rights pursuant to Section 308 of the C.C.P.: and was then arraigned to plead to Indictment found against him respectively:

Minutes of Arraignment of Defendant Louis Buchalter

49

23855 Louis Buchalter, alias "Lepke"	Indicted for Murder in the First Degree. Defendant stands mute, plea of Not Guilty, Ordered by the Court to be entered. Bail denied—Trial set for July 14, 1941, U. S. Marshal, in whose custody defendant is, directed to produce defendant on that day.

50

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk

51

52

Minutes of Arraignment of Defendant Emanuel Weiss

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 11th day of April 1941.

Present: Hon. Franklin Taylor County Judge.

53

The People of the State of New York

against

Emanuel Weiss, alias
"Mendy Weiss"

#23855

54

Proclamation made and Court opened.

The following named defendant personally appeared and was advised as to his rights pursuant to Section 308 C. C. P.; and was then arraigned to plead to indictment found against him respectively:—

Minutes of Arraignment of Defendant Emanuel Weiss 55

#23855	Indicted for Murder—
Emanuel Weiss, alias	1st Degree.
"Mendy Weiss"	Pleads—Not guilty.
	No Bail—Remanded.
	M. M. Kriendler, Esq.
	Atty. for Deft.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk 56

57

58

Minutes of Arraignment of Defendant Louis Capone

At a term of the County Court, held in and for the County of Kings at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 28th day of May 1940.

Present: Hon. FRANKLIN TAYLOR County Judge

59

THE PEOPLE OF THE STATE OF NEW YORK

against

LOUIS CAPONE
Impld.

#23855

60

Proclamation made and Court opened.

The following named defendant personally appeared and was arraigned to plead to indictments found against him respectively:

#23855 Louis Capone Impld.	Indicted for Murder—1st Degree. Pleads—Not guilty Bail denied—Remanded

A true extract from the minutes.

FRANCIS J. SINNOTT

61

Indictment against Defendants Buchalter, Weiss and Capone

COUNTY COURT

OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiffs

against

62

LOUIS BUCHALTER, alias "Lepke"
EMANUEL WEISS, alias "Mendy Weiss"
LOUIS CAPONE,
Defendants

The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder in the First Degree, committed as follows:

63

The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloniously and of malice aforethought shot and killed Joseph Rosen, with revolvers.

WILLIAM O'DWYER
District Attorney

64

(Endorsements on Indictment)

Strauss & Capone, Both
Pleads Not Guilty May 28, 1940
Judge Both bail denied—Matter of A.D.A. discretion—See Sec. 553 CCP
Both remanded
Strauss to County Jail, Kings Co. and Capone to Bronx Co. Jail

Taylor, J.

Cohen pleads "Not Guilty"—Bail denied, as a matter of Discretion.

65 Remanded. Dec. 2, 1940

Taylor, J.

Louis Buchalter, personally appears for arraigament.
Defendant stands mute.
Plea of "Not Guilty" ordered by Court to be entered—bail denied—trial set for July 14, 1941
U. S. Marshal, in whose custody defendant, is, directed to produce defendant on July 14, 1941—Martin, J.
May 29, 1941—Burton Turkus, A.D.A.
12/2/40 Cohen—Defendant personally appears
66 and advised by the Court of his rights pursuant to Sec. 308 C.C.P.—
Have you a lawyer? No, but will retain own counsel.
Weiss (See over)
5/28/40
Moe Levy Esq., Assigned to Strauss, by Taylor, J.
8/26/41 Dism. as against Strauss, he having been duly executed under judgment on another indictment.

F. T.
C.J.

Endorsements on Indictment 67

Emanuel Weiss, alias "Weiss"

Pleads Not Guilty—No bail, remanded to the custody of U. S. Marshall for Eastern District of New York, to be detained at the Federal Detention Prison of New York for recall of Trial—April 11, 1941—Taylor, J.

Buchalter, defendant personally appears and advised by the Court of his rights pursuant to Sec. 308 C.C.P.—Have you a lawyer? Yes or no. Have you money to retain a lawyer? Yes or no.—Do you wish the Court to assign a lawyer? Yes or No. 68

Name of lawyer assigned.

Trial—Buchalter, Weiss, Cohen and Capone—August 4, 1941

August 5, 1941—Taylor, J.

2

Case set to Sept. 15, 1941

Woolsey W. Conlon—Juror in Box.

By Order of the Court—Capone committed to the N. Y. Tombs to await recall for Trial—August 5, 1941—Taylor, J.

September 15, 1941. Trial continued. 69

As to Defendant Philip Cohen; motion by Saul Price, Esq., for a separate trial as to Philip Cohen, defendant present.

Consented to by Burton Turkis, Esq., A.D.A. Motion for a severance Granted as to Philip Cohen. Philip Cohen remanded.

Taylor, J.—Sept. 15, 1941

As to defendant James Feraco:

Motion by Burton Turkis, Esq., A.D.A. for a severance as to James Feraco, defendant not present.

70 *Endorsements on Indictment*

Motion granted as to James Feraco.

Taylor, J. Sept. 15, 1941

Trial began August 4, and 5, 1941

Trial continued Sept. 16, 1941—Sept. 18—Sept. 19—Sept. 24, 25, 26, 29, 30.—October 2, 3, 6, 7, 8, 9, 10, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31.

Nov. 3, 5, 6, 7, 10, 12, 13, 14, 15, 17, 18, 19, 21, 22, 24, 25, 26, 28, 29, 30

Verdict—Buchalter, Weiss and Capone guilty
71 of Murder in the first degree. All three remanded—Taylor, J.

11/30/41

Buchalter, Weiss, Capone Guilty of Murder in the first degree—Sentenced Dec. 2, 1941—

Buchalter, Weiss, Remanded in custody of U. S. Marshalls for the Eastern District of N. Y. to House of Detention, New York City.

Capone—Remanded to Tombs Prison, New York City—

Taylor, J.

72 11/30/41

Endorsements on Indictment 73

No. 23855 112/478a

THE PEOPLE

vs.

LOUIS BUCHALTER, alias "Lepke"
EMANUEL WEISS, alias
"Mendy Weiss" 74

LOUIS CAPONE
Impleaded

INDICTMENT

MURDER FIRST DEGREE

A True Bill

JOHN B. MALONE 75
Foreman

WILLIAM O'DWYER
District Attorney

MURRAY KRIENDLER,
51 Chambers St., N. Y.

Atty. for Weiss
Filed May 28, 1940

76

(Pedigree)

LOUIS BUCHALTER

Counsel Assigned No
Sex Male—White
Age 44
Nativity New York City
Residence 427—West St.
Occupation Retired
Mechanical Trade No
Married Yes
77 Read and Write Yes
Degree of Education Public School Graduate
Religion Hebrew
Degree of Religious Instruction Irregular
Parents Mother living
Temperate Yes
Drugs No
Previous Conviction remains mute

Sentence To be put to death in the manner provided by law on some day in the week beginning the fourth day of January, 1942.

Taylor, J.—December 2, 1941

78

Pedigree of Emanuel Weiss 79

EMANUEL WEISS

Counsel Assigned No
Sex Male—White
Age 35
Nativity New York City
Residence 427 West St., Manhattan
Occupation Salesman
Mechanical Trade None
Married Yes
Read and Write Yes 80
Degree of Education Public School 6th grade
Religion Jewish
Degree of Religious Instruction—Irregular
Parents Mother living
Temperate Yes
Drugs No
Previous Conviction 2 misdemeanors 1 felony
Sentence To be put to death in the manner provided by law on some day in the week beginning the fourth day of January, 1942.
Taylor, J.—December 2, 1941

81

82 *Pedigree of Louis Capone*

LOUIS CAPONE

Counsel Assigned No
Sex Male—White
Age 44
Nativity Naples, Italy
Residence 2780 Stilwell Ave.
Occupation Restaurant Owner
Mechanical Trade None
Married Yes
83 Read and Write Yes
Degree of Education Public School Graduate
Religion Catholic
Degree of Religious Instruction Regular
Parents Father—living
Temperate Yes
Drugs No
Previous Conviction None

Sentence To be put to death in the manner provided by law on some day in the week beginning the fourth day of January, 1942.

Taylor, J.—December 2, 1941

84

85

Order of Brancato, C. J., Denying Capone's Application for Severance

At a Term, Part 1., of the County Court of Kings County held at the Court House thereof, 120 Schermerhorn Street, Borough of Brooklyn, City of New York, on the 23rd day of June, 1941.

Present: Hon. Peter J. Brancato,
County Judge.

86

Indictment No. 23855

The People of the State of New York,
Plaintiffs,

against

Louis Buchalter, alias "Lepke"; Emanuel Weiss, alias "Mendy Weiss"; Harry Strauss, alias "Pittsburgh Phil"; James Feraco; Philip Cohen, alias "Little Farvel"; Louis Capone,
Defendants.

87

The defendant, Louis Capone, having applied to this court for an order severing the indictment herein and granting to the defendant, Louis Capone, a separate trial of the above charges contained in the indictment, and the said motion having duly come on to be heard on June 11, 1941, and Leon Fischbein, Esq., attorney for the

88 *Order of Brancato, C. J., Denying Capone's Application for Severance*

defendant, Louis Capone, having appeared in support thereof, and the District Attorney of Kings County, by Burton B. Turkus, Assistant District Attorney, having appeared in opposition thereto and due deliberation having been had,

Now on reading and filing the notice of motion dated June 5, 1941; the affidavit of Leon Fischbein, duly verified June 5, 1941 and the exhibits submitted therewith, all submitted in
89 support of said motion, and the affidavit of Burton B. Turkus, verified June 17, 1941, submitted in opposition thereto, and upon the opinion rendered on June 20, 1941, and upon all other papers and proceedings heretofore had herein, it is on motion of William O'Dwyer, District Attorney of Kings County,

Ordered, that the said motion be, and the same hereby is, denied without prejudice to renewal of the motion before the trial court.

90 Enter:

Peter J. Brancato
County Judge.

Granted Jun. 23, 1941

Francis J. Sinnott
Clerk

Notice of Motion for Severance (Capone)

91

COUNTY COURT

KINGS COUNTY

Ind. #23855

In the Matter of the Application of

92

LOUIS CAPONE

for a Severance and Separate Trial of the action of THE PEOPLE OF THE STATE OF NEW YORK,

against

EMANUEL WEISS, alias "MENDY WEISS," HARRY STRAUSS, alias "PITTSBURGH PHIL," PHILIP COHEN, alias "LITTLE FARVEL," LOUIS BUCHALTER, alias "LEPKE," and LOUIS CAPONE,

Defendants.

93

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Leon Fischbein, attorney for the defendant, Louis Capone, herein, duly acknowledged the 5th day of June, 1941, and upon the indictment and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court Part 1 thereof for the hearing of motions

94 *Notice of Motion for Severance (Capone)*

at the Courthouse located at 120 Schermerhorn Street in the Borough of Brooklyn, County of Kings, City and State of New York, on the 9th day of June, 1941 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order severing the indictment herein and granting to the defendant Louis Capone a separate trial of the charges contained in the indictment pursuant to Section 391 of the Code of Criminal Procedure and for such other
95 and further relief in the premises as to this Court may seem just and proper.

Dated: Brooklyn, New York, June 5th, 1941.

Yours, etc.,

LEON FISCHBEIN,
Attorney for Defendant,
Louis Capone,
66 Court Street,
Borough of Brooklyn,
City of New York.

96

To:

Hon. WILLIAM O'DWYER,
District Attorney,
Kings County.

97

Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone)

COUNTY COURT

KINGS COUNTY

In the Matter of the Application of

98

LOUIS CAPONE

for a Severance and Separate Trial of the action of THE PEOPLE OF THE STATE OF NEW YORK,

against

EMANUEL WEISS, alias "MENDY WEISS," HARRY STRAUSS, alias "PITTSBURGH PHIL," PHILIP COHEN, alias "LITTLE FARVEL," LOUIS BUCHALTER, alias "LEPKE," and LOUIS CAPONE,

Defendants.

99

State of New York }
City of New York } ss.:
County of Kings }

LEON FISCHBEIN, being duly sworn, deposes and says that he is the attorney for Louis Capone, one of the defendants herein.

Deponent makes this affidavit in support of an application for an order severing the indictment

herein and granting to the defendant Louis Capone a sepa. e trial of the indictment pursuant to Section 391 of the Code of Criminal Procedure.

The indictment herein was filed on the 28th day of May, 1940, charging the defendants with the crime of murder in the first degree, in that on or about the 13th day of September, 1936 in the County of Kings, the defendants willfully, feloniously and with malice aforethought shot and killed one Joseph Rosen with revolvers.

The allegations which your deponent shall hereinafter state are not in any way intended as a reflection upon the other defendants nor are these allegations made as a statement of fact or opinion as to their guilt or innocence.

Your deponent, however, shall submit in support of this motion facts which have created a condition whereby it would be impossible for the defendant Louis Capone to receive a fair and impartial trial if this motion were to be denied. The condition which your deponent refers to is one that has been created by the newspapers published in the metropolitan area and circulated throughout this county, state and nation. Your deponent, however, shall refer to and rely mostly upon the publication called the New York Times, which is and has always been considered a newspaper of conservative editorial policy and the subscribers and readers of this newspaper are persons of average intelligence and who rely upon this newspaper for their knowledge of the events and occurrences in the world of today and usually accept these news items as true.

Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone) 103

The publicity and notoriety given to the other defendants in this case, and more particularly to the defendant, Louis "Lepke" Buchalter, in the public press, has undoubtedly created an impression that there is something sinister and unholy about the other defendants. This impression shall result in the creation of an atmosphere during the trial of these issues, prejudicial to the rights of the defendant, Louis Capone, to a fair and impartial trial.

The prosecution may urge in opposition to this 104
motion that your deponent would have the right to challenge any prospective juror, for actual bias, who has an impression or opinion as to the guilt or innocence of the defendant formed as a result of reading from newspapers or his inability to render an impartial verdict upon the evidence uninfluenced by any opinion or impression that he may have. This fact is unquestionably true and although every man consciously feels that he could render such a verdict upon the evidence uninfluenced by extraneous matters, yet sub-consciously he cannot divorce his mind 105
from that impression which has been created over a period of years as a result of what he has read and heard about the other defendants and more particularly the defendant, Louis "Lepke" Buchalter.

The defendant Louis Capone has never been convicted of any crime; he has resided in the Borough of Brooklyn for a long period of time with his wife and children. Prior to 1940 he was never linked in the press with rackets or racketeers, murderers or persons of sinister and

106 *Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone)*

unlawful repute and has maintained himself as a family man with a definite aversion to publicity and with the exception of innendoes and insinuations cast upon him in the press subsequent to this indictment, his life has been obscure.

The defendant Louis Buchalter, alias "Lepke" is a person of national prominence. The publicity which he has received by innuendo and suggestion, through the medium of radio and
107 the press, has been such as to create the indubitable impression and opinion that he and his associates ruled a vast empire of crime in this country; that their actions were sinister and unlawful to such an extent that the lives of the people and the industry of this city and nation were endangered. The publicity that "Lepke" and his aides received was such that anybody falling into the category of being his aide, although even if not mentioned by name, would create such an unfavorable impression as to preclude the possibility of a juror deciding the issues solely upon the evidence uninfluenced by that impression regardless of the
108 juror's expression of his belief that he could render a verdict solely upon the evidence and his ability to set aside all his prior impressions and opinions created by the press.

Over a period of years the press developed the sinister reputation of "Lepke" until at the present time he is depicted as a tyrannical king and overlord of crime. That he heads a mob of vultures, thieves and killers and if this application is not granted, Louis Capone cannot hope for or receive the type of trial guaranteed

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to him by the constitution and the laws of the State of New York or the Constitution of the United States.

In substantiation of the aforementioned allegations, the files of the New York Times disclose that Louis "Lepke" Buchalter, alias "Buckhouse" was named in the Bakery Trucking racket. In 1935 he was under investigation by District Attorney Dewey as a controller of all major rackets. In 1936 he was named as the 110
head of the Dress Industry racket. The press charged him with jumping bail, kidnapping, the garment racket, murders, one who caused witnesses to disappear, the flour racket, harboring of a fugitive, extortion, violation of the Anti-Trust Laws, and named as head of the racket which compelled payments to him and his aides in the Fancy Fur Dressing Industry. He was named as the head of a narcotic ring, smuggling and dope traffic, and was involved in a passport scandal.

The above are just some of the items that 111
have been taken from the files of the publication hereinbefore mentioned. Your deponent made an extract of the Times Index, which briefly outlines the publicity given to Louis Buchalter, and submit this to the Court as proof of what has been published concerning the career of "Lepke" and his aides.

Your deponent once more calls to this Court's attention that the most conservative newspaper was chosen in order that there be no exaggeration of the publicity which "Lepke" and his aides received. It is needless for deponent to

112 make mention of the publicity given to him by the other tabloids and publications. Most of these items that appeared in the New York Times from the year 1935 up to the present date received first page publicity, "headline publicity." The other newspapers played these items up with greater effect, knowing that such news items appealed to the reading public.

113 After the Honorable Judge William O'Dwyer became the District Attorney of this county, he waged a campaign against crime, the likes of which have never been matched in the history of this state. Although the newspapers prior to 1940 vilified and degraded "Lepke" and his aides, the publicity which this campaign received magnified all prior news items to such a degree that the name "Lepke" stands out like a beacon light as the potential "Czar" and the No. 1 man of "Murder Incorporated."

The following are some of the typical headlines as found in the newspapers published in the year 1940:

114

"Twelve Gunmen Called Killers for Lepke".
"Two Lepke Men seized in Murder Inquiry".

In the World Telegram of March 23rd, 1940, the following article appeared:

> "Murder, Inc. executives decided that Rudnick must be killed. Louis "Lepke" Buchalter, industrial racketeer, heard that they intended to rub out Rudnick and is said to have asked as a favor that they

Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone) 115

use the killing to warn any former associates of "Lepke" who may be inclined to turn State's evidence for District Attorney O'Dwyer. For this reason Rudnick was killed as brutally as possible."

The World Telegram of April 6th, 1940 printed a three column diagram. This diagram contained a number of boxes, mentioning in these various boxes a number of men. Included therein were 116
"Lepke" and "Gurrarh" and attached to these boxes by lines were other boxes and in each box, obviously referring to rackets, were names as follows: garment, fur, flour, trucking, bakery and narcotics. These were attached to the "Lepke" box. In this diagram Louis Capone's name was not mentioned. Below this diagram there appeared this news item:

"District Attorney O'Dwyer's inquiry into Brooklyn crimes quickly revealed the people who employed Brownsville and East New York hoodlums, Murder, Inc., to commit murder for hire. Chief of the Brooklyn mob was Abe Reles, whose lieutenants were Harry "Pittsburgh Phil" Strauss and "Happy" Maione. When the "Lepke", "Gurrarh" gang, Louis Buchalter and Jacob Shapiro, wanted murder done, they got in touch with Murder, Inc." 117

One cannot dispute the power of the press. The press can create good will and the press can create hatred. The effect that newspapers have

upon human beings is indescribable, and when one reads such news items as have been published up to the present date concerning "Lepke" and his aides, it is inconceivable that anyone reading such inflammatory matter can retain such equilibrium of mind as to be able to retain the ability to impartially weigh the legal evidence against the man jointly accused with the commission of crime with Lepke, because the mere placing him on trial with the other defendants would be indicative of an accusation that he is one of "Lepke's" aides.

It is an undisputed fact that millions of dollars are spent yearly by business in advertising through the medium of the press and the radio only because the public is influenced and guided by what it reads and hears. People suffering from ailments use patented products not because it is prescribed by physicians but because they are guided by what they read and hear.

In a perusal of the news items contained not only in the New York Times but in the other newspapers as well it is quite obvious that not once has any newspaper gone to the "front" for "Lepke" or his aides. All the newspapers have consistently been of one opinion concerning "Lepke." They have all characterized him in the same evil light The force of the press would nullify any possibility of Louis Capone receiving a fair and impartial trial if he were to be tried together with the other defendants. A prospective juror could not under these conditions even recognize his own mental reaction to that which has been built up over a period of years and

Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone) 121

although a prospective juror, when questioned as to his bias, prejudice, impressions and opinions, he would honestly answer those questions and yet subconsciously his prejudice would be beyond his control.

Your deponent submits clippings from The New York Sun and The World Telegram, from the Brooklyn Daily Eagle, from the Daily Mirror, from the Daily News, from the New York Post and from The Journal-American, which have been 122 published since the arraignment of "Lepke." Some of these headlines were as follows:

"Thirty Detectives Guard Lepke".
"45 Cops, in Their Golden Badges, anger Lepke Hearing Judge".
"Siegel Ordered Here for Lepke Inquiry".
"Judge Flays 'Arsenal' of 47 Lepke Guards".
"Judge Mocks Lepke Guards Filing Court".
"Lepke Will Hear Murder Charge".
"Murder, Inc., Job Told by State at Nitzberg Trial". 123
"Lepke Reported 'Singing' to Escape Chair as Reles Tells of Murder Ordered by Him".
"Ex-Girl Friend of Lepke on Stand".

His name appears in "The Lyons Den", an article written by Leonard Lyons.

On May 21st, 1941 in The Daily News he is mentioned in the Pete Clifford murder and he is also mentioned on June 2nd, 1941 in the

124 *Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone)*

Journal-American and other newspapers when one Irving (Knadles) Nitzberg was sentenced to die in the electric chair as having been the one who killed Shuman for "Lepke."

That although your deponent submits these newspaper clippings in support of this application, these articles appeared in every metropolitan newspaper.

The other two defendants have been mentioned
125 from time to time in the press and in proceedings in the Federal and State Courts as aides of the alleged Czar "Lepke."

Again deponent states that he does not know the truth or falsity of these alleged statements contained in the press, but the mere fact that they have been mentioned as associates of the man whose career has been painted from coast to coast as the ruler of a criminal empire, their mere presence with Louis Capone at the counsel table will strongly prejudice the jury against deponent's client and prevent him from receiving
126 a fair and impartial trial. The rights of the People of the State of New York would not be defeated or prejudiced if this application is granted. It is true that there may be additional expenses involved but the rights of Louis Capone are also involved and must be considered and every effort should be made to protect those rights.

The Constitution of the State of New York and of the United States guarantees to every defendant a fair and impartial trial and any statute which is opposed to the spirit, intent and pur-

Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone) 127

pose of the Constitution is as much within the condemnation of the organic law as though the intention to violate the Constitution were written in bold characters on the face of the statute itself.

It is obvious and apparent that Louis Capone, sitting at the counsel table with the other defendants mentioned in this indictment, cannot receive a fair and impartial trial for the very definite reason that the passions and prejudices of men 128
who will be called upon to sit as judges of the fact will be swayed by the atmosphere created by the newspapers long before the defendant was joined in this indictment.

The laws of God and man gives your deponent the right to make this application on behalf of his client. To deny this application would amount to depriving this man not only of a fair and impartial trial but denies him the right to his day in Court as prescribed by law.

Your deponent urges this Court to exercise its discretion in order to prevent a great injus- 129
tice being done to a man charged with the crime, the penalty of which calls for the forfeiture of his life.

Your deponent further states that there may be other conditions to contend with which unquestionably will militate against his client, without being required to be tried with the other above named defendants, and that is that the newspapers have created a mythical institution called "Murder, Inc." This organization, as created by the press, has been accused of many infamous and dastardly crimes.

130 *Affidavit of Leon Fischbein, Read in Support of Application for Severance (Capone)*

WHEREFORE, in the interest of justice and to preserve the constitutional rights of the defendant Louis Capone and to continue what has always been the American way of determining the guilt or innocence of a man charged with a crime, your deponent earnestly prays that this motion be granted in all respects and that the indictment be severed and the defendant Louis Capone be granted a separate trial of the charge against
131 him.

LEON FISCHBEIN

Sworn to before me this 5th day of June, 1941.

MAX K. EHRLICH
Attorney and Counsellor at Law
Office Address—66 Court Street
Brooklyn, N. Y.
Kings County Clerk's #6—Reg. #3002

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Exhibits Annexed to Affidavit of Leon Fischbein

133

THE NEW YORK TIMES INDEX TO LOUIS BUCHALTER

PAGE 659 NEW YORK TIMES INDEX YEAR 1935 ***

Oct. 12 p. 2—c. 3
"Louis Buchalter alias Buckhouse and Jacob Shapiro under Investigation by Thomas E. Dewey."

Oct. 16 p. 48—c. 2
"Louis Buckhouse and Jacob Shapiro under investigation by Dewey; 19 cartons of business records taken from Perfection Cost Front Mfg. Co., Inc. and 14 persons taken as witnesses; police records of Buckhouse and Shapiro.

134

PAGE 660 NEW YORK TIMES INDEX YEAR 1936

Oct. 26 p. 1—c. 5
"New group (including Lepke) takes over control of all major rackets. Gangs headed by C. Luciano, C. Siegel, M. Lansky, L. Buckhouse, J. Shapiro and A. Zwillman."

PAGE 667 NEW YORK TIMES INDEX YEAR 1936

135

Apr. 30 p. 44—c. 4
"O. Saffer accused of being payoff man for J. Shapiro and L. Buckhouse in industrial rackets.

July 8 p. 1—c. 4
"Loma Dress Company raided. Interest of Buckhouse and Shapiro recalled.

July 10 p. 40—c. 4
"Buckhouse and Shapiro missing from city for 2 weeks."

*** (p. stands for page; c. stands for column.)

136 *Exhibits Annexed to Affidavit of Leon Fischbein*

Page 698 New York Times Index Year 1936

Oct. 22 p. 1—c. 4
"Dewey raid in Bakery racket reveals L. Buchalter and J. Shapiro connection."

Page 884 p. 17—c. 2
"U. S. Circuit Court confirms conviction of J. Shapiro "Gurrarh" sets aside that of Lepke Buchalter."

July 7 p. 17—c. 2
"Buchalter and Shapiro flee trial. Bail
137 forfeited."

Page 176 New York Times Index Year 1937 and Page 177

Sept. 25 p. 1—c. 3
"Thomas E. Dewey announces arrest of Max Silverman in Los Angeles Telegrams. Show Shapiro and Buchalter supplied Silverman with funds."

Sept. 28 p. 1—c. 2
"Extortion indictment names Shapiro, Buchalter."

138 Page 885 New York Times Index Year 1937

Nov. 6 p. 4—c. 2
"Lepke Buchalter and Gurrarh Shapiro sought in Anti Trust action in fancy fur dressing industry."

Nov. 9 p. 1—c. 2
"Government posts reward for information leading to arrest."

Nov. 17 p. 1—c. 2
"Buchalter alias Lepke evades arrest on Drug Traffic charge."

Exhibits Annexed to Affidavit of Leon Fischbein 139

PAGE 28 NEW YORK TIMES INDEX YEAR 1938

Jan. 7 p. 1—c. 1)
Jan. 8 p. 1—c. 1) man whose photo resembles "Louis "Lepke" Buchalter got passport through County Clerk Marinelli's office."

PAGE 1825 NEW YORK TIMES INDEX YEAR 1938

Feb. 19 p. 32—c. 6
"Shapiro and Lepke sought in Poland for Kidnapping threats."

Apr. 15 p. 1—c. 3 140
"Shapiro surrenders to Federal Court named as aide Lepke Buchalter."

Apr. 16 p. 3—c. 1
"S. Schwartz aide to Lepke returned to U. S. as part of a narcotic ring."

June 12 p. 40—c. 1
"Testimony by witness that payments were made to Buchalter and Shapiro in behalf of Fur Dressers Factor Corporation."

June 17 p. 6—c. 4
"Witness describes threats and pressure methods used against dealers." 141

PAGE 1878 NEW YORK TIMES INDEX YEAR 1939

July 29 p. 1—c. 5
"Dewey asks City to increase reward for Louis Lepke Buchalter co-defendants in Garment and Bakery Racket Cases. Cites murders and disappearances of former associates. Reviews cases and makes statement."

July 30 p. 1—c. 5
"LaGuardia backs higher reward. Dewey asks Board of Estimate to appropriate sum."

142 *Exhibits Annexed to Affidavit of Leon Fischbein*

Aug. 1 p. 1—c. 4
"Tootsie Cohen, former Buchalter (Lepke) aide, held in high bail as witness; police plan wide Lepke search; grand jury subpoenas garment and bakery firms books to stop payments to Lepke."

Aug. 2 p. 7—c. 5
"Estimate Board to act on Dewey's plan for higher reward."

Aug. 3 p. 1—c. 3
"Dewey aides confer with police on Lepke
143 search plans; Borough President Lyons backs higher reward."

Aug. 6 p. 6—c. 1
"Comment on Lepke search."

Aug. 7 p. 3—c. 4
"Police check rumors Lepke has been killed. F.B.I. denies he is held."

Aug. 8 p. 1—c. 4
"Estimate Board votes higher reward."

Aug. 10 p. 5—c. 4
"Rumors of Lepke capture denied. Dewey postpones his vacation."
144

Aug. 23 p. 13—c. 1
"Wife testifies before Grand Jury."

Aug. 25 p. 1—c. 4
"Lepke surrenders to F.B.I. Never left New York City; criminal career reviewed."

Aug. 26 p. 32—c. 3
"Lepke indicted and arraigned on Federal charges of narcotics smuggling; pleads not guilty; Dewey aides not allowed to question him."

Exhibits Annexed to Affidavit of Leon Fischbein 145

Aug. 27 p. 15—c. 1
"Lepke questioned by F.B.I. and U. S. Atty. Gen. Cahill's aides; Dewey aides excluded from hearing."

Aug. 29 p. 13—c. 3
"Lepke arraigned: gets more time to hire counsel; harboring defendants trial set."

Aug. 30 p. 1—c. 3
Lepke hires counsel. Appears in court.

Aug. 31 p. 20—c. 3
"Gets postponement of hearing." 146

Sept. 1 p. 11—c. 6
"New York City rescinds Buchalter (Lepke) reward."

Sept. 3 p. 2—c. 5
"Emanuel "Mendy" Weiss, narcotics smuggling aide, held by Federal agents."

Sept. 12 p. 27—c. 2
"Asks release on habeas corpus writ. Lepke's trial tentatively set."

Sept. 16 p. 34—c. 2
"Lepke transferred to another jail."

Sept. 17 p. 51—c. 4 147
"Dewey aide again denied permission by Federal agents to question Lepke."

Sept. 29 p. 46—c. 4
"B. Siegel, Federal crime inquiry witness, jailed for refusal to answer question on talk with Lepke."

Oct. 3 p. 24—c. 2
"Dismissal of indictments against 7 for harboring Lepke asked."

Oct. 4 p. 52—c. 2
"Siegel freed after answering questions on Lepke talks."

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Oct. 20 p. 14—c. 5
"Trial of C. Shapiro and 4 others on charge of harboring Lepke and J. Shapiro postponed."

Oct. 25 p. 14—c. 4
"Court refuses to dismiss indictment."

Oct. 31 p. 24—c. 2
"Trial set. Snyder murder trial also set."

Nov. 1 p. 14—c. 5
"Trial of C. Shapiro and 4 others opened."

149 Nov. 3 p. 22—c. 2
"M and H. Silverman and S. Schorr arraigned on extortion charges in bakery and flour racket. J. Miller, Government witness, and 4 defendants testify in Shapiro trial."

Nov. 9 p. 10—c. 2
"Lepke trial delayed."

Nov. 22 p. 30—c. 7
"Judge Knox to preside."

Nov. 24 p. 42—c. 4
"H. Greenberg (G. Schaeter) slain, Hollywood."

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Nov. 26 p. 13—c. 1
"Jury chosen."

Dec. 1 p. 15—c. 1
"Narcotics trial of Lepke, D. Kardonick, M. Schmuk'er and M. Sweder opened."

Dec. 12 p. 31—c. 4
"I. Mandel, sought by Government as Lepke witness, slain."

Dec. 20 p. 26—c. 2
"Defense sums up."

Dec. 21 p. 1—c. 4
"Lepke and Schmukler convicted."

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Apr. 5 p. 1—c. 1
"I. Bernstein alleged trigger man and C. Siegel Lepke aide reported in New York City to silence witnesses."

Apr. 13 p. 9—c. 2
"Two witnesses r eal they hid Lepke at request of Abe Reles."

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Apr. 14 p. 24—c. 3
"Reles links Lepke to J. Rosen murder."

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May 24 p. 21—c. 1
"Lepke Buchalter indicted in M. Diamond and J. Cohen murders."

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July 30 p. 21—c. 7
"Court clears C. Shapiro and four others in connection with harboring Lepke and J. Shapiro."

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Aug. 21 p. 40—c. 1
"Lepke and four others indicted for murder of H. Greenberg in Los Angeles, Cal."

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Feb. 2 p. 13—c. 4
"Jury picked to try Lepke on flour and bakery racket charges. Jury locked up."

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Feb. 3 p. 30—c. 2
"A. Held, United Flour Trucking Co. official, testifies to extortions by Lepke, S. Schorr, W. Goldis and M. Silverman."

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Feb. 20 p. 14—c. 7
"Five counts against Lepke and H. and M. Silverman quashed."

Feb. 21 p. 3—c. 1, 5
155 "Two more counts quashed; defense confers with court on guilty pleas; trial of 28 in fur racket case opens."

Feb. 28 p. 23—c. 8
"Defense ends summation."

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Mar. 1 p. 11—c. 4
"Lepke bakery trucking racket case to go to jury."

Mar. 2 p. 1—c. 1
"Lepke and M. and H. Silverman convicted."

156 Mar. 5 p. 44—c. 2
"Lepke examined by court psychiatrists."

Mar. 15 p. 15—c. 1
"W. Karpouzas recants testimony that B. Gold, I. Potash and other union leaders asked him to use force to organize Needle Trades Workers Indus. Union; blames prosecutor; U. S. Atty. Cahill starts inquiry; fur workers back union at rally."

Mar. 31 p. 8—c. 1
"Sentencing of Lepke and M. and H. Silverman postponed."

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Jan. 3 p. 1—c. 4
"Lepke sentenced on narcotics and fur racket charges; to be tried by Dewey on flour racket charges."

Jan. 5 p. 42—c. 4
"Shapiro, Lepke and others to be indicted on garment industry racket charge; Lepke refused to plead to flour-trucking racket charge."

Jan. 6 p. 30—c. 6 158
"Federal Court denies plea to save him from State prosecution on flour-racket charge."

Jan. 7 p. 24—c. 6
"Transfer from Federal to State jurisdiction stayed pending Circuit Appeals Court hearing."

Jan. 9 p. 24—c. 3
"Circuit Appeals Court reserves decision."

Jan. 10 p. 14—c. 5
"Denies plea; C. Shapiro, N. Borish and S. Smith sentenced for harboring Lepke; F. Dwyer and P. Kasakove get suspended sentences." 159

Jan. 11 p. 25—c. 4
"Lepke pleads not guilty to flour-racket charge."

Jan. 16 p. 13—c. 1
"Lepke flour-racket trial date set; court assigns counsel."

Jan. 17 p. 5—c. 3
"J. Shapiro, Lepke and 7 indicted on garment industry racket charges; victimized firms listed."

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Jan. 18 p. 2—c. 7
"Three Lepke aides plead not guilty to garment industry racket charge."

Jan. 25 p. 1—c. 4
"W. Goldis pleads guilty to bakery and flour-trucking racket extortion attempt. Berated by Lepke; trial adjourned."

Jan. 27 p. 30—c. 2
"Trial of Lepke and 3 on flour racket charges opened."

161 Jan. 30 p. 2—c. 4
"Lepke jurors chosen."

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Apr. 6 p. 7—c. 1
"Lepke and H. and M. Silverman sentenced for flour and bakery racket."

Apr. 9 p. 14—c. 5
"I. Potash and 2 ask indictment dismissal in Needle Trades Workers Indus. Union case."

Apr. 14 p. 14—c. 3
162 "B. Gold and 10 found guilty. 7 acquitted."

Apr. 25 p. 14—c. 6
"Gold, Potash and 9 freed on bail."

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Jan. 31 p. 38—c. 4
"P. (Little Farvel) Cohen and 3 others convicted Drug Traffic."

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Affidavit of Leon Fischbein, Sworn to August 4, 1941, Read in Support of Application for Severance (Capone)

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs, 164

against

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,
Defendants.

State of New York }
City of New York } ss.: 165
County of Kings }

LEON FISCHBEIN, being duly sworn, deposes and says

That he is the attorney for Louis Capone, one of the defendants herein. That in his capacity as attorney for Louis Capone he made a motion before Judge Brancato, one of the Judges of this Court on the 11th day of June, 1941 for a severance of this indictment and a separate trial of the issues in this case in so far as the said Louis Capone was concerned. That the grounds

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of such motion are set forth in the moving papers and exhibits submitted in support of such moving papers which are on file in this Court.

That after hearing argument on said motion, Judge Brancato in a decision dated the 17th day of June, 1941 denied the application but granted leave to renew the application before the trial judge and an order was duly entered to that effect on the 23rd day of June, 1941.

167 That your deponent now renews such motion and makes the affidavits and exhibits heretofore used in support of the application before Judge Brancato for a severance and separate trial for Louis Capone, part of this motion as though they were annexed hereto and fully set forth herein.

The application before Judge Brancato was on the ground that Louis Capone could not and would not receive a fair and impartial trial if tried together with the defendant Louis Buchalter, alias Lepke. That the name Lepke has been synonymous with crime and rackets and he

168 had been given so much publicity that the newspaper reputation of Lepke will build up a prejudice against the defendant Louis Capone and prevent him from receiving a fair trial.

The defendant Capone has been practically unheard of in the newspapers and has received no publicity which would cause members of a jury to consider him a sinister or notorious character. Yet if he is forced to trial with the defendant Buchalter all the adverse publicity and the newspaper reputation of Lepke will most assuredly militate against him by the very fact that he is on trial with Lepke. Try as they will the mem-

Affidavit of Leon Fischbein, Sworn to August 4, 1941, Read in Support of Application for Severance (Capone)

bers of the jury will consciously or unconsciously find it impossible to divorce their minds from everything written and said about Lepke and will consciously or unconsciously be prejudiced against Capone by reason of the fact that he is on trial with Lepke. The interests of the defendants Capone and Lepke are antagonistic for this reason. 169

As an indication of the extent to which they are antagonistic your deponent submits herewith and makes a part hereof newspaper clippings of various metropolitan papers published yesterday and which announced the fact that this action was to be tried today. It is apparent that the reading public is interested in Lepke. He is the news. The other defendants are merely tacked on to him. Your deponent submits that this makes the interests of Capone and Lepke antagonistic: that Capone is entitled to receive a fair and impartial trial uneffected by passion or prejudice. Yet how can he receive such a trial? The newspapers as the attached clippings show heralded the trial of Lepke and told of the unusual and heavy guard which would attend the trial not only in the courtroom itself but in the court house and outside in the street around the court house. The atmosphere so created is highly prejudicial to a defendant and makes an indelible impression on jurymen. The presence in the courtroom itself of an armed guard will always be before this jury and will consciously or unconsciously be used against all the defendants. Capone has nothing to do with creating this atmosphere. It is the result of the news- 170 171

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paper publicity and criminal reputation of the defendant Lepke. He is now under sentence in the Federal Prison. The federal authorities are in the courtroom notwithstanding the fact that there is also present an unusually heavy police guard. The number of attendants has been doubled.

This atmosphere would never exist if Capone were tried alone. He is not a notorious character as the jury will think from the very fact he is brought to trial with Lepke. His Constitutional right to a fair and impartial trial uneffected by prejudice or passion is denied him and will be denied him if he is forced to trial with Lepke. The district attorney knows this and on the previous application said that Capone has been neglected by the newspapers but that he will see that he is not neglected in the future. This is not the American way of trying a man for his life. Placing a man on trial for murder in an atmosphere that exists here today solely because of the presence of the defendant Lepke is a violation of the fundamental law of this land and violation of the sacred Constitutional right given to every man to a fair trial.

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The defendant Capone cannot efface what has already happened in this courtroom. The impressions made on the jury by reason of the atmosphere will remain with them as long as they live. This condition was created solely by the presence of Lepke and definitely makes the interests of the defendants Lepke and Capone antagonistic.

As set forth in the memorandum of law furnished upon the motion before Judge Brancato

Affidavit of Leon Fischbein, Sworn to August 4, 1941, Read in Support of Application for Severance (Capone)

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the test and only test as to whether a separate trial in a criminal action should be granted when such an application is made is "Can the defendant receive a fair and impartial trial if tried together with the other defendants." This rule was laid down a long time ago and has been consistently followed by our honored Courts. This test must be applied in this case and the only answer is that because of the unusual atmosphere, the notorious and infamous newspaper reputation of Lepke, Capone cannot receive a fair and impartial trial uneffected by passion and prejudice.

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Louis Capone under these circumstances cannot receive a fair trial and the district attorney of Kings County in the interests of justice should join in the application to the end that the fundamental principal of American fair play will continue unsullied and unblemished.

WHEREFORE your deponent prays that an order be made and entered severing this indictment and granting to the defendant Louis Capone a separate trial of the issues herein.

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LEON FISCHBEIN

Sworn to before me this 4th day of August, 1941.

FRANCIS J. SULLIVAN
FRANCIS J. SULLIVAN
Attorney and Counsellor at Law
66 Court St., B'klyn., N. Y.
Kings Co. Clks. No. 9 Reg. No. 2010
Commission expires March 30, 1942

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* Sunday News, August 3, 1941 • 32

BIG POLICE GUARD FOR LEPKE MURDER TRIAL

Arrangements were completed yesterday for a heavy police guard in Brooklyn County Court when Louis (Lepke) Buchalter goes on trial tomorrow for the murder of Joseph Rosen on Sept. 13, 1936.

179 Emanuel (Mendy) Weiss, Phillip (Little Farvel) Cohen and Louis Capone will be tried with Lepke for the shooting of the Brooklyn candy store proprietor.

A squad of 15 uniformed police under a sergeant has been detailed to guard the doors of the courtroom and the building corridors. Inside the courtroom a dozen or more detectives will be scattered among the spectators.

U. S. Marshal on Guard.

180 In addition, a number of United States marshals will be on hand, because Buchalter and Cohen have already been convicted on federal offenses and Weiss is waiting trial on a Federal indictment.

Two hundred and fifty talesmen from the blue ribbon jury list have been directed to appear in County Judge Franklin Taylor's court for examination as prospective jurors.

Lepke, who for more than a year was the nation's most widely publicized fugitive from justice until he surrendered voluntarily to the Federal Bureau of Investigation, was returned

to New York from Leavenworth prison to be tried.

Rosen was snuffed out in his candy store at 725 Sutter ave., Brooklyn, a few days before he was scheduled to appear as witness for District Attorney Dewey against Lepke during an investigation of the trucking racket.

Burton B. Turkus and Solomon A. Klein, assistants to District Attorney William O'Dwyer, will be in charge of the prosecution.

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BROOKLYN EAGLE, SUNDAY, AUG. 3, 1941 A3

BIG POLICE DETAIL TO GUARD TRIAL OF LEPKE AND THREE

FEDERAL AND LOCAL OFFICERS ASSIGNED TO 'BLUE RIBBON' CASE

Arrangements were completed yesterday for stationing of a heavy police guard in County Court tomorrow, when Louis (Lepke) Buchalter 183 is scheduled to go on trial on an indictment charging him with first degree murder.

Co-defendants with Buchalter are Emanuel (Mendy) Weiss, Louis Capone and Philip (Little Farvel) Cohen. They are charged with the fatal shooting on Sept. 13, 1936, of Joseph Rosen, Brooklyn candy store proprietor, in his establishment at 725 Sutter Ave.

Buchalter and Cohen, who have already been convicted of Federal offenses, and Weiss, who is awaiting trial on a Federal indictment, will be heavily guarded by United States Marshals. Fur-

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ther precautions, however, have been taken by local authorities. A police sergeant, 15 policemen and an undetermined number of plain clothesmen have been detailed to guard not only the courtroom and corridors but the outside of the court building as well.

BLUE RIBBON JURY TRIAL.

Trial of the four defendants is scheduled to
185 take place before County Judge Franklin Taylor and a blue ribbon jury. A panel of 250 talesmen has already been chosen.

Prosecution will be in charge of Assistant District Attorneys Burton B. Turkus and Solomon A. Klein, who successfully prosecuted Harry (Happy) Maione and Frank (The Dasher) Abbandando and Harry (Pittsburgh Phil) Strauss and Martin (Buggsy) Goldstein in the first two trials resulting from District Attorney O'Dwyer's investigation of Murder, Inc.

Rosen, with whose death the quartet are charged, was slain several days before he was
186 to have appeared as a witness for District Attorney Thomas E. Dewey in Manhattan in the investigation into Buchalter's alleged activities in the New York trucking racket.

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SUNDAY MIRROR AUGUST 3, 1941

6 LEPKE WILL GO TO TRIAL TOMORROW

S U N D A Y M I R R O R

A heavy police guard will be stationed in Brooklyn tomorrow when Louis (Lepke) Buchalter goes to trial on first-degree murder indictment.

Co-defendants are Emanuel (Mendy) Weiss, Louis Capone and Phillip (Little Farvel) Cohen. They are charged with the fatal shooting on Sept. 13, 1936, of Joseph Rosen, Brooklyn candy store proprietor.

(PICTURE) 188

Louis Buchalter
Heavy police detail
will guard courtroom
during his trial

A U G U S T

Buchalter and Cohen have already been convicted of Federal offenses.

A police sergeant, 15 policemen and an unspecified number of plainclothes men have been detailed to guard the courtroom, corridors and the outside of the building.

Trial of the four defendants is scheduled before 189
3 County Judge Taylor and a blue ribbon jury. A panel of 250 talesmen has been drawn.

1 Prosecution will be in charge of Assistant Dis-
9 trict Attorneys Turkus and Klein, who successfully
4 prosecuted Harry (Happy) Maione and Frank (The
1 Dasher) Abbandando and Harry (Pittsburgh Phil) Strauss and Martin (Buggy) Goldstein in the first two trials resulting from District Attorney O'Dwyer's investigation of the Brooklyn Murder Ring.

Rosen, with whose death the four are charged, was slain several days before he was to have appeared as a witness for District Attorney Dewey in the investigation of Buchalter's activities.

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NEW YORK JOURNAL AMERICAN

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DOUBLE GUARD AT LEPKE TRIAL

Kings County Court will be like an armed camp tomorrow, when 50 guards patrol the steps, corridors and courtrooms. The reason? Louis (Lepke) Buchalter goes to trial on a first degree murder charge before Judge Franklin Taylor
191 and a blue ribbon jury.

Lepke and his co-defendants, Emanuel (Mendy) Weiss; Louis Capone and Philip (Little Farvel) Cohen, are charged with the shooting on Sept. 13, 1936, of a Dewey witness, Joseph Rosen, in the latter's candy shop at 725 Sutter Ave., Brooklyn.

Burton B. Turkus and Solomon A. Klein, who have conducted District Attorney O'Dwyer's trials of the Brooklyn murder ring, will prosecute Lepke.

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Affidavit of Burton B. Turkus, Read in Opposition to Application for Severance (Capone)

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, 194
Plaintiffs,

against

LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE,
Defendants.

State of New York } 195
County of Kings } ss.:

BURTON B. TURKUS, being duly sworn, deposes and says, that he is an Assistant District Attorney of the County of Kings and Chief of the Homicide Bureau of the District Attorney's Office. This affidavit is submitted in opposition to the motion made by the defendant Capone for an order severing the indictment herein and granting to him a separate trial.

The indictment against the defendants was filed in the County Court of Kings County on

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May 28, 1940, charging them with the crime of Murder in the First Degree, committed as follows:

> "The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloniously and with malice aforethought, shot and killed Joseph Rosen with revolvers."

197 With the exception of the defendant James Feraco all of the defendants have been duly arraigned and pleas of not guilty duly and properly entered and issue joined. The District Attorney intends to proceed with the trial of this case on or about July 14, 1941.

The present motion seeks a severance upon the alleged ground that the wide newspaper publicity received by the co-defendant Buchalter has been of such a nature as to prevent the defendant Capone from receiving a fair and impartial trial. In an attempt to support this contention
198 the defendant Capone submits the affidavit of his attorney, Leon Fischbein, a resume of the New York Times Index, and various newspaper clippings relating to the activities of the defendant Buchalter and others. Based upon the newspaper clippings, Mr. Fischbein speculates that because Buchalter has received unfavorable newspaper publicity, neither Capone nor any other co-defendant jointly tried with him can receive a fair and impartial trial. It is worthy of note that not a single affidavit from a citizen of the community or from one qualified to preside as a

juror is produced to substantiate the speculation and partisan point of view entertained by Capone's counsel. 199

It would indeed be a sad commentary upon the intelligence and integrity of the citizens of Kings County that out of its vast population of approximately two and one-half million people, twelve men could not be found among the qualified jurors to give the defendant a fair and impartial trial, to decide the merits of the case on the evidence uninfluenced by newspaper stories relating to a co-defendant. The moving affidavit would have us believe that such is the case. 200

The argument made on behalf of the defendant completely disregards the law regulating the selection of a fair and impartial jury. We all know the ephemeral nature of impressions derived from reading the public prints. The community is fed on horrors daily, almost hourly, and one sensation crowds out the previous one. So thoroughly is this known that it is provided in Section 376 of the Code of Criminal Procedure that: 201

> "the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declares on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence and the court is satisfied that he does not entertain such

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> a present opinion or impression as would influence his verdict."

In this connection, it is significant that the above quoted provisions of law deal with a situation where a prospective juror has formed an opinion as to the guilt or innocence of the defendant affected thereby. The defendant Capone's speculations are based not upon any con-
203 tention that newspaper publicity has created any prejudices against him, but that he will indirectly be affected by prejudices supposedly created against the co-defendant Buchalter. This argument rests upon a double assumption, first, that no jury could be found qualified to give Buchalter a fair and impartial trial, and, second, if such be the fact then the supposed prejudices against Buchalter must preclude the possibility of a jury being capable of passing upon the merits of the case against the defendant Capone because the publicized Buchalter is seated alongside of him
204 at the trial. Such surmise and speculation does not present any compelling reason for deviating from the statutory rule that defendants jointly indicated should be jointly tried. Furthermore, the defendant Capone completely disregards the special provisions made by law to protect a defendant's rights in cases where there has been widespread newspaper publicity. Under such circumstances the Judiciary Law, Section 749-aa, permits the defendant or the District Attorney to apply for a special jury. Subdivision 2 of that statute affords ample protection against the selection of any juror who may be biased because of newspaper comments. It provides that:

Affidavit of Burton B. Turkus, Read in Opposition to Application for Severance (Capone) 205

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *."

It is evident from the foregoing that the co-defendant Buchalter can and will receive a fair 206
trial by fair and impartial jurors. A fortiori, the defendant Capone who predicates his contention upon alleged prejudice against the co-defendant Buchalter, must necessarily receive such fair and impartial trial.

Apart from the foregoing, defendant Capone attempts to create the impression that he has lived a life free from all association or connections with organized murders. The fact, however, is that far from being the family man who has lived a life of obscurity, which Mr. Fischbein portrays for him, the defendant Capone has been 207
the associate and active partner of organized criminals. The confidential files and records of the District Attorney's Office reveal that the defendant Capone was the mentor of Harry "Pittsburgh Phil" Strauss (named as co-defendant with him in this indictment), Martin "Buggsy" Goldstein, Abe Reles, Harry "Happy" Maione, and Frank "Dasher" Abbandando, all of whom have been revealed in courts of record as being hardened and vicious members of organized murder. Two of his pupils, namely, Strauss and Goldstein have recently been electrocuted, two

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others, Maione and Abbandando await electrocution. These characters were schooled and trained by the defendant Capone. After receiving their training from the defendant Capone, he embraced them as his partners in crime. The records of the trials of Strauss, Goldstein, Maione and Abbandando conclusively establish that Capone was their partner in union-sluggings, extortions, shylocking and murder incidental to
209 their business.

It is true that the defendant Capone has thus far been able to escape conviction for his criminal activities. None the less he is not an unknown character to law-enforcement agencies, nor has he been since 1930 when he was first arrested on a gun charge. Attached hereto is a copy of the criminal record of the defendant Capone as certified by the commanding officer of the Bureau of Criminal Identification. In addition thereto, the defendant Capone has been an active participant, as disclosed by the records of the District Attorney's Office, in five murders exclusive of the
210 Rosen Killing. At least one of these murders, the killing of an innocent man by mistake (Irving Penn) was committed in conjunction with and pursuant to the directions of the co-defendant Buchalter.

In conclusion, the defendant Capone is a man who for the greater part of his life has been engaged in organized crime, participating in murders incidental to the transaction of his illicit business when the occasion required, and who now claims that because he succeeded in hiding behind the mask of alleged respectability that his

Affidavit of Burton B. Turkus, Read in Opposition to Application for Severance (Capone) 211

rights would be invaded if he were tried with the man who committed crime with him. There is thus neither basis in law nor in justice for the granting of a severance upon the ground presented.

WHEREFORE, your deponent respectfully submits that the motion should be denied without prejudice to renew before the trial judge. 212

BURTON B. TURKUS

Sworn to before me this 17th day of June, 1941.

CHARLES T. SCHACK,
Notary Public Kings County
Kings Co. Clk's No. 1099, Reg. No. 3346
Commission Expires March 30, 1943

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Opinion of Brancato, C. J., Denying Application for Severance (Capone)

Motion for a separate trial pursuant to Section 391 Code of Criminal Procedure Denied.

The only issue presented on this motion by the defendant Louis Capone, the moving party, is whether the reputation for obedience to law and order of one of his codefendants, Louis Buchalter, alias "Lepke", is so "sinister" and vicious and his own so "obscure" and good, that for him to be tried jointly with the said "Lepke",
215 upon an indictment charging them both and others with first degree murder, would be tantamount to depriving him of a fair and impartial trial in violation of constitutional guarantees.

The right to a separate trial afforded defendants for upward of a century, was revoked by the Legislature for reasons of public policy in July, 1926 when it enacted Section 391 Code of Criminal Procedure. By the provisions of this Statute the Court is now vested with the discretionary power to grant a separate trial for cause. The Legislature not having seen fit to
216 set fixed bounds to the exercise of the discretion restored to the Courts, there is no general rule limiting or governing the Court's exercise of said discretion. Hence, its decision rendered before trial is dictated by a reasonable anticipation based on the facts then disclosed: (Peo. v. Doran 246 N. Y. 409; Peo. v. Snyder 246 N. Y. 491; Peo. v. Fisher 249 N. Y. 419; Peo. v. Feolo 282 N. Y. 276; Peo. v. Wargo 149 Misc. 461; Peo. v. Lashkowitz 166 Misc. 640.)

Intensely adverse interests between defendants coupled with the fact that a defendant, confessing to the authorities his participation in the com-

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mission of a crime, implicated a codefendant who made no such confession, has been considered sufficient justification for the Court to exercise the judicial discretion contemplated by the Statute under consideration (People v. Feolo; People v. Wago; People v. Lashkowitz, supra.) I have not been referred, however, to any reported case as authority for the proposition herein urged by the defendant Capone, that a separate trial be granted to a defendant solely because, forsooth, 218
the criminal activities and history of a codefendant have been publicized by our daily papers more extensively than his own. Conceding that the searching eye of an alert public press in this City has been focused upon Lepke's alleged many encounters with the Penal Law, resulting even in amazing revelations, I am unwilling to subscribe to the assumption in the general proposition, that a jury of intelligent citizens will be influenced thereby not only against Lepke but will also transcend their prejudice against a codefendant to the extent of depriving the latter 219
of a fair and impartial trial. Our experience in the administration of the Penal Law, negatives any such assumption.

Our Laws give to a defendant accused of murder, a wide latitude in examining the qualifications of the individual prospective jurors. A defendant is provided with thirty peremptory challenges and an unlimited number of challenges, for cause (Sec. 373—Code of Criminal Procedure) and ample means to select from the various walks of life, fair-minded intelligent and unbiased judges of the facts who can discern

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and can divorce themselves from the prejudices which would inflict upon one defendant the ill effects of the sinister reputation of a codefendant: (Judiciary Law Sec. 749aa; sub. 2.)

The moving defendant refers us to the learned opinion in the case of Peo. v. Hines 168 Misc. at 470, wherein it is stated that the Court would have been disposed to grant the defendant a severance of the indictment and a separate
221 trial, "were the moving defendant to be surrounded upon the trial by a larger group of codefendants having criminal records or unsavory reputations." The underlying principle enunciated has no application in the case at bar. Of the defendant Hines, Mr. Justice Pecora in his opinion stated that "many of the newspaper articles present the defendant as an attractive personality, and might well be considered as exciting sympathy for him rather than prejudice." However sinister be the reputation of Capone's codefendants (and it is not my purpose to divine
222 what facts will be adduced at the trial nor to prophesy the result thereof,) the record impels the conclusion herein that Capone's own reputation is not unblemished, nor was it nurtured in the sacred precincts of an obscure family life, as depicted by Defense Counsel in his moving affidavit.

According to the affidavit submitted in opposition to this motion by the Assistant District Attorney who has been prosecuting members of the so-called Murder Incorporated, the files of the District Attorney's office and the trial record attest that such vicious characters as Harry,

Opinion of Brancato, C. J., Denying Application for Severance (Capone)

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"Pittsburgh Phil" Strauss and Martin "Bugsy" Goldstein, both electrocuted for murder a few days ago, also Harry "Happy" Maione and Frank "Dasher" Abbandando, both awaiting electrocution and Abe Reles who has confessed his participation in eleven murders, received their schooling in crime from the moving defendant Capone, with whom they allegedly shared their ill-gotten profit of union-sluggings, extortions, shylockings and the murders incidental to their nefarious business. In an application under Sec. 391 Code of Criminal Procedure, the burden is upon the moving defendant to reasonably satisfy the Court that a joint trial would impede the proper administration of justice; and when the sinister reputation of a co-defendant is made the sole basis for the severance, a reasonable anticipation of petitioner's own bad repute and criminal associations are sufficient to defeat the application. Submit order accordingly:

224

225

Dated: June 19, 1941.

PETER J. BRANCATO
PETER J. BRANCATO
County Judge, Kings County

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Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

County of Kings

227

In the Matter of the Application of

Louis Buchalter

to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county.

228

State of New York }
County of New York } ss.:

Hyman Barshay, being duly sworn, deposes and says:

I am one of the attorneys for the defendant, Louis Buchalter.

This affidavit is made in support of a motion for an order removing the above entitled action from the County Court of Kings County for

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trial in a county outside the City of New York on the ground that a fair and impartial trial cannot be had in Kings County. This application is not intended as a waiver of defendant's contest of the jurisdiction of the State Court under the circumstances and conditions of defendant's incarceration as a Federal prisoner.

A fair and impartial trial of the defendant, Buchalter, cannot be had in Kings County for the manifest reason obvious to anyone who has 230
lived in this City during the past two years, that the defendant has already been tried and convicted in the public mind in consequence of unprecedented newspaper, radio and magazine publicity directed against him. He has been described as society's most dangerous enemy. The attack against him by newspaper, radio and magazine accusations has been continued unremittingly during the past two years even though for the greater part of that period, he has been a prisoner of the Federal Government and shackled by judgments of conviction which
require his imprisonment, first in a Federal Penitentiary for a period of fourteen years, and then 231
in the prisons of the State of New York for a consecutive period of incarceration of thirty years.

One of the explanations for the continued attacks upon the character and reputation of that defendant, even after his imprisonment, is the publicity surrounding the preparation and trial of that series of cases journalistically known as "Murder Inc." In this affidavit, I shall refer to a relatively small number of all of the news-

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paper clippings in which condemnatory references to defendant Buchalter have been made. I shall not attempt to characterize these publications since no compendium description will serve as an adequate substitute for a knowledge of the color and the inflammatory character of the originals.

On April 7, 1940, there appeared in the Sunday edition of the New York Daily News, a three-
233 page resume of the alleged scope of the activities of a group of professional murders. The article, Exhibit 1, summarizes the activities of this defendant with the statement:

> "All in all, O'Dwyer figures, Crime Corp. eliminated seven of the 11 witnesses against Louis (Lepke) Buchalter and Jacob (Gurrah) Shapiro in District Attorney Dewey's investigation of their racket activities."

The article states that the defendant caused
234 the murder of Joseph Rosen in the following language:

> "Joseph Rosen, slain in his Brooklyn candy store in September, 1937. Rosen had been a truck fleet operator, but was driven from business by rackets. The Lepke-Gurrah combination was said to fear his testimony in front of District Attorney Dewey and for that reason contracted to have him killed. Pittsburgh Phil Strauss and Happy Maione were arrested in this case, and soon were freed."

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Much of the article is based upon a reputed interview with the District Attorney of Kings County, as to its contents set forth under the by-line of two reporters, indicate.

The references to the defendant, Buchalter, during the course of the publication of the activities of alleged hired murders have pictured him as the "master-mind". At the same time, the defendant, Buchalter, has been depicted, quite unnecessarily, in other court proceedings and in 236
other jurisdictions within the Greater City of New York, as society's most dreaded enemy. Exhibit 2, annexed hereto, is an excerpt from the New York Journal of February 4, 1941. It quotes an Assistant District Attorney in New York County, during a judicial proceeding, as referring to Buchalter as "the most vicious racketeer who ever preyed on the people of this City."

Since March, 1940, the District Attorney of Kings County has had in his custody one Abe Reles, who is known generally as an important witness for the prosecution and who has been 237
depicted as an associate and employee of the defendant, Buchalter. On May 15, 1941, the New York Sun published an article about Abe Reles. Reles was then in the custody of the District Attorney. The article is set forth herein as Exhibit 3, annexed to this affidavit. It says in substance that Reles, a prospective witness against the defendant Buchalter in the trial of this indictment, had fallen ill in consequence of worry about the prospect of testifying against the defendant, Buchalter. The sense of the

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article is that Buchalter is so dreaded a criminal that Reles, a man who had committed eleven murders by his own admission, became sick of worry at the prospect of confronting Buchalter in Court.

On June 14, 1941, the Journal-American published a story which is annexed hereto as Exhibit 4. It states in substance that one Paul Berger, an associate of the defendant, Buchalter, had
239 acted as a "finger man" in September 13, 1936, murder of Joseph Rosen, and further, that Berger was "squealing".

During the course of the last several months, the New York Post printed an article, a copy of which is set forth as Exhibit 5. It quotes an "official" as saying that arrested men had committed murder on instruction from the defendant, Buchalter, and that were they induced to talk, "both Lepke and Anastasio will die in the electric chair."

On June 5, 1941, the New York Daily News published a story, a copy of which is set forth
240 as Exhibit 6 hereof. In it the District Attorney of Kings County is quoted as having personally accused the defendant, Buchalter, of the murder of Joseph Rosen. In referring to the arrest of Paul Berger, the article said:

> "He has always assumed respectability," the prosecutor said, "but we have positive information that he has been connected with Lepke for years in the clothing racket."
>
> On Sept. 12, 1936, O'Dwyer said, Berger

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pointed out Rosen to the assassins Lepke had hired.

Rosen, a former truckman who had threatened to testify against Lepke in the investigation of the flour-trucking racket, was found next day with 21 slugs in his body.

Brought Back for Trial

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Lepke, who is serving 30 years for extortion, has been brought back from Leavenworth Penitentiary to stand trial for first degree murder as Rosen's technical killer. O'Dwyer did not say whether Berger would be tried at the same time, or later."

There are other recent newspaper statements which state in the baldest terms that this defendant is guilty of the murder of Joseph Rosen. Exhibit 7, annexed hereto, is a photostatic copy of a statement published in the New York Journal on April 7, 1941. 243 Exhibit 8, annexed hereto, is a story published by the New York Sun on April 16, 1941. It states that the District Attorney of Kings County is in possession of strong evidence of the guilt of the defendant, Buchalter, as alleged in the indictment. It says in part:

"Thus far, Mr. O'Dwyer has uncovered strong evidence that Lepke hired the killers to silence at least two men who he

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feared might talk too much about his affairs when District Attorney Thomas E. Dewey was looking into his rackets several years ago.

The former schoolteacher, so the story goes, left pedagogy for the more lucrative field of industrial racketeering in which Lepke was supreme. He became a close friend of Joseph Rosen, the Brooklyn
245 candy store proprietor, who also knew a good deal about Lepke's affairs.

In September, 1936, soon after Rosen had visited Mr. Dewey's office, he was shot to death. The ex-schoolteacher is said to have become so angry at Lepke for having killed his friend that he went to Mr. Dewey's office also. Not long afterward he also was shot down."

On January 22nd, 1941, the News published a story of which Exhibit 9 is a photostatic copy. Referring to Workman, whom it accused of the
246 murder of "Dutch Schultz" the article said:

"Workman is now a prisoner in Brooklyn, in default of $100,000 bail as a material witness in the murder of Joseph Rosen, candy store proprietor who dared to testify against Louis (Lepke) Buchalter. Lepke now serving a federal term in Leavenworth, is one of five men indicted by the Brooklyn Grand Jury for the Rosen murder."

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Exhibit 10 is a copy of a story printed in the News on April 14th, 1940. It also imputes guilt to this defendant for the murder of Joseph Rosen and asserts that this defendant had a motive to cause that murder. The newspapers have not only quoted the authorities as suggesting that the authorities are in possession of proof of the defendant's guilt of the murder of Joseph Rosen and of proof of his motive for desiring to effect the death of Joseph Rosen, 248 but they have also published statements to the effect that the defendant himself had admitted his guilt or was ready so to do if only the Prosecutor would negotiate a bargain with the defendant Buchalter by the terms of which the defendant Buchalter might escape the penalty of death. In other words, the public has been led to believe not only that the District Attorney is convinced of the guilt of the defendant, Buchalter, but beyond that that the defendant Buchalter himself has acknowledged his guilt.

Exhibit 11 annexed hereto is a copy of a remarkable story published in the World Telegram 249 on May 16th, 1941 which says that the defendant acknowledged his guilt and was bargaining with the District Attorney through his relatives and attorneys, but that the District Attorney thought that the demand on him by the defendant was "excessive." It says that Buchalter was ready to deliver "a nationally prominent labor leader on a murder charge, a noted public official of New York City on a conspiracy charge, and a close relative of a very high federal office holder • • •" etc.

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On May 29th, 1941, the World Telegram published a story to the same effect, a copy of which is annexed hereto and marked Exhibit 12. The story said in part:

> "It was regarded as much more likely, however, that the announcement was to put the screws on Lepke to make him come down in his pride. This price was re-
251 ported as freedom from the murder charge and commutation of a 30-to-60 year sentence for racketeering.
>
> Incidentally, political observers speculated on the effect of the announcement on Mr. O'Dwyer's Mayoralty aspirations. Reliable sources reported that Mr. O'Dwyer held a series of conferences with Democratic leaders over the week end, including Brooklyn's Frank V. Kelly and James Roe of Queens. These reports were that the party leaders were pretty lukewarm to
252 Mr. O'Dwyer's ambitions.
>
> The indictment on which Mr. O'Dwyer says he'll proceed in July charges Lepke and others with the murder of Joseph Rosen, shot in his candy store at 725 Sutter Ave., Brooklyn, Sept. 13, 1936, because, the state charges, he had offered to give information about Lepke's racketeering in the Dewey investigation."

The newspaper columnists as well as reporters have imputed acknowledgment of his guilt to the defendant Buchalter. On May 12th, 1941,

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the Mirror in the Column called "Over the River", which is devoted to Brooklyn Gossip said:

> "Lepke, heavily guarded in a local 'hotel' is pendering whether to 'open up' on three bigshots who have so far escaped the crime roundup . . . Convinced that this will be his only chance to beat the chair, the former No. 1 mobster's family are putting on the pressure." 254

On May 17th, 1941, the Mirror following the lead of the Telegram printed a story, a copy of which is marked Exhibit 14. The headline and opening paragraph state:

> "Lepke Reported 'Singing' to Escape Chair as Reles Tells of Murder Ordered by Him.
>
> By Arnold Prince 255
>
> While Louis (Lepke) Buchalter was reported trading for his life, promising to solve numerous murders and implicate three nationally known figures in assassinations and rackets, the cold-blooded story of one murder actually "ordered" by Lepke and how it was done, was told on the witness stand yesterday by Abe (Kid Twist) Reles."

On the following day the Mirror cited in a story a copy of which is Exhibit 15 hereof:

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"Reles has "definitely promised" to testify, a spokesman for District Attorney O'Dwyer, of Brooklyn, said yesterday. This fact is said to have brought Lepke one step nearer the point where he himself is willing to turn informer, if assured he will be saved from the chair.

Among those Lepke is said to be ready to name are "three nationally known fig-
257 ures," allegedly implicated in assassinations and rackets. If a bargain is struck, Lepke's revelations it is predicted, will be the "greatest exposure of organized crime in the United States ever made."

Lepke is known to have conferred with O'Dwyer's aides.

Rosen, like Shuman, was "erased," it is charged, because he informed against Lepke.

Lepke ordered him slain, according to the State, and Reles is said to be ready to give details as he did in the Shuman
258 killing.

Also reported ready to testify against Lepke is "Allie" Tannenbaum, who drove the car in which Shuman took his last ride."

It is a fact, which the authorities should be very willing to acknowledge as such, that the defendant has not conferred with them, that there has been no discussion of a bargain between the defendant's attorneys or other representatives of the defendant with the District

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Attorney of Kings County or any of his associates or employees. Thus the question of whether reporters whose statements appear under their signature and who purported to quote the District Attorney of Kings County or his associates were unauthorized so to do, is not a problem presented on this application. Omitting that question and proceeding on the assumption that such conversations never took place, that the defendant had not acknowledged his guilt, that 260
he had not attempted to bargain with the District Attorney, he has been misrepresented broadly, generally and widely by every important newspaper in this area as having acknowledged his guilt. The public has been led to believe that the prosecutor believed that the defendant was guilty and on top of that the defendant himself had attempted to negotiate a bargain be..use of his own acknowledgment of his guilt.

It is to be observed that these statements imputing an acknowledgment of guilt to the defendant Buchalter are not restricted to the recent past. They were served up to the public 261
as early as October, 1940.

On October 31st, 1940 the Telegram printed a story of which Exhibit 16 is a copy. It said in part:

> "But now Lepke faces the electric chair as a result of the smashing of Murder, Inc., by District Attorney William O'Dwyer of Brooklyn.
>
> And so, the World-Telegram is informed, Lepke has told Mr. O'Dwyer that he will

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buy his life by turning state's evidence as the far lesser Abe Reles and small fry of Murder, Inc., already have done.

It is known that Mr. O'Dwyer and Captain Frank C. Bals, who commands detectives working on the Murder, Inc., case, left Brooklyn together on Oct. 22 for Kansas City.

And today it was reported that Mr.
263 O'Dwyer made two secret journeys to Leavenworth to talk with Lepke before he and Captain Bals returned to the city last Monday.

Previous Report.

It had been previously reported that Lepke probably would talk if that was the only way he could escape the chair, but today's information is the first definite report from a source of such reliability that Lepke's singing was assured.

264 The argument that convinced Lepke to spill all he knows, to bring to light the deepest secrets of the big shots of the underworld and their alliances with politics, is reported to have been the first degree murder indictment obtained against him by Mr. O'Dwyer.

Mr. O'Dwyer's investigation of Murder, Inc., revealed evidence that Lepke had given 11 murder contracts to this syndicate of retailers of homicide and that

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seven of the murder orders had been executed satisfactorily.

The indictment against Lepke was for one of these crimes—the slaying of Joseph Rosen to shut his mouth so he could not testify against Lepke.

Victim of Extortionists.

Rosen was forced out of the trucking 266
business by Lepke's extortionists. He was reduced to running a small candy shop at 725 Sutter Ave., Brooklyn. That was where he was killed Sept. 13, 1936. He had a subpoena to appear before the Dewey grand jury in his pocket when gunmen walked in and fired 22 bullets into his body.

Even this did not shake Lepke's silence, as far as could be learned. But then Assistant District Attorney Louis Aidino obtained important corroborative evidence against Lepke and the five men indicted 267
with him for the Rosen Murder. The nature of the evidence is still a closely guarded secret, but it was important enough to cause Mr. O'Dwyer, to exclaim jubilantly:

"At last I've got Lepke and Capone on their way to the chair:"

And whatever the evidence was, it is reported, it was enough to convince Lepke that his only chance to escape frying in the hot seat was to sing—and sing loud.

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Charge against Capone.

The Capone Mr. O'Dwyer referred to was Louis Capone, one of those indicted with Lepke for the Rosen murder. Capone is now in Raymond St. Jail in Brooklyn. Capone has been described as the liaison officer who took care of murder contracts between Murder, Inc., and Lepke and other top drawer racketeers.

269 Three of the others indicted with them are still fugitives. They are Emanuel (Mandy) Weiss, Phil (Little Farvel) Cohen and James (Dizzy Jimmy) Ferraco.

The sixth man named in the indictment was Harry (Pittsburgh Phil) Strauss, now in the death house waiting electrocution for the murder of Irving (Puggy) Feinstein. He is one of four notorious members of Murder, Inc., convicted so far in Mr. O'Dwyer's drive against the gang."

270 Exhibit 17 is a story published by the New York Sun on October 31st, 1940.

Exhibit 18 is a reprint from the Mirror of November 1st, 1940. The headline and opening paragraph state:

"Report Lepke Will 'Sing' to Escape Chair

Louis (Lepke) Buchalter was officially reported last night to be ready to buy his life by revealing to District Attorney

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O'Dwyer of Brooklyn all he knows about the underworld."

• • • • • • •

Mr. O'Dwyer is quoted as follows:

"At last I've got Lepke and Capone on their way to the chair," O'Dwyer was reported to have declared before Lepke decided to talk. No hint was forthcoming from O'Dwyer's office last night whether he is willing to bargain with the kingpin racketeer." 272

Presumably the District Attorney will be the first to concede that he never spoke with the defendant Buchalter and certainly that he did not confer with him as stated in these last referred to releases.

The publication of inflammatory and irresponsible statements against this defendant Buchalter continue, to the very day of the making of this application. On July 10th, 1941 the Daily Mirror in reporting the progress of Democratic Party conferences held for the purpose of selecting a nominee in the city campaign said: 273

"One reason given yesterday for O'Dwyer's first place position is that he "seems to be the only man who could beat LaGuardia." The Brooklyn prosecutor is expected to strengthen his candidacy further by a successful prosecution of Louis

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> (Lepke) Buchalter, due to go on trial Aug. 4 for the murder of Joseph Rosen, ex-member of the Murder Syndicate, "erased" as an informer."

The story in which this statement is contained is Exhibit 19 hereof.

Prejudice has been generated by the press against this defendant in the report of the pro-
275 ceedings in Kings County Court on those occasions when the defendant Buchalter was produced for arraignment.

Exhibit 20 hereof is an excerpt from the New York Tribune of May 10th, 1941. It quotes Judge Martin who presided on that occasion as saying of this defendant:

> "I know this man is a bad man," he said, "a dangerous man, and his record is bad. But how is any man going to confer with his folks for the choice of counsel if ten other men are hanging over him? I don't
276 see any sense to this. Why couldn't just two or three men go in with him? I'm not afraid anybody will take him out of the courtroom. If they try to take him, they'll take me with him. It seems to me to be ridiculous for him to be surrounded as he is. He won't jump out of a window. One man could keep guard there."

Exhibit 21 is the report of the same proceedings as it appeared in the New York Times that same morning. There is a verbatim repetition

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of the language of Judge Martin in the Times account.

The Journal on May 9th, 1941, reported the same events in its own somewhat different journalistic style. Its story is Exhibit 22 hereof.

Incidentally, it may be noted that on May 16th, 1941, when the defendant was again produced before the County Judge, the Assistant District Attorney in addressing the court said among other things: 278

> "Mr. Turkus: Your Honor, this is a mile stone in law enforcement. After fifteen months of investigation by Judge O'Dwyer we have succeeded in bringing before your Honor at this bar of justice Louis Lepke on a charge of murder in the first degree, the man who pulled the strings."

Mr. Turkus' language was equally unreserved on May 29th, 1941, when addressing Judge Martin. He said in part: 279

> "It is about time that issue was joined to the end that a trial date may be fixed. If this Court has no jurisdiction, as I pointed out in the manner in which he took offense, but which would give his client the 'break,' as the expression goes, if he were convicted, and the Court had no jurisdiction, he would cheat, as I said, the electric chair."

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The public has been led to believe that the defendant Buchalter is not only guilty of the crime charged in this indictment, but that he caused the murders of many other people.

Exhibit 22 is a copy of a headline and story in the New York Journal dated April 16th, 1940. The headline and the first paragraph state:

"Shot Down Stranger in Brooklyn

281 Says 'Armorer' Pointed Victim Out To Him

The amazing admission that he shot and killed a man as the appointed executioner for Louis (Lepke) Buchalter without even knowing his victim's last name was revealed today as part of the confession of Abe (Kid Twist) Reles, tattling triggerman of the Brooklyn cut-rate murder ring."

282 Exhibit 23 is an excerpt from the Tribune of January 3, 1941, in which Mr. Foley, the District Attorney of Bronx County is quoted as being convinced that this Defendant Buchalter had caused the murder of Irving Penn and that that murder had resulted from a confusion of the victim with another intended victim, one Philip Orlofsky.

Exhibit 24 is an excerpt from the Mirror of June 4th, 1940, and asserts that the defendant Buchalter caused the murder in Sullivan County of Hyman Yuran.

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Exhibit 26 is the story in the Times of May 16, 1940, in which the murder of Yuran is attributed to the defendant Buchalter.

On May 16th, 1940, the Post published a statement of which Exhibit 27 is a copy and which included the following:

> "The slaying of Mandel, whose body was found in Folsom, N. J., last December, was almost identical to the murder 284
> of Yuran, whose body was found yesterday in a shallow lime-lined grave near Loch Sheldrake Inn, at Lock Sheldrake, Sullivan County.
>
> Find Gold Wrist Watch
>
> Yuran is believed to have been killed in Lepke's "war of extermination" against witnesses. Bernstein led O'Dwyer and Sullivan County officials immediately to his grave."

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On May 8th, 1940, the News referred to the then current prosecution for the murder of one Rudnick and said in a story of which Exhibit 28 is a copy:

> "Stabbed With Ice Pick
>
> The indictment charges that the trio stabbed Rudnick fifty-four times with an icepick and then crushed his skull with a meat cleaver. The murder, detectives

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claim, was perpetrated on a cash assignment from Louis (Lepke) Buchalter, jailed ex-racket chief in New York."

With respect to Rudnick the Mirror said on April 15th, 1940, of this defendant:

"The specific charge is the slaying of George Rudnick, a police informer, found stabbed 54 times with an ice pick, in his
287 car on Jefferson Ave. between Central and Evergreen Aves., Brooklyn. In a pocket of Rudnick's coat was a letter, signed by an investigator, thanking Rudnick for "the information you gave me." Authorities assert Louis (Lepke) Buchalter ordered the killing and that the letter was put there on Lepke's order as a threat to other informers."

Exhibit 29 is a copy of that story. The paper quoted Mr. O'Dwyer as follows:

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"Anastasio is said by O'Dwyer to be the man who obtained "killing contracts" for the gang and to have been in charge of the hiding of Lepke when the Government and the State were looking for him."

In reporting developments in the investigation of the death of Irving Penn, the New York Times published a statement on April 15th, 1940, of which Exhibit 30 is a copy. The Times said:

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"Mr. O'Dwyer said that Parks had definitely identified Martin (Buggsy) Goldstein, Abraham (Pretty Boy) Levene and Seymour Magoon as the three men who had stolen a car from a garage at 1 Neptune Avenue, where Parks worked, the night of July 21, 1939. Penn was shot down from the car a few days later as he left his home at 250 East 178th Street, the Bronx, to take a subway downtown to 290
his work as an official of a music publishing house. The explanation of his slaying was that he was mistaken for Philip Orlovsky, a witness against Louis (Lepke) Buchalter in District Attorney Thomas E. Dewey's investigation of Lepke's racket empire. Penn and Orlovsky lived in the same apartment house and were of about the same build.

• • • • • •

In connection with an intensified search 291
for two more alleged members of the Murder ring, Albert Anastasia and Vito Gurino, it was revealed that two of Mr. O'Dwyer's material witnesses had been questioned until the early hours of yesterday at his office. Detectives have been sent to Florida on the trail of the two men, it was said. The two witnesses from whom information was sought were Louis Capone, no relative of the Chicago gangster, and Gurino's wife, Gertrude. Both

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> are in jail in default of $100,000 bail. Capone has been described as the go-between who accepted orders from Lepke and other gangsters for murders they wanted performed and passed the orders on to the actual killers."

On April 13th, 1940, the Mirror accused the defendant Buchalter of participation in the murder of Morris Diamond and based the accusation on an affidavit prepared by the office of the
293 District Attorney of Kings County and sworn to by a police officer. Exhibit 31 is a copy of that statement. It says in part:

> "Louis (Lepke) Buchalter was directly implicated yesterday in a Brooklyn murder syndicate execution, according to an announcement from District Attorney O'Dwyer's office.
>
> . . . . . .
>
> 294
>
> The affidavit makes the definite charge that Lepke was involved in the Diamond killing."

On April 16th, 1940, the Telegram published an omnibus charge of murder against the defendant Buchalter. Exhibit 32 is a copy of its statement.

On May 20th, 1940, the Mirror reported that it had been informed by a police official that a witness, Albert Tannenbaum, in the custody of

295

the police, "links Lepke to a 'murder trust.'" Exhibit 33 is a copy of that statement.

On August 6th, 1940, the Mirror accused Buchalter of causing the murder of Sam Feinstein. Exhibit 34 is a copy of that report. It is based on information reputedly obtained from the office of the District Attorney of Kings County.

On August 21st, 1940, the Telegram quoted two witnesses in the custody of the District Attorney of Kings County, the notorious Reles and Tannenbaum as saying that one Schacter had been killed "on Lepke's orders for knowing too much." See Exhibit 35.

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Exhibit 36 is a more inflammatory recital of the same accusation which appeared in the News on August 21st, 1940.

Exhibit 37 is the Telegram's account of the accusation of Reles and Tannenbaum published August 22nd, 1940.

Exhibit 38 is a report from the New York Journal of January 3rd, 1941, in which the District Attorney of Bronx County is quoted as accusing the defendant Buchalter of the murder of Irving Penn. The article proceeds to say:

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> "The District Attorney charged that Capone was a liaison man between Lepke and Murder, Inc., and carried the instructions that resulted in the "mistaken" slaying. Foley announced he would ask for transfer of Capone, held in Brooklyn in default of $100,000 bail, to The Bronx."

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Capone is a defendant in the instant indictment.

Exhibit 39 is the Post version of the same interview with Mr. Foley. It says in part:

> "Penn, a 42-year-old music publisher, was killed by gangsters in front of his home at 250 E. 178th St., The Bronx, on July 28, 1939. Foley says he had been slain by mistake by men hired by Lepke
299 to murder Benjamin Orlofsky, a witness in District Attorney Dewey's garment racket case against Lepke."

On the same day the Daily News said of Capone:

> "Foley will present evidence against Capone, reputed trigger-man for the Louis (Lepke) Buchalter gang, and two unnamed men who are fugitives. Ten witnesses will testify."

300 The article itself is marked Exhibit 40 hereof.

On January 30th, 1941, the body of Peter Panto was excavated at Lyndhurst, New Jersey, and that event is reported in a story which is marked Exhibit 41 hereof, published in the New York Times of that day. The composition of the story, which refers to Buchalter as having caused the death of Yuran, whose body was said to have been disposed of in a similar manner, is calculated to give the impression that Buchalter had caused the murder of Panto and

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all other persons who in the opinion of the District Attorney of Kings County had been buried in the same area in New Jersey.

On February 8th, 1941, the Times reported the murder of Benjamin Tannenbaum. It said that Tannenbaum had been on the payroll of Charles Workman, a material witness in the Rosen murder, and then said "Tannenbaum knew a great deal and was about ready to talk". It attributed that statement to a detective. 302 It quoted another investigator as saying "he was most likely killed for having talked to District Attorney Dewey in his investigations of the rackets in which Lepke and his mob played." That article is exhibit 42.

On February 8th, 1941, the Mirror said that Mr. O'Dwyer accused Buchalter of the murder of Benjamin Tannenbaum. Its story of that day is marked Exhibit 43 hereof. It says in part;

> "Benjamin (Ben, the Boss) Tannenbaum "knew too much about three murders. 303 He was indicted for one; Louis (Lepke) Buchalter for another; and another "pal" of Benny's is said to have fired the shots that "erased" Dutch Schultz.
>
> So, according to Brooklyn District Attorney, O'Dwyer's office, underworld executioners tracked him down in Featherbed Lane in the Bronx." * * *
>
> Yesterday, a hunt was on for the killers,

304 *Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

while O'Dwyer's office offered the following explanation:

"We place this execution squarely at the cell doors of Louis (Lepke) Buchalter and Charles (Charlie the Bug) Workman."

Referring to the indictment in this case, representatives of Mr. O'Dwyer are quoted as say-
305 ing:

"Aides to the Brooklyn District Attorney stressed that Lepke is to be brought from Leavenworth prison in June for trial on the charge of ordering the 1936 murder of Joseph Rosen, prospective Dewey witness against Lepke in the fur racket. Workman is behind bars under $75,000 bail as a witness in the Rosen Killing.

But there is a more important allega-
306 tion against Workman. Authorities in Newark charge he fired the bullets that ended Schultz's career in a tavern there.

"Tannenbaum was in a position to give important testimony concerning these two crimes," was the way O'Dwyer's associates expressed it."

The story based on alleged quotations of aids of Mr. O'Dwyer states that Rosen was killed because he had been a witness against Buchalter and that Benjamin Tannenbaum had been killed

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on Buchalter's directions because he knew of the murder of Rosen.

On or about May 15th, 1941, there began in the Kings County Court the trial of one Nitzberg for the alleged murder of Al Shuman. That proceeding, widely publicized, became the occasion for the accusation that Buchalter had instigated the murder of Shuman. Exhibit 44 is the statement which appeared in the Sun on May 15th, 1941. Exhibit 45 quotes Mr. Helfand, 308
Assistant to the District Attorney of Kings County as explaining to a reporter of the New York Telegram that he was about to make an accusation in Court against Buchalter. The opening paragraphs of that story are:

> "The slaying of Albert (Plug) Shuman in Brooklyn two and a half years ago was ordered by Louis (Lepke) Buchalter before the latter was picked up by police and sentenced to a long prison term. Julius Helfand, Assistant District At- 309
> torney, was to charge today in his opening address to the blue ribbon Kings County Court jury sitting in the murder case against Irving (Knadels) Nitzberg.
>
> Mr. Helfand was to declare the state would produce as a witness the woman in whose home the head of Murder, Inc., hid when he mapped out plans for the killing of Shuman, who was found in front of 628 E. 95th St., Brooklyn, in a stolen car on Jan. 9, 1939—two bullets in the back of his head."

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Exhibit 46 is the Mirror's version of the same accusation printed on May 16th, 1941.

Exhibit 47 is a report from the Sun of May 16th, 1941.

Exhibit 48 is a repetition of this accusation as it appeared in the Mirror on May 16th, 1941.

Exhibit 49 is the Times report of May 17th, 1941.

Exhibit 50 is an excerpt from the News of
311 May 17th, 1941, and Exhibit 51 is an excerpt from that paper of May 20th, 1941.

All of these reports state that Buchalter procured the murder of Shuman. It is to be noted that Buchalter was not named in that indictment. The actual Court proceedings were leveled only against Nitzberg, but in the public mind Buchalter was found guilty of having employed Reles and Tannenbaum and Nitzberg to kill Shuman because Shuman was a squealer. There is of course a gap in this journalistic proof. There was no indication that Shuman had been known
312 to Buchalter or that Buchalter had any reason for fearing anything that Shuman might say to authorities. Nevertheless, Buchalter, who was not afforded an opportunity to contest the accusation of the police and of the District Attorney, was tried in the public press for the murder of Shuman.

The newspaper publicity against the defendant Buchalter has not been limited to the accusation that he had been guilty of the instigation of many murders.

Exhibit 51 is a report from the New York

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Post of February 4th, 1941. Buchalter is there referred to "as the most powerful and vicious racketeer who has preyed upon the public of this city."

Exhibit 52 is a report from the News of May 11th, 1940. Buchalter is referred to as "the brains behind the Brooklyn murder mob."

The News of April 17th, 1940, in a story, a copy of which is Exhibit 53 hereof, quotes Mr. Turkus, Mr. O'Dwyer's assistant, as searching 314 for Max Rubin. It says in part:

> "If Rubin can be found, Assistant District Attorney Burton B. Turkus, of O'Dwyer's office, hopes that he will be able to link Lepke with several syndicate murders, even more definitely than he is connected at present."

It says that:

> "Rubin soured against Lepke when, on orders from the latter, gunmen shot him as 315 he returned to his home at 245 E. Gunhill Road on the night of Oct. 1, 1937. Rubin recovered from his wounds and testified against Lepke in the trial on charges of extortion in the flour and trucking rackets, for which Buchalter was sentenced to 14 years' imprisonment."

Rubin's whereabouts have never been unknown to the District Attorney of King County. The testimony he has given in other proceedings has

316 *Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

indicated that he will be a witness for the People in the trial of the instant indictment. Publication of which Exhibit 53 is a copy, is advance notice to the public by the District Attorney's office that Rubin will testify against this defendant and will do so because Rubin believes that the defendant Buchalter attempted to cause the murder of Rubin.

Exhibit 54 is a copy of a statement which
317 appeared in the World Telegram of April 18th, 1940, which purports to prove that the notorious Reles was an employee of the defendant Buchalter and by that proof attempts to fasten on Buchalter guilt for all of Reles' crimes.

The Exhibits hereto annexed are only a small number of those available in the proof of a proposition that needs no proof. Buchalter has been convicted in the mind of the public of this locality. The prosecutor has been frequently quoted as informing newspaper reporters of his belief in Buchalter's guilt. Witnesses in the
318 custody of the District Attorney have been quoted as acknowledging guilt in the commission of other murders and as having said that they committed those murders upon instructions from Buchalter and while engaged in his employ. There has never been so widespread or devastating an attack upon any defendant. It cannot be believed that this defendant, burdened with these advance notices, can obtain a fair trial in this locality. It is for that reason that this application for a change of venue is made.

There is submitted herewith the affidavit of Benjamin D. Fernbach, a trained investigator,

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who, on the 1st, 2nd and 3rd day of July, 1941, interviewed two hundred persons in various localities in the Borough of Brooklyn. One hundred and sixty-four of those persons said that in their opinion Buchalter is guilty of murder. Thirty-four said that they had no opinion, two that he was not guilty. That report, it is submitted, is proof of the devastating effect of the newspaper attacks on the defendant Buchalter. The public has been conditioned to believe that

320

he must be guilty.

No doubt, everyone will agree that the defendant like any other should be accorded a fair trial. The prosecution, however, will be giving only lip service to that doctrine if it insists that the trial be held in Kings County. A fair trial cannot be had in Kings County for the reason that the literate section of its population has been taught by every agency of propaganda that this defendant is guilty.

It may be suggested in opposition to this application that it ought be denied because a denial will better serve the convenience of the people's

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witnesses. But those who cherish and defend the ideal of a fair trial for any defendant, should not permit their loyalty to that doctrine to be overthrown and frustrated by concern over the convenience of witnesses. It has been found convenient in the past for the witnesses in the custody of the District Attorney to be transferred across the continent. If their convenience was not greatly interfered with by their removal to a point 3,000 miles distant from Kings County, they can now be removed a few hundred miles

322 *Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

if that transfer is needed to accord this defendant a fair trial.

No doubt many of the quotations attributed to the District Attorney of Kings County and his various aides as set forth in the exhibits annexed to this affidavit, were improper in the sense that they were made without authorization. But the fact is that they were circulated to the public with the apparent approval of the officials quoted.

323 It may be that public officials are without power to refute unauthorized statements. Perhaps no one can efficiently deny statements attributed to him in the press. But a confession of inability to make such successful refutation is not the same thing as a demonstration that because the statements were unauthorized they were therefore not harmful. Their harm is incalculable. They deprive the defendant Buchalter of an opportunity for a fair trial. This application should not only be granted, but in common fairness the prosecutor should join in seeking the relief here requested.

324 No prior application for this or any other similar relief has been made.

This application is made by order to show cause rather than by the giving of the ordinary notice of motion for the reason that deponent desires to make this application as consistently as may be possible with the preparation of the voluminous papers necessary for the presentation of this application and as long before the fourth

Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter) 325

day of August, 1941, the date for which this case is now set for trial, as may be possible.

HYMAN BARSHAY

Sworn to before me this 16th day of July, 1941.

AARON A. JANIS
Notary Public, Kings County
Clk's. No. 151, N. Y. Co. Clk's No. 219 326
Commission expires March 30, 1943

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Affidavit of Emanuel Buchalter, Read in Support of Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

329

LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county.

330 State of New York }
County of New York } ss.:

EMANUEL BUCHALTER, being duly sworn, deposes and says: I am a brother of the defendant, Louis Buchalter.

From time to time, during the past eight months, aides and other representatives of the District Attorney of Kings County have, on their initiative, discussed with me the fact that the defendant has been so named in an indictment pending in Kings County, and have asked me to discuss certain matters with my brother.

Affidavit of Emanuel Buchalter, Read in Support of Application for Change of Venue (Buchalter) 331

One of these conversations was initiated by and held at the instance of an Assistant District Attorney of Kings County. That Assistant District Attorney is, I was informed by him, to try this case for the People of the State of New York.

The aforesaid Assistant District Attorney told me at that particular conversation that I should use whatever influence I could to induce my brother to perform certain services for the District Attorney, because if I d.. not, then he would proceed with the prosecution and assuredly the defendant would be convicted upon the trial of this case. He said, "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation." He said in words and in substance that current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction. 332

I submit this affidavit in support of the application made on behalf of the defendant, Louis Buchalter, for a change of venue. 333

EMANUEL BUCHALTER

Sworn to before me this 16th day of July, 1941.

LEE DEUTCH
Com. of Deeds NYC
N. Y. Co. Clerk's #40
Com exp 3-26-42

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Affidavit of Benjamin D. Fernbach, Read in Support of Application for Change of Venue (Buchalter)

State of New York)
County of New York) ss.:

BENJAMIN D. FERNBACH, being duly sworn, deposes and says:

I live at 10 Monroe Street, New York City. I was at one time employed as an agent in the
335 Secret Service Division of the United States Treasury Department. For the past twelve years, I have been engaged in the making of investigation. I am presently associated with the firm of Tracy & Seery whose offices are located at 420 Lexington Avenue, New York City. I was admitted to the Bar of the State of New York in 1938. I am a graduate of New York University and New York University Law School.

On July 1, 2 and 3, 1941, I interviewed two hundred persons in the Borough of Brooklyn,
336 City of New York. These conversations were carried on in the following neighborhoods of Brooklyn:

1. Bay Ridge

2. Coney Island

3. Vicinity of Long Island Railroad Station and Atlantic Avenue.

4. Prospect Park

Affidavit of Benjamin D. Fernbach, Read in Support of Application for Change of Venue (Buchalter)

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5. Flatbush Avenue

6. Church Avenue

I stated to the persons whom I interviewed that I was conducting a publicity survey in an effort to determine how public opinion was formed, based on what the public hears and what the public reads. To each of these persons, I propounded the following questions:

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1. Will this country enter the war?

2. Is Lepke guilty or not guilty of murder?

3. Will democracy survive this war?

I followed this method in interviewing the first 180 persons whose names and addresses are set forth in the schedule annexed hereto, marked "Exhibit A", and made a part hereof.

In interviewing the twenty persons whose names appear in the schedule annexed hereto, marked "Exhibit B" and made a part hereof, I followed a slightly different method of interrogation. I did not mention the purpose of my inquiry, but in each instance with respect to those twenty persons, I asked without preliminary interrogation the following questions:

339

1. Will this country enter the war?

2. Is Lepke guilty or not guilty of murder?

When this second method of interrogation was employed, the persons whose names appear on

340 *Affidavit of Benjamin D. Fernbach, Read in Support of Application for Change of Venue (Buchalter)*

schedule B hereof invariably asked me the reason for the interrogation, and my response was that I was conducting a publicity survey.

Every one of the 200 persons whom I interrogated had a quick answer to the second question. Each of these persons indicated doubts as to the first and third questions and showed a desire to engage in a discussion as to the merits of the answers that they entertained. But
341 in answering the second question as to the guilt or innocence of the defendant Buchalter, they entertained no reservations and gave me a categorical answer without hesitation. 164 of the 200 persons thus interviewed said without reservation that in their opinion, the defendant Buchalter was guilty; 34 said that they had no opinion and two said that he was not guilty.

The twenty persons whose names comprise the schedule "Exhibit B" hereof, gave me the sources of their opinions and the names of the newspapers which they read. That newspaper
342 information is set forth in that schedule. Of those twenty persons, eighteen entertained the definite opinion that the defendant was guilty. One said that he had no opinion and one said that it was his opinion that the defendant was not guilty.

In the same classification, the persons whose names comprise schedule B hereof, several said that they believed the defendant guilty because of his participation in other murders, and some said that they believed him guilty because he had a record.

Affidavit of Benjamin D. Fernbach, Read in Support of Application for Change of Venue (Buchalter) 343

One of the persons I interviewed replied as follows to the question as to whether Lepke was guilty or not guilty of murder. "After hearing Burton Turkus lecture, how could I think otherwise?"

Immediately after interviewing each of these persons whose names appear in schedule A and B hereof, I made a memorandum of the name and address of the person interviewed. My original memoranda are available. 344

BENJAMIN D. FERNBACH

Sworn to before me this 15th day of July, 1941.

LEE DEUTCH
Com of Deeds NYC
N. Y. Co. Clerk's #40
Com exp. 3/26/42

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Exhibit A, Annexed to Affidavit of Benjamin D. Fernbach

Opinion as to guilt or innocence of Buchalter.

Name	Address	Opinion
John Sakal	482 76th Street, B'klyn, N. Y.	Yes
A. Venturelli	2261 60th Street	Yes
Richard Van Jones	7822 Third Avenue	Yes
Chester Flynt	77th St. and 4th Avenue	Yes
Wm. Fitzgerald	339 84th Street	Yes
Fred Lotthamines	7605 Third Avenue	No opinion
John Connelly	309 77th Street	No opinion
347 Edward Connelly	3608 Quentin Road	Yes
Joseph Sackman	194 Gelston Avenue	No opinion
Charles R. Holahan	450 78th Street	Yes
J. W. Sands	7814 Fourth Avenue	No opinion
Wm. F. Stark	205 71st Street	No opinion
Jerome Carroll	429 78th Street	Yes
W. R. Moore	341 41st Street	No opinion
Peter Fleasen	1243 Putnam Avenue	Yes
Thomas J. Donovan	431 79th Street	Yes
F. Foxwell	79th Street	Yes
H. Seyden	888 Fifth Avenue	Yes
F. S. Marsh	237 79th Street	Yes
Dan Gully	8415 Fourth Avenue	Yes
Joseph F.	82nd St. & Fourth Avenue	Yes
348 Anthony D'Antonio	8822 Ft. Hamilton Ave.	Yes
O. Sigmond	245 96th Street	No opinion
F. Clement	8415 Fourth Avenue	Yes
W. Clement	8415 Fourth Avenue	No opinion
John Conrick	301-100	Yes
E. Peterson	325 89th Street	Yes
S. Schwartz	8525 Fourth Avenue	No opinion
Wm. Connors	8525 Fourth Avenue	No opinion
B. Ellenson	405 86th Street	Yes
L. Wyler	1474 E. 55th Street	Yes
Dr. Senter	419 86th Street	No opinion
Sm. F. Gumper	8711 Fifth Avenue	Yes
M. Imbriale	1128 69th Street	No opinion

Exhibit A, Annexed to Affidavit of Benjamin D. Fernbach 349

E	Address	Opinion
einstein	459 86th Street	Yes
s. Mazio	6721 Seventh Avenue	Yes
lermanser	1361 86th Street	No opinion
ph Marone	2124 Avenue T	Yes
lichaels	1435 Bath Avenue	No opinion
nderson	247 86th Street	No opinion
ge West	352 85th Street	Yes
H. Peck	1601 West 6th Street	Yes
ollenstein	900 Avenue H	Yes
mith	38 Westminster	No opinion
wyer	367 96th Street	Yes 350
infer	471 86th Street	No opinion
wyer	469 86th Street	Yes
cMahon	310 94th Street	Yes
enny	402 85th Street	No opinion
Laff	444 72nd Street	Yes
itcher	59 Gatling Place	Yes
ld Nelson	469 86th Street	Yes
Kelly	339 86th Street	Yes
. Walsh	465 84th Street	Yes
k Russo	2467 West 15th Street	Yes
s Carbone	1839 East 18th Street	Yes
Verdoliva	2925 West 19th Street	Yes
. Traae	8602 Ridge Boulevard	Yes 351
. S. Moskowitz	1867 E. 9th Street	Yes
k DeMarco	529 Surf Avenue	Yes
as McCormick	289 16th Street	Yes
Kalish	200 Liberty Avenue	No opinion
rd Nash	1777 76th Street	Yes
S. Rosenfeld	1640 Ocean Avenue	Yes
A. Nicholson	1017 Surf Avenue	Yes
Scott	1919 Surf Avenue	Yes
Roland	1012 Sixth Avenue	Yes
egel	2258 Ocean Avenue	No opinion
s Schenk	2824 West 16th Street	Yes
gers	6408 Gates Avenue	Yes
lazer	2877 West 20th Street	Yes

352 *Exhibit A, Annexed to Affidavit of Benjamin D. Fernbach*

	Name	Address	Opinion
	Jack Cohen	437 St. Johns Place	No opinion
	S. Rosenfeld	914 Avenue M	Yes
	R. McCreery	217 Prospect Place	No opinion
	L. O'Neill	203 Underhill Avenue	Yes
	W. Van Tassel	1721 East 35th Street	Yes
	Axel Bromark	149 St. Marks Avenue	Yes
	F. Koenig	5 Linden Boulevard	Yes
	J. Shulman	155 Riverdale Avenue	Yes
	Ed. Cahill	482 10th Street	Yes
	M. Jacobson	3509 Canal Avenue	Yes
353	Anonymous	Interviewed in front of Half Moon Hotel	Yes
	L. Goodman	3719 Poplar Avenue	Yes
	S. Russo	570 Pacific Street	Yes
	Fred Lehman	4611 Sixth Avenue	Yes
	George Crisp	271 41st Street	Yes
	J. W. Parks	619 Warren Street	No opinion
	Al. Bova	19 Fourth Avenue	Yes
	A. Salc	19 Fourth Avenue	Yes
	J. Germano	19 Fourth Avenue	Yes
	G. Bova	19 Fourth Avenue	Yes
	Louis Gladstein	532 Pacific Street	Yes
	G. Stillwell	126 Terrace Place	Yes
354	L. Endler	333 Bleeker Street	Yes
	A. Russo	19 Fourth Avenue	Yes
	F. D'Antonio	618 Hendricks Street	Yes
	J. Clarke	486 State Street	Yes
	August Trezza	676 DeGroce Avenue	Yes
	Joe Potsdam	596 Atlantic Avenue	Yes
	Max Baslaw	280 Ocean Parkway	Yes
	S. Zegans	139 Flatbush Avenue	Yes
	Frank Pisam	130 Flatbush Avenue	No opinion
	G. Rosenthal	130 Lott Avenue	Yes
	A. Aureiia	1003 40th Street	Yes
	John DeLeo	130 Flatbush Avenue	Yes
	Percy Visconte	1825 West 3rd Street	Yes

Exhibit A, Annexed to Affidavit of Benjamin D. Fernbach 355

Name	Address	Opinion
Gus Resta	1740 44th Street	Yes
Eli Ross	558 Pennsylvania Avenue	Yes
Albert Weissman	526 Pennsylvania Avenue	Yes
Louis Keller	1000 President Street	Yes
A. Silverstein	74 Fifth Avenue	Yes
H. Christie	1239 Dean Street	Yes
Wm. Klein	394 Bergen Street	Yes
Fred B. Roth	1445 75th Street	Yes
Chas. J. Kearney	9281 Shore Road	Yes
Michael Cammaroto	1829 76th Street	Yes
Morris Feiner	239 Prospect Place	Yes 356
Samuel Feiner	1317 East 14th Street	Yes
L. Kaplowitz	433 Dean Street	No opinion
Nathan Cogan	1723 74th Street	No opinion
H. Anargyros	190 East 21st Street	Yes
Sam Takis	310 St. John's Place	Yes
Paul Eliot	234 Bergen Street	Yes
Theodore Levine	1990 Bedford Avenue	Yes
John Quist	82 St. Marks Avenue	Yes
M. Feinstein	693 Crown Street	Yes
J. Abrams	252 Flatbush Avenue	Yes
Frank Sheeron	101 Berkeley Place	Yes
J. Hannon	157 St. Marks Avenue	Yes
Peter Maggio e	648 83rd Street	Yes 357
Michael Pafundi	763 Franklin Avenue	Yes
Michael Kravitch	991 President Street	No opinion
John Martorana	137 Fourth Avenue	Yes
E. J. Duffy	193 St. John's Place	Yes
R. Ziv	285 Prospect Place	Yes
P. Ducato	325 Baltic Street	Yes
F. Hubbard	25 Stratford Road	Yes
John Warren	384 Sterling Place	Yes
J. Walker	918 President Street	Yes
Michael Russell	670 President Street	Yes
Dan Ryan	1 Prospect West	Yes
N. C. Murray	926 President Street	Yes
Thos. Bellafiori	1757 W. 2nd Street	Yes

358 *Exhibit A, Annexed to Affidavit of Benjamin D. Fernbach*

Name	Address	Opinion
John Greies	764 Union Street	Yes
P. Quinn	349 St. John's Place	No
J. A. Fives	670 Lincoln Place	No opinion
Wm. Lane	611 Vanderbilt Avenue	Yes
L. S. Veck	234 Berkeley Place	Yes
M. Lyons	511 Lincoln Place	Yes
J. H. Edsall	199 Park Place	Yes
Tom Maher	2112 Flatbush Avenue	Yes
G. Cleva	221 Ninth Avenue	Yes
John Dorsey	35 Oakland Street	Yes
359 D. Goldstein	122 Van Buren Street	Yes
Daniel Gerstein	1658 Pitkin Avenue	Yes
J. Deegan	1041 Bergen Street	Yes
Arthur Chayes	85 Monroe Street	Yes
C. Drosopulos	73 Sterling Street	No opinion
Graham Brown	1031 Nostrand Avenue	No opinion
Raymond O'Connor	328 E. 26th Street	No opinion
Chas. Lobine	188 South Second Street	No opinion
Harry Hoffman	1365 Carroll Street	Yes
Thos. Earley	528 Flatbush Avenue	Yes
J. Dunne	510 Flatbush Avenue	Yes
Barnett Rahn	379 East 96th Street	Yes
J. B. Munsell	2312 Voorhies Avenue	Yes
360 H. Dietz	2121 Westbury Court	Yes
H. Zeldis	6681 Flatbush Avenue	Yes
S. Skolnick	181 Clarkson Avenue	No opinion
Miss S. Roth	311 Powell Street	No opinion
J. Pecorella	248 East 26th Street	Yes
Emil Chiappetta	977 Rogers Avenue	Yes
A. Calabro	83 Second Place	Yes
S. J. Davidson	2101 Westbury Court	Yes
F. G. Cameron	105 6th Avenue	Yes
R. Sica	2723 Voorhies Avenue	Yes
Emil Purino	1782 Nostrand Avenue	Yes
V. L. Sica	2723 Voorhies Avenue	Yes
F. J. Healey	60 Clarkson Avenue	Yes

Exhibit B, Annexed to Affidavit of Benjamin D. Fernbach

Name	Address		
Meyer Katz	2229 East 24th Street	Yes	Papers and Radio
J. Philipps	533 Ocean Avenue	Yes	Newspapers P. M.
Milton Goldsmith	1307 East 8th Street	Yes	Newspapers Times and Post
M. Rothman	178 Ocean Parkway	Yes	All Papers
J. Centes	540 Ocean Avenue	Yes	Commentators, papers and radio
J. Pecker	90 East 18th Street	Yes	Papers and radio
Dr. Lamkay	416 Ocean Avenue	Yes Wants all racketeers cleared out	Herald Tribune, World Telegram and radio
M. S.	91 South Street	Yes	Comm on sense and Newspapers
Norman Hilford	395 Ocean Avenue	Yes	Times, Post and News
P. Romano	1470 73rd Street	Yes	Times, News and Radio
E. Karchmar	2105 Church Avenue	Yes Because of his record	News, Post, Telegram and Radio
J. Rodskin	540 Ocean Avenue	Yes	World Telegram, Times, News, and Radio
S. Lamberti	1554 Bath Avenue	No opinion	Times and Radio
F. Bramerlow	48 Sterling Place	Yes Takes no stock	Times, Journal-American, News
E. Weisbjerg	1701 Albermarle Road	No Not guilty of murder but for other crimes	Times, World-Telegram, Sun, News, and Radio
F. Panzella	4118 Fort Hamilton	No opinion	Journal, News, and Radio
Dr. Herman Schneider	962 Flatbush Avenue	Yes Because he knows P. D. men on the case	Newspapers Telegram, News and Radio
. Stidle	1638 Coleman Street	Yes	Times, Journal and News and Radio
. Elwell	460 East 38th Street	Yes	All papers and Radio
. Isaacs	2100 Westbury Court	Yes Gangsters	Telegram, Sun, Times and Radio
I. Strom	597 Lefferts Avenue	Yes	Eagle and Telegram
Seidler	216 East 39th Street	Yes	News and P. M.

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Copy of Indictment

COUNTY COURT

County of Kings

The People of the State of New York,
Plaintiff,

against

365 Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss," Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone,
Defendants.

The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of murder in the first degree, committed as follows:

366 The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloniously and of malice aforethought, shot and killed Joseph Rosen with revolvers.

William O'Dwyer
District Attorney

Indictment filed May 28, 1940.

John B. Maione,
Foreman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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and determination of this motion.

LET service of a copy of the within papers on the District Attorney of Kings County or one of his assistants or deputies, on or before July 17th, 1941, be deemed sufficient.

Dated, New York, July 17, 1941.

Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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is my opinion that presumption has been destroyed and in its place we find that each of these defendants are presumptively guilty and will be called upon to establish their innocence.

Unquestionably, it will be urged by opposing counsel that out of the six hundred and fifty names that have been selected as prospective jurors, twelve could be found in this large group, out of which a fair and impartial jury could be composed. But unquestionably, no matter how zealous a person may be to perform his civic duty as a juror, and no matter how honest his answers may be, notwithstanding the fact that he may be able to disregard public opinion and newspapers impressions yet subconsciously, an impression or an opinion cannot be disregarded and that opinion and impression will influence his verdict.

All that I seek at the present time is an opportunity to safeguard the rights of LOUIS CAPONE, and certainly the District Attorney of our county desires that there be no miscarriage of justice in any case and that the right of a defendant be safeguarded. Certainly the rights of the People of the State of New York will be amply safeguarded no matter where this trial is held, but they cannot be safeguarded in the County of Kings because of the notoriety and publicity which this case has, up to the present time, received.

I most respectfully submit that we, the reading public, are duly impressed by what we read in newspapers. We use patent medicines prescribed to us by newspapers only because we believe what we read. We listen to radio broadcasts and when the commodity is advertised in that manner, we purchase said commodity. Millions of dollars a year are spent to promote sales only because manufacturers know the value of advertising. All this holds true even in the trial of an action. Public opinion is created, impressions are created, and finally bias and prejudice is the result; and no matter how honest we may be in our belief that we can se

aside these impressions and render a verdict fairly and impartially and solely upon the evidence, that subconscious impression and opinion will naturally influence that verdict.

During the month of June, your deponent made a motion for severance on behalf of his client. This motion was denied but at that time your deponent submitted voluminous excerpts from the New York "Times" publication. These excerpts are now in the files of the County Court of Kings County in the Clerk's office thereof. I am submitting herewith additional clippings from the newspapers, which have been published subsequent to the argument of the motion heretofore mentioned.

If this motion is denied and the defendant is required to stand trial in this county, I believe that the jury will regard my client as presumptively guilty rather than presumptively innocent.

If this motion is denied and the defendant is required to stand trial in this county, I believe that the jury will regard my client as presumptively guilty rather than presumptively innocent.

That I have read the affidavit of HYMAN BARSHEY and the affidavit of BENJAMIN D. ZENBACH, and the exhibits annexed to these affidavits which are submitted in support of the motion for change of venue on behalf of the defendant LOUIS BUCHALTER. I verily believe that the facts set forth in these affidavits and from my knowledge of local opinion, that a fair trial cannot be accorded my defendant tried with the defendant Buchalter in this jurisdiction at any time. I am now more convinced than ever before that the defendant LOUIS CAPONE, whom I represent, if compelled to proceed to trial as a co-defendant of the defendant LOUIS BUCHALTER in this county, cannot receive a fair and impartial trial.

That no prior application for this or any similar relief has been made on behalf of the defendant LOUIS CAPONE.

That this application is made by order to show cause rather than the ordinary notice of motion because the trial of this action is scheduled for the 4th day of August; and for the further reason that I am informed by co-counsel that they have made this motion returnable for the 18th day of July 1941.

Sworn tobefore me this
day ofJuly, 1941

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Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

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LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county.

State of New York }
County of Kings } ss.: 369

BURTON B. TURKUS, being duly sworn, deposes and says:

I am an assistant district attorney of the County of Kings, in charge of the Homicide Bureau. District Attorney O'Dwyer has assigned me and Mr. Klein to prepare and prosecute the case against the above named defendants.

I have read the affidavit of Emanuel Buchalter submitted in support of his brother's motion

370 *Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)*

for a change of venue. In that affidavit Buchalter's brother asserts that an assistant district attorney, assigned to prosecute the case against Buchalter, made the following statements:

> "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation. * * * current prejudice existing in this locality against
371 the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction."

I have been informed by Mr. Klein, who opposed the motion for a change of venue, that upon the argument the accusation was made that it was I who made the above quoted statement to Buchalter's brother.

I never, either in words or substance, made any such statements to Buchalter's brother or
372 anybody else. The accusation that I made those statements is false.

BURTON B. TURKUS.

Sworn to before me this 21st day of July, 1941.

JOHN J. LEE, Notary Public,
Kings County. Kings Co. Clerk's
No. 557, Reg. No. 3248.
Commission Expires March 30, 1943.

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Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

County of Kings

In the Matter of the Application of

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Louis Buchalter

to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county.

State of New York }
County of Kings } ss.: 375

Solomon A. Klein, being duly sworn, deposes and says:

That he is an assistant district attorney of Kings County assigned to assist in the preparation and presentation of the case against the defendants above named.

This affidavit is submitted in opposition to the motion made by three of the defendants, namely, Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", and Louis

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Capone, for an order removing the trial of the above entitled action from the County Court of Kings County to the Supreme Court, held in a county outside the City of New York.

The defendant, Philip Cohen, alias "Little Farvel", has not made a similar motion nor has he joined in the present motion.

The indictment against all the defendants was filed in the County Court of Kings County on
377 May 28, 1940, charging them with the crime of Murder in the First Degree for the killing of Joseph Rosen, committed in the County of Kings on September 13, 1936.

Your deponent submits that the present motion is completely without merit and is designed solely for the purpose of delay.

When the murder indictment was filed, the defendant Buchalter was serving a 14-year term of imprisonment in the United States Penitentiary at Leavenworth, Kansas, under a judgment and sentence of the United States District
378 Court of the Southern District of New York. In accordance with the practice usually followed in such matters, the District Attorney made a request upon the Attorney General of the United States for his consent to the production of Buchalter for trial in Kings County on the aforesaid murder indictment. After extended negotiations, the Attorney General, on April 25, 1941, gave his consent to produce Buchalter for arraignment and trial in Kings County, provided, among other things, that Buchalter should at all times remain in the custody of the United States Marshal of the Eastern District of New

Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter) 379

York until his return to Leavenworth after the conclusion of the trial, and provided further that the expenses of Buchalter's transfer and maintenance for the purpose of standing trial in the County of Kings be paid for by the County.

Pursuant to the requirements of the Attorney General, habeas corpus proceedings were duly instituted and Buchalter, at an expense of over $1,300, was brought from Leavenworth to 380
the Federal Detention Headquarters in New York City. On May 29, 1941, he was arraigned in the County Court, Kings County, where a plea of not guilty was entered on his behalf.

Thereafter, on June 9, 1941, Buchalter sued out a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking to be transferred back to Leavenworth. In his petition Buchalter contended, among many other things, that the Attorney General had no right to order his removal to New York City for the purpose of standing trial 381
in Kings County and that because of unfavorable newspaper publicity he could not receive a fair trial. On June 19, 1941, the United States District Court dismissed the writ, an opinion being written by Conger, D. J.

The writ having been dismissed, the District Attorney on June 23, 1941, made a motion, pursuant to the provisions of Section 749-aa of the Judiciary Law, for an order directing that the trial be had before a special jury and that the trial date be fixed for July 14, 1941. Upon the argument of the motion, all the defendants con-

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sented to a trial by a special jury, but objected to the trial date upon the ground that it would not afford them sufficient time to prepare their defense. Accordingly, an order for the empaneling of a special jury was duly entered on July 2, 1941. Said order directed the drawing of a panel of 250 special jurors and fixed August 4, 1941, as the date for the commencement of the trial. After due and timely notice to the de-
383 fendants, the provisions of the said order were duly complied with on July 8, 1941, the Honorable Harry E. Lewis, Justice of the Supreme Court, presiding at the selection of the special panel.

Despite the consent by all the defendants to the selection of a special panel, three of them now seek a change of venue to a county outside the City of New York upon the alleged ground that a fair and impartial trial cannot be had in the City of New York. Buchalter's contention is that during the past two years newspapers, radio and
384 magazines have described him "as society's most dangerous enemy," as the "master mind" of all criminals, and as "a vicious racketeer" who not only directed the murder of Rosen but of many others. He argues that this unfavorable publicity has been such as to lead the public to believe that he is guilty not only of the crime charged in the indictment but that he caused other murders to be committed, and therefore concludes that it would be impossible to find anywhere in the City of New York 12 qualified jurors who could give him a fair and and impartial trial.

The defendant, Cohen, does not join in the mo-

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tion. But the defendants, Weiss and Capone, do join in the motion, their argument being that because of the unfavorable newspaper and radio notoriety received by Buchalter, they, as his co-defendants, would be indirectly affected by the alleged prejudice against Buchalter if they were to be tried together in any county of the City of New York.

All three defendants suggest that the District Attorney should join in the motion. It cannot 386
be gainsaid that the District Attorney in this County fully realizes that, as a quasi-judicial officer, it is his duty, not only to prosecute and bring about the conviction of those guilty of crime, but also to see to it that justice is done. The right of a defendant charged with crime to a fair and impartial trial—no matter how vicious a criminal he may be—is guaranteed to him by the law of the State. Thus, if facts were presented, showing that the defendants in the instant case could not receive a fair trial in the County of Kings, or that they could receive a fairer trial 387
anywhere outside the City of New York, the District Attorney would readily join in the motion for a change of venue.

The circumstances at bar, however, do not justify such action. We are here confronted with a case where the defendant, Buchalter, because of his criminal activities for many years, has received widespread notoriety as a gangster-chieftain. This publicity has not commenced, as suggested in Buchalter's moving papers, only two years ago. It has long antedated the present murder indictment. An examination of the New

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York Times index concerning Buchalter reveals that the notoriety given to his criminal activities dates back to at least the year 1935.

Nor has this publicity been limited to the City of New York. It is common knowledge that the metropolitan press circulates throughout the country. Even Buchalter admits that he has also received notoriety through the media of the radio and magazines. In this connection, it is significant to note the contents of an affidavit dated June 5, 1941, and submitted to the County Court of Kings County by the attorney for the co-defendant, Capone, on a motion for a separate trial upon the ground that the publicized criminality of Buchalter would prevent Capone from receiving a fair trial. In that affidavit, Capone's attorney stated:

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> "The condition which your deponent refers to is one that has been created by the newspapers in the metropolitan area and circulated throughout this county, state and nation. * * * The defendant Louis Buchalter, alias Lepke, is a person of national prominence * * *, whose career has been painted from coast to coast as the ruler of a criminal empire."

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This is the affidavit of the attorney for one of the co-defendants. It is thus safe to say that there is no reason to believe that the defendants would receive a fairer trial in any county outside the City of New York than would be given to them in Kings County.

Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter)

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At this point the Court's attention is called to the affidavit submitted on this motion by Buchalter's brother. He states that an assistant district attorney, whose name he fails to mention, informed him that he was assigned to try this case. He further alleges that the assistant district attorney stated:

> "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation. • • • Current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction."

392

The statements just quoted are false. They were never made. Your deponent and Assistant District Attorney Burton B. Turkus, whose affidavit is annexed hereto, have been the only assistant district attorneys assigned to the preparation and trial of the case against Buchalter. Neither he nor your deponent ever uttered, in words or substance, the statements above quoted. It is apparent from the very wording of the alleged statements that they were concocted to bolster Buchalter's attempt to delay his trial for the murder of Rosen.

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Of decisive importance is the fact that the argument made on behalf of the defendants completely disregards the law governing the situation. The orderly administration of jus-

394 *Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter)*

tice, which requires that a trial be held in the county where the crime was committed, should not be disrupted, unless it affirmatively appears that a fair and impartial trial cannot be had in that county. As was said in the famous case of People v. Sharp, where a motion for a change of venue was denied (5 N. Y. Crim. Rep. 155 at p. 158):

395 "The normal condition of things is to try the accused by a jury drawn from the vicinage. Speculations, doubts and possibilities should not cause a deviation from this fundamental rule. Before it is suspended on a particular indictment, defendant must make out a clear and convincing case that by reason of popular passion or prejudice he cannot have a fair trial in the county."

The foregoing rule has been consistently fol-
396 lowed by our courts (People v. Sullivan, Sup. Ct., Kings Co., N. Y. L. J., Dec. 15, 1911, per Kapper, J.: aff'd 150 App. Div. 911; People v. Hyde, 75 Misc. Rep., 407-409, per Lehman, J.: aff'd 149 App. Div., 431; People v. Hines, 168 Misc. Rep. 453, per Pecora, J.).

Tested by this salutary standard, the defendant's motion papers fall far short of establishing justifiable cause for a change of venue. The contention of the defendants rests upon the speculations and surmises of their counsel and the report of a hired investigator, Benjamin D.

Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter)

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Fernbach. The affidavit of this investigator alleges that in three days he interviewed 200 persons in the Borough of Brooklyn and that he asked them the following questions:

1. Will this country enter the war?

2. Is Lepke guilty or not guilty of murder?

398

3. Will democracy survive this war?

He further reports that of the 200 persons thus questioned 164 stated without reservation that, in their opinion, the defendant Buchalter was guilty, that 34 stated that they had no opinion, and that two said that he was not guilty. This investigator also notes in Exhibit B of the moving papers that the opinions of the persons questioned were based upon reports made by newspapers and the radio.

Your deponent submits that the affidavit of the hired investigator is worthless. It does not present any facts justifying the conclusion that 12 qualified jurors could not be found to give the defendants a fair trial. The question propounded by the investigator to the persons he interviewed was misleading and in no way designed to determine whether the persons interviewed could preside fairly and impartially as jurors in the case. The proper question should have been so worded as to determine whether or not the person interviewed if called as a juror

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400 could decide the merits of the case on the facts alone, uninfluenced by newspaper and radio accounts. This was not done apparently for the reason that it would be difficult to find intelligent citizens who would be unable to preside as fair and impartial jurors without and prejudice because of impressions derived from the newspapers.

401 Indeed, it would be a sad commentary upon the intelligence and integrity of the citizens of Kings County if, out of its population of approximately two and one-half million people, 12 men could not be found among the qualified jurors to give the defendants a fair and impartial trial and decide the case on the evidence, uninfluenced by newspaper stories.

Experience teaches us that such is not the situation. In the much publicized case of People v. Hines, the pre-trial newspaper accounts, concerning the alleged corrupt and criminal alliance of Hines with the underworld, were much more
402 constant and voluminous than the newspaper items printed with reference to the case at bar. In answer to the contention that because of such publicity Hines could not receiv a fair and impartial trial in New York County, Justice Pecora said (168 Misc. Rep. 453, at p. 470):

> "Any resident in this county must recognize the fact that it has a most cosmopolitan population, eminently fair and tolerant in its sentiments. That its people are capable of using discrimination in the

Affidavit of Solomon A. Klein, Read in Opposition to Application for Change of Venue (Buchalter)

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formation and exercise of their individual judgment has often been demonstrated at the polls where they have voted in large majorities against predominating newspaper opinion and exhortation."

Justice Pecora's observation is equally applicable to the citizens of Kings County. In People v. Sullivan (Sup. Ct. Kings County) (N. Y. L. J., Dec. 15, 1911, aff'd. (2nd Dept.) 150 App. Div. 911), a motion was made for a change of venue because of prejudicial newspaper publicity. In denying the motion, Judge Kapper wrote:

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"I find myself unable to conclude that in this large county * * * a jury of fair minded and reasonable men cannot be obtained who will determine the question of the guilt or innocence of the defendant upon the evidence, and upon the evidence alone."

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Recent experience substantiates Judge Kapper's conclusion. In three highly publicized cases, the jurors in this county, although surrounded by newspaper accounts showing strong feeling against the defendants, have not been swayed thereby and have rendered verdicts of "not guilty." (People v. George W. Martin; People v. Police Lieutenant Behan; People v. Alexander Baldwin).

Our law gives to a defendant accused of murder a wide latitude in examining the qualifications of the individual prospective juror. A

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defendant is provided with 30 peremptory challenges and an unlimited number of challenges for cause (Code Crim. Pro., Sec. 373). There are thus ample means to select from the various walks of life fair-minded, intelligent and unbiased judges of the facts, who can discern and can divorce themselves from the impressions or opinions received through the medium of newspapers. So thoroughly is this recognized that
407 it is provided in Section 376 of the Code of Criminal Procedure that

> "the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declares on oath, that he believes that such opinion or impression will not influence his verdict,
408 and that he can render an impartial verdict according to the evidence and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict."

Furthermore, where the subject matter of the indictment or the issue to be tried "has been so widely commented upon" in the press "that an ordinary jury cannot without delay and difficulty be obtained to try such issue", the defendant or the district attorney may apply for a

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special jury (Judiciary Law, section 749-aa, subd. 4). This was done in the instant case and consented to by all the defendants. Subdivision 2 of the Statute cited affords ample protection against the selection of any juror who may be biased because of newspaper comments. It provides that:

> "No person shall be selected as such special juror * * * who doubts his 410
> ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *."

In this connection, the opinion of Clarke, P. J., in People v. Brindell (1st Dept.) (194 App. Div. 776), is quite apt here. Judge Clarke stated at page 781:

> "If newspaper articles furnished ground 411
> for removal, no defendant could ever be tried in New York County for a spectacular crime. If the defendant's fears in the case at bar are justified, we would not know to what county his trial should be transferred, as the metropolitan press circulates through the entire state. The busy residents of New York City are too much interested in their own affairs to be so impregnated with casual news accounts as to render them unfit for jury duty. The jury list is large, the special

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jurors are selected with care. We are satisfied from past experience that there will be little difficulty in securing in New York County a fair and impartial jury."

In concluding this affidavit, it is to be remembered that the removal of the trial to a distant community outside the City of New York would entail great delay and great expense. It would
413 necessitate the transfer of practically half of the District Attorney's staff. It would also endanger the safety of the People's witnesses, who are being kept under constant guard by police officers. This protection of witnesses has been made necessary by virtue of the fact that Buchalter and his hirelings have been responsible for the murder of many prospective witnesses against him. Indeed, Rosen, for whose murder Buchalter is presently charged, was killed because he was a prospective witness against him.

For the foregoing reasons deponent respect-
414 fully prays that the motion for a change of venue should be denied.

SOLOMON A. KLEIN.

Sworn to before me this 21st day of July, 1941.

JOHN J. LEE, Notary Public,
Kings County, Kings Co. Clerk's
No. 557, Reg. No. 3248.
Commission expires March 30, 1943.

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Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

County of Kings

In the Matter of the Application of

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Louis Buchalter

to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county.

State of New York }
County of Kings } ss.: 417

Hyman Barshay, being duly sworn, deposes and says:

I submit this affidavit in answer to the affidavit of Solomon A. Klein, sworn to the 21st day of July, 1941.

Mr. Klein states (page 2) that this application for a change of venue is "completely without merit and is designed solely for the purpose of delay." He says also that the newspaper notoriety with which the defendant Buchalter is burdened has been so sweeping and has covered

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so great a period of time, that it is not to be assumed that a fairer trial could be had outside the City of New York than can be obtained within it.

This application is not made for the purpose of delay. It is true that on behalf of the defendant, Buchalter, the jurisdiction of the County Court to try him has been contested. That contest involves serious questions of law
419 which, however, have not been raised in the State Court because they are properly justiciable only in the Federal Court. The District Attorney can be assured and is hereby assured that there is no connection between this application for a change of venue and any effort on the part of the defendant, Buchalter, to delay the trial of this action. There is no demonstration by the District Attorney that there is any such connection. An Assistant District Attorney partakes of the quasi judicial status of his superior. (See page 4, affidavit of Mr. Klein)
420 Mr. Klein's affidavit is somewhat lacking in the quasi judicial aspects of his office when he states that an application is made solely for the purpose of delay and has no proof to support that statement.

Reference is made to the fact that no objection was interposed to the application by the District Attorney for the trial of this action by a special jury. When that application was made, the District Attorney also sought an order placing the case on the Calendar for trial on July 14, 1941. That aspect of the motion only was contested and the County Judge who

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heard the application saw merit in the opposition of the defendants and set the case down for trial on August 4, 1941, three weeks after the date sought by the District Attorney. It is not said in so many words, but Mr. Klein seeks to create the impression that the failure to contest that aspect of the motion which sought a special jury, in some undefined manner constituted a waiver of the right to make this application. The argument is not defined be- 422
cause it could not be logically articulated. The defendants were not required to contest the application for a special jury and their failure so to do has nothing to do with the merits of this application.

The burden in the opposing affidavit is that there is a failure of scientific demonstration, that it is impossible for the defendant Buchalter to obtain a fair trial in Kings County. But it has never been required that a defendant make such demonstration of mathematical formulae or scientific propositions. It is the purpose of the 423
law to assure each defendant a fair trial. (People v. Diamond, 36 Misc. 71, at pages 75-79) All that need be shown is that there is reason to apprehend that a fair trial cannot be had in what the cases refer to as the "vicinage." If that be shown, then discretion ought be exercised by the granting of the application for a change of venue. It is not enough, as the answering affidavit seeks to convey, to justify a denial of the application, merely to show that possibly a fair trial can be obtained. In *People* v. *McLaughlin*, 150 N. Y. 365, at page 379, the Court of Appeals said,

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"That jurors are sometimes prejudiced, and courts may be unconsciously biased to the injury of one of the parties, must be admitted. Prejudice is often an insuperable barrier to the fair and impartial administration of the law. Its influence is subtle, insidious and often unconsciously warps the judgment and blinds the intelligence of those surrounded by its
425 atmosphere. But its presence can usually be discovered only from the circumstances and conditions which produce it. In discussing this question in another case it was said: 'But there cannot well be any serious misapprehension as to the existence of facts (showing prejudice against the defendant), especially where they are of a public nature. The principal question is as to the inferences to be drawn from them. It (the trial) is the very thing which the law seeks to avoid, when
426 it is seen that the party may, and probably will be drawn into a trial by a jury, who, under an influence of which they may themselves be hardly conscious—an influence which, perhaps, no human sagacity can detect—may pronounce a verdict against him, and conclude his rights forever. Above all, would it be dangerous to require that he should risk his trial by a panel selected from a community already sought to be influenced by the course of the press: that very panel being personally appealed to by the opposite party's

Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter) 427

> own press, or one put in motion by him, or by some other person.' (People v. Long Island R. R. Co., 4 Parker's Crim. R. 602, 604; People v. Webb, 1 Hill, 179.)"

In *People* v. *Nathan*, 139 Misc. 345, the Court said:

> "The right thus given to defendants is a substantial one, and follows the fundamental principle of criminal jurisprudence that every person accused of a crime is entitled to a fair and impartial trial before an unprejudiced jury. Obviously, it is not within the realm of possibility to determine, with mathematical accuracy, the existence of prejudice or the extent thereof. It has been held, therefore, that the true test is not the mere possibility of selecting an apparently unprejudiced jury, but whether from the circumstances of a particular case, there is a strong probability that bias exists in the community where the indictments are pending. (People v. Webb, 1 Hill, 179; People v. McLaughlin, 150 N. Y. 365.) Each case must stand on its own merits, and in these cases it must be determined from the surrounding circumstances whether there is probable reason to believe that a fair and impartial trial cannot be had in the county where the venue is laid.
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> It is not reasonable to reject the infer-

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ence that these circumstances in combination must have left an impression on the public mind. Neither the action of the press, the proceedings of the district attorney, nor the actions of those concerned with political issues can be justifiably criticised. Each within its proper sphere performed a legitimate public function, but the fact remains that this peculiar
431 combination of circumstances created an atmosphere which is not conducive to a fair and impartial trial. The average taxpayer, always sensitive about matters of taxation, may well have concluded that the frauds charged were a direct assault on his pocketbook, nor would assurances, as to a recovery of money lost, necessarily remove such impression. The evidence revealed by the committee was certainly not calculated to soothe the feelings of the irate taxpayer, and he may well
432 have been convinced from such evidence that those named were in fact guilty. A voluminous mass of form affidavits has been submitted by the defendants to establish their contentions in this respect, and the district attorney has countered by submitting an equally voluminous mass of affidavits to prove the contrary. Proof through the very uncertain medium of affidavits is invariably unsatisfactory, but in these cases the circumstances themselves lend color to the defendants' claim and are heavily in their favor.

Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)

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For reasons less grave than those enumerated the places of trial of actions, merely civil in their nature, have been changed (Barnes v. Roosevelt, 164 App. Div. 540; Niven v. Stoddard, 225 id. 705). In his opinion in the case of People v. McLaughlin (supra) Judge Martin said: 'That jurors are some times prejudiced, and courts may be unconsciously biased to the injury of one of the parties, must 434 be admitted. Prejudice is often an insuperable barrier to the fair and impartial administration of the law. Its influence is subtle, insidious and often unconsciously warps the judgment and blinds the intelligence of those surrounded by its atmosphere. But its presence can usually be discovered only from the circumstances and conditions which produce it. In discussing this question in another case it was said: "But there cannot well be any serious misapprehension as to the existence of 435 facts (showing prejudice against the defendant), especially where they are of a public nature. The principal question is as to the inference to be drawn from them. It (the trial) is the very thing which the law seeks to avoid, when it is seen that the party may, and probably will be drawn into a trial by a jury, who, under an influence of which they may themselves be hardly conscious—an influence which, perhaps, no human sagacity can detect—may

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pronounce a verdict against him, and conclude his rights forever."

To the same effect is *People* v. *Becker*, 135 Misc. 471.

Where it is established that the community is "practically a unit" in concluding that the defendant is guilty, a proper exercise of discretion dictates the granting of the application for a
437 change of venue. So, in People v. Hyde, 149 App. Div. 131, at page 134, the Appellate Division of the First Department said:

"Whether or not the application should be granted is to be determined by the wise exercise of judicial discretion, and each case must be decided upon its own facts. Of course there can be no certainty established in regard to such a future event. It is enough if the court can find that in all human probability such a condition exists.
438 In People v. Georger (109 App. Div. 111) Mr. Presiding Justice McLennan said: 'Without going into detail as to the character of the opinions expressed, all to the effect that the defendant was culpable and wholly responsible for the difficulties in which the bank was involved, it is sufficient to say that by the quotations from the public press contained in the record, from the opinions of parties interested, assembled to consider the situation, from the expressions of citizens who met and casually discussed the matter, it would seem

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that the community was practically a unit in concluding that the defendant had been guilty of serious wrongdoing and which resulted in or caused the failure of the bank.'

If this court was satisfied that a fair and impartial jury could not be obtained in the county of New York to try the defendant upon the indictment found against him, 'that the community was practically 440 a unit in concluding' him guilty, it would be its duty—and it would not hesitate—to reverse the order appealed from and grant the motion for a change of venue."

Public hatred generated by newspaper comment is in and of itself a sufficient reason to conclude that a fair trial cannot be had in a particular locality and that, therefore, the trial should be removed to another county. As to that Mr. Justice Giegerich said in *People* v. *Diamond*, 36 Misc. 75: 441

"The fairness of a trial should be above and beyond suspicion, and no court should allow a trial by a jury of a vicinage the general opinion and belief of which, upon the matters involved in such a trial, either party has industriously, through newspapers, sought to form. To do this would simply encourage parties, in advance of actual trial, to create prejudice and bias, in the hope of benefit to follow from a legal investigation before men, some of whom,

442 *Answering Affidavit of Human Barshay, Read in Support of Application for Change of Venue (Buchalter)*

at least, might have obtained their views and judgments of a cause elsewhere than in the court room.' (Moulton v. Beecher, 52 How. Pr. 18.)

The possibility of selecting a jury in the county which would be apparently unprejudiced, is not the test of such an application as this, for where there is a general sentiment adverse to the party on trial,
443 and a strong probability that bias exists throughout the community, he should not be compelled to take the risk of coming before a jury whose members, or some of whom, are influenced by adverse sentiments which may be undiscovered in the course of examination, or which, indeed, may be not fully appreciated by the jurors themselves. (See People v. Webb, 1 Hill, 179.)

Although support may be found in certain of the earlier decisions in this State
444 for the proposition that before such an application as this should be granted the impossibility of obtaining a jury should be demonstrated by an actual attempt and failure to obtain one (Bowman v. Ely, 2 Wend. 250; Messenger v. Holmes, 12 id. 203), the later and better decisions repudiate it. (People v. Webb, supra; People v. Long Island R. R. Co., 16 How. Pr. 106; Budge v. Northam, 20 id. 248; People v. McLaughlin, 150 N. Y. 365, 380.)

Indeed, the obtaining of a jury apparently impartial, would seem to be the very

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danger against which this provision of the statute is intended to shield a defendant. Against obvious prejudice, such as can be made to appear upon the record, courts can protect; but this statute is designed to protect against that other prejudice which is the more dangerous because unconscious and not capable of discovery. As was said by Cowen, J., sitting with Nelson, Ch. J., in People v. Webb, supra, 446
at p. 184: 'To make such an experiment essential, would seem to be quite dangerous. It (the trial) is the very thing which the law seeks to avoid, when it is seen that the party may, and probably will be drawn into a trial by a jury, who, under an influence of which they may themselves be hardly conscious—an influence which perhaps no human sagacity can detect—may pronounce a verdict against him, and conclude his rights forever. Above all, would it be dangerous to require that he 447
should risk his trial by a panel selected from a community already sought to be influenced by the course of the press; that very panel being personally appealed to by the opposite party's own press, or one put in motion by him, or by some other person.' This language was quoted with approval by the Court of Appeals in People v. McLaughlin (150 N. Y. 365, 379), in which case the court further said in this point: 'That jurors are sometimes prejudiced, and courts may be unconsciously biased to

448 *Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

> the injury of one of the parties, must be admitted. Prejudice is often an insuperable barrier to the fair and impartial administration of the law. Its influence is subtle, insidious and often unconsciously warps the judgment and blinds the intelligence of those surrounded by its atmosphere. But its presence can usually be discovered only from the circumstances
> 449 and conditions which produce it.' "

In the same case Mr. Justice Giegerich said with respect to highly publicized issues:

> "There is one other consideration on this branch of the case which I am led to advert to by the following pertinent observation made by Strong, J., in People v. Baker, (3 Park Cr. 181, 195): 'During an experience of many years I do not remember a verdict in a criminal case, in opposition
> 450 to a strong public sentiment previously entertained and generally known. If that should be erroneous, and it sometimes is, it will probably lead to an unjust verdict. If there should be a divided sentiment, it would result in a disagreement, and the trial thus prove abortive.' "

In the Diamond case, the same argument was made as is made here to the effect that because certain persons were acquitted by jury, it was to be assumed that everyone else could expect a fair trial in the county. Mr. Justice Giegerich

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(36 Misc. 76) indicates the fallacy of that argument. There is no connection between the public furor against this defendant, Buchalter, and other persons, who, presumed to have been innocent at the time they were indicted, were found to be innocent by a jury. The learned Assistant District Attorney states in his affidavit (page 7) that the affidavit of Fernbach submitted in support of this motion is worthless. People v. Hyde, 149 App. Div. 131, demonstrates the contrary.

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The suggestion that under Section 376 of the Code of Criminal Procedure, a prospective juror is competent if he can state under oath that he can lay aside antecedent opinion and that, therefore, it is to be assumed that twelve such persons can be assembled in the Kings County Court to give the defendant, Buchalter, a fair trial, is fallacious. It misses the point of the remarks of the Court in People v. McLaughlin, 150 N. Y. at 379. The mere expression of a supposed ability to lay aside a judgment already formed, does not eliminate that judgment from the mind of the juror.

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In opposing this application, the learned Assistant District Attorney says:

> "This protection of witnesses has been made necessary by virtue of the fact that Buchalter and his hirelings have been responsible for the murder of many prospective witnesses against him. Indeed, Rosen, for whose murder Buchalter is presently

454 *Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

charged, was killed because he was a prospective witness against him."

Of a less inflammatory statement, it was said in *People* v. *Lucas*, 131 Misc. 664, at page 668:

"In addition to what has been said, there appears to be an attitude on the part of the assistant district attorney, who
455 has charge of the case, which is hardly in keeping with the calm and deliberate administration of the law which every defendant is entitled to in a criminal case. In one of the affidavits filed he has gone entirely beyond the charge made against the defendant, and has presented statements connecting the defendant with the commission of another crime, the presentation of which could have been made with no other purpose than to prejudice the court against the defendant on this motion.
456 In another affidavit he charges the defendant, or persons on his behalf, with attempting to intimidate witnesses, and charged the defendant's counsel with having made an effort to pay certain moneys to witnesses if they would decline to appear and testify against the defendant. The court is satisfied that no improper methods were used by defendant's counsel in obtaining a statement from the complaining witness and that his conduct of the case has been ethical in all respects despite criminations and recriminations on

Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)

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both sides. The zeal of advocacy may be carried beyond the bounds of proper professional conduct that is to be expected of a prosecuting officer. And, finally, he asks to have the case sent to another justice on the ground that the justice before whom the motion is made has prejudged the case. The motion came on before a justice who had out of a sense of duty, passed upon the various motions, in this acrimonious prosecution, as the attorney saw fit to bring them on at Special Term, and, because of his connection with the case, he had been charged with having prejudged the motion to change the place of trial. These matters are referred to as showing the animus of the assistant district attorney and as bearing upon the question whether a fair and impartial trial can be had in Monroe county. The only fair and reasonable conclusion upon the evidence before me, based upon the decisions of the courts on similar motions, is that, in the interests of justice, the defendant should be tried in a county where he will not be met by the atmosphere that would surround him in a trial in the county of Monroe. (People v. Long Island R. R. Co., 4 Park. Cr. 602; People v. Diamond, 36 Misc. 71; People v. Georger, 109 App. Div. 111; People v. Jackson, 114 id. 597; People v. Ryan, 123 Misc. 450; Barnes v. Roosevelt, 164 App. Div. 540; People v. McLaughlin, 150 N. Y. 365.)"

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460 *Answering Affidavit of Hyman Barshay, Read in Support of Application for Change of Venue (Buchalter)*

There are less important errors in Mr. Klein's affidavit. He states that he and Mr. Turkus are the only persons assigned in the preparation of the trial of this case. At the same time, he says that the case should not be removed because to do so would require the transfer of one half the staff of the District Attorney's office. Both statements cannot be true. Neither is important if a demonstration has been made that
461 there is reason to apprehend that a fair trial cannot be accorded the defendant in Kings County at this time.

It is respectfully submitted that a fair trial cannot be accorded that defendant in this County and that that proposition has been demonstrated so far as it is possible to demonstrate it short of an experimental trial. An experimental trial is not a needed requirement to the making of this application. People v. Ryan, 123 Misc. 450.

HYMAN BARSHAY

462

Sworn to before me this 24th day of July, 1941.

IRIS MORRISON, Comm. of Deeds
New York City. Comm. exp. Feb. 11, 1943.

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Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

464

LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county.

State of New York
County of New York } ss.: 465

JESSE CLIMENKO, being duly sworn, deposes and says: I am a member of the firm of Wegman & Climenko, attorneys for the defendant, Louis Buchalter.

I submit this affidavit in support of an application for the removal of the trial of this action from the County Court of Kings County, to the Supreme Court held in another county outside the City of New York.

There is annexed to this affidavit a series of articles published by the Daily Mirror. This

466 *Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)*

application is occasioned by the publication of that series of articles.

The Daily Mirror is a newspaper having a circulation which is counted in hundreds of thousands.

For several days prior to August 25, 1941, the Mirror published a special announcement to the effect that beginning on August 25, 1941, it would publish a series of articles for the exclu-
467 sive attention of its Brooklyn readers, devoted to the defendant Louis Buchalter. On August 25, 1941, and daily thereafter, it proceeded to publish the articles which are annexed as an exhibit hereto.

These publications were made against the following background:

The indictment herein charges the defendants with the murder of one Joseph Rosen on September 13, 1936.

The indictment was filed on May 28, 1940. The defendant Buchalter was then and continues
468 now to be a prisoner in the custody of the Attorney General of the United States. In May, 1941, upon the request of the District Attorney of Kings County, he was transferred from the Federal Penitentiary at Leavenworth, Kansas, to the Federal House of Detention in New York City. He was caused to appear in the County Court of Kings County and instructed to plead to the indictment. Upon advise of counsel he remained mute and a plea of not guilty was entered on his behalf at the direction of the Court. He continues to contest the jurisdiction

Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter) 469

of that Court; and this application is not to be construed as a waiver of that contest.

Subsequently, upon the request of the District Attorney of Kings County, the trial of this action was set for July 14, 1941, and later adjourned by a Judge of the County Court of Kings County to August 4, 1941.

The District Attorney's application for the empanelment of a special jury was granted prior to August 4, 1941, and was unopposed by the 470
defendant Buchalter.

On August 4, 1941, the action was called for trial at a Part of the County Court of Kings County before Judge Taylor. Of the 256 talesmen comprising the special panel, about 230 were present in the Court on that morning.

The Court devoted itself on August 4, 1941, to listening to excuses of those members of the panel who did not want to serve because service would interfere with their own vacation schedule or the vacations of business associates. About 120 such excuses were offered. 471

Presumably, approximately 100 talesmen were ready to serve at that time if accepted as jurors.

Nevertheless, on August 5, 1941, the Court announced that the trial would be adjourned because in the opinion of the Court it was impossible then to obtain a jury to hear the case. No defendant requested that adjournment.

Counsel for this defendant requested the Court at that time to proceed with the case then or to adjourn the trial until a day in November after the municipal elections.

472 *Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)*

The Court adjourned the trial to September 15, 1941, and said in substance that it could not adjourn the case to a date subsequent to the municipal elections because to do so would be a tacit admission that the administration of justice might conceivably be subordinated to the exigencies of a political campaign and, of course, that concept was impossible.

Counsel for this defendant excepted to the
473 Court's ruling.

During the course of colloquy which proceeded between the Court and counsel for the various defendants, the attorney for the defendant, Weiss, the Hon. Alfred Talley, urged the Court to adjourn the trial until the end of the election campaign for the reason that a trial held during the midst of the campaign would of necessity be held at a time when a jury might be influenced against the defendants and in favor of the prosecution, and that for the simple reason that the District Attorney of Kings County was the demo-
474 cratic nominee for Mayor. Counsel for this defendant joined in that request. In urging that contention, Mr. Talley submitted to the Court a copy of the New York Journal American of that date, which included one of a series of articles purporting to constitute a factual biographical record of the democratic nominee. There will be submitted upon the argument of this motion as an exhibit to be appended to these papers, photostatic copies of all of the articles making up the series thus published by the Journal American.

Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)

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In rejecting Mr. Taliey's suggestion that the mere publication of these articles might prejudice a jury against the defense and in favor of the prosecution, the Court said in substance, and there is no pretense here that the statement is given verbatim, although this is the true substance of it, that the series of articles then being currently published by the Journal American would have been completed long before the middle of September and, therefore, counsel need not be concerned about them.

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Since that time and beginning on August 25, 1941, the Mirror has begun and now continues publication of those articles devoted to the alleged career of the defendant, Buchalter, of which complaint is now made. This series is not completed as of the time of the dictation of this affidavit. The text of the articles indicates that the series will con inue perhaps to the date now set for the trial of this action. The articles are obviously intended to reach a climax and that climax will be a discussion of the murder alleged to have been committed according to the allegations of this indictment. Upon the argument of this motion, all of the articles constituting the series and then actually published will be submitted to the Court. There is no other way of bringing this matter to the Court's attention because there is no way of knowing when the series will end, and if this application were suspended until the completion of the series, probably it could not be made until after September 15, 1941, and if it were done in that

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478 *Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)*

way, the District Attorney would undoubtedly assert that it was tardily made.

These articles are prejudicial and inflammatory. They completely destroy the possibility that a fair trial can be accorded the defendant Buchalter. They are of a type of journalism which defies adequate characterization. They assert that the defendant has been guilty of twenty-seven murders and they assure the public
479 of his guilt at the same time that they depict the past inability of public officials to prosecute him. They vest the defendant Buchalter with leadership over a notorious group of murderers. They describe him as one who profited to the extent of countless millions of dollars from criminal activities. By subtle effective statements, they assume his guilt of the murder charged by this indictment.

I do not pretend by this reference to the contents of these articles to have done justice in describing the degree of their prejudicial and in-
480 flammatory character. I assert that it is impossible because they are without parallel. I assume that I am under no obligation to characterize them since they are submitted as an exhibit to the Court and since I believe that the Court itself will gauge the expected harm which must come to the defense from their publication.

Thus it appears that the assurance of the County Court that the prejudicial publications of the Journal American would be forgotten by September 15, 1941, was unfortunately unfounded. The Journal American and the New York Mirror are newspaper properties of the same owner.

Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)

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The offense against the administration of public justice which was initiated by the glorification of the prosecution is continued by the unprecedented denunciation of a defendant under circumstances which indicate that the denunciation will be continued until the opening day of the trial as set by the County Court. It is frequently said in opposition to these applications when they centre about the publication of inflammatory matter, that it would be idle to grant them and for the 482
reason that the circulation of the metropolitan newspapers is not limited to the City of New York. Irrespective of the value of that argument, the fact is that frequently metropolitan newspapers are distributed beyond the confines of New York City, but that contention cannot be made here. These articles are published in an edition which is printed exclusively for the residents of Kings County. You cannot buy a copy of the Mirror which carries this series unless you buy it in Brooklyn. They are set forth on a page which is devoted only to the residents of Brooklyn. The rest of the page is made up of the 483
printing of a gossip column devoted exclusively to the activities, political and amatory, of residents of Kings County. That column printed under the name of Edward Zeltner has, as I am informed, a substantial number of readers. Mr. Zeltner was first and still is a sports reporter and there are many citizens of Brooklyn who read his gossip column. So, the Mirror's special dish for residents of Brooklyn is made up of the Zeltner column and the series of which complaint is made by this motion.

484 *Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)*

Presumably, in a sterner jurisdiction, the publication of these articles would expose the publisher and the author to summary contempt proceedings. In England, no one would dare publish anything like it. In Massachusetts so far as I know, they could not be published without the certainty that the publisher and author would be dealt with by the imposition of summary punishment. But such is the condition of the law in the
485 State of New York that the defendant has no relief from it except by an application for a change of venue. The County Court cannot interfere with the publication of these articles. No one can in advance order the suppression of the publication of any matter unless perhaps it be an incitement against the government during the period of war. The County Court cannot issue a warrant in a contempt proceeding because these articles are not the reports of a current proceeding.

For these reasons, the only relief which any Court can give the defendant is that of ordering
486 the venue of the action to be transferred to a Court, outside of the City of New York. The reasons for granting that application will be found in the articles themselves.

This application is made by order to show cause for the reason that it is impossible to give the ordinary notice of motion in view of the fact that the articles published by The Mirror were being currently published and counsel desired, of necessity, to suspend the making of the application until the nature of the articles might be discerned as they were published.

Affidavit of Jesse Climenko, Read in Support of Application for Change of Venue (Buchalter)

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No prior application for this or any similar relief has been made except that a prior application for a change of venue was made on behalf of the defendant, Buchalter, at a Special Term, Part 1, of this Court held before Mr. Justice Daly. That application was made upon the ground that other publications had resulted in general hostility against that defendant on the part of the residents of King County. That application was made prior to the publication of 488
the series of articles now complained of. There is annexed hereto a copy of the order made by Mr. Justice Daly denying that application and also a copy of the opinion of Mr. Justice Daly on that application.

JESSE CLIMENKO

Sworn to before me this 8th day of September, 1941.

JULIAN BUCHBINDER
Attorney and Counsellor at Law
60 Wall Street
Residing in Bronx County
Bronx Co. Clk's. No. 15 Reg. No. B-43-18
Certificate filed in
N. Y. Co. Clk's. No. 73, Reg. No. 3-B-908
Kings Co. Clk's. No. 7, Reg. No. 3035
Commission Expires March 30, 1943.

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490

Copy of Indictment

COUNTY COURT

County of Kings

The People of the State of New York,
Plaintiff,

against

491 Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss," Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone,
Defendants.

The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of murder in the first degree, committed as follows:

492 The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloniously and of malice aforethought, shot and killed Joseph Rosen with revolvers.

William O'Dwyer
District Attorney

Indictment filed May 28, 1940.

John B. Maione,
Foreman

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Opinion of Mr. Justice Daly Denying Change of Venue (Buchalter)

"The defendant moves for a change of venue to a county outside of the City of New York for the trial of an indictment for murder in the first degree filed against him by the Grand Jury of Kings County on May 28, 1940, upon the ground that a fair and impartial trial cannot be obtained in this county or in this city.

"Upon a motion by the District Attorney for an order directing the trial before a special 494
jury on July 14, 1941, the moving defendant, as well as the defendants, Weiss and Capone (who seek similar relief in separate motions), consented to a special jury and objected solely to the trial date inasmuch as it would not permit sufficient time to prepare. An order was duly entered on July 2, 1941, directing the drawing of a panel of 250 special jurors and fixing August 4, 1941, as the date of the commencement of the trial. Upon due notice, said order was complied with on July 8, 1941, by the selection of a special panel. 495

"After a careful consideration of the application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. Great stress is placed by the defendant upon the notoriety given him by newspapers and radio. It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners in the City and State

of New York. 'If newspaper articles furnish ground for removal, no defendant could ever be tried * * * for a spectacular crime,' in the county of indictment. (*People* v. *Brindell*, 194 App. Div. 776.)

"The affidavit of the investigator to the effect that in a period of 3 days, he interviewed 200 persons in Kings County is of little probative force. Three questions were propounded, two
497 of them wholly unrelated to the defendant. The third was as follows: 'Is Lepke guilty or not guilty of murder?' It is claimed that one hundred sixty-four persons stated that he was guilty; two that he was not; and thirty-four had no opinion one way or the other. Even if a poll of this character could properly be considered upon this application, the Court is of the opinion that the question propounded was misleading and did not reflect whether the persons interviewed could preside fairly and impartially as jurors in the case who must reach their con-
498 clusion on facts established on the witness stand alone, uninfluenced by impressions derived from newspapers or other sources. It is inconceivable that in a cosmopolitan community such as Kings County, with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence.

"Under all the circumstances, therefore, the application is in all respects denied."

PETER M. DALY,
J. S. C.

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Order of Mr. Justice Daly Denying Change of Venue (Buchalter)

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Court House thereof, Borough of Brooklyn, City of New York, on the 1 day of August, 1941.

Present: Hon. PETER M. DALY, Justice. 500

In the Matter of the Application of

LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county. 501

The above named defendant, Louis Buchalter, having applied to this court for an order granting a change of venue of the trial of this action, and the said application having duly come on to be heard on the 18th day of July, 1941,

Now on reading and filing the order to show cause, issued out of this court on the 16th day of July, 1941, the affidavits of Hyman Barshay, duly verified the 16th day of July, 1941, and the

502 *Order of Mr. Justice Daly Denying Change of Venue (Buchalter)*

24th day of July, 1941; the affidavit of Emanuel Buchalter, duly verified the 16th day of July, 1941; the affidavit of Benjamin D. Fernbach, duly verified the 15th day of July, 1941; submitted in support of said order to show cause; the affidavits of Solomon A. Klein and Burton B. Turkus, both duly verified the 21st day of July, 1941, submitted in opposition to said application, and upon all other papers and proceed-
503 ings had herein, and after hearing Hyman Barshay, Esq., of counsel for the defendant, in support of said application, and Solomon A. Klein, assistant district attorney, in opposition thereto, and upon filing the opinion of the court and due deliberation having been had, it is on motion of William O'Dwyer, District Attorney of Kings County,

ORDERED that the said motion be and the same hereby is in all respects denied.

Enter:

504

PETER M. DALY
J. S. C.

Granted Aug. 1, 1941.

FRANCIS J. SINNOTT
Clerk

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Court House thereof, Borough of Brooklyn, City of New York, on the 1st day of August, 1941.

PRESENT:

HON. PETER M. DALY

Justice.

- - - -

The above named defendant, Louis Capone, having applied to this court for an order granting a change of venue of the trial of this action, and the said application having duly come on to be heard on the 18th day of July, 1941,

Now, on reading and filing the order to show cause, issued out of this court on the 17th day of July, 1941; the affidavit of Leon Fischbein, duly verified the 17th day of July, 1941, and a copy of the indictment, No. 23855, submitted in support of the said order to show cause; the affidavits of Solomon A. Klein and Burton Turkus, both duly verified the 21st day of July, 1941, submitted in opposition to said application, and upon all other papers and proceedings had herein, and after hearing Leon Fischbein, Esq., of counsel for the defendant, Capone, in support of said application, and Solomon A. Klein, assistant district attorney, in

opposition thereto, and upon filing the opinion of the court and due deliberation having been had, it is on motion of William O'Dwyer, District Attorney of Kings County.

ORDERED that the said motion be and the same hereby is in all respects denied.

ENTER

Peter M. Daly

Granted

August 1st, 1941.
Francies J. Sinnott
Clerk

505

Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

506

LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county.

State of New York }
County of Kings } ss.: 507

BURTON B. TURKUS, being duly sworn, deposes and says:

That he is Chief of the Homicide Bureau of the District Attorney's office of Kings County, assigned to the preparation and presentation of the case against the defendants above named.

This affidavit is submitted in opposition to the motion made by defendant, Louis Buchalter, alias "Lepke", for an order removing the trial of the above entitled action from the County Court of

508 *Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)*

Kings County to the Supreme Court, held in a county outside the City of New York.

The defendants, Emanuel Weiss, Philip Cohen and Louis Capone, have not made a similar motion, nor have they joined in the present motion.

The indictment against all the defendants was filed in the County Court of Kings County on May 28, 1940, charging them with the crime of Murder in the First Degree for the killing of
509 Joseph Rosen, committed in the County of Kings on September 13, 1936.

Your deponent submits that the present motion to transfer the trial beyond the limits of the City of New York is without merit. This is the second time that the defendant, Buchalter, seeks a change of venue. On July 18, 1941, a similar motion was made in the Supreme Court which was heard by Justice Daly. On that motion Buchalter's contention was that during the past two years newspapers, radio and magazines have described him "as society's most danger-
510 ous enemy," as the "master mind" of all criminals, and as a "vicious racketeer" who not only directed the murder of Rosen but of many others. Buchalter contended that this unfavorable publicity was such as to lead the public to believe that he was guilty not only of the crime charged in the indictment, but that he caused other murders to be committed. He, therefore, contended that it would be impossible to find anywhere in the City of New York, 12 qualified jurors who could give him a fair and impartial trial.

Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter) 511

In an attempt to support his contentions, there was submitted to Justice Daly voluminous exhibits, consisting of photostatic copies of news items appearing in various newspapers. Justice Daly denied the motion and wrote an opinion, a copy of which is annexed to the moving papers. In that opinion Justice Daly said, in part, the following:

> "After a careful consideration of the 512
> application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. Great stress is placed by the defendant upon the notoriety given him by newspapers and radio. It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners 513
> in the City and State of New York. "If newspaper articles furnish the ground for removal, no defendant could ever be tried • • • for a spectacular crime," in the county of indictment. (People v. Brindell, 194 App. Div. 776) • • •"

The present motion is in substance an attempt to re-argue the motion made before Justice Daly. The defendant, Buchalter, does not present any additional proof to justify a different decision. He merely submits additional newspaper arti-

514 cles of recent origin which, he claims, are of such a nature as to preclude the selection of a fair and impartial jury in Kings County. One series of articles submitted as an exhibit appeared in the New York Journal-American describing the life of William O'Dwyer, District Attorney of Kings County. These articles, Buchalter contends, have tended to "glorify" the District Attorney and, therefore, would op-
515 erate to Buchalter's detriment. The other series of articles submitted as an exhibit have been appearing in the New York Daily Mirror (Brooklyn section). A reading of these articles shows that they consist of nothing more than a restatement of what has already been said about Buchalter in many newspapers for at least the past five years.

An examination of the New York Times index concerning Buchalter reveals that the notoriety given to his criminal activities dates back to at least the year 1935. Nor has this publicity been
516 limited to the City of New York. It is common knowledge that the metropolitan press circulates throughout the country. Buchalter has also received notoriety through the media of the radio and magazines. His notoriety has been state and nation wide. There is thus no basis for asserting that Buchalter can receive a fairer trial outside the limits of the City of New York than he can receive in Kings County.

Furthermore, our law gives the defendant accused of murder a wide latitude in examining the qualifications of prospective jurors. A defendant is provided with 30 peremptory chal-

Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)

lenges and an unlimited number of challenges for cause. (Code of Crim. Proc., Sec. 773.)

Where the subject matter of the indictment or the issue to be tried "has been widely commented upon" in the press so "that an ordinary jury cannot without delay and difficulty be obtained to try such issue," the defendant or the District Attorney may apply for a special jury (Judiciary Law, Sec. 749-aa, Subd. 4). This was done in the instant case and consented to by all the defendants. Subdivision 2 of the statute cited affords ample protection against the selection of any juror who may be biased because of newspaper comments. It provides that:

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *."

There are thus ample means to select from the various walks of life fairminded, intelligent and unbiased judges of the facts, who can divorce themselves from impressions or opinions received through the medium of newspapers and render judgment on the evidence, uninfluenced by newspaper accounts. As was said by Justice Daly in denying the prior motion:

> "It is inconceivable that in a cosmopolitan community such as Kings County,

520 *Affidavit of Burton B. Turkus, Read in Opposition to Application for Change of Venue (Buchalter)*

with a population of over two million people, a jury cannot be found qualified to fairly and impartially try the defendant on the evidence."

For the foregoing reasons, your deponent respectfully submits that the motion for a change of venue should be denied.

521 BURTON B. TURKUS

Sworn to before me this 10th day of September, 1941.

ROBERT J. BURT

ROBERT J. BURT
Notary Public, Kings County
Kings County Clks. No. 770, Reg. No. 3319
Commission Expires March 30, 1943.

522

523

Order of Mr. Justice Brennan Denying Change of Venue (Buchalter)

At a Special Term, Part 1 of the Supreme Court, held in and for the County of Kings, at the Court House thereof, Fulton and Joralemon Streets, Borough of Brooklyn, City of New York, on the 22 day of September, 1941.

524

Present: Hon. PHILIP A. BRENNAN, Justice.

In the Matter of the Application of

LOUIS BUCHALTER

to remove the trial of the action of THE PEOPLE OF THE STATE OF NEW YORK vs. LOUIS BUCHALTER, alias "Lepke", EMANUEL WEISS, alias "Mendy Weiss", HARRY STRAUSS, alias "Pittsburgh Phil", JAMES FERACO, PHILIP COHEN, alias "Little Farvel", LOUIS CAPONE, to another county.

525

The above named defendant, Louis Buchalter, having applied to this court for an order removing the trial of the indictment herein from the County Court of Kings County to the Supreme Court, held in another county outside of the City of New York, and the said application having duly come on to be heard on the 10th day of September, 1941,

526 *Order of Mr. Justice Brennan Denying Change of Venue (Buchalter)*

Now on reading and filing the order to show cause issued out of this court on the 8th day of September, 1941; the affidavit of Jesse Climenko, Esq., duly sworn to the 8th day of September, 1941, submitted in support of said application; the affidavit of Burton B. Turkus, duly sworn to the 10th day of September, 1941, submitted in opposition thereto, and upon all other papers and proceedings had herein, and after
527 hearing Jesse Climenko, Esq., attorney for the defendant in support of said application, and Burton B. Turkus, assistant district attorney, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the court, it is on the motion of William O'Dwyer, District Attorney of Kings County,

ORDERED that the said application be and the same hereby is in all respects denied.

Enter:

528 P. A. BRENNAN
J. S. C.

Granted Sep. 22, 1941

FRANCIS J. SINNOTT
Clerk

Memorandum Opinion of Taylor, C. J., Adjourning Trial

529

This jury situation is unprecedented. It is practically a run out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit in that position. To arbitrarily combat it would smack of coercion and would tend to undermine that quality of jury service which is essential for a fair trial of this case. The court will grant the motion for a continuance of the trial until after Labor Day, but it cannot go over until after election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable. No prejudice can come from trying the case before election, because sensibly no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case.

530

"The trial is continued until September 15, 1941. The August term of Part 2 of this court is continued for that and for all other purposes of the trial.

531

"Decision is reserved on all pending applications for excuse from jury service. All members of the jury panel are directed to return on September 15, 1941, in this part at 10 a.m. The prisoners are remanded. This action has no relation to the personal convenience of the court, as the court will remain in session for the trial of other cases throughout the summer.

"The jurors are urged to withdraw their objections and to serve willingly on the date fixed. Should a new panel be desired all counsel for the defense should agree."

532

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 4th. day of August 1941.

Present: Hon. Franklin Taylor. County Judge.

533

The People of the State of New York

against

Louis Buchalter alias Lepke.
Emanuel Weiss alias Mendy Weiss.
Philip Cohen. alias Little Farvel.
Louis Capone.
James Feraco Not Present.

Indict No: 23855
Murder First Degree.
534 Special Panel of Jurors.

Appearances. People &c

Burton B. Turkus. Sol A. Klein. Louis Josephs.

Appearances for Defendants.

Jesse Climenko. Bertram Wegman. Hyman Barshay. for Buchalter.

Minutes of Trial 535

JAMES I. CUFF. ALFRED J. TALLEY. M. M. KRIENDLER. for Weiss.
LEON FISHBEIN. EMANUEL ROSENBERG. SIDNEY ROSENTHAL. for Capone.
SAUL PRICE. for Cohen.
THOMAS F. DARCY. JULIA McGOWEN. Stenographers.

The District Attorney moves this indictment for trial.

Preliminary motions by defense counsel. 536

The Court so orders, the following named juror Woolsey W. Conlon 711 E. 24th St. was called and placed in box not examined or sworn. all application for excuse to be passed upon August 5th. 1941.

Trial continued August 5th. 1941.

A true extract from the minutes

FRANCIS J. SINNOTT.
Clerk.

537

538 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 5th day of August 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from August 4th, 1941. all ap-
539 pearances noted. Juror Woolsey W. Conlon. called, not examined or sworn.

Motion by District Attorney and all counsel

Case adjourned until September 15th, 1941. Jurors ordered to return at that date.

The August term of Part 2. of this Court, is continued for that and for all other purposes of this trial.

A true extract from the minutes.

FRANCIS J. SINNOTT.
Clerk.

540

Minutes of Trial 541

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 15th. day of September 1941.

Trial continued from August 5th. 1941 all appearances noted. the juror heretofore drawn but unsworn. appears and answers to the call of his name. Motion by Saul Price for a separate trial 542
as to defendant Philip Cohen. motion consented to by Mr. Turkus. motion granted. remanded. motion by Mr. Turkus for a severance as to defendant James Feraco defendant not present. motion granted.

Examination of jurors proceed.

Trial continued September 16th. 1941.

At a term of the County Court, held in and for the County of Kings, 543
at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 16th. day of September 1941.

Trial continued from September 15th. 1941. all appearances noted.

Examination of jurors continued.

Motion by Mr. Rosenthal for an adjournment until September 18th. 1941. because said counsel is ill.

Motion granted.

544 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 18th. day of September 1941.

Trial continued from September 16th. 1941.
All appearances noted.
Examination of jurors continued.
545 Trial continued September 19th. 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19th. day of September 1941.

Trial continued from September 18th, 1941.
All appearances noted.
546 Examination of jurors continued.
Morris Leibowitz. accepted tentatively
Examination of jurors continue.
Trial continued September 24th. 1941

Minutes of Trial 547

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 24th. day of September 1941.

Trial continued from September 19th. 1941.
All appearances noted.
Examination of jurors continued.
Charles E. Stevens. accepted tentatively not 548
sworn.
Examination of jurors continue.
Trial continued September 25th. 1941

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 25th. day of September 1941.

549

Trial continued from September 24th. 1941.
All appearances noted.
Trial of jurors continued.
Trial continued September 26th, 1941

550 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 26th. day of September 1941.

Trial continued from September 25th. 1941. All appearances noted.

Examination of jurors continued.

551 Trial continued September 29th. 1941

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 29th day of September 1941.

Trial continued from September 26th, 1941. All appearances noted.

552 Examination of jurors continued.

Benjamin Protter, accepted tentatively not sworn.

Examination of jurors continued.

Trial continued September 30th, 1941.

Minutes of Trial 553

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 30th. day of September 1941.

Trial continued from September 29th, 1941.
All appearances noted.
Examination of jurors continued, tentatively jurors appear and answer to their names. 554
Examination of jurors continued.
Trial continued October 2nd, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 2nd day of October 1941.

Trial continued from September 30th, 1941. 555
All appearances noted.
Examination of jurors continued.
Charles T. Prentice, accepted tentatively not sworn.
Examination of jurors continued.
Trial continued October 3rd, 1941.

556 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 3rd. day of October 1941.

Trial continued from October 2nd, 1941. All appearances noted.

Examination of jurors continued.

557 Trial continued October 6th, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 6th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, Country Judge.

558 Trial continued from October 3rd, 1941. Defendants personally present.

All appearances noted. The jurors placed in the box but not sworn.

Charles A. Murphy, placed in box as tentative juror. No. 3.

Examination of jurors continues.

Jurors admonished. Trial continued October 7th, 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

Minutes of Trial 559

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 7th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 6th. 1941. All appearances noted. 560

3 tentative jurors appear and answer to their names.

Examination of jurors continued.

No. 4 David M. Day accepted by both sides as tentative juror not sworn.

Examination of jurors continued.

No. 5 Henry T. Gill accepted by both sides as tentative juror not sworn.

Examination of jurors continued.

Trial continued tomorrow morning at 10 o'clock jury admonished.

561

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk.

562 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 8th day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 7th. 1941. All
563 appearances noted.

Tentatively accepted jurors appear and answer to their names. Examination of jurors continued.

No 6. James A. Cummings. Tentatively accepted.
No 7 George B. Hall Tentatively accepted
No 8 Philip Stroker Tentatively accepted.

Trial continued to October 9th. 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

564

Minutes of Trial 565

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 9th day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 8th. 1941. All appearances noted.

Tentatively accepted jurors all appear and answer to their names. 566

Examination of jurors continued.

No 9. Harold T. Cross. Tentatively accepted.

Original panel exhausted Court orders additional panel to report October 14th. 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

At a term of the County Court, held in and for the County of Kings, 567 at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 10th day of October 1941.

Present: Hon. FRANKLIN TAYLOR County Judge.

Trial continued from October 9th. 1941. All appearances noted.

Tentatively jurors accepted all appear and answer to their names.

Examination of jurors continued.

Panel exhausted.

Trial continued October 14th. 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk

568 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 14th. day of October 1941.

Additional panel of special jurors present.
Trial continued from October 10th, 1941.
All appearances noted. Tentatively jurors all appear and answer to their names.

569 Arthur G. Jaeger, 3545 89th St., Jackson Heights, Queens Co. U. S. Marshall. Sworn.
Examination of jurors continued.
No. 10, John D. Butt. Tentatively accepted.
Trial adjourned until October 15th, 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

At a term of the County Court, held in and for the County of Kings,
570 at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 15th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 14th, 1941. All appearances noted. The tentatively accepted jurors all appear and answer to their names.
Examination of jurors continued.
Trial continued October 16th, 1941.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

Minutes of Trial 571

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 16th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 15th, 1941. All appearances noted. The tentatively accepted jurors all appear and answer to their names. 572
Examination of jurors continued.
No. 11, James L. Edghill tentatively accepted.
Juror No. 8, Phillip Strober excused by consent of all counsel.
No. 11, John J. Rorke, tentatively accepted.
Examination of jurors continued.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

573

574 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 17th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 16th, 1941. All
575 appearances noted. All tentatively. Jurors appear and answer to their names.

No. 9, John D. Butt, juror No. 9, on consent of all counsel.

No. 11, William C. Links tentatively accepted.

The following jurors were duly drawn, empanelled, accepted and sworn and now constitute the jury to decide the issue.

1 Charles E. Stevens.	7 George B. Hall.
2 Chester T. Prentice.	8 Harold S. Cross.
3 Charles A. Murphy.	9 James R. Edghill.
4 David M. Day.	10 John J. Rorke.
576 5 Henry T. Gill.	11 Wm. C. Links.
6 James B. Cummings.	12 John E. Coleman.

Examination of jurors continued.

Carl M. Gilt, alternate juror.

George K. Ormond, alternate juror.

Trial continued October 20th, 1941.

Jury and alternates to be furnished with lodgings and refreshments.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

Minutes of Trial 577

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 20th. day of October 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

Trial continued from October 17th, 1941.

All appearances noted. The jury heretofore 578
duly sworn all appear and answer to their names.

Opening to the jury on behalf of the People &c.

Counsel for all defendants waive opening to the jury.

Peoples witnesses. Sworn.

Estelle Rosen. 345 Wyona St. Sworn.

Harry Regenbonger. 451 Miller Av. Sworn.

Louis Stamler. 720 Sutter Av. Sworn.

Gieglielmo Cappadora 17733 M. C. S. Sworn.

Dr. Edward Marten. 152 Lenox Rd. Sworn.

Trial adjourned until October 21st, 1941. 579

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

580 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 21st day of October 1941.

Trial continued from October 20, 1941.

All appearances noted. The jury heretofore duly sworn, all appear and answer to their
581 names.

Peoples Witnesses:

Dr. M. Edward Marten. Recalled.

Frederick W. Walsh Shield 809 123 Squad Ballistic Bureau. Sworn.

George V. Dumont Shield 1631 Homicide Squad Sworn.

Emil Schaefer Shield 1163 Ballistic Bureau Sworn.

Herman Schiesser 123-19 85 Ave., Richmond Hill, L. I. Sworn.

Hirsh Merlis 166 Orchard St., New York. Sworn.

582 Hirsh Merlis continued.

John J. McGowan Homicide Squad Sworn.

Samuel Pearl 298 E. 45 St. Sworn.

Henry G. Nelson Shield 12154 Traffic K Sworn.

William S. King Shield 972 75 Squad Sworn.

Henry F. Butts Shield 824 Ballistic Bureau Sworn.

Minutes of Trial 583

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 21 day of October 1941.

Peoples Witnesses:

Max Kaufman 1801 1st St., Peoria, Ill. Sworn. 584

William R. Jarvis Shield 479 75 Squad Sworn.

Trial continued to October 22, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 22nd day of October 1941.

585

Trial continued from October 21, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Peoples witnesses:

Simon P. Ambraz U. S. Army, Camp Upton, N. Y. Sworn.

Abraham Waxman 1167 Wilmohr St. Sworn.

Harold E Rosen 1611 Perkionem Ave., Reading, Pa. Sworn.

Harold E Rosen continued

Hyman W Barran 135-21 229 St., Laurelton, L. I. Sworn.

Trial continued to October 23, 1941.

586 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 23 day of October 1941.

Trial continued from October 22, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

587 Peoples witnesses: continued

Hyman W Barron continued

Anthony O DeSario 610 Ovington Ave. Sworn.

Sylvia R Greenspan 401 Schenectady Ave. Sworn.

Trial continued to October 24, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City
588 of New York, on the 24 day of October 1941.

Trial continued from October 23, 1941.

All appearances noted. The jurors sworn in the case all appear and answer to their names.

Peoples witnesses:

Sylvia R Greenspan continued

Sylvia R Greenspan continued

Sol Bernstein Half Moon Hotel Sworn

Trial continued to Monday, October 27, 1941.

Minutes of Trial 589

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 27 day of October 1941.

Trial continued from October 24, 1941.

All appearances noted. The jurors sworn in the case all appear and answer to their names.

Peoples witnesses: Continued 590

Sol Bernstein Continued

Sol Bernstein Continued

Trial continued to October 28, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 28 day of October 1941.

591

Trial continued from October 27, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Peoples witnesses: continued

Sol Bernstein Recalled

Sol Bernstein Recalled

Trial continued to October 29, 1941.

592 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 29 day of October 1941.

Trial continued from October 28, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to the
593 call of their names.

Peoples witnesses: continued

Sol Bernstein Recalled

Trial adjourned to October 30, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 30 day of October 1941.

594

Trial continued from October 29, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to the call of their names.

Peoples witnesses: continued.

Sol Bernstein recalled.

Sol Bernstein recalled.

Trial continued to October 31, 1941.

Minutes of Trial 595

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 31 day of October, 1941.

Trial continued from October 30, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to their names. 596

Peoples witnesses:

Max Rubin address refused Sworn

Max Rubin recalled

Trial continued to November 3, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 3 day of November, 1941. 597

Trial continued from October 31, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Peoples witnesses: continued.

Max Rubin recalled

Trial continued to November 5, 1941.

598 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 5 day of November, 1941.

Trial continued from November 3, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to their
599 names.

Peoples witnesses: continued.

Max Rubin recalled.

Trial continued to November 6, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 6 day of November, 1941.
600

Trial continued from November 5, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to the call of their names.

Peoples witnesses: continued

Max Rubin recalled

Max Rubin recalled

Trial continued to November 7, 1941.

Minutes of Trial 601

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 7 day of November, 1941.

Trial continued from November 6, 1941.

All appearances noted. The jury heretofore sworn in the case all appear and answer to their names. 602

Peoples witnesses: continued.

Max Rubin recalled.

Edward C Maguire 122 E 42 St, New York Sworn

Paul Berger Bossert Hotel, Sworn

Paul Berger recalled

Trial continued to November 10, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 10 day of November, 1941. 603

Trial continued from November 7, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Peoples witnesses: continued.

Paul Berger recalled

Paul Berger recalled

Trial continued to November 12, 1941.

604 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 12 day of November, 1941.

Trial continued from November 10, 1941.
All appearances noted. The jury sworn in the case all appear and answer to their names.
605 Peoples witnesses: continued
Paul Berger recalled.
Paul Berger recalled.
Albert Tannenbaum address refused Sworn
Trial continued to November 13, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 13 day of
606 November, 1941.

Trial continued from November 12, 1941.
All appearances noted. The jury sworn in the case all appear and answer to their names.
Peoples witnesses:
Albert Tannenbaum recalled
Albert Tannenbaum recalled
Max Rubin recalled
Trial continued to November 14, 1941.

Minutes of Trial 607

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 14 day of November, 1941.

Trial continued from November 13, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Peoples witnesses: 608

Max Rubin recalled.

Seymour Magoon 608 Pennsylvania Ave. Sworn

Trial continued to November 15, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 15th day of November, 1941. 609

Trial continued from November 14th, 1941. All appearances noted. The jurors sworn in the case all appear and answer to their names.

Peoples witnesses.

Seymour Magoon. Recalled.

Seymour Magoon. Recalled.

Albert E Amen 2171 Eastwood Ave., Chicago, Ill. Sworn

Trial continued to November 17, 1941.

610 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 17 day of November, 1941.

Trial continued from November 15, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

611 Peoples witnesses: continued

Albert A Amen recalled.

Joseph Bell 743 West Courthouse, Kansas City, Mo. Sworn

James C Ryan 90 Church St., New York Sworn

Thomas J Wynne 2667 Morris Ave., Bronx Sworn

People rest.

Motion by Mr. Climenko on behalf of defendant, Buchalter, for dismissal of indictment and verdict of Not Guilty. Denied.

612 Same motion by Mr. Talley for defendant Weiss. Denied.

Same motion by Mr. Rosenthal on behalf of defendant, Capone. Denied.

Defendant Buchalter's witnesses:

John J Fegan 5503 31 Ave., Woodside, L. I. Sworn.

Henry H Eisenberg 152 Belleview St., Elizabeth, N. J. Sworn.

Trial continued to November 18, 1941.

Minutes of Trial 613

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 18 day of November, 1941.

Trial continued from November 17, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Defendant Buchalter's witnesses: continued. 614

Henry H Eisenberg recalled

Larry H Cooper 1602 Ave. P., Brooklyn, N. Y. Sworn

Michael J. Monz 6414 99 St., Queens Village, L. I. Sworn

Nat Sobler 170 Bay 29 St., Brooklyn, N. Y. Sworn

Nat Sobler continued.

Ellsworth Baker Monticello, N. Y. Sworn

Carl Shapiro 2301 Springdale Ave., Baltimore, Md. Sworn

Trial continued to November 19, 1941. 615

616 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19 day of November, 1941.

Trial continued from November 18, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

617 Defendant Buchalter's witnesses: continued.

Carl Shapiro recalled

Carl Shapiro recalled

Trial continued to November 21, 1941.

618

Minutes of Trial 619

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 21 day of November, 1941.

Trial continued from November 19, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Defendant Buchalter's witnesses: continued. 620

Carl Shapiro recalled

William W Kleinman, Camp Wheeler, Ga. Sworn

The witness, testifying for defendant, Weiss, taken out of order.

Carl Shapiro recalled

John J Canevari 2401 Cortelyon Road Sworn

Defendant Buchalter rests.

Defendant Weiss's witnesses:

Harry Cohen 32 Glenmore Ave., Sworn

Harry Cohen recalled 621

Sidney Weiss 10 Monroe St., New York City Sworn

Trial continued to November 22, 1941.

622 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 22 day of November, 1941.

Trial continued from November 21, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their na .es.

623 Defendant Weiss's witnesses: continued.

Sidney Weiss recalled

Sidney Weiss recalled

Samuel Weiss 10 Monroe St., New York Sworn

Dorothy Isaacson 148 Clinton St., New York Sworn

Trial continued to November 24, 1941.

624

Minutes of Trial 625

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York on the 24 day of November, 1941.

Trial continued from November 22, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Defendant Weiss's witnesses: continued 626

Blanche Weiss 10 Monroe St., New York Sworn

Blanche Weiss recalled

He'en A Hazley 871 Pavonia Ave., Jersey City Sworn

L a Weiss 10 Monroe St., New York Sworn

T al continued to November 25, 1941.

627

628 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 25 day of November, 1941.

Trial continued from November 24, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

629 Defendant Weiss rests.

Defendant Capone rests.

Peoples witnesses: in rebuttal

James P Malone Shield 1797 Manhattan G. J. Squad Sworn

John J. Whalen 1746 Manhattan G. J. Squad Sworn

Vanse Newman 55 Pierrepont St. Sworn

People rest.

Motion by Mr. Climenko on behalf of defendant Buchalter for dismissal of indictment and direction of verdict of not guilty. Denied.

630 Same motion by Mr. Talley; for Weiss. Denied.

Same motion by Mr. Rosenthal for Capone. Denied.

Trial continued to November 26, 1941.

Minutes of Trial 631

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 26 day of November, 1941.

Trial continued from November 25, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Mr. Barshay sums up for Buchalter. 632

Trial continued to November 27, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 27 day of November, 1941.

Trial continued from November 26, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names. 633

Trial adjourned to November 28, 1941, on account of the illness of Judge Taylor.

634 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 28 day of November, 1941.

Trial continued from November 27, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

635 Summation by Mr. Talley for defendant Weiss.

Summation by Mr. Rosenthal for defendant Capone.

Trial continued to November 29, 1941.

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 29 day of November, 1941.

636

Trial continued from November 28, 1941.

All appearances noted. The jury sworn in the case all appear and answer to their names.

Summation by Mr. Turkus for the People.

Charge to the jury by the Court.

The two alternate jurors discharged in accordance with section 358a of the Code of Criminal Procedure.

The jury retire to deliberate, in custody of Officers Fitzsimmons, Meek, Frawley and Lehritter and Captain Gannon, who were first duly sworn.

Minutes of Trial 637

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 30 day of November, 1941.

Trial continued from November 29, 1941.

All appearances noted.

Returning into Court the jury in the presence of the three defendants and their counsel, answer 638
to the call of their names and say they find all three defendants guilty of Murder in the first degree.

Mr. Barshay moved that the jury be polled. Jury polled.

A true extract from the minutes.

FRANCIS J. SINNOTT,
Clerk.

639

640

Judgment of Conviction against Defendant Louis Buchalter

At a Term of the County Court held in and for the County of Kings, at 129 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 2nd day of December, 1941.

Present: Hon. FRANKLIN TAYLOR, County Judge.

641

THE PEOPLE OF THE STATE OF NEW YORK

against

LOUIS BUCHALTER, alias "LEPKE".

#22855

642 Indicted for Murder, First Degree, and convicted thereof, as charged, by the verdict of a jury on November 30th, 1941.

Being personally present and sworn says: My true name is Louis Buchalter; I am 44 years of age; I was born in New York City; I reside at 427 West Street; I am retired; I am married; I can read and write; I am a Public School graduate; I am a Hebrew, irregular attendant; my mother is living; I am temperate; I do not use drugs; asked as to previous convictions, the defendant remained mute.

Judgment of Conviction against Defendant Louis Buchalter 643

The defendant and his counsel being present and the defendant being asked if he had anything to say why the judgment of the law should not be pronounced against him, and he having nothing to say, the Court pronounced judgment as follows:

WHEREUPON, it is Ordered and Adjudged by the Court that the said Louis Buchalter, alias "Lepke", for the murder in the first degree of 644
Joseph Rosen, whereof he is convicted, be and he hereby is sentenced to the punishment of death, and that within ten days from this date, the Sheriff of the County of Kings deliver the said Louis Buchalter, alias "Lepke", together with the Warrant of this Court, to the Agent and Warden of Sing Sing State Prison at Ossining, where he shall be kept in solitary confinement until the week beginning with Sunday, January 4th, 1942, and that upon some day within the week so appointed the Agent and Warden of the said Sing Sing State Prison, at Ossining, shall 645
do execution upon him, the said Louis Buchalter, alias "Lepke", in the mode and manner prescribed by law.

A true extract of the minutes.

FRANCIS J. SINNOTT
(Seal) Clerk.

646

Death Warrant against Defendant Louis Buchalter

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

647 LOUIS BUCHALTER, alias "LEPKE".

#23855

Death Warrant

State of New York }
County of Kings } ss.:

To the Agent and Warden of Sing Sing State Prison at Ossining, New York:

648 WHEREAS, at a trial term of the County Court held in and for the County of Kings on the 4th and 5th days of August, 1941, the 16th, 18th, 19th, 24th, 25th, 26th, 29th and 30th days of September, 1941, and the 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th, 30th and 31st days of October, 1941, and the 3rd, 5th, 6th, 7th, 10th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 21st, 22nd, 24th, 25th, 26th, 28th, 29th, and 30th days of November, 1941, the above named Louis Buchalter, alias "Lepke", was put upon his trial for

the murder of Joseph Rosen committed in the County of Kings on or about the 13th day of September, 1936, and upon said trial the said Louis Buchalter, alias "Lepke" having been found guilty of murder in the first degree on November 30th, 1941, for the killing of the said Joseph Rosen, and on the 2nd day of December, 1941 having been sentenced to be put to death in the manner provided by law on some day in the week beginning the 4th day of January, 1942.

NOW, IT IS HEREBY ORDERED that the execution of the said sentence be done upon the said Louis Buchalter, alias, "Lepke" by you, the said Warden of Sing Sing State Prison at Ossining, New York, in the manner provided by law, on such day in the week beginning the 4th day of January, 1942 as you shall determine, and within the walls of your said prison or inclosure thereto adjoining

WITNESS my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 2nd day of December, 1941.

FRANKLIN TAYLOR
County Judge of Kings County.

Given under my hand and attested by the seal of the said Court this 2nd day of December, 1941.

FRANCIS J. SINNOTT
(Seal) Clerk.

652

Judgment of Conviction against Defendant Emanuel Weiss

At a Term of the County Court held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 2nd day of December, 1941.

Present: Hon. Franklin Taylor, County Judge.

653

The People of the State of New York

against

Emanuel Weiss, alias "Mendy Weiss".

#23855

654 Indicted for Murder, First Degree, and convicted thereof, as charged, by the verdict of a jury on November 30th, 1941.

Being personally present and sworn says: My true name is Emanuel Weiss; I am 35 years of age; I was born in New York City; I reside at 427 West Street, Manhattan; I am a salesman; I am married; I can read and write; I have had a Public School education, 6th grade; I am Jewish, irregular attendant; my mother is living; I am temperate; I do not use drugs; I have previously been convicted of two Misdemeanors and one Felony.

Judgment of Conviction against Defendant Emanuel Weiss 655

The defendant and his counsel being present and the defendant being asked if he had anything to say why the judgment of the law should not be pronounced against him, and he having nothing to say, the Court pronounced judgment as follows:

WHEREUPON, it is Ordered and Adjudged by the Court that the said Emanuel Weiss, alias "Mendy Weiss", for the murder in the first de- 656
gree of Joseph Rosen, whereof he is convicted, be and he hereby is sentenced to the punishment of death, and that within ten days from this date, the Sheriff of the County of Kings deliver the said Emanuel Weiss, alias "Mendy Weiss", together with the Warrant of this Court, to the Agent and Warden of Sing Sing State Prison at Ossining, where he shall be kept in solitary confinement until the week beginning with Sunday, January 4th, 1942, and that upon some day within the week so appointed the Agent and Warden of the said Sing Sing State Prison, at 657
Ossining, shall do execution upon him, the said Emanuel Weiss, alias "Mendy Weiss", in the mode and manner prescribed by law.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

(Seal)

658

Death Warrant against Defendant Emanuel Weiss

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

659 EMANUEL WEISS, alias "MENDY WEISS".

#23855

Death Warrant

State of New York }
County of Kings } ss.:

To the Agent and Warden of Sing Sing State Prison at Ossining, New York:

660 WHEREAS, at a trial term of the County Court held in and for the County of Kings on the 4th and 5th days of August, 1941, and the 16th, 18th, 19th, 24th, 25th, 26th, 29th and 30th days of September 1941, and the 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th, 30th and 31st days of October, 1941, and the 3rd, 5th, 6th, 7th, 10th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 21st, 22nd, 24th, 25th, 26th, 28th, 29th and 30th days of November, 1941, the above named Emanuel Weiss, alias "Mendy Weiss", was put upon his

Death Warrant against Defendant Emanuel Weiss 661

trial for the murder of Joseph Rosen committed in the County of Kings on or about the 13th day of September, 1936, and upon said trial the said Emanuel Weiss, alias "Mendy Weiss" having been found guilty of murder in the first degree on November 30th, 1941, for the killing of the said Joseph Rosen, and on the 2nd day of December, 1941 having been sentenced to be put to death in the manner provided by law on some day in the week beginning the 4th day of January, 1942: 662

Now, IT IS HEREBY ORDERED that the execution of the said sentence be done upon the said Emanuel Weiss, alias "Mendy Weiss", by you, the said Warden of Sing Sing State Prison at Ossining, New York, in the manner provided by law, on such day in the week beginning the 4th day of January, 1942 as you shall determine, and within the walls of your said prison or inclosure thereto adjoining.

663

WITNESS my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 2nd day of December, 1941.

FRANKLIN TAYLOR
County Judge of Kings County.

Given under my hand and attested by the seal of the said Court this 2nd day of December, 1941.

FRANCIS J. SINNOTT
(Seal) Clerk.

664

Judgment of Conviction against Defendant Louis Capone

At a Term of the County Court held in and for the County of King., at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 2nd day of December, 1941.

Present: Hon. Franklin Taylor, County Judge.

665

The People of the State of New York.

against

Louis Capone.

#23855

666 Indicted for Murder, First Degree, and convicted thereof, as charged, by the verdict of a jury on November 30th, 1941.

Being personally present and sworn says: My true name is Louis Capone; I am 44 years of age; I was born in Naples, Italy; I reside at 2780 Stilwell Avenue; I am a restaurant owner; I am married; I can read and write; I am a Public School graduate; I am a Catholic, regular attendant; my father is living; I am temperate; I do not use drugs; I have never previously been convicted of a Felony or a Misdemeanor.

Judgment of Conviction against Defendant Louis Capone 667

The defendant and his counsel being present and the defendant being asked if he had anything to say why the judgment of the law should not be pronounced against him, and he having nothing to say, the Court pronounced judgment as follows:

WHEREUPON, it is Ordered and Adjudged by the Court that the said Louis Capone, for the murder in the first degree of Joseph Rosen, 668
whereof he is convicted, be and he hereby is sentenced to the punishment of death, and that within ten days from this date, the Sheriff of the County of Kings deliver the said Louis Capone, together with the Warrant of this Court, to the Agent and Warden of Sing Sing State Prison, at Ossining, where he shall be kept in solitary confinement until the week beginning with Sunday, January 4th, 1942, and that upon some day within the week so appointed, the Agent and Warden of the said Sing Sing State Prison, at Ossining, shall do execution upon him, the said Louis Capone, in the mode and manner pre- 669
scribed by law.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk.

(Seal)

670

Death Warrant against Defendant Louis Capone

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

671 LOUIS CAPONE.

#23855

Death Warrant

State of New York }
County of Kings } ss.:

To the Agent and Warden of Sing Sing State Prison at Ossining, New York.

672 WHEREAS, at a trial term of the County Court held in and for the County of Kings on the 4th and 5th days of August, 1941, and the 16th, 18th, 19th, 24th, 25th, 26th, 29th and 30th days of September, 1941, and the 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th, 30th and 31st days of October, 1941, and the 3rd, 5th, 6th, 7th, 10th, 12th, 13th 14th, 15th, 17th, 18th, 19th, 21st, 22nd, 24th, 25th, 26th, 28th, 29th and 30th days of November, 1941, the above named Louis Capone, was put upon his trial for the murder of Joseph

Death Warrant against Defendant Louis Capone 673

Rosen committed in the County of Kings on or about the 13th day of September, 1936, and upon said trial the said Louis Capone having been found guilty of murder in the first degree on November 30th, 1941, for the killing of the said Joseph Rosen, and on the 2nd day of December, 1941 having been sentenced to be put to death in the manner provided by law on some day in the week beginning the 4th day of January, 1942.

NOW, IT IS HEREBY ORDERED that the execution 674
of the said sentence be done upon the said Louis Capone, by you, the said Warden of Sing Sing State Prison at Ossining, New York, in the manner provided by law, on such day in the week beginning the 4th day of January, 1942 as you shall determine, and within the walls of your said prison or inclosure thereto adjoining.

WITNESS my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 2nd day of December, 1941.

FRANKLIN TAYLOR 675
County Judge of Kings County.

Given under my hand and attested by the seal of the said Court this 2nd day of December, 1941.

FRANCIS J. SINNOTT
(Seal) Clerk.

676

Case and Exceptions

COUNTY COURT

KINGS COUNTY

PART II

THE PEOPLE OF THE STATE OF NEW YORK *against* 677 LOUIS BUCHALTER, alias "LEPKE", EMANUEL WEISS, alias "MENDY WEISS" and LOUIS CAPONE, *Defendants.*	Indictment No. 23855. Murder, First Degree.

Brooklyn, N. Y., October 20, 1941.

Before—Hon. FRANKLIN TAYLOR, County Judge, and a Special Jury.

678

APPEARANCES:

For the People:

Hon. WILLIAM O'DWYER,
District Attorney,
By BURTON B. TURKUS, Esq.,
SOLOMON A. KLEIN, Esq.,
LEWIS JOSEPH, Esq.,
Assistant District Attorneys.

679

For the Defendant Buchalter:

HYMAN BARSHAY, Esq.,
BERTRAM WEGMAN, Esq.,
JESSE CLIMENKO, Esq.

For the Defendant Weiss:

ALFRED J. TALLEY, Esq.,
JAMES I. CUFF, Esq.,
M. M. KREINDLER, Esq.

680

For the Defendant Capone:

LEON FISCHBEIN, Esq.,
EMANUEL ROSENBERG, Esq.,
WILLIAM MURPHY, Esq.,
SIDNEY ROSENTHAL, Esq.

THOMAS F. DARCY,
JULIA A. McGOWAN,
Official Stenographers.

Mr. Turkus: In the interests of justice, I respectfully ask that all witnesses on both sides be excluded until after their testimony has been given. 681

The Court: All witnesses for both sides step outside. They will not confer or contact with one another.

(Mr. Turkus then made his opening statement to the jury as follows:)

May it please the Court, Mr. Foreman, and gentlemen of the jury: Now that you have been duly impanelled and sworn as the jury to try the issue between The People of the State of New York and these defendants at the bar,

682 *Opening Statement on Behalf of People*

Buchalter, Weiss and Capone, it becomes the duty of the District Attorney to state what The People of the State of New York intend to prove at this trial.

You will observe as my opening statement proceeds that it is not my intention to set forth each and every detail of the case. Witnesses, whom you will see and hear, will do that. At this time I shall state the highlights of the case so that you may readily follow the testimony of
683 the witnesses when they reveal the facts to you.

Shortly before seven o'clock in the morning on Sunday, September 13, 1936, a uniformed police officer who was patroling his beat on Sutter Avenue, in the Brownsville District of Brooklyn, suddenly observed a man in the middle of the street frantically waving both arms, shouting, "Police! Murder!" The police officer ran to his side. The civilian quickly blurted out a story. The officer dashed into the candy store located at 725 Sutter Avenue. Inside he saw a ghastly sight. There, on the floor of this little candy store lay the proprietor, Joseph Rosen,
684 flat on his back, his arms outstretched; his face, neck and shirt were drenched with blood; pools of blood flowed from the body in the direction of the counter. Scattered newspapers were strewn on the floor. The body was at an angle, head facing toward the rear of the store, feet facing toward the front and side, legs spread apart. The eyes of the corpse were wide open, staring towards the ceiling.

The police officer questioned the civilian. He was a tailor, who lived across the street. At approximately 6:45 A. M. the tailor heard a

series of shots ring out in the quiet of that Sunday morning. The tailor looked out the window. He saw an automobile pull away from in front of the Rosen candy store and start down Sutter Avenue. As the car drew away from in front of the store, the tailor saw the body of a man lying on the floor of this candy store. Whereupon, the tailor followed the car with his eyes to get the license number. As the car was going down Sutter Avenue, and before it reached the corner of Wyona Street, into which it turned, the 686
tailor memorized the license number of that car. The policeman then telephoned an alarm; an alarm for a black sedan, License Number L-16-67, with four occupants.

Radio cars converged at the store, detectives and commanding officers arrived. The ambulance surgeon who responded pronounced the victim "Dead on arrival." The body and scene of the murder were guarded and remained untouched and undisturbed pending the arrival of the Medical Examiner. Photographs were taken by detectives of the Photo Gallery of the Police Department. 687

Dr. Marten, the Deputy Chief Medical Examintr of the City of New York, arrived and made an examination and inspection of the corpse at the scene. He then ordered the removal of the body to the Kings County Morgue, for autopsy. There, and prior to the autopsy, Harold Rosen viewed the body and identified it as being that of his father, Joseph Rosen.

The autopsy revealed that Joseph Rosen had virtually been riddled with bullets. His body had been pierced with seventeen entrance and exit bullet holes.

688 *Opening Statement on Behalf of People*

Mr. Barshay: I object to that as an entirely improper statement.

Mr. Turkus: (continuing) At the point of objection I had come to the point where I told you that Rosen's body had been pierced with seventeen entrance and exit bullet holes. One bullet entered the left side of his face, near the ear, and came out in the back of his neck on the right side. A second bullet entered at the lower left jaw, passed through the brain, and lodged itself
689 in the temporal muscle on the right side of the head, where it was recovered by the Medical Examiner. A third bullet entered on the left side of the neck, went from left to right, almost horizontally, and imbedded itself in the back of his neck. This bullet was likewise recovered by the Medical Examiner. There were thirteen other entrance and exit wounds where bullets had punctured and penetrated the chest, shoulder and neck of the victim.

Two bullets, as stated, were recovered by Dr. Marten, on autopsy. Four bullets were pried
690 out of the floor, directly beneath the victim's body. Another was extracted from the floor near the body; and still another bullet which passed through the wall of the candy store, was recovered on the floor in the millinery shop next door. The recovered bullets were sent to the Ballistics Bureau of the Police Department, for examination.

At approximately 10:40 that very Sunday morning, on Van Sinderen Avenue, about twenty-five or thirty feet north of Livonia Avenue, in the Brownsville section of Brooklyn, a detective discovered an abandoned automobile bearing

License Plates L-16-67 N. Y. 1936; the very car for which the alarm had issued. This car was a Chevrolet, two-door, four-passenger hard top vehicle, black in color, now commonly called a coach. The place of abandonment of the vehicle was close by the I.R.T. and B.M.T. station and railroad bridge at that location.

The operator of the candy store and news stand at this station actually saw this car abandoned at about seven o'clock that Sunday morning. Four men got out of the car and walked 692
up the stairway to the left of his stand. This stairway permitted access to the I.R.T. station and to a bridge which crossed over the railroad tracks, and had an exit a block away on the other side. The news stand operator paid no special attention to the men and could effect no identification of any of them.

The abandoned Chevrolet coach was a stolen car. It had been stolen from the Crown Heights section of Brooklyn sometime between midnight on Friday and nine o'clock in the morning on Saturday, from in front of 621 Lefferts Avenue, 693
where it had been parked over night by the owner, near his residence. The discovery of its theft and report thereof was made by the owner on Saturday morning and a police alarm then sent out for its recovery.

The license plates, L-16-67, affixed to this Chevrolet, were not the license plates which had been issued for the car by the Bureau of Motor Vehicles. The license plates L-16-67 also had been stolen, but from a different vehicle, namely, a Ford, which had been stored in a private garage on East 96th Street, in the Brownsville

section of Brooklyn. The owner of the Ford automobile had last seen it the day after Labor Day when he put the car away and locked the garage doors. The discovery of the theft of the plates was made the very morning of the murder when detectives came to interrogate the owner of the plates. Accompanying the detectives to the private garage, the owner discovered for the first time that the padlock had been broken and the plates were missing.

695 Under the direction of Captain John J. McGowan, the commanding officer of the Brooklyn Homicide Squad in charge of all detectives in the Homicide Division in the Borough of Brooklyn, photographs were taken of the stolen car. In addition, under his direction and supervision, a chalk and mercury mixture was dusted on the windshield, the body of the car, the license plates, inside mirror, and all other places where there might likely be a fingerprint, in an endeavor to bring out fingerprint impressions. The search for fingerprint clues was fruitless.

696 Far away from the place where the murder car was abandoned, a pedestrian shortly after eleven o'clock the very morning of the murder, walking along Ralph Avenue at a point about one hundred feet north of Church Avenue, discovered a gun in the grass, near the sidewalk. He picked up the weapon, looked at it, and then carried it over to a police officer directing traffic in that vicinity. Quickly, notification of this find was given to the detectives working on the Rosen case. The gun was sent to the Ballistics Bureau of the Police Department for inspection and examination.

The Commanding Officer of the Ballistics Bureau personally conducted the examination and inspection of the weapon. This gun was a Colt 38-caliber police positive, special.

In an endeavor to trace the serial number of the gun this ballistics expert made an examination of the gun at the three points where the serial numbers should have been. There he discovered that the numbers had been mechanically removed and obliterated, so that they were not visible either to the naked eye or with a mag- 698
nifying glass. Then with acids he attempted to bring out or restore those serial numbers by etching, that is, bringing to view a ghost-like number which then gives you what the number was before it was obliterated. The obliteration, however, had been too thorough and the expert was unable to bring up the serial number or enough of it so that a trace could be made.

In addition to the obliteration of the numbers, the gun had received other mechanical treatment after it had left the factory. At the muzzle end of the barrel a thread had been cut. This had 699
been cut for the attachment of a "silencer" to muffle or do away with the sound of a report. The "silencer" was not affixed to the gun but the threading for it was covered by a "collar."

As I have already related, eight bullets were now at the Ballistics Bureau for examination. Of the eight, you will remember, two of the bullets had been extracted from the body of Joseph Rosen by the Medical Examiner, and the remaining six bullets had been found at the scene of the murder. Four of these eight bullets were half metal-case bullets and the other four

were copper-coated bullets. One of the bullets recovered from the body of Joseph Rosen by the medical examiner was a half metal-case bullet, and the other was a copper-coated bullet. The eight bullets were microscopically examined and tests made. The tests revealed that the four half metal-case bullets were fired from the very gun found in the lot; whereas, the four copper-coated bullets had been fired from another gun, of similar make. The gun, however, which fired
701 the four copper-coated bullets, was never recovered.

Thus, briefly, the proof discloses that in advance of the murder an automobile was stolen from the Crown Heights section of Brooklyn; the license plates were stolen from another car in the Brownsville district, the stolen plates were switched to the stolen car; the murder was committed; the killers fled from the scene in the stolen car; they abandoned the car at the railroad bridge, and escaped without identification, not a single fingerprint clue was found on the
702 murder car; only one of the guns used in the killing was found, but that with the serial numbers obliterated, blocking trace of its sale or ownership. In short, the killers had made a clean getaway and left no clues in their wake.

This is the point, gentlemen, where we naturally ask ourselves what is the proof as to why the proprietor of a penny business should be the victim of a brutal murder, carried out with flawless technique. Who was this Joseph Rosen?

Joseph Rosen had been a candy store owner in the Brownsville district only a few months. All his adult life he had been in the clothing-

trucking business, starting as a driver and working up to a partnership in the business. The trucking concern in which he was a partner was disrupted, Rosen was forced out. The defendant Buchalter and others manipulated the deal. Rosen, through Buchalter and a union official, was put to work as a foreman. Several months later Rosen was discharged. Then he walked the streets endeavoring to reinstate himself in the clothing-trucking industry, complaining that Buchalter had put him out of business. Finally, 704
Buchalter and this union official put Rosen to work again, but this time as a truck driver. This job lasted only a short time and again Rosen was out of employment. Ultimately, Rosen ended up in the little candy store in Brownsville at 725 Sutter Avenue.

In the latter part of the year 1935, the Honorable Herbert H. Lehman, the Governor of the State of New York, appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into

705

(1) Any and all acts of racketeering and vice;

(2) Any and all acts of organized crime or any other crime;

(3) Any connection between such acts and any law enforcement officials, committed or alleged to have been committed by any and all persons, including public officers, within the County of New York, in violation of the provisions of the Penal Law of the State of New York or the penal provisions of any other general, special or local law.

706 *Opening Statement on Behalf of People*

Thomas E. Dewey was the Special Prosecutor designated to conduct the investigation.

Several months after the Dewey investigation got under way, Joseph Rosen threatened to go to Dewey and tell what he knew. In an attempt to silence him, $200 was turned over to Rosen in his candy store, and he was told to go out of town and stay out, until everything blew over. Rosen took the $200 and he did leave town, but he stayed away for only a few days, and then came
707 back.

Thereafter, Rosen again threatened to talk. On September 13, 1936, in the manner that I have already described, Rosen's lips were forever sealed by a stream of bullets from two guns.

But nothing happened. Weeks passed—months passed—in fact, year after year went by—still nothing happened.

In May, 1940, something did happen. The case was broken from the inside. Then on May 28, 1940, the Grand Jury of Kings County handed down an indictment for murder in the first de-
708 gree against these defendants, Buchalter, Weiss, and Capone, together with others, for the murder of Joseph Rosen.

The indictment duly found by the Grand Jury reads:

"County Court of the County of Kings.

"The People of the State of New York,
Plaintiffs,

against

Louis Buchalter, alias 'Lepke',
Emanuel Weiss, alias 'Mendy Weiss',
Harry Strauss, alias 'Pittsburgh Phil',
James Feraco,
Philip Cohen, alias 'Little Farvel',
Louis Capone,
Defendants.

"The Grand Jury of the County of Kings by this indictment accuse the defendants of the crime of murder in the first degree, committed as follows:

"The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloniously and of malice aforethought shot and killed Joseph Rosen, with revolvers.

"William O'Dwyer,
District Attorney.

"A true bill:

John B. Malone,
Foreman."

712 *Opening Statement on Behalf of People*

The defendant Harry Strauss, alias "Pittsburgh Phil," is no longer alive. In so far as the defendants Philip Cohen, alias "Little Farvel", and James Feraco, are concerned, the indictment against them has been severed by this Court, which means they will not be tried together with these defendants at the bar.

The testimony to be given in open court will show you what the Rosen killing is all about.

In the days when Rosen was a partner in the
713 clothing-trucking business the defendant, Lepke, together with certain officials of the Amalgamated Clothing Workers of America, set out to run that industry, to their liking and benefit. To effectuate this, Rosen was one of the clothing-truckers who had to be dealt with and who, as I have already stated, ultimately wound up running a penny candy store.

Rosen, however, was bitter. He complained endlessly against Lepke for his plight. When the Dewey investigation got under way Rosen threatened to get even.

To keep Rosen's mouth shut, it was the de-
714 fendant Lepke who ordered Rosen to get out of town and stay out until the Dewey investigation blew over. Max Rubin, the business agent of Local 240 of the Clothing, Drivers and Helpers Union, and a trusted aide of the defendant Lepke, was sent by Lepke to do this job. It was Max Rubin who delivered Lepke's message and the $200 to Joseph Rosen. It was at Lepke's orders that Rosen left town, but, as you know, Rosen came back.

The Dewey investigation was under way. Word that Rosen was back and again threatening to tell all that he knew, reached Lepke. Then it was

that Lepke ordered the execution of Joseph Rosen; the murder to have a double-barreled effect: An object example to all others who might dare to talk; and to forever end Rosen's threat to go to Dewey.

Mr. Climenko: We respectfully except and ask the Court to instruct the jury to disregard reference to what is not part of an opening.

The Court: Objection overruled.

Mr. Climenko: Exception.

Mr. Turkus: (continuing) At the point of objection I told you that it was Lepke who ordered 716
the execution of Rosen—that the murder was to have a double-barreled effect: An object example to all others who might dare to talk; and to forever end Rosen's threat to go to Dewey.

Events moved with rapidity. Weiss was assigned to handle the details by Lepke; Lepke personally furnishing Weiss with the man to "finger" Rosen, that is, to point out the victim to Weiss. Capone, "Pittsburgh Phil", Strauss, Feraco and "Farvel" Cohen went to work with Weiss. "Sholem" Bernstein was brought in.

The conspirators made their plans. The pre- 717
liminary details, namely, the theft of the murder car and plates and a "drop" or garage for its concealment until needed—were promptly attended to.

The victim was "fingered" to Weiss. Capone schooled Bernstein in the route to be used for the "getaway," driving Bernstein, who was to be the "wheel man," or chauffeur, over the route again and again until Bernstein knew it by heart —from beginning to end—the end being the place of abandonment of the car at the railroad bridge.

The stage having thus been set, the conspirators set out to kill their victim.

718 Briefly (for the details will be given you in the testimony), the victim was followed from his home to the little candy store that Sunday morning, September 13, 1936. Pursuant to plan and agreement, Weiss and Strauss entered for the "kill." Armed with a loaded gun, Feraco stood outside, as the "lookout." Bernstein sat at the wheel of the getaway car, motor running. Weiss and Strauss pumped shot after shot into Rosen. They made sure he would never reach Dewey's
719 office.

Into the waiting getaway car they piled. Weiss and Strauss gave instructions, but Bernstein adhered to the route that Capone had drilled into him the day before. The car, as planned, came to a halt at the railroad bridge, where it was abandoned. Out stepped the four, Weiss, Strauss, Feraco and Bernstein. Past the news stand, up the stairs, and over the bridge across the tracks to the Junius Street side they walked, to keep their rendezvous with Capone and "Farvel" Cohen. There, in wait, were Capone and Cohen —with two automobiles. Weiss passed his gun
720 to one of his confederates, for destruction. The killers separated—Weiss, Capone, Strauss, and "Farvel" Cohen fleeing in one of the waiting cars in one direction, while Feraco and Bernstein fled in the second car in a different direction. Weiss's gun was destroyed—the second gun was flung into the lot, where it was subsequently discovered.

The murder having been successfully completed, Weiss duly made his report to Lepke.

Lepke set out to insure that there would be no arrest and prosecution in the Rosen case—no arrest and prosecution of himself and his ac-

complices. Lepke maintained contact with the movements and happenings in the Rosen investigation. To thwart and frustrate all investigation, Lepke sent witnesses out of the jurisdiction, keeping some out—permitting others to be questioned when he was satisfied that it was safe to do so.

Lepke soon decided that investigations must collapse, if witnesses are not available. In line with this decision, he ordered Rubin to leave town. 722

At Lepke's insistence and direction, Rubin was at times hidden and concealed in the City of New York and at other times shuttled from city to city throughout the nation. This continued until Rubin could no longer stand the continuous flight and concealment. Contrary to Lepke's orders he, too, came back to New York City, to stay.

Three days after Max Rubin had testified before a Grand Jury in New York County, a bullet was fired into the back of his head—

Mr. Barshay: Now I object to that as having absolutely nothing to do with this case. 723

The Court: Objection overruled.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

Mr. Talley: We all join in that motion and exception.

The Court: Yes.

Mr. Turkus: Gentlemen, before the objection of counsel I told you that three days after Max Rubin had testified before a Grand Jury in New York County, a bullet was fired into the back of

724 *Opening Statement on Behalf of People*

his head, which emerged at the bridge of the nose, in close proximity to his eye.

This shooting was directed and planned by the defendant "Mendy" Weiss,—

Mr. Talley: I object. If your Honor please, that has nothing whatever to do with the case, is inflammatory and improper. I move that the District Attorney be directed to refrain from bringing in extraneous matters of that kind. I move for a mistrial and the withdrawal of a
725 juror.

Mr. Climenko: Defendants join in that motion.

Mr. Rosenthal: As to the defendant Capone, this has no connection with him, and I make the same motion as was made by the two other defendants.

The Court: Motion denied.

Mr. Rosenthal: Exception.

Mr. Turkus: (continuing) Gentlemen, before the interruption or objection, I told you that the shooting of Max Rubin was directed and planned by the defendant "Mendy" Weiss, who
726 had learned that Rubin was "talking." Miraculously, however, Rubin was more fortunate than Rosen. Unlike Rosen, Rubin's lips were not sealed. Rubin survived, and will testify at this trial—the trial for the murder of Rosen.

Mr. Foreman and gentlemen of the jury: The proof that you are about to receive in this court of justice will establish to your satisfaction, beyond all doubt, that these defendants, Louis Buchalter (alias Lepke), Emanuel Weiss (alias Mendy Weiss), and Louis Capone, in combination are three of the killers of Joseph Rosen.

For The People of the State of New York, the interests of justice will require a verdict of guilty as charged—guilty of murder in the first degree.

The Court: Is there any opening by counsel for the defendant Buchalter?

Mr. Barshay: Before that I would like to make some motions.

The Court: Yes.

Mr. Barshay: First I move to dismiss the indictment on the ground that, as a matter of law, Mr. Turkus, the Assistant District Attorney, has failed to set forth sufficient facts to connect the defendant Buchalter with the commission of this crime. 728

The Court: Motion denied.

Mr. Barshay: Exception.

Secondly, I object to the opening of the District Attorney on the ground it was highly prejudicial, highly inflammatory, concerning matters not binding on the defendant Buchalter, and containing evidence of other crimes, in violation of law.

The Court: Motion denied. 729

Mr. Barshay: Exception.

Mr. Talley: I make the same motion in behalf of the defendant Weiss.

The Court: Motion denied.

Mr. Talley: Exception.

Mr. Rosenthal: I make the same motion in behalf of the defendant Capone.

The Court: Motion denied.

Mr. Rosenthal: Exception.

The Court: You may open for the defendant Buchalter.

730 *Opening Statement Waived as to Defendants*

Mr. Barshay: We will not open.

The Court: You waive?

Mr. Barshay: Yes.

The Court: Is there any opening for the defendant Emanuel Weiss?

Mr. Talley: No, we waive opening.

The Court: Any opening for the defendant Capone?

Mr. Rosenthal: Opening waived for Capone.

Mr. Barshay: Now, may I request your Hon-
731 or to instruct the jury at this time that the opening of the Assistant District Attorney shall not be considered by them as evidence in this case.

The Court: The jury is so instructed. Evidence comes from witnesses and such exhibits as may go into the case.

Mr. Cuff: I ask your Honor to instruct the jury now that the statement made by the District Attorney in his opening, with respect to the shooting of Max Rubin be entirely disregarded by them as not being a proper part of the opening address in this case, in which there is no mention
732 of the shooting or killing of Max Rubin in this indictment. We are here on one indictment. The District Attorney has gone on an entirely different matter. If Rubin was not killed it was an entirely different issue; it is no part of this complaint at all; it was injected for no other purpose except to inflame the minds of the jury before any evidence is taken at all against the defendant Weiss in this case.

Mr. Turkus: It was an endeavor to kill off a witness in this prosecution; of course it is admissible.

The Court: You do not have to argue it. The previous ruling applies.

Mr. Cuff: Exception.

ESTELLE ROSEN, residing at 345 Wyona Street in the Borough of Brooklyn, City and State of New York, called as a witness in behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Where did you reside in September of 1936? A. 345 Wyona Street.

Q. Are you the widow of Joseph Rosen? A. 734
Yes, sir.

Q. How many years were you married to him? A. About twenty-five.

Q. At the time of his death how old was he? A. Forty-six.

Q. At the time that you married him, Mrs. Rosen, what was his business? A. He was working in the men's clothing line.

Q. Had he been working in that line when he was courting you? A. Yes, sir.

Q. How many years had he been courting you? A. About a year or eighteen months.

Q. For how many years did he remain in the 735
clothing-trucking line? A. He always was in that line.

Mr. Rosenthal: I object on the ground she said "clothing line."

The Court: Objection orverruled.

Mr. Rosenthal: Exception.

Q. Do you recall when your husband went into the candy store business? A. I do.

Q. When was that? A. It was around April or May of 1936.

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Q. Where did he maintain his candy store? A. 725 Sutter Avenue, Brooklyn.

Q. Was he in that business at the time of his death? A. He was.

Q. Are you familiar with the places of employment he had when he was in the clothing-trucking business? A. I think so.

Q. Where did he first work?

Mr. Barshay: Objected to as immate-
737 rial.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Lippman Bros.

Q. Do you know how long he worked there? A. About eleven or twelve years.

Q. Following that where did he work? A. I think for Arensweig Bros.

Q. After that where did he work? A. Louis Miller.

Q. Then what was his next employment? A. He went to the Garfield Express.

738 Q. Do you know how long he worked for the Garfield Express? A. A few years.

Q. Were those all clothing trucking employments you are relating to this jury? A. That is right.

Q. After he left the Garfield Express, where did he go to work? A. He went in business for himself.

Q. Did he return to work for the Garfield Express? A. He did.

Q. Did he ultimately go into business with a man named Kelly? A. That is correct.

Q. What was the business they were engaged in? A. Men's clothing, the same line.

Q. When you say "men's clothing," do you mean the trucking of men's clothing? A. That is correct.

Q. After he had been in business with Kelly for some period of time, did he join the force or join up with some other men? A. Yes, sir.

Q. Who were those men? A. Nat Sobler and Morris Blustein.

Q. After your husband had been in business 740
with those men, under what name did they do business? A. The New York and New Jersey Transportation Company.

Q. Was that for the trucking of clothing? A. That is correct.

Q. After he was in business with those men under the name of the New York and New Jersey Transportation Company, did the business break up?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception. 741

A. He was forced out of business.

Mr. Barshay: I move to strike out the answer.

The Court: Strike it out. Just say whether or not it broke up.

The Witness: It broke up.

Mr. Barshay: Will your Honor instruct the jury to disregard the remark voluntarily made?

The Court: Yes.

Mr. Rosenthal: On behalf of the defendant Capone, may I have a general objection and exception to this entire line of questioning as not binding upon him.

The Court: You mean the last one?

Mr. Rosenthal: All these questions referring to whatever it may be in the garment trade as depicted by Mr. Turkus.

The Court: That would not be in order.

743 Mr. Rosenthal: I make a general objection as to any testimony regarding any connection of Rosen with any trucking business or otherwise in so far as it affects the defendant Capone, as in no wise binding upon him.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

The reason why I do this at this time is so I do not have to interrupt the continuity of Mr. Turkus's examination.

By Mr. Turkus:

744 Q. After this business, the New York and New Jersey Transportation Company, broke up, what did your husband do? He walked the streets.

Mr. Barshay: I object to that.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. What had happened in the New York and New Jersey—what was his status there? A. Partner.

Q. Sometime after the business of the New York and New Jersey Trucking Company broke

up, did your husband secure a position or a job? A. He did.

Q. Who employed him? A. He went back to Cooper.

Q. Cooper, of the Garfield Express? A. Yes, sir.

Q. Did he go back as a foreman? A. Yes, sir.

Q. What was the first name of this Cooper? A. Louis.

Q. And the Garfield Express, was it located in New Jersey? A. That is correct. 746

Q. Do you know the town? A. Passaic, New Jersey.

Q. After your husband worked for Cooper about six or seven months, what happened? A. He was fired.

Mr. Cuff: I object. I object to that as a conclusion of the witness.

The Court: It is purely collateral. I will take it.

Mr. Cuff: I think we should have competent testimony given in a case of this kind. She is not competent to testify to what she is. 747

Q. (The Court) Was his connection discontinued? A. It was.

Mr. Barshay: I respectfully object and move that the answer she volunteered (that he was fired) be stricken out.

The Court: Yes.

Q. Did your husband's connection with Louis

748 Cooper or the Garfield Express end? A. That is right.

Q. Sometime after it ended did you go to the clothing district? A. I did.

Q. About how long after your husband's connection with Louis Cooper ended, did you go to the Garment District? A. Shortly.

Q. Did you go there to meet somebody? A. I did.

Q. Who was it?

749

Mr. Climenko: I object.

The Court: Objection overruled.

Mr. Climenko: Exception.

Mr. Barshay: May we have the date, Mr. Turkus?

The Witness: I do not remember exactly the date.

By the Court:

Q. About the year—about how many years ago?

750

Mr. Barshay: May we have it before 1935 or after 1935?

The Witness: It was after 1935.

Q. Was it when your husband was still alive? A. Oh, yes.

By Mr. Turkus:

Q. Have you given the date as your best recollection? A. It was around 1935.

Q. The question was, Who did you meet there in the clothing district? A. Max Rubin.

Q. Was Max Rubin business agent for the Clothing Drivers and Helpers Union?

Mr. Barshay: Objected to as leading.

Mr. Turkus: If you want me to ask it the way you want it, I will go right ahead.

The Court: You will have to reframe it.

752

Q. Who was Max Rubin? A. Business agent for the Clothing Express Union.

Q. Did you talk to Max Rubin? A. I did.

Q. What did you say to him?

Mr. Barshay: I object to that as not binding on the defendant Buchalter, or any other defendant.

Mr. Turkus: It will be connected.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Talley: I take it an exception made by one counsel applies to all, doesn't it. 753

The Court: Yes.

Mr. Talley: Throughout the trial?

The Court: Yes.

Mr. Rosenthal: An objection may be based on one ground by one counsel and an entirely different ground by another.

The Court: I am not restricting you.

Mr. Talley: Then, if there is another ground, we will have to make a separate

754 objection. My only thought was whatever benefit there may be—

The Court: It simply means one thing. Counsel makes objection to evidence and excepts. Other counsel fail to stand up, but they nevertheless have the advantage of it. But it does not prevent anybody from standing up and making a separate objection upon any other ground.

755 By Mr. Turkus:

Q. You were asked about relating a conversation you had with Max Rubin in the clothing district. A. I went over and I told him my husband lost his job. I went over to Rubin and told him that for no reason at all my husband lost his job, and I would like to see Mr. Cooper.

Mr. Barshay: I object to that as not binding on the defendant.

756 The Court: Objection overruled.

Mr. Barshay: Exception.

Q. (The Court) You would like him to speak to Mr. Cooper? A. Yes, sir.

Q. What else did you say to Rubin, if anything? A. I told him that I—I don't remember the exact words—I would like him to take me to Cooper and ask him why my husband was discharged. He told me— In fact, he took me down to Cooper.

Q. Did you and Max Rubin go some place after you spoke to him? A. Yes, sir.

Q. Where did you go? A. I think it was in the clothing district on Fifth Avenue somewhere.

Q. Who did you see there when you got there with Max Rubin? A. Louis Cooper.

Q. Is that the Louis Cooper connected with the Garfield Express? A. Yes, sir.

Q. Did you there have a talk with Louis Cooper? A. I did.

Q. Was Max Rubin there at the time? A. He was.

Q. What was said? 758

Mr. Barshay: I object to that as not binding on the defendants.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Talley: I except on the ground it is not binding on Weiss.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Will you kindly relate to the jury what was said in that talk between you, Cooper, and Rubin? A. I went over to Cooper and I talked to Cooper and I said, "After all these years my husband worked for you and he was an honest worker, and a good fellow, why did you discharge him?" He said, "Mrs. Rosen, I cannot say anything to you. It is not my fault. Go over and see Lepke." 759

Mr. Barshay: I move to strike out the answer as not binding on the defendant.

The Court: I will take it subject to connection. If it is not connected, the

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Court then will, upon motion, strike it out.

Mr. Turkus: It will be connected by other witnesses.

The Court: Not by this witness.

Mr. Turkus: No.

Q. After Cooper told you to go see Lepke, did you talk to Max Rubin? A. Yes, sir, I asked Max Rubin to take me to see Lepke.

761

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Did he do so? A. He promised me, but he did not. I never did.

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

762 Mr. Barshay: Exception.

Q. Can you estimate how long it was that your husband remained unemployed after he was discharged by Louis Cooper?

Mr. Barshay: Objected to as not binding on the defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. About eighteen months, I would judge.

Q. Now, did he find him another job after eighteen months, as you estimated it?

Mr. Barshay: If your Honor please, she said that conversation took place sometime in 1935.

The Court: I understood around that time.

Mr. Barshay: Now, eighteen months he was out of employment, and now Mr. Turkus is questioning her about another 764
job. I would like your Honor to ask this witness again to speak of the day when she first saw Rubin.

The Court: She said she does not remember; apparently she kept no diary; that is a long time ago.

Mr. Barshay: Exception.

Q. Before objection by counsel I asked you, after your husband remained unemployed, following his discharge by Louis Cooper, for about eighteen months, as you estimate it, did he then 765
get another job? A. Yes, sir.

Q. When he worked for Louis Cooper what position did he hold? A. He was manager or foreman of the Garfield Express.

Q. Did you know his salary? A. I think at that time he was getting either $100 or $125 a week.

Q. And so, after approximately eighteen months of unemployment, he got another job? A. Yes, sir.

Q. This time who employed him? A. Larry Cooper, I think.

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Q. Is Larry Cooper any relation to Louis Cooper? A. He is not.

Q. How long did that job last? A. Just a few months.

Q. Did your husband then remain unemployed again? A. He did.

Q. Did that last for some time? A. It did.

Q. To your knowledge, did he make any effort to reinstate himself in the clothing trucking industry? A. He made every effort.

767 Q. Was he successful? A. He was not.

Q. Was it then that he opened a candy store? A. That is right.

Q. Approximately when did he open the candy store? A. It must have been around April or May of 1936.

Q. Where did he open this candy store? A. 725 Sutter Avenue.

Q. Is that in the Brownsville district of Brooklyn? A. Yes, sir, in East New York.

Q. Directing your attention to the middle of July, 1936, did your husband come home one evening and talk to you? A. He did.

768 Q. You are not permitted to say what he told you, but at that time did he come home with something in his possession?

Mr. Barshay: I object.

The Court: That does not call for information as to whether or not she saw something in his possession. Objection sustained.

Q. That evening, when your husband came home, in the middle of July, 1936, did you see

him in possession of something? A. Yes, sir, he had money in his hand.

Q. How much money did he have? A. $200.

Mr. Climenko: I move to strike out the answer on the ground that it calls for a conclusion; it is not binding on any of the defendants in this case.

The Court: Objection overruled.

Mr. Climenko: Exception.

770

Q. At that time how much did you and your husband have in the bank?

Mr. Barshay: I make the same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. About one dollar and some change.

Q. Does $1.20 refresh your recollection?

Mr. Barshay: I object. 771

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Something around that.

Q. When your husband had this $200 did he talk to you? A. He did.

Q. After that talk what did your husband do? A. He left.

Q. Did he pack up? A. He did.

Mr. Barshay: I object to counsel leading.

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The Court: Objection overruled. This is all leading up.

Mr. Barshay: Exception.

Q. Answer this question yes or no: Did he tell you where he was going? A. Yes, sir.

Q. Did you have a son named Harold? A. I have.

Q. At that time when your husband left your house where was Harold, your son, living? A.
773 Reading, Pennsylvania.

Q. Sometime after your husband left home, did you receive a telephone call? A. I did.

Q. Who was the telephone call from? A. From my husband.

Mr. Barshay: I object to that as not binding on any of the defendants.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. And at that time, Mrs. Rosen, what was the
774 condition of your health?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I was not well.

Q. While your husband was gone who took care of the store? A. I did.

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

775

Q. After you and your husband spoke on the telephone, what happened? A. He came home the next morning.

Q. Did he go back to his store? A. He did.

Q. Directing your attention to the Saturday before your husband was killed, were you in the store? A. I was.

Q. Were you there during the evening? A. I was.

Q. Was your husband there? A. He was.

776

Q. Can you fix approximately the time when your husband went home that night? A. It must have been about 11 or 11:30.

Q. Who closed the store that Saturday night? A. I did.

Q. About what time did you close the store? A. It must have been between 1:30 and 2 o'clock.

Q. In the morning? A. Yes, sir.

Q. That would be early on Sunday morning? A. Yes, sir, that is correct.

Q. Did you ever close the candy store yourself before that Saturday night? A. I did not.

777

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. What is your answer, that you had not? A. That is correct.

Q. Coming back to the Saturday night before he was killed, and referring to the evening, while your husband was in the store did some man come in the store? A. Yes, sir.

Q. Did you see what that man did—yes or no? A. Yes, sir, I did.

778 *Estelle Rosen—For People—Direct*

Q. Tell this Court and jury what you observed this man do.

Mr. Barshay: Objected to as not binding on the defendant.

The Court: This is taken subject to connection. Objection overruled.

Mr. Barshay: Exception.

Q. Tell us what this man who came in the
779 store—

Mr. Rosenthal: (interrupting) I object unless the man is identified.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. He walked into the store in his shirt sleeves and walked to the back of the store. I followed him and he bought a cigarette for a penny, a single cigarette, and he just looked around the place.

780

Mr. Barshay: I object and move to strike out the answer as not binding on the defendant.

The Court: Motion denied. Objection overruled.

Mr. Barshay: Exception.

Q. Was it customary in that neighborhood to sell single cigarettes? A. Yes, sir.

Mr. Barshay: I object.

781

The Court: Objection overruled.
Mr. Barshay: Exception.

Q. Will you tell the jury how far into the store this man walked, the man you described as being in his shirt sleeves?

Mr. Barshay: The same objection.
The Court: Overruled.
Mr. Barshay: Exception.

782

A. Quite a distance in the back of the store. There was a toilet there and he walked in the back of the store.

Q. Where was your husband in the store at that time? A. In the front of the store, at the window; the open window.

Q. Were there single cigarettes at the open window? A. Yes, sir, there were.

Q. This man, who served him, you or your husband? A. I did.

Q. And a short time later did you see that man again? A. Yes, sir.

783

Q. Where did you see him the second time? A. He came in again and bought another cigarette.

Q. On the second occasion was your husband still in the store? A. He was.

Q. Now, on Sunday morning, September 13, 1936—

Mr. Barshay: I move to strike out all the testimony with respect to the unidentified man.
The Court: Motion denied.
Mr. Barshay: Exception.

784 *Estelle Rosen—For People—Direct*

Q. On Sunday morning, September 13, 1936, at some time in the morning did you see your husband? A. Yes, sir, he woke me before he went down.

Q. Do you remember approximately what time that was? A. It must have been about six o'clock or a little later; I don't know.

Q. Did you ever see your husband alive after that? A. I did not.

Q. Did you see his body after he had been
785 shot? A. I don't remember it.

Q. Coming back to the man who was in the candy store that Saturday night, who was that man? A. The man sitting there (indicating in court-room).

Q. Point him out. A. With glasses, right in the front row.

Q. Indicating the defendant Emanuel Weiss, alias Mendy. A. He was not so heavy at the time.

Q. Did he wear glasses? A. He did not.

786 Mr. Barshay: I object to it on the ground that it is not binding on the defendant Buchalter.

The Court: Objection overruled.

Mr. Barshay: Exception.

May I ask your Honor to instruct the jury to disregard that statement with respect to the defendant Buchalter?

The Court: I will instruct the jury at the proper time. Your motion is denied.

Mr. Rosenthal: I make the same objection on behalf of Capone.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Cross-examination by Mr. Barshay:

Q. You remember the first name of the gentleman for whom your husband worked last, Mr. Cooper? A. Louis Cooper.

Q. Is that his name? A. Yes, sir.

Q. And his place of business was in Brooklyn? A. Passaic, N. J.

Q. No, the last Mr. Cooper. A. Larry?

Q. That is one of the men, is that his name, Larry? A. Yes, sir. 788

Q. He had a place of business in Brooklyn? A. Yes, sir.

Q. Was your husband sick at the time he worked for this Larry Cooper in Brooklyn? A. He was not feeling very well from the trouble he went through.

Mr. Barshay: I move to strike out the last part of the answer.

The Court: Strike it out.

Q. Was your husband complaining of a heart condition when he was working for Larry Cooper? A. He did. 789

Q. Was your husband receiving medical treatment at the time he was working for Larry Cooper for a heart condition? A. I don't remember.

Q. Do you know of your own knowledge whether or not your husband had been visiting a physician for any kind of treatment about that time? A. I don't remember.

Q. Do you know whether or not your husband quit voluntarily when he worked for Larry Cooper? A. I don't remember.

790 Q. Did your husband tell you that he could no longer work because of this illness? A. I don't remember.

Q. You know of your own knowledge that Larry Cooper did not discharge your husband, don't you? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. You do not claim Larry Cooper discharged your husband, do you?

791 Mr. Turkus: I object to the form of the question; the widow does not claim anything; she is here as a witness for the People.

Mr. Barshay: She has claimed substantially, on direct examination—

Mr. Turkus: I ask that the remark of counsel be stricken out.

Mr. Barshay: It is not a remark; it is directly in answer to your argument.

The Court: I think the Court excluded any testimony that he was discharged, on the ground that the witness did not know.

792 Mr. Barshay: We did not come to the point of discharge by Larry Cooper; there were two Coopers.

The Court: Did the witness say he was discharged?

Mr. Barshay: No, she did not say anything.

The Court: Then the objection is sustained.

Mr. Barshay: Exception.

Q. Do you know Larry Cooper personally? A. Maybe if I saw him.

793

Q. Did you ever speak to him? A. I think I did.

Cross-examination by Mr. Talley:

Q. You have answered some seven questions asked by counsel with the reply, "I don't remember." Do you mean to tell us you don't remember whether your husband was ill and receiving medical attention in 1936?

794

Mr. Turkus: Objected to as argumentative.

The Court: Objection overruled.

A. I do not remember.

Q. Your answer is you do not remember whether or not your husband was being treated for heart trouble in 1936; is that correct? A. All I know is that he was worrying—

Mr. Talley: I move to strike out the answer as not responsive.

795

Mr. Turkus: I move that it stand. It is responsive.

The Court: Let it stand.

Mr. Talley: Exception.

Q. Do you not remember whether or not he was attending a physician or a physician was attending him, a visiting physician? A. I do not remember that.

Q. You would have been concerned if you thought your husband had heart failure or heart trouble, wouldn't you?

Mr. Turkus: Objected to as to form.

The Court: Sustained as argumentative.

Q. Was your husband in debt at the time the candy store was opened or shortly before that? A. He was.

Q. Do you know how much money he had borrowed at that time? A. No.

Q. Was it $200? A. I beg your pardon?

797 Q. That he had borrowed, that he was in debt for. A. He never borrowed $200.

Q. Did he borrow any money at all at or about the time he opened the candy store? A. He owed some money, certainly, he borrowed money.

Q. He did borrow? A. Yes, sir.

Q. Do you know from whom he borrowed it? A. Yes, sir, I do.

Q. Do you know it had not been paid in 1936, in September? A. It had not been paid?

Q. Yes. A. I don't know anything about it.

Q. You did not know anything about your husband's business then, did you? A. I knew to a

798 certain extent.

Q. Well, did you know he was in debt for money borrowed in 1936—did you know it to that extent? A. He did not borrow no money from anybody from the outside; from no outside people did he borrow money; I know that.

Q. Who did he owe the money to that you say he did owe? A. He just owed it to my sister when we bought the store.

Q. From whom he bought the store? A. When we bought the store.

Q. He bought it from your sister? A. No,

sir; he borrowed the money from her to buy the store.

Q. How much did he borrow from her? A. A few hundred dollars.

Q. How many hundred? A. I don't remember whether one hundred, two hundred, or three hundred; I don't remember.

Q. Did your sister ever tell you how much she had loaned to him? A. No, sir, I don't know.

Q. You don't know whether your sister told you that or not? A. No, sir. 800

Q. Or is it you do not remember? A. I do not remember.

Q. Do you know all that he owed? A. He did not owe anything.

Q. How do you know? A. Because he told me.

Q. He told you he did not owe any money? A. No, sir, not on the outside.

Q. The only person you know to whom he was indebted for money was your sister? A. That is correct.

Q. What is her name? A. Do I have to answer that? 801

Mr. Turkus: I will object to it as improper cross-examination; nothing about that has been brought out on direct.

The Court: No harm in it. Objection overruled.

Mr. Turkus: She may have a reason for not divulging the name of her sister.

Q. Give me the name and address of the sister. A. I don't like to mention her name here.

Q. Whether you like it or not, I am asking you to give me the name. A. Rose Rosenblatt.

Q. Rose Rosenblatt? A. Yes, sir.

Q. Is that Mrs. Rose? A. Yes, sir.

Q. Where does she live now? A. 1864 Eightieth Street.

Q. Was she living there in 1936? A. She was.

Q. When did she lend the money to Mr. Rosen? A. Just before we bought the store.

Q. You say that was something around three
803 or four hundred? A. Something like that.

Q. When you say "something like that," just how much do you mean? A. I don't know exactly.

By the Court:

Q. Were you there? A. When she loaned the money, no, sir, but I was told he went to borrow it because he had no other alternative; we had to do something.

Q. Judge Talley asked you if any money was borrowed, and you said yes, but you did not
804 make it clear whether you knew it. A. I did know he was going there for the money, yes, sir.

Q. He told you? A. Yes, sir; I knew it. I phoned my sister before to tell her he was coming for the money.

By Mr. Talley:

Q. Did your sister take the money out of the bank and give it to him? A. I would not know that.

Q. You mean you would not know it or you do not remember? A. I don't know whether she had it on hand in her bag or whether she had it in the bank.

805

Q. Did she have a bank account in 1936? A. I do not know her private affairs.

Q. Did she tell you she had loaned your husband money? A. That is right.

Q. She told you that much about her private affairs? A. Yes, sir.

Q. Did she tell you how much she had loaned him? A. I do not remember.

Q. Do you know when the loan was made? A. Before the store was bought.

Q. When was the store bought? A. Around 806
April or May of 1936.

Q. How long before April or May of 1936 was the money loaned by your sister to your husband? A. Maybe a day or two before the store was bought.

Q. A few days before? A. Yes, sir, that is correct.

Q. The District Attorney asked you about the night of September 12th when you said you were in the store. A. Yes, sir, that is right.

Q. At what time did you say it was that the defendant Weiss, whom you pointed out, came 807
into the store? A. I do not remember exactly what time, but it was late in the evening, maybe about 9 or 10 o'clock?

Q. Was that the first time he came into the store, between 9 and 10 o'clock? A. That is right.

Q. At what time was the second time you say he came in? A. Not long after, about maybe about half an hour after that.

Q. Did he say anything to your husband? A. He did not.

Q. Was your husband at the window, do you say, the first time he came in? A. Yes, sir.

Q. Was he at the window the second time? A. I don't know where he was the second time; I don't remember.

Q. Did he have a hat on when he came in? A. No, sir.

Q. He was in his shirt sleeves. You mean by that that he had no coat on? A. That is right.

Q. You had never seen him before that night? A. I did not.

Q. That was on September 12, 1936? A. Yes,
809 sir, that is right.

Q. When was the second time that you saw him? A. A half an hour after the first time he came in.

Q. That is all you saw of him that night? A. That is right.

Q. When, after that night, September 12, 1936, did you next see the defendant Weiss? A. Maybe about two years later.

Q. That would be 1938—that is about three years ago. A. 1938 or 1939.

Q. In what month of 1938 or 1939? A. I do not remember.

810 Q. Do you remember it was in 1939? A. Between 1938 and 1939.

Q. You mean either in 1938 or in 1939? A. Yes, sir.

Q. You do not remember what month? A. I do not.

Q. Do you remember what part of the year it was in? A. I do not.

Q. You do remember where it was, don't you? A. Yes, sir, I remember where it was.

Q. Where? A. Up in the Federal Building.

Q. Was that on Church Street? A. I don't know; I was taken there. I don't remember; I don't know where it was.

Q. Do you remember it was in the Borough of Manhattan? A. I think so.

Q. Do you remember it was not in the Borough of Brooklyn? A. It was in the Borough of Brooklyn.

Q. In whose office was it? A. I don't know in whose office.

Q. In whose office was it you saw him? A. I don't know whose office it was.

Q. Was it in the Court House or the Post Office Building? A. The Post Office Building. 812

Q. The Federal Building? A. Yes, sir.

Q. Who was there? A. I do not know who was there.

Q. Who went with you? A. Somebody took me down. I would not know the name of who took me down there.

Q. Did you ever know his name? A. The one that took me down?

Q. Yes. A. I did not—I do not remember.

Q. You do not remember that name? A. No, sir.

Q. Do you remember what floor it was you were brought to? A. I do not. 813

Q. Do you remember any name on the door of the place where you say you saw him? A. I know it was the Federal Building, that is all I know.

Q. At what time of the day or night was it when you went? A. Sometime in the afternoon.

Q. Had you given a description to anybody of the man whom you saw, that you say you saw in his shirt sleeves in your store? A. I did.

Q. Did you describe him as a man about 5 foot 6 inches or 7 inches tall? A. He was taller than 5 foot 6.

Q. Did you describe him as being a man 5 feet 6 inches or 5 feet 7 inches tall? A. I do not remember that.

Q. Did you describe him as being a man weighing about 135 pounds? A. Well, it was not 135 pounds; he was much heavier, but he wasn't as heavy as I saw him today.

Mr. Talley: I move to strike it out as not responsive.

815 The Court: I will allow it to stand.

Mr. Talley: Exception.

Q. My question is, didn't you describe him as a man weighing about 135 pounds? A. No, sir.

Q. At no time to nobody; is that right? A. Absolutely no.

Q. Did you describe him as being a man 5 feet 5 inches or 6 inches—5 feet 6 or 7 inches tall? A. I do not remember that; I think he was taller than 5 feet 6 or 5 feet 7.

Q. My question is, didn't you describe him as being 5 foot 6 or 7 inches tall and weighing
816 about 135 pounds? A. No, sir.

Q. Now the next occasion you saw the defendant Weiss, after you saw him in the Federal Building—and you are agreed he was there? A. Yes, sir.

Q. The second time you saw him was when? A. A few weeks ago.

Q. That is the first time in the Federal Building, you say in 1937, 1938, or 1939? A. 1938 or 1939.

Q. Then you saw him a few weeks ago? A. Yes, sir.

Q. When you say "a few", precisely how many do you mean? A. Maybe about six or seven or eight weeks back.

Q. You do not remember just when it was? A. I do not remember just when it was.

Q. Then you did not see him again until you pointed him out in this court-room? A. That is right.

Q. Where was it you say you saw him the second time several weeks ago? A. When they were picking a jury. 818

Q. In this Court House? A. I don't remember which court house.

Q. You say after the jury began to be picked in this case? A. Yes, sir.

Q. Was it in this room? A. I don't remember which room it was.

Q. You don't remember whether it was in this building or not? A. Oh, it was this building.

Q. You remember that? A. I think it was this building.

Q. You think it was? A. Yes, sir.

Q. (The Court) Was it a larger court-room? 819
A. It was not in this room; I do not think it was this room.

Q. Do you say it was this room or not? A. I do not remember.

Q. Who brought you to the court-room in which the jury was being selected in this building? A. I was brought down by one of Mr. Turkus's men.

Q. Had you been in the District Attorney's office before you came to the court-room? A. I was.

Q. Do you know who the man was who brought you over? A. I do not know.

Q. Was the defendant Weiss pointed out to you in the court-room? A. He was not pointed out; I pointed him out.

Q. Now, that was the only time you had seen him, in the court-room and in the Federal Court House? A. And in the store.

Q. And in the store? A. Yes, sir, that is right.

821 Q. Was there any court session when you went to the court-room some five or six weeks ago? A. Just picking the jury.

Q. Was the Judge on the bench? A. He was.

Q. Did you see the defendants come into the court-room? A. I seen them walk through.

Q. You saw them walk through the court-room? A. Yes, sir.

Q. They walked through with their guards? A. They did.

Q. Did you notice they had handcuffs on them? A. They did not.

822 Q. When they walked through the room? A. I don't think they did; I don't think they did; I don't remember.

Q. Did you see them coming in the room or leaving? A. I saw them coming in the room; I was not there when they left.

Q. Now, on the occasion when you were in the Federal Building, did you point Weiss out as the man you had seen in your store? A. Well, I seen him sitting there and I recognized it was him, only he was heavier than when he was at the time in the store.

Q. Did you tell anybody in the Federal court-

room that that was Weiss and that was the man in your store? A. Yes, sir.

Q. To whom did you point him out? A. To the detective that was with me. I don't remember who they are.

Q. Would you know him if you saw him again? A. I have seen so many, I don't remember.

Q. You would not remember him? A. No, sir.

Q. Have you seen him since you say you pointed Weiss out? A. I did not.

Q. Who was with Weiss when you say you saw him in the Federal Building? A. Nobody was with him; he was just sitting there alone. There were some detectives, or whoever they were, I don't know. 824

Q. Then, you cannot be right in saying nobody was with him if you saw detectives were with him. A. There were quite a number of them in the room.

Q. Why did you say nobody was with him? A. He was brought down; I saw him brought down; two detectives on both sides of him, into the room where I was sitting. I do not know where he was brought from. 825

Q. You were in the room first and Weiss was brought in? A. That is right.

Q. And brought in between two detectives? A. Yes, sir.

Q. He was the only prisoner that was in the room? A. That is right.

Q. Did they tell you they were going to bring Weiss down, so you could see him? A. They did not mention any name; they just asked me that they would bring someone down and if I recognize that man. They mention no names.

826 *Estelle Rosen—For People—Cross*

Q. You knew you were there to recognize or identify somebody? A. That is right.

Q. Do you mean to say that up to that time, between the time you say you saw this man in his shirt sleeves in your store, up to the time you were in the Federal Building, that nobody told you you were brought there to identify Weiss? A. They did not mention any name; they just told me if I could identify somebody.

Q. Can you tell me the name of anybody that
827 was in the room when they brought this man in between two detectives and pointed him out to you? A. No one pointed him out to me; and I don't remember.

Q. You don't remember what? A. I don't remember the name of the people who were in the room with me at the time.

Q. You don't remember the name, even, of the man who brought you down to the Federal Building? A. I do not.

Q. Have you seen him since? A. I have not.

Q. You mean no? A. I don't think so.

Q. You mean you don't remember whether you
828 did or not? A. That is right.

Mr. Turkus: I object to this as having been already answered.

The Court: Objection overruled.

Q. Did any of the detectives or anybody else tell you they wanted you to identify Weiss? A. They did not mention any name to me.

Q. Did they describe the man they wanted you to identify as the one who had come into your store? A. They did not.

Q. Do you mean to say that all they said to

you was: "We want you to come and identify somebody"? A. That is right; it was done before.

Q. You are sure you told us the only places you saw Weiss after the night you say you saw him in the store? A. That is right.

Q. There was an interval of some three years, wasn't there? A. Yes, sir.

Q. Between the time you say you saw him in your store and the time you saw him in the Federal Building? A. Yes, sir. 830

Q. You say you immediately recognized him? A. Only he got heavier.

Q. Did you immediately recognize the man you saw in the Federal Building as the man who came in and bought two single cigarettes in your store on the night of September 12th or 13th, 1936? A. Certainly; that is right.

Q. And the night you saw him in your store, as you say, did he have a collar on? A. Well, it was a collar on, yes, he had a collar on his shirt; he wore a white shirt.

Q. Did he have a necktie on? A. I do not remember. 831

Q. Do you remember he wore a white shirt? A. Yes, sir.

Q. Do you know what kind of trousers he had on? A. No, sir.

Q. He was without a hat, you say? A. Yes, sir.

Q. When you saw him in the Federal Building, how was he dressed? A. He wore a suit, no hat.

Q. Had a coat on? A. Yes, sir.

Q. Did he have a collar and necktie? A. I do not remember.

Q. Did he have a hat on? A. No, sir.

832 Q. You do remember he did not have a hat on? A. That is right.

Q. When you saw him in the Federal Building did he have eyeglasses on? A. No, sir.

Q. You told us exactly what happened when these two detectives brought him into the room in the Federal Building in which you were waiting—you were there? A. I was there.

Q. You were sitting with some detectives? A. Sitting with two more women of the office.

833 Q. Two more women from the Federal office? A. From the Federal office, correct.

Q. When they brought you there, did somebody say to you they were going to bring somebody in for you to identify? A. That is right, they would bring somebody in.

Mr. Turkus: I object to that as having been already answered.

The Court: Objection overruled.

Q. How long were you kept waiting there before they brought the defendant Weiss in? A.
834 A few minutes.

Q. Then did these two men walk in with Weiss in between them? A. Yes, sir.

Q. Was he handcuffed? A. No, sir.

Q. He had nothing on his wrists at all, no chains, or anything else? A. No, sir.

Q. Are you sure about that? A. I am positive.

Q. What did you say when he was brought in? A. I did not say anything; I was sitting. I did not say anything.

Q. You were thinking? A. I said I was sitting.

Q. Did you say anything while he was there? A. No, sir.

Q. Did you just look at him? A. Yes, sir.

Q. While he was there you did not say, "That is the man I saw in my candy store"? A. I did not say anything.

Q. Did he say anything to you? A. No, sir.

Q. He just came in and you just looked at him? A. He came in; they held a conversation; I don't know who spoke to him at the desk, but there was a conversation about a ring and a setting. They were asking him about some setting in a ring and how he paid the tax or something. 836

Q. You kept silent, looking at him? A. Yes, sir.

Q. Then he was taken out? A. Yes, sir.

Q. Then did you say, "That is the man who was in my candy store," or did you say, "I cannot identify him as the man"? A. I said to him, "He looks much heavier. He was not as heavy in the store. I have not seen him in a few years. He was slimmer when he came in my store." 837

Q. Were you in doubt as to whether he was the man? A. If he was slimmer, I would definitely say he was the man, but he put on weight, much weight; he got much heavier than in 1936.

Q. It created some doubt in your mind as to whether you were looking at the right man? A. It did not create. He did not wear his hair over his forehead; he wore his hair the same way, the same as it was in the store.

Q. Is it not a fact that when you saw him in the Federal Building that you said to all the

people who were surrounding you in the room, "I cannot identify that man as the man who was in my store"? Didn't you say that in substance or effect? A. I do not remember saying that.

Q. Why were you brought into this courtroom in the last two or three weeks to look at the defendant Weiss, do you know?

Mr. Turkus: I object.

839 The Court: She said she was told.

The Witness: I was not told.

By the Court:

Q. When was the Federal Building affair? A. It was between 1938 and 1939, about two or three years ago.

By Mr. Talley:

Q. That is the time I have been asking you about. Is it not a fact you then said you could

840 not identify the man that was brought in by two detectives, as the man who was in your shop?

Mr. Turkus: Objected to as already answered.

The Court: Already answered. Objection sustained.

Mr. Talley: Exception.

Q. Didn't you on that occasion in the Federal Building say, when Weiss was brought in and

you were asked if that is the man, didn't you then say, "I do not remember"?

Mr. Turkus: Objected to as already answered.

The Court: Objection overruled.

A. I said I don't remember, yes, because he got so heavy.

The Court: Gentlemen, please do not discuss the case nor let anyone talk to you about it. Keep your minds open. For convenience we will make lunch hour from 12:30 until 1:30. Defendants remanded. 842

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION. TRIAL RESUMED.

ESTELLE ROSEN, resumes the stand for further cross examination: 843

By Mr. Talley:

Q. Mrs. Rosen, after your husband was shot, were you interviewed by detectives? A. I was.

Q. And was that in your home? A. I was taken down to the police station.

Q. Whereabouts? A. I think it was on Miller Avenue.

Q. And did you then describe this man that you say came into your store the night before?

A. For the spur of the moment I didn't remember anything. My mind was a blank.

Q. Is your answer that you did not?

Mr. Turkus: Objected to. It is already answered.

A. I don't remember what happened at that time.

Q. Didn't you tell the detectives when they first interviewed you the man that came into
845 your store on that Saturday night that you are speaking of was a man about five foot six or seven and weighed about 135 pounds? A. At the moment I don't remember, or don't remember anything at all.

Q. Did you tell them anything at all? A. I would not remember.

Q. Did you ever tell anybody at any time that the man that came in your store on Saturday night was a man that answered that description? A. I did talk to Mr. Turkus and Mr. Klein of a man that came into the store and tried to de-
846 scribe him.

Q. And did you describe him as weighing 135 pounds and being five foot six or seven? A. I don't think so.

Mr. Cuff: What is the answer?

The Witness: No, I don't think so.

Q. When did you describe this man to Mr. Turkus? A. Oh, that was long after the murder.

Q. How long after September 13, 1936, which was the date of the killing? A. Well, a few

months later I picked a picture and I said, "That looks like the man that was in the store."

Mr. Talley: I move to strike that out.

Mr. Turkus: I move that it stand she picked a picture.

The Court: Let it stand.

Mr. Talley: Exception. May I have the question read, if your Honor pleases?

The Court: Yes.

(Question read by the reporter.) 848

Q. Did you talk to Mr. Turkus? A. Not at that time.

Q. How long after that time? A. I don't remember how long after.

Q. You do not remember whether it was weeks or months? A. I do not.

Q. Did you testify before the Grand Jury in this case? A. I did.

Q. Do you remember when that was? A. I would not remember that.

Q. Would it refresh your recollection if I said it was in May, 1940? A. I don't know. It was 849 right after the killing.

Q. Right after the killing? A. I don't know how long after but after the killing.

Q. Would it be as long as a year after? A. No. Sooner than that.

Q. Was it six months after? A. I don't remember the exact time but it was a few months after or maybe a week. I don't remember exactly.

Q. What is your best recollection, Mrs. Rosen; was it a week or two after the killing or was it several months after? A. No, it was right after

850 the killing, maybe a few weeks, maybe it was the following week.

Q. How many times did you testify before the Grand Jury? A. Once.

Q. When you testified before the Grand Jury, is it not a fact that you said nothing whatever about this man that came into the candy store on the night before the killing? A. Well, probably the spur of the moment I didn't remember it but after I remembered. After the murder I
851 realized somebody did come in the store and look around.

Q. I am speaking about your testimony before the Grand Jury. Is it not a fact that you made no mention— A. I don't remember.

Q. Of that fact? A. I don't remember.

Q. You don't remember? A. I do not.

Mr. Talley: I ask your Honor for a direction to the District Attorney to produce the minutes of the Grand Jury in so far as this witness' testimony is concerned.

852 The Court: Have you any authority for that?

Mr. Talley: Why, yes, sir. I think the fact that this witness has stated—

The Court: Have you any authority?

Mr. Talley: —she does not ecollect or does not know entitles me to have those Grand Jury minutes for the purpose of cross-examination.

The Court: Have you any authority at law on that point?

Mr. Talley: Not immediate except the

general authority that I am entitled to any papers that may tend to contradict.

The Court: Denied.

Mr. Talley: It is suggested to me the authority is People against Walsh in 262 New York. I did not think authority really would be necessary upon that point. Here is a document that I want to use to cross-examine this witness that is not within my control and is within the control of the District Attorney and subject 854
to your Honor's direction and I submit that I am entitled to it.

The Court: You are not entitled to the Grand Jury minutes, Judge, unless the Court of Appeals—

Mr. Talley: Will your Honor examine the testimony—

The Court: Pardon me. I will finish. Unless the Court of Appeals has made a recent ruling which changes the law as it was always understood.

Mr. Talley: Will your Honor examine 855
the Grand Jury minutes and this lady's testimony particularly in that regard?

The Court: I will be glad to.

Mr. Talley: Will you do so?

Q. You only testified once before the Grand Jury—

Mr. Turkus: Will you wait just a minute until we get the papers out?

Mr. Talley: Certainly.

Mr. Turkus: Thank you, Judge. I put a pencil mark on page 16.

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Mr. Talley: I request that if your Honor finds anything bearing upon this point on which I have interrogated this lady that you know my demand to inspect the Grand Jury minutes is before you and if you do I submit that I am then entitled to them without any question.

The Court: I will be glad to receive any authority of law giving any relaxation of the rigid rule which has always
857 been against it.

Mr. Talley: This is different from an application before trial for inspection of the Grand Jury minutes.

Mr. Turkus: This has to be something contradictory.

The Court: Is this all her testimony?

Mr. Turkus: That is the particular part that—

The Court: You understand the request which is made places a responsibility on the Court of an unusual nature. There
858 are 17 pages of testimony. The Court cannot read a few words that are pointed out but has to read the entire record.

Mr. Turkus: That is all.

The Court: I think it is an unfair burden. The Court should not be required to decide or assume any responsibility on contradictions unless the Court volunteers to do so. I am glad to read the minutes. I am reading them solely for the purpose of seeing if anything occurs to me to which I should direct the attention of the witness on that point but not because the

Court considers that under the law it is under any obligation to do so. I have never known it to be done.

Mr. Talley: May I read to you the citation?

The Court: If you give me the citation, I will read it myself.

Mr. Talley: I ask your Honor to look at 262 New York, 140, at page 149. Read the excerpt.

Mr. Turkus: I believe that is the 860
Walsh case that deals with a statement.

The Court: I read that case and I want to refresh my memory on it.

Mr. Talley: If you will just let me read this citation to you, that is all your Honor should require. Shall I continue?

The Court: If I have got to read the whole testimony of a witness before the Grand Jury several years ago, it means an interruption of the trial and there can be no questioning until I am through. The Walsh case was in 1933. There is a more 861
recent authority, within the last few months. You might look that up and let me know later if you find it. I have a distinct recollection of having read it.

Mr. Talley: Your Honor does not recall the case, do you?

The Court: I did not memorize the name and citation. I read it in the advance sheets. This case has been followed in a number of cases where statements are involved, prior statements. I have never extended it to apply to Grand Jury minutes unless the Court found something in

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the nature of an inconsistency which it was the duty of the Court to have revealed to the jury.

Mr. Talley: I ask your Honor—

The Court: If you stop asking, I can do some reading.

Mr. Talley: I will stop asking until you finish, if you will tell me when you finish.

The Court: It is here. I think you would like to hear it before the jury hears
863 it.

Mr. Talley: I would like to look at it.

The Court: Do you want to come up?

Mr. Talley: Yes.

(Mr. Talley, Mr. Cuff and Mr. Kriendler conferred at the bench with the Court, not within the hearing of the Jury).

(The following occurred at the bench, not within the hearing of the jury).

The Court: The Court offers to read from page 16 of the Grand Jury minutes of October 14, 1936, testimony of Estelle Rosen. Judge Talley objects to it being
864 on the minutes. The Court, of course, sustains the objection so I will continue reading but not for the minutes—

Mr. Talley: May I object to the reading?

The Court: And also state or say to Judge Talley this puts more or less of a burden upon the Court because I have to read every question and answer and if I slip up on anything that I should notice and fail to call attention to it and it is reviewed for the first time in the appel-

late court, it reflects on the integrity of the trial court. I now continue it.

Mr. Talley: I object to the reading of any of the minutes unless the entire testimony of this witness is placed at my disposal, on my motion, and given to me for the purpose of cross-examination.

The Court: For the same reason you do not want this on the minutes which would only be for the discretion of the appellate court, I am quite sure you would 866
not want all this testimony.

Mr. Talley: I certainly do not. I do not want any of it unless I could cross-examine her.

The Court: There is quite a lot of stuff you would not want.

Mr. Talley: Only on identification.

The Court: As far as the record is concerned, that is all.

(The Court continued to read).

Mr. Turkus: May the record show, your Honor, that I handed to you—
867

The Court: The record is complete.

Mr. Turkus: Has it got the date?

The Court: Yes.

Mr. Talley: I ask that the Grand Jury minutes, in so far as they apply to the testimony of this witness, be marked for identification.

The Court: Mark them for identification but as records I don't think they have to be so marked.

Mr. Talley: I want this record to show

they are marked or considered marked in evidence.

The Court: Any court takes notice—

Mr. Talley: Even so, I ask that they be marked for identification, or regarded as marked.

The Court: The Court is not entering into a controversy. The Court said they would be marked. I am calling attention to the fact it is simply superfluous. They do not have to be marked. Mark them.

869

(Grand Jury minutes marked Defendants' Exhibit C for identification).

By Mr. Talley:

Q. Mrs. Rosen, do you know a Major Williams? A. Maybe I do. I don't remember him.

Q. Do you remember ever having met him? A. I don't remember no names.

Q. Were you ever in the office of Major Williams at 90 Church Street, Manhattan? A. I

870 don't remember.

Q. Do you know a detective named Olivera, a Federal agent named Olivera? A. Maybe I do. I don't remember. I don't remember names.

Q. Do you say that you do not know Mr. Olivera and that you do not know Major Williams? A. I didn't say I don't know. I said I don't remember.

Q. That is you do not remember whether you know either one of them, is that right? A. Maybe if I see them I would know them. I don't remember names.

Q. Did you refresh your recollection during

recess as to whether you were or were not at 90 Church Street in the office of Major Williams there? A. I don't remember.

Q. Were you ever brought to any office building, Federal office building, in the Borough of Manhattan, in connection with this case? A. I was.

Q. And was that a building 90 Church Street? A. I do not know where it was located at.

Q. Was it uptown or downtown in Manhattan? A. It was in Brooklyn, I think, the Post Office 872
Building.

Q. I am asking you about 90 Church Street in the Borough of Manhattan. A. I don't remember.

Q. Have you been living in the Half Moon Hotel? A. That is right.

Q. How long have you been living there? A. About three months.

Q. Three months? A. About three months.

Q. That is these past three months? A. That is correct.

Q. And you are not paying your own bills 873
there, are you? A. No.

Q. They are being paid by the District Attorney? A. I do not know who is paying them.

Q. You don't mean that, do you, Mrs. Rosen? A. I do. I do not know who is paying them.

Q. But you know that you are not paying them yourself? A. That is correct.

Q. And you have no idea who is? A. I don't know.

Q. Do you know Mr. Victor Herwitz of the District Attorney's office in New York County? A. I don't remember names.

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Q. Did you ever hear the name before? A. I would not remember.

Mr. Talley: Mr. Herwitz, can I trouble you to stand up, please?

(Mr. Victor Herwitz, Assistant District Attorney, stands.)

Q. Did you ever see this gentleman before? A. I don't remember.

875 Q. You do not remember having seen him? Did you see Mr. Herwitz at any time in 90 Church Street, Manhattan? A. I do not remember.

Q. Do you remember having seen this gentleman who just stood up at any time? A. I don't remember.

Q. Don't remember that? A. No.

Q. Were you not in 90 Church Street— A. I don't remember.

Q. Let me finish, please. A. I am sorry.

Q. —at a time when Mr. Herwitz, who just
876 stood up, was present and at a time when the defendant Weiss was brought in? A. Maybe he was there. I don't remember.

Q. You don't remember that? A. No, I do not.

Q. Do you remember whether Saturday night when you had this candy store was a busy night? A. It was a very hot night, I know.

Q. Isn't Saturday night the best night that you had for business? A. Well, this night was pretty fair. It was not a rush, a store where it was over rushed.

Q. Was it a busy night? A. Not very busy, not at all.

Q. It was busy enough for you to keep the store open until twelve or one o'clock in the morning, wasn't it? A. We usually kept it open until twelve or one o'clock whether we were busy or not.

Q. Did you keep it open every night in addition to Saturday night as late as that? A. Yes.

Q. Were there any other customers in the store on this Saturday night of September 12, 1936? A. There was no one in the store at the time.

Q. Nobody in the store at the time? A. No, 878
just people passing.

Q. Do you remember that, that at the time you saw this man come into the store nobody was there except himself? A. When he came in nobody was there. I was in the store.

Q. Any customers? A. Well, I do not know; not that I remember.

Q. Not that you remember? Were there any customers there the first time he came in, which you said was between nine and ten o'clock? A. No.

Q. Were there any customers there the second 879
time you saw him which was later? A. I would not remember.

Q. You do not remember? That is your answer? A. No.

Q. Were you not in another courtroom besides the one in which this jury was being selected, which is the courtroom on this floor adjoining this room that we are now in, at the time when Mr. Weiss was present? A. Will you please repeat that?

(Pending question read by the reporter.)

880 Mr. Turkus: I object to it. It is ambiguous.

The Court: Overruled.

A. I don't remember. I don't think so.

By the Court:

Q. Before this trial, were you in another courtroom? This trial began in August. A. I was.

881 Q. Before August were you at any time in any courtroom when the defendant Weiss was brought in? A. I was.

Q. That was when he was first arraigned? That would be a long time ago. A. I don't remember. I was in the courtroom but he was not there at the time.

By Mr. Talley:

Q. How long ago was that? A. Well, that was a different trial entirely.

882 Q. How long ago was it that you— A. I do not remember.

Q. Will you let me finish the question? A. I am sorry.

Q. How long ago was it that you were in a courtroom in Manhattan and this defendant Weiss was there at the same time you were? A. Weiss was not there and I don't remember how long ago it was.

Q. When was the last time you saw Weiss before today? A. That was a few weeks ago.

Q. That was in this building? A. In this building.

Q. After this trial had commenced and the jury was being selected, is that right? A. When the jury was to be picked, correct.

Q. Who was it that brought you into the courtroom?

Mr. Turkus: Objected to. That has been gone over before the recess hour--detail.

The Court: I think so.

Mr. Talley: I am entitled to repetition 884
on cross-examination.

The Court: Sustained.

Mr. Talley: I except to your Honor's ruling.

Q. Somebody brought you in?

Mr. Turkus: Objected to. It has been answered.

The Court: Sustained.

Mr. Talley: Exception.

Q. Describe the man or men who brought you 885
into the courtroom that you said was from Mr. Turkus' office?

Mr. Turkus: Objected to. It has been answered before recess.

Mr. Talley: That has not been asked.

By the Court:

Q. Do you know who they were? A. I don't remember. I was brought in but I don't remember who they were.

886 Q. Would you know them again if you saw them? A. I don't remember faces.

Q. Did you pay attention to the faces of them? A. I was very nervous and so. I do not remember.

Q. Please listen. I do not care whether you were nervous or not. The question now is did you pay attention to the faces and names— A. I paid attention—

Q. Did you pay such attention to faces and
887 names so that at this time you can remember them? A. I paid attention but I do not remember their faces.

By Mr. Talley:

Q. Did you tell his Honor just now that your memory is very poor on faces? A. I did not say it was very poor. I said I don't remember that particular day.

Q. What did you say about being poor on faces, to the Court?

888 The Court: She did not say that.

Q. What did you say about faces? A. I don't remember just which detectives or who the men were that brought me in on that particular day.

Q. I am asking you what you said in answer to the Court's question that you remember names but you do not remember faces?

The Court: She did not say that. The answer was specifically related to the men who brought her in.

Mr. Talley: I would like to have it read.

(Testimony in question read by the reporter.)

The Court: That was only a small part of the answer. (To reporter) Read that so the jury can hear.

(Testimony referred to read by the reporter.)

Mr. Turkus: That is referring to the detectives. 890

Mr. Talley: Referring to what?

Mr. Turkus: To the detectives.

Mr. Talley: We will let the jury determine what it is referring to.

The Court: Do you want to know the names of the detectives? Mr. Turkus may be able to give them to you.

Mr. Turkus: I will find out.

The Court: Then give them to Judge Talley.

Mr. Turkus: I will find out.

The Court: Normally a person would not notice a thing of that kind. 891

Q. Will you describe these persons or detectives that brought you into the courtroom since this jury was being impaneled? A. I cannot describe detectives.

Q. Cannot? A. No.

Q. Where did they bring you from, the District Attorney's office? A. They brought me from my home.

Q. From your home? A. Correct.

Q. What time in the morning did they come

to your home to bring you? A. I do not remember.

Q. How did you get from your home to the court house? A. They took me down by automobile.

Q. I do not hear you, madam. A. They took me by automobile.

Q. And you rode with them in the automobile? A. That is right.

Q. How many were there? A. I don't re-
893 member.

Q. Where did they bring you to from your home in the automobile? A. To the court house.

Q. This court house that you are in now? A. I think so.

Q. Did you go to the District Attorney's office with them before you came into the court room? A. I did not.

Q. Did you go there after you had left the court room? A. I did not.

Q. How long was it between the time they called for you at your home and the time that you left them after having been in the court
894 room in which this trial was progressing?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Talley: Exception.

Q. How long were you in the company of these two men on the morning that you were brought into the court room?

Mr. Turkus: Object to the form of the question.

The Court: Sustained as irrelevant.

Mr. Talley: I am not only testing memory; I am testing credibility.

The Court: Mr. Turkus has said he would find out who they were and give you their names.

Mr. Talley: I am not interested in that, if your Honor pleases. I am interested in this witness from the question of both credibility and her power of description.

The Court: It is not a question of 896
power of description; it is a question of circumstances. You might drive an hour in a taxicab, you might drive all day in a taxicab, and see the chauffeur at the wheel and pay no attention to him whatever—

Mr. Talley: I except to your Honor's statement.

The Court: —because there is nothing to make you look at him memorize his face. I might sit here watching the impaneling of the jury day in and day out, 897
listening to many thousands of questions, and yet when the jury is impaneled I might not have had occasion to have fixed the looks of any particular juryman in my mind so as to recognize him when I see him out of court; so I rule that it is irrelevant—

Mr. Talley: I object to the statement of the Court and take exception to it.

The Court: —that it is not a fair test and tends to be misleading and confuse the jury.

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Mr. Talley: I ask leave to put this question—and do not answer this, madam, until the Court rules.

Q. What time intervened between the time the detectives came to your house, brought you to the court room and you left there together?

Mr. Turkus: Objected to. It is irrelevant.

899 The Court: Sustained.

Mr. Talley: Exception.

Q. You told the Court you paid attention to their faces, didn't you? A. I did not.

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Talley: Exception.

Q. Would you know these men again if you saw them?

900

Mr. Turkus: Objected to. It is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

Q. You now remember that you were brought to a court in Manhattan. Do you not remember that?

Mr. Turkus: I object to the form of the question.

Q. Do you? A. I was brought to a court. I don't remember where it was.

Q. Mrs. Rosen, you know whether the court was in the Borough of Manhattan or the Borough of Brooklyn, don't you? A. I don't remember where it was. I know I was taken, that's all, and after all I went with somebody that I could well be taken care of.

Q. Do you say that the court in which you appeared was not a court in the Borough of Manhattan? A. I do not say that. 902

Q. Will you say it was not in the Borough of Brooklyn? A. I do not say that.

Q. Do you know where it was? A. I do not.

Q. Was the defendant Weiss pointed out to you in that court room, wherever it was? A. He was not.

Q. What was the purpose of bringing you to that court room as explained to you?

Mr. Turkus: Objected to, if it please the Court.

The Court: Sustained. 903

Q. Were you told the purpose for which you were brought to this court room that you do not know whether it was in Manhattan or Brooklyn? A. Will you please repeat that again?

The Court: Did they tell you why you were brought to that court?

The Witness: They told me they were bringing in several men if I could identify them, if I know any one of the men.

Q. And did you identify any men that were brought into that court room? A. I did.

904 Q. You did not identify the defendant Weiss, did you?

Mr. Turkus: Objected to. She has answered that he was not there.

Mr. Talley: That is what she says. I am asking her if she identified the defendant Weiss.

Mr. Turkus: Please, sir, I have an objection. That is a tricky question. How can you identify somebody who was not there to be identified?

905

Mr. Talley: I do not ask tricky questions. I leave that to you.

Mr. Turkus: You are doing a pretty good job of it yourself. I object to the question on the ground that it is a tricky question.

The Court: Sustained.

Mr. Talley: Exception.

The Court: Did you see Weiss there?

The Witness: He was not there.

906 Q. Are you sure about that? A. I am positive.

Q. The fact is that you did not identify Weiss in that court room on that day, isn't that right?

Mr. Turkus: Objected to. It is answered that he was not there.

The Court: Sustained.

Q. Going back to the Saturday night in which you saw this man in his shirt sleeves, how long was he in your store the first time he came in? A. Just walked in, bought a cigarette and looked around and walked out.

Q. How long was he in the candy store the second time he came in? A. The same, just a few minutes, walked in, took a cigarette, looked around and walked out again.

Q. That would take about a minute, wouldn't it? A. I suppose so.

Q. What do you think? A. I do not know. It could not take more than a minute or two minutes, maybe three minutes; I don't know.

Q. When this man in shirt sleeves came into your place, did he give you any money? 908

Mr. Turkus: Object to this man as a man who was in his shirt sleeves. He has been identified by this witness.

Mr. Talley: The witness knows who I am referring to as the man who came into the store in shirt sleeves, the man she so described.

The Court: Overruled.

A. He paid for the cigarette.

Q. Whom did he pay, you? A. To me.

Q. How much did he give you? A. A penny. 909

Q. He handed you a penny? A. That is correct.

Q. And took out one cigarette, is that right? A. That is right.

Q. And the second time that he came in, did he give you a penny? A. He did.

Q. He had no business, or transaction, or talk with your husband on either one of these occasions? A. Oh, no.

Q. And your daughter did not wait on him? A. No.

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Q. And he did not give the penny or any other money to your daughter? A. To me.

Q. On both occasions he gave the money to you? A. That is right.

Q. And you gave him the cigarettes, is that right? A. Yes.

Q. Both times? A. That is right.

Q. Did you ever testify before the Grand Jury that this man that you described as being in his shirt sleeves gave your daughter a dollar? A.

911 This man?

Q. The man that you say came in in his shirt sleeves on Saturday, September 12, 1936, to your store? A. No.

Q. Did you ever testify that the man who came into your store on that date, in his shirt sleeves, that you have described, gave your husband one hundred dollars? A. No.

Mr. Talley: Now I ask your Honor to turn over to me the Grand Jury minutes so that I can examine this witness upon this point.

912 The Court: Every question and answer on that point has been read to you by the Court. Upon your objection it was not taken by Miss McGowan as part of the record. Any one of those questions or answers may be read to the jury if you wish and made a part of the record.

Mr. Talley: I wish to have the Grand Jury minutes placed in my hands so that I can cross-examine or continue my cross-examination of this witness with respect to what she did or did not testify to before the Grand Jury.

The Court: You are not entitled to them.

Mr. Talley: I except to your Honor's ruling. I now ask that the question—

The Court: I am asking you, in view of the questions and answers which you know and which have just been read to you, which on your own objection have been kept out of the record, do you now wish them read to the trial jury?

Mr. Talley: Yes, I do. 914

The Court: Very well then.

Mr. Talley: I want to use them on cross-examination. I will read them to this witness if your Honor will give them to me.

The Court: I cannot give you the Grand Jury minutes and you know I have no right.

Mr. Talley: I know nothing of the kind, sir. I submit I am entitled in the process of cross-examination of this witness—

The Court: Take your exception.

Mr. Talley: Particularly in view of her 915 testimony and your Honor having read the minutes, I am entitled to these Grand Jury minutes.

The Court: You are not entitled to the Grand Jury minutes on other points. I am giving you everything on this point.

Mr. Talley: I don't want them on the other points. I want them on this point.

The Court: You are not entitled to handle them and even use what is in the minutes on other points. You can look

over my shoulder at those points and you can see that the Court is accurate in what he read to you and in what you excluded from the record by your objection. You may come right over here and be persuaded that the Court is fair.

Mr. Talley: I don't need to look over the Court's shoulder to know that, sir. I do not like the suggestion. I ask your Honor to read to this jury this witness' answers before the Grand Jury on those two points, as to the question of the man paying her daughter a dollar and on the question of paying her husband a hundred dollars.

917

The Court: How about the rest of it?

Mr. Talley: I don't want the rest of it now. I am stabbing in the dark. You won't give me the minutes. How can I tell whether I want the rest or not?

Mr. Turkus: Let the part be read about the man in the shirt sleeves.

The Court: You are trying to create an impression that the Court is unfair.

918

Mr. Talley: I am doing nothing of the kind and I object to that statement of your Honor.

Mr. Turkus: The money obviously refers to something else.

The Court: How can I pick this out for his discussion? I will read the question to him. There will be an opportunity on your part, Judge Talley, or on the part of any other counsel to object to the reading of the answer to that question, if you desire to object.

919

"Q. You saw him between eleven and twelve and your daughter saw him earlier in the evening?"

That finishes the question. The Court interpolates that the answer is obviously hearsay.

"A. Yes, she saw him walking up and down the block. I want to call your attention to one more thing. He gave my husband one hundred dollars and gave my little girl a dollar."

920

Mr. Talley: That is all I want, sir.

The Court: "Q. Were you there?" Do you wish that?

Mr. Talley: I object. I do not want any more than those two questions that I asked you for.

So that the record on this point may be complete and there will be no misunderstanding about it, I again ask that the testimony of this witness given before the Grand Jury be placed in my hands solely for the purpose of examining this witness upon her testimony.

921

The Court: The record is complete. You will not resume any discussion on that matter.

Mr. Talley: I except to your Honor's refusal.

Mr. Barshay: Will your Honor entertain an objection on my part, sir? I ask your Honor to instruct the jury to disregard that statement, question and answer, with respect to the defendant Buchalter not binding upon him.

The Court: I do, because it is obviously hearsay.

Mr. Barshay: That is right.

The Court: A child comes and prattles something to the mother, the mother tells it to the Grand Jury because there is no lawyer for the defense there to object. It is incompetent as evidence either for the purpose of procuring or supporting an indictment or procuring a conviction
923 upon this trial.

Mr. Talley: I object to that statement of the Court.

Mr. Fischbein: Your Honor, I at this time, on behalf of the defendant Louis Capone, join in the objection on behalf of Louis Buchalter.

The Court: The jury is so instructed.

By Mr. Talley:

Q. Now I ask you, Mrs. Rosen, having heard the testimony read, did you so testify before the
924 Grand Jury?

Mr. Turkus: Objected to. It is hearsay testimony.

The Court: Sustained.

Mr. Talley: Exception. May I call your Honor's attention to the fact there is nothing about hearsay testimony in that. She testified the girl had been given a dollar by this man in shirt sleeves and that the man in shirt sleeves paid her husband a hundred dollars.

Mr. Turkus: There is not a scintilla of

testimony at all adduced from this witness that there was a man in his shirt sleeves paid a dollar or a hundred dollars to anybody

Mr. Talley: The Court just read the testimony.

Mr. Turkus: Not the man in his shirt sleeves. You did not want it read.

Mr. Talley: Will the District Attorney concede so we won't have to call the Grand Jury stenographer here, that she testified 926
in the manner that the Court read to the jury?

The Court: You do not have to concede it. It is part of the record and established.

Mr. Talley: No further questions.

By the Court:

Q. You are positive you did not see any dollar handed to your daughter or a hundred dollars handed to your husband? A. There was money 927
given but not by this man in the shirt sleeves. There is some mistake somewheres.

Q. I am talking about this man. A. No, not this man.

The Court: The jury will decide whether or not there was any confusion.

The Witness: Not by this man, no.

Mr. Talley: I move to strike out the last statement made by the witness.

The Court: Denied.

Mr. Talley: Exception.

928 *Estelle Rosen—For People—Cross*

Mr. Barshay: May I ask your Honor for a direction to the jury that any testimony she gave up to now with respect to any identification of any person is not binding upon the defendant Buchalter?

The Court: Denied.

Mr. Barshay: Exception.

The Court: The jury will be charged at the proper time.

Mr. Barshay: May I ask your Honor to
929 instruct the jury that your denial of my motion is not any indication that the testimony at this time is binding upon the defendant Buchalter but you are merely reserving—

The Court: Gentlemen, the Court charges the jury at the conclusion of the evidence and if the Court starts a policy of charging piecemeal throughout the trial, it will simply confuse the trial of the issue. Cases are not tried that way.

930 By Mr. Barshay:

Q. Madam, when you were told by Mr. Cooper to see Mr. Buchalter, it was at some time in 1935?

Mr. Turkus: Objected to. The witness has already stated that under oath, that she cannot fix the exact time.

Q. About 1935?

Mr. Turkus: Objected to. This is improper re-cross.

The Court: There has been no cross on behalf of Capone. That is the next in order. Mr. Barshay, you will have to wait until counsel for Capone has cross examined.

Mr. Barshay: I have been informed by Mr. Rosenthal with respect to Capone there will be no cross-examination.

The Court: Mr. Rosenthal will have to make his own announcement.

Mr. Fischbein: Your Honor, there is 932
no cross-examination on behalf of defendant Louis Capone. At this time, if your Honor pleases, I respectfully move that this Court instruct the jurors to disregard the testimony of this witness up to the present time on the ground that her testimony is not any way binding upon the defendant Louis Capone.

The Court: The Court is tired of saying that the jury will be instructed at the conclusion of the trial. That must not be asked every minute. 933

Mr. Fischbein: I respectfully except.

Mr. Barshay: Now may I press my question?

Mr. Turkus: As to that question I object. It is improper re-cross examination.

(Pending question read by the reporter.)

The Court: Sustained. We have been all over that.

Mr. Barshay: This is not re-cross, sir. It is further cross.

The Court: No.

Q. At any rate, were you told by Mr. Cooper that Mr. Buchalter at that time was in Europe?

Mr. Turkus: Objected to.

The Court: You may answer that.

A. No, he just told me to go to see him.

Q. Did you go to see him? A. I was promised but was never taken.

Q. Madam, did you personally go to see him?

935 A. I did not.

Q. You knew where his place of business was, did you, Mr. Buchalter's place of business was? A. I did not.

Q. Did your husband tell you it was in the City of New York? A. I do not know where his place of business was.

Q. Did you ask anyone where his place of business was? A. I asked Mr. Rubin. He told me he will take me to see him.

Q. Of your own accord, madam, did you make any effort to go to his place of business? A. I could not go myself.

936

Q. Did you go? A. I tried to.

Q. Mr. Buchalter never refused to see you, did he? A. Oh, no.

Mr. Barshay: That is all.

Mr. Turkus: Thank you.

Mr. Talley: May I have a further question of this witness?

By Mr. Talley:

Q. Mrs. Rosen, do you remember that this was a warm night that you have been speaking of? A. Particular warm night.

Q. And in that neighborhood it is not unusual to see men in their shirt sleeves, is it? A. No.

Q. And this candy store that you had had an open window? A. That is right.

Q. Leading out to the street? A. That is right.

Q. And you saw many people pass that night? A. That is right.

Q. In their shirt sleeves; is that correct? A. That is right.

Q. There was nothing unusual in anybody purchasing one cigarette in your store at a time, 938
w.... there? A. No.

Q. That was quite the common practice of people, buying one cigarette? A. That is right.

Q. In your store, is that right? A. Yes.

Mr. Talley: That is all.

Mr. Turkus: Harry Regenbogen.

Mr. Talley: If your Honor pleases, will your Honor direct that this witness be kept within call until you definitely and finally pass upon the matter of my application for Grand Jury minutes? I am asking you if you will look at 257 N. Y., 939
page 54, Peo. v. Miller, on this subject, because if your Honor changes your ruling I will have to bring her back,—Peo. v. Miller, 257 N. Y. 54, at page 57.

940 *Harry Regenbogen—For People—Direct*

HARRY REGENBOGEN, residing at 451 Miller Avenue, Brooklyn, New York, called as a witness on behalf of The People, and being first duly sworn, testified as follows:

The Court. I am familiar with this, and that is the reason I indulged as I did. The Court has fully complied with this requirement. Proceed.

Mr. Talley: Take an exception to your Honor's ruling on that.

941

Direct examination by Mr. Turkus:

Q. Mr. Regenbogen, did you state to the stenographer that you reside at 451 Miller Avenue, Brooklyn? A. Yes, sir.

Q. Are you married, sir? A. Yes, sir.

Q. And do you live there with your wife and family? A. Yes, sir.

Q. In the year 1936 were you in business? A. Yes, sir.

Q. What business were you in? A. Grocery

942 Q. Speak up. A. Grocery and dairy.

Q. Where did you have your grocery store? A. 725 Sutter Avenue.

Q. And where is 725 Sutter Avenue? A. Sutter Avenue corner Bradford Street.

Q. Is that Brownsville? A. I beg pardon?

Q. Is that what they call Brownsville? A. East New York.

Q. How many years did you have a grocery store at 725 Sutter Avenue? A. Over ten years.

Q. Are you in business now? A. Yes, sir.

Q. What business are you in now? A. Same business.

Mr. Cuff: Objected to, incompetent.

The Court: Overruled.

The Witness: Same business.

Q. Where is your place of business now? A. 772 Miller Avenue.

Q. In September, 1936, was your grocery store at 725 Sutter Avenue, Brooklyn? A. Yes, sir.

Q. On Sunday, September 13, 1936, what time did you open up your grocery store? A. About half past six. 944

Q. In the morning? A. In the morning.

Q. At the time that you arrived at your grocery store at half past six in the morning, did you notice the Rosen candy store? A. Well, the store was closed.

Q. After you opened your store, did you do certain things inside the store? A. Yes, sir.

Q. How long had you had the store open when you heard something? A. It was about fifteen or twenty minutes.

Q. What did you hear? A. I heard some shooting. 945

Q. When you heard the shooting, what did you do? A. I did not pay much attention to it. I did not think it something wrong. I thought it something outside in the street from some machine tires.

Mr. Talley: We do not hear you.

Mr. Turkus: You will have to speak up.

Mr. Cuff: I move to strike out all except, "I did not pay much attention to it."

The Court: Overruled.

Mr. Cuff: Exception.

Q. Tell me very loud. Try to have me hear you over here. What did you do? A. All right.

Q. Talk to me now. Tell me, what did you do when you heard the shooting? A. I was busy with my things inside the ice box and I tried to straighten out everything in the morning to be ready for business.

Q. All right. You said you were near your ice box doing something when you heard a noise like shooting? A. Yes.

947 Q. When you heard the noise like shooting, what did you do? A. Did not do anything.

Q. Did you walk out of your store? A. No, not at all.

Q. When did you go out of your store, how long after the shooting? A. Quite a few minutes.

Q. At that time when you walked out of your store after you heard the shooting, what did you have on you? What did you wear? A. An apron.

Q. What was the color of the apron? A. White apron.

948 Q. When you got out into the street what did you see? A. I did not see anything in the street when I got out. I tried to look around to see something, but I did not see.

Q. Did you see a man in the street?

Mr. Cuff: Object to that as leading.

A. No, sir.

The Court: Overruled.

Mr. Cuff: The answer is in now.

Q. Do you know a man by the name of Louis Stamler? A. Yes, sir.

Q. Did you see him? A. Yes, sir.

Q. Did you talk to Stamler? A. He tried to talk to me.

Q. He started— A. He saw me.

Mr. Fischbein: That is objected to.

The Court: Overruled.

Mr. Fischbein: Anything that was told to him by another party. 950

The Court: Are you questioning the Court?

Mr. Fischbein: Yes, your Honor.

The Court: Is the Court a witness?

Mr. Fischbein: No, I am merely calling your Honor's attention.

The Court: I am calling attention to the fact the Court has ruled upon something other than that. Apparently you do not understand what is being asked.

Q. Go ahead. What were you saying? A. I looked around in the street and I did not see anyone, but Mr. Stamler noticed me and he told me— 951

Mr. Talley: I object.

The Court: He told you something.

The Witness: He told me to look around in the store.

Mr. Talley: I object to what Stamler told him, if your Honor pleases, and move to strike out whatever it was the witness said.

The Court: Strike it out. You want to find out what he did and what he saw?

Mr. Turkus: That is right.

The Court: Get right down to it.

Mr. Turkus: That is what I am trying to do, but the witness does not speak English as properly as some of the counsel do. It may be a little difficult to extract it from him.

The Court: We all understand that.

953 Q. You say you saw Stamler. Did you see him? A. Yes.

Q. Without telling me what he said, did he say something to you? A. He said to me to look—

Mr. Rosenthal: I object.

Q. Don't tell me what he said, but just tell me yes or no: Did you say something to Stamler or did Stamler say something to you? A. As I remember, Stamler said something to me.

954 Q. After Stamler spoke to you, what did you do? A. I turned around to the store.

Q. What store? A. To the candy store.

Q. Did you walk into the candy store? A. No, sir.

Q. Did you look into the candy store? A. I did look when Stamler told me.

Q. When you looked into the candy store what did you see? A. I saw Rosen laying dead.

Mr. Turkus: I ask that this photograph be marked for identification.

955

(Photograph marked People's Exhibit A for identification.)

Q. Mr. Regenbogen, I show you People's Exhibit A for identification and ask you if that is what you saw when you looked into the candy store.

Mr. Rosenthal: I object to that—

A. Yes, sir.

956

Mr. Rosenthal: —if your Honor pleases, upon the ground that that is not the proper method of proving a photograph.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Turkus: People's Exhibit A for identification is offered in evidence.

Mr. Talley: I object to it, if your Honor pleases. I see no possible aid to the jury that that can be. Let me see it, please.

957

Mr. Turkus: You just said you see, it could not be any aid, without looking at it.

Mr. Talley: I say that that photograph is not necessary on the proof of the People's case, is only presented for the purpose of inflaming the jury. There is no question about the man being found dead in that store, in that place, and there is no necessity for putting this photograph on record.

The Court: Overruled. Let me see it.

Mr. Talley: Exception.

The Court: Before it is marked in evidence, counsel for defense will be permitted to cross-examine on this point.

Mr. Talley: Have to see the picture first.

Mr. Turkus: Your witness.

The Court: Wait a minute.

Mr. Barshay: May I know from the Court whether or not this was offered for identification or in evidence?

959 The Court: It was marked for identification. It has been offered in evidence.

In view of the scanty character of the witness's answer in identifying the picture, the Court is permitting counsel for defense to cross-examine as to the accuracy of the identification of the picture before it will be marked in evidence.

Mr. Barshay: Counsel declines to cross-examine on that point. He has an objection addressed—

The Court: How about counsel for

960 Weiss?

Mr. Barshay: —to the introduction of this picture in evidence.

Mr. Talley: I have no cross-examination. The objection remains the same.

The Court: How about counsel for Capone?

Mr. Rosenthal: I have no questions, your Honor.

The Court: (to the reporter) Mark it in evidence.

Mr. Barshay: May I note my exception?

Mr. Talley: Exception.

(People's Exhibit A for identification received and marked People's Exhibit 1 in evidence.)

Mr. Barshay: May I direct an objection to its introduction in evidence?

The Court: I thought you had.

Mr. Barshay: I did not because I was not permitted to.

The Court: The Court has not forbidden you to.

962

Mr. Barshay: I did not say you had, but by virtue of the questions—

The Court: Objections were made and overruled.

Mr. Barshay: I did not make any, sir.

The Court: Then make yours.

Mr. Barshay: I object to it on the ground that it is highly inflammatory and prejudicial.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: Any other counsel object?

963

Mr. Rosenthal: I reiterate the objection on the ground it is in no wise binding upon my client and it is highly inflammatory and prejudicial.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Turkus: May I exhibit People's Exhibit 1 to the jury?

The Court: Pass it around.

Mr. Turkus: The witness is offered for cross-examination.

964 *Louis Stamler—For People—Direct*

Mr. Barshay: No cross on behalf of defendant Buchalter.

Mr. Talley: No cross on behalf of defendant Weiss.

Mr. Rosenthal: None on behalf of defendant Capone.

LOUIS STAMLER, residing at 720 Sutter
965 Avenue, Brooklyn, New York, called as a witness on behalf of The People, and being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Mr. Stamler, what is your business or occupation? A. Tailor.

Q. And how long have you been a tailor? A. About thirty years.

Q. Are you married, Mr. Stamler? A. Married.

Q. And do you live with your wife and fam-
966 ily? A. Yes, sir.

Q. Where do you live? A. 720 Sutter Avenue, Brooklyn.

Q. Is that near Bradford Street? A. Yes, sir.

Q. Mr. Stamler, on Sunday, September 13, 1936, in the morning, do you recall what time you awoke? A. It was about a quarter to seven I woke up and went to my boy's second room to my boy to wake him up.

Q. You will have to speak loudly.

Mr. Cuff: I move to strike out all except "about a quarter to seven" as not responsive.

Q. Did you say that about a quarter to seven you woke up and you went into your son's room? A. To wake him up, he should go to work in the grocery store.

Q. When you were in your son's room waking him up to go to work, did you hear something? A. I heard a shot. I went in back to my room to look out of the window.

Q. When you were looking out of the window, what did you see? A. I saw a machine pull away from the store, the candy store, and a man was 968 laying on the floor all bloody. Then after—

Q. Wait. Slowly. You say you looked out of your window and you saw a machine pull away from in front of the candy store? A. Yes, sir.

Q. And that when the machine got away from the candy store you saw a man lying on the floor all bloody? A. Yes, sir.

Q. When you saw that, did you continue to look at the automobile? A. Then I looked after the machine and took down the license number, plate number, from the machine.

Q. Did you memorize the license number? 969

Mr. Cuff: Object to leading the witness, if your Honor pleases.

A. Yes.

Mr. Cuff: Wait a minute.

The Court: Overruled.

Mr. Cuff: Exception.

Q. Did you tell me, before the objection, that you had memorized the license number?—A. Yes, sir.

Q. Where did you see that automobile go? A. It was turned into Wyona Street.

Q. Turned into Wyona Street? A. Sutter Avenue to Wyona Street.

Q. Is Wyona Street the next street from Bradford? A. Yes, sir.

Q. After you memorized the number and saw where that automobile went, what did you do? A. I dressed myself, put on pants and shoes, and I went down to that candy store.

971 Q. Did you dress quickly. A. Very quick.

Q. When you went downstairs, did you see a grocer there, Mr. Regenbogen, the man that wore the white apron? A. He was outside.

Q. When you went downstairs what did you do? A. I saw the man laying and I started to holler. I was screaming, "Police! Police!" Then I saw a cop come down, was between my street and Wyona Street. He came down and I was calling—

Q. Wait, Mr. Stamler, not so fast. Before you ran out into the street and started to scream,

972 "Police!" did you look into the candy store? A. Yes.

Q. When you looked in the candy store did you see this, People's Exhibit 1 in evidence (handing exhibit to witness)? A. Yes.

Q. After you saw the man did you know who he was? A. I know him.

Q. What was his name? A. Mr. Rosen.

Q. And was he the proprietor of the candy store? A. Yes.

Q. After you saw Rosen, as you have seen him now in this picture, Exhibit 1, did you then

run out into the street? A. Yes, and then back. I could not go in.

Mr. Talley: We cannot hear.

Mr. Turkus: You'll have to talk up.

Q. After you saw Rosen laying there dead in the store, did you run out into the street? A. Yes, I ran out and started to holler, "Police!"

Q. And when you hollered "Police!" did you wave your hands? A. Yes, then I saw the cop coming and I called him, "Quick, quick, there's a murderer." 974

Q. Did the policeman come over to you? A. Yes, he come.

Q. When the policeman came over to you, without telling me what you said to him, did you talk to him? A. Yes.

Mr. Turkus: Will you bring in Patrolman Cappadora?

(Patrolman Guglielmo Cappadora, Shield No. 17733, enters the court-room.)

975

Q. Do you recognize this police officer? A. Yes, this is the one.

Q. Is that the one? How long after you heard the shots was it before you saw the patrolman, can you tell us, about how many minutes? A. It took about five or seven minutes.

Q. After you spoke to this patrolman whom you have identified as Patrolman Cappadora, did you see the patrolman do something? A. (no answer)

Q. Did you see the policeman go into the candy

976 *Louis Stamler—For People—Direct*

store? A. He went to the candy store and looked and then he went somewhere.

Q. Let me ask you this: Did you tell Cappadora, the patrolman, the number of the car you had memorized? A. Yes, I told him.

Q. And did you give him a description of the car? A. Told him it was a dark car.

Q. And did Patrolman Cappadora have you remain at the scene of the shooting until police officials and detectives came there? A. Yes.

977

Mr. Turkus: (to reporter) Will you mark that large photograph for identification?

(Photograph marked People's Exhibit B for identification.)

Q. Mr. Stamler, will you kindly arise, turn around, and look at that picture, People's Exhibit B for identification, and tell me, does that show the Rosen candy store as you saw it that Sunday? Is that it? A. Yes.

978

Mr. Turkus: It is offered in evidence.

Mr. Talley: No objection.

(People's Exhibit B for identification received and marked People's Exhibit 2 in evidence.)

Mr. Turkus: For convenience in handling, I offer a small-sized photograph, People's Exhibit 2 in evidence, to be received as 2-A, that for the convenience of the jury.

(Photograph received and marked People's Exhibit 2-A in evidence.)

Mr. Talley: Is it a duplicate?

Mr. Turkus: Yes.

Mr. Cuff: That is the regular picture and that is the enlargement.

Q. The house that you house that you live in, Mr. Stamler, is it directly across the street from the Rosen candy store? A. Yes, sir. 980

Mr. Turkus: I ask that this be marked for identification.

(Photograph marked People's Exhibit C for identification.)

Q. Mr. Stamler, I show you People's Exhibit C for identification and ask you if that is a picture of the house you live in and the one that you lived in Sunday, September 13, 1936. A. Yes, sir.

981

Mr. Turkus: It is offered in evidence.

(People's Exhibit C for identification received and marked People's Exhibit 3 in evidence.)

The Court: This is the Bradford Street side?

Mr. Turkus: At Sutter Avenue, one side is the Rosen candy store, that is People's Exhibit 2; the other side is the Stamlers' house, across the way. The third picture will clear up the situation.

982 *Louis Stamler—For People—Direct*

Q. This picture, People's Exhibit 3, which is the house that you told us you live in, what floor, will you point your finger on the floor where you lived and point it so the jury can see it? A. (Witness indicates.)

Q. One flight up? A. One flight up.

Mr. Turkus: Indicating one flight up on People's Exhibit 3. I ask this photograph be marked for identification.

983

(Photograph marked People's Exhibit D for identification.)

Q. I show you People's Exhibit D for identification and ask you if that is the view through your window when you look across the street at the Rosen candy store. A. Yes.

Mr. Turkus: It is offered in evidence.

Mr. Talley: Is this as the premises existed in September, 1936?

Mr. Turkus: No, that is the way it
984 was in September, 1936. That is the way it is now.

Mr. Talley: I object to it, if your Honor pleases, solely because it is not a photograph of the structure as it appeared in September, 1936.

Mr. Turkus: The photograph is offered, your Honor, to give the jury the visual picture of what you see through Stamler's window.

The Court: I take it it is to show what opportunity there was to see the car and

the license plate number from that window.

Mr. Talley: That photograph does not indicate that.

The Court: Pardon me?

Mr. Talley: I beg your pardon.

The Court: For the witness to see from his window into the inside of the store across the street and to see the body lying on the floor.

Mr. Talley: That photograph does not 986
show what anybody could see from the other side of the street.

The Court: It shows only the relative placing of the building, doesn't it?

Mr. Turkus: That is all.

The Court: Let me see it.

Mr. Talley: The photograph can show things that the human eye did not see.

The Court: is this photograph taken from the inside of this witness's premises?

Mr. Turkus: Yes.

The Court: Then the frame—

Mr. Turkus: The window frame. 987

The Court: This dark business on the two sides is the window frame?

Mr. Turkus: That is right.

The Court: And the sole purpose is to show the relative location of the two buildings and opportunity to see what he claims to have seen?

Mr. Turkus: That is right.

The Court: So that the details, in so far as they have been changed, are of no consequence in the case?

Mr. Turkus: None at all.

The Court: The picture is received in evidence. Objection overruled.

Mr. Talley: Exception on the ground it is not an accurate representation of the premises as they existed in September, 1936.

The Court: As long as the location of the building has not changed it stays in evidence

989 (People's Exhibit D for identification received and marked People's Exhibit 4 in evidence.)

Q. Mr. Stamler, will you turn around and look at the big picture, People's Exhibit 2? On Sunday was the hat store next to the candy store, that Sunday when Rosen was shot? A. Yes.

Q. And was the grocery store there that Sunday? A. Yes.

Q. Now there are different stores there, is that right, alongside of the candy store? A. Grocery store now.

990 Q. And what kind of a store is the next store? A. Supply store, electric supplies.

Q. Other than that, is the building in the same condition as it was at that time? A. Yes.

Q. Same place? A. Same place, only the stores are changed.

Q. But the candy store is still a candy store? A. Same store.

The Court: (to jury) Don't discuss it, gentlemen; just look at it.

Mr. Turkus: The witness is offered for cross-examination.

The Court: First, on behalf of the defendant Buchalter.

Mr. Barshay: No cross.

Mr. Talley: No cross.

Mr. Rosenthal: No cross.

GUGLIELMO CAPPADORA, Shield No. 17733, attached to Motorcycle Precinct No. 2, New York Police Department, called as a witness on behalf of The People, and being first duly sworn, testified as follows: 992

Direct examination by Mr. Turkus:

Q. Patrolman Cappadora, are you a member of the uniformed police force of the City of New York? A. Yes, sir.

Q. And what is your present assignment? A. Motorcycle Precinct No. 2.

Q. How many years have you been attached to the uniformed police force of the City of New York? A. Going on eleven years. 993

Q. Are you a member of the Honor Legion of the Police Department?

Mr. Cuff: I object to that.

The Court: Overruled.

Mr. Cuff: Exception.

A. Yes, sir.

Q. And is that cross bar that you wear over your shield the insignia of the Honor Legion?

Mr. Cuff: Objected to, incompetent, irrelevant, immaterial.

994 *Guglielmo Cappadora—For People—Direct*

The Court: Overruled.
Mr. Cuff: Exception.

A. Yes.

Q. When did you receive designation to the Honor Legion of the Police Department?

Mr. Barshay: I object to it. It is not competent with respect to this case.
The Court: Sustained.

995 Q. Did you say your present designation is Motorcycle Squad No. 2? A. Yes, sir.

Q. On September 13, 1936, Patrolman Cappadora, where were you assigned or detailed? A. I was working in the 75th Precinct, assigned to Post 20½ and 19, that is Sutter Avenue.

Q. Where is the 75th Precinct located? A. Miller and Liberty.

Q. How many years had you been in that precinct, the 75th? A. About eight years.

Q. On Sunday, September 13, 1936, up to that time how many years had you been in the 75th
996 Precinct? A. A little over five.

Q. On Sunday, September 13, 1936, what was your tour of duty? A. I was working 12 midnight to 8 A. M. in the morning.

Q. And did you say you were working post 20½ and 19? A. Yes, sir.

Q. Had you previously been assigned to those posts before? A. Yes, sir.

Q. How many years had you worked those specific posts? A. For about three years on and off.

Q. On Saturday night when you went to work,

did you pass that candy store shown on People's Exhibit 2 in evidence? A. Yes, sir.

Q. About what time Saturday night did you go by? A. About 10 or a little after.

Q. Did you stop at the candy store? A. Yes, sir.

Q. Did you there see the proprietor, Joseph Rosen? A. Yes, sir.

Q. What was your occasion for stopping there? A. I stopped in and bought a pack of cigarettes. 998

Q. Was that on your way to work? A. On my way going to work.

Q. You say you worked from 12:01 Sunday midnight all the way down to 8 o'clock in the morning on Sunday? A. Yes, sir.

Q. During the early hours of Sunday morning did you have a particular task to do in connection with traffic lights? A. Yes, sir, I was supposed to put them on.

Q. Approximately what time were you supposed to put those traffic lights on? A. Well, they are supposed to be on by 7 in the morning, so I started a little earlier, about a quarter to. 999

Q. Had you previously put those lights out? A. At 3 in the morning.

Q. And you say about a quarter to seven you started to relight the lights? A. Yes, sir.

Q. While you were performing your duty, did something occur on Sutter Avenue which attracted your attention? A. Yes, sir.

Q. About what time was it? A. I would say around 6:50 or 6:55 A. M.

Q. What attracted your attention? A. Well,

1000 I saw—I was walking west on Sutter Avenue, I mean east on Sutter Avenue—

Q. Between what streets were you? A. I was between Wyona Street and Vermont Street on Sutter Avenue.

Q. And were you walking in the direction of that Rosen candy store shown on People's Exhibit 2? A. Yes, sir.

Q. What did you notice? What did you see? Well, I saw a man in the roadway hellering
1001 "Police! Murder! Help!" So he was looking up my way, calling me, so I immediately ran toward him and pulled my gun out to find out what was wrong, and he told me, "In the candy store a man is dead."

Q. Did you look into the candy store? A. Yes, sir.

Q. Did you see the proprietor in there? A. Yes, sir.

Q. Was he dead? A. He was lying on his back. I figured he was dead.

Q. Look at People's Exhibit 1 and tell me if
1002 that is what you saw when you looked in. A. Yes, sir.

Q. Did you talk to the man who was yelling "Police! Murder!"? Did you talk to him? A. Yes, sir.

Q. Do you know his name? A. Yes, sir.

Q. What is his name? A. Stamler.

Q. Was he the witness who preceded you? A. Yes, sir.

Q. Did you question Stamler? A. I did.

Q. After you questioned Stamler, what did you do? A. Well, he gave me the licence number of the car, and he told me how many men—

Mr. Cuff: I object to what he said to him. Move to strike out the answer.

Mr. Turkus: Consented to.

The Court: Sustained.

Q. Tell this jury, after you spoke to Stamler, exactly what you did. Did you get on the telephone? A. I ran into the back, into the candy store, and I got on the telephone and called up T. B.

Q. The jury do not know what T. B. is. A. 1004
The Telegraph Bureau in the Police Department.

Q. That handles all the alarms? A. Yes, sir.

Q. And radio and all other communications for the Police Department? A. Yes, sir.

Q. What alarm did you broadcast? A. I broadcast an alarm for a car L-16-67, and then I immediately, right after that, I notified the station house of what happened.

Q. What did you say in connection with L-16-67, specifically, the number of occupants? A. I says three or more men in a black sedan, and 1005
I gave them the license number and I told them which way they were proceeding at the time.

Mr. Barshay: I move to strike out as not binding on the defendants.

The Court: Overruled.

Mr. Barshay: Exception, sir.

Q. Now will you describe what you saw when you saw this man, the proprietor, on the floor? A. Well, when I walked in the candy store I saw the proprietor laying on his back with his

1006 arms outstretched, his face facing the ceiling and his eyes wide open at a sort of an angle, his feet facing to the right of the door of the candy store and his head facing towards the rear of the toilet on the right, on this side, and a puddle of blood on the floor and a lot of newspapers.

Q. How were his legs? A. Wide apart, straight up.

Q. Did you see where the blood was flowing
1007 from the body, in which direction?

Mr. Barshay: I object to it. It is prejudicial.

The Court: Overruled.

Mr. Barshay: Exception.

A. There was the blood on the left side of his shoulder and arm, and it was going toward the soda fountain to the left of him, quite a puddle of it, and a lot of newspapers in this blood, and there was blood by his back.

1008 Q. After you telephoned the alarm for the automobile with the license number that you gave us and the occupants that you recited, did you keep Mr. Stamler with you? A. Yes, sir.

Q. Did you make any further report? A. Well, I tried to find out—

Q. No, you cannot tell us that. Did you make any further report to anybody in the Police Department? A. I notified the station house and told them what had happened, and immediately, right after that, the radio cars came down, a sergeant who was on patrol and a sergeant who was turning out for the 8 to 4.

1009

Q. Did the sergeant, your commanding officer from the 75th Precinct, respond? A. Yes, sir.

Q. How long after you got there was it before he arrived? A. Oh, about three minutes.

Q. Did you maintain a guard of the premises? A. Yes, sir.

Q. Did you permit anybody to touch anything in the premises? A. No, sir.

Q. Now, at some time after your commanding officer arrived, did an ambulance arrive? A. Yes, sir.

1010

Q. Was there an interne or ambulance surgeon on the ambulance? A. There was.

Q. Did he look at Joseph Rosen? A. Just looked at him.

Q. And what did he respond? A. He said he was D.O.A.

Q. What does "D.O.A." mean? A. "Dead on arrival."

Q. Did the detectives from the Photo Gallery arrive while you were there? A Yes, sir.

Q. Did they take pictures in your presence? A. They did.

1011

Q. Subsequently did the Medical Examiner of the City of New York arrive? A. He did, right after the ambulance doctor arrived.

Q. Until the Medical Examiner arrived, did you permit anybody to touch or disturb anything either in connection with the body or with the premises? A. No, sir.

Q. Can you fix approximately when the Medical Examiner arrived? A. I would say around 8:30, like that.

Q. Did the Medical Examiner make an inspection of the corpse? A. He did.

Q. Did the Medical Examiner order the removal of the body to the Kings County Morgue? A. He did.

Q. Were you there when the body was taken out of that candy store and sent down to the morgue? A. I was.

Q. Did you assist in putting the body into the morgue wagon? A. I did.

Q. Were you ordered to accompany the body to the morgue? A. I was.

1013 Q. Did you do so? A. I did.

Q. What time did the body arrive at the morgue? A. I would say around 11 o'clock.

Q. Did you there see the body of Joseph Rosen in the Kings County Morgue, on a slab? A. I did.

Q. Who identified the body to the Medical Examiner? A. I did.

Q. Do you remember whether Harold Rosen also identified the body? A. I don't get you.

Q. Harold Rosen, did he also identify the body? A. He did.

1014 The Court: What Medical Examiner?
The Witness: Marten.

Q. Were you present when the Medical Examiner, after identification of the body, commenced the autopsy? A. I was.

Q. Did you stay there long? A. Could not stand it, and I walked out.

Mr. Turkus: Your witness.
Mr. Barshay: No cross.
Mr. Rosenthal: No cross.
Mr. Cuff: No cross.

M. Edward Marten, M.D.—For People—Direct 1015

M. EDWARD MARTEN, M. D., residing at 152 Lenox Road, Brooklyn, New York, called as a witness on behalf of The People, and being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Dr. Marten, are you a physician and surgeon duly licensed to practice your profession in the State of New York? A. Yes, sir.

Q. And how many years have you been so licensed? A. About twenty-five. 1016

Q. Have you continuously practiced and engaged in the practice of your profession? A. Yes, sir, I have.

Q. What position do you hold with the Medical Examiner's office of the City of New York? A. I am the Deputy Chief in charge of Brooklyn and Queens Counties.

Q. And is your title known as Deputy Chief Medical Examiner of the City of New York? A. Yes, sir, that is correct.

Q. And how many years have you held that office? A. More than twenty years. 1017

Q. Has the office of the Medical Examiner of the City of New York any connection whatsoever with the District Attorney's office? A. No, sir, it has not.

Q. In the twenty years that you have been attached to the Medical Examiner's office, approximately how many autopsies have you performed? A. More than four thousand.

Q. Now, Doctor, on Sunday, September 13, 1936, did you go to premises 725 Sutter Avenue, a candy store? A. I did, yes, sir.

Q. And did you there see a body in that candy store? A. I did, yes, sir.

Q. Was that body subsequently identified to you? A. Yes, sir.

Q. Who made the identification of the body? A. The son of the deceased, Harold Rosen, also a nephew by the name of Schraner.

Q. And was the body also identified by a police officer by the name of Cappadora? A. That is correct, yes, sir.

1019 Q. Will you tell the Court and jury what you saw in connection with that body that was identified to you, first telling us who identified the body as the corpse of what individual? Is that clear to you? A. His son identified the body.

Q. As that of his father? A. At the Kings County Morgue, and also a man that said he was his nephew. His name was Otto Schraner.

Q. The name of the deceased? A. Was Rosen. May I refresh my recollection from the records?

Q. I have no objection. A. The deceased's full name was Joseph Rosen.

1020 Q. Directing your testimony now to the inspection and findings that you made at the scene of the homicide— A. Yes, sir.

Q. —tell the Court and jury what you saw. A. I saw a man partly clad in what appeared to be the usual, you understand, small candy shop, lying flat on his back. He was partly dressed. The clothing upon him—do you want?

Q. Yes, give us an entire description, loudly, so that everybody on the jury can hear it. A. Yes. I arrived at this place somewhere around 8:45 in the forenoon of that day, on the 13th of September, and found a man lying prone, on his

M. Edward Marten, M.D.—For People—Direct 1021

back, his body being frankly warm, way down to his extremities, that is to say, he had no opportunity to chill, showing that he had been dead but a short time, relatively speaking.

Q. Will you keep your voice up, Doctor? A. Within an hour or two. He had on a white woven Oxford weave white shirt with collar attached. The collar band had the name "Rosen" on it, and a rather blurred, hard-to-make-out laundry mark. It bore the label "Fox Haberdashery, Philadelphia, Reading, and Norris- 1022
town." This shirt was badly bloodstained, saturated with blood in its upper portion in front and back and also the sleeves. There were bullet holes present corresponding to those found in the chest, which I shall afterward describe.

There was a white apron such as you might see butchers wear, a string attached at the upper part of it.

He had a pair of cotton shorts on with a blue stripe. This garment was marked "Peppereli Fabrics."

He had an athletic undershirt, which was also 1023
bloodsoaked, and marked, "B.V.D. for best retail trade." In the back the shirt was torn and had six holes in it. There were two what might have been bullet holes around the left armhole.

He had a pair of Oxford gray serge trousers bearing the following laundry marks: "315—657—162—743—and 5."

He had a black leather belt with a metal buckle.

He had a pair of gray garters with blue and red stripe.

He had two white cotton socks and a pair of brown slippers.

Q. What did the inspection of the body disclose, Doctor? A. The inspection showed a white male adult who measured 5 feet 5 inches. His approximate weight was about 175 pounds. He was stocky, heavily built, with a broad, short stubby nose—I would call it.

He had a little opacity or scarring in one of the eyes. This was on the right side.

Rigidity, that is to say, the rigor that develops after death, was already setting in. It was
1025 fairly marked.

Q. Did you order that body removed, that corpse removed, to the Kings County Morgue? A. I did, yes, sir.

Q. And was it brought to the Kings County Morgue for autopsy? A. Yes, that was the purpose.

Q. And was it there where identification was made of the body? A. That is quite correct.

Q. Will you tell the Court and jury what you did on autopsy and what you found? A. An autopsy is essentially a minute dissection of a
1026 body, the technique of which I won't go into. It comprises essentially an outward inspection with a description of the entire body as to height, weight, any special peculiar marking, and then the technique of the autopsy is very fine, what you are doing at a certain time.

The Court: You don't need that. What did you find as bearing on the cause of death?

The Witness: I just wanted to say that there is a stenographer present at all times while I am doing the work and telling him

what I am doing and what I am finding and making the proper notations on his record. That is essentially the autopsy.

Q. That autopsy is performed in the regular course of your business as Deputy Chief Medical Examiner of the City of New York? A. Yes.

Q. And it is done for a specific purpose? A. To get all the information I can about the body.

Q. Right. Tell us what you found on autopsy. A. Well, I have described the man to you. Now 1028
I go on to tell you what special markings I found on this man.

This particularly was noted, because of the marks of violence on this man, situated—

Q. You will have to speak more loudly.

Mr. Cuff: We cannot hear you, doctor.

The Witness: Excuse me. I will see that you hear me. There were seventeen bullet holes on this man.

Q. Would you call those entrance and exit 1029
bullet holes, doctor? A. There were a total of seventeen, some of which were entrance and others were exit. If you will permit me to refer to my records, I will give you the exact location of each of the wounds, whether they were or were not entrance or exit wounds, and then give you the tract and the corresponding exit and entrance with which to hook up. Merely for purpose of description I label them 1, 2, 3, and so on. No. 1 was an entrance wound. This was situated on the left side of the face at a level that was one-quarter inch below the ear

1030 *M. Edward Marten, M.D.—For People—Direct*

canal on the left side and one and one-quarter inches anterior to it. The ear canal is merely the hole in your auricle or ear. This was on the left side. It was one and one-quarter inches below—one-quarter inch below this line and one and a quarter inches anterior to it, roughly where my index finger is (indicating). That was an entrance. Bullet hole No. 2 was situated on the lower margin of the mandible or lower jaw—here is the lower margin of the jaw—on the
1031 left side, three inches to the left of the midline —that is the position about where my finger is now (indicating).

Q. Was that an entrance? A. Yes, sir. No. 3 was another entrance which was situated on the left side of the neck, two and a half inches to the left of the midline, on the level with the upper border of the Adam's apple—position about here (indicating). No. 4 now was an exit wound. This was situated on the back of the neck one inch below and one inch to the right of the bony prominence on the back known as the occipital protuberance. That is the position
1032 where my finger is now (indicating) one inch to the right and one inch below. That would be a point where my finger is now. Bullet wound No. 5 was an entrance. This was situated on a level with the sternal notch, that is the concavity above the breast bone where my finger is now. It was situated at this level and two and three-quarters of an inch to the left—position where my index finger is now. This tract was probed and it was found that it passed from before backwards and somewhat mesial or toward the midline, making its exit. Bullet

hole No. 6 which was situated at a point that was on the level with the seventh cervical vertebra and two inches to the left of the midline, the lowest one of these, which would correspond to a position right here on me (indicating) was where this bullet was located or this exit was located, two inches to the left of the midline. Bullet wound No. 7 was an entrance wound and this was situated on the anterior portion of the left shoulder, six inches to the left of the mid-sternal line and one and a half 1034
inches above the supra sternal notch. The supra sternal notch, as before described to you, is the concavity on top of the breast plate, and at a level that was one and a half inches above there and six inches to its left, position about here, indicating by my index finger, there was entrance wound No. 7. This was probed and it was found that the tract was from before backwards and toward the midline, making its exit at bullet wound No. 8, which was situated on the back of the shoulder at a point that was on the level with the seventh cervical vertebra and five 1035
inches to the left of the midline. Now I am going to get into a little difficulty.

Q. Use the court attendant. A. Thank you, sir. There is the seventh cervical and five inches to the left of the midline (indicating on court attendant). That would just about make the exit of that former. Bullet wound No. 9 was situated at a point that was six and three-quarter inches to the left of the midsternal line but on a level with the top of the breast bone. Bullet hole No. 10 was an entrance. This was situated in line with the anterior axillary fold

and two inches below the highest point of the pit of the arm, the anterior axillary fold.

Q. Two inches below the highest point of the pit of the arm? A. That is easy enough to fix (indicating on court attendant). The fold is marked out by this muscle here, so it was in line with the fold of the muscle in front and two inches below the highest point of the pit of the arm, about that level. Bullet wound No. 11 was an entrance. It was situated on the
1037 anterior chest wall at a point four and a half inches below the level of the top of the breast plate and six inches to the left of the midline, four and a half inches below, six inches to the left of the midline. Bullet wound No. 12 was an entrance wound that was situated on the outer surface of the left forearm. Anatomically the outer and inner surfaces of the arm are designated in this way. A man is supposed to hold his hands outward like that (indicating). Anything you see in front is anterior and behind is posterior. This was on the posterior surface of
1038 the arm, on the left forearm, and this at the point that was three and three-quarter inches below the oleeranon process, that is simply the funny bone, three and a half inches below that, a position about here (indicating). To this there was a corresponding bullet wound of exit, No. 13, that was found on the inner surface of the forearm at a point four and a half inches below the bend of the elbow. This caused a fracture of one of the bones of the forearm. Bullet wound No. 14 was an entrance wound and was situated on the anterior aspect of the left shoulder on a level with the notch on top of

the breast plate and seven inches to the left of the midsternal line, position about where my finger is now. This particular bullet took a course from left to right and downward, left, right, and down, making its exit bullet wound No. 15 which was situated on the outer aspect of the arm at a point four inches below the acromion process, on this side. That simply means the highest, the overlapping arching bone that is over the shoulder joint is known as the acromion process, and four inches below that, 1040
on the outer side, was bullet hole No. 15. There were found two exit wounds on the back of this man, bullet wound No. 16 which was situated on a level with the first thoracic vertebra, that is this one below the cervical which I described before, and two inches to the left of the midline of the body. Bullet hole No. 17 was situated one-quarter inch to the left of the midline of the back on a level with the lower angle of the scapula or shoulder-blade. Perhaps I can show that better on you.

The Court: That is near enough. 1041

The Witness: As near as I can make out, right there (indicating).

The Court: The cause of death was what?

The Witness: Bullet holes perforating the skull, brain and lungs.

Q. Doctor, on autopsy you traced the tract or course of the bullets, did you not? A. Yes, sir, I did.

Q. Let us take bullet No. 1, as you described, which had its entrance on the left side of the

face, on a level a quarter of an inch below the line of the external auditory meatus on that side and an inch and a quarter anterior to it. That is labeled bullet hole No. 1, entrance? A. Yes, that is right.

Q. See whether that bullet did not come out at bullet hole 4 exit and trace the course for the jury how that bullet went from the left side of the face, how it went through the head, where it came out? A. Yes, sir. Bullet wound of
1043 entrance labeled 1 made its exit at bullet hole No. 4.

Q. Will you put your two fingers, indicating to the jury on your own body, where the bullet entered and where it exited?

The Court: Is there going to be much more of that?

Mr. Turkus: Yes.

The Court: We will resume at the stipulated time.

Mr. Turkus: It will take another half hour at least.

1044

The Court: Ten o'clock tomorrow morning. Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open. The jury may leave.

Gentlemen of the defense, subpoena duces tecum calls for August 4th, what do you want to do about that?

Mr. Cuff: Make it next Monday.

The Court: Change the date.

Defendants are remanded.

(Whereupon an adjournment was taken to Tuesday, October 21, 1941, at 10 a.m.)

M. Edward Marten, M.D.—For People—Direct 1045

Brooklyn, N. Y., October 21, 1941.

TRIAL RESUMED

M. EDWARD MARTEN, a witness in behalf of The People, resumed the stand and testified further as follows:

Mr. Talley: If your Honor please, may I suggest that while any witness is on the stand who is not going to use the big chart (referring to exhibit on easel in back of witness chair), it should be removed? It has no place there unless a witness is going to use it. 1046

The Court. Will it be all right if it is just turned around?

Mr. Talley: Yes.

The Court: I don't know that it does any harm, but we will turn it around.

(Exhibit adjusted to the wishes of counsel.)

Direct examination (continued) by Mr. Turkus: 1047

Q. At the point of recess last night, if my memory serves me right, you had described the seventeen entrance and exit bullet holes in the corpse of Joseph Rosen, and you were indicating the course or track of Bullet No. 1, exiting at Bullet Hole 4; is that correct? A. Yes, sir.

Q. Will you indicate to the jury with your fingers where Bullet Hole No. 1, the entrance bullet, entered the victim, and where it emerged at Bullet Hole No. 4? A. The wound described as being situated in the front of the ear canal

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on the left side. This made exit at Bullet Hole No. 4. This was on the back of the neck one inch below and one inch to the right of the occipital protuberance. Course: left to right, backward, almost a horizontal course.

Q. (The Court) Through the brain? A. No, through the neck.

Q. Will you indicate to the jury the track or course of Bullet Wound No. 2, which was the entrance?

1049

The Court: I take it this is not in any way assuming the order of shooting, but is an arbitrary designation by numerals?

Mr. Turkus: That is true. Dr. Marten indicated that yesterday before recess.

The Witness: No. 2 was an entrance wound which had no corresponding exit wound.

Q. Will you show the jury on your face the entrance of Bullet Wound No. 2?

1050

Mr. Cuff: I object. I think that was all given yesterday by Dr. Marten.

Mr. Turkus: We are describing the course and track of the bullet.

The Court: If I recall correctly, yesterday the location of the points of entrance and exit were stated. I do not recall that the course of the bullets was stated.

Mr. Cuff: We cannot see any materiality, in view of what Dr. Marten says was the cause of death.

The Court: The Court is powerless to

stop it unless it is incompetent and irrelevant.

The Witness: No. 2 had an entrance point at the lower margin of the mandible on the left side, 3 inches to the left of the mid line—on the left side, 3 inches posterior to the mid line.

Q. (The Court) Do you know the course of that bullet? A. The course of that bullet was from left to right, almost horizontally, and imbedded itself in the 4th cervical verterbra 1052

Q. Meaning what? A. The bony spool, from the top downward the 4th in consecutive order, the top of which is No. 1.

Q. At the top of the spine? A. Yes, sir.

Q. Lodged in the back of the backbone? A. No, sir, in the neck, known as the 4th cervical vertebra.

By Mr. Turkus:

Q. I am referring to the entrance which you labeled the entrance of Bullet Wound No. 2 on the lower margin of the mandible, on the left side, 3 inches to the left of the mid line. I want you to follow the course of that bullet and see if it did not go from its point of entrance left to right and upward, passing on the right side through the brain and lodging itself in the plate of bone up in this region (indicating)—the right temporal muscle. A. Yes, sir; I indicated that Bullets 2 and 3 had no corresponding exits. Now, if we were to take No. 2—is that the next? 1053

Q. Yes? A. No. 2 took a course just as you

pointed out, that is to say, from the point of entrance left to right and upward, passed through the skull and into the space on the right side, lacerating the brain, and found on the right side, on the inner side of the plate or bone that is adjacent.

Q. Would that about indicate the entrance and exit— That bullet was imbedded, wasn't it, in the temporal muscle? A. Yes, sir, on the right side.

1055 Q. Did you recover or extract that bullet from the temporal muscle on the right side of the victim when you performed your autopsy? A. Yes, sir.

Q. Have you that bullet in court? A. Yes, sir.

Q. Did you designate that bullet with any marking? A. Yes, sir, I marked it.

Q. What was the marking? A. "M".

Q. Is it "MM"? A. "MM", and another I recovered that I labeled "MR." "MM" was the one that passed through and mushroomed.

Q. The one you recovered that entered in the
1056 jaw and you found lodged in the temporal muscle, having passed through the brain, which bullet is that? A. The mushroomed bullet.

Q. You have designated that mushroomed bullet— A. "MM", I believe.

Mr. Turkus: "MM", recovered on the autopsy, is now offered in evidence.

The Court: As each bullet is marked in evidence, put it in a separate envelope, a manilla envelope.

Mr. Turkus: Is there anything on the envelope you have (addressing witness)

that should not be on that envelope? Can we use it?

The Witness: Yes, sir.

Mr. Turkus: I see no objection to using that envelope that Dr. Marten has. I will pass it to counsel and see if they have any objection.

(Received in evidence and marked People's Exhibit No. 5, without objection.)

1058

By the Court:

Q. Are we to take it that the mushrooming is caused by its going through the skull? A. Yes, sir, any hard substance would cause a mushroom.

By Mr. Turkus:

Q. Now, Doctor, will you refer to the bullet which you have labeled No. 3, the entrance wound? A. Yes, sir.

1059

Q. Did that bullet enter on the left side of the neck about 2½ inches to the left of the mid line of the neck or on a level with the upper border of the thyroid cartilage, which is known as the Adam's apple? A. Yes, sir.

Q. Will you indicate that point of entrance to the jury and tell us where you recovered that bullet? A. This wound was to the left side of the neck about the level of the Adam's apple. It went from left to right almost horizontally across, somewhat backward, and imbedded itself on the side of the 4th cervical vertebra.

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Q. Will you indicate where the 4th cervical vertebra is? A. (Witness indicates on court attendant.)

Q. Having entered the left side of the neck? A. Yes, sir, just about the level of the upper part of his collar (indicating on court attendant).

Q. Did you recover that bullet that lodged itself in the vicinity of the 4th cervical vertebra in the autopsy? A. Yes, sir.

Q. Did you mark that bullet? A. Yes, sir.

1061 Q. How did you designate it? A. This I believe is "MR," yes, sir.

Mr. Tuskus: I offer that bullet in evidence.

(Received in evidence and marked People's Exhibit No. 6, without objection.)

Q. This bullet which you recovered in the region of the 4th cervical vertebra appears to be deformed. Is that the exact condition in which

1062 you found it? A. Yes, sir.

Q. Can you account for that deformity of the bullet, or has that something to do with ballistics? A. I would rather have it explained by the ballistics expert.

Q. At any rate, that bullet, in its course and track, did not hit any bony parts of the body? A. It hit alongside of the 4th cervical vertebra.

Q. (The Court). That is the bone? A. Yes, sir.

Q. Bullet 5 is the wound that you have described as the entrance wound situated on a level with the suprasternal notch and 2¾ inches to the left of the mid line, and that bullet

passed from backward and slightly laterally. Will you explain to the jury whether that wound does not exit at the Bullet Wound No. 6? Show the jury the course and track of that bullet. A. (indicating on court attendant). About here, on a level with the top of the breastbone and made its exit in the back in the hole we call No. 6. No. 6 situated at a point on the level with the 7th cervical vertebra, 2 inches to the left of the mid line, which would be about here (indicating on court attendant).

1064

Q. I asked you through what part of the body did that bullet pass? A. About the base of the neck.

Q. Referring to Bullet Wound No. 7 which you have described as entrance, situated on the anterior portion of the left shoulder, 6 inches to the left of the mid sternal line and 1½ inches above the level of the suprasternal notch, it took a course from before backward, laterally; see if that does not exit at Bullet Wound 8. A. Yes, sir.

Q. Will you indicate to the jury the course and track of that bullet, showing where it entered and exited and the course through the body it took?

1065

Mr. Cuff: I object to this as being pure repetition, and testified to last night. He testified to that bullet.

Mr. Turkus: The Medical Examiner took seventeen entrance and exit wounds, but the course and track of these bullets have never been established. They are an important part of the People's case.

The importance will be seen with the next witness.

The Court: Objection overruled.

Mr. Cuff: Exception.

The Witness: It is on the anterior part of the left shoulder, 6 inches to the left of the mid line, which is about here (indicating). This went backwards through the shoulder, the soft part, and then went laterally toward the center and also on the left of the 7th cervical vertebra, and came

1067 out at a point 5 inches to the left of the middle, about here (indicating). That takes care of 7 and 8 so far.

Q. Now referring to Bullet No. 9, which you have designated as an entrance wound, did that enter the victim at a point that is about $6\frac{3}{4}$ inches to the left of the mid sternal line and on a level with the suprasternal notch? A. Yes, sir.

Q. Did that wound— Will you describe the track of that bullet wound—showing where it

1068 entered and where it exited? A. The track of Bullet 9 perforated the skin only, did not go inside, did not penetrate any member. There was no track, in other words, beyond the skin, of No. 9 bullet.

Q. Will you show the jury where the entrance was? A. The entrance of No 9 was $6\frac{3}{4}$ inches to the left of the mid sternal line on a level with the suprasternal notch, $6\frac{3}{4}$ inches—about here (indicating).

Q. That left no track and no exit? A. No, sir, it just nicked the skin and did not enter the structure of the chest wall any further.

M. Edward Marten, M.D.—For People—Direct 1069

Q. Referring to Bullet No. 10, which you have described as an entrance wound situated in line with the anterior axillary fold, 2 inches below the highest point of the pit of the arm, and show the jury the course and track of that bullet. A. No. 10 at its entrance is in line with the anterior axillary fold on the left side, 2 inches below its highest point, a position about here (indicating), and came through at 16. Now, 16—

Q. Is that on a level with the 1st thoracic vertebra? A. That is situated on a level with the right thoracic vertebra and 2 inches to the left of the mid line. 1070

Q. Will you indicate the exit and entrance wound and tell us the course or track of the bullet? A. That is No. 10?

Q. Yes. A. No. 10, situated in a line with the anterior axillary fold, 2 inches below the highest point of the pit of the arm, made its exit at 16, situated on a level with the 1st thoracic vertebra, a position about where I am putting my finger. That is on the upper part of the chest and 2 inches to the left of the mid line. 1071

Q. Did that bullet in its course or track go around the chest wall? A. Yes, sir, it did.

Q. It did not pass through the chest cavity? A. No, that is correct.

Q. Now, Doctor, will you refer to the wound you have described as an entrance, Bullet Wound No. 11? A. 11 was situated on the anterior chest wall at a point 4½ inches below the top of the breastplate and 6 inches to the left of the mid sternal line, about where my finger is now (indicating).

1072 Q. Did that exit at Wound No. 17? A. It did, yes, sir.

Q. Will you describe where the bullet came out? A. 11 came out 1/4 of an inch to the left of the mid line of the back and at the lower angle of the scapula or shoulder blade—one sometimes refers to it as "wing."

Q. Will you tell the jury the course and track of that bullet entering at Bullet Hole No. 11 and emerging at Bullet Hole 17? A. 4 1/2 inches
1073 below the level of the suprasternal, 6 inches to the left.

Q. You say that came out on the left of the mid line of the back, at a point you call the scapula or wing? A. Yes, sir. It is a triangular bone. That is, went from before backward, almost horizontally across, and came out at that point.

Q. Did it go from left to right? A. Yes, sir.

Q. Did it go through the 4th rib? A. Yes, sir.

Q. Did it perforate the lower margin and the upper lobe of the left lung? A. Yes, sir.

1074 Q. Did it go through the lower lobe and then through that portion of the body at the 6th thoracic vertebra? A. Yes, sir.

Q. And came out as you indicated at that point where the wing is? A. Yes, sir.

By the Court:

Q. When you were asked last night as to the cause of death, I think you mentioned three causes, one perforation by bullet in the brain, another bullet perforation of the lung. What was the third? A. A hemorrhage that attends either one of those would be fatal.

M. Edward Marten, M.D.—For People—Direct 1075

By Mr. Turkus:

Q. Will you refer to Bullet Hole No. 12, which you described as entrance? A. Yes, sir.

Q. Will you show the jury if it did not exit at Bullet Hole No. 13? Show the jury the course and track of that bullet. A. Yes, sir. 12 and 13 correspond, 12 being situated on the olecranon, on the left forearm, at a point 3¾ inches below the funny-bone. That was the entrance.

Q. (The Court) You mean inside the elbow? 1076
A. I mean it was 3¾ inches below the olecranon, a process which we commonly refer to as the funny-bone, on the surface of the left forearm. This had a corresponding exit wound.

Q. Was that on the inner surface of the forearm? A. This is labeled No. 13; this is on the inner surface of the forearm, 4½ inches below the bone of the elbow. Here is the point of the elbow (indicating); 4½ inches below.

Q. So that the bullet that went in at the point indicated exited at the point you indicate and fractured the radius of the arm? A. Yes, sir. 1077

Q. Will you tell the jury what the radius is? A. It is one of the bones of the forearm. The outer one, near the front, is the radius.

Q. Those are bones you can feel if you press your arm with your fingers? A. They can be felt, yes, sir.

Q. You refer to Bullet Hole No. 14, entrance. See if that does not correspond with Bullet Hole No. 15, exit, and describe to the jury the course and track of that bullet. A. Yes, sir, 14 was the entrance wound, it is situated on the anterior aspect of the left shoulder on the left or top of

1078 *M. Edward Marten, M.D.—For People—Direct*

the breast plate, and 7 inches to the left of the mid sternal line, possibly about here (indicating). This had a corresponding exit at 15, which is on the outer aspect of the arm at a point 4 inches below the bony prominence known as the olecranon process, which overlies the shoulder joint; 4 inches below that on the outer aspect, a corresponding exit wound was No. 15.

I think that takes care of them all.

Q. No, there is one more. A. I checked them
1079 as I was going along.

Q. 16 is the exit of Bullet 10? A. Yes, sir.

Q. 17 is the one that corresponds with 11? A. Yes, sir.

Q. Now Doctor, referring now to People's Exhibit 5 and 6, "MM" and "MR", respectively, which you recovered from the body of Joseph Rosen on autopsy and placed where you told the jury, were they delivered by you to the Bureau of Ballistics of the Police Department? A. Yes, sir. I marked them on the envelope at the time.

Q. Do you recall whether you made delivery
1080 to Detective George Dumont of the Ballistics Bureau? A. Yes, sir, that is correct. He initialed them for me.

Q. Did you produce those bullets in court? A. Yes, sir.

Q. Did you receive them from Detective Schaefer of the Bureau of Ballistics? A. I believe I did. I marked them.

Q. Do you recall the date you gave them to Detective Dumont and the day you received them back from Detective Schaefer? I may be able to refresh your recollection. A. It was very near the 13th of the month, on the day of the

autopsy, and they were returned on the 11th month, 7th day, of the 40th year.

Q. That would be November 7, 1940? A. Yes, sir.

Mr. Turkus: The witness is yours for cross-examination.

Defense Counsel: No cross-examination.

By the Court: 1082

Q. Who identified the body to you? A. The son of Mr. Rosen, Harold, and a nephew whose name was Schraner.

Mr. Turkus: And Patrolman Cappadora. That was also testified to.

FREDERICK W. WALSH, Shield No. 809, attached to the 123rd Squad, Police Department, Borough of Brooklyn, City and State of New York, called as a witness in behalf of The People, after being duly sworn, testified as follows: 1083

Direct examination by Mr. Turkus:

Q. Are you a member of the Police Department of the City of New York? A. I am.

Q. How many years have you been attached to the police force? A. Since July 1st, 1931.

Q. What is your present assignment or detail? A. 123rd Squad, detective.

Q. Have you heretofore been associated or de-

tailed with the Ballistics Bureau of the Police Department? A. I was.

Q. For how many years were you connected with the Ballistics Bureau of the Police Department? A. From April 15, 1934, to October 24, 1940.

Q. Some 6½ years? A. Approximately.

Q. While connected with the Ballistics Bureau what were your duties? A. My duties were to make investigations at the scene of shootings,
1085 examine any firearms that may have been recovered to determine whether or not they had been recently discharged, examine clothing for the presence or absence of powder marks. Make a search for spent bullets, and note their location.

Q. Did you receive your training from the commanding officer of the Ballistics Bureau of the Police Department? A. I did.

Q. What is his name? A. Sergeant Harry Butts.

Q. On Sunday, September 13, 1936, were you attached to the Ballistics Bureau? A. I was.

1086 Q. Did you receive an order or command in connection with certain duties to be performed? A. I did.

Q. Did you respond thereto? A. I did.

Q. Did you ultimately go to 725 Sutter Avenue, in the Borough of Brooklyn? A. I did.

Q. Do you recall approximately at what time you arrived there? A. About 7:45 a. m.

Q. Were the premises a candy store? A. They were.

Q. Will you turn that photograph around, please, referring to the picture in back of the

witness chair, People's Exhibit 2 in evidence—is that the place where you went? A. It is.

Q. Do you say you arrived there at approximately what time? A. 7:45 A. M.

Q. Did you there see the body of a man on the floor of that candy store? A. I did.

Q. Do you recall the condition of that body? A. The body was lying on its back face up; there were pools of blood about the body.

Mr. Barshay: I object. This has already been described amply by the other witnesses; it is repetition. 1088

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Continue with your description. A. And the clothing was bloodstained.

Q. I show you People's Exhibit 1 in evidence and ask you if that is an accurate picture of the condition of the body and the candy store at the time you made your inspection. A. It is.

Q. Now, were you present, Detective, when Medical Examiner Marten arrived and made an inspection of the body? A. I was. 1089

Q. Were you there when the Medical Examiner ordered the corpse removed to the Kings County Morgue for autopsy? A. I was.

Q. Did you see the body removed from the premises? A. I did.

Q. Did you see who picked the body up? A. The officer assisted the morgue attendant.

Q. Did you, after the body was lifted from its position where you first saw it, and then brought to the wagon and then ultimately to the

1090 morgue, did you afterwards commence your work? A. Yes, sir.

Q. Will you tell the jury what you found at the scene of the homicide? I would like you to detail the measurements of the place, where you found the bullets. If you cannot do it by memory, refer to any paper that will refresh your recollection. A. May I refer to my notes?

The Court: Yes.

1091 The Witness: I first noted that there was a bullet hole in the west wall 47½ inches up and 90 inches from the north wall at the edge of the mirror, the same penetrated the wall and exited into the adjoining hat store.

Q. Will you look at People's Exhibit 2 in evidence, that large photograph in back of you. Is the west wall as you describe it the wall between the candy store and the hat store called the Pearl-Renee Hat Shop? A. It is.

1092 Q. Will you look at People's Exhibit 1 in evidence and tell us if the wall you refer to is not the wall nearest the telephone booth on People's Exhibit 1? A. It is.

Q. You say there was a bullet hole on that wall in the candy store nearest the telephone booth, that went through the wall and came out in the hat store or hat shop?

Mr. Rosenthal: May I have it clear on the record that I am going to object and that all this testimony is taken subject to connection and subject to a motion

to strike out as far as the defendant Capone is concerned?

The Court: Yes.

Mr. Barshay: And as far as the defendant Buchalter is concerned?

The Court: Yes.

Mr. Talley: And as far as our defendant, Weiss, is concerned?

The Court: Yes.

Q. Is that correct? A. It is. 1094

Q. Did you give the measurements as being, the point of entrance in the candy store as 47½ inches up and 90 inches from the north wall? A. I did.

Q. Is the north wall the wall against which the telephone booth and the various containers of candy and bottles are indicated on People's Exhibit 1, their Coca-Cola exhibit? A. Yes.

Q. So that roughly, then, the back of the store is the north wall? A. Yes, sir.

Q. And the wall connecting the candy store with the Pearl-Renee Hat Shop is the west wall? A. It is. 1095

Q. Did you go into the Pearl-Renee Hat Shop in search of that bullet which went through the candy store west wall? A. I did.

Q. Where did you find that bullet exited? A. It exited at the east wall of the hat shop at a point 41 inches up from the floor, and I recovered that bullet lying on the floor 36 inches from the north wall and 2 inches from the east wall.

Q. Does that indicate that the bullet, after

going through the wall, still carried on? A. Yes, sir.

Q. 36 inches before it dropped, or does it indicate it dropped right alongside of the wall? That is not clear to me. A. It apparently bounced around the room and was found lodged there or it may have been kicked to the position I recovered it in.

Q. What kind of a bullet was it that you recovered in the Pearl-Renee Hat Shop? A. That
1097 was a .38 calibre copper-coated lead bullet, twisted rifling, left six, which I marked "FW 2" for identification.

Q. Was that a .38 calibre special? A. Yes, sir.

Q. Was it a copper-coated bullet? A. Yes, sir.

Q. When you say "left six," does that refer to the rifling? A. Twisted rifling.

Q. Did you mark that bullet with "FW 2" as you just stated? A. I did.

Q. Have you that bullet here? A. Yes, sir.

1098 Q. May I see it? A. (producing) This is "FW 2".

Mr. Turkus: The bullet "FW 2" found under the circumstances related by Detective Walsh I offer in evidence.

(Received and marked People's Exhibit No. 7 in evidence, without objection.)

Q. Referring to People's Exhibit 7, which is that spent bullet, "FW 2", and which you said

"left six", does that mean the twisted rifling was left? A. It was from the left to the right.

Q What does "six" mean? A. That there are six lines of groove marks engraved on that bullet.

Q. Will you tell the jury what "rifling" is? A. "Rifling" is the result of a bullet or projectile having been fired from a firearm, the twisted rifling having been put there by the manufacturer.

1100

By the Court:

Q. There is rifling in a gun made for the purpose of obtaining greater speed of the bullet when it leaves the gun? A. It does.

Q. By looking down the barrel of a gun, is that visible? A. Yes, sir, it is.

By Mr. Turkus:

Q. Isn't it a scientific fact that every barrel has a rifling that leaves an impression on the bullet, leaves the impression on that bullet alone; in other words, that any gun which fires a bullet will leave a peculiar characteristic of the bullet which has remained in that gun? A. It is true of rifles and firearms. 1101

Q. That is also true as to fingerprints? A. Yes, sir.

Mr. Climenko: I object to that as calling for a comparison. You have not qualified him on that.

The Court: The question of rifling is quite apart from the question of individ-

1102 *Frederick W. Walsh—For People—Direct*

ual characteristics of firearms. I want the jury to understand—is this a plain statement: The purpose of rifling the inner surface of the rifle or gun barrel is to spin the bullet and thereby produce more velocity?

The Witness: That is true.

Q. That is, if the rifle barrel is not rifled or if the gun barrel is not rifled, the bullet shoots
1103 out and simply sails in the air? A. Turns end over end.

Q. But when it spins it maintains its true course afterward? A. That is correct.

Q. Then the rifle mark on the bullet, as I take it, is caused by the resistance of the fire on the inner side or surface of the barrel by the lead or copper or other covering on that bullet, thereby leaving a mark? A. Yes, sir.

Q. Which is indicated in precisely the opposite direction by any scar it leaves on the bullet? A. In the same direction.

1104 By Mr. Turkus:

Q. This bullet which was recovered in the hat shop, initialed "FW 2", People's Exhibit 7 in evidence, was that weighed? A. It was.

Q. And what was its weight? A. 155.6 grains.

Q. Did you find another bullet at the scene of the homicide? A. Yes, sir.

Q. What was the next bullet you found? A. I found a bullet imbedded in the floor at a point 7 inches from the right shoulder of the deceased. This was 52 inches from the west wall and 74 inches from the north wall.

Q. What kind of a bullet was it? A. That was a .38 calibre Special, half metal case bullet, left six, which I marked "FW 1."

Q. You say you pried that out of the floor at a point 7 inches from the right shoulder of the corpse? A. Yes, sir.

Q. Would that be in the vicinity of that Coca-Cola box shown on People's Exhibit 1? A. It would.

Q. Did you put a mark on the bullet which you pried out of the floor? A. I did. 1106

Q. How did you mark or designate that bullet? A. "FW 1."

Q. Did you weigh that bullet? A. I did.

Q. What was its weight? A. 175.2 grains.

Q. Was that a different type of bullet you referred to from People's Exhibit 7 in evidence, the spent bullet which you marked "FW 2," as half-metal case bullet, am I correct? A. The first bullet was copper coated.

Q. The second bullet you speak of, was that a half metal case bullet? A. Half metal case bullet. 1107

Q. That is "FW 1"? A. Yes, sir

Q. Is that a different type of ammunition, that copper-coated bullet? A. The bullet itself is made of different construction. It has a cupro-nickel jacket over the nose of the bullet, half way to its face, and it is termed, half-metal case.

Q. Cupro-coated, is that a fine veneer of copper over the lead bullet? A. Yes, sir.

Mr. Turkus: I offer the bullet, "FW 1" in evidence.

(Received without objection and marked People's Exhibit 8 in evidence.)

By the Court:

Q. What is cupro-nickel? A. A composition of nickel and copper used in the metal covering for manufacturing bullets.

Q. How do you spell it? A. Cupro-nickel.

By Mr. Turkus:

Q. Referring to People's Exhibit 8, that half-metal case bullet, is that jacket that goes or fits
1109 over the lead, is that what makes it known as half-metal case? A. It has a cupro-nickel jacket that fits half way down over the nose of this bullet.

Q. Will you tell the jary now where you found the next bullet? A. I found a bullet hole in the floor at a point 85½ inches from the north wall and 53 inches from the west wall beneath the body from which I recovered a bullet.

Q. You recovered the bullet directly beneath the body at the measurements you have indicated? A. Yes, sir.

1110 Q. What kind of a bullet was that? A. A .38 calibre special copper-coated lead bullet, left deformed, which I marked "FW 3."

Q. Did you weigh that? A. Yes, sir.

Q. What did it weigh? A. 154.6 grains.

Mr. Turkus: I offer the bullet in evidence.

(Received and marked People's Exhibit 9 in evidence, without objection.)

The Court: See that each bullet is in

its proper envelope before another one is passed around.

Q. In addition to People's Exhibit 9, "FW 3," which you pried out from the floor underneath the body, did you find another bullet beneath the body embedded in the floor? A. I did.

Q. Tell the jury about that. A. A bullet hole in the floor beneath the body, 82 inches from the north wall and 58 inches from the west wall.

Q What kind of a bullet was that? A. .38 calibre Special, copper-coated lead bullet, left deformed, which I marked "FW 4." 1112

Q. Did you weigh that bullet? A. Yes, sir.

Q. What did it weigh? A. 152.2 grains

Mr. Turkus: I offer that bullet in evidence.

(Received and marked People's Exhibit 10 in evidence, without objection.)

Q. In addition to these two bullets which you pried out of the floor, underneath the body, People's Exhibit 9 and 10, which are marked "FW 3" and "FW 4," did you find still another bullet beneath the body which you pried out of the floor? A. Yes, sir. 1113

Q. Will you tell the jury where that bullet was? A. That bullet was at a point 78½ inches from the north wall and 57½ inches from the west wall, imbedded in the floor.

Q. What was it? A. A .38 calibre Special half-metal case bullet, left deformed, marked "FW 5."

Q. Did you weigh that bullet? A. Yes, sir.

1114 *Frederick W. Walsh—For People—Direct*

Q. What was the weight? A. 155.2 grains.

Mr. Turkus: I offer that bullet in evidence.

(Received and marked People's Exhibit 11 in evidence, without objection.)

Q. In addition to those three, People's Exhibits 9, 10, and 11, which you have in court, "FW 3", "FW 4", and "FW 5", respectively,
1115 did you find still another bullet imbedded in the floor underneath the body? A. I did.

Q. Where did you find that bullet? A. That was at a point 84½ inches from the north wall and 61 inches from the west wall, imbedded in the floor.

Q. What type did you recover there? A. A .38 calibre Special, half-metal case bullet, left deformed, which I marked "FW 6."

Q. Did you weigh that bullet? A. I did.

Q. What was its weight? A. 156.5 grains.

1116 Mr. Turkus: I offer that bullet in evidence.

(Received and marked People's Exhibit 12, without objection.)

Q. How was that candy store floor covered, and describe how you pried these bullets out of the floor in the condition they were in when you pried them out. A. The floor was covered with two types of linoleum, and the bullets were recovered imbedded straight into the wood beneath the linoleum.

Q. Did you take those bullets out of the wooden floor beneath those two layers of linoleum? A. Yes, sir.

Q. Was there any blood on the bullets? A. There was some blood over the bullets, because I removed the clot from above this in order to locate them.

Q. Were you there when the body was lifted up from its position on the candy store floor? A. Yes, sir, I was.

Q. Did you see the position of the body before 1118
it was lifted up from the floor and removed to the morgue? A. I did.

By the Court:

Q. What method did you use in gouging or cutting out these bullets from the floor to prevent further mutilation? A. I cut around into the floor with a pen knife without touching or scarring further.

By Mr. Turkus: 1119

Q. Referring to the four bullets you dug out of the floor underneath the body, People's Exhibits 9, 10, 11, 12, designated by you as "FW 3," "FW 4," "FW 5," "FW 6," will you tell the jury whether or not two of the bullets are not copper-coated bullets and the other two half-metal case bullets? A. Exhibits 9 and 10 are copper-coated lead bullets, and Exhibits 11 and 12 are half-metal case bullets.

Q. Those four bullets, the two copper-coated and the two half-metal case, were pried out from

1120 the floor in the manner described to the jury. Were those direct shots? A. They entered directly into the floor.

Q. Having been present when the body was lifted up, and having done the things you described to the jury, can you say with reasonable certainty that the victim was flat on his back when those four bullets went through his body into the floor as direct hits? A. I cannot.

Q. Can you say with reasonable certainty the
1121 four bullets, the two copper-coated and the two half-metal case, Exhibits 9, 10, 11, and 12 in evidence, were direct hits through the body into the floor? A. I cannot.

Q. Describe the course of those bullets. A. Those bullets were fired directly into the floor. Whether they passed through the body or not, I am unable to tell.

Q. You found blood on them, didn't you?

Mr. Barshay: I object. He is trying to impeach his own witness.

1122 The Court: I can understand the objection. There was a pool of blood on the floor, so the presence of blood on the bullet would not mean it passed through his body. The jury will listen to argument on that point. The witness says he cannot say as an expert.

By Mr. Turkus:

Q. As I understand it, you were there when the body was lifted off the floor? A. I was.

Q. Now, in prying out those bullets, did you

say there was coagulated blood there? A. There were pools of blood covering these bullet holes beneath the body.

By the Court:

Q. Were there bullet holes in the wood, directly into the wood, or did they go laterally into the wood? A. Directly into the wood.

Q. Laterally would mean they ran somewhat sidewise. A. Either one side or the other. 1124

Q. In other words, it was a downward shot? A. Yes, sir.

By Mr. Turkus:

Q. Referring to the four bullets recovered from underneath the body, they were not angular shots, were they?

Mr. Climenko: I object to that as repetition.

The Court: He has just explained. He said they were directly down into the floor from above. 1125

Mr. Turkus: I ask that this revolver be marked for identification.

(Received and marked People's Exhibit E for identification.)

Q. People's Exhibit E for identification, was that People's Exhibit E for identification brought to the Ballistics Bureau of the Police Department? A. It was.

1126

Q. Do you recall the day it was brought there? A. September 14, 1936.

Q. Was it brought there by Detective King of the 75th Squad? A. It was.

Q. Did you receive the gun from Detective King at the direction of your commanding officer, Sergeant Butts of the Ballistics Bureau? A. I did.

Q. Did you turn it over to Sergeant Butts for comparison purposes? A. I did.

1127

Mr. Turkus: The witness is offered for cross examination.

Defense Counsel: No questions.

GEORGE V. DUMONT, Shield No. 1631, attached to the Brooklyn Homicide Squad, Police Department, Borough of Brooklyn, City and State of New York, called as a witness in behalf of the People, after being duly sworn, testified as follows:

1128

Direct examination by Mr. Turkus:

Q. Are you a detective in the employ of the Police Department of the City of New York? A. Yes.

Q. How many years have you been attached to the Police Department of the City of New York? A. For the past 18½ years.

Q. How many years have you been in the Detective Bureau? A. About 8½ years.

Q. How many years have you been assigned as

a detective to the Ballistics Bureau? A. I was there about 8½ years, I take that back.

Q. Your present assignment, is that in the Brooklyn Homicide Squad? A. Yes, sir.

Q. During the month of September, 1936, were you assigned a detail to the Bureau of Ballistics of the Police Department of the City of New York? A. I was.

Q. In the course of your regular duties did you receive People's Exhibits 5 and 6 in evidence? A. I did. 1130

Q. Did you receive those two bullets, People's Exhibits 5 and 6 in evidence, from the Deputy Chief Medical Examiner, Dr. Martin? A. I did.

Q. Are those two bullets marked MM and MR, respectively? A. They are.

Q. Were they received by you in the regular course of your duties at the Ballistics Bureau on the 14th of September, 1936? A. They were received by me at the morgue; I brought them to the Ballistics Bureau.

Q. What was the date they were received at the morgue? A. September 14, 1936.

Q. Did you take both of these bullets, "MM" and "MR," respectively, designated People's Exhibits 5 and 6 in evidence, to the Bureau of Ballistics of the Police Department? A. Yes, sir. 1131

Q. Did you there turn them over to your commanding officer, Sergeant Butts, for comparison, examination, and inspection? A. I did.

Mr. Turkus: You may inquire.

Defense Counsel: No questions.

1132 *Emil Schaefer—For People—Direct*

EMIL SCHAEFER, Shield No. 1163, Ballistics Bureau, Police Department, Borough of Brooklyn, City and State of New York, called as a witness in behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. You are a detective in the employ of the Police Department of the City of New York? A. Yes.

1133 Q. How many years have you been attached to the Police Department of the City of New York? A. Ten years.

Q. Of those ten years how many years have you been a detective? A. Seven.

Q. Are you attached to the Bureau of Ballistics? A. I am.

Q. How many years have you been there attached? A. Seven years.

Q. I show you People's Exhibits 5 and 6 in evidence, and I ask you whether or not you received them during the regular course of your duties in the Ballistics Bureau? A. Yes, sir.

1134 Q. Are those bullets marked "MM" and "MR," respectively? A. Yes, sir.

Q. Did you on the 7th of November, 1940, receive those two bullets marked "MM" and "MR," respectively, now designated People's Exhibits 5 and 6 in evidence? A. Yes, sir.

Q. From whom did you receive those bullets? A. Sergeant Butts, the commanding officer of the Ballistics Bureau.

Q. To whom did you make delivery of those bullets? A. To Dr. Marten, the Medical Examiner.

Defense Counsel: No questions.

Herman Schiesser—For People—Direct 1135

HERMAN SCHIESSER, residing at 123-19 85th Avenue, Richmond Hill, Borough of Queens, City and State of New York, called as a witness in behalf of The People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Were you a member of the Police Department of the City of New York? A. Yes, sir.

Q. For how many years were you a member of the Police Force? A. About 25 years and 5 months. 1136

Q. Did you retire from it? A. I did.

Q. What was the date of your retirement? A. March 7, 1937.

Q. Are you presently employed? A. Yes, sir.

Q. Where are you employed? A. By Gibbs & Cox, 21 West Street.

Q. Of the 25 years you have been in the Police Department, how many years were you a detective? A. Between 23 and 24.

Q. (The Court) What is the business of Gibbs & Cox? A. They are architects and draftsmen. 1137

Q. For 23 or more years you were attached to the Detective Division of the Police Department and you were assigned to a particular or specific detective division? A. I was.

Q. What detective division were you detailed to? A. The 12th Detective Division.

Q. What squad of detectives were you assigned to? A. The 75th Squad.

Q. Did you then, for upwards of 23 years, work as a detective in that particular district, which was the 12th Detective Division? A. I worked in the 75th Squad for about 20 years.

1138 *Herman Schiesser—For People—Direct*

Q. On Sunday, September 13, 1936, Detective, did you work a tour of duty? A. Yes, sir.

Q. Do you recall the tour? A. From half past eight to six p. m.—from 8:30 in the morning until 6 P. M. at night on September 13, 1936.

Q. At sometime during the morning of Sunday, September 13, 1936, while you were doing your tour of duty, did you find an automobile? A. I did.

Q. At approximately what time did you find
1139 this automobile? A. At about 10:04 a. m. September 13, 1936.

Q. Where did you find it?

Mr. Climenko: At this time may I note an objection to this question and to the line which we may reasonably anticipate will follow, so I will not be required to repeat? The point is that the testimony perhaps is not binding on the defendant.

The Court: Objection overruled.

Mr. Climenko: Exception.

1140 Q. Where did you find it? A. I found it on Van Sinderen Avenue near Livonia.

Q. Was the automobile on Van Sinderen Avenue? A. Yes, sir.

Q. Was it north of Livonia Avenue? A. Yes, sir.

Q. How many feet from it approximately? A. About forty feet.

Q. What kind of an automobile did you find there? A. A black Chevrolet, a 1935 black Chevrolet coach.

Q. Was that car abandoned when you found it? A. Yes, sir.

Q. Was it a two door? A. Yes, sir, two door.

Q. A four passenger hard top vehicle? A. Yes, sir.

Q. Black in color? A. Yes, sir.

Q. Did it bear license plates? A. Yes, sir.

Q. What were they? A. L-16-67.

Q. New York? A. Yes, sir.

Q. 1936? A. Yes, sir.

Q. Did you make a report of your discovery or finding of this abandoned car? A. I did.

1142

Mr. Climenko: Objected to as incompetent.

The Court: Objection overruled.

Mr. Climenko: Exception.

Q. After you made this report of the finding of a stolen car with "L-16-67, N. Y., 1936", plates, did you see Detective King? A. Yes, sir.

Q. Was it Detective King who was attached with you to the 75th Precinct? A. Yes, sir.

Q. Upon the arrival of Detective King was the engine number of the car dusted off with a cloth? A. I had dusted it off. 1143

Q. Were the numbers brought out to view so they were visible? A. Yes, sir.

Mr. Turkus: I offer this photograph to be marked for identification.

(Received and marked People's Exhibit F, for identification.)

Q. (The Court:) Why did you dust it? A. There had been grease on it and you could not see the numbers.

Q. I show you People's Exhibit F, for identification, and ask you if that truly represents the automobile that you described which you found abandoned under the circumstances you have told the jury. A. Yes, sir.

Q. Was that the position in which it was when you made your finding or discovery of that car? A. Yes, sir.

Mr. Turkus: I offer the photo in evidence.

1145 Mr. Climenko: I note the same objection and take exception.

The Court: Objection overruled.

(Received and marked People's Exhibit 13.)

(Exhibit 13 passed around to the jury.)

Mr. Turkus: May I request that this photograph be marked for identification.

(Photograph received and marked Peo-
1146 ple's Exhibit G, for identification.)

Q. I show you People's Exhibit G, for identification, and ask you if that is another view of the automobile which you have related in your testimony to the jury. A. Yes, sir.

Mr. Turkus: I offer it in evidence.

Q. For the record, is that the rear view of the car? A. Yes, sir.

By the Court:

Q. The right wheel being up on the curb—in the same position? A. Yes, sir, the car was facing north on Van Sinderen Avenue.

Q. How far was that from the scene of the alleged shooting? A. Eleven blocks—eleven and one-half blocks—fourteen blocks.

Mr. Cuff: I make the same objection as before.

The Court: Objection overruled. Mark it. 1148

(Received and marked People's Exhibit 14.)

Mr. Cuff: Exception.

By Mr. Turkus:

Q. Did you discover this abandoned car shown on People's Exhibits 13 and 14 at the position they are indicated on the exhibits? A. Yes, sir.

Q. Is that close by the I.R.T. or the B.M.T. station at Van Sinderen Avenue? A. Yes, sir. 1149

Q. Is there a railroad bridge there that goes over the Junius Street side? A. Yes, sir.

Q. Will you look at People's Exhibit 13, look through the front and back glass of the automobile, and see if you can see a portion of a candy stand that is located near the I.R.T. and the B.M.T. station? A. It may be, but it may not be visible.

Mr. Climenko: I object. The exhibit offered speaks for itself.

1150

The Court: Objection overruled.

Mr. Climenko: Exception.

Q. Now, you cannot see it through the glass? A. I know the candy store being there.

Q. Is it where that opening is? Will you indicate where that is? A. Looking right through there (indicating), it would be right in here (indicating). There is a doorway leading up there into the station.

1151

Defense Counsel: No questions.

HIRSH MERLIS, residing at 166 Orchard Street, Borough of Manhattan, City and State of New York, called as a witness on behalf of the People, after being duly sworn, testifies:

Direct examination by Mr. Turkus:

Q. Did you or your father operate a candy
1152 store and newspaper stand underneath the I.R.T. and B.M.T. station located at Livonia and Van Sinderen Avenues in Brooklyn? A. Yes, sir.

Q. For how many years did you and your father operate that stand? A. About seven years.

Q. Would that be from on or about February, 1931, to on or about November, 1937? A. Yes, sir.

Q. Where was the entrance to the B.M.T. station with relation to your newsstand? A. Right opposite.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit H, for identification.)

Q. I show you People's Exhibit H, for identification, and ask you if it fairly and truly represents the candy store you and your father operated for seven years, as you have told this jury. A. Yes, sir.

1154

Mr. Turkus: I offer the photo in evidence.

Mr. Climenko: Your Honor, may we assume this is being taken subject to connection, subject to a motion to strike out.

The Court: Yes.

(Photograph received and marked People's Exhibit 15.)

Q. (The Court) Is that right in the entrance? A. The entrance is right on that side (indicating). 1155

Q. Up where you are, behind the station, you face the entrance? A. Yes, sir.

Q. The entrance to the I.R.T. or the B.M.T.? A. The B.M.T.

Q. (The Court) Just a few feet away? A. Yes, sir.

Q. Referring to People's Exhibit 15, the photograph which you have just identified, is that substantially the way your stand, the candy stand, looked at or about September of 1936? A. Yes, sir.

Q. Is that the exact location where the stand was? A. Yes, sir.

Q. Is that surrounding territory or locale as exhibited on People's Exhibit 15, in evidence? A. Yes, sir.

Q. What is this street which runs toward your stand? A. Van Sinderen Avenue.

Q. What is the street that runs parallel with the bridge? A. Near the B.M.T.?

Q. Yes. A. That is Van Sinderen Avenue.

1157 Q. That is, the street running alongside the railroad tracks is Van Sinderen Avenue? A. Yes, sir.

Q. And the street running toward your stand is Livonia Avenue? A. Yes, sir.

Q. Now, is that stairway indicated on the picture to the left of your stand, a stairway that leads to the I.R.T.? A. The I.R.T. or to Junius Street.

Q. When you say, "or to Junius Street," do you mean Junius Street side of the bridge over the railroad tracks? A. Yes, sir.

1158 Q. That is indicated, isn't it, on People's Exhibit 15, the entrance to that stairway which leads up to the I.R.T. or the Junius Street side of the tracks? A. Yes.

Q. And on Sunday, September 13, 1936, at approximately what time of the morning did you go on duty? A. About 3:00 o'clock.

Q. How long did you work? A. Until about noon of the next day.

Q. Now, during the course of Sunday morning, about 7:00 o'clock, was your attention attracted to something? A. There was a car com-

ing around, went up from Livonia, went around to Van Sinderen Avenue, and stopped.

Q. You say the car came around Livonia and turned into Van Sinderen and stopped? A. Yes, sir.

Q. Did that car go at a fast rate of speed? A. Pretty fast.

Q. Did the car make any noise when it turned into Van Sinderen from Livonia? A. It had to stop a little to make a right hand turn and it screeched a little. 1160

Q. Did it pull up suddenly or abruptly? A. It stopped about thirty or forty feet off the corner.

Q. Did it come to a stop with a screeching noise, or was the screech made when it made the turn?

Mr. Talley: I object unless the witness testifies. I object to this question as leading.

By the Court: 1161

Q. When was the screeching, was it on the turn? A. When he made the turn, like when he came in from Livonia into Van Sinderen.

Q. It screeched at the turn? A. Yes, sir.

Q. Did the car stop? A. Yes, sir.

By Mr. Turkus:

Q. Who did you see get out of the car? A. Four men.

1162 Q. Where did these four men walk? A. Toward my stand.

Q. Did they walk down Van Sinderen toward the stand? A. Yes, sir.

Q. What did they do when they got near the stand? A. They just walked by me.

Q. Where did they walk to? A. They walked up toward the trestle.

Q. Will you show the jury on this picture, People's Exhibit 15, in evidence, the entrance
1163 to the station and trestle that these four men walked up to? A. (Witness indicates.)

Q. Are you indicating the entrance to the L.R.T. subway and to the bridge across to the Junius Street side of that railroad track? A. Yes, sir.

By the Court:

Q. Which one do you refer to? A. The walk which you take over to Junius Street, or you can go over to the L.R.T.

Q. That is a pedestrian trestle? A. Yes, sir.
1164 Q. Not an elevated structure? A. No, sir, a foot bridge.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit I, for identification.)

By Mr. Turkus:

Q. I show you People's Exhibit I, for identification, and ask you whether or not that is a

photograph showing the walk across the railroad track leading from Livonia and Van Sinderen side to the Junius Street side of the tracks. A. Yes, sir.

Q. As you go up the stairs, does that photograph show where the train level is of the I. R. T. station? A. Yes, sir.

Mr. Turkus: I offer the picture in evidence.

1166

(Received without objection and marked People's Exhibit 16.)

By the Court:

Q. What is the name of that station? A. One is Livonia, the B. M. T., and the other is Junius Street station of the I. R. T.

Q. What tracks are those below the crossover? A. The Long Island Railroad.

Mr. Turkus: I ask that this photograph be marked for identification. 1167

(Received and marked People's Exhibit J, for identification.)

Q. I show you People's Exhibit J, for identification, and ask you if that represents the Junius Street side of the walk-over connecting up from the entrance to your stand. A. Yes, sir.

Q. Is that the way it was substantially in September of 1936? A. Yes, sir.

Mr. Turkus: I offer it in evidence.

1168 *Hirsh Merlis—For People—Direct*

(Received without objection and marked People's Exhibit 17.)

By the Court:

Q. Where is your stand (handing witness exhibit)? A. It is on the other side.

Q. It does not show on the picture? A. No, sir.

Q. On the opposite side of the Long Island Railroad? A. Yes, sir.

1169

By Mr. Turkus:

Q. In order to have this clear—

The Court: Which is the street that appears on the other side of the track there (indicating)?

Mr. Turkus: If you are referring to People's Exhibit 17, that refers to Junius Street.

The Court: What is this street here (indicating on photograph)?

1170

The Witness: Junius Street.

The Court: It crosses Livonia Avenue?

The Witness: Yes, sir.

The Court: (To the jury): The court will now recess until 1:30 P. M. Gentlemen, please do not discuss the case or let anybody talk to you about it. Keep your minds open. Do not talk about the case during the recess hour.

Defendants are remanded.

AFTERNOON SESSION. TRIAL RESUMED.

HIRSCH MERLIS, (resumes the stand).

By Mr. Turkus:

Q. Mr. Merlis, just before recess you identified People's Exhibit 15 as a view of the newsstand and the locale of Livonia and Van Sinderen Avenues, did you not? A. Yes, sir.

Q. Did you also identify People's Exhibit 16 in evidence as the bridge across the railroad 1172
track? A. Yes, sir.

Q. And did you identify People's Exhibit 17 in evidence as the other side of the track, namely, the Junius and Livonia Avenue side? A. Yes, sir.

Q. Referring to People's Exhibit 15 which is the photograph with your stand on, am I indicating with my finger the entrance to the I. R. T. station and to the bridge on People's Exhibit 16 in evidence? A. Yes, sir.

Q. And if you walk along People's Exhibit 16 in evidence, do you come out down the stair- 1173
way pictured on People's Exhibit 17 in evidence? A. Yes, sir.

Q. On the Junius and Livonia Street side of the bridge? A. Yes, sir.

Q. Before recess you said that four men got out of this automobile. Do you remember that? A. Yes, sir.

Q. And that they walked past your newsstand up the stairway leading to the I. R. T. and to the bridge, People's Exhibit 17 in evidence. You remember that? A. Yes, sir.

1174 Q. At that time when they walked past your newsstand, what were you doing? A. I was sorting the Sunday papers.

Q. Did you get a sufficient view of any of the four men to make a positive identification of any of them?

Mr. Barshay: I object to the characterization.

The Court: Overruled.

1175 Mr. Barshay: Exception.

Mr. Talley: Calling for a conclusion.

Mr. Turkus: Will you read the question, please?

(Pending question read by the reporter.)

A. No, sir.

Q. Will you look at People's Exhibit 13 in evidence, and tell the jury whether or not that is the car which screeched around the corner and from which the four men got out and walked past your stand, as you have testified? A. Yes, sir.

1176 Q. When for the first time did you know that something was wrong with that car? A. Around eleven.

Mr. Cuff: Object to that, if the Court pleases, calling for a conclusion of the witness.

The Court: He has not yet said that he ever knew.

Mr. Turkus: Withdrawn in that form.

Q. At eleven o'clock in the morning, what happened in connection with that car? A. The police

came around and started taking pictures of it and examining it and looking it over.

Q. And was it the very car which had screeched around the corner and from which the four men had emerged and walked past your stand? A. Yes, sir.

Q. And had that car remained there from the time that you saw it screech around the corner and the four men get out until detectives got there and took pictures and examined the car? A. Yes, sir. 1178

Q. Were you then questioned by police in connection with the car? A. Yes, sir.

Q. Was that the first time that you knew there was something wrong with that car?

Mr. Talley: Objected to, if your Honor pleases.

The Court: Sustained.

Mr. Talley: I move to strike it out. It does not belong in the record.

Mr. Turkus: No objection to it.

Q. What time were you relieved from duty that day? A. Around noon. 1179

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: No questions.

Mr. Cuff: May we have just a few moments?

Mr. Turkus: Will your Honor entertain a motion on my behalf?

The Court: Is there any cross-examination?

1180 Mr. Barshay: No; I would like to make a motion in respect to his testimony.

The Court: All right.

Mr. Barshay: I move to strike it out as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception, sir. Do I understand that the Court is taking this subject to connection?

The Court: Of course.

1181 Mr. Talley: No cross-examination.

JOHN J. McGOWAN, Captain, Homicide Squad, Borough of Brooklyn, called as a witness in behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Captain McGowan, are you the commanding officer of the Brooklyn Homicide Squad in
1182 charge of all detectives in the homicide division in the Borough of Brooklyn? A. Yes, sir.

Q. And have you held that office in September, 1936? A. Yes, sir.

Q. How many years have you been in the Police Department? A. Thirty years.

Q. And how many years have you been a commanding officer? A. About twenty.

Q. On Sunday, September 13, 1936, at approximately eleven o'clock in the morning, were pictures taken of an automobile at Van Sinderen and Livonia Avenues? A. Yes, sir.

Q. And were those pictures taken under your supervision and direction? A. Yes, sir.

Q. Were they taken by Detective Hammel of the photo gallery of the Police Department? A. Yes, sir.

Q. Do you know where Detective Hammel is today? A. He is dead.

Q. I show you People's Exhibit 13 in evidence, and ask you if that is one of the pictures taken under your supervision and direction at Van Sinderen and Livonia Avenues (handing exhibit to witness)? A. Yes, sir. 1184

Q. And is that a true and accurate representation of the vehicle the picture of which was taken in your presence and under your direction and supervision? A. Yes, sir.

Q. I show you People's Exhibit 14 in evidence and ask you whether or not this picture was likewise taken under your direction and supervision at the same time? A. Yes, sir.

Q. And is People's Exhibit 14 in evidence a rear view of the same vehicle? A. Yes, sir.

Q. And are they both, People's Exhibits 13 and 14, true and accurate reproductions of the vehicle the pictures of which were taken under your direction? A. Yes, sir. 1185

Q. In addition, Captain McGowan, was there further examination made of that vehicle? A. Yes, sir.

Q. Was it a black Chevrolet sedan, two door? A. Yes, it was.

Q. Under your supervision and direction, did you have Detective Hammel place a powder on various parts of the car? A. Yes, sir.

Q. Is that powder commonly known as chemist's gray? A. Yes, it is gray and—

1186 *John J. McGowan—For People—Direct*

Q. Is it a chalk and mercury mixture? A. Yes.

Q. Is that the powder commonly used by the detective division to bring out fingerprint impressions? A. Yes, sir.

Q. Where under your supervision and direction did Detective Hammel dust this powder known as chemist's gray? A. He dusted the whole car, the outside, side, inside, and the license plates, wheel, steering wheel, and so forth.

1187

Q. In substance, was every place where there might likely be a fingerprint impression dusted with this mixture of chemist's gray? A. Yes, sir.

Q. Was the purpose of that to bring out fingerprint impressions, if any? A. Yes, sir.

Q. Were you or Detective Hammel or any detective acting under your supervision and direction in your presence able to bring out a fingerprint clue or evidence from that automobile or any part of it? A. No, sir.

1188

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: No questions on behalf of Buchalter.

Mr. Talley: No questions.

Mr. Rosenthal: No questions.

SAMUEL PEARL, residing at 298 East 45th Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Mr. Pearl, are you married? A. Yes, sir.

Q. And do you reside at 298 East 45th Street, Brooklyn, with your wife and family? A. Yes, sir.

1190

Q. What business are you in? A. In the pleating and stitching, embroidery, all combined.

Q. Speak up loud. A. Embroidery business.

Q. And what is the name of the company that you operate? A. American Pleating.

Q. American Pleating & Stitching Company? A. Yes, sir.

Q. Where is your place of business? A. 307 West 36th Street.

Q. In Manhattan, New York City? A. In Manhattan, New York City.

Q. Were you in that business in September, 1936? A. Yes, sir.

1191

Q. And where did you live in September, 1936? A. On 5514 Snyder Avenue.

Q. Speak up. A. 5514 Snyder Avenue, Brooklyn.

Q. Is that commonly known as the East Flatbush section? A. East Flatbush section.

Q. Directing your attention to Sunday morning, September 13, 1936, some time during the morning did you take a walk from your home? A. I walked to see a certain property and I went with Snyder Avenue up to Ralph Avenue.

1192 *Samuel Pearl—For People—Direct*

crossing Church Avenue up to Linden Boulevard, so—

Q. About what time in the morning did you start out to look at a piece of property? A. About after ten, about half past ten.

Q. In your walk in which you were en route to visit a piece of property, did you walk along Ralph Avenue? A. Yes, sir.

Q. And did you walk past Church Avenue? A. Yes, past Church Avenue.

1193 Q. And did you continue north on Ralph Avenue some distance north of Church Avenue? A. North of Church Avenue to Linden Boulevard.

Q. About how far north of Church Avenue had you walked? A. About 125 feet, I think.

Q. While you were walking along Ralph Avenue, in that vicinity, did you see something or find something? A. It just strikes me. I picked it up, that's all. I didn't look for it.

Q. Did something strike your eye? A. Yes.

Q. Where was this something that struck your eye? A. That was on Ralph Avenue.

1194 Q. Where in relation to the sidewalk was it? A. To my left side, walking from Church Avenue.

Q. What was on the left side when you were walking? Was it a vacant lot? A. An empty lot, yes.

Q. Was there high grass in that lot? A. Yes, was grass.

Mr. Turkus: I ask that this photograph be marked for identification.

(Photograph marked People's Exhibit K for identification.)

1195

Q. Mr. Pearl, I show you People's Exhibit K for identification and ask you if that is a true and substantial picture of the place where you were walking when something met or struck your eye, as you told the jury (handing photograph to witness). Is that a picture of the place where you were walking? A. Yes, that looks the picture, on that side.

Mr. Turkus: It is offered in evidence.

1196

(People's Exhibit K for identification received and marked People's Exhibit 18 in evidence.)

The Court: Straighten me out on this. This street with the white line center—

Mr. Turkus: I will have the patrolman that follows.

The Court: Is that Ralph Avenue?

Mr. Turkus: Will you turn the picture so I can see it? That, I understand, is Ralph Avenue. That is my notion of it.

1197

Q. Is that correct? A. I don't believe that Ralph Avenue has a white line.

The Court: He said "on that side." He put his finger to the left side of the picture.

Mr. Talley: The picture certainly has not been identified.

The Court: It is of little importance. It can be straightened out.

Mr. Turkus: It will be straightened out by the time the police officer leaves the stand who will follow.

Q. When something met or struck your eye that was in the grass off the sidewalk, what did you do? A. I picked it up.

Q. When you picked it up, did you look at it? A. I saw it is a little too heavy. First it strike me like a child's gun but I picked it up; I put it in the bag I find on the grass and bring it over to the officer.

Q. Was the gun you picked up on the grass what you put into a bag and you went in search
1199 of a police officer, is that right? A. Yes.

Q. Did you take the gun in the bag to the policeman? A. To the policeman.

Q. Where did you find the policeman? A. On Linden Boulevard, on Linden or Remsen. There is a couple of streets come together.

Q. Are they Remsen, Kings Highway, and Linden Boulevard? A. Yes.

Q. Was that policeman directing traffic there? A. Yes, sir.

Q. Do you know his name now? A. I know his name.

1200 Q. What is his name? A. Nelson.

Q. Patrolman Nelson. Did you show the gun that was in the bag to the patrolman? A. Yes, sir.

Q. And did you talk to him about the gun? A. I just told him this is what I picked up.

Mr. Cuff: I move to strike it out.

Mr. Turkus: Is that made in good faith?

Mr. Cuff: We should not have any conversation.

Mr. Turkus: If you want it stricken out, I will consent to it.

Mr. Cuff: Let it go. Please do not have the conversation.

Q. After you spoke to the policeman, did you, the gun, and the bag and the policeman go back to where you saw the gun the first time? A. Yes, sir.

Q. Did you there point out to the policeman where you found the gun? A. Yes, sir.

Q. Were you then taken to a police station by the policeman? A. Yes, sir. 1202

Q. And did the gun and the bag go along with the two of you? A. Yes.

Q. In the presence of the policeman at the police station, did you initial the gun that you found in the lot? A. Yes, sir.

Q. And what initials did you put on? A. S. P.

Q. Are they the initials for your name, Samuel Pearl? A. Yes, sir.

Q. Look at this gun, People's Exhibit E for identification, and tell us if that is not the gun that you found in the lot and initialed in the presence of the policeman (handing gun to witness). Do you see the "S. P." on it? A. Yes, 1203 this is the one.

Q. Is that the gun? A. Yes.

Mr. Turkus: It is offered in evidence.

Mr Barshay: Objected to, not binding on the defendant Buchalter.

Mr. Talley: Make the same objection. It has not been connected in any way at all.

The Court: Overruled.

Mr. Barshay: Exception.

1204 *Samuel Pearl—For People—Direct*

Mr. Talley: Exception.

The Court: Take it subject to connection.

(People's Exhibit E for identification received and marked People's Exhibit 19 in evidence.)

Mr. Turkus: May I exhibit People's Exhibit 19 to the jury?

1205 The Court: Hadn't you better connect it up first? Sergeant Butts will do that.

Q. Mr. Pearl, can you tell me at about what time it was when you saw that gun, People's Exhibit 19, in the lot? Can you estimate the time? A. Before eleven a couple of minutes.

The Court: What was that?

Mr. Turkus: His estimate was before eleven a couple of minutes.

Q. I guess that means a few minutes before
1206 eleven, according to your estimate, is that right? A. Yes.

Mr. Turkus: The witness is offered for cross-examination.

(No cross-examination.)

1207

HENRY G. NELSON, patrolman, shield 12154, attached to Traffic K, New York Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Patrolman Nelson, are you a member of the uniformed police force of the City of New York? A. Yes, sir.

Q. And are you presently assigned or detailed to Traffic K? A. Yes, sir.

1208

Q. How many years have you been a member of the Police Department? A. Seventeen and three months.

Q. And how many years have you been attached or detailed to Traffic K? A. About twelve years.

Q. On Sunday, September 13, 1936, were you attached to Traffic K? A. Yes, sir.

Q. And what tour of duty did you do on that day, officer? A. Ten a. m. to five p. m.

Q. Where was your assignment or detail? A. At Kings Highway, Linden Boulevard, and Newport Street.

1209

Q. Is one side of that intersection known as East Flatbush, the district to one side? A. Yes, sir.

Q. And is the other known to be the Canarsie side? A. Yes, sir.

Q. Some time while you were directing traffic at that location during the morning of Sunday, September 13, 1936, did a man whom you now know to be Samuel Pearl approach you? A. He did.

Q. Approximately what time was it that he approached you? A. 11:15 a. m.

Q. Without telling me what he said, did that man have a conversation with you; Samuel Pearl, did he hold a conversation with you? A. He did.

Q. At the time that he spoke to you at that intersection, did he have in his possession something? A. He did.

Q. What was that something? A. He had a revolver in a brown paper bag.

1211

Q. In his presence did you take the revolver out of the paper bag? A. I did.

Q. Did you inspect it? A. I did.

Q. Was it a firearm? A. It was.

Q. After you spoke to this man, Samuel Pearl, did you take him to a certain place? A. I took him to the 69th precinct in Canarsie.

Q. What I am referring to is this: Did you take him back to the spot where he found the gun? A. I asked him where he got the revolver and he told me he found it and I asked him to show me the spot and we walked over to the spot where it was found.

1212

Q. Where is the spot that Samuel Pearl pointed out to you as the place where he found the revolver? A. It was about 100 foot north of Church Avenue, west side of Ralph, and the revolver was laying about one foot off the sidewalk on the left.

Q. Will you look at People's Exhibit 18 in evidence and tell us whether or not that substantially shows the place where Pearl indicated he had found the gun (handing exhibit to wit-

ness)? A. Yes, sir, right over here (indicating) at about off that tree.

Q. Are you referring to a large tree as you look at the photograph on the right-hand side? A. That is right, yes, sir.

Q. The tree being on the side nearest the sign which has the word "Ruppert" on it? A. Yes, sir.

Q. And the spot where you indicated as the place where Pearl indicated he found the gun is to the right of that tree as you face the paper? 1214
A. That is right.

Q. In the grass? A. It was a foot off the sidewalk, towards the building line, in the grass.

The Court: How long has that white mark been on Ralph Avenue?

The Witness: I am sorry, I could not say.

Q. At the time when Pearl indicated the spot where he found the gun, was it a vacant lot? A. Yes, sir.

Q. And was there grass there and weeds? A. 1215
There were weeds.

Q. After Pearl indicated to you the position where the gun was found, as you have pointed out to us on People's Exhibit 18, where did you go with Pearl and the gun? A. To the 69th precinct.

Q. Did you there make report to your superior or commanding officer? A. I did, sir.

Q. At the time you arrived was there a report received in the station house about the commission of a murder? A. There was.

Q. Was contact then made to the 75th precinct in Brooklyn? A. Yes, there was.

Q. Was that the precinct in which the news came of the murder having been committed? A. It was.

Q. Did a detective come over from the 75th precinct to the 69th precinct? A. Yes, sir.

Q. Do you know the name of that detective? A. He is here this morning. He is from the homicide squad. I only met him once.

1217 Q. Is it Detective King? A. No, he came from the 75th squad.

Q. Did a man come over from the 75th squad, a detective? A. No, the detective came from the 75th precinct. He was a member of the homicide squad.

Q. Did the detective from the homicide squad, Pearl and yourself go to the 75th precinct? A. Yes, sir.

Q. When you got to the 75th precinct, did Mr. Pearl in your presence initial the revolver, People's Exhibit 19 in evidence, with the initials "S. P."? A. He did.

1218

The Court: When was that picture taken?

Mr. Turkus: This is a recent picture.

Q. Did you in the presence of Pearl and a detective initial this weapon, People's Exhibit 19 in evidence, with the initials "H. N."? A. I did.

Q. And did Detective King of the 75th squad initial the weapon with the initials "W. K." in your presence? A. He did.

Q. Will you look at People's Exhibit 19 in evidence and tell us if that is the gun about which

you have testified (handing exhibit to witness)? A. It is.

Q. Did you, after the gun had been initialed with the initials which it now bears, turn that weapon over to Detective King? A. I did.

Q. At the time when you received that gun from Mr. Pearl under the circumstances you have told the jury, was the barrel empty? A. It was.

Q. And was it in that condition when you turned it over to Detective King? A. It was. 1220

Mr. Turkus: The witness is offered for cross-examination.

Mr. Cuff: No cross-examination.

Mr. Turkus: Just one more thing.

Q. At the time when that gun was initialed in the 75th precinct, was there an Assistant District Attorney by the name of McCarthy then present? A. Yes, sir, there was.

Mr. Barshay: No questions.

1221

1222 *William S. King—For People—Direct*

WILLIAM S. KING, detective, shield 972, attached to the 75th squad, New York Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Detective King, are you a police officer attached to the police force of the City of New York? A. I am.

1223

Q. And are you assigned to the detective division? A. I am.

Q. How many years have you been in the Police Department? A. Twenty-three years.

Q. And how many years have you been attached to the detective division? A. Seventeen years.

Q. In September, 1936, what squad were you attached to? A. 75th squad detectives.

Q. Will you turn around and look at the picture in evidence, People's Exhibit 2, and tell me whether that picture is embraced within the territorial confines of the squad to which you were

1224 attached, that candy store? A. It is.

Q. Are you still attached to the 75th precinct? A. I am.

Q. On Sunday, September 13, 1936, in company with Detective Schiesser, now retired, did you go to Van Sinderen Avenue and Livonia Avenue? A. I did.

Q. On Van Sinderen Avenue near Livonia, did you there find a motor vehicle? A. I did.

Q. Will you look at pictures, People's Exhibits 13 and 14 in evidence, and tell us whether

those are views of the automobile that you found in company with Detective Schiesser? A. It is.

Q. At the time that Detective Schiesser and you found that automobile, was there an alarm out for that car bearing license L-1667-1936? A. There was.

Q. And was it an alarm in connection with a murder which had occurred at 725 Sutter Avenue, Brooklyn? A. It was.

Q. Did you examine the automobile? A. I did. 1226

Q. What did it disclose to you, that is the examination; what kind of a car was it? A. It was a Chevrolet 1936 coach, painted black.

Q. Were the motor numbers dusted off with a cloth? A. Detective Schiesser dusted them off, took the oil off them.

Q. After the oil or other substance was wiped off the motor numbers, what numbers were revealed to your observation? A. The motor number 6376729.

Q. Was there investigation then conducted with regard to that motor number of the car and with regard to the license plates L-1667-1936? A. They were. 1227

Q. Detective King, will you look at People's Exhibit 19 in evidence and tell us whether that weapon bears your initials "W.K." (handing exhibit to witness)? A. It does.

Q. And was that revolver or weapon, People's Exhibit 19 in evidence, turned over to you? A. It was.

Q. In a police station? A. Yes, sir.

Q. What day did you receive that gun? A. On September 13, 1936.

Q. Was there present at the time a patrolman by the name of Henry G. Nelson and a civilian by the name of Samuel Pearl? A. They were.

Q. And were their initials put on the gun? A. They were.

Q. Was that in the presence of a former Assistant District Attorney by the name of McCarthy? A. It was.

1229 Q. What kind of a gun is that, detective? A. That is a .38 calibre special Colt.

Q. Is it known as a police special? A. Police positive, police special.

Q. Did you in turn deliver that gun to the Bureau of Ballistics and specifically to Detective Frederick Walsh of the Ballistics Bureau? A. I did.

By the Court:

Q. Police special is a trade name, isn't it? A. Yes.

1230 Q. it does not mean the Police Department owns the gun? A. No, sir.

Q. That is a name under which the Colt concern puts it out? A. That is right.

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: No cross.

Mr. Cuff: No cross.

Mr. Rosenthal: No cross.

Henry F. Butts—For People—Direct 1231

HENRY F. BUTTS, Sergeant, Shield No. 824, attached to the Ballistics Bureau, Police Department of the City of New York, called as a witness on behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Sergeant Butts, are you a member of the police force of the City of New York? A. I am.

Q. And how many years have you been a member of the Police Department of the City of New York? 1232 A. Thirty-eight years.

Q. What is your present assignment? A. I am in command of the Ballistic Bureau.

Q. And how many years have you been attached to the Ballistic Bureau? A. Since it was established in May, 1930.

Q. And have you since that time been the commanding officer in charge of ballistics? A. I have.

Q. What are the duties of the Ballistic Bureau of the Police Department? A. Investigation of cases wherein a firearm has been used, covering 1233 those things affected by the firearm, cooperating with the other squads in the investigation.

Q. Does it, briefly, take in the gathering and safeguarding of all ballistics evidence? A. It does.

Q. Recovery from walls and furniture of spent bullets? A. Yes.

Q. Examination of bullet holes? A. Bullet holes, bullet wounds, powder marks, examination of bullet markings, whether or not an arm functioned properly, anything connected with the firearm.

Q. In connection with your duties are you brought into the questioning of any witnesses? A. No we have nothing to do with the questioning of witnesses, hearing statements, or anything of that nature.

Q. Is your job confined to looking at the scene and the concrete evidence, and from that to supply expert testimony with regard to the things that you find and discover at the scene of crime? A. That is the job.

1235 Q. And upon that you do not depend upon any testimony given to you by any human witness; is that correct? A. We disregard the human witness.

Q. For how many years have you made a study of firearms and ballistics? A. Over thirty years.

Q. Are you familiar with the manufacture and makes of American firearms? A. I am.

Q. How many tests have you made in connection with firearms? A. Many, many thousands.

Q. We these tests made by firing at and through various types of materials? A. Yes, and observing the results both on the material

1236 and the results of the action on the bullet and what occurred with the arm.

Q. And in connection with the thousands of tests that you have conducted, have they been in connection with the ordinary household furnishings, plaster, brick, wood, and the other materials we frequently come in contact with? A. That would cover it, and dead human tissue, live and dead animal tissue.

Q. In these tests that you have made, were they for different purposes? A. The various purposes were to, I might say, observe the action

of the arm, the action of the ammunition, the effect on the ammunition as it passed through the arm, and the effect of the ammunition on various things.

Q. When you speak of the arm, do you refer to the firearm? A. The firearm.

Q. During the past twenty-two years, have you been testifying for the Police Department as an expert on firearms? A. Yes, twenty-two or twenty-four years. In that time I have testified well over eight hundred times, possibly a thou- 1238
sand.

Q. And has your testimony been accepted in courts of record? A. Yes.

Q. Sergeant, did you on or about September 13, 1936, receive from Detective Walsh six bullets? A. I did.

Q. Were those bullets designated with certain markings? A. They were.

Q. And what were the markings that were designated on the bullets? A. A combination of the letters, "F. W.", and then numbers 1, 2, 3, 4, 5, 6. 1239

Q. I show you People's Exhibits 7, 8, 9, 10, 11 and 12, and ask you if they are the six bullets that you received from Detective Walsh, marked, "F. W.", one to six, inclusive? A. They are.

Q. Will you hold them at your side there, Sergeant. On September 14, 1936, did you receive from the Deputy Chief Medical Examiner, Doctor Marten, two bullets marked, "M. R." and "M. M.", respectively? A. Through Detective Schaefer, I did.

Q. Detective Schaefer is attached to the Ballistics Bureau? A. He is.

1240

Q. And he received them for you and under your command, is that correct? A. Yes.

Q. Will you look at these exhibits, People's Exhibit 5 and People's Exhibit 6, and tell us whether or not they are the two you received from Doctor Marten through Detective Schaefer?

The Court: Be sure that each bullet is put back in its own envelope, so they won't be mixed as to exhibit number.

1241

A. They are.

Q. On the same day when you received those bullets marked, "M. R." and "M. M." from Detective Schaefer sent to you from Doctor Marten, did you receive from Detective King People's Exhibit 19, in evidence, this firearm? A. I did.

Q. What kind of a firearm is People's Exhibit 19? A. It is a Colt, Police Positive Special, 38 calibre revolver.

Q. Does that gun take the same cartridge as the regulation gun for the Police Department

1242

of the City of New York? A. It does.

Q. What is the regulation Police Department gun known as? A. In a Colt it is known as the Army special, or official police, and in Smith and Wesson, it is military and police. That would be in the 38 special. There are also as regulation the old 38 police positive that would be had by men who were in the department before 1926 and the Smith and Wesson 38.

Q. Referring to the regulation gun that is in the Police Department at the present time, is this police special a lighter frame? A. It is.

Q. Is it lighter all over in weight? A. It is.

Q. And it is a lighter gun for carrying purposes than the regulation police firearm? A. Yes, it weighs less.

Q. After you received these articles, People's Exhibit 19, the weapon, the bullets, People's Exhibits 5, 6, 7, 8, 9, 10, 11 and 12, did you make an examination and inspection and tests with regard to the same? A. I did.

Q. Over how long a period of time did it take you to conduct the examination and tests? A. Well, that would be hard to say. The making of 1244
tests with the gun, that is, the firing of test bullets, the examination would be done in a half hour, but then the comparison between the test bullets and the bullets that I had, I don't know just how long it took. I would say off-hand it was probably several days.

Q. Before we go into what the examination and tests showed, when you received that gun, People's Exhibit 19, in evidence, did you examine it? A. I did.

Q. What did you find in connection with that weapon, People's Exhibit 19? A. I found that 1245
after leaving the factory the barrel had been threaded at the muzzle and that on that thread there had been placed a collar. That thread is the thread that is used in silencers. The purpose of the collar is to dress up a muzzle when there is not a silencer on it.

The Court: To protect the thread from damage?

The Witness: Yes, and then it does not look so raw.

1246 *Henry F. Butts—For People—Direct*

Q. Was that thread on the barrel of the weapon, People's Exhibit 19, in evidence, cut into the barrel after the gun had left the factory? A. Yes.

Q. And was that put on by some mechanical means? A. Yes.

Q. Has ever in your experience any manufacturer of guns cut a thread on the barrel of a gun such as is on weapon 19 in evidence? A. Not at the factory. There was a manufacturer
1247 of guns who became, might I say, mixed up with a group, and he did put silencers on guns, but not on his product while he was making them at the factory.

Q. That was some extra activity on the outside? A. Yes. I might say it was not this. It was the Rising (?) pistol.

Q. Are threadings such as appear on People's Exhibit 19, in evidence, put on the weapon by some individual machinist or gunsmith after the gun has left the factory? A. Yes.

By the Court:

1248

Q. Is that standard thread or special? A. It is a standard thread.

Q. Adapted for what silencer? A. Adapted to the Maxim.

Q. There is another one, too? A. You just took the name away from me; the one that is made in Ohio.

Q. Is it adapted to either of those silencers? A. Yes, sir.

By Mr. Turkus:

Q. When that gun, People's Exhibit 19, left

1249

the factory, had it been blued over, as the expression goes, in the factory? A. It was.

The Court: Is that the Moore silencer you were trying to think of?

The Witness: The Moore, yes, sir.

Q. Look at the thread on there. Take the collar off. Does that show raw steel indicating that the threading had been put on after the gun had been blued at the factory? A. Yes.

1250

Q. What is the purpose of a silencer?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: I respectfully except, sir.

The Court: Is it a muffler?

The Witness: It is really a muffler, and the principle of it and its action is the same as the muffler on your car.

Q. Has a silencer any legitimate purpose in peace times?

1251

The Court: Objected to.

The Court: Sustained.

Q. Other than being used by a sniper in war time, has a silencer any legitimate function?

Mr. Barshay: Objected to, sir.

The Court: Sustained.

Q. Do you know of any legitimate purpose for which a silencer may be used?

1252 *Henry F. Butts—For People—Direct*

Mr. Barshay: Same objection.

The Court: The word "legitimate" is objectionable. Sustained.

By the Court:

Q. Is there any standard purpose for which a silencer is commonly used? A. It is not used in hunting; it is not used in target practice.

Q. It is used by police? A. No.

1253 Q. Is it lined on the inside with circular system of battle plates which absorb the sound? A. Yes.

Q. So that when the discharge occurs there is a very slight sound, a hardly noticeable sound? A. That is correct.

By Mr. Turkus:

Q. Sergeant Butts, did you make an examination and inspection of that weapon, People's Exhibit 19, in an endeavor to find the serial number of the weapon? A. I did.

1254

By the Court:

Q. Are those what are known as thimble battle plates? A. Yes, sir.

Q. Inverted backwards? A. Yes, sir, and they are put in so that they have a curve of that sort. The front part would bulge, the rear part—

Q. Briefly, the sound wears itself out before it gets to the muzzle? A. It breaks up sound waves.

Q. Just by interference? A. Yes.

By Mr. Turkus:

Q. I got to the point, Sergeant Butts, where I asked you if you made an examination to endeavor to find the serial numbers of that weapon. A. I did.

Q. When a gun leaves the factory does it have a serial number? A. It does.

Q. And when that particular gun, People's Exhibit 19, left the Colt factory, where did it have its serial numbers? A. At the points that I indicate with the point of the pencil. There would be 1256 one number at that point.

Q. For the record, Sergeant, when you say, "That point," will you describe it with relation to the weapon so that the record will be clear where that number should have been when you looked for it? A. It is not the technical name but let us say this movable hinge on which the cylinder is carried, at that point on the moving part, at that point on the thickest part of the frame.

Q. When you say, "That point," will you describe it for the record? A. The part of the 1257 frame is below the bridge of the barrel, where the barrel is screwed into the frame. It is about an inch below the center of the axis of the barrel, and then on the inside of the plate. The plate is that portion held by those two screws. If those two screws are taken out, that part comes out, and near the latch, the serial number is on the inner surface there.

Q. So that when that weapon, People's Exhibit 19, left the Colt factory it had on it three serial numbers in the positions that you indicated to

1258 *Henry F. Butts—For People—Direct*

this jury? A. It had the same serial number in three places.

By the Court:

Q. Did it have a secret one inside? A. No, this is inside the plate on the Colt.

Q. You have to remove the plate by taking out the screw? A. Yes, sir; it is not visible.

1259 By Mr. Turkus:

Q. When you looked at the three places where the serial numbers should have been, did you see them with the naked eye? A. I did not.

Q. Did you look then with a magnifying glass? A. Not with a magnifying glass. When I found that I could not see the numbers, I went to work with acids.

Q. When you could not see the numbers, what did that indicate to you? A. Well, the surface indicated—and that is visible to the naked eye—

1260 that the surface had been ground away. Instead of a flat surface there was a groove.

Q. In all the three places, can you say with reasonable certainty that the serial number had been mechanically removed and obliterated?

Mr. Barshay: I object to it as not binding on the defendants.

The Court: Overruled.

Mr. Barshay: Exception.

A. I can.

Q. And had they been mechanically removed and obliterated?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. They had.

Q. When you saw that the serial number in the three places where they should have been on the weapon, People's Exhibit 19, had been so removed and obliterated, did you endeavor to bring out or bring up what the number was before the obliteration? A. I did.

1262

Q. Tell the jury what tests you conducted and what results you had. A. The acids that I used are nitric and hydrochloric and glycerine, and it takes sometimes thirty seconds and sometimes thirty minutes and sometimes thirty hours.

By the Court:

Q. Briefly, is that called processing? A. It is. I was unable to bring up the numbers.

Q. Is that due to the under grooves of stamping the numbers on the die? A. Yes, sir, the metal beneath the actual stamping.

1263

Q. Does it crystallize? A. It does.

Q. In the shape of the letters, even though below the cut? A. Yes.

Q. And I take it the acid works in where the metal is crystallized, works around the carbon particles or steel particles? A. Yes.

Q. And forms the letters? A. It does.

Q. That are not visible otherwise to the naked eye? A. And they come up as a ghost.

1264 *Henry F. Butts—For People—Direct*

By Mr. Turkus:

Q. Sergeant, to make this clear to us who are not experts, when the number is stamped on in the factory in the three places that you have indicated to the jury, is the metal underneath the number compressed? A. Yes.

The Court: Is it bruised?

The Witness: Yes.

1265 The Court: That is what I mean by crystallized.

Q. When you found that the numbers had been mechanically removed and obliterated, did you endeavor with the acid to bring out the compression or the ghost-like numbers that would come up when the acid ate into that bruised metal? A. I did.

Q. If the obliteration is not too thorough, does the ghost-like number come to view? A. It does.

1266 The Court: Has that been for many years the common way of determining the numbers of stolen automobiles where the numbers have been filed from the block?

The Witness: The same system. With the automobile very often heat is used in addition to the acid.

Q. Now, what experience or what result did you have after you put the acid on? Did you get a ghost-like number out? A. I got a few numbers but I could not get a complete serial.

Q. Could you get enough numbers on it to

trace that serial number from the Colt factory? A. No.

Q. Had the obliteration and mechanical removal of the numbers been too thorough?

Mr. Cuff: I object to that.

A. It had.

Mr. Cuff: He answered.
The Court: Overruled.
Mr. Cuff: Exception. 1268

Q. Before we go into the tests, when you received that gun, that weapon, People's Exhibit 19, and you examined it, tell the jury what it disclosed with reference to the number of times it had been fired at the time of last discharge. A. My recollection is that it showed that it had been fired four times at the time of last firing.

Q. The jury must be told the tests that you conducted in regard to People's Exhibit 19, the weapon, and its bullets that you took from it. Will you explain that to the jury, how you get 1269
test bullets for comparison? A. We fire the bullet into absorbent cotton. We use the regular hospital rolls of one pound, the ones that are about ten inches in length, about four inches in diameter. We unroll those and take the paper divider out, then re-roll them and fire longwise into the roll. The bullet traveling with forward motion and a motion of rotation strikes the cotton, the cotton fibres are pulled apart and act as a brake and wind themselves around the bullet as a snowball, so that we get in four or five

bes a ball of cotton an inch and a quarter to inch and a half in diameter, and pulling that ton apart we find nested in the center of it bullet. That gives us an undeformed specimen.

Q. For example, Sergeant, could you take that apon, People's Exhibit 19, put a bullet in it d fire it into the cotton in our view and then e that test bullet out of the cotton? A. Yes.

Q. And that would be an accurate specimen llet from that gun, is that right, People's Exbit 19? A. It would.

Q. Has that weapon, People's Exhibit 19, cern peculiar characteristics on the barrel that other weapon has? A. Yes.

Q. And are those characteristics peculiar to at barrel alone? A. They are.

Q. Is that the way in which identification is de of bullets which are fired from a specific particular firearm? A. It is because of that at identification is possible.

Q. And are barrels as different as human finrprints are? A. I say they are more invidual.

The Court: Not from the mere characteristics of the rifling. Will you tell the jury just what there is about the inside of a gun barrel which makes no two exactly alike?

Q. Will you take it from the piece of steel and ow the jury how it is bored out and the whole ystem, so that we will understand it in detail? . The barrel, that portion that I am indicating

that runs forward and from the frame through which the bullet travels starts out in this case as a solid bar. It is first smooth bored by a single lip cutter. That cutter is fixed in a fixture. It does not move. The barrel is rotated around the cutter so that we get then a smooth bore cut.

Q. Is there oil pumped through there when the cutter is boring in there? A. The oil is pumped through the rod or fixture that holds the cutter. The cutter, as much as my hand, is now coming to a cutting point. Back from the 1274
cutter is a V slot and through the center of the fixture there is a hole, and through that hole oil is pumped forward so that it strikes on the cutting point.

Q. Is that oil under pressure? A. About 700 pounds. The purpose of it hitting the cutting point is to lubricate that part and it then after that carries back through the V slot the chips that it has cut away and they come backward along the V slot and are thrown out. After that the barrel is reamed.

Q. That operation that you described, that is 1275
the first operation, isn't it?

The Court: He has not finished. Go ahead.

A. (Continued) After the cutting with the single lip cutter there are in this case three or four reamings, that is to smooth down any burrs, any particles that may stick too high as ridges. After that, spiral grooves are cut in the barrel. Those grooves in this case are about three and a half thousandths deep, and there would be six and they would have a left twist.

1276 *Henry F. Butts—For People—Direct*

Q. Is that commonly called the rifling system, these grooves, or left twist, that you are speaking of? A. That group of six grooves will be called the rifling in that barrel. The twist would make a complete turn in this case in about sixteen inches. If we had a barrel sixteen inches long, the cutter would have one complete turn, cut until it came around. The cutter cuts on the pull stroke, that is, it cuts as it is coming this way and turns, drops into a recess in the
1277 fixture, goes forward, and does not do any work, goes over now into the next place in the barrel. It goes over. Where we have six grooves it would go over one-sixth of a turn. The barrel would be turned and it cuts there, goes back. The barrel turns another sixth, she cuts again until she has gone around, and that cutting keeps on until the depth of the cut has reached three and one-half thousandths. During that time the cutting face, in this case in the Colt they use a hook cutter, and that is shaped as my hand is now, and it pull cuts. During this cutting the
1278 cutting face of the cutting tool is changing—we say cutting; actually it is a scraping, the same as if we scrape snow off the sidewalk with a rake. It is a scrape. It is not the cut that we talk about or think about when we say cut. That, when it is finished, appears to be mirror-like. If you look down the muzzle of a barrel and have light go through it, you see a mirror-like surface. Actually on that surface there are microscopic projections, irregularities. If we cut open a section, take a photograph of it, we see ridges, we see little dots sticking up.

The Court: You mean microscopic photographs?

The Witness: Yes.

A. (Continuing) So that when the bullet is driven through the barrel, those microscopic projections actually engrave on the bullet a pattern, and that pattern will be peculiar to this barrel and no other. Two barrels or six barrels made on the same machine, by the same operator, with the same cutter, will be as different as day and 1280
night, and no two grooves in the one barrel will have the same characteristics as any of the other grooves of the six, so that we then have a bullet with a pattern on it, and that is the purpose of firing into the cotton, to get an undeformed specimen that will carry the characteristics of this particular barrel, and then a microscopic comparison is made between a bullet in question and the test bullet. The examination is made of those patterns on the various areas. We would have six grooved areas and six land areas. The land would be the undisturbed metal be-
tween two grooves. That on the bullet makes 1281
a depression. The microscopic comparison is made with the comparison microscope. That is simply two compound microscopes joined by a comparison eye-piece. It has a prismatic bridge. Actually the bullets are set up on the microscope stages about six inches apart. The images are brought up through their individual tubes, across through the prismatic system, and into a single eye-piece, so that we can examine two objects at one time, and if, in the case of the two bullets, we are looking at like areas and they have the

same pattern, those patterns, those lines, will meet and fuse into each other as my fingers are doing. If they are not from like area or not from the same gun, there won't be a meeting of the lines of the pattern. After the like area is found on both bullets, assuming they are from the one gun, then each successive area of the bullet is examined and checked.

Q. Is this correct, sergeant? If I were to take that weapon, People's Exhibit 19, and fire
1283 a bullet into somebody and that bullet was extracted by a doctor, and then you took the weapon and fired a test bullet into a bale of cotton and took two out under that machine that you told the jury about, you can match up the riflings and show that both bullets came out of that identical barrel? A. If the bullet from the body has not been too badly distorted, yes.

Q. Did you take all of those bullets that were turned over to you, the six that Walsh took from the scene of the homicide and the two that the medical examiner took out of the corpse, and examine them microscopically? A. I did.

1284 Q. And did you examine them microscopically with a test bullet from People's Exhibit 19, that weapon? A. I did.

Q. Will you tell the jury what the examination and inspection disclosed? A. Some of the bullets I found were fired from that gun and some were too deformed to tell what gun they were fired from. Some of the bullets are known as half-metal case. Those are bullets with a metal jacket at the point. I think there were four of those and four that are called copper-coated.

Q. May I direct you in my examination—

1285

The Court: I do not think he has finished.

Mr. Turkus: He has not but I want to specifically direct his attention.

The Court: Let him finish.

A. The copper-coating is different from the copper jacket. The copper-jacketed bullet is a jacket of solid copper. The copper-coated bullet is, let us say, a copper-plated bullet. It is just a copper flashing that is on a lead bullet.

1286

By the Court:

Q. Did you find that any of those bullets had not been fired from that gun? A. On four there was not enough left to see whether or not they had been fired from this particular gun. Four I could identify and four I could not.

Q. How many did you examine in all? A. I think I had eight bullets.

Q. That is two from Dr. Marten and six from the detective who made the search of the premises? A. Yes, sir.

1287

Q. How about the two that came from Dr. Marten? A. One I could identify and one I could not.

Q. Did you identify that one? A. I did.

Q. You say that was fired from that gun? A. Yes, sir.

Q. And of the other six, how many did you identify? A. Three.

By Mr. Turkus:

Q. Sergeant, may I take you step by step in

1288 this examination. Is it that you had eight bullets turned over to you, six recovered at the scene and two taken out of the corpse? A. That is correct.

Q. Of the eight bullets that you had to inspect, were four half-metal case bullets and the other four copper-coated bullets? A. Yes.

Q. Are those two different types of ammunition? A. Yes.

1289 Q. Will you take this sheet of paper and draw a H.M.C. bullet and a copper-coated bullet so the jury can get a visual idea of it? A. The first I have marked "H.M.C." The inner portion would be lead and that portion that I have separated,—while actually it is close to the lead, I have separated so that you could see it,—that is a copper jacket that extends from that point up to the nose and down to here (indicating) leaving lead bare from that portion down. Now a copper-coated bullet is simply a lead bullet that has been copper-plated and it simply has a thin flash of copper all over it.

1290 Q. Sergeant Butts, in your testimony you have been referring to these exhibits in evidence, People's Exhibits 5, 6, 7, 8, 9, 10, 11 and 12, namely the eight bullets, there as bullets. Is that the term that is used to distinguish them from cartridges? A. Oh, yes. The cartridge is the complete assembly. A cartridge would be the shell or case, the primer, the powder, and the bullet. The bullet is the projectile.

Q. It is known as a cartridge before it is fired? A. Yes.

Q. And the projectile is called by you scientific men a bullet? A. That is correct.

Q. I want to get down to an examination bullet by bullet of these eight that you had. Will you take that bullet, the one that had the markings on by Dr. Marten, "M.R." That should be People's Exhibit 6, or maybe 5. A. People's Exhibit 6 is a half-metal case bullet.

Q. People's Exhibit 6, that half-metal case bullet, is that the one marked "M.R." by Marten? A. It is.

Q. Did you examine that microscopically with a test bullet from People's Exhibit 19, the fire- 1292
arm? A. I did.

Q. What did your test disclose? A. That in my opiaion Reople's Exhibit 6 was fired from Exhibit 19.

Q. And can you say that with reasonable certainty? A. Yes.

Q. The other bullet which the medical examiner turned over to your office, the "M.M." bullet, People's Exhibit 5 in evidence, what did you find about that? A. That is a copper-coated bullet.

Q. As distinguished from the other bullet 1293
which was a half-metal case? A. Yes, and that bullet I was not able to identify.

Q. Was that bullet too deformed to identify to that or any other gun? A. Yes.

Q. So that one of the bullets turned over by Marten was a half-metal case bullet and the other was a copper-coated bullet, is that right? A. Yes.

Q. Of the six bullets that were recovered at the scene of the homicide, how many were half-metal case bullets and how many were copper-coated bullets? A. Three and three.

1294

Q. Take a look at bullets "F. W. 1", "F. W. 5" and "F. W. 6". "F. W. 1" is People's Exhibit 8, "F. W. 5" is People's Exhibit 11, and "F. W. 6" People's Exhibit 12. A. 8, 11, and 12, is that what you said?

Q. That is right. A. People's Exhibit 8 is a half-metal case bullet. That bullet I was able to identify.

Q. And do you identify it as having been fired from People's Exhibit 19? A. I do.

1295

Q. Now check "F. W. 5" People's Exhibit 11. A. That bullet is a half-metal case bullet.

Q. And are you able to identify that bullet as having been fired from People's Exhibit 19 in evidence? A. I am.

Q. And do you say that with reasonable certainty? A. Yes.

Q. Take "F. W. 6", People's Exhibit 12 in evidence. A. That bullet is a half-metal case bullet and that bullet I identified as having been fired from Exhibit 19.

1296

Q. In other words, Sergeant Butts, the four half-metal case bullets that were turned over to you, three from the scene and one from the body, are all attributed to having been fired from People's Exhibit 19, that weapon right on the desk? A. That is correct.

Q. Now taking bullets marked "F. W. 2", "F. W. 3", "F. W. 4",—"F. W. 2" is People's Exhibit 7, "F. W. 3" is People's Exhibit 9, and "F. W. 4" is People's Exhibit 10. A. People's Exhibit 7 is a copper-coated .38 special bullet. That I could not identify.

By the Court:

Q. Were all of the copper-coated bullets so badly smashed that you could not identify them? A. That is correct, sir.

Q. Is the purpose of copper jacketing to protect the lead from deformation? A. It does.

Q. But where only plated or coated, the metal is not protected so they deform readily? A. Yes, and the copper flashing or plating tends to move from its original place. It may be high 1298 up on the boring surface but it is dragged down to a place other than where it was originally so it may have gotten a mark up at the top of the boring surface and just brought down toward the bottom. It is just like flakes on the bullet.

Q. Now, sergeant, going back to that weapon, People's Exhibit 19, you told us earlier in your examination that your examination and inspection disclosed that at the last time of firing four bullets had been fired out of that gun. A. Yes.

Q. Now, the four half-metal case bullets that you attribute to having been fired from that gun, 1299 did you examine them to see if there was any copper coating on them? A. I did.

Q. Was there any copper coating? A. There was not.

Q. Had copper-coated bullets first been fired through that weapon, People's Exhibit 19, and then later four half-metal case bullets, would there have been a copper coating on those four "H. M. C.'s" or half-metal coat bullets? A. I would have found some copper coating on some of them at least.

Q. So can you say this with reasonable cer-

1300 *Henry F. Butts—For People—Direct*

tainty, sergeant, that People's Exhibit 19, the weapon, fired the four "H. M. C.'s" or half-metal case bullets? A. Yes.

Q. And that some other gun or weapon of similar make and character fired the four copper-coated bullets? A. That would be my opinion from my examination of the copper-jacketed bullets and I ran a patch through the barrel and I did not get any copper flaking from copper-coated bullets.

1301 Q. Is that conclusion established by two factors, the conclusion that the four "H. M. C.'s", the half-metal case bullets, were fired from People's Exhibit 19, and the four "C. C.'s" or copper-coated bullets were fired from another gun of similar make and calibre, and are these the factors: The examination of the cylinder showing four discharges— A. Yes.

Q. And the residue of copper that you would have found on those "H. M. C." bullets as you have described to the jury? A. That is one thing and then the patch that I ran through the

1302 barrel would have picked up some flaking from a copper-coated bullet.

Q. So then do I understand clearly of the eight bullets the four "H. M. C's" came out of the weapon, People's Exhibit 19, and the four copper-coated bullets issued out another weapon of similar make and character? A. That is my opinion.

Mr. Turkus: Offered for cross-examination.

Mr. Barshay: No cross-examination. I move to strike out his testimony with re-

spect to defendant Buchalter as not binding upon him, sir.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Cuff: Same motion with respect to defendant Weiss.

The Court: Denied.

Mr. Fischbein: Defendant Louis Capone has no questions and makes the same motion made by the other counsel.

The Court: Denied. 1304

Mr. Fischbein: Exception.

Mr. Turkus: May I exhibit People's Exhibit 19, the weapon, to the jury?

The Court: Yes.

MAX KAUFMAN, residing at 1801 First Street, Peoria, Illinois, called as a witness on behalf of the People, being first duly sworn, testified as follows:

1305

Direct examination by Mr. Turkus:

Q. Mr. Kaufman, are you married? A. Yes, sir.

Q. And do you reside with your wife and family in Peoria, Illinois? A. That is right, sir.

Q. And in cooperation with the District Attorney's office and police department of Peoria, did you return to New York City to testify in this case? A. Yes, sir.

Q. Did you live in Brooklyn? A. Yes, sir.

1306 *Max Kaufman—For People—Direct*

Q. How long did you live in Brooklyn? A. About 25 years.

Q. In September, 1936, did you reside in the Borough of Brooklyn? A. Yes, sir.

Q. And specifically did you live at 621 Lefferts Avenue, Brooklyn? A. Yes, sir.

Q. Is that an apartment house? A. Yes, sir.

Q. And is it located on the corner of Lefferts and Albany Avenue in Brooklyn? A. Right, sir.

Q. When you lived at 621 Lefferts Avenue in
1307 Brooklyn in September, 1936, did you own an automobile? A. Yes, sir.

Q. Was it a Chevrolet automobile, 1936, two door, hard top sedan, black in color? A. Right.

Mr. Turkus: I ask that this photograph be marked for identification.

(Photograph marked People's Exhibit L for identification.)

Q. Mr. Kaufman, I show you People's Exhibit L for identification, and ask you if that is sub-
1308 stantially a photograph of the premises in which you lived and the surrounding locale? A. Yes, sir, I lived right here at the white entrance.

Q. Where the white entrance is on that photograph? That is where you lived in September, 1936? A. Yes.

Q. And the building with the white entrance is 621 Lefferts Avenue? A. That is correct.

Mr. Turkus: It is offered in evidence.

Mr. Barshay: Objected to as not binding on the defendant.

Mr. Cuff: Same objection.
The Court: Let me see it. Overruled.
Mr. Barshay: Exception.

(People's Exhibit L for identification received and marked People's Exhibit 20 in evidence.)

Q. Mr. Kaufman, on Friday, September 11, 1936, did you use your Chevrolet car? A. Friday, yes.

1310

Q. And what time did you get through using it? A. It must have been about one o'clock at night.

Q. And would you say one o'clock in the morning of Saturday, September 12, 1936? A. That is right.

Q. When you got through using your car, did you park it? A. Yes, sir.

Q. Where did you park it? A. Right in front, on the other side of the street, across the street.

Q. Will you look at People's Exhibit 20 now in evidence and indicate to the jury where you parked your car in front of your premises? A. I parked it right over here (indicating).

1311

Q. Is it about where the other automobile is? A. Well, I would not say exactly. Right across the street from the house it was, but the other side of the fence. There was a fence around there at that time.

Q. At that time when you parked the car, that Saturday morning early, was there a fence similar to the fence on People's Exhibit 20? A. Right.

Q. And was your car parked directly opposite? A. Opposite the entrance.

Mr. Turkus: May I exhibit People's Exhibit 20 to the jury?

The Court: Yes. Objection is overruled.

Mr. Kaufman, when you parked your auto-
e in front of 621 Lefferts Avenue in Brook-
rly Saturday morning, September 12, 1936,
ou lock your car? A. Yes, sir.

At that time did your car have a radio in
A. Yes, sir.

Did the ignition key, that is the key that
s the engine or ignition key, was that the
key that fitted the handle of the lock? A.
sir.

Did you take the key with you after you
d the door? A. Yes, sir.

Did anybody else to your knowledge ha-e
t of keys? A. No, sir.

Mr. Barshay: I object to that.

The Court: Overruled.

Mr. Barshay: Exception. I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

When you took the keys and you went
ss to your apartment, did you go across to
to sleep? A. Yes, sir.

Did you give anybody permission or au-
ity to use your automobile?

Mr. Barshay: Same objection.

The Court: Overruled.

1315

Mr. Barshay: Exception. I move to strike the answer out.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you give anybody permission or authority to use your automobile? A. No, sir.

Q. Saturday morning what time approximately did you wake up? A. I woke up about nine o'clock.

Q. Did you go downstairs? A. Yes.

1316

Q. Did you go down there with intention of using your car? A. That is right.

Mr. Barshay: Object to it.

The Court: Overruled.

Mr. Barshay: May I take one objection to this whole line of inquiry? Is that all right, sir?

The Court: I would rather you make your objections, unless you make the ground of objection more specific. Then one ruling may be enough to cover all.

1317

Mr. Barshay: On the ground that it is not binding on the defendant Buchalter and on the further ground that it is evidence of another crime that has nothing to do with this.

The Court: All evidence so far is taken subject to checking up and connection.

Mr. Barshay: So when I say the objection, sir, I won't set forth the grounds. Those are the grounds, sir.

The Court: It only goes to the order of proof.

1318 *Max Kaufman—For People—Direct*

Mr. Talley: Also for the other defendants.

The Court: Yes, same ruling. Overruled.

Q. I think we got to the point in your testimony, Mr. Kaufman, where you had parked your car about one or two o'clock Saturday morning in front of your house, locked it up and went home to sleep; is that right? A. That is right.

1319 Q. That nobody else had any keys and you gave nobody permission to use it? A. Correct.

Q. That when you woke up about nine o'clock in the morning, you went down with the intention of using your car? A. Yes, sir.

Q. When you got downstairs was the car there? A. No.

Mr. Barshay: Same objection. Same exception.

The Court: Overruled.

Q. When you found your car missing, Mr.
1320 Kaufman, did you go some place? A. I went to the police station.

Q. Do you recall whether that was on Empire Boulevard near Prospect Park? A. That is right.

Q. Did you there make a report of the occurrence in connection with your automobile?

Mr. Barshay: Same objection.

A. I just made a report that my car was stolen, that was all.

Mr. Barshay: Move to strike the answer out.

The Court: Denied.

Mr. Barshay: Exception.

Q. Do you recall whether there was a detective there by the name of Jarvis or not? I know it is a long time ago. A. It is a long time ago but there was a detective there as far as I know.

Q. On Sunday, September 13th, at about noon time, did you hear something with respect to your automobile; yes or no? A. Yes, sir. 1322

Q. At that time did you receive a telephone call? A. Yes, I received a telephone from the police station from Miller Avenue.

Q. After you received the telephone call from the police station at Miller Avenue, did you go some place? A. I went to the police station.

Q. And did you there see your automobile? A. Yes, sir.

Q. Did you there identify your automobile? A. I did.

Q. Now did you look at your car? Did you examine it at the police station? A. Yes, I looked at it. I did. 1323

Q. When you had parked the car you told us before you had a radio in it, is that right? A. That is right.

Q. When you saw the car Sunday in the Miller Avenue police station and identified it, was the radio in the car? A. No.

Mr. Barshay: Same objection, sir.

The Court: Overruled.

1324 *Max Kaufman—For People—Direct*

Mr. Barshay: Exception. I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Was the radio missing? A. Yes, sir.

Q. Had you given anybody permission to take the radio?

Mr. Barshay: Same objection.

1325 A. No, not that I know of.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Now when you examined the car, did the car have on it when you examined it at Miller Avenue on Sunday after you got the call from the police station, did it have on it the license plates that had been issued to you by the Bureau
1326 of Motor Vehicles and the plates that were on the car when it was stolen? A. No.

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception. I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Will you answer? A. It did not have my license plates. It had somebody else's.

Q. Did you ever recover your license plates back?

Mr. Barshay: Same objection.

A. No.

The Court: Overruled.

Mr. Barshay: Exception, and I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception. 1328

Q. So that when you examined your car, Mr. Kaufman, in the Miller Avenue station on Sunday after it had been recovered by the police, it had different license plates on it? A. Yes, sir.

Q. Did you notice anything else different about your car when you saw it in the Miller Avenue station on Sunday after it had been recovered by the police as contrasted with it when you parked it that Saturday morning? A. You mean the way it looked?

Q. Yes. A. Yes, sir, it was all powdered up 1329
with some kind of powder, for fingerprints—I don't know what it was for but it was all white.

Q. Did you see a wire? A. Yes, there was a wire that went from the ventilation to the ignition.

Q. Mr. Kaufman, I show you People's Exhibits 13 and 14 in evidence, and ask you if that is a front and rear view of the automobile concerning which all these things that you have related to the jury happened? A. That was the color of the car and that is the model that I had.

1330 *Max Kaufman—For People—Cross*

Mr. Turkus: Offered for cross-examination.

Cross-examination by Mr. Talley:

Q. Mr. Kaufman, was the radio in the car when you bought the car? A. You mean when I purchased the car?

Q. Yes. A. No, I installed it after I purchased it.

1331 Q. What kind of a car was it? A. 1936 Chevrolet.

Q. What kind of radio was it? A. I think it was a Motorola.

Q. Where did you buy it? A. I bought it on Graham Avenue.

Q. Do you remember how much you paid for it? A. I think it was about $33, something like that.

Q. Was it a new radio? A. Yes.

Q. And you had it installed in the car? A. I had it installed there.

1332 Q. You left the car about one o'clock in the morning, did you? A. Around that time.

Q. In front of your residence which was 621 Lefferts Avenue, is that right? A. Yes, sir.

Q. And in front of your door? A. In front of, that is across the street.

Q. Across the street from your residence? A. Yes.

Q. Then you went upstairs and went to bed, is that right? A. Yes.

Q. That was one o'clock on Saturday morning? A. That was on Friday night; that is already Saturday morning.

Q. Friday night you left it there. If you left it there at one o'clock that would be one a.m. Saturday morning? A. That is right.

Q. But you missed it about nine o'clock? A. About a little after nine on Saturday morning.

Mr. Turkus: A matter of eight hours.

The Witness: Yes.

Mr. Turkus: That is all and th. ık you.

1334

WILLIAM R. JARVIS, detective, shield 479, attached to the 75th squad, New York Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Detective Jarvis, are you attached to the police force of the City of New York? A. I am.

Q. And how many years have you been a police officer? A. Seventeen. 1335

Q. Of the seventeen years that you have been in the department, how many years have you been assigned to the detective division? A. Over nine.

Q. In September, 1936, what squad were you attached to? A. 71st squad, at Empire Boulevard, Kings County.

Q. On September 12, 1936, were you assigned to the 71st squad? A. I was.

Q. Was it then located on Empire Boulevard? A. It was.

1336 *William R. Jarvis—For People—Direct*

Q. Did you do a tour of duty that day? A. I did.

Q. What hours did you work? A. From 8:30 a.m. until 6 p.m.

Q. At or about 10 o'clock in the morning did a man come in to you by the name of Kaufman? A. He did.

Q. And did he make a report of a stolen automobile?

1337 Mr. Barshay: I object to it. It is incompetent.

The Court: Purely collateral. Overruled.

Mr. Barshay: Exception.

A. He did.

Q. What was the name of the individual? A. Max Kaufman.

Q. Did you recognize him when he left the stand? A. I recognized him before he went into the court.

Q. And was that the Max Kaufman who made
1338 the report of the loss of an automobile? A. It was.

Q. Without stating the conversation, did Mr. Kaufman tell you what happened to the car as far as he knew? A. He did.

Q. What was the license plates of Kaufman's car as reported to you? A. L-8359 New York.

Q. 1936? A. 1936.

Q. Did you get a full description of the property that Mr. Kaufman reported stolen? A. I did.

Q. Did you get the motor number of the car which he reported stolen? A. I did.

Q. What was the motor number? A. May I refer—

Q. Naturally. A. Motor number was 6376729. That was verified with the B. of I. in the Police Headquarters in Manhattan.

Q. Did you get a serial number? A. I did.

Q. What was the serial number? A. 46192.

Q. And did you get a description of the car? A. I did.

Q. What was the description? A. A 1936 Chevrolet sedan, painted black. 1340

Q. When that report was made and you received a full description of the property reported stolen, did you cause a teletype and radio alarm to issue? A. I did.

Q. What was the alarm that issued? A. Alarm No. 11933.

Q. And what was it for? A. It was for a 1936 Chevrolet sedan bearing the license number and motor and serial numbers given before in this testimony.

Q. Did it give the name of the owner, Max Kaufman, and his address? A. It did. 1341

Q. And did the alarm report that vehicle stolen? A. It did. It reported his car was stolen.

Q. And in pursuance of police duties, when that alarm goes out is the police department and all its various members on watch for that motor vehicle? A. They are.

Q. On September 13, 1936, at about 12:30 at noon, did you receive a message from Detective Schiesser? A. I received a message from somebody in the 75th squad that my automobile reported stolen on 1/19/33 had been recovered but

1342 *William R. Jarvis—For People—Direct*

the plates were missing and I should cancel my alarm, it was used in a crime.

Q. And did you cancel the alarm upon the recovery of the car? A. I did.

Q. And was there an alarm, a teletype alarm, sent out over the wire cancelling the lookout alarm for that Max Kaufman stolen Chevrolet? Is that the procedure? A. You mean prior to the recovery?

Q. No, after the recovery. When the car was
1343 recovered? A. Yes.

Q. Does another alarm go out over the wires? A. No, the alarm No. 11933 cancelled in so far as car; plates still missing, which means to keep looking for those plates.

Q. To your knowledge were the plates ever recovered? A. They were not.

Mr. Turkus: Offered for cross.

(No cross-examination.)

Mr. Climenko: If your Honor pleases, the defendant moves to strike out the testimony of the witness Jarvis upon the
1344 ground it is not material to the issue here: it is not binding on any of the defendants and has to do with the commission of another crime.

The Court: Denied.

Mr. Climenko: Exception.

Mr. Rosenthal: Defendant Capone joins in.

Mr. Talley: We all join in.

The Court: Denied.

Gentlemen of the jury, please do not discuss the case; let nobody talk to you

about it. Keep your minds open. Remember the other instructions. Please follow them.

The defendants are remanded.

(Thereupon an adjournment was taken to Wednesday, October 22, 1941, at 10 a. m.)

Brooklyn, N. Y., October 22, 1941. 1346

TRIAL RESUMED

SIMON P. AMBRAZ, United States Army, Camp Upton, New York, called as a witness in behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Are you a captain in the United States Army? A. Yes, sir.

Q. Where is your post? A. Camp Upton, New 1347
York.

Q. Are you captain in any particular special branch of the Government service? A. Yes, sir, military police officer.

Q. Are you captain of the military police at Camp Upton, New York? A. Yes.

Q. Prior to being captain in connection with the military police of the United States Army force were you attached to the Police Department of the City of New York? A. Yes, sir.

Q. How many years were you a member of the Police Department? A. Twenty-six years.

Q. Of the twenty-six years you were a police officer, how many years were you a detective? A. About twenty years.

Q. During the month of September, 1936, were you a detective? A. Yes, sir.

Q. What post or command were you assigned to? A. I was connected with the Homicide Squad, Brooklyn.

1349 Q. On Sunday, September 13, 1936, did you have a conversation with Detective Schiesser? A. No, sir, I do not recall that.

Q. Did you see an automobile bearing license plates L-16-67, N. Y., 1936? A. No, sir.

Q. Did you conduct an investigation in connection with license plates L-16-67 N. Y. 1936 on Sunday, September 13, 1936? A. Yes, sir.

Q. Were those the circumstances under which you went to the home of one Abraham Waxman? A. Yes, sir.

Q. In conducting your investigation as to the ownership of the plates L-16-67 N. Y. 1936, did you ascertain the owner of those plates? A. I did.

1350

Mr. Barshay: I object to it as incompetent, immaterial and irrelevant with respect to the defendant Buchalter; it does not tend to connect him with the commission of the crime.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. At approximately what time on Sunday morning, September 13, 1936, Captain, did you

1351

learn that the plates L-16-67 N. Y. 1936, were in the possession of the police of the City of New York?

Mr. Barshay: I make the same objection.

The Court: It calls for a conclusion. Is there objection on that ground?

Mr. Barshay: On that ground too.

The Court: Sustained on that ground.

1352

Q. At approximately what time on Sunday morning, September 13, 1936, did you start your investigation?

Mr. Barshay: I make objection on the ground stated.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Approximately between 7 and 7:30 o'clock.

Q. Was that at the time when an alarm issued for the plates? A. No, information was received that the license plates bearing those license numbers, L-16-67 N. Y. was seen leaving the premises 725 Sutter Avenue.

1353

Mr. Barshay: I move to strike that out as not binding.

The Court: Strike it out as hearsay.

Mr. Turkus: Does your Honor strike out the time? I asked him what time he started the investigation.

The Court: He made an investigation. I assume your purpose in putting him on

he stand is to show ownership of the license plates that were on the car.

Mr. Turkus: That is true.

The Court: Now, that can be shown in a legal way, according to the rules of evidence.

Mr. Turkus: I have a right to bring out what time in the morning he started his investigation.

The Court: That is all right.

Mr. Turkus: That is all I wanted from that answer.

. Turkus:

Will you tell me the time when you started nvestigation of the ownership of the plates 7 N. Y. 1936, on Sunday, September 13, A. About 7:30 A. M.

Did you ascertain the name and address of vner of those plates?

Mr Barshay: I object.

The Court: Objection overruled. Yes or no.

Mr. Barshay: Exception.

Yes, sir.

After you made your investigation and find with respect to the ownership of the plates, e did you go? A. I went to the premises Newport Street.

Whom there did you see? A. One Abraham nan.

Without stating what the conversation was swer yes or no—did you have a conversation

with Abraham Waxman in connection with plates L-16-67 N. Y. 1936?

Mr. Barshay: I object on the same grounds.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. After you had that conversation with Abraham Waxman in connection with the plates, did you go somewhere? A. Yes, sir. 1358

Q. Did Abraham Waxman accompany you? A. Yes, sir.

Q. Where did the both of you go? A. We went to 384 East 96th Street.

Q. In what portion of the premises did you go? A. We went directly to the garage.

Q. In the rear of the premises? A. In the rear of the building, yes, sir.

Q. Did Waxman point out the garage to you?

Mr. Barshay: I object to that as not binding on the defendants. 1359

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He did.

Q. Did you look at that garage? A. I did.

Q. While you were looking at the garage was Waxman talking to you? A. Yes, sir.

Q. What did you observe in connection with the garage doors?

Mr. Barshay: I make the same objection, and on the further ground that it calls for evidence of another crime.

1360 *Simon P. Ambraz—For People—Direct*

The Court: Objection overruled.

Mr. Barshay: Exception.

A. The garage door was forced and the lock was removed.

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception.

1361 Q. Was that examination of the garage door and the lock made in the presence of Abraham Waxman? A. Yes, sir.

Q. Were the garage doors open so a view of the inside was had? A. No, sir, they were closed, but no lock on it.

Q. After the discovery had been made by you, were the garage doors opened by either you or Waxman? A. Yes, sir, I opened the garage door.

Q. Was there a motor vehicle inside? A. Yes, sir.

Q. Were there any license plates on that motor
1362 vehicle? A. No, sir.

Mr. Barshay: Will your Honor give me one general objection to all this line of inquiry so that I will not interrupt Mr. Turkus, and one exception?

The Court: Yes.

Mr. Turkus: He is your witness.

Mr. Barshay: I move to strike out all of his testimony on the ground it is incompetent, immaterial and irrelevant, it has not connected the defendant Buchalter with the commission of the crime.

Motion denied. Exception.

Mr. Talley: The same applies to the other defendants. (No questions by defense.)

ABRAHAM WAXMAN, residing at 1167 Willmohr Street, in the Borough of Brooklyn, City and State of New York, called as a witness in behalf of The People, after being duly sworn, testified as follows: 1364

Direct examination by Mr. Turkus:

Q. Mr. Waxman, what is your business or profession? A. Barber.

Q. How many years have you been a barber? A. About 40 years.

Q. Did you list your address as 1167 Willmohr Street, Brooklyn, with the stenographer? A. Yes, sir.

Q. Do you reside there with your wife and family? A. Yes, sir.

Q. Did you live there in September of 1936? 1365
A. Yes, sir.

Q. Was Willmohr Street at one time known by another name? A. Yes, sir.

Q. What is the other name? A. Newport Street.

Q. How do you spell that? A. N-e-w-p-o-r-t.

Q. In 1936, and specifically during the month of September, 1936, did you own an automobile? A. I did.

Q. What kind of an automobile was it? A. It was a Ford sedan, '29 four-door sedan.

Q. A four-door sedan? A. Yes, sir.

Q. What was its color? A. Grey.

Q. Do you still own that car? A. I do not.

Q. When did you sell it? A. The latter part of 1939.

Q. Now, Mr. Waxman, in September, 1936, when you owned this grey Ford sedan, do you recall the license plates? A. Yes, sir.

Q. What are the numbers? A. L-16-67.

Q. Did you garage that automobile in a gar-
1367 age? A. Yes, sir.

Q. Where did you keep the garage or maintain the garage?

Mr. Barshay: May I have the same objection on the same ground with respect to this witness?

The Court: Yes, the same ruling.

Mr. Barshay: Exception.

A. 384 East 96th Street.

Q. That is in Brooklyn? A. Yes, sir.

1368 Q. What type of a garage was it? A. It was a three-car garage, with no partition, but a door for each occupant.

Q. Is that commonly called a private garage? A. Yes, sir, I think you would call it so.

Q. How many blocks away from your home was this garage? A. Two and one-half blocks.

Q. What was the method you used to close or lock the doors of the garage? A. Just an ordinary cheap 10-cent lock.

Q. Would you describe it as an ordinary padlock? Would that be a fair description? A.

Well, it would be just an ordinary 10-cent lock such as you buy in a 5-and-10 cent store.

By the Court:

Q. Is that in the Canarsie section? A. No, sir, it is the dividing line between the Canarsie line and the Canarsie district—East New York and East Flatbush—right on the dividing line. That is where I live, right on the dividing line.

Q. (Mr. Turkus) This garage is in what they 1370
call the Brownsville district? A. No, sir, East Flatbush.

Q. Does that street run one block away from the boulevard? A. No, sir, that street, I believe, begins at Lenox Road.

Q. The street runs north and south? A. Are you referring to my home or the garage?

Q. The street where your home is. A. That street commences at East New York, yes, sir, and that is 98th Street, and Newport Street.

Q. That is in the section that meets with Rockaway Boulevard? A. No, sir, Rockaway Parkway. 1371

Q. I mean Parkway? A. One block this side.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit M for identification.)

Q. How far south is Church Avenue from that? A. One block from Church Avenue, one block south.

1372 *Abraham Waxman—For People—Direct*

By Mr. Turkus:

Q. I show you People's Exhibit M for identification and ask you if that substantially portrays the locale there on the picture as it was in September, 1936, including the row of garages in which you stored that Ford automobile. Can you recognize that? Look where the garages are. A. I believe this is the beginning of the alley.

1373 Q. That is the side entrance view? A. The beginning of the alley.

Q. Do you recognize it now? A. Yes, sir.

Mr. Turkus: I offer it in evidence.

Mr. Barshay: The same objection with respect to the exhibit as the objection made to the receipt of the testimony.

The Court: Same ruling.

Mr. Barshay: Exception.

(Received in evidence and marked People's Exhibit No. 21.)

1374

Mr. Turkus: May I submit People's Exhibit 21 for examination by the jury?

The Court: Yes.

By the Court:

Q. So the jury will understand, is Rockaway Parkway a continuation of Rockaway Avenue? A. Rockaway Parkway and Rockaway Avenue, I do not see any connection there. Rockaway Avenue in Brooklyn is about seven or eight blocks further east of Rockaway Parkway.

1375

Q. Where does Rockaway Parkway begin? A. Rockaway Parkway begins at I believe East New York Avenue.

Q. And runs to Canarsie? A. It runs out quite a bit, yes, sir.

Q. Where this garage is located was a short distance from the car barns on Church Avenue Line, wasn't it? A. Your Honor, I really am not familiar. I know there is on Hegeman Street a car barn, but I should judge it would be about a mile away.

1376

Q. I want to get the location. I was under the impression the car barns were at Rockaway Avenue and Church. A. No, it is not there; it is on Hegeman Street, around New Lots Avenue.

Q. My recollection of the car barns probably is the old location; it goes back about 40 years. A. Most likely yes, but it would be about a mile from the garage. That street is called Hegeman Avenue or Hegeman Street, I believe.

Mr. Turkus: I ask that this photograph be marked for identification.

1377

(Received and marked People's Exhibit N for identification.)

Q. I hand you People's Exhibit N for identification and ask you if that is another view of the garages including the one in which you stored your Ford automobile, and I ask you whether it truly represents, substantially, the conditions as they existed in September of 1936. A. Exactly.

Mr. Turkus: I offer it in evidence.

(Received without objection and marked People's Exhibit 22 in evidence.)

Q. As we face this photograph, People's Exhibit 22, and looking at it again, can you indicate which one was the garage you stored your grey Ford in? Can you indicate it or pick it out? A. The first one.

Q. The first garage as you face the photograph on the right-hand side? A. Yes, sir.

1379

Mr. Turkus: May I show this exhibit, People's 22, to the jury?

The Court: Yes.

Q. Mr. Waxman, did you use your Ford car on Labor Day, September, 1936? A. Yes, sir.

Q. When you got through using it did you store it in the garage? A. Yes, sir.

Q. And specifically, did you store it in a garage portrayed on People's Exhibit 22 in evidence? A. Yes, sir.

Q. Did you have any difficulty in the operation
1380 of the car? By that, I mean did you get flat tires at about that time? A. I got a flat tire on Labor Day night.

Q. Did you store the flat shoe in the rear part of the car? A. Inside.

Q. Subsequently did you cause that flat shoe to be brought to a repair man? A. Yes, sir.

Q. Was that taken there by your son? A. Yes, sir.

Q. Thereafter did you personally go to the repair shop for that shoe? A. I did.

Q. Did you drive down in your Ford car? A. I did.

Q. Did you take the shoe with you or was it put on the car? A. The garage man put it on the wheel and I drove back to the garage.

Q. Was the spare tire then put on the rack, back on the rack, the tire rack? A. The one that was repaired was put on the wheel and the one taken off the wheel was put on the rack.

Q. After you had the deflated shoe changed, 1382
which had been flat and subsequently repaired, put on the car, did you drive your car back to the garage portrayed on People's Exhibit 22 in evidence? A. Yes, sir.

Q. Did you lock the car in the garage? A. Yes, sir.

Q. Approximately when was that, to the best of your recollection? A. I believe it was on Wednesday night.

Q. Did you see the car after that and before the arrival of the detectives at your home? A. No, sir.

Q. Was that a car which you used on week- 1383
ends? A. Mostly, yes, sir.

Q. You were one of those Sunday drivers? A. Yes, sir.

Q. On Sunday morning did the detectives come to your home? A. Two detectives.

Q. Did you recognize Captain Ambraz, who preceded you out of the court-room as you came in? A. Yes, sir.

Q. Was he one of the detectives who called to see you? A. Yes, sir.

Q. The law does not permit you to tell us what

the detectives said to you or what you said to the detectives, but I can go this far: Did the detectives talk to you? A. They did.

Q. Did they talk to you in reference to license plates L-16-67—yes or no? A. Yes, sir.

Q. Did they talk to you in reference to the ownership of the plates? A. They asked me if I had a car with license plates 16-67.

Q. Did you answer the detectives? A. I said, "Yes, sir, I have a car."

1385 Q. Well, were you asked where the car was? A. They asked me, "Where is your car?" I said, "In the garage."

Q. After that talk what happened? A. We went to the garage.

Q. You and the two detectives? A. Yes, sir.

Q. Can you estimate what time of the morning you went there? A. About eight o'clock.

Mr. Talley: Is this Sunday morning?

Mr. Turkus: Yes.

Q. That Sunday we speak of was Sunday, Sep-
1386 tember 13, 1936? A. I think it was.

Q. When the detectives accompanied you to the private garage, did they go with you to the garage exhibited on People's Exhibit 22 in evidence? A. Yes, sir.

Q. That was the place where you had stored your car after you had used it last? A. Yes, sir.

Q. When you got to the garage what did you notice in connection with the garage doors and the lock? A. The lock had been broken.

Q. When you had locked the garage doors, was the lock intact? A. It was locked, properly locked.

Q. Were you ever able to use that lock again? A. Never.

Q. Did you give anyone permission to open up your garage? A. No, sir.

Q. Were the garage doors opened by the detectives or yourself to look at the car inside? A. Well, when we got to the garage the first thing I did was to look in through the window, and when I saw my car there I felt safe. Then when the detectives opened the door the first thing they noticed was the plates were off. 1388

Q. Had you given anyone permission to take your plates? A. Never.

Q. Was that the first knowledge or intimation you had that your plates were stolen—under the circumstances you have related to this jury? A. Ye., sir.

Q. Was it through the visit of the detectives that you first learned the plates were gone? A. That is right.

Mr. Turkus: I ask that this photograph be marked for identification. 1389

(Received and marked People's Exhibit O for identification.)

Q. I show you People's Exhibit O for identification and ask you if you can identify it. A. That is right.

Q. When you say "That is right," what is it? A. This was my car.

Q. Were you present when the detectives took that picture? A. No, sir, I don't think so.

Q. Is that the way the car looked without the plates? A. Exactly.

1390 *Colloquy*

Mr. Turkus: People's Exhibit O for identification is offered in evidence.

(Received, without objection, and marked People's Exhibit 23 in evidence.)

Mr. Turkus: May I exhibit People's Exhibit 23 in evidence to the jury?

The Court: Yes.

Mr. Turkus: The witness is offered for cross examination.

1391

Defense Counsel: No questions.

Mr. Barshay: I move to strike out the testimony on the grounds previously set forth.

The Court: Motion denied.

Mr. Barshay: Exception.

And on the further ground that it is evidence of another crime not connected with this case.

The Court: Motion denied.

Mr. Barshay: Exception.

1392

Mr. Talley: May I have the exact location of this garage which is indicated on People's Exhibit 22?

Mr. Turkus: The first garage to the right as you look at the photograph and in which was stored the Ford car.

Mr. Talley: Will you designate the place?

The Court: 384 East 96th Street, he said.

Mr. Talley: 384 East 96th Street is the approximate location?

Mr. Turkus: Yes.

Mr. Talley: I just wanted to know where it was.

1393

HAROLD D. ROSEN, residing at 1611 Perkimonen Avenue, Reading, Pennsylvania, called as a witness in behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. How old are you? A. Thirty years old.

Q. Do you reside at the address listed with the stenographer, 1611 Perkimonen Avenue, Reading, Pennsylvania? A. Yes, sir.

1394

Q. Were you in business in Reading, Pennsylvania until recently? A. I was.

Q. Where was that business located? A. 554 Lancaster Avenue, Reading.

Q. What kind of a business did you conduct? A. A meat market and grocery business.

Q. What kind of work are you engaged in now? A. Part time in a department store in Reading.

Q. When you speak of Reading, do you refer to Reading, Pennsylvania? A. Yes, sir.

Q. Were you at one time a school teacher? A. Yes, sir. For the last two years I was teaching in the Reading evening high school.

1395

Q. What subject did you teach? A. English.

Q. Are you a son of the late Joseph Rosen who was killed September 13, 1936, in the Borough of Brooklyn? A. I am.

Q. Now, from the summer of 1931 to the spring of 1932, did you work for your father, Joseph Rosen? A. Yes, sir, I was employed by him and his partner; I was employed by the firm of my father.

Q. What was the name of the firm your father

ember of? A. The New York and New
Clothing Transportation Company.
w many partners were there in the firm?

o were the four? A. My father, Joseph
Morris Blustein, Nat Sobler, and Martin

at business was this firm, the New York
Jersey Transportation Company, Cloth-
nsportation Company, engaged in? A.
re engaged in transporting clothing from
ufacturer to the contractor, and they
ve the articles, pants, coats, and vests,
and returned back again.
that commonly known as the clothing
industry? A. Yes, sir, known as cloth-
king.
en you were employed there do you re-
re the place of business was, the office?
ington Place off Broadway in Manhat-

ile employed there what were your du-
General charge of the office, taking care
fice, answering telephone calls and be of
ssistance around the books.
re you familiar with bookkeeping and
ng? A. Yes, sir, I took accountancy at

s that one of your regular courses at
A. No, sir, I took that as a subject for
e.
what college did you study accountancy?
ght College, Reading, Pennsylvania.
re you familiar with the books and rec-
the company? A. Yes, sir, at that time

I was familiar with the books and records of the company.

Q. Was the business a paying business?

Mr. Barshay: I object. That is a conclusion.

The Court: Objection overruled.

Mr. Barshay: Exception to defendants.

A. I certainly know; I was bookkeeper there.

1400

The Court: You have not the books here now?

The Witness: No.

Q. Did the partners, including your father, have a weekly salary? A. Yes, sir, they had a weekly salary.

Mr. Barshay: I object to that as entirely incompetent with respect to the defendants.

The Court: It is competent, because it is collateral. The rule as to conclusions 1401
is relaxed as to collateral testimony. Objection is overruled.

Mr. Barshay: Exception to defendants.

Q. You got to the point before objection of counsel of telling me, or rather, telling the jury and the Court that the partners had a weekly drawing account or salary. A. Yes, sir, that is correct.

Q. In addition to that, were there profits that were distributed?

Mr. Barshay: The same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

A. Yes, sir, there were profits; they usually had expense accounts which they took a certain amount during the week, etc. For example, my father had to go to Pennsylvania quite often—

Mr. Barshay: I object to that as not responsive.
1403 The Court: Objection overruled.

Q. Tell me about that. You can respond to me now.

Mr. Barshay: I object to the form of the question.
The Court: Objection overruled.
Mr. Barshay: Exception.
The Witness: For example, he had to go to Pennsylvania to make contacts there with contractors; he certainly had to have
1404 a drawing account to do that, and it was taken out of the firm.

Q. Were there trips to Pennsylvania the disbursements for which were defrayed and paid by the company in connection with securing Pennsylvania business? A. That is right.

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

1405

A. He contacted various chambers of commerce in different towns, like Carbondale, and members of the banks, in order to find out what could be done to place different industries there.

Mr. Barshay: I move to strike out that answer.

The Court: Motion denied.

Mr. Barshay: Exception.

1406

Q. Directing your attention to the summer of 1932, did you accompany your father to a hotel in Manhattan on Broadway and 8th Street, known as the Broadway Central Hotel? A. I did.

Q. Did you go there with your father by appointment?

Mr. Barshay: I object to counsel leading.

The Court: Overruled on that point.

Mr. Barshay: Exception.

1407

A. My father had an appointment and I accompanied him.

Q. Before you and your father went to the Broadway Central Hotel, did you know with whom he had the appointment?

Mr. Barshay: I object to that.

The Court: Objection overruled. Answer yes or no.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Answer this question too yes or no— Did you know when you went with your father to the

Broadway Central Hotel whom he was going to meet?

Mr. Barshay: I make the same objection.

The Court: The word "know" is really objectionable, because it states his own conclusion.

Mr. Turkus: I will reframe it.

The Court: As to the alleged persons—were you so informed?

1409 The Witness: Yes, sir.

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. (The Court) And did you assume it was true?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

1410

A. Yes, sir.

By Mr. Turkus:

Q. Answer this yes or no. Did your father ask you to accompany him to that meeting?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. No, sir.

Q. Did you go of your own initiative?

Mr. Barshay: The same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Yes, sir.
Q. Did you go with him side by side to the hotel?

Mr. Barshay: I make the same objection. 1412
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Yes, sir.
Q. Now, when you and your father got to the Broadway Central Hotel what did you see your father do?

Mr. Rosenthal: I object to this line on behalf of the defendant Capone as in no wise binding on him.
Mr. Cuff: We make the same objection 1413
as to Weiss.
The Court: I don't know whether it is or not; if it is not connected up it means nothing.
Mr. Rosenthal: May I have an objection to this question and may I have a general objection to this line of questioning in so far as the defendant Capone is concerned?
The Court: As to the subject-matter, yes.

1414

Mr. Rosenthal: And I take an exception to the Court's ruling.

Mr. Cuff: May the same rule apply to the defendant Weiss?

The Court: Yes. The Court figures if it is not connected it is not prejudicial in any way. No harm is done by taking it subject to being connected.

By Mr. Turkus:

1415

Q. What did you see your father do? A. I saw him walk into the hotel.

Q. Did you wait for your father to come out? A. Yes, sir.

Q. How long did you wait? A. About three-quarters of an hour or an hour approximately.

Q. Did your father come out? A. Yes, sir, he did.

Q. Was he alone when he came out? A. When he came out he was alone.

Q. Did anybody join him in the lobby? A. Yes, sir, they did.

1416

Q. Now, that question I asked may be ambiguous about coming out alone. Do you mean stepping out of the hotel, the outer door? I am referring to the time you saw him in the lobby. A. In the lobby there were three men with him.

By the Court:

Q. That is rather a small lobby? A. It is not very large, the Broadway Central.

Q. The small lobby was visible from where you stood? A. Yes, sir.

By Mr. Turkus:

Q. Did you see your father walk in the lobby with these men or did you see something else? A. I saw him standing with three men.

Q. Did you watch him and the men?

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

1418

A. Yes, sir, I did.

Q. Do you recognize one of the men? A. I do.

Mr. Barshay: I object.

The Court: Overruled.

Mr. Talley: I object to this line of testimony on the ground he says what he is describing was in 1932, and I submit and object to it on the ground that whatever happened is too remote to be competent evidence in this trial, four years before the crime charged in the indictment, 1932—four years before 1936.

1419

Mr. Barshay: And I join in that objection.

The Court: The same ruling.

Mr. Barshay: Defendants except.

Mr. Talley: Defendants except.

Q. Tell this jury who one of the men was that was in the hotel lobby with your father. A. The gentleman there named Lepke.

The Court: We don't know what that means.

1420 The Witness: The gentleman right here, next to that fellow with the badge.

Q. Do you know his name? A. Yes, sir, Lepke.

Mr. Barshay: I move to strike it out.

The Court: Motion denied.

Mr. Barshay: Exception.

The Court: By "Lepke" indicating whom?

1421 Mr. Turkus: The defendant Buchalter, alias Lepke.

The Court: The record does not show who Lepke is.

Mr. Turkus: He pointed to him and indicated him. He called his name on the record.

Mr. Barshay: I object. There is no proof that they are one and the same person, although there will be. Let the District Attorney wait his time.

The Court: All right.

1422 By Mr. Turkus:

Q. Did the defendant Buchalter, or Lepke, as you call him, and your father and those other men stop in the hotel lobby and talk? A. Yes, sir, they did.

Q. About how far away were you from your father and the defendant Lepke and the other men? A. It seemed about 15 or 20 feet.

Q. As you looked at them, which way was your father facing? A. His back was toward me.

Q. Who was your father facing? A. He was facing the gentlemen—

Mr. Barshay: I object to that as a conclusion.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. You told us as you looked at the group your father's back was to you? A. Yes, sir.

Q. Toward whom was he facing? A. My father was facing toward the man I pointed out in this court-room now.

Q. What name did you call that man? A. The only name I knew him at that time, Lepke. 1424

Q. At that time was the name Lepke a familiar name to you? A. Yes, sir, it was.

Q. Had you heard that name before you went to the hotel with your father? A. Yes, sir, I did.

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. From where you stood did your senses, that is your physical senses, tell you who was doing the talking? 1425

Mr. Barshay: I object.

The Court: Sustained as to form.

Q. Who was talking?

Mr. Barshay: I object. He says he was not in a position to hear.

Mr. Turkus: I never heard such an answer.

1426

Mr. Barshay: He said he was 15 feet away or 20 feet away.

By the Court:

Q. Did you hear who was talking? A. Yes, sir, Lepke was talking.

Mr. Barshay: I move to strike it out.

The Court: Motion denied.

Mr. Barshay: Exception.

1427

By Mr. Turkus:

Q. While Lepke was talking, did he do anything? A. He seemed to be in an animated—

Mr. Barshay: I object.

The Court: Let him finish his answer.

Mr. Barshay: My objection is to the answer as he started it.

The Court: The answer was not finished when the interruption came.

1428

Mr. Barshay: He started to answer with the words "He seemed." It is obviously a conclusion.

By the Court:

Q. What did you observe as to the talk? A. Lepke, the man I referred to, was in an animated discussion with my father.

Mr. Barshay: I object to the characterization.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Turkus: I ask that your Honor rule that the witness be permitted to complete that testimony.

Mr. Barshay: That is an inference that I did not allow him to complete. He finished his answer.

The Court: Did you finish your answer?

The Witness: No, I was continuing.

The Court: Well, go ahead. 1430

The Witness: There were two men beside him. They all seemed—

Mr. Barshay: I move to strike that out. That is not responsive. It is not responsive to the question Mr. Turkus asked. He finished the answer to the question Mr. Turkus put to him.

Mr. Turkus: Will your Honor permit him to finish?

Mr. Cuff: May we have the question read?

The Court: Leave out what "seemed." 1431
State what you observed. Finish your answer.

A. He was in an animated discussion.

Mr. Barshay: I move to strike that out.

The Court: Please don't interrupt. Let the witness finish his answer and then objection may be made. This delays the trial. What is your answer.

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The Witness: Lepke was in an animated discussion with my father.

By the Court:

Q. How about the others? A. There were two men beside him who seemed to edge up close to Mr. Lepke.

The Court: They "seemed" you say?

1433 The Witness: I was looking at them. They did.

By Mr. Turkus:

Q. While Lepke was engaged in this talk with your father, which you said was an animated discussion, did you see Lepke himself do anything?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

1434 A. It all looked like threatening. I would rather not answer that.

Mr. Barshay: I move to strike out the witness's voluntary statement.
The Court: Motion denied.
Mr. Barshay: Exception.

Q. Answer it the way you want to answer it.

Mr. Barshay: I object. It is an improper statement.

The Court: You were asked if you saw Lepke himself do anything.

The Witness: He moved closer to my father.

By Mr. Turkus:

Q. When he moved closer to your father, how far apart were their faces when Lepke was talking? A. They were almost face to face.

Q. How close were the faces? A. He spoke right into his face. 1436

Q. When you say "he spoke right into his face," who spoke? A. Lepke spoke into my father's face.

By the Court:

Q. How many inches away would you say their faces were? A. Maybe six.

By Mr. Turkus:

Q. When facing Lepke quite as close as you told the Judge what did your father do? A. My father turned around and walked out of the hotel. 1437

Q. When he walked out of the hotel, did he join you? A. Yes, sir.

Q. Did you look at your father's face? A. I did.

Q. Describe it to the jury.

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Your Honor will keep mind this is in 1932.

Mr. Cuff: I object on the ground that at his father's face appeared to be is t material; it has no materiality and relevancy whatever to this case.

The Court: The Court is keeping erything in mind.

Mr. Cuff: May we have an exception your Honor's ruling?

The Court: Objection is overruled.

Mr. Cuff: Defendants except.

Mr. Barshay: Defendants except.

The Witness: He was very white and le and seemed very nervous, and was ry nervous.

Mr. Barshay: I move to strike that out a conclusion.

The Court: Motion denied.

Mr. Barshay: It is not binding on these endants. I wish counsel would refrain m his cynical smile when I make an ection.

The Court: It is competent under the es of evidence as understood by the urt. Immediate physical reactions may described.

Mr. Barshay: I have a right to object. r Honor understands that.

Turkus:

n you saw your father in the condition described to the jury—and answer this —did you talk to him? A. Yes, sir.

Q. Did he answer you—yes or no? A. No.

Q. How long after that was it before your father's business broke up?

Mr. Barshay: I objec., especially to the word "broke up." That is a conclusion.

The Court: Well, "discontinued." Use the word "discontinued."

Mr. Barshay: I object to the use of that word on the ground it has no relevancy to this issue. 1442

The Court: Objection overruled.

Mr. Barshay: Exception.

A. About six months.

Q. After your father's business had ended, that is, the New York and New Jersey Company, did your father secure a position? A. Yes, sir.

Q. For whom did he go to work? A. Louis Cooper.

Q. Louis Cooper of the Garfield Express? A. That is right. 1443

Q. Approximately how long did your father work for Louis Cooper? A. About five or six months.

Q. When your father secured this position with Louis Cooper did you return to Reading, Pennsylvania? A. I did.

Q. Did you there go to school?

Mr. Barshay: I object to what he did; it has nothing to do with this case.

The Court: Objection overruled.

Mr. Barshay: Exception.

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A. I went back to finish my last year at college.

Q. When the school semester was completed, did you return to New York City?

Mr. Barshay: Same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I did.

1445 Q. Did your father's position with Louis Cooper or the Garfield Express terminate? A. It did, before I finished school.

Q. During the summer of 1939 did your father have any steady employment—1933—excuse me.

Mr. Barshay: I object to the form of the question.
The Court: Objection overruled.
Mr. Cuff: Same objection.
The Court: Same ruling.
Mr. Cuff and Mr. Barshay: Exception.

1446 A. He did not.

Q. Did he, to your knowledge, make any attempt to secure work?

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. He did.

Q. Did he seek to get a connection in the clothing trucking business?

Mr. Barshay: The same objection.

The Court: How would he know?

Mr. Turkus: He was back from school, working for his father.

The Court: That would be hearsay.

Q. You were not with him when he tried to get work? A. In constant communication with him.

The Court: That is all hearsay.

Mr. Turkus: I will not pursue it. 1448

Q. Do you know this of your own knowledge: While your father was unemployed did he make visits to the garment district and the clothing district?

Mr. Barshay: I object, at the most it is hearsay, unless he went with him.

The Court: Objection sustained.

Q. Do you know of your own knowledge whether your father secured a position with a man named Larry Cooper? A. He did. 1449

Q. Do you know whether that position lasted a short time? A. It lasted a short time, yes, sir.

Q. Was it after that position ended that your father went into business in the candy store at 725 Sutter Avenue, Brooklyn? A. Yes, sir.

Q. I want to direct your attention to the summer of 1936. Were you living then in Reading, Pennsylvania? A. I was.

Q. Did your father, Joseph Rosen, go down to Reading, Pennsylvania? A. He did.

Q. How long did your father stay in Reading, Pennsylvania? A. Just a few days.

1450

Q. Can you remember the date of his arrival now? A. It was a Friday night.

Q. When your father arrived in Reading, Pennsylvania—and this question just answer yes or no—did he talk to you? A. Yes, sir, he did.

Q. Answer this only yes or no: Did he discuss the reason for his visit with you?

Mr. Barshay: I object.

Mr. Cuff: That is calling for hearsay testimony.

1451

The Court: Answer yes or no. Objection overruled.

Mr. Cuff and Mr. Barshay: Exception to defendants.

A. Yes, he did.

The Court: What year was that?

Mr. Turkus: In the summer of 1936.

Q. Approximately how many days did your father spend in Reading?

1452

Mr. Cuff: Objected to as already answered. He said a few days.

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Cuff and Mr. Barshay: Defendants except.

A. Three days.

Q. Did your father then depart from Reading? A. Yes, sir. He did.

Q. On Sunday, September 13, 1936, did you

receive a telephone call in Reading, Pennsylvania? A. Yes, sir, I did.

Q. Who telephoned you? A. My sister Sylvia.

Q. After that telephone call did you go to Brooklyn, New York? A. I did.

Q. When did you arrive in Brooklyn? A. I arrived at about one o'clock.

Q. Would you say one o'clock in the afternoon? A. Yes, sir, I believe—it was the nine o'clock train and it got to New York about 1454
12:30; it was about one o'clock approximately.

Q. Did you go to your father's home? A. Yes, sir, I did.

Q. Where was it then located? A. 720—

Q. No, the home? A. 345 Wyona Street.

Q. Did you there see various people? A. Yes, sir, I did.

Q. Members of your family? A. Yes, sir.

Q. Detectives and police officials? A. Yes, sir.

Q. From your home did you go to the Kings County Morgue? A. Yes, sir, they took me there.

Q. Did you there view the body of your father, 1455
Joseph Rosen? A. Yes, sir, I did.

Q. Did you identify his body to the Medical Examiner? A. I did.

Q. Did you attend the funeral? A. Yes, I did.

Q. On Monday, July 7, 1941, did you receive a visit at Reading, Pennsylvania, from any people now in this court? A. Yes, sir, I did.

Q. Who were the people? A. The attorneys over there—Mr. Barshay and Mr. Cuff.

The Court: When was that?

Mr. Turkus: July 7, 1941.

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The witness is offered for cross-examination.

The Court: (addressing jury) We will now take a recess until 1:30, gentlemen. Please do not discuss the case nor let anyone talk to you about it. Keep your minds open.

The defendants are remanded.

(A recess was taken at this point for
1457 luncheon, at the request of Mr. Barshay, the attorney for the defendant Buchalter.)

AFTERNOON SESSION

TRIAL RESUMED

HAROLD E. ROSEN (resumes the stand).

Mr. Barshay: Now I ask your Honor to instruct the jury at this time, in the
1458 language of Section 39 of the Canons of Professional Ethics of the American Bar Association, the New York City Bar Association of the City of New York, as follows: A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action, without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from its truth or in any

degree to affect his free and untrammelled conduct when appearing at the trial or on the witness-stand.

The Court: That is correct.

Mr. Barshay: I ask Mr. Turkus to concede that by the last question he put to the witness he meant no innuendo of any kind, nature or description with respect to Mr. Barshay or Mr. Cuff.

The Court: I think you are too sensitive. 1460

Mr. Barshay: All right, sir. I ask Mr. Turkus to be gentleman enough to concede that.

The Court: Maybe the manner of putting that request is not quite proper.

Mr. Barshay: Maybe the manner of putting the last question to the witness and dropping him in the manner in which he did is not proper too. I have a right to be sensitive of our reputations when there are people in the court room who do not know the ethics of the profession and have a right to infer there was something wro. g. I do not want that impression to go unchalienged. That is all I care about. 1461

The Court: The Court gives him the instruction that you request. Let the incident rest there.

Mr. Barshay: All right, Mr. Turkus.

Cross-examination by Mr. Barshay:

Q. Mr. Rosen, when for the first time were you questioned by any member of any District At-

1462 torney's office after your father's death? A. Please repeat that, Mr. Barshay.

(Pending question read by the reporter.)

A. I could not remember exactly but I know I was taken up to District Attorney Geoghan's office and questioned there.

Q. And can you tell me how long after your father's death? A. I don't know exactly what you mean, Mr. Barshay.

Q. How long after your father died or was
1463 killed?

The Court: Days, weeks or months?

Q. Were you questioned in the District Attorney's office? A. After that time, you mean?

Q. Yes.

The Court: Was it soon?

A. I don't remember whether he called me or not. That is why—

Q. You now recall that before your father's
1464 death you were not questioned by anyone, is that correct? A. Yes, sir.

By the Court:

Q. Did you identify the body in the morgue? A. Yes, I did, your Honor.

Q. To whom, Dr. Marten? A. I don't know his name.

Q. The medical examiner? A. Yes, sir.

Q. And about that time did you go to the District Attorney's office? A. I know they took

1465

me there. I was so wrought up I don't remember what day but it was right after that.

Q. It was right after? A. Yes, sir.

By Mr. Barshay:

Q. Would you say the same day or the next day or a week later? A. I do not know. I cannot remember.

Q. I am trying to probe your recollection, that is all; nothing personal here at all. A. I understand that, Mr. Barshay.

1466

Q. Was it in a month? A. Naturally in a case like this they would take me up there shortly after the death.

Q. Do you recall the assistant to whom you made the statement? A. Assistant District Attorney McCarthy.

Q. And was there a stenographer present? A. Yes.

Q. You were asked questions and you made answers? A. That is right.

1467

Mr. Barshay: I call upon the District Attorney to produce that statement. Well, I would like to have an answer if he has it or he has not got it. Is he producing it or isn't he? May I ask the Court to address the District Attorney?

The Court: No.

Mr. Barshay: Then I press the question. I call upon the District Attorney to produce such statement for the purpose of marking it for identification.

The Court: The District Attorney is not required to answer you. If there is

1468 *Harold D. Rosen—For People—Cross*

no answer it is a negative response by implication.

Q. Did you testify before the Grand Jury? A. Yes, I did.

Q. Do you recall when? A. It was within that time. I don't remember exactly when.

Mr. Barshay: I call upon the District Attorney to produce this gentleman's testimony before the Grand Jury as this man
1469 says he testified there, for the purpose of marking it for identification.

The Court: You don't have to have the Grand Jury minutes marked. The Court takes at all times judicial notice of them.

Mr. Barshay: Then I call upon the District Attorney to produce that statement and the Grand Jury minutes for the purpose of seeing whether or not therein contained are statements which are contradictory to the testimony that this witness now gives.

1470 Mr. Turkus: There are rules of law. They have not been complied with.

The Court: I understand there is a declination.

Mr. Turkus: There is. There are rules of law governing when I can release Grand Jury minutes. I must comply with the law.

Mr. Barshay: All right, I will prepare a subpoena right away.

Q. Did you in the Grand Jury give testimony with respect to this meeting at the Broadway

Central Hotel? Please either look in the direction of the jury or the judge or anyone else, but please— A. Repeat that question. I do not know what you are driving at, Mr. Barshay.

Q. You are an English teacher? A. Certainly.

Q. Do I speak plain simple language? A. Yes, but please repeat the question.

Q. Don't you hear me, sir? A. Sometimes I do.

Q. I will try to keep my voice up.

1472

(Pending question read by the reporter.)

A. I don't remember.

Q. Did you to Mr. McCarthy give testimony with respect to this meeting at this hotel? A. I repeat I don't remember.

Q. That is your best answer, is that so, sir? A. That is the answer.

Q. Can you give me the date when you went to this hotel? A. How can I give you a date?

Q. Mr. Rosen, I am not here to argue with you. A. I cannot.

1473

Q. If you cannot, please say so. A. No.

Q. Can you give me the month? A. No.

Q. Can you give me the week?

Mr. Turkus: It is objected to as already answered. He said he could not give him the month so obviously he could not give him the week.

The Court: Sustained. I think the answer is clear enough.

Mr. Barshay: Respectfully except.

Q. Can you give me the season of the year? A. Yes.

Q. Will you give it, please?

The Court: Was it in the fall?

The Witness: No.

The Court: Winter?

The Witness: I believe it was in the spring of the year.

1475 Q. In the spring, you say, of 1932? A. Mr. Barshay, I can't remember all those things, the dates, the months, exactly what happened that time.

The Court: Counsel is asking you about 1932, four years before your father was killed.

The Witness: Yes, sir.

The Court: Did you go before the Grand Jury at that time?

The Witness: No, sir.

1476 Mr. Barshay: May I proceed, your Honor?

The Court: Yes.

Q. Do you now claim that this meeting at the Broadway Central Hotel took place in the spring of 1932?

Mr. Turkus: Object to the form, what the witness now claims, carrying with it an intimation and innuendo and implication.

The Court: Yes, it does. Sustained.

1477

Q. Do you now say on your oath that this meeting which you say you went to with your father was in the spring of 1932?

Mr. Turkus: Same objection, the word "now."

The Court: The words "now say."

Mr. Barshay: I eliminate those two words "now say."

1478

Q. Is it your testimony that you went to the Broadway Central Hotel in the spring of 1932?

The Court: Do you recall?

A. I recall that it was the middle, probably, of the year 1931, because that is the year I stayed home from college.

Q. Did you say now 1931? A. Between 1931 and 1932 I stayed home from college. I did not go to college that year.

1479

The Court: That is in the fall and winter?

The Witness: That is right.

The Court: Of 1931-'32?

The Witness: That is right.

The Court: Is it a sensible inference that if it was in the spring, that it was in the spring of 1932?

The Witness: It was approximately that time.

Q. Is that your best answer? A. That is my best answer.

Q. Did you say at the morning session that

1480 it was in the summer of 1932 that you went to that hotel? A. I don't remember. Did I say it? I am asking you.

Q. Under the rules of evidence you have no liberty to ask me questions because the law does not allow it. Do you mind, sir, if I ask you questions? A. Yes, sir.

Q. Did you say this morning that the visit you made to that hotel with your father was in the summer of 1932? A. I remember that it was
1481 six months after—

Q. Excuse me, sir, Mr. Rosen—

The Court: Let him answer.

Mr. Barshay: I object to it. It is not responsive.

The Court: Find out. Let him answer. You remember what?

The Witness: It was probably six months after 1931 began because at that time the partnership started again—

Mr. Barshay: I move to strike out this
1482 man's answer.

The Witness: It was approximately the spring or summer of 1932. This is my best answer, Mr. Barshay.

Q. Mr. Rosen, I am sure you want to respect the rights of other people, too. A. I certainly do, Mr. Barshay.

Mr. Barshay: Your Honor, I ask for a yes or no answer to the question I put to this gentleman.

The Court: He has answered the question excellently.

Mr. Barshay: May I put it again?

Mr. Cuff: I move to strike it out as not responsive.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Cuff: The question asked about this morning.

Q. I ask you again, this morning did you say on this witness stand that you visited with your father the Broadway Central Hotel in the summer of 1932; yes or no? 1484

Mr. Turkus: I object to it. The answer has been completed.

The Court: Sustained.

Mr. Barshay: Respectfully except, sir.

Q. Your father was once a prizefighter, wasn't he? A. No, sir.

Q. You say that with positiveness, sir? A. Certainly, sir. 1485

Q. I don't mean that in any derogatory sense.

Mr. Turkus: I don't care how he means it. The answer is no. I object to it.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. Did you ever hear your father referred to in the professional prizefight business as Kid Rose? A. Certainly not.

Q. All right, you do not have to feel offended. A. I think it is ridiculous to bring that up.

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Q. Are you finished? A. I am sorry.

Q. Your father was a strong man in 1932? A. Physically fit.

Q. He was short and stocky, wasn't he? Is that right? A. Yes, sir.

Q. How did you go with your father from Reading?

Mr. Turkus: Objected to. There is no such testimony.

1487

Q. All right, how did you go with your father from wherever you went? A. Wherever I went, where to where?

Q. To the Broadway Central Hotel. A. From where?

Q. From where did you go? A. From the office, Washington Place.

Q. That is in New York? A. Manhattan.

Q. All right, sir. How did you go there? A. We walked there. It is right around the corner.

Q. Had you ever been to the Broadway Central Hotel before? A. I never was inside.

1488

Q. You never were inside before? A. I never was inside.

Q. You never were inside? A. Inside the hotel.

Q. In the hotel in your entire life, was that, you were not inside the hotel? Please: on the day in question? A. I was not inside the hotel.

Q. When you say inside the hotel you mean— A. Walking through the doors.

Q. You know the hotel had an entrance, did it not? A. Yes, sir.

Q. Did you cross that entrance? A. No, sir.

1489

Q. So that we now have it that you never step foot within the hotel?

Mr. Turkus: I object to "we now have it". It has been answered that way by the witness consistently in his testimony.

The Court: Sustained as to form.

Q. You did not enter the hotel physically, did you? A. No, sir.

1490

Mr. Turkus: Objected to as answered twice.

The Court: That is what he said.

Mr. Barshay: He said no.

Q. How were you dressed? A. I don't remember.

Q. How was your father dressed? A. With pants and shirt, probably a tie.

Q. Do you know the color of the pants? A. Remember the pants you wore ten years ago?

1491

Mr. Barshay: I move to strike out the answer as not responsive.

The Court: Denied.

Mr. Barshay: Exception, sir.

Q. Remember if he had a hat on? A. I don't remember.

Q. A coat? A. I don't remember.

Q. The color of his shoes? A. I don't remember.

Q. Do you know what time you started out? A. No, I don't.

Q. Do you know what time you got there? A. No, I don't.

Q. Do you know what time your father came down? A. Came down from where?

Q. From the Broadway Central Hotel? A. No, I don't.

Q. Do you know what time you left with your father? A. No, I don't.

Q. Do you know what time you arrived at your place back with your father? A. No.

1493 Q. Do you recall speaking to any other person that day? Do you? A. I don't remember that, Mr. Barshay.

Q. Do you recall doing anything that night? A. I don't remember that, Mr. Barshay.

Q. Do you recall where you had your lunch or dinner that night? A. Usually have dinner at home.

Q. Do you recall that night? A. I usually eat dinner at home.

1494 The Court: If these are details you do not remember, all you have to say is you don't remember. Did any of the details of your daily life register except the incident you have testified to?

The Witness: No, sir, not the usual routine.

The Court: Did you have any occasion to remember the daily routine?

The Witness: No.

Mr. Barshay: I object to both of the Court's questions.

Mr. Turkus: I could not hear either the question or the answer.

The Court: Overruled.

Mr. Barshay: Exception, and I move to strike the answers out, sir.

The Court: Denied.

Mr. Barshay: Exception.

Q. Incidentally, Mr. Rosen, you went to Albright College on a football scholarship, did you not? A. If you made the varsity ball team you received something.

Q. You were standing in the street while your father went in? A. That is right. 1496

Q. Did he tell you what room he was going to? A. No, sir.

Q. Did he tell you he had to apply at the desk to determine what room he was going to? A. No, sir.

Q. Did you know the name of any room— A. No, sir.

Q. I want to finish the question. A. Pardon me.

Q. That was assigned to any particular party where your father went? A. Repeat that question please, Mr. Barshay. 1497

(Question read by reporter.)

A. He told me where he was going.

Q. Pardon? A. He told me who he was to meet.

The Court: Did he tell you the number of the room?

Q. Did he tell you the name or the person in whose name the room was registered? A. No, sir.

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Q. Do you know in whose name the room was registered? A. No, sir.

Q. Do you know the floor? A. No, sir.

Q. You waited outside for three-quarters of an hour, did you not? A. Approximately.

Q. Did you meet any one? A. No, sir.

Q. Did you speak to any one? A. No, sir.

Q. Three-quarters of an hour passed and you say your father comes down is that correct? A. That is right.

1499 Q. Where were you when he came out of the building? A. I had been looking in the hotel. I was watching, looking inside.

The Court: Does the lobby floor open directly from the street?

The Witness: Well, they have—

The Court: Just yes or no.

Mr. Barshay: I object to the form of the question. Your Honor, we are referring to 1932.

The Court: Broadway Central Hotel?

1500 Mr. Barshay: That is correct, but there is no proof here that the physical structure was the same then as it is now. I suggest you ask the question then.

The Court: I have been familiar with the hotel for fifty years.

Mr. Barshay: It has been re-constructed, the entire lobby.

The Court: I have a picture of that lobby in my chambers, if you would like to see it.

Mr. Barshay: I am only asking your Honor to ask him as of that date. I don't argue with the court about it.

The Court: That is an old hotel in the vicinity of Wanamaker's, Mr. Witness?

The Witness: Yes, Wanamaker's is on 8th Street, I believe.

The Court: And is that in the Washington Square district?

The Witness: Yes. Of course, Washington Square is down further. That is on Broadway.

The Court: Slightly further?

The Witness: Yes. 1502

The Court: Does Washington Place run over in that direction?

The Witness: Washington Place runs to meet Broadway.

The Court: Yes. It is a short place, isn't it?

The Witness: That is right.

The Court: Then you have University Place?

The Witness: And Waverly Place.

Q. Do you know now whether or not at that time the lobby of the hotel ended directly on the sidewaik or whether or not it had an inner lobby and an inner hall? A. I don't remember. There is glass on each side. I looked through that. 1503

Q. Was it glass through which you could look? A. Yes, sir.

Q. When did you start to look through the lobby glass? A. I had been looking all the time.

Q. Did you stand there and take a position? A. I looked around, naturally, and then after a half hour I started looking inside.

Q. Did you make any effort to go inside? A. No, sir.

Q. And as your father walked out, you were at the glass door? A. Not the glass door, the glass window.

Q. That was in the outer door? A. Yes, sir.

Q. Now, was there any storm door at that time in the Broadway Central Hotel? A. I don't know. I looked through the window.

Q. Could you see the lobby as you were looking in there? A. Yes, sir.

1505

Q. Did you see where your father came from? A. No, sir.

Q. Did you see whether he came out of an elevator? A. No, sir.

Q. Did you see whether he came down the stairs? A. No, sir.

Q. Did you see whether he came from the left? A. No, sir.

Q. Or from the right? A. No, sir.

Q. Or from the back? A. No, sir.

Q. When you saw your father, what was he doing? A. He was talking. I happened to glance in the window and he was talking.

1506

Q. He was talking? Was his face to you? A. No, sir.

Q. Was he standing still? A. Yes.

Q. Was his back to you? A. That is right.

Q. And you could see him talk, is that correct? A. That is right.

Q. How many men was he talking to? A. Talking to one man.

Q. Where were the others? A. Right beside that one man, one on each side.

Q. Could you see the faces of the others? A. I could see them but I didn't know them.

Q. Could you see them, I asked? A. Yes, I could see them.

Q. How far from the door were those three men? A. I don't know the exact distance. I didn't think of distance at that time.

Q. Approximately? A. Maybe fifteen feet.

Q. From where you were? A. Where I was.

Q. Did your father ever turn around so that you could see his face? A. No, sir.

Q. All the time you observed your father his back was towards you? A. It was only a very 1508
short time.

Q. This conversation took a short time? A. That is right.

Q. But his face was never towards you? A. That is right.

Q. In that short time? A. That is right.

Q. Could you describe the other men who were there? A. One was a very tall fellow, husky build. The other fellow was ordinary, medium sized man.

Q. What was the tall fellow's height, if you can tell us? A. Six feet, probably.

Q. How about his weight? A. I don't know— 1509
heavy.

Q. Do you know how he was dressed? A. No, sir.

Q. Do you know the color of his hair? A. No, sir.

Q. Do you know whether he had a hat? A. No, sir.

Q. The kind of a suit he wore? A. Don't remember.

Q. Did he wear a top coat? A. I don't remember.

Q. About the shorter man, about how tall would you say he was? A. I don't know exactly. I was a little agitated then.

Q. You were agitated before you knew what happened, were you? A. I certainly was.

Q. What was the color of his hair? A. I don't remember.

Q. How was he dressed? A. I don't remember.

Q. Did you ever see any of those men before?

1511 A. I don't remember seeing them.

Q. Did you ever see them after? A. No, I don't remember seeing them afterwards.

Q. Was your father directly in front of you? A. I cannot remember that. He was in full view.

Q. Was his back in full view of you? A. Yes, I could see his whole back.

Q. Did he obstruct your vision? A. Not much.

Q. Could you see who was standing directly in front of him? A. Yes, I could.

Q. Did you know that man before? A. I had seen him just once or twice around that neighborhood, in the car.

1512 Q. What? A. I had seen him once or twice in that vicinity, in the car.

Q. You had seen him once or twice in that vicinity? A. That is around that section, clothing section.

Q. Once or twice before? A. That is right.

Q. When before this time at the Broadway Central Hotel was the last time that you had seen that other man? A. Around that time, maybe—

Mr. Turkus: Just a minute. I am going to object because I want the record

clear who the other man is that we speak of. There are three men who have been spoken of, two unidentified and one identified.

Mr. Barshay: That is the one we speak of.

Mr. Turkus: If we speak of the identified man, let the record show we do.

Mr. Barshay: I object to the word "identified". That is his contention. That is for the jury to say.

1514

Mr. Turkus: Let the record note then that he is talking about the defendant Lepke.

Q. You were speaking about the defendant Buchalter, were you not? A. That is right.

Q. You tell me when before that time did you see him before? A. I had seen him going to the Rifter Clothing Company. Somebody pointed him out to me.

Q. Who is that someone? A. Some individual around the office.

Q. What is his name? A. I don't remember. 1515

Q. Where is that company? A. Rifter Clothing Company.

Q. Where was it then? A. Just a block down but in that vicinity.

Q. A block down where? A. I believe it was Washington Place.

Q. A block down from where? A. A block further than where the office was.

Q. Which office? A. New York and New Jersey Transportation Company.

Q. What is the name of the individual who pointed him out to you?

Mr. Turkus: Objected to.

Q. Who is the person? A. There were always tailors and contractors around there. I could not tell which one.

Q. Do you recall his name? A. No, sir.

Q. Did you ever see him again? A. Probably. I don't remember who told me.

Q. How long before this alleged meeting at the Broadway Central did that take place? A. I don't know; maybe a month, maybe two or three weeks.

1517 Q. Do you know the day of the week? A. No, sir.

Q. How long was that person whom you described talking to you before this man came along? A. I don't remember that.

Q. What time of day was it? A. I don't remember that.

Q. Was it a rainy day? A. No, sir.

Q. Was it a sunny day? A. It was clear.

Q. Was it in the morning? A. I don't remember.

Q. Was it in the afternoon? A. I don't remember.

1518 Q. Was it at night? A. No, sir.

Q. Is that the second time you had seen that man? A. I believe that was the first time.

Q. That was the very first time? A. Yes, sir.

Q. What was he doing? A. Walked out of a car.

Q. What kind of a car was it? A. It was a big car. I don't know the names of the cars.

Q. Was it chauffeur driven or not? A. Yes, it was chauffeur driven. The man did not have a chauffeur's uniform, but somebody else was driving it.

Q. Do you know who was driving it? A. No, sir.

Q. Do you know the color of the car? A. Probably black.

The Court: Don't guess.

Q. Probably? A. I don't know, sir.

Q. Do you know whether it was a sedan? A. Yes, sir.

Q. Four-door or two-door? A. I don't remember that. 1520

Q. Do you know the make of the car? A. I don't remember.

Q. Do you know how many people were in the car? A. I don't remember that.

Q. Do you know which side of the street the car parked? A. I don't recall that.

Q. Do you know whether anyone was sitting alongside the driver? A. I don't remember.

Q. Do you know whether the car had white-wall tires or not? A. I don't remember.

Q. Do you know the license plate? A. No, sir.

Q. How long did you have that man in view? 1521

Mr. Turkus: Object to the form of the question. That man has a name. He has been identified. Let the record show whom he speaks of.

Mr. Barshay: You mean he claims he identified him.

Mr. Turkus: I don't care whether you claim or not.

Mr. Barshay: Let us agree and we won't argue.

Mr. Turkus: We won't agree if it is a

1522 *Harold D. Rosen—For People—Cross*

claim, as you say. I say he has been identified. I object to the form of the question.

The Court: Overruled.

Mr. Barshay: You may answer, sir.

The Court: Have you any recollection as to how long you were looking in?

Mr. Turkus: No, that is not the question.

1523 Q. How long did you have him in view? A. I don't remember.

Q. Do you recall how far you were from that man? A. Not very far.

Q. Do you recall whether you saw his full face or side view? A. I saw his full face.

Q. Did he just pass you by? A. I don't remember that.

Q. That is the first time you saw him? A. I think it was the first.

Q. And someone said something to you; is that correct? A. Someone told me who the individual was.

1524 Q. But you don't know who that someone is? A. I don't remember.

Q. When is the next time you saw that person? A. Saw him once again in the car. I don't remember how long afterwards. It was a short time.

Q. How long is a short time?

Mr. Turkus: Objected to. That is how long is long or short.

Mr. Barshay: He understands the question, Mr. Turkus.

1525

Mr. Turkus: I do not care whether he does or not. It is objectionable.

The Court: What is the question?

Mr. Turkus: "How long is short?" is the question. I object to it.

Mr. Barshay: I did not ask him that. I asked him a perfectly proper question.

The Court: He said, "How long or short?"

Mr. Barshay: I will put the question as I said it before.

1526

Q. How long do you claim a short time to be? You said you saw him a short time thereafter. How long is that?

Mr. Turkus: I object to the form of the question.

The Court: Did you give any approximation in minutes?

Mr. Barshay: He does not mean minutes, sir; he did not say minutes.

1527

Q. How many days or weeks or months, can you tell me that? A. It probably was within the month.

Q. Where did you see him? A. I saw him go up to the Rifter Clothing Company.

Q. The— A. Rifter Clothing Company.

Q. Do you know the date? A. No, sir.

Q. Do you know the week? A. No, sir.

Q. Do you know the time of the day? A. No, sir.

Q. Do you know how he was dressed? A. No, sir.

Q. Do you know how he came there? A. By car.

Q. Was it the same car? A. That is right, sir.

Q. Same chauffeur? A. That is right, sir.

Q. Same time? A. I don't know, sir.

Q. Someone else pointed him out to you? A. No, sir.

Q. How long did you see him? A. He walked right by.

1529 Q. What were you doing there? A. My father had an appointment with him. He told me he was going to meet him at Rifter's Clothing Company.

Q. Mr. Rosen— A. Yes, sir.

Q. You understand a simple question, don't you? A. You asked me; I answered you.

Q. All right, I asked you what were you doing there. I did not ask you what your father told you, did I? A. I was looking where he went.

Q. All right, you answer the question, that's all. That took only a second? A. I do not know how long.

1530 Q. Two seconds, three seconds? A. I do not know

Q. The third time you saw him was at this hotel? A. That is right, sir.

Q. Is there anyone else in this court-room whom you saw him with at the Broadway Central Hotel? A. No, sir.

Q. Sure about it? A. I have not looked over anybody.

Q. I want you to look over everybody and see. A I don't remember anyone else.

Q. You did not take much time to look, did you? A. No, I was looking at my father.

Q. I am talking about now, sir.

Mr. Turkus: I object to the form of the question. I take it there are over a hundred people in the court-room. I do not know.

Mr. Barshay: That is exactly my point. He answered very quickly.

Mr. Turkus: I object to the form of 1532
the question as argumentative.

The Court: Do you have any recollection of the looks of the other two—

The Witness: No, sir.

The Court: —sufficient to enable you to make an identification should you see one of them now?

The Witness: I would not remember, sir.

The Court: The only one you noticed was Lepke?

The Witness: Yes, sir.

1533

Q. Since then did you see that man again? A. No, sir.

Q. Until you walked into the court-room? A. That is right, sir.

Q. You knew where he was going to sit? A. No, sir.

Q. You don't know where a defendant sits in the court-room? A. The first time I have been in a court-room, that is for anything.

Q. Did you see the defendant as he was taken

in from the stairs outside of the court-room into this court-room— A. No, sir.

Q. —at any time at all? A. No, sir.

Q. After you spoke to Mr. McCarthy sometime after your father was shot, did you speak to anyone else in official capacity? A. I don't remember whether I spoke to Mr. McCarthy first or Mr. Geoghan first. I don't remember that.

Q. After that some years passed. Did you speak to any other person in official capacity?

1535 A. Yes, sir.

Q. When? A. I spoke to Mr. Joseph.

Q. When did you speak to Mr. Joseph for the first time? A. He was out to see me.

Q. He was out to see you? A. Yes.

Q. In Reading, Pennsylvania? A. That is right.

Q. When was that, sir? A. I don't remember the exact date. It was before the trial opened.

Q. How long before the trial opened? A. I don't remember; maybe a week or two.

Q. Was it after Mr. Cuff and I visited you? A. No, sir, it was before.

1536 Q. It was before that? A. Yes, sir.

Q. How long before? A. Maybe a week. I can't remember the exact date. They would know it; I would not.

Q. Was a stenographer present? A. No, sir.

Q. Did you give him a statement? A. Yes, sir.

Q. Did he take it in longhand or was it just a conversation? A. No, he took it down.

Q. Did you sign it? A. Yes, sir.

Q. Did you sign it yourself? A. Yes, sir.

Q. When did you next speak to any person

from Judge O'Dwyer's office or the Police Department? A. I was down just a few weeks ago.

Q. Whom did you speak to, sir? A. Mr. Turkus.

Q. Anyone else? A. Beg pardon, sir?

Q. Anyone else? A. Mr. Klein was there.

Q. Now have you given us all the people you have spoken to? A. In reference to what?

Q. In reference to this case. A. Yes, sir, Mr. Joseph, Mr. Klein and Mr. Turkus.

Q. First Mr. Joseph asked you some questions—right? A. In Reading. 1538

Q. Then you came to New York and you were questioned again? A. That is right, sir.

Q. Once or more than once? A. Twice.

Q. And do you know how long elapsed between the first time and the second time? A. I don't remember.

Q. You did not testify in the Grand Jury here, did you? A. Again? No, sir.

Q. You do recall that Mr. Cuff and I visited you, to be exact, on July 8, 1941; is that correct?

Mr. Turkus: Objected to. That is not the testimony. 1539

The Court: I thought he said the 3rd.

Mr. Turkus: The date that I submitted to the witness for his consideration was July 7, 1941.

Mr. Barshay: You are right, Mr. Turkus.

Q. July 7th—

Mr. Turkus: And I suggested the date.

Mr. Barshay: I have July 8th.

1540

Mr. Turkus: You ought to know.

Mr. Barshay: Let me finish. —when I dictated our memorandum.

The Court: You have a record of it?

Mr. Barshay: Yes, I have a record when I dictated our memorandum, July 8th.

The Court: That is undoubtedly correct.

Mr. Barshay: No, it was the day before, sir. We came back very late.

1541

The Court: Whatever date you have on office records would be correct, naturally.

Q. How long before July 7, 1941, did Mr. Joseph visit you? A. I don't remember the date, Mr. Barshay.

Mr. Barshay: May we have the date from the District Attorney, if possible?

Mr. Turkus. After all, it is the recollection of a witness that should be in evi-

1542

dence.

The Court: Correct.

Mr. Turkus: I oppose this indiscriminate calling upon the District Attorney.

Mr. Barshay: It is most discriminate. And if you cannot say so, just tell me, and I will pursue something else.

The Court: Neither side has a right to call upon the other side to give evidence without calling counsel on the stand.

Mr. Barshay: I know that.

The Court: And having the oath administered.

Mr. Turkus: I am advised by Mr. Joseph that the date that he went to Reading, Pennsylvania, to see this witness was April 28, 1941.

Q. Now, you recall that it is more than a week? A. I do not remember, Mr. Barshay.

Q. I just want to test your memory. That is exactly the point. In this hotel you did not hear a word of conversation? A. No, sir.

Q. You said you worked for your father in 1544
1931? A. That is right, sir.

Q. And that was the New York and New Jersey Corporation? A. Clothing Transportation Company

Q. Was it a corporation? A. Yes, sir.

Q. Do you know how it happened to be formed? A. What do you mean, how it happened to be formed?

Q. Well, was it an agreement between a few gentlemen to form a corporation? A. There was a corporation, papers drawn up.

Q. That is correct, isn't it? A. Yes, sir.

Q. You went to some lawyer? A. That is 1545
right, sir.

Q. That lawyer was in Elizabeth, New Jersey? A. That is right, sir.

Q. Did you go? A. Beg pardon?

Q. Did you go? A. I think I did.

Q. Were the partners Martin Kelly, Mr. Bluestein, and Mr. Sobler? A. That is right.

Q. Do you know your father's agreed contribution to that company? A. Do I know what?

Q. Do you know what your father agreed to contribute to the formation of this corporation? A. No, sir.

Q. Or company? A. No, sir.

Q. You don't know? At that time did your father have any assets? A. He was in business with Kelly.

Q. He was in business with Martin Kelly and himself? A. That is right.

Q. Kelly & Rosen, wasn't it? A. That is right, sir.

Q. That was a non-union shop, wasn't it? A. What do you mean, non-union shop? They did not have a shop.

1547 Q. Well, perhaps I should say a non-union concern. It was a trucking outfit, wasn't it?

Mr. Turkus: I object, unless it is brought within the personal knowledge of the witness, if he knows.

Q. I am asking if you know it.

Mr. Turkus: You did not ask it. You suggested it was non-union.

Mr. Barshay: I will ask it now.

1548 Q Was it a non-union concern, Kelly & Rosen? A. I do not know what you mean by "non-union" in reference to Kelly & Rosen.

Q. Kelly & Rosen were in business how long? A. For a short time.

Q. How long, a month, two months, three months?

Mr. Turkus: I object to it unless it is shown to be within the knowledge of the witness.

Mr. Barshay: He is the bookkeeper.

and he knows everything about his father's business.

Mr. Turkus: You are not talking about that concern.

Mr. Barshay: I will bring it up to the new concern.

Mr. Turkus: Please, I have an objection before the Court.

The Court: The Court seems to have difficulty in ruling on objections.

Mr. Turkus: Well, you have not had 1550
before.

The Court: There is so much talking on every objection. The witness, I think, knows the meaning of the question. Go ahead.

Q. You knew something about your father's business, did you not? A. That is right.

Q. All right. Do you know how long Kelly & Rosen were together as partners? A. I don't remember.

Q. Do you know where their place of business 1551
was? A. They worked out of Elizabeth, New Jersey.

Q. Do you know that their business consisted of carting merchandise for non-union shops in the clothing district? Do you know that or don't you? A. I don't remember; I don't know about that.

Q. Do you know that Kelly at that time had four trucks which he contributed to the partnership which he formed with himself and your father? Did you know that? A. I did not know that.

Q. Did you know that all your father contributed was his experience to Mr. Kelly? Did you know that? A. I do not know anything about the Kelly-Rosen thing, because I was not there.

Q. Do you know that the New York and New Jersey concern was already in existence for a considerable time and the owners were Mr. Bluestein and Mr. Sobler? A. I knew that.

Q. Did you know that both of these concerns, your father's and Sobler's, were competitors?
1553 Did you know that? A. No, sir.

Q. Did you know that they were covering the same routes or territories in New Jersey, or Pennsylvania, or wherever they were? A. No, sir.

Q. Did you know Max Rubin at that time? A. No, sir.

Q. Did you know that it was agreed that your father and Mr. Kelly should enter the firm of the New York and New Jersey with Bluestein and Sobler as equal partners? A. I don't know anything about that negotiation.

1554 Q. You said you went to the lawyer's office, didn't you? A. I said I do not know. I do not know if I did or not.

Q. Did you know that Mr. Kelly agreed to contribute to this new firm all the trucks that he had and all the good will that he had?

Mr. Turkus: Objected to. The witness has indicated he does not know anything about the transaction. This could go on and on ad infinitum.

Mr. Barshay: I am sure it will not.

The Court: Mr. Barshay and you are entitled to equal liberality.

Q. Did you know that your father agreed to contribute the sum of $10,000 in cash, $10,000, to this new concern? A. I don't know anything about the negotiations.

Q. Did you know that your father was to contribute five thousand of it in cash— A. I don't know anything about it.

Q. Please, just a second. —and the other 1556
five thousand was to come out of the operations of the new company? Did you know that? A. I don't know anything about it.

Q. Did you learn it after you started to work for the company as bookkeeper? A. All I did as bookkeeper was take care of the books when they started.

Q. Did you post who were the record stockholders? A. No, sir.

Q. Did you know how much each one had? A. I understood it was an equal share.

Q. Do you know with what balance they started in the bank? A. No, sir. 1557

Q. Did you know how the money was to be paid by your father—did you? A. I do not know anything about that.

Q. Did you know that your father had no money at all at the time he went into this partnership? A. I don't know about that.

Q. Did you keep those books personally? A. All I kept records of was the work going out and the bills that were supposed to be collected from the contractors.

Q. Did you have an accountant? A. They were supposed to have an accountant come in.

Q. Did you have one come in? A. They had it. I had nothing to do with it.

Q. Do you know his name? A. No, sir.

Q. Did you know his address? A. No, sir.

Q. Did he ever audit your books? A. I believe he did.

Q. Did you ever see an audit? A. No, all I did was take care of the books the way I stipulated.

1559 Q. Did you ever see in any record just how much your father agreed to contribute? A. No, sir.

Q. Did you ever see a balance sheet? A. No, sir.

Q. Did you ever deposit money in the bank? A. No, sir; they took care of that themselves.

Q. Did you ever draw checks yourself? A. Myself?

Q. Yes, not for yourself but for the purposes of the company? A. I wrote it out. They signed it.

1560 Q. I show you two checks here and ask you whether or not any portion of them is in your handwriting. A. No, sir.

Mr. Turkus: May those papers be marked for identification?

Mr. Barshay: Surely.

(Two papers marked Defendants' Exhibits D and E, for identification.)

Q. Do you recognize your father's signature on these checks? A. Yes, sir.

Q. Do you remember the name of the payee, Goldman?

Mr. Turkus: I object to counsel speaking of some record not in evidence.

Mr. Barshay: I offer it in evidence.

Mr. Turkus: I have an objection before the Court.

The Court: Sustained.

Q. Did you know a Mr. Goldman? A. I don't recollect the name. 1562

Q. Did he work for your father in that concern where you were a bookkeeper, A. Goldman? A. The follow worked on the trucks, you mean?

Q. Yes. Is that so? A. I think that was his name.

Q. You drew money to his order every week for the pay that he earned, didn't you? A. No, sometimes he only drew one blank.

Q. Did you know any person by the name of Goldman? A. I think that was the gentleman's name that worked for my father.

Q. How long did he work for your father? 1563
A. I don't remember.

Q. Do you know how long Mr. Kelly stayed in that corporation? A. I do not know how long it was.

Q. Was it a month? A. I don't remember.

Q. Was it two months? A. I don't remember.

Q. Was it three months? A. I don't remember.

Q. Do you know whether your father paid in any portion of his agreed contribution? A. I do not know anything about that negotiation.

Q. Did you ever see your father turn over to

1564 anybody in that corporation any money at all? A. I don't know what you are talking about.

Q. Did your father ever tell you that he paid his share of his contribution in this corporation? A. I don't know what you are talking about.

Q. You were with your father every day, were you not?

Mr. Turkus: I object to it. It is argumentative.

1565 The Court: Overruled.

Q. Will you answer? A. I don't remember that negotiation.

Q. How long did you work for this New York and New Jersey corporation which you say was broken up? How long did you work for them? A. I didn't say anything of the kind.

Q. You didn't say it was broken up?

Mr. Turkus: No, because you objected and it was sustained by the court when I used the expression.

1566 Mr. Barshay: It was stricken out by the court and the Judge suggested the word "discontinued", sir.

Mr. Turkus: Your Honor, I have an objection to the form of the question.

The Court: It is a pretty hard burden to put on the court to remember every word of testimony. I think it was Mr. Turkus who put the question in that form and you objected.

Mr. Barshay: That is right.

The Court: And I suggested to change the word to "discontinued".

Mr. Barshay: All right, sir.

Q. Do you know whether after three months of this New York and New Jersey company's existence Mr. Kelly withdrew from the corporation by taking his contribution of the four trucks right out of it?

Mr. Turkus: I am going to object. The witness has indicated that he does not know of the situation. 1568

The Court: Do you remember that?

The Witness: I don't remember.

Q. Do you know how much each partner drew during those three months? A. How much each drew?

Q. Yes. A. Each had a weekly salary.

Q. How much? A. I don't remember, and they drew besides that themselves. I don't know.

Q. We will get to that, sir. How much did your father draw? A. I don't remember. 1569

Q. Was it $25.00 a week? A. I don't remember.

Q. Was it $30.00 a week? A. I don't remember.

Q. Was it $15.00 a week? A. I don't remember.

Q. Was it $20.00 a week? A. I don't remember.

Q. There were weeks when the company did not earn enough money to pay even $5.00 a week to your father, were there? A. I don't remember anything like that.

1570 Q. Did the finance company replevin your trucks? A. I don't remember anything like that.

Q. Did you know where the company kept its trucks? Do you know that? A. No.

Q. Do you know Pink's garage in Passaic? A. I recall the name.

Q. Do you know whether your company stored these trucks in that garage at that time? A. I don't remember that.

Q. Do you know whether that garage retained
1571 possession of your company's trucks for failure to pay storage and gas? A. The trucks were on the street every day.

Q. Ultimately, do you know that? A. I do not know anything about that.

Q. That is what the company did. Do you know that the finance company replevined one of the automobiles, a Sterling truck, which your company bought, for failure to pay? A. I don't remember anything of the kind.

Q. You don't know about that? Do you know whether or not the company gave out two checks to Mr. A. Goldman dated August 25, 1932, and
1572 August 18, 1932, each in the sum of $30., which came back marked, "Insufficient funds", referring to Defendants' Exhibits for identification D and E? A. What was the date?

Q. August 18th and August 25th. A. What year?

Q. 1932. A. I don't believe I was working for them then.

Q. Do you know that there was an indebtedness due from that company to Mr. Goldman, an employe, in the sum of $700. for back wages? A. I don't know anything about that.

Q. Do you know that the business never made

any money? Do you know that? A. How could we keep a family if we did not?

Q. You don't want me to answer that, sir. You answer my question. A. I answered I do not know anything of the kind. We lived very well.

Q. Do you know that your father was drawing a maximum of $30. a week? A. I do not know how much they drew.

Q. Did you ever see the bank balance of the company? A. No, they never showed it to me. 1574
All I did, as I stated before—

Q. Do you know that Mr. Kelly withdrew from the firm because he could not make a livlihood? A. I do not know why he withdrew from the firm.

Q. Do you know how long your father worked in that concern subsequent to Mr. Kelly's discontinuance with it? A. I don't remember.

Q. You don't remember that? Do you know whether it was eight months? A. I don't remember how long Kelly was in the firm.

Q. Does three months refresh your recollec- 1575
tion? A. I don't remember.

Q. Does eight months after Mr. Kelly left refresh your recollection as to how long your dad stayed? A. I don't remember. It is eleven years ago.

Q. Do you know that your father in desperation told Mr. Sobler and Mr. Bluestein that he can no longer exist on $30. a week? A. I don't know anything about that.

Q. Were you present— A. No, sir.

Q. Wait a minute, please. When he came in

1576 and he said, "I can work for Garfield for $125. a week"? A. I don't remember.

Q. You know that he did go to work for Garfield? A. I do.

Q. And you know that Mr. Buchalter was an owner of Garfield at that time, don't you? Do you know that? A. I understood he was a silent partner.

Q. Silent or loud, do you know he was an owner of that concern? A. How would I know?

1577 Q. Do you know that the defendant Buchalter was the one who got your father that job for $125. a week? Do you? A. I don't know.

Q. Did your father tell you that? A. (No answer).

Q. Did he? A. I do not know anything what happened. I went back to college.

Q. Did you know that the very man whom you say was at the Broadway Central Hotel—withdrawn. Your father moved to Passaic, did he?

Mr. Turkus: Objected to, unless the time be fixed.

1578

Q. When he went to work for Garfield after he left Sobler and Bluestein? Do you know or don't you? A. No.

Q. Do you know how long your father worked for the Garfield in which the defendant Buchalter was a partner after he left Sobler and Bluestein? A. I know he went to work for Louis Cooper.

Q. You knew Louis Cooper was Mr. Buchalter's partner, didn't you? A. How did I know?

Q. You did not know that then? A. I understood it to be. That is about all.

Q. Then he did not go to work for Louis Cooper; he went to work for the Garfield and every owner of the Garfield, didn't he? A. I don't know whether—

Mr. Turkus: Objected to. He said he was a silent partner.

Mr. Barshay: He said he was a silent partner.

The Court: He said he understood so.

1580

Q. We will show you whether he was or he wasn't.

Mr. Turkus: Is that a question to the witness, your Honor? If it is, I ask that it be stricken from the record.

Q. How long did your father work for the Garfield? A. Approximately five or six months.

Q. Is that your best answer? A. When is the date? When is the time?

Q. I am now talking about after he discontinued his connection with the New York and 1581
New Jersey. You say some time in 1932. A. I was at school then.

Q. You communicated with your father, didn't you? A. I did not communicate.

Q. You saw your father? A. Just on holidays.

Q. You saw your mother, didn't you? A. I did not go home until the semester. It is almost five months already.

Q. No matter when. A. I was at school then.

Q. Do you know that your father worked for Garfield? A. That is all I know.

1582

Q. For about two years after he left Sobler and Bluestein? A. He certainly did not.

Q. Do you know that of your own knowledge? A. Yes.

Q. He didn't? A. That is right.

Mr. Turkus: Did not.

Mr. Barshay: Didn't.

1583

Q. Do you know now of your own knowledge when he commenced employment with Garfield after he left the New York and New Jersey and when he discontinued his connection with the Garfield? A. I know he approximately started in September of that year.

Q. September of 1932? A. I think.

Q. Do you know when his services ended with them? A. No, I was at school.

The Court: May the court interrupt?

Mr. Barshay: Yes.

1584

The Court: For the edification of all concerned on the question of prior statements: The Walsh case was made the subject of discussion in the Schainuck case by the Court of Appeals last month. That opinion is in the Law Journal and in the advance sheets. I suggest that counsel read it.

Mr. Barshay: We will, sir.

The Court: Because the rule as brought up to date by the decision in the Schainuck case will have to be followed here.

Mr. Rosenthal: I happen to have

argued that case in the Court of Appeals, your Honor.

The Court: Yes, you did.

Mr. Rosenthal: So, if I may—

The Court: Judge Desmond wrote the decision.

Mr. Rosenthal: That is correct, but the rule has been amplified, and if your Honor desires—

The Court: It seemed to me to be amplified when I read it.

Mr. Rosenthal: I would like to submit 1586
266 of the Code of Criminal Procedure and also Wigmore on Evidence on the question whether we are entitled to use them ourselves for our own edification in order to enable us to properly cross-examine.

The Court: The opinion, I think, cites those and also a provision of the New York City Charter in relation to the production of police reports.

Mr. Rosenthal: That is correct.

The Court: I will read the opinion 1587
carefully at the completion of this afternoon's session.

Mr. Rosenthal: I have here—

The Court: I won't interrupt to read it now.

Q. Do you know the exact date when your father discontinued his services for the New York and New Jersey Corporation? A. No, sir.

Q. Do you know that that corporation continued to exist after your father went to work

for Garfield? A. Are you telling me a question or are you asking me a question?

Q. You leave your rhetoric in your school. I am asking you a question.

Mr. Turkus: Your Honor, I object.
The Court: Will you read that again?
(Last question read by the reporter.)
The Court: Do you know or don't you?
The Witness: I do not know.

1589

Q. Did you know Louis Cooper of Garfield? A. Yes, sir.

Q. Did you ever talk to him? A. Yes, sir.

Q. How many times? A. I don't remember.

Q. Do you know the first time your father worked for the Garfield, the very first time, some time in 1922 or 1923; do you recall that? A. I don't know what year it was. I was young. I remember he worked for him.

Q. About how old were you? A. If it is 1922, I was born in 1911, I was eleven years old.

1590

Q. Do you know or do you recollect, or did you learn, how long your father worked for the Garfield the very first time he worked? A. I don't remember.

Q. Do you know the cause of your father's ceasing his employment with the Garfield the second time? A. I don't know.

Q. Did you ever hear? A. I don't know anything about it.

Q. Not a word? A. I don't know anything about it.

Q. Do you know whether Louis Cooper fired him? A. I don't know anything about that.

Q. Do you know whether your father was fired from any other place of employment? A. Not to my knowledge.

Q. Do you know the firm of Epstein & Siegel? A. No, sir.

Q. Did you ever hear of them? A. No, sir.

Q. Do you know who obtained employment for your father with Larry Cooper after he quit or after his employment terminated with Garfield? Do you? A. I heard it mentioned.

Q. Wasn't it the defendant Buchalter who obtained— 1592

A. No, sir.

Q. Let me finish, please. Wasn't it the defendant Buchalter who obtained for your father employment with Larry Cooper in Brooklyn? A. I do not know anything about that.

Q. Did you know Larry Cooper? A. I probably do but—

Q. That is the last position your father held before he purchased the candy store. Do you know that? A. Yes, sir.

Q. Do you know how long he worked for Larry Cooper? A. A few months. I was not in New York at that time. 1593

Q. Do you know how your father happened to quit employment with Larry Cooper? A. No, sir, I was not in New York at that time.

Q. Do you know it? A. No, sir.

Q. Did he tell you? A. No, sir.

Q. Did he tell you he was suffering from a heart condition? A. No, sir.

Q. Did you know he was suffering from a heart condition? A. No, sir.

Q. Do you know your father was sick? A. Yes, from aggravation.

1594

Mr. Barshay: I move to strike out the answer.

Mr. Turkus: I move that it stand.

Mr. Barshay: One motion at a time, Mr. Turkus.

The Court: Strike it out.

Q. Do you know Larry Cooper did not discharge your father? You know that? A. I do not know anything about that.

1595 Q. You know your father quit of his own volition with Larry Cooper?

Mr. Turkus: Objected to. The witness says he does not know.

Mr. Barshay: On direct examination he said, "I ought to know. I was the bookkeeper."

Mr. Turkus: That is twisting something else.

Mr. Barshay: We will see.

Q. All right, Mr. Witness.

1596

Mr. Turkus: Do what you want.

Q. Do you know that the defendant Buchalter was instrumental in getting your father his last employment with Larry Cooper by causing a transfer of Larry Cooper's employee, Mr. Kranes, transferring him to the Garfield in New Jersey so your father could have a job? Did you know that? A. I don't know.

Q. You never heard it? A. No, sir.

Q. Your father never told you that? A. Father never spoke much about that.

Q. Your mother never told you that? A. Did not speak much about that.

Q. Do you know where your father got the money to purchase the candy store? A. Yes, sir.

Q. You do? A. He told me.

Q. Did he tell you that the fellow employees in the trucking, the employees chipped in to give him that money? A. No, sir.

Q. Do you recall the first time your father worked for Garfield in New Jersey, Mr. Witness, the defendant Buchalter had no connection with 1598
that concern? Do you know that? A. As far as I know.

Q. Do you know the second time that your father worked for the Garfield the defendant Buchalter did have an interest? A. I don't know much about that, Mr. Barshay, don't know anything about that.

Q. You lived in Passaic in 1924, didn't you? A. Yes, I went to high school.

Q. You know Mr. Bluestein paid all expenses to bring your family over when he was at that time connected with the Garfield, don't you? A. 1599
Maybe he did.

Q. Do you know the reason for the discharge of your father by Garfield at that time? A. No, sir.

Q. Do you know the condition upon which your father was reengaged with the Garfield? A. I didn't know he was discharged.

Q. Do you know that he was discharged by Mr. Louis Cooper of the Garfield in his last connection with the Garfield? Do you know that? A. I did not know anything about that.

Q. You don't know the reason for it either?

1600 *Harold D. Rosen—For People—Cross*

Do you know how many times the defendant Buchalter interceded with Louis Cooper on your father's behalf to reengage him and to keep him with the Garfield? A. I don't know anything about that.

Q. You are definite about the fact that you never testified before any Grand Jury since Judge O'Dwyer became the District Attorney? A. Not to my knowledge.

Q. And the only person and the first time that
1601 you were questioned was by Mr. Joseph since Judge O'Dwyer became the District Attorney, with respect to this case? A. That is right.

Mr. Barshay: I call upon your Honor to ask the District Attorney to produce for the Court, not to me, to the Court, both the original statement he made to Mr. McCarthy and his original testimony in the Grand Jury so that the Court can see for itself whether or not therein there are contradictions with respect to this witness' testimony now.

1602 The Court: All right.

Mr. Turkus: What is it that should be produced?

Mr. Barshay: Mr. McCarthy's statement or if you want to term it his statement to Mr. McCarthy and his original testimony before the Grand Jury then.

The Court: This gives no assurance by the Court that the Court will review the Grand Jury minutes. I will decide that later. The thing I have to consider is this: In a lengthy examination such as

this, the Court may or may not follow all of the intricacies accurately. In reading over Grand Jury minutes the Court may or may not slip up on something that somebody else would notice. If the Court does and does not call attention of counsel to it, it places the integrity of the Court under challenge. The Court will not be placed in that position.

Mr. Barshay: Of course, the Court knows it is not intended to do it.

1604

The Court: I know it but it could before another tribunal in a certain eventuality and I cannot afford to have my own reputation risked. I will just see how far I have to go under the authorities to date and I will endeavor to comply with the law as now declared by the Court of Appeals.

Mr. Barshay: May we mark it for identification, sir?

The Court: Yes. Offhand I think that as far as statements taken, not Grand Jury minutes but statements, that you are entitled to see them with deletion of such parts as do not concern you—

1605

Mr. Barshay: That is correct.

The Court: Or are confidential to the inquiry.

Mr. Barshay: That is correct.

The Court: The paradox of the situation seems to be that while you can demand the District Attorney's statements under the rule the District Attorney cannot get hold of yours.

Mr. Barshay: Well, in this case he can.

1606

The Court: That is voluntary. I am talking about the law.

Mr. Turkus: I hand to the Court, subject to its direction—

The Court: Before you hand them to the Court, go over that statement yourself after court hours this afternoon and mark out such parts as you claim the defendant is not entitled to an inspection of. The Court will review those. As to the rest,

1607

counsel for defense will be entitled to see them.

Mr. Barshay: Are we marking them for identification?

Mr. Turkus: These Grand Jury minutes of 1936 (Defendants' Exhibit F for identification) for the record it is more than the Grand Jury testimony of this witness. Now I offer for marking for identification statements of witnesses taken by the office of Mr. Geoghan in 1936, containing the statement made by the witness Harold E. Rosen.

1608

(Statement marked Defendants' Exhibit G for identification.)

Mr. Barshay: Now may we mark for identification the statement that this gentleman signed for Mr. Louis Joseph?

The Court: Yes.

(Statement marked Defendants' Exhibit H for identification.)

Mr. Turkus: That includes some memorandum in the handwriting of Mr. Joseph as well. I also have a memorandum of my own that I used to question the witness. Do you want that marked, too?

Mr. Barshay: When I will, I will ask you for it.

Mr. Turkus: I thought maybe you forgot it.

Mr. Cuff: Don't be smart like that, Mr. Turkus. We did not forget it and we do 1610
not want it and it is of no use to anybody but you. That is not a fair thing to say. We asked for what we are entitled to get.

Mr. Barshay: I have no further questions, your Honor. If necessary may we have this witness back?

The Court: Any other counsel?

Mr. Talley: No cross-examination on behalf of defendant Weiss.

The Court: In that event, I will take that matter up right now.

Mr. Talley: I move that the testimony 1611
of this witness be stricken out so far as it concerns the defendant Weiss.

The Court: Denied.

Mr. Talley: Exception.

Mr. Rosenthal: Do I understand your Honor denies it or reserves on that, subject to it being connected with a particular defendant other than the defendant Buchalter?

The Court: Denied at this time.

Mr. Rosenthal: Exception.

1612 *Colloquy*

The Court: May I have the papers now?

Mr. Turkus: I have not been able to read them.

The Court: The jury may go out for a few minutes while this is being read. Don't discuss the case, gentlemen.

I will now hand to counsel the statement given to Louis Joseph marked for identification Defendants' Exhibit H.

1613 As to Exhibit G for identification, that statement is intermingled with many matters which were not brought out here, which are not contradictory of anything the witness has testified to but which by their very nature are secret and may not be disclosed. The Court finds upon reading nothing which impresses the Court as in any way contradicting any of the testimony by the witness in this case. Therefore, Exhibit G for identification will be returned to the District Attorney.

1614 It is to be noted in this case that the witness has made no admission as having made previous inconsistent statements which was apparently the turning point in the Schainuck case. The Court will now read the Grand Jury minutes of 1936 of this witness' testimony.

Mr. Barshay: Exception.

The Court: The same applies to the Grand Jury minutes. There is considerable matter which is purely supplemental which was not brought out on direct examination, for what reason the Court cannot

1615

question, but it is not contradictory and it does not amplify anything the man has testified to, so far as the Court can see. Returned to the District Attorney.

Mr. Barshay: May we make a request upon the Court? Counsel would like to know whether or not the Grand Jury minutes that your Honor has just referred to contain any reference by this witness to any meeting in the Broadway Central Hotel in 1932?

1616

Mr. Turkus: I object to any disclosure.

Mr. Barshay: That is for the purpose to see whether or not there is any inconsistency, that is all.

The Court: Apparently he was not asked.

Mr. Barshay: Then I take it from that answer—

The Court: There is a reference in the other exhibit which was turned back to counsel.

Mr. Barshay: I know that.

1617

The Court: And that reference mentioned something that was not mentioned here but which is not contradictory. It mentions that he was alarmed because he saw Lepke during that conversation put his hand in his pocket and he thought that might be intended as a threat.

Mr. Barshay: Judge, that has reference to Mr. Joseph's statement.

Mr. Turkus: No, no, it has not. It has reference to the September 13th—

Mr. Barshay: I did not see that.

1618

Mr. Turkus: The statement taken by McCarthy was taken in advance of the Grand Jury testimony.

Mr. Barshay: I know that, Mr. Turkus, but I cannot speak of the statement. The judge did not allow me to look at it so I do not know what is in it.

The Court: No, you cannot see it.

Mr. Barshay: May we have an exception.

1619

Mr. Talley: If your Honor pleases, while we are on the subject, and I think your Honor has examined the law further since the session yesterday, I renew the motion I made for the inspection of the Grand Jury minutes with respect to the testimony of Mrs. Rosen.

The Court: Mrs. Rosen?

Mr. Talley: Who was on the day before yesterday.

Mr. Turkus: You read the Grand Jury minutes.

The Court: I thought I read it.

1620

Mr. Talley: My motion is for leave to inspect the testimony of Mrs. Rosen given before the Grand Jury with respect to matters about which she testified on Monday last.

The Court: You are not entitled to that under the authority. Denied.

Mr. Talley: I submit that I am. If your Honor holds differently, I will note my exception.

The Court: Bring back the jury.

When I spoke of supplemental matters

1621

in the Grand Jury minutes, in 1936, I said the Court could not question or conjecture as to why the witness was not asked about those matters. I have to assume that it may be held in reserve for some other applicable time in the trial of the case.

Mr. Talley: It seems to me that the authorities are quite plain upon our right to those Grand Jury minutes. We cannot point our specific inconsistencies between the testimony on the trial—

1622

The Court: I have ruled on that with knowledge of what the Court of Appeals has written and what I have ruled I claim to be consistent. You have your exception.

Mr. Talley: May I finish my statement, your Honor?

The Court: I thought you had, Judge.

Mr. Talley: No, I have not. I say it is impossible for us to point out to the Court inconsistencies or contradictions or omissions between the testimony given upon the stand in the course of the trial and the testimony given before a Grand Jury unless those Grand Jury minutes are exhibited to us and until we can examine them. Your Honor has taken the burden. You have stated how difficult it was for the Court to follow all the statements given in the testimony and then check up on the Grand Jury minutes, but that is something we could do or at least we should be given an opportunity to do. As I understand the procedure, once that

1623

1624 *Colloquy*

question is raised we are entitled to inspect so much of the Grand Jury minutes as relates to the testimony of a witness whose testimony is challenged. I want to make my position perfectly clear upon the record so that my exception to your Honor's ruling will be understood.

Mr. Rosenthal: I intend, your Honor, when anything affects me to enlarge upon the proposition because I feel sure that
1625 your Honor is in error in construing the case which I argued, and I know under what theory I argued it, and I know that one particular statement in the opinion in which they said—

Mr. Turkus: Here is the jury.

The Court: I have just read the entire opinion.

Mr. Rosenthal: I said I will wait.

(The jury returned to the court-room.)

Mr. Barshay: No further questions, your Honor.

1626 Mr. Talley: There is no cross-examination on behalf of defendant Weiss.

Mr. Rosenthal: No cross-examination.

Mr. Turkus: May it please the Court, the statement taken on the 28th day of April, 1941, at the home of this witness, Harold E. Rosen, by Louis Joseph, in his handwriting, and subscribed by the witness, marked Defendants' Exhibit H for identification, was pursuant to the direction of the Court turned over to the defendant Buchalter's counsel for reading.

The Court: This does not concern the jury, and the Court knows it.

Mr. Cuff: I object.

Mr. Turkus: I have not finished my motion.

Mr. Barshay: I object to Mr. Turkus finishing his motion.

The Court: I excused the jury because I did not want the jury to be confused by the procedural questions.

Mr. Turkus: It having been read by the 1628
defendants' counsel, I offer it in evidence for reading by the jury.

Mr. Barshay: I object to its being offered in evidence. That is an ex parte statement.

The Court: Sustained. Is that all with this witness?

Mr. Turkus: That is all of this witness.

Mr. Barshay: May the Court recall my motion? I objected to Mr. Turkus's statement and I ask for the withdrawal of a 1629
juror and the declaration of a mistrial.

The Court: What statement?

Mr. Barshay: That Mr. Turkus—

The Court: Was there any statement that I did not hear?

Mr. Barshay: No, your Honor, he offered something in evidence, and I want to preserve my record.

The Court: Oh, yes.

Mr. Barshay: Now I move for the withdrawal of a juror.

The Court: I thought there might have

1630

been another complication between counsel.

Mr. Barshay: No, it is not complicated. I am trying to preserve my record.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Turkus: With the Court's permission, I will take a witness or two out of order, that will take a short time, in the regular order of proof, because the

1631

next witness's testimony could not be even completed on direct before the usual hour of adjournment.

The Court: All right.

1632

 1633

HYMAN W. BARRON, residing at 135-21 229th Street, Laurelton, Long Island, New York, called as a witness on behalf of The People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Mr. Barron, what is your profession or occupation? A. I am a civil engineer.

Q. And by whom are you employed? A. The Police Department, City of New York. 1634

Q. And how many years—

Mr. Rosenthal: I concede his qualifications.

Mr. Barshay: On my behalf.

Mr. Turkus: And you, Judge Talley?

Mr. Talley: Yes.

Mr. Turkus: All right, the qualifications of the witness are conceded by all counsel for defendants.

Q. Did you, in pursuance of your regular course of duties as a civil engineer for the Police 1635
Department of the City of New York, make a plan or a map of the candy store at 725 Sutter Avenue and the surrounding locale, indicating its position on Sutter Avenue in relation to Bradford Street and Wyona Street? A. I did.

Q. Prior to making the map or plan, did you consult the records of the Building Department and other departments, municipal departments, of the City of New York indicating the type of property, its location on the block, whether or not there had been any structural or other

1636 *Hyman W. Barron—For People—Direct*

changes, and all pertinent facts in regard to the property? A. I did.

Mr. Turkus: I ask that this map be marked for identification.

Mr. Barshay: As far as we are concerned, you can mark it in evidence.

Mr. Turkus: The interior of the store he made from photographs.

Mr. Rosenthal: As far as counsel is
1637 concerned, if it is explained on the record the details alleged to be contained in the candy store are taken by a description having been given to the witness as to the location and from photographs, there is no objection to the picture going in evidence.

Q. You said before in the regular course—

Mr. Talley: I want to be sure that this sketch shows the store as it existed in September, 1936. If that cannot be shown,
1638 the map is incompetent.

(Map marked People's Exhibit P for identification.)

Q. Mr. Barron, will you look at People's Exhibit P for identification and tell us whether or not that is a plan or map that you have drawn? A. It is.

Q. Tell us what you did in connection with its drawing, where you got the material from and everything that you did in connection with drawing that plan.

Mr. Talley: May we have the date when it was drawn?

Q. Yes, tell the Judge the date and everything about it. A. This survey was made on May 12, 1941. We went into the store, took the actual dimensions of all things that are in the store, such as tables, chairs, soda fountain, and other counters. The dimensions of the store have not changed, because the Building Department has no record of any alterations being made in that 1640
store from that date.

Q. As to the physical layout of the counters, the chairs, and the tables, did you do that from photographs of the premises taken at the time of the homicide? A. We did.

Q. And is People's Exhibit 1 in evidence one of the photographs used by you in getting the placement of the various articles, including the tables and chairs and counters? A. It is.

Q. All right, Mr. Barron, continue and tell the Court and jury how you got that together and what it is all about. A. There is the entrance 1641
to 725 Sutter Avenue, the candy store, which is on the north side of Sutter Avenue. It is 26 foot 2 inches from the corner of Bradford Street and 157 foot 5 inches from Wyona Street. We took the surrounding buildings in that area over to Belmont Avenue. All these dimensions of the stools and tables are from the furniture in the store, and we were told by the owner of the store that that is the furniture that was there when he bought the place.

Q. You have stated a conversation that you

1642 *Hyman W. Barron—For People—Direct*

had with the owner of that candy store. A. Yes, sir.

Q. Do you know when that owner took possession of the candy store? A. I do not.

Mr. Turkus: That portion of it which he recited as a conversation with the candy store proprietor is, of course, hearsay, and not admissible, so I ask that it be stricken out.

1643

Q. That is a rule of evidence that you are not acquainted with. That is all right. You continue and tell us what you did. A. From the photographs we laid out the chairs and the tables in the approximate location as shown on it by taking dimensions on the photograph and comparing it with actual dimensions taken in the store.

The Court: You mean People's Exhibit 1?

1644 Q. That photograph? A. That is right.

Q. Did you have more photographs than that? A. Yes, there were four of them all together.

The Court: Are they in evidence?

Mr. Turkus: No, they are different views.

The Court: Then what value has this? Has the furniture arrangement any relation to the crime? Does it concern this trial?

Mr. Turkus: There won't be a point in dispute about it.

The Court: Then we will just disregard it.

Mr. Turkus: All right, if you want to disregard it, we will disregard it. I went to the pains of rebuilding it.

The Court: I did not say what I want. Go ahead in your own way.

Q. Continue, Mr. Barron. Look at People's Exhibit 1, that is the small photograph. A. Yes, sir.

1646

Q. Did you use that People's Exhibit 1 in evidence in drawing your plan showing the interior of the store, to place the various articles, such as the ice cream fountain, the telephone booth, and the fixtures in the store, on that plan? A. We did.

Q. Now, does that plan truly reflect the set-up of those fixtures as they are portrayed on People's Exhibit 1 in evidence, the photograph in your hand? A. It does.

Q. Does the plan also show the true and correct position of the store, 725 Sutter Avenue, in relation to the corner of Bradford Street and in relation to the corner of Wyona Street? A. It does.

1647

Q. Does the plan also truly and accurately reflect conditions of September, 1936, with respect to the buildings that you have indicated on the plan, namely, the store at 725 Sutter Avenue and the other buildings down the street to Wyona Street, and the one building adjoining the grocery store on the Bradford Street side?

Mr. Talley: I object to that, if your Honor pleases. I distinctly object to try-

1648 *Hyman W. Barron—For People—Direct*

ing to prove a diagram made in 1941, when we are concerned with the happenings in September, 1936.

The Court: Overruled.

Mr. Talley: Exception.

This witness does not know the condition of those buildings in 1936.

Q. Will you continue, Mr. Barron? A. It does show the condition.

1649 Q. In 1936? A. That is correct.

The Court: How do you know 1936?

The Witness: I have been down to the Building Department and looked over their records, and they have no alterations shown on that block.

Q. Why, the plan merely shows the width of each lot all the way down, doesn't it? A. We do have the dimensions.

Q. Now look at People's Exhibit 2 in evidence.

1650 The Court: Are these all old buildings?

The Witness: Yes, sir.

The Court: More than five or six years old?

The Witness: Much more than that.

The Court: Go ahead.

Q. With respect to these stores on each side of the candy store, will you look at People's Exhibit 2, in evidence, taken the very day of the homicide, and tell us if your map truly reflects

the conditions on it as they were in September, 1936? A. It does.

Q. You have indicated a place across the street from 725 Sutter Avenue, a little indentation on your map, is that correct? A. We have.

Q. And what is the one down further? A. That is the entrance to number 720.

Q. 720 Sutter Avenue? A. That is correct.

Q. Look at People's Exhibit 3, in evidence, and tell us whether or not that is not the building that that 720 refers to. A. It is. 1652

Q. Look at People's Exhibit 4, in evidence, the photograph taken through a window from those premises, 720, showing the view across the street to the candy store, and tell us whether you have marked that window on the diagram. A. We have.

Q. And will you indicate it with your finger? A. (Indicating) This window up here.

The Court: Indicating what?

Mr. Turkus: He is indicating, for the record, the first indentation on the right hand side of the plan nearest to the north mark on the plan. 1653

The Court: Directly opposite the doorway of the premises.

Mr. Turkus: Directly opposite the premises in question, 725 Sutter Avenue.

Q. Now, are each and every one of those measurements accurate measurements? A. They are.

Q. Were the measurements made under your personal supervision? A. They were.

1654 *Hyman W. Barron—For People—Direct*

Q. And with your personal cooperation? A. Yes, sir.

Q. Who worked with you on the plan? A. Mr. DeSario.

Q. What is his official title? A. He is a draftsman.

Q. Is he employed by the Police Department? A. He is.

Q. And is he a draftsman associated with you in the performance of duties for the Police De-
1655 partment? A. Yes.

Q. Are you known as civilian employes of the Police Department? A. Yes, sir.

Q. Does the map indicate a residence on Wyona Street? A. It does. It shows number 345 on the east side of the street and it shows a house number 320-322 on the west side of the street.

Q. And those numbers refer to houses on Wyona Street? A. That is correct.

Q. Are these measurements in all details correct and accurate? A. They are.

1656 Q. Have you drawn your plan to scale? A. We did.

Q. What is the scale? A. The location plan is drawn, one inch on the plan is actually ten feet on the street, while the view of the store, one and a half inch on the plan is actually one foot.

Mr. Turkus: I offer the plan in evidence.

Mr. Talley: I object to it as not being properly proved.

The Court: Any other counsel wish to object?

Mr. Turkus: They have consented.

The Court: Overruled. You conceded his qualifications, did you?

Mr. Talley: I concede this gentleman is qualified to make a plan and make measurements and draw the design from such measurements as he has made. My objection is that a plan of this kind, made in 1941, has not been sufficiently 1658
proven to show that the conditions set out on the proposed exhibit existed, as they are set out in that exhibit, in September, 1936.

The Court: Overruled.

Mr. Talley: Exception.

(People's Exhibit P, for identification, received and marked People's Exhibit 24, in evidence.)

Q. Now, does your plan, People's Exhibit 24, 1659
in evidence, show a bullet hole in the wall of the candy store entering near the edge of a mirror hanging on the west wall at a point forty-seven and a half inches up and ninety inches from the north wall?

Mr. Talley: I object to that as being too remote.

The Court: Sustained.

Mr. Turkus: I am going to take the testimony of the ballistics detective, Frederick W. Walsh, who accurately measured the bullet holes in the floor and the

one in the wall, and I am going to ask this witness to put those bullet holes into that exhibit.

Mr. Talley: I object to that.

The Court: You will have to have the record of this trial.

Mr. Turkus: Yes.

Mr. Talley: I object to it.

The Court: Overruled.

Mr. Talley: Exception.

1661 The Court: Has it any bearing on the case?

Mr. Turkus: I might make it visual to the jury so they can see where they are.

The Court: A lot of shots were fired and one bullet went through the wall.

Mr. Turkus: The bullets that I am particularly concerned with are the four bullets in the floor underneath the body. Those are the bullet holes.

The Court: The detective testified to the precise number of feet and inches—

1662 Mr. Turkus: I am not going to pursue it.

The Court: The detective testified as to the precise number of feet and inches as each bullet hole appeared in the floor, measuring from a stated place. You will be entitled to take that testimony of the detective and have the marks put on here by this man, under this concession as to his qualifications, to show where each one of those bullet holes was.

Mr. Turkus: Yes, Judge.

The Court: Only I would suggest you take it up with him over the recess so that he won't waste time here trying to make his measurements.

Mr. Turkus: Yes, your Honor.

The Court: And he will be prepared to make them promptly and it will save considerable time. It is now six or seven minutes of 4:00.

Gentlemen of the jury, please do not discuss the case, let no one talk to you about it. Keep your minds open. The court will remain in session while the jury passes out. 1664

(Recess until 10:00 o'clock tomorrow morning.)

(Defendants remanded.)

(Thereupon adjournment was taken to October 23, 1941, at 10:00 A. M.)

1665

1666 *Hyman W. Barron—For People—Direct*

Brooklyn, N. Y October 23, 1941.

TRIAL RESUMED

HYMAN W. BARRON, a witness on behalf of The People, resumed the stand and testified further as follows:

Mr. Turkus: May I respectfully refer your Honor to pages 153 et seq. in this
1667 regard in connection with the questions that I am about to put to this witness?

The Court: All right.

Mr. Turkus: And they will refer to People's Exhibits 8, 9, 10, 11, and 12 in evidence.

By Mr. Turkus:

Q. Mr. Barron, will you attend at People's Exhibit 24 in evidence with a crayon or other pencil? Will you be kind enough to make an
1668 appropriate notation on People's Exhibit 24 in evidence of a place which was described by Detective Walsh as being a bullet which he removed at a point 7 inches from the right shoulder of the deceased, 52 inches from the west wall and 74 inches from the north wall? A. (The witness marks on Exhibit 24.)

The Court: He should have white chalk for this.

Q. To identify that mark, since that corresponds with the place where People's Exhibit 8

in evidence was found by Detective Walsh, will you put a figure "8"? A. (The witness does as requested.)

Q. The next bullet was removed from a bullet hole in the floor at a point 85½ inches from the north wall and 53 inches from the west wall. Will you indicate that with an appropriate notation? A. (The witness marks on exhibit.)

Q. Alongside of that mark which you have just placed on People's Exhibit 24 in evidence, will you be kind enough to note the figure "9" 1670
which corresponds with People's Exhibit 9, the bullet which was removed from that point by Detective Walsh? A. (Witness marks on exhibit.)

Q. In addition to Exhibit 9, there was removed from a point on the floor underneath the body another bullet by Detective Walsh, 82 inches from the north wall and 58 inches from the west wall. Will you be kind enough to make an appropriate notation thereof on People's Exhibit 24? A. (Witness marks on exhibit.)

Q. Mr. Barron, will you be kind enough to 1671
place alongside of the mark which you have just made for the bullet, People's Exhibit 10, the figure "10" to indicate that that is the point where that People's Exhibit was removed from the floor by Detective Walsh? A. (Witness marks on exhibit.)

Q. In addition to those two bullet holes, 9 and 10, there was a third bullet removed from another hole underneath the body at a point 78½ inches from the north wall and 57½ inches from the west wall. Will you be kind enough to make an appropriate notation on People's

Exhibit 24 in evidence of that bullet hole? A. (Witness marks on exhibit.)

Q. The bullet removed from that point which you have just notated on the diagram People's Exhibit 24, was received in evidence as People's Exhibit 11. Will you be kind enough to place the figure "11" alongside of that bullet hole? A. (Witness marks on exhibit.)

Q. In addition to People's Exhibits 9, 10, and 11, there was a fourth bullet recovered from
1673 underneath the body at a point 84½ inches from the north wall and 61 inches from the west wall. Will you kindly mark that on the diagram, People's Exhibit 24 in evidence? A. (Witness marks.)

Q. The bullet hole which you have just indicated on People's Exhibit 24 in evidence, there was removed therefrom People's Exhibit 12 in evidence. Will you put the figure "12" alongside of that bullet hole? A. (Witness marks on exhibit.)

Q. Will you stand by People's Exhibit 24?
1674 Excluding the figure "8", indicating the bullet hole where People's Exhibit 8 was removed, which was 7 inches from the body, and specifically referring to People's Exhibits 9, 10, 11, and 12, which were the four bullets removed from the four bullet holes directly underneath the body, can you tell us approximately would those four bullet holes be within a 9-inch circle? A. They would fit into a 9-inch circle.

Q. Just one more point, Mr. Barron: When you made the drawing, People's Exhibit 24, and in preparation therefor, did you attend at premises 725 Sutter Avenue? A. I did.

1675

Q. Did you there examine the furniture and fixtures portrayed on People's Exhibit 1 in evidence, and compare it with the fixtures that you found in this store? A. I did.

Q. Were they the same? A. They were.

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: No cross.

Cross-examination by Mr. Talley:

1676

Q. Mr. Barron, how wide on Sutter Avenue were these premises you just have been describing? A. The front of the store is 16 foot 5 inches.

Q. Is that it you just pointed to? A. This is the dimension here on the location plan.

Q. Those are the dimensions of the premises shown on the other side of the street; is that right? A. They are the dimensions of this candy store.

Q. Yes. Will you give me the frontage again? A. 16 foot 5 inches.

1677

Q. And is that 16 foot divided by the doorway? Is the door in the center?

Mr. Talley: May I have the photograph?

Mr. Turkus: It is the large photograph, People's Exhibit 2 in evidence.

Mr. Talley: Give me any pictures you have of the front of that store.

Mr. Turkus: That is People's Exhibit 2-A that I hand you.

Q. The door is approximately in the center? A. In the center.

Q. What are the dimensions of the two show windows, each? A. The windows are 4 foot 8 inches wide at the front.

Q. And how wide is the door? A. The door is 3 foot 4 inches wide.

Q. How deep is the store? A. From the back of the show-window to the north wall is 16 foot 7 inches.

1679 Q. Will you indicate where the north wall is? A. The extreme left of the drawing.

Q. What is that depth, please? A. 16 foot 7 inches.

Q. So that the store is approximately 16 by 16; isn't it? A. Approximately, right.

Q. 16 depth and 16 feet in width? A. The inside of the store is 14 foot 11¾ inches width.

Q. Then what is between the 14-foot line and the 16-foot line? A. It has a brick wall on either side.

Q. What is back of the brick wall? A. The

1680 next store.

Q. What is the depth of the store? 14 or 16? A. The depth is 16 foot 7 inches.

Q. From the inside of the show window? A. To the back wall, and the width is 14 foot 11¾ inches.

Q. The width is? A. 14 foot 11¾ inches.

Q. Are either of these windows open into the street? Is it the type of window that the customer can stand on the sidewalk and make a purchase? A. The easterly window can be opened.

Q. Point that out. A. (Witness indicates.)

Q. Does the opening extend the full length of that window? A. It does.

Q. And from the opening, if you know, can you see from the sidewalk the store, the interior of the store? A. You can.

Q. See all of it? A. Well, as much as would be visible through the window.

Q. That is practically all the store? A. Yes.

Q. And looking through the door, assuming it was open, you could see the entire store? A. You can. 1682

Q. And that would apply, what applied to the other window which you say is the open window, would apply to the remaining window? A. There is a partition in the back of the other window.

Q. Do you know whether that partition was there on the 13th of September, 1936? A. I do not.

Q. When you were there, there was a partition? A. There was.

Q. Was there any partition on the other window when you were there? A. No, there was not. 1683

Q. How high do you say the partition was? A. From the floor of the window up to the ceiling.

Mr. Talley: Have you any other picture that is large that shows the premises?

Mr. Turkus: Yes, the picture in back of Judge Taylor.

Mr. Talley: I want one of these smaller pictures. Have you got one?

Mr. Turkus: That is the only one taken

September 13, 1936, that I have. If you want a more recent one, I can show you that.

Mr. Talley: What are the other exhibits you have been directing this witness' attention to?

Mr. Turkus: People's Exhibits 1 and 2 in evidence.

Mr. Talley: I have no further questions.

Mr. Rosenthal: No questions.

Q. Before you go, Mr. Barron, the width of this store you said was 16 and a half inches—16 feet 5 inches? A. At the front of the store, yes.

Q. Will you indicate on that jury box the extent of 16 feet 5 inches? The railing for instance in front of where the jury sits, how long is that? A. It is about the width of the jury box.

Q. You mean the entire width of the jury box from the both rails? A. Correct.

Mr. Talley: That is all.

The Court: Any other cross?

Mr. Rosenthal: No cross by defendant Capone.

Mr. Barshay: No cross. I move, your Honor, to strike out the testimony in respect to my client on the ground it is irrelevant and has no tendency to connect the defendant with the commission of the crime.

The Court: Denied.

Mr. Barshay: Exception, sir.

Anthony O. DeSario—For People—Direct 1687

ANTHONY O. DESARIO, residing at 610 Ovington Avenue, Brooklyn, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Mr. DeSario, by whom are you employed? A. Police Department, City of New York.

Q. In what capacity? A. Draftsman.

Q. And how many years have you been attached to the Police Department of the City of New York as a draftsman? A. Twelve years. 1688

Q. Are you what is known as a civilian employee of the Police Department? A. That is correct.

Q. Attached to the engineering office? A. That is correct.

Q. Will you turn around and look at People's Exhibit 24 in evidence and tell us whether you worked with Mr. Barron, an engineer, in the making of that diagram and map? A. I did.

Q. Will you state your qualifications to the jury, and by that I mean for twelve years have you been actively engaged as a civilian draftsman for the Police Department? A. I have. 1689

Q. In the twelve years that you have been with the Police Department, have you drawn many drawings and maps to scale?

Mr. Cuff: Qualifications conceded.

Q. What part did you take in the making of People's Exhibit 24? A. We left the office and went to the District Attorney's office, went out

to 725 Sutter Avenue, surveyed the surrounding streets, the inside of the store, including all the furnishings, made our sketches, and went back to the office and prepared our drawings.

Mr. Talley: When was this?

Q. Do you recall the date? A. I do. May 12, 1941.

Q. And is the date indicated on People's Ex-
1691 hibit 24 in evidence? A. It is.

Q. Is People's Exhibit 24 in evidence a true and accurate drawing to scale of premises 725 Sutter Avenue, Brooklyn, New York, and the surrounding locale thereon set forth? A. It is.

Mr. Turkus: You may inquire.

Mr. Barshay: No cross. Make the same motion with respect to this witness.

The Court: Denied.

Mr. Barshay: Exception.

1692

SYLVIA GREENSPAN, residing at 401 Schenectady Avenue, Brooklyn, New York, called as a witness on behalf of The People, and being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Mrs. Greenspan, are you married? A. Yes.

Q. And do you reside with your husband? A. Yes.

Q. At the address that you have listed with the stenographer? A. Yes.

Q. Before you were married, what was your maiden name? A. Sylvia Rosen.

Q. Are you a daughter of the late Joseph Rosen? A. Yes.

Q. Who was killed on September 13, 1936? A. Yes.

Q. Were you employed by your father and the other members of his firm during your father's lifetime, as a bookkeeper? A. Yes. 1694

Q. Was the firm then known as the New York and New Jersey Clothing Transportation Company? A. Yes.

Q. Where was its office, Mrs. Greenspan? A. It was either on Washington Place or 8th Street off Broadway.

Q. Are you a bookkeeper? A. Yes.

Q. And how long have you been a bookkeeper? A. About 13 years.

Q. Did you have preliminary training or study? A. I had high school training.

Q. Will you speak loudly, Mrs. Greenspan? A. I had high school training. 1695

Q. At what high school? A. Passaic.

Q. And did you have a course in bookkeeping? A. Yes.

Q. When your father went into the business of the New York and New Jersey Clothing Transportation Company, who opened the books? A. I did.

Mr. Rosenthal: May I have a general objection to all this line of testimony by

this witness on the ground that it is not binding upon the defendant Capone?

The Court: Yes.

Mr. Rosenthal: Subject to a motion to strike it out.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. After you opened the books for the firm, do you know who acted as bookkeeper? A. My
1697 brother.

Q. And what is your brother's name? A. Harold.

Q. When Harold Rosen left as bookkeeper, who took his position? A. I did.

Q. How long did you remain as bookkeeper? A. About six or seven months.

Q. I do not hear you? A. About six or seven months.

Q. Was that when the business terminated? A. Yes, it did.

1698 Mr. Barshay: I object to that as a conclusion.

The Court: Overruled.

Mr. Barshay: Exception. I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. I want to direct your attention to the time when you had been in the employ of your father and his partners in the New York and New Jersey Clothing Transportation Company for about four months. Approximately when was that?

Will you fix that time? A. To the best of my recollection it was during the summer of 1932.

Q. Did you say during the summer of 1932, to the best of your recollection? A. That is right.

Q. Will you kindly, Mrs. Greenspan, keep your voice up so that everybody in the jury can hear what you have to say and so that defense counsel as well will have no difficulty. Respond to this question either yes or no only: Sometime during the summer of 1932 did you receive 1700 a telephone call from your father, the late Joseph Rosen?

Mr. Climenko: If your Honor pleases, I object to even a yes or no answer on that question on the ground it is irrelevant, incompetent, not binding on the defendant, and has nothing to do with the issues in this case, and it is too remote to anything involved in this case.

The Court: Overruled.

Mr. Climenko: Exception. 1701

Q. Have you that question? A. Yes, I did receive a telephone call.

The Court: What year was that?

Mr. Turkus: During the summer of the year 1932, to the best recollection of the witness.

Q. Where were you, Mrs. Greenspan, when you received that telephone call from your father?

1702

Mr. Climenko: Same objection.
The Court: Overruled.
Mr. Climenko: Exception.

A. I was in the office of the New York and New Jersey Clothing Transportation Company.

Q. After you received that telephone call from your father, Mrs. Greenspan, what did you do?

Mr. Climenko: Same objection.
The Court: Overruled.
1703 Mr. Climenko: Exception.

A. My father asked me—

Mr. Barshay: Please— I move to strike out the answer.
Mr. Turkus: I consent to it.

Q. Mrs. Greenspan, listen to me a moment. These are technical questions that you must answer exactly as I ask them. After you received the telephone call—you cannot tell us what your
1704 father said to you, but you can tell us—what did you do after you received that call? What was the first thing you did, and then what did you do? A. I took the books of the New York and New Jersey Clothing Transportation to where my father told me to.

Mr. Barshay: I move to strike it out.
Mr. Turkus: "to where my father told me to" I consent be stricken from the record.
Mr. Barshay: Your Honor, I think this witness ought to be told now to ad-

here strictly to Mr. Turkus's suggestion not to volunteer anything at all because of the remoteness of the time she speaks of to the alleged commission of the crime.

The Court: Where did you take the books?

The Witness: I took the books to an office on 17th or 19th Street off Broadway.

The Court: Nobody can hear you. If the jury does not hear you testify, the jury does not know what the evidence is. Will you please repeat that loudly? 1706

The Witness: I took the books to an office on 17th or 19th Street off Broadway.

Mr. Barshay: I move to strike out the answer on the ground set forth heretofore.

The Court: Denied.

Mr. Barshay: Exception.

Q. Let me see if I understand you correctly. Did you take the books of the firm in which your father was a partner, namely, the books of the New York and New Jersey Transportation Company, and bring those books some place? A. Yes. 1707

Q. Where was that place that you took those books to?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: She said 17th or 19th Street off Broadway.

Mr. Turkus: All right. I did not hear it.

Q. Was the place that you took the books to an office of a manufacturer?

Mr. Barshay: I object to it. It is leading.

The Court: Overruled.

Mr. Barshay: Exception. And on the ground that I heretofore urged.

The Court: Overruled.

Mr. Barshay: Same exception.

1709

Q. Have you followed the question? A. Yes, I did.

Q. And what is your answer, you did? A. Yes.

Q. When you arrived in this office with the books of the New York and New Jersey Clothing Transportation Company, whom did you see inside the office?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

Mr. Barshay: Same exception.

1710

A. Four men.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Who are the four men, Mrs. Greenspan, whom you saw in the office when you went there with the books?

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

A. Max Rubin, Danny Fields, Buchalter and Shapiro.

Mr. Barshay: Same objection.

Q. Point out Buchalter.

1712

Mr. Barshay: Move to strike out the answer.
The Court: Denied.
Mr. Barshay: Exception.
The Court: Which Shapiro?
The Witness: He was commonly called Gurrah.
Mr. Barshay: We do not hear you.
Mr. Turkus: We do not hear you and the jury does not hear you.
The Witness: He was commonly called Gurrah.

1713

Mr. Barshay: I move to strike that out.
The Court: Denied.
Mr. Barshay: Exception.

Q. Will you drink the water? Possibly that will help you. In order to insure that the jury has heard the names of the four men in this office when you arrived there with the books, was one man Max Rubin? A. Yes.

Q. Was the other man in your testimony Danny Fields? A. Yes.

Q. Was the third man Shapiro? A. Yes.

Q. Whom you say was also known as Gurrah? A. Yes.

Q. The fourth man you say was Buchalter? A. Yes.

Q. What name did you know Buchalter by besides Buchalter? A. Lepke.

Q. Where was your father? A. In that room.

Q. Where was this man Shapiro, whom you say is also known as Gurrah? What position did he have in the room?

Mr. Barshay: I make the objection as I made before.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. He was sitting behind a desk.

Q. While Gurrah was seated behind the desk in the office, where was this man Buchalter, also known as Lepke?

Mr. Barshay: Same objection.

A. He was standing—

Q. I did not hear you. A. May I answer?

Q. Yes.

Mr. Barshay: Please wait a minute.

Mr. Turkus: Excuse me. I thought the Court had ruled.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. Will you repeat the question?

Q. (Pending question read by the reporter.) A. He was standing behind Shapiro.

Q. You will have to speak up loudly. Is your answer that Lepke was standing behind Shapiro? A. Yes.

Q. Had you seen this individual Danny Fields before the time that you saw him in that office?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception. 1718

A. Yes, I did.

Q. Where had you seen Danny Fields before that occasion?

Mr. Barshay: Same objection, sir.
The Court: Same ruling.
Mr. Barshay: Exception.

A. I met him on 5th Avenue.

Q. In the clothing district? A. Yes.

Q. Was that during the time that you worked for your father and his concern? 1719

Mr. Barshay: Please. That may be an important question. Don't lead. I object to it.
The Court: Overruled.
Mr. Barshay: Exception, sir.

A. I met him previous to that and a number of times during that time.

Q. Had you seen this man Buchalter, also known as Lepke, before this occasion that you were in the office?

1720 *Sylvia Greenspan—For People—Direct*

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

A. Yes, I did.
Q. Where had you seen him?

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

1721

A. I met him on 5th Avenue.
Q. In the clothing district? A. Yes.
Q. Had you been introduced to this man Buchalter, also known as Lepke?

Mr. Barshay: Please. I object to it. And I ask your Honor to tell the District Attorney now the defendant has been identified by one name or the other, and there is no need for "Buchalter also known as Lepke."
The Court: Overruled.
1722 Mr. Barshay: Exception.

A. Yes, I met him once.
Q. The question is: Had you been introduced to him? A. Yes.
Q. Who introduced you to Lepke? A. My father and Max Rubin were standing there, and I don't remember which one introduced me.

Mr. Climenko: If your Honor pleases, we move to strike out the answer as not

binding on the defendants, not relevant to the issues in this case.

The Court: Denied.

Mr. Climenko: Exception.

Q. I take it, then—and am I correct—that from your last answer you had met Max Rubin before this occasion in the office.

Mr. Climenko: I object to that upon the same ground. 1724

The Court: Overruled.

Mr. Climenko: Exception.

A. Yes, I met him on a number of occasions.

Q. In the clothing district? A. Yes.

Q. And when you were introduced to Lipke, was that in the clothing district? A. Yes.

Q. Mrs. Greenspan, when you stepped into that office with the books of the concern, what happened?

Mr. Climenko: Object to that, if your Honor pleases, on the ground that it calls for an answer not binding on the defendants, not relevant to the issues here. 1725

The Court: Overruled.

Mr. Climenko: Exception.

A. I put the books on the desk, and Gurrah took the ledger, that is, the accounts receivable ledger, opened it up, and went through the accounts.

Mr. Barshay: I move to strike out the answer.

1726

The Court: Denied.

Mr. Barshay: Exception, sir.

Q. Your voice is very low, Mrs. Greenspan, and not quite audible to the jurors who sit in this part of the room. A. Sorry.

Q. Did you respond to that question and say that you brought the books into that office and put them on the desk? A. Yes, I did.

Q. And who picked up the ledger? A. Shapiro.

1727

Q. The man also known as Gurrah? A. Yes.

Q. At that time when Gurrah picked up the ledger, was the defendant Lepke in back of him?

Mr. Barshay: Same objection.

A. Yes.

Q. Directly in back of him?

The Court: Overruled.

Mr. Barshay: Exception. I move to strike out the answer.

1728

The Court: Denied.

Mr. Barshay: Exception.

Q. The question is: Directly in back of him? A. Yes.

Q. What did Gurrah do with the book that he opened up?

Mr. Barshay: I object to it, not binding on the defendant, too remote.

The Court: Overruled.

Mr. Barshay: Exception.

A. He looked at the names of the accounts.

Mr. Barshay: I object to it unless she can say that of her own personal knowledge.

The Court: Overruled.

Mr. Barshay: Exception, sir.

Q. Will you continue, Mrs. Greenspan, and as loudly as you can talk, please? A. And he told my father that there were certain manufacturers that he could not go up to to take work from.

1730

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

The Court: Lepke said that?

The Witness: No.

Mr. Turkus: Gurrah.

The Witness: Shapiro.

Mr. Barshay: I renew my motion, sir.

The Court: Denied.

Mr. Barshay: Exception.

1731

Q. When your father was told by Gurrah what you told this jury in substance, namely, that he could not go to certain manufacturers for business, what did your father say, if anything?

Mr. Barshay: I object to it. It is not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. My father said he could not see why not, if the manufacturers were willing to give him

1732 the work; he was carrying on a legitimate business, and he was going to take it.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. When your father said that, did anybody in the room answer him; yes or no? A. Well,

1733 at certain intervals—

Mr. Barshay: Please. Yes or no.

The Witness: Yes.

Q. When Gurrah was talking to your father and said the things that you have told this Court and jury, what was Lepke doing?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

1734 A. At certain intervals he would bend over and whisper into Shapiro's ear.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Directing your attention to a point of time, at those intervals when Lepke whispered into Gurrah's or Shapiro's ear, how soon after that was it before Shapiro spoke to your father?

Mr. Barshay: Same objection, sir.

Q. Do you understand my question?

The Court: Same ruling.
Mr. Barshay: Exception.

Q. You may answer. A. Well, Shapiro would mention certain names of manufacturers and Buchalter would bend over and whisper in his ear, and then Shapiro would tell my father whether he could go up to that manufacturer or he couldn't. 1736

Q. You told this jury that your father said in substance that he did not see why he could not handle the business, he was doing a legitimate business; is that correct? A. That is correct.

Q. After your father said that, did anybody else in the room other than Shapiro enter into the conversation?

Mr. Barshay: Object to it.
The Court: Overruled. 1737
Mr. Barshay: Exception.

A. Yes, my father was becoming very excited—

Mr. Barshay: Please. I move to strike out the answer.
The Court: Strike it out.
Mr. Turkus: From "Yes" on I consent to. Does the Court permit the word "yes" to stand on the record?
The Court: Yes.
Mr. Barshay: Exception.

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Q. Who entered and joined in the conversation?

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

A. Max Rubin interceded then and advised my father to take what he can get.

1739 Mr. Barshay: I move to strike out that part of the answer.

Mr. Turkus: Up to the point "interceded" I say should stand, and from there on I consent be stricken.

Mr. Barshay: I object to the whole answer.

The Court: Of course it is competent if made responsive.

Mr. Barshay: First I objected to the question. Your Honor has overruled the objection. I now move to strike out the answer as not responsive.

1740 The Court: The latter part is not responsive.

Mr. Turkus: Does the record indicate that the answer up to the word "interceded" stands on the record?

The Court: Yes.

Q. You said that Max Rubin interceded. What did Max Rubin say?

Mr. Barshay: I object to it, not binding on this defendant, too remote.

The Court: Overruled.
Mr. Barshay: Exception.

A. May I answer?
Q. You may. A. Max Rubin advised my father to take what he can get.

Mr. Barshay: I move to strike out the answer.
The Court: Denied.
Mr. Barshay: Exception. 1742

Q. Did Danny Fields take any part in the conversation?

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

A. Not to my recollection.
Q. What happened after Rubin took a part in the conversation and gave your father he advice that you related to this Court and jury? A. My father was very excited. 1743

Mr. Barshay: I move to strike that out.
Mr. Turkus: It is responsive. I submit it should stand.
The Court: Let it stand.
Mr. Barshay: Exception, sir.

Q. Will you continue? You say your father was very excited. Continue. A. And he said that he does not see why he should take that

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advice, he had worked very hard to build that up.

Q. Continue.

Mr. Barshay: Are you finished?

Q. You continue with your answer. A. He had worked very hard to build that up and he was going to continue to do so and not stop for anybody.

1745

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Describe your father's appearance at that time.

Mr. Barshay: I object to it.

Q. And by "appearance," I mean his facial expression.

1746

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. My father was very excited. He was pacing up and down and he became very, very white.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

1747

Q. At that point, Mrs. Greenspan, did you say something?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

A. Yes, I did.
Q. What did you say?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Same exception.

1748

A. I went over to my father and I told him he was getting too excited and would he please retur.. with me.

Mr. Barshay: I move to strike out the answer.
The Court: Denied.
Mr. Barshay: Exception.

1749

Q. Did your father return with you? A. No.
Q. Did he send you out from the office? A. Yes, he told me he would be all right and I should go back and wait for him.
Q. Did the books go back with you or did they stay in the office when you left?

Mr. Barshay: I object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.

A. I left the books there. I went back myself.

1750

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you return to your father's place of business?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

1751

Mr. Barshay: Exception.

A. Yes, I did.

Mr. Barshay: Move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you see your father again after that? A. Yes, he returned in about an hour.

Q. Did he have with him the books that you had brought over to that office? A. I don't remember.

1752

Q. How long after that occurrence was it that your father's connection with the New York and New Jersey Transportation Company as a partner terminated?

Mr. Barshay: Objected to.

The Court: Overruled.

Mr. Barshay: Exception.

A. About three months.

Mr. Turkus: The witness is offered for cross-examination.

Mr. Climenko: May it please the Court, the defendant Buchalter moves to strike out all of the testimony of this witness upon the ground that it refers to matters which are too remote to the issues involved in this case, upon the ground that the testimony is not binding on that defendant.

The Court: Denied.

Mr. Climenko: And is irrelevant to 1754
the issue here. Exception.

Cross-examination by Mr. Climenko:

Q. Mrs. Greenspan, when did you start working for New York and New Jersey? A. During the summer of 1932.

Q. Well, could you give me a date better than that? A. No, I can't.

Q. Well, do you know what month it was in the summer of 1932? A. No, I could not tell you that.

Q. I beg your pardon? A. I could not tell 1755
you that. I don't remember the exact month.

Q. Well, do you remember whether it was in June or July of 1932 that you started work there?

Mr. Turkus: Objected to. The witness has responded that she is unable to fix the month.

The Court: Overruled.

A. I don't remember the exact month.

1756 Q. I have heard that answer, and what I am now asking you is to please make an effort as you sit here now to think about it. After you make the effort, tell me whether you can remember the month. A. I cannot remember the month.

Q. So that, try as you may, at this moment you cannot recall the month when you started to work for New York and New Jersey? A. That is right.

Q. Is that correct? A. Yes.

1757 Q. Would you tell me when it was that you ceased to work for New York and New Jersey? A. The only thing I can tell you is that I worked there for about six or seven months.

Q. I know that, Mrs. Greenspan, and I am trying to ask you to cooperate with me to the slight extent. As you sit here now, try to make that mental effort to think about it and tell me as best you can remember when it was you ceased to work for New York and New Jersey.

Mr. Turkus: I object to it. The wit-

1758 ness's memory has been exhausted on that point, nine years ago.

Mr. Climenko: Your Honor, I will agree after that question is answered it may have been exhausted. It has not been yet.

The Court: She says she does not remember. That entitles you to ask any leading question that may prompt her memory, but of course if she fails to respond in answer to that, that is as far as you can go.

Mr. Climenko: I understand, your

Honor. I merely put that as a conclusory question.

The Court: You may answer the question.

Q. Do you remember the question? A. Yes, I do.

Q. Having it in mind, can you make an answer to it? A. I cannot tell you any more than I did.

Q. So that you have no recollection as to what month you started work for New York and New Jersey and what month you quit work for New York and New Jersey, is that right? A. That is right. 1760

Q. Have you a recollection as to when, in month and year, your father first became associated with New York and New Jersey? A. To the best of my recollection, it must have been around April of that year of 1932.

Q. It was in April of 1932, you think, that your father first became connected with that firm? A. To the best of my recollection.

Q. Is that right? A. That is right. 1761

Q. Now do you remember when it was that your father's relationship with that firm ended? A. No, I don't.

Q. You have no recollection of that whatsoever? A. No.

Q. Have you any recollection as you sit here now as to whether that firm continued in business after your father's connection with it terminated? A. No, I had no interest in it after that.

Q. So that you don't know as a fact whether

1762 *Sylvia Greenspan—For People—Cross*

that firm continued in business after your father severed his connection with it? A. I know that it didn't continue, but whether it broke up at that particular moment or a month later, I don't know exactly.

Q. You know that it did not continue; is that your testimony? A. Yes.

Q. And do you know whether it continued for some time after your father severed his connection with it?

1763

Mr. Turkus: The witness has already said so.

A. No, I do not.

Q. Do you not know?

Mr. Turkus: To the best of her recollection, she said whether it broke up then or a month later she did not know.

The Court: That is what she said.

1764 Q. Do you know whether the firm may have continued for a year or five years after your father's connection with it was severed? A. I know it didn't continue that long.

Q. I beg your pardon? A. I know that it didn't continue that long.

Q. Are you ready to say as to your own knowledge that it ceased in business less than a year after your father severed his connection with it? Are you ready to say that?

Mr. Turkus: I object to the form of the question. The witness has indicated

she had lost interest with the concern after her father's interest terminated.

Mr. Climenko: I withdraw the word "ready," but I press the question.

The Court: Just repeat it in modified form.

Q. Do you say that the firm continued for at least a year after your father severed his connection with it? A. I cannot say exactly.

Q. You really don't know, do you? A. I know 1766
that there was no New York and New Jersey Clothing Transportation for very long after my father severed his connections.

Q. And I am now asking you, Mrs. Greenspan, to define that period "very long." Can you tell me how long you mean by that phrase? A. As far as I can remember, it could not have been more than a few months at the most.

Q. And you are ready to leave us with that impression that you know as a fact that it did not continue for more than three months after your father severed his connection with it?

1767

Mr. Turkus: Object to it.

The Court: She said a few months.

The Witness: I said a few.

Q. What does "a few months" mean, if I may ask that question? A. I could not say.

Q. You don't know? A. No.

Q. Well, does it mean two or does it mean six?

1768

Mr. Turkus: I object to the form of the question.

The Court: Sustained. It is obvious she cannot say.

Q. Do you mean more or less than a half a year? A. It might mean anything from two to six.

Q. Indeed it might mean anything. That is why I ask you this question.

1769

Mr. Turkus: Just a minute. I object to the preamble: "indeed it might mean anything." That is why I ask the question, and ask it be stricken from the record.

The Court: Let the preamble stand.

Q. Will you answer the question?

Mr. Turkus: There is no question.

A. Will you repeat the question?

1770

Mr. Climenko (to reporter): Will you read it?

(Pending question read by the reporter.)

Mr. Turkus: That is a statement.

Q. Did you mean more or less than a half a year? A. I don't know.

Q. You really don't know, do you? A. No, I don't.

Q. What month in what year did your father

sever his connection with New York and New Jersey? A. His connection was severed in 1932. I could not tell you the month exactly.

Q. And you don't know, as I understand your testimony now, how long New York and New Jersey continued in business after that time; is that correct? A. No, I don't.

Q. Is that right? A. That is right.

Q. That is true. Who were your father's partners in New York and New Jersey? A. Morris Bluestein; there was a man by the name 1772
of Kelly—I don't remember his first name.

Q. And who else? A. I don't remember anybody else.

Q. You don't remember anybody else? A. No.

Q. So that your recollection is, as you sit here now, that your father had two partners in that firm? A. Yes.

Q. Is that correct? A. Yes.

Q. There were only these three interests; is that right? A. Yes.

Q. And you are the person who, as a book- 1773
keeper, opened a set of books for this firm? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, at the time that you opened the set of books, were you acquainted with the persons who made up or who had the interests in the corporation? A. I was at that time.

Q. You were at that time? A. Yes.

Q. Are you presently able to remember who those people were who had an interest at that time? A. Only those that I mentioned.

1774 Q. You cannot tell me whether there were any more or less? A. No, I can't.

Q. No? A. No.

Mr. Turkus: It could not be less. She named three.

Mr. Climenko: She could be wrong as to that.

Mr. Turkus: Ask her.

1775 Q. Do you know what Kelly's first name was? A. I don't remember his first name.

Q. Do you remember the other man's first name? A. I said Morris Bluestein.

Q. You did say Morris Bluestein? A. Yes.

Q. When did Kelly enter into this association? A. Almost immediately, I believe.

Q. I beg your pardon? A. Almost immediately, I believe.

Q. "Almost immediately" means when, in point of time? That is what I am trying to get.

1776 Mr. Turkus: I object to it. The witness said, "Almost immediately, I believe," so that it is speculative at best.

The Court: The jury understands what it means. This is all practical language used in every-day life among people.

Mr. Climenko: I am not trying to quibble with anybody, your Honor. I am just trying to get the entry day of Kelly's association with this business.

The Court: Of course, you must realize, going back nine years—

Mr. Climenko: Indeed, I believe it.

The Court: —you cannot expect to get everything you are asking for unless the witness has a remarkable memory. Then there might be some doubt about it.

Mr. Climenko: I just want to ask her one question. If she cannot answer it I will go to something else.

The Court: That is all right.

Q. Do you remember when it was that Kelly came into that business? A. No, I could not 1778
give you the exact date.

Q. Do you remember when it was that your father went into that business? A. I believe I answered that before.

Q. Yes, what was your answer? A. I told you to the best of my recollection it was around March or April of 1932.

Q. Did Kelly go in there after your father did? A. My father started it.

Q. I beg your pardon? A. My father started it.

Q. Am I to understand you to tell us that 1779
your father started New York and New Jersey Transportation Corporation?

Mr. Turkus: I object to the form of the question.

Mr. Climenko: I withdraw the question.

Q. Mrs. Greenspan, did your father start this business? A. You mean was it called the New York and New Jersey Transportation Company when my father went in? I am sorry I do not understand your question.

Mr. Climenko: (to the reporter) Will you read what she said?

Mr. Turkus: The witness responded.

Mr. Climenko: Do you mind if I get it verbatim from the stenographer?

(The testimony requested was read by the reporter.)

Q. Did your father start the business? A. I opened the books for the New York and New
1781 Jersey. As far as I was concerned, there was no concern before.

Q. So far as you know, there never had been a New York and New Jersey until that point when your father asked you to start that set of books? A. That is correct.

Q. Is that correct? A. That is correct.

Q. You do not know whether there had been a New York and New Jersey Transportation Corporation in existence? A. No, I don't.

Q. For one year or ten years before that time? A. No, I don't.

1782 Q. Is that correct? A. That is correct.

Q. And you don't know who the partners or other stockholders may have been in that corporation is that correct? A. Not before I opened the books.

Q. Do you know whether any books for such corporation had been in existence before the time— A. No, I don't.

Q. —that you opened the books that you did open? A. No, I don't.

Q. You have no knowledge of that? A. No.

Q. When you opened the books, did you speak

to anyone about it other than your father? Answer that yes or no. A. No.

Q. The only person you spoke to in relation to opening of the books was your father? A. Yes.

Q. Did your father make a contribution to the assets of that corporation to your knowledge, or is that a subject on which you have no information? A. I don't know.

Q. You really do not know? A. No, I don't.

Q. In opening the books, were you appraised— 1784
and answer this yes or no—were you acquainted with the contribution of other persons to the corporation? A. No.

Q. Do you know anything about the capital contribution of anybody to the corporation? A. No.

Q. Nothing at all? A. No.

Q. When you opened the books, were you told anything about salaries of employees? A. No.

Q. Were you told who the employees were? I am not now referring to your father or people who were his associates. I am referring to em- 1785
ployees of the corporation. Were you told who the employees were? A. Yes, I was.

Q. You were? A. Yes.

Q. Can you remember the name of any of the employees? A. I might remember one or two.

Q. Did you speak to your brother last night after he left the witness stand? A. No, my brother left immediately.

Q. You have not seen your brother since he testified here yesterday? A. No.

Q. Is that correct? A That is correct.

Q. Did you talk to him before he took the

witness stand? A. I have spoken to him a number of times before he took the witness stand.

Q. Did you speak to him yesterday morning before he took the witness stand? A. Yes.

Q. In relation to his testimony or your testimony as it might be given here? A. No.

Q. You did not discuss with your brother the matter which he might be called upon to testify in this court? A. No.

Q. Did you at any time discuss that with him?

1787 A. No.

Q. Did he ever discuss with you at any time the matters as to which you might be called on to testify in this court? A. No.

Q. It is clear that at no time yesterday did you discuss with your brother his testimony here? A. Yes.

Q. I beg your pardon? A. Yes.

Q. That is clear? A. Yes.

Q. That ~~such~~ a conversation did not take place between you and your brother? A. Yes.

Q. And it is also clear that at no time prior

1788 to your taking the stand today did you ever discuss with your brother the subject-matter of his proposed testimony and your proposed testimony? A. Yes.

Q. I beg your pardon? A. Yes. We did not know what we were going to be asked.

Q. Then you did discuss that with your brother? A. I said no. How could we discuss it? We did not know what we were going to be asked.

Q. Did you talk with anybody in the District Attorney's office before you took the stand? A. Yes, I did.

Q. With whom? A. I spoke to Mr. Klein.

Q. Anybody else? A. I spoke to Mr. Turkus.

Q. Anybody else? A. No, that is all.

Q. Were you present when your brother spoke to either of those gentlemen? A. No.

Q. How many times did you talk with Mr. Klein or Mr. Turkus? A. Once to Mr. Turkus and once to Mr. Klein.

Q. And those are the only occasions? A. Yes.

Q. That you have spoken with those gentlemen? A. Yes. 1790

Q. Is that correct? A. Yes.

Q. Did you talk with your brother about what you had discussed with Mr. Turkus or Mr. Klein? A. No.

Q. Never? A. No.

Q. And he never told you what he might have discussed with either of those gentlemen or any of those associates? A. He couldn't.

Q. Did Mr. Turkus or Mr. Klein in talking with you refer to what they might have said to your brother or what he might have said to them? A. No. 1791

Q. No reference whatsoever? A. No.

Q. In your talk with Mr. Turkus or Mr. Klein, did they refer to anything that they might have said with your mother, or what your mother may have said to them? A. No.

Q. No? A. No.

Q. And then you never discussed with your mother prior to your taking the stand the matters about what you might be interrogated by Mr. Turkus here this morning; is that correct? A. I have no idea of what she would be asked.

1792 Q. No, no. I am afraid you misunderstood my question. Did you ever discuss with your mother the matters as to which, following your conversation with Mr. Turkus or Mr. Klein, you had a notion you might be interrogated by Mr. Turkus here? Do you understand it now? A. Yes, but I never discussed it with her.

Q. Never? A. No.

Q. And she never asked you any questions about it? A. No.

1793 Q. Is that correct? A. No.

Q. So that you took the stand this morning without any prior notice on the part of any member of your family—

Mr. Turkus: Objected to. That is not the fact.

Mr. Climenko: I have not finished the question.

Mr. Turkus: Excuse me.

Mr. Climenko: Since you object to that phrase, I withdraw it.

1794 Q. You took the stand with morning without ever having mentioned to any member of your family the matters which you had discussed with Mr. Turkus or Mr. Klein?

Mr. Turkus: Objected to. That has been asnwered at least five times with a series of questions.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Now I should like to ask you again just once: Can you now tell me whether there were

any other persons in New York and New Jersey other than the persons that you have mentioned?

Mr. Turkus: Objected to as already answered.

Mr. Climenko: If your Honor pleases—

The Court: Overruled.

A. No, I can't.

Q. You cannot think of any other persons? A. No.

1796

Q. Did you ever hear the name Sobler? A. Yes.

Q. Who is he? A. I think he was one of the partners.

Q. Well, did he have an interest equal to that of your father? A. What would you call an equal interest?

The Court: Capital contribution.

The Witness: I do not know anything about the contributions.

1797

Q. I beg your pardon? A. I do not know anything about the contributions.

Q. Do you mean, then, that you don't know what the interests of the various partners were in this business? A. Yes.

Q. You do not know whether Sobler, whose name you now remember because I mentioned it to you, had a 50 per cent interest in this business, or less than a 50 per cent interest? A. I do not know.

Q. For all you knew then, or all you know

now, he might have had a larger interest than everybody else in the business; is that correct?

Mr. Turkus: Objected to. Anything is possible, if you do not know.

The Court: Sustained.

Q. Mr. Sobler was there every day that you worked in this business, was he not? A. He may have been.

1799 Q. I beg your pardon? A. He may have been.

Q. Of course, as Mr. Turkus informs us, anything might have happened. Was he there every day that you were at that business? A. I don't recall.

Q. Was Mr. Bluestein there every day? A. No, Mr. Bluestein came and went.

Q. How frequently did you see Mr. Sobler at the place of business in the months that you worked in that business? A. I saw him a number of times. I could not tell you exactly how many.

1800 Q. It is a fact, is it not, that whether or not you know the degree or nature of his interest, he certainly had an interest in that business, is that right? A. Yes, but we took orders from my father.

Mr. Climenko: I move to strike out everything after the word "but".

Mr. Turkus: I ask that it stand.

The Court: Let it stand.

Mr. Climenko: Exception.

Q. He was a partner in that business?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Climenko: Exception.

Q. How many times in all did you see Sobler in the premises of that business? A. I answered that. I told you I saw him a number of times. I could not tell you exactly how many.

Q. When you were first interrogated by me this morning, you had no recollection whatsoever that Sobler had an interest in that business, is that so? 1802

Mr. Turkus: Objected to. Already answered.

The Court: Sustained. The question of partnership is always a question of law. There has to be competent proof on which the Court can decide whether or not a man is a partner or not. The most that we can say in regard to this witness's testimony is that it apparently appeared to her, as a conclusion she drew from what she saw and heard, that he probably was a partner. That does not establish partnership. 1803

Mr. Climenko: I was not interested in that, if I may say so, your Honor; I was interested only in her recollection.

Q. When did Martin Keily enter into this business? I asked you that before. Do you remember? A. Yes, you asked me that before.

but I could not tell you whether he went in immediately or he came in a little bit later.

Q. He may have come in after you posted the books?

Mr. Turkus: Objected to. It is already answered. She said he could have come in immediately or some time after.

The Court: Overruled.

1805 Q. Will you answer the question, please? A. He may.

The Court: Do you remember definitely?

The Witness: I don't remember definitely. I can't say definitely exactly when he came in.

Q. What was your father's business before his association with New York & New Jersey? A. I think he worked for the Garfield Express at
1806 that time.

Q. Before his association with New York & New Jersey? A. I think so. I am not sure.

Q. When do you think that was? A. I don't remember.

Q. You have no recollection of that? A. No.

Q. What was his business immediately before, immediately before his association with New York & New Jersey?

Mr. Turkus: I object to it. It has already been answered. The witness has

speculated. She said "I think". This is more speculation. It is objectionable.

The Court: Do you know?

The Witness: No, not exactly.

Q. Well, now, wasn't your father in business immediately before his association with New York & New Jersey, wasn't he in business with Kelly, or don't you know? A. He was in business with Kelly. I don't remember whether that was exactly preceding or not. 1808

The Court: Exactly what?

The Witness: Whether that preceded the business of the New York & New Jersey.

Q. How long did that business last? A. I don't remember.

Q. Did it last one month or four, do you know? A. No, I don't.

Q. Do you know whether that was a successful business? A. I don't know.

Q You know nothing about that? Do you know as a fact that it was unsuccessful and that your father suggested that Mr. Kelly contribute his trucks to the existing corporation of New York & New Jersey Transportation Company? A. I said— 1809

Mr. Turkus: I object to it. The witness has just responded she does not know anything about it, she does not know if it was successful, so how could she possibly know that it was unsuccessful.

The Court: Were you the bookkeeper at that time?

The Witness: No.

The Court: You were just your father's daughter at that time?

The Witness: Yes, sir.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Now don't you know as a fact that Kelly came into the business the same time that your father did? A. No, I don't.

Q. You don't know that? A. No.

Q. Do you know what Kelly's contribution to the business was? A. I don't know any of the contributions.

Q. You don't? A. No.

Q. Do you know when Kelly left the business? A. No.

Q. Did he leave while you were there? A. I don't remember.

Q. Well, you were there for at least six months, were you not? A. Yes, I was.

Q. Is that your recollection? A. Yes.

Q. Did Kelly leave before or after you left?

Mr. Turkus: Objected to.

A. I could not tell you that.

Q. You have no notion of that at all? A. No.

Q. Do you know whether Kelly's trucks were ever withdrawn from the vehicles of the New York & New Jersey Transportation Corporation at a time when you were connected with that corporation? A. I don't remember that.

Q. You don't remember that? A. No.

Q. Did you receive a salary? A. Yes.

Q. Did you draw checks? A. Yes.

Q. Did you pay the other employees by drawing checks for them? A. Yes.

Q. You did? A. Yes.

Q. Were the employees paid regularly while you were there? A. For the first few months.

Q. Until what time? A. Until business started going bad.

Q. When would you say that business began 1814
starting going bad? A. After the meeting in the office that I spoke about.

Q. Business was good until that time? A. Yes.

Q. What was the date of that meeting? A. I could not tell you the exact date.

Q. I beg your pardon? A. I could not tell you the exact date.

Q. Do you know what month it was in? A. No.

Q. Do you know that at the time that your father entered into this association with New York & New Jersey, New York & New Jersey was already in arrears in the payment of salaries 1815
to it's employees? Did you know that? A. No, I didn't.

Q. Did you ever hear of a man by the name of Abe Goldman? A. I don't remember him.

Q. Don't you know that Goldman was one of the truck drivers for New York & New Jersey? A. I don't remember.

Q. Have you no recollection of that? A. No.

Q. Didn't you draw the checks which were given to him in payment of his salary when he was paid? A. Yes, but I cannot remember all the names of nine years ago.

1816

Q. Did you tell me about ten minutes ago that you did remember the name of Goldman? A. I did not.

Q. You did not? A. No.

Q. Of course, you recall that meeting nine years ago, do you not? A. Yes, I do.

Q. You remember all of the details of that? A. Yes, I do.

Q. Correct? A. Yes.

Q. Now at the time that your father first was
1817 connected with New York & New Jersey, were you told that New York & New Jersey could not pay the salary, the wages, of Goldman, one of its truck drivers? Were you told that?

Mr. Turkus: Just a minute. I object to it. Counsel has brought out when business started to go bad, after the meeting in this office. That has been answered.

The Court: The question can be reframed. You will have to show who gave that information.

1818

Q. Did Goldman ever tell you that New York & New Jersey owed him seven hundred dollars in back salary from a time even before your father came in there? A. I told you I don't remember Goldman.

Q. So you do not remember whether such a demand was ever made on you for back salary? A. No.

Q. But you do not know that it did not happen, is that correct? A. I do not know anything about Goldman.

Q. It may have happened? A. I could not say.

Q. You do not know? A. No.

Q. You say business was good before that meeting? A. Yes.

Q. Is that correct? You had charge of the books? A. Yes.

Q. What did the corporation own? A. What do you mean by what they owned?

Q. What were its assets? You said business was good. What did they have? A. They had a few trucks.

Q. Yes. A. And the manufacturers from whom they took the work. 1820

Q. All right. Who owned those trucks? A. The New York & New Jersey.

Q. The corporation? A. Yes.

Q. Did they own them outright? A. No.

Q. They owned them subject to chattel mortgages or conditional bills of sale, is that right? A. They bought new trucks during the time I was there.

Q. And they bought them on time? A. Yes.

Q. Is that correct? A. Yes.

Q. Where were those trucks stored? A. I don't remember. 1821

Q. Were they stored in New York or in New Jersey? A. I don't remember.

Q. You don't know even that? A. No.

Mr. Turkus: Just a minute. I ask that that question be stricken "You don't know even that". The implication—

The Court: Strike it out.

Q. Didn't you know that those trucks were stored at Pink's garage? A. No.

Q. In Passaic? A. No.

Q. Did you pay garage rent for the garage of those trucks by check? A. Yes, I did.

Q. You don't recall the name of the payee? A. No.

Q. Is that correct? A. That is correct.

Q. Now did a time come when those trucks were withdrawn by the finance company? A. Yes.

Q. That did come? A. Yes.

Q. Did a time come when Kelly withdrew his
1823 trucks or don't you remember that? A. I don't remember about his individual trucks but I do know that the finance company did take the trucks back.

Q. They did take those trucks back? A. Yes.

Q. After the finance company took those trucks back, did Sobler and Bluestein continue that business, do you know that? A. There was no business left. That is why the trucks—

Mr. Climenko: I move to strike out the answer.

1824 Mr. Turkus: I object to it and I ask the witness be permitted to continue with the rest of the answer.

The Court: Yes.

Mr. Climenko: I take exception. The answer is not responsive.

Mr. Turkus: (To reporter) Will you read to the witness the point to which she got?

(Answer read by the reporter.)

Mr. Turkus: Continue.

The Witness: That is why the trucks were taken back.

1825

Q. Were you there at that time? A. I was there until that time.

Q. When was that? A. I don't remember the exact month.

Q. You have no recollection of it whatsoever? A. No.

Mr. Turkus: Objected to.

The Court: She did not say that.

Q. What did you say? Have you any recollection as to when it happened? 1826

Mr. Turkus: Objected to as just answered.

The Court: Sustained.

Mr. Climenko: Exception.

Q. At the time the business started, did it have a bank account? A. Yes.

Q. How much money did it hav in the account? A. I don't remember.

Q. Do you remember whether it had ten dollars or a thousand dollars? A. I could not tell you exactly. 1827

Q. You say that business was good?

Mr. Turkus: Objected to as argumentative.

The Court: Sustained.

Mr. Climenko: Exception.

Q. At the end of the first week that you were there, how much did the corporation have in its bank account? A. I cannot answer that. I don't remember anything like that.

1828 Q. Well, do you remember whether it had a thousand dollars or less than a thousand dollars?

Mr. Turkus: Objected to.

The Court: Sustained. She said she did not know.

Mr. Climenko: Exception.

Q. At the end of each week, did you draw a check to your father? A. Salaries were paid.

1829 Q. Did you draw a salary check for your father? A. Yes.

Q. Do you recall how much that was? A. No.

Q. Do you remember whether it was $25 more or less? A. I don't know.

Q. You do not know whether your father drew more or less than $25 from this prosperous business?

Mr. Turkus: Object to the form of the question.

1830 The Court: You asked about salaries. Now you say how much did he draw. That is different. In a corporation, on account of income tax, it is customary, and I think we can take notice of it, for the officers to draw salaries and that is charged against the expenses of the business. The profits are over and above and the profits may be split.

Mr. Climenko: Has your Honor concluded?

The Court: I am just calling your at-

tention to the confusion between the two questions.

Mr. Climenko: Thank you, sir. I take exception to your Honor's remarks. I understand the spirit in which they were made.

Q. Let me ask you, Mrs. Greenspan, did your father have both a salary and some other account in the corporation? A. What do you mean by that? 1832

The Court: Do you know if there were any dividends paid?

The Witness: The business was not in existence long enough for dividends.

The Court: Just yes or no, do you remember?

The Witness: No.

Q. Your father did not draw any dividends?

Mr. Turkus: Just a minute. She said she did not remember, as I understand it. 1833

Mr. Climenko: I think you are wrong too, Mr. Turkus.

By the Court:

Q. Did you attend any stockholders' meetings? A. No.

Q. Did you attend any meetings of the board of directors? A. No.

Q. Did you prepare any minutes of the meetings of either directors or stockholders? A. No.

1834

By Mr. Climenko:

Q. Did your father draw any dividends? A. I don't know.

Q. Do you know what your father drew as his salary?

Mr. Turkus: Objected to as already answered.

The Court: Overruled.

1835

A. No, I don't.

Q. You have no idea at all, have you? A. No.

Q. Do you know that it was $25 a week? A. I don't know.

Q. You do not know that? A. No.

Q. You do not know that that is not true?

Mr. Turkus: Objected to in that form. If she does not know if it was twenty-five she does not know if it is not twenty-five.

The Court: She says she does not know. Sustained.

1836

Q. Do you know whether he ever drew as much as $30 a week as a salary from this business? A. I don't remember any figures on it.

Q. No, but you have a general impression as to what your father was drawing?

Mr. Turkus: Object to the form of the question.

Mr. Climenko: All right, I will withdraw it.

1837

Q. Do you have some general recollection as to what your father drew from the fact that you drew the checks of the corporation?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Do you have any recollection now as to what your father's salary was?

1838

Mr. Turkus: Objected to.

The Court: She has answered it. Sustained.

Mr. Climenko: Exception.

Q. Did your father ever draw as much as $30 a week as a salary from this business?

Mr. Turkus: Objected to.

The Court: Sustained as answered.

Mr. Climenko: Exception.

1839

Q. Did your father ever make a capital contribution, a contribution of money, to the assets of this business?

Mr. Turkus: Objected to as already answered on a number of occasions.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Did your father ever put any money into this business?

1840

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Climenko: Exception.

Q. At the time that you posted the books of this corporation, did you make any note as to any money put into the business by your father?

Mr. Turkus: Objected to as already answered.

1841

Mr. Climenko: A different question.

Mr. Turkus: It is the same thing.

The Court: Overruled.

By the Court:

Q. In these books that you opened, did you have capital account? A. No.

Q. Were they just the charges and credits? A. That is right.

Q. For trucking? A. That is right.

Q. And did they also keep a record of the bank

1842

deposits? A. Yes. I made deposits, entered in the charges, moneys received, bills purchased and everything in regard to the bookkeeping end of it, but no capital account at all.

Q. The books were not as complete as that? A. No.

By Mr. Climenko:

Q. Did you make any note about your father putting any money into the business?

Mr. Turkus: Objected to.

A. No.
Q. You never did? A. No.

Mr. Turkus: I ask that the answers be stricken because she did not keep this kind of book. How could she make that kind of entries?

The Court: Yes, she said she only had a high school education. Apparently there 1844
was no business college.

Mr. Climenko: I know, your Honor, but she was the only person, she was her father's daughter, who was keeping books of any contribution he might have made and I want to know if he made any.

The Court: The witness has given quite a few answers which light up that situation fairly. In small businesses, how many times are books kept according to the course of the New York University School of Commerce? Just usually a rather low grade of bookkeeping. 1845

Mr. Climenko: I know, your Honor.

The Court: In small businesses.

Mr. Climenko: My questions are pointed only as to her recollection. I take exception to your Honor's remarks only for that reason, that they don't touch on the point of my question.

Q. Don't you know that Kelly withdrew from this business because your father did not put into the business the money he was supposed

to? Don't you know that that is a fact? A. No, I don't.

Q. Don't you know that your father had an agreement with Sobler and Bluestein that your father would put in a certain amount of money and that he never did that? Don't you know that? A. I had nothing to do with any agreement.

Q. Don't you know that your father was supposed to put $10,000 into the business, of which
1847 $5,000 he was to put in in cash, and he could not do that? Don't you know that? A. No, I don't.

Q. Don't you know that Sobler and Bluestein said to him, "Even though you cannot put in any part of what you are supposed to put in, we will let you stay here, and if the business makes money, we will let you put your share in from profits"? Don't you know that that happened? A. No, I don't.

Q. Don't you know that as a matter of fact the business never made any money and your father left the business because of that fact? Don't you know that? A. No, I don't.

1848

Q. You do not know that? A. No.

Q. Don't you know as a matter of fact that he asked for and obtained a job at a much higher salary than any salary he had ever got from New York and New Jersey? A. That is not so.

Q. Don't you know that? A. No, that is not so.

Q. You lived—

Mr. Turkus: Don't shut off the answer. What was the answer?

The Witness: I say that is not so because the business was progressing.

1849

Q. Because what? A. Because the business was progressing.

Mr. Climenko: I move to strike that out.

Mr. Turkus: I move that it stand.

The Court: Let it stand.

Mr. Climenko: Exception.

Q. If the business progressed, as you say, was its bank account larger one month after you had opened the books than three weeks before that time?

1850

Mr. Turkus: Objected to. That is not an indication of whether a business is progressing.

Mr. Climenko: That is one indication.

The Court: Sustained.

Mr. Climenko: Exception.

Q. How much money did the business have on deposit the first week after you opened the books?

1851

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Did it have a larger sum of money on deposit three weeks later?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Climenko: Exception.

1852 Q. How much money did the business have on deposit two months after you started work for the business?

Mr. Turkus: Objected to as already answered.

The Court: Overruled.

A. I don't remember.

Q. You have no recollection of that at all? A.

1853 No.

By the Court:

Q. Do you remember how large a bank balance there was at any time when you were there? A. Your Honor, I cannot answer that because they kept investing money in new trucks. If they did make money, they invested it.

Q. How much was left in the bank from day to day? A. I cannot remember that.

Q. A thousand, two thousand? A. I cannot remember the exact figure.

1854

By Mr. Climenko:

Q. Do you remember if anything was left in the bank from day to day? A. There must have been something left. Bills had to be met.

Mr. Climenko: I move to strike that out.

By the Court:

Q. What bank was the account in? A. I don't know.

1855

Q. You don't remember? A. I don't remember that, no.

Q. Some banks require minimum average bank balances, but others make a charge for bank balances under a certain amount. Others don't care how large the bank balance is, but carry the account anyway. That is why I asked what bank, if you can remember, the account was in. A. I don't remember.

By Mr. Climenko:

1856

Q. You say you do not remember the names of the banks where the accounts were kept? A. That is right.

Q. Suppose that you take a look at Defendants' Exhibit E for identification and tell me whether after looking at that your recollection is refreshed as to the name of the bank. Does that refresh your recollection? A. No. To the best of my recollection it was a New York bank.

Q. It was a New York bank? A. Yes.

Q. Do you recognize your father's signature on that photostatic copy of a check?

1857

The Court: What bank is that?

Mr. Climenko: A Passaic bank, your Honor.

A. I believe that is his signature.

Q. You believe that is his signature? A. Yes.

Mr. Climenko: May I have it?

The Court: Let me see it. Is this an exhibit?

Mr. Turkus: No, that is only marked for identification.

Q. You recall the other signature that is on this check, N. Sobler? A. Yes.

Q. Is that the man whose identity you could not remember this morning? Is that right? A. Yes.

Q. Did you ever make deposits for this corporation? A. Yes, I did.

1859 Q. Where? A. I don't remember the bank. It was a New York bank.

Q. Are you the only person who made the deposits?

Mr. Turkus: Objected to. That is something she could not tell.

Q. So far as you know, was anybody else requested to make deposits for this corporation?

Mr. Turkus: Objected to. If there are four partners or less partners, anybody

1860 can make deposits. How would she know? Speculative. Objectionable.

The Court: It seems to have been assumed that this was a corporation, and of course it is still an open question whether it was a corporation or a partnership. There is no legal proof on either point. Overruled.

Mr. Climenko: If your Honor will take another look at that exhibit which was just handed to you, you will get some indication.

The Court: Yes, but it is not proof.

Mr. Climenko: I don't submit it as such.

The Court: Furthermore, it is not in evidence.

Mr. Climenko: I am reminded, your Honor, that the son testified yesterday that he attended a meeting in a lawyer's office in connection with the corporation.

Mr. Turkus: That is certainly proof of a corporation.

The Court: I recall that now. 1862

Mr. Climenko: It is not proof of anything, and I said it, if your Honor please, not to produce a sarcastic rejoinder from my adversary, but only in support of the request made by your Honor.

The Court: There has to be a certain amount of that.

Mr. Climenko: I do not know why there need be any.

The Court: Go ahead.

By Mr. Climenko: 1863

Q. Were you the only person, so far as you know, who made deposits in the bank for the corporation?

Mr. Turkus: I object to it.

The Court: I did not hear the question.

Mr. Climenko: Your Honor, I asked her if, so far as she knew, she was the only person who made deposits in the bank for the corporation.

Mr. Turkus: Objection withdrawn.

1864

The Court: Do you know of anybody else who made deposits?

The Witness: Yes.

Q. Who else? A. Anyone that collected a very large check after I had made a morning deposit would deposit it.

Q. I see. But it was your habit to make a morning deposit? A. Yes.

Q. Is that right? A. Yes.

1865 Q. So that you made the deposit at least once a day during business days? A. Yes.

Q. Where did you go to make those deposits?

Mr. Turkus: Objected to as already answered.

Mr. Climenko: That question has never been asked.

Mr. Turkus: It has been asked three times.

The Court: Overruled. She has said that she went to a New York bank; she does not recall what bank. Do you recall

1866 the street the bank was on?

The Witness: I think it was on Broadway.

The Court: Near where?

The Witness: I don't know.

Q. Do you know the name of that bank that you went to at least once every day? A. No, I don't.

Q. You have no recollection of that whatsoever? A. No.

Q. Can you think about it, see whether your memory will be refreshed on that point? A. I

could not tell you. I have been in so many banks since.

Q. But you worked for this business for at least six months, did you not?

Mr. Turkus: Objected to as already answered.

Q. Is that right? A. That is right.

Q. And each day of those six months you went to that particular bank? 1868

Mr. Turkus: I object to it as already answered. The witness has said she has gone to many banks since. It is nine years ago.

The Court: She did not say each and every day. Were there any days that you skipped, had no money to deposit?

The Witness: There might have been.

Q. I am asking you, with that recollection that you made the daily bank deposit yourself, will you make an effort as you sit here now to think 1869 of the name of the bank?

Mr. Turkus: I object to it.

The Court: She has answered it. Sustained.

Mr. Climenko: Exception.

Q. Did you at one time live in Passaic, New Jersey? A. Yes.

Q. And do you remember what years those were? A. I lived there twice.

1870

Q. Yes, when was the first time that you lived there? A. That was about eighteen years ago.

Q. Do you know whom your father was working for at that time? A. Yes.

Q. Whom? A. Louis Cooper.

Q. And under what name was he conducting his business at that time, do you know? A. Garfield Express.

Q. Was he your father's only boss then?

1871

Mr. Turkus: Objected to. How in the world could this witness know that?

Mr. Climenko: If she does not, she will say so, Mr. Turkus.

The Court: It is a conclusion. Sustained.

Q. Do you know whether anybody had an interest in Garfield with Mr. Louis Cooper at that time, eighteen years ago, when so far as you recall your father was working for Garfield?

1872

The Court: There is no evidence here, Counsellor, that she herself worked for the Garfield Express.

Mr. Climenko: I don't make any such claim, your Honor.

The Court: So anything that she would have in the way of information would be information in the home.

Mr. Climenko: Right.

The Court: Not in the place of business. She would not know who bossed her father.

Mr. Climenko: I understand, but she lived there. I just want to know whether

she was then acquainted with a certain person.

The Court: You can ask that.

Q. Did you then know Mr. Bluestein, in those years? A. Morris Bluestein?

Q. Yes. A. Yes, I knew him.

Q. And didn't he then have an interest with Louis Cooper in Garfield Express?

Mr. Turkus: Objected to. Eighteen years ago this witness obviously was a child. 1874

Mr. Climenko: You have been explaining matters in this court-room for two days now as to what happened nine years ago.

Mr. Turkus: Yes. She will never forget that.

Mr. Climenko: They have nothing to do with this case.

Mr. Turkus: That is what you think.

Mr. Cuff: Judge, I object to the District Attorney making statements in connection with any objection. If he makes an objection, he should make it in a legal fashion and not a speech. 1875

Mr. Turkus: Will the Court instruct associate counsel and Mr. Cuff to be civil?

The Court: This acts as an inhibition on the part of the Court when it tries to think. Do I understand she is being questioned now as to something that happened eighteen years ago? Is that accurate?

1876

Mr. Climenko: I beg pardon, your Honor. I first want to know whether eighteen year ago she was acquainted with Bluestein, that is all.

The Court: (to witness) How old are you now, if you do not mind telling us?

The Witness: Twenty-eight.

The Court: When you were ten years old, do you know if he was associated with Bluestein?

1877

The Witness: I know Bluestein, but I do not know anything about the business of the Garfield Express.

Q. You do not know whether he had an interest in Garfield Express? A. No, I do not.

Q. How long ago eighteen years ago did your father remain in the employ of Garfield? A. I don't remember.

Q. You have no recollection?

The Court: At that age were you in primary school?

1878

The Witness: Yes.

Q. Then did your father start work for Garfield again in 1933? A. He went to work again. I do not know exactly when.

Q. Did he go to work for Louis Cooper and Garfield? A. Yes.

Q. In 1933? A. I do not know exactly when.

Q. Do you know how long he remained in their employ? A. I don't remember.

Q. I beg your pardon? A. I don't know.

Q. You do not know whether it was six months or two years? A. No, I don't.

1879

Q. You do not know what his salary was? A. I never knew what my father's salary was.

Q. You never knew what it was even in New York and New Jersey; is that correct? A. I did at that time because I made out the checks.

Q. But you have no recollection of it now? A. No.

Q. Do you say that on a particular occasion you went to a place where you saw, among other people, a Mr. Shapiro? A. Yes.

1880

Q. And that he looked at certain books that you had brought with you? A. Yes.

Q. And he read those books? A. Yes.

Q. And he read names from them? A. Yes.

Q. Are you sure that he was the person who did that? A. Yes.

Q. At that time was part of the business of New York and New Jersey in connection with houses in Pennsylvania, do you know? A. Yes.

Q. Yes? A. Yes.

Q. Were those non-union shops? A. I don't know.

1881

Q. Do you know whether they were union or non-union? A. No, I don't.

Q. You never knew anything about them? A. No.

Q. Was the subject of whether they were union or non-union discussed on the occasion when you were at that particular place? Yes or no? A. I cannot answer that yes or no.

Q. You don't know? A. I don't know.

Q. You were there listening to this conversation? A. Yes.

Q. Is that right? A. That is right.

Q. You say that those books were not returned

to you after you left that place? A. I didn't bring them back.

Q. You did not bring them back? A. That is right.

Q. Were they returned at the office of New York and New Jersey at any other time? A. Yes.

Q. When? A. I don't remember.

Q. Well, was it more than a day or two days, do you know? A. My father may have brought
1883 them back. I do not remember exactly.

Q. May he have brought them back on that same day? A. He may.

Q. Yes? A. I said, "He may."

Q. How long did your father continue his association with New York and New Jersey after the date of that meeting, whenever it may have been? A. About two or three months.

Q. Did you remain in New York and New Jersey for that same period of time? A. I remained until the time when it was evident that there was no more business left.

1884

Mr. Climenko: I move to strike the answer out.

Mr. Turkus: I move that it stand. That is the way the witness fixes her recollection.

The Court: Let it stand.

Mr. Climenko: Exception.

Q. Did you testify before the Grand Jury in this case? A. Yes, I did.

Q. When? A. After the murder of my father.

Q. Will you give me a date, please? A. I cannot give you a date.

Q. Do you remember what year it occurred in? A. Yes, 1936.

Q. Did you testify at any time after 1936? A. No, not until the time I saw Mr. Turkus and Mr. Klein.

Q. Did you testify before a Grand Jury after you saw Mr. Turkus and Mr. Klein? A. No.

Q. So that the only time that you testified before a Grand Jury was in 1936? A. Yes. 1886

Mr. Climenko: I respectfully request Mr. Turkus, through the Court, to submit to the Court—

Mr. Turkus: You can have the minutes.

Mr. Climenko: —a transcript of the Grand Jury testimony of this witness for inspection, pursuant to the same request made yesterday.

Mr. Turkus: I hand to your Honor the exhibit that you received yesterday, People's Exhibit F. The index indicates 1887 where that testimony is.

The Court: The Court proceeds to read the minutes.

Mr. Turkus: May I say this: I offer the Grand Jury minutes in evidence of this witness.

Mr. Climenko: If your Honor pleases, I ask your Honor—

The Court: The Court is trying to read the minutes. Make your motions later.

The Court having completed the reading

of minutes of testimony before the Grand Jury of this county by Sylvia Rosen, under date October 16, 1936, finds that apparently there are no contradictions therein with any of the testimony given here, but there are certain amplifications which the Court is prepared to call attention to if counsel for defense wishes. There is also supplemental testimony covering a point not brought out here, concerning an alleged
1889 meeting in a candy store several years later, what was said there and who was present. The Court cannot go into that. That is a matter for the District Attorney. And also an alleged communication sent by this witness to someone else concerning the latter alleged meeting.

Mr. Barshay: We enter an objection to the Court's saying to this jury and for the record what was in the Grand Jury minutes.

The Court: The Court has not revealed
1890 anything prejudicial.

Mr. Barshay: I know that. I did not say you revealed anything.

The Court: The Court will be very glad, so far as the amplifications of testimony concerning the subject-matter of the witness's testimony here today are concerned, to reveal them if counsel for defense wishes.

Mr. Barshay: We would like to have it.

The Court: Very well. I will put it in the form of questions.

Mr. Barshay: I do not want any bundle of Grand Jury minutes.

(To Mr. Turkus) You stop those side remarks audible to the jury. You know better.

Mr. Turkus: I am offering them in evidence.

Mr. Barshay: You know they have no right in evidence. A law student knows it. You ought to know it.

Mr. Turkus: Thank you for the compliment. 1892

The Court: The Court sustains objection to the Grand Jury minutes going into evidence.

In the conversation in this place of business on what you have described as 17th or 19th Street off of Broadway, do you recall if anything was said in relation to your father's trucks running into Pennsylvania?

Mr. Climenko: If your Honor pleases, I object to that question, not binding on the defendants. The issue is remote in the matter before the Court. 1893

The Court: This is the amplification. It is more specific than what the witness said here.

Mr. Climenko: If your Honor pleases, I lodge my objection to your Honor's question in connection with our application. That was an application to permit us, if I may say so ever so respectfully, your Honor, to look at those minutes in the assistance of our cross-examination.

1894

The Court: You cannot do it unless the Court finds contradictions.

Mr. Climenko: I respectfully except to your Honor's remark. I press my objection to your Honor's question.

The Court: It is not a remark. The Court was requested by counsel for defense to go into this. Now you get up and object.

Mr. Climenko: No, if your Honor

1895

pleases, we have been misconstrued. We did not ask your Honor—

Mr. Barshay: Your Honor, within the principles of the law—

The Court: The Court would like to know what is what.

Mr. Barshay: I would like to see the Grand Jury minutes or that part thereof, with the Court's permission, which shows any inconsistency with respect to this witness's testimony. That is all I want.

The Court: The Court finds none.

1896

That is the third time I said it, and I shall not be involved in any wrangle with counsel causing the Court to make repetitions of statements.

Mr. Barshay: I will abide by your Honor's ruling. This is the first time, unfortunately, that I have heard it.

The Court: If you do not want the Court to ask questions concerning the supplemental matters, the amplifications, I should say—

Mr. Barshay: I do not want the Court to ask any questions contained therein un-

less they show inconsistencies with her present testimony.

The Court: There are no inconsistencies.

Mr. Barshay: Now may I ask the Court whether or not there is any mention of this meeting at the so-called Broadway address, or whatever the address was, in the Grand Jury minutes?

The Court: There is.

Mr. Barshay: That is what I would like 1898
to see.

The Court: That is precisely what I am asking about.

Mr. Barshay: I would like to see them, sir.

The Court: I know you would, and you will not, because that is covered by the Court's ruling, to which you have exception.

Mr. Barshay: Then I take an exception, that's all.

The Court: Now you have got a lot of 1899
exceptions. We will call it a day on that.

Mr. Climenko: May we have those minutes marked for identification?

Mr. Turkus? They were marked yesterday.

The Court: They are court records.

Mr. Turkus: They bear Exhibit—Defendants' Exhibit F.

Mr. Climenko: What part of F is made up by her examination?

Mr. Turkus: The index is on the outside.

The Court: The Court has put pencil

1900 *Sylvia Greenspan—For People—Cross*

marks against each one of the points of amplification. They concern the Pennsylvania business and also as to who was the alleged owner of the place of business where the alleged meeting occurred.

Mr. Climenko: Now, if your Honor pleases, for the record, we respectfully request that that portion of Exhibit F for identification which is made up of a transcript of this witness's testimony before
1901 the Grand Jury, be separately marked as an exhibit for identification only.

Mr. Turkus: The whole thing is marked as Exhibit F. It was marked yesterday.

Mr. Climenko: I made myself very clear to your Honor. My application is merely that portion which is a transcript of her testimony be separately marked as a separate exhibit for identification, merely for the clarification of the record.

The Court: The Court should not be obliged to repeat. You have the ruling.

1902 Mr. Climenko: Exception.

By Mr. Climenko:

Q. Did you make a statement to anybody in the District Attorney's office in 1936? A. What kind of a statement?

Q. Did you sign a paper? A. I don't remember if I signed a paper.

Q. Did you speak to someone who made a report of what you said, either in writing or in typing? A. Yes.

Q. Which you thereafter signed? Is that

right? Did you do such a thing? A. You are adding something that I don't remember.

Q. What is it that you do remember? A. I made a statement. Whether that statement was signed at that time or not, I don't remember.

Q. Do you remember the person to whom you made the statement? A. Yes.

Q. What was his name? A. Assistant District Attorney McCarthy, I believe.

Mr. Climenko: I respectfully request 1904
the Assistant District Attorney to submit to your Honor the statement referred to by the witness. I make the same request as to that statement heretofore made as to the Grand Jury minutes.

Mr. Turkus: I tender to the Court the same exhibit as was marked yesterday Defendants' Exhibit G. The index indicates the statement of this witness.

The Court: You mean G for identification?

Mr. Turkus: G for identification.

The Court: The Court proceeds to 1905
read.

The Court has read the statement and finds nothing in it concerning the alleged meeting and production of books. Nothing was asked and nothing answered concerning that meeting. Questions and answers relate to something that is alleged to have happened in the candy store in 1936 and to writing of a letter.

Mr. Climenko: If your Honor pleases,

we make a request to your Honor for those papers.

The Court: There is nothing contradictory.

Mr. Climenko: In order to assist us in our cross-examination—

The Court: Please. There is nothing contradictory of any of the testimony given here today.

Mr. Climenko: As to that, I merely
1907 have two things to say: One was we did not request a description of it from your Honor, but we did request an opportunity to look at it to determine for ourselves whether the matter would be of assistance to us in our cross-examination.

The Court: So there will be no confusion on the part of people who are listening in at the trial as well as the jurors, the purpose of the Court's reading this, as you know perfectly well, is to see if there is any basis for your application.
1908 There Court finds there is no legal basis under the authorities for your application and denies it.

Mr. Climenko: Exception. May we have it on the record as to the date of the statement given?

The Court: Yes.

Mr. Climenko: Which is referred to by your Honor?

Mr. Turkus: People's Exhibit F, Grand Jury testimony, was given October 16, 1936.

1909

The Court: Give me back the statement.

Mr. Turkus: Defendants' Exhibit G for identification—

The Court: The date?

Mr. Turkus: I was just looking at it.

The Court: October 5, 1936.

Mr. Climenko: Is that the date of the statement? May we have the date of the record of the testimony before the Grand Jury?

1910

Mr. Turkus: I did place it on the record—October 16, 1936. That is just exactly a month after the murder.

Q. Did you make any other statement at any other time to anybody else in the District Attorney's office? A. Not until recently, when Mr. Turkus called upon me.

Q. When was that? A. A few months ago.

Q. So that from October 16, 1936, to a few months ago, 1941, you did not communicate with anybody connected with the office of the District Attorney in relation to this matter?

1911

Mr. Turkus: Objected to—pointless.

Mr. Climenko: I do not know whether he has to pass on whether it is pointless, your Honor.

The Court: Overruled.

A. No, I did not.

Q. And you did not testify before any Grand Jury in 1940 or in 1941; is that correct? A. Yes.

1912

Q. Now, referring to this meeting which you say took place sometime in 1932, did you go to this particular place alone? A. Yes.

Q. Had you been given an address before you went there? A. On the telephone.

Q. I beg your pardon? A. On the telephone.

Q. Had you ever been to that particular office before? A. No.

Q. Did you go there at the request of your father? A. Yes.

1913

Q. When you went there did you find your father in that room? A. Yes.

Q. He was already engaged in a discussion? A. Yes.

Q. Did you hear an argument between your father and other people who were there? A. Yes.

Q. Is that correct? A. Yes.

Q. And this argument proceeded in your presence; is that right? A. Well, it stopped momentarily when I walked in.

Q. When you walked in, it stopped momentarily? And then it was resumed, if it stopped only momentarily? A. Yes.

1914

Q. Is that right? A. Yes.

Q. You walked in, and you were then how old? A. About nineteen.

Q. And you walked into this room, the argument stopped momentarily, and then it started over again? A. Yes.

Q. And it was a heated discussion; is that right? A. That is right.

Q. Did anybody ask you to leave the room while this argument was going on? A. No, not until the time I told my father—

Q. Pardon me.

Mr. Turkus: Just a minute. The witness has been foreclosed in answering.

Mr. Climenko: Nobody is foreclosing anybody and you know that.

Mr. Turkus: I have an application before the Court to permit the answer to be continued.

Mr. Climenko: If your Honor pleases, the objection was interposed at a point, only at a point, when Mr. Turkus knows she was reporting hearsay matter not re- 1916
sponsive to the question.

The Court: I would like to hear the answer before I can entertain a motion to strike out any part of it. Finish the answer.

The Witness: He asked me if anybody asked me—

Mr. Climenko: I take exception to your Honor's ruling.

Mr. Cuff: Let us have the answer read, Judge, and the question.

(Question and answer read by the re- 1917
porter).

Mr. Climenko: If your Honor pleases, I object to that question.

Mr. Turkus: That is your question.

Mr. Climenko: I object to that portion of the answer which is obviously hearsay.

The Court: Are you repeating all of this? That is all behind us.

Mr. Turkus: I want the witness to continue the rest of the answer.

The Court: This simply interrupts and prevents the witness from having a trend

1918

of thought. The Court is going to hear the rest of that answer in order to rule. There will be no further interruption.

(The answer was again read by the reporter).

The Witness: —that he was getting too excited and to leave with me.

The Court: Then were you told to leave?

The Witness: Then my father told me

1919 to leave.

By Mr. Climenko:

Q. So that none of the other people in that room asked you to leave? A. No.

Q. Mr. Fields did not ask you to leave? A. No, nobody.

Q. Mr. Shapiro did not ask you?

Mr. Turkus: Objected to as already answered that no one except her father.

The Court: Sustained.

1920 Mr. Climenko: Exception.

Q. That finished their conversation with your father in your presence? A. Yes.

Q. How long were you there altogether? A. About twenty minutes.

Q. Did you take part in the conversation? A. No.

Q. At any point? A. No.

Q. Had you ever seen Mr. Max Rubin before that day? A. I answered that, yes.

Q. You had? How many times? A. A number of times.

Q. At your place of business? A. Yes, and also around the garment district.

Q. Do you know what his job was at that time? A. From hearsay, I understood he was a delegate.

Q. Did you know of your own knowledge? Did you know of your own knowledge what his business was? A. How could I know of my own knowledge?

Q. Did he ever tell you? A. No.

Q. Had you ever been to this particular office before? A. No. 1922

Q. Did it have a name on it? A. It did.

Q. Do you recall what the name was? Yes or no. A. No.

The Court: What office was that?

Mr. Climenko: The office where this alleged meeting took place, your Honor.

The Court: Why don't you ask her the name of the business?

Mr. Climenko: I beg your pardon?

The Court: Whose place of business was it? 1923

The Witness: I understood it was—

Mr. Climenko: Now—

The Witness: I cannot answer it any other way.

Mr. Climenko: If your Honor pleases, my objection is only to anything which, from the preface of the answer, is obviously incompetent.

The Court: What she understood may be hearsay. Did you see any name on it?

The Witness: Yes, I did.

The Court: What was it?

1924 *Sylvia Greenspan—For People—Cross*

The Witness: It was some canvas company but I don't remember the full name.

The Court: Did any one of the group of the men who were in the place of business then other than your father tell you whose business it was?

The Witness: Nobody spoke to me while I was there.

Q. You do not remember the name, do you?
1925 A. No, I don't.

Q. And you had never been there before? A. No.

Q. Don't you know that Mr. Shapiro could not read or write? A. I do not know anything about Mr. Shapiro.

Q. You said that Shapiro read from a book, one of your books? A. You asked me I knew whether he could read or write. I said I do not know anything about him.

Q. I said to you, don't you know as a matter of fact that he cannot read or write? A. No,
1926 I do not.

Mr. Turkus: I object to it as answered.

The Court: Sustained.

Q. Don't you know that Mr. Shapiro could not read or write? A. No.

Q. Did you see him read on that occasion from your book?

Mr. Turkus: Objected to. That is something you cannot tell.

1927

The Court: All you can judge is by appearance.

Mr. Turkus: There was somebody in back of him, too.

Q. Did you see him read from that book on that day?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Climenko: Exception.

1928

Q. Did you say before that Shapiro read from a book? A. I said he opened the book and looked at it.

Q. Did you say this morning, when Mr. Turkus was asking you questions, that Mr. Shapiro read from a book and that book you described as a ledger with accounts receivable?

The Court: That is what she stated.

Mr. Climenko: That is what she said.

1929

Q. Did you say that this morning? A. Yes.

Q. Don't you know that Mr. Shapiro cannot read from a book? A. No, I don't.

Q. Do I understand you to say now that he did read from that book?

Mr. Turkus: Object to it.

A. To make myself clear—

Q. No.

The Court: Let her answer.

1930

Q. Did you say that this morning?

The Court: Let her answer. (To witness) Finish your answer.

The Witness: He opened the book and looked at it and manufacturers' names were called out.

The Court: By him?

The Witness: By him. Now whether they were mentioned to him or not, I don't

1931 know.

Q. So that you do not know whether he was reading that book? A. Of course I don't know.

Q. Where was Mr. Buchalter standing? A. Right in back of him.

Q. Was he looking over Mr. Shapiro's shoulder? A. Yes, he was.

Q. Did you see Mr. Buchalter's lips move? A. Yes. I said that he had held whispered consultations with him.

Q. So you want me to understand that it was

1932 Mr. Buchalter that was reading?

Mr. Turkus: Just a minute.

A. I do not know.

Mr. Turkus: I want the word stricken from the question.

The Court: Strike it out.

Q. Who was reading these names?

Mr. Turkus: Objected to. The witness

has already testified in detail. Now the jury draws the conclusion what went on.

The Court: The jury can figure it out.

Mr. Climenko: Did your Honor rule?

The Court: Yes. We will have to take a recess for this reason. There is a large accumulation of sentences. For practical reasons that must interrupt this trial. These sentences cannot be delayed until the end of the trial. There are too many people in the jail. The sentence calendar 1934
has been made up for this afternoon at two o'clock of part of these cases. That will be the work of the afternoon. We will take a recess now until tomorrow morning at ten o'clock.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open. Remember the other admonitions that you heretofore received.

The jury will pass out.

Defendants are remanded.

1935

(Whereupon an adjournment was taken to Friday, October 24, 1941, at ten a.m.)

1936 *Sylvia Greenspan—For People—Cross*

Brooklyn, N. Y., October 24, 1941.

TRIAL RESUMED

SYLVIA GREENSPAN, a witness for the People, resumed the stand and testified further as follows:

Cross-examination by Mr. Climenko (continued):

1937 Q. When you left here yesterday where did you go? A. I went to my place of business.

Q. Did you at any time since you left the stand yesterday discuss your testimony with anyone connected with the District Attorney's office? A. No, sir.

Q. Will you tell me, when was the last time you saw Max Rubin? A. You mean to speak to?

Q. When was the last time you saw him?

Mr. Turkus: I object unless counsel makes it clear to the witness what he refers to.

1938 The Court: The language could not be clearer. When you saw him, not to speak to necessarily.

A. I saw him about four months ago.

Q. How long ago? A. About four months ago.

Q. Where? A. On the Boardwalk in Coney Island.

Q. Did you talk to him on that occasion? A. No, sir.

Q. When was the last time before that you had seen him? A. I saw him once before; the last time before that, in the store my father owned.

Q. Did you ever discuss with Max Rubin the subject-matter of your testimony here? A. No.

Q. You are certain of that? A. Yes, sir. When could I? I have not seen him since.

Q. You did not discuss your testimony of yesterday with anybody since you left the stand yesterday? A. No, sir, except with my husband.

Q. But not with your mother? A. I have not seen my mother.

Q. In 1931 were you living with your family? A. Yes, sir. 1940

Q. In Brooklyn or in Passaic? A. In Brooklyn.

Q. Was your brother Harold living with you at that time? A. I believe my brother was married at that time—no, he was not married then.

Q. In 1931 your brother was married? A. Well, no, my brother was living in 1931—he went to school.

Q. Was he attending school in 1931? A. Yes, sir, I believe he was.

Q. Did he go to school in September of 1931? A. I believe he did. 1941

Q. What was the name of the school? A. He went to Albright College.

Q. When did he return from Albright College? A. What do you mean, when did he return? You mean when did he graduate?

Q. When did he come home from Albright College? A. He came home at the end of the semester, in the summer.

Q. That would be sometime in June, 1932? A. There was a year interval there he did not go to school.

Q. In 1931 did he go to college? A. I could

1942 *Sylvia Greenspan—For People—Cross*

not tell you exactly what year he missed up on; there was one year he was out of school; I do not remember whether it was 1931 or 1932.

Q. So you do not know whether or not your brother was at Albright College in the year from September, 1931, to June, 1932?

Mr. Turkus: I object to that as having been already answered.

The Court: Objection sustained.

1943 Mr. Climenko: Exception.

Q. Was your brother a student at Albright College in the year beginning September, 1931?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Where was your brother in September of 1931?

1944 Mr. Turkus: Objected to as already answered.

The Court: Sustained as repetitious.

Mr. Climenko. Exception.

Q. Did your brother live with your family in September of 1931?

Mr. Turkus: I object to that as repetitious.

The Court: He could live there and still be at school, or he could be a roomer some place else.

The Witness: If he went to school that year he would not be living at home; he would be in Pennsylvania. And if that is the year he missed, he was at home with us.

Q. Did he go to school that year? A. I said I do not remember whether that is the year he missed or not.

Q. Did he go to school or college in the year beginning September, 1939, to the end of June, 1946 1931?

Mr. Turkus: I object.

The Court: She can say if she remembers.

A. Yes, in 1930 I believe he was in school.

Q. Where is Albright College? A. In Reading, Pennsylvania.

Q. Now, where was the office of the New York and New Jersey Transportation Company? A. On Washington Place off 8th Street—off Broadway. 1947

Q. What is the distance between Washington Place and 8th Street? A. You mean how many blocks?

Q. Yes. A. They are very close together; there may be one or two blocks difference.

Q. Do you know the distance? A. No, sir, I do not.

Q. During the time you worked at the New York and New Jersey, at its office, did that company ever move its office? A. No, sir.

Q. So during the period you worked there it had only the one office? A. Yes, sir.

Q. You do not remember whether that office was located at Washington Place earlier? A. No, sir.

Q. You have no recollection of that whatever? A. I know it was on either one or the other.

Q. But you do not remember which one it was? A. That is right.

Q. And that is the office you went to daily for a period of about six months; is that correct? A. Yes, sir.

1949 Q. Now, when did you open the books for that corporation?

Mr. Turkus: Objected to as repetitions; we went over that yesterday.

Mr. Climenko: No, not that question.

The Court: I do not recall whether it was in direct or cross.

Q. Do you remember when you opened the books? A. Yes, sir, I answered that yesterday: I said I believed it was in March or April.

Q. Of what year? A. 1932.

1950 Q. Was you brother living, physically, with your family at that time? A. Yes, sir, he was home.

Q. He was at home? A. Yes, sir.

Q. Did your brother work for the New York and New Jersey Transportation Company? A. Yes, sir.

Q. For how long? A. For about three or four months.

Q. Now, during that time you worked for the New York and New Jersey Transportation Company? A. No, sir.

Q. Did your brother receive a salary when he worked there? A. Yes.

Q. Do you know that of your own knowledge? A. Yes.

Q. You do? A. Yes, sir.

Q. Did you receive a salary when you worked there? A. Yes, sir.

Q. What was your salary? A. I do not remember.

Q. Have you no recollection of what you were paid? A. To the best of my recollection when I 1952
started to work there I drew $15 a week.

Q. How long did you continue to draw $15 a week as your salary? A. Well, I believe there was one time there when my father told me to take more, but I refused it.

Q. How long did you continue to draw $15 a week as your salary? A. As long as I was there.

Q. You never spent a week there when you were working there, when you did not receive at least $15 a week; is that correct? A. That is correct.

Q. Were you paid by cash or by check? A. 1953
Both.

Q. Did you draw the checks? A. Yes, sir.

Q. Don't you know, as a matter of fact, that you never received $15 a week as your salary? A. No, sir, I do not.

Q. Don't you know as a matter of fact that this concern could not afford to pay you a regular salary and did not pay you any regular salary? A. That is not true.

Q. Don't you know as a matter of fact, you worked there on a part time basis and took what-

ever they offered you, and that was usually $5 or $6 a week? A. No, sir, that is not so.

Q. You do not recall that? A. I was not on part time.

Q. Your connection with this firm was to open the books, and that is all you did, and you left your brother working there? A. Yes, sir.

Q. So, while he was working there you were not there? A. That is right.

Q. You had nothing to do with the books from
1955 the time he was working there? A. Yes, sir.

Q. You do not know anything about the financial condition of the company during that period he was there? A. That is correct.

Q. He was there for at least six months; is that correct? A. I did not say that.

Q. What did you say? A. I said he was there for about three or four months.

Q. When did he start work there? A. When the firm opened, during March or April of 1932.

Q. About four months after April would be the beginning of July, isn't that correct? A.
1956 Yes, sir, that is right.

Q. So you came back to work there sometime in July of 1932? A. That is right.

Q. Now, when, after you started working, did this meeting take place you referred to yesterday—how much later after you began to work there?

Mr. Turkus: I object. There were two meetings.

Q. Did you say you received a telephone call from your father sometime and then you went somewhere? A. Yes, sir.

Q. What was the address of the place to which you went? A. I don't know; I said on 17th or 19th Street, off Broadway.

Q. You are sure it was either 17th or 19th Street? A. It could be 18th—it was somewhere in the district between 17th and 19th.

Q. You said yesterday it was 17th or 19th. A. Yes, sir, to the best of my recollection, I said. I know it was somewhere in the vicinity.

Q. Did you father give you the address to go to? A. Yes, sir, at that time he did. 1958

Q. You had never been to that particular place before? A. No.

Q. You do not recall the address? A. No.

Q. You have no idea whether it was 17th, 18th, or 19th?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

Mr. Turkus. Exception.

Q. Might it have been 14th Street? A. No, sir. 1959

Q. Might it have been 34th Street? A. No, sir, definitely no.

Q. You are sure it was one of those three streets? A. Yes, sir.

Q. Was it one of those two streets or one of those three streets?

Mr. Turkus: I object to that as having been already answered by the witness; she has gone over it in detail.

The Court: Objection sustained.

Mr. Climenko: Exception.

1960 *Sylvia Greenspan—For People—Cross*

Q. How did you travel from the place of business of the New York and New Jersey Transportation Company, wherever that may have been, to the place you went to?

Mr. Turkus: I object. This witness cannot with certainty fix that.

Mr. Climenko: The witness has not said anything about what she did or did not do. I object to this remark of Mr.
1961 Turkus. There is no excuse for this interruption of cross-examination, and I ask the jury be instructed to disregard it.

The Court: You might inform the Court why it is necessary nine years after an alleged meeting to find out the manner of travel.

Mr. Climenko: I object to your Honor's question.

The Court: I am asking you a question. The Court asked the question and is entitled to an answer, and demands an
1962 answer.

Mr. Climenko: In view of the fact it is demanded, I will answer it, but I object to the question and I object to the fact of a demand I take exception.

The Court: This is disorderly. The Court withdraws the request. Your conduct is impertinent.

Mr. Climenko: I take an exception to your Honor's remarks.

The Court: It is disrespectful to the dignity of the Court. The objection to

the question is sustained upon the ground the question is frivolous.

Mr. Climenko: Exception to the ruling; exception to the Court's comment.

Q. Now, how long did it take you to go from the office of the New York and New Jersey to the place where you did go on that day? A. About ten minutes.

Q. Did you travel by foot? A. No, sir.

Q. Do you recall how you traveled? 1964

The Court: The Court sustained objection to that; it is utterly frivolous.

Mr. Climenko: Exception to the Court's comment.

The Court: You will not repeat questions when the Court sustains objection, unless you are willing to be accountable to the Court for that disobedience.

Mr. Climenko: I did not hear that. I ask it be repeated. I take exception.

The Court: The remark was perfectly audible. The Court will take fifteen minutes' recess until counsel thinks over his proper court demeanor. 1965

The jury is excused.

Mr. Climenko: I except. I submit to your Honor there has been nothing wrong with my demeanor.

The Court: The defendants are remanded.

(The jury retired from the court-room, after being admonished not to talk about the case among themselves nor to anyone

else, nor allow anyone to talk to them about it during the recess.)

(A short recess was then taken, during which the following occurred:)

The Court: The incident which just occurred calls for comment here and now by the Court to the end there be a continuation of orderly sequence and conduct in the trial. There cannot be an orderly trial unless counsel and the Court are in
1967 accord in their respective attitudes toward one another. It is very easy for the trial of any case to become disorderly unless both sides use proper restraint. Now, it is fundamental in trying a case—I learned it through twenty years practicing law as a trial lawyer—that to hope to be successful before a jury the attitude of counsel must at all times be one of respect in relation to the judge. I know that from experience. The Judge is not taking sides in the issue now being tried on either side.
1968 The jury is quick to sense if the Judge's dignity, which means the Court, is not respected. I say this not as censure; I say this as food for thought, because I am talking to experienced and distinguished trial counsel. What I am about to say particularly is not said in tone of censure. There has grown up in the last few years a tendency to do what is known as "baiting the Court" in an attempt to impair the judicial poise, and in a manner to get some sort of display, emotionally, from the Court, to which exception is taken.

which may be for the hope of disapproval upon review of the record in the event of conviction. This is not ethical and I do not want it indulged in here. I am giving my attention exclusively to the trial of this case, and this is the seventh week. So far we have been able to get along very nicely. I want it to continue. When the Court makes a ruling, that is its judgment. The ruling may not be acceptable to counsel, and an exception may be taken, 1970 but it does not call for argument or dispute. There must not, under any circumstances, be a repetition in persistently plying a question to any witness once the Court has ruled. That settles the point. I have said this and I must ask there be no comment by counsel on it. Just drink it in. I think, with proper understanding, we will be able to get along very nicely together. It will help the trial of this case.

Take note on the record the jury was 1971 not present during the Court's remarks to counsel.

Mr. Climenko: I do not want to comment, but I would like to reserve an exception to your Honor's comment.

The Court: Do not start in again.

Mr. Climenko: May I simply note my exception?

The Court: Yes, I will tell you now, as long as you have shown an indication to start in again, that you will not sue-

1972 *Sylvia Greenspan—For People—Cross*

ceed in getting the Court's goat, if I may use that expression—

Mr. Climenko: (interrupting) May I note an exception—

The Court: Sit down until the Court is finished. Do not bring the jury down. I may have to deal with counsel. The Court will be firm enough to deal with you, sir, if you disregard what the Court has endeavored in a courteous manner to

1973 bring to your attention, and if, by any chance, you succeed in your effort, which is now obvious, of throwing the Court out of judicial poise, I doubt if any appellate tribunal would do other than condemn you for the practice. I will deal with you at the proper time, if necessary.

Mr. Climenko: May I take an exception to—

The Court: Pardon me. You will sit down until I am through. I will deal with you at the proper time, if necessary, be-

1974 cause now I have your number. I thought I had straightened this out in a proper manner.

Mr. Climenko: May I have an exception to your Honor's remarks?

The Court: As long as you are the lone sheep in the line of defense counsel in this attitude—

Mr. Climenko: (interrupting) May I take an exception simply to that remark? I think your Honor's comment is improper.

The Court: This is simply a disorderly

1975

interruption for which the Court now censures you.

Mr. Talley: Before the jury come in I desire, as one of defense counsel, to take exception to your Honor's remarks and observation and direction to defense counsel, particularly in your reference to the fact that Mr. Barshay is the lone sheep amongst defense counsel.

The Court: I did not say Mr. Barshay.

Mr. Talley: Mr. Climenko. We are at 1976
a loss to understand why the episode has been created, causing a delay in the trial, with the comment of the Court.

The Court: Now you will have until 1:30 to think it over, because, obviously, the purpose of taking exception would be utterly worthless and possess nothing for review.

Mr. Talley: However, we have to protest against your Honor's remarks.

The Court: Pardon me. The obvious purpose of it is to throw the Court further 1977
out of poise, for which you are censured.

We will take a recess now until 1:30.

Mr. Talley: I object to the trial being interrupted while the witness is under cross-examination.

The Court: Defendants are remanded.

Mr. Talley: Note my exception.

(Recess taken until 1:30 P. M.)

1978 *Sylvia Greenspan—For People—Cross*

AFTERNOON SESSION

TRIAL RESUMED

SYLVIA GREENSPAN, a witness on behalf of The People, resumed the stand and testified further as follows:

Cross-examination by Mr. Climenko (continued):

1979 Q. Now, Mrs. Greenspan, did this meeting take place four months after you opened the books or four months after you began work for the company? A. The meeting took place about two months after I started work there.

Q. You said yesterday, in answer to a question by Mr. Turkus, that it was four months after you started work. Do you recall saying that? A. I don't know. I know it was a few months after.

Q. If I may refer to what you said yesterday and call your attention to page 359, to what would be the final part of the page of the minutes where this appears, and I invite your attention to this question which was put to you by Mr. Turkus: "I want to direct your attention to the time when you had been in the employ of your father and his partners in the New York and New Jersey Clothing Transportation Company for about four months. Approximately when was that? Will you fix that time? A. To the best of my recollection it was during the summer of 1932.

1980

"Q. Did you say during the summer of 1932, to the best of your recollection? A. That is right."

Do you remember those questions and your answers? A. Yes.

Q. That was yesterday? A. Yes.

Q. So that yesterday you said that you thought that this meeting took place four months after you began working.

Mr. Turkus: Just a minute. That is not—

Mr. Climenko: I have not finished the question. 1982

Mr. Turkus: I am sorry.

(to witness) Will you refrain from answering until I register an objection?

The Court: Finish the question.

Q. Did you say yesterday this meeting took place four months after you had begun work?

Mr. Turkus: That is objected to. That is not the tenor of those questions and answers.

The Court: Sustained. That is not the answer 1983

Q. All right. I call your attention to another portion of your testimony yesterday:

"Q. Sometime during the summer of—"

Mr. Turkus: What page?

Mr. Climenko: Same page. I am skipping the preamble to the next question, so that you may follow.

Q. "Sometime during the summer of 1932 did you receive a telephone call from your father,

1984

the late Joseph Rosen?" Have you that question? "A. Yes, I did receive a telephone call."

Mr. Climenko: And then, if I may say so, there is the testimony, Mr. Turkus, with respect to the taking the books to a certain place.

Q. Do you recall that testimony yesterday? A. Yes.

1985

Mr. Turkus: You have not read it.

Mr. Climenko: Do you want me to read all of it?

Mr. Turkus: Yes.

Mr. Climenko: If your Honor pleases, I am trying to read this record. If, on the other hand, there is objection—

Mr. Turkus: I have no desire that he read the record made yesterday, but the next question was—

The Court: That was simply a side remark of counsel. That was not an objection.

1986

Q. Was it two or four months after you started work that this meeting took place?

Mr. Turkus: That has been answered yesterday and answered today.

The Court: Yes. Sustained.

Mr. Climenko: Exception.

Q. Will you tell me how long after you started work this meeting took place? A. A few months.

Q. A few months? A. Yes.

1987

Q. You do not remember whether it was two or four?

Mr. Turkus: Objected to. That has been answered.

The Court: Sustained.

Q. You started work there in August, did you not? A. No.

Q. Did you not say to me this morning that you started work four months after you opened the books? A. Yes, and I believe you approximately set the date as the middle of July, approximately.

1988

Q. So that this meeting, if it took place two months after you started work there, took place in September; is that correct?

Mr. Turkus: Objected to. That is obvious if.

The Court: Sustained.

Mr. Climenko: Exception.

1989

Q. Did the meeting take place before September, 1932.

Mr. Turkus: Objected to as already answered.

The Court: She can say if she remembers.

A. The best I can answer to that is that it took place about that time.

Q. About September of 1932? A. Yes.

Q. When you reached the place where the meeting occurred, did you know on what floor the

office was? A. No. As I came in there was a freight elevator there, and it seemed as though he was waiting for me, because he said, "I will take you right up."

Q. Somebody in the freight elevator? A. Yes.

Q. What floor did you go to? A. I don't know. He took me right up, and I did not bother to take notice.

Q You don't remember what floor you went to? A. No.

1991 Q. As you entered this place of business, did you come into an office? A. As I entered the place of business there was a blank wall facing me, and I noticed a small office to my right.

Q. And is that where you went? A. Yes.

Q. And in that office you met these four men? A. Yes.

Q. Had you ever seen Mr. Shapiro before that day? A. No.

Q. Was he introduced to you on that day? A. No.

Q. He was not? A. No.

1992 Q. Have you ever seen him since that time? A. No.

Q. Can you describe him? A. No.

Q. You don't recall what he looks like? A. No. That was the only time I ever saw him.

Q. I say, you do not remember what he looked like? A. No.

Q. He is the man who participated in this conversation? A. Yes.

Q. And whom you heard talk? A. Yes.

Q. Is that correct? A. Yes.

Q. Did you see the name of any concern on the door of this place as you entered?

Mr. Turkus: Objected to. That was answered yesterday. My recollection is that the witness responded something with the word "canvas" in it.

The Court: That was on the direct.

Mr. Turkus: Excuse me?

The Court: Overruled.

A. Yes, I saw a name there.

Q. Do you recall what the name is? A. I repeat that I remember the name "canvas," but I 1994
cannot give you the full name.

Q. You are sure that the name "canvas" was included? A. To the best of my recollection.

Q. Had you been given that name before you went there? A. Well, I was told where to go.

Q. Yes, so that you were given a name?

Mr. Turkus: Objected to.

A. No.

Mr. Turkus: It has been answered. Objection is withdrawn. 1995

The Court: Sustained.

Q. Do you remember the name "Century Canvas"? A. I only remember the name "canvas." I could not give you a better answer than that.

Q. You do not know whether it was "Century Canvas"? A. No, I don't.

Q. Will you describe the furnishings of this room that you entered? How was the room furnished? A. What do you mean by "how"? The usual way an office is furnished. It had a desk

1996 *Sylvia Greenspan—For People—Cross*

as I walked in, and some filing cabinets. That is all I can recall.

Q. How many chairs? A. I do not know.

Q. Were there any chairs there? A. There was a chair behind the desk, that Mr. Shapiro was sitting on.

Q. Were there any other chairs? A. I don't recall.

Q. Don't you know whether the other people were seated or standing? A. They were stand-

1997 ing.

Q. Was your father standing? A. Yes.

Q. And you were standing? A. Yes.

Q. So that there was only one chair in this room?

Mr. Turkus: Objected to. That is not proper.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Was there more than one chair in the room, as best you can remember? A. I don't know.

1998

Q. You do not know now whether there were five chairs or two chairs, do you? A. No.

Q. Was there a window in this room? A. I don't remember.

Q. You don't remember whether this room had any windows, do you? A. No, I don't.

Q. It might have had? A. It might.

Q. You have no recollection on that subject at all? A. No.

Q. You were there for about twenty minutes? A. About.

Q. Is that correct? A. Yes.

Q. Who was the president of New York and New Jersey Trucking Corporation? A. I don't know if they had a president.

Q. Don't you know that Mr. Bluestein was the president? A. No.

Q. Even now you don't know that? A. No. I don't.

Q. What office did your father hold in the corporation? A. I don't know anything about the officers.

Q. Well, you drew the checks, didn't you? A. 2000
Yes.

Q. The checks had places for officers to sign? A. I don't believe it had.

Q. You think not? A. I think not.

Q. Your recollection is that there was no reference to the name of an officer or a blank or a line for which an officer was to sign the check of the corporation?

Mr. Turkus: Objected to as already answered.

The Court: Overruled. 2001

A. No, I don't recall that.

Q. Have no recollection of it? A. No.

Q. When you returned to the place of business of the New York and New Jersey Trucking Corporation, did you mention this meeting to Mr. Bluestein? A. I don't remember if I saw him there at the time.

Q. Well, did you see him the next day? A. I may have. I don't know.

Q. Well, you stayed on at work there for four months after this incident, did you not? A. Yes.

Q. You saw Mr. Bluestein at some time after

that occurrence? A. Yes, but I don't know if it was the next day or not.

Q. Whenever it was, did you at any time mention to Mr. Bluestein, the president of this corporation, this incident?

Mr. Turkus: Objected to.

The Court: Overruled.

Mr. Turkus: Is your Honor aware of the fact there is the inclusion of "Mr.
2003 Bluestein, the president of this corporation", with no testimony at all that he was?

The Court: I did not notice that. Just reframe it.

Mr. Climenko: All right.

Q. Did you ever at any time mention this incident to Mr. Bluestein? A. I don't believe I did.

Q. And did you ever at any time mention this incident to Mr. Sobler? A. I don't believe I
2004 discussed it with anybody but my father.

Q. Would you be good enough to answer my question?

Mr. Turkus: That is objected to.

Q. Did you ever mention it to Mr. Sobler?

Mr. Turkus: The witness has just responded she does not believe she discussed it with anyone except her father. That excludes Mr. Sobler and excludes everybody else.

Mr. Climenko: With that explanation, I am glad to accept the answer.

Mr. Turkus: That is English.

Q. Before you started work for New York and New Jersey, were you yourself employed in some other place? A. You mean at the time I took that job?

Q. Immediately before, did you have another job? A. No, I don't believe I was working at the time. 2006

Q. For how long had you not been working before you took the job with New York and New Jersey? A. Probably a few months.

Q. When your brother left and you came in there, did he take a job anywhere? A. No.

Q. You continued to live with your family in 1932, did you not? A. Yes.

Q. Did your brother go back to college? A. In 1932?

Q. Yes. A. I don't know exactly what year he went back.

Q. Did he go back to college in 1931? 2007

Mr. Turkus: Objected to. We went over that this morning, about the college.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Do you remember now whether he went back to college in 1932?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Climenko: Exception.

2008 *Sylvia Greenspan—For People—Cross*

Q. While you were working at New York and New Jersey, were you looking for other employment? A. No.

Q. You were not? A. No.

Q. How many hours a day did you work at New York and New Jersey while you were there? A. A full day, from 9 to 5:30.

Q. You are sure about that? A. Yes.

Q. You opened these books in March or April of 1932, according to your present recollection?

2009 A. Yes.

Q. And you came back to the corporation, as you said this afternoon, perhaps sometime about the middle of July, is that correct? A. About June or July.

Q. You are not sure which? A. No; I believe my brother worked there about three or four months, which would mean that I had to work about June or July.

Q. Did your brother find other employment after he quit working there?

2010 Mr. Turkus: I object to it as incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Climenko: Exception.

Q. While you were working there, was there a strike affecting this industry? A. I think there was a strike.

Q. When did it occur? A. Shortly before the business broke up.

Q. Did it occur while you were working there? A. I don't know if I was working there at the time. I know of a strike. I do not know

whether I left already or I was still there at the time.

Q. Wasn't there a strike in progress during the summer of 1932 while you were there? Don't you know that to be a fact? A. I don't remember whether I was there at the time or not. I know there was a strike.

Q. You have no recollection of that? A. No.

Q. Did the strike hurt the business? A. Definitely.

Q. It did? A. Yes. 2012

Q. By the time that you returned after you had opened the books and you had been out of there for three or four months and you came back, was Kelly still in that corporation? A. I believe he was.

Q. You think that he was there in July or August, 1932? A. I think so. I am not sure. I know he was in the business at some time, but exactly what time that included, I don't know.

Q. Well, at the time that you opened the books of the corporation, did he have an interest in the business? 2013

Mr. Turkus: Objected to. We went over that yesterday, about the interest of the various partners in the corporation, where the witness made it clear she had access to none of those books.

The Court: Sustained.

Mr. Climenko: Exception.

Q. At the time that you began work, was Kelly there in that place of business, working there?

Mr. Turkus: Objected to as answered yesterday.

The Court: Overruled.

A. I believe I answered that. As far as I could remember, I know he was there at some time. Exactly what time that was I don't know.

Q. Don't you know as a matter of fact that Kelly withdrew and took with him his trucks two months or three months at the most after
2015 the business started? A. No, I don't know that.

Q. You don't recall that? A. No.

Q. You do not know whether it is a fact or not a fact? A. No.

Q. And you do not remember whether when you came back to work there as a bookkeeper Kelly was there or he was not there? A. That is right.

Q. Don't you know that during the time that you were not there that business was so bad that this corporation could not pay its garage bill?

2016

Mr. Turkus: Just a minute. How possibly could anybody know something when she was not there?

The Court: Overruled. Do you know anything about that?

The Witness: Yes, that is not so. I came to work there because business was progressing and my brother could not handle it.

Mr. Climenko: I move to strike it out.

Mr. Turkus: Now I move that it stand as responsive to the question.

The Court: Let it stand.

Mr. Climenko: Exception.

Q. As a matter of fact didn't you go to work there because you had nothing else to do and your brother had an argument with Sobler? Isn't that the fact? A. On the contrary, I did not want to work for my father. My father asked me to do him a favor—

Mr. Turkus: He has shut off an answer. 2018

Mr. Climenko: I do not want to shut off any answer.

(Answer read by the reporter.)

Q. He wanted you to do him a favor at a time when you were unemployed and had been unemployed for some months? A. That is right.

Q. And he wanted you to do him a favor because that concern could not afford a regular bookkeeper? A. No, why not?

Mr. Turkus: Will you continue, why not? 2019

The Witness: They paid me a salary. They could just as well have paid somebody else.

Q. They paid you $15 a week as you recall it? A. Yes.

Q. Don't you know that the concern did not pay its rent during the time that you were working there? A. No.

Q. You don't recall it? A. No. They paid.

2020

Q. Don't you know that it is a fact that they did not pay their electric light bill? A. No.

Q. Don't you know that they did not pay their telephone bill? A. Why didn't they pay? The business was going along all right.

Q. Don't you know that it is a fact that they did not pay it? A. No, I don't know that.

Q. Don't you know it is a fact that they did not pay their chauffeurs? A. No.

Q. Don't you know that employees of that
2021 concern as of 1932 are still unpaid as of the time when you were working there as a bookkeeper? Don't you know that to be the fact? A. No.

Q. Don't you know that it is a fact that those telephone bills are still unpaid to this day? A. No, I don't know.

Q. After your father left the New York and New Jersey Transportation Company, do you remember what day of the week it was that he did leave? A. No, I cannot remember that.

Q. Do you know that he left on a Saturday and on the following Monday started work for
2022 Garfield Trucking Company? A. No.

Q. Do you know that he got that job when he requested Mr. Buchalter to help him get a job? A. I don't believe it.

Q. I say don't you know that that is the fact? A. No.

Q. Don't you know that he continued to work for Garfield thereafter for two years? A. I know he worked for Garfield Express.

Q. Yes. A. But not as the result of that.

Q. Well, whether you know it as the result of that or not, do you know that after he had been working there for six months Mr. Louis Cooper

discharged him and he asked Mr. Buchalter to have him reinstated and at Mr. Buchalter's request he was reinstated? Did you know that? A. No.

Q. Did you know what he was receiving as a salary from Garfield Express? A. No, I don't.

Q. Did you know that he was receiving at least $125 a week while he was working there as against practically nothing that he was ever able to draw out of New York and New Jersey?

2024

Mr. Turkus: Objected to. That was answered yesterday.

The Court: She has answered on both propositions. Sustained.

Q. Don't you know that your brother returned to college in the fall of 1932? A. He returned to college. I don't know exactly when.

Q. Do you know that your father was finally discharged by Louis Cooper at the end of two years of employment by Garfield? A. Yes.

Q. You do know that? A. Yes.

2025

Q. Do you know that after that he obtained another job with another man by the name of Larry Cooper? Did you know that? A. He obtained another job. I don't know who he was working for.

Q. Don't you know that he got that job when he requested Mr. Louis Buchalter to help him find employment? A. No.

Q. You don't know that? A. No.

Q. Did you ever hear the name of Krames? A. No.

Q. Do you know that in order to find a position for him, it became necessary to transfer a

2026 man from the business of Larry Cooper to Louis Cooper's business, the Garfield Express, and that that was the way in which a job was made for your father? Don't you know that? A. No, I don't.

Q. You never heard that before? A. No.

Q. Were you living at home all this time? A. Yes.

Q. Did you know that your father left Larry Cooper because he suffered a heart attack? A.
2027 No, definitely not.

Q. Well, did you know that your father was sick? A. Yes, I knew my father was sick later.

Q. Did you know that he gave up his employment with Larry Cooper because he was suffering from a heart attack? A. No, definitely not.

Q. Do you know that he suffered from a heart condition and that that was the reason that he gave up his job with Larry Cooper? A. No.

Q. Do you know that he voluntarily gave up his position with Larry Cooper? A. He did not.

Q. You say he was discharged by Larry
2028 Cooper? A. I don't know, but he did not voluntarily give it up.

Q. Which way did it happen, do you know? A. I don't know.

Q. You say that he did not voluntarily give it up? A. Of course not.

Mr. Turkus: Objected to as just answered.

Q. You also—

Mr. Turkus: Please, sir. It is argumentative, been answered.

2029

The Court: Sustained as argumentative.

Q. Do you know that this company could not afford to pay for the repair of its tru ks while you were there? A. The company could afford to pay everything until the business went bad.

Q. Do you know that the company did not pay for the repair of its trucks while you were there?

Mr. Turkus: Objected to as just answered.

2030

The Court: Sustained.

Mr. Climenko: Exception.

Q. Do you know that this company could not afford an accountant?

Mr. Turkus: Objected to. The witness has given an omnibus answer that the company paid for everything until business went bad. That answers it.

The Court: Sustained.

Mr. Climenko: I object to comment of Mr. Turkus and I move to strike it out and I respectfully request your Honor to instruct the jury to disregard it.

2031

The Court: The objection is sustained.

Q. Do you know that this company never made enough money so it was ever obligated to pay an income tax?

Mr. Turkus: Objected to on the same ground.

2032

The Court: Overruled. Do you know if it paid its income tax or not?

The Witness: No, I don't.

Mr. Climenko: That is all.

Mr. Turkus: Any further cross?

Mr. Talley: Yes.

Mr. Rosenthal: Not by Capone.

Cross-examination by Mr. Talley:

2033

Q. Madam, you testified you saw Max Rubin on the boardwalk at Coney Island? A. Yes.

Q. You say that was about four weeks ago? A. No, that was in August of this year.

Q. In August of this year? A. Yes.

Q. Was he pointed out to you by some one? A. No, I know him.

Q. You did know him? A. Yes.

Q. Were you in company with your mother at the time you saw him? A. I believe I was walking with my mother.

Q. Was your mother stopping then at the Half Moon Hotel? A. Yes.

2034

Q. Did she tell you that Max Rubin was stopping at the Half Moon Hotel?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you know that Max Rubin was stopping at the Half Moon Hotel? A. Yes.

Q. At the same time that your mother was? A. I did not know whether he was still there or not. I had heard that he was there.

Q. Was he there during the time that your mother was a guest at the Half Moon Hotel in Coney Island? A. I don't know.

Q. How long was your mother staying at the Half Moon Hotel? A. During the summer.

Q. This past summer? A. Yes.

Q. Do you know for how long? A. No.

Q. Do you know how many weeks or months? A. No, I don't know.

Q. How many times did you visit her there? A. About three times. 2036

Q. And do you remember what interval of time it was between your visits? A. Yes.

Q. How long a time elapsed between each of the three visits that you made? A. My vacation was during the month of August. I visited my mother a week before my vacation and twice during my vacation.

Q. That would be in July? A. In August.

Q. Were your three visits in August? A. Well, the first one might have been before August.

Q. Yes, I asked you was it in July? A. Probably. 2037

Q. Was it in June? A. No.

Q. Were you working last summer? A. Yes.

Q. Where?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.

Mr. Talley: Proper cross-examination. I have a right to inquire about this witness' whereabouts.

The Court: Overruled.

Q. Where? A. Do you want me to give the name of the concern?

2038 *Sylvia Greenspan—For People—Cross*

Q. I want you to give me the name and the address. A. Majestic Rayon Corporation, 116 West 23rd.

Q. Are you there now employed? A. Yes.

Q. How long before July and August of last year were you employed there? A. I have been there for five years.

Q. You did not give up your employment when you were married? A. No.

Q. Did you speak to Max Rubin when you saw
2039 him on the boardwalk? A. No.

Q. Did you speak to your mother about Max Rubin?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did your mother tell you that she had talked with Max Rubin while she was a guest at the Half Moon Hotel?

2040

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you ever see Rubin and your mother talking together? A. No.

Q. Was this occasion that you speak of the only time when you saw Max Rubin?

Mr. Turkus: Objected to. It is an ambiguous question. I do not know what occasion he is talking about.

Mr. Talley: Nothing could possibly be plainer than that.

Mr. Turkus: There is an objection before the Court.

The Court: I think she said, in answer to a previous question, that she knew Max Rubin by sight and that she did not have to have her mother tell her that that was Max Rubin, so it is a fair inference she met him before.

Mr. Talley: Does your Honor sustain 2042
the objection?

The Court: I am just calling that to your attention. She may answer.

Mr. Talley: I ask for a ruling.

The Court: Overruled.

Q. Will you answer, please? A. I met Max Rubin previously on a number of occasions.

Q. A number of occasions? A. Yes.

Q. Did you ever meet him in the Half Moon Hotel? A. No.

Q. Was your mother stopping at any other 2043
hotel? A. No.

Q. Than the Half Moon Hotel since 1936?

Mr. Turkus: I object to it as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Did you ever visit your mother in any other hotel than the Half Moon Hotel since your father's death?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: Exception.

Q. Do you know a restaurant across the street from the store that your father had? A. I don't believe there was a restaurant there.

Q. Did you ever hear of a restaurant named Ardie's? A. Yes, but that is not a restaurant.

Q. What is it? A. Call it a candy store.

Q. A candy store? A. Yes.

Q. Where was that? A. That was on the corner of Sutter and Bradford.

Q. Is that near where your father's office was?

2045

Mr. Turkus: Ardie's luncheonette is on the corner, right there, Bradford and Sutter.

Mr. Talley: I want it on the record, please.

Q. How near was it to your father's store on Sutter Avenue? A. Across the street.

Q. That is what I asked you, wasn't it, madam, in the beginning.

2046

Mr. Turkus: You asked about the office. Objected to.

Mr. Talley: I object to any comment from the District Attorney.

Mr. Turkus: I have an objection before the Court.

Mr. Talley: Then make the objection without comment while I am cross-examining.

Mr. Turkus: I am talking to Judge Taylor who presides at the trial.

The Court: I think the jury understands both answers. It was across the street but not directly across.

2047

Q. Did you know a brother of Abe Reles? A. Yes.

Q. Did you know that he was carrying on a shylock business in this store that we have described as Ardie's?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial, and insulting to the witness.

The Court: Overruled.

2048

Q. Did you? A. No.

Q. Did you ever see Abe Reles' brother? A. Yes, I saw him.

Q. Did you see him in Ardie's? A. Yes.

Q. Did you ever see your father there? A. No.

Q. You never saw your father and Reles' brother speaking together? A. He may have passed the time of day, said hello.

Q. Did you see them speaking together? Never mind what he may or may not have done. Did you see them speaking together? A. Not that I know of.

2049

Q. Did you ever see Abe Reles in your father's store? A. No.

Q. Did you ever see Abe Reles' brother in your father's store? A. No, I don't believe I have.

Q. The only place then you saw Abe Reles' brother was in Ardie's, is that right? A. In or standing outside.

Q. Did you ever see your father in Ardies' restaurant?

2050 *Sylvia Greenspan—For People—Redirect*

Mr. Turkus: Objected to as already answered. The witness said no.

The Court: Overruled.

A. No.

Q. Did you ever see him standing outside of Ardies' store— A. No.

Q. With Reles' brother? A. No.

Q. Do you know Abe Reles? A. No.

Q. Did you ever see him? A. No.

2051

Mr. Talley: I have no further questions.

Mr. Rosenthal: Defendant Capone has no cross-examination.

Mr. Turkus: (To court officer) Will you bring in that other exhibit? Will you remove the one on the easel and put on this picture in the back. There is one showing the corner intersection.

(To reporter) Be kind enough to mark that exhibit for identification.

2052 (Picture marked People's Exhibit Q for identification).

Redirect examination by Mr. Turkus:

Q. Mrs. Greenspan, Judge Talley spoke to you about Ardies which you described as a soda or candy store. Will you turn around and look at People's Exhibit Q for identification and see if you see a picture of Ardies' soda, candy and luncheonette?

Mr. Cuff: I object to it. Why don't you put it in evidence?

Mr. Turkus. Why don't you be patient?

The Court: Overruled.

A. May I answer?

Q. Yes, you may get up and look at it.

(Witness indicates on exhibit).

Q. Indicating the corner store to the left of the exhibit? A. Yes. 2054

Q. That was on the corner of Bradford and Sutter, is that correct? A. Yes.

Mr. Turkus: That is all.

Recross examination by Mr. Talley:

Q. Mrs. Greenspan, this brother of Abe Reles that I asked you about, what is his first name? A. I knew him as Sandy.

Q. You do not know him by any other name? A. No. 2055

The Court: This chart is not in evidence.

Mr. Turkus: I will have it in evidence by the next witness.

The Court: All right.

Mr. Cuff: What is that street?

Mr. Turkus: You are looking down the direction from which Cappadora came. You are looking at Sutter as the picture faces you.

Mr. Cuff: Looking east on Sutter?

2056

Mr. Turkus: I don't think it is east. You are looking in the direction of Wyona Street. You will remember Cappadora's testimony.

Mr. Barshay: We consent it be offered in evidence.

Mr. Turkus: Offered in evidence.

(People's Exhibit Q for identification received and marked People's Exhibit 25 in evidence).

2057

Mr. Turkus: The next witness I will call, your Honor, I doubt whether his testimony will be completed today.

The Court: Call him anyway.

SOL BERNSTEIN, called as a witness on behalf of the People, after being duly sworn, testified as follows:

2058

By the Court:

Q. Where are you stopping at present? A. In a hotel.

Q. What hotel? A. Half Moon.

Mr. Barshay: With your Honor's permission, may the record show that when this witness, Mr. Bernstein, came into the court room from your right he was preceded by a court attendant and he was followed by three men who I know to be detectives.

The Court: All right.

2059

Mr. Barshay: Will your Honor note my objection to that proceeding?

The Court: I did not see it. I take your word for it.

Mr. Cuff: Two of them have their badges on now.

Mr. Turkus: Mr. McDonough is one of them; Mr. Harrington is another one standing to your Honor's left.

Mr. Cuff: May I have the name of the other gentleman who followed?

2060

Mr. Turkus: Detective James Bell.

Mr. Cuff: And the court officer, to whom I have no objection, Mr. Meek.

Mr. Turkus: Is the objection to the protection of the witness?

Mr. Barshay: I object to the comment of Mr. Turkus. That was an unfair comment, and I ask the court to direct the jury now to disregard that and admonish Mr. Turkus not to repeat any such thing. There is no intimation that this witness in this court room or in any other place in this world needs any protection.

2061

Mr. Turkus: You will know that before the case is over.

Mr. Barshay: I object to that comment.

The Court: The jury will disregard all side play.

Mr. Barshay: Side play on the part of the District Attorney, sir.

The Court: Please—

Mr. Barshay: May you say that, please?

2062 *Sol Bernstein—For People—Direct*

The Court: Whichever side it comes from. The matter calls for no ruling.

Mr. Barshay: I ask your Honor—

The Court: You are dictating to the record. That is your right, but there is nothing that calls for a ruling. I do not know what it means, so please do not argue. Just proceed.

Mr. Barshay: Exception.

Mr. Rosenthal: May I have a ruling?

2063 In view of the atmosphere created insofar as the defendant Capone is concerned by having two police officers standing in an unusual position next to the jury box while the witness is testifying and the two court officers, one standing directly behind the witness and the other to his left, I ask for a mistrial upon the ground of prejudicial conduct against the defendant Capone.

Mr. Cuff: Defendant Weiss joins in that motion.

2064 The Court: To get the record absolutely straight, let us have a survey of relative locations.

Mr. Rosenthal: All right, sir, I will take your Honor's statement as to where they are.

The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly

behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial.

Mr. Rosenthal: I respectfully except.

Mr. Cuff: I except.

Mr. Barshay: May I make a motion for the withdrawal of a juror and the declaration of a mistrial on the ground that Mr. Turkus made a prejudicial remark? 2066

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I ask for the removal of the court officer that has been stationed directly behind the witness-

The Court: Denied.

Mr. Talley: —as he sits in the witness chair. He has not been there during the testimony of any other witness, and I object to this stage setting upon the entrance of this witness. I do not know what he is going to testify to, if anything, but I object to this display that has been occasioned 2067 because I regard it all as prejudicial to the defendant whom I represent and as unnecessary and unprecedented.

The Court: The court officer, George Meek, who is personally assigned to me as a judge of this court, in my chambers only, his place is right there or any place else that the court sees fit to put him, and it is nobody else's affair. Motion denied.

Mr. Talley: Does your Honor contend his place is directly behind the witness

2068 *Sol Bernstein—For People—Direct*

chair while the witness is testifying or about to testify?

The Court: Proceed.

Mr. Talley: I except to your Honor's refusal to grant my request.

Direct examination by Mr. Turkus:

Q. How old are you, Bernstein? A. Thirty years of age.

2069 Q. Are you married? A. Yes, sir.

Q. Did you go to public school in Brooklyn? A. Yes, sir.

Q. In what section or district of Brooklyn did you go to public school? A. I went to Junior High School 178, Dean and Saratoga Avenue, Brooklyn.

Q. How old were you when you quit school? A. Fifteen years of age.

Q. Did you go to work after you quit school? A. Yes, sir.

Q. Do you remember what your first job was? A. Yes, sir.

2079

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Tell the court and jury what your first job was. A. I was a messenger boy in the telegraph office.

Q. Do you know how long you held that job? A. One month.

Q. Did you get a job after that? A. Yes, sir.

Q. What was the next job? A. An errand boy in a hat factory.

Q. Do you remember where that hat factory was? A. I think it was on Waverly Place.

Q. In Manhattan? A. Yes.

Q. How long did you hold the job as errand boy? A. Three months.

Q. Did you then get some other work? A. Yes, sir.

Q. What was that job? A. A leather goods factory, as as a cutter.

Q. Did you work on a machine? A. Yes, sir.

Q. Do you remember the name of the company? A. Yes. 2072

Q. What is its name? A. Majestic Briefcase Company.

Q. Were they employed in the manufacture of briefcases? A. Yes, sir.

Q. How long did you work on a machine in the Briefcase Company? A. Three years.

Q. During all this time while you had these jobs, where were you living, Bernstein? A. In Brooklyn, Brownsville section.

Q. And did you associate with the people living in that district? A. Yes, sir.

Q. While you were working for the Briefcase Company on the machine, did you do any gambling? A. Yes, sir, lots of it. 2073

Q. And you became involved in debt? A. Yes, sir.

Q. Did you then start to borrow money? A. Yes, from shylocks.

Q. From shylocks operating where? A. Sackman and Livonia Avenue, Brooklyn, Brownsville section, in the Coffee Pot.

Q. From gambling did you go into some other kind of business? A. Yes, myself in shylocking.

2074 Q. And were you after that . professional loan shark? A. Yes, sir.

Mr. Barshay: I object to it, your Honor. This is a matter proper for cross-examination.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Now, while you were a professional loan
2075 shark, did you engage in any other occupation? A. Yes, sir.

Q. What were you? A. Gambler and a bookmaker.

Q. Where did you operate from, Bernstein? A. Amboy and Sutter Avenue, Brownsville section.

Q. When you say from Amboy and Sutter Avenue, do you mean from the corner there? A. Yes, sir.

Q. On February 13, 1930, were you convicted of crime? A. I don't remember what year it was, but I was convicted of a crime.

2076 Q. I suggest to you the date of February 13, 1930, and the crime of unlawful entry. Does that refresh your recollection? A. Yes, sir.

Q. Were you convicted of that crime on that day? A. Yes, sir.

Q. What was your sentence? A. Suspended sentence.

Q. Were you convicted of crime after that? A. Yes, sir.

Q. I suggest the date of May 22, 1934, and the crime of petit larceny. Does that refresh your recollection? A. I don't remember what year, but I remember petit larceny.

Q. What was your sentence? A. Suspended sentence.

Q. Three years probation? A. Yes, sir.

Q. On both of the convictions were they on your plea of guilty to the court? A. Yes, sir.

Q. When you were a professional loan shark, bookmaker and gambler, did you make the acquaintance of various people in the Brownsville district of Brooklyn? A. Yes, sir.

Q. I direct your attention to in or about the year of 1932 and ask you whether you made 2078
the acquaintance of one Harry Strauss? A. Yes, sir.

Mr. Barshay: I object to it, not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Rosenthal: I object to it upon the ground it is leading and suggestive. The witness may state when he remembers meeting particular people but not have his attention directed by the District Attorney to a specific case. I object to the 2079
question as leading and suggestive.

The Court: It is already answered, and objection is untimely.

Mr. Rosenthal: I ask that the answer be stricken. I could not get up any faster. Mr. Barshay was on his feet.

The Court: Denied.

Mr. Rosenthal: Exception.

Q. Did you know Strauss by any name other than Harry? A. Yes, sir.

Q. What was the name?

2080 *Sol Bernstein—For People—Direct*

Mr. Rosenthal: Objected to.

Q. Or names?

The Court: Overruled.
Mr. Rosenthal: Exception.

A. Pep, Big Harry, and Pittsburg Phil Strauss.

Q. Where did you meet him for the first time, if you can recall?

2081

Mr. Barshay: Objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. On Sackman and Livonia Avenue, Coffee Pot, in the Brownsville section.

Q. I did not hear what you said. A. On Sackman and Livonia Avenue, in the Brownsville section, in the Coffee Pot.

Q. Was the Coffee Pot a hangout? A. Yes, sir.

2082

Mr. Barshay: Object to it.
The Court: Overruled.
Mr. Barshay: Exception.
The Court: It is all collateral.
Mr. Barshay: Will you give me one exception to all this kind of questions?
The Court: Yes.

Q. Did you frequent or hangout in that Coffee Pot? A. No, sir. I used to borrow money off them.

Q. Do you include Pittsburg Phil Strauss? A. Yes, sir.

Q. At or about the time when you met Strauss, otherwise known as Pep, Big Harry and Pittsberg Phil, did you meet anyone else who is now present in this court room? A. Louis Capone.

Q. Point him out. A. Right over there (indicating defendant Capone).

Q. Where did you meet him? A. On Sackman and Livonia. 2084

Q. The Coffee Pot? A. Yes, sir.

Q. Now, without mentioning the nature of the work, did you do any work for Louis Capone? A. Yes, sir.

Q. Did you do many jobs, without telling what the jobs were?

Mr. Rosenthal: I object to the question.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Cuff: Same objection. 2085

A. Can I hear it again?

(Question read by reporter.)

A. Many times.

Q. Did you ever receive any money from him for the work you did, for Capone? A. No, sir, I obeyed orders.

Mr. Rosenthal: I ask that the answer be stricken, the latter part of it.

The Court: Strike out the latter part.

2086 *Sol Bernstein—For People—Direct*

Mr. Rosenthal: I ask that the jury be admonished to disregard it.

The Court: Disregard it.

Mr. Rosenthal: I ask that this witness be informed that he should not volunteer anything that is not asked of him, sir.

The Court: So instructed.

Q. Do you remember when one Joseph Rosen
2087 was murdered in a candy store at 725 Sutter Avenue, Brooklyn? A. Yes, sir.

Q. On the Friday before the Rosen murder, where were you? A. On Sackman and Livonia, having a general conversation with Harry Strauss, in my automobile.

Q. Where was your automobile? A. On Sackman and Livonia Avenue.

Mr. Turkus: I ask that this photograph be marked for identification.

(Photograph marked People's Exhibit
2088 R, for identification.)

Q. Bernstein, I show you People's Exhibit R, for identification, and I ask you whether you can identify the picture. A. Yes, sir.

Q. What does the picture show?

Mr. Rosenthal: That is objected to.

Mr. Turkus: It is withdrawn in that form.

Q. Does that truly and accurately show Sackman Street near where your car was parked? A. Yes, sir.

Mr. Turkus: I offer it in evidence.
The Court: As it was at that time?
The Witness: Yes, sir.

Q. Sackman and Livonia Avenue? A. Yes, sir.

(People's Exhibit R, for identification, received and marked People's Exhibit 26, in evidence.)

Mr. Barshay: I object to the introduction. 2090

Q. Will you look at People's Exhibit 26, in evidence, and tell us where on that photograph you had your automobile parked. A. Right near this ash can.

Q. When you say, "Right near this ash can," do you refer to the ash can nearest the telegraph pole on the left hand side of the picture? A. Can I take a look at it again?

(Exhibit handed to witness.)

The Witness: Yes, this here ash can 2091
over here.

Q. Is that the one in the photograph nearest to the telegraph pole? A. Yes, sir.

Q. And you are referring to which side of the picture? A. This here side, the left.

Mr. Turkus: Now, may People's Exhibit 26, in evidence, be submitted to the jury for examination?
The Court: All right.

2092 *Sol Bernstein—For People—Direct*

Q. Bernstein, in what kind of an automobile were you seated which was parked near that ash can on People's Exhibit 26, in evidence? A. A Buick, four door, car, black.

Q. In relation to the Coffee Pot, where was your automobile—by that I mean where was the Coffee Pot located at that time? A. That was located on Livonia Avenue near Sackman.

Q. In connection with the position of where your car was, where was the Coffee Pot? A.
2093 Across the street.

Q. Were you waiting for somebody in your car? A. Yes, sir, I was waiting for Mike Sickoff (?).

Mr. Barshay: I object to anything but "Yes".

Mr. Turkus: That is all. I consent that anything, if it came out, be stricken.

Q. Who else frequented that Coffee Pot or hangout on the corner of Sackman and Livonia Avenue?

2094

Mr. Rosenthal: That is objected to.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. Louis Capone, Harry Strauss, Mike Sickoff, Buggsy Goldstein, Harry Maione, Abbendando, at that time.

Mr. Rosenthal: I ask that the answer be stricken as in no wise connected with this issue.

The Court: Overruled.

2095

Mr. Rosenthal: Exception.

Mr. Barshay: On the further ground that no relevancy or competency with respect to the defendant Buchalter, his name not having been mentioned.

Mr. Cuff: The same with respect to the defendant Weiss.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Cuff: Exception.

2096

Q. Without disclosing at this time the identity of the individual for whom you were waiting, were you waiting for somebody? A. Yes, sir.

Q. While you were in your car waiting for that person, did somebody approach you or come to where your car was? A. Along came Louis Capone, Mendy Weiss and Farvel Cohen.

Q. At that time who was in the car with you? A. Harry Strauss was in the car with me.

Q. You say Mendy Weiss. Point him out. A. Right over there, but he didn't have no glasses at that time.

2097

Mr. Turkus: Indicating the defendant Weiss.

Q. What name did you know Weiss under? A. As Mendy Weiss.

Q. And this man Cohen, what name did you know him by? A. Farvel Cohen.

Q. When Mendy Weiss, Farvel Cohen and Louis Capone came along, what happened? A. They called Harry Strauss out of the car.

2098 *Sol Bernstein—For People—Direct*

Mr. Barshay: May the record show an objection on the part of the defendant Buchalter?

Mr. Turkus: I thought you had a continuing—

Mr. Barshay: It is getting now to details. The defendant Buchalter not being there, I object to any testimony with respect to him.

The Court: Overruled.

2099 Mr. Barshay: Not binding upon him. Exception, sir.

(Question read by reporter.)

A. I did not finish it yet.

Q. Continue. A. Before getting out of the car—

Mr. Rosenthal: I object to the word "they".

The Court: Be more specific.

Mr. Rosenthal: I ask that it be stricken, sir.

2100

The Court: Try to be more specific.

Mr. Turkus: It is consented to, and I will reframe the question.

Q. As I understand it, you were seated in your car with Harry Strauss? A. Yes, sir.

Q. Along came Capone, Farvel Cohen and Mendy Weiss? A. Yes, sir.

Q. Did one of the three—and answer this yes or no—say something to Harry (Pittsburg Phil) Strauss? A. Yes, sir.

Q. Do you know which one said it? A. Mendy Weiss.

Q. What did Mendy Weiss say to Strauss, if you can remember?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

A. Before he called him out of the car, before Harry Strauss went out of the car, he told me to hang around, don't go away.

Q. Who told you to hang around, not go away? A. Harry Strauss. 2102

Q. Had you known Mendy Weiss from before that occasion? A. Yes, sir, a year before.

Q. Had you known Farvel Cohen from before the occasion when they called Strauss out of the car? A. Yes, sir, a year before.

Q. Who introduced you to Farvel Cohen and Mendy Weiss? A. Louis Capone.

Q. When Harry (Pittsburg Phil) Strauss told you to stick around, in words or substance, did you remain in your car? A. Yes, sir.

Q. Did some period of time elapse? A. Yes, sir. 2103

Q. How long, can you remember? A. About three-quarters of an hour.

Q. What happened then? A. They all came back, Mendy Weiss—

Q. Yes. A. Harry Strauss, Louis Capone and Farvel Cohen.

Q. When those four came back, did one of the four speak to you? A. Yes, sir.

Q. Where were the other three when one of the four spoke to you? A. They were all together.

2104 *Sol Bernstein—For People—Direct*

Q. Who did the speaking? A. Harry Strauss.
Q. What did he say?

Mr. Barshay: May the record show that the defendant Buchalter, not being there, this testimony is not binding upon him, sir.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: The court makes that ruling because it is not confronted with the necessity of ruling at this time.

2105

Mr. Barshay: All right. Then I won't interrupt and I will have a general objection on that ground.

The Court: It stands to reason that Buchalter has to be connected up by subsequent evidence.

Mr. Barshay: All right, sir.

The Court: Or the case against him will fall.

Mr. Barshay: As long as the jury heard that, sir, I won't interfere with a general objection.

2106

Q. While Capone, Weiss and Farvel Cohen were standing, as you have told the jury, what did Strauss say to you? A. Harry Strauss said to me, "Steal a car and get a drop."

The Court: What?

The Witness: "Steal a car and get a drop."

Q. The jury does not know what "a drop" is. What is "a drop"? A. A garage.

Q. A garage for what purpose? A. To put away something stolen.

Q. Did you tell the jury that a drop in that particular case was a garage in which to place a stolen car? A. Yes, sir.

Q. Is a drop known to you and your associates as a place where you hide or conceal stolen property? A. Yes, sir.

Q. Did Strauss ask you in the form of a question or was it in the form of an order?

2108

Mr. Rosenthal: Objected to.

The Court: Sustained.

Q. Tell us as best you can recall what Strauss said to you when he asked you to get that car and drop.

Mr. Rosenthal: Objected to, on the ground it is already answered and repetitious.

The Court: Anything in addition?

Mr. Rosenthal: That is not the question. 2109

The Court: I am asking Mr. Turkus, do you mean anything further?

Mr. Turkus: Yes.

The Court: Overruled. Did he say anything else?

The Witness: Yes, sir.

Q. Tell us what he said. A. He asked me if I could get a drop. I said to him, "Yes." Then he said to me, "After you get that, come over tomorrow afternoon at four o'clock on Sackman and Livonia Avenue. I want to see you."

Q. Did he say anything else about the car?

2110

Mr. Rosenthal: I object to that, if the court pleases, as leading and suggestive. The witness' memory has not been exhausted upon the conversation, if any. The directing of his attention to something while in the midst of a conversation is highly improper.

The Court: Sustained.

Mr. Rosenthal: I ask your Honor to direct the District Attorney not to lead or

2111 suggest to the witness.

The Court: So instructed.

Q. Have you related all the conversation in the presence of Capone and Weiss and Farvel Cohen that you remember? A. Yes, sir.

Q. That you had with Strauss? A. Yes, sir. They were all over there together.

Q. What did you say? They were all together.

Mr. Cuff: I move to strike out all except, "Yes".

2112 Mr. Turkus: No, he said they were all together. I ask that it stand.

The Court: I have a note that he has testified all four returned together, and they stood together.

Mr. Cuff: Judge, I am asking to have the portion of that answer stricken—I am not referring to the entire part of his testimony—as not responsive to the question.

Mr. Turkus: Obviously, the witness did not understand the question , because he said, "Yes, they were all together."

The Court: The part which counsel

moves to strike out has already been testified to.

Mr. Cuff: No, I do not make it on that ground. I make it on the ground that it is not responsive to the question just put and answered.

The Court: I will strike it out as not responsive.

Q. What I want to know, Bernstein, is this: Have you told the court and jury everything 2114
that was said about the car and drop?

Mr. Cuff: I object to that as already answered, if your Honor pleases.

The Court: He says so.

Mr. Turkus: I did not hear him say that.

A. Yes, they were all together.

Q. You said they were all together, but I want to know this—

Mr. Cuff: I move to strike that out, if 2115
your Honor pleases.

Mr. Turkus: Will you keep quiet a minute?

The Court: I think I see what the trouble is.

Mr. Turkus: Certainly.

The Court: You may answer the question. Repeat it and listen carefully.

Q. Did you tell the Judge and jury here everything that was said by Strauss in connection with the automobile and the drop? A. Yes, sir.

2116 *Sol Bernstein—For People—Direct*

Q. What did you do after Strauss told you that?

Mr. Cuff: That is objected to.
The Court: Overruled.
Mr. Cuff: Exception.

A. I went right away.

Q. I don't hear you. A. I went right away to rent out a drop.

2117 Q. Where did you go to rent the drop? A. Lincoln and Ralph.

Q. Would you recognize a picture of the premises? A. Yes, sir.

Mr. Turkus: I ask that this photograph be marked for identification.

(Photograph marked People's Exhibit S, for identification.)

Q. Bernstein, I show you People's Exhibit S, for identification, and ask you if you can recog-
2118 nize and identify it. Yes or no. A. This is the house and this is the alleyway.

Q. Just say yes or no. A. Yes.

Q. And does that truly show the house and alley thereon portrayed as it was when you went to rent the drop; substantially does it show? A. At that time I think there was a fence over here, inside the alley.

Q. Substantially, is the picture the way the situation looked at that time with the exception of the fence? A. Yes, sir.

Mr. Turkus: It is offered in evidence.

(People's Exhibit S, for identification, received and marked People's Exhibit 27, in evidence.)

Q. Look at the photograph with the numbers over the doorway and see if it refreshes your recollection as to the address of the house to the right of the driveway on People's Exhibit 27, in evidence. (Handing exhibit to witness.) A. Will you repeat that question again?

Q. Do you remember 1611-1613 Lincoln Place 2120
over the doorway of the house to the right of the driveway as you look at the picture, People's Exhibit 27? A. Yes, sir.

Q. Is that the place where you went to rent the drop? A. Yes, sir.

Q. Was that on Lincoln Place? A. Yes, sir.

Q. Do you know between what streets? A. I know it was near Ralph.

Q. When you walk through the driveway of those premises set forth on the picture, Exhibit 27 in evidence for the People, are those garages in the back? A. Yes, lots of them. 2121

Mr. Turkus: May I show People's Exhibit 27 to the jury?

The Court: Yes.

Mr. Turkus (To reporter): Mark this for identification.

(Photograph marked People's Exhibit T, for identification.)

Q. I show you People's Exhibit T, for identification, and ask you if you recognize and can

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identify the garages thereon pictured. A. Yes, sir.

Q. Are those the series of garages in back of the driveway shown on People's Exhibit 27, in evidence? A. Yes, sir.

Q. Is that substantially the way those garages looked the day you went out to hire a garage for a drop? A. Yes, sir.

Mr. Turkus: It is offered in evidence.

2123

(People's Exhibit T, for identification, received and marked People's Exhibit 28, in evidence.)

Mr. Barshay: We object.

Mr. Cuff: We all object.

Mr. Rosenthal: We object.

Mr. Talley: All counsel object, if your Honor pleases.

The Court: Overruled.

Defense Counsel: Exception.

2124 Q. Bernstein, did you hire one of the garages shown on People's Exhibit 28, in evidence, as a drop? A. Yes, sir.

Q. Look at People's Exhibit 28, in evidence, and directing your attention specifically to the tops of the doors of the garages, see if you can indicate which garage you hired for the drop. A. The second garage.

Q. Has it got something on top of the doorway? A. Yes, a little "2".

Q. A metal figure, "2"? A. Yes, it is right on top.

2125

Mr. Turkus: May that exhibit, People's Exhibit 28, be exhibited to the jury?

The Court: Yes.

Q. Do you remember from whom you hired that garage? A. Yes, sir.

Q. Have you seen that person at the District Attorney's office? A. Yes, sir.

Q. How long did you hire the garage for? A. One month.

Q. How much did you pay? A. About eight dollars. 2126

Q. Was there some talk about the price, some haggling or bargaining? A. Yes, sir.

Q. What was that? A. At first she showed me a different garage that she wanted about six dollars—

Mr. Rosenthal: I object to any conversation with any owner of a garage not in the presence of any of the defendants.

The Court: Sustained.

Mr. Rosenthal: I ask that so much of the answer as has been given be stricken. 2127

The Court: It does not mean anything. Sustained.

Q. Well, at any rate, was it the garage with the metal "2" on it that you finally hired—

Mr. Cuff: That is already testified to.

Mr. Turkus: I have not finished the question.

Q. —for approximately eight dollars a month?

Mr. Cuff: I object to it.

A. Yes, sir.

Q. Now, that you had the drop what was the next thing you did?

Mr. Rosenthal: I object to the preamble to the question.

The Court: Overruled.

Mr. Rosenthal: Exception.

2129 A. The next thing I done, I went to buy a lock because the superintendent told me—

Mr. Rosenthal: I object to anything the superintendent told him.

Mr. Turkus: I consent to it.

Q. You went to buy a lock? A. Yes, sir.

Q. Did you buy a lock? A. Yes, sir.

Q. And did you put the lock on the garage doors? A. Yes, sir.

Q. After you got the lock for the drop, what
2130 did you do next? A. I went to Amboy and Sutter.

Q. About what time was that? A. It must have been about three o'clock.

Q. When you say three o'clock, do you mean three o'clock Saturday morning? A. Yes, sir.

Q. Or Friday morning? A. Three o'clock Friday morning—it was in the afternoon, three o'clock in the afternoon; three o'clock in the afternoon.

Q. I was confused myself as to the time. This is three o'clock in the afternoon? A. Yes, sir.

Q. What did you do? A. Where?

Q. Where you went at three o'clock in the afternoon? A. I seen Mugsy Cohen.

Q. Who is Mugsy Cohen? A. A car thief and a radio crook.

Q. Did you talk with Mugsy Cohen? A. Yes, sir.

Q. What did you and Mugsy Cohen do? A. I asked him—

Mr. Rosenthal: I object to any conversation.

2132

Mr. Turkus: I consent to it.

Q. Bernstein, there are rules of evidence and you cannot tell us under the rules what you and Muggsy said to each other, but you can tell us what you did. You tell us what you and Mugsy Cohen, this car and radio thief, did?

Mr. Talley: I object to testimony as to what they did in the absence of any of these defendants as remote, as immaterial and irrelevant, just as immaterial and irrelevant as what they said, as not binding upon any of these defendants.

2133

The Court: Overruled.

Mr. Talley: Exception.

Q. Do you understand the question? A. Yes, sir.

Q. Now tell us. A. About one o'clock in the morning I went with Mugsy to steal a car.

Mr. Talley: Just a minute. Went to Mugsy?

Mr. Turkus: Went with Mugsy.

2134

The Witness: Went in the morning.

Q. Where did you go looking for a car? A. Around the East Flatbush section.

Q. What kind of a car were you looking for? A. Any kind of car as long as it had a radio and a good running car.

Q. After looking for that kind of a car, did you finally come across one? A. Yes, sir.

Q. Where was that? A. Around Lefferts Ave-

2135 nue.

Q. I show you People's Exhibit 20 in evidence, and ask you if you recognize and can identify the area set forth on that picture? A. Yes, around here somewhere was an empty lot at that time, too.

Q. You recognize the picture? A. Yes, sir.

Q. Hold the picture in your hand and tell us when you and Mugsy were looking for the car where you found the car? A. Somewhere near this here lamppost.

Q. When you say the lamppost, do you mean

2136 across the way from the apartment house shown on that exhibit, People's Exhibit 20 in evidence? A. Yes, sir.

Mr. Talley: May I look at that photograph, please?

Mr. Turkus: Yes.

Mr. Talley: Where did he point out?

Mr. Turkus: The lamppost on People's Exhibit 20, the one put in evidence by Mr. Kaufman.

Q. About what time was this that you were with Mugsy when you saw the particular car? A. About two o'clock in the morning.

Q. What morning? A. Saturday morning.

Q. What kind of a car was it that you saw parked there on People's Exhibit 20 as you told the jury? A. A Chevrolet car, two door, black.

Q. Describe to the jury the manner in which the car was stolen and how the doors were opened? A. Mugsy Cohen broke first the window. Then he opened up the door. Then he took a jump-box and picked up the hood. Then he started it. I don't know how he started it but he started it.

2138

Q. The jury don't know about a jump-box. What is that? A. That is to start a car up, a hot box.

Q. To start a car up when you have not got what? A. A key.

Q. Who started the Chevrolet now? A. Mugsy Cohen.

Q. Now that Mugsy Cohen has got the stolen car started, what happened? A. I told him to follow me to the drop.

Q. Did you drive over to the drop? A. Yes, sir.

2139

Q. The garage "2" on People's Exhibit 28 in evidence? A. Let's take a look at it. (Looking at exhibit.) Yes, sir.

Q. What was done with the stolen Chevrolet car? A. Mugsy Cohen took the radio out of the car.

Q. When the radio was removed from the car, where was the car put? A. The car was in the garage when Mugsy Cohen took the radio out of the car.

Q. Was it in the garage, People's Exhibit 28 you just looked at? A. Yes, sir.

2140 Q. The place you called the "drop"? A. Yes, sir.

Q. After Mugsy removed the radio from the car what was done? A. I drove him off.

Q. Did he have the radio with him? A. Yes, sir.

Q. Did you lock the garage with the lock that you had put on? A. Yes, sir.

Q. Now that you had the stolen car in the "drop," what was the next thing you did with
2141 regard to the car? A. The next morning I went back to the garage. I took the handle off the car and went—

Q. When you say "the next morning," are you still talking about Saturday morning? A. No, sir, that was Sunday morning.

Q. Are you sure? A. Saturday morning.

Mr. Rosenthal: I object.

Q. Now that you had the handle removed off the stolen Chevrolet, what did you do? A. I
2142 went to a locksmith on Rockaway between Livonia and Dumont Avenue to make up a key.

Q. Did you have a key made? A. Yes, sir.

Q. After the key was made, did you return to the "drop"? A. Yes, sir.

Q. What did you do with the key? A. I put first the handle back and then I tried with the key to see if it fit the ignition to start the car.

Q. Did the key you had made fit the handle, fit the ignition switch? A. Yes, sir.

Q. Now, you had a key for the stolen car in the drop; what was the next thing you did? A. I had an appointment for four o'clock with Louis

Capone and Harry Strauss at Sackman and Livonia.

Q. Did you keep the appointment with Louis Capone and Harry Strauss? A. Yes, sir.

Q. Did they keep the appointment with you? A. Yes, sir.

Q. Did you meet them there? A. Yes, sir, in the coffee pot.

Q. Did you talk together? A. Yes, sir.

Q. Tell the jury what was said. A. Louis Capone asked me if I got the car in the "drop." 2144
I said, "Yes, sir." Then he asked me—

Q. Did you say "Yes, sir," to Louis Capone? A. Yes, sir. Then he asked me what kind of a car it was. I told him a two-door Chevrolet, black car. He gave me an argument, saying, "Why did you get a two-door car?"

Q. What did he say when you say he gave you an argument? A. He said, "What the hell is the matter with you? Why did you get a two-door car?"

Q. What was the matter with a two-door car?

2145

Mr. Rosenthal: I object.

The Court: Objection sustained.

Q. After the argument ended about you getting a two-door car, what else was said? A. Louis Capone said, "Come on, I will show you the job you have got to do."

Q. Then what happened? A. Louis Capone drove my car and showed me the route.

Q. Let me ask you this: Where did Louis Capone drive your car? A. He drove—

Q Where to, first. A. First he showed me—

first he drove to Bradford and Blake, near the park.

Q. What was the name of that park? A. I don't know the name of the park.

Q. When he got you to the park at Bradford and Blake, what did he say to you? A. At Bradford and Blake he said, "Now watch,—this is going to be your job,—what to do."

Q. Now, when he said that to you, what did Capone do? A. He drove my car and started
2147 showing me Rosen's candy store.

Q. I show you Exhibit 2-A in evidence and ask you— A. (Interrupting) Pardon me, Mr. Turkus, I did not know at that time his name was Rosen.

Q. He just showed you the candy store? A. Yes, sir.

By the Court:

Q. I want to get this straight. What was the rest of that answer? A. "Watch, this is going to be your job, what to do, how to drive."

2148 Q. When you got to Bradford and Blake? A. Yes, sir.

Q. What did he say there? A. He said, "Now watch, this is the job what you are going to do; I am going to show you the route."

By Mr. Turkus:

Q. Let us go with this slowly, so we are sure we understand each other. After he told you what you have just related to the Judge and the jury, did he keep on driving your car? A. Yes, sir.

Q. Did he drive your car into Sutter Avenue? A. Yes, sir.

Mr. Rosenthal: I object to anything leading or suggestive.

Q. Tell us the street into which he drove your car. A. On Bradford and Blake he made a left turn.

Q. A left turn into where? A. Into Sutter Avenue, that was a left turn.

2150

Q. Turn around and look at that big picture in back of you. Look at it carefully and see if you recognize it. A. Yes, here (indicating).

Q. First, tell us, do you recognize that picture? A. Yes, sir.

Q. What is it a picture of? A. It is the street where the candy store is.

Q. What is the number of that exhibit? A. (Court Attendant) People's 25 in evidence.

Q. Does People's Exhibit 25 in evidence show the corner around which Capone drove the car and passed the candy store? A. This way (indicating); he made a left turn.

2151

Mr. Turkus: Indicating, facing the photograph, from the left-hand side past the luncheonette or soda store down Sutter in a westerly direction, the direction of Wyona Street.

Q. When Capone was driving your car down Sutter Avenue and past the candy store, did he say anything to you? A. He said, "Now, watch very good, because this is the way you got to drive." When he showed me the candy store

he said, "Here is where somebody is going to be killed."

Q. Look at People's Exhibit 25 in evidence first, the one in back of you, and show us where that store was that he was at. A. The candy store here (indicating).

Mr. Turkus: Indicating the candy store 725 Sutter Avenue.

2153 Q. Take a look at this picture, People's Exhibit 2-A in evidence, the one of handy size for handling, and see if you recognize the store. A. Yes, sir.

Q. Is that the candy store? A. Yes, sir.

Q. Now, after Capone drove you past that candy store on Sutter Avenue which you have just identified, where did he drive your car? A. He made a left turn on Wyona and Sutter.

Q. Yes, and from there where did he go? A. A left turn on Wyona and Sutter—Wyona and Blake.

2154 Q. Continue with the route. A. On Wyona and Blake he made a right turn into Pennsylvania Avenue to Blake. Pennsylvania and Blake I made a left turn to Pennsylvania and Dumont. On Pennsylvania and Dumont I made a right turn on Dumont Avenue and went straight down to Snediker and Dumont. On Snediker and Dumont I made a left turn into Snediker and Livonia. On Snediker and Livonia I made a right turn straight to Livonia, and on Livonia I made a right turn at VanSinderen and Livonia, where the station is.

Q. How far up VanSinderen Avenue was the

car driven on this route you were being instructed in? A. What do you mean?

Mr. Rosenthal: I object to the form of the question.

The Court: Objection overruled.

Mr. Turkus: I will withdraw it, your Honor, so there will be no dispute.

Q. Who was driving the car at that time you are talking about? A. All the time, Louis Capone was driving my car. 2156

Q. Where did he bring that car to a stop? A. About 15 or 20 feet from Livonia Avenue, VanSinderen and Livonia.

Q. I show you People's Exhibit 15 in evidence and I ask you if you recognize and identify that exhibit. A. Yes, sir, I remember this here news stand, but the car was parked a little further.

Q. According to your recollection? A. Yes, sir.

Q. I show you People's Exhibit 13 in evidence and ask you if you recognize and can identify that exhibit. A. Yes, sir. 2157

Q. Now, does that show approximately where Louis Capone stopped your car? A. Around there some place.

Q. Now, when you got to that point on VanSinderen Avenue off Livonia, what if anything did Louis Capone say to you? A. He showed me the route seven or eight times; he went back again.

Q. Before he went over the route with you again and again, what did he tell you the first time you came to VanSinderen and Livonia? A. "Now, are you sure—"

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Mr. Rosenthal (interrupting): I object to it—leading and suggestive. This witness said nothing about him saying anything, and he directed his attention after the witness said he went over this route seven or eight times. Then Mr. Turkus said, "What did he say to you the first time you arrived there?" That is leading and suggestive.

Mr. Turkus: How else can you ask that

2159 question?

Mr. Rosenthal: I will tell you if you want to know the proper way.

The Court: You can ask him whether or not Capone did say anything to him.

Mr. Rosenthal: Does your Honor rule on my objection?

Mr. Talley: I object to this entire line as having no bearing whatever on the defendant Weiss.

The Court: Objection overruled.

Mr. Talley and Mr. Rosenthal: Exception.

2160

Q. Have you followed the Judge's question? A. Yes, sir.

Q. Do you understand what he asked you? A. Yes, sir. He said, "Are you sure you know the route?"

Q. I want to ask you this: You told us that Capone stopped your car at a point near where the car is on People's Exhibit 13 in evidence when you first went over the route. A. Yes, sir.

Q. When he stopped your car there the first time you went over the route, did he say any-

thing to you? A. He said, "This is the place where you drop the car off."

Mr. Turkus: That is all I wanted to hear.

Mr. Rosenthal: That is an improper observation, and I move to strike it out.

Mr. Turkus: If it is improper, I move that it be stricken out.

The Court: Proceed.

2162

Q. How many times did you and Capone go over the route? A. About seven or eight times.

Q. Did you learn the route by heart? A. Yes, sir.

Q. After that where did you go? Where did you and Capone go? A. Went back to Sackman and Livonia Avenues.

Q. What was done with your car? A. Louis Capone held my car all the time.

Q. When you got back to Sackman and Livonia, was there any talk between you and Capone? A. Harry Strauss came over, then Louis Capone told me—

2163

Mr. Talley: I object, if your Honor please, as far as the defendant Weiss is concerned, to any conversation.

The Court: Overruled.

Mr. Talley: Exception.

Q. Continue with your answer. Harry Strauss came over and Louis Capone told you what? A. He told me to go over and steal plates, to make sure to take plates where the car will not be missed.

Q. Did he say anything else? A. Yes.

Q. What else? A. He said, "After you get the plates from the car to put it on the hot car and drive the car over about 10:30 at night to Sackman and Livonia Avenue."

Q. After Capone told you to steal the plates as you told the jury, did he keep your car? A. Yes, sir.

Q. After you got that direction from Capone, what did you do?

2165

Mr. Rosenthal: I object to the form of the question.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I took a flashlight out of the car, a screw driver, and a pair of pliers.

Q. Out of which car? A. Out of my own car, and a pair of gloves.

Q. When you had the equipment in your possession, what did you do? A. I went to go to steal plates.

2166 Q. Where did you go? A. I went around somewhere, around East Flatbush neighborhood.

Q. Would you recognize a picture of the neighborhood where you went? A. Yes, sir.

Q. I show you this exhibit, People's Exhibit 21 in evidence, and ask you if you can recognize and identify it. A. Yes, sir. I remember the lot in Newport Street here (indicating).

Q. Is that where you went to steal the plates? A. Yes, sir.

Q. When you walked through Newport Street, as shown on People's Exhibit 21, in what part

did you walk? A. Let me have the picture, please.

Q. Hold it up there. A. I walked this here way (indicating).

Q. When you say "This here way," what do you mean? A. This way (indicating). Across the sidewalk, in the center of the picture, on Newport Street.

Q. Did you walk in behind the houses where there are a row of garages on that photograph? A. Lots of garages; more than where I had the 2168
"drop." More garages than the "drop" had.

Q. When you got back there what did you do? A. I broke the lock and I went into the garage. I took off a pair of plates from a car.

Q. After you removed the plates from the car in the garage, the private garage indicated by you in People's Exhibit 21 in evidence, what did you do with the plates? A. I took the plates and I went over to the "drop" to put it on the hot car. Then I took off—

Q. (interrupting) Before that—Just a minute. When you took the plates off, how did you get 2169
them over to the "drop"? A. I put them in a paper and took a cab.

Q. Did you drive to the "drop"? A. Yes, sir, with a taxicab, a block away from there.

Q. From the place where the taxicab left you off, did you walk with the plates to the "drop"? A. Yes, sir.

Q. When you got— A. (interrupting) It was packed up in a newspaper.

Q. When you got to the "drop" what did you do? A. I went into the garage and took off the plates from the car that was on and put on the

2170 plates what I stole. Then I broke up the plates. I went out and broke up the old plates from the car and threw them in some sewer or ash can, I don't remember.

Q. So you switched, then, the plates you had stolen from around Newport Street onto the stolen car? A. Yes, sir.

Q. You broke up the plates that were originally on the stolen car when you stole it with Mugsy Cohen? A. Yes, sir.

2171 Q. Now, putting the stolen plates that had been secured from Newport Street onto the stolen car, what did you do after that? A. I hung around until about a quarter after ten, because I had an appointment to bring the car on Sackman and Livonia Avenue.

Q. Who did you have the appointment with? A. I had the appointment with Louis Capone and Harry Strauss.

Q. Did you drive the stolen car to the place of appointment? A. Yes, sir.

Q. Where did you park it? A. Between Sackman and Livonia, near Riverdale.

2172

Mr. Talley: Do you mean the night or the morning?

Mr. Turkus: He just told you ten o'clock at night.

Mr. Klein: A quarter after ten at night.

Q. After you parked this stolen car, what did you do? A. What did I do? I got out of the car.

Q. Where did you go? A. I went near the coal store.

Q. Where was that? A. Sackman and Livonia.

Q. Did you see anybody you knew on the corner? A. Yes, sir.

Q. Who did you see? A. Mendy Weiss, Louis Capone, Farvel Cohen, Harry Strauss, and Jimmy Ferraco.

Q. When you saw them, what were they doing? A. They were talking.

Q. Did you walk over to them? A. Yes, sir.

Q. What happened then? A. I went to Mendy Weiss, and Harry Strauss went over to take a look at the car with me. 2174

Q. How far from that corner had you parked the stolen car? A. About—there were a lot of stores, about two or three houses, I don't know how far that is.

Q. Who went with you to inspect the stolen car? A. Mendy Weiss, Harry Strauss, and Louis Capone.

Q. What do you and your associates call a stolen car? What other name do you call it?

Mr. Rosenthal: Objected to.
The Witness: A hot car. 2175
The Court: Objection overruled.
Mr. Rosenthal: Exception.

Q. Did you say a hot car? A. Yes, sir.

Q. What happened when the car was being inspected? A. Mendy Weiss started hollering at me. He said, "What the hell is the matter with you? Why did you get a two-door car for?" He said, "You know for a job like this you need a four-door car." He said, "The next job you get orders you steal a four-door car."

Q. Did you answer him? A. I kept quiet.

Q. What happened after that? A. After that Mendy Weiss told me to take— Oh, after that somebody brought a package over to Harry Strauss and Harry Strauss, when he brought the package over to Harry Strauss, Harry Strauss gave it to me and said to me, "There are the guns in that. Put them in the compartment of the car."

Q. Did you put that package in the glove com-
2177 partment of the car? A. Yes, sir.

Q. Was that the package that Strauss told you had the guns in it? A. Yes, sir.

Q. After the package of guns had been put into this hot car, what happened? A. Mendy Weiss told me to take the car and bring it where Louis Capone showed me where, on Bradford and Blake, in the middle of the block.

Q. That is not quite clear as you say it. Tell us what was said. A. Mendy Weiss told me to take the stolen car and park it on Bradford and Blake near Sutter in the middle of the block; put the car there and leave him in the little
2178 park on Blake and Bradford.

Q. How far away was the little park from the candy store? A. That was Blake Avenue, and the candy store was on Sutter.

Q. How far apart are they? A. A block and a half.

Q. How far from the candy store were you directed to park the hot car? A. In the center of the block on Bradford Street.

Q. Look at that picture in back of you, People's Exhibit 25 in evidence, and show us which direction on the picture that block is where you

parked the car? A. It is here (indicating); Blake goes all the way down.

Q. Down from Artie's? A. The ice cream parlor.

Q. Is that also the direction in which that little park is? A. Yes, sir.

Q. Did you park the car where you were told? A. Yes, sir.

Q. Did you go to meet them in the little park? A. Yes, sir.

Q. Who did you meet in the little park? A. 2180
I met Mendy Weiss, Harry Strauss, Louis Capone, Jimmy Ferraco, and Farvel Cohen,—no, not Louis Capone.

Q. Louis Capone was not there? A. No, sir.

Q. So you met Weiss, Strauss, Farvel Cohen, and Jimmy Ferraco? A. Yes, sir.

Q. When you got there, what did they do? That is, Weiss, Strauss, Farvel Cohen, and Jimmy Ferraco? A. They were talking, and Mendy Weiss told me to bring the package of guns into the park.

Q. Did you return to the car? A. Yes, sir.

Q. Did you take the package of guns out of 2181
the glove compartment? A. Yes, sir.

Q. Did you bring them back to the little park? A. Yes, sir.

Q. What did you do with the package? A. I gave it to Mendy Weiss.

Q. What was done with the package? A. Mendy Weiss opened up the package and I seen the guns in the package. He gave one to Harry Strauss and Jimmy Ferraco and he took one for himself with extra pills. The bullets were

not in the gun, and I saw him put in the pills in the gun.

Q. What do you mean by "pills," bullets? A. Bullets were not in the gun.

Q. Who filled the guns with pills or bullets? A. Mendy Weiss.

Q. After he got through putting the pills in the gun what did he do? A. He gave Harry Strauss one gun, Jimmy Ferraco one gun, and he took one for himself, and he held the extra
2183 bullets with it.

Q. Then what happened? A. Then what happened? Mendy Weiss said he is going over to take a look at the store and see how things are, and if it looks good.

Q. Which way did he walk? A. He walked straight down Bradford Street.

Q. In what direction? A. Toward Sutter Avenue.

Q. How long did he stay away? A. About 15 to 20 minutes.

Q. Did he come back? A. Yes, sir.

Q. When he came back, what did Mendy Weiss
2184 do? A. He said to Harry Strauss, "Come on, you take a look. You take a walk and see how you like it," and both of them left, going in the same direction.

Q. Walking in the same direction? A. Yes, sir.

Q. How long was Mendy Weiss gone that time? A. Fifteen to twenty minutes also.

Q. Did Weiss and Pittsburgh Phil Strauss come back together? A. Yes, sir.

Q. When they came back to the little park, did they talk? A. Yes, sir.

Q. What did they say? A. Mendy Weiss said to Harry Strauss, "How do you like it?" and Harry Strauss said, "I am afraid of that ice cream parlor on Sutter Avenue; I am liable to be made."

Q. What does "being made" indicate? A. Recognized.

Q. Is that an expression, "being made," is that the expression you and your associates use for identification? A. Yes, sir.

Q. If you are identified, that is being "made?" 2186
A. Yes, sir.

Q. You got to the point when I stopped you where you said that Strauss said he was afraid of being "made" in the ice cream parlor. Now what else was said? A. Then Mendy Weiss said to Harry Strauss, "I will tell you what we will do, we will grab him in the morning when he opens up the store and make a good job out of it so you don't have to worry."

Q. After that was said, what was done in reference to the guns? A. Mendy Weiss told him —gave me orders to hold the guns and put them 2187
in the car.

Q. Did he say anything else, Mendy Weiss? A. Yes, sir, he gave me the address of a house, and then he told me to pull the car back into the garage and meet him up at this house. He wrote the address on a piece of paper.

Q. Mendy Weiss himself wrote that address on a piece of paper? A. Yes, sir.

Q. Now, after you got the address from Mendy Weiss, what did you do? A. I took the car.

2188 Q. What car are you talking about? A. The hot car. I took the car and pulled it into the garage where the drop was. Then I took a cab and went where the address was that he told me, Mendy Weiss.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit U for identification.)

2189 Q. Can you remember where that house was, the address of which you had on a piece of paper, which Mendy Weiss gave you, where was that house? A. On Eastern Parkway.

Q. Take a look at People's Exhibit U for identification and see if you can recognize and identify that exhibit. A. Yes, sir.

Q. What does it show? A. That is the house where it was written the number down where Mendy Weiss told me to come to.

2190 Mr. Turkus: I offer it in evidence.

Mr. Rosenthal: I object to it on behalf of the defendant Capone.

Mr. Talley: I object to it on behalf of defendant Weiss.

Mr. Barshay: Objected to on behalf of defendant Buchalter.

The Court: Objection overruled.

Defense Counsel: Exception.

(Received and marked People's Exhibit 29 in evidence.)

Mr. Turkus: May that be passed to the jury?

The Court: Yes.

Q. Did you go to that apartment house on People's Exhibit 29 in evidence? A. Yes, sir.

Q. Where in the apartment house did you go, if you remember? A. Oh, I don't remember.

Q. Was it some apartment? A. Yes, sir.

Q. Did you go into the apartment? A. Yes, sir.

2192

Q. Who did you find in the apartment? A. I found Mendy Weiss, Harry Strauss, Farvel Cohen, and Jimmy Ferraco.

Q. When you found them there what were they doing? A. They were eating.

Q. What did you do, did you eat with them? A. They gave me a sandwich.

Q. Do you know whose apartment it was? A. When I got up there I knew; I did not know at first.

Q. Whose apartment was it? A. Farvel Cohen's.

2193

Q. After you got through eating the sandwich they gave you, were you told anything? A. Yes, sir, they told me to get some sleep, because "You will have to get up at five in the morning."

Q. Where did you sleep? A. In Farvel's house.

Q. What part of the house or apartment? A. In the living room, there were rugs there.

Q. Where did you sleep? A. On the rugs.

Q. Who woke you up? A. Mendy Weiss.

Q. At what time? A. I think it was about five o'clock in the morning.

Q. When Mendy Weiss woke you up what did he tell you? A. He told me to go and get the car and meet them at the same place in the park and take out the guns out of the car and bring them into the park.

Q. After Mendy Weiss told you that, what did you do? A. I done what he told me.

Q. Did you go to the drop? A. Yes, sir.

Q. Did you get the hot car? A. Yes, sir.

Q. Where did you drive it? A. I drove it to
2195 Bradford between Blake and Sutter.

Q. You mean Bradford between Blake and Sutter? A. Yes, sir.

Q. Did you park the hot car there? A. Yes, sir.

Q. What did you do after you parked the hot car? A. I took the guns out of the car and brought them into the park.

Q. Who did you meet in the park? A. Mendy Weiss, Harry Strauss, Jimmy Ferraco.

Q. Did you at that time see either Farvel Cohen or Louis Capone? A. No, sir.

Q. What did you do with the guns? A. I
2196 gave them to Mendy Weiss, and the extra bullets.

Q. What did Weiss do with the guns? A. He gave one to Harry Strauss and Jimmy Ferraco.

Q. What about the third one? A. He took it himself.

Q. After the guns were parceled out that way, what happened? A. Mendy Weiss said, "Come on."

Q. Who did he say "come on" to? A. To all of us.

Q. After Mendy Weiss said, "Come on," where did all of you go? A. We went to Wyona and Belmont, an apartment house, in the hallway.

Mr. Turkus: I ask this photograph be marked for identification.

(Received and marked People's Exhibit V for identification.)

2198

Q. You say Mendy Weiss said, "Come on" to all of you and you all went to an apartment house on Wyona Street? A. Wyona Street near Belmont.

Q. How far away was that from Sutter Avenue? A. About a block.

Q. Look at People's Exhibit V for identification and tell us, can you recognize and identify that exhibit? A. Yes, sir, there was another house like that. That is the house.

Q. Is that substantially the way that house and the rest of the houses pictured on People's Exhibit V for identification looked at that time? 2199
A. Yes, sir.

Mr. Turkus: I offer the photo in evidence.

Mr. Barshay: Same objection.

Mr. Rosenthal: I object to its materiality.

Mr. Cuff: Same objection on behalf of Weiss.

Mr. Rosenthal: It is not necessary and has no evidentiary value.

2200

The Court: Objection overruled.

Defense Counsel: Exception.

(Received and marked People's Exhibit 30.)

Q. Now, point out the house that Mendy Weiss, Harry Strauss, Ferraco, and yourself walked to, on People's Exhibit 30 in evidence. A. This one here (indicating).

2201

Mr. Turkus: Indicating apartment house on the right-hand side of People's Exhibit 30 as you look at the exhibit.

The Witness: Yes, sir.

Mr. Turkus: May it be exhibited to the jury?

The Court: Yes.

Q. When the four of you got to that apartment house you have indicated to the jury on People's Exhibit 30, where did the four of you go when you got to that house? A. We all

2202

stood in the house; we all stood in the hallway.

Q. In the hallway of that apartment building? A. Yes, sir.

Q. While standing in the hallway of the apartment building did Mendy Weiss say anything? A. Yes, sir. Mendy Weiss said, "Over here we can see when Rosen comes out of the house." At that time I did not know it was Rosen's name.

Q. Is that the first time you hear dRosen's name? A. I never heard of Rosen's name.

Q. Tell us what he said when you were stand-

ing in the hallway. A. He said, "Look, it is here, if that rat should come out of the house."

Q. If the "rat" should come out of the house where? A. He looked out and said, "This is where we can see the rat coming out of the house."

Q. How long did the four of you wait in the house, the vestibule of that apartment house? A. About an hour.

Q. During that hour what were the four of you doing? A. Smoking cigarettes, and Mendy 2204
Weiss was looking out.

Q. In which direction was he looking out? A. I can show you on the picture.

Q. All right, show us on the picture which way he was looking. A. Through this first door (indicating).

Q. He was looking into the little row of houses on the left-hand side? A. He was looking at this house over here (indicating).

Mr. Turkus: It will be impossible for me to conclude the testimony of this witness within the time prescribed for recess. 2205

Mr. Rosenthal: May I suggest we complete the direct examination? We lost considerable time today.

Mr. Turkus: I have as much testimony to put in as I have put in already.

Mr. Rosenthal: We will stay with you.

Mr. Turkus: I expected that.

Mr. Rosenthal: Then you are not disappointed.

2206

Mr. Turkus: You asked for a recess at four o'clock, and now I am asking.

Mr. Cuff: We have not asked for any recess at four o'clock.

Mr. Turkus: Yes, that was the arrangement you made with the Court.

Mr. Cuff: I did not.

Mr. Turkus: So you could confer with your client.

Mr. Cuff: We did not.

2207

The Court: We will look at the record. That arrangement was made in the Judge's chambers in the absence of the press and the jury. When counsel says it was not made, the Court states it was made, and that a stenographer was there and made a record of it. It was made to enable counsel for defense to have an interview with their clients in the pen daily before removal to the House of Detention, and that it would give time for the defendants to arrive at their respective institutions in time for their meal.

2208

Mr. Cuff: That was the Court's own suggestion, I think.

The Court: The record speaks for itself. When the Court speaks, there will be no contradiction in matters which occurred, even when the press was not present. The Court under the circumstances thinks it advisable to take a recess now.

(Addressing the jury) Gentlemen, please do not discuss the case nor let anybody talk to you about it; keep your minds

open; remember the other instructions. First, the witness will be taken away.

Mr. Rosenthal: May I, before you take him away, ask the Court to instruct this witness he is not to be interviewed by anybody, or speak about the case in the recess until Monday.

The Court: The Court has no jurisdiction to do that.

Mr. Rosenthal: I respectfully except.

The Court: Now the jury may leave. 2210

Recess until Monday morning at 10 o'clock.

Now the defendants are remanded.

(Recess taken until Monday, October 27, 1941, at 10:00 A. M.)

Brooklyn, N. Y., October 27, 1941.

TRIAL RESUMED

2211

SOL BERNSTEIN, a witness for the People, resumed the stand and testified further as follows:

Mr. Turkus: At this time I respectfully offer to be marked as Exhibit 25-A, the original small-sized photograph which corresponds to and is an exact duplicate of People's 25 in evidence, except for its size. This is for convenience in handling by the jury.

2212

(Received without objection and marked People's Exhibit 25-A in evidence.)

Direct examination by Mr. Turkus (continued):

Q. Just before recess on Friday you spoke of certain transactions that took place in the small park a short distance from the candy store at 725 Sutter Avenue, do you remember? A. Yes, sir.

2213

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit W for identification.)

Q. I show you People's Exhibit W for identification and ask you if that indicates the corner of the park at Bradford and Blake Avenues. A. Yes, sir.

Q. Is that the park you spoke about in your testimony on Friday? A. Yes, sir.

2214

Mr. Turkus: I offer it in evidence.

(Received without objection and marked People's Exhibit 31.)

Mr. Turkus: May People's Exhibit 31 be exhibited to the jury?

The Court: Yes.

Q. How far away is that park on People's Exhibit 31 from the candy store, 725 Sutter Avenue? A. One block away.

Q. At recess, Friday, Bernstein, you told the jury at the concluding portion of it, that you, Weiss, and others were waiting at an apartment house set forth on People's Exhibit 30 in evidence. A. Yes, sir.

Q. That is where you said Weiss said, "This is where I can see the rat coming out of the house"? A. Yes, sir.

Q. How long did you wait at that apartment house with Weiss and the others? A. For about three-quarters of an hour.

2216

Q. Now, after that wait— Question withdrawn.

Q. During that wait, what were you doing there, you and the others? A. Smoking cigarettes.

Q. After that wait of approximately three-quarters of an hour, what happened? A. Mendy Weiss went out.

Q. Where did he go? A. I don't know where he went, I think across the street from the house.

Mr. Cuff: I move to strike out all except, "I don't know where he went." 2217

The Court: Strike it out.

Q. How long was he gone? A. A few minutes.

Q. When he came back what took place? A. He said, "That rat just came out of the house, and I think he is going to open up the store."

Q. What happened after that, or what was said? A. For a few minutes he stood in the hallway and then he said, "I am going over to take a look and see how everything is."

Q. What did he do after that, after he said,

"I am going to take a look," where did he go? A. He went toward the store.

Q. How far away from that apartment house in which you, Weiss, and the others were laying in wait for the person whom Weiss described as a "rat," was the candy store?

Mr. Cuff: I object to the form of the question.

The Witness: I don't know what he means.

2219 The Court: I did not understand the question.

Mr. Turkus: Question withdrawn.

Q. You said you were waiting with Weiss and the others at People's Exhibit 30. That is correct? A. Yes.

Q. That Weiss was looking across the street, at a little row of houses opposite. A. I don't know which house he was looking at; he was looking across the street.

Q. In the direction of these little houses? A. Towards Sutter.

2220

Q. How far away is that location from the candy store at No. 725 Sutter Avenue? A. Around the corner.

Q. After Weiss said, in substance, that he was going to take a look, did he walk down Wyona Street in the direction of the candy store? A. Yes, sir.

Q. Did he come back? A. Yes, sir.

Q. After how long an interval of time? A. About five or ten minutes, I am not sure.

Q. When he came back to the group did he say anything? A. Yes, sir.

Q. What did he say? A. He said to me, "Go over, get the car, and stop it in front of Rosen's store, and make sure the motor is running."

Q. At that time where was the car parked, that is, that hot car? A. Bradford and Blake, near Sutter.

Q. How far away from the candy store was the car parked? A. Around the corner.

Q. Did you go for the hot car? A. Yes, sir.

Q. Where did Weiss and the others go? A. They were in the hallway when I left.

2222

Q. Who remained in the hallway when you left? A. Mendy Weiss, Harry Strauss, and Jimmy Ferraco.

Q. Did you go to the place where you had left the hot car? A. Yes, sir.

Q. Did you find it there? A. Yes, sir.

Q. Tell the jury what you did. A. I then took the car, pulled it in front of Rosen's store, like he told me, with the motor running.

Q. When you were behind the wheel of this hot car with the motor running, in front of Rosen's store, what did you see happen? A. Before I pulled over with the car I saw Mendy 2223
Weiss, Harry Strauss, and Jimmy Ferraco walk toward the store.

Q. When they walked toward the store, did you stay behind the wheel of that hot car with the engine running? A. Yes, sir.

Q. What happened next? A. I saw Mendy Weiss and Harry Strauss walk in the store and Jimmy Ferraco stood outside.

Q. Then what happened? A. I heard a lot of shots; Mendy Weiss and Harry Strauss came running out of the store and they ran into the car with Jimmy Ferraco.

2224 *Sol Bernstein—For People—Direct*

Q. Tell us how they got into this two-door hot car. A. I opened up the door, picked up the seat, because it was a two-door car.

Q. Now, you picked up the front seat? A. Yes, sir.

Q. Was that to make it easier for the three of them to climb in? A. Yes, sir.

Q. After the three climbed in this hot car, with you behind the wheel, with the engine running, what happened? A. I started on the route Lou Capone showed me to.

2225

Mr. Rosenthal: I move to strike it out.

The Court: Motion denied.

Mr. Rosenthal: Exception.

Q. When you were in the car, did Weiss and Strauss say anything while you were driving it on that route? A. Yes, sir.

Q. What was it? A. They started hollering, "Turn here," "Turn there." I did not pay any attention to that because Louis Capone showed me the route seven or eight times.

2226

Mr. Rosenthal: I object.

Mr. Turkus: I consent that after "because" be stricken out.

Mr. Rosenthal: I object and move that all after "because" be stricken out.

The Court: Strike it out.

Mr. Rosenthal: If your Honor please, I ask your Honor to instruct the jury to disregard that statement.

The Court: Members of the jury, throughout the trial, when the Court strikes out any part of an answer, that is

because the rules of evidence require it. It is then your duty to disregard the part that the Court strikes out.

By Mr. Turkus:

Q. Answer these questions yes or no: When Weiss and Strauss were hollering, "Turn this way," "Turn that way,"— yes or no—did you do it? A. No, sir.

Q. Which course or route did you follow in the get-away from the store; which way did you go on the get-away; what route did you follow? A. I made a left turn on Wyona— 2228

Q. Do not describe it that way. I do not want to go all through that route.

Mr. Rosenthal: I object to any interruption of the witness when he is answering a question.

Q. Continue. A. I made a left turn on Wyona Street—

2229

Mr. Rosenthal: I object to the sardonic grin on Mr. Klein's face when counsel for the defendant gets up and objects. It may be humorous to him, but it is not to me. I consider it my duty to get up when I consider a question asked is being answered and interrupted by the District Attorney. I ask your Honor to admonish counsel not to be continually grinning when counsel for the defense gets up to make an objection.

Mr. Turkus: I remember Mr. Rosen-

thal telling us once before that he could not control the facial expressions of counsel, or counsel's expression on his face. Mr. Klein is not here to be sardonic.

The Court: Just a minute. I do not like to break into this narrative. I did not notice the grin because I was busy. I hope it did not happen. Now, please proceed.

Mr. Rosenthal: I respectfully except.

By Mr. Turkus:

Q. Did you then pursue the route that Capone had shown you the day before?

Mr. Rosenthal: I object to the question.

The Court: He has already said so.

Mr. Turkus: I will not continue it then.

Q. Now, where was this hot car stopped? A. Right in front of the store.

Q. No, no. I am talking now after you got away. A. Van Sinderen and Livonia Avenues.

Q. I show you People's Exhibit 13 in evidence and ask you if you can indicate thereon, approximately, where you stopped the hot car. A. Yes, sir.

Q. Where? A. Over here (indicating).

Mr. Turkus: Indicating the car on that picture.

The Witness: Yes, sir.

Q. In going around, stopping the car at that point, did you go around the intersection indi-

cated on People's Exhibit 15 in evidence, also showing the candy stand, the I.R.T., the B.M.T., and the railroad bridge? A. Yes, sir, I went this way, (indicating); we passed the stairway.

Q. When you brought the hot car to a stop at the point you have indicated, namely, as set forth on People's Exhibit 13 in evidence, what happened at that point? A. I took the key out of the car, and they all walked out.

Q. When you say, "They all walked out," who walked out? A. Mendy Weiss, Harry Strauss, Jimmy Ferraco, and myself. 2234

Q. Where did you walk to, Bernstein? A. We walked past the subway station.

Q. Is that subway station indicated on the exhibit, People's Exhibit 15? A. Yes, sir, over here to the right (indicating).

Q. Did the four of you walk past the stand? A. Yes, sir.

Q. Up where? A. Up the steps and on the trestle.

Q. Up the steps to what? A. To the bridge, all the way up the steps and up to the bridge.

Q. I show you People's Exhibit 16 in evidence and ask you if you recognize that photograph. A. Yes, sir. 2235

Q. Tell the jury if that is the bridge you walked over with those men. A. Yes, sir.

Q. Take a look at People's Exhibit 17 in evidence and tell us if you recognize that. A. Yes, sir, that is going down to Junius Street.

Q. Is that where you and Weiss and Strauss and Ferraco walked down? A. Yes, sir.

Q. Look at People's Exhibit 17 and tell us, when you walked down with these four men, if

anything occurred while you were going down the stairs going to Junius Street side of this railroad track. A. This is 17. Yes, sir, I saw Louis Capone in my car and Farvel Cohen with his car.

Q. Where did you see Louis Capone with your car, where on People's Exhibit 17 are you? A. Across the street, over here (indicating); I will show you on the picture. Right over here (indicating).

2237 Q. What is on that side of the picture? A. The subway station, I think, going up.

Q. Now, there is a hydrant in that photograph to the left side, the side that has the houses portrayed on it. In reference to the hydrant and the pole near it, there is a telegraph pole, can you estimate or describe to us, approximately where your car was with Louis Capone in it? A. Somewhere around there, but I did not take notice of any pumps at that time.

Q. In relation to where your car with Capone was, where was the car with Farvel Cohen in it?

2238 A. Back of my car.

Q. On the way over that trestle or railroad bridge which you have identified as People's Exhibit 16, and when you were coming down the stairway leading to that exhibit which you have in your hand, People's Exhibit 17, did Weiss say anything to you? A. Yes, sir, Mendy Weiss gave me his gun and told me to break it up and throw it away.

Q. Did you take possession of that gun? A. Yes, sir.

Q. When you saw the two cars, your car with Capone in it and the other car with Farvel

Cohen in, what did Strauss, Weiss, and Ferraco do? A. Louis Capone told me to take Jimmy Ferraco and drop him off. Then Louis Capone, Mendy Weiss, Harry Strauss, and Jimmy Ferraco went away in Farvel's car.

Q. When you got down there, what did Capone say you should do? A. He told me to take Jimmy Ferraco.

Mr. Talley: I object to that as repetition. We all heard it. The jury heard it. 2240
It is simply endeavoring to have it repeated, what he has already testified to.

The Court: There is an apparent mix-up. Objection overruled.

Mr. Talley: I take exception. There is no mix-up in the question at all.

The Court: I thought there was.

Mr. Talley: No, not in the slightest. It is simply repeating the answer he gave before.

The Court: I thought he had Ferraco in both cars. 2241

Mr. Turkus: He did, that is why I am going over it, to clear it up.

The Court: Clear it up.

By Mr. Turkus:

Q. As to what happened, just before the objection was made you said Capone, in substance, said: "Take Ferraco with you"? A. Yes, sir.

Q. At that time you told us Capone had possession of your car. A. Yes, sir.

Q. Did he then release the car to you? A. Yes, sir.

Q. Did you get in your car? A. I did not get in yet, but I seen Mendy Weiss, Farvel Cohen, Louis Capone, and Harry Strauss go into Farvel's car, and Jimmy Ferraco went with my car.

Q. Where did the men who went with Farvel Cohen drive off, in which direction? A. They went up straight with Junius Street.

Q. At that time did Weiss and Ferraco have their respective guns, do you know? A. Mendy
2243 Weiss gave me his gun, and Jimmy Ferraco had his gun.

Q. Did Strauss have his own gun? A. I don't know about that.

Q. At the time you got in your car did you have Weiss's gun then in your possession? A. Yes, sir.

Q. You say you and Ferraco drove off in your car? A. Yes, sir.

Q. Where did you drive with Ferraco? A. I rode to first the Kenwood Garage, on Portland Street and East New York Avenue, and dropped off the gun that Mendy Weiss gave me.

2244 Q. On the route to the Kenwood Garage did you do anything with the ignition key? A. I threw the key away while riding.

Q. I am referring to the ignition key of the hot car,—is that correct? A. Yes, sir.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit X for identification.)

Q. When you got to the Kenwood Garage in your car, was Ferraco still with you? A. Yes, sir.

Q. When you got to this Kenwood Garage what did you do? A. I took the gun and put it in the cellar. I hid it.

Q. Where is the Kenwood Garage located? A. Portland Street and East New York Avenue.

Q. You say you hid the gun in the cellar of the garage? A. Yes, sir.

Q. I show you People's Exhibit X for identification and ask you if you can identify that exhibit? A. Yes, sir. 2246

Q. What is it? A. That is the garage where I hid the gun in the cellar.

Q. In the cellar door leading to the cellar? A. Yes, sir.

Mr. Turkus: I offer this photograph in evidence.

(Received without objection and marked People's Exhibit 32 in evidence.)

2247

Mr. Turkus: May People's Exhibit 32, the garage photograph, be exhibited to the jury?

The Court: Yes.

Q. Now, is that garage on People's Exhibit 32 a garage that you had been familiar with? A. Yes, sir; I kept my car there all the time.

Q. Do the cellar doors on the right-hand side of the photograph, leading into the garage, indicate the place where you walked into the cellar? A. Yes, sir.

2248 *Sol Bernstein—For People—Direct*

Q. When you got into the cellar what did you do with the gun that Weiss had given you for destruction? A. I hid the gun.

Q. At that time where was Ferraco? A. In my car.

Q. After you hid the gun, Bernstein, what did you do? A. I went into my car to drop off Jimmy Ferraco.

Q. Where did you drop Ferraco off? A. I think it was on Franklin Avenue station and
2249 the Eastern Parkway, I am not sure.

Q. After you let Ferraco out of your car, as you say, what did you do then? A. I went to the Baths.

Q. What baths? A. Shumer's Baths, on East New York Avenue and Douglass Street.

Q. How long did you stay at Shumer's Baths? A. A couple of hours.

Q. When you left the Baths, what did you do? A. I went to look for Mugsy Cohen.

Q. Where did you look for Mugsy Cohen? A. Somewhere in the Brownsville section.

2250 Q. Is that the same Mugsy Cohen who helped you steal the car and who got possession of the radio? A. Yes, sir.

Q. Did you find Mugsy Cohen? A. Yes, sir.

Q. Did you have a talk with him—yes or no? A. Yes, sir.

Q. After you got through talking with Mugsy, did you get anything from him?

Mr. Talley: I object. This happening, if it ever occurred, has nothing to do with the apparent conspiracy the District Attorney, as I assume, is trying to present, and what he does or what Mugsy Cohen

or anybody else did in the absence of these defendants has no bearing upon this indictment whatever. I object to it.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. You may answer. A. I asked him if he got the radio.

Mr. Talley: I object to it and move to strike it out.

Mr. Turkus: I consent it be stricken out. 2252

Q. After you talked with Mugsy, did you get something? A. I got the radio off him.

Q. What radio are you talking about? A. The one that was taken out of the stolen car.

Q. What did you do with the radio that you got back from Mugsy? A. I went to Canarsie and threw the radio into the Bay, broke it up.

Q. After you threw the radio into the Bay, in Canarsie, what did you do? A. I went back to the garage, in the Kenwood Garage, and broke 2253 up the gun.

Q. Where did you break up the gun? A. In the cellar.

Q. What did you break it up with? A. A sledge hammer.

Q. What did you do with the pieces of the gun? A. Threw it in the sewers.

Q. Did you get any money from anybody for driving the car?

Mr. Rosenthal: That is objected to.

The Witness: I obey orders.

2254 *Sol Bernstein—For People—Direct*

Mr. Rosenthal: I move to strike out the answer.

The Court: Strike it out.

Q. Answer the question yes or no.

Mr. Rosenthal: I object to the question.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

2255 Q. Did you get any money for driving the car? A. No, sir.

Q. Did you get any money for stealing the car? A. No, sir.

Q. Did you get any money for stealing the plates? A. No, sir.

Q. Were you promised any money? A. No, sir.

Q. Did you know who was going to be killed? A. No, sir.

Mr. Rosenthal: Wait a minute. I ob-
2256 ject to the question.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Q. What was your answer? A. I knew somebody was going to be killed, but I did not know who.

Q. When for the first time did you learn the name of the victim of that killing?

Mr. Rosenthal: That is objected to.

A. When I picked up the paper, Sunday night.

Mr. Rosenthal: Just a moment: I objected.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Q. What was your answer? A. When I picked up the paper Sunday night I seen on the front page a pictu of the Rosen killing.

Q. Did you ever know that man, Joseph Rosen? A. No, sir.

Q. Now, after the killing of Rosen, did you continue to stay in Brooklyn for some time? A. Yes, sir. 2258

Q. Did you continue operating as a loan shark? A. Gambler and bookmaker, yes, sir.

Q. In what section? A. The Brownsville section.

Q. Where did you continue to operate from? A. Amboy and Sutter.

Q. How long did you operate there? A Until I got arrested—until I gave myself up.

Q. Let me direct your attention to January 1, 1940. Did a new District Attorney come into office then, to your knowledge? A. Yes, sir. 2259

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception. I move to strike out the answer.

The Court: Motion denied.

Mr. Talley: I take exception.

Will your Honor admonish the witness when an objection is made not to too quickly give his answer before your Honor rules on it?

2260

Mr. Turkus: I object to the implication contained in that statement.

Th Court: (addressing witness) You just be on the alert—

Mr. Turkus: I object to the sardonic look on Judge Talley's face.

Mr. Talley. Go ahead with your case.

Mr. Rosenthal: You and your associates have been looking toward the jury all the time.

2261

The Court: Now that the interruption of the Court is over, will the stenographer repeat what the Court started to say before?

(The reporter read as directed.)

The Court: (addressing witness) You just be on the alert. When you see counsel arise, you will know he intends making an objection. Do not give your answer until the Court has ruled on that objection.

The Witness: It will not happen again, your Honor.

2262

By Mr. Turkus:

Q. In or about February of 1940 was there activity by the law enforcement agent, in the Brownsville district which you knew about?

Mr. Talley: I object to that.

The Court: Objection sustained.

Q. What happened in February, 1940, in the Brownsville district?

Mr. Rosenthal: I object.

The Court: Objection sustained, too indefinite. The other ruling was because it was too leading.

Q. Answer this question yes or no: In February of 1940 did you see certain things happen in Brownsville?

Mr. Cuff: I object to anything this man saw or did or said in January, 1940, or thereafter. 2264

Mr. Turkus: This is preliminary, your Honor.

The Court: It is indefinite. The answer would, if given, involve guesswork by the jury, because, being as he says, a gambler and bookmaker in Brownsville, he would constantly see things happen in Brownsville that have no relation to this case. I don't think you need that.

Mr. Turkus: I withdraw the question in that form.

2265

Q. In or about February of 1940, after there was a new District Attorney, what did you do?

Mr. Cuff: I object to that on the ground it is incompetent, immaterial, and irrelevant what he did.

The Court: Objection overruled.

Mr. Cuff: Exception.

Mr. Rosenthal: I object to the form of the question.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

2266 *Sol Bernstein—For People—Direct*

The Witness: When District Attorney O'Dwyer declared war on the mob, I ran to Florida.

Mr. Rosenthal: I ask the answer to be stricken out.

The Court: Strike out the first part. Leave stand, "I ran to Florida."

Q. How long did you reside in Florida? A. A couple of weeks.

2267 Q. Where did you stay in Florida? A. The Commodore Hotel.

Q. What city? A. In Miami Beach.

Q. After you were there for a period of time, in Miami, Florida, where did you go? A. I went to Brooklyn.

Mr. Talley: I object. This has no bearing on anything. We are not concerned with what he did in 1940.

The Court: Objection overruled.

Mr. Talley: Exception.

2268 Q. Have you followed the question? A. Before, I seen somebody; that is the reason I went to Brooklyn.

Mr. Rosenthal: I object to his volunteering an answer without a question.

The Court: It is unresponsive; strike it out.

Q. Down in Florida did you see somebody? A. Yes, sir.

Mr. Rosenthal: I object to that as in no wise binding these defendants.

The Court: Objection overruled.
Mr. Rosenthal: Exception.

Q. Who did you see in Florida?

Mr. Rosenthal: The same objection.
The Court: Objection overruled.
Mr. Rosenthal: Exception.

A. I saw a lot of people there.
Q. Did you see any detectives you knew? 2270

Mr. Rosenthal: Objected to as leading and suggestive.
The Court: Objection overruled.
Mr. Rosenthal: Exception.

A. Yes, sir.

Q. How long did you stay in Brooklyn after you came back from Florida? A. I left right away for California, Los Angeles.

Q. When you went to Los Angeles, California, where did you stop? A. I stopped in the Hotel Olympic, a hotel on Olympic Avenue between 2271 7th and 8th, in Los Angeles.

Q. How many days did you stay in Los Angeles? A. A few days.

Q. Where did you go after you left Los Angeles? A. I went to San Francisco.

Q. How long did you stay in San Francisco? A. I stood a few days.

Q. Where did you stop in San Francisco? A. In The President Hotel; then I sold my car for $550.

Q. After you sold your car for $550, where did you go from San Francisco? A. I took a

bus and I went to Dallas, Texas, around Commerce Street.

Q. Where did you stop in Dallas, Texas? A. I stopped there about eight or nine hours.

Q. Where did you go from Dallas, Texas? A. I then took a bus and I went to St. Louis.

Q. Where did you stop in St. Louis? A. Some cheap hotel, not far from the Greyhound Bus station.

Q. How long did you stay in St. Louis? A.
2273 About two days.

Q. Where did you go from St. Louis? A. To Chicago.

Q. Where did you stop in Chicago? A. The Paramount Hotel, Winthrop Avenue.

Q. How long did you stay there in Chicago? A. Two weeks—about two weeks.

Q. After you were in Chicago a couple of weeks where did you go? A. I came in to Brooklyn.

Q. When you came in to Brooklyn where did you go? A. I gave myself up to Detective John McDonough.

2274 Q. Where did Detective John McDonough take you? A. He brought me to District Attorney O'Dwyer and Captain Bals. There I became a rat and told everything.

Mr. Rosenthal: I move to strike out the latter part.

The Court: Strike out after "Captain Bals."

Q. We were to the point where Detective McDonough took you to see District Attorney

O'Dwyer and Captain Bals; is that correct? A. Yes, sir.

Q. Do you remember the day you were brought in or that you gave yourself up as you have indicated to the jury? A. I think it was sometime in April; I don't remember no dates.

The Court: What year?

The Witness: 1940.

Q. When you were running from city to city as you told the jury, were you what is known in your language as "hot?" 2276

Mr. Talley: I object.

The Court: Objection sustained.

Q. What were you running from?

Mr. Rosenthal: I object.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I knew the combination was looking for me. 2277

Mr. Rosenthal: I ask that that answer be stricken out.

The Court: Yes.

Mr. Rosenthal: I move for a mistrial and the withdrawal of a juror.

The Court: Motion denied.

Mr. Rosenthal: Exception.

I ask your Honor to admonish the jury to disregard it.

Mr. Cuff: I make the same motion on behalf of the defendant Weiss.

The Court: The Court has already given instructions during the whole trial on matters that are stricken out, and further instructions are denied at this time.

Mr. Rosenthal: I take an exception.

Mr. Cuff: I make the same motion on behalf of the defendant Weiss.

The Court: I just ruled on both motions.

2279

Q. Do you remember the day you surrendered yourself to Detective McDonough and were brought to the District Attorney's office? A. I don't remember no dates.

Q. Was it sometime in April of 1940, can you remember that? A. Yes, sir, I know it was in April, 1940.

Q. Have you another name besides Sol? A. Yes, sir.

Q. What is it? A. Sholem.

Q. Is Sholem a Hebrew word? A. Yes, sir, a Jewish name.

2280 Q. Is that the name which you were given at the time of circumcision? A. Yes, sir.

Q. What is the English equivalent of Sholem? A. Peace.

Q. When you were brought in to see Judge O'Dwyer—just answer this yes or no—did Judge O'Dwyer talk to you? A. Yes, sir.

Mr. Cuff: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Cuff: Exception.

Q. And did you talk with Judge O'Dwyer? A. Yes, sir.

Mr. Talley: I made the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. After you talked to Judge O'Dwyer were you brought before the Grand Jury in Brooklyn sometime later? A. Yes, sir.

2282

Q. Did you testify before a Grand Jury up in Sullivan County? A. Yes, sir.

Q. Did you testify in the court-room up in Sullivan County? A. Yes, sir.

Q. Were you cross-examined there by a lawyer? A. Yes, sir.

Q. Where are you looking? A. Looking at that lawyer (indicating).

Q. Who do you mean, Mr. Saul Price? A. Yes, sir.

Q. Was that in the Gangy Cohen case? A. Yes, sir.

Q. Were you taken to the State of California 2283 and there did you testify before a Grand Jury? A. No, sir.

Mr. Cuff: I object to it.

The Court: What is your answer?

A. No, sir.

Q. Did you testify—yes or no—before the Brooklyn Grand Jury before you went up to Sullivan County? A. A long time before.

Q. Since the time of your surrender to Detective McDonough, under the circumstances you

2284 *Sol Bernstein—For People—Direct*

have related to the jury, have you been kept confined in various hotels? A. Yes, sir.

Q. Have you been confined with others? A. Yes, sir.

Q. Who are the people you have been locked up with? A. Do you mean in the hotel?

Q. Yes. A. Abie Reles, Syckoff, and Ai Panama.

Q. Are there police in the hotel? A. Yes, sir.

Q. Is it a separate suite? A. What do you
2285 mean by a separate suite?

Q. Are there a separate series of rooms there, so you can gain access only through certain methods? A. Yes, sir.

Mr. Talley: I object.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Are the doors barricaded? A. Yes, sir.

Q. Are detectives there, heavily armed? A. Yes, sir, machine guns, shot guns, and what else they have.

2286

Mr. Cuff: I object to it.
The Court: Objection overruled.
Mr. Cuff: Exception.
I move on behalf of the defendant Weiss for the withdrawal of a juror and the declaration of a mistrial.
The Court: Motion denied.
Mr. Cuff: Exception.

Q. Do you know of your own knowledge about an arrangement of mirrors which command a view of the corridor?

Mr. Cuff: Objected to.
The Court: Objection overruled.
Mr. Cuff: Exception.

Q. (continuing) —that the detectives have whereby they can see anybody coming up on that floor through the corridor? A. Yes, sir; there is a big mirror in the hallway right near the door.

Q. Is there a peep-hole in the door behind which you and these other men are kept? 2288

Mr. Cuff: I make the same objection.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. Yes, sir.

Mr. Barshay: Before the examination, your Honor recalls that I had a general objection to this man's testimony with respect to our defendant, Buchalter, and with respect to the reception of any exhibits in evidence, as not binding upon 2289
Buchalter. I now renew my motion to strike out each and every piece of testimony and each and every exhibit on the grounds set forth when I originally made my motion.

The Court: Motion denied.

Mr. Barshay: Exception.

The Court: If it is agreeable, I would rather take cross-examination in the order in which the names appear, so there will be no confusion. First, cross-examination by the defendant Buchalter.

What is the answer?

2290 *Sol Bernstein—For People—Cross*

Mr. Barshay: I shall not cross-examine this witness at this time.

The Court: I do not understand the answer.

Mr. Barshay: The answer is that this man has in no wise connected the defendant Buchalter, and I have nothing to cross-examine him on.

The Court: I did not mean that. You say "at this time."

2291 Mr. Barshay: If anything develops later on in which my client may be connected, then I will have something to cross-examine about. I have nothing to cross-examine him about now.

The Court: The Court cannot accept a qualification.

Mr. Barshay: No cross-examination.

Cross-examination by Mr. Talley:

2292 Mr. Talley: Before I commence to examine this witness, I request your Honor to remove the court officer who stands within six inches behind the chair of the witness. I ask your Honor to remove from the sight of the jury the two detectives who escorted this witness to the witness chair. There is another officer standing, in uniform, immediately alongside of the witness chair. I have no objection to his standing in that general vicinity, but the other display I ask to be removed, as prejudicial to these defendants and interfering with proper cross-

examination and prejudicial to the defendants in this court-room. There are plenty of detectives in this court-room and there are other uniformed policemen who are kept outside of the court-room. These three defendants are brought in here, in sight of the jury, in chains, literally in chains. There are three or four officers sitting alongside of these defendants, and I object to this display as unnecessary, unprecedented, and here for no other reason than to prejudice the jury against these defendants. I ask that they be removed, and that we proceed in a legal, judicial manner in the conduct of this trial from now on, and that we take away this theatrical display. 2294

Mr. Rosenthal: I join in that motion.

The Court: Anything by the defendant Buchalter?

Mr. Barshay: We join in the motion.

The Court: All right, for the purpose of the record—the set-up is the usual one which is followed in this court in all cases so far as the Court can recall. When witnesses are brought in, in custody, detectives who are charged with the custody—that is, detectives or other officers or jailers who are charged with the custody, stand back in the corner, substantially out of sight of the jury, but close enough not to lose technical custody. Then the two attendants of this court stand, first the Judge's personal attendant, directly behind the prisoner witness, and next an- 2295

other one, in a position where he can guard the door, which is directly to the left of the witness stand and which opens into the Judge's chambers, and provides a means of escape. There is nothing unusual about this, so that is not considered seriously, and it is denied.

Did I understand you to say the defendants are brought in in chains?

Mr. Talley: Yes.

2297 The Court: You mean they are manacled?

Mr. Talley: Yes, sir, manacled with these officers who are with them.

The Court: At the present time?

Mr. Talley. No, the manacles are removed when they come in the court-room, but not before; when they are seated and not before; and your Honor requires the jury to be in their seats so they can see this spectacle of how these men are brought in.

2298 The Court: Do you impugn the Court's honor? The Court does not require the jury to be in their seats in order to see "the spectacle" because the Court is not aware of it; and the Court has not been aware of it until you just informed the Court to that effect. This compels, being before the jury, a ruling in the presence of the jury, and that is, so far as the custodianship is concerned, until the defendants enter the court-room and are seated it is not within the Court's jurisdiction, and is not under the Court's direc-

tion. That is a responsibility that is elsewhere charged. But at no time during the trial will the Court permit any defendant to sit here menacled, and, so far as the Court is informed by you, the defendants have not sat here manacled. That is overruled.

Mr. Talley: My objection is to their being brought into your court-room menacled, and as soon as they enter the court-room the manacle or manacles are 2300
kept on them until they are seated. Then they are removed. As soon as recess is declared the manacles are then put on and they are taken out, not merely with these three detectives who are sitting alongside of them now, but also preceded and followed by uniformed court attendants. Your Honor has direction of what happens in this court-room, and it is what happens here that I object to, not what they do outside the court-room and not in the presence of the jury. 2301

The Court: These defendants have been brought into this court-room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor, down a public staircase, and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say. Denied.

Mr. Talley: Exception. I take an ex-

ception to your ruling and also to your comment, as being prejudicial to these defendants.

I am now asking for my own information and not for any other reason, I beg to assure the Court: Are you going to continue to permit these defendants to be brought into this court-room manacled, the manacles being kept on them until they are seated in their chairs?

2303 The Court: The Court is not under examination as a witness and declines to answer the question. Please proceed with your examination.

Mr. Talley: Exception.

By Mr. Talley:

Q. Bernstein, you referred to Mugsy in your testimony as being an automobile thief and a radio crook; do you remember that? A. Yes, sir.

Q. That is Mugsy Cohen is his name? A. Yes, 2304 sir.

Q. An automobile thief and a radio crook, that is how you designated him? A. Yes, sir.

Mr. Turkus: Objected to as already answered.

Q. What kind of a thief are you? A. Whenever I get orders from the mob.

Q. That is, you do any kind of a theft or any kind of criminal work so long as you are told to do so? A. Never, unless I get orders from the mob.

Mr. Talley: I move to strike it out.

The Court: Motion granted. Answer the question yes or no.

A. Yes, sir.

Q. You had considerable experience as an automobile thief before August of 1936, or the time you have testified about?

Mr. Turkus: I object. He testified to no such crime; it was September. 2306

Q. September, 1936, or the time you referred to—you had stolen automobiles before that? A. Not to steal, with a hot box.

Mr. Talley: I move to strike it out as not responsive.

The Court: Strike it out; just say yes or no.

The Witness: Yes, sir.

Q. How many automobiles had you stolen before September, 1936? A. Whenever I got orders. 2307

Mr. Rosenthal: I ask that the answer be stricken out as not responsive.

Mr. Turkus: I say it is responsive.

The Court: Strike it out.

Q. My question was, how many? A. Before 1936?

Q. Yes. A. About four or five.

Q. Where were they stolen, in Brooklyn? A. Yes, sir.

Q. Were they stolen in Brownsville? A. Yes, sir.

Q. You always stole them when you got orders, as you say, from somebody, is that right?

Mr. Barshay: I object to the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. From the mob.

2309 Q. When you stole cars, you would get orders to steal them? A. Until I got arrested; I stopped stealing them. Whenever I got orders from the mob I stole them.

Mr. Barshay: I don't want to interrupt, but may I have, on behalf of the defendant Buchalter, a general objection?

Mr. Talley: I move to strike out the answer.

The Court: The answer is partly responsive, but obviously objectionable and stricken out. The question may be repeated and the witness try to answer it more clearly.

2310

The Witness: I stopped stealing when I was arrested.

Q. What? A. I stopped stealing when I was arrested.

Q. When you were arrested when? A. For the car I stole—the plea I took to.

Q. You stopped stealing after you were arrested? A. Yes, sir.

Q. And you were arrested seven or eight

times, weren't you? A. What do you mean, I was arrested seven or eight times?

Q. Just listen to what I say. A. I was picked up a lot of times.

Q. You were arrested? A. Yes, sir, I was arrested.

Q. Was each of these arrests for stealing an automobile? A. No, sir.

Q. You said you were thirty years old now? A. Yes, sir.

Q. You were arrested and indicted for the crime of burglary in 1933? A. In 1930? 2312

Q. Weren't you? A. I don't remember no years.

Q. You don't remember the years? A. I don't remember, that was a long time ago.

Q. It would be eleven years ago, February 13, 1930, you were arrested and charged and indicted for burglary, weren't you?

Mr. Turkus: I object to the form of the question. As a former Judge of the Court of General Sessions he should know that arrests are not the subject-matter of cross-examination. 2313

Mr. Talley: He was indicted and pleaded guilty to the charge I am speaking of.

Mr. Turkus: Well, say so.

Mr. Talley: Don't you give me any instructions.

Mr. Turkus: It might do you some good.

Mr. Talley: You have a long way to go for that.

Q. May I have an answer to my question? A. What is that?

Q. (The Court:) Were you convicted in General Sessions? A. No, sir.

The Court: Then the objection is sustained.

By Mr. Talley:

2315 Q. In 1930 did you plead guilty to the charge of unlawful entry? A. Yes, sir.

Q. Were you guilty of the crime to which you pleaded guilty? A. Yes, sir.

Q. That was a burglary, wasn't it?

Mr. Turkus: I object. He just said it was unlawful entry.

The Court: Objection overruled.

A. Yes, sir.

Q. You were indicted for burglary? A. Yes, sir.

2316 Q. You took a plea to a lesser crime than burglary, which was unlawful entry? A. Yes, sir.

Q. Were you acting under orders from anybody when you committed that crime? A. No, sir.

Q. Now, in 1933, you again committed a burglary for which you were arrested, didn't you? A. Yes, sir. I don't know what year it is: I cannot tell you that. I know I was convicted of stealing a car.

Q. I am speaking of your arrest on March 2,

1933, that was for burglary, wasn't it? A. I don't remember that, sir.

Mr. Turkus: I object.

The Court: Objection sustained, unless there was a conviction.

Q. You were arrested again in 1933 and charged with petit larceny?

Mr. Turkus: Objected to.

The Court: Objection sustained. 2318

Mr. Talley: Exception.

Mr. Turkus: Just a minute. May Judge Talley be admonished that he is not to discuss arrests?

The Court: The attitude of the Court is not to admonish counsel on either side. Neither side can be admonished, because the law is elementary. The witness may not be cross-examined or examined as to arrests unless there was a conviction.

Q. You pleaded guilty in 1933 to the crime of 2319 stealing an automobile, didn't you? A. I don't remember what year it was, but I took a plea, yes, sir.

Q. Was it 1940? A. Not near that time.

Q. Was it 1938? A. No, sir, not that time.

Q. Was it 1935? A. No, sir.

Q. Before? A. I don't think—I don't remember that.

Q. You don't remember being charged with stealing an automobile? A. Yes, sir, I do remember.

Q. You don't remember the circumstances of

your having plead guilty to that crime? A. Yes, sir, I do remember.

Q. Wasn't that in 1933? A. I don't remember that date.

Q. December 19, 1933, to be correct. A. I don't remember the year.

Q. You mean you do not remember the date, but you do remember the charge and the arrest and your plea? A. Yes, sir.

Q. You were put on probation for three years, weren't you, by a judge in this court, Judge 2321 Martin? A. I don't remember; I know I was in front of Judge Martin and Vause on those two cases; that is all I can remember.

Q. Weren't you sentenced to three years in the penitentiary, and the sentence suspended while you were on probation? A. Yes, sir.

Q. Your probation, then, was for three years, wasn't it? A. I don't know how long it was.

Q. Do you remember being on probation at all? A. Yes, sir.

Q. Do you remember the time for which you were on probation? A. What do you mean, the 2322 time?

Q. You know what I mean. A. I don't know what you mean.

Q. Were you put on probation for six months or for a year? A. For the whole term, whenever I might have probation.

Q. Wasn't it three years? A. I don't recall it, sir.

Q. You had to report to a parole officer, didn't you, while you were on probation? A. Yes, sir.

Q. What was his name? A. I only believe it was Higgins, I am not sure.

Q. How many times did you report to him? A. Every time I was to make a report, I reported.

Q. How many times? A. Whenever I was to make a report.

Q. How often did you have to make a report? A. I think once a month, I think, I am not sure.

Q. How many months did you report to him? A. Whenever I had to.

Mr. Talley: I move to strike out the answer as unresponsive. I now ask the Court to direct the witness to answer these questions. 2324

The Witness: Whatever my probation was.

Q. (The Court) Was it about once a month for the entire period of your probation? A. Oh, no, every time I had to report was once a month or once in two weeks.

Q. (The Court) It varied? A. Yes, sir, continuously.

Q. For how long a time were you required to report once a month or once every two weeks, how often did you have to report? A. I don't understand. 2325

Q. Was it for a year, two years, or three years? A. It might have been.

Q. Might have been what? A. Might have been one year, might have been two years, might have been three years.

Q. I am asking you how long it was. A. I don't recall it.

Q. Did you steal the car that was the subject

2326 of that charge against you? Did you steal that because somebody ordered you to? A. No, sir.

Q. So that the two times when you pleaded guilty to crimes they were crimes which were committed by you yourself and not under orders? A. Excuse me, let me get this right; let me get this right. I didn't hear you.

Q. It is perfectly plain. A. No, sir, that car was stolen under orders.

Q. Didn't you just, two minutes ago, tell me
2327 it was not under orders? A. I refreshed my memory.

Q. You've refreshed your memory lately on a lot of things, haven't you? A. What do you mean by a lot of things?

Q. Don't you understand English? A. No, sir. I don't understand what you are saying about it.

Mr. Turkus: I ask that the sarcastic observation, "You have had your memory refreshed on a lot of things," be stricken
2328 out and the jury told to disregard it.

The Court: The objection is untimely. He has answered. An objection of that kind should be made promptly.

Q. In addition to being a burglar and an automobile thief, what other crimes have you committed?

Mr. Turkus: I object to the preamble.

Mr. Talley: He has stated he was a burglar and he pleaded guilty to it, and

he stated he was an automobile thief and pleaded guilty to that.

The Court: Objection overruled.

(At the request of Mr. Talley, the reporter reads the question.)

The Witness: Whenever I got orders from the mob.

Mr. Rosenthal: I object and move that be stricken out.

The Court: The question is what other other kinds of crimes.

2330

Mr. Rosenthal: I ask your Honor to admonish the witness to answer the question if it is physically possible, and not to volunteer the same answer each time he is asked a question.

The Court: That is not necessary.

Mr. Rosenthal: Exception to your Honor's refusal.

The Witness: Murders, schlammin jobs, and whenever the mob needed tires for their cars.

Mr. Rosenthal: I move to strike it out as not responsive. The latter part is not responsive.

2331

The Court: Strike it out.

By Mr. Talley:

Q. Are you finished? A. Yes, sir.

Q. How many murders did you commit or take part in? A. This is the only one. I took part in one in the mountains. I don't know what you mean by "part."

Q. You don't know the expression "take part

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in"? A. I know they brought a dead man there; that is all I can tell you.

Q. So you say you took part, participated in, and had something to do with two murders; is that right?

Mr. Turkus: I object. That is not the testimony.

The Court: Objection sustained.

Mr. Talley: Exception.

2333 Q. What did you say about two murders? A. What do you mean, what I said?

Q. Just repeat to me what you said.

Mr. Turkus: Objected to as repetitious.

Mr. Talley: I have a right, on cross-examination, to have any such repetition—that is one of the purposes of cross-examination.

The Court: Objection sustained.

Mr. Talley: Exception.

2334 Q. Do you say you took part in or committed one murder other than this one; is that what you said?

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. What do you mean? I don't understand you.

Q. That murder in the mountains, did you take part in the murder itself? A. I know they brought a dead body there; I was not there when it was killed.

Q. What did you do? A. I helped them bury the body.

By the Court:

Q. You helped dispose of it after death, that would be the most you recall? A. Yes, sir.

By Mr. Talley:

Q. You know that was a man who was murdered in Sullivan County? A. When they brought the man over I didn't know anything about it. 2336

Q. You knew a man named Yuran had been murdered? A. I never knew his name until I read the papers, when I gave myself up.

Q. You say you did not know his name? I am asking you, didn't you know the man in Sullivan County, in the murder you referred to, that his name was Yuran? A. I didn't know his name at that time.

Q. Do you know it now? A. Now I do, yes, sir. 2337

Q. You were one who took the police in Sullivan County, whether they came from New York or belonged up there, to the place where the body of this man Yuran, who had been murdered, was buried? A. Yes, sir, that is right.

Q. What else did you show them? A. What do you mean, what else? You will have to explain better.

Q. You don't understand English at all? A. I understand English, but you have to explain.

Q. You did not have a bit of trouble answering the District Attorney's questions? A. That

was the first murder I ever was on; I cannot forget that.

Q. That was the first murder you ever were on? A. Yes, sir.

Q. That is the Yuran murder? A. I just said the Rosen murder.

Q. Was the Yuran murder after the Rosen murder? A. Yes, sir.

Q. Well, then you don't deny taking part in the Rosen murder, do you? A. No, sir.

2339 Q. You have not been indicted for your part in the Rosen murder, have you? A. No, sir.

Q. You were not indicted for anything you had to do with the Yuran murder in Sullivan County? A. No, sir.

Q. You have never served time for any of your crimes, have you? A. No, sir.

Q. And you are taking good care now not to serve any time for this Rosen murder if you can help it? A. What do you mean? I don't understand you.

Q. You went to public school in Brooklyn? A. Yes, sir.

2340 Q. Were you born here? A. In Brownsville, yes, sir.

Q. I think you said you went to junior high school. A. Yes, sir.

Q. And you still say you don't understand my language? A. I did not finish public school; I went to 8-A. I understand, too.

Q. Didn't you tell us you went to junior high school? A. Well, it was junior high school, the 9-B.

Q. You went to a junior high school? A. Yes, sir, that is what they called the school.

Q. You don't speak any language other than

the English language? A. I can speak Jewish very good.

Q. Now, you tell us that you worked, when you left school, one month as a messenger boy? A. Yes, sir.

Q. Did you lose your job in the messenger company at the end of the month? A. I quit.

Q. Did you go right to work then? A. Later, a little later on.

Q. How much? A. About a month or so later.

Q. Then you went to work for another concern, didn't you? A. A hat factory. 2342

Q. You told us you worked three months there. A. A couple of months.

Q. You told us on Friday three months, do you remember? A. It could be three months.

Q. Or it could be two months? A. It could be two months.

Q. Then you told us you got a job as a cutter in leather goods? A. Yes, sir, Majestic Brief Case Company on Spring Street and Broadway.

Q. Are they still in business, do you know? A. I don't know, sir.

Q. You told us you worked in that place for three years. A. Yes, sir, about three years. 2343

Q. You said three years. Do you mean to change it? A. About three years.

Mr. Turkus: I object.

The Witness: I am not accurate at years.

Mr. Turkus: I am trying to make a formal objection, but these are all rapid-fire questions and answers.

The Court: What is your objection?

Mr. Turkus: My objection was as to

the form of the question, but it has been answered; an objection is worthless, so I withdraw it.

Q. As a matter of fact, you only worked two years for the leather factory, didn't you? A. I worked about three years.

Q. Didn't you testify under oath in another case you worked there for two years? A. Maybe I did, sir.

2345 Q. You testified here that you worked there three years. A. I am not accurate at years; I know the facts; just ask me the facts, and I will tell you.

Q. Which was right, two years or three years? A. Listen, sir, I am not accurate at years.

Q. You don't know a year contains twelve months? A. I know that.

Q. I am asking you now which was the correct testimony you gave, that you worked for this leather place two years or that which you gave on a previous occasion, under oath, or the testimony that you gave here Friday, that you

2346 worked for three years?

Mr. Turkus: Objected to as argumentative and repetitious; already fully answered.

The Court: It is immaterial, too, because it applies to when he was a messenger boy. Objection sustained.

Mr. Talley: I take an exception. I want to correct your Honor's impression that this has to do with his service as a messenger boy. He said he worked in a leather factory. One was for a month

and the other was three months, then he said he worked three years subsequent to being a messenger boy. He testified on another occasion that he only worked there two years.

The Court: I recall the witness used the word "about." Objection sustained. This is all a matter of background and has no direct or indirect relation to the alleged crime.

Mr. Talley: Exception. 2348

It has very much more relation to the alleged crime than has the larger part of the testimony he gave.

Mr. Turkus: I object to his going over every period of this witness's life without restriction.

The Court: The Court is most liberal.

Mr. Rosenthal: I object to that remark. These are all matters that have been brought out on direct examination by the District Attorney, and defense counsel certainly has a right to prove and cross-examine on matters which the District Attorney brought out to this jury on direct examination in this case. 2349

The Court: Is that a speech or an objection?

Mr. Rosenthal: I am making an objection.

The Court: The Court strikes it out because it constitutes a speech and is not for the edification of the Court but the edification of the gallery. Now proceed.

Mr. Rosenthal: I except.

2350 *Sol Bernstein—For People—Cross*

By Mr. Talley:

Q. In the trial in which you testified in Monticello, Sullivan County, in the month of June, 1940, were you asked these questions and did you make these answers:

"Q. Where did you work? A. I worked for a leather company's place.

"Q. Right after you left public school? A. The Majestic Leather Company.

2351 "Q. What is their address? A. I don't remember.

"Q. Are they in business now? A. I don't know.

"Q. How long did you work for them? A. Two years." Were you asked those questions and did you make those answers that I have just read? A. If it is in the book I said it.

Mr. Talley: I move to strike out the answer and ask for a responsive answer to my question.

The Court: Motion denied.

2352 Mr. Talley: Exception.

Q. How old were you when you went to work for the Majestic Leather Company? A. How old I was?

Q. Yes. A. About sixteen, close to sixteen.

Q. Sixteen? A. I think so; I am not sure.

Q. Would you be eighteen when you left their employ? A. I might have been eighteen or nineteen, sir.

Q. Whether it was eighteen or nineteen, were you then heavily in debt? A. When I worked in the leather company I started getting in debt.

2353

Q. When you went to the leather goods company? A. Yes, sir.

Q. Which you say was when you were about sixteen? A. Now wait a minute—eighteen or nineteen—something like that.

Q. You were eighteen or nineteen when you left? A. Yes, sir. Not when I was sixteen. I did not graduate until then.

Q. If you were sixteen when you left there— A. I don't remember saying it is—I will let you know.

2354

Q. I am trying my best to give you an opportunity to let me know. A. I will let you know. When I graduated—

Q. Answer my question. A. What is it?

Q. Did you say you went to work for the leather goods concern when you were about sixteen? A. Yes, sir.

Q. Did you say that when you went to work for the leather goods people you began to get into debt? A. Yes, sir.

Q. Then by the time you left there, whether it was two or three years,—you would be eighteen or nineteen,—you were very heavily in debt, weren't you? A. Yes, sir.

2355

Q. And who did you owe money to, shylocks in Brownsville? A. Yes, sir, the mob on Sackman and Livonia Avenue, and if you want me to tell you, I will tell you.

Q. I will give you a chance to tell everything you want to tell before I get through with you, don't worry about telling me.

Mr. Turkus: I object to the criticism of the offer in his answer.

Mr. Talley: Will you kindly take your seat?

2356

Mr. Turkus: Will you kindly take yours? As a former judge, you should know how to conduct yourself.

Mr. Talley: Sit down.

Mr. Turkus: No matter whom you represent—

Mr. Talley: I told you before I did not need any admonition from you, and don't make it necessary for me to say it again.

The Court: The Court's gavel is in
2357 chambers, locked up in the desk. I did not anticipate having use for it in this trial. I have not, so far. Now, let us try to get along nicely. We all know how to try a case.

Q. So that after you left the leather goods place you became a shylock on your own account? A. Yes, sir.

Q. And a gambler? A. On my own account, yes, sir.

Q. And a bookmaker? A. On my own account.

2358 Q. And a thief? A. Whenever I got orders from the mob.

Mr. Rosenthal: I move that be stricken out.

The Court: Strike it out.

The Witness: Now wait a minute, sir —not at that time; until I got the arrest, then I started; but I don't know. When they told me to steal that car, I was working for that mob then.

Mr. Rosenthal: I move to strike out

the answer as not responsive to any question.

The Court: Strike it out.

Q. After you left the leather goods place you did not do any honest work, did you? A. Shylocks—how can I do any honest work.

Q. Is your answer no? A. What do you mean, "No"? I just answered you.

Q. Do you know what "No" means in the English language? A. Yes, sir. I was shylocking, I just answered you. 2360

Q. And also a thief? A. Yes, sir, for the mob.

Mr. Rosenthal: I object and ask the latter part be stricken out.

The Witness: Listen, Counsellor—

Mr. Rosenthal: Just a minute, Mr. Witness; I am addressing the Court. I move the latter part of the answer be stricken out.

The Court: Strike it out.

Mr. Rosenthal: I ask your Honor to admonish this witness,—he has been admonished by your Honor twice,—to answer questions and not volunteer. 2361

The Court: (addressing witness) Stop saying "for the mob."

The Witness: I was not an angel. Does that satisfy you?

The Court: Do not quarrel. Just keep your head and answer questions.

Q. Instead of being an angel, you were a safe burglar, weren't you? A. No, sir.

Q. You have broken open many safes right

here in this Borough of Brooklyn, haven't you? A. No, sir.

Q. Do you mean to say you never opened or cracked a safe? A. No, sir.

Q. That is what you mean to say? A. Yes, sir.

Q. Weren't you known throughout Brooklyn amongst your crowd, as a safe burglar? A. You are telling me something new.

Q. Weren't you? A. I don't know, sir.

2363 Q. You told us all the jobs you had before you became a criminal. Do you know what— A. What do you mean, before I became a murderer? I don't get you.

Q. Well, did you become a shylock? A. When I started being a shylock, then I didn't become an angel. I was not a good citizen, if that is more clear.

Q. I don't understand that language at all. A. Well, I don't know.

Q. You say when you started to become a shylock you became an angel?

2364 Mr. Turkus: He said he did not become an angel.

Q. Now my question is, and I will repeat it—you listen to it: After you left the leather goods concern you went into the shylock business; is that right? A. Yes, sir.

Q. And you told us the only job you had since you were a school boy was a messenger boy, the other job which you worked three months at, and the leather goods concern. That is all the legitimate business experience you had, wasn't it? A. Legitimate?

Q. Yes. A. Yes, sir.

2365

Q. Now, you are not confused about that, are you? A. What do you mean, I am not confused?

Q. You understand what I am saying to you, don't you? A. When I worked it was a legiti- matter matter. I did steal. I got arrested,—I think so, I am not sure,—for trying to break into a store. I am not sure I was working at that time.

Q. You told us three place where you worked. A. I am not sure; if I am not positively sure I will tell you.

2366

By the Court:

Q. In the burglary, in 1930, were you working then? A. I know when I was working—I think I got arrested for trying to break into a store, but I cannot remember just when,—I think so; I am not sure.

By Mr. Talley:

2367

Q. Now, you are not sure whether, when you broke into the store in 1930, you were working for the leather goods company? A. Yes, sir.

Q. You are not sure about it? A. No, sir.

Q. You are sure you worked for a messenger company? A. What did you say? I worked as a messenger boy, yes.

Q. You did hear me? A. I worked in a radiogram, too, on Wall Street.

Q. Radiograms? A. Radiograms, not Western Union or not Postal Telegraph.

Q. As a messenger boy? A. Yes, sir.

Q. Then you worked where? A. On Wall Street.

Q. Then you worked in a hat factory? A. Then a brief case place.

Q. Then after that where did you work? A. After the brief case place I began as a shylock.

Q. You did not go in any other business than that of crime? A. As a bookmaker and a gambler. Whenever I was told to do something—if you want me to tell you who, I will tell you who.

Q. You are not basting to tell a whole lot,
2369 Bernstein—you certainly are anxious.

Mr. Turkus: I object to that. If you want to take up his invitation, accept it. If you don't, I object to the comment.

Mr. Talley: We are not taking any invitation from this witness, I will tell you that.

The Court: That does not require any ruling, the comments.

Q. Have you told us all the businesses you were engaged in from the time you left high
2370 school? A. I was not so smart, I did not go to high school.

Q. You said you went to junior high school. I will change it.

Mr. Turkus: I object. He has answered.

The Witness: A junior high school is not a high school by me; it is a junior high school.

Mr. Talley: At page 481 of his testimony—and I am addressing the Court—this witness said, "I went to Junior High

2371

School 178, Dean and Saratoga Avenue, Brooklyn."

Q. My question is: Were you in any other business besides the three you have told us about? A. Three what?

Q. Three places of employment which you had. A. I told you what I was: shylock, a bookmaker, and a gambler, and what else I told you before. If you want me to tell you it, I will tell you it.

2372

Q. That is what you call yourself? A. What do you mean? Yes, when I was shylocking, a bookmaker, and a gambler, that was my business.

Q. Why didn't you tell us about operating a candy store here in Brooklyn when you were being asked what business you were engaged in? A. I forgot to tell you.

Q. Ah—you forget that? A. Yes, sir. You asked me, and I am telling you.

Q. Now, have you forgotten any other line of business you were in besides operating a candy store? A. Maybe you can tell me, I don't know.

2373

Q. I am asking you. A. I don't know.

Q. How tall are you? A. 5 foot 8, I think, or 8½.

Q. How much do you weigh? A. 165 pounds when I was on the outside. I don't know now because I have not got a scale to weigh myself.

Q. We will have to get you one and make you comfortable. You are living in the Half Moon Hotel, aren't you?

Mr. Turkus: Just a minute. May we have some d'gnity in the conduct of this case?

The Witness: Do you want me to answer that question?

Q. You are living at the Half Moon Hotel, aren't you? A. Yes, sir, heavily guarded, with plenty of machine guns and shot guns.

Q. Is that at your request you are heavily guarded? A. I thought you meant that.

Q. Is it at your request you are heavily guarded? A. What do you mean, at my re-

2375 quest?

By the Court:

Q. Did you ask for it? A. (no answer.)

By Mr. Talley:

Q. Do you speak Yiddish better than you do English? A. To say what?

Q. You heard what I said. A. English I talk better.

Q. You don't need an interpreter, do you?

2376

Mr. Turkus: I object. This is sarcastic.

The Court: Objection sustained.

Q. You told the District Attorney many times about your being in what you said was "My automobile." Do you remember using that expression? A. Yes, sir.

Q. What kind of an automobile was that? A. A Buick.

Q. What kind of a Buick? A. A '36—a '35, four-door sedan.

Q. Was it your automobile? A. Yes, sir.

2377

Q. Who did you buy it from? A. Who did I buy it from? I think Litvin got that for me, East New York Avenue.

Q. Who is he? A. A dealer who sells cars, on East New York Avenue.

Q. Was it a new car or a second-hand? A. A new car.

Q. A new Buick car? A. Yes, sir.

Q. Was it registered in your name? A. No, sir.

2378

Q. How long did you have it before this time in September, 1936, we have been talking about? A. I owed money to shylocks and I had to sell it.

Q. How long did you have it? A. I am telling you when, when I had to pay money to shylocks I sold it.

Q. How many weeks, days, or months? A. I am telling you when.

Q. Did you have this car before September 13, 1936? A. Not when I had to pay the shylocks, I sold that car.

2379

Mr. Talley: I move to strike it out as not responsive.

Mr. Turkus: Consented to.

Mr. Talley: I ask your Honor to have the witness answer the question.

By the Court:

Q. Do you remember about how long you had it? A. I really cannot tell you.

By Mr. Talley:

Q. In whose name was the registration? A. Al Glass.

Q. Who is Al Glass? A. He was my partner in shylocking.

2380 Q. Why didn't you have it in your name? A. Why didn't I have it in my name?

Q. You heard what I said. Answer the question without repeating. A. Because one of the mob who like to borrow my car took it for a couple of hours and kept it for weeks; that is the reason why.

Mr. Rosenthal: I object.

Mr. Turkus: It is a fair question and invited the answer.

2381 Mr. Rosenthal: I object to a speech by the District Attorney when I make an objection.

Mr. Turkus: When the District Attorney objects he calls it a speech. That is an objection.

The Court: The objection is dilatory. It can be viewed as a motion, and the Court denies the motion.

Mr. Rosenthal: I respectfully except.

Q. So the registration was in the name of 2382 Al Glass, who was a partner of yours? A. Yes, sir.

Q. Was it at his request that the car was put in his name?

Mr. Rosenthal: I object.

The Court: Sustained as immaterial.

Q. Did you pay for the car with your money? A. I paid for it in cash.

Q. With your money? A. Yes, sir, about $1,200.

Q. How much? A. About $1,200.

2383

Q. Where did you get the $1,200 to buy this car? A. I won it in gambling.

Q. And stealing? A. No, sir.

Q. And murdering? A. Whenever I got orders from the mob.

Mr. Rosenthal: I ask the answer be stricken out.

The Court: Strike out the latter part.

2384

Q. Then, you committed or participated in more murders than these two you have spoken of? A. That is not what I told you.

Q. How many murders did you take part in or commit besides those two you say you know about?

Mr. Turkus: I object. That is not the testimony.

Mr. Talley: Never mind what the testimony is. I am cross-examining.

Objection overruled.

2385

A. None.

Q. This trial that you testified to before the grand jury in the court-room in Monticello, that was a trial of a man named Gangy Cohen, wasn't it?

Mr. Turkus: I object. The question is not intelligible; "this trial" he "testified before the Grand Jury."

Mr. Talley: In answer to your question, he testified—

Mr. Turkus: I have an objection to that question as not intelligible.

2386 *Sol Bernstein—For People—Cross*

Mr. Talley: In answer to the District Attorney's question, this witness stated that he testified in Monticello before the Grand Jury and in the trial. I am pursuing that inquiry that was brought into this case by the District Attorney.

By the Court:

Q. Did you testify at the trial of Gangy Cohen?
2387 A. Yes, sir.

By Mr. Talley:

Q. Did you tell the truth there? A. All the truth, no, because I did not want to give the mob any information before; they were not picked up yet.

Mr. Rosenthal: I move to strike out all after "No."

The Court: Let it stand.

Mr. Rosenthal: Exception.

2388

Q. You took an oath to tell the truth when you took the witness chair? A. Yes, sir.

Q. Just the same oath as you took in this court-room on Friday last? A. Yes, sir.

Q. And after taking that oath to tell the truth you testified falsely in Sullivan County? A. Whatever Gangy told me, I said the truth, but I did not want to give no information to the mob because they were not picked up yet, and he was a lawyer.

Mr. Rosenthal: I move to strike it out.

A. (continuing) But I told the Grand Jury the truth about this case.

The Court: The latter part is not responsive. Strike it out.

Q. You testified falsely, didn't you? A. About some matters in this trial in Monticello, because I did not want to give information.

Q. Did you or didn't you? A. Because I did not want to give information. 2390

Q. Did you or didn't you? A. I told the Grand Jury the truth about everything in this case long before I was a witness.

Q. Did you testify falsely when you appeared in court in the case in Monticello?

Mr. Rosenthal: I object.

The Court: Yes or no.

Mr. Rosenthal: I have a motion to make. My motion is to strike out the voluntary statement that this witness is repeating right now. It is not responsive to the question asked by Judge Talley. 2391

The Court: Strike it out.

Mr. Rosenthal: In view of the fact of continued repetition by this witness, I ask your Honor to admonish the jury to disregard the statements which your Honor has stricken out.

The Court: The jury has already been instructed on that.

By the Court:

Q. Did you testify in the trial of Gangy Cohen

2392 *Sol Bernstein—For People—Cross*

to anything that was not true? A. Yes, sir, I knew I was doing wrong.

Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong.

The Court: At this time we will require only direct answers and no explanations. The District Attorney will examine at the conclusion of the cross.

2393 Mr. Rosenthal: I move to strike out everything after "Yes."

The Court: Strike it out.

By Mr. Talley:

Q. In this trial of Gangy Cohen, you testified on behalf of the District Attorney then? A. I don't understand what you mean, "behalf."

Q. You testified for The People? A. I am a stool pigeon, sir.

Q. You were a stool pigeon? A. I am a stool pigeon, in other words, a rat. Does that satisfy you?

2394

Q. Oh, no, I am not nearly satisfied with you yet. I am not nearly satisfied. When you say "rat", you mean one who squeals on his friends? A. What am I to do now?

Mr. Rosenthal: I move to strike that out.

Q. What did you say you are doing?

Mr. Rosenthal: I object to it.

The Court: The whole colloquy is wrong.

2395

Q. What did you say you are doing? A. I am telling the truth about everything.

The Court: Let us proceed with question and answer; do not quarrel.

Mr. Turkus: Mr. Talley continues on the repetition of a fair question and answer of the witness, and then we have another counsel object to it.

Mr. Rosenthal: I am representing one of the defendants, and I have a right to object whenever I feel like it. 2396

The Court: What is your objection?

Mr. Rosenthal: My objection was to the question of Judge Talley, and now my motion is to strike out the answer. The objection was on the record before the answer was given.

The Court: Objection overruled. Motion denied.

Mr. Rosenthal: Exception.

Q. You testified against Gangy Cohen, didn't you? A. Yes, sir. You tell me for what. 2397

Q. What? A. You tell me that.

Q. You did testify against him? A. Yes, sir.

Q. You testified as to a statement that you said Gangy Cohen made to you, in Florida. A. What, sir? You are making a mistake.

Q. Where was it? A. In California, Los Angeles.

Q. You testified that Cohen had admitted killing the victim of the Monticello crime? A. Yes, sir, Walter Sage, he told me he had something to do with it.

Q. You testified that Gangy Cohen told you

2398 *Sol Bernstein—For People—Cross*

he had killed Walter Sage? A. With other people, yes, sir.

Q. And the jury acquitted Gangy after hearing your testimony, didn't they?

Mr. Turkus: I object.

The Court: Very reluctantly, the Court is required to censure Mr. Talley for asking a question which he knows is incompetent, and the jury is instructed to utterly disregard it. The decision of this
2399 case has no relation to the decision in any trial of any other case, gentlemen. This case is being decided in this court-room, not in Sullivan County.

We will take a recess now.

Mr. Talley: Just before you do that, you have got to give me an opportunity to note my exception to your Honor's statement as well as to your Honor's ruling. Now I am ready to adjourn if your Honor sees fit.

The Court: (addressing the jury) We
2460 will resume at 1:30 o'clock. That will give you an opportunity to go around and be seated together before the crowd comes in the restaurant.

Please do not discuss the case nor let anybody talk to you about it. Keep your minds open.

First the witness will leave.

(Witness leaves the witness stand.)

The Court: Now the jury may go out. The defendants are remanded.

(Whereupon a recess was taken until 1:30 P. M.)

(Continued in Volume II)

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER

vs

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER

vs

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER

vs

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED DECEMBER 30, 1942
JANUARY 2, 1943.
JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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Sol Bernstein—For People—Cross 2401

(Afternoon Session. Trial Resumed.)

SOL BERNSTEIN, resumed the stand:

By Mr. Talley:

Q. You told the District Attorney about your middle name being Sholem?

Mr. Turkus: Objected to. That is not the statement. 2402

Q. Is that your first name, Sholem? A. No, sir.

Q. What? A. It is my Jewish name.

Q. What is your first name, Sol, isn't it? A. Solomon.

Q. Solomon Sholem Bernstein? A. Yes, ir.

Mr. Talley: What is wrong with that?

Q. What other names have you been known by other than Sholem Bernstein and Solomon Bernstein? A. That is all. 2403

Q. You used the name Berman, didn't you? A. Yes, sir.

Q. Tell us what other names you used besides Berman. A. The only time when I was running, sir.

Q. Is your testimony now that you never used any other name than Sholem besides your own and Berman?

Mr. Turkus: I object. His testimony "now", carrying an implication that it

2404 *Sol Bernstein—For People—Cross*

might have been something else some other time.

The Court: Sustained.

Mr. Talley: Exception.

Q. You were known in Brownsville as The Chief, weren't you? A. No, sir.

Q. Never heard yourself called The Chief? A. No, sir.

Q. Never heard yourself referred to as The
2405 Chief? A. No, sir.

Q. You don't mean that, do you? A. No, sir.

Q. I suppose you mean by that answer, yes, sir. My question is, you don't mean that. Do you want to say that you do mean it or that you don't mean it? A. No, sir.

Q. I will ask you again, to straighten out the record, so as not to take any advantage of that answer. Were you known as The Chief? A. No, sir.

Q. Did you ever hear of the Ali Baba gang? A. No, sir.

2406 Q. Your answer is that you never hear of it? A. No, sir.

Q. And weren't you called the Chief of that gang? A. No, sir.

Q. Wasn't that a gang, or to use your expression, a mob, around Brownsville of which you were the head? A. I know nothing about it, sir.

Q. You know nothing about it? Were you in Florida in 1897, or 1937?

Mr. Turkus: What is the first part of the question?

2407

Q. Were you in Florida in 1937? A. I might have been, sir.

Q. What? A. I might have been, sir.

Q. You might have been any place. My question is were you there? A. I think so, but I am not sure.

Q. Were you there in 1939? A. I am not sure. I might have been.

Q. What is your best recollection? A. I am not sure, sir.

2408

Q. Have you any recollection as to whether you were in Florida in 1939? A. 1939?

Q. Yes. A. I think I was, sir, but I am not sure.

Q. You were working there, weren't you? A. Yes, as a shylock.

Q. You were working as a bouncer, weren't you? A. I don't know what year it was, but I was working in a gambling joint, sir.

Q. Doing what? A. Stopping people they shouldn't cheat.

Q. Stopping the people who would cheat? A. Shouldn't cheat.

2409

Q. What did you call yourself, a spotter? A. Yes, sir.

Q. What was the name of the place in which you were working? A. I don't know what year it was, but I know I was working in the Frolics Club in Miami Beach, a gambling place.

Q. Did you fix that as 1939? A. I don't recall the year. I know I was working there.

Q. Have you any recollection as to when it was? A. Counsellor Barshay can tell you that, sir.

2410 Q. I am not asking them; I am asking you. A. I can't remember, sir.

Q. Do you remember who it was that got you the job there? A. Yes, sir.

Q. Who? A. Mendy Weiss.

Q. And who introduced you to Mendy Weiss? A. Louis Capone and Harry Strauss.

Q. They are the ones that introduced you to him? A. A long time ago. I think it was 1935, sir, when I first met him.

2411 Q. Isn't it a fact that you never knew Mendy Weiss until 1939 when he helped you to get a job in Miami, Florida? A. No, sir.

Q. That is not true? A. No, sir.

Q. Did you see Mendy Weiss at or about the time you got the job in the Frolics Club in Miami? A. Yes, sir.

Q. And you asked him to get you the job, didn't you? A. No, sir.

Q. Did he get it for you without your asking him? A. What did you say, sir?

2412 (Question read by reporter.)

A. Yes, sir.

Q. You went down there and he put you to work without your asking him to get you a job; is that what you want us to believe? A. I was down there?

Q. Wern't you? A. Yes, sir.

Q. And you asked Mendy Weiss to get you a job? A. No, sir.

Q. Did he ask these people to put you to work there? A. I don't know, sir.

Q. You told us, didn't you, that he helped you

to get the job, or got the job for you? A. I found out later, sir.

Q. How much later? A. When I went to work there, sir.

Q. You did not know that it was he who got you the job there until after you went to work? A. Yes, sir.

Q. Do you know a man named Barney Cutler? A. Yes, sir.

Q. Wasn't it Barney Cutler who introduced you and Mendy Weiss in 1939 in Florida? A. 2414 No, sir.

Q. Did you see Barney Cutler there? A. Yes, sir.

Q. Was he there at the time you got the job in this gambling house? A. Yes, sir.

Q. Did you ever have a talk with Barney Cutler and Mendy Weiss about that job? A. No, sir.

Q. Do you say that it was not in the winter of 1939—

Mr. Turkus: Objected to. 2415

The Court: Finish the question.

Mr. Turkus: I am sorry. I thought it was finished.

Mr. Talley: How could it be finished?

Q. Do you say that it was not—I would like the District Attorney to be seated while I am asking the question—do you say it was not in the winter of 1939, in Florida, Miami, that you were first introduced to Mendy Weiss?

2416

Mr. Turkus: It is objected to as already answered.

Mr. Talley: I have a right to repeat a dozen different times in cross examination.

The Court: You do not have to argue the point.

Mr. Turkus: That is more than I have been taught.

The Court: Objection overruled.

2417 Q. Will you answer, please? A. He did not introduce me, sir.

Q. What? A. He did not introduce me to him, sir.

The Court: Where is the Frolics?

The Witness: It is off the Causeway in Miami.

The Court: Miami City or Miami Beach?

The Witness: Miami City.

2418 Q. Who was running it at the time you worked there? A. Game Boy, Moey Dimples and Tommy Cutty.

The Court: You mean around that circle where Sears, Roebuck is?

The Witness: Yes.

Q. Did you ever hear of a man named Lefty Clark connected with that Frolics? A. Yes, sir.

Q. He was the real owner of it, wasn't he? A. I don't know, sir.

Q. What was his connection with it? A. He was running the game there.

Q. Why didn't you tell the jury when we asked you who was there; why did you omit his name? A. There was a lot of people over there, sir.

Q. But Lefty Clark was running the game, wasn't he? A. The New York game. There was all kind of craps up there.

Q. He was running one game? A. Yes, sir.

Q. And were you working for him? A. No, 2420
sir.

Q. Were you working in connection with his game? A. I don't know if it was his game.

Q. Didn't you just tell me it was his game? A. I didn't mean that. I was working for the house over there.

Q. Who else was in that gambling house besides the ones you mentioned? A. There was a lot of peoples over there I don't remember.

Q. You tell us all you do recollect. A. I told you.

Q. We are asking for names. Have you told 2421
us all that you recall? A. I just don't recall, sir.

Q. You just don't recall? A. A lot of people.

By the Court:

Q. Were there quite a few tables there? A. Lots of tables there.

Q. Did they have roulette? A. Roulette and western craps. Lefty Clark had a New York game.

Q. Cage game? A. No, sir, that is New York craps. No, there will be most of them playing western craps, different from a New York game.

Q. Not Cuban? A. I don't know what you mean.

Q. Silver dollars? A. They all played with silver dollars—not the New York game.

Q. Wheels of fortune? A. They called that the table game.

Q. Squared off? A. Yes, sir, there is two games; one you call the line and one the New York game.

2423

Q. How many tables all told? A. There was only one New York crap game and the rest were called field games.

Q. How many tables all told? I want to get some idea of the place. A. About five or six besides the New York game.

Q. And how many table men? A. They had about three on each field game, that is the western game.

Q. How many in all? A. About 20 or 22 men all told.

2424

Q. Twenty or 22 table men? A. Yes, sir.

Q. How many inside guards? A. Oh, there was a lot of spotters there like me.

Q. I mean with guns? A. I don't know, sir.

Q. How many outside guards? A. There was no outside guards. It was wide open.

Q. Anybody could go in? A. Yes, sir, women, children and everything.

Q. How many guards to protect the house bank roll? A. I can't tell you that, sir.

Q. How long were you working there? A. About a week.

2425

Q. The spotter's job is to find out who can be cheated? A. No, sir, to find out like, for instance, they got people working in the game as a shill that I should see they didn't put no money in their pockets. That was my job.

Q. The shill is the phoney player? A. That's right, to try to get customers.

Q. The shill, not being allowed to win, might stick money in his pocket and get away? A. Yes, sir.

Q. The shill is employed by the house? A. Yes, sir.

2426

Q. And he has to lead others into the game like an auction sale? A. Yes, sir, start the game.

Q. Until legitimate players come in to lose their money? A. Yes, sir.

By Mr. Tailey:

Q. In other words, he is the come-on, the shill? A. Yes, sir.

The Court: The decoy duck?

The Witness: I don't understand you, sir.

2427

Q. Did you know a man named Willie Shapiro? A. Yes, sir.

Q. You knew him before 1936, September, didn't you? A. Yes, sir.

Q. And Irving Shapiro, did you know him? A. Yes, sir.

Q. And Meyer Shapiro? A. Yes, sir.

Q. They were three brothers, weren't they? A. Yes, sir.

Q. And you were friendly with them before 1936, weren't you? A. Yes, sir.

Q. And the three of them were murdered, weren't they? A. Yes, sir.

Q. Did you know Leon Goldstein? A. Yes, sir.

Q. He was known as Ear Bender, wasn't he? A. Yes, sir.

Q. He was a friend of yours, too, wasn't he? A. Yes, sir.

2429 Q. You knew him before 1936? A. Yes, sir.

Q. And you knew a man named Sammy Silverman, didn't you? A. Yes, sir.

Q. And they both were killed, weren't they? A. Yes, sir.

Q. Before 1936? A. I don't know, sir.

Q. You don't know that? A. No, sir.

Q. Weren't they killed before this Rosen killing that you told us about? A. I know the Shapiros were killed. That I know.

Q. What? A. I know the Shapiros were killed in 1936 and the Ear Bender was killed in 1936 and I don't think Sam Silverman was killed

2430 before that.

Q. You don't know when he was killed? A. Yes.

Q. Don't you know he was killed before then? A. No, sir.

Q. Did you know a man named Fat Cooperman? A. Yes, sir.

Q. He was a friend of yours? A. Yes, sir.

Q. And he was killed? A. Yes, sir.

Q. Killed in his doorway? A. Yes, sir.

Q. And you drove him there, didn't you? A. Yes, sir.

Q. In other words, you put Fat Cooperman on the spot, didn't you? A. No, sir.

Q. Did you witness Cooperman being killed? A. No, sir.

Q. In his own doorway? A. No, sir.

Q. After you left him there, what did you do with your car? A. I went home, sir.

Q. Did you drive away? A. I didn't know he was killed.

Q. You did not know Fat Cooperman was killed? A. Until I drove home. The next day 2432
I found out. I read in the papers.

Q. You knew the next day he was killed, didn't you? A. Yes, sir.

Q. And you knew that he was killed immediately after you deposited him at his doorway? A. I can't tell you that, sir.

Q. You cannot tell me? Bernstein, in April, 1933, April 2, 1933, together with a man named Hirshel Bernstein—you know Hirshel Bernstein, don't you? A. Yes, sir.

Q. And did you know a man named Harold Kepner? A. Yes, sir.

Q. Together with those two men, you broke 2433
into a poolroom at 1516 Pitkin Avenue, in Brooklyn, through a skylight, didn't you? A. No, sir.

Q. And you took from a safe there some $600, didn't you? A. No, sir.

Q. Do you say you had nothing to do with the burglary and theft in that address at that time? A. No, sir.

Q. You mean by that answer, you mean to say that you did not have anything to do with it; is that what you mean? A. No, sir.

Q. On February 24, 1934, did you, with a man named Joseph Gordon and another man known as Cherry, who was Al Glass, and a Max Rozinsky, didn't you steal from a night watchman named Walter Ellis, on Adams Street, Brooklyn, a truck containing 1,014 suits of clothing which were the property of the Howard Clothes Company? A. No, sir.

Q. Did you have nothing to do with that theft? A. No, sir.

2435 Q. You knew nothing about it? A. No, sir.

Q. You are sure about that? A. No, sir.

Q. And you are telling the truth? A. Yes, sir.

Q. Al Glass was a partner of yours, wasn't he? A. Yes, sir.

Q. And he was a partner in February, 1934, wasn't he? A. Yes, sir.

Q. Didn't you receive some $3,000 as your share of the kidnapping of a man named Batisto Salvo in the Bronx? A. No, sir.

Q. You are sure of that now, are you? A. Yes, sir.

Q. Did you have anything to do with the
2436 Batisto Salvo kidnapping? A. No, sir.

Q. Did you know anything about it? A. No, sir.

Q. How long did you say you worked in this night club in Florida, Miami is it? A. About a week, sir.

Q. Did you commit any burglaries in Florida? A. No, sir.

Q. Didn't you commit burglaries in Florida from the time you went down there? A. No, sir.

Q. Before 1936, the month of September, and 1930 or 1933 we will make it when you left this leather factory, how many times had you been

2437

in Florida? A. You will have to repeat that question again, sir.

Q. How many times were you in Florida between the years 1933 and 1936? A. Maybe once.

Q. Once? Weren't you there every year? A. I really can't tell you, sir.

Q. Well, how many times? Go back to 1930. How many times were you in Florida between 1930 and 1936? A. Once or twice, sir.

Q. Is that all? A. I think so.

2438

Q. How long did you remain in 1939 at the time you worked for a week in the gambling house? A. How long? About a month, sir.

Q. How long? A. About a month.

Q. You were married at that time, weren't you, 1939? A. Yes, sir.

Q. Was your wife with you that time? A. No, sir.

Q. Did you ever take your wife to Florida on any of these trips you made? A. No, sir.

Q. Do you say you never committed any burglaries or crimes in Florida? A. No, sir.

2439

Mr. Turkus: May the record indicate that the witness means no, that he did not. That has been answered before.

The Court: The answer has to speak for itself.

Q. From 1930 to 1939, to 1940, during that ten years how many times were you in California? A. 1940, you say?

Q. From 1930 to 1940, that ten year period. I want to make the dates easy for you. A. About six or seven times.

2440 Q. In California, weren't you a thief there? A. No, sir.

Q. Did you commit any crimes in California on any of the trips you made there? A. No, sir.

Q. Was your wife with you on any of those trips to California? A. No, sir.

Q. How many times did you go to Monticello, in New York State? A. In Monticello, sir?

Q. To Monticello, or Sullivan County, some-
2441 where in that location? A. About eight or ten times, sir.

Q. Did you take your wife with you on any of those trips? A. Just once, sir.

Q. Once? A. To Monticello.

Q. In what year? A. 1937.

Q. You did commit some crimes in Monticello, didn't you? A. No, sir.

Q. Weren't you mixed up with the Yuran murder in Monticello? A. I don't know what you mean, sir.

Q. Do you know what the words "mixed up"
2442 mean? A. I told you what I had to do, sir. I helped them bury the body. That's all I know.

Q. You took the police to where the body was buried, didn't you? A. I don't know what you mean by "mixed up".

Q. Do you know what the word "involved" means? A. Yes, sir.

Q. Ah! I will be more careful.

Mr. Turkus: I ask that the "Ah!" be stricken from the record.

The Court: Let it stand.

Q. Were you involved in the Yuran murder? A. Yes, sir.

Q. And that crime was committed up in Sullivan County, wasn't it? A. Yes, sir.

Q. You were in Los Angeles, weren't you, when you were on the trips to the West? A. What do you mean?

Q. What do I mean? A. Yes, sir.

Q. Let us see how much plainer that could be made. Were you in Los Angeles on any of the trips which you made to California? It cannot 2444
be any plainer in language than that, can it? A. Will you repeat that again, sir?

The Court: Have you ever been to Los Angeles?

The Witness: Plenty of times; about eight to ten times.

Q. What was difficult about understanding in that question? A. I just didn't get it clear, sir.

Q. In 1937 were you in Los Angeles? A. I think so.

Q. Was Hershel Bernstein with you? A. No, 2445
sir.

Q. No? A. No, sir.

Q. Sure about that? A. Some year I met Hershel Bernstein over that, that's right, sir. One year, I don't know what year it was.

Q. You say it was 1937 or wasn't 1937? A. I don't remember the year, but I met him out there.

Q. He was a thief, wasn't he? A. I don't know, sir.

2446

Q. In 1937, in company with Hershel Bernstein, didn't you commit a burglary in Los Angeles? A. No, sir.

Q. Do you remember that Hershel Bernstein was sent away for a year to jail in Los Angeles? A. Yes, sir.

Q. You sent him money there, didn't you? A. Yes, sir.

Q. And you were in Los Angeles at the time the burglary for which Hershel Bernstein was
2447 sent to jail was committed, weren't you? A. Yes, sir.

Q. And how long after the commission of that burglary did you get away from Los Angeles? A. What do you mean, get away?

Q. Go away, depart, scram. You know what I mean by get away.

Mr. Turkus: I object to the form of the question.

Mr. Talley: I am trying to speak in words of one syllable.

2448 Mr. Turkus: The words are not synonymous.

The Court: How long did you remain in Los Angeles after Hershel was arrested for burglary?

The Witness: About a month, sir.

Q. Did you remain there for his trial? A. No, sir.

Q. Were you away before he was put on trial? A. Yes, sir.

Q. Was he put in jail after his arrest for the burglary? A. Yes, sir.

2449

Q. Was he kept in jail? A. Yes, sir.

Q. Was he in jail while you still remained in Los Angeles? A. Yes, sir.

The Court: Is he related to you?

The Witness: No, sir.

Q. You hired the lawyer for Hershel Bernstein in 1937, didn't you? A. No, sir.

Q. Didn't you commit burglary, Bernstein, in a store known as Shimmy's Clothing Store on Pitkin Avenue, Brooklyn? A. No, sir.

2450

Q. Didn't you commit a burglary in the Finance Company's premises on Pitkin Avenue and Douglas Street? A. No, sir.

Q. Didn't you commit a burglary in Nokel's Cigar Store here in the Borough of Brooklyn? A. No, sir.

Q. Didn't you commit a burglary in the Parkway Restaurant? A. No, sir.

Q. On Pitkin Avenue? A. No, sir.

Q. Did you not commit a burglary in Dubrow's Restaurant? A. No, sir.

2451

Q. Did you not commit a burglary or theft in a bus terminal in Queens County? A. No, sir.

Q. In 1934? A. No, sir.

Q. Did you not commit a burglary in a hotel up in the mountains, around Monticello, in Sullivan County? A. No, sir.

Q. In the shylocking business you had to borrow a lot of money to finance yourself, didn't you? A. Borrow? I gambled, sir, and I won some money.

Q. To get money to loan to other people? A. What?

2452

Q. You had to get money to loan to other people, didn't you? A. What do you mean get? I had it—

Q. Where did you get it? A. I gambled.

Q. You did not borrow any money from anybody in order to carry on the shylock business, did you? A. Sometimes I was short, I took it from different shylocks.

Q. Where did you get it from when you were short? A. Louis Capone, Harry Strauss and

2453 Mike Sycoff.

Q. Not Mendy Weiss? You forgot him, didn't you? A. No, sir.

Q. You did not forget him? A. No, sir.

Q. You did not get any money from him, did you? A. No, sir.

Q. Did you ever borrow any money from Food Dealers? A. Yes, sir.

Q. That was to carry on your shylock business, wasn't it? A. That was when I got stuck.

Q. That was to carry on your shylock business, wasn't not? A. Whenever I got stuck and

2454 I could not pay the shylocks, I had that ace in the hole.

Q. Why didn't you mention that when I was asking you the people from whom you had borrowed money? A. I borrowed from a lot of banks.

Q. You borrowed as much as $50,000., didn't you, from the Food Dealers? A. I don't keep no figures.

Q. You don't keep no figures? A. No, sir.

Q. Did you keep any figures of the moneys that you loaned other people? A. Yes, sir.

2455

Q. Then you did keep some figures, didn't you? A. Not in the banks.

Q. Did you keep any record of the moneys that people borrowed from you that they did not pay back? A. Did I keep any records? Yes, sir.

Q. You kept records on cards, didn't you? A. What do you mean? I don't understand you, sir.

Q. You don't understand what the word "cards" is? A. I know what the cards mean.

2456

Q. You know what the word "record" is? A. Yes, sir.

Q. My question is, did you not keep records of these shylock transactions on cards, memorandum cards, not playing cards? A. On cards?

Q. C-a-r-d-s? A. On the customers, you mean, sir?

Q. Did you not keep records of your transactions in the shylocking business on cards, memorandum cards? A. Yes, sir.

Q. So your statement that you kept no records was not true, was it? You did keep records?

2457

Mr. Turkus: Objected to. He made it clear what records he referred to.

Mr. Talley: I am cross-examining, your Honor.

Mr. Turkus: That does not permit an improper statement of fact to be offered to the witness.

Mr. Talley: He said, "I keep no records." That is what he said. I have now brought out that he has kept records.

2458 *Sol Bernstein—For People—Cross*

Mr. Turkus: I have an objection.

The Court: I think his previous answer related to moneys which he borrowed for the purpose of loan. I thought I understood you to ask him if he had borrowed $50,000 from certain banks.

Mr. Talley: Relating to his records of the shylocking business.

The Court: Do you mean you did not keep records of what you loaned?

2459 The Witness: I did keep records of the loaned shylock money, yes, but I did not keep records in the banks.

The Court: You did not keep any books?

The Witness: No, sir.

Q. You borrowed as much as $50,000, didn't you, from the Food Dealers?

Mr. Turkus: Objected to, unless he fixes the period of time in which it was borrowed.

2460 The Court: Overruled. All told.

Q. We are waiting for your answer. A. I did not keep no figures.

Q. Don't you know without the figures? A. It might have been, sir.

Q. Was it? A. It might have been close to that, or maybe more.

Q. Is that your best answer, it might have been? A. It might have been, maybe more. I can't tell you that, sir.

Q. So you had quite an extensive business as

a shylock, didn't you? A. No, sir, gambling, sir.

Q. You borrowed the money from the Food Dealers Association, if it was that, or bank, for your shylocking, not your gambling business, isn't that so?

Mr. Turkus: Objected to. That was not the testimony. It was to re-pay the shylocks whom he enumerated. He said it was an ace in the hole. 2462

Mr. Talley: I object to the statement of the District Attorney.

Mr. Turkus: I have an objection.

The Court: Overruled.

(Question read by reporter.)

A. Yes, sir.

By the Court:

Q. What did you do, borrow that on demand notes? A. I had some man who made good for me all the time. 2463

Q. Was it on demand notes or I.O.U.'s? A. I don't know, because he had a big property on Pitkin Avenue and he was good for a lot of money there.

Q. Was it secured loans? A. I suppose so.

Q. You must have paid a pretty good rate for it? A. Thousand dollar loans, five hundred dollar loans, something like that.

Q. How much did you pay? A. I think it was $72.50 for $1,000.

Mr. Turkus: May I have the first part of the answer, from whom he borrowed this money?

By Mr. Talley:

Q. Who was the man that had property on Pitkin Avenue? A. Charles Meyers of 171 Herzl Street, and I will give you some more if you want to know.

2465 Q. And he used to endorse your notes, didn't he? Meyers endorsed your notes? A. What did you say?

Q. Meyers was one of those who would endorse your notes? A. Yes.

Q. Sign his name on the back? A. And if you want to also know who gave me loans of this bank, I will tell you, too.

Q. I will ask you at the proper time, if you will just answer the questions you are asked.

Mr. Rosenthal: May I move to strike out the voluntary answer of the witness?

2466 The voluntary statement of the witness I ask to strike out.

The Court: Strike it out.

Mr. Turkus: I ask it stand.

Mr. Rosenthal: I ask your Honor, in view of the fact that we had a morning recess and the witness has forgotten, that your Honor admonish this witness to answer questions and not volunteer.

The Court: So admonished.

Mr. Talley: Will you tell the witness that? I am sure he will say he did not

2467

understand what you meant by the words, "So admonished".

The Court: Yes. You put your mind on the questions; then you will understand them better and simply answer them. There are enough lawyers in court to take care of everything.

The Witness: Yes, sir.

Q. There came a time when Charley Meyers refused to endorse any more of your notes, 2468 didn't there? A. Yes, sir.

Q. And then you struck his daughter, didn't you? A. No, sir.

Q. Never touched her? A. No, sir.

Q. Why, didn't she have you arrested and weren't you arraigned in court?

Mr. Turkus: Objected to.

Q. On her charge of assault?

Mr. Turkus: Objected to. I thought your Honor had admonished Judge Talley 2469 that an arrest is not proper evidence.

Mr. Talley: I am asking about an act here.

The Court: Sustained.

Mr. Talley: I take an exception.

Q. The fact is that you got Charlie Meyers to pull his daughter off the charge she made against you, isn't that right?

Mr. Turkus: Object to the question.

The Court: Sustained.

Mr. Rosenthal: I take an exception.

2470 Q. And didn't you threaten Meyers and threaten his daughter that if they testified in court against you that harm would come to them? A. No, sir.

Q. Why, didn't you pay $200 to the Meyers girl or to her father to have them pull off the charge against you of assault? A. No, sir.

Q. In 1934 you stole $7,000 worth of merchandise from Abe Stark's store, didn't you? A. No, sir.

2471 Q. Did you know anything about that burglary? A. No, sir.

Q. Or theft? A. No, sir.

Q. Never heard of a store kept by Abe Stark or known as Abe Stark's store? A. Yes, sir.

Q. You mean by that you never heard of it, is that what you mean?

Mr. Turkus: Object to that. That is not the meaning at all.

Q. Then you did hear of Abe Stark's store, did you? A. Yes, sir.

2472 Q. Where was it? A. On Pitkin Avenue.

Q. Was it in 1934 broken into? A. I don't know, sir.

Q. Was there a burglary there? A. I don't know, sir.

Q. Did you ever hear that there was a burglary in Abe Stark's store in which he claimed to have lost $7,000 worth of merchandise? A. No, sir.

Q. Never heard of that? A. No, sir.

Q. How well did you know Abe Stark? A. I knew him like this, buy clothes there.

2473

Q. You used to buy clothes there? A. Yes, sir.

Q. Did you buy them in 1934? A. I am buying them for a good many years there. I don't know how long, sir.

Q. Well, can you tell us whether 1934 was one of the years you were buying them?

Mr. Turkus: Objected to.

The Court: Sustained as irrelevant.

2474

Q. Do you mean to say that Abe Stark never told you that he had been robbed of $7,000 worth of merchandise?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: Exception.

The Court: That is the leading clothing store in Brownsville, is it not?

The Witness: Yes, sir.

The Court: Has been for years?

The Witness: Yes, sir.

2475

Q. How many automobiles do you say that you have stolen? A. Close to 75 cars.

Q. 75 cars? A. Yes, sir.

Q. Is that the truth now?

Mr. Turkus: Object to the form of the question.

The Court: Overruled.

Mr. Turkus: The word "now" is what I objected to.

2476 *Sol Bernstein—For People—Cross*

Q. Is it the truth you are telling us here about those cars? A. Yes, sir.

Q. Was not more than 75 or a hundred, was it? A. I don't know, sir. Close to 75.

Q. And do you say that you never used what you described as a hot-box in any of your thefts of these 75 cars? A. No, sir, except what Muggsy used.

Q. Excepting what? A. No, sir, except that Muggsy used in this here case.

2477 Q. This one case? A. Yes, sir.

Q. Is the only time that a hot-box, which is an appliance to start a car, was used, is that right? A. Yes, sir.

Q. What was your method of starting the cars that you stole? A. Stole them out of garages.

Q. You never stole a car from the sidewalk until you stole this car that you used in the Rosen case, is that right? A. Yes, sir.

Q. And how was it that you, with a record as an automobile thief, having stolen 75, why did you have to get Muggsy Cohen or anybody else to help you steal a car? A. Because I didn't know there was going to be a murder, sir.

2473

Q. When did you learn that there was going to be a murder? A. When I seen Louis Capone, four o'clock, on Sackman and Livonia.

Q. What time was it that you say you saw Louis Capone? A. About four o'clock.

Q. And that he told you? A. Saturday.

Q. Four o'clock in the afternoon or morning? A. In the afternoon, when he showed me the route, he came to the store.

2479

Q. He pointed out the store and said, "Somebody is going to be killed there"? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And you knew that you were to drive the car for the men that were doing the killing, didn't you? A. Yes, sir.

Q. When he told you that somebody was going to be killed in that candy store, you did not tell the police? A. I was not a stool pigeon then.

2480

Q. Did you?

Mr. Rosenthal: I ask that the answer be stricken as not responsive.

Mr. Turkus: I ask that it stand. It is responsive to Judge Talley's question.

Mr. Rosenthal: The answer to that is yes or no.

The Court: Strike it out. Say yes or no. Did you tell the police?

The Witness: No.

2481

Q. You did nothing to prevent the killing in this candy store that you were told about, did you? A. No, sir.

Q. In the trial of Gangi Cohen in Monticello, in June term of the County Court, Sullivan County, 1940, you were sworn to tell the truth, weren't you? A. Yes, sir.

Q. And were you asked this question and did you make this reply (page 70 of the minutes of that trial):

"Q. Did you ever steal a car? A. Yes.

Q. How many times did you steal cars? A. Once or twice."

2482

The Witness: I mean in two cases, sir.

Q. You mean in two cases? A. Yes, sir.

Mr. Talley: I move to strike out the answer as not responsive. The question was, was he asked that question and did he make that reply.

The Court: Strike out the answer.

The Witness: If it is in the book, I said it.

2483

Q. It is in the book. A. I said it.

Q. That was not true, was it? A. No, sir.

Q. Instead of stealing a car once or twice before June, 1940, you had stolen between 75 and a hundred, hadn't you? A. Before when, sir?

Q. June, 1940, when you testified in Monticello? A. Yes.

Q. Have not stolen any since then, have you? A. Since when?

Q. Since June, 1940? June of last year? A. I was arrested, sir.

2484

Q. I say you have not stolen any since that time, have you? A. I was under police protection, sir.

Q. All right. When did you get under police protection? A. Some time in April, 1940.

Q. April, 1940? A. Yes, sir.

Q. And you went under police protection because you gave yourself up, is that right? A. Yes, sir.

Q. You were not arrested; you walked into Captain McDonough's or Detective McDonough's office? A. Who?

2485

Q. You walked into Detective McDonough and gave yourself up, didn't you? A. No, sir.

Q. How did you give yourself up? A. I gave myself up to Detective John McDonough and he brought me to the District Attorney's office where District Attorney O'Dwyer and Captain Bals were.

Q. Didn't you do that, give yourself up to Detective McDonough? A. There he is right there (indicating).

2486

Q. Did you give yourself up to Detective McDonough? A. Yes, sir.

Q. And he has been with you ever since, hasn't he? A. What do you mean he is with me ever since?

Q. Had you in custody ever since? A. No, sir.

Q. Is he down in the Half Moon Hotel with you? A. No, sir.

Q. By the way, did you ever have any talk with Mrs. Rosen in the Half Moon Hotel? A. I don't know if she was there, sir.

2487

Q. Did you have any talk with her? A. No, sir.

Q. Did you see her there? A. No, sir.

Q. Did you have any talk with Abe Reles in the Half Moon Hotel? A. Yes, sir.

Q. Many times? A. Yes, sir, about baseball, football, radio.

Q. Nothing about crime in Brooklyn? A. We are not allowed to talk about any case, sir, because the cops are always there.

Q. The cops are always there? A. Yes, sir.

Q. So all you talked about with Abe Reles was baseball and football? A. Yes, sir.

2488 *Sol Bernstein—For People—Cross*

Q. And horse racing? A. Very seldom I talked with that mouse.

Q. Referring to Abe Reles as a mouse? A. Yes, sir.

Q. Didn't you tell us how many times you talked with him? A. I very seldom talked up there, sir.

Q. How many times did you tell us you talked with him? A. I said I very seldom talked with him, sir.

2489 Q. How many times I asked you?

Mr. Turkus: I object to it. It is answered three times in a row "very seldom" and the reason must be quite obvious even to Judge Talley.

Mr. Rosenthal: I object to any statement.

Mr. Turkus: Why didn't you make a statement and sit down?

Mr. Talley: What difference does it make what statement he makes?

2490 By the Court:

Q. Do you remember how many times you talked to Reles in the Half Moon? Just yes or no. A. About a year, sir.

Q. How many times, ten, twelve, fifteen, twenty? A. About 366 or 367, something like that.

Q. Several hundred times?

Mr. Talley: 366 or 370 times you talked with Abe Reles.

2491

Q. It is a daily matter, isn't it? A. No, sir, it isn't; I don't go around talking; I only look.

Q. Have you ever talked with him about the case? A. No, sir; we are not allowed to talk about any case, sir.

By Mr. Talley:

Q. Did you live in the same room with Abe Reles? A. What do you mean, I lived in the same room, sir?

2492

Q. Oh, you know what "live in the same room" means. Answer the question. Did you live in the same room with Abe Reles? A. I saw him there but I slept in a different room with two detectives guarding me.

Q. In the Half Moon Hotel did you occupy the same room as Reles? A. Yes, sir.

The Court: To sleep?

The Witness: I do not sleep with him.

The Court: Have you ever slept in the same room?

The Witness: No, sir.

2493

Q. Since you have been living in the Half Moon Hotel, you received visits from your wife, didn't you? A. Yes, once a week and there are always detectives with us.

Q. You never were left alone with your wife in the Half Moon Hotel? A. Yes, sir.

Q. Are you sure of that? A. I am positive.

Q. And what time were the visits that your wife was allowed to make to you? A. She comes from two to six, sir, just Sundays because she works, sir.

Q. And at all times when your wife was with you in the room, there was a detective in the room with you; is that right? A. Yes, sir.

Q. When was the last time she called to see you? A. Sunday, sir.

Q. Last Sunday? A. This here Sunday coming.

Q. What detective was in the room while she was visiting you? A. Brennan, sir.

Q. Has he been there before? A. What do you mean? Yes, sir.

2495

Q. Brennan? A. Yes, sir.

Q. Has he been there at frequent times in the 365 days that you were talking to Reles in the Hotel? A. Yes, sir.

Q. He has been almost constantly there, hasn't he? A. There is a lot of detectives there, sir.

Q. He is Brennan? A. I don't understand you, sir.

Q. Was District Attorney O'Dwyer in the court room in Monticello when you were testifying? A. I don't know, sir. I didn't take notice.

Q. Will you say that he was or was not? A.

2496

I can't tell you that, sir.

Q. Can you remember? Did you see District Attorney O'Dwyer in Monticello while that trial was on? A. No, sir.

Q. You did not talk with Judge O'Dwyer in Monticello at any time when you were there, did you? A. At the trial, sir?

Q. At the trial or at the time of the trial, before court opened, after it closed, during recess, any time during that period? A. Yes, sir, did not see him.

Q. You did talk with him? A. No, sir. I didn't.

Q. You mean by "Yes, sir" no, sir?

Mr. Turkus: Objected to. He said "I did not see him." I have an objection to the statement made by Judge Talley that "Yes, sir" means "No, sir."

The Court: I think Judge Talley did not hear the latter part of the answer. He said "Yes, sir, I did not see him."

Q. Did you see District Attorney O'Dwyer while you were in Monticello in connection with the trial of the Gangi Cohen case? A. No, sir.

2498

Q. Was District Attorney O'Dwyer before the Grand Jury in this case, the Rosen case, when you testified? A. No, sir.

Q. Who examined you there, Mr. Turkus? A. In the Grand Jury room?

Q. Yes. A. Mr. Heffernan and Mr. Hanley, sir.

Q. And did you tell the truth before the Grand Jury of this county? A. Yes, everything.

Q. All of it? A. All of it, yes, sir.

Q. Did you tell the Grand Jury that you had stolen 75 to a hundred automobiles? A. No, sir.

2499

Mr. Turkus: He first has to be asked it. I object to it.

Mr. Talley: I object to the statement made by the District Attorney. If he wants to be examined on these things, I will take great pleasure in putting some questions to him if he takes the stand.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Turkus: I do not know who is overruled. Don't be so quick with your exception. I take objection to the form

of the question because the Grand Jury proceeding is conducted with Q. and A. and the witness in order to answer must be questioned.

The Court: The questions that are answered are the questions that are asked. I take it when he said he told everything, he means everything in response to the questions that were asked.

2501 Q. Bernstein, why did you testify falsely in this murder case in Monticello about your stealing 75 or a hundred automobiles?

Mr. Rosenthal: I object to the form of the question.

The Court: Overruled.

Mr. Rosenthal: I object to the question itself. Exception.

A. Because the whole mob was not picked up yet. I didn't want to give no information.

2502 Q. Therefore you testified under oath falsely, is that right? A. Yes, sir, not to give any information.

Q. Did you tell the District Attorney that you were going to testify falsely because all the mob were not picked up? A. What did you say, sir?

(Pending question read by the reporter.)

A. I was told not to talk about any other case.

Q. Who told you that? A. Somebody in the District Attorney's office. I don't recall who. I didn't tell all of the truth up there, sir.

Q. What? A. I didn't tell all of the truth up there, sir, but just the truth about Gangi, sir, mostly.

The Court: When you say some one in the District Attorney's office, that case up there was not tried by District Attorney O'Dwyer's office; it was tried by the local District Attorney?

The Witness: Yes, sir.

The Court: Do you mean somebody connected with the local District Attorney's office or somebody from District Attorney O'Dwyer's office? 2504

The Witness: I don't know who they were, sir.

The Court: Was it somebody connected with that trial?

The Witness: I really can't tell you, sir. I don't know who is who.

Mr. Rosenthal: I cannot hear the answer.

The Court: He said he does not know who was who. 2505

You understand the District Attorney of Kings County did not try that case?

The Witness: No, sir.

The Court: That was tried by the local District Attorney at Monticello?

The Witness: Yes, sir.

Q. It was not the local District Attorney or any Assistant District Attorney in Sullivan County that told you not to tell all the truth, was it?

Mr. Turkus: I object to that. That is

2506 *Sol Bernstein—For People—Cross*

not the testimony. That is a scurrilous and scandalous attack on a public official without warrant or justification.

The Court: Yes, that is not a fair inference. He said that he was told not to talk about any other case. It is apparent that this was his interpretation of that instruction from the person whom he cannot identify.

2507 Q. What were you told about not telling all of the facts in your testimony in Monticello?

Mr. Turkus: Objected to. There is no such testimony in the record. It carries with it an implication unfounded in any of the testimony.

The Court: He has already answered it. Sustained.

Mr. Talley: Exception.

Q. Was the man who spoke to you about your testimony part of the District Attorney's office
2508 in Brooklyn? A. I didn't know who was who, sir.

Q. You don't know who was who? A. No, sir.

Q. Would you take a statement from anybody without knowing who he was?

Mr. Turkus: I object to that.

The Court: Sustained as argumentative.

Mr. Talley: Exception. It is not argumentative. I respectfully except to your Honor's ruling.

Q. Do you know whether the man was part of the District Attorney's office in Sullivan County that told you that? A. Can't tell you that, sir. I don't know.

Q. But following the direction of whoever it was that told you, whom you now don't know, you did conceal some of the truth in the trial in Monticello, didn't you?

Mr. Turkus: I object to it, please the Court: I object to the preamble. It is 2510
not consistent with the testimony already given.

The Court: I am just trying to think. It is a close question. The question as to how many automobiles were stolen is not connected with the prosecution of any murder case. The only reason it may be gone into is on the question if impeaching the credibility of the witness by showing his criminal tendencies. He has abundantly admitted plenty of that.

Mr. Talley: I don't think we have 2511
scratched the surface of it, Judge.

Mr. Turkus: I ask—

Mr. Talley: I intend to pursue it as far as I can.

The Court: The Court is going to give you liberal latitude. I think you better re-frame that question because it is a little puzzling in its form.

Q. You swore falsely in your trial in Monticello, didn't you?

2512 *Sol Bernstein—For People—Cross*

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Talley: I have got to pick up. In view of the objection that has been made, I have got to ask these preliminary questions. I except to your Honor's ruling.

Q. This testimony that you gave that I have read to you, in which you were asked how many
2513 times did you steal cars, and you said once or twice, was false, wasn't it?

Mr. Turkus: Objected to as already answered.

The Court: Sustained as repetitious.

Mr. Talley: Exception. I insist that on cross examination I have a right to repeat.

The Court: I have here on my notes that he admits the theft of about seventy-five cars.

2514 Mr. Talley: I am proceeding on another line.

The Court: That stands.

Mr. Talley: I am proceeding on another line.

The Court: Go ahead, then, Judge.

Q. In what other respects did you testify falsely in this trial in Monticello? A. The lawyer started asking me about different cases. I got confused in the blizzard. I didn't know what to say. I said that, knowing I was doing wrong that lawyer over there (indicating).

Q. You knew you were doing wrong when you

gave this testimony? A. Because he wanted to get information out of me.

Q. Did you? A. About different cases.

Mr. Rosenthal: I ask that the answer be stricken as voluntary and not an answer to the question.

Mr. Turkus: I ask that it stand—responsive and it explains a whole line of questioning.

The Court: Let it stand. 2516

Mr. Rosenthal: Exception.

Q. In what other matters did you testify falsely in this trial in Monticello?

Mr. Turkus: Objected to as already answered.

Mr. Talley: I have not the answer.

Mr. Turkus: Yes, you have.

Mr. Talley: No, I have not.

Mr. Turkus: He has just given an answer which Mr. Rosenthal wanted stricken out and the court let it stand. That is the 2517 answer.

The Court: I don't think it is an answer.

The Court: Do you recall in any other respects that you gave false testimony in Monticello? Search your memory and see if you can remember any points.

The Witness: If it is in the book, I said it, but I can explain about that.

Mr. Cuff: I move to strike it out.

The Court: Do you at this time re-

member in what respects you gave otherwise false testimony?

The Witness: No, sir.

Mr. Rosenthal: I cannot hear.

The Court: The court tried at the outset of this trial to get amplifiers but the cost is prohibitive and there is no fund out of which to make the purchase, so we have to accept the acoustic properties of this room for what they are.

2519 Mr. Rosenthal: I am not complaining about that. All I am complaining of is that I did not hear the question. May I have the privilege of having it repeated, plus the answer?

The Court: Much of the difficulty in hearing in this room is due to street noise and also at certain times there is an undercurrent of room noise that has to be overcome.

2520 Q. When you say you were in a blizzard, do you mean you were all befogged? You do not mean there was actually a blizzard in Sullivan County in June, 1940? A. I was in a blizzard.

By the Court:

Q. Explain what you mean by that. A. I was in a fog.

Q. You mean mental? A. I don't know what he was saying.

Q. Do you mean you were confused? A. Yes, sir, I was confused.

Q. You do not mean snow was falling? A. No, sir.

By Mr. Talley:

Q. And were you confused on the question of whether you had been the thief in the case of seventy-five or a hundred automobiles and one or two? Do you mean to say you answered that way because you were confused?

Mr. Turkus: I object to it.

The Court: Yes, he has testified he had a different reason for answering that question untruthfully. He has told us what that reason is. Sustained. 2522

Mr. Talley: Exception.

Q. Most of these seventy-five or hundred cars that you stole were before 1936, weren't they? A. No, sir.

Q. Were most of them after September 13, 1936? A. Yes, sir.

Q. How many had you stolen before September 13, 1936? A. About ten or twelve, sir.

Q. Then you did not extensively go into the automobile stealing business until after the Rosen killing, is that right? A. Yes, I got graduated, sir. 2523

Mr. Cuff: I move to strike it out.

Mr. Turkus: I ask that it stand as responsive.

Mr. Rosenthal: I ask that it be stricken.

The Court: Strike it out.

Q. You never were once put in jail for stealing these seventy-five or a hundred cars, were you? A. I got arrested once for a stolen car.

2524 *Sol Bernstein—For People—Cross*

Q. That is the time you pleaded guilty, wasn't it? A. Yes, sir.

Q. And that is the only time out of seventy-five or a hundred times you stole cars that you were arrested? A. Yes, sir.

Q. And on that occasion when you were arrested for stealing the car, there was a gun found in the car, wasn't there? A. No, sir.

Q. You don't mean that, do you? A. No, sir—yes, sir.

2525 Q. Do you mean that you heard no talk about a gun being found in that car when you pleaded guilty to having stolen the car?

Mr. Turkus: Objected to. That is not the question—

The Court: Sustained.

Mr. Turkus: That he answered no.

Mr. Talley: Exception.

Q. When the car was picked up, don't you know that a gun was found in it?

2526

Mr. Turkus: Objected to as already answered in the negative.

The Court: Sustained.

Mr. Talley: Exception.

Q. Were any of these cars that you stole used in a murder case other than this Rosen case? A. I don't know, sir.

Q. You don't know? A. No, sir.

Q. At the time you were arrested for the crime for which you later pleaded guilty, that is, stealing an automobile, when the car was

picked up there was powder inside the car and cartridges there, were there not?

Mr. Turkus: I object to it as already answered.

Mr. Talley: He has not answered that.

Mr. Turkus: Then it would be impossible to answer because if he was arrested he could not see what went on in the car.

The Court: Did you see any?

The Witness: No, sir.

The Court: Did you know of any? 2528

The Witness: No, sir.

Q. Did you hear any officers testify on your trial or at your plea of guilty what the condition of the car was when it was picked up?

Mr. Turkus: I object to it. That is elementary.

The Court: Sustained.

Mr. Talley: Exception.

Q. So your testimony now is—and you are not in any blizzard now, are you? 2529

Mr. Turkus: Just a minute.

Q. Your testimony now is that in respect to the car that you pleaded guilty to stealing, you never heard until now, when I spoke that a gun was found in that car, that there was evidence of gunpowder inside the car, and that there were some bullets in the same car? Is that your answer?

2530

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Turkus: That is worse than elementary.

Mr. Cuff: That is highly reprehensible

Mr. Turkus: It is a wonder he would not know it. He was a Judge. You should know it. You were an assistant.

Mr. Talley: I am trying to speak in words of one syllable so that the witness will understand it.

2531

Q. Did you know a man named Red Rabiner? A. Yes, sir.

Q. Was he an automobile thief? A. I don't know, sir.

Q. What was he? A. I don't know, sir.

Q. Was he a friend of yours? A. Yes, sir.

Q. Did he steal the car that was used in the killing of Thomas Hitter, the fireman, here in the Borough of Brooklyn?

2532

Mr. Turkus: I object to dragging in any other case in which this witness has no part.

Mr. Cuff: I object to that statement.

Mr. Turkus: He asked if a man named Red Rabiner stole the car used in the Hitter murder.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you have anything to do with the theft of that car? A. No, sir. Counsellor Barshay can tell you about that case. He questioned me two days.

2533

Mr. Cuff: I move to strike the answer out.

Q. I am asking you. A. He questioned me when he was District Attorney.

Mr. Barshay: May I move to strike out any information that that man may think I have, has nothing to do with this case.

The Court: Strike it out.

2534

Mr. Turkus: Consented to.

Q. Did you send any money to Rabiner while he was in jail on that charge?

Mr. Turkus: Objected to. It is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you have anything to do with the killing of Fireman Hitter?

2535

Mr. Turkus: Objected to as already answered in the negative.

The Court: Overruled. Yes or no.

A. No, sir.

Q. That is not one of the murders that you were identified with here in the Borough of Brooklyn, was it?

Mr. Turkus: I object to it. That carries with it an implication.

Mr. Talley: Why, he said he is a mur-

2536 *Sol Bernstein—For People—Cross*

derer. He testified he was in the murder business.

Mr. Turkus: Will your Honor tell Judge Talley to reserve whatever summation he has for the proper time.

Mr. Talley: This man has said that he was a murderer. He said it from that witness chair.

Mr. Turkus: He said your client was, too. That is something you are not talk-
2537 ing about.

Mr. Cuff: If your Honor pleases, I think the statement of Mr. Turkus is improper and should be stricken from the record, and your Honor should reprimand him for making it.

The Court: He has said that he was a participant in the Rosen murder. He has said that he assisted in the illegal disposition of a body alleged to have been the subject of a murder which he himself was not a participant in, in Sullivan County.
2538 That is as far as the evidence on that point goes. The objection is sustained.

Q. Bernstein, aren't you the man that killed Fireman Hitter? A. No, sir.

Q. Do you remember when Fireman Hitter was killed?

Mr. Turkus: Objected to. It is incompetent, irrelevant, immaterial, not the subject matter of this inquiry.

The Court: Overruled. Within reasonable limitations inquiry may be made

2539

directly along that line, although the issue itself may not be tried. This comes under the specific impeachment rule.

(Question read by reporter.)

A. I was in the bank, sir. I was told about that—Modern Industrial Bank.

Mr. Rosenthal: I do not hear.

The Witness: I was in the bank, the Modern Industrial Bank. I was told about 2540
it by the president. The special officer and the Litvins were there. Counsellor Barshay questioned me on that case.

Q. When you were told about the killing of Fireman Hitter, you were in a bank? A. Yes, sir, to get a $5,000 loan.

Q. For your shylocking business? A. To pay different shylocks. No, I made good for Joe Litvin, the Litvin brothers.

Q. Were you visiting or being attended by some doctor for some trouble with your leg on 2541
the day that Fireman Hitter was killed? A. No, sir. I don't know nothing about that case, sir.

Q. What? A. I don't know nothing about that case, sir.

Q. Do you know whether or not you ever were attended by a physician for something that was wrong with your leg?

Mr. Turkus: Objected to as already answered in the negative.

The Court: Overruled. Do you remember that?

2542 *Sol Bernstein—For People—Cross*

The Witness: What is that again, sir?

(Question read by reporter.)

Mr. Turkus: He was ever attended by a physician, that is incompetent, irrelevant—

The Court: He means by that—

Mr. Turkus: He stated he was in a bank, making a $5,000 loan.

The Court: Around that time were you being attended for your leg?

2543 The Witness: No, sir.

Q. Do you know a doctor named Wiener? A. Yes, sir.

Q. Were you being attended by Doctor Wiener? A. About what, sir?

Q. About something that was wrong with one of your legs? A. No, sir.

Q. He never attended you for that? A. No, sir.

Q. Was there a time when you were lame from some affliction in one of your legs, something the matter with one of your legs?

2544

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial, having nothing to do with this homicide that we are trying.

The Court: Overruled.

A. What did you say?

Q. Why didn't you listen?

Mr. Turkus: I object to this gratuitous statement made by Mr. Talley.

Mr. Talley: Perfectly natural question.

2545

Mr. Turkus: Perfectly natural for any witness to lose the question.

The Court: It is quite a common ailment. Even counsel may ask a question and in the ensuing discussion lose track of the question.

Mr. Talley: There has not been any discussion on this question, none whatever.

(Question read by reporter.)

2546

A. No, sir.

Q. Do you remember when the Fireman Hitter murder occurred here?

Mr. Turkus: Objected to. He has gone over that.

Mr. Talley: Going over it again.

The Court: Overruled.

Q. I was in the Modern Industrial Bank, sir.

Q. When? A. The time the president told all of us.

2547

Q. When was the time of the Hitter, Fireman Hitter, killing? A. You can check up on that loan, that $5,000 loan. Mr. Barshay checked up on that, sir.

Mr. Talley: I move to strike that out.

Mr. Barshay: Lest anybody misunderstand, I was in the D. A.'s office.

The Court: I was just about to clear that up.

Mr. Barshay: I was investigating that case.

2548

The Court: You had charge of the initial investigation.

Mr. Barshay: Positively. I investigated this man, but that has nothing to do with this case, and I object to my name being brought in.

The Court: You can interrupt, Judge Talley, if you do not want this question asked—

Mr. Barshay: I am speaking for my-

2549 self.

Mr. Turkus: There is something going on at the foot of the jury box by way of stage whispers.

Mr. Rosenthal: There are stage whispers in front of the jury box continuously.

The Court: Stage whispers cannot be heard in this room. When the Judge talks in an audible tone it cannot be heard. Just listen to this, please.

By the Court:

2550

Q. Was the Modern Industrial Bank the bank where Fireman Hitter had cashed the payroll checks? A. Yes, sir, the president said so.

Q. Just before the murder? A. Yes, sir, the president said so, and there was a special cop over there and I think the lawyer was there and the five Litvin brothers and Charles Meyer was there.

Q. And that is the way you got the news. When he was carrying the money back from the bank to the firehouse he was shot and killed? A. Yes, sir, and he got the records, and everything.

Q. Your alibi is in the fact that you were in the bank when the news came after? A. Yes, sir.

Q. You were negotiating a $5,000 loan? A. Yes, sir, it was a $5,000 loan, or a renewal for that $5,000.

Mr. Barshay: Now, your Honor, may I ask as a favor to me, please, so that nobody will misunderstand, let the record show that I have nothing to do with this 2552
part of this examination and I have a general objection to it and I don't want to have my name drawn into it so that anybody may misunderstand.

The Court: You were the public official who investigated it.

Mr. Barshay: That is right, sir.

The Court: But at that time the case did not break. It was later on investigated. The investigation was reopened upon other evidence being obtained.

Mr Barshay: I did that, too. I re- 2553
opened that myself.

The Court: And you were not in the office when the case was tried?

Mr. Barshay: Positively, sir.

The Court: And this man was not the defendant in that case.

Mr. Barshay: That is right, sir.

By Mr. Talley:

Q. Did you know a man named Sandy Reles? A. No, sir.

Q. Never heard of him? A. No, sir.

2554

Q. Didn't you know that a man named Sandy Reles— A. Excuse me, sir.

Q. What? A. I heard of Reles.

Q. You talked 365 days or 366 days to Abe Reles, didn't you? A. That name I will never forget, sir, never.

Mr. Talley: I move to strike that out.

The Witness: When you say Reles, I will never forget that name, sir.

2555

Q. Didn't you just tell us that you have spoken as many as 365 times to a man named Abe Reles? A. Yes, sir.

Q. And now you tell us that you heard that name, didn't you? A. Reles.

Q. Now I am asking you if you know a man named Sandy Reles? A. No, sir.

Q. Never heard of Sandy Reles, is that right? A. No, sir.

Q. Wasn't Sandy Reles the shylock that carried on business right in the neighborhood of this Rosen candy store? A. No, sir; don't even

2556

know him, sir.

Q. The first thing that Strauss said to you when you say you were sitting in your car on the Friday before the Sunday upon which Rosen was killed, was to go out and get a car; is that right? A. In the presence of all of them Friday at one o'clock in the afternoon.

Q. He said that to you privately, didn't he? A. No, sir.

Q. And then you immediately went out to get a car, didn't you? A. No, sir; I went to get a drop first.

Q. Went to get a drop? A. Yes, sir.

Q. You knew exactly where to go to get a drop, didn't you? A. I cruised around, sir, first. Q. Cruised around? A. Yes, sir.

Q. You knew that neighborhood thoroughly, didn't you? A. Yes, sir.

Q. You had lived there as a boy, hadn't you? A. Yes, sir.

Q. You had driven through every street in Brownsville, hadn't you? A. Yes, sir.

Q. And when you raised your eyes up and looked at the ceiling, giving us this route that 2558
you say you drove about, you had driven over those streets maybe a hundred times, had you not?

Mr. Turkus: Objected to. That is not the testimony at all.

Mr. Talley: I still insist, if your Honor please, I am cross-examining this witness and I should be allowed to continue.

Mr. Turkus: But that is no license to misquote testimony.

Mr. Talley: The District Attorney 2559
seems to forget, if he ever knew—

The Court: He said he was familiar with the locality.

Mr. Talley: I want to press it further than that.

The Court: You may.

Mr. Talley: Thank you.

Q. You knew every one of these streets that you testified to as the route that you were told to take by Capone? A. Never forget that.

2560 Mr. Talley: I move to strike that out.

The Witness: Louis Capone made sure of that.

Mr. Talley: And I ask for a direct answer to my question.

The Witness: Louis Capone made sure of that and I never forgot it.

Mr. Talley: I move that that be stricken as not responsive.

The Court: Yes. Yes or no?

2561 Mr. Rosenthal: Your Honor has admonished this witness several times. Evidently he does not understand what the word "admonish" means. I am going to ask your Honor to tell this witness, not admonish him, that it is improper for him to make statements unless he is asked a question and to tell him to refrain from doing it, just as you would any other witness that you would tell that you would punish him for contempt if he disobeys the orders of the Court. I ask you to tell this witness in plain language that he

2562 should not volunteer any infomation here without a question being asked.

Mr. Turkus: May I say to your Honor that there is a rapid fire between the questioner and the witness and those kind of responses are invited by that type of repartee. I consent that he be admonished and I consent that he be instructed.

The Court: One of the favorite duties that a Judge has to perform in the course of a trial is to admonish a lot of people, the ones who answer the questions and

2563

the ones who ask them, and every once in a whole there is a slip-up by everybody and, regardless of who it is, the Judge has to repeat the admonition.

(To witness) Do not volunteer evidence. Simply answer the questions. Pay strict attention to the questions.

Q. Do you understand what the Judge has just said to you, Bernstein? A. Yes, sir.

2564

Mr. Rosenthal: Did your Honor strike that out, before I sit down?

The Court: Yes.

Q. Had you ever hired one of these garages where you hired this particular one, before? A. No, sir.

Q. Is this the first time you hired one of these small garages as a drop? A. Before that, sir? Past 1936 I got plenty of drops, sir, but this was the first one, sir.

Q. This is the first time you ever hired a drop? A. Yes, sir, but I had a different drop, sir. 2565

Q. You had what? A. Had a different drop.

Q. You mean you had a drop that was already engaged or rented by you? A. No, sir, where I used to keep my car, sir.

Q. In a drop? A. That is what you call a drop, too, because I used to keep sometimes stolen cars there.

Q. You used to keep stolen cars in your drops? A. Yes, sir, whenever I got orders.

Q. What? A. Whenever I got orders.

Mr. Talley: I move to strike that out.
Mr. Turkus: I move that it stand.
The Court: Strike it out.
Mr. Talley: It cannot stand.

Q. You stole automobiles and put them in drops long before 1936, didn't you? A. Whenever I got orders, sir.
Q. What? A. Whenever I got orders, sir.

Mr. Talley: I move to strike it out and
2567 I ask for a response to my question.
The Court: Just say yes or no.
The Witness: Yes.

Q. And you stole cars and put them in drops long before 1935, didn't you? A. Might have been, sir.
Q. What is your answer? Is it a fact or isn't it? A. Might have been, sir.
Q. Is that your best answer, that it might have been? A. Yes, sir.
Q. Don't you know? A. Yes, yes, about ten
2568 or twelve cars in that time.
Q. You what? A. About ten to twelve cars.
Q. Ten to twelve cars before 1935? Up to 1936.
Q. Before 1935 you had stolen ten to twelve cars, is that right?

Mr. Turkus: I object to it. He just said 1936. Why quibble about it?
Mr. Talley: I object to the District Attorney's comment and statement as to my quibbling about anything. This is serious business.

Mr. Turkus: Not the way you go about it. I object to it.

The Court: He did say 1936. Sustained.

Mr. Talley: Exception.

Q. Did you steal cars in 1935? A. Yes, sir.

Q. Did you steal cars in 1934? A. Yes, sir.

Q. Did you steal cars in 1933? A. Yes, sir.

Q. So that you were an automobile thief two or three years before you ever met the defendant Weiss, weren't you? 2570

Mr. Turkus: Objected to as already answered.

The Court: Overruled.

A. Yes, sir.

Q. So those automobiles were not stolen because Weiss gave you any orders, were they? A. Wait a minute, sir.

Q. Answer my question. A. Wait a minute.

Mr. Turkus: The witness is trying to make an explanation and he stops him. 2571

Mr. Talley: I want an answer to my question without any statement.

Mr. Turkus: The witness has a right to answer.

The Court: What is your answer?

The Witness: I knew Weiss to 1935.

The Court: You began to know him then?

The Witness: 1935.

Q. And before 1935 you have told us that you stole cars? A. Yes, sir.

Q. And that you stole cars in 1934? A. Yes, sir.

Q. You stole cars in 1933, didn't you? A. Yes, sir.

Q. In 1935, when you say you met the defendant Weiss, where did you meet him? A. I met him on Amboy and Pitkin, in a rental station, rent out cars.

2573 Q. In a renting station at Amboy and Pitkin? A. Yes, sir.

Q. What time of day did you meet him? A. Don't remember, sir.

Q. What month was it that you met him there? A. Can't tell you that, sir.

Q. Who introduced you to him? A. Louis Capone and Harry Strauss.

Q. Those two were in that station and introduced you in 1935, is that right? A. Yes, sir.

Q. You don't know what month it was? A. No, sir.

2574 Q. Don't know whether it was winter- or summer-time? A. Yes, sir.

Q. Is that right? A. That is right.

Q. Was it in the spring of 1935? A. Can't tell you that, sir.

Q. Was it in the summer? A. I don't remember, sir.

Q. Was it in the fall? A. Can't tell you.

Q. Was it in the winter of 1935? A. Can't tell you that. It might be one of them.

Q. What were you doing in this automobile rental place? A. What was I doing? I passed. I used to hang around Amboy and Sutter, and I passed up to Pitkin Avenue and Louis Capone

2575

called me in, into the store. That was my shylock, Amboy and Sutter, and the store was a block away, Amboy and Pitkin.

Q. And you found Mendy Weiss there, did you? A. Yes, sir, with Louis Capone and Harry Strauss.

Q. And how long did you stay with them? A. About fifteen minutes.

Q. Did you talk with him? A. Yes, sir.

Q. Did he talk to you? A. Yes, sir.

2576

Q. How was he dressed? A. That I can't tell you, sir.

Q. That you don't remember? A. No, sir.

Q. Do you remember any date in 1935, such as Election Day? A. I know. What did you say? I know there is twelve months, that's all I can tell you. I know every month, but I don't know what month it was.

Q. Don't know one from another?

Mr. Turkus: Objected to. That is not his testimony. He says he does know one from another.

2577

Q. Do you know the difference between winter and summer? A. Yes, sir.

Q. Do you know the 4th of July, that in the twelve months that you know about there comes a day that is known as the 4th of July? A. Yes, sir.

Q. Now, was this meeting that you speak about, was that before the 4th of July or after the 4th of July? A. I can't tell you that, sir.

Q. Do you know the holiday called Labor Day that comes in September of these twelve months that you are familiar with? A. Yes, sir.

2578 Q. Was this meeting before or after Labor Day of 1935?

Mr. Turkus: I object to it. I think it is quite clear the witness is not able to fix the time after these extended questions.

Mr. Talley: That is for the jury.

The Court: He may be able to if he uses a different method, that is, tries to remember the circumstances of the meeting.

2579

Mr. Turkus: But he is not asked that.

The Court: Whether it was indoors or outdoors.

Mr. Talley: Is there a question pending?

The Court: I did not ask a question; I was suggesting. Overruled. Do you remember.

The Witness: I don't remember, sir. It was in a store.

2580 Q. Do you remember whether you had an overcoat on or that you didn't? A. I can't tell you that, sir. Don't remember.

By the Court:

Q. Do you remember any of the circumstances of the meeting? A. That is the only time I seen Mendy Weiss there.

Q. Where was it? A. This was on Amboy and Pitkin, in a rental station.

Q. Was there anything about the circumstances of the meeting that would give any key

as to what time of the year it was? A. Yes, I was supposed to do something for them, sir.

Q. Had it any relation, to do with any of the seasons of the year? A. I don't know what you mean, sir.

Q. What were you supposed to do? A. I was supposed to finger somebody.

Mr. Rosenthal: I object to that.

The Court: I don't mean that. Strike that out. The jury disregard it. 2582

By the Court:

Q. Have you in your mind now a picture of that meeting at the service station or gasoline station? A. It was not a service station. It was a store where they rent out cars.

Q. The meeting was not outside? A. No, in the store, sir.

By Mr. Talley:

Q. Did you see Mendy Weiss after that meeting? 2583 A. After that here?

Q. After the meeting in 1935 that you say you were introduced to him at. A. Yes, sir.

Q. Did you see him frequently? A. No, sir.

Q. How frequently did you see him between that meeting in 1935 and the meeting that you say took place in 1936, in September? A. Just a few times, sir.

Q. How many do you call a few, two? A. Maybe about two or three, sir.

Q. About two or three, you say? A. Yes, sir.

Q. You never knew him very well, did you?

2584 A. Just on account of that, when I got the contract to finger somebody, sir.

Mr. Talley: I move to strike that out, and I ask an answer to my question.

The Court: Strike it out.

Mr. Turkus: I do not think the jury heard it.

The Court: Say nothing more about that.

2585 Q. (Pending question read.) A. I must know him real well now.

Q. Did you know him very well between the meeting in 1935 and the meeting which you say took place in September, 1936?

Mr. Turkus: I object to it as already answered, and it is dangerous territory. I do not want anything to happen.

The Court: He can answer it yes or no.

A. Yes.

2586 Q. You did know him very well? A. Yes.

Q. But you only saw him two or three times, is that right? A. Yes, sir.

Q. He was a taller man than you, wasn't he? A. Yes, sir.

Q. How tall was he? A. I don't know. I think he is taller than me, sir.

Q. And you are what, 5 foot 7, did you say? A. I am 5 foot 8 or 9.

Q. And he was a heavier man than you, wasn't he? A. Yes, sir.

Q. Always much heavier? A. Yes, sir.

Q. Would you say he was around 6 feet tall? A. I think so, sir.

Q. Would you say he weighed about 200 pounds? A. I don't know how much he weighed; I never weighed him.

Q. How much did you think when you saw him in 1935 or 1936?

Mr. Turkus: I object to it.

Mr. Talley: I want him to describe this man he says he knew very well. 2588

The Court: Did you notice him, and, if you noticed, do you remember?

The Witness: He was fatter than that.

The Court: Fatter or thinner?

The Witness: Fatter.

Q. Fatter than he is now? A. Yes, sir.

The Court: In the face or in the body?

The Witness: All over.

Q. After you got the drop, or found the drop, what was the next thing you did in September, 1936? 2589 A. After what, sir?

Q. After you went out and found the drop, what did you next do? A. I went and got in touch with Mugsy Cohen.

Q. Where did you get in touch with Mugsy Cohen? A. On Amboy and Sutter.

Q. Where? A. On Amboy and Sutter.

Q. Amboy and Sutter Avenues in the Borough of Brooklyn? A. Yes, sir, Brownsville section.

Q. And what time did you get in touch with him? A. About eight o'clock at night, sir.

Q. Eight o'clock at night? A. Yes, sir.

Q. That was Friday night, wasn't it? A. Yes, sir.

Q. Sure about that? A. Positively, sir.

Q. And it was Friday afternoon when you started out to get your drop, wasn't it? A. Yes, sir.

Q. So that eight o'clock you met Mugsy Cohen and you and he started out to steal an automobile; is that right? A. No, sir.

Q. What did you do after you met him? A. I
2591 seen him; I told him to do me a favor, twelve o'clock to come around on Amboy and Sutter, I need a car.

Q. Come down at twelve o'clock at night? A. Yes.

Q. Where? A. Amboy and Sutter.

Q. The same place you were talking? A. Yes, and told him to get a jump box, a hot box; said, "Bring around your hot box."

Q. To bring around a hot box? A. Yes, I told him that I need a car, sir.

Q. You already had stolen up to this time seventy-five or a hundred cars. You say that
2592 you had to get Mugsy Cohen to help you steal this one; is that right?

Mr. Turkus: Objected to. That is not the testimony. He said before 1936 it was ten or twelve; after 1936 was the majority. Consequently, it has been answered.

Q. You had stolen a good many automobiles before this talk with Mugsy Cohen, hadn't you? A. Yes, ten to twelve.

Q. Still you had to go to Mugsy Cohen to

help you steal this particular car; is that right? A. Yes, sir.

Q. What time did you meet Mugsy Cohen? A. Twelve o'clock at night, on Amboy and Sutter.

Q. You are sure it was eight o'clock on Friday night that you saw Mugsy Cohen and talked to him about this car that was going to be stolen, is that right? A. About eight o'clock at night, sir.

Q. You are sure about that, are you? A. Yes, 2594
sir.

Q. And you are sure it was eight o'clock on Friday night? A. Yes, sir.

Q. Were you asked these questions and did you make these answers here in this court-room on last Friday (page 507):

"Q. After you got the lock for the drop, what did you do next? A. I went to Amboy and Sutter.

"Q. About what time was that? A. It must have been about three o'clock.

"Q. When you say three o'clock, do you mean 2595
three o'clock Saturday morning? A. Yes, sir.

"Q. Or Friday morning? A. Three o'clock Friday morning—it was in the afternoon, three o'clock in the afternoon; three o'clock in the afternoon."

That is repeated three times in the testimony.

"Q. I was confused myself as to the time. This is three o'clock in the afternoon?" and then you said, "Yes, sir."

"Q. What did you do? A. Where?

"Q. Where you went at three o'clock in the afternoon. A. I seen Mugsy Cohen.

2596 "Q. Who is Mugsy Cohen? A. A car thief and a radio crook."

Were you asked those questions and did you answer as I have read to you, on last Friday when you were testifying in answer to the District Attorney? A. What you read?

Q. What? A. I seen Louis Capone about one o'clock on Sackman and Livonia.

Mr. Talley: I move to strike out that
2597 answer as not responsive.

The Witness: I really don't know what you mean.

Mr. Talley: The question is a simple one, I submit to the Court: Was he asked those questions and did he make those answers? I want the answer yes or no.

The Witness: If it is in the book, I said it.

Mr. Cuff: I move to strike the answer out.

The Witness: If it is in the book, I said
2598 it.

Q. Do you remember now that you testified that it was three o'clock in the afternoon that you met Mugsy Cohen? A. That is the time I got the drop, sir.

Mr. Talley: I move to strike that out.

Mr. Turkus: I move it stand. Now he is pressing him for his recollection.

Mr. Talley: I press him for his recollection of his own testimony forty-eight hours ago.

2599

Mr. Turkus: Your Honor, I have an objection, that is, request, that the answer stand as responsive to the question, on his present recollection.

Mr. Talley: I ask your Honor to direct this witness to answer my simple question yes or no, was he asked these questions and did he make these answers?

Mr. Turkus: You have gone beyond that now.

2600

The Court: Mr. Witness, you testified on Friday that after you bought the cheap padlock for the drop, that you then, at about three o'clock in the afternoon of Friday, went and saw Mugsy Cohen; that thereafter, about two o'clock on Saturday morning, you and Mugsy stole the car on Lefferts Avenue. Do you remember that?

The Witness: Yes, sir.

The Court: Is that true or isn't it?

The Witness: I am a little tangled up, sir. I got out of the drop was three o'clock, sir.

2601

Mr. Cuff: I move to strike the answer out.

The Witness: If it is in the book, I said it.

Mr. Talley: What?

The Witness: If it is in the book, I said it.

Mr. Talley: It is in the book. I ask you again: Did you say it?

Mr. Turkus: I object to the question, has not taken in all the testimony. There is page 598 in the record, too.

Mr. Talley: What is that, Mr. Turkus?

Mr. Turkus: I said you did not read all the Q and A.

Mr. Cuff: I object to the statement of the District Attorney.

The Court: What page is this read from?

Mr. Cuff: 507.

Mr. Talley: I read everything, without
2603 passing a line or a word, and Mr. Turkus knew it because he was following me as I read it.

Mr. Turkus: And I turned the page. You did not.

Mr. Talley: What part didn't I read?

Mr. Turkus: I turned the page. Turn the page.

Mr. Talley: I object to the District Attorney's statement. I began at the top of page 507 of the minutes of this trial and I read every question and every an-
2604 swer down to where I concluded my questioning to him.

Mr. Turkus: Nobody said you didn't.

Mr. Talley: "Where you went at three o'clock in the afternoon."

The next is: "Who is Mugsy Cohen? A. A car thief and radio crook." I read that.

Then there is another question: "Did you talk with Mugsy Cohen? A. Yes, sir." That I did not read because I was not at the moment interested.

"Q. What did you and Mugsy Cohen

2605

do? A. I asked him—" That takes in the entire page.

I will not have any insinuations in this case that I am not reading properly and correctly anything that I attempt to read. I won't permit this District Attorney to do what no other District Attorney in this state would assume to do, and if I have to appeal to this Court for protection against that kind of tactics, I will do it, but I can, fortunately, take care of myself.

2606

Mr. Turkus: Nobody said he did not read page 507.

Mr. Talley: You did say that I did not read all that was on that page. Now don't do it again.

Mr. Turkus: Now don't be getting so sensitive. You know your integrity was not challenged.

The Court: If this continues, the Court will have to send out for its gavel.

Mr. Turkus: I am sorry.

2607

Mr. Talley: Send out for it and use it against the District Attorney. It is increasingly necessary. You won't need it as far as the defense is concerned.

The Court: There has been so much disturbance the Court does not know what it has to rule on. Will you read it?

By the Court:

Q. What is your best recollection as to what time you met Mugsy and talked to him about

2608 stealing the car? A. I think it was about eight o'clock, sir.

Q. What time? A. Eight o'clock at night.

Q. Eight, not three? A. That is right.

Mr. Talley: That was not my question. I am questioning him on the very simple fact as to whether he testified it was three o'clock in the afternoon or eight o'clock at night, and I am entitled to an
2609 answer on whether he testified to that or not. Now he gives us his usual stock reply: "If it is in the book, I said it," which is not good enough for me. I want his recollection as to whether he said it or whether he did not. If he does not recollect what he testified to here in this courtroom on last Friday, it is a pretty serious strain upon the credulity of the jury and everybody else as to what happened in 1936.

Mr. Turkus: He could not remember, the counsel.

2610

The Court: If even counsel in the court can get confused in a discussion such as this, the witness may or may not be right in saying he was confused about that.

Mr. Talley: He does not say he was confused. He will not answer whether he testified, irrespective of the fact I am asking him did he testify to this.

The Court: He does not have to answer he testified; that is the record.

Mr. Talley: I think he does have to testify on the question either of credibility

or his recollection, particularly where he is testifying about a crime that happened in 1936, five years ago.

The Court: The Court rules that this is the record, that it is established that he so said. Please let it go at that.

Mr. Rosenthal: May I except to the Court's ruling?

The Court: Certainly.

Mr. Cuff: May we except, too?

The Court: Certainly. 2612

By Mr. Talley:

Q. What do you say now, Bernstein, was it eight o'clock or was it three o'clock? A. Eight o'clock, sir.

Q. Eight o'clock? A. Yes, sir. I can explain you how, sir, if you want me to.

Mr. Cuff: I move to strike out the witness's voluntary statement.

The Witness: I just got mixed up, that's all. 2613

The Court: Let that stand.

Mr. Cuff: I take exception. No question to the witness at that time at all.

Q. Do you want to explain why you said three o'clock— A. Yes, sir.

Q. —Friday afternoon, and repeated it four or five times on one page of testimony? Is that what you want to explain, when you now come in here—this is Monday—you testified the last court day, Friday—now you come in and say the meeting was at eight o'clock? Do you

2614 want to explain something in connection with that? A. Yes, sir.

Q. Go ahead and explain it. A. Because I met them at one o'clock, sir, at Sackman and Livonia. Then I had to go and get the drop. It took me at least two hours, cruising around, to find that.

The Court: Then what?

The Witness: I hung around at Amboy and Sutter until Mugsy Cohen came around, because he used to borrow money

2615 off me.

The Court: Did you time yourself at any time by watch or clock?

The Witness: No, sir.

The Court: Is the estimate of time that you are now giving based upon figuring the length of time that you did one thing or another?

The Witness: Yes, sir.

The Court: In the course of that procedure?

The Witness: Yes, sir.

2616 Mr. Cuff: Object to that, if your Honor pleases.

The Court: Overruled.

Mr. Cuff: Exception.

Q. Now, having answered the Court's questions the way you did, do you say that you were confused between the time of three o'clock in the afternoon and eight o'clock in the evening? A. Yes, sir.

Q. Before you took the stand here on Friday, you had had many conferences with somebody

in the District Attorney's office about your testimony, didn't you? A. No, sir.

Q. When before Friday was the last time you went over, with any representative of the District Attorney's office, your testimony? A. Never did, sir.

Q. You never did? A. No, sir, not since this case.

Q. You never went over with Mr. Turkus what you were going to testify when you were called in this trial? A. You mean before, sir? Before? 2618

The Court: At any time?

Q. Before Friday? A. Before Friday.

Q. Before last Friday? A. District Attorney Turkus asked me questions and I answered them, sir. That was about a week ago, sir.

Q. About a week ago? A. Yes, sir.

Q. You testified on Friday. What day did you go over your questions and answers with Mr. Turkus? 2619

Mr. Turkus: I object to that. He did not say he went over his questions and answers.

A. He asked me questions. I answered them. That is all.

Mr. Talley: I did not think you were so sensitive about your investigation. I do not see much difference in what I said and what the witness said.

2620 *Sol Bernstein—For People—Cross*

Q. Mr. Tarkus asked you questions, didn't he? A. And I answered them.

Q. And that were the answers that you told him you would make to his questions when you were called as a witness in this room, is that true? A. I do not understand what you mean. I was talking about this here case, sir.

By the Court:

2621 Q. Where did this conference occur? A. In the District Attorney's office.

Q. In this building or in the other building? A. In the other building, sir.

Mr. Talley: When?

Q. What day of the week, do you remember? A. I think it was about two weeks ago.

Q. Do you remember the day of the week? A. It was on a Tuesday, sir, something like that.

By Mr. Talley:

2622

Q. When do you say it was? A. On a Tuesday, sir.

Q. On Tuesday of last week? A. It might have been in the hotel, sir, too.

Q. It might have been when? A. In the hotel.

The Court: About how long ago was it?

The Witness: About two weeks ago.

Q. Why, you remember the last time you went over your testimony in the District Attorney's office, don't you?

2623

Mr. Turkus: I object to the form of the question.

The Court: Sustained. He said so.

Mr. Talley: Exception.

Q. Don't you remember when you last talked with Mr. Turkus or his associate, Mr. Klein, or Mr. Joseph, about this case? You remember that, don't you? A. Yes; about two weeks ago, sir.

Q. How many times did you go over it with them, or any of them? 2624

Mr. Turkus: I object to the form of the question.

The Court: Overruled.

A. How many times, you mean, sir?

The Court: How many times were you questioned?

The Witness: About two or three times, si..

2625

Q. You have been in custody since early last year, haven't you? A. Yes, sir.

Q. Some time in April, 1946, is that right? A. Yes, sir.

Q. That is the time you gave yourself up? A. Yes, sir.

Q. And do you say you have only been questioned two or three times about this case by anybody from the District Attorney's office? A. Asking me questions?

Mr. Turkus: I object. That is not the testimony. Two or three times by Mr. Turkus.

The Court: So I understood.

Mr. Talley: I said Turkus, Klein, Joseph.

Mr. Turkus: That is the same thing. We did not get this file until the summer of 1941.

Mr. Cuff: I object to that statement, if your Honor pleases.

2627

The Court: The jury, disregard it. It is not evidence.

Mr. Talley: I am still waiting for the witness' answer.

The Court: You say you had only two or three sessions of questions and answers?

The Witness: Yes, sir, and District Attorney O'Dwyer asked me questions, too, and I answered them, sir.

The Court: How many times?

The Witness: Five or six times, sir.

2628

Q. So, now you say you were interrogated or asked questions four or five times, or five or six times, since the early part of 1940, when you gave yourself up? Is that your answer now?

Mr. Turkus: I object to the form of the question, "now", carrying with it an implication.

The Court: Overruled. Is that substantially correct?

The Witness: Yes, sir.

Q. And before you appeared here on Friday last and testified, when was the last time that you went over your testimony with any member of the District Attorney's staff? A. I don't get you, sir. Nobody asked me questions until two weeks ago, sir. That was the last time, if that is what you mean, sir.

Q. Which is it, two or three weeks ago, or a week ago? A. About two weeks ago.

Q. Didn't you say a week ago just a few minutes ago when I asked you? A. Yes, sir. 2630

Q. Now you make it two weeks? A. I am not sure. It was a week or two.

Q. Two or three weeks, is that it? A. I stopped counting days, sir.

Q. You do not care what you say on the witness stand, do you? A. Telling the truth about everything in this case, everything.

Q. You did not tell the truth in Monticello, did you? A. Because I don't want to give no information.

Q. Did you tell the truth?

2631

Mr. Cuff: I move to strike it out.

Mr. Turkus: I consent to it, and I object to the question as repetitious. We have been over it.

The Court: Sustained.

Mr Talley: Exception.

Q. You say you are telling the truth on this trial? A. All of the truth, and I told the Grand Jury the truth, too.

Q. You are expecting some consideration for your testimony, aren't you? A. No, sir

Q. None whatsoever? A. No, sir.

2632 Q. You know that you took part in the Rosen murder, don't you? A. Yes, sir.

Q. And you know that you were not indicted for this crime, were you? A. Yes, sir.

Q. By the answer you mean that you know that, is that what you mean? A. Yes, sir.

Q. And you were called before the Grand Jury considering this Rosen killing, weren't you? A. Yes, sir.

Q. And you know that you did not sign any
2633 waiver of immunity, don't you? A. Yes, sir.

Q. And you know that you were not asked to sign any waiver of immunity? A. Yes, sir.

Q. And you know that when you are called before a Grand Jury and do not waive immunity, you cannot be indicted? A. I don't know that.

Q. You don't know that? A. No, sir.

Q. Never heard of that before? A. What is that, sir?

Mr. Turkus: That is a legal question.

2634 Q. In all your criminal career, did you never hear that if you are brought to testify before a Grand Jury you cannot be indicted for the crime upon which you testify?

Mr. Turkus: That is objected to. It is a legal question.

Mr. Talley: This is a crook. He knows more about that phase of the law than even you do.

Mr. Turkus: Do not include yourself. You are very bright.

A. I do not know, sir.

2635

Q. You testified before the Grand Jury in the Yuran case, didn't you? A. That is right.

Q. And did you tell all of the truth there? A. Yes, sir.

Q. It was only on the trial that you did not tell the truth?

Mr. Turkus: Objected to.

Q. Is that right?

2636

Mr. Turkus: That is not his testimony.

The Court: Sustained.

Q. You did not sign a waiver of immunity in the Yuran case, did you? A. No, sir.

Mr. Turkus: Objected to.

The Court: Overruled.

Q. You got immunity in that case, didn't you? A. What do you mean by immunity?

Q. You were not indicted in that case, were you? A. No, sir.

2637

Q. So the only two cases of murder which you have admitted taking part in both cases you have been given immunity from punishment, haven't you?

Mr. Turkus: I object to it. That is not his testimony.

The Court: Sustained. He has not admitted taking part in the Yuran murder.

Q. Didn't you take part in the Yuran killing? A. I told you what I done, sir.

2638 Q. Didn't you take part in it? A. I was not there when they killed him, sir.

Q. Weren't you the man that led the police up there to where a pickaxe or some other tool was buried by the people who did the murder? A. Pickaxe?

Q. Yes, some implement that was used? A. No, sir

Q. Were you the man who took the police to where the body was buried? A. Yes, sir.

2639 Q. How did you know where it was buried? A. How did I know?

Q. You heard my question. A. Because I was there.

Q. How did you know it was there? A. I was there.

Q. What? A. I was there when they buried him.

Q. Did you assist in the burial? A. Yes, sir.

Q. Helped put the body in the ground? A. Yes, sir—no, sir.

Q. What? A. No, sir.

Q. You did not do that? A. No, sir.

2640 Q. What did you do in connection with burying this man? A. I was watching, sir.

Q. You were watching? A. Yes, sir.

Q. That is, you were there to give warning in case anybody came and saw them burying this murdered man, is that right? A. Yes, sir.

Q. You were a lookout? A. Yes, sir.

Q. Was Yuran shot? Is that how he was killed? A. Yes, sir.

Q. And you pointed out to the police where the .32 calibre gun with which Yuran was killed was hid, didn't you? A. I pointed out where he threw the gun.

Q. Where what? A. Where the gun was thrown. I did not have it.

Q. How did you know where the gun was thrown? A. Because I was there with Harry Strauss, sir.

Q. When the killing happened? A. No, sir.

Q. How soon after the killing? A. After he was hid, sir.

Q. After what? A. The body was hid.

Q. You saw where the gun was thrown? A. Yes, sir. 2642

Q. By Harry Strauss? A. Right in the field.

Q. And then you showed a pickaxe where that was buried or hidden? A. No, sir.

Q. Stop and think a minute. A. No, sir.

Q. Didn't you show the police where the .32 calibre gun was and also where a pickaxe was? A. No, sir.

Q. Where was Yuran buried? What kind of a place? A. Near the Loch Sheldrake Inn.

Q. Near the Loch Sheldrake Inn? That is a hotel, isn't it? A. Yes, sir.

Q. Where was he carried from to that place near the Loch Sheldrake Inn? A. From Fallsburg, sir. 2643

Q. Did you drive the car? A. Wait a minute. Let me get this straight.

Q. Yes, get it straight by all means. A. Will you repeat it, sir?

The Court: Did you drive the car from Fallsburg?

The Witness: Fallsburg? They drove a truck, sir.

The Court: Did you drive it?

The Witness: No, sir.

2644 *Sol Bernstein—For People—Cross*

Q. Were you in the truck? A. Yes, sir.

Q. Did they have the body of Yuran in the truck they drove? A. Yes, sir.

Q. So you drove on the truck that carried the body of Yuran who had just been murdered, is that right? A. Yes, sir.

Q. Where were you when he was murdered? A. Where was I? I was taking a walk with somebody, sir.

Q. Taking a walk where? A. Around Falls-

2645 burg, sir.

Q. In Fallsburg? A. I think so. It was Fallsburg.

Q. And did you see Yuran alive there? A. No, sir.

Q. What? A. I didn't even know, sir.

Q. You don't even know?

Mr. Turkus: He did not say that. Objected to. Judge Talley repeats an answer differently than the witness gave it. I object to it.

The Court: Overruled.

2646

Q. Bernstein, you knew that Yuran was going to be killed, didn't you? A. No, sir.

Q. You did not? A. No, sir.

Q. You just happened to be there? A. I took a walk with somebody, sir, and then came along a car with a body.

Q. And they came along with a truck, did they, with his body in it? A. No, sir.

Q. Where did you first see the body? A. In Hymie Yuran's car.

Q. In a garage? A. No, sir, in the field.

Q. The first time you saw the body was in the fields? A. Yes, in the car first. They threw out his body.

Mr. Talley: I cannot understand that talk.

The Court: His body was in an automobile; it was thrown into a field and then picked up and put into a truck?

The Witness: No, sir.

2648

Q. Is the answer yes, sir? Did you help to put the body in the truck? A. Yes, sir.

The Court: You mean the shooting must have been in the automobile?

The Witness: Yes, sir, but I was not there, sir.

The Court: You came up afterwards?

The Witness: Yes, sir.

Q. What kind of a truck was this that you drove from Fallsburg to Loch Sheldrake Inn? A. I think it was a bakery truck. 2649

Q. Did you ride inside the truck or on the seat? A. Inside the truck, sir.

Q. With the body? A. Yes, sir.

Q. This man had been shot, hadn't he? A. Yes, sir.

Q. What was the pickaxe for? A. To bury him, sir.

Q. What time of the day or night was he buried? A. I think about twelve o'clock, sir.

Q. At night, midnight? A. Yes, sir.

Q. And you acted as a lookout while they

were digging the grave for him and throwing him in, is that right? A. Yes, sir.

Q. And your purpose was to give warning if anybody came along that they were to be on their guard against, is that right? A. Yes, sir.

Q. So you do not deny that you are an accomplice in the Yuran murder, do you?

Mr. Turkus: I object to it.

The Court: Sustained. That is not an accomplice.

2651

Mr. Talley: Exception.

The Court: According to law.

Mr. Talley: He assisted them in disposing of the corpus delicti, of the evidence of the crime. Certainly it makes him an accomplice.

Mr. Turkus: That makes him an accessory after the fact.

Mr. Talley: It is both.

Mr. Turkus: First year criminal court book.

Mr. Talley: Thank you for the education I got before you even started in. Don't attempt that with me, Turkus. You are making a grave mistake.

2652

The Court: The Court has been three times interrupted while attempting to speak. This is an exhibition of bad manners.

Mr. Turkus: I am sorry. I apologize to the Court.

Q. After the body of Yuran was buried, what did you do? A. After Yuran's body was buried?

Q. You heard the question. Answer it.

Mr. Turkus: I object to it, argumentative.

Mr. Talley: I object to this constant repetition by this witness of questions so that he will get time to think.

Mr. Turkus: I object to the advance summation in addition.

The Court: Overruled.

Q. Answer the question, please. A. I went back to the hotel where I was staying, sir.

Q. The hotel where? A. Oliver Hill in Woodbridge. 2654

Q. Not in Fallsburg? A. No, sir.

Q. Did you go back to Fallsburg where you brought the body from? A. What did you say, sir?

Q. Did you go back after you buried this body at midnight? A. I told you.

Q. Did you go back to Fallsburg where you had brought it from? A. I don't know what you mean.

Q. You do not? I am certainly using simple language. After the body of Yuran was buried, 2655 did you leave this field it was buried in? A. Yes, sir.

Q. Was it wrapped up at all or was it just thrown in the gave? A. Was it wrapped up?

Q. Yes. A. I don't know, sir.

Q. You saw it being taken out of the truck, didn't you? A. Yes, sir.

Q. You helped them to take it out of the truck, didn't you? A. Yes, sir.

Q. You helped them to carry it over to a hole in the ground? A. Yes, sir.

2656 Q. And you helped them put it in the grave? A. No, sir.

Q. Well, just where did you lay off? You took the body out of the truck; you carried it over to the grave. What did you do then? A. I was watching, sir.

Q. Did you leave the body? A. Yes, sir.

Q. And then you went some place to watch? A. Where they told me to watch.

Q. Where did you go to watch? A. Near the
2657 swimming pool.

Q. How far was that from this grave that they dug? A. About fifty feet I think, sir.

Q. Not much further than from where you are sitting to where I stand, is that right? A. I think further than that, sir.

Q. Was it as far as this table here where these distinguished newspaper men are sitting? A. A little further than that.

Q. Was it further than that? A. Yes, sir.

Q. Was it as far back as the wall of this court room? A. No, sir.

Q. It was not quite as far as that? A. I
2658 don't know about that. I am just giving you an idea.

Q. You just said it was fifty feet. Are you as far wrong on distance as you are on dates? A. I think where the dark fellow is, the curly haired fellow.

The Court: This room is supposed to be 45 feet deep.

Mr. Talley: From wall to wall?

The Court: I doubt if it is that. But I have been told it is 45.

Mr. Talley: What does your Honor

estimate the distance from the witness chair to where this gentleman is sitting?

The Court: The Court does not qualify as an expert.

Mr. Talley: I will take your Honor's statement it is 45. Mr. Foreman, what do you say the distance is from the witness chair

Mr. Turkus: This is Talley law.

The Court: This is grossly wrong and Court is reluctantly caused to repri- 2660
mand—

Mr. Talley: Judge, it has been done thousands of times, to have a foreman of a—

The Court: You will not interrupt the Judge.

Mr. Talley: I did not know the Court was continuing to speak.

The Court: Will you please sit down until the Judge is finished and I tell you?

Mr. Talley: I will be delighted to get the opportunity.

The Court: It is elementary that this 2661
is a departure from what the law permits. The Judge knows better than that. Now proceed.

Mr. Talley: I request that the foreman of the jury be permitted to estimate for the record what he regards as the distance between the witness chair, where the witness is testifying, and the point which he pointed out in the court room.

The Court: The Court reluctantly has been obliged to reprimand you for the

2662 previous question. You are doubly reprimanded for this. This is disorderly. It is nine minutes to four now and I am not going to permit the closing part of this session to become a staged brawl by counsel, so we are going to take a recess.

Mr. Talley: I take exception.

The Court: Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it and keep your minds
2663 open. We will resume tomorrow at ten o'clock. Everybody be in order while the witness is remanded.

Mr. Talley: Note my exception to your Honor's statement, your Honor's ruling, your Honor's observations.

The Court: Also, gentlemen, please remember the other admonition of the Court as contained in the instructions previously given. The jury may leave. The defendants are remanded.

2664 (Thereupon an adjournment was taken until Tuesday, October 28, 1941, at ten a.m.)

2665

Brooklyn, N. Y., October 28, 1941.

TRIAL RESUMED

SOL BERNSTEIN, a witness for The People, resumed the stand and testified further as follows:

Cross-examination by Mr. Talley (continued):

2666

Q. Mr. Bernstein, what did you do with the radio you said you took from the car that was stolen by you and Mugsy Cohen? A. I took the radio and threw it in the Bay; I broke it up.

Q. You threw it in Canarsie Bay? A. Yes, sir.

Q. First you say that Cohen took it out of the car, or you took it out of the car? A. Cohen took it out of the car.

Q. What did Cohen do with it? Did he take it away from the drop or did you take it away? A. I rode him away with it.

Q. You rode him away with it? A. Yes, sir.

2667

Q. When you parted, did he have the radio or did you? A. What do you mean?

Q. You rode him away with it. To what place did you ride him? A. Around the Brownsville section.

Q. Whereabouts in the Brownsville section? A. Amboy and Sutter.

Q. Did he get out of the car? A. Yes, sir.

Q. Did he take the radio with him? A. Yes, sir.

Q. Where did he take it? A. He took it out into a house.

Q. What house? A. I don't know; he went into the house.

Q. Not his house? A. I don't know, sir.

Q. You don't know what he did with it? A. No, sir.

Q. How did you get it again? A. How did I get it again? I went looking for him.

Q. Did you tell him you wanted the radio? A. Yes, sir.

Q. Then how did he get it back into your hands? A. He gave it to me.

Q. Where? A. In the same place where I
2669 brought him to.

Q. In the same place where you took him? A. Yes, sir.

Q. Did he give it to you on the street or on the sidewalk? A. No, sir, I went in the hallway; he told me to wait in the hallway.

Q. Of what house? A. Amboy and Sutter Avenue.

Q. What number? A. I do not recall, sir. I did not take notice to the number.

Q. Whose house was it? A. I don't know, sir.

Q. Did you know that Cohen did not live there? A. I cannot tell you that.

2670 Q. Where in the house did Cohen go to get the radio? A. I cannot tell you that, sir.

Q. Why did you take the radio out of the car? A. After I knew there was a murder I wanted nobody to get into any trouble, sir.

Q. You took the radio out of the car after you knew there was a murder, is that what you say? Will you repeat that? A. I did not want him to get in trouble; I did not want to get in any trouble myself.

Q. What did the radio have to do with getting in any more trouble than you were already in?

2671

A. If you sell the radio they were liable to get the numbers.

Q. That is what you wanted to avoid, anybody selling the radio? A. Yes, sir, he was a radio thief.

Q. You told us he was a radio crook, an automobile thief, that is how you designated him. A. Yes, sir.

Q. But you were the one who took the radio out of the car, weren't you? A. No, sir, Mugsy Cohen took it out.

2672

Q. When did you see Mugsy Cohen last, if there is such a person, where did you see him last?

Mr. Turkus: I object to the question, "if there is such a person," carrying with it an implication or characterization that is improper.

Mr. Talley: I am cross-examining him.

Mr. Turkus: I object to the form of the question, the objectionable portion being the part that starts with, "if there is such a person."

2673

The Court: No harm done. Objection overruled.

A. Sunday.

Q. The day before yesterday? A. I don't mean that day.

Q. That is what you said. A. I did not mean that, sir.

Q. When did you see him last. You know what "last" means. When was the last occasion? I cannot think of any other way of putting it. When did you last see him? There is

a limit to my vocabulary. A. Before I gave myself up.

Q. You gave yourself up in April of 1940? A. Yes, sir.

Q. You have not seen Mugsy Cohen since? A. No, sir.

Q. That is sure? A. Yes, sir.

Q. Where did you see Mugsy Cohen the last time you saw him? A. In Brownsville.

Q. Whereabouts in Brownsville? A. Amboy
2675 and Pitkin.

Q. Where is that? What place is that? A. A bar and grill, sir.

Q. What is the name of the bar and grill? A. Weiner's.

Q. Will you speak up so we can hear you? A. Weiner's.

Q. How do you spell that? A. (Spelling) W-e-i-n-e-r-s.

Q. Did you talk about this case when you saw him? A. I never talked with anybody, sir.

Q. You never talked with anybody? A. No, sir.

2676

Q. You do not mean that? A. Yes, sir.

Q. You talked to the District Attorney's office, didn't you? A. Yes, sir.

Q. You talked with Captain Bals of the Police Department? A. Yes, sir.

Q. You talked with Mr. McDonough, the detective? A. No, sir, he was not there.

Q. At any time did you talk about this case with Captain McDonough? A. No, sir.

Q. You did not? A. No, sir.

Q. Even when you gave yourself up to Detec-

tive McDonough you did not talk to him about the case? A. Yes, sir.

Q. Is that what you want us to understand? A. Yes, sir.

Q. Where is Mugsy Cohen now, do you know? A. I don't know what is doing in the outside world, sir; the only time I know what is doing is when I read the papers or listen to the radio. In other words, I don't know what is doing on the outside.

Q. Well, since you have been living at the Half Moon Hotel—it must be a good place, the Half Moon Hotel—since you have been living at the Half Moon Hotel at Coney Island you have been taken out for walks on the Boardwalk? 2678

Mr. Turkus: I object to a remark about the Half Moon Hotel accompanied by a smile of derision, which I think makes the question objectionable. I object to it.

Mr. Talley: You cannot stop me from smiling. I say this is some hotel.

Mr. Turkus: I have an objection.

Mr. Talley: Stop your smiling. It would be a crime to make me stop it. 2679

Mr. Turkus: I have an objection; I do not want to discuss personalities.

The Court: It would be a help to this trial if there was more smiling.

Mr. Turkus: Well, I will withdraw the objection.

The Court: The Half Moon Hotel is quite a place. I have stopped there.

Mr. Talley: You were in good company, Judge, if you want the record of

2680 this case to disclose it. But I would recommend you get another hotel.

Q. You were taken out on the Boardwalk, weren't you? A. No, sir.

Q. You had baseball games down there, didn't you? A. No, sir.

Q. Did you say you were or were not taken out on the Boardwalk? A. No, sir.

Q. You never were? A. Yes, sir.

2681 Q. Do you mean by that you have not been taken out on the Boardwalk for walks? A. No, sir.

Q. I will have to put it in your language: Were you taken out on the Boardwalk for walks at any time since you have been living in the Half Moon Hotel? A. No, sir.

Q. You were not—given any exercise at all down there; is that right? A. In the hotel, sir?

The Court: Outside of the hotel.

A. Yes, sir.

2682 Q. What does that mean? What do you mean by "Yes, sir"? A. Explain to me and I will tell you.

Q. You will have to speak up louder. I cannot be persistently asking this witness to raise his voice. We know he can. It is too much of a strain here to try to get this muttering.

Mr. Turkus: Your Honor put the question to the witness did he have exercise outside of the hotel, and to that question he responded in the affirmative, "Yes, sir."

The Court: Yes.

Mr. Talley: It is not clear to me, and I am sure it is not clear to the jury.

Q. You understand what I am saying to you? A. You will have to explain me, sir.

Q. I will have to explain to you?

The Court: Speak louder; the jury has to hear.

The Witness: You will have to explain to me, sir. 2684

Q. How long have you been living at the Half Moon Hotel? A. On and off, sir.

Q. That helps us a lot. How long have you been living there, how many days, weeks, months, or years,—how long have you been living there? A. About thirteen months, sir.

Q. During those thirteen months have you been taken out of the Half Moon Hotel for exercise? A. Yes, sir.

Q. Where were you taken for exercise? A. In Long Island, sir.

Q. Long Island? A. Yes, sir. 2685

Q. Whereabouts on Long Island? A. Some park—

Mr. Turkus: I object to the identity of the place.

The Court: Objection sustained.

Mr. Talley: Exception.

Mr. Turkus: In the objection I want it clearly understood that all I want—

The Court: I understand. The record may not state your grounds.

Mr. Turkus: I only object—I don't

2686 care what facts are gone into, but I do object to divulging the specific place where the witnesses were taken.

Mr. Talley: I object to the statement by the District Attorney and ask it be stricken from the record and the jury be instructed to disregard it.

The Court: Objection overruled; motion denied.

Mr. Talley: Exception. I insist I have
2687 a right to inquire.

The Court: The jury is instructed that these remarks are addressed to the Court and call for no ruling by the Court.

Mr. Talley: I insist I have a right to inquire as to the details of any place this man says he has been at, whether the District Attorney likes it or not. The responsibility here is on the Court.

Q. Did you ever go to a baseball game since you have been in custody in the Half Moon
2688 Hotel? A. Did I ever go? What do you mean, did I ever go?

Q. (The Court) Have you been taken to baseball games? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. Did you ever go to the movies since you have been in custody? A. No, sir.

Q. Did you ever play baseball? A. Yes, sir.

Q. Where did you play baseball? A. On Long Island, sir.

Q. Was that at Heckscher Park?

Mr. Turkus: I object to the location of the place.

The Court: Objection sustained.
Mr. Talley: Exception.

Q. That is, since you have been in custody you played ball? A. Yes, sir.

Q. You were with detectives who were guarding you? A. Yes, sir.

Q. Anybody else? A. Yes, sir.

Q. With whom else? A. The other witnesses.

Q. How many times did you do that? A. About four times, sir. 2690

Q. Where is Mugsy Cohen now? A. I don't know, sir.

Q. You have not seen him or heard from him in over a year and a half, is that your testimony? A. Since I am over here.

Q. What? A. Since I gave myself up.

Q. You first got into this Rosen case about four o'clock on the Friday afternoon before the killing, didn't you?

Mr. Turkus: I object to the form of the question; that is not my recollection of the testimony. 2691

Mr. Talley: It is not what your recollection is. I am asking him a question. Your recollection has nothing whatever to do with my question.

Mr. Turkus: Judge Talley seems to think that when I am addressing your Honor I am indulging in personalities. My purpose in addressing the Court is to register an objection. The witness has testified to the Rosen killing but has not mentioned he had any knowledge of it at four o'clock on Friday.

2692 The Court: The Court suggests that when an objection is made there be no discussion between counsel. The Court is prepared to rule promptly on objections. It will save a lot of time if this is kept in mind. The objection is overruled. However, the other question is indefinite. I do not know quite what you mean when you say, "You got into."

Mr. Talley: First got into this case; when he was first told about this case; when he was first told to go out and steal a car, change the plates, and deliver it to some drop. I want to know when that was. And he testified—

2693 The Court: The Court will not indulge in controversy with counsel; I am suggesting to you that you make your question more clear.

Mr. Talley: I am answering your question as to it not being clear.

The Court: I have overruled the objection.

2694 The Witness: There was no Friday afternoon at four o'clock.

Q. When were you first spoken to about stealing this car? A. Saturday, when Louis Capone showed me the route.

Q. Saturday? A. Yes, sir.

Q. When was it you say you were sitting in your automobile when you say Strauss came up to you? A. Four o'clock.

Q. Four o'clock Friday or Saturday? A. Saturday.

Q. Saturday afternoon? A. Yes, sir.

2695

Q. Then you were told to steal the car, is that right? A. No, sir.

Q. No? A. No, sir.

Q. When were you told to steal the car? A. Friday.

Q. Didn't you say a minute ago, "There was no Friday afternoon," that it was Saturday when this thing happened? A. Friday he told me to steal the car.

Q. You now say that Capone told you to steal the car? A. Louis Capone and Harry Strauss.

2696

Q. Didn't you tell us on your direct examination that it was Harry Strauss that told you to steal the car? A. They were all there, sir.

Mr. Rosenthal: I move to strike out the answer.

Mr. Talley: I move to strike out the answer as not responsive.

The Court: Let it stand.

Mr. Talley and Mr. Rosenthal: Exception.

2697

Q. You have told us, haven't you, when you were examined by the District Attorney that you were told to steal this car by a man named Strauss, isn't that the fact? A. Yes, sir.

Q. Now do you tell us that you were told to steal the car by Capone? A. They were all there together.

Q. Is that what you tell us now, that it was Capone that told you to steal the car? A. Harry Strauss told me to steal the car, but they were all together there.

Q. Are we now to understand it was Strauss

2698 that told you to steal the car? A. Yes, sir, Harry told me to steal the car.

Mr. Turkus: Will you instruct the witness to speak a little louder so everyone can hear his testimony at the end of the jury box?

The Court: The witness testified on direct examination that on that Friday, at Sackman and Livonia, he had a conversation with Strauss; he was sitting in
2699 his own car; Strauss got into the car with him; that while waiting in the car with Strauss, along came Weiss, Farvel Cohen, and Capone. I think you will find that is correct, Judge (addressing Mr. Talley).

Mr. Talley: Of course I will find it correct. I want this witness to admit it is correct. He just definitely and deliberately says, "There was no Friday afternoon," that it was Saturday afternoon. Now, your Honor bears out the recollection of the testimony by reading your notes.

2700 The Court: I understood you to be under the impression that Capone is now mentioned for the first time in connection with the incident.

Mr. Talley: He is mentioned for the first time with the direction of stealing the car. Up to now he has said it was Harry Strauss that told him to steal the car.

The Court: I have just read from my notes of the direct testimony in connection with instructions to steal the car: that Capone, according to the direct testimony

of this witness, was there, in addition to Strauss, Weiss, and Farvel Cohen.

By Mr. Talley:

Q. What were you and Harry Strauss talking about before you say the others came along? A. A general conversation.

Q. It had nothing to do with this proposed killing of Rosen? A. No, sir.

Q. Nothing at all, until they came along? A. Yes, sir. 2702

Q. As soon as they came into sight, then Strauss said to you, "You go steal a car," is that correct? A. After he came back.

Q. After who came back? A. Harry Strauss, Mendy Weiss, Louis Capone, and Farvel Cohen.

Q. After they came back from where? A. I don't know where they walked to.

Q. Did they walk away and leave you alone in the car? A. Yes, sir.

Q. And then they came back? A. Yes, sir.

Q. After how long a time? A. About three-quarters of an hour, I am not sure. 2703

Q. Then Strauss told you to steal a car, is that right? A. When they were all together, sir.

Q. Is that the time that Strauss told you to steal the car? A. Yes, sir, they were together, sir.

Q. You told us that at least four times, but they did not all together scream at you, "Go out and steal a car," did they? A. They were together, sir.

Q. Did they all at the same time tell you to steal a car? A. No, sir.

Q. Who did tell you to steal a car? A. Harry Strauss, sir.

Q. Is that on Friday or Saturday afternoon? A. On Friday, sir.

Q. Why did you tell me a few minutes ago that there was no Friday in this matter?

Mr. Turkus: I object. That was not the testimony. He was saying there was no Friday at four o'clock, whatever that means.

2705

The Court: I call your attention to the fact that it seems to me to be indefinite here as to when he got into the Rosen case. Apparently the witness understood it the same way. There was no Friday, so far as the testimony is concerned, involving knowledge by him of the killing of Rosen, but simply of stealing the car.

Q. You were told to steal the car on Friday afternoon, weren't you? A. Yes, sir.

Q. When were you told that a murder was to be done in this candy store on Sutter Avenue? A. When Louis Capone showed me the route.

2706

Q. When was that? A. Saturday, sir.

Q. What were you told about stealing the car on Friday afternoon? A. Just told me to steal the car and get a "drop".

Q. And that you did, Friday? A. Yes, sir.

Q. Did you leave at about four o'clock to go out and steal the car? A. I left when they told me, sir.

Q. Was that around four, between four and five? A. About one o'clock, 1:15 or something.

Q. What happened between 4 o'clock in the

afternoon and 1 or 1:15, so far as they were concerned? A. What happened when?

Q. Between 4 o'clock or thereabouts, when you say that they told you to steal the car—or Strauss told you to, and one o'clock.

Mr. Turkus: I object. That was not the testimony.

The Court: The witness testified under direct that after waiting around, pursuant to instructions, Friday afternoon, for 2708
three-quarters of an hour, about, the four returned and Strauss then said, "Steal a car and get a drop," and that after he was told, "Come over tomorrow afternoon at four o'clock on Sackman and Livonia Avenue."

Is that what your question has relation to?

Mr. Talley: Yes, that is my question. It is perfectly simple: what he did between four o'clock on that afternoon of Friday, when he says Strauss told him to steal a car, and when he stole the car and 2709
again saw Strauss.

The Witness: I went looking for Mugsy after I got the drop.

Q. Did you see any of these defendants on Friday night? A. No, sir.

Q. You got Mugsy to steal the car about one o'clock in the morning, is that right? A. Yes, sir.

Q. You stood there alongside of the car while you say Mugsy was getting it started? A. Yes, sir.

2710 *Sol Bernstein—For People—Cross*

Q. Then you drove away in your car and told Mugsy to follow you in the stolen car? A. Yes, sir.

Q. Then you led Mugsy to the garage? A. He followed me.

Q. You led him there; he followed you? A. Yes, sir.

Q. You told him where to put the car? A. Yes, sir.

Q. When you went into this drop you took out
2711 the radio, didn't you? A. No, sir.

Q. Who did that? A. Mugsy Cohen.

Q. Were you standing looking at him? A. Yes, sir.

Q. Did you say you did not know how to take a radio out of a car? A. Yes, sir.

Q. In all the cars that you had stolen before that time, you never took a radio out of one? A. No, sir.

Q. The radio was taken out of this car in order to sell the radio, wasn't it, to get something for it? A. Yes, sir.

2712 Q. You did not sell it? A. No, sir.

Q. You threw it into Canarsie Bay? A. Yes, sir.

Q. To destroy it as evidence, to get rid of it? A. Yes, sir.

Q. Now, at what time did you go out of the garage with the radio? A. About a quarter after two.

Q. A quarter after two in the morning? A. I am not sure of the time.

Q. About what time would you say it was, two or three o'clock in the morning? A. I cannot tell you.

Q. Four o'clock? A. No, not so late as that.

Q. It was between two and four? A. No, sir.

Q. You did not start out until after one? A. I did not have a watch; I cannot tell you.

Q. Haven't you testified you had an appointment with Mugsy for one o'clock? A. No, sir.

Q. Haven't you told us that it was one o'clock when you went out to get the car? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. Then you stole the car at one o'clock? And it must have been pretty close to two o'clock 2714
when you got it back into the drop and removed the radio, and closed up the garage again? A. I did not clock it.

Q. When you left the garage with the radio taken out of the stolen car in your possession, it must have been pretty close to two o'clock wasn't it? A. I did not have no watch.

Q. It was after one? A. Yes, sir.

Q. And it was before four o'clock, you say? A. Yes, sir.

Q. What is your best estimate of the time you got out of the drop with the stolen radio? A. 2715
About two or half past two or a quarter after two.

Q. At what time did you get back to Amboy and Sutter, where you say you had to go?

Mr. Turkus: I object. That is not a proper chronology of this.

Mr. Talley: Must I follow it chronologically?

Mr Turkus: I have an objection pending before the Court.

The Court: What is the day, Saturday?

Mr. Talley: Yes.

2716 *Sol Bernstein—For People—Cross*

The Court: Objection overruled.

Mr. Talley: It is now past one o'clock Saturday morning when they stole that car, and I am trying to follow up his activity in connection with this Rosen murder from one o'clock, when he stole the car, Friday night or Saturday morning, up to Sunday morning when Rosen was killed.

The Court: Go ahead.

2717

Q. (Last question repeated by reporter.) A. About 20 minutes or 25 minutes; I am not sure; I did not have no watch; it is not far from Amboy and Sutter.

Q. When did you get the lock, go out and buy the lock for the drop? A. When I rented the garage the woman told me to get a lock.

Q. When was that, Friday afternoon or evening? A. Friday afternoon, sir.

Q. When did you come back to the place where you say you met Strauss and the others after having stolen the car and taken out and given to Mugsy Cohen the radio, what time did you get back? A. To where?

2718

Q. To wherever you went after stealing the car and putting it in the drop. A. I don't know what you mean; I had an appointment four o'clock the next day.

Q. Where did you have the appointment? A. Sackman and Livonia.

Q. That would be four o'clock Saturday? A. Yes, sir.

Q. Were you in their company from four

o'clock Saturday until the killing on Sunday morning? A. No, sir.

Q. You were with them that night, weren't you? A. I don't know what you mean.

Q. Were you with them on Saturday night? A. Yes, sir.

Q. What time did you pick them up on Saturday night? A. 10 to 10:30.

Q. Was it after 10 o'clock? A. I said 10 to 10:30.

Q. And I said, I am asking you, was it after 2720
10 o'clock? A. Yes, sir.

Q. Where did you see them then? A. Sackman and Livonia.

Q. Was Weiss there? A. Yes, sir.

Q. Were you in your car? A. I got out of the car.

Q. Did you have a car there? A. The hot car, yes, sir.

Q. The stolen car? A. Yes, sir.

Q. Sackman and Livonia Streets, is that right? A. Yes, sir.

Q. Was that the time the guns were handed 2721
out? A. Yes, sir.

Q. Who brought the package that you say contained the guns? A. I think it was Joe Pileh, I am not sure.

Q. How do you spell that? A. (Spelling) P-i-l-e-h, I think.

Q. You say you are not sure whether it was him or not? A. Yes, sir.

Q. Did you know Joe Pileh before this night? A. Yes, sir.

Q. Have you seen him since that night? A. Since that night?

Q. Yes. A. Yes, sir.

Q. When did you see him last? A. I seen him in the Brownsville section lots of times.

Q. Have you seen him since you have been in custody? A. No, sir.

Q. Where were you standing when the guns were handed out? A. By the car, sir.

Q. By what? A. By the hot car.

Q. By your car? A. The hot car.

Q. On the sidewalk? A. Yes, sir.

Q. Was everybody out of the car? A. There
2723 was nobody in the car.

Q. That is another way of saying that everybody was out of the car, is that right? A. Yes, sir.

Q. Who handed the guns around? A. What do you mean, who handed the guns?

Q. You don't know what that means? A. I don't understand you, sir.

Q. Did anybody give anybody else a gun? A. It was a package, sir.

Q. Was the package opened? A. No, sir.

Q. How did you know there were guns in the
2724 package if you did not see it opened? A. Harry Strauss said, "The package of guns, put in the car."

Q. What was done with the package? A. He gave it to me to put in the car.

Q. And did you? A. Yes, sir.

Q. Did you ever see it opened? A. Yes, sir.

Q. Where was it opened? A. In the park.

Q. In this little park you have described? A. Yes, sir.

Q. You went into the park? A. What do you mean, we all went in.

2725

Q. That is exactly what I say. What did you think I meant? A. We were all in the park.

Mr. Turkus: I object to the repartee.

The Court: Objection overruled.

Q. At what time? A. About 11 o'clock.

Q. Did you see the package opened then? A. Yes, sir.

Q. Who passed the guns out? A. I gave the package to Mendy Weiss.

2726

Q. You gave the package to Mendy Weiss? A. Yes, sir, and Mendy Weiss passed the guns.

Q. Did he open it? A. Yes, sir.

Q. Did he take the guns out? A. Yes, sir.

Q. How many? A. Three.

Q. Did he hand the guns around to two of the others? A. Yes, sir.

Q. He took one himself, you testified to? A. Yes, sir.

Q. You say Ferraco got a gun? A. Yes, sir.

Q. Where did he put it? A. I did not take notice.

2727

Q. Who else did you see get a gun? A. Harry Strauss.

Q. Where did Harry Strauss put his gun? A. I don't know, but he must have put it in his pocket somewhere.

Q. What pocket? A. I cannot tell you that.

Q. Where did Weiss put his gun? A. I cannot tell you that. He must have put it in his pocket.

Q. What pocket?

The Court: (interrupting) We are not

asking you what you think, but only what you know.

Q. What pocket? A. I cannot tell you that.

Q. His pants pocket? A. I could not tell you that.

Q. His coat pocket? A. Might have been his pants, might have been his coat pocket.

Q. You were standing right alongside of him, weren't you? A. Yes, sir.

2729 Q. As close as that officer is standing behind your chair? A. Yes, sir.

Q. You say you did not see what they did with their guns? A. They put them in their pocket; I don't know which pocket.

Q. Now, did they put it in the right-hand pocket or the left-hand pocket?

Mr. Turkus: I object.
The Court: Sustained.
Mr. Talley: Exception.

2730 Q. Can't you tell us whether they put it in their pants or coat pocket, any of the three of them?

Mr. Turkus: Objected to.
The Court: Sustained as repetitious.
Mr. Talley: Exception.

Q. How were they dressed? A. Just with suits and hats on.

Q. When you say suits, do you mean pants and coat? A. Yes, sir.

Q. That is the way Harry Strauss was

dressed? A. They were all dressed the same way.

Q. Did they have hats or caps on? A. Hats.

Q. Were they soft hats, federas? A. Felt hats.

Q. Not derbies? A. No, sir.

Q. What color hat did the defendant Weiss have on? A. I think it was grey.

Q. What kind did Strauss have on? A. I think they all had grey.

Q. All grey, according to your recollection? 2732
A. Yes, sir.

Q. Now, did they have their hats and coats on for the remainder of that evening? A. Yes, sir.

Q. You say that Weiss went away from you during part of that Saturday night with one of the others, do you remember that? A. He went alone first.

Q. Did he have his hat and coat on when he went then? A. Yes, sir.

Q. Then the second time he went, did he have his coat on then? A. Yes, sir.

Q. You saw Weiss go alone once, and then 2733
Weiss go with somebody else the second time? A. Yes, sir.

Q. You saw him come back alone and you saw him come back with this other person? A. Yes, sir.

Q. Who do you say he went with, Strauss? A. Yes, sir

Q. When they came back they both had their hats and coats on? A. Yes, sir.

Q. When he came back alone the first time he had his hat and coat on? A. Yes, sir.

Q. That is Weiss I am speaking about? A. Yes, sir.

Q. Now, you told us that Weiss gave you a slip of paper with an address on, that you were to go to. That was Saturday night, wasn't it? A. Yes, sir, in the morning.

Q. What time in the morning? A. I mean Saturday night.

Q. Now what do you mean? A. Yes, sir. Saturday night.

2735 Q. At what time Saturday night, as long as you know? A. About 11 o'clock or half past 11, something like that.

Q. Did he write the name and address? A. Yes, sir.

Q. What was on that slip of paper? A. There was an address on it.

Q. Was there a name on it? A. No, sir.

Q. Just the address? A. Yes, sir, an apartment number.

Q. Do you remember what the address was? A. No, sir.

2736 Q. Have you got that slip? A. I beg your pardon?

Q. Did you hear what I said?

The Court: Did you keep the slip?

A. They gave it to me, yes, sir.

Q. (The Court) Have you got it now? A. No sir.

Q. What did you do with it? A. I ripped it up.

Q. You say you what? A. Ripped it.

Q. When did you rip it up? A. When I got to the apartment house.

2737

Q. You threw the slips away, the pieces away? A. Yes, sir.

Q. You have not seen that since? A. Yes, sir.

Q. What? A. I did not see that since.

Q. Did you know whose apartment you were going to? A. No, sir.

Q. When did you find out? A. When I got up to the apartment.

Q. You did not have the name on the slip? A. No, sir.

2738

Q. How did you know what apartment to go to? A. Because it was written on the paper.

Q. The number of the floor was written on the paper? A. The apartment number.

Q. When you got in there you told us these friends were eating? A. Yes, sir.

Q. And they invited you to have a sandwich? A. Yes, sir.

Q. You said that was Cohen's house, didn't you? A. Yes, sir.

Q. Farvel Cohen? A. Yes, sir.

Q. Did you know Cohen before that? A. Yes, sir.

2739

Q. Did you know he had a wife and two children? A. I did not know, sir.

Q. Do you know now he has, in 1936? A. I don't understand what you mean.

Q. Did you know in 1936 that he had a wife and two children? A. No, sir.

Q. Did you see his wife or any child in the apartment when you went in that night? A. No, sir.

Q. You did not see anybody except these men you say you saw? A. Yes, sir.

2740 Q. No woman around there at all? A. No, sir.

Q. No child around there? A. No, sir.

Q. You say that you slept on rugs? A. Yes, sir.

Q. Have you ever been in that apartment since? A. No, sir.

Q. Did you ever see a diagram of that apartment? A. A diagram?

Q. A drawing? A. I seen a picture of it.

2741 Q. You saw a picture of the apartment? A. Yes, sir.

Q. Where was that? A. I pointed it out.

Q. You pointed what out? A. The apartment house.

Q. On this picture? A. Yes, sir, the apartment house, sir.

Q. I am talking about the interior or the living part of the room there inside the building. A. No, sir.

Q. Did you ever see a picture of the rooms you say you were in? A. No, sir.

2742 Q. Did you ever see a diagram or drawing of that apartment you say you were in? A. No, sir.

Q. You got there about what time, 11 o'clock? A. 11 or 11:15, or something like that.

Q. Eleven or 11:15? A. No, sir, it was later than that. I don't know how long it took me to get there, because I had to drop the car and then I took a cab; I don't know how long. I did not have a watch.

Q. What time would you say you got there? A. Maybe half past 12.

Q. And was the defendant Weiss there when you came in? A. Yes, sir.

Q. Did he remain there during all the time you were there? A. Yes, sir.

Q. You went to sleep in a room and you did not go out again after you went in? A. What do you mean?

Q. You went to sleep in a room in which a rug was on which you say you slept? A. Yes, sir.

Q. You slept there until, you say, five o'clock in the morning? A. About five o'clock.

Q. That would be Sunday morning? A. When 2744
Mendy Weiss woke me up.

Q. Mendy Weiss was there and he woke you at five o'clock? A. Yes, sir.

Q. Then you went out to get the car, didn't you? A. They told me to get the car.

Q. The stolen car? A. Yes, sir.

Q. You knew when you went out to get the stolen car at five o'clock on Sunday morning that there was going to me a murder committed, didn't you? A. Yes, sir.

Q. You knew that that car that you had stolen for them and for which you had stolen plates to put on— A. I did not know at first. 2745

Q. You knew when you took that car upon which you had put plates which you had stolen, and from which you had taken the plates that were on it when you and Cohen did steal the car, as you say, was to be used to kill somebody in Rosen's candy store?

Mr. Turkus: I object. That is not the testimony. The time element is bad.

The Court: The time element is not clear. Sustained.

2746

Mr. Talley: Exception. I will make it clearer.

Q. This car that you were told at five o'clock in the morning to go out and get, was the car that was stolen by you? A. Me and Mugsy, yes, sir.

Q. And this car bore on it at five o'clock on this Sunday afternoon the plates which you had stolen from another car?

2747

Mr. Turkus: I object.

Mr. Talley: Sunday morning, I mean.

Q. (The Court) When you went for the car at five o'clock on Sunday morning you knew it was for a killing, didn't you? A. What is that?

The Court: Repeat the question, Mr. Stenographer.

Q. (Question repeated by the reporter.) A. Yes, sir.

2748

By Mr. Talley:

Q. And on that car were plates you had stolen from another car? A. Yes, sir.

Q. You had broken up the plates that you took from the stolen or original car? A. Yes, sir.

Q. And threw them into the sewer? A. Yes, sir.

Q. You had taken a radio out of this stolen car so as to help you to avoid detection; you did not want to get yourself in trouble or anybody else?

2749

Mr. Turkus: I object. That is not the testimony. The testimony was that was in Canarsie. He said the radio was taken out by Mugsie, who was a radio thief, and he got the radio later from Mugsie.

Mr. Talley: He said it was taken out so nobody would get in trouble.

The Court: He said he got it back. He took it away from Mugsie and destroyed it so nobody would get in trouble.

2750

Q. Why did you take the radio out of the car?

Mr. Turkus: I object unless the time is fixed.

Mr. Talley: You don't dispute the radio was taken out of the car; your own witness says so.

Mr. Turkus: "Taken out of the car" is ambiguous. The radio was taken out of the car several times.

Mr. Talley: Once it was taken out by this witness and Mugsie Cohen. I am sorry I have to go into that, but apparently I must, although it interrupts the line I was on. 2751

Q. Bernstein, when you got the car which you say you and Mugsie stole together, and you led him by driving your car ahead of him into this drop, you and he took the radio out of the car, didn't you? A. Mugsie took the radio out of the car.

Q. You were standing there looking at him, weren't you? You were ready to assist him if

2752 *Sol Bernstein—For People—Cross*

he needed any assistance? A. What do you mean?

Q. You were ready to help him to get the radio out if he needed any help? A. He did not need any help; he was a good man for it.

Q. You were ready to help him if he needed that help? A. I don't understand you.

Mr. Turkus: Objected to as already answered.

2753 The Court: Objection sustained.

Q. Were you there waiting for him to take the radio out? A. Yes, sir.

Q. How close to him? A. How close to him?

Q. Yes. A. Right from here to here. (indicating)

Q. Indicating about a foot? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Then you drove Mugsy away, he carrying the radio? A. In the car, yes, sir.

Q. In the car. You drove the car? A. Yes, sir.

2754 Q. Mugsy holding the radio? A. He did not hold it; he put it in the car.

Q. You are quite particular now, aren't you? A. It was in the car.

Mr. Turkus: I object to Judge Talley saying to the witness, "You are quite particular now." It is not a question, but it is a sarcastic remark, and the jury should be admonished to disregard it.

The Court: I don't think that calls for a ruling.

Q. Did you have a light on the car when you stole the radio out of it? A. A flashlight, yes, sir.

Q. That flashlight was provided by you? A. Yes, sir.

Q. Did you hold the flashlight while you say Mugsy was taking the radio out of the car? A. Yes, sir.

Q. Was that taken out with a pair or pliers which you brought along? A. Yes, sir.

Q. And also the screw driver which you brought along? Was that also used? A. Yes, sir. 2756

Q. How many rooms were in this apartment you went into, in which you slept on a rug? A. I did not take notice.

Q. What room did you sleep in? A. The living room.

Q. Was it furnished? A. No, sir.

Q. Nothing there but rugs? A. Yes, sir.

Q. No chairs? A. I cannot tell you that.

Q. When you say it was not furnished, you must mean there were not chairs or tables there. A. I did not see— What do you call that again? I don't know what to call that. I did not see any living room suite, just rugs. I don't know if there were any chairs in the corner; I did not take notice. 2757

Q. Were you there from one o'clock in the morning until five? A. Yes, sir.

Q. You ate there and you slept there? A. Yes, sir.

Q. And you cannot tell us whether there were any chairs or tables in the room which you slept in? A. I did not go looking around.

2758 *Sol Bernstein—For People—Cross.*

Q. Where were the other men sleeping? A. I cannot tell you.

Q. Did they sleep on the rug with you? A. I left them in the kitchen.

Q. Did they sleep in the room with you? A. I cannot tell you that, sir.

Q. Did any of them sleep on the rug which you say you slept on? A. I did not see them, sir.

Q. Were you the first to leave the kitchen? A. Yes, sir.

2759 Q. You went out and went and threw yourself on the rug and went to sleep; is that right? A. Not sleep, just laying around.

Q. You did not sleep? A. No, sir.

Q. You knew that these men were in the apartment all that night and they had not left and you did not leave? A. Yes, sir.

Q. Between the time you left them in the kitchen and when you awakened at about five o'clock in the morning? A. Yes, sir.

Q. When you got to the Rosen candy store it was broad daylight, wasn't it? A. Yes, sir.

2760 Q. At what time do you say it was when you got there? A. I could not tell you that, sir.

Q. It was after five o'clock, wasn't it? A. Yes, sir.

Q. Was the store open for business? A. When I pulled over the car it was open.

Q. You pulled over directly in front of the store? A. Yes, sir.

Q. So that these men you say went in, when they came out they could go right into your car by crossing the sidewalk? A. What do you mean by crossing the sidewalk?

Q. Just exactly what I say, crossing the side-

walk, from the entrance of the store to the curb where your car was. A. Yes, sir.

Q. That is all they had to do? A. Yes, sir.

Q. And you were sitting at the wheel of the car? A. Yes, sir, with the motor running.

Q. And with the motor running? A. Yes, sir.

Q. Do you say you did not see Rosen that morning at all? A. No, sir.

Q. This is not a wide sidewalk there, is it? A. What do you mean by wide sidewalk?

Q. Don't you know what I mean by wide sidewalk? A. Like every street in Brooklyn that I know. 2762

Q. Can you estimate the width of the sidewalk from the front of Rosen's store to the curb? A. I did not have a ruler, I did not measure it.

Q. You did not have a ruler and you did not have a watch; all you had was a pliers and a flashlight and a screwdriver to steal the car and steal the plates with; is that right?

Mr. Turkus: Objected to as argumentative, inducing the witness to engage in repartee and discussion, not seemly in a court-room. 2763

Mr. Talley: This is serious business for me.

Mr. Turkus: Will your Honor direct counsel to address the Court without an incessant barrage from Judge Talley? I have an objection.

Mr. Talley: Has what I said called for comment?

Mr. Turkus: Will you kindly conduct yourself with proper deportment?

2764 *Sol Bernstein—For People—Cross*

Mr. Talley: Don't tell me anything about proper department.

Mr. Turkus: Nobody can tell you anything.

Mr. Talley: Don't dare tell me anything about that. Don't dare tell me how to conduct myself in the courtroom. That is one thing I will not take from you. That is one thing you cannot talk to me about.

The Court: I will have to send for the
2765 gavel. The witness has already testified to these matters. The objection is sustained as repetitious.

Mr. Talley: Exception.

Q. When you went down from that apartment, you went out to get the car, didn't you? A. What apartment do you mean?

Q. What apartment do you think I mean? A. You will have to explain me more clearly.

Q. Then I will be clearer.

By the Court:

2766

Q. When you were called up at five o'clock in the morning you went to get the car? A. Yes, sir.

Q. Where did you go? A. Where did I go? I went to get the car and bring it up to the park, where they told me.

By Mr. Haley:

Q. Did you do that? A. Yes, sir.

Q. You brought it over to the little park you spoke of? A. Yes, sir.

Q. Were those men there when you got to the little park? A. Mendy Weiss was there, Harry Strauss was there, and Jimmy Ferraco.

Q. In the park? A. Yes, sir, in the park.

Q. What part of the park? A. The park at Blake and Bradford.

Q. What part of the park? A. I beg your pardon?

Q. What part of the park? A. There was a fence around; I can show it on the picture if you want me to.

2768

Q. Just tell me. A. I cannot tell you, the portion I know.

Q. Was it in the center of the park or at the entrance of the park? A. Where the entrance is you just make a right turn. If you show me a picture I wil show you where.

Mr. Talley: You can see the pictures. The District Attorney has quite a string of pictures. He has got a collection.

The Court: Judge Talley wants to see the picture.

2769

Mr. Talley: The District Attorney declines to hand me the picture. His witness has asked me to look at it. When I ask for it this young gentleman declines to hand it to me. What kind of conduct is that in a serious trial?

The Court: In the exhibit which has the corner of the park where this witness previously testified as to the meeting, hand it to Mr. Talley.

Mr. Turkus: There are two pictures.

The Court: Let him see both.

2770

Mr. Turkus: In addition to that I have a diagram about six feet long. I will bring in the diagram.

Mr. Talley: We did not ask for the diagram.

Mr. Turkus: May the record indicate two photographs have been handed to Judge Talley by the District Attorney? They are not in evidence as yet. And I will ask to have them marked for identi-

2771

fication.

(Received and marked People's Exhibits Y and Z for identification.)

By Mr. Talley:

Q. Was it after you met these men in this little park you stood in the hallway of this apartment house? A. Which apartment house?

Q. The apartment house which you have described as all standing in.

2772

The Court: He told you in the lobby.

The Witness: We all were there, yes, sir.

Q. Did you drive them over in the car you were driving, the hot car, as you described it? A. No, sir.

Q. How did you get to this apartment house? A. We all walked.

Q. Where did you leave the car? A. Bradford and Blake.

Q. That is where the park is? A. Yes.

Q. How far did you walk from there to get to

this apartment? A. Up to the corner of Sutter Avenue, and the next block is Belmont, and we made a left turn on Belmont to Wyona; on Wyona and Belmont, that is where it was.

Q. How long did you stay in the lobby? A. I didn't have a watch.

Q. You told us that at least five times. We will take your word for that, at least, that you did not have a watch. A. It might have been three-quarters of an hour.

Q. The four of you stood in the hallway? A. 2774
Mendy Weiss, Harry Strauss, Jimmy Ferraco, and myself.

Q. Inside of the doorway? A. In the hallway, sir. Right near the door.

Q. What time in the morning would you say that was? A. I don't know how long; five o'clock they called me up. I don't know how long I got there.

Q. You had to go out and get the car? A. Yes, sir.

Q. You had to go up to this little park? A. Yes, sir.

Q. You had to meet those four men? A. I did not clock it; I did not have any watch. 2775

Q. You had to do all those things? A. Yes, sir.

Q. What time do you say it was when you got to this apartment house?

Mr. Turkus: I object. The witness cannot fix the time limit. He has been exhausted.

By the Court:

Q. How much after five was it according to

2776 *Sol Bernstein—For People—Cross*

your estimate? A. It might have been seven o'clock. I cannot tell you.

Q. (Mr. Talley) Might have been seven? A. What do you mean, in the house?

Q. How long did it take you to get to the lobby and look out? A. From where I walked to?

Q. Yes. A. About ten minutes.

By Mr. Talley:

2777

Q. Was the door open or shut when you were standing in this hallway? A. Shut.

Q. Will you look at the photograph which is marked People's Exhibit 30, and will you tell us exactly where you were standing when you say you were standing in the hallway? A. We were all in the hallway over here, inside (indicating).

Q. With the door shut? A. Yes, sir.

Q. Will you look at the door on that photograph? A. Yes, sir.

Q. That is not a door you can see through, is it? A. Yes, sir.

2778 Q. Is there a glass in that door? A. Yes, sir.

Q. Let me see the photograph again, please. All right, you stood in the hallway with the door shut looking out through the glass that may or may not be there. I think it is there.

Mr. Talley: I have no objection to the jury looking at it, to see if it is.

Q. You stood there for three-quarters of an hour? A. Yes, sir.

Q. Did anybody come down from the apart-

ment house while you were standing there? A. No, sir.

Q. Did anybody go up in the apartment house while you were standing there? A. No, sir.

Q. Did anybody pass on the sidewalk while you were standing there? A. I could not tell you that.

Q. *Do you mean by that answer you do not* remember? A. I do not recollect.

Q. You didn't see any policeman walking along there who saw you four men in the place, did you? A. I don't understand what you mean. 2780

Q. You don't understand? Did a policeman walk along in front of that house while you were standing there that Sunday morning? A. I did not take notice.

Q. Did you see Rosen leave his house while you were standing in the hallway? A. No, sir. I did not even know who Rosen was.

Q. When did you know the identity of Rosen? A. When I picked up the paper on Sunday night.

Q. Not before? A. Yes, sir.

Q. You did not take the trouble to ask Harry 2781 Strauss or anybody else who the man was that was going to be killed in the candy store? A. I did not ask questions; I just obeyed them.

Q. You did not care who was being killed, did you? A. It would be more healthier for me.

Q. You did not care who was being killed, did you? A. I could not back down.

Mr. Talley: I move to strike out the answer as not responsive.

Mr. Turkus: I move the answer stand. It is responsive.

2782 *Sol Bernstein—For People—Cross*

The Court: Motion denied.
Mr. Talley: Exception.

Q. Will you answer my question? You did not care who it was that was being killed that morning, did you?

Mr. Turkus: Objected to as already answered.

The Court: The Court accepted the answer as being an answer to the question.

2783 Mr. Talley: I did not accept it, sir. I take an exception to your Honor. The answer, I contend, is clearly unresponsive and voluntary and not an answer to my question.

By the Court:

Q. We will put it this way: Were you interested in who was going to be killed? A. No, sir.

Q. Did it make any difference to you who was
2784 going to be killed? A. I could not help myself.

Mr. Rosenthal: I move to strike it out.

Q. Yes or no? A. What could I have done.

Q. Was it a matter of interest to you who it was that was to be killed? A. I cannot answer that.

Mr. Rosenthal: I have objected to the answer, which was not responsive to the Court's question, and my motion was to strike out the answer.

2785

The Court: Strike out, "What could I have done?"

Q. Did you look into the store during the shooting? A. No, sir.

Q. Did you look in the store at any time after the others went in? A. Just looked, yes, sir, not into the store.

Q. That is what I want to find out: Did you look in the store at the time? A. I just looked at the store, but I did not look inside.

2786

Q. Not inside? A. No, sir.

By Mr. Talley:

Q. Did you see anybody in the store while you were waiting outside with the car, directly at the door? A. No, sir.

Q. You did not see these men inside the store at all? A. No, sir.

Q. You did not see what they did? A. No, sir.

Q. You heard shots? A. A lot of shots.

2787

Q. When you heard a lot of shots did you look in the direction from which they came? A. Yes, sir.

Q. Did you see anything then? A. Mendy Weiss and Harry Strauss ran out of the store.

Q. Before they ran out of the store did you see anything happen inside the store? A. No, sir.

Q. Was the window of the store open from the street when you got there and parked your car directly in front of the store? A. I did not take notice of the store then.

2788 Q. Of course, you knew where you were going to park when you went there? A. Yes, sir.

Q. You knew you were going to park directly in front of the candy store, didn't you? A. Yes, sir.

Q. You held back the seat and held the door open for these men to get into the car? A. Yes, sir, after the shooting.

Q. So you knew a lot about this killing, didn't you? A. I did not deny it, sir.

2789 Mr. Turkus: I object to the question. It is ambiguous, argumentative, and repetitious.

The Court: Sustained as ambiguous.

Mr. Talley: Exception.

Q. You stole the car that was used in this murder, didn't you?

Mr. Turkus: Objected to as already answered.

The Court: Sustained as repetitious.

2790 Mr. Talley: Exception.

Q. You stole the plates from another car and put them onto the car which was used in the murder, didn't you?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained as repetitious.

Mr. Talley: Exception.

Q. You were shown the route that you were to take the killers away from the scene of the

2791

killing, weren't you? A. Yes, sir, by Louis Capone.

Q. Yes, you told us that before, but were you told there was going to be a killing in that store on that morning, I asked you.

Mr. Turkus: Objected to as repetitious and improper in form: that was not the testimony given.

The Court: We have been all over that.

2792

Q. And you drove—after you heard the shots in this store in which you were told there was going to be somebody killed—you drove some men away from the scene of the killing? A. Yes, sir.

Q. Now, under oath, Bernstein, you swore that you did not know what this Rosen killing was all about, didn't you?

Mr. Turkus: Objected to as to form.

The Court: Objection overruled.

2793

A. You want me to answer.

Q. Yes. A. I did not know, sir.

Q. What? A. I did not know.

Q. You did not know what? A. What it was all about.

Q. You knew there was to be a killing, didn't you? A. Yes, sir.

Q. You knew it was to be on a Sunday morning, September 13, 1936, didn't you?

Mr. Turkus: I object, that is not the testimony: it is repetitious.

The Court: Objection sustained.

2794 Mr. Talley: Exception. Your Honor heard this witness say he did not know what it was all about. Are you going to prevent me from bringing back to his memory things he did in connection with it and in furtherance of it, which make him an accomplice? Are you going to prevent me from proving that?

The Court: Don't forget yourself.

Mr. Talley: I never do, nor do I over-
2795 look, your Honor, the necessity for preserving dignity in this court, but I do want my rights in cross-examination protected by you. You are the only one who can protect them, and I say I am entirely, definitely, and manifestly within my rights when I am asking this principal witness for the People the questions I am now asking.

Mr. Turkus: I object to the summation. He is not here as the People's principal witness.

2796 Mr. Talley: He is your principal witness, and do not attempt to deny it.

Mr. Turkus: You may think so.

The Court: The Court tries to rule fairly, and counsel should rest on their exceptions. I would rather you asked the question and the Court would then rule.

By Mr. Talley:

Q. You say you did not know anything about this killing?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained. He has not said so.

Mr. Talley: Exception. He has testified he does not know anything about this killing. He testified to that within the last five minutes.

The Court: No, he has not.

Mr. Talley: Exception. I did not ask him anything about the Rosen—I asked 2798
him about if he had not sworn before a Court and jury he knew nothing about it.

Mr. Turkus: That was not your question.

The Court: I will not indulge in altercations.

By the Court:

Q. Did anybody at or about the time of this occurrence tell you the reason why it was to be done? A. No, sir.

Q. And after the alleged killing did anybody 2799
tell you, in the group, tell you the reason why it was done? A. No, sir.

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

By Mr. Talley:

Q. In the case of People v. Irving Cohen, in which you testified as a witness for the prosecution, which was tried in the June term of 1940,

2800 *Sol Bernstein—For People—Cross*

in Monticello, New York, were you asked these questions and did you make these replies:

"Q. You aren't (meaning are not)—You aren't accessory or accomplice to any murder? A. That is right."

Mr. Turkus: There were other lawyers who tried that case. If that question was asked in this court I would have objected to it as a legal question.

2801 The Court: There is nothing to call for a ruling now. I am not interested in what you would have done if you were there.

Mr. Turkus: I object to the question.

The Court: Sustained. It is a legal point.

Mr. Talley: Exception.

I don't think your Honor understood the situation.

The Court: What is an accessory as defined by Section 2 of the Penal Code?

2802 Mr. Talley: I am asking you to bear with me. If on a certain occasion which I have called his attention to he was asked this question and whether he made a certain reply it matters not whether the question has any significance or sense or legal meaning. I am entitled to know whether he was asked that question and whether he made that answer.

The Court: The Court has said you are not. It has nothing to do with this case.

Mr. Rosenthal: I except.

Mr. Talley: I except.

Q. Were you asked this question and did you make this reply: "I must get this question and answer on the record, if your Honor please.

The Court: Certainly. Otherwise your exception is no good, although in this case no exceptions are needed; the entire record is subject to review without exceptions."

By Mr. Talley: 2804

Q. On the trial in Monticello were you asked these questions and did you make these replies:

"Q. You aren't an accessory or accomplice to any murder? A. That is right.

"Q. And that is true? A. Yes.

"Q. And you have had nothing to do with any murder on any occasion? A. That is right."

Were you asked those questions and did you make those replies on the trial of Irvin Cohen in Monticello, New York?

Mr. Turkus: I object. The additional ground of my objection is there is nothing inconsistent between that and his admission which he has made in this courtroom, that he told the truth about Cohen and that he withheld other information. I will not go into the explanation he made. There is nothing inconsistent in that testimony and the present testimony. 2805

Mr. Talley: I object to this statement. It is a summation. It is not time to sum up to the jury, and it is not the basis of an objection.

2806

The Court: The last part, that is, the last question and answer, are competent. The rest is ruled out.

Mr. Talley: Exception.

Q. "Q. And you had nothing to do with any murder on any occasion? A. That is right."

Were you asked that question and did you make that reply under oath?

2807

The Court: Yes or no?

A. I can explain about that.

Mr. Talley: I move to strike out the answer.

The Court: Strike it out.

Q. Were you asked that question and did you make that answer? A. If it is in the book, I said it.

Q. It is in the book. A. I said it, but I can explain.

2808

Mr. Talley: I move to strike out all except, "I said it."

Mr. Turkus: He can further explain anything.

The Court: It is stricken out.

Mr. Rosenthal: And I ask the latter part of this last answer be stricken out, about explaining.

The Court: The question of explaining can be attended to at the proper time by examination.

2809

Mr. Rosenthal: Does your Honor strike it out?

The Court: Strike it out.

Q. In the same trial, when you were under oath, were you asked this question about the Rosen murder:

"Q. Did you have any part in that murder? A. I don't know what it was all about."

Were you asked that question and did you make that reply? A. If it is in the book I said it.

2810

Q. It is in the book. A. I said it.

Q. And that testimony was given by you under oath in June, 1940? A. Yes, sir.

Q. That is four years after Rosen was killed, which was in September of 1936? A. Yes, sir.

Mr. Talley: I have no further questions.

Cross-examination by Mr. Rosenthal:

2811

Q. Now, Bernstein, so will understand one another,— A. (interrupting) You can come out with it. Go ahead.

The Court: Just listen to the questions and give direct answers.

Q. If you don't understand the question, you tell me, will you? A. Yes, sir.

Q. You testified that in 1930 you pleaded guilty before Judge Vause in this court? A. I don't remember what year it was, but I pleaded guilty.

2812 *Sol Bernstein—For People—Cross*

Q. You pleaded guilty to that crime before you ever knew Louis Capone, didn't you? A. Yes, sir.

Q. You pleaded guilty to unlawful entry, didn't you? A. Yes, sir.

Q. But that was not the crime you were charged with, was it? A. No, sir.

Q. You were charged with a felony, weren't you? A. Yes, sir.

Q. And you were permitted by the courtesy of
2813 the Court and the District Attorney to take a lesser plea? A. I don't know what you mean.

Q. You don't know what a lesser plea is? A. I took a plea.

Q. Do you know what a lesser plea is? A. A lower plea, yes, sir.

Q. By courtesy of the Court and the District Attorney you were given—

Mr. Turkus: I object.

Mr. Rosenthal: I have not finished my question. Will you please sit down until I do so?

2814

Q. Don't answer it. Mr. Turkus wants to object. And when you see him get on his feet do not answer any question that I ask you—is that clear? A. Yes, sir. Tell me the question.

Q. Is that clear to you? A. Very clear.

Q. By courtesy of the Court and the District Attorney you were permitted to take a plea to a misdemeanor, weren't you?

Mr. Turkus: I object.

The Court: Sustained. He does not

know whether it was a courtesy or what the reason was.

Q. You did take a plea to a misdemeanor?

Mr. Turkus: Objected to as repetitious.

The Court: That is what he said.

Mr. Rosenthal: I am representing the defendant Capone. I don't care what he said to Mr. Turkus and I don't care what he said to Judge Talley. This is an in- 2816
dependent cross-examination conducted on behalf of the defendant I represent. If your Honor intends to restrict it I will change my course of examination and take exception to your Honor's ruling.

The Court: That is entirely uncalled for and done for the obvious purpose of provoking the Court.

Mr. Rosenthal: And to that I respectfully except. I ask for a ruling on the question.

The Court: You have it.

Mr. Rosenthal: Is the objection sus- 2817
tained?

The Court: It is sustained as repetitious. He told you a few moments ago.

Mr. Rosenthal: Exception.

Q. When you were asked by Mr. Turkus regarding this conviction you were asked the question on page 488 of these minutes:

"Q. I suggest to you the date of February 13, 1930, and the crime of unlawful entry. Does that refresh your recollection? A. Yes, sir.

2818 *Sol Bernstein—For People—Cross*

"Q. Were you convicted of that crime on that day? A. Yes, sir."

Do you remember being asked those questions and giving those answers?

Mr. Turkus: Objected to. There is nothing inconsistent with his testimony.

Mr. Rosenthal: I will show he was not convicted on that date, but he answered you with all alacrity that he was, because you suggested the date.

2819

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Did you say you were convicted on the 13th day of February, or pleaded guilty on the 13th day of February in that case?

Q. (The Court) Do you remember the date? A. No, sir.

Q. Is it not a fact that you pleaded guilty on April 21st in respect to that crime? A. I cannot tell you that.

Q. Now, the second conviction which you testified to, you said that you also took a plea to a misdemeanor; is that right? A. I took two pleas, misdemeanors.

2820

Q. I am talking about the second conviction; we have passed the first one. Is that clear, Bernstein?

Mr. Turkus: Objected to as already answered.

Mr. Rosenthal: I have not spoken about the second conviction.

The Court: He said he pleaded twice to misdemeanors.

Q. You were not charged with committing a misdemeanor on the second offense, were you? A. No, sir.

Q. You were accused of a felony, stealing an automobile worth five hundred some odd dollars, weren't you? A. I don't know how much it was worth.

Q. In respect to that crime that you pleaded guilty to, you were accused of grand larceny in the first degree, weren't you?

2822

Mr. Turkus: Objected to as repetitious. He said it was a felony and he pleaded to a misdemeanor.

Mr. Rosenthal: I am showing the degree of crime.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

The Court: You can ask him what he did. He is bound by his plea. That constitutes an admission of guilt to the extent of the plea. He cannot be examined as to the nature of the charge, because by the plea he does not admit the full extent 2823 of the charge, but you may examine him ad lib as to what he did, in order to ascertain the gravamen and to what extent it affects his credibility, if you think that is important.

Mr. Rosenthal: Thank you. From the standpoint of credibility I think it is very important.

The Court: It probably is. Go ahead.

Q. Now, on the 14th of October, 1933, did you

2824 steal a Ford Victoria sedan? A. I cannot tell you that, sir.

Q. Well, can you tell us whether or not the subject matter of the charge that was made against you, that you were permitted to plead to a misdemeanor on, involved the theft of a Ford Victoria sedan automobile stolen in October, 1933? A. I don't know what it was. I took a plea for the car. I don't know the year.

2825 By the Court:

Q. In brief, did you steal a Ford? Is that what you were convicted of? A. I don't know what car it was.

Q. You have forgotten the make? A. Yes, sir.

By Mr. Rosenthal:

Q. Do you remember whether the subject-matter of conviction was theft of an automobile from a garage, a public garage situated at 1479 St. Marks Avenue in this Borough? A. Yes, sir.

2826 Q. Did you, in company with one Moe Cohen and Meyer Halperin, steal an automobile? A. No, sir.

Q. Were you with Meyer Halperin when the automobile was stolen? A. No, sir.

Q. Were you with Moe Cohen when the automobile was stolen?

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. No, sir.

Q. Do you know a Moe Cohen? A. Yes, sir.

Q. Did you know him on the 14th of October, 1933, when you stole that automobile? A. When I got arrested, yes.

Q. Do you know Meyer Halperin? A. Yes, sir.

Q. Did you know him at the time you stole the automobile in October of 1933? A. Yes, sir.

Q. Did you steal that automobile alone, without the assistance of anybody? A. Yes, sir.

Q. So that neither Cohen nor Halperin as- 2828
sisted you in the theft of the automobile; is that correct? A. Yes, sir.

Q. That automobile that you stole was practically a new automobile, wasn't it? A. I do not remember, sir. No, sir, an old car, sir.

Q. Weren't you apprehended in an automobile together with Moe Cohen and Meyer Halperin by Detective William Cassidy of the 69th Precinct, while you were driving the car at Linden Boulevard and Kings Highway? A. Not Detective Cassidy, but Patrolman Cassidy.

Q. You remember he was a patrolman? A. 2829
Patrolman Cassidy.

Q. With the exception of the change in words, "Detective" to "Patrolman", are the facts which I just stated to you substantially correct? A. Yes, sir.

Q. Were the other two men in the car with you when you were apprehended by Patrolman Cassidy? A. Yes, sir.

Q. Now, at that time, the Patrolman arrested you together with Halperin and Cohen? A. Yes, sir.

Q. Was the complaint which was made against

2830 you read to you at the time in the County Court before your plea was entered?

Mr. Turkus: Objected to as incompetent, immaterial, and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Didn't you first enter a plea of a greater degree of crime before you were permitted to withdraw it and plead to a lesser degree? A. Yes, sir.

2831

Q. So that in respect to the charge which I have now related, in which you took a plea of misdemeanor, you first took a plea of a felony, didn't you, before Judge Martin, in this court? A. Yes, sir.

Q. Now then, in 1933, did you know a man named Herschel Bernstein? A. No, sir—yes, sir.

Q. Now, which is it? A. Yes, sir.

Q. In 1933 did you know a man named Hal Kempner? A. What is his name?

Q. Did you know any Kempner, never mind the first name? A. Yes, sir.

2832

Q. What was the Kempner's first name whom you knew? A. Harold.

Q. In 1933 did you know an Aaron Smith? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Did you know a man named Smith in 1933? A. No, sir.

Q. In 1933, in the month of February, or the 26th of February— A. Excuse me, sir. Did you say a man named Smith?

Q. That is a pretty common name, isn't it? A. I know a man named Smith, yes, sir. When

you said Aaron Smith—I know I know somebody by the name of Smith.

Q. You just remembered that, Bernstein, didn't you? A. I was a little tangled up.

Mr. Turkus: I object to the sarcastic language.

Mr. Rosenthal: There is nothing sarcastic. I just asked him if he remembered.

The Court: Objection overruled. 2834

Q. You just remembered it? A. No, sir, it just slipped, that is all.

Q. Slipped your mind? A. Yes, sir.

Q. Well now, you did know a Smith in 1933, didn't you?

Mr. Turkus: Objected to as repetition.

Mr. Rosenthal: No, it is not.

Q. Did you know an Aaron Smith? A. No, sir.

Q. What is the first name of the Smith you 2835
know? A. Milton Smith.

Q. (The Court) He is a lawyer, isn't he? A. He was a lawyer, yes, sir.

By the Court:

Q. Bald headed? A. Yes, sir.

Q. Known as Baldy Smith? A. Yes, sir.

By Mr. Rosenthal:

Q. A lawyer with a nickname of Baldy Smith?

2836 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: Maybe we had better have a recess now.

The Court: Go ahead.

Q. Were you on the 26th of February, 1933, in the company of Herschel Bernstein, Hal Kempner, and a man named Smith, or any one of them, at or about one o'clock in the morning?

Mr. Turkus: What year?

2837 Mr. Rosenthal: February 26, 1933. I would ask that you ask the question after we get an answer.

A. I don't know what you are talking about.

Q. Did you break into a pool room located at 1516 Pitkin Avenue in the Borough of Brooklyn through a skylight and take from a safe therein the sum of $600, you accompanied by one Bernstein, Kempner, and Smith? A. No, sir.

Q. Milton Smith? A. Aaron Smith.

2838 The Court: Let the record be cleared. That would be unjust to Milton Smith, who has practiced in this court, and he also represented Herschel Bernstein.

Mr. Rosenthal: Your Honor knows more about that than I do. We will make it clear. Aaron Smith.

Q. Did you in February, 1934, know a man named Joseph Gordon? A. No, sir.

Q. You never heard the name of Joseph Gordon before—just think. A. No, sir.

Q. Do you know Al Glass? A. Yes, sir.

Q. That is the man who was your partner, wasn't it? A. Yes, sir, in shylocking.

Q. Shylocking and other things, wasn't he? A. No, sir.

Q. Just shylocking? A. Yes, sir.

Q. You are sure of that, aren't you? A. Yes, sir.

Q. Was he known by any nickname? A. Cherry.

Q. (Spelling) C-h-e-r-r-y? A. Yes, sir.

Q. Do you know Max Richinski? A. Yes, sir. 2840

Q. Did you know him in 1934? A. Yes, sir.

Q. Did you together with Joseph Gordon, Al Glass, and Max Richinski, on the 24th of February, 1934, take from the possession of one Walter Ellis, a night watchman in a garage at Adams Street, a truck containing 1,014 suits of clothes, which truck belonged to the Howard Clothing Manufacturing Company and the Howard Clothes, Incorporated? A. No, sir.

Q. Do you know anything about that theft? A. No, sir.

Q. You never heard about it until I asked you on the stand? A. Yes, sir. 2841

Q. Is that right? A. Yes, sir.

Q. The first time you ever heard about that is when I asked you on the stand today or when Judge Talley asked you yesterday, is that right? A. Yes, sir.

Q. Is it not a fact that you were arrested and charged with that crime in 1934?

Mr. Turkus: That has gone far enough.

Mr. Rosenthal: No, it has not. I want to finish the question.

Mr. Turkus: Will your Honor instruct Mr. Rosenthal, who has been appearing as a lawyer nearly as many years as I have been living, that he should know better than to ask such a question?

The Court: It is obvious at this point that counsel, who knows this to be incompetent, is just trying to get it before the jury. Objection sustained.

Mr. Rosenthal: I respectfully except.

2843 This man said he never heard of it until today, and this is to attack his credibility as to whether he did or not, and this jury is entitled to know whether he is telling the truth when he said on this stand that this is the first time he ever heard of that theft.

The Court: All right, Mr. Rosenthal, when the Court is tired of sitting here and presiding, it will turn over the gavel to you. In the meantime take your exception by obeying the ruling.

2844 Mr. Rosenthal: I respectfully except to the Court's ruling.

Q. On the 24th of February or thereabouts, in 1934, did you have three $1,000 bills concealed in one of your shoes? A. No, sir.

Q. On any day in the year 1934 did you have three $1,000 bills concealed in your shoes?

Mr. Turkus: I object. What is the difference where he kept his money?

The Court: Objection overruled.

A. No, sir.

2845

Q. At no time, in any year, did you have three $1,000 bills concealed in your shoe? A. No, sir.

Q. Did you have three $1,000 bills at any time, in any year, concealed on your person, on any part of your person?

Mr. Turkus: I object. I don't understand what you mean by concealing money on his person. I object to the form of the question as incompetent and immaterial and irrelevant.

2846

The Court: Sustained as irrelevant.

Mr. Turkus: We are trying everything but the case.

The Court: There is nothing illegal about it.

Mr. Rosenthal: Exception.

Q. Did you know Jean Glick? A. Yes, sir.

Q. She was a daughter of Charles Meyer, the man you mentioned yesterday? A. Yes, sir.

Q. Let me ask you this: Were you ever a bond salesman? A. A what?

2847

Q. A bond salesman, b-o-n-d. A. Yes, sir, what do you mean by a bond salesman?

The Court: Bail bonds?

Q. Any kind of a bond. Did you ever sell any kind of a bond? A. I don't know what you are trying to bring out.

Q. You will find out soon enough, as Mr. Turkus used that expression.

Mr. Turkus: May that be stricken from

2848 the record and the jury told to disregard it?

The Court: Gentlemen of the jury, please do not discuss the case. Let nobody talk to you about it. Keep your minds open.

The recess will be for lunch until 1:30 o'clock.

First the witness will be taken out.

(The witness leaves the court-room.)

2849 The Court: Now the jury may leave.

(The jury leaves the court-room.)

The Court: Now the defendants are remanded.

(Whereupon a recess was taken until 1:30 P. M.)

AFTERNOON SESSION. TRIAL RESUMED.

2850 SOL. BERNSTEIN, (resumes the stand for further cross-examination):

By Mr. Rosenthal:

Q. Were you ever a salesman, any kind of salesman? A. No, sir.

Q. Were you ever in the real estate business? A. No, sir.

Q. At any time in your life? A. No, sir.

Q. When did you get married? A. 1937.

Q. And you are still married, are you? A. Yes, sir.

Q. Did you ever represent yourself in the bank

to be in the real estate business? A. I can't tell you that, sir.

Q. Did you ever represent yourself to be single when you were married, when you were trying to get money from a bank? A. Might have been. I don't recall.

Q. What is your best recollection? A. Don't recall, sir.

Mr. Rosenthal: I ask that these be marked for identification. 2852

(Papers marked Defendants' Exhibits I, J, K, L and M for identification).

Q. I show you this paper marked Defendants' Exhibit, Capone's exhibit, M for identification, and ask you whether at the bottom of that page is your handwriting and signature (handing exhibit to witness)? A. Yes, sir.

Q. I show you Defendants' Exhibit L for identification, and ask you whether at the bottom of the page is your handwriting and signature (handing exhibit to witness)? A. Yes, sir. 2853

Q. I show you Defendants' Exhibit K for identification, and ask you whether at the bottom of the page is your handwriting and signature (handing exhibit to witness)? A. Yes, sir.

Q. I show you Defendants' Exhibit I for identification, and ask you whether at the bottom of the page is your handwriting and signature, and, in addition thereto, whether or not it is not your handwriting, starting at the top of the page, where it says "Full name" and so forth, "Residence" and so forth. A. Yes, sir.

2854 *Sol Bernstein—For People—Cross*

Q. I show you Defendants' Exhibit J for identification, and ask you whether on the back of that is not your handwriting and signature? A. That is my handwriting, sir.

Q. And is it your signature also? A. Yes, sir.

Q. Then in the year 1939 were you in the real estate business? A. No, sir.

Q. Did you represent to the Food Dealers Industrial Bank, in order to procure a loan, that you were in the real estate business? A. Yes,
2855 sir.

Q. That was not true, was it? A. That is right, sir.

Q. In the year 1938, tenth month, that is October 17th, were you single? A. I beg your pardon. Read that again over.

Q. Were you single in October of 1938? A. Married, sir.

Q. Did you represent to the Food Dealers Industrial Bank that you were single at that time? A. Yes, sir.

Q. That was not true either was it? A. Yes,
2856 sir—no, sir, it was not true, sir.

Q. Did you represent to the Food Dealers Industrial Bank that you were a salesman at that time with a fixed salary of $100 a week? A. I don't recall that but it is not true, sir.

Q. What is your best recollection? Did you tell them that you were a salesman? A. I did tell them, yes, sir.

Q. Did you tell them that you were earning $100 a week? A. Yes, sir.

Q. Neither of those things was true? A. That is right, sir.

Q. In the year 1938, the month of May, did you represent to the Food Dealers Industrial Bank

that you were single? A. If it is there I said it, sir.

Q. What is your best recollection? A. I can't recall, sir.

Q. Were you in business in the year 1938, in the month of May? A. Yes, shylocking and bookmaking and gambling.

Q. It was not true that you were single, was it?

Mr. Turkus: Objected to as already answered. 2858

Mr. Rosenthal: This is on a different application, a different time.

Mr. Turkus: What's the difference? He said he was married in 1937 so he is married up to today.

Q. At the time of making these representations you also signed your name at the bottom of the statement, did you not? A. I don't get you, sir.

Q. At the time of making these representations to the bank, you signed your name at the bottom of these statements, did you not? A. Yes, sir. 2859

Q. Where did you live in 1938? A. 1938?

Q. Yes. A. In Bensonhurst, sir.

Q. Where, what address? A. 60th Street.

Q. What address? A. 2161 60th Street.

Q. How long had you lived there? A. About two years, sir. I am not sure. I lived a lot of places. I am just giving you an idea.

Q. What was the answer? A. I am just giving you an idea.

Q. Let us put it this way. What was the last address that you had in Brooklyn before you went to Miami? A. 99 East 96th Street.

2860 *Sol Bernstein—For People—Cross*

Q. How long did you live there? A. About a year, sir.

Q. Where did you live prior to then? A. Bensonhurst, sir.

Q. What address? A. 2161 60th Street.

Q. How long did you live there? A. About three years, sir.

Q. And where did you live before that? A. On 71st Street.

Q. In Bensonhurst? A. Yes, sir.

2861 Q. How long did you live there? A. About two years, sir—a year or two years.

Q. That would bring you down to around 1936, is that right? A. I don't understand. I am just telling you where I lived, sir.

Q. Where did you live in the year 1936?

Mr. Turkus: Objected to as already answered.

The Court: Do you remember?

A. I lived in 60th Street; I lived in 62nd Street; I lived near 71st Street.

2862 Q. Where did you live in September, 1936? A. On Bay Parkway, 2161 60th Street. Wait a minute, sir. I don't know if this is 60th Street, or 62nd Street, or 71st Street—around there.

Q. It was any one of three places, is that it? A. I think so.

Q. Don't you recall where you came from when you came from home to meet Muggsy Cohen on the Friday before— A. I think it was 60th Street, sir.

Q. Are you sure of that? A. I am not sure.

Q. It might have been 62nd Street? A. It might have been 62nd Street.

Q. It might have been 71st Street? A. Yes, sir.

Q. In December of 1938 did you represent to the Food Dealers Industrial Bank of 89 Osborne Street, Brooklyn, that you were single? A. If it is on there, I said it, sir.

Q. What is your recollection? Did you tell them? A. If it is on there, I said it.

Q. Have you any recollection, independent of this paper which I hold in my hand and which you see me holding in my hand, as to whether 2864
you represented to the bank in December of 1938 that you were single? A. If it is on there I said it. A lot of loans.

Q. Did you always tell them you were single? A. Yes, sir, I think so. I am not sure.

Q. Was there any reason why you hid from the bank the fact that you were married? A. I think I would not have gotten so much of a loan.

Q. What? A. I don't know, sir.

Q. I am asking you for your mind. Was there any reason that you had in your mind to hide from the bank the fact that you were married? 2865
A. I don't understand what you mean, sir.

The Court: Did you have any reason for stating you were not married?

The Witness: Yes, I think that is the only way I could get the loan, sir.

The Court: You did that in order to get the loan?

The Witness: Yes, sir.

Q. Were you told by somebody that if you were married the bank would not loan you money?

2866 *Sol Bernstein—For People—Cross*

Mr. Tarkus: Objected to.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

The Court: That was his reason. He stated that.

Q. Isn't it a fact that this man, Charles Meyers, always endorsed these notes? A. Yes, sir.

Q. Up until a certain time when he refused to
2867 endorse, is that right? A. Yes, sir.

Q. And after he refused to endorse these notes, you went to his home, didn't you, to see him? A. No, sir.

Q. You did not go to his home? A. No, sir.

Q. Did you see Charles Meyers—did Meyers live at 171 Herzl Street? A. Yes, sir.

Q. Did his daughter, Jean Glick, live there? A. Yes, sir.

Q. She lived with him? A. Yes, sir.

Q. Did you go to the home of Charles Meyers on July 8, 1939? A. I went a lot of times there, sir.

2868 Q. Prior to July 8, 1939, did Meyers refuse to further endorse your notes for you? A. No, sir.

Q. Do you know what the word "prior" means? A. Before, yes.

Q. He was still endorsing your notes in July of 1939, is that correct? A. I don't recall, sir.

Q. You just said "No, sir," didn't you? A. Yes, sir. You asked me things, I got so many loans I don't remember, sir.

Q. I will ask you the question again. Isn't it a fact that before July of 1939, Charles Meyers refused to endorse any more loans for you or notes for you?

Mr. Turkus: I object to it. It is repetitious, already answered.

The Court: Do you remember one way or the other?

The Witness: I did not ask him, sir.

The Court: About that date?

The Witness: I don't recall the date, sir.

The Court: Do you recall the date when he refused to endorse further loans?

The Witness: Yes, that was over that, 2870
I think, $5,000, loan. I don't know when it was.

The Court: Will you try to figure when that was, if you have any recollection of it?

The Witness: That is the time counsellor Barshay came in. That is with the loan in the bank, the $5,000. loan.

Q. You mean that Mr. Barshay was an Assistant District Attorney? A. Yes, sir.

Q. Is that what you mean? That was in 1939 2871
wasn't it? A. I think so.

Q. Didn't you go into Meyer's home on one night, around one o'clock in the morning, and there hit his daughter in the eye? A. No, sir.

Q. Were you in any court, particularly, the Tenth District Magistrate's Court in Brooklyn, and did you admit at that time that you had hit his daughter in the eye but said it was an accident? A. No, sir.

Q. Were you in the Tenth District Magistrate's Court? A. Yes, sir.

2872 *Sol Bernstein—For People—Cross*

Q. In Brooklyn, in A. Pennsylvania Avenue Court. I can tell you.

Q. What? A. I can tell you, Pennsylvania Avenue Court.

Q. Pennsylvania Avenue Court, when? A. The time you are talking about, sir.

Q. Yes, July, 1939. A. I don't recall the date, sir.

Q. Was the name of Meyer's daughter Jean Glick?

2873

Mr. Turkus: Objected to as repetitious.

The Court: Overruled.

Q. What is your answer? A. Yes.

Q. Did she, in your presence, say that you had accidentally hit her in the eye and that she wanted to withdraw the complaint because it was an accident? A. I don't recall, sir.

Q. What? A. I don't recall it.

Q. When you were first asked regarding your second conviction on this trial by Judge Talley, you recall telling Judge Talley that nobody ordered you to steal that automobile,—when you were first asked,—that was the subject of your first conviction. Do you remember saying that

2874

the second conviction, I should say? Let me withdraw it, so that you understand my question and put it a little more plainly for you. Do you remember Judge Talley examining you about your second conviction which related to a stolen automobile? Do you remember that? A. Yes, sir.

Q. Do you remember him asking you questions about it? A. Yes, sir.

Q. Do you remember, in answer to his ques-

tions, your first stating to him that nobody ordered you to steal that car? Do you remember saying that to him? A. Yes, sir.

Q. Do you remember then saying, "Well, I just thought it over and now I want to correct myself. Somebody ordered me to steal the car." Do you remember saying that? A. I don't recall it, sir.

Q. Do you recall whether or not you did tell Judge Talley that you were ordered to steal that car or not by somebody? The car that I have 2876
reference to, sir, is the car which is the subject matter of your second conviction, namely, the Ford Victoria coupe. Do you remember saying that?

Mr. Turkus: I object to it. The testimony adduced by Mr. Rosenthal was that this witness could not remember the type of the car.

Mr. Rosenthal: I will withdraw the type of the car. Let me re-frame the question.

2877

Q. Whatever the type of car it was that you stole from this public garage—you know the car I mean, don't you? A. Yes, sir.

Q. That is the car I am referring to. A. Yes, sir.

Q. That is the one you were arrested on? A. Yes, sir.

Mr. Turkus: Objected to.

Q. That is the one you pleaded guilty on, isn't it? A. Yes, sir.

2878 Q. In reference to that car, did you first tell Judge Talley that no one ordered you to steal that car? A. No, sir.

Q. You did not say that? A. No, sir.

Q. Were you asked these questions and did you give these answers, in answer to Judge Talley's questions, at page 575 of these minutes:

"Q. Did you steal the car that was the subject of that charge against you? Did you steal that because somebody ordered you to? A. No,

2879 sir."

Were you asked that question and did you give that answer? A. Yes, sir.

Q. You just told me that you did not answer the question put by Judge Talley, "No, sir". Didn't you just say that to me a minute ago? A. Yes, sir.

Q. That was, not true, was it?

Mr. Turkus: Your Honor, he has not read all.

Mr. Rosenthal: I am going to read the

2880 rest. I have already said to the witness the first answer which he gave, and then he subsequently changed it.

Mr. Turkus: The witness has a right to correct his testimony.

Mr. Rosenthal: We will find out about it, and, as you say, we will progress slowly but surely.

Mr. Turkus: Thank you.

Q. You said a minute ago to me that you never told Judge Talley when you were under cross examination by him that nobody had or-

dered you to steal that car. Did you just say that a minute ago?

Mr. Turkus: Objected to as repetitious.
The Court: Sustained.
Mr. Rosenthal: I respectfully except.

Q. Now, which is correct, that you did tell Judge Talley when he asked you whether or not you had stolen this car under orders and said "No" A. No, not that car. 2882

Mr. Turkus: I have an objection to the question. Will you be patient, please?

Q. Let me ask you this. Let me withdraw the question now and let me put it this way. Did anybody order you to steal the car that was the subject matter of your arrest and conviction? A. No, sir.

Q. That question is plain to you? A. Yes, sir.

Q. You understand the car I am referring to is the car which you stole out of the public garage at 1479 St. Marks Avenue on the 14th day of October, 1933? That is plain to you? A. Yes, sir. 2883

Q. Nobody ordered you to steal that car? A. Yes, sir.

Q. Let us understand one another. It is a fact that nobody did order you to steal that car? A. Yes, sir.

Q. You stole that car of your own volition, on your own hook, without any orders from anybody? A. That is right, sir.

Q. Didn't you on your cross-examination—let me read the question to you—weren't you asked

2884 those questions by Judge Talley and didn't you give these answers:

"Q. (Page 575) Did you steal the car that was the subject of that charge against you? Did you steal that because somebody ordered you to? A. No, sir.

"Q. So that the two times when you pleaded guilty to crimes they were crimes which were committed by you yourself and not under orders? A. Excuse me, let me get this right, I
2885 didn't hear you.

"Q. It is perfectly plain. A. No, sir, that car was stolen under orders.

"Q. Didn't you just, two minutes ago, tell me it was not under orders? A. I refreshed my memory."

Were you asked those questions by Judge Talley and did you give those answers? A. Yes, sir.

Q. They were not true, were they?

Mr. Turkus: Object to the characteri-
2886 zation.

A. No, sir.

Q. It is definite, Mr. Bernstein, that two charges that you were arrested on, pleaded guilty to and were convicted for, nobody ordered you to commit either of those two crimes; isn't that true? A. Yes, sir.

Q. How much money did you get out of the Modern Industrial Bank? A. Modern Industrial Bank?

Q. Yes. A. A thousand dollars, sir.

Q. Is that all? A. I don't understand what you mean, sir.

Q. You borrowed, you told Judge Talley, $50,000., or maybe more, through the endorsement of Charles Meyers in the Food Industrial Bank. Did you not say that?

Mr. Turkus: Objected to. That is not the testimony.

Mr. Rosenthal: I will get you the verbatim testimony. 2888

Mr. Turkus: The testimony was brought out by your Honor that in all the loans were $50,000. or more.

The Court: Mr. Rosenthal, you don't mean $50,000. in one loan?

Mr. Rosenthal: I am going to have it explained, Judge. We can only ask one question at a time.

The Court: Do you really mean that?

Mr. Rosenthal: No, I do not mean one loan. I am going to find out from him in how many loans.

2889

Q. It is a fact that you were asked by someone in this court room respecting loans that you made from the Food Dealers Bank, that you borrowed up to $50,000. or more from them? Isn't that true? A. Not for myself, sir.

Q. Did you say in answer either to Mr. Talley's question or Judge Taylor's question that through the endorsement of Meyers you had borrowed from the Food Dealers Bank up to or upwards of $50,000.? Did you say that, yes or no? A. Yes, sir.

Q. That was true, was it? A. Yes.

2890 *Sol Bernstein—For People—Cross*

Q. Covering what period of time did you borrow from the Food Bank, or the Food Dealers Bank, this sum of money? A. I don't recall, sir. I don't mean this bank—

Q. Well, starting, when was the first loan that you made at the Food Dealers Bank?

Mr. Turkus: I object to it as incompetent, irrelevant, immaterial, having nothing to do with the Rosen killing.

2891 The Court: Sustained.

Mr. Rosenthal: I respectfully except.

The Court: It is collateral.

Mr. Rosenthal: I respectfully except.

Q. In addition to borrowing money from the Food Dealers Bank, did you borrow sums of money from the Modern Industrial Bank?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial, nothing to do with the Rosen killing.

The Court: Sustained.

2892 Mr. Rosenthal: I respectfully except.

Q. Was this a large shylock business you had? A. No, sir.

Q. About how many customers did you have? A. Twenty, thirty, forty— I don't know how many.

Q. I do not hear you. A. I do not know how many.

Q. Can you approximate?

Mr. Turkus: I object, unless the time be fixed. The business was conducted over

a period of year. I suppose customers varied.

The Court: Overruled.

Q. What is your answer? A. Twenty, thirty, forty— I don't know how many there was, sir.

Q. You were very familier with the shylock business, weren't you?

Mr. Turkus: Objected to, repetitious.

The Court: Overruled. 2894

Q. Weren't you? A. Yes, sir.

Q. What did you do, loan five dollars to somebody and get six back for it? A. Yes, sir.

Q. Within a week? A. I beg your pardon, sir?

Q. That is, you loaned five and got a dollar profit for the week's loan, is that right? A. Yes, sir.

Q. In this shylock business that you conducted —let me withdraw that.

Q. Out in Florida, you said you were a spotter, didn't you? A. Yes, sir. 2895

Q. You mean a strong arm man, don't you? A. Yes, sir.

Q. You were a strong arm man in a gambling place in Florida weren't you? A. Yes, sir.

Q. Did you know, in the conducting of the shylock business, that strong arm methods were used in order to collect from the unfortunates that borrowed money?

Mr. Turkus: Object to the question.

The Court: Overruled.

A. Yes, sir.

2896

Q. If you did not get back the six dollars within a week, you beat it out of the man, did you? A. No, sir.

Q. Did you conduct your shylock business different than the other shylocks? A. Yes, sir.

Q. What methods did you use to get back your money if it was not paid by the individual who borrowed it? A. Charged somebody more interest, sir.

Q. I don't get that. A. Charged somebody

2897 more interest, sir; different customers, make up on them.

Q. Oh, you just let the loan go and charged an additional amount to the other suckers that borrowed from you, is that it? A. Yes, sir.

Q. Let us get that straight. In other words, instead of beating the person that borrowed from you, you charged the other man two dollars a week instead of one; is that the way? A. Sometimes behind, sir. I did not charge interest on top of interest, if that is what you are trying to bring out. Of course, if a man did not pay, I

2898 would threaten him. That is a known fact, sir, I would threaten him, yes.

Q. If a man did not pay, you would threaten him? A. Yes, sir.

Q. By that you mean you would threaten to beat him up? A. Yes, sir.

Q. You just told me, did you not, that you would let the sucker go that had borrowed from you and would charge a different one an additional amount to make up the loss. Didn't you just say that? A. Yes, sir.

Q. So that by that do you mean that if someone other than the man that owed you and did

2899

not pay, borrowed five dollars, you would charge him seven dollars at the end of the week instead of six? Is that what you mean? A. No, sir.

Q. What did you mean that you charged an additional amount to the other man to make up the loss for the man that did not pay? What did you mean by that? A. Sometimes a man takes ten. Let me explain you, sir.

Q. Yes, I am waiting for you to explain. A. Sometimes a man takes ten. If he stays away 2900
twelve weeks, sir, I am not going to charge him two dollars every week interest. I make a settlement with him and sometimes if a man can't pay, whether he can afford, a dollar a week, two dollars a week, that is the only way you can get your money out. It is no sense of hitting him like, that's why.

Q. You use only threats? A. Yes, money never got the best of me.

Q. In other words, you would say "I am going to beat your head off if you don't pay"? A. Yes, sir.

2901

Q. But if he did not pay, you did not beat his head off. Is that the way you did? A. Yes, sir.

Q. You are sure, however, that you did use threats? A. Yes, sir.

Q. Did you testify in the mountains that you did not threaten anybody in the Gangi Cohen case? A. I did not say I threatened anybody, sir.

Q. What? A. I did not say I threatened anybody, sir, in the mountains.

Q. You said you did not threaten? A. Yes, sir.

2902

Q. Now you remember that you did threaten people? A. I am telling the truth about everything in this case.

Q. Now you remember that you did threaten people, didn't you? A. Yes, sir.

Q. So you did not tell the truth in the mountains, did you?

Mr. Turkus: Objected to as repetitious.

2903

The Court: That is what he said.

Q. You were under oath in the mountains, weren't you?

Mr. Turkus: Just a minute, Mr. Rosenthal, if you are going to shout.

Mr. Rosenthal: But you told Judge Taylor he did not speak loud enough. Now you complain I speak too loud.

Mr. Turkus: You are shouting in my ear. I will appreciate it if you step back.

2904

Mr. Rosenthal: I will stand in the rear of the court room if you want. Anything to please you. You won't get me into any argument. If the Judge says "smile" I am going to smile.

Q. You were under oath in the Gangi trial, weren't you? A. Yes, sir.

Q. Swore the same way as you did in this court room, didn't you? A. Yes, sir.

Q. To tell the truth? A. Yes, sir.

Q. A man's life was at stake, wasn't it? A. Yes, sir.

2905

Q. And you had a jury similar to this, sitting there listening to your story? A. Yes, sir.

Q. And in the court you told the jury, I am telling you the truth? A. About the case.

Q. Did you— A. About the case.

Mr. Turkus: Just a minute, don't shut o' the answer.

Mr. Rosenthal: I am not shutting off the answer.

2906

Q. Did you tell that jury that you were telling the truth?

Mr. Turkus: Objected to.

Q. When you testified?

Mr. Turkus: Objected to as already answered.

Mr. Rosenthal: All right, withdrawn. I will give you his exact testimony in a minute.

2907

Q. Did you ever have a bank account? A. Bank account?

Q. Yes, bank account. You know what a bank account is, don't you? A. Yes, I did, sir.

Q. You did have a bank account? A. Yes.

Q. Where? A. Manufacturers Trust Company, sir.

Q. Was there any reason to secrete that fact when you were up in the mountains, that you had a bank account?

Mr. Turkus: I object to the form of the question.

2908 Mr. Rosenthal: Let me withdraw it and put it this way.

Q. Were you asked this question in the mountains and did you give this answer (page 15, starting on page 14):

"Q. And what money did you use to go there? Was it the loan shark money? A. Yes.

"Q. Did you keep a bank account? A. No, sir.

2909 "Q. Never? A. No, sir."

Were you asked those questions in the mountains and did you give those answers? A. If it is in the book, I said it.

Q. Did anybody tell you to say "If it is in the book, I said it"? A. I myself, sir.

Q. You thought of that yourself, did you? A. What do you mean, I thought of it myself?

Q. Did you think of that expression "If it is in the book, I said it" by yourself or were you told by somebody to say "If it is in the book, I said it"? A. Nobody told me anything.

2910 Q. So you thought of it yourself, did you? Did you think of it yourself? A. I myself, sir.

Q. How did you know there was a book? A. You are reading a book, aren't you, sir?

Q. So that you thought of it when you got on the stand, is that it? A. You are reading a book.

Mr. Turkus: Just a minute.

Mr. Rosenthal: Withdraw and put it this way—

Mr. Turkus: Wait, please.

Mr. Rosenthal: I withdraw it.

2911

Mr. Turkus: Don't be shouting and withdrawing. Let us be a little friendly with the situation.

Mr. Rosenthal: We are going to be very friendly.

Mr. Turkus: The matter has been answered. He saw him read from the book. I ask the answer stand. Any further answer I object as repetitious.

Mr. Rosenthal: I have no objection to the answer standing.

2912

Q. When was it that you first thought of the expression "If it is in the book it must be so"?

Mr. Turkus: I object to it. It has nothing to do with the Rosen killing.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

The Court: That is just quarreling with the witness.

Q. Did you say in the trial, in the mountains, under oath, in answer to the question, "Do you keep a bank account" contained on page 15, "No, sir.

2913

"Q. Never? A. No, sir."

Mr. Turkus: Objected to. It is repetitious. He has just said so.

The Court: Sustained as repetitious.

Mr. Rosenthal: Respectfully except. He said "If it is in the book it is so."

Q. If you said under oath in the mountains

2914 that you never had a bank account, that was not the truth, was it? A. Yes, sir.

Q. It was the truth? A. It was not the truth, sir.

Q. You told Judge Talley that since you were confined you have been out playing baseball on Long Island with some detectives; is that right? A. Yes, sir.

Q. Give me the name of the baseball team that you were on. Who were the men that played
2915 with you?

Mr. Turkus: I object to it.

Mr. Rosenthal: I submit that I have a right to find out whether he played with men who may or may not appear as witnesses in this trial, which we have no knowledge of at this present time, which we are entitled to know.

Mr. Turkus: I have no objection to the identity of the people who played baseball but I object to part of the question, the preamble, the name of the team.

2916 Mr. Rosenthal: Excuse me. Let me withdraw it then.

Q. Were there nine men playing on one side in the baseball game you were in? A. I don't know how many men. There was plenty of detectives there.

Q. Were there nine men on one side, and nine on the other? A. There might have been twelve men on one side sometimes.

Q. Did you ever play baseball? A. Yes, sir.

Q. I mean were there more than nine playing at one time? A. Yes, sir.

Q. In the lineup? A. Yes, sir.

Q. Nine on each side? A. Yes, sir.

Q. So there would be sometimes twelve on each side? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Tell me the names of the twelve that were on your side? A. Tell you the names?

Q. Yes, the names. A. There was a lot of detectives over there. There was only four wit- 2918
nesses.

Q. Tell me the names of the witnesses that were on your side, playing baseball? A. I don't understand what you mean, sir.

Q. You don't know what I mean?

Mr. Turkus: I object to it. It is ambiguous because he said there were four witnesses playing with detectives so they may not have been on the same side.

A. I didn't play on their sides. I played on 2919
the cops' side.

Q. Oh, you played on the cops' side? A. Yes, sir.

Q. And the other witnesses played on the cops' side, too, didn't they? A. Yes, sir.

Q. So you were both playing on the cops' side? A. Yes, sir.

Q. On the cops' side that you were on, what other witnesses were on it? A. Sometimes was another witness and sometimes there was none, sir.

Q. Give me the names of the men that were

2920 out there playing baseball with you? A. You mean the detectives, sir?

Q. Yes, I will take the detectives first if you want it that way. Give me the names of the detectives?

The Court: We can get quickly to this. Pass on to something else. If you will just tell Mr. Rosenthal the names of the various witnesses who on either side
2921 played ball with you at any time since you have been.

The Witness: Mike Sycoff, Abe Reles, Al Tannenbaum.

Q. What were the names of the detectives?

Mr. Turkus: I object to it, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

The Court: Played baseball with whom?

The Witness: Abe Reles, Mike Sycoff,
2922 Al Tannenbaum.

Q. Before you said there were four witnesses that you played baseball with. Who was the fourth? You mentioned Sycoff, Tannenbaum and Reles? A. Myself.

Q. Was Magoon there? A. No, sir.

Q. Was Levine? A. No, sir.

Q. Dukey Maffetore? A. No, sir.

Q. Just the four that you mentioned were in this ball game that you had with these detectives? A. Yes, sir.

Q. How often would you go out to these ball games? A. I went out exactly four times, sir.

Q. Covering what period of time did you go out and play ball? A. This was in the summer time, sir.

Q. How did you get to Long Island?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Turkus: That has nothing to do with the Rosca killing.

2924

Mr. Rosenthal: I respectfully except, sir. I believe I have a right to show that these men rode in conveyances and the type of conveyances and where they were taken.

Mr. Turkus: If it is for the purpose of showing a contract—

The Court: I know the purpose.

Mr. Turkus: If it is, I withdraw the objection.

The Court: The Court has ruled and will permit no discussion.

Mr. Rosenthal: I respectfully except. 2925

Q. Did you ever walk on the boardwalk at Long Beach? A. No, sir.

Q. Did you ever walk on any boardwalk since you have been in custody? A. No, sir.

Q. Did you ever go in swimming down in Coney Island or Long Beach? A. No, sir.

Q. You say that you were always under guard? A. Yes, sir.

Q. Did you write any letters while you were under guard? A. No, sir.

2926

Q. At no time did you write letters or send them out to anybody? A. No, sir.

Q. That is positive, is it? A. Yes, sir.

Q. You had no communication whatsoever with the outside world, is I think your expression? A. Yes, sir.

Q. You never wrote a letter to anybody while you were in custody and gave it to your wife or to any detectives or any person to mail? A. No, sir.

2927

Q. That is right? A. Yes, sir

Q. Were you permitted to write letters? A. No, sir.

Q. Were you permitted to send out mail? A. No, sir.

Q. Were you ever left alone with your wife at any time so that you could give her a letter? A. No, sir.

Q. At all times there was always a detective there? A. Yes, sir.

Q. At no time did you ever write to anybody while you have been incarcerated, or kept, I should say, in the Half Moon Hotel or any of the hotels that you have been kept in while you were a material witness; is that right?

2928

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: I want a definite reply to that

The Court: Sustained as repetitious.

Mr. Rosenthal: I respectfully except.

Q. You mentioned a man by the name of Muggsy Cohen. Was he a close friend of yours? A. What do you mean by close friend?

Q. Well, did you pal together? A. Yes, sir.

Q. Go on trips together? A. Yes, sir.

Q. Out or town together? A. Yes, sir.

Q. California? A. No, sir.

Q. What? A. No, sir.

Q. Any state other than New York State? A. I beg your pardon, sir.

Q Did you go to any other state outside of New York State with Muggsy Cohen? A. Yes, sir.

Q. What state? A. Florida. 2930

Q. When did you go to Florida with Muggsy Cohen? A. When District Attorney O'Dwyer declared war on the mob, I ran to Florida.

Mr. Rosenthal: I ask that the answer be stricken as not responsive.

Mr. Turkus: I ask that it stand.

The Court: Let it stand.

Mr. Turkus: It fixes the time all right.

Mr. Rosenthal: I respectfully except.

Q. Was it in 1940 that you went with Mr. Cohen to Florida? A. Yes, sir. 2931

Q. Who else did you go to Florida with? A. Glass.

Q. Glass is the man you call "Cherry", isn't it? A. Yes, sir.

Q. Did the three of you go together? A. Yes, sir.

Q. How did you go down? A. By car, sir.

Q. Whose car? A. Some friend's of mine, sir.

Q. What is his name? A. Theodore Feleher.

Q. Where does he live? A. He worked for Litvins. I don't know where he lived.

Q. He worked for Litvins? A. Yes, sir.

2932 *Sol Bernstein—For People—Cross*

Q. Is that the automobile place that you bought the car? A. Yes, sir.

Q. Is he related to you, Litvin? A. No, sir.

Q. You do not know where Felcher lives?

Mr. Turkus: Objected to. It has nothing to do with the Rosen killing.

Mr. Rosenthal: I do not know whether it has or not. There are certain things not brought out here that I intend to bring

2933 out.

Mr. Turkus: I have an objection.

The Court: It seems to bring fishing to Florida. Sustained.

Mr. Rosenthal: I don't get the significance of that.

The Court: Think it over.

Mr. Rosenthal: I am thinking, but, Judge, I still don't get the significance.

Q. Did you stop with Cohen en route to Florida? A. Yes, sir.

2934 Q. Where did you stop? A. Commodore Hotel.

Q. While you were on the way to Florida did you stop any place?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial, having nothing to do with the issue of the murder.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. When you were first asked by Judge Tally as to whether you used any other names out-

side of your own, you said no, didn't you, on this trial?

Mr. Turkus: I object to it. At that time the question was ambiguous.

Mr. Rosenthal: Was it?

Mr. Turkus: Yes, it was.

Mr. Rosenthal: I will read the minutes.

The Court: Overruled.

Mr. Turkus: Don't do me any favors.

Mr. Rosenthal: I will do you a favor. 2936

Q. What is you answer? A. Repeat that question again, sir.

Q. When you were first asked by Judge Talley whether you ever had used any fictitious name in your life, you said no, didn't you? A. I said yes, sir.

Q. When you were first asked you said— A. I don't know if Talley asked me or Mr. Turkus asked me. I said yes, sir.

Q. Didn't you tell Judge Talley if he tells you, you will answer him? A. Yes, sir.

Q. Now, in the mountains did you have any reason to secrete the fact that you had used a fictitious name in Florida, the name of Jackie Berman? Did you have any reason in the mountains of secreting that fact? 2937

Mr. Turkus: I object to the form of the question.

Mr. Rosenthal: That is preliminary to confronting him with the mountain minutes.

The Court: Overruled.

2938 *Sol Bernstein—For People—Cross*

Q. What is your answer? A. What is that, sir?

The Court: Read it.
(Question read by reporter.)

A. I think he has got a mistake. I think that is the name I went under in Florida.

Q. I am asking you this. I will make it very plain. In the mountains you were asked whether
2939 you had ever used any fictitious names, names other than Bernstein, and you told them that you hadn't. Do you remember that? A. I don't recall, sir.

Q. Well, in the mountains did you have any reason to hide from the jury that was hearing the Cohen case the fact that you had used the name Jackie Berman, in Florida? Did you have any reason to hide that fact?

Mr. Turkus: That is objected to.

Mr. Rosenthal: That is the same question, only put more plainly, that the court
2940 overruled.

The Court: Overruled.

Q. Do you understand that question? A. In the mountains, sir?

The Court: Did you have any reason for concealing that when you testified in the Cohen case?

The Witness: I did not want to give no information, sir.

The Court: All right, that is an answer.

Q. The name Jackie Berman was your name, wasn't it? A. Yes, sir.

Q. And when you say you did not want to give out any information, do you mean information about yourself and the aliases that you had used? Is that what you mean? A. Yes, sir.

Q. So that when you told the untruth in the mountains it was because you did not want to give any information to the court or the jury in the Cohen case about your aliases, is that it?

2942

Mr. Turkus: Objected to—

A. Because—

Mr. Turkus: Continue. You started.

The Court: That is what he said.

Mr. Rosenthal: All right, withdrawn.

Q. Who is Louis Glass? A. Al Glass.

Q. He has got a name "Cherry", and he has also got his first name, Louis? A. Yes, sir.

Q. Which is his right first name, Louis or Al? A. Al Glass. 2943

Q. Do you know that he registered with you in the Commodore Hotel as Louis Glass?

Mr. Turkus: Objected to. This has nothing to do with the Rosen killing.

Mr. Rosenthal: This was all brought out on direct in the history of this man by Mr. Turkus.

Mr. Turkus: It was not.

Mr. Rosenthal: Although we objected on the ground that it was proper cross-

examination. You took him through a tour of the country.

Mr. Turkus: Sure, after Judge O'Dwyer became District Attorney.

Mr. Rosenthal: Yes, yes, we have heard that so often now—

Mr. Turkus: You certainly have, Mr. Rosenthal.

Mr. Rosenthal: And you will hear some things, too. You will hear some things, too, Mr. Turkus.

2945

The Court (To officer): Will you get the court's gavel?

Mr. Turkus: All right. I am sorry, Judge. Don't send for the gavel. I have an objection.

The Court: I have not the least recollection of what the question was.

Mr. Turkus: I can understand that.

The Court: Read it again.

(Question read by reporter.)

The Court: Sustained as irrelevant.

2946

Mr. Rosenthal: Exception. So much time has elapsed, if I may, with the permission of the court, recall the fact that Mr. Turkus—

The Court: Don't argue.

Mr. Rosenthal: I am not arguing.

The Court: When the gavel comes, I don't want to use it.

Mr. Rosenthal: I hope you don't have to use it on me. I don't think anybody has yet.

The Court: I intend to keep it right in the drawer.

Q. Was Harry Cohen a partner of yours? A. No, sir.

Q. Was he one of the people from East New York? A. What do you mean, from East New York, sir?

Q. Do you know Harry Cohen? A. That is Muggsy Cohen.

Q. That is Muggsy Cohen? A. Yes, sir.

Q. Did I understand you to say that since you are in jail, or since you have been held as a material witness, no one of Judge O'Dwyer's 2948
office has ever confronted you with Muggsy Cohen? A. Yes, sir.

Q. Muggsy Cohen has never been in the District Attorney's office in Kings County here or in the hotel where you were, in your presence, since you are in jail. A. No, sir.

Q. That is positive, is it? A. Positive, sir.

Q. About this man "Cherry" Al Glass—let me withdraw that. Of course, you mentioned to the District Attorney, did you not, that Mugsy Cohen is the man that went with you to steal the car?

2949

Mr. Turkus: Objected to. That is obvious from the record.

The Court: That is what he said.

Mr. Rosenthal: He did not say that he mentioned it to the Distrtct Attorney at all. I am asking whether he did, when he was originally arrested. I will re-frame the question.

Q. When you were originally arrested or gave yourself up, did you mention to the District

2950

Attorney that the man who aided you in stealing this automobile was Muggsy Cohen? A. Yes, sir.

Q. And at that time Muggsy Cohen was in Brooklyn, wasn't he? A. I don't know, sir.

Q. You had seen him only just a little while before you gave yourself up, hadn't you? A. I was away for a while, when I was running.

Q. Wasn't he with you while you were running? A. No, sir.

2951

Q. Wasn't he in Florida with you? Isn't that what you just told me a couple of minutes ago? A. Yes, sir.

Q. Didn't he leave Brooklyn with you to go to Florida? A. Yes, sir.

Q. And that is when you said you were running because District Attorney O'Dwyer had started a war on the mob? A. I was running.

Q. Yes. A. I.

Q. He was running with you, wasn't he? A. I was running.

Q. Was he running with you? A. He went

2952

with his own car, sir.

Q. Didn't you tell us a little while ago that you borrowed a car from a man by the name of Felcher whose address you do not know and that you, Muggsy Cohen and Al Glass, otherwise known as Louis Glass, and otherwise known as Cherry, went along with you in Felcher's car? A. He went in his own car.

Q. Did you tell us a little while ago—

Mr. Turkus: Objected to. It is repetitious. It never happened.

The Court: Overruled.

Q. Did you tell us that a little while ago? A. I got mixed up. I didn't understand you.

Q. You got mixed up? Let us start over again if you are mixed up. You recall my asking you a little while ago about your using the name of Jackie Berman? A. Yes, sir.

Q. And you remember my asking you about Harry Cohen, otherwise Muggsy Cohen, and Louis Glass, otherwise Al Glass, otherwise Cherry, being with you in Florida? A. Yes, sir.

Q. Do you remember my asking you how you 2954
got to Florida? A. Yes, sir.

Q. And you remember your saying, "We took an automobile to go to Florida."? A. I didn't understand you then, sir, clear.

Q. Do you remember my asking you whose automobile it was, and you said a man by the name of Fetcher who works with Litvin, but you don't know Fetcher's address; do you remember saying that? A. Yes, sir.

Q. Not having understood me, Muggsy Cohen did or did not go with you to Florida? Which is it?

2955

Mr. Turkus: I object to it.

Mr. Rosenthal: He said he did not understand me. Now I want to get it straight

Mr. Turkus: This has nothing to do with the Rosen killing. Whether they went in one or two cars to Florida, what difference does it make? I object to it.

The Court: I do not recall that he said that Cohen went in the same car, but I fail to see its relevancy.

2956 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: The relevancy, sir, is the fact that he has now said on the stand here that Cohen is the man who, in the Rosen murder, stole *the car with him, and* this man Cohen, he is now saying he knows nothing about, and I am showing that he was in his company continuously up to the time practically that he gave himself up.

2957 Mr. Turkus: What has that got to do with it? How would that even—

Mr. Rosenthal: Don't—

Mr. Turkus: Please— How would that even be binding on the defendants?

Mr. Rosenthal: Leave that to me, Mr. Turkus. Do you want to know? You are not so stupid as you pretend to be.

Mr. Turkus: Thanks for the compliment.

Mr. Rosenthal: Where is Cohen? Why isn't he arrested? Why isn't he in jail? Why isn't he questioned? If you want

2958 to know the materiality of it, I will tell it to you very quickly.

The Court: When this is all over, let me know.

Mr. Rosenthal: It is all over now, Judge.

The Court: The witness testified that he went to Florida with Muggsy Cohen and was in Florida with Muggsy Cohen at the Commodore Hotel. Whether or not that is relevant to the issue, I don't know. I cannot say. Whether or not they went in the same car seems to me to be

2959

quite far afield from the trial of this issue. Sustained.

Mr. Rosenthal: I respectfully except, sir.

Q. Did you remain in Florida with Muggsy Cohen? A. Yes, sir.

Q. How long did you remain there? A. About three weeks, sir.

Q. Did you leave Florida with Muggsy Cohen —withdraw.

2960

Q. Did you check in the same room with Muggsy Cohen while you were in Florida? A. Yes, sir.

Q. Did you remain in the same room with him for the three weeks that you were in Florida? A. Yes, sir.

By the Court:

Q. That is a high class hotel, isn't it? A. I don't know. Yes, sir.

Q. On the ocean front? A. It is on Collins Avenue.

2961

Q. Collins Avenue near 23rd? A. No, I think near 15th Street or 16th Street.

Q. Down near Lincoln Road? A. Lincoln Road is further down, sir. Lincoln Road, I think, starts at 23rd Street.

Q. This was in 1940? A. Yes. All the detectives stopped in the Commodore Hotel, sir.

Q. Wasn't Harry Strauss down there at the time you were there? A. No, sir.

Q. Sure? A. Not at the time, at the Commodore, sir.

Q. Did you meet him there? A. No, sir.

2962

Q. Did you meet him in Florida? A. Yes, sir.

Q. What hotel was he stopping at? A. The Nassau Hotel.

Q. That is down— A. Across the street, on Collins Avenue.

Q. That is Collins near Lincoln Road? A. What do you mean, sir.

Q. Is that near Lincoln Road? A. That is blocks away, sir.

Q. Is that an oceanfront hotel? A. No, sir.

2963 Counsellor Rosenberg stopped in the Nassau Hotel.

Q. You were not asked that. Strike that out. A. That's it. I want to just refresh a little bit.

Q. I am trying to figure the month. Do you remember the month in 1940 you were in Florida? A. Yes, sir.

Q. What month was it? A. About February, sir.

Q. That was the heart of the racing season? A. Yes, sir.

Q. Did Harry Strauss have a woman with

2964 him?

Mr. Rosenthal: I object to that as immaterial to this issue, whether he did or did not.

A. That time I was in February, 1940, sir.—

The Court: I withdraw that. I asked that for information only. It does not belong in this trial.

The Witness: He was not there.

Mr. Cuff: I move to strike the answer out.

The Witness: He was not there at that time.

Mr. Turkus: Consented to.

By Mr. Rosenthal:

Q. You and Cohen and Glass were partners, weren't you? A. What do you mean, partners?

Q. Do you know what the word "partners" means? A. What do you mean? Explain it, sir. 2966

Q. Do you know what the word "partners" means? A. Yes, sir.

Q. Were you partners? A. No, sir.

Q. In any line of business? A. Just with Glass, shylocking, sir.

Q. Were you partners with Cohen, too? A. No, sir.

Q. At any time? A. Yes, sir.

Q. You mean no, sir. You don't mean yes, sir. A. What say? I was never partners with him, sir.

Q. Wasn't Dapper Dan Siegel down there when you were there? A. Yes, sir. 2967

Q. That is the man that ran the candy store at Saratoga and Livonia Avenue? A. Yes, sir.

Q. Was he stopping with you? A. Yes, sir, he lived in the same hotel, sir.

Q. Did he go down with you, too? A. I beg pardon, sir?

Q. Did he go down with you, too? A. What do you mean, did he go down with me, sir?

Q. Isn't that a plain question? A. I don't understand you. He was there.

Q. You are now telling us that you had two

cars going down instead of one, didn't you? A. Yes, sir; Muggsy Cohen had his own car, sir.

Q. Did he go down in either of the two cars? A. I beg your pardon. I can't understand you, sir.

Mr. Turkus: Did who go down? I don't know whom you are talking about. I object to it. It is incompetent, irrelevant and immaterial, far from the Rosen
2969 killing, nothing to do with the issue.

The Court: Sustained as immaterial.

Mr. Rosenthal: I respectfully except, sir. Your Honor has asked whether Strauss was there.

The Court: I withdraw it.

Q. Was there another man there with you by the name of Alli Abramson? A. He was living with Counselor Rosenberg and his brother and a friend of his in the same room.

Q. Whose brother? A. Maanie Rosenberg's brother

2970 Q. What is his name? A. I don't know his name.

Q. You are sure of that now? A. Positively sure, in the Drake Hotel.

Q. This is in the Drake Hotel? A. In the Drake Hotel.

Q. And you were in the Commodor.? A. Yes, sir.

Q. And Strauss was in the Nassau? A. I beg your pardon. At the time Strauss was not there.

Q. Didn't the Judge ask you just a little while ago whether Strauss was there when you were

there and didn't you say yes, he was stopping at the Nassau? A. I said not at that time. That's what I said.

Mr. Turkus: I object to it. That is just what he said to the Judge.

The Court: He corrected that.

Mr. Rosenthal: Who is to be the witness, Mr. Turkus or the witness?

The Court: The witness corrected that. That is on the record. At the end of that 2972
inquiry, he said not at that time.

Mr. Turkus: I object to this. It has nothing to do with the Rosen killing; it is far afield. He was down in Miami and what hotel. What has that got to do with the case we are trying? I object to it.

The Court: It is irrelevant although in some respects interesting.

Mr. Rosenthal: I respectfully except to the Court's remarks. All of this matter was brought out by Mr. Turkus on direct examination.

2973

The Court: The jury will disregard it.

Mr. Rosenthal: Does your Honor mean the jury will disregard your remark or what I have to say?

The Court: The colloquy.

Q. Did you leave Miami with Muggsy Cohen? A. No, sir.

Q. Did he remain there when you left?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

2974

Mr. Rosenthal: This is February, 1940, just before he gave himself up. It is on the question of this man's credibility.

Mr. Turkus: It is withdrawn.

The Court: The Court can see nothing bearing on credibility in whether Cohen went home or stayed in Miami Beach.

Mr. Rosenthal: I am not exposing the entire thing at this time, your Honor, and I can only ask one question at a time and

2975 I don't intend to permit this witness to know what is in my mind when I am asking the questions.

The Court: That is proper.

Mr. Rosenthal: I have in mind that this witness says that Mr. Cohen was never in the District Attorney's office when he was there.

The Court: Go ahead.

Q. After you left Miami, when did you come back to New York? A. What do you mean, when?

2976 Q. What does the word "when" mean, do you know? A. Coming in February.

The Court: Was it about February?

The Witness: Latter part of February or the early part of March, sir.

Q. Did you remain in New York after you got here, before you surrendered yourself? A. No. I went to see somebody, sir.

Q. Did you go out of town or did you remain in New York, is my question to you? A. I went to see somebody.

Q. Did you leave town or did you remain in New York? A. When I seen somebody then I left—

Q. Did you leave town is the question. A. When I seen somebody I left.

Mr. Rosenthal: I ask that the answer be stricken as not responsive and this witness directed to answer whether he left town or he did not leave town. It is a simple question. 2978

Mr. Turkus: I object and ask that it stand.

Mr. Rosenthal: I ask it be stricken.

Mr. Turkus: It shows why he left town now. You brought that out.

Mr. Rosenthal: I object to the statement of Mr. Turkus also.

Mr. Turkus: I have the first objection that it stand as an answer. Then we will get rid of the second objection.

The Court: These colloquies give the Court a great time to relax. Let us find out what the question is. 2979

(Pending question read by the reporter.)

The Court: Do you mean before he went to Florida?

Mr. Rosenthal: No. I said after he came back to New York did he then leave town again.

The Court: And before he surrendered?

Mr. Rosenthal: Before he surrendered. The answer to that is yes or not, not voluntary statements such as this witness has been in the habit of giving.

2980

The Court: Overruled. It is overruled because that is covered by the direct examination: therefore Mr. Rosenthal is entitled to go into it on cross.

Mr. Rosenthal: I move to strike out his answer on the ground it is not responsive.

The Court: Strike it out.

Mr. Rosenthal: I ask your Honor at this time to admonish this witness not to

2981 volunteer any information and merely to answer questions, where he can, yes or no or he does not know.

The Court: The witness is so admonished.

Q. Is that clear to you? A. Yes, sir.

Q. Did you leave town: yes or no? A. Yes, sir.

Q. Where did you go when you left town? A. Los Angles.

Q. When did you leave town? After you re-

2982 turned to New York from Miami, when did you leave town, February, March April or when, what month? A. I think it was in March, sir.

Q. Did you go to Los Angles alone or were you accompanied by anybody? A. With somebody.

Q. Were you accompanied by Glass? A. No, sir.

Q. What is the name of the person that went to Los Angles with you? A. Joe Bernstein, sir.

Q. Is that the man known as Herschel Bernstein? A. No, sir.

Q. That is a different Bernstein? A. Yes, sir.

Q. Where does he live? A. Near Flatbush Avenue somewheres.

Q. Was he engaged in business with you in any of your businesses? A. He worked for the mob.

Mr. Rosenthal: I ask that the answer be stricken out, not responsive.

Mr. Turkus: It is responsive.

Mr. Rosenthal: I asked whether he was in any business with him. 2984

Mr. Turkus: That invites the answer what business he was in.

Mr. Rosenthal: I did not ask any such question.

The Court: The witness has previously said he worked for something which he describes as the mob. Now he say that Herschel Bernstein worked for the mob.

Mr. Rosenthal: This is Joe Bernstein, not Herschel Bernstein. I asked whether he was in business with him.

The Court: I thought you said Her- 2985
schel.

Mr. Rosenthal: No. I asked whether it was the same Bernstein, and he said no, this is a different Bernstein.

Mr. Turkus: What difference is it what Bernstein it is? He was with the mob, he said.

Mr. Rosenthal: I am addressing myself to the Court.

Mr. Turkus: That is all I am doing.

Mr. Rosenthal: I ask that the answer be stricken.

The Court: Denied.

2986 *Sol Bernstein—For People—Cross*

Mr. Turkus: I ask that it stand.

Mr. Rosenthal: Respectfully except.

Q. When was it that you left to go to Los Angeles? A. I think it was March.

Q. Anybody else go with you except Bernstein? A. Just Joe Bernstein.

Q. How did you go, by what method? A. By car, sir.

Q. Whose car did you use? A. My car, sir.

2987 Q. When you say your car, do you mean a car that is registered in your name? A. No, sir.

Q. Or registered in somebody else's name? A. No, sir.

Q. "No, sir" what? Registered in your name? A. Somebody else's name.

Q. What name was the car registered in? A. Al Felcher.

Q. Is that the name of the man that you said owned the car that you went to Florida in also? A. Yes, sir.

Q. So that when you said you borrowed Fel-
2988 cher's car to go to Florida, you mean you borrowed your own car: is that what you mean? A. What do you mean, sir?

Mr. Turkus: I object to it. It is incompetent, irrelevant, immaterial.

Mr. Rosenthal: This is on his credibility. A minute ago he said he borrowed a car from a man by the name of Felcher, whose address he did not know, in order to go to Florida. Now he said his car was registered in the name of Felcher.

Mr. Turkus: What has that got to do with the Rosen killing? I object to it.

2989

The Court: It is too far afield.

Mr. Rosenthal: This is on the question of this witness's own testimony given a couple of minutes ago, on his credibility as to anything.

The Court: The Court has allowed great latitude on collateral impeachment, but there are certain discretions which the Court must at some time exercise; otherwise there will be no end to the case and there will be confusion to the jury.

2990

Mr. Rosenthal: Does your Honor sustain the objection?

The Court: Go ahead.

Mr. Rosenthal: If your Honor sustained it, I will take an exception and go on.

The Court: The stenographer will read.

(The remarks of the Court were read.)

The Court: Sustained.

Mr. Rosenthal: Exception.

2991

Q. How long did you remain in Los Angeles before you came back? A. What do you mean, how long did I remain?

Q. You said you took an automobile in the month of March or the end of February, with a man by the name of Joe Bernstein, left New York and went to Los Angeles. A. I went to San Francisco then. I started going. I don't know what you mean, sir.

Q. How yong were you away from New York before you returned to New York? A. I gave myself us, sir. I was running.

2992 Q. How long a time elapsed between the time you left New York and went to California, and you returned to New York? A. I left in March and I came back in April.

The Court: Will you pardon me just a moment?

By the Court:

2993 Q. Isn't Meyer Bernstein the same person as Herschel Bernstein? A. I knew him as Herschel Bernstein.

Q. But in Long Breach, when he had this conviction and was sent up for a year, he went under the name of Meyer, is that it? A. I can't tell you that, sir.

Q. The reason, in your direct examination yesterday you referred to him throughout as Herschel? A. Yes, sir.

Q. Now Mr. Rosenthal refers to him as Meyer, as though he were a different person.

2994 Mr. Rosenthal: May I respectfully state to the Court that I do not refer to him as Meyer? The complaint which I read from refers to him as Meyer. I do not know the difference.

The Court: The Court does.

Mr. Rosenthal: I don't.

The Court: Pardon me, but there is no more colloquy. Just forget there is anybody else in the room and be just as courteous as if you were talking to me alone in chambers.

Mr. Rosenthal: I always try to.

The Court: Unfortunately not.

By the Court:

Q. When you spoke of Joe Bernstein, do you mean the man who went out with this witness to Long Beach and was there convicted and sent to jail for one year? A. No, sir.

The Court: I am asking Mr. Rosenthal.

Mr. Rosenthal: I did you speak of Joe Bernstein, your Honor; he spoke of Joe Bernstein.

2996

The Court: Whom are you talking about, Herschel, or Joe, or Meyer?

Mr. Rosenthal: I am only mentioning the names that he mentioned. I am not talking about anybody. He has mentioned three names and said one Herschel, one Meyer, and one Joe.

The Court: The Court won't press this because it only tends to confuse the proceedings.

Mr. Rosenthal: I did not use the names; he has used the names of different Bernsteins.

2997

The Court: Don't argue.

By Mr. Rosenthal:

Q. Did you use the name "Herschel Bernstein"?

The Court: Don't answer. Proceed with the next question.

Q. Are the persons, the Bernsteins whom you mentioned to me, the three different first names,

2998 different people, or are they all the same people, Joe, Meyer and Herschel? Are they all the same person? A. I did not mention Meyer.

Q. You mentioned "Herschel," didn't you? A. Yes.

Q. And you mentioned Joe as the man that you went to Los Angeles with? A. Yes, sir.

Q. Is that a different man than Herschel? A. Yes, sir.

Q. On the question of Meyer, do you say you
2999 do not know Meyer Bernstein? A. No, sir.

Q. Isn't it a fact that Meyer Bernstein is Herschel Bernstein? A. I didn't know that, sir.

Q. How long had you known Herschel Bernstein, how many years? A. I met him in—

Mr. Turkus: I object to it. This is incompetent, irrelevant, immaterial.

The Court: Mr. Rosenthal, I think I see where the confusion arose. It arose through a coincidence which I cannot amplify on the record in the presence of this jury.

3000 Mr. Rosenthal: I did not want your Honor to in any wise infer—

The Court: It is straightened out in my own mind now.

Mr. Rosenthal: I did not want your Honor to infer there was anything I had done in respect to it.

The Court: I was simply confused and puzzled. I see the point now, but I cannot tell you how it came up.

Mr. Rosenthal: As long as your Honor exonerates me on the proposition.

The Court: You do not require exoneration, now or at any other time.

Mr. Rosenthal: Thank you.

Q. You returned to New York in the month of April? A. Yes, sir.

Q. How long were you in New York—by that I mean any part of it, including Brooklyn—before you gave yourself up? A. I gave myself up right away, sir.

Q. Did you see Muggsy Cohen before you gave 3002
yourself up? A. No, sir.

Q. Did you see Al Glass before you gave yourself up? A. No, sir.

Q. W n was the last time before you gave yoursel up that you saw Muggsy Cohen? A. Never saw him, sir.

Q. You saw him in Florida, didn't you? A. Yes, sir.

Q. That is the last time you saw him, then, isn't it? A. I don't understand you, sir. That is the time I seen him, that's right, and then I never saw him again, sir.

Q. So the last time you saw him was in 3003
Florida in February, is that right?

Mr. Turkus: Objected to, incompetent, irrelevant, immaterial.

The Court: Sustained.

Q. When was the last time you saw Al Glass before you gave yourself up?

Mr. Turkus: Objected to, incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

3004 *Sol Bernstein—For People—Cross*

Q. Did you tell the District Attorney when you surrendered, either Mr. McDonough or Judge O'Dwyer or Captain Bals or anybody else, that Muggsy Cohen was the man who aided you in the theft of the automobile that was used in the Rosen murder? A. Yes, sir.

Q. Did you tell that to the District Attorney? A. Yes, sir.

Q. Whom did you tell it to and when did you tell it for the first time? A. The time I gave
3005 myself up, sir.

Q. That would be in April, 1940? A. Yes, sir.

Q. And whom did you tell it to? A. Captain Bals and District Attorney O'Dwyer, sir.

Q. When you were telling them about it, was there a stenographer there? A. No, sir.

Q. Was anybody present taking down what you were saying? A. No, sir.

Q. Did anybody take it down? A. No, sir.

Q. Were you asked to write out what you were saying? A. No, sir.

Q. So that, in the presence of District Attor-
3006 ney O'Dwyer and Captain Bals, you then stated, in April of 1940, that Muggsy Cohen was the man who aided on—

Mr. Turkus: Objected to as repetitious.

Q. —in stealing the car? I want this plain and understood.

Mr. Turkus: I object to it. It is repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. When for the next time did you repeat to anybody— A. I beg your pardon, sir.

Q. When for the next time did you repeat the fact—I have not asked you anything yet—when for the next time did you repeat to anybody the fact that Muggsy Cohen was the man who aided you in stealing the car used in the Rosen murder?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. 3008

Mr. Rosenthal: I respectfully except.

Q. Did you ever repeat to any other person the fact that Muggsy Cohen was involved in the theft of this car, while you have been in custody? A. I told the Grand Jury.

Q. That was when? A. A couple of weeks later, sir.

Q. Were you ever asked to put in writing before you went before the Grand Jury the statement as to what you knew about the theft of this car? A. No, sir. 3009

Q. Were you ever asked to put it in writing any place? A. No, sir.

Q. Was ever a stenographer present when you were relating to any person what you knew about the theft of this car? A. In the Grand Jury I seen a stenographer.

Q. With the exception of the Grand Jury, was there ever a stenographer present either when the police questioned you or the District Attorney questioned you or any of his Assistants questioned you? A. No, sir.

Q. Regarding Cherry or Al Glass, have you

3010 ever seen him in the District Attorney's office or in the Half Moon Hotel?

Mr. Turkus: Objected to.

Q. Since the time you have been arrested?

Mr. Turkus: Objected to.

Q. Or in custody?

3011 Mr. Turkus: Incompetent, irrelevant, immaterial, nothing to do with the Rosen killing.

The Court: Overruled.

Q. What is your answer? A. No, sir.

Q. You have never been confronted with him at any time or place since your arrest?

Mr. Turkus: I object.

Q. Or since you gave yourself up?

3012 Mr. Turkus: That is repetitious now.

Mr. Rosenthal: Before I confine it to a particular place, now I want the general answer as to everything, so he cannot say afterwards that it was confined to a different place and that he saw him some other place.

The Court: What is the question?

(Pending question read by the reporter.)

Mr. Turkus: This is referring to Glass?

Mr. Rosenthal: I first directed his attention to a specific place. Now I want to

know any time and any place so it cannot be a different place he saw him and that is why he answered in the negative.

Mr. Turkus: It is objected to, incompetent, irrelevant and immaterial, nothing to do with the issue in the case.

The Court: I cannot see it but he can answer.

A. No, sir.

Q. When and where were you born, Bernstein? 3014
A. Brooklyn, sir.

Q. When? A. October 10, 1911.

Q. Can you read and write? A. Can I read and write?

Q. Yes. A. Yes, sir.

Q. When you pleaded guilty the first time, were you asked by the Court whether you could read and write and did you say no?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

Mr. Rosenthal: This is on his credibility. These are all statements made in public places, to courts and to juries, that I am questioning on. 3015

Mr. Turkus: Withdrawn.

The Court: Overruled.

Q. Did you? A. I did not get you, sir.

Q. I will repeat the question. The time that you pleaded guilty in this court before Judge Vause and received a suspended sentence, did you say in answer to the question as to whether you could read and write "No"? A. I don't recall, sir.

3016 Q. I did not get your answer. A. I don't recall, sir.

Q. The time before your first conviction, sir, you were out of employment? You were not working any more, isn't that right? A. What did you say, sir?

Q. Before you started to burglarize this place that you said you burglarized, you had already lost your job and were in the shylocking business, weren't you? A. I think I was working.

3017 Q. You think you were still working when you committed this burglary? A. What year was this? I don't recall so far back, years like that, sir.

Q. Don't you recall what year? Just try and think. What is your best recollection? A. I think I was working, sir.

Q. But weren't you asked by Judge Talley when he was examining you as to the time of your first conviction and didn't you say it was after you had lost your job or left your job in the leather goods where you had gotten into a

3018 great deal of debt due to the fact that you had been gambling and went into the shylock business? Didn't you say that when Judge Talley was questioning you? A. I think that was about the car, sir.

Q. You say you did not say that?

Mr. Turkus: He says he thinks it was about the car.

Mr. Rosenthal: I am asking another question.

Mr. Turkus: Object to it as repetitious and answered. He said he thought he

said at a different time, in reference to the car. Repetitious.

The Court: My recollection may be right and may be wrong but I thought he was uncertain on that examination at one point as to whether he was working at the time of that burglary or not.

The Witness: I think I was working, sir.

The Court: He says now he thinks he was working but a few minutes ago he 3020
said he could not remember that far back. Has it any relevancy to the issue, whether he was working or not?

Mr. Rosenthal: Yes, it has, your Honor, in view of a certain statement that he made at the time to the Court when he took his plea. And on the question of his credibility at all times from the time he was eighteen, the question of his credibility, I have a right to bring to this jury.

The Court: You mean when his pedigree was taken? 3021

Mr. Rosenthal: Yes.

The Court: Have you got it there?

Mr. Rosenthal: I have a copy of it, an extract.

The Court: May I see it?

Mr. Rosenthal: Yes, surely. I have not got the original, Judge.

The Court: This is prepared by the clerk's office?

Mr. Rosenthal: Somebody in Mr. Fischbein's office prepared it.

The Court: It goes to a question of memory rather than credibility.

3022 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: It also goes to the question of credibility if he told an untruth even at that time when he was arraigned.

The Court: According to this, at the time of your conviction, when your pedigree was taken, you gave your occupation as leather goods?

The Witness: That is right.

The Court: Would that refresh your recollection?

3023 The Witness: Yes, I was working.

The Court: I assume you lost your job when you were arrested?

The Witness: No, I went back to work again.

The Court: You remember that?

The Witness: Yes, sir.

The Court: That refreshes your recollection?

The Witness: Yes, sir.

Q. You remember that the leather goods was
3024 the last place that you ever worked, is that right? A. Yes.

Q. That you worked as an errand boy before you worked in the leather goods?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: I have not asked a thing about this.

Q. Was your memory just as good in the mountains when you testified then?

Mr. Turkus: Object to it as argumentative.

The Court: Overruled.

Q. Was it? Was your memory just as good in the mountains? What is your answer? Have you given an answer? A. I don't understand what you mean, sir.

Q. Was there anything the matter with your memory when you were testifying under oath in the mountains, in the Cohen trial? A. I was confused, sir.

Q. You were confused? A. Yes.

Q. Were you asked in the mountains in regard to your employment (on page 25) these questions and did you give these answers: "Q. Where did you go to work?"—withdrawn. I will start so that you get the connecting thought. 3026

"Q. What grade did you leave public school? A. Eighth grade.

"Q. How old were you? A. Sixteen or fifteen.

"Q. Go to work? A. That's right.

"Q. Where did you go to work? A. I worked for a leather goods place.

"Q. Right after you left public school? A. Majestic Leather Goods.

"Q. What is their address? A. I don't remember." 3027

A. I will tell you now, sir, if you want to know.

Q. Wait a minute, listen to the question. I will ask you a question when I am finished reading this to you. You just wait.

"Q. Are they in business now? A. I don't know.

"Q. How long did you work for them? A. Two years.

"Q. Give me the name of your employer? A. I think Moskowitz.

"Q. First name? A. I don't remember.

3028 "Q. What work did you do? A. Cutter.

"Q. What did you cut? A. Leather.

"Q. When you were fifteen years old you went to work as a leather cutter? A. At fifteen or sixteen.

"Q. What was your next job? A. As an errand boy in some hat place.

"Q. Give me the name? A. I don't remember.

"Q. How long did you work? A. A few months."

3029 Q. Do you recall being asked those questions in the mountains regarding your employment from the time you left school and giving those answers? Do you remember? A. If it is in the book, I said it, sir.

Q. Was your memory foggy then when you testified in the mountains? A. Yes, sir.

Q. You were not secreting from the jury the fact that you worked in the Majestic Leather concern after you were an errand boy and telling them that you worked there before you were an errand boy, were you?

3030

Mr. Turkus: I object. The testimony speaks for itself.

Mr. Rosenthal: No, because he has given a motive for his testifying to part of the truth.

Mr. Turkus: All right, withdrawn.

The Court: Wait a minute. I want to find out something.

Mr. Turkus: I don't know what it is all about.

The Court: I don't either and for that reason I do not propose to have—

Mr. Rosenthal: Let me put it this way—

The Court: Please don't interrupt the Court. I cannot sit here and have objections made and just as the Court is ready to rule, have them withdrawn.

Mr. Turkus: I did not understand what he was driving at. I still don't.

The Court: I do not either. For that reason I consider it remotely. The man, so far as the record reveals, there could 3032
be no argument to base for concealing matters of infantile employment long antecedent to the crime.

Mr. Turkus: That is right.

The Court: But possible confusion in narration. I sustain the objection as irrelevant.

Mr. Rosenthal: I respectfully except.

Q. Were you telling the truth in the mountains when you said that the first employment that you got after you left school was with the 3033
Majestic Leather Company and you only worked for two years there?

Mr. Turkus: Objected to.

Mr. Rosenthal: This was brought out on direct, if your Honor pleases, by Mr. Turkus.

The Court: The Court should not be involved in argument of counsel on rulings of law. A great deal of preliminary work done when a witness is put on the stand may be irrelevant and have no bearing on the issues at all and that is

3034 *Sol Bernstein—For People—Cross*

only because the law allows latitude in showing the background of the witness but it does not raise an issue on things that happened years before the alleged crime and have no relation to it whatever.

Mr. Rosenthal: I respectfully except to the Court's statement.

Mr. Talley: May I say a word, if your Honor pleases?

The Court: No. I am giving you the
3035 benefit of it although I do not attach any importance to it.

Mr. Rosenthal: I except to the Court's remark as to the importance that he places. The question, as I understand it, is as to what importance a jury will place on it.

The Court: For the purpose of ruling, the Court must depend upon its own judgment. Those issues, as you know, are not submitted to the jury. You go ahead.

Mr. Talley: The Court says "No" so
3036 I have subsided, so I will say it later.

Mr. Turkus: I object to this colloquy between the lawyers, in the presence of the jury, advance summations, break up the trial at any cost.

The Court: We are losing a great deal of time which tends to have the jury lose the thread of the narrative and of the cross-examination and confuses the Court and confuses everybody.

Mr. Rosenthal: I respectfully except to the Court's ruling.

The Court: Now will you pease stop

the colloquy and proceed with the cross-examination?

Mr. Rosenthal: I merely took an exception, sir.

The Court: I have been patient with these colloquies.

Mr. Rosenthal: Shall I proceed?

The Court: Yes, I wish you would.

Q. Did you tell the truth in the mountains when you told the jury there that the first job 3038
you ever had was in a leather goods factory and you had only worked there two years and subsequently your job was an errand boy for a couple of months and those were the only two jobs you had? Did you tell them the truth then?

Mr. Turkus: I object to it. That is a characterization. He has already answered.

Mr. Rosenthal: The Court just overruled the objection.

Mr. Turkus: I renew it.

The Court: Which is the fact? 3039

The Witness: I worked first in the telegram office. Then I worked in a hat factory. Then I worked in the brief case.

Mr. Rosenthal: I did not get his answer.

The Court: Read it.

(Answer read by the reporter.)

The Witness: Leather goods.

Q. While you were working for this brief case concern, you say you did a lot of gambling; is that right? A. Yes, sir.

3040 *Sol Bernstein—For People—Cross*

Q. On the horses? A. Horses, shooting crap.
Q. Dice? A. Yes, sir.
Q. While you were doing this gambling, what was your salary a week?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.
The Court: Sustained.
Mr. Rosenthal: Exception. I call the Court's attention—
3041 The Court: No, don't.
Mr. Rosenthal: This is all matter of direct examination brought out by Mr. Turkus.
The Court: Please!
Mr. Rosenthal: I respectfully except to the Court's ruling.

Q. What year was it to your recollection that you left—let me withdraw that.
Did you leave or were you discharged from the place of employment in the Majestic Leather Company?
3042

Mr. Turkus: Objected to. It is incompetent, irrelevant and immaterial.
The Court: Sustained.
Mr. Rosenthal: I respectfully except, sir.

Q. What year was it that you started in as a shylock? A. After I quit the job, sir.
Q. What year—

The Court: What year, if you recall?
The Witness: I don't recall the year.

3043

Q. How old were you when you started in as a shylock? A. Nineteen, twenty, eighteen—I don't know. I can't recall so far back, sir.

Q. Can you tell us approximately how old you were, whether you were eighteen years of age when you became a shylock?

Mr. Turkus: Objected to as just answered, repetitious.

Mr. Rosenthal: He has not answered.

The Court: About how old were you? 3044

The Witness: Nineteen, twenty, eighteen.

Q. How long either before or after your first conviction did you become a shylock? Let us put it that way.

Mr. Turkus: Objected to.

Mr. Rosenthal: If he can fix the date.

Mr. Turkus: Objected to.

By the Court:

3045

Q. Was it after? A. What is that again, sir?

Q. Was it after your conviction for unlawful entry that you became a shylock, or was it before? A. It was after.

Q. How long, counsellor wants to know, if you remember? A. After the stolen car. That's all I remember, not before breaking into the store.

Mr. Rosenthal: I cannot hear a word he is saying.

The Court: Speak out loud.

Q. You say it was after the stolen car? A. Stolen car or the burglary.

Q. It was after the burglary? A. I think so, sir.

Q. Do you remember precisely how long after? A. A couple of years. I don't know, sir.

Mr. Rosenthal: We cannot hear him.

The Court: A couple of years. He does not know.

3047

By Mr. Rosenthal:

Q. Did he say a couple of years after the burglary? A. I don't recall, sir. I know the judge was Vause and the other judge was Martin.

Q. I am not asking you about the judges. The Judge asked you and I ask you, can you approximate either how long before or how long after your conviction or plea of guilty of petty larceny based on the burglary charge it was that you started in as a shylock?

3048

Mr. Turkus: I object to it. It is incompetent, irrelevant, and immaterial. It is repetitious. He stated his background.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Did you become a professional loan shark at the time that you started shylocking? A. Yes, sir.

Q. And when did you become a gambler and bookmaker? A. Gambler and bookmaker? When I was shylocking, at the same time.

Q. You started in the three occupations at one time? A. Yes, but when I was working I was gambling, sir.

Q. I am not asking you about what you were doing when you were working. I am now asking you when did you become a bookmaker?

Mr. Turkus: Objected to as repetitious. He has just responded.

Mr. Rosenthal: His response was irresponsive by saying when he was working he was gambling. 3050

Q. When did you become a bookmaker? A. When I was shylocking.

Mr. Turkus: There is an objection.

The Court: Do you remember what year?

The Witness: I don't remember.

The Court: Do you remember how old you were?

The Witness: Nineteen, twenty—something like that. 3051

The Court: Speak out loud.

The Witness: I think I was nineteen or twenty, sir.

Q. You are thirty years old now, are you? A. Yes, sir.

Q. So that if it was 1920, you were then about nineteen years of age when you became a bookmaker and a shylock, is that right?

Mr. Turkus: I object to it. It is confusing. 1920 is twenty-one years ago.

3052 *Sol Bernstein—For People—Cross*

The Court: Sustained on the ground he has already answered. He said nineteen or twenty.

Q. Where did you conduct your bookmaking from? A. Amboy and Sutter.

Q. On the street or in some house or on the corner or in a place of business or where? A. In a store, sir.

3053 Q. What store did you conduct your gambling or bookmaking business from? A. Candy store, sir.

Q. What is the name of the candy store? A. At that time the name was Proppers.

Q. Do you know where he is?

Mr. Turkus: Objected to, incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

3054 Q. In 1932 you say you met Harry Strauss, is that right? A. About 1932 or 1933, sometime like that.

Q. Can you give use your best estimate of when it was that you met Harry Strauss?

Mr. Turkus: Objected to. He has just given it. It is repetitious.

The Court: Sustained as repetitious.

Mr. Rosenthal: He said, "Something like that."

Q. Is that the nearest you can come, 1932 or 1933, something like that?

Mr. Turkus: Objected to as repetitious.

The Court: Is it?

The Witness: Yes, sir.

Q. So as far as you recall it may have been 1934 that you met Strauss? A. No, sir, I don't think so.

Q. When you were asked by Mr. Turkus as to when you met Strauss—

3056

The Court: He said 1932.

Mr. Rosenthal: I know what he said, Judge. I am just getting the minutes here.

Q. You were asked this question and you gave this answer, didn't you (on page 489):

"Q. I direct your attention to in or about the year of 1932 and ask you whether you made the acquaintance of one Harry Strauss? A. Yes, sir."

Mr. Turkus: "In or about." 3057

Q. Do you remember being asked that question and giving that answer? A. Yes, sir. If it is in the book I said it. I don't know, sir.

Q. I did not hear you. A. If it is in the book, I said it. If you read it in the book, I said it.

Q. You then were asked by Mr. Turkus as to a number of people who visited this Coffee Pot, were you, at which you had met Harry Strauss? Do you remember being asked by Mr. Turkus that? A. Yes, sir.

Q. On your direct examination? A. Yes, sir.

Q. And you remember mentioning a number of names among which was Buggsy Goldstein? A. Yes, sir.

Q. You knew Buggsy Goldstein at that time, did you? A. Yes, sir.

Q. Sure of that? A. Yes, sir.

Q. You were asked up in the mountains these questions and you gave these answers, didn't you (page 21):

3059 "Q. Do you know Buggsy Goldstein? A. No."

Were you asked that question in the mountains and did you give that answer? A. That is a mistake, sir.

Q. Were you asked that question and did you give that answer in the mountains, yes or no? A. If it is in the book, I said it, but that must be a mistake, sir.

Q. The question which I am asking you is whether or not you recall now having been asked the question under oath in the mountains, "Do you know Buggsy Goldstein?," and whether under oath your answer to that question was,

3060 "No"? That is the question that I am asking you.

Mr. Turkus: That is objected to. He has just answered it.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. You say that is a mistake. Do you mean you made a mistake when you testified in the mountains? Is that what you mean? A. No, sir.

Q. Do you mean that the stenographer made a

mistake and put "No" down when you said "Yes", is that what you mean? A. I can't tell you that, sir. That is a mistake, sir.

The Court: How can he say that? Stenographers are human, as every lawyer knows.

Mr. Rosenthal: I except to your Honor's statement.

Q. When you said that there was a mistake, in answer to my question, did you mean to infer that you made the mistake or somebody else made the mistake? 3062

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Whose mistake was it?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Rosenthal: Exception. 3063

Q. When was it that you say that you met the defendant Capone? A. '32 or 1933, sir.

Q. And where was it that you say that you met Capone for the first time? A. Sackman and Livonia, in the Coffee Pot.

Q. Who introduced you, did you say, to Capone? A. What do you mean? I don't understand what you mean, sir.

Q. You don't know what the word "introduced" means? A. What do you mean, "introduced"?

3064 *Sol Bernstein—For People—Cross*

Q. Do you know what the word "introduced" means? A. I was first borrowing money over there, sir, from the shylocks.

Q. Do you know what the word "introduced" means? A. Yes, but I can't understand you.

Q. Did anybody introduce you to the defendant Capone at any time? A. Yes, Mike Sycoff, who worked for them, worked for the mob shylocking. He was their shylock.

3065 Mr. Rosenthal: I ask that all but the words, "Mike Sycoff", be stricken as not responsive.

Mr. Turkus: That was invited. He pursued this witness as to what he meant by an introduction and the witness has indicated how he met Capone, through one of the employees, and what the transaction was.

Mr. Rosenthal: Now that you have that speech over, my question was merely did anybody introduce him.

3066 Mr. Turkus: I ask that the answer stand.

Mr. Rosenthal: May I have the question read?

The Court: The latter part of the answer is stricken out as irresponsive. The first part will stand.

Q. You mentioned Mike Sycoff. Is that who you mentioned? A. Yes, sir.

Q. Is he one of the men that are in jail with you, or in the Luna Park Hotel, or Half Moon, or whatever you call it? A. Yes, sir.

3067

Q. How long has he been down in the Half Moon with you? A. How long?

Q. Yes, how long? Is there anything difficult about that question?

Mr. Turkus: I object to it. It is incompetent, irrelevant, immaterial whether there is anything difficult with his question or not.

The Court: Sustained.

3068

Q. How long has Mike Sycoff been down in the Half Moon Hotel with you? A. He come a month after me, 'sir.

Q. So he has been there practically a year and a half with you, is that right? A. Yes, sir.

Q. Was he one of the men that played baseball with you out on Long Island?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Turkus: Four witnesses. His name was given. Repetitious.

3069

The Court: I think it was Judge Talley who asked that.

Mr. Turkus: No, Mr. Rosenthal brought it out himself. He had the four names. This will go on ad infinitum.

The Court: Sustained.

Mr. Rosenthal: I certainly object to Mr. Turkus' continual interjections. Nobody interjected when he led this man all over the map of the United States which he now complains of as immaterial be-

3070 *Sol Bernstein—For People—Cross*

cause I am leading him over the same map.

The Court: Proceed.

Q. Were you in the same suite with him down in the Half Moon? A. What do you mean?

Mr. Turkus: Objected to as already answered. Repetitious.

Mr. Rosenthal: Never asked him about any association that he remembered.

3071 The Court: Why can't we leave out these discussions?

Mr. Rosenthal: If Mr. Turkus does, I will, your Honor.

Mr. Turkus: I have made legal objections, if it please your Honor. I cannot stop him from arguing every point.

Mr. Rosenthal: And we cannot stop you.

The Court: The gavel is in the drawer. I am afraid to trust it on the desk. You must avoid these discussions. Time is be-

3072 ing consumed. It means this man has got to come back here tomorrow for another session and the court had hoped to finish today. The court cannot, in an important matter of this kind, and with a witness of such importance, press counsel too much. Please proceed. I don't know what it is all about now, there has been so much discussion.

Mr. Rosenthal: I will repeat the question, your Honor, and withdraw the other to save time and put it in as nearly the same form as I can.

3073

Q. Were you and Mike Sycoff in the same suite in the Half Moon Hotel for the last year and a half that you and he have been in custody?

The Court: He may answer.

A. Answer that, sir?

The Court: Yes.

The Witness: Yes, sir.

3074

Q. Did you eat together? A. With the detectives.

Q. Did you and he eat at the same table?

Mr. Turkus: Objected to as repetitious.

The Court: It makes no difference whether it was a table or they were standing up.

Mr. Rosenthal: Wherever it was. I did not use the word "table" before.

Mr. Turkus: He said they ate together with detectives. It is repetitious.

3075

Q. Did you sleep in the same room? A. No, sir.

Q. How far was his room removed from yours? A. What do you mean? I don't understand what you mean.

By the Court:

Q. How far was his room from yours? A. The other side of the building, sir.

Q. The other side of the building? A. Yes.

Q. The other end of the hotel? A. Yes, sir.

3076 a big suite and on the other side. I am away from all of them, sir.

Q. How many hours a day were you in his company? A. I don't understand you, sir.

Q. How long each day would you be with him? A. I go to sleep nine o'clock, sir.

Q. When you are awake, how long are you with Sycoff? A. About thirteen hours, sir.

Q. That is daily routine? A. Yes, sir.

3077 By Mr. Rosenthal:

Q. This man Tannenbaum, he was the other man that you mentioned as playing baseball, Al Tannenbaum? A. Yes, sir.

Q. Do you eat with him? A. Yes, sir, with the detectives, sir.

Q. How many hours a day with him? A. Same time, sir.

Q. Do you sleep in the same room with him? A. No, sir.

Q. Who sleeps in the room with you? A. Nobody, sir, except the detectives guarding me, sir.

3078 Q. You and the detectives sleep in one room? A. They don't sleep there. They guard me. They stay up. They sit next to me.

Q. They sit next to your bed while you are sleeping, is that it? A. Yes, sir.

Q. Are there any other People's witnesses that are together there with you— A. I do not understand, sir.

Q. Wait until I finish the question and maybe you will—outside of Sycoff and Tannenbaum, are there any other witnesses who are in this

room with you for thirteen hours a day? A. Abe Reles.

Q. Anybody else? A. That's all, sir, and the detectives.

Q. Reles, you, Tannenbaum and Sycoff, is that right? A. Yes, sir.

Q. Was Mike Sycoff in business with you at any time, working for you any time? A. Working for me?

Q. I am asking you the question, did he ever work for you. That is plain, isn't it? A. No, 3080
sir.

Mr. Turkus: What is the answer? "Is it plain? No, sir." Or he didn't work for him?

Mr. Rosenthal: You ask him. I will ask him for you, if you want me to.

Mr. Turkus: I think he told you who Sycoff worked for.

Mr. Rosenthal: Judge, you do not hear the side remarks and you object when I make statements. It is like a continuous barrage from Mr. Turkus every time the 3081
witness says something.

Mr. Turkus: That is not true. You have something now, but not a continuous barrage.

The Court: Please, both sides go according to Hoyle.

Q. Did you know Reles very well? A. I knew him since—No, not so well, sir, but I knew him, sir.

Q. Weren't you asked in the mountains, under

3082 oath, this question (on page 21) and didn't you give this answer:

"Q. You knew Abie Reles very well? A. Yes."

Were you asked that question and did you give that answer? A. He asked me how many years. I told him, sir.

Q. Were you asked in the mountains that question and did you give that answer? A. If it is in the book, I said it.

3083 Q. If it is in the book, it is so; is that your answer? A. Yes.

Q. It is in the book. Is that so? A. You ask me how many years and I tell you, sir.

Q. It is in the book.

Mr. Turkus: I object.

A. I know, but I never bothered with him, sir. That is what I am trying to bring out.

Q. It is in the book that you said you knew Abie Reles very well. Is that so? A. You ask me how many years.

3084 Q. Will you please answer the question, if you can, and if you cannot understand it, say so. It is in the book. I will repeat the question. It is in the book. A. And I said it.

Q. Wait, you do not know what I am going to ask you. It is in the book that you said you knew Abie Reles very well. Being in the book, is it so? A. Yes, sir.

Q. Did you ever have anything to do with Abie Reles at any time? A. What do you mean, sir?

Q. You. A. What do you mean?

3085

Q. Did you ever hang out with Abie Reles? A. What do you mean, hang out?

By the Court:

Q. How long have you known him? A. I know him, I think, since '37, sir, the early part of '37, but I seen him around before that.

Q. How many years have you been seeing him? A. Since the time I used to come around to the corner to borrow money.

3086

Q. Was he one of the people that you used to see at the corners? A. Yes, sir, but I never spoke to him until 1937.

Q. In 1937 you became personally acquainted with him? A. Yes, sir.

Q. Before that you knew him by sight? A. Yes, sir.

By Mr. Rosenthal:

Q. Did you know him as "Kid Twist"? A. Yes, sir.

Q. Did you know him by any other names?

3087

Mr. Turkus: Objected to. It is incompetent, irrelevant, immaterial.

Mr. Rosenthal: It may become very competent.

The Court: Overruled.

Q. Did you know him by any other names besides Kid Twist? A. That's all I know of.

Q. Did you know him by the name of Glick or Gliss? A. No, sir.

3088 *Sol Bernstein—For People—Cross*

Q. You knew him before he went to jail in '34, didn't you? A. No, sir.

Q. Had you ever seen Abie Reles before 1934?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: That has not been asked by me.

Mr. Turkus: He has answered the Court that he saw him around before that.

3089 Mr. Rosenthal: I cannot hear his answers when he turns his face to the Court. I am sorry, and I do not want to have it continuously repeated. He drops his voice every time he speaks to your Honor.

The Court: Objection sustained.

Mr. Rosenthal: I respectfully except. May I have read, then, whatever he said to your Honor? I did not hear it, I confess.

The Court: He not only said it audibly, but the Court repeated it audibly. The Court's questions were audible; his answers were audible.

3090

Mr. Talley: Judge, we could not hear down here either the questions or answers.

Mr. Rosenthal: I could not hear them.

The Court: As I recollect, he knew him by sight, contact, up to about '37, did you say, or '38?

The Witness: '37.

The Court: Beginning with 1937 he did business with him, knew him.

Mr. Rosenthal: I did not hear anything about that, Judge.

The Court: He may not have said "did business," but he knew him personally.

Q. Did you know him before 1932? A. No, sir.
Q. Did you know him in 1932?

Mr. Turkus: Objected to as repetitious.

The Court: Did you know him by sight in 1932? 3092

The Witness: No, sir.

Q. Did you know him by sight in 1933? A. I don't think so.

Q. Did you ever see him at this Coffee Pot that you spoke about? A. Yes, sir, lots of times, sir.

Q. You did not mention his name when you were asked, as one of the men that you saw at the Coffee Pot— Withdrawn.

Q. When you were asked by Mr. Turkus as to the names of people that you had seen at the Coffee Pot, you did not mention Abie Reles as 3093
one of them, did you? Yes or no. A. No.

Q. You had seen Abie Reles often at the Coffee Pot before the time that he went to jail, hadn't you? Yes or no.

Mr. Turkus: Objected to as repetitious. He just answered it.

Mr. Rosenthal: He just admits that he saw him there, but he did not say how often. I am pursuing the question further.

Mr. Turkus: It is objected to as repe-

3094 *Sol Bernstein—For People—Cross*

titious, no time limit fixed, incompetent, irrelevant, immaterial and nothing to do with the Rosen case.

The Court: I will sustain it as to form.

Q. Did you see Abie Reles many times at the Coffee Pot prior to 1936; yes or no? A. What do you mean, "prior to 1936?" I seen him about '33, I think. I think it was '33, not '34.

Q. Didn't you tell me before, when I asked
3095 you whether you knew what the word "prior" meant, that "prior" meant "before?" A. You are mixing me up with the years. I think it was 1933.

Q. Before I asked you whether you had seen him in '33, and you said no, didn't you?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Was it '33 that you saw Abie Reles in the Coffee Pot? A. Yes, sir.

3096

Mr. Turkus: Your Honor, there are little side remarks going on between counsel for Buchalter and counsel for Capone.

Mr. Wegman: That is not so. Not a single remark has been made. I laughed at Mr. Turkus because he objected to something as repetitious where the witness contradicted himself. I could not restrain my laughter. I apologize for it.

Mr. Turkus: At the Court's ruling which sustained the objection.

Mr. Rosenthal: And what happened

was Mr. Turkus usurped the Court's rights and wanted to admonish him and that is the only part I took in it, that he should not take the Court's duties upon himself. He has got enough to do to be an Assistant District Attorney. (To Mr. Turkkus) Yes, and you will find it so before you are finished with the case.

The Court: It is now ten minutes of four. If things like this happened in school among children, they would be kept 3098
in after school.

Mr. Rosenthal: Fortunately, we have grown up, Judge.

The Court: Please proceed with the trial.

Mr. Rosenthal: May I have the question read?

(Question and answer read by the reporter).

Q. How often did you see him in the Coffee Pot in 1933? 3099

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. How often did you go to the Coffee Pot in 1933?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

3100 *Sol Bernstein—For People—Cross*

This goes to the question of his alleged acquaintanceship with the defendant Capone, sir, and is absolutely material to the issue here.

The Court: How? Will you tell me how?

Mr. Rosenthal: Yes, sir. He says that he met this defendant at that particular place and has been permitted on direct examination to describe an alleged asso-
3101 ciation with him. That is direct examination by Mr. Turkus. I will accept the Court's ruling if I am precluded from showing anything that happened—

The Court: I am asking you the question.

Mr. Rosenthal: I have already answered the question, your Honor.

The Court: The Court cannot think when it is confused by all this bickering. I don't recall that Reles was mixed up in the People's case, I mean People'e ex-
3102 amination of this witness, with this crime. I am utterly at a loss to know what difference it makes how many times he met Reles in the Coffee Pot several years before the crime. You say it has a bearing on the introduction to Capone. I don't recall that. Sustained.

Mr. Rosenthal: I respectfully except.

Q. When Mr. Turkus asked you on direct examination regarding whom you had seen at the Coffee Pot in the year 1933, did you then

have in your mind the fact that Abe Reles was one of the men that hung out in that Coffee Pot?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Did you wilfully conceal from this jury, when you were questioned on direct examination by Mr. Turkus, the fact that Abe Reles had hung out in this Coffee Pot in the year 1933, when you 3104
were asked by Mr. Turkus as to who were the people that hung out in that Coffee Pot? Do you understand the question? A. Just forgot, sir.

Q. You just forgot? A. Yes, sir.

Q. That is your answer? A. Yes, sir.

Q. Did you ever steal a typewriter for Abie Reles? A. No, sir.

Q. What is the answer? A. No, sir.

The Court: You stole one for Strauss?

The Witness: Stole for Louis Capone 3105
and Strauss.

Mr. Rosenthal: I ask that that be stricken.

The Court: Strike out the answer as irresponsive.

Mr. Rosenthal: And not only that, I now ask for a mistrial on the ground that the answer is prejudicial, has no foundation in fact whatsoever, is not in anywise allegedly connected with this or any other case. I ask that your Honor rule on the motion.

The Court: The Court's question about

3106 *Sol Bernstein—For People—Cross*

Strauss was to straighten you out on the typewriter incident because you had the names mixed. The irresponsive part of the witness' answer was stricken. It was not called for by the Court. The jury is instructed to disregard it and I think the jury is old enough and mature enough and intelligent enough to do that. The motion for mistrial is denied.

Mr. Rosenthal: Exception, sir.

3107 Q. Did you bring a stolen typewriter into the home of Abe Reles? Did you physically carry a stolen typewriter into the home of Abe Reles? A. No, sir.

Q. At no time? A. Brought a typewriter over, yes.

Q. Do you know what the word "carry" means? A. You said if I stole it, didn't you?

Q. Do you know what I said when you answered the question? A. I thought you meant if I stole it.

3108 Q. Do you know what I said when you answered the question?

Mr. Turkus: Objected to as answered. It is repetitious.

Mr. Rosenthal: I want to know if this man is making answers without knowing what I am talking about.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

The Court: It is only quarreling.

Q. Did you bring a stolen typewriter into the home of Abie Reles?

3109

Mr. Turkus: Objected to as already answered.

Q. Yes or no.

The Court: Knowing the same to be stolen?

The Witness: I bought it.

The Court: You bought it?

The Witness: Yes, sir.

The Court: Did you know it to be stolen?

3110

The Witness: No, sir.

Q. Where did you buy this typewriter? A. In a junk shop.

Q. What junk shop? A. On Osborne and Blake.

Q. Give me the name and address. A. I don't know the name of the address. I think it was on Osborne and Blake, a couple of junk shops over there.

Q. Which side of the street and which street is it on? A. There is a couple of them over there.

3111

Q. Which one is it that you say that you bought the typewriter in? A. There is lots of them over there.

Q What? A. Lot of junk shops.

Q. You just said there was a couple of them over there?

Mr. Turkus: Objected to as repetitious, argumentative.

The Court: Sustained.

3112 *Sol Bernstein—For People—Cross*

Q. Which is the one, if you can tell us, that you bought it from? Where is it located? What side of the street is it on? Between what streets is it?

Mr. Turkus: Objected to.

Q. And what does it look like?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial, has nothing to do with the Rosen killing. Objectionable further that no time is fixed.

3113 The Court: This has no direct relation to the issue. It is allowed by the Court with a considerable degree of latitude under the collateral impeachment rule. Under the collateral impeachment rule, you are bound by the witness' answer. You may not try a collateral issue.

Mr. Rosenthal: May I discuss this matter in the absence of the jury with this Court, in the interest of justice?

3114 The Court: The Court is familiar with the rule of law.

Mr. Rosenthal: I am now going further, sir, on a question of the interests of justice to discuss with the Court, in the absence of the jury, the question in respect to my pursuing this line of inquiry with this man.

The Court: If it has anything to do with any case other than this, it is a matter for chambers.

Mr. Rosenthal: That is what I asked

3115

your Honor. May I discuss it in chambers with your Honor?

The Court: Not directly after adjournment because I am tied up with appointments.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open and please remember and follow any and all admonitions heretofore given. Recess until tomorrow morning.

3116

Mr. Talley: If your Honor pleases, may it be understood that all of the exceptions taken by the examining counsel, Mr. Rosenthal, apply to the defendant Weiss?

The Court: That applies throughout the trial for all counsel. That is the understanding.

Mr. Talley: I want to make sure there is no misunderstanding.

The Court: It will not be forgotten. It is on the record.

3117

The court will be in order. First the witness is taken out.

(The witness leaves the court room.)

Now the jury.

(Thereupon an adjournment was taken until Wednesday, October 29, 1941, at ten a.m.)

3118 *Sol Bernstein—For People—Cross*

Brooklyn, N. Y., October 29, 1941.

TRIAL RESUMED

(Mr. Rosenthal confers with the Judge before the bench, without the hearing of the jury.)

Mr. Rosenthal: (within the hearing of the jury) Before proceeding further, if
3119 the Court please: Just before recess yesterday your Honor made a statement concerning a matter which I then referred to with a view of wanting the matter discussed in chambers. In view of the fact that you want to proceed with the trial, I now make a formal motion for a mistrial and the withdrawal of a juror, based upon the matter stated by this witness.

The Court: Motion denied.

Mr. Rosenthal: Exception.

The Court: There having been a discussion quietly between counsel and the
3120 Court at the bench, not within the hearing of the jury.

Mr. Rosenthal: That is correct.

The Court: The Judge understands the situation.

Mr. Rosenthal: Yes. That is the only reason why I do not discuss at length now, because of the fact we have had a discussion at the bench.

The Court: I understand.

SOL BERNSTEIN, a witness in behalf of The People, resumed the stand and testified further as follows:

Cross-examination by Mr. Rosenthal (Continued):

Q. Do you recall answering Judge Talley when he was questioning you in respect to a gun being found in the car, in the automobile which you admitted stealing, which was the subject-matter of your plea of guilty in 1933—do you remember Judge Talley questioning you about that? 3122
A. I saw lots of guns, sir.

Q. (The Court) The question is: Do you remember Judge Talley questioning you about that. A. I think he did, sir. I have seen lots of guns.

Q. I am not asking you whether or not you saw lots of guns; we will come to that afterwards. I am now asking you a specific question: Do you remember Judge Talley questioning you about the car that you were in at the time of your arrest, and that you admitted to the Court 3123
you had stolen in 1933 from a garage?

Mr. Turkus: Objected to as repetitious; the witness has responded.

The Court: He said so.

Q. I am trying to draw his attention to a specific car—do you know the car I mean? A. Yes, sir.

Q. Did you tell Judge Talley there was no gun in that car? A. I did not understand him, sir. I seen lots of guns.

3124 Q. I am referring to that particular car in 1933 that you attempted to steal. Did you tell Judge Talley you did not see any gun in that car? A. I did not understand him, sir. I seen lots of guns, sir.

Q. Did you see lots of guns in that car? A. There were a few guns there, yes, sir.

Q. The man who was with you at the time that you were in that car was a man named Moe Cohen, wasn't he? A. Yes, sir.

3125 Q. What was Moe Cohen's business, a burglar?

Mr. Turkus: Objected to as incompetent, immaterial, and irrelevant.

Mr. Rosenthal: This is showing association, sir, at the time of the arrest, prior to the time he says he had met any of these defendants.

The Court: The question is not whether he knows now that Moe Cohen was a burglar.

3126 Mr. Rosenthal: Yes.

The Court: But whether at the time of his association in 1933 he knew Moe Cohen's business?

Mr. Rosenthal: Yes, I will put it your Honor's way. I withdraw the question.

Q. When Moe Cohen was riding in the car with you at that time did you know that he had a roll of insulated wire in his pocket? A. I cannot tell you that.

Q. Did you know what his business was when he was riding in the car with you that you had stolen? A. Yes, sir.

Q. What was Moe Cohen's business? A. A stick-up fellow.

Q. Did you know he had a gun on his person at that time when he was riding in this stolen car with you? A. No, sir, it was in the car, sir.

Q. Where in the car was the gun? A. I think it was in the back seat or the front seat; I do not recall. I know there were guns there.

Q. You knew there were guns there? A. Yes, sir; I did not understand Talley before.

Q. Were you asked this question by Judge 3128
Talley on page 646, and did you give this answer:

"Q. And that is the only time out of seventy-five or a hundred times you stole cars that you were arrested? A. Yes, sir."

"Q. And on that occasion when you were arrested for stealing the cars, there was a gun found—"

I withdraw the question.

"Q. And on that occasion when you were arrested for stealing the cars, there was a gun found in the car, wasn't there? A. No, sir." 3129

Mr. Turkus: I object. He said that he did not understand the question.

Mr. Rosenthal: I have a right to see whether or not he made that answer and find out what he did not understand about it.

Mr. Turkus: You have not read the next question and answer.

Mr. Rosenthal: I will read all the questions you want.

3130 *Sol Bernstein—For People—Cross*

Q. "Q. You don't mean that, do you? A. No, sir—yes, sir."

Mr. Turkus: I object.
The Court: Objection overruled.

Q. Were you asked those questions by Judge Talley? A. I did not understand him; I seen lots of guns.

Q. Will you please let me finish the question? Were you asked those questions by Judge Talley
3131 and did you give those answers only yesterday in this court-room? A. Yes, sir. I did not understand him, sir.

Q. So that when you answered the question that there was no gun in that car in which you were riding when it was stolen, you did not understand the question that Judge Talley was asking; is that right?

Mr. Turkus: Objected to as repetitious. He just said that.
The Court: Sustained as repetitious.
3132 Mr. Rosenthal: Exception.

Q. Who else was in the car with you? A. Meyer Halperin.

Q. Did you know Meyer Halperin's business at that time? A. Yes, sir.

Q. What was Meyer Halperin's business? A. He was also a stick-up fellow.

Q. Were there just the three of you in that car, the two stick-up men and you? A. Yes, sir.

Q. Now I ask you again: Did you know or did you see a roll of insulated wire in that car

either just before you were arrested or at the time you were arrested?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant, and repetitious.

Mr. Rosenthal: This is not repetitious. I asked him whether he saw it in Cohen's pocket—

Mr. Turkus: I have an objection that it is incompetent, immaterial and irrelevant and repetitious. 3134

The Court: It is not material whether he saw it at the time of his arrest or whether he saw it before.

Mr. Rosenthal: That is what I want to know.

The Court: And he continued the association; what his knowledge of the guns was at the time of the arrest when the police found him—that is different.

Mr. Rosenthal: I understand what your Honor has in mind, and I will pursue it that way. 3135

Q. Before these men entered the car with you, did you know they were both stick-up men? A. Yes, sir.

Q. You knew there were guns in that car too? A. Yes, sir.

Q. You knew one of them had a roll of insulated wire with him, didn't you? A. No, sir.

Q. That you did not know? A. Yes, sir.

Q. Were there ropes in that car? A. Yes, sir.

Q. All of this you knew before your arrest? A. Yes, sir.

3136 Q. Did you know the ropes were going to be used to tie up somebody in a stick-up? A. Yes, sir.

Q. Did you know the guns were going to be used by one of these men, or by you or somebody else in your company, in a stick-up on that man in the event he resisted you? A. Yes, sir.

Q. So that in reality, when you were arrested for stealing the automobile, you were out on a stick-up with two stick-up men, weren't you? A.
3137 Yes, sir.

Mr. Turkus: I object to that as already answered.

The Court: Objection overruled.

Q. (The Court) What judge took the plea? A. I believe it was Martin, sir.

Q. Were you ever charged with robbery in that case, or attempted robbery? A. No, sir.

Q. Did you ever disclose to the Court or to the probation officer that you were with two stick-up men and were going to hold up some-
3138 body and kill him if necessary in order to get his money?

Mr. Turkus: I object.

Mr. Rosenthal: In view of the fact that the Judge brought out there was a plea taken in a degree by another judge in this court, I want to show that this man at that time concealed these facts from the court.

The Court: I don't think this is a matter of impeachment, because he had no obligation to make disclosures.

3139

Mr. Rosenthal: If he was asked by the probation man whether or not he was on a stick-up.

The Court: The Court has made inquiry and received an answer. We will let it rest there.

Mr. Rosenthal: Exception.

Q. Now, you continued to be a thief up until the time that you gave yourself up, did you not? A. No, sir, only when I got orders, sir.

3140

Mr. Rosenthal: I ask that "only when I got orders" be stricken out.

The Court: Strike it out.

Q. You continued to steal automobiles up to the time of your arrest or your giving yourself up in 1940, didn't you? A. Before I gave myself up.

Q. Up until 1940 you continued to steal automobiles, didn't you? A. Yes, sir.

Q. Did you continue to associate with these two stick-up men you had been out with in 1933? A. No, sir.

3141

Q. Is it not a fact that in California you and others held up the Victor Hugo Restaurant in Los Angeles? A. No, sir.

Q. Have you testified as a witness in any other case except the Gangy Cohen case, up to this case? A. The Yuran case, sir.

Q. By that you mean in the Grand Jury? A. Yes, sir.

Q. But the only two times you have been in court testifying before a jury similar to this is the time you testified now and the time you tes-

tified in the Gangy Cohen trial in the mountains, in June of 1940; is that right? A. Yes, sir.

Q. Now, in the Gangy Cohen trial, in Monticello, were you asked these questions regarding whether you were a thief, and did you give these answers— Let me start two questions before that.

I withdraw the question I asked. You were questioned by Mr. Price on cross-examination:

"Q. You are very anxious to let the jury hear
3143 everything you have to say?" and you answered: "Yes."

"Q. You want to make sure every word you say is heard? A. I am telling the truth."

Do you remember those questions and those answers? A. Yes, sir.

Q. "Q. Were you coached to answer? A. Telling the truth."

Do you remember that question and answer? A. If it is in the book I said it.

Q. Do you recall saying it? A. If it is in the book I said it.

3144 Q. Have you any independent recollection, whether it is in the book or not, that you told the jury in the Gangy Cohen trial that you were telling the truth?

Mr. Turkus: I object. It is a waste of time. The answer is responsive.

Mr. Rosenthal: The next question will show it.

Mr. Turkus: Read it. Now this is becoming a filibuster. I object.

Mr. Rosenthal: I object to the statement of Mr. Turkus. It is not an objection; it is a statement. Now, your Honor

asked that we conduct ourselves orderly. I ask you to ask the District Attorney to make objections without speeches, and counsel for the defense will be under no necessity to answer those speeches.

The Court: You are right.

Mr. Turkus: There is an objection pending.

The Court: If the accuracy of the minutes is conceded, it will avoid this.

Mr. Turkus: I have no objection to 3146
concede it.

Mr. Rosenthal: May it appear then on the record that the questions I am reading—and I trust Mr. Joseph will follow and see that I am reading correctly—the questions which I am reading and the answers which I am reading are taken from this witness's testimony under oath in the trial in the County Court, Sullivan County, of the People of the State of New York against Irving Cohen, in June of 1940.

3147

Mr. Turkus: And one thing further: That the direct testimony was three pages and the cross-examination began at page 4 and ended at page 78, showing that the direct examination was three pages and the cross-examination was twenty-five times that, or seventy-five pages.

Mr. Rosenthal: You see, Judge. Again he—

Mr. Turkus: That is a concession I will make as to the authenticity of the minutes.

Mr. Rosenthal: You see, again we have statements which form no part of the concession and only call for retaliation by counsel for the defendants. I want to desist from that, but I do not intend to let Mr. Turkus get away with continuous statements in the presence of this jury, without answering.

I ask your Honor to tell Mr. Turkus to make proper objections and orderly objections, and not to make statements.

Mr. Turkus: That was not an objection; that was a concession.

The Court: What was stated after the concession has no bearing upon the case and should not have been said.

Mr. Talley: With respect to the concession made by the District Attorney as to the accuracy of these minutes in the trial in the Sullivan County Court, may we have that concession as to the entire minutes that are here, rather than simply as to the questions that are being asked now of the witness by Mr. Rosenthal, and the answers made? Can we have a concession on the record that the record we have here is an accurate stenographic record of the trial?

The Court: That needs no answer.

Mr. Talley: So as to preclude the necessity of bringing down the court stenographer?

The Court: You mean so as to foreclose either side from disputing the stenographic accuracy on any specific point,

because such inaccuracies may occur, and either attorney at the proper place will have a right to challenge the accuracy.

Mr. Turkus: You need only one concession. There are two counsel for the defendants.

The Court: Suppose we forget all this and proceed in an orderly manner.

Mr. Talley: Will your Honor pass upon this?

The Court: I cannot, because that 3152
would be to shut the windows to the truth; if an error has been made by the stenographer, either side may challenge it.

Mr. Talley: We have the stenographic record.

The Court: Please do not argue it now. We will proceed in an orderly manner.

Mr. Talley: I except to your Honor's refusal to allow me to make a statement to this Court.

Mr. Rosenthal: May we have stricken 3153
from the concession—

The Court: Please proceed with the examination. Please proceed as if no concession had been made.

Mr. Rosenthal: All right.

Q. Now then, do you recall now at this time whether or not you were not directly asked the question in the mountains, in the Gangy Cohen trial:

"Q. You want to make sure every word you say is heard? A. I am telling the truth.

3154 "Q. You were coached to answer? A. Telling the truth."

Have you any recollection of whether or not you did not make, in form or substance, that statement in the presence of the Court and the jury in the Gangy Cohen trial? A. About Gangy, yes, sir.

Mr. Rosenthal: I move to strike out the answer as not responsive.

3155 By the Court:

Q. Do you remember those questions and answers—yes or no? A. If it is in the book.

Q. No, the evidence. Do you remember that? A. Yes, sir.

Mr. Rosenthal: May I have his first answer stricken from the record?

The Court: Let it stand.

Mr. Rosenthal: Exception.

3156 Q. In the very next question after that:

"Q. You are a thief, aren't you? A. No, sir.

"Q. When you committed petit larceny"—Question withdrawn. I jumped a question, I want to put it in. Let me start over again.

"Q. You are a thief, aren't you? A. No.

"Q. You are not? A. No, sir.

"Q. When you committed petit larceny? A. Yes.

"Q. Is a man who steals a thief or angel? A. That was years ago."

A. I told you—

Q. Now wait a minute.

"Q. You were a thief years ago?"

3157

"The Court: Let us modulate our voices; there is no use of this loud talking. Talk in a reasonable tone.

Q. "Q. You don't mean to answer you were not a thief? A. Years ago.

"Q. You did not mean to answer you were not a thief? A. Yes.

"Q. You know you are a reformed thief, is that what you mean? A. What do you mean by 'reformed thief'?

3158

"Q. You don't know what I mean? A. I am a loan shark now."

Do you remember being asked that? A. Yes, sir. I told the lawyer I had two convictions.

Q. You told the lawyer you were a reformed thief? A. I meant—

Q. Listen to me, sir. You told the lawyer you had been a reformed thief for years, didn't you, that you were only in the loan shark business—

Mr. Turkus: I object. That is not the testimony. It speaks for itself.

3159

The Court: Objection sustained.

Q. Were you asked those questions and did you give those answers?

Mr. Turkus: Objected to as repetitious.

Q. (The Court) Do you remember it? A. Yes, sir.

Q. Now, when was the last, approximately the last, of the seventy-five or one hundred cars you stole—the year and approximately the month, if

3160 you can remember, when you stole the last car. Do you remember that? Can you answer that correctly? A. The last car?

Q. Yes. When, approximately, was the year —I will ask you that first—1939 or 1940? A. 1940.

Q. How long before you surrendered yourself in 1940 was it that you had stolen the last car, a week or two weeks? A. I don't think it was in 1940.

3161 Q. You are the only one who can tell me. I just asked you. You said 1940. Was it 1939? A. I think it was 1939.

Q. Might it have been 1940? A. Might have been 1940, too, I cannot remember, sir.

Q. Can you remember it this way: How long after Judge O'Dwyer came into office and started a war, as Mr. Turkus called it, on the mob, was it that you stole your last car?

Mr. Turkus: I object, it is what the witness called it "war on the mob."

3162 Mr. Rosenthal: I will withdraw it.

Q. How long after Judge O'Dwyer came in office did you steal your last car? A. I think it was in 1939, sir.

Q. But you are not sure? A. No, sir.

Q. Will you give me your best estimate— Let me withdraw that and I will put it this way: It was only a very short period before you surrendered yourself? A. I think it was 1939, sir.

Q. Will you listen to my question? A. I did not keep a diary.

Q. Are you finished? A. Yes, sir.

Q. Now listen to the next question. It was

3163

not very long before your surrender that you stole your last car, was it?

Mr. Turkus: I object. It is repetitious. He has already answered. There have been a half dozen questions as between 1940 and 1939.

Mr. Rosenthal: I haven't got a direct answer.

Mr. Turkus: It is repetitious. It is an endless cross-examination.

3164

The Court: Please do not argue. The objection is sustained as repetitious.

Mr. Rosenthal: Exception.

Q. You volunteered to me just a little while ago that you had seen guns on many occasions. Didn't you say that when I asked you?

Mr. Turkus: I object to the form of the question. It is repetitious.

Mr. Rosenthal: It is a preamble to the question on impeachment.

Mr. Turkus: I object to the form and as repetitious.

3165

The Court: We know he said it. Objection sustained.

Q. Now then, in the mountains, in the Gangy Cohen trial, when you told the jury that you were telling the truth, were you asked this question and did you give this answer—

Mr. Turkus: I am going to object to the form of the question, to the form of

the preamble, so we might as well save time.

Mr. Rosenthal: I will do anything you want within reason. I will withdraw the question and leave the preamble out if it hurts you.

Mr. Turkus: I ask that "if it hurts you" be stricken out.

Mr. Rosenthal: Let us get along.

Mr. Turkus: I will if you act properly.

3167 Mr. Rosenthal: You conduct yourself properly and you will have no trouble with me.

Mr. Turkus: You do so, and we will get along all right.

Mr. Rosenthal: I don't know which one of us will be accused of being a woman for wanting the last word.

Q. In the Gangy Cohen trial in the mountains, in Monticello, in 1940, were you asked these questions and did you give these answers:

3168 "Q. Are you a one-man finance company, with muscles and gun?

"Mr. Dickerman: I object to that on the ground already stated.

"Q. You know what muscles are? A. Yes, sir.

"Q. You know what guns are? A. Yes.

"Q. You have seen a gun many times? A. No, sir.

"Q. You have never in your life seen a gun? A. Yes.

"Q. Why did you say at first, 'No, sir?' A. I just reminded myself.

"Q. How many times did you see a gun? A. Once.

"Q. What year was it? A. I don't know what year it was. I seen it."

Were you asked those questions in the mountains and did you give those answers? A. I can explain about that.

Mr. Rosenthal: I move the answer be stricken out as not responsive.

3170

Q. (The Court) Yes or no? A. Yes, sir.

Q. That was not true, that you had only seen a gun once in your life when you told that to the jury in the Gangy Cohen trial? A. No, sir.

Q. The fact is, you had seen guns as early as 1933 when you went out with a couple of stick-up men?

Mr. Turkus: Objected to as repetitious?

The Court: Objection overruled.

A. Yes, sir.

Q. Had you seen them prior—I will use the word "before"— Let me withdraw it. 3171

Q. You had seen guns before 1933 when you were caught in company of these stick-up men, hadn't you? A. No, sir.

Q. How long had you known these two stick-up men?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: I have not asked him how long he had been associated with them. I am trying to find out previous association with these men.

The Court: Objection overruled.

3172 *Sol Bernstein—For People—Cross*

Q. How long had you known these two stick-up men? A. A few months, sir.

Q. Had you been with them on other occasions during the three months? A. No, sir.

Q. Did they tell you when you met them three months before that they were stick-up men? A. No, sir, I knew it.

Q. Did you go out in a car with knowledge that you were going to stick up somebody?

3173 Mr. Turkus: Objected to as repetition and as already answered.

The Court: He has already said it.

Mr. Rosenthal: I will withdraw it. I think you are right.

Q. Continuing, after the questions I just asked you: Were you asked these questions in the mountains—the very next question on page 8:

"Q. What year was it?"—so you will get the connected thought, we are now talking about the gun you had seen before once in your lifetime; is that clear to you?

3174 "Q. What year was it? A. I don't recall the year.

"Q. Do you want me to refresh your recollection? A. Maybe you can.

"Q. Who was with you when you saw that gun? A. Harry Strauss.

"Q. Where was that? A. That was in Brownsville." Do you remember being asked those questions and giving those answers? A. Yes, sir.

Q. Had you forgotten, when you were in the mountains in the Gangy Cohen trial, that you

saw guns when you went out on a stick-up in 1933, when you told the jury you had only seen a gun once in your life? Had you forgotten about that?

Mr. Turkus: I object.

Mr. Rosenthal: This is on his credibility.

The Court: Objection overruled.

Q. Do you understand the question? A. Repeat it again. 3176

Q. I will repeat it. When you were under oath in the Gangy Cohen trial in the mountains, in Monticello, and you were asked about guns, and when you had ever seen them, while you were on the stand had you forgotten all about the fact that in 1933, while out with a couple of stick-up men, you saw guns? Had you forgotten about that when you testified? A. No, sir.

Q. You had it in your mind? A. What do you mean, I had it in my mind? 3177

Mr. Turkus: I object. If he hadn't forgotten it, it must have been in his mind.

Mr. Rosenthal: He said he didn't know what I meant. I will make it plain. I want to make sure that this man understands everything I say, if I have to repeat it twenty times. I don't want him to say, as he now says, to Judge Talley's question, that he did not understand it.

Mr. Turkus: I object to the speech.

Mr. Rosenthal: That is not a speech,

3178 *Sol Bernstein—For People—Cross*

but just a statement addressed to the Court.

Mr. Turkus: Mr. Rosenthal addresses your Honor and he terms it an objection, although it is a speech. If I try to make an objection it becomes a speech. I have an objection. He said he had not forgotten.

Q. Did you deliberately conceal from the jury
3179 in the Gangy Cohen case the fact that you had been out with two stick-up men with guns in 1933?

Mr. Turkus: I object

The Court: Sustained. He was not asked that.

Q. Did you deliberately conceal from the jury in the Gangy Cohen case the fact that you had seen guns while you were out with a couple of stick-up men in 1933?

3180 Mr. Turkus: I object.

The Court: I think this is a matter of argument for the jury. You have his admission.

Mr. Rosenthal: I will accept your Honor's ruling. I think it is a perfectly proper question, but if your Honor—

The Court: I think it goes into the realm of argument. He has admitted he did not tell the truth. He had seen lots of guns, had been out on stick-ups, or in stick-up cars.

Mr. Rosenthal: I will not press it fur-

ther. I have other matters of equal importance.

Q. You were shown a gun by Harry Strauss in 1937, weren't you? A. I don't know what year it was—yes.

Q. You were asked by Harry Strauss to go out and kill the very man that you testified about—to go to California to kill the very man you were testifying against, weren't you? A. Yes, sir.

3182

Q. (The Court) What man is that? A. Gangy Cohen.

Q. In 1937— Question withdrawn.

Q. Didn't you tell the jury in the mountains that the only time you saw a gun was at the time with Harry Strauss—the year you think was 1937 although you cannot recall it—that Harry Strauss showed it to you and asked you to go to California and kill Gangy Cohen—didn't you tell that to the jury in the mountains? A. No, sir.

Q. Is it your testimony— Were you asked these questions and did you give these answers in the Cohen trial in Monticello, starting at page 13:

3183

"Q. That was the time that Harry Strauss told you to go there to kill Cohen? A. That is right.

"Q. Did he give you a gun? A. No, sir.

"Q. What"—I will read it just as it is here. It is a typographical error— "Q. What is that time?"

Mr. Turkus: The word should be "was."

Mr. Rosenthal: That does not appear in the question.

Mr. Turkus: Read it so as it makes sense.

Q. "Q. Was that the time, in 1937, that you saw a gun? A. What do you say?"

Question repeated. "Do you want to think about it? A. I don't know when it was.

"Q. Didn't you say before you thought it
3185 was in 1937? A. I don't know.

"Q. Could it have been in 1937? A. Maybe.

"Q. Didn't Strauss give you a gun when you went to California in 1937? A. I seen a gun. He did not give me a gun.

"Q. Who had the gun when you saw it? A. Harry Strauss." Do you remember being asked those questions and giving those answers?

Mr. Turkus: I object. It had nothing to do with the Rosen case. There is nothing inconsistent between that testimony and what he said here in response to Mr.
3186 Rosenthal's question.

Mr. Rosenthal: He just answered the question before I read this testimony that he—

The Court: (interrupting) Do not argue. There is no harm to it. Objection overruled.

Q. Did you give these answers to these questions in the mountains? A. Yes, sir.

Q. Didn't you just tell me before I asked you these questions that you did not say to the jury in the mountains that the time you had seen the

gun, which you said was once in your life, was the time it was shown to you by Harry Strauss before he sent you out to kill Gangy Cohen? Didn't you say that to me a minute ago.

Mr. Turkus: Objected to as repetitious.
The Court: Sustained on that ground.
Mr. Rosenthal: Exception.

Q. Whenever it was, whether it was 1937 or whatever year, that Harry Strauss asked you 3188
to go out and kill Gangy Cohen in California, did you leave New York and go to California? A. Yes, sir.

Q. Did you see Cohen in California? A. Yes, sir.

By the Court:

Q. Is that the time that Herschel Bernstein was out there? A. I really cannot tell you the year.

Q. You told us it in this way: That Herschel 3189
got in trouble out there and that he was convicted and sent up? A. Yes, sir.

Q. Is that the place, whether or not it was on that occasion, that you met Herschel Bernstein in California? A. I really cannot tell you; I think it was in 1937 or 1938.

Q. It was 1937, wasn't it? A. I think so, your Honor.

Q. Now, supposing I ask you this—I don't know whether or not this has any bearing on this case, but we will find out—When you put up the money to defend Herschel Bernstein at the time of his arrest in California and his con-

3190 viction in California, did you have any particular reason for putting up the money? A. He got himself in trouble.

Q. You mean it was just a matter of friendship? A. Yes, sir.

Q. It was not that you were out there on a matter of mutual interest? A. No, sir.

Q. You were not both out there to kill Gangy Cohen? A. No, sir.

3191 By Mr. Rosenthal:

Q. Didn't you go out to California with Bernstein?

Mr. Turkus: Objected to as repetitious.

The Court: There are two Bernsteins. One was in 1940 and the other was in 1937. These are two different persons. In the examination by Judge Talley there is considerable space in the record given over to contact with Herschel Bernstein. In your examination yesterday you re-

3192 ferred to another Bernstein.

Mr. Rosenthal: Yes, a Joe Bernstein he referred to.

The Court: That is a different man, isn't it?

Mr. Rosenthal: Yes, sir.

The Court: I know that Herschel was also known as "Meyer"—that was the name on his conviction in California. That is why I made inquiry as to whether or not the one you were questioning about was the same one that Judge Talley was questioning about.

3193

Mr. Rosenthal: He volunteered the name "Joe." I don't know the difference between either.

The Witness: We did go out together.

Q. You both went out together? A. Yes, sir.

Q. Do you remember going out to kill anybody? A. No, sir. Joseph Bernstein went alone, about a year after that.

Q. I am talking about 1937, about Herschel. A. No, sir.

3194

Q. You did not go out with him? A. No, sir.

Q. Did you just meet him there? A. No, sir, one year I went down with him; I do not know what year it was.

Q. That was in 1937, the conviction? A. That must be that year then.

By Mr. Rosenthal:

Q. Just try to think. Didn't you leave Brooklyn with Herschel Bernstein after you had a conversation with Harry Strauss in which he asked you to go to California to kill Gangy Cohen?

3195

Mr. Turkus: Objected to as repetitious.

The Court: I have just sent for the record, and it will be here in a moment.

Mr. Rosenthal: I am pursuing the line your Honor was; I am trying to refresh this man's memory.

The Court: Objection overruled.

Q. What is your answer? A. What is that?

3196 *Sol Bernstein—For People—Cross*

By the Court:

Q. Have you any memory that you went out with Herschel Bernstein, the both of you, to kill Gangy Cohen? A. Oh, no, sir.

Q. Cohen was in the movies? A. I got him the job.

Q. He was quite a shot in the movies? A. No, sir, he was working as an extra. I got him the job.

3197

By Mr. Rosenthal:

Q. You got Cohen a job in California? A. Yes, sir.

Q. You had connections in California that enabled you to get Cohen a job in the movies?

The Court: Pardon me, Mr. Rosenthal; I will show you this record. I was in error as to the year. It is 1936.

Mr. Rosenthal: May I see the record, Judge?

3198

The Court: Yes.

Mr. Turkus: May we have an answer to the question Mr. Rosenthal just put to the witness about his connection in the moving pictures and who the connection was with?

Mr. Rosenthal: There goes a speech again, Judge, while you are not looking.

The Court: If you come up here, Mr. Rosenthal, I will show you the record, the fingerprints. I cannot show you the report.

(Mr. Rosenthal confers with the Judge without the hearing of the jury.)

3199

By Mr. Rosenthal:

Q. I have asked you a question and I will repeat it. You answer this yes or no: You had connections in the movie world, you say, which enabled you to get Cohen a job in the movies?

Mr. Turkus: I object to him reframing the question. I want an answer to the question Mr. Rosenthal first asked.

Mr. Rosenthal: I will withdraw it.

3200

Mr. Turkus: Let the stenographer read it word for word.

Mr. Rosenthal: I will withdraw it as long as you are telling me what to do. I with withdraw it entirely. I am withdrawing the question, so the objection fails.

Q. Did you know in 1937 that Herschel Bernstein was a burglar and a crook? A. What do you mean?

Q. You don't knew what a burglar and a crook is? A. (Witness remains mute.)

3201

Q. Do you know what a burglar or a crook is? A. I heard of it.

Q. Why, you associated with him, didn't you? You rode in the same car with him in California, didn't you? A. Yes, sir.

Q. When was the first time you rode to California with Herschel Bernstein?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: You were unable to get an answer from him, Judge. I will try to get one.

3202

The Court: The question was only as to the year. I just showed you the record.

Mr. Rosenthal: I want to find out a number of things about Herschel Bernstein.

The Court: I think that is satisfactory as placing the time.

Mr. Rosenthal: Yes.

By the Court:

3203

Q. How long did you know Herschel? A. From the time I met him in Raymond Street.

Q. Many years ago? A. Yes, sir.

Q. You know he was a notorious Brownsville burglar? A. Yes, sir.

Q. You knew that right along? A. Yes, sir, but I never seen him or heard of him.

Q. That he was what you call an "ace"? A. A thief.

Q. I mean as a burglar also. A. An "ace", yes, sir.

3204 By Mr. Rosenthal:

Q. Did you follow carnivals all over the country with him? A. No.

Q. Do you remember following carnivals? A. Yes, sir.

Q. When did you first start to follow carnivals? A. I cannot tell you that.

Q. So long ago you cannot remember? A. Yes, sir.

Q. Away back in 1932 or '3 wasn't it, when you were only 18 or 19 years of age, you started to follow carnivals all over the country, didn't

3205

you? A. What do you mean, all over the country; the furthest I went was Philadelphia or Maryland at the furthest.

Q. You had no job with the carnival, did you? A. I was a "schil."

Q. You mean you were one that was employed by the carnival itself to bring on people to play certain games; is that what you mean? A. Yes, sir.

Q. Is it not a fact that while the farmers were attending the carnival you would attend their homes and burglarize them? Wasn't that the way you would follow carnivals ever since you were eighteen years of age? A. No, sir. 3206

Q. Did you ever enter farmers' homes to burglarize them while they were attending the carnivals? A. No, sir.

Q. At any time? A. No, sir.

Q. Did Herschel Bernstein go traveling with carnivals with you? A. No, sir.

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant. 3207

The Court: Objection overruled.

Q. How long did you continue to follow carnivals, up until when? A. The season, sir.

Q. Every year up to 1940? A. No, sir.

Q. What year did you stop following carnivals? A. I cannot tell you.

Q. Can you give us any idea? A. I cannot tell you the year. I might have gone whenever there was a fair, like over in Newark.

Q. I want you tell me as near as you recall when you stopped following carnivals.

3208

Mr. Turkus: Objected to as argumentative between the witness and the lawyer. The preamble is improper and objectionable.

Mr. Rosenthal: I will put it in a different form.

Q. You understand, I am not asking you what you might have done, Bernstein—do you understand that? A. Yes, sir.

3209 Q. I am asking you to give this jury your best recollection of when you stopped following carnivals.

Mr. Turkus: Objected to as repetitious.
The Court: Objection overruled.

By the Court:

Q. When did you stop? How many years ago? A. I think it is 1935.

By Mr. Rosenthal:

3210

Q. It may have been 1939? A. No, sir.
Q. 1938? A. No, sir, I don't think so.
Q. Which is it, "No, sir," or you don't think so?

Mr. Turkus: Objected to as repetitious.
The Court: Overruled.

Q. Which is it, Bernstein? A. I don't recall, sir.

Q. Now do you recall the year you took your trip in an automobile with Herschel Bernstein,

whether or not you stopped off at different principal cities on your way to California?

Mr. Turkus: Objected to as incompetent and immaterial and irrelevant, nothing to do with this matter.

Mr. Rosenthal: I will show you association with criminals of every type that this man had from the time—

Mr. Turkus: I can show you some associations myself that he had that are 3212
foreign to this issue.

Mr. Rosenthal: Not the angel you depict him.

Mr. Turkus: I don't depict him as an angel; I have him associated with your clients.

Mr. Rosenthal: If you are going to make remarks, you will get answers, Mr. Turkus.

Mr. Turkus: I am satisfied.

Mr. Rosenthal: (to the Court) Again I ask you to ask this man not to make 3213
remarks. I do not want to be drawn into an argument with him, but I am not going to sit idly by and let him get away with anything in this court-room. If your Honor will tell him to make proper objections and not make side remarks—I don't want to make them, but I will make them every time he does.

Mr. Turkus: I have an objection.

The Court: Objection overruled.

Q. Did you understand the question? A. Will you repeat it again?

3214 Q. Did you stop on your ride with Herschel Bernstein throughout the country in different cities of the United States, on your way to California? A. I had to.

Q. Did you go by automobile? A. Yes, sir.

Q. Did he, with your knowledge, commit thefts in each of the states or cities or counties you stopped in?

Mr. Turkus: Objected to as incompe-
3215 tent, immaterial and irrelevant.

The Court: Objection overruled.

A. No, sir.

Q. The only burglary or theft he committed to your knowledge was the one he committed in California, is that right?

Mr. Turkus: Objected to as repetitious.

The Court: You mean on that trip?

Mr. Rosenthal: Yes.

The Court: Objection overruled.

3216 Q. Is that right? A. Yes, sir.

Q. You were with him when he committed that burglary, weren't you?

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled.

Q. (The Court) Were you in on that job? A. No, sir.

Q. Were you in that town at the time he committed the job?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: He has already stated that.

Q. Weren't you living with him at the time he committed that job?

Mr. Turkus: Objected to.

The Court: Objection overruled.

Q. (The Court) Rooming with him? A. No, sir. 3218

Q. Were you in the same hotel together, rooming? A. No, sir.

Q. Now, when you went to California—before you left for California with him you knew he was a notorious crook, didn't you?

Mr. Turkus: Objected to as repetitious. He told the Court he was an ace thief.

The Court: He knew it for years; he could not have lived in Brownsville without knowing him.

3219

Q. The different times you went to California you paid your own expenses, didn't you?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Sustained as immaterial.

Mr. Rosenthal: Exception.

I want to show that this man had no means of livelihood; that these supposed-to-be vacations he took throughout the United States in all those different years at that time, paying his own expenses,

3220

without any income, the jury has a right to infer whether he is telling them the truth or not. He said he was shylocking, gambling, etc., and who he associated with.

Mr. Turkus: That has nothing to do with the Rosen murder, you forget.

The Court: You can inquire whether or not he had any funds when he went there, and if not how he paid his expenses.

3221

By Mr. Rosenthal:

Q. When you left New York what funds did you have with you, any? A. Yes, sir.

Q. How much money did you have with you when you left New York to go to California?

Mr. Turkus: Objected to unless the time is fixed.

Q. When you went with Herschel Bernstein, we will take that one, that was in 1936. A. I

3222

won some money.

Q. I did not ask you whether you won. I asked you how much money you had. A. I know I won a lot of money; I don't know how much.

The Court: Hundreds, thousands, or what?

The Witness: It must have been about a thousand dollars.

Q. Who did you win it from? A. Shooting crap. I won lots of it shooting crap, lots.

Q. So that each time you took a trip to Cali-

fornia you took it on money you won shooting crap; is that so?

Mr. Turkus: I object. That is not the testimony. He did not say that.

Mr. Rosenthal: I am asking him, so as to shorten it.

The Witness: No, sir, I had a reason for it.

Q. You went, you said, to California, five or 3224
six times? A. Yes, sir, I had a reason for it.

Q. Didn't you go there on a vacation each time? A. To avoid murder, sir, that is the qualification; to avoid murders. That is what I call a vacation. Don't you think so?

Mr. Rosenthal: I move to strike that out.

The Court: Strike it out as unresponsive.

Q. Weren't you asked in the mountains, in the Cohen trial, these questions, and didn't you give 3225
these answers:

"Q. You went to California many times? A. Yes.

"Q. Pursuant to request of Harry Strauss? A. That is right.

"Q. Who paid your expenses? A. Nobody paid my expenses.

"Q. How many times, tell us exactly, did you go to California? A. Maybe ten times.

"Q. How many times did you go between 1937 and the time you were taken into custody? A. About five or six times.

3226 *Sol Bernstein—For People—Cross*

"Q. And on every one of these five or six times you went for a vacation? A. That is right.

"Q. And you paid your own expenses? A. That is right."

Were you asked those questions and did you make those answers? A. Don't you think it is a vaca: on—

Mr. Rosenthal: I move to strike out the answer in view of the fact your Honor
3227 has admonished this individual to answer questions and not to volunteer anything.

The Witness: Yes, sir.

Mr. Rosenthal: You wait. I am addressing the Court. Do not talk to me when I am addressing the Court. Do you understand that? I don't want you to talk to me unless I am addressing a question to you.

I ask your Honor to admonish this man to answer questions.

The Court: I am busy thinking what you have in mind. The court understood
3228 the previous answer of the witness as meaning he was away for reasons stated, that it did not mean he went there to do business, but he did go there on a vacation. Therefore, when he asked if that means a vacation, he meant you would accept it in the affirmative. This does not appear to contradict; but at least it clarifies the meaning. Let it stand.

Mr. Rosenthal: Will your Honor advise this man that he should answer questions and not volunteer anything?

Mr. Turkus: I object to it in view of your Honor's ruling that the answer was proper. He needs no admonition for making a proper answer.

The Court: Admonished.

Q. You had a candy store, didn't you? A. Yes, sir.

Q. Where was that candy store located? A. Amboy and Sutter, in the Brownsville section.

Q. Before going to that, you had a lot of 3230
friends in California, didn't you? A. Yes, sir.

Q. When you made your trip there, you made your trip to go to see your friends in California, didn't you, because you had a lot of friends there? A. Yes, sir.

Q. When you made those trips you made them out of moneys you had won at dice games, is that right? A. Yes, sir.

Q. Isn't it a fact you told the jury in the Cohen trial—

"Q. You just went there for a vacation? A. Yes, I met a lot of friends there.

"Q. And what money did you use to go there, 3231
was it loan shark money? A. Yes."

Were you asked those questions and did you give those answers? A. Yes, sir.

Q. Did you use loan shark money to go on your vacation or did you use dice money you won?

Mr. Turkus: I object.

The Court: Does that refer to this specific vacation?

Mr. Rosenthal: To the vacation: he had lots of friends there.

3232 *Sol Bernstein—For People—Cross*

The Court: He said more than one vacation. It does not appear which one this refers to. Objection sustained.

Q. This candy store, where was that located? A. Amboy and Sutter Avenue.

Q. Did you have a partner? A. I beg your pardon, sir.

Q. Did you have a partner? A. Yes, sir.

Q. What was his name? A. Glass, sir.

3233 Q. Is that Al Glass, otherwise known as Louis Glass, otherwise known as Cherry? A. Yes, sir.

Q. Is that the one? A. Yes, sir.

Q. When was it you had this candy store? A. In 1938 or 1939, sir.

Q. Are you sure of the year? A. I think so.

Mr. Turkus: Objected to an incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Q. Did Harry Strauss ever visit that store? A. No, sir.

3234 Q. That store was a blind, wasn't it? You know what a blind is? A. Yes, sir.

Q. Was that a blind for your loan shark business? A. Yes, sir.

Q. Did any of these stick-up men hang out in your candy store? A. No, sir.

Q. Any of these ace burglars hang out in your candy store? A. What do you mean by ace burglars?

Q. You told the Judge, didn't you, what an ace burglar was, I mean the same thing that the Judge means?

3235

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

Mr. Rosenthal: He said it was a blind. I want to find out.

Mr. Turkus: For the shylock business.

Mr. Rosenthal: It may have been a blind for a lot of other things.

By the Court:

Q. Well, did burglars hang out there? A. Yes, sir. 3236

Q. It was a big hangout? A. Yes, sir.

Q. When you and Strauss used to go to Miami, you say he stopped at the Nassau Hotel and you stopped at the Commodore? A. That year he was not there, but the year before.

Q. He was not there in February? A. No, sir. I know when he was there, but the year before. I can tell you who was there. Counsellor Rosenberg was there. I was there.

Q. I am not asking you that, but both of these hotels are in the same locality, aren't they, 15th Street and Collins Avenue? A. I 3237 can explain it. Here is the Nassau on this side, and across the street is the Commodore.

Q. Directly facing each other? A. Yes, sir.

Q. That is about 16th Street and Collins Avenue? A. Yes, sir, I think so.

Q. Isn't that on the ocean side of the street? A. No, sir, that is Collins Avenue.

Q. I mean towards the ocean? A. Yes, sir, Ocean Drive, Collins and Ocean Drive.

Q. Then the ocean? A. Yes, sir, the beach.

Q. There is a park right along the ocean drive and buildings only on one side? A. Yes, sir.

Q. That is seven blocks from 23rd Street and Collins Avenue? A. Yes, sir.

Q. Manny's Coffee House is there, isn't it? A. Mammy's.

Q. That was a hangout? A. Yes, and Dempsey's place also was a hangout.

Q. Little Augie Pisano used to hang out there? A. Yes, sir.

Q. In Mammy's? A. I don't know about Mammy's; he hung around the Continental on
3239 23rd Street and Lincoln Road, or something.

Q. Did they hang out at the Roney-Plaza pool? A. I don't know about that—the Roney-Plaza, yes.

Q. The finest pool in Miami Beach? A. Yes, sir.

Q. All swam there? A. Yes, sir.

By Mr. Rosenthal:

Q. I just want to go back. When you told the jury in the Gangi Cohen case that you had only seen a gun once in your life, did you have
3240 in mind, while you were in the chair, under oath, that you had seen three guns in 1936 in the Rosen murder? Did you have that in your mind? A. I don't understand you, sir.

Q. I will make it plain for you. Do you remember you were a witness in the Gangi Cohen trial in the mountains? A. Yes, sir.

Q. In Monticello? A. Yes, sir.

Q. Do you remember you were asked a question as to how many times in your life you had ever seen a gun—do you remember that? A. Yes, sir.

Q. You remember that you told the jury sitting in the box in the court at that time that you had only seen a gun once in your life, do you remember that? A. Yes, sir.

Q. Now, then, I am asking you this— While sitting there, under oath, testifying, did you have in your mind present at the time the knowledge or the thought that you had seen three guns in 1936 in the Rosen murder, when you gave the answer you had only seen one gun once in your life? 3242

Mr. Turkus: Objected to as already testified.

The Court: You have been all over that.

Mr. Turkus: I will recall it to your Honor. He said he testified—

Mr. Rosenthal: You don't have to recall it. Please don't May I call your Honor's attention to this, that the thing that I asked him before was did he have in mind—I do not want to argue this, I just want to recall it to your mind—the only thing I asked him then was did he have in mind guns used in the stick-up. I had not come to any question on this particular murder. That was where my question was directed. Now I am asking did he also have in mind when he answered that question the guns he saw at the Rosen murder. 3243

The Court: I have your recollection. Do not argue any further.

Mr. Rosenthal: Does your Honor sustain the objection?

3244 *Sol Bernstein—For People—Cross*

The Court: Yes, it is repetitious.

Mr. Rosenthal: Exception.

Q. Now, was Al Glass, or Cherry, or Louis Glass, they are all the same, aren't they?

Mr. Turkus: Objected to as repetitious.

Q. Did he have anything to do with you in any of these stolen cars which you stole?

3245 Mr. Turkus: Objected to as incompetent, immaterial and irrelevant, and as repetitious.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Mr. Rosenthal: May I ask, so that I do not pursue it further, is it sustained on the repetitious ground? Because I have not asked anything on that independently.

The Court: Sustained because it is irrelevant and because it impresses the
3246 court as fishing. The court referred to that yesterday. You said you did not know what the court meant.

Mr. Rosenthal: I still don't see.

The Court: The court cannot permit collateral advantage to be taken in cross-examination.

Mr. Rosenthal: Any question I ask, I have a reason which will develop as the trial goes on and which becomes fruitless if I ask this man ahead of time, because it is evidenced by his answers that he will

change it as soon as he sees what I am after.

Mr. Turkus: That is reprehensible.

The Court: The court has ruled.

Mr. Rosenthal: Exception.

Q. Did you have any other partner besides Al Glass? A. Max Lachinsky was working for us.

Q. Was he a partner? A. He worked for us.

Q. Was he a partner? 3248

Mr. Turkus: Objected to.

Mr. Rosenthal: This is a foundation for impeachment on further testimony.

The Court: That is always a question of law. Objection sustained.

Q. Did Al Glass run away when you had a candy store, with your money?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: I don't know what it means. Objection overruled. 3249

Q. Did Al Glass ever run away with your money? A. No, sir.

Q. He was the only partner you had at that time, wasn't he?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3250 Q. Did you testify this way in the mountains, in the Cohen trial:

"Q. Does anybody owe you any money? A. Yes, sir.

"Q. Weren't you interested in finding out who owed you? A. I had a partner; he ran away.

"Q. What happened to him? A. I don't know.

"Q. Do you know where he is now? A. No, sir.

3251 "Q. Is he still alive? A. I don't know."

Were you asked those questions in the mountains and did you give those answers?

Mr. Turkus: I object to that as incompetent.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. When you were questioned in the mountains about your partner, did you mean Al Glass was your partner?

3252 Mr. Turkus: Objected to.

The Court: Sustained. Too far afield.

Mr. Rosenthal: This is all on the question of credibility, your Honor.

The Court: You can go on from now until Doomsday, but the Court must reasonably restrain. In this case a great deal of latitude is allowed as a matter of Court policy, but not without limit.

Q. Do you know Al Tannenbaum? A. Yes, sir.

 3253

Q. How long do you know him? A. Seven or eight years, sir.

Q. Did you ever go out with him any place?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Overruled. It may be preliminary to something.

A. Yes, sir.

Q. Did you ever steal automobiles with him? 3254
A. I beg pardon?

Q. Did you hear what I said? A. I did not understand you, sir.

Q. You don't understand what it means, what the question means when I ask you did you ever steal any automobiles with him?

Mr. Turkus: Objected to as argumentative.

Mr. Rosenthal: I asked him did he ever steal automobiles with Tannenbaum and he says he doesn't understand what I mean. 3255

The Court: We will take the evidence. He may have said he did not understand what you said.

Mr. Rosenthal: I wish I could stop Mr. Turkus. Before he said I yelled too loud. Now he says I drop my voice. I wish I could strike a happy medium.

Mr. Turkus: I wish you would. One minute you holler in my ear and the next minute I cannot hear you—one extreme to the other.

Mr. Rosenthal: Am I supposed to

stand here and let him talk like a woman and not make an answer? I suppose it is in all men's homes, though, with the husband, anyway.

Mr. Turkus: You ought to know; I am a bachelor.

Mr. Rosenthal: Maybe if you were a married man you would behave yourself.

Mr. Turkus: I feel sorry for you.

The Court: I don't know whether a
3257 record is made of all this, but I think it should be, in view of the fact that the Court is compelled to admonish from time to time. Otherwise the record will look queer unless it is explained. Now, what is the question.

(Last question repeated by the reporter.)

Q. (The Court) Did you and Tannenbaum steal automobiles together? A. No, sir.

3258 By Mr. Rosenthal:

Q. Did you ever go out with Tannenbaum on any criminal job, together? A. What do you mean, "criminal job"? Explain. I don't understand. That is a question I don't know how to answer. I really don't know how to answer.

Q. I will put it plainer to you: Were you ever in the company of Tannenbaum at any time that either he or you were committing any type of crime whatever, whether it is from disorderly conduct up to murder in the first degree? Is that clear to you?

3259

Mr. Turkus: I object to the form of the question.

Mr. Rosenthal: He said he did not understand. Now I am making it plain to him.

By the Court:

Q. Did you ever commit crimes together with Tannenbaum—yes or no? A. I don't know how to say, your Honor.

3260

Q. Did you go on any jobs with him? A. Yes, sir.

By Mr. Rosenthal:

Q. Yes or no?

The Court: He says "Yes."

Q. You and Tannenbaum were in the same automobile or truck, or whatever it was that you testified to was the conveyance that carried away Yuran's body in nineteen hundred and whatever year it was? A. Yes, sir.

3261

Mr. Rosenthal: What is the year of Yuran's murder? Have you got it?

Mr. Turkus: I have a list of all of them.

Mr. Rosenthal: There he goes again.

The Court: What is the point?

Mr. Rosenthal: I simply asked him as a gentleman for the year of Yuran's murder, and he then makes a highly improper

3262 statement which has no connection with this case.

He can step up before your Honor and see whether he is admonished.

Mr. Turkus: I will accept the invitation.

Mr. Rosenthal: Then, all right, let us go up with the court's permission.

The Court: Now, wait a minute. Please listen to the court at this time. The trial
3263 of a case is very difficult for a Judge because the Judge is human, and this situation tends to wear down anybody. The court has to maintain patience and poise at every moment of this trial. Therefore, it will certainly be indebted to both sides if the trial, from now on, will be conducted with some semblance of order.

Mr. Rosenthal: I will withdraw the request.

By Mr. Rosenthal:

3264 Q. When was the Yuran murder, I am asking you? A. 1937 or 1938.

Q. You are not sure of the year? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. You were up in the mountains when the Yuran murder was committed? A. Yes, sir.

Q. Where were you stopping in the mountains? A. The Oliver Hill Hotel.

Q. Where was that located? A. Woodbourne.

Q. How far is Woodbourne from Fallsburg? A. About eight miles.

Q. And did you have your automobile with you at the time? A. Yes, sir.

3265

Q. Were you accompanied by anybody in the mountains at the Oliver Hotel, is that it? A. The Oliver Hill Hotel.

Q. Were you stopping with anybody at the Oliver Hill Hotel? A. No, sir.

Q. Was anybody stopping at that hotel with you from Brooklyn? A. The owner of the hotel.

Q. What is the owner's name? A. Max Resnikoff.

Q. Who did you see at the time you got in the truck to dispose of the Yuran body, who 3266
were the people that were there? A. You mean all in the truck?

Q. Yes, I want to know the names of all the men in the truck. A. Al Tannenbaum, Jack Drucker, myself and Harry Strauss.

Q. The Al Tannenbaum you refer to is the one that we just spoke about? A. Yes, sir.

Q. Before you got into the truck did you know that Al Tannenbaum was staying any place in the vicinity? A. Yes, sir.

Q. How long before the actual murder did you know that Al Tannenbaum was in that vicinity? 3267
A. What do you mean, I cannot understand you?

Q. You cannot understand that? A. No, sir.

Q. You know the day Yuran was murdered? A. What do you mean, do I know the day?

By the Court:

Q. You were there when the body was still warm? A. Yes, sir, but I was not there when they murdered him.

3268

By Mr. Rosenthal:

Q. You know the day he was murdered, don't you?

By the Court:

Q. Was that truck the same one connected with the Druckman murder, in Brooklyn? A. I could not tell you that.

3269

The Court: According to reports—I understood the name Drucker was mixed up in that.

Mr. Rosenthal: I don't know.

By Mr. Rosenthal:

Q. How long before you saw this dead body did you know that Tannenbaum was up in the mountains, days, hours or weeks? A. I don't understand you, sir, I really don't understand you.

3270 Q. I will make it very plain so you do understand it.

Mr. Turkus: I object to the preamble, and I ask that it be stricken from the record.

Mr. Rosenthal: I am only replying to him. I will consent, to save the time of your Honor in ruling.

Q. You met Al Tannenbaum when you were carrying this dead body? A. Yes, sir.

Q. How long before you started to carry the

dead body, either in hours or days, did you know that Al Tannenbaum was in the mountains? A. I cannot explain it; I don't know what you mean.

By the Court:

Q. Before you found Tannenbaum on the truck did you know he was in the mountains? A. Oh, yes, sir.

By Mr. Rosenthal: 3272

Q. How long did you know he was in the mountains on that occasion? A. I understand what you mean now. They came over to my hotel, sir.

Q. Who is "they"? A. Al Strauss—I mean Harry Strauss, Jack Drucker, Al Tannenbaum; they came over to my hotel.

Q. When did they come over to your hotel, how long before the murder? A. I think about three days, sir.

Q. That is—I do not remember the names—it may be quicker to ask you—did Drucker, 3273
Strauss and Tannenbaum, the three came over? A. Yes, sir.

Q. And they had a conversation with you in your hotel? A. No, sir, they just told me something.

Q. Did they have a talk with you in your hotel about this Yuran murder? A. No, sir.

Q. Had you told either Tannenbaum or Strauss or Drucker that you were over in the Oliver Hill Hotel before they came over to interview you there? A. They knew where I was.

Q. Had you told them? A. Oh, no, sir.

3274 *Sol Bernstein—For People—Cross*

Q. Were they stopping in the same town, Woodbourne, that you were stopping in? A. No, sir.

Q. Where were they stopping? A. In the Plaza Hotel.

Q. In the same town? A. No, sir.

Q. Where is the Plaza Hotel? A. I think it is in Fallsburg.

Q. You know it is in Fallsburg, don't you? A. I think it is Fallsburg.

3275 Q. Eight miles away from where you were stopping, is that true? A. I think so, sir.

Q. Did you see them between the time they had this conference with you three days before in the—

Mr. Rosenthal: Do not answer this question, Mr. Turkus is going to get up. But I now ask the court to tell him to sit down until I finish.

Mr. Turkus: Will your Honor instruct Mr. Rosenthal to not repeat anything to him that starts any discussion.

3276

The Court: Yes, forget that.

Mr. Rosenthal: I will withdraw the question.

Q. How long after this conference or talk that you had with them in your hotel was it before you next saw any one of these three men?

Mr. Turkus: I object to the question, with the use of the word "conference". It contains a statement of facts not testified to by this witness.

Mr. Rosenthal: I will withdraw it. I don't want your Honor to rule on it. I will put it in a different form.

The Court: It is not permissible on the trial of this issue to re-try the Gangi Cohen case. The most you can do with regard to the Gangi Cohen case is to impeach credibility by contradictions.

Mr. Rosenthal: This is in reference to the Yuran murder. I want to show this man is an accomplice to that murder. 3278
That is my purpose in asking this question.

The Court: I understand Gangi Cohen is the man who was tried for the Yuran murder.

Mr. Rosenthal: No, it is a different murder entirely.

The Court: Who was tried for that?

Mr. Turkus: That indictment is pending. There is a fugitive there.

The Court: Then the court cannot allow any fishing.

3279

Mr. Rosenthal: I am trying to show—there is no fishing about names exposed here. He has exposed the names of three people in the truck and I am going to show that this man is an accomplice, and not, as he says, an undertaker burying a body after he was murdered, but that he was an accomplice.

The Court: For the court's information, let me have this—what was the name of the corpus delicti in the Cohen murder case?

3280

Mr. Turkus: Walter Sage, alias Walter the Polack.

The Court: The objection is sustained.

Mr. Rosenthal: Exception.

Q. Did you see either Drucker, Tannenbaum or Harry Strauss, after they visited your hotel in Woodbourne, three days before the murder of Yuran, in between that time—the time of the murder and the first conversation you had with them, did you see them again? A. Yes, sir, they told me to go over some place, sir.

3281

Q. Where was the next place you saw either Harry Strauss, Drucker or Tannenbaum, prior to the murder of Yuran? A. The Plaza Hotel.

Q. Is the Plaza Hotel their hotel, where they stopped? A. Yes, sir.

Q. When were you told to come over to the Plaza Hotel, where they stopped, how long before the murder of Yuran? A. That was the same day, I think; I think that was the same day, sir.

3282

The Court: Although no objection is made—this is what the court has reference to—I cannot rule because there is no objection, but it strikes me as having no legitimate purpose in this cross-examination, but as being in a sense, fishing for information concerning entirely different matters.

Mr. Rosenthal: I respectfully except to the Court's statement. May I state on the record that the only purpose in my mind that I have of all these names are public matters I am speaking about now.

He has already spoken about them under oath. I am impeaching his credibility on the question of whether or not he had ever been connected with or took any part in any other murder, other than the Rosen murder. This jury has a right to know whether or not he did or aided in the commission of any murders either prior or subsequent, in order to appraise what weight, if any, they will give his testimony. I am not bound by his statement. 3284

The Court: If the jury were not present, you would not address the Court in an angry tone.

Mr. Rosenthal: I am not angry.

The Court: Your attitude is surely such. Otherwise you are talking for the benefit of the jury. I call you to order for that.

Mr. Rosenthal: I except.

The Court: Next question.

Q. Did you see either Drucker, Strauss or Tannenbaum prior to the murder of Yuran? A. 3285 What do you mean, "prior to"? I don't know what you mean, sir.

Q. (The Court) Before. A. No, sir. I met them over there the same day I stood at the hotel. They told me to hang around. That is all I know.

By Mr. Rosenthal:

Q. You were asked to come over to the hotel at what time of the day, to be there at what

time of the day? A. I think it was about five or six o'clock at night.

Q. Were you asked to take your car along? A. Yes, sir, I had to go with my car. It is about eight miles to get there.

Q. When you arrived there did you see them? A. Yes, sir.

Q. Did they tell you that you should wait around? A. Yes, sir.

Q. They just told you to wait there? A. Yes,
3287 sir.

Q. Didn't you say before, in answer to Judge Talley, that you were accidentally walking along in Fallsburgh, accidentally walking along the street in Fallsburgh, when you met these men? Isn't that what your testimony was on this stand in answer to Judge Talley when you were questioned about the Yuran murder? A. You don't understand me, sir.

Mr. Rosenthal: I ask the answer be stricken out as not responsive.

Mr. Turkus: I ask that it stand.

3288 The Witness: You don't understand.

Q. You don't understand. A. I said you don't understand.

The Court: What he said before, Counsellor, when Judge Talley was questioning him is that when the alleged victim was murdered, he came up after the murder. I don't recall whether he said, "accidentally." Maybe he did and maybe he did not. For goodness' sake, don't let that

delay things. Proceed with your examination.

Mr. Rosenthal: May I press the question?

The Court: I withdraw the last part of the remark to save time.

Q. Didn't you tell Judge Talley you knew nothing about the Yuran murder, but were accidentally walking along the street in Fallsburg when you met those men? A. Yes, sir. 3290

Q. And that was true? A. Yes, sir.

Q. What time were you "accidentally" walking along the street in Fallsburg when you met these men? A. I was walking with somebody.

Q. Who were you walking with? A. Jack Drucker, sir. You are getting off the line—I cannot explain it to you—I can explain it to you, but what you are telling me is wrong.

By the Court:

Q. What time of day did that happen? A. This it at night. 3291

Q. What time? A. Say about eleven or twelve o'clock at night.

Q. How far from the village of Fallsburg did you find them in this lot or field? A. I took a ride and then he told me to take a walk.

Q. Go ahead, please. A. Sometime at night, it was in the Plaza Hotel, Jack Drucker told me to take a ride with him. I took a ride with him. He told me to come and take a walk with him. I took a walk with him. On the road there was an alleyway and along came a car and inside was the dead body.

3292 Q. Before that did you know about it? A. No, sir.

Q. Did Drucker tell you? A. No, sir, he just told me to take a walk.

Q. Then you went, accompanied with Drucker, to assist in burying the body? A. No, sir, that was the next day.

Q. You acted as a lookout at the burial? A. No, sir. They dropped off the body. They went away with the car, with the dead man's car.

3293 Q. They left the body there? A. Yes, sir, me and Harry Strauss stood there all alone until they came back.

Q. The next day? A. That same night we took the body and hid it in the bushes and then that same night they started digging, but they could not make a hole.

Q. You had to get a pick? A. There was a pick there already. And the next day they came with the truck and then we took the body to the grave.

Q. How far away? A. That was in Loch Sheldrake.

3294 Q. How far away? A. I cannot tell you, because I was riding in the truck, I could not see it. It took about ten or fifteen minutes, maybe more.

Q. It was a short distance? A. Yes, sir, but I was riding in the truck and I could not see.

By Mr. Rosenthal:

Q. Is it your testimony you came with Drucker to a certain spot in your automobile? A. Oh, no, sir.

Q. In his automobile? A. Yes, sir.

Q. Then when you got to a certain spot

3295

Drucker said, "Let us get out and take a walk"? A. What do you mean, "Let us get out and take a walk"? He stopped the car and said, "Come on, take a walk."

Q. Then while you were walking you saw Strauss come along with Drucker? A. Wait a minute. Just take it easy, sir. We got to the spot there. We stood a few minutes, and then came along the car.

Q. And in the car you discovered who? A. Who did I discover? What do you mean?

3296

Q. Who did you see? A. They pulled over the car.

Q. Who is "they" that pulled over the car? A. Al Tannenbaum, Harry Strauss, and another fellow was Simey, and the dead man.

Q. Then you, together with them, took the body and hid it in the bushes? A. Wait a minute, you are going too fast. When they dropped off the body they started digging, fixing a hole. Then when he could not dig to make a hole he hid it in the bushes.

3297

By the Court:

Q. You mean it was too rocky? A. I don't know what it is, but weeds or something.

By Mr. Rosenthal:

Q. Did you just tell Judge Taylor, when you were reciting it now, as to what happened, that "we" hid the body, using the words "we hid the body in the bushes"?

Mr. Turkus: Objected to as repetitious.

3298 *Sol Bernstein—For People—Cross*

By the Court:

Q. Who did hide it? A. We all did hide it; we all had a part.

Q. You were then in on the job? A. Yes, sir.

By Mr. Rosenthal:

Q. But you had not been told by Drucker that the purpose you and he were to be there
3299 for was for the purpose of aiding the get-away and the murder, had you? A. No, sir.

Q. But after you hid the body you went with Strauss? A. I beg your pardon, sir?

Q. You went with Strauss, didn't you, after you hid the body? A. Wait a minute; either Jack Drucker came back with his car or Alie Tannenbaum came back with his car and they picked us up. I will tell you the whole thing. I will tell you everything. I will tell you what happened first.

Q. Go ahead. A. When they dropped off the body and they could not dig a hole, I think that
3300 is when Harry Strauss went through his pockets and he found a lot of money there—I don't know how much, and then either Jack Drucker or Allie Tannenbaum came back with his car to pick us up there.

Q. Are you sure of that? A. Yes, sir.

Q. Didn't you just tell the Judge when you were reciting the story to him that when you found you could not dig you went away with Strauss, and Drucker and Tannenbaum drove the dead man's car away, didn't you say that to the Judge only three minutes ago?

Mr. Turkus: I object to that as repetitious.

Mr. Rosenthal: This is on the question of impeachment; he has changed his story within thr.e minutes after he told it to your Honor.

Mr. Turkus: I object to the summation in advance.

Mr. Rosenthal: I submit I am entitled to an answer to the question.

Mr. Turkus: I submit the witness has 3302
a right to tell the whole story.

Mr. Rosenthal: I am not stopping him, but I am stopping him from telling a different story within three minutes of one another.

The Court: It is very easy for counsel and the Court to get confused. My own mind is clear as to what he did say. We are very far afield. The most you are entitled to in collateral impeachment is to get an admission of somebody else present, but you may not try the other 3303
issue in all its details. I mean to say it is within reason for the Court not to permit cross-examination on collateral details. I know examination on collateral details is permissible on the main issue within certain limitations, but not on collateral impeachment. I have got to put a stop to this somewhere, or there will be no end to the trial.

Mr. Rosenthal: I respectfully except to your Honor's statement.

The Court: You have your admission of the unlawful disposition of the body.

3304 Mr. Rosenthal: May we come back ten minutes earlier? I would like the stenographer over recess to transcribe that for me.

The Court: No, I will stop you right here and now on that. I think it is reasonable and the Court will be sustained on it. It is too far afield.

Mr. Rosenthal: I respectfully except to the Court's ruling. Now that my pur-

3305 pose is clear I am now asking this question—

The Court: Do not argue it, please. Take your exception and proceed with your examination.

Mr. Rosenthal: I will take exception.

The Court: Because today I will proceed until one o'clock. I have a long sentence calendar at two o'clock, and that work will take all afternoon, so we must now cover all the ground possible between now and one o'clock.

3306 Mr. Rosenthal: I have every desire to do so, but I have a duty to perform for my client.

The Court: Do not make speeches, then.

Q. Did you tell Judge Talley—

Mr. Barshay: I don't want to repeat it, but all this is subject to our objection which your Honor gave me from the moment this man started testifying.

The Court: Surely.

Q. You admitted using the name of Jackie Berman?

Mr. Turkus: I object to that as repetitious and also as to the form of the question.

Q. In answer to a question by Judge Talley you admitted using the name of Jackie Berman, when you were in Miami?

3308

Mr. Turkus: I object to that as repetitious.

Mr. Rosenthal: This is preliminary to an impeachment question.

Q. (The Court) Do you remember? A. Yes, sir.

Q. In the mountains, in the Gangi Cohen trial, were you asked these questions in respect to that proposition, and did you give these answers:

"Q. Did you ever use any name other than you own on any occasion? A. My own name. 3309

"Q. You were never afraid as to hiding your identity? A. No.

"Q. Never afraid? A. No.

"Q. That is the fact? A. Yes, sir."

Were those questions asked you in the trial of Gangi Cohen and did you give those answers? A. Yes, sir.

Q. That was not true, either? A. Yes, sir.

Q. What? A. It was not true, sir, yes, sir.

Q. In respect to Tannenbaum, were you asked in the trial of Gangi Cohen, in the mountains, these questions and did you give these answers:

3310 "Q. You knew him well, you knew Tannenbaum, and you passed him by—"

Well, I will repeat for you before that. This is in respect to meeting Tannenbaum in Miami. Do you recall testifying in the mountains about meeting him in Miami? A. Yes, sir.

Q. Now, in respect to that situation, were you asked these questions and did you give these answers:

"Q. You knew him well, you knew Tannen-
3311 baum, and you passed him by? A. I did not know him so well.

"Q. You have known Tannenbaum for years? A. Never do business with him.

"Q. Then it is a passing acquaintance? A. That is right."

Do you remember those questions being asked of you and those answers given? A. Yes, sir.

Q. Did you mean when you told the jury in the Gangi Cohen case that you had a passing acquaintance with Tannenbaum that—I will withdraw it. Do you call a "passing acquaintance"
3312 with a man being with him right after a murder is committed and carting the body and burying it, et cetera, do you call that a "passing acquaintance"?

Mr. Turkus: I object to that as summation.

The Court: Sustained as argumentative.

Q. You told Judge Talley in this trial, at page 682, that when you went with the police to point out where the body of Yuran was buried, that you did not point out anything about the pick

or the axe, do you remember being asked by Judge Talley about that? A. Yes, sir.

Q. The fact is you did not point out to the police where the pick or the axe were buried, isn't that right? A. No, sir.

Q. In the trial in the mountains, in the Gangi Cohen trial at Monticello, were you asked these questions and did you make these answers:

"Q. Did you point out to the officers the place where the 32 calibre pistol and the axe and the pick were thrown and buried in connection with 3314
the Yuran murder?"

Mr. Turkus: Read the objection.

Mr. Rosenthal: All right, I will read it, even though it is not material.

Mr. Turkus: It is very material.

Q. Were you asked this question and did you make this answer in the mountains in the Gangi Cohen trial:

"Q. Did you point out to the officers the place where the 32 calibre pistol and the axe and the pick were thrown and buried in connection with 3315
the Yuran murder?

"Mr. Dickerman: I object as an attempt to disclose evidence in another indictment now pending in this court.

"The Court: You may answer.

"Q. Did you or didn't you? A. I did."

A. Oh, you don't understand. I will explain if you want me to bring it out.

3316

By the Court:

Q. Were those questions asked and those answers made? A. Yes, sir, but I did not understand them, sir.

By Mr. Rosenthal:

Q. That was not true, was it? A. You don't let me explain.

3317

By the Court:

Q. Yes or no? A. You don't let me explain, sir. If it is in the book, I said it.

By Mr. Rosenthal:

Q. In your mind did you have— In June of 1940, before you were a witness in the Gangi Cohen trial in the mountains, did you have an idea of your own as to what the word "accomplice" to a murder meant?

3318

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. When you were questioned— Let me withdraw that. You told Judge Talley, didn't you, that Judge O'Dwyer and Captain Bals questioned you about five or six times, asked you questions, and you gave them answers? A. Yes, sir.

Q. You told Judge Talley when he asked you

3319

questions that those questions and answers that were asked of you by Judge O'Dwyer and Captain Bals were asked before you became a witness in the Gangi Cohen trial. You have not been interviewed by them since? A. What do you mean, sir?

Q. All of the six interviews, or the five or six interviews in which questions were asked of you by Judge O'Dwyer and Captain Bals, and you made answers, were questions which were had before you took the stand as a witness in the 3320
mountains, is that right? A. No, sir.

Q. Did they ask you questions since then? A. After the trial?

Q. Yes. A. Oh, sure, sir.

Q. Judge O'Dwyer asked you questions after? A. Yes, sir, Captain Bals, District Attorney Turkus, Mr. Klein.

Q. All of them asked questions? A. Not all at one time. They asked me questions and I answered them.

Q. Did you in the mountains, in 1940, in the Gangi Cohen trial, when you were asked— Let 3321
me withdraw that question. When you were first questioned by the District Attorney, after you had surrendered yourself, did you immediately tell him what you knew about the murder of Walter Sage; did you tell him that along with the other things you told him? A. No, sir.

Q. You did not tell him a word about it? A. Nothing about Walter Sage, no, sir.

Q. How long after you had surrendered yourself was the first time you mentioned you knew something about Walter Sage, or you had helped—

3322 Mr. Turkus (Interrupting): I object to the form of the question.

The Court: Sustained as being too far afield.

Mr. Rosenthal: This is all preliminary to testimony under oath for the purpose of impeachment.

The Court: Do not argue, please.

Mr. Rosenthal: Exception.

3323 Q. Now, in June, when you were asked on the stand in the Gangi Cohen trial, in respect to whether the District Attorney had ever questioned you or not, were you asked these questions and did you give these answers:

"Q. And how many times were you questioned by the District Attorney in Brooklyn? A. How many times?

"Q. Can't you hear me? A. Just once I told him all I knew.

"Q. On that one occasion did you tell them everything you knew?

3324 "The Court: In Brooklyn?

"A. Yes, sir.

"Q. Was a stenographer present? A. No, sir.

"Q. You were talking to the District Attorney what you knew about murders, and there was not a stenographer present taking down what you were saying?"

We will neave the next question out, because it is subsequently sustained.

Mr. Turkus: Read the record right.

3325

Mr. Rosenthal: I object to any statement or inference from Mr. Turkus that I have not read the record right, and I defy him to tell me where at any time I did not read the record right. I am not taking any accusation from this man.

The Court: Won't you complete your question?

Mr. Rosenthal: I ask that his statement be stricken from the record.

The Court: All right, strike it out. Let us proceed. Finish your question. I am trying to follow it. 3326

Q. I will continue the question. Did you understand it as far as I have read? A. Very clearly, sir.

Q. "Q. How long did they question you in Brooklyn?"

Mr. Turkus: I object. There is something omitted.

Mr. Rosenthal: There is nothing omitted. There is an objection sustained, and when it is sustained the question is stricken out, as I understand the rulings of the Court. If the Court wants me to read it I will read it, but I will take the Court's ruling and not Mr. Turkus's. 3327

Mr. Turkus: You read the question but did not read on.

Mr. Rosenthal: I said it was sustained and stricken out and therefore I omitted the question; that is exactly what I said.

The Court: This all tends to confusion. Go ahead with the question.

3328 Q. "Q. How long did they question you in Brooklyn? A. They did question me. I told them what I knew.

"Q. "The Court: How long?

"A. "The Witness: An hour, I told them.

"Q. Who asked you the questions, Judge O'Dwyer? A. Captain Bals and Judge O'Dwyer.

"Q. And you told them everything you knew? A. Yes.

"Q. You mean you went in and volunteered to
3329 give them everything you knew about murders, and you told them everything you knew? A. Yes."

Were you asked those questions and did you give those answers? A. Yes, sir.

Q. Now then, let me ask you, is it a fact that you were only spoken to— Question withdrawn.

Q. Isn't it a fact you were only spoken to once before June of 1940 by Captain Bals or Judge O'Dwyer about any murders?

Mr. Turkus: Objected to as repetitious.

3330 The Court: Repetitious; also too far afield. Objection sustained.

Mr. Rosenthal: Exception.

Q. Now, do you remember you were questioned about your knowledge of the Rosen murder while you were a witness in the Gangy Cohen trial in Monticello in June, 1940? Do you remember that? A. Yes, sir.

Q. Did you tell the jury in Monticello the truth in respect to your testimony regarding the Rosen murder—yes or no?

Mr. Turkus: Objected to as repetitious and as already answered.

Mr. Rosenthal: I never even questioned him on this yet.

The Court: Objection overruled.

The Witness: What do you mean?

Mr. Rosenthal: I move to strike out the answer.

The Witness: I do not undestand what you mean.

The Court: Mr. Rosenthal, what in the 3332
world has the trial in Monticello got to do with the Rosen case?

Mr. Rosenthal: He said under oath what he knows about the Rosen case there, and I am quoting from his testimony as to his supposed knowledge of the Rosen case, in which he denied he had any complicity, in the mountains.

The Court: Come down to the point.

Mr. Rosenthal: That is the reason, I asked him first—I read to him and asked him whether he told the jury the truth 3333
in the Rosen case.

Mr. Turkus: That is what I object to. It is repetition.

The Court: You have objected once and the Court has ruled. Let it go at that. The objection is sustained.

Mr. Rosenthal: Exception.

Q. Were you asked these questions in the Gangi Cohen trial in Monticello:

"Q. You never killed anybody, did you? A. No, sir.

3334 *Sol Bernstein—For People—Cross*

"Q. You never were a witness to a killing, were you? A. Witness to a killing? No, sir.

"Q. You never saw anyone killed? A. What do you mean, see?

"Q. Don't you know what "see" means? A. Means actually seeing a person get killed?

"Q. What did you see? A. I know something about it.

3335 "Mr. Dickerman: I object to any question of any other killing, as this witness may be a witness.

"Mr. Price: There is such a thing as credibility.

"The Court: You can ask as to any act that was his."

Were you asked those questions and did you give those answers? A. Yes, sir.

Q. After having given those answers, were you then asked these questions:

"Q. You are not an accessory or accomplice to any murder? A. That is right."

3336

Mr. Turkus: I object.

Mr. Rosenthal: Will you please sit down until I am finished with my question?

The Court: Let him finish it.

Q. Were you asked these questions and did you give these answers? A. My mind is very clear. Go ahead.

Q. "Q. You are not an accessory or accomplice to another murder? A. That is right.

"Q. And that is true? A. Yes.

"Q. And you have had nothing to do with any murder on any occasion? A. That is right."

Did you answer those questions that way?

Mr. Turkus: I object. That is a legal question. "Accessory or accomplice."

The Court: Sustained as to all except the last question and answer.

Q. Under the Court's ruling I will repeat just this question:

"Q. And you have had nothing to do with any murder on any occasion? A. That is right." 3338

Were you asked that question and did you give that answer? A. Yes, sir.

Q. That was not true, was it? A. I can explain it.

Mr. Rosenthal: I ask the answer be stricken out as not responsive.

The Court: It is really arguing with the witness because the actual killing, according to his testimony here, he did not participate in, but he did participate, according to his admissions, in sitting in the car and in acting as an outside principal. 3339

Mr. Rosenthal: And in stealing the car and in taking the plates, and in getting them there, bringing them there and bringing them away.

The Court: Pardon me. The answer given to the question you have just read in the other trial could be viewed as being meant to be true by the witness if he considered it referred to taking part in the actual shooting. It would be untrue

3340 *Sol Bernstein—For People—Cross*

in relation to his being a principal under Section 2 of the Penal Law, in the other work than killing. Therefore it is a matter of argument for the jury.

Mr. Rosenthal: I except to the Court's interpretation and its statement in the presence of this jury. My interpretation, without mentioning it, is entirely different.

Mr. Talley: I wish to put on the record at this time our objection to your Honor's
3341 statement, our exception to the statement which you made, and for the withdrawal of a juror, and I move for a mistrial in view of your Honor's statement made at this point in the case.

The Court: I can see no sense in that, no sense whatever. The statement by the Court was fair; the man legally was a principal of his own admission in the Rosen murder, if the Rosen murder occurred as he testified. There is no prejudice about it.

Mr. Talley: He testified.

3342 The Court: Do not argue. The motion for the withdrawal of a juror and the declaration of a mistrial is denied.

Mr. Talley: I respectfully except to your Honor's refusal to allow me to reply to your Honor's statement.

The Court: Proceed, please.

By Mr. Rosenthal:

Q. Regarding the Rosen murder, were you asked these questions—page 61 of the minutes

in the Gangy Cohen trial in Monticello, and did you give these answers:

"Q. Did you know a man named Joseph Rosen? A. No, sir.

"Q. Did you ever hear that name? A. I know something about it.

"Q. About what? A. About Rosen.

"By the Court:

"Q. Did you say you did not know him personally? A. (The Witness) Yes. 3344

"Q. Did you know this man Rosen had a candy store? A. Did I know?

"Q. Yes, sir. A. Yes, sir.

"Q. Was that located at 725 Sutter Avenue, Brooklyn? A. I don't know the number, but I know it was on Sutter Avenue.

"Q. You know he was murdered in the candy store on September 13, 1936? A. I don't remember the date.

"Q. But you know that was the time, around that time? A. It could be.

"Q. Was it in 1936 he was murdered? A. I 3345 do not remember the year.

"Q. Did you see him murdered? A. No.

"Q. Did you have any part in that murder? A. I don't know what it was all about.

"Q. Did you testify in the Grand Jury about that murder? A. Yes, sir.

"Q. The District Attorney put you in the Grand Jury as a witness in the Joseph Rosen murder, and you tell this jury now you don't know what it was all about? A. Yes, I know now about it.

3346

"Q. Were you with Rosen at the time he was killed? A. No, sir."

Were you asked those questions and did you make those answers?

Mr. Turkus: I object to that, there being nothing inconsistent.

The Court: Sustained. No contradiction.

Mr. Rosenthal: I respectfully except to the Court's ruling and the statement of the Court there is no contradiction.

3347

The Court: The statement is withdrawn. The jury will disregard it.

Q. When you were in California in 1940 did anybody know you were there? A. Yes, sir.

Q. Who knew you were there? A. Louis and Al.

Q. What is the name of Al, the last name? A. Do I have to tell that, your Honor?

The Court: If there is any objection—

3348

For some reason the witness does not wish to answer the question. I cannot rule because there is no objection.

Mr. Rosenthal: Question withdrawn.

Q. Were you asked in respect to these supposed friends of yours in the trial of Gangy Cohen? A. They asked me who knew I was in California.

Q. You said you did not know the names of the men that knew—did you say that?

3349

Mr. Turkus: I object. That is not inconsistent with anything here.

Mr. Rosenthal: I will withdraw it.

Q. When you had this candy store, wasn't that a blind for the Ali Baba gang?

Mr. Turkus: I object. That was asked by Judge Talley.

A. Ali Baga gang?

3350

Q. Well, let us see. Did you know a man named Jacob Eisman (?), otherwise known as Baby Face?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

Mr. Rosenthal: This is on the question of his credibility.

The Court: Overruled. It may lead to something.

A. I knew Eisman, yes, sir.

3351

Q. You knew him as Baby Face, didn't you? A. I don't know what you mean.

Q. (The Court) Yes or no? A. No, sir.

Q. Did you know a man named Abie Goldberg, with an alias of Whitey? A. No, sir.

Q. You never heard of that name, is that right?

Mr. Turkus: I object to the question, whether he ever heard.

The Court: Objection sustained.

3352 *Sol Bernstein—For People—Cross*

Q. Did you know Willie Rosenson? A. I have heard that name.

Q. You heard of that name, didn't you, you know who Willie Rosenson is? A. I heard of that name.

Q. Do you know him, beside hearing of him by name? A. I must have.

Q. Did you hear of Willie Rosenson, outside of hearing his name? A. Yes, sir.

3353 Mr. Turkus: I object.

Q. Was he known by the alias, by the name of Punchy Willie, or something like that?

Mr. Turkus: Objected to as incompetent and irrelevant.

Mr. Rosenthal: I will show the competency—that this man is not telling the truth in anything he says here, that his purpose—

Mr. Turkus: I object to Mr. Rosenthal making an advance summation to the jury,
3354 injecting improper and reprehensible remarks.

The Court: This means nothing at the present time, but it may mean something later. Objection overruled.

Mr. Rosenthal: I object to the speech, making those voluntary remarks.

Mr. Turkus: I am always asked to be admonished if I make any form of an objection. Yet we have defense counsel doing the most reprehensible things. Now, I ask that they be admonished.

3355

The Court: I am always admonishing both sides.

Mr. Rosenthal: I accept the admonition of the court.

The Court: It is understood that throughout the rest of the trial all admonitions apply to all counsel.

Q. Both of those men were confirmed criminals, weren't they?

3356

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

Mr. Rosenthal: I withdraw the question.

By the Court:

Q. At the time of your association, if you had any, did you know that they were crooks? A. I don't know what he is talking about, Judge.

By Mr. Rosenthal:

3357

Q. Do you know Irving Shenker, otherwise known as Faker? A. I know there is a Shenker.

Q. Did you associate with him? A. He came around the store.

Q. The store you kept as a blind? A. Yes, sir.

Q. Did you know Sam Nagur, also known as Mitch? A. No, sir.

Q. Did you know Max Moskowitz? A. Yes, sir.

3358 *Sol Bernstein—For People—Cross*

Q. Did he come around the store, too? A. Yes, sir.

Q. Did you know Eisman?

Mr. Turkus: Objected to as repetitious.

Q. The Eisman I mean is the man who was arrested for killing a policeman and convicted: did you know him?

3359 Mr. Turkus: I object.

Mr. Rosenthal: I will show his association whether he likes it or not.

The Court: The court will now take a recess. On account of sentencing this afternoon, and I have quite a calendar, the court will recess until tomorrow morning at ten o'clock. Gentlemen of the jury, let no one talk to you about the case, keep your minds open, remember the admonition given you previously, which follows throughout the trial.

3360 The Court: The witness may pass out first. Now, the jury may retire. Defendants remanded.

(Recess until 10:00 A. M., October 30, 1941.)

3361

Brooklyn, N. Y., October 30, 1941.

TRIAL RESUMED

SOL BERNSTEIN, a witness for the People, resumed the stand and testified further as follows:

Cross-examination by Mr. Rosenthal (continued):

3362

Q. Just before recess yesterday I was asking you about the names of certain individuals and whether they hung out in this store you kept as a blind; do you recall that? A. Yes, sir.

Q. Did you know a man by the name of Eiseman? A. Yes, sir.

Q. Was he known as "Baby Face"? A. No, sir.

Q. Was his first name Jake Eiseman? A. No, sir.

Q. What was his first name? A. Nat Eiseman.

Q. Did he hang out in this store of yours? A. Yes, sir.

3363

Q. Was he a professional burglar? A. No, sir.

Q. Was he a thief? A. No, sir.

Q. Did you know a man named Harry Stein? A. Yes, sir.

Q. Did he hang out in your store? A. Yes, sir.

Q. Was he a thief? A. Yes, sir.

Q. Do you know a man named Red Rabiner? A. Yes, sir.

Q. Did he hang out in your store? A. No, sir.

3364 *Sol Bernstein—For People—Cross*

Q. How long have you known him? A. I went to school with him.

Q. Was he a thief also? A. Yes, sir.

Q. Do you know a man called Big Dick? A. Yes, sir.

Q. Did he hang out in your store? A. No, sir.

Q. How long had you known him? A. I went to school with him, sir.

Q. Is he another thief? A. Yes, sir.

Q. Do you know a man called Ridge? A. No,

3365 sir.

Q. Do you know a man named Wick Horowitz, otherwise known as "Wick"? A. No, sir.

Q. Is it not a fact that these men that hung out in your store, whom you say were thieves, were known as the Ali Baba gang? A. No, sir.

Q. You never heard of the name "Ali Baba Gang" before you got on the stand?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: Judge Talley asked about that; I did not.

The Court: He may answer.

3366

Q. (The Court) Did you ever hear of them? A. No, sir.

Q. Do you know you were known as The Chief?

Mr. Turkus: Objected to as already answered.

Q. Were you known as— Or were you known by any other name besides the names you gave, Jake Berman and Sol. Scholem, Bernstein? A. There might have been some other names too.

Q. Don't you know you were known by other names?

Mr. Turitus: I object unless the time is fixed.

Mr. Rosenthal: I can only ask one question at a time. I will ask him that.

The Court: You might ask him specifically as to some other names.

Q. Can you give this jury any other name you were known by, and the times you were known by other names? A. I don't understand what you mean. 3368

Q. You said you might have been known by other names besides Bernstein, Scholem, and Jacky Berman. A. Yes, sir.

Q. Now what other names, can you give us any of them that you were known by, and can you tell us during what years you were known by those names? A. When I checked in sometimes to a hotel, sir.

Q. When you were traveling the country, you mean, with carnivals? A. No, sir. 3369

Q. When you were traveling around the country in those years you went on a vacation, you mean? A. I don't understand what you mean, sir.

Q. You say you checked in a hotel sometimes and gave fictitious names. Did you say that just now? A. Yes, sir.

Q. Did you do that in 1936? A. No, sir.

Q. Or in 1937? A. I cannot recall, sir.

Q. In 1938? A. It might have been, sir.

Q. And in 1939? A. It might have been, sir.

Q. What is your best recollection? Is that the

best you can tell us, "It might have been"? A. I went under, maybe once or twice in a hotel, under different names, but I do not recollect, sir.

Q. Frank Cooperman was another friend of yours? A. Yes, sir.

Q. Do you know a man named Arkie Cohen? A. Yes, sir.

Q. How long did you know him? A. About ten years, sir.

Q. Is he another thief? A. No, sir.

3371 Q. Is he a loan shark man? A. He is an electrician, sir.

Q. Is he a friend of yours? A. Yes, sir.

Q. Did you see Arkie Cohen while you were with Fat Cooperman the night that Fat Cooperman was killed in his doorway?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant; we have gone over that; this is repetitious.

Mr. Rosenthal: I have not asked a question about this. I am now cross-examining in behalf of the defendant Capone.

3372 The Court: Do not argue. Objection overruled.

Q. Did you understand the question? A. Yes, sir.

Q. Answer it. A. I may have.

Q. Didn't you have a talk with Arkie Cohen—Question withdrawn.

Q. Didn't Arkie Cohen want to go in a car with you and Fat Cooperman that night, and didn't you tell him not to go in the car with you because Fat Cooperman was going to be killed? A. No, sir.

Q. You did pick up Fat Cooperman and drive him to his doorway? A. Yes, sir.

Q. How long after you deposited him at his doorway was it before you heard that Fat Cooperman had been killed in that doorway? A. The next day, sir.

By the Court:

Q. How long ago was that? A. A good many years ago, sir.

Q. Did that have some connection with the Kauffman chicken market murder? A. No, sir. 3374

Q. In Sullivan County? A. No, sir. Explain again, sir.

Q. Was that a chicken market murder? A. No, sir.

By Mr. Rosenthal:

Q. Did you accidentally meet Fat Cooperman?

Mr. Turkus: Will you wait just a minute, sir? 3375

(Mr. Turkus appears before the bench and talks privately to the Judge, without the hearing of the jury.)

(Mr. Turkus resumes his place in the court-room.)

Q. Did you accidentally meet Fat Cooperman that night and take him home? A. No, sir. I met him in the cafeteria. If you want to know who killed him I can tell you, if you want to know who killed him, if you want to know that.

3376 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: I ask that be stricken out.

The Court: Strike it out.

Mr. Rosenthal: Now, for about the eighth time I ask your Honor, in view of the fact we had another recess, that this individual be told to answer questions only.

The Court: Yes.

3377 Q. Did you understand what the Judge told you? A. Yes, sir.

Q. You have been told that now seven times, haven't you?

Mr. Turkus: I object. Just a minute. Admonitions come from Judge Taylor and are satisfactory.

Mr. Rosenthal: I have a right to question this man as to whether he understood what he has been told seven times in the last few days.

Mr. Turkus: He is willing to tell you
3378 everything.

Mr. Rosenthal: I ask that that be stricken out. If it is to be a repetition of what we have had on other days, he is going to have his answer. I ask your Honor to tell Mr. Turkus that he has no more right than this man has to make statements in the presence of this jury.

Mr. Turkus: That goes for Mr. Rosenthal.

Mr. Rosenthal: It goes for everybody in this court-room.

Mr. Turkus: But this time I am addressing my remark to you.

The Court: Well, that is all over.

Mr. Turkus: As far as I am concerned it has subsided.

Mr. Rosenthal: May I have an instruction made to Mr. Turkus not to make statements in the presence of the jury?

The Court: All right.

Q. Did you understand the Court's—I am talking to you, Bernstein— 3380

The Court: Don't quiz him about the Court's admonition.

Mr. Rosenthal: I will accept the Court's ruling as to that, but I respectfully except.

Q. Did you accidentally meet Fat Cooperman that night in a cafeteria, when you took him home—yes or no?

Mr. Turkus: I object to that as repetitious. He has just answered. 3381

Mr. Rosenthal: The answer has been stricken by the Court as not responsive.

The Court: Objection overruled.

A. No, sir, he was in Witty's cafeteria on Pitkin and Douglass.

By the Court:

Q. He was killed on Snyder Avenue, wasn't he? A. Yes, sir.

Q. Around East 59th Street? A. Yes, sir.

3382 *Sol Bernstein—For People—Cross*

By Mr. Rosenthal:

Q. That is the place where you let him off? A. Yes, sir.

By the Court:

Q. And if the District Attorney wants to find out who did it— A. (interrupting) I will tell him, sir.

3383 The Court: All right, there is plenty of time.

By Mr. Rosenthal:

Q. You told Judge Talley that you did not know anything about the fact of the Cooperman murder whatever until the next morning, didn't you, when he asked you the question yesterday when he was examining you—yes or no?

Mr. Turkus: I object, that is just what
3384 he said today. This is not inconsistent.

Mr. Rosenthal: If we accept Mr. Turkus's answer, I withdraw the question.

Q. How long did you know Seymour Magoon? A. About eight or nine years, sir.

Q. Did he frequent the store you ran as a blind? A. No, sir.

Q. Did he frequent the Coffee Pot that you mentioned at Amboy and Sutter? A. I seen him lots of times there, sir.

Q. Did Mugsy Cohen visit your store? A.

Yes, sir, hung around in the store, in the same store.

Q. At the time that Muggsy Cohen was hanging around in your store you knew him as a first class radio and automobile thief?

Mr. Turkus: Objected to as repetitious; we have had his accomplishments related already.

Mr. Rosenthal: I have not asked any questions on anything I am asking today. 3386
What Judge Talley or Mr. Turkus may have asked him—

The Court: (interrupting) Please do not argue. The objection is overruled.

Q. Do you remember the question? A. Yes, sir.

Q. Is your answer "Yes, sir"? A. He was the best in the business, sir.

Q. When you testified in Monticello, it was in June of 1940, wasn't it? A. Yes, sir.

Q. You had previously testified in Kings County before the Grand Jury in the Rosen case, 3387
hadn't you? A. Yes, sir.

Q. And subsequent or after your testimony in Monticello did you ever testify before the Grand Jury again in Brooklyn about the Rosen case? A. Just once, sir.

Q. That once was prior to the time you swore as a witness in the Cohen trial in Monticello, is that right? A. Yes, sir.

Q. Now, you told Judge Talley that you were told by someone in the District Attorney's office not to give any information— I will withdraw

3388 that and give your exact words—you told Judge Talley that (on page 682) you did not tell the truth in Monticello because you did not want to give any information? A. All of it, no, sir. I told the truth about the Gangy case; everything was the truth, sir.

Mr. Rosenthal: I move to strike that out as not responsive.

Mr. Turkus: I ask that it stand; it is

3389 most responsive.

The Court: Let it stand.

Mr. Rosenthal: Exception.

Q. Were you asked this question and did you give this answer (page 682):

"Q. You did not tell the truth in Monticello, did you? A. Because I don't want to give no information."

Were you asked that question and did you give that answer?

Mr. Turkus: Objected to as repetitious

3390 and not inconsistent with his testimony in response to Mr. Rosenthal's questions.

Q. Were you asked that question and did you give that answer? A. I went to testify in the Gangy case and not in the other case.

Mr. Rosenthal: I move to strike that out as not responsive.

Mr. Turkus: Consented to.

The Court: Of course, Mr. Rosenthal, you know that is part of the record in this case.

Mr. Rosenthal: Yes, I know that.

The Court: It is not customary, after the witness has been asked a question and given an answer, to later on take time to ask him if that question were true and that answer given in the same case unless he makes a contradiction.

Mr. Rosenthal: That was not asked by me. And it is preliminary.

The Court: Just the same, it is part of the record. Go ahead with your next 3392
question and we will avoid loss of time.

Mr. Rosenthal: Does your Honor strike the answer out.

The Court: I am making it as a suggestion. Every time the Court makes a suggestion it is time lost and the Court means to save that.

Mr. Rosenthal: I accept the suggestion, but there is an answer which I ask the Court to strike out before I continue.

The Court: Let it stand.

Mr. Rosenthal: Exception. 3393

Q. Where was the conversation you had with the man in the District Attorney's office who spoke to you about giving no information? Where was that had?

Mr. Turkus: I object. That is not testimony.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Didn't you tell Judge Talley you had been told by a man in the District Attorney's office

not to give any information? Did you tell that to Judge Talley?

Mr. Turkus: I object. That has just been sustained.

Mr. Rosenthal: I have not asked that before.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3395 Q. Can you tell this jury the name of any individual attached to either the Brooklyn District Attorney's office or the District Attorney's office in Monticello who told you what you related to Judge Talley regarding not giving information?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. You were asked by Judge Talley at page 638, these questions:

"Q. Did you tell the District Attorney that
3396 you were going to testify falsely because all the mob were not picked up? A. What did you say, sir?"

Then the question was repeated, and your answer: "A. I was told not to talk about any other case.

"Q. Who told you that? A. Somebody in the District Attorney's office. I don't recall who. I didn't tell all of the truth up there, sir."

Do you recall those questions being asked you and your giving those answers?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Rosenthal: This is preliminary to my asking another question.

The Court: It is just a waste of time; it is already part of the record in this case.

Mr. Rosenthal: It is preliminary.

The Court: Don't argue that. This is elementary and I am surprised you do this.

3398

Q. Can you tell me in which District Attorney's office this conversation which you told Judge Talley about took place?

Mr. Turkus: Objected to as already answered and repetitious.

Mr. Rosenthal: It is not contained in the record, if your Honor will look. Judge Talley did not ask in which District Attorney's office the conversation took place or where it took place, and that is what I am asking him.

3399

Mr. Turkus: The answer, he said, was "I don't recall."

The Court: The rule as to impeachment entitles you to inquire as to whether or not any witness who goes on the stand has committed perjury on another occasion. There it stops. You are not permitted to go on a fishing excursion along the lines of an admission. The record is complete then on that point and it may not be pursued any further than to get the admission. Objection sustained.

Mr. Rosenthal: I respectfully except to your Honor's remarks.

The Court: It is elementary law; it is not a remark. It is a ruling, and I am telling you the law because you do not seem to know it.

Mr. Rosenthal: I respectfully except to that remark.

Q. Did you know Abie Reles's brother? A.
3401 No, sir.

Q. You never knew a man named Sandy Reles? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. Now, in 1938, when you applied for a loan, did you give the name of a man, Herman Schact as your employer, residing at 365 East 98th Street? A. Yes, sir.

Q. Did you ever work for Schact? A. No, sir.

Q. Did you also at that time say you worked for Schact as a salesman? A. Yes, sir.

Q. That was not true either? A. No, sir.

Q. Schact is a brother-in-law of your partner
3402 Cherry, isn't he? A. Yes, sir.

Mr. Turkus: I object. What difference does it make?

The Court: Objection sustained.

The Witness: I paid him off the loans.

Q. Are you finished? Didn't you go out to California— Question withdrawn.

Q. Didn't Meyers, the man who was endorser on your note or notes, leave and go to California in 1938?

Mr. Turkus: I object.

Mr. Rosenthal: He has made responses. They are on the record, and I will show it is not a fact.

Mr. Turkus: I ask Mr. Rosenthal's remarks not only be stricker from the record but the jury instructed to disregard them. They are not testimony.

The Court: I do not think the jury needs instruction.

3404

Q. Didn't you on one of your trips to California go to see this man Meyers who had previously endorsed the notes for you?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Didn't you and Cherry, your partner, kill a man named Silverman? A. What do you say?

Q. You heard me, didn't you? A. I did not hear you, sir.

3405

Q. I will repeat it. Didn't you and your partner Cherry kill a man named Silverman? A. No, sir.

Q. Did you know a man named Silverman? A. Yes, sir.

Q. Was he a stick-up man? A. Yes, sir.

Q. How long had you known Mr. Silverman? A. Six or seven years, sir.

Q. Was Silverman killed? A. Yes, sir.

Q. When was he killed? A. I don't know, sir.

Q. Approximately, was he killed after you knew him or before you knew him?

Mr. Turkus: I object. How could he be killed before he knew him? That is ridiculous.

Mr. Rosenthal: He might have heard of it.

Mr. Turkus: I object on the ground it is ridiculous to know a man after he was killed.

The Court: Objection sustained.

3407 Q. How long before he was killed did you know Silverman? A. I knew him seven or eight years.

Q. Was he out on stick-ups with you? A. No, sir.

Q. Now, you owned an automobile in 1936, didn't you?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

I have not touched anything about 1936 your Honor.

3409 The Court: It is on the record that he did. Why waste time.

Q. You said you sold that automobile in order to pay loan sharks; is that what you testified to?

Mr. Turkus: I object.

Mr. Rosenthal: This is preliminary to questions that have not been touched upon for the purpose of impeachment. I can only bring his attention by asking certain questions that have been previously asked so as to obtain a contradiction.

The Court: I cannot see it. It is very far afield. Objection sustained.

Mr. Rosenthal: Exception.

Q. Is it not a fact that you had your car stolen in 1936, this car you owned? A. Yes, sir, I think so, yes, sir. It was stolen, yes, sir.

The Court: Now, counsel did not ask you that. He asked you did you have it stolen.

3410

The Witness: No, sir.

Q. It was insured, wasn't it? A. Yes, sir.

Q. You hired a lawyer by the name of—Aaron Babrow? A. Yes, sir.

Q. And sued the insurance company? A. I don't know what you mean by to sue the insurance company.

Mr. Turkus: I object to that as incompetent, immaterial and irrelevant; nothing to do with the Rosen killing.

The Court: Do not argue. Objection sustained. 3411

Mr. Rosenthal: Exception.

Q. Is it a fact, as you testified when asked by Judge Talley, that your 1936 car was sold by you to pay loan sharks off, or is it a fact it was stolen away from you by somebody?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3412 *Sol Bernstein—For People—Cross*

Q. Was this car of 1936 registered in your name? A. No, sir.

Q. In whose name was it registered? A. I think it was under Al Glass, sir.

Q. You had the car registered subsequently in somebody else's name, didn't you?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant, having nothing to do with the Rosen killing.

3413 The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Now, I am speaking, Mr. Bernstein. Do you mind looking in my direction when I address you? A. I am sorry, sir.

Q. Didn't you see Al Glass in the District Attorney's office in Brooklyn only a couple of weeks ago? A. No, sir.

Q. Have you ever seen him in the District Attorney's office since you have been in jail?

Mr. Turkus: Objected to as incompe-

3414 tent, immaterial and irrelevant.

The Court: Sustained as irrelevant.

Mr. Rosenthal: Exception.

Q. You testified in answer to Mr. Turkus that you left Brooklyn when Judge O'Dwyer became District Attorney, is that right?

Mr. Turkus: I object, that was not the answer. He said when Judge O'Dwyer did something he left town. I don't want to repeat it.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3415

Q. Did you leave Brooklyn when certain men were arrested for disorderly conduct? A. When he declared war on the mob he kept pinching everybody, and I ran to Florida.

Q. You mean by "pinching," arresting for disorderly conduct, isn't that what you mean?

Mr. Turkus: I object. It speaks for itself.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3416

Q. You had gone to Florida every year at the same time, hadn't you, for the last six years?

Mr. Turkus: I object. That does not take anything away from why he left on that trip.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

May I direct the Court's attention to the fact that these are matters brought out by the District Attorney?

3417

The Court: We are wasting time. Proceed.

Mr. Rosenthal: I respectfully except.

Q. Were you in Florida in 1937 around the month of February?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

3418 Q. Did you stop at the Hotel Nassau around the beginning of the year 1938—1939, in Florida?

Mr. Turkus: Objected to as repetitious, and incompetent, immaterial, and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. You said you were in Miami in 1940, in answer to Mr. Turkus, and then left in the month
3419 of March to go some other place. A. I went in to Brooklyn to see a lawyer, Manny Rosenberg and Fischbein was there, too, in Brooklyn.

By the Court:

Q. You mean Mr. Rosenberg? A. And Mr. Fischbein was there too, in Manny Rosenberg's house.

Q. You mean Mr. Rosenberg who is Mr. Rosenthal's associate? A. Yes, sir, Fischbein was there too.

3420 Q. He was your lawyer then? A. Yes, sir, both.

By Mr. Rosenthal:

Q. Look at Mr. Fischbein—you saw Mr. Fischbein in 1940? A. Yes, sir.

Q. Is that what you say? A. Yes, sir.

By the Court:

Q. Was he your regular lawyer? A. Yes, sir.

Q. How many years?

Mr. Rosenthal: I object.

A. Quite many years, sir.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

I am waiting for the witness to turn toward me.

The Court: He does not have to.

Mr. Rosenthal: I submit, when I am asking a question I am entitled to all of 3422
the witness' attention.

The Court: There is no law on that point.

Mr. Rosenthal: I respectfully except.

By Mr. Rosenthal:

Q. Wasn't Detective Laurie, of the District Attorney's office, and Detective Joseph, of the District Attorney's office, right there in the same hotel with you, in February—yes or no? A. In the Commodore Hotel, yes, sir.

Q. Didn't you often see them and take sun 3423
baths with them in the Commodore Hotel in February of 1940? A. Take it easy.

Q. You take it easy. A. No, sir. Take it easy, sir.

Q. Did you see them in the hotel?

Mr. Turkus: Objected to as repetitious.

The Court: I don't see what it has to do with the case.

Mr. Turkus: That was just venomous.

Mr. Rosenthal: What it has to do with the case is the statement of this witness,

which I ask be stricken out, in response to your Honor's question.

The Court: All right, maybe I made a mistake, but I don't recall what you are talking about.

Q. Did you see Detective Walter Laurie of the District Attorney's office in the Commodore Hotel in February or March of 1940 before you left and came to New York—yes or no?

3425

Mr. Turkus: Objected to as already answered.

The Court: It has nothing to do with the case. Objection sustained. It makes no difference what hotels the detectives went to or whether they took sun baths or whether they even dined or swam in the luxurious Rooney Plaza.

Mr. Turkus: Detectives have business to be mingling with certain people.

Mr. Rosenthal: Again we have a statement.

3426

Mr. Turkus: I don't want any detective venomously assailed in a court-room if I can stop it.

The Court: It has no bearing on anything. Every Miami hotel usually has a couple of New York detectives during the season. That has been going on for a good many years. It is a matter of common knowledge.

Mr. Rosenthal: May we have Mr. Turkus's statement stricken from the record and the jury instructed to disregard it?

3427

The Court: There is no such law as that.

Mr. Rosenthal: I ask the jury be instructed to disregard it.

The Court: If the Court's jurisdiction is controlling, counsel should use different methods. Proceed.

Mr. Rosenthal: I respectfully except to your Honor's refusal to advise the jury to disregard it.

3428

Q. Before you gave yourself up had you learned that Mr. Abie Reles had spoken to the District Attorney from newspapers or any source —I will withdraw that.

Q. Had you read in the newspapers before you walked into the District Attorney's office about Abie Reles having spoken to the District Attorney—yes or no? A. Yes, sir, the papers were filled with the story.

Mr. Rosenthal: I ask your Honor to instruct this man when he answers yes or no not to continue and volunteer information.

3429

The Court: Yes.

By the Court:

Q. Did you read the Miami Herald when you were there? A. Yes, sir.

Q. Did it carry stories of Judge O'Dwyer's investigation in Brooklyn? A. Yes, sir.

Q. Large, first-page stories? A. Yes, sir. That was about Dukey Maffetore, sir.

3430 *Sol Bernstein—For People—Cross*

Q. Is that a daily paper? A. Yes, an out standing paper.

Mr. Rosenthal: Will your Honor again instruct this witness not to volunteer after he has finished an answer?

The Court: Yes.

By Mr. Rosenthal:

3431 Q. Did you speak to anybody attached to the District Attorney's office since you left the stand yesterday? A. The District Attorney's office?

Q. Yes. A. No, sir.

Q. Has your wife been receiving any money since you are in jail?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Q. From the City of New York, has your wife been receiving $50 every two months since the time you are in jail?

3422

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Did you have any other visitors outside of your wife coming into the hotel or wherever you were kept, to see you? A. I am here close to twenty months.

Q. Did you have other visitors coming to see you? A. No, sir.

Q. Are you now charged with any crime, as you are sitting on this stand? Is there any

3433

charge against you outside of being held as a material witness as you are sitting here in this court? A. No, sir.

Q. Do you know what the word "immunity" means? A. Yes, sir.

Q. You know that that means, then, that you cannot be prosecuted for a particular crime where you are permitted to testify—do you know that? A. Yes, sir.

Q. How long have you known that? A. A long time.

3431

Q. You knew it before you gave yourself up, didn't you? A. Yes, sir.

Q. So at the time you went to the District Attorney's office in 1940, you knew that if you were permitted to testify in any proceeding of which you were a part, that you could not be prosecuted unless you would sign a paper waiving immunity? A. I did not know what was going to happen to me.

Q. I will repeat the question. You say you knew what the word "immunity" meant for a long period of time? A. Yes, sir.

3435

Mr. Turkus: I object to it, as fully covered.

The Court: That is what he said.

Q. You knew what immunity was before you testified in the mountains, didn't you?

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled.

Mr. Turkus: If he knew it before he was arrested he knew it subsequent.

3436 *Sol Bernstein—For People—Cross*

Q. Did you know it before the Gangy Cohen trial? A. I knew the meaning of immunity, but I did not know what was going to happen to me.

Mr. Rosenthal: To save time I will come back to that.

Q. You did not sign any waiver in this case here, did you? A. No, sir.

Q. You did not sign any waiver in the Yuran
3437 murder, did you?

Mr. Turkus: Objected to, he was not a party to that.

Mr. Rosenthal: I again submit that Mr. Turkus is again injecting, and as long as he is I have a right to say this—that it is for this jury to determine from his testimony whether he was a party to it or not, and not for Mr. Turkus to tell them.

The Court: As far as the Yuran murder is concerned, the Court holds that
3438 this is too far afield and not retriable. Objection sustained. You are permitted to go into the question as to whether or not this man committed perjury in the Yuran murder, and there it stops.

Mr. Turkus: That case nas not been tried

The Court: I got that mixed up with the Gangy Cohen case.

Mr. Rosenthal: Therefore I asked him whether he procured immunity or whether he signed a waiver when he testified before the Grand Jury.

3439

The Court: That has nothing to do with this case. Objection sustained.

Mr. Rosenthal: On the question of promises held out to him on anything he may have done.

The Court: You are not entitled to go into a fishing excursion for prospective trials. This is only manufacturing material for the purpose of the trial of other cases.

Mr. Rosenthal: I respectfully except 3440
to your Honor's statement, and I ask your Honor to instruct the jury to disregard that statement.

The Court: The jury knows that they are to listen only to evidence. They will have to disregard a whole lot of things in this case that do not concern them.

Q. Did you testify before the Grand Jury—now wait for the objection—I am going to make this my record—that is why I ask the question. Did you testify before the Grand Jury in whatever county the Yuran murder took place—yes 3441
or no? A. I don't understand what he means.

Q. (The Court) Concerning the Yuran murder case, did you testify before some Grand Jury? A. Yes, sir.

Q. Did you sign any waiver of immunity before you went in before that Grand Jury—yes or no?

Mr. Turkus: Objected to.

The Court: Sustained as irrelevant and incompetent.

Mr. Rosenthal: Exc ption.

3442 Q. Did you ever go to a race track?

Mr. Turkus: I object.

Mr. Rosenthal: This has a direct bearing on association, connected with this case.

Mr. Turkus: Then it is withdrawn.

The Witness: What do you mean, did I go to a race track.

3443 Q. Did you ever visit a race track in the year 1936? A. Yes.

Q. Did you ever go to the races when they were in Queens County or up in Westchester at any time?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant, nothing to do with the Rosen killing.

Mr. Rosenthal: We will find out about that.

Mr. Turkus: It certainly does not affect credibility if a man goes to a race track.

3444 The Court: Objection sustained.

Mr. Rosenthal: May I argue this proposition in the absence of the jury?

The Court: No, you may not. Make your question specific so that the Court may see whether it has anything to do with the case.

Mr. Rosenthal: Exception.

Q. Did you ever see the defendant Louis Capone at any race track in or about Long Island or Westchester? A. What do you mean—a lot of times.

Q. In Jamaica, Belmont, anywhere? A. I don't understand what you mean.

Mr. Rosenthal: Being told by your Honor I must ask my questions specifically, after this man has denied he has ever been to a race track—

The Witness: (interrupting) I have been to race track lots of times, with him.

The Court: Now you have your answer. He says he met Capone many times 3446
at the race track.

The Witness: I went with him, too.

By Mr. Rosenthal:

Q. What race tracks did you go with Capone to? A. Jamaica, Belmont, those two tracks.

Q. In 1936? A. I don't recall what year it was.

Q. In 1937? A. It might have been 1937.

Q. Might it have been 1938? A. Might have been.

3447

Mr. Turkus: I object to speculation about visiting race tracks. It has nothing to do with the Rosen killing. After two and a half days of cross-examination I persist in my objection.

The Court: It is of no consequence. Sustained.

Mr. Rosenthal: I respectfully except. And I also except to the statement of two and a half days. He had this man on direct for a day. I have not had him on the stand for three hours, and I am

entitled to a cross-examination as long as his direct, if not more.

Mr. Turkus: Is that statement for the record that he is making?

The Court: Please let it go.

Q. Did you know that Capone owned a restaurant? A. What do you mean by restaurant, sir?

Q. Do you know what the meaning of the word "restaurant" is? A. I understand what you
3449 mean, but if you explain it to me better I will tell you, sir. I know what you mean, very good.

Q. Then answer it. A. A cabaret. He had a piece of it, a partner of the mob.

Q. (The Court) Which one? A. The Rendezvous, on Ralph and Sutter.

Mr. Rosenthal: I move to strike out the answer as not responsive.

The Court: Motion denied.

Mr. Rosenthal: Exception.

By Mr. Rosenthal:

3450

Q. Where was this cabaret? A. Ralph and Sutter.

Q. What was the name? A. Rendezvous.

Q. When was this? A. I don't recall the year.

Q. Do you know whether Capone owned a baker shop at any time? A. I cannot recall, sir.

Q. Do you know he had a restaurant on Stone Avenue—yes or no? A. I cannot recall, sir.

Q. Were you ever in a restaurant that had the name "Capone" on it, at Stone Avenue, at No. 220?

Mr. Turkus: Objected to.
The Court: Objection overruled.

Q. Were you, at any time? A. I cannot recall.
Q. You cannot recall whether you were in a restaurant at 220 Stone Avenue?

Mr. Turkus: I object, that is just what he said.

3452

Q. Is that your answer?

Mr. Turkus: I object to it as argumentative.
The Court: Objection sustained.
Mr. Rosenthal: Exception.

Q. When you were first arrested were you confronted with Reles? A. No, sir.
Q. At any time before you made the statement to Captain Bals and Mr. O'Dwyer, or Judge O'Dwyer, were you confronted with Reles?

3453

Mr. Turkus: Objected to as repetitious. He said no.
The Court: Objection overruled.

Q. What is your answer? A. No, sir.
Q. Did you immediately upon your arrest, or your giving yourself up, talk about the Rosen murder, immediately upon your giving yourself up?

Mr. Turkus: Objected to as repetitious. This was discussed yesterday.

Mr. Rosenthal: Not by me at any time.

The Court: It is repetitious, but, technically speaking, you are entitled to an answer the same as Judge Talley.

Mr. Rosenthal: Judge Talley did not ask about it. The District Attorney rehearsed it—it was brought out on examination by Mr. Turkus.

The Court: If it is on the record, it is there. Let us have it again, though.

3455 Q. May we have an answer to the question? A. What did you say?

By the Court:

Q. Did you talk right away about the Rosen case? A. Yes, sir, right away.

Mr. Rosenthal: If you will pardon me for a moment, Judge, while I look over these papers.

The Court: Can't you let your associate turn over those numerous papers while you proceed on something else?

3456

Mr. Rosenthal: All right.

By Mr. Rosenthal:

Q. Is it not a fact that in this trial, before I asked you today, in the trial in the mountains, you said you did not know what the word "immunity" meant?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

A. You had better look good, sir, look good, look in your book good.

Q. Are you now finished? A. Yes, sir.

Q. When after September 13, 1936, did you next see Louis Capone, how long after? A. About a couple of weeks, sir.

Q. I want to get this straight, now, so that after you say the car left in which you and Ferraco were, you did not see Capone again for a couple of weeks, is that right? A. Yes, sir.

Q. How long have you lived in Brownsville? 3458

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Do you know the Brownsville neighborhood thoroughly? A. Yes, sir.

Q. Had you lived there practically all of your life?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: I have not asked anything on that, sir. 3459

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Prior to 1936, did you know Blake Avenue, in the Brownsville section? A. I passed it, yes, sir.

Q. Had you traveled through it thousands of times before 1936?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

3460 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: Exception.

Mr. Rosenthal: This is in connection with his statement as to Capone having told him about a particular route. I want to show familiarity on his own part for years before with those particular streets.

Q. Well, I will put it in a different form. Prior to 1936, had you driven through Blake Avenue on innumerable occasions?

3461

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant; further, it is repetitious and it does not go to the point urged.

Q. (The Court) Were you thoroughly familiar with Blake Avenue and have you been on it many times? A. Yes, sir.

Q. Were you thoroughly familiar with Pennsylvania Avenue? A. I passed it, yes, sir; I passed around there. That is East New York. You are talking about Brownsville. That is East

3462 New York. You are talking about Brownsville, sir.

Q. Are you through? A. Yes, sir.

Q. Were you thoroughly familiar with Van Sinderen Avenue?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant; it does not go to the point urged.

The Court: Objection overruled.

A. I passed it, sir, yes, sir.

Q. Had you driven through Van Sinderen Avenue on innumerable occasions prior to 1936?

Mr. Turkus: Objected to as repetitious.

The Court: I don't see what bearing it has, because there is no legitimate deduction that the alleged purpose of the rehearsal as to the route was to familiarize him with Brownsville or take a particular course at a certain time.

Mr. Rosenthal: I except to the court's statement and say that is for the jury to determine based upon this man's knowledge of a particular locality, it was necessary to go over it seven or eight times, streets that he knew by heart. 3464

The Court: You are not talking to the court, you are talking to the gallery and to the jury. Sustained.

Mr. Rosenthal: I respectfully except.

The Court: If you were talking to the court, you would be respectful in your manner.

Mr. Rosenthal: I except. 3465

The Court: You are not looking at the Judge, you are looking at the jury, so as to create a feigned attitude in relation to the court, which the court disapproves.

Mr. Rosenthal: I except. I am looking directly at your Honor.

The Court: Now, please proceed with your examination.

Mr. Rosenthal: I take exception to your Honor's remarks.

3466 *Sol Bernstein—For People—Cross*

Q. You are thoroughly familiar for years with each one of the streets which you say you went over with Louis Capone in 1936? A. What do you mean, familiar?

The Court: Is there an objection?
Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Rosenthal: Exception.

3467 Q. I am going to show you a paper and ask you whether that correctly describes the route which you were told by Louis Capone to take, according to your statement.

Mr. Turkus: I object to that.
The Court: Let me see it.
(Paper handed to court.)
The Court: This is a chart. I don't know whether it is correct or not.
Mr. Rosenthal: I am asking the witness if he knows.
The Court: The record sets the route.
3468 All this requires is a check-up against the route.
Mr. Turkus: I have something much better than that. There will not be any question about it. If you have any, I will give it to you now.
The Court: The reason I am going to sustain it is that while it states the route, it also contains something else which is very nice from the viewpoint of the defense but which the court considers improper, and if seen by the jury might create confusion.

Mr. Rosenthal: I ask that it be marked for identification, and respectfully except to your Honor's remark.

(Received and marked Defendants' Exhibit N, for identification.)

Mr. Rosenthal: I ask for a ruling on the question as to whether the witness on the stand can see this and say whether it correctly or does not correctly depicts the route. I will ask the question. 3470

The Court: You will not ask the question. The court has ruled, it is on the record. The stenographer will read the ruling of the court.

(Stenographer reads.)

Mr. Rosenthal: I except to your Honor's ruling. May it appear on the record the witness did not see the paper at all?

Q. When was it you first met Strauss? 3471

Mr. Turkus: Objected to as repetitious.

The Court: Finish the question.

Q. (Continuing) Before the 13th of September, at which time you say you had a talk with him?

Mr Turkus: Objected to.

The Court: Objection overruled. I think you went over that.

Mr. Rosenthal: I have not even touched anything regarding this. This is between

3472 *Sol Bernstein—For People—Cross*

Friday and Sunday. I have not even asked a question on it.

Mr. Turkus: That is true; there was nothing touched on it in the cross-examination about the killing, that is true.

The Court: You are right, that was Judge Talley.

The Court: Is it your intention, Mr. Rosenthal, to go over that?

Mr. Rosenthal: It is my intention to
3473 go over any part of that that in anywise allegedly affects my client, whether Judge Talley, Mr. Turkus, or any other attorney in this case, goes over it in behalf of his own defendant.

The Court: You are not adopting any part of Judge Talley's cross-examination as your own?

Mr. Rosenthal: I don't say that. Any part of his examination which may in anywise affect my client and has any bearing on it, I will not even dwell upon to any
3474 extent, or I may not even touch.

The Court: This was all gone over by Judge Talley. What this court means is, you do not accept the answers of the witness. All right, go ahead.

Mr. Rosenthal: I intend to show there was a difference in his answers to Judge Talley as compared to Mr. Turkus in this trial, and there also may be a difference when I question him. That is what I am cross-examining him for.

The Court: I know what you are cross-examining for. I do not have to be told.

Mr. Rosenthal: I say that with all respect. That was the reason and necessity for repetition.

The Court: There is too much talk to the gallery and not to the court.

Mr. Rosenthal: I except to that. All my remarks are addressed to you, and you alone, and for no other purpose.

The Court: A great many are for other purposes.

Mr. Rosenthal: May I proceed? 3476

The Court: Yes.

Mr. Rosenthal: I will withdraw the question and start over again.

Q. When was it you say you met Strauss prior to the 13th of September in respect to the Rosen matter?

Mr. Turkus: I object to the form of the question. This witness is not testifying according to dates.

The Court: The 13th of September was Sunday, the day of the alleged killing. 3477
Do you mean in relation to this particular killing?

Mr. Rosenthal: I do not know of any other killing. Yes, I directed his attention to Mr. Rosen.

The Court: He knew Strauss for years, it is claimed. Do you want him to tell you each and every time he met Strauss?

Mr. Rosenthal: I mentioned the Rosen killing in my question.

3478

The Court: That is what I am asking you.

By the Court:

Q. When did you first see Strauss in relation to the Rosen killing? A. After I came back from the route with Louis Capone.

By Mr. Rosenthal:

3479

Q. Were you waiting for a party on Friday to come along while you were seated in your automobile? A. No, sir, I was in the Coffee Pot first. I left word there that I would be sitting in the car.

Q. I just asked you whether you were waiting in your automobile for somebody to come along on Friday, and you said, "No, sir." A. Yes, sir.

Q. Now, who was it that you were waiting for to come along? A. Mike Sycoff, who works for Louis Capone and Harry Strauss, a shylock.

3480

Mr. Rosenthal: May I ask it be stricken, all after "Mike Sycoff"?

The Court: Strike that part out.

Q. How long had you been waiting for Mike Sycoff? A. I cannot tell you.

Q. What time of the day were you waiting for Mike Sycoff? A. Must have been 12 o'clock or 12:30, something like that. I did not have any watch; I did not time it.

Q. When you were under direct examination by Mr. Turkus you were asked the time, but

you did not tell him you did not have any watch, did you?

Mr. Turkus: Objected to as argumentative.

The Court: Objection sustained.

Mr. Turkus: I did not ask him the time, the way you did. I withdraw that. I apologize to the Court. I did not mean to wrangle.

The Court: The objection is sustained. 3482

Mr. Rosenthal: Exception.

Q. About what time, to the best of your recollection, was it that you were waiting in your automobile for Mike Sycoff to come along?

Mr. Turkus: Objected to as repetitious, he has stated that.

By the Court:

Q. Was it on Friday morning? A. About 12:45 in the afternoon. 3483

By Mr. Rosenthal:

Q. How long had you been wating before you saw Strauss? A. About 15 minutes, sir.

Q. Were you in the car when you first saw Strauss? A. Yes, sir.

Q. Was this an accidental meeting between you and Strauss?

Mr. Turkus: I object to the form of the question.

3484 *Sol Bernstein—For People—Cross*

The Court: Objection overruled.

A. What do you mean?

By the Court:

Q. Was it an appointment or did he just happen to come along? A. Just happened to come along, sir.

By Mr. Rosenthal:

3485

Q. When he came along where was your car parked? A. On Sackman and Livonia; if you give me a picture I will show you where.

Mr. Rosenthal: Never mind, Mr. Turkus, if I want the information I will ask for it.

Q. How near the Coffee Pot was it you were parked with this car? A. Across the street, on Sackman Street, sir, away from the movies; the movies on the corner of Sackman and Livonia, away from that, a little bit back. Show me the picture and I will show you it good.

3486

Mr. Turkus: May the record show at the time Mr. Rosenthal stated he did not want my assistance, that if he wanted anything he would ask for it, I took hold of People's exhibits in the case and had them in my hand?

Mr. Rosenthal: You started to hand them back toward me, but I told you when

I needed your assistance I would ask you for them.

Mr. Turkus: That is true.

Q. What type of car were you in? A. My own car, a Buick.

Q. What type of car? You understand the question. A. A Buick.

Q. Was it a closed Buick? A. A four-door Buick.

Q. A sedan? A. What do you mean by "sedan"? A sedan, yes, sir. 3488

Q. You have stolen 75 automobiles, haven't you?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained. This is just a waste of time.

Mr. Rosenthal: When the man asked me what I meant by a sedan—

The Court: This is a waste of time. You are only quarreling with the witness, all calculated to lose the attention of the jury, and the Court wants the jury to pay strict attention to the case. 3489

Mr. Rosenthal: There is no such calculation on my part.

The Court: That is the way it works out. If you keep to the point you will hold interest.

By Mr. Rosenthal:

Q. Were you seated behind the wheel of the car? A. Yes.

Q. Was the motor running? A. No, sir.

Q. You had been parked there for about 15 minutes waiting, when Strauss came along?

Mr. Turkus: Objected to as repetitious.

3490 *Sol Bernstein—For People—Cross*

Q. (The Court) Do you know how long it was before he came? A. About 15 minutes.

The Court: It is immaterial anyway.

By Mr. Rosenthal:

Q. Did Strauss then come over to your car? A. Yes sir.

Q. Get into your car? A. Yes, sir.

3491 Q. And you sat down, having a general conversation, is that right? A. Yes, sir.

Q. Now, how long had you been talking before anybody else came along? A. 15 minutes, 20 minutes, 25 minutes, something like that.

By the Court:

Q. Did you time it? A. No, sir, I had no watch.

Mr. Rosenthal: I respectfully except to your Honor interrupting my cross-ex-

3492 amination.

The Court: Mr. Rosenthal, sensibly, in 1936 if you sat in an automobile talking to somebody about nothing in particular, would you at this late day be able to tell how many minutes you sat there?

Mr. Rosenthal: Does your Honor wish me to answer that?

The Court: I am just calling your attention to it.

Mr. Rosenthal: My credibility is not at stake; his is.

The Court: It is not a question of credibility; it is a question of whether this man has a super-brain, beyond yours or mine or anybody else's.

Mr. Rosenthal: That is for the jury to determine, whether he has or whether he is making believe he has, or not.

The Court: Keep to the point.

By Mr. Rosenthal:

Q. Who came along? A. Louis Capone, Mendy Weiss, and Farvel Cohen. 3494

Q. Before they came along nothing was said by Strauss to you regarding getting a drop, was there? A. No, sir.

Q. Now, when they came along who was it that approached the car? A. What do you mean, when they came along? I don't understand what you mean. When they came back?

Q. I am up to the point where you say three men came along. A. Yes, sir.

Q. As you are sitting in the car with Strauss. A. Yes sir. 3495

Q. Now, then, did Strauss call out of the car to these men or did these men walk directly over to the car without being accosted by anybody? A. They walked over to the car, and Pep, they called him, "Come on outside." Before he went outside he said to me, "Hang around, don't go away."

Q. So, without Strauss calling them, they came over to the car where you and Strauss were seated, is that right?

Mr. Turkus: I object. He just said it.

3496 *Sol Bernstein—For People—Cross*

Q. (The Court) Do you recall whether one of them called him out of the car? A. They all called over to the car together.

Q. Then they left the car, is that right? A. Yes, sir.

Q. Did Strauss, while he was waiting in the car with you, say anything about having an appointment with these three men? A. No, sir.

Q. After they left the car, how long were they gone before they returned? A. Might have been
3497 three-quarters of an hour, sir.

Q. During that time did Sycoff come along? A. No, sir.

Q. Did Sycoff ever come along that day while you were waiting for them? A. No, sir.

Q. Had you made an appointment with Sycoff to meet you that day? A. No, sir.

Q. When they returned, in about three-quarters of an hour, who was the first one that spoke to you? A. Harry Strauss, sir.

Q. When he spoke to you the three other men were standing right there? A. Together, sir.

3498 Q. You had previously gone away on trips with Strauss, had you?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: I have not asked him about that. I want to show association between him and Strauss, if any.

The Court: That has been shown. Objection sustained.

Mr. Rosenthal: I respectfully except.

Q. When Strauss came back what was it he said to you in the presence of these men? A. He said to me, "Steal a car and get a drop to

put the car." Then he said to me if I can get a drop. I said, "Yes."

Q. Have you read over the minutes of your testimony since you have been on the stand? A. No, sir.

Q. Will you just repeat what he said to you?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

Mr. Rosenthal: I submit I am entitled to that. I take exception. 3500

Q. Didn't he only tell you at that time merely to get a drop, and saying nothing about stealing a car?

Mr. Turkus: Objected to as repetitious. This witness just answered.

The Court: Objection sustained.

Q. Is it not a fact he merely told you to get a drop and said nothing about stealing a car?

Mr. Turkus: Objected to as repetitious. 3501

The Court: The Court has ruled on that. The last question should not have been put.

Mr. Rosenthal: I respectfully except to to the Court's ruling.

Q. Weren't you told to steal a car on the following day? A. No, sir.

Q. After he told you to steal a car and get the drop, and then he changed it and said, "Can you get a drop?" Is that it?

3502 *Sol Bernstein—For People—Cross*

Mr. Turkus: I object.

The Court: Objection sustained.

Q. Did they leave you? A. What do you mean?

Q. Did the people leave you and you stay alone then? A. They told me to come back at Sackman and Livonia at four o'clock on Saturday.

Q. Is that all that was said? A. That is all
3503 that was said.

Q. That was all said by Strauss, wasn't it? A. Yes, sir, they were together, sir.

Q. Strauss was the only one that was doing the talking, is that right? A. Yes, sir.

Q. Did they then leave? A. Yes, sir.

Q. All of them together? A. Yes, sir.

Q. Did they walk away? A. Yes, sir.

Q. And you remained there, waiting, with your car? A. No, sir.

Q. Did you leave with your car? A. Yes, sir.

Q. When you left with your car, where was it you went to? A. Lincoln and Ralph, to get a
3504 drop.

Q. Were you familiar with the locality, Lincoln and Ralph? A. Yes, sir.

Q. Did you know the owner of the place where you went to get the drop? A. No, sir.

Q. Did you go to get this drop without being directed in what vicinity you were to get the drop? A. No, sir.

Q. Were you told by anybody where you were to get the drop? A. No, sir.

Q. Well then, you went to this particular vicinity without instructions as to where you were

to get a drop? A. I went cruising until I came to that spot.

Q. Cruising? A. Yes, sir, looking around for a place.

Q. But you cruised around for this place without any direction from anybody as to where the drop you were after was to be located?

Mr. Turkus: Objected to as repetitious and answered twice.

The Court: Objection sustained.

Mr. Rosenthal: Exception. 3506

Q. How many times had you been to the locality where this drop was located? A. What do you mean? I don't understand what you mean.

Q. I will put it a little more plainly. How many times had you been in this neighborhood or block where you say this drop was located? A. Jesus, I passed around there lots of times.

Q. Were you very familiar with that particular locality?

Mr. Turkus: I object. He says he went over it many times. 3507

The Court: Sustained. It makes no difference. You do not have to be familiar with a locality to get a drop.

Mr. Rosenthal: These are all matters brought out on direct.

The Court: It is all irrelevant.

Mr. Rosenthal: They were brought out on direct.

The Court: Sustained as irrelevant, a waste of time.

Mr. Rosenthal: Exception.

3508

Q. Do you know the name of the person from whom you rented the drop? A. No, sir.

Q. Was it a man or a woman? A. A woman, sir.

Q. Did you see the woman in the District Attorney's office? A. Yes, sir.

Q. When you were asked by Mr. Turkus, didn't you say you saw a man, the owner, in the District Attorney's office? A. No, sir.

Q. It was a woman you saw? A. Yes, sir.

3509

Q. When was the last time you saw this woman in the District Attorney's office? A. Four or five months ago, I think.

Q. Did you go over the route or place where the drop is located since you gave yourself up? A. Yes, sir.

Q. When did you go over the place, and with whom, where the drop was located? A. At first I went with Captain Bals.

Q. How long after you gave yourself up, about, if you remember? A. About three or four weeks, I think.

Q. About three or four weeks?

3510

The Court: He said, "I think."

Q. Did you go over more than once the place where it is located? A. Yes, sir, with District Attorney Turkus, Mr. Klein, and plenty of detectives.

Q. How many times did you go over there? A. I went once, then once taking pictures, pointing out the spot.

Q. How many times did you go up there? A. About three times all told, with Captain Bals, maybe four times.

Q. You led them to the place where the drop was located? A. Yes, sir.

Q. How long before you surrendered yourself was it you had last seen the drop? A. What do you mean, how long?

Q. Had you ever seen it after September 13, 1936, had you ever gone there again? A. No, sir, only when I went with them, sir.

Q. Up until the time you gave yourself up and went with them, had you ever gone to this place since September, 1936? 3512

Mr. Turkus: Objected to as repetitious. He just answered it.

The Court: Sustained as repetitious.

Mr. Rosenthal: Exception.

Q. At what time was it, approximately, that you got the drop? A. I would say close to three o'clock.

Q. Then where did you go? A. I went looking for Muggsy—oh, I went to get a lock first by the locksmith; then I went looking for Muggsy—Muggsy Cohen.

Q. What time was it you went looking for Muggsy? A. After I got done getting the lock. 3513

Q. Three o'clock? A. I got done about three o'clock.

Q. Four o'clock?

Mr. Turkus: I object. He has just answered.

Q. (The Court) Did you time yourself by a watch or a clock? A. No, sir, I didn't have no watch.

3514 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: I object to the court's question.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Q. Approximately at what time was it you then went to get Muggsy? A. I found him at eight o'clock at night.

Q. Did you state in answer to—

Q. (The Court) Did you take any pains to jog your memory all these years with the time of
3515 day that each one of these events happened?

Mr. Rosenthal: May I have an exception to your Honor's question?

The Witness: I could never forget.

By the Court:

Q. Did you pay any attention to the particular time? A. No, sir, I did not have no watch. I did not have no diary.

Q. Did you keep any record of the hours or
3516 minutes? A. I did not have a diary.

Mr. Rosenthal: I except to the court's questions, interrupting my cross-examination.

The Court: I am not interrupting. You have been turning pages and asking no questions for some time.

By Mr. Rosenthal:

Q. You just testified when Mr. Turkus asked you the question and when Judge Talley asked

you the question first, that you met Muggsy at two o'clock. Did you say that in this very trial?

Mr. Turkus: I object That is not the testimony.

The Court: The previous testimony speaks for itself.. Objection sustained.

Mr. Rosenthal: Exception.

Q. What did you do between the time you say you got the drop and you went looking for Muggsy—just look for him some place? A. I looked for him some time, and I hung around Amboy and Sutter, that is where he comes around. 3518

Q. You hung around there for five hours? A. Wait a minute—no, I cruised around maybe for two hours. For two hours I was looking for him, sir.

Q. Which is it, you hung around Amboy and Sutter, or you cruised around for a couple of hours looking for him first?

3519

Mr. Turkus: I object to that as repetitious.

The Court: Sustained. He has answered it.

Mr. Rosenthal: Exception.

Q. How long did you hang around the corner of Amboy and Sutter waiting for Muggsy Cohen? A. About three hours.

Q. Then he finally came along, is that right? A. Yes, sir.

3520

Q. Now, you took him or wanted to take him along because you knew there was going to be a murder, isn't that right, you wanted him to help you? A. No, sir; if I knew there was going to be a murder, I would not let him take out the radio, I would not have made up a key, and I would not have gotten a two door car.

Q. If you knew there was going to be a murder, you would not have made any key? A. No, sir.

3521

Mr. Turkus: I object to it. He has answered.

(By direction of the court, the last answer of the witness was read.)

Q. Why, you were told when there was going to be a murder? A. Saturday, when I came back with Louis Capone from the route, Saturday at four. I met Louis Capone at four o'clock. He took me over the route and he told me there was going to be a murder.

Q. You remember that time specifically? A. I cannot forget it. I never will forget it, sir.

3522

Q. Are you finished?

Mr. Rosenthal: I move to strike that out, his exclamation. I will withdraw it.

Q. You did forget, Mr. Bernstein, that when you were eighteen of age you went out to kill a man in a stick-up if he resisted, you with two other professional stick-up men, that you forgot until I directed your attention to it on this trial?

Mr. Turkus: I object to it as repetition.

The Court: Objection sustained. This is simply a quarrel.

Mr. Rosenthal: Exception.

Q. You had always stolen cars from garages, hadn't you?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained. 3524

Mr. Rosenthal: I never touched on any of this examination, sir.

The Court: The record accommodates you with that information, unless you want to prove that he did not.

Mr. Rosenthal: I submit, if I can get a ruling from the court—

The Court: If you want testimony that he did not steal a great many, I will let you proceed.

Mr. Rosenthal: That is not the purpose of my question at all.

The Court: Then the Court sustains 3525
the objection.

Q. Of the 75 cars which you admit having stolen, with the exception of this one, you stole alone, didn't you?

Mr. Turkus: I object to that as repetitious.

The Court: Objection overruled.

Q. (The Court) Were you always alone? A. Always alone, except this car.

3526 *Sol Bernstein—For People—Cross*

Q. And the 75 cars, with the exception of this one that you stole, were stolen from garages and not from the street, is that right?

Mr. Turkus: Objected to as repetitious, already gone over; he has been over two days on cross-examination as to the theft of cars, the make of cars, where they were stolen from.

The Court: Please do not argue. The
3527 objection is sustained as repetitious.

Mr. Rosenthal: Exception.

Q. Did you steal any other car other than this one in question, from the street?

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled.

A. Always in garages, sir.

Q. Now, when you met Muggsy that night at eight o'clock you asked him to do you a favor, to come along with you, didn't you? A. Told
3528 him to get the hot box and meet me at 12 or 1 o'clock at night, do me that favor, yes, yes, if that is what you mean.

Q. (The Court) By "hot box" do you mean jumper? A. Yes, sir, a jumper to start the car.

Q. In the 74 other cars, approximately, that you had stolen, no jump box was ever used? A. Yes, sir.

Mr. Turkus: Objected to as repetitious; he said there was—

The Court: No argument.

Q. Were you asked these questions at page 670:

"Q. What did you do? A. Where?

"Q. Where you went at three o'clock in the afternoon. A. I seen Muggsy Cohen.

"Q. Who is Muggsy Cohen? A. A car thief and radio—"

Mr. Turkus: Will your Honor read the next question and you will see that is the fourth time they were asked?

3530

Mr. Rosenthal: Again that is improper for the District Attorney to state. If there is anything about the testimony that he wants to read he has a right after I get finished to read such part as he desires.

Mr. Turkus: I know the law. I am making objection it is repetitious.

The Court: Sustained as incompetent for the simple reason it is already in the record and before the jury. But it is noted that from a strict construction of the text it is not inconsistent with what he has testified to in answer to you. He does not say he saw Muggsy Cohen at that hour.

3531

Mr. Rosenthal: I except to the Court's interpretation of the testimony instead of leaving it to the jury to determine.

The Court: You may argue that to the jury.

Mr. Rosenthal: I am making a legal objection.

The Court: At the right time. The Court has ruled. Proceed.

3532 *Sol Bernstein—For People—Cross*

If we can hold this examination down to relevant matters and avoid incompetent matters, it is possible another witness may be able to testify before we recess this afternoon. Now please proceed with that argument.

Mr. Rosenthal: I am not going to argue, but I am going to—

The Court: This is simply a waste of time. The Court is through. Now proceed with the witness.

3533

Mr. Rosenthal: I submit I have a right to put an exception on the record.

The Court: I know your rights, and I know the Court's rights very well, and I am quite confident the Court is right. Proceed.

Mr. Rosenthal: I respectfully except to the Court's statement, since this man has not been under my cross-examination—

The Court: (interrupting) No speeches. You have your exception.

Mr. Rosenthal: All right, I except to the Court's statement.

3534

Q. When was it you went with Muggsy to get the car? A. About 12 or 1 o'clock.

Q. Did you just cruise around until you found a car? A. What do you mean, sir? We were looking for a car, yes, sir.

Q. You used the word "cruise" didn't you? A. Yes, sir.

Q. Did you cruise around looking for a car?

Mr. Tarkus: Objected to as repetitious. He has just answered.

3535

Mr. Rosenthal: He asked me what I meant. I want a direct answer from this man as to what I do mean and his understanding of what I mean.

The Court: This is splitting hairs on verbiage. Sustained as repetitious.

Mr. Rosenthal: Exception.

Q. Had you ever been in the particular locality where you stole this car before?

3536

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

A. Yes, sir.

Q. When for the next time after you stole this car was it that you went back to that particular location with anybody to show them where the car had been stolen from?

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled.

3537

By the Court:

Q. When did you take Captain Bals or anybody else to Lefferts Avenue, do you remember how long after? A. Three weeks after I told them everything I done, then I went with Turkus, Mr. Klein, and plenty of detectives. I showed them everything. That is how they got those pictures.

Q. Did you keep a diary of any of those times? A. No, sir.

3538 *Sol Bernstein—For People—Cross*

By Mr. Rosenthal:

Q. Did you, from the day you stole the car until the day you returned after delivering yourself up, ever go back to that particular spot where that car had been stolen from?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Sustained as irrelevant.

3539 Mr. Rosenthal: Exception. That is all on the question of this man's credibility, on the testimony given on direct.

The Court: The court knows your purpose without any explanation.

Q. You had no difficulty recognizing the exact spot that you stole this car from when you went back four or more years afterwards with Captain Bals, did you?

Mr. Turkus: Objected to as argumentative.

3540 The Court: Objection overruled.

A. There was an empty lot there.

Q. (The Court) Did you have any difficulty in finding or recognizing it? A. No, sir.

Q. What time was the car stolen? A. About one o'clock.

Q. Was it stolen at two o'clock? A. Maybe two o'clock I didn't have a watch; I didn't keep this in any books, whatever I done.

Q. Are you finished?

3541

Mr. Turkus: I object to the question, "Are you finished?", when it is apparent the witness said nothing for seconds.

The Court: Proceed with the next question.

Q. Why was it you wanted Muggsy Cohen with you on this particular theft when you stole seventy-five cars alone, why did you want him to do you a favor on this particular car?

3542

Mr. Turkus: I object. That is a double question.

Mr. Rosenthal: I will withdraw it.

Q. Why did you take Muggsy Cohen? A. Because it didn't make anything to me; he was a radio crook, just take the car and take the radio out; it didn't mean anything to me after he takes the radio out.

By the Court:

Q. Then the impression was, if the car was found, it was stolen for the purpose of stripping? A. Yes, sir. 3543

Q. And not for the purpose of committing any other crime? A. Yes, sir.

By Mr. Rosenthal:

Q. You understood the Judge's question? A. Yes, sir.

Q. What were you trying to conceal, if the car was found, so as to make it look as if it was only for stripping and not for any other purpose?

3544 *Sol Bernstein—For People—Cross*

By the Court:

Q. (Interrupting) Just answer the next question yes or no— Did you have a suspicion as to what Strauss wanted the car for?

Mr. Rosenthal: I object.

The Court: The objection is sustained. I thought you wanted that evidence.

Mr. Rosenthal: I don't want words put in the witness' mouth. I wanted him
3545 to tell me, not have your Honor ask him a question which would call for yes or no— I want him to tell the jury the reason. I don't want the reason furnished.

Mr. Turkus: I object to that.

The Court: It does not penetrate the Court's skin. Go ahead.

Mr. Rosenthal: I have no desire to penetrate your skin any more than you have to penetrate mine. We are both practicing law after this case is over, you on the Bench, and me at the Bar, I hope.

3546 The Court: Please proceed with the trial.

By Mr. Rosenthal:

Q. You understood the court's original question to you as to the fact that the reason why you wanted Buggsy Cohen was that if the car was found with the radio out, it would look as though the car was merely taken to be stripped and not for any other purpose? You understood that when you answered the court's question?

Mr. Turkus: Objected to as repetitious.
The Court: Objection overruled.

Q. Did you understand that? A. What is that again?

(Question repeated by reporter.)
The Witness: No, sir.

Q. You did not understand the court's question? A. No, sir.
Q. Do you understand what I am asking you now? A. Yes, sir. 3548
Q. I am asking you whether you understood the court's question that the court asked you, when you answered the court in the affirmative, "Yes", regarding— A. Did you understand—
Q. I can. A. Yes.

Mr. Turkus: I object, and ask that that be stricken out. When it is obvious, I will register an objection. You cannot by any other way get an answer in over an impending objection. That is why I stood 3549
up.

The Court: It is also obvious that by the time all this confusion is over the witness will not have the least idea what he is expected to answer.

Q. What I asked you when you just answered was this— Do you remember that Judge Taylor asked you a question about taking Muggsy Cohen along?

Mr. Turkus: Objected to as repetitious.

3550 *Sol Bernstein—For People—Cross*

The Court: Objection overruled.

A. Yes.

Q. You remember in that question he asked you—the Judge—whether or not the real purpose of taking Muggsy Cohen along and taking the radio out of the car was so that when the car would be found it would appear that the car had merely been stolen for stripping and for nothing else. I think I have substantially stated it.

3551

The Court: That is correct.

By the Court:

Q. Was that the reason? A. I did not know there was to be a murder or I would never have him take out the radio of the car.

Mr. Turkus: He did not understand your Honor's question. That is clear.

The Court: You may, if you wish, make inquiry as to why he took Muggsy Cohen.

3552

Mr. Rosenthal: May I pursue once more whether he definitely says now he did not understand what your Honor meant.

The Court: That is clear. Put the next question.

Q. Why, then, did you ask Muggsy Cohen at eight o'clock in the evening of Friday to do you a favor and go along with you at twelve o'clock and help you steal the car—why was it you asked Muggsy Cohen to do this when you stole every other car you ever stole in your life alone? Tell

the jury why it was. A. I thought it was to be a slamming job. I didn't figure it was to be murder.

By the Court:

Q. For what? A. To break somebody's head.
Q. How do you spell that—s-c-h-l-a-m? A. I really cannot tell you.
Q. What is the Yiddish meaning of schlam?

3554

Mr. Turkus: I think it is a cut, a slam.

Mr. Rosenthal: I will take your definition.

By Mr. Rosenthal:

Q. What is it slam? A. Yes, sir.
Q. Not slumming? A. No, sir.

Mr. Turkus: I object; that is intended to be semi-comic, I take it.

The Court: Objection sustained.

3555

Q. So you say when Muggsy Cohen—when you took Muggsy Cohen along, you felt that somebody's head was going to be broken, is that it?

Mr. Turkus: I object to that as repetitious.

Mr. Rosenthal: It is very important in view of the previous statement in respect to this particular thing.

The Court: Sustained.

Mr. Turkus: While we are at it, may the record also indicate, in view of Mr. Resen-

3556 thal's objection to where the witness was looking, that half the time Mr. Rosenthal himself looks in the direction of the jury when he questions the witness.

Mr. Rosenthal: I followed Mr. Turkus' habit since this case started, and Mr. Klein's also. That is all they have been doing since this case started.

Mr. Turkus: It might be up to him to take a look at fourteen good looking men.

3557 Mr. Rosenthal: Of course, this is an obvious attempt to curry favor.

The Court: I think it would curry favor with the jury if we would get down to the point.

Mr. Rosenthal: I know that, but I will not let Mr. Turkus get away with it.

The Court: Because they want to get through and get back to their work. The case should be tried with reasonable expedition.

3558 Q. Is it definite that the reason why you wanted Muggsy to steal this car was that you did think a crime was going to be committed with that car?

Mr. Turkus: Objected to as repetitious. He has explained it.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. If you thought, as you just testified now, that somebody was going to be beaten up with this car, then why did you allow Muggsy to take the radio out?

Mr. Turkus: I object. We can go on ad infinitum, why, why, why.

Mr. Rosenthal: Again we have another speech. This is taking more time than all of my examination.

Mr. Turkus: That is as true as anything else you say.

Q. Why did you let Muggsy take the radio if you thought a crime was going to be committed? A. It was not a murder, sir.

Q. Murder is more serious? A. Yes, sir. 3560

Q. This definition of crime—what do you mean by schlam, beating with the fists, beating with a blackjack, beating with the hands, beating with a blackjack over the head, or with a gun, or with a pipe; what does it mean? A. A pipe.

Q. A lead pipe? A. Yes, sir.

Q. You mean—I want to get a definition of this—that people take a lead pipe and hit the other man over the head with the lead pipe?

The Court: That is a known custom.

Mr. Rosenthal: It is not known by me. 3561
This is the first time I ever heard the name in my life.

Mr. Turkus: I congratulate you, Mr. Rosenthal.

Mr. Rosenthal: May we have again on the record the Chesterfieldian bow of Mr. Turkus. We have the hands—

The Court: Will you please proceed with the trial of the case?

Mr. Rosenthal: I think I have a right when my integrity is impugned.

The Court: The man has told you in

3562 *Sol Bernstein—For People—Cross*

answer to your question that he meant slugging with a lead pipe. Now, please proceed with your next question. Let all this nonsense stop. By nonsense, I mean constant interruption by both counsel to the orderly conduct of this cross-examination along competent and relevant lines.

Q. After you stole this car with Muggsy Cohen, who drove the car? A. Muggsy Cohen, sir.

3563

Q. Did you at that time have your own car with you? A. Yes, sir.

By the Court:

Q. Did he wear gloves? A. Yes, sir, so as not to get any fingerprints.

By Mr. Rosenthal:

Q. Did you carry gloves in your car for that purpose?

3564

The Court: He said he got them from his own before he went on the job. He testified he got the gloves before he went to take the plates.

Mr. Rosenthal: This is the automobile.

Mr. Turkus: Further, there was not a single fingerprint.

By the Court:

Q. Did Muggsy use gloves? A. Yes, sir, he had his own gloves.

Q. He is an old time thief? A. Yes, sir, a radio thief and a car thief.

By Mr. Rosenthal:

Q. And you used the gloves? A. Yes, sir.
Q. While the car was being stolen? A. Yes, sir, I held the flashlight, sir—oh, no, no, sir—wait a minute—no, sir.
Q. Do you just recall that you did not have anything to do with stealing the car at all? A. 3566
In the garage I had the gloves.
Q. We will come to the garage afterwards. The Judge asked you, Judge Taylor, whether you wore gloves, and you said, "Yes", and I asked you whether you wore gloves when you were stealing the car, and you said, "Yes," didn't you?

Mr Turkus: Objected to as repetitious.
The Court: Sustained. He corrected that.

Q. When was it you put the gloves on? A. 3567
When we pulled the car from the garage—when the car was in the garage we were taking out the radio and I had to hold the flashlight.
Q. That was your flashlight? A. Yes, sir.
Q. You carried that flashlight in the car with you? A. It was in my own car. I took it out of the car.
Q. And brought it there, wearing gloves, while he was taking the radio out, is that right? A. Yes sir, I was holding the flashlight when he took out the radio.
Q. You did not touch this car all that time?

A. What do you mean, I had to touch the car with the flashlight; I had to touch the door, to hold the door open, and give him light to take the radio out underneath.

Q. Up until the time the car had gotten to the garage you had not touched it, had you?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant. He has told us what he did.

3569 Mr. Rosenthal: There goes another speech.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. When the radio was taken out of the car, what did you do? A. Took Muggsy in my own car.

Q. Where did you drop him off at? A. Amboy and Sutter.

Q. In the street, with the radio? A. He went into some house.

Q. How long had you known Muggsy Cohen
3570 before that? A. Ten or twelve years.

Q. You had been very friendly, very close to him, hadn't you?

Mr. Turkus: Objected to as repetitious. You even asked him if he went to Florida with him.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

The Court: Gentlemen of the jury, please remember the previous admonition and follow it in all details. The witness is first remanded.

Mr. Talley: May I speak to your Honor before you leave the Bench, privately, with the District Attorney?

The Court: I will let the jury go out now. Gentlemen, we will adjourn until one-thirty P. M.

The Court: Now, counsel may come up.

(Mr. Turkus, Mr. Klein and Mr. Talley confer with the Judge privately before the Bench.)

(The jury leaves the court room.) 3572

(Defendants remanded.)

(Recess until 1:30 P. M.)

Afternoon Session. Trial Resumed.

SOL BERNSTEIN, resumes the stand for further cross-examination:

By Mr. Rosenthal:

3573

Q. You say on Saturday, at four o'clock, you met the defendant Capone and Strauss, did you? A. Yes, sir.

Q. Where? A. Sackman and Livonia, sir.

Q. On the street? A. Coffee Pot, sir.

Q. In the Coffee Pot? A. Called me out, sir. We went out, sir, right outside.

Q. Which is it, they called you out or you went out?

Mr. Turkus: Objected to. That is argumentative "Which is it?". The answer is clear.

The Court: Sustained.
Mr. Rosenthl: Exception.

Q. Did they come after you or were you there waiting for them? A. They were there, sir.

Q. And then you went into the Coffee Pot? A. Yes, sir.

Q. And then you all left? A. Went outside, sir.

Q. Did Harry Strauss say anything at all? A.
3575 He was there, sir.

Q. Did he say anything at all? A. No, sir.

Q. The only one that spoke was the defendant Capone, is that right? A. Yes, sir.

Q. Just what did the defendant Capone say to you then at that time? A. I told him I got a two-door car and he started hollering at me.

Q. Did Strauss say anything at all? A. He was there, sir.

Q. Did he say anything? A. No, sir.

Q. What next was said? A. Louis Capone told me to take a ride with him, sir.

Q. What did he say, "Get in the car and take
3576 a ride"? A. I had my car, sir. He drove my car.

Q. Did you have the other car there, too? A. No, sir.

Q. At that time where was the other car? A. In the drop, sir.

Q. Had you driven up in your car? A. To the Coffee Pot, sir?

Q. Yes. A. Yes, sir.

Q. And when you drove to the Coffee Pot, were you alone? A. Yes, sir.

Q. Then when he told you, "Come on, take a

ride", he got in and started to drive your car? A. Yes, sir.

Q. Did he drive it over streets that you were familiar with? A. At Bradford and Blake he started to show me the route, sir.

Q. I ask you did he drive it through streets that you were familiar with?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: He did not answer.

Mr. Turkus: He did. 3578

Mr. Rosenthal: I ask the answer be stricken as not responsive.

The Court: He said before he was familiar with all of those streets.

Mr. Rosenthal: I am not talking about the streets of the alleged route now. I am talking, from the Coffee Pot to where they drove.

The Court: From the Coffee Pot? Do you remember the route?

The Witness: Yes, sir; went straight down with Sackman Street, made a left turn until we came to Blake Avenue because you can't go through Vermont or Livonia because there is a trestle. The only way is Blake Avenue, the only entrance. Blake Avenue and Sutter Avenue, there is entrances there. 3579

Q. You were familiar with that?

Mr. Turkus: Objected to as answered.

Mr. Rosenthal: It has not been answered.

3580 *Sol Bernstein—For People—Cross*

The Court: Yes or no.

The Witness: Yes, sir.

The Court: Was there any street in Brownsville you are not familiar with?

The Witness: I lived in Brownsville. I was born in Brownsville.

The Court: Were you familiar with all of the Brownsville Streets?

The Witness: Yes, sir, not East New York but I know how to get around, sir.

3581

Q. Are you familiar with the points of the compass, north, east, south and west? A. No, sir.

Q. From the Coffee Pot you drove through Sackman Street?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Where did you stop, if you stopped at all, after you left the Coffee Pot and got to Bradford
3582 and Blake? A. What do you mean, sir?

Q. Did the car stop any place? A. When we came to Bradford and Blake, he slowed up, sir.

Q. Did it come to a stop? A. No, sir.

Q. So that from the time that you started from the Coffee Pot, you did not stop until you returned back to Van Sinderen Avenue, is that right?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception. I have not even questioned on that.

Q. Did you ever stop on the route from the time you left the Coffee Pot until you arrived at Van Sinderen Avenue and the railroad station? A. No, sir.

Q. When you slowed up at Bradford and Blake, was there any conversation between you and Capone? A. He says, "Now watch. This is the route you are going to take", sir.

Q. Is that all? A. When we came to the candy store, he told me, "This is where a guy is going to get killed." That is on Sutter Avenue and 3584
Bradford.

Q. We will come to the candy store in a minute. At Bradford and Blake, did you tell us all the conversation that you had?

Mr. Turkus: Objected to. It is repetitious.

The Court: Is that all the conversation, do you recall?

The Witness: I don't recall. That's what he told me. I remember very good — can't forget it, sir.

3585

Q. So that as far as you remember, you have now related to me the entire conversation that was had at Bradford and Blake, is that right?

Mr. Turkus: Objected to as repetitious. He has just said so.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. You continued going slowly then until you got to where the candy store was on Sutter Ave-

nue, is that right? A. What do you mean, slowly?

Q. Did you go slowly? A. You got to make a left turn. You got to go slow.

Q. Did you go slowly? A. When you made a left turn, sure, you got to go slow. There is lights over there, sir. I think there was lights —I ain't sure—but when you make a left turn you got to go slow.

3387 The Court: Did you go slow?

The Witness: Yes.

Q. At that time were there lights on Sutter Avenue?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

The Court: Nothing to do with the case.

Mr. Rosenthal: I respectfully except
3388 to that, your Honor.

Q. While you were passing the candy store, you just told us that Capone said something to you. Did he say anything else excepting what you have already stated in answer to the previous question just a couple of minutes ago? A. When we come to the store, that's all he said, sir.

Q. As you left the store,—the store was on Sutter Avenue between Bradford and Wyona; is that right? A. More to Bradford Street.

Q. Did you continue down Sutter Avenue as

you left the store? A. Made a left turn on Sutter and Wyona.

Q. That is the first corner that you come to? A. Yes, sir.

Q. Then how many blocks did you go on Wyona? A. I went one block, sir, into Wyona and Blake.

Q. That is Blake? A. Yes, sir.

Q. Then how did you turn? A. I went straight ahead with Blake into Pennsylvania.

Q. You made a turn into Blake, did you? A. 3590
A right turn, yes, sir.

Q. And then when you turned into Blake you went on Vermont? A. Wait a minute—I said Pennsylvania, sir.

Q. How many blocks down from Wyona is Pennsylvania Avenue? A. That I did not count, sir.

Q. You know that between Wyona and Vermont are New Jersey and then Pennsylvania Avenue, don't you? A. I went the way he told me, sir. I didn't count.

3591

Mr. Rosenthal: I ask the answer be stricken as not responsive.

Mr. Turkus: I ask that it stand. It is responsive.

Mr. Rosenthal: I am asking for his knowledge now, sir.

The Court: Strike it out.

Q. Do you know that from Wyona Avenue to Pennsylvania Avenue there were two intervening streets, Vermont Street and New Jersey Avenue? A. Can't tell you that, sir. I done the way he told me, sir.

3392 *Sol Bernstein—For People—Cross*

Mr. Rosenthal: I ask that the latter part be stricken as not responsive.

The Court: No harm done. Strike it out.

Q. Were you familiar with Vermont Street at that time? A. I said I was not so familiar with East New York. Brownsville I said I was familiar.

Q. You turned where on Pennsylvania Avenue, what turn left or right? A. Left.

3393

Q. How many blocks did you go then? A. One block, sir, to Dumont, made a right turn on Dumont.

Q. And then you went straight down Dumont, didn't you? A. Yes, sir.

Q. For six blocks? A. I don't know how many blocks. I went to Snediker Avenue, sir.

Q. You knew Snediker Avenue— A. Yes, couldn't miss that because it was a one way street.

Q. Will you please wait until I finish the question? You knew where Snediker Avenue lay

3394 from Pennsylvania Avenue, didn't you?

Mr. Turkus: Objected to. Just answered it was a one way street.

Mr. Rosenthal: That is not an answer to my question.

Mr. Turkus: I have an objection that it is answered.

The Court: Let it stand.

Q. Did you know where Snediker Avenue lay from Pennsylvania Avenue, going down on Dumont Street?

Mr. Turkus: Objected to as repetitious.
Mr. Rosenthal: I have not asked it yet.
The Court: Sustained.
Mr. Rosenthal: Exception.

Q. When you got to Snediker Avenue, what did you do? A. Made a left turn.

Q. For how many blocks? A. One block. That is Livonia Avenue, sir. That is where the elevator is.

Q. And then what did you do? A. Made a right turn, sir. 3596

Q. For how many blocks? A. Just one block, sir.

Q. Then what did you do? A. Made a right turn and stopped, sir.

Q. Right off the corner? A. Right off the corner, yes, sir.

Q. All told, the entire distance that you traveled from the store to where you stopped at Van Sinderin Avenue was approximately how far, in mileage? A. I didn't check it, sir.

Q. Have you any idea? A. No, sir.

Q. Can you tell us how long it took, approxi- 3597
mately? A. I didn't have no watch, sir. I didn't clock it, sir.

Q. Did you go slowly over the route? A. What do you mean slowly? I came from the store and the turns, that's where I had to watch myself, sir, them turns—the only thing I had really to know, sir, them turns.

Q. As you were coming from the store, going to Van Sinderen, on this Saturday, did you slow up at each turn? A. Yes, sir. Louis Capone drove the car, sir. He drove my car all the time, sir.

Q. Did he drive slowly over the route?

3598 *Sol Bernstein—For People—Cross*

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: I respectfully except, sir.

Q. Was anything said, after you left the candy store, up until the time that you arrived at the Van Sinderen Avenue station? A. What time is it?

Q. While you were driving along. A. He kept
3599 on talking. He said, "Watch", "Make sure", "Don't forget."

Q. This is on the first trip I am talking about now. A. I can't remember that. We went over it seven or eight times.

Q. Yes, you said that to Mr. Turkus. I am asking you on your first trip was anything said after you left the candy store up until the time that you arrived at Van Sinderen Avenue?

Mr. Turkus: Objected to as repetitious.

The Court: You mean at the time he arrived?

3600 Mr. Turkus: On the first trip.

Mr. Rosenthal: On the first trip, between the time he left the candy store and up until the time he arrived.

Mr. Turkus: This will go on for seven or eight trips.

The Court: Inclusive of the time that he arrived?

Mr. Rosenthal: No, sir, I said up until the time he arrived.

The Court: You mean while on the way to the destination?

Mr. Rosenthal: Yes, sir.

Mr. Turkus: He has answered that, your Honor.

The Court: He has answered it.

Mr. Rosenthal: I submit there is no answer to that question, but I will accept the Court's ruling on it. Does your Honor overrule or sustain the objection?

The Court: Oh, let him answer again.

A. When we came to Bradford and Blake, he says to me, "Watch."

3602

Q. I said, after you left the candy store—is that clear? A. Yes.

Q. And up until the time and just prior to the time that you stopped at Van Sinderen Avenue, on your first trip, was anything said by Louis Capone to you?

Mr. Turkus: I object to the question. It is misleading in its form because Capone was driving.

The Court: I know what it means.

Mr. Turkus: It is repetitious.

3603

The Court: It is a little bit of a net. I asked you, sir, if you meant inclusive of the time of stopping. You said no.

Mr. Rosenthal: That is right, sir.

The Court: And now you make it up to practically the same moment. That is confusing.

Mr. Rosenthal: I said up to and prior to the time that it stopped, is my question, sir—prior to the time it stopped and while en route from the candy store to Van Sinderen Avenue. I cannot make it any plainer than that.

Mr. Turkus: That is repetitious.

The Court: He has answered that. You can ask him, if you wish, what, if anything, was said when the car was stopped.

Mr. Rosenthal: I respectfully except. There is no answer to the question, as I recall it. I take it then your Honor sustains the objection?

The Court: Yes.

Mr. Rosenthal: I respectfully except.

3605 Q. After you had come to a stop at Van Sinderen Avenue, was there any talk between you and Capone? A. While riding in the car, he told me, "Watch."

The Court: No, did he say anything?

The Witness: He says, "This is the route you are going to take."

The Court: —when the car arrived at its destination?

The Witness: He said, "Here is where you dump the car."

3606 Q. Is that all he said? A. Then he went over the route again and showed me, to make sure.

Q. I first asked you is that all he said while you were at that point. Is that all he said? A. I didn't have a book and wrote down everything what he said to me, sir.

Q. Is that all you remember he said?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Now, then, you started on the same route again, is that right? A. Yes, sir.

Q. How did you get back to Bradford and Blake? What route did you take? A. Made a right—

Mr. Turkus: I object to it, may it please the Court, ' is incompetent, irrelevant and immaterial. Besides the question is misleading because so far it has been indicated Capone was driving. 3608

The Court: Yes.

Mr. Rosenthal: Again we have an interjection by the District Attorney which I object to.

The Court: It is one of the questions that this man might readily answer without noticing the joker, "What route did you take?"

The Witness: Louis Capone was driving the car all the time, sir. I was not driving. All the time he was driving my car. After he left Sackman and Livonia, he had my car all the time, sir. 3609

The Court: These rehearsals that were held, did you go back and forth the same route?

The Witness: Same route, sir.

The Court: Each time?

The Witness: Each time same route.

By Mr. Rosenthal:

Q. You had not started on the first occasion from Van Sinderen, had you? A. What do you mean?

Q. You left from the Coffee Pot, didn't you? A. Wait a minute, wait a minute. I got him now, sir. I got him very clear now, very clear, very clear now.

The Court: When the Court speaks, everybody stop. The Court is not trying to appear superior but that is the Court's position it has to maintain.

(To witness) Some of these streets are
36.. one way streets. How did you go back, do you remember?

The Witness: Oh, we went about twice to Van Sinderen and Livonia. Then we turned in and then when it came to Snediker and Livonia he said to me, "You know where the spot is." You see we did not make a right turn all the time on Livonia.

The Court: Mr. Rosenthal wants to know whether, when you went back to resume the rehearsal from the point of starti , you went back over it each time
3612 by the same or other streets?

The Witness: Other streets until we got to Bradford and Blake and there is where we had to watch all the time, sir. I know what he means.

Q. Did you take a different route from Van Sinderen each of the seven times until you got to Bradford and Blake and then take the same route back to Van Sinderen? Is that what you mean? A. Look, sir, I just had to watch from Bradford and Blake.

Mr. Rosenthal: I ask that the answer be stricken as not responsive.

Mr. Turkus: I ask that it stand.

The Court: Did you pay attention and do you remember now how you went back each time?

The Witness: Back each time, I don't recall, but I know how I was supposed to drop that car off on Bradford and Blake. That's what I had to watch and make them turns.

3614

The Court: That you say you remember?

The Witness: Very good—can't forget that, sir.

Q. Do you know whether or not Louis Capone owned his own car at that time?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Rosenthal: I respectfully except to the Court's ruling.

3615

Q. At or about that time, did you see Louis Capone drive in an automobile other than the one which you say you owned? A. What do you mean, sir? He had a car, sir. Yes, he had a car.

Q. Did you ever see him drive any other car? Yes or no. A. Yes, sir.

Q. In that year and at about that time? A. Yes, sir, he had a big car, sir.

Q. What was the make of the big car that

3616 *Sol Bernstein—For People—Cross*

you saw him drive? A. I don't recall, sir. He had a big car.

Q. Was it a Chevrolet?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial. Once I have been sustained on that line of questioning.

The Court: Every time you object, I am going to continue to sustain it. Sustained.

3617

Mr. Rosenthal: Exception.

Q. After you had gone over this route, as you claim, seven or eight times, then where did you go to? A. After that here? Went back to Sackman and Livonia, sir.

Q. And who was there when you got to Sackman and Livonia? A. Harry Strauss, sir.

Q. Did Harry Strauss, when you got back there, say anything at all to you? A. He come out. He was talking with Louis Capone, sir.

Q. Did he say anything to you? A. No, sir.

3618

Q. Did Capone say anything to you? A. Yes, sir.

Q. What did Capone say at that time? A. He says, "Go and get plates from a place where it won't be noticeable" meaning a place in a garage where nobody would take out a car—in other words, that it be legitimate.

Mr. Rosenthal: I ask the meaning be stricken as not responsive. I asked for conversation, sir.

Mr. Turkus: I ask that it stand.

The Court: Let the conversation part stand. Strike out the rest.

Q. When Capone said that to you, did Strauss say anything at all? A. He was there, sir.

Q. Did he say anything, is my question? A. I don't recall, sir. I know what I was told, sir.

Q. Is that all the conversation that was had at that spot at that time? A. When I get the plates, put it back on the car and he said "bring the car back to Sackman and Livonia." I will 3620
show you a place on the picture. He says, "About ten to half past ten," sir. If you get the picture I will show you where.

Q. Are you finished?

Mr. Turkus: Objected to. An interval of time has elapsed between the witness's answer and that sarcastic question. I ask it be stricken from the record.

The Court: Objection sustained.

Q. After Capone told you to steal the plates, did you leave Sackman and Livonia Avenue? A. 3621
I took the flashlight out of my car, the screw driver and the pair of pliers and the glove, sir, and Louis Capone had my car all the time, sir.

Q. Louis Capone had your car all the time; is that what you said? A. Yes, sir.

Q. By "all the time," do you mean all the time that night or all the time— A. Until after the murder, sir.

Q. All the time until after the murder, is that right? A. Yes, sir.

Q. But you had your car when you went out to steal the other car, didn't you?

3622 *Sol Bernstein—For People—Cross*

Mr. Turkus: Objected to. That has already been answered. Repetitious.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Did you walk away from Sackman and Livonia? A. Yes.

Q. And did you walk around, looking for a place to steal plates? A. No, sir.

Q. Did you get a car to go around? A. No, sir.

3623 Q. How did you get to the place where you say you stole the plates? A. I waited until it gets dark and I took a cab to drop me off around East Flatbush section. I think you call that East Flatbush.

Q. You waited until it got dark? A. Yes, sir.

Q. Where did you wait until it got dark? A. On Rockaway and Livonia, sir.

Q. And then took a cab that happened to be passing? A. No, sir, there is plenty of cabs on that corner, sir.

Q. Do you recall who drove you there? A. No, sir.

3624 Q. Then you got off and started to look around the neighborhood?

Mr. Turkus: Objected to as already answered.

Mr. Rosenthal: I have not asked him that, sir.

Mr. Turkus: It is repetitious.

The Court: That is what he said.

Mr. Rosenthal: Does your Honor sustain the objection?

The Court: This is so trivial. Let him answer.

Mr. Rosenthal: I respectfully except. All of this has been gone over in detail on direct examination. If it is trivial, your Honor, now, it was trivial then.

The Court: It is obvious there is no cooperation. It is in the interest of all concerned to be reasonably expeditious, not to deliberately stall the trial of the case.

Mr. Rosenthal: I respectfully except to that remark.

3626

The Court: Every time the Court opens its mouth, there is a leisurely, slow, measured movement of action on the part of counsel to involve the Court in argument. At any and every place, everything is done to prolong the trial. I know how to try a case.

Mr. Rosenthal: I certainly except to your Honor's remark, if it is addressed to me.

The Court: I ought to know how they should be tried, and I know what stalling is. Now proceed.

3627

Q. How did you know, in this particular garage, that the person who owned the car with the plates would not miss the plates the next morning? A. How did I know?

Q. Yes. A. I knew at that time nobody would take out a car, sir, because I was told to go into a private garage and take it.

Q. And did you at that time, when you stole the plates, know that the murder was going to be

committed that night? Did you—yes or no? A. Yes, sir.

Q. Had you ever been in the particular neighborhood from which you stole these plates prior to the time that you stole them? A. I rode through, around the neighborhood, sir.

Q. When was the next time, after you stole them, that you went to this particular garage from which these plates were stolen? After you surrendered?

3629

Mr. Turkus: Obected to as incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Rosenthal: I except.

Q. What time, then, did you next see the defendant Capone? A. When I brought the car around.

Q. When was that? A. Ten, between half past ten, sir, on Sackman and Livonia Avenue.

Q. And who was there at that time? A. Louis Capone, Mendy Weiss, Farvel Cohen, Harry
3630 Strauss, Jimmy Ferraco.

Q. Did these men have a conversation in your presence at that time? A. What do you mean, conversation?

Q. Was there any talk in your presence by any of those men at that time? A. They came over to the car and Mendy Weiss started hollering at me why I got a two-door car, sir.

Q. Did he say anything else? A. He says, "What the hell is the matter with you? What the hell did you get a two-door car for for a job like this?"—something like that. I kept quiet, sir.

Q. Is that all that was said by any of the men at that time? A. He told me to take the car and drive it up Bradford and Blake near Sutter and meet him in the park.

Q. Who told you that? A. Mendy Weiss, sir.

Q. Had Capone left before you started to go away with the car? A. I didn't take notice, sir—wait a minute, sir—but I know I gave him back the screw-driver—wait a minute—

Mr. Rosenthal: I ask all but "I didn't take notice" be stricken— 3632

The Witness: Wait a minute.

Mr. Rosenthal: —as not responsive.

Mr. Turkus: I ask it stand and the witness be permitted to finish the rest of his answer.

The Court: Finish.

A. (continued) Louis Capone was there with my car. I gave him back the screw-driver, the flashlight, and the pair of pliers to put back in my car, and I held the gloves.

3633

By the Court:

Q. Did you see whether or not he did leave? A. I can't tell you. I went away first.

Q. Did he have your car then? A. Yes, sir.

Q. He could have put them in the car without leaving the scene? A. I went away first, sir.

Q. You went and left him there? A. I went away first.

Mr. Rosenthal: I had a motion to strike out. May I have a ruling?

3634 *Sol Bernstein—For People—Cross*

The Court: Denied.
Mr. Rosenthal: Exception.

Q. Was that the time when Capone, Weiss, Cohen, Ferraco and Strauss were all there? A. Yes, sir.

Q. And you were two or three doors away from the address? A. Yes, sir. On the picture I can show you where I was around, sir.

3635 Mr. Rosenthal: I object and ask that it be stricken. There is no such testimony about an address about two or three doors away. His testimony is in regard to the coal store.

The Court: I beg pardon. In his direct examination he testified that at the appointed time he took the car to Sackman and Livonia and there were Cohen, Weiss, Ferraco, and Strauss, and he parked the car two or three doors away. They then inspected the car.

3636 By Mr. Rosenthal:

Q. That is from a coal store? A. What do you mean, "from a coal store"? Yes, sir, the coal store was around there, but I did not have the car parked over there, sir.

Q. How far from the coal store was the car parked?

Mr. Turkus: Objected to as repetitious. We have gone over the location.

The Court: There has been enough of that. Sustained.

Mr. Rosenthal: I respectfully except.

Q. While you were standing there didn't somebody deliver a package of guns? A. Yes, sir; I think it was Joe Pilch (phonetic spelling).

Q. Is there any question in your mind that maybe it was not Joe Pilch? A. I was excited, but I am not sure, with Mendy Weiss hollering at me. I was excited. I think it was.

Q. I asked you whether or not you are sure it was Joe Pilch, or is there a question or doubt in your mind?

3638

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Rosenthal: I respectully except.

The Court: Who gave the package to you?

The Witness: Harry Strauss, sir.

Q. Then you took the car over to the park, is that right? A. Did I tell you the park, sir? Bradford and Blake and Sutter, in the middle of the block.

Q. Was there a park there where you took it? 3639
A. Yes, sir.

Q. How far from the park did you park the car? A. Between Bradford and Blake and Sutter, in the center of the block.

Q. How near to the park were you? A. You got to show me the picture and I can tell you, sir.

Q. Have you any idea without a picture how near you parked to the entrance to the park? A. A half a block, sir.

Q. Now, have you fully described to the District Attorney from that point on everything that was done and said in your presence when

3640 *Sol Bernstein—For People—Cross*

you were questioned by the District Attorney, from the time that you arrived at the park until the following morning when you were in front of the store of Rosen with the motor running?

Mr. Turkus: Objected to as to form.

Mr. Rosenthal: Now he objects to my abbreviating.

Mr. Turkus: There is an objection as to form.

3641 The Court: Overruled. (to the reporter) Read the question again.

(Pending question read by the reporter.)

The Court: That is improper. Sustained.

Mr. Rosenthal: I respectfully except.

Q. You were asked by the District Attorney relating to your entering into the park and seeing certain people there after you arrived there with the car. Do you recall that? A. Yes, sir.

3642 Q. The defendant Capone was not one of those people, was he? A. No, sir.

Q. You related also about the defendant Weiss and Strauss leaving at intervals, one at one time and then two at the other time, and returning? A. Yes, sir.

Q. And what was said to you by them and the directions that were given to you? A. I stood in the park there.

Q. You have already told that to Mr. Turkus, haven't you, how you went to Cohen's house in pursuance of havi. the address written out? A. That was after, when they came back together, sir. Said, "Let's make a good job out

of it," when Harry Strauss said he was afraid of the store. That is on Sutter Avenue and Bradford.

Q. You told the District Attorney, when he asked you questions, all you knew about those episodes, didn't you? A. Yes, sir.

Q. You also told the District Attorney all you knew about what happened while you were up in Cohen's apartment, as you described it? A. Yes, sir.

Q. You also told the District Attorney all 3644
you knew about in the morning going for the car and coming and standing in a hallway: is that right? A. Yes, sir.

Q. Now, from the place where you left the defendant Weiss and them on Saturday night, after Strauss had returned to the park, to where the so-called drop was, was a distance of how far?

Mr. Turkus: I object to the form of the question.

The Court: Will you read it again? 3645

(Pending question read by the reporter.)

Mr. Rosenthal: Let me withdraw it and put it this way:

Q. Where were you when Strauss and Weiss, as you say, went around or left you and then came back? Where were you at that time? A. I was in the park with Jimmy Ferraco, and Farvel Cohen was there, sir.

Q. And the car was where? A. In Bradford and Blake, and Sutter.

Q. How far was that from the park? A. A half a block, sir.

Q. From the place where the car was parked to the place where you say the drop was was how far in distance? A. I didn't take no mileage, sir.

Q. Can you give us any idea: was it a short distance? A. I didn't take no mileage, sir.

Q. Well, you drove that car to the drop, didn't you?

3647

Mr. Turkus: Objected to as answered.

Q. From Bradford Street?

Mr. Turkus: Objected to as repetitious, and in that form argumentative.

The Court: It is too far afield. Sustained.

Mr. Rosenthal: I respectfully except.

Q. How long a time elapsed from the time that you left these men at Bradford and the time you
3648 got to Cohen's apartment? A. What do you mean, sir?

Q. How long a time elapsed— Do you know what the word "elapsed" means? A. Yes.

Q. —between the time that you left Weiss, Strauss and Ferraco at Bradford, after they had returned in the evening of Saturday, and your going to the drop and to the apartment; how long a time took place?

Mr. Turkus: I object to that as complicated, unintelligible.

The Court: Did you time it?

The Witness: No, sir.

Mr. Rosenthal: I respectfully except.

Q. Can you give us any approximation of time that elapsed between the time you last saw them at Bradford and next saw them at Cohen's apartment? A. I didn't have a watch, sir.

Q. In the morning, when you were standing in front of—sitting in front of this candy store with the motor running, you then knew that the purpose of the men in going into that store was 3650
to shoot and kill Rosen, didn't you?

Mr. Turkus: Objected to. That has already been answered.

Mr. Rosenthal: I have not asked anything regarding that.

Mr. Turkus: It is in the record.

The Court: Did you know who they were going to kill?

The Witness: I knew somebody was going to be killed, but I didn't know his name was Rosen. 3651

The Court: Had anybody told you it was Rosen?

The Witness: No, sir.

Q. But you knew they were in that store to kill someone?

Mr. Turkus: Objected to as repetitious. He has just said so.

Q. Did you purposely keep your head away from the front of the store while you had the

3652 *Sol Bernstein—For People—Cross*

motor running, with the door open and the seat folded back?

Mr. Turkus: Objected to.

Q. Did you purposely keep your face averted from the store itself? Yes or no?

Mr. Turkus: I object to it.
The Court: Overruled.

3653 A. What do you mean, purposely?

The Court: Did you look inside of the store to see what went on?

The Witness: No, I didn't take notice of that store.

The Court: Do you remember what you were looking at?

The Witness: Looking in the front and happened to turn a little bit to see what was going on—you know what I mean—it took seconds to me: 1, 2, 3, and out, when

3654 they walked into the store.

Mr. Rosenthal: Now, on the question of the Grand Jury minutes, I would like to make a motion to the Court, which is a legal question, in the absence of the jury.

The Court: What is the motion?

Mr. Rosenthal: The motion is in respect to having the District Attorney turn over to the Court the Grand Jury minutes, the testimony of this man before the Grand Jury.

The Court: Let me see it, please.

Mr. Turkus: Let them be marked for identification first.

The Court: Don't have to.

Mr. Turkus: I want them marked.

Mr. Rosenthal: So do I. want them marked.

Mr. Turkus: I will offer them in evidence.

Mr. Rosenthal: Again, because of the highly improper statement, I ask for the withdrawal of a juror and a mistrial. The 3656
District Attorney knows it is one of the elementary principles of law that that is the most reprehensible thing that he can say in a court-room.

Mr. Turkus: He just said he wanted them marked.

The Court: He said he wanted them marked for identification, not in evidence. They cannot go into evidence, of course.

Mr. Turkus: I did not understand that—

Mr. Rosenthal: You said it three times. 3657

Mr. Turkus: —when he said he wanted them marked. I was contented that they go in.

Mr. Rosenthal: With that grin of yours.

The Court: I don't think you did.

Mr. Rosenthal: No, I don't think he did either.

Mr. Cuff: We join in the motion.

Mr. Barshay: All counsel join in that motion.

The Court: Motion is denied.

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Mr. Cuff: Exception.

Mr. Rosenthal: After the reading of the minutes by the Court, I would respectfully request the Court to give counsel the opportunity of reading these minutes for the purpose of further aiding counsel in the cross-examination of this witness on any matters that may have been either omitted, or any matters in which there may be statements other than that of the witness on the witness stand.

3659 The Court: I will reserve on that until I read the minutes.

(Minutes marked People's Exhibit Z-1 for identification.)

Mr. Rosenthal: I respectfully request the Court, at the time of any argument or ruling on the subject, that the argument be in the absence of the jury. It is a legal question.

3660 The Court: I am going to ask all counsel to remain seated and quiet and the court-room in order, so that I will be able to read these minutes and know what is in them. There is no index on here. Is this all of the witness's testimony?

Mr. Turkus: That is all of this witness's testimony.

The Court: The entire 46 pages?

Mr. Turkus: Yes, and been compared.

The Court: Have I got to read these entire 46 pages, I am asking?

Mr. Turkus: I don't know how many

pages there are, but you have to read everything in your hand.

The Court: Is this that you have handed me all of this witness's testimony?

Mr. Turkus: It is, your Honor.

The Court: And not the testimony of other witnesses?

Mr. Turkus: No other witness, only this witness.

The Court: All right. It took a long time to get that. Everybody kindly re- 3662
main in order.

I am handing over up to and including page 24 for the perusal of counsel. The rest will be handed over after the Court reviews them and sees that everything is all right. I want to see if there is anything that should not be turned over, that is, something foreign to this case.

(Minutes handed to Mr. Rosenthal.)

The Court: The rest are handed over with the exception of pages 32 and 43. There seems to be a mistake here, sud- 3663
denly jumping from 32 to 43.

Mr. Turkus: That was where the witness had been recalled. I took that out of the bundle. That is an exact copy of the testimony of Bernstein, 10 to 32—

The Court: These pages that I mentioned, 32 and 43, contain the beginning and the ending of the testimony of another witness or witnesses?

Mr. Turkus: Yes, this witness Bernstein testified on pages 10 to 32—

The Court: Pardon me. These two pages will have to be deleted because they

3664 *Sol Bernstein—For People—Cross*

contain, as to this witness, no contradictions or amplifications of testimony given here. The rest are handed over.

Mr. Rosenthal: May I have a few minutes to read it, Judge?

The Court: Yes, it won't take long. It took the Court 12 minutes.

Mr. Rosenthal: I will try to do it in five, Judge. Judge, if I can have a five-minute recess, I want to refer to his testimony. There are certain particular contradictions that I want to take from his testimony here.

3665

The Court: I noticed no contradictions, according to my recollection.

Mr. Rosenthal: I did, sir, and I want to have it from these minutes.

The Court: If you did, you don't have to look it up; you know it. Let us find out what they are.

Mr. Rosenthal: All right. I would also request after recess that I have an opportunity to again review these minutes. It is very disconcerting to me to have to look at around forty pages right in the presence of the jury, knowing that everybody is impatient.

3666

The Court: I think you are just as smart as the Court. The Court read them in twelve. You have had twelve. Now proceed.

Mr. Turkus: It is not forty pages; it is twenty-three pages. He was the fourth witness before the Grand Jury and started at page 16.

By Mr. Rosenthal:

Q. The only time that Muggsy Cohen was with you was the night that you drove the car and he took the radio out and you delivered him to his home; is that right?

Mr. Turkus: Object to it as repetitious.

Mr. Rosenthal: I have got to ask this now in order to form a basis for this contradiction. 3668

Mr. Turkus: That is the testimony. If there is any alleged contradiction, he can go right to it. We all have memories.

Mr. Rosenthal: May I ask the question, your Honor, or does your Honor sustain the objection?

The Court: It is much easier to let you have your own way.

Mr. Rosenthal: I am only asking for a ruling.

The Court: Let him answer it. Get it over with. 3669

Q. Do you understand the question? A. What did you say, sir?

The Court: Repeat it.

Q. (Pending question read by the reporter.) A. Yes, sir.

Q. Didn't you tell the Grand Jury—Weren't you asked these questions and didn't you give these answers:

"Q. After having placed the car in the garage, what did you do next? A. The next morn-

ing we went back, me and Muggsy Cohen, and we took off the handle from the car and brought it to a locksmith to make up a key for the car.

"Q. A handle of the door? A. That's right."

Were you asked those questions in the Grand Jury and did you give those answers? A. Yes, sir.

Q. Was that true? A. I refreshed my memory—

Q. Or was it true what you said in this trial?

3671 A. I refreshed by memory a lot of things.

The Court: Does that refresh your recollection?

The Witness: Yes, sir.

The Court: Is it true?

The Witness: No, sir.

The Court: That was a mistake?

The Witness: That's right, that is what it is, a mistake, sir.

Q. Now then, you told the Court and jury on this trial that at four o'clock in the afternoon

3672 Louis Capone had told you to come, he wanted to show you a route, and went in your car, and Louis Capone continuously drove your car. Do you remember telling the jury that here? A. Yes, sir.

Q. Now, were you asked (on page 50)—or, before I come to that, there is another thing. All right, I have got that question.

"Q. But at this time Louis Capone said, 'Come on, I want to show you the route'? A. That's right.

"Q. What route did he mean? A. How to go to the Rosen store and leave the car at Van

Sinderen and Livonia, drop the car off over there.

"Q. Did you go with him for that purpose? A. Correct.

"Q. Who drove? A. I did.

"Q. And he rode with you? A. That's right."

The Witness: That is a mistake, sir.

Mr. Rosenthal: Wait a minute. I am asking you whether you were asked that in the Grand Jury and whether those are 3674
the answers that you gave to the Grand Jury.

Mr. Turkus: He has just answered.

Mr. Rosenthal: Yes or no?

Mr. Turkus: It is responsive.

Mr. Rosenthal: It is not responsive.

The Court: He did not say whose mistake, so Mr. Rosenthal is entitled to know if he recalls having said that.

The Witness: Yes, sir.

Q. Did you say that? A. Yes, but it is a mistake, sir. 3675

Q. Did you say that to the Grand Jury? A. Yes, sir.

Q. That was not true, was it?

Mr. Turkus: Object to the form.

A. It is a mistake, sir.

Q. When you say it is a mistake, do you mean it was your mistake when you told the Grand Jury under oath that that is what happened, or do you mean that it was the stenographer in the Grand Jury room made the mistake? What

3676 mistake do you mean, or whose mistake do you mean? A. I made the mistake, sir.

Q. You made it. All right. And the mistake which you made was in reference to who drove the car, is that right?

Mr. Turkus: Objected to. It has already been answered.

The Court: Sustained.

Mr. Rosenthal: Exception.

3677 Q. Was the time a mistake that you told the Grand Jury also, that it was in the evening at seven o'clock? Was that a mistake also?

Mr. Turkus: What page is this?

Mr. Rosenthal: The same page. If I could mark these out, your Honor—

Mr. Turkus: That is an exhibit. The part that you want is on page 16, in the middle.

Mr. Rosenthal: I think it is 14.

Mr. Turkus: Look at 16. It is in the
3678 middle. It does say seven o'clock, like you just said, so that is one for nothing.

Mr. Rosenthal: You mean you are helping me for nothing?

Mr. Turkus: Yes.

Mr. Rosenthal: Thanks very much.

Mr. Turkus: I am trying to save time.

Mr. Rosenthal: Beware of Greeks bearing gifts.

Mr. Turkus: I am not a Greek.

Mr. Rosenthal: Your Honor will have to pardon me a second. I have got to get the connecting questions.

Q. What time was it that you say that you went back to Sackman and Livonia and met Strauss and told him that you had stolen the car?

Mr. Turkus: Objected to as repetitious.

Mr. Rosenthal: This is preliminary, as a foundation for these questions.

Mr. Turkus: It is not needed. If there is any inconsistency he can bring it right out. Wasting time.

By the Court: 3680

Q. Do you remember what time? Did you time it when you kept the appointment to go over the route? A. What do you mean?

Q. Did you time it? Did you make any note of the time that you went over the route? A. No, sir.

Q. Can you approximate, according to your best recollection? A. I really can't tell you, sir. I didn't clock it.

Q. And you were told, you say, to go back there at four o'clock? A. Four o'clock I went 3681
back, yes.

Q. Do you recall what time you went out on the route? A. Four o'clock, a quarter after four, something like that.

Q. Do you remember you were promptly on the job? A. Yes.

By Mr. Rosenthal:

Q. It was daylight, wasn't it, four o'clock? A. Yes, sir.

Q. And it was dark at seven o'clock, wasn't it?

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Mr. Turkus: Objected to, repetitious.

Mr. Rosenthal: I have not asked him that.

The Court: That is a matter of calendar. Daylight saving was still in effect on September 15th.

Mr. Rosenthal: I respectfully except.

Q. Were you asked before the Grand Jury these questions and did you give these answers—before I ask you these questions, you told this
3683 jury that Louis Capone told you to steal the plates, didn't you? A. Yes, sir.

Q. And that Harry Strauss said nothing when Louis Capone told you that?

Mr. Turkus: Objected to as repetitious.

Q. Now, on page 14.

"Q. After that what did you do? A. After that I went back to Sackman and Livonia and told Harry Strauss I had the car.

"Q. Was anybody with him when you had that
3684 conversation? A. Louis Capone.

"Q. What time of day was that? A. It must have been about seven o'clock at night."

Were you asked those questions by the Grand Jury and did you give those answers? A. Yes, sir; it was a mistake, sir.

Q. That was a mistake? A. Yes, sir.

Mr. Rosenthal: It does not say when this testimony was taken.

Mr. Turkus: May 20, 1940.

Mr. Rosenthal: May it appear on the

record that the exhibit Z-1 for identification was testimony taken on May 20, 1940?

Mr. Turkus: Lillian R. Cohen, stenographer of Grand Jury; Edward A. Heffernan, Esq., Assistant District Attorney.

Q. Did you tell this jury that Louis Capone told you to steal the plates before you went out on this route to be shown the route that you were to take? 3686

Mr. Turkus: Objected to as repetitious.

The Court: Well, the Court can say that he didn't. The record is that after the seven or eight rehearsals, they returned to Sackman and Livonia and Strauss came over and Capone then told him to steal the plates, with further instructions which are on the record.

Mr. Rosenthal: I take your Honor's statement.

The Court: That is the record.

Mr. Rosenthal: All right, sir, if that is 3687 the record.

Q. Were you again asked before the Grand Jury (on page 16 and 17) as follows:

"Q. When you got back to Sackman and Livonia Louis Capone was still with you? A. That's right.

"Q. Did you meet somebody there? A. Harry Strauss.

"Q. Anybody else? A. No.

"Q. Was there a conversation there then? A. That is correct.

3688 *Sol Bernstein—For People—Cross*

"Q. Please tell me what the conversation was? A. Harry told me to go and steal license plates for the car.

"Q. Was Capone there when that was said? A. That is right.

"Q. Is that the full conversation at that time? A. That is right.

"Q. Then what did you do? A. He said steal license plates and come back eleven o'clock with the car on Sackman and Livonia."

3689 Were you asked those questions and did you give those answers?

Mr. Turkus: I don't think there is any inconsistency.

Mr. Rosenthal: Why, on this trial he said that Harry Strauss stood by and said nothing and Capone asked him to go and steal the plates.

The Court: Overruled.

Q. Were you asked those questions before the Grand Jury and did you give those answers? A.

3690 Yes, sir; it was a mistake.

Q. On this trial you say that a man whom you believe was Joe Pileh came up while you were standing with Strauss and others and handed Strauss a package which you subsequently found to contain guns and that you were delivered the package by Strauss and that you put the package in your car. Did you not, insubstance, say that on this trial?

Mr. Turkus: I object to it. It is repetitious and not a correct version of what the witness has said, in that summary.

3691

The Court: What is the fact: who put them in the glove box?

The Witness: I did. Harry Strauss gave them to me.

The Court: Is your memory now clear on that?

The Witness: Very good now, sir.

The Court: Any doubt whatever?

The Witness: No doubt. My memory is very refreshed now, sir.

3692

Q. Did you also tell this jury that there was a doubt in your mind as to whether the man who came up and gave the package was a man by the name of Joe Pilch? Did you tell that to this jury?

Mr. Turkus: I object to it. That is not a correct version. He said, "I think it was Joe Pilch."

Mr. Rosenthal: This is cross-examination.

Mr. Turkus: I object to it. It is a repetition that will go on endlessly. 3693

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Now I ask you—

Mr. Turkus: Page 18.

Mr. Rosenthal: Thanks.

Q. "Q. (On page 18) Having seen this group go, was there a conversation? A. That's right.

"Q. Tell me what the conversation was? A. The conversation was at first Harry Strauss told

some fellow by the name of Joe Pilch to bring the guns over to the car.

"Q. Did you know Joe Pilch up to this time? A. That is right.

"Q. And Joe was there at the time? A. That is right.

"Q. And what did Joe Pilch do? A. He brought the guns in a package and gave it to Harry Strauss and he put the package in the car, in the little box.

3695 "Q. Is that the glove compartment? A. That's right."

Were you asked those questions by the Grand Jury and did you give those answers?

Mr. Turkus: That is trivial.

Mr. Rosenthal: I again except to the statement of Mr. Turkus.

Mr. Turkus: That is an objection.

Mr. Rosenthal: Is it an objection? Well, I have one to make also.

The Court: Overruled. Is that what you testified to in the Grand Jury?

3696 The Witness: Yes; that is a mistake, sir.

The Court: Was that your belief at that time?

The Witness: Yes, sir, at that time, sir. Now my memory is refreshed because they hollered at me, sir. I got a two-door car. That's the time Mendy Weiss hollered at me.

The Court: You mean since then it has come more clearly to your mind?

The Witness: Yes, sir, very clear, very clear.

 3697

Q. How long had you known Joe Pilch before 1936?

Mr. Turkus: Objected to, repetitious.

Mr. Rosenthal: He said it is very clear now, Judge, so I want to now find out whether when he told this jury he thinks it is Joe Pilch—

The Court: I am not quibbling on questions whether he thinks or whether he thought before the Grand Jury. It is substantially the same, or on the item of whether or not Strauss handed him the guns and he put them in the glove box or whether Strauss put them in the glove box, if that is of any importance whatever. He says now he is clear that Strauss put them in the glove box. Objection sustained. 3698

Mr. Rosenthal: I respectfully except to the Court's remarks and the sustaining of the objection.

3699

By the Court:

Q. You say now that you are sure you put them in the glove box? A. Yes, sir, positively.

Q. You handled them? A. Yes, sir.

Q. That has become clear since you testified before the Grand Jury? A. Yes, sir.

Mr. Turkus: Your Honor—

By Mr. Rosenthal:

Q. Had there been any conversation concern-

ing Louis Capone being at the scene prior to the time that you went over to the store? A. Yes, sir.

Mr. Turkus: I object to this. I do not know what it means.

The Court: You mean on Sunday morning?

Mr. Rosenthal: I mean Saturday or Sunday.

3701 The Court: Sustained as indefinite.

Mr. Rosenthal: I respectfully except, sir. May I have noted on the record that at the time this question was asked, I had the Grand Jury minutes?

The Court: If you will put the question and answer that appeared in the Grand Jury minutes to the witness, I may be able to call your attention to where the testimony is on that point as given in this trial.

Q. On page 28 were you asked this question: "Q. Had there been any conversation concern-
3702 ing Louis Capone being at that scene prior to the time you went over to the store? A. I didn't hear nothing."

Were you asked that question in the Grand Jury and did you give that answer?

Mr. Turkus: I object to it. What is inconsistent?

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Do you know a Kingsway Garage? A. Kingsway?

Q. Yes. A. What do you mean a Kingsway Garage?

Q. Do you know a garage by the name of Kingsway? A. I don't recall it, sir.

Q. Were you asked in the Grand Jury this question (page 28) and did you give this answer:

"Q. Where did you go with Jimmy? A. Jimmy? At first I drove to a garage, Kingsway Garage, took the gun from Jimmy and brought it down to a cellar that Mendy gave Jimmy."

3704

Mr. Turkus: May I call your Honor's attention that the testimony here was the Kenwood Garage? Kingsway and Kenwood in stenographic notes may have been confused by the stenographer.

Mr. Rosenthal: Again we have Mr. Turkus testifying on the record, again not under oath, and I again except to his statement made to the Court and ask that it be stricken.

The Court: Isn't that the same location precisely?

3705

Mr. Rosenthal: I don't know. I know there is a Kingsway Garage.

The Court: You are not confusing it with the Kingsway Theatre, by any chance?

Mr. Rosenthal: No; there may be a Kingsway Theatre. I think your Honor is more acquainted with that than I would be.

The Court: The picture is there. What street do you say that is, Mr. Turkus?

Mr. Turkus: Portal Street and East

3706 *Sol Bernstein—For People—Cross*

New York Avenue. It is the Kenwood Garage.

The Court: That is a stenographic error or slip of the tongue?

The Witness: I said Kenwood. It must be a mistake, sir.

Mr. Turkus: There is other misspelling of names in testimony.

Mr. Rosenthal: May I request of the Court that if there is anything overnight
3707 that I be given a copy of these for my perusal overnight, if there should be—

The Court: I am not going to have this witness brought here again.

Mr. Rosenthal: I am not going to ask that. I merely ask if there is anything that I have a copy of these in my possession overnight so that I can call the attention—

The Court: Don't worry now. We are no way near closing, according to the rate of your cross-examination.

3708 Mr. Rosenthal: I am nearly closing with this witness.

The Court: Suppose you go right ahead.

Mr. Talley: I suppose that on behalf of the defendant Weiss, my examination of this witness, together with the minutes which your Honor withheld, if they have any reference to Weiss—

The Court: What other minutes? At this moment I do not know what other minutes you refer to.

Mr. Talley: I assume, sir, that I may have an opportunity—

The Court: I am not deaf. I heard what you said but I do not understand you.

Mr. Talley: I thought I spoke pretty plainly. I will try it again.

The Court: You wish to see the minutes. I handed them over to counsel. You are entitled to see them, of course.

Mr. Talley: That is all I want to know. Now I will go a step further. Your 'onor said you were withholding certain pages 3710
of the testimony of this witness—

The Court: Two pages.

Mr. Talley: I ask they be delivered to me.

The Court: I said I had deleted two pages which related to the testimony of a different witness, that there was a small amount of testimony given by this witness on each one of those pages which contained no contradiction or variance of any kind.

Mr. Talley: I ask nevertheless, if your 3711
Honor pleases, if they are part of the testimony of this witness that I now see them.

The Court: The Court will show them to you at the bench, at the proper time, and you will be satisfied.

Mr. Turkus: Four questions and answers.

The Court: Don't have any more delay. Everybody's rights will be preserved.

3712 *Sol Bernstein—For People—Cross*

By Mr. Rosenthal:

Q. Now, Mr. Bernstein, do you know a man by the name of Ben Warshinsky?

The Court: Are you through with the Grand Jury minutes?

Mr. Rosenthal: I am through with them temporarily.

The Court: Will you pass them on to Judge Talley?

3713 Mr. Rosenthal: I have not had a proper opportunity to see whether or not there are other contradictions that I might consider important.

Mr. Turkus: May the record show how long he has had those Grand Jury minutes?

Mr. Rosenthal: Yes, and if you want to make it longer, but I cannot digest those minutes, go over those minutes properly with a jury which I know will get impatient and with the Court having the

3714 jury in session here.

The Court: Yes, you have had lots of time. You have had fifteen minutes.

Mr. Talley: I cannot follow the cross-examination as I should and examine these minutes at the same time. I ask to be given these minutes overnight so I can examine them.

The Court: I will not rule on that now.

By Mr. Rosenthal:

Q. Do you know a man by the name of Ben Warshinsky? A. Yes, sir.

Q. 306 Osborne Street?

Mr. Rosenthal: I ask the Court to permit this witness to have a paper and pencil and to write the name Ben Warshinsky, 306 Osborne Street.

The Court: First mark a paper for identification.

(Blank paper marked Defendants' Exhibit O for identification.)

(Witness writes.)

Q. I now ask you to write Ben Glass Schatz (phonetic spelling). You know how to spell it, don't you? 3716

(Witness writes.)

Q. 39 East 92nd Street, Bklyn., N. Y. Have you got it? A. Yes, sir.

Q. I want you to write the word "Sunday". A. Sunday?

Q. Yes, Sunday. A. (Witness writes.)

Q. And I want you to write the word "Ben". A. (Witness writes.)

3717

Mr. Rosenthal: I ask that it be marked in evidence. The materiality will be shown in two minutes.

Mr. Turkus: Not at this point it is not admissible.

The Court: Is there an objection?

Mr. Turkus: There is.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. You told this jury that you have been kept incommunicado—I withdraw that. You told this

3718 *Sol Bernstein—For People—Cross*

jury that you never were allowed to write a letter, you never were allowed to be alone with a pencil or paper, that you never sent out a letter, and that you never communicated with the outside world since you gave yourself up to Judge O'Dwyer?

Mr. Turkus: Objected to.

Q. Is that right, sir?

3719

Mr. Turkus: Objected to. It is not a correct version. If it is, even at that, it is repetitious.

The Court: I don't recall whether it is or not. Did you say so?

The Witness: Yes, sir.

The Court: Is that your best recollection? Just put your memory on that and see if you remember any time when you wrote to anybody.

The Witness: Yes, I did, sir.

The Court: When was that?

3720 The Witness: About four or five letters, sir.

Q. Keep your voice up so that the jury can hear you. A. About four or five letters, sir.

Q. You sent out four or five letters? Let me call your attention to whether or not to this jury, when I started to cross-examine you, you were asked these questions and you gave these answers—

Mr. Turkus: I object to it. That is reptitious.

3721

Mr. Rosenthal: I have not finished the question yet, sir.

Mr. Turkus: That does not give him license—

Mr. Rosenthal: Why, when Mr. Turkus goes that it gives him the privilege—

Mr. Turkus: Your Honor, I have an objection before the court.

The Court: What is it?

Mr. Turkus: I object to him reading the record that was taken earlier of this witness. It is repetitious. He has admitted he said those things.

3722

Mr. Rosenthal: He has not. Page 785, sir. Now I am in the midst of a question. May I, with the court's permission, continue the question?

Mr. Turkus: I have an objection to reading the record. The jury heard it.

The Court: Overruled.

Q. Now, listen to this. Were you asked these questions when I first started to cross-examine you (page 785 of this record):

3723

"Q. You say you were always under guard? A. Yes, sir.

"Q. Did you write any letters while you were under guard? A. No, sir.

"Q. At no time did you write letters or send them out to anybody? A. No, sir.

"Q. That is positive, is it? A. Yes, sir."

Mr. Turkus: Will you modulate your tone, please?

Mr. Rosenthal: Excuse me. Before I

did not talk. I will get over where it won't annoy you. You are not going to disconcert me.

"Q. You had no communication whatsoever with the outside world, is I think your expression? A. Yes, sir.

"Q. You never wrote a letter to anybody while you were in custody and gave it to your wife or to any detectives or any person to mail? A. No, sir.

3725

"Q. That is right? A. Yes, sir.

"Q. (On next page) Were you permitted to write letters? A. No, sir.

"Q. Were you permitted to send out mail? A. No, sir.

"Q. Were you ever left alone with your wife at any time so that you could give her a letter? A. No, sir.

"Q. At all times there was always a detective there? A. Yes, sir.

"Q. At no time did you ever write to anybody while you have been incarcerated, or kept, I should say, in the Half Moon Hotel, or any other hotel that you have been kept in while you were a material witness, is that right?"

3726

That was sustained. I withdraw that last question.

Mr. Turkus: Now, just a minute.

Q. You were asked those questions, were you not, and do you remember giving this jury and this court those answers?

Mr. Turkus: Objected to. He has not said he did not.

The Court: That is the record.

Mr. Turkus: Yes.

Mr. Rosenthal: The question is whether he did, Judge, before I submit certain documentary evidence which I have and—

The Court: I never heard of such a thing in the orderly process of a trial as having to prove the record of the present trial by the testimony of the witness all 3728
over again.

Mr. Rosenthal: I respectfully except.

The Court: Everything the witness has testified to is a part of the record.

Q. Did you threaten anybody in letters that you wrote out of the Half Moon Hotel while you were under guard there? Did you threaten any people on the outside?

Mr. Turkus: I object to it. It is repetitious. 3729

Mr. Rosenthal: Oh, no.

The Court: Overruled.

Mr. Turkus: It is incompetent.

Q. Did you? A. What do you mean, threaten?

Q. Did you write letters to individuals on the outside on the stationery of the Half Moon Hotel, get them out with the mail, the United States mail, in which you had threats against individuals contained in it, individuals other than these defendants? A. Wait a minute.

3730

Mr. Turkus: I object to the form of the question. That is a tricky question.

Mr. Rosenthal: Is it?

Mr. Turkus: Yes.

Mr. Rosenthal: We will see how tricky it is in a minute.

Mr. Turkus: That is tricky enough to appear as if he threatened the defendants.

Mr. Rosenthal: I am going to show to the court, if your Honor wishes—

3731

Mr. Turkus: I have an objection and I do not want any more theatrical reading of records and Mr. Rosenthal prancing from one end of the court room to the other, shouting in counsel's ear.

The Court: The witness asked you what you mean by threats. That is a matter—

Mr. Rosenthal: Well, all right.

The Court: Are you interrupting the court?

Mr. Rosenthal: Excuse me, your

3732

Honor.

The Court: That is a matter of debate. One person may say that something written is a threat and another may not. You may direct his attention to what he is alleged to have written. The jury can say whether it is a threat.

Q. I will show you this letter—

Mr. Turkus: First mark it for identification. Do it orderly; take it easy.

Mr. Rosenthal: If I was as old as you

when you were young. I would have you on my knee.

Mr. Turkus: That is old stuff. I will outgrow my youth in time.

Mr. Rosenthal: You will never outgrow your ignorance.

Mr. Turkus: Thank you.

Mr. Rosenthal: I am just showing him that to ask if it is his handwriting. I ask the court to instruct him not to read it but merely to identify whether or not he 3734
wrote that letter while he was in the Half Moon Hotel.

The Court: How can he tell without reading it?

Mr. Rosenthal: He can tell whether it is his handwriting.

Mr. Turkus: Without reading it?

Mr. Rosenthal: He has to read the letter?

Mr. Turkus: That happens to be a photostat.

Mr. Rosenthal: Does it? 3735

The Court: What is the question?

Mr. Turkus: He wants to know if it is in his handwriting.

Mr. Rosenthal: Thanks, Mr. Turkus.

The Court: There is no question before the court.

(Two papers marked Defendants' Exhibits P and Q, for identification.)

Q. I show you this envelope first, marked Defendants' Exhibit Q, for identification, and ask you if that envelope is in your handwriting, a

3736 *Sol Bernstein—For People—Cross*

photostatic copy of an envelope in your handwriting. A. Yes, sir.

Mr. Rosenthal: I offer it in evidence.

Mr. Turkus: May I see it?

The Witness: I can explain why I did not want to tell you.

Mr. Rosenthal: I ask that this witness be instructed not to answer anything unless he is asked, your Honor.

3737 Mr. Turkus: I consent to it.

The Court: The District Attorney is entitled to ask for explanations at the proper time. Until then nothing can be volunteered.

Mr. Turkus: Is there another photostat of this available? No objection.

Mr. Rosenthal: May I show it to the jury?

The Court: Mark it in evidence.

(Defendants' Exhibit Q, for identification, received and marked Defendants' Exhibit 1, in evidence.)

3738

Q. Was that envelope addressed by you in the Half Moon Hotel and a letter enclosed in it and sent out? A. Yes, sir.

Q. Who is Ben? A. That is Cherry's brother.

Q. And Cherry is the man, Al Glass, your partner, isn't he? A. Yes, sir.

Q. Did you write a letter—read this letter.

The Court: Mark it for identification.

Mr. Rosenthal: It has been marked Defendants' Exhibit P, for identification.

3739

The Witness: What is so terrible about this letter?

Mr. Turkus: Let me read it.

The Court: What?

Mr. Rosenthal: He said, "What is so terrible about this letter." That is his answer.

The Court: Did you write it?

The Witness: Yes, sir.

3740

Q. Did you send that out from the Half Moon Hotel while you were under guard; yes or no? A. Yes, sir.

Mr. Rosenthal: I offer it in evidence.

Mr. Turkus: Let me read it. This has nothing to do with the Rosen case.

The Court: Is there objection, or what?

Mr. Turkus: There is an objection. It has nothing to do with this killing we are trying.

The Court: Where is the rest of it? The court cannot judge as to the relevancy or competency of the letter without the rest of it. There are only two pages and it is not signed and does not appear to be a complete letter.

3741

Mr. Turkus: It is a photostat.

Mr. Rosenthal: That has no materiality, whether it is or not. This witness has identified it as a letter sent out by him in the ordinary course of the mail from the Half Moon Hotel.

The Court: Don't tell the court what the court already knows. I am asking for

3742

the rest of the letter so I can tell whether it is relevant or competent.

Mr. Rosenthal: That is all of that letter.

The Court: There is some more of it. It is only two pages of a letter which is not signed and which stops abruptly and there is no termination of the letter to indicate anything that the court can base judgment on. Frankly, I don't know what the two pages, in the absence of the rest

3743

of the letter, mean. Objection sustained.

Mr. Talley: May I be heard on that?

The Court: Yes.

Mr. Talley: This letter is introduced for the purpose of impeaching this witness' testimony on this trial, to wit, that he never sent out any communications while he was in custody in the Half Moon Hotel. This paper which you are now examining has been identified by this witness as having been written by him and as having been sent in the envelope that he

3744

has identified, and which he said is in his handwriting. On the question of the impeachment of the witness and the question of his credibility, if that was only one line of a letter instead of a complete letter, it would be competent to attack his credibility and show that he testified to one thing on this trial whereas the fact, as he now admits, is quite the contrary, to wit, he testified he sent out no letter and had no communication with the outside world, and here is a paper in his handwriting which he did send out through

the United States mail. That is the purpose of impeachment.

The Court: That impeachment is already established. Supplemental to that impeachment, Mr. Rosenthal has offered this part of a letter.

Mr. Rosenthal: May I further urge the proposition that this man on the stand, as appears by the record has admitted that this is a letter which he wrote.

The Court: You are putting in a part, 3746
and I cannot tell from reading that part whether it relates to this case or not.

Mr. Talley: If your Honor pleases, it would not mak a bit of difference.

The Court: The rest of the letter must be submitted before the court can pass on it. He has admitted now that he lied. You do not have to establish that. Now, don't put the court in a false position. You are not going to put in, in order to create an inference which may be misleading to the jury, a piece of a letter and 3747
have the jury devour its contents. It is established that the witness testified under previous cross that he did not send out a letter and now he admits that he did.

Mr. Turkus: Why not let the witness complete the letter and tell the jury what the balance of it was, if there was any? It may have been a complete letter.

The Court: It is up to counsel to produce it. Objection sustained.

Mr. Talley: I except.

Mr. Rosenthal: And at this particular

time I am asking now—it is a quarter to four—for a recess. I intend to attempt to produce other letters of this man.

The Court: You proceed. I am going to sit late today. You are not entitled to ask for an early adjournment because there has been too much time wasted.

Mr. Rosenthal: I respectfully except to the court's ruling, insofar as this matter is concerned.

3749 The Court: The tempo has been largo minus.

Mr. Rosenthal: I did not hear that.

The Court: The stenographer will repeat it.

(The remark of the court was read by the stenographer.)

Mr. Rosenthal: I ask that this sample of handwriting, Defendants' Exhibit O, for identification, be marked in evidence.

Mr. Turkus: I object to it. He has already admitted that he wrote a letter, although early in his testimony he denied 3750 he did, so that this exhibit has no relevancy or competency.

The Court: Sustained.

Q. I show you this paper, Defendants' Exhibit P, and ask you, Mr. Witness, whether that was not the end of that particular letter, those two pages.

Mr. Turkus: I object to it. It is incomplete on its face.

Mr. Rosenthal: I object to any statement—

Mr. Turkus: Just a minute—

Mr. Rosenthal: By the District Attorney.

Mr. Turkus: And it is intended as a slight to the court, which said it is incomplete on its face. That is reprehensible. That is not the way I was taught to practice law.

Mr. Rosenthal: You stoop too low— 3752

The Court: Did you send the letter without signing, Mr. Witness?

The Witness: No, sir.

The Court: Look at the bottom of page two. You notice it is not signed?

The Witness: My name is not there, sir.

Q. Did you put your name on that particular letter? A. I can't tell you that, sir.

Q. Is that the complete letter— Read it through—that you sent out at that particular time? A. Yes, sir. 3753

Mr. Rosenthal: Now, I offer it in evidence.

The Court: Why didn't you sign it?

The Witness: I did sign it.

Mr. Rosenthal: I object to that, if the Court pleases.

The Court: Obviously, this is a part of a letter. Now he says he did sign it, but his signature is not there.

Mr. Rosenthal: I except to the statement of the court.

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The Court: Where is the signature?

The Witness: It is supposed to be here. I don't see it.

The Court: It is not there, is it?

The Witness: No, sir.

The Court: On what do you base your statement that that is a full letter?

The Witness: I cannot tell you that, sir.

Mr. Rosenthal: I renew the offer, sir.

3755 Mr. Turkus: I object to it. There was a matter of collateral impeachment first.

The Court: Please don't argue so much.

Mr. Turkus: All right, I have an objection.

The Court: The court is quite competent to rule on questions of law involving matters of mediocre intelligence on the part of the court without having counsel get into a brawl and argue every point to the court. That only confuses and delays the situation.

3756

By the Court:

Q. Mr. Witness—

The Court: Will you kindly sit down?

Mr. Rosenthal: Yes, sir.

Q. Do you remember that letter? A. Yes, sir.

Q. Will you see if you can find your signature on it? A. No, there is no signature, sir.

Sol Bernstein—For People—Cross 3757

Q. Did you ever send a letter to this party unsigned? A. Always signed, sir.

Q. Always signed? A. Yes, sir.

Q. When you said a few minutes ago this was the entire letter, were you right or were you wrong? A. This is not the letter, sir.

Q. Is that or is that not the entire letter? A. No, sir.

The Court: The ruling stands.

Mr. Rosenthal: Exception. 3758

By Mr. Rosenthal:

Q. Did you say a minute ago it was the entire letter?

The Court: I know what he said a minute ago, and the incident is closed.

Mr. Rosenthal: I respectfully except—

Mr. Talley: I except.

Mr. Rosenthal: —to the Court's ruling on the subject and the Court's interrogation of this witness after he had stated it was the letter. 3759

Q. Did you ever, in the letter that you sent out while under guard, threaten, if you did not get $200, that you would cause trouble for individuals?

Mr. Turkus: I object to it. That is an indirect way of trying to put in evidence something not able to be done by direct—

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

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The Court: The word "threaten" is a conclusion.

Q. Look at the bottom of this paper.

Mr. Rosenthal: First mark it for identification.

(Paper marked Defendants' Exhibit R for identification.)

3761 Mr. Rosenthal: I am asking that the witness see it.

Mr. Turkus: Let me see it.

Q. Look at the last part and see whether you signed it with your signature.

Mr. Turkus: I object to, by indirection, putting anything into evidence that cannot go in directly.

The Court: Overruled. Where are the originals of these letters?

3762 Mr. Rosenthal: I have not got them, sir.

The Court: That means nothing. I asked you a question; I ask for the courtesy of an answer.

Mr. Rosenthal: I don't know, sir.

The Court: Under the rules of evidence the originals must be produced or their absence accounted for as unproducible, in order to enable the copy to go into evidence, even though fully authenticated otherwise.

Mr. Rosenthal: I know of no rule, your Honor, which prevents a photostatic—

The Court: I am not obliged to be responsible for what you do know or do not know.

Mr. Talley: Your Honor, these photostats are admitted to be correct by this witness, the writer of them.

The Court: The Court is aware of the record. What is your question?

3764

Q. (Pending question read by the reporter.) A. Yes, sir.

Q. Is that a complete photostatic copy of a letter which you sent out while you say you were under guard in the Half Moon Hotel, to a person to whom it is addressed?

Mr. Turkus: Objected to.

The Court: How can he tell unless he reads it? Sustained.

Mr. Rosenthal: I did not ask him not to read it, sir.

3765

Q. Read it first. A. I am not sure, sir.

The Court: Read it.

The Witness: I am not sure, sir.

By the Court:

Q. Did you read this over? A. Yes, sir.

Q. Surely you ought to be able to remember whether you wrote that. A. I don't recall, sir. That is my signature there.

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Q. Read the context. You cannot fail to know. Can you see it? A. Yes, sir. Yes, sir.

Q. You wrote that letter? A. Yes, sir.

Mr. Rosenthal: Now I offer it in evidence.

Mr. Turkus: Let me see it.

Q. You wrote that from the Half Moon Hotel? A. Yes, sir.

3767 Q. Do you remember how long ago? A. I really cannot tell you, sir.

Q. Is it while you were in custody? A. Yes, sir, a detective beside me, sir. He seen it, sir.

Mr. Turkus: It is objectionable on the grounds urged in connection with the other exhibit, and further it is not an original document.

The Court: Sustained as having nothing to do with this case, incompetent and irrelevant.

Mr. Rosenthal: I respectfully except to

3768 the Court's ruling.

Mr. Turkus: I ask that these photostatic copies be impounded by the Court.

The Court: You cannot—

Mr. Rosenthal: You can impound them by putting them in evidence.

Mr. Klein: That is not impounding them.

Q. How many more letters did you write while in custody and under guard to different people, from the Half Moon Hotel?

Mr. Turkus: Objection, incompetent, irrelevant, immaterial.

The Court: Overruled.

A. About four or five letters all told, sir.

Q. To how many different people did you write letters? A. Just two, sir.

Q. Who were the two that you wrote letters to?

Mr. Turkus: Objectionable. It is incompetent, irrelevant, immaterial. 3770

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Did you demand money in letters that were sent out while you were under guard, from people that you wrote to?

Mr. Turkus: I object to it. That by indirection is attempting to put something in that is improper.

The Court: Sustained.

Mr. Rosenthal: Exception. 3771

(to Mr. Turkus) Will you turn around?

Mr. Turkus: No, I want to watch you. I do not like to have my back turned to you.

Mr. Rosenthal: Your back is better than your face.

Mr. Turkus: Thank you.

Mr. Rosenthal: If I had to look at your face all day, I would not be able to cross-examine. I will stand over here where you can see me and I do not have to look at you.

3772 *Sol Bernstein—For People—Cross*

Mr. Turkus: That ought to be pleasurable.

Q. Did the detectives that were guarding you in the same room see you writing letters that were sent out?

Mr. Turkus: I object to it as incompetent, irrelevant, immaterial.

Mr. Rosenthal: It is on impeachment now.

3773 The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Were those letters which you mailed out from the Half Moon Hotel and while you were under guard, given to detectives to mail?

Mr. Turkus: I think that is insulting and venomous, and I object to it.

The Court: It is immaterial.

Mr. Turkus: Incompetent, irrelevant and immaterial.

3774 The Court: He had a right to write letters.

Mr. Turkus: Of course he did.

The Court: There is no law against it, no expression against it.

Mr. Rosenthal: I object to the Court's remark and to the District Attorney's remark.

The Court: It would be a funny kind of house of detention if you could not write a letter and if you were not entitled to have them mailed.

Mr. Rosenthal: That is not the issue here, sir.

The Court: No.

Mr. Rosenthal: I will mark another letter for identification.

(Paper marked Defendants' Exhibit S for identification.)

Q. I show you that letter and ask you whether you sent that out while you were under guard, in the presence of detectives. 3776

Mr. Turkus: I object to the form of the question.

Mr. Rosenthal: Asking the question—

The Court: Wait.

A. I don't recall the letter, but my signature is on there, sir.

Mr. Turkus: I have an objection to the question first.

3777

By the Court:

Q. Is the letter in your handwriting? A. But I don't recall the letter.

Q. Did you read it? A. Yes, sir.

Q. Does it bring back to mind in its contents whether you wrote it? A. Yes, sir.

By Mr. Rosenthal:

Q. And is it a complete letter?

The Court: This is signed and has a "P. S."

3778

Mr. Rosenthal: I want it for the record, your Honor, with your permission.

Q. Is that a complete letter? A. I don't recall it, sir.

Mr. Turkus: May it also be noted on the record it is a photostat, not the original.

The Court: Photostat, yes.

Mr. Turkus: May I see it?

3779

The Court: Is it offered in evidence?

Mr. Rosenthal: Yes, I am offering it.

The Court: That is, the photostat?

Mr. Rosenthal: Yes, I am offering the photostat of a letter which he identifies to be in his handwriting and a complete letter.

Mr. Turkus: Objected to. It has nothing to do with the Rosen killing.

The Court: Sustained.

Mr. Rosenthal: I respectfully except. May I have that on the record? I am going to ask your Honor to admonish this

3780

individual not to be so free with his language, because of the fact that he now happens to be an Assistant District Attorney, whereas formerly he practiced on this side of the bar. We have more courtesy from men in the District Attorney's office than he will ever give to anybody, and it is about time he is taught manners.

Mr. Turkus: It seems I have been on the receiving end of all abuse.

Mr. Rosenthal: Vile and low and abusive. That is all he says. Let him stick to the case.

Mr. Turkus: Now I am down to a correspondence course.

Mr. Rosenthal: And insulting everybody that opposes you.

The Court: This sounds like an up-to-date political speech. The Court will disregard it. It is out of order.

Mr. Rosenthal: I have no further questions to ask this man.

The Court: Judge Talley?

Mr. Talley: Before I proceed any fur- 3782
ther—

Mr. Rosenthal: I ask that Mr. Klein be asked to face toward the front of the room.

Mr. Klein: I will face where I have a right to.

The Court: The Court is hearing Judge Talley Kindly come to order.

Mr. Talley: Your Honor has stated from the bench that this witness has testified falsely with regard to sending the letters?

3783

The Court: Yes.

Mr. Talley: Your Honor stated—I think the language was—that he has lied before this jury.

The Court: Yes. That is obvious.

Mr. Talley: It is therefore incumbent upon me, it is obvious to the Court, and I now not only request, but in the politest manner possible demand that your Honor sit as a committing magistrate and commit this witness to jail, not to the Half Moon Hotel, but to jail, on the charge of

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perjury or at least false swearing, which your Honor has heard himself in the presence of the Court, in the presence of this jury, which is a crime committed in your presence, and I demand, as I say, that your Honor act according to the circumstances and commit this witness to jail for false swearing.

The Court: You would like him moved from the Half Moon down to Raymond
3785 Street?

Mr. Talley: I would like him committed for the perjury that he has committed in this case. I do not care where your Honor commits him.

The Court: I think you'd better not do any worrying about perjury. The Court is able to attend to its own business without advice. You confine yourself to the trial of this case.

Mr. Talley: I move that this witness be committed for perjury.

3786 The Court: The motion will not be entertained because you have no business to make it. It is none of your concern.

Mr. Talley: I am an officer of this court just as much as your Honor is.

The Court: As an officer of the court, proceed with the Court's instructions. Proceed with the case. This is grandstand play, and utterly cheap.

Mr. Talley: I must take an exception to that remark of your Honor.

The Court: Please proceed with the case.

Mr. Talley: I am not given to grand-

stand plays and I think nobody in this building knows it better than you do.

The Court: Do you wish to continue the examination?

Mr. Talley: Yes, I do.

The Court: Proceed.

By Mr. Talley:

Q. You remember testifying, Bernstein, in this case, in this room, that you got the address of Farvel Cohen's apartment where you went and slept on the rugs the night before Rosen was killed? A. Yes, sir. 3788

Q. And you remember that you testified that that name and address, or at least the address of Cohen's apartment house was written down on a slip of paper by the defendant Weiss and handed to you?

Mr. Turkus: Objected to as repetitious.

Mr. Talley: I have got to lay a foundation for my question or the question would be ridiculous without it. 3789

The Court: Overruled.

Q. Did you so testify? A. Yes, sir.

Q. And of course that testimony given before this jury was true, wasn't it? A. Yes, sir.

Q. On your testimony before the Grand Jury were you asked this question and did you make this reply, at page 21 of the copy of the Grand Jury minutes marked People's Exhibit Z-1—I will ask you the question ahead of it so as to get the connection:

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"Q. What other conversation was there? A. Mendy said we will leave it for the morning when he opens the store and we will do the job right."

Were you asked that question and did you make that reply before the Grand Jury? A. What did you say, sir?

The Court: Listen to it. Read it again.

The Witness: Yes, sir.

3791

Q. "Q. Then what happened after that? A. After that Harry Strauss told me to take the car and bring it into the private garage and he gave me Farvel's address where he lived and I should meet him there." Were you asked that question and did you make that reply? A. It is a mistake, sir; yes, sir.

Q. Another mistake? A. Yes, sir.

Q. You made a great many mistakes in your testimony before the Grand Jury, didn't you?

3792

Mr. Turkus: I object to it. That is not the proof.

The Court: Sustained.

Mr. Talley: Exception.

Mr. Turkus: He made very few mistakes.

Mr. Talley: It is his testimony. He has answered at least five questions where he testified differently before the Grand Jury than he did here by saying "It is a mistake."

Mr. Turkus: Trivialities.

The Court: That will be argued to the jury at the proper time—

Mr. Talley: Exception.

The Court: Whether these are trifling discrepancies which are reconcilable with essential truth or whether they are wilful falsifications on material points.

Mr. Talley: I take an exception.

Q. Do you remember testifying upon this trial that the defendant Weiss distributed the guns?

Mr. Turkus: I object unless he fixes the time. 3794

The Court: There were two distributions testified to.

Mr. Talley: I did not hear your Honor.

The Court: Repeat it.

(The remarks of the Court were read by the reporter).

Q. Do you remember the second distribution of guns, the second time the guns were distributed? A. I don't understand what you mean, sir.

Q. Do you know what "second" means, first, second? A. Yes, sir. 3795

Q. Do you know what that means? A. Yes, sir.

Q. Why do you tell me you do not know what it means? A. Yes, sir.

Mr. Turkus: Objected to— there are other words in the sentence besides first and second.

Q. How many times—

Mr. Turkus: Just a moment. I have an

3796 *Sol Bernstein—For People—Cross*

objection to the argumentation with the witness.

The Court: Avoid arguing.

Q. How many times do you say you saw guns distributed—

Mr. Turkus: Object to it.

Q. —on the night before or the morning of the Rosen killing?

3797

Mr. Turkus: Objected to as repetitious.

The Court: The testimony on direct is that Weiss distributed the guns the night before but after the inspection of premises the guns were returned; that the following morning he gave Weiss the guns and the extra bullets and Weiss gave one each to Strauss and Ferraco and said "Come on."

Q. You testified that on both occasions, the night before and the morning of the killing, that

3798 Weiss distributed the guns? A. Yes, sir.

Q. That was true, wasn't it? A. Yes, sir.

Q. Now were you asked these questions in your testimony before the Grand Jury and did you make these answers:

"Q. What was taken from the package"—referring I said to the package which you said contained guns—

"Q. What was taken from the package? A. Three guns taken out of the package.

"Q. When you say guns, were they revolvers? A. Revolvers.

"Q. Or automatics? A. I don't know what they were. I know they were revolvers."

Q. Were you asked those questions and did you make those replies? A. Yes, sir.

Q. Were you asked these questions and did you make these replies:

"Q. What did you do with the guns when you opened the package? A. Harry opened the package and gave Mendy a gun, Jimmy a gun, and he took one himself."

Were you asked those questions and did you 3800
make those answers? A. Yes, sir.

Q. And the Harry that you referred to in your testimony was not Weiss; it was Harry Strauss, wasn't it? A. It is a mistake, sir.

Q. Another mistake?

Mr. Turkus: I ask that the observation "Another mistake" be stricken from the record.

The Court: It is for the jury to say.

Q. Were you in California in March of 1939? 3801
A. 1939? Yes, sir.

Q. And you told us yesterday about the number of friends you had in California, didn't you? A. Yes, sir.

Q. And did you visit some of your friends there?

Mr. Turkus: It is objected to as incompetent, irrelevant, immaterial, nothing to do with the Rosen killing.

Mr. Talley: Preliminary foundation. I am entitled to it.

3802 *Sol Bernstein—For People—Cross*

Mr. Turkus: This is recross examination now.

The Court: Has it any reference to the Grand Jury minutes?

Mr. Talley: No, it has not.

The Court: Sustained.

Q. Did you visit any of your friends in California in March of 1939 who were in jail?

3803 Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

The Court: Sustained upon the ground that it is not new matter and you had your cross-examination of this witness.

Mr. Talley: I am asking leave now of your Honor to continue my cross-examination on a matter that I did not call this witness' attention to.

The Court: That, of course, rests in the discretion of the Court. I will let you
3804 go on for the present and see what it means.

Mr. Talley: Thank you.

Q. When you were in California in March of 1939, did you visit any of your friends that you spoke about who were in jail? A. I don't know what year it was but it was, sir.

Q. What? A. Yes, sir.

The Court: You say you do not know what year?

The Witness: I do not know what year, but I visited somebody in jail.

The Court: Mr. Talley wants to know specifically 1939. Do you remember that?

The Witness: I don't know what year it was but I did visit somebody in jail. I do not know what year it was.

Q. Whom did you visit in jail?

Mr. Turkus: That is objected to. 3806

The Court: Let him answer.

A. Nati Katz.

Q. Is that name Nathan Katz? A. Yes, sir.

Q. In what jail did you visit him? A. San Quentin, San Francisco.

Q. Did you have a talk with him? A. Yes, sir.

Q. How long were you there with Nati Katz in San Quentin prison? A. An hour or so.

Q. Don't you remember that that was in March of 1939?

Mr. Turkus: That is objectionable. 3807

Mr. Talley: I have a right to fix the time.

The Court: Overruled.

A. I don't recall what month it was, sir.

Q. Can't you recall it was in the year 1939? A. It might have been, sir.

The Court: No, not what it might have been. If you do not know, say so.

The Witness: Don't recall, sir.

3808 *Sol Bernstein—For People—Cross*

Q. On the first day of March, 1939, in San Quentin prison, California, did you not tell Nathan Katz, a prisoner in San Quentin jail, on a visit which you made to him there, that you had killed Rosen because Rosen owed you several hundred dollars and that you got Strauss to help you out with the job? A. No, sir.

Q. To help you out? A. No, sir.

Q. You did not tell him that? A. No, sir.

Q. Did you tell him anything like that? A. No, sir.

3809

Mr. Turkus: Objected to.

The Court: Overruled.

Q. These letters that Mr. Rosenthal has shown to you, you say are correct photostats of letters which you wrote in the Half Moon Hotel, is that right?

Mr. Turkus: Objected to as repetition.

Mr. Talley: I have not asked him anything about it. My position is precisely

3810 the same as though the defendant Weiss was the only one on trial in this case. You seem to think that word "repetitious" has a charm and every time you object on that ground the Court must sustain it. You don't understand the elementary principles of cross-examination which is based upon repetition.

Mr. Turkus: Some duet, Talley and Rosenthal—a pipperoo.

Mr. Talley: "Repetitious", that is the only objection you seem to know.

Mr. Turkus: It seems to be pretty good.

Mr. Rosenthal: Some duet and he is the whole orchestra. You blow your own horn.

The Court: Is the speechmaking over?

Mr. Talley: I had no speech.

Mr. Turkus: I had an objection.

The Court: That certainly was a speech and was unnecessary. The objection is overruled. 3812

Q. Answer the question. A. Yes, sir.

Q. And you don't deny having written those letters, do you? A. No, sir.

Mr. Turkus: Objectionable.

The Court: He has not denied it.

The Witness: Yes, sir.

The Court: But Mr. Talley is entitled to cross-examine and impeach him on that point to show that he did not write that. It adds nothing to the fund of knowledge in the court room to have more lawyers prove that he did when he admits to one that he did. 3813

Mr. Talley: Do I get an answer to the question?

Mr. Turkus: He said yes.

Q. When you write do you write fast or slowly?

Mr. Turkus: Objectionable.

The Court: Sustained as immaterial.

Mr. Talley: I submit it is proper cross-

examination and should be permitted. I except to your Honor's ruling.

Q. How long did it take you to write any of these three letters?

Mr. Turkus: I object to it, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

3815 Q. When they were written, was anybody present in the room in which you wrote them?

Mr. Turkus: That is objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: I take an exception.

Q. Were any of the detectives that you say are constantly with you and have been constantly with you in the Half Moon Hotel, or whatever other hotels you have been a guest at, were any
3816 of the detectives present when you wrote those letters?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you mail those letters personally? A. No, sir.

Q. Who did?

Mr. Turkus: Objected to, incompetent, irrelevant and immaterial.

The Court: Sustained as immaterial.

Mr. Talley: Exception. May I state that your Honor remembers that this witness denied that he ever did mail or send any letters through his wife or anybody else?

The Court: Proceed.

Mr. Talley: I take an exception to your Honor's ruling, your Honor's failure to permit me to conduct my cross-examination in a proper, legal manner— 3818

The Court: Make no speeches.

Mr. Talley: I am making no speeches. I note for the record that I except to your Honor's ruling which I regard as highly erroneous and highly prejudicial to the defendant, if you call that a speech but it is not.

The Court: When you were a judge, if any lawyer appeared before you, surely you were not more patient than I.

Mr. Talley: I never made rulings on cross-examination such as I have been compelled to here during this trial. 3819

The Court: Well, now you heard them.

Mr. Talley: I say I am entitled to cross-examine this witness at length.

The Court: Will you kindly come to order and ask your questions?

Mr. Talley: No, sir, I have no further questions to ask. I note my exception to your Honor's interference with proper cross-examination.

The Court: You interrupted the Court. You have interrupted the Court so that

I forgot what I was saying. What was I saying when I was interrupted?

(The last remark of the Court was read by the reporter.)

The Court: Ask the questions, state your exception, and let it go at that. That is the proper court decorum.

Mr. Talley: I have done that.

The Court: Any more cross from anybody, or redirect?

3821 Mr. Rosenthal: With the exception of what I stated to your Honor regarding these Grand Jury minutes which I have not had time to properly digest—

The Court: You have. You certainly cannot take Grand Jury minutes home with you.

Mr. Rosenthal: These are only a copy.

The Court: You have had plenty of time. The Court is against you on it.

Any redirect?

Mr. Turkus: Yes, very brief.

The Court: Proceed.

3822 Mr. Turkus: I am waiting for someone to be brought in.

(A man enters the court-room.)

Mr. Turkus: Bring him down here where he can be seen.

The Court: Put the other lights on.

Redirect examination by Mr. Turkus:

Q. Who is that (indicating man who entered the courtroom)? A. Muggsy Cohen.

Mr. Turkus: Before he is removed, let him give his name to the stenographer.

(Name given: Harry Cohen, of 85 Bristol Street.)

Q. Is that the Harry Cohen that you referred to in your testimony to this Court and jury as Muggsy Cohen? A. Automobile thief and a radio thief, yes, sir.

Q. You were asked by Capone's lawyer and Weiss's lawyer about your testimony upstate in the Gangi Cohen case; do you remember that? A. Yes, sir. 3824

Q. Gangi Cohen, what was his right name, first name; was it Irving? A. Irving.

Q. Was he a Brownsville boy? A. Yes, sir.

Mr. Rosenthal: Objected to as not proper redirect examination.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. When you went on the stand upstate and you were questioned by Mr. Deckelman, the District Attorney, how long were you kept on the stand? 3825

Mr. Rosenthal: That is objected to.

The Court: Overruled.

A. By Mr. Deckelman?

Q. Yes. A. About three to five minutes, sir.

Q. Do you know whether or not all your testimony in the Cohen case comprises three pages of testimony?

Mr. Cuff: Objected to, incompetent, irrelevant, immaterial.

A. It took three to five minutes.

3826 *Sol Bernstein—For People—Redirect*

The Court: He cannot say how many pages.

Mr. Turkus: All right.

Q. How long did Mr. Saul Price, whom you pointed out as having been seated in the second chair at the time he was there, cross-question you or cross-examine you?

Mr. Cuff: Objected to.

3827

A. I think about three or four hours.

The Court: Overruled.

Mr. Cuff: Exception.

Q. How many hours? A. About three or four hours, sir.

Q. Do you know that Saul Price, the lawyer who questioned you upstate, is Farvel Cohen's lawyer? A. Yes, sir.

Mr. Cuff: Objection.

3828 The Court: Overruled.

Mr. Cuff: Exception.

Q. At the time you were sent upstate to Mr. Deckelman's office, were there many fugitives at large?

Mr. Rosenthal: Objected to.

A. A lot of them, sir.

The Court: Overruled.

Mr. Rosenthal: Exception.

There does not seem to be any hesitancy on this witness's part when counsel for defense objects.

The Court: Please. Do you object?

Mr. Rosenthal: Yes, sir, and I ask—

The Court: The Court has overruled your objection.

Mr. Rosenthal: —I ask this witness be told when counsel for defendant objects, he has the same right as when The People's counsel objects, that he should not answer 3830
until the Court rules on the objection.

The Court: The witness is so instructed.

Mr. Turkus: Do not answer a single question until the objection has been ruled on.

Q. At the time when you testified in the Cohen case, were there fugitives on that indictment?

Mr. Talley: Objected to. Not proper redirect examination.

Mr. Turkus: All right, it is withdrawn. 3831

Mr. Rosenthal: Repetitious.

Mr. Talley: Don't say that.

Q. Were there witnesses who were not then in custody, protective custody?

Mr. Rosenthal: That is objected to as a conclusion of law, not one of fact.

The Court: He said there were many fugitives at large.

Mr. Turkus: I want to know about wit-

nesses who were not taken into protective custody.

Mr. Rosenthal: I object to it. It is a legal question.

Mr. Turkus: That is not legal.

The Court: It has bearing on motive for thoroughness in testimony. He may answer.

Mr. Talley: It would not justify perjury and false swearing because a few wit-

3833 nesses were at large.

The Court: You do not have to argue that to the Court.

Mr. Talley: That is my ground of objection.

The Court: The Court considers that offensive. The Court will ignore it.

Mr. Talley: Exception.

Q. (Pending question read by the reporter.) A. What do you mean, sir?

Q. Do you know that there were certain wi-

3834 nesses in the investigation that were not under the protection then of the District Attorney?

Mr. Rosenthal: I object.

A. Yes, sir.

The Court: Objection is overruled.

Mr. Rosenthal: I respectfully except and move to strike out the answer.

The Court: Denied.

Mr. Rosenthal: Exception.

Mr. Cuff: Exception.

3835

Q. Now, when Mr. Deckelman, the District Attorney, had you on the stand upstate, was your testimony in the Gangi Cohen case in so far as Gangi Cohen was concerned, limited to a single conversation that you had with Gangi Cohen?

Mr. Rosenthal: I object to the question.

The Court: Overruled.

A. Yes, sir.

3836

Mr. Rosenthal: I respectfully except.

Q. And did you tell District Attorney Deckelman and the jury upstate the truth about that conversation that you had with Gangi Cohen?

Mr. Rosenthal: Object to the question. That is for this jury to say, whether he did or he did not.

The Court: Overruled.

Mr. Rosenthal: The other jury has passed on that.

3837

The Court: Never mind about that, or there will be trouble in this court.

Mr. Rosenthal: I said the other jury—

The Court: It may go beyond this court.

Mr. Rosenthal: I said the other jury has passed on that.

The Court: You say nothing of the kind.

Mr. Rosenthal: I respectfully except to the Court's ruling. I am not stating anything—

The Court: You sit down. The Court requests you to sit down immediately.

Mr. Rosenthal: I except.

3838 *Sol Bernstein—For People—Redirect*

Mr. Talley: I wish to make an objection, sir.

The Court: Make it, Judge Talley.

Mr. Talley: I object to it upon the ground that it is not the best evidence—any reference to his testimony in the Monticello Gangi Cohen case. The best evidence of that is the stenographer's minutes. If he is to be interrogated about his testimony there, there is only one
3839 proper way to do that and that is read him the question and the answer.

The Court: I think that is a good objection, and I think that if we proceed under the ruling as made it involves a retrial of the evidence in that case, and that cannot be permitted here

Mr. Talley: I move to strike out the last answer.

The Court: Sustained upon that ground. Strike out the answer.

3840 Q. You were asked by Capone's lawyer and Weiss's lawyer about the Yuran body that was buried. Remember that? A. Yes, sir.

Q. Did you know Hyman Yuran? A. No, sir.

Q. Did you know what business he was in? A. No, sir.

Q. Did you know who ordered him killed? A. No, sir.

Mr. Rosenthal: I object to that.

Mr. Talley: Object to that, if your Honor pleases, wholly irrelevant, wholly immaterial, makes no difference whether

he knew him or not. He has testified that he helped to bury the body, that he helped to carry the body to the burial place. What difference does it make whether he knew him or not?

The Court: Don't argue. Overruled.

Mr. Talley: Exception.

Q. Did you know the motive for the killing of Yuran?

3842

Mr. Rosenthal: Objected to.

Mr. Talley: Objected to as immaterial.

The Court: Overruled.

Defendants' Counsel: Exception.

A. No, sir.

Q. Did you testify in any Grand Jury, either in Brooklyn, Sullivan County, or anywhere else, except in the Rosen case, The Gangi case, and the Yuran case? A. Them three cases.

Mr. Rosenthal: I object to the form of the question. 3843

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. Did you testify before any Grand Jury investigating any other cases of any kind, nature or description?

Mr. Rosenthal: That is objected to.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. What do you mean, sir?

Q. I will do it over with you.

3844 *Sol Bernstein—For People—Redirect*

The Court: He said those were the only three cases. Let it go at that.

Mr. Turkus: If that answer is there, I am contented with it. That is all.

Shall I call another witness?

Mr. Barshay: I have some motions.

The Court: Mr. Barshay is starting in.

Mr. Barshay: I just have a formal motion, sir. I don't want this man on the stand.

3845

The Court: You want to make a motion?

Mr. Barshay: Yes.

The Court: You had better make it.

Mr. Barshay: I renew my motion to strike out the testimony of this witness, both direct, cross, and redirect, on the grounds heretofore set forth, that it is incompetent, irrelevant, immaterial with respect to the defendant Buchalter, and does not tend to connect him with the commission of the crime in any shape, manner or form.

3846

The Court: It remains to be seen whether or not it will be so connected.

Mr. Barshay: Yes, but at present, sir.

The Court: That is purely a question of law. The motion is denied.

Mr. Barshay: Exception, and let the record show—

The Court: Taken subject to connection.

Mr. Barshay: Let the record show that every objection and exception and motion

made by every counsel inures to our benefit.

The Court: Precisely. That is everything?

Mr. Turkus: That is everything with this witness.

The Court: First remand the witness.

(The witness leaves the court-room.)

The Court: Gentlemen of the jury, please remember the previous admonition of the Court. Do not discuss this case. 3848
Let nobody talk to you about it. Keep your minds open and follow all other instructions as to your demeanor while under supervision as heretofore given.

You may leave until ten o'clock tomorrow morning.

(The jury retired from the court-room.)

All others remain in order.

The defendants are remanded.

(Whereupon an adjournment was taken to Friday, October 31, 1941, at ten o'clock a. m.) 3849

3850 *Max Rubin—For People—Direct*

Brooklyn, N. Y., October 31, 1941.

TRIAL RESUMED

MAX RUBIN, (refusing to give his address), called as a witness in behalf of The People, after being duly sworn, testifies as follows:

By Clerk Clark:

3851 Q. Where do you live? A. I will not give my address. I was shot once.

Mr. Barshay: I ask your Honor now to admonish this witness that there shall be no remarks. I do not know whether the jury heard it, but I ask your Honor to tell him now not to repeat it. And if they did hear it, I ask you to admonish them to disregard it.

The Court: So admonished, and the jury is so instructed.

3852 *Direct examination by Mr. Turkus:*

Q. Mr. Rubin, how old are you? A. I will be 52 November 5th or 7th, I don't know which.

Q. Are you married? A. I am.

Q. Have you any children? A. Two.

Q. Have you been previously married? A. I have been.

Q. When you say "two children," was there a child by each marriage? A. That is right.

Q. Do you live with your wife and son? A. I do.

Q. Did you attend the public school system in New York City? A. I did.

Q. What school did you attend? A. Public School 34, Broome and Sheriff Street, New York.

Q. Is that commonly known as the East Side of Manhattan? A. That is right.

Q. How far did you go in Public School? A. Went up to 4-B.

Q. Did you leave school when you were in the fourth grade? A. I did. 3854

Q. What did you do after you left school? A. I went to work as a messenger boy for the Postal Telegraph.

Q. You say you left school in the fourth grade? A. Yes, sir, that is right, eleven years old.

Q. For what company did you work as a messenger boy when you left school? A. The Postal Telegraph, 533 Broadway, New York.

Q. Did you do any work after you left the Postal Telegraph Company? A. Yes, sir.

Q. Do you recall what your next job was? 3855
A. I worked for a concern at 150 Nassau Street, a medical manufacturing company.

Q. What work did you do there? A. Messenger boy.

Q. What was your next job, if you recall? A. Then I worked for a concern named Isidor Cohen, or Isidor Stern on 14th Street, who made gold caps, dental work. I worked in the laboratory.

Q. At one time had you been a messenger boy for the Western Union? A. Yes, sir, in 14th Street east of 3rd Avenue.

3856 Q. Was that a concern that manufactured gold caps named Stillwell & Gladding? A. No, sir, this was an analytical chemist, I worked for later, when I was about 19 or 20 years of age.

Q. I am trying the best I can to put the jobs in the order in which you had them. Did you at one time work for French & Ward? A. Yes, sir, I did, as shipping clerk; they were on Worth or Leonard Street.

Q. How long did you work there? A. Quite
3857 some time.

Q. Did you ever work as a milk driver? A. I did.

Q. For whom were you employed? A. I worked for the Locust Farms and then later on for the Sheffield Farms.

Q. In your capacity were you a milk driver and salesman? A. Well, that is what a milk driver is, a salesman.

Q. Did you work for a railroad company? A. I did, I was a conductor on the 4th Avenue Line, and later on for the 5th Avenue Bus Line.

3858 Q. That would be the New York City Transit System that has railroad and transit facilities throughout New York City? A. That is right.

Q. Having left school at the age of approximately 11 years, Mr. Rubin, did you continue your education? A. I did.

Q. Was it at night schools? A. Yes, sir, preparatory schools and night schools.

Q. What schools did you attend? A. I went to the New York Preparatory School, I went to the Eron Preparatory School, Manhattan. Whenever I could possibly further my limited education I did.

Q. You say you have been married twice? A. Yes, sir, that is right.

Q. In 1917, you were then married to your first wife; is that correct? A. Yes, sir.

Q. What classification did you get in the draft?

Mr. Barshay: I object. That is a matter of cross-examination, sir. I have not objected to these preliminaries, but they continue on.

3860

The Court: This is just a pro forma background.

Mr. Barshay: It is not a formal background from this point on, these are matters for cross-examination.

The Court: As long as it is objected to I will sustain it.

Mr. Turkus: May I urge I have a right—

Mr. Barshay: Please—I do not want to have any trouble. The Judge sustained the objection.

3861

Mr. Turkus: The District Attorney has no exception.

The Court: You mean in this war?

Mr. Turkus: In 1917. I have a right, I submit, to have his true life.

The Court: This has no relation to what happened lately?

Mr. Turkus: No.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. My first classification was 4-A.

3862 *Max Rubin—For People—Direct*

Q. Was that on the basis of being a married man with children?

Mr. Barshay: I object.

The Court: It is irrelevant.

Mr. Turkus: There is a situation in regard to the 1917 draft that the jury has a right to know.

Mr. Barshay: They will know it.

Mr. Turkus: And the District Attorney has a right to submit the witness in
3863 his true light, to the jury for their consideration.

The Court: I think I sense the situation. Objection overruled.

Mr. Barshay: Exception.

Q. (Last question repeated to the witness.) A. Yes, sir.

Q. Thereafter, was there a complaint made in connection with your classification? A. Yes, sir.

Q. Was that made by your wife? A. It was.

3864 Q. At that time had you been living separate and apart from your wife from time to time, and living with her from time to time? A. That is so.

Q. After complaint had been made, what was your new classification? A. 1-A.

Q. Were you sent for or called to appear for physical examination after the 1-A classification? A. I was.

Q. Did you go? A. I did.

Q. Were you examined? A. I was.

Q. Were you called up for services? A. I was.

Q. Did you go? A. I did not.

Q. Now, sometime in the year 1918 did you join and become a member of a union known as the Amalgamated Clothing Workers of America? A. That is right.

Q. Becoming a member of that union did you join a particular or specific local thereof? A. I did.

3866

Mr. Rosenthal: Judge, so that I in no wise may interrupt the continuity of the testimony of this witness, on behalf of the defendant Capone I object to this line of testimony on the ground it is in no wise binding on him. May I have a general objection to the entire line of testimony?

Mr. Talley: The defendant Weiss joins in the objection.

The Court: Objection overruled.

Defense Counsel: We except.

3867

Mr. Rosenthal: May I have an objection to this entire line so I do not have to get up at each question?

The Court: The trouble is, you get up and then the Court is on its guard. There may be a special reason for some particular question.

Mr. Rosenthal: I mean, if there is any special reason I will get up on a different ground: but my ground now is a general ground in so far as it affects the defendant Capone it is not binding. But if there

3868 *Max Rubin—For People—Direct*

is any special ground I will get up and make an additional objection so as to apprise the Court of the additional reason, if there be any.

The Court: All right.

Q. What was the specific local that you were a member of? A. Local 4, Cutters Union, Amalgamated Clothing Workers of America.

Q. At that time who was president of the
3869 Amalgamated Clothing Workers of America? A. Sidney Hillman.

Q. After you joined the Amalgamated Union and became attached to Local No. 4, did you work as a cutter? A. I did.

Q. Did that membership in the Cutters Union entitle you to work as a cutter? A. It did.

Q. Had you done any work as a cutter before becoming a member? A. No.

Q. When you became a member of this union did you get a job as a cutter? A. I did.

Q. You say you had no previous experience?
A. None whatsoever.

3870 Q. Who did you get your first job with? A. My first job was with a bathrobe house, the name of the concern was Pollock & Behrens, they are on 4th Avenue and 12th Street.

Q. Did you get a job there as a cutter for this bathrobe house? A. Yes, sir, I did.

Q. Was that a job of the cutting of bathrobes? A. That is right.

Q. From that time on did you work for a considerable period of time as a cutter for various concerns? A. I did.

Q. By what houses were you employed and

what was their line of merchandise? A. I worked for the F.B.Q.; they are on Lafayette Street. They were making uniforms.

Q. Army uniforms? A. Yes, sir. I worked for Kahn & Dreyfus; they were making Army uniforms; and several other houses I do not remember; and then I worked for some clothing houses that made ordinary clothing, like Sherrick & Hirsch, Samuel Falk, maybe some others.

Q. From 1918 how long did you work as a cutter, as you have just related to the Court and the jury? A. Until about 1926 or 1927. 3872

Q. Was there a period of time when you did not work as a cutter? A. That is right.

Q. What was that period of time? A. Between 1921 and 1923.

Q. Did you then leave the United States? A. I did.

Q. What country did you go to? A. Germany.

Q. In order to leave the United States to go to a foreign country it was necessary, wasn't it, to get a passport? A. It was.

Q. In 1917, as you have told the jury, you had evaded service in the draft, is that correct? 3873
A. That is right.

Q. Did you get a passport to leave the United States? A. I did.

Q. Did you get it in the name of Max Rubin? A. I did not.

Q. What name did you get your passport in? A. Instead of using the name Max, I used the name Benjamin.

Q. Was the name Benjamin the name of some member of your family? A. A brother of mine.

Q. When you returned from Europe, did you

rejoin your association and connection with the Amalgamated Clothing Workers of America? A. Yes, sir.

Q. Did you go back to Local No. 4 of the Cutters Union? A. Yes, sir.

Q. As I understand it, then, you maintained that connection until 1926 or 1927? A. That is right.

Q. Do you know a man named Murray Weinstein? A. I do.

3875 Q. Do you know him well? A. Yes, sir.

Q. Was he connected with the Amalgamated Clothing Workers of America Union? A. Yes.

Q. In what capacity? A. He was business agent, later on became the manager of that particular local, Local 4.

Q. At the time when you rejoined your connection with the Amalgamated Clothing Workers of America in Local 4, Cutters Union, what position then did this Murray Weinstein hold? A. To my best recollection he was a business agent.

Q. Shortly after you rejoined the union of the Amalgamated Clothing Cutters Union, Local 4,

3876 were you elected to any office in that union? A. I was an executive board member, and became an executive board member when I rejoined.

Q. Had you been an executive board member before you went to Europe? A. I was.

Q. On your return from Europe were you on the executive board again? A. A short time after I came back, yes, sir.

Q. Is that an elective office, in the executive board? A. It is.

Q. In addition to being a member of the executive board did you occupy any other official

3877

position with the union? A. I was on committees. I was on the finance committee of the organization.

Q. Until approximately what time—what year—did you continue in these official capacities with the union? A. Until 1927.

Q. Did you, while you were a union official connected with the Amalgamated Clothing Workers of America, make the acquaintance of a man named Terry Burns?

3878

Mr. Barshay: I object to that as wholly irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception.

May we fix the date, please?

Mr. Turkus: I will.

A. I did.

Q. Approximately when did you meet Burns? A. About 1923.

Q. Did you also make the acquaintance of an individual while you were an official of the Amalgamated Clothing Workers of America by the name of Abie Slabow?

3879

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Were those individuals, Abie Slabow and Terry Burns, connected with the Amalgamated Clothing Workers of America?

3880 *Max Rubin—For People—Direct*

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. They were on the payroll.

Mr. Barshay: I move to strike out the answer. The answer requires "yes" or "no."

3881 The Court: Not necessarily. Motion denied.

Mr. Barshay: Exception.

Q. At the time Burns and Slabow were on the payroll of the union, what position did Murray Weinstein occupy with the Amalgamated Clothing Workers of America?

Mr. Barshay: I object to that. It has nothing to do with this defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

3882

A. He was active in the organizing work of the organization.

Q. Did the payroll, in connection with Slabow and Burns, continue with the Amalgamated at the time after Weinstein became maaager of the union?

Mr. Barshay: I make the same objection, not binding on this defendant, in no wise connected with this case.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir, until—the payroll continued while Weinstein was manager of the union, yes, sir.

Q. In your connection as a union official, did you become acquainted with a man known as Philip Orlofsky?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

3884

A. I did.

Q. Was he connected with the Amalgamated Clothing Workers of America? A. He was.

Q. Now, in or about 1926, did Philip Orlofsky secure some official position with the Amalgamated Union?

Mr. Barshay: I make the same objection; I don't know, Judge, whether we are trying the Amalgamated Union or trying this case.

The Court: Objection overruled.

Mr. Barshay: Exception. 3885

The Court: You and I will find it out at the same moment, so we must see what it is all about.

Mr. Barshay: This man has been on the stand forty minutes and he has not mentioned a single thing yet. It is absolutely immaterial to this issue. I know the purpose of this examination.

The Court: I see. If it is not material, then why object?

Mr. Barshay: It is not material.

3886 *Max Rubin—For People—Direct*

Mr. Turkus: May the record indicate that the witness went on the stand at approximately ten minutes to eleven and it is now ten minates after eleven?

Mr. Barshay: All right, twenty minutes.

Q. (Last question repeated to witness.) A. He was business agent; then he became manager of the union by defeating Murray Weinstein in
3887 the election.

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. After Philip Orlofsky replaced Murray Weinstein as manager of the Cutters Union, Local 4, of the Amalgamated, did Burns and Slabow continue on the payroll of the union?

Mr. Barshay: I make the same objec-
3888 tion.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. They did.

Q. Now, how long after Orlofsky became manager of the union did Slabow and Burns remain on the payroll?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Until 1927, I believe.

Q. Now, Mr. Rubin, as an official of the union did you come to know a man named Hymie Holtz?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I knew him as Hymie "Curly" Holtz, very well. 3890

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay. Exception.

Q. Was "Curly" an alias?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Do you know whether Hymie "Curly" Holtz is alive today? 3891

Mr. Barshay: I object.

The Court: This calls for yes or no. Objection overruled.

Mr. Barshay: Exception.

A. I don't know.

Q. Do you know a man named Shapiro?

Mr. Barshay: I make the same objection.

3892

The Witness: What Shapiro?
The Court: Objection overruled.
Mr. Barshay: Exception.

Q. Well, the one who is sometimes known as Jacob Shapiro. Did you know such an individual? Did you come to meet him, as an official of the union?

Mr. Barshay: I object.
The Court: Objection overruled.
3893 Mr. Barshay: Exception.

A. I do, but they never called him "Jacob Shapiro."

Q. Under what name did you know Shapiro? A. Charley Gurrah.

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

3894 Q. (The Court) How do you spell that? A. G-u-r r-a-h.

Q. As a union official working with the Amalgamated, did you come to know the defendant Louis Buchalter? A. I did.

Q. Under what name other than Buchalter did you know him? A. Lepke, and there is another name we used when we called him on the telephone.

Q. I will come to that later. What was the name under which he was commonly referred to? A. Lepke.

Q. Now, did the Defendant Lepke, Gurrah, and Curly Holtz become connected with the union?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. They did.

Q. Whose places in the union did Lepke, Gurrah, and Hymie Curly Holtz take? 3896

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Slabow and Terry Burns.

Q. In other words, Lepke, Gurrah and Hymie Holtz replaced Slabow and Burns? A. That is right.

Q. And that was after Orlofsky was business manager of the union? A. That is right. 3897

Mr. Barshay: May we have the time?
Mr. Turkus: You will have it, be patient.

Q. Through whom, Mr. Rubin, did you make the acquaintance of Lepke and Gurrah? A. Through Curly.

Q. Who was it that introduced you to Curly first, do you recall?

Mr. Barshay: Objected to.
The Court: Objection overruled.

Mr. Barshay: Exception.

A. Irving Whitey Deutsch.

Q. Was Irving Whitey Deutsch a member of the Union? A. He was, at that time.

Q. Was he a cutter? A. He was.

Q. Was it through your association with Deutsch that you ultimately made the acquaintance of Hymie Curly Holtz, Lepke, and Gurrah? A. Yes, sir, that is right.

3899 Q. How long have you known Lepke and Gurrah? A. Since 1927, I believe.

Q. Had you seen Lepke before you actually made his acquaintance? A. I did.

Q. Where had you seen him? A. In the Clothing Center, particularly downtown, on Broadway.

Q. Is that commonly known as the Clothing District? A. At that time it was below 14th Street. Now it is above 14th Street, on 5th Avenue.

Q. So at the time you first saw him, you saw him in the area that was then commonly known
3900 as the Clothing District? A. That is right.

Q. When did you first become intimate with Lepke?

Mr. Barshay: I object to that characterization.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. 1932.

Q. Now, prior to 1932, did you come in frequent contact with Lepke? A. Intimately? You are speaking of intimately? Not how often?

saw him before 1932—you are speaking of intimately?

Q. Yes. A. By intimately you mean after Curly Holtz disappeared?

Mr. Barshay: I move to strike it out. He can answer yes or no.

Mr. Turkus: I move to withdraw it in that form.

Mr. Barshay: Will your Honor instruct the jury to disregard that statement? 3902

The Court: It does not mean anything as far as I can see.

Mr. Barshay: Whatever it means, may they disregard it?

The Court: Somebody disappeared—suppose he did?

Mr. Barshay: Do you strike it out?

The Court: It does not mean anything.

Mr. Barshay: I take exception.

The Court: Strike it out.

Mr. Barshay: I withdraw the exception. 3903

Q. Did Hymie Curly Holtz have a place of business in the clothing district?

Mr. Barshay: Objected to as immaterial.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He had a place of business on 24th Street.

Q. Did he have a partner in that business? A. He did.

3904

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Who was the partner? A. His name was Dun.

Q. Did you have occasion to go to that place of business from time to time?

3905

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I went there from time to time.

Q. Who did you see there?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

3906

A. Curley, Lepke, Gurrah, and a few others.

Q. In the years you have known Lepke, did you ever make contacts with him and with Gurrah?

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Rosenthal: At this time I object. I have a special objection. I object to it as in no wise connecting or binding on

the defendant Capone; no knowledge on his part of any of these things.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I did.

Q. Now, as an official of the union did you have any business deals with Lepke? A. I did, and with Gurrah whenever Lepke was not around.

Q. Without stating the nature of the work you did, will you tell the Court and the jury whether you did any work for Lepke in connection with Local 138 of the Flour Truckmens Union? 3908

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Likewise, without stating the nature of the work you performed, tell the Court and jury whether or not you did any work for Lepke in connection with the Expressmens Association. 3909

Mr. Barshay: Same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. What was the full name of the Expressmens Association? A. The Greater New York Tailors Expressmens Association.

Q. Was that the association of boss truckers? A. Of boss truckers in the clothing industry.

Q. Exclusively? A. Exclusively.

3910 *Max Rubin—For People—Direct*

Q. As a result of the work you did for Lepke for the Flour Truckmens Union and the Greater New York Tailors Expressmens Association, did you come in frequent contact and have many meetings with Lepke? A. Almost daily; when he was around, almost daily.

Mr. Barshay: He answered the question.

The Witness: I have got to be careful.

3911 Mr. Barshay: You had better be careful.

The Witness: I want to be exact as I can be. Don't you bulldoze me. I know Hymie Barshay very well. Don't bulldoze me.

Mr. Barshay: I never saw this man in my life. He had an experience in a case before and he is resuming the same tactics, and I read him the record and he was admonished by the judge. Now I ask your Honor to admonish him to answer questions. He is an intelligent individual.

3912 The Court: You are speaking in a very angry tone. You presume to jump up and in that tone to aggravate this witness by addressing him and admonishing him, when you have no business to do it. You brought this on yourself.

Mr. Barshay: I take exception.

The Court: You are both to blame.

Mr. Barshay: You should tell him now he cannot stand up in this court-room and speak that way to any person who makes a legal and proper and competent objection.

The Court: You are in a highly excited state.

Mr. Barshay: I am not excited.

The Court: You are. You are shouting in a high voice and in an excited manner.

Resume the examination, please.

By Mr. Turkus:

Q. Sometime in the year 1928 were you appointed by the executive board to become a business agent of Local 240 of the Clothing Drivers and Helpers Union? A. I was. 3914

Q. At that time was Local 240 of the Clothing Drivers and Helpers Union affiliated with the Amalgamated Clothing Workers of America? A. It was.

Q. Sometime in or about the year 1933 did they, Local 240 of the Clothing Drivers and Helpers Union, become affiliated as part of the Teamsters Union? A. It did. It became part of the Teamsters Union of the A. F. of L.

Q. In 1928 it was then part of the Amalgamated, is that correct? A. That is right. 3915

Q. Until what year did you continue on the payroll, as business agent of Local 240? A. Until February, 1939.

Q. Did you do any work, however, as business agent for the local from about the middle of October, 1936, until August of 1937? A. I did not—very little.

Q. Now, after that period which you have just related to the Court and Jury, and from on or about August, 1937, until—I withdraw the question

3916 Q. After that period when you say you did very little work, did you become intensely active as business agent?

Mr. Climenko: That is objected to.
The Court: Objection overruled.
Mr. Climenko: Exception.

A. From August, 1937, yes, sir.

Q. Now, going back to the time when Orlofsky replaced Weinstein as business manager of the
3917 Amalgamated Clothing Workers of America, Local No. 4, did there come a time when there was some internal dispute in the union?

Mr. Barshay: Objected to as incompetent, immaterial, and irrelevant, not binding on the defendants.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Yes, sir.

Q. Between whom was the dispute?

3918

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Between the Hillman group and the Orlofsky group.

Q. (The Court) When? A. 1931.

Mr. Barshay: I move to strike out the answer. I cannot understand what this has to do with this case.

3919

The Court: Objection overruled.
Mr. Barshay: Exception.

Q. Who was with Philip Orlofsky's faction or side?

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay Exception.

3920

A. In the union, that is directly connected with the Orlofsky faction, inside the union there was Abe Beckerman.

Q. What position did he occupy? A. He was manager of the Joint Board of the Amalgamated Clothing Workers of America; there was Dave Wolff, who was ex-manager of the union, and then there were several business agents with Orlofsky in the Cutters Union, that were inside the union.

Q. Who were with Orlofsky outside of the union but on the payroll?

3921

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant, not binding upon the defendant. Too remote. Nothing to do with this case. The purpose of Mr. Turkus's question is too obvious—I don't like to say it, but I will be forced to say it if he doesn't desist.
The Court: Objection overruled.
Mr. Barshay: Exception.

Q. Is the question clear to you? A. Yes, sir.

Hymie Curly Holtz, up to 1932, then Lepke and Gurrah, after that.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Now, this dispute in the union, what was
3923 that over?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. A question of power.

Q. Was that the real dispute?

Mr. Barshay: I object to the characterization.

The Court: Objection overruled.

3924 Mr. Barshay: Exception.

A. That was the real dispute.

Q. Would you say power and supremacy?

A. That is right.

Mr. Barshay: I object to that.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Do you know a man named Bruno Belea?

A. I do.

Q. What position did he occupy in the Amal-

gamated Clothing Workers of America? A. He was a general organizer for the Amalgamated Clothing Workers directly, the general office.

Q. Did Bruno Belea take a side in the internal dispute?

Mr. Barshay: I object to that on all the grounds already stated?

The Court: Overruled.

Mr. Barshay: Exception.

3926

A. H did.

Q. Which side was he on?

Mr. Barshay: Same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He was on the Hillman side.

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception. 3927

Q. Now, daring the course of this internai dispute of control between the Orlofsky faction on the one side and the Hillman faction on the other, did you have a meeting with Lepke?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. In that meeting did Lepke and you have a talk? A. We did.

Q. At that time had you been seeing Lepke frequently in regard to other business deals you had with him, the character of which you will not disclose?

Mr. Barshay: Objected to.

A. I want to know the time.

3929 Mr. Turkus: Question withdrawn.

Q. Do you know a man named Luciano?

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I know him as "Lucky"—Charley Luciano.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of
3930 a mistrial.
The Court: Motion denied.
Mr. Barshay: Exception.

Q. Through whom did you meet Charley "Lucky" Luciano?

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Through Lepke.

Q. Now, during the course of this dispute between Orlofsky and the Hillman factions, did

Lepke have any talk with you in which the name of Luciano was mentioned?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Yes, sir.
Q What did Lepke tell you?

Mr. Barshay: I object. 3932
The Court: Fix the time.

Q. When was that? A. The early part of 1932.

Mr. Barshay: Objected to as too remote, incompetent, immaterial, and irrelevant.
The Court: Objection overruled.
Mr. Barshay: Exception.
Mr. Rosenthal: On behalf of the defendant Capone I object on the ground it is no wise binding on that defendant. 3933
The Court: Objection overruled.
Mr. Rosenthal: Exception.
Mr. Rosenthal: It is in no wise connected with this case.
The Court: Objection overruled.
Mr. Rosenthal: Exception.
Mr. Cuff: Same objection on behalf of the defendant Weiss.
The Court: Objection overruled.
Mr. Cuff: Exception.

3934 *Max Rubin—For People—Direct*

Q. Now, the question is, What did Lepke tell you in that talk?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He told me that Orlofsky would have to give up his fight—would have to give up his union.

3935

Q. Was the name of Luciano mentioned?

Mr. Barshay: Are you satisfied he finished with the answer—the answer is not complete.

Q. Please answer before the next question. A. He said to me that Orlofsky has to give up the fight; that he has to give up his union; that he had just met with Lucky and Bebea, and that the deal was made for Orlofsky to give up the union, and I should get hold of Orlofsky for him.

3936

Mr. Barshay: I move to strike out the answer.

Q. (The Court) How do you spell Bebea? A. B-e-b-e-a, the first name is Bruno.

The Court: Motion denied.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

Q. What is that—he met who? A. He had just met Bruno Belea and Lucky, and I should get hold of Orlofsky for him. That Orlofsky would have to give up the union, his union.

Q. What union was that? A. That was the union that Orlofsky started in opposition to the Amalgamated.

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied. 3938

Mr. Barshay: Exception.

Q. Who was "Lucky" that was mentioned in the conversation?

Mr. Barshay: I object. He has been identified.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. His name is Charley Luciano—"Lucky".

Q. When Lepke told you about that deal which he had just made with Luciano and Belea, 3939 what did you say to him?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I said to him, "What about me?" He said, that I am going to remain on but the other officials, Emanuel Strauss, and Abe Beckerman, and Irving Alexander, and maybe one or two others I don't remember, were going to get a year's pay after the union broke.

Q. What was their connection? A. They were business agents, and they continued as business agents in Orlofsky's union. They would have to give that up, but they would get a year's pay from the Amalgamated, and I was to continue as I was before, as business agent of Local 240.

Q. These other officials got a year's pay and were on the street?

Mr. Barshay: Objected to as a con-
3941 clusion.

The Court: Sustained.

Q. When you said to Lepke, "What about me?" what official position in the union did you hold? A. I was the business agent of Local 240, the Clothing Drivers and Helpers Union, at that time connected with the Amalgamated Clothing Workers of America.

Q. After Lepke told you your job would be safe, in the language you told the jury, did he tell you to do anything? A. To get Orlofsky for him.

3942

Mr. Barshay: May we have the date?

Q. Tell the jury to the best of your recollection what Lepke said to you in regard to arranging for a meeting with Orlofsky.

Mr. Barshay: Objected to as already answered.

The Court: See if you can be more precise.

The Witness: He told me to get a hotel room where we could meet.

Q. Did you get a hotel room for the meeting? A. I did.

Q. What was the name of the hotel? A. The Governor Clinton.

Q. Did you arrange for a meeting between Lepke and Orlofsky?

Mr. Barshay: Same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

3944

A. I did.

Q. Did you attend the meeting? A. I did.

Mr. Barshay: I tried to get a date set.
Mr. Klein: It was 1932.
The Court: It was early in 1932.

Q. Did you, Lepke, and Orlofsky meet in a room in the Governor Clinton Hotel? A. We did.

Q. Did Lepke talk to Orlofsky? A. He did.

Q. At that time Lepke was on the payroll of the Orlofsky faction, wasn't he? 3945

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. He was.

Mr. Barshay: I move again for the withdrawal of a juror and the declaration of a mistrial.
The Court: Motion denied.
Mr. Barshay: Exception.

3946 *Max Rubin—For People—Direct*

Q. Will you be kind enough to tell the Court and jury what Lepke said to Orlofsky?

Mr. Turkus: I will withdraw it in that form.

Q. Was there a talk between Lepke, Orlofsky, and yourself? A. There was.

Q. Did Lepke say something to Orlofsky? A. He did.

3947 Q. What did he say to him?

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He said he would have to break up his union; that he had just left Charley "Lucky" and Bebea, and that Orlofsky would have to break up his organization.

Q. After this meeting did Orlofsky give up the union? A. He did.

Q. Did he quit the factional fight? A. He

3948 did.

Q. Now, after Orlofsky quit that fight did Lepke and Gurrah continue on the payroll of the Amalgamated Clothing Workers of America?

Mr. Barshay: I object.

The Court: Objection overruled. Say yes or no.

A. Yes, sir.

The Court: The witness makes a request, and I was advised before he came

on the stand to be on the alert—for physical reasons he wants to take a recess. For how long?

The Witness: Just five minutes.

The Court: Then we will make it ten minutes, so the jury will have a chance to go in and out from the room.

The witness may leave.

The jury may recess for a few minutes. Do not discuss the case.

The defendants are remanded. 3950

(Whereupon a recess of fifteen minutes was taken.)

(After Recess—Trial Resumed)

(12:00 noon)

MAX RUBIN, a witness in behalf of The People, resumed the stand and testified further as follows:

3951

Direct examination by Mr. Turkus (Continued):

Q. Did you continue meeting with Lepke and Bruno Belea from time to time? A. I did.

Q. In any of those meetings was there a conversation in which there was a discussion as to who was to be the intermediary between Lepke and the union?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

3952 *Max Rubin—For People—Direct*

A. There was.

Q. Who was present at that meeting? A. Belea, Lepke, and myself.

Q. Relate the conversation to the Court and the jury.

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

May we fix the time?

3953 The Court: Yes, time and place.

The Witness: It was in 1932—the early part of 1932—I am trying very hard to place the month for you if I can.

The Court: What was the place of meeting?

The Witness: The place, I believe, was Belea's—he had a furnished room on 11th Street—I believe it was in Belea's room.

By Mr. Turkus:

3954 Q. Relate the conversation to the Court and the jury.

Mr. Barshay: Note my objection and exception.

Mr. Talley: I object on behalf of the defendant Weiss, if your Honor please, to all this line of testimony.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Belea said the union wants Danny Fields and Paul Berger to be the intermediary between the union and Lepke.

Mr. Barshay: I move to strike out the answer.

Q. (The Court) Danny Fields? A. Yes, sir, and Paul Berger.

The Court: Motion denied.
Mr. Barshay: Exception.

Q. At that time who was the intermediary?

3956

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Whitey Deutsch.

Q. Answer this question yes or no only: Is Danny Fields alive?

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial.

3957

The Court: Motion denied.
Mr. Barshay: Exception.

A. He is not.

Q. Did Danny Fields and Paul Berger become the intermediaries after that conversation, between Lepke and the union?

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant, too remote, calls for a conclusion, tends to prejudice the jury.

3958 *Max Rubin—For People—Direct*

The Court: So far the Court does not understand it, so I assume the jury does not. It is all subject to connection.

Mr. Barshay: Exception.

The Court: And not prejudicial.

A. They did.

Q. Was it after that arrangement was made that Murray Weinstein became reinstated as manager of Local 4 of the Clothing Cutters
3959 Union?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. It was.

Q. Do you know Sam Katz? A. I do.

Q. Did you meet him through being a union official? A. I did.

Q. At the time I am talking about, namely, when Weinstein was reinstated as manager of
3960 Local 4 of the Cutters Union of the Amalgamated, was Katz connected with the union? A. He was business agent of Local 4.

Q. Now, after that meeting out of which Fields and Berger became the intermediary between the union and Lepke, did you continue meeting Lepke, Bebea, Sam Katz, and Murray Weinstein? A. On different occasions, yes, sir.

Q. On some of the occasions did you attend a meeting as between Lepke and Murray Weinstein? A. Yes, sir.

Q. When did you get together, with Lepke and Murray Weinstein? A. At the Governor Clinton

Hotel. Murray Weinstein had arranged for a room.

Q. After the arrangement had been made for a go-between, Danny Fields and Berger, did there come a time when Lepke had a talk with you in regard to stoppage?

Mr. Barshay: I objec. The question is ambiguous to me. In respect to what?

Q. (The Court) What was the word? A. Stoppage. 3962

The Court: Objection overruled.
Mr. Barshay: Exception.

Q. (Previous question read to witness.) A. Yes, sir.

Q. Tell the Court and the jury what is meant by "stoppage". A. It is preliminary to calling a strike. When the union official or union officials are not sure of a success in calling people out and having the strike run properly, they call it "stoppage," so that if it falls down and 3963 does not materialize, or there is a double-cross in any way, nothing is said about it. But if it takes on force and volume, and people respond, then you call it a strike.

Q. Will you tell this Court and jury what Lepke told you about a stoppage?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

3964 *Max Rubin—For People—Direct*

A. He said he had first met Sam Katz and the union wants a stoppage of all the trucks, clothing trucks, that branch stores were taking all the work out of town and that the trucks would have to be stopped, and he said, "If this thing continues, all the workers out of town, there will be nothing left for the New York market." Then he said, "Whenever manufacturers go out of town there is no chance to make a dime."

3965

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Now, at that time what official position did you have with the union? A. I was business agent of Local 240, the Clothing Drivers and Helpers Union at that time connected with the Amalgamated Clothing Workers of America.

Q. Were the union members fellows who drove clothing trucks? A. That is right.

3966

Q. Was a stoppage to be called in the clothing trucking industry? A. That is right.

Q. Was anything mentioned where the New York business was going? A. Pennsylvania.

Q. Now, when Lepke told you about this stoppage to be called in the clothing trucking industry, did he tell you a specific date or dates where the stoppage would be called? A. He did.

Q. Can you recall that date? A. The summer of 1932, I believe.

Q. After Lepke told you about the stoppage to be called on a specific date, did he give you

any instructions? A. Yes, sir, he told me to go out and stop all the trucks.

Q. By stopping all the trucks, what does that mean? A. All the trucks that cart clothing in and out of New York were to be stopped on a specific day.

Q. Does that mean that no trucks roll on the streets? A. No trucks.

Q. When you got your instructions to see that no trucks rolled, did you say anything to Lepke? A. I told him I believed I could stop all the 3968
trucks except three companies that I had my doubts about.

Q. Did you tell Lepke the three companies you had your doubts about? A. Yes, sir.

Q. Tell us what you said to him? A. I told him I did not think I would be able to stop Louis Cooper, or the Garfield Express Company. I am almost sure the Branch Storage would not stop, and since the New York and New Jersey handled both union and non-union work, I thought there would be trouble stopping them to.

3969

Q. Were they an important factor in the clothing trucking industry? A. They were taking most of the work out of town, yes, sir.

Q. When you said "Louis Cooper," did you say "Louis Cooper, the Garfield Express"? A. I did.

Q. Where was the Garfield Express operating from? A. Oak Street, Passaic, New Jersey.

Q. Was Louis Cooper of the Garfield Express operating as a union or a non-union? A. Non-union.

Q. You have also related to the Court and

jury that you mentioned New York and New Jersey. A. That is right.

Q. By that do you mean the New York and New Jersey Transportation Company? A. That is right.

Q. Engaged in the business of clothing trucking? A. That is right.

Q. Now, where was the New York & New Jersey transacting its business, in what state? A. It has done business in New York; had busi-
3971 ness in Passaic, in competition with Louis Cooper, and they had a little business in Pennsylvania, I think in Wilkes Barre, in that section.

Q. In the New Jersey end of their clothing industry, you say they were in competition with Louis Cooper of the Garfield Express? A. Yes, sir.

Q. Did Lepke say anything to you about the Pennsylvania business of the New York & New Jersey Transportation Company? A. He said all the business was to stop and the Pennsyl-
3972 vania business was to be done away with.

Q. Who was operating as the New York and New Jersey Transportation Company at the time when you were informed of the stoppage and given instructions? A. Nathan Salzman, Morris Bluestein, and Joe Rosen.

Q. By Joe Rosen, do you mean Joseph Rosen, now deceased? A. That is right.

Q. After you told Lepke you might have trouble with those three firms that you have related to the jury, did Lepke say something to you? A. He told me to go out and see what I could

do, if I had any trouble to come back and see him.

Q. Were you instructed to report to Lepke? A. Just what I told you. He told me to go and see him if I had any trouble.

Q. Did you, pursuant to Lepke's instructions, go out in an endeavor to have a stoppage of all trucks in the clothing trucking industry? A. I did.

Q. Did you go to Branch Storage? A. I did.

Q. In pursuance of your instructions from 3974
Lepke? A. Yes, sir.

Q. Who did you meet, connected with the Branch Storage? A. Meyer Butinsky, his first name is Meyer.

Q. What was Meyer Butinsky in the Branch Storage? A. He was one of the owners.

Q. Did Butinsky agree to stop his truck on a designated day?

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception. 3975

A. He did not.

Q. Did you go to the people operating the New York & New Jersey Transportation Company? A. I did.

Q. Did you talk to them more than once? A. I spoke to them several times.

Mr. Barshay: Let us identify who he spoke to, please.

Mr. Turkus: May I continue with my examination?

3976 *Max Rubin—For People—Direct*

The Court: Yes.

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception. It is important to know with whom this gentleman spoke.

The Court: Proceed.

Q. After you had this interview you have related to the jury, did you go back to see Lepke?

3977 A. I did.

Q. Did you make a report to Lepke? A. I told him what I had done. I don't like the word "report". I just told him what I had done.

Q. In your conversation with Lepke, was the name of Joseph Rosen mentioned?

Mr. Barshay: I object to Mr. Turkus leading.

The Court: This is simply directing attention to a specific point.

Mr. Barshay: The man said nothing to have his attention directed to anything.

3978 He can ask for the conversation. That can be had from the witness and not from Mr. Turkus.

The Court: See if you can reframe your question so as to direct attention to the conversation without mentioning the name.

Q. Relate what you told us you said to Lepke. A. Regarding the New York & New Jersey?

Q. Yes.

The Court: Try to fix the approximate year.

The Witness: 1932—Summer of 1932. I told him I had been to the New York and New Jersey and that they objected to stop because they thought it was a trick in it—a trick on the part of Louis Cooper—and they did not want to step. And when I told Joe Rosen he would have to give up the Pennsylvania business, Joe Rosen said that was the only thing he had in business; he did not have any money investment there but he had brought 3980 in that business and that is all he had there. Sobler objected also.

Q. After you told that to Lepke did he say anything to you as to what you were to do? A. I told him I thought I could straighten out the account of the concern if I could get him a little more business, and then maybe I would be able to straighten it out.

Q. What concern was that? A. The one I had in mind was the Fyirsky Clothing Company.

Q. I am talking about what concern you had in mind getting more business to effectuate the 3981 stoppage. A. The New York and New Jersey.

Q. Did you see and talk to Rosen after that? A. I spoke to the two, Rosen, Binestein and Sobler.

Q. After talking with them did you have any talk with Lepke? A. I did.

Q. What did you say to Lepke about that interview? A. I told him that the three of them are objecting, Rosen persisted because of the Pennsylvania situation, and the others also objected because they were afraid that Louis

Cooper was going to take away all their business, and there was kind of a move to hurt them.

Q. Was the name of Rosen mentioned? A. Just as I told you.

Q. Did Lepke say anything about Rosen?

Mr. Barshay: Mr. Turkus, please, may we have this man give his testimony on matters which are now for the first time becoming material, in some respects at least, to this issue, without you making suggestions to the witness.

3983

Mr. Turkus: Your Honor must have in mind that there had been a lot of transactions—

The Court: Please don't argue. Objection is overruled.

Mr. Barshay: Exception.

(Last question repeated.)

A. He told me he wanted me to see him.

Q. At about that time, in the year 1932, were there various places where you met with Lepke? 3984 A. There were.

Q. Various places in the clothing district? A. The clothing district, and up in the cloak section.

Q. Now, when Lepke told you he wanted to see Rosen, did he specify any particular place that you can recall? A. To my best recollection, I believe it was Sam Weiner, on 20th Street.

Q. In what business was Sam Weiner? A. Canvas.

Q. Do you remember the trade name? A. I do not.

Q. Where was it located? A. On 20th Street.

Q. Off what other street? A. Fifth Avenue.

Q. After Lepke told you to arrange for an appointment, did you go to see Rosen? A. I did.

Q. Did you tell him that Lepke wanted to see him? A. I did.

Q. Were you present when Rosen and Lepke met? A. I was.

Q. Where did they meet? A. In that concern, Weiner's concern.

Q. Now, who was present there at the time of the meeting, tell us all the people who were 3986
in the room? A. Lepke, Gurrah, Danny Fields, and I.

Mr. Barshay: I object to that as irrelevant and immaterial, and too remote.

The Court: Objection overruled.

Q. Now, do I understand correctly that there were present Lepke, Gurrah, Danny Fields, Rosen and yourself at the meeting? A. Yes, sir.

Q. At that time was Gurrah associated with Lepke in business?

3987

Mr. Barshay: Objected to as immaterial here.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Was Danny Fields the individual whom you told us was intermediary? A. Yes, sir.

Q. Was Gurrah then Lepke's partner?

Mr. Barshay: Objected to as a conclusion.

The Court: How does he know?

Mr. Turkus: Question withdrawn.

Q. What did Rosen say at the meeting? A. He walked in and he said that I, Rubin, "told me that I would have to close down the Pennsylvania business, and we have to close down the whole business in New York. The Pennsylvania business was the only thing I have in the concern and if I lose that I lose everything in the
3989 concern."

Q. Did Lepke say anything to Rosen when he said that? A. "You are kidding, you have plenty of business, you are kidding.

Q. Plenty of business in addition to what? A. To the Pennsylvania business.

Q. Did Lepke say anything else when there was a discussion about business? A. He wanted to see his books.

Q. When Lepke said that to Rosen, what did Rosen do? A. Rosen said, "I will show you," and he went to the 'phone and called up his
3990 office and spoke.

Q. He spoke on the telephone? A. Yes, sir.

Q. Do you know a young lady named Sylvia Rosen? A. I do.

Q. What was her relationship to Joseph Rosen? A. His daughter.

Q. After the telephone conversation who came to the meeting? A. Sylvia Rosen.

Q. Did she have something in her possession? A. She did.

Q. What was it? A. A book.

Q. How many, do you know? A. I don't; I know there was one large one.

Q. When she came in with the books—

Mr. Barshay: I object.

Mr. Turkus: Question withdrawn.

Q. Was there one or more than one, if you can recall? A. I cannot.

Q. When she came in with the large book, do you recall what happened? A. She gave it to her father.

Q. What did the father do with the book? A. He brought the book over to the desk.

Q. Who was at the desk? A. Charley Gurrah 3992
and Lepke.

Q. All right, tell the court and jury what happened then in connection with the large book that you recall. A. Charley Gurrah opened the book. He went with his hand like this (indicating), "You cannot go to this house, you cannot go to this house."

Q. Where was Lepke at the time Gurrah did that slicking motion, hitting the book, as you indicated? A. Close by him.

Q. When Gurrah told that to Rosen, what did Rosen say? A. He is being ruined. That is 3993
the only business he has there, and that if he lost that he would lose everything; he would be absolutely—he is a married man—and all that.

Q. Did you participate in that discussion? A. Very little. All I did was, I told Joe Rosen not to hit his head up against a stone wall; if they tell him to do something, he should do it.

Mr. Barshay: I move to strike that out as not binding on the defendant.

The Court: Motion denied.

Mr. Barshay: Exception.

3994 *Max Rubin—For People—Direct*

Q. Was there a time when the daughter left the room?

Mr. Barshay: Now, Mr. Turkus—

Mr. Turkus: There has to be some time—

Mr. Barshay: Let him say what happened, please. I object to it as leading.

Mr. Turkus: I insist it is proper.

The Court: I think it is proper. Ob-
3995 jection overruled.

A. Her father told her to go. She left. She wanted her father to go along with her, but he stayed.

Mr. Barshay: I move to strike it out.

Q. (The Court) Did she say that? A. Yes, sir.

The Court: Motion denied.
3996 Mr. Barshay: Exception.

Q. Now, after the daughter left was there a further discussion? A. There was.

Q. What was said? A. Joe Rosen started to cry; he said he was being ruined; his business would be lost; he would have nothing left; he was in business all his life and was being pushed out of the clothing business. And Lepke said, "Don't worry, we will do something for you. You have nothing to worry about. If you have any trouble in the concern, we will do something for you."

Q. After that did Rosen leave? A. Then Rosen left, yes, sir.

Q. Can you recall who took the book? A. Joe Rosen.

Q. After that occurrence did you have further talks with Lepke in regard to this stoppage of the clothing trucks? A. Yes, sir.

Q. Was there any talk in which the name of Louis Cooper was mentioned? A. Yes, sir.

Q. Tell the Court and jury what was said in that talk. 3998

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception. May we fix the time, please, and the place?

Mr. Turkus: This has a bearing on the stoppage.

The Witness: In the summer of 1932, prior to the stoppage.

Mr. Barshay: Exception.

Q. (The Court) Where was this talk held? A. In the clothing district, your Honor. 3999

Q. All right, tell us this conversation you had with Lepke in which Louis Cooper's name was mentioned. A. I reminded Louis Cooper that the question of getting Louis Cooper to stop was very important; that he was a big cog in the success of this proposition. And he said he already had an appointment with Louis Cooper.

When you say, "he", who do you mean? A. Lepke; that he already had talked with Louis Cooper, or at least had an appointment with

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Louis Cooper. He wanted me to go up and see him with him.

Q. Did you go with Lepke thereafter and see Louis Cooper? A. Yes.

Q. In relation to that talk you just told the jury about, when did you go with Lepke to see Louis Cooper? A. In the summer of 1932, prior to the stoppage.

Q. How long after the talk, when Lepke said to you that he had an appointment with Louis
4001 Cooper, was it you went with Lepke to meet Louis Cooper? A. Either that day or the next day or the day after—a very short time after.

Q. Can you recall when you and Lepke met Louis Cooper? A. I think we met him for the first time in a speakeasy in 30th Street.

Q. In Manhattan? A. Yes, sir.

Q. Will you relate to the Court and jury the conversation that took place between Lepke, Cooper and yourself?

Mr. Barshay: I urge my objection to
4002 that.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Cuff: We object on behalf of Weiss also.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. Louis Cooper told Lepke—Lepke told Louis Cooper he would have to stop his trucks—that there is going to be a stoppage.

Mr. Barshay: I move to strike it out.

The Court: Motion denied.
Mr. Barshay: Exception.

Q. When Lepke told that to Louis Cooper, what did Louis Cooper say? A. He refused. He said he was double-crossed by the Amalgamated once before and does not intend to be double-crossed by them again.

Mr. Barshay: I move to strike that out as not binding on this defendant, what the 4004
Amalgamated did.

Mr. Turkus: The Amalgamated and Lepke have now been established as being like this (indicating).

Mr. Barshay: I again ask for the withdrawal of a juror and the declaration of a mistrial on the ground of created prejudice.

The Court: Motion denied.

Mr. Barshay: Exception.

Mr. Barshay: I came here, if I may state, to defend a man charged with a 4005
specific crime set forth in the indictment.

The Court: Don't forget it.

Mr. Barshay: I am not forgetting it, but the District Attorney has gone far afield. I made serious, strenuous objections from time to time about long before 1932, when there was absolutely nothing to do between the Amalgamated and this case. All this was brought out only for one purpose, I regret to say—it was used as a political sounding board. It was calculated to be tried out this very way, on campaign material, that has

nothing to do with the case. Mr. Turkus has gotten away from it by his very questions and answers. This has nothing to do with the case and it is calculated to prejudice the jury in addition. I have refrained from doing this, but I told Mr. Turkus his questions would compel me to do so, even though I did not want to. It is not fair.

The Court: Your objections have been
4007 strenuous. They have been fervid. There has been no politics brought into the case. The Court suggests that during recess you take a bromide. Proceed.

Mr. Barshay: Exception.

Q. After Louis Cooper spoke about the double-crossing, what did Lepke say? A. Lepke said, "You have nothing to do about worrying now, I am the Amalgamated, they will not double-cross you this time."

Q. Did Cooper respond to him? A. Not immediately.

4008 Q. What did he say, what did Cooper say after he disclosed that? A. He still refused. He said, "You don't know them as I do; you have not had dealings with them; I did." Finally, he said, "If you will come with me, if you will be my partner, I will stop."

Q. When Cooper said to Lepke, "If you will be my partner, I will stop," what did Lepke say? A. He said, "I will be your partner."

Q. Did Cooper then, after Lepke said he would be his partner, agree to stop the trucks on a designated day? A. He did.

Q. Finally, did this stoppage actually occur? A. It did.

Q. Did any clothing trucks move or roll? A. The Branch Stores were the only trucks that rolled.

Q. Did the New York and New Jersey Transportation Company's trucks remain immobile? A. They did.

Q. Now, you told the jury one of the talks you had mentioned to Lepke was about getting additional business for the New York and New 4010
Jersey, was the name of the Fvirsky Clothing Company; do you remember that? A. That is right.

Q. Did the Fvirsky Clothing account go to one of the men who had been a partner of the New York and New Jersey, after the stoppage? A. It went to the whole concern.

Q. Were there certain cards then issued after the stoppage? A. Yes, sir, they could not start unless they got the O. K. card given out by a committee composed of Amalgamated officials.

Q. What happened to Rosen insofar as the 4011
clothing trucking industry was concerned? A. He was out of the concern.

Mr. Barshay: I object to the form of the question.

The Court: Try to make that more specific.

Mr. Turkus: I don't know how to make it more specific than that.

The Court: I don't know what it calls for. Try it.

4012 Q. Did Rosen continue in business as a clothing trucker?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He did not.

Q. Now, after the trucks started to roll again, after the stoppage was settled, did Rosen have a talk with you? A. He did.

4013 Q. Where did you have a talk with him? A. On Fifth Avenue.

Q. Do you recall any specific location? A. I usually stood around 17th Street and Fifth Avenue.

Q. Is that the hub of the clothing district? A. It is, and then the Association's office is on 17th Street, 22 East, so I made Fifth Avenue and 17th Street sort of a hangout.

Q. What did Rosen say to you?

Mr. Barshay: I object.

4014 Mr. Talley: I object.

Mr. Barshay: Rosen have a talk with this man, the defendant not being present?

The Court: That is not competent.

Mr. Turkus: Yes, it is.

The Court: What Rosen said to him?

Mr. Turkus: Yes, because it was transmitted to the defendant. It will be connected.

The Court: You will have to show that before it is let in. Let it stand that he had a conversation. The converation with

Rosen, and about the hangout at Fifth Avenue and 17th Street.

Q. After you had that talk with Rosen did you see any of the defendants? A. I saw Lepke.

Q. Did you have a talk with Lepke? A. I did.

Q. What did you say to Lepke? A. I told him I just met Rosen, and that Rosen said—

Mr. Talley: I object to what this witness said that Rosen said to the defendant, or to anybody else. 4016

The Court: Objection overruled.

Mr. Talley: Exception.

The Witness: (Continuing): And that Rosen said that Lepke and I had promised him that he would be taken care of, and that here the stoppage has taken place and everybody has gone back to work and he is on the street.

Q. What did Lepke say to that? A. Lepke said, "What can we do with him?", and I said, "He once worked for Louis Cooper as a foreman, let us get him back there." 4017

Q. Did Lepke say anything in reply to that? A. He said he would get in touch with Louis Cooper.

Q. Thereafter, did you and Lepke and Louis Cooper meet? A. We did.

Q. Where did you meet? A. To the best of my recollection, it was a concern named Rosenblatt Brothers.

Q. A clothing concern? A. Yes, sir.

Q. What did Lepke say to Louis Cooper at

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that meeting? A. Lepke told Louis Cooper to put Joe Rosen to work.

Q. Did he say why? A. He said that he had promised to put him to work— "You got to put him to work." And Louis Cooper said no, he would not put him to work, that while he is a very good foreman, he is a loud-mouthed guy.

Q. After the stoppage and the clothing truck concern wound up—

4019 Mr. Barshay: I object. What has that got to do with these defendants?

The Court: Objection overruled.

Mr. Barshay: Exception.

The Court: The court will charge the jury at the proper time, if the case is connected up.

A. The Garfield Express Company got all of the New Jersey business—all of it—with the exception of knee pants, which is considered the smallest part of the clothing business.

4020 Mr. Barshay: I move to strike out the word, "considered."

The Court: Motion denied.

Mr. Barshay: Exception.

Q. After the stoppage did the Garfield Truck Company get the New Jersey business that the New York and New Jersey Transportation Company had had before the stoppage, with the exception of the knee pants business which you have indicated?

Mr. Barshay: Objected to as a conclusion; secondly, it is entirely irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. They got all of the suiting business, all of it.

Q. When Cooper said to Lepke that he did not want him, he was a loud-mouthed guy, to use the language you used to the jury, what did Lepke say to Cooper? A. Lepke said that they should put him to work—"You have most of the New York and New Jersey business and it is advisable you put him to work." 4022

Q. After that what did Cooper say? A. He consented to put him to work at $100. a week.

Q. In what position? A. As a foreman.

Q. After that arrangement had been made did you see Rosen? A. I did.

Q. Under instructions? A. Of course.

Q. Under whose instructions? A. Lepke's.

Q. What did you tell Rosen? A. After the stoppage, it was also in the summer of 1932— 4023

Q. (Interrupting) Answer my question.

The Court: We will now have a noon recess on account of this man's condition. His hour is about up. We will resume at two o'clock.

(To the jury:) Members of the jury, remember the admonition previously given, and follow it. Now, the jury may pass out.

(The defendants were then remanded.)

(Recess taken until two P. M.)

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AFTERNOON SESSION. TRIAL RESUMED.

MAX RUBIN, resumed the stand and testified further as follows:

By Mr. Turkus:

Q. At the point of recess, Mr. Rubin, I believe you got to where you told us that at the meeting between Lepke and Cooper, Cooper agreed to
4025 put Joseph Rosen to work and you were instructed by Lepke to report that fact to Joseph Rosen. Do you recall that? A. That is right.

Q. In pursuance of the instructions from Lepke, did you see Joseph Rosen? A. I did.

Q. Did you tell him he could go to work for Cooper of the Garfield Express? A. I did.

Q. And did he do so? A. He did.

Q. After some time elapsed, did Joseph Rosen speak to you again? A. Anywheres from eight months to a year later, I believe.

Q. Where did he speak to you, Mr. Rubin? A. On Fifth Avenue.

4026 Q. What did he say to you?

Mr. Barshay: I object to it.

The Court: Sustained.

Q. Did you, after you had the talk with Rosen—was it in the clothing district that you had the talk? A. It was.

Q. After you had that talk with Rosen in the clothing district at the time you have already related, did you see Lepke? A. I did.

Q. Did you talk to Lepke? A. I did.

Q. What did you say to Lepke? A. I told

Lepke that I had seen Joseph Rosen and Joseph Rosen's wife and Louis Cooper; that I went to Louis Cooper because of a statement made to me about Joe Rosen—a statement made to me by Joe Rosen that he was fired for stealing some hampers and I told him that I went to Louis Cooper and I said to Louis Cooper, "Put that man back to work. That is no reason to fire a man off a truck, for stealing some hampers, if he stole them." And he said, "I am not putting him back." I looked for Lepke and could 4028
not find him. In the meantime Mrs. Rosen came to me and I continued telling Lepke the story.

Q. Yes, continue to tell us. A. This is what I told Lepke. I said, "Mrs. Rosen saw me and I took her over to see Louis Cooper and Louis Cooper told her in front of me that he is not putting him back to work, putting Joe Rosen back to work." And I said, "We cannot afford" —I said this to Lepke—I said, "We cannot afford to have a woman on Fifth Avenue hollering that her husband has lost a job and been put out of business; we better put him back." 4029

Q. In substance then did you relate to Lepke what Joe Rosen had told you in the clothing district? A. I did.

Q. And did you relate in substance, as you have told the jury, what happened in reference to the incident of Mrs. Rosen and Cooper? A. I did.

Q. And had there been such a meeting by you and Mrs. Rosen and then a meeting with Cooper and Mrs. Rosen? A. There was.

Q. And did you give Lepke an accurate report of what had transpired?

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Mr. Barshay: I object to the word "accurate."

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. After you made this report to Lepke of what had transpired between the Rosens and Cooper, what did Lepke say to you? A. He would get in touch with Louis Cooper for me.

4031 Q. Did there come a time when you and Lepke spoke to Cooper? A. We did.

Q. How long after that report that you had made was that conversation? A. A question of days.

Q. Do you recall where you met Cooper with Lepke? A. I think it was on 18th Street and Fifth Avenue. I am not certain.

Q. With you, Lepke and Cooper there, what was said? A. Lepke asked him—Lepke asked Louis Cooper to put the man back to work and Louis Cooper said he would not, and I said, "You have got to put him back to work. We

4032 had trouble enough and we don't want any more trouble. We want to put the man back to work," and Louis Cooper said he would not do it, he is not going to put him back to work because he bit the hand that fed him and he is not going to put him back to work.

Q. Now, when Cooper said that Rosen bit the hand that fed him, did Lepke say anything? A. Lepke turned to me and said, "I can't do anything about this. We make a God damn good living out of this over here and if Louis Cooper wants to run it that way, that's the way

he is going to run it." I said, "If that's good enough for you, it is good enough for me."

Q. Is that what you said to Lepke? A. Yes.

Q. Is that how the meeting broke up? A. That is how it broke up.

Q. After that meeting did Rosen come to you and talk to you? A. Rosen came to me and talked to me after that meeting, yes, sir.

Q. How many times? A. Oh, he was out of work for sixteen months.

4034

Mr. Barshay: That is not responsive.

The Witness: Dozens and dozens of times.

Mr. Barshay: Excuse me. I move to strike out the answer as not responsive.

The Court: Let it stand.

Mr. Barshay: Exception.

Q. How long was Rosen out of work? A. Sixteen months.

Q. And during the sixteen months that he was out of work, did he come and talk to you time and again? A. He did. 4035

Q. Each time that Rosen came to you and spoke to you, did you report to Lepke? A. I would not say each time but very, very often.

Q. On the times that you did report to Lepke, what did you say to him about Rosen? A. I told him that Rosen was complaining that he is out of work, hasn't got what to eat, married man with a family—words to that effect.

Q. You said he was out of work, Rosen was, for about sixteen months. Towards the end of that period of unemployment, did there come

4036 a time when Rosen had a talk with you? A. Yes.

Q. Was that talk subsequently reported to Lepke? A. It was.

Q. What did Rosen say—in substance? A. I just gave a mere outline.

Q. Tell us first what Rosen said to you near the end of that sixteen months unemployment period? A. Before, Mr. Turkus?

4037 Mr. Barshay: What Rosen said to him? That is your question?

Mr. Turkus: Yes.

Mr. Barshay: I object to it.

The Court: Sustained.

Mr. Turkus: Does your Honor recall that I showed that that conversation was reported subsequently to Lepke?

The Witness: No, it was not completely reported to Lepke. It was not.

The Court: He can tell only what he reported to Lepke.

4038 Q. First, let me ask you this: At the time when you had that talk with Rosen, approximately when was that? A. I think it was in 1935. I am not sure.

Q. Was it before or after the appointment of Thomas E. Dewey as a special prosecutor?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. It was.

Q. It was what? A. After the appointment of Dewey.

Mr. Turkus: I ask that this paper be marked for identification.

(Paper marked People's Exhibit Z-2 for identification.)

Mr. Turkus: I further ask that this additional paper be marked for identification. 4040

(Paper marked People's Exhibit Z-3 for identification.)

Mr. Turkus: I offer in evidence Z-2 and Z-3, being, respectively, the order of the appointment of Extraordinary Special and Trial Term of the Supreme Court, and appointment and oath of Thomas E. Dewey.

Mr. Barshay: I object to it. If Mr. Turkus will give me a date when Mr. 4041 Dewey was appointed for that purpose, I will concede it.

The Court: It has not been connected up yet. Offer it later. Excluded at this time.

Q. After you had that talk with Rosen, I understood you to say you reported to Lepke; you went back and spoke to Lepke? A. That is right.

Q. Did you tell Lepke everything that Rosen had told you? A. No.

4042 Q. Tell us what part of the conversation that you had with Rosen that you told Lepke? A. I told him, "We have a desperate man on our hands. Something has to be done."

Mr. Barshay: Excuse me, please. May the witness just answer what Rosen said to him which he conveyed to Lepke, not his own impression.

Mr. Turkus: That is what he is telling.

4043 Mr. Barshay: Please, Mr. Turkus, I have an objection. He is now giving his impression of Mr. Rosen to this jury.

The Court: Proceed.

Mr. Turkus: (To reporter) Will you read to the witness—

Mr. Barshay: May I have a ruling, your Honor?

The Court: What is before the Court?

Mr. Barshay: I object to it.

The Court: This is proper. The conversation is proper.

4044 Mr. Barshay: I do not object to the conversation, sir. I merely object to that part of this man's description.

The Court: The conversation with Lepke is proper.

Mr. Barshay: I do not object to that part. He started off—

The Court: He says he told Lepke that they had a desperate man on their hands. That is proper.

Mr. Barshay: Exception.

Q. Will you continue where you said to him, "We have got a desperate man on our hands."

4045

Continue to tell the jury what you said to Lepke. A. I said to Lepke, "We have a desperate man on our hands", that we have t get him a job; he will work for anything; he is talking a whole lot and we are liable to get into a lot of trouble with this but he is willing to go to work for any price, anywheres.

Q. Did you suggest to Lepke any place where Rosen might get employment? A. I did.

Q. What did you say? A. I told him that Larry Cooper—no relation to Louis Cooper— 4046
has a man on his job by the name of Meyer Cranes.

Q. Spell the name. A. (Spelling) C-r-a-n-e-s —and that Larry Cooper does not want this man Meyer Cranes on his truck and if I can get a switch, that is transfer this Meyer Cranes over to Louis Cooper's job, which means the Garfield Express Company, I could get Joe Rosen on Larry Cooper's truck.

Q. In other words, Rosen, having been fired from Cooper, you could get Cranes to work for Cooper and give Rosen Cranes' job? A. That is 4047
right.

Q. The job with Larry Cooper, no relative of Louis Cooper? A. That is right.

Q. What did Lepke say to that? A. He would get hold of Louis Cooper.

Q. After that talk, did you have a meeting with Louis Cooper and Lepke? A. We did.

Q. Do you remember where that was? A. Passaic.

Q. Is that where the Garfield Express had its place of business? A. That is right.

Q. What happened there? A. Louis Cooper—

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Lepke asked Louis Cooper to put this Meyer Cranes to work and Louis Cooper said he would not do it and I asked him why wouldn't he do it, it is very important that we get Joe Rosen to work, it is very, very important, and Louis Cooper still said he would not do it. He said the fellow was too small—he is only about five foot two or something like that—and he said he is no good for this job and Lepke turned to Louis Cooper and said, "It is very important
4049 for us if we put him to work", and then Louis Cooper said, "All right, I will take him. Make the change."

Q. Had Louis Cooper himself one time been business agent of Local 240 of the Clothing Drivers & Helpers Union? A. He was.

Q. And that is the union for all of those clothing truckers, that is the drivers of trucks? A. That is right.

Q. Was Cranes in fact a small man about five foot two or thereabouts? A. That's all he was, still is as far as I know.

4050 Q. Finally was the arrangement made whereby Rosen went to work for Larry Cooper? A. He did.

Q. Did Meyer Cranes work for the Garfield? A. He did.

Q. Some months thereafter, did you learn that Rosen had opened up a candy store? A. I did.

Q. In the Brownsville district of Brooklyn? A. Yes, sir.

Q. Earlier in your testimony you told us that you had been doing business with Lepke in connection with the Greater New York Tailors Pressmen's Association and the Flour Truck-

men's Union. Do you remember that? A. That is right.

Q. Was that business relationship continuing between you and Lepke at this time? A. It was.

Q. Were you then seeing Lepke frequently in connection with the business that you had in connection with Flour Truckmen's Union and the Greater New York Tailors Expressmen's Association?

Mr. Rosenthal: I object to it—in no- 4052
wise connected with this issue.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. I did.

Q. How often were you then coming in contact with Lepke? A. Very often, almost daily when he was around.

Q. What places were you meeting Lepke at? A. In 1935?

Q. Yes. A. In Greenberg & Shapiro and I believe the Perfection Coat Front.

Q. You say Greenberg & Shapiro was one of 4053
the places. Was that Shapiro of Greenberg & Shapiro related to the one that you called Charlie Gurrah Shapiro?

Mr. Barshay: Object to it. It is immaterial.

The Court: Overruled.

Mr. Barshay: Exception.

A. A brother.

Q. In the year 1936, where were you meeting Lepke? A. 200 Fifth Avenue.

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Q. What was the name of the concern at 200 Fifth Avenue where you had these meetings with Lepke? A. Raleigh Clothing Company.

Q. Do you remember what floor the Raleigh Clothing Company was on? A. Tenth.

Q. In these numerous meetings which you have described to the jury, did you talk to Lepke on those occasions? A. I did.

Q. I specifically direct your attention to a book of matches. Was there a talk in which a book
4055 of matches was mentioned?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. There was.

Q. Where was that talk in which a book of matches was mentioned? A. Raleigh Clothing.

Q. Earlier in your testimony you said that you knew Lepke by some other name and you mentioned the word "telephone" in connection with it. Do you remember that? A. That is right.

4056 Q. Tell us the incident about this book of matches and the conversation that was had?

Mr. Barshay: I object to it unless it has a bearing upon the issue here.

The Court: I cannot tell. Overruled.

Mr. Barshay: Exception. Mr. Turkus can tell.

The Court: Go ahead.

Mr. Barshay: Exception, sir.

A. May I have the question repeated?

(Pending question read by the reporter.)

A. Lepke pointed out an ordinary book of matches, opened it up, and on the inside, like this (demonstrating) he had two telephone numbers. He read them both off to me and he says, "Do you know the numbers?"

Q. Tell us what numbers he read off to you, if you can remember them? A. I can remember one very well.

Q. Tell us the one you remember very well? 4058
A. He read off Gramercy 5—9043.

Q. Did you recognize that telephone number when he read it off? A. Of course.

Q. What was the telephone number, of whom? A. That was the number of the Greater New York Tailors Expressmen's Association, where I used to hang out.

Q. For years? A. Since they moved in there.

Q. When Lepke read off that telephone number, Gramercy 5—9043, the telephone number of the Greater New York Tailors Expressmen's Association, what did you say to him? A. I 4059
said, "Gee whiz, that's the number of the association."

Q. What did Lepke say? A. He told me not to use the 'phone any more, that the wire was tapped.

Mr. Barshay: I move to strike out the answer. It is apparently incompetent, irrelevant and immaterial to this issue, sir.

The Court: Denied.

Mr. Barshay: Exception, sir.

4060 Q. Tell us the name that you knew Lepke by on the telephone?

Mr. Barshay: Same objection, sir.
The Court: Overruled.
Mr. Barshay: Exception.

Q. Tell us. A. The name is Murphy.

Q. You mean when you called him on the telephone you asked for Murphy? A. That is right.

4061 Q. And when you asked for Murphy, whom did you get?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

Q. Whom did you get when you asked for Murphy? A. Lepke.

Q. When you asked for Gurrah on the telephone, what name did you ask for?

Mr. Barshay: I object to it, sir.
4062 The Court: Overruled.
Mr. Barshay: Exception.

A. Callahan.

Q. And when you asked for Callahan, whom did you get on the wire? A. Gurrah.

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

Q. After you had that talk with Lepke about that number in the book of matches that he had

written down, did he say anything to you in reference to the building 200 Fifth Avenue?

Mr. Barshay: Same objection.
The Court: Overruled.

A. He told me not to use the same exit that I used in going in.

Q. Were there various entrances and exits to 200 Fifth Avenue? A. There were.

Q. Tell us about those entrances and exits. 4064

Mr. Barshay: I object to it. It is immaterial.
The Court: Overruled.
Mr. Barshay: Exception, sir.

A. There is one on Broadway, one on 23rd Street, and one by going into the subway by the Flatiron Building; you go through the street, a tunnel there; you get into the building.

Q. So there was a tunnel entrance that you could go through from the subway to get into that Flatiron Building? A. That is right. 4065

Q. After Lepke gave the warning to you that you told the jury, when he was looking at that number in the—withdrawn.

After Lepke gave you the instruction or warning to be careful and use different exits coming into the building, did he ever talk to you about Joseph Rosen again? A. In June of 1936.

Q. What did he tell you about Rosen then? A. He told me the fellow was going around Brownsville, shooting off his mouth that he is going to go down to Dewey's office.

Q. What did you say to Lepke when he told

you that? A. I said, "It does not mean anything. The fellow is harmless. He must be broke and need a couple of dollars. Let me take care of it."

Q. Did you suggest to Lepke how you would take care of it? A. I did.

Q. What did you say? A. I told him I would tell my members to go to the store and do their shopping there, purchase whatever is needed, and I am sure the fellow would keep quiet.

4067 Q. What members were you then referring to when you spoke to Lepke? A. Members of the union that I represented, Local 240.

Q. After you made that suggestion about having the members of the union patronize the candy store, what did Lepke say to you? A. He said, "I don't care what you do as long as he keeps quiet."

Q. Did you talk to the members of your union? A. I first called a meeting of the Executive Board and I told them—

Mr. Barshay: I object.

4068

Q. Relate the conversation.

Mr. Barshay: I object to what he said, in the absence of the defendant.

Mr. Turkus: The Judge will rule.

Mr. Barshay: I intend that he shall.

The Court: Sustained.

Q. All right, was there a meeting of your union? A. There was.

Q Without stating the conversation, did you address the meeting? A. I did. There were two

meetings, an Executive Board meeting and a regular meeting.

Q. And did you address both of the meetings? A. I did.

Q. After the meetings of the Executive Board and the members, did you talk with Lepke? A. I did.

Q. What did you tell Lepke? A. I told him that I had called a meeting of the Executive Board and at the regular meeting of the local and at the Executive Board I suggested to the 4070
members that they take $25 from the treasury and bury it in some other item and go into the store and spend the money; that the Executive Board members should do it, and I told Sneaky Levine, Sammy Levine, who was the president of the local at that time, to be sure and see that it is done. Then I called a meeting of the regular members and I spoke to them about taking care of old-timers, that old-timers must be taken care of, and I explained to Lepke just what I had done.

Q. When you explained to Lepke just what 4071
you had done about the expression "old-timers", did you tell him what had occurred at the union meeting? A. I did.

Q. Tell us how you referred to Rosen in that conversation? A. I referred to him as an old-timer.

Q. And were you making the report to Lepke of what had transpired in the union? A. I did.

Q. Did you tell Lepke what the reaction of the union members was about doing these things? A. They all said they were going to go to the store.

Q. Did you tell that to Lepke? A. I did.

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Q. What did Lepke say after you told him about that? A. O. K.

Q. Did there come a time later on when you had another talk with Lepke about Joseph Rosen? A. There were two or three talks, I believe.

Q. Well, specifically I want to direct your attention—

Mr. Barshay: Your Honor, will you tell
4073 the District Attorney please not to lead?

The Court: I want to hear the question.

Mr. Turkus: (To reporter) Read the one prior and read the question.

(Prior question and pending question read by the reporter.)

Mr. Turkus: That is as far as I have gotten.

The Court: Finish the question.

Mr. Barshay: Exception.

Q. —Some time around July in the year 1936.
4074 Do you follow the question? A. Yes, I do. He told me again that Rosen was talking and going around to Brownsville, going around in Brownsville, and saying he is going to do down to Dewey's office and is going to speak about Lepke, and I again said there was nothing to worry about that man, he must be up against it, there is no harm in him, there is absolutely nothing to worry about.

Q. After you made that report to Lepke, did you meet a man by the name of Louis Feinberg? A. I did.

Q. Who was Louis Feinberg? A. The secretary-treasurer of Local 240.

Q. The same local for which you were the business agent? A. That is right.

Q. Did Feinberg say something to you? You cannot relate the conversation. A. Yes, Feinberg did.

Q. After Feinberg spoke to you, did you go and talk to Lepke? A. I did.

Q. Tell us what you said to Lepke? A. I told Lepke that Sylvia Rosen had called and asked 4076
for me and Feinberg had told her that I was not in and then she left a message for me to go over and see her father in the candy store; and then I told Lepke that now is a good chance for me to go over there, I am sure I can straighten out Joseph Rosen.

Q. What did Lepke say? A. He said, "Go ahead, if you can straighten him out."

Q. In any other talk that you had with Lepke before that, did Lepke make any suggestion to you about Rosen? A. He always spoke about him talking, that's all. He wants him q[illegible] 4077

Q. When you told him about that telephone call from the daughter of Rosen, what was the discussion then in connection with Rosen?

Mr. Barshay: Your Honor, I object to it. It has already been answered, the answer being, "Go ahead."

The Court: That is what he said.

Mr. Turkus: Well, what I want to do is continue the conversation from that point.

Q. What did Lepke say to you?

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The Court: I have it here, "Lepke said, 'Go ahead, if you can straighten him out.'"

Q. Well, when Lepke said, "Go ahead," did you say something to him? A. Yes.

Q. All right, what did you say to Lepke? A. I said to him, "I will need some money."

Q. Now, when you said to Lepke, "I will need some money," what did Lepke say to you? A.
4079 He said, "How much money have you got?" I took out Lepke's money that I had in my pocket and I had about $500 there. I said, "I have about five hundred or six hundred"—I don't remember the amount. He said, "You take two bills and give it to Joe Rosen and tell him to stay out of town until I tell him to come back."

Q. How much is "two bills"? A. Two hundred dollars.

Q. How did Lepke refer to Rosen when he told you to take two bills and tell him to go out of town and stay out of town?

4080 Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Let him give the conversation.

The Court: Overruled.

Mr. Barshay: Exception.

A. He swore at him.

Q. Well, what was the epithet? A. Son of a bitch.

The Court: Tell him to stay out of town until when?

The Witness: Until he tells him to come back.

Q. That five or six hundred dollars that you had in your possession, was that as the result of some financial transactions that you had been having with Lepke?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception. 4082

A. Yes.

Q. And was it with the Flour Truckmen and the Greater New York Expressmen's Association? Was that the business?

Mr. Barshay: Same objection.
The Court: Same ruling.
Mr. Barshay: Exception, sir.

A. Yes.

Q. When Lepke told you what you have related to the jury about the two bills and the message to be given to Rosen, did you agree to do it? 4083

Mr. Barshay: I object to the District Attorney repeating the answer in the subsequent question. We understand what was said.
The Court: Overruled.
Mr. Barshay: Exception, sir.
(Pending question read by the reporter.)

A. I did.

Q. Did you thereafter go to Joseph Rosen's

4084 candy store? A. I took Feinberg with me and went to Joseph Rosen's candy store.

Q. At that time did you know where it was? A. I did not.

Q. Who took you to the candy store? A. Louis Feinberg.

Q. When you went there with Feinberg, did you find Rosen in the candy store? A. I did.

Q. Did you have a talk with Rosen? A. I did.

4085 Q. Was part of the conversation in the presence of Feinberg? A. It was.

Q. Was there a part of the conversation in the absence of Feinberg? A. It was.

Q. Tell us what you said to Rosen in connection with the two bills as directed by Lepke?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception. This is a conversation with Rosen in the absence of the defendant.

The Court: I beg pardon?

4086 Mr. Turkus: Under instructions from Lepke to deliver the two bills and the message.

Mr. Barshay: Mr. Turkus knows it is not competent.

Mr. Turkus: I know it is competent. There is agency.

The Court: This is special ground and should be on the minutes. Overruled.

Mr. Barshay: Exception. You cannot prove agency by the agent.

The Court: Overruled.

Mr. Barshay: Exception.

4087

Q. Tell us. A. Feinberg went into the telephone booth and Rosen and I walked to the side of the telephone booth away from Feinberg so that he could not see us and I said, "Here is $200 from Lepke. He wants you to go away and you are to stay away until he tells you to come back."

Q. When you said that, did you give Rosen the $200? A. I did.

Q. What did Rosen say when he got the $200 and that message?

4088

Mr. Barshay: I object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.

A. Rosen said to me he was going to his son's place in Reading, Pennsylvania, but if he could get another thousand dollars he would sell the store and open some sort of business there.

Q. And where was the son's place of living at that time? A. I said Reading, Pennsylvania.

Q. And was that where Rosen said he would open up another place of business if he could get another thousand dollars? A. Yes.

4089

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

Q. When he told you that about opening up a place of business out of the State of New York, what did you say to him? A. I said, "I will take it up with Lepke."

Q. When Rosen accepted the $200 under those circumstances that you have related to the Court

and jury, did he tell you where he was going? A. Reading, Pennsylvania.

Q. After you delivered this $200 to Joseph Rosen and the message, did you go back to see Lepke? A. I did.

Q. What did you say to Lepke? A. I told Lepke that I had given Rosen the $200 and that he was going up to his son's place in Reading, Pennsylvania, and that if he had another thousand dollars he would stay up there and open
4091 some kind of a business.

Q. Did Lepke make any response to that? A. Not that I recall.

Q. Approximately when was this $200 and the message delivered to Rosen? A. July, 1936.

Q. After that delivery of the $200 and the message, in July, 1936, when was the next time that Lepke spoke to you about Joseph Rosen? A. Friday, September 11, 1936.

Q. Friday, the 11th of September, 1936? A. That is right.

Q. You remember that date? A. Vividly.

4092 Q. What did Lepke say to you on Friday, September 11, 1936, about Joe Rosen? A. I no more than stepped into the office of the Raleigh Clothing Company when Lepke, his face flushed—

Mr. Barshay: I object to the description, sir.

The Court: It is responsive. Leave out the "flushed."

A. (Continued) Lepke said to me, "I have stood enough of the crap that you have been

handing me. That son of a bitch, that bastard, is going around Brownsville and shooting his mouth off that he is going down to Dewey. Well, he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all." I said, "Louis, don't be rash; don't be foolish; don't do something that will get us into trouble. I can straighten it out. He is harmless. Leave him to me." "No, I have stood enough." I said, "Let me handle it. I will run 4094
over to Murray Weinstein. I am sure that Murray Weinstein will do something about it. Give me a chance to straighten the thing out. Don't forget I was in the store in July." He said to me, "I don't care where you go. Straighten the guy out." I ran as fast as I could, over to Murray Weinstein.

Q. Did you have a talk with Murray Weinstein? A. I did.

Q. Before you ran over to Murray Weinstein, was there anything said in the conversation by Lepke with respect to the length of time that 4095
Rosen was in Reading, Pennsylvania? A. Yes, he said "He was only there for a few days. He double-crossed us."

Q. When you said to Lepke that Rosen was harmless, what did he say to you? A. "The fact that he is going around, talking. Anybody can do us harm." This was in the heat of the Dewey investigation.

Mr. Barshay: I move to strike the latter part out.

The Court: Strike that out as irresponsive.

Q. When was that talk? A. September, 1936.

Q. Was the Dewey investigation under way? A. And how.

Q. Where did you have that talk with Murray Weinstein? A. In his office.

Q. Where was it located? A. 15th Street and Union Square West, right on the corner.

Q. Weinstein was then, as he is now, the manager of that Cutters Local 4 affiliated with the Amalgamated? A. That is right.

4097 Q. Did you go back and talk to Lepke after you had the talk with Weinstein? A. I did.

Q. Relate that talk to the Court and jury that you had with Lepke after the visit to Weinstein. A. I said to Lepke—I come back from Murray Weinstein and I told Murray Weinstein that—I just don't know how to put it—

Q. Tell us the best of your recollection what you said to Lepke after you had the talk with Weinstein. A. I told Lepke that I went to Murray Weinstein and asked him to do something for me about Joe Rosen and that Murray Weinstein said he can't do anything.

4098 Q. Did you say anything to Lepke about an invitation from Weinstein? A. I then told him that Murray Weinstein said I should not worry, that the Local 4 baseball team was playing a baseball game in Vineland, New Jersey, and that he invited me out there to attend the game. The game was to take place Saturday afternoon which is September 12, 1936.

Q. After you told Lepke that you could not get Weinstein to do anything, what did Lepke say? A. He said, "Go ahead to the game."

Q. Do you know a man named Paul Berger? A. I do.

Q. Is that Paul Berger the one whom you earlier in your testimony described as an intermediary between Lepke and the union? A. He is.

Q. Was Paul Berger's name mentioned that Friday, September 11, 1936?

Mr. Barshay: I object to counsel leading. He asked for the complete conversation, sir. I understood the witness to have given the complete conversation. 4100

The Court: Overruled.

Mr. Barshay: Exception.

A. He told me to get Paul Berger and send him up to him right away.

Q. Did you go to see Berger? A. I did.

Q. What did you tell Berger?

Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Exception. 4101

A. I told him Lepke wants to see him.

Q. The following morning, September 12th, Saturday, did you go to that baseball game that Weinstein had invited you to? A. I took my wife and child and I went to the game in my car.

Q. Did you actually attend the game? A. I did not.

Q. Where was the game scheduled to be played? A. Vineland.

4102

Q. Did you turn off from the route? A. I did.

Q. Where?

Mr. Barshay: I object to that. That is absolutely immaterial.

The Court: Overruled.

Mr. Barshay: How he went to New Jersey, what he did there.

The Court: Overruled.

4103

Mr. Barshay: Exception. This is not pursuant to instructions, let me say. He went there to accept an invitation to a baseball game. Whether he diverted his route and where he stayed and all that, is not relevant here, sir.

The Court: Proceed.

Mr. Barshay: Exception.

(Pending question read by the reporter.)

A. Along the road, there is a road that leads to Vineland and one to Atlantic City, and I took the road to Atlantic City. I don't remember

4104

any more.

Q. What was the condition of your wife's health at that time?

Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Exception.

A. She just did not feel well.

Q. Did you stay in Atlantic City? A. I did.

Q. What hotel? A. Breakers Hotel.

Q. How long did you stay there?

Mr. Barshay: Objected to, incompetent, irrelevant, immaterial.

The Court: Overruled.

Mr. Barshay: Exception.

A. Until Sunday about noon time.

Q. Did you see any members of the union at the hotel? A. Oh, yes.

Q. Did you see Murray Weinstein there? A. I did.

4106

Mr. Turkus: I am going to renew my offer at this time of the Exhibits Z-2 and Z-3 for identification, the appointment of the Extraordinary Special and Trial Term of the Supreme Court and the appointment and oath of Thomas E. Dewey.

Mr. Barshay: Same objection, and, again, if Mr. Turkus merely wants the date when Mr. Dewey was appointed, I will concede it.

The Court: Overruled.

Mr. Barshay: Exception.

4107

Mr. Rosenthal: I object on behalf of defendant Capone.

Mr. Talley: Same objection on the part of defendant Weiss.

Mr. Turkus: I ask that they be marked as separate exhibits.

Mr. Barshay: Will your Honor inspect them, please, before they are marked?

The Court: Yes.

Mr. Barshay: Especially with reference to No. 10066, photostatic copy, on the ground that it is incompetent, irrelevant,

4108

immaterial and an attempt to prejudice the jury.

The Court: Let me see it. Overruled.

Mr. Barshay: Exception.

(People's Exhibit Z-2 for identification received and marked People's Exhibit 33 in evidence. People's Exhibit Z-3 for identification received and marked People's Exhibit 34 in evidence.)

4109

The Court: Briefly, what is the date?

Mr. Turkus: Date of filing, July 3, 1935.

May I read People's Exhibits 33 and 34 in evidence to the jury?

The Court: Yes.

Mr. Turkus: (reading) "Certificate No. 10066.

"State of New York)
"County of New York) ss.:

4110

"I, Albert Marinelli, Clerk of the County of New York and also Clerk of the Supreme Court in and for said county,

"Do hereby certify, that I have compared the within photographic copy of an order entitled Appointment of Extraordinary Special and Trial Term of the Supreme Court, etc., the original of which is filed and recorded in my office under Index Number Misc. 907—1935, File Number 28789—1935, Date Filed July 3, 1935, and I do further certify that such photo-

graphic copy is a correct transcript of such record and of the whole of said original.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court and county at the City of New York, this 22nd day of October, 1936."

Signed "Albert Marinelli, Clerk of the County of New York and Clerk of the 4112
Supreme Court."

Over to the left-hand side it has a seal and "No fee charged Pursuant to Law." Signed "Albert Marinelli, County Clerk."

At the top, on the left, is a seal. "State of New York, Executive Chamber, Albany.

"It appearing to my satisfaction that the public interest requires it:

"THEREFORE, in accordance with the statute in such case made and provided, 4113
I do hereby appoint an Extraordinary Special and Trial Term of the Supreme Court to be held at the County Court House in the County of New York on the 29th day of July, 1935, at ten o'clock in the forenoon of that day, and to continue so long as it may be necessary, for the purpose of inquiring into:

"(1) any and all acts of racketeering and vice,

4114 *Max Rubin—For People—Direct*

"(2) any and all acts of organized crime or any other crime,

"(3) any connection between such acts and any law-enforcement officials,

committed or alleged to have been committed by any and all persons, including public officers, within the County of New York in violation of the provisions of the
4115 Penal Law of the State of New York or the penal provisions of any other general, special or local law; and

I do hereby designate HONORABLE PHILIP J. McCOOK, of the City of New York, who is a Justice of the Supreme Court of the First Judicial District, to hold the said Extraordinary Special and Trial Term as hereinbefore described, and among other things to cause to be drawn according to law a Grand Jury to serve at the said Extraordinary Special and Trial Term of
4116 the Supreme Court; and

"I do further direct that notice of the appointment of the said Extraordinary Special and Trial Term of the Supreme Court and the designation of the said Presiding Justice be given by publication of this order on the eighth and fifteenth days of July, nineteen hundred and thirty-five, in the New York Law Journal, the New York Times, and the New York Herald Tribune, newspapers published in the Borough of Manhattan, County of New York.

"This order shall supersede in all respects the order dated June 28th, 1935, appointing an Extraordinary and Special Trial Term of the Supreme Court to be held in the County of New York on the twenty-ninth day of July, 1935.

"GIVEN under my hand and the Privy Seal of the State at the Capital in the City of Albany this third day of July in the year of our Lord one thousand nine 4118
hundred and thirty-five.

"HERBERT H. LEHMAN" (in ink)
and to the left the seal of the State of New York.

"BY THE GOVERNOR:
"Walter T. Brown
"Secretary to the Governor."

People's Exhibit 34:

"Certificate No. 10068. 4119

"State of New York }
"County of New York } ss.:

"I, ALBERT MARINELLI, Clerk of the County of New York and also Clerk of the Supreme Court in and for said County,

"DO HEREBY CERTIFY, that I have compared the within photographic copy of an Appointment and Oath of THOMAS E. DEWEY, the original of which is filed and

recorded in my office, under Index Number Misc. 1064—1935, File Number (blank), Date Filed July 29, 1935, and I do further certify that such photographic copy is a correct transcript of such record and of the whole of said original.

"In witness whereof, I have hereunto set my hand and affixed the seal of said court and county at the City of New York, this 22nd day of October, 1936.

4121

"Albert Marinelli, Clerk of the County of New York and Clerk of the Supreme Court."

To the left, the seal and then "No fee charged Pursuant to Law, Albert Marinelli, County Clerk"

"District Attorney's Office, County of New York.

"I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York and that I will faithfully discharge

4122

the duties of the office of Deputy Assistant District Attorney in the office of the District Attorney in and for the County of New York, according to the best of my ability.

"Thomas E. Dewey.

"Sworn to before me the 29 day of July, 1935.

P. McC. J. S. C."

"State of New York)
"City and County of New York) ss.:

"To all who shall see these Presents, GREETING:

"Know ye, that I, WILLIAM COPELAND DODGE, District Attorney of the County of New York, do, pursuant to the authority conferred by law, hereby depute, constitute and appoint THOMAS E. DEWEY 4124
Deputy Assistant District Attorney in and for the County of New York.

"Given under my hand at the office of the District Attorney in and for the County of New York, this 29th day of July in the year one thousand nine hundred and thirty five.

"WILLIAM COPELAND DODGE,
"District Attorney."

with the seal to the right, and to the left: 4125

"Attest:
"George Groden,
"Acting Chief Clerk."

and the cover having: "Filed July 29, 1935, in the New York County Clerk's office."

By Mr. Turkus:

Q. I believe you had told me that you had seen Murray Weinstein in Atlantic City? A. I did.

Q. And did you stay there up until Sunday sometime? A. Sunday noon.

Q. What time, approximately, did you leave Atlantic City? A. About noon time, a little before, perhaps.

Q. When did you arrive in New York City? A. About four o'clock.

Q. When after your arrival was the next time that you had seen a newspaper? A. The next morning.

4127 Q. What newspaper did you see the next morning? A. New York Times.

Q. What did you read in the New York Times?

Mr. Barshay: Objection.

The Court: Sustained.

Q. Did you read an account of—

Mr. Barshay: Mr. Turkus, the Judge just sustained the objection.

Mr. Turkus: It may have been on another ground. I want to show knowledge now, as to a certain event.

4128 The Court: All right.

Q. Did you read the account in the New York Times of the killing of Joseph Rosen? A. I did.

Q. After you read that account in the New York Times, did you go to see Lepke? A. I did.

Q. What did you say to Lepke? A. I said, "Now I am in trouble. I was there in July and now I am in real trouble." And he said to me, "You have nothing to worry about. Brooklyn is all right. You have nothing to worry about as far as Brooklyn."

Q. That was on Monday? A. On Monday.

Q. I direct your attention towards the end of the month of September, 1936, and ask you if you read an article in the New York Post. A. I did.

Q. When you read that article in the New York Post, where did you go? A. I took the paper with me and went up to see Lepke.

Q. Did you see Lepke? A. I did.

Q. Tell us what happened on that occasion when you were there talking with Lepke with a 4130
copy of the New York Post.

Mr. Talley: May we have the date, Mr. Turkus?

Mr. Turkus: Toward the end of September, 1936.

Mr. Talley: I object to it, if your Honor pleases.

The Court: Overruled.

Mr. Rosenthal: On behalf of defendant Capone I object to it—subsequent to the time of the killing, in no wise binding upon him. 4131

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Turkus: (to reporter) Will you read the question, please?

(Pending question read by the reporter.)

A. I said, "Look at this, look at this paper. Read it. It does everything but mention my name. It makes me a principal in a murder of that fellow."

Q. When you said that and you moved your

hands as you did in the witness chair, were you pointing to something when you were talking to Lepke? A. I pointed to the article.

Q. When you said that, pointing to the article, what did Lepke say? A. Lepke said, "You have nothing to worry about. They are not asking for you. They are not looking for you. They are looking for Little Farvel. They are looking for Shimmy. They are looking for Mendy Weiss. They are not looking for you. You
4133 have nothing to worry about."

Q. What was Shimmy's real name? A. Sidney Sales.

Q. Am I correct in the spelling of S-a-l-l-e-s? A. No, S-a-l-e-s, I believe.

Q. Just answer this question yes or no: Is Sidney Sales alive?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial on the ground that it is
4134 prejudicial.

The Court: Denied.

Mr. Barshay: Exception, sir.

A. No.

The Court: He said they are looking for whom?

The Witness: Little Farvel, Shimmy, and Mendy Weiss.

Q. You mean Farvel—what is his right name? A. Philip Cohen.

Q. Who is Mendy Weiss? A. There he is, the man with the glasses.

Q. Indicating the defendant Weiss.

The Court: Who is Shimmy?

Mr. Turkus: Shimmy was "Sales."

The Witness: His name is Sidney Sales.

Mr. Talley: I object to it, if your Honor pleases, as not binding on the defendant Weiss.

4136

The Court: Overruled.

Mr. Talley: Exception. My motion is likewise to striking out, if your Honor pleases.

The Court: Denied. I will instruct the jury at the proper time on the application of evidence.

Mr. Talley: I take exception.

Q. Now, when Lepke said, "Don't worry, they are looking for those three," naming them as you have named them to the Court and jury, did he say anything else? A. He said he is going to send them in when he is ready to send them in. He will send them in to be there. They wanted them for identification purpose. 4137

Q. Whom did he say he was going to send in? A. Shimmy and Farvel.

Q. What did he say about Mendy? A. He would not send him in.

Mr. Talley: Make the same objection, if your Honor pleases.

The Court: Overruled.

4138

Mr. Talley: Not binding upon the defendant Weiss.

The Court: He said he would send who?

The Witness: He would send in Shimmy and Farvel.

The Court: Send them where?

The Witness: To Brooklyn for identification. The police wanted to get hold of them.

4139

Mr. Talley: What is that?

The Witness: The police wanted them. They were hiding.

Mr. Talley: I move to strike the latter part out, if your Honor pleases, not responsive.

The Witness: You said, "Send them where?" didn't you?

Mr. Talley: I move to strike out that voluntary remark of this witness.

The Court: Yes, strike it out. Strike out, "They were hiding."

4140

Q. Sometime in October, 1936, did you have another talk with Lepke? A. I did. Every time I saw him I spoke to him.

Q. Well, what I am trying to direct your attention to now—

Mr. Barshay: Excuse me, Mr. Turkus. The man has not said that he does not recollect any such talk. Let us fix the date and let him give the answer without any suggestions, please.

The Court: Go ahead.

Mr. Turkus: I was in the middle of a question.

(Pending question read by the reporter.)

Mr. Barshay: I object to it. It is leading.

The Court: Overruled.

Mr. Barshay: Exception.

Q. —is the conversation after the names of Farvel, Shimmy and Mendy Weiss were mentioned. Now, sometime in October did you have a talk with Lepke? A. The early part of October. 4142

Q. What was said in that discussion?

Mr. Rosenthal: I make the same objection that I made before.

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. He said, "See, you have nothing to worry about. Shimmy and Farvel went in. They are out. There is nothing to worry about." And I said, "What about Mendy?" He said, "I am keeping Mendy out." 4143

Mr. Talley: I move to strike that out as having no binding effect upon the defendant Weiss.

The Court: Denied.

Mr. Talley: Exception.

Q. Is the name of McCarthy, a former Assistant District Attorney, familiar to you? A. Yes.

Q. After that talk which you have just told

the jury about, did you hear that name in the conversation with Lepke? A. I did.

Q. What did he say? A. He told me that McCarthy was going around saying he is going to make one of the best pinches he has ever made; he is going to collar Lepke and Gurrah for the Rosen murder.

Q. When Lepke told you this about former Assistant District Attorney McCarthy, did he say anything to you about yourself? A. He told

4145 me I had to go away.

Q. What did Lepke tell you when he said to you you have got to go away? A. The early part of October.

Q. What did he say? What was the language he used? A. He told me I have to go away. "Things are very hot in Brooklyn." This McCarthy is going around and making those statements I just mentioned and that I have to go away.

Q. What did you say to Lepke when he said you have got to go away? A. I didn't know where to go.

4146 Q. What did he say to you then? A. He said, "I have got the spot for you. Go up with Danny Fields. Danny Fields is hiding up in Glens Falls. You go up there and you stay with him."

Q. Was Danny Fields the Danny Fields that you described earlier in your testimony as an intermediary between a union and Lepke? A. Yes, sir.

Q. Just answer this yes or no: Is Danny Fields alive?

Mr. Barshay: Same objection, sir, as I made before with respect to the man whom he identified as Shimmy.

The Court: The witness's information as to the alleged death of Danny Fields may be hearsay. Sustained.

Q. All right. Lepke said for you to make arrangements with Danny Fields to go where he was. What did you say to Lepke? A. I told you before I said I did not know where to go, and he said up there. I said, "All right, I will go," after he told me.

Q. Did Lepke tell you who was to make the arrangements? A. He did. 4148

Q. Who? A. Paul Berger.

Q. Did Lepke tell you anything in reference to Paul Berger?

Mr. Barshay: Your Honor, I object to Mr. Turkus leading.

The Court: Do you object to the question?

Mr. Barshay: Yes.

The Court: Overruled.

Mr. Barshay: Exception, sir.

4149

A. He told me to take Paul Berger around and introduce him to the people that I was getting money from for Lepke.

Mr. Barshay: I object to it now. I move to strike out the answer.

The Court: Overruled. Denied.

Mr. Barshay: I now move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Denied.

4150

Mr. Barshay: I take an exception, and I specifically direct your Honor to the case of People again Richardson in 222 New York.

The Court: The part of that answer which refers to collecting money from people is stricken out as irresponsive and incompetent. The jury is instructed to disregard it.

4151

Q. Did you take Paul Berger to various places and introduce him? Yes or no. A. I did.

Q. After you made those introductions, did you go away? A. I did.

Q. Who made the arrangements? A. Paul Berger.

Q. Where did you go and with whom? A. I went with Paul Berger to a sort of coffee stand or lunch room along the road about fifty miles from New York, fifty to seventy-five, and there we met Danny Fields.

Q. After the meeting, where did Berger go? A. Berger went back to New York.

4152

Mr. Barshay: I object.

The Court: Sustained.

Q. Where did you go? A. I went with Danny Fields to Saratoga Springs.

Q. How long did you stay in Saratoga? A. One week.

Mr. Barshay: I object to it, immaterial.

The Court: Overruled.

Mr. Barshay: Exception.

Q. After that week elapsed, where did you go? A. Came back to New York.

Q. Where in New York did you go? A. Hatfield Hotel.

Q. Was that a familiar hotel to you? A. Yes.

Q. Did you have to register there? A. No.

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

4154

Q. Where is the Hatfield located. A. 28th or 29th Street and Madison Avenue.

Q. Manhattan? A. Manhattan.

Q. After you got into the Hatfield Hotel, did you communicate with anybody? A. I did.

Q. With whom? A. Either with Lepke direct or with Paul Berger to get Lepke for me.

Mr. Barshay: I move to strike out the answer. He says with one or the other.

The Court: Let it stand.

Mr. Barshay: Exception, sir.

4155

Q. After that communication was made, did you see Lepke? A. I did.

Q. Where? A. At the hotel.

Q. Where in the hotel did you see Lepke? A. I had a room there.

Q. When Lepke came in, what did he say to you? A. "Why did you come back?" I said, "I can't stay there. Danny was in different places. I didn't have anybody to talk to. I was very lonesome and I came back."

Q. When you were up in Saratoga, did Danny have a girl friend?

4156

Mr. Barshay: I object to it. Is that our fault, too?

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. He did.

Q. Did you tell that to Lepke? A. I did.

Mr. Barshay: Object to it.

The Court: Overruled.

Mr. Barshay: Exception, sir.

4157

Q. When you told him your reason for coming back, what did Lepke say to you? A. He said I should stay in the Hatfield. He wanted to send me away again, but in the meantime I should stay there and out of sight of everybody in the clothing industry.

Q. Did he say why he wanted to send you away? A. Yes, he told me things were getting too hot.

Q. Where? A. That Brooklyn was not straightened out yet, and that the Dewey in-

4158 vestigation is closing in on everybody.

Q. Did you stay at the Hatfield, as you were told? A. I did.

Q. Did Lepke get in touch with you? A. Sometime—I went away for a few days, I believe—there was one about—when I came back from Saratoga Springs I met Lepke again and he told me to meet him down at Willie Albert's office.

Q. Who was Willie Alberts? Just tell me his occupation. A. He dealt in bail bonds.

Q. Did he have a connection with Lepke?

Mr. Barshay: I object to it, sir, did he have a connection with Lepke.

The Court: Calls for a conclusion. Sustained.

Q. Do you know what his relationship was with Lepke?

Mr. Barshay: Same objection.

The Court: Sustained.

4160

Q. Did you have a conversation with Lepke in which the name of Willie Alberts was mentioned? A. He told me to go down to the office.

Q. Where was Willie Alberts' office? A. 2 Lafayette Street.

Q. Manhattan? A. Manhattan.

Q. Did you go there? A. I did.

Q. Did you meet Lepke at Willie Alberts' office? A. I did.

Mr. Barshay: Fix the time, Mr. Turkus, please.

4161

Q. This man Feinberg, what connection did he have with Local 240? A. Secretary-treasurer.

Q. Local 240? A. That is right.

Q. You described an individual as Sam Sneaky Levine. What was his connection with Local 240, Clothing Drivers and Helpers Union? A. He was the president of the Local, and ex-business agent.

Q. Who is Louis Plotkin in connection with his relationship to Local 240? A. He worked on the trucks and was also the president of the executive board.

4162 *Max Rubin—For People—Direct*

Q. And Davey Kantor, what his connection? A. Member of the executive board and worked on the truck.

Q. Tell the jury what Lepke said to you in Willie Alberts' office at that meeting.

Mr. Barshay: May we fix the time, Mr. Turkus, please?

Q. Fix the time, to the best of your recollection. A. When I came back from Saratoga
4163 Springs, I should say anywhere between the middle of October and October 30th, I should say about the 17th, 18th, 20th, something like that, 22nd. Put it in that period.

Q. Now, you fixed the time and the place. Tell us the conversation that Lepke had with you.

Mr. Rosenthal: I make the same objection as I urged heretofore.

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

4164 Defendants' Counsel: Exception.

A. I think, Mr. Turkus, that Willie Alberts started the conversation.

Q. All right, tell us what was said.

Mr. Barshay: I object to anything Willie Alberts said as not binding on this defendant.

Mr. Talley: The same objection for Weiss.

The Court: Only as to what Alberts

said in the conversation where Lepke attended.

Mr. Turkus: Yes, that is what I am talking about.

The Court: Not any part where Lepke may not have been there or was out of hearing. Please restrict it accordingly. Otherwise, overruled.

Mr. Barshay: Exception.

Mr. Talley: Exception.

4166

Q. Will you relate what Willie Alberts said to you and Lepke and what was said in return? A. He said the police were looking for Louis Plotkin, Sam Levine, Davey Kantor and Jeff Feinberg, and I said, "What for? What do they want them for?" and he said—

Q. When you say "he"— A. Willie Alberts said that they were in the store and they spent some money and the police want to question them about that, and Lepke said I should take them out of town. I said, "You cannot take them out of town. They work on trucks, and Feinberg is in the office." He says, "Well, take 4167
them at least for the week-end, anyhow." And so I got in touch with them—

Q. Did you agree to do it, take them out for a week-end? A. I did.

Q. Did you get in touch with those individuals, Plotkin, Levine, Kantor and Feinberg? A. I did, through Davey Kantor.

Q. Did you take them out of town over the week-end? A. I did.

Q. Where did you go that week-end, you personally? You agreed to take those men out for the week-end, as you have told us. Where did

4168 you go? A. I told Davey Kantor that I would meet him—

Mr. Barshay: I object to anything he said to Mr. Kantor, sir. Now the defendant is not present.

Mr. Turkus: Pursuant to an instruction.

The Court: Overruled.

Mr. Barshay: Exception.

4169 Q. Continue what you told Kantor. A. I told Kantor I would meet him at the Americus Hotel.

Q. Where is that? A. I am just trying to think of the name. The name escapes me. In Pennsylvania.

Q. Is it Allentown? A. In Allentown, the Americus Hotel.

Q. Did you meet Kantor, Plotkin, Levine and Feinberg in that hotel in Allentown? A. I did.

Q. Did you tell them that Lepke had wanted you to take them out for the week-end? A. Of course, not.

4170 Q. Did you return to New York City after that week-end there? A. I did.

Q. Do you recall where you went to stop after you returned from the week-end? A. At the Shelton, I believe.

Q. The Shelton, is that a hotel in Manhattan? A. A hotel, yes.

Q. Is that, to the best of your recollection, the place where you went? A. Yes, I either stopped at the Shelton or the Lexington as many times as I came in. I believe at that time I was at the Shelton.

Q. Did you continue to go to Willie Alberts' place? A. I did.

Q. Did you see Lepke after that week-end with Levine and Plotkin, Kantor and Feinberg? A. I did.

Q. Did you talk with them? A. I did.

Q. What did you say?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. I told him that I had taken them out and they are back, and he said to me, "Don't worry about them any more. You have got to go away again." I said, "What for this time?" He said, "Well, things are very, very hot, and you cannot stay around. Willie Alberts has a relation, a nephew, in Salt Lake City. I want you to go up there." 4172

Q. When he said "things were getting very hot", did he mention where they were getting very hot? A. New York.

Mr. Barshay: I then move to strike out the entire testimony with respect to that on the ground that it no longer has any bearing with respect to this case or instructions to anyone. 4173

Mr. Turkus: The conversation has not been completed.

The Court: Denied.

Mr. Barshay: Exception.

Q. Tell us everything that Lepke said about it getting hot. A. He said that the Dewey investigation is very, very hot and that Brooklyn is not yet straightened out.

4174 Q. Did I understand you to say he wanted you to go with Willie Alberts' relative in Salt Lake City? A. That is right.

Q. When he told you that, did you agree to go? A. Of course.

Q. Was anything said, when you agreed to go, about communication? A. He told me that Willie would keep me informed of how matters are going on, how things are going on, in Brooklyn, how matters were going on in Manhattan, and that Willie would send me my money. I
4175 was getting $50 a week.

Q. When he told you about receiving information as to what was going on and that you would get your money while you were away, through Willie Alberts, did he give you any instructions in preparation for your trip? A. I had some pictures up in the house. He told me to take whatever pictures I had up in the house and give them to Willie Alberts and if I had any money in the bank to take it out and Willie would bring it up to my wife.

Q. What kind of pictures did you have around
4176 the house at that time? A. I had a motion picture camera.

Q. Did you obey Lepke's instructions with regard to the pictures? A. I did. I took Willie Alberts up the house and he took the pictures.

Q. And what did you do with the pictures? A. I gave them to Willie Alberts.

The Court: Pictures of what?

The Witness: Myself, my wife and child, sights.

Q. Did you eventually go to Salt Lake City; yes or no? A. I did.

Q. Before you left for Salt Lake City, did you go to a lawyer's office? A. I did.

Q. Who was the lawyer you went to see? A. Edward Maguire, of Rice and Maguire.

Q. Where are the offices of Rice and Maguire? A. On 42nd Street and Lexington Avenue.

Q. Was Mr. Maguire a labor lawyer? A. Primarily.

Q. And was he at that time representing Local 240? A. He was. 4178

Q. Did you have a talk?

Mr. Barshay: May we have the date, please?

A. In the late 20's, in the 20's of October, 1936.

Mr. Turkus: That is in response to Mr. Barshay's question.

Q. Did you have a talk with Mr. Edward Maguire? A. I did. 4179

Q. What did you say to Mr. Maguire?

Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Your Honor, he goes there of his own volition now. He is talking now to his lawyer.

The Court: I misunderstood. Read the last page.

(Questions and answers read by the reporter.)

4180 *Max Rubin—For People—Direct*

The Court: Sustained. I was under the impression that he was sent there by Lepke.

Q. Did you have a talk, yes or no, with Mr. Maguire of the law firm? A. I did.

Q. Were you then a union official? A. I was.

Q. After you spoke with Mr. Maguire, where did you go, or whom did you see? A. I went to see Lepke.

4181 Q. Did you talk with Lepke about Maguire? A. I did.

Q. What did you say to Lepke? A. That Maguire would like to see him.

Q. Did Lepke at that time know that Maguire was representing the local?

Mr. Barshay: I object to it.

The Court: Calls for a conclusion. Sustained.

Q. Did you tell him who Maguire was? A. I did.

4182 Q. What did you tell Lepke as to Maguire? A. That Maguire wants to see him.

Q. Did you go with Lepke to Mr. Maguire's law office? A. I did.

Q. Did you have a talk with Mr. Maguire and Mr. Lepke? A. I did.

Q. What did you say to Maguire, what did he say to you, and what was the entire discussion in Mr. Maguire's office?

Mr. Rosenthal: I urge the same objection as far as the defendant Capone, in no wise binding on him.

Mr. Talley: Same objection as to the defendant Weiss.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Talley: Exception.

A. I said to him, "Mr. Maguire, will you repeat to Lepke what you told me yesterday?", and he said he would.

Q. Did he repeat? A. He did.

Q. What did he say? 4184

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

A. He said it was inadvisable for me to leave the city, that as a union man it was not advisable; as a married man it was foolish; that eventually I would have to come back anyhow, and that I should stay in the city and face whatever I have to face because I cannot stay away, and I would lose my job if I stayed away any length of time. 4185

Q. Did Mr. Maguire say anything about flight in that talk? A. Yes.

Q. What did he say about flight? A. He said it would be a suspicion of guilt, it would be a sign to any jury that I ran away because I was guilty of something, and I should stay.

Q. When Mr. Maguire had repeated the advice that he had given you when you were along with him, what did Lepke say? A. Lepke said, "All I know, that when a witness is not around, there cannot be a case."

4186 Q. After Lepke said, "When there is no witness around there cannot be a case," did Mr.—

Mr. Barshay: He say, "A witness", please, Mr. Turkus.

Mr. Turkus: Withdrawn.

Q. When Lepke said that to Mr. Maguire and to you, what did Mr. Maguire say? A. Mr. Maguire said, "Don't forget he is a married man, he has a family. It is no good for him to be away. No family man should be away. It is not right." He pleaded with him that I should stay.

4187

Q. And what did Lepke say? A. "I will see about it."

Q. Did that break up the meeting with Mr. Maguire and Lepke? A. It did.

Q. Did you leave Mr. Maguire's law offices with Lepke? A. I did.

Q. Did Mr. Maguire remain in his office then? A. He did.

4188 Q. After you left Mr. Maguire's presence, did Lepke talk to you? A. He did.

Q. What did he say? A. In the hall, outside of Maguire's office, he says, "I didn't want to tell you this in front of Maguire but you have nothing to worry about. That case in Brooklyn is going to be thrown out the window. McCarthy is not going to take care of it any more and Jacobs is going to come in and Jacobs is going to be pushed in something else in another building and the case will die."

Q. Did he say anything else? A. That is all.

Q. After that, did you agree to leave and go to Salt Lake City? A. I did.

Q. Did you go to Salt Lake City? A. I did.

Q. Do you remember when you left for Salt Lake City? A. I think it was October 30, 1936.

Q. What hotel did you stop at in Salt Lake City? A. The Carlton.

Q. Have you seen photostatic copies of certain documents that were secured by the District Attorney in Salt Lake City? A. I did.

Q. And were those papers submitted to you 4190
for the refreshment of your recollection? A. They were.

Q. What hotel did you stop at in Salt Lake City? A. The Carlton.

Q. Under what name? A. George Miller.

Q. How long did you stay in Salt Lake City? A. One month.

Q. After you got to Salt Lake City, did you get sick? A. Yes, when I got off the train I got sick.

Q. And did you have a doctor? A. I had a doctor.

4191

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

Q. Did you go to a hospital? A. I did.

Mr. Barshay: Same objection, sir.
The Court: Overruled.
Mr. Barshay: I take exception.

Q. What was the hospital you were taken to? A. The All Saints Hospital.

Q. In Salt Lake City? A. Yes, sir.

Q. Is the full name Dr. N. H. Groves Latter Day Saints Hospital? A. That is it.

Q. Under what name were you admitted to the hospital? A. George Miller.

Q. How long did you stay in the hospital? A. Three days, I believe.

Q. Have you seen photostatic copies of the hospital records?

Mr. Barshay: I object to it.

4193 Q. In the District Attorney's office?

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. While you were in Salt Lake City, did you receive communications? A. I received three letters.

Q. Whom did you receive the letters from? A. Willie Alberts.

4194 Mr. Barshay: I object to it and move to strike out the answer.

Mr. Turkus: This is absolutely admissible, Lepke having told him that Willie Alberts—

Mr. Barshay: Now, please, Mr. Turkus.

Mr. Turkus: Your Honor, I desire to address you on a point of law without being hampered by any counsel.

The Court: The only question is the authentication of the signatures. The other legal point is in your favor. Sustained.

Q. Had you frequented Willie Alberts' bail bond place?

Mr. Barshay: Already answered, sir.

Q. Did you know Willie Alberts' handwriting?

Mr. Cuff: Object to that, calling for a conclusion.

A. No.

4196

The Court: He says he did not.
Mr. Cuff: I did not hear the answer.
Mr. Furkus: It is not a conclusion now.

Q. Never mind what was in the letters. Did you receive money?

Mr. Barshay: I object to it.

A. I did.

The Court: Overruled.
Mr. Barshay: Exception. 4197
The Court: Any money?
The Witness: I did, yes, sir.
The Court: With the letters?
The Witness: With the three letters.

Q. How often did you receive money?

Mr. Barshay: I move to strike out the answer, the first answer, and I object to this question.
The Court: Overruled.

4198

Mr. Barshay: Exception.

A. I received money four times.

Q. Do you remember in what form you received the money?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

Mr. Barshay: Exception.

4199

A. The three letters had fifty dollar bills in each and the fourth time I received money through a money order sent through the Western Union.

Mr. Turkus: I ask that this be marked for identification.

(Paper marked People's Exhibit Z-3 for identification.)

Q. Who was Sam Teitelbaum? A. Nephew of Willie Alberts. He used that name. That was

4200

not his right name.

Mr. Barshay: I object to it and move to strike out the answer.

The Court: Does he know the relationship? Sustained. Strike it out.

Q. Where was this Sam Teitelbaum at the time you were in Salt Lake City?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: Do you know?

The Witness: Yes, surely. He had a florist establishment there. I went there.

Q. Wasn't that the place that Lepke told you to go? A. He told me that Willie Alberts would send me to a nephew of his and that is where I went.

Mr. Barshay: I move to strike it out.

The Court: Is that the place?

The Witness: Yes. 4202

Mr. Barshay: I move to strike out the answer as not responsive.

The Court: I thought it was. Let it stand.

Mr. Barshay: Exception.

The Court: We will take a recess now. Everybody kindly remain in order, the witness going out first.

Gentlemen of the jury, do not discuss the case, let nobody talk to you about it, keep your minds open and follow all the previous admonitions. We will resume at 4203
ten o'clock on Monday morning. Let the jury pass out.

(Thereupon an adjournment was taken to Monday, November 3, 1941, at ten a. m.)

4204 *Max Rubin—For People—Direct*

Brooklyn, N. Y., November 3, 1941.

TRIAL RESUMED

MAX RUBIN, a witness called in behalf of the People, resumed the stand and testified further as follows:

Direct examination by Mr. Turkus (continued):

4205 Q. Prior to recess on Friday you were testifying, among other things, that you were told to turn over certain pictures, you were told by Lepke to turn them over to Willie Alberts, and also to clean out a bank account? A. Yes, sir.

Q. At that time did you have a bank account? A. I did.

Q. In what bank did you have your account? A. The Bank for Savings, on 4th Avenue.

Q. Did you have money in that bank account? A. I did.

4206 Mr. Turkus: I ask that these papers be marked for identification—the two papers pinned together.

(Received and marked People's Exhibit Z-4 for identification.)

Mr. Turkus: I offer in evidence People's Exhibit Z-4 for identification, the same being a photostatic copy of bank account.

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant, self-serving.

The Court: Objection overruled.
Mr. Barshay: Exception.

(Received and marked People's Exhibit 35 in evidence.)

Mr. Rosenthal: May I have an exception also on behalf of the defendant Capone, as not binding?
Mr. Cuff: I understand we all have exceptions.
The Court: Yes. 4208
Mr. Turkus: May I read People's Exhibit 35 in evidence to the jury?
The Court: Yes.
Mr. Barshay: I object. What has that got to do with it? I object to the reading of this exhibit to the jury, or any part of it.
The Court: Do you mean that when an exhibit goes into evidence, the jury cannot see it?
Mr. Barshay: I did not say that.
The Court: I have overruled your objection. 4209
Mr. Barshay: Exception.
Mr. Turkus: (reading to jury) People's Exhibit 35 consists of two pieces of paper, "No. 1,395,354, July"—"Jul—1 1935" Alongside a dollar sign and the figures "2500." "I hereby agree to be bound by the conditions printed on the reverse side hereof."

The signature is "Max Rubin" in handwriting, and in typewriting it is, "Rubin, Max".

4210

I am reading the left-hand column: 1,395,354.

Reading under the column 1,395,354: "80 Van Cortlandt Pk. South, Bx. Business Agent."

Opposite "80 Van Cortlandt Pk." is "Residence," and opposite "Business Agent" is "Occupation."

"Harry" is opposite "Father's full name," and "Yetta Rothbard-d. Mother's full maiden name."

4211

A stamp across the face of that says, "Closed, Oct. 21, 1935."

The other portion of the exhibit reads, small number "4"—underneath are the figures "1,395,354."

Typewritten: "MAX RUBIN."

"The Bank for Savings in the City of New York."

These figures will appear under four columns: "Date," "Drafts," "Balance," "Deposits." "1935, July 1, Balance $2,500, Deposits $2,500."

4212

In the right-hand column: "$15.62."

Underneath "Balance," "2,515.62."

Underneath "Deposits," it says "15.62."

"Oct. 11, Drafts, $450; Balance, $2,065.62." Over on the right-hand column is "10.32."

"Dec. 7, Drafts, 1,500." Underneath "Balance, 565.62." Right-hand side, small lead-pencil figures, "2.82," Dec. 7, 1936.

"Jan'y 1, Int." Under "Balance, 568.44. Deposits, 2.82. L. 2.84."

"Mar. 2, 578.44," under "Balance." Under "Deposits, 10." Alongside of that in small figures: "2.85."

"April 1, Int." Under "Balance, 581.29. Deposits, 2.85." Alongside of that in small figures, "2.90."

"July 7, Int." Underneath "Balance, 584.19. Deposits, 2.90." And in the right-hand column "2.92."

"Oct. 21, Drafts, 587.11." Underneath is written, "2,537.11." Underneath "Deposits," "2,537.11." 4214

Q. Now, did you on October 21, 1936—

The Court: There was a final withdrawal?

Mr. Turkus: $587.11, which closed out the account.

I want to make a correction in my reading from the first exhibit. The account was closed out October 21, 1936.

Q. Pursuant to that instruction of Lepke's to close out your account in the Bank for Savings in the City of New York— 4215

Mr. Barshay: I object, first on the ground it is repetitious.

The Court: It is repetitious, sustained.

Q. Before recess Friday you told us that you arrived in Salt Lake City, and upon your arrival you were sick and went to the hospital which you described as Dr. N. H. Groves' Latter

Day Saints Hospital, am I correct? A. Yes, sir, that is correct.

Q. And that you went there under the name that you were using, George Miller? A. That is correct.

Mr Turkus: I offer a photostatic copy of a hospital record for identification. I ask that it be marked as one exhibit—consisting of 11 pages.

4217

(Received and marked People's Exhibit Z-5 for identification.)

The Court: Are they certified?
Mr. Turkus: Only photostats.

Q. When you went into the hospital, Mr. Rubin, I direct your attention to People's Exhibit Z-5 for identification and ask you whether upon admission to the hospital you signed the name of George Miller as the signature for the patient.

4218

Mr. Barshay: I object to that as not binding upon this defendant.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I did.

Q. Is that the signature you wrote, appearing on People's Exhibit Z-5 for identification, the one that you just laid down? A. Yes, sir, I did.

Mr. Turkus: I am going to offer in evidence at this time so much of People's

Exhibit Z-5 for identification as contains the signature of "George Miller," identified by the witness as having been subscribed by him upon his admission to the hospital.

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant, not binding in any fashion on this defendant.

The Court: Hospital records will have to come under the provision of the Civil Practice Act which requires certification. 4220
This is not certified. Also, if I recall correctly, it would have to be a record, a public record in this State. I am not clear on the latter point. We will come to that. But on the question of signature, that is not admissible unless for the purpose of proving by outside evidence that that is his signature. That has not yet been done. The rest of the paper is incompetent, in so far as it relates to hearsay matter, which was obviously stated by the patient at the time of his entry into the hospital. Objection sustained. 4221

Q. Without reference to the patient's admission record, can you, without reference to that record for refreshment of your recollection, can you tell me the date you entered Dr. N. H. Groves Latter Day Saints Hospital in Salt Lake City? A. I believe it was November 2, 1936, perhaps November 3rd.

Q. I believe you jsut stated it was—

Mr. Barshay: I object to counsel re-

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peating testimony of this witness just given a few minutes ago.

The Court: Reframe your question.

Q. Will you look at People's Exhibit Z-5 for identification and say if you can give us the exact date. A. November 3, 1936.

Q. Do you recall what address you gave in the hospital as your place of residence?

4223 Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I do.

Q. What address? A. The Carlton Hotel.

Q. Do you recall, without refershing your recollection from People's Exhibit Z-5 for identification, who you listed as your relative or friend, and the address you gave?

4224 Mr. Barshay: I object. May I direct your Honor's attention that Mr. Rosenthal sought to introduce letters in evidence, when your Honor sustained objection, and he tried to read contents of those letters under objection by Mr. Turkus.

The Court: You cannot read, therefore you cannot refresh his recollection from memoranda which he himself did not make, but if he recalls independently who it was, he can so state.

Mr. Turkus: I am asking him that.

A. Sam Teitelbaum.

Q. Do you remember what address you gave

of Sam Teitelbaum's? A. Broadway—I don't remember the address any more.

Q. Was that the Sam Teitelbaum that Lepke had sent you out to stay with?

Mr. Barshay: I object. There is no such testimony, that Sam Teitelbaum who is alleged to have been mentioned by the defendant is the same person he mentioned.

The Court: Objection overruled. 4226

Mr. Barshay: Exception. There is no proof that Mr. Buchalter ever saw Sam Teitelbaum, so he may not have been speaking about the same man.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes.

Q. Did this Sam Teitelbaum have a florist shop, as you were told before you went out to Salt Lake City?

Mr. Barshay: Objected to as not binding on the defendant. 4227

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Did you spend time in Sam Teitelbaum's florist shop, as you had been instructed to do?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

4228 *Max Rubin—For People—Direct*

Q. Before recess on Friday, you told us you did receive money and you did receive information, didn't you?

Mr. Barshay: Objected to as repetitious.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

4229 Q. Will you look at People's Exhibit Z 3 for identification and tell us whether this was the Western Union money order, rather, a photostat of it, which you received out in Salt Lake City?

Mr. Barshay: I object to the characterization of Mr. Turkus's question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I don't want to look at it, because I did not receive it.

4230 Q. Did you at any time ever see People's Exhibit Z 3 for identification after you came back? A. I saw it, yes, sir.

Q. When, after you came back, did you see it for the first time, if you can recall? A. A month or two months ago; something like that.

Q. Can you identify this man (indicating)? A. I can.

Q. Who is he?

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. (Referring to man who enters room) His name is Murray Weinstein.

Mr. Turkus: (Addressing man) Will you kindly give your name and address to the stenographer?

Person Addressed: Murray Weinstein, 1731 Harrison Avenue, Bronx.

Mr. Barshay: May we have this witness available, if he is under subpoena?

The Court: Are you going to call him again? 4232

Mr. Turkus: He is under subpoena.

The Court: All right.

Mr. Turkus: Mr. Barshay, if he needs him, knows he can exercise the service of a subpoena. Let us have that understood.

Is that man out of the room? (referring to Mr. Weinstein)

The Court Attendant: Yes.

Q. Is that the Murray Weinstein concerning whom you testified on Friday? A. He is.

Q. A union official? A. That is right. 4233

Mr. Barshay: May Mr. Turkus and I come up to see you for a minute?

The Court: Yes.

(Mr. Turkus and Mr. Barshay confer with the Court privately, without the hearing of the jury.)

(Respective counsel return to their places in the court-room.)

4234

By Mr. Turkus:

Q. Before you went to Salt Lake City, Mr. Rubin, did you tell your wife where you were going?

Mr. Barshay: I object.

The Court: Sustained as hearsay.

Mr. Turkus: May I argue that point? I will pursue some other question, and then maybe the relevancy will be apparent.

4235

Q. Did you tell anybody other than Lepke and Albert where you were going in Salt Lake City?

Mr. Barshay: Same objection.

The Court: Just yes or no. Objection overruled.

Mr. Parshay: Exception.

A. No.

Q. On Friday you spoke of a Cutters Union, or Local 4, Cutters Local 4, do you recall? A.

4236 Yes, sir.

Q. Affiliated with the Amalgamated Clothing Workers of America? A. Yes, sir.

Q. So that the jury may understand what a Cutters Local is, will you explain the set-up of the Cutters Local in connection with the Amalgamated? A. The piece goods make up clothing for men and boys goes into the cutting floor after it has been sponged. The sponger shrinks the garment as much as he possibly can so no shortage develops afterwards. Then it is put on a table, stretched out by stretchers, or layers,

or pullers, who cut it a specific length, and then if he has a required height, 20, 30, 40, and in the cheaper houses, 60 high, a marker comes along with a pattern and puts the pattern on the cloth, and then, with a piece of chalk, outlines these patterns, and then the main cutter comes along and cuts the garments out, and then the fitter comes along and chalks up the respective parts of the fit in the garment. Each one has a chalk number on, so you can relate different parts to one another, the under sleeve, the top sleeve, etc. 4238
Then the bundles are made and go to the tailor shop by the express route that I represented. And in the tailor shop the tailor takes each individual garment and makes it up. The cutter is the hub, the heart, the soul of the make of the garment.

You know, you need about 2,000 cutters and about 20 to 25 thousand tailors, that is the center of that particular organization.

Q. As you have outlined the various steps each of these departments function in connection with the manufacture of a suit or garment, there 4239
are separate locals, aren't there? For example, you have the Cutters Local, you have the Tailors Local—you had better explain, so the jury will understand. A. The Cutters Local represents about 1,800 or 2,000 men, as I said before. Then there are the canvas men, the canvas that goes inside of the garment to give it body, the lapel makers—a special art—and the button-hole makers—a special union. Then there are the operators that make the complete garment, so that in a coat there are four or five—there are four or five or six different organizations that

4240 take care of that particular work; and then there are the vest workers, who have their own local, and then there are the pants makers. The knee pants have a local of their own, and the long pants have a local of their own.

Q. As you state, the hub of the whole thing is the cutters? A. Positively.

Q. Did you tell us on Friday how long you stayed in Salt Lake City? A. I stood there one month.

4241 Q. During that entire month where did you live? A. I lived at the Carlton Hotel.

Q. Where did you spend your days? A. In the flower shop.

Q. With whom? A. With Sam Teitelbaum, in his shop.

Q. After you had stayed that month, where did you go? A. I came back to New York.

Q. Did you contact anyone before you returned to New York City?

Mr. Barshay: Objected to as not binding on the defendant.

4242 The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did not.

Q. When you returned to New York City where did you go? A. I stopped I believe at the Shelton.

Q. In Manhattan? A. In Manhattan.

Q. When you got back to Manhattan did you communicate with anyone? A. I did.

Q. With whom? A. With Lapke.

Q. Did you meet him? A. I did.

Q. Where did you meet him? A. My best recollection is in Willie Albert's office!

Q. At No. 2 Lafayette Street, Manhattan, is that the best of your recollection? A. Yes, sir, that is right.

Q. Did you have a talk with Lepke? A. Yes, sir, I did.

Q. Tell us what he said to you and what you said to him. A. He asked me why I came back. I said "I could not stay there, it is too lonesome; I did not see my family; that I am a 4244
home man; I wanted to stay home." He asked me if I had anything in the back of my head that brings me back. I said, "No," I had not anything in the back of my head, that I considered him a friend of mine and I had no notions of any kind. Then he said that things are very hot—"Brooklyn is not straightened out. Investigations are getting very serious," and that I had no right to come back.

Q. After he told you you had no right to come back, was anything further discussed? A. I told him he had nothing to worry about as far as I 4245
was concerned, that I was a friend.

Q. Did you continue to stay at the hotel in Manhattan? A. I did.

Q. All during this period that you were away in Salt Lake City did you have any contact with your wife and family?

Mr Barshay: I object to that.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Not while I was in Salt Lake City, no, sir.

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Q. Or with any relative or member of your family? A. No, sir, no one.

Q. Did you obey the instructions you received prior to going to Salt Lake City and when you were there?

Mr. Barshay: Objected to as a conclusion.

The Court: Objection overruled.

Mr. Barshay: Exception.

4247

A. I did.

Q. How long did you continue to stay in this Manhattan hotel, if you can remember? A. Until some part of December; I think it was the early part of December.

Q. Did Lepke, at or about that time, have a talk with you about going away? A. He did.

Mr. Barshay: I object to counsel leading.

The Court: Objection sustained.

4248 Mr. Turkus: I ask that this paper be marked for identification.

(Received and marked People's Exhibit Z-6 for identification.)

Q. After you had stayed in this hotel for the period of time you have related to the jury, did you have a talk with Lepke? A. Yes, sir.

Q. Who spoke first, if you can remember? A. Lepke told me I would have to go away again.

Q. When he told you you would have to go away, what did you say to him? A. I did not

want to go. I said, "I am better off staying in the city."

Q. What did he say to you? A. He said to me, "you are complaining you are lonesome, you have nothing to do, I will send you to a place where you will be occupied; you will make some money besides. I want you to go to New Orleans. Frank Costello is up there, and he is running the machines—all kinds of slot machines. You go around and help with the machines and you will be occupied. You will have money from 4250
New York, money from me, money from there. You will have nothing to worry about. You will be O. K."

Q. Did you agree to go? A. I did.

Q. Did you go to New Orleans? A. I did.

Q. Before you went to New Orleans did you get any instructions from Lepke about communication?

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception. 4251

A. I did.

Q. What were the instructions you received? A. That as soon as I got there I should notify Paul Berger, where I was stopping.

Q. You say you did go to New Orleans? A. Yes, sir.

Q. Do you recall what hotel in New Orleans you went to? A. Yes, sir, the Hotel New Orleans.

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Q. Have you seen a photostatic copy of the registration of that hotel? A. I did.

Q. Look at People's Exhibit Z-6 for identification and tell us if you can identify it. A. Yes, sir.

Q. Is that your registration in the Hotel New Orleans? A. It is.

Q. Under the name you used? A. Yes, sir.

Mr. Turkus: I offer that in evidence.

4253 The Court: What is the date?

Mr. Turkus: The date stamped on it is December 9, 1936, at 9:56 P. M.

Q. (The Court) Does that refresh your recollection, December 9, 1936? A. Yes, sir.

Mr. Barshay: The same objection as before.

The Court: Objection overruled.

Mr. Barshay: Exception.

4254 (Received and marked People's Exhibit 36 in evidence.)

Mr. Turkus: May I read People's Exhibit 36 to the jury?

The Court: Yes.

Mr. Turkus: This is a photostatic copy of a card—

The Court: I thought that was an original.

Mr. Turkus: No, it is a photostat.

(continuing reading) "Welcome to Hotel New Orleans." A large black line under "New Orleans."

4255

"New Orleans' Newest and Most Modern Hotel. Guests are hereby notified that the Company will not be responsible for valuables, Money, Jewelry, Clothing, etc.; unless same are deposited in the safe. Nor will we be responsible for Automobiles, Tires, or other property left in parking space."

Registration "11497"

"Room No. 1016. Rate $2.50. Room Clerk, B." "Baggage" has a check on it—maybe the figure "1"—you can examine it. "Typist: G." "Account Number 26193."

4256

"Arrival," stamped: "Hotel New Orleans, Dec. 9, 9:56 P. M. 1936."

"Name: William Harris.

"City: Phila" — meaning "Philadelphia."

"State: Pa." meaning "Pennsylvania."

Q. Did you register under the name of "William Harris"? A. I did.

4257

Q. Did you use the address, "Philadelphia, Pennsylvania"? A. I did.

Q. In regard to instructions you received from Lepke, to communicate with Berger, did you follow out that instruction and communicate with Berger? A. I did.

Q. Did you tell Berger what hotel you were stopping at? A. I did.

Q. Did you tell him what name you were using? A. I did.

Q. How long did you stay in New Orleans? A. One week.

Q. During the week you were in New Orleans,

did you contact or communicate with your wife or any member of your family? A. I did not.

Q. Did you hear anything from your wife or any member of your family? A. I did not.

Q. After you had been in New Orleans a week, where did you go? A. I came back to New York.

Q. Before you came back to New York City did you talk or communicate with anybody? A. I did not.

Q. Did you tell Berger you were coming back?

4259 A. I did not.

Q. Did you tell Lepke you were coming back? A. I did not.

Q. When you came back to New York City from New Orleans, where did you go? A. I went home.

Q. When you got home was your wife home?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. She was not.

4260 Q. Did you see her later?

Mr. Barshay: Objected to.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.
Q. Where? A. In my house.
Q. Did you see your son? A. I did.

Mr. Barshay: I make the same objection.
The Court: Same ruling.
Mr. Barshay: Exception.

Q. After that, did you communicate with anybody? A. I went to sleep. When I woke up I called up Paul Berger.

Q. After you called up Paul Berger, did you receive a visit from anybody? A. I received a visit from Paul Berger.

Q. Did he say something to you?

Mr. Barshay: Yes or no.

A. Yes, sir. 4262

Q. What did you say to him?

Mr. Barshay: I object. This is not pursuant to any instructions according to the witness's own testimony.

Mr. Turkus: It will be connected.

The Court: The trouble is, mischief may be done.

Mr. Turkus: I think your Honor can take my judgment when I say it will be connected, that it will be connected, within the next few minutes, right from the witness. 4263

Mr. Barshay: I do not take his judgment or anyone else's judgment on an issue.

The Court: The Court according to its notes undestands the alleged instructions by Lepke were in regard to Paul Berger.

Mr. Turkus: To communicate with Paul Berger and let him know the address, that is all. There have been other instructions with regard to Paul Berger: if you will refer to Friday's testimony you will see what the significance of the

4264 Berger contact is, and I represent to your Honor that it will be connected.

The Court: I thought most of the instructions to Paul Berger were by Belea.

Mr. Turkus: I do not want to go into any extended talk.

The Court: I will overrule the objection.

Mr. Barshay: Exception.

4265 Q. Will you relate to the Court and the jury what Berger said to you in your house? A. That Lepke is waiting for me, he wants to see me.

Q. Did you go somewhere with Berger? A. I did.

Q. At that time were you dressed, when Berger got there?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I got dressed.

4266 Q. Did you leave your home with Berger?

Mr. Barshay: I object to counsel leading.

The Court: Objection sustained.

Q. Did you walk outside of your apartment or your home?

Mr. Barshay: Same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. (The Court) Who went with you? A. Paul Berger.

Q. When you got downstairs was there a conveyance there?

Mr. Barshay: Objected to as leading.

The Court: Objection sustained. How did you go?

Q. What was there when you got downstairs? A. Paul Berger's car. 4268

Q. Do you remember the condition of the weather then?

Mr. Barshay: Same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I do.

Q. What was it? A. It was raining pitchforks; coming down in torrents.

Q. Did you go into Berger's car with him? A. I did.

Q. Who drove? A. Paul Berger. 4269

Q. Where did he drive? A. Amsterdam Avenue, 150th or 160th Street, I don't know exactly, but around that neighborhood.

Q. Did Berger stop the car? A. He did.

Q. When he stopped the car did you see somebody? A. Yes.

Q. Where was that "somebody" when you saw him? A. Under an awning.

Q. Who was it? A. Lepke.

Q. When you saw Lepke under the awning, what did you do? A. I walked over to him.

Q. Did he say anything to you? A. He did.

Q. What did he say? A. He wanted to know

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why I came back. He told me he had something nice for me up there and why I came back—I would have been occupied, I would have been happy up there—I would have had plenty to do—why I came back. I told him I could not stay there, that I went to see two movies a day, and I just could not stay there.

Q. After you said that, did Lepke say something else to you? A. He did.

Q. What did he say to you? A. He asked me
4271 how old I was.

Q. What did you say when he asked you how old you were? A. I said I was 48.

Q. Was that your right age? A. It was at that time.

Q. When you told Lepke you were 48, what did he say to you?

Mr. Barshay: I object to what Mr. Lepke said to him.

The Court: Objection overruled.

Mr. Barshay: Exception.

4272 A. He said it was a ripe age.

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. After Lepke told you that was a ripe age—

Mr. Barshay: I object to counsel repeating the answer. The jury heard it and everybody else heard it.

The Court: Go ahead.

Mr. Barshay: May I have a ruling on my objection?

The Court: Objection overruled. Complete your question.

Mr. Barshay: Exception. 4274

Q (continuing)—what happened? A. I replied to him again that he had nothing to worry about me.

The Court: I don't like to disorganize the court—this is only for a few minutes, in order for the witness to take medicine. See that he is provided with water. You will remain in order, gentlemen.

(Witness leaves stand and returns in a few minutes.) 4275

Q. After you told Lepke he had nothing to worry about, what did he say? A. He told me to get in the car with him.

Q. What car? A. Paul Berger's car.

Q. Did you get in Paul Berger's car with Lepke? A. I did.

Q. When you got into the car what did Lepke say to Berger? A. Lepke told Berger to take me home, I should get my things, and pack, and get out of the house, immediately, and that Berger was to take me down to a hotel.

Q. Did Lepke then say where you were to go?

A. He told me he is going to send me out of town with a fellow who is a very good fellow—a fellow that has plenty of money and was good company, and I would be occupied, and I would be able to stay away, but that in the meantime I should stay in the hotel, I should not go home, I should not stay home.

Q. Where did he tell Berger to leave you? A. At the hotel; I usually stopped either at the Shelton or the Lexington.

4277 Q. Did Berger drive you home? A. He did.

Q. At any time during the trip to your house did Lepke exit from the car? A. He did.

Q. Do you remember where? A. Someplace on the way up.

Q. Now, when Berger drove you home, did he go upstairs with you? A. He did.

Q. Did you pack? A. He helped me pack, yes, sir.

Q. Did you say goodbye to your wife? A. I did.

Q. And your boy? A. He was sleeping. I kissed him.

4278

Q. Where did you go from the house? A. We drove down to the Lexington, and Paul Berger left me off there and took my two valises—I believe I had—and he drove away.

Q. When Berger left you off at the Lexington with the valises, did he drive off in his car? A. He did.

Q. Did you actually stop then at the Lexington? A. No, sir.

Q. Where did you stop? A. At the Shelton.

Q. Was that close by? A. One block.

Q. Do you recall how long you stopped there?

A. I think, with a slight interruption, until about the middle of January.

Q. Did you enter the Shelton after Berger had left you outside there? A. I entered the Lexington.

Q. Were you able to secure accommodations? A. No, sir, they were crowded, overcrowded.

Q. Was it then you went to the other hotel? A. Yes, sir; the door man carried my bags over to the Shelton.

Q. Had you been receiving money all this period of time? A. I had. 4280

Q. Did you get money while you were at the hotel? A. I did.

Q. Who was bringing you the money? A. Paul Berger.

Q. Were arrangements made for you to go and see that man that Lepke spoke to you about when he was under the awning? A. Yes, sir, Lepke told me sometime in January, I believe it was before the 15th of January, that this fellow was going out with a fellow named Bartfield.

Q. What is Bartfield's full name? A. Irving 4281
Zenreith.

Q. Under what name was Zenreith known? A. Bartfield.

Q. Continue the conversation. I stopped you. A. This fellow did not like this Bartfield around with him, and I would be all right, and that he was stopping in the Americus Hotel in Philadelphia, Pennsylvania, and I should go there and I would meet him.

Q. Are you sure about the name of the hotel in which you met this individual that Lepke

4282 told you to go away with on that occasion? A. I was there several times before.

Mr. Turkus: I ask to have this marked for identification.

(Received and marked People's Exhibit Z-7 for identification.)

Q. Will you look at People's Exhibit Z-7 for identification and tell us if you can identify it?
4283 A. I can.

Q. What is it? A. My signature, Max Rubin.

Q. In what hotel? A. At the Americus—oh, the hotel—the Hotel Adelphi—I am sorry. The Americus is in Allentown.

Q. Did you meet this individual that Lepke spoke to you about under the awning on that occasion, at the Hotel Adelphi in Philadelphia? A. I did.

Q. Did you register in that hotel? A. I did.

Q. Under the name of Max Rubin? A. Yes, sir.

4284

Mr. Turkus: I offer in evidence People's Exhibit Z-7 for identification, the hotel registration record.

Mr. Barshay: I make the same objection as before.

The Court: The trouble with this is it is a photostat.

Mr. Turkus: Yes.

The Court: It is not identified as an original signature. For a copy to be admissible it must be certified as a public record.

Mr. Turkus: I will prove that.

The Court: I understood when the other hotel record was offered that it was an original, because it appeared to be.

Mr. Turkus: No, it was a photostat.

The Court: It did not look like a photostat.

Mr. Turkus: Do you want that exhibit withdrawn? Being you did not know it was a photostat.

The Court: Well, if there is any motion to that effect. But I cannot let this one in. 4286

Mr. Turkus: You can strike out or withdraw the other exhibit then.

Mr. Barshay: I direct your Honor's attention to the fact that it was given to the jury under my objection.

The Court: The Court has not forgotten that. The Court is ruling in your favor.

Mr. Turkus: This is Exhibit 32, the register at New Orleans.

The Court: Strike that out, and the jury is instructed to disregard the exhibit because it is a photostat and was improperly admitted. 4287

Q. Well, will People's Exhibit Z-7 for identification refresh your recollection as to the date that you met this individual in the Hotel Adelphi at Philadelphia—will that refresh your recollection as to the date? A. Yes, sir.

Q. Look at it for that purpose. A. It does.

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Q. What is the date you met him? A. January 19th.

Q. And the year—1937? A. 1937, yes, sir.

Q. Did this man have an automobile?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He did.

4289 Q. What state's license plates did this automobile bear?

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Michigan.

Q. How long did you stay away with this man? A. About seven weeks.

Q. Where did you go with him? A. We went south to St. Petersburg, Key West, one day in

4290 Miami—about seven weeks all together, traveling around.

Q. Before you went with this man did you receive any word about your money?

Mr. Barshay: Objected to unless it is connected with the defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

The Court: Yes or no.

A. Yes, sir.

Q. From whom did you receive word? A. From Lepke.

Q. What were you told about your money? A. That this fellow would get money every week for me and give it to me.

Q. This man with the Michigan plates? A. Yes, sir.

Q. While you were on your seven-weeks trip, going through Miami and all these other places you have related to the jury, each and every week did you get your money? A. I did. 4292

Q. How much? A. Fifty dollars

Q. And in what form did you receive this money? A. In cash.

Q. After about seven weeks on this trip, did you decide to return to New York City again? A. I did.

Mr. Barshay: I object to the form of the question.

The Court: Sustained as to form.

Q. Did you say anything to the man with whom you were riding about returning to New York City? 4293

Mr. Barshay: I make the same objection.

The Court: Objection overruled—yes or no.

Mr. Barshay: Exception.

A. Yes, sir.

Q. In all of those seven weeks' trip, as you have described it, to the best of your recollec-

tion did you hear from your wife or child or any member of your family?

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did not.

Q. After you told this man about your intention to return to New York City, did you again
4295 see Lepke? A. I saw him in March, in Washington, D. C.

Q. Where in Washington, D. C. did you see Lepke? A. In a hotel room.

Q. Did you communicate with Lepke before you met him in the hotel? A. I did not.

Q. Did you know that Lepke was in Washington before he walked into your hotel room? A. I did not.

Q. When Lepke came into the hotel room in Washington, did he talk to you? A. He did.

Q. What did he say to you? A. He wanted
4296 to know why I was coming back to New York City.

Q. And what did you say to him? A. I told him I was anxious to come back, I wanted to pay my income tax; I usually paid it in the Custom House, New York, and I was anxious to get back.

Q. When you told him you were anxious to get back to New York City, what did Lepke say to you? A. I cannot come back.

Q. When he told you that you could not come back, what did you say? A. I told him he had

nothing to worry about, and then I asked him to come into the bathroom with me and without the hearing of the others that were in the room.

Q. Was this man who had the Michigan plates on his car in the room with you when Lepke was telling you you could not come back? A. He and a brother of his.

Q. Then I understand you to say to the Court and jury you called Lepke into the bathroom? A. Yes, sir.

Q. Out of the hearing of the two others? A. 4298
Yes, sir.

Q. What was said in the bathroom? A. I told him he had nothing to worry about, I was coming back to New York, if I got in any trouble he had nothing to worry about; if I had to pay any penalty of any kind I was willing to pay it; but as far as he was concerned he had nothing to worry about.

Q. Did you say anything to Lepke about this other man and your reason for calling him into the bathroom? A. Yes, sir.

Q. What did you say to Lepke about that? A. 4299
I told him that the reason I brought him in was I was afraid of this other fellow,—that he would give me permission to come back, and perhaps he did not want to give me permission, because this fellow was in the other room and wanted to come back too,—that I brought him in there for that purpose, out of earshot of everybody.

Q. When you made that explanation to Lepke did he say anything to you? A. He said to me, "If you get in any trouble in New York, don't come to me." I said, "What do you mean by trouble?" He said, "I mean if you need a law-

yer or need money to get up a bail bond or something, don't come to me for that." I said, "That is all right, I will stay on my own."

Mr. Barshay: I move to strike out the answer, with this inducement of flight, nothing to do with the case at issue by the witness's own testimony. He said, "Now, if you get in any trouble in New York"—

4301 The Court: Maybe because Brooklyn is technically a part of New York—

Mr. Turkus: That is what I want for the record.

The Court: Some people in other parts of the city don't want to know it.

Mr. Barshay: I object to the Court's remark.

The Court: Strike it out, and the jury will disregard it. Your motion to strike out the answer is denied.

Mr. Barshay: Exception.

4302 Q. Now, you have related to the Court and jury when, in substance, he told you if you went back you would be on your own—did he tell you where to go? A. He did.

Q. What did he say about where you should stop? A. He told me to stop at the Bossert.

Q. The Bossert Hotel? A. Yes, sir.

Q. In Brooklyn? A. Yes, sir.

Q. Did he say anything about the Bossert Hotel in Brooklyn when he told you to stop there? A. That it was a good place.

Q. Did you come back to New York City? A. I did.

4303

Q. And pursuant to Lepke's instructions, did you go to the Hotel Bossert in Brooklyn? A. I did.

Q. Did you register at the Hotel Bossert? A. I did.

Q. Did you register there under your right or true name? A. I did not.

Mr. Turkus: I ask that this paper be marked for identification—this is an original.

4304

(Received and marked People's Exhibit Z-8 for identification.)

Q. I show you People's Exhibit Z-8 for identification and ask you if that is the original hotel registration card at the Hotel Bossert. A. It is.

Mr. Turkus: I offer it in evidence.

Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

4305

(Received and marked People's Exhibit 37 in evidence.)

Mr. Turkus: May I read it to the jury?

The Court: Yes.

Mr. Turkus: (reading to jury) This is a registration card of the Hotel Bossert, Brooklyn: In figures, "116". In writing are the words "Louis Stein." "Date, Mar. 7—1937." Number blank. "Name: Louis Stein. Street: 210 E. 166th St."

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"City and State: New York City."

Then there is a notice to guests reading: "A safe is provided for the deposit of valuables. The Hotel will not be responsible for valuables not deposited therein.

"Apt. No. 1106. Rate $3.00. Folio 561. Clerk, Karaioff."

On the reverse side is a stamp: "Hotel Bossert, Mar. 7, 3:57 P. M., 1937—Front office."

4307

Q. How long did you stay in the Hotel Bossert under the name of Louis Stein? A. I believe a day or two.

Q. Where did you go from there? A. I went to the home of the president of the union, Sammy Sneaky Levine.

Q. Sammy Sneaky Levine was president of what union? A. Local 240.

Q. The Clothing Drivers and Helpers Union? A. That is right.

4308 Q. While you were at the home of Sammy Sneaky Levine did you communicate with anybody? A. I did.

Q. With whom? A. I got Sam Levine to get Paul Berger for me.

Mr. Barshay: I object from this point on. If your Honor recalls, even according to his own testimony, the defendant said to him, "You are on your own," and there are no further instructions from then on.

The Court: Sustained upon the ground

it calls for a conclusion as to what Berger did and as to what he did in relation to Berger.

Mr. Barshay: May I have an objection, or a ruling on the objection I raised?

The Court: You have all the rulings necessary. You have enough rulings. I sustain the objection.

Q. At any rate, while at the home of Sammy Sneaky Levine, did you see or meet with Paul Berger? 4310

Mr. Barshay: I object.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I did.
Q. Did you continue to receive your money?

Mr. Barshay: Objected to.
The Court: Objection overruled.
Mr. Barshay: Exception.

4311

A. I did.
Q. From whom? A. Paul Berger.
Q. How much did you get?

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I got $50, and I got more money besides that.
Q. Tell us what you got. A. I got $50, then

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some accumulation, I believe, of some money—I don't remember now—but I believe I got some other money besides the $50. I believe so.

Q. Did you get that money from Berger each and every week you were at Sam Sneaky Levine's house? A. Yes, sir.

Q. How long did you stay there? A. About three weeks.

Q. Where did you go from Sneaky Levine's house?

4313

Mr. Barshay: I make the same objection now; he is on his own, your Honor, according to his own testimony; it is not binding on the defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I took an apartment on Flatbush Avenue.

Q. Where on Flatbush Avenue did you take an apartment, can you recall the number of that? A. 532.

Q. Now, before you had taken that apartment
4314 did you speak to Berger?

Mr. Barshay: I object.

The Court: Objection overruled. Answer yes or no.

Mr. Barshay: Exception.

A. Yes, sir.

Q. At the time you were living— Question withdrawn.

Q. When you met Berger, at the time you were living at Sammy Sneaky Levine's home, describe your appearance to the jury.

Mr. Barshay: I object to that as not binding on the defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I wore glasses, and I had a moustache; I let my hair—

Q. (interrupting) What kind of glasses did you wear? A. Regular glasses.

Q. And you say you wore a moustache? A. Yes, sir. 4316

Q. Had you ever worn a moustache before or since?

Mr. Barshay: The same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. (continuing) During that period of time? A. No, sir.

The Court: You started to say something else when you were interrupted.

The Witness: I wanted to say I let 4317 my hair grow long, too.

Q. What about your hair? A. I let it grow longer than I usually have it.

Q. You told the Court and jury that you took an apartment at 532 Flatbush Avenue; is that correct? A. Yes, sir.

Q. Did you take an apartment under the name of Max Rubin? A. I did not.

Q. Under what name was the apartment taken? A. Harry Chernilow.

Q. Will you spell that, please? A. C-h-e-r-n-i-l-o-w.

Q. While living on Flatbush Avenue in Brooklyn under the name of Chernilow, did Paul Berger see you there?

Mr. Barshay: Objected to.

The Court: Objection overruled.

Mr. Barshay: Exception.

4319 A. At least once a week.

Q. Did you get your money at [illegible] once a week?

Mr. Barshay: The same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. (The Court:) From whom? A. From Paul Berger.

Q. Now, all of this period of time when you were sent out of town by Lepke, was your wife

4320 receiving money? A. She was.

Q. What was the arrangement made about that?

Mr. Barshay: I object unless the defendant is connected.

The Court: Sustained. It calls for a conclusion.

Mr. Turkus: It is not a conclusion, because he had part in the arrangement.

Mr. Barshay: Prove it.

Mr. Turkus: I will, but I cannot prove it if the objection is sustained.

4321

The Court: The question is improper in form.

Q. Tell us what you did to see that your wife got her money.

Mr. Barshay: I object to what he did. That is not binding on the defendant.

The Court: Objection overruled.

Mr. Barshay: Exception.

4322

A. Before I took the Salt Lake City trip I wrote a letter to the union telling them I was separated from my wife and that I had made an arrangement with her to get $60 a week, and that she should continue getting that $60 every week while I was away.

Mr. Barshay: I move to strike out what he wrote to the union.

The Court: Strike it out.

Q. Before you wrote the letter to the union did you have a talk with Lepke about your wife getting money? 4323

Mr. Barshay: Yes, or no.

A. Yes, sir.

Mr. Turkus: I ask that this book be marked for identification.

(Received and marked People's Exhibit Z-9 for identification.)

4324 Q. As a matter of fact, was the discussion about your wife before and after you met in Maguire's office? A. Yes, sir.

Mr. Barshay: Objected to as leading.

Q. Look at People's Exhibit Z-9 for identification and tell us if you can refresh your recollection from that and see if you wrote a letter saying your wife was to get the money. Read at the bottom of page 54. That may refresh
4325 your recollection. A. Yes, sir.

Q. When was it you wrote that letter? A. October 30, 1936.

Q. A letter to whom? A. To the union.

Mr. Turkus: Will you mark this specific check for identification?

(Received and marked People's Exhibit Z-10 for identification.)

Q. I show you People's Exhibit Z-10 for iden-
4326 tification and ask you if you can identify it. Look at the endorsement on the back. A. I can.

Q. Do you know your wife's handwriting? A. I do.

Q. Is that her signature on the back of People's Exhibit Z-10 for identification? A. It is.

Mr. Turkus: The check is offered in evidence.

Mr. Barshay: I object to it as not binding upon this defendant.

Mr. Turkus: That is part of the arrangement under which he went away.

The Court: He has not yet so testified.

Mr. Turkus: On Friday.

The Court: He said he had a talk with Lepke about it, but he did not say what the talk was.

Q. Will you tell the conversation which you had with Lepke about your wife getting money from the Clothing Drivers and Helpers Union while you were away?

4328

Mr. Barshay: May we have the time and place fixed?

The Court: Fix the time.

Mr. Turkus: That portion was played up on Friday.

Q. (The Court) Was that before you went to Salt Lake City?

Mr. Turkus: May I discuss the question without this bickering?

The Court: You may state the conversation on that point. Objection overruled. 4329

Mr. Barshay: We want to fix the time and place.

The Court: You are right.

Q. During the period of meeting Lepke at Willie Albert's office— A. That was up to the time I went away—it must have been, to the best of my recollection, in Willie Albert's office.

Q. What was the talk? A. He told me—on the question of cleaning out all the records and everything else, but in order that my wife should not be called before any Grand Jury or any of

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those things, or it was to be known where I was, that the separation letter should be sent in.

Q. (The Court) The what? A. A letter that I am separated from my wife, and all that. I do not remember the exact wording of the matter, but now, to the best of my recollection, the fact I was separated from the wife, that I should go away.

Mr. Barshay: I move to strike that out
4331 as not responsive to the question.
The Court: Motion denied.
Mr. Barshay: Exception.

Q. What was said about the arrangement for a check to go to your wife? A. That is the arrangement I made.

Q. After that talk? A. Yes, sir, after that talk.

Mr. Barshay: I move to strike out the answer as not binding on this defendant, that is an arrangement that he made, and
4332 in the talk with Mr. Buchaiter there was absolutely no arrangement with respect to that phase.
The Witness: This is not a question of my own.
Mr. Turkus: May I point out exactly—
The Court: You do not have to argue.

By the Court:

Q. What was said with Lepke about the money to your wife—that is the question. A. He told me to make arrangements that she—

Q. With whom? A. With my wife, that she cannot be dragged into the Grand Jury and asked where I was, that I should make arrangements to sort of separate or appear as if I was separated from her.

Q. Was anything said to the union respecting the money—you did not answer that—to your wife? A. Those are the arrangements we made.

Q. Was anything said to Lepke about the union sending money to your wife? A. No, sir.

4334

Mr. Barshay: I move to strike it out.

The Court: The answer will stand, but the Court sustains the objection as to time.

By Mr. Turkus:

Q. Was it in pursuance of Lepke's instructions that your wife was to keep away from the Grand Jury that you wrote the letter to the Clothing Drivers & Helpers Union?

4335

Mr. Barshay: I object, especially to that part which says she should be kept away from the Grand Jury. There is no proof any Grand Jury was seeking her.

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Turkus: That was to thwart the Grand Jury.

Mr. Barshay: I thought you did not want any bickering. A question of law can be proven in view of the basis now being laid, but it will have to be proven

4336

in the proper way and not by stating a conclusion.

Q. I asked whether you wrote a letter.

The Court: He said he did.

Q. Pursuant to instructions?

Mr. Barshay: I object to that question.

4337

The Court: Maybe the ruling is not understood. Mr. Turkus, have you the original letter?

Mr. Turkus: I haven't it, no, sir.

The Court: Is there any possibility of proving it by secondary evidence, the contents of the letter?

Q. Will you look at Z-9 for identification, particularly the bottom of page 54 and the rest on 55, those are the minutes of the union.

4338

The Court: They are not authenticated.

Mr. Turkus: Look at it. I don't want to go into any discussion about a book not in evidence.

The Court: The point is, these minutes will have to be authenticated by the secretary.

Mr. Turkus: They are.

The Court: He has to be sworn on the witness stand, subject to cross-examination on this point.

Mr. Turkus: All I want to establish is

he got instructions from the defendant Lepke, whether he obeyed them, and in pursuance of the instructions sent a letter to the union.

The Court: The Court is trying to call attention to this: that under the rules of evidence you would be required to produce the letter from the union. If this is not produced, because it has disappeared or is out of jurisdiction, then you may prove it by your own witness, by parol testimony, the contents of that letter. 4340

Mr. Turkus: I first have to show there was such a letter in fact sent.

The Court: But as to the contents—

Mr. Turkus: I am not going into that now.

The Court: Then proceed.

Mr. Turkus: Read the last question, so that we can get an answer for the record.

(Pending question read by reporter.) 4341

Mr. Barshay: I object to the form of the question.

The Court: Part of it is objectionable as stating his conclusion.

By the Court:

Q. Did you, after that conversation with Lepke, write the letter to the union? A. I did.

Q. How long after? A. Anywheres between, I should say between the 21st and 30th of October. The letter was dated October 30th, that is

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when the letter was dated; I met Feinberg and I gave him the letter.

By Mr. Turkus:

Q. Who was Feinberg? A. I knew him as Jeff. He is Louis Feinberg, the secretary-treasurer of the union.

Q. At the time you wrote the letter had there been any disagreement at all between you and your wife?

4343

Mr. Barshay: I object.

The Court. Objection overruled.

Mr. Barshay: Exception.

A. There was none.

Q. Now, at that time, when you wrote the letter to the union, what office did you have in the union? A. Business agent.

Q. Are you familiar with People's Exhibit Z-9 for identification—are you familiar with the book? A. Being an official of the union, I saw it very often.

4344

Q. What is that book? A. It is a minute book of the local, kept a little haphazard, but still a minute book.

Q. Do you know in whose handwriting that minute book is, specifically, pages 54 and 55? A. Yes, sir. Isidore Cohen's.

Q. What office does he hold? A. He was an executive board member when I was there.

Mr. Turkus: I offer in evidence pages 54 and 55 of People's Exhibit Z-9 for identification.

4345

By the Court:

Q. What was your salary as business agent? A. $80 a week.

By Mr. Turkus:

Q. While you were away—

Mr. Barshay: I object to it. First, it is not binding upon the defendant; secondly, it is entirely hearsay; and third, it is not properly authenticated. 4346

The Court: I don't know of any statute under which the minute book of an organization is permissible without putting a witness on the stand who attends the meetings and testifies that the minutes are correct.

Mr. Turkus: I will not press it.

Q. You just told Judge Taylor that your salary at that time was $80 a week? A. Yes, sir.

Q. Will you look at People's Exhibit Z-11 for identification and tell us if you can identify that book. A. I can. 4347

Q. What book is it? A. That is a check book we had for '36—this is September here (indicating).

Q. What book? When you say "we", who is "we"? A. The Clothing Drivers Union.

Q. Local 240? A. That is right.

Q. Does that book contain in it checks which you received at the rate of $80 a week until you wrote the letter to the union?

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Mr. Barshay: I object, unless it is of his own personal knowledge.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Mr. Barshay: He did not get the checks, your Honor.

The Court: Objection overruled.

4349 Mr. Barshay: Exception.

Q. Now, does People's Exhibit Z-11 for identification refresh your recollection as to when you got your last $80 as business agent before you went away—the date when you received the check is on the top where you turn the page—look at the top one. A. Yes, sir, Check No. 3593.

Q. What is the date? A. October 30, 1936, check made out to Max Rubin for $80 a week.

Q. After that was the date the letter was written that was sent to the union in reference
4350 to your wife, is that correct? A. Yes, sir, that is right.

Mr. Turkus: Now I ask that this specific book be marked for identification.

(Received and marked People's Z-12 for identification.)

Q. I show you two People's Exhibits for identification, Z-10 and Z-12, being the first and second checks at the top of the page, and ask you if that represents the first splitup of the eighty

into sixty and twenty. A. Yes, sir, that represents it.

Q. On that $20 check, People's Exhibit Z-12 for identification, is that your signature on the back? A. No, sir, that is Feinberg's, but I want to say that he signed other checks for me, too. Even my $80 checks he signed for me.

Q. But you got your $20 differentials? A. Yes, sir.

Q. You say you are familiar with your wife's handwriting on People's Exhibt for identification Z-10, which bears her handwriting on the reverse side? A. I saw that before, yes, sir. 4352

Mr. Turkus: That check is re-offered in evidence.

Mr. Barshay: I object. This man affirmatively said the financial arrangement was made by him and not in pursuance of any instructions.

The Court: That is understood. It is clear he received no specific instructions from Lepke. It is relevant to show what he did. The objection is overruled. 4353

Mr. Barshay: Exception.

(Received in evidence and marked People's Exhibit 38.)

Mr. Turkus: May I read People's Exhibit 38 to the jury?

The Court: Yes.

Mr. Turkus: (reading) "Clothing Drivers & Helpers Union, Local 240, A.F. of L. 359.

"Pay to the order of Esther Rubin,

4354 Sixty Dollars"—"Sixty" written out in ink, in longhand.

"Clothing Drivers & Helpers Union, I.B. of T. & C., Local 240, A.F. of L.," drawn on the Amalgamated Bank, 11-15 Union Square, signed "Sam Levine, Pres.; Louis Feinberg, Treas."

On the reverse side is the endorsement "Esther Rubin" written twice, and "Received payment" through the check department of the Federal Reserve Bank of New York—and it has "1/30." "November 10, 1936." Another "1/10"

4355 "Prior endorsements guaranteed. Manufacturers Trust Company, 3408 Jerome Avenue, New York, N. Y."

Q. That was your wife's name, Esther Rubin, and still is? A. Yes, sir.

Mr. Turkus: That check number should be "3599."

I ask that this specific check be marked for identification.

4356

(Received and marked People's Exhibit Z-13 for identification.)

Q. Will you look at People's Exhibit Z-13 for identification, at the top of the page, and tell us if that bears the endorsement of your wife Esther Rubin. A. It does.

Mr. Turkus: Offered in evidence.

Mr. Barshay: The same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

(Received and marked People's Exhibit 39 in evidence.)

Mr. Turkus: May I read 39 to the jury?

The Court: Yes.

Mr. Turkus: (reading) "Clothing Drivers & Helpers Union, I.B. of T. & C., Check No. 3605. Pay to the order of Esther Rubin, Sixty Dollars, New York, November 13, 1936," drawn on the Amalgamated Bank, 11-15 Union Square. 4358
Signed "Clothing Drivers & Helpers Union, I.B. of T. & C., Local 240, A. F. of L.," same bearing the signature of "Sam Levine, Pres." and "Louis Feinberg, Treas." On the reverse side the name of Esther Rubin, with the Federal Reserve Bank clearing the check, and the Corn Exchange Bank.

The Court: We will now take a recess, gentlemen of the jury. Remember the admonition heretofore given you in all respects Please follow it. 4359

We will resume at two o'clock.

First the witness will go out.

(The witness left the Court-room.)

Now the jury may go.

(The jury left the court-room.)

Now the defendants are remanded.

(Recess taken until 2:00 P. M.)

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AFTERNOON SESSION—TRIAL RESUMED.

MAX RUBIN, resumed the stand and testified further as follows:

Mr. Turkus: Your Honor, there is a series of weekly checks to Esther Rubin in the sum of $60 which, for the sake of expedition, I would like to offer in bulk as a single exhibit.

4361 Mr. Barshay: I object to it.

The Court: Authenticate them first.

Mr. Turkus: All right. I ask to be marked for identification as a single exhibit the following checks, the numbers of which I will read off to you with the date: November 20, 1936, check No. 3608; November 27, 1936, check No. 3611; December 4, 1936, check 3616; December 11, 1936, check 3625; December 18, 1936, check 3630; December 24, 1936, check 3644; December 31, 1936, check 3647; January 8, 1937, check 3650; January 15, 1937, check

4362 3656; January 22, 1937, check 3664; January 29, 1937, check 3668; February 5, 1937, check 3673; February 11, 1937, check 3678; February 19, 1937, check 3687; February 26, 1937, check 3690; March 4, 1937, check 3697; March 12, 1937, check 3701; March 19, 1937, check 3708; March 25, 1937, check 3712; April 2, 1937, check 3717; April 9, 1937, check 3727; April 16, 1937, check 3735; April 23, 1937, check No. 3740; May 1, 1937, check No. 3749; May 7, 1937, check No. 3757; May 14, 1937, check No. 3765; May 21, 1937, check No. 3770;

4363

May 28, 1937, check No. 3774; June 4, 1937, check No. 3781; June 11, 1937, check No. 3788; June 18, 1937, check No. 3791; June 25, 1937, check No. 3796. May they be deemed to be marked for identification.

The Court: As long as you specify the dates and numbers, yes.

(32 checks deemed marked People's Exhibit Z-14 for identification.)

4364

Mr. Turkus: May I hand the exhibit to the witness and have him check the signatures on the reverse side of those checks? It starts with check No. 3608, November 20?

By Mr. Turkus:

Q. As to the one dated November 20, 1936, check 3608, is that your wife's signature on the back of it? A. It is.

Q. The next one is check No. 3611. A. It is.

Q. That is your wife's signature. Now look 4365
at 3616. A. It is.

Q. 3625. A. It is.

Q. Check 3630. A. It is.

Q. Check 3644. A. It is.

Q. Check 3650. A. There is a check 3647.

Q. That is right. A. It is.

Q. The next is 3650. A. It is.

Q. 3656. A. It is.

Q. 3664. A. Yes.

Q. 3668. A. Yes.

Q. 3673. A. Yes.

Q. 3678. A. It is.

Q. 3687. A. It is.
Q. 3690. A. Yes.
Q. 3697. A. Yes.
Q. 3701. A. Yes.
Q. 3708. A. Yes.
Q. 3712. A. Yes.
Q. 3717. A. Yes.
Q. 3727. A. Yes.
Q. 3735. A. Yes.
Q. 3740. A. Yes.
4367 Q. 3749. A. Yes.
Q. 3757. A. Yes.
Q. 3765. A. Yes.
Q. Check No. 3770. A. Yes.
Q. Check No. 3774. A. Yes.
Q. Check No. 3781. A. Yes.
Q. Check No. 3788. A. Yes.
Q. Check No. 3791. A. Yes.
Q. Check No. 3796. A. Yes.

Q. And when you say "yes" does your wife's signature appear on the reverse side of each of those checks to which you have said "yes" as we have gone over them one by one? A. It does.

4368

Mr. Turkus: I offer in evidence all of those $60 checks from the Local 240, Clothing Drivers & Helpers Union, to Esther Rubin, as one exhibit.

Mr. Barshay: Let me see them, please.

Mr. Turkus: That is not an examination of the exhibit. That is an examination of other checks.

Mr. Barshay: I move to strike out that remark.

Mr. Turkus: That is not a remark. That is an application addressed to the Court.

Mr. Barshay: Mine is an application.

Mr. Turkus: The exhibits were handed to counsel. Upon his examination he wanted to examine those offered in evidence.

Mr. Barshay: That is what I am doing.

Mr. Turkus: He is examining other checks.

Mr. Barshay: That is an outright lie. They are all in order, sir, and I can look 4370
at them one at a time. I cannot keep in mind the numbers as you have them here—

Mr. Turkus: I heard Mr. Barshay say—

Mr. Barshay: —and when I discovered that one of the checks in order is to another person other than Mrs. Rubin, I said in the presence and hearing of Mr. Turkus, "That has no application to this." Don't say I have no right to be looking at something I have a right to be looking at.

The Court: This was entirely unnecessary. Mr. Barshay, all you had to do was 4371
say that Mr. Turkus was wrong and the Court would have accepted your word. Proceed with the examination.

Mr. Barshay: I said it in just that way so that Mr. Turkus won't repeat this again.

The Court: This excitement must stop.

Mr. Barshay: I am not excited. I am incensed. There is a difference.

The Court: Both sides must keep their heads at all times. That is the way to try a case.

Mr. Barshay: I object to their introduc-

4372 tion in evidence on the ground they are incompetent and not binding upon this defendant, especially in view of the witness' testimony that he made the financial arrangements himself.

The Court: Same ruling as to the others. Overruled.

Mr. Barshay: Exception.

(Checks described received and marked
4373 People's Exhibit 40 in evidence.)

The Court: Just state briefly to the jury the amount of each check and the name of the payee. Is there one a week?

Mr. Turkus: One a week.

The Court: How much is each?

Mr. Turkus: $60 to Esther Rubin, the wife of this witness.

Preparatory to offering as one exhibit eight checks, I ask that the following checks be deemed marked for identification as one exhibit.

4374 The Court: Are they in the book?

Mr. Turkus: They are in the book, pasted in.

Check No. 3804, July 2, 1937; 3808, July 9, 1937; 3811, July 16, 1937; 3814, July 23, 1937; 3821, July 28, 1937; 3829, August 6, 1937; 3834, August 13, 1937; 3845, August 20, 1937.

(Eight checks above mentioned deemed marked People's Exhibit Z-15 for identification.)

4375

Q. I hand the witness People's Exhibit Z-15 for identification, and ask you, Mr. Rubin, to check the signature on the reverse side of each of those checks as I call them off: 3804, July 2, 1937. A. That is right.

Q. Is that your wife's signature? A. It is.

Q. Check No. 3808, July 9, 1937. A. That is.

Q. Check No. 3811, July 16, 1937. A. That is right.

Q. Check No. 3814, July 23, 1937, is that your wife's signature? A. That is right.

4376

Q. Check No. 3821, July 28, 1937, is that your wife's signature? A. That is right.

Q. Check No. 3829, dated August 6, 1937, is that your wife's signature? A. That is right.

Q. Check No. 3834, August 13, 1937, is that your wife's signature? A. That is right.

Q. And finally check No. 3845, dated August 20, 1937, is that your wife's signature? A. That is right.

4377

Mr. Turkus: The eight checks now deemed marked People's Exhibit Z-15 for identification are offered in evidence as one exhibit.

Mr. Barshay: I object to it on the ground heretofore urged, sir.

The Court: Overruled.

Mr. Barshay: Exception. May I look at them?

Mr. Turkus: I offer them in evidence.

Mr. Barshay: Exception.

(Eight checks previously marked People's Exhibit Z-15 for identification received and marked People's Exhibit 41 in evidence.)

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Mr. Turkus: In lieu of reading all of the eight checks to the jury, may I merely give the date of the check, the amount, and the payee? They are weekly checks for $60, to Mrs. Esther Rubin, terminating August 20, 1937.

The Court: All right.

Mr. Turkus: Those are a series of eight checks in the second check book, beginning with No. 3804 and ending with 3845.

4379 The date begins July 2nd. They are weekly thereafter down to August 20th and they are all checks of $60 each to Esther Rubin who was the wife of this witness.

Q. On Friday, Mr. Rubin, you referred in your testimony to a Mr. Louis Cooper of the Garfield Express and stated that you had met him on some occasions in New York and other occasions in New Jersey. Do you recall that testimony? A. I do.

4380 Q. Did you ever see Louis Cooper in New York City after the Dewey investigation started? A. No.

Q. Did you ever see any of these other defendants in association with Lepke? A. I did.

Mr. Rosenthal: I object to the form of the question.

The Court: Sustained.

Mr. Talley: I join in the objection.

Q. Did you ever see any of these other defendants at the same time you saw Lepke?

Mr. Talley: Objected to, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. I did.

Q. Who? A. I saw Mendy Weiss and Louis Capone.

Q. With respect to Louis Capone, when is the first time you saw him, if you can recall? A. I believe some time in 1932 or '33.

4382

Mr. Barshay: I object to it, entirely too remote. Move to strike out the answer.

The Court: Overruled.

Q. Where did you see him? Do you recall the place? A. I do not.

Q. Who was there at the time you saw him?

Mr. Rosenthal: That is objected to.

The Court: Overruled.

Mr. Rosenthal: Exception. 4383

A. I saw him with Lepke.

The Court: Is that in 1932?

The Witness: 1932 or 1933.

Q. Were you introduced to him?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. No.

4384

Q. Was there anybody else there?

Mr. Rosenthal: That is objected to as already answered and repetitious. He was asked that question and he said he saw him with Lepke.

The Court: That is what he said.

Mr. Rosenthal: The very question was asked once before.

The Court: Just the three of you?

4385

The Witness: There was another one there.

The Court: You can say who the other was.

Mr. Rosenthal: I object to it.

Mr. Barshay: I object to it.

The Court: Overruled.

Defense Counsel: Exception.

A. Buggsy Goldstein.

Q. What was the name? A. Buggsy Goldstein.

Mr. Barshay: I move to strike out the

4386

answer, sir.

The Court: Denied.

Mr. Barshay: Exception. I move for the withdrawal of a juror and a declaration of a mistrial on the ground of created prejudice.

The Court: Denied.

Mr. Barshay: Exception, sir.

Q. Did you see Louis Capone after that? A. Once after.

Mr. Barshay: I object to it as not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

Q. What was your answer? A. Once after that.

Q. Whom did you see him with?

Mr. Rosenthal: That is objected to.

The Court: Overruled. 4388

Mr. Rosenthal: Exception — unless a time and place is fixed first so that I can make my objection properly.

The Court: Fix it.

The Witness: In 1935, in the fall of 1935, in the office of Samuel Safier, I saw Louis Capone.

Mr. Rosenthal: Wait a minute, please. Now I object to it as having no bearing on the Rosen murder.

Th Court: Overuled.

Mr. Rosenthal: Exception.

4389

A. I saw Louis Capone, Buggsy Goldstein, Pretty Amberg and Lepke.

Mr. Barshay: I move to strike out the answer, sir.

The Court: Denied.

Mr. Barshay: Exception. I move again for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice.

The Court: Denied.

Mr. Barshay: Exception, sir.

4390

Mr. Rosenthal: And I make the same motion.

Mr. Talley: Same on behalf of defendant Weiss.

The Court: Denied.

Q. Did you ever see Capone after that?

Mr. Cuff: Objected to as already answered.

4391

A. No.

Q. And the defendant Weiss, did you have occasion to see him?

Mr. Talley: Objected to, if your Honor pleases.

The Court: Overruled.

Mr. Talley: I ask the time and place be fixed.

The Court: He can say yes or no.

A. Yes.

4392

Q. Do you recall when and where it was you saw him for the first time? A. To my best recollection, I can.

Q. What is your best recollection? A. Perfection Coat Front.

Mr. Talley: When?

The Witness: In 1934.

Mr. Talley: I object to it, if your Honor pleases, and move to strike it out on the ground it is too remote, two years before the crime designated in this indictment.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Barshay: Join in the objection and exception, sir.

Q. Who was there at the time you saw Mendy Weiss?

Mr. Barshay: Same objection.

The Court: Overruled.

A. Lepke. 4394

The Court: Anybody else?

The Witness: Lepke and Farvel Cohen.

Mr. Barshay: I again move for the withdrawal of a juror and the declaration of a mistrial, sir.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you see him on other occasions with Lepke?

4395

Mr. Talley: Same objection.

A. I may have.

The Court: Overruled.

Mr. Talley: I move to strike out that asnwer as not being an answer at all. Either he did see him or he did not see him.

The Court: Maybe he did or maybe he did not, or maybe he does not remember. Do you remember whether you did or not?

4396

The Witness: There was one time, your Honor, that Lepke sent me down to meet them on Madison Street.

Mr. Talley: I move to strike out this recital as not being responsive to the question. Did he see or didn't he?

Q. Tell us about this occasion that you started to tell the Judge.

4397

Mr. Talley: I object to that as being too general and indefinite.

The Court: Overruled.

Mr. Talley: Exception.

A. That is reason I said I may have. Lepke once told me that Farvel Cohen and Mendy Weiss have some sort of a proposition, a window cleaning or a window association—I don't remember whether it was window cleaning or window association; would I go down and see them. I met them down on Madison Street.

Q. Did you meet them both together?

4398

Mr. Talley: I move to strike that out as having no bearing, immaterial and irrelevant, having no bearing on the indictment here.

The Court: Denied.

Mr. Talley: It is not responsive to any question that was asked.

Mr. Barshay: I join in that objection and exception.

The Court: Denied.

Mr. Cuff: Exception.

Q. Do you recall whether you saw Farvel Cohen together with Mendy Weiss on that occasion? A. I did.

Mr. Talley: Same objection.

Q. Before recess today you had testified about the apartment on Flatbush Avenue which you had taken under the name of Harry Chernilow. Do you recall that? A. That is right.

Q. And about receiving the payments from Berger weekly while you were there? A. That is right. 4400

Q. You recall that? How long did you stay at that apartment located at 532 Flatbush Avenue under the name of Harry Chernilow? A. Until some time in August, 1937.

Q. Is there anything by which you can fix the exact date that you left that apartment under the name of Chernilow, in Flatbush Avenue, Brooklyn?

Mr. Barshay: I object to it.
The Court: Overruled. 4401
Mr. Barshay: Exception.

A. My boy's birthday is on August 9th.

Q. In relation to your son's birthday of August 9th, when did you get out of the Flatbush Avenue apartment in Brooklyn?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. I got out August 9th. Mr. Turkus, I may

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not have taken the furniture out immediately but I got out of there August the 9th.

Q. When you yourself finally went out of there on August 9th, your son's birthday, where did you go?

Mr. Barshay: Object to it.

The Court: Overruled.

Mr. Barshay: This is not pursuant to instruction of any defendant, sir.

4403 The Court: I don't know what it is. I am going to find out. Where did you go?

The Witness: I went home. My wife had an apartment that she had taken during my absence at 245 East Gunhill Road, and I went there.

Q. Is 245 East Gunhill Road in the Borough of the Bronx? A. It is.

Q. When you went home, did you find your wife and child at 245 East Gunhill Road in the Bronx? A. I did.

Q. After you got home did you again com-
4404 municate with Mr. Edward Maguire?

Mr. Barshay: I object to it. It is not binding on this defendant, sir.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Just yes or no to that. A. Yes.

Q. Is that the same Mr. Maguire that you had consulted before you went away? A. Yes.

Q. And is that the same Mr. Maguire to whom you took Lepke? A. Yes

Q. Just answer this question yes or no: Did you have a talk with Mr. Maguire? A. Yes.

Q. After that talk that you had with Mr. Maguire, did you ultimately go down to the office of Thomas E. Dewey?

Mr. Barshay: I object to it. It is incompetent, not binding upon this defendant.

The Court: Overruled.

Mr. Barshay: Exception. 4406

A. I went to a former office of Thomas E. Dewey, 120 Broadway.

The Court: Who is Maguire?

Mr. Turkus: Mr. Maguire is the labor lawyer. You remember in the early testimony on Friday—

The Court: All right; the one who advised you not to go out of town?

Mr. Turkus: That is right. The one to whom he brought the defendant Lepke under the circumstances he has related. 4407

Q. You say you went to the former office. Were those private law offices that you went to?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. Yes.

Q. And you say they were located at 120 Broadway? A. Yes.

4408

Q. What is the name of that building, do you remember? A. No, I don't remember.

The Court: Equitable, isn't it?
The Witness: Equitable, yes.

Q. Did you there see somebody?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

4409

A. I met Mr. Frank S. Hogan and Barent TenEyck who were connected with District Attorney Dewey.

Q. Without stating what the conversation is—the law does not permit the stating of the conversation—did you have a talk with Mr. Frank S. Hogan and Mr. Barent TenEyck?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

4410

A. I did.

Q. Were Frank S. Hogan and Barent Ten Eyck then Assistant District Attorneys?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

A. They were.

Q. And were they attached to the office of Thomas E. Dewey?

Mr. Barshay: Same objection.

The Court: Overruled.
Mr. Barshay: Exception.

A. They were.

Q. In order to fix the time, can you, with reference to the last check that your wife got for $60, People's Exhibit 41 in evidence, namely the one August 20, 1937, can you fix the time that you were in that office? A. Yes.

Q. Fix it. A. Right after that.

Q. After you spoke to Assistant District Attorneys Hogan and Ten Eyck, did you go back to work as a business agent? 4412

Mr. Barshay: I object to it. It is immaterial and incompetent.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.

Q. As business agent for Local 240 of the Clothing Drivers & Helpers Union? A. Yes.

Q. While performing your duties as business agent, Mr. Rubin, did you come in contact with Paul Berger? A. I did. 4413

Mr. Barshay: I object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.

Q. Did you tell anybody that you had been down to Thomas E. Dewey's office and saw Hogan and Ten Eyck?

Mr. Barshay: I object to it.
The Court: Overruled.

4414 Mr. Barshay: Exception.

A. I did not.

Q. You say you met Berger. Did you meet him frequently at that time?

Mr. Barshay: I object to it, not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

4415 A. I did.

Q. Where did you see him?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

Mr. Barshay: Exception.

A. On Fifth Avenue in the clothing center.

Q. And did you at those meetings talk with him?

Mr. Barshay: I object to it, sir.

4416 Q. Just yes or no, that is all I want.

The Court: Yes or no.

A. Yes.

Mr. Barshay: Exception.

Q. Did you have any talk with Berger in which the name of Lepke was mentioned?

Mr. Barshay: I object to it and I object to counsel leading.

Mr. Turkus: I have to lead at this point. May I tell your Honor why?

The Court: Don't say anything.

Mr. Turkus: I am merely marking something for your Honor to look at. (Handing paper to Court.)

Mr. Talley: I object to any communications of that kind being passed by counsel to the Court.

The Court: That does not call for a ruling. The Court will disregard it. You 4418
cannot give that conversation.

Mr. Turkus: No, I don't want the conversation. I just want a yes or no answer.

Mr. Barshay: May the record indicate just exactly what the Assistant District Attorney passed to the Court?

The Court: No.

Mr. Barshay: Exception.

The Court: I ruled in your favor. You take an exception. Go ahead.

Mr. Talley: Can we have whatever it 4419
was that the District Attorney handed up to your Honor marked for identification.

The Court: No.

Mr. Talley: I except to your Honor's action in accepting the communication.

The Court: I said I exclude it so the rest of this is just a show.

Mr. Talley: What is that, sir? We do not hear you down here.

The Court: I don't repeat. I am talking audibly and anybody in the courtroom can hear it.

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Mr. Talley: We do not hear it: whether you are speaking audibly or not, we don't hear you.

The Court: Proceed.

Mr. Turkus: Was I overruled?

The Court: I said you cannot put that in evidence and he cannot speak about the substance of the conversation because that reveals a part of the conversation, in substance.

4421 Mr. Turkus: All right.

The Court: The objection is sustained.

Q. At that time were you personally in communication or contact with Lepke? A. No.

Q. Did you know where he was? A. I did not.

Q. I want to direct your attention to a time in September, 1937, and ask you if there was such an occasion when you had lunch with Paul Berger?

Mr. Barshay: I object to it, not binding on this defendant.

The Court: Overruled.

4422 Mr. Barshay: Exception.

A. I did.

Q. Prior to the luncheon that you had with Paul Berger, when was the last time prior or before that that you had seen Paul Berger?

Mr. Barshay: I object to it, not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

A. I saw him the day before the luncheon.

Q. And when prior to that had you seen Paul Berger last?

Mr. Barshay: Same objection, sir.

The Court: Overruled.

Mr. Barshay: Exception.

A. About two or three weeks.

Q. Getting back to the day before the luncheon, where did you see Paul Berger? A. On Fifth 4424
Avenue.

Q. Was the luncheon engagement made for the following day at that time?

Mr. Barshay: I object to it, no relevancy with respect to this defendant.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. It was.

Q. Did you keep the engagement?

Mr. Barshay: I object to it, sir. 4425

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Where did Paul Berger take you to luncheon?

Mr. Barshay: I object to it, not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

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A. Child's restaurant on 14th Street east of University Place, on the south side of the street.

Q. Did you there, in that Child's restaurant, have luncheon with Paul Berger?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

4427 Q. Can you identify this man (indicating man who has entered courtroom)?

Mr. Barshay: May the record indicate that this man has been brought in by a sheriff?

The Court: Who brought him in?

Mr. Turkus: A sheriff.

Mr. Barshay: May we get the sheriff's name?

(Name given: Catapano, Deputy Sheriff, Kings County.)

Mr. Turkus: May we have an answer

4428 to the question?

Mr. Barshay: Will your Honor give me an objection to this procedure?

The Court: Yes.

Mr. Barshay: Exception.

(Pending question read by the reporter.)

A. I can.

Q. What is his name? A. Sam Levine.

Mr. Turkus: (To man in question) What is your name?

(Name given: Sam Levine, 206 Grafton Street.)

Mr. Talley: What is his present address, if your Honor pleases? May we have that?

The Court: You mean where he is being detained?

Mr. Talley: Yes.

The Court: No.

Mr. Talley: Exception.

(Sam Levine leaves the courtroom.) 4430

Q. Is that the Samuel Levine concerning whom you testified before this jury? A. Yes, that is the "Sneaky" I spoke about.

Q. Mr. Rubin, can you identify these gentlemen (indicating two men who have entered the courtroom)?

Mr. Barshay: I object to it, sir.

The Court: How many?

Mr. Turkus: Just two of them.

The Court: Overruled.

Mr. Barshay: Exception. 4431

A. The smaller one is Davey Kantor and the taller one is Louis Feinberg.

Mr. Turkus: (To men in question) What is your name?

A. David Kantor, 295 East 94th Street, Brooklyn.

Mr. Turkus: May the record indicate he is the smaller of the two?

And your name?

A. Louis Feinberg, 1145 President Street.

(Mr. Kantor and Mr. Feinberg leave the courtroom.)

Q. Is Feinberg the official with 240 concerning whom you gave testimony on Friday and today? A. Yes, sir.

Q. That is the Louis Feinberg you know as Jeff? A. Yes, sir.

4433 Q. And the other man, Kantor, is the one you testified about on Friday as having taken him out of town pursuant to instructions? A. That is right.

Q. We will go back to that luncheon that you had with Paul Berger in September, 1937. I think you have already told us that you did have lunch with him. Do you know how long you spent in Child's restaurant? Have you any idea? A. I should say about an hour. It was right before, we left right before the noon lunch. People were beginning to come in so we went out.

4434 Q. Toward the end of September, 1937, did you testify before a Grand Jury in Manhattan, an inquiry being held by the office of Thomas E. Dewey?

Mr. Barshay: I object to it, sir, not binding upon this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Talley: I object to it upon the ground it is incompetent, irrelevant, immaterial, November, 1937.

Mr. Turkus: It is September.

Mr. Talley: September, 1937, more than a year after the alleged killing as set forth in the indictment, too remote.

The Court: Overruled.

Mr. Talley: Exception.

Q. What was the answer? A. I went to the Grand Jury, yes.

Q. And did you testify before a Grand Jury in Manhattan?

4436

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Do you recall the days that you testified?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. Only one. It was either the 27th or the 28th of September, 1937.

4437

Q. One day or the other? A. Either one day or the other, yes.

Q. Several days after you testified before the Grand Jury in Manhattan, and specifically on October 1, 1937, what happened to you?

Mr. Barshay: I object to it, sir.

The Court: Now you are on dangerous ground. I cannot allow that unless it is connected up. There can be no speculation.

Mr. Turkus: It will be connected up

by other witnesses. Your Honor must have in mind my opening statement to the jury.

The Court: That puts upon the Court the obligation of being under the necessity of declaring a mistrial if you fail to connect it up. That is not right.

Mr. Turkus: Well, then I will connect it first and recall the witness later.

The Court: You will have to do that.

4439 Mr. Barshay: On the statement of the District Attorney, sir, I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

Mr. Talley: I join in that motion.

The Court: Denied.

Mr. Rosenthal: I make a separate motion as to the defendant Capone. This is in no wise binding upon him or material to him. As such it is incompetent evidence.

4440 The Court: It has relation to whoever may be involved, but we cannot speculate as to whether any of ~~them~~ are involved. Denied.

Mr. Rosenthal: Respectfully except.

The Court: We cannot try the case inside out.

Q. Did you sometime in October, 1937, go to a hospital?

Mr. Barshay: I object to it and now move for the withdrawal of a juror and

declaration of a mistrial on the ground of prejudice and on the ground by indirection Mr. Turkus has sought to convey to the jury what the Court has seen fit to withhold.

The Court: Your objection is sustained and motion is denied.

Mr. Barshay: Exception.

Mr. Talley: I join in the motion and in the objection and I call your Honor's attention to the opening of the District 4442
Attorney in this case in which reference was made, in connection with my client, to what he is trying to bring out from this witness. It is highly objectionable,—fatal, it seems to me,—and trying to prove a crime other than alleged in this indictment, and it cannot be done.

The Court: Your objection is sustained.

Mr. Turkus: May we have a five-minute recess at this time, your Honor? We have been going well over the hour.

The Court: You mean for the convenience of the witness? 4443

Mr. Turkus: What did you say?

The Court: So he can take his medicine?

Mr. Turkus: And at the same time I want to discuss something.

The Court: It won't be necessary to discuss anything with the Court.

Mr. Turkus: No, not with the Court.

The Court: I understand the situation. The witness may leave the stand for five

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minutes, but the court will remain in order.

(After a short interval the witness resumed the stand.)

By Mr. Turkus:

Q. Mr. Rubin, in October, 1937, did you see Assistant District Attorney McCarthy of Brooklyn? Did you see him? A. October, 1937?

Q. October, 1937. A. No, I did not see him.

4445 Q. Did you hear his voice?

Mr. Barshay: I object to it and I move again for the withdrawal of a juror and the declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you? A. Yes.

Mr. Barshay: I object to it on the ground the foundation has not been laid, no proof that this man here has known Mr. McCarthy's voice.

4446

The Court: Had you met him before?

The Witness: No, sir.

Q. You met him after, didn't you?

The Court: Did you meet him after that?

The Witness: Yes, sir.

The Court: Was it the same voice?

The Witness: The same voice, yes, sir.

Mr. Barshay: Exception.

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Q. Now, on November 8, 1937, were you at home, living at home? A. Yes, I was home November 8, 1937.

Q. What was your home address then on November 8, 1937? A. 245 East Gunhill Road.

Q. In the Bronx? A. In the Bronx.

Q. Were you then under police guard?

Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Exception. I again move for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice, as not binding in any wise on this defendant. 4448

The Court: Denied.

Mr. Cuff: Defendant Weiss joins in that motion.

The Court: Denied.

Mr. Cuff: Exception.

Q. What was the answer? A. I was.

Q. 24-hour guard? 4449

Mr. Barshay: Same objection.

The Court: It is immaterial what it was. I assume this is leading up to something.

Mr. Turkus: Yes, it will be connected with subsequent witnesses.

The Court: Don't try the case inside out.

Mr. Turkus: I am not.

The Court: I thought you were leading up to a visit and conversation.

Mr. Turkus: It is a foundation for other testimony that will follow.

The Court: That is as far as you can go in that now. You can bring the witness back on the stand if you lay the basis for this evidence.

Mr. Turkus: I will.

The Court: That would have to come under the theory of spoliation.

Mr. Turkus: That is what it is.

4451 The Court: I think they call it spoliatory. That is the only way in which you can hope to get that in.

Mr. Turkus: That is it.

The Court: After it is connected.

Q. In or about the month of December, 1937, did you see former Assistant District Attorney William E. McCarthy of Brooklyn? A. I did.

Q. Where did you see him?

Mr. Barshay: I object to it.

The Court: Overruled.

4452 Mr. Barshay: Exception.

A. In the office of Frank S. Hogan.

Q. And when you say the office of Frank S. Hogan, do you mean an Assistant District Attorney attached to the office of Thomas E. Dewey? A. That is right, and at that time they were in the Woolworth Building.

The Court: You have referred to Mr. Dewey being District Attorney. He was not District Attorney at that time.

Mr. Turkus: I had put in evidence the

proper designation. He was a special prosecutor.

The Court: Wasn't he a Special Deputy Attorney General?

Mr. Turkus: No, Special Assistant District Attorney, under the order of the Governor and his oath of office—Deputy Assistant District Attorney.

The Court: Not Attorney General?

Mr. Turkus: No.

The Court: All right. 4454

Mr. Turkus: People's Exhibits 34 in evidence and 33 in evidence indicate the official capacity. He was sworn in as a Deputy Assistant District Attorney as indicated in People's Exhibit 34, in the office of William Copeland Dodge. That was the way it was conducted, under that designation. The exhibits keep the record correct.

Q. Did Mr. McCarthy, the former Assistant District Attorney of Brooklyn, ask you questions about the Rosen case? 4455

Mr. Barshay: I object to it as not binding upon this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: Just yes or no.

The Witness: Yes.

Mr. Turkus: I ask that this be marked for identification.

(Papers marked People's Exhibit Z-16 for identification.)

4456 Q. Do you know whether or not the questions and answers that were made at that time were reduced to writing? A. They were.

Mr. Barshay: Same objection.

The Court: Overruled.

Q. Is People's Exhibit Z-16 for identification a transcript—

4457 Mr. Talley: I object to that, if your Honor pleases, as not proper examination under any circumstances.

The Court: Sustained.

Q. Does the date December 16, 1937, refresh your recollection as to the specific time when you were questioned? A. Only that you told me that was the date. I had forgotten it. It was in December.

Q. Did you, in December of 1937, tell former Assistant District Attorney McCarthy the truth in that statement that you gave to him?

4458 Mr. Barshay: I object to it, your Honor, and I object to the form of the question. It is a self-serving declaration.

The Court: Sustained. The paper itself is not competent. Under the law it may be used only for examination, to establish a possible impeachment—

Mr. Turkus: I am not quarreling with the Court's ruling. The District Attorney has no quarrel with the Court's ruling.

4459

Q. Do you recall when Judge O'Dwyer became District Attorney of Brooklyn? A. Only that I read about it.

Q. Did you follow any of his investigations with interest?

Mr. Barshay: I object to it, sir.

The Court: It makes no difference whether he was interested or not. Sustained.

4460

Q All right. Did there come a time after Judge O'Dwyer was District Attorney of this county when you met a police official by the name of Michael J. McDermott?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. Yes.

Q. When was it that you met that police official? Give us his title, when and where you met him.

4461

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. He is the Chief Inspector. I met him in headquarters, Police Headquarters in New York City, that is, Manhattan.

Q. Do you remember when it was that you met Inspector McDermott? A. The early part of March, 1940.

Q. The law does not permit you to relate the

4462 *Max Rubin—For People—Direct*

conversation. Merely tell the Court and jury, did Inspector McDermott speak to you? A. He did.

Q. And did you speak to him? A. I did.

Q. Following that conversation with Inspector McDermott, did you subsequently go some place? A. I did.

Q. Where did you go?

Mr. Barshay: I object to it.

4463 The Court: Overruled.

Mr. Barshay: Exception.

A. In a room in the Bossert Hotel.

Q. Do you remember how long after your conversation with Inspector McDermott that you went to the room in the Bossert Hotel in Brooklyn? A. About a week.

Q. Whom did you meet at the Bossert Hotel in Brooklyn?

Mr. Barshay: I object to it, not binding upon this defendant.

4464 The Court: Overruled.

Mr. Barshay: Exception.

A. Judge O'Dwyer.

Q. By "Judge O'Dwyer," do you mean the District Attorney of Kings County? A. I do.

Q. The law does not permit you to relate the conversation. You can merely state yes or no. Did you have a conversation with Judge O'Dwyer at the Bossert Hotel at the time of that meeting? A. I did.

Q. Did you subsequently meet Judge O'Dwyer again at the Bossert Hotel?

4465

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.

Q. Do you remember when that was? A. About a week or so later.

Q. Do you remember who was with Judge O'Dwyer at that meeting?

Mr. Barshay: Same objection. 4466
The Court: Overruled.
Mr. Barshay: Exception.

A. Mr. Heffernan.

Q. By "Mr. Heffernan," do you mean an Assistant District Attorney attached to the office of Judge O'Dwyer? A. I do.

Q. The law does not permit you to relate the conversation. Did you have a talk with Judge O'Dwyer on that occasion? A. I did.

Q. When after that conversation with Judge O'Dwyer was it for the first time that you met Assistant District Attorney Joseph, Assistant 4467
District Attorney Klein, and myself, Assistant District Attorney Turkus?

Mr. Barshay: Same objection, sir.
The Court: Overruled.
Mr. Barshay: Exception.

A. About a year later.

Q. Was that sometime in June, 1941? A. That is right.

Q. Without relating the conversation, did you talk to us? A. I did.

4468

Q. And have you testified about the Rosen killing before a Grand Jury in this county? A. I did.

Q. Are you under police guard?

Mr. Barshay: I object to it.

The Court: Sustained.

Mr. Barshay: I move again for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice.

4469

The Court: Denied.

Mr. Barshay: Exception.

Mr. Turkus: Subject to the further recall in connection with the matter which your Honor has temporarily ruled out, I am through with this witness.

The Court: You understand this now puts him under cross-examination on everything opened up thus far. At any time in the case, if you think you have established a sufficient ground to bring him back and ask those questions again, you may do so. Then there may be a

4470

cross-examination on that. It is all contingent on what is produced.

Mr. Turkus: Yes, your Honor.

The Court: But the cross-examination up to the present moment cannot be put over until that contingency is, if ever, fulfilled.

Mr. Turkus: I had no intention of doing that.

The Court: All right. Do counsel want to cross-examine this afternoon?

Mr. Barshay: It is only twenty minutes, and we will take a little more than that

to cross-examine him, so I think, for the convenience of everybody, if it is all right with the Court, we will consent that it go over.

The Court: You will have sufficient time to digest this situation because tomorrow is Election Day and the following morning we have a sad duty of attending the obsequies of Mr. William Ziegler, who is considered by many to be the dean of the Probation Department in this court. He 4472
dropped dead suddenly a few hours ago, during the night. The services will be held on Wednesday morning, and, I think, in decency, members of the staff should be permitted to attend out of respect for Mr. Ziegler's memory. That means for practical purposes of this trial that we can have the lunch hour at twelve o'clock, assemble at one o'clock on Wednesday, and then continue and work long hours in order to make up the lost time.

Gentlemen of the jury, please do not discuss the case; let nobody talk to you 4473
about it.

Please follow the further admonitions heretofore given.

We will reassemble promptly at one o'clock on Monday and continue for several hours in order to make up lost time.

The jury may leave.

Take the witness out this door.

Defendants are remanded.

(Thereupon an adjournment was taken to November 5, 1941, at 1:00 P. M.)

4474 *Max Rubin—For People—Cross*

Brooklyn, N. Y., November 5, 1941.

TRIAL RESUMED

MAX RUBIN, a witness in behalf of The People, resumed the stand and testified further as follows:

Mr. Rosenthal: I have a motion to make prior to Mr. Barshay commencing his cross-examination. On behalf of the
4475 defendant Capone, at this time I move for a mistrial and the withdrawal of a juror on the ground of surprise and prejudice, evidence having been admitted over my objection as to this witness, having, in my estimation, no bearing either upon the crime the defendant Capone has been charged with, nor in any wise connected with him.

The Court: The Court will have to charge at the proper time, when the legal point involved in the evidence is con-
4476 sidered. The motion is now denied.

Mr. Rosenthal: Exception.

Cross examination by Mr. Barshay:

Q. Mr. Rubin, you testified against the defendant Buchalter on a prior occasion, didn't you? A. I did.

Q. That was in the Court of General Sessions, in February of 1940? A. That is right.

Q. Have you since that time read the minutes of that trial? A. I have not.

Q. Have the minutes been read to you? A. They have not.

Q. In the preparation of this case has anybody in this District Attorney's office referred you to questions and answers contained in these minutes? A. They have not.

Q. Did you know a man named Lou Honingsberg? A. Yes, sir, I knew him as Red Honingsberg.

Q. Did you see Mr. Honingsberg, whom you have referred to as Red Honingsberg, in 4478
Dewey's office sometime after 1937, sometime perhaps in the latter part of 1937 or the early part of 1938? A. I cannot recall it.

Q. Did you ever meet him at 5th Avenue, in the garment center, sometime in 1937 or 1938? A. If I did, he never spoke to me.

Q. Did you ever speak to him at all? A. Prior?

Q. Since 1937 or the latter part of it. A. No, sir.

Q. Is it your contention you never had a conversation with him at any time since 1937?

4479

Mr. Turkus: I object to the question as to form.

The Court: As to the word "contention"—objection sustained.

Q. Did you ever speak to him, irrespective of the time, since 1936?

Mr. Turkus: Objected to as repetitious.

The Court: You mean about the case?

Mr. Barshay: I want to lay my foundation for something.

Q. (The Court) Do you recall? A. I may have spoken to him in 1936, prior to the time I went away.

Q. At any time, did you say to him, in the garment center, around 5th Avenue, "If it is the last thing I do, I will burn Lepke. As soon as Lepke goes to the chair I will feel that I have lived my life"? A. I would have been justified in saying it, but I never did.

4481 Mr. Barshay: I move to strike out the answer.

The Court: Strike out the first part; let the last part remain.

Mr. Barshay: I ask your Honor to tell this jury to disregard it.

The Court: Disregard it.

Mr. Barshay: May I ask your Honor now to please tell this witness to answer questions as I ask them and not to volunteer any information?

The Court: So instructed.

4482 Q. When did you testify before this Grand Jury in Brooklyn for the very first time in this case? A. About two weeks ago, or three weeks ago.

Q. Two or three weeks ago? A. Yes, sir.

Q. This is the 5th of November. Would you say in October of 1941? A. I think so.

Q. Before that, sir, you never testified in any Grand Jury in Brooklyn with respect to this case? Am I correct? A. No, sir.

Q. That is correct? A. Yes, sir.

Q. I believe you testified here you met the defendant Buchalter in 1927 for the first time?

A. I spoke to him—the first time I spoke to him, yes.

Q. That was in the year 1927? That is what you said here. A. About that time.

Q. You claim you received an education—Question withdrawn.

Q. You said you received an education that extended up to 4-B, public school? A. That is right.

Q. And then you obtained whatever education you could get on your own merit? A. I tried to, 4484
yes, sir.

Q. In the day time or the night time, in various schools? A. Whenever I could.

Q. Did you go to public evening high school at one time? A. No, sir.

Q. Have you gone to public school at night at any time? A. No, sir.

Q. But you did get a good education by yourself, didn't you? A. By having a dictionary and book alongside of me, doing it the hard way. I did the best I possibly could.

Q. You worked as a messenger for various telegraph companies? A. That is right. 4485

Q. You had no training in the clothing area, did you, before 1917? A. I did not have any before 1918, I believe.

Q. You said here that it was in 1917 that you became connected with the Cutters Union. A. It may have been 1918; I am not sure.

Q. So that ten years or thereabouts before you met the defendant Buchalter, you met a man named Noya, Jack Noya, didn't you? A. Yes, sir, I did.

Q. Was he the one who obtained for you a position in the bathrobe house? A. No, sir.

Q. Was it Beckerman who obtained for you a position with this bathrobe house? A. No, sir.

Q. Did you obtain this position yourself? A. No, sir, the position comes into the office of the Cutters Union, and they give you a card, and with that card you go up to work.

Q. At that time wasn't Mr. Beckerman in charge of the Cutters Union? A. No, sir.

Q. Was Mr. Noya in charge of the Cutters Union? A. No, sir.

4487 Q. Was he a member of that union? A. Not in my time.

Q. He was a man who was instrumental in getting you into this union in 1917, wasn't he? A. No, sir.

Your answer is "No"? A. Positively.

Q. That is a difinite "No," he did not? A. He did not.

Q. You said you testified in the flour case in General Sessions in February of 1940—page 1092, Mr. Turkus— A. That is right.

Q. Were you asked this question:

"Q. When did you first meet Noya? A. Noya, 4488 since 1917; he was one of those who was instrumental in getting me into the union."

Did you make that answer to that question? A. If it is there I must have made it, but it is not entirely correct; it is not correct in the sense of the one that got me in the union.

Mr. Barshay: I object to that and move to strike it out.

Mr. Turkus: It is responsive to the question.

The Court: Let him answer.

The Witness: (continuing) The one that got me in the union was Abe Beckerman, who was a very close friend of Jack Noya, and I met him right after that, but he did not get me in the union.

Mr. Barshay: I move to strike it out as not responsive, to the question I asked him. I merely asked one question, sir: "Was that question asked of you and did you make that answer?" That is all at the present.

4490

Mr. Turkus: And the question is, "Is that correct?" and the witness made response.

Mr. Bashay: "Is that correct?" had only one reference, and that is, "Is it correct that that question was asked of him, and is that the answer he made, as I read it?"

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Answer this question yes or no, will you please? Were you asked this question by the District Attorney—or counsel for the defendant, rather: 4491

"Q. When did you first meet Noya? A. Noya since 1917; he was one of those who was instrumental in getting me into the union."

Was that question asked of you and was that answer made—yes or no?

Mr. Turkus: Objected to as repetition.

The Court: Is that a record of this trial?

Mr. Barshay: In the flour case.

The Court: You mean in General Sessions?

Mr. Barshay: Yes, sir, I directed his attention to that, and all I wanted was—

The Court: Isn't that what he just said? Didn't he just say if it was there he must have said so? Isn't that the same thing?

Mr. Barshay: And then I asked him did he say so, but I never got an answer up to this minute. He made an explanation, your Honor, but he never answered the question.

4493

The Court: Objection sustained as repetitious.

Mr. Barshay: Exception.

The Court: Also because the explanation he just gave sheds light on the possible meaning of the word "instrumental" as used in the alleged answer.

Mr. Barshay: Exception. I did not ask him for any explanation; that is just the point.

4494 The Court: Proceed.

Q. Did you first get into the union or did you first get a job in the bathrobe house? A. First I got into the union—I knew nothing about cutting.

Q. In other words, you were not a member of the cutters' trade upon admission to the Cutters Union; is that correct? A. Yes, sir.

Q. Wasn't that the ordinary course of events followed then by the union? A. Not the ordinary, no sir.

Q. Isn't it customary with unions that first

you have to be a member of a trade, to work at a trade, and then get into the union? A. Not during the war period, when they needed men. Then they took them off the streets almost. And that was the period when they could use cutters.

Q. You had not been experienced in the cutting field at all, had you, at that point? A. Mr. Barshay, can I make an explanation?

The Court: Yes.

The Witness: Being a puller does not necessarily mean being a skilled mechanic. All you did was to take the cloth and put it on a table, unroll it a certain length, take a pair of shears and cut the cloth that particular length. That is all you did. 4496

Mr. Barshay: I move to strike it out.

By the Court:

Q. You mean you did not cut patterns? A. No, sir, you have to be skilled at that.

Q. You just mean unrolling a length of cloth? A. Yes, sir, except that in bathrobe houses, you don't have to fit a bathrobe. If you do not get it exactly right it does not make any difference. 4497

Q. You mean that a bathrobe must not necessarily be a perfect fit? A. No, sir.

Mr. Barshay: I move to strike out the explanation as not responsive to any question I asked.

The Court: Motion denied.

Mr. Barshay: Exception.

4498 *Max Rubin—For People—Cross*

By Mr. Barshay:

Q. Up to that point you knew nothing about the clothing industry; is that correct?

Mr. Turkus: I object to that as repetitious.

The Court: Objection sustained.

Q. You had no experience as a fitter, had you, when you joined the union? A. I was no fitter.

4499 Q. You had no experience as a marker when you joined the union? A. I was no marker.

Q. You had no experience as a machine cutter, had you? A. I was no machine cutter.

Q. You had no experience as a fitter? I asked you that before, and you did answer. A. I said no.

Q. Now, before that you were quite friendly with Beckerman, weren't you? A. Yes, sir, quite.

Q. You met him in Socialist movements in which you and he were actively engaged; am I

4500 correct? A. I would not say actively engaged, but I met him through that.

Q. You spoke in Union Square when you were a young man, didn't you? A. I did.

Q. And Mr. Beckerman did too? A. I don't know.

Q. Did you ever see him there? A. No, sir.

Q. You spoke in various places about Socialism at that time? A. No, sir.

Q. Did you speak at the Rand School? A. No, sir.

Q. Did you speak at the Local Union on the subject of Social Economics? A. No, sir.

Q. Did you hold yourself out as instructor of Socialism at that time? A. I was interested in economics, particularly Marxism economics. At that date it was quite the vogue. It had nothing to do with the activity of any Socialist movement; it was an abstract philosophy.

Q. Marxism economics followed the Socialist economic theory? A. Did in colleges.

Q. Were those Socialistic economics followed? A. Socialists took them to their bosom, yes, sir.

Q. As a matter of fact, the Marxism theory 4502
is also interpreted as the Communist theory, too, isn't it? A. I don't know what interpretation they put on; I have never been a Communist.

Q. You were quite an eloquent speaker in those days, weren't you?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant, nothing to do with the Rosen murder.

The Court: Objection sustained.

Mr. Barshay: Exception.

4503

Q. Your speaking attracted the attention of Beckerman and Noya to you, isn't that so? A. It is not so.

Q. As a matter of fact, isn't that the reason why you were taken into the Cutters Union, even though you had no prior experience in that? A. No, sir, that is not so.

Q. Mr. Noya at that time was a gangster, wasn't he—yes or no, please? A. How can I answer that question?

Q. If you cannot answer it, just say no. A. How do I know whether he was a gangster or

not; he hung around with gangsters, but I never saw —

Q. You saw him around the union, didn't you, with gangsters, in 1917? A. I told you I was not there in 1917.

Q. In 1918? A. He was not connected with the union in 1918.

Q. When did you see him around with gangsters, in 1917 or 1918 or 1919? A. Whenever I went into his place of business.

4505 Q. You know that this Noya was a strong-arm man for the union, do you? A. Not in 1918, no, sir.

Q. Did you know it in 1919? A. No, sir, he was not there in 1919.

Q. I am trying to respect you; I hope you will be respectful to me. A. If you ask me for an explanation I will tell you the history of the union.

Q. If there is needed any explanation, Mr. Turkus is competent enough to ask you. A. He does not know that end of it.

Q. He is a very smart young man; he knows everything.

4506

Mr. Turkus: I object. This is no time for compliments.

The Court: Go ahead.

Q. Around that time was Abie Slabow a strong-arm man for the union? A. He was.

Q. Did you know that as a fact? A. I did not actually know it until much later, but I knew it.

Q. You knew Abie Slabow since 1923? A. Yes, sir, but I knew he was on the payroll of the union.

Q. You knew he was not a cutter? A. Oh, yes.

Q. Frankly, he was a tough guy, a strong-arm man at that time for the union, wasn't he? A. In 1919?

Q. In 1923. A. Yes, sir.

Q. You knew Terry Burns in 1923? A. Yes, sir, after that, too.

Q. Did you know Terry Burns in 1923—yes or no? A. Of course I knew him.

Q. Did you know Terry Burns was a gangster, a guerilla, a strong-arm man of the union with which you were connected at that time? A. Of 4508
course I did.

Q. Did you know Johnny Spanish at that time? A. I did not know him, no.

Q. Did you know him by reputation then? A. Yes, sir, I even knew he was around there.

Q. Did you see him around there? A. Yes, sir.

Q. Did you know he was a gunman and a gangster for the union then? A. I did not know if he was a gunman for the union or a gangster for the union, but I know he was around there.

Q. He was on the payroll, wasn't he? A. Not of the Cutters Union.

Q. For the Cutters Union or some affiliated 4509
union, was he on the payroll? A. If I answered that it would only be hearsay.

Q. Tell me. A. He was on the payroll of the Shirtmakers Union, which was part of the Amalgamated at that time.

Q. You knew Curly Holtz too then, didn't you? A. I knew Curly Holtz in 1926, yes, sir.

Q. You knew who he was—yes or no? A. I knew who he was, yes, sir.

Q. How long did you work for this bathrobe company? A. I cannot tell you.

4510

Q. Was the name of that firm Behrens & Blinmark(?)? A. When I worked for them it was Pollock & Behrens; then it later became Behrens & Blinmark.

Q. Do you recall you were sent there by the union, and promptly they expressed to you dissatisfaction with your work because you were not skilled as a cutter? A. That is not so.

Q. You were still on their payroll? A. I worked there.

4511

Q. Did you work a full day? A. Positively.

Q. Every day? A. Every day; you don't know that concern when you pass that remark.

Mr. Barshay: I move to strike it out.

Mr. Turkus: The answer is responsive to the question.

The Court: Strike out the last part of the answer.

4512

Q. When you were on the Joint Board of this union, part of the things that were discussed were grievances of employees against the employer, weren't they? A. That is right.

Q. Accused of violating union conditions? A. Yes, sir.

Q. Where a strike was to be called? A. Yes, sir, that is right.

Q. When a strike was to be called? A. That is right.

Q. Who was to run the strike, who was to manage it? A. Well, generally a small group that ran those things.

Q. Mr. Noya was not a member of the joint board at that time with you? A. No, sir.

4513

Q. Did you communicate information that you gathered at these meetings to Noya on the outside? A. I did not have to.

Q. Did you? A. No, sir.

Q. Did you receive compensation from Mr. Noya at any time for that information? A. No, sir.

Q. Is it not a fact that Mr. Noya used that information to shake down manufacturers where strikes were to be called, to your knowledge? A. No, sir.

4514

Q. Is it not a fact that Mr. Noya constantly shares the proceeds of these shake-downs with you, for your information? A. Mr. Barshay, I didn't have enough to eat; he used to buy my meals. You are talking absolute rot.

Mr. Barshay: Will your Honor instruct this man to answer questions?

The Court: Go ahead.

Q. It is true Mr. Noya did buy you your meals? A. I used to go to the same place to eat.

4515

Q. You were getting $35 a week from the union at that time, weren't you? A. Oh, no.

Q. Weren't you getting that from the bathrobe house as a cutter, as you say? A. Whenever I worked. I didn't have to go anywheres.

Q. Mr. Noya was constantly taking you to Dinty Moore's? A. I think I have been just twice to Dinty Moore's.

Q. Did Mr. Noya take you there? A. I may have gone there with him.

Q. Once or twice, as you say, and you went there because Mr. Noya took you there? A. Yes, sir.

4516 *Max Rubin—For People—Cross*

Q. You yourself could not afford to pay those prices in those places? A. Positively not—in that place or any other kind.

Q. Did you, through Mr. Noya, in those places obtain favorite contracts for favorite expressmen—yes or no? A. No.

Q. Did you and Mr. Noya share in the kickbacks from these favorite expressmen's contracts which you obtained in those places? A. Your Honor, can't I answer these questions a little
4517 more elaborately?

The Court: I am quite puzzled over something. Did you mean by your previous question that the man was taken to Dinty Moore's because he had nothing to eat?

Mr. Barshay: No, sir.

The Court: Because that is where very prominent and wealthy people go.

Mr. Barshay: I have no reflection on the place; that was not my intention.

The Court: You mean whether he had
4518 ever gone there as a guest, in order to entertain him?

Mr. Barshay: You may call it "guest"; I have another name for it.

The Court: I am trying to find out. All right, then the Court's question remains unanswered. Go ahead. I thought you were trying to create the impression the witness was found hungry on the street, needed a meal and was taken into Dinty Moore's for a sandwich.

Mr. Barshay: You get that impression

when the man in reality was getting $35 a week from a bathrobe house?

The Court: Don't argue. I am puzzled as to why you ask it. Proceed. When I got up there I meet judges from General Sessions or men having their annual blow-out. Go ahead.

Mr. Barshay: I take an exception to your Honor's remarks.

The Court: Yes, let the jury disregard them. 4520

Q. Were you on the Finance Committee in those days in the union? A. About 1923.

Q. That is the time after you came back from Germany? A. Yes, sir.

Q. We will get back to before you went to Germany: You were married to Miss Coghlin, weren't you? A. Yes, sir. Why bring her in—the woman is dead, you know.

Q. You don't blame that on me, do you? A. I blame it if you bring her in.

Q. I have a right to cross-examine you the same as Mr. Turkus has a right to cross-examine you. A. That is all right; I was married to Ady Coghlin. 4521

Q. During the war period in 1917, you and Mrs. Rubin and the child you had by her, were separated. Am I right? A. Yes, sir, on and off separated, now separated and together.

Q. And there came a time when you had to register for the draft? A. Yes, sir.

Q. And in your registration you asserted you were a married man living with your wife and

supporting her and the child—yes or no? A. Yes, sir.

Q. And by virtue thereof the Registration Board gave you a 4-A classification as a married man? A. Yes, sir, that is right.

Q. That postponed your being called by the War Department? A. Yes, sir.

Q. Was it at that time you were actually engaged in espousing the Marxism manner of economics? A. No, sir, I was looking for work

4523 then.

Q. I did not know that was your full day's work, but in addition to looking for work did you do that? A. No, sir.

Q. Was it at that time you spoke in Union Square against American participation in the war? A. Never.

Q. So there came a time when your wife complained to the Draft Board about the assertion when you registered that you had been living with and supporting her was not true? A. That is not a fact.

4524 Q. Is it not a fact she complained to the Draft Board? A. She complained, but she did not say what you said she said.

Q. She said you were not supporting her? A. That is what she said.

Q. She said you were not supporting her son, your son? A. She did not say anything about the son; she said I was not supporting her, that she worked, she was a stenographer and typist, and she went to work, but I was not working.

Q. Her complaint was then entertained by the War Department, and were reclassified? A. Yes, sir.

Q. In other words, Mr. Rubin, the War Department believed her story to be true? A. It was true.

Mr. Turkus: Objected to.

The Court: Objection sustained.

Q. So you were reclassified to 1-A? A. Yes, sir, that is right.

Q. How much money were you making then per week? A. Would you really believe it if I told you I went to work on the docks as a longshoreman, pushing a wheeltruck, and the only place I could work was in the fruit market, where the work was lighter? I could not get a job in those places where they lifted heavy suiting cases. I did not have the strength, but I could push a wheelbarrow to a freight car to earn myself $3 a day. And I would have to go over every day hoping to get work, because I stood on a line with the men and they called me whenever they wanted me. 4526

Q. You just told this jury you got in the Cutters Union at that time because of the necessity of supplying war material? A. I said in 1917, didn't I? 4527

Q. I am speaking about 1917. A. I did not say anything about '17—in 1918 I got in the Cutters Union.

Q. Weren't we in the war in 1917?

Mr. Turkus: I object. The Court will take judicial notice of when we entered the war.

The Court: Objection sustained.

Mr. Barshay: Exception.

4528 *Max Rubin—For People—Cross*

Q. Don't you know as a matter of fact that America got into the war on the 6th of April, 1917?

Mr. Turkus: Objected to.
The Court: Sustained as immaterial.
Mr. Barshay: Exception.

Q. There came a time, didn't there, when you were called for actual service by the United States Government? A. That is right.

4529 Q. You were notified to come? A. I was.

Q. And you refused to go? A. Presumably, yes.

Mr. Barshay: I move to strike out "presumably".
The Court: Let it stand.
Mr. Barshay: Exception.

Q. And you did not go? A. I did not go.

Mr. Turkus: Objected to as repetitious.
4530 The Court: Objection sustained.

Q. So you became a draft-dodger; is that right?

Mr. Turkus: I object to the characterization.
The Court: Objection sustained.
Mr. Barshay: Exception.
The Court: You see, the prejudice, as far as the Court can see, does not tend to impeach.
Mr. Barshay: I ask for the withdrawal

of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

The Court: A man may be honest or dishonest and yet be a soldier. He may be honest or dishonest and still be a conscientious objector. So far as I can see, it does not justify presenting to the jury on the question of impeachment.

Mr. Barshay: I take an exception to 4532
the court's remarks; there is no proof this man was a conscientious objector.

The Court: Sustained.

Q. At that time you relied on what you were doing when you refused or did not answer the call of the United States Government for service?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

4533

Q. Did you then adopt your brother's name, your brother's first name? A. No, sir.

Q. Did you live under your own name? A. I did.

Q. Did you stay in the country during the war? A. I did.

Q. And you worked? A. Whenever I could get it.

Q. You earned money? A. Whenever I could, yes, sir.

4534 *Max Rubin—For People—Cross*

Q. The war lasted during the year 1918, didn't it?

Mr. Turkus: I object. The court takes judicial of the duration of the United States war.

The Court: Sustained as immaterial.

Mr. Barshay: Exception.

Q. You were engaged—

4535

The Court: If you can tell the court how this has any bearing on credibility, I will revise my opinion concerning William Penn who refused to enter military service and came to this country—

Mr. Cuff: He was a Quaker. This man is not a Quaker.

Mr. Barshay: I object to the court's remarks, and I again move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

4536 Mr. Barshay: Exception.

Q. There is no doubt, Mr. Rubin, that you were not a conscientious objector, were you?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. There came a time when you wanted to go to Germany? A. That is right.

Q. That was in 1921? A. Yes, sir.

Q. You were a member of the Cutters' Union then? A. Yes, sir.

Q. Had you been working? A. At that time, yes.

Q. Had you been on the finance committee? A. I was.

Q. Had you been on the joint board? A. No.

Q. Had you been on the executive board? A. Yes.

Q. Had you been on the control board? A. No, sir, not then. 4538

Q. You applied for a passport to go to Germany? A. That is right.

Q. You were not sick? A. No.

Q. There was a special reason for you going to Germany? A. Yes, sir.

Q. Did you adopt your brother's name at that time? A. When I went for a passport?

Q. Yes. A. Yes, sir.

Q. So you used the name of Benjamin Rubin instead of Max Rubin? A. That is right.

Q. You swore to that fact in the application for a passport? A. I did. 4539

Q. You realized then you were under oath?

Mr. Turkus: I object. He said he swore.

The Court: That is what he said.

Q. You swore to that fact, didn't you?

Mr. Turkus: Objected to as repetition.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Did you know you were under oath?

4540

Q. (The Court) Did you know you were being sworn? A. Yes, sir.

Q. And you committed perjury?

Mr. Turkus: I object to the form of the question.

The Court: Sustained. That is a question of law.

Q. You knew you were swearing falsely?

4541

The Court: So he says.

A. I did.

Q. You had a reason for doing that, isn't that so? A. A reason for myself.

Q. I understand you had a reason? A. No outside reason.

Q. We will come to that. You knew then that the United States Government was looking for you as a draft evader? A. Oh, no, I went under my own name, went in the Cutters' Union in my name.

4542

Q. When you went to Germany, I am speaking about, and no other time, when you swore that your name was Benjamin Rubin, did you at that time fear detection by the United States Government; yes or no? A. That would be one of the reasons, yes; the other reason was I was anxious to go.

Q. You were anxious to go? A. Yes, sir.

Q. You knew, if you signed your name, "Max Rubin", on the passport, the chances of being apprehended by the United States Government would be greater than if you used the name, "Benjamin Rubin," isn't that a fact?

Mr. Turkus: I object.

The Court: Sustained as immaterial.

Mr. Barshay: Exception.

Q. When you went to Germany did you use the name in Germany of your brother? A. I did.

Q. For two years you remained in Germany? A. I did.

Q. Under the name of Benjamin Rubin? A. Yes, sir, that is right.

Q. Then you obtained some work in Germany? 4544
A. I did.

Q. The name of the man who employed you was Mr. Zuckerman? A. Yes, sir.

Q. That Mr. Zuckerman was engaged in the transmission of money to the Soviet Government? A. That is right.

Q. And at that time the United States Government did not recognize the Soviet Government, am I right?

Mr. Turkus: I object.

The Court: Objection sustained, nothing whatever to do with the case; solely 4545
for the apparent purpose of trying to prejudice the jury.

Mr. Barshay: I take an exception, and I ask for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception. On the ground the court's remarks are prejudicial to this defendant.

The Court: Prejudicial to your attempt. Go ahead.

4546 *Max Rubin—For People—Cross*

Mr. Barshay: I take an exception to that.

Q. You stayed there for two years? A. I did.

Q. You came back under the name of Benjamin Rubin again? A. The only way you could come back.

Q. Because that was the way your passport read? A. As you made your bed, so you lie in it.

4547 Q. Whenever you were asked what your name was, you said, "Benjamin Rubin"? A. In Germany.

Q. And on the way back to the United States? A. Yes, sir.

Q. When you applied for re-admission to this country, you did so under your brother's first name? A. I presented the passport.

Q. It was not for the purpose of evading detection by the Federal Government?

Mr. Turkus: Objected to.

The Court: Sustained as immaterial.

4548 Mr. Barshay: Exception.

Q. So you promptly re-joined the union, didn't you? A. I believe so.

Q. Did you get a job as a cutter? A. I cannot tell you.

Q. Did you work for any house in 1923? A. I worked for a few, I imagine.

Q. Can you name one? A. I think Sherrick and Hirsh is one.

Q. Will you tell me how long you worked there? A. I think for two seasons; I don't remember. I want to explain I went only into

4549

work when there was seasons, I was the last one to get on and the first one put off, since I was unskilled.

Q. You had not yet advanced to a skilled workman? A. I never reached that honorable title.

Q. As a matter of fact, in your entire career with the union you never attained any skill at all in the trade? A. There were lots of them there that have reached that stage.

4550

Q. You were strictly a union man?

Mr. Turkus: Objected to.
The Court: Objection sustained.
Mr. Barshay: Exception.

Q. Your activities were on behalf of the union, isn't that so, in the shops? A. In behalf of anybody.

Mr. Turkus: I object.
The Witness: What else can I say?

4551

Q. In reality, you did no work at all but received pay because you were connected with the union as a delegate? A. Maybe you can say that for the District Attorney's office. I cannot say that for the Cutters' Union.

Mr. Barshay: I move to strike it out.
The Court: Strike it out.

Q. When you got back in the union were you on the control board or the executive board? A. When I got back in the union I was on the executive board.

4552 *Max Rubin—For People—Cross*

Q. That was about 1925? A. Maybe so. I believe I got on the executive board in 1923.

Q. Immediately, when you came back from Germany? A. Within a short time; I do not know just how long.

Q. Now, can you explain to this jury the make-up of the union? A. Of a union, or Local 4 of the Cutters' Union?

Q. Well, you confine yourself to the Cutters' Union in view of the fact you know most about that. A. There are members who work in the
4553 shops, known as workers. Then they had an executive board committee, I believe of twelve men, those were members of the executive board.

Q. How were they chosen? A. By election.

Q. To membership? A. Yes, sir; then they had three or four business agents and one manager.

Q. Who appointed them? A. Elected.

Q. By whom? A. By the membership.

Q. The joint membership or the executive board? A. The joint membership.

Q. Go ahead. A. Then in the executive board
4554 they had a committee whenever a certain thing was to be done that required committee activity. They had that committee, and then they had a finance committee which took care of the bills of business agents, or whoever did the organizing work. They would look over these bills, O. K. them, and after they were O. K.'d, vouchers with the signatures of the recipients of the money were drawn up and the amount put in the ledger. And when I was there I was also secretary-treasurer, but there is no secretary-treasurer there now.

Q. You were really on the inside of that union? A. No, sir.

Q. Were you on the Finance Committee? A. Yes, sir, but that was not the real inside.

Q. Did you know, when you were on the Finance Committee, that the union had gunmen on their payrolls in those days? A. Those days and afterwards, yes, sir.

Mr. Barshay: I move to strike out the word 'afterwards."

4556

Mr. Turkus: I move it stand. It is responsive.

The Court: Strike out "afterwards."

Q. You were well aware of that fact? A. Well aware, yes, sir, and they had them within the union, too. I want to help you.

Q. You will have all the chance you want when Mr. Turkus questions you, but in the meantime you can accommodate me. A. I will do so.

The Court: Did you say "gunmen"?

Mr. Barshay: Yes, sir. 4557

Q. In your duties, particularly in that union, did you wish to promote the cause of labor? A. That is right.

Q. And to organize non-union firms? A. No, sir. I never had that job.

Q. Wasn't that part of the union work? A. No, sir, mine was only a mouthpiece, that is all. All I was in my life was just a mouthpiece.

Q. You made speeches at various locals? A. When you cannot use small hands like that

(indicating) you have got to use your mouth, and I used my mouth.

Q. That is what you did then? A. And all the time, yes, sir.

Q. Was it part of your job to see to it that manufacturers dealt only with union workmen, union drivers, and union helpers? A. My job?

Q. Yes. A. I was one of the executive board members.

Q. Was that part of your duty on the execu-
4559 tive board? A. No, sir, of course not. They are just small cogs in the wheel. What do they mean to any union?

Mr. Barshay: I move to strike it out as not responsive.

The Court: Let it stand.

Mr. Barshay: Exception.

Q. You say here that it was not your work to organize firms in the union field; is that what you said? A. Positively no.

Q. On page 1091 of the flour case, were you asked this question:

4560 "Q. To organize those firms that would not organize? A. I helped along in the field."

Q. Did you make that answer? A. Yes, sir. That is not organizing, helping along.

Q. Did you help along in the organizing? A. Yes, sir, of course, every union man helps along. That is his job.

Q. Did you make answer to the question that was asked of you just the way I read it? That is all I want to know.

Mr. Turkus: Objected to as repetitious.

The Court: I thought he said he had. Is that right?

The Witness: Surely.

Q. Were there strikes then, about that period, in 1923, 1924, and 1925? A. There were strikes all the time; the biggest strike was in 1921. Is that what you are alluding to?

Q. You were in Germany, so I cannot allude to that. A. I went to Germany September 21st.

Q. I am talking about after you came back. 4562
A. Yes, sir, there were strikes.

Q. At that time was union and non-union competition very severe? A. It was.

Q. Was it part of your duty to check manufacturers and contractors and expressmen and allocate work to the union drivers and union expressmen? A. If you take out the word "allocate," the rest is true. You are talking now of 1925 and 1926, when I was in the Control Department, and I had charge of the Control Department for a while.

Q. If it was not your job to allocate it, it was 4563
the job of somebody in your union? A. No, sir, the Amalgamated is some big organization, Sidney Hillman at the head of it. Don't give me that title.

Q. Were you part of that organization? A. I was that small (indicating).

Q. You are very modest, but were you a part of it? A. Very, very small; I have to be modest.

By the Court:

Q. Is that the same Sidney Hillman that is

4564 part of the Government at Washington today? A. It is, sir.

Q. What is his title now, if he is there in Washington? A. I don't know; O. P. M., isn't it?

Q. Office of Production Manager? A. Yes, sir.

By Mr. Barshay:

Q. When there were strikes, what did you do
4565 or what did your union do?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Q. How did you attack non-union competition?

Mr. Turkus: I object to the form of the question, no such testimony in the record he did.

Mr. Barshay: He said he was part of the organization, even though he played a
4566 small part in it, he was an officer of that organization.

The Court: If I could sense what this was leading up to, I would know better how to rule, but so far it seems to be rather far afield. There is nothing in the question to indicate it calls for information that has a bearing on the question of impeachment.

Mr. Barshay: The most important part is the first part of this man's direct testimony and I am attacking his credibility on that part.

Mr. Barshay: I object to letting me finish the question.

The Court: We want no discussion on the question of labor union procedure. These things may be interesting enough when written by columnists and read in the newspaper. We don't want the jury to split on the question of what the union should or should not do. The case should be reasonably confined to the guilt or innocence of the accused. 4568

Mr. Barshay: Exception to that.

Q. Was part of the method of dealing with non-union competition the strike method?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. You were part of this organization, weren't you, which declared strikes, weren't you? 4569

Mr. Turkus: Objected to as repetitious.

The Court: That is what he said.

The Witness: Your Honor, I had nothing to do with the calling of strikes, or anything like that.

Q. Did I accuse you of that? A. What else are you trying to do?

Q. Were you part of the organization which did that? A. So is every member connected with an organization, twenty-five thousand people in New York.

4570

Q. You were an officer? A. I was getting $50. a week in the control department; you are making me as important as the Amalgamated of New York.

Q. I am not trying to do that. Will you be patient? Was strikes one of the methods used to deal with non-union competition?

Mr. Turkus: I object. It is a well known fact, but it has nothing to do with the Rosen murder case.

4571

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Did that part of your union activity call for all sorts of work in connection with strikes?

The Court: You mean illegally?

Mr. Barshay: If the court wants me to anticipate—I don't want to say anything. I have an important case. If you insist, I will answer.

The Court: I don't insist. The objec-

4572

tion is sustained.

Mr. Barshay: If I did, I would lose my point that I have in mind.

The Court: Please do not argue. Hereafter the court will say either sustained or overruled to avoid argument on your part.

Q. Do you know your own union, of which you were a member, no matter how small a part you were, at that time, in order to win a strike, was using dirty and illegitimate methods?

Mr. Turkus: I object. We are trying a murder case.

The Court: Objection sustained as indefinite, calling for a characterization which may or may not mean something.

Q. Did you know of your own personal knowledge at that time that men were being beaten up, merchandise was being stolen, in the course of that strike?

4574

Mr. Turkus: I object; nothing to do with the Rosen murder case at that time.

Mr. Barshay: You started in 1917.

The Court: Its present form is objectionable, because it does not show who was doing the beating up. Objection sustained.

Mr. Barshay: Exception.

The Court: If you want to limit that to activity of the union to show participation by this witness, you can do so.

Mr. Barshay: I think I have a right to show—

4575

The Court: Don't argue.

Mr. Barshay: Exception.

Q. Do you know of your own personal knowledge that the union, in calling and conducting a strike at that time, would beat up strikers, or rather non-strikers, and would spoil merchandise, throw acid on merchandise, break windows, throw stink bombs, et cetera?

Mr. Turkus: I object.

The Court: You can ask him if he participated in any such methods.

Mr. Barshay: I don't want to ask him if he participated—that is not my point. I do not accuse him of participation actively.

The Court: Are you sure?

Mr. Barshay: Yes.

The Court: Are you through?

Mr. Barshay: Yes.

4577 The Court: Objection sustained. In seeking to know what the union does, we are entitled to know whether he participated in any illegitimate acts.

Mr. Barshay: I take exception.

The Court: I withdraw it, if you take a contrary view. I thought I was doing something in your favor. That you won't answer—all right, you are entitled to show whether or not he participated in any illegitimate acts, but not what anybody else did. I will not permit you to be disorderly when the court rules.

4578 Mr. Barshay: I am not disorderly.

The Court: You are when you are recalcitrant.

Mr. Barshay: I am not recalcitrant.

The Court: The court has ruled and deems you to be disorderly.

Mr. Barshay: I take exception.

Q. Did you at that time close your eyes as to what was going on in the 1925 strike, yes or no?

Mr. Turkus: Objected to.

The Court: Objection sustained; too indefinite.

Q. Did you complain to any police official, to any District Attorney, or to any other official, with respect to what was going on in the 1925 strike?

Mr. Turkus: Objected to as having nothing to do with the Rosen case.

The Court: Objection sustained. 4580

Q. Was there a strike in 1925 that you know of, or was it in 1924? A. I don't know off-hand. Tell me and I will tell you the time. There were strikes at all times.

Q. There was a strike in 1925, wasn't there? A. There may have been.

Q. I am not creating it through the air. A. I don't know what you are talking about.

Q. You testified about this before, didn't you?

Mr. Turkus: I object. He did not testify about this at all. 4581

Mr. Barshay: I am talking about a strike.

The Witness: You are certainly reading that backwards.

Q. You read it at 293. Maybe it will refresh your recollection.

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

4582 Q. When you were a member of this organization at any time when there was a strike, wasn't your method of attack against non-union competition the calling and execution of a strike?

Mr. Turkus: I object. It has nothing to do with the Rosen killing.

The Court: Objection sustained.

Mr. Barshay: Exception.

4583 Q. There were all sorts of methods used by you? A. By me?

Q. Yes. A. By me? You know what I amounted to in this union. By me?

Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Q. You just said, "By me?", in the form of a question, intimating that you had no particular knowledge, is that so?

4584 Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. In the flour case were you asked this question:

"Q. When you had severe non-union competition your method of attack was by strikes, is that right? A. All sorts of methods were used."

A. By the union, not by me.

Q. I can only read what I see in there. It says you, and I cannot interpret that to mean

the union. You understand me, don't you? A. Very well.

Q. Did you answer that question as it was asked?

Mr. Turkus: Objected to a repetitious.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. I take it at that time you were doing personally legitimate and honest work? A. I was working for the joint board in 1925. 4586

Q. You really were? A. I was.

Q. You were absolutely doing nothing dishonest at that time? A. Dishonest?

Q. Yes. A. Absolutely no.

Q. Was this question asked you:

"Q. You were not doing anything dishonest at that time, were you? A. Except that union activity called for all sorts of work and I knew of the work going on though I had no part of it at that time."

A. That is correct.

Q. "Q. You just closed your eyes to what was going on? A. Yes." 4587

Mr. Turkus: I object. Your Honor sustained an objection to that question. It cannot be done differently by another question.

The Court: Objection sustained.

Mr. Barshay: Exception.

Mr. Turkus: I ask that the jury be instructed to disregard the question and answer.

4588 *Max Rubin—For People—Cross*

The Court: The objection has been sustained. Disregard it.

Mr. Barshay: Exception.

Q. You did not withdraw from membership in that union when you saw what was going on, did you?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Barshay: Exception.

4589

Q. You did not withdraw from the executive board at that time when that work was going on which you say you know of doing?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Do you remember there was a strike in the International Clothing Company? A. You mean the International Tailoring Company?

4590 Q. Yes. A. That is right.

Q. That was in 1926? A. It may have been that year.

Q. You participated in the conduct of that strike? A. During the summer.

Q. Did you, in any fashion whatever, in the summer months, visit the premises almost daily? A. The premises, no, sir, outside.

Q. On the street? A. Yes, sir.

Q. There were pickets? A. There were.

Q. There were strikebreakers, as you called them there? A. Yes, sir.

Q. Jack Noya was connected with the union at that time? A. Yes.

Q. Paul Berger was connected with the union at that time? A. Paul Berger was connected.

Q. How long was Paul Berger connected with the union? A. I could not tell.

Q. Did you know Paul Berger's connection with the union? A. A machine cutter.

Q. And what else? A. Did whatever work they wanted him.

Q. Was he a strong-arm man? A. When they 4592
wanted him.

Q. Was he a guerilla? A. When they wanted him to do something.

Q. Was he a guerilla? A. The union calls for a lot of work of that kind.

Q. Did your union? A. All unions would do that kind of work.

Q. Did your union call for that?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

Mr. Barshay: Exception. 4593

The Witness: I only got $50. a week salary when I worked.

Q. We will come to that. Mr. Turkus will ask you that in orderly fashion.

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Q. I am trying to find out, do you know— A. (Interrupting) if you are saying the Amalgamated instead of "my" union, and "your"

4594 union, and things like that, I will answer you, but when you say "my" union and "your" union, you are not putting the questions honestly, and you know it.

Mr. Barshay: Will your Honor admonish this witness?

The Court: Admonished.

Q. I am only taking the testimony as you gave
4595 it in other places, so do not attribute it to me.

Mr. Turkus: I object to Mr. Barshay stating that on the record: it has no place in the record.

The Court: Objection sustained.

Mr. Turkus: I move to strike it out, and I ask that the jury be told to disregard it.

The Court: Yes.

Q. Call it the Amalgamated, if you please. You were drawing money from that union, isn't
4596 that so? A. I was working for them in the control department at $50. a week.

Q. You knew what you were doing? A. I was doing control work, and nothing but.

Q. You knew what the union was doing?

Mr. Turkus: Objected to as repetitious.

Q. (The Court) Did you do any illegal work? A. Positively no.

Q. (The Court) Did you participate in any acts of violence? A. No, sir.

4597

Q. (The Court) Did you give instructions as to acts of violence? A. No, sir.

Q. Did you close your eyes to it?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. You did not withdraw from the Amalgamated by virtue of the work charged to them?

4598

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Barshay: Exception.

The Witness: No more than you withdrew from the District Attorney's office whenever work went on there.

The Court: Strike it out. The jury is instructed to disregard that. The witness is admonished not to do that again.

Q. In the International strike did you know a man named Burrow? A. Burrow?

4599

Q. Al Burrow? A. There was a cutter named Al Burrow.

Q. Did you point out his brother-in-law to Paul Berger during that strike, and Paul Berger killed him; yes or no? A. No.

Q. Do you know a cutter named Samuel Miller? A. You mean Nuttsy Miller?

Q. You have a name for everyone, call him Nuttsy. A. That is a name he has in the union.

Q. Did you know a man named Sam Miller? A. I know fifteen hundred cutters in the union.

4600

Mr. Turkus: I move to strike out the previous question, "You have a name for everyone."

The Court: Yes.

Q. You called him Nuttsy Miller? A. Everybody called him Nuttsy Miller.

Q. You did so? A. Yes, sir.

Q. Was he molested because he demanded work when you would not give it to him? A. I? When did I ever have any power to give anybody any work? What job would I have? You have to go to the business agent and he gives you a card.

4601

Q. But you get the work? A. What did I have to do with that?

Mr. Barshay: Will your Honor instruct him to answer questions?

The Court: Yes.

Mr. Barshay: I move to strike out the last answer.

The Court: Yes.

4602

Q. Do you recall Mr. Sam Miller stood on line one Saturday afternoon in Orlofsky's office while you were there, waiting his turn to see Orlofsky, do you recall that? A. I do not.

Q. Do you recall when Sam Miller could get no work in the Cutters' Union?

Mr. Turkus: I object.

The Court: Let him finish the question.

A. (Continuing) And had to take a job as a taxi driver?

Mr. Turkus: I object; nothing to do with the Rosen killing.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Do you recall having a talk with Mr. Miller in the outer office of Mr. Orlofsky's, in 1925, or 1926? A. I do not.

Q. Do you recall when this Sam or Nuttsy Miller was so beaten that he had to go on crutches for eighteen weeks, do you recall that? 4604

Mr. Turkus: I object to that.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Did you point him out to Mr. Jack Noya on 12th Street and Broadway when Mr. Nuttsy, or Sam Miller, as I called him, was violently assaulted by Jack Noya; yes or no? A. What year is that?

Q. 1926 or 1925, was it in that year? A. I don't remember it.

4605

By the Court:

Q. Do you remember pointing him out? A. I positively did not; it is too ridiculous for words.

Mr. Barshay: I move to strike that out.

Q. Have you ever been a finger man? A. No, sir, never.

By Mr. Barshay:

Q. Did you know Kid Dropper, when he worked

for the union in 1920 or 1921? A. I met Kid Dropper. I saw him in Jack Noya's place of business.

Q. Did you know he was a gunman? A. I did.

Q. Did you ever work with Dropper? A. No, sir, never; never even spoke to the man.

Q. Did you know Sammy Fields? A. Very well.

Q. In 1920 or 1921, what was his connection with the union? A. I don't know.

4607 Q. Did you know him in 1920 or 1921? A. I think I did.

Q. Did you know him in 1917, 1918 or 1919? A. I don't know what years he was around.

Q. You knew him for a considerable time? A. Yes, sir.

Q. Did you know he was then on the payroll of the union?

Mr. Turkus: I object unless the time is fixed.

Q. From the time you knew him, whatever time
4608 that may have been? A. I don't know if he was on the payroll of the union until much later.

Q. Did you know that he was on the payroll of the union in 1923, 1924 and 1925? A. I could not tell you.

Q. Did you see him around? A. Oh, yes.

Q. Did you know he was a strong-arm man? A. I think they used him.

Q. You knew that? A. I did.

Q. You knew he did the same type of work as Berger? A. Yes, and there were a lot of others.

Q. And they were working for the same union from whom you were drawing pay?

Mr. Turkus: Objected to.
The Court: Objection overruled.

A. I was working in the control department. They were part of the Cutters' Union. If any work was done, it was done from the Cutters' Union, not where I was.

Q. You came from the Cutters' Union; that does not necessarily say it was part of their work. That is how you got into that union, through the Cutters' Union? A. Yes, sir. 4610

Q. You did not withdraw from the union or from the executive board?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Barshay: I did not finish the question. I take an exception.

Q. Now, there came a time in 1927 when you met the defendant Buchalter? A. That is right.

Q. And there came a time that in a talk with Buchalter he told you that Orlofsky would have to give up his union? A. Yes, sir. 4611

Q. And that the other business agents would get a year's pay, isn't that right? A. That is right.

Q. And at that time you knew who Buchalter was? A. Yes, sir.

Q. You willingly participated with him, didn't you, in union activities? A. I did.

Q. The same as you willingly participated with Hymie Curly Holtz? A. When you mean participate, will you please explain what you mean?

Q. We will come to that. You know what the word participate means? A. I don't know what

it means because participation can mean a whole lot and mean very little. Tell me what you mean.

Q. There are two types of participation, active participation and passive participation. Do you know the difference? A. Mine was passive.

Q. That is exactly what I have been trying to prove, you knew what was going on but you did nothing about it? A. Positively no.

Q. And you did not withdraw from it? A. I did not.

4613 Q. Incidentally the control department is a department which knows what is going on in the union itself, isn't that so? A. They should know.

Q. They knew what gangsters were on the payroll? A. Oh, no, only about the work. They get a report from the express boy at that time and they were supposed to get it from the chairman of the shop, what cut work was in their particular place, but he would not always report the work if it did not belong to him, and we did not always know. It had nothing to do with people being on the payroll, that is, gangsters.

4614 Q. Sometimes you did know? A. I knew by the fact we should be able to.

Q. At any rate, you knew sometimes what was going on?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Did you know what kind of a union Orlofsky was organizing at that time? A. You are talking about after?

Q. When Buchalter told him he had to give up his union, what kind of a union did Orlofsky have? A. A rival union.

Q. What? A. A local in opposition to the Amalgamated.

Q. The Amalgamated was an all-powerful union at that time, wasn't it? A. I would not say all-powerful.

Q. Very powerful, numerically? A. Numerically, yes.

Q. Numerically, it was the strongest union? A. Yes, sir.

Q. Orlofsky lost out then? A. He was thrown out, yes, sir.

4616

Q. In what year? A. 1931.

Q. So he tried to form an independent union? A. Yes, sir.

Q. He did not have much success, did he, to your knowledge? A. Well, he had small success at first; it could have been more.

Q. How many firms did he have in his union, if you know? A. I don't know.

Q. Wasn't it one firm, just one? A. I don't know.

Q. Wasn't it a membership of less than one hundred? A. I could not tell you that.

Q. You did not know that at all? A. No, sir. 4617

Q. Wasn't it insignificant by comparison with the Amalgamated? A. For members?

Q. Yes. A. Of course.

Q. And, of course, insignificance in members was a very significant factor? A. Yes, sir.

Q. So Orlofsky was not giving up much; when he had to give up that union it was incipiently growing? A. At that time it may not have been large; it could have been large, or it could not have.

Q. You know who Lucky was? A. I heard about it.

Q. Lucky Luciano? A. I heard about him.

Q. When Buchalter mentioned Lucky Luciano's name, you were fully familiar as to who he was? A. Yes, sir.

Q. You did not ask Buchalter for a year's pay from the union, did you, together with the other business agents, who he told you were going to get a year's pay and their connections would be severed? A. No, sir, he told me I did not have to.

4619 Q. All you wanted to know was, "What about me?"? A. Yes, sir.

Q. You were interested strictly in yourself? A. Quite naturally, yes, sir.

(A recess of five minutes was taken at this point.)

The Court: We will not take a recess because of the trouble is disorganizing and reorganizing the court. All will remain here except the witness, who will come back as soon as he takes his medicine.

4620 (The witness leaves the stand.)

Q. I think I asked you, Mr. Rubin, about your knowledge of Lucky Luciano at that time, if you recall? A. I knew of him, yes.

Q. That is when you said, "What about me?" and you were told you could stay on; is that right? A. That is right.

Q. So it was then your own voluntary act to stay on, was it not? Yes or no. A. No, it depended on Buchalter whether I stayed on or not.

Q. What I am trying to find out from you, Mr. Rubin, is did you willingly stay on yourself?

Mr. Turkus: Objected to.

A. Of course.

Q. So much so that you said, "What about me?" You were concerned about yourself? A. I wanted to know if I would go out with the rest of the Orlofsky group that did go out.

Q. You knew at that time, as you say in your language, who was controlling the union. Is that so? A. I did.

Q. Define to us please, if you can, what were the duties of the control board? A. When I was 4622
there? Is that what you want? Or the control board in general?

Q. The control board when you were there. A. We got the reports. The express boys that worked on the different trucks gave in a daily report to Louis Feinberg of the amount of work that they took from a particular manufacturer to a particular pants, coat and vest maker. Feinberg would make that report out and bring it into the control department that I was in. I would then take those stubs to the respective managers. Each branch had a manager and 4623
these managers would look over those slips and if they disagreed with where the work was going to, they would stop the work in the shop where this work was in.

Q. Before you got to the expressmen's local, did the control board turn over information of its meetings, the complaints, its grievances, to the Cutters Local? A. The managers of these particular groups?

Q. Well, the entire control board, through some person, did they communicate the result of the meetings to the Cutters Local? A. No.

When I was there, each manager took care of his own particular branch.

Q. But there would be some one then who could communicate to the Cutters Local what was going on, whether it was you or someone else? A. It would have been one of the managers perhaps of the different branches or sometimes it would be such a minute thing they could stop it themselves, they would not call on the Cutters.

4625 Q. And, as you said, the Cutters were the very hub? A. That is right.

Q. The most powerful financially in America? A. I cannot tell you that.

Q. Well, is it a fair guess to say that?

Mr. Turkus: I object to speculation.

The Court: Sustained.

Q. It is true though that when every other method was used and failed in bringing non-union shops into some sort of a compromise, the Cutters Local would be called upon to do it; isn't

4626 that so? A. That is true.

Q. And if they acted, why that would practically end any non-union activity, if they acted? A. If they had the control of the shop, if they had one of their men in there that they could call out, that would be the end of it, if they had one.

Q. Did you know the firm of Siegel & Cohen in New Jersey? A. I did.

Q. Beckerman was in control then of what? A. He was the manager of the Joint Board.

Q. What position did you hold?

Mr. Turkus: I object unless the time be fixed.

Mr. Barshay: He can fix the time.

Mr. Turkus: I have an objection, your Honor.

Q. Can you fix the time?

The Court: Fix the time.

A. When Beckerman was there?

Q. The Siegel & Cohen incident. A. With 4628
Beckerman, you mean?

Q. Yes, with Beckerman.

Mr. Turkus: I object to the use of the word "incident".

The Witness: I know what he is alluding to.

The Court: What word?

The Witness: Incident.

Q. I won't describe it. Call it transaction. What year was it, Mr. Rubin? A. I had no 4629
transaction.

Q. Was it 1926? A. I had no transaction.

Q. Was it directly before— A. But I had no transaction.

Q. We will get to that. A. O.K.

Q. You are entitled to your version too, I admit that, but I have a right to ask you about it.

Mr. Turkus: I object to the statement of Mr. Barshay; ask it be stricken from the record and the jury told to disregard it. It was not a question.

The Court: Disregard it. Proceed.

4630 *Max Rubin—For People—Cross*

Q. Was it the year of 1926 or 1927? A. About then.

Q. Did you and Beckerman accuse each other of extorting $1500 from that firm?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Barshay: Exception.

4631 Q. Did you extort that money or participate in the extortion of that money from that firm? A. There was no money extorted.

The Court: By you?

The Witness: By me at all. If you want the incident, I will give it to you and then you won't have to ask so many questions. I will help you.

Mr. Barshay: I appreciate that but I am going to ask some questions and Mr. Turkus will ask you some other questions.

Mr. Turkus: I object to it now because
4632 it has nothing to do with the Rosen killing. We are here trying a murder case.

Mr. Barshay: This affects his credibility, sir.

The Court: Next question.

Q. Did Beckerman charge you with taking that money?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did you charge Beckerman with taking that money?

Mr. Turkus: I object to it.
The Court: Sustained.
Mr. Barshay: Exception.

Q. At any rate, as the result of that incident, your connection with the Joint Board ended; is that correct?

Mr. Turkus: I object to the form of the question.
The Court: Sustained.
Mr. Barshay: Exception. 4634

Q. Right after that did you sever your connection with the Joint Board?

Mr. Turkus: Objected to. It does not affect the Rosen killing or his credibility.
The Court: Sustained.
Mr. Barshay: Exception.

Q. When did you sever your relations with the Joint Board? A. About 1927 or 1928.

Q. With respect to the month, can you tell us in relation to the Cohen incident? 4635

Mr. Turkus: That has been objected to and sustained.
The Court: Sustained.
Mr. Barshay: Exception.
Mr. Turkus: I object to the innuendo.

Q. Can you tell us the month?

Mr. Turkus: Objected to as incompetent, irrelevant and immaterial.
The Court: Immaterial.
Mr. Barshay: Exception, sir.

4636 Q. Where were you living then, Mr. Rubin?

Mr. Turkus: In 1927? I object to it. It is incompetent, irrelevant and immaterial, nothing to do about affecting his credibility, certainly nothing to do with the Rosen killing.

The Court: Overruled. Do you remember where you were living in 1927?

The Witness: I can give all the places that I lived in the Bronx and I may strike

4637 that.

The Court: Do you remember where you lived in 1927?

The Witness: I may have lived at—

The Court: Do you remember?

The Witness: No, I do not, your Honor.

Q. Did you furnish a new home at that time? A. 1927?

Q. Yes. A. No, sir.

Q. Did you buy new furniture for your home? A. No, sir, not in '27.

4638 Q. Was it then that you got into the Expressmen's Local? A. That is right.

Q. What were you getting by way of salary with the Joint Board? A. $50.

Q. Who suggested you going to the Expressmen's Local? A. Sneaky Levine.

Q. What was Sneaky Levine's position with the Expressmen's Local at that time? A. He was the business agent.

Q. How much was he getting? A. $80.

Q. So Sneaky Levine gave up an $80 job and he went back on his truck; is that correct? A. That is right.

4639

Q. And you who had a $50 job got the $80 job? A. Oh, no. I got a $50 job.

Q. Did you get $80 from the union? A. I didn't, no.

Q. From the Expressmen's Local? A. I got $50. I had to split some of it.

By the Court:

Q. You mean you got $50 net? A. $50 net, sir.

4640

Q. Counsel wants to know what the gross was? A. The gross was $80 but I only got $50.

Q. $30 was the kick-back? A. It went to other officials in the union. I was a new man and in order for me to get in, I gave the rest of it to a fellow by the name of Mike Wolff and I stayed there under this arrangement for over a year until Mike Wolff went into the Waiters Union.

Q. That is, you had to pay $30 a week to hold the $80 job? A. That is right.

Q. That is what the Court means by kick-back. A. I was glad to do it, your Honor, so it was not a kick-back. I was glad to work.

4641

By Mr. Barshay:

Q. Did you give Mr. Levine a kick-back? A. No.

Q. So that he, according to you, of his own volition, gave up a job which paid him $80 a week?

Mr. Turkus: Objected to.

Q. In order to drive a truck?

4642

Mr. Turkus: Objected to. It is repetitious.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Incidentally, while you were working for the Joint Board, you received $50 plus expenses for an automobile? A. You don't know the Joint Board. No, I didn't.

Q. Never? A. Not from the Joint Board. I

4643 got the expenses from the Expressmen's Local, if that is what you mean. I bought my own automobile but the expenses I got from the Expressmen's Union.

Q. Was it $15— A. Whatever the bill was, the garage bill was sent to the office and not to me and they paid it.

Q. That you did not get from the Joint Board? A. No.

Q. So you bettered your position, did you not? A. And the time you allude to was 1933 and 1934.

Q. That is exactly what I was going to ask

4644 you next, the year 1933. A. '33 or '34, yes, sir.

Q. The Local at that time, 1927, that you joined it contained how many members? A. About eighty.

Q. It was a very small union, wasn't it? A. Always was. I think during the war they had about a hundred members.

Q. The dues were small, were they not? A. The dues were very high.

Q. Were they paid? A. Oh, yes.

Q. Was its treasury full? A. Oh, no. Only eighty members.

Q. That is what I asked you. A. Eighty members, two dollars a week.

Q. It was a very poor union, comparatively speaking?

Mr. Turkus: I object to it. He stated the amount of dues, two dollars a week, eighty members; the rest is speculation; incompetent, irrelevant, immaterial, nothing to do with the Rosen killing or affecting his credibility.

4646

Mr. Barshay: I guess nothing that I ask has anything to do with the Rosen killing.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Of course you never drove a truck? A. Never.

Q. And so you became familiar with the membership of that Local 240 which is the Expressmen's Local? A. I did.

Q. You came to know the members? A. I did.

Q. Intimately? A. More or less. 4647

Q. Did you listen to their grievances? A. They never had but when they did I listened to them.

Q. When they did have grievances, you listened to them and you tried to straighten them out? A. That is right.

Q. You knew exactly which truckman served which manufacturer, did you not? A. I did.

Q. You knew exactly about the amount of business that each truckman did with the respective manufacturers? A. I did.

Q. You knew approximately the financial con-

dition of each of those trucknmen? A. I cannot tell you that, what their financial condition was.

Q. From the earnings? You could tell by the amount of business they did with the respective manufacturers? A. They always cried so you could never tell.

Q. But there was a way to find out from the manufacturer, was there not?

Mr. Turkus: I object to it. This is
4649 going far afield, has nothing to do with the Rosen murder or his credibility.

The Court: Sustained.

Mr. Barshay: Exception.

Q. It was your business to know which manufacturers lived up to union conditions at that time? A. When I was in the union?

Q. Expressmen's Local. A. No.

Q. It was not your business to know which were living up to the union conditions and which were violating them? A. You mean the trucking bosses?

4650 Q. That is right. A. It was a very loose proposition. They worked practically 52 weeks a year and so if they put in extra hours in the busy season, it did not mean anything. Most of them worked all that time.

Q. I am not concerned with that. What I am trying to find out is this: Some manufacturers would give their work to non-union truckmen: isn't that so? A. They did.

Q. It was your job to know who they were? A. That is right.

Q. It was your job to stop it? A. Oh, no; just to know:

Q. After you knew that a manufacturer was giving his work to non-union truckmen, what did you do with your knowledge? A. Told it to Orlofsky or if Beckerman was in the office, in his department, Beckerman.

Q. And then they could do something about it? A. Sometimes they didn't.

Q. Did you check whether something was done about it? A. No.

Q. When did you become acquainted with Rosen? A. Well, I saw him and knew him 4652
around there for some time. I can't tell you when.

Q. About when? A. I saw him on Louis Cooper's truck; I did not speak to him. It was a non-union shop.

Q. I am speaking of 1927, Mr. Rubin, 1927. Did you know Rosen then? A. I think I knew him then.

Q. When you first got into the expressmen's local, did you know him then? A. Not well enough.

Q. Is that the first time you had met him? A. 4653
No, I saw him around there.

Q. You saw him before? A. Yes.

Q. Did you ever speak to him before? A. No.

Q. Did you have anything to do with him before? A. No.

Q. Did you know anything about him before? A. No.

Q. You did say you knew him or that you knew that he worked for Louis Cooper? A. Yes, I knew of him.

Q. That is in New Jersey? A. I knew of him.

Q. How long before 1927 did you know that fact? A. I imagine since I have been around there, but I am not sure.

4654

Q. That is many years? A. Yes. I am not sure, of course.

Q. Did you know Sobler? A. Oh, yes.

Q. Did you know Bluestein? A. Morris Bluestein, yes.

Q. Did you know a man by the name of Kelly? A. I knew Kelly, yes.

Q. Did you know where Rosen worked in 1927? A. I can't tell you.

Q. Did you know that Rosen originally came from Brooklyn? Did you? A. From Brooklyn?

4655

Q. Yes. A. I can't tell you that.

Q. Did you know that he moved over to Passaic to work for Sobler and Bluestein?

Mr. Turkus: I object to that.

The Court: Sustained as immaterial.

Mr. Barshay: Exception, sir.

Q. Did you know it was Mr. Bluestein who gave Mr. Rosen a job when Sobler and Bluestein ran, in Passaic, the Garfield Express Company? A. I did not know those things in those days, no, sir.

4656

Q. Did you know when Louis Cooper joined the Garfield? A. In my mind he was always there. I don't know. I don't remember him being out of there.

Q. Did you know that Sobler and Bluestein first owned it and then Louis Cooper came in afterwards? A. I thought that Louis Cooper started it.

Q. I thought that you were familiar with the truckmen business, being the business agent for the Local. A. Not at that time.

Q. That was 1927 and 1928. A. I did not know. I was practically new then.

Q. Did you know the reputation of Rosen in the industry at that time when you came into the Local? A. I did not.

Q. Did you learn it thereafter? A. Later on, about 19—in the 30's, and so on, I heard about Joe Rosen.

Q. You heard he was a very good workman, did you not? A. Yes.

Q. Did you aiso hear—

Mr. Turkus: I object to this. The character of the deceased is not in issue. There is no defense here of self-defense. 4658

Mr. Barshay: He brought this out on direct examination, sir. I am leading to something now.

Mr. Turkus: I object to it.

The Court: It may lead to something.

Q. You are the man who told us that Cooper fired Roser. because of stealing some packages? A. Hampers.

Q. Hampers, rather. A. That is right.

Q. In 1930 or 1931, when you learned to know Rosen, when you learned to know his reputation that he was a good workman, did it come to your attention in the trade that he was in the habit of stealing packages? 4659

Mr. Turkus: That is highly reprehensible and objectionable.

Mr. Barshay: Highly reprehensible? It is most material here, sir.

A. I could answer it negatively, anyhow.

Mr. Barshay: I ask your Honor to have the jury disregard Mr. Turkus's remark, and that it be stricken from the record.

Mr. Turkus: Mine was an objection.

The Court: I thought it was an objection.

Mr. Turkus: It was, your Honor.

The Court: The Court's affair, not the jury's. The witness has answered the question.

4661 Q. You did not know that? A. I did not.

Q. You did know about the time he took those racks from Cooper, for which he was fired?

Mr. Turkus: That is objectionable. There is no such testimony that was the alleged charge upon which he was fired.

The Court: It means the same thing.

A. Just what Rosen told me he was charged with; and what Louis Cooper told me that he did.

Q. You knew more about that than you told
4662 us, isn't that so? A. Oh, no.

Q. You suspended the people who bought those hampers or racks? A. What did I do?

Q. You suspended them from the union. Were the names Siegel and were the names Epstein? A. Siegel and Epstein?

Q. Yes. A. I put them back to work after they were fired, you mean. I did not suspend them. They went right back to work, because I had enough power in New York to put them back, and they went right back to work and I don't remember Epstein. Which one is Epstein? I remember this Siegel. We used to call him Galitz.

The Court: How do you spell that?

The Witness: (Spelling.) G-a-l-i-t-z. He comes from Galicia, so they called him Galitz.

Q. Is he the person to whom Rosen is alleged to have sold those hampers or those racks?

Mr. Turkus: It is objected to, incompetent, irrelevant and immaterial.

The Court: Let him answer.

Mr. Turkus: It calls for hearsay. 4664

A. All I heard was that they were involved in that thing.

Q. Being involved, were they not suspended from the Expressmens Local 240? A. Positively not.

Q. Weren't they kept out of work for a considerable number of years, or for a considerable number of months, rather, and only restored when the wife of Mr. Siegel came to plead to you on their behalf? A. Positively not. He went right to work. 4665

Q. How long was he out? A. Two days, three days. Dave Siegel was the boss, and I was able to speak to him. I said, "Put him back to work," and he put him back to work. I don't remember who this Epstein was. If you tell me where he worked, I may recollect who that particular party is.

Q. Did you check whether or not Rosen stole those things from Mr. Cooper? A. I was not interested. I wanted him to go back to work.

Q. The stealing of things may be a cause for discharge in the minds of some people, Mr. Rubin, isn't that so?

4666

Mr. Turkus: I object to that.
The Court: Sustained.
Mr. Barshay: Exception.

Q. It was in the mind of Mr. Cooper?

Mr. Turkus: You would have to have a mind reader to know that.
The Court: Is there an objection?
Mr. Turkus: There is.
The Court: Sustained.

4667

Q. Mr. Cooper told you that?

Mr. Turkus: Objected to as repetitious, already answered.
The Court: Sustained.

Q. Mr. Rosen told you that?

Mr. Turkus: That is repetitious and objectionable.

4668 Q. Isn't that so?

Mr. Turkus: I have an objection.
The Court: Sustained.
Mr. Barshay: I never asked that on cross examination, your Honor.
Mr. Turkus: You did, just before this.
The Court: What differences does it make what Rosen told him?

Q. Did you know when Sobler and Bluestein left the Garfield? A. I did not.
Q. And started the New York & New Jersey?

4669

Mr. Turkus: Objected to as repetitious.
The Court: Overruled.

Q. Did you? A. I did not know the date, no.
Q. Was it 1927? A. I can't tell you that.
Q. Did you know that they had been competing with the Garfield? A. I can't tell you from what year on.
Q. Well, at the time you joined the Local,—that is 1927 according to your own language,—did you know that? A. I can't tell you whether they started in that year to compete with Louis Cooper.

4670

Q. Did you know that Rosen at that time went out to Pennsylvania to build up a route for himself? A. I can't tell you that, whether he went out or Kelly went out or they both went out, but they had a route in Pennsylvania.
Q. Let us go step by step. Did you know Kelly before you knew Rosen? A. No, I would not say I did. Do you mean before they became partners?
Q. Before they became partners. A. I saw them in the district.

4671

Q. Did you know that Kelly was operating in New Jersey and Pennsylvania? A. I only knew him to operate in New Jersey.
Q. In New Jersey? A. That is right.
Q. And he was doing non-union work? A. Absolutely non-union work.
Q. Did you know that Rosen at that time was also doing non-union work? A. If he was with Kelly, he was doing non-union.
Q. Before he was with Kelly. A. I can't answer that.

4672 Q. Did you know that Rosen would go to the small towns in Pennsylvania and solicit the Chambers of Commerce to invite New York manufacturers to build their factories to avoid union competition? Did you know that? A. Well, he may have done it. All the contractors usually did it. Those contractors that went out of town would do it. It was quite common.

Q. It was a very common thing in those days? A. Yes.

4673 Q. And the more people that left New York, contractors or manufacturers, the less success the union had in New York, isn't that so? A. That is right.

Q. The more work taken from New York, the less powerful the union? A. That is right.

Q. So the union's job was to try to limit it as much as possible, and even to avoid it? A. That is right.

Q. And it was the union's job to call stoppages? A. That's right.

Q. It was the union's job to call strikes? A. That is right.

4674 Q. Considered lawful to call a stoppage and considered lawful to call a strike? A. That is right.

Q. And it was considered lawful for the settlement of the strike to allocate work to the various truck drivers for the various contractors, is that so? A. Yes.

Q. They do that now, don't they? A. Yes, except with the truck drivers. They are usually fixtures in the house. The truck drivers were usually fixtures in a house and there was hardly any change.

Q. Sometimes there were changes? A. Sometimes.

Q. You yourself have changed truck drivers from one house to the other? A. I did in one case, yes.

Q. That was perfectly lawful, perfectly proper? A. It was a necessity.

Q. Yes, but it was perfectly recognized as lawful? A. I don't know how lawful it was.

Q. You did not do anything illegitimate? A. It was not illegitimate, but when I look back 4676
now, it was not such a sensible thing to do.

Q. They are doing it now? A. I do not know; I have not been there since,—

Q. You have been a labor—

Mr. Turkus: The time was shut off.

Q. Since when? A. '39.

Q. They did it as late as 1939? A. I don't think so. It is a rare course.

Q. You mean to say that unions— A. I am talking about the truckmen.

Q. Do you mean to tell me that unions did not 4677
and don't now allocate work for every truckman to deal with certain houses and say to them, "You will take this manufacturer, and you will take the other"?

Mr. Turkus: I object to it.

A. It is very rare in the clothing industry, very rare.

Q. Do you know that is an unlawful thing to do?

4678 *Max Rubin—For People—Cross*

Mr. Turkus: I object to it.
The Court: Sustained.
Mr. Barshay: Exception.

Q. Do you know that in April of 1931 Rosen was not meeting with any success in building a route in Pennsylvania? Did you know that? A. Who was he partners with at the time?

Q. Himself A. I can't tell you that.

Q. You did not know that? A. No, I didn't.

4679 Q. You did not hear it in the union? A. No.

Q. You know he had no trucks? A. I didn't know that.

Q. You had been in this Expressmen's Local Union since 1927, and I am talking now about the early part of 1931. A. I would not know that, whether he was trying to get—

Q. That was four years of active work in this local as business agent, with only eighty members belonging. A. I would not know whether he went to Pennsylvania to look to build up a business.

Q. Did you hear it in the trade? A. I did not.

4680 Q. Did you know that at that time Rosen and Kelly had agreed to form a partnership under Kelly & Rosen, Incorporated? I am speaking of April, 1931. A. I only know that at one time they started to go to Pennsylvania in relation to that one particular contractor that went up there.

Q. Named Goldstein or something like that? A. No, an Italian fellow.

Q. Was it in April of 1931? A. I cannot tell you the time; no, sir.

Q. Did you know that it was agreed that Rosen should contribute whatever customer or

customers he had in Pennsylvania and that Kelly would contribute the trucks that he had and that they were to form a partnership in April of 1931, and each was to have fifty per cent of the business? A. I would not know that, no, sir.

Q. Did you know that Rosen's share was to be his contribution toward the incorporation expenses and Kelly's was to be likewise, in April of 1931? A. I would not know that.

Q. Did you know that the deal did not go through because Rosen in April of 1931 could 4682
not and did not pay his share of the incorporation expenses? Do you know that? A. No.

Q. Do you know that is why the firm never went into existence as Kelly & Rosen, Incorporated? Did you know that? A. No.

Q. Did you report to the Amalgamated the names of the manufacturers who used non-union contractors?

Mr. Turkus: I object unless the time be fixed.

Q. 1931, 1930, 1929, any time after you became 4683
connected with Local 240?

Mr. Turkus: Further objection, it is repetitious.

The Court: Let him answer.

A. Whenever I knew of any, I would report it.

Q. Did you know which one of these Rosen served in Pennsylvania? A. No, only—

Q. Can you name one? A. Yes, I could name one.

Q. Yes? A. But I don't know the year.

Q. The only time that I am speaking of and the only time I thought that of your own knowledge Rosen went to Pennsylvania was about 1930 and 1931. A. Yes, that would be the time that I know. There was a concern named Goodstein Bros. that went out of town, and a contractor by the name of Ferraro, Johnny Ferraro, went out of town. That is the only one that I can remember.

4685 Q. Do you know Rosen personally, without Kelly, served them as truckman? A. I do not know whether it was with or without Kelly, but I know they drove for them.

Q. Do you know that, out of pity, after Mr. Rosen failed to pay his portion of the incorporation expenses, Kelly just let Rosen stay on with him? Do you? A. No, I don't.

Q. Did you know that business in 1931, the period that I speak of, was so bad for Rosen that he was allowed by Kelly to keep the few dollars that he collected from the contractors?

4686 A. I would not know that.

Q. Did you know that they struggled along until November of 1931 and then agreed to combine with Sobler and Bluestein and conducted the New York & New Jersey Corporation? A. That is when I really knew about them.

Q. Were you instrumental in getting them together? A. No, sir.

Q. Did you know that—

Mr Turkus: There is an answer that is not responsive to the question. I am going to ask it be stricken because it may be ambiguous and confusing.

Mr. Barshay: Let us have the question and the answer.

(The following was read by the reporter: "Q. Did you know that they struggled along until November of 1931 and then agreed to combine with Sobler and Bluestein and conducted the New York & New Jersey Corporation? A. That is when I really knew about them.")

Mr. Turkus: I object to that.

The Court: Strike it out. 4688

Mr. Barshay: Take an exception.

Mr. Turkus: May the witness be permitted to answer the question, because under that state of affairs that answer was not responsive to the question.

The Court: Read it, please.

(The same question was read by the reporter.)

The Witness: I would not know that about the struggling and all that.

Q. Did you know that when Kelly and Rosen were together they could not even afford a bookkeeper in 1931? A. I don't know that. 4689

Q. You did not hear that in the trade? A. No.

Q. Did you know that then Rosen was borrowing from all the express drivers that belonged to your union? A. Never heard of it.

Q. Did you know that Rosen could not even afford to pay the dues in your union? A. I don't think he belonged to it.

Q. There was a time when he did belong. A. That was much later.

4690 Q. Did you know that your union dropped him for non-payment of dues?

Mr. Turkus: Object to it unless the time be fixed. Has nothing to do with his credibility or the Rosen murder.

The Court: Sustained as immaterial.

Mr. Barshay: I take an exception. May I urge the Court the reason for my proceeding with this line of questioning?

4691 The Court: You don't need to urge, you can tell me, if you want to make it clear.

Mr. Barshay: Mr. Turkus has advanced the theory that Rosen was forced out of a prosperous business. I am trying to disprove that theory by facts which would show that no such theory could have existed, because Rosen was impoverished from the beginning, and I am trying to establish it in the only way I can.

4692 The Court: The ruling stands.

Mr. Barshay: Exception.

Q. New Jersey and Pennsylvania then was open territory? A. Yes, I believe there was a certain section of Pennsylvania that had single knee pants. That is the other end. But the part that Rosen went was non-union, and New Jersey, the section that Louis Cooper went and Bluestein, took non-union work—Bluestein, Sobler—was practically a non-union territory. There was a union shop here and there, but not much of it.

Q. Do you know that the financial strength and numerical strength of the Amalgamated at that time in New York was very weak? A. 1931?

Q. Yes. A. Yes, I think that was during that—

Q. And that was because—

Mr. Turkus: There was an answer shut off.

4694

A. (continued) It was during the slump. There was a period during 1931, a very bad period.

The Court: You mean hard times?

The Witness: That is right.

Q. And that slump was enhanced by the moving of the contractors and manufacturers out of the city, isn't that so? A. I think you are right.

Q. So that the New York & New Jersey, which was owned by Sobler and Bluestein, was in competition with Kelly and Rosen in those Pennsylvania territories. 4695

Mr. Turkus: Objected to. There is no such testimony.

Mr. Barshay: I am asking him.

Mr. Turkus: I object to the form of the question. The "so" infers there has been such testimony in the record. When you say "so", the implication and the inference is that he has so testified. I object to the form.

The Court: Sustained.

Mr. Barshay: Exception.

4696 Q. Did you know that? A. If they went to Louis Cooper's territory they would compete. It would be natural.

Q. You knew that to be the fact? A. Louis Cooper had his house pretty well sewed up and it was very hard to get into that territory.

Q. Did you know that Kelly and Rosen, and Sobler and Bluestein were competing with each other more than they were competing with Louis Cooper of the Garfield? He was too big to
4697 compete with, wasn't he? A. That would be quite probable.

Q. And so—

Mr. Turkus: I ask that it be stricken. This is hearsay, obviously.

Mr. Barshay: He says he knows of his own knowledge.

The Witness: No, I said it would be probable.

Mr. Barshay: I asked if he knew those things of his own knowledge by virtue of
4698 his position as business agent for the Expressmen's Local.

Mr. Turkus: The answer indicates the witness does not know, when he says, "probable." That is speculation.

The Court: Read the question.

(Question read by the reporter.)

The Witness: Actually I do not know.

Q. Were you told that?

Mr. Turkus: I object to that.

Q. Were you told that by Sobler or Bluestein or Rosen or Kelly?

Mr. Turkus: I object to it.
The Court: Sustained.
Mr. Barshay: Exception.

Q. Did you learn it in the official connection that you had with the Expressmen's Local then?

Mr. Turkus: I object to the form of the question.
The Court: Sustained as calling for a conclusion.
Mr. Barshay: Exception. 4700

Q. Did you know the lawyer who closed the deal between the New York & New Jersey and Kelly and Rosen? A. Do I know his name?
Q. Yes. A. Maybe if you told me. I don't know.
Q. Did you know him without knowing his name?

Mr. Turkus: I object to that. That is a peculiar question. I do not understand it. "Did you know him without knowing his name?" 4701
Mr. Barshay: You can know people without knowing their names, Mr. Turkus.
The Court: Did you know his name?
The Witness: Not offhand, no.

Q. Was it Eisenberg? A. I never heard of him.
Q. Was it Salzman? A. I never heard of him.
Q. Was it either one? A. I never heard of them.
Q. Did you know that Sobler and Bluestein at

4702 that time had four trucks and agreed to contribute that to the new corporation?

Mr. Turkus: I object to it. He has already indicated by his testimony that he did not knew of the arrangements.

The Court: Yes or no, did you know that?

The Witness: You mean Kelly and Rosen?

4703 Q. I say Sobler and Bluestein agreed to contribute to the new organization to be composed of Kelly, Rosen, Sobler and Bluestein? A. I can't remember.

Q. Did you know that they agreed to contribute four trucks? A. I can't tell you that.

Q. Did you know the financial condition of the New York & New Jersey at that time before this new combination was to come into existence? A. No, I don't know.

Q. Did you know that the New York & New Jersey's trucks were all fully mortgaged?

4704

Mr. Turkus: I object to it. He just said he does not know the financial condition so the answer to this is obvious; he could not know.

Mr. Barshay: He can answer it if he does not know.

Mr. Turkus: I object to it. It has nothing to do with the case, waste of time after that answer.

The Court: Overruled.

Mr. Barshay: I object to counsel saying—

The Court: Do you know that?

The Witness: I do not know anything about the finances.

Mr. Barshay: May we have an objection in legal form and not by saying it is a waste of time?

The Court: The Court won't direct the verbiage of an objection.

Q. Did you know that Rosen agreed for his 25 per cent interest in this corporation to pay $5,000 by deducting $250 each and every year out of the earnings, if there were any? 4706

Mr. Turkus: Object to it.

Q. Did you know that?

Mr. Turkus: Object to it. He just said he knew nothing of the financial conditions.

The Court: Do you know anything about it?

The Witness: I don't: no, sir.

4707

Q. Did you know that the formal contract for the new corporation was entered into on November 2, 1931, and that Rosen's shares were held in escrow? Did you know that? A. No.

Q. Did you know that the new corporation agreed to assume the existing indebtedness of Kelly and Rosen of $1521?

Mr. Turkus: That is objected to. The witness has said he knows nothing of it. This could go on ad infinitum.

The Court: Do you know?

The Witness: I do not.

4708 Q. Did you know from the very first week that the partners were unable to draw any salaries whatever? Did you know that? A. No, sir.

Q. Didn't Rosen tell you that at any time? A. No, sir.

Q. Did Kelly tell you that at any time? A. No, sir.

Q. Was the firm the subject of discussion in your union? A. No.

Q. Did you know that from the very beginning
4709 both Kelly and Rosen kept the accounts they collected and they did not contribute it to the new corporation? Did you know that? A. I would not know that, no, sir.

Q. Did you know that the State of New Jersey instituted proceedings in 1931 for failure of this new corporation to even pay its franchise tax? A. I didn't know that.

Q. Would this refresh your recollection, or would it bring to your mind a reconstructed recollection of whether or not you may have known it? Will you look at this instrument, please? A. You want me to read that part that
4710 you have with X's?

Q. No, just to yourself. A. I see here a name.

Q. Just to yourself, please. Now look at the outside of that book.

Mr. Turkus: The question is if it refreshes your recollection, not to read it into evidence.

Mr. Barshay: I am not asking him to read it into evidence, Mr. Turkus. I expressly said "Read it to yourself," didn't I, Mr. Rubin?

The Witness: That is right.

Mr. Turkus: Nobody quarrels with that.

Q. Does that reconstruct your recollection, sir? A. No, it does not.

Mr. Barshay: Will you mark it for identification.

(Marked Defendants' Exhibit T for identification.)

4712

Q. Did you know that Kelly's lawyer in April of 1932 filed a petition declaring that corporation in insolvency? This is April of 1932. A. I did not know that, no, sir.

Q. You said you did not know the lawyer whose name was Henry H. Eisenberg, 58 Broad Street, Elizabeth, New Jersey? A. I never heard of the name before.

Q. Did you hear or do you know personally of the action that he started, Martin F. Kelly, Incorporated, a corporation of New Jersey, against the New York & New Jersey Clothing Transportation Company, Incorporated? Did you know that? A. No, I didn't. 4713

Mr. Barshay: May we mark this for identification.

(Marked Defendants' Exhibit U for identification.)

Q. Did you know that in settlement of this petition Kelly withdrew his two trucks that he put in and that the corporation agreed to assume the garage and fuel expenses and in addition

gave Kelly two notes for $100 each—$150 each—each of which came back unpaid? Did you know that?

Mr. Turkus: Objected to. He says he never knew about the lawyer, never knew about the lawsuit. How could he know about that?

The Court: Do you know about that?

The Witness: I do not.

4715 Q. You never heard that discussed with respect to Rosen? A. No.

Q. Wasn't it the subject of discussion at the various meetings or subjects of discussion preliminary to meetings of your association? A. No, sir, never.

Q. Didn't you see Rosen around the union borrowing money or attempting to borrow money? I am speaking now of April, 1932, before the stoppage. A. I never have, no, sir.

Q. Did you know a man by the name of Goldman who worked for the New York & New Jer-

4716 sey? A. Yes.

Q. Did you speak to him? A. He was a member of the union.

Q. Did you speak to him?

Mr. Turkus: Objected to.

A. Of course.

Mr. Turkus: As already answered.

Mr. Barshay: He may be a member of the union without speaking to him.

The Witness: Not that union.

Q. In other words, everybody brought their complaints to you? A. Everybody spoke to each other. It was a small group.

Q. Did you know that Goldman was unpaid to the extent of $700 by the New York & New Jersey Transportation in April of 1932? A. No, I did not.

Q. Did he ever tell you that? A. No, sir.

Q. Did he ever enlist your aid in trying to speak to the members of the corporation to pay him that money? A. No, sir.

4718

Q. Did you place him in another job? A. I think I sent him from there to Louis Cooper in Passaic.

Q. Did you? A. I do not know. He went to Passaic. I do not know whether he went from that job or not.

Q. Do you know the reason he quit the New York & New Jersey? A. I can't tell you the reason.

Q. Do you know it was for nonpayment of wages? A. No, I don't.

Q. Do you know that they gave him checks of $30 and $35 and they were not paid? A. With Sobler being there?

4719

Q. With Rosen, Sobler and Bluestein remaining after Kelly left. A. Sobler is a very rich man. I can't understand that.

Q. You know Mr. Sobler then was a member of a corporation? You know that? A. I did not know that.

Q. Well, he was a member of the New York & New Jersey and you say he is a very rich man. You mean now? A. At that time, as far as I know.

4720

Q. He did not own the company as an individual, did he? A. No.

Q. To your knowledge? A. No.

Q. He did not obligate himself to run this corporation as an individual? You understand that? A. Yes.

Q. Did you place Plotkin with the New York & New Jersey Corporation? A. I don't remember that.

Q. You did not? A. I don't remember.

4721

Q. You said before you transferred some truckman from one concern to another. Is Plotkin the name of that man? A. I don't know.

Q. Did you know Plotkin worked for Fvirsky? A. That is right.

Q. Did you know that Fvirsky expressed for Greenbaum? A. That is right.

Q. Aren't you the person who transferred Mr. Plotkin from Greenbaum to the New York & New Jersey?

Mr. Turkus: I object unless the time be fixed.

4722

Q. In 1932. A. That is right. It was not a transfer. He went along with the house. He went along with the Fvirsky Clothing house. That was the main house of this Greenbaum and he went along with this house and he went with the New York & New Jersey on that basis.

Q. In other words, the New York & New Jersey got a new house? A. That is right.

Q. To cater to? A. That is right.

Q. And express for? A. That is right.

Q. You are responsible for that situation or did you aid in that situation? A. I aided.

Q. Plotkin was one of the men who went along? A. He was the man.

Q. He was the only man? A. I think so.

Q. Now do you recall that the very first week he finished his work with the New York & New Jersey, a little after April of 1932 or thereabouts, there was not sufficient money to pay his his wages? I am speaking before the stoppage. A. I can't recall that, no, sir.

Q. Didn't he complain of that fact to you? A. I don't remember it if he did. 4724

Q. Didn't Plotkin tell you that the first Saturday that he was there, the first pay day, all the workmen were lined up waiting for their money and they did not get it? Didn't he tell you that? A. No, sir. I do not remember. He may have but I don't remember.

Q. Didn't he beg you to take him back from that concern and put him back? A. No.

Q. He did not tell you that? A. No, sir.

Q. Didn't he tell yo uhow he pleaded with Rosen that he must have his money? Didn't he tell you that the arrangement was made immediately after the first week that Fvirsky was 4725
to pay Plotkin directly and charge it to the New York & New Jersey account and that was the only way Plotkin could get his weekly wages? Didn't he tell you that? A. I can't recall that.

Q. He may have? A. May have, but I can't recall.

Q. It would b part of your job to know? A. It would be.

Q. You won't deny that he did? A. Of course not.

Q. Did Plotkin tell you "what kind of a con-

4726 cern did you send me to? The workmen, one says 300, one says 400, one says 500, and there was no answer from the New York & New Jersey"; did he tell you that?

Mr. Turkus: Objected to as repetitious, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Barshay: Exception.

4727 Q. Did you know that the garage seized the trucks of this New York & New Jersey for non-payment?

Mr. Turkus: Object unless the time be fixed; further, that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. I am speaking of the period before the stoppage. You understand, Mr. Rubin? A. Yes. I heard that the trucks were seized but I would not know where I heard it.

4728

The Court: Do you know it?

The Witness: I do not know it only what I heard.

Q. Did you know that they stored their trucks in Pink's garage in Passaic, New Jersey? A. No, I do not.

Q. Did you know that in disgust Rosen left the New York & New Jersey? Did you? A. No.

Q. Because he could not draw any money there? A. I would not know that.

Q. Did you know that the bookkeeper was

getting only five or six dollars a week? A. I did not know that.

Q. You never attended their place of business? A. No, I was in there once in a while and there did not seem to be that poverty there that you speak about.

Q. There was poverty, wasn't there? A. Nothing along the lines you mentioned. I thought they had a very good business.

Q. Is that why the petition in insolvency was filed? 4730

Mr. Turkus: Just a minute.

A. It surprises me.

Mr. Turkus: He has answered it now.

Q. It is a surprise to you? A. Yes.

Q. Do you want to look at this petition, Mr. Rubin?

Mr. Turkus: I object to it.

The Court: Sustained. 4731

Mr. Barshay: Exception.

Q. Did you know that their bank account never exceeded the sum of $100 as an average balance? A. I would not know that.

Q. In your visits there, were you not told that fact?

Mr. Turkus: Objected to. That would be hearsay.

The Court: Sustained.

Mr. Barshay: Exception.

4732 Q. Did you know that the telephone company brought action against them for nonpayment of their telephone bills? This is before the stoppage, Mr. Rubin.

The Court: Do you know anything about it?

The Witness: Not a thing.

Q. Do you know when Mr. Rosen left the New York & New Jersey? A. At the time of the
4733 stoppage.

Q. About when was that? A. In the summer, I believe, or maybe the fall of 1932.

Q. The stoppage was in August, 1932. A. I do not know the date.

Q. I will remind you it was August 4, 1932. A. It was around that time. I do not know the date.

Q. Well, between August 4th and August 12th. Did you know how much money Rosen drew from the New York & New Jersey before the stoppage? A. I do not.

4734 Q. You said a little while ago that it was not the poverty that I described. Is there a poverty which you can describe based on your own knowledge and observation before the stoppage? A. My opinion is that they had a darn good business.

Q. It is only your opinion I am now asking of your personal knowledge.

Mr. Turkus: He has already told him that he did not know anything of his personal knowledge. He has been telling him that for a half an hour. I object to it.

The Court: That is what he said.

4735

Q. You said it was not the poverty I described.

Mr. Turkus: I object to it. That is a play on words. It is objectionable.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Well, you yourself on direct examination said that Rosen said that they had a little business in Pennsylvania? A. That is right.

Q. "Little" you mean financially little? A. It was a small business. That would mean financially small also. 4736

Q. You knew that Rosen had no trucks of his own? A. I did.

Q. No visible assets of his own? A. That is right.

Q. No garage? A. That is right.

Q. No employees? A. That is right.

Q. Whatever he could build up in Pennsylvania under non-union shop was all he had, wasn't that so? A. That is right.

Q. Let us get down to the stoppage. Tell me, who calls the stoppage, Mr. Rubin? A. As far as I know, Sidney Hillman. He was out on the picket line every day with his wife, walking up and down,—thousands of people marching up and down Fifth Avenue—so I figured that he must have called it. 4737

Q. Who else had the power to call the stoppage? A. The Joint Board in conjunction with the Cutters' Union.

Q. In other words, no one individual does it, but the organization through its elected officials or organization officials? A. Yes, officially it

4738 would be done that way, though one man would simply suggest it.

Q. This stoppage was called according to the rules of the organization? A. Yes.

Q. By the officers? A. That is right.

Q. The defendant Buchalter did not call it, did he? A. The stoppage?

Q. Yes. A. No.

Q. He had no power to call it, did he? Yes or no. A. No, he was not in on any of the con-
4739 ferences with the union officials, if that is what you mean—I mean with the actual organization.

Q. So, Mr. Rubin, that is a condition that occurred through no action of Mr. Buchalter?

Mr. Turkus: Objected to. That is not the testimony.

Mr. Barshay: The stoppage, I am speaking of.

Mr. Turkus: That is not the testimony either.

Mr. Barshay: He just said that.

Mr. Turkus: No, he did not.

4740 The Court: Sustained.

Mr. Barshay: Exception.

Q. Was the stoppage called by the duly-constituted officers of the union?

Mr. Turkus: That is objected to as repetitious.

Q. To your knowledge?

Mr. Turkus. That is objected to as repetitious.

The Court: Overruled.

A. To my knowledge it was called by the actual officials of the organization.

Q. Mr. Buchalter at that time was not a member of the organization, an official of the organization, was he? A. He was not.

Q. Now, the stoppage is called, as you say, and then it is executed; isn't that so?

Mr. Turkus: Objected to. I do not know whether this is a general discussion of stoppages or whether it is the stoppage that we are referring to in this particular case. 4742

Mr. Barshay: I am only speaking of this stoppage, and the witness is clear about it and he has been answering it just that way.

Mr. Turkus: I object to the form of the question as being ambiguous.

The Court: The testimony under direct was that Buchalter once told the witness that Katz wanted a stoppage of all clothing trucks, as the New York business was going to Pennsylvania, and he told Buchalter that he had doubts about stopping Cooper of Garfield, and New York & New Jersy, also the Branch Stores. 4743

Mr. Barshay: I am not up to that yet, your Honor.

The Court: You may cross-examine on that.

Mr. Barshay: That is exactly what I am trying to do.

The Court: He said in 1932 he told Buchalter that the New York & New Jer-

4744 sey and Rosen objected to the stoppage, also Sobler, and Buchalter wanted to see Rosen at that time about it, at 20th Street off 5th Avenue. That is properly subject of cross examination.

Mr. Barshay: Do you want to recess, your Honor? I will be quite a while with this witness yet.

The Court: How long do you expect to be?

4745 Mr. Barshay: I have twenty pages of notes that I must cover, your Honor.

The Court: I do not know what that means. You do not think you can conclude this afternoon?

Mr. Barshay: Oh, no, undoubtedly I cannot.

The Court: Gentlemen, please do not discuss the case. Let nobody talk to you about it. Keep your minds open and remember all of the admonitions and restrictions heretofore directed.

4746 Everybody will kindly remain in order. First let the witness pass out. Let the jury go by the other door.

Ten o'clock tomorrow morning.

Defendants are remanded.

(Whereupon an adjournment was taken to Thursday, November 6, 1941, at 10:00 A. M.)

(Continued in Volume III)

Vol. III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED — DECEMBER 30, 1942.
JANUARY 2, 1943.
JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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Brooklyn, N. Y., November 6, 1941.

TRIAL RESUMED.

MAX RUBIN, a witness in behalf of The People, resumed the stand and testified further as follows:

Cross examination by Mr. Barshay (continued):

Q. As business agent for Local 240, didn't you then have the power to distribute jobs to various 4748
drivers who belonged to your union? A. Yes, sir, after consulting the executive board, of course.

Q. The executive board, you mean, of Local 240? A. That is right.

Q. Who was on the executive board at this time? A. Moe Levine, Sam Levine, Louis Plotkin, Davey Cantor, Isidor Cohen.

Q. They were all drivers, weren't they? A. Yes, sir, and there were a few others.

Q. Rarely, if ever, were you overruled by the executive board? A. I believe so. 4749

Q. That is true? A. Yes.

Q. It was also your job to know which employer—truckman employer. I am speaking of now—operated for a non-union house A. Not when I was with the Expressmens Union, no, sir.

Q. Wasn't that one of your jobs, to see that your men could have their employment? A. Yes, sir.

Q. Wasn't it to their advantage that they should work for a union house? A. No.

Q. Wasn't that the very purpose of the union?

4750 A. No, sir, not Local 240. The purpose was to keep their men working. The question of organizing jobs or organizing manufacturers, that was a job for the Amalgamated, as I said yesterday, so I was a very minute part there.

Q. Mr. Rubin, wasn't it to the advantage of members of Local 240 to see to it that the manufacturers employed union truckmen

Mr. Turkus: I object.

4751 The Court: Objection overruled.

A. From the standpoint of unionism, do you mean

Q. For their own personal, private interest. A. No, sir, it made no difference.

Q. Wasn't there a holding up of union men then A. It was simply I had no non-union in the industry—I had none—I don't remember one non-union truckman I had—that anybody drove a non-union truck that was a member of my local at that time.

4752 Q. Of course, that was the very point of the existence of that local, to have only union men in the union? A. No.

Q. And it was to their advantage to see to it that that situation continued? A. I don't know about that. That is an abstract question. Whether it was to their advantage or whether it was of interest to them to keep it that way, that is another question.

Q. Why were they paying you a salary if not to preserve their status? A. You asked me a question of unionism and non-unionism and non-enforcement; you did not ask me anything about maintaining the status of all the members of the

local I was business agent of. I say of course it was an advantage to them to be a member of that particular group and maintain their condition.

Q. And they put you there to see that that condition was carried out? A. Yes, sir.

Q. We understand each other now. Now, you said that truckmen were a fixture with every manufacturing house? A. As a general rule, yes, sir.

Q. And if a manufacturer became non-union, Local 240 men might lose their jobs with him? 4754
A. No, sir, unless the work went out of town into the hands of non-union truckmen—go out of town—but in the city it had no effect.

Q. It had no effect? A. Yes, sir, out of town, but not in the city.

Q. They did a lot of work outside the city? A. Three concerns; there may have been others, but three primarily.

Q. As a matter of fact, the stoppage occurred because so much of the work was going out of the city? A. That we had no control of, particularly the branch.

Q. And you were familiar with that situation 4755
before the stoppage? A. Of course.

Q. Now, you knew the Svirsky Clothing House very well, didn't you? A. Yes, sir.

Q. Did you extort from the Svirsky Clothing Company the sum of $1,500 just before you severed your connection with the Joint Control Board—yes or no? A. Postively not.

Q. Just for the sake of repetition from yesterday, very briefly: The Amalgamated is made up of representatives of the various locals constituting the various branches of the garment trade.

directing the interests of the helpers, drivers, etc.? A. That is right, at that time.

Q. I am speaking only of the time before the stoppage. A. Yes, sir.

Q. Incidentally, before this stoppage, did you participate in any other stoppage? A. Well, the strike in 1921 was a big one; there may have been some others.

Q. In the 1921 strike, Mr. Rubin, you received your orders directly from the duly constituted
4757 officers of the Amalgamated? A. In 1921 I worked in the office, giving out relief to employees. I was getting $35 a week. That is what I did then.

Q. Did you partake in stoppage? A. No, sir.

Q. Did you ever partake in stoppages other than in 1932? A. That was the only one, I think.

Q. Was that your first experience? A. I don't say that; there may have been a little strike here and there. That is the first one I played any real part in.

Q. In the little strikes that you had previously experienced did you receive your orders directly
4758 from the officers of the Amalgamated, or else their subordinates? A. No, sir.

Q. You yourself did not call a stoppage? A. No, sir.

Q. Someone above you instructed you that there was a stoppage? A. No, sir, not me. I just went around to see how things went along; I had no power.

Q. I want to know if you had any part in the stoppage. A. I had absolutely no part in any stoppage except the 1932 stoppage; that I played an actual part in, actually.

Q. You led me to believe you did participate

in some small stoppages on other occasions. A. By going around, that is, I went around to a particular neighborhood where a strike took place. I was a part of it. I took some part in the stoppage of the International Tailoring Company you spoke about yesterday.

Q. Coming down to this stoppage, you had heard it was to happen to the general industry, didn't you? A. I did not know that, no, sir.

Q. You did not know the stoppage was to take place? A. No.

4760

Q. You did not know that the business was so bad because of the truckmen of the manufacturers and contractors going out of town? A. I know we done business, if that is what you mean, but you speak about stoppage.

Q. You did not know the officers of the Amalgamated were contemplating something in order to correct that condition? A. Of course, no—Mr. Barshay, let me explain. I will help you.

Q. Just a second. I am trying to get from you, before the stoppage was called by the duly-constituted officers of the Amalgamated, is that a fact? A. I answered that I was an outlaw there. The Amalgamated group wanted no part of me. What would I know what the Amalgamated officers would do? They did not talk to me.

4761

Q. I am now speaking of the time when you are not an officer connected with any group except Local 240 as business agent. Do you understand me now? A. You spoke of before the stoppage.

Q. Before the stoppage in the summer of 1932, you were business agent of Local 240? A. That is right.

4762 *Max Rubin—For People—Cross*

Q. You were part of the Amalgamated? A. In the Cutters Union, yes, sir.

Q. That is the only period I am speaking of, immediately before the stoppage did you get your instructions from your superior officers of the Amalgamated as to any stoppage that would take place? A. No, sir.

Q. Did you learn of it? A. Yes, sir.

Q. From whom did you learn of it? A. From Lepke.

4763 Q. Didn't you testify yesterday in this very court room at page 1416: "To my knowledge"—

"Q. Was the stoppage called by the duly-constituted officers of the Union?"

And then after Mr. Turkus made an objection to the question did you say that to your knowledge—

"A. To my knowledge it was called by the actual officials of the organization."

A. Wouldn't that be the logical thing, for a union to call a stoppage—but when I heard about it, that is a different story.

4764 Q. Of course, you don't suppose they are going to get an outsider to call a stoppage for them? A. They will call it—of course they will—they go through all the legal formalities of calling a stoppage after they first find out whether the thing can be successful. Once they find out the thing can be successful, then they go ahead, but not until then.

Q. So that this stoppage was called by the duly-constituted officials of the Amalgamated, wasn't it?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. You also said that Mr. Buchalter at that time was not a member or official of that organization; is that correct? A. Officially? Of course not.

Q. As business agent of the Expressmens Local, which is an important factor in executing a stoppage successfully, would you not get your instructions directly from the Amalgamated officers? A. Not at that period; I was not part of that machine. 4766

Q. I am now speaking of the time when this stoppage was called in 1932. You were part of the machine then, weren't you, as business agent? A. No, sir, the Orlofsky union started in 1931, and I went with that group. Bruno Belea came into Local 240 and assumed sort of a dictatorial position there. I could not immediately go back to my own job. That was part of the arrangement. 4767

Q. You got into Local 240 in 1927? A. That is right.

Q. Anyway, all the way up to the time of the stoppage in 1932, at that time you were in full control, as business agent, of Local 240, weren't you? A. Except for two months.

Q. Excluding now the two months. A. I don't know when Belea was there. It was right after the agreement was made.

Q. When was the agreement made? You said yesterday Orlofsky's union was given up in April, 1932; you said the stoppage was called

4768 August 4th. A. It was between that period. I did not even go to the place.

Q. A day or two or three or four before all the stoppages in August of 1932, you were business agent of that union, weren't you? A. I was always business agent.

Q. And you were getting your money? A. I did not get paid. They paid me later on.

Q. You mean you did not get paid because financially they could not afford to pay you then? 4769 Was that the reason? A. I don't know if that was the reason. No one paid any dues, it is true. The union was demoralized. Belea was there.

Q. Actually, you got your money at a subsequent time? A. Yes, sir.

Q. Was that immediately before August 4, 1932, you were business agent of Local 240? A. That is right.

Q. In the normal course of events, when a stoppage was called by the Amalgamated through all its branches, all the way down, would you not receive, as business agent, your instructions with respect to carrying out your part in 4770 executing successfully this stoppage?

Mr. Turkus: Objected to as speculative.

The Court: Objection sustained.

Mr. Barshay: Exception.

The Court: You can ask what he did do, not what he would do.

Mr. Barshay: I want to first show the custom and then show what he did, that it was not a deviation, but that it was in

the ordinary course of events that this man carried out his instructions.

The Witness: You cannot show that by me.

The Court: Counsel may try to show it.

Q. Is it not a fact, Mr. Rubin, that immediately before the stoppage was called in 1932, you received your instructions as to what part you would play in this stoppage from the duly-constituted officers of the Amalgamated? A. Absolutely not. I will tell you the reason why— 4772

Q. Please don't volunteer. Do you recall that when this stoppage took place hundreds of workmen connected with the Amalgamated lay down in the street on 5th Avenue in the garment center to prevent trucks from leaving the City of New York to go to Jersey and Pennsylvania? A. A few did.

Q. Your members participated in that demonstration, didn't they? A. They did.

Q. No trucks rolled? A. They did not.

Q. No trucks rolled outside of Branch Stores? A. No trucks rolled. 4773

Q. As a matter of fact, Mr. Rubin, the stoppage was successful and was completed about the 11th of August, 1932? A. I do not know the date.

Q. Well, about August 11, 1932?

Mr. Turkus: I object. He says he does not know the date.

Q. I asked him is it about August 11th. A. I have no idea; I think you told me yesterday from the 4th to the 12th.

4774

Q. What part did you play in this stoppage in those eight days? A. Nothing at all, just walked around the same as the others did. Did absolutely nothing else.

Q. You mean you took a walk in the street? A. It was the Amalgamated's strike.

Q. You were part of the Amalgamated; your union was part of the Amalgamated? A. Yes, sir, but that is all we did.

Q. Just walk around? A. The members and
4775 myself walked around. There was nothing else for us to do.

Q. Did you instruct your members not to roll? A. I did. I told the express force also not to roll.

Q. In other words, briefly, you carried out all the duties necessary on your part to culminate this stoppage successfully? A. Yes, sir.

Q. No matter what you had to do, whether to instruct them or to urge them, dictate or instruct them to lay down and not to work, walk around in group demonstrations, to take them
4776 off the trucks or similar duties, isn't that so?

Mr. Turkus: I object.

The Court: He can answer. Objection overruled.

A. All I instructed the men to do was to help on the picket line. We were only aiding. There were 25,000 or 26,000 other people out on the street, say about 5,000 were out on the street of the organization and you might add that maybe fifteen or twenty or thirty were there too.

Q. In order to successfully prosecute a strike

you needed the cooperation of every branch of the industry, didn't you? A. Yes, sir.

Q. Were you giving yours? A. Yes, sir.

Q. Now, stoppage is lawful, and means the carrying out of a conflict, a temporary conflict between the union and manufacturers?

Mr. Turkus: I object.

The Court: He cannot answer a question of law. Objection sustained.

Q. They do it right now, don't they? 4778

Mr. Turkus: I object.

The Court: He testified on direct that stoppage was practically to see if the men were in a mood to strike and if a strike could be successfully undertaken.

Q. And this stoppage resulted in a strike and was successful, wasn't it? A. It was, all the elements inside and outside of the union cooperated.

Q. As a matter of fact, Mr. Rubin, right now you read in the daily papers with respect to these strikes and these stoppages? 4779

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. It is the customary way of trying to culminate successfully a dispute between a manufacturer and the union?

Mr. Turkus: I object.

4780 *Max Rubin—For People—Cross*

The Court: I think you missed the point. I did not understand the direct testimony on this point to be for the purpose of showing that an illegal act was being done, but simply that the purpose was part of a general scheme, as he said, according to Lepke, for a stoppage because business was going to Pennsylvania; and that there was protest by this witness against bringing in either the Garfield concern or the New York & New Jersey,

4781 but that, notwithstanding this protest, there was, in the summer of 1932, a conversation in which he told Lepke the New York & New Jersey and Rosen objected to the stoppage, and that Sobler and Bluestein also, and that Lepke said he wanted to see Rosen. This is all put in, as I understand it, as part of a chain of events and not to show the stoppage itself was illegal. There is no question of law presented.

Mr. Barshay: Can I have it understood

4782 for this record that the stoppage called then was lawful, in the regular course of Amalgamated work?

The Court: The Court recognizes the alleged exercise of stoppage rights as legal; the question here is what was the purpose of the stoppage, as one of a chain of events leading up to the alleged killing. Was it directed particularly at the one who became ultimately the victim of a killing? It does not legitimatize that.

Mr. Barshay: I don't urge that at all.

I urge it is entirely disconnected with the alleged killing.

The Court: That is a question for argument to the jury.

Mr. Barshay: I am trying to prove by this witness that stoppage is the ordinary means used between unions and manufacturers, that it was not unusual, and that it was not directed at Rosen or anyone in particular; it was directed at the industry.

The Court: You have a right to show that. 4784

Mr. Barshay: I am trying to do that from this witness.

Q. Wasn't that the very purpose of the stoppage?

Mr. Turkus: I object to the form of the question.

Mr. Barshay: I will withdraw the question.

Q. This stoppage was not directed expressly at any particular person, was it? A. It was expressly directed— 4785

Q. At any particular individual, was it? A. No, sir. Not at any individual, the industry—the Branch stores—it was particularly directed at that group and any other group at that time that wanted to regulate industry altogether, but particularly stop the Branch Stores from taking work out.

Q. Mr. Rosen was no part of the Branch Stores? A. No, sir.

4786 *Max Rubin—For People—Cross*

Q. The Branch Stores are a large outfit? A. Fairly large.

Q. The Garfield was substantially large? A. Yes, sir.

Q. By comparison, Rosen's little business in Pennsylvania, as you described it, was infinitesimal, wasn't it? A. On the whole it was not much.

Q. I am speaking of Mr. Rosen's interest in the little business, the Pennsylvania business he
4787 had, in the collection of it; you do not seek, do you, to convey the impression that in any degree this stoppage was called by the Amalgamated and all the subsidiaries in order to get Rosen out of business? A. Oh, no.

Q. How long did you know Weiner? A. Sam Weiner?

Q. Yes. A. About 1928, '27, '29, something like that.

Q. Weiner was the one in the Perfection? A. When I knew him he was not with them.

By the Court:

4788

Q. He was the man who had the canvas place? A. Yes, sir.

Q. Where the books were produced and examined? A. Yes, sir.

By Mr. Barshay:

Q. You knew Weiner before you knew Buchalter? A. Yes, sir.

Q. You knew Weiner independently of Buchalter? A. Yes, sir. I knew Weiner independently of Buchalter, sure.

Q. You know Weiner had a "Perfection Coats"? A. I knew him to be the Perfection Coats.

Q. What was the address of Weiner in 1932? A. Around 20th Street, I don't know.

Q. Around 20th Street? A. Yes, sir.

By the Court:

Q. You told us before 20th Street off 5th Avenue; is that correct? A. Yes, sir; I believe it was on the north side of the street. 4790

By Mr. Barshay:

Q. You claim you had a meeting at Weiner's with the defendant Buchalter in 1932?

Mr. Turkus: I object to the form of the question, "you claim."

Q. You said that? A. To my best recollection it was in 1932.

Q. Was Buchalter then connected with the Perfection? A. I don't think the Perfection was any good since then. 4791

Q. Whatever the name, was Buchalter connected with Weiner in any business then? A. I don't think so.

Q. Did Buchalter have any interest in Mr. Weiner's concern then? A. I don't think so.

Q. Don't you know, as a matter of fact, Buchalter did not become connected with Weiner until 1934, two years after this meeting you described? A. You mean became a partner in the concern?

4792

Q. Yes. A. That is true, in 1934.

Q. Don't you know Buchalter did not visit Weiner until he became a partner with him in 1934? A. I don't know that, and neither do you.

Mr. Barshay: I move to strike out the voluntary remark. If he wants to put my credibility at issue, I will tell him what I know.

The Court: Strike out the last part,

4793 and also your remarks about telling him what you know.

Q. How many times did you meet Buchalter in Weiner's in 1932? A. That happens to be a year that I had great difficulty—

Mr. Barshay: I move to strike out the answer as not responsive.

The Court: Let him finish his answer.

Mr. Barshay: It is absolutely unresponsive, from the very beginning.

The Court: Let him finish his answer.

4794 Mr. Barshay: Exception.

The Witness: (continuing) in placing all the places where I had stopped in the clothing industry.

By the Court:

Q. That is nine years ago and you cannot place all the places? A. I know a good many places where I stopped in 1932; there was about five or six.

Q. You remember the places, you have a mental picture of them. Did you keep a record or sheet? A. No, sir.

Mr. Barshay: I object to the Court's question.

The Court: Objection overruled.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. You remember this particular meeting with Buchalter, don't you? A. Yes.

Q. You did not keep a diary of that meeting? A. No, sir.

Q. You kept no written record of this meeting, and it is nine years ago? A. No, sir. 4796

The Court: Do not quarrel.

Mr. Barshay: I object to the Court's comment, that I am quarreling with the witness.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Did you meet Buchalter in Weiner's place in 1932, the other meeting you just described? A. I don't remember. 4797

Q. You cannot remember another instance? A. I cannot, no, sir.

Q. Did you meet and go there before this meeting in 1932? A. I think one time we met when he borrowed $6,000 from Sam Weiner. I think it was in that period. I am almost—I am not sure—I am not positive, because I am afraid to say I am positive, because I may not be, but he borrowed $6,000 from Sam Weiner around that time.

Q. In Weiner's office? A. I don't remember the diagram, I say.

4798 Q. I am asking you about Weiner's office and no other place. A. I don't remember, but I know there was an incident like that that took place, around that particular time.

Q. I did not ask you about any other place; do you understand? A. I am doing the best I can.

Q. The best you can do is to please answer my questions in the same way you cooperated with Mr. Turkus. A. I am trying to.

4799 Q. I did not ask you about any other incident or any other place. I want to know, if you cannot remember, tell me; if you can, tell me. That is all I want from you. Do you know of any other time in 1932 before this alleged meeting?

Mr. Turkus: I object to that as repetitious.

The Court: Objection sustained.

Q. (continued) With Buchalter, at Weiner's place.

4800

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Or after that.

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. I cannot remember of any other.

Q. Do you know the date of this meeting? A. No, sir, just before—

4801

The Court: Do you mean the book event in the office of Weiner?

Mr. Barshay: Yes.

The Court: He testified it was in the summer of 1932.

Mr. Barshay: I think I have the privilege of getting an answer from this man, what this man's recollection is, without being refreshed constantly as to what he testified to on direct examination. That is exactly the point of cross-examination.

4802

The Court: Do you impute to the Court an ulterior motive?

Mr. Barshay: I don't impute any such thing.

The Court: Then just come to order and do not be disagreeable.

Mr. Barshay: I am not disagreeable.

The Court: You act that way.

Mr. Barshay: I do not act that way. Then I have a duty to cross-examine him, but he is constantly being told what he testified to on direct examination, so there may as well not be a cross-examination.

4803

The Court: The Court will not permit you to address it in that tone of voice. The Court demands respect. The Court is trying to get that respect, and has never raised its voice. Your manner toward the Court is distinctly quarrelsome, extremely so.

Mr. Barshay: I take an exception to that.

The Court: Outside of the court-room you would not talk to a judge in such a

4804

tone. Now please come to order, and do not forget your manners.

Mr. Barshay: I take an exception to that. I have control of my manners.

The Court: I wish you would exercise it.

Mr. Barshay: It is a matter of opinion, sir.

The Court: Decidedly. There is only one person in the court-room taking your

4805 side, and that is yourself, on that point.

By Mr. Barshay:

Q. Did you go out immediately after you received notice about this stoppage, to all of the truckmen?

Mr. Turkus: I object. That is not the testimony. The testimony he gave as to what he did on stoppage was related on direct examination. This is taking in evidence something he never testified to.

4806 The Court: The word stressed here is "all" of the truckmen.

Mr. Barshay: I am going to a different subject now, your Honor.

The Court: Objection overruled.

(Pending question repeated by reporter.)

A. I believe I did.

Q. How long did it take you? A. Not so very long.

Q. All the same, you knew what was going on? A. I told each one individually.

Q. You had no difficulty? A. Just with those few.

Q. You mean they said they did not agree with this stoppage, is that what you mean? A. One absolutely refused.

Q. You had no fight? A. No, sir, I am not a fighting man.

Q. You did not threaten anybody? A. I am not a threating man.

Q. I am asking you now, did you? A. Of course not.

4808

Q. You did not intimidate anybody? A. No, sir.

Q. There was no necessity for it? A. I never did, even if there was any necessity.

Q. Does your conscience bother you? A. Not at all.

Q. I am not accusing you at the present, am I? A. I don't know.

Q. Then you came to the Branch Storage, and there was some difficulty with them? A. Yes, sir.

Q. They refused it? A. Yes, sir.

4809

Q. Did they continue to refuse, or did they finally give in?

Mr. Turkus: I object, unless the time is fixed, otherwise it is confusing to the jury.

Mr. Barshay: What is confusing? You know we are speaking only of stoppage. It is not confusing, is it, Mr. Rubin?

The Witness: I spoke to Butinsky, and he said no trucks had rolled.

4810 Q. You and Meyer Butinsky and the defendant Buchalter never met at Weiner's, did you? A. I don't think so.

Q. Or any other place? A. He knew Meyer Butinsky very well. He is a partner of Meyer Butinsky.

Mr. Turkus: May the record show that when counsel said "he", he indicated Lepke?

4811 Mr. Barshay: Yes.

Q. He knew Meyer Butinsky very well? A. Of course he did.

Q. Mr. Turkus wants the record to show it, and I want to see that it does. Was he a partner of the Branch Storage, to your knowledge, at that time? A. Before the stoppage?

Q. At the stoppage, or before the stoppage.

Mr. Turkus: I object to the confusion. "He." I don't know whether it refers to Lepke or Butinsky.

4812

By the Court:

Q. Was this a partnership or a corporation? A. There was stock given out, yes, sir, and the stock was made out to Hymie Curley Holtz.

Q. It was not a partnership? A. It was a corporation, to my best knowledge.

By Mr. Barshay:

Q. At the time of the stoppage, to your knowledge was Buchalter a partner in the Branch

Storage? A. He had Hymie Curley Holtz hold the stock, because I had it in my hands to sell for him.

Mr. Barshay: May we have instructions to this witness to answer the question yes or no?

The Court: He cannot answer that yes or no; he answered it already.

Mr. Barshay: I move to strike out the answer as absolute hearsay. 4814

The Court: He said he had the stock in his hands to sell, although it was in somebody else's name. Motion denied.

Mr. Barshay: Exception.

Q. Now, assuming, for the sake of your testimony here, that the defendant Buchalter was practically, as you say, a partner or a stockholder in this Branch Storage, he did not ask you to play favorite with the Branch Storage, did he?

Mr. Turkus: I object to the form of the question, "assuming for the sake of." It is confusing; it is improper. I object to it. 4815

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. He did not tell you to play favorites with the Branch Storage, did he—yes or no?

The Court: The Court has ruled on that. Do not repeat it.

Mr. Barshay: The Court has not ruled

on that question because in the other question I put in something else.

The Court: The objectionable part of that is the word "favorite," because it may be interpreted by the witness in a different sense.

Q. He told you to stop the Branch Storage? A. Yes, sir.

Q. The same as he told you to stop every other truck? A. That is right.

4817

Q. You say that the certificate you speak of, you held in your hand? A. Yes, sir, that is right.

Q. You are sure it was the Branch Storage? A. Positively—no, it was the Holland Haulage, which later went in the Branch Storage.

Q. You straightened yourself out. Is it the Branch or the Holland? A. It was the Holland Haulage that went into the Branch. It was originally started as the Holland Haulage, and then it came into the Branch Storage. This was in nineteen hundred and—I don't know, 1929, '30, or '31. I don't know what year it was, about.

4818

Q. When did you see the stock? A. During the stoppage.

Q. That was 1932? A. Yes, sir, but the stock was made out—

Q. Now, Mr. Rubin—

Mr. Turkus: I object: he interrupted with a question before he finished the answer.

The Witness: I remember the Holland

Haulage original stock was taken out, and then later on it became the Branch Storage.

Q. You never saw stock of the Branch Storage belonging to the defendant Buchalter, did you? A. Was it the Holland Haulage then? I am sure it was the Holland Haulage or the Branch, but it was a long time ago. If you will refresh my memory by questioning me—

Q. It was the Holland, wasn't it? A. Yes, sir. 4820

Q. And not the Branch? A. I think so.

Q. You corrected yourself.

Mr. Turkus: I object. There is no question but one is the successor of the other.

By the Court:

Q. Was it the same business? A. Absolutely.

Mr. Barshay: I object. This witness is not competent to testify to that.

The Court: That is a question as to 4821
physical setup. Objection overruled.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. You know the Holland Haulage was already out of business at the time of the stoppage? A. They ordered it into the Branch Storage; they forced it in; they made some arrangement with the Branch Storage outfit and they became one.

Q. Is the Holland in business now?

4822 *Max Rubin—For People—Cross*

Mr. Turkus: Objected to as immaterial to the issue in this case; we are trying a murder case.

The Court: Objection overruled.

A. I know they became part of one outfit.

Q. So he asked you to stop the outfit with which he was connected? A. Yes, sir. That is peculiar.

Q. He did? A. Yes, sir.

4823 Q. You went to the New York & New Jersey, in accordance with your testimony? A. Yes, sir.

Q. At that time did you know the set-up of the New York & New Jersey, who was the president, who was the vice-president, who was the secretary, who had the trucks? A. No, sir, I did not know that. I knew there were three bosses there; that is all.

Q. Did you know that Rosen was the least financially interested in the New York & New Jersey at that time? A. I could gather that from his past—

4824 The Court: No, not what you detected or assumed. Do you know anything about it?

The Witness: No, sir, not actually, no, sir.

Q. Did you know he had only one customer in Pennsylvania, and that is all he had in the business? Did you know that? A. Only one he had there?

Q. There was one customer in Pennsylvania? A. The only business he had there was the Pennsylvania business; whether it was one or more

I could not tell you, and I don't know the one you mentioned; I only know Freddy Ferraro.

Q. Whatever the name was, it was only one? A. That is all I knew; there may have been others.

Q. One customer did not furnish much money to Mr. Rosen, did it?

Mr. Turkus: Objected to; he was a partner in the whole concern. That was the business, according to the testimony, of the New York & New Jersey, and Pennsylvania. 4826

The Court: Objection sustained.

Mr Barshay: Exception.

Q. Was Kelly there at that time? A. No, sir, I never heard of Kelly there.

Q. Was he part of the concern at that time? A. Kelly?

Q. Yes. A. I don't know.

Q. To your knowledge, do you know that Kelly ever was? A. I heard he was a partner there at one time, but I don't know at this particular time 4827 whether he was or not.

Q. Sobler & Bluestein did not agree to stop? A. No, sir.

Q. You never brought them to the defendant Buchalter, did you? A. They were more pliable.

Mr. Barshay: May I ask that the witness be instructed to answer the question?

The Court: Yes.

A. No, I did not bring them down.

4828 *Max Rubin—For People—Cross*

Mr. Barshay: Again I must ask you not to volunteer.

Q. You did not bring them down—Sobler & Bluestein?

Mr. Turkus: I object to that as already answered: "They were more pliable."

The Court: The Court sustains the objection. That part was stricken out.

4829 Q. (Question read by the reporter.) A. No, sir.

Q. Get down to this meeting. You said nothing in that meeting which implied any threat or intimidation to Mr. Rosen, did you—you personally?

Mr. Turkus: Objected to as a conclusion.

The Court: Objection sustained.

Q. You did not threaten Rosen personally in
4830 that meeting, did you? A. Of course not.

Q. You did not intimidate him in any respect? A. I did not.

Q. This was a discussion which involved the reason for Rosen not agreeing to stoppage, isn't that so?

Mr. Turkus: I object. The question is what was said in the place. Not conclusions.

The Court: Objection sustained.

Mr. Barshay: Exception.

4831

Q. There was a discussion between the defendant, you say, and Rosen, as to why he should agree to the stoppage, and Rosen in return gave the reasons why he should not agree to the stoppage?

Mr. Turkus: I object to that as a conclusion. The jury is to draw conclusions as to what the language means that was said in the room under those circumstances.

4832

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Nobody hit Rosen then? A. No one hit Rosen, no, sir.

Q. As a matter of fact, as you said on your direct testimony at page 1153— "What did Rosen say at the meeting? Walked in—" You said, "I, Rubin, told me that I would have to close down the Pennsylvania business." A. What is the wording on that?

Q. "Q. He walked in and said that I, Rubin—" meaning he meant you, Rubin— Well, I will read it as it is. It is only what I am looking at. "He told me I would have to close down the Pennsylvania business and we had to close down the whole business in New York. The Pennsylvania business was the only thing I have in the concern. If I lose that I will lose everything in the concern." That was the nature of the discussion, wasn't it? A. That is right.

4833

Mr. Turkus: I object. That was only one element, one question and answer.

4834 *Max Rubin—For People—Cross*

There were discussions there that went on, that included Lepke and Gurrah.

Mr. Barshay: Please make your objection without a speech.

Mr. Turkus: That is an objection, to draw a conclusion from what transpired. The jury does that.

The Court: Objection overruled.

Q. You did tell Rosen that he would have to quit the Pennsylvania business, didn't you? A.
4835 I said, "Don't hit your head," in that room.

Q. Before that time? A. Yes, sir, before that time I did. He told me he would not do it. He told me he could not do it.

Q. So in this room, then, the defendant, you say, told him again something? A. That is right.

Q. You were present? A. Yes, sir.

Q. He said no, he could not do it? A. He said he could not afford it; that was all he had. He did not say "No," he said he could not do it. He was pleading.

4836 Q. Then the defendant, you say, said to him, "Rosen, you are kidding, you have plenty of business, you are kidding," that is exactly what he said? A. That is about it, yes, sir.

Q. Then the defendant said, "You show me the books," and Rosen said, "I will show you," and he went to the telephone and called up his office, is that correct? A. That is right.

Q. Then a lady came in who was Sylvia Rosen, with a book? A. That is right.

Q. Did you look at the book? A. No, sir.

Q. Wasn't it part of your business to see that? A. No.

Q. What route, or business, or customers, he was serving in Pennsylvania? A. Not with Lepke and Gurrah in the same room, no.

Mr. Barshay: I object to that as not responsive and move to strike it out.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. The lady came in with the book, is that correct? A. Yes, sir.

4838

Q. She was invited to sit down? A. I don't remember that.

Q. Well, she sat down, didn't she? A. I hope so.

Q. Nobody asked her to leave the room during the ensuing discussion? A. No, sir.

Q. Nobody made any effort to keep from her what the subject of the discussion was?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained as to form.

1839

Mr. Barshay: Exception.

Q. How long did she sit there? A. I cannot tell you that.

Q. Do you know whether it was five or ten minutes, or twenty minutes? A. I don't know: it was a short time, but I cannot tell you how long.

Q. Would it refresh your recollection that she testified here it was twenty minutes, would that refresh your recollection? A. It was a short

time; sometimes twenty minutes is short and sometimes it is very, very long.

Q. Then Rosen was told, "You cannot go to this house"? A. That particular house was mentioned, Gurrah said, "You cannot go here," mentioning like Mr. Turkus said, a flicking of his hand across the books.

Q. That is done all the time in the union field? A. Oh, no.

Q. Aren't truckmen allocated to various manufacturers? A. They have those houses registered
4841 and it belongs to them, yes, sir.

Q. You yourself have transferred truckmen from one house to another? A. In one case.

Q. That is what they were doing in this instance? A. They were doing?

Q. Yes, they were telling Rosen he could not go to this manufacturer? A. They said, "You cannot go here, you cannot go here."

Q. He only had one customer, you told us? A. I didn't know that. I said I only knew one; I did not know if he had any others.

Q. Did Rosen, in your presence, tell them he
4842 had more than one? A. I did not hear that.

Q. Did Rosen tell him how many he had? A. No, sir, I did not hear that.

Q. Did Rosen name another? A. No, he did not.

Q. Did you join in the conversation and say to Rosen, substantially, "Don't hit your head up against a stone wall, if they tell you to stop, stop."? A. That would apply to all people who did not stop.

Q. Isn't that so—that cards would not be given to other truckmen? A. It had nothing to do with cards. I don't know the formation.

After the stoppage was over I did not know how things were going to end.

Q. You spent your life in union activities with the Amalgamated, Joint Board, Control Board, Finance Committee, Business Agent, didn't you, so you knew what was to be followed subsequent to stoppage? A. I can answer that. I don't think there was ever a time before that that O.K. cards were given out. I think that was an innovation.

Q. Have they been given out since then? A. 4844
Since that particular talk. I think that was the first time, if I can remember correctly, that was the first time these O.K. cards were ever given out.

Q. They were given out in the regular offices of the Amalgamated? A. No, sir. I think the meetings were held at 22 East 17th Street, the office of the manufacturers and trucking.

Q. Books were kept as to whom you gave each card? A. I think they kept a record.

Q. That was the system inaugurated then and followed since? A. I think so.

Q. Mr. Rosen was not treated in any other 4845
way than all the other truckmen were treated at that time? A. From the Amalgamated?

Q. Yes. A. Of course, not.

Q. You made the suggestion that you would try to get him some extra business? A. I did.

Q. And that pleased Rosen?

Mr. Turkus: Objected to as calling for a conclusion.

The Witness: I think Lepke promised first more.

4846 Q. Lepke made him that promise, you say? A. He did.

Q. And you carried out that promise? A. I did.

Q. Perfectly proper, wasn't it? A. I don't know how proper it was; I carried it out.

Q. You did so? A. Yes, sir.

Q. On those visits, Mr. Rubin, you told this jury you did nothing illegitimate? A. That is correct, that is right.

4847 Q. I mean you used no illegal methods to get Mr. Rosen that customer? A. No, sir, I just went up to Sam Svirsky and told him he would do us a big favor—I told him who wanted the favor—he did it.

(At this point the witness was allowed to leave the stand.)

The Court: Recess for five minutes for the benefit of the witness. The court will remain organized.

(The witness returns to the stand.)

4848 Q. Did you know, Mr. Rubin, then, at the time of the stoppage that the Pennsylvania, or the territory in Pennsylvania, was declared to be on the union side or the non-union side, did you know that? A. When we went up to see Svirsky, before the stoppage, do you mean?

Q. No, during the conference about the stoppage? A. I was not in any of those things. I cannot answer that.

Q. As a matter of fact, you know now, don't you, that Svirsky still employs Sobler who was once with the New York and New Jersey, approximately to this very day? A. Yes. What

has that got to do with the Pennsylvania question that you just asked prior?

Mr. Barshay: I ask that the witness be instructed to answer questions.

The Court: So instructed.

The Witness: Yes.

Q. And he still does work for them today, do you know that?

Mr. Turkus: I object. 4850

By the Court:

Q. Does he? A. He does, yes, sir—I mean, I have not been out since 1939, so I have reason to believe he still continues. He did in 1939.

By Mr. Barshay:

Q. Now, the allocation of territory was really the allocation of the houses included in certain towns in Pennsylvania where the union work was going on? 4851

Mr. Turkus: I object. The question is confusing. I don't understand what it means.

The Court: I think we know what it means.

By the Court:

Q. When Gurrah had the book and forbade certain accounts, did you see what the accounts were? A. No, sir.

4852 *Max Rubin—For People—Cross*

Q. Did he mention what the accounts were so you could tell whether they were in Pennsylvania or not? A. No, sir, and he did not, either.

By Mr. Barshay:

Q. Do you know where those accounts were located? A. The New York and New Jersey?

By the Court:

4853 Q. No, that were forbidden by Gurrah? A. No, a couple I know, he spoke, he said about Wilkes Barre region, I believe.

Q. No, do you know? A. No, I don't know. All I know is it was not in the territory of the Branch. It went to a different part of Pennsylvania than the Branch did.

By Mr. Barshay:

Q. Summing it all up, wasn't it decided as a result of the successful conclusion of the stop-
4854 page, which towns and territory were to be catered to by union truckmen? A. Not to my knowledge.

Q. You never learned of that? A. No, sir.

Q. Wasn't that the very purpose of the stoppage? A. No, sir.

Q. What was the purpose of the stoppage? A. To prevent him from going out of town.

Q. You say, "Going out of town," you mean out of town to perform under non-union conditions? A. No, sir, it was union shop; they were taking the work away from New York.

Q. Union shops competing with union shops, no matter where they were? A. No, sir.

The Court: There is a question which has not been cleared up by anybody.

By the Court:

Q. When you speak about business going out of town, do you mean pieces of cloth, cut from patterns, were being sent out of town for sewing and finishing? A. In some cases piece goods 4856
went out of town, too.

Q. You mean the cutting as well? A. Yes, sir, in some cases.

Q. You mean that the manufacturer instead of having work done in Manhattan was shipping these goods, the cut goods, to Pennsylvania, and getting the labor there? A. That is right.

Q. For completing, making and completing the garment? A. Yes, sir.

Q. And that some of the Pennsylvania shops were not union shops, and that union labor was obtained which made a bigger overhead in the 4857
production of the garment? A. Yes, sir, it was cheaper to produce the garments there, and that is the reason the manufacturers sent their work out.

By Mr. Barshay:

Q. And that was really the reason for the business going out of town? A. Yes, sir.

Q. And that was opposed to the best interests of the Amalgamated? A. (No answer).

4858

By the Court:

Q. And these truckers could have prevented their taking the stuff out of town, which would strangle the transfer of unfinished garments for making or completion to non-union districts? A. That is right.

Q. Is that correct? A. Yes, sir, that is right, but with the question of the Branch stores, if I may amplify it—they could get sales territory in

4859 Pennsylvania, for manufacturers to go there. That was an added danger to them and their concerns.

Q. What concern? A. The Branch stores.

Q. When you say, "Branch Stores," do you mean a specific organization having that name? A. Yes, sir.

By Mr. Barshay:

Q. Do you know how many accounts the New York and New Jersey had in this Wilkes Barre region? A. I do not.

4860 Q. Do you know whether it was one, two or three? A. I don't know, I told you before.

Q. Did you ever learn? A. No, sir.

Q. In the conference room, did you ever learn? A. I was never in a conference room.

Q. The conference room I am speaking of now was where Rosen was there with you and the defendant, as you claim.

Mr. Turkus: I object. That was no conference room at all. The jury will decide what went on in that room. You

refer to it as conference: I would call it something else.

Mr. Barshay: I take an exception.

The Court: Call it the room where the conference was held.

Mr. Barshay: I object to the remark used by Mr. Turkus.

By the Court:

Q. When you speak of Wilkes Barre, that is in the coal mining district? A. That is right. 4862

Q. Was the condition in the coal mining district at that time one of general unemployment where men and women get jobs at something other than the coal mines? A. I cannot answer that. I was not up there.

Q. Where labor was cheap? A. Yes, sir, labor was cheap in Pennsylvania.

By Mr. Barshay:

Q. The room where this conference took place, you were there, weren't you? A. I was. 4863

Q. And it was a conference room for the moment? A. That is right.

Q. Who asked the daughter to leave? A. Her father told her to go.

Q. The defendant did not? A. No, sir.

Q. She left? A. She did.

Q. And the discussion continued? A. That is right.

Q. Rosen urged his side of the story, didn't he? A. Urged his side of the story?

Q. Yes. A. Yes, sir.

Q. Then the defendants said, "Don't worry,

4864 we will do something for you. You have nothing to worry about. If you have any trouble, we will do something for you."? A. That is right.

Q. That is exactly what he said? A. Yes, sir.

Q. And then Rosen left? A. Yes, sir.

Q. Do you know how soon thereafter Rosen went to the Garfield as an employe? A. When they resumed work, I believe.

Q. When was that, August 12th, do you say?

4865 A. Yes, a few days later, I think so.

Q. So that at the most, Rosen, after this alleged conference, or after this convention, went to the Garfield within a week? A. About that time, I imagine.

Q. Do you know of your own knowledge whether or not Rosen while he was a member of the New York and the New Jersey was drawing $100. a week? A. I cannot tell you that.

Q. Do you know whether he drew less? A. I imagined he would draw less, but I would not know definitely.

4866 Q. Do you know whether he ever netted in his connection with the New York and New Jersey anywhere in the sum of $100. a week? A. I do not know of any.

Q. Now, you had a talk with the defendant before he went to Garfield to work, didn't you, before Rosen went to Garfield to work? A. Before we got him into the Garfield, yes, sir.

Q. In other words, the defendant was instrumental in persuading the Garfield to employ Rosen at $100. a week? A. Positively.

Q. As a matter of fact, Cooper refused to do it? A. Yes, sir, that is right.

Q. And this was before the defendant, to your knowledge, was invited by Cooper to join the Garfield? A. He did not go to work, in my opinion, for Louis Cooper until after the stoppage.

Q. The stoppage was finished August 12th? A. He could not have gone to work for Louis Cooper much after that.

Q. Had you gotten Louis Cooper to agree to the stoppage before he went to work for Cooper, within the week? A. After the stoppage was 4868 over.

Q. But it was within a week? A. I think so.

Q. It took a little longer than that for the defendant to accept Mr. Cooper's invitation to join there? A. No, sir, no, just the same moment, the same day.

Q. You mean stock was issued and the agreement was drawn on the same day? A. I don't know anything about stocks. I am talking about a conversation Louis Cooper had with Lepke in a particular speakeasy.

Q. I am asking you if you know when the 4869 defendant Buchalter joined, at the invitation of Cooper? A. I don't know if there was any stock issued.

Q. You know formal legal papers were drawn? A. No, sir.

Q. You know that lawyers attended to the drawing and closing? A. No, sir, I don't.

Q. You don't know that, either? A. No, sir.

Q. Rosen was put to work immediately within a week, at $100. a week? A. That is right.

Q. Was it $125., do you recall? A. I think he got that later.

4870 Q. So he was advanced to $125. a week shortly, later?

Mr. Turkus: I object. That is confusing.

The Court: Sustained as leading. He said he got it later.

Q. How much later? A. Maybe $115.

By the Court:

4871 Q. Do you know anything about it? A. I know he got an increase; Rosen himself told me.

Q. Did you see him get it? A. No, sir, Rosen himself told me.

By Mr. Barshay:

Q. So he continued to work for Louis Cooper at the Garfield? A. Yes, sir.

Q. Do you know exactly how long he worked? A. I said before about eight months; I may be

4872 wrong, but that is my opinion.

Q. Could it have been two years? A. It may have been.

Q. Could it have been two and one-half years, do you know? A. I am not sure of the exact time.

Q. You had been seeing Rosen in the meantime? A. Oh, yes.

Q. He was grateful, wasn't he? A. Grateful?

Q. Yes, to you? A. No more than usual when you get something which is all right.

Q. He was getting $115. or $125. per week, he was a foreman in a large concern, he expressed

his gratitude to you, didn't he? A. He did not thank me; he was glad; he thanked everybody, I imagine.

Q. In other words, Rosen was quite happy about the change?

Mr. Turkus: I object. There is no such testimony on this record.

The Court: It is too psychological. Objection sustained.

4874

Q. He expressed joy, didn't he, verbally? A. When I told him that I did not have any more business with the man.

Q. When you first told him he was going to work for the Garfield at $100. a week, he expressed his pleasure? A. At that particular time.

Mr. Turkus: I object. It is confusing. When a man has no alternative—

Mr. Barshay. I object to Mr. Turkus making any argument.

The Court: You are going in the realm 4875
of psychology and philosophy.

Mr. Turkus: I object to it as confusing.

Mr. Barshay: I took an objection to the speech.

The Court: It makes no difference whether he was grateful or not. Rosen's reactions are of no consequence.

Mr. Barshay: Exception.

Mr. Barshay: The District Attorney made a speech which was inflammatory and prejudicial, when I was trying to dis-

4876 *Max Rubin—For People—Cross*

prove the theory advanced by him and just at a time when I was succeeding.

The Court: The Court did not hear the speech, so many people are talking at once.

Mr. Barshay: The jury heard it. It was intended for the jury and not for the Court.

The Court: Then the jury will disregard it. These interruptions must stop
4877 after objection is made. The Court must rule without wrangle. We have had enough of that in the last few days. We must go along with the case in an orderly fashion.

Q. Now, you say you don't recall how long he worked, maybe eight months, maybe a year, maybe a year and a half? A. That is right.

Q. No complaint from Rosen in the meantime, Mr. Rubin? A. No, sir, none whatsoever.

Q. Did Sobler and Bluestein, to your knowledge, still continue with the New York and New
4878 Jersey, or did they split? A. I think they split up. Sobler continued to run the business: Sobler took the New York business and Bluestein took the Jersey business.

Q. Sobler is still in business? A. He is.

Q. Then there came a time when you met Rosen and he told you that Copper had fired him? A. That is right.

Q. The defendant Buchalter had nothing to do with his discharge, did he? A. I don't believe so.

Q. You know he did not? A. I can safely say he had nothing to do with it.

Q. As a matter of fact, when you conveyed that fact to the defendant, he said he was going to see Cooper and try to have him reinstated? A. That is right.

Q. And he went to Cooper? A. That is right.

Q. And he urged Cooper to reinstate Rosen? A. That is right.

Q. And Cooper said he stole some racks, he bit the hand that fed him? A. He stole some hampers.

Q. That was the only reason Cooper ascribed 4880
for discharging Rosen? A. That is right.

Q. You did not agree with him? A. Positively not.

Q. Cooper persisted? A. That is right.

Q. And Buchalter did everything he could for Cooper to change his mind? A. Everything he could?

Q. Yes, in the conference?

Mr. Turkus: I object. He does not know.

Q. He urged him to reinstate the man; he 4881
said, "Take him back"? A. That is right.

Q. He agreed with you that the stealing of a few hampers is no reason for discharging a man? A. That is correct.

Q. He said, "Cooper, take Rosen back"? A. Yes sir.

Q. He said it more than once? A. A dozen times.

Q. And Cooper persisted? A. Yes, sir.

Q. So you ascribe the discharge of Rosen directly to Mr. Cooper, don't you?

Mr. Turkus: I object to what he does.
The Court: He has already said so.

4882

Q. Now, Cooper was the man who really ran the Garfield, wasn't he, the manager? A. He managed it, yes, sir.

Q. He was the active person in the business? A. Yes, sir.

Q. The defendant Buchalter took no participation actively in the business? A. No, sir, except that everybody knew that he was a partner, of course.

4883

Q. I said actively, he did not hire or fire, or do anything in the business? A. No, sir, not at all.

Q. Cooper said finally, "I will not take him back," and he did not? A. That is right.

Q. Finally, the defendant gave up his efforts to convince Cooper to reinstate Rosen? A. That is right.

Q. You agreed with that by saying, "It is good enough for you, it is good enough for me"? A. That is right.

4884

Q. So that at that time you felt that you did your bit for Rosen? A. That is right.

Q. You felt the defendant did his bit for Rosen? A. No, sir, I did not feel that way.

Q. You know what I am speaking about? At the time of these conferences when Cooper persisted in refusal to reinstate Rosen, the defendant Buchalter a dozen times urged upon Cooper to reinstate him? A. That is right.

Q. You heard it yourself? A. That is right.

Q. And you joined in that? A. Yes, sir.

Q. And you say, with respect to Cooper, the defendant did everything he could with Cooper to put him back? A. By word of mouth, yes, sir.

Q. You did not want Buchalter to hit Cooper and make him take Rosen back? A. He did not have to.

Q. It was then you said, I repeat, "If that is good enough for you, it is good enough for me"? A. That is right.

Q. You could put a man to work yourself, couldn't you? A. I could.

Q. Because of being a business agent? A. Anything in New York that happened I could do in New York. 4886

Q. Did you personally try to get any employment for Rosen? A. I did.

Q. And you could not succeed? A. No, sir.

Q. To whom did you go? A. I spoke to dozens of bosses and they did not want him.

Q. They personally did not want him? A. No, sir.

Q. That had nothing to do with the defendant Buchalter? A. No, sir, not at all.

Q. So every person who rejected your request for employment of Rosen, to your personal knowledge, did so of their own volition? A. Positively. 4887

Q. Was it because of his reputation in the industry?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Q. Did they ascribe a reason to you for their failure to employ Mr. Rosen?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

4888 *Max Rubin—For People—Cross*

The Court: Objection sustained.

Mr. Barshay: Exception.

Mr. Barshay: Your Honor, it goes directly to the point. The claim here, as advanced by the District Attorney, is that the defendant is the one who forced Rosen out of business, when everything is undoubtedly to the contrary. I am proceeding along that line through this witness' own knowledge.

4889 The Court: I am just thinking— The Court made a ruling. Now it comes to mind that before Lepke and this witness went to Cooper, there is evidence in the direct that this witness told, as a reason for going there, to Lepke, that it was no time to have Rosen hollering on Fifth Avenue, and that Rosen should therefore be put back. In view of that testimony you may cross-examine on that point. The Court reverses its ruling.

4890 Q At this conference between Cooper, you and the defendant, when you say the defendant—

Mr. Turkus: (Interrupting) I object, unless the defendant is named. We have three defendants here.

Mr. Barshay: Isn't it obvious, Mr. Turkus, that I am representing Louis Buchalter. If you want to call him Lepke, go ahead. I call him Buchalter—the only name I know him by.

The Court: The Court stands repri-

manded. The Court will call him Buchalter.

Mr. Barshay: I am addressing Mr. Rubin—let the record be clear that I looked at Mr. Rubin and not at the Court.

The Court: The Court will not address any defendant by "Mister", or "Your Honor", or anything like that. We will call people by their proper names.

Mr. Barshay: I will call the defendant, "Buchalter." 4892

Q. Do you say that you had this talk with Buchalter or Cooper? A. All I can recall— I think it was 1934—

Q. Do you recall the year? A. I think it was '34.

Q. Have you any recollection of the month? A. No, I am not even quite sure about the year, but I think so.

Q. Now, in the talk you had with these men, these truckmen to whom you went to seek employment for Rosen, can you please tell us what reasons they gave for not wanting to employ him? A. He was considered a chiseler in the trade, and that, if you want me to amplify it, he would go to a tailor shop and take $25. from a tailor and promise to get him some work and not get him the work; and he would go to a manufacturer and take a suit of clothes and promise to pay the manufacturer, and then he did not send him the money—that he did not want to pay the man—just petty larceny stuff. 4893

Q. Who was that? A. Joe Rosen, he had that reputation.

4894

Q. That is why, Mr. Rubin, these men refused to give him employment? A. Trucking bosses, yes, sir.

Q. So he stayed out of work for a considerable period of time? A. I figure about sixteen months.

Q. Despite your efforts to get him employment? A. That is right.

Q. You made honest and sincere efforts to get him employment? A. Yes, sir.

4895

Q. And you got rebuffed at the hands of employers because of the reason you gave this Court and jury? A. Yes, sir.

Q. When Mr. Cooper persisted in his refusal to re-employ Rosen, I believe you had a visit from Mrs. Rosen? A. Mrs. Rosen?

Q. Yes. A. The only time he was discharged, yes, sir.

Q. She came to you and she wanted to know why her husband was discharged by Cooper? A. That is right.

Q. Did she ask you? A. She did.

4896

Q. Did you tell her? A. I did.

Q. Did she then ask you to go to Cooper? A. I said, I invited her— I said, "Come on over."

Q. Did you go? A. Yes, sir.

Q. What did Cooper say? A. He would not put him back.

Q. That is all he said? A. Well, that was the gist of the conversation.

Q. Give us everything you can recollect. A. He would not put him back; he was no good; did not want him, and so on.

Q. Try to give us the best you can everything that was said. A. That is about all.

Q. That is about all? A. That is about all. It may have been a little longer, but that was the gist.

Q. He never said to her, "It is not up to me, go and see Lepke"? A. I did not hear that.

Q. And you were present all the time? A. That is right.

Q. Were there any other unemployed truck drivers in the Local 240 about that time? A. 4898
I don't think so.

Q. Did you place any to work? A. I cannot tell you now, but I don't—the problem of unemployment is never very great there.

Q. In other words, if people really wanted men, there was plenty of work for them? A. I don't say plenty of work, but I never took anybody in there to keep them hanging around. Unless there was a job for a man I brought in, I would bring nobody in.

Q. Finally, after a considerable period of unemployment, as you described, and the reasons therefor, did you meet Larry Cooper, who was 4899
not related to Louis Cooper at all? A. He has been in business a long time.

Q. You know him? A. Yes, sir.

Q. Were you instrumental in getting Larry Cooper to employ Rosen? A. Yes, sir, I spoke to him about it.

Q. Do you know of your own knowledge whether the defendant Buchalter also spoke to Larry Cooper and asked him to take Rosen? A. I could not answer that, but as far as I know, he did not.

Q. He may have, without your knowledge? A. Of course.

Q. And so Larry Cooper employed Rosen as a truckman, is that so? A. Yes, sir, after the switch.

Q. But you were able to accomplish that—and a man named Cranes did work for Larry Cooper had to be shifted to the Garfield? A. That is right.

Q. It could not be done otherwise? A. No, sir.

1901 Q. Larry Cooper would not fire a man to accommodate Rosen? A. He would not dare.

Q. But Louis Cooper did not want to do that? A. That is right.

Q. Then Buchalter was then a partner with Louis Cooper in the Garfield about that time? A. I don't know when, but he was a partner.

Q. Was the defendant a partner with Louis Cooper in the Garfield about that time? A. I don't know when, but he was a partner.

Q. As a matter of fact, he was a partner since 1937, wasn't he? A. He was a partner.

Q. In the Garfield? A. From 1932.

1902 Q. Until 1937? A. I don't know when he severed his connection.

Q. So again it was necessary to enlist the aid of the defendant Buchalter to persuade Louis Cooper to take Cranes? A. Yes, sir.

Q. The defendant Buchalter did persuade Louis Cooper to employ Cranes, so Rosen could get employment? A. Yes, sir.

Q. There was a little difficulty to persuade Cooper to carry out that transaction? A. Yes, sir.

Q. The defendant Buchalter who was a partner of Louis Cooper insisted and finally suc-

ceeded and Cranes was employed and still is employed, to your knowledge, with the Garfield? A. I think he still is, yes, sir.

Q. Now, Rosen worked for Larry Cooper how long? A. A very short time, a few months, I believe.

Q. Larry Cooper did not fire him, to your knowledge? A. He did not.

Q. Rosen quit of his own volition? A. That is right.

Q. He claimed he was sick? A. I don't know the reason; I heard afterwards that he claimed he was sick. 4904

Q. Something the matter with his heart, do you know?

Mr. Turkus: Objected to as hearsay, what he heard about the man.

Mr. Barshay: I asked him did he know.

Mr. Turkus: I object; it is hearsay.

Q. At any rate, Mr. Rubin, it is definite that the disassociation between Larry Cooper and Rosen was absoluteiy voluntary on Rosen's part? 4905

Mr. Turkus: I object. The witness indicated he does not know how it happened.

The Court: I will allow it. Answer the question.

A. It was voluntary, wholly voluntary.

Q. After the disassociation of Rosen from Larry Cooper, did you see Rosen? A. Only the time I spoke of.

Q. In the candy store? A. Yes, sir.

4906

Q. In other words, he no longer came in to ask you for employment? A. He did not.

Q. He no longer bothered you about getting a job for him any place? A. He did not.

Q. The first you learned, he bought a candy store, he did not ask you, or ask your help to get money to buy the candy store? A. He did not.

Q. Do you know when he bought the candy store? A. I don't know, sir.

Q. When did you learn he bought the candy store? A. A short time after I saw he was not on the job and I made inquiry, and some of the members he told me he had a candy store, told me he bought a candy store in Brownsville.

4907

Q. Would you say that was some time in April of 1936? A. I imagine about that time.

Q. You said that Dewey was appointed in July of 1935?

Mr. Turkus: That was June.

Q. You agree with Mr. Turkus, then?

4908

Mr. Turkus: It doesn't make any difference whether he does or not.

Q. Isn't that so? A. Yes, sir, July.

Q. July of 1935, let us not quibble about the date, but it was in July, 1935? A. Yes, sir.

Q. Let us go back to 1934. You became connected with another union, a flour trucking union? A. You mean by visiting unions?

Q. You became connected? A. I did not become connected. I visited the union in 1932, at the end of the year.

Q. Was there another trucking union, Local 138? A. Yes, sir.

Q. That has to do with flour trucking? A. Yes, sir.

Q. Disassociated completely from the garment workers? A. Yes, sir.

Q. One had nothing to do with the other? A. That is right.

Q. Did you know a man named Mike Cashel? A. Yes, sir.

Q. What was his position? A. He was as- 4910
sistant representative of the teamsters' union of the American Federation of Labor.

Q. Did you know him well? A. For a short time I was a member of that outfit.

Q. You mean the flour outfit? A. No, sir, when I became a member of the American Federation of Labor; I became a member in 1933.

Q. Was it through his influence that you obtained admission to Local 138? A. No, sir.

Q. Did you ever tell anyone that was the fact? A. No, sir.

Q. Did you finally receive compensation from 4911
138? A. I did.

Q. How much? A. $25. a week.

Q. You did not inform Local 240 that you were getting $25. a week from Local 138, did you? A. I did not.

Q. You did not inform Local 138 what your salary was with Local 240? A. I did, but that has nothing to do with it.

Q. In other words, you carried on two jobs at one time? A. No, no, it was not a job.

Q. A pretty big job? A. It was not a job, no, sir, it was not, it was an association.

Q. A very big association? A. Yes.

4912 Q. From which you profited? A. I profited by it, yes, sir.

Q. Without telling your employer, your real employer? A. Without notifying Local 240 of the union?

Q. Yes. A. I never notified them.

Q. As a matter of fact, your membership began, as you claimed, with your association under 138? A. That is not even true.

4913 Mr. Turkus: I object. It has nothing to do with the Rosen killing.

The Witness: It is not even true.

Q. In Local 138, you actively participated, didn't you? A. No, sir, not in local affairs, not at all.

Q. Will you please answer this yes or no—Did you participate and share financially, to your profit, in extortion, while you were associated with Local 138? A. As agent of Lepke, yes, sir.

4914 Mr. Barshay: May I ask you to do something with this witness, your Honor, who despite all your admonitions and instructions is speaking forth from the witness stand answers which have nothing to do with the case and he does it purposely, repeatedly and deliberately.

Mr. Turkus: Your Honor, he knew the situation when he asked the question.

Mr. Barshay: We will find out about that. Of course I knew it or I would not ask.

The Court: The qualification "as agent for Lepke", although competent, and

although it may be brought out in any direct by the District Attorney, is not responsive. Therefore it is stricken out.

Mr. Barshay: Now, for the record, as in the Richardson case, which I call to your Honor's attention, I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: The motion is denied, a purely technical rule. The subject-matter is competent. 4916

You may ask again if he was a graft collector. He can answer, but he may not state whether for his own pocket or for another, in response to your question.

Mr. Barshay: Of course, the Court is entitled to put it to him and to ask him to answer yes or no. May I take an exception to your Honor's ruling.

The Court: The ruling is based—

Mr. Barshay: On the withdrawal of a juror. That is what I have reference to.

The Court: Denied. 4917

Mr. Barshay: Exception.

Q. Did you participate in a shake-down of the Gottfried Baking Company to the tune of $15,000? A. I did.

Q. Did you participate in a shake-down of the Wagner Pies to the tune of $1,600? A. I don't remember that; I did not participate in that at all.

Q. Is your answer no, you don't remember? A. I don't know—I said I don't remember; I

happen to remember the Gottfried very well, but I don't remember Wagner Pies.

Q. Is there a name to refresh your recollection? A. Maybe you can look in the book.

Q. You testified in the flour case? A. Look at the books and get the question and answer. They are correct.

Q. I want to give you a chance. A. Why should you? I don't remember; I am giving it the best I can. I said that Gottfried I remembered very well. I don't remember the 4919 Wagner Pies.

Q. Do you deny it? A. No, sir, I don't deny anything.

Q. You admit it? A. I don't know.

Q. You don't know whether you participated in the shakedown of the Wagner Pies? Answer my question. A. I am trying to do the best I can. When you ask me— Let me make a general statement—

Mr. Barshay: I object. There is something your Honor can do that I cannot.

4920 The Court: Put your next question.

By the Court:

Q. Did you participate in a lot of shake downs? A. I did.

Q. Never mind whether for yourself or for whom. A. I did, at the end of '34 until '36.

Q. Two years? A. Yes.

Q. Did you do a lot of graft-collecting? A. From the end of 1934 I did until about the middle of 1935, until I went away in September or October, 1936, the middle of October, 1936. I

did all that, from about the middle of July, 1935, until about October, 1936.

By Mr. Barshay:

Q. Do you need to refresh your recollection? A. You read it from the book; what is in there I said; I simply don't remember the Wagner Pic. It does not stand out as the Gottfried. I am not denying anything.

Q. Do you want to refresh your recollection by looking at your testimony? A. No, you read it. Put it on the record. 4922

Q. I have read it. I ask you if you now admit participation. A. Read it to me and I will tell you.

Q. Won't you read it to yourself? A. If it is necessary, all right.

Mr. Turkus: Let me see what you are showing him.

Mr. Barshay: Sure.

Mr. Turkus: May the record note it is page 950—don't close the book on me. 4923

Mr. Barshay: Wait a while. Don't pull that stuff. The Court has something to say about this.

The Court: The Court cannot permit books to be handed to witnesses to read, which would delay this trial. Ask your question and let the witness answer.

Mr. Barshay: I thought it shortened the trial.

Mr. Turkus: That was not the purpose.

The Court: The Court rules you cannot do it.

4924 Q. On page 950, were you asked this question: "What did Harold Silverman say at that time? A. He got $1,500 from some lawyer, I believe I don't remember the name—about the Wagner Pie, and that he was giving me one-half but under no condition should I give Wolfy any of it; that Wolfy threw him out of the office and wants nothing to do with him. He does not want Wolfy to get any of this."

Does that refresh your recollection? A. Yes, sir.

4925

Mr. Turkus: May the record show that folio 2859 was not read?

The Court: You have your re-direct when this is over.

Mr. Barshay: Will your Honor tell the District Attorney to desist from this kind of talk? He has re-direct, and he can read it.

The Court: Maybe he will, and maybe he will forget.

Mr. Barshay: He will not forget; he has two assistants to remind him.

4926

Q. Did you participate in a shake-down or extortion of Fink in 1936? A. I think Fink Sam Schorr came to my house and gave me some money.

The Court: Did you or didn't you?

The Witness: I did not meet Fink.

By the Court:

Q. Did you shake down Fink? A. I got some

4927

money from somebody who told me he got it from Fink.

Q. Who did you get it from? A. I don't know what particular man he got it from; I got it from Sam Schorr.

Q. You got your split? A. Yes, sir.

By Mr. Barshay:

Q. Did you participate in a shake-down or extortion of Micky Shalit? A. Yes, sir.

4928

Q. Is it not a fact that between 1935 and 1936 you participated in total shakes of $400 to $700 per week? A. It may have been more some weeks and it may have been less.

Q. But that was—some of it, rather, was after the appointment of Thomas E. Dewey as Special Prosecutor in July of 1935? A. That is right.

(A recess was then taken until 1:30 P. M., the jury admonished as to their demeanor in the interim.)

4929

(The witness is first allowed to leave the room, the jury next; defendants are remanded.)

4930

AFTERNOON SESSION—TRIAL RESUMED.

MAX RUBIN, resumed the stand and testified further as follows:

Cross-examination by Mr. Barshay (continued):

Q. Before we adjourned, Mr. Rubin, the last question I asked you was, "Q. Some of it was after the appointment of Thomas E. Dewey as special prosecutor in July of 1935? A. That is right." Is that correct? A. That is correct.

4931

Q. Did you hear, after the appointment of Mr. Dewey, Mr. Dewey's speech on the radio, appealing to the public for cooperation and offering protection of all witnesses who would give information against people whom he was investigating? A. No, I did not.

Q. Did you read it in the newspaper? A. I may have. I don't remember.

Q. Did you hear about it in any way then? A. I may have.

Q. Did you know that Mr. Dewey was then

4932

offering police protection to all those who wished to testify, putting people under guard for 24 hours at a time? Did you know that? A. I may have.

Q. As Mr. Dewey proceeded to work along in his special investigation, did that subject ever come to your attention? A. As I worked with the Dewey office, is that your question?

Q. No, as Mr. Dewey himself was proceeding with his investigation— A. No.

Q. Did you learn that he was offering witnesses protection? A. No.

Q. I take it you had absolute faith in the

integrity of Mr. Dewey? A. I absolutely did, after I knew the man.

Q. You had faith in him before you knew the man? A. I did not know him so I could not have faith in somebody I did not know.

Q. By his reputation— A. I can't have faith in anybody I don't know. After I know a person, I can have faith in him. After I knew him I had a lot of faith in him.

Q. You committed no extortions in the Borough of Brooklyn, did you? A. No, sir. 4934

Q. The extortions which you admitted participating in were all in the Borough of Manhattan, were they not? A. I don't know where the money came from. I, myself?

Q. Yes. A. I was only in the office of 138.

Q. All your activities, whether large or small, were in the Borough of Manhattan? A. Whatever money was collected in 138, I got in Manhattan, yes, sir.

Q. You are not under indictment in Manhattan, to your knowledge, for any of the crimes you admitted participating in, are you? A. I am not. No. 4935

Q. You never have been? A. Never have been though I signed two waivers of immunity.

Q. I understand that. But you never have been indicted. That is what I want to know. A. I have not.

Q. And when you signed the two waivers of immunity, was it with respect to the flour extortion case? A. Yes.

Q. And that is the case in which you gave testimony against the defendant Buchalter? A. That is right.

4936 *Max Rubin—For People—Cross*

Q. Were you on the Garfield payroll at any time? A. No, sir.

Q. At no time? A. No, sir.

Q. Were you ever on the payroll of Brown & Pollock? A. No, sir.

Q. Isn't it a fact that you collected money at the restaurant of Shimmy Weinberger? You know Shimmy Weinberger, don't you? A. He is an ex-cutter.

Q. Did you ever collect money through him
4937 from the firm of Brown & Pollock? Yes or no. A. No, sir.

Q. Now there came a time that you referred to as September 11, 1936. You said in your direct testimony that you met the defendant Buchalter on that day, Friday, September 11, and that day you remember quite vividly. Do you recall that on direct testimony? A. Yes, sir.

Q. Will you tell us the place you met him? A. 200 Fifth Avenue, Raleigh Clothing.

Q. Will you tell us the time you met him?
4938 A. Some time about one o'clock, I imagine, in the afternoon.

Q. Give us as best you can the time you met him? A. Well, I would say in the early afternoon. I can't tell you exactly.

Q. Was it one o'clock? A. He usually came around, I believe, around one o'clock.

Q. You remember that day vividly. Can you tell us whether it was one o'clock or two o'clock or three o'clock? A. It was the early part of the afternoon.

Q. What is your best guess, your best recol-

lection with respect to the time, best recollection?

Mr. Turkus: Objectionable, best guess.

Mr. Barshay: I said best recollection and I leave "guess" out.

The Court: Have you any recollection, best or not best?

The Witness: The early afternoon, sir.

Q. Can you tell us who was in the room? A. When I spoke to Lepke? 4940

Q. Yes. A. I don't know if there was anybody there in that particular place.

Q. Have you any recollection on the point? A. I think there was a bookkeeper on the other side but I don't know.

Q. Do you know whether she was within hearing distance, on the question of space? A. I can't tell you that. I don't know if she was paying attention or not.

Q. You did not ask her to get out of the room? A. I did not. Of course not.

Q. The defendant to your knowledge did not ask her to get out of the room? A. No, he did not. 4941

Q. Do you know her name? A. No, I don't.

The Court: Do you remember whether she was there or not?

The Witness: I don't remember but there was always a girl—

The Court: We don't want any conjecture; we only want recollection.

The Witness: I don't remember, your Honor.

4942 *Max Rubin—For People—Cross*

Q. Do you know how long your talk took? A. Not very long.

Q. Would you say a half hour? A. I don't think so.

Q. Would you say less? A. I imagine so.

Q. Did anybody come in while you were talking to him? A. I think Allie Tannenbaum came in.

The Court: Not what you think; do you remember?

4943

The Witness: I think Allie Tannenbaum came in.

Q. During the conversation? A. Yes.

Q. Did he participate in the conversation? A. No.

Q. Was he within hearing distance of you and Buchalter?

Mr. Turkus: Objectionable. He cannot tell what someone else can hear.

The Court: He can say how close he was, if he remembers or if he noticed.

4944

Q. How close was he? A. I don't know. I didn't notice.

Q. Was he as close as I am now to Mr. Turkus, about two feet? A. I can't tell you that. I don't remember.

Q. You don't remember that? A. No.

Q. Were there any telephone calls while you and he were speaking that came into the office? A. I can't tell you that.

Q. Were there any telephone calls made by

4945

Buchalter or by you or by anyone there while you were in the office? A. I can't tell you that.

Q. Did you say at that conference that you were going to see Murray Weinstein? A. After Lepke got through talking, yes.

Q. Did you make an appointment with Murray Weinstein? A. No.

Q. Did you telephone him that you were coming? A. No.

Q. Did you know that he was in his place of business? A. On a Friday he is usually there earlier than usual. 4946

Q. Did you know that day? A. No, I took a chance and went over.

Q. What entrance did you go into the 200 Fifth Avenue when you came up that day to Buchalter's office? A. I can't tell you that.

Q. Do you know of your own knowledge which entrance Tannenbaum used, if you know? A. I don't know.

Q. Did you leave alone? A. I did.

Q. Do you know whether or not Tannenbaum remained after you left? A. He did.

4947

Q. Or before you left? A. He remained.

Q. How did you go to Weinstein's office? A. Down Broadway.

Q. Did you walk? A. I did.

Q. How long did it take you? A. From 23rd Street to 15th Street.

Q. How long did it take you? A. Five minutes.

Q. Did you meet any people on the way? A. I may have. I don't remember.

Q. Did you stop to talk to them? A. I don't think so.

Q. Do you recall the names of any people you met? A. No, I don't.

Q. What time did you get to Weinstein's office? A. I don't know. It was right after I left Lepke.

Q. Was he there—Weinstein? A. He was.

Q. Did you see anyone else there? A. The place was full of cutters or a few cutters.

Q. Did you wait your turn to see Weinstein? A. No, I went right in; knocked on his door and went right in.

Q. Was anyone present when you talked to him? A. No.

4949 Q. How long did you talk to him? A. About a half hour or so.

Q. And during that time did you call from his office? A. No.

Q. Do you know whether Weinstein called from his office while you were there? A. I can't tell you that.

Q. Did you tell Weinstein that Rosen would work at anything at all, anything? A. I did not tell him that.

Q. Did you tell that to Buchalter? A. Not at that Friday, no.

4950 Q. You asked Weinstein to give him a position, did you not, to make room for Rosen some place? A. I said to help me as far as Rosen was concerned.

Q. And Weinstein was the head of the union that employed how many people? A. Two thousand.

Q. And you now say that Weinstein rejected any help for Rosen?

Mr. Turkus: Object to the form. The word "now" carries an implication not warranted by the testimony.

Mr. Barshay: I withdraw the question.

Max Rubin—For People—Cross

4951

The Court: Yes, he said that on his direct.

Q. You say now that Weinstein showed no interest in Rosen?

Mr. Turkus: Objectionable. The word "now" is objectionable.

Mr. Barshay: I will leave out the word "now".

The Court: Go ahead.

4952

Mr. Turkus: Your question has to be reframed.

Q. Do you say that Weinstein showed no interest in Rosen? A. I would not say he did not show any interest. He simply did not want to do what I requested him to do.

Q. Where did you ask Weinstein to place Rosen? A. I did not ask him to place him at all. I asked him to help me. I wanted to save his life. I asked him to help me. That is what I told him.

4953

Mr. Barshay: I move to strike out the answer of this witness which is entirely voluntary and not in response to any question put by me to him.

The Court: Strike it out.

Mr. Turkus: May that part where he said "I did not ask him to place him at all" remain?

The Court: Strike out the rest. The jury disregard it.

Q. Did you ask for any particular work for Rosen of Weinstein? A. No.

Q. Do you know of your own knowledge whether Weinstein knew Rosen? A. He did.

Q. Was Weinstein then in a position to obtain employment for Rosen as a truckman?

Mr. Turkus: That is objected to. That is—

4955 Q. To your knowledge?

Mr. Turkus: That is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Barshay: Exception.

Q. You told Weinstein that Buchalter sent you, did you not? A. I did not.

Q. You did not convey that message to him at all? A. No.

Q. This was a personal request on your part of Weinstein? A. That is right.

4956 Q. What time did you get back to Buchalter that day? A. If I was a half hour in Murray Weinstein's office, then it must have taken me another fifteen minutes or so to get back.

Q. Can you give me as best you can— A. I said it was early afternoon.

Q. —what time you got back Buchalter? A. I don't know the time.

Q. Was it three o'clock? A. I can't tell you that.

Q. It was after lunch? A. Yes, sure.

Q. Was it an hour after lunch? A. I said around one o'clock, a little after that.

4957

Q. One o'clock you started with Buchalter? A. It would be another three-quarters of an hour.

Q. By the time you got back would you say it was a little after two, three?

Mr. Turkus: I object. The witness' recollection has been exhausted on point of time.

The Court: Sustained.

Mr. Barshay: Exception.

4958

Q. In the conversation with Weinstein then, September 11, he told you about a baseball game, is that so? A. That is right.

Q. Had he ever told you about a baseball game before? A. He never did.

Q. Did you know there was to be a baseball game? A. I did not.

Q. Did you ever got away for week-ends yourself before? A. Oh, yes, conventions and things of that sort.

Q. Yes. A. Yes.

Q. You did not need Buchalter's permission to go, did you? A. To go away?

4959

Q. Yes. A. No, sir.

Q. You could go wherever you wanted to? A. No, not all the time.

Q. On week-ends the time was your own? A. You mean this particular period that you are speaking of now?

Q. Yes. A. Yes.

Q. And so the subject of Rosen between you and Weinstein was dropped and the talk continued about a baseball game, an invitation to you to attend it in Vineland, New Jersey? A. That is right.

4960 Q. You had never attended a baseball game before with respect to the union playing on one side or the other? A. That is right.

The Court: Where is that, near Cape May?

The Witness: It is near Atlantic City, your Honor, about an hour's ride from Atlantic City.

4961 Q. Was there a convention in Atlantic City that week-end? A. No; he simply told me to meet him at the Breakers Hotel, to go to the game and meet him at the Breakers Hotel.

Q. Did he say he was going to the game? A. Yes.

Q. When you came back to see Buchalter, what entrance did you take? A. I don't remember. There were three ways of getting in.

Q. Which way did you choose? A. I don't remember.

Q. Did you have to use the tunnel? A. At times I used it.

4962 Q. I mean then, that day? A. I don't remember that.

Q. When you came back, did you see Tannenbaum? A. I did not.

Q. You did not? A. No, sir.

Q. Did you see any detectives around the building? A. I don't know if I saw them that particular day. I know they were around.

Q. I am speaking only of that day, Mr. Rubin— A. I don't remember seeing them.

Q. And no other day. Didn't you know, Rubin, that Buchalter was under the constant supervision of the Police Department, under the constant

4963

surveillance of the Police Department, then 24 hours each and every day? A. I didn't know that and I know it can't be true because many times I met him and there was no surveillance of any kind.

Q. You did not expect that the police would show their faces to you, did you?

Mr. Turkus: Now—

The Court: Don't argue. Sustained.

4964

Q. Didn't you know that from the latter part of September or rather from the early part of September, 1935, until the defendant was tried in the Federal Court in October of 1936, the defendant Buchalter was under the constant surveillance 24 hours a day of the Police Department of the City of New York and Tom Dewey's office?

Mr. Turkus: I object to it. It is already answered by the witness.

The Court: Sustained as repetitious.

Mr. Barshay: Exception, sir.

4965

Q. Did you know that the surveillance continued while he was being tried in the Federal Court?

Mr. Turkus: I object to that.

Q. In 1936.

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception.

4966 *Max Rubin—For People—Cross*

Q. Did you know that it continued until about March of 1937?

Mr. Turkus: Same objection.

The Court: All I can see to this persistence in the face of the Court's ruling is that it may be an attempt to impress on the jury something that is not in the evidence.

Mr. Barshay: I take an exception to the
4967 Court's remarks.

The Court: Don't do it again. Abide by the ruling.

Mr. Barshay: I am asking the question, your Honor, and if your Honor sustains it I will abide by it but I am laying my foundation for something which I have in mind and which your Honor could know at the bench in one single second.

The Court: Please don't violate the Court's ruling again. You have done it several times and each time gets into the mind of the jury something suggested by a
4968 question but not substantiated by an answer.

Mr. Barshay: It will be in the form of proof, sir.

The Court: Go ahead to something else.

Mr. Barshay: I ask the Court whether or not the District Attorney has in his possession in this court-room the records of the Police Department of the City of New York with respect to the surveillance of the defendant Buchalter during the periods I put to this witness.

4969

The Court: Proceed with the cross-examination.

Mr. Barshay: Exception.

The Court: (To witness) The Court asked you where Vineland was because the Court wants to get an idea why you went to the Breakers. Is Vineland below Atlantic City?

The Witness: It is off to the left. I don't remember the road now but there is a certain place—

4970

The Court: After you get to Atlantic City?

The Witness: No, sir; you have to make a turn, if I remember correctly, to the right in order to get to Vineland. It is about an hour's ride from Atlantic City.

The Court: The Causeway ride alone is half an hour or more?

The Witness: I would not know that.

The Court: But at any rate are we to understand that you were told to go to the Breakers? That was the meeting place of those who were going to the baseball game in this place outside of Atlantic City?

4971

The Witness: That is right.

Q. Can you tell me what time you left the defendant Buchalter at the Raleigh on September 11th, the second time?

Mr. Turkus: That is objected to. That has already been gone over. The witness' recollection has been exhausted.

The Court: Sustained.

Mr. Barshay. Exception.

The Court: You mean the time he was told to go and get Berger?

Mr. Barshay: I am leading to that, Judge.

The Court: All right. That is what I thought you meant.

Mr. Barshay: I am leading to that now.

Q. Do you recall then? A. Right after I reported to—

4973 Q. I asked you for the time, that's all. A. I can't tell you the time.

The Court: Did you time any of these events?

The Witness: I did not.

Q. You said you remembered this vividly? A. I didn't remember any time. I know the—

Q. Was it after three?

The Court: Were you looking at your watch at any time?

4974 The Witness: No, sir.

Mr. Barshay: I object to the Court's question.

The Court: Overruled.

Mr. Barshay: This is a very vital point in my examination.

The Court: Overruled.

Mr. Barshay: Exception, sir.

Q. How long did you stay with Buchalter before you went to get Berger? A. In and out.

Q. You told him about the baseball game? A. Yes, but I mean after I explained to him what

happened. I went in, explained to him what happened, and went out.

Q. It took how long? A. A few minutes. I don't know the time.

Q. Anybody else there at that time? A. I don't remember.

Q. Buchalter did not send you to the game, did he? A. No, I told him I was going there. He said, "Go ahead."

Q. You were the one suggested it? A. I told him that Murray Weinstein had suggested it. 4976

Q. And you accepted the invitation? A. Yes.

Q. I mean Buchalter did not bring up the subject? A. No.

Q. He did not tell you to get out of town? A. No, I told him I was going. He said O.K.

Q. You volunteered that yourself? A. That is right.

Q. Where did you go to get Berger? A. I think I met him at the Expressmen's Association on 17th Street. I think so.

Q. Did you phone that you were coming? A. No. 4977

Q. Did you walk over there? A. I did.

Q. What time? A. I don't know. That is right after I left Buchalter.

Q. How long did that take you? A. From 23rd to 17th Street, five minutes, ten minutes.

Q. Walked again? A. Yes

Q. Did you meet anyone on that occasion? A. I don't remember.

Q. Was Berger in the quarters where you say you went? A. I believe he was there when I got there, in fact I am sure he was there.

Q. Did you speak to Berger? A. I did.

4978 *Max Rubin—For People—Cross*

Q. How long did that take? A. Just to tell him that Lepke wants to see him.

Q. Was anyone else there? A. The room was full of people.

Q. Anyone within earshot of you, do you know? A. No.

Q. Can you name some of the people that were there? A. No.

Q. Can you name one of the people? A. Friday was usually the day when people came in in the
4979 afternoon. They played cards there, pinochle and so on, so there was a few people there.

Q. So you cannot give us the name of one person? A. No.

Q. You knew everyone in that room? A. I did.

Q. Did Paul Berger leave right away? A. He did.

Q. Can you tell us that time? A. No, I can't.

Q. Not even approximate? A. No.

Q. Would you say it was about two hours after the first conversation you had with Buchalter? A. I would approximate it that way.

4980 Q. So the next day you went to Atlantic City? A. I took my wife and child in my car and we drove to Atlantic City.

Q. The reason you took your wife and child was because she was ill? A. No, I took her.

Q. Maybe I misunderstood you. A. She got ill on the way. She did not feel so well as we neared the place, so instead of driving to Vineland I drove to Atlantic City.

Q. Then I misunderstood you when you said to Mr. Turkus at that time your wife's health was not good. A. Oh, no.

Q. It was just on the way? A. On the way.

Q. You started out for the game? A. That is right.

Q. Did you get to the game? A. No.

Q. When did you decide not to go to the game? A. On the way up to Atlantic City or through that section.

Q. At what point? A. I can't tell you that.

Q. You had a son then, I take it. Was your son with you? A. Yes, he was with us. He is thirteen now and he was about nine or eight then.

Q. Did you tell him that you were going to the 4982
baseball game? A. My boy?

Q. Yes. A. Maybe, but I don't remember. A very little fellow, you know.

Q. Was there a convention at The Breakers at that time? A. There was not.

Q. Were there any union people stopping at The Breakers? A. I don't believe so. I didn't see anybody outside of those that went to the baseball game.

The Court: Were there many of those?

The Witness: About a hundred, sir, left 4983
from the Cutters Union on 15th Street, and we all drove out together, but in driving out on the road we lost one another.

Q. Generally, you were a retiring gentleman personally, were you not? You were not a good mixer?

Mr. Turkus: I object to it. That is incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Barshay: Exception.

Q. At the Breakers Hotel you mixed with everyone, did you not? A. No, I didn't

Q. You registered under your name? A. I did.

Q. You saw Murray Weinstein there? A. I did.

Q. Talked to him about your not going to the game? A. No, I did not see him until after the game.

Q. Did you tell him you were not at the game? A. I imagine so.

Q. Did you tell him why? A. No, I didn't.

4985 Q. Did you ask him again to do something for Rosen? A. I didn't.

Q. Did you tell him anything about Buchalter sending you to get Berger.

Q. Did not mention a word about it? A. No, sir.

Q. Did you mention to Weinstein one word about the conversation you and Buchalter had after you reported to Buchalter that Weinstein could not do anything for you? A. No, sir.

Q. Not one word? A. Not one word.

Q. So that you did not tell anything at all with respect to what happened between you and

4986 Buchalter? A. To no one.

Q. The next day you left, back for New York? A. Sunday.

Q. The next morning, that is, Monday morning, you read the New York Times, and you learned of the death of Rosen? A. That is right.

Q. The first thing you did was to go to see Buchalter? A. That is right.

Q. Let us go back to the time you visited Rubin at the store. A. Rosen?

Q. I beg your pardon, Mr. Rubin—Rosen at the store, when Feinberg was there, which was

the only time you say you were there. A. That is right.

Q. You did not threaten Rosen, did you? A. Of course not.

Q. You did not intimidate him? A. Of course not.

Q. You did not even speak in a boisterous tone to him, did you? A. Hardly ever do.

Q. You were quite gentlemanly with him? A. I was.

Q. You did absolutely nothing wrong? 4988

Mr. Turkus: Just a minute. That is for the jury to decide.

Mr. Barshay: He says she did not.

Mr. Turkus: That is for the jury to decide, whether when he delivered Lep'o's message and the $200, whether he did something wrong or not.

The Court: Yes, the jury will have to say.

Q. I am speaking of you personally, Mr. Rubin. You, yourself, of your own free will, did absolutely nothing wrong with respect to Rosen in that store on that day? 4989

Mr. Turkus: It is for the jury to say.

The Court: Sustained.

Mr. Barshay: Exception.

Q. You gave him $200? A. I did.

The Court: The question of right or wrong is an indefinite term, solely a matter of viewpoint and largely influenced by

4990 whether or not the person himself does it. You are entitled to cross-examine thoroughly on the question as to what extent, if any, this defendant, and whether or not this defendant, was in any way implicated as principal or as an accessory in this alleged murder.

Mr. Barshay: You mean this defendant, or this witness?

The Court: This witness. The ruling
4991 is only on the question of the use of the word.

Q. You had some money belonging to Buchalter there? A. I did.

Q. You gave it to Rosen? A. The money he told me to give to Rosen, I gave to Rosen; yes.

Q. And, giving it to him, you threatened him, not at all? A. Absolutely not.

Q. You told him to go out of town? A. I told him that Lepke told me to tell him to go out of town and stay out until he tells him to come back.

4992 Q. There were no instructions—

The Court: That was not at the baseball game?

Mr. Barshay: This has nothing to do with it.

The Witness: He is talking about July, 1936.

Mr. Barshay: When he went there with a man by the name of Feinberg.

The Witness: Louis Feinberg.

Q. You were not instructed to tell Rosen to sell his candy store? A. I was not.

Q. You were not? A. No, sir.

Q. You were not instructed to have Rosen go some place under an assumed name? A. I was not.

Q. You were not instructed for him to go to any particular place? A. I was not.

Q. You were not instructed for him to close the store and take his wife and family? A. I was not. 4994

Q. You were not instructed to give Rosen any other instructions to become a fugitive, were you? A. Oh, yes.

Q. Wait a minute. —in the sense of disguising, concealing, or using an assumed name, were you?

Mr. Turkus: I object to it. That is not the testimony.

Mr. Barshay: He knows whether he was or not.

Mr. Turkus: The jury draws the inference from the authorization as to what that meant when Lepke sent a message to get out of town. 4995

The Court: It is a confusing question because it calls for two different things. Divide it up.

Mr. Barshay: I will withdraw it.

Q. Did Buchalter tell you to tell Rosen to conceal himself? Did he? A. Yes.

The Court: The word "conceal"?

4996

Mr. Barshay: Yes.

The Witness: Said, "Get out of town." Concealing by orders.

Q. I am asking a specific question.

The Court: Did he use the word "conceal"?

The Witness: No, he did not use the word "conceal."

4997

Q. Did he use the word "disguise"? A. He did not.

Q. Did he tell you to tell Rosen to leave no trace of his whereabouts? A. He did not.

Q. Did he tell you to tell Rosen to close the candy store until such time as he receives word to come back? A. He did not.

Q. Did he tell you to tell Rosen to register some place under an assumed name? A. He did not.

Q. Did he tell you to tell Rosen not to go to Reading, Pennsylvania, where his son lived?

4998

A. He did not.

Q. Did he tell you to tell Rosen that more money would be forthcoming, in that conversation; yes or no? A. He did not.

The Court: Briefly, did he tell you anything—be careful now; listen carefully—did he tell you anything besides that you should give $200 to Rosen and have Rosen to stay away until he, Buchalter, told him to come back?

The Witness: Nothing else besides that.

The Court: That was all that was said on that subject?

The Witness: That is right.

Q. And that was all you did? A. That is all I did.

Q. So that when you and Rosen finished the conversation, in the absence of Feinberg, you said nothing to Rosen that, "If you don't do this, something is going to happen to you", did you? A. I did not.

Q. Not even an intimation? A. Not an intimation.

Q. You left him in good spirits? A. I thought I did. 5000

Q. Did he tell you where he was going? A. Yes.

Q. Where? A. Reading, Pennsylvania, to his son's.

Q. And you reported that to Buchalter? A. I did.

Q. His son's name was Rosen, too? A. Yes.

Q. Harold Rosen? A. Yes.

Q. To your knowledge, at that time Harold Rosen and his father were friendly? A. As far as I know.

Q. The family relationship was friendly? A. I can't tell you that, except that he told me he was going there, so I take it that it must have been friendly. 5001

Q. And then he came back, or did he at that time say, rather, that he would like to have another thousand dollars? A. At that time he told me if he sold his store for a thousand dollars he would go up there and open a little business, when I gave him the two hundred.

Q. Will you repeat that answer, please? A. At that time, when I gave him the two hundred

dollars, he said if he had another thousand dollars he would open a business out of town.

Mr. Barshay: Will your Honor let the stenographer—

The Court: Let him finish this. He has not finished.

Mr. Barshay: I wanted the answer, your Honor, from the stenographer.

The Court: You are interrupting.

5003 The Witness: That is the best answer I remember.

The Court: Is that substantially what he told you?

The Witness: Yes, surely.

The Court: Without being the exact words?

The Witness: That is about it.

Mr. Barshay: I ask your Honor to have the stenographer read the first answer to that question.

The Court: Why?

5004 Mr. Barshay: Because it was different, in my opinion, than the one he gave now.

The Court: You heard it?

Mr. Barshay: I heard it.

The Court: Presumably the jury heard it.

Mr. Barshay: Can't we have it again?

The Court: All right.

(The following was read by the reporter: "At that time he told me if he sold his store for a thousand dollars he would go up there and open a little business, when I gave him the two hundred.")

Q. That is what you said at first, isn't that so?

Mr. Turkus: I object to it. That appears in the record.

Mr. Barshay: Then it is conceded that he did say that?

Mr. Turkus: You cannot stipulate with this. The record shows.

Mr. Barshay: Don't concede it, Mr. Turkus; the record shows it.

The Court: The jury will figure out 5006
whether that is substantially correct.

The Witness: Instead of "sold", I should have said "got". Is that what you mean?

Mr. Barshay: I will tell you what I mean in a second.

Q. Did he tell you that he wanted $1,000 from Buchalter or from you or that he wanted to sell the store? A. I said he wanted a thousand dollars. I did not say he wanted a thousand dollars more from Buchalter. If he got another 5007
thousand dollars—

Q. Was it from you, from Buchalter, or through you or through Buchalter? A. He did not say. He just said, if he got another thousand dollars.

Q. Did you tell Buchalter that he wanted another thousand dollars by selling the store? A. I just said, "He said if he got another thousand dollars he would open a business out of town," yes.

Q. With his son, or near his son? A. Yes, in Reading, Pennsylvania.

5008

Q. Buchalter said nothing about that? A. He said nothing to it.

Q. So as far as your own personal conduct is concerned in the store on that day, Mr. Rubin, you did nothing which in your own mind violated any law whatever?

Mr. Turkus: I object to it. That is for the jury to decide, when he delivered that message.

5009

The Court: Sustained.

Mr. Barshay: Exception.

Q. And after you read the newspaper, you said you saw Buchalter and you said to him, "Now I am in trouble." Did you? A. That is right.

Q. Were you in trouble? A. I ask you whether being in the store in July, when a man gets killed in September, whether you are not in trouble.

Q. All right, the Court won't allow me to answer the question, so I won't.

5010

The Court: The Court has not ruled on that.

Mr. Barshay: If you want me to answer it, I will.

The Witness: You cannot answer it, because I would ask you where you were at that time. Maybe you can tell me.

The Court: Go ahead with the next question.

Mr. Barshay: Take it easy, Mr. Rubin.

The Witness: Don't accuse me of things. I will admit everything I know

that I ever did. I am willing to open myself up to any accusation that I am guilty of, but don't insinuate anything that is not so. Be open and above board and on the level with your questions and don't be throwing any hints, because I have had enough experience with you and your kind.

The Court: Strike that out. The jury disregard it.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial. 5012

The Court: Denied.

Mr. Barshay: Exception. I ask your Honor to do something about this witness.

The Court: What do you want me to do?

Mr. Barshay: I know what I would get if I conducted myself in this fashion.

The Court: Don't give an answer like that. Make a motion. Ask me something that I can rule on.

Mr. Barshay: I ask your Honor to hold this witness in contempt. 5013

The Court: I will take care of that at the proper time.

Mr. Barshay: Now I ask your Honor to admonish this witness not to argue with counsel, and answer questions.

The Court: I remind you of this, that holding for contempt is a job of the Court, without any suggestion of counsel at any time. The Court will take care of its own dignity.

Mr. Barshay: I ask your Honor to

admonish this witness not to repeat this again.

The Court: The witness is so admonished.

Q. Mr. Rubin, I did not accuse you of anything, did I?

The Court: Mr. Rubin, it is very important that you maintain your composure and put your mind on the examination and, no matter what the strain may be, try to avoid any and all further emotional outbursts. Just put your brains on it, not your emotions. Go ahead, counsel.

5015

Q. Mr. Rubin, I did not accuse you of anything, did I?

Mr. Turkus: Objection.

The Court: Don't start anything again. That is only quarreling. Sustained.

Mr. Barshay: I take an exception.

5016

Q. I am trying to prove you did not do anything in the Rosen store, Mr. Rubin. Do you understand me?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception.

Q. And I say to you again: You did nothing wrong in the Rosen store, personally, did you?

Mr. Turkus: I object to it.

Max Rubin—For People—Cross 5017

The Court: Sustained.
Mr. Barshay: Exception.

Q. Nevertheless, you said to him, "Now I am in trouble", is that so?

Mr. Turkus: I object to the "nevertheless."
The Court: Sustained.

Q. And you said to him further, "I was there in July and now I am in real trouble." Did you say that to him? A. I did. 5018

Q. But you personally were not in any trouble whatever, were you?

Mr. Turkus: That was answered before, and we had some altercation.
Mr. Barshay: This is another sentence, Mr. Turkus.
Mr. Turkus: All right, if you want to pursue it.
Mr. Barshay: Yes.
Mr. Turkus: Objection withdrawn. 5019

A. I felt I was in tremendous trouble. I felt as if the world was coming to an end as far as I was concerned and if you ask me why, I will tell you why.

Q. I am not asking you why, I am merely repeating what you just said. A. I will tell you why I had this particular feeling.

Q. If your conscience is bothering you, Mr. Rubin, I cannot help it. A. It is not my conscience.

5020 *Max Rubin—For People—Cross*

Mr. Turkus: That is inviting another outburst.

A. (continued) Maybe years.

Q. You won't get me to roll in the gutter with you, Mr. Rubin.

Mr. Turkus: Please. I object to this, your Honor.

The Court: Stop.

5021

A. I rolled in the gutter with a bullet hole wound.

The Court: Strike that out. The jury disregard it.

Mr. Barshay: I move for the withdrawal of a juror and declaration of a mistrial.

The Court: Denied upon the ground you provoked it, a normal reaction.

Mr. Barshay: I take exception to your Honor's remark, and on the remark that

5022 your Honor made I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

The Court: This is an intelligent jury and I believe will obey the Court's instructions too.

Mr. Barshay: I object to your Honor saying I provoked anything.

The Witness: You said I was in the gutter.

Mr. Turkus: May we have a five-minute recess for the witness?

The Court: I think I will take a five-minute recess both for the witness and counsel.

Mr. Barshay: I object to your Honor saying counsel needs any recess.

The Court: You are highly excited.

Mr. Barshay: I am not excited but I won't tolerate any abuse from anyone in this court-room. 5024

The Court: You are shouting—

Mr. Barshay: I am not, sir.

The Court: Showing disrespect of the Court, even interrupting it.

Mr. Barshay: The Court is going to treat me with respect, and I am entitled to it, and I have been treated with respect for eighteen years and I have returned that respect, and you know it better than any other man.

The Court: Compose yourself. The witness will retire. The jury disregard this. Pay no attention to it; don't be influenced by it. 5025

(The witness leaves the stand, and after a short time resumes the stand.)

By Mr. Barshay:

Q. Buchalter further said to you, "You have nothing to worry about", did he? A. That is right.

Q. And he added, "You have nothing to worry

5026

about as far as Brooklyn is concerned"? A. That is right.

Q. This was in September of 1936? A. That is right.

Q. There is no mistake about that? A. No mistake.

Q. Answer this yes or no, please: Did you know at that time that in the Borough of Brooklyn there was a Special Prosecutor by the name of Hiram Todd at that time: yes or no?

5027

Mr. Turkus: Just a minute—investigating a special matter.

Mr. Barshay: Please, Mr. Turkus—

Mr. Turkus: I object to it. It is incompetent, irrelevant, immaterial, having nothing to do with this indictment.

Mr. Barshay: I asked a simple question, if he knew it or he did not, and Mr. Turkus puts an answer in the gentleman's mouth.

The Court: Sustained. Mr. Todd's investigation is of no consequence here. We

5028

are not going to litigate it.

Mr. Barshay: I did not even say it is or it is not.

The Court: The Court knows that it is not.

Mr. Barshay: Will your Honor concede for the record that he was a Special Investigator, then: yes or no?

The Court: He was investigating the Drukman case. He had no such general powers as Mr. Dewey. What difference does it make?

Mr. Barshay: I take an exception, sir.

Q. You did not leave town thereafter, did you, Mr. Rubin, on September 15th, did you? A. No, sir.

Q. You did not leave town on September 16th? A. No, sir.

Q. You did not leave town on September 17th? A. No, sir.

Q. You did not leave town on September 18th? A. I don't think so.

Q. Or the 19th? A. No, I don't think I left.

Q. Or the 20th? A. No, sir. 5030

Q. Or the 21st? A. No, sir.

Q. Or the 22nd? A. I don't believe I left town during that period at all.

Q. How long did you stay, after you came back from Atlantic City, in the City of New York, before you went away for the very first time? A. I think I stayed until the middle of October.

Q. What? A. I think in New York until the middle of October.

Q. You attended to your regular business? A. I did. 5031

Q. Went to your home? A. I did.

Q. Saw your family? A. I did.

Q. Worked at the union? A. I did.

Q. Saw your customers? A. I did.

Q. Did not disguise yourself? A. No, sir.

Q. Lived the normal daily life? A. That is right.

Q. Anybody come to the office from Brooklyn to look for you, police or district attorney, during that period, any single day? A. No.

Q. Anyone leave word at your home from the

5032 *Max Rubin—For People—Cross*

Police Department or District Attorney's office at any time before you left? A. No, sir.

Q. Anyone call you by phone or leave a message for you, or in any way, directly or indirectly, during that period notify you that you were being sought? A. No, sir.

Q. Or wanted for questioning? A. No, sir.

Q. Not a word, is that so? A. Not a word.

Q. In the meantime, Dewey was becoming very active in the flour cases, was he not? A.

5033 Becoming active in general.

Q. But very active in the direction of Buchalter in the flour situation, was he not? A. In September of 1936?

Q. From then on. A. I imagine so. I am not so sure.

Q. You learned or you knew personally? You knew personally that witnesses in the flour industry were now being subpoenaed and questioned by Thomas Dewey in the flour investigation at that very time?

5034 Mr. Turkus: I object to it. Mr. Dewey's investigations are known to him, what he was investigating in 1936, not to the witness.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did you know that of your own personal knowledge?

Mr. Turkus: Object to it.

The Court: I cannot see its relevancy. Sustained.

Mr. Barshay: I take an exception.

The Court: This is cross-examination. The witness testified to a long series of ramblings, covering a considerable period of time, while allegedly keeping away from New York for a specific purpose, and then coming back because he could not be away any more; he got lonely.

Mr. Barshay: May I address the Court?

The Court: Just a minute. According to the direct examination, he did not go to Mr. Dewey until after he came back 5036
and consulted with a lawyer.

Mr. Barshay: All right. I will tell the Court what I have in mind and maybe we can get along. It was undoubtedly the attempted proof by Mr. Turkus that this man was induced to flee from the authorities in Brooklyn on the theory of inducement of flight and consciousness of guilt.

The Court: I assume that is true.

Mr. Barshay: That is correct. And now I am in possession of proof, and I am trying to prove through this witness, 5037
that this flight that he said was induced because of this case had absolutely nothing to do with this case but that he was fleeing from the Dewey investigation in New York, and he so testified in another place, under oath, in another court. That is the purpose of my proof.

The Court: Very well, then, you may cross-examine on that point.

Mr. Barshay: That is what I am trying to.

5038 Q. In New York, however, Mr. Rubin, you did participate in extortions, did you not? I mean in the Borough of Manhattan.

Mr. Turkus: It has been already answered.

Mr. Barshay: Preliminary question.

A. In the flour situation?

Q. Yes, I am talking about the flour. A. Yes.

5039 Q. And that was the inquiry that Thomas E. Dewey was then diligently proceeding with?

Mr. Turkus: I object to it. Mr. Dewey knows everything he was investigating, not this witness.

The Court: The witness can say whether or not he knew that at the time he went away.

Mr. Turkus: He may have known more.

The Court: Overruled.

Q. You knew that yourself? A. I did not know

5040 what particular thing he was investigating.

Q. Well— A. He had general powers.

Q. You spoke, did you not, to this jury on direct examination with respect to Buchalter telling you that Dewey had certain wires tapped? A. That is right.

Q. Then you knew that Dewey was investigating Buchalter, did you not? A. I knew there was an investigation, of course.

Q. You knew that? A. Of course.

Q. You knew that Thomas E. Dewey could tie up Buchalter through you, isn't that so? A. I knew that that could be done, yes.

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Q. Subsequently he did tie up Buchalter in the flour investigation through you? A. That is right.

Q. And the thing that Dewey was investigating about Buchalter in those days was the flour extortion in which you participated?

Mr. Turkus: That is not the limit of the Dewey investigation.

Mr. Barshay: I do not say it was.

Mr. Turkus: Let us not confuse the jury.

5042

Mr. Barshay: Let the jury say later on whether they are confused or not, Mr. Turkus.

Mr. Turkus: I object to it, your Honor. This witness cannot tell what Mr. Dewey was investigating unless there were leaks from Mr. Dewey's office.

The Court: The witness said at the time of going away he did not know on that point. The present question is not as to whether or not he did know at that time on that point, but as to what Mr. Dewey was doing. That is incompetent. Sustained.

5043

Mr. Barshay: Exception.

Q. You knew what Mr. Dewey was doing with respect to Buchalter's activities in the flour industry? A. I did not. He was making a general investigation.

Q. You know he investigated one industry at a time, don't you? A. There were different men there who investigated different industries. I cannot state specifically. I took it for granted

5044 *Max Rubin—For People—Cross*

and I agree with you that the flour was among the many branches that he was investigating.

Q. You said on direct testimony that Buchalter told you the wires were tapped? A. Yes.

Q. Buchalter told you that a Dictaphone was in the Tailoring Association office?

Mr. Turkus: I object to it. There is no such direct testimony.

5045 Q. In some office. A. You mean in Local 138?

Q. 138, was it?

Mr. Turkus: Please. I have an objection. You cannot have any repartee when there is objection. There is no such testimony in the record about a Dictaphone. The conversation was about a book of matches and a number on the cover.

Mr. Cuff: We object to the statement.

The Court: Gramercy 9043.

The Witness: Gramercy 5-9043.

5046 Q. Whose number was that? A. Association, Greater New York Tailors Expressmen's Association.

Q. Anything else that Buchalter told you?

Mr. Turkus: I object unless the time be fixed.

Q. Then and there, about September of 1936, and that is the only time we are speaking of.

Mr. Turkus: I ask, before or after the Rosen murder?

5047

Mr. Barshay: Long after the Rosen murder.

The Court: You mean at the time of the match book incident?

Mr. Barshay: Yes.

The Court: Anything else said?

A. He told me that he thought there was a Dictaphone in the room and that I should tell Wolfie Goldis to buy a radio and if we put a radio on loud enough, if there is a Dictaphone in the room, you cannot hear any of the conversation. 5048

Q. Wolfie Goldis was the man who was interested in the flour investigation, wasn't he? A. Wolfie Goldis was—

Q. One of the men? A. In 138, an official of the union.

Q. That is the flour. And so Buchalter was giving you information personally that 138 was being investigated, did he not? A. That is right.

Q. And you in your mind then knew that an investigation of 138 in the flour industry would undoubtedly involve your own personal self, did you not? A. I did not think of it at the time. 5049

Q. It did not occur to your mind at all? A. No, I was very secure in the magic powers of Mr. Buchalter.

Q. You thought— A. I was lulled into a sense of security.

Q. You thought he could do things with Thomas E. Dewey; yes or no? A. I did not say that.

Q. You tell us now when Buchalter was telling you that 138, the flour local, was being investi-

5050 gated, you did not have in your mind one single thought of the extortions that you participated and shared in; is that what you tell us?

Mr. Turkus: Objected to. He has answered about being lulled into security.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Didn't Buchalter tell you the very first time you went to Saratoga that it was because 5051 of the Dewey investigation? A. Positively not.

Q. Positively not? A. Positively not.

Q. No doubt about that? A. Absolutely no doubt.

Q. You testified in the flour case, did you not, as you said? A. I did.

Q. Were you asked this question, at page 1144: "Q. Now you claim that Buchalter told you to leave and go to Saratoga, is that right? A. That is right."

Did you make that answer to the question the way I read it? A. I guess so. You are 5052 reading it correctly, I hope.

Q. You can take my word for some things. A. Then don't ask me whether I remember it. If you read it, I will take it for granted it is correct.

Mr. Barshay: Will Mr. Turkus concede I am reading correctly?

Mr. Turkus: Let us not quibble over it. Of course you are.

Q. Were you asked this question: "Q. And I believe you testified that that was to avoid being

5053

questioned by Mr. Dewey or his staff? A. That is right." Was that question asked and that answer made by you in the flour case? A. If it is there, I answered it.

Mr. Barshay: Mr. Turkus—

Mr. Turkus: It is there. We will not quibble about it.

Q. Were you asked further, at page 1161: "Q. Well—"

5054

Mr. Turkus: What folio?

Mr. Barshay: 3483.

Mr. Turkus: All right.

Q. "Q. Well, at the time you say Lepke told you to go away, did you testify here that he told you to go away on account of the Dewey investigation? A. That is right." Was that question asked and was that answer made by you? A. That is right

Q. So the first place you went was to Saratoga? A. That is right.

5055

Q. You had a talk with Buchalter before you went to Saratoga? A. That is right.

Q. Where was that talk, Mr. Rubin? A. I think over at the Perfection Coat Front or Greenberg & Kupperman. Oh, you mean in 1936?

Q. Yes. A. I think it was at the Raleigh.

Q. He told you that you had to go away? A. That is right.

Q. That is the very first time? A. That is right.

Q. Give us again, please, your language, as best you know how, what Buchalter said to you at that time, the early part of October? A. He told me

5056 *Max Rubin—For People—Cross*

that things were too hot, that McCarthy was going around saying he is going to make one of the greatest pinches he ever made, he is going to collar Lepke and Gurrah. He told me that I would have to go away and I told him I did not know where to go and he said that Danny Fields is up in Saratoga Springs and I should get Paul Berger and Paul Berger would take me up there; before I could go there I should take Paul Berger to certain places.

5057 Q. Have you got the date in your mind? A. About the middle of October.

Q. Now you have told us everything Buchalter has said? A. I think so.

Q. Do you know the time of the day, if you can? A. No, I don't.

Q. Do you know the time of the day? A. No, I don't.

Q. Was it at night? Was it? A. No, I don't believe.

Q. Was anyone present? A. I don't remember.

Q. Was your memory fresher in 1940 with respect to this than it is now?

5058

Mr. Turkus: I object to that.

A. I don't know.

Mr. Turkus: It calls for a conclusion.

The Court: Calls for an opinion.

Mr. Barshay: His own opinion, of his own mind.

The Court: I think it is a matter of argument to the jury. (To witness) What do you think on the subject?

The Witness: I am getting older and sicker.

The Court: Does your memory improve with age?

The Witness: It certainly does not.

Q. In other words, the longer away from an event, the better you remember it?

Mr. Turkus: He did not say that.

Mr. Barshay: He said it gets better with 5060
age.

The Witness: I said it gets worse.

Mr. Barshay: I am sorry. I did not hear it.

Q. So we can reasonably assume that your memory was better in 1940 when you testified in the flour case than it is now? A. I try to recollect thinks as best I know how without any prompting from anybody.

Q. I did not suggest anything. A. That is the implication to me by the question.

Q. You testified with respect to flight as against 5061
the defendant Buchalter in the flour case before Judge Freschi in General Sessions in 1940, is that so? A. That is right.

Q. And the same place that you testified here that you fled from the Rosen case you testified there you fled from the Dewey investigation, isn't that so? A. No.

Q. Did you go to any other place? A. Any other place than I say there that I went? You mean cities where I went like Saratoga and so on?

Q. That is right. A. Those are the places.

Q. You said you left for Saratoga and New

Orleans, and the talk in Washington and Philadelphia? A. That is right.

Q. You remember all that? A. I do.

Q. There are not any additional places that you are testifying here that you went to that you did not testify there? A. No, sir.

Q. The District Attorney there asked you questions with respect to what Buchalter said to you before you went to Saratoga, did he not? A. I think he did.

5063 Q. And you answered? A. Yes.

Mr. Barshay: Page 961, flour record.

Q. You keep in mind, Mr. Rubin, what you said here a few seconds ago what Buchalter said to you, will you? A. Yes.

Q. Were you asked these questions: "Q. Now when did you go away? A. The middle of October, 1936." Did you make that answer to that question? A. I did.

Q. "Q. And did you have a conversation with defendant Buchalter about it? A. Yes." Did

5064 you make that answer to that question? A. Yes.

Q. "Q. How long before you went away? A. A week, two weeks.

"Q. What was said between you?

"Mr. Price: Objection on the ground it is not binding on my client.

"The Court: I will take it as against the defendant Buchalter.

"Q. What did he say? A. He told me I was getting too hot and I should go away." Did you

give that answer to that question? A. If it is there, I made it, yes.

Q. You can take my word I am reading correctly.

"Q. What did you say? A. I said I did not know where to go." Was that answer made by you to that question? A. It was.

Q. "Q. Did he say anything else?" and did you make this answer: "A. That having a job and working for a union I could not go away. He told me things were too hot. He seemed to 5066 have an idea—

"Mr. Kleinman: I object to this.

"Mr. Grumet: All right.

"Mr. Kleinman: I ask him not to volunteer anything.

"The Court: Yes.

"Q. —"

Mr. Turkus: That answer was interrupted.

Mr. Barshay: By whom? 5067

Mr. Turkus: By Mr. Kleinman the lawyer for Lepke.

Mr. Barshay: I cannot help it. I am reading correctly, am I not?

Mr. Turkus: Will your Honor take a look at the record? That answer was interrupted by Mr. Kleinman who then represented Buchalter or Lepke as he has been called here and there, so that that answer is not complete, the Court having sustained and admonished the witness not

5068 to pursue that any further, so how can that be the concern of this jury?

The Court: Go ahead with your question.

Mr. Barshay: Very clever argument, Mr. Turkus.

Mr. Turkus: This is no time for compliments. I have an objection.

Mr. Barshay: I don't mean that as a compliment either.

5069 Mr. Turkus: Then it is no time for insults either, if he means it that way.

Mr. Barshay: I don't insult you. I am reading correctly and that is all I care about.

The Court: Read the rest.

Q. "Q. Did he say anything about Dewey? A. He said the investigation was too hot, that things were getting too hot" Did you give that answer to that question as I read it?

5070 Mr. Turkus: The very next question.

Mr. Barshay: Mr. Turkus, you know very well you have a right to read that next question at the proper time and please don't do it again.

The Court: You read a series of questions. As long as you have seen fit to read a series of questions, complete the context.

Mr. Turkus: There is one more question and answer.

Mr. Barshay: I did not say I am not going to read it. I did not say I am, but I have a right, your Honor, to pursue

my cross-examination in the way I planned it and I won't deprive Mr. Turkus of any rights to read any other question.

The Court: When the Court rules, please continue the context.

Mr. Barshay: I take an exception.

The Court: As far as it relates to and qualifies and becomes naturally a part of this question.

Mr. Barshay: Will your Honor instruct the jury that by no innuendo is it conveyed to the jury that I am not going to read, or I did not intend to read, or I intended to exclude the next question from this Court and jury? 5072

The Court: Will you please proceed and finish it?

Mr. Barshay: Exception.

Q. "Q. Did he say anything at that time about Dewey? A. No." Were those questions asked of you and did you make those answers? A. That is right. 5073

Mr. Barshay: Then there was a discussion, Mr. Turkus, between Mr. Kleinman and the Court and I am proceeding to the bottom of the page, page 962.

Q. "Q. Where did you go? A. I went to Saratoga Springs." May I refresh your recollection on that point, Mr. Rubin. A. Will you repeat that?

Q. "Q. Where did you go? A. I went to Saratoga Springs." A. That is right.

5074 *Max Rubin—For People—Cross*

Q. Is that right? A. That is right.

Q. Were you asked these questions:

"Q. Did you have a conversation with Lepke about it before you went to Saratoga Springs? A. I did." A. That is right.

Q. And again were you asked:

"Q. What was said? A. He told me to go up." Then there is—

Mr. Turkus: I ask that you read that.

5075 Mr. Barshay: "He told me to go up" and there is an answer interrupted Mr. Kleinman interrupting, "I object to it.

"The Court: I shall receive this as to the defendant Lepke only.

"Mr. Kleinman: Exception.

A. He told me to go up there." Did you answer the questions the way I read them? A. I did.

Q. "Q. What else did he say about it? A. He said I would find Danny Fields up there, that Danny Fields was right below Saratoga Springs 5076 and I would find Danny up there. I would have company." Did you make that answer to that question? A. I did.

Q. And so you gave to the questioner then, the Assistant District Attorney from Mr. Dewey's office in charge of the prosecution, the full conversation that you had with Buchalter before you went to Saratoga; is that correct?

Mr. Turkus: I object to it. There is nothing inconsistent.

The Court: Do you remember whether you gave him every detail?

Mr. Barshay: I object to your Honor's question.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: Mr. Witness, do you remember whether you gave all details of that conversation?

The Witness: I did not give all the details of the conversation. I gave all that I could remember. I was concentrating on the case dealing with that particular court and that case and I gave him 5078
answers to cover that particular case and when you speak of the Dewey investigation, any particular place, to me wherever there was any question at all about Dewey it was part of his jurisdiction.

Q. You did not say a word there about McCarthy, did you?

Mr. Turkus: I object to that. That would have been bringing in a matter of 5079
another incident that might have made reversible error in New York.

Mr. Barshay: I object to Mr. Turkus' statement and I wish he would not do that, your Honor. It is most unfair when a man is cross-examined and is in the box to be pulled out of the hole in just that way.

Mr. Turkus: I am not pulling anyone out of the hole. I am addressing the Court.

The Court: Mr. Turkus' objection is correct. Sustained.

Mr. Barshay: I except, your Honor.

Q. You understood, did you not, when the District Attorney questioned you there, when he said, "What else was said?" You understood the meaning of that word, did you?

Mr. Turkus: I object to it because if the witness was to bring out anything—

Mr. Barshay: Can he make an objection, your Honor, without a speech?

5081 Mr. Turkus: I have urged the ground if he brought in some other incident.

The Court: If the Rosen case were brought out in the flour case, there would promptly have been a motion by Mr. Kleinman for a mistrial.

Mr. Barshay: Is that so, your Honor? Will your Honor please look at the record and see whether it was brought out or was not brought out in the Rosen case?

Mr. Turkus: By the District Attorney, if it were brought out.

5082 Mr. Barshay: In the flour case, your Honor.

The Court: By the District Attorney?

Mr. Barshay: By both sides.

The Court: All right, now proceed. Come to order and don't forget yourself.

Mr. Barshay: I take an exception to that.

The Court: Counselor says this (note on the record) in an angry resentful tone.

Mr. Barshay: I take an exception to that. I am neither angry nor resentful.

5083

I am merely asserting my rights, your Honor.

The Court: Will you please come to order and resume the cross-examination?

Q. You did testify with respect to the Rosen case in the flour case, too, did you not?

Mr. Turkus: I object unless it be brought out whether it was on direct examination or cross-examination?

5084

The Court: Sustained.

Q. Did you testify on both direct and cross with respect to the Rosen case?

The Court: Is there an objection to that?

Mr. Turkus: There is.

The Court: Sustained.

Q. As a matter of fact weren't you questioned by the Assistant District Attorney Mr. Grunnet—

5085

The Court: The Court instructs you to come to order and not ask any more questions on that line.

Mr. Barshay: I take an exception to that.

The Court: Now you are trying to provoke a quarrel with the Court.

Mr. Barshay: I do not want to quarrel with the Court but I am going to make my record.

The Court: You are going to make the

5086 record accounting to Hoyle as a lawyer should.

Mr. Barshay: That is what I am doing.

The Court: And stop interrupting the Court.

Mr. Barshay: I ask for permission to put a question at page 1175 asked by the Assistant District Attorney.

The Court: Put your questions, only don't violate the Court's instructions.

5087

Mr. Turkus: May it be noted that page 1175 is redirect by the District Attorney after cross-examination?

Mr. Barshay: That is right.

Mr. Turkus: That is an entirely—

Mr. Barshay: What difference does it make?

Mr. Turkus: The Judge will tell the jury.

The Court: Will you resume the trial of your case and stop playing to the gallery? If you were trying this case without a jury and without an audience, you would have your manners with you because you would not want to antagonize the Court and would have a decision on the facts.

5088

Mr. Barshay: I take an exception to that.

The Court: I am trying this case without a gavel.

Mr. Barshay: I don't need a gavel.

The Court: The Court at all times is

maintaining its poise. Now please proceed with the case.

Mr. Barshay: And let the record show that counsel is not losing its poise.

The Court: Because if the Court did you would probably get an exception on the record and get a motion for a mistrial and there might be something to it, as you know.

Mr. Barshay: Let the record show that counsel is absolutely calm and collected 5090
and is not baiting the Court and I move for the withdrawal of a juror based upon the Court's remarks and the declaration of a mistrial on the ground of prejudice.

The Court: Denied.

Mr. Barshay: Exception, sir.

Q. (Page 1212 of this record) When you got back from Saratoga, Mr. Rubin, you met the defendant Buchalter at the Hatfield Hotel. Is that correct? A. That is right.

Q. And here you said: "Q. Did he say why 5091
he wanted to send you away? A. Yes. He told me things were getting too hot." Is that correct? A. That is right.

Q. "Q. Where? A. That Brooklyn was not straightened out yet and that the Dewey investigation is closing in on everybody." You said that? A. That is right.

Q. Now in the flour case (at page 964, folio 2836) were you asked these questions: "Q. Did you have a conversation with Buchalter after you returned to New York?" and did you give this answer: "I did."? A. That is right.

5092 *Max Rubin—For People—Cross*

"Mr. Kleinman: Will you ask him, when, please, he returned?

"Q. When did you return? A. I would say around the end of October, something in the 20's." Did you give that answer to that question? A. That is right.

Q. "Q. You mean the latter part of October? A. Yes." Did you give the answer to that question? A. That is right.

5093 Q. "Q. Did you have a conversation with the defendant Buchalter? A. Yes.

"Q. Tell us what was said?" A. I will answer yes to those things.

Q. "Q. Did you have a conversation with the defendant Buchalter? A. Yes."? A. Yes.

Q. "Q. Tell us what was said?

"Mr. Price: I object to it.

"The Court: I shall receive this as against the defendant Buchalter only.

"Mr. Kleinman: Exception.

5094 A. I told him I could not stay up there with Danny.

"Mr. Kleinman: I move to strike out that as not having been a part of anything involved in this case even though it purports to be a conversation with Buchalter."

Do you remember those questions?

Mr. Turkus: You have to finish what the Court said.

Mr. Barshay: Please, one at a time. I have to make my record, sir.

Q. Did you give those answers to those questions? A. That is right.

Q. "The Court: Is that all the conversation that took place? I want to know this in order to rule.

"The Witness: That would be the gist of the conversation, yes.

"The Court: You just told him why you did not stay? 5096

"The Witness: I told him why. I gave him more details of the way that fellow was living up there and so he and I couldn't—" interruption by the Court

"I am going to allow that to stand.

"Mr. Kleinman: Exception."

Mr. Turkus: May it be indicated for our record now that the witness was interrupted in the conclusion of the answer at folio 2893 by the Court in that case?

Mr. Barshay: I read every word, Mr. Turkus, just the way it followed and just the way you said. 5097

Q. Were those questions asked? A. That is right.

Q. Were those answers made? A. That is right.

Q. Dewey was closing in on everybody, wasn't he? A. He was.

Q. And that everybody included you? A. I don't know if it included me.

Q. Again I say you were the very central

focus of the testimony against Buchalter in the flour case, were you not?

Mr. Turkus: I object to it.

A. I don't know that.

Mr. Turkus: I object to it.
The Court: Sustained.
Mr. Barshay: Exception.

5099 Q. Did you have an idea in your mind then— A. No District Attorney will tell you that so I don't know.

Q. Did you have an idea then in your mind from what Buchalter told you that you were involved?

Mr. Turkus: I object to it.
The Court: You mean in the flour investigation?
Mr. Barshay: I am only speaking of the flour investigation.
5100 The Court: When you went away to these various places, did you have that in mind?
The Witness: I had that in mind, yes, sir.

Q. In the meantime nobody was looking for you from Brooklyn, were they?

Mr. Turkus: Objected to.

Q. To your knowledge? A. That is right.
Q. Your wife was home? A. That is right.

5101

Q. You made visits to the union when you came back? A. I did.

Q. You used your own name? A. That is right.

Q. You had a telephone? A. That is right.

Q. Paid rent? A. That is right.

Q. Made no effort to disguise yourself? A. No.

Q. Nobody from Brooklyn was looking for you at all, police or District Attorney, were they? A. That is right.

5102

Q. Isn't that so? A. That is so.

Q. And you were fleeing from the Dewey investigation, as per the instructions of defendant Buchalter, were you not? A. No, I was fleeing from investigations, Dewey and otherwise. I was more afraid of the Brooklyn case than I was of the Dewey case.

Q. You committed no crime in Brooklyn personally, did you? A. I did not commit any crime.

Q. That is all. A. But wait a minute.

5103

The Court: Let him answer.

The Witness: I can tell your Honor if you think it is advisable for me to repeat it to the Court, I will do it.

The Court: If there is any element of danger, don't repeat it.

The Witness: I don't want to go through this again but I could tell you why.

Mr. Cuff: I object to the statements of the witness, if your Honor pleases, and move to strike them out.

5104

The Court: Better to shut it off right now.

Q. You knew, did you not, Paul Berger by name when you testified in the flour case? A. I did.

Q. You knew there was such a person? A. I did.

Q. Did you mention the name of Paul Berger in response to the Court's and Kleinman's questions with respect to Paul Berger once?

5105

Mr. Turkus: They were trying the flour case over in New York. They were not trying the Rosen case. As I pointed out, the District Attorney on direct is in one position. On redirect he may be in another, depending upon the cross.

The Court: Sustained.

Mr. Barshay: Exception.

Q. You said somebody made arrangements for you to go to Saratoga to see Danny Fields, did you not? A. I did.

5106

Q. You used the word "somebody"? A. That is right.

Q. You did not use the word "Paul Berger", did you? A. That is right.

Q. You used the word "somebody" on two occasions in that testimony, did you not?

Mr. Turkus: I object to it, it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Were you protecting Paul Berger? A. I was protecting nobody.

5107

Q. I am asking you. Was there a reason to leave out Paul Berger? A. Yes.

Q. Yes or no. A. There was a reason for leaving out every name. You will notice there is not a name there that I mentioned.

Mr. Barshay: I move to have the witness' answer stricken from the record. I asked a simple question, your Honor. I do not know how long this is going to continue.

5108

Mr. Turkus: The simple question was if he had a reason and he got a very simple answer, which was responsive to the simple question.

Mr. Barshay: And I was satisfied with the answer and the rest I move to strike out.

The Court: Strike out the latter part.

Q. Now Buchalter to your knowledge had never seen Maguire before? A. He had not.

Q. That is true, isn't it? A. That is right.

5109

Q. Buchalter had lawyers of his own in those days, did he not? A. He did.

Q. Maguire was not one of them? A. That is right.

Q. And to your own idea, from your own knowledge, Maguire was unknown to Buchalter? A. That is right.

Q. So much so that you had to introduce one to the other? A. That is right.

Q. You testified here that after the talk in Maguire's office you had a further talk in the hallway? A. That is right.

5110 Q. With the defendant Buchalter? A. That is right.

Q. Not in the presence or in the hearing of anyone but you and Buchalter? A. That is right.

Q. You testified here (page 1223 and 1224). "I did not want to tell you"—this is what Buchalter, you say, said to you in the hallway after you left Maguire—"I did not want to tell you this in front of Maguire but you have
5111 nothing to worry about. That case in Brooklyn is going to be thrown out of the window. McCarthy is not going to take care of it any more and Jacobs is going to come in and Jacobs is going to be pushed in something else in another building and the case will die". That is what you testified to here? A. That is right.

Q. (Page 967 of the flour case) Were you asked this question: "Did you and Buchalter leave Maguire's office together? A. Yes." Was that question asked? A. That is right.

Q. And that answer made. "Q. (Next page)
5112 Did you have any other talk with the defendant Buchalter about going away? A. Out in the hall trying to—" somebody interrupted—

Mr. Turkus: Trying to (dash).

Mr. Barshay: I said somebody interrupted him.

"Q. (Interrupting) What did he say?"

Mr. Barshay: Do you want me to read Mr. Kleinman's objection?

Mr. Turkus: Yes.

Mr. Barshay: "Mr. Kleinman: Now if your Honor pleases, may I enter my objection and formulate it a little more legalistically than we did before. I simply entered an objection upon the ground that the conversation at that time was incompetent, irrelevant, immaterial. I submit now that this conversation could in nowise be in furtherance of the original conspiracy and the case of extortion alleged in the indictment, that if anything 5114
this tends to prove the commission of another crime, therefore it is not relevant and should not come into this case. I ask that it be stricken from the record as highly prejudicial.

"The Court: I find this is competent testimony against defendant Buchalter. I overrule the objection.

"Mr. Kleinman: Exception.

"Please, Mr. Grumet, what is the question?"

"(The question was read)." 5115

All those things did take place as I read them? A. Yes.

Q. "Q. What did he say"—referring to Buchalter and you in the hallway when you left Maguire's office—and did you make this answer: "He told me I have nothing to worry about, everything would be O.K. and I should trust him.

"Q. Anything else that you can remember? A. That is all that." Did you make those answers to those questions? A. I did.

5116 *Max Rubin—For People—Cross*

Q. Was your memory fresher in 1940 when you testified—

Mr. Turkus: Objected to.

Q. —in the flour case than it is now?

Mr. Turkus: Repetitious and argumentative.

The Court: Sustained.

Mr. Barshay: Exception.

5117

Q. Had you gone in detail with respect to the Rosen case in conversations with Buchalter? A. Had I gone?

Mr. Turkus: I object to this. I do not know when he is talking about, whether it is this trial, in the D. A.'s office, in the Manhattan trial, or what. It is objectionable.

The Court: Sustained as indefinite.

5118 Q. You met Buchalter in Albert's office? A. I did.

Q. Many times? A. From the time I came back until I went away again, about the 30th of October, I met him once and sometimes twice a day in the office.

Q. Was it for convenience sake that Albert's office was chosen by Buchalter and you?

Mr. Turkus: Objected to. That is not the testimony.

Mr. Barshay: I am asking him.

Mr. Turkus: Buchalter has to answer that.

The Court: He cannot say what Buchalter's motive was.

Q. Was Buchalter being tried across the street from Albert's office on those days? A. Yes.

Q. Isn't that so? A. Yes.

Q. He was in court every single day? A. That is right.

Q. And after recess you would meet him in Albert's office? A. That is right. 5120

Q. Isn't that why Albert's office was chosen, according to what Buchalter said to you? A. No, it was the fact that he was being tried there may have been one of the reasons but the other reason was that—

Q. Please, was that one of the reasons? A. In my opinion it was one of the reasons.

Q. He was there on trial for a considerable number of days, was he not? A. I don't know for how long. I don't know if it was completed by the time I went away, that is the reason I say I do not know for how long. I left October 30th. 5121

Q. The Albert's office was at 2 Lafayette Street? A. That is right.

Q. Across the street? A. That is right.

Q. Did Buchalter tell you, "Meet me at Albert's office after the day session"? A. Meet me in Albert's office.

Q. You did not meet him during the trial days, did you? A. When did the trial start?

Q. You did not meet him when he was actually on trial, I am trying to show. It was after the

5122 court day? A. Or at noon recess he would come over there.

Q. You gave testimony here that pictures of yourself were held in your home by yourself or by your family? A. That is right.

Q. Buchalter did not ask you to destroy them, did he? A. No, he told me to give them to Willie Alberts.

Q. For safekeeping? A. That is right.

Q. With instructions for Albert to return
5123 them to you later? A. I never got them back. I wish I could.

Q. When you went away, Mr. Rubin, from the very day you went away to Saratoga, no one had been looking for you from the Brooklyn District Attorney's office, had they? A. As far as I know, no one was.

Q. While you were in Salt Lake City you testified here that you received not one word from your home; is that correct? A. That is right.

Q. There is no doubt about that either? A. No doubt at all.

5124 Q. You testified in the case of The People of The United States of America against Polakoff and Albert, did you not? A. I did.

Q. That was in the Federal Court, Southern District, January 9, 1940? A. That is right.

Q. Were you asked this question there and did you make this answer?

Mr. Barshay: Mr. Turkus, do you want to see whether I am reading correctly?

Mr. Turkus: I will take your word for it.

5125

Q. "Q. Do you know if any other County authorities of any county were looking for you at the time that you were in Salt Lake City?"

An objection by Mr. Halley:

"Objected to as assuming that somebody was looking for him.

"The Court: Where did you get your information about them looking for you?

"The Witness: I got word from my home that the New York County was looking for me."

5126

A. Not at that time. After I got back.

Q. Mr. Rubin, I asked you merely did you make this answer to the question as I read it.

Mr. Turkus: I object to it. It is not inconsistent with his testimony here.

The Court: Sustained. He did not say where he received word.

The Witness: I did not say I was in Salt Lake City when I got it.

5127

Mr. Barshay: Your Honor, this man testified here that while he was in Salt Lake City—

The Court: I know what he testified to. That answer is not inconsistent.

Mr. Barshay: I take an exception.

The Court: Simply misunderstood by you.

Mr. Barshay: May I read it again?

The Court: Yes. If I misunderstood I will be glad to correct the error.

Mr. Barshay: All right, sir.

"Q. Do you know if any other County authorities of any Counties were looking for you at the time you were in Salt Lake City?

"Mr. Halley: Objected to as assuming that somebody was looking for him.

"The Court: Where did you get your information about them looking for you?

"The Witness: I got word from my home that New York County was looking
5129 for me."

Your Honor, this refers to the fact that while he was in Salt Lake City he got word from his home.

The Court: I beg your pardon, the question, "Do you know?" is in praesenti and means, "Do you know as you sit here on the witness stand in the trial of the flour case?" The ruling of the Court stands.

Mr. Barshay: I take an exception to your Honor's interpretation, sir.

5130 The Court: It is no interpretation, but the plain meaning of the English language.

Q. Did you want to go away? A. I did not.

Q. Not at all? A. Not at all.

Q. Not in the slightest degree. A. Not in the slightest.

Q. You don't want to qualify that answer? A. What is that?

Q. You don't want to qualify that answer? A. I did not want to go away. I was scared terribly, very much frightened. I was so scared I almost died of fright and when the suggestion

to go away was made to me, I was happy to take it, but I did not want to go away.

Q. In no way did you want to go away?

Mr. Turkus: I object to it.

Mr. Barshay: That is what I am trying to find out.

Mr. Turkus: The answer speaks for itself, what his feelings were at that time.

Q. In that same case, did you testify in United States of American against Polakoff and Albert? 5132

Were you asked this question: "Q You were anxious to get away at the time? A. In a way, yes."

A. In a way, sure. That is the reason I kept on putting in "in a way", in a way that if I did not get away. Of course I had to answer it that way, "In a way, yes," and you will notice there are a few questions I answered that way, because I was warned, "Don't make any statement that will cause mistrials and mistrials", and I did not want to go over these things over and over again, so I kept on saying, 5133 "In a way" without completing my answer.

Q. Before I read the question and answer to you, Mr. Rubin, I asked you to qualify it in every way you knew how. A. I am no magician and I have not got a crystal ball.

Q. Were you asked that question and did you make that answer? A. I did. You explain to me what "in a way" means.

The Court: Counsel, I call your attention to the fact you asked him if he wanted to go away. Now you confound him by a

5134

question as to whether he was anxious to go away. The jury knows what that means. A man can go away reluctantly and leave his family reluctantly and be depressed about it and yet be anxious to get away for another reason, although not wanting to. The jury can figure that out.

Mr. Barshay: May I object to the Court's remarks? I take exception to your Honor's remarks.

5135

Q. Were you asked the following question: "Q. You wanted to be away from this Grand Jury investigation, didn't you? A. In a way, yes." Did you say that? A. Yes, I answered several questions in that way: "In a way, yes."

The Court: Was it for pleasure or was it from a sense of fear?

The Witness: Absolutely from a sense of fear.

Mr Barshay: I object to it and I ask again for the withdrawal of a juror and the declaration of a mistrial.

5136

The Court: Objection overruled. Motion denied.

Mr. Barshay: Exception.

Q. You testified here—

The Court: I mentioned "fear". For the record, the Court meant fear of being involved in something in the way of the investigations he has testified to. There is no implication in the Court's question

that justifies any insinuation of fear of bodily injury.

Mr. Barshay: Will your Honor give me an exception?

The Court: I was wondering why you took your objection and exception. I can see it now. That is why I am trying to straighten out the record.

Q. You remember when Buchalter said to you to go to New Orleans? A. He did—or I did. 5138

Q. He told you that he would put you to work there with somebody in the slot machine business, did he not? A. That is right.

Q. You knew the name of that somebody when you testified in the flour case? A. I did.

Q. You did not mention that somebody's name in the flour case, did you? A. I did not.

Q. You took pains to mention it in this case, did you?

Mr. Turkus: I object to it.

The Court: Sustained as to form. 5139

Mr. Barshay: Exception.

Q. Did you mention it in this case? A. I did.

Q. In this case you mentioned it was Frank Costello, did you not? A. That is right.

Q. In the flour case you merely mentioned someone? A. That is right.

Q. Here you said that Buchalter said to you, "You will have money from New York, money from me, and money from there, and you will be O.K.," is that correct? A. That is right.

Q. Did you say that here? A. That is right

5140 *Max Rubin—For People—Cross*

Q. On the same subject, were you asked this question in the flour case (page 973):

"Q. Did you have a conversation with him?

"Mr. Grumet: I want the whole story, the whole story.

"A. Yes, he wanted me to go to New Orleans, keep myself occupied, that is going to be the thing for me to keep away, there was a friend
5141 out there running slot machines." Was that the answer you made to the question?

Mr. Turkus: Just a minute. It has not been read what happened at that point, that Mr. Kleinman objected. I submit, your Honor, this is—

Mr. Barshay: Do you want me to read objections?

Mr. Turkus: Yes, certainly. Objections lots of times end answers by witnesses.

Mr. Barshay: I am now reading Mr.
5142 Kleinman's objection to that, Judge, as your Honor ruled.

Mr. Turkus: Your Honor, there was a question. The question was read and an answer was given. The context of the record shows clearly that at that point in the answer, Lepke's then lawyer got up and made an objection that it could in no wise be in furtherance of what we have in the indictment, referring to that indictment, and then there was discussion between the District Attorney, the defense lawyer, the Court and the witness. That should be told to this jury so they will

understand when that answer was terminated and under what circumstances.

The Court: I thought, Mr. Barshay, you said you were going to read it?

Mr. Barshay: The Court overruled Mr. Kleinman's objection. If you want me to read it, I will read it.

The Court: I thought you said you were going to read it. I did not rule at all, that I know of.

Mr. Barshay: I am going to read it, 5144
knowing very well if I do not, Mr. Turkus has a right to read anything.

(Mr. Barshay reads as follows:)

"Mr. Kleinman: I submit, your Honor, this answer, what I tried to anticipate, this conversation could in nowise be in furtherance of what we have in the indictment.

"Mr. Grumet: It certainly is, because he said something about keeping him occupied, and it has a direct bearing on it

"The Court: I do not know whether 5145
Mr. Kleinman understands. I do not understand whether this is the witness's own conclusion or whether it is something the defendant Buchalter said.

"The Witness: He said to me.

"The Court: I will overrule the objection.

"Mr. Kleinman: Exception.

"Q. What did he say to you?

"Mr. Price: Exception.

5146

"A. He said to me he has a friend out there who is running the slot machines.

"Q. Where? A. In New Orleans, and that I should break myself in to fix the machines and keep myself occupied.

"Q. Yes, go on. A. And I went to New Orleans." Those questions were asked? A. That is right.

Q. Those statements were made, and those objections, to your knowledge, were made by Mr.
5147 Kleinman, and the Court acted as I read? A. That is right.

Q. You did not mention the name of Frank Costello there; yes or no? A. I did not.

Q. You did not say a single word in the flour case, "You will have money from New York, money from me, and money from there, and you will be O.K.," did you? A. I did not.

Q. You testified here that Buchalter told you to tell Berger in some way where you are stopping and under what name? A. That is right.

Q. Buchalter was sending you to a friend of
5148 his, wasn't he? A. That is right.

Q. Buchalter gave you the name and the address of that friend? A. No.

Q. Well, he told you where you could find him? A. He told me after— No, he did not—he told me after I got to a hotel I should let Paul Berger know and then he would send—he would get in touch with these people.

Q. You told us here that he told you to go to a friend in New Orleans by the name of Costello?

Mr. Turkus: That is objectionable.

That is not the testimony in the record. The testimony is precisely as Mr. Rubin has just stated it.

The Court: Sustained.

Mr. Barshay: Exception, sir.

Q. You testified that when you came back from New Orleans you went to your home and you sent for Paul Berger? A. I telephoned him that I was home.

Q. Whatever way you did it? A. I did not 5150
send fo. him.

Q. In the flour case, when you gave testimony, you knew Paul Berger's name, did you not? A. Very well.

Q. You knew he was around? A. That is right.

Q. You knew he was out on bail from Dewey? A. That is right.

Q. You knew he was available? A. That is right.

Q. At page 975 of the flour case, were you asked these questions: "Q. How soon afte. your 5151
return did you see the defendant Buchalter? A. The same day." Were you asked that question and did you give that answer? A. That is right.

Q. "Q. Where? A. A fellow came to my house." Did you make that answer to that question? A. That is right.

Mr. Turkus: Then Mr. Kleinman objected.

Mr. Barshay: All right, I will read the objection.

5152

Mr. Turkus: You read it so that this jury gets the whole context.

Mr. Barshay: Am I responsible for the form of Kleinman's objection, Mr. Turkus?

Mr. Turkus: No, but you have got to take the answer with it.

Mr. Barshay: It was overruled.

Mr. Turkus: "A fellow came up to my house—"

"Mr. Kleinman: The question is where."

5153

The Court: Was he asked any name?

Mr. Turkus: No, he was not.

The Court: Then what does it amount to?

Mr. Turkus: That is what I do not understand.

Mr. Barshay: You will understand if you will be patient, not interrupt me, Mr. Turkus. I have a right to read, your Honor, the questions and answers as I have them without the objections, but if the Court wants me to read the objections which were overruled, I will do so.

5154

The Court: The jury is entitled to a fair presentation of every element there. If a little piece of it is put in now which creates an impression in the minds of the jury, what good is it when maybe Monday the District Attorney comes back and asks the rest of it? The jury by that time cannot piece it together.

Mr. Barshay: I take objection to the Court's observation.

The Court: The time for the jury to get it is right now.

Mr. Barshay: I hope the Court does not intend to convey to the jury the impression that by my not reading Mr. Kleinman's objection I intended to change the context of any answer.

Mr. Turkus: No.

The Court: I do not know what your purpose is.

Mr. Barshay: It take an exception to that, sir.

The Court: I am not committing myself one way or the other on that point. 5156

Q. "Q. How soon after your return did you see the defendant Buchalter? A. The same day.

"Q. Where? A. A fellow came up to my house—" Interrupting.

Mr. Turkus: Will you put the dash in?

Mr. Barshay: Wait a minute, please. I am doing it just that way.

Mr. Turkus: You are not putting the dash in.

Mr. Barshay: I said, "Interrupting". 5157

Q. "Q. Where? A. A fellow came up to my house" Dash.

"Mr. Kleinman: The question is where.

"Q. Where did you see him? A. On Amsterdam Avenue.

Q. Did you say somebody came to your house? A. Somebody came to my house."

Now, I ask you, you knew Paul Berger's name at that time? A. I did.

5158 Q. You knew he was around and available? A. That is right.

Q. You did not mention the name of Paul Berger in the flour case, did you? A. I did not.

Q. That is all I wanted. You say Paul Berger was an intimate of this defendant Buchalter then? A. He was.

Q. He was entrusted with messages from him to you? A. That is right.

5159 Q. He was entrusted with your whereabouts? A. That is right.

Q. But when Buchalter and you spoke, Berger was in the automobile, and you and Buchalter spoke under an awning? A. That is right.

Q. In the absence of Berger? A. That is right.

Q. Did you ask Berger to stay away? A. No.

Q. Did Buchalter ask Berger to stay away? A. No.

Q. Did anybody tell Berger to stay away? A. I don't know.

5160 Q. You all three rode in the car? A. We did.

Q. You wanted to speak to Buchalter all alone, did you? A. I did not want to speak to Buchalter all alone. I got a summons to meet him, and when the king directs, you go.

Mr. Barshay: I move to strike out the answer, your Honor.

The Court: Leave out, "the king". You mean from Buchalter?

The Witness: Of course.

The Court: Berger was the messenger?

The Witness: He told me that Lepke wants to see me and I should go down with him, and I got dressed and I went down.

Q. Berger was not permitted to partake in the conversation?

Mr. Turkus: That is objectionable?
The Court: Sustained.
Mr. Barshay: Exception. 5162

Q. While you were away to these various places, exclusive of the time that you mentioned a man from Michigan, you were all alone? A. Except when I was in Teitelbaum's store. I was with this here Sam Teitelbaum, but when I was in New Orleans, and in Atlantic City I was with Danny Fields.

Q. Mr. Rubin, will you tell us, you were all alone when you went to Salt Lake City, on the way out? A. Yes.

Q. You were all alone when you came back from Salt Lake City? A. Yes 5163

Q. You were all alone when you went to New Orleans? A. Yes.

Q. You were all alone when you came back from there? A. That is right.

Q. You knew then that Dewey was still offering protection to witnesses, did you not, who testified for him: did you? A. I did not know that. I was away. Whenever I came back, I do not know if I remember him saying it, but I suppose that is what he said.

The Court: Never mind what you suppose. You were only asked as to whether or not you knew it at the time.

Q. You did not go to Mr. Dewey's office, did you? A. When?

Q. Between those trips when you came back; did you? A. No, I did not.

Q. Buchalter did not send a man to guard you, did he? A. He did not.

5165 Q. In Washington you met Buchalter in a hotel, is that correct? A. That is right.

Q. You took him in the bath room, did you not, you said here? A. That is right.

Q. And you had a talk with him? A. That is right.

Q. In the flour case you were asked (pages 978 and 979):

"Q. Did you have a talk with him?"

I am now speaking with respect to the defendant Buchalter in Washington (folios 2933 and 2934). The first question, to show continuity:

5166 "Q. Before you returned to New York did you see the defendant Buchalter? A. I did.

"Q. Where? A. In Washington.

"Q. The District of Columbia? A. That is right.

"Q. And where did you see him there? A. In a hotel.

"Q. Did you have a talk with him? A. I did.

"Q. How long were you in Washington, by the way? A. Just overnight, that's all.

"Q. What conversation did you have with the defendant Buchalter in Washington?

"Mr. Price: Objected to.

"Mr. Kleinman: Before that, may I have a time fixed?

"Q. When was that? A. I would say approximately, I am not so sure, but I will make you a fair guess, March 9th."

Were you asked those questions and did you make those answers as I read them? A. I did.

Q. "Q. How long before you came back to New York? A. The next day. 5168

"Q. You returned to New York the next day? A. That is right." A. That is right.

Q. Were you asked this question: "Q. What conversation did you have with the defendant Buchalter in Washington?

"Mr. Price: Objected to.

"Mr. Kleinman: Same objection for Buchalter.

"The Court: Mr. District Attorney, do you mind coming up here for a moment and telling me what the purpose of this conversation is? 5169

"(Discussion at the bench between the Court and Mr. Gramet not within the hearing of the jury.)

"The Court: What is that last question.

"(Record repeated.)

"The Court: Objection overruled. Received only as to Buchalter.

"Mr. Price: Exception.

"Mr. Kleinman: Exception as to Buchalter.

"A. He told me not to come to New York."

5170 *Max Rubin—For People—Cross*

Were those question asked— Wait a minute, Mr. Turkus, I am not finished. —and did you make those answers? A. I did.

Q. "Q. Did he say anything else? A. I told him I can't stay away, I have been away seven weeks now, I have not seen my family, all along these lines, and the other fellow that was with me said—

"The Court: Never mind that.

5171 "Mr. Grumet: Never mind what he said, unless your Honor feels it is admissible. Never mind what the other fellow said.

"Q. What did you say to him? A. I told him I was going, that he has nothing to worry about me. Whatever would transpire with me would not affect him at all, and then he said to me, 'Remember, if you get in any trouble, don't come to me.' I asked him what he meant. He said, 'Well, if you need a lawyer for bail bond, something like that, don't expect me to foot any
5172 bills.'" Those are the answers you made in the flour case, as I read them, did you not? A. I did.

Q. Did not say one word about paying your income tax, did you? A. Did he say?

Q. You did not? A. I may have.

Q. I read them. A. I did not say it there perhaps.

Q. You did not say one word about taking Buchalter in any bathroom, did you? A. I did take him in. I did not say it there.

Q. That is all I am asking you, Mr. Rubin, won't you please cooperate to some extent? A. O. K., I am very anxious to.

Q. Now, you spoke about the penalty that you were willing to pay: is that correct? A. That is right.

Q. (Page 1261) You said that you were willing to pay substantially any penalty of any kind, is that correct? A. That is right.

Q. Again I say— A. Did I say from any penalty of any kind?

Q. Yes. Do you want to read it, Mr. Rubin? A. I just want to know.

5174

Mr. Barshay: Am I reading correctly, Mr. Turkus?

Mr. Turkus: I have not seen it yet.

Mr. Barshay: (Page 1261, beginning at the bottom of 1260) "Q. What was said in the bathroom? A. I told him he had nothing to worry about, I was coming back to New York, if I got into trouble he had nothing to worry about; if I had to pay any penalty of any kind I was willing to pay it; but as far as he was concerned he had nothing to worry about."

5175

Q. The only crimes that you say you participated in were in the Borough of Manhattan, City of New York; isn't that so?

Mr. Turkus: I object to it. That is for the jury to determine on the basis of what he stated; further, that it is repetitious.

The Court: I am trying to figure out what this means. Let it in.

Q. Will you answer the question? A. I had in

5176 *Max Rubin—For People—Cross*

mind to pay whatever penalty for any crime that I thought I had committed.

Q. That was in the Borough of Manhattan, City of New York, wasn't it? A. I had in mind the Borough of Manhattan and City of New York.

Q. Because there was no penalty that you could pay for anything that you did in Brooklyn; is that so? A. I felt that way.

Q. That is true? A. I felt that way.

Q. So that you were fleeing from the places
5177 where you could be punished, and only from those places, isn't that so, at the direction of the defendant Buchalter? A. I did not know from where I could be punished. I did not know that.

Q. Well, you knew as a man of above average intelligence that you could not be punished for something you did not do? A. I don't know that.

Q. You could not be punished for anything you did in Brooklyn, could you? A. I don't know that. I don't know.

Q. I took your own word, sir, that you did absolutely nothing wrong in the Borough of Brooklyn.
5178 A. That goes into a long question of District Attorneys, their honesty, and a million other things. I do not want to go into that question. That can mean a whole lot.

Q. You were afraid of being framed by some District Attorney? A. Positively, positively.

Mr. Barshay: Judge, may we recess now? I have about four more pages, which will require considerable time.

The Court: How much time do you estimate?

Mr. Barshay: From an hour to two hours, your Honor.

The Court: May I suggest this afternoon that inasmuch as it is raining and the jury will not be able to take a walk and will be irked by being indoors so much, you keep occupied during the next twenty-three minutes and recess at half past four?

Mr. Cuff: Judge, relying upon your statement, I made an important appointment for 4:30.

The Court: If it is not agreeable, the Court has to go along with the arrange- 5180
ment promised counsel.

Mr. Rosenthal: I have an appointment with Judge Conway of the Court of Appeals at 4:30.

The Court: Members of the jury, please do not discuss the case; let no one talk to you about it; keep your minds open, and remember all of the other admonitions given heretofore.

First let the witness go out.

Recess to ten o'clock tomorrow morning, but everybody remain seated.

5181

Now the jury may go out the other door.

The defendants are remanded.

(Whereupon an adjournment was taken to November 7, 1941, at 10:00 A. M.)

5182 *Max Rubin—For People—Cross*

Brooklyn, N. Y., November 7, 1941.

TRIAL RESUMED

MAX RUBIN, a witness in behalf of The People, resumed the stand and testified further as follows:

Cross examination by Mr. Barshay (continued):

5183 Q. Yesterday I asked you whether or not you were on the payroll of the Garfield. I want to withdraw that.

Were you getting from Mr. Cooper, personally, $50 a month? A. No, sir.

Q. Or from anybody connected with the Garfield, personally? A. No, sir.

Q. At any time did you get any compensation from the Garfield in any way whatever? A. He bought a meal.

Q. I did not mean that. A. No, sir.

Q. Now, on page 1242 of this case, you testified substantially to a conversation you had with
5184 the defendant Buchalter after you came back from Salt Lake City. Do you recall that? A. Yes, sir.

Q. Substantially, at page 1242, you said, among other things, that the defendant Buchalter said to you, "Things are very hot. Brooklyn is not straightened out. Investigations are getting very serious." Do you recall that? A. Yes, sir.

Q. At the bottom of page 971, Mr. Turkus,—in the Four case, were you asked this question: "Q. Now, you testified that you returned from Salt Lake City? A. That is right." A. Yes, sir.

Q. At page 973: "Q. How long did you remain in New York then? A. Until the middle of December." Do you remember that? A. About that time.

Q. Did you answer the question as I read it? A. Yes, sir.

Q. "Q. Did you go away again? A. Yes, I went away again." A. Yes, sir.

Q. "Q. Did you have a talk with Buchalter about it? A. I did." A. Yes, sir.

Q. "Q. What was said? 5186

"Mr. Price: Same objection, on the same ground.

"Mr. Kleinman: May we have the time fixed?

"The Court: Objection is overruled with respect to Buchalter; I will take it only as to Buchalter and not as against the other defendants. Now, the time.

"The Witness: About the middle of December, your Honor, 1936, when I came back from Salt Lake City and I met him. He asked me, 'Why did you come back? Why do you always come back to New York? Have you got something in the back of your head?' And I said, 'No, Louis, why should I have anything in the back of my head? I have always been a friend of yours; you have always been a friend of mine; why should I have anything in the back of my head?' And that continued a little while. I believe he went in and had something to eat and he told me to stay in an East Side hotel, and see what he could do for me." 5187

5188 *Max Rubin—For People—Cross*

Did you make those answers to those questions, as I read them? A. Yes, sir, I did.

Q. At page 1261, you testified in this case, substantially that the defendant said to you, "If you get in any trouble in New York, don't come to me." You said that? A. Yes, sir.

Q. Now, on other occasions, in consultations he had with you, you specifically used the word "Brooklyn," didn't you? A. Here?

5189 Mr. Tarkus: I object unless the time is fixed.

The Court: In connection with which return?

Mr. Barshay: With respect to all returns he made when he had a talk with Buchalter and Buchalter said, "Brooklyn is not straightened out," and that "Brooklyn is very hot." That is the only conversation I have reference to.

The Court: "Brooklyn is still too hot?"

Mr. Barshay: Yes, in all conversations he specifically used the word "Brooklyn," whereas in this conversation he used the words "in New York."

5190

The Witness: That is right. You are speaking about the one in Washington?

The Court: You are speaking about a different matter than the return from Salt Lake City?

Mr. Barshay: This conversation he is alleged to have had in Washington.

The Witness: In the hotel, yes, sir.

The Court: Is that where he said, "If you get in any trouble in New York, such

as any lawyer and bail bond, don't come to me"?

Mr. Barshay: That is correct.

The Witness: That is right.

By Mr. Barshay:

Q. You stopped at the Bossert Hotel? A. Yes.

Q. That is very close to the District Attorney's office, you know that? A. I did not know it at that time. 5192

Q. You know it now? A. Yes, sir.

Q. You stopped on Flatbush Avenue? A. That is right.

Q. That is not very far from Police Headquarters? A. I did not know it then.

Q. Do you know it now? A. No, sir.

Q. Flatbush, near where? A. 532 is the number.

Q. Do you know where near? A. Clinton Place—

Mr. Turkus: Lincoln Place. 5193

The Witness: Lincoln Place, yes, sir.

Q. That is not far from Washington Avenue and the Parkway, where the Homicide Bureau sits? A. I don't know. I am not too well acquainted in Brooklyn.

Q. Is it near Ebbets Field? A. Yes, sir, I believe it is, but I was not there.

Q. When you finally decided to surrender, you went to Maguire's office, and he took you to Dewey's office? A. No, sir, he went himself.

Q. He made arrangements for you? A. Yes, sir.

Q. You knew he was going to Dewey's office? A. I sent him there.

Q. You did not send him to Brooklyn, did you? A. No, sir.

Q. You never went to Brooklyn? A. No, sir.

Q. You came back from Washington sometime in March of 1937? A. The early part.

Q. The last time you saw the defendant Bu-
5195 chalter was in Washington? A. That is right.

Q. You were in New York until Mr. Maguire made arrangements for you to go to the Dewey office? A. Yes, sir.

Q. Sometime in the latter part of September, 1937? A. I think it was in August.

Q. Between March and September you personally had never seen or spoken to the defendant Buchalter? A. No, sir.

Q. But before that time, while— Question withdrawn.

Q. You know that Buchalter himself has never
5196 left the City of New York during the latter part of 1935, the year of 1936, and the early part of 1937, did you know that? A. I think Paul Berger told me he had left.

Q. From the time you were in New York, of course, you say you saw him? A. Saw who? Berger?

Q. Yes. A. You are talking after March 5th, after the Washington trip?

Q. Before the Washington trip. A. Whenever I saw him, whenever I came back.

Q. To your knowledge he was in the City of New York all the time until March of 1937? A. Yes, sir.

Mr. Turkus: May we have that clear? I object; all that knowledge is hearsay as to what somebody said to him.

By the Court:

Q. You mean so far as you know; is that what you mean? A. Yes, sir, as far as I know.

Q. You don't know where he was when you were away? A. No, sir, Mr. Barshay said only those times when I came in did I find Mr. 5198
Buchalter here each time I came in, and I said yes.

By Mr. Barshay:

Q. You remember testifying in the flour case that Buchalter said he was staying in New York? A. If it is there I said it.

Q. You came home on the occasions that you did, and you did not speak to your wife? A. No, sir, not often.

Q. Not often, did you say—

5199

Mr. Turkus: I object unless the time is fixed, what occasion.

Q. Every occasion, Rubin, you came home, did you speak to your wife? Do you recall that? A. I spoke to her a few times.

Q. In those few times did she ever tell you that the Brooklyn District Attorney's office or the Police Department of the City of New York were looking for you with respect to a visit to the Kings County authorities? A. Never.

Q. So you can safely say now that, to your

5200 *Max Rubin—For People—Cross*

own personal knowledge, no one, either at the office, at your home, or in the places of business you customarily visited, was there anybody looking for you from the Brooklyn District Attorney's office?

Mr. Turkus: He cannot have knowledge; I object; all he can say is whether or not he heard it.

5201 Q. Did anyone ever tell you that? A. No, sir.

Q. It is a fact, isn't it, that there was a visitor at your home from Dewey's office? A. That is right, but I was only told of it.

Q. Your wife told you that? A. Yes, sir.

By the Court:

Q. From where? A. Dewey's office.

Q. Is that before or after you were arrested? A. Before I surrendered.

Q. Was that before you went to see Mr. Maguire? A. Much before that.

5202

By Mr. Barshay:

Q. That is to say, while you were in transit? A. While I was away.

Q. When you came to the office of the union for the $20 differential you testified about, did anyone tell you there that anybody from the Brooklyn District Attorney's office or the Police Department had left word for you? A. Never.

Q. Did you communicate with a brother-in-law of yours while you were away? A. I did not.

Q. Did he communicate with you? A. No, sir.

Q. May I know your brother-in-law's name? A. Jacob Kaminez.

Q. What business is he in? A. He is an office man, clerk in the Greater New York Expressmen's Association.

Q. That is an association you visited from time to time? A. Yes, sir.

Q. The same association you had been testifying about? A. Yes, sir, that is right.

Q. You knew Inspector McDermott before you 5204
spoke to him in 1940, in March? A. 1932, I believe.

Q. You knew him, whether you saw him or not, you knew who he was? A. Yes, sir.

Q. He knew you, to your knowledge? He did not.

Q. You mean that you knew him by reputation? A. No, sir.

Q. You knew him by speaking to him in some fashion? A. Yes, sir.

Q. Your testimony in the flour case was before Inspector McDermott spoke to you in 1940? A. 5205
That is right.

Q. Your testimony in the flour case had already been completed when Inspector McDermott spoke to you? A. Yes, sir, about a month later.

Q. He took you to the District Attorney's office, or I will say, in the Bossert Hotel? A. About a week later.

Mr. Barshay: May we have the date of the defendant's indictment, your Honor?

The Court: May 28, 1940.

Mr. Barshay: Is it conceded, instead of reading it into evidence?

5206 *Max Rubin—For People—Cross*

Mr. Turkus: When the Court makes a statement on the record, that is enough.

Mr. Barshay: I will read it into evidence. Now, we have it as May 28, 1940.

Q. You did not testify in the Grand Jury that found that indictment, did you? A. I went to the Grand Jury, I said, about a month ago, or maybe less.

Q. While the jury was being chosen in this
5207 case, you testified before the Grand Jury? A. No, sir, before that.

Q. We started to pick this jury September 15, 1941; can you recall when you testified before the Grand Jury? A. I think it was during that time—I think so, but you can ask them and get the exact date.

Mr. Barshay: If the District Attorney will accommodate me I can have the exact date.

Mr. Turkus: September 25, 1941, is the
5208 exact date.

The Court: That is over a year after this indictment.

Mr. Barshay: Your Honor, may we have for the record the number of times this case was upon the trial calendar, and then adjourned from time to time to September 15th?

The Court: I will not take time with that now. You may put it on the record later. The clerk's minutes show everything that is required in that respect.

Mr. Barshay: I wanted to get the dates

5209

before this jury, but if you will allow me to do it later, that will be all right.

The Court: For the information of the jury here?

Mr. Barshay: I did not say that, but that I may have something to say about the order of events. Unless I lay the foundation, I will not be able to make comments about it.

The Court: The procedural record is the Clerk's minutes. The Court should not be expected to convey that information. The Clerk's minutes are open to counsel for inspection.

5210

Q. Were you subpoenaed as a witness or asked to be a witness in this court between May 9, 1941, and May 16, 1941? A. I received no subpoena of any kind.

Q. Did you receive a request, or did you receive instructions to be here? A. I simply got a call from Inspector McDermott to meet Judge O'Dwyer at the Bossert.

5211

Q. I am not talking about that. I am talking about before the testimony in the Grand Jury, a year later. A. I got no subpoena.

Q. Were you in court May 9, 1941? A. No.

Q. Were you asked to come to court right after that? A. No.

Q. On May 16, 1941, were you asked to come? A. In court?

Q. Yes. A. No, sir, only on that particular day.

Q. June 15, 1941? A. No, sir.

5212 *Max Rubin—For People—Cross*

Q. Were you asked to come to court that day? A. No, sir.

The Court: May I ask what the purpose of this is?

Mr. Turkus: There was no case on that day.

The Court: It makes no difference whether there was or not.

Mr. Barshay: I know that too.

5213 The Court: And you will get the jury speculating as to what it is all about, when it is none of their affair.

Mr. Barshay: I am not using it for any other purpose than the one I said. I must lay a foundation if I am going to talk about it in summation.

The Court: The Court is not going to allow you to discuss matters outside of the case, in the presence of the jury.

Mr. Barshay: I don't intend to do it. There is only one more date. If you

5214 say I shall stop, I will stop.

The Court: I don't know what it has to do with the case, except to confuse.

Mr. Barshay: I except.

Q. When did you see Paul Berger last? A. In the Grand Jury, in the Bronx.

Q. Just give me the date. A. I don't know the date.

Q. Well, about. A. About three months ago, I imagine, something like that.

Q. Did you talk to Paul Berger about this case? A. They will not let you do that, no, sir

Q. Just answer yes or no. A. No, sir.

Q. Is that the very last time you saw Paul Berger? A. The very, very last.

Q. When did you see Paul Berger before that three-months period? A. When he was picked up and brought to the District Attorney's office.

Q. When Berger was picked up? A. Yes, sir. I was told to be there and I came there.

Q. Do you know how long ago that was? A. It was before that Bronx meeting.

Q. In the summer of 1941? A. I think it was.

Q. Did you speak to Berger? A. I just went 5216
in and said one thing only.

Q. Did you speak to him? A. I just made one statement.

Q. Did you speak to him? A. Yes, sir, I made a statement, that is, a statement to him.

Q. When you made a statement in the man's presence and spoke to him, did you speak directly to him? A. Yes, sir.

Q. And did he answer? A. He did not.

Q. How long did you and he face each other then? A. Just as long as it took to make that one statement. 5217

Q. Was it a long one? A. About 15 words.

Q. When did you see Berger before that? A. At his place of business, I believe.

Q. How long before the meeting you just described? A. I think in 1938.

Q. Then between 1938 to the time you described in the District Attorney's office, sometime this summer, you had not seen him or spoken to him? A. I don't think so; I cannot remember; that last meeting—

Q. Have you told us all the times you have seen and spoken to Berger? A. I think so.

Q. When did you see Allie Tannenbaum last? A. Also at this Bronx meeting.

Q. That was about three months ago? A. Yes, sir.

Q. You talked to him about the case? A. No, sir, he was not in the room.

Q. Did you see him other than that? A. Yes, sir.

Q. Where? A. I stopped at the Half Moon Hotel during the summer under custody, and
5219 I used to see him from the window or passing in the hall. His wife was on the same floor I was on.

Q. How long did you stay at the hotel? A. During the summer.

Q. Not at your own expense? A. No, sir.

Q. During that time how many times did you see Tannenbaum? A. I saw him a half a dozen times.

Q. Did you speak to him? A. Just "hello" and passed by.

Q. That is all? A. That is all.

5220 Q. Did you speak to his wife? A. I did not know his wife.

Q. You were not a material witness, you were not held as a material witness at the Half Moon Hotel, were you?

Mr. Turkus: I object to the form of the question.

Mr. Barshay: Question withdrawn.

Mr. Turkus: He will state his status.

Q. Were you there pursuant to an order of any court, to your knowledge? A. No, sir.

5221

Q. Before that, you lived at your home? A. I did.

Q. All of the time? A. All the time.

Q. When did you leave the hotel and go back to your home? A. In September.

Q. You have been at your home ever since? A. Yes, sir.

Q. That is September, 1941? A. Yes, sir.

Q. When did you see Mrs. Rosen last? A. I saw her at the hotel but I never spoke to her.

5222

Q. Did she, to your knowledge, live at the hotel?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant; that was discussed with Mrs. Rosen when she was on the stand.

Mr. Barshay: May we have an objection without a speech, your Honor?

The Court: Objection overruled.

5223

A. Yes, sir. Mr. Barshay, before I went to the Half Moon Hotel, I took a place in Sea Gate, on Atlantic Avenue, and I paid a deposit of $100, and when I reported—

Q. (interrupting) That was your own money? A. Yes, sir. And when I reported to the District Attorney what I had done and I explained to them some of the people I had met there, they advised me to come to the Half Moon. I want to get the record clear.

Q. Did your family live with you at the Half Moon Hotel? A. My wife. I sent my boy to camp.

5224 *Max Rubin—For People—Cross*

Q. When you went to the candy store with Feinberg that day, you said it was pursuant to a call by Sylvia Rosen? A. That is what Feinberg told me.

Q. Had you spoken to Sylvia Rosen since? A. No, sir.

Q. Had you spoken to her about that time, about the time you visited the candy store? A. No, sir, I have not seen her since she—

Q. (interrupting) You have not seen her at all
5225 or communicated with her? A. No, sir.

Q. From the time you came to the union office, in transit, coming back from the various places you were, had you seen Feinberg? A. Yes, sir, he had those $20 accumulations.

Q. In other words, to your knowledge, he was attending to union affairs all the time? A. There was a committee that was appointed.

Q. He was one of them? A. Yes, sir.

Q. The union did stop your pay sometime in 1937, in the fall, didn't they—yes or no? Can you answer the question that way? A. You are put-
5226 ting it very unfairly.

Q. Was there a time when the union stopped your pay for even one day? A. I was— You are putting the question very unfairly.

Q. If you can answer the question yes, say so, if you cannot, tell me you cannot. A. I think they did stop it.

Q. And then you were reinstated? A. There was no process of reinstatement. I simply got it again.

Q. Until 1939? A. Yes, sir.

Q. Were you discharged from the union in 1939 —yes or no? A. I was not discharged.

Q. Did you resign? A. I did.

Q. At your own suggestion? A. I had nothing else to do.

Q. Did they ask you to resign? A. They did not.

Q. Do you recall October 31, 1938, meeting Danny Fields and Paul Berger at 5th Avenue and 17th Street? A. October 31st?

Q. 1938. A. Tell me what it is about, and maybe I can remember.

Q. Did you give them some money, both Fields and Berger? A. I did not give them any money, 5228
no, sir.

Q. Did you transfer to them on behalf of anyone else the sum of $400? A. I did not, no, sir; I can tell you what I did do.

Q. You don't mind answering my question? A. I took them to a certain place to get $400. I am trying to help you.

Q. Did you tell Paul Berger and Danny Fields then you could put them on the union payroll? A. There was no union payroll; it was an association.

Q. Did you tell them you could put them on the association payroll? A. Danny, yes; I spoke to 5229
the association and I got Danny a job at $50 a week as association manager.

Q. Which association? A. The Greater New York Tailors Expressmens Association.

Q. Was that in 1938? A. That is right.

Q. Did you put Berger on the same payroll? A. No, sir, absolutely not.

Q. Did you give them $400 to be divided? A. I did not give them anything.

Q. Not your own, but the association's money? A. I did not give them a cent. Ike Brown gave it to them.

5230

Q. Was it in your presence? A. Yes, sir.

Q. That is the same Paul Berger and Danny Fields that you have been testifying about? A. Yes, sir, they told me they were broke and needed the money.

Q. You made that arrangement for them? A. I was anxious to help them. I helped lots of people.

Q. Did you get any part of that $400 from Danny Fields or Paul Berger? A. Of course not.

5231 Q. How long were they on the association payroll to your knowledge after this arrangement? A. I said— There was not "they" on; it was only Danny Fields on; he was only on a week or two.

Q. Did he get off? A. He did not get off.

Q. They put him off? A. They did not put him off; he was took off.

Q. By the District Attorney's office of Manhattan? A. Oh, no, sir.

Q. Did Mr. Gurfen speak to you about that situation, do you recall?

5232

Mr. Turkus: I object. That has nothing to do with the Rosen murder case.

Mr. Barshay: I object to Mr. Turkus making an objection in that form. If he has a legal objection, I wish he would make it.

Mr. Turkus: That is a very legal objection.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q Did you hand any more money over for the association to Danny Fields, other than the money you described? A. I did not hand that over.

Q. Did you make arrangements for any other moneys to be paid to Danny Fields other than you described? A. No, sir, he just got a check; he got a weekly payroll check from the association, that is all.

Mr. Talley: In view of the testimony of this witness, I say he has testified to exactly nothing so far as the defendant Weiss is concerned, or which tends to connect the defendant Weiss with the matter we are 5234
now engaged in trying. For that reason it would be useless to take up the time of the Court and the jury if I were to cross-examine this witness.

In this connection, at this time, I move that the entire testimony of this witness, in so far as it affects the defendant Weiss, be stricken from the record and the jury instructed now to disregard it,—in so far as the defendant Weiss is concerned.

The Court: Is there a similar motion by the defendant Capone?

5235

Mr. Rosenthal: My motion is similar in effect, but it goes further than that, because of the admission of this testimony and because of the previous motions made to your Honor respecting the defendant whom I represent. My additional motion is on the ground of prejudice to my client, and I ask for a mistrial.

Mr. Talley: I join in that motion.

The Court: As it is the policy of the Court to give a reason for deciding, the following will be stated: Under the law whereby several defendants are tried to-

5236 *Max Rubin—For People—Cross*

gether on the same indictment, the evidence does not have to apply to all in order to be received; it may apply to one only. That entitles it to be received. The Court may or may not instruct the jury at the time of each item of testimony by the witness that, according to the record up to that time, it applies to only a defendant or defendants.

The Court has followed the policy here
5237 of not giving such an instruction at the time for this reason: that the way the case is being tried it is impossible to know how this testimony may be hooked up against the defendants Weiss and Capone before the People's case is over. Therefore, it is possible that there may be, and it is possible that there may not be, a hook. The Court cannot give an instruction at this time except that, so far as the law is concerned, the evidence is applicable only to the defendant or defend-
5238 ants to whom it relates, and as to the others must be disregarded.

When it comes to the charge of the Court, at the conclusion of the case, this will be amply dealt with. The Court will have an opportunity to fully study the entire record by that time and to formulate a charge which will be sufficient for the jury to understand.

The motions are denied.

Mr. Rosenthal: May I say this, so that my motion is made clear: I came here on behalf of the defendant Capone to try

a case alleging that Rosen was killed and that he participated. I am in no wise prepared to cross-examine or examine this man, or anticipate that this man has told the truth about anything with respect to the other defendant, Buchalter, in court, in regard to some flour record or otherwise. All that testimony is in here and I am not prepared to meet it. Whether it is hooked up or is not hooked up—and I assume there is no such contention by the 5240
District Attorney that it is going to be hooked up, or that we are in any wise associated with the flour record or the flour trial in the form of competent legal proof in this proceeding. So that whether your Honor subsequently strikes it out or does not, and says to this jury that it does not in any wise affect the defendant Capone, nevertheless, in so far as his interest is concerned there has been brought into this case a considerable amount of prejudicial testimony before this jury that may or 5241
may not affect their determination, even though the Court may instruct the jury to disregard it.

The Court: This comes under the statutory procedure ordered by the laws of the State of New York. As to the wisdom or unwisdom of that procedure, the Court has nothing to do. Counsel may assume the responsibility in the matter of a decision on cross-examination.

Mr. Rosenthal: In so far as a cross-examination of this man is concerned, he

has mentioned that he has seen the defendant Capone twice in his life. I intend merely to question him on those two episodes which affect my defendant—not that it affects or tends to prove he is guilty of this crime, but the source of his knowledge, and that only, keeping in mind and reserving, if I may, my motion.

The Court: Judge Talley, do you intend to cross-examine?

5243 Mr. Talley: I do not, because, as I have stated, there is nothing affecting Weiss upon which I feel I should cross-examine him.

The Court: Very well, then Mr. Rosenthal may cross-examine.

Mr. Talley: I wish to note my exception to your Honor's ruling and your refusal to grant the motion.

The Court: Exception to Mr. Rosenthal, too.

5244 By Mr. Barshay:

Q. I forgot one question: Other than the statement you made to McCarthy, referring to one of the Exhibits for identification by Mr. Turkus, in 1937, did you at any time make a statement to Mr. McCarthy—yes or no? A. No, sir.

Q. You mean that at no time did you talk to McCarthy when a stenographer was present? A. Only that one time.

Q. That is the only time? A. Yes, sir.

Cross-examination by Mr. Rosenthal:

Q. Do you understand, Mr. Rubin, that my questions are directed solely as to the defendant Capone? A. I understand very well.

Q. If you do not understand any question I ask you, just make that fact known to me, and I will make it clear. Is that clear to you? A. Yes, sir.

Q. Now, you said that you saw the defendant Capone twice in your life prior to the time he 5246
came into this court-room: is that what you said on your direct? A. Twice or three times; I am not sure, maybe twice.

Q. Let me get it straight. Do you recall what you said to this jury at the outset of your examination? A. Let it be twice if that is what it was.

Q. What is your recollection? A. Twice. I will go along with you.

Q. Is there any doubt whether it was twice or three times? A. No, sir, I will go along with you. 5247

Q. I don't want you to go along with me. I just want you to tell this jury in your own way, in answer to my questions, the things which you have said on direct examination in answer to Mr. Turkus's questions. Is that clear? I don't want any quarrel with you. A. I say twice or three times.

Q. The first time you say you saw this defendant was when and where? A. I can guess at the year, but I cannot tell you where.

Q. Give us a guess at the year you first saw

5248 *Max Rubin—For People—Cross*

this defendant. A. I say around 1933, purely a guess.

Q. Might it have been 1932?

Mr. Turkus: I object, if it is guessing.

Mr. Rosenthal: I ask your Honor to direct Mr. Turkus that when he makes an objection now—and I consider this is legal—that your Honor direct him when he makes his objection on legal grounds, not
5249 to inject into it any reason which will give the witness an opportunity to gain knowledge of what the purpose of the cross-examination is. Further, I ask your Honor to direct Mr. Turkus that he refrain from now on, in his objections, from giving anything but the ground. He should legally say it is either irrelevant or immaterial to the issue, and say nothing about the "Rosen killing." The jury will determine whether there is anything to do with the Rosen killing. I am asking
5250 for a direction to Mr. Turkus at this time.

Mr. Turkus: That is an insulting remark, intended to bait the District Attorney into a discussion.

The Court: The Court recalls, in this case, several discussions have been indulged in from time to time by other lawyers than Mr. Turkus. All counsel are expected by the Court to make their objections in legal form. To object on the ground that the question calls for something that has nothing to do with the case is proper, legal ground of objection

and synonymous to suggesting "upon the ground that the subject-matter is irrelevant."

The objection is overruled.

Q. Do you remember the question?

The Court: (interrupting) In 1932, could it have been?

A. It could have been, yes, sir, but I guess 5252
1933.

By Mr. Rosenthal:

Q. Is it not a fact that only on direct examination when you were asked by Mr. Turkus, on page 1288:

"Q. With respect to Louis Capone, when is the first time you saw him, if you can recall? A. I believe sometime in 1932 or '33."

Isn't that the answer you gave to Mr. Turkus? A. Yes, sir, that is.

Q. At that time, when you answered Mr. Tur- 5253
kus, your knowledge was no better or worse than it is when you are speaking to me? A. I guessed then, too.

Q. Is that correct? I want to get through with this. Is that correct? A. Yes, sir. I want to get through myself. I am sick of this.

Q. So you are not sure what year it was you saw the defendant? A. I place it around that period; I am not sure.

Q. Give me the place where you say you saw him. A. I cannot tell you.

5254

Q. You cannot give me any idea of the place, is that it? A. No, sir.

Q. Whether it was in Brooklyn or Manhattan? A. Manhattan.

Q. Then you have still an idea. A. I mean as far as the Borough. I can tell you that, and that is all.

Q. Can you give me any—have you any indication about any place whatsoever, any place at all, other than the fact you now say Manhattan?

5255 A. We stopped in quite a few places during that period.

Q. Yes or no. A. I cannot give you an answer as to a specific place, no sir.

Q. You were not introduced to him? A. No, sir.

Q. You did not speak to him? A. I think we did. I think there was some sort of a conversation.

Q. I don't want you to think. A. There was some conversation.

Q. Didn't you say on direct examination you

5256 were not introduced and did not talk to him? A. I did not talk to him. It was in some sort of a conversation.

Q. (The Court) Did you participate in it? A. I don't believe so, but I heard.

Q. (The Court) It had nothing to do with this case? A. Not a thing, no, sir.

By Mr. Rosenthal:

Q. Then, can you please tell me, if you remember, how long he was within your sight or view in 1932 or 1933, or whatever year it may be? A. I cannot tell you that.

5257

Q. It may have been a few seconds? A. It might have been longer.

Q. Or it might have been longer? A. Yes, sir.

Q. Then you next saw the defendant when? A. In 1935, in the fall.

Q. At that time you were not introduced to him either? A. No, sir.

Q. At that time you did not talk to him or he did not talk to you? A. That is right.

Q. Can you give me any idea as to the length of time that ensued during which he was within your view on that particular occasion? A. Just to go in and out of a certain room.

5258

Q. A fleeting glance? A. Yes, sir.

Q. The next time you saw him was when you entered this court-room? A. Yes, sir.

Q. Had you been shown the defendant by anybody, either the police or the District Attorney, on any occasion outside of the court-room or inside the court-room before you ascended the chair? A. No, sir.

Q. So when the question was asked you by the District Attorney as to the occasion, or whether you had seen the defendant Capone any time, you were then gazing at Capone for the first time after you had seen him in this fleeting glance in 1935; is that right, and 1932 or '33? A. Yes, sir.

5259

By the Court:

Q. Was it a fleeting glance? A. I saw him come in the room and out of the room in 1932 or '33.

5260 *Max Rubin—For People—Redirect*

Mr. Rosenthal: I object to your Honor's question; he has already testified he went in and out of the room and it was a fleeting glance, in response to my question.

The Court: As to whether it was a fleeting glance?

Mr. Rosenthal: He said yes.

By Mr. Rosenthal:

5261 Q. Is that correct, Mr. Rubin? A. When?

The Court: The objection is overruled.

Mr. Rosenthal: Exception.

By the Court:

Q. Was it a fleeting glance on each occasion? A. Not on the first time, but on this particular time he went into a certain room and that is all.

Q. The second time was there any conversation? A. Not a word, no, sir.

5262 *Redirect examination by Mr. Turkus:*

Q. During the cross-examination by Lepke's counsel, he elicited from you that the bakery extortion racket was going on even after Mr. Dewey had been appointed prosecutor; do you remember that? A. That is right.

Q. In fairness to Mr. Dewey, it did not take him long to catch up with those defendants and convict them, did it?

Mr. Barshay: I object and I ask for the withdrawal of a juror and the declaration of a mistrial.

The Court: Objection is sustained; motion is denied.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. Before I saw you in court, did you ever talk to me in your life? A. No, sir.

Q. That is true? A. Yes, sir.

By Mr. Tailey: 5264

Q. Before this witness leaves the stand, may I have the record indicate that during the entire course of his testimony a uniformed court officer stood directly behind his chair, within a foot, in the back of it; that two uniformed—another uniformed court officer stood within a few feet from him at the end of the jury box—and that during the entire testimony there was always a detective with a badge exposed on the lapel of his coat, standing also at the end of the jury box?

5265

The Court: Well, the set-up is perfectly proper. The two uniformed court officers are here legally, and the Court refuses to conduct the court without proper discretion and place court officers where it sees fit. It is none of counsel's business, and the jury will disregard it.

Mr. Talley: I submit—

The Court: Do not interrupt. There is a detective against the exit door between the court-room and the public hallway.

5266 *Max Rubin—For People—Recross*

Mr. Cuff: About two or three feet away from the jury box.

The Court: I will say he is almost in contact with it—behind the jury box—to one end; and that he is properly there. That door is going to be guarded at all times during this or any other trial this Court is engaged in. Now, the witness will be taken away.

Mr. Talley: I also ask your Honor to
5267 remove the picture which stood behind the witness chair through the entire course of this trial. It is entirely unnecessary and was never once referred to by this witness, who has been on the stand three days. I don't think it belongs there.

The Court: Let us have the number of the exhibit.

Mr. Turkus: That is People's Exhibit 2 in evidence.

The Court: It is not prejudicial in any way, and the Court was unaware of its
5268 presence.

This might create an impression on the record which, upon reading, would make it seem that the defendants were not having a fair trial. That is nonsense. Take the exhibit away—turn it the other way. The jury is not supposed to see exhibits, apparently. It is quite large, is on an easel, and requires a man to lift it.

Now the record is the way it should be as to accuracy and fairness.

Mr. Talley: Exception.

Edward C. Maguire—For People—Direct 5269

EDWARD C. MAGUIRE, residing at 122 East 42nd Street, in the Borough of Manhattan, City and State of New York, called as a witness in behalf of The People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Are you a member of the Bar of the State of New York? A. I am.

Q. How many years have you been engaged 5270
in the practice of your profession? A. I was admitted in 1922 in this Department.

Q. By this Department, you mean the Second Judicial District? A. That is right.

Q. Are you likewise admitted to practice in the Supreme Court of the United States of America? A. I am.

Q. Are you entitled, and have you received permission to practice in the Eastern and Southern Districts of the Federal Court of the United States? A. Yes, sir.

Q. Have you been engaged, in all the years 5271
of your practice, actively in the practice of your profession as a lawyer? A. I have.

Q. Have you specialized in the practice of the Labor Law? A. That is correct.

Q. In or about October of 1936, where were your law offices located? A. 122 East 42nd Street.

Q. In Manhattan? A. In Manhattan.

Q. Were you retained by Local 240 of the Clothing Drivers & Helpers Union of the Amalgamated as their counsel? A. I do not think it

5272 *Edward C. Maguire—For People—Direct*

was as of the Amalgamated; it was at that time the International Brotherhood of Teamsters.

Q. When was it you were retained as counsel? A. In the fall of 1936.

Q. Do you remember meeting a man named Mr. Max Rubin sometime after that retainer? A. Yes, sir.

Q. Had you known him prior to that time? A. I have probably known him from the early part of 1936.

5273 Q. Now, subsequent to the retainer by Local 240, where was it you met Mr. Rubin, Mr. Max Rubin? A. Mr. Max Rubin saw me in my office, I dare say, several times after the retainer.

Q. Did Mr. Max Rubin in the fall of 1936 have a conversation with you at your law offices? A. Yes, sir.

Q. Subsequent to the conversation, Mr. Maguire, did Mr. Rubin return? A. Yes.

Q. Did he return in company with Louis Buchalter, sometimes known as Lepke? A. Yes, sir.

5274

Mr. Rosenthal: So as not to interrupt the continuity of whatever this witness may testify to, may I have the Court's permission to enter a general objection to all of this testimony upon the ground it is in no wise binding upon the defendant Capone? It will save the necessity of my getting up continually throughout the trial, and I will reserve my motion until the close to strike out, if it turns out that my objection is well founded.

The Court: That remains to be seen.

The Court will instruct the jury at the proper time in its charge.

Mr. Rosenthal: May I have a general objection at this time so that I do not have to get up again and object to each question?

The Court: Yes. Your objection now is overrruled.

Mr. Rosenthai: Exception.

The Court: Gentlemen of the jury, when several people are tried together 5276
testimony must be accepted from witnesses only against such defendant or defendants as it applies to.

Q. Now, at the time Mr. Rubin returned with Louis Buchalter, sometimes known as Lepke, had you known Mr. Lepke or Buchalter at that time? A. I had not.

Q. On this occasion, then, when Mr. Rubin brought Lepke up to your law offices, did Rubin introduce you to Lepke? A. He did, as Mr. Buchalter.

Q. What did Rubin say? A. In the presence 5277
of Buchalter, or Lepke, as he has been called in this trial, he asked me to repeat what I had said to Rubin a day or two before.

Q. Did you do that? A. I did.

Q. What did you repeat or reiterate in the presence of Lepke? A. I told him—

Mr. Talley: This does not affect my client, and apparently will not. I object to the testimony upon the ground that it apparently is a disclosure or communica-

tion given to him by a client of his, which is improper and objectionable. Here he is going to repeat—and I am sure Mr. Maguire knows it as well as I do—he is about to repeat a conversation between him and Rubin, who was a representative or business agent—a direct representative of the union for which Mr. Maguire was counsel at the time. It is a confidential communication.

5279 Mr. Maguire: May I say this—

Mr. Turkus: You have something to say with regard to an instrument you secured before you came here to testify, as to some waiver of privilege from Rubin, in writing?

Mr. Maguire: Yes.

Q. Have you it with you? A. I haven't it just now.

Mr. Turkus: I ask that this paper be marked for identification.

5280

(Received and marked People's Exhibit Z-17 for identification.)

Mr. Maguire: With your Honor's permission, may I ask the District Attorney—there is a boy coming from my office, and it should be here any minute.

Q. Now look at People's Exhibit Z-17 for identification and tell us whether that is an exact copy of a waiver you received prior to testifying in this case. A. Yes, sir.

Q. So that, pursuant to the rules and ethics of the practice of law, you secured all the law requires before you took the witness stand? A. The privilege was his, not mine.

Q. You insisted on receiving such waiver before you would divulge or disclose the conversation? A. That is right.

Q. Now, at the time of the objection by Judge Tailey, there was a pending question which was not answered; I will ask the stenographer to read it to you. 5282

(Pending question read by reporter.)

The Witness: I told him, I told both of them, that in my opinion any man who would become a fugitive while an investigation was pending, was foolish and extremely unwise; that if that man should be indicted while he was such a fugitive and thereafter caught and brought back, that the fact he had been a fugitive would be a very weighty matter against him. I also told them that Rubin, I understood, was a married man with a child and I said it was utterly ridiculous for any man with those responsibilities to go off as a fugitive indefinitely. I told them also this: That Rubin was a representative of a union, and that no union was going to stand for its representative being off in some unknown place, and that the membership of the union would naturally rise and oust him. 5283

Q. When you made that statement to Lepke and Rubin, in connection with the word "in-

5284 vestigation," did you use it in the singular or plural?

Mr. Barshay: I object to that as leading. He has answered.

Mr. Turkus: Question withdrawn.

Q. When you made that statement to Rubin and Lepke, did Lepke say something? A. In the early part of my statement to them he interrupted and said, "If witnesses are not available, 5285 investigations collapse."

Q. So the record may be clear, when you used that word, was that in the plural, was it "investigations"? A. Definitely plural.

Q. After you pointed out the inadvisability of fleeing during investigations, did Lepke say anything further? A. At the conclusion he said either, "I will see," or "We will see," and they departed.

Q. Did they leave together? A. Yes, sir.

Q. Did you remain in your law offices? A. I did.

5286 Q. Mr. Maguire, did you see Max Rubin sometime in August of 1937? A. I did.

Q. At that time did he call at your law offices? A. That is right.

Q. Did he speak with you? A. He did.

Q. After his conference with you did you arrange for Rubin to attend at the office of the District Attorney, who was then Special Prosecutor, Thomas E. Dewey? A. He was not Special Prosecutor, he was District Attorney.

Q. Did you make such arrangement? A. I did. Now, wait a minute. He was Special Prosecutor. You are right.

 5287

Q. Did he have on his staff as Assistant District Attorneys Messrs. Hogan and TenEyck? A. Yes, sir.

Q. Was there any appointment made for Rubin to meet those Assistants? A. He was to meet Berent TenEyck.

Mr. Rosenthal: At the conclusion of the testimony I again move, in behalf of the defendant Capone, on the ground of prejudicial evidence, for a mistrial and the withdrawal of a juror, on the ground that this testimony is in no wise binding on him. 5288

The Court: Motion denied.

Mr. Rosenthal: Exception.

Mr. Talley: I make the same motion with respect to the defendant Weiss.

The Court: Motion denied.

Mr. Talley: Exception.

Cross-examination by Mr. Barshay:

Q. You testified in the flour case? A. In the New York case, yes. 5289

Q. In 1940? A. Yes, sir.

Q. In just the same way as you testified here? A. Substantially so, I believe.

Q. When you were called to testify, that was to apply against the defendant Buchalter?

Mr. Turkus: Objected to.

The Court: Sustained.

Q. You never saw Buchalter before, and you

never saw Buchalter thereafter? A. Excepting at the trial.

Q. I am speaking now of 1936. A. In 1936 I saw Buchalter once, at the time he was in my office.

Q. That was only for a few minutes? A. Yes, sir, ten minutes to fifteen minutes or so.

Q. You and he were absolute strangers to one another? A. Yes, sir.

Q. Now, Rubin had been to see you before?
5291 A. That is right.

Q. You knew Rubin fairly well? A. No, I would not say that. I may have met him three or four time, possibly, then, at dinners or the like of that.

Q. You knew his connection with the Expressmen's Local? A. I knew he was with a local, some teamsters' local.

Q. You claim you were retained by the local? A. That is right. I knew he was connected with the local.

Q. Was he somewhat instrumental in getting
5292 the retainer in your behalf? A. When the committee came up he was present and he seemed to feel that it was desirable for the union to retain a lawyer. He expressed his thoughts in that direction.

Q. Did you learn, through your activity in the labor field and as a lawyer, that Dewey then was conducting investigations? A. I knew that from the newspapers, that it seemed to be general knowledge that certainly Mr. Dewey had investigations on.

Q. Mr. Dewey was not only conducting an in-

vestigation but he was conducting investigations, wasn't he? A. I suppose he was.

Q. Isn't that so? A. I suppose he was.

Q. Flour was one investigation; the garment racket was another investigation; isn't that so? A. I am afraid they didn't tell me what they were doing there, but with the union they were very active.

Q. I don't say they told you, but it was common knowledge in the newspapers what Dewey was doing; he had already been in office upward 5294
of a year, hadn't he? A. That is right.

Q. As a general proposition, being a lawyer, you knew he was conducting investigations—plural—into various fields? A. Yes, sir.

Q. You did not know there was a Rosen investigation, did you? A. I knew this—that there was a great deal of publicity in September for some time with reference to the Rosen case. I do not want to go into anything.

Mr. Turkus: Just you finish your answer. 5295

Q. Go ahead, finish your answer. A. At one time, subsequent to the time when I was retained by union Local 240, Rubin did mention the Rosen situation.

Q. Do you know when? A. I know he mentioned it to me a day or two before Mr. Buchalter came into the office. I believe, further, it was mentioned, not at any great length, but at one time when the committee of the union was in the office.

Q. With respect to Mr. Rubin, can you give us a definite date when he told you about the

5296 Rosen case? A. My best judgment would be late in October or early in November, 1936, when Mr. Rubin, alone with me, mentioned the situation. The thing was mentioned with no great weight placed upon it, but just in passing at that time, when this committee was present.

Q. Confining ourselves to Mr. Rubin, did he tell you he ever waived privilege—did he tell you his connection with the Rosen case? A. He told me some things about it, but I do not know
5297 if you would consider it a statement of his in connection with the Rosen case.

Q. Did you take a stenographic statement of what he said? A. I did not.

Q. In your professional point of view, from what he told you, did he implicate himself or exculpate himself in the Rosen case? A. He exculpated himself; he certainly did not involve himself in his statement.

Q. From what he told you, you, as a lawyer, formed a conclusion that he was in no way involved in the Rosen case? A. I formed a con-
5298 clusion he was in no way responsible in the Rosen case.

Q. And you advised him accordingly? A. Well, what he was after. The advice he wanted was along the lines I have outlined before, that I recited, at the time Buchalter was there.

Q. Take one step at a time, please.

Mr. Turkus: I objected to that, one step at a time.

Q. When Rubin spoke to you the very time, you came to the conclusion from what he told

you that he had absolutely no connection whatever of a criminal nature in the Rosen case?

Mr. Turkus: I object to that as already answered in a different form.

The Court: That is what he said.

Mr. Turkus: It is repetitious, it has been answered by the witness in another way.

The Court: It is not a proper matter for objection by the District Attorney, 5300
but if any counsel for the other defendants object, the objection will be sustained. The opinion of counsel is of no consequence whatever.

Mr. Barshay: No counsel objects. May I have an answer?

The Court: The objection is overruled.

A. From what he told me, I believe he was innocent of the Rosen case.

Q. And you so advised him? A. I did not so advise him.

Q. He did not ask you for advise as to whether 5301
he was innocent or guilty? A. He made a statement to me and then asked about this fugitive thing.

Q. You did not give him any advice on the first proposition? A. I did not, that was not the question, that was not among the questions he asked me.

Q. You did not volunteer any advice to him? A. I did not.

Q. He did not tell you anybody was looking for him in Brooklyn, did he? A. No, sir, he did not.

5302 *Edward C. Maguire—For People—Cross*

Q. Of course, if he did, you would promptly advise him to go there, wouldn't you?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Barshay: Exception.

Q. Did he say if any police were looking for him? A. He claimed that—

Q. (Interrupting) Did he say that any Assist-
5303 ant District Attorney was looking for him? A. He did not.

Q. He did not tell you that anybody was asking for him at any time or any place up to that time, in the Borough of Brooklyn? A. That is right.

Q. Did he tell you about his participation in extortion, in the Borough of Manhattan? A. No, he did not, but he did mention that— I do not want to be long-winded— he did mention there was this Rosen situation and there was the Dewey situation. And then came the ques-
tion about fleeing jurisdiction.

5304 Q. Did he tell you at any time that he was involved in the Dewey investigation? A. He did not.

Q. So that it is safe to say, Mr. Maguire, that at the time you spoke with Buchalter, you knew about the Rosen investigation? A. Yes, it had been mentioned to me, the Rosen matter had been mentioned, but as far as whether or not there was an actual investigation going on, to my own knowledge, I did not know it.

Q. That is what I want to know. Did you know of your own knowledge at any time that

Rubin was wanted in the Rosen investigation? A. I did not.

Q. He did not tell you that, did he? A. He did not tell me he was wanted in the Rosen investigation.

Q. He did not seek advice from you on the Rosen investigation, did he?

Mr. Turkus: I object. That has been covered in all its phases, as to what the advice was. 5306

Mr. Barshay: I would be very much pleased if Mr. Turkus would just make objections and nothing else, no speeches.

The Court: The witness testified that there was mentioned both the Rosen situation and the Dewey situation, and that then followed the talk as to the question of flight. The present question calls for a conclusion and the objection is sustained.

Mr. Barshay: Exception.

Q. Did you tell Mr. Buchalter that Rubin spoke to you about the Rosen case? A. No, sir, I did not. 5307

Q. You did not say one word in those fifteen minutes, with respect to the Rosen case, in the presence of Buchalter? A. That is right.

Q. But there was a talk about the Dewey investigation during that fifteen minutes? A. The way it was referred to was as an investigation pending.

Q. (The Court) Nothing said about what? A. A specific Dewey investigation was not mentioned, either. It was "pending investigation".

Q. But Dewey was conducting investigations, wasn't he? A. Yes, sir, according to the press.

Q. In Brooklyn there was just one investigation which you said you only assumed was going on? A. I assumed something happened in September.

Q. You simply assumed it? A. Yes, sir.

Q. So we have it now that in the fifteen minutes talk with Buchalter and Rubin in your office, not one word was mentioned with respect
5309 to the Rosen investigation? A. Not by name. The only thing that was referred to was, "investigation pending."

Q. And I agree with you that neither Rosen nor Dewey was mentioned—we have that clear? A. Yes, sir.

Q. May I ask you whether, at the time you spoke to Buchalter and Rubin in your office, you, of your own knowledge, had been aware, through information given to you by Rubin, that there was a Rosen investigation; yes or no? A. A day or two before he had mentioned a Rosen
5310 matter, but he did not specifically advise me there was an investigation pending, so of my own knowledge—

Q. (Interrupting) The Rosen matter was in all the newspapers? A. Yes, sir, it was in September; I doubt if it was in October.

Q. It was a matter which required newspaper publicity—you knew something about it from the papers, having read it? A. Yes, sir.

Q. And it was generally discussed, Rubin may have—

Mr. Turkus: I object.

The Court: Objection sustained.

Q. Did he come seeking advice on the Rosen matter from you a day or two before?

Mr. Turkus: I object as already answered.

The Court: Objection sustained.

Q. Did you give him advice on the Rosen matter? A. I did not.

Q. It was mentioned in the ordinary course of events, was it? A. I would not characterize it 5312
that way; it was mentioned preliminary to the question about—the main question that he put to me.

Q. In the preliminary matter he did not ask you—rather, he did not tell you that he was being sought as a witness in the Rosen case? A. He definitely did not.

Q. Were you asked these questions in the flour case, at page 1326:

"Q. Did you simply offer Mr. Rubin some advice along broad general lines? A. Yes, sir.

"Q. And that it was not in connection with 5313
any specific thing that he mentioned? A. He referred to pending investigations.

"Q. There was an investigation pending at the time in the Rosen shooting, was there not?"

The Witness: Yes, sir.

Mr. Grumet: I object to that on the ground it has no bearing on the issue here.

The Court: I will allow the witness to answer if he knows.

"A. I Assume so; I don't know myself."

5314 *Edward C. Maguire—For People—Cross*

Did you say that? A. Yes, sir, I said it. It is correct.

Mr. Turkus: That is the testimony here.

Mr. Cuff: I object to that as an improper statement.

The Court: Go ahead.

Q. "Q. Well, then, you don't know what in-
5315 vestigations were pending, do you, Mr. Maguire? A. I know the Dewey investigation was pending then."

Did you make that answer? A. Yes, sir.

Q. "Q. And how about the investigation in Brooklyn in connection with the shooting of Rosen?

The Court: He just said he did not know, Mr. Kleinman."

Do you remember that? A. I did not say that; Mr. Kleinman may have said it.

5316

Mr. Turkus: I object, unless he gives the first question and answer and not stop when the lawyer makes objection.

Mr. Barshay: I never saw such conduct on the part of a public officer in all my life. I am reading questions and answers. I asked him whether he was asked that question and made that answer. I can only do it in one way. At that time I read what the Court said. I will now read—

Mr. Turkus: (Interrupting) He did

not read the answer, because there is no answer to the question. He could not have read something that is not an answer. You should know that, having been an assistant.

Mr. Barshay: Will your Honor please say something to the District Attorney to stop this?

The Court: I am trying to make out this.

Mr. Barshay: I am going to read 5318
every question and answer, one at a time.

The Court: I want to get clear in my mind what you just read. It is not a matter for discussion with the witness. Ask him the question as to what he said.

Q. I want you to recall, when I was reading the questions and answers.

Mr. Turkus: He don't recall anything. This is all confusing.

The Court: You said you were going 5319
to read the next question and answer. Please do so.

Q. "Q. How about the investigation in Brooklyn, in connection with the shooting of Rosen?" And then this is the comment of the Court:

"He just said he did not know, Mr. Kleinman.

Mr. Kleinman: Well, I thought perhaps the fact he remembered the Dewey investigation might refresh his recollection, your Honor.

5320

The Court: Well, I will allow you to repeat the question.

Q. Did you know, Mr. Maguire, about any investigation in Brooklyn? A. I assume there was one."

Did you make those answers to the question I just read to you? A. Unquestionably.

Q. (The Court) That was correct? A. Yes, sir.

5321

Q. Here is the next question:

"Q. And according to your testimony you merely advised that flight was bad under any circumstances, is that right? A. Definitely, yes, sir."

A. That is right.

Q. Of course, Mr. Maguire, in 1937, when Rubin came—he came to you previously, is that right? A. Yes.

Q. And so you knew, after you had discussed with him, which District Attorney you were to go to, did you?

5322

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. You did take him to Dewey's office? A. Yes, sir.

Q. You never did take him to the District Attorney's office in Brooklyn? A. I did not.

Q. At no time you never took him to the Police Department in the Borough of Brooklyn? A. I did not.

Q. You never surrendered him in any shape, manner or form to any authorities in Brooklyn? A. I did not.

Q. Did Mr. Buchalter say to you during that conversation, "Well, we will think it over"? A. He said that at the conclusion.

Q. He never said to you, in your presence, or to Rubin, in your presence, "Don't leave the jurisdiction"? A. He did not.

Q. He never said to you, in your presence, or to Rubin, in your presence, "Get out of the jurisdiction"? A. He did not.

Mr. Talley: I have no cross-examination of this witness. 5324

Mr. Rosenthal: I wish to renew the motion I made, your Honor.

Mr. Talley: I move to strike out the testimony of this witness insofar as it applies to the defendant Weiss, on the ground it has no bearing on any of the matters in this indictment, respecting Weiss.

The Court: The Court cannot strike it out, but it will be applicable only against such defendant or defendants as 5325 are or will hereafter be connected with it. The jury will be instructed at the proper time, in the charge.

Mr. Talley: I except to your Honor's refusal to grant the motion now.

Mr. Barshay: I move to strike out the testimony of Mr. Maguire on the ground it specifically shows that the inducement of flight, if any, was with respect to the Dewey investigation and no part of this case at all.

The Court: Oh, no. Motion denied.

Mr. Barshay: Exception.

5326 *Paul Berger—For People—Direct*

PAUL BERGER, residing at the Hotel Bossert, in the Borough of Brooklyn, City and State of New York, called as a witness in behalf of The People, after being duly sworn, testified as follows:

The Court: Is this man in custody as a material witness or as a defendant?

Mr. Turkus: He is in the custody of the New York City Police Department.

5327 The Court: As a material witness or as a defendant under indictment?

Mr. Turkus: He is under indictment in Manhattan.

The Court: Then before he is permitted to be your witness he should be advised as to his Constitutional rights. Has your lawyer advised you?

The Witness: Yes, sir.

The Court: As to your Constitutional rights?

The Witness: Yes, sir.

5328 The Court: All right, proceed.

(Bernard J. Gardener, 60 Wall Street, Borough of Manhattan, seated in the opposite jury box, addresses the Court.)

Mr. Gardener: I represent the witness, your Honor. I have only advised him by phone. I would like your Honor to advise him now.

The Court: Repeat that, please.

Mr. Gardener: I represent the witness. I have only advised him as to his Constitutional rights over the telephone.

He is under indictment in New York County.

The Court: You have told him what his Constitutional rights as a witness are.

Mr. Gardener: Very briefly. I wish your Honor would so advise him at this time. It was with special reference to the indictment in New York.

The Court: We want to get this correct. The Court advises the witness that in the course of his examination he is entitled to refuse to answer any question upon the ground it will tend to degrade or incriminate him. 5330

Is that sufficient, Counsellor?

Mr. Gardener: I wish your Honor would do it further—If he is asked any questions concerning any crime committed in the State of New York, he may refuse to answer on the ground that the answer would incriminate him.

The Court: The Court so instructs you as to your Constitutional rights. The former instruction covered everything; this is specific. The previous instruction was sufficiently broad to cover the entire Constitutional privilege of the witness. 5331

Direct examination by Mr. Turkus:

Q. How old are you? A. Forty-one.
Q. Are you married? A. I am.
Q. Have you any children? A. I have.
Q. How many? A. One.
Q. A son? A. A son.
Q. How old is he? A. Twenty years old.

5332 *Paul Berger—For People—Direct*

Q. Did you go to public school in New York City? A. I did.

Q. *What public school* did you go to? A. No. 34.

Q. Where is Public School No. 34—where was it located at the time you went there? A. Broome and Sheriff Street.

Q. Is that on the East Side of Manhattan? A. Yes, sir, it is.

Q. Did you graduate from public school? A.

5333 I did.

Q. After you graduated from public school did you go to high school? A. I did.

Q. To what kind of high school—was it a day or evening? A. Evening high school.

Q. How long did you go to evening high school? A. About six months.

Q. You quit school then? A. I did.

Q. How old were you when you quit school? A. About 16½.

Q. Did you do odd jobs after you quit school? A. Yes.

5334 Q. For example, what did you do? A. I sold newspapers, ice cream, chewing gum, things like that.

Q. In or about December of 1916 did you enlist in the United States Army? A. I did.

Q. Where were you stationed after your enlistment? A. Fort Slocum.

Q. How old were you when you enlisted in the United States Army? A. About 16½, a little over 16.

Q. When your mother found out you had enlisted in the Army at 16 years of age, did she do something? A. She went to the Command-

ing Officer and told him my age, and I was discharged.

Q. Sometime after your discharge from the United States Army for being under age, did you enlist in the National Guard? A. A number of months after that.

Q. Did you enlist in the National Guard? A. Yes, sir.

Q. In what regiment was it? A. The 14th, in Brooklyn.

Q. Where was the 14th sent? A. Up to guard 5336
the Aqueduct, in New York.

Q. Were you sent up there on guard duty? A. I was.

Q. How old were you then? A. Past 17.

Q. When your mother found out about the enlistment in the National Guard, did she make complaint to the Commanding Officer? A. Yes, sir.

Q. Were you again put out of the Army? A. Yes, sir.

Q. After your second discharge from the United States Army, did you go to work? A. 5337
I did.

Q. Do you recall now from whom you got that job, or by whom you were employed? A. I do.

Q. Who was your employer? A. Rensdorf & Kalikow.

Q. Where was that firm located? A. On West 3rd Street, Manhattan.

Q. What was the nature of the business of that firm? A. Clothing manufacturers.

Q. What kind of a job did you get in Rensdorf & Kalikow's? A. Cutter's apprentice.

5338 *Paul Berger—For People—Direct*

Q. Is that helper to a cutter? A. Helper to a cutter.

Q. How long did you work at that job with Rensdorf & Kalikow? A. I worked there about seven or eight years.

Q. Do you remember the time when that firm was unionized? A. I do.

Q. When was that? A. Around 1919.

Q. What union unionized that firm of Rensdorf & Kalikow?

5339

Mr. Barshay: I object.

The Court: Objection overruled.

A. The Amalgamated Clothing Workers of America.

Q. After the Amalgamated Clothing Workers of America, unionized the firm or their employees, did you become a member of the union? A. I did.

Q. What local did you join? A. Local 4.

Q. Local 4 of what? A. New York Clothing Cutters Union.

5340

Mr. Barshay: May I have one general objection so that I may not interrupt Mr. Turkus, and except to your Honor's ruling?

The Court: It is proper in the examination of a witness to show the jury who the man is that is talking. It is not proper upon the question of guilt or innocence. Objection overruled.

Mr. Barshay: Exception.

Q. Did you tell us you became a member of the union, Local 4 of the New York Clothing Cutters Union? A. That is right.

Q. Who was the manager of that local at the time you became a member? A. Murray Weinstein.

Q. After you joined the union, Local 4 of the Clothing Cutters, affiliated with the Amalgamated, did you continue working for Rensdorf & Kalikow? A. I did.

Q. After you became a union member did you 5342
do any union work? A. As far as picketing, here and there.

Q. When you say picketing here and there, do you mean picketing during the course of strikes in which the union was interested? A. Yes, sir.

Q. While you were connected with the union did you meet a man named Abie Slabow?

Mr. Barshay: I object, highly prejudicial, not binding on this defendant, and this is before this man ever said that he knew the defendant Buchalter. 5343

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Was he connected with the union? A. At the time, yes, sir.

Q. And on the payroll? A. On the payroll.

Q. Did you know a man named Philip Orlofsky? A. I did.

Q. Did he occupy any official position in the union? A. He did.

5344 *Paul Berger—For People—Direct*

Q. What was it at that time, when you joined up, do you understand me? A. I do not.

Q. I will withdraw it. What position did Orlofsky have in the union, Philip Orlofsky? A. Business agent.

Q. Now, who was the business manager of the union before Orlofsky?

Mr. Climenko: I object to it as not binding on the defendants, too remote,
5345 and incompetent.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. Murray Weinstein.

Q. Did Orlofsky take over Weinstein's job?

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. He did.

5346 Q. Do you know Louis Buchalter? A. I do.

Q. What other name did you know him by? A. Lepke.

Q. After Orlofsky became manager, did you begin to see Lepke?

Mr. Barshay: May we have the time fixed, your Honor?

The Court: Objection overruled.

Mr. Barshay: We don't know whether this is 1919, 1920, 1930, or 1941.

The Court: Objection overruled.

Mr. Barshay: Exception.

The Court: You will find out in a minute.

A. I did.

Q. Was that sometime around 1926, if you can recall? A. 1927, to be exact.

Q. Did you, about that time, come to know a man named Jacob Shapiro?

Mr. Barshay: I object.

The Court: Objection overruled. 5348

Mr. Barshay: Exception.

A. I did.

Q. Did you know that Shapiro by any name other than Jacob Shapiro? A. I did.

Q. What name was he known by? A. Gurrah.

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant to this issue.

The Court: Objection overruled.

Mr. Barshay: Exception. 5349

Q. At or about that time did you come to know a man named Hymie Holtz?

Mr. Barshay: Objected to as incompetent, immaterial, and irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Was Hymie Holtz known by any other name? A. He was.

Q. What name?

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Mr. Barshay: I make the same objection.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Curley.

Q. Now, after Orlofsky became manager of the union did you see Lepke and Curley Holtz and Gurrah, at certain places?

5351 Mr. Barshay: Objected to as incompetent, immaterial and irrelevant to the issue in this case.

The Court: Objection overruled.

Mr. Barshay: Also, it is a conclusion.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Where did you see them together? A. In the barber shop.

Q. Where was the barber shop located? A. On Broadway between 11th and 12th Streets.

5352 Q. How far from the Union Headquarters was the barber shop? A. About a block.

Q. When you saw Lepke and Gurrah and Holtz in this barber shop, did you see them with union officials there?

Mr. Barshay: I object to that as immaterial, too far afield, too remote to the issue in this case.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I did.

Q. Who did you see them with, what union officials?

Mr. Barshay: The same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. Philip Orlofsky, Lepke, Gurrah, Curley, Whitey Deutsch, Jack Noya.

Mr. Barshay: May we have the time and place, Mr. Turkus? 5354
Mr. Turkus: I cannot fix it every minute.
The Court: What year?
The Witness: To the best of my recollection around 1927.

Q. You know Max Rubin? A. I do.
Q. Did you see him? A. I did.
Q. Did you see him with Lepke, Gurrah, Curley, and Whitey Deutsch at that barber shop near Union Headquarters? A. On many occasions. 5355
Q. Did you see Rubin together with Lepke and Gurrah?

Mr. Barshay: Objected to as leading.
The Court: Sustained.

Q. With whom did you see Rubin close by the Union Headquarters at that time—who did he go with? Do you know what I mean? A. No.
Q. You say you saw Orlofsky and Rubin and Curley and Lepke and Deutsch in and around this barber shop? A. Yes, sir.

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Q. Did you see Rubin there too? A. Yes, sir.

Q. With those people? A. Yes, sir, with those people.

Q. On numerous times? A. Quite a number of times.

Q. Did you know Max Rubin well? A. I do.

Q. Did you see him around the clothing district in Manhattan? A. I did.

Q. Was he a union official? A. He was.

Q. At the time Orlofsky was manager, did
5357 you know what jobs with the union Rubin had? A. Executive Board member.

Q. After Orlofsky became manager of the union were you assigned to any strike duty? A. I was.

Q. What kind of duties did you perform pursuant to assignment? A. Slugging, pickets.

Mr. Barshay: I urge your Honor that this is entirely not binding upon the defendants.

The Court: Objection overruled.

5358 Mr. Barshay: Exception.

A. (continuing) Kept scabs from going to work wherever there was a strike.

Q. Did you do those duties pursuant to your instructions?

Mr. Barshay: I object—instructions from whom?

The Court: Objection overruled.

Mr. Barshay: Exception.

I object further on the ground it is not binding on this defendant.

 5359

The Court: Objection overruled.
Mr. Barshay: Exception.

A. I did.

Q. Now, how long were you on that job doing that work on the strike? A. About two weeks.

Q. After that were you put to work? A. I was.

Mr. Barshay: I object; it is in no wise connected with this defendant; it is entirely incompetent, immaterial and irrelevant. 5360

The Court: Objection overruled.
Mr. Barshay: Exception.
Will you please give us the year, Mr. Turkus?

Q. With whom were you placed after the strike duty?

Mr. Barshay: I object. I make the same objection.
The Court: Objection overruled. 5361
Mr. Barshay: Exception.

A. J. Eisner & Son.

Q. You mean the business was J. Eisner & Son? What kind of a business was J. Eisner & Son conducting? A. Clothing manufacturers.

By the Court:

Q. That is in Red Bank? A. No, sir, it happened to be in Brooklyn at the time. This is a

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different concern: it is not the Red Bank concern.

By Mr. Turkus:

Q. After the strike duty you went to work with J. Eisner & Son. What kind of clothing were they then manufacturing? A. Men's clothing.

Q. How long did you stay at that job?

5363

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. About a year.

Q. After that did you work for other firms in the clothing industry? A. I did.

Q. Can you recall the names of the firms by whom you were employed? A. I can.

Q. Will you tell us the ones that you can recall? A. The Eagle Clothes, Barsiowitz Bros.,
5364 Greenberg & Kupperman.

Q. Did you also work for the Worlds Clothing Exchange? A. I did.

Q. And for the firm of Max Udel & Sons? A. I did.

Q. Can you tell us what year you worked for Greenberg & Kupperman when you began to work for them? A. The beginning of 1932.

Q. Did you know a man named Bruno Belen?

Mr. Barshay: I object to that as immaterial, not binding on the defendants.

5365

The Court: Objection overruled.
Mr. Barshay: Exception.

A. I do.
Q. How long have you known Bruno Belea?
A. About between 12 and 14 years.

The Court: Gentlemen of the jury, please do not discuss the case nor let anybody talk to you about it. Keep your minds open.

5366

We will take a recess until 1:30 P. M.
Let the witness leave first.
The jury will leave by the other door.
The defendants are remanded.
Recess until 1:30 P. M.

(Whereupon a recess was taken to 1:30 P. M.)

AFTERNOON SESSION

TRIAL RESUMED

5367

PAUL BERGER, resumed the stand and testified further, as follows:

Direct examination by Mr. Turkus (continued):

Q. Just before we went to lunch you told the Court and jury that you knew Bruno Belia, is that correct? A. That is right.
Q. Was Bruno Belia an official attached to the Amalgamated Clothing Workers of America in some capacity?

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Mr. Climenko: I object to that as not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Climenko: Exception.

A. He was.

Q. What was his position? A. General organizer.

Q. Do you recall the Finkelstein Brothers strike in the Bronx? A. I do.

5369 Q. Was Bruno Belia the organizer at that time?

Mr. Barshay: May we fix the date, please?

The Court: Yes, fix the date.

The Witness: It was either '27 or '28.

Mr. Barshay: I object to it. It is entirely incompetent, irrelevant, immaterial.

The Court: Overruled.

Mr. Barshay: Exception.

5370 Q. Will you answer the main question?

(Question read.)

A. One of them.

Q. Did you meet Bruno Belia frequently at union headquarters?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Do you know whether or not Bruno Belia is still an organizer for the Amalgamated?

Mr. Barshay: Same objection; not binding on the defendant.
The Court: Overruled.
Mr. Barshay: Exception.

A. He is.

Q. In or about the year 1931 was this Irving Whitey Deutsch connected with the union? 5372

Mr. Barshay: Same objection, your Honor.
The Court: Overruled.
Mr. Barshay: Exception.

Q. Just yes or no. A. He was.

Q. Was he on the payroll?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

5373

A. He was.

Q. Did this Irving Deutsch, whom you described also as known as Whitey, have some connection for the firm that you were working for—

Mr. Barshay: Same objection.

Q. —namely, Greenberg and Kupperman?

Mr. Barshay: Same objection.
The Court: Overruled.

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Mr. Barshay: Exception.

A. He did.

Q. While you were working for Greenberg and Kupperman, in or about the year 1931, did you there see Lepke and Gurrah?

Mr. Barshay: Same objection. I wish counsel would not lead.

The Court: Overruled.

5375 Mr. Barshay: Exception.

A. I did.

Q. Did you see them there at the same time that you saw Irving Whitey Deutsch?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Did you see Lepke, Gurrah and Deutsch in conversation, that is, talking to each other?

5376

Mr. Barshay: 1931?

Mr. Turkus: Yes.

A. I did.

Mr. Barshay: Same objection; on the further ground it is too remote.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Did you see them talking together a num-

ber of times? A. Quite a number of times, yes, sir.

Q. Do you remember when there was a dispute between the Orlofsky faction and the Hillman faction—

Mr. Barshay: Same objection.

Q. —of the union?

Mr. Barshay: I renew my objection. 5378
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.

Q. What year was that, can you recall? Can you remember the year? A. 1932.

Q. At the time of the Orlofsky-Hillman factional dispute, did Lepke have a talk with you? A. He did.

Q. Did he give you a job to do?

Mr. Barshay: I object to it. 5379
The Court: Overruled.
Mr. Barshay: Exception.

A. He did.

Q. What did he tell you to do?

Mr. Barshay: I object to it. It has nothing to do with this case.
The Court: Overruled.
Mr. Barshay: Exception.

A. He told me to go in the market and speak to members to be with the Phil Orlofsky faction.

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Mr. Barshay: I move to strike out the answer as entirely irrelevant to the issues in this case.

The Court: Overruled.

Mr. Barshay: Exception.

Q. When you say the "market", do you mean the clothing market? A. That is right.

Q. And you were told by the defendant Lepke to speak to people in the clothing market to side
5381 with the Orlofsky group, is that it?

Mr. Barshay: I object to counsel repeating an answer.

The Court: Overruled.

Mr. Barshay: Exception.

A. That is right.

Q. Did you, after you received that job, speak to people down at the market to side with the Orlofsky faction?

Mr. Barshay: Same objection.

5382 The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Do you know the result of that Hillman-Orlofsky dispute?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Yes or no. A. I do.

Q. Did Orlofsky quit the dispute?

Mr. Barshay: I object to it as not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

A. He did.

Q. And after that, was he out of the union? A. He was.

Mr. Barshay: Same objection.

5384

Q. After that dispute was ended by Orlofsky quitting, did you continue working for Greenberg and Kupperman? A. I did.

Q. Until about what year did you continue working for Greenberg and Kupperman, if you can recall the year? A. To the best of my recollection, about 1933.

Q. Did you know a man by the name of Danny Fields? A. I did.

Q. Do you remember when a general stoppage was called in the clothing trucking industry?

5385

Mr. Climenko: If your Honor pleases, we object to this as not binding on the defendant, as leading.

The Court: Overruled.

Mr. Climenko: Exception.

A. I do.

Q. This question answer only yes or no: Before that stoppage was called, did Danny Fields have a talk with you?

Mr. Barshay: I object to it, sir; not binding on the defendant.

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The Court: Overruled.
Mr. Barshay: Exception.

A. Yes.

Q. After you had the talk with Danny Fields, did you have a talk with Lepke? A. I did.

Q. After you spoke to Lepke, were you put on the payroll?

Mr. Barshay: I object to it, sir.
5387 The Court: Overruled.
Mr. Barshay Exception.

A. I was.

Q. When you were put on the payroll, did Lepke say anything to you about a man named Murray Weinstein?

Mr. Barshay: I object to it as not relevant to the issues in this case.
The Court: Overruled.
Mr. Barshay: Exception.

5388 A. Yes.

Q. What did Lepke say? A. I should do everything Murray Weinstein tells me.

Q. Were you invited by Lepke and Weinstein to go to a certain hotel?

Mr. Barshay: Fix the time, please.

A. I was.

Q. What was the name of the hotel? A. Hotel Governor Clinton.

Q. When you got there, who was there? A.

5389

Murray Weinstein, Sam Katz, Danny Fields, myself, Lepke, Charlie Gurrah.

Q. At that time what was Murray Weinstein in the union? A. Manager of Local 4.

Q. By manager, do you mean business manager? A. Business manager.

Q. Had he taken Orlofsky's place?

Mr. Barshay: Objected to; not binding on the defendant.

The Court: Overruled.

5390

Mr. Barshay. Exception.

A. He did.

Q. What was Sam Katz with the union at the time of the meeting in the Governor Clinton hotel?

Mr. Barshay: Same objection; not binding on the defendant.

The Court: Overruled.

Mr. Barshay: Exception.

5391

A. Business agent.

Q. Of what local? A. Local 4.

Q. Clothing Cutters' Union? A. That is right.

Q. When you were up at the Governor Clinton Hotel with those people whose names you have given to the Court and jury, did Lepke speak to you? A. He did.

Q. What did he tell you? A. He told us that we should— We discussed the stoppage for the next day, and I was told to be with Danny Fields on the corner of 16th Street and Fifth Avenue about 5:30 in the morning, and over there we would meet a number of other union

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men and we will stop trucks delivering and taking out work from any clothing house.

Q. That meeting at the Governor Clinton Hotel, then, was the day before the general stoppage of the trucking industry; is that correct? A. That is right.

Mr. Barshay: I move to strike out the answer before this question.

The Court: Denied.

5393 Mr. Barshay: Exception.

Q. And at that meeting at the Governor Clinton Hotel with those people whose names you told the Court and jury, you got the instructions you just told us; is that correct? A. That is right.

Q. After you got the instructions, did you go down to the clothing district the next day? A. I did.

Q. Did you do what you were told to do? A. I did.

5394 Q. And did you perform the duties that you were instructed to do? A. I did.

Mr. Barshay: I object to the form of the question, calls for a conclusion.

The Court: This is purely collateral.

Mr. Barshay: I object to it on the further ground, too, but your Honor has overruled it. He can tell what he did.

The Court: Yes, tell what you did.

The Witness: We stopped trucks, slugged drivers, things along those lines.

Mr. Barshay: I move to strike out he "slugged drivers", because he, in his own

testimony, your Honor, said that he received no such instructions.

The Court: You wanted to know what he did. Now you heard it.

Mr. Barshay: I wanted to know what he did pursuant to the instructions, not what he did on his own.

The Court: Let the jury figure that out.

Mr. Barshay: Exception, sir. I move to strike out the answer. 5396

The Court: Denied.

Mr. Barshay: Exception.

Q. After your day's work was done during the stoppage, did you go back and see anybody?

Mr. Barshay: I object to the characterization, "After your day's work was done".

The Court: Overruled.

Mr. Barshay: Exception.

5397

A. We did.

Q. Whom did you report to? A. To Lepke, Murray Weinstein, Sam Katz.

Q. Where did you report to Lepke after the day's work was done? A. Met up in the Governor Clinton.

Q. And when you made your reports nightly, who was there at the Governor Clinton?

Mr. Barshay: I object to the characterization.

The Court: Overruled.

Mr. Barshay: Exception.

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A. Lepke, Gurrah, myself, Danny Fields, Murray Weinstein, Sam Katz.

Q. When these nightly reports were made, were plans discussed as to what should be done the following day?

Mr. Barshay: I object to it, sir, entirely irrelevant to this issue, your Honor.

The Court: Overruled.

Mr. Barshay: Exception.

5399

A. It was.

Q. Was that stoppage at one time settled? A. It was.

Q. After the stoppage came to an end, did you continue on the payroll of the union?

Mr. Barshay: I object to it as not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

5400 Q. While you were on the payroll of the union at any time did either Murray Weinstein or Sam Katz give you money to bring to someone?

Mr. Barshay: I object to it as not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

A. He did.

Q. By "he", do you mean Murray Weinstein and Sam Katz? A. Either one of them.

5401

Q. When you got that money, to whom did you deliver it? A. Lepke.

Mr. Barshay: I move to strike out the answer as entirely irrelevant to this issue.

The Court: What is the purpose of this?

Mr. Turkus: Showing that Lepke and the unions were closely allied.

The Court: Objection overruled. 5402

Mr. Barshay: Exception, sir.

Q. When you were on the payroll of the union, did you become an intermediary, a go-between, between Weinstein and Lepke?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. I was.

Q. Did you make appointments for Weinstein to meet Lepke and for Lepke to meet Weinstein? 5403

Mr. Barshay: I object to it; nothing to do with this case.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

Q. Do you remember the time when Danny Fields left New York City? A. I do.

Mr. Barshay: I object to it as not binding on the defendant.

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The Court: Overruled.
Mr. Barshay: Exception.

Q. Can you tell us approximately when that was, to the best of your recollection?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

5405 A. March or April, 1936.
Q. Before Danny Fields left town, did he talk with you; yes or no? A. He did.
Q. After Danny Fields spoke to you, did you see Lepke? A. I did.
Q. And did you do business for Lepke, without stating what it was?

Mr. Barshay: I object to the form of the question.
The Court: Overruled.
Mr. Barshay: Exception.

5406 A. I did.
Q. Did you come in frequent contact with Lepke from time to time thereafter?

Mr. Barshay: I object to it. It is immaterial to the issue here.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.
Q. How often did you see Lepke from that time on, for a period of time?

Mr. Barshay: Same objection.

Q. How often, how many times during the week?

The Court: Overruled.
Mr. Barshay: Exception.

A. Every day or every other day.

Q. Did you know Joseph Rosen during his life time? A. I did. 5408

Q. Where did you come to know him, from what industry? A. Clothing industry.

Q. Was he a clothing trucker? A. He was.

Q. And where did you come in contact with him, that is, where did you see him? A. On the clothing market.

Q. Did you ever have any business dealings with him? A. I did.

Q. When was that? A. That was the time when I was contracting for the World's Clothing Exchange.

Q. At that time who was Rosen working for, do you know? A. He was working for Louis Cooper. 5409

Q. And did the World's Clothing Exchange have business with Louis Cooper? A. They were doing some trucking for us.

Q. Did you come to see Rosen frequently? A. I did.

Q. This question respond only yes or no: Do you recall reading in the newspapers about Joseph Rosen being killed? A. Yes.

Q. On the Friday before Rosen was killed, did you see Max Rubin? A. I did.

Q. Did he talk to you? A. He did.

Q. What did he say to you?

Mr. Barshay: I object to it—in the absence of the defendant.

The Court: According to Rubin's testimony, he testified that Buchalter told him on that Friday to send this witness to see him right away, and that he conveyed the message. For that reason the objection

5411 is overruled.

Mr. Barshay: I except, sir.

(Pending question read.)

A. That Lepke wants to see me.

Q. Can you remember where you were when Rubin told you that Lepke wants to see you? A. I was up in the Clothing Cutters' headquarters.

Q. Is that known as union headquarters? A. That is right.

Q. After Rubin told you that Lepke wanted

5412 to see you, did you go up to see Lepke? A. I did.

Q. Where did you go to see Lepke? A. Up in his office.

Q. Where was it located? A. 200 Fifth Avenue.

Q. Is that the place you had been going to frequently, as you have heretofore testified, on other business dealings with Lepke? A. That is right.

Q. When you got up to Lepke's office, what happened? A. I opened the door and Lepke walked out. He said to me, "You know that Joe Rosen?" I said, "Yes." He said, "I want

you to point him out." I said, "All right." He said, "Wait for me down the hall."

Mr. Rosenthal: We do not hear him. (Answer repeated by reporter.)

Q. Where down the hall did you go to wait for Lepke? A. The floor below, at the foot of the stairs.

Q. Did you there wait for him on the floor-below? A. I did.

5414

Q. Did Lepke come down? A. He did.

Q. And did you meet him on that floor below? A. I did.

Q. Did you accompany Lepke downstairs? A. I did.

Q. On those visits that you had been making to Lepke at 230 Fifth Avenue, had you gotten off at the same floor every time in the past?

Mr. Barshay: I object to counsel leading, your Honor.

The Court: Sustained.

5415

Q. When you visited Lepke, what floors did you get off at? A. Either the floor below or the floor above the office.

Q. Did anyone tell you to do that? A. Yes, sir.

Q. Who? A. Lepke.

Q. Now, we are getting back to the Friday before the Rosen killing. When you got downstairs with Lepke, what did he do? A. He got into a cab.

Q. Did you get into the cab with Lepke? A. I did.

Q. Who gave the driver the directions? A. Lepke.

Q. Where was the cab driver directed to stop the cab? A. In Suffolk Street and Grand Street.

Q. Is that in the East Side, Manhattan? A. That is right.

Q. Did the cab stop there? A. He did.

Q. Did Lepke get out of the cab? A. He did.

Q. Did you get out of the cab too? A. I did.

5417 Q. What happened after you and Lepke got out of the cab? A. He walked down Suffolk Street towards Broome Street, and near the corner we met some man there.

Q. Do you know who that man was that was met? A. I do not.

Q. Did Lepke speak to the man? A. He did.

Q. Did you hear what he said to him? A. I did.

Q. What did he say to that man? A. "Come over to the corner of Clinton and Broome and tell Mendy I want to see him."

5418 Q. How far away was Clinton and Broome Street from where Lepke told that man to go over and get Mendy? A. About a block.

Q. Some time after Lepke told this man to get Mendy, who showed up? A. Mendy.

Q. What is Mendy's full name? A. Emanuel Weiss.

Q. Emanuel Weiss? A. That is right.

Q. Had you known Emanuel Weiss before that, or Mendy, as you call him? A. I did.

Q. Now, when Mendy Weiss showed up, did Lepke talk to Mendy Weiss? A. He did.

Q. How long did Lepke talk to Mendy Weiss? A. Between five and ten minutes.

Q. Tell the jury when Mendy Weiss approached what Lepke did. Do you understand me? A. He walked towards him.

Q. In walking toward Mendy Weiss, did he walk away from you? A. He did.

Q. Were they at a distance away from you where you could not hear what Lepke and Mendy Weiss were talking? A. They were.

Q. You did not hear, did you, what Lepke said to Mendy Weiss, or what Mendy Weiss said to Lepke? A. No. 5420

Q. After they spoke together for that period of time that you told the Court and jury, did Lepke come over to you? A. He did.

Q. Did he come over with Mendy? A. He did.

Q. What did Lepke say to you with Mendy there alongside of the two of you? A. He told me to point out Joe Rosen to him.

Q. After Lepke told you that in Mendy Weiss' presence, did Lepke go away? A. He did.

Q. Where did you and Mendy Weiss go? A. Went over to eat.

Q. Where did you go to eat, if you can remember? A. Restaurant was located at the time on 5421
Clinton and Broome Street.

Q. A restaurant then located on the corner of Clinton and Broome Street? A. That is right.

Q. After Mendy Weiss and you had the meal, did you go some place? A. We did.

Q. In an automobile? A. That is right.

Q. Whose automobile? A. Mendy's.

Q. Who drove the car? A. Mendy.

Q. Where did Mendy Weiss drive that automobile? A. To Saratoga and Livonia Avenue.

Q. Brownsville? A. That is right.

Q. Brooklyn? A. That is right.

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Q. You say you had known Mendy Weiss from before? A. I did.

Q. How long before had you known him, the best estimate that you can give? A. About two years.

Q. Had you seen him in company with Lepke before this Friday? A. I did.

Q. A number of occasions? A. Quite a number of occasions.

Q. Had you yourself had any personal deal-
5423 ings with Mendy Weiss before this Friday? A. I did.

Q. You came to the point in your testimony where you said Mendy Weiss drove over to the corner of Saratoga and Livonia Avenue, in Brownsville; is that correct? A. That is right.

Q. Did Mendy Weiss bring the car to a stop at or near that corner? A. He did.

Q. Did you see what Mendy Weiss did when he stopped the car? A. I did.

Q. What did he do? A. He got out of the car and walked into the candy store.

5424 Q. Where was the candy store? A. Saratoga and Livonia Avenue.

Q. To your knowledge, was that place a hang-out for the Brownsville boys?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

A. It was.

Q. Do you know how long he stayed in the candy store? A. About five minutes.

Q. Did he come back to the car? A. Yes.

Q. After he came out of the candy store and went back into the car, did he drive the car some place else? A. He did.

Q. Where did he drive it to, then? A. Sackman and Livonia.

Q. Also in Brownsville? A. That is right.

Q. A short distance away from the candy store? A. That is right.

Q. When he stopped the car at Sackman and Livonia, what did Mendy Weiss do? A. He got out of the car. 5426

Q. Did he say anything to you? A. No.

Q. Did you see where he went when he got out of the car? A. I did.

Q. Where did he go? A. He went across the street, speaking to Capone.

Q. Speaking to whom? A. Louis Capone.

Q. Had you known Louis Capone before that? A. I did.

Q. Can you tell us approximately how long you had known him before that occasion? A. Around two years.

Q. Did you see Mendy Weiss talk to Capone? 5427
A. I did.

Q. After they were through talking, did you see what Mendy Weiss and Capone did? A. I did.

Q. What did they do? A. Walked over to the car.

Q. Both of them? A. Both of them.

Q. When Capone walked over to the car with Mendy Weiss, what did you do? A. Capone said, "Hello", to me, and I said, "Hello", to him.

Q. Who got into the car? A. Mendy.

5428 *Paul Berger—For People—Direct*

Q. Did Capone get in? A. No.

Q. Did Mendy Weiss then drive the car some place else? A. He did.

Q. Where did he drive the car? A. Some corner off Sutter Avenue.

Q. Did Mendy Weiss stop the car on a corner off Sutter Avenue?

Mr. Barshay: Your Honor, may counsel not lead? This is most material. The
5429 witness can be asked what he did.

The Court: Yes, this is vital.

Mr. Barshay: Let him tell what he did.

Mr. Turkus: He has already testified to this.

The Court: All right.

Mr. Barshay: Let him tell what he did.

The Court: You can ask him just where he stopped the car in relation to Sutter.

Mr. Turkus: I will adopt the Court's suggestion.

5430 Q. Where, in relation to that corner of Sutter Avenue, did Mendy Weiss stop the car? A. Off Sutter Avenue.

Q. When he stopped the car, did he say anything to you? A. He did.

Q. What did he say? A. He says, "Come on, I will show you where the candy store is and see if you can see Joe Rosen there."

Q. Did you go with Mendy Weiss? A. I did.

Q. Where did he walk to? A. We walked on the opposite side of the candy store, on Sutter Avenue.

Q. When you got opposite the candy store, what happened? A. As we got opposite the candy store, it just happened that Joe Rosen was coming out of the candy store and he was fixing some newspapers and he was fixing the jars on the window there, and I said to him, "That's him, there he is."

Q. When you said to Mendy, "That's him, there he is," what did Mendy say to you? A. "All right," he said. "Now, get back to the car."

5432

Q. When Mendy said, "Go back to the car," did you see what Mendy did? A. I did.

Q. What did he do? A. I walked up a few steps and I turned around and I seen him crossing over the street to the side where the candy store is, walked past it once, walked back again. Then he walked toward the side I was on.

Q. Did he come over to you? A. He did.

Q. When Mendy Weiss re-joined you, did he have any talk with you? A. He did.

Q. What was said? What did you say? A. I asked him if he'll know him now.

5433

Mr. Talley: Louder.

The Witness: I asked him if he'll know this Joe Rosen now. He said, "Yes, I will know him all right."

Q. Where did you go after that, after Mendy Weiss said that? A. Went down to the East Side.

Mr. Turkus: May I have People's Exhibit 2 put back on the easel?

5434 *Paul Berger—For People—Direct*

Q. Turn around, please, and look at the candy store, People's Exhibit 2, in evidence, and tell us is that the candy store. A. That is it (indicating).

Mr. Turkus: Indicating the candy store on People's Exhibit 2, in evidence.

Q. On the Sunday after that Friday did you read a newspaper? A. I did.

5435 Q. Do you recall the name of the newspaper? A. I do.

Q. What was it? A. News.

Q. Was it the Monday morning News? A. That is right.

Q. Just answer this question yes or no: Did you in that newspaper read an account of the killing of Joseph Rosen? A. I did.

Q. After the killing of Joseph Rosen, did you speak with Lepke? A. I did.

Q. Where was that? A. Up in his office.

Q. What was the conversation?

5436

Mr. Barshay: Time, please.

Mr. Turkus: After the Rosen killing.

Mr. Barshay: I know that. A year later, a day later, or when? I object to it unless a time is set, your Honor.

The Court: How long after?

The Witness: That was Monday following the murder.

Q. What did Lepke say to you? A. He asked me what the reaction is in the market.

Q. The jury did not hear you. A. He asked me what the reaction is in the clothing market.

Q. The reaction as to what? A. As to the killing of Joe Rosen.

Q. What did you say? A. I told him, "They all seem to be scared."

Q. What did he say to you then? A. He asked me if I seen Sam Katz and Murray Weinstein.

Q. What did you say to Lepke? A. I told him I did. 5438

Q. Yes, and when you told him you did, what did Lepke say, or did you say anything else? A. I told him, "They seem to be terrible nervous and worried."

Q. Who was terribly nervous and worried? A. Murray Weinstein and Sam Katz.

Q. When you told that to Lepke, what did he say to you? A. "Tell them I want to see them."

Q. After Lepke told you he wanted to see Weinstein and Katz, for you to tell them that, did you speak to Murray Weinstein and Sam Katz? A. I did. 5439

Q. Did you tell them that Lepke wanted to see them? A. I did.

Q. What did they say?

Mr. Barshay: I object to what they said.

The Court: Overruled.

Mr. Barshay: Exception.

A. They said, "Things is too hot now. Wait until it cools off and then we will see him."

5440 *Paul Berger—For People—Direct*

Mr. Barshay: I move to strike out the answer as not binding on this defendant, what Weinstein and Katz said.

Mr. Turkus: It will be connected.

The Court: Denied.

Mr. Barshay: Exception.

Q. After you were told that, did you see Lepke? A. I did.

Q. What did you tell Lepke? A. I told him
5441 what Murray Weinstein and Sam Katz told me.

Q. In order to keep the record straight, you must say the exact language that you said to Lepke as best you can recall. What did you say about Weinstein and Katz to Lepke? A. I told him that, "I told Murray and Sam Katz that you want to see them and they told me to wait until things cool down a bit," then they will see him.

Q. About two weeks or thereabouts after the Rosen killing, did you have a talk with Max Rubin? Yes or no. A. Yes.

5442 Q. After you had that talk with Max Rubin, were you introduced to some people? Yes or no. A. Yes.

Mr. Barshay: I move to strike out the answer as not binding on this defendant.

The Court: Denied.

Mr Barshay: Exception.

Q. After that did you see Lepke? A. I did.

Q. Did he talk to you? Yes or no. A. Yes.

Q. Did he say anything about Max Rubin? Yes or no. A. Yes.

Q. Did he say anything about Danny Fields? Only yes or no. A. Yes.

Q. What did he say in that talk? A. He said it would be advisable for Max to go with Danny Fields.

Q. Did he say how long?

Mr. Barshay: Let us have the full conversation, without suggestions, if your Honor pleases.

The Court: Overruled. 5444

Mr. Barshay: Exception.

The Court: Yes, I think that is right.

Mr. Turkus: All right, it is withdrawn.

Q. When he said it would be advisable for Rubin to go with Danny Fields, did he say something else? A. Yes.

Q. Tell us what he said? A. Until things clear out in Brooklyn.

Q. Did he tell you to do anything? A. He did.

Q. Did he tell you to get in touch with anyone? 5445

Mr. Barshay: Please don't lead, Mr. Turkus. What did he tell you?

Mr. Turkus: I will ask it the way you want it and you take what goes with it. Is there an objection to the question?

Mr. Barshay: Yes, I object to counsel leading, your Honor.

The Court: Do you object to this question upon that ground?

Mr. Barshay: Yes, your Honor.

The Court: Sustained.

Q. What did Lepke say to you? A. He told me to get in touch with Danny Fields and make all arrangements for Rubin to go up there.

Q. Did he say anything else? A. He did.

Q. What did he say? A. Until things clear up in Brooklyn.

Q. Did you get in touch with Danny Fields after that? A. I did.

Q. Did you and Rubin go any place after that? A. I did.

5447 Q. Where? A. I made an appointment with Danny over in the Rustic Cabin.

Q. On what road is that? A. 9-W.

Q. When you got to the Rustic Cabin with Rubin, whom did you see him meet there? A. Danny Fields and a girl by the name of Ruth.

Q. And this girl, was that Danny's girl? A. That is right.

Q. After that meeting, did you go back to New York? A. I did.

Q. Did Rubin remain with Fields and Fields' girl? A. He did.

5448 Q. Did you see Lepke after that? A. I did.

Q. When after that? A. The next day.

Q. Did you talk to him? A. I did.

Q. What did you say to Lepke? A. I told him that I had Rubin over to meet Danny Fields and all arrangements were made for Rubin to stay with Danny.

Q. When you told that to Lepke, did Lepke tell you to do anything? A. He did.

Q. What did he tell you? A. He told me to keep in touch with Danny and tell Danny to pep Rubin up.

Q. Did you get in touch and keep in touch with Danny Fields? A. I did.

Q. Just answer this yes or no: Did he tell you certain things? A. He did.

Q. Did you tell those things to anybody?

Mr. Barshay: Who is "he", Mr. Turkus?

Mr. Turkus: Danny Fields.

Mr. Barshay: I object to what Danny Fields said to this man. 5450

The Court: Yes or no. Overruled.

Mr. Barshay: Exception.

(Question read.)

A. I did.

Q. Whom did you tell it to? A. To Lepke.

Q. What did you tell Lepke? A. I told Lepke that I got in touch with Danny and Danny told me that Max called him up. At that time Max was staying in Saratoga and Danny Fields was stopping over in Glens Falls. Max Rubin called him up two o'clock in the morning and told him he must see him right away and Danny 5451 Fields rode over to see him and when he got there he seen Rubin raving.

Mr. Barshay: I object to anything that happened, the defendant not being present, your Honor.

Mr. Turkus: This is a conversation.

The Court: With Lepke. Overruled.

Mr. Barshay: Exception.

Q. Rubin was raving. Go ahead. A. Rubin was raving on account he was named in the

newspapers that he was wanted for questioning in the Joe Rosen murder.

Q. Just get back a minute. Before you related that conversation to Lepke, did Lepke again speak to you about meeting Weinstein and Katz, before that incident with Rubin? A. He did.

Q. What did he tell you to do? A. He told me to make an appointment, that he wants to see Murray Weinstein and Sam Katz.

5453 Q. When Lepke told you that, did you get in touch with Murray Weinstein and Sam Katz? A. I did.

Q. Did you make an appointment? A. I did.

Q. What place? A. The Governor Clinton Hotel.

Q. Did you attend the meeting? A. I did not.

Q. Did you see Lepke some time after the meeting had been scheduled? A. I did.

Q. When after? A. Next day.

Q. Did Lepke say anything to you? A. He

5454 did.

Q. What did he say? A. He told me that he made arrangements with Murray Weinstein and Sam Katz to give Max Rubin $50 a week while he was away.

Q. Did he say anything about the collection of the money? A. He did.

Q. What did he say? A. That I should get it from either Murray or Sam and give it to Max Rubin.

Q. Was it after that that you had gotten the telephone call from Danny Fields and you related to Lepke about Rubin raving about something in the newspapers? A. That is right.

5455

Q. When you told Lepke what Danny Fields had told you about Rubin, did Lepke say anything? I am referring to the conversation when you told Lepke that you received a telephone call from Danny Fields that Rubin was raving about something that appeared in the newspapers. Did you say anything else to Lepke and did he say something else to you? A. I did.

Q. Tell us what was said? A. I told him that Danny told me that he would not have 5456
him up there.

Q. Would not have Rubin up there? A. That is right.

Q. Yes. A. And the next day I got a telephone call from Max Rubin and he told me he was over in the Hatfield Hotel and then I told Lepke and he says, "I don't know what I am going to do with that son of a bitch. He has to stay away until things clear up in Brooklyn."

Q. After Lepke said that, did you hear from Max Rubin? Did you hear from him? A. I did.

5457

Q. In what way? A. By telephone.

Q. Did you speak with him on the phone? Yes or no. A. I did.

Q. Did you go to see Lepke after that telephone call with Rubin? A. I did.

Q. Did you speak to Lepke? A. I did.

Q. What did you say to him? A. Told him I got a call from Max Rubin, he is over in the Hotel Hatfield.

Q. When you told Lepke that you got a call from Max Rubin, that he was over at the Hotel Hatfield, did Lepke say anything? A. Yes.

Q. What did he say. A. He says, "I don't know what I am going to do with that son of a bitch. He has to stay away until things clear up in Brooklyn." He said, "Come on over. I will go over to see him with you."

Q. Did you go over to the Hatfield with Lepke? A. I did.

Q. When you got there did Lepke talk to Rubin? A. He did.

Q. What did he say to Rubin? A. He says,
5459 "Listen, Max, you got to stay away until things clear up in Brooklyn and you know things are getting pretty hot in New York", and Max said to him, "I can't get along with Danny." Lepke said, "Well, I think I got another spot for you."

Q. Do you know whether Lepke mentioned that other spot at that time? Can you remember? A. Yes.

Q. What spot did he mention? A. Salt Lake City.

Q. Any particular place in Salt Lake City? A. No.

5460 Q. Well, when Lepke spoke of this Salt Lake City, did Rubin agree to go? A. He did.

Q. Do you know a man named Willie Alberts? A. I do.

Q. Do you know what business he was in? A. I do.

Q. What business? A. Bonding business.

Q. Do you know where his office was located? A. I do.

Q. Where was it? A. Lafayette Street.

Q. Some time after that meeting in the hotel between Lepke, Rubin and yourself, did you learn that Rubin had left New York City? A. I did.

Q. From whom? A. From Lepke.

Q. What did he tell you? A. He told me that he sent him to Salt Lake City with a relative of Willie Alberts.

Q. Did he give you any instructions, Lepke give you any instructions? A. He did.

Q. What did he tell you? A. He told me to keep his money, meaning the $50 a week I was getting from Murray Weinstein; I should hold it until he'll see him.

Q. After that did you hear from Rubin? A. I did. 5462

Q. How long after, if you can remember? A. To the best of my recollection, about two or three weeks after.

Q. Did Rubin get in touch with you? A. He did.

Q. In what way? A. By telephone.

Q. Did he talk to you on the telephone? A. He did.

Q. Did you tell Lepke of that? A. I did.

Q. How long after you received the call? A. Same day.

Q. What did you say to Lepke? A. I just got a call from Max Rubin; he is over in the hotel. 5463

Q. Did you tell him the name of the hotel? A. That is right.

Q. What hotel was it? A. Hotel Hatfield.

Q. When you told that to Lepke, did Lepke say anything to you—that Rubin was in the Hotel Hatfield, I am talking about that conversation? A. He did.

Q. What did he say? A. He told me, "I don't know what I am going to do with him. He has got to stay away until things clear up." He also told me to give him his money.

Q. Did you turn over the money to Rubin that was coming to him? A. I did.

Q. Some time after that did Lepke have a talk with you about Rubin? A. He did.

Q. Do you remember how much later that was? A. To the best of my recollection it was about a week or so.

Q. What did Lepke say to you then? A. He told me he is making arrangement to have Rubin go down to New Orleans and he also told me
5465 that Rubin was going to get in touch with me and tell me the hotel he is going to stop and the name he is going to use and Lepke was going to get in touch with some people over there to take care of him.

Q. When Lepke told you that Rubin would communicate with you and tell you the name he was using and the place he was stopping at, did Lepke give you any instructions as to what you were to do with the information? A. As soon as I received the call from Rubin I should tell Lepke the name and the hotel that he is stopping
5466 at.

Q. Did you receive a telephone call from Max Rubin? A. I did.

Q. What did he tell you in that talk? A. He told me the name of the hotel he was stopping. He also told me the name that he was using.

Q. Can you remember either the name of the hotel he was stopping at or the name he was using? A. I cannot.

Q. At any rate, after you got that information, did you see Lepke? A. I did.

Q. Did you talk to him? A. I did.

Q. What did you tell him? A. I told him the

name of the hotel that he told me he was stopping, also the name he was using.

Q. You came to a point in your testimony where you had told us that Lepke said he would have some people communicate with Rubin. Do you remember that? A. That is right.

Q. Some time after you had told Lepke the name of the hotel and the name that Rubin was using in New Orleans, did Lepke speak to you again? A. He did.

Q. Can you tell us how long after that time 5468
it was that you told him the hotel Rubin was stopping at and the name he was using, if you can remember? A. The next day.

Q. What did he say to you? A. He says to me, "I got in touch with them people out in New Orleans and they called up the hotel and where Max was supposed to be stopping and he is not there." He said, "I don't know what the hell I am going to do with that son of a bitch." He said, "Call up and find out what is wrong."

Q. He said call up whom? A. Call up the hotel where he was stopping.

Q. Did you call up the hotel? A. I did. 5469

Q. What information did you get? A. They told me there was a man registered there—

Mr. Barshay: I object to it. It is not in the presence of the defendant, absolutely hearsay. He is now speaking to a gentleman, your Honor, somewheres in New Orleans who has not been identified.

Mr. Turkus: Subject to a direction of Lepke to do so, and then it will be connected by the next piece of testimony.

5470

Mr. Barshay: I don't care what that man in New Orleans said to this man. That was not pursuant to Lepke's direction.

Mr. Turkus: It was.

The Court: Sustained.

Q. After you spoke to somebody on the telephone in New Orleans, did you go and talk to Lepke? A. I did.

5471

Q. What did you tell him? A. I told him I called up the hotel and they told me there was a man registered there by that name but he checked out.

Q. Did you hear from Rubin after that? A. I did.

Q. Did he speak to you? A. He did.

Q. Was it in person or on the telephone? A. On the telephone.

Q. What did Rubin tell you?

Mr. Barshay: I object to it. This is not as per instructions. It is apparently a voluntary act on the part of Rubin.

5472

The Court: According to the evidence it is competent, the connection being sufficiently established if the jury believes it. Overruled.

Mr. Barshay: Exception.

Q. What did Rubin tell you? A. He told me he is in his home.

Q. Where was his home? A. Up in the Bronx.

Q. After you got that information from Rubin, did you see Lepke? A. I did.

Q. What did you tell him? A. I told him,

"I just received a telephone call from Max" and he asked me where he is and I told him, "He is home."

Q. And when you told that to Lepke, did he tell you to do anything? A. He did.

Q. What did he tell you to do? A. He says to me, "Meet me tonight."

Q. Where did he tell you to meet him? A. In 63rd Street and Central Park West.

Q. Do you know whether Lepke had lived in that vicinity? A. I do. 5474

Q. Was he living in that vicinity, as far as you know, at that time? A. He was.

Q. And had you ever been to his home? A. I was.

Q. Was it a nice place?

Mr. Barshay: I object to it.

A. Yes.

The Court: Overruled.

Mr. Barshay: I withdraw the objection. 5475

Q. You mean it was a very nice place?

Mr. Barshay: Yes or no.

A. Beautiful place.

Q. Did you meet him up on Central Park West? A. I did.

Q. Did you and he go some place? A. We did.

Q. In what kind of a conveyance? Do you understand what a conveyance is? A. No.

Q. In what did you go some place? A. An automobile.

Q. Whose car was it? A. Mine.

Q. Who did the driving? A. I did.

Q. On the way, in the car, did Lepke talk to you? A. He did.

Q. In which direction did you drive the car? A. Towards the Bronx.

Q. On the road to the Bronx did something happen? A. It did.

5477 Q. What happened? A. Lepke got off and he says, "Go over to Max's house and pick him up and bring him over here."

Q. Did you then drive up to Max Rubin's house? A. I did.

Q. Did Rubin go with you? A. He did.

Q. Where did you drive him? A. I drove him to the corner where I dropped Lepke off.

Q. When you got to the corner, did Rubin get out of the car? A. He did.

Q. Where did he go? A. It happened to be that it was raining that night and Lepke was

5478 standing under an awning and Rubin got off the car and he spoke with him.

Q. Did you see them talking together? A. I did.

Q. Could you hear what they were saying while they were under the awning? A. No.

Q. Can you give us an idea of about how long they talked together under the awning? A. I would say about ten minutes.

Q. What happened after that time elapsed? A. The both of them got into the car again.

Q. When they both got into the car, did they talk? A. They did.

Q. And by "they" I mean Lepke and Rubin. A. They did.

Q. What did Rubin say in the car? A. I heard Rubin say to Lepke, he said, "Listen, Lep, I got to be around somewheres where I can be near my wife and kid", so Lepke says, "Well, you can't stay home. I will tell you what you will do. I'll let Paul drive you downtown and pick out some hotel and check in in that."

Q. Who was the first one that got out of the car? A. Lepke. 5480

Q. Where did you drive Rubin after that? A. Back to his home.

Q. When he got home, what did you see him do? A. Took a couple of grips, some belongings, and went down in my car.

Q. Did he take the grips and belongings into the car? A. He did.

Q. Where did you drive him, if you can remember? A. We drove downtown and I think he either checked in either the Lexington Hotel or the Shelton Hotel.

Q. Did you give Rubin his money? A. I did.

Q. Did you pep him up? 5481

Mr. Barshay: I object to it.

A. I did.

Mr. Barshay: There is an objection.

The Court: I don't know what that means. Sustained.

Mr. Turkus: He was told by Lepke to pep him up.

Mr. Barshay: That was with respect to Danny Fields, if you recall, in Saratoga.

5482 *Paul Berger—For People—Direct*

The Court: I don't understand the meaning of the term.

Mr. Turkus: All right, I won't bother with it, if it is not understandable.

Q. In order that we may all understand what "pep up" is, what does that mean? A. Well, to cheer him up, that he should not be worried about that they are looking for him.

5483 Mr. Barshay: Will you get who is "they", Mr. Turkus?

Q. After that did Rubin go some place? Some time after he had gone into one hotel or the other, the names of which you have given us, did he leave New York City? A. He did.

Q. Did anyone tell you whom he went away with?

Mr. Barshay: I object to it. It is hearsay.

Mr. Turkus: It only calls for yes or

5484 no.

Mr. Barshay: I object to it, sir, beause it is hearsay.

The Court: That concludes that what someone told him is true.

Mr. Turkus: If your Honor will only understand it, when I ask a question and I submit it is proper, that the next question will connect it.

Mr. Barshay: I press my objection, sir.

The Court: You may say yes or no.

Mr. Barshay: Exception.

A. Yes.

Q. Who told you? A. Lepke.

Q. What did he tell you? A. That he went away with Benny Levine.

Q. At that time did you have any of Rubin's money? A. I did.

Q. Was anything said about that? A. Lepke told me to give him the money.

Q. Give whom the money? A. Lepke.

Q. Rubin's money? A. That is right.

Q. How long after you were told that Rubin had gone away with Benny Levine, by Lepke, 5486
was it that you next heard from Max Rubin? A. To the best of my recollection, about four weeks.

Q. Who told you that Rubin was back? A. Lepke told me that he was back and Rubin is going to get in touch with me.

Q. Get in touch with you? A. That is right.

Q. Did Rubin get in touch with you? A. He did.

Q. Did you meet him some place? A. I did.

Q. Where did you meet him? A. I met him on Nostrand Avenue and Eastern Parkway.

Q. In Brooklyn? A. In Brooklyn. 5487

Q. And when you met Rubin on Eastern Parkway and Nostrand Avenue, describe how his face looked to you.

Mr. Barshay: I object to it.

The Court: Sustained.

Q. Describe his appearance.

Mr. Barshay: I object to it.

The Court: You mean disguise or something?

Mr. Turkus: Yes, absolutely.

Mr. Barshay: Mr. Turkus, you should not do that.

Mr. Turkus: I cannot give the Judge thought waves. When he asks me a question I must answer him.

The Court: I thought you meant expression. Under some conditions you can show normal reaction by change of expression. But you may show disguise at any time.

5489

Mr. Turkus: Naturally.

Mr. Barshay: Exception.

Q. Tell the jury about Rubin's appearance when you saw him on that corner at Nostrand Avenue and Eastern Parkway in Brooklyn? A. He was disguised and he looked very comical to me.

Q. What was the disguise that looked comical to you? A. He had a moustache and he wore glasses.

Q. After you had seen Rubin with that comical
5490 appearance as you have described it, did you speak to Lepke? A. I did.

Q. What did you tell him? A. I described how funny Max Rubin looked with his moustache and his glasses and he told me to give him his money and keep pepping him up.

Q. Do you remember the time when Rubin was staying at an apartment in Brooklyn after that? A. I do.

Q. Do you know where that apartment was located, on what street in Brooklyn? Can you remember it? A. Flatbush Avenue.

Q. Was Rubin using his own name in that apartment? A. No.

Q. Do you remember the name he was using? A. He was using some kind of a Russian name.

Q. Can you remember it? A. I could not even pronounce it at the time.

Q. Did you visit Rubin at that apartment when he was living under that unpronounceable Russian name? A. I did.

Q. Did you give him his money? A. I did.

Q. I mean unpronounceable in so far as you 5492
are concerned? A. That is right, unpronounceable for anybody that is concerned.

Q. Do you remember a time when Lepke left New York City?

Mr. Climenko: If your Honor pleases, we object to this, improper, incompetent, improper in form and is leading.

The Court: Overruled.

Mr. Climenko: Exception.

(Pending question read.)

A. I do. 5493

Q. Can you tell us approximately when that was? A. Around June, 1937.

Q. Before he went away, did he say anything to you? A. He did.

Q. What did he say to you? A. That things were getting too hot, he will have to lamm.

The Court: He will have to what?

Mr. Turkus: The New York Times spells it (spelling) l-a-m-m.

5494 *Paul Berger—For People—Direct*

Q. Do you know a man named Simie Diesenhaus? A. I do.

Q. At that time that you have just related, was the name of Diesenhaus mentioned? A. It was.

Q. What was said by Lepke about Diesenhaus? A. If I should want anything, I should see Simie.

Q. Was Diesenhaus an associate of Lepke?

Mr. Climenko: Object to the form of
5495 the question.

Mr. Barshay: If he knows.

A. He was.

Q. Did you have dealings with Diesenhaus from that time on? A. I did.

Q. Did there come a time when you were picked up as a material witness? A. There was.

Q. When was that? A. July, 1937.

Q. Picked up by Mr Dewey's men? A. That is right.

Q. Held in default of bail as a material wit-
5496 ness in some jail in New York County? A. I was.

Q. Was bail fixed by the court upon which you could get your release as a material witness? A. There was.

Q. And to insure your appearance before the authorities in Manhattan? A. There was.

Q. What was the bail fixed? A. $20,000.

Q. How many thousand? A. Twenty.

Mr. Barshay: May we have it clear it was not with respect to this case, Mr. Turkus?

Mr. Turkus: To the Rosen case?

Mr. Barshay: Yes. If your Honor pleases, may I address the Court?

The Court: I am just trying to think. I can see where it might be and where it might not be. Do you promise to connect it up, because if you cannot give your assurance on that point—

Mr. Turkus: Well, I have a right to submit him in his true light, and it will be connected up in another direction. It is an important fact, or I would not bring 5498
it out.

Mr. Barshay: Judge, I don't want anything except—

Mr. Turkus: I won't say anything—

Mr. Barshay: I am addressing the Court, Mr. Turkus.

Mr. Turkus: I will be very guarded and wary of the record.

The Court: You can ask him whether or not he was bailed out.

Mr. Turkus: Yes.

Mr. Barshay: May I address the Court? 5499

The Court: Yes.

Mr. Barshay: I just want to know now for the record whether or not this material witness was picked up by Dewey with respect to the Rosen case or some other matter.

The Court: The Court received the impression that the answer meant picked up in one of Mr. Dewey's matters.

Mr. Barshay: Not with this case.

The Court: Mr. Dewey had nothing to do with this case.

Mr. Barshay: All right.

5500 *Paul Berger—For People—Direct*

Q. How long were you in jail before you were bailed out, if you can remember? A. Close to two weeks.

Q. After your release on bail, were you indicted over in Manhattan? A. I was.

The Court: In another matter?

Mr. Turkus: Naturally.

The Court: That was in a Manhattan matter?

5501 The Witness: Yes.

Q. Was bail set by the court in Manhattan? A. There was.

Q. How much bail was set? A. $35,000.

Q. How long did you stay in before bail was put up? A. Close to two weeks.

Q. When you got out on bail, did you go to see somebody? A. I did.

Q. Whom did you go to see? A. Murray Weinstein and Sam Katz.

Mr. Barshay: I move to strike it out.

5502 It is not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception.

Q. After that did you see any of these defendants on trial in this case? A. I did.

Q. Who? A. Mendy Weiss.

Q. Where did you see him?

Mr. Barshay: I object to it. It is not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

A. At Clinton and Broome.

Mr. Talley: I do not hear the witness.

The Witness: Clinton Street and Broome Street.

Q. East Side?

Mr. Cuff: Fix the time.

Q. Did you have a talk with Mendy Weiss?

Mr. Cuff: May we have the time fixed first, Judge? 5504

The Court: Try to fix the time.

The Witness: The time or the date?

The Court: About the month. This was 1937, you said?

The Witness: About September.

Q. What did you say to Mendy Weiss?

Mr. Barshay: I ask your Honor now that this conversation is not binding upon the defendant Buchalter. This is September, 1937. 5505

The Court: I will charge the jury at the proper time.

Mr. Rosenthal: I make my objection similar to the ones that I have heretofore made in so far as the defendant Capone is concerned.

The Court: Same ruling.

Mr. Rosenthal: Exception.

Mr. Talley: I object to it as being too remote, too long after the date alleged in this indictment, over a year after.

The Court: Overruled.

5506 *Paul Berger—For People—Direct*

Mr. Talley: Exception.
(Pending question read.)

A. I explained him the way I went up to Murray Weinstein and Sam Katz.

Mr. Talley: Please speak up.

A. I explained him the time I went up to Murray Weinstein and Sam Katz, and I had an argument with them, and I told him, "What do
5507 you think of these guys, they wouldn't even send me down a lawyer or they wouldn't even get me bail after all what I have done for them", and Mendy says, "What are you going to do with them sons-of-a-bitch? After all we built the union for them and they won't even do a thing for us."

Q. Did Mendy say, "We built the union"? A. That is right.

Mr. Barshay: Is that the end of the conversation, Mr. Turkus?

5508 Mr. Turkus: Just a minute—

Mr. Barshay: I have to make a motion.

Mr. Turkus: I have to see if there is anything else. That is the end of it.

Mr. Barshay: I move to strike it out with respect to the defendant Buchalter as not binding upon him.

The Court: It is not connected as far as I can see. Strike it out.

Mr. Turkus: This is a statement made by Mendy Weiss.

The Court: It had it down otherwise.

Mr. Turkus: I cannot help that.

The Court: Pardon me. He saw Weiss at the corner of Clinton and Broome and told Weiss he had an argument with Weinstein and Katz.

Mr. Turkus: Right, and now the witness has just related what Weiss said when he reported the conversation to Weiss, in substance, that Weiss said—

The Court: I am beginning to get it now. 5510

Mr. Turkus: Those so-and-so's.

The Court: They had built up the union.

Mr. Turkus: Yes, that is what Weiss said to him.

Mr. Barshay: I am moving, your Honor, now, with respect to the defendant Buchalter: It is not binding upon him.

The Court: I will charge the jury at the proper time.

Mr. Barshay: Exception.

The Court: That is overruled. Motion to strike out is denied. 5511

Mr. Barshay: Exception.

Q. Now, about that time were you seeing Max Rubin? A. I did.

Q. Where were you seeing Max Rubin? A. Around the clothing market.

Q. Is that on Fifth Avenue? A. That is right.

Q. And where on Fifth Avenue were you seeing Max Rubin at that time, between what streets? A. Fifth Avenue between 15th and 18th Street, I will say.

5512 *Paul Berger—For People—Direct*

Q. Sometime in the fall of 1937 did you have a talk with Mendy Weiss? A. I did.

Q. Where was that? A. Clinton and Broome.

The Court: Another talk?

Mr. Turkus: Yes.

Q. What did Mendy Weiss say to you on that occasion?

5513 Mr. Barshay: I object to it, sir. It is not binding on the defendant Buchalter.

Mr. Rosenthal: Same objection.

The Court: Overruled.

Mr. Talley: I object on the ground it is too remote, the fall of 1937.

The Court: Overruled.

Defense Counsel: Exception.

The Court: What did he say?

(Pending question read.)

A. He told me, "We got some information that Max Rubin is squealing, and he has got to
5514 be hit."

Mr. Barshay: I move—

Mr. Turkus: He has not finished yet.

Q. You got to the point where he said, "We got some information that Max Rubin is squealing," that "he has got to be hit." A. "I want you to point him out to Schlermer (Schloime) and work with Schlermer."

Mr. Barshay: Are you finished with the answer?

5515

Mr. Turkus: Yes, at this point.

Mr. Barshay: I move for the withdrawal of a juror, your Honor, and declaration of a mistrial on the ground of prejudice.

The Court: Denied.

Mr. Barshay: Exception. I move to strike out the answer on the ground that it has in no way been connected up with the defendant Buchalter.

The Court: Denied.

5516

Mr. Barshay: Exception.

The Court: The Court will charge the jury on that point at the proper time.

Mr. Rosenthal: I make the same motion on behalf of the defendant Capone.

The Court: The Court will say now, as a general legal proposition, that when it comes to what is known as spoliation or fixation of evidence, that evidence on that point is applicable only to the person who does it. The Court will charge the jury specifically as applied to this case at the proper time.

5517

Mr. Talley: I move to strike out the answer as having no bearing or relevancy upon the questions now before this Court and jury for determination, as being, if anything, an attempt to bring in evidence of another crime not alleged in this indictment, so far as the defendant Weiss is concerned.

The Court: Denied.

Mr. Talley: It cannot be testified to.

The Court: Denied.

Mr. Talley: Exception.

5518

Mr. Rosenthal: May I ask your Honor to inform the jury now that merely because your Honor has called attention to a certain rule of evidence is no indication that there is any proof in this case that that rule is applicable to the facts here.

The Court: That is why the Court is going to charge at the proper time.

Mr. Rosenthal: I am making the request now so that the jury is not under

5519

any erroneous impression as the trial proceeds, sir.

The Court: No doubt counsel are familiar with the maxim omnia contra spoliatorem. Counsel are referred to Chamberlain's Handbook, beginning with Section 431, on this point.

Proceed.

Mr. Talley: If your Honor pleases, I hope you bear in mind that this conversation apparently has reference to squealing in Manhattan, not anything connected

5520

here.

Mr. Turkus: May Mr. Talley sum up at the right time?

Mr. Talley: You bet I will sum up at the right time.

Mr. Turkus: Then do it.

Mr. Talley: You bet I will. Don't overlook that fact. I will have something to say about your witnesses, too. I don't want any confusion here of any other crime being brought in here or any confusion between the squealing in Manhattan

in the Dewey investigation and the crime alleged in this indictment.

The Court: The Court understands. Objection is overruled.

Mr. Talley: Exception.

Q. Tell the Court and jury what it means, "He will have to be hit." A. Get killed.

Mr. Barshay: I move to strike out the answer with respect to the defendant Buchalter on the ground it is not binding upon him and on no theory applicable to him. 5522

The Court: Denied.

Mr. Talley: I move to strike out the answer.

Mr. Barshay: And I again move for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice as against the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I move, if your Honor pleases, to strike out the answer as being this witness's interpretation of somebody else's language. 5523

The Court: Why wasn't there objection? There was sufficient opportunity to make objection.

Mr. Talley: There was not an opportunity. There was nothing in the question that it was going to elicit anything approaching that answer.

The Court: He was asked as to the

meaning of the word. When no objection was made, I assumed it was the lingo that counsel conceded it was willing that this witness should testify to the meaning of.

Mr. Talley: No, I was not at any time willing. I move for the withdrawal of a juror and declaration of a mistrial in view of that answer.

The Court: Well, for safety, notwithstanding no objection was made, the Court
5525 will strike out the witness's understanding as to the meaning of the words "have to be hit," and will instruct the jury to disregard it.

Mr. Talley: Take an exception to the denial of my motion.

Q. Now, when Mendy Weiss told you, as you have related to the jury, about Rubin squealing, "He will have to be hit," and he wanted you to work with Schlermer, did you agree to do so?

5526 Mr. Barshay: I object to it as not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. I did.

Q. Do you know Schlermer's right name? A. I only know him by the name of Schlermer Katz.

The Court: Is that the Katz who has been referred to here?

Mr. Turkus: No. The Sam Katz that was referred to here was a business agent.

Schlermer Katz is an entirely different individual.

Q. There have been some objections here by counsel, which have consumed some time. I want to direct your attention to this: Did Weiss say anything about Schlermer Katz to you?

Mr. Barshay: I object to it. Not binding on the defendant Buchalter.

The Court: Overruled. 5528

Mr. Barshay: Exception.

Mr. Talley: I object to it as incompetent, irrelevant, immaterial to matters in this indictment, too remote.

The Court: Overruled.

Mr. Talley: Exception.

Q. Do you understand what I mean? A. Repeat that question.

(Pending question read.)

A. I did. 5529

Q. What did he say? A. He is going to have Schlermer get in touch with me.

Mr. Barshay: With respect to the defendant Buchalter I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you, after that talk with Mendy Weiss, meet Schlermer Katz? A. I did.

5530 *Paul Berger—For People—Direct*

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception, your Honor.

Q. Where was the meeting between you and Schlermer?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception, your Honor.

5531

A. I met him on Stanton and Cannon.
Q. Did you have a talk with Schlermer?

Mr. Barshay: Yes or no.

A. I did.
Q. What was said?

Mr. Talley: I object to it as being immaterial, incompetent, irrelevant, not in any way binding upon the defendant Weiss, not in his presence, apparently having reference again, I submit, to another crime.

5532

Mr. Turkus: I refer your Honor to the conversation had by Mendy Weiss with this witness.

The Court: You don't have to. I remember it.

Mr. Talley: It does not make any difference. It has nothing to do with this particular indictment here and we are here to try that.

The Court: That is what we are trying.

Mr. Talley: And no other.

The Court: Yes, sir. Your objection, however, is overruled,—

Mr. Talley: Exception.

Mr. Barshay: Now I make a motion.

The Court: —because it is properly a part of this trial. Under the law it is properly a part of this trial.

Mr. Talley: I except to that statement and submit that it is not.

The Court: All right.

Mr. Barshay: Will you hear my ob- 5534
jection, your Honor, on another ground?

The Court: Yes.

Mr. Barshay: Not binding upon the defendant Buchalter.

The Court: I will charge the jury at the proper time as to whom it is binding upon, if any.

Mr. Barshay: Exception, your Honor.

Q. What was said? A. He told me that Mendy told him to see me.

Q. Did you answer him? A. Yes, I was look- 5535
ing for him myself.

Mr. Barshay: I still object to it on the same grounds.

The Court: Overruled.

Mr. Talley: Same objection I made before. I take an exception.

The Court: Overruled.

Q. Tell us the rest of the conversation.

Mr. Talley: I object to it upon the grounds already stated.

5536 *Paul Berger—For People—Direct*

Mr. Barshay: I object to it on the grounds that I stated.

The Court: Overruled.

Defense Counsel: Exception.

(Pending question read.)

A. I asked him if he knows Max Rubin. He said no, and I tried to describe him to Schlermer. He said, "Well, maybe if I see him, I may know him." I says to him, "I will tell you what you
5537 will do. I have an appointment for lunch with Max Rubin over in Childs on 14th Street and University Place, at 11:30. You be in there at 11 o'clock."

11:30 I walked—

Mr. Barshay: Please. Are you finished with the answer?

The Witness: No, not yet.

Q. Finish. A. I met Max Rubin—

Q. That is all right. You finished with the
5538 answer.

Mr. Barshay: I move to strike it out on the ground it is not in any wise connected with the defendant Buchalter; on the further ground that it is not binding upon him

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I move to strike it out upon the grounds already urged in respect to the previous objections.

Mr. Barshay: And in respect to defendant Buchalter I further move for the

withdrawal of a juror and declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: Exception to your Honor's ruling in respect to my motion.

Q. Did you, in fact, have an appointment with Max Rubin for 11:30 for lunch at Childs Retaurant on 14th Street off University Place? Was that true, that you had such an appointment? 5540 A. That is right.

Q. Did you take Max Rubin to Childs Restaurant off University Place? A. I did.

Q. When you and Max Rubin went into the restaurant, that Childs Restaurant, did you see Schlermer there? A. I did.

Mr. Barshay: I object to it, your Honor. Will you give me one objection, and I won't interfere with Mr. Turkus's questions, on the ground I already set forth, not binding in any wise on the de- 5541 dent Buchalter?

The Court: Overruled.

Mr. Barshay: Exception. Is that agreeable to the Court—one objection instead of getting up every second?

The Court: It is difficult for the Court to assume any responsibility on that.

Mr. Barshay: Then I will have to get up, Judge.

Q. Can you remember where in the restaurant you saw Schlermer? A. About in the middle of the restaurant.

5542

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.
The Witness: The middle of the restaurant, facing the door.

Q. Did you have lunch there?

Mr. Barshay: Same objection.
The Court: Overruled.
5543 Mr. Barshay: Exception.

A. We did.
Q. Did Max Rubin eat with you? A. He did.
Q. Do you remember how long you spent in the restaurant with Max Rubin?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. About an hour.
Q. Did you leave the restaurant with Max
5544 Rubin?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.
Q. Did you later have a further talk with Schlermer?

Mr. Barshay: Same objection.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.

5545

Q. When was that? A. Same day, same night.

Mr. Talley: May I get the date of that day and night?

Mr. Turkus: It is fixed. It is on the record.

Mr. Talley: Will you ask him, please?

Mr. Turkus: No, I won't. It is on the record, and I am not going back.

Mr. Talley: May I have the time fixed upon this conversation, if your Honor pleases?

5546

The Court: He said he had another talk with Schlermer that night.

Mr. Talley: What night is the witness referring to, is my question.

The Witness: The night that I ate in the restaurant.

Mr. Talley: What night, what month, what day of the week?

Mr. Turkus: Just a minute. I am conducting the—

Mr. Talley: I am asking the Court.

5547

Mr. Turkus: —the direct examination. The time has been properly fixed in chronology, and I object to any cross-examination in the middle of direct examination.

Mr. Talley: I am asking your Honor to have the time fixed by this witness, the District Attorney having refused to do it.

The Court: He has testified that he had another talk with Weiss at Clinton and Broome.

Mr. Talley: I am asking if I can have the time definitely fixed. Will your Honor

5548 *Paul Berger—For People—Direct*

ask this witness what month he is referring to?

The Court: Please wait a minute. And he then met Schlermer at Stanton and Cannon, but there is nothing in the record as to what month or approximately what part of any month this occurred.

(To the witness) Can you place that in any way as to time, Mr. Witness?

5549 Q. Your best recollection. A. Either the end of September or the beginning of October.

The Court: You think that was it?

The Witness: Yes, sir.

Q. It was the same night that you had that further talk with Schlermer? A. I did.

Q. What did Schlermer say and what did you say? A. He told me that he lost Max Rubin, and he asked me where he can pick him up and what is the best time to pick him up. I told him to be around the clothing district on Fifth
5550 Avenue between 15th and 18th Street, to be there about 10:30, usually pick him up about 10:30 to 12.

Mr. Barshay: I move to strike out the answer as not binding on defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception.

Q. You were familiar with Mr. Rubin's transaction of business and the places that he went customarily in the market? A. That is right.

Q. And by that I refer to the streets that he customarily walked on. A. That is right.

Q. And at times when he would be at certain corners. A. Right.

Q. After that talk with Schlermer, did you speak to Schlermer again? A. I did.

Q. When was that? A. The next day.

Q. What was said on that occasion?

Mr. Barshay: I object to it.

The Court: Overruled. 5552

Mr. Talley: Same objection that I made previously.

The Court: Overruled.

Defense Counsel: Exception.

A. He told me he picked up Max Rubin up on Fifth Avenue and he had Cuppie with him and they tailed him down to the Woolworth Building—at that time Dewey was the Special Investigator—and they waited there about an hour and they seen Max Rubin come downstairs and walk down to the subway, and they followed him home. He also told me that he has got to pick him up again tomorrow around the clothing market and when he goes into the subway to go home, he has got to get in touch with somebody in the Bronx. 5553

Mr. Talley: I move to strike that out, your Honor, on the ground heretofore set forth.

The Court: Denied.

Mr. Talley: Exception.

Q. Do you know Cuppie's right name? A. No.

5554 *Paul Berger—For People—Direct*

Q. Does the name Jack Migden mean anything to you, or Jacob Migden? A. I think that is it.
Q. You think it is Cuppie? A. That is right.
Q. In that talk did Schlermer tell you who in the Bronx he was supposed to telephone and report when Rubin got in the subway train to go home?

Mr. Barshay: I object to it.

5555 A. No.

Mr. Talley: I object to it on the ground it is incompetent, irrelevant, immaterial, has no binding effect upon the defendant Weiss.
The Court: Overruled.
Defense Counsel: Exception.

A. No, he did not tell me who, but he told me they got to time it how long it takes when he goes into the subway, when he goes home. He has to get in touch with somebody but he didn't
5556 tell me whom he has got to get in touch with.

Mr. Talley: I move to strike out the answer on the grounds heretofore urged.
The Court: Overruled.
Mr. Talley: Exception.

Q. Sometime after that did you read about an accident happening to Mr. Rubin?

Mr. Barshay: I object to it.
Mr. Talley: I object to it.
The Court: Sustained.
Mr. Barshay: I move for the with-

drawal of a juror and the declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Rosenthal: Same exception.

The Court: It is sustained because what you read in a newspaper is hearsay; it is not evidence.

Mr. Turkus: I only wanted a yes or no answer.

Mr. Talley: It does not make any difference what you want. 5558

The Court: Even that is dangerous.

Mr. Turkus: I won't pursue it at that point.

Q. How long after, if you can recall, after you were told by Schlermer what you just related to the jury, was it that you saw Mendy Weiss again?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception. 5559

Q. Do you understand the question? A. Repeat that question.

(Question read.)

A. Quite some time after Rubin was shot.

Mr. Talley: I move to strike out that answer.

The Court: Strike it out.

5560 *Paul Berger—For People—Direct*

Mr. Talley: And ask that the jury be directed to disregard it.

The Court: The jury is directed to disregard it.

Mr. Talley: And I move for the withdrawal of a juror and a mistrial.

The Court: Denied.

Mr. Talley: Exception.

Mr. Barshay: I make the motion for the withdrawal of a juror and the declaration of a mistrial, and I join in the other
5561 motion Judge Talley made.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Rosenthal: May I have the same motion and exception?

Mr. Barshay: Exception to all counsel.

The Court: Same ruling.

Q. Tell the Court and jury what Mendy Weiss said to you.

Mr. Barshay: I object.

5562 The Court: You asked him how long after. That means days, weeks or months. Was it a few days, a few weeks or a few months between the time you left Schlomer the last time?

The Witness: I would say a couple of months.

The Court: You saw Weiss a couple of months later?

Q. Tell us what Mendy Weiss said to you.

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Barshay: I object to it. It is not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

(Question read.)

A. He said to me, "Look at that lucky son-of-a-bitch, he gets hit in the head and he is still alive."

5564

The Court: Louder.

The Witness: "Look how lucky the son-of-a-bitch is. He gets hit in the head and he is still alive, but we will catch up with him yet."

Mr. Barshay: I move to strike out the answer as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial on the ground of absolute prejudice. 5565

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: Same motion on behalf of the defendant Weiss.

The Court: Same ruling.

Mr. Talley: Exception.

Mr. Rosenthal: Exception.

The Court: Same ruling.

Q. Some time after Mendy Weiss told you what you have just told this Court and jury, did you see him again; yes or no? A. Yes.

5566 *Paul Berger—For People—Direct*

Q. How long after that when he told you about how lucky, et cetera, et cetera? A. To the best of my recollection, about six or seven months.

Q. What happened at that time?

Mr. Barshay: I object to the form of the question.

Mr. Talley: I object to it as being incompetent, irrelevant and immaterial, too remote.

5567

The Court: It is too general. (To Witness) You saw Weiss six or seven months later?

The Witness: That is right.

Q Did you go some place with Mendy Weiss? A. He asked me to take a ride with him.

Q. And did you ride with him? A. I did.

Mr. Barshay: Objected to. It is not binding on the defendant Buchalter.

The Court: Overruled.

5568 Mr. Barshay: Exception.

Q. Who drove the car?

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. Mendy.

Q. Where did he drive you to?

Mr. Barshay: Same objection, your Honor.

The Court: Overruled.
Mr. Barshay: Exception.

A. Saratoga and Livonia.
Q. In Brooklyn? A. In Brooklyn.
Q. The Brownsville corner? A. That is right.
Q. Whom did you meet there?

Mr. Barshay: Same objection.

A. Pittsburg Phil Strauss. 5570

Mr. Barshay: I move to strike out the answer.
The Court: Denied.
Mr. Barshay: Exception.

Q. After you met Pittsburg Phil Strauss there, did you and Mendy Weiss go some place?
A. We did.

Mr. Barshay: Same objection.

Q. Where did you go? 5571

The Court: Did Strauss go with you?
The Witness: He did.
The Court: All went?
The Witness: That is right.

Q. Who went?

Mr. Barshay: Did your Honor rule?
The Court: Overruled.
Mr. Barshay: Exception.

5572 *Paul Berger—For People—Direct*

Q. Where did you go? A. Went over to Louis Cohen's house.

Q. Who were the ones that went to Louis Cohen's house? A. Myself, Mendy Weiss and Pittsburg Phil Strauss.

Q. How long did you, Mendy Weiss and Pittsburg Phil Strauss stay in Cohen's house?

Mr. Barshay: I object to it, not binding on the defendant Buchalter.

5573 The Court: You mean Louis Cohen or Philip Cohen?

The Witness: Louis Cohen.

The Court: Where is his house?

The Witness: Somewhere off Kings Highway.

The Court: Objection overruled.

Mr. Barshay: Exception.

(Question read.)

A. About an hour.

Q. Did the three of you leave, that is, you, Strauss and Mendy Weiss leave?

5574

Mr. Barshay: Same objection.

A. We did.

The Court: Same ruling.

Mr. Barshay: Exception.

Q. Did you get into the car?

Mr. Barshay: Same objection.

A. We did.

5575

Q. In the car did Mendy Weiss say anything to you?

Mr. Barshay: I object to it, not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

A. He did.

Q. What did he say to you?

5576

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

A. He asked me if I know that Seymour Magoon.

Q. What did you say when he asked you if you knew Seymour Magoon?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

5577

Q. I did not hear you. A. I was not positive that I knew him and he started to describe him to me.

Mr. Barshay: I object to it and move to strike out the answer.

Mr. Turkus: Let him finish his answer.

Mr. Barshay: He dropped his voice and I thought he did.

Q. Finish your answer and then we will objections. A. He tried to describe him to me and

I said, "Maybe if I will see him I may know him." He says, "I tell you what I want you to do." He said, "I want you to point out Max Rubin to Magoon. This time the son of a bitch ain't going to be so lucky." Then he says to me, "Be over in Ratner's restaurant—that is located on Delancey Street and Suffolk Street—at 9:30 in the morning and Magoon will be there and I will have Cuppie there with him."

5579 Mr. Barshay: I move to strike out the answer, your Honor, as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice.

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I move to strike it out, if your Honor pleases, upon the ground that it has to do with a crime entirely

5580 distinct and remote from the crime named in this indictment.

The Court: Denied.

Mr. Talley: I join in the motion for the withdrawal of a juror and a mistrial. Take exception to your Honor's both rulings.

The Court: Denied.

Mr. Talley: Exception.

Mr. Rosenthal: Exception.

Mr. Barshay: At the same time, your

Honor, may we have the date of this conversation, if possible.

The Court: About when was it?

Mr. Turkus: The witness has already fixed the time.

The Court: He said about two months after the previous occasion.

Mr. Turkus: May I continue with my direct? I fixed the time properly enough for the record. If there is any cross-examination, it can be done without breaking up the direct. 5582

The Court: All right, go ahead.

Q. Is that Cuppie the same Cuppie that Schermer was talking about? A. That is right.

Mr. Barshay: I object to it.

Q. After Mendy Weiss gave you those instructions, did you go to Ratner's restaurant the following morning? A. I did.

Mr. Barshay: I object to it. 5583

The Court: Overruled.

Mr. Barshay: Exception.

Q. Whom did you meet in Ratner's restaurant?

Mr. Barshay: Same objection, your Honor.

The Court: Same ruling.

Mr. Barshay: Exception.

A. I met Magoon and Cuppie.

5584 Q. By Magoon you mean Seymour Magoon? A. That is right.

Q. When you saw Magoon there with Cuppie, did you recognize him?

Mr. Barshay: I object to it, sir.

The Court: Overruled.

Mr. Barshay: Exception.

A. I did.

5585 Q. Was he one of the boys from Brownsville?

Mr. Barshay: I object to it, sir, not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

A. He was.

Q. Now, did you, Magoon and Cuppie talk together?

Mr. Barshay: I object to it.

The Court: Overruled.

3586 Mr. Barshay: Exception.

A. We did.

Q. What was said?

Mr. Talley: Objected to, if your Honor pleases, on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Barshay: I object to it on the ground I heretofore urged.

The Court: Overruled.

Defense Counsel: Exception.

A. I spoke over with him the best way to point Max Rubin out to Magoon.

Q. Tell us what you told him, what was the best way to point him out?

Mr. Barshay: I object to it.

A. I told him that they should meet me over 16th Street and Union Square.

Q. Whom did you tell to follow you down to Union Square and 16th Street? A. Cuppie was 5588
with me and Magoon followed me up in another car.

Mr. Barshay: I object to it, your Honor, and move to strike out the answer. I asked Mr. Turkus, to have one objection and I would not interrupt you but the Court would not allow it and I cannot help it. If the Court will allow it, I will sit down with one objection.

Mr. Turkus: I am only the prosecutor.

Mr. Barshay: I don't want to interrupt 5589
Mr. Turkus except I want to record my objection.

The Court: The Court does not say it won't allow it. The Court says you will have to assume the responsibility as to the extent and number to which your objection and exception may go because if the Court assumes the responsibility, that will put over on the Court the burden of watching for objectionable points and doing the work that should properly be done by counsel. That is not the best procedure.

5590

Mr. Barshay: Then, your Honor, I will have to do it as I have been doing.

The Court: Use your judgment.

Mr. Talley: I move to strike out the answer.

The Court: Denied.

Mr. Talley: As having no bearing whatever or relation to defendant Weiss, not in his presence or hearing, and I am warning your Honor with all the earnestness

5591

that I can that we are now delving into the alleged commission of another crime entirely distinct and apart from the indictment that we are here to answer.

The Court: The Court is quite alert to its duties, but thank you for the warning nevertheless.

Mr. Talley: Perhaps your Honor, being alert to your duties, will rule on my motion.

The Court: Yes, I had already said "overruled" when you went on.

5592

Mr. Talley: I take an exception. I have done all I could to make plain what is in my mind.

The Court: All right.

Mr. Rosenthal: I do not want to make any objection but I want to see whether I understood your Honor properly at the outset of this testimony. I asked in so far as this witness was concerned that if the testimony was not applicable to my client, whether I could have a general objection and exception to the particular line without interrupting, and I understood your Honor said yes.

The Court: Certainly. I am going to instruct the jury at the proper time in the law as to whom this is applicable.

Mr. Rosenthal: That is the reason why I have not gotten up to object.

The Court: And I have even gone to the extent of stating in a brief and preliminary way to the jury generally the law on that point.

Mr. Rosenthal: I thought that I had understood your Honor correctly. 5594

The Court: I am trying to see you are not prejudiced. At the same time the Court cannot prejudice the case by making a ruling limiting the application of evidence in the absence of the possible connecting up of the evidence at a later stage of the trial with other defendants than is now indicated by the record.

Mr. Rosenthal: That was my theory, that your Honor and I had agreed on that particular point.

The Court: I think we understand one another. 5595

Mr. Rosenthal: All right.

Mr. Barshay: I will do the same as Mr. Rosenthal, one objection and one exception to this line of inquiry.

The Court: Yes.

Q. In view of the series of objections that were made here, I want to direct your attention to this: At the time when you were talking over with Magoon and Cuppie the best way to point out Rubin, did you tell them anything about speaking to you? A. I did.

Q. What did you say?

5596 *Paul Berger—For People—Direct*

Mr. Talley: That is objected to, in competent, irrelevant, immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I told them not to talk to me because I am very well known around there.

Q. Very well known around where? A. The clothing market.

Q. That is what you said to Magoon and Cuppie? A. That is right.

5597

Q. Now we got to the point where you started out to point him out. A. That is right.

Q. Where did you go to point out Max Rubin on this occasion? A. We walked down—we got off our cars on 16th Street and Union Square, and they followed me down towards 5th Avenue.

Q. So the jury will understand it, did you walk first? A. I did.

Q. Who walked behind you? A. Magoon walked behind me and Cuppie was following Magoon.

Q. Now, in that formation, or in that way, where did you walk? A. We walked down toward 5th Avenue. I walked up a block and I spotted Max Rubin.

5598

Q. Where did you spot Max Rubin? A. On the opposite side from where I was.

Q. Where were you then when you spotted him? A. On 17th Street and 5th Avenue, and he happened to be standing near a candy store right opposite me.

Q. When you spotted Max Rubin in that location, what did you do or what did you say? A. I walked over to Magoon. I says, "There's the

fellow, standing across the street, the fellow with a stiff neck, standing with somebody else there."

Q. When you said that to Magoon, describe to the jury how you said it to him. A. As he was standing, he was watching me. I walked back. I said to Magoon, "There he is on the other side, the fellow with the stiff neck, talking to the other fellow on the corner."

Q. At that time did Rubin have a stiff neck? A. He did.

Q. After you had pointed out Rubin in that 5600
fashion to Magoon, what did you see Magoon do? A. I seen him cross over to the side where Max Rubin was standing, and he stood there. Then I walked away.

Q. After you had pointed out Rubin to Magoon, this Seymour Magoon, did you talk to Mendy Weiss again? A. I did.

Q. Where did you have the talk at that time? A. Over in the bar and grill on Lewis and Grand Street.

Q. How long after you had pointed out Max Rubin was that, after you had pointed him out to Magoon? A. To the best of my recollection, 5601
about two weeks.

Q. What did you say to Mendy Weiss?

Mr. Talley: Objected to, if your Honor pleases, incompetent, irrelevant, immaterial.

The Court: Overruled.

Mr. Talley: Too remote.

The Court: Overruled.

Mr. Talley: Exception.

A. I said, "What is happening with Max?"

5602 *Paul Berger—For People—Direct*

Q. What did Mendy say to you? A. Mendy says to me, "What is the matter with you? We got to be very careful. He is with a cop and we don't want to hit a cop, so we got to be very careful how are we going to hit him."

Q. What does the expression mean, to be "hit"?

Mr. Talley: Objected to, if your Honor pleases.

5603

A. To get shot.

The Court: You can qualify him on those terms.

Mr. Turkus: He is an expert.

Mr. Talley: Expert spotter.

Q. Are you familiar with the expressions used by the underworld? A. I am.

Q. Have you heard it for years, these expressions? A. I did.

Q. Are you an expert in the use of the lan-
5604 guage? A. I am.

Q. What does the expression, to be hit, mean in the underworld? A. Shot.

Mr. Talley: I object, if your Honor please.

Q. What was the answer? A. Shot.

The Court: Strike that out. The objection is sustained. He cannot say he is an expert.

(To Witness) How long have you

been familiar with the word, as you used it, "hit"?

The Witness: About fourteen or fifteen years.

The Court: Is it common lingo?

The Witness: It is.

The Court: In the market there, among your group?

The Witness: That is right.

The Court: You may answer.

Mr. Talley: Exception. 5606

Q. Tell us what it means. A. It means shot.

The Court: Just what did he say about that? He said he was being followed by a cop?

The Witness: No, he said he is with a cop and we have to be careful, we don't want to hit the cop, too.

Q. At that time did you know that Rubin was under police protection? A. I did.

Q. Was he under police protection when you fingered him to Seymour Magoon in the clothing district? A. He was. 5607

Q. After Mendy Weiss told you about not wanting to hit the cop with Rubin, did you see Magoon in the East Side of Manhattan? A. I did.

Q. Where did you see him? A. I seen him talking to Mendy Weiss.

Q. Where was he talking with Mendy Weiss? A. On Lewis and Grand Street.

Q. Is that a hangout there, Lewis and Grand? A. It was at the time.

5608 *Paul Berger—For People—Direct*

Q. Describe the dress, or clothes, rather, that Magoon wore on that occasion when you saw him talking with Mendy Weiss on Lewis and Grand Street. A. He was dressed like a laborer.

Q. Did he have on overalls? A. He did, with a flannel shirt.

Q. That was not the usual manner of dress of Seymour Magoon, was it? A. Absolutely not.

Q. That was something unusual? A. That is right.

5609 Q. After Mendy Weiss and Magoon got through talking, did you walk over to Magoon? A. I did.

Q. Did you talk to Magoon? A. I did.

Q. What did you say to him? A. I asked him what is the idea of dressing up the way he did. He says to me, "Listen, I am casing Max: around where he lives there happens to be some construction work going on there and I don't want to be spotted, so I dresses up like one of the laborers."

Q. Tell us what does "casing" mean. A.

5610 Watching.

Q. That is watching and observing his movements? A. That is right.

Q. Preliminary to doing something? A. Right.

Q. Tailing him, timing him? A. Right.

Q. Do you remember some time in May, 1940, reading a newspaper: yes or no? A. Yes.

Q. Do you remember reading something in the newspaper about one Albert Tannenbaum, or Allie Tannenbaum: yes or no? A. Yes.

Q. Did you know Albert Tannenbaum? A. I did.

Q. Was he an associate of Lepke? A. One of Lepke's men.

Q. Was he generally called Allie? A. He was.

Q. After you read something in the newspaper about Allie Tannenbaum, did you have a talk with Mendy Weiss? A. I did.

Q. Where did you have that talk with him? A. Met him in Williamsburg.

Q. Williamsburg, Brooklyn? A. That is right.

Q. What was said by Mendy in that conversation? 5612

Mr. Cuff: May we have the time fixed?

Mr. Turkus: This is May, 1940, about.

Mr. Cuff: May we have the time fixed, Judge, by the witness, not by Mr. Turkus?

The Court: Yes. How long after this talk with Tannenbaum did you talk to Weiss?

Mr. Turkus: No, there is no talk with Tannenbaum.

The Court: I thought he said he talked with Tannenbaum.

Mr. Turkus: No, he read something in the newspapers. 5613

Mr. Talley: In May, 1940. Now, he asked about a talk he had with Weiss, and we are asking that that time be fixed.

The Court: How long after you read, did you talk with Weiss?

The Witness: About the next day.

Q. What did Mendy Weiss tell you over in Williamsburg?

5614 *Paul Berger—For People—Direct*

Mr. Talley: Same objection as made before, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Apparently has reference to the same happening, matter not referred to in the indictment.

The Court: Overruled.

Mr. Talley: Exception.

A. "It looks like Allie is talking."

5615 Q. Yes. Open up your mouth when you talk, so we can hear you. A. "It looks like Allie is talking and I will have to duck. If you want anything, get in touch with Shimmy."

Mr. Talley: I move to strike that out upon the grounds already urged, no reference to any matter in the indictment.

Mr. Barshay: It appears apparently that Mr. Turkus has left the theory of spoliation, so I want to renew my motion to strike out the testimony.

The Court: So far as the Court under-
5616 stands, so far as the Court sees at the present moment, that is so.

Mr. Barshay: Then I move to strike out all this man's testimony.

The Court: I would like to inquire of Mr. Turkus if he can completely—

Mr. Turkus: I don't hear you.

The Court: Can you tell me what you are driving at?

Mr. Turkus: Did you hear his answer?

The Court: Yes, sir. I as asking you a question.

Mr. Turkus: Flight.

Mr. Barshay: As against whom?

Mr. Turkus: Mendy Weiss says to this man, "It looks like Allie is talking. I have got to duck. You get in touch with Shimmy."

The Court: The Court understands that perfectly. From what crime?

Mr. Turkus: From this.

The Court: From what crime?

Mr. Turkus: From the killing of Rosen.

The Court: How do you connect Allie 5618
Tannenbaum with that knowledge?

Mr. Turkus: We will unfold that. We will have Allie Tannenbaum here to tell the jury.

The Court: You mean you intend to connect it?

Mr. Turkus: Of course.

The Court: Let it stand.

Mr. Talley: Exception.

Mr. Turkus: I am sorry. I did not mean to have a petuiant tone of voice.

The Court: I could not recall where 5619
Allie Tannenbaum had been shown to have any knowledge of the Rosen murder and I could not figure what Weiss was ducking from, whether it was that or something else, whether it was possibly the Dewey general investigation. That would be incompetent, but upon your promise to connect it up, we will let the answer stand.

Mr. Barshay: Will your Honor listen to my motion?

Mr. Turkus: If you recall, on Rubin's cross-examination, counsel for Lepke

5620 *Paul Berger—For People—Direct*

brought out something about Allie Tannenbaum.

The Court: I remember that.

Mr. Turkus: You will hear from Allie Tannenbaum later on.

Mr. Barshay: Will you rule on my motion first to strike out this testimony?

The Court: Denied.

Mr. Barshay: May I make a motion?

The Court: I thought you made the

5621 motion.

Mr. Barshay: Yes, I was making the motion. Mr. Turkus, apparently having left the theory from this witness about spoliation, I want to make a motion to strike out all his testimony he gave in support of that theory as not binding upon the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception. I object to this line of inquiry because this has in absolutely no way any tendency to connect the defendant Buchalter.

5622

The Court: It is in the record. If it is not connected up, the Court will strike it out later. At this time it is denied.

Mr. Barshay: Exception.

The Court: Thereby avoiding the necessity of bringing this witness back if it is connected up, and if it is not connected up, no harm is done, because to duck from something else has no evidentiary value in this case. I am sure the jury will not be prejudiced by that.

Mr. Barshay: The point I make is that

the flight of one defendant is not binding upon any other defendant. That is my point.

The Court: I understand that perfectly. The jury will be so instructed, but I cannot strike out the evidence at this time.

Mr. Talley: I take exception.

The Court: I mean I shan't.

Q. I think prior to these objections, and so that we get back at the point of testimony that 5624
we were at, did you say in substance that Weiss said in substance, "It looks like Allie is talking," and that he, Weiss, will have to duck, and if anything comes up, if you want anything, to get in touch with Shimmy? A. That is right.

Q. Did you know Shimmy? A. I did.

Q. Was he one of Lepke's men? A. He was.

Q. After Mendy told you he would have to duck, did you ever see him again before you came to court? A. I did not.

Q. When were you picked up by District Attorney O'Dwyer? A. Around June 5, 1941. 5625

Mr. Rosenthal: That is objected to, if the Court pleases, nothing to show he was picked up.

Mr. Turkus: Nothing to show he was picked up?

Mr. Rosenthal: No.

Mr. Turkus: We got him here.

Mr. Rosenthal: He might have walked in.

Mr. Turkus: You be patient.

5626 *Paul Berger—For People—Direct*

Mr. Rosenthal: Don't worry about me. I have been patient for a number of weeks. I still object to the question.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. And were you arrested and charged with murder in the first degree, the murder of Rosen, your part of it? A. I was.

Q. Went to jail? A. I did.

5627 Q. No bail? A. No bail.

Q. After that did you ask to see Judge O'Dwyer? A. I did.

Q. Did you see Judge O'Dwyer? A. I did.

Q. Did you have a full talk with Judge O'Dwyer?

Mr. Rosenthal: I object to the characterization; whether he had a full one is what the jury will determine, not Mr. Turkus.

The Court: Sustained.

5628 Mr. Rosenthal: Or Judge O'Dwyer either. We had that question asked of Mr. Bernstein also.

Mr. Turkus: Have you finished, Mr. Rosenthal?

Mr. Rosenthal: I made my objection. The Court has sustained it.

The Court: The objection is sustained for the reasons stated.

Q. Did you have a talk with Judge O'Dwyer? A. I did.

Q. You were taken out of jail after the talk? A. I was.

Q. Put into a hotel? A. That is right.

Q. Custody of the New York City Police Department? A. That is right.

Q. Twenty-four hour police guard? A. That is right.

Q. Still in the hotel? A. That is right.

Q. Still under 24 hour police guard? A. That is right.

Q. Were you taken before a Grand Jury and did you testify about the Rosen killing? A. I did.

5630

Mr. Turkus: The witness is offered for cross-examination.

Mr. Rosenthal: Before any cross, if your Honor pleases, so as to have the record straight, I now move for a mistrial and withdrawal of a juror in so far as the defendant Capone is concerned since it now appears affirmatively that in no wise is any of the testimony of this witness related to that defendant and the testimony in so far as he is concerned is highly prejudicial to his rights and interests to a fair trial. 5631

The Court: Denied.

Mr. Rosenthal: I respectfully except, sir.

Mr. Barshay: I make a motion with respect to the defendant Buchalter for the withdrawal of a juror and the declaration of a mistrial on the ground that the latter part of the testimony with respect to spoliation and flight is highly prejudicial to him.

5632 *Paul Berger—For People—Direct*

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I make the same motion with respect to the defendant Weiss, if your Honor pleases.

The Court: Denied.

Mr. Talley: Exception.

The Court: Gentlemen, I want to be reasonable with counsel and I want counsel to be reasonable with the Court. It is
5633 obvious that after the direct examination of this witness, defendants' counsel are entitled to an opportunity to properly prepare for cross-examination. I had intended to hold a Saturday session but if I do it will give the appearance of suddenly pushing the case to the disadvantage of the defense and I won't give the case that complexion so we will have no Saturday session, but I am going to ask counsel between now and Monday to decide and let me know on Monday one of
5634 two alternatives: Shall we sit later hours or shall we hold Saturday sessions. Don't answer that now. It is one or the other. Gentlemen of the jury, please don't discuss the case, let nobody talk to you about it, keep your minds open. Remember each and every other admonition heretofore given, both orally in court and in the instructions given to the chief court officer concerning your demeanor. We will resume this trial at ten o'clock Monday and the Court expresses the wish that we shall all of us try to be promptly on hand so we can start the case promptly at ten

o'clock each morning. We will do quite a bit more work. I think most of the trial as far as the prosecution is concerned may be over. Ten o'clock Monday morning.

The witness may leave first.

The jury by the other door.

Remand the defendants.

Mr. Talley: Will your Honor direct that I may have an opportunity for a very brief time to consult now in the pen with 5636 my client?

The Court: I gave that right to all counsel every day. That is understood. That is to avoid the necessity of any trips to their places of confinement.

Defendants are remanded.

(Thereupon an adjournment was taken to Monday, November 10, 1941, at ten a.m.)

5637

5638 *Paul Berger—For People—Direct*

Brooklyn, N. Y., November 10, 1941.

TRIAL RESUMED

PAUL BERGER, a witness in behalf of The People, resumed the stand and testified further as follows:

Mr. Turkus: I am not seeking to reopen the direct examination, but I want
5639 to go only to the extent of asking this witness to identify two individuals.

The Court: All right.

By Mr. Turkus:

Q. Will you identify this man, please? A. Yes, sir, that is Murray Weinstein, manager of Local No. 4, also executive board member of the General Executive Board of the Amalgamated.

Q. Can you identify this man (indicating)? A. Sam Katz, business agent of Local 4, New York Clothing Cutters Union.

5640

Mr. Turkus: Mr. Weinstein having been previously identified by Rubin, I ask that this man identified as Katz state his name for the record.

The Party Addressed: Sam Katz, 1045 Anderson Avenue, Bronx.

Mr. Barshay: We subpoenaed some police records. I understand they were brought to court by a police officer the other day and the officer turned them over to Mr. Turkus. May we have them, please?

Mr. Turkus: What are they?

Mr. Barshay: Police records indicating surveillance in New York County of the defendant Buchalter by the Police Department. The police officer who came here the other day did not bring the records, your Honor, but he did explain to Mr. Climenko, my associate, that he was here pursuant to subpoena, and he was told to deliver to Mr. Turkus the record. It had already been in his possession for 5642
a considerable time. Those are the records I have reference to.

Mr. Turkus: The records are in court, but counsel for the defendant Lepke will have to proceed according to law with respect to those records.

Mr. Barshay: I am proceeding according to law: I subpoenaed them by an order signed by your Honor. I subpoenaed them and I would like them.

Mr. Turkus: A subpoena does not warrant the turning over by the Police Department of D.D. 4's and D.D. 5's, to 5643
counsel for the defendant.

The Court: That is right.

Mr. Barshay: Mr. Turkus should not have them in his control then. Whether or not the D.D. 4's have anything to do with this case, they are only concerning the movements of the defendant Buchalter in the years 1935, 1936, and 1937 in Manhattan, and have absolutely no bearing upon this case.

The Court: I know nothing about it.

5644 *Paul Berger—For People—Direct*

All I know is what the law purports to be. You know how to proceed, with a subpoena duces tecum.

Mr. Barshay: I complied with every phase of the law.

The Court: Please. If you wish you can have it marked for identification and then offer it in evidence, and if there is an objection, the Court will rule.

Mr. Barshay: May we have them
5645 marked for identification? I have only information, in reply to Mr. Turkus's question, that the police officer told that to Mr. Chimenko in the hall the morning he was here, November 8th.

The Court: Is there a dispute about it now?

Mr. Turkus: I am checking through the records to see if we have such a record.

The Court: If Mr. Klein were here, he would probably know.

Mr. Turkus: Mr. Joseph takes care of all records.

5646 The Court: Do you know anything about it, Mr. Joseph?

Mr. Joseph: All we have is the original D.D. 5' and that is not part of the Rosen record.

Mr. Barshay: I don't want it at this time.

The Court: Instead of making a statement before the jury, proceed according to law. Put your policeman on the stand and see if he knows what he is talking about.

Mr. Barshay: The policeman was ex-

cused by Mr. Turkus, he is not here. I will have to get him again.

The Court: I am not interested in that. Nobody's subpoenas can be excused by counsel for either side, and you should not make such a hearsay statement before this jury.

Mr. Barshay: I take an exception, because I am telling you what the officer said.

The Court: You do not have to raise 5648
your voice and shout your exception.

Mr. Barshay: May the record show that counsel has not raised his voice, nor has counsel shouted to the Court, but that counsel is talking in a regular tone and in his ordinary voice.

The Court: The Court states on the record that you are not telling the truth.

Mr. Barshay: I take an exception to that. Not even the Court is going to say that to me.

The Court: Sit down and behave your- 5649
self.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Denied.

Mr. Barshay: Exception.

The Court: Cross-examination first on behalf of Buchalter.

Cross-examination by Mr. Barshay:

Q. Can you tell us where you were born? A. Poland.

Q. Are you a citizen of the United States? A. I am not.

Q. Did you register as an alien? A. I did.

Q. Can you tell me when? A. A few months ago.

Q. Can you tell me where? A. Up in the District Attorney's office.

Q. In Brooklyn? A. That is right.

Q. You mean you registered as an alien in the District Attorney's office? A. I did.

5651 Q. Can you tell us the time, please? Was it since your arrest? A. That is right.

Q. Do you know when the law allowed for registration period, between when registration began and registration ended? A. I did.

Q. You did not register within those times? A. I did not.

Q. So it was only after June 5, 1941, when you were arrested in this case by the District Attorney's office and the police? A. I thought I was a citizen.

Q. (continued) That for the first time you declared yourself as an alien? A. Through ques-

5652 tioning by the District Attorney. I presumed I was a citizen, through questions.

Q. You never applied, Berger, for citizenship papers, did you? A. No, sir, I was under the impression my father was a citizen, and being that I was in the Army, naturally I thought I was.

Q. Now, when for the very first time were you questioned in this case? A. When I was first arrested.

Q. That was June 5, 1941? A. That is right.

Q. You have lived in the City of New York all the time since 1936 or before that? A. I did.

Q. So that, going back to sometime before September 11, 1936, you used your own name, Berger, Paul Berger? A. That is right.

Q. You lived with your family? A. That is right.

Q. And your son used his own name, Berger? A. That is my name.

Q. He used that name too? A. Yes, sir.

Q. Where did you live? A. At what time?

Q. About 1936. A. 1936—at No. 96 East 54th Street.

5654

Mr. Turkus: I that Manhattan?

The Court: The jury and counsel are all entitled to hear what you say. Speak loudly.

Q. Was it in Brooklyn or Manhattan? A. In Brooklyn.

Q. Did you have a telephone? A. No, sir.

Q. Did you have a bank account in your own name? A. I did.

Q. And you attended to the business of either working for the union or working for yourself during all that time? A. That is right. 5655

Q. You made no effort to conceal yourself? A. You mean to hide myself in any way?

Q. Yes. A. No, sir.

Q. You were always available, weren't you?

Mr. Turkus: I object.

A. Available to whom?

Q. Well, put it this way: You were always at your place of business, weren't you, or at your home, or in the garment district, or in the Cut

5656 ters Local, during these periods, September, 1936, 1937, September, 1938, 1939, 1940, all those times—isn't that a fact? A. Yes, sir, that is right.

Mr. Barshay: May we have the date, Mr. Turkus, please, when McCarthy took a statement from Mr. Rubin?

Mr. Turkus: December 16, 1937.

5657 Q. So that up to December 16, 1937, you were living in the City of New York with your family, attending to your business in the regular course of events, using your own name and living openly?

Mr. Turkus: Objected to as already answered.

The Court: Let him answer, again.

Q. (continuing) Is that so? A. Yes, sir.

Q. From December 16, 1937, until the day you were arrested in this case, June 5, 1941, you also

5658 were in the City of New York, living under your own name, with your family, attending to your regular business, appearing daily at places of business; is that so? A. Yes, sir.

Q. You never left town except for maybe a vacation or so? A. I did.

Q. (The Court) Were you ever in hiding? A. No, sir, I never hid.

Q. The defendant Buchalter never told you to hide from the authorities? A. No, he told me to be careful, though.

5659

Mr. Barshay: I move to strike out the latter part.

The Court: Strike out the last part as unresponsive.

Q. Will you please try to answer my questions without volunteering? A. Yes, sir.

Q. As a matter of fact, Berger, after December 16, 1937, that being the day when Rubin was questioned by Assistant District Attorney McCarthy, you had seen and spoken to Rubin very often, didn't you? A. Repeat that question, please.

5660

Q. After December 16, 1937, that is the day on which Mr. Rubin was questioned by Mr. McCarthy, you had seen and spoken to Rubin quite frequently, is that right? A. On that day?

Q. No, after that date. A. Yes, sir.

Q. I mean, if you used to see Rubin in the garment center or the Clothing Truckers Association, you spoke to him? A. Did you say December?

Q. December 16, 1937. A. Yes, sir.

5661

Q. You had seen Rubin, hadn't you? A. I don't think I did.

Q. You did not? A. No, sir.

The Court: You mean on that day?

Mr. Barshay: No, after that day.

The Witness: Oh, yes.

Q. If you are not clear now, tell me. Do we understand each other? A. After that day?

Q. Yes, you saw him in 1937 and 1938, 1939 and 1940? A. No, sir.

Q. You did not? A. I did not.

5662 Q. When is the last time you saw him? A. The last time I seen him, to be sure, to the best of my recollection, that is when I went before the Grand Jury, that is the last time. I did not see him in 1939.

Q. Did you see him in 1938? A. I did.

Q. There is no doubt about that? A. No, sir.

Q. Did you talk to him? A. That is right.

Q. Did you have business with him? A. I will not say business, but I spoke to him.

5663 Q. You had some financial dealings with him with respect to the New York Truckmens Association, didn't you? A. I did not.

Q. In 1938? A. Absolutely not.

Q. We will come back to that later. At no time until June 5, 1941, had anyone from the District Attorney's office in Brooklyn been to your home or to your place of business and left a subpoena for you, is that right? A. That is right.

Q. You learned in the newspapers or by talk in the garment center that Rubin, in 1937, had

5664 spoken before the Grand Jury in Manhattan, hadn't you?

Mr. Turkus: I object, that is not the testimony.

Mr. Barshay: That was Rubin's testimony, Mr. Turkus.

Mr. Turkus: This man has testified how he learned about the Rubin talk.

The Court: Objection overruled.

A. That is right.

Q. You knew he testified in the flour case against the defendant Buchalter?

Mr. Turkus: I object, unless the time is fixed.

Q. In 1940, February, 1940. A. That is right.

Q. Do you know when the defendant Buchalter surrendered to Edgar Hoover, of the F.B.I., in August of 1939? A. I read about it.

Q. You heard about it? A. I read about it in the newspaper.

Q. You were still in town, living under your own name? A. Yes, sir, but I was in custody at the time. 5666

Q. Will you please not volunteer? You said you would not.

Mr. Turkus: I object, that is not volunteering.

Q. Did you read in the paper or did you hear any place all that the defendant Buchalter was indicted in May of 1940? A. I did.

Q. In this case? A. That is right.

Q. You knew about that? A. I read about it.

Q. You were still living in town under your own name, with your family, attending to your business? A. That is right. 5667

Q. Did there come a time when you heard or read that Rubin had made a statement to Inspector McDermott and to District Attorney O'Dwyer, in the early part of 1940, before the indictment of the defendant Buchalter? A. I don't remember reading that.

Q. Did you ever hear it? A. I did not.

Q. Did anybody tell you that—yes or no? A. No.

5668 *Paul Berger—For People—Cross*

Q. Did Rubin tell you that? A. Absolutely not.

Q. At any rate, you were not sent for, to your knowledge? A. Will you repeat that?

Q. At any rate, you were not sent for by Judge O'Dwyer's office—I don't mean by the Judge himself—but by his Assistants or by the Police Department working with the D. A.'s office, before the indictment of this defendant, in May, 1940, were you? A. No, sir.

5669 Q. You were not sent for or questioned by the District Attorney's office, meaning Judge O'Dwyer's office, or the Police Department, with respect to this case, until June 5, 1941; is that right? A. Yes, sir.

Q. Can you give me the date when you testified before this Grand Jury? A. I would say about five or six weeks ago.

Q. Did you sign a waiver of immunity? A. I did not.

Q. So that you have not been indicted in the Rosen murder? A. Not as far as I know.

5670 Q. Did you receive advice from counsel about not signing a waiver, when you went in before the Grand Jury in this case? A. I did.

Q. And pursuant to his instructions you did not sign; is that correct? A. That is right.

Q. The lawyer that stood up in court the other day, Mr. Gardner, was the same lawyer that gave you that advice, wasn't he? A. Yes, sir, that is right.

Q. Will you please speak up? A. That is right.

Q. Now, between September 11, 1936, and the day you were arrested here, you testified in

direct examination that you had been in custody in New York County, that is, you were under arrest awaiting fixation and putting up of bail, twice? A. Yes, sir.

Q. You were arrested under your right name there? A. Yes, sir.

Q. You gave your right address? A. Yes, sir.

Q. When did you see the defendant Buchalter for the last time before you saw him in this court? A. In the beginning of June, 1937.

Q. You have a good memory, Berger? A. 5672
Pretty fair.

Q. You remember that without any doubt? A. That is right.

Q. Can you tell us the place where you saw the defendant Buchalter in June of 1937? A. The last time I met him was on 5th Avenue and 23rd Street.

Q. On 5th Avenue and 23rd Street, what part of June, if you can tell us? A. Around the beginning of June.

Q. Would you say the first week of June? A. The beginning of it.

Q. Is it fair to say between June 1st and June 10th? 5673

Mr. Turkus: I object.

Q. Do you want to make it between June 1st and June 15th, 1937?

Mr. Turkus: I object.

The Court: See if you can fix it accurately; don't guess. Can you remember?

The Witness: I cannot say definitely.

5674 *Paul Berger—For People—Cross*

Q. But you are definite about the month? A. Yes, sir, about the beginning.

Q. And you are definite about the year? A. Yes, sir.

Q. Where did you see him, in the street or in his place of business? A. In the street.

Q. Do you know exactly where? A. Around 5th Avenue and 23rd Street.

Q. Was it by appointment? A. It was.

Q. Can you tell us where you made the ap-
5675 pointment? A. I was meeting him there quite a number of times.

Q. Before that time, I take it, you made an appointment to meet him there that time? A. That is right.

Q. With reference to the last time, now when before the last time did you see Bachalter? A. I would say, to the best of my recollection, a couple of days before that.

Q. About two days before; where did you meet him then? A. The same place.

Q. Always in the street? A. The last month
5676 or so I used to meet him in the street.

Q. Did he have the Raleigh Clothes then, at No. 200 Fifth Avenue? A. Yes, sir.

Q. In other words, instead of meeting you upstairs at the Raleigh Clothes, he met you downstairs? A. Not in front of the building, sometimes in the park.

Q. Would you see him coming down from the Raleigh Clothes? A. No, sir.

Q. Did you call him at the Raleigh Clothes about that time? A. No.

Q. You knew he was there, though, at 200

Fifth Avenue, about that time? A. I presumed he was.

Q. Well, that is what brought him in the vicinity of 23rd Street and 5th Avenue?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Before the time you just described you saw Buchalter at 23rd Street and 5th Avenue, when had you seen him before that? A. I would like the question repeated. 5678

(Last question read to the witness.)

A. Before I started meeting him in the street I used to meet him up in his office.

Q. When was the last time you saw Buchalter in his office? A. To the best of my recollection, it would be about between a month or five weeks before he left.

Q. You said you saw him last in the early part of June, 1937, didn't you? A. That is right. 5679

Q. And for the last time you saw him in the Raleigh Clothes at 200 Fifth Avenue, it was within a month of the last time you saw him in the early part of June, 1937? A. I did not say that.

Q. Is it fair to say that in the month of May, 1937, you saw the defendant Buchalter at the Raleigh Clothes?

Mr. Turkus: I object to it as having been already answered. Well, I will withdraw the objection.

5680 *Paul Berger—For People—Cross*

A. I would say that to the best of my recollection it would be the first couple of weeks.

By the Court:

Q. We don't know what your best recollection means. A. It would be maybe about—between two or three weeks of May—after April.

By Mr. Barshay:

5681

Q. What? A. The first few weeks in April.

Q. The first few weeks in April is the last time you saw him at the Raleigh Clothes?

The Court: He said it could be. He did not say it was. He is obviously groping to form a recollection of dates.

Q. Give us your best recollection, please. A. The best of my recollection would be the first week or two in April.

Q. That is the last time you saw him at the
5682 Raleigh Clothes? A. Yes, sir.

Q. That refers to 1937? A. Yes, sir.

Q. Thereafter you met him in the street almost daily? A. Daily or every other day.

Q. Openly on the street corner? A. Well, we were pretty careful.

Q. But you spoke to him openly?

Mr. Turkus: I object as already answered. He said they were pretty careful.

Mr. Barshay: I withdraw the question.

Q. I mean, you did not hide in hallways? A. We did.

Q. What hallway did you hide in? A. Well, there was one building on 5th Avenue and 23rd Street.

Q. That is the Raleigh building? A. I beg your pardon.

Q. In that other building? A. No, sir, right opposite.

Q. The Flatiron Building? A. Yes, sir, and also in the subway. We would walk down in the 5684
subway, the 23rd Street subway.

Q. Where did you meet him? A. Sometimes I would meet him at 23rd Street and 5th Avenue.

Q. In the street? A. In the street, sometimes in the park, sometimes downstairs in the subway.

Q. How many times did you meet him, after April of 1937, in the street? A. We always met after that in the street.

Q. Always met in the street? A. After that.

Q. You mean in the public street? A. Yes, sir. 5685

Q. Anybody else with you? A. No, sir.

Q. Anybody else with him? A. No, sometimes Sidney would be there too.

Q. In the street? A. Yes, sir.

Q. Between the first two weeks of April, 1937, and the last time you saw him in June of 1937, can you tell me how many times you saw the defendant Buchalter in the City of New York at any time or in any place?

Mr. Turkus: Objected to as already answered.

5686 *Paul Berger—For People—Cross*

By the Court:

Q. Do you remember? A. I did not keep any tabs, but quite often I did.

By Mr. Barshay:

Q. But you have a recollection of seeing him? A. Yes, sir.

Q. You knew, didn't you, at that time, that
5687 the Police Department of the City of New York were surveilling him every single day, did you?

Mr. Turkus: I object to the form of the question.

Q. (The Court) Did you know it? A. I did.

Q. As a matter of fact, Berger, the fact that the cops were following him from New York, and the District Attorney's office, was made known to you by the defendant Buchalter himself? A. He told me that he sneaks away from them; and that is the only way he can meet me,
5688 that he loses the cops.

Q. Tell us everything he told you about the cops trailing him.

Mr. Turkus: I object; he said he sneaks away from the cops.

Q. And sneaking away from the cops—the cop must first be there to sneak away from, isn't that so?

Mr. Turkus: I object; that is obvious.

5689

A. The only thing I know is he told me he loses the cop. He comes to where I am because he usually lost them in the subway. He loses them some way—how he did it I don't know.

Q. He did tell you the cops were on his tail? A. He told me he was being watched.

Q. Twenty-four hours a day? A. He did not tell me how long, but he told me he was being watched.

Q. He was being tailed? A. He told me he was being watched.

5690

Q. You saw some policemen around, sometime, didn't you? A. I don't remember.

Q. Never? A. I don't know whether they were police or not. They did not have any uniforms. I saw people in plain clothes; I don't know whether they were cops or not.

Q. (The Court) That is a busy locality and there are lots of people? A. Yes, sir.

Q. You knew some of the detectives who were assigned to watch the defendant Buchalter? A. No, sir.

Q. Not by name, I mean by face. A. No, sir.

5691

Q. Do you know when the cops started to watch him? A. No, sir.

Q. Did he tell you? A. No, sir.

Q. Did you know then that the cops stopped watching him? A. No, sir.

Q. Did he tell you? A. No, sir.

Q. Did you know he was on trial in the Federal Court in October and November, a part of each month, in November, 1936? A. Yes, sir.

Q. You used to see him then, in 1936, when he was on trial in the Federal Court? A. See him where?

5692 Q. Where did you see him, if you did at all? A. The last time I seen him—when he was on trial, yes, I saw him in the bull pen.

Q. Is that the only time you saw him during that trial? A. I seen him after the case was over.

Q. But during the trial he was out on bail, wasn't he, Berger, if you know? If you do not know, tell me. A. I don't remember.

Q. Now, answer this yes or no, please: On
5693 November 1, 1938, did you see Rubin? A. I am not definite whether I seen him just on that day.

Q. Well, about that day did you see Rubin? A. I seen him around the district, around the clothing market.

The Court: Counsel is specific as to dates.

The Witness: I definitely cannot say.

By the Court:

5694 Q. He wants to know if around that date—if you can recall. A. I cannot definitely recall, if it was around that date or not. I know I answered him.

By Mr. Barshay:

Q. Did you on that day attempt to induce Max Rubin to commit perjury in New York County, and did you attempt to induce him to say that Thomas Dewey and his assistants were forcing Rubin to swear falsely in a case pending in New York County against you? A. I refuse to answer that question, on the ground it may in

criminate me, on the advice of my counsel. But I wish I could answer it so I could tell you who told me to do it.

Q. Do you want to waive privilege of your rights?

Mr. Turkus: I object. The witness has stated his position.

Mr. Barshay: I move to strike out the latter part of his answer.

The Court: Strike it out. 5696

Mr. Barshay: Will your Honor instruct the jury to please disregard it?

The Court: Yes.

The Witness: You know who told me.

Q Now, please. Now do you recall the date?

Mr. Turkus: I object. It makes no difference, the exact date.

The Court: What date?

Mr. Barshay: The date of this alleged inducement.

The Court: He said he refuses to answer your question upon constitutional grounds. 5697

Mr. Barshay: I want to know if he remembers the date, November 1, 1938.

The Court: But your question embraced something which would violate his Constitutional rights, and the objection was sustained.

Q. Answer this question yes or no: Did you threaten Rubin with violence unless he swore as you wanted him to do?

5698 *Paul Berger—For People—Cross*

Mr. Turkus: I object. That would be violative of his rights; although I am prosecutor I have to protect him from injury, as much as I dislike to.

The Court: You cannot.

The Witness: I refuse to answer the question; it might incriminate me. I only hope I could.

Mr. Barshay: I move to strike out the answer.

5699 The Court: Strike out the latter part. It does not mean anything. The point is, as all counsel know, the man is under indictment in New York County, and he was advised at the outset by the Court, before he was permitted to answer any questions by the District Attorney, as to his Constitutional rights. The Court is obligated to do that. Now he is availing himself of that right in respect to this question. We cannot conjecture as to whether or not it could be used against him on the trial of that indictment. We are bound to accept, 5700 under the law, his assertion of his Constitutional right.

Mr. Barshay: I take it your Honor does not intend to preclude me from asking the question?

The Court: No.

Q. This advice, too, was given to you by Mr. Gardener, who was in court here on the morning you took the stand; he was the same lawyer? A. Yes.

Q. You are awaiting trial in New York County on that charge, are you? A. I am.

 5701

The Court: Is the copy of the New York indictment here?

Mr. Barshay: There are more than one. I have a copy of one and part of another.

The Court: I would ask to see them all.

Mr. Barshay: This is a copy that was made for me, with respect to the subject we are now talking about.

The Court: Tell me how many indictments are against him. Have you just 5702
checked that up?

Mr. Barshay: I cannot say I did, but my information is, from the copy of the record handed to me, Judge— This is the one we are speaking about, and another one.

The Court: I do not know if you get what I mean. If I had copies of all indictments I could read them and I could form, at least in my own mind, a notion as to whether the Constitutional right is asserted in good faith. 5703

Mr. Barshay: Then I will have copies for you before this man leaves the stand.

The Court: I don't say I have a right to reveal that or alter my ruling, but at least I can form an impression.

Mr. Barshay: I will make the effort, Judge.

By Mr. Barshay:

Q. Did you tell us, of your own personal knowledge, how many trials you are already in in New York County? A. Two.

5704 *Paul Berger—For People—Cross*

Q. The one that I just spoke of, is that one of them? A. That is right.

Q. The other one is extortion, isn't it? A. A superseding indictment; the extortion was a superseding indictment. I presume that is the only one.

Q. You are out on bail on two charges now, Berger?

Mr. Turkus: He is not on bail. I ob-

5705 ject.

Q. In New York County, I should say. A. That is right.

Q. You knew personally, didn't you, that after September 3rd—rather, after October, 1947, Rubin was under police guard? A. That is right.

Q. You saw him with policemen? A. That is right.

Q. You saw him with detectives? A. I did.

Q. When I say detectives, I don't mean uniformed men. A. That is right.

5706 Q. You spoke to him while the officers were there; is that so? A. That is right.

Q. Did the officers step aside when you and Rubin spoke? A. At times he did.

Q. You had a private conversation with him, did you? A. That is right.

Q. Without the hearing of the officer? A. We did.

Q. Berger, when did you join the union? A. 1919.

Q. Were you a cutter before you joined the union? A. I was an apprentice.

Q. In the clothing industry? A. That is right.

Q. Was it essential, then, before you could gain membership in the union, to be either a cutter or an apprentice? A. That is right.

Q. If you were not connected in some way with the clothing industry, either as an apprentice or a helper of some kind in the clothing industry, you could gain no membership in Local 4, is that right? A. I would not say that.

Q. There were exceptions? A. At that time, if anybody connected with the union, as far as the underworld is concerned, they would fix it 5708
p, and you would be able to do so.

Q. So if someone had a connection with the underworld, he could get into the union? A. Yes.

Q. That is how Rubin got in, isn't that so? A. I cannot say that; I don't know. How do I know how Rubin got in the union?

Q. Well, if you don't know, tell me: I am trying to find out whether you do or not. Did you know Jack Noya when you joined the union? A. Yes, sir.

Q. What position did he have in the union? 5709
A. I don't know whether he had any position there.

Q. Did you know then, in 1919, whether or not Jack Noya was one of the underworld men connected with the union? A. No. I would not say I knew at that time.

Q. Did you know that in 1920? A. I cannot definitely remember that.

Q. In 1921? A. Around that time.

Q. So that in 1921, to your knowledge, Jack Noya was a strong arm guerilla, or underworld character, connected with the union? A. That is right.

Q. When did you meet Rubin for the first time? A. I would say around—to the best of my recollection, about 1926.

Q. Was that the very first time? A. That is right.

Q. You never saw Rubin around the union between 1917—exclusive of the years 1921 and 1923? A. To the best of my recollection.

Q. Who introduced you to Rubin? A. Danny Fields.

5711 Q. He was a partner of yours, or a good friend of yours? A. That is right.

Q. Which was it? A. A good friend of mine.

Q. An underworld character, was he, at that time—yes or no? A. Not at that time.

Q. Did you know "Legs" Diamond? A. No, sir.

Q. Did you know Johnny Spanish? A. No, sir.

Q. Did you know Kid Dropper? A. No, sir.

Q. Did you know Slabow, Abie Slabow? A. I did.

Q. Where did you meet him? A. I met him

5712 on Broadway and 12th Street.

Q. In what year? A. I would say around 1924 or 1925.

Q. May I direct your attention to your direct testimony. Did you say it was—if I am mistaken, let me know—about 1923, could that be possible? A. Around that time. I cannot definitely say to the month, so many years back.

Q. Did you know Terry Burns? A. I did not, but I heard of him.

Q. Up to 1926, can you give me the names of the underworld characters, gunmen, guerillas or sluggers that were working for the union of

which you were a member? A. Kid Dropper. I heard of him. I did not know him.

Q. Tell me the names.

Mr. Turkus: Is this hearsay? I have no objection, but I want the record to show that it is hearsay; what he knows is by hearsay.

Q. Will you answer? A. Kid Dropper, Johnny Spanish, Jack Noya. 5714

By the Court:

Q. Do you know that, or is it hearsay? A. Johnny Spanish I don't know. I did know of Jack Noya.

Q. Don't say anything unless you know it of your own knowledge, because it is of no value whatever; it is hearsay.

By Mr. Barshay:

Q. Tell us whom you knew personally. A. Jack Noya. 5715

Mr. Turkus: That is not responsive to the other question. The question was, who were the guerillas that were on the union payroll doing certain jobs of slugging and other work for the union?

By Mr. Barshay:

Q. That you knew personally.

The Court: I did not understand it that

way. The Court has to do a little thinking while all this is going on. The first thing that occurs to the Court is, what is the reason for the question? I assume it is to attack credibility.

Mr. Barshay: That is correct.

The Court: Of course you under and, it being collateral, you are bound by the answer, and you cannot put a single witness on the stand to say it is not so?

5717 Mr. Barshay: That is elementary. But what I want to show is association before a certain specific time.

The Court: The question asks for more that that; it asks for hearsay, and the District Attorney is grabbing that to get before the jury the names of certain people, underworld characters of which the witness has no personal knowledge.

Mr. Barshay: I am trying to find that out. These names were brought out by Mr. Turkus.

The Court: I was just cautioning you.

5718 Mr. Turkus: He just asked if he knew Dropper or Spanish personally, and as to what guerilla work was done.

By Mr. Barshay:

Q. Let us straighten it out, Berger: Who did you know personally who was doing strong-arm work for the union before 1926? A. I would say Jack Noya.

Q. Now, anyone else that you knew personally, who was doing that kind of work? A. Danny Fields, but he was a member of the Union.

Q. Any one else? A. Slabow, I heard.

Q. Anyone else? Don't shake your head. A. That is all I know.

Q. Did you take instructions from Slabow personally with respect to the conduct in strikes, the settlement of strikes, picketing, etc.? A. No, I did not.

Q. Did you take instructions from Noya, with respect to the same thing? A. I did not.

Q. Did you take instructions from Danny Fields, with respect to those things? A. Not 5720
before 1926.

Q. When did you become a slugger for the union? A. I would say around, to the best of my recollection, around 1926, when Phil Orlofsky became manager.

Q. Do you say that before 1926 you participated in no sluggings whatever? A. No.

Q. You say no? Would you say that? A. To the best of my recollection, no, sir.

Q. You did not? A. No, sir.

Q. You were working as a cutter? A. A cutter and an active union member at that time. 5721

Q. What were your duties as an active union member at that time? A. Attend meetings.

Q. Anything else? A. Picket where there was a strike.

Q. Anything else? A. No, sir.

Q. Did you participate in the International strike? A. I did.

Q. Were you a slugger then? A. I was, and there were a hundred others; I was only one.

Q. You said you would not volunteer. Now please answer the question and give us the year of the International strike. A. I do not definitely remember that.

Q. May I remind you? A. Sure.

Q. Was it 1925? A. I don't definitely remember.

Q. It does not refresh your recollection? A. I am still saying not definitely.

Q. Do you remember August 4, 1925? A. So many years back I can't remember.

Q. You tell me if you don't remember. A. I cannot remember.

Q. How long did that strike last? A. Quite a
5723 number of months.

Q. How long were you active in that strike? A. I was active during that strike.

Q. Were you a cutter at the same time? A. I think I was.

Q. What? A. I was.

Q. Did you work as a cutter during the International Tailoring strike? A. I think I did; I did, sure.

Q. From morning until night? A. Some days I would be off.

Q. Did you get paid for the days you were
5724 off?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant. What difference does it make?

Mr. Barshay: It makes a lot of difference. May I say the purpose, if you want to know?

The Court: Yes.

Mr. Barshay: This man has said he has been a cutter until 1926. I am now directing his attention to a strike in 1925 and impeaching him for the purpose of

showing that he was a guerilla and slugger in 1925. That is my purpose.

The Witness: And I was a cutter at the time.

The Court: You are going back quite a number of years, and he has answered it is hard to recall. Do you think this would amount to anything as impeachment? Splitting hairs on things so far back?

Mr. Barshay: I except. I think it means a lot. It will amount to a lot when 5726
I connect it up.

The Court: Thank you for raising your voice. He may answer.

Mr. Barshay: Am I not allowed to raise my voice in this court?

The Court. You are expected to be courteous and follow the Court's rulings.

Mr. Barshay: I cannot understand your Honor.

The Court: You are a man that likes to beat up a referee.

Mr. Barshay: My name is not Durocher. 5727

The Court: The Court is trying to be fair to both sides.

Mr. Barshay: I didn't say anything else.

The Court: Just have in mind your voice.

Mr. Barshay: I am proud of it.

The Court: I will see that you have something to be proud of from now on. Proceed.

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By Mr. Barshay:

Q. Did you get paid for the days you were off?

Q. (The Court) Do you remember? A. No, I do not, but I know I was a cutter at the time.

Q. You attended to activities in the International Tailoring strike from time to time, didn't you? A. Sometimes.

Q. Did you get any extra pay from the union
5729 for that work? A. I did.

Q. So that that pay was in addition to the pay you had been receiving from your private employer? A. That is right.

Q. Can you tell us how long you received extra pay from the union? A. The duration of the strike.

Q. How many months? A. I definitely would not say.

Q. Can you tell us the amount? A. $25 a week while I was working.

Q. Who was directing the International strike
5730 on behalf of the union? A. Philip Orlofsky.

Q. Who was giving you the orders with respect to your personal conduct in the International Tailoring strike? A. Philip Orlofsky.

Q. Who was the underworld character in charge of that strike? A. Jack Noya.

Q. Was he the man who was giving your instructions? A. No, sir, he did not.

Q. Was he present every day on the picket line? A. Well, I have never seen him there.

Q. How many sluggings did you take part in in the strike? A. A couple of them.

Q. How many? A. Maybe two or three.

Q. Did you use any blunt instrument in the sluggings? A. I did not.

Q. Did you use any weapon in the sluggings? A. I did not.

Q. Was Danny Fields working with you at that time in the strike? A. He was, and there were a hundred others.

Q. A hundred others? A. Around that.

Q. All participating in the slugging? A. That is right.

Q. You being one of the one hundred? A. 5732
That is right.

Q. Do you remember August 4, 1925, during that strike? A. I am not definite what year the strike was on. I just cannot remember.

Q. May I refresh your recollection? Had you been in custody August 4, 1925? A. I don't remember.

Mr. Turkus: Objected to as immaterial.

The Court: Objection overruled.

5733

Q. You don't remember that day? A. Absolutely not.

Q. Do you remember whether you were in court on that day during that strike? A. I was arrested in that strike.

Q. Was it August 4, 1925? A. I cannot remember.

Q. Was it for felonious assault that you were charged with? A. It was.

Q. Do you remember August 6, 1925, during that strike? A. I do not.

Q. Two days after the day you said you were

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arrested during that strike? A. I don't even remember that I was arrested—I know I was arrested and charged with feeenious assault, but when, what year, I don't remember.

Q. Can't you tell us, Berger, how many times during that strike you had been arrested? A. I definitely cannot say; I don't remember.

Q. Was it once?

Mr. Turkus: I object. Arrests are not
5735 proper.

Mr. Barshay: He volunteered it.

The Court: Objection overruled.

A. I don't remember. I know I was arrested maybe once, twice, maybe three—I don't remember.

Q. Did you kill a man during that strike? A. No, sir.

Q. Did you beat him up so badly he died two days later? A. No, sir.

Q. Were you in the Homicide Court during that strike?

5736

Mr. Turkus: I object; that is going beyond the realms of cross-examination.

The Court: Objection sustained.

Q. Did you know Izzy Korman, who was a picket in the strike? A. I do not.

Q. Who was a brother-in-law of Barlow, did you know him? A. No, sir, there are a few thousand members there; do you expect me to know everybody.

Q. Do you know that Korman was killed during that strike?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Barshay: Exception.

Q. Did you participate in the slugging and killing of this Izzy Kornman during that strike, on August 6, 1925?

Mr. Turkus: Objected to as already answered.
The Court: Objection overruled. 5738

A. Absolutely not.
Q. Did you see Rubin there during that strike? A. I did not.
Q. Wasn't he there on the picket line? A. I have not seen him.
Q. Did you know him then? A. Yes, I did.
Q. Was he an active participant in that strike?

Mr. Turkus: I object, that is neither affecting his credibility nor going to the Rosen killing.
Mr. Barshay: I object to the form of 5739
the objection saying anything about the Rosen killing.
The Court: Objection sustained.
Mr. Barshay: Will your Honor permit me to repeat that question? I made an objection, and I thought your Honor sustained my objection to that statement.
Mr. Turkus: Your objection was after mine.
The Court: I ruled on Mr. Turkus's objection.

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Mr. Barshay: Will you rule on mine, Judge?

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Did you know a person named Carl Johnson(?)? A. No.

Q. Were you on a trolley car, a Church Avenue trolley car, October 21, 1925? Do you recall that? A. Repeat that, please.

5741 Q. Were you on a Church Avenue trolley car October 21, 1925, at 20 minutes after 6 o'clock in the morning? A. I was, with a half a dozen others.

Q. Was Carl D. Johnson, a cutter, there? A. I don't know.

Q. Were you on that trolley car for the purpose of following someone who was made known to you to be a strike breaker? A. I was there with six others.

Q. On that trolley car, while you were there with six others, at Church Avenue and Nostrand, did you cut Johnson's face on the right cheek, the right side of his head, four times with a knife? A. I did not.

5742

Q. Did you participate in it? A. I was there.

Q. For the purpose—for that specific purpose, isn't that so? A. No, sir.

Q. What were you on the trolley car for? A. We were going to beat him up, me and six others.

Q. And that is what you did, you and the six others? A. No.

Q. Didn't you and six others plan this beating up of Johnson after you got on the trolley car? A. We were told to do it.

Q. Who told you to do it? A. Philip Orlofsky.

Q. And you carried out your instructions? A. With a half a dozen others.

Q. Was Johnson cut? A. I don't know; I was told after that he was.

Q. You were on the trolley car? A. I was.

Q. You knew what you were going on the trolley car for? A. That is right.

Q. You had followed him from his home? A. That is right.

Q. To make sure he does not get to his place 5744
of employment? A. That is right.

Q. Was he cut on the trolley car? A. I don't know.

Q. Did you flee from the trolley car? A. I did.

Q. Were you caught? A. I was.

Q. Did you learn then that he was cut? A. I did.

Q. Four times on the side of his cheek? A. I don't know where, but I was told he was cut.

Q. Did you see him subsequently? A. I did not.

Q. Did you see him subsequently in court? A. 5745
What do you mean by "subsequently"?

Q. Did you see him later in court? A. Yes, sir.

Q. Did you see his face? A. I did.

Q. Was it cut? A. I don't remember seeing it cut.

Q. How many other people did you personally or with others participate in slugging in the International strike? A. I told you before.

Mr. Turkus: I object to that.

The Court: Objection overruled.

Q. (The Court) How many did you participate in slugging during that strike, if you remember? A. Maybe two or three.

By Mr. Barshay:

Q. Were there any other strikes before then which you participated in? A. I cannot recollect.

Q. Can you recollect how many sluggings you took part in before this one we spoke about?

5747 A. No, sir.

Q. Were there some? A. I don't remember.

Q. Did you participate in the Finkelstein strike, in 1921? A. No, sir.

Q. You were never there? A. No, sir.

Q. Not once? A. No, sir.

Q. Did you have anything to do with the Finkelstein strike? A. To the best of my recollection, I know there was a Finkelstein strike at one time, and they beat the union somehow. The next time I participated in the strike, and that time he was chased out of town.

5748 Q. What year was that? A. I don't remember definitely.

Q. Was it after the International strike? A. Yes, sir, to the best of my recollection.

Q. About how many years? A. I cannot answer that because I do not remember.

Q. Did you slug anybody in that strike—yes or not? A. Maybe I did; I don't remember.

Q. Do you know how many times you slugged people in that strike? A. Listen, Counsellor, I told you there were over a hundred people working for the union at the time, and the members.

Q. And you were one? A. No, sir, I beg your pardon; I was a member of that union. There

were a hundred others that were members and there were outsiders.

Q. I want to know about you. A. I am answering you.

Q. How many sluggings can you recall participating in in the last Finkelstein strike before you chased him out of town? A. I chased him out?

Q. Before the union chased him out of town. A. Maybe one, maybe two; I don't remember.

5750

By the Court:

Q. Were all sluggings under orders by union officials? A. That is right.

Q. Were the sluggings left to the discretion of the slugger? A. That is right.

Q. Did you have any discretion about it or just take orders? A. Just took orders.

Q. That was part of the system? A. That is right. There were a hundred there.

Q. No free-lancing in slugging? A. Now and then.

5751

Q. Sometimes you would do it on your own? A. If I were attacked by some other Guerillas who would be there, naturally I would fight back.

By Mr. Barshay:

Q. The union did not tell you which people to slug at which time, did they? A. What is that?

Q. The union did not tell you which persons to slug at a particular time, did they? A. Then how would you know who to slug?

Q. I will tell you if you want to know—maybe

on who was on the picket line whom you thought deserved a slugging, you slugged. A. No, sir, you are all wrong.

Q. Do you know which ones? A. It could have been the union had some people working on the inside; they usually have that.

Q. Spies? A. That is right. Then they would go out and tell union officials who he is and that is the way they worked it. Sometimes the other side would have the underworld—well, gangsters
5753 connected there, or they were likely to attack us and we would attack them.

Q. In other words, manufacturers had underworld characters, then? A. Sure. Finkelstein did, I know.

Q. The union had, too? A. Yes, sir.

Q. Both of them worked hand to hand, and you were one of those who worked hand to hand? A. No, sir, I was a member; I was not an underworld character; I was a cutter.

Q. You were a "cutter" in all the sense of the word? A. Yes, sir. I cut myself many times
5754 while working on the machine.

Q. And you cut others? A. No, sir, the only one I cut was myself. I was a damn good cutter, for your information. Ask some of the firms I worked for; I was a good cutter.

Q. Did you know Anthony Brullo of 312 East 112th Street? A. No, sir.

Q. Did you know him March 9, 1927? A. No, sir.

Q. Did you know Anthony Brullo who had a place of business, or worked in a place of business at 361 West 36th Street in the Borough of

Manhattan in March of 1927? A. I don't remember nobody by that name.

Q. Was there a strike in those premises then? A. What kind of a place was it?

Q. I am trying to probe your memory. A. I do not.

Q. I will try to refresh your recollection: did you know or did you use the name Sam Gold then? A. Yes, sir.

Q. Did you live at 106 Ludlow Street at any time? A. No, sir. 5756

Q. Did you tell the police that you did? A. I did.

Q. Did you tell them your name was Sam Gold? A. I did.

Q. Did you know a person named Morris Zolombeck? A. No.

Q. Or Harry Liss, or Sam Shifter? A. Yes.

Q. Isaac Robbins? A. No, sir.

Q. Henry Myers? A. No, sir.

Q. Did you know a group of men, one of whom was the person you just mentioned you knew, Harry Liss, or Sam Shifter, and did you go in 5757
the place of Anthony Brullo, at 361 West 36th Street, on March 9, 1927, and there attack him and give him eight stitches? A. I don't remember that.

Mr. Turkus: I object.

The Court: Objection overruled.

Q. Do you remember when you gave the name Sam Gold, address 106 Ludlow Street to the police? A. I remember that name, yes, sir.

Q. Do you remember the name and the time

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you gave it to the police, and the address you gave to the police with respect to this occurrence on March 9, 1927, at 361 West 36th Street? A. I do not.

Q. Did you tell the police then you were a shipping clerk?

Mr. Turkus: I object to the form of the question because the form makes it ambiguous and confusing.

5759 The Court: It is terribly remote.

Mr. Barshay: Terribly remote, did you say?

The Court: Yes, are you going to quarrel about it?

Mr. Barshay: Exception.

The Court: The objection is sustained, too far away.

Q. Do you remember Brullo walking in front of the premises where there was this strike at 361 West 36th Street? A. I do not.

5760 Q. Did you tell the police then you were a shipping clerk for three years?

Mr. Turkus: I object.

The Court: The Court has ruled that out.

Mr. Barshay: I am trying to refresh his memory with respect to that.

The Court: No.

Q. Were you in court with the men whose names I mentioned to you, on that day?

Mr. Turkus: Objected to. That does not affect credibility.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Did you all pull up in an automobile in front of these premises, jump out of the car, and attack Brullo?

Mr. Turkus: I object.

The Court: I will allow it. This goes into more detail. 5762

A. No, sir.

By the Court:

Q. You said that for years you did slugging and picketing? A. Yes, sir.

Q. And for many years you slugged a good many people, I take it? A. I did.

Q. In many strikes? A. Not many, but a few of them I did.

Q. Is this a fair statement: that most of these were on union official orders, specifically as to the names of people to be assaulted? 5763

Mr. Barshay: I object to the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. That is right.

By Mr. Barshay:

Q. On August 3, 1928, did you use the name of Harry Weinstein? A. I don't remember.

Q. Did you ever use the name of Harry Weinstein? A. I cannot definitely recollect.

Q. Do you deny using the name of Harry Weinstein?

Mr. Turkus: I object to the form of the question. He says he does not remember.

Q. Did you ever live at No. 90 Norfolk Street? A. No, sir.

5765 Q. Did you ever tell the police you did? A. I don't remember.

Q. Did you ever tell the police your name was Harry Weinstein, and that you lived at No. 90 Norfolk Street, on August 3, 1928? A. I do not definitely remember that.

Q. Did you know Harry Freedman and Sol Bloom, in August of 1928? A. No, sir.

Q. Did you and Harry Freedman and Sol Bloom attack a man named Ben Green, in a strike conducted on August 3, 1928, in the Borough of Manhattan?

5766 Mr. Turkus: I object to that.

The Court: Objection overruled.

A. No, sir.

Q. Were you in court that day, if you recall? A. I do not remember. If it was so, I will tell you. I am not looking to hide anything. I don't remember being in court then. Ask me if I was there and I will tell you.

Q. If that is the way you will take it, all right. You know what I am reading from? A. I don't know; you are sidetracking; you are going up-

town; you are trying to hit me in the back to tell you what you want.

Q. I am going in the order of your arrests. A. Tell me what it is; just call them off when I was arrested and I will tell you if I was guilty or not. You don't have to make a big long story, go to Canarsie and the Bronx. Go to the book and tell me what it is.

Q. You did it when anyone told you? A. Under orders.

Q. On March 9, 1927, then, you were arrested as Sam Gold, for felonious assault? A. Is it so on the record? 5768

Q. Yes. A. Call up the record, and I will tell you. You don't have to make a big thing of it.

Mr. Turkus: No matter what Lepke's counsel or the witness may say as to procedure; we still have rules of procedure that the Court must follow. I object to it.

The Court: Objection overruled. 5769

Q. The court records show that you and Harry Freedman and Sol Bloom, when you used the name of Harry Weinstein and gave the address 90 Norfolk Street, and assaulted Benny Green in a strike, cutting him with a knife—

Mr. Turkus: I object. That is reprehensible. The court records show he assaulted somebody.

The Court: Sustained.

Mr. Barshay: The man invited me to do so and I was accommodating him.

5770 *Paul Berger—For People—Cross*

Q. Did you use the name of Paul Goldstein August 31, 1938? A. If it is there I used it.

Q. July 3, 1928, while you used the name of Paul Goldstein, did you go to the premises occupied by Rousemond Company at 67 Fifth Avenue? A. No, sir. You said a minute ago if it is there you must have it— I said whatever name I used, if it is there, that is the name.

The Court: If you don't remember a
5771 thing, say so.

Q. Did you speak to Mr. Rousemond in those premises? A. I knew him.

Q. Did you talk to him? A. I don't remember.

Q. Were you up there? A. I don't remember being up there.

Q. Did you ever talk to him about taking a certain employee back? A. Repeat that.

Q. Did you ever talk to Mr. Rousemond about taking certain employees back to work? A. No, sir.

Q. Were you ever there with three other men?
5772 A. No, sir.

Q. In your presence, Berger, at any time in Rousemond's place, either on the 3rd of July, 1928, or a day or two before or after, with a young man that worked for him at one time— A. (interrupting) I was up there several times. I happened to work with this fellow, a cutter; he was connected with J. Eisner at one time. I worked and knew him as a cutter, if that is the fellow you mean.

Q. Yes, was it the time you were there that

bolts of cloth were destroyed by acid? A. I remember I was arrested for it.

Q. Were there three other men with you at that time? A. I was arrested.

Q. Were there three other men with you when you were arrested? A. No, sir.

Q. Did you live at 668 Saratoga Avenue then? A. I was there, but I do not remember if it was at that time.

Q. Did you use the name of Joe Cohen at that time? A. If it is there I used it; if it is on the 5774
record I used it, on the arrest.

By the Court:

Q. Do you remember? That is the question. A. I don't definitely remember.

Q. Did you ever charge your mind with the various names you had given on various times you were arrested? A. I was innocent; I used to go picked up; I didn't want my name in the paper.

Q. Was it customary to give false names on 5775
arrests, slugging arrests? A. Well, it was, more or less.

Q. And did you charge your mind with those names so you can remember any of them at this time? A. I can hardly remember them.

By Mr. Barshay:

Q. Do you remember July 28, 1929, pointing a revolver at a man named Meyer Rubin, of 241 West 37th Street? A. No, sir.

Q. Do you remember July 31, 1929, at the place of Meyer Rubin, 241 West 37th Street, throwing

a quantity of acid and spoiling $1,300 worth of merchandise?

Mr. Turkus: I object to the "and". That carries an implication.

The Court: He may answer.

By the Court:

Q. Did you ever throw acid on merchandise? A. No, sir.

5777 Q. Was that part of your work, or was that a specialist's job? A. There is quite a number of them that probably did, but I did not use it.

By Mr. Barshay:

Q. Were you a member of this brigade that did it? A. Yes, sir.

Q. Do you remember August 17, 1932, using the name of Joseph Schwartz? A. If it is on the record.

Q. I am reading from the record. Did you assault anyone on that day? A. No, sir.

5778 Q. Do you remember March 3, 1933, assaulting someone in the Borough of Manhattan in another strike in the garment center? A. I do not.

Q. You have been living with your wife, you say? A. Yes, sir.

Q. Did you live with any other woman at the same time? A. Must I answer that question?

Mr. Turkus: Objected to.

The Court: Sustained. That is too far afield.

Mr. Barshay: Exception. I submit

your Honor, that goes to a person's credibility.

The Court: Yes? (Question mark after "yes.")

Q. Did you hit a woman on the head with a bottle in a cabaret on Allen Street? A. No, sir.

Q. Do you know who I mean? A. No, sir.

Q. Did you and Danny Fields put yourselves on the payroll of the Stock Clerks Union at $75 a week—yes or no? A. No, sir. 5780

Q. Were you ever on their payroll? A. No, sir.

Q. Were you ever to the Uneeda Frock Company, on West 23rd Street?

Mr. Turkus: I object unless the time is fixed.

The Court: Objection overruled.

A. If you tell me the name of the boss, I can remember.

Q. Don't you know the name of the boss? A. Well, I don't remember whether I was there or not. 5781

Q. Did you ever work for Little Frenchy, a strong-arm man? A. I did.

Q. Did you and Little Frenchy go to the premises 7th Avenue and 25th Street during a strike? A. I don't definitely remember.

Q. Did you ever go out beating up people during strikes with Little Frenchy? A. I was arrested with him.

Q. In 1937, I believe, were you questioned by an Assistant District Attorney in Mr. Dewey's office? A. That is right.

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Q. Were you questioned about the defendant Buchalter—yes or no? A. I think I was; I am not definite.

Q. And in reply to the questions they asked you did you say to them that you never gave any money to Lepke and you had never had any kind of business with him whatever?

Mr. Turkus: I object unless there is some alleged statement.

5783 Mr. Barshay: You know there could not be such a thing that I would have in my possession—a statement from Mr. Dewey's office.

Mr. Turkus: It looks awfully suspicious to me.

Mr. Barshay: I take an exception to that remark.

Mr. Turkus: I object to this procedure.

Mr. Barshay: I am trying to show a prior inconsistent statement.

By the Court:

5784 Q. Do you remember on any occasion at all that you were interviewed in Mr. Dewey's office, stating that you did not give money to Lepke—

Mr. Barshay: Or have any kind of business with Lepke.

A. I do not definitely remember it.

By Mr. Barshay:

Q. You would not deny it? A. No, I don't remember.

Mr. Turkus: I object to his not denying it.

The Court: He says he does not definitely remember. That is an answer. The objection is sustained to the last question.

Q. When were you definitely put on the payroll of the union as a strong-arm man, what year?

Mr. Turkus: I object to the form of the question; there is nothing in the record to show he was definitely put on any payroll. He showed his slugging in connection with his union work. 5786

The Witness: I was not put on the payroll then.

By Mr. Barshay:

Q. What year were you put on the payroll as a slugger? A. I was not put on as a slugger.

Q. When did you stop really working as a cutter? A. When I started to take a contract for the Worlds Clothing Exchange. 5787

Q. What year was that? A. 1933 or 1934, I don't definitely remember.

Q. When were you put on the payroll of the union, the payroll, without doing any work as a cutter—strictly working for the union? A. Never.

Q. Never? A. No, sir.

Q. You never got money from Weinstein? A. I did.

Q. What year? A. I worked also as a cutter.

Q. I am now speaking of any time when you

worked strictly for the union and Weinstein was in charge, or anybody was in charge, when you did not work as a cutter. A. Then I was in business for myself, when I started working for the Worlds Clothes, when I started contracts.

Q. How long were you at the Worlds Clothing Exchange? A. I would say about two years.

Q. What years were they, if you know? A. I don't know definitely—'33, '34 or '35.

Q. After you finished that connection, did you
5789 go back to the Union on the payroll? A. Finished what connection?

Q. With the World's Clothing Exchange. A. No, sir.

Q. When did you go back on the Union payroll? A. I still was on the payroll but I still had my business.

Q. I get you. In other words, while you were conducting your business, the Union kept you on their payroll? A. I was one of them.

Q. That is right. How many years? A. Until I was arrested.

5790 Q. June 5, 1941. The defendant Buchalter you saw for the last time, as you say, in June of 1937?

Mr. Turkus: Objected to as repetitious.

Q. Did you?

Mr. Turkus: Objected to, repetitious.

Mr. Barshay: Trying to fix the date for the next question, Judge.

The Court: Overruled.

A. Yes, sir.

Q. So while the defendant Buchalter was away up until June 5, 1941, you were on the Union payroll, is that so? A. That is right.

Q. Even though you were in business for yourself? A. That is right.

Q. Or business with some one else? A. That is right.

Q. Can you tell me how much you were getting a week? A. $50. a week.

Q. Every week? A. That is right.

Q. Can you tell me how much you were earning per week in your private business? 5792

Mr. Turkus: That is objected to. That neither goes to credibility nor the issue.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did you report the $50 a week in your income tax? A. No, sir.

Q. Never? A. No, sir.

Q. Did you get any other advantages from the Union other than being on the payroll since you saw the defendant Buchalter in June of 1937? 5793
A. Did I what?

Q. Did you get any other advantages? Were there any other favors extended to you by the Union other than your payroll? A. Favors?

Q. Yes. A. Not that I can definitely say.

Q. I will try to refresh your memory. Did you conduct businesses yourself, contracting businesses? Did you—either yourself or as a member of a firm?

Mr. Turkus: I object to that. This does not go to credibility. This neither

5794 *Paul Berger—For People—Cross*

affects his reliability nor has it anything to do with the issue we are trying, this murder case.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Were you allowed by the Union to conduct non union shops since 1937? A. It was not on account of me; it was on account of your client, on account of Mendy. I was only a front
5795 over there.

Q. You mean on account of Mendy, my client? A. I don't know who.

Q. I am not his attorney; he has a much better one in Judge Talley and in Mr. Cuff. A. I was only fronting there. Mendy was the boss, if you want to know something.

Q. Judge Talley will take care of that. But were you getting that advantage from the Union? Were you allowed to run non-union shops in your own personal business? Yes or no. A. It was not my personal business.

Q. Did you have a share in it? Yes or no.
5796 A. No, sir, I did not.

Q. Did you profit by it, if you wish? A. I was getting paid. Most of it I handed over to Mendy. I only got a little bit of it.

Q. A little bit? A. Even handed over the money I got from the Union to Mendy, now if you want to know something, the $50 a week I handed that over.

Q. Judge Talley will take good care of that. I am trying to find out about my defendant. Were you a partner with a man by the name of Nathan Berger? A. I was not a partner. He was a partner, not me.

Mr. Turkus: Who is "he"?

The Witness: That Berger was, not me. When you see me, you see Mendy.

Q. You said before you would not volunteer, Berger. Do you mind doing that, please, not volunteering? Mr. Turkus will have another chance with you and you can tell him all you want.

Mr. Turkus: I object to this. This is 5798
not a question. (To reporter) Will you read it?

(Remarks of Mr. Barshay read.)

Mr. Barshay: Will your Honor please tell the witness not to volunteer anything other than in response to a question?

The Court: Yes.

Mr. Turkus: In this specific instance where he brought out about Mendy Weiss

Mr. Barshay: Will you stop arguing?

Mr. Turkus: In this specific instance 5799
of the defendant Mendy Weiss, the witness did not volunteer but he responsively answered the question as to the things in that particular firm.

The Court: The Court understands.

Q. What was the name of this concern that you had some interest in with Nathan Berger? A. Berger Clothing Company. Let us presume that I did not have the interest.

Q. Were you drawing $100 a week? Yes or no. A. Two hundred.

Q. Please, Berger— A. $200 a week I said.

5800 *Paul Berger—For People—Cross*

Q. Were you drawing $200 a week? A. That is right. Half of it went to Mendy.

Mr. Talley: I move to strike that out, if your Honor please. I listened long enough to this stuff, and I now move to strike out that part of the answer as not responsive.

The Court: Strike it out.

5801 Q. Was this business at 57 Thames Street in the Borough of Brooklyn? A. That is right.

Q. How long were you in that business? A. What business?

Q. In this business? A. Since they formed the Berger Clothing Company.

Q. How long, please? A. Say about two years.

Q. How much were you getting out of it for yourself? A. A hundred a week.

Q. That was a non-union shop, wasn't it? Yes or no? A. It was.

Q. You did not put any money into this business, did you? A. Neither did Mendy.

5802

Mr. Talley: I move to strike that out, if your Honor pleases.

The Court: Strike it out.

Mr. Talley: And I think your Honor should now instruct this witness, if instructions mean anything to him, again not to volunteer answers of this kind. He is a little over anxious.

Mr. Turkus: I object to that.

The Court: Don't volunteer explanations.

The Witness: I have to say that in order to explain myself. I am getting accused of something that isn't so. I was nothing over there. Mendy was the boss. I was no partner there.

Mr. Talley: I move to strike that out, and I ask your Honor to instruct the jury at this time to disregard it.

The Witness: A lousy $50. a week I have to give up, too.

The Court: Strike it out. 5804

The Witness: Good thing he didn't ask me to give my wife up, too. I would do that, too.

Q. You gave your wife up a long time ago, didn't you, Mr. Berger? A. No, sir.

The Court: Does it impeach credibility if a man engages in non-union business?

Mr. Barshay: Oh, no. I am trying to show, sir, that he muscled into a firm and continued there—

5805

The Witness: I did not muscle in.

The Court: You have not touched that point.

Mr. Barshay: I can only do it one step at a time, your Honor.

The Witness: Mendy put me in as a front there. Mendy muscled in, not me.

The Court: Why not get down to the point? This is collateral. It is of no value unless it tends to show that he is dishonest.

5806 *Paul Berger—For People—Cross*

Mr. Talley: I move to strike out that reference to Weiss.

The Court: Strike it out.

The Witness: I was put in there as a front and there was thousands of dollars coming out of there besides that hundred dollars a week that I gave up.

Mr. Talley: Will your Honor strike that from the record and direct the jury to disregard it?

5807 The Court: Strike it out. The jury will disregard it.

The Witness: And what is more, I had to pay income tax on money I gave him. The money I gave him I had to pay income tax and pay him. I am still paying some of that money that Mendy got.

The Court: Please, no more of that.

Mr. Turkus: Mr. Barshay said, "Go ahead".

The Witness: I am paying income tax and still paying it on the money I gave

5808 to Mendy.

The Court: Five minute recess. The witness will be taken out. When you come back, no more of that.

Mr. Talley: I want your Honor to instruct the jury to disregard that.

The Court: Pay no attention to it. It is obvious the man, in persisting, thought he had the floor and the Court had no gavel.

(After a short recess the witness resumed the stand.)

Q. Do you know the month you disassociated yourself from the Berger Clothes? A. The month I associated myself?

Q. Disassociated yourself? When you stopped with the Berger Clothes? A. Yes, then we formed a corporation. First it was a partnership.

Q. Yes, but when did you stop being connected with Berger Clothes? A. Completely?

Q. Yes. In 57 Thames Street? A. Over a year. 5810

Q. 1946? A. It was in 1940.

Q. Do you remember during the last month that you were there, a nineteen year old boy by the name of Tony Brusillier of 102 Harrison Place, coming up there and asking you for a job? A. That is right.

Q. At that time were you having coffee and rolls? A. That is right.

Q. On the desk? A. That is right.

Q. Do you recall whether or not you gave him a job? A. No.

Q. Did he tell you that he had not eaten for two weeks? A. No, sir. 5811

Q. Did he ask you for some coffee and rolls? A. No, he did not.

Q. Did you offer it to him?

Mr. Turkus: I object to it.

Mr. Barshay: Just wait a while.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did you then grab him by the collar, beat him up against the wall, cut his lip, and throw

5812 *Paul Berger—For People—Cross*

him downstairs? Did you? A. I will tell you why.

Q. Go ahead. A. I was in the office and he came walking in and I asked him what he is looking for. He said he is looking for a job. I said, "We are not open for any one now." He said, "All you Jews are alike." So when he said that, that's just what I done.

Q. You busted his lip? A. I did not.

Q. Did you throw him down the stairs? A.
5813 And then he started to fighting. That is just what he said to me.

Q. Do you remember—

Mr. Turkus: Just a minute. Anything under those circumstances does not affect the credibility of a witness.

Mr. Barshay: I object to the comment of counsel.

The Witness: What would you do if you were in a place of business and somebody comes in for a job and you told him you don't need any one and he said, "All
5814 you Jews are alike," and he starts to wrestle me. I told him to go out. I should have had him arrested. When he told me he has not eaten, then I brought him coffee.

The Court: That was afterwards?

The Witness: That is right.

Q. You gave him coffee afterwards? A. That is right.

Q. Where? A. In the place.

Q. Didn't your partner's brother-in-law take

that boy immediately to a doctor and have his lip stitched? A. I don't remember that.

Q. Didn't your partner continue to pay the expenses, medical expenses, for that boy?

Mr. Turkus: I object to that. That does not affect credibility. That merely shows an act of being a good Samaritan under those circumstances.

The Court: Sustained.

The Witness: Yes, and I told him that— 5816

Q. You were a good Samaritan with that boy? A. What would you do if anybody come into your place of business and acts that way? I thought he was looking to burglarize the place, and so he came walking in. You are a lawyer. If you have somebody coming into your office like that, what would you do if he says to you, "All you Jews are alike," what would you do about it? I don't think you would buy him coffee after that neither.

Q. Finished? Did your partner, Nathan Berger, and you have an argument over that incident; yes or no? 5817

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did you say to Berger, "If I was not in trouble with Dewey, I would break your God damn neck"? Did you say that? A. Absolutely not.

Q. Did Berger say to you then, "I am an ex-

Army man. Go ahead and do it"? Did he? A. Absolutely not.

Q. Wasn't that the last day that you were in that place? A. Absolutely not. We were on friendly terms. I never had an argument with Berger.

Q. You were on friendly terms with Berger? A. Absolutely.

Q. You still are? A. I don't think now. I was at the time, until I left that business, very

5819 friendly terms.

Q. You say until you left that business you were on very friendly terms with him? A. That is right.

Q. There is litigation pending between you and him for money that you overdrew, isn't there? A. There is.

Q. Isn't there? A. There is.

Q. And he charged you with taking money from the business without his permission or consent, isn't that so? A. That is not so.

Q. Isn't that the litigation that is pending now? A. No.

5820 Q. Yes or no. A. No, sir.

Q. Is there litigation pending? A. There is. He is suing me.

Q. Is it for money? A. That is right, for some of the money I took and gave to Mendy.

Mr. Talley: I move to strike that out.

The Court: Strike it out.

The Witness: Because he would never give me a nickel unless Mendy sent word to give him the money.

The Court: That is too far afield.

The Witness: Because Mendy was the boss there; I was not.

Mr. Talley: I move to strike that out.

The Witness: He would not give me any money unless Mendy said so.

The Court: Strike it out. No more about Mendy.

Q. You spoke, at page 1651, substantially about a meeting at a Governor Clinton Hotel with respect to the stoppage. Do you remember that? A. That is right. 5822

Q. Did you see Rubin at Fifth Avenue during that stoppage? A. I think I did.

Q. Did you see him do anything? A. I don't remember.

Q. Is that the time when the striking employees lay down at Fifth Avenue and 17th and 16th Streets and refused the trucks permission to go? A. That is right.

Q. Did you beat up anybody then; yes or no? A. I don't recollect.

Q. What? A. I did not. I don't recollect whether I did or not. 5823

Q. Page 1653, on direct examination, were you asked by the Court:

"Yes, tell what you did.

"The Witness: We stopped trucks, slugged the drivers, things along those lines."

A. I said that. It was me and maybe about two hundred others, maybe five hundred, maybe two thousand.

5824 *Paul Berger—For People—Cross*

Q. It included you? A. I was one of them, yes—had a whole union stopped at that time, and got a 50,000 membership, I think, in New York City alone.

Q. Did Rubin point out anybody to you? A. He did not.

Q. Did you see him do anything at all— A. I did not.

Q. With respect to that strike? You knew that Danny Fields fled from the Dewey investigation, did you not? A. I did. Lepke's orders.

5825

Mr. Barshay: I move to strike out the answer, sir.

The Court: Strike out the last part.

Mr. Barshay: Will your Honor tell this witness again not to volunteer?

The Court: Volunteer nothing, just answer the questions.

Q. When do you say, to your personal knowledge, the defendant Buchalter's connection with the union ended? A. Will you repeat that question again?

5826

(Pending question read.)

Mr. Turkus: He never did say that.

The Court: Is that an objection?

Mr. Turkus: Yes, there is an objection as to the form.

The Court: Sustained as to form.

Q. Do you know when the defendant Buchalter's connection with the union ended?

The Court: Do you know if it did?

The Witness: What do you mean by "connection"? I don't think — It ended?

Q. Please, Berger. You say you saw Buchalter for the last time in 1937, is that correct? A. Yes.

Q. You did not see him again until you saw him in court? A. That is when he got off the payroll, in 1937. That is when he got off the payroll from the Amalgamated Clothing Workers. Until then he was on the payroll. 5828

Q. After that, to your knowledge, he was not? A. That is right. I was told that they would not give him any more money.

Q. That is right, isn't it, after 1937 you say he was not on the payroll? A. I was told they would not give him any more money. That is what I was told, the exact words.

Q. You said here that on the Friday before the killing of Rosen you were at the clothing cutters' headquarters, is that correct? A. That is right.

Q. What was the address of that concern? A. What concern? 5829

Q. Clothing cutters' headquarters, call it the union headquarters, or concern—call it what you want— What was its address? A. On 15th Street and Union Square, in the Amalgamated Bank Building.

Q. What floor? A. Top floor.

Q. What was the address of the Truckmen's Association, New York Truckmen's Association, that day? A. What was the address of it?

Q. Greater New York Truckmen's Association? A. On 17th Street, it was.

Q. Do you know the exact address? A. No.

Q. Do you know the building? A. That is right.

Q. Do you know between what avenues? A. 17th Street and Union Square.

Q. And there is no doubt, Berger, that Rubin saw you that Friday, September 11, 1936, at the clothing cutters' headquarters? A. That is right.

Q. That is what you testified to? A. That is right.

Q. Now, will you give me the time? A. About
5831 five o'clock.

Q. Had you had your lunch that day? Had you eaten that day? A. I was not sick. I must have eaten.

Q. Was it your custom on Friday nights to go home and have dinner with your family? A. Not all the time.

Q. Not every Friday night? Do you know whether that night you did? A. I did not.

Q. Don't be mad at me. I only asked you whether you did or you didn't. A. I didn't.

Q. When did you look at a clock, to your knowledge, or a watch, before Rubin came to see
5832 you that day at the clothing cutters' headquarters? A. I don't remember.

Q. But it was about five o'clock? A. To the best of my recollection.

Q. What was the usual time on Fridays that you left the clothing cutters' headquarters? A. There was no usual time.

Q. Was it before supper hour? A. As a rule.

Q. Supper hour, would you say, was six o'clock, about? A. Sometimes there Friday until seven. Sometimes there is meetings. They are there until eight and nine. There was meetings on Friday nights.

Q. Do you know whom you were talking to when Rubin came? A. I was just walking out.

Q. You were going home, do you recall? Do you know where you were going? A. I don't remember definitely.

Q. He gave you a message, didn't he? Didn't he? A. That is right.

Q. Do you know what time you got to see Buchalter? A. After he told me, I went over.

Q. How long after? A. I walked all the way up. 5834

Q. How long did it take you? A. I just can't remember. Maybe I said, "Hello", to a person here or there. I just don't remember when I got there.

Q. You remember definitely Rubin coming up? A. Definitely.

Q. But you don't remember meeting anybody on the way? A. No, sir.

Q. Do you remember what entrance you came into the premises? A. I do. What premises?

Q. Wherever you saw Buchalter? A. That is right. 5835

Q. What entrance? A. On the Fifth Avenue side.

Q. Walked right in through the street? A. That is right.

Q. Walked into the elevator? A. That is right.

Q. Right into the elevator? A. That is right.

Q. Went right up to see Buchalter? A. I got off on the floor above and came down.

Q. Did you know an employee by the name of Cohen who worked for Buchalter then, Louis Cohen—Frank Cohen? A. If I see him, I may know him.

5836 *Paul Berger—For People—Cross*

Q. Did you ever see an employee of Buchalter's at that office? A. I seen a girl, a couple of girls.

Q. Was the girl there? A. I seen a couple of girls.

Q. Never a person by the name of Frank Cohen? A. If I see him, I may know him.

Q. Was the girl there that day? A. What day?

Q. The day that you went up to see Buchalter,
5837 September 11, 1936? A. I can't say that definitely.

Q. You don't recollect that either? A. Because I didn't walk into the office. I just opened the door and he seen me and he walked out.

Q. It was a little bit of an office, wasn't it? A. What would you call a little bit of an office?

Q. Describe the size yourself. A. Well, as you walked in there was a desk and a telephone. Then they had one—like after his desk and telephone, then there was one room there; there was another little room on this side.

5838 Q. In the room in which Buchalter was? A. He was out front. When I opened the door he seen me.

Q. The room whose door you opened, was that a big room or a small room? A. Small room.

Q. Look around in back of you. There is a big board there. Was the room much bigger than that board? A. What board?

Q. This blackboard right in back of you? A. Bigger than that?

Q. Was the room bigger than this blackboard, and if so, how much? A. You are asking me ridiculous questions. Did you ever see a room as big as that?

Q. I have seen lots of rooms as big as that. A. Would you be able to walk into it?

Q. How many times the size of that blackboard is that room, do you know? A. I am not a mathematician. I didn't go to college. How can I tell you how large? Can you tell me how large?

Q. I want to know the size of that room, to the best of your recollection. A. I can't say unless you showed me a little office here.

Q. Buchalter said to you, "You know that Joe 5840
Rosen," didn't he? A. That's right, he did.

Q. He asked you whether or not you knew Joe Rosen, didn't he? A. That is right.

Q. And you said, "Yes"? A. Yes.

Q. And then, in the hall, he said to you, "I want you to point out that Joe Rosen"? A. That is right.

Q. Then you claim you went down with Mendy and you did, is that right? A. That is right.

Q. Berger, don't you know as a fact that Mendy Weiss and Joe Rosen had worked together for one employer for a period of one 5841
year? A. I do not. Absolutely. Worked as what? Mendy ever work as a truckman? Is that what you are trying to tell me? Are you trying to tell me that Mendy worked as a truckman? Answer my question, will you, please? Are you trying to tell me that?

Q. Finished? A. That is right.

Q. Don't you know that Mendy Weiss and Rosen rode the same truck in the Borough of Manhattan, City of New York, when Rosen worked for Cooper? A. I do not.

Q. Please—

5842 *Paul Berger—For People—Cross*

Mr. Turkus: Please what? That is an answer.

Mr. Barshay: Let me finish.

Q. When Rosen worked for Cooper on Bleecker Street, in the Borough of Manhattan?

Mr. Turkus: The question has been answered.

A. I do not.

5843 Q. Don't you know that Weiss and Rosen knew each other personally and intimately? A. Then why did he tell me to point him out to him? I wish to hell he wouldn't have told me to point him out.

Q. The jury may answer that, Berger; I won't. A. Why the hell didn't he go himself? Why the hell did he want me over there for if he knew him? I wish I had never gone over there. From your estimation that he knew him, then what the hell did he need me there?

5844 The Court: No more.

Mr. Barshay: May we suspend now?

The Court: We will reassemble promptly. All counsel be here at 1:30.

Gentlemen, please remember the previous admonition in all respects. Follow it.

First, the witness will be taken out.

Now the jury taken out by the other door.

Now the defendants are remanded.

(Recess until 1:30 P.M.)

AFTERNOON SESSION—TRIAL RESUMED

PAUL BERGER, resumed the stand and testified further as follows:

Cross-examination by Mr. Barshay (continued):

Q. Berger, did you see Weinstein on September 11, 1936? A. I seen him in September.

Q. I am now speaking of September 11th. Do you know what day that was? A. Was that before the murder? 5846

Q. Yes. Did you see Weinstein? A. What day is September 11th?

Q. You tell me. A. I ask you what day is September 11th, Monday, Tuesday, Wednesday?

Q. You remember everything else. Can you tell me what day of the week it was? A. I don't remember that. Tell me the day.

Q. You cannot tell me? All right, I will tell you. Friday, September 11th. A. That is right.

Q. Did you see Weinstein that day? A. I did.

Q. Where did you see Weinstein that day? A. I think it was the Cutters' Local. 5847

Q. Was it before you received your message from Rubin? A. I think it was.

Q. What? A. It was before.

Q. Did you communicate to Weinstein the message you received from Rubin?

Mr. Turkus: I object.

A. Did I what?

Q. Did you tell Weinstein the message you got from Rubin? A. No.

5848 *Paul Berger—For People—Cross*

Q. You did not tell a soul, did you? A. Will you repeat that question?

(Pending question read.)

A. The one before that.

(Question preceding read.)

A. That is right.

5849 Q. Did you see Weinstein at the same place that you saw Rubin that day? A. I am not sure.

Q. Well, that was the Clothing Cutters' Headquarters, wasn't it? A. That is right; maybe a time when he is not there.

Q. You know best. You tell me. Did you see him, meaning Weinstein, at the Clothing Cutters' Headquarters that day? A. I would not say definitely.

Q. How long were you at this Clothing Cutters' Headquarters that day? A. Maybe about 15 or 20 minutes.

5850 Q. What time did you get there? A. I did not look at the time when I walked up there.

Q. How close to five o'clock? A. A little over 4:30, maybe.

Q. Do you know where you had been before that day? A. I was in my place of business.

Q. Where was that? A. I think it was at that time 714 Broadway.

Q. Manhattan? A. Manhattan.

Q. Was that the only time that day you saw Rubin? A. That is right.

Q. When you came to the headquarters of the Clothing Cutters, did you see Weinstein there?

A. Well, I can't say that definitely. I answered that before.

Q. You say you stayed 15 minutes; is that correct? A. 15 or 20 minutes.

Q. Did you come there for any special purpose that day? A. Well, it was more or less of me coming up there almost every day. I understand what you are driving at, if I go up there for the money I used to bring Lepke. Sometimes I used to get the money on Thursday, sometimes Friday, sometimes Wednesday. The 5852
reason for that was he thought he was being watched for Mr. Dewey's office, and Mr. Weinstein told me, "Lepke told me don't go up there all the time the same day for the money," but I used to go up there, regardless of why I used to go up there.

Q. He told you he was being watched by the police very carefully? A. Or maybe there may be a Dewey man who saw me going in there every time the same time.

Q. In other words, he told you he had to be very careful whom he meets? A. Who told me?

Q. Buchalter. Buchalter told you he has got 5853
to be very careful whom he meets? A. So did Weinstein and Katz.

Q. They told you, too, that Buchalter has got to be very careful whom he meets? A. Meaning officials.

Q. Police? A. I said officials.

Q. Not detectives? A. What do you mean?

Q. In other words, Berger, the idea expressed to you or told to you by Weinstein and Katz and Buchalter all together, substantially was that the police from Dewey's office are watching Lepke very carefully, and they want to know, the police

want to know and Dewey's office want to know whom Lepke was meeting, whether it was union officials whom he was meeting; right? A. That is right.

Q. You stayed at the Clothiers' Local, 15 minutes, you say? A. Around that.

Q. Did you get your money then? A. I don't remember whether I got it that day or the day before. Not my money. It was my money, Lepke's money, and Danny's money, not my
5855 money alone.

Q. You said that. I asked you did you see Weinstein during those 15 minutes? A. I can't say definitely.

Q. Did you see Weinstein when you left? A. No.

Q. Did you leave alone or with Rubin? A. I left alone.

Q. Where did Rubin stay? A. I think he remained there; I am not definite.

Q. You did not ask Rubin why Buchalter wants to see you, did you? A. No.

5856 Q. And he did not tell you? A. No.

Q. You were told the message? A. That is right.

Q. He has done that before? Has he done that before? A. Very seldom.

Q. But he has? A. At one time or another.

Q. When you went into the 200 Fifth Avenue, it was to see Buchalter at the Raleigh Clothes? A. That is right.

Q. Did you see any detectives whom you recognized as you entered the building? A. No.

Q. As you got off the elevator, did you see any detectives in the hall? A. No.

Q. Do you know the elevator boy who operated the elevator? A. I do not know. There is quite a lot of elevators there.

Q. Did you know any of them? A. No. I made sure that I would not.

Q. What? A. I was pretty careful they should not know me.

Q. Did you hide your face? A. No.

Q. You walked in normally, did you not? A. There is thousands of people walking in there every day. 5858

Q. To your knowledge, the Police Department had a picture of you, did they not?

Mr. Turkus: I object to that.

Mr. Barshay: I am trying to prove something, your Honor.

The Court: Overruled.

Q. Did you not? A. I did not.

Q. Well, you had been photographed by the Police Department on prior occasions, had you not? A. I was.

Q. Then they had a picture of you to your knowledge, didn't they? 5859

Mr. Turkus: Objection. That does not follow.

A. They had it in Headquarters.

Mr. Turkus: Even that does not follow.

The Court: It is only an argument. Sustained.

Mr. Turkus: At certain times prints and pictures are returned.

5860 *Paul Berger—For People—Cross*

Q. Well, did you get any pictures back from the Police Department? A. What?

Q. Did you get any of the pictures that were taken of you by the Police Department? Did you ever get them back? A. Did I get any of them?

Q. Yes. A. What did I need them for?

Q. I asked you if you ever got them back from the Police Department. A. I asked them. I wish I could get them back.

5861 Q. But you did not get them back, so they had them? A. That is right.

Q. Did Buchalter tell you that even the elevator boys in the building were instructed to watch who was going into the Raleigh office? A. If he ever told me that?

Q. Yes. A. No, sir.

Q. Did he tell you that even the elevator boys were given pictures of certain people for them to look at? A. That is the first time.

Q. Well, if he did not, he did not. I am trying to find out from you. A. The first time I hear it.

5862 Q. Did Buchalter tell you that even the taxicab drivers in the vicinity of Raleigh and in the vicinity of his home had been picked up and questioned by the police every time Buchalter was taken for a ride as a passenger? A. This I don't know.

Q. Did he tell you that they inquired of the taxicab drivers at Police Headquarters and at Dewey's office where they took Buchalter from and where they took him to? Did he tell you that? A. Don't know anything about it.

Q. You claim you saw, as you opened the door, someone in the office, did you? A. Lepke.

Q. That is all? A. That is right.

Q. Anybody else? A. Well, there was some people in there, but I didn't take notice. He just walked out as I opened the door. As soon as he seen me he walked towards me.

Q. Did he have his hat and coat on? A. No.

Q. Did he go back into the office to put his hat and coat on? A. After he told me to wait for him down by the stairs. 5864

Q. He went back and got dressed? A. Put his hat on and came out.

Q. Did you go back into the office with him? A. No, I did not.

Q. So that you know nobody who was in that room from the moment you opened the door until the moment you left? A. Will you repeat that question, please?

(Pending question read.)

A. No, I could not identify anybody.

Q. Not a soul? Did you know there was a 5865
Dictaphone in that office? A. I didn't know that.

Q. Were you told there was a Dictaphone in that office? A. I was told there may be.

Q. You were not told that it was sure? A. No, Lepke told me that office may be wired.

Q. Did you and Buchalter ever look around the office to see whether or not there were any wires? A. No.

Q. Or Dictaphones? A. I did not.

Q. You know the telephone was tapped by Dewey's office? A. I did not know that.

Q. Were you told that? A. I was told it may

be tapped; that's why I never called; I always come up in person.

Q. You and he went down in the elevator together, did you not? A. That's right.

Q. What floor did you leave from? A. From the floor below.

Q. How long had Buchalter been in that building as a tenant, if you know? A. I cannot say that definitely.

Q. A few years? A. What?

5867 Q. At least a few years? A. I cannot say it definitely.

Q. At least one year, if you know?

Mr. Turkus: I object to it because it had there, "as a tenant"—

The Witness: You have got it on record. You know when he moved in: I don't.

Q. I know when he moved in and when he moved out. I want to know whether you know that. A. I know when Danny was told to go

5868 away by Lepke and I was told to deliver messages and other things to it. Then I knew he was up there, but I don't know how long.

Q. You say Danny was told to go away by Lepke; is that right? A. Positively.

Q. Did you ever tell anyone that Weinstein told Danny Fields to go away? A. Don't be ridiculous.

Q. I should not be ridiculous? A. That is right.

Q. Did you tell that to an Assistant in Dewey's office? A. I never spoke to anyone, to an As-

sistant, in Dewey's office. I would not talk to him, if you want to know the truth.

Q. I know the truth. A. I am telling the truth now.

Q. Did you tell it to anyone at all? A. That what?

Q. That Weinstein told Danny Fields to go away. Did you? A. No, sir.

Q. Were you up to a lawyer's office at 51 Chambers Street in the Borough of Manhattan? Were you? A. By the orders of—

5870

Q. Please. Were you there? A. Just a minute— By the orders of Mendy Weiss.

Mr. Barshay: Your Honor, I ask this man to please be told—

The Witness: Yes, I was told to go up there.

Mr. Barshay: —not to volunteer.

The Witness: I was told to go up there by Mendy. I was told to go up there, and I knew what would happen to me if I didn't go up there.

5871

Mr. Barshay: I move to strike out the answer.

The Court: Strike out the latter part.

Mr. Barshay: I move for the withdrawal of a juror and declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Will your Honor please tell this witness again not to volunteer any information?

The Court: The Court was about to do that.

Mr. Barshay: All right, sir. I thank you.

The Court: Just answer the question, no more. Volunteer no information.

Q. Did you go up to a lawyer's office at 51 Chambers Street? A. What was the name of the lawyer, please?

Q. What difference does that make? A. It does make a difference. There is a number of
5873 lawyers that I know in that building. What lawyer are you referring to?

Q. Did you go up to any lawyer at 51 Chambers Street and speak to him with respect to the investigation that Dewey was conducting then?

Mr. Turkus: I object to it on the ground that the name of the lawyer be fixed, as the witness asked. There are a number of lawyers in the building.

The Witness: That I know.

The Court: Sustained.

Mr. Barshay: Exception.

5874

Q. Whoever the lawyer may have been, did you ever tell him that it was Weinstein who told Danny Fields to go away? Did you tell him? A. If you will tell me who the lawyer is, then I will answer that question. There was a number of lawyers in that building.

Q. Did you tell it to any lawyer in that building?

Mr. Turkus: I object. I ask that the name of that particular lawyer be revealed.

The Court: Overruled.

Q. Did you tell it to any lawyer in that building or any building in this Universe, that Weinstein was the one who told Danny Fields to leave town? Did you? A. Can you tell me the name of the lawyer?

The Court: Yes or no.

The Witness: Yes, by the instructions of Mendy.

Mr. Barshay: I move to strike out the latter part of the answer and that only 5876
that part which is responsive stand.

Mr. Turkus: Of course, under those circumstances any inconsistent statement would not impeach his credibility here, if that is the fact, as testified to. I think the answer should stand.

The Court: If you will make a memorandum of these so you do not forget them on redirect, you won't have to worry about it. It is stricken out.

Mr. Turkus: I am not worried about it.

Q. As you got into the elevator with Buch- 5877
alter, did you know whether or not he said, "Hello" to the elevator boy? A. No.

Q. Was he disguised—Buchalter? A. No.

Q. No smoked glasses? A. No.

Q. Walked right into the elevator, rode down with you? A. That is right.

Q. Walked out of the building in the main entrance? A. There was quite a number of entrances there.

Q. What entrance did he walk out with you, what exit or entrance? A. I think it was—

The Court: Not what you think: do you remember?

The Witness: The front entrance.

Q. 200 Fifth Avenue? A. That is right.

Q. There is a cab line there? A. There is.

Q. Hailed one of the cabs right on the line? A. No.

Q. Where did you go for a cab? A. A cab passing by.

5879 Q. Hailed it right from the street? A. Walked up a bit, not in front of the door.

Q. Right in the public street? A. What is that?

Mr. Turkus: Every street is public.

The Witness: Walked up a bit, away from the building.

Q. How far did you walk? A. Crossed over to Broadway, 23rd Street.

Q. How far? A block, half a block? A. That is a corner there with a number of streets coming in. It is more or less of a square, to a certain extent. We walked up towards Broadway.

5880

Q. Did Buchalter turn around to see if anyone was following him? A. That is right.

Q. A lot of people were following, were they not? A. Walking.

Q. Directly behind him? A. That is right.

Q. You did not know any? A. No, sir.

Q. Then he hailed a cab? A. That is right.

Q. Both got in? A. That is right.

Q. As far as you could learn, or as far as you knew then, Buchalter did not know that cab driver, did he? A. No.

Q. It was an ordinary passing cab? A. That is right.

Q. You and he sat in the cab? A. That is right.

Q. Did you hear Lepke giving instructions to this cab driver? A. That is right.

Q. What did he say? A. Just "Ride downtown."

Q. That is all? A. Just a minute. That ain't all. When we rode down a way, then he says, "Go over to Suffolk and Grand."

5882

Q. Is that all? A. And while riding in the cab, we were looking back in the window.

Q. You were looking back? A. Not me.

Q. Buchalter? A. That is right, to see if anyone was following us.

Q. There were cars following you? A. I don't know what he was watching; watching to see if he was being followed by cars.

Q. There were cars following you? A. There was a lot of cars riding.

Q. Have you told us all the instructions he had given to that cab driver? A. That is right.

5883

Q. He has not given another instruction in your presence and hearing? A. Not that I know.

Q. Right? A. Yes.

Q. You were there all the time and immediately alongside of Buchalter? A. That is right.

Q. So that Buchalter did not tell this cab driver through which streets to go, did he? A. He was telling him to go downtown.

Q. He did not tell him through which streets to go, did he? A. No.

Q. The cab stopped at the street you said? A. What? Grand and Sutter.

Q. It did? Cab man paid? Cab man paid? A. Cab paid.

Q. Who paid him? A. Lepke.

Q. You both stood on the street corner? A. That is right.

Q. The cab went on? A. That is right.

Q. No instructions given to the cab driver by Buchalter after that? A. No.

Q. Then there was some talk with an unknown man and then Mendy Weiss came over? A. We
5885 walked down towards Broome Street.

Q. Right in the street? A. That is right.

Q. Both of you? A. Both of us.

Q. How long a time elapsed before Mendy Weiss comes along? A. About 10 minutes.

Q. During the 10 minutes, where were you and Buchalter? A. When we stopped near the corner there he said, "Go over and get Mendy. He is on the corner of Clinton and Broome." This fellow walked down.

Q. Where were you and Buchalter during that 10 minutes? A. I was standing with Buchalter
5886 on Suffolk Street, and as the man walked down, we turned around towards Broome Street.

Q. Still no glasses on Buchalter's face, no smoked glasses? A. No.

Q. No collar up? A. No.

Q. Nor on yours? A. No, sir.

Q. About what time would you say, if you can tell us, when Mendy Weiss came along? A. I can't remember the time to the minute, but I can tell you about.

Q. About. A. To the best of my recollection it would be about six o'clock.

Q. Was it dark? A. No

Q. Was it getting dark? A. No.

Q. Then there was a talk with Buchaiter and Mendy? A. That is right.

Q. Were you told to keep out of that talk? A. No. Walked away on the side; don't think I was going to go over and listen what they were going to say. Do you get it?

Q. That was right on the street? A. That is right.

Q. Buchalter and Mendy talking? A. That is right. 5888

Q. Light? A. Light.

Q. There was daylight saving time then; six o'clock would be really five o'clock; right? A. I know it was light.

Mr. Turkus: I object to the form of the question.

Q. How long did they talk? A. About 5 or 10 minutes, I would say.

Q. About a quarter after six or something like that? A. They did speak about 5 or 10 minutes. 5889

Q. Well, you said you got there about six o'clock. A. Got where?

Q. At the corner? A. What corner?

Q. Suffolk and Grand. Did you? A. I did not say we got there at the corner at six.

Q. What time did you get at the corner? A. You did not ask me that question.

Q. Well, I ask you now. A. It would be near six o'clock.

Q. Then it took about 10 minutes to get Mendy and they spoke about 5 minutes, so I said to you it was about a quarter after six.

5890 *Paul Berger—For People—Cross*

Mr. Turkus: I object to it. That was because the witness has indicated an approximate time.

Mr. Barshay: I will withdraw it.

The Witness: I cannot remember definite on that.

The Court: Did you look at your watch at any time?

The Witness: No, sir, Judge; just a matter of the best of my recollection.

5891 Mr. Barshay: May I object to the question, if your Honor pleases? I move to strike the answer out.

The Court: Let it stand.

Mr. Barshay: Exception.

Q. You did not hear a single word of the talk between Lepke and Mendy, did you? A. No, sir.

Q. What is the next thing Buchalter said? A. To whom?

Q. To you. A. He says, "You go with Mendy and point out Joe Rosen."

5892 Q. Did he tell you where? A. No.

Q. Did you know where? A. I did not.

Q. You did not know where Rosen had a candy store? A. No, sir.

Q. You never heard Rosen had a candy store? A. I heard it.

Q. Did you ever hear the address of that candy store? A. In Brownsville—all I knew.

Q. When did you see Rosen last before that day? A. Before what day?

Q. September 11, 1936. A. You mean on the Friday?

Q. Yes. A. About a week or 10 days before.

Q. Where? A. Around the clothing district.

Q What time? A During the day. I can't remember what time

Q. Did you talk to him? A. I did not

Q. When did you talk to him before?

Mr. Turkus: Objected to. That takes in an improper implication. The witness just said he did not talk to him.

The Court: Sustained.

5894

Q. When did you talk to Rosen before September 11, 1936? A. Maybe a couple of weeks before that.

Q. Where? A. In the clothing district.

Q. Did you talk to him then? A. I did.

Q. Did he tell you about a candy store that he had? A. He did.

Q Did he tell you that he was doing badly at the candy store? A. No.

Q. Did he tell you that he was there just with his wife and children? A. No.

Q. Did you hear he was doing very badly at the candy store? 5895

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Do you know whether or not Rosen had a partner in that candy store? A. I don't know.

Q. You know he did not have a partner, don't you? A. I cannot say either. I don't know.

Q. You know his son lived in Reading, Pennsylvania, at that time? A. I don't know that.

Q. Did you know that Rosen was the only per-

5896 *Paul Berger—For People—Cross*

son tending that candy store, the only male person tending that candy store? A. Did I know what?

Q. Did you know that Rosen was the only male person working in that candy store? A. I did not know that.

Q. Did you know that he could afford neither helper nor partner? A. I did not know anything about that.

Q. Did you know that he was the only man tending that candy store?

5897

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Now Buchalter leaves. You are left alone with Moody; is that right?

Mr. Turkus: I object to it. I don't understand the question at all.

5898 Q. You understand, Berger.

Mr. Turkus: Just a minute.

Q. We are back again at the East Side, aren't we?

Mr. Turkus: There is a question and objection: "Now Lepke leaves." I object to it.

Mr. Barshay: I will fix the time and place, if you want it.

Q. Going back again to the East Side, after this talk with Buchalter, he leaves, does he? A. Yes.

Q. And you are left alone with Mendy? A. That is right.

Q. You know what I am talking about, don't you, what period? A. It was that Friday you are talking about.

Q. Yes. A. That is right.

Q. Where did you go with Mendy? A. We walked down towards Broome and Clinton. 5900

Q. Did you meet anybody on the way? A. He did. I didn't.

Q. Whom did he meet on the way? A. I don't know. He spoke to some people.

Q. Did you know them? A. No.

Q. How long did he speak to them? A. About 10 minutes.

Q. You waited? A. That is right.

Q. That is about 6:25, isn't it?

Mr. Turkus: I object.

Mr. Barshay: "About," I said.

Mr. Turkus: I object to it. 5901

The Court: He said he did not time himself.

Q. You set the time yourself, Berger. It is 10 minutes now after Buchalter leaves.

Mr. Turkus: I object to it, because if he cannot predicate the first time, anything upon that is speculation. That is my objection.

The Court: Pure guesswork. Sustained.

Mr. Barshay: Exception.

5902 *Paul Berger—For People—Cross*

Q. Where did you go after this talk that Mendy had with an unknown man? A. Went into the restaurant.

Q. Do you know the name of it? A. No, it was a restaurant on the corner of Broome and Clinton.

Q. What kind, self-service? A. No; regular meals.

Q. What did you do there? A. We ate there.

Q. Both of you? A. Both of us.

5903 Q. You had your dinner there? A. That is right.

Q. How long did it take you to eat? A. Not only ate. There was some people coming in. We spoke there. We were sitting around there.

Q. Did you know any of them? A. Some of them I knew.

Q. Can you tell me their names? A. There was Farvel there.

Q. Anybody else? A. Some others there that I know.

Q. How long did you stay in the restaurant? A. Starting to get dark.

5904 Q. About that you are sure? A. That is right.

Q. Would you say you stayed in the restaurant about an hour or less or more? A. More.

Q. Would you say it was an hour and a half or two? A. I cannot say that definitely. The best I can say, that when we got out of there it was getting dark.

Q. Who go out of there? A. Me and Mendy.

Q. That is all? A. And others. There was a few others when we got out. Farvel, I think, was there.

Q. Walked out, right? A. That is right.

Q. Where did you go then? A. He talked to a couple of people there.

Q. For how long? A. Killed maybe another half hour or so, and I was hanging around.

Q. Was it dark by then? A. That is right.

Q. No doubt about it? A. That is right.

Q. Where did you go then? A. We got into the car.

Q. Where was this car? A. On Broome Street.

Q. Both of you got in? A. That is right.

Q. Only you two? A. That is right. 5906

Q. You drove out to where? A. Saratoga and Livonia.

Q. How long does the trip take? A. We rode over there. I can't say how long the trip will take.

Q. A half hour? A. Around that.

Q. Traffic is pretty heavy over the Williamsburgh Bridge at that hour, is it not? A. No, not at that hour. Not heavy.

Q. Have you been over the Williamsburgh Bridge? A. Yes, many times.

Q. Have you been there between 5 and 8 o'clock at night? A. I have been through that 5907 hour.

Q. Isn't that the time that most people who live in Brooklyn and work in Manhattan travel, between 5 and 8? A. Towards 8 o'clock the traffic is not so heavy.

Mr. Turkus: I object to it. This is incompetent, irrelevant, immaterial. There is no time fixed.

The Court: It is purely argumentative. Sustained.

5908 *Paul Berger—For People—Cross*

Mr. Barshay: I except to it. It is going to be most vital. I wish you would allow me a little latitude in respect to this.

The Court: The Court can indulge you no more.

Q. Berger, as you crossed the Williamsburgh Bridge, was it— A. That is right.

Q. —was traffic heavy or not? A. Not very

5909 heavy.

Q. How long would you say it took you and Mendy Weiss in that car to get to Saratoga and Livonia? A. Between a half hour and three-quarters of an hour.

Q. But it was absolutely dark? A. That is right.

Q. Lights of the car were on? A. Yes.

Q. On the way out, did you look back in the car to see if anyone was following you? A. We did.

Q. Lots of cars behind you? A. Yes.

5910 Q. On the way out, after you crossed the Williamsburgh Bridge and you went to Saratoga and Livonia, did you look to see if anyone was following you? A. You mean the car?

Q. Yes. A. Yes, we were riding through a lot of side streets.

Q. Was that because you knew then that the police or members of District Attorney Dewey's office were following you two? A. No, sir.

Q. Or Mendy? A. I don't know that.

Q. Were you told that by either Mendy or Buchalter? A. That I was followed by—

Q. That you were followed? A. No.

Q. That everyone in connection with Buchalter was being tailed? A. No.

Q. When you got to Saratoga and Livonia it was positively dark, wasn't it? A. That is right.

Q. How long did you stay there? A. About 10 minutes.

Q. How long did it take you to get to the candy store? A. What candy store?

The Court: Rosen's.

The Witness: What candy store? 5912

The Court: Rosen's.

Mr. Turkus: Wait. The witness has something else in mind. He is talking times now. There was a candy store at Saratoga and Livonia.

The Witness: That is right.

Mr. Barshay: I am past that, Mr. Turkus.

Mr. Turkus: I did not know that. Neither did he.

Q. You said you stayed there 10 minutes? A. That is right. 5913

Q. I am past that candy store. A. He got into the car—just a minute—

Q. All right. A. He got into the car with me again.

Q. And you went to another place? A. That is right.

Q. How long did that take? A. From there to Sackman Street and Livonia.

Q. How long? A. From there? About five minutes.

Q. Can you tell us as best you can what time you got to Sackman Street.

5914 Mr. Turkus: I object to this. The witness has indicated he kept no watch or clock of the movements, and he has explained that he could not even fix the first time.

Mr. Cuff: If your Honor pleases, I object to Mr. Turkus putting the words into the witness's mouth. If he has an objection he ought to state it in a legal form and not make a statement that will guide
5915 the witness later on. I object to the statement.

Mr. Turkus: That is very unfair of Mr. Cuff.

Mr. Cuff: And you have been doing that right a'ong.

Mr. Turkus: If he cannot predicate the first time, anything else is speculation.

By the Court:

Q. Did you have a watch with you? Do you remember? A. I did.

5916 Q. Do you remember whether or not you looked at it? A. I did not. Had no special reason.

Q. Did you look at any watch or clock? A. No, sir; I had no special reason to look at a watch.

Q. Have you any means of determining so as to give us fairly reliable information as to what time you got to the store on Sackman and Livonia?

Mr. Barshay: May we have an objection, your Honor, to line of inquiry?

The Court: I withdraw it. I was trying to help you out. Go ahead.

The Witness: To the best of my recollection—

The Court: Recollection or judgment?

The Witness: —it would be about 9:30.

By Mr. Barshay:

Q. Then you left Rosen's candy store. After you did what you told the jury you did, you left Rosen's candy store? 5918

Mr. Turkus: I object to it. The witness is shaking his head in the negative.

Q. Without shaking your head, Mr. Berger—

Mr. Turkus: I object to it because he said that that is not the fact.

The Court: I thought the questioning already had the witness there.

Mr. Turkus: No, the questioning has got him on Sackman and Livonia. There is something else happened here. 5919

Q. You said you were there five minutes and you went to Rosen's candy store, did you not,—at Sackman and Livonia, and then you went to Rosen's candy store? A. From Sackman and Livonia.

Q. That is what I said. A. You did not. You asked me when I left Rosen's candy store.

Q. It only took five minutes to get to Rosen's candy store? A. That is right. And then you asked me if I left.

5920 *Paul Berger—For People—Cross*

Q. That is what I say now. A. That is different.

Q. Did you leave Rosen's candy store? A. After I pointed him out to Mendy.

Q. Did you leave Rosen's candy store? A. After I pointed him out to Mendy.

Q. If you want to say it again, you can, but did you finally leave Rosen's candy store? A. I say after I pointed him out.

Q. What is the closest you got to Rosen's
5921 candy store? A. Across the street.

Q. Directly opposite? A. That is right.

Q. It is a 30-foot gutter, if you know? A. What is that?

Q. The gutter is 30 feet wide? A. I don't know how wide any gutter is. I did not measure it.

Q. And the best time you can give us is 9:30? A. Between 9:30 and 10. I left that place 9:30, to the best of my recollection.

Q. After you did whatever you said you did at Rosen's candy store, where did you go? A.
5922 Down to the East Side again with Mendy.

Q. How much time did you spend in Brownsville near the vicinity of Sackman and Livonia, Saratoga and Livonia, and Rosen's candy store, all together?

Mr. Turkus: I object to it as already answered to the best of his recollection.

The Court: His testimony shows it is all guesswork.

Mr. Barshay: He has fixed himself the time as between 9:30 and 10.

The Court: Pardon me, he has not fixed the time. The Court won't discuss that.

5923

Q. Mr. Witness, did you say between 9:30 and 10?

The Court: I know what he said, but the Court knows it means nothing.

Mr. Barshay: I take an exception to the Court's remarks.

The Court: Now proceed.

Mr. Barshay: And I ask for the withdrawal of a juror and the declaration of a mistrial.

5924

The Court: On what ground?

Mr. Barshay: On the ground of prejudice, when the Court said that does not mean anything.

The Court: You mean to have a withdrawal of a juror because the Court will not agree with you that guessing as to time is accurate?

Mr. Barshay: No, sir, that is not my point.

The Court: I think it is. Denied.

Mr. Barshay: Exception, sir.

5925

Q. Did you ride back with Mendy Weiss to New York? A. I did.

Q. Where did you leave Mendy Weiss? A. On the East Side.

Q. Can you tell us now, your best recollection of what time you got back to the East Side? A. I cannot say definite.

Q. Can you tell us how long it took you to get back? A. Whatever time it took us to get back from there.

Q. About how long, please? A. You can figure about three-quarters of an hour.

Q. Where did you live then? A. I lived in East 54th Street, Brooklyn.

Q. Weiss left you off where? A. On the East Side.

Q. Where did you go from there? A. I took my car. I had my car there.

Q. Where did you have your car? ... On the East Side.

5927 Q. What kind of a car? A. My own car.

Q. What make? A. I had, at that time I had a Chrysler.

Q. When did you leave it on the East Side, that night or that day? A. I come in with it in the morning. I used to park it on 12th Street and Broadway in a lot.

Q. Where did you park it that day? A. 12th Street and Broadway, in the morning.

Q. Is that what you call the East Side? A. What would you call it, the West Side?

Q. I won't call it anything. Is that what you
5928 call the East Side? A. To my recollection, yes, sir; to my knowledge, unless I am wrong.

Q. Where did Mendy take you from East New York and Rosen's candy store? Where did he leave you off? A. On the East Side.

Q. Exactly where? A. On Broome and Clinton.

Q. And where did you go from there? A. I took a cab and I went up to 12th Street and Broadway. 12th Street off Broadway there was a lot, parking lot.

Q. Did you ask Mendy to drive you to where your car was? A. I did.

Q. He refused? A. He had to see somebody.

Q. You testified here that about two weeks after the killing of Rosen, Buchalter had a talk with you; did you not? A. That is right.

Q. Where was this talk? A. Up in his office.

Q. Where? A. 200 Fifth Avenue.

Q. In the office? A. Not in the office.

Q. Where? A. In the hall. I never spoke in the office. We always used to walk out in the hall; walk up one flight or walk downstairs one flight—talked like that on the stairs. 5930

Q. He told you the police were looking for Rubin? A. That is right.

Q. He told you that the District Attorney's office was looking for Rubin? A. I don't remember that definite.

Q. But definitely you do remember that the police were looking for him? A. I don't know if they were at the time; probably were, but I can't say that definitely.

Q. A few minutes ago or a few seconds ago you told this jury that he told you in that hallway, that Buchalter told you in that hallway, that the police were looking for Rubin. A. That is right. 5931

Q. No doubt about that? A. He will have to go away.

Q. Had you seen Rubin in the meantime in those two weeks? A. I did.

Q. Talked to him? A. I did.

Q. He told you that the Brooklyn D.A.'s office and police were looking for him too, didn't he?

Mr. Turkus: Objected to.

The Court: Overruled.

A. He did.

5932 *Paul Berger—For People—Cross*

Q. How many times did he tell you that? A. Once.

Q. Then you were told to make arrangements to have Rubin go with Danny Fields? A. That is right, until things straightened out in Brooklyn.

Q. Danny Fields had already been told to go away on account of the Dewey investigation, is that right? A. The time, yes.

Q. Speak up, please. A. That is right, Lepke
5933 told him to go away.

Q. And when you were told by Buchalter that Rubin had to go away with Danny Fields until things cleared out in Brooklyn—is that what you said? A. Yes.

Q. You remember that phrase distinctly? A. That is right.

Q. And in that conversation he told you again, did he not, that the District Attorney's office and the Police Department were looking for Rubin?

5934 Mr. Turkus: I object to it. That is not the testimony.

The Court: Let him state.

Mr. Barshay: If your Honor pleases—

The Court: Objection overruled.

Q. Will you answer that? A. What is that again?

(Pending question read.)

A. No, he did not.

Q. Please, will you not look in this direction? A. What is that? What was that?

5935

Q. If you don't mind, Mr. Berger, in this direction. A. What was that? That is where I am looking.

Q. Face the jury. A. That is where I am looking. Just wanted to see—

Q. Did Rubin tell you that when he made the arrangements to go away? A. Did Rubin tell me what?

Q. That he was going away as per instructions because the Police Department and the District Attorney's office were looking for him? A. No, sir, Lepke.

5936

Q. Lepke told you that? A. Lepke told me that he should go away until things straighten out in Brooklyn, and he suggested that he should go with Danny Fields, and I said it would be all right, and have Danny Fields cheer him up, and to be away until things start clearing up in Brooklyn.

Q. Did Lepke tell you that the police were looking for Rubin before you made those arrangements?

5937

Mr. Turkus: I object to it. It is repetitious. It has already been answered.

The Court: That is what he said. Did he specifically say the police were looking, or did he simply say what you have just testified to, that it was advisable for Rubin to go away with Danny Fields?

Mr. Barshay: May I object to the form of the question, your Honor?

The Court: On what ground?

Mr. Barshay: This witness is a clever witness, Judge. I am allowed on cross-

5938 *Paul Berger—For People—Cross*

examination a little wider latitude than on direct.

The Court: Now you are starting to scold the Court.

Mr. Barshay: I am not scolding the Court.

The Court: Yes, you are. Objection overruled. Listen to the question.

(Pending question by the Court read.)

The Court: Which was it?

5939 The Witness: That it was advisable for Rubin to go away with Danny Fields until things cleared up in Brooklyn.

The Court: But did he say specifically that the police were looking for Rubin?

The Witness: No.

Q. You mean at that point he did not say that?

The Court: At any time.

The Witness: Not at that time.

5940 Q. At what time did he say that? A. A few days before.

Q. A few days before? Where? A. Up in his office. I say "office"; I do not mean we spoke in the office.

Q. And when after that did he tell you that again? A. That was the time when he suggested that it would be a good idea for him to go up with Danny Fields. That is the time he only said that he should go away with Danny Fields until things cleared up in Brooklyn and have Danny Fields cheer him up, pep him up.

Q. When else, Berger, did Lepke, or Buchalter,

tell you? At any other time or place did Buchalter tell you that the police were looking for Rubin or that the District Attorney's office were looking for Rubin?

Mr. Turkus: I object to it. He has already answered it.

Mr. Barshay: I object to it. If your Honor pleases, I have now gone beyond the time with respect to the arrangements being made between Rubin and Danny Fields. I am going beyond that now. Any conversation with Buchalter is admissible, your Honor has ruled, and it is admissible. Might this witness be allowed to answer those questions? 5942

The Court: He has answered the question, but obviously there was some confusion as to what your question called for. Apparently he did not pay attention to it closely. You may go ahead with that.

Q. Berger, when at any other time did Buchalter tell you, in all your dealings with respect to your making arrangements with Rubin for his going out of town and giving him his money, that the police or the Brooklyn D.A.'s office was looking for him? A. He told me they were looking for him. 5943

Q. Yes. A. He did not tell me who.

The Court: Did he say "police"?

The Witness: No, I won't say that definitely.

The Court: Did he say "District Attorney", if you recall?

5944 *Paul Berger—For People—Cross*

The Witness: I can't recall it definitely, but I know he told me they were looking for him.

Q. Yes. Did he say, with respect to who was looking for him, the word "Brooklyn"? A. Meaning on account of the murder of Rosen.

Q. That is clear, isn't it? A. In my mind it was.

Q. You understood it that way? A. Right.

5945 Q. How many times did he tell you they were looking for him, without mentioning who, because of the murder of Rosen in Brooklyn? A. That was just the time.

Q. Any other time, Berger? A. No, not that I can recollect.

Q. When he came back from Salt Lake City, was there any such talk by Lepke and you? Was there? A. Of what?

Q. That the police or the District Attorney's office or someone, no matter who it is, was looking for Rubin with respect to the Rosen case? A. Well, this I can't say definitely, but I do

5946 know that he was told to go away until things cleared up in Brooklyn.

Q. You have said that about three or four times. Now I am asking you something else, Berger. Rubin came back from trips here and there, didn't he? A. That is right.

Q. You used to see him when he came back? A. That is right.

Q. Did you speak to Rubin? A. I did.

Q. He complained did not want to stay away, didn't he? A. That is right.

Q. Always? A. That is right.

Q. Buchalter always urged him to go away.

through you or personally, right? A. Personally. Not through me. I had no say there.

Q. In those talks, when you and Rubin spoke, when he came back from Salt Lake City, New Orleans, and here and there, he told you that he was tired, he did not want to stay away, and did he tell you also that he was away because the police or the D. A.'s office were looking for him with respect to the Rosen case?

Mr. Turkus: Objected to. There is a double question there. 5948

Mr. Barshay: I will ask it one at a time. You are right.

Q. Did he tell you when he came back from those trips that someone was looking for him on account of the Rosen case? A. Who tell me?

Q. Rubin.

Mr. Turkus: Speak up.

A. He did not.

Q. Did you ever speak to Rubin about his fleeing from the Rosen case? A. In regards to what? 5949

Q. In regards to running away from the Rosen case.

Mr. Turkus: I object to it.

A. He was following instructions. I don't know what you mean, Counsellor.

Q. Well, did Rubin tell you that they were looking for him? A. Lepke told me they were looking.

5950 *Paul Berger—For People—Cross*

Q. We will get to that, Berger. Did Rubin tell you—

Mr. Turkus: Objected to.

Q. —that they were looking for him because of the Rosen case?

Mr. Turkus: Object to it. That has been answered.

The Court: This calls for yes or no.

5951 Mr. Turkus: He has answered it.

The Court: Did Rubin ever say they were looking for him because of the Rosen case, specifically using the name Rosen?

The Witness: He did.

Q. Now tell me how many times he told you that. A. That was the time when Danny Fields, when I spoke to Danny Fields.

Q. Any other time, Berger? A. Danny Fields told me at the time I spoke with him over the wire that Rubin called him up, wanted to see him

5952 at two in the morning, and when he went over there Rubin was raving. The reason for that was he had seen in the papers they were looking for him in regards to the Rosen murder. That is the only time.

Q. In other words, you were told that Rubin's name was mentioned in the paper? A. That is right.

Q. With respect to the Rosen case. Was that the New York *Post*, if you recall? A. I did not see it in the papers.

Q. There is no doubt you were told that is the

name appeared in the newspaper? A. That is the conversation I had.

Q. At any other time—forget this one for the second—at any other time from the beginning to the time that Rubin finally came back and surrendered himself, did Rubin tell you that they were looking for him in the Rosen case? A. No.

Q. Did Lepke tell you? A. No.

Q. What? A. You mean at what time?

Q. At any time other than the time you just told us. A. No. 5954

Q. Did you ever speak to Rubin about the Rosen case in those conversations you had? A. No, sir.

Q. Did you collect any money from Local 138 or from Wolfie Goldis for Rubin? A. I refuse to answer that question on the ground that it may incriminate me, on the advice of counsel.

Q. Maybe you do not understand me, Berger. I am speaking only of the $25 amounts. Did you collect any moneys? A. I refuse to answer that question on the ground it may incriminate me and on the advice of my counsel.

Q. Before Rubin left for Saratoga, did Rubin take you around to customers? Did he? A. What do you mean, "customers"? 5955

Q. Did he take you around to people, to any people, and introduce you? A. What is the purpose of introducing me?

Q. I do not know. Did he do such a thing? Did he take you and introduce you to people whom you had never met before, before Rubin left for Saratoga?

Mr. Turkus: The witness has raised his Constitutional point on that.

5956

Mr. Barshay: If your Honor pleases, he never raised it with respect to this question and, Mr. Turkus, I think you ought to be fair enough not to make an objection in that form.

The Court: Yes.

Q. Did Rubin take you around and introduce you, before you had made arrangements for him to go to Saratoga, to introduce you to some people whom you had never met before? A. I

5957 can't answer that question. That question is going to incriminate me on account of my case in New York.

The Court: No more suggesting on the question of Constitutional rights. The witness is well able to take care of himself, having been advised by his own lawyer.

Q. Did you get any money from any of those people to whom Rubin introduced you? A. I

5958 refuse to answer that question on the ground that it may incriminate me.

Q. Can you tell us how many people he introduced you to? A. I refuse to answer that question on the same ground.

The Court: May I see those indictments?

(Assistant District Attorney Hurwitz of Mr. Dewey's office, handed papers to the Court.)

Mr. Barshay: May I proceed in the meantime?

The Court: Yes.

Mr. Barshay: Because I want to pursue exactly the subject you are going to look at.

The Court: Briefly they cover alleged extortion and coercion from the period beginning about 1929 up to and including the specific date in 1937.

Mr. Barshay: May I go into each one, your Honor?

The Court: No. I looked at them only to see whether there was any indication 5960
that the refusal to answer was not in good faith and for the constitutional reasons stated. You go ahead.

Mr. Barshay: Perhaps I do not understand the Court's ruling. Are you going to allow me to ask each and every question?

The Court: The Court should not be required to explain a point of law. I did this for your benefit. The explanation is that if it was apparent from the indictments that the refusal to answer was 5961
not in good faith and obviously not for the purpose of protecting the constitutional rights of the witness, then the Court would have a right, in another way, to deal with the witness for contumacious refusal to testify; but after reading the indictments the Court is satisfied that it cannot deal with the witness in that way.

Mr. Barshay: All right. May I ask your Honor specifically to direct this witness to answer?

The Court: I cannot.

5962 *Paul Berger—For People—Cross*

Mr. Barshay: May I take an exception?

The Court: He is within his constitutional rights.

Mr. Barshay: May I take an exception?

The Court: Certainly.

Mr. Barshay: May I have the same request with respect to a direction and an exception in every question and answer I am now going to put to this man?

The Court: I don't know what they are.

5963

Q. Berger, between August, 1933, and August, 1937, did you participate and share in the extortion of moneys to the amount of $4800 from the Acme Textile Shrinkage Works, Incorporated, and David Greenberg, in the County of New York? A. I refuse to answer that question on the same ground, that it may incriminate me.

Mr. Barshay: I ask your Honor to direct him to answer.

The Court: Denied.

Mr. Barshay: Exception.

5964

Q. Did you participate and share in the extortion of moneys to the amount of $4800 between August, 1933, and August, 1937, from the Atlas Cloth Sponging Corporation and Isidore Feingold, in the County of New York? A. (No answer).

Q. May I have an answer to the question? A. I refuse to answer that question. It may incriminate me.

Mr. Barshay: Instead, your Honor, of my asking for a specific direction on each

question, may I have one objection to your failure to do so and one exception?

The Court: Yes.

Q. Did you participate—

The Court: I take it you are reading from the indictments?

Mr. Barshay: I have been so informed, your Honor.

The Court: I think that should be on the record, that these questions are asked from the reading of the indictments by counsel. 5966

Mr. Barshay: They have been given me with that understanding.

The Court: Yes, all right. That should protect you sufficiently in your rights.

Q. Did you participate in the month of October, 1954, in extorting the sum of $1500 from the Adeline Dress Manufacturing Company, Incorporated, and Herman Goodman? A. I don't even know what it is. 5967

Q. Is that your answer or do you refuse to answer? Which is it? A. Refuse to answer on the same ground. Judge, is it all right?

The Court: The Court cannot advise you. You have been advised by the Court previously and been advised by your counsel.

The Witness: I had nothing to do with it anyway. As long as the counsel advised me that, all right.

Q. I want to get these questions to you, Berger. Did you participate in extorting the sum of $20,000 from May, 1934, to July, 1935, from the B. & R. Clothing Company, Incorporated, and Irving O. Rudow and Albert Turner? A. I will answer the question. I never extorted a nickel. That was all extorting, you ask me?

Q. Are you now waiving your rights to object and refuse to answer, Mr. Berger?

5969

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Do you want me to go back to the first case?

Mr. Turkus: I object to that.

The Court: Sustained.

Mr. Barshay: Exception.

5970 Q. Did you participate in the extortion of $9,000 between July, 1933, and October, 1935, from Blacker Brothers, Incorporated, and Morris Blacker? A. I will give you the answer that will settle the whole thing. I never extorted five pennies. I worked for my money. Besides I got paid from the Union. That settles the whole thing. I never got two pennies from any one of them, only followed instructions. I carried the damn money after they went away, nothing to do with any extortions. Never extorted a nickel from anybody.

The Court: These indictments, I think

should be on the record, are against quite a large number of defendants collectively. They are not against just this defendant but all who are claimed by the Grand Jury to have participated.

Mr. Barshay: I take an exception to that.

The Court: Do you deny it?

Mr. Barshay: No, that is why I am using the words "Did you participate?" That means with others. It is quite ob- 5972
vious.

The Court: You don't deny what the Court says is true?

Mr. Barshay: Of course what the Court says is true. That is why I am using the words "participate in".

The Court: The names of those defendants would be put on the record, if you wished, but I am just informed by Mr. Dewey's representative that some of the defendants are still fugitives and it is not wise to let anybody know who they 5973
are.

Mr. Barshay: I did not ask to put them on. I am only asking of this witness whether he is a defendant in that case.

The Court: You see you are asking him if he participated. That may be confusing to him and it may be confusing to the jury. It may mean, did you go out and take the money and carry it, whereas legal participation may require no such thing. The actual carrying and collecting

5974 *Paul Berger—For People—Cross*

may have been by other members of a group. You can go ahead with that understanding.

Mr. Barshay: I will take the answer from this witness to tell what he did in each and every case. They claimed privilege so I was stopped from doing so.

The Court: Go ahead. He has not waived his privilege.

Mr. Barshay: He claimed it. I said not
5975 waived it.

Q. Berger, you knew what that money was, did you not, that you got from these people?

Mr. Turkus: Wait a minute. I object to the form of the question. That is a confusing question.

A. I did not, absolutely not, what the agreement was made with.

The Court: Did you collect any of the
5976 money yourself?

A. I was told to pick it up by Lepke. That's all I know.

Q. Did you pick it up? A. Yes.

Q. Did you go to the people whose names I read and pick it up personally? A. Went to some, not to some of them that you read.

Q. Can you tell me whether or not you did so personally with respect to Acme Textile Shrinkage? A. I don't know who Textile is.

Q. David Greenberg. A. Who?

Q. David Greenberg. A. I don't know who David Greenberg is.

Q. Atlas Cloth Sponging Company, Isidore Feingold. A. I refuse to answer these kinds of questions. I am indicted on them. I gave you a couple of things.

Q. Berger, either you answer them or you don't, depending upon yourself. Which do you want to do? A. I just gave you an outline of it but I refuse to answer these questions that it may incriminate me. I am indicted on a case in 5978
New York.

Q. All right, Berger, tell me one way of the other. A. I refuse to answer.

Q. You refuse to answer?

Mr. Barshay: Now may I ask the Court to direct the witness to answer?

The Court: Denied.

Mr. Barshay: Exception.

Q. Answer the questions, please, as I put them to you. 5979

The Court: The Court will rule this way now because the man has asserted his constitutional rights. First the Court will ask this of the witness: Does your assertion of constitutional privilege refer to each and every allegation in those indictments? Is that your claim?

The Witness: I don't understand that.

The Court: Counsel is now reading paragraph after paragraph from the indictment. When you say you refuse to answer upon the ground it may tend to

5980 *Paul Berger—For People—Cross*

incriminate you, is that refusal to answer intended to apply to all of the allegations against you in those indictments?

The Witness: Not all against me. Maybe some of them.

The Court: Your refusal to answer applies to the entire indictment?

The Witness: That is right.

The Court: The Court rules counsel may not ask any further questions con-

5981 cerning the guilt or innocence of this defendant upon any of the matter alleged in the Dewey indictments.

Mr. Barshay: I take an exception to that and then may we mark—can we get into the record, your Honor, the names and addresses and the dates and the amounts of each and every person mentioned as the victim in those indictments?

The Court: No.

Mr. Barshay: I take an exception. May I mark this piece of paper, which is

5982 not a full copy of the indictment but which contains the names and addresses, the dates and the amounts, for identification?

Mr. Turkus: I object. I ask that the indictments be marked for identification so that upon any review it may be properly before the Court.

The Court: You don't have to mark an indictment for identification.

Mr. Turkus: May we have the indictments considered marked for identification?

The Court: The Court assumes no responsibility for the contents of counsel's memorandum and therefore refuses to let this be marked for identification.

Mr. Barshay: May I have the original indictments or copies—

The Court: You may not because, as I told you, it is silent as to some defendants. That would disclose to you the names of people whom the police are seeking and who are alleged to be fugitive. 5984

Mr. Barshay: Your Honor, may I urge upon you this fact, that the office of District Attorney Dewey allows you to make a copy of the indictment but leaves out the names of the fugitives.

The Court: I know nothing about it.

Mr. Barshay: That is how I got them, sir.

The Court: I know nothing about it. That is Mr. Dewey's business. These allegations in those indictments are worthless as evidence against the witness. The 5985
jury is so instructed. That is a mere charge on which this witness is awaiting trial.

Mr. Barshay: I take an exception.

The Court: In the absence of any admission by this witness as to the truth or not of those allegations, the asking of these questions is worthless. This witness has a constitutional right to refuse to answer any and all questions concerning his guilt or innocence upon those charges.

Mr. Barshay: I take an exception.

5986 *Paul Berger—For People—Cross*

The Court: So disregard it. That is the reason the Court will not permit the reading of the indictments.

Mr. Talley: May I be heard on that?

Mr. Barshay: I take an exception.

The Court: A question of law, Judge.

Mr. Barshay: I make an offer of proof, your Honor.

The Court: No, you won't read them that way.

5987 Mr. Barshay: I do not want to read them. I am making an offer of proof.

The Court: Refused.

Mr. Barshay: To prove each and every allegation in the indictment against this witness on the theory that when a man offers himself to cross-examination, counsel is entitled to inquire into every act of his life which involves moral turpitude.

The Court: The Court has ruled. You have your exception. Let it go at that.

Mr. Barshay: I take an exception.

The Court: You wanted to say something, Judge Talley?

5988 Mr. Talley: May I be heard, sir?

The Court: Yes, sir.

Mr. Talley: I want to submit to your Honor, as a matter about which I did not think there would be any question or dispute, that this witness, having been offered by the District Attorney, counsel for any defendant is entitled as a matter of right to inquire into any discreditable, criminal, dishonorable act ever committed by this witness. He has been offered, he has been vouched for, his veracity has been attested

5989

by his being called as a witness for the prosecution in this case. I respectfully submit that you cannot close the door; you have no power to close the door to a searching examination into every alleged discreditable or criminal act on the part of this witness, and I respectfully submit, sir, that we have a right to call his attention to every case of extortion upon which he has been indicted or which has been called to our attention and that he must 5990
be required to give some answer to those questions. If he chooses to say that he refuses to answer on the ground it will incriminate or tend to degrade him, then he may, under certain conditions, have the right to make that answer, but your Honor has no right to estop or foreclose counsel from calling his attention to a specific act upon which the inquiry is to be made.

The Court: The Court is not trying to conceal anything.

Mr. Talley: Yes, you are. 5991

The Court: But you are trying to create the impression the Court is.

Mr. Talley: That is exactly my impression.

The Court: The Court is trying to prevent an hour or maybe two hours being wasted in a long lengthy trial where the witness has already said that his constitutional right, as alleged by him, applies to each and every part of those indictments, but as long as the good faith of the Court is challenged by you, the Court

5992 *Paul Berger—For People—Cross*

will not be put in that light before this jury, will permit any and every question to be asked. Proceed. We will sit until we get through with it, even if we work late.

Mr. Talley: I think that is the proper way to proceed.

The Court: You will be howling for an adjournment about five or six o'clock.

Mr. Talley: No, I won't.

5993 The Court: Proceed.

By Mr. Barshay:

Q. Did you participate in the extortion of moneys to the amount of $9,000 between July, 1933, and October, 1935, from Blacker Brothers, Incorporated, and Morris Blacker? A. I refuse to answer that question on the ground it may incriminate me.

Mr. Barshay: Take an exception to the Court's refusal to direct this man to an-

5994 swer all along the line, your Honor, without saying so specifically. Is that all right, Judge?

The Court: That is all right.

Q. Did you participate in the extortion of moneys to the amount of $3,000 between July, 1933, and October, 1935, from Blankson Clothes, Incorporated, and Irving Blank? A. I refuse to answer that question on the same ground.

Q. Did you participate in the extortion of $12,500 from Blue Comet Dress, Incorporated, and Morris Joseph, between July, 1931, and July,

1936? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $10,000 from March, 1935, to October, 1936, from City Hall Clothes, Incorporated, Louis Litt and Louis Chinitz? A. I refuse to answer.

Q. Did you participate in the extortion of $50,000 from Donnie Frocks, Incorporated, and David Goldberg from January, 1934, to December, 1937? A. I refuse to answer that on the same ground.

5996

Q. Did you participate in the extortion of $15,000 from Empire Bilt Clothing, Incorporated, Max Zerkow, and Samuel Cassidy from January, 1935, to December, 1936? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $15,000 from January, 1933, to August, 1934, from the Fair Waist & Dress Company, Incorporated, and Abraham Gerwitz?

Mr. Turkus: I object to the form of the question.

5997

The Court: Overruled.

A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $2700 from March, 1935, to December, 1936, from Gladdy Trusize Dress Corporation and William Schwartz? A. I refuse to answer that.

Q. Did you participate in the extortion of $1500 in the month of March, 1935, from Joseph Goldman and Brother, Incorporated, and Joseph Goldman? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of

$10,000 from Goldsmith Brothers Manufacturing Company, Incorporated and Samuel R. Goldsmith between January, 1929, and December, 1935? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $90,000 from the Greater New York Tailors Expressmen's Association, Incorporated, between May, 1928, and November, 1937? A. I refuse to answer that on the same ground.

5999 Q. Did you participate in the extortion of $6500 from Halpern Modell Company, Incorporated, and Samuel Halpern and Bernard Modell from July, 1934, to December, 1936? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $7500 on July 1, 1934, from Hammondton Park Clothes Incorporated, William Kessler and Charles Goldberg? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $4800 from Hylo Textile Shrinking Company, Incorporated, Harry Buchalter and Anthony 6000 Sartori, from August, 1933, to August, 1937? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $12,900 from the Interstate Shrinking Corporation and John Lippman, from August, 1933, to August, 1937? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $7,000 from Jay Day Frocks, Incorporated, and Jack Davis, from March, 1932, to November, 1935? A. I refuse to answer that on the same ground.

6001

Q. And did you participate in the extortion of $13,000 from January, 1930, to December, 1936, from Jerry Dress Company, Incorporated, and Joseph Meyer? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $27,000 from Kaplan & Elias, Mattie Kaplan and Samuel Elias, from February, 1933, to August, 1937? A. I refuse to answer. Three-quarters of them I don't know about.

6002

Q. Did you participate in the extortion of $4,000 from Varsity Dress Company, Incorporated, Samuel Edelman and Henry Meisler, from January, 1931, to October, 1935? A. I refuse to answer that on the same ground. Over ninety per cent of them firms I don't even know who they are.

Mr. Barshay: I move to strike out the answer, your Honor, not responsive.

The Court: Let it stand.

Mr. Barshay: Exception.

6003

Q. Did you participate in the extortion of $35,000 from Welco Dress Company, Incorporated, and Samuel J. Weiss, from January, 1934, to December, 1937? A. I refuse to answer on the same ground.

Q. Did you participate in the extortion of $30,000 from Lustberg & Lipschitz, Max Lustberg and Jacob Lipschitz, from March, 1933, to April, 1937? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $25,000 from Lombardy Frocks, Incorporated, and Max Blauner, from August, 1931, to August,

6004

1936? A. Refuse to answer to that on the same ground. Them firms I don't even know what you are talking about.

The Court: Be patient and listen.

The Witness: Never heard of them firms in my life, ninety per cent of them or ninety-five per cent. You are asking me and I am answering.

The Court: Strike that out. Either

6005 answer or assert your constitutional rights.

Q. Did you participate in the extortion of $9600 from L. & L. Expert Shrinking Corporation and Morris Zydney, from August, 1933, to August, 1937? A. I refuse to answer that on the same ground.

Q. Did you participate in the extortion of $5,000 from January, 1934, to December, 1936, from Monogram Costume Company, Incorporated, and William Slonin? A. Refuse to answer that on the same ground.

6006

Q. Did you participate in the extortion of $4200 from the Monarch Textile Shrinking Corporation and David Glick, from August, 1933, to August, 1937? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $4200 from Accurate Sponging Works, Incorporated, and Martin Dribben, from August, 1933, to August, 1937? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $9600 from Perfect Chatham Corporation and Morris Horowitz, from August, 1933, to Au-

gust, 1937? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $6,000 from Shil-Or Textile Shrinking Corporation and Philip Orlofsky, from August, 1933, to August, 1937? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $6,000 from Sachs Clothes, Incorporated, and Rudy Sachs, from March, 1935, to October, 1936? A. I refuse to answer that on the same ground. 6008

Q. Did you participate in the extortion of $2,000 from Frank Starr-Friedlander, Incorporated, and Frank Starr and Samuel Friedlander, from January, 1934, to August, 1936? A. Refuse to answer that on the same ground.

Q. Did you participate in the extortion of $30,000 from Samuel Saffer, Incorporated, and Oscar Saffer, from January, 1932, to October, 1935? A. Refuse to answer that on the same ground.

Q. And did you participate in the extortion of $4800 from the Union Cloth Sponging Works, 6009
Incorporated, and Ralph Kibel, from August, 1933, to August, 1937? A. Refuse to answer that on the same ground. A whole lot more names in the telephone book.

Mr. Barshay: I move to strike out the answer, sir, not responsive.

The Court: Strike it out.

Mr. Barshay: I ask again, your Honor, for the record, to direct this witness to answer those questions.

The Court: Denied.

6010 *Paul Berger—For People—Cross*

Mr. Barshay: Exception. May I ask your Honor to direct this witness to answer the question heretofore put by me to him with respect to the alleged inducement of the commission of perjury on November 1, 1938, of one Max Rubin.

The Court: I don't recall that.

Mr. Barshay: I asked that question of him, your Honor, and he claimed privilege.

The Court: Denied.

6011 Mr. Barshay: Exception, sir.

Q. Now, Berger, are you sure that the conversation between Buchalter and you and Rubin with respect to Rubin's going to Salt Lake City took place at the Hatfield Hotel? A. That is right, sir.

Q. No doubt about it? A. No.

Q. That is where the arrangements were made, at the Hatfield Hotel, with respect to Max Rubin leaving for Salt Lake City? A. That is right.

Q. How many conversations did you have with the defendant Buchalter and Rubin at the same time at the Hatfield Hotel?

6012

Mr. Turkus: I object unless the time be fixed. The Hatfield figured in the testimony—

Mr. Barshay: In his testimony.

Mr. Turkus: On other occasions too. I object unless the time be fixed.

The Court: Try to fix the time.

Mr. Barshay: I will get back to it, Judge.

The Court: You mean in relation to the Salt Lake City incident?

Mr. Barshay: No, sir.

The Court: Other occasions too?

Mr. Barshay: He testified to two occasions where he saw Rubin at the Hatfield Hotel. I will try to get the date exact.

The Court: Yes.

Q. There is no doubt that the money that you were getting for Max Rubin to give to him, you 6014
got from Murray Weinstein, is that so? A. Moneys or money.

Q. Moneys or money to give to Rubin you always got from Murray Weinstein? A. Only $50.

Q. Only once? A. The time that he was away, every week.

Q. Yes, but you got it from Murray Weinstein? A. Either Murray Weinstein or Sam Katz.

Q. Never from the defendant Buchalter? A. No.

Q. Can you tell me the date that you first saw 6015
Rubin at the Hatfield Hotel, pursuant to the telephone call that you got? A. I can't remember that definitely.

Q. Was it immediately after he came back from Saratoga in October of 1936? A. That is right.

Q. What part of October, do you know? A. I cannot say that definitely.

Q. He was away one week, was he not? A. About a week or so.

Q. Where did you get the telephone call from

Rubin? Where were you? A. I was in my place of business.

Q. Which place of business? A. 714 Broadway.

Q. Name of the concern? A. Goldcraft Clothing Company.

Q. Did you tell Rubin where you had your place of business before he left? A. He knew it.

Q. Had he ever called you there before? A. He did.

6017 Q. He and you had personal business that had nothing to do with Buchalter, isn't that so?

Mr. Turkus: I object unless the time be fixed.

Q. At any time.

Mr. Turkus: I object to it, incompetent, irrelevant and immaterial, at any time.

The Court: Overruled.

6018 Q. Do you understand me, Berger? A. No, I do not.

Q. You and Rubin had matters of personal interest between you and Rubin alone that had nothing to do with Buchalter; isn't that so? A. No.

Q. Never? A. We did not have any personal business. Any business we had was through Lepke.

Q. Did you ever have any other business other than for Lepke, you and Rubin, any union business? A. Not that I know of. Only business I

had with Max Rubin was through the instructions of Lepke.

Q. About that there is no doubt? A. That is all.

Q. On October 31, 1938, Buchalter had already been away; isn't that so? A. That is right.

Q. You had not been communicating with Buchalter while he was away? A. No.

Q. You did not know where he was? A. No.

Q. He never got in touch with you? A. No.

Q. Did you see Max Rubin then at twelve o'clock noon at Fifth Avenue and 17th Street? 6020

Mr. Turkus: That is objected to as repetitious. This morning we had that incident.

Mr. Barshay: I barely touched upon that.

Mr. Turkus: I know, but you brought out something about another defendant and he objected, his counsel did. I object to it. It has been answered.

The Court: Sustained.

Mr. Barshay: Exception. 6021

Q. On that day did you have personal business with him?

Mr. Turkus: Objected to as already answered, what the business was and who instructed him.

The Court: Sustained.

Mr. Barshay: Exception.

Q. At that time was Max Rubin in custody of police? A. He was.

6022 *Paul Berger—For People—Cross*

Q. You mean he was under guard? A. At that time?

Q. Yes. A. He was under guard since he got shot.

Mr. Barshay: I move to strike out the answer, your Honor.

The Court: Strike it out. The jury disregard it.

6023 Q. Did he speak to you in the absence of these police; yes or no? A. I refuse to answer that on the ground that it may incriminate me in New York.

Q. Did he offer to put you then on the payroll of the New York Tailoring, Greater New York Tailoring Expressmen's Association? Did he? A. I refuse to answer that question, that it may not incriminate me.

Q. Did he give you $400 to be split between you and Danny Fields? A. I refuse to answer that one that it may incriminate me.

Q. Did he offer you a job on the payroll of
6024 this association at the rate of $50 a week?

Mr. Turkus: I object. That is not competent, material or relevant, does not affect his credibility.

The Court: Sustained.

Mr. Barshay: Exception. May I call your Honor's attention, if you please, that this man said he had no personal business with Rubin and on that point I am now trying to impeach him, that he did have personal business with Rubin after the defendant Buchalter had been away from

the jurisdiction of New York and he did not communicate with him nor had he heard from him.

The Witness: At the direction of Mendy Weiss.

Mr. Barshay: I move to strike out the answer.

The Witness: The same as Lepke.

The Court: Strike out the answer as irresponsive.

Mr. Barshay: On that theory will your Honor permit me to go ahead? 6026

The Court: No.

Mr. Barshay: I take an exception.

Q. On November 2, 1938, at Fifth Avenue and 17th Street, did you meet Rubin again? A. I don't definitely remember that.

Q. Well, did he give you $200 on that day?

Mr. Turkus: I object to [redacted] That does not affect his credibility. He has made that statement this morning.

The Court: Overruled. You would remember $200, wouldn't you? Did he give you $200? 6027

The Witness: He did.

The Court: Do you remember when that was and where it was?

The Witness: He loaned me $200.

Q. He loaned you $200?

The Court: Counsel is trying to place time, the time this happened. Do you remember that?

6028 *Paul Berger—For People—Cross*

The Witness: I don't definitely remember, Judge.

The Court: Do you remember the place?

The Witness: Oh, that was up in the Expressmen's Association.

The Court: Whereabouts?

The Witness: 17th Street.

Q. Did Rubin say to you at that time and at that place at Fifth Avenue and 17th Street,
6029 "Berger, you be with me just to let the members of the Union see me walk with you and speak with you"? A. He did not.

Q. How many weeks did you get $50, if you got any at all, from this association?

Mr. Turkus: I object.

A. He loaned me $200.

Mr. Turkus: I object to the form of the question.

Mr. Barshay: I will withdraw it, Mr.
6030 Turkus.

Q. You did get the $200, you say? A. He loaned me $200.

Q. You say it was a loan? A. That is just what it was.

Q. Did you give him a note for it? A. No.

Q. Did you ever pay it to him back? A. No.

Q. You still owe it to him, don't you? A. That is right. That time I told him I am in need of some money and it is the best thing to get a loan of $200.

6031

Q. You did not tell Rubin then that you fingered him, did you? A. I did not.

Q. Did Rubin tell you, after he gave you this $200, that an Assistant District Attorney of Dewey's office told him, Rubin, not to put you on any payroll and Rubin then said to you, "Under these conditions I have to take you off"? Did he say that to you? A. No, sir; I don't remember that definitely at all.

Q. What? A. I don't remember definitely about me being put on any kind of a payroll 6032
there. The only thing I loaned $200, the only thing I remember. Anything else what you tell me now, there is no truth in it.

Q. Did you give Danny Fields any money? A. I did not give him.

Q. Did Rubin give him any money? A. He loaned him $200.

Q. He loaned Danny Fields how much? A. $200.

Mr. Turkus: I object to this. That does not affect his credibility or have any- 6033
thing to do with the case under indictment that we are trying here.

The Court: Sustained.

Mr. Barshay: I except to it.

The Witness: I took the $200 and I gave it to Mendy Weiss, if you want to know that.

Mr. Talley: I move to strike that out and ask the jury disregard it.

The Witness: I gave it to Mendy and Mendy took it too.

The Court: Strike it out.

6034 *Paul Berger—For People—Cross*

Mr. Barshay: Will your Honor admonish this witness?

The Court: Yes. Don't interrupt that way again. What were you saying, Mr. Barshay?

Mr. Barshay: Your Honor, I am only addressing this to this witness because he said he had no personal business with Rubin.

The Court: Go ahead.

6035 Mr. Barshay: On that score and that score alone.

The Court: Whether he did or not has no bearing on the question.

Mr. Barshay: I take an exception.

Q. Did he first give you a check for $400 and did you say to him at that time, "Where can I cash this check?"

Mr. Turkus: I object.

6036 Q. And then did he take it back?

Mr. Turkus: I object to it. That is a triple question.

Mr. Barshay: Do you want me to do it three different ways?

Mr. Turkus: I do not want you to even be annoyed with it at all. I object. It does not have anything to do with the case.

Mr. Barshay: I assure you I am not annoyed, Mr. Turkus.

Mr. Turkus: Do it any way you want.

The Court: Sustained.

Q. Do you know whether or not your telephone was tapped at this Golderaft Corporation? A. I didn't know.

Q. Dewey at that time had been in the process of questioning you through his assistants, isn't that so?

Mr. Turkus: I object to the question.

The Court: Overruled.

A. Will you repeat that question? 6038

Q. Mr. Dewey at that time was in the process of questioning you?

Mr. Turkus: My objection was on the ground it is repetitious. That was answered this morning.

The Court: I think so.

Mr. Turkus: And again this afternoon.

Q. Rubin called you up and gave his right name?

Mr. Turkus: I object unless the time be fixed. 6039

Mr. Barshay: The time that he speaks of, the only conversation over the telephone at his place of business from the Hatfield Hotel.

Q. Did he give you his right name? A. No.

Q. What name did he give on the telephone? A. I naturally recognized his voice.

Q. Did you answer all the telephone calls? A. If I was not there, some one else answered.

Q. What name did he leave? A. Did not leave

6040 *Paul Berger—For People—Cross*

any name, just a friend and the time he called back so I would be there and get a phone call.

Q. You know Rubin at that time was being looked for by the District Attorney's office of Manhattan, isn't that so?

Mr. Turkus: Objected to. It does not affect his credibility or go to the issue of this indictment.

The Court: Sustained.

6041 Mr. Barshay: Exception.

Q. Did Rubin tell you that?

Mr. Turkus: I object to it. It is incompetent, irrelevant and immaterial. It does not affect his credibility or go to the issue of the indictment.

The Court: Overruled.

Q. Did Rubin tell you that? A. Tell me what?

Q. That Dewey was looking for him? A. Never told me.

6042 Q. You did not know that?

Mr. Turkus: I object to the form of the question. That does not go to his credibility.

The Court: Sustained.

Mr. Barshay: Exception.

Mr. Turkus: Or the Rosen murder.

Mr. Barshay: Again I object, your Honor, to Mr. Turkus naming the Rosen murder in any objection he makes.

Mr. Turkus: Three times you have been overruled on that.

The Court: Overruled again.
Mr. Turkus: That is the fourth.

Q. You knew Rubin was engaged in participating in extortions in the flour industry, did you not?

Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Barshay: Exception.

6044

Q. At the Hatfield Hotel, when you and Rubin separated, did you give him any money? A. I did.

Q. Did you get that money from Weinstein? A. I refuse to answer that question that it may incriminate me.

Mr. Barshay: That question I ask your Honor to direct him to answer.
The Court: Denied.
Mr. Barshay: Exception.

6045

Q. Did Buchalter say anything about Brooklyn at that time? A. At what time?

Q. At the time that you gave Rubin money? A. I gave him money—

Q. At the Hatfield Hotel. A. I gave him money a number of times.

Q. At the Hatfield Hotel, the very first time he came back from Saratoga? A. What is the question?

Q. Did Lepke say anything to you with respect to Brooklyn at that conversation? A. That is right, while we were there.

Q. No doubt about it? A. That is right.

6046 *Paul Berger—For People—Cross*

Mr. Barshay: Page 1677, at the bottom. Mr. Turkus.

Q. Were you asked this question on your direct examination, referring to a talk at the Hatfield Hotel, the very first talk: "Q. When you told that to Lepke did Lepke say anything to you—that Rubin was in a hotel Hatfield I am talking about that conversation. A. He did.

"Q. (At the top of page 1678) What did he
6047 say?" And did you make this answer on your direct examination: "A. He told me, 'I don't know what I am going to do with him. He has got to stay away until things clear up,' and Lep told me to give him his money."

Did you answer the question exactly the way I read it? A. Cleared up in Brooklyn.

Mr. Barshay: I move to strike out the answer as not responsive.

Mr. Turkus: That is responsive to that question, did he answer it exactly that way.

6048

The Court: I cannot understand the answer.

(Answer read by the reporter.)

Mr. Barshay: I move to strike out the answer as not responsive. I asked him whether that question was asked of him and that answer was made and I read as Mr. Turkus followed me, correctly.

The Court: You mean you are reading from the record of this trial?

Mr. Turkus: If you read page 1676, at the top.

Mr. Barshay: I object to that. I asked a simple question for the purpose of impeaching him, after laying my foundation properly.

Mr. Turkus: I am going to object to it because it does not impeach his testimony. On page 1676 he said verbatim —

Mr. Barshay: I object to counsel doing any such thing and getting the witness out of a hole.

Mr. Turkus: I am not getting him out 6050
of a hole.

Mr. Barshay: Which I have a right to do, your Honor, exactly as it is quoted.

Mr. Turkus: Page 1676, the top, the first question has it verbatim, the way he has answered now.

Mr. Barshay: What page did you say?

Mr. Turkus: 1676.

Mr. Barshay: Where is that?

Mr. Turkus: The page before what you read.

Mr. Barshay: First, your Honor, I 6051
think Mr. Turkus ought to know he will have a chance at redirect to read whatever he wants. I asked a proper question and I ask a ruling on it. Did he make that answer to that question as I read it?

The Court: Is there any doubt about it?

Mr. Barshay: I want Mr. Turkus to say that.

The Court: It is in the record.

Mr. Barshay: Yes, but this witness

6052 *Paul Berger—For People—Cross*

now says he said "cleared up in Brooklyn," which is inconsistent.

Mr. Turkus: He did on 1676.

Mr. Barshay: You ought to be ashamed of yourself.

Mr. Turkus: You ought to be ashamed of yourself to try to confuse someone.

Mr. Barshay: I take an exception to that remark, your Honor.

Mr. Turkus: Well, if he is going to

6053 bait the District Attorney, I won't make any objection to anything he says. Let him say what he pleases.

The Court: The Court has not been able to get in a word edgewise—

Mr. Turkus: I am sorry, your Honor.

The Court: —for some time back. The Court cannot understand why you have to ask a man whether he has been asked this and was his answer this, when it is on the record of this trial. All you have to do is read it. If there is any dispute about

6054 it—

Mr. Barshay: The man now denies, apparently, your Honor, that he said that.

The Court: He has not denied anything.

Mr. Barshay: He added something which is not contained in the answer.

The Court: He gave something not directly responsive, but quite illuminating and also competent. Let it stand.

Mr. Barshay: Take an exception to it.

The Court: You won't get a technical ruling on that.

Mr. Barshay: May I urge upon the Court that the question of flight from Manhattan and the question of flight from Brooklyn is very vital in this case?

The Court: Please proceed.

Mr. Barshay: Take an exception.

Q. You called New Orleans on the telephone? A. I did.

Q. From where? A. From a booth, telephone booth.

6056

Q. What booth? A. I was in Brooklyn. Telephone booth.

Q. Where did you telephone New Orleans from? A. From a telephone booth.

Q. Address, please? A. I don't remember the address.

Q. The street? A. Somewhere on Broadway, Brooklyn.

Q. Broadway near where? A. On Gates Avenue.

Q. Do you know what kind of a store it was? A. Either a drug store or a cigar store.

6057

Q. Do you know which? A. I cannot definitely say.

Q. Do you know what time you called? A. At night.

Q. Do you know what time at night? A. After nine o'clock. I know because the rates were down.

Q. How much money did you put in the coin box? A. I don't remember definitely, but I think it was a couple of dollars.

Q. Do you know how much? A. I don't remember definitely.

Q. Did you have to put in any more money when the three minutes were up, if they were up? A. I don't remember that definitely.

Q. Did you ever telephone to New Orleans on any other occasion? A. No, sir.

Q. For Max Rubin? A. No, sir.

Q. That was the only time, wasn't it? A. That was.

Q. And you could not remember where you made that call from? A. I cannot.

6059 Q. Is it because you know I could trace that number— A. I am telling you the truth.

Q. —that you don't remember? A. If I knew I would tell you. There is nothing for me to hide. I called him. I did call him. I put my own money in there. What is there to hide? I did call him at New Orleans by Lepke's orders.

Mr. Barshay: I move to strike out the answer, your Honor.

Mr. Turkus: That was invited by the observation does he know he could trace the number. I ask that it stand.

6060

Mr. Barshay: Yes, you know that too.

Mr. Turkus: I don't know that.

The Court: All through? Strike out the latter part as irresporsive.

Q. When did you see Rubin again at the Hatfield Hotel? A. Repeat that question again.

Q. When did you see Rubin again at the Hatfield Hotel? A. After what?

Q. After the first time you described you saw him at the Hatfield Hotel. A. What is relating

6061

to? I seen him a couple of times. I don't remember just what time you mean.

Q. You saw him the first time when he came from Saratoga, did you not? A. That is right.

Q. That is the time you described as the conversation about Salt Lake City taking place; is that right? A. That is right.

Q. When again did you see him at the Hatfield Hotel after that? Do you know? Do you know that? A. After he came back from Salt Lake City?

6062

Q. Yes. After he came back from Salt Lake City you are definitely certain about seeing Rubin at the Hatfield Hotel? A. That is right.

Q. There is no doubt about it in your mind? A. That is right.

Q. Do you know the date? A. I do not.

Q. Do you know who was present? A. I was with him.

Q. Who else? A. I don't remember anybody else being there.

Q. Do you know where he called you? A. I think he called me from the hotel.

6063

Q. Where? A. In my place.

Q. You did not expect that call, did you? A. Lepke told me he was back and he was going to get in touch with me.

Q. Buchalter told you before he came back from Salt Lake City that Berger is to get in touch with you? A. What? Who was to get in touch with me?

Q. Withdrawn. That Rubin was to get in touch with you.

Mr. Turkus: That is an incomplete question.

6064 *Paul Berger—For People—Cross*

The Witness: I presumed that he was back, when he told me he was back he was going to get in touch with me.

Q. What I want to know is, did Buchalter tell you he was back, meaning Rubin? A. That is right.

Q. He told you that he was back before— A. That is right.

Q. —you saw Rubin at the hotel? A. That is
6065 right.

Q. Isn't it a fact, Berger, that when you got the call from Rubin at the Hatfield, you went and told Buchalter that Rubin was back? A. No, I did not keep in touch with him since he was in Salt Lake City. How did I know he was going to come back?

The Court: After he came back.

Q. After he came back from Salt Lake City, he got in touch with you first, did he not, and you were the one that told Buchalter that he is
6066 back? A. No, sir.

Q. You say now that Buchalter told you he was back? A. He was back in town from Salt Lake City.

Q. (Page 1677) Were you asked these questions and did you make these answers:

"Q. After that did you hear from Rubin? A. I did.

"Q. How long after, if you can remember? A. To the best of my recollection, about two or three weeks after.

6067

"Q. Did Rubin get in touch with you? A. He did.

"Q. In what way? A. By telephone.

"Q. Did he talk to you on the telephone? A. He did.

"Q. Did you tell Lepke of that? A. I did.

"Q. How long after you received the call? A. Same day.

"Q. What did you say to Lepke? A. I just got a call from Max Rubin: he is over in the hotel.

6068

"Q. Did you tell him the name of the hotel? A. That is right.

"Q. What hotel was it? A. Hotel Hatfield."

Mr. Turkus: I object to it. There is nothing inconsistent.

The Court: Overruled.

Q. Did you testify as I read? A. That is right.

Q. Do you remember that conversation in the automobile between Buchalter, yourself, and Rubin? A. At what time and what place are you talking about?

6069

Q. After you took Rubin from the Bronx to meet Buchalter in Manhattan. Do you remember that? A. That is right.

Q. Did you talk to Rubin on the way down from the Bronx, on your way down to meet Buchalter? A. I did.

Q. Did you talk to him about his being away? A. I don't think I did. The only thing I told him was Lep wanted to see him.

Q. Is that all that was said on the way down from the Bronx, all the way downtown? A. As

6070 far as I can remember, all the way downtown, and a few blocks away from his house.

Q. How long did you stay at the house? A. I think I was there five minutes.

Q. Did you talk to him during those five minutes? A. I told him, I said, Lepke wanted to see him.

Q. Did he tell you about his whereabouts? A. Who?

Q. Rubin? A. He was there. What do you
6071 mean?

Q. Did he tell you what had happened, what was going on while he was away? A. No, sir.

Q. Did he ask you what was going on while he was away? A. No, sir, the only thing I told him was Lepke wanted to see him; he is a few blocks away from here.

Q. Did he tell you that Brooklyn was looking for him? A. Who?

Q. Did Rubin tell you Brooklyn was looking for him? A. No, sir.

Q. Did he tell you that the Police Department
6072 was looking for him? A. If I am not mistaken, I think he told me a cop was to his house.

Q. Did he tell you from where the cop was? A. I don't remember definitely.

Q. Did he mention the Dewey investigation? A. I don't remember that definitely; the best of my recollection is he told me there was a cop around to his house.

Q. Where did Rubin live at that time? A. In the Bronx.

Q. What street? A. I cannot remember that.

Q. Where did you meet Buchalter with Rubin on the way from the Bronx? A. You mean when

I took him out of his house, when I took Rubin?

Q. Yes. A. A few blocks away from there.

Q. How many blocks is a few blocks? A. Between ten or fifteen blocks, about that area—about five or ten minutes ride from his house.

Q. Buchalter remained in the Borough of Manhattan, didn't he? A. I don't remember that definitely.

Q. Do you know where you let him off? A. Well, about ten minutes ride from where I let him off to Max's house. 6074

Q. It took you about ten minutes to drive back? A. There was some traffic.

Q. If there was no traffic you could go fairly fast? A. I don't definitely remember.

Q. It took you ten minutes to go between ten or fifteen blocks? A. I figured on that time; I did not time myself.

Q. Was anybody following you in an automobile from the point you picked up Buchalter on the way up to Rubins'? A. From the point I picked up Buchalter?

Q. That night on the way to meet Rubin? A. 6075
Not as I know of.

Q. Did Buchalter tell you to go through side streets? A. He was pretty careful. I was watching through the mirror. I went through a one-way street to see if I am getting followed.

Q. Buchalter and Rubin spoke right under the awning, is that right? A. Yes, sir.

Q. Your car was parked right at the gutter, right in the gutter, right at the curb? A. Yes, sir.

Q. Did they talk to each other under the store awning? A. Under the awning.

Q. Was the store lit? A. I don't remember definitely.

Q. They did not hide in a hallway? A. No, sir.

Q. They did not go into your car to talk? A. Well, after they spoke a few minutes they came in my car.

Q. How many minutes is a few? A. Between five and ten minutes.

Q. So for five or ten minutes at that time they
6077 stood out in the public street? A. Under the awning.

Q. It was not an enclosed awning, was it? A. No, sir.

Q. Incidentally, do you know when Buchalter entered the Perfection Coat Company? A. Do I know when?

Q. Yes. A. I do not.

Q. Do you know the year? A. I do not; I had nothing to do with it; how can I know?

Q. Had you seen Buchalter at the Perfection? A. Yes.

6078 Q. When was the first time you saw him at the Perfection? A. I don't remember that definitely.

Q. Was it in 1934? A. Maybe.

Q. Can you give us a better answer than that? A. No, sir, I cannot.

Q. When did you first meet Wiener from the Perfection? A. I know him from the trade.

Q. You knew him before Buchalter was a partner? A. Yes, sir. You mean Sam Wiener? There are a lot of them.

Q. The Perfection Coats? A. Sam Wiener?

Q. Yes. A. Yes, sir.

6079

Q. Does that refresh your recollection that Buchalter did not join that concern until the latter part of 1934 or the early part of 1935? A. Not definitely.

Q. Do you know when Gurrah left town in the year 1936, or 1937, rather? A. When he left?

Q. Yes. A. Just when he left, I don't know. Do you think they are telling me about that?

Q. You saw Gurrah and Buchalter together very often? A. Yes, sir.

6080

Q. When did you stop seeing Gurrah and Buchalter together in 1937? A. All of a sudden I stopped seeing them around.

Q. Was it in June of 1937? A. No, sir; that was before 1937; he was away, if I am not mistaken, but Danny Fields, if I am not mistaken—

Mr. Turkus: Does "he" refer to Gurrah?

The Witness: Yes, sir.

6081

Q. When you got in trouble in July, 1937, with Mr. Dewey's office, you said you made a demand upon Weinstein for bail, isn't that so? A. That is right—just a minute, repeat that question.

(Question repeated.)

A. That is right.

Q. You wanted a lawyer from him, too? A. Yes, sir.

Q. You made no such demand upon Buchalter, did you? A. He was not there.

Q. And you made no such demand upon him? A. No, sir.

Mr. Turkus: I object. That has been answered by, "He was not there."

Q. You say he asked you to get in touch with a man named Diesenhaus, the last time you saw Buchalter? A. Yes, sir.

Q. You did not get in touch with Diesenhaus for a lawyer or a bondsman? A. No, sir.

Q. You went where, directly to Weinstein? A. When I came out.

6083 Q. While in jail, awaiting bail, you sent word to Weinstein? A. No, sir, not while I was in jail.

Q. When did you send word to Weinstein? A. I spoke to him myself.

Q. When? A. After I was bailed out.

Q. What did you say to Weinstein? A. I asked him why he didn't send up a lawyer and try to get me bail, and he told me — Of course, I had an argument with him— they said they cannot stick their heads out.

Q. You went to Weinstein because you felt that Weinstein owed you an obligation? A.

6084 Well, he owed everybody, he owed quite a number of obligations.

Mr. Barshay: I move to strike it out.

Q. Berger, you were in jail and got out on bail in July of 1937 and went to the union for help, didn't you?

Mr. Turkus: I object to that as repetitious.

The Court: Objection overruled.

A. After I was bailed out?

6085

Q. You went to the union for help, didn't you? A. I thought that they should at least get me a lawyer.

Q. You were on the payroll of the union then? A. So was Lepke.

Mr. Barshay: I move to strike out the answer and I ask your Honor to do something with this witness.

The Court: I am trying to find out what the last answer means— "That was Lepke," he said?

6086

Mr. Barshay: He said, "So was Lepke".

The Court: Strike it out.

Q. When you were arrested in this case you engaged Mr. Gardiner, of counsel, didn't you? A. I did.

Q. Before your arrest what business were you in, I am speaking of June, 1941? A. Manufacturer.

Q. What was the name of the concern? A. S. B. and M. Corporation.

6087

Q. Can you tell us what that consisted of? A. Schwartz, Berger and Montlick.

Q. Was it you, Berger—you were in the corporation? A. Yes, sir.

Q. Did you invest any money in that corporation; yes or no?

Mr. Turkus: I object.

The Court: Sustained as irrelevant.

Mr. Barshay: Exception.

Q. Was that corporation engaged in doing government work? A. That is right.

6088 *Paul Berger—For People—Cross*

Q. Making Army uniforms? A. Yes, sir.

Q. Did you sign any of the bids given by the Government for contracts? A. Did I what?

Q. Did you sign any bids submitted to the Government before your corporation got the contract?

Mr. Turkus: I object. That does not go to credibility.

The Court: Sustained.

6089 Mr. Barshay: I am trying to lay a foundation for something, your Honor, that may attack his credibility.

Mr. Turkus: If that is the purpose, I will withdraw the objection, if it goes to credibility.

Mr. Barshay: I may not succeed, but that is my purpose.

The Court: Why don't you come down to the point?

Q. Did you sign personally an application for bids? A. I don't think I did.

6090 Q. Did your partner sign applications for bids?

Mr. Turkus: I object. That does not go to the credibility of this witness.

The Court: Sustained.

Mr. Barshay: Exception.

The Court: It is too far afield.

Q. Do you know of your own knowledge that one of the questions submitted in the application was whether or not any one of the corporation had a police record? A. Absolutely not.

Q. When you were arrested, on June 5, 1941,

on the charge of murder, you denied your guilt of participation in it? A. I did.

Q. You were arraigned in the Magistrates' Court on a short affidavit? A. I was.

Q. You had Gardiner as your lawyer? A. I did.

Q. You pleaded not guilty? A. I did.

Mr. Turkus: The law requires that.

Q. Isn't that so? A. That is right. 6092

Q. Did you then tell Gardiner to go to Weinstein and get for you a lawyer of the calibre of Martin Littleton? A. I did.

Q. Did you then go to Weinstein and demand, through your lawyer, that Weinstein pay all counsel fees in your defense? A. I asked him for a lawyer.

Q. At their expense? A. That is right.

Q. And then did you say that unless a lawyer was furnished by them of the calibre of the gentleman I mention, they would feel sorry? A. I did not say about the calibre. I asked for any lawyer. I did not say any calibre. 6093

Q. (The Court) Did you mention Martin Littleton? A. I did not mention it.

Q. (The Court) Who did? A. I don't know.

Q. Did you hear the name? A. Yes, sir, from my lawyer.

Q. Yes, of the calibre of Mr. Littleton? A. Yes.

Mr. Turkus: I object. How does it go to discredit this witness?

6094 *Paul Berger—For People—Cross*

Q. The union rejected your request? A. Not as far as I was told.

Q. Did the union furnish a lawyer for you? A. They did not, but they said they were going to take it up.

Q. When they took it up, did they reject your request? A. From what I was told.

Q. So they never furnished a lawyer for you? A. No.

Q. You made no demand upon the defendant
6095 Buchalter for a lawyer, did you? A. Repeat that.

(Question repeated.)

A. Absolutely not.

Q. You felt then that the union was still obligated to you because you were one of the men who built it up, isn't that so?

Mr. Turkus: I object.

The Court: Sustained.

Mr. Barshay: Exception.

6096

Q. You demanded a lawyer at the union's expense because in your mind you acted for them and it was their obligation to protect you? A. Acted for them in what?

Q. In anything you did? A. I did not know anything I did—I did some things—a lot of things I done, that is, for Lepke.

Mr. Barshay: I move to strike that out.

The Court: Strike out the latter part.

6097

Q. How long did you remain in jail? A. A little over a week.

Q. During that week you had not seen anybody from Judge O'Dwyer's office, had you? A. While I was in jail?

Q. Yes—when did you get word from the union that they cannot stick their heads out and give you a lawyer? A. You mean after I was arrested in this case?

Q. Yes. A. I answered that question before.

6098

Q. Was it a week after your arrest? A. Didn't I answer you that question? I told you that they said they would think it over—that is an answer.

Q. That is the last answer you got from them? A. Yes, sir. They were supposed to get in touch with a lawyer but they never did.

Q. You waited how long to get that answer before you decided to do something? A. About a week. I know the make-up of these people, you know.

Q. So at the end of the week your patience became exhausted, is that so?

6099

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. At the end of the week, when you did not hear from the union, you decided to do something about it? A. Do what?

Mr. Turkus: I object to the form.

The Court: Objection sustained.

Mr. Barshay: Exception.

6100 *Paul Berger—For People—Cross*

Q. When you failed to hear from the union at the expiration of a week, did you then send word through this lawyer to the District Attorney of Brooklyn? A. That is right.

Q. You were angry at the union officials, weren't you?

Mr. Turkus: I object. His state of mind does not affect his credibility, whether he was angry at them or not.

6101 Mr. Barshay: I submit, your Honor, we are entitled to show his animosity and his motive.

Mr. Turkus: On that ground, I will withdraw it.

Q. You were incensed, weren't you, at the time? A. I was angry at the whole union, not at any particular official.

Q. You knew at that time that Buchalter had already been in jail, had already surrendered, already been tried, and already been convicted, and he was awaiting trial here, isn't that so? A.

6102 Yes, sir.

Q. When were you taken out of jail and put into a hotel? A. After my lawyer got in touch with the District Attorney.

Q. How long after your arrest? A. The latter part of the week, about eight days.

Q. When did you have your first talk with any representative of Judge O'Dwyer's office? A. I had no talk at all. When I first was arrested I refused to talk.

Q. And you maintained that refusal for about a week—when did you have your first talk with respect to this case? A. When my lawyer got

in touch with Judge O'Dwyer and he had me brought to his office.

Q. Was there a stenographer present? A. No.

Q. When first was there a stenographer present when you talked to any representative of the District Attorney's office? A. I don't remember seeing any stenographer.

Q. Did you ever see any person sitting at a desk when some official was questioning you, either Judge O'Dwyer or anybody else, making 6104
notes while you were speaking? A. Well, when Mr. Turkus and Mr. Klein spoke to me.

Q. Was there a stenographer then? A. Not as I know of: I seen him taking notes.

Q. Notes himself? A. Yes, sir.

Q. At any time in your recollection do you recall a stenographer being present when you spoke to a representative of the D. A.'s office? A. No, sir, not to my recollection.

Q. Did you speak to Captain Bals? A. I did.

Q. In the talk with Judge O'Dwyer and with Captain Bals, did you tell them you fingered 6105
Rubin on two occasions: yes or no? A. Yes, sir.

Q. Have you ever been arraigned on a charge of assault, or attempted assault, with respect to the fingering of Rubin? A. Well, will you explain to me what is meant by that?

Q. I mean, had you ever been arrested for those two things? A. I was up before the Grand Jury on it in the Bronx.

Q. Did you sign a waiver of immunity? A. No, sir.

Q. You got immunity? A. I did not sign a waiver.

Q. You have not been arraigned for that in any court? A. I was only before the Grand Jury.

Q. You did not sign a single paper? A. No, sir.

Q. That was pursuant to instructions of your counsel? A. The District Attorney told me.

Q. In other words, you have not been arrested charged with fingering Rubin, either for assault or attempted assault? A. No, sir, I told you I went before the Grand Jury in the Bronx.

Q. While you were in jail did you receive any message from your partners that your pay was being cut off? A. No, sir.

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Mr. Barshay: I am leading to something which may affect his motive, and I have to lay my foundation for it.

The Court: All right.

Q. Were you getting your pay while you were in jail? A. That is right.

Q. Did any one in the District Attorney's office tell you, or your lawyer tell you, as a result of having received a message from the D. A.'s office, that unless you would turn State's evidence, the Government contract that your corporation had would be cancelled?

Mr. Turkus: I object.

A. No, absolutely not; not to my knowledge.

Q. After you turned State's evidence, Berger,

did the members of your corporation put you, or tell you they were going to put you off the payroll? A. They did not.

Mr. Turkus: I object. He has already answered it, Judge.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Are you living at the Bossert since your arrest? A. Yes, sir. 6110

Q. Are you allowed visitors? A. No, sir.

Q. Do you see your wife? A. I do.

Q. Do you see your son? A. That is right.

Q. Do you go out? A. I go to see them.

Q. You go for automobile rides? A. To see them.

Q. Do you go for automobile rides?

Mr. Turkus: Objected to as already answered.

Q. Did you visit your place of business? A. No, sir. 6111

Q. Did you go to your place of business—withdrawn. Did you visit the premises opposite your place of business in the custody of the police?

Mr. Turkus: I object. That does not affect his credibility.

Mr. Barshay: It may affect his motive in giving testimony, if he got the treatment that I am trying to bring out.

The Court: To keep him good natured, you mean?

Mr. Barshay: Yes.

6112 *Paul Berger—For People—Cross*

Q. Did you go with policemen, did you go with policemen and go into a restaurant opposite your place of business? A. No, sir, never.

Q. Never at all? A. Absolutely not.

Q. Do you know Cy, who worked there as a foreman? A. I do.

Q. Didn't you meet him opposite the place of business in the custody of police? A. No, sir, I never did.

Q. Not even once?

6113

Mr. Turkus: Objected to as already answered. He said "No" twice.

Q. Were you getting your pay from the corporation ever since?

Mr. Turkus: Objected to. It does not affect his credibility on the issue of this indictment.

The Court: Objection overruled.

A. Yes, sir.

6114 Q. Can you tell me how much a week? A. $150. a week.

Q. Did you ever go into the Half Moon Hotel? A. I did not.

Q. Had you seen Tannenbaum at the hotel? A. I did not.

Q. Had you seen Mrs. Rosen? A. I never seen her, never know her.

Q. Have you spoken to Mrs. Tannenbaum? A. I did.

Q. And was that on the Boardwalk near the Half Moon Hotel? A. That is right.

Q. How many times? A. Once.

6115

Mr. Turkus: I object. This does not go to his credibility.

The Court: Objection sustained; a fishing expedition.

Mr. Barshay: I am not fishing, because he answered correctly. I am trying to show opportunity for association with prospective witnesses. She might be an intermediary. It is my province to prove it, if I can.

The Court: You cannot guess at it.

6116

Mr. Barshay: I am not guessing, sir.

Mr. Turkus: Is that a representation to the Court that Mr. Barshay has made?

Mr. Barshay: I make no representations. I am making an effort to discredit this man, and nothing else, no more than you vouch for the integrity of your witness.

Mr. Turkus: I will tell the jury what I vouch for in this case before it is over.

Q. Were you told what Rubin testified to in this case? A. Absolutely not.

6117

Q. When for the last time, before you took the stand, did you speak to any Assistant District Attorney? A. Repeat that question.

(Question repeated.)

Q. Tell me when. A. You mean before I took the stand on Friday?

Q. Will you tell me which assistant it was?

Mr. Turkus: He is asking you a question.

6118 Q. Yes, that is what I mean. A. Before I took the stand?

Q. Yes. A. Turkus.

Q. When did you speak to him before you took the stand? A. He told me to be down Friday morning.

Q. Is that all? A. That is right.

Q. Did you read the Grand Jury minutes before you took the stand — Question withdrawn. Did any official read to you the questions and

6119 answers that you gave before the Grand Jury, before you took the stand? A. Absolutely not.

Q. Now, you said you knew Rosen when you were a contractor with the World's Clothing Exchange? A. That is correct.

Q. Can you tell me what year that was? A. You mean when I had actual dealings with him?

Q. Yes, what year? A. What is the question?

(Question repeated.)

A. To the best of my recollection, it was 1934 or 1935.

6120 Q. At that time Rosen was working for Louis Cooper, wasn't he? A. I presume so.

Q. Had you ever been at Cooper's place? A. I had.

Q. While Rosen was working there? A. I don't recall while he was working.

Q. He was working there at the time he had business with your concern? A. Yes, sir.

Q. Did you ever see him there? A. Where?

Q. Rosen, at Cooper's place, at the garage? A. I do not definitely remember I saw him at the place.

6121

Q. Did you see Mendy Weiss at Cooper's place? A. No.

Q. Never? A. I never did—I think I saw Lepke there—I am not sure whether I saw—

Q. (interrupting) I am asking you about Mendy Weiss. A. Where?

Q. At Cooper's place? A. No, sir, I did not.

Q. Did you ever talk with Cy, either on the telephone, since you have been under arrest, or personally?

6122

Mr. Turkus: Who is Cy?

Q. The foreman of your premises. A. Yes, sir.

Q. Where did you speak to him? A. Over the 'phone.

Q. You were allowed to talk from the Hotel Bossert to your place of business?

Mr. Turkus: I object. That has nothing to do with the witness' credibility.

The Court: Objection sustained.

Mr. Barshay: Exception.

6123

Q. Did you instruct your concern to give any part of your salary to some woman? A. Absolutely not.

Mr. Barshay: Will your Honor permit me to reserve one or two questions? I am not now in a position to ask him.

The Court: You have had a very, very long examination and I thought you had concluded it. It is within the Court's discretion. If there is really something

6124

which you think should be inquired into, all right; otherwise proceed and finish with your cross-examination.

Mr. Barshay: I am finished then.

Cross examination by Mr. Talley:

Q. Did I understand you correctly in saying—Question withdrawn.

6125

Mr. Talley: If your Honor please, I move to strike out all the testimony given by the witness, direct and cross, up to now, upon the ground that no witness has a right to be called by the District Attorney to give testimony on behalf of the People, and then, upon cross-examination, take refuge behind the provision which says a man is not called upon to testify against himself—that he may claim the privilege of refusing to testify because it might incriminate or degrade him. I submit, sir, it is my understanding of the law

6126

that when a witness is submitted on behalf of the People, as in this case, he cannot take refuge upon cross-examination in any so-called claimed constitutional right of safety. As Your Honor has no right to allow any of the testimony on direct examination or on cross examination to go to the jury in this case, he having refused to answer certain questions propounded to him by counsel upon the ground that to answer those questions would incriminate him, he has either got

to go all the way or none. He cannot answer the questions that he chooses to answer and then decline answering another line of questions because he chooses not to answer those questions. I therefore move that the entire testimony be stricken out and that the jury be instructed to disregard it.

Mr. Climenko: May the record show that the defendant Buchalter joins in that motion? 6128

The Court: All of you join?

Defense Counsel: Yes.

The Court: The law is against all of you, so all of you are overruled.

Defense Counsel: Exception.

Mr. Talley: Before I commence my cross-examination on the part of my defendant of this witness, I ask your Honor to remove the court officer standing within one foot of the back of this witness there on the ground that it tends to distract the jury and to prejudice the defendants 6129 in this case.

The Court: The officer is in the proper place.

Mr. Talley: I ask your Honor to remove the big drop you have hanging on the wall showing the scene of the alleged murder in this case.

The Court: There is no objection to that. It can be taken to any part of the court room you so desire at any time you request, or hidden from view. It is not prejudicial in any way.

6130 *Paul Berger—For People—Cross*

Mr. Talley: I submit it is.

The Court: Then take it away. Please turn it so the jury will not be prejudiced by it.

(Exhibit removed from wall.)

A Juror: May we have a five minute intermission, please?

The Court: We will take a ten minute recess. Everybody will be in order, please. Now, gentlemen, remember the admonition
6131 previously given. First, the witness goes out.

(The jury then left the court room.)

(The defendants were remanded.)

The Court: We will reassemble at 4:30 P. M.

(The jury returned to the courtroom and the trial continued.)

6132

6133

PAUL BERGER, resumed the stand, and further testified, as follows:

Cross examination by Mr. Talley:

Q. Did you say that you gave yourself up? A. In the summer of this year—the spring of this year—to the District Attorney.

Q. Did you say you were living at the Hotel Bossert? A. I am.

Q. And what other hotels? A. No others.

6134

Q. Did you ever live at the Towers Hotel in Brooklyn? A. I don't know even where it is.

Q. What? A. I don't even know where the Towers Hotel is.

Q. You do not? A. Absolutely not.

Q. Do you know a woman named Dorothy Katz? A. Shall I answer that question?

The Court: Yes or no.

A. Yes, sir.

Q. Did she ever visit you since you have been in custody? A. No, sir.

6135

Q. She did not visit you at the Towels Hotel? A. I don't even know where the Towers Hotel is.

Q. The answer is no? A. I don't know even where it is.

Q. Is your answer no? A. Absolutely not.

Q. You have been keeping that woman, haven't you, living with her?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Talley: Exception.

6136 *Paul Berger—For People—Cross*

Q. You are not a citizen of the United States, are you? A. I thought I was.

Q. How long did you think you were, how long a time was it during which you thought you were a citizen of the United States? A. I thought my father took out his papers; besides that I thought I was in the Army and that made me a citizen.

Q. Have you thought you were a citizen for the last twenty years? A. I did.

6137 Q. Did you vote every year? A. I never did.

Q. If you thought you were a citizen of the United States, would you not have voted?

Mr. Turkus: I object. That is argumentative. All citizens don't vote.

Mr. Talley: I am cross-examining. I have a right to be argumentative in cross-examination.

Mr. Turkus: All citizens do not exercise the right of franchise, unfortunately.

The Court: Objection sustained as argumentative.

6138 Mr. Talley: Exception.

Q. When do you say you learned you were not a citizen? A. When Judge O'Dwyer was questioning me.

Q. That was this year, 1941? A. Yes, sir.

Q. Before that you had sworn on two different occasions that you were a citizen, didn't you? A. I thought I was; I answered that.

Q. You answered you were? A. That is right, definitely under the impression I was.

Q. What effort did you make to find out

6139

whether you were a citizen or not? A. I made no effort; I took it for granted that I was.

Q. So without making an effort or taking any advice, you made two affidavits at various times that you were a citizen of the United States, is that true?

Mr. Turkus: I object to that as repetitious.

Mr. Talley: I have a right to be repetitious on cross-examination.

6140

The Court: Objection overruled.

A. I definitely thought I was.

Q. Because you were in the Army, is that one of the reasons? A. Yes, sir, because I was twice in the Army; that was one of the reasons; I enlisted twice; that is more than a lot of citizens would do that were born in this country.

Q. One of those Army experiences was joining the Militia in Brooklyn, is that what you call the Army? A. After I was discharged from Fort Slocum, yes, sir, I joined the Militia, and I was sent up to patrol the Aequeduct that furnishes the water to New York. At the time of the war they thought they would get poisoned water. I was up there guarding it in 1917.

6141

Q. Do you consider that service in the United States Army? A. What?

Q. Do you consider being in the 14th Regiment, being in the United States Army? A. No, sir, I was in Fort Slocum with the United States Army.

Q. How long were you in the Army at that time? A. A number of months.

6142 Q. How many months? A. I would say about three months.

Q. So because of that three months service at Fort Slocum you regarded yourself as a citizen?

Mr. Turkus: I object. He said he had a dual reason.

The Court: Objection sustained.

Mr. Talley: Exception.

6143 Q. Was your father's name Berger? A. No, sir.

Q. What was his name? A. Hamburger. That is the reason why I changed it, because I was kidded when I was in the Army, it sounded German, and for other reasons that is right. I changed it after I came out.

Q. How did you have the name changed from Hamberger to Berger? A. I changed it myself on account I was being kidded when I was in the Army, and it sounded a whole lot like German, and I just took the "Ham" off. Besides

6144 that, there was a "Ham" on there and I was a Jew, and I wanted the "Ham" off.

Q. So you dropped it? A. Yes, sir, that was a couple reasons.

Q. You did not have any legal proceedings? A. No, sir.

Mr. Turkus: I object. There is no law you have to have a legal proceeding to change your name.

The Court: Will you come down to the point?

6145

Q. When you went into the Army did you give your name as Berger or Hamberger? A. Hamberger.

Q. Was it when you came out of the Army that you changed it to Berger? A. After I was discharged from the Militia, the 14th Regiment here.

Q. Did you give your name when you joined up with the 14th Regiment as Berger or Hamberger? A. Hamberger.

6146

Q. So then when you discontinued your association with the 14th Regiment, then you began using the name of Berger? A. Yes, sir, I told you the reason why. If you had that name, I think you would change it.

Q. You're getting quite comical, aren't you? A. It is the truth. You asked me those questions and I am answering you. It is true.

Mr. Turkus: I must object to this.

The Court: Objection sustained.

6147

Q. You are feeling pretty good about this case, aren't you?

Mr. Turkus: I object.

The Court: Don't answer it. Objection sustained.

Q. You are under arrest in connection with the murder of Joseph Rosen, aren't you? A. I am.

Q. You have not been indicted, have you? A. I don't think I was.

Q. You know you were not, don't you? A. Yes.

Q. You do not expect to be punished in any

6148 way for your connection with the killing of Joseph Rosen, do you? A. I don't know about that.

Q. Have you any doubt about it? A. I have. I am leaving myself to the mercy of the District Attorney and the mercy of the Judge.

Q. What did the District Attorney or any of his assistants promise you in connection with the killing of Joseph Rosen? A. They promised me nothing.

6149 Q. Nothing at all? A. No, sir.

Q. Do you mean that? A. Positively, sir.

Q. Didn't your lawyer tell you—didn't your lawyer tell you that you could not be indicted for killing Joseph Rosen because you testified before the Grand Jury and did not sign, under legal advice, a waiver of immunity? A. No, sir.

Q. You never heard that? A. The lawyer told me if I had anything to do with it, to tell the truth.

Q. Did he tell you that if you testified before the Grand Jury you could not be indicted? A. That is right.

6150 Q. Did the District Attorney tell you that, too? A. Yes, sir.

Q. So you know now you cannot be indicted for the murder of Joseph Rosen? A. That is right.

Q. And the reason you gained immunity was by promising to give the testimony you have given in this trial, isn't that so?

Mr. Turkus: That is a legal question. I object.

Mr. Talley: I have a right to show bias, motive.

6151

The Court: The question calls for an answer on a point of law, and the previous question and answer covers that point. Objection sustained.

Mr. Talley: Exception.

Q. Well, Berger, you refused to testify before the Grand Jury unless you got immunity, didn't you? A. I don't understand that question.

Q. You understood when you were asked about not signing a waiver of immunity, dida't you know what that means? A. Yes, sir.

6152

Q. My question is, didn't you refuse to testify before the Grand Jury this year, 1941, unless you got immunity from punishment? A. No, sir, that was not so. I was only told that. I did not refuse. I made my mind up to tell the truth. That is what I am doing.

Q. Everything you have told us is the truth? A. Today, yes, sir, all times since I have spoke to the Judge, yes, sir.

Q. Well, now, as long as you are telling only the truth—

6153

The Court (Interrupting): When you say, "Judge", who do you mean?

The Witness: Judge O'Dwyer.

Q. You said you were familiar with the terms used in the underworld? A. Yes, sir.

Q. What does the term "fingerman" mean? A. Pointer.

By the Court:

Q. What does it mean? A. The same thing as a fingerman.

6154 *Paul Berger—For People—Cross*

Q. In connection with what? A. You know—he was a Judge, ask him.

By Mr. Talley:

Q. Yes, and without any further quibbling, what does "fingerman" mean in your language, in the underworld?

Mr. Turkus: I object to the form of the
6155 question. It embraces "without any further quibbling."

Mr. Talley: Isn't he quibbling?

The Court: Objection sustained as to form.

Q. I ask you again what is meant by a "fingerman"?

Mr. Turkus: Objected to as already answered.

By the Court:

6156

Q. Using the term that Judge Talley mentioned, and your answer, what is the pointing done in connection with? Is it to point out a man to be bumped off, or to be beaten? A. Either that, or to be beaten.

Q. Or given a ride? A. That is right.

Q. Is that what it means, somebody has to identify? A. Somebody that knows the man.

Q. And then others do the work? A. Yes, sir.

By Mr. Talley:

Q. Don't you know it is only used in connec-

6157

tion with pointing out a man who is to be murdered, or whose murder is attempted? A. I do not.

Q. It means pointing out a man who is to be "hit", in your language, does it?

Mr. Turkus: I object. He gave a more comprehensive definition of "fingerman" than that.

Mr. Talley: He gave a very fine definition of what it means to be "hit", and I am asking him now if that is what a "fingerman" is. 6158

The Court: The definition includes that but does not make it exclusive.

Q. You do not deny you were the fingerman in the killing of Joseph Rosen? A. No, sir.

Q. And you know that makes you an accomplice in this murder, don't you? A. I know it now, but I did not know it then.

Q. You did not know when you pointed out Rosen, as you say you did, that you were a participant or accomplice? A. Absolutely not. 6159

Q. In his subsequent murder? A. Absolutely not; I never had the least idea that man was going to be killed.

Q. When you acted as fingerman against Max Rubin, that was different, wasn't it? A. That is right.

Q. You knew then — A. (Interrupting) That was the first time I ever pointed out a man to get killed.

Q. When you pointed him out you knew that he was to be killed? A. Absolutely not.

Q. Rubin? A. I am talking about Rosen.

6160 *Paul Berger—For People—Cross*

Q. I am talking about Rubin. A. Why don't you say who you are talking about?

Q. I said who I was talking about.

Mr. Turkus: Objected to as already answered.

The Court: Objection overruled.

Q. I am talking about Rubin. A. Talking about Rubin, all right.

6161 Q. My question is, when you acted as fingerman for Rubin, you knew he was to be killed? A. Yes, sir. I did not know then.

Q. You not only pointed him out once, but twice? A. I did.

Q. And in the case of Rubin, you yourself made arrangements, in part, as to where he was to be and where you were to be? A. That is right, by orders.

Q. You never did anything since you left the 14th Regiment without orders, did you?

6162 Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Q. Did you know the Monday after Rosen was killed, when you say you read it in the newspaper, did you know then that you had been an accomplice in his murder?

Mr. Turkus: I object. It makes no difference.

The Court: Objection sustained.

Mr. Talley: Exception.

6163

Q. Besides the name of Berger, which you are now using, did you ever use any other names in the underworld, in which you were so familiar? A. Not as I can recollect.

Q. Your memory is pretty good? A. To a certain extent.

Q. Were you ever known or heard yourself referred to as "Crazy Paul?" A. Don't be ridiculous.

Q. I am waiting for an answer to my question, yes or no.

6164

Mr. Turkus: I object. It has been answered.

The Court: It makes no difference what he heard himself called. Sustained.

Q. Wasn't your nickname in the underworld, "Crazy Paul"? A. That's the most ridiculous thing I ever heard a lawyer ask me.

Q. You mean to convey by that that your answer is no? A. Absolutely no.

Q. Why didn't you say, so? You have been also known in the underworld as—

6165

Mr. Turkus (Interrupting): I just want to make an objection.

Mr. Talley: I will ask the District Attorney to take his seat until my question is finished.

Q. Were you also known among your associates as "Whackey"?

Mr. Turkus: I object. "Also known".

He has indicated he was not known under that alleged other name.

The Court: Objection sustained.

Q. Were you known as "Whackey"? A. No, sir.

Q. Were you known as "Dopey"?

The Court: What a person is called by an outsider is something that he is not responsible for. But the name which he adopts himself and uses as his own is something which may be inquired into.

6167

Mr. Talley: I take exception.

Q. Did you tell us all the places you worked when you say you were taken out of the Army by your mother?

Mr. Turkus: I object to the form of the question. He was discharged from the Army, being under age.

Mr. Talley: He said he was taken out by his mother's request because he was under age, too young to enlist.

6168

Mr. Turkus: She, of course, would have no authority to bodily remove him from the United States Army.

The Witness: I would like to hear the question.

(Question repeated by reporter.)

A. Maybe I missed a couple of places.

Q. Go back in your recollection and tell us, if you can recall, any place you worked after you came out of your military experience; just

6169

go back in your recollection and tell us if there are any others which you have not yet mentioned. A. I answered before in direct examination the places where I worked.

Q. And that is all the places you remember you worked? A. That is all I can positively remember, unless there may be one or two which I did not say.

Q. Did you ever work in an insane asylum? A. Worked as what?

6170

Mr. Talley: Will your Honor direct the witness to answer the question?

By the Court:

Q. Did you ever work in a State hospital in any form at all? A. I did.

Q. As an orderly? A. An attendant.

Q. What State hospital? A. I think it is around Middletown, New York.

By Mr. Talley:

6171

Q. How long did you work there? A. About two weeks.

Q. Is that all? A. Yes, sir.

Q. Why didn't you tell us that? A. You did not ask me that.

Q. The District Attorney and Mr. Barshay asked you very directly where you worked. It was the District Attorney, if I remember. A. I may have slipped on probably a couple of places.

Q. I ask you to try to recall them now. You stated you have given all you remembered? A.

6172 That is right. There may be one or two left out.

Q. Can you figure that out now? A. I did not have anything to hide.

Q. Why didn't you tell us you worked in the Middletown State Hospital for the Insane? A. Because I forgot about it. There is nothing to hide; there is no crime to work as an attendant in a hospital, is there? I worked for my money, didn't I? I did not steal anything there. I
6173 worked there.

Q. You had a sister as an inmate of an insane asylum right here in this vicinity, didn't you?

Mr. Turkus: Objected to.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. Did you ever make a statement that your experience in the Middletown State Hospital for the insane had made you a little crazy, too? A. Absolutely not.

6174 Q. Now, were your parents Russian?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. What language did they speak when you were at home? A. With them?

Mr. Turkus: Objected to.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. Did you speak Russian? A. No, sir.

6175

Q. Did you speak Yiddish? A. I do.
Q. You do now? A. At that time I did, too.
Q. And do you now? A. Certainly.
Q. And Yiddish is a form of the Russian language, isn't it? A. Not to my knowledge.

Mr. Turkus: I object.
The Court: Sustained as immaterial.
Mr. Talley: Exception.

6176

Q. You told us you could not even pronounce the name that Rubin was using? A. I did.
Q. Despite the fact that you spoke Yiddish? A. Yes, sir, that is a fact, correct.
Q. You cannot either remember the name or pronounce it if you knew it? A. Yes, sir, there is a difference between Jewish and Russian like Chinese and English.
Q. Isn't Yiddish a corruption of the Russian language? A. No, sir; maybe with the German but not with the Russian. I will tell you something now.

6177

Q. What was the language that you spoke when you were a boy in your home?

Mr. Turkus: I object.
The Court: Sustained as immaterial.
Mr. Talley: Exception.

Q. Now, are you now in business at 599 Broadway? A. I am.
Q. In this clothing business that has a contract with the United States Government? A. That is right.
Q. During all the time you have been under arrest and in the custody of police officers you

6178 *Paul Berger—For People—Cross*

say you have lived in the Hotel Bossert? A. I was.

Q. You still own an automobile, don't you? A. I do.

Q. You secretly have been taken out of the Hotel Bossert and brought to 599 Broadway, your place of business? A. Absolutely no.

Q. That is not true? A. Absolutely no.

Q. Have you driven around in your automobile with police officers? A. I drove any place
6179 the police told me; I drove them with me.

Q. Where?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. Did anybody else drive your automobile besides yourself? A. No, sir.

Q. You have been in the custody of the Police Department in the hotel since about May of this year, 1941—when were you put in custody, in
6180 the hotel? A. In the month of June.

Q. June of 1941? A. Yes, sir.

Q. You have kept your automobile since June, 1941? A. Yes, sir. I had most of it paid out before I was arrested.

Q. You have used it since June, 1941, haven't you? A. That is right.

Q. And to what use have you put it to, how often have you been using it?

Mr. Turkus: I object. That does not go to his credibility.

6181

The Court: It is immaterial. Sustained.

Mr. Talley: Exception.

Q. Haven't you been using it to take drives for yourself and police officers in whose custody you have been since June, 1941?

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled.

6182

A. That is right; drives me home.

Q. How often do you drive to your home from the Hotel Bossert? A. I refuse to answer that question.

Q. You refuse to answer that upon what ground? A. Well, on the ground that certain people would find out where I am living.

Mr. Talley: I ask the Court to inform the witness to answer my question.

Mr. Turkus: I ask that the witness be allowed to refrain from divulging his address.

6183

The Court: Why don't you object?

Mr. Turkus: I do.

The Court: Objection sustained.

Mr. Talley: I did not ask the address of his home. I am not asking it now.

The Court: The question, as I understood it, was how often he drove home.

Mr. Talley: That is what I asked him. In an automobile that he is permitted to retain and use while in custody and being on trial for the murder of Joseph Rosen. I have a right to show the manner of

6184 *Paul Berger—For People—Cross*

treatment that is being accorded to him in exchange for the testimony he has given here. That is one element.

Mr. Turkus: The District Attorney cannot take his property away.

The Court: Sustained as incompetent and for the further reason that as a matter of public policy the comings and goings to public places of any witness of this character should not be divulged.

6185 Mr. Talley: I am not asking him about his comings and goings. I am asking about the use of this automobile. It is unprecedented. Nobody ever heard of such an arrangement being made with a witness in a criminal trial.

The Court: Take your exception.

Mr. Talley: I do take exception.

The Court: You say it is unprecedented. I thought that Judge O'Dwyer learned it from Mr. Dewey. That has been my impression.

6186 Q. Did you testify you are getting $150 a week now from your business at 599 Broadway?

Mr. Turkus: Objected to as incompetent and irrelevant.

The Court: Objection overruled.

A. Did I testify where?

Q. Here in this courtroom, this afternoon? A. That is right.

Q. You knew where I meant, didn't you? A. Now I know; I didn't know where you meant.

Q. Is it correct that you have been getting that every week? A. I have.

Q. For how long a time? A. Since I was in business.

Q. How long is that? A. Since the first of this year.

Q. January 1, 1940? A. Yes, sir.

Mr. Turkus: 1941.

Q. Is that right, 1941 or 1940? A. 1941. 6188

Q. January 1st of this year? A. Yes, sir, this year.

Q. What was your source of income in 1940? A. I was in another business.

Q. What business were you in? A. I was contracting.

Q. Contracting clothier? A. Yes, sir.

Q. Where was your place of business? A. One of them was No. 8 Astor Place.

Q. How long were you in business at No. 8 Astor Place? A. Well, I would say from about June or July of 1940.

Q. Just those two months? A. No, sir, I was 6189
there from that time on until about the first of the year.

Q. June or July of 1940 until the first of the year? A. Yes, sir.

Q. Before June or July of 1940 what was your business? A. That is the time I left the Berger Clothing.

Q. What was your business between January of 1940 and July of 1940? A. I was in business with Berger Clothing Company.

Q. How long before June or July of 1940 had you been with the Berger Clothing Company?

3190

A. About two years to the best of my recollection.

Q. How much did you get from the Berger Clothing Company? A. Toward the end of the year?

Q. For the two or three years you were in business with the Berger Clothing Company, what was your income or draw? A. At one time it was $200. Half of it went to Mendy. Then it was cut down. Besides that there was more

3191 money taken out which I gave to Mendy.

Q. How much did you manage to hold onto yourself? A. Nothing—$5,000 went out.

Q. During that time you were in business with Berger Clothing Company you drew nothing? A. I did, one-half.

Q. You just told us you got nothing. Which is true? You did get something or you didn't? A. At the time I got $200, and $100 went to Mendy. When I drew out $5,000, that went to Mendy; I got nothing out of the $5,000. Only out of the $200 I got half.

3192 Q. How much did you get out of the business, I asked you. A. I answered that question.

Q. Answer it again.

Mr. Turkus: I object; one answer is enough.

The Court: He said he got $100 a week. Objection sustained.

Q. For three years, two and a half or three years you were with the Berger Clothing Company, did you get $100 a week? A. I did not.

Q. How many weeks did you get $100? A. I said $200 a week; and not $100.

6193

Q. You said you gave $100. A. $100 I gave away to Mendy. It was quite a number of months.

Q. That is, you got $100 a month for yourself? A. A week.

Q. For yourself? A. To be exact, I got $200; $100 went to Mendy, and $50 I got from the union. I got from Mendy. So legitimately I only got $50, not $100.

Q. I am trying to get you to tell us how much you got for yourself. You are saying you are a Santa Claus, giving away money. A. I didn't give it away; I would not be here—you would not be here to question me if I did not get it. 6194

Mr. Turkus: I object to the word "Santa Claus."

The Court: Strike out "Santa Claus."

Mr. Talley: I move his whole answer be stricken out.

The Court: Strike it out.

Q. I will ask you again until I get an answer: How much did you get from the Berger Clothing Company during the two and a half or three years you were employed there, for yourself? 6195

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

Mr. Talley: Exception. Will your Honor tell me what the answer was, if it is repetitious?

The Court: No, the Court is not under examination.

Mr. Talley: But this witness is, and

6196 *Paul Berger—For People—Cross*

your Honor sustains an objection to testimony that is not on the record. I take an exception.

The Court: Don't forget that you are no longer a judge. I am the judge here.

Mr. Talley: I take exception to that remark by the Court.

Q. In the year 1940, how many months of that year were you with the Berger Clothing Company? A. I will say between five and six months.

6197 Q. How much was your income for that five or six months from the Berger Clothing Company? A. Very lit le because the firm was going on the downward grade.

Q. How much? You understand. A. I am answering your question.

Q. Answer it in dollars. A. I said at the utmost I only got $50. a week, and some weeks I got nothing.

Q. Are you able to tell us how much you got in those six months? A. No, I am not; it is on the record.

6198 Q. Where? A. In the books.

Q. The Berger Clothing Company's books? A. Absolutely.

Q. Is that still in business? A. The books are there.

Q. Where are they? A. In the place, Berger has them.

Q. Berger has a place now of its own? A. I think so.

Q. Was there a man named Drucker employed in that Berger Clothing Company? A. He was put in there by Mendy.

Paul Berger—For People—Cross

6199

Q. Did you give him any money? A. To give to Mendy.

Q. Did you give Drucker money? A. To give to Mendy, I did.

Q. Is your answer yes? A. Yes, sir, I am answering it, to give to Mendy.

Mr. Talley: I move to strike the latter part of the answer out, to keep the record intelligent.

The Court: Motion denied. 6200

Mr. Talley: Exception.

Q. Did you see Drucker give any money that you gave, to Mendy Weiss? A. No, sir.

Q. No? A. At that time I was under police guard and I could not get near Mendy; I could not sneak away from them; I had to give it to Drucker.

Q. Your answer is you never saw Drucker give any money to Mendy Weiss, that you had given to Drucker? A. No, sir, I will tell you the reason why. If I saw him, I would give 6201 it to him myself.

Q. The fact of the matter is, all the money you delivered or tried to deliver, you gave to Mendy Weiss out of the Berger Clothing Company, is the money you gave to a man named Drucker, is that right? A. No, sir. There were times when I gave Mendy money myself, and there were times I could not get away from the cops that were watching me, so I gave it to Drucker, that he should be able to give it to him, because I could not get away that night.

Q. Then you say you never saw Drucker hand

it to Weiss? A. No, sir, because I could give it to him myself if I did not have Drucker to give it to him.

Q. How much of this money you say you gave to Weiss did you give through Drucker? A. Quite a bit of money; I cannot remember definitely.

Q. Now, since you have been in custody, did you talk to a man named Allie Tannenbaum? A. I did not.

6203 Q. When did you talk with him last? A. Oh, sometime before he was arrested.

Q. When do you fix that time as? A. The beginning of the year 1940.

Q. Did you talk to him in 1940? A. I did, before he was arrested.

Q. You have had no talk with him since you were arrested in the Rosen case? A. No, sir.

Q. Have you talked with Rubin since you were put under arrest in the Rosen case? A. I did not talk to him; he spoke to me.

Q. You did not talk to him? A. No, sir.

6204 Q. At any time or any place? A. In the District Attorney's office.

Q. You met there? A. The first time, when I was arrested.

Q. Is that the only time you saw him? A. That was the only time.

Q. And no other time? A. I seen him up in the Bronx before we went before the Grand Jury.

Q. Was he there at the same time you were there before the Grand Jury? A. He was there that day, but he was not there at the same time.

Q. Did you talk to him there? A. No, sir.

Q. Where did you talk to him about this case?

6205

A. When I was picked up; when I was brought over to the District Attorney's office. I told him everything. You might as well—

Q. Tannenbaum told you that? A. I said that to Maxie Rubin.

Q. Is that the only talk you had with Rubin? A. That is the only time I spoke with him.

Q. Now, Tannenbaum was there on the same day, wasn't he, when you say Rubin talked to you? A. No, sir, I have not seen Tannenbaum.

6206

Q. Wasn't Tannenbaum present in the Bronx when you went before the Grand Jury there? A. He was brought up there.

Q. Did you see him? A. I seen him passing by.

Q. Didn't you talk with him up there? A. I did not.

Q. When was this talk you had with Rubin, such as you have described, in the District Attorney's office? A. I answered that, didn't I?

Q. Answer it again, please. A. I said in the District Attorney's office.

6207

Q. I asked you when that was. A. When I was arrested.

Q. When was that? A. When was I arrested?

Q. Don't you know? A. Not definitely, it is the 4th or the 5th. It is on the record.

Q. You tell us your best recollection as to the day you were arrested. A. Either the 4th or the 5th of June.

Q. And have you been in custody ever since? A. I have, after I came out of the Tombs.

Q. Now, you told Mr. Barshay you were a good clothing cutter? A. I did.

Q. You still say you are? A. I presume so.

Q. And you could always get a job as a good clothing cutter, couldn't you? A. I could at one time, but I will tell you one thing now, that is, I told the truth, and I think the union may stop me from getting a job. I could at that time, but now that I have told the truth, I am under the impression now the union would stop me from getting a job.

Q. The what? A. The union.

Q. Because of your confession of complicity in
6209 the murder of Rosen; is that why they would stop you? A. No, sir.

Q. Because you are a murderer? A. Absolutely not, because I told them the truth, that I got money from them and I gave the money to Lep and Danny Fields.

Q. You think because you tell the truth now, the union would not allow you to go back in their rank-? A. Absolutely not.

Q. How much could you earn as a cutter when you were working as such? A. $60 a week; maybe $10 more $70. Some jobs pay more.
6210 The scale on them now is $60. Cutters at different places, some get $70.

Q. You went into the employ of the union as a strong-arm man, when you got $60 or $70? A. At that time it was not $60 or $70; the scale was $50 to $55.

Q. Although making $55 a week, you took a job as a slugger in the union? A. I did.

Q. Strong-arm? A. Yes, sir, after working hours and sometimes before working hours, but I worked.

Q. You don't deny that that is what you were.

a strong-arm man, during these times you have been asked about, do you?

Mr. Turkus: Objected to as already answered.

The Court: Objection overruled.

Q. (The Court) Were you a strong-arm man? A. Yes, sir.

Q. And you committed assaults on a great many men, didn't you? A. What do you mean, "a great many men"? 6212

Q. (The Court) You committed many assaults? A. I did.

Q. Some of those assaults were with the use of blackjacks? A. Absolutely not.

Q. Did you ever use any weapons in any of those assaults you committed? A. No, sir.

Q. Just your hands, is that right? A. That is right.

Q. And some of the people you beat up were pretty badly hurt, weren't they? A. How bad can you be beaten up if you get beaten up with your hands? 6213

Q. Don't you know some of the people you say you beat up with your hands had to be taken to a hospital?

Mr. Turkus: I object, he never testified to that. That is not testimony.

The Court: He can say so, if it is so or not.

A. I cannot say it definitely; I did not see them go to a hospital.

6214 *Paul Berger—For People—Cross*

Q. Now, do you know what a schlom expert is? A. A schlom?

Q. You were that? A. I was no schlom, though.

Q. Tell the jury what it is. A. A schlom means beating.

Q. Well, a beating for what purpose? A. Scabs.

Q. Also to intimidate witnesses, wasn't it, to keep them from testifying? A. What do you
6215 mean by that?

Q. Part of your job was to beat up people who were going to be witnesses against strong arm men or against the union, isn't that right? A. No, sir.

Q. Did you ever beat up anybody under orders, as you say you did everything to keep them away from testifying in court against you or some of your other strong arm men?

Mr. Turkus: I object.

The Court: Yes or no.

6216

A. No, sir.

Q. Didn't you intimidate witnesses against yourself on more than one occasion by beating them up? A. Absolutely no.

Q. Did you shake down Murray Weinstein for $2,000 in 1946? A. I did not shake—do you know what shake means? Do you know what it means?

Q. I know what it means. A. Well, you tell me. I don't know what it means.

Q. Do you know what extortion means? A. Absolutely not. I did not extort.

Q. Did you get $2,000 from Murray Weinstein? A. I did, and it went to Lepke's defense. That is not extortion.

Q. Didn't you demand that Murray Weinstein give you $2,000? A. I did not.

Q. Did you get $2,000 from him? A. I did.

Q. Didn't you threaten him that something was going to happen if he did not pay? A. Absolutely not. I will tell you what I told him.

Q. You just answer my question. A. Now that you asked me I will tell you what I told 6218 him.

Q. I don't want to hear anything further. You said you did not shake down Murray Weinstein for $2,000. A. Absolutely not. I got the money and it went to Lepke's defense in the floor racket.

Q. You got it? A. Yes, sir, and I will tell you who I turned it over to.

Q. Oh, stop. A. Mendy told me to give it to Shimmy, and I gave it to Shimmy.

Mr. Talley: Are you going to allow 6219 this witness to take possession of this court-room?

The Court: Are you asking the Court a question for the purpose of entertaining the jury? I don't think your question is in order.

Mr. Talley: I ask you with all the vehemence I have at my command whether you are going to permit this witness to refuse to answer questions and shout at counsel.

The Court: The Court rules your ques-

6220 *Paul Berger—For People—Cross*

tion is impertinent. The Court can run its business and demands respect. The Court has had no opportunity to inject itself into this colloquy between you and the witness. The Court is not going to shout you both down. When you are through with this show you are putting on just now, the Court will have a chance to say something, if permitted.

6221 Mr. Talley: I object to your Honor's statement and I take an exception. I am not putting on any show. I am trying to cross-examine in accordance with the rules of law with which I assume your Honor is and should be familiar, that govern cross examination of witnesses of this kind. It has not been my experience that any judge will permit a witness to go through such a performance as this man has been allowed to go through.

6222 The Court: The Court will request you sit down and behave yourself until the Court has a chance to speak. You have tried to put the Court in a false light on the record, contingent for somebody else to read, but you are not going to get away with it.

Mr. Talley: I take an exception. That is my only resort.

The Court. Now I know what you are up to.

Mr. Talley: I take an exception to that: I am up to nothing except to represent a client.

The Court: The Court demands you sit down at once.

6223

Mr. Talley: Yes, of course

The Court: And hold your tongue.

Mr. Talley: I except to your admonition.

The Court: Now, Mr. Witness, this is my first opportunity to address you. You are required to answer questions and not inject. Do not quarrel with counsel. Proceed.

Mr. Barshay: I move to strike out the witness's answer with respect to the defendant Buchalter,—the statement that the $2,000 he got was for a specific purpose.

6224

Mr. Turkus: He was asked whether he extorted money, and he denied any extortion.

The Court: The Court strikes out the purpose of it, as unresponsive. This is the first opportunity the Court has had to do so because this has been just a rabble between counsel and the witness.

Mr. Talley: I take an exception.

Mr. Barshay: Will your Honor give me a general exception to the line of inquiry as not binding on the defendant Buchalter?

6225

The Court: Yes.

By Mr. Talley:

Q. You never had any quarrel with Rosen, did you? A. Absolutely not.

Q. In fact, you were rather friendly with him, weren't you? A. Well, we were not very intimate, but we had no quarrel. I knew him the same as any other person.

Q. You were friendly? A. Yes, sir.

Q. He never did anything to hurt or injure you? A. He never did.

Q. You were friendly with Rubin, too, weren't you? A. Certainly was.

Q. You never had any quarrel with him either? A. No, sir.

Q. As a matter of fact, on one occasion he loaned you $200, didn't he? A. Yes, sir.

Q. Yet you pointed out Rosen, you say, when
6227 you knew that something was going to happen to him, and you pointed out Rubin, when you knew he was to be killed; is that true? A. As far as Rubin is concerned, but not true as far as Rosen was concerned. I never knew that man was going to be killed.

Q. Is your answer predicated upon the fact that Rosen is dead and Rubin is alive, that you admit you knew Rubin was going to be killed? A. Absolutely not. I never pointed out anybody, only except Rosen. I thought he was going to be schlommed or something.

6228 Q. You thought Rosen was going to be Schlommed? A. Yes, sir.

Q. What does that mean? A. Beaten up.

Q. You were willing to point him out because you thought he was going to be beaten up or schlommed? A. I know what would happen to me if I was not willing to agree to that.

Mr. Talley: I move to strike out the latter part of the answer.

The Court: Motion granted.

Q. Now, schlomming, as you call it, means striking somebody with a lead pipe, doesn't it?

A. Not necessarily. It don't necessarily mean it has to be a lead pipe. Schlomming can be with the hand.

Q. But usually it is applied to assault with a lead pipe, isn't it? A. Absolutely not.

Q. Do you use that expression when a man is to be assaulted without a weapon? A. Either way, certainly.

Q. But generally, isn't it your knowledge that, when you use the term "schlom" it means hitting a man with a lead pipe? A. Absolutely not. 6230

Q. Isn't that what you thought was going to happen to Rosen? A. No, sir, I thought he was going to get a deal.

Q. What does that mean? A. A deal means to get hit, the same thing as schlomming.

Q. With or without a weapon? A. Yes, sir.

By the Court:

Q. What language is the word "schlom" in—is that Yiddish? A. It is more or less of a Yiddish expression.

Q. The German is "schlag." What is the 6231
Yiddish for "schlag"? A. I know what the word "schlom" means definitely.

Q. Is "schlag" also Yiddish? A. "Schlug."

Q. "Schlom" is not Yiddish, but I take it it is New York slang? A. A certain amount of slang in it.

Q. It is plain slang? A. Yes, sir.

By Mr. Talley:

Q. It means hitting somebody with a blunt instrument? A. No, sir, it does not.

6232

Mr. Turkus: I object. We have gone over the definition several times.

Mr. Talley: You qualify this man as an expert.

The Court: Sustained as repetitious.

Q. How tall are you, Berger? A. About 5 foot 7½.

Q. How tall is Mendy Weiss? A. I would say about 6 feet.

6233

Q. How heavy are you or were you when you pointed out Rosen for this schlom you thought he was going to get; how much did you weigh? A. Well, about 155 or 160.

Q. Is that what you are now? A. No, sir, I weigh more now. Of course, I am older now; sure, we get more weight after the age of 40.

Q. You gained more weight since you have been living at the Hotel Bossert, haven't you? A. Maybe I did; I did not weigh myself.

Q. How was Weiss with regard to weight; about the same as he is now? He was just as heavy, wasn't he?

6234

Mr. Turkus: I object unless the time is fixed.

A. Yes.

Mr. Turkus: I move to strike out the answer unless the time is fixed.

The Court: I don't see what it has to do with it anyway.

Q. In 1936 was Weiss about the same height

and weight he is now? A. I cannot say that definitely.

Q. What is your impression? A. I cannot definitely say.

Q. I again ask you your best impression; he was a big, husky, heavy man, wasn't he? A. He was, yes.

Q. Would you say about 200 pounds? A. I would.

Q. So we have him about 6 feet tall and about 200 pounds, in 1936, is that right? A. Yes, sir, 6236 that is right.

Q. Now, you testified that you got money to give to Rubin, didn't you? A. I did.

Q. Did you give him that money you got for him? A. I did.

Q. You didn't hold on to any of that for yourself? A. Absolutely not.

Q. How many weeks did you give him money? A. Quite some time.

Q. What does that amount to in weeks, 10 weeks, 30 weeks? A. Months, I gave him money, quite a number of months. 6237

Q. How many months would you say? A. Between eight and nine months.

Q. How did you give it to him, in what manner? A. I gave it to him personally.

Q. Where was he during the time you were collecting money for him? A. At times he was away, and I kept the money until I seen him.

Q. Did you keep the money when he was in Salt Lake City? A. I did.

Q. You gave him that money at the rate of $50 a week, is that right? A. That is right.

Q. For the entire period he was in Salt Lake City? A. That is right.

Q. How much money did you give him when he came back from Salt Lake City? A. I don't remember that definitely. I do know I was getting $50 a week for him from Murray Weinstein.

Q. What is your best recollection as to how much you gave Rubin when he came back from Salt Lake City? A. I could not say definitely.

6239 Q. I am asking you for your best recollection, not definitely. A. Maybe three weeks, maybe four weeks, maybe less, I don't remember definitely.

Q. Is that as long as you say he was in Salt Lake City, three or four weeks?

Mr. Turkus: I object. That is something he cannot say, how long somebody else was in some other place.

6240 Q. (The Court) How long was he away, if you recall? A. I don't recall definitely, but the best of my recollection would be between three and four weeks.

Q. So when he came back you handed him $150 or $200? A. Whatever it was; maybe it was a little less; maybe he was short the last time and I gave him less. It was at the rate of $50 a week.

Q. It was approximately that if he was away three or four weeks? A. Yes, sir.

Q. Where would you hand him that particular money? A. At the Hotel Hatfield.

Q. Is that a hotel in the Borough of Man-

hattan? A. Yes, sir, 29th Street and 4th Avenue.

Q. Was anybody with you when you handed Rubin that money? A. I don't remember definitely.

Q. What is your best recollection, indefinitely, generally?

Mr. Turkus: I object to the sarcastic form of the question.

Mr. Talley: Nothing sarcastic about that; he has been using the term "indefinitely" for the past few days. Now we are going to try to get something different. 6242

Mr. Turkus: May we have objections without any interpolations from Judge Talley?

The Court: Are you all through?

Mr. Turkus: I have stated my objection.

The Court: Objection sustained.

Mr. Talley: Exception. 6243

Q. Did you give him money for the time you say he was in New Orleans? A. Yes, sir, I kept the money for him.

Q. How much money did you give him after he returned from that visit? A. I don't remember that.

Q. What is your best recollection? A. A number of weeks.

Q. Do you remember how much money you gave him when he came back? A. I was giving him at the rate of $50 a week.

6244 *Paul Berger—For People—Cross*

Q. Was it more than $250 you gave him?

Mr. Turkus: Objected to as speculative.

A. I do not remember definitely.

Q. Where did you give it to him? A. I gave it to him when I took him down to the hotel.

Q. The Hotel Hatfield? A. No, no.

Q. What hotel? A. Either the Lexington or
6245 to the Shelton.

Q. You don't remember which? A. I don't remember definitely.

Q. Did you give him any money after his return from any other trips than those two? A. I did.

Q. How much did you give him on any other occasion other than his return from New Orleans and after his return from Salt Lake City—on what other occasion did you? A. If you will ask me the question I will tell you, because there was a time—

6246 Q. I am asking you now, never mind about the time. A. There was a time when Lepke told me not to give him the money, but to give him the money.

Q. Let me know the time—

Mr. Talley: I move to strike out the last answer as not responsive.

The Court: Motion denied to strike out.

Mr. Talley: Exception.

Mr. Climenko: If your Honor please, on behalf of the defendant Buchalter, we

move that that be stricken out as prejudicial.

The Court: Motion denied.

Mr. Climenko: Exception.

I also move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Climenko: Exception.

Q. Did you give him money on any other occasions than after he returned from Salt Lake 6248
City and after he returned from New Orleans?

Mr. Turkus: I object unless the time is fixed.

The Court: Objection sustained.

Mr. Talley: Exception.

The Court: All you have to do is to fix the time reasonably, because otherwise the question is too general.

Mr. Talley: I am fixing the time as any other time than the time he returned from these two places. 6249

The Court: That is too general. You may answer yes or no to that question.

The Witness: Yes.

Q. What money did you give him?

Mr. Turkus: I object unless the time is fixed.

By the Court:

Q. When was it you paid him other money?

6250

The Court: The witness hesitates a long time. Make it more specific.

Mr. Talley: At this point I am not able to make it more specific. He said he got $50 a week to pay Rubin when he came back from certain trips. I am asking him the amount which he paid.

The Witness: I will answer that: After he came back when he was away with Benny Levine, at that time I had to give
6251 the money to Lep. When he came back from there Lep told me he would get in touch with me. Lep told me I should give him the money.

By Mr. Talley:

Q. How much did you give him? A. I did not owe him anything the; then I started to give him money because of that money I was giving to Lep.

Q. I am asking you about the money you gave
6252 to Rubin. Did you give him money after you paid him this time in New Orleans, and after his return from Salt Lake City, was there any other time? A. Yes, sir.

Q. I am asking you when. A. When he came back to the city that time when he was living on Flatbush Avenue.

Q. Did you pay him any money for any time he was out of New York other than once you told us about in New Orleans and Salt Lake City?

Mr. Turkus: I object. That is confusing.

The Court: Objection overruled.

6253

By the Court:

Q. When he was away in any other city than New Orleans or Salt Lake City, did you send any money to him? A. I never sent any money to him.

By Mr. Talley:

Q. Did you pay him any money after he had been away on any of these trips? A. I did. 6254
The only time I did not hold money for him was the time he was away with Benny Levine, and Lep told me to give him the money. After that I was giving him the money direct.

Q. Giving who? A. Rubin, whenever he was here.

Q. You never sent any money to him, did you? A. Not to my recollection.

Q. Now I want you to go to Friday, September 11— Question withdrawn.

Q. You knew Rubin in 1936, didn't you? A. Certainly. 6255

Q. And you knew him in 1937? A. Yes.

Q. And you knew him in 1935? A. Yes.

Q. Did Rubin wear glasses in any of those years? A. The first time I seen Rubin with glasses is the time I met him on Nostrand and Eastern Parkway.

Q. When you said he was in disguise? A. Yes, sir.

Q. You say you never saw Rubin wear glasses before that time? A. Not to my knowledge.

Q. Are you sure? A. I am sure I never saw him with glasses before.

6256 *Paul Berger—For People—Cross*

Q. Did you know Rubin's brother-in-law? A. Will you please tell me his name?

Q. Don't you know anybody you knew as a brother-in-law of Rubin?

Mr. Turkus: I object unless he directs his attention to a name.

The Court: Objection overruled.

A. I do not.

6257 Q. How did you know him? A. I knew of one. Maybe he has a few more.

Q. The one you know is the one I am asking you about. A. What is his name?

Q. I asked you if you know a brother-in-law of Rubin's, and your answer now is yes? A. I know one. He may have a number of others.

Q. What is the name of the one you know? A. I don't know.

Q. Did you know Rubin's brother-in-law when you got any mail for Rubin? A. Not as I know of.

6258 Q. Do you know if he got any mail from Rubin? A. Do you mean the one who is working in the Association?

Q. The one in the Expressmens Union; did he get any money from Rubin while Rubin was away? A. I cannot say that; I don't know anything about it.

Q. What time do you say you saw the defendant Weiss on Friday, September 11th, the first time that day? A. When I came down there with Lepke.

Mr. Talley: I move to strike it out.

The Court: Strike it out.

6259

Q. Answer the question, please. A. The first time I seen him was when I was standing with Lepke, I saw him coming over toward us.

Mr. Talley: I move to strike it out as unresponsive.

The Court: Do you want the time of day?

Mr. Talley: Yes.

By the Court:

6260

Q. Do you remember the time of day, if you know? A. The best of my recollection would be about 5:30 or 6.

Q. That is based upon an impression or looking at a watch? A. On impression; I did not look at any watch.

By Mr. Talley:

Q. But you are pretty sure that is about the time, aren't you?

6261

Mr. Turkus: I object; he said it was his impression.

The Court: Objection sustained.

Q. Is it your best recollection as to time? A. Around that.

Mr. Turkus: I object to it as already having been answered.

The Court: He said "impression." Objection sustained.

Gentlemen of the jury, please remem-

6262 *Paul Berger—For People—Cross*

ber the previous admonition given you and particularly the one regarding segregation and housing. Let no one talk to you about the case; do not listen to radios or read anything in the newspaper. Keep your minds open.

Recognizing what Armistice Day means in the public mind today, the Court would be misunderstood if it sat tomorrow. I think it is up to us to give that day the
6263 due respect that everybody else gives to it. We will make up for the lost time in other ways this week. At the present time we will recess until 10 o'clock Wednesday morning.

First the witness may leave.

Now the jury may go out the other door.

The defendants are remanded.

Mr. Barshay: (After the jury leaves, but before the defendants are remanded) I find it necessary to ask the District Attorney to produce for the Court's inspec-
6264 tion a statement made by the witness Rubin to former Assistant District Attorney McCarthy. It is marked for identification.

The Court: You have the "Q. & A." in that statement?

Mr. Turkus: I have the "Q. & A." that McCarthy took.

The Court: I will read it. Send it to my chambers.

The defendants are remanded.

(Whereupon an adjournment was taken until Wednesday, November 12, 1941, at 10:00 A. M.)

Paul Berger—For People—Cross

6265

Brooklyn, N. Y., November 12, 1941

TRIAL RESUMED

PAUL BERGER, a witness on behalf of The People, resumed the stand and testified further as follows:

The Court: Mr. Witness, we are now starting this session. You are going to be subject to cross-examination for probably the day. Now, please bear in mind that the Court requires order. Questions must be asked civilly and answers must be given civilly, and to the point. Bear in mind that this is not a picket line. This is a court of law, and the atmosphere must be kept as dignified as the tradition of the Court entitles it to. Volunteer nothing. Just answer the questions frankly and honestly, and treat counsel with civility. No more demonstrations.

6266

Proceed, Judge Talley.

6267

Cross-examination by Mr. Talley (continued):

Q. When did you register as an alien? A. At the time when Judge O'Dwyer was questioning me.

Q. That was in May of this present year? A. No, sir, it was sometime in June.

Q. In June of 1941? A. That is right.

Q. You only registered at the direction of the District Attorney, isn't that right?

Mr. Turkus: I object to the question.

The Court: Objection sustained.

6268 *Paul Berger—For People—Cross*

Q. You registered at the direction and request of the District Attorney, isn't that right?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. Who prepared your registration as an alien?

6269 Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. Did you answer all the questions that were required to be answered in the registration? A. I did.

Q. Did you answer them truthfully? A. I answered them truthfully to Judge O'Dwyer; that is how he came to know I should be registered.

Q. Then it was at Judge O'Dwyer's request
6270 that you did register?

Mr. Turkus: I object. That is the second time the Court's ruling has been violated.
The Court: Objection sustained.
Mr. Talley: This witness has just opened the door. I say my question is the only way to make it comprehensive for the jury.
The Court: Proceed.
Mr. Talley: Exception.

Q. My question is, did you answer all of the questions *truthfully and completely*?

Mr. Turkus: I object. That has just been answered.

The Court: He has not answered that. Answer yes or no.

A. Yes, sir.

Q. Did you state in the application the various names or aliases that you had used for the last ten or fifteen years? A. Yes, sir. 6272

Q. You put them all down, did you? A. Yes, sir, it is of my remembrance.

Q. You have a pretty good memory, haven't you?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Q. You have a good memory, have you not?

The Court: A man is sometimes afraid of his own memory. 6273

Q. You have remembered the names of the streets exactly in the last ten instances in which you met people and had various conversations, as long ago as 1936, haven't you?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Mr. Talley: Exception.

6274 Q. Did you notify the Government when you registered as an alien that you had used the name of Samuel Gold, in 1927?

Mr. Turkus: Objected to as already covered.

The Court: You can say yes or no. Do you remember?

The Witness: Every name I will explain.

6275 Q. I don't want you to explain. I want you to tell me if, when you registered as an alien citizen in 1941, in June or thereabouts, when you were talking to the District Attorney of this county, did you tell the Government that you had used the name of Samuel Gold? A. For your information—

Q. Tell me, yes or no? A. I have to answer that question so you will know what it is all about. I will tell you what it is. When I was registered, my record was taken off the Police Department, and every name was put in there;
6276 if you want to know something, that is an answer.

By the Court:

Q. Counsel wants to know if at that time you remember particularly whether or not you put "Samuel Gold" on the return. Do you remember? A. Yes, sir, my record was given from the Police Department.

Q. Are you assuming that "Gold" was there, or is that a matter of recollection? A. I am positive "Gold" was there, because that is one of the names I used when I was arrested.

6277

By Mr. Talley:

Q. Did you tell the Government in that statement which you filed that in 1926 you used the name of Henry Weinstein?

The Court: Do you remember?

Mr. Turkus: I object, it is cumulative. He stated he gave every name that he has with the police.

The Court: It is not clear whether he remembers or whether he is only assuming because of the police record. 6278

The Witness: If it was on the police record I used it and it was put in there.

By Mr. Talley:

Q. What is your independent recollection, whether you put that in or not? A. Because he was handed the yellow sheet, and he took all the names off the sheet.

Q. Who did? 6279

Mr. Turkus: I object. That does not make any difference.

Mr. Talley: It does make a lot of difference for the purpose of my examination.

By the Court:

Q. Who filled it out? A. A man from the Federal—he was from the Immigration Department, or whatever it is.

Q. You did not fill out the form? A. No, sir,

6280 *Paul Berger—For People—Cross*

I signed it; I know he was handed that yellow sheet. Definitely I saw he got that yellow sheet and he copied the whole thing.

Q. You are only assuming that those names were accurately recorded by the man who filled it in?

Mr. Talley: I take an exception. I object to your Honor's question as an interference with my cross-examination of
6281 this witness.

Q. (continuing)—filled in the form, but you are not stating according to your recollection; is that it?

Mr. Talley: Objected to as leading and suggesting to the witness.

The Court: Objection overruled.

Mr. Talley: Exception.

A. That is right, and he was also kidding me about all the names I was using.

6282

By Mr. Talley:

Q. Kidding, he kidded you about it? A. Yes, sir.

Q. He kidded—what did he say about all the names?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Talley: Exception.

6283

Q. Now, my question, which is not answered: Did you tell the Government when you filed this statement, your registration as an alien, that you had been known as or used the name of Henry Weinstein, in 1928?

Mr. Turkus: I object. The witness has made a comprehensive answer.

The Court: Sustained, as answered.

Mr. Talley: Exception.

6284

Q. Did you tell the Government in your certificate of registration that you had used the name of Paul Goldstein, in 1928?

Mr. Turkus: I object for the same reason.

By the Court:

Q. Do you actually remember that? A. To the best of my recollection—

Q. No, not the "best", we don't know whether the best is good or not. Do you actually remember whether you did or not? A. Whether I used that name?

6285

Q. Whether that was filled in on the form. Did you see it on the form? A. I did not see it on the form, but the only time I used aliases was when I was arested. Before that I never used aliases.

Q. Did you read the form before you signed it? A. No, sir.

By Mr. Talley:

Q. Are you telling us that you made this

declaration to the Government and signed it without reading it? A. I presume everything was copied off.

Q. My question is: Do you say you signed that registration statement without reading it?

The Court: Yes or no.

Mr. Turkus: I object. He does not have to read it if it is read to him.

The Court: Answer yes or no to that.

6287

A. I read some of it.

Q. You mean you did not read all? A. No, sir.

Q. Did you swear to it? A. I did.

Q. In this instance you swore to something and you did not know whether it was correct or not—is that true?

Mr. Turkus: Objected to.

The Court: Sustained as argumentative.

Mr. Talley: Exception.

6288

Q. Did you tell the Government when you made that form that you used the name of Joseph Cohen, in 1929?

Mr. Turkus: I object. The witness has given a comprehensive statement as to these names that appeared.

Mr. Talley: The witness has not given any.

Mr. Turkus: I am addressing the Court.

Mr. Talley: So am I.

6289

The Court: Objection sustained.
Mr. Talley: Exception.

Q. What part of this application or declaration of being an alien did you read?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection sustained.
Mr. Talley: Exception.

6290

Q. Now, did you tell the Government in that declaration that in 1932 you used the name Joseph Schwartz?

Mr. Turkus: I make the same objection.
The Court: The same ruling.
Mr. Talley: Exception.

Q Did you set out in your declaration of being an alien the different crimes you had committed at various times? A. That is right. I answered that question before.

6291

Q. Answer it again. A. I told you before there was a sheet given to that man and he took everything down, and that settled it. I answered that question before.

Q. That sheet you speak of was your police record? A. No convictions, for your information.

The Court: Are you talking about fingerprint sheets?
The Witness: Yes.
The Court: Police Department record?

6292 The Witness: Yes, sir. You never asked me if I was convicted of any crime. Why don't you ask me that?

Mr. Talley: You will be asked plenty of questions.

The Witness: Yes, that particular question you would not ask me: Was I ever convicted.

Mr. Talley: Did you hear the Court's direction to you before we opened here?

6293 The Court: Just answer the question.

By Mr. Talley:

Q. You committed other crimes than those set out in this yellow sheet you speak about? A. No, sir. That was no crime, either. When you talk about the yellow sheet, those were arrests. No crimes there.

The Court: No convictions?

The Witness: No.

6294 Q. Each time you were arrested as shown on this long yellow sheet known as the police record, you were arrested actually for crimes you did not commit?

Mr. Turkus: I object. Arrests are not competent for cross-examination.

The Court: Objection sustained.

Mr. Talley: Am I required to allow this witness to answer these questions without following him up? This is cross-examination.

6295

The Court: The Court is glad to be enlightened.

Mr. Talley: Does your Honor not permit me an answer to that question?

The Court: The Court is not a witness. Please abide by the ruling.

Mr. Talley: Exception.

Q. Do you say that the statement you filed, the sheet as to being an alien, was true in every respect?

6296

Mr. Turkus: Objected to.

The Court: Objection sustained as already answered.

Mr. Talley: Exception.

Q. When you were in the Middletown State Insane Asylum— A. (interrupting) What do you mean, I was in it? I was never in it.

Q. You told us you were working there. A. I worked there. When you say "in" that means I was an inmate.

6297

Q. Didn't you go there as an inmate and a patient? A. I will ask you the same question: Did you ever go there as an inmate? That answers the question. Did you?

Q. If I had listened to you very much longer, I might. A. The question you asked me—

Mr. Turkus: This is no time for a confession by Mr. Talley. I object to it.

The Court: Come to order.

By the Court:

Q. Were you ever committed there as an in-

sane patient? A. Absolutely not. That is ridiculous.

By Mr. Talley:

Q. When you got there weren't you given the job of being an orderly? Isn't that what happened? A. Absolutely not. I went for the job. I worked there. I got paid for it. Look that up if you want to. Why don't you look it up? I
6299 worked there, I got paid for it, and I was there two weeks. You would not go to the trouble of looking it up, would you, if I was not? That is a ridiculous question.

The Court: Strike that out. Come to order, Mr. Witness.

Mr. Talley: I would like to have it in. I did not move to strike it out.

The Court: All right, leave it in.

Q. In what court was your father naturalized?

6300 Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. Was your father ever naturalized, to your knowledge?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. As a matter of fact, you know he never

6301

was made an American citizen, don't you? A. That is not a matter of fact.

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Talley: Exception.

Q. You don't deny that in two affidavits you made you swore that you were an American citizen—you don't deny that, do you?

6302

Mr. Turkus: I object to the form of the question.
The Court: Objection overruled.

A. What?

By the Court:

Q. You swore in two affidavits you were a citizen? A. At all times I thought I was. I probably did.

By Mr. Talley:

6303

Q. Did you or didn't you? A. What?
Q. Did you make two affidavits in which you swore you were a citizen of the United States? A. If I—, I probably did, thinking I was. That is right.
Q. Did you? A. (Witness remains mute.)

By the Court:

Q. Do you remember whether you did or not?

6304 *Paul Berger—For People—Cross*

A. I said I was always under the impression I was a citizen, then it was that way—

Q. Do you remember whether you ever swore to two affidavits which stated you were a citizen? Do you remember—yes or no? A. Can I have an explanation of what he means?

Q. Do you remember swearing to these affidavits? A. Out and out affidavits, where I said I was?

Q. Yes. A. I don't remember.

6305

By Mr. Talley.

Q. Did you make an affidavit dated the 16th of August, 1937, when you were seeking a reduction in your bail from $35,000, in the Borough of Manhattan, County of New York? A. I did.

Q. And in that affidavit did you say as follows: "That your petitioner"—meaning you—"is a citizen of the United States and has never been convicted of any crime"? Did you say that?

6306

Mr. Turkus: That does not affect his credibility under the circumstances stated by the witness, who was under the belief of citizenship.

Mr. Talley: Supposing we leave that to the jury.

The Court: Objection overruled.

A. I did.

Q. In an affidavit dated April 28, 1939, in a proceeding in the Appellate Division, Borough of Manhattan, County of New York, where you were seeking to reduce your bail from $100,000, did you make an affidavit in which you swore as

follows: "That your petitioner"—meaning you —"is a citizen of the United States and has never been convicted of any crime"? A. I did. At that time, I explained, I thought I was a citizen.

Q. The answer is you did? A. Yes, sir, I did. I explained that to you a number of times. I thought I was.

Q. Now, you assaulted a man named Brucillo, didn't you, who came into your shop? A. I answered that question to you, if I am not mistaken, on Monday. 6308

Q. You did not answer it to my question, did you? Have you any real, unseparable objection to answering it again?

Mr. Turkus: I object to it as argumentative.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. I ask you now to answer that question. I ask you if you did not assault a 19-year-old Italian boy named Brucillo in your shop. 6309

The Court: Isn't that the same question?

Mr. Talley: Mr. Barshay questioned him about that; I did not.

The Court: I don't recall. I thought Mr. Barshay said 50 years old.

Mr. Barshay: I said 19 years old.

The Court: Objection overruled.

A. I did.

Q. You did not have anybody to help you in

6310 that assault, did you? You did that all alone, didn't you?

Mr. Turkus: I object. The witness has stated what occurred. I object to the form of the question.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. Was anybody in the shop with you when
6311 you assaulted this young man? A. That was right in front of the office.

Q. Do you mean on the street or in the hallway? A. In my place of business, right near the office. He was on the premises, on the floor; he came in and opened the door like a burglar.

Q. Was anybody else in the office with you at the time you assaulted him? A. There was.

Q. How many?

Mr. Turkus: I object to the form of the question. Under the circumstances, that was a legal assault.

6312

The Court: Sustained, but not on that ground.

Mr. Talley: It is an illegal assault.

Q. Now, you assaulted him, you said, because he said to you, "All you Jews are alike," is that correct? A. No, sir. That is one of the things that was said. You are not asking me how he came walking in and how he acted and what I called him.

Q. Didn't you tell us on Monday when he said to you, "All you Jews are alike," then you assaulted him?

 6313

Mr. Turkus: I object. That is not the testimony.

Mr. Talley: That is the testimony.

Mr. Turkus: That is only a portion of it which he seeks to inject into the record for reasons best known to himself.

The Court: It is a collateral issue. Details of a collateral issue cannot be tried out on the main issue here as collateral impeachment. You have his admission of committing an assault. That is as far as 6314
you can go.

Mr. Talley: I have a right, I submit, to go into the character and circumstances surrounding that assault.

The Court: You may do that, but you may not go into the question of witnesses.

Mr. Talley: I understand I cannot try a collateral issue and I am bound by this witness's answer, but I am certainly entitled to his answer.

The Court: Bear that in mind.

Mr. Talley: Now I ask that I may have 6315
an answer to my question, and I take an exception.

Q. You assaulted him because you believed that his statement to you was an insult to your race, isn't that so? A. That is one of the reasons. The other reason is he refused to get out.

Q. What is the other reason? A. He refused to get out. He came walking in like a burglar and I spotted him from the office, and I walked out and I said, "What do you want?" He said,

"I am looking for a job." I said, "I am sorry, I cannot do anything for you." He said, "All Jews are alike." I said, "Get out," and he started shoving me.

Q. You don't mean that, do you? A. I certainly do.

Q. A man comes in looking for a job in your place and because you told him you didn't have any work he started shoving you around? A. I explained how it happened.

6317 Q. Is that right? A. Definitely so, yes, sir.

Q. Now, you learned afterwards that that boy had not eaten for two days, didn't you?

Mr. Turkus: I object. That would be hearsay.

The Court: I thought Mr. Barshay said 12 days.

Mr. Barshay: Two days, I said.

The Court: How would he know? Objection sustained.

6318 Q. Didn't the boy tell you that?

Mr. Turkus: I object; he said in answer to Mr. Barshay's question that when the boy told him he had not eaten for some days, he fed him. Do you wish to go over the same ground.

Q. Did you testify you fed this boy after you assaulted him? A. That is right.

Q. You know the boy was taken to a doctor by your partner? A. That is right.

Q. You know he had six stitches taken in his head from the blow you gave him? A. Not as

6319

I know of. Absolutely not. How am I to know that? I was not there with the doctor.

Q. You hit him, didn't you?

Mr. Turkus: Objected to. That has been answered. We have been over that.

The Court: He said the boy went downstairs—fell down on being struck, but it does not appear by the record whether there was any laceration by reason of a blow—whether the laceration occurred in the fall.

6320

Mr. Talley: That is why I am inquiring into it.

The Court: If you wish to go that far you are entitled to do so.

Q. When you struck this boy, did you see him bleed? A. Yes, sir.

Q. Where was he bleeding from? A. Right here (indicating).

Q. From his lip? A. Yes, sir.

Q. Do you know your partner took him to a doctor? A. He was there.

6321

Q. Do you know he took him to a doctor? A. Yes, sir, we went over to the doctor with him—not my partner—one of the men working.

Q. You say you thought this boy was going to commit a burglary when he came into your place?

Mr. Turkus: I object to that as too far afield.

The Court: Sustained. You cannot go any further on that. It is purely collateral.

6322 *Paul Berger—For People—Cross*

Q. The real reason you hit him was because he said, "All you Jews are alike"?

Mr. Turkus: I object to that, trying to inject such an issue in this case—

The Court: Objection sustained.

Mr. Talley: Exception.

Q. You knew that Rosen was a Jew, didn't you?

6323

Mr. Turkus: I object. We are in the United States of America.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. And you knew Rubin was a Jew, didn't you?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Turkus: Will your Honor now admonish counsel that we are trying this

6324 case in Kings County?

Mr. Talley: God knows I know you are trying it in Kings County—I know you are trying it in Kings County—bringing out witnesses of this type and those you have had.

Mr. Turkus: I did not bring them: your client associated with them. I am forced to prove their association.

The Court: Cannot this be stopped?

Mr. Turkus: I resent the implication.

The Court: Let us stop resenting, let us get to work. They don't do these

things in New York County; that is settled.

Mr. Talley: May I have an answer?

Mr. Turkus: I object to it.

The Court: The objection was sustained.

Mr. Talley: Exception.

Q. You did not hesitate to point out men who were Jews whom you knew were going to be assaulted or killed, did you? 6326

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. You did not hesitate to extort hundreds of thousands of dollars from business men who were Jews, did you?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Talley: Exception. 6327

Q. You were always a good union man, weren't you? A. To a certain extent.

Q. You worked for the union? A. I answered that question, "to a certain extent."

Q. Answer it again, if you did. A. To a certain extent. I did until I found out who they really were.

Q. How long did it take you to find that out? A. When I started working for them.

Q. When was that? A. 1927, 1928, 1926.

Q. You worked for them in 1927? A. Yes, sir.

Q. And in 1928? A. Yes.

6328 *Paul Berger—For People—Cross*

Q. And in 1929? A. Yes.

Q. And in 1930? A. On and off.

Q. Right up to 1941, didn't you? A. I said on and off.

Q. Did it take you all that time to find out, as you say, what they were? A. I said it.

Q. You beat up scabs, didn't you? A. I did.

Q. And you beat up non-union men? A. I did.

Q. That was as early as 1925 and 1926, wasn't it? A. If it is so, then it is.

6329 Q. Don't you know? A. Well, it was.

Q. You went right on from 1925 right through to 1935 and up to 1940 or 1941 doing that kind of work? A. That was not the only kind of work —I was working as a cutter, if you please.

Q. While you were working as a cutter, you were also working as a picket and as a strong-arm man for the union? A. Now and then, when there was a strike.

Q. When there was a strike on you were called on as a strong-arm man, weren't you? A. One of them. There were a hundred others. I was

6330 a member of that union.

Q. You began doing strong-arm work back as far as 1921, didn't you? A. I am not definitely positive about that.

Q. Are you reasonably sure of it? A. Almost sure.

Q. You continued from 1921 to 1922, 1923, 1924? A. Continued what?

Q. As a slugger and a strong-arm man, beating up non-union men. A. Them years I was working in a factory, if you please.

Q. Weren't you working as a strong-arm man

for the union before 1926, as you told us? A. Absolutely not.

Q. Didn't you tell Mr. Barshay you were working as a strong-arm man and committing assaults in 1925, at the time of the general strike? A. That is right, but not in 1921.

Q. You were working in 1925, weren't you? A. '25 or '26, around that time.

Q. How about 1924? A. I was working around there as a picket.

Q. And as a slugger? A. I would not say at 6332
that time.

Q. Weren't you? A. I would not say at that time; I answered you.

Q. How about 1923, weren't you acting as a slugger and a strong-arm man then for the union? A. I was a picket.

Q. Did you assault people who were going to work or coming from work in non-union shops? A. Not as far as I can remember.

Q. How about 1923? A. Not as far as I can remember.

Q. How about '22? A. Not as far as I can re- 6333
member; I was a picket.

Q. Do you say you started out as a slugger and a strong-arm man in the spring of 1925? A. Around that time.

Q. It could have been before? A. I said around that time.

Q. Do you mean by that it might have been before 1925?

Mr. Turkus: I think we are splitting hairs.

Mr. Talley: I am cross-examining him.

The Court: Objection overruled.

6334

A. Maybe it was. If it is so, I will tell you. I have nothing to hide—nothing I am trying to hide. I am teling you the truth. If it is so, it is so. I am telling you the truth. I am telling you it was. If it was around 1923 or 1924 then I worked like that.

Q. Suppose you begin to tell us the truth from now on. A. I have been telling you it all the time.

Q. Is it not a fact that in 1921—

6335

Mr. Turkus: (interrupting) Mr. Talley has heard your Honor admonish the witness. Now he invites repartee by this kind of bantering remarks back and forth with the witness, such as "Supposing you start to tell us the truth now." That invites an answer like we are just getting from the witness. I will ask your Honor to advise him again.

The Court: The court is ready to admonish the witness as often as necessary.

6336

The only thing the Court objects to is this, and I do not want it to occur again: That when the Court is unable to admonish because it cannot get a word in edgewise and the situation becomes somewhat out of hand, that the Court should be blamed for it. I came here this morning expecting, and I still believe, to have an orderly day's work in court. Go ahead, Judge Talley.

Q. In 1921 you were committing assaults for the union?

6337

Mr. Turkus: Objected to as repetitious.

By the Court:

Q. Do you remember the year? A. To the best of my recollection—

Q. Do you remember the year you began to do muscle work? A. Actual muscle work?

Q. Yes. A. I would say around between 1925 and 1926—1925 and 1926.

6338

By Mr. Talley:

Q. I am asking you if you did not do that as early as 1921. A. Not to my recollection.

Q. Didn't you do it as early as 1922?

Mr. Turkus: Objected to as repetitious. We have gone up and down the ladder in years.

The Court: Objection sustained.

Mr. Talley: Exception.

6339

Q. Now, you were a member of the union, weren't you? A. I was also working in a factory.

Q. Also working for the union, weren't you? A. That is right: not all the time, not all the time. I answered that.

Q. Yet you have been running a non-union shop at 599 Broadway, haven't you? A. I beg your pardon?

Q. (Question repeated by the reporter.) A. Absolutely not.

Q. Is that a union concern at 599 Broadway? A. That is right, 100 per cent.

6340 Q. Is that business at 599 Broadway known as the S.B.M. Corporation? A. That's right.

Q. What does the "S" stand for? A. Schwartz.

Q. What does the "B" stand for? A. Beeble and Berger.

Q. And what does the "M" stand for? A. Montluk.

Q. A man named Schwartz and a man named Montluk were your partners? A. That is right.

6341 Q. Are you secretary of that company? A. That is right.

Q. Did that company, on Monday last, while you were testifying in this court, before the Department of Labor, admit it was violating the law while operating on Government contracts? A. Did they?

Q. I am asking you. A. I am asking you. I want to learn something about that.

Q. You will learn a lot of things before we get through. A. This particular thing I don't know anything about.

6342 Q. You don't know, do you? A. About what?

Q. About that company being before the Federal Department of Labor? A. What happened to it?

Q. I am asking you. A. I want to know what happened. I want to know about it.

Mr. Turkus: They are having a very pleasant debate.

The Witness: He is telling me something.

Mr. Turkus: This does not go to his

credibility or affect the issue we are trying.

The Court: Do I hear an objection?

Mr. Turkus: Yes, I object.

The Court: Sustained as too far afield.

Mr. Talley: Exception.

Q. Are you president of the Berger Clothing Company at 57 Thames Street? A. I was.

Q. Are you now? A. I think I am; I am not sure. If you want to know who the real president was, I will tell you. Right here, Mendy Weiss. 6344

The Court: Stop volunteering.

Mr. Talley: I move to strike it out.

The Court: Answer the question and no more.

Q. Do you know Samuel Kaminsky? A. Yes, sir.

Q. Do you know Nathan Berger? A. Yes, sir.

Q. Is he a relative of yours? A. He is not.

Q. Were they your partners? A. They were Mendy's partners. 6345

Mr. Talley: I move to strike it out and I ask the Court to direct an answer.

The Witness: That is the truth that I am telling you. I am telling you the truth. They were Mendy's partners.

The Court: Strike it out. Say yes or no.

A. On paper I was, that is right.

6346

Q. You mean on a paper filed with the Secretary of State? A. That is right.

Q. You were a stockholder and officer of that corporation? A. That is right.

Q. And they were officers and stockholders? A. Yes, sir.

Q. What was your office there, president? A. I think it was.

Q. What connection was there between the Berger Clothing Company and the Promenade Clothes Company of Brooklyn? A. It was practically one.

6347

Q. On Monday last when you testified in this court, did Samuel Kaminsky and Nathan Berger plead guilty in the United States Court in Brooklyn to violating the Wage & Hour Law on this Government contract you told us you had?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: This is his own corporation. He is president.

The Witness: I had nothing to do with

6348

that Government contract they had, for your information.

Mr. Talley: I take an exception to your Honor's ruling.

Q. Did they plead guilty and were they given 18 months? A. For your information, I am away from that concern for over a year. You don't know what you are talking about. I am in business for myself. I am not in business with them any more.

6349

Mr. Talley: I move to strike out the answer.

The Court: Despite the Court's ruling, counsel deliberately puts this before the jury. It was an impropriety, and it provoked the answer by the witness. Both counsel and witness will come to order and proceed.

Mr. Talley: Does your Honor sustain the objection?

6350

The Court: I surely do; apparently you were not listening. The Court is entitled to the attention of all counsel, and you had no right to turn your back to the Court and then ask the Court to repeat its ruling.

Mr. Talley: I did not turn my back on this court, and I am quite confident of deporting myself properly and with respect. I assume your Honor ruled against me, and I will take an exception to your Honor's ruling.

6351

Q. You were not prosecuted for anything in connection with the violation of the Federal law, in connection with your Government contract, were you?

Mr. Turkus: I object. That is becoming reprehensible.

The Court: Objection sustained. The Court refuses to be goaded into losing its temper, but is going to be very patient.

Q. Now, you were a slugger and a strong-arm

6352 man for a man named Jack Noya, weren't you? A. No, sir.

Q. Didn't you tell Mr. Barshay on Monday that you were?

Mr. Turkus: I object, that is not the testimony.

The Court: Objection sustained.

Q. Did you work for a man named Jack Noya in any capacity? A. I never worked for him.

6353 Q. Did you know him? A. I did.

Q. He was a gangster? A. Yes, sir.

Q. Did you do any work for a man known as Little Frenchy? A. For him?

Q. Yes. A. I never done any work for him. He was arrested with me.

Q. You were working with him, not for him? A. That is right.

Q. You were working with Jack Noya and not for him: is that right? A. I did not work with him.

Q. Were you ever arrested with Jack Noya?

6354

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. Little Frenchy was a gangster too, wasn't he? A. He was.

Q. Now, these assaults you committed you only committed with a lot of people around you; is that right.

Mr. Turkus: I object. It has been a

ready gone over six or seven times this morning.

The Court: Objection sustained, but not upon that ground.

Mr. Talley: May I ask upon what ground your Honor sustains the objection, so I may be guided?

The Court: Upon the ground it is immaterial how many witnesses may or may not have been there. As to this assault, under the rule of collateral impeachment, 6356 that is as far as you can go. We are not trying atmosphere in connection with collateral matters.

Mr. Talley: I have a right to show that this man committed assaults only when he was protected by having others around him. "Me and six others," was his expression, when they assaulted a lone man in a street car. And I have a right to go into that respecting credibility and whether this jury can properly be asked to believe anything he says.

The Court: The question you asked 6357 appears to be a question as to whether or not there were witnesses, not co-participants. You are inquiring whether or not they were co-participants in this case?

Mr. Talley: I have no relation to witnesses.

The Court: Proceed.

Q. You only committed these assaults when there were people around you, in company with you? A. Repeat that.

6358

By the Court:

Q. In connection with others. You did not do a solo attack? Is that what counsel means? A. As a rule, yes, sir.

By Mr. Talley:

Q. Did you do any job by yourself, alone, without some of your underworld friends or gangsters, like Noya, Frenchy? A. How would I know what is what? I had to have some people with me.

6359

Q. Your answer is you never committed any of these assaults? A. For the union?

Q. (The Court) Yes. A. That is right.

Q. How about the assaults you committed that were not for the union? Did you ever assault anybody alone for any reason not connected with the union? A. Not as I can remember.

Q. In any of these attacks you made upon people, did you kill any of them? A. Absolutely not.

6360

Q. You are sure about it? A. Positive.

Q. You did leave them stretched out unconscious, didn't you, on the sidewalk, many times? A. Did I?

Q. Who do you think we are talking to? You. A. I explained to you, at times there were four or five, sometimes a half a dozen.

By the Court:

Q. Judge Talley's question is whether or not the victims were at that time knocked out or

appeared to be knocked out. Yes or no. A. Yes and no.

Q. Both ways? A. I cannot definitely say.

By Mr. Talley:

Q. Some were knocked out and some were not knocked out? A. I said yes and no.

Q. You never used a lead pipe or a blackjack in any of these assaults, did you? A. Absolutely not. 6362

Q. You never had any weapon at all? A. No, sir.

Q. Is that right? A. That is right.

Q. How many of these assaults do you think you committed? A. I cannot definitely say.

Q. They would run from the hundreds, wouldn't they? A. Absolutely no.

Q. Over a period of several years, would you say you did not assault hundreds of men? A. What would you call several years, if you please?

Q. I say from 1921 to approximately 1941, 20 years. 6363

Mr. Turkus: I object.

The Court: Objection overruled.

A. Absolutely not.

Q. How many do you say you have assaulted and injured? A. You said 20 years. I told you I was working in the factory.

Q. How many years did you say you have at various times assaulted and injured? A. Some of them—I don't remember how many, but not what you are talking about, 1921. All those years I was working in the factory.

6364 *Paul Berger—For People—Cross*

Q. My question is, how many men have you assaulted during whatever period you say it was you have been acting as a slugger and strong-arm man? A. Maybe 15, maybe 20.

Q. Maybe more? A. Maybe more.

Q. How many more? A. I cannot say definitely. Maybe one or two more, maybe two less. Not what you are talking about. You are ridiculous altogether. I was working. It was years I never went out. I was working in the factory.

6365 All those records can be brought here.

Q. When you were working in the factory and you were called upon by the union to do something for the union, you did it? A. There were times that years went by.

Q. Did you? A. All right, but that has nothing to do with what I am telling you now, that there were sometimes a year and a year and a half I was not called on to do any picket work. I told you there were hundreds more there. I am not the only one.

Q. That is what I say, you only assaulted people when there were a hundred other people

6366 to help you? A. A hundred others were working, union men. I told you I was working as a cutter.

Q. You told me you were working for $25 a week as a slugger. That is true, isn't it? A. I told you I was working as a cutter, and at night when there was a strike, at night and in the morning, I used to get twenty-five bucks for that. Not all the time. Only when there was a strike. There were times I was not called upon in a year or a year and a half. You are trying to impress me that I was on it for 20 years. I am a cutter, and I am a damn good cutter, one

of the best in the business. Now, what do you think of that?

Q. In addition to being the kind of a cutter you say you were— A. (interrupting) You don't think I would be kept on all the time—I had to work.

The Court: Now please come to order. You have completely disregarded what the Court told you about behaving yourself.

Q. In addition to being a good cutter, with all the rest of it, you say, you also were a good slugger, weren't you? 6368

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Mr. Talley: Let him answer.

Mr. Turkus: There is only one judge here.

The Court: No outburst, please. This means nothing.

Q. You were working with the Worlds Clothing Exchange? A. I was. 6369

Q. In what year? A. I think I started for them around 1933, I would say.

Q. What part of the year 1933 did you commence working for the Worlds Trucking Company? A. What?

Q. The Worlds Clothing Company. A. For the Worlds Clothing Exchange?

Q. Yes.

6370 *Paul Berger—For People—Cross*

Mr. Turkus: I object. This is confusing for the record.

Mr. Talley: I withdraw the question.

Q. What part of the year 1933 did you commence to work for the Worlds Clothing Exchange? A. To the best of my recollection about the beginning of the year. I don't remember definitely. It may be so and may not.

Q. Would you make it around January? A.
6371 I cannot tell you.

Mr. Turkus: Objected to as speculation.

Mr. Talley: This is not speculation; this is cross-examination. You don't seem to appreciate this province at all. May I have an answer?

By the Court:

Q. Do you remember? A. I don't definitely remember.

6372

By Mr. Talley:

Q. When you say the early part— A. There's a record there, why not look at the record? I am not denying it. I don't remember. I worked there. Sure I did. What is it you want to know?

Q. When did you begin to work there, you say? A. I think it was—I don't remember. If the records are here, all right.

Q. When you said the early part of the year, what did you mean, what month? A. I cannot

6373

definitely say. I told you it is on record. I done work there, I told you.

Q. Cannot you definitely tell us what you mean by the early part?

Mr. Turkus: Object.

The Court: Sustained as answered already.

Mr. Talley: Exception.

6374

Q. You did trucking for them when you went to work for them in 1933? A. Who did trucking for them?

Q. You heard the question. A. Before I went to work for them?

Q. When you went to work for them, when you were working for them. A. A number of truckmen.

Q. Who were they? A. One was Louis Cooper, another one was named Larry Cooper, and maybe one other that I don't remember.

Q. Which one did you see Joseph Rosen work for? A. He worked for Louis Cooper.

6375

Q. Are you sure it was Louis and not Larry? A. He also worked for Larry Cooper.

Q. And for what other truckmen? A. For what other truckmen he worked?

Q. Did Joseph Rosen work for. You say he worked for Larry Cooper and Louis Cooper. Did he work for any other truckmen? A. I don't know.

Q. While you were connected with the Worlds Clothing Exchange? A. Not as I know of.

Q. How long were you connected with the

6376 Worlds Clothing Exchange? A. A couple of years.

Q. Would they be 1933 and 1934?

Mr. Turkus: Objected to as speculative.

A. I presume they would; I presume they would be '34, I presume that would be 1935.

Q. Was a man named Weiss working for
6377 Larry Cooper or Louis Cooper at the time you were connected with the Worlds Clothing Exchange? A. A man named who?

Q. A man named Weiss. A. What Weiss?

Q. A brother of the defendant Weiss in this case. A. He was.

Q. He was working with the Worlds Clothing Exchange? A. No, sir, he was working for me. Mendy asked me to put him on to work to break him in as a cutter. He worked for me.

Q. That was for the Worlds Clothing Exchange? A. I said for me. I paid him.

6378 Q. While you were working for the Worlds Clothing Exchange? A. That is right. I was contracting for the Worlds Clothing Exchange. He was breaking in in my place as a cutter. I paid him $20 a week. I should not have given him 20 cents. 20 cents is all, because he was Mendy's brother.

Q. How long did Mendy's brother work for you? A. I don't remember definitely. I know he worked some time.

Q. How long? A. Six months or more. I don't remember definitely.

Q. Is it not a fact that he worked there

6379

approximately two years? A. I don't remember definitely.

Q. If you don't remember definitely, why did you say six months? A. I said six months or more. I don't remember definitely. I told you he worked there. Get the record and it will show you.

Q. I am asking you how long he worked there. A. I don't remember; I know he worked there. I paid him $20 and I should not have given him 20 cents.

6380

Q. While working there did you ever see Mendy Weiss in the place of business of the Worlds Clothing Exchange? A. I did.

Q. Many times? A. I seen him there a number of times, while his brother was there, and I saw him many times while Lepke was there, and the whole mob were there—Charlie Gurrah and everybody else.

Mr. Barshay: I move to strike that out as not binding.

The Court: Strike it out as not responsive. You are again told not to volunteer information.

6381

Q. Did you see Mendy Weiss there while Rosen was working in the same shop?

Mr. Turkus: I object, that is not the testimony at all. It is embracing a state of facts not testified to in this case by any witness.

The Court: Sustained as leading.

Q. Was Rosen working as a truckman? A.

6382 (interrupting) What do you mean, as a truckman? How can he work on a truck? Do you know how many truckmen there are in the place?

Q. Was Rosen doing work for the World Clothing Exchange? A. Was doing trucking. He was only a foreman. He came up for five minutes. How long do you think he was there?

Q. He came there very often, didn't he? A. I wouldn't say very often.

Q. He came there every day, didn't he? A.
6383 When, the times we had work. We didn't ship all our work out to Louis Cooper.

Q. When you had work, Rosen was there every day, wasn't he? A. I beg your pardon, he was not. Sometimes he would call up. What the hell he wants to come down to Broadway and Eighth Street when his office on Fifth Avenue some place?

Q. Isn't it that he even came more frequently than once a day? A. When we had work.

Q. When you had work, he would be there sometimes two or three times a day, wouldn't
6384 he? A. No, sir. No reason for it. Could he spend so much time? The man was taking care of the business for Louis Cooper. I had one lousy office down in the World's Clothing Exchange. He had to take care of about a hundred accounts. He had to call up on the phone, did we have any work, he got something to pick up. Sometimes he didn't send work out at all. He sent it to other places. He was working for Louis Cooper. He had to take care of maybe a hundred accounts. I was a peanut account to him. I used to ship four hundred or five hundred a week.

6385

Q. Are you through? A. That is right.

Q. Louis Cooper did the bulk of the work for the World's Clothing Exchange while you were there, didn't he?

Mr. Turkus: I object to it. This is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Not the whole time that I was there.

6386

Q. Most of the time that you were there, was not most of the trucking done by Louis Cooper? A. Not most of it. There was a lot of work that had to be sent to New York and when it was sent to New York Louis Cooper can't handle it. He only handled stuff that went to Jersey.

Q. Rosen was working for Louis Cooper, wasn't he? A. That is right.

Q. And you saw him in your place of business, didn't you? A. I did. I seen him before he came to my place of business, too. I used to know him from the avenue.

6387

Q. Did you ever see him at your place of business at any of the times when Mendy Weiss visited there? A. Absolutely not.

Q. Never did? A. Absolutely not.

Q. It never happened that they met in your place of business? A. Absolutely not.

Q And yet you say Mendy Weiss came to your place of business frequently to see you and see his brother, is that right? A. What would you call frequently? There was times I didn't see him in months.

Q. What do you call frequently, when you said in answer to my question that he was there

6388 *Paul Berger—For People—Cross*

often? What did you mean by that? A. I would say he was there maybe a dozen times since I was there. The way you are talking he is liable to think he was there 180 times.

Q. Are you drawing a salary now from this business at 599 Broadway? A. I am.

Q. Are you drawing $150 a week? A. I am.

Q. And you have been drawing that during all the time that you have been in the custody of the police? A. That is right.

6389 Q. That is true, isn't it? A. That is right.

Q. What do you do with the $150 a week that you get now?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Talley: Exception.

Q. It does not cost you anything to live at the hotel that you are putting up at, does it? A. No.

Q. Your board is paid; your lodging is paid? A. That is right.

6390 Q. And has been since May or June of this year?

Mr. Turkus: I object to the form of the question. It is not May.

Q. Is that right? June 5, 1941? A. Not June 5th.

The Court: Just a minute. There is an objection.

Q. Was it in June?

The Court: Please. The Court refuses to engage in a brawl. Objection was made that requires ruling. What is the objection? Repeat it again.

Mr. Turkus: I object to the form of the question.

The Court: Isn't this witness in custody?

Mr. Turkus: The witness is in custody of the New York City Police Department.

The Court: Under an order of the court? 6392

Mr. Turkus: That is right.

The Court: Then it may fairly be assumed that being a prisoner and being held under an order of the court, that the City pays his board, of course, the same as if he was locked up in a cell.

Mr. Talley: Is the objection sustained?

The Court: Certainly it is sustained. It has nothing to do with the case anyway.

6393

Q. You were locked up in a cell, weren't you, when you were first arrested? A. I was.

Q. And spent a week there, did you? A. I did.

Q. In the Tombs prison in New York? A. That is right.

Q. And you were not driving an automobile during that week that you were in the Tombs, were you?

Mr. Turkus: It is a known fact in the law that one charged with homicide is held

6394 *Paul Berger—For People—Cross*

without bail, so that that necessarily and obviously is an impossibility.

The Court: It is immaterial anyway.

Q. You are still being held on a homicide charge, aren't you? A. Yes.

Q. And the charge is the killing of Joseph Rosen. That is true, isn't it?

Mr. Turkus: Participation. I object
6395 to the form.

Mr. Talley: The law does not recognize any difference. You ought to know that.

The Court: May I ask this?

Mr. Turkus: Yes.

The Court: Did I make the order holding this witness, or was it made in New York?

Mr. Turkus: No, this witness was held on a short affidavit in the Felony Court.

The Court: I am talking about putting
6396 him in custody of the police. Who made that order?

Mr. Turkus: That is either a Supreme Court order or it is an order downstairs in the Felony Court. My recollection is—

The Court: It is a New York indictment?

Mr. Talley: No, it is not.

Mr. Turkus: No, he was held in the Rosen case on a short affidavit for his participation.

The Court: I thought he was indicted in New York?

Mr. Turkus: No. He is on bail on New York indictments.

The Court: He was held on a short affidavit?

Mr. Turkus: I do not want the jury to be confused.

The Court: So whoever made the order was some Judge in Brooklyn?

Mr. Turkus: That is right, in the Felony Court.

The Court: The reason why the court 6398
sees fit to place this witness in the custody of the police, instead of remanding him to jail, is the Court's affair and is not the affair of this jury.

Mr. Turkus: That is right.

Mr. Talley: I take an exception to that.

The Court: And cannot be questioned.

Mr. Talley: I take an exception to that statement.

The Court: And furthermore it would be prejudicial to conjecture as to the reason why it was deemed wise to take 6399
him out of the jail and put him in the custody of the police.

Mr. Talley: I take exception to that statement. As I understand the situation, this witness was held, charged with complicity in the murder of Joseph Rosen. He is being held without bail and the order, or any order, if there is such a one, has nothing to do with the situation prevailing, that he is under arrest charged with the murder and killing of Joseph Rosen.

6400 *Paul Berger—For People—Cross*

The Court: That has no bearing upon this question that is before the Court.

Mr. Talley: It has a lot of bearing—

The Court: That is simply diversion.

Q. After you were a week in jail, you were taken to the Bossert Hotel, is that correct? A. That is correct.

Q. And would that be in the month of June, 1941? A. That is correct.

6401 Q. And you have been at the Bossert Hotel ever since? A. That is correct.

Q. You have not been paying any expenses in the Bossert Hotel, have you?

Mr. Turkus: I object.

Q. For your lodging or your board?

Mr. Turkus: That has already been answered.

The Court: Sustained.

Mr. Talley: Exception.

6402

Q. It is very much more comfortable there than it was in your cell in the Tombs, isn't it?

Mr. Turkus: I object to it.

The Court: Sustained. It is not done for that reason. It is done for a reason of sound public policy. The Court knows the reason why it was done and why the Court deems it necessary for it to be done, to get him out of Raymond Street jail.

Mr. Talley: I except to that statement of the Court as being prejudicial.

The Court: I advise you you are treading on dangerous ground. Get off it.

Mr. Talley: I think your Honor inadvertenly said this witness was in Raymond Street jail. He never was.

Mr. Turkus: In jail.

The Court: That was an inadvertence.

Mr. Turkus: It applies to any jail.

The Court: What I mean is this, that I have made in this court many such orders. It has always been upon the 6404
ground of sound public policy and what appeared to the Court to be necessity. It is not a matter that concerns a jury in this or any other case. It makes no difference whether I made this order or whether some other Judge made the order; it is none of the jury's business and you may not question it. The man is a prisoner but he is not held as a prisoner in Raymond Street Jail or in the Tombs or any other prison for a reason that is sufficient to the Court and does 6405
not concern the jury. Now let it rest there.

Mr. Talley: I take exception to your Honor's statement.

Mr. Barshay: May I address the Court, your Honor?

The Court: I instruct the jury to completely disregard it.

Mr. Barshay: May I address the Court?

The Court: No, not on that. The ruling is made and it is none of your affair.

Mr. Barshay: Will your Honor give me an exception?

The Court: Yes.

6406 *Paul Berger—For People—Cross*

Mr. Talley: Will the District Attorney tell us what Judge made the order, if there is such an order?

The Court: Here is the Judge right here (indicating). Judge Solomon, stand up. Did you make the order?

Magistrate Solomon: Sitting in the Felony Court, on two occasions, he was brought before me; at the request of the District Attorney's office, under a short affidavit, he was continued.

6407

The Court: How about the order committing him?

Magistrate Solomon: No, I made no such order; just that.

Mr. Talley: Now I ask the District Attorney in charge of this case if there is such an order and, if so, what Judge did make it?

Mr. Turkus: I just instruct Mr. Talley all he has to do is walk downstairs to the Felony Court and look it up. It is there on the record.

6408

Mr. Talley: I ask the District Attorney to put upon the record now who made the order and when it was made, and I further ask the District Attorney, in view of his apparent reluctance to produce that order—

Mr. Turkus: "In view of his apparent reluctance" is a reprehensible remark that I can well take from him.

The Court: Do you know who made it?

Mr. Turkus: I don't. I know it was

done in the Felony Court. Who the Judge was is immaterial.

The Court: It is none of the jury's business and if Judge Talley wants to know from curiosity, he can find out.

Mr. Turkus: I cannot charge my mind with all those things, Judge.

The Court: Let us please proceed with the trial.

Mr. Talley: Then I understand the District Attorney does not agree to pro- 6410
duce that order in this court?

Mr. Turkus: There is no such understanding at all.

The Court: You are trying to put the District Attorney in the wrong attitude and the Court rebukes you for that. I say that reluctantly. The situation was sufficiently clarified before and this tends to cause the jury to confuse it. If there is any persistence along this line, the jury will be excused and we will see how far you go then.

Mr Talley: This situation is not clari- 6411
fied at all—

The Court: The Court instructs you not to go any further on that.

Mr. Talley: I take exception to your Honor's ruling and I say that it all has a bearing—

The Court: Judge, if you persist in this, there is always a risk of provoking something that you will use as a basis for a motion for a mistrial. I advise you to get off dangerous ground. Try your case.

6412 *Paul Berger—For People—Cross*

Mr. Talley: I appreciate your advice but I think I am quite as competent as your Honor is to know when I am on dangerous ground, when I am not.

The Court: The jury is excused until the Court sends for you.

Mr. Talley: I take an exception.

The Court: After the jury goes out, you may complete your record and the jury will then come back.

6413 Mr. Talley: I have no record to complete.

(The jury retired from the court-room.)

The Court: Now the jury is out of the room. This is without prejudice because the jury is out of the room and because they are not permitted to read newspapers concerning this trial.

In all orders made by this court, the Court has followed the practice which was

6414 inaugurated by Mr. Dewey in New York and which was followed by the Judges in New York and the reason has been to prevent the assassination of witnesses in the jail. At one time the situation was so desperate here that in trying a case it was deemed necessary to get an armored bank car with armed police outriders in order to escort one witness here because it was indirectly reported that there was a scheme on to block traffic and to assassinate that witness on his way to the jail. That witness is reported to have com-

mitted suicide this morning by jumping out of the eighth story window of a hotel.

If there is anything more to be said by way of a record, sir, put it on the record and have it over with.

Mr. Barshay: Now may I address the Court, your Honor?

The Court: Yes.

Mr. Barshay: Of course, with respect to this witness—

The Court: The Court will say nothing 6416
more on it nor permit anything further to be said on the subject when the jury comes back.

Mr. Barshay: Can I say something now, Judge?

The Court: Yes.

Mr. Barshay: Of course, out of the mouth of this witness, he testified here that at no time was he induced to flee but I do not know whether or not he said or was asked about intimidation or threats, but the point is this, Judge, if his 6417
being placed in a hotel would induce him to give false testimony, may we ask the Court isn't that proper, if we can convince the jury through questions and answers that his treatment, his special treatment, could induce him to give false testimony?

The Court: The Court has not discussed that question at all.

Mr. Barshay: That is the purpose of the inquiry, Judge.

The Court: The Court has ruled on a

6418 specific point of judicial procedure and the Court will not be drawn into saying something on which you can place an exception to raise in the event of conviction.

Mr. Barshay: The only reason I would be interested in that is whether or not that treatment induced false testimony, and no other reason.

The Court: You are not going to draw
6419 the Court into that. The Court will rule on that in response to objections to questions.

Mr. Barshay: I only want to make my purpose clear, Judge.

The Court: You have it on the record. If there is anything else to be said, let us have it on the record.

Mr. Climenko: If your Honor pleases, since the jury is out of the room now,—your Honor recalls that I mentioned that matter to you this morning with respect
6420 to those papers. May we discuss it now, your Honor?

The Court: Yes, this is a good opportunity.

Mr. Climenko: The situation is simply this. We on behalf of our client subpoenaed certain records which were records made by the Police Department of the City of New York and records in the possession of the City of New York, and we asked for their production here.

Mr. Turkus: The records are here.

Mr. Climenko: The other day, on Fri-

day, when we requested them, it was in Mr. Turkus' mind that they were not in his possession or in the possession of his office.

Mr. Turkus: They were not in the court-room.

Mr. Climenko: I am going to make a complete statement, Mr. Turkus, and nobody is going to be misunderstood.

Mr. Turkus: O. K.

Mr. Climenko: We persisted, however, 6422
and Mr. Turkus has completed his investigation and he finds that he has those records. In the meantime, so that the record may be complete as to what has happened as to our efforts to obtain them, we had subpoenaed an officer of the Police Department to come here and produce them and that man did appear here, though I did not know he was here, and I understand that he had a conversation with someone from the District Attorney's office—what I am now saying is not 6423
in criticism of anyone—but he was apparently told that since the District Attorney had them, there was no necessity for him to remain here.

Now, if your Honor pleases, those are records that we believe we have a right to see; they are in the possession of the District Attorney but they are not the property of the District Attorney. They are public records. We called for their production from the only source that we can get them and, if your Honor pleases, those are not records having to do with

6424 *Paul Berger—For People—Cross*

this case as a case but rather are they records having to do, as I understand the situation, with the work of the Police Department of the City of New York during the period from about September of 1935 to the end of 1936 in respect to surveillance by agents of that department of one of the persons on trial here. Now we ask Mr. Turkus, through your Honor, making the request to your Honor re-

6425 spectfully, of course, for the production of those records. For the record, so that I will be entirely clear—

The Court: What is the nature of these records?

Mr. Climenko: I thought I described them, your Honor. They deal with surveillance by the Police Department of the defendant Buchalter.

The Court: Are they required in connection with the examination of this witness?

6426 Mr. Climenko: They may be, your Honor, because those records, as I understand it, have to do with all of the activities of that defendant, have to do with an identification of the people whom he saw, what he did throughout the period that I described.

(At this point the witness left the court-room.)

The Court: May I see the record?

Mr. Turkus: These are not public records. This is an investigation conducted

by the Police Department in regard to certain criminals, crooks, and gangsters. To release these public records—

Mr. Wegman: Even with the jury out of the room, I take exception to that, if your Honor pleases. I think the District Attorney ought to be criticized for making a speech for the purpose of the newspapers, even though there is no jury present, and even though the jury does not read the newspapers while on this 6428 case.

The Court: This is properly a basis on which a question of law is predicated.

Mr. Wegman: It may be, but the District Attorney has no right to make any such statement. His statement is grievously wrong and knowingly wrong to him. This is a record of the Police Department's surveillance of one individual.

Mr. Turkus: Have you seen the records?

Mr. Wegman: And it was a 24 hour 6429 guard. We have been informed by the Police Department.

Mr. Turkus: You do not know what you are talking about.

Mr. Wegman: We have been informed by the Police Department.

The Court: Please do not interrupt counsel when he is talking to the Court.

Mr. Turkus: I am stating to the Court, your Honor, that these records are in connection with crooks, criminals and gangsters, that they are not public records,

6430 and that it would be unconscionable, that it would be against the public interest, to reveal the contents of these documents as we have them now, to anybody.

Mr. Wegman: And I say that is a deliberate lie on the part of Mr. Turkus, and I cannot use a stronger word.

The Court: Counselor, I am very sorry but that is going to cost you ten dollars which you will pay right away.

6431 Mr. Wegman: I will be glad to, if contempt of Mr. Turkus is contempt of court.

The Court: It will cost you ten dollars each time.

Mr. Wegman: Incidentally I take exception and note my right to appeal from your Honor's ruling.

The Court: Yes, and see how far you get.

Mr. Wegman: I pay it under protest.

The Court: I am very much surprised, considering the quarter from which it

6432 comes, because you surely forgot yourself.

Mr. Wegman: That is perhaps true and I apologize if the Court took it as that.

The Court: You should go through life without ever doing that.

Mr. Wegman: I do not recall any other occasion when I have done it but there are certain things that go too far. There is a point to which one can be tormented by conduct of another person which is unconscionable and which after a while gets so far under the skin that it causes

an eruption. I think that Mr. Turkus's conduct calls for condemnation from your Honor, but I don't suggest it because I would not presume to suggest to your Honor what your Honor ought to do.

The Court: Counselor, I do not think you will do it again, but the ten dollars will be a reminder.

Mr. Wegman: I hope it has been noted that I paid it under protest.

The Court: The Court was goaded on 6434
Monday at one point, where there was an obvious attempt to create a wrong record situation that might be misunderstood in the eventuality of an appeal, into saying to a distinguished counsel in the case, "Hold your tongue." The Court has been trying to bite his own tongue out ever since saying it. That simply tumbled out under the impulse of the moment.

Mr. Wegman: The Court suggested on the record on Monday, at least the Court said in so many words, that one of the 6435
defense counsel was telling a deliberate untruth.

The Court: Please, no further of this.

Mr. Climenko: If your Honor pleases—

The Court: No more. I am hearing Mr. Turkus. He was interrupted. Where was that?

(Remarks of Mr. Turkus were read.)

Mr. Turkus: However, they are about three inches in thickness. They refer not only to the type of individuals I have

6436

mentioned but their activities and their associates.

The Court: I am asking you this: Do they contain any Q's and A's by witnesses in this case?

Mr. Turkus: They do not.

The Court: Do they contain any depositions by witnesses in this case?

Mr. Turkus: They do not.

The Court: Are they purely police re-

6437 ports?

Mr. Turkus: They are police confidential reports of activities of the Police Department.

The Court: No depositions?

Mr. Turkus: No depositions.

The Court: No admissions?

Mr. Turkus: No conversations, no admissions that I could find. They are about three inches thick.

The Court: All right. Then what was it that counsel desires to have done, so

6438 that the Court can make an intelligent ruling, if that be possible?

Mr. Wegman: May I state what those records are, your Honor? It has been stated in court, and it may as well be made clear. The defendant Buchalter was under surveillance by the Police Department of the City of New York every single day over a period of time. He was followed by police officers—

The Court: Without that, what is the purpose of this? I want to get the procedure correct.

Mr. Wegman: These records of the Police Department show the report of these police officers as to where the defendant Buchalter was, and with whom he spoke, and who spoke to him, over the period of time as to which these witnesses have testified. It is important for the purpose of contradicting the testimony of the witness Rubin and of the witness Berger to show that the Police Department's own records indicate that their testimony 6440
could not have been true.

Mr. Turkus: Unfortunately—

Mr. Wegman: That in these records—

The Court: It requires no further argument.

Mr. Turkus: I want to make a statement of fact.

The Court: I am hearing counsel. Go ahead.

Mr. Wegman: We want to see these records for two reasons: First, because in order to lay a foundation we ought to be able to cross-examine these witnesses as to places and times indicated by these records and, secondly, to call the police officers who witnessed— 6441

The Court: I understand now. Have you any authority of law to show that the law has been changed on that point?

Mr. Wegman: May I ask your Honor on what point? I am afraid that I do not understand.

The Court: You know that these have always been held to be confidential.

6442 *Louis Berger—For People—Cross*

Mr. Wegman: These are not investigations of crime. If they are, perhaps they are confidential. They are a record made by police officers of surveillance—

The Court: Pardon me. Has the law been changed recently on that point?

Mr. Wegman: Not that I know of.

The Court: Then the Court is compelled to rule against you, but still I don't know specifically what your motion is.

6443 Mr. Wegman: Our motion—we subpoenaed the Police Department to produce those records.

The Court: I know that.

Mr. Wegman: We have now asked for their production.

The Court: They are here. Now you want to see them, is that right?

Mr. Wegman: Specifically as to certain dates.

The Court: (To District Attorney) Do you object?

6444 Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Wegman: Might they be marked for identification?

The Court: Yes.

Mr. Wegman: May I also make note of the fact that we are asking only for certain dates, not for the entire record.

Mr. Turkus: So that the record may be clear—

Mr. Wegman: We want the record of the month of September, 1936.

 6445

The Court: Mark the outside of the folder.

Mr. Turkus: So the record may be clear, may I make this statement? It is in the absence of the jury. Had there been any such police surveillance of the defendant, there may not have been this homicide. Unfortunately the only kind of surveillance was known in police parlance as a harassing detail, an annoying detail, to annoy. In addition to that, it was, of 6446
course, an incomplete type of police surveillance. If this defendant and others had been followed 24 hours a day, we would not have had this indictment; there would have been no necessity for it. It was known as an annoying or harassing affair. In addition, these papers which are about three or four inches in thickness as you can see—

The Court: Please cut things short. Mark the folder for identification.

6447

(Folder marked People's Exhibit Z-18 for identification.)

The Court: Not only is this illegal but were the Court to divulge this, it would practically permit these confidential records to be divulged for counsel in a manner that could be used in connection with a defense of any of the other cases in so-called Murder Incorporated line.

Mr. Wegman: May we ask your Honor before making that statement to look at

these records because I think that Mr. Turkus has just completely justified my resentment of his earlier statement and has indicated that his earlier statement was not in accordance with facts, as I charged that it was not, when he says that these are records of a harassing detail, not an investigation.

Mr. Turkus: They are an investigation—

6449 Mr. Wegman: I suggest, your Honor—

Mr. Turkus: Your Honor, I am not going to permit him to create a false record for a contingent basis.

Mr. Wegman: May I be permitted to continue my statement?

Mr. Turkus: I resent this thing which cost him a ten dollar fine.

The Court: Mr. Wegman knows nothing about the contents because he has not seen them. He is not going to be permitted to see them and all the record

6450 that is going to be made has been made.

Mr. Wegman: May I ask your Honor to look at them yourself?

Mr. Barshay: May I address the Court because the vital point has been missed?

The Court: What is it? Is there anything new?

Mr. Barshay: Yes. First of all we do not want to see a single thing that has anything to do other than with respect to the whereabouts and the people who saw Buchalter on the specific occasions when Rubin and Berger said they saw him on

certain days beginning September 11, 1936, up to and including June, 1937, to see whether or not there is something in those records which would dispute the truth of their allegations. For example, your Honor, if Berger said that he saw Buchalter at the Hatfield Hotel on a certain day, at a certain hour,—and I tried to be specific with respect to that—and these records would show that on that day the police reported him to be at an entirely different place in the city of New York, with different people, then in the interest of public justice these records are not confidential and your Honor should look at them and see if there are any such things in existence. Public policy demands— 6452

Mr. Turkus: Why don't you look at them, Judge?

The Court: If a policeman took the stand and testified otherwise, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling, but that is not present at this moment. Now as it stands, in addition to the fact that these are privileged and confidential under the law, they are hearsay. I will go further than that and I will do this and then stop because I am not going to get into too long a harangue. You practiced law, counsellor, and I assume you have employed detectives and so have I. I prac- 6453

6454 ticed law for twenty years and spent many thousands of dollars for detectives who rendered private reports and I have paid good money per day for trailing and making those reports and found them in a large percentage to be arrant humbug. I have had to employ detectives to watch detectives and even they sold me out. That may make you think.

Mr. Barshay: May I finish the state-
6455 ment, Judge?

The Court: The Court is not going to say any more because I do not propose to have any record that will cause an appellate court to think that that is what activates my ruling, but I am telling you it is just arrant hearsay. You are not going to be permitted to have the inspection and I am not going to hear anything more.

Mr. Barshay: Judge, I did not finish my statement. I will finish it and I will
6456 take my exception and sit down.

The Court: Very well.

Mr. Barshay: First, your Honor, I do not know of any law which makes these police records private records. My understanding is that they are public records and I cite to you as authority the case I tried, People against Behan, where he was indicted for stealing public records, and I contended under the law there that they were private records, being under the same impression then as your Honor is now. I was overruled by the Court and the in-

dictment was sustained and we had to go to the jury on the question of fact. Now, second, I do not know which police officers, your Honor, to subpoena because unless I know which police officer said he followed him and reported to his chief that he did follow him and said in that report whom he saw the defendant Buchalter with, at what place, at what time, at what date, I am in no position to subpoena the entire Police Department of the City of New 6458
York. Third, under the law, the law presumes that an officer of the City of New York does his duty honestly and faithfully and not that he does it by hearsay and, if in Mr. Turkus' possession or in the Police Department's possession there is evidence which gives the lie to any witness offered in this court-room, as a public duty he owes it not only to the defendants but to the community to produce him.

Mr. Turkus: Nobody finds fault with that statement. There is another— 6459

The Court: The Court will permit no more post mortem.

Mr. Barshay: I take exception.

The Court: A long time back the Court made its ruling.

Mr. Barshay: Exception.

Mr. Talley: I ask to be heard upon this point, if your Honor pleases.

The Court: Go ahead.

Mr. Talley: Counsel for defendant Weiss have subpoenaed certain D.D.4 records from the Police Department. They have not been produced and I am asking

6460 *Paul Berger—For People—Cross*

the District Attorney now if he has them in court and if he will permit the examination of them preliminary to adducing testimony with respect to them.

Mr. Turkus: The first I heard of any D.D.4's and 5's other than this. What D.D.4's and 5's have you reference to?

Mr. Talley: We want them in reference to the statements taken by the police in reference to this case from witnesses who

6461 have testified and we presume will be called to testify in this case.

Mr. Turkus: You don't understand what D.D.4's and 5's are, apparently, Judge Talley.

Mr. Talley: What is it?

Mr. Turkus: Apparently you have some misconception about D.D.4's and 5's.

Mr. Talley: No, we have not. We know exactly what they are.

Mr. Turkus: You mean you want the D.D.4's and 5's in the Rosen case?

6462 Mr. Talley: Yes, certainly.

Mr. Turkus: They are in court. We have them.

Mr. Talley: May we inspect them?

Mr. Turkus: Of course not.

Mr. Talley: Will the Court permit them to be marked for identification, and I request that the Court inspect them.

The Court: Mark for identification only.

(Folder marked People's Exhibit Z-19 for identification.)

Mr. Talley: May we have the number of papers contained in this folder counted now, preferably by the clerk of the court?

The Court: Is it much of a folder?

Mr. Turkus: It is. It is a substantial folder.

The Court: How many pages?

Mr. Turkus: I don't know.

The Court: No. We are not going to lose time on that.

Mr. Talley: Will the Court permit 6464
counsel to count the number of papers?

The Court: No, that carries an insinuation which is wholly uncalled for. I assume Mr. Turkus is a man of honor.

Mr. Turkus: These are Police Department records.

Mr. Talley: I ask they be counted so we will know how many of these separate sheets are in the folder.

The Court: The Court has ruled.

Mr. Talley: I take an exception to your Honor's ruling.

The Court: Anybody else wants to be 6465
heard?

Mr. Climenko: Yes, if your Honor pleases, merely for the record, if I may, your Honor. I should like to have marked for identification a subpoena duces tecum signed by your Honor and directed to Louis Valentine as Police Commissioner, calling for the production of those records which presumably have now been marked People's Exhibit Z-18 for identification.

The Court: All right, mark it.

6466 *Paul Berger—For People—Cross*

(Paper marked Defendants' Exhibit D for identification.)

Mr. Turkus: May the subpoena be marked in evidence, your Honor?

The Court: For identification. Bring back the jury.

(The jury returned to the court-room. The witness resumed the stand.)

6467 By Mr. Talley:

Q. Since you have been in the Bossert Hotel, Berger, with whom have you talked about this case? A. To no one.

Q. You went into the Bossert Hotel in June, 1941? A. That is right.

Q. And since June, 1941, up to this present 12th of November, 1941, you say you have talked to nobody about this case? A. In the Bossert Hotel. I answered that question, sir.

Q. I asked you whether you talked with any
6468 of them since you have been in the Bossert Hotel?

Mr Turkus: I object to it.

Q. I did not ask you whether you talked in the Bossert Hotel; I asked you since you have been there? A. You asked me if I spoke to anybody about this case in the Bossert Hotel.

Q. I beg pardon?

Mr. Turkus: Then there was a misunderstanding.

Q. Since you have been confined in the Bossert Hotel, under police guard, as a defendant in this Rosen case, with whom have you talked about this case, any place? A. To the District Attorney.

Q. Judge O'Dwyer? A. I did.

Q. Who else? A. Mr. Turkus, Mr. Klein.

Q. Who else? A. No one else.

Q. Did you talk to Captain Bals of the Police Department? A. I did not.

Q. Then the only ones that you talked to are 6470
those that you named, is that so? A. Talked to.

Q. Who was the first of those three that you talked to, Judge O'Dwyer? A. That is right.

Q. Was that in the District Attorney's office? A. That is right. Captain Bals was sitting there.

Q. And then how many times did you talk with him about this case? A. A couple of times.

Q. How many times did you talk with Mr. Turkus about your testimony in this case? A. A number of times.

Q. How many? A. A number of times. 6471

Q. How many? A. About three or four times.

Q. And how many times have you talked with Mr. Klein about this case? A. Klein was there too at the time.

Q. Klein was always with Mr. Turkus when he was talking to you? A. That is right.

Q. And you never talked to Mr. Klein in the absence of Mr. Turkus? A. Unless Mr. Turkus walked out of the office, or vice versa.

Q. Then your testimony is that you talked with Mr. Jacobs the same number of times that you talked with Mr. Turkus, is that right—

6472 Josephs, not Jacobs—you talked with Mr. Josephs the same number of times that you talked with Mr. Klein? A. I was not talking to Josephs; I was talking to Mr. Turkus.

Q. And who else? A. Quite a number of men in there. Some of them I didn't know.

Q. Didn't you mention Mr. Josephs? A. I mentioned Mr. Klein. Maybe Josephs was there, too, I don't know. There was a number of men there.

6473 Q. Did you ever talk with Mr. Klein without Mr. Josephs being present? A. Yes, if he walked out.

Q. How many times did you talk with Mr. Klein about your testimony in this case? A. When he was in and out? Repeat that question again, please.

Q. You know what I mean by "How many times," don't you? How often? A. Talked to whom?

Q. Mr. Klein. A. As many times as I spoke to Turkus, unless they walked out. I don't know

6474 how many times.

Q. You remember when this case commenced, don't you, the 15th of September? Do you remember when the trial began? A. That is right.

Q. Since that date have you talked with Mr. Klein of the District Attorney's office? A. I did.

Q. Didn't you talk to him while the jury was being picked in this case? A. I did.

Q. And Mr. Turkus was not present when you were talking to Mr. Klein? A. No.

Q. While the jury was being picked, was he? A. That is right.

6475

Q. But you just told us that you never talked to one without the other being present, didn't you? A. He spoke to me when I was before the Grand Jury alone.

Q. Do you want to change your testimony that you gave, that you never talked with Mr. Klein except in the presence of Mr. Turkus?

Mr. Turkus: I object to it.

6476

Q. About your testimony in this case? Do you want to change that?

Mr. Turkus: I object to the form of the question.

The Witness: Repeat that question.

The Court: Sustained.

Mr. Talley: Exception.

Q. While this case was going on, after the selection of the jury was commenced, you testified before the Grand Jury, didn't you? A. I did.

6477

Q. And until this case commenced by the beginning of the selection of the jury, you had not testified before the Grand Jury, had you? A. I don't think I did.

Q. And up to that time you had never given a written statement to the District Attorney or to the Police Department, isn't that so? A. I never signed a statement.

Q. Did they ever take a statement from you in writing? A. What do you mean, take a statement from me in writing? What do you mean by that? Explain that to me, please.

6478 *Paul Berger—For People—Cross*

Q. You do not know what that means? A. Will you explain it to me, please?

Q. You do not know what it means, is that right? A. I want to know what it means definitely before I answer.

Q. Do you say you do not know what it means?

Mr. Turkus: I object to it. That witness has repeated three times he wants
6479 to know what is meant by a statement.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you see a stenographer taking down any statements that you were making to Judge O'Dwyer, to Mr. Turkus, or to Mr. Klein, before you testified before the Grand Jury? A. I seen Turkus and Klein take notes. I don't know if it was stenography or not.

The Court: Any shorthand writer?

6480 The Witness: Not that I know of. I seen them taking down notes.

Q. Did you see any stenographer taking down what you were saying, the same as this court stenographer is taking it down? A. I did not.

Q. Did you ever sign a statement for the District Attorney? A. I did not.

Q. You were asked to sign it several times, were you not? A. I was not asked.

Q. Had you given any written statement or signed any statement up to the very day you went before the Grand Jury?

Mr. Turkus: That is objected to. It is repetitious.

The Court: That is what he said.

Mr. Talley: Is the objection sustained?

The Court: I say that is what he said.

Mr. Talley: I would like to have it again, if your Honor pleases.

The Court: It is repetitious.

Mr. Talley: I have a right to be repetitious on cross-examination.

The Court: Who is ruling? I thought 6482
I was.

Mr. Turkus: That is law I never heard of before Judge Talley pronounced it.

The Court: That is said in good humor. The objection is sustained, and I guess that is what counts.

Mr. Talley: Exception.

Q. You refused to testify before the Grand Jury unless you got immunity, didn't you? A. I don't know what you mean by that, definitely.

Q. Don't know what I mean definitely? Do 6483
you know what immunity from prosecution is, to be free? You know what that means? A. I have an idea. I just want the explanation definitely so I can explain it definitely. You explain it to me. I ain't sure of it. I have an idea of it but I want to know definitely.

Q. I will tell you definitely. Immunity is given by a District Attorney against his being prosecuted for a crime which he admits commiting. Is that plain?

Mr. Turkus: Just a minute. That is not plain at all.

6484

Mr. Talley: It is not for you: it is for the witness.

Mr. Turkus: I don't care about that. That is bad law. It is an improper question. It is incorrect law.

The Court: Let the question be finished.

Mr. Turkus: It was finished. Is that clear?

Mr. Talley: The question is finished.

6485

The Court: There was a little confusion in pronouns. The way your question is phrased, it would keep the District Attorney from being prosecuted. You better re-frame it.

Mr. Talley: This witness knows so well what immunity is that it is carrying coals to Newcastle to explain it. He knows better than you and I—

The Witness: That certainly ain't true.

The Court: Is it the fact, that you

6486

have been given immunity from being prosecuted for the Rosen murder as the finger man by being permitted to testify before the Grand Jury without signing a waiver of immunity? Did you so understand?

The Witness: I understand now.

The Court: You understand now?

The Witness: I understand that now. Ask me straight and I will tell you. Ask me what immunity means. Tell me what it is. I will tell you. I am here to tell the truth and I am telling it.

The Court: Please—

Q. Don't you think I speak plain English? A. You are pretty tricky about your questions.

Q. Is that so? A. Speak to me plain, will you, please?

Q. Am I not speaking to you plain? A. A whole lot of tricking is right behind you. I am straight. I am telling you the truth.

Q. When did you become straight? A. After I spoke to the Judge.

Q. And not before? A. I was not. I am telling the truth now. I probably lied before. 6488

Q. You were a crook, a strong-arm man, and a murderer, before you spoke to the District Attorney? A. No murderer. I was a strong-arm man; I was a slugger; and that's about all, and a cutter.

Q. That is about all? A. After I spoke to the Judge I told him I am going to tell the truth, and I am telling the truth. You are the one—

Q. You put your finger on Max Rubin, though, didn't you, before you spoke to the District Attorney? A. I did, and so did I put my finger on Rosen, and if Mendy knew him, why the hell did he take me over there to show me who he is? Why didn't he go himself if he knew? I wish the hell I had never gone over there, damn it. He knew him, didn't he? 6489

Mr. Climenko: If your Honor pleases—

The Witness: Why the hell did Lepke tell me to point him out, God damn him? Didn't he know him?

Mr. Climenko: If your Honor pleases—

The Court: This must stop.

The Witness: He knew him so well,

6490 why did he want to implicate me? If he knew him, he made sure I'd be implicated, and you know that, don't you? You look me straight in the eyes and tell me if he didn't know that. If that man you claim knew that man, then why did Lepke tell me to go and point him out to Mendy, if Mendy knew him? Why?

The Court: Please sit back in your chair and stop talking.

6491 The Witness: Answer me that question.

Mr. Climenko: If your Honor please, by reason of the apparent uncontrolled—

The Witness: I wish he never done it. I wouldn't be here now.

Mr. Climenko: I repeat my application, if I may—

The Witness: And you know it.

The Court: Keep quiet.

Mr. Climenko: By reason of the fact that it is apparently impossible to control

6492 this witness through the admonition of the Court, and on behalf of the defendant Buchalter, I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: The Court takes this view, that the witness was twitted. No objection was made to the twitting by counsel for any of the defendants. That was the time to object. That is what provoked this. It was a reaction which might have been foreseen. It must not happen again, Mr. Witness. You behave yourself in the future and just answer questions.

The Witness: I will try, the best of my ability.

The Court: If you sit back in your chair and relax, instead of leaning forward and feeling resentful, this is less likely to occur.

The Witness: He is trying to trick me into something.

The Court: Just forget that. The incident is closed. Motion denied.

Mr. Climenko: Exception. May I state 6494
for the record, without desiring in any way to engage in any controversy as to what your Honor has said, that I have been paying quick earnest attention to the proceedings here, that I did not notice that the witness had been affected as your Honor said.

The Court: No post-mortems. Don't take this on the record at all. Now, please sit down. The cross-examination will be resumed. The Court has ruled and you have taken an exception. 6495

Mr. Climenko: Yes.

The Court: There will be no speech making.

Mr. Climenko: I have no desire to make any speeches. I take my exception.

Q. Berger, you refused to testify before the Grand Jury unless you were given immunity, isn't that so? A. That is not so.

Q. You were given immunity, weren't you?

Mr. Turkus: He has already answered that.

6496

A. I did not refuse it.

Q. Was it offered to you? A. What was offered?

Q. The immunity that you say you did not refuse?

Mr. Turkus: I object. The question is confusing unless the offer is explained as emanating from what source.

The Court: It is beyond the proper
6497 scope of cross-examination. Once he admits that he has received immunity, that is all that pertains to this situation. Sustained.

Mr. Talley: Exception.

Q. You refused to testify in this court before this jury unless you were given immunity in this Rosen case, isn't that the fact?

The Court: Yes or no.

A. I don't know definitely what counsel means.
6498 I went before the Grand Jury.

The Court: Did you say that you would not testify before the Grand Jury unless without a waiver of immunity?

The Witness: I did not say that.

Mr. Talley: That is not my question, sir. The Court misapprehended.

The Court: I will put it in a different way.

Mr. Talley: My questions is—I will put it the same way. My question is this: Did you not refuse to give testimony in

this trial unless you were brought before the Grand Jury and given immunity?

The Court: Yes or no.

A. No.

Q. Isn't that the reason you were taken before the Grand Jury after this trial had commenced?

Mr. Turkus: I object to it. He has twice said no to that.

The Court: Sustained. He cannot tell why he was taken before the Grand Jury. 6500

Mr. Talley: I except, your Honor.

The Court: That is the District Attorney's business.

Q. You knew that if you were brought before the Grand Jury and gave testimony about this case, you could not be prosecuted for it, did you not? A. I did.

Q. And you were so advised by lawyers to that effect, were you not? A. I was.

Q. And was your lawyer, Mr. Gardiner, with you when you came over and testified before the Grand Jury? A. He was not. 6501

Q. Was it your suggestion or was it your lawyer's that you be taken before the Grand Jury?

Mr. Turkus: I object to that. That embraces an improper state of facts not testified by this or any other witness.

The Court: Sustained.

Mr. Talley: Exception.

6502 Q. Who was your lawyer at the time you testified before the Grand Jury? A. I had no lawyer in the Grand Jury only Mr. Klein.

Q. Mr. Klein, the Assistant District Attorney? A. That is right.

Q. He was your lawyer?

Mr. Turkus: I object to that. That is not the testimony.

6503 A. No, no.

Mr. Talley: That is what he said, he had no lawyer except Mr. Klein.

Mr. Turkus: He did not.

Q. What did you say?

Mr. Turkus: I can understand why the witness characterized your question.

Q. What did you say? A. Will you please ask me direct questions and don't be tricky about it?
6504 I am telling the truth. I said Mr. Klein asked me. I did not say he was my lawyer. He asked me before the Grand Jury. He questioned me.

The Court: He was the Assistant District Attorney who conducted that examination?

The Witness: He was the one who was speaking to me in front of the Grand Jury.

The Court: Counsel wants to know if he was your lawyer?

The Witness: Absolutely not. That is ridiculous.

6505

Q. Didn't you say that he was? A. Was he? I am asking you. I told you who my lawyer was, is today, Mr. Gardner.

Q. Yes. A. Klein questioned me in front of the Grand Jury. He ain't my lawyer.

Q. It was Mr. Gardiner who advised you about getting immunity?

Mr. Turkus: Objected to. That is repetitious. We have gone over that.

The Court: Sustained.

6506

Mr. Talley: Exception.

Q. It was Mr. Gardiner who arranged that you get immunity, wasn't it, before you testified?

Mr. Turkus: I object.

The Court: Sustained.

Mr. Talley: Exception.

Q. You charged this same Mr. Gardiner with stealing $600 of your money, didn't you, in a proceeding in the City Court in the City of New York, in the Borough of Manhattan?

6507

Mr. Turkus: I object to it. That is entirely incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception. It seems to me I have a right to show his freedom of accusing people of crime. I should not be stopped.

The Court: Don't argue after the ruling.

Mr. Talley: Exception.

6508 Q. You were sued for legal services by Mr. Gardiner's firm, were you not, in the City Court of the City of New York?

Mr. Turkus: I object to that.

The Witness: Let me answer that question, will you, please?

The Court: Sustained.

Mr. Talley: I except.

The Witness: I will tell you who told

6509 me to sue him.

The Court: No.

Q. And you made an affidavit that you did not owe him any money, didn't you?

The Court: Counselor, you are persistently violating the Court's rulings.

Mr. Talley: I am not, sir.

The Court: I beg your pardon, the Court rules that you are.

Mr. Talley: May I have an answer?

The Court: Please don't do it any more.

6510 Mr. Talley: Your Honor ruled that I can ask him about papers, affidavits.

The Court: Will you please proceed with the trial and come to order.

Mr. Talley: I am in order, sir.

The Court: Now you are shouting at the Court.

Mr. Talley: No, I am not shouting at the Court or anybody else. That is my natural voice.

The Court: You are distinctly rude and uncivil. The Court refuses to be goaded

to the extent that you are obviously trying to goad the Court at this or any other time. The Court will be patient to the utmost and take it on both cheeks from counsel. Now please proceed.

Mr. Talley: I won't proceed until I deny that I am trying to goad this Court into anything. I am cross-examining this witness and I am cross-examining him in accordance with the rules of evidence strictly and I have no time or disposition to be 6512
goading the Court. It is this jury that I am concerned with at this present moment.

The Court: I know the whole speech is for the jury. Proceed.

Mr. Talley. Exception.

The Court: It is disorderly and it would not occur if there were no jury.

Mr. Talley: My conduct would be precisely the same, sir, jury or no jury.

The Court: I think you are prejudicing your case before this jury.

Mr. Talley: We are taking the re- 6513
sponsibility for that, sir, and I take an exception to your Honor's statements.

Q. Now, Berger, we will get back to Friday, September 11th, yes, September 11th, 1936. You testified that you got in touch with the defendant Lepke at his office in 200 Fifth Avenue. Do you remember that? A. I do. I walked up there.

Q. What time did you get there? A. After five o'clock.

Q. After five o'clock? A. Some time after five.

6514 Q. In the evening? A. That is right.

Q. And how long did you talk with him there? A. With whom?

Q. Whom do you think?

Mr. Turkus: I object to the form of the question. It is not what he thinks.

The Court: Sustained.

Mr. Talley: Exception.

6515 Q. Whom did you say you met at 20 Fifth Avenue? A. Lepke.

Q. Don't you know that I am asking you how long you talked with him there?

Mr. Turkus: I object to it. There are four questions that could have been done in one.

The Court: Sustained.

Q. How long did you talk with Lepke on that Friday afternoon at five o'clock? A. At where? Up in 200 Fifth Avenue? Is that what you mean?

6516

Q. You know what I mean. I will repeat it—200 Fifth Avenue. A. About five to ten minutes.

Q. Then you came down in the street, didn't you, out of the building? A. That is right.

Q. And then you took the car? A. Cab.

Q. Cab, and you went where? A. Went down to Suffolk and Grand Streets.

Q. Did you stop at Suffolk and Grand Streets? A. We did.

Q. How long did you stay there? A. We got out of the car, out of the cab.

Q. When you got out of the cab, how long did you stay at Suffolk and Grand Street? A. He paid the cab and we started walking. Lepke paid the cab and we walked down.

Q. Where did you walk? A. Down Suffolk Street.

Q. Where did you stop? A. Off the corner of Broome Street he met some man. He told this man to go over to Clinton and Broome and tell Mendy, "I want to see him."

6518

Q. Then did you wait there? A. No, we walked up a bit, turned around on Broome Street. We walked up a bit and we seen Mendy was coming towards us.

Q. Was he coming towards you on Broome Street? A. That is right.

Q. What time would you say that was, 5:30? A. To the best of my recollection it would be.

The Court: You mean estimate?

The Witness: Best of my recollection it would be around—

6519

The Court: Did you time it?

The Witness: I absolutely did not time it.

The Court: We will take the noon recess now until 1:30. Everybody remain seated. Gentlemen of the jury, remember the Court's previous admonitions in all respects. First the witness will leave. Then the jury by the other door. Defendants are remanded.

The Court: Mr. Climenko is asking as to the closing hour. The question of court hours is always for the Court's discretion.

6520 It is not even reviewable. The Court may sit as early as eight o'clock in the morning and as late at night as it decrees, but the case has been dragging terribly. We are between the devil and the deep sea. I know that this is a case of unusual stress. We have to be mindful of the ability of counsel to try the case with a minimum of strain. We also have to be mindful of the necessity of the jury being able to absorb and digest
6521 the testimony, otherwise so much of it is simply lost, but we have got to do one of two things: we have either got to work on Saturdays and close at normal hour of four o'clock or we have got to come here at eight o'clock in the morning and work until four, or we have got to come here at ten o'clock in the morning and work until six. Now my own notion is the best plan is to proceed with normal court hours, ten until four. Everybody is pretty tired by that time and the jury's mind is tired too.
6522 That enables the jury to get its daily exercise, not be fatigued, enables counsel to confer with clients before they are taken over to Manhattan, and enables the defendants to get their meal hour in accordance with the time which the Federal authorities prefer. Unless there is objection to this upon the religious grounds, the Court will go along with that idea. Ten to four and a session of ten to four on Saturdays. That is also advisable for this reason: For the jury to be for two days alone means boredom and a temptation to talk about the case in violation of

the Court's instructions. There is a danger about that. I don't think it should occur. Keep the jury busy six days a week and one day of idleness is just about as much at this time as a patient jury can stand. Think it over.

(Whereupon a recess is taken to 1:30 P. M.)

6524

AFTERNOON SESSION—TRIAL RESUMED

PAUL BERGER, a witness in behalf of The People, resumed the stand and testified further as follows:

Cross-examination by Mr. Talley (continued):

Q. We were speaking about Friday night, September 11th, 1936, after you say you met Mendy Weiss, the defendant Weiss, at Suffolk and Grand Street. A. What is that? 6525

Q. After you met Weiss, as you said, at Suffolk and Grand. A. I didn't say Suffolk and Grand, if you please.

Q. Where did you say you met him? A. On Broome Street.

Q. What other street? A. Off Suffolk Street.

Q. Then you went to eat, didn't you? A. After Lepke told me to point him out to him.

Mr. Barshay: I move to strike that out as not responsive.

The Court: Objection sustained.

6526 *Paul Berger—For People—Cross*

Mr. Barshay: Will your Honor again admonish this witness to answer questions yes or no, if the answer calls for that?

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: We take an exception on behalf of the defendant Weiss.

The Court: It should not be required to explain a ruling. I think it is a fair
6527 answer to the question, even though not yes or no. We will let it go at that, because it fairly takes in the time that counsel wants.

Mr. Talley: I except.

Q. What restaurant did you go to? A. On Broome Street and Clinton.

Q. Do you know the name of it? A. I do not.

Q. Was it Seltz's? A. I am not sure.

Q. Was it Bloom's? A. Absolutely not Bloom's; that is the candy store around the corner, a hangout for them. It was a restaurant.

6528 Q. Do you know Seltz's Restaurant? A. I am not sure that is the name, but that was a restaurant.

Q. I am asking you do you know the restaurant you say you and Weiss went to? A. I am not sure if that is the name. There is a restaurant on the corner there.

Q. Do you know the name of it? A. I did not know at that time.

Q. How far is that corner on which the restaurant is from Clinton and Delancey Street? A. One block.

Q. And there is a police station at Clinton and Delancy, isn't there? A. That is right.

Q. At what time did you go into this restaurant? A. Around six o'clock I would say.

Q. How long did you stay in the restaurant? A. A couple of hours.

Q. That would bring it up to about 8 o'clock, would it? A. It would.

Q. At eight o'clock you left the restaurant in an automobile? A. No, sir, he went outside and there were some people there that he was talking to. They stood there for some time. 6530

Q. Did you get into the automobile? A. After he spoke to these people.

Q. How long did it take him to talk to these people? A. He spoke to them, not long.

Q. How long did it take him to speak? A. Some time wasted.

Q. What was wasted? A. Speaking to him, that is right.

Q. You were in a hurry to get to Rosen's place to point Rosen out, weren't you? A. I was not.

Q. This corner restaurant, which you say you don't know whether it is Seltz's or not, what kind of a restaurant is it? A. It was—you get regular meals in there. 6531

Q. It was not a cafeteria? A. No, sir, it was not a cafeteria.

Q. It was a regular restaurant, with tables and chairs, where people sit at tables? A. That is right.

Q. You are sure it was on the corner, are you? A. Positive.

Q. Which corner was it on? A. On Broome and Clinton, on the same side as the station house is.

6532 *Paul Berger—For People—Cross*

Q. On the same side? A. Yes, sir.

Q. On the same block? A. On the same block.

Q. That is the northeast corner, isn't it? A. If that is what it is, I am not definite on east or west.

Q. Do you know? A. No, sir, it is on the same side where the station house is, wherever that is, is it.

Q. Is it toward downtown or uptown? A. What do you mean, uptown or downtown?

6533 Q. I want to know whether it is the uptown corner or the downtown corner, you know which is uptown and downtown in that location? A. Uptown and downtown—that is on the East Side.

Q. You don't know whether it is the north or the south corner? A. I don't; I could tell you the corner it is on. The same side and the same block as the station house, on the corner of Broome and Clinton, whatever you want to call it, go ahead, that is the place.

Q. What time was it when you got into the automobile? A. It was getting dark then.

6534 Q. Would you say it was 8:30? A. Maybe more than that.

Q. Later than that? A. Maybe, I am not definite on time.

Q. Was it about 9? A. I would say it was getting dark.

Q. Would you say it was more than 8:30? Now I am asking you if, to your best recollection, that would be about 9 o'clock.

Mr. Turkus: I object; he has answered it was getting dark. May I point out that

the time was predicated on a surmise, anyway, from the start?

Mr. Talley: I object to that statement on the part of the District Attorney. I am trying to find out from this witness what time he did these things he says.

The Court: If I recall correctly, he testified under cross-examination before that he did not look at any watch or clock. This is purely an estimate.

Mr. Talley: I want his estimate. I am 6536
entitled to his estimate. I want to know what time he did the things he claims to have done.

The Court: Of course, that all goes to the accuracy of his memory.

Mr. Talley: I intend to have the jury pass on that. I have a right to probe into this matter and ask under cross-examination,—

The Court: Are you telling the Court?

Mr. Talley: No, I am asserting my rights as I view the law on the subject. 6537
It is my duty and obligation.

The Court: There are ways of doing these things.

Mr. Talley: Yes, they are very curious, some of the ways.

The Court: I notice that. I am learning all the time. Proceed.

Q. Are you sure it was getting dark? A. Yes, sir, positively.

Q. Wasn't it dark when you got into the automobile? A. I said it was getting dark.

Q. Wasn't it actually dark? A. Well, about. It was not actually dark when I got in there.

Q. Was it dark before you got out of there? A. That is right.

Q. When you drove away from this place? A. What place?

Q. When you drove away from this place were the lights lighted? A. What place?

Q. This restauarant. A. I am not positive.

Q. Were the lights lit in the restaurant before
6539 you left? A. I think they were.

The Court: Do you remember?
The Witness: I am not positive.

Q. What kind of a car did you get into? A. I am not definite; I know I got into an automobile.

Q. Do you know what make it was? A. I am not sure.

Q. Do you know what type of car it was? A. I will not say definitely that I remember.

Q. What is your best recollection? A. I don't
6540 definitely remember.

Q. Was it—you know what a limousine is? A. An open car?

Q. No, a limousine is a closed car. Was it a closed car type? A. Yes, sir.

Q. You owned a car yourself? A. Yes, sir.

Q. Is your car a closed type or open? A. A closed type.

Q. This car you drove away from this place. Clinton and Broome, whatever corner it was, that was a closed car? A. Yes, sir.

Q. You have been running automobiles for a good many years, haven't you? A. Yes, sir.

6541

Q. You cannot give us any better description of this car you got into when you left the restaurant? A. It was a closed type of car; I am not definite as to the make of the car.

Q. You drove then to Brooklyn? A. Yes.

Q. Where did you get out of that car? A. When I got out?

Q. Where did you stop, when you did stop, in Brooklyn? A. You mean the first stop?

Q. Yes. A. Saratoga and Livonia.

6542

Q. How long did you stay there? A. Who stood there?

Q. Were the lights lit when you got to Saratoga and Livonia? A. Absolutely.

Q. Then it was quite dark? A. Yes, sir, dark.

Q. All the way over to Brooklyn the lights were lit in the street and shops, weren't they? A. Yes, sir.

Q. What time did you get to Saratoga and Livonia? A. To the best of my recollection it would be around 9:30 o'clock.

6543

Q. Then, when did you get out of the car? A. I didn't; Mendy got out of the car.

Q. Did he come back to the car? A. He went into a candy store, and when he came out of the candy store he went in the car.

Q. You are not referring to Rosen's? A. No, sir, the corner of Livonia and Saratoga candy store.

Q. How long was he there? A. A couple of minutes.

Q. Then he came back and got into the car? A. Yes, sir.

Q. You drove from that place to where? A. To Livonia—

Mr. Turkus: (Interrupting) I object. That is not the testimony, that he drove.

Q. Who did drive the car? A. Mendy, I told you, I didn't drive the car.

Q I am not asking you,—I am asking you if Mendy did not drive the car. A. Mendy Weiss did drive the car.

Q. Where did you go from there? A. To Livonia and Sackman Street.

6545 Q. What time was it when you got there? A. To the best of my recollection it would be between 9:30 and 10 o'clock; only a few minutes from Livonia and Saratoga to Livonia and Sackman.

Q. When you got there did you both get out of the car? A. We did not. Mendy got out. I saw him talk to Capone, and Capone came back with Mendy and said, "Hello" to me.

Q. Then did he get in the car? A. Yes, sir.

Q. Then he drove some place else? A. Yes, sir, me and Mendy drove away.

6546 Q. Where did you go? A. To some corner on Sutter Avenue.

Q. Did you both get out of the car? A. That is right.

Q. What time was it when you got out of the car around Sutter Avenue? A. It would be around 10 o'clock, I would say. I am not definite about the minutes. I don't remember to the minute. I was not watching time.

Q. The lights were lighted in the shops around Sutter Avenue? A. Definitely, yes.

Q. It is a busy place there? A. I would not say very busy.

Q. There were penty of people around there on a summer night? A. Yes.

Q. What did you do when you got out of the car? A. Mendy says, "Come on, I will show you where the candy store is, and see if you can see Joe Rosen there."

Q. Then you told us you saw Joe Rosen and pointed him out to Mendy? A. I walked to the opposite side of the candy store and he said, "That is the candy store. See if you can see him." As it happens, Joe Rosen walked out 6548
and he happened to fix the papers on the stand and the jars in the window. I said, "That is him."

Q. What time was that? A. As I said before, how long does it take from here to the candy store—a minute or two minutes.

Q. Was it between 9:30 and 10? A. Around 10 o'clock.

Q. After you pointed out Rosen and said, "That is him," what did you do then? A. Then he says to me, "Go back to the car."

Q. After you left Sutter, or wherever you had 6549
stopped, where did you go? A. You mean after I pointed him out to Mendy and Mendy came back to the car?

Q. Yes. A. Downtown.

Q. Whereabouts? A. Dropped me off at Broome and Clinton.

Q. He let you off at Broome and Clinton? A. Yes, sir.

Q. Is that the last you saw of him that night? A. That is right.

Q. Then you went to Manhattan, the Borough of Manhattan? A. That is in the Borough of Manhattan, Broome and Clinton, isn't it?

6550

Q. You went uptown, didn't you? A. That is right.

Q. Now, at what time was it when you got to Broome and Clinton where you say he let you off? A. Around—To the best of my recollection it would be around eleven o'clock.

Q. Where did you go from there? A. I went to pick my own car up.

Q. Where had you left it? A. I think I left it at 12th Street and Broadway, parked there.

6551

Q. Now, the next thing you heard about Rosen you say was when you read in the Monday morning News that he had been shot? A. That is right.

Q. You knew he was the man you had pointed out? A. Yes, sir.

Q. You did not leave town, did you? A. I did not.

Q. And nobody told you to leave town? A. No, sir.

Q. But you became busy and tried to get Max Rubin out of town? A. I did not.

6552

Q. Nobody at any time told you to get out of town, did they? A. No, sir.

Q. Broadway and 12th Street, you say, you parked your car that night? A. I presume so.

Q. That afternoon? A. That morning, not that afternoon.

Q. You left it there until 11 or 12 o'clock that night? A. Around that time.

Q. Where was your place of business then, in September of 1936? A. I think it was in 714 Broadway.

Q. What street is that? A. Off—I think it was near Washington Place.

Q. How far was your place of business from

12th Street and Broadway, where you say you parked your car? A. About four or five blocks.

Q. Had you ever parked it there, at Broadway and 12th Street, before that day? A. Sure, I think I did.

Q. Why didn't you park it in front of your business? A. The reason for that was I did not want the car to get banged up. Sometimes there was no room to park in front of my place of business.

Q. Wasn't there danger of it being banged up 6554
at Broadway and 12th Street? A. That is a parking lot.

Q. Were you in the parking lot? A. I think I was.

Q. You think you were? A. There is a parking lot right on 12th Street off Broadway; that is where the union used to be there at one time.

Q. On this day did you park your car in the parking lot? A. I think I did.

Q. At Broadway and 12th Street? A. I think I did.

Q. You think you did? A. I parked there 6555
many times.

Q. What is your best recollection of this particular day, the 11th of September, 1936?

Mr. Turkus: I object to that as repetitious.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. Have you any recollection now that you did park your car in the parking space at 12th Street and Broadway on this day, September 11th? A. I think I did.

6556

Mr. Talley: I move to strike out the answer as not responsive.

The Court: Motion denied.

Mr. Talley: Exception.

The Witness: I happen to know the man that owns that lot. The Union used to be over there; park there many times.

Mr. Cuff: May we have this outburst stricken out?

The Court: The supplemental answer

6557 is stricken out.

Q. Did you go home directly from this place where you parked your car at 12th Street and Broadway? A. I did.

Q. What time did you get home? A. I cannot definitely say; probably it was after 12.

Q. Do you remember if your wife was home? A. Positively.

Q. Now, when was it you pointed Rubin out to Schlermer? A. It was around the month of September.

Q. September of 1936? A. No.

6558

Mr. Turkus: I object.

Q. What year in the month of September? A. I think it was 1937.

Q. Just about a year after you had pointed Rosen out? A. Yes, sir.

Q. When was it you pointed Rubin out to Seymour Magoon? A. You mean when Mendy told me to point him out to Seymour Magoon?

Mr. Talley: I move to strike out the question he asked and that the witness be directed to answer my question.

The Court: Motion denied.

Mr. Talley: Exception.

The Court: I think the witness wants to be enlightened so he can answer you correctly.

Mr. Talley: There is nothing difficult about his answering me correctly when I ask him when he pointed out a man whose life he thought was to be taken.

The Court: You have had the last word. That settles it. But the Court's 6560
ruling stands.

Mr. Talley: Exception.

Q. When did you point out Max Rubin to Seymour Magoon? A. Around eight or nine months after that.

Q. Eight or nine months after September of 1937, when you pointed him out to Schlermer? A. That is correct.

Q. You made the plans on both of these occasions for pointing out Rubin to both of these men? 6561

Mr. Turkus: I object. That is not his testimony.

Mr. Talley: I have a right to ask questions on cross-examination which are not in the testimony at all.

The Witness: I made plans at the direction of Mendy.

Mr. Talley: I move to strike out the latter part.

The Court: Motion denied.

Mr. Talley: Exception.

6562 Q. You told us that in the case of Magoon you saw Rubin standing on the other side of the street and you pointed Rubin out to him. Do you remember that? A. That is correct.

Q. Will you tell us again what you told Magoon? A. That Rubin was on the other side of the street.

Q. You stand up and tell us what you did. A. I went over to Magoon, I spotted him 15 or 20 feet away from me, when I saw him on the other
6563 side of the street. I walked over to him and I said, "On the other side, the fellow with the stiff neck, standing with another man."

Q. Then you walked past him? A. Who?

Q. Magoon. A. That is right.

Q. You told him so out of the corner of your mouth, just as you are indicating? A. Yes, sir.

Q. You did not want anybody to see you were speaking to Magoon? A. That is right, to a certain extent, yes.

Q. When you were arranging to point Rubin out to Schlermer, you arranged that you and
6564 Rubin were to have a meal in the Childs Restaurant? A. That is right.

Q. That was your suggestion, wasn't it, about taking him to Childs Restaurant? That was, nobody suggested that you do that on that particular night, did they? A. No, sir.

Q. That was on your own? A. On my own.

Q. Then you went and you sat with him for about one hour in Childs Restaurant? A. I did.

Q. You had arranged that while you were eating with this man, that Schlermer was to be in the restaurant? A. That is right.

Q. You arranged with him that he would know

it was Rubin because you were going to sit at a table eating with Rubin? A. That is right.

Q. How long did you sit with Rubin in Childs Restaurant? A. I would say about an hour.

Q. You saw Schlermer there? A. Positively.

Q. Did you leave Schlermer behind you when you came out? A. When I walked out with Rubin?

Q. Schlermer was still there? A. That is right.

Q. Then after you got Rubin out of the restaurant, where did you go? A. I left. 6566

Q. You left him there? A. Left him where?

Q. At the restaurant where you had been dining, outside of it. A. I left Rubin?

Q. Yes, did you? A. I did.

Q. When you did that, you knew, you told us, that Rubin was to be killed? A. I did.

Q. Yet you did not hesitate to sit down and eat with that man in Childs Restaurant that night, did you?

Mr. Turkus: I object. 6567

The Court: Objection sustained.

Mr. Talley: Exception.

Q. And was it after you had pointed him out in the manner you described to Schlermer that you borrowed $200 from him? A. I did.

Q. And you never paid him back, did you? A. No, sir, I gave that money to Mendy, that money Mendy got.

Q. Not up to this day? A. That money Mendy got.

Q. You have been receiving $150 a week from

6568 the business you conducted at 599 Broadway since June of this year, haven't you? A. I did.

Q. That is $600 a month? A. Yes, sir.

Q. Have you paid Rubin back that $200 since June, 1941?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

6569 Q. Why didn't you pay him back that money you got since June, 1941, since you have been in the Hotel Bossert? A. Pay Rubin back money?

Q. Why didn't you pay back Rubin? A. He did not as me. Maybe I would not pay him if he did ask me. That is the truth. Maybe I would not. What more do you want to know, anything? Have you anything to show that he gave me $200? Maybe I would give it to him back and maybe I would not.

The Court: No more of that.

6570

Q. Yes, you said that several times. Berger, you would not hesitate to lie to save yourself from prison, would you?

Mr. Turkus: I object to the form of the question.

The Court: Objection overruled.

A. What is the question?

Q. (Question repeated by reporter.) A. No.

Q. Of course, you would not hesitate to lie to save yourself from the electric chair, would you?

Mr. Turkus: I object to the form of the question. It may not have been made clear to the witness.

The Court: Objection overruled.

A. Maybe I would.

Q. What is your answer? A. I said maybe I would.

Q. Maybe you would or would not? A. Common sense—anybody would probably lie to save themselves from trouble. 6572

Q. That includes you? A. Certainly.

Q. When you pointed Rubin out to Magoon, you knew he was being guarded by policemen? A. I did.

Q. Did it occur to you that if Rubin were shot at, the policemen who were guarding him might also be shot? A. Probably.

Mr. Talley: I have no further questions.

Mr. Rosenthal: My motion is directed along the same line I previously made about the other witness, and as has been outlined in my original motion for a severance. Now I move for the withdrawal of a juror and the declaration of a mistrial, and a severance, on behalf of Capone, on the ground the evidence is prejudicial to his rights. 6573

The Court: Motion denied.

Mr. Rosenthal: Exception.

Redirect examination by Mr. Turkus:

Q. Weiss's lawyer asked you if you would

6574 lie to save your skin and you answered, in substance,— Now, I am asking you did you lie in this case? A. Absolutely not.

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

The Witness: (repeating) Absolutely not.

6575 Q. Weiss's lawyer brought out something about Bloom's candy store. Do you remember? A. Yes, sir.

Q. Did you tell him that that was a hang-out? A. Yes, sir, the whole mob used to come there.

Q. Tell me who they were—

Mr. Barshay: I move to strike the last answer out on behalf of the defendant Buchalter as not binding on him.

Mr. Talley: May I also make that motion with respect to the defendant Weiss. And, with regard to Bloom's candy store,

6576 I was trying to ascertain from the witness whether he had gone into Bloom's or to Seltz's. There is nothing on direct or on cross about this being a hang-out for anybody. I also object on the ground it is not proper redirect examination.

The Court: You mean the restaurant at Broome and Clinton?

The Turkus: Judge Talley inquired of the witness. This was a candy store.

The Court: What address?

Mr. Turkus: I don't know the address. Your Honor may ask the witness. This

is something he elicited on cross-examination and I want to inquire about.

Mr. Cuff: It was as to the identity of the restaurant he went in.

By the Court:

Q. What is the address? A. On Clinton Street, right next to the station house.

Q. Is it on the same block as the restaurant? A. Certainly. 6578

The Court: Just what is before the Court now? Did Judge Talley move to strike it out?

Mr. Talley: Yes, I do.

The Court: Motion denied.

Mr. Tailey: Exception.

Q. Tell me who used to hang out in Bloom's candy store?

Mr. Barshay: I object to that as not binding upon the defendant Buchalter. 6579

Mr. Talley: I object on the ground it is incompetent, immaterial and irrelevant, and not proper redirect examination.

The Court: He can be asked only what persons he saw hanging out there from time to time.

Mr. Turkus: That is it.

Mr. Cuff: And we have an objection to that..

The Court: Objection overruled.

Mr. Cuff: Exception.

A. Mendy—Farvel.

6580 Q. Do you mean Farvel Cohen? A. Yes, sir. Charlie the Bug.

Q. That is Charlie the Bug, Charlie Workman, known as Charlie the Bug? A. Yes, sir. Toots—

Q. Was Toots Feinstein? A. Yes, sir. Al Tannenbaum. Red Levine.

Q. Do you remember any more? A. Farvel, Specht.

Q. Do you know his right name or other alias? A. Spick.

6581 Q. Was that big or little Farvel? A. Big Farvel. His name is Siegel.

Q. Do you remember any others? A. A fellow named Big Mannie; we used to call him Culky Mannie.

Mr. Barshay: I move to strike it out as not binding on the defendant Buchalter, in no way involving him.

The Court: Motion denied.

Mr. Barshay: Exception. I move for the withdrawal of a juror and the declaration of a mistrial.

6582 The Court: Motion denied. Gentlemen of the jury, the Court will charge you at the proper time as to the application to persons to whom a specific point of the evidence applies or may be considered as applying. The reason the Court cannot charge at this time is that the Court rules, up to date, only on what has been connected up to date. It does not know what yet may be connected with other defendants and those who have been directly involved on specific points of evidence. I trust you are of sufficient intelligence to

follow all this evidence in all its ramifications and can properly apply it in accordance with the Court's instructions at the proper time.

By Mr. Turkus:

Q. When Lepke's lawyer questioned you about eating with Mendy Weiss in a restaurant before going over on your mission with Mendy, you said that Farvel ate there with both of you, do you remember? A. Yes, sir. 6584

Q. By Farvel, do you mean Farvel Cohen? A. Yes, sir, Farvel Cohen.

Q. Weiss' lawyer brought out about a concern known as the Berger Clothing Company? A. Yes, sir.

Q. You told him that the real president was Mendy? A. Yes, sir.

Q. Was Mendy Weiss the real president of the Berger Clothing Company? A. That is right.

Mr. Cuff: I object to that as calling for a conclusion and improper. He cannot say that. 6585

The Court: He cannot say that. That is a conclusion, but he can state who he understood to be the real boss.

Mr. Cuff: I object to that, too.

The Court: Objection overruled. He has given the impression, from cross-examination, that he was only a paper officer.

Mr. Cuff: May I take an exception to your Honor's statement and suggestion.

6586 *Paul Berger—For People—Redirect*

Q. Further, in response to Weiss' lawyer's question, you said that on paper you were a partner, do you recall that? A. Yes, sir, on paper.

Q. Did you have knowledge about who was actually getting the money from the Berger Clothing Company?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

6587 The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you know who was actually getting the money?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. That's right, Mendy.

By the Court:

6588 Q. Did you see him get it? A. I gave it to him, plenty of times.

By Mr Turkus:

Q. Lepke's lawyer asked you about making a visit to a law office at 51 Chambers Street, Manhattan, and you responded, didn't you, that you went there by instructions of Mendy Weiss? A. That is correct.

Q. In substance, you were asked by counsel for Lepke, "Did you tell it to any lawyer in that building, or any building in this universe,

that Weinstein was the one who told Danny Fields to leave town, did you? A. Can you tell me the name of the lawyer?", and the Court pressed you for a yes or no answer? A. That is right.

Q. By whose instructions did you go up to see that lawyer? A. By Mendy's.

Mr. Talley: I object.
The Court: Objection overruled.
Mr. Talley: Exception. 6590

Q. Did you tell that particular lawyer that Weinstein was the one who told Danny Fields to leave town, did you tell that to the lawyer? A. That is right; they were the instructions of Mendy that Danny Fields was up there, too. He told me to tell one thing with another that was not so. That is what we done.

Q. You mean when you were up there Danny Fields was also up there? A. Yes, sir; I did not want to go there but Mendy forced me to tell him about everything that was going on in the union office, tell about the bonus he got from Hillman for $25,000 for Lepke after the strike. 6591

Mr. Barshay: I move to strike that out.

The Court: That is not re onsive, the latter part. Strike it out.

Mr. Barshay: I ask that the jury be instructed to disregard it.

The Court: So instructed.

Mr. Barshay: Will your Honor admonish this witness so he will understand not to make speeches from this witness stand?

6592 *Paul Berger—For People—Redirect*

The Witness: That is what happened.

The Court: I have repeatedly admonished him. I admonish him again to just answer questions and no more.

Q. Answer these questions if they can be answered yes or no, answer them yes or no. At the time that you were up to the lawyer's office was Danny Fields there—this particular lawyer at 51 Chambers Street?

6593

Mr. Barshay: I object on the ground it has already been answered two or three times.

The Court: Objection sustained.

Q. Do you know of your own knowledge who sent Danny Fields to the lawyer's office?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant.

The Court: It calls for a yes or no answer. Objection overruled.

6594 Mr. Talley: Exception.

A. Yes, sir.

Q. Who was it? A. Mendy Weiss.

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

By the Court:

Q. Were you there? A. I was. I know what was told, too.

6595

Q. You heard it? A. I was there. Whatever I was to say was what Danny had to say. That was done for the purpose to scare off—to tell him to come across with the money—that is what it was done for.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Hadn't you better move to strike out the answer?

6596

The Court: Counsel hesitates— The Court, on its own motion, strikes out the latter part of the answer as not responsive, and instructs the jury to disregard it. The motion is denied for a mistrial.

Mr. Barshay: Exception.

Q. Were you asked this question by counsel for Lepke and did you make the following answer, at page 1844:

"Q. Did you ask Mendy to drive you to where your car was? A. I did.

6597

"Q. He refused? A. He had to see somebody."

Mr. Cuff: I object to that as already part of the record.

The Court: Objection overruled. I have allowed both sides to do it within reason. The Court is really fair, notwithstanding what you say.

Q. Did you, in substance, make those answers in reply to questions I just read to you? A. What do you mean?

6598 Q. I mean by that, did Mendy Weiss tell you when you asked him to take you to where your car was parked, after you had come back to the East Side, did he refuse, saying he had to see somebody? A. That is correct.

Q. Did he tell you who that somebody was? A. No, sir.

Q. One of the lawyers, I don't remember which one it was, asked you whether or not $2,000. was received by you from Weinstein.

6599 Were you asked that by one of the lawyers on cross-examination? A. Yes, sir.

Q. Where did that $2,000. go to?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant; not proper redirect.

The Court: This element of the examination was the subject of caution by the Court at the time. Strictly speaking, the Court was compelled to go into considerable latitude in indulging counsel for the

6600 defense in that line of questioning. But you will recall that the answers of the witness were that he pleaded his constitutional privilege, because those matters were included in an indictment now pending against him in New York County. So that does not permit of this question. The objection is sustained.

Mr. Barshay: I move to strike out the testimony of this witness with respect to Buchalter from the time he last saw the defendant Buchalter, as he claims, in June of 1937, on the ground that there is no

connection between that, directly or indirectly, and it is not, therefore, binding on the defendant Buchalter.

The Court: I do not want to repeat each time I deny that kind of a motion the reason why it is denied, purely as a matter of procedure at this time, but the jury will be properly instructed in the course of the trial at the proper time. The motion is denied.

Mr. Barshay: Exception. 6602

Recross examination by Mr. Talley:

Q. This Bloom's candy store which you spoke about, how many times were you in there? A. Plenty of times.

Q. Plenty? A. Yes, sir, that is correct.

Q. You were one of those who hung out there with others you described? A. Yes, sir.

Q. This was within the block, right next door to the police station? A. Yes, sir.

Q. You have seen a good many policemen from the police station in Bloom's candy store? 6603
A. In uniform; I don't know plainclothesmen.

Q. You say that on occasions policemen in uniform were in the candy store? A. Yes, sir, when I went in.

Q. You saw them there frequently? A. Now and then.

Q. What do you mean by "now and then"? A. Well, I did not always see policemen in uniform there all the time when I walked in. Sure, I saw policemen in there in uniform, police.

Q. You knew some of the detectives from the Clinton Street station, didn't you? A. I did.

6604

Q. You never saw a plainclothesman in Bloom's candy store? A. I probably did, once in a while.

By the Court:

Q. Did they hang out there, or just make purchases and go out? A. They did not hang out. They probably came in and bought cigarettes.

Q. I mean, they were not members of the

6605 crowd? A. No, absolutely not.

Mr. Talley: I object to your Honor's questions as leading and suggestive to this witness.

The Court: Strike out the word "members".

Q. I mean, they did not associate with the crowd? A. Not as I know of.

Q. Did you ever see them do that? A. No.

By Mr. Talley:

6606

Q. What do you mean by your answer, "No", that you did not see them associate with the others? A. Yes, sir.

Q. Could you get anything to eat in this candy store, sandwiches? A. Yes, sir.

Q. Did they have a soda fountain? A. Yes, sir.

Q. Did they serve coffee? A. Yes, sir.

Q. Did you ever see any plainclothesmen or uniformed policemen eating sandwiches at the fountain or taking coffee? A. Yes, sir.

Q. When you said uniformed men, you meant

to exclude plainclothesmen? A. I did not; I maybe knew one or two of them.

Q. Your testimony is you frequently saw in this candy store that has been referred to as Bloom's, which is next to the Clinton Street police station, you frequently saw there both uniformed policemen and plainclothesmen? A. The ones I knew. I did not know all the plainclothesmen in the house, though.

Q. Did you see policemen in uniform in the candy store? A. Yes. 6608

Q. Did you see plainclothesmen, whom you knew to be policemen, in the candy store? A. I did.

ALBERT TANNENBAUM, residing in Brooklyn, New York, called as a witness in behalf of The People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus: 6609

Q. How old are you? A. 35.

Q. Where were you born? A. Nanticoke, Pennsylvania.

Q. Will you raise your voice so the last juror can hear you? Are you married? A. Yes, sir.

Q. Have you a child? A. Yes, sir.

Q. How old is your child? A. Five years.

Q. When you were a young boy did your parents move from Pennsylvania to New York City? A. Yes, sir.

Q. Do you know whether they took up resi-

dence on the East Side of Manhattan? A. Yes, sir.

Q. Do you know on what street? A. On Orchard Street.

Q. Did they, when you were young, move to Brooklyn? A. Yes, sir.

Q. In what section of Brooklyn? A. The Brownsville section.

Q. Do you know what street in Brownsville they took up their residence? A. Yes, sir.

6611 Powell Street.

Q. Did you go to the public school system in Brooklyn? A. Yes, sir.

Q. What public school did you go to? A. Public School 150 and Public School No. 84.

Q. How far did you go in Public School No. 150? A. I think it was to 6-A.

Q. Did you complete your public school education in Public School No. 84? A. Yes, sir.

Q. Did you graduate from public school? A. I did.

Q. From public school did you go to high school? A. Yes, sir.

6612

Q. What high school did you attend? A. The Bushwick High School.

Q. How long did you attend the Bushwick High School? A. About two or two and a half years.

Q. After that did you get your first job? A. Yes, sir.

Q. Do you remember how old you were when you got your first job? A. I was about 16.

Q. Do you remember with whom you got your first position? A. Yes, sir.

Q. Who employed you? A. The National Cloak and Suit Company.

Q. What kind of a company was that? By that I mean what business were they engaged in? A. A mail order house.

Q. What kind of a job did you get in this mail order house? A. Stock boy.

Q. How long did you work as a stock boy for the National Cloak and suit company? A. About a year.

Q. At that time did your father own and operate a hotel up-State, at Rock Hill, New York? A. Yes, sir. 6614

Q. From Decoration Day to Labor Day, where did you work? A. At my father's place.

Q. By your father's place do you mean that hotel at Rock Hill, New York? A. Yes, sir.

Q. Can you remember what your next job was? A. The next job I was a haberdashery salesman.

Q. Do you remember the name of your employer? A. Yes, sir.

Q. What was his name? A. Bernstein.

Q. Did he operate this haberdashery shop under some firm or trade name? A. He did. 6615

Q. Do you remember the trade name? A. Yes, sir, the College Shop.

Q. Where was the College Shop in which you were employed as a haberdashery salesman located? A. Broadway and 113th Street.

Q. In Manhattan? A. Yes, sir.

Q. How many years did you work at this College Shop in the Borough of Manhattan, on Broadway? A. About three or four years.

The Court: Please speak loudly.

Mr. Turkus: It is important that everybody hears this testimony.

Q. After you worked in this haberdashery store for a period of time you told the jury, did you get another job? A. I did.

Q. Do you remember the name of that boss? A. Yes, sir.

Q. What was his name? A. Buzen.

Q. And the first name? A. "D."

Q. What business was Buzen in? A. Paper and twine business.

Q. Where was his place located? A. On Blake
6617 Avenue, East New York.

Q. By East New York, you mean the East New York section of Brooklyn? A. Yes, sir.

Q. What type of work did you do in this paper and twine business? A. I delivered orders and I took orders.

Q. Would a description of salesman and delivery man fit that job? A. Yes, sir.

Q. How many years did you work in the paper and twine business for Buzen? A. For about five years.

6618 The Court: Just keep your voice up so that the last juryman will hear you.

Q. After your father had owned Rock Hill, that is, the hotel in Rock Hill, did he thereafter own and operate a place known as Loch Sheldrake Country Club? A. Yes, sir.

Q. Where was the Loch Sheldrake Country Club which was owned and operated by your father located? A. Loch Sheldrake, New York.

Q. After you got through working in this paper and twine business, did you go to help your father during the summer season? A. I did.

6619

Q. Did that season extend from Decoration Day until Labor Day? A. Yes, sir.

Q. Now, was this Loch Sheldrake country club a large place? A. Yes, sir.

Q. What did it consist of? A. Consisted of a hotel, cabaret, bar, bowling alley, barber shop, soda fountain.

Q. Did that have a swimming pool? A. It had a lake.

Q. There was boating on the lake? A. Yes, sir, boating and bathing.

6620

Q. Was it a public casino and cabaret? A. Yes, sir.

Q. Did it have all those facilities which you have described to the jury? A. Yes, sir.

Q. Was it well patronized? A. Yes, sir.

Q. You say you worked from Decoration Day till Labor Day for your father at the Loch Sheldrake Country Club? A. Yes, sir.

Mr. Cuff: May we have the time?

6621

Q. How old were you then, do you remember? A. About twenty— Twenty-five or so.

Q. Now, coming back to the hotel which your father operated at Rock Hill, New York, did you meet a man at that hotel by the name of Shapiro? A. Yes, sir.

Q. What was Shapiro's first name? A. Jack Shapiro.

Q. Did you know Jack Shapiro under any other name? A. Yes, sir, I did.

Q. What name? A. Charlie Gurrah.

Q. Did you become friendly with Charlie Gurrah Shapiro? A. I did.

6622 *Albert Tannenbaum—For People—Direct*

Mr. Barshay: I object to counsel for The People leading. May the witness testify himself?

The Court: That appears to be a question you ask the Court. Make your objection in proper form.

Mr. Barshay: I object to it as leading.

The Court: Sustained as leading.

Q. Did you see Charlie Gurrah Shapiro fre-
6623 quently at the Rock Hill Hotel your father owned and operated? A. Yes, sir.

Q. Did you talk with him? A. Yes, sir.

Q. And did he talk with you? A. Yes, sir.

Q. Can you remember what year it was that you first met Charlie Gurrah Shapiro? A. About 1925 or so.

Q. Now, when your father operated this Loch Sheldrake Country Club, did Shapiro patronize the facilities there? A. He did.

Q. Did you see him frequently? A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.

6624 Q. And did he talk to you? A. Yes, sir.

Q. Did you become friendly with him? A. Yes, sir.

Q. Now, through your acquaintance with Charlie Gurrah Shapiro, did you meet other people? A. I did.

Q. Where did you meet these other people? A. In the casino, my father's place.

Q. Were these other people patrons of the casino? A. Yes, sir.

Q. Were they there in company with Gurrah? A. Yes, sir.

Q. Who did you meet through the acquaint-

ance with Charlie Gurrah Shapiro in your father's casino at the Loch Sheldrake Country Club? A. I met Harry Greenberg, I met Lepke, I met Shimmy, Curley, Toots Feinstein, Farvel.

Q. When you say "Farvel," Farvel who? A. Farvel Cohen.

Q. When you say "Lepke," who do you mean? A. Louis Buchalter.

Q. And he is known also as Lepke? A. Yes, sir.

Q. Now, this man Greenberg, was he known 6626
by any other name? A. Yes, sir.

Q. What name? A. Green.

Q. Tootsie Feinstein, was that his real name? A. Sam Feinstein.

Q. The man whom you call Curley, what was his full name? A. Holtz.

Q. Hymie Holtz? A. Yes, sir.

Q. When you met those individuals whose names you have related to the jury, through Gurrah, did you talk together? A. Yes, sir.

Q. Did you speak to Lepke? A. Yes, sir.

Q. Did he speak to you? A. Yes, sir. 6627

Q. And the others whose names you mentioned, did they talk to you? A. Yes, sir.

Q. Did Lepke and the others patronize the Loch Sheldrake Country Club?

Mr. Barshay: I object unless we have the time set.

The Court: Set the time.

Q. When was that you first met Lepke? A. About 1930 or 1929.

Q. Are you referring to the time when you

6628 first met him at the Loch Sheldrake Country Club? A. Yes, sir.

Mr. Barshay: I move to strike out all the testimony with reference to a time prior thereto, as not binding on the defendant Buchalter.

The Court: Did I understand the date previously mentioned was 1925?

Mr. Barshay: Yes, that is as to

6629 Shapiro.

The Court: Motion denied. It means nothing so far, but I do not know what it may lead to. That is why the motion is denied.

Mr. Barshay: Exception.

Q. When you saw Lepke at the Loch Sheldrake Country Club whom did you see with him? A. I saw Charlie Gurrah with him, Hymie Holtz, Farvel, Toots.

Q. By "Farvel," you mean Farvel Cohen? A. Yes, sir.

6630 Q. And "Toots," that is Feinstein? A. Yes, sir.

Q. And other people? A. Yes, sir.

Q. Do you remember the names of any others that you saw Lepke with? A. A few more, a fellow named "Lady Lucy."

Q. At the time you saw Lepke in company with those people, was he a patron at the Loch Sheldrake Country Club and some of its facilities? A. Yes, sir.

Q. Answer this yes or no—did you, after you

had made the acquaintance of Lepke, meet Harry Greenberg in Manhattan? A. Yes, sir.

Q. Where was it you had the meeting with Harry Greenberg? A. About 1931.

Q. Do you recall where it was or when it was that you met Greenberg in Manhattan?

Mr. Barshay: Objected to as immaterial and not binding on Buchalter.

The Court: Objection overruled.

Mr. Barshay: Exception. 6632

Q. Where? A. Around Broadway and 31st Street.

Q. Answer this yes or no: Did you have a talk with Greenberg? A. Yes, sir.

Q. After that talk with Greenberg did you go to work for any of the defendants in this case? A. Yes, sir.

Q. Which one? A. Lepke.

Q. What was your salary? A. $35 a week.

Q. Now, without stating the nature of your services, was your work performed at that time in the clothing district? A. In the ladies' garment district. 6633

Q. And without stating the nature of your work, did you receive general assignments from Lepke? A. Yes, sir.

Q. Now, did there come a time when you got a specific assignment from Lepke? A. Yes, sir.

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

6634

Q. Now, after you followed the specific assignment, did you meet Lepke?

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Was that by instruction? A. Yes, sir.

6635

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Whose instructions? A. Lepke's—whoever gave me authority—Lepke, Gurrah.

Mr. Talley: I object. That is incompetent and not binding on the defendant Weiss.

The Court: Objection overruled.

6636 Mr. Talley: Exception.

Q. Where did you see Lepke after you had performed the specific assignment given to you?

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Wherever his office was located.

Q. Where was the office located from time to time? A. There was one office Broadway and 8th Street, another office at 19th Street between

5th and 6th Avenue, another office at 22nd Street and 5th Avenue, and an office at 200 5th Avenue.

Q. Where did you spend your time when you were in between assignments? A. Up in the office.

Q. Whose office? A. Lepke and Gurrah.

Q. Did you meet other employees of Lepke at the office when you were there in between assignments?

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant. 6638

The Court: Objection overruled.

Mr. Barshay: Exception.

Mr. Rosenthal: My objection is that it calls for a conclusion.

The Court: That ground is good. Objection sustained.

Q. In between assignments, when you were at the office of Lepke, who did you see there with Lepke? A. I saw a whole lot of fellows who worked for him.

6639

Q. Who did you see there? Can you name some of them? A. I saw Charlie Workman, Toots.

Q. Is that Charlie the Bug? A. Yes, sir.

Q. Toots? A. Yes. Farvel Cohen, Mendy Weiss, Shimmy.

Q. Do you know Shimmy's right name? A. Yes, sir.

Q. What is it? A. Sidney Salles.

Mr. Barshay: Will you please fix the time?

Q. Who else did you see there? A. I used to see Danny Fields there and Max Rubin; and Bartfield.

Q. What was Bartfield's right name? A. I knew him as Bartfield.

Q. Did you know his first name, what he was called? A. Izzy. I saw Murray Weinstein there, Sam Katz.

Q. Was there a man named Feinberg you saw there? A. Feinberg? A. Yes, Yegel Feinberg.

6641 Q. A man named Cravatz? A. Yes, sir, Louis Cravatz.

Q. Did he use any other name? A. Louis Kay.

Q. Do you know Danny Fields' right name? A. Yes.

Q. What was it? A. Irving Friedman.

Q. Did you know a man named Oscar Frankel? A. Yes, sir.

Q. Did you ever see him there? A. Yes, sir.

Q. Did your salary go up while you were in the employ of Lepke? A. Yes, sir.

6642 Q. Did it go up when you got specific assignments? A. Yes, sir.

Q. How much did it go after your first raise? A. I got $50 a week.

Q. Did you go up from $50? A. Yes, sir.

Q. Up to what? A. $75.

Q. Did your pay continue to go up? A. Yes, sir.

Q. What was the next raise after $75? A. $100.

Q. From $100 did it go higher? A. Yes, sir.

Q. To what? A. $125.

Q. Now, was this your weekly salary? A. Yes, sir.

Q. In August, 1936, did you get a specific assignment, without stating what that assignment was? A. Yes, sir.

Mr. Barshay: Objected to as incompetent, immaterial and irrelevant to this issue.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. From whom did you get that specific assignment? 6644

Mr. Barshay: I make the same objection.

The Witness: I got it from Lepke through Mendy Weiss.

Mr. Barshay: I move to strike out the answer as hearsay.

Mr. Talley: I make the same motion.

The Court: Strike out the answer.

Q. While you worked for Lepke, from whom did you receive orders? A. I received orders from Lepke, Charlie Gurrah, and in later years I took orders from Mendy Weiss. 6645

Mr. Barshay: I move to strike that out as not binding on the defendant Buchalter.

Mr. Talley: I make the same motion, on the ground it is not binding on Weiss.

The Court: He has not stated whether or not those orders were in the course of his employment, the usual employment procedure.

Mr. Turkus: I mean to do that step by step.

6646 *Albert Tannenbaum—For People—Direct*

The Court: The question in the form it is asked is objectionable and sustained.

Q. Did you, in the course of your employment by Lepke, receive orders from Lepke? A. Yes.

Q. Did you, in the course of your employment by Lepke, receive instructions to obey others? A. Yes, sir.

Q. Who were the others that Lepke told you to obey? A. Charlie Gurrah, and in later years,

6647 Mendy Weiss.

Q. Was it in the regular course of your employment that you received those orders?

Mr. Talley: I object to that as a conclusion.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. In the regular course of your employment did you receive those orders? A. Yes, sir.

Q. In August of 1936, through the course of your regular employment, did you receive an order

6648 with reference to a specified assignment, without telling us what that assignment was? A. Yes, sir.

Mr. Barshay: I object to that as not binding on Buchalter. He has not said that he did receive it from Buchalter.

The Court: We have not gotten to that yet.

Mr. Barshay: Exception.

Q. From whom did you receive the assignment? A. From Mendy Weiss.

Mr. Barshay: I move to strike out the answer as not binding on the defendant Buchalter.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Now, in the regular course of your employment did you have instructions from your employer to report back to him? A. Yes, sir.

Q. Did you, after you had performed specific assignments, report back to your employer? A. 6650
Yes, sir.

Q. To whom did you make your report? A. Whoever gave me the assignment.

Q. Referring to the assignment given in August of 1936, without stating what the assignment was, tell the Court and jury, did you perform your assignment? A. I did.

Mr. Cuff: Objected to as a conclusion.

The Court: Objection overruled.

Mr. Cuff: Exception.

6651

Q. Merely to fix the time, did you hear of the death of one Joseph Rosen? A. Yes, sir.

Q. On the Friday before his death, where were you?

Mr. Barshay: I object to counsel leading.

The Court: Objection overruled.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I was in New York.

6652 *Albert Tannenbaum—For People—Direct*

Q. At that time had you performed the specific assignment you had been given? A. I did.

Mr. Barshay: Objected to as immaterial.

Mr. Barshay: Exception.

Q. When you were in New York did you go some place? A. Yes.

Q. Where did you go? A. I went up to the
6653 office to report.

Q. To report to whom? A. Lepke.

Q. What office were you up to to report to Lepke, where was it? A. That was at No. 200 Fifth Avenue.

Q. Do you know the name of that office? A. Yes, sir.

Q. What was the name of it? A. Raleigh Manufacturing Company.

Q. When you went up to that office to make your report, as you stated to the jury, whom did you see in the office? A. I saw different people
6654 that worked there. Then I walked into one of the rooms and I saw Lepke.

Q. Speak loudly. Were you seated somewhere in the office? A. Yes, sir, I walked in.

Mr. Barshay: I object to that as leading.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. (The Court) Did you sit down or stand up? A. I sat down.

Q. When you were seated there did you see any of the defendants in the office? A. Yes, sir.

6655

Q. Which defendant did you see? A. Lepke.

Q. When you saw Lepke did you see who he was with? A. Yes, sir.

Q. Who was he with? A. Max.

Q. Max who? A. Max Rubin.

Q. What were Lepke and Max Rubin doing when you saw them there together? A. They were talking.

Q. Now, at the time Lepke was talking to Max Rubin did you observe his face, his demeanor?

6656

Mr. Barshay: I object.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. What did you observe in connection with his face? A. I saw he was—

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

The Witness: (continuing) His face was flushed; he looked angry. 6657

Mr. Cuff: I move to strike that out.

The Court: Motion denied.

Mr. Cuff: Exception.

Q. When you saw Lepke's face flushed, what was Lepke doing? A. He was talking to Max; he was yelling at Max.

Q. By "Max," who do you mean? A. Max Rubin.

Q. Was that a usual occurrence, from your observation, to see Lepke with his face flushed? A. No, sir.

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Mr. Barshay: I move to strike out the answer.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Now, when Lepke's face was flushed, what did you hear him say to Rubin, in substance, the best you can recall? A. He was yelling at Max and he was saying—I heard him tell Max he gave Rosen some money to go away and he
6659 comes back; stays away a little while and then he comes back and sneaks back into a candy store. Lepke was hollering. He said, "There is one son-of-a-bitch who will never go down to talk to Dewey about me." And Max was trying to quiet him down.

Q. Repeat that and talk loudly. I did not hear you. A. He was yelling at Max and telling Max he could not set up with Rosen. He gave him some money to go away and he stayed away a short time and he came back, and he sneaked back into the candy store after he told him to
6660 go away. He said he has got to take it up with him, and there is one son-of-a-bitch that will never go downtown and talk to Dewey about him.

Q. That is what Lepke said to Rubin? A. Yes.

Q. Did Rubin answer Lepke? A. Yes, sir.

Q. What was the tone of Rubin's voice? A. Max was quiet, he was trying to calm him down; he was saying, "Take it easy, take it easy," he said, "I will handle Joe Rosen," he said, "he is all right."

Q. When Rubin said to Lepke, "Take it easy, I will handle Rosen," what did Lepke say to

Rubin—you said when Rubin spoke in a lower tone of voice, saying to Lepke, "Take it easy, I will handle Rosen," when Rubin said that to Lepke, what did Lepke say? A. He said no. He told him that before and that is the end of it.

Q. When he said, "You told me that before," did he use any curse words? A. Yes, sir.

Q. Tell us what he said? A. He told him, he said "that he is fed up with that son-of-a-bitch and he will take care of him. That is one fellow that will never go downtown." 6662

Q. And after Lepke said that did Rubin make some response to Lepke? A. Yes, sir.

Q. What did he say? A. Max said, "All right, give me a chance, let me run up to Murray and see, maybe Murray could straighten the whole thing out."

Q. When he said "Murray", did he say the last name? A. Murray Weinstein.

Q. When Rubin asked for an opportunity to see Murray Weinstein, what did Lepke say? A. Lepke said, "Go ahead if you want to see him, go ahead, but make sure to come back and let me know what happened." 6663

Q. You had seen Murray Weinstein before? A. Yes, sir.

Q. Had you seen him before that with any of these defendants? A. Yes, sir.

Q. Which one? A. I saw him with Lepke.

Q. Was he a union official, Murray Weinstein? A. Yes, sir.

Q. Had you ever seen Weinstein at any office in which Lepke was present? A. I saw him in all the offices.

Q. Did Rubin leave Lepke after that talk? A. Yes, sir.

6664

Q. Were you waiting for him to finish? A. Yes, sir.

Q. After he finished what did you do? A. I went to Lepke and told him what I did.

Q. Without saying what you told Lepke, did you make a report of the specific assignment you had been given in August of 1936? A. Yes, sir.

Mr. Climenko: I object to that as having no bearing on this matter.

6665

The Court: Objection overruled.

Mr. Climenko: Exception.

Q. Were you there in the office pursuant to your instructions to make a report? A. Yes, sir.

Q. In the course of your employment by Lepke, to make a report? A. Yes, sir.

Q. After you made your report to Lepke, did Lepke say anything to you? A. Yes, sir.

Q. What did he say? A. He said, "All right, go ahead."

Q. Some days later were you in the office of Lepke again? A. Yes, sir.

6666

Q. And is that the place that you were frequenting in between specific assignments? A. Yes, sir.

Q. While you were hanging around the office, did you see any one of these defendants come in? A. Yes, sir.

Q. Which one? A. Mendy Weiss.

Q. Mendy Weiss? A. Yes, sir.

Q. Was Lepke there at the time? A. Yes, sir.

Q. What did you see Weiss do?

Mr. Barshay: I object to it unless we have the time set.

The Court: Try to fix the time.

Mr. Turkus: This is several days after Friday, September 11, 1936, so the time is fixed.

Mr. Talley: Let the witness fix it.

Mr. Turkus: It is fixed by the witness.

Mr. Talley: Let the witness fix it.

Mr. Turkus: Your Honor, may I continue my direct examination?

Mr. Talley: I object to the question unless the time is fixed, not by the District 6668
Attorney but by the witness.

The Court: Just what do you mean by "several"?

The Witness: What is that?

The Court: About how many days?

The Witness: Three or four days.

Q. The question pending without answer, I believe, is the one that when Weiss came in was Lepke in the premises, in the office? A. Yes, sir.

Q. What did you see Weiss do? A. Weiss walked in and he said to Lepke, "O.K.?" 6669

Q. He said to Lepke, "O.K.?", in the form of a question? A. Yes, sir.

Q. When Weiss said, "O.K.?", in the form of a question to Lepke, did Lepke answer him? A. Yes, sir.

Q. What did he say? A. He said, "Was everything all right?"

Q. What did Weiss say? A. Weiss said, "Everything is O.K., but that son-of-a-bitch, Harry Strauss," he said, "I gave him strict orders not to do any shooting, and", he says, "after I shot Rosen," he says, "he was laying

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on the floor, Harry Strauss started shooting him."

Mr. Barshay: I move to strike out the answer as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception.

6671 Q. After Weiss told Lepke that Harry Strauss stuck his nose in, as you have related to the jury, and shot Rosen after he was on the floor, did Lepke say anything? A. Yes, sir.

Q. What did he say to Weiss? A. He said, "All right, what's the difference as long as everyone is clean and you got away all right?"

Q. "As long as everyone is clean and you get away all right"? A. Yes, sir.

Q. After Lepke said that, did he do anything with relation to Mendy Weiss, do you know? A. Yes, sir.

Q. What did he do? A. He patted him on the back. He said, "All right, go ahead." He said,

6672 "I will see you later."

Q. After Weiss had that talk with Lepke and he got the pat on the back, where were you? A. I was sitting there.

Q. Did Weiss speak to you? A. Yes, sir.

Q. What did he say to you? A. He walked over to me and he said, "What are you doing?" I said, "Nothing." He said, "Come on, let's go out and get some coffee."

Q. "Let's go out and get some coffee"? A. Yes, sir.

Q. Did you go out with Mendy Weiss to get coffee? A. Yes, sir.

Q. Where did you go with him? A. Walked into a restaurant on Fifth Avenue right off 23rd Street.

Q. Do you know the name of that restaurant on Fifth Avenue off 23rd Street that you and Weiss went to? A. Yes, sir.

Q. What was it? A. Child's.

Q. Did you and Mendy Weiss have coffee together in Child's restaurant? A. Yes, sir.

Q. While you were having your coffee did he talk to you? A. Yes, sir. 6674

Q. What did he say to you?

Mr. Barshay: I object to it, not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

A. He said to me, "When did you get back?" I told him, "I got back just a few days ago."

Q. When you said you had gotten back a few days ago, did he ask you a question about the specific assignment that you had up there? 6675

Mr. Barshay: I object to counsel leading.

The Court: Overruled.

Mr. Barshay: Exception.

A. Yes.

Q. Without telling us what the answer was, did you give him an answer? A. Yes, sir.

Q. And after you spoke about the specific assignment, did Weiss talk to you further? A. Yes, sir.

Q. What did he say to you?

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Mr. Barshay: I object to it, not binding on the defendant Buchalter.
The Court: Overruled.
Mr. Barshay: Exception.

A. He said, "Yes, I just got through with a piece of work myself."

Mr. Barshay: I move to strike out the answer as not binding on the defendant Buchalter.
6677
The Court: Denied.
Mr. Barshay: Exception.

Q. When Weiss said to you, "I just got through with a piece of work myself," did you answer him? A. Yes, sir.
Q. What did you say to him? A. I said, "Yes, I just heard you say it."

Mr. Barshay: Object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.
6678

Q. You were in the middle of an answer there. Will you complete your answer? A. I said, "Yes, I just heard you tell Louis about it."
Q. Was the name of Strauss mentioned by Weiss in that conversation?

Mr. Barshay: I object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.

A. Yes, sir.

Q. Did you ask Mendy any questions about Rosen in that talk? A. Yes, sir, I did.

Q. What did you say to him or ask him?

Mr. Barshay: I object to it. It is not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

A. I asked Mendy who Rosen was.

Q. What did he say? A. He says, well, he 6680
was some truck—

Mr. Barshay: Same objection.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Speak up. What did Mendy say when you asked him who Rosen was? A. Mendy told me this Rosen is some fellow used to be in the trucking business and that he was threatening to go down to Dewey and talk about Lep.

Mr. Barshay: Is that the answer com- 6681
plete now?

The Witness: Yes, sir.

Mr. Barshay: I move to strike out the answer.

The Court: Denied.

Mr. Barshay: Exception.

Q. Tannenbaum, heretofore, have you ever been convicted of a crime? A. No, sir.

Q. You did commit crimes, didn't you? A. Yes, sir.

Q. Did you engage in throwing stink bombs? A. I did.

Q. Sluggings? A. Yes, sir.

Q. Strike breakings? A. Yes, sir.

Q. And did you, together with others participate in the crime of murder? A. I did.

Q. Together with others, how many crimes of murder did you participate in? A. Six.

Q. Six? A. Yes, sir.

Q. In addition to the six murders in which you
6683 were a participant, did you, together with others, help dump the body of a dead man? A. Yes, sir.

Q. For disposition? A. Yes, sir.

Q. And concealment? A. Yes, sir.

Q. The six murders, who were the victims of the six murders? Name them. A. One was Ashkenaz, Yuran, Diamond—

Q. You mean Mersh Diamond?

The Court: What Diamond?
The Witness: Morris.

Q. Morris or Mersh Diamond? A. Plug Shu-
6684 man, Whitey Friedman, and Harry Greenberg.

Q. And the case in which you helped to dump the body into a lake after the murder, was that victim's name Solomon Goldstein? A. Yes, sir.

Q. In the Ashkenaz case, what part did you play in the murder? A. I did the shooting.

Q. You did the shooting? A. Yes, sir.

Q. That meant you were the trigger man in that one? A. Yes, sir.

Q. In the Yuran case, what part did you play in that murder? A. Drove the car.

Q. That made you the wheelman, is that right? A. Yes.

Q. In the Plug Shuman murder, what part did you play in that? A. Drove the car.

Q. That made you the wheelman? A. Yes, sir.

Q. In the Greenberg murder? A. I covered the get-away car.

Q. That is covering the get-away car of the man who actually fired the shot? A. Yes, sir.

Q. In the Whitey Friedman murder, what part did you play? A. I fingered him.

Q. And in the Mersh Diamond, what part did you play? A. I fingered him. 6686

Q. Tannenbaum, after District Attorney O'Dwyer came into office, you were arrested, were you not? A. Yes, sir.

Q. Do you remember when you were arrested? A. About the latter part of March.

Q. 1940? A. Yes, sir.

Q. Were you brought to the District Attorney's office for questioning? A. Yes, sir.

Q. Were you there questioned by two Assistant District Attorneys? A. Yes, sir.

Q. Was one of the assistants Mr. Heffernan? A. Yes, sir. 6687

Q. Was the other myself, Turkus? A. Yes, sir.

Q. When you were questioned by Assistant District Attorneys Heffernan and Turkus, did you raise your constitutional rights not to incriminate yourself?

Mr. Barshay: I object to counsel leading, sir.

The Court: Overruled.

Mr. Barshay: Exception.

A. Yes, sir.

Q. Did you answer questions? A. Just my name and address, then I refused to answer.

Q. To other questions, did you say you had constitutional rights and refused to answer? A. Yes, sir.

Q. Were you subsequently taken up-State? A. Yes, sir.

Q. Were you lodged in an institution up-State? A. Yes, sir.

Q. Who was the District Attorney of the
6689 county in which that institution was and in which you were lodged? A. Mr. Deckelman.

Q. When was it that you spoke to Mr. Deckelman in which the name of District Attorney O'Dwyer was mentioned? A. About the first or second Sunday in May.

Q. The first or second Sunday in May, 1940? A. Yes, sir.

Q. After you spoke to District Attorney Deckelman after the name of Judge O'Dwyer was mentioned, were you visited by Judge O'Dwyer? A. Yes, sir.

6690 Q. Did you have a talk with Judge O'Dwyer? A. I did.

Q. Thereafter, did Judge O'Dwyer come up with Assistant District Attorney Turkus and have a talk with you? A. Yes, sir.

Q. How many days after that was it before you went to a Grand Jury in Brooklyn, how many days after that talk with Judge O'Dwyer and Assistant District Attorney Turkus? A. Oh, about a week.

Q. From that institution up-State were you taken to Brooklyn? A. Yes, sir.

Q. Where were you put in Brooklyn? A. At a hotel.

Mr. Talley: What hotel?
Mr. Turkus: At a hotel.

Q. Do you know whether you were brought down by a court order? A. Yes.

Q. From that time on have you been in the custody of the New York City police authorities? A. Yes, sir. 6692

Q. Have you at various times in that custody of the New York City Police Department been confined in a hotel? A. Yes, sir.

Q. Have you been confined there with other men? A. Yes, sir.

Q. Who were the other men that you have been confined with from time to time? A. Sol Bernstein, Ike Sykoff, Abe Reles.

Q. In that hotel were there police officers? A. Yes, sir.

Q. Were they armed? A. Yes, sir.

Q. Have the hotel arrangements been one with a peep hole and shackles on the door? A. Yes, sir. 6693

Q. Do you know whether or not there have been mirror set-ups in the corridors? A. Yes, sir.

Q. And police officers armed? A. Yes, sir.

Q. Since you had the talk with Judge O'Dwyer have you testified for the People of the State of New York in the Plug Shuman murder? A. Yes, sir.

Q. Have you also testified for the People of

6694 the State of New Jersey against Charlie, the Bug? A. Yes, sir.

Q. And have you been before a Grand Jury in Southern California? A. Yes, sir.

Q. You have not testified before any Grand Jury in the Mersh Diamond murder, have you? A. Yes, I did.

Q. Had you in the Whitey Friedman matter? A. No, sir.

Q. How long were you on the payroll of the
6695 defendant?

Mr. Rosenthal: I object unless he specifies which defendant.

Mr. Turkus: The defendant who had him on the payroll.

The Court: Overruled. Buchalter, you mean?

Mr. Turkus: Yes, that is right.

A. About nine years.

Q. Were you on the payroll up to the time of your arrest? A. Yes, sir.

6696 Q. What was the top salary that you had gotten? Was it $125. a week? A. Yes, sir.

Q. During the course of your employment, was your salary at one time reduced? A. Yes, sir.

Q. What was it reduced to? A. At one time it was reduced to $80. a week.

Q. What was your salary at the time of your arrest? A. $100.

Q. $100. a week.

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: I move for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice.

The Court: Denied.

Mr. Barshay: Exception. Will your Honor give us a few minutes to get our notes together?

The Court: How long do you wish?

Mr. Barshay: Ten minutes. 6698

The Court: It is now half-past three.

Mr. Barshay: Until what time does your Honor desire to work?

The Court: You see, that is all up to the way the increased working schedule is arranged. I have tried to see if counsel could not be agreeable, although I have the power to fix it.

Mr. Rosenthal: Will your Honor give us a few minutes to see whether we all cannot agree along the line of what your Honor suggested? I am perfectly willing. 6699

The Court: Is there any one here who does not go to his office on Saturday?

Mr. Barshay: We will work Saturday.

The Court: That is very much better. We will work then only until four o'clock daily and that will give you a chance to read your minutes, the stenographers to prepare the daily copy, to prepare for the next day, the jury to get its exercise, and also the jury to work on Saturday so as not to be bored by two days' inactivity, so it works out very nicely all along.

6700 Mr. Talley; Can we work until one o'clock on Saturday, straight session?

The Court: No.

Mr. Turkus: I ask your Honor to open this examination for a few questions I omitted.

The Court: There is no sense in coming back for fifteen minutes. I was willing to give counsel until tomorrow morning to start the cross.

6701 Mr. Turkus: Let me finish my direct.

The Court: Finish your direct.

By Mr. Turkus:

Q. Do you know the third defendant in this case, Capone? A. Yes, sir.

Q. When did you first meet Capone? A. About 1938.

Mr. Rosenthal: Will you keep your voice up?

6702 The Witness: About 1938.

Mr. Rosenthal: You can talk loud enough, can't you?

Q. Where did you meet Capone? Try to imitate me.

Mr. Rosenthal: I object to it, if it is 1938, upon the ground that it is immaterial, incompetent, irrelevant to this issue.

The Court: I cannot tell, but if it im-

material, no harm done. See what it leads to. Overruled.

Mr. Rosenthal: I respectfully except.

(Pending question read.)

A. At Saratoga and Livonia Avenue.

Q. Saratoga and Livonia Avenue, that is Brownsville, isn't it? A. Yes, sir.

Q. Between the time when you met him at Saratoga and Livonia Avenue until the time of your arrest, how many times have you seen 6704 Capone?

Mr. Rosenthal: I object to it upon the ground it is immaterial, two years after the alleged killing in this case.

The Court: Overruled.

Mr. Rosenthal: I respectfully except.

A. It was a good many times.

Mr. Rosenthal: I do not hear you.

The Witness: I said a good many times. 6705

Q. Try to estimate the number of times. A. Maybe a hundred times.

Q. Maybe a hundred times, is that what you said? A. Yes, sir.

Q. With whom did you see Capone on these frequent times that you have seen him? Whom was he with?

Mr. Rosenthal: I object to it upon the same ground previously urged.

The Court: Overruled.

6706 Mr. Rosenthal: I respectfully except to the Court's ruling.

A. I used to see him with Harry Strauss, with Buggsy Goldstein, Abie Reles, Mendy Weiss, Farvel.

Q. And where did you see him on these occasions with these individuals whom you have named?

6707 Mr. Rosenthal: I make the same objection.

A. On the corner.

Q. Was that Harry Strauss one Pittsburg Phil? A. Yes, sir.

Q. Did you ever hear him called "Pep"? A. Yes, sir.

Q. "Big Harry"? A. Yes, sir.

Q. And Farvel, what was his last name? A. Cohen.

Q. Is that the Farvel Cohen you have been talking about in your earlier testimony? A. Yes.

6708 Q. And Buggsy Goldstein, was that Martin Buggsy Goldstein? A. Yes, sir.

Q. And Reles, was that Abie Reles? A. Yes, sir.

Q. Where did you say you saw Capone with these men on the various occasions?

Mr. Rosenthal: I object to it. It is repetitious. The very question itself is improper in form.

The Court: He just stated.

Mr. Turkus: I did not hear the answer.

The Court: He said it was Saratoga and Livonia Avenue.

Mr. Rosenthal: Mr. Turkus wants it repeated again. He said Saratoga and Livonia. Did you hear it?

Mr. Turkus: I hear you.

Mr. Rosenthal: The fourteen jurymen have heard it, too, Saratoga and Livonia.

Q. Was Saratoga and Livonia Avenue a hang-out in Brownsville? A. Yes, sir. 6710

Mr. Rosenthal: Isn't that repetitious, Judge? I object to the question on the ground that it is repetitious which is the word frequently used by the District Attorney towards defense counsel.

The Court: And also by the Court. It is repetitious.

Mr. Rosenthal: That is right.

The Court: That is Rose Gold's?

Mr. Rosenthal: Does your Honor sustain the objection? 6711

The Court: Yes, repetitious.

Mr. Turkus: Having been sustained on the ground of repetition, I am through with the witness.

Mr. Rosenthal: I move to strike out the entire testimony upon the ground it is based upon actions of this defendant two years subsequent to the alleged killing. It is immaterial. It is only for one purpose, to prejudice this jury.

The Court: Denied.

Mr. Rosenthal: I respectfully except.

6712 In line with my previous motions, I move for the withdrawal of a juror and the declaration of a mistrial upon the grounds which I urged at the time I moved to strike out.

The Court: The usual ruling. Denied.

Mr. Rosenthal: And the usual exception, sir.

The Court: Everybody kindly remain seated. Gentlemen of the jury, please

6713 don't discuss the case, let nobody talk to you about it, keep your minds open. We will resume at ten o'clock tomorrow morning, and I think that from now on the case will make more speed so far as the length of testimony of witnesses is concerned. Please do not discuss the case, let nobody talk to you about it, keep your minds open, and read nothing in the newspapers, and follow the other previous instructions.

Let the witness go.

The jury out the other door.

6714 The defendants are remanded.

(Thereupon adjournment was taken to November 13, 1941, at 10:00 A. M.)

Brooklyn, N. Y., November 13, 1941.

TRIAL RESUMED

The Court: One of counsel for the defense (Climenko) approached the bench and hands up a paper to the Court.

I say that because I have seen a similar notation on the record, in reviewing the testimony of Bernstein:

"(The District Attorney approached the bench and conferred privately)"—which casts suspicion on the Court, which was not justified. 6716

Mr. Climenko: Oh, no, your Honor. Then I withdraw it.

The Court: The Court now reads the paper and asks to have it marked for identification.

(Received and marked Defendants' Exhibit V for identification.)

The Court: I will tell counsel the Court refuses to do these things over the bench surreptitiously. If you have any motion to make, make it in open court. The jury will be excused while you make it. 6717

(The jury thereupon left the courtroom.)

The Court: Are all of the defendants represented by counsel?

Defense Counsel: Yes.

Mr. Climenko: If your Honor pleases,

6718 the defendant Buchalter now moves for the withdrawal of a juror and the declaration of a mistrial by reason of prejudice created by the manner of the conduct of the direct examination of the witness Tannenbaum, which direct examination was conducted in such a manner as to convey to the jury the belief that the defendant Buchalter directed that witness to commit other crimes, including murder.

6719 The Court: Do any of the other counsel wish to be heard?

Defense Counsel: We join in the motion.

Mr. Rosenthal: The motion I made has nothing to do with that particular phase. My motion was made and denied upon an entirely different ground, and that was the ground contained in my original motion for a severance, namely, that the permission of all this testimony against two defendants in reality, and not connected with the defendant Capone, was

6720 highly prejudicial to his interest and warranted the granting of the original motion for a severance on his behalf. That has been, your Honor, all my motions throughout in so far as concerns the witnesses who were unconnected with him and were permitted to testify.

The Court: Both motions are denied.

Mr. Rosenthal: Of course, the motion incorporates the application for the withdrawal of a juror on the ground that I mentioned.

The Court: Referring to the matter just spoken of by the Court, a matter which directly puts the Court in an entirely false position in the event of a conviction and in the event of a review of the record by the Court of Appeals, I found last night in my nightly work of reviewing the evidence in its many ramifications that in the minutes, at page 943, is the following:

6722

"By Mr. Rosenthal:

"Q. Did you accidentally meet Fat Cooperman?

"Mr. Turkus: Will you wait just a minute, sir?" Then, parenthetically: "Mr. Turkus appears before the bench and talks privately to the Judge, without the hearing of the jury.)" Then another parenthesis: "(Mr. Turkus resumes his place in the court-room.)" Then comes the question:

6723

"Q. Did you accidentally meet Fat Cooperman that night and take him home?"

Now, when I read that in the record I did not recognize it as the record of the trial, but in putting my thought to it it did come back to me that at one time when a question was asked and no answer had been made, and no objection had been made, there was an interruption by Mr. Turkus approaching the bench and handing up some sort—or attempting to show

6724 the Court some sort of a confidential police report concerning the murder or alleged murder of Fat Cooperman. The Court paid no attention to it whatever, and Mr. Turkus resumed his seat.

It also brought to mind that at various times during the ' al the Court, in perfectly good faith and in courtesy to counsel for the defense, has permitted counsel for the defense, and without any record being
6725 made in the minutes, to step over to the bench and present papers—some of them subpoenas—and also for various other reasons. The Court, feeling that its integrity could not under any circumstances be put in issue, innocently permitted these practices to go on. From now on, however, in view of this at page 943, the Court will allow no counsel to approach the bench at any time during the course of this trial for any purpose whatever, no matter how innocent it may be.

6726 There is just another matter: In reviewing and epitomizing the record for the purpose of the jury charge, there has come to the attention of the Court that the case has been beset by quarrels between counsel upon the asking of questions and upon the interposition of objections, quarrels which disturbed the orderly procedure of the court—quarrels which were heated and personal, and sometimes, in fact, many times, have caused the Court to sit by, unable to interrupt or restore order until the quarrels wore themselves out. These

are largely omitted from the record. Now, this results in the following situation: That remarks thereupon made by the Court which had relation to the disorder are made by the record to appear to have application to the question and answer or objection which preceded it. There is no other way I can see in which the Appellate Court could otherwise interpret that record.

For instance, as a concrete example, at 6728
page 1024:

"Q. You left from the Coffee Pot, didn't you? A. Wait a minute, wait a minute. I got him now, sir. I got him very clear now, very clear, very clear now."

The colloquy which naturally followed that outburst from the witness was extensive. I know why the stenographer could not take it down, because more than one talked at once. But every word of the quarrel between counsel is omitted. However, we do find this: 6729

"The Court: When the Court speaks, everybody stop. The Court is not trying to appear superior but that is the Court's position it has to maintain."

That remark by the Court is made to appear to have reference to the "Q. & A." just repeated, which would put the Court in a ridiculous position, because the Court could not sensibly make such a remark in connection with "Q. & A." At the same time, I know perfectly well how an Appellate Court will look at that unless

it is explained. I am instructing the stenographers from now on to put on the record every word of every quarrel and colloquy between counsel. If, because it jumbles too much, or because more than one talk at the same time, it cannot be accurately transcribed, the stenographer will record, "Disorder between counsel."

Mr. Climenko: May I note an exception to the part of your Honor's comment
6731 regarding any motive on my part to be surreptitious, and also, on behalf of the defendant Buchalter, I except to your Honor's comment in so far as—

The Court: Now that the jury is not here, let me have the slip and I will read it. The motion should have been made from where you stand.

Mr. Climenko: Here is the motion; it was made word for word (handing paper to the Court).

The Court: (reading) "The defendant
6732 Buchalter moves for the withdrawal of a juror and the declaration of a mistrial by reason of prejudice created by the manner of the conduct of the direct examination of the witness Tannenbaum, which direct examination was conducted in such a manner as to convey to the jury the belief that the defendant Buchalter directed that witness to commit other crimes, including murder."

The Court cannot entertain a motion in a case other than on the other side of the rail.

6733

Mr. Climenko: May the record now show that the intention of counsel was only to preserve time; that counsel, with respect to the motion, could not make it before the jury without doing that which the motion attempts to avoid the harm of.

The Court: All you had to do was to ask to have the jury excused. I am only concerned about the record, because this Court has done its utmost from the very start of the trial to handle a tough situation with fairness to both sides. It will stand by the court record as to everything and anything it says, but it wants no false record.

6734

Bring in the jury.

(The jury thereupon returned to the courtroom.)

ALBERT TANNENBAUM, a witness on behalf of The People, resumed the stand and testified further as follows:

6735

Cross-examination by Mr. Barshay:

Q. Will you please answer the questions the same way you answered Mr. Turkus, without volunteering anything? A. Yes, sir.

Q. Is that all right? A. Yes, sir.

Q. You admitted participation in six murders, didn't you? A. Yes, sir.

Q. How many were in the County of Kings? Just give me the number. A. Three.

Q. Have you been arraigned on any indictment with respect to any of those three murders? A. Have I been indicted, you mean?

Q. To your knowledge, have you? A. Not as I know of.

Q. Speak up. A. I don't know.

Q. Have you ever been arraigned in any court to plead to an indictment? A. In Kings County?

Q. Yes, for murder. A. No, sir.

Q. To your knowledge, have you been indicted
6737 in California? A. I don't know.

Q. Have you ever been before any Court to plead to any indictment in California? A. No, sir.

Q. How many murders did you participate in in Sullivan County? A. One.

Q. Did you gain immunity? A. Two, rather.

Q. Did you gain immunity for the one? A. I don't know.

Q. You testified before the Grand Jury which sat up in Sullivan County, and you did not sign a waiver of immunity, isn't that so? A. Yes, sir.

6738

Q. That is the Ashkenaz case? A. Yes, sir.

Q. So you gained immunity in that case, didn't you? A. I don't know.

Q. Well, we will leave that for the Court. You are indicted in Sullivan County for the Yuran case? A. I don't know if I am indicted.

Q. You were never called to trial in that? A. No, sir.

Q. Since your arrest? A. No, sir.

Q. Have you been called for pleading in Sullivan County to any indictment? A. Yes, sir.

Q. Which one? A. The Ashkenaz case.

Q. That is the one you testified to before a Grand Jury? A. Yes, sir.

Q. That is the one where you entered the Grand Jury without signing any paper whatever? A. Yes, sir.

Q. Without signing any waiver of immunity? A. Yes, sir.

Q. Give me the number of sluggings you participated in over the period of years you said you did. A. Oh, I could not give you the exact number. 6740

Q. About. A. Maybe fifty.

Q. How many? A. Maybe fifty.

Q. Have you ever been in jail for any of them? A. No, sir.

Q. How many stench bombs did you throw? A. I don't know.

Q. About how many? A. I could not give you the exact amount.

Q. Well, approximately. A. Maybe one hundred.

Q. Have you been in jail for any of that? A. No, sir. 6741

Q. How many times did you throw acid and destroy merchandise? A. I never did.

Q. When you went out to California did Abie Reles go with you? A. Yes, sir.

Q. Was it in an aeroplane? A. Yes, sir.

Q. You stayed there in California? A. Yes, sir.

Q. Then you came back? A. Yes, sir.

Q. Did you make another trip to California? A. I did.

Q. While this jury was being chosen did you make a trip to California? A. I don't know that.

6742 *Albert Tannenbaum—For People—Cross*

Q. When is the last time you flew to California? A. About six weeks ago.

Q. You were not an eye-witness to the Dutch Schultz killing? A. No, sir.

Q. You did not participate in that? A. I did not.

Q. But you were a witness in the trial of that case? A. Yes, sir.

Q. You met the defendant Buchalter, I believe you said, sometime in 1930? A. Around that time.

6743

Q. Or was it 1931? A. About 1930 or 1931.

Q. May I refresh your recollection if I can. In the Grand Jury in California you testified in August of 1940, do you remember? A. Yes, sir.

Q. Do you know the exact date? A. No, sir.

Q. Did you there testify—perhaps I may refresh your recollection—and say you knew the defendant Buchalter for nine years? A. I don't remember, I might have.

Q. That would approximately make the meeting between you and Buchalter in 1931?

6744

Mr. Turkus: I object to the form of the question. That is arithmetic.

The Court: Objection overruled.

Q. Isn't that so? A. About 1931.

Q. Going back to your days in Brownsville, how many years did you live there before 1931? A. About 20 years.

Q. In 1925, approximately six years before you met the defendant Buchalter, were you a stool pigeon for Detective Barney Rabinsky? A. I was not.

Q. Didn't you turn Abie Reles in to Barney

Rabinsky when Abie Reles shot Marcelle Ryan in the breast? A. I did not.

Q. Isn't that what made you and Abie Reles enemies? A. No, sir.

Mr. Turkus: I object. There is no such testimony.

Mr. Barshay: I am asking him if there is.

The Court: Objection overruled.

6746

Q. What? A. No, sir.

Q. At that time in Brownsville or East New York were you a member of a gang? A. No, sir.

Q. Did you know Meyer Shapiro? A. I did.

Q. Was he a gangster? A. Yes, sir.

Q. Did you know his brother Irving Shapiro? A. Yes.

Q. Was he a gangster? A. Yes, sir.

Q. Did you know his brother Willie Shapiro? A. Yes.

Q. Was he a gangster? A. Yes, sir.

Q. Didn't you associate with them? A. I knew them but I did not associate with them. 6747

Q. You lived with Meyer Shapiro, didn't you? A. I did not.

Q. Did you ever live at 92nd Street, Manhattan? A. I did not.

Q. With Meyer Shapiro? A. I did not.

Q. Did you live there with Louis Kauffman? A. No, sir.

Q. Known as Kaufy? A. I don't remember.

Q. You don't know Kaufy? A. I never lived with him.

Q. Did you know Kaufy? A. If I see him maybe I would.

6748 *Albert Tannenbaum—For People—Cross*

Q. You pointed a gun at him on Vermont Street? A. I did not.

Q. Were you ever in the 92nd Street apartment with Kauffman and Meyer Shapiro, and Meyer Shapiro's girl? A. Not as I know.

Q. Didn't you live there the night Meyer Shapiro was shot? A. No, sir.

Mr. Barshay: We will come to that.

Mr. Turkus: I ask that that be stricken
6749 out, Mr. Barshay's remark.

The Court: I did not hear it.

Mr. Barshay: I withdraw it. Maybe I will come to it later.

Q. You knew Alex Eisenberg? A. Yes, sir.

Q. Do you know what business he was in? A. Yes, sir.

Q. On the 30th of November 1931, at 290 Junius Street, in the City of New York, or rather, in the County of Kings, City of New York, did you point a gun at this Eisenberg and take from him at the point of this gun one
6750 diamond ring and one diamond pin? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. You had a gun there? A. Yes, sir.

Q. This was you own act, wasn't it? A. Yes, sir.

Q. The gun was loaded? A. Yes, sir.

Q. You intended to kill him if he resisted? A. I did not.

Q. Did you point the gun at him? A. I did.

Q. Did he make resistance? A. No, sir.

Q. That was your friend, wasn't he? A. My friend?

Q. Yes, Eisenberg. A. No, sir.

Q. Did you know him before the hold-up? A. Yes, sir.

Q. After the hold-up did you threaten to kill him if he prosecuted you? A. I did not.

Q. He did not prosecute you? A. I did not see him after that.

Q. Did you send word to him? A. No, sir.

Q. But he did not prosecute you?

Mr. Turkus: Objected to as already answered. 6752

The Court: Objection overruled.

Q. Did he? A. What is that?

Q. He did not prosecute you? A. No, sir.

Q. Although he did sign an affidavit in the Magistrate's Court charging you with what you just admitted? A. I don't know what he signed.

Q. It was read to you? A. I don't remember whether it was read to me; I don't remember what was read to me.

Q. You knew the Shapiros at that time? A. Yes, sir.

Q. Where did you see the Shapiros in those days? A. Around Brownsville section, East New York. 6753

Q. On what particular corner? A. Sutter Avenue.

Q. Sutter and where? A. Around Hinsdale Street.

Q. Is it not a fact that the Shapiro gang was a rival to Reles's gang at that time? A. They were enemies.

Q. The Shapiro brothers were pimps—

Mr. Turkus: I object. We are trying

6754

this indictment; we are not trying rival gangs in Brownsville now.

By the Court:

Q. Did you associate with the Shapiros? A. I knew them, but I did not associate with them.

The Court: Objection sustained.

Mr. Barshay: Exception. I have a right, I think, to show he did associate with the Shapiros despite—

6755

The Court: If you can show association, then you have a right to show they were pimps.

Mr. Barshay: I am trying to, but if I am shut off, I cannot.

The Court: I am not shutting you off, I am telling you what you can do. I have ruled on a specific question.

By Mr. Barshay:

6756

Q. Do you recall the night Meyer Shapiro was shot? A. Yes, sir.

Q. The first time, do you recall that? A. No, sir.

Q. Did you know the Earbender? A. No, sir.

Q. Did you know a man named Leo Goldstein? A. No, sir.

By the Court:

Q. Were the Shapiros in your crowd? A. No, sir, they were in Brownsville.

6757

Q. Then Reles's crowd was in Brownsville, too? A. Yes, sir.

Q. There was a feud between the two? A. As far as I know.

By Mr. Barshay:

Q. You were a friend of a man named Leo Goldstein, knowr as the Earbender? A. I was not.

Q. Speak up. A. I was not.

6758

Q. Do you know who I am speaking about when I speak of Leo Goldstein, also known as the Earbender?

Mr. Turkus: I object. It does not make any difference. He says he was not his friend; there was no association.

The Court: Objection overruled.

Q. Do you know who I as speaking about when I refer to Leo Goldstein, also known as the Earbender? A. I don't know who you mean.

6759

Q. You never heard the name? A. No, sir.

Q. You never saw him at the apartment in 92nd Street? A. No, sir.

Q. Were you ever there? A. No, sir.

Q. Did you ever visit Meyer Shapiro there? A. No, sir.

Q. You said you did recall when Meyer Shapiro was shot. A. When he was killed?

Q. I said shot. A. No, sir.

Q. Maybe he was killed, I don't know. Do you recall that night? A. Which night?

Q. The night Meyer Shapiro was shot and killed. A. Yes, sir.

6760

By the Court:

Q. Were you there? A. No, sir.

By Mr. Barshay:

Q. Did you know Icchy Belsky? A. No, sir.

Q. Did you know Fat Kupperman then? A. No, sir.

Q. Did you know Dave Needleman then? A.

6761 No, sir.

Q. Didn't you drive those men whom I have just mentioned to the corner of Elton Street and Glenmore Avenue, in pursuance of a tip you got from Meyer Shapiro's brother? A. No, sir.

Q. Did you know at that time the Reles gang was responsible for the shooting of Meyer Shapiro? A. No, sir.

Mr. Turkus: I object. He just said he did not do something. That would be an implication that he did it, not matter how he answered it.

6762 The Court: It is hearsay. Objection sustained.

Mr. Barshay: Exception.

Q. Did you pull up in a car to that corner, Elton and Glenmore, and you, personally, puncture tires of an Oldsmobile standing at that corner? A. I did not.

Q. Did you see DeFeo there? A. I don't know him.

Q. Or Buggsy Goldstein? A. No, sir.

Q. While you were puncturing the tires, is it not a fact that men who were with you in the

car, whom I mentioned, Fat Kupperman, Icchy Belsky, and Dave Needleman, fired in the direction of that car, killing DeFeo? A. I did not know that at that time.

Q. Didn't you shoot—the crowd of men, not you personally—right then and there, Buggsy Goldstein, in the nose? A. I did not.

By the Court:

Q. Were you in the car? A. No, sir. 6764

Q. Did you know Buggsy? A. No, sir.

By Mr. Barshay:

Q. You did not know Buggsy? A. No, sir.

Q. You never knew Buggsy? A. I knew him from the name in the newspaper, but I never met him. I never saw him.

Q. I take it you never met Reles either? A. At that time I didn't know them.

Q. Did you know them later? A. Yes, sir.

Q. When did you know them? A. I met them in 1936. 6765

By the Court:

Q. Buggsy? A. Yes, sir.

Q. Part of his nose was already deformed, wasn't it? A. I don't know.

Q. He had a flat nose, didn't he? A. He had a funny nose.

By Mr. Barshay:

Q. The year I am speaking of, Tannenbaum, is 1932. A. I did not know them at that time.

6766 *Albert Tannenbaum—For People—Cross*

Q. You lived in Brownsville? A. I did.

Q. You associated with them? A. Yes, sir—associated with whom?

Q. With the Shapiros. A. Yes, sir, I knew them.

Q. You knew they were a rival gang of Reles'? A. I knew they were fighting, yes.

The Court: Mr. Barshay, may I interrupt you? This may take a little time to
6767 clarify the situation.

By the Court:

Q. Was there a feud on about the pinball racket? A. I don't know what they were feuding about.

Q. Was there a feud between the Shapiros and the Reles gang because the Reles gang muscled in on Brownsville under the pinball racket? A. I don't know.

Q. You don't know? A. No, sir.

6768 Q. Were you connected with the pinball racket? A. No, sir.

By Mr. Barshay:

Q. You knew of the reason for the feud between them? A. No, sir.

Q. Why, it was for the control and the protection of houses of prostitution in Brownsville? A. I did not know anything about it.

Q. You knew then that the Shapiros and the Reles mob were both pimps? A. No, sir.

Q. Didn't you know the girl over whom the feud started?

Mr. Turkus: I object. That is an obvious attempt to try to prejudice the jury on matters that this witness did not know anything about.

The Court: Objection overruled.

Mr. Barshay: I have an objection to Mr. Turkus's remarks.

Q. You knew the girl over whom this feud started? A. I did not.

Q. Do you know her now? A. No, sir. 6770

Q. Did you come to the conclusion at any time that the Reles gang was the more powerful one? A. I did not.

Q. (The Court) You knew that two of the Shapiros were wiped out? A. Yes, sir.

Mr. Barshay: Three, if your Honor please.

The Court: All three?

Mr. Barshay: All three, yes, sir.

By Mr. Barshay: 6771

Q. Did you and a man named Kennedy and his wife enter a bar and grill of Leo Goldstein, known as the Earbender, in Long Island City, and shoot him? A. I did not.

Q. You were at a meeting at the Lido Hotel on West 61st Street, uptown, at any time? A. The Lido?

Q. Yes. A. No, sir.

Q. What is the name of the hotel? A. You just said Lido.

Q. Is there any hotel you were up at a meeting? A. No, sir.

6772 Q. With the Shapiro brothers and Reles, when peace was attempted to be made? A. No, sir.

Q. Didn't you kill then, Mr. and Mrs. Kennedy in Long Island City, in a furnished room in Long Island City? A. I did not.

Q. You know whom I speak about? A. I knew George Kennedy.

Q. And you knew his wife? A. Yes, sir.

Q. They ran a cabaret, didn't they? A. I don't know if he ran a cabaret.

6773 Q. You know they were killed, don't you? A. Yes, sir.

Q. They were your friends, weren't they? A. I knew them, yes, sir.

Q. Did you know them at the time the Earbender was killed?

Mr. Turkus: I object. That does not go to the credibility of this witness; it is far afield from this indictment.

The Court: The defense is entitled to much latitude.

6774 Mr. Turkus: All right.

Q. Did you? A. What?

Q. Did you know them when the Earbender was killed? A. I don't know. When was the Earbender killed?

Q. Did you know that Kennedy, George and his wife, when they were arrested for the killing of the Earbender? A. I don't think so.

Q. Do you know that within a few weeks after that they were both killed in their furnished room in Long Island City? A. I know they were killed.

Q. You had nothing to do with the killing, did you? A. No, sir.

Q. Did you know Chinky Sherman? A. No, sir.

Q. You never heard of Chink Sherman? A. I heard of him.

Q. In Montecello? A. I never met him.

Q. Did you help bury him? A. I did not.

Q. Was he buried on your friend's farm? A. Yes, sir.

Q. Was that in 1935? A. I don't know the 6776
year.

Q. Did you know Maurice Carillot? A. No, sir.

Q. Did you ever hear of him? A. No, sir.

Q. Did you ever work as a strong-arm man in a gambling house? A. Yes, sir.

Q. That was later, on your own? A. No, sir, I was sent there to work.

Q. Just answer yes or no.

Mr. Turkus: That does not call for a yes or no answer. That was not given 6777
in the form of obtaining a yes or no answer.

Mr. Barshay: I move to strike it out as not responsive.

The Court: Motion denied.

Mr. Barshay: Exception.

Q. Was this gambling house known as the Riviera, not in New Jersey, but in Sullivan County? A. That was my father's cabaret.

Q. The Riviera? A. Yes, sir.

Q. Was that a gambling house? A. No, sir.

Q. Where did you work as a strong-arm man

in a gambling house? A. I worked in Florida and I worked in Saratoga.

Q. You worked in Florida every winter? A. No, sir, not every winter.

Q. How many winters? A. Two.

Q. Which winters did you work there? A. The winter of 1935 and the winter of 1936.

Q. How many other times had you been in Florida without working? A. Without working?

Q. Yes. A. Maybe three times.

6879 Q. Was it '37?

Mr. Turkus: I object to the form of the question as confusing. Do you mean 1937?

Mr. Barshay: Yes.

A. Yes, I was there in 1937.

Q. You spent the whole winter there? A. Of 1937?

Q. Yes. A. Yes, sir.

Q. Without working? A. I worked there in 1937.

6880 Q. You said in 1935 and 1936. A. 1936 into 1937; there is a winter in '37, too.

Q. In 1938, did you spend that winter in Florida?

By the Court:

Q. That is '38 and '39. A. No, sir.

Q. In 1937 and 1938, where did you work? A. I worked in 1935 and 1936.

Q. What gambling house? A. One was in Miami Beach and the other was in Hollywood, Florida.

Q. Which one in Miami Beach, and where was it located? A. In Deauville, North Miami Beach.

Q. Right on the ocean? A. Yes, sir.

Q. Did you know the crowd at Mannie's Coffee Shop on 33rd Street? A. Yes, sir.

Q. Did you hang out there too? A. No, sir.

Q. Did you know about a poker game there? A. Yes, sir.

Q. That was to hook people from the Rooney Plaza? A. I don't know; I was never in ther.

Q. Little Augie ran that, didn't he, Pisano? 6882
A. Yes, sir.

Q. He ran Jimmy Kelly's up here on Atlantic Avenue and Court? A. I don't know.

Q. Did you belong to the Rooney Plaza pool? A. Did I belong?

Q. Did you bathe there? A. No, sir.

By Mr. Barshay:

Q. Other than the 1938-1939 winter season, did you sojourn in Florida? A. No, sir.

Q. In 1939 and 1940 did you sojourn in 6883
Florida? A. I did.

Q. You were not working then? A. I worked three days and then the place closed.

Q. Then did you remain there for the rest of the season? A. I did.

Q. That was in 1940? A. Yes, sir.

Q. Now, how many seasons did you work in Saratoga as a strong-arm man in a gambling house? A. One.

Q. What year was that? A. That was in the summer of 1937.

Q. Did you spend any summers up there? A. No, sir.

Q. Other than working as a strong-arm man in a gambling house? A. No, sir.

Q. Now, in Sullivan County, where your father ran this country club, did you run slot machines? A. I did not.

Q. Were you partners with men who ran slot machines? A. No, sir.

Q. Wasn't that your racket? A. No, sir.

Q. Didn't you, in association with others, force upon the hotel keepers in Sullivan County your
6785 slot machines? A. I never had slot machines.

Q. Did you have a partner up there? A. No, sir.

Q. Did you have a friend up there in that business? A. Yes, sir.

Q. Did he have his machines in your father's place? A. No, sir.

Mr. Turkus: I object—All right, it is answered.

Q. Have you been working recently, Tannenbaum, before your arrest in legitimate employ-
6786 ment? A. No, sir.

Q. Did you ever tell anyone you worked—Did you ever tell any Government agency that you worked? A. Yes, sir.

Q. That was a lie? A. Yes, sir.

Q. You obtained a Social Security card, didn't you? A. I did.

Q. Did it say that you were working at the Annette Shop, a hat shop at 596 Broadway? A. No, sir.

Q. What is the name you gave as the one company that employed you? A. Passaic, New Jersey.

Q. What was the name of it? A. The D. R. Clothing Company.

Q. You did not work for them? A. No, sir.

Q. You secured a Social Security card that you did? A. Yes, sir.

Q. For how long did you carry that? A. Oh, for about a year.

Q. Did you register for the draft? A. Yes, sir.

Q. Where from? A. From Brooklyn.

Q. What date, do you know? 6788

Mr. Turkus: I object, it does not make any difference.

The Court: Objection overruled.

A. I don't know.

Q. Did you ever use an alias? A. No, sir—An alias?

Q. Yes. Do you know what that means? A. Yes, sir, I did use an alias.

Q. You change your answer? A. I did use an alias. 6789

Q. What name did you use? A. Engel.

Q. Any other? A. Schafer.

Q. Any other? A. Snyder.

Q. Any other? A. No, that is about all.

Q. Did you live in the Borough of Brooklyn under aliases? A. Yes, sir.

Q. Under what name? A. Schafer.

Q. You were married then? A. Yes, sir.

Q. Living with your wife and child? A. Yes, sir.

Q. Do you know the date of your marriage? A. No, sir, I do not.

Q. Do you know when your baby was born? A. Yes, sir.

Q. Did you live at the White Hotel? A. I did.

Q. How long did you know Rubin? A. Who?

Q. Rubin. A. Max Rubin?

Q. Yes. A. I met him about 1933 or 1934.

Q. You know his business? A. Yes, sir.

Q. Did you know he was a finger man? A. No, sir.

Q. Did you ever have any business with him?

6891 A. No, sir.

Q. Did you ever see him at his union? A. No, sir.

Q. Did you ever talk to him? A. Yes, sir.

Q. Now, this country club that your father ran, was this a Sullivan County bar and grill, bowling alley, and above it were some rooms? A. He had a hotel.

Q. In 1925, was it the way I described it, or did he have a hotel in addition?

Mr. Turkus: I object to how it was in 1925.

6892

Q. In 1925, at that time was it a hotel or was it just a bar and grill, concession like bowling and pool, and some rooms above the bar and grill? A. I don't know what it was in 1925.

Q. You went to work there? A. In 1925?

Q. You said so. A. He bought the place about 15 years ago; it would not be 1925.

Q. Were you there in 1925? A. Rock Hill?

Q. I am now speaking after you left Rock Hill and went to Sullivan County, Loch Scheldrake.

What year did he go there? A. About 15 years ago.

Q. I am approximately right, 1925 or 1926. Do you recall that? A. That would make it 1927.

Q. What? A. 1927.

Q. May I refresh your recollection? Did you say yesterday here that you met Charlie Gurrah Shapiro about 1925 or so? A. Yes, sir.

Mr. Turkus: That is not inconsistent, because he did not say he met him at Loch Sheldrake. 6894

Mr. Barshay: I did not say it was inconsistent. I simply asked him to refresh his recollection.

The Court: Objection overruled.

Q. It was then you met Gurrah? A. About 1925.

Q. Did you sell liquor up there in 1925? A. Where are you talking about, Rock Hill?

Q. I am talking about Loch Sheldrake. A. We did not have it then. 6895

Q. When did you have it? A. About 15 years ago.

Q. This is 1941. Now subtract 15 from 1941 in your own mind. What year was it? A. 1926.

Q. Did you sell liquor up there then? A. Loch Sheldrake? When we had Loch Sheldrake we did sell liquor.

Q. A speakeasy? A. No, sir, it was not a speakeasy.

Q. That was in violation of law? A. Yes, sir.

Q. You ran gambling there, too, didn't you? A. No, sir.

Q. That was the attraction to your father's bar and grill, wasn't it, gambling and liquor? A. I did not run it.

Q. Your father ran it, and you worked there? A. He did not.

Q. Shapiro did not stop at your father's place in 1926, did he? A. Loch Sheldrake, no.

Q. All these men you mentioned did not stop at your father's place in 1926, did they? A. No, sir.

6797 Q. They stopped in surrounding hotels? A. That is right.

Q. And your father's place attracted them because he was running a speakeasy and gambling, didn't it? A. He was running it, but if you want me to tell you who ran the gambling place, I will tell you.

Mr. Barshay: I move to strike it out.
The Court: Motion granted.

Q. Please answer the question, Mr. Tannen-
6798 baum. What did you do there during the summers, up until the time you met Buchalter? A. I worked up there during the summer.

Q. What did you do? A. All around the place, by the boats, the lake. Used to drive to the station.

Q. In a gambling house at night? A. I did not work in a gambling house; it had nothing to do with the gambling house.

Q. Did you work there at night—yes or no? A. I did not.

Q. Did you work in a speakeasy—yes or no? A. No, sir.

Q. Never? A. No, sir.

Q. What were you making a week up there before you met Buchalter? A. I was not getting paid by the week.

Q. So you had very little money? A. Well, if we had a good summer my father used to pay me.

Q. You, personally, had very little pocket money? A. That is right.

Q. You saw all these men who came there spending rather freely? A. Yes, sir.

Q. And the bug began to bite you, didn't it, 6800
isn't that so? A. The what?

Mr. Turkus: Which bug, the Charley bug?

Mr. Barshay: No, the Charley bug did not bite him.

Mr. Turkus: We will tell you more about that afterwards.

Q. You saw these men who were coming there before you met Buchalter, you saw them spending lots of money? A. Buchalter came with 6801
them.

Q. You said you met him in 1930—I am speaking about before you met him.

Mr. Turkus: I object. That is not the testimony. The testimony is—

Mr. Barshay: (Interrupting) I object to Mr. Turkus saying what the testimony is. I refer you to the record.

Mr. Turkus: At the proper time, maybe you will.

6802 *Albert Tannenbaum—For People—Cross*

Mr. Barshay: I will let the witness read the testimony.

Q. Did you say you met Buchalter in 1930 or 1931? A. I knew him in 1930 or 1931. I went to work for him in 1930 or 1931. I met him before.

Q. Do you remember this question yesterday: "Q. When was that you first met Lepke? A. About 1930 or 1929."

6803 Did you say that yesterday? A. I went to work for him in 1930 or 1931, but I met him before.

Mr. Barshay: I move to strike out the answer as not responsive.

The Court: Let it stand.

Mr. Barshay: Exception.

Q. The next question, right after the one I just read to you:

"Q. Are you referring to the time when you

6804 first met him at the Loch Sheldrake Country Club? A. Yes, sir."

Did you make that answer to the question as I read it to you? A. What is that?

Q. I will read them together so as to get your mind clear:

"Q. When was that you first met Lepke? A. About 1930 or 1929.

"Q. Are you referring to the time when you first met him at the Loch Sheldrake Country Club? A. Yes, sir."

Did you make those answers to the questions as I read them? A. Yes.

Q. Now, all these times until 1930 your father was asking Shapiro to put you to work? A. He was not.

Q. Shapiro forced you to work for him? A. He did not.

Q. You went there to work voluntarily? A. Where?

Q. For Shapiro? A. Greeny put me to work.

Q. Greeny? A. Yes, sir.

Q. You went to work for him eventually? A. He asked me if I wanted to go to work. 6806

Q. And you said, "Yes"? A. Yes, sir.

Q. In other words, no one put a gun to your back and made you go to work? A. No, sir.

Q. The pay was good? A. $35. a week.

Q. You enjoyed it?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Q. Was it to your liking?

6807

Mr. Turkus: I object. Everybody likes their pay.

The Court: It is immaterial. Objection sustained.

Mr. Barshay: Exception.

Q. So you continued in this employ until you were getting $150. a week? A. $125.

Q. Now, in 1935, toward the end, and of the year 1936, you said you saw the defendant Buchalter? A. Yes, sir.

Mr. Turkus: There is not a scintilla

of evidence in the record by this witness that any such statement was made which you just said.

Mr. Barshay: I object to counsel interrupting.

The Court: Yes.

Q. How often did you see him in 1936? A. Whenever I went up to the office.

Q. How often, once, twice, ten times? A. You
6809 mean during the year 1936?

Q. Yes. A. I saw him about four or five times a week.

Q. Well, did you see him after September 11, 1936, four or five times a week? A. After September 11th?

Q. Yes. A. No, sir.

Q. How many times a week did you see him after that? A. I used to start going to the office less.

Q. You started going to the office less and less? A. Yes, sir.

Q. What month in 1936 did you start to do
6810 that? A. Toward the end of 1936.

Q. Was it because he told you that the police were following him? A. He did not tell me but I knew it.

Q. You knew that yourself? A. Yes, sir.

Q. You knew before September, 1936, that the defendant Buchalter was being followed by police? A. Yes, sir.

Q. You knew it in the latter part of 1935, didn't you? A. I don't know about the latter part of 1935.

Q. Did you know it in the early part of 1936? A. I knew he was being followed.

Q. Did you know until when he was being followed by the police? A. Until he went away.

Q. Do you know when he went away? A. About August of 1937.

Q. Is your memory clear on that? A. To the best of my knowledge.

Q. When did you see him last before he went away? A. Oh, I don't know, maybe a few weeks before he went away.

Q. So that, can you say with reasonable certainty, you saw him in August of 1937? 6812

Mr. Turkus: I object to that as already answered.

The Court: Objection overruled.

Q. (The Court) Was it in August? A. I don't know.

Q. Was it in July? A. It might have been in July.

Q. Give me your best recollection. A. I could not tell you that. A few weeks before he went away.

Q. Can you give me your best recollection now when, to your knowledge, Buchalter went away? 6813
A. About August of 1937.

Q. Your best recollection is that about two weeks before he went away in August of 1937, as you say, you saw Buchalter?

Mr. Turkus: Objected to as repetitious of what he said.

The Court: Sustained.

Mr. Barshay: Exception.

Q. When before the time you just spoke of,

two weeks before he went away, did you see Buchalter? A. What?

Q. When before the last time you saw him—next to the last time you saw him—

Mr. Turkus: I object to that as confusing.

The Court: Objection overruled.

Q. Do you know? A. No.

6815 Q. (The Court) Do you remember? A. No, sir.

Q. Did you see Buchalter in February or March of 1936? A. February or March?

Q. Yes. A. I don't know.

Q. What is your best recollection? A. I don't know.

Q. Did you see him in October, or November, or December of 1936? A. I used to see him right along.

Q. If you saw him right along, you are not sure that you saw him in September, 1936? A. I know it was 1936, I was in Florida for a while.

6816 Q. You were in Florida in October of 1936? A. October?

Q. Yes. A. No, sir.

Q. Did you see Buchalter then? A. I might have.

Q. I want to know your best recollection. A. I could not answer that. That is five years ago.

Q. You did not keep a diary? A. No, sir.

Q. You did not keep notes of what people say to you? A. No, sir.

Q. And you do not keep notes of where you see people? A. No, sir.

Q. You did not keep notes of what hours of the day you saw people? A. No, sir.

Q. You never made a memorandum who was present when you saw people? A. No, sir.

Q. Did you see him in November of 1936? A. I don't know.

Q. Did you see him in the early part of December, 1936? A. I don't know.

Q. Do you know whether you saw him before he went away in 1937? A. No, sir.

Q. Was it at number 200 Fifth Avenue? A. 6818
I do not remember.

Q. Was it at any one of the other offices which you say you saw him at? A. I don't think so.

Q. Can you tell me, to the best of your recollection, when you saw him before he went away, two weeks before he went away? A. Toward the end we got strict orders to stay away, just before he went away; and he used to make different appointments, in different places, sometimes in the subway, sometimes in the street.

Q. Give me your best recollection when before he went away, where you saw him. A. I don't 6819
remember that.

Q. Or who was present? A. I don't remember that.

Q. When, for the first time, did you learn that Buchalter was under surveillance? A. I could not give you the date of that.

Q. Give me the approximate year. A. About 1936.

Q. Can you give me the approximate month? A. I could not give you that.

Q. Did you see Buchalter in 1935? A. Yes, sir.

Q. Did you see him in September of 1935? A. September of 1935?

Q. Yes. A. Yes, sir.

Q. You are positive of that? A. I think so.

Q. Can you tell me what part of September, 1935? A. No, sir, I could not give you the exact date.

Q. Can you tell me where you saw him in September, 1935? A. It might have been in the office.

6821 Q. Which one? A. I do not remember which one; I could not tell you the exact place.

Q. Did you see him in August of 1935? A. I might have.

Q. Give me your best recollection. A. I don't know; I could not tell you exactly.

Q. You cannot remember? A. No, sir.

Q. Did you know he was in Europe in 1935? A. I knew he was in Europe.

Q. Do you know what month he was in Europe, was it in August or September? A. I don't know; I don't remember the month.

6822 Q. When he came back from Europe in 1935, did you learn that Thomas E. Dewey was appointed Special Assistant District Attorney? A. Yes, sir.

Q. Was it well known? A. Yes, sir.

Q. Tannenbaum, were you told immediately after he came back from Europe, meaning the defendant Buchalter, in 1935, to keep away from him because Dewey's representatives or members of the Police Department attached to Dewey's office were following him day and night? A. Yes, we were told but we used to sneak over.

Q. Did you know that detectives were in front of his home? A. No.

Q. Did you know they were in front of his place of business? A. As far as I was told, they were.

Q. What? A. As far as I was told, they were.

Mr. Turkus: I think the hearsay will have to be stricken out. It may give a confused picture of what kind of surveillance this was.

Mr. Barshay: I object to counsel—

The Court: It has a relation nevertheless to this witness' comings and goings in relation to Buchalter. 6824

Mr. Turkus: He has not been asked about that.

The Court: I figure that is the purpose of it. Overruled.

Q. The defendant Buchalter told you that? A. I don't remember if it was Buchalter.

Q. You knew, it, did you not? A. Yes, sir.

Q. And you acted accordingly? A. Well, we could always sneak away from the police.

Q. The police were not good, were they? A. 6825
Not that I know of.

Q. What? A. As far as I know, we used to sneak up.

Q. What? A. We used to sneak up.

Q. Did you know that police were immediately outside of the Raleigh Clothes at 200 Fifth Avenue, in the very hallway— A. I never saw them.

Q. From time to time? A. I never saw them.

Q. Did you know some of the detectives assigned then to watch Mr. Buchalter? A. No, sir.

Q. Did you know any of them? A. No, sir.

Q. Until what time—until what year, rather,

did you continue to see Buchalter four or five times a week? A. About 1936 or so, some time in 1936.

Q. Can you tell me what month? A. No, I could not.

Q. What? A. No, sir.

Q. Can you tell me any other date that you met Rubin? A. No.

Q. What? A. I could not tell you the exact date.

6827 Q. Nohow?

Mr. Turkus: I object to that "nohow". That is confusing.

Q. You cannot tell me nohow? A. What do you mean, when I met Rubin?

Q. Yes, what date you met Rubin other than the time you mentioned? A. No, I could not mention it.

Q. Do you know the size of this office, the Raleigh Clothes? A. The size?

Q. Yes. A. I could not tell you the exact size.

6828 Q. Do you know the floor? A. Yes, sir.

Q. How many floors did they occupy there? A. How many floors?

Q. Yes. I don't mean in space. I withdraw it. I will put it this way:

Q. Did they occupy at one time a floor other than the one you described? A. Which building are you talking about?

Q. 200 Fifth Avenue. A. They occupied any other in that building?

Q. Yes. A. No, sir, not that I know of.

Q. Didn't you know they were on the seventh

floor? A. They were on the tenth floor that I know.

Q. And then on the tenth? A. They were on the tenth.

Q. Were you ever on the seventh? A. I don't think so.

Q. Do you know when they moved out? A. Out of 200?

Q. Yes. A. No.

Q. Cannot tell us at all? A. No.

Q. Do you know when the last time was you 6830
were at the Raleigh? A. The last time? It was some time in '36.

Q. Do you know the day? A. No.

Q. Do you know the construction of that office? A. Yes, sir.

Q. As you walk in, there is one outer office? A. Yes, sir.

Q. Is it divided inside with a wooden partition, right? A. Yes, sir.

Q. And two small rooms? A. Yes, sir.

Q. About eight by ten feet? A. I don't know the measurements.

Q. Can you indicate here, from the beginning 6831
of the jury rail, just exactly how the inside office, how large rather the inside office was? A. I could not tell you the exact size.

Q. Was it a small office? A. It was a medium office.

Q. How many windows in the office? A. I don't remember how many windows.

Q. Do you know how many people worked there? A. I know about how many people.

Q. How many? A. Bookkeeper, about three salesmen—he had about three salesmen up there.

6832 *Albert Tannenbaum—For People—Cross*

Q. Do you know their names? A. I forgot their names.

Q. Do you know how many girls were employed there? A. I think there was two girls there, one or two girls.

Q. Did you know their names? A. One was Charlie Gurrah's niece.

Q. You knew her? A. Yes, sir.

Q. The other one? A. The other one I don't know.

6833 Q. Do you know anyone else who was working there? A. In that particular office?

Q. Yes. A. The same people that worked over in 22nd Street and Fifth Avenue went over there.

Q. That was an office of a Baltimore concern, wasn't it? A. Raleigh Manufacturing Company.

Q. Their main factory was in Baltimore? A. Yes, sir.

Q. This was a buying office, was it not, a selling office? A. Selling office.

Q. And people used to come there to sell cloth, is that correct? A. Yes.

6834 Q. And it was a very active office? A. Sometimes it was active.

Q. The outer office was always active, wasn't it? A. Well, no, not always.

Q. Well, there were girls there? A. There was a girl worked there.

Q. Typewriters, telephone? A. Yes.

Q. Filing system? A. Yes.

Q. Cabinets? A. Yes, sir.

Q. Samples? A. I don't know if the samples were outside.

Q. Samples of cloth, not the finished product but samples of cloth? A. They had cloth samples there, yes.

Q. Was the defendant Buchalter's name on the door? A. I don't think so.

Q. What? A. I don't think so.

Q. Was it on the inner door? A. I don't think so.

Q. Can you pick out any one in this courtroom who worked there? Do you think you can?

The Court: It is a pretty big courtroom, Mr. Barshay.

Mr. Barshay: That is all right. That 6836
is the only way.

The Court: Do you want him to step down and walk around? I doubt if he can do it up here. I have been trying to pick out some relative of mine, without success.

Mr. Barshay: I won't bother the Court with having him walk down, although that is the proper way.

The Court: It will be done, if you wish.

Q. You walked into this Raleigh, you say, on September 11, 1936? 6837

Mr. Turkus: Objected to. There was no testimony by this witness as to the date.

The Court: I think that is right, Mr. Barshay.

Q. All right, I will ask you what day did you go there? A. I don't remember the date.

Q. What day of the week was it? A. It was on a Friday.

Q. Had your father's place been opened in

Loch Sheldrake at that time? A. It was right after Labor Day.

Q. Yes. Didn't your father keep open for the Jewish holidays? A. I don't remember.

Q. Do you know when the Jewish holidays followed Labor Day then? A. No, sir.

Q. I am speaking of the Jewish holidays, that is Rosh Hashana and Yom Kippur. A. Yes, I know.

Q. Wasn't it the custom to keep open in Sul-
6839 livan County until the end of the Jewish holidays? A. Some places did and some places didn't.

Q. What was the custom with respect to your father? A. Sometimes he kept open.

Q. What did he do that year? A. I don't remember what he did.

Q. You have no recollection? A. No.

Q. Have you a recollection of being at the Laurel Club that week-end, the Labor Day week-end? A. The Laurel Club?

Q. The Laurel Country Club. A. I don't re-
6840 member.

Q. You don't remember that? A. No.

Q. Have you a recollection of being at the Park Hotel? A. Park Hotel?

Q. Yes. A. Where is the Park Hotel?

Q. Is there a Park Hotel in Sullivan County, to your knowledge? A. I don't know.

Q. The Palace Hotel? A. I don't know.

Q. You don't remember those? Do you recall now whether or not your father kept his place open during the Jewish holidays of September, 1936? A. I don't remember.

Q. Do you recall staying there any portion of those holidays? A. I don't remember.

Q. Do you recall what date you left Sullivan County? A. No, sir.

Q. Do you recall what date you arrived in New York? A. No, sir.

The Court: Were not those holidays in October?

Mr. Barshay: Not that year, your Honor. I can say with reasonable certainty they were September 17th. They began September 17th. That is the best I can get. They don't always run in October; mostly in September. 6842

Q. You have no recollection of your doings? A. Of what?

Q. I said, you have no recollection of your doings?

Mr. Turkus: I object to that.

Mr. Barshay: Let me finish. I will make it more specific. 6843

Q. You have no recollection with respect to your doings before September 11, 1936? A. Before September 11th?

Q. Yes, when you came from Sullivan County, when you arrived. A. I came in to New York.

Q. You don't know the date, do you? A. No, the exact date I don't know.

Q. Did you go back to Sullivan County in September of 1936? A. After I came back?

Q. Yes. A. No, sir.

Q. Did you go back to help your father close

6844 *Albert Tannenbaum—For People—Cross*

his place? A. I did not work for my father any more.

Q. I did not say you did. Did you go back to help him close his place? A. No, sir.

Q. Did you go back to gather up the slot machines in 1936 for that year?

Mr. Turkus: Object to it.

A. I did not have any slot machines to gather
6845 up.

Q. You did not see them? A. I saw them. I had no part of them.

Q. Were they in your father's place then? A. Yes, sir.

Q. Do you know who put them there? A. Yes, sir.

Q. Your friend, wasn't it? A. No, sir.

Q. Was it the same man on whose farm a body of one of the men you mentioned was buried?

6846 Mr. Turkus: Let us have identities mentioned for the record. I object to the question.

Q. Do you know the man I mean? Do you know the body I mean? A. Yes.

Q. What was the name? A. Chink Sherman.

Q. That is the same man who put the slot machines in your father's place? A. Chink Sherman?

Q. No, the man who owned the ground. A. No, he did not have any slot machines in my father's place.

Q. Was it another man? A. Yes, sir.

Q. Can you give us his name? A. I can give you his first name.

Q. What was his first name? A. Morris.

Q. You don't know his second name at all? A. No.

Q. Do you know what time you came up to this office at the Raleigh to see Buchalter? A. When are you talking about?

Q. What? A. When are you talking about?

Q. The time you are talking about.

6848

Mr. Turkus: I object to this colloquy between the witness and the lawyer. That is prone to start some discussion—

Mr. Barshay: Please, Mr. Turkus, there is no colloquy. I put a question to the man.

Mr. Turkus: He asked you a question and you answered him one back, and that will start an argument. I object to that type of examination.

The Court: Better reframe it.

6849

Q. I am talking about the Friday. Now you understand? A. Yes, sir.

Q. But you don't know the date? You don't know the date or the month? A. The date?

Q. Yes. A. No, sir.

Q. So we speak of it as Friday? A. Yes, sir.

Q. But it is clear what day we are speaking of? A. Yes, sir.

Q. Do you know what time you came in? A. Sometime in the afternoon.

Q. Do you know the time? A. No.

Q. Can you give me the approximate time? A. No, sir. All I can say was the afternoon.

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Q. The afternoon is quite big, isn't it? A. Yes.

Mr. Turkus: I object.

Q. You tell me your best recollection of the hour.

Mr. Turkus: I object to it. He stated that he could not.

6851 The Court: Are you in a position to make any estimate as to the hour that is fairly accurate?

The Witness: No, I could not give an accurate hour.

Q. I will try to probe your recollection. Was it three o'clock? A. I would not say for sure.

Q. Four o'clock? A. It was sometime in the afternoon.

Q. I am trying for a purpose to find out if you can fix your recollection. A. I would not say for sure.

6852 Q. You had a very vivid recollection as to the conversation, didn't you? A. Yes.

Q. But you have no recollection as to the hour you came? A. The exact hour I don't know.

Q. I don't want the exact hour. A. It was sometime in the afternoon.

Q. Was it five o'clock?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception.

Q. You have not any idea whatever? A. No.

Q. Do you know what time you left? A. No, I could not give you the time.

Q. Do you know how long you stayed there? A. About a half hour or so.

Q. Do you know who was in the office when you first came? A. In which office? There were three rooms to that office.

Q. I am speaking of the main office, when you entered the door, and in the outer room. A. The outer room?

Q. Yes. A. The girl was there. 6854

Q. Which one? A. I don't know which one.

Q. You don't recall that? A. No.

Q. Anybody else there? A. I don't remember if there was anybody else there.

Q. Speak up, please. A. I say I don't remember if there was anybody else there.

Q. Did you know Frank Cohen there? A. Who?

Q. Frank Cohen. A. I don't recall the name.

Q. Do you know who was in charge of that office? A. Yes, sir.

Q. Do you know his name? A. Yes, sir. 6855

Q. What is his name? A. Carl Shapiro.

Q. Carl Shapiro was in charge of the factory and traveled from the factory to the office. You knew that? A. As far as I knew, he was in charge of Raleigh Manufacturing Company.

Q. Was Carl Shapiro there that day? A. I don't recall.

Q. You knew him well? A. Yes, sir.

Q. You don't recall seeing him, do you? A. I don't remember. Sometimes if I went up there he was there; sometimes he was not there.

Q. How many people who worked there did you see that day when you entered? A. They

might have been in different rooms. I don't know how many were there. I saw the girl outside. I remember her.

Q. Only one? A. Yes, I think there was one girl.

Q. That is all? A. I would not say for sure how many was there.

Q. Did you speak to her? A. Just, "Hello."

Q. Was it Naomi Shapiro? A. That's her name. Naomi Shapiro worked there.

6857 Q. Did you speak to her that day? A. I don't remember if I spoke; probably said hello and kept walking.

Q. Do you remember her definitely being there that day? A. I can't say definitely.

Q. Do you remember the other girl being there that day? A. No.

Q. Was this after the lunch hour that you came up? A. I think it was, yes.

Q. How many people would you say you saw in the outer room as you entered? A. I would not say for sure.

6858 Q. About how many? A. I don't know. I would not answer.

Q. Would you say one? A. One I know I seen.

Q. Would you say two?

Mr. Turkus: I object to it. He has indicated—

Mr. Barshay: I object to counsel making a speech so that the witness can gain some suggestion, even though it may not be intended for that purpose.

The Court: Overruled.

Mr. Turkus: I have heard these charges before.

Mr. Barshay: I am not making any charges.

Mr. Turkus: They are underhand attacks to bait the prosecutor.

Mr. Barshay: You are an expert at that.

Mr. Turkus: You are an expert at that, and your coterie of counsel with you.

The Court: Lots of compliments. 6860

Mr. Barshay: All right, let us skip it.

Mr. Rosenthal: I thought we started out without casting slurs on one another. "Coterie," I assume, means everybody.

Mr. Cuff: He did not leave me out either.

The Court: You are smiling, and Mr. Barshay is smiling, so I guess everything is all right.

Mr. Rosenthal: I will forgive him.

Mr. Turkus: There are so many of you, I got confused. I should not have said "coterie." 6861

Q. Tannenbaum, can you tell me in your best recollection how many people you saw in the outer room? A. No, I couldn't.

Q. Was it more than one? A. Possibly.

Q. Was it more than two? A. I could not say for sure.

Q. Did you see different people in that room? A. What do you mean by different people?

Q. I am using your expression at page 2098: "When you went up to that office to make your

6862 report, as you stated to the jury, whom did you see in the office? A. I saw different people that worked there. Then I walked into one of the rooms and I saw Lepke."

Don't shake your head, please. A. Yes, sir.

Q. Which different people did you see there? A. People that work there. I don't know their names. I don't remember their names.

Q. How many? A. I don't know. I would not say the exact amount.

6863 Q. Can you give me your best definition of what you mean by "different people," in numbers?

Mr. Turkus: I object to it. The testimony has been elicited clearly as to what his recollection is.

The Court: Obviously there was nothing to attract his attention to that unless he went up in connection with people who worked there. Did that register?

The Witness: No, sir.

6864 The Court: Let it go at that.

Q. Were there people there other than those who worked there?

Mr. Turkus: I object to it.

A. I don't remember.

Q. You do not remember, do you? A. No.

Q. Now, the partitions are made of wood. Is that so? A. I imagine so.

Q. Oak wood? A. I don't know what kind of wood.

Q. Do you know the color of wood? A. I don't know.

Q. And did the partitions made of wood run to the ceiling?

Mr. Turkus: I object to it. The witness said he imagined they were made of wood. That does not make them made of wood.

The Court: Don't imagine anything.

Mr. Turkus: I object to the question.

The Court: Just state, Mr. Witness, 6866
what you know.

Mr. Turkus: I object to the question.

The Court: He can say whether he noticed if the partitions ran to the ceiling.

The Witness: I don't know.

Q. Whatever they were made of, Tannenbaum, did they run to the ceiling? A. I don't know. I don't remember that. Never noticed.

Q. Were the partition part up against the wall made of some substance which was solid and the other part up to the ceiling a substance which was glass? 6867
A. I don't know.

Q. You do not recall that? A. I never noticed it.

Q. Were the transoms open so that the outer room could get air from the inner room if the windows were open? A. I don't know.

Q. You do not recall that at all? Were you told there was a dictaphone in that room? A. No, sir.

Q. When you went into the outer office, did you announce yourself? A. No, sir.

Q. Did you hear a lot of noise? A. No. No.

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Q. Did you hear any voices within the room? A. I heard voices.

Q. Could you hear it from where you were in the outer room? A. Could I what? Could I hear it from the outer room?

Q. When you were in the outer office, could you hear the voices in the inner room? A. I could hear voices, yes.

Q. Loud enough— A. You could not make it out though, could not understand it.

6869 Q. Well, as you got into the outer office of this Raleigh, from the noises that you heard did you come to the conclusion that they were speaking louder than in the ordinary tone? A. No.

Q. What? A. No.

Q. Did the voices seem excited inside? A. I could not make it out through the wall.

Q. Not in the hall? A. I said through the wall.

Q. Did they sound loud and angry?

Mr. Turkus: Objected to as already
6870 answered.

The Court: Just yes or no. Could you tell?

The Witness: What is that?

The Court: Did they sound loud and angry?

The Witness: No, I could not tell.

Q. And so you opened the door of Buchalter's office, did you? A. Yes, sir.

Q. Just when Rubin was there? A. Yes, sir.

Q. Can you tell me of any other time when that same occurrence took place, that you opened

the door and you saw Rubin and Buchalter speaking? A. I used to see them together a lot.

Q. Give me one time. A. I could not give you the exact time. I saw them together a lot of times.

Q. In that office? A. In that office, Fifth Avenue.

Q. Give me now the exact time or near the exact time as you can when you saw that situation? A. I could not tell you the exact time.

Q. Nobody asked you to stay out of that office, 6872
that private office, where Rubin and Buchalter were speaking? A. No, sir.

Q. Just walked right in and sat down? A. That is right.

Q. At that time the conversation was loud and angry, wasn't it? A. When I walked in, yes.

Q. And it continued loud and angry for how long? A. A few minutes.

Q. Were the voices raised when you walked in? A. Louis was angry.

Q. Were the voices raised, that of Louis or Rubin?

6873

Mr. Turkus: Object as already answered. He said Louis was angry.

The Court: Let it stand. Sustained.

Mr. Barshay: Exception.

Q. When you walked in was Buchalter's voice louder than what you heard on the outside? A. Yes, sir.

Q. Much louder? A. A little louder.

Q. Shouting? A. Not shouting.

Q. Very angry? A. He was angry.

6874 Q. He did not subside when you walked in? A. No, sir.

Q. No request to come out into the hallway? A. What?

Q. There was no request by Buchalter to come out into the hallway? A. Request of me?

Q. Of you or of Rubin? A. Not that I know.

Q. Were the voices at the time when you got into the room loud enough to be heard on the outside?

6875 Mr. Turkus: I object to that. That is something he could not tell. Mr. Barshay has him in the room now with these two individuals, Lepke and Rubin, where there is a conversation and asks him were the voices there loud, loud enough for people on the outside to hear. That is an impossibility.

The Court: That calls for expert testimony but he can state whether they were loud or whether they were quiet.

6876 Q. What were they?

The Court: Were they loud?

Mr. Turkus: I object to the word "they" because the testimony is that only one voice was raised.

Mr. Barshay: All right, Buchalter's.

The Court: Was Buchalter's voice loud?

The Witness: It was not too loud.

Q. It was not too loud? A. No.

Q. He was not trying to modulate his tone so that he could not be heard on the outside?

Mr. Turkus: Objected to. He cannot tell what Lepke was trying to do.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Normally Buchalter talks in a quiet tone, does he not? A. Yes, sir.

Q. Isn't that his normal speech? A. Yes, sir. 6878

Q. About as quiet as you were talking on the stand until the Judge asked you to raise your voice? A. Yes, sir.

Q. But this time he was shouting?

Mr. Turkus: Objected to. That is not the testimony.

The Court: I don't think he said. Did he say shouting?

Mr. Turkus: He did not.

Mr. Barshay: Judge, I must not have him repeat what he said in his testimony. That is the very purpose of cross-examination, to see what his recollection is now. 6879

The Court: Counselor, the reason I asked you is because you say "this time he was shouting." You did not say it with an upward inflection but you said it as a statement, with a downward inflection.

Mr. Barshay: I am questioning him, Judge. I have not even turned to the page so I do not know.

The Court: You can ask him if he was shouting.

(Pending question read.)

6880

A. He was not shouting. He was talking louder than he usually does.

The Court: Does he usually talk in undertones?

The Witness: Not undertones—soft.

The Court: Quiet spoken?

The Witness: Yes.

Q. Was he yelling?

6881

Mr. Turkus: I object to it.

The Court: He said he was not shouting. Now the question is, was he yelling?

Mr. Turkus: That is a play on words.

Mr. Barshay: Just a second, please. I must have Mr. Turkus not interfere. I do not want to make any accusations but this is a smart witness.

Mr. Turkus: Every witness in this case is sure to be smart. If they were so smart, they would not have been here, you bet your life.

6882

Mr. Barshay: I won't answer that now. I will later.

The Court: Objection is overruled. Was he yelling?

The Witness: He was talking louder than he usually does.

Q. Was he yeling? Yes or no.

Mr. Turkus: I object to it. That is already answered.

The Court: Overruled. Just yes or no, was he yelling?

The Witness: He was talking louder than he usually does.

Q. Can we get an answer to that, Tannenbaum, yes or no? A. I would not call it yelling.
Q. You would not call it yelling? A. No.
Q. That is the truth? A. What?

Mr. Barshay: I withdraw the question.

At page 2099: 6884
Q. "Q. Now, when Lepke's face was flushed, what did you hear him say to Rubin, in substance, the best you can recall? A. He was yelling at Max and he was saying"—do you remember—

Mr. Turkus: Finish the answer.
Mr. Barshay: Wait a minute, please.
Mr. Turkus: Finish the answer.
Mr. Barshay: Judge, can I go one step at a time?
Mr. Turkus: No, you cannot read a question and a partial answer. That is 6885
not permitted.
The Court: Overruled. Did you use the word "yelling" there? Yesterday did you use the word "yelling"?
The Witness: I don't remember.

Q. You do not remember whether you used the word "yelling" yesterday? Is that your answer? Is that your answer? A. I might have used "yelling".
Q. As a matter of fact wasn't he yelling so

loudly that Max tried to quiet him? A. For Louis it was yelling.

Q. In all that conversation about Rosen, calling Rosen an s.o.b., all that—remember? A. Yes.

Q. And "that is the last time and he won't go down to Dewey"? Remember that conversation? A. Yes.

Q. That is the conversation you described in your direct testimony as yelling; isn't that so?

6887 A. Yes, sir.

Q. Did not ask you to get out of the room? A. No, sir.

Q. Wanted you to hear it?

Mr. Turkus: I object to it. He cannot tell what Lepke wanted him to hear.

The Court: Sustained.

Mr. Barshay: Exception.

Q. He did not ask you to get out of the room? A. No, sir.

6888 Q. He did not ask Rubin to go in the public hallway, in the main hallway, of the building? A. No, sir.

Q. He did not open the door, Buchalter did not, to see if anyone came into the outer office? Did he? A. No.

Q. What? A. Not that I remember.

Q. He did not open the door to see who was in the outer room at that conversation? A. Not that I know.

Q. You did not see him do it? A. No.

Q. Do you recall exactly what was said? A. I don't recall the exact words.

Q. You are sure you heard him say—you are snre you heard Buchalter say to Rubin, "Go ahead if you want to see him go ahead but make sure to come back and let me know what happened"? A. Yes, sure.

Q. That remained in your mind from 1936, on that Friday, until you testified yesterday? A. Well, I don't know if that is the exact words but I heard him say that.

Q. Did you give us what Buchalter said yesterday or did you give us your idea of what he 6890
said? A. What he said.

Q. I am asking you now, did he use the words to Rubin, in the presence and hearing of Rubin—A. Yes.

Q. In this conversation that was yelling: "Go ahead if you want to see him, go ahead, but make sure to come back and let me know what happened?" A. That is right.

Q. That was Buchalter's exact words? A. Yes, sir.

Q. Said in the presence of Rubin, said in the hearing of Rubin? A. Yes, sir. 6891

Q. You made no note of that? A. Note?

Q. Yes. A. No.

Q. When you went out of the room how many people were in the outer room? A. I don't know.

Q. Don't remember that? A. No.

Q. Anybody speak to you? A. No, sir.

Q. Where did you go after that? A. Went around. I went out, probably went uptown.

Q. What? A. Probably went uptown.

Q. You don't remember? A. No.

6892 *Albert Tannenbaum—For People—Cross*

Q. You don't remember where you went that night? A. No.

Q. You don't remember where you went the next day? A. Where I went?

Q. Yes. A. No.

Q. You don't? No recollection whatever? A. No.

Q. What? A. No, sir.

Q. That was a Saturday? A. Yes.

Q. Do you know where you were Sunday? A.
6893 No.

Q. Do you know whom you saw Saturday? A. No.

Q. Have no recollection whatever? A. No, sir.

Q. Did you see Shapiro Saturday? A. Might have.

Q. Have you a recollection? A. No.

Q. Did you see any Shapiro Saturday? A. I don't remember.

Q. You don't remember that? Did you have a hotel or did your family have a hotel in Long Beach then? A. My family have a hotel?

6894 Q. Yes. A. No.

Q. Were you at Long Beach that week-end? A. No, sir.

Q. You are positive? A. Yes.

Q. Did you register at the Nassau Hotel that Saturday, in Long Beach? A. Never lived in the Nassau Hotel.

Q. What? A. Never lived in the Nassau Hotel.

Q. I did not ask you that. Did you register at the Nassau Hotel? A. No, sir.

Q. Did you ever register at the Nassau Hotel? A. No, sir.

Q. You were not there? A. No, sir.

Q. At any time in your life? A. No, sir.

Q. In Long Beach? A. No, sir—I was in Long Beach but not at the Nassau.

Q. Which hotel? A. Never lived in Long Beach.

Q. I did not say lived. Did you register for the night? A. No.

Q. At no hotel in Long Beach? A. No, sir.

Q. Were you ever in a hotel at Long Beach? A. No, sir.

Q. In that conversation with Buchalter you 6896
heard the name Rosen, did you not? A. Yes, sir.

Q. You knew Rubin at that time was a representative of a union? A. Yes, sir.

Q. You knew it was the Truckmen's Union? A. Yes, sir.

Q. Did you hear in that conversation that Rosen was a truckman? A. No, sir.

Q. Was that the first time you heard the name Rosen? A. Yes, sir.

Q. Did you at that time know that Rubin was also interested in the flour trucking business in 6897
some fashion or other? A. Yes, sir.

Q. You knew he was part and parcel of a scheme to extort money from flour merchants?

Mr. Turkus: I object to that.

The Court: Sustained.

Mr. Barshay: Exception.

The Court: It calls for a conclusion.

Mr. Turkus: That does not go to his credibility.

The Court: Also hearsay. It is not evidence.

6898 Q. Did Rubin ever tell you that?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Barshay: Exception, your Honor.

The Court: It is collateral impeachment, does not come under the rule.

Mr. Barshay: I am laying my foundation for something else, not to impeach him.

6899 The Court: What is the purpose?

Mr. Barshay: Well, if I say the purpose openly, Judge, I am afraid the witness will get my idea.

The Court: Not to impeach him?

Mr. Barshay: No, not to impeach him.

The Court: You cannot impeach Rubin that way.

Mr. Bar hay: No, I am not asking to impeach Rubin. It is on the question of flight.

The Court: Of Rubin's flight?

6900 Mr. Barshay: Yes.

The Court: You mean to challenge Rubin's testimony that he did?

Mr. Barshay: Not to challenge it, but to show whom he was fleeing from.

The Court: That would have to be by way of collateral impeachment or specific impeachment.

Mr. Barshay: Just laying my foundation.

The Court: Pardon me just a minute.

Mr. Barshay: I beg your pardon?

The Court: I am thinking. No, I do not

see where the rules of evidence as to either collateral or specific impeachment of Rubin on that point apply. Rubin has denied having fled for any other reason than the Rosen murder, hasn't he?

Mr. Barshay: I beg your Honor's pardon. To the contrary.

The Court: I am asking you.

Mr. Barshay: My idea is that Rubin has admitted flight from Dewey but he also adds flight from the Rosen case. 6902

The Court: You mean flight for general reasons, to keep away from Dewey?

Mr. Barshay: That is right. My purpose, your Honor, was to show that there was no flight on Rubin's part from the Rosen case, but a definite purpose to flee from the Dewey investigation. I hope to prove that.

The Court: Yes, but the objection is sustained because you are not under the rule.

Mr. Barshay: Exception. 6903

Q. Did Rubin ever tell you that Dewey was looking for him? A. No, sir.

The Court: That what?

Mr. Barshay: That Dewey was looking for him.

Mr. Turkus: He has answered "No."

Q. When did you learn of the Rosen murder? A. I think it was Sunday night.

Q. You read about it in the newspapers? A. Yes, sir.

Q. You read, I may say, tomorrow's edition today; is that so? A. That is right.

Q. What papers did you read? A. News, the Mirror.

Q. Any others? A. No.

Q. The next morning did you read the other papers? A. Yes, sir.

Q. Still about the Rosen murder? A. Yes, sir.

Q. Frankly, it made the headlines then, didn't it? A. I think so.

6905 Q. You read it quite in detail? A. Yes, sir.

Q. Because when you read the name of the victim, it recollected to your mind exactly what happened? A. Yes, sir.

Q. So that in that story did you read in either the News, Mirror, or any other newspaper, that Rosen was a truckman? Did you? A. I don't remember.

Q. You don't recall that? A. No.

Q. You don't recall reading in the newspaper that Sunday with respect to the name of Rosen as to the alleged motive of his killing? You don't

6906 remember that? A. I don't think so, no.

Q. Weren't the papers full of the story? A. They were full of the murder.

Q. Yes? A. Yes.

Q. And the alleged reason for the murder? A. I don't remember about the reason in the papers.

Q. And who it was? A. Who what was?

Q. Who it was that was killed. A. Rosen.

Q. Isn't that so? You knew that? A. Yes.

Q. Something occurred in your mind of the similarity of names? A. Yes.

Q. Did it occur to your mind that the name

Rosen mentioned the day before was the same person mentioned in the newspaper? A. It occurred to me it might be.

Q. You guessed at it? A. Yes.

Q. Well, in reading the details, did it say that Rosen was a truckman?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Barshay: Exception. 6908

Q. The following day did you read it? A. I think so. What do you mean now, Tuesday or Monday?

Q. Monday.

Mr. Turkus: I object to the word "it" as confusing. Read "it" in referring to the Rosen murder would be one thing; read "it" referring to something else, is another thing.

The Court: The Court assumes "it" means the Rosen murder. 6909

Mr. Turkus: I know, but when you read questions back afterwards that assumption is not worth anything. "It" is confusing on the record.

Mr. Barshay: I did not know anything was confusing to you, but all right.

Q. I mean the Rosen murder, did you read it? A. I might have.

Q. Any other papers? A. I think so.

Q. What other papers did you read then? A. The Journal and some other paper.

6910

Q. Did you read in those papers who Rosen was? A. I don't remember if it was in the papers.

Q. Did it say something about him being a member of the Trucking Union or that he was a truckman? A. I don't remember that.

Q. Or that Dewey was looking for him? A. There was something in there about Dewey.

Q. Isn't that so? A. Yes, sir.

Q. So you knew, did you not, after you read
6911 the papers—you tell me whether you did or not —who Rosen was, without knowing him personally, when you finished reading all the accounts in all the press?

Mr. Turkus: Is this going to open up the newspaper articles for the jury?

The Court: Please.

Mr. Turkus: I am satisfied, if that is the purpose.

The Court: No objection?

Mr. Turkus: No objection to newspapers
6912 going in, if they want to be offered.

The Court: I say there is no objection before the Court; there is nothing to rule on.

Mr. Turkus: Then I object to the form of the question.

The Court: The form of the question is indefinite.

Mr. Barshay: All right, I will reframe it; but will your Honor entertain a motion on my part, please, to instruct the District Attorney to make no such comment as he did?

The Court: Yes.

Mr. Turkus: By indirection he is trying to put in evidence—

Mr. Barshay: There he goes again.

Mr. Turkus: —a recollection and a newspaper article of five years ago.

The Court: You are so instructed. Go ahead, Counsellor. I take it you mean, Mr. Barshay, whether or not when he read it he placed Rosen as the same person who had been discussed by Rubin.

Mr. Barshay: I go further. He has 6914
already admitted that. I go further than that. But again I am forced into the position, Judge, to give myself away if I explain it.

The Court: You will have the latitude, although the question is a little ambiguous, too general.

Mr. Barshay: I withdraw it.

Q. Do you recollect the contents of any of the articles you read in the newspaper with respect to the killing of this man Rosen? A. I read 6915
something about Dewey in there.

Q. You recall that? A. Yes.

Q. You recall the name Rosen? A. Yes.

Q. Do you recall the address of where the killing took place? A. No, I don't.

Q. Do you recall it was East New York or Brownsville? A. You mean now?

Q. Now, do you recall now whether or not that was in the papers? A. It mentioned candy store.

Q. Yes, in East New York or Brownsville: do you recall it? A. Yes.

Q. Now do you recall whether or not the item in any of the papers described the victim Rosen as a truckman? A. I don't remember that.

Q. Or connected with the Clothing Truckmen's Union? A. No, I don't remember that.

Q. Do you recall whether or not the papers said anything at all about this Rosen threatened to go— Withdrawn. Rather, being a witness for Dewey? A. There was something in the paper about it.

6917 Q. You do recall that? A. Yes.

Q. Did you see Rubin after that? A. I don't think so.

Q. What? A. No, I don't think so.

Q. You never saw Rubin after that Friday? A. No.

Q. What? A. I don't think so.

Q. That was the last day you saw him in your life? A. No.

Q. When did you see him again? A. I saw him this past summer.

Q. When? A. This past summer.

6918 Q. At the Half Moon Hotel? A. Yes, sir.

Q. Between the Friday that you described of this talk, did you see Rubin at all between then, 1936, and this last summer? A. I might have seen him.

Q. What? A. I might have seen him.

Q. You tell me where you might have seen him? A. I don't know where I might have seen him. I don't remember that.

Q. Will you tell me when? A. I would not tell you the exact time.

Q. Give me the approximate time, when subsequent to September 1, 1936, that you saw Rubin. A. What? In '36?

Q. Yes, after the day you saw him at Buchalter's office, when again did you see Rubin next? A. I don't remember that.

Q. Well, did you see him that year, 1936? A. I don't know. I said I might have seen him after that.

Q. Have you any recollection at all? A. No.

Q. What? A. No, I have not.

Q. Have you any recollection of seeing him in '37, the early part of '37? A. No.

Q. Have you a recollection of seeing him after 6920
October, 1937? A. No, I don't remember.

Q. Have you ever seen him in the market when he was under police guard after October, 1937? A. No.

Q. Have you seen him before Buchalter was indicted for this crime in the month of May, 1940? A. May, 1940?

Q. Yes. A. No.

Q. So that your answer is that between September 11th, or the Friday of which you do not know the date, 1936, and until this summer, you can give us no recollection of ever having seen 6921
Rubin? A. I have seen him.

Q. But Rubin did see you in Buchalter's office that day? A. He should have seen me.

Q. And you knew each other? A. Yes, sure.

Q. Now, in December of 1937 did you learn that something happened to Rubin? A. That what?

Q. You did not hear me, Tannenbaum? A. No, I did not hear the full question.

Q. I will reframe the question. Did you hear that something happened to Rubin in, sometime in 1937, the latter part? Yes or no. A. I heard something happened to him.

Q. Yes. After that did you see him? A. After 1937?

Q. Yes. A. I seen him once.

Q. Where? A. I met him over in the Federal Grand Jury building in 1939.

Q. Did you talk to him? A. Yes, sir.

Q. Did you talk to him? At that time you were not under arrest, were you? A. No, sir.

Q. You mean, you gave testimony in a harboring case there, did you not? A. No.

6923 Q. In the Federal Grand Jury? A. Special Grand Jury.

Q. Was it Dewey's office or the Federal Building? A. Federal.

Q. You know that building? A. I was in it once or twice.

Q. Did you speak to Rubin then? A. Yes.

Q. You were a witness before that jury, were you not? A. I had a subpoena.

Q. Yes. You came there pursuant to the subpoena? A. Yes, sir.

Q. Came there yourself? A. Yes, sir.

6924 Q. Your movements were not restricted? A. No, sir.

Q. Where did you speak to Rubin? A. In the hallway.

Q. Who was with him? A. There was a policeman with him.

Q. What? A. There was a policeman with him.

Q. Were you prohibited from speaking to him or were you allowed to speak to him? A. No, I just said, "Hello, how are you feeling?" He walked over to me.

Q. That is all? A. That is all.

Q. Nothing was mentioned about the occurrence of September, 1936, when you were in the same room with Buchalter, at the conference, at the few words you had with Rubin in the Federal hall? A. No, sir.

Q. Not a word? A. No, sir.

Q. No cops detained you? A. At that time?

Q. Yes. A. No.

Q. You were allowed to walk away? A. Yes, sir.

Q. You were around New York? A. Yes, sir. 6926

Q. Lived with your wife and family? A. Yes, sir.

Q. Nobody told you to run away? A. No, sir.

Q. You were not questioned by the police? A. No, sir.

Q. When did you go to Florida? A. When?

Q. Yes, after that. A. January of 1940.

Q. Under your own name? A. Yes, sir.

Q. Openly? A. Yes, sir.

Q. Lived openly? A. Yes, sir.

Q. Nobody questioned you? A. No, sir.

Q. So that from December, 1937, until you were picked up in this case— I withdraw the question. —until you were arrested in March or April of 1940, no person had questioned you about the Rosen case? 6927

Mr. Turkus: March was the date.

Q. March, 1940. A. From when?

Q. Put it this way: Up to March, 1940, when you were arrested in Brooklyn, you had not been questioned about the Rosen case? A. No, sir.

Q. Not even after you saw Rubin in the Federal Building?

6928 *Albert Tannenbaum—For People—Cross*

Mr. Turkus: Objected to as already answered. It has been answered twice.

The Court: That is what he said.

Q. You read in the papers of the arrest of Abe Reles when you were in Florida? A. Yes, sir.

Q. You did not run away? A. No.

Q. At that time you already knew that Buchalter surrendered in August of 1939 to Edgar
6929 Hoover, did you not? A. Yes, sir.

Q. You knew he was in prison, did you? A. Yes, sir.

Q. You knew he had been convicted in the Federal Court? A. Yes, sir.

Q. You knew he had already been tried in the flour case in General Sessions in New York, did you? A. Yes, sir.

Q. You knew he had already been sentenced? A. I don't know if he was sentenced yet.

Q. Did you read about it? A. I don't remember.

Q. All this time you say you were getting your
6930 pay? A. Yes, sir.

Q. $125 a week? A. $100 a week.

Q. While Buchalter was in prison? A. Yes, sir.

Q. Living in Florida? A. Yes, sir.

Q. Not working? A. No, sir.

Q. How long did you stay in Florida before you came back in 1940? A. About two and a half months, two months, something like that.

Q. When you came back from Florida, you lived in Brooklyn with your wife and family? A. When I came back from Florida?

Q. Yes. A. I was arrested when I came back from Florida.

Q. But before your arrest, you lived in Brooklyn? A. Before I went to Florida?

Q. No, before your arrest in 1940, when you came from Florida, you lived in Brooklyn, didn't you? A. 1940?

Q. Yes. A. When I came from Florida?

Q. Yes. A. I was arrested.

Q. The same day? A. Two days later.

Q. That day you did go back to your home, 6932
didn't you? A. No, sir.

Q. Where did you go? A. Went to somebody's house in Brighton Beach.

Q. With your wife and family? A. No, sir.

Q. Yourself? A. I came up alone.

Q. You rode up from Florida? A. By train.

Q. In the train, is that so? A. Yes.

Q. The last day you left Florida you were still under your own name? A. Yes, sir.

Q. You saw lots of people in Florida whom you knew in Brooklyn, did you not? A. That I knew in Brooklyn?

Q. Yes, in Florida then you saw lots of people 6933
whom you knew from Brooklyn? A. Yes.

Q. Can you give me the address where you lived in Florida then? A. Meridian Avenue.

Q. Under your own name? A. Yes, sir.

The Court: Near where?
The Witness: 1427.

Q. When did your wife and child leave Florida? A. Oh, about ten days to two weeks after I came back.

Q. So you left them there? A. Yes, sir.

Q. In Florida, during that period, you went out nights, saw people? A. Yes.

Q. Undisguised? You did not disguise yourself? A. No. The time I was in Florida.

Q. You met some New York City policemen, didn't you, in Florida—I don't mean socially; you bunked into them accidentally? A. I don't remember.

Q. You don't remember any at all? A. I don't know many policemen.

6935 Q. Did you know there were New York City policemen assigned to Florida during the winter season? A. No.

Q. Did you see any of them around the gambling houses where you worked? A. (No answer.)

Q. At any rate, you were not running away from them? A. No.

Q. When you came back to New York, can you tell me the exact date when you were placed under arrest? A. No, I could not tell you the exact date.

6936 Q. You don't remember? Do you know the day of the week? A. I think it was a Saturday.

Q. Do you know the early part of March or the latter part of March? A. March.

Q. You do not know which part? A. I think it was the latter part of March.

Q. Do you know whether it was day time or night time? A. When I was arrested?

Q. Yes. A. Night time.

Q. Were you told what you were arrested for? A. Not when I was arrested.

Q. Did you ask what they were charging you with? A. I asked the detective.

Q. What did he say? A. He did not answer me.

Q. You were taken where? A. I was taken down to Greenwich Street, New York.

Q. Greenwich Street, New York? A. Yes, sir.

Q. Were you booked? A. I don't know.

Q. Were you questioned? A. Not there.

Q. Do you know who arrested you, wherever you were arrested in March of 1940? A. Yes, sir.

Q. Who? A. Detective Belsky. 6938

Q. And who else? A. I don't know the other fellow's name.

Q. He took you directly to Greenwich Street station in Manhattan? A. Yes, sir.

Q. There were you told by anyone the reason for your arrest? A. No, sir.

Q. Did you find out that night the reason for your arrest? A. Did I what?

Q. Did you find out that night the reason for your arrest? A. No, sir.

Q. How long were you kept at the Greenwich Street station house? A. A few hours.

Q. During that time were you questioned about the Rosen case? A. No, sir. 6939

Q. Were you booked at that station house? A. I don't know where I was booked.

Q. You know what it means to book a man? A. Fingerprint him and take his picture.

Q. Yes, right in front of the lieutenant's desk. A. No, not in Greenwich Street.

The Court: Make the blotter entries.

The Witness: Not in Greenwich Street, I don't think.

6940 Q. Did anyone from the Brooklyn District Attorney's office question you at the Greenwich Street station house? A. No, sir.

Q. Where were you taken from the Greenwich Street station house? A. Taken to Coney Island Court.

Q. Coney Island Court? A. Yes, sir.

Q. You mean the next morning? A. Yes, sir.

Q. Where did you spend the night? A. I think it was in headquarters.

6941 Q. Manhattan? A. I think so.

Q. In other words, were you taken from Greenwich Street to Police Headquarters in Manhattan? A. Coney Island.

Q. Which headquarters do you refer to that you spent the night in? A. I think it was Manhattan headquarters.

Q. 240 Centre Street? A. Yes.

Q. Is that where you slept? A. I think so.

Q. Were you questioned there during the night by anyone from any office with respect to the Rosen case? A. No, sir.

6942 Q. In the morning you were taken to Coney Island Court, is that so? A. Yes. The first night I was arrested I was all night in Greenwich Street.

Q. That is what I am asking you. A. Yes.

Q. During that night, were you questioned about the Rosen case? A. No, sir.

Q. Were you charged with any participation in the Rosen case? A. No, sir.

Q. Did you see anyone from Judge O'Dwyer's office at the Greenwich Street station during that night? A. No, sir.

Q. Did you see anyone from Inspector Mc-

Dermott's office during that night whom you knew? A. No, sir.

Q. Did you see Inspector McDermott? A. I don't know Inspector McDermott.

Q. In the morning you were taken to Coney Island and you were charged with what? A. Vagrancy.

Q. You were arraigned before the magistrate? A. Yes, sir.

Q. Were you let out on bail? A. No, sir.

Q. Were you in jail from the day of your 6944
arrest until you were discharged in the Magistrates' Court for vagrancy? A. Was I in jail?

Q. Yes. A. Yes.

Q. Which jail? A. I was in custody.

Q. What? A. I was in custody.

Q. Where were you in custody during those days? A. I was in Coney Island Court a while. I was in Snyder Avenue.

Q. For another while? A. Yes.

Q. Let us see. Were you arrested on March 23, 1940, about 11 p.m.? A. At night.

Q. Yes. A. It was about that time. 6945

Q. You did not get out on bail on the 23rd, did you? A. No, sir.

Q. You did not get out on bail on the 24th, did you? A. No.

Q. You did not get out on bail on the 25th, did you? A. No, sir.

Q. And during those days, Tannenbaum, were you questioned about the Rosen case? A. No, sir.

Q. By no one? A. No, sir.

Q. During those days had you seen anyone from Judge O'Dwyer's office? A. Yes, sir.

Q. Whom did you see? A. I saw Mr. Turkus. I saw Mr. Heffernan.

Q. Mr. who? A. Heffernan.

Q. Edward Heffernan? A. Yes.

Q. Anyone else? A. A few people.

Q. How soon after your arrest on March 23rd did you first see Mr. Turkus? A. A day or two after that. I think it was two days after that.

Q. Two days? A. I think so.

Q. Where? A. At the District Attorney's
6947 office.

Q. Was it before you were arraigned in the Magistrates' Court for vagrancy? A. No, it was after.

Q. I am trying to find out, between March 23rd when you were arrested and March 26th, had you seen anyone from the District Attorney's office? A. March 23rd to March 26th?

Q. Yes. A. Two days after, I think it was two days after I was arrested, I saw Mr. Turkus.

Q. Do you know when you were dismissed in the Magistrates' Court for the vagrancy charge?
6948 A. I think it was the day before they took me up to Sullivan County.

Q. Was it March 26th? A. I don't know the date.

Q. During the time that you were here in custody, in Brooklyn, until the time you left the Borough of Brooklyn to go in custody to Sullivan County, had you been questioned about the Rosen case? A. No.

Q. Not a word? A. No.

Q. And in those days you were questioned by Mr. Turkus and by Mr. Heffernan? A. Yes, sir.

Q. Anyone else? A. No, that's all.

Q. Captain Bals? A. No.

Q. Any other detective? A. No.

Q. Was a stenographer present? A. Yes, there was.

Q. Were any of the questions about the Rosen case? A. No, sir.

Q. Was any question asked of you whether or not you had been in the office with Rubin and Buchalter on Friday, in September of 1936? A. No, sir.

Q. Not one question? But you were questioned about other things? A. Yes. 6950

Q. And you refused to answer? A. That is right.

Q. From the Magistrates' Court in Coney Island, were you taken any place? A. Yes.

Q. Where? A. To the District Attorney's office.

Q. Who took you? A. A couple of detectives.

Q. Who? A. Some detectives.

Q. Do you know their names? A. No, I don't.

Q. In the District Attorney's office were you again questioned by any assistant? A. Well, that day I was questioned. 6951

Q. Yes, by any assistant? A. When I was discharged from Coney Island Avenue Court, then I went over to the District Attorney's office.

Q. You were questioned at the District Attorney's office? A. Yes.

Q. But not about the Rosen case? A. No.

Q. And not about the meeting in Buchalter's office of yourself—the accidental meeting of yourself, Rubin and Buchalter? A. No.

Mr. Turkus: I object to the form of

6952

the question, carrying with it an implication.

The Court: You mean the word "accidental"?

Mr. Turkus: Yes.

Mr. Barshay: All right, I will leave it out.

Q. You were not asked any question about your seeing Rubin and Buchalter on Friday in
6953 September, 1936? A. No.

Q. At the Raleigh Clothes? As a matter of fact not one time was the Rosen case mentioned to you— A. No.

Q. During that questioning? You maintained your silence and refused to answer on the ground it may tend to degrade, or something like that; right? A. Yes.

Mr. Turkus: Let us have the "something like that" understood.

Mr. Barshay: Let him tell us.

6954 Mr. Turkus: Yes.

Q. You tell us, what grounds did you give? A. Me?

Q. Yes. A. Constitutional rights.

Q. You asserted them and they were respected; right? A. Yes.

Q. Where were you taken from the District Attorney's office after you asserted your constitutional rights? A. I was taken to headquarters.

Q. Where? A. In New York.

Q. By whom? A. I don't know: a couple of detectives.

Q. From where? A. From the District Attorney's office.

Q. Brooklyn? A. Yes.

Q. Do you know their names? A. No.

Q. On the way over to headquarters, Tannenbaum, were you questioned about the Rosen case? A. No, sir.

Q. Whom did you see at headquarters? A. I was locked in a cell.

Q. What? A. They locked me in a cell.

Q. How long were you kept there? A. Over 6956
night.

Q. Were you questioned over night by anyone? A. No.

Q. Where were you taken then? A. The following day?

Q. Yes. A. Back to the District Attorney's office.

Q. Brooklyn? A. Yes.

Q. Whom were you questioned by then? A. Mr. Turkus.

Q. Anyone else? A. No, that's all.

Q. How long were you questioned? A. A few 6957
hours.

Q. Was a stenographer present? A. I don't think so. A few other people in the room but I don't know if there was a stenographer there.

Q. You know what a stenographer is, of course, and you knew then? A. Yes.

Q. Did you see anyone taking notes? A. No.

Q. Were you questioned about the Rosen case? A. No.

Q. Not a word? Isn't that so? A. Yes.

Q. Were you questioned about your presence in 1936 at the Raleigh Clothes, with Rubin and Buchalter? A. No.

6958 Q. Did you still assert your constitutional rights? A. Yes, sir.

Q. And again they were respected? A. Again what?

Q. Again they were respected? A. Yes.

Q. After the District Attorney's office, where did you go? A. Sullivan County.

Q. Who took you? A. A few State troopers.

Q. Do you know their names? A. One was Inspector Maynard.

6959 Q. Who else? A. Two others—three others.

Q. Was it Sergeant Quinn? A. Sergeant Quinn.

Q. Was it Trooper Driscoll? A. Trooper Driscoll.

Q. Was it Corporal Lawson of the State police? A. Yes, sir.

Q. This all took place right at Police Headquarters, didn't it, where they took you? A. No, I left from the District Attorney's office.

Q. Right from the District Attorney's office up there? A. Yes.

6960 Q. They are the men that had custody of you all the way up to Sullivan County? A. Yes, sir.

Q. Up to that minute, Tannenbaum, you had not been questioned with respect to the Rosen case? A. No sir.

The Court: These were all upstate troopers, were they?

The Witness: Yes, sir.

The Court: Is not Quinn from White Plains?

The Witness: Around Hawthorne.

Mr. Barshay: May we stop now?

6961

The Court: Gentlemen of the Jury, please do not discuss the case, let nobody talk to you about it, keep your minds open. We will resume at 1:30.

First the witness will go.

The jury out the other door.

Defendants are remanded.

(A recess was taken to 1:30 p.m.)

6962

(Afternoon Session. Trial Resumed.)

ALBERT TANNENBAUM, recalled, further testified, as follows:

Cross examination by Mr. Barshay (continued):

Q. The last question I put to you was with respect to your being questioned about the Rosen case at the time you were taken to Sullivan County? A. Yes, sir.

6963

Q. Is that clear in your mind? A. Yes, sir.

Q. You said you had not? A. That is right.

Q. Where were you taken in Sullivan County? A. Monticello.

Q. Were you lodged in jail? A. Yes, sir.

Q. Did you engage counsel? A. I did.

Q. Were you questioned in the jail by any one with respect to the Rosen case? A. No, sir.

Q. Were you arraigned for the Yuran murder in Sullivan County? A. No, sir.

Q. Were you arraigned for the murder of Ashkenaz? A. Yes, sir.

Q. Do you know the date? A. No, sir.

Q. Have you any recollection? A. I don't remember the date.

Q. Was it April 22, 1940? A. I do not know the exact date.

Q. Was it in April? A. It might have been April.

Q. Can you give me your best recollection of the date? A. No, sir.

Q. Did you plead not guilty? A. Yes, sir.

Q. Who was your lawyer at that time? A.
6965 Mr. Baker and Mr. Price.

Q. Who appeared in court for you on that day? A. Mr. Baker.

Q. Is that Mr. Ellsworth Baker? A. Yes, sir.

Mr. Barshay: Do you mind standing up to be identified? Is this the gentleman?

The Witness: Yes, sir.

Mr. Barshay: You are Mr. Ellsworth Baker, of Monticello, New York?

Person Addressed: Yes, sir.

6966 Q. Was he the only one who appeared for you in court on that day? A. Yes, sir.

Q. He had been your family lawyer? A. Yes, sir.

Q. Do you mind talking up and taking your hand away, so that I will be able to hear you—Do you know when you retained him? A. The date?

Q. Yes. A. No, sir.

Q. Do you know how soon after you reached Monticello Jail you retained him? A. About a week after I got there.

Q. Is that the same case in which you later

testified before the Grand Jury, the Ashkenaz case, without signing a waiver? A. Yes, sir.

Q. Do you know that date? A. No.

Q. Was it after you pleaded not guilty? A. Yes.

Q. Do you know how long after? A. A few weeks after.

Q. You don't know the month? A. No, sir.

Q. You don't know the day? A. No, sir.

6968

The Court: What is the name of that case?

Mr. Barshay: Irving Ashkenaz, according to my records.

Q. Did there come a time when you had been receiving visits from your lawyer? A. Yes, sir.

Q. Up to that point, when you pleaded not guilty in the Ashkenaz case, is it a fact that no one came up to question you about the Rosen case? A. That is right.

6969

Q. Did you sign an affidavit supporting a motion to inspect the Grand Jury minutes in the case entitled, "Supreme Court, Sullivan County, People of the State of New York against Albert Tannenbaum, Defendant," involving the Ashkenaz indictment? A. Yes, sir.

Q. Do you know where you signed that affidavit? A. I do.

Q. Where? A. In the Monticello jail.

Q. Do you know who brought the affidavit to you? A. Yes, sir.

Q. Who? A. Mr. Baker.

Q. Personally? A. Yes, sir.

Q. Do you know that Mr. Baker was the

6970 former District Attorney of that county, did you know that? A. No, sir.

Q. Did you sign that affidavit? A. Yes, sir.

Q. Did you read that affidavit? A. I did.

Q. And after you read it, you signed it? A. Yes, sir.

Mr. Barshay: May I address the Court?

The Court: You have the affidavit?

Mr. Barshay: Mr. Baker has. He is
6971 here ready to produce it. If you want the jury present, all right. I want to confront him with the affidavit.

The Court: I think a question of law should be publicly stated.

Mr. Barshay: Then can I, through the Court, ask Mr. Baker to produce the affidavit here which he brought pursuant to subpoena duces tecum served upon him?

The Court: Yes.

Mr. Turkus: Was that an affidavit that was ever used in a court of record, or re-
6972 tained exclusively in possession of the lawyer?

Mr. Barshay: Mr. Baker knows that. Mine is hearsay. He is here.

Mr. Turkus: Mr. Baker has been asked to produce it. It has not been offered in evidence. The question of confidential communication between attorney and client is not yet presented.

The Court: Is the paper on file as a court record or has it remained in the files of a lawyer?

Mr. Barshay: I do know, but mine is

hearsay, and Mr. Baker is here. It was before a Supreme Court Judge on his desk and returned to Mr. Baker. There was a copy served on the D.A.'s office.

Mr. Turkus: What D.A.'s office?

Mr. Barshay: Mr. Deckelman's.

The Court: Is that a case in which this defendant was indicted?

Mr. Barshay: Yes, sir.

The Court: Did Mr. Baker represent this defendant in the submission of the 6974
affidavit?

Mr. Barshay: Yes, your Honor.

The Court: Why did the Supreme Court hand it back instead of filing it?

Mr. Barshay: Because, by the time the motion came on to be heard, this man became a State witness, and it was no longer necessary.

The Court: Let me see the paper.

Mr. Baker: May I correct a statement in one respect? After the motion came on to be heard, but before it was decided, 6975
it was found that it was no longer necessary at that time to inspect the minutes of the Grand Jury, and it was returned to me by the Judge, and the motion held in abeyance.

The Court: But the motion had already been submitted?

Mr. Baker: Had been submitted and the papers returned to me, and I have a letter of the Judge returning it to me.

The Court: But the papers had been submitted?

Mr. Baker: The papers had been submitted to the Court, yes, sir.

The Court: And they then became the custody of the Court.

Mr. Baker: That is right.

Mr. Barshay: May I have the affidavit?

Mr. Baker: I want to address the Court in that respect. I have it here.

The Court: That affidavit was not submitted without a copy being given to the District Attorney?

Mr. Baker: A copy was given to the District Attorney, with notice of motion attached.

The Court: That was part of the District Attorney's file?

Mr. Baker: That is right.

The Court: That is a public office.

Mr. Baker: Yes.

The Court: Then I direct you to show it.

(Paper handed to Mr. Barshay.)

By Mr. Barshay:

Q. I show you this paper and ask you whether or not that is your signature. A. Yes, sir.

Q. That is the affidavit you signed in prison, in Monticello? A. Yes, sir.

Q. And you swore to it before Mr. Ellsworth Baker, who, according to this paper, was also a notary public? A. Yes.

Mr. Barshay: I offer it in evidence.

Mr. Turkus: At this time it is objected to.

The Court: Objection overruled.

Mr. Barshay: With the Court's permission, may I read it to the jury?

The Court: Mark it and then read it.

Mr. Turkus: May I simply state my position? The objection was that it was not asked by alleged prior inconsistent statements. I think the regular procedure would be to ask him if he had made the statement in the affidavit.

The Court: I had a different point in 6980
mind, and that was perjury, false swearing in a judicial proceeding. But, inasmuch as the affidavit was withdrawn, that nullifies that particular motion. But there is a question of doubt about it and I think the defendant is entitled to the benefit of that doubt; and certainly the affidavit goes right to the question of his credibility.

(Received and marked Defendants' Exhibit 2.)

6981

Mr. Barshay: May I read this paper to the jury?

The Court: Just the affidavit, that is all the jury is interested in. Briefly, it is a notice of motion for leave to inspect the Grand Jury minutes in an indictment against this witness for the murder of this Lithuanian— What is his name?

Mr. Turkus: Irving Ashkenaz.

The Court: An inspection of the Grand Jury minutes would reveal the names of witnesses who testified against him on

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which the indictment was found, and also what they testified to. Proceed and read it.

(Mr. Barshay reads, as follows:)

"SUPREME COURT—SULLIVAN COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

6983 against

ALBERT TANNENBAUM

Defendant.

State of New York)
County of Sullivan) ss.:

"ALBERT TANNENBAUM, being duly sworn deposes and says, that he is the defendant

6984 in the above entitled proceeding; that he was indicted for the crime of murder in the first degree, alleged to have been committed September 15, 1936, at the March, 1940, term of this court.

"A copy of the indictment, as has been furnished to deponent, is attached to this affidavit and made a part hereof.

"It will be noted that the indictment indicates that there are two other defendants charged with the same crime. Deponent assumes that these defendants are not named because they are not in custody.

"It will also be noted that the names of the witnesses heard by the Grand Jury are not endorsed upon the indictment.

"Deponent is informed and believes that the witnesses, upon whose testimony the indictment was found, are witnesses who claim to be accomplices in the alleged murder and present at the time the same was committed.

"Deponent desires to say at the outset of this affidavit that he is entirely innocent of the charge and was not connected with the alleged murder, nor with any other murder, and deponent will be able to establish his innocence beyond any question upon the trial of the indictment. 6986

"Deponent is of the firm belief and opinion that there was not sufficient evidence to warrant the finding of the indictment and inasmuch as he is incarcerated in jail, without an opportunity to furnish bail because of the nature of the offense he has decided to make an application to dismiss the indictment upon the ground that there was not sufficient proof produced before the Grand Jury to warrant the finding of the same. 6987

"Deponent has never had any criminal record, he is married, has one child, lives with and supports his family. Deponent's father is connected with a restaurant at Loch Sheldrake and has been for many years, and deponent himself has resided at Loch Sheldrake for several summer seasons where he has enjoyed a good reputation.

"Deponent does not even know the names of the other parties indicted under this indictment. He not only has no knowledge or information concerning the nature of the testimony before the Grand Jury, except what he has read, or appears in the public talk, nor does he know the names of the co-defendants.

"Deponent was arraigned on said indict-
on the 22nd day of April, 1940, in the
Sullivan County Court and pleaded not guilty. He is informed that it is the purpose of the District Attorney to move the indictment for trial at the June Term of the County Court. The indictment was found in the Supreme Court and moved to the County Court by the District Attorney.

"Deponent, therefore, asks that an order be made directing the District Attorney of Sullivan County to permit deponent, or his attorney, to inspect the minutes of
the Grand Jury which found the indictment and for such other and further relief as the Court may deem proper to grant.

"No previous application has been made for this relief.

(Signed) Albert Tannenbaum.

"Sworn to before me this
3rd day of April—stricken out—1940, the word 'May' written over that, and signed, Ellsworth Baker, Notary Public."

6991

Q. You testified in the Workman case, with respect to the same subject matter I just questioned you about? A. Yes, sir.

Q. Did you admit signing this affidavit I just read to the jury when you were asked about it in the Workman case? A. I was not asked about it.

Q. You were not asked about it? A. Not to my recollection.

Q. Give us your best recollection. A. I don't think so.

6992

Q. Is that your best answer? A. Yes, sir.

Q. Do you know the date you testified in the Workman case? A. No, sir.

Q. Do you know the month? A. In the spring, I think.

Q. May I refresh your recollection? A. Yes.

Q. Was it some time in June of 1931? A. June?

Q. Yes. A. Around that time.

The Court: Was that the Newark case?

Mr. Barshay: Yes.

6993

The Court: That was tried in Common Pleas?

Mr. Barshay: Court of Oyer and Terminer.

The Court: That is Common Pleas.

Mr. Wegman: Court of Oyer and Terminer of the criminal branch of the Supreme Court.

Q. At page 392 in the case of The State of New Jersey against Charles Workman, Indictment 336, April, 1941, indictment for murder—

6994 *Albert Tannenbaum—For People—Cross*

I might say to the Court that this is for the murder of Dutch Schultz—am I right, Mr. Turkus?

Mr. Turkus: Yes.

The Court: One defendant?

Mr. Barshay: One defendant, to my knowledge.

The Court: Go ahead.

6995 Q. Were you asked these questions, at page 392, in that case:

"Q. Before then you were first taken to Sullivan County on the charge of Ashkenaz' murder?" And did you make this answer: "Yes". A. What do you mean, "Before then"?

Q. Maybe I had better read one more question. After the testimony concerning your being taken from Brooklyn to Sullivan County, which is the preceding question— I do not want to burden the record, you were asked this question:

"Q. Before then you were first taken to Sullivan County on the charge of Ashkenaz' murder?

6996 A. Yes." A. Yes, sir.

Q. "Q. Is that right? A. Yes." A. Yes.

Q. "Q. You were charged with that murder? A. Yes." Yes.

Q. "Q. You were indicted? A. Yes, sir."

"Q. You made an affidavit in that case in which you denied that you had anything to do with it? A. I never made an affidavit."

Did you say that exactly as I read it, in the Workman case, in June, 1941? A. I don't remember.

Mr. Barshay: Am I reading correctly, Mr. Turkus?

Mr. Turkus: Yes.

Q. "Q. Didn't you make an affidavit for your attorney, a man name Baker, who filed it in court, that you were not guilty of that crime?

"Mr. Wakenfield: —That is the District Attorney in New Jersey—I object to that.

"The Court: I sustain the objection. 6998
What difference does it make?

"Mr. Kessler: On the question of credibility, I think."

Mr. Turkus: Mr. Kessler was Charley the Bug's lawyer?

Mr. Barshay: Yes.

(Mr. Barshay continues reading, as follows:)

"Mr. Kessler, representing the defendant, then—"On the question of credibility, I think I have a right to test his credibility of whether an oath means anything to the 6999
man.

"The Court: Remote—I make no point of it from his answer.

"A. I signed a paper, I did not know what it was." A. I might have made that answer.

Q. Your answer here is, "I might have made that answer"? A. Yes, sir.

Q. "Q. (By the Court) You signed a paper and you did not know what it was? A. No, sir."

Did you make that answer that way in court?

A. If it is in there I probably made it.

7000 *Albert Tannenbaum—For People—Cross*

Q. It is in there, and you made it? A. Yes, sir.

Q. "Mr. Wakenfield (District Attorney): He said something to the Court. I think we ought to have on the record what he told the court.

"The Court: I am perfectly willing to put on the record what he said to me—'He told me it was a bill of particulars.'"

7001 Do you remember that? A. Yes, sir.

Q. "Q. (By Mr. Kessler, attorney for Workman) In that paper you thought was a bill of particulars, didn't you say that: 'Deponent desires to say at the outset of this affidavit that he is entirely innocent of the charge and is not connected with the alleged murder, nor with any other murder; and deponent will be able to establish his innocence beyond any question upon the trial of the indictment.' Didn't you sign that affidavit?

7002 "Mr. Wakenfield (District Attorney) I object.

"The Court: I will permit it.

"Q. Didn't you sign that affidavit? A. I signed an affidavit, but I did not know what it was. I was told it was for a bill of particulars."

Did you say that in that case, exactly as I read it? A. If it is in there, I did.

Q. It is in there. Did you say it? A. Yes, sir.

Q. "Q. You signed the affidavit, didn't you? A. I signed it. He told me it was a paper for a bill of particulars."

Did you say that exactly as I read it? A. If it is in there, I said it.

Q. It is in there. A. I said it.

Q. "Q. All right, so he said it was a bill of particulars, that is what you signed, was it? A. I don't know. I did not read it."

Did you make that reply as I read it? A. If it is in there, I said it.

Q. It is in there. A. I said it, then.

Q. "Q. You did not read it. After that were you taken to Sullivan County, but you were 7004 never put on trial? A. No, sir."

Did you make that answer?

Mr. Turkus: At this time, may the defendants' exhibit be deemed in evidence, not only the affidavit but the notice of motion and the indictment appended?

Mr. Barshay: I have no objection.

Mr. Turkus: It is marked Defendants' Exhibit 2. It will be deemed in evidence as to everything in it, including the notice of motion and the indictment.

Mr. Barshay: I am informed that the 7005 correct title of Mr. Wakenfield is not District Attorney, but Prosecutor of the Pleas.

Q. You testified here that there came a time when you had a talk with Mr. Deckelman, the District Attorney of Sullivan County, while you were in jail, in which the name of Judge O'Dwyer was mentioned? A. Yes, sir.

Q. Can you tell us the date? A. I cannot give you the date; it was either the first or second Sunday in May.

Q. Either the first or second Sunday in May, 1940? A. Yes, sir, that is right.

Q. That is your best recollection? A. Yes, sir.

Q. Was a stenographer present? A. No, sir.

Q. During that conversation with Mr. Deckelman? A. No, sir.

Q. Are you sure about it? A. Yes, sir.

Q. Did you sign any paper for Mr. Deckelman during or after that conversation? A. No, sir.

Q. Thereafter, did Judge O'Dwyer come to see
7007 you personally? A. Yes, sir.

Q. Alone? A. No, sir, with some others.

Q. Can you tell me the names of the others? A. Captain Bals came up with him.

Q. Any one else? A. Yes, sir, I think there was somebody.

Q. You think there were some others? A. Yes, sir.

Q. Do you know where they visited you? A. Yes, sir.

Q. Where? A. In the court house, the Sullivan County Court House.

Q. You were taken out of the jail and taken
7008 to the court house? A. Yes, sir.

Q. And this was on a Sunday? A. Yes, sir.

Q. Were you questioned then by Judge O'Dwyer or any of his associates or assistants? A. Yes, sir. Judge O'Dwyer asked me some questions.

Q. Was a stenographer present? A. No, sir.

Q. At no time? A. No.

Q. No one took notes at all? A. No, sir.

Q. Will you tell me how long this conference took, or this questioning and answering took? A. About an hour.

Q. During that time did you sign any paper? A. No, sir.

Q. Did you see any stenographer present at all during that hour taking any notes in that room? A. No, sir.

Q. Were you questioned during that hour about the Rosen case? A. Yes, sir, I was asked about that.

Q. And no statement in any form whatever was presented to you for signature? A. No, sir.

7009

Q. You were asked about a lot of other things, too, weren't you? A. Yes, sir.

7010

Q. And about other things was there a statement; yes or no—either signed by you or a stenographer present? A. No, sir.

Q. When were you taken back to Brooklyn? A. About the middle of May, a little after that; I would say it was about the 17th of May, somewhere around there.

Q. Is that your best recollection? A. Yes, sir.

Q. From that court house, after Judge O'Dwyer spoke to you, where were you taken? A. Back to the Monticello jail.

7011

Q. And you remained there? A. Yes, sir.

Q. Had you been visited by anybody from Judge O'Dwyer's office after this talk with Judge O'Dwyer on the Sunday before you were taken back to Brooklyn? A. Yes, sir, I got another visit.

Q. From whom? A. Judge O'Dwyer, Mr. Turkus and Captain Bals.

Q. Was a stenographer present then when you talked about the Rosen case, if you did speak about the Rosen case the second time? A. No, sir.

7012 *Albert Tannenbaum—For People—Cross*

Q. Did you speak about the Rosen case the second visit? A. I spoke about a few cases.

Q. Did you speak about the Rosen case? A. Yes, sir.

Q. Was a stenographer present? A. No, sir.

Q. Did you sign any statement? A. I did not.

Q. Were there any other visits from Judge O'Dwyer's office, either by himself or through his assistants, that you received while you were waiting to return yourself to the County of
7013 Kings? A. Any visits from Judge O'Dwyer or any of his assistants?

Q. After that one you just told us about? A. they came up and took me down to Brooklyn.

Q. Yes, was that May 18, 1940? A. I don't know the exact date.

Q. My question was, does that refresh your recollection? A. No, sir.

Q. Do you know the day of the week? A. Today, today is Thursday.

Q. I don't mean today, do you know the day of the week then? A. No, sir.

Q. Were you placed in a hotel when you came
7014 back to Brooklyn? A. Yes, sir.

Q. In the Borough of Brooklyn? A. Yes, sir.

Q. Was it the Half Moon Hotel? A. No, sir.

Q. Was it another hotel? A. Yes.

Q. Since then, I think you testified you were not arraigned in any court on this charge? A. Yes, sir.

Q. That is true? A. Yes, sir.

Q. When you say, "Yes, sir," do you mean you were not arraigned, but you testified before several Grand Juries? A. Yes, sir.

Q. You had been eating at the hotel? A. Yes, sir.

Q. Did you see your wife? A. Yes, sir.

Q. Did you see your child? A. Yes, sir.

Q. Were you taken out for rides? A. Once in a while.

Q. About how many times a week? A. Once a week, at the most; sometimes not even once a week.

Q. On the average? A. On the average, once in three weeks.

Q. Did you get any money from the District Attorney's office to maintain your wife? A. No, 7016
sir.

Q. Do you know of your own knowledge whether or not your wife received any money? A. No, sir.

Q. Were you transferred from that hotel to another hotel? A. Yes.

Q. Was that other hotel to which you were transferred the Half Moon Hotel? A. Yes, sir.

Q. Were you taken out to Long Island to play baseball? A. Yes, sir.

Q. During the summer? A. Yes, sir.

Q. How many times? A. Oh, maybe six or 7017
seven times.

Q. Always in the custody of detectives? A. Yes, sir.

Q. Did you see Sholem Bernstein at either of the hotels? A. Yes, sir.

Q. Did you see Abie Reles at either of the hotels? A. Yes, sir.

Q. Did they go out and play baseball with you? A. Yes, sir.

Q. Was there any one else that went to play baseball with you? A. Yes, sir.

Q. Who? A. Mikey Syeoff.

Q. Anybody else? A. Yes, some detectives.

Q. Did you eat together with Abe Reles and the others at the hotel? A. Sometimes.

Q. Did you sleep in the same room with him? A. With Reles?

Q. Yes. A. No, sir.

Q. Did you sleep in the same room with Sholem Bernstein? A. No, sir.

Q. Or with Sycoff? A. Yes, sir.

Q. With Sycoff? A. Yes, sir.

Q. Did you play cards with Reles? A. Yes,
7019 sir.

Q. Did you play cards with Bernstein? A. Yes, sir.

Q. And with Sycoff? A. Yes, sir.

Q. Did you take walks on the Boardwalk in the custody of detectives? A. No, sir.

Q. Did you see Mrs. Rosen at the hotel? A. I don't know Mrs. Rosen.

Q. Then you say you did not?

Mr. Turkus: I object. He says he does not know her.

Mr. Barshay: Question withdrawn.

7020

Q. Before yesterday, Wednesday, when did you see any one from the District Attorney's office? A. Tuesday.

Q. Where? A. Over in the District Attorney's office.

Q. May I know the name of the assistant you saw? A. Sure, Mr. Turkus.

Q. Mr. Turkus was in court; do you mean after court? A. Tuesday was Armistice Day.

Q. Before that did you see any one from the District Attorney's office? A. I saw him a few times.

7021

Q. You discussed your testimony, which is all right, didn't you? A. Yes, sir.

Q. You knew Berger was on the stand? A. Yes, sir, sure.

Q. You knew Ruben had already testified? A. Yes, sir.

Q. Did you learn through any source whatever the substance of Ruben's testimony? A. Just what I read in the paper.

Q. Just what you read in a paper? A. Yes, sir.

7022

Q. When did you see Reles last? A. On Tuesday.

Q. Did you play cards with him? A. No, sir.

Q. Did you have dinner with him? A. No, sir.

Q. Were you in the same room with him? A. Yes, sir.

Q. Did you speak to him? A. Yes, sir.

Q. Were detectives there? A. Yes, sir.

Q. Now, Tannenbaum, you wish to escape electrocution, don't you? A. I would like to.

7023

(At this point the witness is excused and leaves the court room. The Court remains in session. After three minutes the witness returns and resumes the stand.)

Cross examination by Mr. Talley:

Q. You know the defendant Weiss very well? A. Yes, sir.

Q. You have known him very well from 1930 or 1932? A. No, sir, I met Weiss when he came out of prison in Trenton.

Mr. Talley: I move to strike it out,

7024

if your Honor please, and I move for the declaration of a mistrial. The answer is not responsive.

The Court: Strike it out as not responsive. The jury is directed to reject it and not consider it. The motion for a mistrial is denied.

Mr. Talley: Exception.

Mr. Wegman: I join with Judge Talley in that motion.

7025

The Court: Motion denied.

Mr. Wegman: Exception.

The Court: Mr. Witness, do not volunteer any information. Just answer the question and nothing more.

Q. What year did you begin your acquaintance with the defendant Weiss? Keep your voice up now. A. 1934, around that time.

Q. From 1934 to 1941 you got pretty well acquainted with him? A. Yes, sir.

Q. You knew him very well? A. Yes, sir.

7026

Q. You knew him so well that, according to your testimony, in Child's Restaurant at 23rd Street, he told you all about the Rosen case, that is your testimony? A. Yes, sir.

Q. At what time of day were you discussing this in Child's Restaurant? A. Some time in the afternoon.

Q. Other people were present besides you and Weiss? A. Other customers there, but not at our table.

Q. There were a number of customers there? A. Yes, sir.

Q. You say you discussed this Rosen case in

Child's Restaurant with other people sitting around you?

Mr. Turkus: I object. That is not what he said.

Q. You said there were a lot of people there?

Mr. Turkus: That is different.

A. Yes. 7028

Q. You would not hesitate to testify falsely, would you? A. No, sir.

Q. Under oath? A. I would now.

Q. But prior to what you call "now", you would not hesitate to testify falsely under oath? A. That is right.

Q. What do you call "now"? Let us have the date of your reform. A. Now I am telling the truth, now.

Q. When did you commence to tell the truth? A. In May of 1940.

Q. Since then, every time you have testified, any statement, since May, 1940, you have told the truth? A. To the best of my knowledge, yes, sir. 7029

Q. Would you testify falsely now to save yourself from prison or the electric chair? A. No, sir.

Q. You would not? A. No, sir.

Q. In May of 1940, that was when you began to tell the truth, is that right? A. Yes, sir.

Q. In the month of May, 1939, which is about a year before you began to tell the truth, you testified in a trial right here in Brooklyn, didn't

7030 you, or in a trial before the Grand Jury, didn't you?

Mr. Turkus: I object to the question as confusing. If you will straighten it out, I will not object.

Mr. Talley: Question withdrawn.

Q. Didn't you testify in May, 1939, in a trial before the Federal Grand Jury?

7031

Mr. Turkus: I object. It is still confusing, "In a trial before the Federal Grand Jury", that is impossible.

Q. In a hearing before a Federal Grand Jury, in May of 1939?

Mr. Turkus: Is the question revised?

Mr. Talley: Yes, that is the question.

The Witness: May of 1939? No, sir, I did not.

7032 Q. Did you ever testify before the Federal Grand Jury? A. I did.

Q. Where? A. In New York.

Q. In what proceeding? A. The Special Grand Jury.

Q. What you call the harboring case? A. Yes, sir.

Q. Did you tell the truth before that Grand Jury? A. Are you talking about the Grand Jury in Brooklyn here or the one in New York?

Q. I am talking about the one in New York. I just asked you about the Federal Grand Jury in New York. A. That I what?

Q. Did you testify? A. Yes, sir.

Q. That was in what you call the harboring case? A. Yes, sir.

Q. Did you tell the truth before that Grand Jury? A. No, sir.

Q. You testified falsely? A. Yes, sir.

Q. And you were under oath? A. Yes, sir.

Q. Did you testify before Judge Brancato in the Nitzberg case in the Borough of Brooklyn? A. Yes, sir.

Q. You were under oath there when you gave your testimony? A. Yes, sir. 7034

Q. Did you tell the truth there? A. I did.

Q. Didn't you testify before the Federal Grand Jury that you only knew Mendy Weiss slightly? A. Yes, sir.

Q. That was false, you say now? A. Yes, sir.

Q. That was a deliberate false statement you made to the Federal Grand Jury? A. It was.

Q. Do you remember when it was? A. September of 1939.

Q. Now, you have been at the Half Moon Hotel since when? A. About a year ago. 7035

Q. What month did you go there, was it before the summer of 1940? A. After the summer.

Q. Was it in the winter time? A. No, sir, it was right after summer.

Q. Will you say about September? A. About the end of September.

Q. September of 1940? A. Yes, sir.

Q. This is November of 1941, you have been living there ever since? A. Yes, sir.

Q. Without any expense to you? A. No, sir.

Q. You mean by that that you have not been

paying your bills at the Half Moon, is that what you mean? A. That is right.

Q. (The Court) You have been in custody, haven't you? A. Yes, sir.

Q. (The Court) Under an order of arrest? A. Yes, sir.

Q. Was Reles also held at the Half Moon? A. Yes, sir.

Q. Was Bernstein? A. Yes, sir.

Q. Was Berger? A. Berger? No.

7037 Q. He has never been there while you were there, in custody? A. No, sir.

Q. And Sycoff? A. Yes, sir.

Q. And Ruben? A. Ruben was there.

Q. Anybody else? A. That is all.

Q. You occupied rooms on the sixth floor, didn't you? A. Yes, sir.

Q. You told the District Attorney about the door being shackled; I think that was the term used? A. Bolted.

Mr. Turkus: I used the word "shackled" incorrectly.

7038

Q. You talked about the mirrors in the hallway? A. About what?

Q. Mirrors in the hallway? A. That is right.

Q. You were under guard constantly, weren't you? A. Yes, sir.

Q. For twenty-four hours a day? A. Yes, sir.

Q. How many policemen were guarding you at a time? A. At a time, six.

Q. How close to Reles' room was yours? A. A few feet.

Q. On Tuesday night, the night before last, you were in Reles' room? A. No.

Q. You were not? A. No, sir.

Q. How close to Reles' room was your room? A. Right across the hall.

Q. Did you see Reles Tuesday night? A. Yes, sir, I did.

Q. How late Tuesday night were you in his company? A. I saw him about eleven o'clock.

Q. You were not playing cards with him that night? A. No, sir. 7040

Q. What was he doing when you saw him last? A. His wife had just left.

Q. At eleven o'clock? A. Around that time.

Q. Was the door— Where did his wife visit him, in his room? A. Yes, sir.

Q. Was he sleeping alone? A. He had a room by himself.

Q. Did you have a room by yourself? A. No, sir.

Q. Who was sleeping in your room? A. Sycoff.

Q. How long had Sycoff been your room mate? 7041
A. A few months.

Q. Were there policemen outside of Reles' door? A. Yes, sir.

Q. All of the time? A. Well, if he was not in his room.

Q. (The Court) When you were in there playing cards on Tuesday night? A. I was not playing cards.

Mr. Turkus: That is not his testimony.

The Court: Then I misunderstood. I

7042 *Albert Tannenbaum—For People—Cross*

thought he related that on Tuesday night after the wife left they had a card game.

Mr. Turkus: He did not say that.

Q. When you slept in the Half Moon at night, were there guards there? A. When I went to sleep there were guards.

Q. Where do the guards stay? A. There is a chair there, they used to sit down.

Q. At the door? A. No, sir, inside.

7043 Q. Did the same thing apply to Reles' room? A. Yes, sir.

Mr. Turkus: I object. This man cannot tell; he was not in the same room with him.

The Court: Objection sustained.

Q. Were the windows locked in your room? A. Locked?

Q. Locked? A. We could open them.

Q. Were the windows open in Reles' room?

7044

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Talley: Exception.

Q. You did play cards with Reles and others, didn't you? A. At night? Are you talking about Tuesday?

Q. No, at any time? A. Yes, sir, I did.

Q. Where were the card games usually held, in his room? A. No, sir.

Q. In your room? A. No, sir.

Q. Where? A. In the living room.

7045

Q. You had a living room, did you? A. Yes, sir.

Mr. Turkus: I object to the form of the question, "He had a living room". He had what was given to him there.

The Court: Leave out "living".

Mr. Talley: I am quoting this witness. I am sure they had quite a suite there.

The Court: He said he had a room.

7046

Q. You told us you had a living room? A. A room where they used to stay during the day.

By the Court:

Q. You mean where all gathered? A. Yes.

Q. You yourself did not have a suite? A. No, sir.

Q. You had a common room where you people would all get together at times, is that right? A. That is right.

Q. That is the one you called the living room? 7047
A. Yes, sir.

Q. And you had ample opportunity to talk to one another, didn't you? A. That is right.

Q. And you did talk with Reles? A. Yes, sir.

Q. And with Bernstein? A. Yes, sir.

Q. And with Sycoff? A. Yes, sir.

Q. And with Rubin? A. I did not talk to Rubin.

Q. Did not talk to Rubin? A. Not up there, I didn't.

Q. Why not? A. Did not come up there.

Q. Was not he at the hotel? A. Yes, sir.

Q. Was not he on the same floor that you were? A. No, sir.

Q. When did he come to the hotel? A. I don't know.

Q. Did you never see him there? A. I saw him there, yes.

Q. But you never spoke to him? A. I did.

Q. When you say he never came up there, do you mean to the card room, the living room? A. In our place. He never came up to our place.

7049 Q. Did you ever talk with any of these others that you have named, Reles, Bernstein, Sycoff?

Mr. Turkus: He has already answered that.

Q. About this case? A. No, sir.

Q. And the subject of this case or any testimony that you were to give was never mentioned; is that right? A. Yes, sir.

Q. You talked about everything else under the sun except the testimony you were to give in this case, is that correct? A. Not only this case, 7050 all cases.

Q. What? A. We never spoke about any case.

Q. You never did? A. No, sir.

Q. Not in the fourteen months that you have been down in the Half Moon Hotel? A. That is right.

Q. No case was ever mentioned between you? A. No, sir.

Q. You took out registration cards for automobile licenses, didn't you? A. I did.

Q. And you had them signed in your name by

other people, didn't you? A. What? Had them sign in my name?

Q. No. Other people signed your name to those applications; isn't that true?

Mr. Turkus: I object unless the time be fixed.

The Court: Try to . the time if you can.

Q. Any time in the last five years in which you have taken out license to drive cars and registration of cars, did you have someone else sign your name? A. You mean my driver's license? 7052

Q. Yes.

Mr. Turkus: I object to it. That does not affect credibility in that form. It has nothing to do with the issue we are trying.

The Court: Sustained.

Mr. Talley: Exception.

Q. When you left court yesterday where did you go? A. I went over to the office. 7053

Q. To the District Attorney's office? A. Yes, sir.

Q. And were you interrogated there about your testimony in this case? A. No, sir.

Q. What were you interrogated about? A. About a different matter.

Q. What matter?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Talley: Exception.

Q. Why not?

Mr. Turkus: Do you want me to tell you why not?

Mr. Barshay: Please, Mr. Turkus.

Q. How long were you in the District Attorney's office after you left court yesterday afternoon? A. About a half hour.

The Court: Was that an entirely different investigation?

7055 The Witness: Yes, sir.

Q. And nothing was said to you, do you say, in the District Attorney's office about the testimony you gave yesterday? A. Nothing was said.

The Court: Was that about something that just happened?

The Witness: Yes, sir.

Q. Besides testifying falsely under oath before the Federal Grand Jury in New York, in what other case did you testify falsely under oath? A.

7056 That is all.

Q. What? A. That is all.

Q. That is the only one? A. Yes, sir.

Q. And of course, this affidavit that was shown to you by Mr. Barshay, that was false, wasn't it?

Mr. Turkus: What do you mean, the wording of it, the contents?

Q. Will you take your hand away from your mouth, please? A. What do you mean, it was false?

Q. The one in Sullivan County was a false affidavit, wasn't it? A. That is right.

Mr. Talley: I have no further questions.

Mr. Rosenthal: I have no questions.

Redirect examination by Mr. Turkus:

Q. Counsel for the defendant Lepke brought out that you were arrested by Detective Belsky, 7058
do you remember that? A. Yes, sir.

Q. Do you know whose squad Detective Belsky was attached to? A. Yes, sir.

Q Whose squad? A. District Attorney Dewey's squad.

Q. And after the arrest by Detective Belsky of District Attorney Dewey's squad, you were eventually brought to Brooklyn? A. Yes, sir.

Q. Counsel for Lepke also brought out that you refused to answer all questions that were put to you by the Assistant District Attorneys, namely, Heffernan and Turkus, shortly after your arrest, on the ground of self-incrimination; is 7059
that right?

Mr. Barshay: I object to it, your Honor, in view of the fact that Mr. Turkus brought that out on direct examination.

Mr. Turkus: I am going to get specifically to the Rosen matter. That is only to direct his attention to these questions.

The Court: I don't recall. Overruled.

(Pending question read.)

A. Yes, sir.

7060 Q. Before you were questioned by Assistant District Attorneys Heffernan and Turkus, had you been given legal advice by a lawyer? A. Yes, sir.

Q. Who gave you the advice not to answer the Assistant District Attorneys on the ground of Constitutional rights and self-incrimination? A. You mean the lawyer's name?

Q. No. Was it the lawyer that gave it? A. Yes, sir.

7061 Q. So that before you were questioned by the Assistant District Attorneys, you had had the advice of counsel as to how to answer them? A. Yes, sir.

Q. When you persisted in your refusal to answer questions, you were taken up to Sullivan County on a murder charge. That you told the counsel for Lepke. Is that correct? A. Yes, sir.

Q. When you were brought up there on the murder charge, you were lodged in the Sullivan County jail where prisoners awaiting trial for murder in the first degree are usually lodged; is that correct? A. Yes, sir.

7062 Q. At that time, you told counsel for Lepke, a man by the name of Ellsworth Baker, Esq., prepared Defendants' Exhibit 2, is that right, this affidavit? A. Yes, sir.

Q. At that time were you likewise represented by another lawyer besides Mr. Ellsworth Baker of Monticello? A. Yes, sir

Q. And were you represented as co-counsel by the same lawyer who gave you the advice not to answer the District Attorney's questions in Brooklyn?

Mr. Barshay: I object to it. It is immaterial.

The Court: Overruled.

Mr. Barshay: Exception. May I have another objection on the ground that "that time" includes a general time and he is referring specifically to the time this affidavit was signed.

The Court: Yes. Go ahead. Was it the same lawyer?

The Witness: That was my co-counsel 7064
up there, that gave me the advice?

The Court: Yes.

The Witness: Yes.

Q. And the co-counsel to Ellsworth Baker was also the lawyer for Farvel Cohen, a defendant in the Rosen case?

Mr. Barshay: I object to it. There was no Rosen case at that time.

Mr. Turkus: It was in being. There was a Rosen murder September 13, 1936. 7065
There most emphatically was a Rosen case.

Mr. Barshay: Just a second. May I direct your Honor's attention that at that time, referring to the time mentioned in this affidavit or prior thereto there was no such person by the name of Farvel Cohen as a defendant; consequently he had no counsel and could not have counsel.

The Court: I will take it subject to being connected.

Mr. Barshay: Exception.

The Court: But if it is not connected,

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there is no harm done because Farvel Cohen is not being tried.

(Pending question read.)

A. Yes, sir.

Q. In other words, Farvel Cohen's lawyer on the indictment for the killing of Rosen is that same lawyer who was co-counsel with Mr. Baker?

Mr. Cuff: Objected to as already an-
7067 swered.

The Court: He has already answered it. Sustained.

Q. And has that lawyer been sitting in court now while you were on the stand, listening to the testimony?

Mr. Barshay: I object to it.

The Court: Overruled.

Mr. Barshay: Exception.

Q. The co-counsel I am talking of? A. I don't
7068 see him.

Q. Look over in the jury box. A. That is Mr. Price (indicating Saul Price).

Q. I did not ask you for the name. The name is on the record. Do you know the difference legally between a motion to inspect the Grand Jury minutes which find a murder indictment and a bill of particulars supplied by the District Attorney?

Mr. Barshay. I object to it. It is entirely immaterial.

The Court: He does not have to know.

Mr. Turkus: Didn't you hear, your Honor, that he asked him questions that were put to him in the Bug Workman case in Jersey about a bill of particulars?

The Court: You can ask him if he read it.

Mr. Turkus: I wish to direct your Honor's attention to this—

The Court: That is as far as you can go.

Mr. Turkus: This witness was asked 7070
whether or not he testified in the Charlie Bug Workman case for the killing of Dutch Shultz in reference to the bill of particulars.

Mr. Barshay: Your Honor, that is a misstatement.

The Court: You do not have to argue this and there is no use in splitting fine hairs on small points considering the large points that have been admitted, but he has stated that he swore in the Workman case that he made the affidavit, not knowing 7071
what it was. The furthest you can go is to ask him whether or not he read or had the affidavit read to him before he signed it, thereby knowing its contents.

Mr. Turkus: What I want to elicit from the witness—

The Court: Does it get you anywhere or does it only open a new jam? The man has admitted murders; he has admitted perjuries.

Mr. Turkus: I will go beyond that.

The Court: He says he would not hesitate ordinarily to commit perjury but he

7072 *Albert Tannenbaum—For People—Redirect*

claims that since about a year ago this last spring he has been telling the truth. Now it is for the jury to say whether or not, in spite of his bad credibility, he is nevertheless telling the truth now.

Mr. Turkus: I won't pursue it.

Q. At any rate, at the time you entered the plea of not guilty and signed Defendants' Exhibit 2, you were then a defendant resisting con-
7073 viction on the indictment therein alleged, namely, the killing of one Irving Ashkenas, is that right? A. Yes.

The Court: You were then fighting to save your own life, is that it?

The Witness: Yes, sir.

Q. You also said on your cross-examination by counsel for Mendy Weiss, that after May, 1940, you had told the truth in all matters in which you had testified? A. Yes, sir.

Q. Was that after your conversation with
7074 Judge O'Dwyer? A. Yes, sir.

Q. Just answer this question yes or no: Did Judge O'Dwyer say to you what would occur if you testified falsely?

Mr. Barshay: I object to it. It is not proper redirect. We never brought that out.

Mr. Turkus: Yes, Judge Talley did. He brought out that since May, 1940, that was the period of transition when he decided to tell the truth. Let the jury understand how the transition came about.

The Court: Put it in clearer language —alleged change of front.

Mr. Turkus: Yes, put it that way.

The Court: Overruled.

Mr. Barshay: Exception. I object to what Judge O'Dwyer told him.

The Court: He was not asked what Judge O'Dwyer told him, but whether he told him what would happen. It calls for yes or no.

Mr. Barshay: I may have heard 7076 wrongly, but I thought Mr. Turkus asked the question in that way.

Mr. Turkus: Will you read the question?

(Pending question read.)

The Court: Yes or no.

The Witness: Yes, sir.

Mr. Barshay: Exception. I move to strike out the answer.

The Court: Denied.

Q. Can you recall when Judge O'Dwyer spoke to you and said that he kept his fingers like that 7077 (indicating two fingers held closely together)?

Mr. Barshay: A half an inch apart.

Mr. Turkus: Even less than that.

Mr. Barshay: I object to it. It is not binding on the defendants, what Judge O'Dwyer told this man.

The Court: Sustained.

Q. At any rate, has it been since that talk with Judge O'Dwyer that you have told the truth as you have stated to Mr. Talley?

7078 *Albert Tannenbaum—For People—Redirect*

Mr. Barshay: I object to it. That is a conclusion. That is for the jury to decide.

The Court: He can state when that talk occurred.

Q. Yes, when did that talk occur? A. In May of 1940.

Q. It was brought out by counsel for the defendant Lepke that you went to California in an
7079 aeroplane since you have been in the custody of the New York Police Department, that is, since May, 1940. Was that trip with police officers in connection with your testimony before a Grand Jury in Southern California? A. Yes, sir.

Q. It was also brought out by counsel for defendant Lepke that you secured a Social Security card? A. Yes, sir.

Q. On the basis of working at some D. R. Clothing Company of Passaic, New Jersey? A. Yes, sir.

Q. And as a matter of fact, you were not working for that company at all? A. No, sir.

7080 Q. When did you get that Social Security card? A. I think it was 1938.

Q. Was that at a time when you were on the payroll of the defendant Lepke?

Mr. Barshay: I object to it, sir. The defendant Lepke—I will just confine myself to the objection as I made it.

The Court: Overruled.

Mr. Barshay: Exception.

(Pending question read.)

A. Yes, sir.

7081

Q. Did you walk over to the agency of the United States Government and secure a Social Security card exclusively upon your representation that you were working for the D. R. Clothing of Passaic, New Jersey?

Mr. Barshay: I object to it.
The Court: Overruled.
Mr. Barshay: Exception.

A. The owner of the shop gave me the Social Security card. 7082

Q. The owner of the shop gave it to you? A. Yes, sir.

Q. Who is the owner of the shop? A. Dave Ricefield.

Q. Was that for the purpose of showing allegedly legitimate employment if you were arrested?

Mr. Barshay: I object to it. It is not binding on the defendant Buchalter, whom this witness at that time said he had not seen since August of 1937. 7083

The Court: Overruled.
Mr. Barshay: Exception.
(Pending question read.)

A. Yes.

Mr. Climenko: If your Honor pleases, may we add the further objection as to impropriety of form as to that question?

The Court: Obviously he could not get any compensation. His motive may be

disclosed if it was to frame up an alibi in case he got in any kind of trouble.

Mr. Turkus: That is all I am asking about.

The Court: That would explain his motive, but it would not connect him with any defendant.

Mr. Turkus: I don't say that it does. I just wanted to show the purpose of getting that type of Social Security card in
7085 so far as he was concerned.

Q. You also told counsel for defendant Lepke, when he asked you about gambling houses that you were sent down to work there? A. Yes, sir.

Q. Does that refer to the two gambling houses in Florida and the one gambling house in Saratoga? A. Yes, sir.

Mr. Barshay: I object to it. The purpose I asked it, your Honor, was for the purpose of attacking his credibility. That
7086 does not excuse him.

Mr. Turkus: I submit the door was opened.

The Court: Overruled.

Mr. Barshay: Exception.

The Witness: Who sent me?

Q. Yes, you said you were sent down there to work. A. Yes. The first job Lepke sent me down.

Q. Yes, what about the second? A. Second one Moey sent me down.

Mr. Barshay: I object to that and move to strike it out.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Who is that? A. Moey Dimples.

Q. Was that Dimples Wolinsky? A. Yes.

Q. Was he an employee of the defendant Lepke?

Mr. Barshay: I object to it, sir. That 7088
is a conclusion.

The Court: Sustained.

Q. How about the one in Saratoga? A. Moey sent me up there too.

Q. That is referring to Dimples Wolinsky? A. Yes, sir.

Mr. Barshay: Same objection. I move to strike out the answer.

The Court: Overruled. Denied.

Mr. Barshay: Exception.

7089

Q. Counsel for defendant Lepke also spoke to you about a police vigilance of the defendant Lepke. Do you remember those questions? A. Yes, sir.

Q. Did you say to him in substance that it was easy to sneak away from them? A. Yes, sir.

Q. Did you say in substance that there were meetings with the defendant Lepke in the subway and street?

Mr. Barshay: I object to it. That is

7090

not proper redirect. That is merely repetition.

The Court: It is repetition. Sustained.

Q. You were asked by counsel for defendant Mendy Weiss if you saw Rubin at the Half Moon Hotel. Do you remember that? A. Yes, sir.

Q. Did you ever see Rubin in the Half Moon Hotel in that suite of rooms which you testified
7091 were barricaded with a peep hole and with the mirrors outside? A. No, sir.

Q. On any occasion that you spoke to Rubin, did you say to him more than "Hello," that's all, as you responded to the question? A. That's all I said to him.

Q. Were you ever permitted to discuss facts of any case with any witness?

Mr. Talley: I object to that, if your Honor pleases. What they were permitted to do and what they did are two entirely
7092 different things.

The Court: Overruled.

Mr. Talley: Exception.

A. No, we were not permitted.

Q. And did you ever talk about any case with any other prospective witnesses? A. No, sir.

Q. Since your incarceration and custody with the New York City Police Department, I mean. A. Yes, sir.

Q. You were asked by counsel for Mendy Weiss about being a good friend of Mendy Weiss. Do you remember that? A. Yes, sir.

Q. Were you as good friend in September,

1939, when you testified before the Federal Grand Jury? A. Yes, sir.

Q. That was also brought out by counsel for defendant Lepke. There was a time when he went away? A. When Lepke went away.

Mr. Talley: I object, if your Honor pleases, to that.

Mr. Turkus: I am leading up to something that is most important.

The Court: All right, take it on that 7094
basis only. Overruled.

Mr. Talley: Exception.

Q. And you had testified on direct examination that you were on the payroll right up to the time of your arrest. Do you recall that? A. Yes.

Q. After Lepke went away, who paid you?

Mr. Barshay: I object to it. It has already been answered on direct examination.

7095

Mr. Turkus: This has a bearing as to September, 1939, when he was in that Federal Grand Jury.

Mr. Talley: I object, if your Honor pleases, on the ground it is incompetent, irrelevant, immaterial.

Mr. Turkus: Mr. Talley brought out that he lied to a Federal Grand Jury with respect to Mendy Weiss. Now we are entitled to have the jury understand all the facts attendant upon that circumstance.

Mr. Talley: Not entitled to anything

except the fact that he swore falsely before a Grand Jury in New York County that he did not know Mendy Weiss except slightly.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. Mendy Weiss.

Q. And was Mendy Weiss paying you in Sep-
7097 tember, 1939? A. Yes.

Mr. Talley: Objected to as incompetent, irrelevant, immaterial.

The Court: Overruled.

Mr. Talley: Exception.

Q. And were you getting paid through Mendy Weiss at the time when you were testifying before the Federal Grand Jury in September, 1939, in the matter which Mr. Talley referred to as the harboring case?

7098

Mr. Barshay: I object to the question because it contains the words, "through Mendy Weiss," as an implication for which there is no basis in the record.

Mr. Talley: I object to it on the ground it is incompetent, irrelevant, and immaterial.

The Court: The word "through" is objectionable.

Q. Was the money actually being handed to you by Mendy Weiss at the time in September, 1939, when you were testifying in the Federal

Grand Jury in the matter which Mr. Talley referred to in questioning you as the harboring case?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: That would not justify perjury, even if it were true.
The Court: Overruled.
Mr. Talley: Exception.
(Pending question read.) 7100

A. Yes.

Q. Just answer this question yes or no: Had you spoken to anyone with reference to the testimony that you were going to give in the Federal Grand Jury before you gave it? A. I did.

Mr. Barshay: I object to it, incompetent.
The Court: Overruled.
Mr. Talley: Same objection.
The Court: Overruled.
Defense Counsel: Exception. 7101

Q. Did you receive any instructions from Lepke as to the payroll, as to who was to pay you, before he went away?

Mr. Barshay: I object to it. It is repetitious.
Mr. Turkus: I am referring to the future, as to who would pay him thereafter.
Mr. Talley: I object to it.
Mr. Barshay: Your Honor, he has a-

ready answered that on direct examination.

Mr. Turkus: I have no recollection of that.

The Court: I have none at this moment. Overruled.

Defense Counsel: Exception.

A. Did Lepke tell me anything?

Q. Yes, before Lepke went away, did you re-
7103 ceive any instructions from Lepke as to who would pay you thereafter? A. No, sir.

Recross examination by Mr. Barshay:

Q. Mr. Tannenbaum, if I misunderstood you, you let me know. At the time you were arrested by Mr. Belsky of Dewey's office and charged with vagrancy, and then questioned by Mr. Turkus, you told me on cross-examination that you were not questioned about the Rosen case. Am I correct? A. That is right.

Q. So that with respect to the Rosen case you
7104 did not assert any constitutional rights. It was not even mentioned by Mr. Turkus or Judge O'Dwyer or anyone else? A. No, sir.

Q. Isn't that right? A. That is right.

Q. You said that Mr. Price, Saul Price, was associate counsel for you at that time in Sullivan County? A. Yes, sir.

Q. But at the time this affidavit was signed by you and read to you, was Mr. Saul Price present? A. No, sir.

Q. When had you seen him before that time? A. A few days before.

Q. Did he have anything to do in the execution of this document in the prison?

Mr. Turkus: I object to it. He would not know about that.

Mr. Barshay: I will reframe it so that he will know the simple language.

Q. There is no doubt he was not present when you signed it? A. Yes, sir.

Q. Only Mr. Baker was? A. That is right. 7106

Q. You said up to that time you had not been questioned by anyone with respect to the Rosen case? A. That is right.

Q. As a matter of fact, Tannenbaum, Farvel Cohen at that time was not under arrest for the Rosen case at all, was he? A. No, sir.

Q. As far as you know there was no arrest of anyone with respect to the Rosen case at that time, referring to the day you signed the affidavit? A. As far as I know, no.

Q. Isn't that a fact? A. Yes, sir.

Q. You did not want to convey to this jury 7107 the thought that Saul Price asked you to lie?

Mr. Turkus: I object to it.

Q. Did you?

Mr. Turkus: Just a minute. Does he want to convey that? That was not the intent of anybody.

Mr. Barshay: I will withdraw the question as long as you did not intend that.

Mr. Turkus: I intended to show he was Farvel Cohen's lawyer.

7108 *Albert Tannenbaum—For People—Recross*

Q. At that time to your knowledge Mr. Price was not the attorney for Farvel Cohen with respect to the Rosen case, was he?

Mr. Turkus: I object to that. That has already been answered.

The Court: Overruled.

Q. Was he? A. As far as I know, no.

Q. He was not? A. No, sir.

7109

Mr. Barshay: That is all.

Mr. Turkus: Just one question.

By Mr. Turkus:

Q. At the time that the affidavit was signed in May of 1940, May 3rd was it, did you know where Farvel Cohen was? A. No, sir.

Mr. Turkus: That is all.

Mr. Barshay: Judge, as a convenience to Mr. Baker—I want to ask him one question—would you take him out of order so that he should not have to come back?

7110

Mr. Turkus: This is unusual to break up the State's case.

The Court: I think it would tend to confuse.

Mr. Barshay: All right, I will abide by the Court's ruling.

Mr. Turkus: May all counsel approach the Court at the bench, all counsel? Is there a ruling on that?

The Court: That goes.

Mr. Turkus: Bring in Mr. Rubin, Max Rubin.

Max Rubin—Recalled for People—Redirect 7111

MAX RUBIN, having been previously sworn, recalled as a witness in behalf of The People, testified further as follows:

Redirect examination by Mr. Turkus:

Q. Mr. Rubin, on October 1, 1937, were you walking towards your home at one time during that day?

Mr. Barshay: With respect to the defendant Buchalter, I object to it. 7112
The Court: Overruled.
Mr. Barshay: Exception.

A. Yes.
Q. Where had you come from?

Mr. Rosenthal: Judge, so that I might not interrupt this line of questioning, may I have a general objection and exception to these questions on the ground that it is in no wise bearing upon my client and is highly prejudicial in its nature. I don't want to get up at each question and make the same objection. 7113
The Court: Yes. Of course, you know the ruling is not final. The ruling is only temporary, overruling the objection.
Mr. Rosenthal: Yes, but the purpose is so that I do not interrupt the continuity of it by getting up. I preserve my objection to the end.
The Court: Correct.
Mr. Barshay: If your Honor will per-

mit me to do that, then I won't interfere either.

The Court: All right.

(Pending question read.)

A. From 17th Street.

Q. 17th Street and where? A. I had left the office of the Greater New York Tailors Expressmen's Association on 22 East 17th Street, on a Friday.

7115 Q. And where did you go? Take the subway? A. I took the Lexington Avenue subway from 14th Street and rode up to Gunhill Road.

Q. Gunhill Road is where? A. Mosholu Parkway is the station.

Q. At that time where were you living, Mr. Rubin? A. 245 East Gunhill Road.

Q. Did you get out at the Mosholu Parkway station? A. I did.

Q. And where did you walk? A. On the east side of Jerome Avenue, for one block, to Gunhill Road, and then I turned right, which meant I was on the south side of Gunhill Road, walking towards my home.

7116

Q. Were you alone? A. I was alone.

Q. What happened to you?

Mr. Talley: I object, if your Honor please, as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Mr. Talley: No bearing upon the issue being tried before your Honor; apparently an endeavor to do something, to present evidence of something that has no bearing upon this indictment whatsoever.

The Court: Overruled.
Mr. Talley: Exception.

A. When I got opposite Montefiore Hospital I heard a report, a shot, and I was stunned and then I fell down.

Mr. Talley: I move to strike out that answer as indicating the purpose now of the question, on the ground that the shooting of this witness, if it happened, has no 7118
bearing whatever upon this indictment.
The Court: Overruled.
Mr. Talley: And may involve testimony of a crime entirely distinct from that named in this indictment.
The Court: Overruled.
Mr. Talley: I take an exception.

Q. After you were shot, Mr. Rubin, were you taken to a hospital? A. I was.
Q. What hospital? A. Fordham.

Mr. Talley: May I have an objection 7119
to all this line of testimony?
The Court: Yes.
Mr. Talley: And an exception to it.

Q. Do you know how long you were in Fordham Hospital? A. From October 1st to November 8th,—thirty-eight days, about.
Q. Get a blood transfusion? A. I did.
Q. After you came out of the hospital on November 8th, were you given a police guard? A. Yes, at first three men.
Q. That would have been a full 24-hour guard?

7120 A. One man for 24 hours and the other two men whenever I went outside, so I had three men whenever I went down on the street.

Q. How long did that 3-man guard keep up? A. Several months, I believe.

Q. After several months, was it cut down? A. Yes, it was.

Q. To what kind of a guard? A. 24-hour guard, one man.

Q. One man 24 hours? A. That is right.

7121 Q. How long after you were shot was it before you went back to the garment district? A. I walked through the garment district whenever I could because I was getting paid from the union and I wanted to try to maintain that relationship, if I possibly could, and so I was there until February, 1939. Whenever I was able to walk around, I went down there and sort of said, "Hello" to a few people and made myself at least as if I was appearing there, to get paid.

Q. Where did the bullet enter you, Mr. Rosen?

7122 Mr. Climenko: I object to that, if your Honor pleases.

The Court: Overruled.

Mr. Climenko: Object to this demonstration. This matter has no materiality to the issue before the Court and it can tend only to be inflammatory.

The Court: Overruled.

Mr. Climenko: Exception.

Mr. Talley: I make the same objection and call your Honor's attention to the fact this claimed shooting was more than a year after the crime named in this indict-

ment, too remote, in addition to being incompetent and immaterial and irrelevant to this issue.

The Court: Overruled.

Mr. Talley: Exception.

A. The bullet entered right here in back of my head (indicating), and it came out right here, right close to my eye (indicating).

Q. It entered the back of your neck and emerged at the bridge of your nose? A. That 7124
is right.

Q. In close proximity to your right eye? A. Yes; a .38 calibre revolver bullet, too.

Q. Since that bullet went from the back of your neck and came out at the vicinity of one of your eyes, at the bridge of your nose, has your neck been permanently on the side?

Mr. Talley: Objected to as immaterial.

The Court: Overruled.

Mr. Talley: Exception.

7125

A. Yes, sir.

Q. Have some of those neck muscles and nerve muscles been affected by the bullet so that your head is to one side? A. Yes, and my nerves have all been shattered.

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. And have you since that time been on total

7126 disability on your insurance, and receiving payments?

Mr. Talley: I object, if your Honor pleases, as being purely inflammatory and tending to have an effect upon this jury that cannot possibly be justified and should not be permitted.

The Court: Overruled.

Mr. Talley: Exception.

7127 A. Yes, I have been on disability from that time on.

Q. Receiving weekly checks or monthly checks? A. Monthly check.

Mr. Turkus: That is all.

Mr. Barshay: I move to strike out each and every bit of testimony that this witness gave on the ground it has no binding effect upon the defendant Buchalter, not connected with him in any wise whatever.

7128 The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I join in the motion, if your Honor pleases, and take an exception.

Mr. Barshay: I now move for the withdrawal of a juror and the declaration of a mistrial on the ground that this testimony is highly prejudicial and inflammatory and does not tend to connect the defendant with the commission of this crime.

The Court: Judge Talley's objection is overruled. Both motions are denied.

Defense Counsel: Exception, sir.

Mr. Rosenthal: On behalf of defendant Capone I again renew the motions which were made at the time of the severance and throughout this trial and ask for the withdrawal of a juror and a severance upon the ground that this testimony is in no wise connected with the defendant Capone and is prejudicial to his rights 7130
and interests.

The Court: Denied.

Mr. Rosenthal: I respectfully except.

Mr. Talley: I join in both motions, if your Honor pleases. Take an exception.

The Court: Denied.

Mr. Barshay: We all except. May I call upon your Honor now to let us know whether or not we have a right to see that statement?

The Court: I did not anticipate that this witness would be back this afternoon. 7131
I have the deposition before me now. Of course, the jury will have to be excused while the matter is discussed. I have read it about three times so as to try to comprehend it, but I have not checked it up against my notes of the testimony of the witness. However, I will excuse the jury now. We may be able to come to a conclusion on it.

(To jury) Excuse you for a few minutes, gentlemen.

(The jury retired from the court-room.)

The Court: The deposition now being before the Court, notations will be put against each question and answer which the Court feels the defense is entitled to see. As to some of the material in the deposition, the same is highly speculative, opinionative, and therefore incompetent, and some concerns a possible prospective witness in this case, so that it would be a matter of court policy not to let counsel see that in advance of that witness taking the stand.

The Court can state now that the witness, when the deposition was being taken, told nothing whatever about flight and hiding, this, of course, in keeping with the advice previously given by Mr. Maguire.

The witness also failed in any way to implicate Lepke. On the other hand, he went out of his way to give assurance that if he could, he would. The Court will not comment one way or the other as to why that may have been deemed feasible, whether true or untrue, by the witness when he gave this deposition. Counsel can figure that out without any suggestion from the Court. The witness did name two men as probably active participants in the killing, whose names are included in this indictment as probable killers. That was purely on the basis of speculation. The witness was offered immunity by Mr. McCarthy, but in another part of the deposition he expresses not wishing or not wanting immunity, in other words, apparently

rejecting the offer of immunity. I will go over these questions and answers, if you will be patient for a few minutes.

Mr. Barshay: Can I take one exception to one part of the comment your Honor made?

The Court: The jury is out of the room.

Mr. Barshay: I know that, Judge, but for the record, it is an observation which your Honor made which is not based on 7136 the testimony in this case. I would like to call your Honor's attention to it.

The Court: What is that?

Mr. Barshay: That is that he failed to mention anything about flight, pursuant to the suggestion of Mr. Maguire. I do not believe, your Honor, there is anything in the record with respect to that phase.

The Court: I did not say that.

Mr. Barshay: I thought I heard you say that.

The Court: In accordance with the 7137 legal advice. Mr. Maguire, you will recollect, is supposed to have advised him and told Lepke that flight may be viewed as evidence of guilt, makes a man look guilty, and then came the alleged, somewhat trite, saying by Lepke that when witnesses are away, investigations collapse. You recall that?

Mr. Barshay: Yes, Judge.

The Court: Of course, as to that, we have a motive for concealment.

Mr. Turkus: May the record indicate

that that statement was the one that was marked for identification by the District Attorney?

The Court: Z-16 for identification.

Mr. Turkus: Was offered in evidence by the District Attorney, the offer was rejected by the defense, and when the witness was asked whether the statement was true or false, objection was made by defense counsel.

7139 Mr. Barshay: Counsel acting as lawyers made the objection then and they would make the objection now, because that is incompetent.

The Court: It is incompetent. It could not be admitted without prejudice to the defense. There was also an admission of giving money to Rosen, but there was an attempt to cover it up and to say that it was not connected in any way with the Rosen murder but was a mere casual hand-out.

7140 The Court amends what it said first about not leaving town. He admitted leaving town, but denied it was about the Rosen matter.

This is just preliminary, because my notes are rather voluminous. I am asking of all counsel, does any counsel recall at any place this witness claims that Lepke admitted having any part in the killing of Rosen?

Mr. Barshay: No, he never claimed that.

The Court: That is agreed. To save

the trouble of having to make, through some member of the court staff, a transcript of questions and answers which the Court finds defense is entitled to see, the Court will, in view of the lateness of the hour, dictate those questions and answers, and then when counsel get a daily transcript they will have them before them and continue the cross-examination tomorrow morning. Is that agreeable?

Mr. Barshay: Very much so. 7142

Mr. Rosenthal: If that is so and there will be no other testimony, may I be excused for the afternoon?

The Court: I think you had better be here when this is read. It will take only a few minutes.

(Reading.)

"By Mr. McCarthy:"—and the date of the deposition being December 16, 1937.

"Stenographer: Caneveri.

"Book No. 26. 7143

"Q. Your name and address? A. Max Rubin, 245 East Gunhill Road, Bronx.

"Q. Now Mr. Rubin, my name is McCarthy. I am an Assistant District Attorney of Kings County. I am going to ask you some questions and at the same time I want you to know that you can expect something from us. The District Attorney of Kings County is willing to give you immunity and we will agree not to prosecute you. We want to question you about the Joseph Rosen murder. Of course, you know you were over to the Joseph Rosen store. That is before the

Grand Jury now. Even if it does involve you, we are not going to prosecute you. A. I was only over to the store once, and that was on an invitation from Louis Feinberg from the union I represent. I had a car at the time, a Buick."

Mr. Barshay: Pardon my interruption. May I ask your Honor's indulgence in excusing Mr. Rubin at this time, so that he should not hear?

7145 The Court: Oh, yes. Thank you for the suggestion.

Mr. Rubin need not be brought back today. Ten o'clock tomorrow morning.

(Continuing reading.)

"Q. What color was it? A. Black. He had to meet this Sam Levine to go to Brighton or wherever they wanted to go fishing. He said at the same time that Rosen wanted to see me. I went over there just that once to see Joe Rosen. It was an afternoon, I imagine about three
7146 o'clock or so, or two o'clock. I am not sure about the time. He was in the store alone. Later on his little girl came drifting in and out, maybe two or three times. The general conversation that I had with him I don't think lasted more than half or three-quarters of an hour. He complained about the business he was in and asked me what I could do to get him out of it. I did not know what he wanted to see me for, and I said, 'Joe, I will do what I possibly can do, but you had no right to quit the job without first taking it up with me.'

"Q. Quit what job? A. He was working at that time for Larry Cooper.

"Q. That is a fellow from Jersey, isn't it? A. No. His brother is a detective in the Homicide Squad. I think his name is Nat, or Nathan Cooper. He has been there for years. (continuing) He jumped off that job without me knowing it. I told him at first that I could have gotten him some money because there was always somebody hanging around the union that would have paid him. He said he had heart trouble and that is why he had to leave the job. He said he wanted to go in the cleaning and 7148
dyeing business. He said, 'I want to get in that other business.' I said, 'I may be able to help you, because we have done it in three or four other cases before.' We would run an affair and put them in business. That is the small union that I represent.

"Q. What union do you represent? A. The Clothing Drivers & Helpers Union, Local 240.

"Q. Are you the business agent? A. Yes, and have been for about twelve years, at 35 West 15th Street. I told him I would see what I could do for him, and that is all the conversation
we had, and I did not see him from that day 7149
until I read he was shot, in the newspaper.

"Q. Didn't you leave town then? A. Yes, sometime in November, but not on account of that.

"Q. Did you know Lepke and Gurrah? A. Yes, very well.

"Q. Did you ever tell Rosen to get out of town? A. No.

"Q. Did you give him any money to go away? A. No.

"Q. Did you give Mrs. Rosen any money? A. I gave Rosen plenty of money. I used to give

him 5's or 10's or deuces as I would do for anybody else.

"Q. You don't know anything about the Rosen murder at all? A. No."

The next question and answer are debatable. I put "yes" against it and then a question mark, but determined not to reveal it because I think it is incompetent, and I am absolutely sure that counsel for

7151 defense would not use it.

According to another part of the deposition I have a question mark against the question and answer next to the last, on page 5, but the trouble with it is that it states—and this must be read in connection with the rest of the answer, which is simply to state his own motive and position—it states the following, which is incompetent, clearly: "I am in a position to know whether the whole thing will be run on the up-and-up. If it will be run on the up-and-up, I will do anything I

7152 can." I decided not to let that in.

Then at the bottom of page 5:

"Q. I am giving you immunity. A. I don't need immunity. I was never taken into anybody's confidence on any murder cases. That was always one thing. Where I got that other stuff from was from general conversation."

On page 8, next-to-the last question and answer:

"Q. The little girl said you threatened their father and told him to get out of town. A. I did give him some money, but he did not ask me. He wanted to go in the cleaning and dyeing business, which would have required about six or seven hundred dollars. It was a question of trying to get together."

On page 9, the lower half—in reference to context which deals with Mrs. Rosen's knowledge concerning him: 7154

"Q. Because you were in the store"—

I will read the one before that. I had "No" against it. I will mark it "Yes," because these two must be read together:

"Q. She knows a whole lot about you. You were the man, according to her. A. How could she base it on?

"Q. Because you were in the store. A. I was only there once." 7155

There is a question and answer in the middle of page 10. I don't think it is competent. There is a question mark put by me against it to qualify the notation "Yes," but I think counsel should know it.

"Q. Tell me, is there anything else you want to say? A. All you ought to do with me is to pray for a break. It will come, and if I can be of any help and if you find that my story devi-

7156 *Max Rubin—Recalled for People—Redirect*

ates one bit from what I told you, you can do what you want. You will find that in the long run we will get many of them. You will see more of a chap in me today than any cop in the Department today."

The rest of the questions and answers are deemed incompetent, speculative, and, to a certain extent, confidential.

7157 Mr. Barshay: I hope your Honor won't misunderstand when I read my motion or my objection and exception in the record as tending to put the Court in any spot. It is merely on the law. We may be wrong.

The Court: The Court may be right or wrong. It can only do the best it knows how.

7158 Mr. Barshay: Counsel for defendant Buchalter take an exception to the ruling that speculative statements are incompetent and not available to the defendants and also an exception to the ruling that the portion affecting a prospective witness is not available to defendants for the reason— I shall modify that, Judge. If that prospective witness, whoever he may be, is not called, then your Honor will let us see any other part of the statement which you deem advisable as competent?

The Court: I have not gone so far as to say that. So far as I can see at the present time, this was purely opinionative

as to personality and speculative as to possible connection.

Mr. Barshay: May I finish, Judge?

The Court: Yes.

Mr. Barshay: We also, in view of the view we have about the law, which may be right or wrong, request the opportunity of seeing the whole statement in order to exercise the right to determine, as counsel, what portions are inconsistent with the testimony of the witness and affect his 7160
credibility, for if any inconsistency exists, it is our view that we must see the whole statement in order to propound our cross-examination in the light of our understanding of the record.

The Court: Of course, you understand, Counsellor, the development and present liberality of the law, allowing the defense on a criminal indictment trial to see the prosecution's preparation work, has never been liberalized one bit to the extent of allowing the prosecution to see the de- 7161
fense preparation work or statements. This is a one-sided liberalization. It works entirely in favor of the alleged criminal. The Court, therefore, is not justified in going any further than compelled by the authority of which it is at present cognizant, which it recognizes as being controlling upon the action of the Court in this trial. Personally, I don't agree with it. I think it is one-sided, and I agree with Judge Crane in what he has said many times, that the laws tend in all re-

7162 spects to favor the criminal and not The People of the State of New York.

Bring back the jury.

Mr. Barshay: If your Honor pleases may the record show all people present at the time this questioning of Rubin took place, according to the statement? Was there anybody else present in addition to Mr. McCarthy and the stenographer, and the exact time and place?

7163 The Court: Detective Giordano of the Homicide Squad, Brooklyn; Mr. Frank S. Hogan, Assistant Prosecutor, who represented Mr. Dewey.

(The jury returned to the court-room.)

The Court: Gentlemen of the jury, we will take a recess until tomorrow morning at ten o'clock, when the cross-examination of the witness now on the stand will be resumed. In the meantime you are cautioned to follow all admonitions heretofore given in relation to not talking or reading or discussing or receiving any impression regarding the case. Keep your minds open.

7164

The jury may go out of that door.

The defendants are remanded.

(Whereupon an adjournment was taker to November 14, 1941, at 10 A. M.)

Brooklyn, N. Y., November 14, 1941.

TRIAL RESUMED

MAX RUBIN, a witness on behalf of The People, resumed the stand and testified further as follows:

Mr. Barshay: If your Honor please, there are some things I would like to clear up with respect to the statement we spoke 7166
of yesterday, so there may not be any misunderstanding at all when your Honor makes a ruling. If I understood it clearly last night, I was to have certain rights and not have other rights. Will you excuse the jury?

The Court: The Court has ruled on that.

Mr. Barshay: It is a question of interpreting some of the rulings your Honor has made.

The Court: Refer to it by page.

Mr. Barshay: Page 2266. Will I be 7167
allowed to make comment? Will I be allowed to ask the witness questions on that point? It is next to the last paragraph.

The Court: Not only that, but you will be permitted to even read that part of the record to the jury. That was the purpose of the Court's stating it. You have that right. Likewise, the last paragraph, which begins at the bottom of that page and continues on the other, up to and including the first four lines on page

2267. Omit the speculation, but as to the offer of immunity, that may go in. Is there anything else?

Mr. Barshay: There may be some odds and ends.

The Court: You can call my attention to that.

Mr. Barshay: I ask again that you permit counsel, for the purpose of assisting him in cross-examination, to use the
7169 entire statement.

The Court: The Court has ruled on that. This is repetitious.

Mr. Barshay: Because, when I read it over, I wanted to make it clear. Do you deny my motion?

The Court: Yes.

Mr. Barshay: Exception.

Mr. Turkus: Since the statement was given, that portion was given to the defense counsel in the absence of the jury—

The Court: You will have to speak
7170 louder.

Mr. Turkus: I say that since that portion of the statement, Z-16 for identification, a People's exhibit, was given in the absence of the jury, I would like the jury to know that was a statement, that was not for identification.

The Court: There is nothing that the jury cannot hear. Speak louder.

Mr. Turkus: I would like— It was the Court's direction that Z-16, a statement concerning which the District Attorney questioned Rubin on direct examination,

be marked for identification. When a question was addressed to the witness as to whether or not the contents thereof were true or false, that was prevented by the Court at that time. I would like the jury to know the circumstances.

The Court: This refers to the deposition taken by Assistant District Attorney McCarthy, who was one of the Assistants under Mr. Geoghan in an investigation that was made before Judge O'Dwyer 7172
came into office as District Attorney of this county. You, Mr. Turkus, offered it in evidence, and it was objected to and excluded, but was marked for identification. The Court has read parts of it to determine what is fair to allow counsel for the defense to see, for the purpose of further cross-examining this witness. Those parts have been revealed to counsel, and counsel have the right now, to cross-examine on those points. Is that sufficient? 7173

Mr. Barshay: That is clear.

Recross-examination by Mr. Barshay:

Q. Will you try to answer these questions without volunteering anything? A. Yes, sir, but it is pretty hard as far as that paper is concerned.

Q. You will try, please. I will try to ask of you questions in a way that will give me a simple answer. A. If you ask me fairly, I will certainly answer them fairly.

Q. I don't want to quarrel with you. Will

you please answer the questions if you can, and if not, will you tell the Judge you cannot, without volunteering? Is that all right? A. I will try.

Q. Subsequent to the occurrence that happened to you as you described it to the jury, when you came out of the hospital you were under guard by the Police Department, weren't you? A. I was.

Q. For 24 hours a day? A. That is right.

7175 Q. You had already been in Mr. Dewey's office, you said, sometime in September of 1937? A. In August.

Q. Sometime in 1937? A. Yes, sir.

Q. There did come a time when you became acquainted with Mr. Frank Hogan, then an Assistant District Attorney? A. At that time.

Q. You dealt a great deal with him? A. That is right.

Q. Mr. Frank Hogan is the same person who is now District Attorney elect in New York County? A. That is right.

7176 Q. On December 16, 1937, there is no doubt about when you were under police guard? A. That is right.

Q. Were you at the office of Mr. Hogan on that day? A. I was.

Q. Can you tell us where the address was? A. 120 Broadway— Not 120—the Woolworth Building.

Q. 233 Broadway? A. Yes, sir.

Q. That was Mr. Dewey's headquarters? A. That is right.

Q. Some of the building was rented to him? A. Yes, sir.

Q. You were there at what time of day? A. I cannot tell you that.

Q. You were there under guard, I take it. A. That is right.

Q. Did you meet Mr. McCarthy, an Assistant District Attorney then serving under Mr. Geoghan? A. I did.

Q. Mr. Hogan was in the room? A. He was.

Q. The police were in the room? A. Just the one detective that Mr. McCarthy came with, and the stenographer. The detective I had went out- 7178
side.

Q. Right outside of the room? A. Yes, sir.

Q. In other words, in that immediate room you were certainly not under physical fear? A. No, sir, not in that room.

Q. You had heard the name McCarthy before, hadn't you, as you say from the defendant Buchalter? A. That is right.

Q. That is the famous McCarthy whose name was mentioned by Mr. Buchalter to you when he said, "McCarthy is going around saying he will make the biggest collar," or something like that, 7179
of Lepke and Gurrah? A. That is right.

Q. Were you asked questions there by Mr. McCarthy? A. I was.

Q. Was a stenographer there? A. He was.

Q. Do you know now whether his name was Caneveri? A. Yes, sir.

Q. Mr. Hogan was in the room? A. Yes, sir.

Q. And a detective? A. Yes, sir.

Q. Were you asked this question? I am going to read it just exactly as the Court gave it to you, and you answer yes or no, will you? A. Can't I elaborate?

7180 *Max Rubin—Recalled for People—Recross*

Q. No, please. A. Wait a minute Mr. Barshay—

Q. I don't want to quarrel with you.

Mr. Barshay: May I ask that the Court just say to this witness he shall answer the question yes or no, because that is the only way I shall ask the question.

The Witness: Your Honor, there is a
7181 background to this case.

The Court: I understand there is a background, but you don't have to shove it before the jury. The District Attorney is here to take care of you. At the present you will be asked questions by counsel for the defense which call for direct answers and for no volunteering. The question as to whether or not a reason may be given for any apparent inconsistency is a question of law for the Court to rule upon, but the situation will
7182 be confused if you attempt to volunteer anything in order to straighten this out.

Q. Was this question asked of you: "Q. Your name and address?" and did you give this answer: "A. Max Rubin, 245 East Gunhill Road, Bronx"? A. That is right.

Q. Was this question asked you: "Q. Now, Mr. Rubin, my name is McCarthy. I am an Assistant District Attorney of Kings County. I am going to ask you some questions and at the same time I want you to know that you can expect something from us. The District Attorney

of Kings County is willing to give you immunity and we will agree not to prosecute you. We want to question you about the Joseph Rosen murder. Of course, you know you were over to the Joseph Rosen store. That is before the Grand Jury now. Even if it does involve you, we are not going to prosecute you. A. I was only over to the store once, and that was on an invitation from Louis Feinberg from the union I represented. I had a car at the time, a Buick." 7184

Did you make that answer to that question? A. I did.

Q. Were you asked this question: "Q. What color was it? A. Black. He had to meet this Sam Levine to go to Brighton or wherever they wanted to go fishing. He said at the same time that Rosen wanted to see me. I went over there just that once to see Joe Rosen. It was an afternoon, I imagine about three o'clock or so, or two o'clock. I am not sure about the time. He was in the store alone. Later on his little girl came drifting in and out, maybe two or three 7185 times. The general conversation that I had with him I don't think lasted more than half or three-quarters of an hour. He complained about the business he was in and asked me what I could do to get him out of it. I did not know what he wanted to see me for, and I said, 'Joe, I will do what I possibly can do, but you had no right to quit the job without first taking it up with me.'"

Did you make that answer to that question as I read it? A. That is right.

Q. "Q. Quit what job? A. He was working at that time for Larry Cooper."

Did you answer that question as I read it? A. Yes, sir.

Q. "Q. That is a fellow from Jersey, isn't it? A. No. His brother is a detective in the Homicide Squad. I think his name is Nat, or Nathan Cooper. He has been there for years. (continuing) He jumped off that job without me knowing it. I told him at first that I could have
7187 gotten him some money because there was always somebody hanging around the union that would have paid him. He said he had heart trouble and that is why he had to leave the job. He said he wanted to go in the cleaning and dyeing business. He said, 'I want to get in that other business.' I said, 'I may be able to help you, because we have done it in three or four other cases before.' We would run an affair and put them in business. That is the small union I represent."

Were you asked that question and did you
7188 make that answer? A. That is right.

Q. You were then speaking about a conversation you had with Joseph Rosen? A. Yes, sir.

Q. Were you asked this question: "Q. What union do you represent? A. The Clothing Drivers & Helpers Union, Local 240."

Did you answer that question in that way, as I read it? A. Yes, sir.

Q. "Q. Are you the business agent? A. Yes, and have been for about twelve years, at 35 West 15th Street. I told him I would see what I could do for him, and that is all the conversation we had, and I did not see him from that day until I read he was shot, in the newspaper."

7189

Did you answer that question just as I read it? A. I did.

Q. "Q. Didn't you leave town then? A. Yes, sometime in November, but not on account of that."

Did you answer that question as I read it? A. I did.

Q. "Q. Did you know Lepke and Gurrah? A. Yes, very well.

Did you answer that question as I read it? A. Yes, sir.

7190

Q. "Q. Did you ever tell Rosen to get out of town? A. No."

Did you answer that question the way I read it? A. Yes, sir.

Q. "Q. Did you give him any money to go away? A. No."

Did you answer that question as I read it? A. Yes, sir.

Q. "Q. Did you give Mrs. Rosen any money? A. I gave Rosen plenty of money. I used to give him 5's or 10's or deuces as I would do for anybody else."

7191

Did you answer that question as I read it? A. I did.

Q. "Q. You don't know anything about the Rosen murder at all? A. No."

Did you answer that question as I have read it? A. I did.

Q. "Q. I am giving you immunity. A. I don't need immunity. I was never taken into anybody's confidence on any murder cases. That was always one thing. Where I got that other stuff from was from general conversation."

Did you answer that question the way I read it? A. Yes, sir.

Q. "Q. The little girl said you threatened their father and told him to get out of town. A. I did give him some money, but he did not ask me. He wanted to go in the cleaning and dyeing business, which would have required about six or seven hundred dollars. It was a question of trying to get together."

Did you answer that question as I read it? A.
7193 I did.

Q. "Q. She knows a whole lot about you."—referring to Mrs. Rosen—"You were the man, according to her. A. How could she base it on?"

Were you asked that question and did you make that answer? A. Yes, sir.

Q. "Q. Because you were in the store. A. I was only there once."

Did you make that answer to that question? A. Yes, sir.

Q. Were you asked this question by Mr. McCarthy:

"Q. Tell me, is there anything else you want to
7194 say? A. All you ought to do with me"—

Mr. Barshay: Am I reading it correctly, Mr. Klein?

Mr. Turkus: The record is that way. Let it go according to the record. We have no quarrel.

The Court: It shows as the stenographer transcribed it. I do not assume responsibility for errors in transcription.

Mr. Turkus: It has the word "got" instead of "ought."

The Court: Change it. There are numerous mistakes in the record of a trial, sometimes several to a page.

Mr. Barshay: That does not change the meaning of the statement.

Q. Were you asked this question by Mr. McCarthy: "Q. Tell me, is there anything else you want to say? A. All you got to do with me is to pray for a break. It will come, and if I can be of any help and if you find that my story deviates 7196
one bit from what I told you, you can do what you want. You will find that in the long run we will get many of them. You will see more of a chap in me today than any cop in the department today."

Mr. Barshay: I believe the word "chap" is meant to be "cop."

Q. Did you mean "chap" or "cop"? A. I cannot remember now.

Q. I will read it just as it says: "You will see more of a chap in me today than any cop 7197
in the Department today." Did you make that answer to the question I just read? A. I did.

The Court: The word "chap" was in the transcript that the Court read from, but it is obviously an error. He must have said "cop."

Mr. Turkus: May I say at this point, your Honor, in reading the statement, or the portions of it you have given to the defense counsel, you referred to this as a deposition. In order that the record may

be clear, this is simply a "Q. & A." statement taken by McCarthy on December 16, 1937. This is not signed or sworn to and not what I would call a deposition.

The Court: In the sense that it is not signed or sworn to, the term "deposition" does not apply, but "deposition" was used to typify it, because the legal meaning of "deposition" is a sworn statement in question and answer form. An
7199 affidavit is in the narrative form, purely as matter that is alleged. Go ahead.

By Mr. Barshay:

Q. Is it not a fact, Mr. Rubin, that in that statement to Mr. McCarthy at Mr. Dewey's office, in the presence of Frank Hogan, you in any way— Question withdrawn.

Q. You did not implicate the defendant Buchalter, or Lepke, in any respect whatever—yes or no? A. That is true.

Q. You did not implicate him? A. I did not.

7200 Q. Is it not a fact that in that statement you, on the other hand, went out of your way to give assurance to the Assistant District Attorney then that if you could implicate Lepke you would? A. Where do you get that inference from?

Mr. Turkus: No, is is something the Court disclosed to counsel yesterday.

By the Court:

Q. Is it a fact you said you would implicate

Lepke if you could? A. I don't remember saying that. I don't think at that time I would implicate him, even if I could.

Mr. Barshay: I move to strike out the answer as not responsive. I am following the Court's instructions to the letter.

The Court: Correct. Strike it out. The District Attorney can take care of anything by way of explanation.

Mr. Barshay: I ask to have the question repeated by the stenographer. 7202

Q. (Repeated by stenographer.) A. I did.

By Mr. Barshay:

Q. There is no doubt, Mr. Rubin, that the offer of immunity made to you by the Assistant District Attorney, Mr. McCarthy, was repected by you? Yes or no. A. I am not looking to deviate from my understanding or instructions from the Court, but I simply want to say as a layman I did not know—you can stop me if you want to— I would be pleased if you stopped— 7203

The Court: Mr. Barshay wants to know if it is not a fact you said you did not want immunity.

The Witness: Yes, sir, that is right.

Q. Is it not a fact that in that statement made to Assistant District Attorney McCarthy you did not mention to him the incident with respect to you going to Berger and telling him to go to Buchalter? A. I certainly did not.

7204 *Max Rubin—Recalled for People—Redirect*

Q. Isn't it a fact that in that statement made to Assistant District Attorney McCarthy then, that you did not tell him that Allie Tannenbaum was present in the room with respect to the conversation you and Bachalter had on September 11th?

Mr. Turkus: I object, there was no conversation in that statement in which he said he had such a conversation with Lepke.

7205

The Court: There is nothing in the statement concerning any conversation with Lepke whatever.

Mr. Barshay: Is it clear, your Honor, that the name of Tannebaum is not mentioned in that statement?

The Court: It is clear the statement is silent so far as such a conversation with Lepke is concerned.

The Court: Any other questions?

Defense Counsel: No questions.

7206 *Redirect examination by Mr. Turkus:*

Q. When you were on direct examination I put a question to you: Was the statement Z-16, District Attorney's exhibit for identification, true or untrue, and at that time the Court sustained objection to the question. I now renew it. Was People's Exhibit Z-16, the District Attorney's exhibit in this case for identification, true or untrue as to your anwers?

Mr. Barshay: Object: that is a matter for the jury.

The Court: Objection overruled.
Mr. Barshay: Exception.

A. Untrue.

Q. When you discussed the matter in the District Attorney's office after Judge O'Dwyer was District Attorney, was this statement, Z-16 for identification, shown to you—yes or no?

Mr. Barshay: I object to it as not binding upon this defendant. 7208
The Court: Objection overruled.
Mr. Barshay: Exception.

A. It was.

Q. Answer this question yes or no: And were you asked about that statement in the District Attorney's office?

Mr. Barshay: I object to that as incompetent, not binding on the defendants.
The Court: Objection overruled.
Mr. Barshay: Exception. 7209

A. Yes, sir.

Q. Did you make response to the District Attorney in connection with People's Exhibit Z-16 for identification?

Mr. Barshay: I make the same objection.
The Court: Objection overruled.
Mr. Barshay: Exception.
The Court: Answer that yes or no.

A. Yes, sir.

7210 *Max Rubin—Recalled for People—Redirect*

Q. Now, you have related to the Court and Jury that the contents of People's Exhibit Z-16 for identification are untrue.

Mr. Barshay: I object to that as repetitious.

The Court: Yes, that is what he said.

Q. Why did you give untrue answers to Mr. McCarthy on December 16, 1937, in the Rosen case?

7211

Mr. Barshay: I object. That calls for the witness's opinion and is a conclusion and self-serving declaration, and not binding in any wise upon the defendants.

The Court: This is a ticklish question of the law of evidence. The Court must use care, unusual care, in deciding it, but the Court must assume the responsibility of decision. Under the rules of evidence ther are circumstances under which a witness may state the reason existing in his

7212 own mind at the time of doing a certain thing. There is no doubt about that. As applied to the evidence in this case as heretofore given by this witness, the statement concerning which he has just been cross-examined on is obviously for the purpose of impeaching his credibility as a witness in giving his testimony for the prosecution in the trial of this case. It is the view of the Court, and I think it is good law, that if a witness has given an untrue statement on some occasion and that is used as the basis of impeachment

of his credibility, that in redirect the prosecution may go into the gravamen of the falsification as having a bearing on the extent to which his credibility is affected. The magnitude of the falsification varies in accordanee with the temptation that produces it; varies in accordance with the temptation that produces it. There is a distinction that is properly considered between a wilful falsification as a sheer matter of dishonesty, and that which, under temptation or inducement, is tendered to serve an end—to serve a selfish purpose—an instinct of self-preservation, or an instinct, possibly, of personal safety. I think that some of counsel have read an illustration of that kind in the first book of Victor Hugo's Les Miserables, where Javert enter the home of the priest, after Jean Valjean, a criminal fugitive has just fled to escape arrest after having been dined at the table of the priest and of the priest's two sisters—I should say a sister. That sister enjoyed the reputation of having never told a lie, and when Javert asked the sister whether or not Jean Valjean had been there, the sister told her first lie. She said "No." I read that book while my philosophy on this subject was in its formative stage—that is a good many years ago—but the words of Victor Hugo, as recorded there, in commenting on the lie told by the priest's sister, have had a profound influence on my philosophy in determining

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the extent to which a person, to my notion, is impeached in general credibility by falsification in a specific respect. Counsel may possibly have the same recollection that I have. I think this is admissible. I think the witness is entitled to state the reason why he did not tell the truth, if, in fact, he did not tell the truth and that is the view of the jury. The objection is overruled.

7217 Mr. Barshay: Your Honor, may I take exception to the Court's observation, most respectfully.

Now, I have another objection, if your Honor will hear it, a very brief one. We object to the ruling of the Court because we anticipate that the answer of this witness, if improperly received, will tend to create prejudice by reason of the statement of the mental operation of this witness. And for that reason we move for the withdrawal of a juror and the declaration of a mistrial.

7218 The Court: Objection overruled. Motion denied.

Mr. Barshay: In addition, we most respectfully move for the withdrawal of a juror by reason of the remarks of the Court, which, however intended, may well be construed by the triers of the facts to be exculpatory of the witness.

The Court: Not at all. I know nothing about the question of the truth or falsity of this witness's statement, nor have I permitted myself to form any opin-

ion. In my own mind a wall has been erected between myself and the consideration of that point because that is the function of the jury.

Mr. Barshay: Exception.

I ask your Honor, in the absence of the jury, to hear the answer of this witness to determine for yourself whether or not his answer is prejudicial and inflammatory, in order for your Honor to obviate the necessity of a subsequent declaration 7220
of a mistrial should you find that to be necessary.

The Court: I think that is a fair suggestion. The jury is excused.

(The jury leaves the court-room.)

The Court: Now that the jury is out of the room, the Court will state for the edification of counsel its recollection of the quotation from Les Miserables. "God bless her for that lie."

Mr. Talley: Supposing some of these 7221
jurors have read Les Miserables. Is not the telling of that story just about the same as giving them the answer that you just quoted, which would be fatal, and nearly every one of those twelve men have read Les Miserables.

The Court: I doubt if it has been read for the last forty years. I read it nearly fifty years ago.

Mr. Turkus: At any rate, we are try-

7222 *Max Rubin—Recalled for People—Redirect*

ing an indictment for murder, not a literary gem.

Mr. Cuff: We did not drag it in.

By Mr. Turkus:

Q. Now that the jury is out of the room, state to the Court why it was that on December 16, 1937, when Assistant District Attorney McCarthy questioned you about the Rosen case, why you made untrue answers.

7223

Mr. Barshay: I make the same objection as I made before. I ask your Honor at the same time to instruct the witness not to give any hearsay testimony.

The Court: Overruled.

Mr. Barshay: Exception. It is improper in form and improper redirect.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I had just been shot in the head. I went
7224 to the Grand Jury, where anybody knew where I was. I was shot in the head. Do you mean to tell me I would give that man or any other man a statement for his office? Like hell I would—like hell I would. It was like giving it to that man (indicating defendants). And if I had fifty cops around me I would have been killed with these rifle shots two blocks away. It would be as much as death to myself and family if that office had that statement. You could not keep it secret from that man. He had an "in" there, and he knows it. And I know it, because he told it to me.

The Court: Now, gentlemen, of course it is obvious that a demonstration of this kind before the jury cannot be permitted. Mr. Witness, you are instructed that this will not be tolerated before a jury. When the jury comes back, under no circumstances must there be any such demonstration with the answer, no matter how you feel on the subject. Now, counsel, the furthest the witness can be permitted to go will be to state in a temperate manner whether or not he falsified under a feeling of fear, because of having been shot. 7226

Mr. Turkus: He has other reasons.

The Court: I have not heard that.

Mr. Turkus: I am making this suggestion: I am going to withdraw the question in that form because I understand what your Honor has reference to.

The Court: I will permit this—and I think no exception can properly be taken to it—I am going to permit a leading question to be asked in order to prevent a repetition of this demonstration. There must be assurance against that. We know what the answer is; therefore a leading question is not harmful. The witness may be asked whether or not he gave false answers. 7227

Mr. Turkus: Due to fear on account of having been shot?

The Court: Those are the words that may be asked, and the answer will have

to be yes or no, without demonstration or emphasis.

Now, there was one other point there in the deposition which does not relate to the question of fear, and that is concealment or flight. On that point he has had advice, according to the record, of an attorney named Maguire, as to what inference of guilt could be drawn from flight. If questioned on that point he would have a right
7229 to answer.

You may bring the jury back.

Mr. Turkus: Under that rule, the information that Lepke had been giving this witness as to his contact with the District Attorney's office then in Brooklyn was something that was in this man's mind, which he stated here on the record. Now, under that rule, it is not before a jury, may we have what he said?

The Court: I know what he said. I am thinking hard on that point at the
7230 present moment. I think that would be incompetent. He can state—he can be asked whether or not it was fear of a come-back from Lepke due to the fact he had been shot.

Mr. Turkus: The witness has pointed out what he told, even in the Grand Jury, then he is asked to relate something about some representative in the office—

The Court: You don't want a mistrial, do you?

Mr. Turkus: No, but can't we have this reread to see if there is any objec-

tionable matter? That can be read by the stenographer.

The Court: The Court has said you may ask a leading question which calls for a simple "yes" or "no" from the witness.

Mr. Turkus: I will do it that way.

The Court: I dictated the question, which you are permitted to ask exactly as the Court dictated it, word for word. Please do not deviate from it or you may 7232
run into trouble. Do you want me to put it in writing? I will again read it to you, before the jury is called back. I will read the question you are permitted to ask: "Did you give untruthful answers to Mr. McCarthy due to fear of Lepke on your part because of the fact of you having been shot, following"—that was after he testified before the Grand Jury?

Mr. Klein: Yes.

The Court: (continuing)—"following your testimony before the Dewey Grand 7233
Jury?"

Mr. Turkus: I don't want to limit the redirect examination to that question. There are certain matters I want to bring out. For example, Lepke was on the loose at that time. Another thing I want to show is the forecast that Lepke made as to happenings in the Rosen investigation, that they came true—every forecast he made. It was brought out by Mr. Barshay that he was then under the protection of a bodyguard; that he was not in fear of

any physical harm in the room of Mr. Hogan at that time, so that argument may be made to the jury about the man in that respect. I want to show that Lepke was not in custody then, that this witness had confidence in Dewey's office, and that the matters he said there—

The Court: There was no evidence he was in custody.

Mr. Turkus: No, Lepke was then on
7235 the loose at that time. McCarthy might be able to give him immunity from any prosecution in the Rosen case, but he could not give him immunity from Lepke on the loose. I want to bring out the real situation here.

Mr. Barshay: I object to further comment.

The Court: How can he answer whether or not Lepke had been apprehended? How does Rubin know? How could he know?

7236 Mr. Turkus: (addressing the witness) Tell the Judge.

The Court: I am talking to you. There is nothing on the record to show he had been apprehended. Why do you have to ask this witness for hearsay evidence on that point?

Mr. Turkus: That was his mental status, that Lepke was on the loose, and that immunity could not be given to him by McCarthy, because Lepke was on the loose. Further, that he knew that whatever was said to anybody over across the

Bridge at that time would get right back to the defendant Lepke.

The Court: Now you are just going to run into a wrangle on a collateral issue concerning the manner in which another administration of the District Attorney's office was conducted, and I do not think that would look very pretty to discuss in connection with this case.

Mr. Turkus: Only his state of mind.

The Court: It would be unfair to the 7238
gentlemen who were connected with that administration and the high class and excellent public officials who were on the stand, including Mr. Geoghan himself.

Mr. Turkus: Nobody finds any fault with Mr. Geoghan.

The Court: You know how this will be sensationalized by the press. It is not fair. I will not permit it.

Mr. Barshay: I regret an opportunity has been given to the press for this, but it was instigated by Assistant District 7239
Attorney Turkus. I will keep my temper.

The Court: A fair and true report is expected by representatives of the press. The Court has shown courtesy to all of them in the court-room set-up, and in every way has enabled them to be facilitated in the handling of press comment in this case. And the Court feels confident that the members of the press will handle this in a gentlemanly manner and with due regard for propriety.

Mr. Barshay: Some of the members of

7240 *Max Rubin—Recalled for People—Redirect*

the press left before your Honor made this comment. However, I am not going to be put in a position of defending Mr. Geoghan. He needs no defense. All the people in Judge O'Dwyer's office cannot come up to his standard, that is all I want to say about that.

I move to strike out this witness's answer that he has given to Mr. Turkus.

The Court: Motion denied.

7241 Mr. Barshay: Exception.

The Court: It cannot be stricken out without confusing the record in reference to the precautions taken as to the method by which this witness may be interrogated upon the return of the jury to the court-room.

Mr. Talley: I wish to advise your Honor that I will object to the question as dictated by your Honor for the guidance of the District Attorney, when it is put. I think I should apprise your

7242 Honor of that beforehand.

The Court: I naturally expected there would be objection.

Mr. Talley: I wish to add, and I regard it as my duty as a member of this bar, that the attack upon Mr. Geoghan and his office is the most outrageous and unjustified thing I ever heard in a court-room. I can only give you my experience with that office. I found Mr. Geoghan a high-class, capable, intelligent, and able District Attorney, despite the attack made upon him by Mr. Turkus, and I think your

Honor and the gentlemen of the press who appear here should consider it as coming from a polluted, vile source, and I mean this witness, whose testimony has been heard, who cannot tell the truth either here or in any other tribunal, whether before an Assistant District Attorney or a judge of this court.

The Court: Mr. Turkus has not said anything derogatory to Mr. Geoghan. Mr. Geoghan is a close personal friend of 7244
mine. I have the highest respect and admiration for him. I have the utmost confidence in his integrity, and I feel quite sure Mr. Turkus feels the same way.

Mr. Turkus: That is true, and it is unfortunate he was betrayed by somebody who was an alleged friend.

The Court: We are not going to try here the question of integrity concerning any person on that staff.

Mr. Talley: We should not allow it by an attack which emanates from a cow- 7245
ardly killer like this, upon a decent man like Mr. Geoghan, to go unchallenged.

The Court: Do you expect this man, after what he has gone through, to be without emotion and be insulted—

Mr. Talley: He is a fakir and an actor.

The Witness: You are only the front of this whole thing; that is all you are.

The Court: The Court asks you to take your seat. This is disorderly conduct.

Mr. Talley: I will be glad to.

The Witness: He has no right to insult

me like that. You are the front. That is all you are. You are the great big front, because you are a judge, not for what you can do—don't insult me like that. I want you to know I am 52 years old. Until I met that man I never did anything wrong, and only to do him a favor is why I got in any trouble. I never was a crook and I never was a murderer and I never had anything to do with that. You filthy
7247 swine, to call me such names. I think it is an outrage when a witness comes up here voluntarily. I am not involved in this thing. I came up voluntarily. I am not lying to save my skin. I have more guts in me than you will ever have.

The Court: This unwarranted insult was done for the purpose of causing this outbreak, which is a normal reaction as observed by the Court and compels the Court to allow the witness to go out at this time for the purpose of composing
7248 himself. I know that an emotional outburst of this kind takes considerable time to recover from, and it forces the Court now, at 25 minutes after 11, to declare a recess until one o'clock.

The jury will be brought back. A recess will not be declared until the jury has been brought back. There will be no more discussion. I feel the Court has been deeply humiliated.

Mr. Rosenthal: I will wait until after recess. I do not want to be accused of being dilatory, though, to make a motion.

The Court: Please make it now.

Mr. Rosenthal: My motion is, in so far as the defendant Capone is concerned, for a mistrial, the withdrawal of a juror and the declaration of a mistrial upon the ground that his rights have been absolutely prejudiced and that he is in no wise connected with any of these matters that have been alleged or testified to, or in accordance with your Honor's proposed question that will be propounded. 7250

The Court: The motion is denied.

Mr. Rosenthal: Exception.

Mr. Barshay: Will your Honor note my objection.

The Court: The whole thing here was disgraceful and absolutely reacts upon the one who caused it.

Mr. Barshay: Will your Honor give me an exception to the entire proceeding?

The Court: It is a discredit to the party who caused it.

(The jury then returned to the room.) 7251

The Court: (addressing jury) For reasons which the Court is not permitted to state to you, it has become necessary to recess at this time until one o'clock. Please do not discuss the case not let anybody talk to you about it. Keep your minds open. You may go to dinner or lunch at 12 o'clock. Be promptly on hand, everybody at one o'clock.

The Court wants to call attention to another matter. In the reorganization of

7252 *Max Rubin—Recalled for People—Redirect*

the court, a ceremony which is usual in opening the court session, all counsel should be in their places when the Judge enters and makes his bow. That is a courtesy owed, not only by the other members of the staff and by the jury, but by counsel. It has been repeatedly called to the attention of the Court that counsel, notwithstanding advice in the corridor to be in their places, have disregarded such
7253 advice particularly and to a large degree have sauntered into their places after the ceremony of calling the court-room to order. The Court will not be provoked into discipline but expects a gentlemanly response. The jury will now pass out. The defendants are remanded. Recess till one p. m.

(Recess taken until 1:00 P. M.)

7254 AFTERNOON SESSION—TRIAL RESUMED

The Court: Gentlemen of the jury, counsel for both sides know the answer to that question but, in order to avoid the possibility of a mistrial by reason of the framing of the answer by the witness, the Court has permitted a paraphrasing of the answer that was given by the witness in such a manner as to eliminate anything of an improper or objectionable nature and is permitting the District Attorney to put

7255

that question as a leading question so as to call simply for a yes or no answer.

Bring in the witness.

MAX RUBIN, resumed the stand and testified further, as follows:

By Mr. Turkus:

Q. Mr. Rubin, the District Attorney is permitted to only ask you a single question and to that single question you are permitted to make only a yes or no answer and disclose nothing else. Is that clear to you? A. That is right. 7256

Q. Listen very attentively to the question and answer it exclusively either yes or no. Did you give untruthful answers to Mr. McCarthy due to fear of Lepke on your part because of the fact of having been shot, following your testimony before the Dewey Grand Jury?

Mr. Talley: I object to the question as leading, suggestive, incompetent, irrelevant and immaterial, and not proper redirect examination. 7257

The Court: The Court is making it leading in order to benefit you, sir. Now you object to it as leading.

Mr. Talley: Your Honor has ruled?

The Court: After what occurred this morning, I think it is in bad taste. The ruling is that the Court's view is you are doing this to provoke an outbreak to use as the basis for a motion for a mistrial. You have called for this answer. Now you have it. The objection is overruled.

The Court will assume the responsibility for this ruling.

Mr. Talley: I take exception to your Honor's ruling.

The Court: Of course, the word "that", Mr. Turkus, is wrong.

Mr. Turkus: I tried to write it verbatim.

The Court: I did not say "that".

Mr. Turkus: I thought I took your
7259 Honor down verbatim. The way I wrote it down—

The Court: Put it just as you read it. Put the question.

Q. Did you give untruthful answers to Mr. McCarthy due to fear of Lepke on your part because of the fact of having been shot, following your testimony before the Dewey Grand Jury?

Mr. Talley: We make the same objection, upon the same grounds.

The Court: Overruled.

7260 Mr. Talley: Exception.

The Court: Answer yes or no.

A. Yes.

The Court: That is all.

Mr. Barshay: Exception.

(Continued in Volume IV)

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Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1942.
JANUARY 2, 1943.
JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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7261

SEYMOUR MAGOON, residing at 608 Pennsylvania Avenue, Borough of Brooklyn, City and State of New York, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Magoon, how old are you? A. Thirty-three.

Q. Will you keep your voice up, keep it at the same tone as mine, if you can, so that it will be audible to everybody in the jury box and to defense counsel, some of whom are to my rear. Are you married? A. Yes, sir.

7262

Q. Have you any children? A. Yes, sir.

Q. About how many? A. Two.

Mr. Fischbein: We do not hear you.

Q. You will have to speak more loudly because the last jurors here must hear you and there are defense counsel to my back and your voice must carry to them as well.

7263

Q. Did you go to public school? A. Yes, sir.

Q. How far did you go in public school? A. Eighth grade.

The Court: Loud. Repeat it.

The Witness: Eighth grade.

The Court: Can't hear it.

The Witness: I have a sore throat, your Honor.

The Court: Let a court attendant stand here and repeat his answers.

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Q. Did you graduate from public school? A. No, sir.

Q. How old were you, Magoon, when you quit school? A. About sixteen years old.

Q. Did you after you quit school go to work? A. Yes, sir.

Q. And did you thereafter get some odd jobs? A. Yes, sir.

Mr. Turkus: I think he is doing all
7265 right now.

Q. Did you know a man by the name of Harry (Pittsburg Phil) Strauss? A. Yes, sir.

Q. How long did you know Harry Strauss? A. About fifteen years.

Q. Did you know him by any other name besides Pittsburg Phil? A. Yes, sir.

Q. What name? A. Big Harry.

Q. Did you know a man by the name of Martin Goldstein? A. Yes, sir.

Q. Did you know him by any name other than Martin Goldstein? A. Yes, sir.

7266 Q. What name? A. Buggsy.

The Court: You may repeat, if you wish.

Q. Buggsy Goldstein? A. Yes, sir.

Mr. Barshay: Will your Honor grant me one objection?

The Court: Yes.

Mr. Barshay: —with respect to the defendant Buchalter, on the ground that it does not in any wise tend to connect him

with the commission of the crime. It is not binding upon him. I take one exception and I won't interfere with Mr. Turkus.

The Court: I have not the least idea as to whether it is or not binding. Overruled.

Mr. Barshay: Exception.

Q. Did you also know one Abie Reles? A. Yes, sir.

7268

Q. How long did you know Martin (Buggsy) Goldstein? A. About fifteen years.

Q. And does the same go for Abie Reles? A. Yes, sir.

Q. Do you know the defendant Louis Capone? A. Yes, sir.

Q. How long do you know Louis Capone? A. About nine years.

Q. About nine years? A. Yes, sir.

Q. Did you know a man by the name of Albert Anastasia? A. Yes, sir.

Q. How many years did you know him? A. About eight or nine years.

7269

Q. Eight or nine years, is that correct? A. Yes, sir.

Q. Do you know the defendant Mendy Weiss? A. Yes, sir.

Q. How many years have you known Mendy Weiss? A. About five or six years.

Q. Did you meet Mendy Weiss in Brownsville? A. Yes, sir.

Q. Do you know exactly where it was that you saw Mendy Weiss in Brownsville for the first time? A. Yes, sir.

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Q. Where? A. At the corner.

Q. At a corner? A. Yes, sir.

Q. At what corner did you see Mendy Weiss in Brownsville for the first time? A. Saratoga and Livonia Avenue.

Q. Saratoga and Livonia Avenue? A. Yes, sir.

Q. Which particular corner of Saratoga and Livonia Avenue was that? Describe it by the place of business that was on the corner. A. A

7271 cigar store.

Q. Was this cigar store also a candy store? A. Yes, sir.

Q. Was that place a hang-out for the boys from Brownsville? A. Yes, sir.

Q. Do you know a man by the name of Farvel Cohen? A. Yes, sir.

Q. How long do you know Farvel Cohen? A. About five or six years.

Q. Do you know a man by the name of Harry Maione? A. Yes, sir.

Q. Do you knew Maione by any name other

7272 than Harry?

Mr. Rosenthal: That is objected to. It is in no wise material to this trial.

The Court: Overruled.

Mr. Rosenthal: Exception.

(Pending question read.)

A. Yes, sir.

Q. What name? A. Hap.

Q. Is that short for Happy? A. Yes, sir.

Q. Do you know Frank Abbendando?

Mr. Rosenthal: Same objection.

The Court: Overruled.
Mr. Rosenthal: Exception.

A. Yes, sir.
Q. You said you knew him? A. Yes, sir.
Q. Did you know Frank Abbendando by any name other than Frank? A. Yes, sir.
Q. What name? A. Abby and "The Dasher".
Q. Is that (spelling) A-b-b-y? A. Yes, sir.
Q. And "The Dasher"? A. Yes, sir.
Q. How long do you know Maione and Abbendando? A. Several years. 7274
Q. Were you associated with the men whose names I have just questioned you about, namely, Strauss, Pittsburg Phil Strauss, Martin (Buggsy) Goldstein, Abie Reles, Louis Capone, Albert Anastasio, Farvel Cohen, Harry (Happy) Maione and Frank (The Dasher) Abbendando—

Mr. Rosenthal: I object to the form of the question.

Q. —and Mendy Weiss?

7275

The Court: Overruled.
Mr. Rosenthal: Exception.
Mr. Barshay: May I object to it as not binding on the defendant Buchalter?
The Court: Overruled.
Mr. Barshay: Exception.

Q. I did not hear the answer. A. Yes, sir.
Q. Did that association have a name? A. Yes, sir.
Q. What was the name? A. The Combination.
Q. The Combination? A. Yes, sir.

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Mr. Barshay: I move to strike out the answer as not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: His name not having been mentioned by this witness in any respect, your Honor.

The Court: Denied.

Mr. Barshay: Exception.

7277 Q. Without stating what the nature of the business was, do you know of your own knowledge whether Martin (Buggsy) Goldstein, Harry (Pittsburg Phil) Strauss, Abie Reles and Louis Capone were engaged in business together?

Mr. Rosenthal: I object to that upon the ground it calls for a conclusion.

The Court: Sustained.

Mr. Turkus: I will put it in this form, then:

7278 Q. Did you work for Martin (Buggsy) Goldstein, Harry (Pittsburg Phil) Strauss, Abie Reles and Louis Capone?

Mr. Rosenthal: I object to the question upon the ground, first, it is leading and suggestive; second, it calls for a conclusion.

Mr. Talley: I object to it.

Mr. Turkus: Conclusion whether he worked for them?

Mr. Talley: Same grounds.

The Court: Overruled.

Defense Counsel: Exception.

Mr. Barshay: May I have an objection on another ground?

The Court: Yes.

Mr. Barshay: Not binding on the defendant Buchalter in any respect whatever.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: Just answer that yes or no.

7280

A. Yes.

The Court: Let me have those names again, please.

Mr. Turkus: Martin Buggsy Goldstein, Harry Pittsburg Phil Strauss, Abe Reles, and Louis Capone.

The Court: All right.

Q. Were the four of them your boss?

Mr. Rosenthal: I object to that.

The Court: Overruled. 7281

Mr. Rosenthal: Exception.

A. Yes, sir.

Q. Did you receive a salary? A. Yes, sir.

Q. Without stating the nature of the instructions, did you from time to time get orders and instructions from your four employers?

Mr. Rosenthal: I object to that, not binding on this defendant.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Talley: Same objection.

Mr. Barshay: I object to it, that it in no wise involves the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: Exception.

Q. You may answer. A. Will you repeat that question, please?

(Pending question read.)

7283

A. Yes, sir.

Q. Did you obey the orders and instructions?

Mr. Rosenthal: Objected to.

A. Yes, sir.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Barshay: Your Honor, will you give me one general objection? It is apparent it does not involve the defendant Buchalter and I won't interfere.

7284

The Court: Yes.

Mr. Barshay: And one exception.

Q. Was your answer yes? A. Yes, sir.

Q. Did you on or about Labor Day in the year 1936 leave the State of New York? A. Yes, sir.

Q. Where did you go? A. Out to California.

Q. To the State of California? A. Yes, sir.

Q. Did you go alone? A. No, sir.

Q. Who went with you? A. Buggsy Goldstein.

Q. How long did you and Buggsy Goldstein remain in the State of California? A. About a month.

Q. From California where did you and Buggsy Goldstein go?

Mr. Rosenthal: Objected to as in no-wise connected with this trial.

The Court: Overruled.

Mr. Rosenthal: I respectfully except. (Pending question read.) 7286

A. Back East.

Q. And by "back East" what State did you go to? A. New York State.

Q. Did you go to some place in New York State, a town, a village, or a city, having a name? A. Yes, sir.

Q. What was the name of the place where you and Buggsy Goldstein went?

Mr. Rosenthal: That is objected to.

The Court: Overruled.

Mr. Rosenthal: Exception. 7287

A. Milton.

Q. Was it Milton, New York? A. Yes, sir.

The Court: You mean right above Marlboro?

The Witness: Yes, sir.

The Court: Just below Highland?

The Witness: That is right.

Q. Did you and Martin Buggsy Goldstein stay in or about Milton, New York? A. Yes, sir.

7288

Mr. Rosenthal: Make the same objection.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. In what kind of a place did you and Goldstein stay?

Mr. Rosenthal: Same objection.

7289

A. A tomato farm.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. A tomato farm, is that right? A. Yes, sir.

Q. Who owned the tomato farm? A. Mannesse (phonetic spelling)

Q. A person by the name of Mannesse? Is Mannesse spelled (spelling) M-a-n-n-e-s-s-e? A. I would not know.

Q. Was the Mannesse tomato farm a place that you used for a hideout?

7290

Mr. Rosenthal: That is objected to, not material to this issue.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. The mob used it for a hangout.

Mr. Rosenthal: I ask that that be stricken as not responsive.

The Court: Strike it out.

Q. Did you, is the question, among others use that place for a hideout? A. Yes, sir.

Q. Did other people use that Mannesse tomato farm up in Milton, New York, for a hideout?

Mr. Rosenthal: I object to that.

Mr. Talley: I object to it as immaterial, irrelevant.

Mr. Rosenthal: A conclusion.

The Court: Overruled.

Defense Counsel: Exception.

Q. What is the answer? A. Yes, sir. 7292

By the Court:

Q. Is that between the river and the highway? A. It is off the highway.

Q. There are two sides to the highway. Is it towards the river? A. No, the hill side.

Q. It is west of the highway? A. It is on the left-hand side of the highway.

Q. Going north? A. Going into Milton proper, into the town of Milton.

Q. Do you know Jim Conklin's stand and farm? A. No, sir. 7293

The Court: All right.

By Mr. Turkus:

Q. Were you hiding out—

The Court: Pardon me just a minute.

By the Court:

Q. Before you get into Milton proper, the old

highway branches off. There are remnants of it there. Do you know what I mean? A. I don't know much about the old highway.

Q. You mean that this is left of the concrete highway? A. Yes, sir.

The Court: All right.

By Mr. Turkus:

7295 Q. While you were hiding out in this farm in Milton, New York, were you arrested there? A. Yes, sir.

Q. And were you brought to the Grand Jury of Queens on a charge? A. Yes, sir.

Q. Can you recall when that was? A. (No answer).

Q. I see you hesitate so I suggest the month of October, 1936. Does it refresh your recollection? A. October 8, 1936.

Q. Before January 1, 1940, had you ever been convicted of any crime? A. No, sir.

7296 Q. During the month of March, 1940, were you arrested in Brooklyn and convicted by the District Attorney's office of the crime of vagrancy? A. Yes, sir.

Q. To date, is that the only conviction that stands against you? A. Yes, sir.

Q. Were you sentenced to a jail? A. Yes, sir.

Q. What jail were you sent to? A. The Riker's Island Penitentiary.

Q. Did you serve your sentence? A. Yes, sir.

Q. How long did you get on that vagrancy conviction? A. Two months.

Q. Were you actually released from Riker's

Island Penitentiary? Did you get as far as the street? A. No, sir.

Q. Or the warden's office? A. The warden's office.

Q. Did you reach the warden's office on the last day of your sentence on the vagrancy charge? Do you understand me? A. You will have to explain that.

Q. Well, had you served your sentence and were you brought into the warden's office preparatory to going out on the street? A. Yes, sir. 7298

Q. Were you arrested again? A. Yes, sir.

Q. Then and there? A. Yes, sir.

Q. Were you taken to a jail? A. Yes, sir.

Q. What jail? A. The Raymond Street Jail.

Q. So that you had actually not set foot out on to the street after that conviction? A. That is right.

Q. You say you were brought to Raymond Street Jail, is that correct? A. Yes, sir.

Q. From Raymond Street Jail were you taken to some county other than Brooklyn? A. Yes, sir.

Q. Other than Kings? Where were you taken? 7299
A. To the Bronx.

Q. In the County of Bronx did you see District Attorney Foley? A. Yes, sir.

Q. This question you are permitted to answer only yes or no: Did District Attorney Foley speak to you in the Bronx? A. Yes, sir.

Q. Likewise did Assistant District Attorney Edward Breslin of the Bronx speak to you? A. Yes, sir.

Q. This question, too, you can only answer yes or no: Did you speak to District Attorney Foley

and Assistant District Attorney Breslin of the Bronx? A. Yes.

Q. After that were you removed from the Raymond Street Jail in Brooklyn? A. Yes, sir.

Q. Were you put in the custody of the New York City Police Department? A. Yes, sir.

Q. Were you taken to another institution? A. Yes, sir.

Q. What is the name of that institution? A. Bronx County Jail.

7301 Q. Are you segregated from other prisoners? Do you know what "segregated" means first? A. Yes, sir.

Q. Are you segregated from other persons? A. Yes, sir.

Q. Are you still kept in this Bronx County Jail? A. Yes, sir.

Q. You have already told us that you knew Mendy Weiss, Louis Capone, Pittsburg Phil Strauss, and Abie Reles. Is that correct? A. Yes, sir.

Q. Directing your attention to the fall of 1938, did you see Mendy Weiss, Louis Capone, Strauss
7302 and Reles together at a certain place? A. Yes, sir.

Q. Where did you see them together? A. At the corner.

Q. And when you say "the corner" do you refer to the corner of Saratoga and Livonia Avenues? A. Yes, sir.

Q. Was that corner known by you and others as "the corner"? A. Yes, sir.

Q. At that time and place did you receive an assignment?

Mr. Rosenthal: I object to it.

Mr. Talley: I object to it, calling for a conclusion.

The Court: Overruled.

Defense Counsel: Exception.

A. Yes, sir.

Q. Who spoke to you? A. Weiss.

Q. Did Weiss speak to you in the presence of Capone, the defendant Capone, Harry Pittsburg Phil Strauss, and Abie Reles? A. Yes, sir.

7304

Mr. Rosenthal: I object to that.

Mr. Barshay: Just another objection, your Honor, on the defendant Buchalter's part.

The Court: What date was that?

Mr. Turkus: The fall of 1938.

Mr. Rosenthal: Two years after the alleged crime. I object to it on the ground it is immaterial.

Mr. Turkus: The relevancy and materiality—

The Court: That is overruled. What is your objection, Mr. Barshay? 7305

Mr. Barshay: My objection is on the ground that the defendant Buchalter, not being present, certainly is not binding upon him.

The Court: Overruled.

Defense Counsel: Exception.

Q. What did the defendant Mendy Weiss say to you in the presence of the defendant Louis Capone, and Strauss and Reles?

Mr. Rosenthal: I object.

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The Court: Overruled.

Mr. Talley: Objected to on the ground it is two years after the alleged crime named in the indictment, too remote, and immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Barshay: With respect to Buchalter on the grounds heretofore urged by me.

The Court: Is this on the subject of
7307 spoliation?

Mr. Turkus: Yes, sir.

The Court: I assumed it was. Overruled.

Defense Counsel: Exception.

(Pending question read.)

A. He says, "Go to Ratner's restaurant tomorrow morning and meet Paul Berger and another fellow. He will point out Rubin, Max Rubin, and you tail him and find out all his habits and see if he has a police bodyguard with
7308 him."

Mr. Barshay: I move to strike out the answer on the ground it is not binding on the defendant Buchalter and on the ground that it is evidence of another crime not connected with him, and on the further ground with respect to him there has been no attempt to prove spoliation chargeable directly to him in this case.

The Court: At the present time it would apply only to Capone, but the Court cannot tell with whom else it may be con-

7309

nected before the end of the trial, so at this time I will overrule the objection.

Mr. Turkus: It applies to the defendant Weiss, too.

The Court: Pardon me?

Mr. Turkus: And Capone.

The Court: Wait just a minute.

Mr. Rosenthal: Let the Judge rule, not you.

Mr. Turkus: I am stating the District Attorney's position in the offer of evi- 7310
dence.

The Court: Will you correct me if I am wrong? My notes say—and of course I am a little behind the questioning in my notes always—about the fall of 1938 Weiss spoke to him in the presence of Capone, Strauss and Reles. You mean Weiss was there, too?

Mr. Turkus: Weiss was the speaker. Weiss was the one who gave him the assignment and gave him the instructions.

The Court: That is right. 7311

Mr. Talley: According to his testimony.

The Court: O. K.

Mr. Rosenthal: Your Honor mentioned defendant Capone. Does that ruling of your Honor hold, in view of the fact that it now appears that the defendant Weiss is supposed to have done the talking, not Capone?

The Court: Now you are going to get the Court in a corner. I have quoted evidence. I am not going to fall into that little trap. Objection overruled.

7312 *Seymour Magoon—For People—Direct*

Mr. Rosenthal: I object on behalf of the defendant Capone on the ground it is not binding upon him.

The Court: Overruled at this time.

Mr. Rosenthal: Exception.

Mr. Talley: I object to it as an attempt on the part of the District Attorney to introduce evidence having to do with a crime separate and distinct from that named in the indictment.

7313 The Court: Overruled. The applicability will be dealt with at the proper time in the charge.

Q. Before the Court's ruling, you had told us in substance what Weiss told you in connection with tailing Max Rubin. Were you told the purpose of tailing him?

Mr. Rosenthal: I object to that as leading and suggestive.

The Court: He can say whether or not Weiss told him anything else. That is

7314 leading. Sustained.

Q. Did the defendant Weiss tell you anything else?

Mr. Talley: I make the same objection as to the last question.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. What else did Weiss say? A. He says, "After you find out what is what, come back

on the corner and we'll see what we have to do."— Not in those words but to that effect.

Q. At that time, when you received those instructions, did you know Paul Berger? A. Yes, sir.

Q. Where had you met him, if you can remember, before you were told by Weiss to meet him in Ratner's restaurant? A. On the corner.

Q. On the corner? A. Yes, sir.

Q. After the defendant Weiss gave you those instructions, what did he do? After he told you 7316
this that you have just told the jury, to meet Berger in Ratner's restaurant, and the other instructions, what did Weiss do? A. I don't know. I left the corner.

Q. Before you left the corner, did you have any talk with either Capone, Reles, or Strauss? A. Not that night.

Q. Are you sure that that very night, when you got the instructions, that you did not have a talk with either Capone, Reles or Strauss?

Mr. Rosenthal: I object to the question on the ground it is already answered. It 7317
is repetitious.

The Court: Overruled.

Mr. Rosenthal: I respectfully except. It is both leading and suggestive.

(Pending question read.)

Mr. Rosenthal: Might I add the further ground, it is an attempt to impeach his own witness.

Mr. Turkus: We will worry about that if we have to come to it.

The Court: The effect of this is to confuse and cause constant repeating of

the question by the stenographer. When counsel has an objection, he should state it completely and be done with it. Once more, the stenographer will repeat the question. Objection overruled.

Mr. Rosenthal: Exception.

(Pending question read.)

A. Yes, sir.

Q. With which one did you have the talk?

7319 The Court: He said he did not.

Mr. Turkus: He said he did.

The Court: He said he is sure he did not.

Q. What do you mean by "yes", that you did or did not?

Mr. Rosenthal: I object to the question.

The Court: He said and he has made clear, he did not have a talk with one of them that night at that corner.

7320 Mr. Turkus: I want to pursue it.

Mr. Rosenthal: I have an objection before the Court.

The Court: Objection to what?

Mr. Rosenthal: To his pursuing it or to an answer to the question.

The Court: There is no question before the Court. (to witness) Did you have a talk with one of them later?

The Witness: The next night.

The Court: Go ahead from there.

Q. I want to go back to that conversation that you had with Mendy Weiss, where you got your instructions to go to Ratner's Restaurant, and ask you specifically, were you told the purpose of tailing Rubin?

Mr. Rosenthal: I object to it, if your Honor pleases, upon the ground that it is answered twice; it is repetitious, and now it is leading and suggestive.

The Court: Overruled. 7322

Mr. Rosenthal: Exception.

The Court: By anybody? You have told us that it was said, in effect, that after you find out what is what, "Come back on the corner and we will see what we have to do." Was anything else said?

The Witness: Not then.

Q. Were you told the time that you were to be at Ratner's Restaurant?

Mr. Rosenthal: I object to that as leading and suggestive. The witness should be permitted to exhaust his recollection of any alleged conversation before he is led by the District Attorney. 7323

The Court: Overruled.

Mr. Rosenthal: Exception.

A. Yes, sir.

Q. Did you go to Ratner's Restaurant the next day after that talk? A. Yes, sir.

Q. In between the time you got your instructions to go to Ratner's Restaurant the following

7324 morning, did you see either Capone, Reles, or Strauss? A. Will you repeat that question?

(Pending question read.)

Q. Do you understand it? A. Yes, sir.

Q. Did you? A. I don't recollect.

Q. Did you the following morning go to Ratner's Restaurant? A. Yes, sir.

Q. Approximately what time did you go, if you can remember? A. About 9:30 or 10:00—around
7325 that time.

Mr. Cuff: May we have the date fixed?

Mr. Turkus: This is the fall of 1938.

Mr. Cuff: That is not definite.

Mr. Turkus: Then you take care of it on cross.

Mr. Cuff: I am asking the Court if we may have the time fixed by the witness, not by the District Attorney.

The Court: Overruled.

7326 Q. Where was this Ratner's Restaurant located, if you can remember? A. On Delancey Street.

Q. Did you meet anybody in Ratner's Restaurant? A. Yes, sir.

Q. Whom did you meet there? A. Paul Berger and another fellow.

Q. This other fellow, were you introduced to him? A. Yes, sir.

Q. Who introduced you to him? A. Paul Berger.

Q. What is the name of this other fellow you were introduced to? A. Cuppie.

Q. Do you know Cuppie's true or right name? A. Yes, sir.

Q. What is it? A. Jack Migden.

Q. Did you, Berger, and Cuppie do anything in Ratner's Restaurant? A. Yes, sir.

Q. What did you do there? A. Ate.

Q. During the course of the meal, did the three of you speak together? A. Yes, sir.

Q. Answer this question yes or no: Did you speak about Rubin? A. Yes, sir.

Q. After the meal was over and the talk was over, did the three of you leave the restaurant? 7328
A. Yes, sir.

Q. Did you see where Berger went? A. Yes, sir.

Q. Where did he go? A. He went in his car with Cuppie.

Q. When you say "his car" do you mean Berger's car? A. Yes, sir.

Q. When Berger and Cuppie went together in a car, where did you go? A. I went in my car and I followed them.

Q. Had that matter been discussed in the restaurant? A. Yes, sir. 7329

Q. Can you remember now where Berger parked the car in which he and Cuppie were riding? A. Around Union Square.

Q. When that car was parked around Union Square, where did you park your car, if you can recall? A. Right near his car.

Q. After the cars were parked, did Berger say something to you and Cuppie? A. Yes, sir.

Q. What did Berger say to you and Cuppie?

Mr. Rosenthal: I object.

7330 *Seymour Magoon—For People—Direct*

Mr. Talley: Objected to, incompetent, irrelevant, immaterial, not in the presence of any of these defendants, in no way binding upon any of them.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. He says, "I will walk first and Cuppie and you follow me, and as soon as I see Max Rubin
7331 I will point him out."

Q. Did Berger walk first? A. Yes, sir.

Q. And where did he walk? On what street or avenue, if you can remember? I do not want the route, but ultimately what streets did he walk along? A. He walked up—I think it was —16th Street or 17th Street—17th Street.

Q. And did he walk down that street to an avenue? A. Yes.

Q. What Avenue? A. Fifth Avenue.

Q. When Berger walked down to that place, 17th Street and 5th Avenue, as you recall it, what did you and Cuppie do? A. Followed Paul
7332 Berger.

Q. At or about 5th Avenue and 17th Street, did Berger say anything to you? A. Yes, sir.

Q. In what tone of voice did he say it? A. In a whisper.

Q. What did Berger whisper?

Mr. Rosenthal: I object to it.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. He says, "That is Rubin on the other side,

the fellow in the blue suit with a crooked neck, and I think it is the law with him."

Q. When he said, in words or substance, "There is Rubin, the guy with the blue suit and the crooked neck, and I think it is the law with him," was there a man standing near the person that Paul Berger pointed out as Max Rubin? A. Yes, sir.

Q. What is meant by "the law"? A. A policeman.

Q. At that time when Paul Berger whispered 7334
what you have just told the jury about Rubin and the law, where was Rubin standing? A. On the other corner.

Q. Do you mean by that across the way? A. That is right.

Q. Did that man have a bent or crooked neck that he pointed out? A. Yes, sir.

Q. After Berger whispered this to you, did he keep on walking? A. Yes, sir.

Q. After Berger walked off after having whispered what you have told the jury, to you, did you remain? A. Yes, sir.

Q. What did Cuppie do? A. He remained with 7335
me.

Q. What did you and Cuppie do in connection with Rubin? A. We followed Rubin all afternoon.

Q. All afternoon did the man that you had seen with him on the corner when Berger whispered, "Maybe it's the law," or "It is the law"—whichever he said—did that man remain with Rubin all afternoon? A. Yes, sir.

Q. Did there come a time when Rubin and that man went into a subway? A. Yes, sir.

7336 Q. Can you give us an approximate time when that was that afternoon? A. Approximately 4:30.

Q. What subway did Rubin and the man with him enter? A. 14th Street and 7th Avenue.

Q. When Rubin and this man went into the subway, what did Cuppie do? A. He went after them.

Q. And what did you do? A. I went back to Brooklyn.

7337 Q. Now, that night did you go to the corner, namely Saratoga and Livonia Avenue? A. Yes, sir.

Q. That night whom did you see at the corner? A. Weiss, Capone, Strauss and Reles.

Q. Was there a talk on the corner between all of you? A. Yes, sir.

Q. What was said at the corner that night, and by whom?

Mr. Talley: I object to it, if your Honor pleases, upon the ground that this is evidence apparently tending to attempt to prove a crime separate and distinct from that named in this indictment, being incompetent, irrelevant and immaterial.

7338

The Court: Overruled.

Mr. Talley: Exception.

Mr. Rosenthal: I make the same objection and take the exception.

Mr. Barshay: All counsel.

The Court: Overruled.

Defense Counsel: Exception.

(Pending question read.)

A. Weiss spoke to me. He said, "Tomorrow morning put on old clothes and here is Rubin's home address and go up there and watch his house, see who he comes out of the house with, how he walks over to the subway, who walks with him, and so forth."

Q. Now, when he said, "Here is his address," did he give you anything? A. Yes, sir.

Q. What did he give you? A. An address.

Q. Can you remember what the address was? A. It was some address on Gunhill Road. 7340

Q. In the Bronx? A. In the Bronx.

Q. Was that said by Weiss to you in the presence of Capone?

Mr. Rosenthal: I object to it.

A. Yes, sir.

Mr. Rosenthal: And ask that the answer be stricken.

The Court: Overruled. Denied.

Mr. Rosenthal: Exception.

The Court: How close was Capone? 7341

The Witness: In the group.

The Court: How close? We want to know if he could hear?

The Witness: Yes, sir.

Mr. Rosenthal: I ask that that be stricken.

The Court: Strike out that he could hear. The jury has to judge if he could hear.

The Witness: A foot away.

The Court: All right.

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Q. When you were told to go up to this address in Gunhill Road, what else, if anything were you told about the following morning?

Mr. Rosenthal: That is objected to as inferring that something else was told, leading and suggestive.

The Court: Overruled.

Mr. Rosenthal: Exception.

Mr. Talley: Same objection.

7343 The Court: Overruled.

Mr. Talley: Exception.

The Court: Anything else told?

The Witness: Yes, sir.

Q. What else was said? A. I was told that, "After you find out—"

The Court: By whom?

The Witness: Weiss.

The Court: Go ahead.

A. (Continued) "After you find out what is
7344 what, see me at a saloon on Grand and some other street there."

Q. Was anything else said in connection with what you were to do the next morning up at Gunhill Road? A. Yes, find out all his habits, I would say.

Q. How were you dressed when Weiss was telling you this at Saratoga and Livonia Avenues? What type of clothes? I know you cannot remember the color, but what type of clothes did you have on then? A. A suit.

Q. Was anything else said about what you

were to do the following morning at Gunhill Road?

Mr. Talley: Same objection, if your Honor pleases.

Mr. Rosenthal: It has been answered twice, repetitious.

The Court: Overruled.

Defense Counsel: Exception.

The Court: Go ahead.

7346

A. No, sir.

Q. Did you go to Gunhill Road the following morning? A. Yes, sir.

Q. Did you go in your suit? A. No, sir.

Q. What did you go in? A. I went in other clothes.

Q. Was anything said the night before about the other clothes? A. Yes, sir.

Q. All right. That is what I want to hear about.

Mr. Rosenthal: I object to what the District Attorney wants to hear and I ask that the interjection be stricken out. 7347

Mr. Turkas: I consent to it that it be stricken. I am sorry I said it.

The Court: What other clothes did you wear?

The Witness: I wore overalls, a lumber jacket, old pants, a slouch hat, and he says, "Use a pipe."

Q. Who said, "Use a pipe"? A. Weiss.

Q. What kind of a pipe are you referring to? A. A smoking pipe.

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Q. That is the kind you put tobacco in? A. Yes, sir.

Q. And were you told that the night before? A. Yes, sir.

Q. And was that in the presence of Capone? A. Yes, sir.

Q. The following morning, after getting the instructions, did you put on that outfit which you have related to the jury? A. Yes, sir.

Q. Dressed in that outfit, what time approxi-
7349 mately did you arrive at Gunhill Road in the Bronx? A. About six o'clock the following morning.

Q. At six o'clock or approximately then that morning, what did you do when you got there in this outfit, at Gunhill Road? A. I parked my car and walked opposite Rubin's house and sat on the curb and was watching his house.

Q. As you sat there on the curb in that outfit, did you see somebody come out of Rubin's house? A. I seen a lot of people come out of Rubin's house.

Q. In addition to the other people that came
7350 out, did Rubin come out? A. Eventually he came out.

Q. Did he come out alone? A. No, sir.

Q. Who came with him? A. A police bodyguard.

Q. Did you observe what Rubin and the police bodyguard did that morning? A. Yes, sir.

Q. What did you see the police bodyguard and Rubin do that morning? A. Walked to the subway and Gunhill Road.

Q. Did they enter the subway? A. Yes, sir.

Q. After they went into the subway, what did you do? A. I hung around there.

7351

Q. How long did you hang around? A. All day.

Q. After hanging around all day, did you see Rubin again? A. Yes, sir.

Q. Approximately when was that? A. Approximately five o'clock.

Q. Was he alone then when you saw him? A. No, sir.

Q. Who was with him, do you know? A. The same man.

Q. What did you see Rubin and this man do? 7352
A. Go into that house.

Q. Did anybody come out of that house? A. Yes.

Q. Who came out? A. The man.

Q. How long after Rubin and the man had gon a was it that the man came out? A. A few minutes.

Q. In conformity with Weiss's instructions, did you go to a saloon?

Mr. Talley: Object, if your Honor pleases, to the form of the question. 7353

The Court: Sustained.

Q. Did you that evening go to a saloon? A. Yes, sir.

Q. Do you know where that saloon was located? A. On Grand Street.

Q. East Side of Manhattan? A. Yes, sir.

Q. Do you know the other street? A. I think it was Lewis Street.

Q. Did you there at that saloon see one of the defendants? A. Yes, sir.

Q. Which one? A. Weiss.

Q. Did Weiss ask you a question?

7354

Mr. Talley: I object, if your Honor pleases, upon the ground already stated, to this line of inquiry; has to do with an offense not named in this indictment.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. Yes, sir.

Q. What did he ask you?

7355

Mr. Rosenthal: I object to it.

Mr. Talley: Same objection I made.

The Court: Overruled.

Defense Counsel: Exception.

A. He said, "What happened?"

Q. Did you tell him? A. Yes, sir.

Q. After you told him what had happened up there in the Bronx, did Weiss say anything else? A. Yes, sir.

Q. What did he say? A. He says, "Go back to Brooklyn and see Harry Strauss, and he will give you further instructions."

7356

Q. Did you go back to Brooklyn that night? A. Yes, sir.

Q. Did you go to the corner? A. Yes, sir.

Q. Whom did you see at the corner? A. Strauss, Capone, and Reles.

Q. At that corner where you saw Strauss, Capone, and Reles, was there a talk? A. Yes, sir.

Q. Tell us who spoke and what was said.

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.
Mr. Talley: Exception.

A. Strauss spoke and he said, "What happened up there?"

Q. Was this in the presence of Capone and Reles? A. Yes.

Q. Were you all close to one another when you were talking? A. Yes, sir.

Mr. Rosenthal: I object to it, leading and suggestive. 7358

The Court: He can say how close they were.

Mr. Rosenthal: Is the question withdrawn, or is there a ruling on it?

The Court: Sustained.

Q. State where you were in proximity to one another. Do you know what that means? A. Yes, sir.

Q. All right, tell us. A. About arm's length away from one another.

Q. Continue to tell us what was stated there. 7359
A. He asked me, "What happened up there?" and I explained to him exactly what happened. He says, "Well," he says, "go up there again tomorrow morning and watch him again and stay around there until about 7:30 and see if he comes out of the house after supper; if he does come out of the house, where he walks to and with whom."

Q. At that time did Capone say anything? A. Yes, sir.

Q. What did he say? A. He says, "That

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Rubin is hurting Lep, and we got to hit him in the head—

Mr. Barshay: I move to strike it out—

A. (continued) —and get rid of him."

Mr. Turkus: Let him finish, please.

Q. Continue. "That Rubin is hurting Lepke" — A. 'And we have to hit him in the head and
7361 get rid of him."

Mr. Barshay: I move to strike it out as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Barshay: Exception.

Q. Did you agree to continue your job? A. Yes, sir.

Q As you walked away, did Capone say and do anything?

7362 Mr. Rosenthal: I object to the continuous leading and suggesting to this witness.

Mr. Turkus: There were other people there in conversation, Judge.

The Court: What was the question?

(Pending question read.)

The Court: Overruled.

Q. Do you understand the question? A. Yes, sir.

Q. All right, did he? A. No, sir.

7363

Q. At any time in the talk, did anybody use the word "luck"?

Mr. Rosenthal: I object to leading and suggesting.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. Not then.

Q. When was that word used?

7364

Mr. Rosenthal: I object to it.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. The next night.

Q. Did you continue on the job of watching the movements of Rubin? A. Yes, sir.

Q. How many days after that night was it that you continued to watch him? A. Oh, about three more days.

Q. And while you were watching him for those times, how were you dressed? A. In those overalls that I spoke about.

7365

Q. I am calling your attention now to the last day of the watch. What time, if you can recall, did you arrive out in the vicinity of Gunhill Road? A. Early in the morning.

Q. Were you dressed in those overalls and the rest of that outfit that you described to the jury, on that occasion? A. Yes, sir.

Q. Dressed in that outfit, where did you keep yourself in relation to Rubin's house? A. Across the street from Rubin's house.

Q. And what were you doing there while you

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were waiting for Rubin that morning? A. Sitting on the curb.

Q. While you were sitting on the curb, did somebody come over and question you? A. Yes, sir.

Q. Who? A. A policeman.

Q. Was it a policeman in uniform? A. Yes, sir.

Q. What did the policeman in uniform say to you?

7367

Mr. Rosenthal: Objected to.

The Court: Sustained.

Q. Did the policeman in uniform—and answer this only yes or no—ask you questions? A. Yes, sir.

Mr. Rosenthal: Objected to.

The Court: That is what he says.

Q. Did you make answers? A. Yes, sir.

Q. Did the policeman go away? A. Yes, sir.

7368 Q. Did you see Rubin come out of the house? A. Yes, sir.

Q. Keep on tailing him? A. Yes, sir.

Q. After that incident with the policeman that you have told us about, did you go to the corner, namely, Saratoga and Livonia Avenues? A. Yes, sir.

Q. Was it that night? A. Yes, sir.

Q. Whom did you see on the corner that night? A. Weiss, Capone, Reles, and Strauss.

Q. Did you speak to any one of these defendants on trial? A. Yes, sir.

Q. Which one? A. Weiss.

Q. What did you tell Weiss?

Mr. Rosenthal: I make the same objection.

Mr. Talley: I object to it, if your Honor pleases, on the ground already stated.

The Court: Overruled.

Defense Counsel: Exception.

Mr. Barshay: My general objection still holds good, I take it?

The Court: Yes.

Mr. Barshay: Exception. 7370

(Pending question read.)

A. I told him once more that he has a guard with him at all hours, at all hours that I was there; he walks out of the house with the guard and back into the house with the guard; he has the bodyguard with him at all times.

Q. Had you ever seen Rubin leave the house by himself? A. No, sir.

Q. And from your observation of him, had he always been with the bodyguard every time that you saw him? A. Yes, sir.

7371

Q. When you told that to Weiss, that he was always in the company of the cop or the bodyguard, what did Weiss say?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. He said, "Then we will have to whack him and the cop."

Q. After Weiss said about what would have to happen to Rubin and the cop, did you say

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anything about the incident of the policeman? A. Yes, sir.

Q. What did you say? A. I explained what happened, that I was stopped up there that morning and questioned off a cop.

Q. Did you tell them what the cop asked you? A. Yes.

Q. And did you tell him what you said to the cop? A. Yes, sir.

7373 Mr. Rosenthal: I object to the form of the question, "Did you tell them?"

The Court: He said he was talking to Weiss and has not made clear how closely together they were.

Q. How close—

Mr. Rosenthal: Just a minute. I have an objection.

The Court: Sustained.

7374 Q. How close together were you, Mendy Weiss, Capone, Strauss, and Reles, when this talk went on? A. All in a huddle.

Q. And were you in a huddle when Weiss said about watching Rubin and the cops? A. Yes, sir.

Q. And were you in a huddle when you made your report as to what you had seen up in the Bronx in connection with Rubin and the cop? A. Yes, sir.

Q. Tell us what you said in that huddle to them in relation to your experience with the uniformed police officer that stopped you and questioned you.

Mr. Rosenthal: I again object to the form of the question.

The Court: Overruled.

Mr. Rosenthal: Conversation he said was with Weiss. Exception.

(Pending question read.)

The Court: Technically, I think Mr. Rosenthal is right.

Mr. Turkus: I will withdraw it in that form.

The Court: He has placed them all within apparent hearing distance. The conversation was with Weiss. 7376

Mr. Rosenthal: Does your Honor then sustain the objection?

The Court: Yes.

Q. Tell the court and jury what you said about that incident. A. I told him that as I was sitting on the curb a police officer walked over to me and he saw me sitting there, and says, "What are you doing here?" I says, "I am a plumber and I work upstairs and I am waiting for my boss." So he says, "Well, leave it go for a while, drop it for a while." 7377

Q. Who said, "Leave it go for a while," then? A. Weiss.

Q. Now, at the time when this police officer asked you the questions, were you dressed up in that outfit? A. Yes, sir.

Q. And when you indicated the house that you were waiting for your boss to show up, what house did you point out, in relation to where Rubin's house was? A. Across the street.

Q. I am going to direct your attention to the

month of April, 1939, and ask you if in April, 1939, you saw the defendant Capone. A. Yes, sir.

Q. Did Capone in April, 1939, speak to you with reference to a man named Friedman? Yes or no?

Mr. Rosenthal: I object to it.
The Court: Overruled.
Mr. Rosenthal: Exception.
(Pending question read.)

7379

A. Yes.

Q. Answer this question only yes or no, and no other disclosure: Were you given an assignment with reference to a man named Friedman?

Mr. Rosenthal: I object to the question.
The Court: The word "assignment" is objectionable. Sustained.

Q. Were you told to do something with reference to a man named Friedman?

7380

Mr. Rosenthal: I object to the question.
The Court: Overruled.
Mr. Rosenthal: Exception.

A. Yes, sir.

Q. After that conversation did you see Capone again? A. Yes, sir.

Q. How many days later? A. A few days later.

Q. Where did you see Capone a few days later? A. I went over to his house.

Q. Do you remember where Capone's home was located then? A. I think it was Avenue K.

Q. Did you see Capone at his home? A. Yes, sir.

Q. Do you remember where in his home you spoke with him, what room? A. The parlor.

Q. In the parlor did you ask Capone a question? A. Yes, sir.

Q. What did you ask him?

Mr. Rosenthal: I object to it. 7382

The Court: Overruled.

Mr. Rosenthal: Exception.

A. I asked him if he thought it was advisable that I work on the Friedman thing because I hung out about a block away and I thought I would be recognized.

Mr. Rosenthal: Is that the finish?

Q. Is that the finish of the question that you put to him, that you said to Capone? Is that what you said to Capone? A. Yes, sir. 7383

Q. Did Capone answer you?

Mr. Rosenthal: I object to it and ask that the answer be stricken. At this time I move for the withdrawal of a juror.

Mr. Barshay: In that motion counsel for Buchalter joins.

Mr. Talley: Weiss joins in that motion, if your Honor pleases.

The Court: I am trying to place who Friedman was.

Mr. Turkus: That is no concern of the

jury at this time, as far as the District Attorney is concerned.

The Court: On what theory is it offered?

Mr. Turkus: The next part of the conversation, which is so interwoven with that, will be the competent part against Capone. I don't want to make any disclosure. I want it to come from the witness. I don't want anybody to say I suggested anything. It is inextricably wound
7385 up with it so that you cannot part it. It has got to be brought out that way. Mr. Klein and I have given it considerable thought before putting the question, and it is the only way it can be done.

Mr. Rosenthal: If there is any question of law involved, in pursuance to your Honor's former policy, I think it should be discussed by both the Court and counsel without the presence of the jury. That seems to have been the policy that has been formulated during the trial,—with all
7386 due deference to the intelligence of both Assistant District Attorneys, their thought and deliberation being the ruling of the Court or even being impressed as a proper method of examination, insofar as I am concerned. I think we should be let in on the secret.

Mr. Turkus: You will be let in very quickly.

Mr. Rosenthal: Just a minute, Mr. Turkus.

Mr. Turkus: I object to any such im-

plication about a secret. There is nothing secret here. We will expose everything—no secrets.

Mr. Rosenthal: I thought your Honor had ruled that we discuss with the Court and not with Mr. Turkus or one another and we would get along very nicely.

The Court: The policy of the Court is always not to talk with counsel arguing but wait patiently until the discussion ends and then try to put in a word or two. 7388

Mr. Rosenthal: If there is any question—

The Court: Will you wait just a minute, please? Offhand, the impression given is that this is inter alios but I don't want any error here. The jury is excused for a few minutes.

(The jury retired from the court-room.)

The Court: What is this all about, now that the jury is out?

Mr. Turkus: When the witness spoke 7389
to Capone about the advisability of working on the Freedman thing, which is the word in the testimony, Capone's next words are the words that tie him up by an admission.

Mr. Cuff: May we have the witness excused, Judge?

Mr. Turkus: Certainly, I have no objection.

The Court: Let the witness be excused.

(The witness leaves the court-room.)

7390 Mr. Turkus: Without going into the exact language, Capone then said there was, in substance, nothing to worry about and made the admission which puts him into the Rosen killing. That is what will be developed. The answer is so wound up with that conversation that you cannot take some of it away and put the rest of it in because it will be completely without sense and understanding.

7391 Mr. Rosenthal: The only thing that is lost sight of is the fact that the witness Allie Tannenbaum has already testified in the presence of this jury that a man by the name of Whitey Freedman, whom he now identifies, Mr. Turkus, in the form of the question—was shot and killed or in some way was killed—I do not know whether he was shot or what happened but in any event that he was killed, and that is in this record.

Mr. Turkus: Will your Honor understand this—

7392 Mr. Rosenthal: This question which has been formulated already in the presence of this jury, first in the form which was objectionable and ruled out by your Honor, namely, were you given an assignment in respect to this particular individual, is already prejudicial to the rights of this defendant and is calling into this trial something which should not be developed, which is accusing this defendant of another crime or participation in another crime.

Mr. Turkus: Let me say this. This

witness did not mention—let me get the record straight. There is a serious charge there as if the District Attorney did something improper and while defense lawyers have a lot of latitude, still somebody has a sense of feeling in the matter. Freedman is a very common name. It has three different spellings. Nothing was extracted from this witness as to it being Whitey Freedman or any victim of a homicide. As a matter of fact I took every precaution I could that that would not be brought out into the case; that was the purpose of the language used, but the Freedman incident is so interwoven with Capone's admission of guilt in the Rosen case, it is so inextricably interwoven, that you cannot bring it out any other way so that is the problem that we in the District Attorney's office had and this is the only way we could meet it. 7394

The Court: Naturally I don't remember the use or connection of use of the word "Freedman" in the record because it is not a constituent part of this case. It is purely atmosphere, purely incidental and I assume that the memories of the members of the jury are as bad as that of the Judge, and no prejudice has been done. But will you kindly tell me precisely what you expect this witness to answer to that question? 7395

Mr. Turkus: How far did he go?

The Court: You know every detail.

Mr. Turkus: I want to see how far we

got and then I will tell you what is going to happen next, according to what I anticipate.

The Court: The admission that will link up Capone, you said.

Mr. Turkus: Well, Capone is going to admit his part in the Rosen killing, tell him what is he worrying about, he worked on the Rosen job and he hung around there and nobody made him, so what is
7397 this fellow worrying about. I cannot tell you the exact language he is going to use, but that, in substance, is the way it is going to be.

Mr. Rosenthal: May I address the Court, if that is supposed to be the purpose?

The Court: Will you wait just a moment?

Mr. Rosenthal: Yes, sir.

The Court: What are the words that you claim were used in reference to Ca-
7398 pone on the Rosen job, I mean Capone's words?

Mr. Turkus: I have made a memorandum.

The Court: Let me know what it is.

Mr. Turkus: The memorandum is this, that he asked him if it is advisable that he should work on this Friedman thing, because he used to hang out a block away from there, just off Sutter Avenue, and that Capone said to him why, and Magoon said he was afraid of being made. Being made is the expression for being identified.

The Court: Don't tell a Judge who has been on the Bench twenty years.

Mr. Turkus: And Capone is supposed to have said to him, in words or substance, what are you worrying about? I worked on the Rosen thing right on Sutter Avenue and I was not made. I hung around there, too. What are you worrying about, being made? Magoon said, in words or substance, I am not worried about it. I just want to let you know and 7400
get your advice. That is all the conversation.

The Court: I will hear Mr. Rosenthal.

Mr. Rosenthal: Even assuming that such a thing was said, the very following conversation alleged to have emanated from Capone would substantiate the statement which I originally made to your Honor, that it is an attempt to prove guilt of another crime, namely the Friedman crime, because if, as he says, the alleged admission relates to the Rosen killing and 7401
says, "What are you worrying about Friedman for?", and already having the testimony here in the form of one or more witnesses the fact that Friedman was killed, it definitely is putting this defendant on trial for a crime which he is not charged with in the indictment.

Mr. Turkus: No, that is not a proper analogy.

Mr. Rosenthal: No?

Mr. Turkus: No, there was nothing brought out—

The Court: Bring in the jury.

Mr. Barshay: Is there any need for any urging the ground? I am moving for a mistrial.

The Court: I am not telling counsel what is their job.

Mr. Rosenthal: May I just add one more thing before the jury comes back? I understand from other counsel, which I did not know, that this man is charged with the Friedman killing and they are
7403 going to bring it out cross-examination, which would make the error still more harmful.

The Court: The Court is prepared to rule.

Mr. Barshay: May I add for the record that Friedman is one of the names mentioned by Mr. Tannenbaum when he said he was receiving instructions, both specific and general, from the defendant Buchalter. That fact may prejudice the jury to a point where they have a right to draw an inference from the question
7404 put by Mr. Turkus that this, too, was done at the direction of Buchalter, and it is not offered on the theory of spoliation and is in no wise connected with the Rosen case.

The Court: All I can say is I have no recollection of it and I just hope that the jury has just as bad a memory as I have.

Mr. Barshay: I cannot rely on that hope, your Honor.

The Court: It may not be prejudicial, anyway.

7405

Mr. Barshay: We have our exception, of course.

(The jury returned to the court room.)

The Court: The objection is overruled and the motion is denied.

Mr. Talley: Exception to all defendants.

The Court: Bring in the witness.

7406

SEYMOUR MAGOON, resumes the stand:

(Last question read.)

Q. After you asked him that question, did he say anything to you? Did he, Capone, say anything to you? A. I have not finished my answer on that.

Q. Continue. A. I says, "I hung out about a block away and it is sort of off Sutter Avenue."

7407

Q. When you said that, that you hung around about a block away and it is sort of off Sutter Avenue, did Capone say anything to you? A. Yes, sir.

Q. What did he say? A. He says, "What are you worried about?" He says, "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." I said, "I am not worried, Louie; I am just asking your advice."

Mr. Talley: I move to strike out that

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conversation as having no bearing upon the defendant Weiss, being incompetent, irrelevant and immaterial.

The Court: Denied.

Mr. Talley: Exception.

Mr. Barshay: Same motion with respect to Buchalter and exception.

Q. Earlier in your examination you told us that you had only been convicted heretofore of
7409 the crime of vagrancy. Do you recall that? A. Yes, sir.

Q. Nevertheless you have committed other crimes, haven't you? A. Yes, sir.

Q. Have you stolen automobiles? A. Yes, sir.

Q. Approximately how many? A. I could not count them.

Q. Well, can we help you make an estimate? Fifty? More? A. Roughly I will say fifty or better.

Q. Did you participate in the commission of the crime of murder with others, in Brooklyn? A. Yes, sir.

7410 Q. Once in Brooklyn? A. Yes, sir.

Q. Did you participate in the crime of murder in the County of Bronx? A. Yes, sir.

Q. In Brooklyn were you the wheel man on the job? A. Yes, sir.

Q. In the Bronx were you the wheel man? A. Yes, sir.

Q. Did you testify in the case of Plug Shuman here in Brooklyn, in which Irving Knadles Nitzberg was a defendant? A. Yes, sir.

Q. In connection with that homicide, did you deliver the car to Nitzberg and Sheppy Shapiro? A. Yes, sir.

Q. Did you know when you made delivery of the car that it was to be used in a murder? A. No, sir.

Q. Were you asked that question in that trial, in the Nitzberg trial?

Mr. Cuff: Object to that, if your Honor pleases.

The Court: Sustained.

Q. In the matter of one Irving Feinstein who was killed on or about Labor Day, September 4, 1939, did you help one of the defendants in that case get rid of the empty gasoline can which was used to burn the body of Feinstein? A. Yes, sir. 7412

Mr. Turkus: The witness is offered for cross-examination.

Mr. Barshay: I have a motion. I move to strike out this witness' testimony on the ground that it is in no way connected with the defendant Buchalter and is not binding upon him.

The Court: That remains to be seen. Denied. 7413

Mr. Barshay: Exception. I take it, your Honor, that some of the testimony with respect to his activities with Rubin was offered on the theory of spoliation. Your Honor will remember that the period he spoke of was October, 1938, or thereafter, perhaps thereafter, even after December of 1938. Will your Honor recall that the record here is clear that Rubin at that time did not involve the defendant Buchalter in the Rosen case. Conse-

7414 quently there could be no motive on the part of defendant Buchalter, either through himself or anyone else, to dispose of Rubin in the Rosen case.

The Court: I do not know what this is about. There is nothing before the Court.

Mr. Barshay: It is in support of my motion.

The Court: I thought I had just denied the motion?

7415 Mr. Barshay: That is another ground I urge, your Honor.

The Court. It was denied twice. All right, denied twice.

Mr. Barshay: Exception. No cross on the part of Buchalter.

Cross-examination by Mr. Talley:

Q. Are you known by any other name than Seymour Magoon? A. No, sir.

Q. No? A. No, sir.

Q. Sure about that? A. Yes, sir.

7416 Q. Did you ever give any other name in any court or to public authorities than Seymour Magoon? A. I don't think it was ever in any court.

Q. Where was it that you gave a name other than Seymour Magoon? A. If a police officer stopped me sometimes or I was picked up for something or other, I would give another name.

Q. Were you picked up many times? A. Yes, sir.

Q. How many? A. I could not say exactly.

Q. Would it be as many as the automobiles

you have stolen, fifty or better? A. No, it would be less.

Q. How much less? A. Oh, I will say about twenty-five times.

Q. And each of those times that you were picked up by police officers, you gave some other names than Seymour Magoon? A. Not at all times.

Q. How many of the 25 times, as best you can remember, did you give false names? A. Probably once or twice. 7418

Q. Is that all? A. Yes, sir.

Q. Then if it was only once of twice, you remember the occasions, don't you, when you gave false names? Give me the first time you gave a name other than Seymour Magoon? A. Will you kindly repeat that question?

Q. Yes, give me the first time when you used a name other than Seymour Magoon? A. I could not very well do that.

Q. You don't remember when it was? A. I don't remember the initial time, but I remember that I have given it on one or two occasions.

Q. All right, I am asking you to tell us either of those occasions. Where was it? When was it? 7419

Mr. Turkus: Objected to. He has already answered.

Mr. Talley: He has not answered.

Mr. Turkus: Will you read the answer to Judge Taylor?

The Court: He used the word "initial." I suppose he meant "identical." Do you remember any particular time?

7420

The Witness: I mean first time, your Honor.

The Court: You may answer. Repeat the question.

(Pending question read.)

Q. Tell us what those occasions were. A. I think once was in Milton, New York, and another time in Brooklyn.

Q. Were you picked up at the tomato farm in

7421 Milton, New York? A. Yes, sir.

Q. And what name did you give then? A. If I recollect right, it was Harry Levinson.

Q. Harry Levinson? A. Right.

Q. That is not your name? A. No, sir.

Q. Never was your name? A. No, sir.

Q. And to whom did you give that name? A. To the police officers who broke in on the farm there and asked me my name.

Q. They took you to the police station, didn't they? A. Yes, sir.

Q. And were you taken to any court? A. I don't think that night.

7422

Q. The next day? A. Yes, sir.

Q. Did you give your name there as Harry Levinson? A. I don't think so.

Q. Did you give the name of Seymour Magoon? A. Yes, sir.

Q. When was the next occasion when you used a false name? A. It was some sort of pick-up, if I recollect right, not exactly a pick-up—I was stopped. A few of the fellows were stopped then: "What's your name?" and "What's your name?" and when I was asked my name I told them "Harry Levinson."

Q That was the second time you used the name of Harry Levinson? A. To the best of my knowledge, yes.

Q. And you used the same name on two different occasions, is that right? A. Yes, sir.

Q. You are known as Blue Jaw, are you not? A. No, sir.

Q. Never heard that name applied to you? A. I have read that name.

Q. You have read it? A. Yes, sir.

Q. But you never heard anybody apply it to you? A. No, sir. 7424

Q. You took part in the killing of a man named Irving Penn, didn't you? A. Yes, sir.

Q. That was in the Bronx? A. Yes, sir.

Q. Do you say you were driving the car from which the shots were fired that killed Irving Penn? A. I drove the car after the shots were fired.

Q. You helped to kill a man named Whitey Friedman, did you not? A. I drove the car on that occasion as well.

Q. And you knew that Whitey Friedman was to be killed? A. Yes, sir. 7425

Q. When you drove the car? A. Yes, sir.

Q. You knew what the job was that night, didn't you? A. Yes, sir.

Q. And you drove the men who did kill Whitey Friedman to where Whitey Friedman was? A. The man who killed him.

Q. The man who did it. And then you drove that man away, did you, after Whitey Friedman was killed? A. Yes, sir.

Q How was he killed? Was he shot? A. Shot.

Q. These cars that you say you stole, some fifty or better, some of them were used in murders, were they not? A. Yes, sir.

Q. And some of them that were used in murders were driven by you? A. Will you kindly repeat that question?

Q. Some of these cars that were used in murders were driven by you?

Mr. Turkus: I object to it. That is an ambiguous question. Does he mean were they driven on the murder? I object to the form of the question. It is very, very ambiguous and confusing.

7427

The Court: He testified he had wheeled on at least two. I think Judge Talley wants to know whether they were stolen cars.

Mr. Turkus: I did not get that as the import of the question. I thought he was going into other—

Mr. Talley: I will reframe the question, if the District Attorney cannot understand my language.

7428

Q. You told the District Attorney that you stole some fifty cars or better; to use your language; didn't you? A. Yes, sir.

Q. And you have just told me that some of those cars were used in murders, didn't you? A. Yes, sir.

Q. Now my question is, when those cars were used for murders, did you on any of the occasions drive the cars either before the murder or after the murder?

Mr. Turkus: The words "before the murder" are confusing because to steal the car you have to do some driving. To affect his credibility, was he driving them on those murders; that is the question. In its form it is objectionable.

The Court: Overruled.

Mr. Turkus: And is confusing.

Q. Did you? A. I don't understand your question.

7430

Q. I see. That is good enough. Some of the fifty cars that you stole were used in murders? A. Yes, sir.

Q. What murders were they used in? A. On the Penn case.

Q. You told us about that. A. On the Friedman case.

Q. You told us about that. A. And on a couple of other cases that I have read in the papers the next morning. I recognized the car that I stole.

Q. What cases were they that you got your first notice about from the papers? A. Well, there was one on a couple of plasterers who was killed in Brooklyn.

7431

Q. What were the names of those plasterers? A. I don't know.

Q. Didn't you read their names in the newspaper that you say you read? A. Yes, sir.

Q. And you don't remember their names? A. Yes, sir.

Q. You mean you do not remember their names? A. I do not remember their names.

Q. And who killed these two plasterers?

Mr. Barshay: I object.

Mr. Turkus: Oh!

The Court: Sustained. That is fishing.

Q. Did you drive a car in any other murder than the murder of these Freedman, Penn, and the two plasterers? Did you steal the car that was used in any other murder? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Do you know how many? A. No. There
7433 was another one that I have in mind.

Q. You beat up a policeman in Coney Island, didn't you, on one occasion? A. No, sir.

Q. You did not? A. No, sir.

Q. Had no part in the beating up of a patrolman Murphy? A. I had a fight with him.

Q. Did you beat him up? A. I won the fight.

Q. What? A. I won the fight.

Q. You and who else? A. I fought with him alone but there was others standing around.

Q. Who helped you to beat Patrolman Murphy in Coney Island? A. Nobody.

Q. Is that your answer, nobody? A. Yes, sir.

7434 Q. At the time you beat up, had the fight as you say with this policeman, was Abie Reles with you?

Mr. Turkus: I object to the form of the question.

The Court: Sustained. It is too collateral.

Mr. Talley: I don't quite understand your Honor's ruling.

The Court: I am ruling according to the rules of evidence that on matters of

collateral impeachment, when you get through impeaching you stop. You do not try the case.

Mr. Talley: This is not a question of impeachment. This is a question of ascertaining who was with him when he beat a policeman.

The Court: We are not trying that issue.

Q. Isn't it a fact that you and Abie Reles and others ganged up on this patrolman in Coney Island? A. No, sir. 7436

Q. It is not? In the trial of Goldstein, you testified there, did you not? A. Yes, sir.

Q. And were you asked this question and did you make this reply (page 471): "Q. Reles was with you when you beat Murphy up, wasn't he? A. Yes, sir." Were you asked that question and did you make that reply?

Mr. Turkus: Object to it. That is not inconsistent.

The Court: Sustained. 7437

Mr. Talley: Exception.

Q. Did you ever shoot anybody? A. Yes, sir.

Q. Who? A. A couple of fellows.

Q. What were their names? A. Whitey Whalen.

Q. Where did you shoot Whitey Whalen? A. On Park Place off Buffalo Avenue.

Q. Brooklyn? A. Yes, sir.

Q. You never were convicted of that crime, were you?

Mr. Turkus: I object unless he fixes the time when the shooting took place and what the crime was.

Mr. Talley: We will get to that.

Mr. Turkus: I object to it now unless the time be fixed.

The Court: Sustained.

Mr. Talley: Exception.

Q. What did you say the name was, Whitey
7439 what? A. Whitey Whalen.

Q. When did you shoot Whitey Whalen? A. A few years ago.

Q. What year would that be? A. I would say about '32.

Q. About '32? A. 1932, around that time, '33.

Q. And were you arrested on the charge of shooting Whitey Whalen?

Mr. Turkus: I object to it. Arrests are not permissible.

The Court: Sustained.

7440 Q. Were you convicted of the charge of shooting Whitey Whalen?

Mr. Turkus: Objection. There is no such thing that there was a charge.

The Court: Overruled.

Q. Were you?

The Court: Yes or no.

The Witness: Can I hear that question again, please?

The Court: Were you convicted of that murder?

The Witness: That was no murder.

Mr. Turkus: Just a minute, Judge—

The Court: I beg your pardon, were you convicted of that shooting?

The Witness: I was not arrested for it.

The Court: Then the answer is "No"?

The Witness: No.

Q. What was the other case of shooting by you? When and where and whom did you shoot? 7442
A. A fellow Jerry.

Q. What was his other name? A. I don't recollect his other name.

Q. And when did you shoot him? A. About seven or eight years ago.

Q. That would be again about 1932 or '33? A. Say about '33 or '34.

Q. About '34? A. Around that time.

Q. And where was Jerry when you shot him? A. On Buffalo and St. Johns Place.

Q. In the day time or the night time? A. 7443
Night time.

Q. What time at night? A. About eleven o'clock at night.

Q. Did he die as a result of the shooting? A. No, sir.

Q. Were you arrested for that charge? A. No, sir.

Q. So with your fifty or better automobiles, your several murders, and your at least two shootings by yourself, the only conviction that you have had was for vagrancy; is that right?

7444 Mr. Turkus: I object to the form of the question. "Several murders" is not in the testimony.

Mr. Talley: It is in the testimony out of the mouth of this witness.

Mr. Turkus: Judge, may I address the Court on a legal objection? I submit that that question is improper in form.

The Court: The objection is overruled

7445 Q. What is your answer? A. Will you repeat the question?

The Court: Your only conviction is vagrancy?

The Witness: Yes, sir.

Q. You are not living in any hotel now, are you? A. No, sir.

Q. You are confined in the Bronx County Jail, is that right? A Yes, sir.

Q. And what is the charge against you there? A. I don't think there is any charge against me
7446 there.

Q. What do you expect for giving testimony in this case? A. (No answer).

Q. Do you expect leniency? A. I expect a little help.

Q. From whom? A. From those I am helping, in fact, I was told as much, providing I tell the truth about everything in the Bronx and in Brooklyn.

Q. Who told you that you would be helped if you told the truth in court, that apparently meant? A. District Attorney O'Dwyer and District Attorney Sam Foley.

Q. Have you testified before the Grand Jury in any of these cases? A. Yes, sir.

Q. Did you testify before the Grand Jury in the killing in the Bronx? A. Yes, sir.

Q. Did you sign a waiver of immunity before you testified? A. Yes, sir.

Q. And have you testified before any Grand Jury in Brooklyn? A. Yes, sir.

Q. In what case? A. In the Plug Shuman case.

Q. And did you sign a waiver of immunity 7448
in the Plug Shuman case before you testified before the Grand Jury? A. I don't recollect that.

Q. Do you know what I am talking about when I say a waiver of immunity? A. I understand a little of what you are talking about.

Q. And you do not know whether you did or not in the Plug Shuman case? A. I don't know.

Q. Of course, you are charged with murder in the Bronx, aren't you? A. I suppose so.

Q. Do you know whether you were ever indicted in the Bronx for murder? A. I don't 7449
think I was.

Q. You want to save yourself from going to the electric chair, if you can, do you not? A. Yes, sir.

Q. And in an effort to save yourself from going to the electric chair, you are testifying in this case, are you not? A. Yes, sir.

Mr. Talley: I have no further questions, sir.

Mr. Rosenthal: Judge, I have not made any applications throughout the trial, but in view of this testimony and the necessity

7450 of interviewing my client so as to intelligently cross-examine, I have no objection to your Honor sitting an extra half hour tomorrow, but I would like to get this testimony and not only digest it, but there are certain things which I don't want to divulge at this time, which I will have to get in the form of documentary things in addition to speaking to my client. So I earnestly request your Honor to give me
7451 this half hour or thirty-five minutes. I know this much, that if I am permitted this that I will save at least three hours tomorrow on cross-examination because I will have it in connected form and proper form.

The Court: The trouble is that while the Court wishes to, in fairness, oblige counsel as much as possible, if a precedent is created now it will have to be followed and will actually prolong this long trial.

Mr. Rosenthal: I will then say to your Honor—

7452 The Court: Pardon me just a minute. Nothing here has been done hastily in all of the weeks that the trial has continued. Everything has been done methodically and, as I said before, largo, but I am sorry I cannot grant that request.

Mr. Rosenthal: I, of course, had no knowledge until this man took the stand—

The Court: You are up against that in the trial of any case.

Mr. Rosenthal: Usually the opening apprises you of just what to expect.

The Court: Oh, no, I never heard of such a thing as that.

Mr. Rosenthal: Then I will ask your Honor to give me ten or fifteen minutes without the jury, with my client, so I can intelligently cross-examine.

The Court: The trouble is the next time you want to cross-examine there will be another ten minutes.

Mr. Rosenthal: No, I have not asked for anything. I have been here at ten minutes 7454
to ten every morning and I have not desired to prolong this trial and I would not arbitrarily make a request of this character unless I was in absolute earnestness as to the necessity of it. This witness and his testimony is an absolute surprise to me and I must prepare in order to intelligently bring before the jury whatever defense there may be in the mind of this defendant.

The Court: Here is your client. We will all wait here, and you consult him. 7455
That is the usual procedure in the trial of a case. Please don't discuss it any more.

Mr. Rosenthal: I am not going to discuss it any further. Your Honor refuses the request. The most I can do is except to your Honor's ruling.

Mr. Talley: May I suggest counsel agree to sit an extra half hour tomorrow.

Mr. Rosenthal: Come here at half past nine tomorrow, as far as that is concerned.

The Court: The discussion is ended.

7456 *Seymour Magoon—For People—Cross*

By Mr. Rosenthal:

Q. Did you, Magoon, in the year 1928— Let me withdraw that.

Q. You say you have known the defendant Capone for how long? A. Eight or nine years.

Q. That would be that you know him since approximately the year 1933, is that right? A. Approximately, yes.

Q. How old did you say you were? A. Thirty-three.

7457

Q. In 1928, that is thirteen years ago, did you not, in company with a man by the name of Abraham Itzkowitz, on the 29th day of December, 1928, commit a robbery upon a man by the name of William J. Kennedy, a bricklayer, taking from him a Cole touring automobile, around 1:30 in the morning, on New Lots Avenue near Sackman Street, telling him at the time that if he tried anything funny, if he tried any funny stuff, that you would blow him apart, and at the same time beat him on the face and head when he resisted the taking of his car from him? Do you

7458

understand the question? A. Yes, sir.

Q. Did you do that, you in company with one Abraham Itzkowitz? A. I think you are wrong on that, Counsellor. I can help you and give you the real story about that.

Q. Just a minute. Let me take it piece by piece then, sir. Didn't you at that time sign— Withdrawn.

Q. Didn't you go before the Grand Jury and testify against him— Let me withdraw that.

Q. First of all, do you know Abraham Itzkowitz? A. Yes, sir.

Q. Or did you know him in 1928? A. Yes, sir.

Q. Was he a friend of yours? A. An acquaintance.

Q. Did you go out with him prior to September of 1928? Did you and he go out together? A. No, sir.

Q. Did you on the night or the early morning of September 9, 1928, in his company, accost—Let me put it so you can understand it—talk to a man by the name of William J. Kennedy who was the owner of a Code touring automobile? Did you talk to him, to Mr. Kennedy, the bricklayer? 7460

Mr. Turkus: There are three questions there.

A. No, sir.

The Court: What is the answer?

Mr. Turkus: "No" was the answer.

Q. Did you, in company with Itzkowitz on that night hold up and take away from William J. Kennedy his automobile at 1:30 or thereabouts in the morning? Did you? Yes or no? A. No, sir. 7461

Q. Did you participate with Itzkowitz in the taking away of the automobile of Kennedy on that day and at that time? A. No, sir.

Q. You had nothing to do with the crime of taking from William J. Kennedy an automobile on that day, or on that morning? A. I had something to do with it.

Q. Now then, let me put it this way: Did you, in company with Itzkowitz, on or about that day, steal and take away from the possession of

William J. Kennedy an automobile, a Cole automobile owned by Kennedy? Did you do that? A. No, sir.

Q. You say you had something to do with the stealing of the automobile. Didn't you say that? A. Yes, sir.

Q. What part did you play in the stealing of Kennedy's automobile? A. Stole it.

Q. You stole it? A. Yes, sir.

Q. Was he present at the time that you stole
7463 it—Kennedy? A. Yes, sir.

Q. Was Itzkowitz present with you at the time that you stole it?

Mr. Turkus: That is objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Q. Do you understand the question? A. Yes, sir.

Q. I assume that when you said you understand the question, the "Yes, sir" was to understanding the question. Will you answer the
7464 question? Was Itzkowitz with you at the time that you now say you stole that automobile? A. No, sir.

Q. Did you steal it alone? A. No, sir.

Q. Was anybody else with you when you stole it? A. Yes, sir.

Q. Who was the second person or other person who was with you in 1928 when you stole the automobile? A. A fellow, Whitey.

Q. What is Whitey's last name? A. It ends with a "sky".

Q. Well, you mean his last name ends with a "sky"? A. Yes, sir.

Q. You are sure it is not with a "witz", Itzkowitz? A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. Now, then, the circumstances of your theft of this automobile, isn't it a fact that— Let me withdraw that.

You did not know Kennedy before the theft of this automobile, did you? A. No, sir.

Q. A total stranger? A. Yes, sir.

Q. Isn't it a fact that this man Kennedy, this bricklayer, parked his car on New Lots Avenue near Sackman Street at the hour of about 1:30 A. M., for about fifteen minutes, and entered his house, that is, Kennedy's house, and that when he came out he, Kennedy, entered his own car and he proceeded to start the car, when you approached him with the other man whom you say is Whitey with a ski on the end of his name, and struck him several blows upon the face and head, stating at the time—either you or your companion Whitey— "If you try any funny stuff, we will blow you apart," and then Kennedy was compelled to drive you and Whitey to Watkins Street and Lott Avenue? 7466 7467

Mr. Tarkus: I object to the form of the question, containing a wealth of material not testified to.

The Court: Overruled. Is that substantially true?

Q. Is that substantially the fact, yes or no? A. A small part of it, your Honor, is true.

The Court: You stole the car?

The Witness: Yes, sir.

7468 The Court: And you beat up the man?

The Witness: We fought the man.

The Court: And you made him take you to another place?

The Witness: No, sir.

Q. That part is not correct, is it? All right, we will pass that. In any event, you fought off the legitimate owner of the car when he got in his car and tried to start it, is that right? A.
7469 I can explain that, counsellor.

Mr. Rosenthal: Let us start off, Judge, if you will, please, with telling the witness we want no explanations. Where he can answer it yes or no, say yes or no. If he cannot, I will repeat the question to him so that he can fully and ably understand it.

Mr. Turkus: May we understand this, that Mr. Rosenthal is reading from a sheaf of prepared papers a question that it took at least a minute to read off.

7470 Mr. Rosenthal: Mark for identification, please, what he called prepared papers, a copy of a complaint in a Magistrate's Court.

Mr. Turkus: That is reprehensible. That is done solely to get something before the jury that an experienced trial lawyer like Mr. Rosenthal knew was reprehensible when he did it.

Mr. Rosenthal: I am not going to answer him, Judge.

The Court: The witness is instructed

just to answer the questions and not to volunteer any information.

Mr. Rosenthal: May I have this paper marked for identification?

Mr. Turkus: Yes, let us have it, and let us have all the other papers marked for identification.

Mr. Rosenthal: You will get them.

Mr. Turkus: On the theory that an adjournment was requested for lack of preparation. There are a sheaf of papers 7472
in his hand.

Mr. Rosenthal: He is not going to make any statements about me. I am marking the three papers in my hand—I am not like him—for identification, consisting of complaints against this man. Will you please give these to the stenographer? I want them marked.

The Court: You mean Mr. Rosenthal did not mean he was taken by surprise?

Mr. Turkus: That is it.

Mr. Rosenthal: I am not surprised as 7473
to complaints that exist where there is public knowledge, but I am definitely surprised as to the testimony, and I reiterate what I said, so I will spend the rest of the afternoon in what are public records as to this man.

Mr. Turkus: There is some surprise here, Judge.

The Court: We will spend it to more advantage if there is less argument between counsel. Proceed, Mr. Rosenthal.

Mr. Rosenthal: I offer those three

papers that Mr. Turkus offered. First, I want them marked for identification, then I will offer them in evidence after they are marked—what he calls a sheaf of papers.

The Court: He cannot say anything until the offer in evidence is made.

(Papers marked Defendants' Exhibits W, X and Y, for identification.)

7475

Mr. Rosenthal: Now I offer the three papers in evidence.

Mr. Turkus: Let me see them. With respect to People's Exhibit W, for identification, consisting of seven pages, it is incompetent.

The Court: I don't even have to read it. Sustained.

Mr. Rosenthal: Exception.

Mr. Turkus: With respect to People's Exhibit X, consisting of one page, that is incompetent.

7476

The Court: Sustained.

Mr. Turkus: As to People's Exhibit Y, consisting of two pages, even though it is incompetent, I have no objection.

Mr. Rosenthal: Just a minute. I am going to show the inconsistency of the proposition.

The Court: No.

Mr. Rosenthal: I have offered these three papers together.

The Court: I won't hear of any inconsistency. That is for the jury. The

Judge was initiated forty years ago into this practice.

Mr. Rosenthal: I except to the Court's ruling. I have offered these three papers.

The Court: There is not one that is competent. Now you are objecting because counsel consents that one of them go in evidence. All right, he consents. You offer to put it in evidence.

Mr. Rosenthal: I consent to it. I am not objecting to it at all.

7478

The Court: No speeches.

Mr. Rosenthal: Now I reoffer the other two.

The Court: The Court refuses to even pass on it.

Mr. Rosenthal: I respectfully except.

The Court: Just by-play to the jury.

Mr. Rosenthal: I except to that remark.

The Court: You ought to know better.

Mr. Rosenthal: And I again except.

The Court: In fact I say you do know better. Now take that for what it is worth. Take your exception and make a motion for a mistrial; the Court overrules it and you have an exception. Proceed with the examination.

7479

(Defendants' Exhibit Y for identification received and marked Defendants' Exhibit 3 in evidence.)

Mr. Rosenthal: Now then I ask the privilege of reading it.

The Court: You do not have to ask it.

7480 You know you have a right. Go ahead and read it to the jury.

Mr. Rosenthal: Thank you.

(Reading) "Affidavit—Robbery. City Magistrates' Court, Tenth District, City of New York, Borough of Brooklyn, County of Kings. William J. Kennedy of 61 New Lots Avenue, aged 21 years, occupation bricklayer, being duly sworn, deposes and says that on the 9th day of

7481 September, 1928, in the Borough of Brooklyn, in the City of New York and County of Kings, was feloniously taken, stolen and carried away from the person of deponent by force and violence, without his consent and against his will, the following property, viz:

"A Cole touring automobile of the value of five hundred ($500) dollars, the property of deponent, and that this deponent has a probable cause to suspect and does suspect that the said property was feloni-

7482 ously taken, stolen and carried away by force and violence by Seymour Magoon and Abraham Itzkowitz. Deponent further says that he parked said car on New Lots Avenue near Sackman Street at the hour of about 1:30 a. m., for about 15 minutes, while he went into his house for that period and that when he came out he entered his car and proceeded to start same when these two defendants approached, one on each side of same, and struck him several blows upon the face and head with their fists saying, 'If you

try any funny stuff we will blow you apart' and compelled deponent to drive them to Watkins Street and Lott Avenue and told him 'to get the hell over, we are going to drive this car.' Deponent got out and then sent an alarm to Police Headquarters and they were found by two motorcycle patrolmen at Kings Highway and Ocean Parkway, Brooklyn, in the possession of said car.

"Corroborative affidavits of said officers 7484
hereto annexed. William J. Kennedy. Sworn to before me this 9th day of September, 1928, Charles Haubert, City Magistrate. Bailed on September 10, 1928, by Annie Magoon, one thousand dollars for examination.

"Bailed on October 5, 1928, by Lena Frosch, twenty-five hundred dollars to answer when held for Grand Jury.

"Letter on file.

"To whom it may concern, I, Seymour Magoon, am willing to appear before the 7485
Grand Jury and testify to the truth of the case Monday at ten a. m. Seymour Magoon.

"Signed waiver of immunity 10/29/28.

"Letter 10/2/28 from Harold Reitman, Attorney for Magoon, requesting permission to testify before Grand Jury under waiver of immunity. Corroborating affidavits of Officers Fitzgerald and Meeks 9/9/28. Dismissal by Grand Jury."

Q. Did you testify before the Grand Jury in that case? A. I think so.

Q. What is your recollection? Did you? A. I say I think so.

Q. Now you admit today, do you not, that you actually did steal that automobile? A. Yes, sir.

Q. Didn't you tell an untruth before the Grand Jury in respect to whether or not you stole that automobile when you testified under oath before them in 1928? A. I don't understand the question.

Q. Let me put it very plainly to you. You
7487 signed a waiver to appear before the Grand Jury in respect to this charge made by William J. Kennedy against you. Do you recal that now? You said you think so? A. Yes, sir.

Q. Is it clear in your mind? Do you recall now that you actually did testify before the Grand Jury? A. If that is there, I must have done that.

Mr. Rosenthal: I ask that the answer be stricken, not responsive.

The Court: Let it stand.

Mr. Rosenthal: Exception.

7488

Q. I am asking you for your recollection at the present time. Did you or did you not in respect to that particular charge testify before the Grand Jury? A. I answered that question, counsel.

Q. Can you recall better than your answer whether or not— Let me withdraw that.

Q. Have you any recollection whatsoever as to whether or not you in 1928 appeared before a Grand Jury in Brooklyn and testified in your own behalf in respect to that particular charge?

Have you any independent recollection at this time? Do you know what the word "independent" means? A. No, sir.

Q. Let me explain it in a way that you do understand.

The Court: Do you know whether you did or not?

Q. Do you have any recollection? A. I think so, your Honor. 7490

The Court: Is that as far as you can go?

The Witness: That is about as far as I can go.

The Court: You don't actually remember?

The Witness: No, I don't fully remember the thing.

Q. Isn't it a fact that in so far as that charge was concerned that you testified falsely before the Grand Jury in respect to yourself and your connection with that particular charge? 7491

Mr. Turkus: I object to it, if he cannot even remember whether he testified or not—

Mr. Rosenthal: I object to any argument by the District Attorney that will put words into the witness's mouth.

Mr. Turkus: That might be expected.

Mr. Rosenthal: Whether that is the intention or not.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Have you any recollection?

The Court: Just a minute. I sustained your objection to what Mr. Turkus said.

Mr. Rosenthal: Thank you, sir.

The Court: In connection with his objection. Mr. Turkus's objection is overruled.

7493 Q. Do you recall the question or do you want me to repeat it?

The Court: Do you remember testifying falsely before the Grand Jury?

The Witness: No, sir.

The Court: In that case?

The Witness: No, sir.

The Court: There is your answer.

Q. You said you are how old now? A. Thirty-three.

7494 Q. When were you born? A. April 21, 1908.

Q. In 1930, in the Borough of Manhattan, on October the 29th— Let me withdraw that.

Q. Did you know a firm Max Udell & Sons Company in Manhattan in the year 1930? A. I have heard of the firm.

Q. Did you know one Theodore Lentz in October of 1930? A. Yes, sir.

Q. Did you know one William Adams in October of 1930? A. No, sir.

Q. Did you know a Philip Lentz in October of 1930? A. Yes, sir.

Q. Did you, in company with others whose names I have just mentioned, on or about the 29th of October, 1930, steal from Max Udell merchandise and evening apparel of the value of over two hundred thirty-odd dollars? Did you, in company with them or any one of them? A. No, sir.

Q. Were you at the premises of Max Udell & Sons on the 29th of October, 1930?

Mr. Turkus: It is objected to. It is incompetent, irrelevant, immaterial. 7496

Mr. Rosenthal: I will lay the proper foundation. There is a twofold purpose, if you wish me to explain it to your Honor.

The Court: You cannot try the issue. You can ask him if he committed these other crimes.

Mr. Rosenthal: The purpose is not to try the issue, your Honor; the purpose is to see whether or not, if he now denies, he did not testify under oath contrary to his denial, which would be an entirely different crime. That is the purpose. 7497

The Court: You can ask him that.

Mr. Rosenthal: That is what my purpose is.

The Court: That is not what the question appeared to be.

Mr. Rosenthal: This is preliminary. I am first laying the foundation as to whether he knew these people and knew they were employees of this concern, and

then as to whether he was at that concern on that day.

The Court: That may lead you to speculate to the jury as to whether or not he was telling the truth when he said he did not commit the crime. That is not permissible under collateral impeachment because it causes the jury to be lost in a maze of issues which are not on trial. The witness on the stand either admits or

7499 denies the commission of the other crimes or the doing of the alleged acts which tend to show dishonesty on his part. Of course, the record is quite replete on that point.

Mr. Rosenthal: This, of course, goes back, your Honor—

The Court: This is quite cumulative.

Mr. Rosenthal: No, this goes back to 1930, your Honor, whereas this witness claims that he became acquainted with this defendant at a subsequent time. The pur-

7500 pose of my inquiry—

The Court: Which defendant?

Mr. Rosenthal: With the defendant represented by me, sir.

The Court: I thought he said about 1935 or 1936.

Mr. Turkus: I believe it was 1934.

The Court: If this is to show association with Capone before that date, you may do it.

Mr. Rosenthal: No, this is to show the criminal propensities prior to the date of his ever meeting Capone, according to his own testimony.

7501

The Court: I do not understand he hangs his hat on Capone for deviation from the straight and narrow path. You cannot try the issue. Sustained.

Mr. Rosenthal: I respectfully except.

Q. Let me ask you this question in respect to this particular thing—

Mr. Rosenthal: Your Honor will have to indulge me a second so that I can read it so that I can properly ask the question—

7502

The Court: May I suggest this, because four o'clock is about at hand. I think that it would be well if the prosecution would, whenever it sees it is approaching the close of its case, so advise the defense so that they may be ready to proceed with the trial.

Mr. Turkus: I believe I will be able to rest tomorrow.

The Court: If we rest tomorrow, then I won't have to compel the defense to go ahead tomorrow, if you rest tomorrow.

7503

Mr. Turkus: Yes, if we work tomorrow, I believe I will be in a position to rest the People's case.

The Court: Then it is all right of the Court to ask the defense to be ready to proceed with the defense on Monday upon the prosecution resting. It is six minutes of four, and I will indulge you now, Mr. Rosenthal.

Mr. Rosenthal: I will continue now until four o'clock, your Honor.

7504

The Court: All right, use up the six minutes.

Mr. Rosenthal: I will use the six minutes up. The purpose I had before was to save time.

By Mr. Rosenthal:

Q. Now, I will ask you this question: Did you on October 29, 1930, and Philip Lentz receive from two employes of Udell Sons and Company, to wit, Theodore Lentz, and William Adams, property or goods which were owned by Udell and Company and stolen by those two employes and delivered to you and Philip Lentz? Did you commit that act in October of 1930?

7505

Mr. Turkus: That is objectionable.

The Court: Overruled.

Mr. Turkus: Your Honor, there is no scienter in that question.

Mr. Rosenthal: Certainly.

Mr. Turkus: No, not the way it has been read.

7506

Mr. Rosenthal: It is overruled. Let us get along with the six minutes.

Mr. Turkus: Let me discuss something, Judge. I have a lot of judges at my back. Let me talk to the one in the front. If your Honor will read that question you will see that the essential element to affect his credibility, namely, scienter, is absent, and thus the question is confusing and improper.

The Court: I felt justified in presuming it.

Mr. Turkus: You felt justified in presuming, but it is not there.

Mr. Rosenthal: I thought, Judge, that counsel was not to argue with the Court when the ruling was made. I think that should apply to the District Attorney.

Mr. Turkus: The District Attorney has no exception, you know. We cannot say "exception" and make a record, so the Court should indulge the District Attorney. 7508

The Court: That applies to both sides.

Mr. Rosenthal: The six minutes are gone.

Mr. Turkus: So you are very lucky.

The Court: Now you are willing to give up.

Mr. Rosenthal: No, I am not. The Court has ruled in my favor.

The Court: I have ruled in your favor. Now let the witness answer.

Q. Now, answer the question, will you? 7509

The Court: Did you receive the goods?

The Witness: Yes, sir.

Q. And you knew that they were stealing them from Udell when you got them, didn't you? A. Yes, sir.

Q. And you had a brother of one of the employees of Udell with you when they stole the goods and when they were delivered to you; isn't that true? A. Yes, sir.

Q. Now, then, at the time that he got the goods, isn't it a fact in addition thereto that you

7510 threatened somebody at the time that you got these goods?

Mr. Turkus: Object to the form of the question.

The Court: Overruled.

Q. Isn't that the fact? A. If you say so, counsellor, it must be so.

Q. Oh, no.

7511 Mr. Rosenthal: I think we will take a recess. The witness is getting too agreeable, Judge.

The Court: Everybody kindly remain in order. Members of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open, follow all the other admonitions heretofore given. We will resume tomorrow morning at ten o'clock. First, the witness may go, then the jury out by the other door. Defendant remanded.

7512 (Adjournment taken to November 15, 1941, at 10:00 A. M.)

Seymour Magoon—For People—Cross 7513

Brooklyn, N. Y., November 15, 1941.

TRIAL RESUMED.

SEYMOUR MAGOON, a witness for the People, resumed the stand and testified further, as follows:

Cross examination by Mr. Rosenthal (continued):

7514

Q. Now, Mr. Magoon, yesterday I was questioning you, and just as you made the effort to recall, I was asking you about stolen merchandise from Udell and Company, do you recall? A. Yes, sir.

Q. Now, did you know a man named Joseph Cooperman? A. I did not hear that.

Q. Did you know a man named Joseph Cooperman? A. Yes, sir.

Q. Did you know that man in the year 1934? A. I have known him for a number of years.

Q. Was he a friend of yours? A. I could not very well say that.

7515

Q. Was he an acquaintance of yours? A. Yes, sir.

Q. Did you on the 23rd of October, 1934, in front of premises or at premises number 5815 Snyder Avenue, shoot and kill Joseph Cooperman? A. No, sir.

Q. Were you at or near those premises on that night? A. No, sir.

Q. Do you know a man named Bobby Burns? A. Yes, sir.

Q. Were you in business with him? A. Yes, sir.

Q. You were in the shylock business with him, weren't you? A. Yes, sir.

Q. How long a period of time had you been in the shylock business with Bobby Burns, approximately? A. I would say roughly about two years.

Q. Commencing from when, approximately? A. I could not very well say that.

Q. Well, were you in business with him in the year 1936 and the end of 1935? A. I would say
7517 it was about that time.

Q. Did you know a man named Leo Shayer, of number 405 Lexington Avenue, Manhattan, a merchant? A. Yes, sir.

Q. Did you and Bobby Burns extort money from Leo Shayer in front of the premises 1101 Rutland Road, in Brooklyn? A. No, sir.

Q. Did you and Bobby Burns extort money from in front of any premises? A. I did not extort any money from him.

Q. Let me put it this way: Were you in the company of Bobby Burns when he extorted
7518 money from Shayer, you know, prior to the time he was extorting the money, that he was going to extort it? A. No, sir.

Q. Did you threaten this man Shayer at any time? A. No, sir.

Q. Were you present with Bobby Burns at the time he took a pistol from his pocket and struck Shayer over the temple with the butt of the gun, were you present with him?

Mr. Turkus: I object. That does not affect his credibility.

The Court: Overruled.

A. No, sir.

Q. How long had you known Shayer? A. A number of years.

Q. Did you and Bobby Burns loan Shayer any money in your shylock business? A. I loaned Shayer money in my shylock business.

Q. That is, you loaned him the sum of $50. for which you demanded $60.? A. No, sir.

Q. How much did you loan him? A. $25.

Q. How much did you ask for? A. $30.

Q. For a week, that was? A. Yes, sir.

Q. Did you know a woman named Anna Stein? 7520
A. Yes, sir.

Q. When you loaned this money to Shayer, did you procure from him notes which were payable to the name of Anna Stein? A. No, sir.

Q. Was Anna Stein a friend or a relative of yours? A. No, sir.

Q. Where did she come from? A. I do not know.

Q. Did she sign any of the notes? A. Not that I know of.

Q. Did there come a time when Shayer did not pay you the amount of money which you demanded for the loan? 7521
A. Will you please repeat that?

Q. Did there come a time when Shayer did not pay you the money which you demanded for the loan which you had made? A. No, sir.

Q. He paid it voluntarily? A. Yes, sir.

Q. Were you with Bobby Burns on the 9th day of January, 1936, at 11:40 P. M. in the premises or in front of the premises 1101 Rutland Road? A. Yes, sir.

Q. At that time, while you were with him, did you see Leo Shayer? A. Yes, sir.

7522 Q. Prior to the time that Leo Shayer arrived, had you had a conversation with Bobby Burns as to the purpose for which Shayer was coming to 1101 Rutland Road? A. No, sir.

Q. Did you, when you went to 1101 Rutland Road with Bobby Burns, know that Shayer was coming there? A. Yes, sir.

Q. At any time did Shayer owe you any money? A. Yes, sir.

Q. Now, then, is it a fact that on that day you
7523 demanded the money from Shayer that he owed you? A. No, sir.

Q. Did Burns in your presence demand the money? A. It was money that he owed Burns, no shylock money.

Q. So that in your presence Burns demanded other money that had been owed to Burns, is that right? A. Right.

Q. At that time did the man ask for a week's time in which to get it?

Mr. Turkus: I object. That does not
7524 affect the witness' credibility.

Mr. Rosenthal: I am coming to the issue. There are several issues here.

Mr. Turkus: It looks like the trial of an issue far afield from the credibility of the witness or the indictment that we are here trying.

The Court: If there was an assault committed, why not come right down to it.

Mr. Rosenthal: I will accept your Honor's suggestion.

Q. Did you on the 2nd day of January, 1936, go to Shayer's office at number 45 Lexington Avenue? A. No, sir.

Q. Did you on that day or about that day, at those premises, accompany Burns when Shayer was struck with a gun and told that if he did not get the money that he would be killed; were you with Burns when that happened?

Mr. Turkus: I object. That does not affect the credibility of the witness.

7526

Mr. Rosenthal: He was asked whether he had knowledge of what was to take place.

The Court: Objection overruled.

A. I have already answered that question, counsellor.

Q. Well, what is your answer, if you answered it, do you recall it?

Q. (The Court) Were you there? A. No, sir.

Q. Now, the shylock business that you conducted—withdrawn.

Q. How long had you been conducting the shylock business, how many years? A. On and off for about ten years. 7527

Q. And, by the shylocking business, do you mean that you would loan sums like five dollars for one dollar additional every week? A. Yes, sir.

Q. Were you familiar with the methods used by most shylocks in and about the vicinity where you hung out?

Mr. Turkus: I object to that. That

7528

does not affect his credibility—that is his method.

Mr. Rosenthal: That is preliminary.

The Court: If he did not know the method, he should not have been in business.

Q. (The Court) Was the method to beat up for the money? A. No, sir.

Q. (The Court) What? A. No, sir.

7529

Mr. Turkus: He may be talking about his method or somebody else's method.

The Court: It is a matter of common knowledge how shylocks work.

Q. When did the ten years commence when you were in the shylock business, approximately? A. Approximately, in '31, '32.

Q. Now, you testified here that you left school when you were about sixteen years old? A. Right.

Q. Is it not a fact you left school when you
7530 were fourteen years old? A. I said about sixteen; I did not exactly say sixteen, counsellor.

Q. Well, were you asked— Question withdrawn.

Q. You testified in the trial of the People against Nitzberg, in the County Court here in May of 1941, did you, as a witness? A. Yes, sir.

Q. That is about five or six months ago, isn't it, that you were a witness? A. Yes, sir.

Q. Were you asked this question regarding your schooling and did you give this answer, page 220 of the printed record on appeal:

"Q. How old were you when you graduated,

or when you left 7-B or 7-A? A. About fourteen years old."

Did you say that? A. If it is there, I said it.

Q. Have you any independent recollection as to whether or not when you testified in that trial you did not say you were fourteen years old when you left school? A. I say, counsellor, if it is there, I said it.

Q. Well, now, it is here. Do you say that if it is here you said it? A. Yes, sir.

Q. Was it correct that you were only fourteen 7532
years old when you left school? A. About that; I would not remember eighteen years ago exactly, counsellor; I was never interested in school very much.

Q. Well, before, in this trial, you said that you were in the eighth grade when you left; didn't you say that in this trial? A. Yes, sir.

Q. And in the Nitzberg trial you said you were in the seventh grade when you left, did you not? A. 7-B is called the eighth grade, one and the same thing, in my estimation.

Q. What would the 8-A be called? A. The 7533
eighth grade.

Q. 7-B and 7-A would be called the eighth grade? A. 7-B I would call the eighth grade.

Q. Now, whatever your age was when you left school, did you go to work? A. Yes, sir.

Q. Before going into that, Magoon, let me ask you this question: At the time you had this so-called fight with Patrolman Murphy, you told Judge Talley you knocked him to the ground—was he unconscious? A. Yes, sir.

Q. When you left school did you go to work? A. Yes, sir.

Q. Where did you go to work? A. In a millinery supply house.

Q. What was the name of it? A. I don't remember.

Q. Where was it located? A. On 38th Street.

Q. In Manhattan? A. Yes, sir.

Q. How long did you work there? A. I would say approximately over a year.

Q. You don't know the name of your boss? A. I do not recollect it off-hand, but I will even-
7535 tually.

By the Court:

Q. How long ago was that fight, sixteen or seventeen years ago? A. Yes.

Q. Where was it? A. On 38th Street, Manhattan.

By Mr. Rosenthal:

Q. Did you work there steadily for this year? A. Yes, sir.

7536 Q. Did you have any other employment at any time? A. No, sir.

Q. Was that the only legitimate employment you ever had in your life? A. No, sir.

Q. Well, did you work for somebody else at some other time? A. Yes, sir.

Q. Then I suppose you did not understand my question when I said was that the only employment you ever had, legitimate employment. Where else did you work, if you worked for somebody else, and when, if you can recall? A. I worked in a liquor supply house on Fifth Avenue.

Q. How long did you work there? A. I don't remember how long, because I will be truthful with you, I was never interested in work or in school.

Q. All right, but can you remember whether or not, even while you were working in the millinery house, you did not steal automobiles, even while you were working in this first legitimate place of employment you had, didn't you steal automobiles? A. I may have.

Q. Well, cannot you answer any more definitely 7538
than that, that in your first place of employment—I will withdraw that.

Q. How long after you left school was it that you went to work in this millinery supply house in 38th Street, how long after you left school did you get that job, approximately? A. I cannot answer that question to be correct about it.

Q. When I say approximately, was it within six months after you left school that you got that job? A. I cannot very well answer that question.

Q. Can you approximate in time whether it 7539
was a year after you left school—let me withdraw that and put it this way: Did you immediately upon leaving school start to steal automobiles, before you got any legitimate jobs? A. I stole cars when I was going to public school.

Q. You stole them even while you were in public school? A. Yes, sir.

Q. Then, after you got out of public school, you continued to steal cars? A. For joy rides, and such, yes, sir.

Q. You mean that the first cars you stole when

you were in public school were for joy rides, is that what you mean? A. Yes, sir.

Q. Then later did it become a business, your stealing of automobiles, and selling them, when you were working in this millinery house? A. No, sir.

Q. Then, is it your idea, that you first became a thief while you were attending public school, is that right? A. Yes, sir.

Q. Now, you do not expect to be electrocuted
7541 for any of the murders you have committed, do you? A. I hope not.

Q. You don't expect to be? A. I hope not.

Mr. Turkus: I object.

Q. Weren't you asked in the Strauss trial this question and didn't you give this answer— I will withdraw that for the moment.

Q. Would you lie to save your own life?

Mr. Turkus: I object to the form of the question.

7542 The Court: Objection overruled.

A. No, sir.

Q. Your answer is you would not lie to save your own life, is that right? A. Yes, sir.

Q. Did you ever lie in your life? A. Little white lies.

Q. White lies? A. Little white lies.

Q. You have been telling little white lies pretty nearly all your life, haven't you? A. No, sir.

Q. Well, from the time you went to public

school and started to steal, you told little white lies, didn't you? A. Yes, sir.

Q. And you continued on telling little while lies all the way through? A. Just at intervals, counsellor.

Q. But you never told anything but little white lies, is that right? A. Yes.

Mr. Turkus: I object.

Mr. Rosenthal: All right, he has answered. Do you want to strike out the answer? 7544

Mr. Turkus: No, let it stand in the record.

Q. Now, you have been in the neighborhood of Brownsville for how long a period of time, approximately? Let me put it this way, so you can get it clear: Were you born in Brownsville? A. No, sir.

Q. Where were you born? A. Manhattan.

Q. When did you move to Brooklyn? A. I was about one year old when my people moved to Brooklyn. 7545

Q. You were practically born in Brooklyn, you went to school in Brooklyn, didn't you? A. Yes, sir.

Q. When you say "in Brooklyn", you mean the Brownsville area or the East New York area? A. That is right.

Q. So that from the time you were one year of age you have lived in the Brownsville or East New York area of Brooklyn, is that right? A. Yes, sir.

Q. Now, you say you knew Abe Reles, you said that to Mr. Turkus, didn't you? A. Yes, sir.

Q. How long did you know him? A. About fifteen years.

Q. Is it not a fact you knew Reles from the time you were a kid? A. No, sir.

Q. You used to visit Reles almost every day in the week at his home, didn't you?

Mr. Turkus: I object unless the time is fixed.

7547 Q. Over a period of time, of years? A. In the late years, yes, sir.

Q. Commencing when did you start to visit Reles' house— Let me withdraw it and put it this way: You visited Reles' house mornings, afternoons and nights pretty nearly every day, didn't you, for a period of time? A. Yes, sir.

Q. Commencing when was it that you first started visiting Reles' home on mornings, afternoons and nights, almost daily—commencing when—how many years ago? A. For the last four years or so.

7548 Q. When you say, "the last four years or so", do you mean commencing about 1935 or 1936? A. No.

Q. Do you remember when Reles came out of jail? A. Yes, sir.

Q. When did he come out of jail? A. On what charge are you referring to, counsellor?

Q. I don't know what the charge was, but in or around 1934, 1935 or 1936— I will withdraw that.

Q. When did he come out of jail the last time, I will point it out that way, that you know of?

Mr. Turkus: I object. That does not go to his credibility.

Mr. Rosenthal: It is for the purpose of fixing the time, that is all.

Mr. Turkus: I will tell you it was October, 1936. See if that refreshes him.

Q. Mr. Turkus says approximately, so we do not get the exact date, in October of 1936 was the last time Reles came out of jail. Now, does that refresh your memory—the last time before 1940, on the sentence that he served, does that refresh your memory? A. Please repeat. 7550

Q. Mr. Turkus has informed me that in the month of October, 1936, approximately, was the last time that Reles came out of jail after receiving a sentence: does that refresh your memory? A. Yes, sir. I was in jail at that time.

Q. Before he came out of jail you had known him? A. Yes, sir.

Q. Now, then, I understand he was in jail from 1934, does that refresh your memory, to 1936— Reles? A. Yes, if I recollect right.

Q. Well, approximately, I am not trying to catch you on any date? A. Yes, sir. 7551

Q. Didn't you and Reles hang out together before he went to this jail in 1934, and go out socially together? A. We were friends.

Q. And you went out to visit one another, and went out socially, isn't that true? A. Far and few times in between.

Q. But in 1936, after you came back from jail, you visited him mornings, noons and nights, didn't you, practically every day in the week? A. Well, I was at his home quite often.

Q. In fact, do you recall whether or not you

were not even at his home on Labor Day when Feinstein was killed in his home? Do you recall whether you were not there on that day? A. Will you repeat that question, please?

Q. Do you recall whether or not you had not been to Reles' home on the day that Feinstein was killed in his home—Labor Day? A. No, sir.

Q. Well, you say, "No, sir," you were not there, or, "No, sir," you do not recollect? A.
7553 No, sir, I was not there.

Q. Were you there the day before at Reles' home? A. I cannot very well answer that and be honest in answering it.

Q. You cannot remember, is that your answer, is that your answer, that you cannot remember whether you were or not? A. I was at his home, as you say, mornings, noons and nights, at all hours of the night.

Q. That is as you say, not as I say.

Mr. Turkus: What is the difference who says it, if that is his testimony?

7554 The Witness: Well, it is correct.

Q. All right, it is answered— Did you know Reles' brother, Sandy Reles? A. Yes, sir.

Q. How long had you known him? A. Quite a number of years.

Q. Was he in the shylock business also? A. Yes, sir.

Q. Did he conduct a shylock business right across the street from 725 Sutter Avenue, on the corner of Sutter and Bradford Street; is that where he conducted his business? A. I don't know.

Q. Are you acquainted with the corner of Bradford Street and Sutter Avenue; or, were you acquainted— I will put it in that way—in 1936 and prior thereto with the surrounding vicinity, including the corner of Bradford Street and Sutter Avenue? A. How do you mean by acquainted?

Q. I mean, did you have knowledge of that neighborhood, that is, if you passed by there on occasions? A. Yes, sir, I have passed by on occasions.

7556

Q. Were you acquainted with the luncheonette that was on the corner there of Bradford Street and Sutter Avenue, Ardie's—Ardie's Luncheonette—were you acquainted with that place? A. No, sir.

Q. Had you ever been in there? A. I don't think so.

Q. Well, now, to your knowledge, did Sandy Reles shylock—or, we will put it this way—Did you ever see Sandy Reles hanging out on the corner of Sutter Avenue and Bradford Street during the year 1936, and prior, or before 1936, did you ever see Sandy Reles hanging out there? 7557
A. I have met him in East New York on a few occasions, but on what streets they were, I do not recall.

Q. In other words, so I can get your answer, is your answer that the street or location where you met Sandy Reles you cannot recall at this time? A. It was in East New York, but where, I cannot.

Q. Is Bradford and Sutter Avenue in East New York? A. Yes, sir.

Q. Is your answer that you cannot recall

7558 *Seymour Magoon—For People—Cross*

whether it was at Bradford and Sutter you met him, or that you cannot recall what streets you met him; is that your answer?

Mr. Turkus: He met him somewhere in East New York. It is far afield on the question of credibility. It has nothing to do with the issue here.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

7559 The Court: You can ask him about the act, but avoid details.

Q. Did you know Harry Strauss for any length of time? A. Yes, sir.

Q. How long had you known Harry Strauss? A. Fifteen years or so.

Q. And where did you meet Harry Strauss, do you recall? A. In East New York.

Q. Where, in East New York? A. On Livonia Avenue.

Q. Livonia and what other avenue? A. Well, it was in a pool room.

7560 Q. (The Court) Saratoga and Livonia? A. No, sir, it was in a pool room in East New York.

Q. After becoming acquainted with him, did you go out socially and continuously with Harry Strauss for a number of years? A. In later years, yes.

Q. By later years, how many years do you mean that he and you went out socially together, practically daily— I will withdraw that.

The Court: He testified that he was a member of the combination that Strauss was in.

Q. (The Court) Was Strauss the treasurer? A. He was one of the bosses.

Q. (The Court) Did he carry the bag and make the split? A. No, sir.

Q. You and Strauss visited one another's homes, didn't you? A. Yes, sir.

Q. You went out socially, didn't you? A. Yes, sir.

Q. Practically daily, is that right? A. Yes, sir.

Q. Regarding Goldstein, how long did you know him? A. The same number of years. 7562

Q. And the same situation as in respect to Reles and Strauss—going out daily and socially? A. Was that Goldstein also?

Q. Wasn't it? A. How could that be, counsellor?

Q. Let me put it this way: Did you go out socially with Goldstein? A. Yes, sir.

Q. Practically daily? A. Well, if I was with him daily, and Strauss daily, and Reles daily, there's something funny some place.

Q I will ask you, Magoon, and I just want your answer— Did you go out socially with Goldstein? A. Yes, sir. 7563

Q. Did you visit one another at each other's home? A. Yes, sir.

Q. Very frequently, would you put it that way? A. Yes, sir.

Q. And over a period of years, is that correct? A. Yes, sir.

By the Court:

Q. Did you go to Florida, too? A. Yes.

7564 Q. What hotel did you stop at? A. The Everglades.

Q. That is in Miami City? A. Yes, sir.

Q. The biggest hotel there? A. Yes, sir.

Q. A high-class hotel? A. Yes, sir.

By Mr. Rosenthal:

Q. You went to Florida with Harry Strauss? A. Yes.

7565 The Court: He stopped at the Nassau, Miami Beach.

The Witness: Yes.

Q. How often did you go to Florida, as long as the Judge has asked these questions I will ask you a few questions on it. How often did you sojourn in Florida? A. That was the only time I ever was.

Q. (The Court) What year was that? A. That was in the summer of 1939.

Q. The summer of 1939? A. Yes, sir.

7566 Q. (The Court) The Everglades was open in the summer? A. Yes, sir, of 1939.

Q. (The Court) There was no racing season on? A. No, sir.

Q. (The Court) No dog races either? A. No, sir.

Q. (The Court) Sure of that? A. Positively.

Q. What part of the summer were you stopping at the Everglades, July? A. June.

Q. With Harry Strauss? A. Yes, sir, and others.

Q. Now, the defendant Capone was not in Florida with you, was he? A. No, sir.

Q. Now, you had a garage on Sackman Street near New Lots Avenue which had been rented by Joe Pilch, didn't you? A. Yes, sir.

Q. Do you recall when that garage was rented by Joe Pilch, approximately? A. I do not know the exact date. I think it was about the early part of 1938.

Q. Well, now, is it not a fact that it was around about four or five months before January of 1939, isn't that the fact? A. No, I think it was about 1938. 7568

Q. Well, now, were you asked in the Nitzberg trial, at page 220, folio 660:

"Q. Do you know a garage, a private garage, out on Sackman Street, in Brooklyn? A. Yes, sir.

"Q. Near what other street was that? A. Lott and New Lots.

"Q. And how many cars did that garage hold? A. One car.

"Q. Who rented the garage? A. Pilch.

"Q. A man by the name of Pilch? A. Yes, sir.

"Q. When prior to the 9th of January, 1939, 7569 was that garage rented, if you know? A. To the best of my knowledge, about four months—four or five months."

Were you asked those questions and did you give those answers?

Mr. Turkus: I object. That is a 1938 matter. It was the renting of a garage by another man. I don't see how it affects this witness' credibility.

Mr. Rosenthal: It will in the next question.

The Court: Ask the next question and come down to the point. In all collateral matters you should come right down to the point, because there can be no answer in a collateral matter except yes or no, and the jury is bound by the answer; if the witness says no, that is the end of it.

Mr. Rosenthal: May I have an answer to my question?

7571 Q. Did you hear the question, Mr. Magoon, that I asked you? A. Yes, sir.

Q. Were you asked those questions and did you give those answers? A. Yes, sir.

Q. Did that fix the time better in your mind? A. I still think it was about 1938.

Q. Now, is it not a fact that you had a set of keys to that garage and stored the automobile that was used in the Schuman murder, isn't that a fact? A. Yes, sir.

Q. And is it not a fact that you had stored a few cars in the garage—you personally had stored a few cars in the garage that had been
7572 stolen and were subsequently used in murders? A. On orders, yes, sir.

Mr. Rosenthal: I ask that that be stricken out. The first part is not responsive.

Mr. Turkus: I think that is important, since it affects credibility.

The Court: Let it stand.

Mr. Rosenthal: Exception.

The Court: Although it is a mighty tight question.

7573

Q. Now, did you own an automobile? A. Will you repeat the question?

Q. In 1936? A. Repeat that, please.

Q. Did you own an automobile in 1936—did you own your own car in 1936? A. Yes, sir.

Q. What type of automobile was it? A. A Plymouth coupe.

Q. Was it a new car? A. Well, it was mostly new; it was given to me.

Q. Was that the first car you ever owned?

7574

Mr. Turkus: I object. That does not affect his credibility. What is the difference?

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. How long did you know Allie Tannenbaum? A. A few years.

Q. Can you not give us anything more definite than that, "a few years"— Do you mean to answer '33, '34, or approximately what year? A. About eight years, nine years, ten years.

7575

Q. Well, would you say around 1931 or 1932 you first met Allie Tannenbaum? A. Well, I would say '33 or '34.

Q. Well, it is '41 now, you understand? A. Yes, sir.

Q. You said eight, or nine, or ten years? A. Yes, sir.

Q. So that at the present time it has been definite in your mind as to when you met him, whether in '31 or '33, is that it? A. I said in '33 or '34.

7576 *Seymour Magoon—For People—Cross*

Q. Did you meet him at Saratoga and Livonia Avenue at any time? A. Yes, sir.

Q. Did he frequently— Question withdrawn.

Q. Did you see him at Saratoga and Livonia Avenue frequently during the years 1933, '34 and '35? A. Yes.

Mr. Turkus: I object. That does not affect his credibility.

The Court: It is not a question of his credibility at all.

7577

Mr. Turkus: Then that does not go to the issue of this case.

Mr. Rosenthal: I press the question. I submit it does.

By the Court:

Q. Was he a member of the combination? A. Yes, sir.

The Court: Let it go at that.

Mr. Rosenthal: I respectfully except.

7578

The Court: The record is pretty voluble on that point. Rather than argue it, I will let you go ahead. I thought you had enough on it.

Q. Is it not a fact that Allie Tannenbaum was one of the persons whom you saw hanging around on the corner of Saratoga and Livonia, in the years 1934, '35 and '36? A. No, sir.

Q. Did you see him at Saratoga and Livonia Avenue in any of those years? A. I don't think so.

Q. Didn't you say a little while ago that you met him in 1933, in Brooklyn? A. Yes.

Q. Where did you meet him in Brooklyn in '32 or '33?

Mr. Turkus: I object. That is not the testimony.

The Court: Objection sustained. You cannot cross examine on collateral. It is only for the purpose of impeaching credibility. That is the rule of law. You can 7580
ask him as to any criminal association, with a yes or no answer. You can ask him as to any crime. You can ask him as to any dishonest act—anything that affects his credibility, but you must get directly down to the point.

Mr. Rosenthal: I have another question in mind. I do not wish to disclose it now, but I will be glad to disclose it to your Honor. It is not pointed along that particular line at all. In view of the prior testimony of Tannenbaum, which I say I 7581
have a right to rebut, or any witness that may be called by the prosecution—

The Court: I don't know what you are talking about. The ruling stands.

Mr. Rosenthal: Exception.

Q. Now, your shylocking business was conducted where? A. At what period are you speaking of?

Q. I am referring to the entire period of your shylocking business, where was it conducted

from? A. At what place? From different places.

Q. Yes, at what place was it conducted? A. Amboy Street was one place.

Q. Amboy and what? A. Off Pitkin Avenue.

Q. On the street or in some store? A. In a pool room.

Q. What period of time was it conducted there? A. About 1931.

7583 The Court: If there is objection, I will sustain it. It is too far afield? Is there an objection?

Mr. Turkus: He has finished his answer. I might as well let it stand.

The Court: There is no sense in occasional ruling and then in the meantime have cross-examination on collateral matters.

Mr. Rosenthal: I except to that.

The Court: The law is based upon sound reason, that if you are permitted to cross-examine upon matters which are

7584 far afield and which are simply collateral, relate only to credibility, the jury may lose sight of the main issue and not know what it is about.

Mr. Rosenthal: May I state the purpose of this?

The Court: No.

Mr. Rosenthal: I except.

Q. In 1936—

The Court: If you think it is necessary to go further along the line of impeach-

ment, it is your right to do so, although were the District Attorney cross-examining, the Court would be compelled at a certain point to restrain him lest it prejudices the rights of the defendant to a fair trial. But when a man has already admitted previous crimes, a number of murder combinations, and various other crimes, it looks to the Court as if it comes down to a flat foot proposition whether or not the jury will, notwithstanding the 7586
facts just mentioned, believe he is telling the truth on this particular occasion concerning this particular crime. That is all. The jury requires no further persuasion he is a criminal or that he is a murderer.

Mr. Rosenthal: This particular line of questions goes directly to that point on testimony adduced.

The Court: As long as the record is replete with it now, you can go further with it, but come right down to the point.

Mr. Rosenthal: I respectfully except to 7587
the Court's observation.

Q. In 1936 where was your shylocking business being conducted from? A. St. John's Place.

The Court: The Court, apparently, is wasting its breath. There is no objection.

Mr. Turkus: I don't know whether it is a preliminary question or what it is.

The Court: Do you object?

Mr. Turkus: He has answered. I will have to object to the next question.

7588 *Seymour Magoon—For People—Cross*

The Court: Don't go asleep.

Mr. Turkus: I am not asleep.

Mr. Rosenthal: May I respectfully except to the Court's observation to the District Attorney.

Q. Is it not a fact that your shylocking business in the years 1936, 1937 and 1938 and 1939 was conducted at St. John's Place and Buffalo Avenue?

7589

Mr. Turkus: I object. May the record show I am awake?

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. You testified on direct examination that you were at Saratoga and Livonia Avenue every day, on the corner there, didn't you?

Mr. Turkus: I object. That was not the testimony.

The Court: Objection sustained.

7590 Mr. Rosenthal: Exception.

The Court: The record speaks for itself, and that is the reason the objection was sustained. You are wasting time.

Mr. Rosenthal: I respectfully except to your Honor's observation.

Q. Is it not a fact that instead of your hanging out on Saratoga and Livonia, you hung out morning, noon and night during the period you testified on direct examination in this trial at St. John's Place and Buffalo Avenue?

Mr. Turkus: I object to the form of the question.

The Court: Objection sustained; too far afield.

Mr. Rosenthal: Exception.

Q. Now, you testified in the Nitzberg trial about meeting certain people on the corner of Saratoga and Livonia Avenue, didn't you?

Mr. Turkus: I object. That has nothing to do with his credibility or the issue here. 7592

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Is it not a fact that in the Nitzberg trial, when you were questioned concerning those persons whom you saw at Saratoga and Livonia Avenues on the periods you were there, you failed to mention the name of this defendant Louis Capone?

Mr. Turkus: I object, that was in 1939, not within the issue. 7593

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Is it not a fact that in the case of The People against Strauss, when you were asked as to whom you had met on the corner of Saratoga and Livonia Avenues when you were there at that time, you did not say or mention the defendant Louis Capone as one of the persons?

Mr. Turkus: I object.

7594 *Seymour Magoon—For People—Cross*

The Court: Objection sustained.
Mr. Rosenthal: Exception.

Q. Now, when you were arrested, you say you were arrested when—in 1940, what month? A. I think it was March.
Q. The fact is you were arrested February 21st, weren't you charged with vagrancy?

Mr. Turkus: I object.
7595 The Court: Sustained as immaterial.
Mr. Rosenthal: Exception, this was brought out on direct examination.
The Court: Conviction, the number of arrests is not on trial.

Q. When were you convicted on the vagrancy charge? A. In March.
Q. Do you recall what part of March?

Mr. Turkus: Does that make any difference?
The Court: Is there an objection?
7596 Mr. Turkus: Yes, it does not make any difference what part of March.
The Court: Objection sustained.
Mr. Rosenthal: Exception. I submit to the Court these are all matters brought out on direct and I have a right to question him.
The Court: Do not "submit", just take your exception.
Mr. Rosenthal: All right, I will take my exception.

Q. How long after you were arrested and con-

victed on the vagrancy charge was it before you went to the Bronx? A. Will you please repeat that question?

Q. How long after you were convicted on the vagrancy charge was it before you went to the Bronx? A. About nine weeks.

Q. During those nine weeks you were over on Riker's Island, were you, serving your two months sentence? A. Yes, sir.

Q. Now, after your sentence had been completed and you got as far as the warden's office, 7598
you say that somebody arrested you, is that right? A. Yes, sir.

Q. Do you recall who the persons were that arrested you? A. No, sir.

Q. Did you know the detectives who arrested you? A. No, sir.

Q. Where were you brought from the warden's office to—where were you brought to from the warden's office? A. To Brooklyn.

Q. What part of Brooklyn? A. The Raymond Street Jail.

Q. Were you brought to the District Attorney's office first before you were brought to jail? 7599
A. No, sir.

Q. You were brought directly to jail? A. Directly to jail.

Q. Were you apprised or told of the charge that was against you when you were brought over to the jail? A. Yes, sir.

Q. Was it a murder charge you were being brought over and lodged in jail on? A. No, sir.

Q. What charge was it you were brought over from the jail, to Raymond Street?

7600 *Seymour Magoon—For People—Cross*

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. How long after you had been in Raymond Street jail did you first see anybody, either Judge O'Dwyer or anybody from his office or the police?

7601 Mr. Turkus: I object to the form of the question.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. How long did you remain in Raymond Street Jail before you were taken out of there? A. About a week.

Q. Where were you taken from Raymond Street Jail? A. Up to the Bronx.

Q. While you were in Raymond Street Jail, before you were taken to the Bronx, did you receive any visit from District Attorney O'Dwyer
7602 or any of his assistants? A. No, sir.

Q. Had you spoken to anybody connected with his office? A. No, sir.

Q. Had you spoken to anybody connected with the Police Department? A. No, sir.

Q. Now, when you were taken to the Bronx where were you first lodged? A. In the Concourse Plaza Hotel.

Q. You were taken to a room in the Concourse Plaza? A. Yes, sir.

Q. Who took you to this room in the Concourse Plaza Hotel? A. A policeman.

Q. Do you know who the police were that took you there, by name? A. No, sir.

Q. Had you prior to that time asked to be taken to a hotel or asked to talk to anybody? A. Yes, sir.

Q. When you arrived at the Plaza Hotel, were you registered there in a room or a suite of rooms?

Mr. Turkus: I object to the form of the question was he registered. 7604

The Court: Objection sustained.

Q. Were you detained or kept there in a suite of rooms? A. In a room.

By the Court:

Q. You mean in custody? A. Yes, sir.

Q. Dewey's men? A. No.

Mr. Turkus: Judge Foley's men.

The Witness: Foley's men.

7605

Q. He was the District Attorney of the Bronx? A. Yes, sir.

By Mr. Rosenthal:

Q. When you arrived at the Concourse Plaza Hotel did you speak to anybody connected with either the Police Department—let me divide the question—when you arrived at the Concourse Plaza Hotel did you speak to anyone attached to either the Brooklyn District Attorney's office or the Bronx District Attorney's office?

7606 *Seymour Magoon—For People—Cross*

Mr. Turkus: I object to the double question, we don't get anywheres with that.

The Court: Objection overruled.

By the Court:

Q. Did you talk to anybody there from any District Attorney's office? A. Yes, sir.

Q. Which one—

7607 By Mr. Rosenthal:

Q. Which District Attorney's office are you talking about—what was the name of the man? A. Mr. Foley and Mr. Breslin of the Bronx District Attorney's office.

Q. They were both there at that time? A. Yes.

Q. At that time was there a stenographer present? A. I do not recollect.

Q. This was in what month of 1940 that you were brought there, approximately, to the Con-

7608 course Plaza Hotel? A. May.

Q. Did you see anybody writing down in a book while you were talking? A. I do not recollect, because I was in a "blizzard" that day.

Q. After you had spoken, not recalling whether it was taken down or not, did you remain in the hotel? A. I did.

Q. For how long a period did you remain in the Concourse Plaza Hotel? A. For a few months.

Q. During that time that you remained in the Concourse Plaza Hotel did you testify before a Grand Jury in the Bronx?

Mr. Turkus: I object to the question, what difference does it make; that does not affect his credibility.

Mr. Rosenthal: I want to show immunity of any charge in which he implicated himself.

Mr. Turkus: Why not ask him that.

Mr. Rosenthal: I will ask him but not the way you want me to.

The Court: Objection sustained.

Mr. Rosenthal: Exception. 7610

Q. Were you called as a witness before any Grand Jury while you were up in the Bronx? A. Yes, sir.

Q. At the time you were called as a witness was it in a matter in which you admitted your participation in? Yes or no. A. Yes, sir.

Q. At the time you were called as a witness were you asked to sign—I will withdraw that. Do you know what a waiver of immunity is? A. Well, I have an idea.

Q. Were you asked to sign any paper waiving immunity at the time you were called to testify before the Grand Jury? A. Yes, sir. 7611

Q. Did you sign a paper in which you waived immunity? A Yes, sir.

Q. And admitted your participation? A. Yes, sir.

Q. Now, before you—while you were in the Bronx, that was in May, you say—question withdrawn. Was it in "May" you appeared before the Grand Jury—when was it? A. I don't recollect when it was.

7612 *Seymour Magoon—For People—Cross*

Q. How long after you got to the hotel was it before you appeared before the Grand Jury?

Mr. Turkus: I object, that does not affect his credibility.

The Court: That was a different crime. What is the difference when the day was when he appeared before the Grand Jury as affecting credibility?

Mr. Rosenthal: I can only ask one question at a time.

7613

Mr. Turkus: It has been brought out he waived immunity.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. At the time you made your statement to District Attorney Foley, in the Bronx, in May, or that you had your conversation with him, did you mention anything at all to him about the Osen case, yes or no?

Mr. Turkus: I object.

7614

The Court: Objection overruled.

Mr. Turkus: He first has to be asked.

Q. (The Court) Were you asked anything about it?

Mr. Rosenthal: I object, not only to the Court's question but also to Mr. Turkus' statement.

The Court: I withdraw the question.

Mr. Rosenthal: I object to the interjection of the District Attorney, although it may not have been meant for that pur-

pose, as giving the witness an opportunity of formulating an answer. I ask that his interjection be stricken out.

The Court: I should have sustained the objection instead of overruling it. Objection sustained.

Mr. Rosenthal: I except. I made a motion with regard to the District Attorney's interjection. And I except to the Court's ruling.

7616

Q. Did you have more than one conversation with the District Attorney or his assistant in the Bronx? A. Yes, sir.

Q. How many conversations did you have covering what period of time? A. I am still having conversations with him.

Q. Up to what time was it before you first started to speak to Judge O'Dwyer in Brooklyn—what was the first month you started to speak to him? A. Will you please repeat that question?

Q. You said you had first a conversation with Mr. Foley and Mr. Breslin in the Bronx? A. Yes, sir. 7617

Q. Now, how long after your first conversation with Mr. Foley in the Bronx was it that you had your first conversation with either Judge O'Dwyer or any Assistant District Attorney from his office? A. Well, it was approximately two days.

Q. After the first conversation? A. With Mr. Foley?

By the Court:

Q. Did you tell Mr. Foley anything about the

7618 *Seymour Magoon—For People—Cross*

Rosen case? A. I told him that night about one that he was interested in.

Q. Please—did you tell Mr. Foley anything about the Rosen case? A. No, sir.

The Court: We will now take a recess until 1:30 p. m. Gentlemen, please do not discuss the case, let nobody talk to you about it, keep your minds open. Be back promptly at 1:30.

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AFTERNOON SESSION. TRIAL RESUMED

SEYMOUR MAGOON, resumed the stand and testified further as follows:

Cross-examination by Mr. Rosenthal (continued):

Q. Do you recall, just before recess, Magoon, you were asked the question by the Court in respect to whether or not you had told District Attorney Foley, at the time you were first questioned, about the Rosen case and your answer 7622
was "No". Remember saying that? A. Yes, sir.

Q. You started to tell me just before recess—and I am merely repeating this so as to enable you to get the line of thought—that two days after you spoke to District Attorney Foley you first spoke to District Attorney O'Dwyer or somebody from his office. Is that right? A. Yes, sir.

Q. Where was that conversation held and with whom? A. In the Bronx D. A.'s office with O'Dwyer— 7623

Q. Are you finished? A. No, sir.

Q. All right, go ahead. A. Mr. Foley, and there was other people there.

Q. You were taken out of the hotel over to the District Attorney's office in the Bronx, is that right? A. Yes, sir.

Q. The Concourse Plaza, is it? A. Yes, sir.

Q. And then there you met District Attorney Foley, District Attorney O'Dwyer, and who were the other persons that were there? A. I didn't know them.

Q. Was one of them Captain Bals? A. I don't think I recognized anyone.

Q. Since then have you met Captain Bals on occasions? A. Yes, sir.

Q. Was he there, now that you do know him, at that time do you recollect? A. I don't think he was.

Q. Were any of the assistants, either Mr. Turkus or Mr. Klein or Mr. Joseph, there with District Attorney O'Dwyer? A. I don't recol-
7625 lect who was there then.

Q. Was Assistant District Attorney Heffernan there? A. I say I don't recall who was there.

Q. You do not recollect? A. Outside of the outstanding people who were there.

Q. Before District Attorney O'Dwyer had come, I think you told us that District Attorney Foley said that he would help you, is that right? A. Yes, sir.

Q. And when you started to speak with District Attorney O'Dwyer, was there a stenogra-
7626 pher there taking down what was being said? A. There was somebody who was writing there. Whether it was a stenographer or not, I don't know.

Q. You testified in the Goldstein-Strauss case, as you said before, did you not? A. Yes, sir.

Q. At that time were you asked regarding —let me withdraw that temporarily.

Q. You say there was somebody there writing down in a book, is that right? A. Yes, sir.

Mr. Turkus: I object. I don't think he said "a book."

The Witness: Somebody was writing there at the time.

Q. You just said "Yes, sir" when I asked you whether they were writing in a book, didn't you, before Mr. Turkus got up? A. They were writing in something, Mr. Rosenthal. If it was a book or papers, I don't recollect, but they were writing.

Q. Were you asked questions and did you give answers? A. Yes, sir. 7628

Q. Yes, or no, were you then asked or did you then say anything about the Rosen case? A. No, sir.

Q. This was then, so as to fix the time, in the month of May, 1940; is that correct? A. Yes, sir.

Q. Have you any idea of whether it was the latter part of the month or the early part? A. I don't recollect, but I know it was about the month of May.

Q. After you had spoken, were you returned to the hotel again? A. Yes, sir.

Q. Did you go back to the hotel? And how long was it before you were next questioned by anybody? How many days, hours or weeks elapsed before you were next questioned by anybody? A. The next day. 7629

Q. And where was that questioning? A. In the Bronx.

Q. And was any of the Assistant District Attorneys or the District Attorney of Brooklyn present? A. No, sir.

Q. That was just questioning by District Attorney Foley? A. And Mr. Breslin.

7630

Q. I mean Bronx officials? A. From the Bronx, yes.

Q. Nobody from Brooklyn? A. No, sir.

Q. Let me ask you this so as to come down to the Brooklyn proposition. When next were you questioned by anybody from Brooklyn, any Assistant District Attorney or the District Attorney of Brooklyn; how long a time later? A. I would say a couple of months, roughly.

Q. So that from the time that you first ap-
7631 peared in the District Attorney's office in the Bronx, when Judge O'Dwyer was there with District Attorney Foley, you were not questioned by anybody from Brooklyn—I am not confining myself only to the District Attorney; I am talking of anybody from the District Attorney's office of Brooklyn—is that clear? A. Yes, sir.

Q. For a period of two months? A. Approximately, yes.

Q. On the first occasion that you were questioned by District Attorney O'Dwyer in the presence of District Attorney Foley, when you
7632 say somebody was there writing down, did you answer questions that were asked of you by Judge O'Dwyer? Yes or no. A. Yes, sir.

Q. Were you asked to sign anything that you were asked about at that time? A. I don't think so.

Q. Well, is there a doubt in your mind, Mr. Magoon, as to whether you did or you did not? A. Yes, there is a slight doubt.

Q. Now, then, for the two months that succeeded your first interview, were you still confined in the Concourse Plaza? Were you still confined in that hotel? A. Yes, sir.

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Q. During the two months from May until, that would be, July that you next saw anybody from District Attorney O'Dwyer's office, is that right? A. I would not specify but—

Q. Approximately? A. Approximately then.

By the Court:

Q. Is not that hotel right opposite the Bronx Court House? A. Yes, sir.

Q. And the District Attorney's office? A. Yes, sir.

7634

By Mr. Rosenthal:

Q. During those two months, without going into it at any length, were you questioned on a number of occasions by the District Attorney's office of the Bronx? A. Yes, sir.

Q. At any time was your questioning reduced to writing or was there a stenographer present while you were being questioned on these different occasions by the District Attorney in the Bronx? A. Yes, sir.

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Q. Did you sign any statement for the District Attorney of the Bronx? A. I signed a flock of papers on other occasions but I don't recollect what they were. I never read them.

Q. You merely put your signature to it on the strength of being told so by the District Attorney, without reading them; is that right? A. Yes, sir.

Q. At any time during those two months—just yes or no to this,—were you asked any questions by any of the officials of Bronx County in re-

spect to the Rosen case; yes or no? A. Will you please repeat that question?

Q. Yes, I will repeat it. At any time during the number of questionings that you had with officials of the Bronx District Attorney's office, were you asked any questions in respect to the Rosen case? That is before coming to Brooklyn in about July. A. No, sir.

Q. And at any time prior to your coming to Brooklyn, did you say anything to any of the
7637 officials of Bronx County about the Rosen case? Yes or no.

Mr. Turkus: I object to the form of the question. He said he was not asked.

Mr. Rosenthal: Again, Judge—

Mr. Turkus: I am repeating your question. I don't wish to quarrel.

Mr. Rosenthal: I am not quarreling.

By the Court:

Q. Did you volunteer anything to the District
7638 Attorney of the Bronx about the Rosen case? A. No, sir.

By Mr. Rosenthal:

Q. Now, then, in July or thereabouts, were you taken to Brooklyn by somebody? We are now coming down to your first interview with the District Attorney's office in Brooklyn. Were you taken to Brooklyn by somebody or did District Attorney O'Dwyer or one of his assistants come to the Bronx? A. I was taken to Brooklyn.

Q. And do you recall who brought you to Brooklyn? A. Yes, sir.

Q. Who was it brought you to Brooklyn? A. The Bronx police officers.

Q. At that time you were confined in a hotel, is that right? A. Yes, sir.

Q. I assume you came to the District Attorney's office in Brooklyn? A. Yes, sir.

Q. Whom did you see there on your first visit? This is not any trap question; I mean the first visit after your first talk in the Bronx. Do you 7640
understand that?

Mr. Turkus: I object to the question as to form.

Mr. Rosenthal: All right, I withdraw it.

Q. Who was present on your first visit to Brooklyn, to the D. A.'s office? Is that clear to you? A. Yes, sir.

Q. Will you name the persons who were present? A. Judge O'Dwyer.

Q. Yes. A. Mr. Klein.

Q. That is Mr. Sol Klein who is seated at the 7641
counsel table here? A. Yes, sir.

Q. Assistant District Attorney, right? A. Yes, sir. Mr. Heffernan.

Q. Yes. A. There may have been others.

Q. Wasn't there a stenographer there writing down notes? A. I would not know if it was a stenographer or not but there was somebody—

Q. Wasn't there a person there—

Mr. Turkus: He is finishing.

Mr. Rosenthal: All right, let him finish.

7642 *Seymour Magoon—For People—Cross*

Q. Finish your answer. A. But there was somebody there writing.

Q. Was it a man or a woman? A. A man.

Q. Were you asked questions and did you make answers? A. Yes, sir.

Q. And did this person write down what you were saying?

Mr. Turkus: I object.

Mr. Rosenthal: I withdraw it and put it this way:

7643

Q. Was this person writing, using a pencil, while you were talking and any of the persons, District Attorney O'Dwyer, Mr. Klein, or Mr. Heffernan, was talking? Was that person writing? A. I was not watching him all the time.

Q. Well, when you were watching him, was he using his pencil on paper? A. On occasions, yes.

Q. Were you asked these questions in the Goldstein-Strauss trial and did you give these answers:

7644 "Q. (On page 480, starting at folio 1440) When you came over to Brooklyn after seeing Mr. Foley, you saw Judge O'Dwyer and he asked you what you knew about the case, is that right? A. Yes.

"Q. And you made a statement to him, is that correct? A. Yes.

"Q. Was there a stenographer present taking down questions and answers that were being propounded to you? A. Yes, sir."

Were you asked those questions and did you give those answers?

Mr. Turkus: So the record may be clear, that case was the Feinstein case where the victim was Irving Feinstein. "The case" may be ambiguous and confusing, not only to the jury but possibly to the record.

The Court: Sustained.

Mr. Rosenthal: I respectfully except, sir.

Q. This occasion that you were first questioned in the month of July or thereabouts by Judge O'Dwyer— 7646

The Court: Will you suspend a minute?

Mr. Rosenthal: Yes.

The Court: Mr. Turkus, have you "Q" and "A" on this case?

Mr. Turkus: No, your Honor.

The Court: If you had, I might just as well be reading it.

Mr. Turkus: I have no "Q" and "A".

The Court: Are you sure the office has none? 7647

Mr. Klein: Quite certain, your Honor. I was there. I made personal notes of the questioning.

The Court: Check up and be sure.

Mr. Klein: I have. We have gone through every piece of paper before we have come into court so that if they called for anything they would get it.

Mr. Rosenthal: I am going to press questions and then ask and if there is none in existence, I want it on the record.

Q. Did you speak to Judge O'Dwyer himself in Brooklyn in July or was it his assistants that were conducting the questioning and answers of you, or were they all there? A. Judge O'Dwyer was there. They were all there.

Q. In other words, each one of them interjected at times questions and you would answer what any one of them asked you, is that correct? A. Yes, sir.

Q. Answer this question yes or no, sir: At
7649 that time in the month of July, 1940, were you asked any questions about the Rosen case, your first visit to Brooklyn in July of 1940? Yes or no. A. No, sir.

Q. What is the answer? A. No, sir.

Q. Answer this question yes or no: At that time did you volunteer to either Judge O'Dwyer, Mr. Klein, Mr. Heffernan, or any other person who was at that examination, anything about the Rosen case? Yes or no. A. No, sir.

Q. Did you on that occasion sign the paper, sign any paper, after your examination was con-
7650 cluded in respect to the subject matter—wait a minute, I will make this clearer—did you after the examination was over, that is after the questions and answers, sign any paper containing the substance of what had been said by you and the questions that were asked at any time? Is that clear to you? A. Yes, sir.

Q. Did you sign such a paper? A. I signed papers there on a few occasions but I just don't recollect if it was on that occasion or the next day or a day later or a week later but I have signed a lot of papers there.

Q. For Judge O'Dwyer you signed a lot of papers? A. Yes, sir.

Q. As well as for District Attorney Foley? A. That is right.

Q. The papers which you signed, were they in question and answer form, sir? Do you understand what I mean? A. Yes, sir.

Q. Well, if you understand, would you mind answering, were they in question and answer form?

7652

Mr. Turkus: Which ones?

A. I did not read them. I just signed them.

Q. While you were looking and placing your signature on these papers at any time, did you see there on that paper "Q (period)" and "A (period)", meaning question and answer? Did you see it above your signature? A. I never looked at that, counselor.

Q. Well, before you signed these papers were you told by anybody, Judge O'Dwyer or any other person in his office, the nature of the paper which you were about to sign? Were you told of that fact before you signed the paper? Yes or no. A. Yes, sir. 7653

Q. Were you told at any time that the papers which you were asked to sign were statements of what you had said to any of the persons in the District Attorney's office of Brooklyn and the answers which you had made to those questions? Were you told that at any time? A. I was told it is my statement.

Mr. Rosenthal: Now I ask for the pro-

duction of any statement in respect to the Rosen case.

By the Court:

Q. Was that in the Rosen case? A. No, sir, I don't specify in any cases.

Q. Do you know what case it was? A. No, sir.

Mr. Rosenthal: Let me pursue it further before I make my demand, sir.

7655

By Mr. Rosenthal:

Q. After your first talk with Judge O'Dwyer and his assistants, were you returned to the Bronx or did you remain in Brooklyn? A. Returned to the Bronx.

Q. In the custody of this police officer I assume? A. Police officers.

Q. And you went back to the hotel? A. Yes, sir.

Q. How long a time elapsed before you were
7656 next questioned by anybody from the Brooklyn District Attorney's office? A. I think it was at shorter intervals then.

Q. So as not to prolong it—about how many times, covering what period, was it that you spoke to officials of the District Attorney's office in the year 1940? We will take only the year 1940 now from July up to January, 1941; in Brooklyn, I am confining myself. Is my question clear to you? A. Yes, sir.

Q. About how many times? A. Quite a few times.

Q. Well, would you say once a week, once a

month, once in two months; about how often? A. I would say all told better than twelve times.

Q. You are confining yourself up to January 1st, 1941, are you? A. Yes, sir.

Q. That would be from July to January, would be about twice a month; is that about right?

Mr. Turkus: I object to that because that may give a confusing answer.

Mr. Rosenthal: I withdraw it. There is no idea of confusing him. 7658

Q. How many times elapsed between each talk, about? A. I cannot say that.

Q. Was it practically at the same intervals that you would go back to the Brooklyn District Attorney's office? A. No, sir.

Q. Do you understand what I mean? A. I understand what you mean.

Q. On these occasions when you went back there on these approximately twelve occasions, were there always the same persons there questioning you that you have mentioned, Mr. Heffernan, Mr. Klein and Judge O'Dwyer? Were 7659
they the people who were there and questioned you? A. Judge O'Dwyer wasn't. There was others there after the first couple of times.

Q. Let us get that clear. The only time Judge O'Dwyer was there was on the first occasion? A. On the first or second occasion.

Q. I mean first in Brooklyn. First or second in Brooklyn? A. Yes.

Q. And from that time on— A. There was assistants.

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Q. There were others than Judge O'Dwyer; is that right? A. Yes.

Q. The assistants were Mr. Klein, Mr. Heffernan. Did Mr. Turkus— A. Mr. Turkus.

Q. Mr. Joseph also? A. Yes, sir.

Q. On these occasions when you were being questioned, did you see a person there writing down on paper? A. Not on all the occasions.

Q. On how many of the occasions that you were there did you see, of those twelve, some-
7661 body writing on paper? A. A few.

Q. When for the first time was it that you mentioned anything about the Rosen case? When was the first time that you mentioned anything about the Rosen case? A. Oh, quite a few months ago.

Q. That does not mean anything, Mr. Magoon. This is now November. Would you say it was in June of 1941 that you first mentioned about the Rosen case? A. No, I will say it was before June.

Q. Would you say May? A. I would not say
7662 but I will say it was before June that I mentioned it.

Q. Well, would you say that it was after April and before June of 1941 that you first mentioned anything about the Rosen case to District Attorney O'Dwyer's office? A. No; I will say it was after January and before June.

Q. But you cannot fix the exact date? A. No, sir.

Q. Can you tell us how many additional meetings or questionings you had in Judge O'Dwyer's office in 1941 before you first mentioned the Rosen case?

Mr. Turkus: I object to the form of the question.

Mr. Rosenthal: All right, I will make it clear. If you do not understand it, maybe he does not, so I will make it so both of you understand it.

Q. You said you had twelve conversations about, or approximately, up to January 1st, 1941; is that right? A. Yes, sir.

Q. You said it was later than January 1st, 1941, when you first spoke about the Rosen case; is that right? A. Yes, sir. 7664

Q. How many other questionings of you was there in the District Attorney's office in Brooklyn after January of this year before you first mentioned the Rosen case? Is that clear? A. Yes, sir. A few.

Q. You cannot give us an approximate number, to the best of your recollection? A. I would not try.

Q. When you were first spoken to by Judge O'Dwyer way back in July, 1940, he told you if you told him everything you knew he would help you, didn't he? A. Yes, sir. 7665

Q. That was what he said then? A. Yes, sir.

Q. When you were being questioned about the Rosen case in 1941, who was it that conducted the questioning of you? A. Will you please repeat the question?

Q. Yes, I will repeat it. You say in 1941, after January and before June, you were questioned, after you had had a few conversations, by somebody in the District Attorney's office re-

garding the Rosen case; is that right? A. I still don't get that.

Q. All right, I will make it as plain as I can for you. You said there came a time in 1941 when you said to the District Attorney something about the Rosen case? A. Yes, sir.

Q. Is that clear to you? A. Yes, sir.

Q. Who was it that was present when you made your first declaration about the Rosen case? A. Turkus.

7667 Q. Mr. Turkus? A. Excuse me—Mr. Turkus, Mr. Klein and a few other misters.

Q. A few other misters you cannot recall, is that it? Was one of the misters Captain Bals? Do you recall that? A. No, sir.

Q. I want to be fair to you. When you say "No, sir", do you mean you don't recollect or he was not there? A. He was not.

Q. Was there a person there taking down or writing with a pencil when you were being questioned? A. Yes, sir.

Q. And was the questioning in respect to the Rosen case, a question asked by one of these 7668 assistants of you and you responding in answer form? A. Yes, sir.

Q. And how long a time did it take, approximately, for the questioning in respect to the Rosen case on this occasion when you were in the District Attorney's office in Brooklyn, in this year? Can you recall, about? A. I was a few hours there at least.

Q. A few hours? A. Yes, sir.

Q. During that entire period of time there was somebody there writing with a pencil on a piece of paper of some character or book; is that right? A. Yes, sir.

Mr. Rosenthal: Now I ask the District Attorney to produce the statement made by this man in 1941 when first questioned in respect to the Rosen murder.

Mr. Turkus: There is no "Q" and "A" statement of this witness.

The Court: You may have a narrative. It makes no difference whether it is "Q" and "A" or not.

Q. Were you asked to sign that paper, do you recall? A. I don't think so. 7670

Q. Before you said you were asked to sign a number? A. Yes, sir.

Q. Containing your statements, containing what you had told the District Attorney? A. Yes, sir.

Q. You don't definitely recall whether this was one of them that you were asked to sign; is that right? A. That is right.

Mr. Rosenthal: I call for the production of the statement made in the early part of 1941, according to this witness. 7671

The Court: Any narrative, if signed, may be seen by the Court.

Mr. Turkus: We will give the Court anything we have got. We have got them on several matters, including a memorandum of information on the Rosen matter.

The Court: Signed?

Mr. Turkus: No, they are not signed.

The Court: Then they are of no value unless authenticated.

Mr. Turkus: May I state the purpose

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of the manner in which we have conducted the investigations?

Mr. Rosenthal: No, no.

Mr. Turkus: It is important that there be no confusion here in the minds of the jury.

Mr. Rosenthal: You bring it out from the witness.

Mr. Turkus: The witness does not know how we handled things in the District Attorney's office.

7673

Mr. Rosenthal: I object to any statement going on this record, sir, which would be in the nature of testimony.

The Court: These matters are confidential.

Mr. Rosenthal: I do not want his confidential notes.

The Court: Pardon me. Any statement in response to a question where the text is actually taken down by a stenographer or written in longhand, in question and answer form, may be read by the

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Court and, if found to contain something contradictory which may be shown to defense counsel, then the Court will pass it on.

Mr. Turkus: I will hand you now whatever I have.

The Court: Likewise anything in the nature of narrative but only provided that is signed.

Mr. Turkus: That is narrative. We have a certain method of taking examinations.

The Court: I know the method.

Mr. Turkus: All right.

Mr. Rosenthal: That is their trial memorandum I assume.

Mr. Klein: No, that is not our trial memorandum.

The Court: This is in the nature of a trial brief.

Mr. Klein: It is not.

Mr. Rosenthal: I am only taking the Judge's word for it.

The Court: This is just made from notes. 7676

Mr. Turkus: Yes.

The Court: This may not be revealed. This is strictly the property of the prosecution.

Mr. Turkus: As far as I am concerned, I have no objection.

Mr. Rosenthal: All right, we will go further. I take it the answer is there is no signed statement of this man.

Mr. Klein: In the Rosen case, that is correct.

The Court: You might check up again at the office about that. You may have something in the files. 7677

Mr. Klein: I will check, but I am quite certain it was not done.

The Court: A memorandum in narrative form that was signed.

Mr. Klein: I know there is no such statement signed.

The Court: All right.

Q. It is true, Mr. Magoon, what you said before that you actually did sign statements for the

District Attorney's office in Brooklyn which were told to you to be your statements to them of occurrences, whatever they might have been; is that correct, sir? There is no question about that, is there? A. I signed papers—

Q. Do you understand? Yes or no.

Mr. Turkus: Let him answer.

Q. All right, answer it. Go ahead.

7679

The Court: May I advise something?

Mr. Rosenthal: Yes, your Honor.

The Court: Go ahead with your examination.

Mr. Rosenthal: I will repeat the question. You objected to it so I will withdraw it.

Q. Did you not tell me a few minutes ago, Mr. Magoon—

The Court: Is this man held under an indictment or is he held under a commitment order as a material witness?

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Mr. Turkus: He is held up in the Bronx by Judge Foley up there on a charge of murder.

Mr. Rosenthal: Now, wait a minute.

Mr. Turkus: Now wait. I did not say indictment.

Mr. Rosenthal: This man is not under indictment in the Bronx at all.

Mr. Turkus: He signed a waiver of immunity.

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The Court: What order is he committed under?

Mr. Turkus: Judge Foley has it. I don't know technically.

The Court: You don't know. Because if he is held as a material witness, it is quite likely that from time to time he has signed vouchers, being entitled to daily compensation under the law.

Mr. Turkus: I do not know. That is up in the Bronx.

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The Court: Purely speculative as to what he signed but there is no evidence here yet that he has signed a "Q" and "A".

Mr. Rosenthal: I must except to your Honor's statement. My questioning has been confined to Brooklyn, not what he did in the Bronx, and, of course,—I do not say that Mr. Turkus wilfully made this statement,—I think the record should be clear that this man is not held on any murder charge in the Bronx; he is merely held as a material witness.

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Mr. Turkus: Let him state what it is. I do not know technically how Judge Foley holds him. I know this, he is in jail and we have him when we need him. Let us go that far with him and there won't be any misunderstanding.

The Court: You cannot pit the word of the District Attorney against the word of this witness on the question of depositions. I know you would not want to do that.

Mr. Rosenthal: I have no intention of pitting anybody's word.

The Court: If the District Attorney, upon checking up at the office, finds any paper whatever signed by this witness, let it be brought to the court on Monday morning.

Mr. Klein: We will make a further check.

Mr. Turkus: I will instruct Mr. Joseph.

7685 The Court: I want a thorough search made.

Mr. Turkus: Yes.

Mr. Rosenthal: Would I then have the privilege, if concluded before then, to recall him?

The Court: You may then, if it is so indicated, recall the witness.

Mr. Rosenthal: We will pass this subject then.

Q. In respect to the Rosen case, did you ever appear at any time before any Grand Jury, at

7686 any time up to the present day? A. No, sir.

Q. Did you appear before the Grand Jury after this trial started?

Mr. Rosenthal: (To Mr. Turkus) Did he?

Mr. Turkus: He did not.

Mr. Rosenthal: Then I won't press it.

Q. After July or thereabout, whenever it was that you fix as the date when you spoke about the Rosen case—

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Mr. Turkus: That is confusing on the record. Will you revise it?

Mr. Rosenthal: Let me put it more plainly. I do not want anything confusing.

Q. You said that you recall the first time that you were asked about the Rosen case, or spoke about it, was about two months after May, didn't you?

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Mr. Turkus: I object to it. He said it was not. He said it was after January of 1941 and before June.

Mr. Rosenthal: Let us get it straight, Judge.

Q. When did you say that you first spoke to anybody about the Rosen case, approximately? A. After January and before June.

Q. The exact month you cannot tell us? A. No, sir.

Q. After your first conversation in respect to the Rosen case, and confining yourself to the Rosen case, did you have any later conversations with any of the personnel of District Attorney O'Dwyer's office? A. Will you please repeat that question?

7689

Q. Let us put it this way—

The Court: Staff.

Mr. Rosenthal: I will reframe it.

Q. After the first conversation which you had, whatever the month was, did you again talk at any time with any of the assistants of Mr.

O'Dwyer in respect to the Rosen case? A. Yes, sir.

Q. How many times, and covering what period? A. On a few occasions.

Q. Well, when you say "a few," would you say about four or five? A. About six or seven.

Q. And the first time after this first conversation was about how long after; a week, a month? A. A few days.

Q. And your last time was how long before
7691 today? Approximately? A. Approximately?

Q. Yes. You don't have to give me the exact day, just the approximate time. A. About four or five months.

Q. No, I don't think you understand me. Four or five months ago was the last time you spoke? A. Before today, yes.

Q. And you have not spoken to anybody in the District Attorney's office about the Rosen case for the last four or five months: is that correct? A. Yes, sir.

Q. Regarding your place of confinement, when
7692 were you removed, if at all, from the Concourse Plaza Hotel? A. After I was there about seven months.

Q. And then you were removed to Bronx County Jail? A. Yes, sir.

Q. Were you removed to the civil part of the jail? No, sir.

Q. Are you in the jail where people charged with crime are? A. Yes, sir.

Q. Segregated from other people? A. Yes, sir.

Q. Is that right? A. I was.

Q. You are there—other than being on the

stand now, that is where you are confined now, isn't it? A. In the Bronx County Jail?

Q. Yes. A. Yes, sir.

Q. And you say there are policemen on guard there all day and all night, in the Bronx County Jail? A. In the Jail?

Q. Yes. A. Outside the Jail.

Q. I understood you to say you had a 24-hour guard. Did you say that? A. While I was in the Concourse Plaza, I did.

Q. But while you are in the jail there is no 7694
guard—that is wh I want to get clear—other than the guard of the jail? A. That is right.

Q. Can you tell us the month that you were transferred to the Bronx County Jail? About? A. About October or November.

Q. Of 1940? Last year? A. Yes, sir.

Q. Or this year? A. Last year.

Q. And you have been there ever since? A. Yes, sir.

Q. On this trial you told this jury that you know the defendant Capone, is that right? A. Yes, sir.

Q. How long do you know the defendant Ca- 7695
pone? A. Quite a few years.

Q. Well, give us an idea; five years, six years, four years, seven years? Give me your best recollection. A. Oh, about eight or nine years.

Q. And you mentioned, did you not, on this trial that you were associated with Strauss, Goldstein, Reles, and others, including Capone, as The Combination. That is what you said on this trial: is that right? A. Yes, sir.

Q. You further said on this trial, did you not, that you were working for a salary for this

Combination. That is what you told this jury, is that right? A. Yes, sir.

Q. And you also told this jury that you were only an employee; you were not in business with any of these people at any time. Did you tell them that?

Mr. Turkus: I object to the form of the question.

7697 Q. Did you tell this jury that you were merely an employee and were not in business with any of these men at any time?

Mr. Turkus: I object to that. That is not the testimony.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Were you merely an employee of these men?

The Court: What men?

7698

Q. Whom you mentioned as comprising The Combination.

The Court: He said he was a member of The Combination.

Mr. Rosenthal: He said that he worked for The Combination, is the extract that I have.

Mr. Turkus. Mr. Rosenthal used the words "at any time." That was not the testimony. He said he was a member of The Combination.

7699

Mr. Rosenthal: There is no such testimony at all. I have the printed record, which is entirely different.

The Court: He can say whether he was employed by or worked together.

By the Court:

Q. Did you work with them or for them? A. With them and for them.

Q. Both? A. Yes, sir.

7700

Q. What was your salary? A. I started at $40 a week.

Q. Speak loud. A. I started at $40 a week.

Q. And went up to how much? A. $75.

By Mr. Rosenthal:

Q. You were in the shylock business for a period of ten years—you were in the shylock business by yourself conducting your place from Buffalo and St. Johns; is that right? A. Yes, sir.

7701

Q. And you had been in that business at times with a partner whom you named as Bobby Burns, for a period of upwards of 10 years; isn't that true? A. Him and others.

Q. Did you, in answer to my question, say that you conducted the shylock business and that Bobby Burns was merely a partner for a short period of time with you? Did you say that when I asked you this morning?

Mr. Turkus: The record speaks for itself.

A. The record speaks for itself.

7702 *Seymour Magoon—For People—Cross*

The Court: Sustained.
Mr. Rosenthal: Exception.

Q. You were in business with Goldstein at one time, weren't you? A. What Goldstein?

Q. Martin (Buggsy) Goldstein, were you in business with him? A. Yes, sir.

The Court: Pinball?
The Witness: No, sir.

7703 Q. You were in business with Strauss, weren't you? A. Yes, sir.

Q. You were in business with Reles also, weren't you? A. Yes, sir.

Q. You were asked in the Nitzberg trial, weren't you, at page 238 and 239, as to whom you had been in business with. Let me withdraw that first.

And you mentioned as being the persons whom you were in business with the following persons, did you not; (page 238 and 239) I ask you now were you asked these questions and
7704 did you give these answers in the Nitzberg trial, commencing at folio 713:

"Q. Mr. Magoon, you were in business with Goldstein, weren't you? A. Yes, sir.

"Q. And you were in business with Strauss also, weren't you? A. That is, I worked for them.

"Q. Yes. A. Yes.

"Q. You were in business with them, weren't you? A. Yes, sir.

"Q. And Reles was also interested in that business too, wasn't he? A. Yes, sir.

"Q. And the whole bunch of you there, Reles,

Strauss, Goldstein and yourself, were more or less partners in the business, weren't you? A. Yes, sir.

"Q. Well, how long were you and Reles in partnership? A. Would you kindly repeat that?

"Q. How long were you and Reles in partnership? A. I was never partners with Reles."

Were you asked those questions and did you give those answers?

Mr. Turkus: There is nothing inconsistent with that. 7706

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. In the Nitzberg trial, which occurred in 1941, when you were asked concerning the persons whom you were in business with, did you mention the name of Louis Capone at all?

Mr. Turkus: Objected to. The reading of the full question shows that the questioner put certain names to him and he made response, that the questioner did not put the name of Capone to him. That is all those questions and answers indicate. 7707

The Court: Sustained.

Mr. Rosenthal: I respectfully except. So as not to waste any time here, I offer to prove here that this witness never mentioned the name Capone in that trial in respect to his business or activities. Your Honor sustains that line of questions. I respectfully except.

Mr. Turkus: I do not want a bad record, your Honor. That offer of proof was bad. If he has got any other proof, let him submit it.

The Court: The Court sees through it.

Mr. Rosenthal: I respectfully except to the Court's remarks.

The Court: You will be permitted to show whether or not, in response to a question which called for such information,

7709 he omitted to give that information.

Mr. Rosenthal: I respectfully except to what your Honor says I am limited to, the manner in which I am limited to prove that particular point.

The Court: I said "liberty", not "limited." The fact that a man fails on a certain occasion to mention somebody's name means nothing unless it was shown that the information was called for by some question or some event.

Mr. Talley: I except to your Honor's

7710 statement.

Mr. Rosenthal: I except.

The Court: I don't know what the exception is about, but inasmuch as the statement is considered valueless, it is withdrawn and the jury is instructed to disregard it.

Mr. Rosenthal: The exception is that that is a question of fact for the jury, not for your Honor's interpretation of the fact.

The Court: What are you worrying about.

Mr. Rosenthal: That is the exception I am taking and the reason for it.

The Court: The jury has nothing to do with rulings on evidence.

Mr. Talley: It is your Honor's observations when you make the rulings, to which I take my exception.

The Court: Don't argue the rulings.

Mr. Talley: I do not intend to argue, but I intend to explain, in view of your Honor's statement. 7712

The Court: You are not going to do any explaining. You are only making a speech to the jury.

Mr. Talley: I am not making a speech to the jury. I am addressing you.

The Court: Then sit down.

Mr. Talley: I intend to sit down when I finish what I have to say.

By Mr. Rosenthal:

Q. On this trial you were asked, at page 2318, whether you took orders from your four employers, including Reles. Do you recall being asked that? 7713

Mr. Turkus: Objected to. This record speaks for itself.

The Court: Sustained.

Mr. Rosenthal: This is cross-examination, sir, and laying a foundation for a prior inconsistent statement, and in order to lay that foundation I must first ask him whether or not he did not so testify.

7714 *Seymour Magoon—For People—Cross*

The Court: The objection is sustained.

Mr. Rosenthal: I respectfully except, sir.

Q. Was Reles one of your bosses? A. Yes, sir.

Q. Did Reles give you orders? A. Yes, sir.

Q. Were you asked these questions on the Nitzberg trial and did you give these answers (page 239, folio 715):

7715 "Q. You were interested in the business that Reles was doing, weren't you? A. No, sir.

"Q. Never had anything to do with Reles? A. He was interested in my business.

"Q. He was more or less your boss, wasn't he? A. No, sir.

"Q. You never did any jobs with him at all? A. No, sir.

"Q. At no time? A. No, sir."

Were you asked those questions on the Nitzberg trial and did you give those answers in respect to Mr. Reles? A. If it is there, I have given it.

7716 Q. What is your recollection? This was only a few months ago. Did you, in response to questions which I have now propounded to you, give those answers, to your best recollection? Yes or no? A. I says if it is there, I have said that.

Mr. Rosenthal: I ask that the answer be stricken as not responsive.

The Court: Strike it out. Do you remember those questions and answers? Yes or no?

The Witness: Not very clearly, your Honor.

Q. Now then, if you did testify in the Nitzberg trial— Withdrawn.

Mr. Rosenthal: You concede that I correctly read from the minutes?

Mr. Turkus: If you say it is correct, that is enough.

Q. Upon the concession of the District Attorney that I have correctly read from the printed record in that case, I will now say to you, Mr. Magoon, you did say that according to the record of the Nitzberg trial. Now do you say that you made those answers to those questions? It is in the record. A. Then I have said it. 7718

Q. That was not true, was it? A. It was true.

Q. All right. You did not take any orders from Reles since May of 1941, when Nitzberg was tried, did you?

Mr. Turkus: I object to that.

Mr. Rosenthal: I want to confine him right up to the present minute. 7719

Mr. Turkus: You mean since he is in the Bronx County Jail?

Mr. Rosenthal: Yes.

Mr. Turkus: Are you serious with that question? Go ahead.

The Court: There is no objection?

Mr. Turkus: No objection.

Q. Did you? A. Will you repeat that question, please?

7720 By the Court:

Q. Since you have been locked up, have you been taking orders from Reles? A. No, sir.

By Mr. Rosenthal:

Q. You did not go out on any of the baseball games, did you, at any time? A. No, sir.

Q. You say that you were hiding in a farm of a man Mannesse, a tomato farm? I will repeat the question. You said you were hiding out in a tomato farm in Milton, New York, in 1936; is that right? Is that correct? A. Yes, sir.

7721

Q. And you said the name of the place was Mannesse, I think; is that correct? A. The owner's name was Mannesse.

Q. Yes, the owner's name. A. Yes, sir.

Q. How many times had you been to that farm before? A. Never.

Q. How many times had you been to that farm after that, if at all? A. Two or three times after.

7722 Q. And covering what period of time were the two or three other times? When were the two other times? A. After I was in police custody.

Q. Oh, you mean you went to this farm accompanied by some police officers since you were arrested? A. Yes, sir.

By the Court:

Q. City police or State police? A. City police and State police.

By Mr. Rosenthal:

Q. So that the only time that you ever were at this farm in your life—

The Court: Pardon me.

By the Court:

Q. No revenue men? A. No, sir.

Q. You know there have been a lot of raids in that immediate section? 7724

Mr. Rosenthal: I object to your Honor's question. Exception.

The Court: Withdrawn. The Court apologizes for its remark. Any motion for a mistrial? Any motion for a mistrial?

Mr. Rosenthal: I am leaving that to your Honor. Your Honor has done that for me twice, so I feel there is no necessity for me to make one.

The Court: Go ahead. 7725

7726 *Seymour Magoon—For People—Cross*

By Mr. Rosenthal:

Q. With the exception of the time in 1936 that you say you were at Mannesse's farm, tomato farm, you never were there, either before or after, excepting after you were arrested in 1940, when you were taken there by a couple of police officers or State troopers; is that correct? A. Yes, sir.

Q. You testified in this trial that you hung
7727 around the corner of Saratoga and Livonia Avenue. That was one of your hangouts. Did you say that? A. Yes, sir.

Q. Was that true up to the time you were arrested, that this was one of your hangouts? A. Yes, sir.

Q. You were asked by Mr. Turkus about having been arrested for vagrancy when Judge O'Dwyer took office, in the month of February, 1940. Do you remember being asked about that? A. Yes, sir.

Q. At that time a number of police officers took the stand against you to testify, isn't that
7728 right, as to your whereabouts? A. Yes, sir.

Q. Over a period of months? A. Yes, sir.

Q. And you were present in court when these various police officers testified under oath, some six or eight in number, weren't you? A. Yes, sir.

Q. And did these police officers testify under oath to your whereabouts morning, noon, and night for a period of six months?

Mr. Turkus: I object to it. How does this impeach his credibility?

7729

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. Isn't it a fact that your regular hangout, morning, noon, and night, was at Buffalo Avenue and St. Johns Place?

Mr. Turkus: I object to it. That may be a regular hangout, but that—

Mr. Rosenthal: I object to him interjecting, when he makes an objection, something which will be taken as an answer by the witness, whether it is intentional or not. I object to any argument when he makes his objection.

7730

Mr. Turkus: The District Attorney has no exception to rulings—

Mr. Rosenthal: I object to that statement. We have heard that since the beginning of the trial also.

Mr. Turkus: I wish Mr. Rosenthal would permit me to address the Court without becoming unduly perturbed about it.

7731

Mr. Rosenthal: I am not becoming perturbed at all.

Mr. Turkus: Please, sir, I know how to conduct myself in a trial, and I will with all propriety. I merely mention the fact that since the District Attorney has no exception, he has a right to urge a point of explanation.

The Court: You do not have to. Sustained.

Mr. Rosenthal: I respectfully except to the Court's ruling.

The Court: Unless you want to show that he hung out there exclusively.

Mr. Turkus: That is different.

The Court: To the elimination of Saratoga and Livonia, but when you say "regular," that means nothing. That is the reason the Court sustained the objection.

7733 Mr. Rosenthal: There is only one way I can prove—

The Court: It is all the same general locality.

Mr. Rosenthal: I except to your Honor's observation.

The Court: Nobody is glued to one corner.

Mr. Rosenthal: In view of the fact that is the ground of your Honor sustaining the objection, I will put the question in another form:

7734 By Mr. Rosenthal:

Q. Is it a fact that your business for the last five years was conducted from the corner of Buffalo Avenue and St. Johns Place?

Mr. Turkus: That has been answered. I object.

Mr. Rosenthal: That has not been answered.

The Court: Yes or no.

A. Yes, sir.

Q. Isn't it a fact that you would, when you got up in the morning, go right to Buffalo Avenue and St. Johns Place? A. Not at all times.

Q. Did you go there every day in the morning? A. No, sir.

Q. Did you go there practically every day in the morning? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Well, for the six months including 1939 and up to the time you were arrested for vagrancy—Let me withdraw that. 7736

Q. Did you go there every night? A. I can explain that for you, Counsellor.

Q. No, please, we are getting along very nicely. You answer questions and I will make them. If you do not understand me, I will repeat them. A. Excuse me.

Q. Is that clear? Now then, did you go there every night?

Mr. Turkus: I object to it.

Q. And hang around. 7737

Mr. Turkus: That does not go to the point of exclusion of other contacts at other places. The witness has asked to make a statement.

The Court: He can say if he went there every night, even though it does not prove exclusion.

Q. Did you, yes or no? A. Practically every night.

7738 *Seymour Magoon—For People—Cross*

By the Court:

Q. Were you kept so busy at that corner that you did not go to Saratoga and Livonia? A. I had a working man there, your Honor. He was there all the time. I had a car.

Q. He was where? A. On St. Johns Place and Buffalo Avenue. Then I was not held to any particular place.

Q. You had your car and went around? A.
7739 That is right, sir.

By Mr. Rosenthal:

Q. Were you asked these questions in the Goldstein Strauss trial in respect to St. Johns Place, and did you make these answers: (on page 469, folio 1407)

"Q. Do you know where you were at half past nine that night? A. Well, the only place possibe is on St. Johns Place and Buffalo Avenue.

"Q. And you say that because it was your custom to ride around there, is that right? A. I
7740 hung out there.

"Q. You hung out there every night? A. Yes, sir.

"Q. At half past nine? A. All day and all night, or all morning, any time I got up out of the house.

"Q. Any time that you were not with anybody you were at that corner, is that right? A. Yes, sir."

Question, at page 473 of the same printed record—first, before I read that, were you asked those questions and did you give those answers? A. If it is there, Counsellor.

Q. If it is in the book, you made that statement; is that right? A. Yes, sir.

Q. Now, it is in the book. Did you make the statement? A. Yes, sir.

Q. Now then, in the book, at page 473, were you asked these questions:

"Q. You told me that you were at Buffalo and St. Johns Place on Sunday night. A. I did not specify any day

"Q. About half past four. A. I did not specify any day. 7742

"Q. What? A. I did not specify any day.

"Q. You might have been there? That was your usual hangout? A. St. Johns and Buffalo.

"Q. Sundays, holidays, and everything else? A. Yes, sir.

"Q. Is that correct? A. Yes, sir."

Were you asked those questions and did you give those answers? A. If it is there, it is so.

Q. Well, it is in the book.

Mr. Turkus: Then the answer is yes.

Q. Did you say that? A. Yes, sir. 7743

Q. Is the defendant Capone married, do you know? A. Will you please repeat that?

Q. Is the defendant Capone married? A. Yes, sir.

Q. Has he any family? A. Yes, sir.

Q. What does his family consist of? A. A wife and children.

Q. How many children?

The Court: What has that got to do with the case?

Mr. Rosenthal: On the point of the

credibility of this man, which will come out in a little while in my questioning.

The Court: As to the number of children another man had?

Mr. Rosenthal: As to how old they are and what they are.

Mr. Turkus: He did not pretend any friendship with the children.

The Court: Is there an objection?

Mr. Turkus: Yes.

7745 The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. You say you were at Capone's house once, is that right? A. Pardon?

Q. You said you were at Capone's house once? A. Not once, but a number of times.

Q. And you said it was on Avenue K? A. I said I think it is on Avenue K.

Q. Avenue K, is it between—off of Schenectady Avenue on Avenue K? A. It is a couple of blocks off Utica Avenue.

7746 Q. Well, you are acquainted with that section, aren't you? A. Not that section very well.

Q. That section is how far from Saratoga and Livonia to this Avenue K section that you are talking about? A. Driving a car or walking?

The Court: How many blocks?

Q. How far in blocks, in mileage? A. Oh, I would say a couple of miles.

Q. And you are acquainted with Schenectady Avenue, aren't you? A. One end of Schenectady Avenue.

Q. Do you know where 46th Street is? A. I have heard the street.

Q. Well, is it between 46th Street and Schenectady Avenue on Avenue K that Capone lives? A. I know the house; I don't know the street.

Q. You know the house but you do not know the street, is that it? A. Yes, sir.

Q. Well, do you know between what streets is it? A. I think it is around Avenue K, a couple of blocks off Utica Avenue.

Q. But you are guessing now, is that right? 7748
A. If we walk over there now, I can take you right there.

Q. Is it on the corner or is it between blocks? A. A corner house.

Q. Is the entrance on Avenue K? A. Two entrances.

Q. One on Avenue K and one on the other avenue, is that it? A. I am not saying on what street. There was one front entrance and a back entrance.

Q. You are sure of this, aren't you? A. Yes, sir.

Q. And this was in—I am talking about 1939; 7749
is that what you are talking about, talking about where he lived in 1939, is when you testified? Is that what you are talking about? A. Almost sure of that.

Q. Is that your best answer, you are almost sure? A. If you—

Q. Just please— A. If you give me that question clear in one question at a time, counsellor, I can answer better.

Q. Am I not asking you one question at a

time? I withdraw it. We will give it to you, half a question, if you want it, at a time.

Mr. Turkus: I object to it. The witness wanted one question at a time.

Mr. Rosenthal: We will give it to him.

Q. Do you remember on your direct examination talking about telling Mr. Turkus about a conversation that you were supposed to have had in Capone's house? Remember telling him? A. Yes, sir.

7751

Q. Is that where he lived at the time that you had this conversation, the place where you have just described? A. Yes, sir.

Q. Is that where he lived? A. Yes, sir.

Q. In the fall of 1928 you said you saw, on direct examination, Weiss, Capone and others on a certain corner?

Mr. Turkus: I object to that. There is no such testimony in the record. You are ten years out of the way.

7752

Mr. Rosenthal: We will see whether you are.

Mr. Turkus: You said in the fall of '28.

Mr. Rosenthal: '38 was what was intended.

Q. Where was it you said you saw these people? A. Will you please repeat that question?

Q. In 1938, where did you say you saw these people, in the fall of 1938?

Mr. Turkus: I object to the form of

the question. It does not show what people he is referring to.

The Court: Sustained.

Mr. Rosenthal: Already mentioned. Do you want me to repeat them in the question?

The Court: Name the people.

Q. Did you on direct examination testify about seeing Weiss, Capone, Strauss and Reles together some place in 1938? A. Yes, sir. 7754

Q. When in 1938 was it that you saw them? A. In the fall of 1938.

Q. What part of the fall of 1938? A. It was kind of cool then, counsellor.

Q. I cannot hear you. A. I say it was kind of cool then.

Q. It was kind of cool that night? A. No, in that season.

Q. Can you fix any approximate month? A. I will say about October or November.

Q. Is that your estimate or are you merely guessing? A. That is my estimate. 7755

Q. Where was it that you say you met them? A. On the corner.

Q. What corner? A. Saratoga and Livonia Avenue.

Q. Were they the only people there at the time, to your recollection; yes or no? A. There is always people there.

Q. Do you recall anybody else that was there at the time; yes or no? A. Off-hand, no.

Q. About what time of the night was it? A. Around 9:30, 10:00, around that time.

Q. Are you guessing, or is that your estimate at this time? A. That is my answer.

Q. At that time did you know Paul Berger? A. Yes, sir.

Q. How long had you known him? A. A little while prior to that time.

Q. What do you mean by a little while, a year? A. Two or three.

Q. And did Berger hang out on that corner? A. No, sir.

7757 Q. Had you met Berger on that corner prior to that time? A. I think it was on that corner that I met Berger.

Q. Well, what is your best recollection as to where you met Berger for the first time? A. I would say Brownsville.

Q. Well, is that the nearest you can recall as to where you first met Berger, in Brownsville? A. Yes, sir.

Q. On direct examination did you not say that it was on the corner, the corner meaning Saratoga and Livonia, that you first met Berger?

7758 Do you know what direct examination is? A. Yes, sir.

Q. That is when Mr. Turkus asked you questions. A. Yes, sir.

Q. Didn't you then say that it was the corner that you met Berger?

Mr. Turkus: I object to it. This record speaks for itself.

Mr. Rosenthal: This is cross-examination on a question of this man's credibility and remembrance of what he even said today on the stand.

7759

Mr. Turkus: He says this time on cross he thinks it is the corner. He is definite it was Brownsville. The jury has not forgotten the testimony. It happened a short time ago.

The Court: The record speaks for itself. Sustained.

Mr. Rosenthal: I respectfully except to the Court's ruling.

7760

Q. What was the conversation that you had on the corner that night? A. Who?

Q. With anybody, in the fall of 1938, the months October or November, the time 9:30 to 10:00 o'clock, what conversation did you have on that corner?

Mr. Turkus: I object unless he fixes the persons with whom he had the conversation.

The Court: Fix the persons. Sustained.

Mr. Rosenthal: I respectfully except.

7761

Q. With whom did you talk on that corner on that particular night? A. In reference to what, counsellor?

Q. In reference to anything, whom did you speak to on that corner at 9:30 o'clock that night, when you arrived at the corner and, as you say, you saw Weiss, Capone, Reles and Strauss?

Mr. Turkus: I object to the form of the question, anything.

The Court: It is indefinite because fall is indefinite. There may have been other

conversations. If you fix the subject matter of the conversation—

Mr. Rosenthal: I have already designated the same time as Mr. Turkus designated.

The Court: He is not required to remember the record. Even the Court has to go back on its notes to remember what was said yesterday. The human mind cannot carry a record. That is why we
7763 have the stenographer and the typewritten record. This was the conversation about Ratner's restaurant.

By the Court:

Q. Can you place that? A. Yes, sir.

Mr. Rosenthal: I respectfully except to the Court's observation.

The Court: Now proceed.

Mr. Rosenthal: And to the Court's direction to the witness as to what the
7764 conversation was about.

The Court: All right, the Court withdraws it, sustains the objection as indefinite. I thought that was what you wanted.

Mr. Rosenthal: I except to the sustaining of the objection.

By Mr. Rosenthal:

Q. When you arrived at the corner of Saratoga and Livonia Avenue, in the fall of 1938, and, as you say, saw Weiss, Capone, Strauss and Reles, to whom did you speak on that occasion?

Mr. Turkus: I object to the form of the question because the fall is a long period of time. That would presuppose that was the only meeting and, second, it must be directed to the attention of the witness what the subject matter is that he wishes to elicit on this question.

The Court: You see the trouble is the direct called for only information as to conversation with one but it does not include conversation as to the others. 7766

Mr. Turkus: That is right.

The Court: That is what tends to confuse. Sustained.

Mr. Rosenthal: I respectfully except to the Court's ruling.

The Court: When a person meets several in a group, it may be reasonable to suppose that it is more or less inconsequential conversation with all but we are concerned with the conversation with such as had something to do with this charge that is now being tried. You may inquire about that. 7767

Mr. Rosenthal: May I first except to the Court's observation?

The Court: But that eliminates "hello" and "goodbye".

Mr. Rosenthal: May I proceed, sir?

The Court: Yes.

By Mr. Rosenthal:

Q. Did you at that time speak to Weiss, according to you, about going some place? A. Yes, sir.

7768 *Seymour Magoon—For People—Cross*

Q. What did you say Weiss said to you or you said to Weiss on that occasion? A. He says—

Mr. Barshay: Will your Honor give me a general objection to this line of inquiry on the ground it is not binding on the defendant Buchalter?

The Court: Yes.

A. He says, "Go to Ratner's restaurant to-
7769 morrow morning and you will meet Paul Berger and some other fellow and he will point out Max Rubin to you. Tail him, find out his habits and so forth."

Q. What is the "and so forth"? Tell us the whole conversation. Anything else said? A. Who he walks with, who he comes out of the house, who he walks into the house, and all things like that, on following a man in order to have him killed.

Q. He told you that? A. That was next day, counselor.

7770

Mr. Rosenthal: I ask that be stricken if it was next day.

The Court: Strike it out.

Q. I am asking you now did he tell you that; yes or no? In that first conversation did he tell you that? A. No, sir.

Mr. Rosenthal: Then I ask that his observation be stricken out.

Mr. Turkus: It was stricken out.

Mr. Rosenthal: No, the other thing is stricken. Now I am asking that the

observation be stricken of this man and the jury instructed to disregard it.

The Court: The Court has ruled on that.

Mr. Rosenthal: The Court ruled on the other but I ask his original answer be stricken.

The Court: The stenographer will read back.

(The Court's remark "Strike it out" was read.) 7772

Mr. Rosenthal: That is only directed to the question I was asking but he had already answered prior.

The Court: The Court knows what it was. It is perfectly plain.

Q. Was anything else said that night in that conversation? This is the first conversation in respect to going over to Ratner's restaurant. Have you told us all you recall of that conversation? A. Yes, sir.

Q. Isn't it a fact you were not told at that time the purpose of your tailing Rubin, on the first conversation? A. Will you repeat that question, please? 7773

Q. Isn't it a fact that on this first occasion you were not told anything about the purpose of tailing Rubin?

The Court: He has just told you the purpose of tailing him but not the eventuality.

Mr. Talley: He volunteered that, if your Honor pleases.

7774 *Seymour Magoon—For People—Cross*

The Court: Not the reason for the instruction. He said that was understood and then the Court struck that out on your motion.

Mr. Rosenthal: I except to the Court's observation.

The Court: Counsel, under purpose of tailing comes the instructions as to the particulars that were to be observed, to keep track of his movements, see whom
7775 he went in and out with, whether he was under bodyguard, and so on, where he went, the time and all that. All those are elements, but as to the reason behind all this, we have nothing, in so far as this answer is concerned.

Mr. Rosenthal: I merely except to the Court's observation as to the meaning of answers as being an invasion of the province of this jury.

The Court: You mean when the Judge has to rule on an objection the Judge has
7776 to submit his brains to the jury and let the jury tell him how to rule before he passes on it? That is ridiculous. Don't try anything like that. That is a cheap speech to this jury. Now proceed. You are just trying to turn the jury against the Court's rulings, hook somebody up on prejudice against the Court. Don't try it. It is too cheap. Now proceed.

Mr. Rosenthal: Before I proceed, as a representative member of the Bar, I except to the Court's statement as to what the intention of counsel is. I have a per-

feet right to stand here and object to anything in the interest of my client.

The Court: Yes, and the Court will see to it, too. Now proceed.

Mr. Rosenthal: I except to your Honor's observation.

By Mr. Rosenthal:

Q. After this conversation, what is the next thing you did? A. I went away. 7778

Q. Did you go to Ratner's? A. Yes, sir.

Q. When did you go to Ratner's? A. The following morning.

Q. At what time? A. About 9:30, 10, in the morning.

Q. When you arrived at Ratner's, did you see Berger? A. Yes, sir.

Q. Had you known the man that was with Berger before then? A. No, sir.

Q. How long did you remain in the restaurant? A. A little while.

Q. What do you call a little while? A. Half hour, three-quarters of an hour, forty minutes. 7779

Q. After the meal was over, what happened? A. We went out.

Q. Where did you go to? A. I went to my car. Paul Berger and the other fellow went to their car.

Q. Where was your car parked? A. In the vicinity.

Q. Approximately where? A. Off Delancey Street.

Q. Off Delancey Street? A. Yes, sir, on the side street.

Q. Where was this restaurant? A. On Delancey Street.

Q. Weren't the cars parked up at Union Square? A. Yes, sir.

Q. I thought you just said they were parked on Delancey Street?

Mr. Turkus: He did, but that is not inconsistent. You are talking about two different times.

7781 Mr. Rosenthal: I object to the District Attorney saying it is or is not inconsistent.

Mr. Turkus: That is an objection.

Mr. Rosenthal: That is an observation only, not an objection.

Mr. Turkus: Do you want to quarrel with me?

Mr. Rosenthal: No, I don't want to quarrel with you, or anybody else, but I will not be stepped on.

By the Court:

7782 Q. Counsel does not mean after you left Ratner's, he means while you were in Ratner's, do you recall where you parked your car then? A. I said up Delancey.

Q. Before you went to Ratner's? A. I parked off Delancey and then I went into Ratner's.

Q. After you left Ratner's, where did you go? A. With the other fellows. With the other two fellows?

Q. Yes. A. Parked the car on Union Square.

Q. Two different parkings? A. Yes, sir.

By Mr. Rosenthal:

Q. Did the both of you have your cars parked at the same place when you went into Ratner's? A. I don't know.

Q. You came out of Ratner's together? A. Yes, sir.

Q. You went to your car? A. Yes.

Q. Didn't they go in their car? A. Yes, sir, to Paul Berger's car.

Q. Where was it parked? A. Up ahead of my 7784
car.

Q. And then you both drove in separate cars, you following? A. Yes, sir.

Q. Who was in your car, anybody other than yourself? A. No, sir.

Q. How far did you drive? A. Over to Union Square.

Q. Then you both parked your cars again on the street? A. Yes, sir.

Q. Then started walking? A. Yes, sir.

Q. Where did you walk to? A. Fifth Avenue and 17th Street—17th Street and Fifth Avenue. 7785

Q. Was Berger walking with you? A. No, sir.

Q. Berger was ahead and Cuppie following? A. Yes, sir.

Q. Then Berger spoke to you in a whisper? A. Yes, sir.

Q. After Berger spoke to you, did you do something? A. Yes, sir.

Q. What did you do? A. Followed Rubin.

Q. Were you alone when you followed him? A. No, sir.

Q. Who was with you? A. Cuppie.

7786 Q. Where did you follow him to? A. All around.

Q. Did he go in any buildings or in any places? A. Yes, sir.

Q. Did you go in the buildings with him? A. No, sir.

Q. Did you wait out in front of the buildings? A. Yes, sir.

Q. The buildings had more than one entrance? A. I presume so.

7787 Q. He always came out the same entrance? A. Yes, sir.

Q. And you were waiting there sometimes an hour or an hour and a half in front of the buildings after he would enter it? A. No, sir.

Q. For a period of time you would wait? A. Not very long.

Q. As long as it took him to go in and transact whatever business he was doing? A. Yes, sir.

Q. Where did he go and at what time— Question withdrawn. At what time did you finally

7788 leave him that night? A. I left him about 4:30.

Q. Where was he when you left him? A. 14th Street and 7th Avenue.

Q. Then where did you go? A. Back to Brooklyn.

Q. When after this did you next see any of the defendants and where did you see them? A. That night.

Q. Where did you see them? A. On the corner.

Q. That would be in the month of October or November, 1938? A. In the fall, yes, sir.

Q. Now, you fixed it as your approximation of time, October or November, is that right?

Mr. Turkus: I object. The witness said in the fall.

Mr. Rosenthal: I am asking him to fix it, if possible.

Mr. Turkus: That was not the purport of that question.

The Court: He says in the fall—whether it was then cold, if counsel can 7790
recall that fall—that was the fall that the hurricane was in, in September. What the condition was in the early part of November, maybe you can recall yourself.

Mr. Rosenthal: It was thirty degrees this summer also in some places, but that does not necessarily mean the time I mean.

The Court: He said in the fall. Don't argue.

Q. Didn't you tell me you fixed the time approximately in October or November of this conversation? 7791

Mr. Turkus: I object.

Q. (The Court) Do you remember the month? A. No, sir.

Q. Did you a few minutes ago say to me that to the best of your estimation it was either the month of October or November, did you say that?

Mr. Turkus: I object. That is an objectionable question.

The Court: That is not recollection; that is only conjecture. Objection sustained.

Mr. Rosenthal: Exception.

Q. Well, can you more definitely fix at this time what you mean by the fall of the year 1938? A. It was cold weather then.

Q. Other than being cold weather, can you more definitely fix at this time the month of the
7793 year, to the best of your recollection? A. I say, approximately, either October or November.

Q. Now, on that night you say you had another talk with the defendant Weiss? A. Yes, sir.

Q. And after that talk you went some place to follow him there? A. Yes, sir.

Q. You went up to Rubin's house to watch? A. Yes, sir.

Q. And you stood there until about what time? A. Until the evening.

Q. Approximately what time? A. 4:30—5:00
7794 o'clock.

Q. Then you say Rubin returned? A. Yes, sir.

Q. Then that night you went there? A. To a saloon on Grand and Lewis Streets.

Q. You are sure it is Lewis Street? A. No, sir.

Q. You only think it is? A. Yes, sir, that is right.

Q. At that time would you say you saw just the defendant Weiss and had a consultation? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Now, isn't it your testimony that at that

time Weiss said to you, according to you, "Go back to Brooklyn and see Harry Strauss and he will give you further instructions"? Is that what you testified to on direct that he said? A. Yes, sir.

Q. Now, then, you say you went to Brooklyn? A. Yes, sir.

Q. What time was it that you got to Brooklyn, what time of night? A. After nine.

Q. Can you fix it any more definitely than after nine, how much after nine? A. Roughly, 7796
I say between nine and ten.

Q. At that time you say you saw the defendant Capone, Strauss and Reles on the corner, is that right? A. Correct.

Q. You talked to Strauss— Question withdrawn.

Q. Didn't you direct your conversation to Strauss at that time? A. It was a free-for-all conversation.

Q. Didn't you say on your direct examination that Strauss said, "What happened up there?" A. Yes, sir. 7797

Q. Is that what happened when you got there? Did Strauss say that? A. Yes, sir.

Q. Didn't you say that after Strauss asked you, "What happened up there?", you explained to him? Wasn't that your testimony on direct examination? A. Yes, sir.

Q. And after you had explained to him, Strauss then said something to you, is that correct? A. Yes, sir.

Q. What did Strauss say to you after you had explained to him what you had done that day;

7798 what did Strauss say? A. He said, "Go back there again tomorrow."

Q. Is that all he said? A. No, sir.

Q. I am asking you what did Strauss say in that conversation to you after you had told him what had happened. A. "Go back there tomorrow morning and watch Rubin, tail him, who is he with, how he walks, how he goes over to the subway, how he gets off the subway, and on what side of the street he walks, and so forth."

7799 Q. Did you say anything after Strauss said that to you, to Strauss, did you say, "All right, I will"? A. Well, it is understood that it is all right.

Mr. Rosenthal: I ask that the answer be stricken out, "It is understood," as not responsive.

Q. (The Court) Do you recall whether you said anything or not?

7800 Mr. Rosenthal: I move to strike out the last answer as not responsive.

The Court: Strike it out.

A. I must have shook my head.

Q. (The Court) Do you have any recollection one way or the other? A. Off-hand, no, your Honor.

Q. How long were you there all told at that particular meeting? A. A little while.

Q. What does that mean, a few minutes? A. A half an hour or so.

Q. Well, did you leave immediately after Strauss had told you to go up and watch his

habits, et cetera, as you related? A. After a half an hour or so, yes, sir.

Q. You stood around after he had finished his conversation with you? A. We were speaking for about a half an hour or so and then I left.

Q. Now, did anybody else speak except Strauss? A. Yes, sir.

Q. Who else spoke? A. Capone spoke.

Q. When did he speak? A. In that conversation there.

Q. After the conversation— 7802

Mr. Turkus: I object. He has already testified—

Mr. Rosenthal: Now I except—

Mr. Turkus: You except to what?

Mr. Rosenthal: He is starting in again with an explanation of what he is said to have said, so that when I ask the question the witness will know.

Mr. Turkus: I object to this question as already answered.

The Court: Objection sustained. 7803

Mr. Rosenthal: Exception.

Q. Didn't you testify on your direct examination that after the conversation was all over and when you were going away, that then Capone said something? Did you say that in words or substance in your conversation?

Mr. Turkus: I object. That is not the testimony. I refer your Honor to page 2346 of the record.

The Court: I remember it. Objection sustained.

7804 *Seymour Magcon—For People—Cross*

Mr. Rosenthal: I respectfully except to the Court's ruling.

Q. Now, you were directed, according to you, by Weiss to get instructions from Strauss, weren't you?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

7805 Mr. Rosenthal: Exception.

Q. Was anything, other than what you testified to on your direct examination, said by Capone at any time during that conversation; yes or no?

Mr. Turkus: I object to the form of the question. He has not brought out what Capone said.

Mr. Rosenthal: Other than what he testified to on direct examination.

Mr. Turkus: Why omit it? I object.

7806 The Court: That implies he has got to remember what he said yesterday on direct, and if your memory is so good why do you have to have a daily copy of the minutes?

Mr. Rosenthal: I except to that remark. I except to the Court's observation. If the Court desires me to answer, I will answer that very clearly.

The Court: The objection is sustained.

Mr. Rosenthal: I respectfully except. With the Court's observation, I have no further questions. At this time I move

for the withdrawal of a juror and the declaration of a mistrial.

The Court: On what ground?

Mr. Rosenthal: Upon the ground that the action of the Court toward defense counsel and upon the observations of this Court throughout this trial as to the testimony of various witnesses and what the import of their testimony is throughout the trial, being an invasion of the jury's province. 7808

The Court: Gentlemen of the jury, disregard that. These are just tactics trying to set the jury against the Court, thereby lessening the authority of the Court with the jury—giving the Court instructions.

Mr. Rosenthal: I except to that observation.

The Court: The motion is denied.

Defense Counsel: All except.

Re-direct examination by Mr. Turkus: 7809

Q. Both counsel for Capone and Weiss asked you about a fight you had with a policeman, do you remember that? A. Yes, sir.

Q. At the time you had the fight with the policeman, was the police officer in uniform? A. No, sir.

The Court: Why palliate it?

Mr. Turkus: I don't have to palliate it, but I don't want something that is improper on the record.

The Court: Do you draw a distinction

as to whether the policeman is in uniform or not?

Mr. Turkus: Will your Honor permit me to ask the question? I am not trying to put this man in any light other than what he is. There is just one point I wish to straighten out.

Q. Was it in a gambling joint where this happened? A. Yes, sir.

7811 Q. Was the cop there as a patron at the time?

Mr. Rosenthal: I object to his trying the case on a collateral issue.

The Court: Objection sustained.

Mr. Turkus: Well, forget that.

Q. Now, will you come down to the social contact you had—Mr. Rosenthal, counsel for the defendant said—

Mr. Rosenthal: I object to the observation of "We will come down to," and,
7812 "What Mr. Rosenthal did," as not a proper part of a question.

Mr. Turkus: I have not finished the question.

Q. He asked you about the social contact you had with Buggsy Goldstein, Pittsburg Phil Strauss and Reles; do you recall that? A. Yes, sir.

Q. He also asked you whether or not you knew that Capone was married; do you remember that? A. Yes, sir.

Q. Did you have any social contact with Capone?

Mr. Rosenthal: I objected and the Court sustained the objection at the time I tried to get that in. I object to it as not proper re-direct.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Q. What were some of the social contacts you had with Capone? 7814

Mr. Rosenthal: I object.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I was at his wedding.

Q. Did you ever go to any party at his home?

A. Yes, sir.

Mr. Rosenthal: I object to that as leading and suggestive.

The Court: Objection sustained. 7815

Q. Besides attending his wedding did you have any other social contacts with Capone?

Mr. Rosenthal: Objected to.

The Court: Objection sustained.

Q. Will you relate all the social contacts with Capone that you can recall?

Mr. Rosenthal: I object.

The Court: No, that is quite apart from the case.

7816 *Seymour Magoon—For People—Redirect*

Mr. Turkus: I take it your Honor has precluded me from going any further on that subject.

The Court: You have opened a field that has nothing to do with the issue.

Q. There is one final question. I do not wish to embarrass you, but do you have an impediment in your speech? A. Yes, sir.

7817 Mr. Barshay: I move to strike out this man's testimony on the ground it is not binding on the defendant Buchalter; on the further ground that any act this man did subsequent to the commission of this crime on September 11, 1936, is binding only upon himself and not upon the defendant Buchalter. And I move to strike out anything he said, together with others, after that date, on the ground it is not binding on Buchalter.

The Court: Denied at this time for the reason heretofore stated on similar motions.

7818

Mr. Barshay: Exception.

Mr. Turkus: I cannot possibly conclude the People's case today.

The Court: You can go ahead until closing hour.

Mr. Turkus: I would just as soon take a recess now, I am tired.

The Court: I read five hundred pages of the record last night and I have spent from two to two and a half hours in addition in conference, together with my court work.

Mr. Barshay: I do not want to draw any parallel between the work of the Court and the District Attorney.

The Court: The Court is willing to work.

Mr. Turkus: We have fifteen minutes left, all right.

ALBERT E. AMAN, residing at 2171 Eastwood Avenue, Chicago, Illinois, called as a witness on behalf of the People, after being duly sworn, testified as follows: 7820

Mr. Rosenthal: Before the testimony, so I will not have to interrupt, I am objecting as far as the defendant Capone is concerned, if it so develops, on the ground it is not binding upon him.

The Court: I haven't the least idea what it is about.

Mr. Rosenthal: I do not want to get up and object, if your Honor will permit me to reserve my objections to the close of the testimony. 7821

The Court: That is the best time to make it.

Mr. Rosenthal: Then I might be accused of being dilatory, so I am making this motion.

Direct examination by Mr. Turkus:

Q. Did you state your residence as being in Chicago, Illinois? A. I did.

7822 *Albert E. Aman—For People—Direct*

Q. Are you employed by the United States Government? A. I am.

Q. How many years have you been in the employ of the United States Government? A. In all, about eleven and a half years.

Q. In your eleven and a half years of employment with the United States Government, have you been attached to specific bureaus or agencies? A. I have.

Q. Has that been two in number? A. Yes,
7823 sir.

Q. Now, on April 6, 1941, in what city in the United States were you? A. Kansas City, Missouri.

Q. On April 6, 1941, did you see any defendant you now see in the court room? A. I did.

Q. Which one? A. The second man in the first row.

Mr. Turkus: Indicating the defendant Weiss?

The Witness: That is right.

7824 By the Court:

Q. Are you on the F.B.I.? A. No, sir, United States Bureau of Narcotics.

Mr. Turkus: May we take a recess now, your Honor?

Mr. Talley: I object to a recess being taken at this time. Let us have the evidence of this witness.

The Court: Go ahead with the case.

By Mr. Turkus:

Q. Where did you find the defendant Weiss?

Mr. Barshay: With respect to Buchalter, may I have one objection so I will not interrupt, as the testimony not being binding upon him.

The Court: Overruled.

Mr. Barshay: Exception.

7826

A. In an automobile.

Q. Where did you find him in an automobile, can you give the specific location?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. In front of a street address, 3752 Highland Street, Kansas City, Missouri.

Q. Now, at the time you found him in this automobile, who was he with? A. He was with his wife and another lady. 7827

Q. What was the name of the other lady? A. Fay Dilly (name spelled by Mr. Turkus).

Q. Did you, when Weiss was in the automobile, ask him his name? A. I did not.

Mr. Barshay: Is it understood I have a general objection to this line of inquiry?

The Court: Yes.

Q. Did you and Weiss go to the office in Kansas City? A. We did.

7828 *Albert E. Aman—For People—Direct*

Q. In the office did you ask Weiss what his name was?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. He said it was Weiss, he identified him.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not ask him his name.

7829 Q. Was his name asked of him by someone in your presence? A. It was.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Who asked the defendant Weiss what his name was? A. Joseph Bell.

Q. Now, when Mr. Bell asked the defendant Mendy Weiss for his name, what did Mendy Weiss say his name was?

7830

Mr. Talley: The same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. James W. Bell.

Q. Is the Mr. Bell, who asked Mr. Mendy Weiss, for his name the district supervisor, Joseph Bell? A. Yes, sir.

Q. Now, in the office, Mr. Aman, did you inspect any of the belongings of the person of the defendant Mendy Weiss? A. I did.

Q. What did you take from his person?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Has this anything to do with the case?

Mr. Talley: Nothing whatever to do with this case.

Mr. Turkus: This is on the point of flight.

The Court: You mean having something on his person having a bearing on the question of flight? 7832

Mr. Turkus: Yes. Flight, disguise in identity, which is highly important.

The Court: Objection overruled.

Mr. Talley: I object to the statement of the District Attorney and I take an exception to it.

Mr. Turkus: The Judge asked me a question and I must give my answer, and then counsel for the defense takes objection to it.

Mr. Talley: Yes, I object, and I move for the withdrawal of a juror and a declaration of a mistrial because of the improper statement made by the District Attorney. 7833

The Court: Motion denied.

Mr. Talley: Exception.

A. I took all the papers and personal effects he had in his pocket.

Q. Did all those effects he had in his pocket, on his person, included papers and money? A. Yes, sir.

Q. Can you at this time remember approxi-

7834 *Albert E. Aman—For People—Direct*

mately the amount of money he had in his pocket?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. About $134 in currency.

Q. When you removed the papers and the
7835 currency from the pocket of the person of this defendant, Mendy Weiss, did you initial each and every one of them, those documents and papers you found? A. All, but the currency.

Q. Have you with you, with the exception of the currency, all of the papers and purported documents you found on the person of the defendant Mendy Weiss? A. I have.

Mr. Turkus: Will you hand me Item E?

The Witness: May I ask the Court a question, please?

7836 The Court: Yes.

The Witness: The papers that I have with me, I might have to use in litigation.

Mr. Turkus: I think I understand what the witness has in mind.

The Court: You want to take them back, you don't want to leave them here? You don't have to leave them here.

Q. Have you photostats of them? A. Yes, sir.

Q. You can produce the originals in court? A. Yes, sir.

Q. They can be exhibited to the Court and

the jury and you can leave the photostats in their place? A. Yes, sir.

Mr. Turkus: That will be the procedure I will adopt, with the Court's permission.

The Court: All right.

Mr. Turkus: May I have the original Item E?

(Paper handed to District Attorney by witness.)

Mr. Turkus: Since this is an original, 7838
I will not mark it, but I hand you a card and ask you if that is one of the items you found on the person of the defendant Mendy Weiss.

Mr. Talley: It calls for a yes or no answer.

The Witness: Yes.

Q. Did you question Mendy Weiss in reference to that card?

Mr. Talley: I object. I might as well state my objection further. 7839

The Court: Yes.

Mr. Talley: The offer in evidence of these papers is suggested by the District Attorney. I object to their introduction or to the introduction of any papers, or to the giving of any testimony with respect to them, upon the ground that this was an illegal seizure and search of this witness, of the defendant Weiss, and that it nowhere appears as yet that this witness had any authority to make that search that resulted in the taking of these papers.

7840 *Albert E. Aman—For People—Cross*
(Preliminary)

The Court: You mean it was an illegal arrest?

Mr. Talley: And on the further ground it is incompetent, immaterial and irrelevant.

The Court: You mean it was an unlawful arrest?

Mr. Talley: I say it was an unlawful search, and I do not know upon what
7841 authority the arrest, if it was an arrest, was made. May I examine preliminarily this witness?

The Court: You may.

By Mr. Talley:

Q. Did you have a search warrant when you searched and removed from the defendant Weiss the papers you speak of? A. I did not.

Mr. Talley: I press my objection.

Mr. Turkus: That does not go far
7842 enough.

The Court: It does not go far enough because if the arrest was a legal one the search was entirely incident to the arrest.

Mr. Talley: I will proceed further, then.

By Mr. Talley:

Q. Did you have a warrant for the arrest of Emanuel Weiss? A. I did not.

Mr. Talley: That seems to end that situation, if your Honor please.

The Court: The trouble is I don't know just what the Federal statute is in relation to arrest without warrant.

Mr. Talley: You know what the Federal statute is which prohibits any illegal search or seizure of anybody, and that would include this defendant.

The Court: That sounds more like an argument to the jury than an argument to the Judge. I know what the statute is in this State. There could be an arrest 7844
without a warrant if a felony had been committed, if the defendant had committed it. There could also be an arrest without a warrant, if I recall correctly, if there was reasonable ground to believe a felony had been committed by a person.

Mr. Talley: This is not a police officer. This is an officer of a bureau, a bureau of investigation, a bureau of Federal investigation.

The Court: That makes no difference.

Mr. Talley: Without a warrant he had 7845
no authority to make an arrest or a seizure.

The Court: You mean he has no authority to make arrests?

Mr. Talley: Without a warrant, he had no authority to make either an arrest or the seizure of papers.

The Court: You had better develop that, Mr. Turkus.

Mr. Turkus: Under authority, what is the difference how the District Attorney gets this, in the State of New York it is admissible, but I steered away from ar-

7846

rest because I did not want anything mentioned here about me introducing possibly some other matter that would be the cause for another motion for a mistrial.

Mr. Talley: I object to that statement as highly prejudicial.

The Court: Years ago there used to be arrests by public officers in places of business and the seizure of books and papers. Books and papers thus seized were used
7847 as a basis for investigation of the fraudulent use of the mails. A lot of people went to Atlanta upon conviction. But finally the Federal Court held— I don't know whether it went to the highest court, but it certainly went to the Circuit Court of Appeals—that papers so seized without a search warrant and without reasonable grounds for arrest—without legal grounds to make an arrest, to which the searching of a person might be incidental—must be suppressed upon trial as an illegal act—
7848 I will let you think it over until Monday morning because the legal point I will have to look into.

(At this point a recess was taken. The jury was admonished in the following language:)

The Court: Please do not discuss the case nor let anybody talk to you about it. Keep your minds open. Remember all the other admonitions and follow them. The defendants are remanded.

(Adjournment taken to November 17, 1941, at 10:00 A. M.)

Colloquy 7849

Brooklyn, N. Y., November 17, 1941.

TRIAL RESUMED

Mr. Turkus: On Saturday, at time of recess, there was a law point raised by Judge Talley.

The Court: Have the authorities been run down?

Mr. Talley: I have not checked the authorities since the Defour case; I know 7850
of no change since that.

The Court: Have counsel for the defendants run down authorities since the Defour case?

Mr. Talley: There are none.

The Court: I checked up on the statute. There appear to be none. In the Defour case it seems to be clear that the basis of the decision and the ground of distinction between the Defour and the Weeks case is that the State Court procedure does not come under any provi- 7851
sions of the Federal Constitution. The point I was conjecturing about on Saturday, which had relation to this witness being a Federal agent, and that possibly bringing his conduct, even in State Court procedure, under the authority of the Weeks case, seems to be lacking in value. Apparently, this evidence, if competent, may be taken regardless of the conditions under which the seizure was made, and the objection is overruled on that ground.

but I must see the paper that was offered in evidence to judge as to competency.

Mr. Turkus: I don't think we got to the point of offer. Judge Talley raised his objection when I asked this question.

The Court: I thought you offered the card.

Mr. Turkus: It was just preliminary to the offer.

Mr. Talley: Let me note an exception
7853 to your Honor's ruling before you go any further. I note my exception, and I object on the further ground that the testimony is incompetent.

The Court: I will look at the paper after it is offered.

Mr. Turkus: Agent Aman has the original paper.

ALBERT E. AMAN, a witness in behalf of
7854 the People, resumed the stand and testified further as follows:

Direct examination by Mr. Turkus (continued):

Q. The question was, did you question Mendy Weiss in reference to the card? I am waiting for a yes or no answer to that. That is in reference to Item E.

Mr. Talley: That is objected to. That question is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

The Court: Has that exhibit been marked for identification?

Mr. Turkus: No, your Honor. There is a question now pending which has not been answered.

(Pending question read to the witness.)

A. Yes, sir.

Q. What did you ask Mendy Weiss in reference to that card? 7856

Mr. Barshay: Will your Honor give me the same objection I have had heretofore, and I will not interrupt Mr. Turkus?

The Court: Yes.

Mr. Talley: I object on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I showed him the card and I asked him what it was. He said, "That is my driver's card from Colorado." 7857

Mr. Turkus: I offer that driver's card in evidence. I ask that the original be checked and this photostatic copy be substituted and marked in evidence for the purpose of this trial. The photostatic copy thereof which was procured by the agent.

The Court: Show both the original and the photostat to counsel for the defense.

Mr. Talley: I object to it as incompetent, immaterial and irrelevant.

7858 *Albert E. Aman—For People—Direct*

Q. With respect to the photostat, Agent Amen, did you have this card, the Colorado State license, photostated? A. I did.

Q. Is it an identical photostat of the original? A. It is.

Mr. Talley: My objection is pending, I take it.

Mr. Turkus: May the record first note that the original exhibit and the photo-
7859 stat have been handed to counsel for Mendy Weiss, for inspection?

The Court: Is that a true photostat?

Mr. Talley: I have no objection to the photostat being substituted for the original, but I object to the being offered in evidence.

The Court: Objection overruled.

(Received and marked People's Exhibit 42.)

Mr. Talley: Exception.

7860 Mr. Turkus: May I read People's Exhibit 42 in evidence to the jury? The original item.

The Court: You cannot pass papers around which have not been marked. You may pass around the photostat.

Mr. Turkus: May I read the original?

The Court: Read the photostat. Counsel said there is no question about it.

Mr. Turkus: (Reading) "Operator's License. State of Colorado. No. A 9 6138.

"Always carry this license with you.

"Glasses:" marked "No."

"Name in Full: James William Bell.
"Street and No.: 204 South 7th Street
"City or P. O.: Rocky Ford, Colo.
"Age: 34. Sex: M. Weight: 215. Height: 6'. "Color of Hair: Brown. Color of Eyes: Grey.
"Date of Issue: June 6, 1940. Renew license between Jan. 1 and July 1, 1943.
"Restriction, if any: None.
"Previous License No.: None.
"Date of Birth: Apr. 10, 1906. 7862
"Signature: James W. Bell"
And it says underneath signature: "Above described person is hereby licensed to operate a motor vehicle in accordance with the provisions of Section 7, Chapter 164, S. L. 1935."

Signed "George E. Saunder,
"Secretary of State."

By Mr. Turkus:

Q. On the reverse side of this original exhibit, 7863 Agent Aman, there appear to be the initials "A.E.A. 4/6/41," the initials "J. B. 4/6/41." Are those the signatures of yourself and Supervisor Bell? A. They are.

Q. Were those initials placed upon the Colorado operator's license found in the possession of Mendy Weiss, at the time it was recovered from his person? A. They are.

Q. Before I continue with the other items in there: Had you seen Weiss on April 6, 1941, at any place other than where you found him in

the automobile at or near the premises 3752 Highland Street, Kansas City, Missouri? A. I did not see Weiss before I saw his car.

Q. Had you seen his car earlier on April 6, 1941? A. I did.

Q. What time did you see it? A. At about 12:30 A. M., April 6th.

Q. Where did you see his car at that time?

Mr. Talley: Objected to as incompetent,
7865 immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Directly across the street from the premises known as 3543 Olive Street, Kansas City, Missouri.

Q. Did you watch outside of that address and keep the car of Mendy Weiss under observation? A. I did.

Q. How long did you wait before you saw him? A. Until 20 minutes to 4 on April 6, 1941.

7866 Q. At 20 minutes to 4 in the morning, did you see Weiss emerge from any premises? A. I saw a group of people emerge from 3543 Olive Street and they got into various automobiles. I then saw Weiss and two women get into a Ford automobile bearing Missouri license 493 931—1941 license.

Q. Did you tail that automobile, as the expression goes? In other words, did you continue to follow it? A. I did.

Q. Did you follow it to the premises 3752 Highland Street? A. I did.

Q. Now, at that time did you have knowledge of the existence of a warrant for the arrest of Mendy Weiss? A. I did.

Q. Was it at or about or near the premises 3752 Highland Street, Kansas City, Missouri, that you took the defendant Weiss into custody? A. It was.

Q. Was it from there you took him over to an office, without describing the nature of the office, in Kansas City? A. I did.

Q. Was it in that office in Kansas City where you recovered the various documents, purported documents, and initialed them as you have stated before recess on Saturday? A. I did. 7868

Q. Will you describe what was the appearance of the defendant Mendy Weiss at that time? A. At that time Mendy Weiss was dressed in a greyish suit, no vest; he had a moustache and wore glasses.

Q. And, in describing that appearance, was that his appearance at the time you took him into custody? A. It was.

Q. In the office in Kansas City did the District Supervisor, Joseph Bell, ask him his name? A. He did.

Q. Was it at that time he said his name was James W. Bell? A. He did. 7869

Q. During the examination of these various documents and purported documents, did District Supervisor Bell say anything to Mendy Weiss with reference to his name? A. He said, "Mendy"—

Mr. Talley: I ask that it be answered yes or no.

A. Yes.

Q. What did he say?

7870

Mr. Talley: I object to that as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He said, "Mendy, why don't you cut out the kidding? We know you are Mendy Weiss."

Q. Did Mendy Weiss make any response? A. He said, "All right, I am Mendy Weiss."

Q. Was that conversation after the examina-

7871 tion of all those documents and purported documents that were found on his person, or during the course of it, if you can recall? A. It was right after I had taken these documents from his person, but I had not examined them as yet.

Q. At the time you took him into custody, did you know his true identity? A. I did.

Q. Have you the originals there? A. I gave you all of the originals in a brown envelope.

Q. Now, in addition to June 6, 1940, the Colorado license with the name of James W. Bell, did you find this (indicating) in the possession

7872 of Mendy Weiss? A. I did.

Q. Did you initial it in his presence? A. I did.

Q. And mark the date on it? A. Yes, sir.

Q. Was it initialed by District Supervisor Bell, and the date marked on it? A. It was.

Q. Was the defendant Mendy Weiss questioned with reference thereto? A. He was.

Q. What was he asked, and by whom?

Mr. Talley: I object to that on the same ground as I stated in the beginning, that was a Constitutional ground, which I take it will apply to all of this type of

evidence or testimony sought to be introduced, without the necessity of my objecting on that ground each time. May I so consider your Honor's understanding?

The Court: Yes. I shall hold throughout that the provisions of the Federal Constitution was in accordance with the opinion of the Court of Appeals in the Defour case, as written by Judge Cardozo.

Mr. Talley: I note my exception to all rulings along that line, without feeling it 7874
incumbent upon me to make the same objection as each one of these documents may be produced. In this case I object on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: I take an exception, together with the grounds as stated.

The Court: Yes.

Q. Will you answer, please? A. I asked him how he happened to have this bank book or check 7875
book. He said, "I have money in the bank."

I said, "How did you happen to have it under the name of James W. Bell?" He said, "I wanted to get a book with a gold name on the outside."

I said, "How did you know such a book could be procured?" He said, "I was taken to the bank and found out about it."

Mr. Turkus: I offer in evidence the check book in the name of James W. Bell, together with the stubs and the checks

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therein contained, and ask that the original be deemed marked in evidence, and that there be accepted in lieu thereof in this case a true and accurate photostatic copy thereof.

Mr. Talley: I make the same objection already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

7877 Q. Before I pursue my offer, I will ask you this: Did you endeavor to take a photostatic copy of that book—that is, the leather back with the name "James W. Bell" in gold letters on it? A. Yes, sir.

Q. Would it come out? A. It did not.

Q. With reference to the photostat you did take, did you take a photostatic copy of the first check? A. I did.

Q. No. 17? A. That is right.

Q. And the other checks, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 15, are they identical in print-
7878 ing matter with that 17? A. They are.

Q. Now, Check No. 15, which is a part of it, has a lot of figures written on it. Do you know anything about those figures? A. I do not, only that they were there when I took the check book.

Q. With respect to a portion of the exhibit that contains the stubs, did you take a photostatic copy of the portion under which the stubs appear? A. Yes, sir.

Q. Did you photostat the stubs too? A. No, sir.

Mr. Turkus: In lieu of the original book with a series of checks and stubs, I

offer photostat of the first check and a photostat of the first sheet of the stubs. I will show them to counsel for the defendant Mendy Weiss for examination and inspection.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, together with the first ground stated.

The Court: Objection overruled.

Mr. Talley: Exception.

Mr. Turkus: I ask they be marked as 7880
one exhibit.

(Received — two sheets — and marked People's Exhibit 43.)

Mr. Turkus: May I read that exhibit to the jury?

The Court: Yes.

Mr. Turkus: This is People's Exhibit 23, and consists of two pieces. The first is a photostatic copy of a check, the first check in a series of checks. It reads: 7881
"James W. Bell"—printed on—"420 West 46 St. Terrace, Kansas City, Missouri." Check "No. 17.

"Kansas City, Kans. 194—
"Pay to the order of"—blank—
—blank — "Dollars"
"Security National Bank,
"18-92 Kansas City, Kans."

The other portion of the exhibit is that which was found on the stub register, reading:

"Check Register No."—blank—

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"This register contains the records of checks numbered from"—blank—"to"—blank—"and dated from"—blank—"to"—blank—and over, the signature of the agent, "A.E.A., 4/6/41," and "J. B., 4/16/41."

The Court: So that the jury will know what otherwise might be confusing, there is a part of Kansas City in Kansas and part of it in Missouri?

7883 The Witness: Yes, sir.

By the Court:

Q. Is Kansas City located at the junction of the Missouri and the Kaw? A. Yes, sir.

Q. That is the dividing line? A. No, sir, there is an imaginary line also.

Q. What is that? A. It runs southward on a street known as "State Line," from the intersection of the Kaw River and the Missouri River.

Q. That is what I mean, where the Armour plant is? A. Yes, sir.

7884

By Mr. Turkus:

Q. How far is Kansas City, Missouri, from the Federal Prison at Leavenworth? A. Approximately 35 miles, not over that.

Q. I show you a book and ask you if this is one of the papers you found in the possession of Mendy Weiss under the circumstances related to the jury. A. It is.

Q. At the time of this seizure did you initial it "A.E.A." and put the date "4/6/41" on it

in the presence of the defendant Mendy Weiss? A. I did.

Q. The photostat which I now hand you, is that a true photostat of the face of that book? A. It is.

Mr. Turkus: I offer in evidence the original bank book and ask that it be deemed marked in evidence, and for the purposes of the trial a photostat of the face of it be accepted in evidence in lieu 7886
of the original. And I offer both the photostat and the original book to counsel for the defendant Mendy Weiss for inspection and examination.

Mr. Talley: Same objection.

The Court: Same ruling.

Mr. Talley: Exception.

(Received and marked People's Exhibit 44.)

Mr. Turkus: This is a bank book— 7887
People's Exhibit 44—of the Security National Bank, Kansas City, Kansas, in the name of James W. Bell; deposits, October 1, 1940, $1,000.

Q. Did you ask the defendant, Mendy Weiss, if that was his bank account? A. I did.

Q. Did he say it was his? A. Yes.

Q. Under the name of James W. Bell? A. Yes, sir.

Q. Did he tell you that was the name he was using?

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Mr. Talley: Objected to as leading.
The Court: Objection sustained.

Q. What name did the defendant Mendy Weiss say he was using? A. James W. Bell.

Mr. Talley: Objected to as leading.
The Court: Objection overruled.
Mr. Talley: Exception.

7889 Q. I hand you another card and ask you if that is another paper or card recovered from the possession of Mendy Weiss under the circumstances you have related to this jury. A. It is.

Q. Is that the original card recovered from his possession? A. One of a number.

Q. Does that contain your initials and date, and initials and date put on by Supervisor Bell? A. Yes, sir.

Q. Was that done in the presence of the defendant Mendy Weiss? A. It was.

Q. Was the defendant Mendy Weiss questioned with reference to that card? A. Yes, sir.

7890 Q. What was he asked and what did he say?

Mr. Talley: I object to that on the grounds already stated.
The Court: Let me see the card.
Objection overruled.
Mr. Talley: Exception.

A. I asked him how he happened to have this card, and if there was such a corporation. He said yes. I said, who were the other partners? "Well," he said, "I stuck $500 in there with a fellow named Walter Rainey and a fellow named

Beck." I said, "Is the mine doing business?" He said, "I don't know anything about the mine. You know how it is when you are on the lam, you have to have something to cover yourself up. All I wanted was vice-president or some other office in the corporation."

Mr. Turkus: The original card is offered in evidence. I ask the Court that it be received in evidence and marked, and a true and accurate photostat substituted as the actual exhibit. 7892

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

(Received and marked People's Exhibit 45.)

Q. Do I pronounce that correctly? Is that Chihuahua—that is the way it is spelled—"Chihuahua Tungsten Mining & Development, Black Hawk, Colorado. James W. Bell, Vice President." 7893

I hand you another card and ask you if this is one of the original cards you secured from the person and possession of the defendant Mendy Weiss under the circumstances already related to the jury. A. It is.

Q. Now, at the time you secured the original card on his person and under the circumstances related, did you have a talk with Mendy Weiss in reference thereto? A. I did.

Q. Will you relate to the Court and jury what

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you asked Mendy Weiss in regard thereto and what he responded?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Let me see the card.

(Handed to the Court.)

The Court: Objection overruled.

Mr. Talley: Exception.

7895 A. The card is a Social Security Card, No. 5141906.

Mr. Talley: I object. The card speaks for itself.

Q. Yes. You told us what you asked him about that card. What did he tell you? A. I asked him if he was working. He said, "No, I am not working." He said, "I never work." I said, "Where did you get this Social Security card from?" He said, "Anybody can go over and get one of those things."

7896 Q. Did you go over to the place of issuance of the Social Security card and find out if that was correct, that anybody can walk in and get a Social Security card?

Mr. Talley: Objected to as incompetent, immaterial, and hearsay.

The Court: Objection sustained.

Q. Is this a photostat of the front and back of the Social Security card concerning which you have just testified? A. It is.

Mr. Turkus: Without repetition at all times in connection with the original and photostat, the photostat copy is offered in place of the original exhibit.

Mr. Talley: No objection to the photostat copy being offered in lieu of the original, but the exhibit is objected to on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception. 7898

(Received and marked People's Exhibit 46.)

Mr. Turkus: (Reading) "Social Security, Account No. 500-14-1906, has been established for James William Bell, 10/19/40; Worker's signature: J. W. Bell."

On the reverse side of the Social Security Account No. 500-14-1906, in red letters, "Worker's name: "James William Bell. Worker's home address: 420 West 46th Street, Ter., Kansas City, Missouri. Employer's name: (blank)." 7899

The exhibit bears the date "4/6/41," with the initials of the agent: "A.E.A,' and the supervisor, "J. B."

Q. Now, among other cards found in the possession of Mendy Weiss, was this certificate or purported certificate found in his possession? A. It was.

Mr. Turkus: I offer it in evidence.

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Mr. Talley: Objected to on the same grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Turkus: I hand counsel for the defendant Mendy Weiss a registration certificate and photostatic copy thereof for inspection and examination.

(Received and marked People's Exhibit
7901 47.)

Mr. Talley: I ask your Honor to rule. The objection is urged, and I am not sure whether your Honor ruled on it or not.

The Court: It was overruled.

Mr. Talley: Exception.

Mr. Turkus: With the Court's permission I will read Exhibit 47 to the jury:

"Registration Certificate.

"This is to certify that in accordance with the Selective Service Proclamation
7902 of the President of The United States, James William Bell—first name, middle name, last name—James William Bell.

"Number of Street or R. F. D. number—City or Town, County or State: 420 West 46th Street Terrace, Kansas City, Missouri, has been duly registered this 16th day of October, 1940." Signature of the registrar: "James H. Floyd, Registrar for the 18th Precinct, 7th Ward. City or County: Kansas City. State: Missouri." Signature on margin: "James William Bell." It says, "Registrant must

sign here." Underneath the registrar's signature is this endorsement: "Be alert, keep in touch with your Local Board; notify Local Board immediately of change of address. Carry this card with you at all times. D. S. S. Form 2."

On the reverse side: "Description of Registrant: Height, 6 ft. approx. Weight, approx. 215. Race, White. Eyes, grey. Hair, brown. Complexion, ruddy. Other obvious physical characteristics that will 7904
aid in identification: 6-inch scar, lower right leg. U. S. Government, 16, 17, 105." Initialed by agent: "A.E.A." and District Supervisor, "J. B." "Date, 4/6/41."

Q. Now, did you hold a conversation with the defendant Mendy Weiss in reference to that People's Exhibit 47, the registration—the Selective Service registration card? A. I did.

Q. What did you ask him about this Selective Service registration card, People's Exhibit 47? 7905

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, no part of the issue.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I asked him if he registered from that address, 420 West 46th St. Terrace, Kansas City, Missouri, and he said "No." I asked him how old he was and he said, "Thirty-four." I asked him if he registered anywhere in the country, and he said "No."

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Q. When he told you that did you ask him how he got this card, People's Exhibit 47 in evidence?

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. I did.

Q. What did he say? A. He said, "I just got
7907 it."

Q. Did he give you any further information than, "I just got it"? A. No, sir.

Q. Did you go to the Selective Service Board appearing on the face of People's Exhibit 47 in evidence, namely, the board of James H. Floyd, Registrar, 18th Precinct, 7th Ward, Kansas City, Missouri, and make an investigation there? A. I did.

Q. Did you examine the records of that Selective Service Board?

7908 Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did.

Mr. Turkus: In order that we may save time, when the Judge overrules an objection, you may answer it; if he sustains it, you may not.
The Witness: Very well.
Mr. Talley: He is an experienced witness; he does not need that instruction;

he knows how to answer. He knows how to conduct himself on the witness stand.

Mr. Turkus: And in investigations, too. Do you desire me to withdraw the instructions?

Mr. Talley: Not at all. I desire you to proceed with your examination.

Mr. Turkus: Will you resume your seat?

Mr. Talley: I will as soon as you put your question and I make my objection. 7910

Q. In pursuance to that investigation did you find the registration of James W. Bell, 420 West 46th St. Terrace, Kansas City?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: The witness has not shown that he knew how to examine the records or knew what particular books to look into. It will have to be shown.

Mr. Talley: It seems to me that the records themselves would be the best and only competent evidence, if he is going to disclose what is in the record. 7911

The Court: They are out of jurisdiction. Parol is admissible providing you qualify the witness, because the alleged record is out of jurisdiction.

Q. How many years have you been with the United States Government as an agent? A. About eleven and a half.

7912 *Albert E. Aman—For People—Direct*

Q. How many years have you been with them since your first assignment? A. Eight years.

Q. What bureau were you in? A. The Department of Justice and the Treasury Department.

Q. What were your duties in the Department of Justice and the Treasury Department?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

7913

A. Investigator.

The Court: The question is specifically what he knows about investigation of records of this particular kind.

Q. For the other three and a half years of your Government service with what bureau or agency have you been connected?

Mr. Talley: I object. That in no way indicates he is qualified to examine these

7914 records.

The Court: Objection overruled.

Mr. Talley: Exception.

A. The United States Treasury Department, Bureau of Narcotics.

Q. In the 11½ years you have been with the Government employ, have you done investigating? A. I have.

Q. And in pursuance of that and in the course of your duties, have you had occasion to check records? A. Yes, sir.

Q. What kind of records have you checked in the eleven and a half years of service?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. It would cover a very extensive latitude checking the records of banks, checking the records of boiler factories, the records of banks, 7916
the records of savings institutions.

Q. Have you checked records of the United States Government? A. I have.

Q. Have you checked records in connection with United States Selective Service registration? A. Not until this.

Q. Was that your first experience? A. Yes, sir.

Q. Did you check these records thoroughly?

Mr. Talley: I object; calling for a conclusion and characterization.

7917

The Court: Where did you go to see these records and what records did you see?

The Witness: I went to the local draft board in the community of 420 West 46th Street, Terrace, Kansas City, Missouri.

Q. Was it in the neighborhood embraced in that address? A. Yes, sir.

Q. In what that address was embraced? A. Yes, sir.

Q. What particular book or file did you look into? A. The clerk, Miss Booker, in my pres-

ence, for a period of about one hour and a half, examined them.

Mr. Talley: I object and move to strike it out.

The Court: Objection overruled.

Mr. Talley: It is not responsive to the question. I except.

By the Court:

7919

Q. Did you yourself check? A. I ran along all the records with her.

Q. You mean that you looked along with her to see what she was looking at? A. Yes, sir.

Q. Throughout that search? A. Yes, sir.

Q. What part of the file or books did you look at? A. There was an index file of cards, filing cards with street address.

Q. Are those in the selective draft? A. Yes, sir.

Q. Or the selective registration? A. Selective registration.

7920

Q. Did you cover the entire gamut? A. Yes, your Honor.

By Mr. Turkus:

Q. What did a search, investigation and inspection of these records of the selective service records reveal?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. That there was no registration of James W. Bell, 420 West 46th Street Terrace, Kansas City, Missouri; and that there was no other James W. Bell registered.

Q. Now, you stated you kept that automobile with a certain license number under observation, and that was the automobile in which you found the defendant Mendy Weiss, in company with two women, is that correct? A. Yes, sir.

Q. Do you recall what that license number was? A. It was Mo. 493931. It was a 1941 7922 license.

Q. (The Court) That was a Ford? A. Yes, your Honor.

Q. I show you a receipt and ask you if that is another one of the instruments found in the possession of Mendy Weiss under the circumstances already related by you to this Court and jury. A. It is.

Q. Was that initialed in the presence of the defendant Mendy Weiss by you and District Supervisor Bell? A. It was.

Q. This photostat I now hand you— Is that 7923 a true and accurate photostat of that exhibit? A. It is.

Mr. Turkus: That exhibit is offered in evidence.

Q. (The Court) What did you say that license was? A. 493931.

Mr. Talley: I make the same objection to the offer as I made to the previous offer.

7924 *Albert E. Aman—For People—Direct*

The Court: Same ruling.
Mr. Talley: Exception.

(Received and marked People's Exhibit 48.)

Mr. Turkus: May I read this exhibit to the jury?
The Court: Yes.
Mr. Turkus (Reading) "Motor Vehicle
7925 License Receipt. Kansas City, Missouri. Number 35629. 1941 Tag No. 54236. Date—It has '194' and a blank. Received of Rose Bell. Address, 3752 Highland. Amount, $500. Vehicle, Ford. Body, Sedan. Engine No. 18-58476. Horsepower, 30. Important—To transfer or replace remove license from windshield and present with this receipt. This license expires January 4, 1942. Paid, January 2nd, $5. January 25, 1941, check, $5."

7926 Q. (The Court) What is that, Tag No. 54236? A. 1941, 54236.

Mr. Turkus: (Reading) "This is a receipt only for amount certified above. H. J. Gorman, City Treasurer. Personal checks accepted subject to final payment."

By the Court:

Q. Is that an automobile license? A. It is a city tag, a city vehicle tag.
Q. Is that a city vehicle tax? A. Yes, sir.

Q. What does "tag" mean? A. They get a little tag with a number corresponding to that.

Q. That is not supposed to be a State tax? A. No, sir.

Q. A State automobile license number? A. That is just a city.

By Mr. Turkus:

Q. Did you question the defendant Mendy Weiss about this motor vehicle license receipt, 7928
People's Exhibit 48, in evidence? A. I did not.

Q. Who were the two women you found with him? A. His wife, Mrs. Bell, and Fay Dilley.

Q. When you say his wife, Mrs. Bell, was that the name she had? A. No, sir.

Q. What name did she have? A. She gave the name of Rose Bell.

Q. This Mrs. Dilley, is that the woman who lived at that address on Highland—3754 Highland Street—did she live there? A. The same woman.

Q. Now, on this operator's license of Colorado, 7929
issued on June 6th, to James William Bell, People's Exhibit 42, in evidence, did you go to the premises 204 South 7th Street, Rocky Ford? A. Yes, sir.

Q. Did you conduct an investigation of those premises? A. Yes, sir.

Q. And did you ascertained who lived at those premises? A. I did.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and it is hearsay.

The Court: It calls for a conclusion.

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Q. All right, what did your examination disclose?

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

Q. Did you ascertain who owned this apartment, or who leased it, 204 South 7th Street, Rocky Ford, Colorado, in pursuance of your
7931 investigation and the examination you made?

Mr. Talley: I make the same objection.
The Court: The same ruling.

Q. Did you have a conversation with the defendant Mezady Weiss in reference to 204 South 7th Street, Rocky Ford, Colorado?

Mr. Talley: I object to it as incompetent, immaterial and irrelevant; not binding on any matter connected with this indictment.
7932 The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not have any conversation with the defendant about that particular address.

Q. Did you, in reference to any other address?

Mr. Talley: I object on the same ground.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did, as far as 420 West 46th Street Terrace, Kansas City, Missouri, was concerned.

Q. What was discussed in reference thereto? A. I asked him if he lived there.

Mr. Talley: I make the same objection on the same ground.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. And what did he say? A. He said "Yes". 7934

Q. Did he tell you how long he had been living there under the name of James W. Bell? A. No, sir, he did not.

Q. Well, now, I cannot go into the investigation you conducted in Colorado, but I will ask you if you found on the person of Mendy Weiss this prescription (indicating). A. I did.

Q. I hand you a photostat and ask you if that is a true photostat of the prescription. A. It is.

Q. Did you have a conversation with Mendy Weiss in reference to that prescription? A. I did. 7935

Q. What did you ask him about it and what did he say?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the further ground advocated with respect to all this line of testimony.

The Court: Let me see it.

Mr. Talley: The paper itself is not in evidence and cannot be inquired into.

The Court: There is nothing prejudicial; it is not a narcotic.

7936 *Albert E. Aman—For People—Direct*

Mr. Turkus: There is no contention it is.

Mr. Talley: It should not be admitted, it has not bearing on this case.

The Court: Show it to Judge Talley.

Mr. Talley: It has a bearing—

Mr. Turkus: The Court just said in substance it has not.

The Court: It has a certain name on it. I said it was not prejudicial. It is not a
7937 narcotic prescription. It is a prescription for an ordinary cold.

Mr. Talley: It is objected to on the ground it is incompetent, immaterial and irrelevant, and having no bearing upon the issue in this case.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. The first thing is the conversation. A. I asked him what the prescription was for. He said that while he was in Colorado during the
7938 summer of 1940 he fell off a horse and dislocated his arm.

Mr. Turkus: The prescription is offered in evidence—as a photostatic copy.

Mr. Talley: I ask that it be stricken out. I object to the offer of the prescription on the grounds already stated, sir.

The Court: Objection overruled.

Mr. Talley: Exception.

(Received and marked People's Exhibit 49.)

Mr. Turkus: With the Court's permission, I am reading People's Exhibit 49 to the jury. It is a prescription blank of "Dr. Geo. Wm. Bancroft.

"Physician and Surgeon

219. Ferguson Building.

Telephone Main 2259.

Hours: 11 A. M. to 12:30 P. M.

3 to 5 P. M.

Residence 314 West Del Norte.

Main 2871. 7940

For J. Bell.

R/"

Prescription written in Latin.

Mr. Talley: Read it all.

The Court: Read it all.

Mr. Turkus: I don't know how to read it.

Mr. Talley: Why stop at the important part?

Mr. Turkus: All right, you read it. I have not got the preliminary education and training you have had. I cannot read it. 7941

The Court: It is aspirin, phenacetin and codeine, and stated in medical language:

"Acetyl sal. acid ..... .195

Acetphenetidin 065

Codeina sulph 0325

Take XII caps.

— One — 4 hrs. when having pain.

G. W. B., M.D."

Mr. Turkus: On the back of the exhibit is "Johnson English Drug Company, 134 North Tejon, Colorado Springs."

7942 *Albert E. Aman—For People—Direct*

Q. Did the defendant Mendy Weiss make any statement about being in a hospital in Colorado Springs, Colorado, Rocky Ford?

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Exception.

A. He did.

Q. And what did he tell you? A. He said he
7943 fell off a horse, dislocated his arm, and had to go to the hospital.

Q. Saint Francis was it?

Mr. Talley: See how leading that is, if your Honor pleases? Objected to as leading.
The Court: Sustained.

Q. What hospital? A. He went to the Saint Francis Hospital, Colorado Springs, Colorado.

Q. Is this the duplicate original hospital record which I now hand you?

7944

Mr. Talley: That is objected to as being incompetent, irrelevant and immaterial, not the way to prove it.
The Court: Sustained.

A. It is.

Mr. Talley: I move to strike out the answer.
The Court: Strike it out.

Q. What is that paper?

Mr. Talley: Objected to upon the same ground.

The Court: He is not qualified to state.

Q. Agent Aman, did you go to Saint Francis Hospital? A. I did.

Q. You went there personally, did you? A. I did.

Q. In Colorado Springs, Colorado, right? A. I did.

Q. Did you there, in collaboration with an employee of the hospital make an inspection of the hospital records? 7946

Mr. Talley: I object to it as incompetent, irrelevant and immaterial, no bearing on the issues here.

The Court: Overruled.

Mr. Talley: Exception.

A. I did.

Q. Did you procure this paper which is now before you on the desk, at the Saint Francis Hospital? 7947

Mr. Talley: Object to it as incompetent, irrelevant and immaterial. It does not make any difference where he got it.

The Court: He can say yes or no.

A. Yes.

Q. Did the hospital maintain records?

Mr. Talley: Objected to as incompetent. The witness is not qualified to tell that.

7948 The Court: He can say if he saw records.

Q. Did you see any records there?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. I did.

7949 Q. And did you examine the records there? A. I did.

Q. Is the record which is before you on the rail there a duplicate original record of the Saint Francis Hospital?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, not the proper way to prove records of a hospital.
The Court: He can say whether or not he compared it with the original.

Q. Did you compare it with the original? A.
7950 I did.

Q. Tell the Court and jury how you came into possession of that paper?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. Sister Salina, in charge of the records of the St. Francis Hospital, Colorado Springs, Colorado, procured the original records and said that she could not let those go out of the hos-

pital. In my presence she typed from the original record this record and I stood and watched the comparison.

Q. Is that paper which is before you a true and accurate copy of the hospital records and a duplicate original thereof?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception. 7952

A. It is.

Mr. Turkus: It is offered in evidence.

Mr. Talley: Same objection to it as I urged to the other questions. I take an exception.

The Court: The only authority under which any hospital record can possibly be admitted by way of certified copy would be the Civil Practice Act applying to public records. I can not see its applicability to records of a hospital in another 7953 State, particularly when not a public but a private institution. Sustained.

Mr. Turkus: I ask that the hospital record be marked for identification.

(Paper photostat marked People's Exhibit Z-20 for identification.)

Mr. Talley: I move to strike out the testimony given by this witness with respect to these records.

The Court: Denied.

Mr. Talley: Exception.

7954 Q. In the conversation that you had with Mendy Weiss in which he said he fell off a horse, did he say how long he was in a hospital?

Mr. Talley: Objected to as immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. He did not.

Q. After you secured these hospital records, did you have any further conversation with him
7955 or was he out of your jurisdiction? A. He was out of my jurisdiction.

Q. I hand you a yellow sheet of paper and ask you if that is another one of the papers found in the possession of the defendant Mendy Weiss under the circumstances already disclosed to the jury? A. It is not.

Q. Was that one found by you on investigation? A. Yes, sir.

Q. Under what circumstances did you procure that paper?

7956 Mr. Talley: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. The motor number of the Ford automobile in which Mendy Weiss was riding the night that we apprehended him is 185847—

The Court: Not the contents.

Q. Not the contents of the paper, but tell us under what circumstances you secured it? A. I was going to do that.

Q. Continue. A. The motor number was 185-847630 and in checking with the Ford Motor people we learned that the car was sold by the—

Mr. Talley: I move to strike it out.
The Court: Strike it out.
Mr. Talley: Direct the jury—
The Court: The jury will disregard it.

Q. As the result of investigation that you made in connection with the registration of that automobile in which you found and apprehended Mendy Weiss, did you go some place? A. I did. 7958
Q. Where was the place you went? What was the name of it and the address?

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Immaterial and irrelevant, having nothing to do with the issues here; merely an endeavor by indirection to bring out testimony that the District Attorney knows or should know has no part in this case. 7959
The Court: He can say whether or not he personally examined the motor number and compared it with the motor number as stated on the tag.
Mr. Turkus: There is a pending question first.
The Court: Did you?
The Witness: I did not.
The Court: He cannot state any hearsay.

7960 *Albert E. Arnan—For People—Direct*

Mr. Turkus: I am not going to put in hearsay evidence. There is a pending question that has not been answered.

(Question read.)

Mr. Talley: That is objected to.

The Court: Overruled.

A. It is the Harry Grossman Ford Agency, Englewood, Colorado.

Q. Did that place maintain records? A. They

7961 did.

Q. Did you examine the records of that agency? A. I did.

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

Q. Did you examine the records with reference to a sale of a Ford V-8 Model 01A, Del. Fordor mtr. #18-5, 847,630?

7962

Mr. Talley: Same objection. We are trying a case of a theft of an automobile here.

The Court: Yes, it is sufficiently apparent that this will lead us into a corner where we will have to stop. No more of that.

Mr. Turkus: I am merely asking for a yes or no answer.

Mr. Talley: I object to the question.

The Court: Sustained.

Mr. Turkus: I ask that that paper concerning which we have been question-

ing the witness be marked for identification.

(Photostat marked People's Exhibit Z-21 for identification).

Q. This photostatic copy of an operator's license was not found in the possession of Mendy Weiss? A. No, sir.

Q. How was that procured? 7964

Mr. Cuff: Objected to.
The Court: Overruled.
Mr. Cuff: Exception.

A. State License Vehicle Bureau, State of Colorado.

Q. Did you personally go there? A. I did.

Q. Are the State records there kept in the usual conduct of the office? A. They are.

Q. Did you examine the records there in conjunction with an employee of the office? A. I did. 7965

Q. Did you see the original on file? A. I did.

Q. And was that photostat made in your presence? A. Yes, sir.

Q. Is that an exact duplicate of the original operator's license on file with the Bureau of Motor Vehicles, State of Colorado? A. It is.

By the Court:

Q. Did you personally compare it with the original? A. I did.

Q. Did you find it to be accurate in all respects? A. I did.

7966

Mr. Turkus: It is offered in evidence.

Mr. Talley: Objected to upon the ground it is incompetent, immaterial and irrelevant, not the way to prove a public document.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Turkus: I am offering another photostat in lieu of that photostat because that is the one that bears the initials of

7967

the agent.

Mr. Talley: If I did not object, if your Honor pleases, I object to it now on the grounds already stated.

The Court: Let me look at it. Overruled.

Mr. Talley: Exception.

(Photostat received and marked People's Exhibit 50 in evidence).

Mr. Turkus: (Reading) "State of

7968

Colorado, Application for Operator's License, County of Otero, No. A 9 6138. Glasses checked No.

"Name in full. James William Bell.

Street and number. 204 South 7th Street, Rocky Ford, Colorado.

Age, 40.

Checked male.

Weight, 215.

Height, 6 feet.

Color of hair, brown.

Color of eyes, grey.

Date of issue, June 6, 1940.

Renew license between January 1 and July 2, 1943.

Restrictions, if any. None.

Previous license number. None.

Date of birth. April 10, 1900.

Signature, James W. Bell."

"Affidavit of applicant. The above signed applicant states that the information given herein is true to the best of his knowledge.

Sworn and subscribed to before me this 7970
4th day of June, 1940.

Paul A. Osborne, Examiner."

"Read this first.

"This entire form must without exception be filled out according to the instructions below or license cannot be issued.

Use only black ink or typewriter ribbon in filling out this form.

Print or type everything except the signature.

Give full name. Do not use, Mr., Mrs., Miss, or other titles with name. 7971

"Give permanent residence, not merely P. O. Box number.

Answer all questions.

Sign the application with your regular signature."

"Answer all questions below.

"Has your driving privilege ever been suspended? No. Or revoked? No

Have you ever taken a driver's examination in this State for an operator's or chauffeur's license. In part—No. Or full examination. No.

Have you been licensed as operator? Where? None.

Have you ever been convicted of or forfeited bail for any violation of the State Motor Vehicle Laws? No.

Have you ever had an accident resulting in property damage, personal injury or fatality? No.

Have you ever been afflicted with epilepsy or other mental or physical disa-
7973 bility which might affect your operation of a motor vehicle? No.

How long have you known how to operate a motor vehicle? 18 years.

Do you understand highway warnings and direction signals? Yes.

Do you know that false statements herein will cause your license to be revoked? Yes."

"Physical condition.

"Eyes.

Color blind. No.

7974 Without glasses. Right, 20/30. Left, 20/40. Both, 20/25."

"Road signs.

"Number signs shown—10.

Grade on first test, 100.

P. A. O.
Examiner.

The applicant named herein has passed the examination on physical condition, written examination, and road signs.

Paul A. Osborn,
Examiner."

Q. I show you a driver's license card, and ask you if you found that on the person of Mendy Weiss? A. I did.

Q. I show you a photostat and ask you if it is a true photostatic copy of the said license? A. It is.

Mr. Turkus: The original license is offered in evidence in that it be deemed marked in evidence and receive in evidence the photostatic copy in lieu thereof. 7976

Mr. Talley: Objected to on the ground that it is incompetent, irrelevant and immaterial; upon the grounds already stated.

The Court: Overruled.

Mr. Talley: Exception.

(Photostat received and marked People's Exhibit 51 in evidence).

Mr. Turkus: With the Court's permission I am reading People's Exhibit 51 in evidence: 7977

"State of Missouri. Commissioner of Motor Vehicles, Missouri (and the seal of the State to the left).

Driver's License R License No. 1078237.

Name, James W. Bell.

Street and number, 420 West 46th Terrace.

City or P. O. K. C. Mo.

Is hereby licensed to operate a motor vehicle upon the public highways of this State. Expires two years from date.

7978 *Albert E. Aman—For People—Direct*

Age, 34. Race, W. Sex, M. Weight, 215. Height, 6 feet. Color of eyes, Gray. Color of hair, Brown. Date issued, Oct. 9, 1940.

Signature of licensee, James W. Bell.

Dwight H. Brown, Secretary of State. V. H. Stewart, Commissioner of Motor Vehicles."

Q. Did you speak to him about that particular
7979 license? A. I did not.

Q. That was among the papers and credentials, and purported credentials, found on his person, was it not?

Mr. Talley: Objected to, if your Honor pleases, calling for a conclusion; improper. I object to it as to form. It is already testified to.

The Court: Sustained on account of the word "credentials."

7980 Q. I show you this motor vehicle driver's license and ask you if that was found on the person of Mendy Weiss under the circumstances disclosed to the Court and jury? A. It was.

Q. Is this which I now hand you a true photostatic copy thereof?

Mr. Talley: Why don't you offer, Mr. District Attorney, the photostats you have without taking up the time asking if it is a photostat. I have stated no question would be raised as to the photostats being offered instead of the originals.

Mr. Turkus: All right, the photostatic copy is offered in evidence.

Mr. Talley: It is objected to upon the grounds already stated to similar documents that have been offered.

The Court: Let me see it.

Mr. Turkus: Better take the original.

The Court: The original is easier to read. Overruled.

Mr. Talley: Exception.

7982

(Photostat received and marked People's Exhibit 52 in evidence.)

Mr. Turkus: People's Exhibit 52 in evidence is the "motor vehicle driver's license, Kansas City, Mo. No. 153827 (in red type).

"Oct. 2, 1940.

"Name, James W. Bell.
Address, 420 West 46th Terrace.
Color eyes, gray.
Hair, brown. 7983
Sex, Male. Height, 6 ft. Weight, 215.
Signature of driver, James W. Bell.
Fee, fifty cents. Expires two years from above date.

James A. Taylor,
License Commissioner.

Keep this license in good condition."

Q. I hand you a photostatic copy and ask you under what circumstances you secured it? A.

7984 *Albert E. Aman—For People—Direct*

From the motor vehicle division, State of Colorado.

Q. Did you secure this photostatic copy which you have just seen at the Bureau of Motor Vehicles of the State of Colorado? A. I did.

Q. Is it a photostatic copy of an original record on file with that bureau?

Mr. Talley: I object to it, if your Honor pleases, incompetent, not the proper way--

7985 Mr. Turkus: It has not been offered yet. I have a right to inquire into the circumstances under which any paper was secured.

The Court: It makes no difference if it was given to him without a personal comparison with the original. It must be certified—

Mr. Turkus: I am going to prove that he did.

The Court: Please. (To reporter) How much have you got?

7986 (Remarks of the Court read.)

The Court: —and properly authenticated as required by law. Only if he himself compared it in all details with the original record seen by him and can swear tha he found it upon such comparison to be correct, is it admissible.

Mr. Turkus: May I proceed with my examination?

The Court: Your question does not call for that information.

Mr. Turkus: I withdraw it in that form.

Q. Were you there personally at the office of the Motor Vehicle Bureau of the State of Colorado? A. I was.

Q. Were the original records of that bureau brought out in your presence? A. They were.

Q. Did you see the original record personally? A. I did.

Q Did you make a comparison of this photostat with the original record? A. I did.

Q. Is it a true and accurate photostat of the original record to your own knowledge and from your own inspection and examination and comparison? A. It is. 7988

Mr. Turkus: It is offered in evidence.

Mr. Talley: I press my objection as incompetent.

The Court: Overruled.

Mr. Talley: Immaterial and irrelevant and not the proper way to prove a public document. Your Honor stated if the document itself is not produced a certified copy is the only proof—

The Court: This method of proving a public document which is without the jurisdiction of the State was followed before the statutes were enacted permitting certified copies to be admitted. This required no statute. It comes under the common law rules of evidence. 7989

Mr. Talley: Common law rules of evidence with respect to proof of evidence has been supplemented by the direct and specific statutory provision which tells how public documents may be introduced.

The Court: That is supplementary. Overruled.

Mr. Talley: Exception.

(Photostat received and marked People's Exhibit 53 in evidence.)

Mr. Turkus: (Reading) "State of Colorado. Application for a title for a motor vehicle.

7991 "State of Colorado, George E. Saunders, Secretary of State, Motor Vehicle Department, Certificate of Title Division, Denver, Colorado.
Sign here, Rose Bell.
Address, 204 So. 7th St.
I am the owner, or duly authorized agent of the owner of the described motor vehicle and make the following statements for the purpose of obtaining a certificate of title thereto; that said motor vehicle is subject to the chattel mortgage noted.

7992 State of Colorado, }
County of Otero. } ss:

being by me first duly sworn, on his oath states: That he is the duly authorized agent of the applicant above named; that the matters set forth in said application are true of his own knowledge.

Signature, Frank Hamer, County Clerk and Notary Public.

Albert E. Aman—For People—Direct 7993

Note: This application must first be completed by applicant. Not to be accepted until reverse side has been completed as required.

Make, Ford. Title No. A 8636.
Year, 1940. Model O 1 A. County, Otero.
Style, DeL 4 dr. Motor No. 18-5-847 630.
Weight, 2856.
List price, 785.00.
Date purchased, 7-9-40. Date first sold, 7-9-40. 7994
Name, Rose Bell.
Address, 204 S. 7th, Rocky Ford.
The said motor vehicle is subject to the following chattel mortgage.
Amount, None.
Where purchased, Denver.
From whom purchaser, E. M. Weinstein.
Previous title No. A-139807. County, Denver."

And reverse side: 7995

"Make, Ford.
Year, 1940.
Motor No. 185847630.
Inspected by, Jack Ellison."

And stamped on it July 11—one dollar fee.

Mr. Talley: July 11th, what year, 1940? I want you to add the year.

Mr. Turkus: I cannot add it if it is not there.

Mr. Talley: You just kept it back.

Mr. Turkus: You are not stating correctly for the record. Just a minute, you are going to have something on the record that is improper.

Mr. Talley: Read the date, cut out the talk and read the year.

Mr. Turkus: I cannot read it if it is not there. You read it yourself if you don't believe me. That is a fine accusation to make when you cannot even see it.

Mr. Talley: Try your case. Don't be so childish.

Mr. Turkus: When you get a little peeved you don't care what you say.

Mr. Talley: Oh, yes, I do. I am very careful what I say on all occasions. I am reading here the date 7-9-40. Date purchased was 7-9-40.

Mr. Turkus: I read that five minutes ago, if you were listening.

Mr. Talley: Where is the other date that you read? I cannot make out any year.

Mr. Turkus: Neither could I so we are in accord at last.

By Mr. Turkus:

Q. I hand you a piece of paper and ask you under what circumstances you secured that paper? A. On this one I wrote to the Secretary of State, Jefferson City, Missouri.

Q. So that you did not see that actually compared with the original? A. I did not.

Mr. Turkus: I merely ask that it be marked for identification.

(Marked People's Exhibit Z-22 for identification.)

Q. I hand you a photostatic copy of an instrument—I will hand you two of them and ask you how you secured them? A. Those I wrote to the Secretary of State, Jefferson City, Missouri.

8000

Q. You did not see them actually compared with the original? A. I did not.

Mr. Turkus: I ask that it be marked for identification. Which is the Government's exhibit, the black one or green one?

The Witness: The black one.

Mr. Turkus: I ask that this be marked for identification.

(Marked People's Exhibit Z-23 for identification.)

8001

Q. I show you a physician's prescription, and ask you where you secured it? A. From Emanuel Weiss on April 6, 1941.

Q. Is that one of the papers that was secured from his person under the circumstances you have testified to? A. It is.

Q. And is this a photostatic copy which I now hand you? A. It is.

Mr. Turkus: In lieu of offering the original the photostatic copy thereof is offered in evidence.

Mr. Talley: Objected to upon the grounds already stated to similar type of evidence.

The Court: Overruled.

Mr. Talley: Exception.

(Received and marked People's Exhibit 54 in evidence.)

8003 Mr. Turkus: With the Court's permission I shall now read People's Exhibit 54 in evidence, prescription of "George William Bancroft, M.D., Physician and Surgeon" with the same residence and same office address as I have read before, bearing the initials of the agent "A.E.A., A. E. Aman, and J.B., Joseph Bell, District Supervisors, 4/6/41."

"Rec'd of James Bell, 40.00, 9-23-40. Signed Geo. W. Bancroft, M.D.

The Phillips-Smith Drug Co., Prescription Specialists, 117 South Tejon Street."

8004 Q. I show you a receipt and ask you where you found that receipt or how you secured it? A. I secured that from Emanuel Weiss on April 6, 1941.

Q. Was that one of the papers on his person at the time that he was taken into custody? A. It was.

Mr. Turkus: The photostatic copy in lieu of the original is offered in evidence.

Mr. Talley: Let me see it, please. Objected to upon the grounds already stated;

upon the further ground it is incompetent, irrelevant and immaterial; is not the proper way to prove records of a hospital and that is what this is supposed to be.

Mr. Turkus: That is a paper taken from the possession of the defendant, not a hospital record.

Mr. Talley: It is objected to upon the grounds already stated.

The Court: Let me see it.

Mr. Turkus: That is a paper found on 8006
the person of the defendant under the circumstances described by the agent. That is a receipt, not a hospital record, a receipt which he secured under the name of James W. Bell.

The Court: Overruled.

Mr. Talley: Exception.

(Photostat received and marked People's Exhibit 55 in evidence.)

Mr. Turkus: This is a receipt of "St. 8007
Francis Hospital and Sanatorium, Sisters of St. Francis, Colorado Springs, 8-29-40.

"For services rendered James Bell" and across the face of it "Paid in full, L. Vandenberg, 8-29-40."

"Anesthetic fee, ether, 2.00

"8-29-40, X-ray, right elbow, 5.00. Fluorscope, 5.00

"Physiotherapy treatment, X-ray elbow, 5.00. 15.00 Total $17.00".

Having the initials of Agent Aman and Supervisor Bell of 4/6/41.

8008 *Albert E. Aman—For People—Direct*

The Court: May I see that again?

Mr. Turkus: I am going to renew the offer now. In view of the receipt in evidence of People's Exhibit 55, the receipt of the St. Francis Hospital and Sanatorium, Sisters of St. Francis, found on the person of James Bell, I offer in evidence the hospital records of St. Francis Hospital heretofore marked Exhibit Z-20 for identification.

8009 Mr. Talley: Same objection as already urged to it on its previous presentation and rejection by the Court.

The Court: Sustained.

Q. I show you another receipt and ask you under what circumstances you found it? A. I took it from Emanuel Weiss April 6, 1941.

Q. Same circumstances as all the other papers you testified to? A. Yes, sir.

Q. And is this a photostatic copy of the said receipt secured under those circumstances? A.

8010 It is.

Mr. Turkus: The photostatic copy, in lieu of the original, is offered in evidence.

Mr. Talley: Objected to upon the same grounds already indicated. I would like to look at the original or the photostat.

The Court: Overruled.

Mr. Talley: Exception. May I see it before it is marked in evidence?

The Court: Yes.

(Photostat received and marked People's Exhibit 56 in evidence.)

Mr. Turkus: With the Court's permission I will read People's Exhibit 56 to the jury. It is dated July 24, 1940. "Received of Rose Bell eleven and no/100 dollars, one year fire & theft & compr ins. 1940 Ford DeL Fordor Motor No. 18-5,630. Std. Finance Co. (meaning Standard Finance Company) by E. R. Dragoo. $11.00."

Q. I show you a card and ask you if you found that in the possession of Mendy Weiss under the same circumstances as pertaining to all the other papers found? A. I did. 8012

Q. And is this a true and accurate photostatic copy of that card? A. It is.

Q. Did you have a conversation with the defendant Mendy Weiss in regard to that card? A. I did.

Q. What did you ask him?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled. 8013

Mr. Talley: On all the grounds urged to the seizure of the papers in question. They would apply, if apply at all, to any conversations had by this Federal agent with the person from whom he seized the documents.

The Court: Overruled.

Mr. Talley: Exception.

A. I asked him if he owned a chicken farm and he said no and I said, "How do you happen to have this card with you?"

Mr. Talley: I object to any testimony with respect to any paper not in evidence.

The Court: Do you offer the paper?

Mr. Turkus: I will offer the paper.

Mr. Talley: Now I make the same objection to this paper as I made to the other papers taken under the circumstances.

Mr. Turkus: The conversation will make the paper admissible. I wanted to
8015 do it in the proper way but as long as the offer is forced upon me, I have no other recourse but offer at this time. The conversation will make it explainable and understandable.

Mr. Talley: It might be well if the District Attorney knew the proper way to discuss a paper is to put it in evidence.

Mr. Turkus: The proper way is first get the materiality of it.

Mr. Talley: That is your erroneous idea.

Mr. Turkus: I am very sorry, I am
8016 only a beginner.

The Court: Overruled.

Mr. Talley: Exception.

(Photostat received and marked People's Exhibit 57 in evidence.)

Mr. Turkus: This card says in type: "Frys" on the left side; on the right side "Broilers"; on the bottom it says "Eggs" on the left side; and on the right bottom "Hens". "Martin's indoor poultry farm. 77th and Blue Ridge, Fleming 1747."

Q. You got to the point where you related that you asked Mendy Weiss if he owned a chicken farm and he said he did not. A. That is right.

Q. When he said he did not own a farm, did you question him further in regard to this card, People's Exhibit 57?

Mr. Talley: Objected to, if your Honor pleases, upon the same grounds.

The Court: Overruled.

Mr. Talley: Exception. 8018

A. I asked him how he happened to have this card and he said, "Well, I go out there and buy chickens." He said, "I can call up and they will deliver them to me."

Q. Did he say that he had chickens delivered to his house?

Mr. Talley: I object to it, certainly immaterial, incompetent and irrelevant, not within any issues.

The Court: It may be relevant. I don't know. 8019

Mr. Turkus: I want to find out where the house was that these chickens were delivered to. Don't you understand, Judge Talley?

Mr. Talley: No, I don't understand. I certainly do not understand.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. He said sometimes he went there and, if

8020

he wanted to, he could call up and they would deliver chickens.

Q. Did you go out to this farm, Martin's indoor poultry farm at 77th and Blue Ridge?

Mr. Talley: That is objected to, what chicken farms the agent visited.

The Court: Overruled.

Mr. Talley: Exception.

8021

A. I did.

Q. Did you there see the owner Louis Martin? A. I did.

Q. Without revealing the conversation, did you have a talk with Louis Martin, the owner of the indoor poultry farm? A. I did.

Q. Where was that place located, near what city? A. Kansas City, Missouri.

Q. How far out of the city limits was it? A. I judge roughly about fifteen miles.

Q. Did you go somewhere with Louis Martin? A. I did.

Q. Where did you go with him?

8022

Mr. Talley: Objected to as immaterial, incompetent and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. 700 West 48th Street, Kansas City, Missouri.

Q. Did you conduct an investigation with respect to a particular apartment and, if so, give me merely the apartment number?

Mr. Talley: That is objected to as in-

competent, irrelevant and immaterial, not within any issues involved in this trial.

The Court: Overruled.

Mr. Talley: Exception.

A. Apartment 302.

Q. While you were in Kansas City, Missouri, did you see an individual known as Cuppie? A. I did.

Q. What is his right name?

8024

Mr. Talley: Objected to.

A. May I correct my answer? I did not.

Q. Did you see his picture? A. I did.

Mr. Talley: I object to that, if your Honor pleases.

The Court: Nothing to show he knows Cuppie's picture. Sustained.

Mr. Turkus: I had an incorrect note.

Mr. Talley: I move to strike out the testimony.

8025

The Court: Strike it out.

Mr. Turkus: I have not finished. Strike out the testimony.

Mr. Talley: The answer that has been given to your previous question on this point.

Q. At the time that you went to premises 700 West 48th Street, Kansas City, and, specifically, apartment 302, did you have pictures in your possession of certain individuals? A. I did.

Mr. Talley: I object to that, if your Honor pleases.

8026 *Albert E. Aman—For People—Direct*

The Court: Overruled.
Mr. Talley: Immaterial and irrelevant.
The Court: Overruled.
Mr. Talley: Exception.

A. I did.
Q. Did you have pictures of whom?

Mr. Talley: I object to that, entirely too far afield and speculative.
8027 The Court: That calls for a conclusion, hearsay, as to who the people were, unless he knew them personally.
Mr. Turkus: All right, I won't pursue it.

Q. Well, did you there interview—yes or no—Henry Horton, the janitor of 700 West 48th Street? A. Yes.

Mr. Talley: Objected to, if your Honor pleases.
The Court: Overruled.
8028 Mr. Talley: Exception.

Q. Did you conduct an investigation with reference to the occupants of apartment 700 West 48th Street, Kansas City, Missouri?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial, not within the issues here, and hearsay.
The Court: Overruled.
Mr. Talley: Exception.

A. I did.

Q. Will you describe that moustache that the defendant Mendy Weiss had at the time that he was placed in custody and apprehended?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. It was a reddish colored moustache on his upper lip, from one end of his mouth to the other. 8030

Q. Was it a big one or a hairline moustache? A. Hairline.

Q. At the time that Mendy Weiss was taken into custody in that automobile in front of those premises, did he say something to you and District Supervisor Bell? A. Not to my knowledge.

Q. Did he at any time have a conversation in which the word "cops" was used? A. Not until later.

Q. When was that? A. In an office.

Q. Was that in the office in which these exhibits that we have just put into evidence were secured? A. Yes, sir. 8031

Q. What did he say then?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, too remote.

The Court: Overruled.

Mr. Talley: Exception.

A. That was about two hours later.

The Court: What did he say?

8032 A. And he said that he had been picked up about fifteen times for various traffic violations in Kansas City, Missouri, and that each time he talked his way out.

Mr. Talley: I move to strike that out, if your Honor pleases. It seems to justify the objection I made. It is immaterial and irrelevant, being picked up for traffic violations. That puts us all in a bad spot.

8033 Mr. Turkus: This is James W. Bell talking himself out under that name, James W. Bell.

The Court: You have not hooked him up with the use of the word "Bell."

Mr. Turkus: You can only go one step at a time.

Q. Will you continue with the entire conversation?

Mr. Talley: I object to the entire conversation or any part of it.

8034 The Court: I will let it stand for the present, see if it is hooked up. Otherwise it is only interesting.

Q. Continue what he said about how he talked himself out of it?

Mr. Talley: I object to the form of the question and object to the question itself.

The Court: Overruled. Give the entire conversation.

Mr. Talley: Exception.

A. The conversation started—

Mr. Talley: I object to that, if your Honor pleases. If we are going to have the conversation, let us have it. What did he say?

The Court: Give the conversation.

Q. He said, "If I had known that you fellows were Government agents I would have ran for it and you would not have taken me so easy," and I said, "What do you mean by that?" He said, "I know damn well that if I had made a 8036
break and got into the gangway, that none of you Federal men would shoot and you would have had a hell of a time finding me from there on."

Mr. Talley: I move to strike it out, if your Honor pleases, as incompetent, highly prejudicial, having no bearing upon this case whatsoever one way or the other in the remotest respect. I move for the withdrawal of a juror and a mistrial because of that testimony. 8037

By the Court:

Q. Did you say "ran"? A. Yes, sir.
Q. You mean "run"? A. Run.
Q. Did you say "gangway"? A. Yes, sir.

The Court: Overruled. Denied.

Mr. Talley: Exception in both instances.

Q. What is the gangway? A. An areaway

8038 *Albert E. Aman--For People—Direct*

between houses in the city of Kansas City, Missouri.

Q. And are they laid out in that manner? A. Generally all through the city.

Q. And was there such a gangway or areaway in front of the premises in which you apprehended Mendy Weiss in that automobile? A. Yes, sir.

By the Court:

8039

Q. You don't mean areaway; you mean an alley? A. No, your Honor, the houses all have—ordinarily have a driveway on either side of the house and the garages are in the back of the lots.

The Court: In the East we call those alleyways or runways. Here when we speak of areaway we mean in front of a house, permitting a stairway to go down into the cellar. We understand you now.

8040 By Mr. Turkus:

Q. Did you have any conversation in the office in Kansas City in which the name "O'Dwyer" was mentioned by Mendy Weiss? A. Yes, sir.

Mr. Talley: Object to it as a leading question, if your Honor pleases. I move to strike out the answer.

The Court: Overruled.

Mr. Talley: Exception.

Q. What did Mendy Weiss say in connection with that name? A. We were talking about bringing him to New York—

Q. Don't disclose the reason, but just merely state the conversation in which "O'Dwyer" was mentioned. A. And he said, "I don't mind going back to New York except that I hate to sit between O'Dwyer and Dewey." That conversation was studded very heavily with profanity.

Mr. Talley: I move to strike out this gentleman's addition to the conversation. 8042

Mr. Turkus: That was not an addition; that was a subtraction.

Mr. Talley: I move to strike out the whole answer.

The Court: Denied.

Mr. Talley: Exception.

Q. In other words, you have left the profanity out? A. Yes, sir.

The Court: Do you want it, Judge Talley? 8043

Mr. Talley: I do not want profanity.

Q. We will continue on without it. A. Shall I continue with the conversation?

Q. Yes, that is right. A. And he further added that O'Dwyer had been in St. Louis, Missouri, trying to make a big-shot out of himself over he, Weiss.

Q. And was that also studded with profanity? A. The entire conversation.

Q. Did he further say something to you, in the

8044 *Albert E. Aman—For People—Direct*

presence of Supervisor Bell, in which O'Dwyer's name was again mentioned? A. I believe that is all the conversation that I recollect at this time.

Q. Did you take him to an aeroplane? A. I did.

Q. And was that aeroplane scheduled to go to New York? A. It was not.

Q. Who went with Weiss? A. It was not, not that aeroplane.

Q. Where was that aeroplane scheduled to
8045 go? A. Omaha, Nebraska.

Q. Who went with Weiss? A. District Supervisor Bell and Agent Westover.

Q. At the time that you brought him to the plane scheduled to go to Omaha, in company with District Supervisor Bell and Agent Westover, had Mendy Weiss been continually in your presence and sight? A. From the time of his being detained.

Q. Did you ever let him out of your sight once? A. I did not personally.

8046 Mr. Turkus: The witness is offered for cross-examination.

Mr. Climenko: If your Honor pleases, at this point, on behalf of the defendant Buchalter, I move to strike all of the testimony of this witness upon the ground that it is not competent against that defendant nor is it binding on him.

The Court: Denied.

Mr. Climenko: Exception.

The Court: For reasons heretofore stated on similar motions.

Mr. Rosenthal: My motion which I

make as to this witness is similar to the motions I have made throughout the trial as to the numerous witnesses who were called and who did not affect the defendant Capone, and I again renew the motion for the withdrawal of a juror on the grounds mentioned in my original motion for a severance throughout the trial.

The Court: Denied.

Mr. Rosenthal: I respectfully except.

Mr. Talley: Shall I commence? 8048

The Court: You have only three minutes to go, so you better rest up for the next hour. Everybody kindly remain seated.

Gentlemen of the jury, luncheon will be provided. We will resume promptly at 1:30. Please do not discuss the case. Let nobody talk to you about it. Keep your minds open.

The witness may go and return at 1:30.

The jury out of the other door.

Defendants are remanded. 8049

(Recess until 1:30).

8050 *Albert E. Aman—For People—Cross*

(Afternoon Session Trial Resumed.)

ALBERT E. AMAN, resumed the stand and further testified, as follows:

Cross examination by Mr. Talley (continued):

Q. You told us, I think, that the office to which this man was taken by you was the office of the supervisor of your district, is that right? A.
8051 I did not say that.

Q. The supervisor of the district in Kansas City? A. It is the office of the United States Bureau of Narcotics.

Q. The supervisor of that office? A. Yes, sir.

Q. Joseph Bell? A. Yes, sir.

Q. Did he take any part in the examination you made of the man who said his name was James W. Bell? A. I did.

Q. Did he? A. Yes, sir.

Q. Did he ask him questions? A. He asked him his name.

Q. Is that all he inquired about? A. He talked
8052 to him about coming back to New York.

The Court: Don't tell what he talked about; just say yes or no.

The Witness: Yes.

Q. And that was all? A. He may have asked other questions.

Q. You practically conducted the investigation and examination? A. Yes, sir.

Q. Alone? A. In his presence.

Q. And when you made the arrest, you de-

scribed about waiting and watching his car, were you alone then? A. No, sir.

Q. How many other agents were with you? A. There were four others.

Q. Did any of those four others ask any questions? A. They did not.

Q. You conducted the entire inquiry and investigation? A. Yes, sir.

Q. At the time you put him under arrest, I think you said you had no search warrant and you had no warrant for his arrest, didn't you? 8054
A. That is right.

Q. But you knew there was a warrant pending? A. Yes, sir.

Q. That was a warrant from the Federal Court, wasn't it, giving you jurisdiction? A. Yes, sir.

Q. Was that Federal Court in the Federal District of New York? A. I am not familiar with the judicial districts, but Brooklyn.

Q. Was the Eastern District of New York? A. I am not familiar with the judicial districts.

Q. Were you also advised there was a warrant 8055
in Texas for him? A. I was.

Q. You say you made the arrest and the search and seizure because of your knowledge that this warrant existed from the Federal Court of New York and the Federal Court of Texas, is that right? A. Yes, sir.

Q. Did you say anything to the defendant Weiss about taking him to Texas? A. Mr. Bell did.

Q. Mr. Bell offered him to take him either to Texas or to New York? A. Yes, sir.

8056

Q. And Weiss selected New York? A. Yes, sir.

Q. And in all that you have done in this connection you were working as a Federal agent, weren't you? A. Yes, sir.

Mr. Talley: I have no further questions.

Redirect examination by Mr. Turkus:

8057

Q. At the time you apprehended and made the arrest of the defendant, Emanuel Wendy Weiss, did you have knowledge of the existence of a warrant in this murder case?

Mr. Talley: I object to it.

The Court: Objection sustained.

Mr. Barshay: May I resume my motion at this time to strike out the testimony of the witness with respect to the defendant Buchalter, on the ground it is in no way binding upon him and has nothing

8058

to do with flight by the defendant Buchalter, nor is it in any wise whatever connected with him?

The Court: I make the same denial for the same reasons I have on all other similar motions. I will say to the jury again that the question of flight or hiding is applicable only in reference or in relation to the person who does it.

Joseph Bell—For People—Direct 8059

JOSEPH BELL, residing at 743 U. S. Court House, Kansas City, Missouri, called as a witness on behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Are you District Supervisor in the employ of the United States Government? A. I am.

Q. How long have you been attached to the 8060
United States Government? A. Approximately nineteen years.

Q. With what bureau or agency of the United States Government are you attached or connected with? A. The Bureau of Narcotics.

Q. Where are you District Supervisor? A. In Kansas City, Missouri.

Q. On April 6, 1941, did you see one of the defendants who is now in court? A. I did.

Q. Which one? A. Emanuel Weiss.

Mr. Barshay: Will your Honor give 8061
me one general objection to this man's testimony.

The Court: Yes, overruled.

Mr. Barshay: Exception.

Q. Where did you see him for the first time? A. Seated in an automobile in front of 3752 Highland Avenue, in the city of Kansas City, Missouri.

Q. At that time he was seated in the automobile were there others with him? A. There were.

Q. Who was with him? A. A woman who

8062 *Joseph Bell—For People—Direct*

said her name was Rose Bell and a woman named Fay Dilley.

Q. The woman who gave the name of Rose Bell, was she claimed to have any relationship by the defendant Weiss to himself? A. She said she was his wife.

Q. Do you see that woman in court? A. I do.

Q. Pick her out. A. I think it is in the second row there, the fourth woman from the aisle, to the right (indicating), with the black hat and
8063 the pin on her coat.

Q. The one with the large pin? A. Yes, sir.

Q. Will you stand up? A. Not that one- the one next to her, to her right.

Mr. Turkus (Addressing woman in court room): Will you stand up, please, and give your name to the stenographer?

Mr. Talley: I will give it to you. Mrs. Emanuel Weiss.

Mr. Turkus: The defendant Mendy Weiss' wife?

Mr. Talley: Yes.

8064

Q. Was there any other woman in this automobile? A. A woman named Fay Dilley.

Q. Is that (spelling) D-i-l-l-e-y? A. Yes, sir.

Q. Was the defendant Emanuel Weiss taken to an office in Kansas City? A. He was.

Q. At the time he was apprehended did you have knowledge of the existence of warrants against the defendant Mendy Weiss? A. I did.

Q. Where, in Kansas City, was he taken, to what office? A. Room 532 in the General Post-office Building, in my office.

Q. In your office did you ask him his name? A. I did.

Q. What name did he give you? A. Jim Bell.

Q. Were you present when Agent Aman examined certain papers and instruments found on the defendant Mendy Weiss' possession? A. I was.

Q. At any time during the course of the examination of these papers did you say anything to Weiss in reference to his true identity? A. As soon as I brought Weiss to this office I asked 8066
him his name, and he said, "Jim Bell," and I walked him over to the board and showed him his picture and asked him if he knew the individual in that picture, and he made no comment, and I said, "Well, cut out the fooling, Mendy, we know you are Mendy Weiss." He said, "Well, you've got me, I am Mendy Weiss."

Q. That picture you showed him, was that a picture of Mendy Weiss? A. Yes, sir.

Q. At the time you found and apprehended this defendant, Mendy Weiss, in this automobile in Kansas City, will you describe to the jury what his appearance was then? A. At that time 8067
he was wearing glasses and he had a mustache.

Q. Now, that picture of Mendy Weiss you exhibited to him, did that picture have glasses and a mustache? A. It did not.

Q. Were you present and did you talk to him, together with Agent Aman, initial all the papers and documents found in the possession of Mendy Weiss, and inscribe the date of the discovery thereof upon the same? A. Yes, sir.

Q. At any time did you have any conversation with the defendant Mendy Weiss in connection

8068 *Joseph Bell—For People—Direct*

with an individual known as Cuppie? A. No, sir, I did not.

Q. At some time during this conversation with the defendant Emanuel, alias Mendy Weiss, did you have any conversation in which the word "cops" was mentioned? A. Yes, sir.

Q. What did he say at that time?

Mr. Talley: I object. It is incompetent, immaterial and irrelevent.

8069 The Court: Objection overruled.

Mr. Talley: Exception.

A. He said at the time, "If I knew you were not cops, you would not have taken me so easy."

Q. When did he make that statement? A. Shortly after we brought him to the office.

Q. Was there a time in any conversation when he was apprised of the nature of the charge against him? A. Yes.

Q. At that time did Mendy Weiss make any response?

8070 Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

Mr. Turkus: I am referring specifically to a conversation in which the name of Judge O'Dwyer was mentioned.

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. At one time during the conversation it was said that he did not think I would believe him what he was telling me, what he was going to tell me, but he said he had intentions of sur-

rendering at a later date when O'Dwyer, in New York, would leave office.

Q. Did you accompany him to an aeroplane? A. I did.

Q. Did you go in the aeroplane with him? A. Yes, sir.

Q. Where did he go in that aeroplane with you? A. To New York City.

Q. Was there another agent with you? A. Yes.

Q. What was his name? A. H. V. West- 8072
over (?).

Q. Where did you, Supervisor Bell, and Westover, go with the defendant Mendy Weiss? A. When I got to New York, or when we left Kansas City?

Q. When you got to New York. A. There was some agents waiting for us at the airport and they took him into custody. I don't know where they went with him.

Cross examination by Mr. Talley:

Q. You were present when Weiss was 8073
searched? A. Yes, sir.

Q. He did not have a gun or any other kind of a weapon on him? A. No, sir, he had no gun.

Q. You say he said if he did not know you were cops you never would have taken him? A. That we would not have taken him so easy.

Q. Was anybody present with you when you showed him his picture which you say was on the wall? A. There were two or three other agents around; I don't know whether they were close enough to hear the conversation.

8074 Q. Agent Aman was with you in the room? A. Yes, sir.

Q. He was close enough to hear you, wasn't he?

Mr. Turkus: Objected to as a conclusion, as to what Aman heard.

Q. Well, can you say how far away he was at that particular time? A. At that particular time
8075 I showed Weiss that picture I think he and Weiss were half of the board away.

Q. What distance do you say Weiss was from you? A. I could not say at that time because the agents were busy moving around. I think he was in the vicinity there.

Q. But you say he was not within earshot?

Mr. Turkus: Objected to as incompetent and improper in form.

Q. How close was he to you? A. There were times when Aman was two or three feet away.

8076 Q. When you were showing him the picture on the wall, how close was Aman to you? A. He was close by in the room; I could not say exactly in feet or inches.

Q. Can you tell us whether two or three feet? A. He was more than three feet.

Q. Can you indicate by the rail of that jury box from where you sit how far he was away from you? A. Possibly at that particular time, as close as I can remember, would be about to the end of the jury box.

Q. The end of the jury row or the end of the jury box? A. The end of the jury box.

Q. Including the openings there? A. Yes, sir.

The Court: The far end or the near end?

The Witness: The far end.

Q. Is that picture you showed him in your room or in an adjoining room? A. That was in the large room.

Q. In the room in which the examination of him and his effects was made? A. No, sir. 8078

Q. It was not? A. No, sir.

Q. Was it the first room to which he was taken when he was brought in? A. Yes, sir.

Q. Did you take him first into the large room? A. Well, that is the main entrance to the office—the large room.

Q. Where was the picture that you say you showed him? A. In the large room.

Q. Was that amongst other pictures that were hanging in the large room? A. Yes, sir.

Q. That was a picture issued by the Federal authorities, wasn't it? A. Yes, sir, that is right.

Q. And had to do with some Federal offense 8079 with which whoever's picture was there related to? A. Yes, sir.

Q. Now, you proposed to Weiss that you would take him either to Texas or New York, didn't you? A. Yes, sir.

Q. It was he who designated New York as the place he wanted to be taken to? A. Yes, sir, eventually, yes, he said he would go back to New York.

Mr. Talley: I move to strike out "even-

8080

tually" as part of the answer as not responsive.

Mr. Turkus: I ask that it stand because it shows a discussion that extended over a period of time.

The Court: You can come back to it. He was stating an opinion. Strike it out.

Q. In addition to saying he would come back to New York, he waived extradition, didn't he?

8081 A. Yes, sir.

Q. That is, he did not require the authorities to go into court to extradite him from the State of Kansas to the State of New York, or Texas either? A. That is right.

By Mr. Turkus:

Q. How long was that conversation in which he finally stated he would go to New York City?

Mr. Talley: I object to the form of the question. The word "finally" is objec-

8082 tionable.

The Court: Leave out "finally".

Q. How long was it before he said he would come to New York? A. I would say around thirty-five or forty minutes.

By Mr. Talley:

Q. You were not talking to him for thirty-five or forty minutes on the question of whether he was going to New York or not, were you? A.

That was practically the substance of the conversation.

Q. All of it? A. Yes, sir, the most of it.

Q. Did you conduct the conversation with him? A. I did, and Mr. Aman.

Q. Who did most of the talking during those thirty-five or forty minutes, you or Aman? A. I would say we talked about equally; I could not say how many words each said.

Q. You think you asked twice as many questions as Mr. Aman did and got as many answers? 8084 A. I would say so.

Q. You did not turn the entire investigation over to Mr. Aman when Weiss was brought in? A. I did. I was in the office for about thirty-five or forty minutes and then I went home, and Mr. Aman talked with him for an hour or two afterwards.

Q. But in the thirty-five or forty minutes you say you were there, do you say that was taken up entirely with the question of whether Weiss would go to Texas or to New York? A. Not entirely, but I would say a good part of it, about ninety percent was. 8085

Q. Ninety percent? A. Yes, sir.

Q. Weren't you discussing the papers you had seized from his person? A. Yes, sir.

Q. That was in the thirty-five or forty minutes, wasn't it? A. The discussion of the papers taken from Weiss' person did not take up much of my time because he did not have much to say about it.

Q. He was asked questions about each one of them, wasn't he? A. Yes, sir.

Q. By you? A. No, sir, Mr. Aman did most of the questioning.

8086 *Joseph Bell—For People—Cross*

Q. But in your presence? A. Yes, sir.

Q. And that talk was the larger part of thirty-five or forty minutes during which you were there? A. I don't think that took more than fifteen or twenty minutes.

Q. How many papers did you take away from him in that session? A. I could not tell you the exact number.

Q. Probably twenty-five or thirty? A. I would say about twenty-five.

8087 Q. He was questioned about each one, wasn't he? A. Yes.

Q. In your presence? A. Yes, sir.

Q. Do you still say it did not take the larger part of the thirty-five or forty minutes in which you were engaged in the inquiry? A. I would say that, yes, sir.

Q. Now, after each paper was inquired into, you put your initials on each one, didn't you? A. I believe I initialed all of them.

Q. The papers that have been introduced here bear what Agent Aman said are your initials?

8088 A. Yes, sir.

Q. So you don't refute you took each one of these papers after being presented and put your initials on? A. I think I initialed all of them; I may not; I was in a hurry to go out; I had some other things to do.

Q. You did initial them during the thirty-five of forty minutes you were inquiring about that from Weiss, didn't you? A. No, sir, I initialed them after he was in another room; after we talked to him about the papers, yes, sir.

Q. The initialing was done during that thirty-five or forty minutes during which you were

present at the interview? A. After the discussion about the papers.

Q. How long after? A. About two or three minutes probably.

Q. In his presence or away from him? A. No, sir, it was not in his presence.

Q. Then you were only initialing them as papers that had been brought to your office and not as papers that had been identified by him, is that correct? A. No, sir, that is not correct.

Q. Despite the fact that all these papers which 8090
have been introduced in evidence, and there are a considerable number of them which were not introduced, all bear your initials, and you say that ninety percent of the time was occupied in discussing with Weiss whether he would go to Texas or New York?

Mr. Turkus: I object to the preamble.
The Court: Objection sustained.

Q. Is it your testimony that of the thirty-five or forty minutes during which you had Weiss in 8091
your office, in either room, that ninety percent of that thirty-five or forty minutes was taken up with the discussion of whether he would go to New York or to Texas?

The Court: The Court has just ruled on that. Do not repeat.

Mr. Talley: The objection was made as to the preamble of the question. This is a different question.

The Court: I sustained the objection.

Mr. Talley: Then your Honor does not

wish this to be pressed? There was no objection to it.

The Court: No.

Mr. Talley: I take exception.

Q. Do you now say, Mr. Bell, that thirty-five or forty minutes of the conversation you had with Weiss, in his presence, was taken up with discussion of whether he would go back to New York or to Texas? A. I don't say all of that;
8093 I said most of the discussion was in reference to going back to New York or Texas; I did not look at any clock.

Q. Did you say about ninety percent was taken up? A. I would say about eighty percent, probably eighty-five.

Q. That was really the first thing you started to discuss with him? A. No, sir, the first thing we talked about were the papers in his possession, and his identity, and so on and so forth.

Mr. Talley: I have no further questions.

8094 Mr. Barshay: I renew my motion to strike out this witness' testimony on the grounds heretofore set forth. May I ask your Honor to instruct the jury, referring to the testimony of this witness, in the same manner as you did with respect to the testimony of Mr. Aman?

The Court: The same ruling; the same instruction.

Mr. Rosenthal: May I make a similar motion to the one I made with respect to Agent Aman's testimony?

The Court: Yes. As to flight or hiding, neither Buchalter nor Capone can be

linked up unless it be shown that they were instrumental in it, under Section 2 of the Penal Law.

Mr. Rosenthal: I assume your Honor makes the same ruling as you did with respect to Agent Aman when I made the motion?

The Court: Yes.

Mr. Rosenthal: Then your Honor overrules the objection, and I take an exception. 8096

The Court: Yes.

JAMES C. RYAN, residing at 90 Church Street, Borough of Manhattan, City and State of New York, called as a witness on behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Are you employed by the United States Government? A. Yes. 8097

Q. In what bureau or agency? A. I am with the Federal Bureau of Narcotics, the Treasury Department.

Q. Where is your office? A. Number 90 Church Street, New York City.

Q. Did you see the defendant, Emanuel Mendy Weiss, some time during the month of April, 1941? A. Yes, sir.

Q. Where did you see him? A. I saw him on the night of April 5, 1941.

8098 *James C. Ryan—For People—Direct*

Q. Where did you see him for the first time? A. I saw him when he disembarked from a plane at La Guardia Field, at about 8:30 or so in the evening.

Q. At the time he got out of the plane at La Guardia Field, did he have a mustache on him then? A. I believe he did—I don't recall exactly; I believe he did.

Mr. Talley: I move to strike it out.

8099 Mr. Turkus: I have no objection.

The Court: Strike it out.

Q. Did you go some place with the defendant Mendy Weiss? A. He was turned over to me and I accompanied him to the Federal detention quarters, 11th and West Streets, New York.

Q. Did you bring him inside? A. Into the detention quarters, yes, sir.

Q. Did you see him remove certain possessions from his pocket? A. Yes, sir, I did.

Q. What did he remove? A. He was requested

8100 to surrender all his personal property before being admitted into the prison, and I saw him remove a diamond ring, I can recall, a buckle with a diamond signet on it, and about $2700.—$2713. in cash.

Q. $2713. in cash, do you remember the denomination of one specific bill?

Mr. Talley: I object. It is immaterial, incompetent and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I recall particularly there was a one thousand dollar bill and there were several one hundred dollar bills and other smaller bills, and about two dollars in change.

Q. That diamond studded— Was that a diamond studded belt buckle?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

8102

A. It was a star which was outlined in diamonds.

The Court: Is the purpose of this to connect up that one thousand dollar bill?

Mr. Turkus: No, to show the amount of money he had under the name of James W. Bell, to enable him to continue this flight; similarly, the disguise of the mustache; assuming the identity of James W. Bell, and all the papers under the name of Bell.

8103

Mr. Talley: I object. That is an improper statement from the District Attorney.

Mr. Turkus: So he could go away on flight.

Mr. Talley: I ask your Honor to instruct the jury to disregard it.

The Court: I am asking for this reason—the pass book showed that in October, 1940, there was one deposit of $1,000. The check book shows there were some withdrawals, and the check book apparently does not account for the expenses

8104

that he may have reasonably been put to. Now, you say when he was brought here he had $2,713. in cash, and he had jewelry in addition, diamonds, which could be changed into terms of currency. From your argument, you are preparing to show continued flight and hiding?

Mr. Turkus: Yes, and bearing in mind the further admissions he made to District Supervisor Bell as to what he would

8105 do when O'Dwyer went out of office, showing how long he intended to stay away on his flight.

The Court: The reason for my inquiry was that you mentioned a specific bill. I did not know whether you were making a particular note of that.

Mr. Turkus: No, sir, that is different money entirely.

The Court: The thousand dollar bill was part of the $2,713. in actual cash in his pocket?

8106 Mr. Turkus: Yes, sir, that is right.

The Court: The objection is overruled.

Mr. Talley: Exception.

Cross examination by Mr. Talley:

Q. You are not a diamond expert? A. No, sir.

Q. You don't know whether these stones and rings you described were diamonds or imitations? A. I was only guided by the defendant's own statement.

Q. You took his statement, of course, that they were diamond rings? A. Yes, sir.

Mr. Talley: No further questions.

Mr. Barshay: I move to strike out this witness' testimony on behalf of the defendant Buchalter, on the grounds heretofore stated with respect to the testimony of the other agents.

Mr. Rosenthal: I make the same motion as regards Mr. Ryan.

The Court: Same ruling.

Defense Counsel: Exception.

8108

By Mr. Talley:

Q. After you lodged Weiss in the Federal Detention Prison on West Street, Manhattan, did you accompany him anywhere the next morning? A. No, sir, I did not.

Q. Was he arraigned in any court, as far as you know? A. I believe he was. I cannot say of my own knowledge.

Mr. Talley: Then don't guess at it. Nothing further.

8109

Mr. Rosenthal: May I have the same motion as heretofore and exception?

The Court: Same ruling and exception.

8110 *Thomas J. Winne—For People—Direct*

THOMAS J. WINNE, residing at 2667 Morris Avenue, Borough of Bronx, City and State of New York, called as a witness on behalf of the People, after being duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. What is your business or occupation? A. A custodial officer.

8111 Q. Where are you employed? A. Federal Detention Headquarters.

Q. Is that in the employ of the United States Government? A. Yes, sir.

Q. How many years have you been in the employ of the United States Government? A. About three and a half years.

Q. How many years have you been at the Federal Detention Pen? A. One year and a half.

Q. On or about April 6, 1941, did you see the defendant Mendy Weiss in your institution? A. Yes, sir.

8112 Q. Were you there when he was admitted thereto? A. Yes, sir.

Q. Did you have a conversation with him there in reference to his personal belongings and valuables? A. I made him check them off out of his pocket.

Q. When you made him check them out of his pocket, what did you see?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, no bearing upon the issue we are here to try.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Several pieces of jewelry and some cash.

Q. Several pieces of jewelry, what were they? A. A watch, a ring, a belt buckle.

Q. What kind of a ring was it? A. A diamond ring.

Q. What kind of a belt buckle was it? A. It may have been a gold buckle with a stone in it.

Mr. Talley: I move to strike it out.

Mr. Turkus: Consented to.

8114

Q. Tell me whether or not the belt buckle, to your knowledge, was adorned or embellished by anything. A. It had a diamond in it and some kind of an emblem.

Q. Was the emblem made out by diamonds? A. That I would not know.

Q. Was Ryan present when this went on? A. Yes, sir.

Q. Ryan is the agent who just preceded you on the stand? A. Yes, sir.

Q. How much cash did you first see? A. I saw several bundles of cash.

8115

Q. Was the defendant Mendy Weiss taken through some kind of a machine? A. We do that, yes, sir.

Q. Is that what discloses the presence of metal? A. Weapons.

Q. When he was taken back from the machine did you see the amount of cash and where it came from? A. He checked the property.

Q. How much cash was there? A. Approximately $2700.

Q. Do you remember a specific bill, a large bill? A. There was one large bill, a thousand dollar bill.

8116 *Thomas J. Winne—For People—Cross*

Q. Did you see where the cash came from? A. No, sir.

Q. It came from his person, however? A. Yes, sir.

Cross examination by Mr. Talley:

Q. Is your name Westpaul? A. Wynne.

Q. You are a prison keeper over there in the Federal Detention Pen? A. Yes, sir.

8117 Q. Since April 6, 1941, have you been continuously employed in this Federal Detention Prison on West Street? A. Yes, sir.

Q. You know that the defendant Weiss has been kept there in custody since that time up to the present day, don't you? A. Yes, sir.

Mr. Barshay: I move to strike out this man's testimony on the grounds heretofore urged, not binding upon the defendant Buchalter.

The Court: The same ruling.

Mr. Barshay: Exception.

8118 Mr. Rosenthal: I renew my motion, your Honor. Will your Honor make the same ruling?

The Court: Yes.

Mr. Rosenthal: Exception.

Mr. Turkus: The People of the State of New York rest.

The Court: I will take the defense of the defendant Buchalter first. The defense will be taken up in the order in which the names appear on the indictment.

Mr. Rosenthal: There are motions to be made first, I understand.

The Court: The motions will be made in the same order.

Mr. Talley: I am not going to make a motion now. I want to call your Honor's attention to the fact, on behalf of the defendant Weiss, that certain D.D. four forms used by the Police Department were asked for. My understanding is that your Honor directed that they be produced. I would like before the People rest entirely to get a report as to whether we are to 8120 have them here.

The Court: I am trying to recall. Are they under subpoena?

Mr. Talley: Yes, sir.

Mr. Turkus: Your Honor had an extended discussion on the D.D. fours. At the time there was a hectic discussion in the absence of the jury. There was no ruling made, as Judge Talley said.

The Court: I am under the impression that from time to time during the trial—I am trying to recall—different counsel 8121 got a number of subpoenas duces tecum, and that those included the D.D. 4. Am I right?

Mr. Talley: You are right, Judge. I want them produced, so your Honor can examine them, if you will not turn them over to us. We would like you to examine them with regard to our contention that there are certain inconsistencies therein set forth with certain testimony given on the trial. If you find those inconsisten-

cies, I assume your Honor will regard it as your duty to turn them over to us.

The Court: Mr. Turkus, have you them?

Mr. Turkus: Yes (producing papers to Court).

May I say this— These are D.D. 4's and 5's in the Rosen case, marked People's Exhibit Z-19 for identification, which are handed to the Court for inspection.

8123 The Court: Isn't this part of the defendants' case, properly?

Mr. Turkus: It is.

Mr. Talley: It is for an examination of one of the People's witnesses, whom I want to recall if the information is in those forms, or any of them, which I expect will be there.

The Court: You mean what witness?

Mr. Talley: Mrs. Rosen is the witness.

The Court: Are these all D.D. 4's and D.D. 5's in the Rosen case, all of them?

8124 Mr. Turkus: Yes.

The Court: What particular point in the testimony of Mrs. Rosen are you seeking to contradict?

Mr. Talley: The description she gave of the defendant Weiss, the man whom she said fit Weiss's description, the man who was in the shop the night before the killing.

The Court: The first thing I pick up has no relation whatever. I cannot wade through all these papers. They will have to be sorted out and the particular D.D.

4's which have reference to the description given by Mrs. Rosen will have to be shown to the Court. I am not supposed to search to the bottom of a barrel to find a piece of china.

Mr. Talley: Will your Honor permit counsel for the defendants, or one of them, to go over the papers?

The Court: I am addressing Mr. Turkus. I am not going to search through this bunch of papers for a needle in a hay- 8126
stack. Mr. Turkus can hand me the proper paper in which the description given by Mrs. Rosen is stated.

Mr. Turkus: I will have to wade through them too.

The Court: Then I will take the defense, and check this up later. In the meantime I will instruct that Mr. Turkus, after hours, go through all these papers and find the description in the D.D. 4 given by Mrs. Rosen of the person who came in to buy the one cigarette and made 8127
a couple of trips—I think that is what she said.

Mr. Rosenthal: There was one other thing which your Honor directed the District Attorney to let you know this morning, as to whether or not, in respect to the witness Magoon, who claims he had been asked questions, given answers, and signed them—whether that statement exists in the District Attorney's office, and if so it was to be produced, and I was to be given an opportunity to further examine Mr. Magoon.

8128

Colloquy

Mr. Turkus: That was delegated to Assistant District Attorney Klein, who can respond.

Mr. Klein: I made a complete search and check-up of the statements made. I repeat that there is no such statement in the Rosen case.

The Court: The jury will be excused for the motions.

(The jury then left the court-room.)

8129 Mr. Turkus: Your Honor, now that the jury has left the room I want the record to show that during the voir dire examination of the jury, each and every juror, including both alternates, were apprised by counsel for the defendant Lepke of prior convictions of that defendant and his incarceration for a term of approximately 44 to 70 years in jail as a result thereof. The record should show that without the recourse of going through the entire voir dire examination of each and

8130 every juror.

The Court: That was discussed freely from the very start of the selection of the jury, and, as you said, in the questioning of talesman by the defense counsel.

Mr. Turkus: That is right. I want the record to properly reflect that.

Mr. Climenko: I will move to strike out first, before I make my motion.

Your Honor, on behalf of the defendant Buchalter, I move to strike from the record all of the testimony of the witness Maguire, on the ground that it is not bind-

ing on the defendant Buchalter by reason of the fact there is no proof that the witness Rubin was induced to flee the jurisdiction for fear that he might become a witness in this case.

The Court: We are up against a practical proposition here. In order to form any impression as to the manner in which details of testimony apply to one rather than against all, or rather than against the others, it will be necessary for the 8132
Court to make a minute and detailed study and review of the entire evidence for the People. It is not practical to make intelligent rulings on motions of this kind at this time. That can wait until the charge to the jury. Counsel knows this as well as the Court does.

Mr. Climenko: With that understanding, we will be very glad to reserve these motions until the close of the entire case.

The Court: Then there may be some question about the form of the motion. I 8133
don't think it is properly a motion to strike out as against one or two, but rather an application to charge the jury as to whether or not certain parts of the testimony fail to connect one or two of the defendants.

Mr. Climenko: I think that comment does apply to a good many of these matters.

The Court: It is like the piecing together of the parts of a watch—in fact, it is a jigsaw puzzle.

8134 *Motions to Dismiss Indictment*

Mr. Climenko: We have nothing further to say at this time. We will be glad to do so.

The Court: Supposing we make a blanket rule now that the Court is not in a position to make any ruling at this time to strike out any evidence or declare its applicability as to any individual defendant or defendants. That will be taken up later when the Court is preparing its
8135 charge to the jury.

Mr. Climenko: It is our right to make a motion.

The Court: Your rights will be preserved.

Mr. Climenko: We have no objection to that procedure.

On behalf of the defendant Buchalter we now move to dismiss the indictment upon the ground there has been failure on the part of the People to prove the commission of the crime alleged as against
8136 him. We also move at this time to dismiss the indictment as against him upon the ground there has been a failure of proof of guilt beyond a reasonable doubt.

The Court: Motion denied.

Mr. Climenko: And at this time, on behalf of the defendant Buchalter, we move for the direction of a verdict of acquittal upon the ground that there has been a failure of proof of guilt beyond a reasonable doubt, as a matter of law.

The Court: Motions denied.

Mr. Climenko: Exception to the denials.

The Court: Motion on behalf of Weiss?

Mr. Talley: I make the same motions on behalf of the defendant Weiss as were made on behalf of the defendant Buchalter. I make the further statement that I renew all motions made during the course of the trial to strike out the various portions of the testimony which we claim should have been stricken out as not applicable to the defendant Weiss and not having any bearing on matters herein named in the in- 8138
dictment. We make the same motion on behalf of the defendant Weiss as was made on behalf of the defendant Buchalter.

The Court: On all except the last-mentioned motion, the motions are denied. On the last motion, I do not recall at this time whether or not, in any detail of the evidence, anything was taken subject to connection without being later connected. I think not. So I will deny the motion. If you find there is any such item of evidence, you may later renew that motion. 8139

Mr. Talley: I make a further motion to dismiss the indictment and for the discharge of the defendant Weiss upon the ground there is no credible evidence adduced on behalf of The People against the defendant Weiss except what comes out of the mouths of admitted and acknowledged accomplices to the crime; and there is no independent evidence other than the testimony of accomplices that in any way tends to connect the defendant Weiss with the commission of the crime named in the indictment.

8140

The Court: Motion denied.

Mr. Talley: Exception to the denial of all of my motions and each of them.

Mr. Climenko: May the record show, on behalf of the defendant Buchalter, that I move similarly to dismiss the indictment upon the ground that the only testimony adduced against him was testimony of alleged accomplices.

The Court: Motion denied.

8141

Mr. Climenko: Exception.

Mr. Rosenthal: On behalf of the defendant Capone at this time I move to dismiss the indictment and for the direction of a verdict of acquittal upon the ground that The People have failed to prove sufficient facts against the said defendant to warrant the submission of the case to the jury; and upon the ground that the proof is insufficient as a matter of law, in view of the fact that the only testimony in this case in so far as that defendant is con-

8142

cerned, is that of the witnesses Bernstein, Berger, Rubin, Tannenbaum, and Magoon, and that the testimony of Bernstein is that of an accomplice as a matter of law; that the testimony of the witness Tannenbaum relates to the knowledge of the defendant two years subsequent to the alleged killing; that the testimony of the witness Rubin is that he merely saw the defendant on two occasions, the last being in the fall of 1935, one year before the killing. The testimony of the witness Berger is simply to the effect that on one occasion

he saw him in company of the co-defendant Weiss; that Magoon's testimony, which seeks to be independent testimony, is insufficient as a matter of law to supply the type of independent evidence required by law to warrant submission of the case, in so far as the defendant Capone is concerned, to the jury as a matter of law.

The Court: Motion denied.

Mr. Rosenthal: Exception.

At this time, in view of the fact there 8144
have been some thirty-odd witnesses, of which only the number mentioned above related to the defendant Capone—in view of the fact there have been fifty-six exhibits, none of which in fact relate to the defendant Capone, and the volumes of testimony that has been adduced here that has been prejudicial to the rights and interests of that particular defendant, I again renew my motion which was made prior to this trial, for a severance. I again renew my motion for a mistrial and 8145
the withdrawal of a juror and for a severance upon the grounds heretofore mentioned by me.

The Court: Denied.

Mr. Rosenthal: Exception.

(The jury then returned to the Courtroom.)

The Court: I will take the defense of the defendant Buchalter.

8146 *John J. Fegan—For Defts.—Direct*

JOHN J. FEGAN, residing at 5503 Thirty-first Avenue, Woodside, Borough of Queens, City and State of New York, called as a witness in behalf of the defendant Buchalter, after being duly sworn, testified as follows:

Direct examination by Mr. Climenko:

Q. By whom are you employed? A. The New York Telephone Company.

8147 Q. For how long have you been so employed? A. Over 35 years.

Q. Did you appear here today pursuant to subpoena duces tecum which was served upon your employer? A. Yes, sir.

Q. Does that subpoena call for the production of such records as may be in the possession of your employer with respect to facilities rented to the New York & New Jersey Clothing Trucking Corporation? A. Yes, sir.

Q. And in pursuance of that subpoena, have you produced certain records here? A. I have some index cards. That is about the only rec-

8148 ords we were able to find that are available.

Q. May I have them? A. (Witness hands counsel papers.)

Mr. Climenko: May the two cards now produced by the witness be marked temporarily for identification?

(Received and marked Defendants' Exhibits Z and Z-1 for identification.)

Q. Now, did you, pursuant to that subpoena, look for any other record with respect to the

account of the New York & New Jersey Clothing Transportation Company with your employer, the New York Telephone Company? A. A complete check was made by the office.

Q. Were any other records found than these? A. None.

Q. In the regular course of business of the New York Telephone Company are index cards such as the ones which have now been marked for identification, as Defendants' Exhibits Z and Z-1 for identification—are they regularly made 8150 and filed with respect to certain types of accounts? A. They are.

Q. What types of accounts? A. Where there are some outstanding charges due to the company.

Q. Are those kept in the regular course of business? A. They are.

Mr. Climenko: I now offer them in evidence.

Mr. Turkus: I object. The proper foundation has not been laid for the receipt of 8151 these exhibits. Defendants' Z and Z-1 for identification.

The Court: Will you be more specific in your objection?

Mr. Turkus: Will your Honor look at them? I say there has been no proper foundation laid, that this witness has no knowledge of any of the contents of the alleged record cards; they do not disclose he personally made them up or what relevancy they have to the issue.

8152 *John J. Fegan—For Defts.—Direct*

The Court: I assume this has to do, Mr. Climenko, with the testimony of the decedent's daughter.

Mr. Climenko: Yes, your Honor.

The Court: Mr. Climenko, let me ask you first about this SPring 7-0123. Do you know what I mean?

Mr. Climenko: Yes.

The Court: Do you mind telling me what this applies to?

8153 Mr. Climenko: I know only that which I have learned from the witness. Apparently it was what is known as a pay box telephone which had been subscribed for by that corporation, and the service at that pay box was discontinued by reason of the failure of the corporation to pay its obligation thereunder, and the regular telephone service was suspended by reason of default in payment of a larger obligation.

The Court: There is very little here on that. I don't see that.

8154 Mr. Climenko: But the witness can tell you, I think, by reason of his acquaintance with custom or bookkeeping traditions of the business, that there are symbols on that card which indicate to him, though they would not to you or me, the type of service there was. There are a series of identical digits there which have some significance to him or anybody as well versed as he is with the bookkeeping habits of the company.

The Court: Can you tell me what the number 2 9317 means?

Mr. Climenko: I have made no inquiry about that, but I assume it is the subscriber's telephone number.

The Court: There is nothing on the face of these cards which, so far as I can see now, in any way contradicts anything testified to by that witness.

Mr. Climenko: Perhaps I can lay the foundation.

The Court: Offer them later, if they are connected up. 8156

Mr. Climenko: If your Honor pleases, may I recall to your Honor's attention at this moment—if I am wrong in my assumption as to what is in your Honor's mind—that there is a direct issue apparently created by the testimony of one witness as to the condition of this business in April of 1932, and this proof goes to that issue. I said one witness; there were two.

The Court: There is nothing on the face of the card to indicate it.

Mr. Climenko: The face of the card, I think, does indicate it, but I think I will proceed to inquire of the witness, if your Honor pleases, and then perhaps your Honor's feeling about it may change. 8157

The Court: Go ahead.

By Mr. Climenko:

Q. Now, in the regular course of business of the Telephone Company, Mr. Fegan, assume that a subscriber, at the end of a month or whenever a bill is payable, fails to pay his bill, what happens?

Mr. Turkus: I object to it.
The Court: Overruled.

By the Court:

Q. How long do you wait for your money before shutting off service? A. It all depends, your Honor, upon the credit of the account. Usually 30 days, sometimes sooner, sometimes a little later.

8159 Q. The middle of the month is the usual time, isn't it? A. Yes, sir.

Q. Not 30 days? A. Sometimes we go that long, depending upon circumstances.

By Mr. Climenko:

Q. Mr. Fegan, will you try to talk so we can hear you back here? Mr. Fegan, assume that an account has its service cancelled, you cancelled the service because of non-payment of a bill; in that event are cards made, customarily, such as these cards which are now marked Defend-

8160 ants' Exhibits Z and Z-1 for identification? A. Yes, sir.

Q. At the same time, are the regular records with respect to that account retained or preserved for a certain period of time? A. They are.

Q. And regularly, in the regular course of business for your employer, for how long a period? A. Usually six years.

Q. At the end of six years, what happens to the other records with respect to that account where service has been discontinued by reason

of default in payment for service? A. Usually destroyed.

Q. At the same time when service is discontinued and these cards are made, what is done with these cards? A. They are used for checking purposes in the event that the customer applies for telephone service again.

Q. In other words, counterparts of these cards are referred to various parts of your employer? A. We retain them. All is checked through our office for checking.

8162

Q. At the present time or as of the time when that subpoena was served on the New York Telephone Company, were there any records in existence with respect to the account of the New York & New Jersey Clothing Transportation Company with the Telephone Company other than these cards? A. No, sir.

Q. These were the only records? A. That is right.

Q. And the other records had been destroyed in accordance with the bookkeeping practice of your company; is that correct?

8163

Mr. Turkus: I object to it. He has no knowledge of it. He says they are usually destroyed.

By the Court:

Q. What is your job there? A. I am a representative.

Q. That does not mean anything.

Mr. Climenko: I withdraw the question.

8164 *John J. Fegan—For Defts.—Direct*

Q. That is too indefinite. What do you do? Are you a bookkeeper? A. No, sir, outside representative.

Q. Do you keep the records? A. No, I interview customers; assigned to detailed inside work occasionally.

Q. Do you have anything to do with the bookkeeping system? A. No, sir.

By Mr. Climenko:

8165

Q. Do you have to do occasionally with the collection of delinquent accounts? A. I do.

Q. In the past four years has it been your job to work with the house attorneys for the Telephone Company? A. Correct.

Q. Have you had other occasion to look for records or discontinued accounts? A. That is right, sir.

Q. Before that, were you for about 35 years working directly with the Telephone Company? A. Yes, sir.

8166 Q. Are these records, Z and Z-1 for identification, records of the discontinuance of service by the Telephone Company, of facilities theretofore rendered to New York & New Jersey Clothing Transportation Company? A. They are.

Q. And do these records show the state of the account as of the time when service was discontinued?

Mr. Turkus: I object to it. That is something he would not know.

The Court: He is not qualified. Sustained.

Q. Is this the only type of record, referring now to Defendants' Exhibits Z and Z-1 for identification, retained by your company with respect to any delinquent accounts—

Mr. Turkus: That is already answered.

Q. —for a period of more than six years after the delinquency occurred?

Mr. Turkus: Objected to as already answered. 8168

The Court: That is what he said.

Mr. Climenko: If your Honor pleases, I now make a re-offer into evidence of these cards, because it now appears that these are records with respect to the status of that account.

Mr. Turkus: The objection is renewed that no proper foundation has been laid for the receipt of the instruments, and, further, no relevancy to the issue.

The Court: He is not qualified on that. Sustained. 8169

Q. Are these records, Z and Z-1 for identification, kept in the regular course of business by your company? A. They are.

The Court: You see, Counsellor, now "in the regular course of business," if there was anything on them to say that the account was discontinued, that would be different, but there is nothing whatever to say that service was discontinued.

Mr. Climenko: If your Honor pleases,

8170 may I invite your Honor's attention to the matter and data set forth on the 4th line of each of these cards?

The Court: I will look at it again. I have studied it carefully. Oh, I beg your pardon. Counsellor, I did not notice that. That is further over on the line and in fine print.

Mr. Climenko: If your Honor pleases, in view of the witness's statement as to
8171 the conduct and the habits of the Company as to the keeping of records, the fact that these are the only records that exist, the character of the records themselves, I re-offer them in evidence at this time.

Mr. Turkus: I object now on the ground of relevancy.

Mr. Climenko: If that be the point of objection, will your Honor hear me on that?

The Court: Yes, on the ground it is
8172 conjecture, because anybody can have the telephone service shut off due to neglect of payment, and furthermore, the cards don't show that the service was actually cut off. It does not state in that fine print whether that is a proviso or an accomplishment, whether the term was in future or whether in the past tense.

Mr. Climenko: Will your Honor take it subject to connection?

The Court: Maybe you have had your telephone cut off at some time because you have been too busy to send a check.

Mr. Climenko: Will your Honor take it subject to connection?

The Court: You can mark them for identification, but I cannot let them be received as evidence on the ground that it is conjectural and it does not contradict anything testified to by Rosen's daughter.

Mr. Climenko: May I have an exception, your Honor?

The Court: Yes. 8174

By Mr. Climenko:

Q. Do you know from the records of your company—

The Court: Except this. Pardon me. This comes to mind: that she testified that in the early summer of 1932 came this alleged conference off of Broadway in which the books were thumbed over and there was a discussion and she was told to go out. She said from that time on the business went down and her father left about three months later. The card has relation to that, but is corroborative rather than contradictory. 8175

Mr. Climenko: On the contrary, your Honor, it shows there was no telephone service then existing at the time, and it was her testimony that her father did telephone to her at the place of business.

The Court: That does not show it.

8176 *John J. Fegan—For Defts.—Direct*

You can cut off service and restore it the next day.

Mr. Climenko: All things are possible. This shows that the service was cut off.

The Court: Maybe for an hour, maybe for a minute, maybe for a week. You do not know how long.

By Mr. Climenko:

8177 Q. Did you look for all the records of your Company with the New York & New Jersey Clothing Transportation Company, Inc.? A. The check was made, not by me personally.

Q. Were there any records in existence other than these cards Z and Z-1 for identification?

Mr. Turkus: He cannot answer that, because he did not make the check.

The Court: Sustained.

8178 Q. All right. Who makes the check, Mr. Fegan? Do you know his name? A. Usually delegated to some employee in the office.

Q. Do you know the name? A. Could be delegated to two or three.

Q. Could you give us the names of the persons who actually made the check in this instance? A. I could not.

Q. I mean the two or three who might have. A. No, I cannot say who made the check in this particular case.

Q. Could you find that out for us? A. I could.

Q. I mean after you leave here? A. I could.

By the Court:

Q. Will you let Mr. Climenko know? A. Yes, sir.

Q. Because he wants to get the right one here to testify. A. I will be glad to.

By Mr. Climenko:

Q. Is it the custom, after a service has been reconnected or reestablished, to make a note of that fact in the records of your company? A. On those records that you have? 8180

Q. On any records. A. Where there is a very definite record indicating that the customer did have service at one time.

Q. Is there any record in the possession of your company to the effect that this company, the New York & New Jersey Clothing Transportation Company, at 2 Washington Place, had telephone service after April 3, 1932?

Mr. Turkus: Object to it. He has already testified these are the only two records he knows of. 8181

The Court: He has not qualified as having knowledge of any records. Sustained.

Mr. Climenko: Exception.

The Court: Apparently he is just a messenger, so far as this case is concerned.

Q. Are you presently employed by the house attorneys for the New York Telephone Company? A. Correct.

Q. And is it the business of those attorneys to

8182 *John J. Fegan—For Defts.—Direct*

collect delinquent accounts whenever possible? A. That is right.

Q. Do you know whether the delinquent account of the New York & New Jersey Clothing Transportation Company was ever paid?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Climenko: Exception.

8183 Q. Did the attorneys by whom you are employed and for whom you work make effort to obtain collection of delinquency owed by New York & New Jersey Transportation Company?

Mr. Turkus: I object to it.

Q. To the New York Telephone Company, if you know.

Mr. Turkus: I object to it. That takes into evidence something not yet testified to or appearing.

8184 The Court: Yes, he has not shown he is qualified.

Mr. Climenko: I asked him if he knew, your Honor.

The Court: With all the many, many thousands of accounts, millions, how would he remember nine years later—

Mr. Climenko: Well, if he knows. That is the question.

The Court: —have any independent recollection whatsoever about a specific account?

By the Court:

Q. Do you remember anything about this account? A. I don't your Honor.

Q. Did you ever handle it? A. No, your Honor.

Q. Are you here simply on some cards someone gave you to bring over? A. Yes, your Honor.

Q. No personal knowledge? A. No, sir.

8186

The Court: Apparently you have the wrong witness.

Mr. Climenko: I would like to press it, if I may. Perhaps we can save some time.

By Mr. Climenko:

Q. Who makes out these cards, cards of this character, Defendants' Exhibits Z and Z-1?

Mr. Turkus: I object to it. It makes no difference who makes them out under the circumstances. This witness has no personal knowledge of them. 8187

By the Court:

Q. Do you know who made that one out? Can you tell by the handwriting? A. It is typed, your Honor. I could not tell.

Mr. Climenko: If your Honor pleases, I now propose to show the system.

The Court: Counsellor, don't you see this is a tremendous—

8188 *John J. Fegan—For Defts.—Direct*

Mr. Climenko: Your Honor, I don't think under the rules of evidence I have to call all of the specific employees of the Telephone Company and a full accounting staff.

The Court: Don't you realize by this time that the man is simply a messenger so far as these cards are concerned? Somebody said, "Here are two cards. Bring them over." You have the wrong
8189 witness. You can no doubt take it up with the Company and have some chance, even at this late date, of finding the right witness.

Mr. Climenko: I have no doubt of that but I thought we might obviate all that by having him tell, if he knows, what the system is. Then the cards may be competent, even though he had nothing to do personally with composing them, if he knows. He has been there a long time. I merely want to spend a couple of minutes.

8190 The Court: Go ahead. See if you can authenticate them.

By Mr. Climenko:

Q. In the ordinary course of business, Mr. Fegan, when are cards of the type of Defendants' Exhibits Z and Z-1 for identification made up by the Telephone Company? A. When the account is cancelled and the bill has not been paid.

Q. And not until then are cards of this type composed; is that correct? A. That is right.

8191

By the Court:

Q. You don't mean "cancelled," do you? You mean temporarily discontinued. A. Terminated, your Honor. That is before the account is actually terminated. There is a time when the service is interrupted for a short period. We don't prepare cards. It is only when an account is actually cancelled.

Q. After this temporary termination of the account? A. That is right.

8192

Q. There is a lapse of time? A. Right, your Honor.

Q. And then if, on the expiration of that other length of time, the account has not yet been paid, then the account is marked "cancelled"? A. Right.

Q. And the cards are filled out and sent to the Collection Department? Is that what these cards are? A. That is right.

Q. Then what happens when the customer pays? A. The cards are removed from the file.

Q. And put where? A. They are put in a file as destroyed within a recent period.

8193

Q. Are the cards then returned from the attorneys' office? A. The collection attorneys' office handles those particular accounts.

Q. Then the collection attorney hands those cards back to the Company? A. We are part of the Company.

Q. I understand that. A. No, we just file the cards, case closed, account paid.

By Mr. Climenko:

Q. In this particular instance these cards were never returned to anybody, were they?

8194 *John J. Fegan—For Defts.—Direct*

Mr. Turkus: I object to it. He is a messenger. He does not know the first thing about these cards.

Mr. Climenko: All right, if he knows. He is a little bit more than a messenger.

Mr. Turkus: I do not mean to disparage the man. In this specific case I urge he is nothing more than a messenger who has delivered these cards to the court house. He does not know where they came
8195 from, who dug them out, what file they came out of, if they are accurate, or whether they should have been destroyed or not. He knows nothing of the situation.

The Court: Let us find out.

By Mr. Climenko:

Q. Mr. Fegan, may I direct your attention, invite your attention to the fourth line of each card, and call your attention to the fact— (To Mr. Turkus) Would you mind waiting until I get finished?

8196

Mr. Turkus: I will.

Q. I call your attention to the fact that each card has a date on that fourth line on its right hand side and a later date on its left hand side, and is that the way these cards are usually composed, and may I invite your Honor's attention to that?

The Court: Yes.

Mr. Turkus: I object to the question.

Mr. Climenko: Then I withdraw the question and I submit them to your Honor.

By the Court:

Q. In your precise connection, Mr. Witness, with the telephone company, does the handling of the cards go through you? A. No, your Honor.

Q. Do you have anything to do with it? A. No, your Honor.

8198

Q. Do you go out with these cards and ask anybody for money? A. No, your Honor.

Q. Do you do any of the collecting? A. I do.

Q. Just what part do you do? A. Collect delinquent accounts, but we have other data besides the cards.

Q. You don't have these cards? A. They are on file.

Q. Who makes out those other cards which you speak of that you handle? A. In our efforts to collect the accounts, your Honor.

Q. Yes, when you go out you say you are given some other record? A. We have the customer's 8199 signature to the contract for service; we have toll tickets, and other credit information which would assist us in locating the customer.

Q. When you go out to make a dun, is that your job? A. Yes.

Q. You have some sort of a record in your pocket? A. We have.

Q. Who makes that out? A. That is made out by some clerks in the office.

Q. Not made out by you from these cards? A. No.

8200 *John J. Fegan—For Defts.—Direct*

The Court: Counsellor, it is quite possible you may be able, with proper authentication to get those in, but inasmuch as the other records have been apparently, if this witness is correct in his conjecture, destroyed, that will still leave open the question as to whether or not service was not restored.

Mr. Climenko: All right, your Honor. Independently—

8201 The Court: But one of these is in the spring and the other one is in the fall. So far as that summer is concerned, that is not covered by these records.

Mr. Climenko: If your Honor pleases, there is a difference in these telephones. One of them is at one address and one is at another address.

The Court: It is the same company. I assume it moved.

Mr. Climenko: There is no proof here of that in this record, your Honor.

8202 The Court: There may not be, but you are offering the records and if the records go in you would have to accept anything that they tended to prove.

Mr. Turkus: Mr. Climenko has urged another ground for objection, too. They don't even show they are the same company or same address. He has just urged that as another ground to disqualify them.

The Court: Greene Street is down around Canal Street. What number is that, Greene Street? If I remember correctly, it is Broadway, Walker, Greene.

Mr. Climenko: I do not know the pre-

cise location, but that is not the point, your Honor.

The Court: This should be around Canal Street, the other up around Washington Square.

Mr. Climenko: They had another type of service at their office.

The Court: What is that?

Mr. Climenko: They had one type of service at a particular place outside of their office and they had another type 8204
within their office, and the service within their office was discontinued.

The Court: You better get whoever is an expert in the accounts over there.

Mr. Climenko: I beg pardon?

The Court: You better get somebody who can authenticate the records so that anybody will be able sensibly to do more than conjecture upon reading it.

Mr. Climenko: Will your Honor accept them subject to connection?

The Court: The trouble is you are ask- 8205
ing the Court to do this, to put in two cards with all intermediate records admittedly destroyed and have the jury to conjecture that there was no restored service in the interim. Now when the Court calls your attention to two different addresses you say there is proof it is the same.

Mr. Climenko: Your Honor misunderstood me. You are confusing Mr. Turkus' remarks with mine. I realize that there are two different addresses on it and I do

8206 *John J. Fegan—For Defts.—Direct*

not say they are two different concerns. I say they are the same concerns with two different types of service, one type at its office and another type at a place outside of its office, and both services were discontinued, the office service on one day and the other service outside of its office at a different day. There is no inconsistency about that at all.

The Court: There is a six months pe-
8207 riod between.

Mr. Climenko: Quite true and there is certainly also a great disparity in the obligation on the account.

The Court: What is the question before the Court now?

Mr. Climenko: I would like your Honor to permit me to ask one question of this witness in respect to one of these cards.

The Court: Go ahead.

By Mr. Climenko:

8208 Q. Mr. Fegan, I show you Defendants' Exhibit Z-1 for identification. Can you tell me by inspecting any of the symbols on that card the type of service called for by the subscriber with respect to the telephone at the address set forth on that card?

Mr. Turkus: I object to it. There is no time fixed. There is no relevancy shown.

Mr. Climenko: It is merely to qualify a matter mentioned by your Honor.

The Court: I will have to sustain the objection upon the ground he is not qualified to state.

Mr. Climenko: Let me ask him then, your Honor—

Q. Mr. Fegan, there are certain symbols underneath a telephone number on the upper right-hand corner of that card, is that right? A. Correct.

Q. Do you know what those symbols mean? 8210
A. I do.

Q. What do they mean?

Mr. Turkus: I object to him reading from a card not in evidence.

Mr. Climenko: He is not reading anything. Your Honor can see he is not reading. I am asking him as to the meaning of four symbols on that card.

Mr. Turkus: I object to it. The card is not in evidence. Its relevancy has not been shown. It is a card which, from the 8211
examination of this witness, he received together with a subpoena and has brought over here merely as a manual messenger. He has nothing to do in the course of business with those cards; he knows nothing of the accuracy of the statements thereon; he does not even know what file they came out of.

By the Court:

Q. Mr. Witness, quite apart from whether you

know about the card or not, are you familiar in the course of your business with those symbols? A. I am.

Q. What do those ciphers mean? A. Indicates a semi public telephone.

Q. You mean it is a slot machine? A. That is right.

By Mr. Climenko:

8213 Q. That was a coin box? A. That is right.

Q. And that was rented by that corporation, is that so?

Mr. Turkus: I object to this. That is by indirection reading this alleged card which is not in evidence, and the further ground if your Honor will examine the data and the address on that card you will see the other ground of objection and irrelevancy. There is no such address appearing in the entire testimony in the case.

8214 The Court: Let me see it again. You mean 266 Greene Street?

Mr. Climenko: That is right.

Mr. Turkus: In that November, 1932, after the stoppage, it is irrelevant, it is incompetent, has no place in this case.

The Court: That, according to the lady's testimony, would be after her father had left the concern. Sustained.

Mr. Climenko: I withdraw my offer with respect to that at this moment but at this time I again offer in evidence the card, Exhibit Z for identification.

8215

Mr. Turkus: I object to it on the ground previously urged and on the further ground of irrelevancy.

The Court: Sustained.

Mr. Climenko: Exception.

By Mr. Climenko:

Q. Can you have here, Mr. Fegan, the man who kept this record or from whom you got it? A. I will.

8216

Q. And who knew about retaining it in the files of your company? A. Yes, sir.

Q. And who also is acquainted with the system employed in the composition of these cards?

Mr. Turkus: I object to this. He does not know that. He does not know if any such man is alive.

The Court: He can try to find out.

Mr. Turkus: Certainly, that is all he can do.

The Court: Anything else?

8217

Mr. Climenko: That is all from this witness at this time, your Honor.

8218 *Henry H. Eisenberg—For Defts.—Direct*

HENRY H. EISENBERG, residing at 152 Bellevue Street, Elizabeth, New Jersey, called as a witness on behalf of the defendant Buchalter, and being first duly sworn, testified as follows:

Direct examination by Mr. Climenko:

Q. Mr. Eisenberg, are you an attorney? A. I am.

Q. Admitted to practice in what state? A.
8219 New Jersey.

Q. How long have you been a lawyer? A. Twenty years.

Q. Do you know a man by the name of Martin F. Kelly? A. I do.

Q. And had you known him for some time in or about the year 1931? A. I did.

Q. And had you on occasion represented him before that time? A. I did.

Q. In or about the year 1931 did you meet one Joseph Rosen? A. I did.

Q. And were you introduced to him by your
8220 client, Martin F. Kelly? A. Yes, sir.

Q. In or about the spring of 1931 did you draw a contract between Martin F. Kelly, his wife, Joseph Rosen, and his wife? A. I did.

Q. And pursuant to that contract did you also draw a certificate of incorporation? A. I did.

Q. For a company to be known as the K. & R. Trucking Company, Incorporated? A. I did.

Q. Would you say that happened in or about the month of March, 1931? A. That is right.

Q. And pursuant to that contract did Rosen and Kelly agree to enter into business together in the trucking business? A. They did.

Mr. Turkus: I object to this. That is not the best evidence.

The Court: Sustained.

Q. Did you, at my request, today produce certain papers? A. I did.

Q. After that contract had been drawn in April, 1931, have you any recollection—I withdraw that.

Q. Have you any recollection as to whether that particular contract was signed? A. That 8222
was not signed.

Q. Have you any recollection as to whether or not the certificate of incorporation for the company to be known as the K. & R. Trucking Company, Incorporated, was ever filed? A. It was not.

Q. Were the fees for the incorporation of that company paid?

Mr. Turkus: I object to this. This is totally incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Turkus: Having nothing to do with 8223
the issue.

Mr. Climenko: Exception.

Q. Subsequent to the spring, or April, of 1931, did you again meet Joe Rosen and Martin Kelly at your office? A. I did.

Q. At that time did they have a discussion with you?

Mr. Turkus: I object to it.

The Court: Yes or no? Overruled.

8224 *Henry H. Eisenberg—For Defts.—Direct*

A. They had several discussions after that time.

Q. At that particular time, in or about the month of October, 1931, did they have a discussion with you? A. They did.

Q. At that discussion was Joe Rosen represented by his lawyer, Mr. Burr, of the firm of Spindel & Burr of Passaic, New Jersey? A. I have the notation on the paper.

Q. I show you a paper writing and ask you if
8225 that refreshes your recollection with respect to the question I now ask you (handing paper to witness). A. Yes, sir; Mr. Burr, of the firm of Spindel & Burr, represented Mr. Rosen.

Q. At that time, in October of 1931, was there a discussion between Rosen & Kelly with respect to the earlier agreement of April, 1931?

Mr. Turkus: Objected to. It is incompetent, irrelevant, immaterial.

The Court: When was this?

The Witness: October, 1931.

8226 The Court: You realize when these questions were asked under cross-examination, the Court has to go back over a great mass of detail to determine whether or not they are relevant. That takes a moment or so. Sustained.

Mr. Climenko: Exception.

Q. In or about the month of October, 1931, did Rosen and Kelly enter into an arrangement to go into business with persons by the name of Bluestein and Sobler? A. They did.

Q. Before they did that, did they have a discussion in your office about those arrangements?

Mr. Turkus: I object to it as incompetent, irrelevant, immaterial.

The Court: Yes or no.

A. I don't recall.

Q. I show you these two papers and ask you whether they refresh your recollection as to whether such discussions were had in your office. 8228

The Court: What are those, the certificates of incorporation, Counsellor?

Mr. Climenko: No, sir, those are agreements that I handed him at this moment.

The Court: Partnership?

Mr. Climenko: Well, not precisely, but for the association. They are really incorporation contracts.

A. Yes, sir, they did have a consultation in the office.

Q. I beg pardon? A. They did have a conference in the office. 8229

Q. They did? A. That is right.

Q. Mr. Rosen and Mr. Kelly? A. Mr. Rosen and Mr. Kelly.

Q. In that discussion was there talk about the K. & R. Corporation, the certificate of incorporation which you had drawn in April, 1931?

Mr. Turkus: I object to it, incompetent, irrelevant, immaterial; certainly not the best evidence, there having been exhibited to the witness certain documents which

8230 *Henry H. Eisenberg—For Defts.—Direct*

speak for themselves. So on both grounds I urge its inadmissibility.

The Court: I do not know what this is. Let us have it. Overruled.

(Pending question read.)

A. There was.

Q. And was there reference to the fact that that corporation had not been incorporated by reason of the default of Rosen in failing to pay
8231 a part or all of the incorporation expense, as he had earlier agreed to do?

Mr. Turkus: Objected to as incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Did you, as a matter of fact, refrain from filing the certificate of incorporation of that proposed corporation, K. & R. Trucking Corporation, by reason of that default on the part of Joseph Rosen?

8232

Mr. Turkus: Same objection.

The Court: Sustained.

Mr. Climenko: Exception.

The Court: Of course, you know, Mr. Climenko, the difficulty in your task is appreciated, but what the Court has in mind, so you will know, possibly, what is behind the ruling, is this: that the testimony of the daughter related to the summer of 1932, the alleged conference, and that at that time the business apparently may have been on a paying basis. There was

some attempt made to cut off some of the accounts. That conference, of course, is relevant on the issues brought up by this indictment. Then Harold Rosen, the brother, testified to having been taken in 1932 to a meeting at the Broadway Central Hotel, having looked through the window into the lobby and having seen certain gestures. That is not 1931. Then he went on and told about six months later—this would place the Broadway Central 8234
meeting sometime in the spring, because he said six months later the father went out of business. Then he goes on and tells about his father's subsequent employment. I think this is too remote.

Mr. Climenko: If your Honor pleases, may I address myself to your Honor's suggestion?

The Court: Yes, because, granting that there were difficulties in 1931, granting that there were all kinds of details and difficulties, they are only remotely related 8235
to the condition in 1931. By "difficulties," I mean arguments. There may be a difficulty on the part of Rosen not putting up the required capital. Many such difficulties at the beginning of a business are easily overcome, and if I admit this evidence, remote as it is, it drives the jury into a conjecture as to how it is related to a condition in the summer of 1932 or in the spring of 1932.

Mr. Climenko: I respectfully suggest to your Honor that your Honor has mis-

construed the possible effect of the proof which I am about to offer. It has nothing to do with anything except the history immediately preceding the spring of 1932, and I will get to that in a moment, but I cannot do more than ask one question at a time.

The Court: Go ahead then.

Mr. Climenko: I merely want to show the antecedents and origin of this business, and I then want to show, as fast as I can talk, the condition of it in the spring of '32.

8237

The Court: The Court is not crowding you. Having to sustain so many objections is disagreeable to me, and I don't want you to be embarrassed by that, because that might interfere with the quality of your work.

Mr. Climenko: Not at all. I am not embarrassed, your Honor. I merely want to go along and prove these facts.

8238

The Court: Go ahead.

Mr. Climenko: All I want to say to your Honor is that I am representing to your Honor that they are relevant—

The Court: Go ahead then.

Mr. Climenko: —to the issues as made by the prosecution.

(Pending question read.)

The Court: I am going to let him answer it because you tell me you are going to lead up to something that means something.

Mr. Turkus: May I say to your Honor,

if I may respectfully suggest that you press counsel as to the relevancy of the offer of this proof. What is its relevancy in this case?

The Court: Counsel promises to hook it up. I am going to give him a chance.

Mr. Climenko: I have been, as I think your Honor realizes, very careful not to make any specific announcements, but to try to convey my meaning to your Honor without specific statements. I would 8240 rather have the witness do that.

A. I cannot be definite about the reason for not filing that certificate at this time. There were several things involved there. That may be one of five or six reasons that it was not filed.

Q. But, in any event, you are definite that in or about October of 1931 there was this discussion at your office? A. That is right.

Q. In which Kelly and Rosen participated, about the proposed association of Kelly and Rosen with Bluestein and Sobler; is that correct? 8241 A. That is correct.

Q. At that time did you draw a contract in your office between Kelly and Rosen? A. I did.

Q. And is this that contract (handing paper to witness)? A. It is.

Q. At the time that this contract was signed, Rosen was at your office, represented by Mr. Burr, a lawyer of Passaic; is that correct? A. That is right. I don't know where he is from.

Q. Well, the notation seems to indicate Passaic, but that is not important.

8242

Mr. Climenko: At this time I offer in evidence the agreement dated October 28, 1931.

Mr. Turkus: I have read this instrument offered in evidence. I cannot see its relevancy. I object to it.

The Court: The objection is sustained at this time, but, as you may be leading up to something—

Mr. Climenko: That is right, your Hon-

8243

or.

The Court: —you may renew your offer later.

Mr. Climenko: At this time may it be marked for identification so the record may be clear?

The Court: Yes.

(Paper marked Defendants' Exhibit Z-1 for identification.)

Q. Now, to your knowledge, Mr. Eisenberg, did Kelly and Rosen become associated with the

8244

firm known as the New York & New Jersey Clothing Transportation Company, Inc. in or about October of 1931? A. They did.

Q. And at that time were Kelly and Rosen, and Bluestein and Sobler employed to work for that corporation? A. They were.

Q. Did you again hear from Kelly with respect to the business of the New York & New Jersey Clothing Transportation Company, Inc. in or about April of 1932?

Mr. Turkus: I object to it. It is in-

competent, irrelevant, immaterial, whether he heard anything from Kelly or not.

The Court: Sustained.

Mr. Climenko: Exception.

Q. In or about the month of April, 1932, did you attend a conference at which the business of New York and New Jersey Clothing Transportation Company, Inc. was discussed?

Mr. Turkus: I object to it, incompetent, irrelevant, immaterial. 8246

The Court: That is April, 1932?

Mr. Climenko: April, 1932.

The Court: He can say yes or no.

A. I did.

Q. Who were present? A. I don't recall.

Q. I beg pardon? A. I don't recall who were present.

Q. Was Mr. Kelly present? A. Mr. Kelly was.

Q. Do you remember whether Mr. Rosen was present? A. I don't recall.

Q. Did that conference take place in the office 8247
of a lawyer by the name of Salzman in Passaic, New Jersey? A. We had several conferences there.

Q. Did that conference take place after you, on behalf of Kelly, had started a lawsuit to collect moneys due Kelly from New York & New Jersey Clothing Transportation Company, Inc.?

Mr. Turkus: I object to this. It is incompetent, irrelevant, immaterial. There was a conference without the presence of Rosen. He does not know who was pres-

8248 *Henry H. Eisenberg—For Defts.—Direct*

ent. Has nothing to do with the issue of the indictment.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Did you on or about the 27th day of April, 1932, institute an action in the Court of Chancery of the State of New Jersey for the appointment of a receiver of the corporation known as New York & New Jersey Clothing Transportation Company, Inc., and did you do that on be-
8249 half of your client Martin F. Kelly? A. I did.

Mr. Turkus: Objected to as incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Climenko: Exception.

Q. In or about the month of April, 1932, did you sue, on behalf of Kelly, to recover from New York & New Jersey Clothing Transportation Company, Inc., the sum of approximately $200 owing to Kelly for garage rent for trucks
8250 belonging to the corporation?

Mr. Turkus: Same objection.

The Court: Sustained.

Mr. Climenko: Exception.

Q. On or about the 28th day of April, 1932, —I withdraw that.

Q. On or about the 27th day of April, 1932, were you present at a conference attended by Joseph Rosen, Nat Sobler, and Martin Kelly with respect to litigation which you had insti-

tuted against New York & New Jersey Clothing Transportation Company, Inc.?

Mr. Turkus: Just a minute. Your Honor has sustained the objection to any litigation, and now by indirection you are getting the litigation in that was ordered out by the Court's ruling on this question.

The Court: Bringing Rosen into this conference.

Mr. Turkus: I know, but he is doing 8252
it improperly.

The Court: Overruled.

Mr. Climenko: If your Honor pleases, I take exception to these remarks. That was a perfectly proper question, I submit.

The Court: Go ahead.

A. I don't recall.

Q. Will you look at this paper and see if it refreshes your recollection (handing paper to witness)? A. I was present at that conference.

Q. Now, at that conference which was attended 8253
by those people, was there a reference made to the lawsuit, the action for the appointment of a receiver, which you had theretofore instituted?

Mr. Turkus: I object. The witness has not testified that those people were there under any conference, and there is a further ground, there is no relevancy to the issue in this indictment.

The Court: Sustained.

8254 *Henry H. Eisenberg—For Defts.—Direct*

Q. Was the financial condition of the New York & New Jersey Clothing Transportation Company, Inc. discussed on that occasion? A. It was.

Q. Now, what was said with respect to the obligation of that corporation to pay salaries to Kelly at that time?

Mr. Turkus: I object to it. No proof as to who had the conversation or its relevancy to this issue.

8255 The Court: Sustained.

Q. Was there any discussion at that time about whether or not the company was then insolvent?

Mr. Turkus: I object to it on the same ground; no proof as to who had this alleged conversation or its relevancy here to this issue on the indictment.

The Court: Sustained.

Mr. Climenko: Exception.

8256 Q. At the conclusion of this conference was this agreement dated the 27th day of April, 1932, signed by Joseph Rosen, Nat Sobler, Martin Kelly, and by the corporation by one of its officers? A. It was.

Mr. Climenko: I offer that instrument in evidence.

Mr. Turkus: May I see it? I have looked this over, your Honor. The first agreement has an exhibit attached to it. I cannot find any relevancy in this issue,

and I object to its introduction in evidence as tending to cause confusion.

The Court: Let me see it. It does not appear to be admissible at this time. Mark it for identification. If connected, let it be offered later.

Mr. Climenko: Exception.

(Paper marked Defendants' Exhibit Z-3 for identification.)

8258

Q. Now, Mr. Eisenberg, I show you a paper which is headed with the words "Resolution of the New York & New Jersey Clothing Transportation Company, Inc.," and ask you whether you produced that paper today in this court. A. I did.

Mr. Climenko: I ask that this paper now be marked for identification.

(Paper marked Defendants' Exhibit Z-4 for identification.)

8259

Q. The paper, Defendants' Exhibit Z-4 for identification, bears whose signature, if you know? A. Sobler and Bluestein, I think.

Q. Not Sobler and Rosen? A. Sobler and Rosen, yes.

Q. The authorization set forth in Defendants' Exhibit Z-4 for identification is an authorization, is it not, for the execution by the corporation, New York & New Jersey Clothing Transportation Company, Inc., of the agreement of April 27, 1932, here marked Defendants' Exhibit Z-3 for identification; is that right? A. Yes.

8260 *Henry H. Eisenberg—For Defts.—Direct*

Mr. Turkus: Objected to. The paper speaks for itself.

The Court: Sustained.

Mr. Climenko: Exception. I now offer in evidence the resolution, Defendants' Exhibit Z-4 for identification.

Mr. Turkus: Objection, on the same ground as the contract.

The Court: Excluded at this time. You may renew the offer later.

8261 Mr. Climenko: Exception.

Q. Mr. Eisenberg, was the contract, which is Defendants' Exhibit Z-3 for identification, a contract which was drawn and signed in settlement of a lawsuit instituted by you on behalf of Kelly to recover moneys due to Kelly from New York & New Jersey Clothing Company, Inc., and so instituted by you on April 21, 1932?

Mr. Turkus: Objection. The instrument speaks for itself.

8262 The Court: Sustained.

Mr. Climenko: Exception.

Q. At the time that the contract Defendants' Exhibit Z-3 for identification was drawn, did Kelly tell you, in Rosen's presence, that the company New York & New Jersey Clothing Transportation Company, Inc. had failed to pay Kelly his salary for more than three months prior to that date?

Mr. Turkus: I object to this by counsel, by an improper question, trying to bring something to the attention of the jury.

The Court: Sustained.
Mr. Climenko: Exception.

Q. At the conference—

The Court: I don't know if I understand this correctly, but I understood that the testimony of both the son and daughter of the deceased was, as to the former, to show the Broadway Central occurrence, followed by a discontinuance of the father's 8264
connection with the business six months later, and the testimony of the latter having to do with the alleged meeting off Broadway in the Washington Square section sometime about the summer of 1932, —I think she said around July, as she recalled, if that means anything,—and as to what occurred in regard to the alleged attempt to throttle certain accounts; from that time the business went down hill, and two or three months later her father severed his connection; but in the direct 8265
evidence of both of these witnesses there was no attempt made by the District Attorney to show solvency or to show that the company may not have been milked by salaries which it could not afford to pay because of the business. There was a wide cross-examination permitted, wide latitude on cross-examination, and these things were more or less delved into, but that does not open that subject for discussion.

Mr. Climenko: May I submit to your Honor that on the direct examination of

the witness, the daughter, there was testimony to the effect that that business was in good, solvent, and improving—progressively improving—condition.

The Court: What witness?

Mr. Climenko: The daughter.

The Court: On the part of the direct, that it was a solvent business?

Mr. Climenko: Yes, sir, your Honor, and may I call your Honor's attention to this
8267 fact, that the son testified that this was a solvent, progressive, and sound business and that it paid his father not only a salary regularly, but in addition to that paid expenses, which he indicated were of a substantial nature. Now, he said that he was working for that concern in the spring of 1932, and this proof is directly to the contrary, and that is why it is submitted, because these papers deal with lawsuits affecting the insolvency of this corporation in April of 1932.

The Court: No, Counsellor, I am quite
8268 sure you will find, if you consult the record, that that question was opened up by the defense on cross-examination of those witnesses.

Mr. Climenko: May I ask this of your Honor: Before a final ruling is made on this point, may counsel have an opportunity to indicate to your Honor, by a reference to the record over night, in the morning the specific portions of the record by which we believe that the District Attorney made this proof competent?

The Court: If it is in the direct, you

may call my attention to it. If it is in the cross, then you cannot open the field of litigating the question, because it is purely collateral.

Mr. Climenko: May we submit to your Honor such portions of the record which we deem pertinent and such citations as we may deem pertinent to this issue?

The Court: All right. Then we will have a recess now, and you review that evidence. 8270

Mr. Talley: Will your Honor hear a motion I have to make? I can make it in the absence of the jury.

The Court: Yes, make the motion after the jury is out.

All will remain seated until the jury is out.

Gentlemen of the jury, do not discuss the case, let nobody talk to you about it. Keep your minds open and follow all of the other admonitions heretofore given.

Let the witness and the jury go.

Mr. Climenko: There is something 8271 about the witness I want to bring to your Honor's attention.

The Court: Let the jury go out.

(The jury retired from the court-room.)

Mr. Climenko: Your Honor, the witness is a lawyer, as we know, and he has a professional engagement for tomorrow. I want to know whether it is possible for him to return in the morning. He is a New Jersey attorney.

8272 *Henry H. Eisenberg—For Defts.—Direct*

The Witness: I have made arrangements.

Mr. Climenko: Beyond all that, we don't want to embarrass him.

The Witness: I have made arrangements this afternoon for someone to take over.

Mr. Talley: I ask your Honor to direct the District Attorney to produce in court tomorrow morning Harry Cohen, known
8273 as Muggsy Cohen. He is in their custody. You remember he was produced for identification by the witness Bernstein, and he has been in custody, I understand, since, and I ask that he be produced.

The Court: You mean have him in the court-house? All right, have him here where he can be produced.

Mr. Turkus: He will be here all right.

Mr. Climenko: If your Honor please, I have a further request: May all other witnesses presently under subpoena be directed to return tomorrow.

8274 The Court: Yes.

(To clerk) Make the announcement.

Court Clerk: All witnesses in this case under subpoena report here again tomorrow morning at ten o'clock without further notice.

Mr. Turkus: They are out in the hall.

Mr. Barshay: Bring them in.

Mr. Wegman: If they are told the Judge made the announcement, they will be here.

The Court: The defendants are remanded.

(An adjournment was taken to Tuesday, November 18, 1941, at ten o'clock a. m.)

Brooklyn, N. Y., November 18, 1941.

TRIAL RESUMED

Mr. Climenko: When we recessed last night there was a question as to the contents of the direct examination of the two witnesses, the son and the daughter of Rosen, called by The People. I respectfully invite your Honor's attention to page 256 of the direct examination. My 8276
contention, not a contention but simply a statement as to what their testimony was —the young man said that he worked in this business in the spring of 1932; that it was a prosperous business which paid profits in salaries and expenses of those concerned in it, and that those were substantial.

The Court: Will you direct my attention to the specific questions and answers?

Mr. Climenko: The last question on 8277
page 255, and the answer at the top of 256, fixing the time with respect to the testimony.

The Court: That is where the witness states that he was employed by his father in business from the summer of 1931 to the spring of 1932?

Mr. Climenko: Yes. So, presumably when he testified he testified with respect to the condition at that time. Now, I invite your Honor to look at the third

question on page 257, and then at the fourth question.

The Court: The third question: "Were you familiar with the books and records of the company? A. Yes, sir, at that time I was familiar with the books and records of the company.

"Q. Was the business a paying business?"

Then Mr. Barshay objected to it as a
8279 conclusion. The objection was overruled and an exception taken.

Mr. Climenko: Mr. Turkus told your Honor yesterday that no such testimony was elicited on direct examination.

The Court: Then comes the answer: "I certainly know; I was bookkeeper there." But he was not pressed for an answer as to whether it was a paying business or not.

Mr. Climenko: With due respect I ask your Honor to look at the following ques-
8280 tion: "Did the partners, including your father, have a weekly salary? A. Yes, sir, they had a weekly salary."

The Court: Yes, that is on page 257, the same page I am looking at now: "Did the partners, including your father, have a weekly salary? A. Yes, sir, they had a weekly salary."

Mr. Climenko: May I ask your Honor to skip the balance of that page and look at the first question on page 258.

The Court: "In addition to that, were there profits that were distributed?"

"Mr. Barshay: The same objection." Mr. Climenko: The answer, however, came in.

The Court: Do not interrupt. "A. Yes, sir, there were profits; they usually had expense accounts which they took a certain amount during the week, etc. For example, my father had to go to Pennsylvania quite often—" Interruption:

"Mr. Barshay: I object to that as not responsive." What else is there? 8282

Mr. Climenko: That is enough.

The Court: Is there anything else?

Mr. Climenko: Nothing that I know of now.

The Court: This is in the testimony of Harold Rosen. Is there anything in the direct evidence other than that?

Mr. Climenko: No, sir, nothing that I was able to find last night. In any event, I make no point about that. When the witness was asked these questions on direct examination by the District At- 8283 torney he referred to the condition of business in the spring of 1932, and I desire to show by this witness that the condition as spoken of by the witness was not true, that the reverse was the fact, that this was a failing business after the spring of 1932.

The Court: You realize that all of these questions and answers were preliminary to the main testimony of Harold Rosen. They led up to the point of Harold Rosen's testimony, first, on the matter of the al-

leged meeting in the lobby of the Broadway Central Hotel, secondly, to the alleged visit of his father to Reading, Pennsylvania, a short time before the alleged murder, and his father leaving three days after arrival, upon a telephone message from the witness's sister. It is in the opinion of the Court of no evidentiary value. It was received only because it was in the preliminary stage of
8285 the examination of the witness. It adds nothing to the lustre of The People's case to show whether or not the business was solvent at all times—to show whether or not it was paying its debts at all times, and to show whether or not there were profits over and above the alleged drawing of salaries. The essential part of the testimony and the only thing of any evidentiary value—the only thing that has any bearing upon the issue of the matter testified to by Harold and Sylvia con-
8286 cerns the contacts between Rosen and the defendants, and a few matters specifically related by contact, and also to the movements of Rosen up to and including the time of the alleged murder. If the business was in operation in the summer months at the time when the alleged direction was given by one of the defendants regarding certain out-of-town accounts, causing protest to be made, and if, following that protest, the meeting off Broadway and in the Washington Square district, Rosen presently severed his con-

nection with the company, I don't think it opens the field for exploration by a lot of far-fetched and collateral evidence—I should say involving conjecture largely—as to the precise condition of the business in the spring preceding the alleged examination of the books. Nor does it have any direct bearing or indirect bearing on the meeting in the Broadway Central Hotel, where the conversation was not overheard but was looked at through a 8288
window from the street.

Now, I have given this a good deal of thought over night in determining whether or not at this stage you are entitled to transform this into a far-fetched procedure in the nature of a bankruptcy hearing to determine the precise nature of the ousiness and its financial soundness at any and all times during its existence. I am just telling you what is in my mind. You can go ahead with your examination and the Court will rule. I think the 8289
record is sufficiently clarified. I am not ruling, but I am telling you something for your own good, for your own guidance, to clarify the record, and it is not going to be turned into a debate. Please ask your questions and the Court will rule.

Mr. Climenko: Now, if your Honor please—

The Court: Are you going to ask questions or not?

Mr. Climenko: First I will take exception.

The Court: You are entitled to an exception to everything, even if the Court blows its nose; I cannot stop you, but I would request there be no more speeches.

Mr. Climenko: I take an exception on this record—

The Court: You are not going to raise an exception for the benefit of a speech. The jury is excused. See how far you can go when the jury goes out.

8291

(The jury thereupon left the courtroom.)

The Court: Now, go ahead with your speech.

Mr. Climenko: I have no intention of making any speech. I take an exception, however, at this time, in view of your Honor's actions in the presence of the jury. And I want to take exception to the statement that I could take exception to anything the Court did, including the

8292

blowing of your Honor's nose. I take exception to that, because it hurts the defense and puts me in a disparaging light, and I submit to your Honor it was not warranted by anything that happened here. All that happened last night was that your Honor said to me, "If you find anything in the record on direct examination as to the condition of that business in April of 1932, as testified to by the People's witnesses, call it to my attention," and I did. As I understood your

Honor's ruling, your Honor said that in view of your reflection on the matter you no longer think it is material, even if it is in the People's witnesses' direct case. Now, I cannot, if your Honor please, preserve myself against your Honor's remarks, and I mean by that the defendant whom I represent, except by taking exception. Your Honor has made the statement of your change of mind.

The Court: Will you please come to order and sit down? Are you ready to proceed with the trial of the case? 8294

Mr. Climenko: I take exception to your Honor's ruling.

The Court: All right, bring the jury back.

Mr. Climenko: (While jury is at door of court-room) If your Honor please, for the preservation of the record—

The Court: Take the jury back again. There are more speeches. Go on, get it out of your system.

8295

Mr. Climenko: I take exception to that. By virtue of that incident I move for the declaration of a mistrial and the withdrawal of a juror.

The Court: Motion denied. The jury was just starting to come in the room when counsel jumped up with another speech.

Mr. Climenko: May the record show that counsel did not notice it?

The Court: The Court has waited for several minutes for the jury to be brought

8296 back. Counsel maintained order in the meantime, but started in again just as the jury started to walk in the room. Is it all out of your system now?

Mr. Climenko: I take exception. Of course, I think it was apparent to your Honor that my back was to the door and I did not notice the jury was beginning to come in. I knew nothing about.

The Court: I know nothing about that,
8297 but the question is: Are you all through? I will not have the jury brought back until you are.

Mr. Climenko: I am not all through, because I have not started.

The Court: Are you prepared to resume the start of the case?

Mr. Climenko: I am ready at all times. I was ready at the time your Honor dismissed the jury.

The Court: The Court is fully aware of what you are up to.

8298 Mr. Climenko: I take exception to that, because it carries an implication we are up to something improper.

The Court: There is no jury here. The Court is fully aware of what you are up to. You are not going to get the Court to lose poise.

Mr. Climenko: I take an exception to that. Let the record show there is no jury here at this time, but in the presence or in the absence of the jury I have a right to say in this record that the Court's remarks, which reflect upon the integrity

of my conduct, are unwarranted, and I except for that reason.

The Court: You have your exception. Now sit down. Bring in the jury.

Mr. Wegman: While the jury is still out of the room—this has nothing to do with what has preceded—I just want on the record—I would like to ask the District Attorney to produce and have available here at two o'clock the witnesses Rubin and Tannenbaum—not for questioning, but for the purpose of having them exhibited to witnesses who will take the stand. 8300

The Court: All right.

(The jury then took their seats in the jury box.)

HENRY H. EISENBERG, a witness in behalf of the defendants, resumed the stand and testified further as follows: 8301

Direct examination by Mr. Climenko (continued):

Q. I show you defendants' Exhibit Z-3 for identification and ask you whether the signatures which purport to be those of Joseph Rosen and Nat Sobler were affixed to that agreement in your presence on the date of that contract, in April, 1932. A. I am not sure of that, whether it was in my presence or not. They were affixed that day before—they were affixed in my presence.

8302 *Henry H. Eisenberg—For Defts.—Direct*

Q. Both of those signatures? A. Yes, sir, both.

Q. And that was on or about the 27th of April, 1932? A. That is right.

Q. Immediately before, or within six days before that date, had you on behalf— Question withdrawn.

Q. Was your client, Martin F. Kelly, in April, 1932, the owner of 25 per cent of the stock of the New York & New Jersey Clothing Trans-
8303 portation Company?

Mr. Turkus: I object.

The Court: It is hearsay. Sustained.

Mr. Turkus: That is one of the main objections. I object to this line, first, on the ground it has no relevancy, and secondly, these are hearsay declarations. If there was any relevancy in the matter of the solvency of the firm, that would have to be done in a regular, legal way, by producing some of the partners, or through some other, regular, legal course, not hear-
8304 say declarations made.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Now, Mr. Eisenberg, I again show you papers which are marked as Defendants' Exhibit Z-3 for identification and I call your attention to the fact that there are grouped in those papers two agreements, one of April 27, 1932, and an earlier one dated October 28, 1931, between Morris Bluestein and Nathan Sobler and Martin F. Kelly, Inc., and one Joseph Rosen, and I refer your attention to the signatures

which appear on the last page of that second contract, those of Morris Bluestein, Nat Sobler, Martin F. Kelly, and Joseph Rosen, and I refer your attention also to this signature that appears to be that—below the words "Signed, sealed, and delivered in the presence of," and your signature, and I ask you whether the signatures of Bluestein, Kelly, Sobler and Rosen were affixed in your presence. A. They were.

Q. Now, is it a fact, to your knowledge, that Martin Kelly then became associated with or 8306
connected with the company known as the New York & New Jersey Transportation Company, Inc., as of the date of the signing of that second contract, which was signed in your presence on October 28, 1931?

Mr. Turkus: I object to that as a hearsay declaration.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Subsequent to October 28, 1931, and on or about April 21, 1932, did you, at the request 8307
of your client, Martin F. Kelly, did you, in the Court of Chancery of the State of New Jersey, attempt to have the company known as the New York & New Jersey Clothing Transportation Company, Inc., declared insolvent and to have the appointment of a receiver?

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant; that is submitting to the jury indirectly an involved question.

The Court: Counsellor, the bringing of

8308

a lawsuit never proves anybody insolvent. Objection sustained.

Q. I show you papers, including a petition by Martin F. Kelly, Inc., and an affidavit signed by Martin F. Kelly, on the 21st of April, 1932, in an action entitled "Martin F. Kelly, Inc., a corporation of New York and New Jersey, complainant, and the New York & New Jersey Clothing Transportation Company, Inc., a corporation of New Jersey," and I ask you whether those papers were drawn by you.

8309

The Court: Now, by the method of asking that question the jury has been informed as to the contents of papers not in evidence. Counsel will not do that again.

The Witness: At my direction they were prepared.

Mr. Climenko: I offer that instrument in evidence.

Mr. Turkus: I object to it as incompetent.

8310

The Court: That is for the same reason previously stated. Objection sustained.

Mr. Climenko: Exception. May it now be marked for identification?

(Marked Defendants' Exhibit Z-5 for identification.)

The Court: If there is any decree of any court in bankruptcy, I mean an adjudication in bankruptcy, that will be admitted, but the mere accusation by a

lawyer or any other person does not amount to anything.

Mr. Climenko: This was Defendants' Exhibit Z-3 for identification.

The Court: I am just telling you something. I just told you something and it does not call for any speech.

Mr. Climenko: I wanted to tell your Honor—

The Court: You made a speech to the jury a minute ago about the nature of a 8312
paper that was not in evidence. You took care to do that.

Mr. Climenko: I take an exception.

Q. Now, was this petition, Defendants' Exhibit Z-5 for identification, served on an officer of the New York & New Jersey Transportation Company?

Mr. Turkus: Objected to as incompetent.

The Court: Objection sustained. 8313

Mr. Climenko: Exception.

Mr. Turkus: My further objection is that it would be hearsay unless he personally served the paper.

The Court: That is no way to prove insolvency.

Q. Does that petition— I show you a paper entitled, "In Chancery of New Jersey"—

Mr. Turkus: I object to that.

The Court: The Court has cautioned

8314 *Henry H. Eisenberg—For Defts.—Direct*

you about that. I will deal with you in a few minutes in the absence of the jury, if you do not lay off that.

Q. (continuing) —and I ask you whether that paper was served by you.

Mr. Turkus: I object to the preamble in the question. It is improperly bringing before the jury matters not in evidence.

8315 The Court: Objection sustained.

Mr. Climenko: Exception.

I ask that the second page so bound in the papers now referred to the witness be marked as an exhibit for identification.

(Received and marked Defendants' Exhibit Z-6 for identification.)

Q. Now, was the paper marked Defendants' Exhibit Z-6 for identification filed?

8316 Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Now, in or about the 27th day of April, 1932, did you have a conference with Kelly and Rosen and an attorney representing the New York & New Jersey Clothing Transportation Company? A. If that is the date on that agreement, I did have.

Q. In other words, that conference took place on the same day as the date of the agreement,

Defendants' Exhibit Z-3 for identification; is that correct? A. What is Z-3?

Q. That is a contract dated April 27, 1932. A. It is.

Q. The conference took place on the same day? A. Yes, sir.

Q. At that time, in the presence of Rosen and Sobler and Kelly, did you have a discussion with the attorney with respect to the then financial condition of the New York & New Jersey Clothing Transportation? 8318

Mr. Turkus: Objected to as incompetent.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Was there a discussion on that occasion of the claim of Kelly against that corporation?

Mr. Turkus: I object on the same ground.

The Court: Objection sustained.

Mr. Turkus: Exception. 8319

Q. Were the claims of Kelly finally adjusted at the conclusion of that conference?

Mr. Turkus: Same objection.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. At the conclusion of that conference did Kelly withdraw from participation in the New York & New Jersey Clothing Transportation Company?

8320 *Henry H. Eisenberg—For Defts.—Direct*

Mr. Turkus: I make the same objection, and the further objection that it is not inconsistent. The People's theory is that there were three partners.

The Court: Sustained for many reasons. The conversation is not evidence. So far as proceedings are concerned, the bringing of a lawsuit or even the filing of a petition in bankruptcy, that is, involuntary bankruptcy, the filing of a petition in in-
8321 solvency proceedings, if not done by the concern itself, is of no more value as evidence than an indictment. It is only an accusation.

Mr. Climenko: Your Honor, I do not—

The Court: Do not argue on that point.

Mr. Climenko: I will take an exception to your Honor's remarks, if I am not permitted to argue.

Q. I refer your attention to the fact that the paper People's Exhibit Z-3 for identification.
8322 bears a certain date which is different from the date throughout the agreement bound by cover. Did you notice that?

Mr. Turkus: I object. This paper is not in evidence.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Subsequent to the 27th of April, 1932, and on or about June 30, 1932, did you write a registered letter to Salzman & Bunsevitch, of

689 Main Avenue, Passaic, New Jersey, and is this a copy of that letter? A. It is.

Q. Is the red card on it, which is apparently clipped to it by a paper clipping, the return registration slip you received from the post office for that letter?

Mr. Turkus: I object to that as hearsay; the red card—there is no signature on there identified as being that of the recipient of the alleged letter. 8324

The Court: Objection overruled.

A. It is.

Mr. Climenko: I ask to have it marked for identification.

(Received and marked Defendants' Exhibit Z-7 for identification.)

Q. Was that letter written after something had happened in connection with the matters concerned in the agreement, Defendants' Exhibit Z-3 for identification? 8325

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. It was.

Q. Now, pursuant to arrangements set forth in the agreement between Kelly and the others of the New York & New Jersey Company, in April, 1932, were certain notes given to Kelly by that corporation, the New York & New Jersey Clothing Transportation Company?

8326 *Larry H. Cooper—For Defts.—Direct*

Mr. Turkus: I object. Your Honor has ruled on the agreement. Now counsel, by question, endeavors to bring to the attention of the jury facts he knows he cannot put in evidence directly.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. Were those notes paid at their maturity date?

8327

Mr. Turkus: I object.

The Court: That is an improper question. You had no right to ask it.

Mr. Climenko: Exception.

LARRY H. COOPER, residing at 1602 Avenue P, Borough of Brooklyn, City and State of New York, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

8328

Direct examination by Mr. Barshay:

Q. What business are you in? A. Clothing trucking business.

Q. How long have you been in that business? A. For myself?

Q. Yes. A. I am in it for myself about twenty years.

Q. You are not related to Louis Cooper of the Garfield? A. No, sir.

Q. In no way whatever? A. No, sir.

Q. Merely a similarity of names? A. Yes, sir.

Q. Did you know Joseph Rosen during his lifetime? A. Yes, sir.

Q. Did you employ Joseph Rosen during his lifetime in your trucking business? A. Yes, sir.

Q. When did you employ him? A. About 1935.

Q. Do you know when his employment with you commenced? A. About 1935.

Q. What part of the year? A. I don't remember just about the month.

Q. Was it the early part or the latter part or 8330
the middle part? A. Offhand I could not say.

Q. Can you give us your best recollection? A. He worked for me about a year and a half.

Q. From 1935? A. Yes, sir.

Q. In other words, he commenced to work for you in 1935 and he worked for you a year and a half? A. Yes, sir.

Q. At what salary? A. He got the same salary as the other men got that were working for me.

Q. How much? A. $45.

Q. Did you ever increase his salary? A. Yes, 8331
sir, to $50.

Q. So at the end of this employment, to your knowledge, he received $50? A. Yes, sir.

Q. What did he do? A. He was a chauffeur.

Q. Driving a truck? A. An all-round man.

Q. A clothing truck? A. Yes, sir.

Q. Did you discharge him? A. I never discharged him or anybody.

Q. Did he quit? A. Yes, sir.

Q. Did you have a talk with him after he quit as to why he quit? A. Yes, sir.

Q. Tell us.

8332 *Larry H. Cooper—For Defts.—Direct*

Mr. Turkus: I object unless the time and place is fixed.

Mr. Barshay: He said a year and a half after he worked; he began in 1935; he cannot fix the time.

Mr. Turkus: A declaration made after he quit as to why he quit, I object to.

Mr. Barshay: Do you want him to make it before he quits?

Mr. Turkus: I object. There was
8333 nothing brought out in the People's case by witnesses as to that. Nobody contended that Larry Cooper fired him. The only testimony about Larry Cooper that the record shows was that he took him on to replace Meyer Cranes, who went with Louis Cooper.

Mr. Barshay: That still doesn't prevent me from putting in my defense.

The Court: There are two Coopers, and it is quite easy to get confused as to the points of evidence relating to each one.
8334 You must keep that distinct in order to understand this witness's testimony. Is this the Cooper who is supposed to have discharged Rosen for having stolen baskets?

Mr. Barshay: No, sir, that is an entirely different Cooper. I asked that by the first few questions I put to this man. He is not related nor has he any connection with the other Cooper. The other one is in Passaic, New Jersey. He owned the Garfield, but this man is an individual truckman and works and lives in Brooklyn.

The Court: Objection sustained.
Mr. Barshay: Exception.

Q. Was there a man named Cranes working for you before you took on Rosen in 1935? A. That is right.

Q. Did you effectuate a transfer of Cranes to the Garfield, owned by Louis Cooper in New Jersey, in order for you to take on Rosen? A. No, sir.

Q. Was that done—did Cranes leave you to go 8336
to the Garfield in New Jersey? A. Yes, sir.

Q. And you took on Rosen? A. Yes, sir.

Q. In other words, there was an exchange? A. Yes, sir.

Q. At that time that you employed Rosen did you know of your own knowledge whether he at that time had been employed or unemployed? A. He was unemployed at that time.

Q. Do you know when Rosen quit your employment? A. He worked about a year and a half.

Q. Do you know approximately when he quit your employment? A. I could not say. I never 8337
kept track of when he quit.

Q. Do you know when he purchased, if you do, any candy store? A. No, sir.

Q. Were you ever in his candy store? A. No, sir. I have not seen him after he quit the job.

Q. When he quit the job, Mr. Cooper—I ask you now not to answer until the Court rules—did you have a talk with Rosen? A. Yes, sir.

Mr. Barshay: With your Honor's permission, may I ask this witness to relate that talk?

Mr. Turkus: What is the relevancy of it?

Mr. Barshay: If the Court will permit me to answer you, I will.

The Court: That question was asked before and the objection was sustained as incompetent and irrelevant.

Mr. Barshay: If your Honor rules against me, I will take an exception. No further questions of this witness.

8339 The Court: Is there anything from any other counsel?

(No answer from the counsel table.)

MICHAEL J. MONZ, residing at 64-14 Ninety-ninth Street, Queens Village, State of New York, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

Direct examination by Mr. Wegman:

8340 Q. How are you employed? A. I am the chief interviewer of the District Attorney's office in New York County.

Q. The office of Thomas E. Dewey? A. Yes, sir.

Q. How long have you been so employed? A. I have been with Mr. Dewey since July 29, 1935.

Q. Is that the date on which Mr. Dewey started in on his career as Special Prosecutor? A. That is right.

Q. With the title of Deputy Assistant District Attorney, New York County? A. That is right.

Q. That was the very beginning of that investigation? A. Yes, sir.

Q. And you have continued to hold that position until the present date? A. Yes, sir.

Q. At my request have you made an examination of the records and files in the office of Thomas E. Dewey, the District Attorney? A. I have.

Q. The files of Thomas E. Dewey, as special prosecutor, with the title of Deputy Assistant District Attorney? A. I have. 8342

Q. From the beginning of that investigation until the present time? A. That is right.

Q. Are those records which you checked over the records that were kept under your supervision and direction? A. That is right.

Q. Is it the custom and practice and procedure of Mr. Dewey's office, for you to interview all persons who come to Mr. Dewey's office to make complaint or to be interviewed? A. It is.

Q. Now, do you know Joseph Rosen, or did you know Joseph Rosen? A. I never knew him.

Q. Did you ever hear of him? A. I have read 8343 the papers about him.

Q. Was that after his death? A. That is right.

Q. Did you ever hear of him at all before his death? A. I did not.

Q. Is there any record whatever in the office of Thomas E. Dewey to indicate that Joseph Rosen ever came to that office, ever spoke to anyone in that office, or was ever interviewed or wanted for an interview by anybody in connection with that office?

Mr. Turkus: We never contended Mr. Rosen reached Mr. Dewey's office. Our

8344 *Michael J. Monz—For Defts.—Direct*

contention has been quite to the contrary, that he was killed to keep him from going there.

Mr. Wegman: The District Attorney took a different position at one time. I don't know whether he has modified or altered his position, but the record will show it.

Mr. Turkus: I don't know what he is talking about. The testimony in this case
8345 is that the victim was slain before he reached Dewey's office, to keep him away from Dewey's office.

The Court: Mr. Wegman may be confusing Rosen with Rubin. Rubin is alleged to have gone to the District Attorney's office.

Mr. Wegman: No, Rosen is the one I am talking about. I asked this witness whether he ever had, and that is the question we are now up to.

The Court: The trouble is between
8346 Rosen and Rubin, one not going to Dewey's office and the other going there. It tends to confuse the jury unless you are very careful.

Mr. Turkus: That is why I am making my objection.

Mr. Wegman: We don't want the jury to get mixed up.

Mr. Turkus: I don't think they will be anyway, but I want to keep the record straight.

Mr. Wegman: May I have an exception?

The Court: Do you claim there is any

evidence, Mr. Wegman, by the People, that Rosen went to Dewey's office?

Mr. Wegman: I do not.

The Court: Objection sustained.

Mr. Wegman: Exception.

Q. You are present in court this morning with the approval of Thomas E. Dewey, and your chief? A. Yes, sir.

The Court: Mr. Dewey is not the supervisor here. The Court's authority is supreme. 8348

Mr. Wegman: I understand that, but I believe the District Attorney has a right to show his approval.

Mr. Turkus: But that does not sanctify the appearance of this witness, to have Mr. Dewey's blessing. I think we ought to have Mr. Dewey's blessing in this case, too.

Mr. Talley: Why don't you prove that?

Mr. Turkus: I will before it is over.

Mr. Talley: I object to the remark and move to strike it out. 8349

The Court: Strike it out. The jury will disregard that.

Mr. Talley: I ask the Court to instruct the jury to disregard that statement.

The Court: I have just instructed the jury to disregard it.

Mr. Talley: I want you to do it in response to my request.

The Court: I do it in response to your request.

8350 *Nat Sobler—For Defts.—Direct*

Mr. Talley: It is perfectly improper, and I think the Court should take some action at remarks like that being made by the District Attorney. It is not very easy for counsel for the defense to have those strictures placed upon them.

The Court: Yes, I will place strictures on both, both Mr. Wegman and Mr. Turkus.

8351

NAT SOBLER, residing at 170 Bay 29th Street, Borough of Brooklyn, City and State of New York, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

Direct examination by Mr. Barshay:

Q. Will you keep your voice up, if possible? A. I will.

Q. What was your business in 1931? A. In
8352 the express business.

Q. What was the name of your concern in 1931? A. The New York & New Jersey Clothing Transportation.

Q. Do you know when that corporation came into existence? A. I believe it was in 1927.

Q. Mr. Sobler, who was your partner in the corporation? A. Morris Bluestein and myself.

Q. Where was your office? A. No. 2 Washington Place.

Q. Before 1927 were you in the trucking business? A. That is right.

Q. Where was that? A. We had an office in Passaic, New Jersey.

Q. That was not the New York & New Jersey, was it? A. Yes.

Q. What? A. Oh, no, it was the Garfield Express Company.

Q. In other words, before 1927 you had been in some way connected with the Garfield? A. Yes, sir, started in 1922.

Q. In 1922? A. Yes, sir, that is right.

Q. At that time how long did you continue 8354
with the Garfield? A. Up to 1925.

Q. From 1922 to 1925 you were in the Garfield? A. Yes, sir.

Q. Then you got out? A. Yes, sir.

Q. During the time you were in the Garfield, from 1922 to 1925, was the defendant Buchalter, called here Lepke, was he a partner of yours during those years? A. No.

Q. When for the first time did you and Rosen become connected in the New York & New Jersey corporation? A. That was in 1931, the latter part of 1931. 8355

Q. Was your office then in New York? A. Yes, sir.

Q. Before that time, 1931, and while you were the owner of the Garfield from 1922 to 1925, was Rosen working for you as a truckman? A. Yes, sir.

Q. Who became a partner with you in 1931, if anybody, when you became connected with Rosen? A. A fellow named Martin Kelly.

Q. Do you know whether at that time Kelly and Rosen, before being connected with you, were partners themselves? A. That is right.

8356 *Nat Sobler—For Defts.—Direct*

Q. Will you tell us how you and Bluestein operating as the New York & New Jersey, became connected with Rosen and Kelly in 1931, or whatever date it was?

Mr. Turkus: I object to the use of the word "how" as incompetent, immaterial and irrelevant.

The Court: It is a little indefinite. Do you mean there was a contract?

8357 Mr. Barshay: Yes.

Q. (The Court) Was the contract in writing? A. Yes, sir.

The Court: I thought that was a corporation. The word "partner" has been used many times.

Mr. Barshay: I am using it because of the character of the man on the stand. If you want me to refer to him as a stockholder, I will.

8358 The Court: I just wanted to understand.

Q. You were a stockholder of that corporation? A. Yes.

Q. I show you a document referred to as Defendants' Exhibit Z-3 for identification, and I ask you whether or not your signature appears thereon. A. Yes, sir.

Q. Is that a document you signed at the same time— Question withdrawn.

Q. —at the same time the other men signed it? A. I don't understand the question.

8359

Q. Did the other men whose names appear on the paper sign it at the same time you did? A. Yes, sir.

Q. Did you see them do it? A. Yes, sir.

Mr. Barshay: I offer the document in evidence.

The Court: Let me see it.

(Paper handed to the Court.)

Mr. Barshay: I refer to the second part. There are two—the last signature on the page.

8360

The Court: I don't have to read the whole thing?

Mr. Barshay: No, I am just asking you to look at the last page and see where this man signed the document. There are two agreements attached to that exhibit here; I am only speaking of the last one.

The Court: This is all one contract?

Mr. Barshay: No, there are two of them, one is a joinder of parties and the other is a disassociation of parties in 1932, and they are under one cover.

8361

The Court: This is dated the 27th of April, 1922.

Mr. Barshay: That is not the one to which I had reference.

The Court: This is the one you handed up.

Mr. Barshay: I handed it up because they are joined together, but if your Honor will look toward the end you will find a separate agreement.

8362 *Nat Sobler—For Defts.—Direct*

The Court: They appear to be one instrument. I see now there are two.

Mr. Barshay: That is right.

The Court: This one is the 28th of October, 1931.

Mr. Barshay: That is right.

The Court: I will read that.

Mr. Barshay, do you intend to put in the certificate of incorporation?

Mr. Barshay: Of which corporation?

8363 The Court: Was the corporation formed?

Mr. Barshay: No, they bought stock in the existing corporation which was organized, according to this witness's testimony, in 1927, four years before.

The Court: Please correct me if I am wrong. This appears to me to be a contract to reorganize by a re-allotment of shares.

Mr. Barshay: In the existing agreement, known as the New York & New

8364 Jersey.

The Court: By the re-allotment of shares so that new-comers would have a participation? Am I right so far?

Mr. Barshay: Yes.

The Court: As to taking over the trucking and possibly some other assets, as to who the officers were to be and where and when the meeting was to be held for the purpose of carrying out the provisions of the contract, and as to the proposed amendments to the constitution and by-laws—I don't know what he means by

8365

"constitution"—but, at any rate, proposed amendments to the by-laws and also certain fixations of salaries of the officers?

Mr. Barshay: That is right.

The Court: Now let me ask you this, Mr. Barshay: Have you got a minute book to show whether this was done?

Mr. Barshay: I have not.

The Court: Is it obtainable?

Mr. Barshay: I cannot answer that of my own personal knowledge. This is the first time this question occurred to me.

8366

The Court: You see, if this goes in, the question is, is it competent to presume that it was carried into effect in precisely the manner stated?

Mr. Barshay: I am in a position to prove why one of the men did not carry out this contract. That is exactly why I called this witness.

The Court: Now, you answer me something else, concerning the evidence of Harold Rosen as to the alleged pantomime that he witnessed at the Broadway Central Hotel, and the testimony of his sister, as to the examination of certain accounts in or about the month of July. Do you claim that this has any bearing on that?

8367

Mr. Barshay: It has a bearing.

The Court: Do you mind telling me what it is, so I will be able to rule intelligently?

Mr. Barshay: I will be glad to do so. First, before that occurrence took place, at the address where Gurrah—

8368

The Court: I mean, without revealing any detailed stuff before the jury.

Mr. Barshay: Kelly was already out, as I understand; he got out in April, 1932, as I intend to prove by the next exhibit. He got out, and I will show the jury the reason for his getting out was that it was an insolvent company. I will try to prove that through this man. Then the three of them continued until the stoppage, and,

8369

at the stoppage, Rosen went out, and we will try to prove he went out, not as Mr. Turkus said—because he was forced out—but because the company was absolutely broke and insolvent.

The Court: You claim the company was not functioning at the time the books were supposed to have been shown and certain accounts forbidden?

Mr. Barshay: They were positively functioning and continued thereafter until December of 1932.

8370

The Court: Of course, if a company is functioning, there must at least be hope of establishing it on a sound basis, even if it is having a struggle.

Mr. Barshay: I shall show through this witness that Rosen abandoned that hope; that it existed then.

The Court: You see, the jury cannot be permitted to conjecture about what was said during an alleged pantomime; it has to depend upon evidence. But as to whether or not the company was solvent or having trouble financially—a struggle—at

the time of the alleged submission of the account, do you think that would have any bearing as to whether any such conversation took place?

Mr. Barshay: I certainly think so.

The Court: Do you mean you know the Company was having financial difficulty, or the defendants would not have forbidden those Pennsylvania accounts?

Mr. Barshay: There was nothing to forbid; there was nothing in it to forbid 8372
to this man Rosen. He had nothing.

The Court: You say his business was functioning?

Mr. Barshay: Yes.

The Court: And that it was voluntary?

Mr. Barshay: I do not admit the existence of that conference at all. We dispute it. I say it is a fabrication.

The Court: I am trying to figure out in what manner the precise financial condition of the company would have a bearing upon either of those two alleged in- 8373
stances. The impression I have gained is that the company was having a struggle of some kind.

Mr. Barshay: That is right.

The Court: A financial struggle, like many small businesses, but nevertheless continued. I will let this in for what it is worth. It will have to be detached.

Mr. Barshay: May I say one thing: In all the comments which your Honor has made with respect to the record here, about this conference, I hope that there will be

8374

no innuendo with the jury that we concede the existence of any such conference, either there or at the Broadway Central Hotel.

The Court: Of course not.

Mr. Barshay: We firmly dispute it. We say it is a fabrication, and we will prove it, if we can.

The Court: These two contracts, one accepted as an exhibit and one not ac-

8375

cepted as an exhibit, have been fastened together with a fastener; one detached from its cover. Will you fasten it again?

Mr. Barshay: Except the cover. Whoever put on this one has the wrong date by mistake, which I thought the lawyer would explain, but he was not permitted to.

Mr. Turkus: Take it without the cover.

The Court: You had better fasten it together before the sheets become loose; put a proper cover on it. I handed you

8376

back the cover.

Mr. Barshay: The cover has the wrong date. It has the wrong date on it by error, which the lawyer tried to explain, but he was foreclosed. 1926, five years before this contract was drawn. I do not want Mr. Turkus to misunderstand me.

The Court: Mark it in evidence, the original contract, October, 1931.

Mr. Turkus: In order to keep the record straight, that was ripped out of a bundle attached to Defendants' Exhibit Z-3 for identification.

The Court: Exactly. It presented the appearance of being one document. I did not sense there were two covers; one was concealed—until my attention was called to it upon inquiry. It caused confusion at the time.

Mr. Barshay: You mean it has been separated from Z-3, the exhibit for identification?

Mr. Turkus: Yes. But there was an exception taken to the exclusion of Z-3, 8378
and the record must be clear.

The Court: This part is competent. Mark it.

(Received and marked Defendants' Exhibit 4.)

By Mr. Barshay:

Q. Can you tell us what—

The Court: Don't you want to read that to the jury? 8379

Mr. Barshay: If you want me to do so now I will. I thought I would do it later.

The Court: One step at a time, and we will avoid confusion.

(Mr. Barshay then read Exhibit 4 to the jury, as follows:)

"This agreement, made this 28th day of October, in the year of Our Lord, One Thousand Nine Hundred and thirty-one;

"Between Morris Bluestein and Nathan Sobler, of the City of Passaic, County of

8380 *Nat Sobler—For Defts.—Direct*

Passaic and State of New Jersey, parties of the first part, and

"Martin F. Kelly, Inc., a corp. of N. J. and

"Joseph Rosen, of the City of County of and State of parties of the second part,

"Witnesseth: That for and in consideration of the sum of One Dollar and other good and valuable considerations,
8381 each to the other in hand paid, receipt hereof is hereby acknowledged, the parties hereto agree as follows:

"That whereas, the parties of the first part are all the holders of all the shares of stock of the New York & New Jersey Clothing Transportation Company Inc.,

"That whereas, the parties of the first part are also the owners of four certain trucks which were used in the trucking business of the said New York & New Jersey Clothing Transportation Company
8382 Inc., which said trucks are known as follows:

"Model No. 621, 3-ton White truck;

"Model No. 61, 2-ton White truck;

"Model No. 60, 1½-ton White truck;

"Model No. 51—2½-ton White truck;

"That whereas, there is still due on the said trucks certain notes which are payable monthly, and the said New York & New Jersey Clothing Transportation Company Inc., also have a certain amount of good will in their said trucking business.

"That whereas, the parties of the first part are desirous of combining with the

parties of the second part in the said trucking business under the name of New York & New Jersey Clothing Transportation Company Inc.,

"That whereas, the parties of the second part have heretofore and still are in the said trucking business and also have a certain amount of good will in their said business.

"That whereas, the parties of the second part are also the owners of five other 8384
trucks which have been used in the conduct of their trucking business, which said five trucks are as follows:

"One 2-ton Brockway truck;

"Two 2½-ton Garford Trucks;

"One 2-ton Auto Car;

"One 1-ton Ford truck.

"That whereas, there are still certain unpaid monthly notes due on some of the trucks hereinabove mentioned.

"That whereas, Martin F. Kelly, Inc., has also the authority and use of a cer- 8385
tain garage in the rear of premises known as No. 9 Catherine Street, Elizabeth, New Jersey, which he has used in the conduct of his said trucking business.

"That whereas, the parties of the second part are desirous of joining in with the parties of the first part in the operation of the business heretofore conducted by the New York & New Jersey Clothing Transportation Company, Inc.,

"Now, therefore, in consideration of the mutual promises and agreements herein

8386 *Nat Sobler—For Defts.—Direct*

contained, the parties hereto agree to the following:

"1. That the parties of the first part will surrender to the New York and New Jersey Clothing Transportation Company, Inc., all its shares of stock and on November 2nd, 1931, reorganize the said corporation, so that new shares of stock will be issued to the following:

Martin F. Kelly—50 shares;

8387 Joseph Rosen—50 shares;

Nathan Sobler—50 shares;

Morris Bluestein—50 shares;

and these 200 shares will constitute all the outstanding shares of said corporation.

"2. That the said corporation shall do business with $20,000.00 actual paid in, being the aggregate value of the combined assets of all the parties hereto.

"3. That a meeting of the parties hereto will be held at the offices of Henry H. Eisenberg, No. 60 Broad Street, Elizabeth, N. J. on the 2nd day of November,

8388 1931, at which time the by-laws governing the conducting of the said corporation business will be prepared and adopted and the election of officers will take place. It is herein mutually agreed that the officers of the corporation will be as follows:

"Martin F. Kelly—President,

"Joseph Rosen—Vice-President,

"Nathan Sobler—Secretary,

"Morris Bluestein—Treasurer.

"4. That the corporation will do busi-

ness with the Bank of America, at its Broadway and 3rd Street, Branch, and that the President, Martin F. Kelly, and Secretary Nathan Sobler, shall be the only authorized signatures on the checks or other instruments in writing to be issued by the corporation, and that at the meeting of November 2nd, proper resolutions to that effect will be prepared.

"5. That the corporation will hold monthly meetings on the second Saturday 8390
of each and every month and that dividends by the said corporation will be declared quarter-annually.

"6. The corporation shall also make contracts of hire with the parties hereto, which said contracts will be in full force and effect as long as the respective parties to said contracts shall retain control or ownership of their shares of stock in said corporation, said contracts will provide for payment of $75.00 weekly salary to each of the parties hereto and said contracts 8391
will contain a restrictive covenant, which will prevent the respective parties to the contract from directly or indirectly canvassing from the customers of the said New York & New Jersey Clothing Transportation Company, Inc., should the parties of the respective contract quit their job or sell out their interest in the said corporation, for a period of five years, from date of quitting their job or disposing of their shares of stock.

"7. That the corporation shall not go

8392 *Nat Sobler—For Defts.—Direct*

into any enterprise or any undertaking whatsoever without a vote of all the shareholders as it is the intentions of the parties hereto that all the shareholders of the corporation must consent to any undertaking of the corporation involving the expenditures of any monies.

"8. That the constitution and by-laws will also provide that should any of the shareholders desire to dispose of their
8393 shares of stock in the said corporation, that individual shall first offer his shares of stock to the corporation, who is to pay for the same according to the book value thereof or at such price as can be mutually agreed between the seller and the corporation, and should the parties be unable to come to an agreement as to the price of those shares, the said shareholder shall have the opportunity of attempting to dispose of his shares to some third party and the price offered by the said third
8394 party shall be submitted to the corporation for a competitive bid, and the said corporation is to have the first privilege of purchasing the said shares of stock, if the corporation offer is equal to or larger than that third party's bid, and should the corporation fail or refuse to make said purchase after the offer is made, then the shareholder shall have the privilege of selling to that third party and said third party will step into the shoes of the retired shareholder with the same rights

and privileges as said retiring shareholder had in the corporation.

"9. That the by-laws will also provide that should one of the parties hereto decease, then the widow of that party shall receive the salary of her husband out of which salary the widow is to pay for the services of a man who will substitute for and do the work of her husband in said corporation, providing such salary does not exceed the sum of $40.00 per week, on 8396
condition, however, that should one of the parties hereto prepare a will and designate some other person than his wife to receive that benefit, that person so designated will receive that benefit in accordance with the wishes of the deceased shareholder.

"10. That the parties of the first part will lease without any expense to the corporation, their four White trucks hereinabove enumerated until the 15th day of December, at which time a bill of sale will 8397
be issued by the parties of the first part direct to the corporation, for all the said trucks.

"11. That the parties of the first part will cause all unpaid notes on the trucks up to November to be paid so that the corporation will only assume the balance of the notes due on the trucks on or after November 2nd.

"12. That the parties of the second part will lease without any expense to the corporation their five trucks hereinabove

8398 *Nat Sobler—For Defts.—Direct*

enumerated until after the 15th day of December, at which time a bill of sale will be issued by the parties of the second part direct to the corporation for the said trucks.

"13. That Martin F. Kelly will give a lease to the corporation on his said garage for a period of one year, at a rental of $50.00 per month, which said lease will contain a privilege in favor of the corpo-
8399 ration for the renewal of the said lease for an additional period of one year at the same rental of $50.00 per month, said lease to commence on November 1, 1931.

"14. That the parties of the second part will pay or cause to be paid all notes that may be due on their trucks prior to November 2nd, 1931, and the corporation will take over the obligations of the parties of the second part on said trucks, falling due on and after November 2nd, 1931.

8400 "15. That whereas, the parties hereto agree that after an adjustment of all equity of the respective interests of the parties of the first part and the parties of the second part, there is a balance in favor of the parties of the first part in the sum of One thousand Dollars which the parties of the second part agree to pay as follows: On May 1, 1932, $500.00 and on November 2nd, 1932, balance of $500.00

"16. The parties of the first part represent that the balance due on the trucks which were used in the conduct of the

business of the New York & New Jersey Clothing Transportation Company Inc., is not in excess of $7,000.00 and should there be an excess of that amount, they as individuals agree to pay the same.

"17. The respective parties to this agreement hereby agree that the obligations of this corporation that are to be assumed by the respective parties shall be only those pertaining to the unpaid balance due on trucks and for work done on 8402

the bodies of the said trucks, all other obligations, such as gas, oil, wages, garage rent, tires and etc., shall be paid by the respective parties hereto and not charged upon the corporation, and the parties of the first part represent that the New York & New Jersey Clothing Transportation Company Inc., are not indebted in any amount whatsoever, except for balance due on the trucks and for balance that may be due for body work on the 8403 trucks.

"In the place of paragraph 8 the following clause is to be substituted:

"That should any of the shareholders desire to dispose of their interest or shares of stock in this corporation or quit their job, then and in that event that retiring shareholder shall sell his shares of stock to the corporation, who are to pay for the same one hundred per cent of the book value of said shares at that time the seller is offering the same for sale and

8404 *Nat Sobler—For Defts.—Direct*

said one hundred per cent is to be paid in cash at the time the said shares are surrendered.

"In witness whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Morris Bluestein (L.S.)
Nat. Sobler (L. S.)
8405 Martin F. Kelly Inc.
By Martin F. Kelly,
President.
Joseph Rosen (L. S.)

Signed, sealed and delivered
in the presence of

Henry H. Eisenberg

Attest:

Secretary.

8406

By Mr. Barshay:

Q. After the execution of this agreement I just read, Mr. Sobler, did the four of you commence to work in this corporation? A. That is right.

Q. Do you know of your own knowledge whether Rosen put in any money? A. No.

Q. Do you know whether he did or he did not? A. He didn't.

Q. He did not? A. No.

Q. Do you know whether Rosen had any trucks? A. Well, he had trucks with Kelly.

8407

Q. Do you know whether he had any of his own? A. I don't think he had any.

Q. Do you know whether he had any trucks registered in his own name? A. No.

Q. Did Kelly put in any money? A. No.

Q. Did you and Bluestein put in any money? A. We had money in the bank.

Q. How much? A. I could not say.

Q. About. A. A couple thousands or so.

Q. Was it about $1,550? A. I could not give you—it is ten years passed by.

8408

Q. Where did you have your routes? A. Jersey and New York.

Q. In New Jersey and— A. New York. Some part of it in New York.

Q. Did you have any routes then in Pennsylvania? A. No.

Q. To your knowledge, when this corporation was reorganized as per agreement, did Rosen have any customers in Pennsylvania? A. He said he had.

Q. Do you know their names? A. Well, I can't remember.

8409

Q. Do you know how many? A. Well, about five or six or something like it, I think.

Q. Were they big ones or small ones, if you know? A. Well, they were fairly good size.

Q. The first month of your doing business together, did you draw the pay agreed upon, the $75 a week? A. First month, yes.

Q. Did the Company make money the first month? A. We could not know we make any money until the 1st of the month.

Q. And on the 1st of the month did you make any money? A. No, we went about $1,200 or $1,400 in the rear. All our money was gone.

Q. I did not hear that. A. All our money what we had there was gone.

Q. Was gone? A. That is right.

Q. You took in some money from the customers, did you not? A. We worked by months. We worked for October a full month, we collected in November, so we did not have much to collect. We were in the rear about $1,200 or $1,400, the first month.

Q. At the end of the first month, this corporation was in arrears? A. About $1,200 or $1,400.

Q. Going to the next month, Mr. Sobler, at the end of the second month was the company ahead or in arrears? A. In arrears.

Q. How much? A. I could not say. That I could not say. We did not have no money, but we stopped drawing pay. We didn't have no money and we stopped drawing pay. I refused to put more money into it, and we owed everybody and we couldn't run it any further. That's all.

Q. That is the second? A. That is the second month.

Q. So that the second month you did not draw pay? A. No.

Q. Do you know whether Rosen drew pay? A. No.

Q. Were you able to pay the garage bills to Kelly? A. I don't think we did.

Q. Did you continue for the third month in January of 1932? Did you? A. Yes.

Q. At the end of the third month, did the company make or lose money? A. We still lost money.

Q. Did you put in any more? A. No, I didn't.

Q. Do you know whether or not the finance companies began to foreclose on the trucks? A. I sure do.

Q. Did they? A. I believe that the garage man chained the trucks up.

Q. Do you know which garage man? A. In Passaic, on Main Street.

Q. Was it Pink's? A. Pink's Garage.

Q. Did you draw money the third month? A. No.

Q. At the end of the fourth month— A. No, 8414
we did not.

Q. Just one month at a time. The end of the fourth month, did the company make money? A. No.

Q. Did you draw pay? A. No.

Q. Did the other partners draw pay? A. No.

Q. Were you indebted to the workmen for pay? A. Some part of it, yes. Can I answer?

Q. What? A. We used to give them 'head checks.

Q. You used to give them 'head checks for pay? A. That is right. 8415

Q. At the end of the fifth month? A. We still did not draw no money.

Q. In April of 1932 did Kelly withdraw from the business? A. Yes.

Q. Before Kelly withdrew from the business, to your knowledge were papers served upon you? A. After he withdraw—

Q. Please, Mr. Sobler, I have to finish the question. Were papers served upon you? A. Repeat that again, please.

Q. I want to finish the question. I said, before Mr. Kelly withdrew from the business in

April of 1932, do you know of your own knowledge whether or not you were served with papers by Kelly's lawyer declaring your corporation insolvent because you had not paid him either for the garage rent or his salary? A. Not before.

Q. When? A. After, a few days after.

Q. A few days after what? A. After Kelly withdraw.

Q. The papers were served? A. That is right.

8417 Q. How much did you owe Kelly for back wages, I mean the corporation? A. I could not say.

Q. Did you owe him a lot? A. Maybe five or six hundred dollars, maybe seven hundred.

Q. How much was the corporation indebted to you for back wages, do you know? A. About the same amount.

Q. And to Rosen? A. The same amount.

Q. And to Bluestein? A. Same thing.

Q. Do you know of your own knowledge whether or not you paid the garage rent which the

8418 corporation agreed to pay to Kelly? A. To Kelly, no.

Q. You did not pay? A. Did not pay.

Q. Do you know about the average balance your company had in the bank during those five months? A. I don't think we had any balance in it.

Q. Was it a little balance or a large balance, do you know? A. We had to change banks all the time.

Q. Tell the Judge and jury why? A. We could not make any deposits. We didn't make no money, so we had nothing in the bank.

8419

Q. After Kelly served those papers through his lawyer upon you, did you and Rosen and Bluestein and Kelly come to some agreement? A. Yes.

Q. Can you tell us what the agreement was? Yes or no? A. Yes, I think I can.

Q. All right.

Mr. Barshay: Mr. Turkus, this is Exhibit 3-Z for identification. I am now directing this witness's attention to Z-3 for identification.

8420

Mr. Turkus: The balance of it?

Mr. Barshay: The balance of it.

Q. I ask you, Mr. Sobler, whether your signature is on this paper. A. Yes.

Q. And did you see the other men sign that paper at the same time as you did? A. I did.

Mr. Barshay: I offer that in evidence.

The Court: Let me see it. This is the split-up of the arrangement?

8421

Mr. Barshay: Yes, your Honor.

The Court: They came together in October and divided again in April?

Mr. Barshay: That is right, sir.

The Court: Admitted.

(Received and marked Defendants' Exhibit 5 in evidence.)

The Court: Briefly—tell me if I am wrong—Kelly was out?

Mr. Barshay: Kelly was out.

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The Court: The company continued, run by the remaining two?

Mr. Turkus: Three.

Mr. Barshay: Rosen, Sobler, and Bluestein.

The Court: Read it to the jury.

Mr. Barshay: (Reading) "THIS AGREEMENT, made this 27th day of April, in the year of Our Lord, One thousand Nine hundred and thirty-two:

8423

"BETWEEN

"MORRIS BLUESTEIN, NATHAN SOBLER and JOSEPH ROSEN, as individuals, of the City of Passaic, County of Passaic and State of New Jersey, and NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY, Inc., a corp. of New Jersey, parties of the first part,

AND

8424

MARTIN F. KELLY INC. a corp. of N.J. and MARTIN F. KELLY, as an individual. of the City of Elizabeth, County of Union and State of New Jersey, parties of the second part

WITNESSETH: That for and in consideration of the sum of ONE DOLLAR and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

That whereas, on the 28th day of October, 1931, Morris Bluestein and Nathan Sobler, who were all the shareholders of the New York and New Jersey Clothing Transportation Company Inc. and Martin F. Kelly Inc. and Joseph Rosen, agreed under the agreement above mentioned to consolidate and form one corporation, to be known and designated as the New York and New Jersey Clothing Transportation Company Inc. a true copy of which said 8426
agreement is attached hereto and made a part hereof and marked Agreement A.

That whereas, all the parties hereto have carried out said agreement and consolidation and each of the parties hereto have performed their share in the said formation of the newly formed organization, the New York and New Jersey Clothing Transportation Company Inc.

That whereas, the parties hereto mutually agreed that it is for the best interest of all the parties hereto that the 8427
parties of the second part herein, to wit, Martin F. Kelly Inc. and Martin F. Kelly, individually, be paid out as and for his interest in the said corporation, so that the remaining interest in the said corporation will be held by Nathan Sobler, Morris Bluestein and Joseph Rosen.

Now, THEREFORE, in consideration of the mutual promises and agreements herein contained which the parties hereto admit

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is valuable consideration, the parties hereto agree as follows:

That the said New York and New Jersey Clothing Transportation Company, Inc. do convey to the parties of the second part or to one whom they may designate, the four trucks which the said Martin F. Kelly Inc., heretofore conveyed to the corporation in the agreement above mentioned and marked agreement A;

8429 One—2 ton Brockway Truck;
One—2½ ton Garford Truck;
One—2 ton Auto Car and
One—1-ton Ford Truck.

That the parties of the first part assume all the outstanding obligations of the said New York and New Jersey Clothing Transportation Company Inc. except those which will hereinafter be specifically enumerated and save the parties of the second part harmless by reason of any indebtedness of the said New York and

8430 New Jersey Clothing Transportation Company Inc. except the following:

Labor, and also protested check to Mr. P. Leib	$261.62
Due to Jannelli for 5 months repairs on trucks	310.00
Ford notes	135.00
Hire truck to Long Branch	6.00
Hire truck to New York from Point Koski	9.50
Petty cash advanced to Rosen	9.00

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Cash advanced to Bluestein	5.00
To American Oil	23.00
Notes on Brockway Truck	231.00
Lost Silk	286.00
Garage rent	200.00
Linden Sales for truck shaft	8.00
Straightening Chassey	10.75
Tire Rebuilding	5.50
John Carr, battery and ignition service	21.10
Total	$1521.47

8432

To meet these obligations the said New York and New Jersey Clothing Transportation Company Inc. are to give to the parties of the second part in addition to the trucks above enumerated the sum of $852.97, which said amount is to be paid in the following manner; $448.20 collection due on the route, worked on by the parties of the second part and $100.00 in cash this day and the balance of $304.37 by two promissory notes, one in the sum of $154.37 due 60 days after the date of its making and one note in the sum of $150.00 due 90 days after the date of its making, both of said notes are to be made by the corporation and to be endorsed by the individuals herein mentioned as the parties of the first part, and as security for the repayment of said notes the parties of the first part agree and hereby do

8433

assign all their outstanding accounts, subject however, to the right the parties of the first part retain in collecting the said moneys and pay the said notes out of the first moneys collected, so that said notes will be paid prior to their due date and should the moneys be collected by the parties of the first part, the party of the second part hereby designates each and all of the parties of the first part as his or
8435 its agent for the collection of the said moneys due on said outstanding accounts, and the first moneys collected on said outstanding accounts are to be applied to the repayment of the balance of $304.37, representing the total amount due on both notes, which the parties of the first part represent they will do and will not use the said funds until said notes are paid, for any other purpose, and the parties of the second part is not to notify or collect any moneys on the said accounts due to
8436 the parties of the first part, unless he ascertains that a default has been made in this covenant.

The parties of the first part represent that there is no indebtedness due on the trucks to be conveyed to the parties of the second part as above mentioned, except such indebtedness as the parties of the second part has knowledge of, which is represented to be arrearages on notes the finance company, damages to the body on a large Brockway truck and such other items as is enumerated on the list herein-

before enumerated, as items that are to be paid for and assumed by the parties of the second part.

Morris Bluestein and Nathan Sobler, two of the parties of the first part herein are to give a release to the parties of the second part for $1000.00 mentioned in the agreement herein attached and marked agreement 'A' which was to be paid by the parties of the second part to the said Morris Bluestein and Nathan Sobler, as 8438
an additional investment by the parties of the second part in the said New York and New Jersey Clothing Transportation Company Inc. being the amount designated and agreed upon as a difference in equity.

The parties of the second part are to execute a release to the New York and New Jersey Clothing Transportation Company Inc., releasing it from any and all indebtedness due it by reason of its former association in the said corporation and Martin F. Kelly as an individual is 8439
to release the said New York and New Jersey Clothing Transportation Company Inc., from the contract of hire formerly given by the corporation to Martin F. Kelly.

The parties of the second part are also to release one, Joseph Rosen, who was formerly associated with the parties of the second part, by reason of all indebtedness due from Joseph Rosen to the parties of the second part, which said indebtedness amounted to approximately $4750.00.

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The parties of the first part hereby assign to the parties of the second part the following outstanding accounts, which are the accounts above mentioned, given as security for the repayment of the two notes represented to be the balance due to the parties of the second part and the moneys collected on the accounts are to be first paid to the parties of the second part; the following are the accounts mentioned;

8441

Standard Trouser	$45.64
Red Bank Co.	27.80
Ledgin	145.18
Schwartz & Starg	205.00
Finn	256.00
Ideal Paid $12.00	27.00
Pisteal Mfg.	42.36
Princeton	36.01
Kramer & Son	49.74
Passaic Clothing	181.31
Garfield Vest	24.92

8442

Frourvante	19.08
Estein	4.02
Condina	62.70
Duratex Mfg.	11.60
Ferrere	340.50
Capital Coats, Newark	31.45
Best Make	37.00
Carbondale Clothing	71.74
Cortland	46.46
Plainfield	373.00
Enterprise	39.21
Fashion paid 86.05	170.54

Rosenberg	17.61
Rel Clothing	80.00
Umansky	121.91
Weekes Barre	9.93
Bon Weiss	29.08
Superior Quality	44.25

The parties of the second part is to assign to the three individuals mentioned as parties of the first part the 50 shares of stock held by it or him in the said New 8444
York or New Jersey Clothing Transportation Company Inc. which said stock, before the assignment becomes effective shall be held in escrow by J. Bernard Saltzman, attorney for the parties of the first part, until such time as the notes above mentioned are repaid or the parties of the first part refuse or neglect to pay, the moneys that may be collected by them or it on the accounts outstanding, or any breach of this agreement on the part of the parties of the first part, and should 8445
the parties of the first part fail to comply with these provisions or any of them in any measure whatsoever, then the said J. Bernard Saltzman, is to redeliver the said 50 shares of stock to the parties of the second part, said redelivery to be made by the said J. Bernard Saltzman, immediately upon receiving notice that the agreement or any part of it has not been properly performed by the parties of the first part or either of them.

The parties of the second part is to

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immediately, upon receipt of the notes in question deliver a resignation as officer and director from the said corporation, and the parties of the second part is to sign a check which will be drawn on the First National Bank of 580 Broadway, New York City, which said check will be in an amount representing the balance in said bank and the said New York and New Jersey Clothing Transportation
8447 Clothing Company Inc. is to draw under the direction and supervision of the parties of the first part and proper representations that a check so signed represents and balance held in said bank.

The 50 shares of stock above referred to as those being assigned to J. Bernard Saltzman are to be held in escrow by him and the said J. Bernard Saltzman shall have full power to vote said stock as if he were the original owner thereof, provided, however, that the said J. B. Saltz-
8448 man shall not consent to the filing of a voluntary petition in Bankruptcy and not consent to the appointment of an equity receiver.

The parties of the first part in lieu of the sum of $304.73, being the balance due to the parties of the second part, shall have the privilege of paying the sum of $250.00 in cash, in lieu of said sum of $304.73, provided, however, said $250.00 is paid on or before, Tuesday, May 2nd, 1932.

8449

IN WITNESS WHEREOF, the parties have hereto interchangeably set their hands and seal the day and year first above written.

NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY INC.

By: JOSEPH ROSEN,
Vice President

NAT SOBLER,

8450

JOSEPH ROSEN

Signed, sealed and delivered
in the presence of

Attested:

NAT SOBLER
Secretary

MARTIN F. KELLY INC.

8451

By: MARTIN F. KELLY,
President

MARTIN F. KELLY."

Attested:

.....

Secretary."

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Mr. Barshay: May the record show that the Exhibit A mentioned in the document I just read is the one marked in evidence here as Defendants' Exhibit No. 4? They were both part of the same exhibit, Z-3, before.

By Mr. Barshay:

Q. Mr. Sobler, after you gave those notes, one
8453 to be paid in 60 days and one in 90, did you pay those notes? Did the corporation pay those notes? A. I don't think we did.

Mr. Turkus: There is a lot of testimony here where "I don't think, ' and "I don't think."

The Court: Don't tell me what the testimony is; if you object, I will rule.

Mr. Turkus: I am going to ask that it be stricken.

The Court: Strike it out.

8454 The Witness: We did not pay that, your Honor.

Q. Please, do you know of your own knowledge—don't tell me what you think or guess—do you know of your own knowledge whether or not those notes came back for non-payment? A. Came back for non-payment but I took care of it later.

Q. Personally? A. Yes.

Q. To your own knowledge were any dividends declared before Kelly left the corporation? A. No.

8455

Q. After Kelly left the corporation, did you, Rosen, and Bluestein continue to work? A. Yes.

Q. How long did you continue to work before Rosen quit? A. That was 1932, July, the end or the later part of July.

Q. From April, 1932, when Kelly quit until July, going back to the month of May, do you know whether or not your corporation made any money? A. No.

Q. Do you know whether they did? A. No.

Q. Did they make money? A. No.

8456

Q. Do you know whether or not at the end of the month there was a balance in the bank of your corporation? A. There was no balance in the bank at any time.

Q. Did you draw your pay that month? A. Not of the corporation.

Q. Did Rosen draw any pay that month? A. No.

Q. Did Bluestein draw pay? A. No.

The Court: What month?

Mr. Barshay: The month of May which followed Kelly's withdrawal.

8457

Q. Did you take in any accounts? A. Accounts of what?

Q. Did you collect any accounts? A. We did.

Q. Was there enough to pay the workmen? A. No.

Q. Did you still continue to give head checks? A. That is right.

Q. Do you know whether or not Rosen brought in any moneys into the corporation during the month? A. No.

Q. Of May? A. He did not.

Q. In the month of June did the company make money? A. No.

Q. In the month of July did the company make money? A. No.

Q. Were any dividends declared? A. No, sir.

Q. Did the finance company seize any trucks? A. Yes.

Q. How many? A. Two.

Q. Do you know the name of the finance company? A. Well, the White truck, one White
8459 and one Sterling.

Q. Do you know how much Rosen drew during those months? A. No.

Q. May, June and July, 1932? A. No.

Q. Did you have an accountant? A. Accountant? A. No.

Q. Did you have a bookkeeper? A. Not at that time, no.

Q. When did you have a bookkeeper? A. From the beginning.

Q. Who was it? A. Harold Rosen.

Q. How long did he stay? A. About two
8460 months or so.

Q. How much did he get? A. $15 a week.

Q. Who was the bookkeeper who followed Harold Rosen? A. We didn't have any.

Q. Then did you employ any other bookkeeper? A. No.

Q. Do you remember Sylvia Rosen, the daughter of Joseph Rosen? A. I do.

Q. Did she come to the place? A. She used to come in but not for work.

Q. Did she help you at all with the books? A. No, never had—

Q. Did you give her any money?

Mr. Turkus: Wait a minute. Don't shut it off.

Mr. Barshay: If he did not finish, let him finish.

Q. You tell us everything about Sylvia Rosen. A. She did not have no work that time. She used to come in once or twice a week just to see her father, as far as I know.

The Court: We do not know how far you know. 8462

The Witness: She used to come in to see her father but no getting pay or anything like it.

Q. Did you give her a regular salary every week? A. Sylvia Rosen?

Q. Yes. A. No, sir.

Q. Do you know when Joseph Rosen became dissociated from your company, when he left your company? A. Was in August—I don't remember the date but was the month of August, the beginning of August. 8463

Q. Do you remember the stoppage in 1932? A. I do.

Q. With respect to the stoppage, did he quit before, or during, or after? A. During the stoppage.

Q. Do you know how long after the stoppage began that he quit? A. Well, the stoppage began, I think, about Monday or something about Monday and he quit Saturday.

The Court: What month, if you know?

The Witness: In August.

Q. Can I refresh your recollection by referring to the month of August, 1932? A. That is right, that was the stoppage.

Q. Did Rosen have a talk with you? A. He did.

Q. Where? A. On Fifth Avenue and 17th Street.

Q. How many days after the stoppage started? A. Must have been about four or five or six days. Was on a Saturday. I remember that Saturday.

8465

Q. On a Saturday? A. On a Saturday.

Q. You tell us what Rosen said to you. What did he say to you? A. About what?

Q. You said you had a talk with him during the stoppage.

The Court: Is not this hearsay?

Mr. Barshay: No, this is what Rosen said to him.

The Court: This is not a suit against Rosen.

Mr. Barshay: I beg pardon?

8466

The Court: This is not a lawsuit against Rosen.

Mr. Barshay: We went to show how he became dissociated from the firm.

The Court: It is hearsay.

Mr. Barshay: It is not hearsay, your Honor. We are going to prove now—

The Court: Rosen is not here. He is not a witness. You are not impeaching his testimony.

Mr. Barshay: I am not, sir.

The Court: If the District Attorney does not object—it is hearsay—the Court

will not be put in a forced position of doing the District Attorney's work. Go ahead.

Q. What did Rosen say to you about quitting your firm? A. Well, he came over Saturday after twelve o'clock and he says, "I am going to quit." I said, "What's the matter, Joe?" He says, "I am getting a job back by the Garfield Express and I am getting a hundred to $125 a week." I says, "I know Louis Cooper very well. Once he said no, so now how are you going back to him?" He said, "Louis Buchalter or Lepke got in as a partner there and he told Louis Cooper to take me back to work." 8468

Q. Was that the end of his association with your company? A. He left. That was the end of it.

Q. Do you know how much your company owed Rosen for back wages at that time? A. I don't know. They owed him as much as they owed me.

Q. Did you and Bluestein continue? A. What is that? 8469

Q. Did you and Bluestein continue to do business? A. Yes.

Q. Did you have to pay or did you pay any money to Rosen for his shares in the corporation when he quit? A. No.

Q. Did he ever ask you for any money for his shares? A. No.

Q. How long did you and Bluestein continue in business with the New York and New Jersey after that? A. After that, I believe five months.

8470 Q. During the five months, did you make any money? A. Well, we start to make a living again.

Q. Where did you go? A. Passaic, Jersey State.

Mr. Turkus: State of Jersey. What else?

The Witness: And New York City.

8471 Q. So that there were only two partners left? A. That is right.

Q. When did you discontinue your association with Mr. Bluestein? A. I believe it was 1933.

Q. You continued with the New York and New Jersey, didn't you? A. Not in the New York and New Jersey.

Q. Under another name? A. Under another name.

Q. Was there ever a time when Lepke, the defendant Buchalter, sent for you during the stoppage or before the stoppage of 1932? A. No.

8472 Mr. Turkus: Wait a minute, sir. There is no testimony that he ever did.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did Rosen ever tell you at any time in his life that Lepke sent for him while he was a member of your company?

Mr. Turkus: That is objected to.

The Court: Sustained.

Mr. Barshay: Exception.

8473

Q. Did Rosen ever tell you that he had been to see the defendant Lepke at the Perfection Coat Front Company and there was told by him, or someone there, not to continue with certain customers in Pennsylvania? A. No.

Mr. Turkus: Objected to. Please don't you answer questions. No testimony at all that he ever made such a revelation to this man.

8474

The Court: Utterly incompetent. Sustained—

Mr. Turkus: Will your Honor caution this witness not to be so—

The Court: Don't interrupt the ruling. Sustained, the answer stricken and the jury is instructed to disregard it.

Mr. Barshay: That is all, sir.

Cross-examination by Mr. Turkus:

Q. Sobler, you know Lepke since 1926 or 1927, don't you? A. 1927 or 1928.

8475

Q. About June or July of 1940 Philly Buchalter took you to a lawyer's office, didn't he?

Mr. Barshay: I object to it, sir; first, on one ground—

The Court: What date was that?

Mr. Barshay: 1940.

The Court: What is the objection?

Mr. Barshay: First, Judge, he had a right to go to a lawyer's office,—there is nothing wrong about that,—just as much as he had a right to go to the District

8476 Attorney's office. I want that clearly understood.

The Court: Who is Philly Buchalter?

Mr. Barshay: Philly Buchalter is a brother of the defendant Louis Buchalter and his name is not Philip Buchalter; his name is Philip Kauver.

Mr. Turkus: Known as Philly Buchalter.

Mr. Barshay: Kauver and he is a half-
8477 brother, I am informed, of the defendant Buchalter.

The Court: What is the use of fighting about that?

Mr. Barshay: As long as there is no wrong implication, that's all.

Mr. Turkus: We just want to fix the time.

The Court: The question is simply one of admissibility of evidence under the rules. The objection is overruled.

Mr. Barshay: Exception.

(Pending question read.)

8478

A. Yes, not to the lawyer's office.

Q. Where did he take you, what kind of an office? A. It is a business place.

Q. Business place? A. On 35th Street.

Q. Somewhere around 35th Street? A. That is right.

Q. And a statement was prepared then in June or July of 1940 for your signature, isn't that right?

Mr. Barshay: Where, please?

Mr. Turkus: In this place.

Mr. Barshay: Are you asking him the question or telling him?

Mr. Turkus: Yes, certainly.

A. No, sir.

Q. Did you sign a statement there? A. Yes.

Q. In the early part of 1941 you received a telephone call and then went to 60 Wall Street, Manhattan, didn't you? A. Right.

Q. And you spoke to the lawyer there about 8480
ten or fifteen minutes? A. More than that.

Q. How long? A. About an hour.

Q. And then you went away? A. That is right.

Q. And you got another telephone call?

Mr. Barshay: Excuse me. Can we get the name of the lawyer in the record?

Mr. Turkus: Be patient.

Mr. Barshay: So there will be no misunderstanding.

Mr. Turkus: I want to get the chronology of events. 8481

The Witness: If the Judge allow me, can I tell the lawyer something? I was called to the lawyer's office; at least I was not kidnapped from the street like you do. That's all I got to say. Nothing to smile about it either.

The Court: If this—

The Witness: Trying to kidnap people from the street.

The Court: (To witness) Stop talking when the Judge is talking.

8482

The Witness: O.K.

The Court: If this happened when the witness for the People was testifying, there would have been an immediate motion for a mistrial.

(To witness) You just hold your tongue and you give direct answers.

The Witness: O.K.

The Court: Remember you are in court, not in a barroom.

8483

Proceed.

(Pending question read.)

Q. Then you went up to that same law office again, didn't you? A. That is right.

Q. Whom did you see on the first visit? A. Counselor right there (indicating) I don't know his name.

Mr. Climenko: Does he indicate me, Mr. Turkus?

Mr. Turkus: I don't know.

8484

Mr. Climenko: Well, ask him.

Q. Which one? A. Right there.

Mr. Barshay: This gentleman here (indicating Mr. Climenko)?

The Witness: That is right.

Q. And on the second time, which one did you see? A. I saw Mr.—both of them.

Q. Wegman and Climenko. You know the names, don't you? A. I do not.

Q. How many times have you been up to 60 Wall Street? A. Twice.

Q. And how long did you spend the second time? A. Maybe a half an hour or so.

Q. And in the hour and a half that you spent on the two occasions at 60 Wall Street, don't you know the names of the lawyers that you spoke to? A. I just got a bad head. I can't remember.

Q. You have been remembering about nine years ago without any books and papers, haven't 8486
you? A. Well, you know I am a sick man. I am a little upset now so just leave me alone.

Q. Who brought you up to this law office? Let us get that. A. They called me to come up there.

Q. And you went up on a telephone call? A. That is right.

Q. Had not Philly Buchalter been over to see you first? A. I don't think so. No.

Q. Did anybody suggest that you go up there? A. No. They just called me, they want to see me about—

Q. Who invited you here today? A. A sub- 8487
poena.

Q. Who brought it? A. What?

Q. Who brought the subpoena? A. Gave me a subpoena.

Q. Who gave it to you? A. I don't know the man's name.

Q. Where did you get it? A. In my home.

Q. What address? A. 170 Bay 29th Street.

Q. How many times have you seen Philly Buchalter since the time he took you up to this

8488 *Nat Sobler—For Defts.—Cross*

place on 35th Street where you signed the statement? A. What is that?

Q. How many times have you seen Philly Buchalter since June or July of 1940 when you signed a statement in some place of business around 35th Street?

Mr. Wegman: May I ask in order to avoid confusion that Mr. Turkus be instructed to use the right name of the
8489 gentleman he is referring to. It is Phil Kauver, not Buchalter.

Mr. Turkus: He is known as Buchalter as well as Kauver.

Mr. Wegman: Have you proven that, Mr. Turkus?

Mr. Turkus: Read the question.

The Court: The Court cannot remember which name is right. We know who is meant.

Q. You know who I mean by Philly Buchalter, don't you? A. That is right.

8490 Q. Is he in court? There he is, the fellow with the glasses, isn't he? A. That is right.

The Court: The man with the dark glasses?

Mr. Turkus: Yes.

The Court: Let him stand up and be identified. What is your name?

A. Philip Kauver, never was known as Buchalter.

8491

Mr. Turkus: And he has added gratuitously that he is never known as Philly Buchalter.

The Court: Call him Kauver for the sake of peace.

Q. How many times have you seen that individual with his black glasses since June or July, 1940, when you signed the statement up in that place of business?

8492

Mr. Barshay: I object to the characterization of black glasses because medically they are an essential with him.

The Court: Then it is obvious to the Court the man is blind.

Mr. Barshay: Almost blind, sir.

The Court: He has little peep holes in the middle of opaque lenses.

Mr. Barshay: That is correct.

The Court: Which focus the vision directly on the lens of the eye and shut off the lateral rays. I assume that is correct. 8493

Mr. Turkus: I am not going into any medical discussion of the eye-glasses. He says he is Kauver. This man knows him as Philly Buchalter.

The Court: There is no harm meant by referring to the glasses.

Mr. Turkus: Of course not, merely being identified.

(Pending question read.)

A. That up to me to answer?

8494 Q. Yes. I believe I saw him once or twice but not more than twice.

Q. And was it about this case? A. First time it was about this case.

Q. Second time? A. Second time that the same, what I know about the case.

Q. And the second time when he saw you, was that when you went to 60 Wall Street? A. No, he did not give me any order to go to 60 Wall Street but he said "the lawyer will call you and
8495 go up and what you know about it."

Q. You did not get any orders on that occasion, did you? A. No.

Q. Philly, this gentleman here, is in the trucking business, too, isn't he? A. Who is that?

Q. Philly, the man with the black glasses. A. Yes, in different line, not in the same line as we are.

Q. The first time you got orders though, didn't you? A. Orders what?

Q. Orders to go up to 35th Street. A. Didn't get any orders from anybody.

8496 Q. Not from Philly? A. No, he just told me "the lawyer wants to see you about what do you know about the case." That's about all.

Q. How many times have you been in the lawyer's office? A. I said twice.

Q. And once in 35th Street? A. That is right.

Q. That is three times? A. That is three times.

Q. And the man who gave you the subpoena, do you know his name? A. No.

Q. Had you ever seen him before? A. No.

Q. This morning when you came to court, did

you see Philly Buchalter or Philly Kauver? A. Not when I was outside, I didn't see him.

Q. You didn't? A. No.

Q. You live at 170 Bay 29th Street, in Brooklyn, don't you? A. That is right.

Q. And you live there with your wife, Lena Sobler, and your daughter May Sobler and a third daughter, a married daughter, is that right? A. That is right.

Q. Which female in the family is running a trucking business? A. My wife. 8498

Q. Lena? A. That is right.

Q. And what is the name of the outfit that she is running? A. R. S. & Z. Express Company.

Q. Your wife is a housewife, isn't she? A. Never was a housewife.

Q. And where is this trucking business located? A. Right where I live.

Q. Where does it operate? A. In New York.

Q. Is it a sizable business? A. I don't know the word about sizable.

Q. How many trucks? A. Two trucks.

Q. And the income derived from that is dependent upon the good will of the industry, isn't it? 8499 A. I don't know what that means.

Q. How do you get your business? Don't you understand that? A. How we get our business?

Q. Yes. A. We got a little business left and she operates it. Since I got sick I left it all. I can't take care of it.

Q. The two trucks are being operated in the name of your wife as the R. S. & Z.? A. That is right.

Q. You have got truckmen working on the trucks? A. Yes.

8500 Q. Is it your business or your wife's? A. My wife's.

Q. She is getting an income from it? A. I suppose she does.

Q. You know nothing about the income? A. I don't pay any thought to it.

Q. You do not know whether your wife is making money or losing money? A. She could not be in business to lose money.

Q. Do you know what accounts she has got?

8501 A. Not all of them but I know a few of them.

Q. How many do you know? A. Two or three.

Q. You only know two or three of the accounts? A. She got about three accounts.

The Court: We will continue at 1:30. Everybody kindly remain in order.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it. Keep your minds open. The jury may go out of one door, the witness out of the other.

8502 Mr. Turkus: Will your Honor ask the witness to stay a moment?

The Court: Let the witness come back.

(The jury retired from the court-room.)

The Court: Why do you want the witness?

Mr. Turkus: I want a direction to the witness that he do not discuss the matters until his cross-examination is completed.

The Court: What good is that? The Court cannot follow the man up.

Mr. Barshay: Counsel all consent to it and give their word that they will not permit anyone else to talk to him in any respect whatever and we request your Honor to instruct the witness accordingly.

The Court: The Court has nothing to do with it.

Mr. Wegman: If your Honor pleases, I want to make this statement in the absence of the jury and what I was about to do when I came up here at recess time 8504 was to request you to let me make a statement in the absence of the jury. The jury being out I should now like to ask your Honor to permit us to put on this record an offer of proof of what we expected to prove by the last question asked of the witness Larry Cooper, that is to say the question relating to his conversation with Joseph Rosen at the time Joseph Rosen quit his employment by Larry Cooper. As the record now stands there is nothing to indicate what was expected to be proved 8505 by means of that corroboration.

The Court: You cannot fill the hole in by doing it in a dilatory manner.

Mr. Wegman: The witness is still available.

The Court: Call him back and make your offer in open court. What the Court wants to direct attention to is this: This morning there was presented at chambers by a representative of one of the counsel for defense two subpoenas duces tecum—I think they were duplicates. They called

8506 for police information as to traffic signals on the alleged route of rehearsal testified to by Bernstein as having been gone over a number of times prior to the alleged murder. The Court called the attention of this man to the fact that the subpoena was blind as to date, that apparently this would simply bring the present regulations or the present setup and not the setup as of the date of the alleged rehearsal, which
8507 is the only thing competent. An interpolation was then made by this man representing one of the counsel on the subpoena duces tecum but I told him that I did not think that it was adequate; I think it would tend to be confusing. I take it that what is wanted is what was the setup both as to arrow directions and as to traffic lights at the time of the alleged rehearsals of route. If you want to get a proper subpoena, I would suggest you read over what has already been signed and I will
8508 be glad to sign one which will avoid confusion.

Defendants are remanded.

Mr. Wegman: If your Honor pleases, the witness Larry Cooper is still in the court-room. May I ask for a direction that he return?

The Court: That is a recess now. The defendants are being led out.

(A recess was thereupon taken to 1:30 P. M.)

8509

(Afternoon Session. Trial Resumed.)

NAT SOBLER, resumed the stand and testified further as follows:

Cross examination by Mr. Turkus (continued):

Q. Don't look at Lepke, look at me.

Mr. Climenko: I move to strike out the remark and I ask that the jury be instructed to disregard it. 8510

The Court: It does not call for a ruling.

Mr. Climenko: I will ask for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice calculated to be created by the District Attorney.

The Court: Motion denied.

Mr. Climenko: Exception.

Q. On July 29, 1941, did you see this detective (indicating)? A. When? 8511

Q. On July 29, 1941, this year? A. Did I see this gentleman here?

Q. Yes. A. I think I did.

Q. Where is the Svirsky Clothing? A. Fifth Avenue.

Q. What street? A. 16th Street.

Q. Did you see this detective outside of the Svirsky Clothing on July 29, 1941? A. I said I did.

Q. Did you have a talk with him? A. A few words, yes, sir.

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Q. Is that the detective who accompanied you to the District Attorney's office? A. That is right.

Mr. Turkus: For the record, will you state your name, please?

Person Addressed: Frank S. Grey, Shield No. 475, District Attorney's office, Kings County.

8513 Q. Outside of this Svirsky Clothing Company, you were waiting for Plotkin to come and unload material he had on the truck, isn't that right? A. Yes, sir.

Q. One of the R.S.Z. trucks? A. Yes, sir.

Q. That detective was waiting for you, wasn't he? A. I don't know if he was waiting for me, but he was waiting there.

Q. He had a conversation with you, Detective Grey? A. No conversation at all.

Q. Didn't he tell you he wanted you to accompany him to the District Attorney's office? A.
8514 That is right.

Q. Didn't you say you were busy, that you had some $100,000. worth of merchandise to take off the trucks? A. No, sir. I told him that I was a sick man, that I could not ride in the subway.

Q. When you told him you were a sick man, you could not ride in the subway, he took you in a taxicab? A. Yes, sir.

Q. He waited until your business was over? A. He did not.

Q. He did not? A. No, sir.

Q. He took you down in a taxicab to the Dis-

trict Attorney's office and himself paid $1.40 for the taxicab, didn't he? A. I don't know what the amount was.

Q. You did not pay? A. No, sir.

Q. And after the questioning was over in the District Attorney's office, you were taken home to your house by automobile? A. That is right.

Q. And the automobile was driven by a detective? A. I don't know if he was a detective. It was driven by a chauffeur.

Q. That is the incident you were talking about 8516
when you made that remark to the jury? A. Yes, sir, that is right.

Q. Now, Plotkin was there with an R.S.Z. truck, wasn't he? A. Just a minute, Plotkin was a foreman of my wife's business, and they did not have any business to take him away from there or talk to him. They had no business. That is what I told him.

Q. Enough of the volunteering— Plotkin was the man on the truck, the man who came up with the R.S.Z. truck? A. Yes, sir.

Q. Plotkin did not go with you in the taxicab? 8517
A. No, sir.

Q. He came over by himself after the day's work was over? A. Yes, sir.

Q. Where was your brother-in-law's place of business at or about the time of the stoppage in 1932? A. On Washington Place.

Q. What is your brother-in-law's name? A. Sam Richter.

Q. He was in business with Dutch Schultz, wasn't he?

Mr. Barshay: I object.

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The Witness: He might have been—

Mr. Barshay: Please keep quiet.

Q. Look at me, don't look over there.

Mr. Barshay: Don't let him look, my face is not as nice as Mr. Turkus'.

Mr. Turkus: It is not a question of whose face is nice.

Mr. Barshay: I object to it as wholly
8519 immaterial, who his brother-in-law was. It does not affect his credibility.

The Court: It does not. Objection sustained.

Mr. Turkus: There is something I want to lead to.

The Court: I would rather you lead to it first.

Q. You are a rich man, you would object to that, would you?

8520 Mr. Barshay: I object. I object, not to his being a rich man, but I object to two questions being asked.

Q. Well, we will sever them. You are a rich man? A. I don't know about it, maybe you know about it. I don't know about it.

Q. You don't know whether you are a rich man? A. I would like to know what you call a rich man.

Q. How much money have you got? A. (Witness remains mute.)

Mr. Turkus: All right, his answer is a shrug.

The Court: It is immaterial, anyway.

By the Court:

Q. Mr. Witness, have you stopped chewing gum? A. I am sick with my heart and I have to take something to stimulate.

Q. You keep chewing gum all the time? A. No, sir, once in a while I have to have it. 8522

Q. That is chewing gum? A. Yes, sir.

The Court: Now you can talk clear.

By Mr. Turkus:

Q. At the time or about the time of the stoppage did you talk to your brother-in-law, Sam Richter? A. I spoke to him lots of times.

Q. Did you have any talk with your brother-in-law together with Dutch Schultz? A. No, sir.

Q. After the stoppage was over, you had a business, didn't you? A. Yes. 8523

Q. We will come to that in a minute— Now, are you presently on disability insurance? A. Yes, sir.

Q. Are you collecting money every week? A. Yes, not every week.

Q. How often? A. Every month.

Q. This business you got in your wife's name, that was a deal you put over on the insurance company, wasn't it?

Mr. Barshay: I object. I object to the form of the question.

8524

The Court: Objection overruled.
Mr. Barshay: Exception.

By the Court:

Q. Yes or no? A. I did not take care of any business.

By Mr. Turkus:

8525

Q. You are there every day running the business, aren't you? A. No, sir.

Q. Your wife stays home, she is home now, isn't she? A. You know more about it than I do.

Q. Wasn't your wife home this morning? A. I don't know.

Q. You are collecting about $2,000. a week on these trucks you are running with the R.S.Z., aren't you? A. $1900., not $2,000.

Q. That makes a net profit of three or four hundred dollars a week? A. It is not what——

8526

Q. (Interrupting.) When you take in about $2,000., that means a net profit of about three or four hundred dollars a week? A. I don't know nothing about my wife's business.

Q. You don't know a thing about it? A. No, sir.

Q. You don't know where she banks her money? A. No.

Q. You don't know what checking account she maintains? A. What do you mean? What bank account?

Q. Yes. A. No, sir, I don't think she has got any.

Q. You live at home? A. Yes, sir.

Q. You see your wife every day? A. Yes, sir.

Mr. Barshay: I object to this line of inquiry as collateral and he is bound by the answers he has received.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. You and your wife are not separated, are you? 8528

Mr. Barshay: I object. That does not affect his credibility.

Q. On July 29, 1941, when Detective Grey brought you up to the District Attorney's office in a taxicab, weren't you supervising the unloading of merchandise for the Svirsky Clothing?

Mr. Barshay: Objected to.

The Court: Objection overruled.

A. What was I doing, supervising? 8529

Q. Yes, bossing it? A. No, sir, I stood about a half a block or so away.

Q. A half a block away from the Svirsky Clothing? A. Yes, sir.

Q. How many days a week did you spend a half a block away from the accounts your wife, you say, runs? A. It all depends.

Q. How many times a month? A. I don't go there for no accounts.

Q. You are in the clothing district all the time, aren't you? A. When I feel I would like to take a little walk.

8530

Q. You go there for your health? A. Yes, sir, just to see my old friends.

Q. That is the only business you had in that clothing and garment district? A. I had not any.

Q. You just go there to see old friends? A. Yes, sir.

Q. Now, weren't you the complainant before the impartial chairman against the employe Plotkin, who drives a truck for the R.S.Z.? A. No, sir, not me.

8531

Mr. Barshay: I object. That does not affect his credibility, whether he was a complainant or not.

The Court: What is an impartial chairman?

Mr. Turkus: That is somebody at the Labor Board. I will withdraw it in that form.

Q. You know what an impartial chairman is, don't you? A. Yes, sir.

Q. Speak up. Don't you? A. Yes, sir.

8532

Q. Speak up just as loud as you did for the counsel for Lepke. What is an impartial chairman? A. He is an adjuster of differences.

Q. Disputes? A. Yes, sir.

Q. Between employer and employe? A. Yes, sir.

Q. Your wife did not appear before the impartial chairman, did she? A. She did.

Q. You did, didn't you? A. No, sir, my wife.

Q. You did not appear at all? A. No, sir.

Q. Wasn't it you that gave testimony before the impartial chairman that Plotkin would not stay on the truck? A. My wife did.

Q. You were not there before the impartial chairman? A. No, sir. I was four floors below.

Q. Where was that building? A. I think it was 22.

Q. 22 what? A. 17th Street.

Q. Were you there four floors below seeing old friends in business? A. Yes, sir.

Q. You were there just at the time the complaint was being heard against Plotkin? A. Yes, sir.

Q. That was a coincidence? A. Yes, sir. 8534

Q. How much worth of merchandise was in the R.S.Z. truck July 29, 1941, when Detective Grey accompanied you in a taxicab to the Brooklyn District Attorney's office?

Mr. Barshay: I object. That is too far afield and has nothing to do with his credibility. That is with the insurance company.

Mr. Turkus: That is for the jury to find out what kind of an individual we are dealing with.

8535

The Court: Objection overruled.

Mr. Barshay: Exception.

(Question repeated by reporter.)

A. I do not know.

Q. Did you tell Detective Grey there was $300,000. worth of merchandise on that truck? A. I told the detective the car there must have a load of stuff and he could not take a man away from his work during the day.

Q. Did you say $300,000. worth? A. I don't know whether it was $300,000. worth or $75,000.;

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there was plenty of merchandise there, I told him. I said to leave the man alone until he finishes his work on the truck.

Q. The man was left alone until that work was finished? A. Yes, sir, after my plea for him.

Q. Nobody ever did any pleading to bring you up to 35th Street and sign a statement, did they?

Mr. Barshay: I object. He had as much right to go to 35th Street as to your office.

8537

The Court: Objection sustained.

Q. Isn't this business you say is in your wife's name a set-up so as to defraud the insurance company and getting all these monthly checks?

Mr. Barshay: I object.

The Court: He has never said what the monthly checks are. They may be small or large.

By the Court:

8538

Q. What are the monthly checks? A. $12.50 a week.

By Mr. Turkus:

Q. Answer the question.

The Court: The previous objection placed to that same question was sustained. The ruling stands.

Q. In 1933, you were actively in the clothing

trucking business, weren't you? A. Up to some part of 1933.

Q. Do you know Joey Miller? A. No.

Q. Do you know Barney Gold? A. No.

Q. See if this does not refresh your recollection— Were there a couple of loft thieves whom you knew? A. I did not know no thieves, for your information.

Q. Didn't you give them a tip-off on your own customers so these loft thieves could go in and burglarize places? A. Your Honor, can I say a 8540
word? What am I brought here for? As a thief?

Q. You are brought here to testify. A. You called me a thief.

Q. Don't look at Lepke. Look here. A. I am looking right at you. I did not give any tip-off to anybody.

Q. Did you live in Passaic, New Jersey, for ten year, from 1922 to 1932? A. I did not.

Q. You did not? A. No, sir.

Q. When did you live in Passaic, New Jersey? A. From 1922 to 1925, and then I moved back to New York, and kept in New York until 1927. 8541

Q. From Passaic, New Jersey, didn't you move to Elizabeth, New Jersey, for three years? A. That is right.

Q. Wasn't that three years from 1932 to 1935? A. Yes.

Q. Didn't you sign an affidavit in the District Attorney's office on July 29, 1941? A. Here?

Q. Yes, in Brooklyn? A. Yes, sir.

Q. Didn't you swear in that affidavit that you lived in Passaic, New Jersey, for about ten years, from 1922 to 1932? A. I lived about ten years.

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Q. Did you say that in the District Attorney's office under oath? A. What is that?

(Question repeated by reporter.)

The Witness: Yes, sir, I lived in 1925 and I went back to New York and stayed in New York until 1927; then I came back to Elizabeth—Passaic, New Jersey. From Passaic, New Jersey, I came to Elizabeth, New Jersey, and I stood there until 1933.

8543 How long is that?

Q. Didn't you state you lived in Passaic, New Jersey, from 1922 to 1932, for ten years? A. I might did, but I am incorrect.

Q. Did you say that from Passaic, New Jersey, you came to Elizabeth, where you lived for three years, from 1932 to 1935? A. That is right.

Q. And from 1935 on you lived in Brooklyn? A. One year, yes, sir.

Q. Don't you live in Brooklyn now? A. I live, yes.

8544 Q. Haven't you lived in Brooklyn since 1935? A. 1935 I moved to Brooklyn.

Q. You have been living in Brooklyn ever since? A. No. From Elizabeth I went down to the Bronx. I lived one year there.

Q. With the exception of one year in the Bronx, have you lived in Brooklyn ever since 1935? A. Yes, sir.

Q. With the exception of one year in which you were in the taxicab business, you have been in the clothing trucking for twenty-three years? A. That is right.

8545

Q. And your specialty was trucking in New Jersey? A. Yes, sir.

Q. Didn't you swear in the District Attorney's office, "My specialty was trucking in New Jersey and I was particularly active in the New Jersey field and familiar with it"? A. Yes, sir, but when I—

Q. Do not volunteer anything.

Mr. Barshay: I object. The witness ought to be allowed to explain his answer.

8546

The Witness: When I started this business in 1908 I started in New York and I had been around New York from 1920, nothing less. In 1920 or 1921 I started for New Jersey. That is the way it happened.

By the Court:

Q. Up to 1935 did you make any income tax report to the State of New York? A. Well, no, I was a Jersey man up to 1935.

8547

Q. When did you start to make any income tax report? A. 1933, when I moved back to New York.

Q. You mean after you left Elizabeth? A. Yes, sir.

Q. Never before that? A. No, sir.

Q. And on the Federal income tax report you only stated your address? A. Yes, sir.

Q. Before that as New Jersey? A. That is right.

Q. Including the Elizabeth sojourn? A. Yes, sir.

8548 By Mr. Turkus:

Q. Was your affidavit in the District Attorney's office that you were a specialist in New Jersey trucking true? A. Yes, sir.

Q. From 1922 to 1925, were you a partner with Louis Cooper and Morris Bluestein in the New Jersey trucking business, known as the Garfield Express? A. That is right.

Q. After you were in that business for about
8549 three years, that was a very substantial business, wasn't it? A. Yes, sir.

Q. And in your opinion, that business, as an expert, was worth half a million dollars, isn't that so? A. That is right.

Q. Now, during 1925 Louis Cooper, Morris Bluestein, your partners, kicked you out of the business, didn't they? A. Yes, sir.

Q. And you were paid five or six thousand dollars for your share? A. That is right.

Q. And Morris Bluestein and Louis Cooper remained as partners together? A. That is
8550 right.

Q. Several months after that Bluestein got kicked out of the Garfield Express, didn't he?

Mr. Barshay: I object. That has nothing to do with this man's credibility and is not binding on this defendant.

The Court: If he was not in business?

Mr. Barshay: He said he was already out of business.

The Court: Objection sustained.

Q. Do you know when Louis Cooper and Lepke

became partners in the Garfield Express? A. I don't know.

The Court: When did he say he left the Garfield?

Mr. Turkus: 1925.

Q. Several months after you were kicked out of the Garfield Express by Cooper and Bluestein, your partners in it, Bluestein left the Garfield, didn't he? A. That is right. 8552

Mr. Barshay: Objected to as immaterial.

The Court: Sustained. Don't repeat.

Mr. Turkus: I am just leading up to something in cross-examination.

The Court: The previous objection was as to when Bluestein got out.

Mr. Turkus: Not got out, but kicked out.

The Court: After he was kicked out; so he would not know, only by hearsay.

Mr. Turkus: I will not press it. 8553

Q. In 1925, do you know of your own knowledge if Louis Cooper was the sole owner of the business, the Garfield Express?

Mr. Barshay: I object. He said he got out and after that, as your Honor suggested, is hearsay.

The Court: Objection overruled. He was asked if he knows of his own knowledge who was the sole owner.

8554

Mr. Barshay: Exception.

The Court: That Cooper was the sole owner in 1925?

The Witness: At the time I left he was partners with Morris Bluestein.

Q. How long after did Bluestein leave? A. I don't know.

Q. How many months? A. I don't know, a short time, maybe a year or so, I could not say.

8555

Q. Did you swear in the District Attorney's office that several months after that, referring to the time you were kicked out, that Bluestein went out of the Garfield Express and Louis Cooper remained the sole owner of the business? A. What did I swear? When I leave, then you ask me how long Morris Bluestein stayed with Louis Cooper?

Q. Didn't you say several months? A. Several months, I don't know how long he stood.

Q. And after that Louis Cooper became the sole owner? A. I don't know who became the sole owner. I was not there.

8556

Q. Didn't you say that in your affidavit? A. I don't know.

Q. Read the second paragraph, page two, and see if it refreshes your recollection. A. I have not got my glasses, I cannot read.

Q. I will read it for you.

Mr. Barshay: Go ahead and read it.

Mr. Turkus: "During 1925 Louis Cooper and Morris Bluestein kicked me out of business and I was paid five or

six thousand dollars for my share." Is that right?

The Witness: That is right.

Q. Morris Bluestein and Louis Cooper remained partners? A. That is right.

Q. "Several months after that Bluestein went out of the Garfield Express and Louis Cooper remained the sole owner of the business"? A. That is something I cannot answer; I don't know who remained.

8558

Q. Up to that point everything is right? A. Yes, sir.

Q. Of your own knowledge, you know this, don't you, that after Bluestein left the Garfield Express he went into the clothing trucking business under the name of the New York and New Jersey Clothing Transportation Co., Inc.? A. No, sir.

Q. He did not? A. No, sir.

Q. Didn't you state that in your affidavit in the District Attorney's office? A. If you will let me explain, I will.

8559

Q. Just explain whether you swore to that in the District Attorney's office. A. The District Attorney just got hold of people and gave them a break—I will explain it right. I didn't go to school. I don't know what it is all about. I can explain you how that thing happened.

Q. I am just asking you. Didn't you say in the District Attorney's office, in the third paragraph, page two, of that affidavit which you signed each sheet of and initialed corrections, that after Bluestein went out of the Garfield Express he went into the clothing trucking busi-

ness under the name of the New York and New Jersey Clothing Transportation Company, Inc., and "I went in the taxicab business and went broke in that business about two years later."? Didn't you say that in the District Attorney's office under oath? A. If you let me explain—

Q. Explain yes or no. A. You have to explain me that. I did not answer that way. I did not understand it. I can explain what it is if you give me a chance. I will explain every-

8561 thing.

Q. You did not understand when you signed that in the District Attorney's office? A. Not so well I did not understand it.

Q. Did you go in the taxicab business and go broke in that business about two years later? A. I went broke in '25.

Q. Did you go in the taxicab business? A. Yes, sir.

Q. You said that in your affidavit? A. Yes, sir.

Q. You went broke in the taxicab business?

8562 A. Yes, sir.

Q. You understood that affidavit? A. Yes, sir.

Q. After you went broke in the taxicab business, didn't you meet Bluestein in the clothing district in Manhattan? A. Yes, sir.

Q. You told that in your affidavit? A. Yes, sir, that is fine.

Q. That is the same Bluestein, who, with Cooper, kicked you out of the Garfield Express? A. Yes, sir.

Q. In the clothing district in Manhattan, didn't Bluestein ask you how you were doing—rather,

what you were doing—and you told him that your taxicab business had broken up and you were doing nothing? A. Yes, sir.

Q. Did you understand that when you said it in your affidavit? A. Yes, sir.

Mr. Barshay: I object to this line of inquiry. It has nothing to do with the witness' credibility.

The Court: I don't know what it is leading to. 8564

Q. Didn't Bluestein suggest that you go back in partnership and that you join him in the New York and New Jersey Transportation Company? A. Not at that time, there was no New York and New Jersey in existence. When Bluestein took me in we organized the New York and New Jersey Clothing Transportation Company.

Q. At any rate, Bluestein suggested that you come back as a partner? A. Yes.

Q. And you went into a business known as the New York and New Jersey Transportation? 8565
A. No, sir, we established that about a week or so later.

Q. A week after the conversation? A. Yes, sir.

Q. Then in the District Attorney's office you misunderstood what you said, that Bluestein suggested that you go back in partnership under the joint name of the New York and New Jersey Transportation Company, which I did? A. There was no New York and New Jersey at that time.

Q. The New York and New Jersey Transportation Company, which you ran with Bluestein, that was a good business, wasn't it? A. Yes, sir.

Q. You ran four or five trucks? A. That is right.

Q. You did most of the trucking in New Jersey, didn't you? A. Yes, sir.

Q. You handled all lines of clothing? A. Yes, sir.

8567 Q. You had what is known in the trade as a free hand? A. Yes, sir.

Q. You understood that when you said that in your affidavit? A. Yes, sir.

Q. Some time around the latter part of 1930, Martin Kelly and Joe Rosen were doing a clothing trucking business in New Jersey? A. Yes, sir.

Q. You know that they were your competitors? A. Yes, sir.

Q. They were competing with you and Bluestein? A. Yes, sir.

8568 Q. They were trying to win over houses from you? A. Yes, sir.

Q. And you said to Bluestein about merging with Kelly and Rosen? A. Yes, sir.

Q. To end the competition? A. Yes, sir.

Q. You understood all that when you said that in the District Attorney's office? A. Yes, sir.

Q. Kelly and Rosen came in as partners with you and Bluestein? A. Yes, sir.

Q. And you continued doing business under the name of the New York and New Jersey Transportation Company? A. That is right.

Q. In the early part of 1931 Kelly pulled out of the business with his trucks? A. Yes, sir.

Q. That left Bluestein, Rosen and you still in business as the New York and New Jersey Transportation Company? A. Yes, sir.

Q. You understood that when you said it in the District Attorney's office? A. Yes, sir.

Q. After Kelly pulled out, Rosen, Bluestein and yourself continued in the New York and New Jersey Transportation Company? A. Yes, sir.

Q. Now, you had New Jersey, didn't you? A. 8570
Yes, sir.

Q. New Jersey, with all its lines of trucking, with a free hand? A. Yes, sir.

Q. That was the real paying part of the business? A. Yes, sir.

Q. You understood that when you said that in the District Attorney's office? A. Yes, sir.

Q. And you were using three or four trucks in the New Jersey business, weren't you? A. Yes, sir.

Q. And with three or four trucks, you were doing your usual net, when you operated three 8571
or four trucks? A. It all depends upon the season. That is impossible.

Q. If it is impossible, tell me what you were netting, you and Bluestein and Rosen? A. You mean from their business there?

Q. Yes, in 1931. A. We netted around $3,000. or so.

Mr. Barshay: I object, unless the time is set in 1931.

Q. When was it that you and Bluestein and

8572 Rosen were having a free hand in the State of New Jersey, trucking all lines of clothing, and operating three or four trucks in the New Jersey business? A. 1931.

Q. What part of 1931? A. It must have been the latter part of 1931, for 1932—the latter part of 1931.

The Court: When this witness spoke of the net earnings for the trucks, did you
8573 mean roughly—he did not say by the week, or the month, or the year.

Q. What is the estimate that you made at that time? A. About a $1,000 a month.

Q. Net? A. No, sir, not net, gross.

Q. You had New York accounts, didn't you? A. Very little.

Q. In the New York accounts you had but one truck? A. Didn't have no trucks.

Q. Didn't you say in the District Attorney's office the New York accounts were just about holding their own and they had one truck? A.
8574 I used to do it with my own car. I only had a couple and I used to do it with my own car.

Q. Did you say in your affidavit that the New York accounts were just about holding their own and you needed about one truck? A. Yes, sir.

Q. Did you understand it when you said it? A. Yes, sir.

Q. Did you understand, when you said it in the District Attorney's office, after Kelly pulled out, that Rosen, Bluestein and I continued as the New York and New Jersey Transportation Company, the real paying part of the business

8575

was in New Jersey, handling all lines with a free hand, we had over three or four trucks in the business? A. Yes, sir.

Q. Did you understand it when you said it? A. Yes, sir.

Q. You also had Pennsylvania business? A. No, sir, I want to correct that.

Q. What? A. Four trucks had been rolling in Pennsylvania and New Jersey.

Q. Before you start in correcting, let us see what you testified to— The fact is that you had 8576
Pennsylvania accounts? A. No, sir.

Q. Those were accounts that Joe Rosen brought in, weren't they? A. Yes, sir.

Q. Those were the accounts that Joe Rosen was seeking to get, Pennsylvania accounts? A. Yes, sir.

Q. And Rosen did not put any money in this business? A. No, sir.

Q. Of course, not— He came in with the Pennsylvania accounts, trying to get the Pennsylvania business for the New York and New Jersey? A. Yes, sir.

8577

Q. The Pennsylvania business used to have four trucks, didn't it? A. Four trucks were used all around.

Q. Didn't you say in the District Attorney's office, under oath—and I call your attention to page three, where you crossed out the word "two" and wrote "to" in it. I will read it: "The Pennsylvania business required four trucks. It was not a paying business." Did you say that under oath? A. I said that, but the four trucks were running all around; we did not have no special trucks for Pennsylvania.

8578 *Nat Sobler—For Defts.—Cross*

Q. I am not asking you for an explanation. Didn't you say in the District Attorney's office, as follows—this is the whole paragraph: "After Kelly pulled out, Rosen, Bluestein and I continued as the New York and New Jersey Transportation Company"? A. Yes, sir.

Q. "The real paying part of the business was in New Jersey, handling all lines with a free hand"? A. That is right.

Q. You were using three or four trucks in that
8579 business? A. That means the business on the whole.

Q. That the New York accounts were just about holding their own and needed but one truck? A. Yes, sir.

Q. Do you remember saying the Pennsylvania business required four trucks, and was not a paying business? A. Yes, sir.

Q. That you remember was in the District Attorney's office? A. Yes, sir.

Q. Didn't you swear under oath in the District Attorney's office that by discontinuing the Penn-
8580 sylvania business there was a good living for Rosen, Bluestein and myself? A. Yes, sir.

Q. Was that true? A. Yes, sir.

Q. The New Jersey business, of all lines, was commonly called in the trade a "gentlman's business"? A. Yes, sir.

Q. And that operated three or four trucks and was a good paying business? A. Two trucks.

Q. Didn't you say in the District Attorney's office, under oath, signing each page and swearing to the final page: "The New Jersey business of all lines was commonly called in the trade the gentleman's business and operated three or

four trucks and was a good paying business"? A. I did.

Q. Do you want to correct that? A. Yes, sir.

Q. What is the correction? A. The correction is that we never ran more than four trucks.

Q. It was known in the trade as a gentleman's business? A. Yes, sir.

Q. And it was a good paying business? A. Yes, sir.

Q. Didn't you say this under oath—look at me—"To discontinue the Pennsylvania business 8582
would mean to cut down most of the expenses and leave us with the cream of the business"? A Yes, sir.

Q. Now, Rosen was trying to branch out into a new field in Pennsylvania? A. Yes, sir.

Q. He used to go there and try to get business? A. Yes, sir.

Q. If you got any business in Pennsylvania it meant the trucking business would not stay in New York any more, is that right?

Mr. Barshay: I object to that as specu- 8583
lative on his part.

A. That was Mr. Rosen's idea.

Q. That was what he was working on? A. Yes, sir.

Q. That was the idea he propounded with great faith and sincerity?

Mr. Barshay: I object to the characterization.

The Court: Objection sustained.

Q. In 1932, in that general stoppage, when all

8584 the clothing truckers were stopped, Max Rubin came to you and told you the New York and New Jersey Transportation Company would have to stop on a certain day? A. That is not so.

Q. You understood that? A. Yes, sir.

Q. Didn't you say in the District Attorney's office under oath, right above your signature, on page three of your affidavit of July 29, 1941: "That in 1932 before the general stoppage when all the clothing truckers were stopped, Max
8585 Rubin came to me and told me that the New York and New Jersey Transportation Company would have to stop on a certain day"? Didn't you say that? A. No.

Q. You did not say that? A. No, sir. You tried to make out in a different way.

Q. See if you can see your signature without glasses. A. My signature is all right, I know it, but I cannot see, I have no glasses.

Q. You cannot see your signature? A. I can see the signature but I cannot read it.

Q. You say you did not say that? A. I mean
8586 different.

Q. Let us hear what you meant. A. I mean—

Q. Wait a minute, I will find out what you mean. Was there a general stoppage? A. Right.

Q. Did you see Max Rubin before the general stoppage? A. Right.

Q. That is all right, as far as that goes? A. Yes, sir.

Q. Did Max Rubin see you and talk to you about the stoppage? A. Yes, sir.

Q. Did he tell you that the New York and the New Jersey Transportation Company would have to stop? A. No, sir.

8587

Q. That part is not right? A. No, sir, that part is not right.

Q. Did the New York and New Jersey Clothing Transportation Company stop in that stoppage? A. Right.

Q. Did you understand this thing you said under oath in the District Attorney's office—"Some time in July, 1932, a general stoppage was called and trucks of the New York and New Jersey Transportation Company also stopped"? A. Right.

8588

Q. You understood that? A. Yes, sir.

Q. That was the time you were talking of your brother-in-law, Richter, about the stoppage? A. My brother-in-law don't have anything to do with any stoppage.

Q. Did you consult him for advice? A. No, sir.

Q. You did not see your brother-in-law with Dutch Schultz about this matter? A. You insult me. If you continue that, I am getting off the stand. Either talk as a person or I will get off the stand. I am a sick man. I cannot take it any more. Do you think you are telling that to me?

8589

Q. I think I understand with whom I am talking. A. I object to this. Who do you think you are, telling that to? Are you bringing me in with gangsters—Dutch Schultz—who knows him? Perhaps, you know him. I don't know him. Who the hell do you think you are?

(At this point the witness rises from his chair and starts to leave.)

The Court: Sit back in your chair.

The Witness: You mix me up with

8590 Dutch Schultz— Where do you come in to say that?

The Court: Sit back in your chair, compose yourself.

The Witness: I work for my living all my life; you have no business to call me Dutch Schultz. I don't know who Dutch Schultz is. Let me get out of here.

(Witness again rises from the chair and attempts to leave.)

8591 The Court: The witness is obviously in too nervous a state at the present moment to properly continue cross-examination.

The Witness: What did you ever give me for Dutch Schultz?

The Court: You are to blame for it, you are working yourself up to that state. Counsel has a right to ask questions, but you have gotten yourself in such a nervous state that I am going to allow you to rest for five minutes to pull yourself together, after which you can come back here. I

8592 will stand for no more of these outbursts. Listen to the questions and answer them, but do not volunteer information. We will take a recess for ten minutes. Lie down for ten minutes and pull yourself together. The defendants will be remanded.

(To the Jury:) Gentlemen, we will take a recess for about ten minutes. Do not discuss the case or allow anyone to talk to you in the interim.

(Defendants remanded.)

The Court: (After jury leaves room) You might state on the record something

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that did not appear. The witness was trembling from head to foot and in no condition to proceed at the moment with his examination.

(The jury returned to the court-room.)

NAT SOBLER, resumed the stand:

8594

The Court: The witness' nervous condition must be taken into consideration. It is quite important to maintain a placid attitude in the cross-examination and it is just as important, ever more important, that the witness shall not permit himself to become riled and work himself up into a state by going off the handle and saying things that are not called for by the questions.

Mr. Turkus: May I respectfully state, your Honor, that that may carry an implication on the record.

8595

The Court: Nervousness to the point of trembling as the witness was, is largely a matter of gradation. All emotions work up that way.

Mr. Turkus: I just want to be sure the record does not carry an implication that there was something—

The Court: Let us say nothing more about it. We have the man's age and apparent nervous condition in mind.

Mr. Turkus: Shall I continue?

The Court: Yes.

8596 *Nat Sobler—For Defts.—Cross*

By Mr. Turkus:

Q. While the stoppage was on, Sobler, New York and New Jersey Transportation Company trucks did not roll, did they? A. No.

Q. Branch Storage rolled, didn't they? A. Yes.

Q. All other trucks did not roll? A. I don't know how many was rolling and how many not.

8597 Q. While the stoppage was on, isn't it true that Joe Rosen came to you one Saturday morning and told you that he was getting a job with the Garfield Express? A. Right.

Q. You said that in your affidavit? A. That is right.

Q. You understood that? A. That is right.

Q. Isn't it also true that you said to him on that occasion, "How in the world can you do that? I know Louis Cooper won't give you a job"? A. That is right.

Q. Did you say that in your affidavit? A. Yes.

Q. And you understood that? A. Yes.

8598 Q. And isn't it true that after that Rosen said either Lep or Louis Buchalter—which name he called him you cannot exactly say but it was one of the two—"is Cooper's partner and he is giving me the job"? A. Right.

Q. And you said that—

The Court: Wait a minute. There is no objection. Is that competent?

Mr. Turkus: Yes, it is. That was brought out on direct.

Mr. Barshay: I have no objection to it, your Honor.

The Court: All right.

8599

Q. So it was true, isn't it, and you understood that when you said it in your affidavit? A. That is right.

Q. So it was on one Saturday morning during the stoppage that Rosen told you that either Lep or Louis Buchalter was getting Rosen a job with the Garfield and that Lep or Louis Buchalter was Cooper's partner? A. That is right.

Q. Now, on that very Saturday, isn't it true that Max Rubin told Bluestein and you that you both were going to have the New Jersey knee pants business and the New York accounts that you had? A. Not on that Saturday.

8600

Mr. Barshay: The man has answered but when I get up, do not answer.

Q. What Saturday and when?

Mr. Barshay: I object to anything Mr. Rubin told this man, not binding on the defendant.

The Court: Sustained.

8601

Mr. Turkus: This is part of the direct proof and in contradiction of what was brought out on the direct testimony of this witness.

The Court: Mr. Turkus, when the defense was on that point and you did not object, the Court went out of its way, if you will recall, to suggest it was an objectionable point and you did not take advantage of it and then the Court said, to avoid being misunderstood as doing the District Attorney's work, the Court would

8602

not rule unless there was an objection. Do you recall that?

Mr. Turkus: I do.

The Court: I cannot accept your silence at that time as the basis for making incompetent evidence, on cross, competent.

Mr. Turkus: I sat here and permitted that—

The Court: The Court has to watch all the time and there are points when

8603

the Court must interrupt regardless of whether there is objection or not in order to see that the trial is fairly conducted.

Mr. Turkus: I know, your Honor, but the tenor of his direct testimony is that Rosen walked out of a business in great glee or satisfaction and I want to show by his testimony what the true state of affairs was.

Mr. Barshay: If your Honor pleases, I object to the characterization of Mr. Turkus. There was no description of the

8604

manner in which Rosen walked out. There was no description of glee of any kind. He just said to this man he was going to work for Garfield, which is consistent with the State's case, and he has not shown anything inconsistent in this affidavit.

The Court: He said he was getting a job with the Garfield Express so was going to quit.

Mr. Barshay: That is it.

The Court: Objection is sustained.

Mr. Turkus: I am going to show it was

not a quitting. I want to show the true situation in that respect.

The Court: I don't care who is on trial—

Mr. Turkus: All right.

The Court: It makes no difference. Nobody can have it counted against him that somebody else behind his back says something to somebody else still.

Q. After Rosen was out of the New York and 8606
New Jersey, did you and Bluestein continue in business and have the New Jersey knee pants business and the New York accounts which you had formerly had? A. Right.

Q. The knee pants business was the slavery business, wasn't it? A. Right.

Q. And the rest of the New Jersey business was the gentlemen's business, isn't that right? A. Right.

Q. The gentlemen's business consisted of coats, pants, and vests; isn't that right? A. That is right. 8607

Q. On coats, pants and vests—

The Court: What is slavery business?

Mr. Turkus: I am going to bring that out in a minute.

Q. Coats, pants, and vests, how much do you get for trucking that? A. By piece.

Q. How much per piece? A. Well, let us say for a coat we get about four cents, for a vest we get a cent and a half or two cents—all de-

pends what the contractor—and for pants we get about two cents, we get for pants.

Q. You said the knee pants business was the slavery end of the business. A. That is right.

Q. What do you get for knee pants? A. About a cent.

Q. And that is in big bulk, isn't it? A. Yes.

Q. That is a lot of hard work and a small return? A. That is right.

Q. And the other stuff, the coats, the pants,
8609 and the vests, that is the cream of the business? A. That is right.

Q. The cream of the business you no longer had after the stoppage? A. No.

Mr. Barshay: I object to it. Rosen has already been declared out of this business, your Honor, so it is no longer material here.

Mr. Turkus: I am going to show that the cream of the business went to Garfield Express, Louis Cooper, and the defendant.

8610 Mr. Barshay: What of it?

The Court: Overruled.

Mr. Barshay: Exception.

Q. The cream of the business and everything except the knee pants business and the New York accounts all went to the Garfield Express? A. Right.

Q. And the New York accounts you have already told us was just holding its own? A. Right.

Q. So you were left with the short end of the business, weren't you? A. Right.

8611

Q. And the cream of it went to the Garfield? A. Right.

Q. And the Garfield still has it?

Mr. Barshay: I object to it.

A. I don't know about it.

Q. Didn't you say in the District Attorney's office and didn't you thereafter swear to it, "All the rest of the Jersey business that the New York and New Jersey Transportation Company had, went to the Garfield Express and they still have the business"? A. I said that.

8612

Mr. Barshay: I object to it. The evidence here is clear that Buchalter's disassociation from the Garfield took place some time in 1937 and we are not responsible for what happened thereafter.

The Court: Sustained.

Q. Did you and Bluestein handle the knee pants business in New Jersey and the New York accounts together as partners for some period of time?

8613

Mr. Barshay: When?

Q. After Rosen got out.

Mr. Barshay: I object to it. It is immaterial.

The Court: Overruled.

Mr. Barshay: Exception, sir.

A. Yes.

8614 Q. A short time after that did Bluestein tell you he wanted to split, that Bluestein wanted the New Jersey knee pants business?

Mr. Barshay: Judge, I object to anything that transpired between Bluestein and this man. It is not in the presence of the defendant and it does not bind him in any way.

The Court: Conversation is incom-

8615 petent.

Q. Well, did Bluestein leave the partnership with you?

Mr. Barshay: I object to it. It is not binding on this defendant.

The Court: Overruled.

Mr. Barshay: Exception, sir.

(Pending question read).

Q. Did he leave the partnership that he had

8616 and go out of it? A. That took place about a year later or eight months later.

Q. But did he? A. Yes.

Q. Did you wind up with the New York City business? A. No.

Q. Who did? A. Bluestein did.

Q. And you retained the knee pants? A. The Jersey business.

Q. That is slavery business that you told us about? A. That is right.

Q. Did you take over the city business later? A. Yes.

8617

Q. When was that? A. About six or seven months, five months, later.

Q. And Bluestein took over the Jersey knee pants then? A. That is right.

Q. A short time thereafter didn't Bluestein go broke and the New Jersey knee pants business also go to the Garfield?

Mr. Barshay: I object to it, not binding on this defendant that any man went broke. It does not connect him in any way. 8618

Mr. Turkus: This is within the period that Lepke was a partner in the Garfield Express.

The Court: How would he know another one did go broke?

Mr. Turkus: I withdraw it in that form.

Q. Didn't the Garfield shortly thereafter get the New Jersey knee pants business that you and Bluestein once had? 8619

Mr. Barshay: I object to it. It is incompetent here. It is not binding on this defendant.

The Court: He can state whether or not he knows that.

Mr. Barshay: Yes or no.

By the Court:

Q. Do you know that? A. I can explain that, your Honor.

8620

Q. Do you know it one way or the other? A. Yes, the Garfield paid him money for the business.

By Mr. Turkus:

Q. How much, $500? A. $500.

Q. You have been in contact with Bluestein recently, haven't you? A. Yes.

Q. How many times? A. Maybe once or twice a week, still friendly, I see him often.

8621

Q. Talk about this case? A. No.

Q. Was not Morris Bluestein one of the men that went with you to 35th Street? A. Right.

Mr. Barshay: That is 1940.

Q. Yes, in June or July of 1940? A. I can't remember the date.

Q. The time that you signed the statement? A. That is right.

Q. When Philly had you come up, you remember that? A. Yes.

8622

Q. Bluestein was with you? A. That is right.

Q. And he was one of the men who brought you to this place where you signed the statement? A. That is right.

Q. In before the impartial chairman, Sobler, didn't Plotkin refuse to go on with the hearing while you were present at the hearing?

Mr. Barshay: Please, that is a collateral matter. He is bound by the answer. It certainly does not bind this defendant what happened in '41 between this man and the impartial chairman.

8623

Mr. Turkus: This is as to his credibility. It is cross-examination.

Mr. Barshay: It is collateral. He has already answered he was not there. He is bound by the answer.

Mr. Turkus: I have a right to refresh his recollection on cross-examination. As Judge Talley used to say, you can even be repetitious on cross-examination.

Mr. Barshay: I am glad you and the Judge agree.

8624

The Court: For once you agree with Judge Talley. Read the question slowly.

(Pending question read.)

Mr. Turkus: That is a preliminary question.

By the Court:

Q. Do you know one way or the other? A. I don't know what happened there. I was not there.

8625

By Mr. Turkus:

Q. Didn't your wife then take the stand and swear in your presence that the business was in her name but that you were the boss?

Mr. Barshay: I object to it, sir. The man said he was not there.

The Court: He was asked whether or not he was present and heard his wife swear—

Mr. Turkus: Yes.

8626 The Court: That he, after all, was the boss?

Mr. Turkus: Yes.

The Court: He can answer that.

Mr. Turkus: That is all I want him to answer.

The Court: Because if he was not the boss, he could have jumped up and protested.

The Witness: What is that?

8627 (Pending question read.)

A. Don't you know nothing about it.

By the Court:

Q. Did you hear her so testify? A. I don't know nothing about it. I was never for the unpartial chairman or had anything to do with it.

By Mr. Turkus:

Q. This affidavit that you signed each sheet and swore to, you read that in your own house, didn't you? A. I did.

8628 Q. Assistant District Attorney Joseph was one of the men that went on the automobile ride to your home, wasn't he? A. That is right.

Q. And you sat down in the leisure and privacy of your own home and read this affidavit with your glasses, didn't you? A. That is right.

Q. And in your presence one word that was misspelled was corrected, wasn't it? A. I suppose so.

Q. And you initialed it in the margin? A. That is right.

Q. And there was some relative or some friend

of yours at home when you read this leisurely, wasn't there? A. That is right.

Q. Who was that relative? A. A brother-in-law of mine.

Q. What is his name? A. Sam Richter.

Q. And Sam Richter, with his own handwriting, made the correction on page 3 of the affidavit, didn't he? A. That is right.

Q. And you initialed the correction and so did your brother-in-law, Sam Richter? A. That is right. 8630

Q. So it was read over, not only by you but your brother-in-law, Sam Richter; is that right? A. That is right.

Q. And that is the Sam Richter that you have been testifying about heretofore, isn't it? A. That is right.

Q. How long after, in the privacy of your own home, that you read this affidavit and swore to it, was it that you appeared in one of the offices of counsel for Lepke? A. I don't know, maybe about six weeks or eight weeks. Before that. I really can't recollect. Perhaps maybe 8631 before that. I think I said before that.

Q. Which offices did you go to? A. 60 Wall Street.

Mr. Turkus: That is all.

Mr. Barshay: Let us see the date of that affidavit, Mr. Turkus.

Mr. Turkus: July 29, 1941.

Mr. Barshay: May I call your Honor's attention that the District Attorney has failed to offer this affidavit in evidence.

Mr. Turkus: It is offered in evidence.

8632 *Nat Sobler—For Defts.—Cross*

Mr. Barshay: Just a second. Let me finish my statement.

Mr. Turkus: The affidavit is offered in evidence.

Mr. Barshay: I will accept it. Let me see it. There is nothing inconsistent in that affidavit with this man's testimony.

Mr. Turkus: I made an offer. You said you accepted it.

Mr. Barshay: Let me look at it. You
8633 do not want me to do it blindly, do you?

We have no objection to that part of the statement offered by Mr. Turkus except that which would be incompetent because of hearsay statements and not in the personal knowledge of this man.

The Court: That is what I figured, that when you got reading the full affidavit you would find more or less incompetent matter.

Mr. Barshay: That is right, sir. To the competent part we have no objection.

8634 Mr. Turkus: I deem the entire affidavit competent. Will the Court read it?

The Court: Do not pass this responsibility to the Judge. There was an offer and acceptance.

Mr. Turkus: There was an offer and acceptance.

The Court: Now if the Judge rules this way or that way, contrary to the way counsel views it, there will be an exception, maybe a motion for a mistrial. Either let it go in or withdraw your acceptance.

Mr. Barshay: I did not accept it un-

conditionally. I said I accept his offer but I have a right to view every instrument offered in evidence.

The Court: You would be foolish not to.

Mr. Barshay: I would be foolish not to. I would not be a lawyer if I did not.

The Court: The affidavit is excluded.

Mr. Turkus: May I reopen the cross for one or two questions?

The Court: Yes. 8636

By Mr. Turkus:

Q. Weren't you threatened to get out of your business?

Mr. Barshay: I object to it unless it is connected with this defendant.

The Court: I don't know what it is. Overruled.

Mr. Barshay: Exception.

The Court: Yes or no. 8637

A. No.

Q. Didn't you state in the District Attorney's office that you were told that was what you were going to get and you would have to take it, referring to the knee pants business?

Mr. Barshay: I object to it as not binding on this defendant, and as far as this defendant is concerned it is absolutely hearsay.

8638 The Court: Does this apply to his direct examination?

Mr. Turkus: It applies to his direct examination.

The Court: How? He said nothing about that or anything connected with it.

Mr. Turkus: He did. He explained the chronology or events of his connection with with clothing business before and after Rosen and I am taking this because
8639 there is one other sentence that I want to read to him.

Mr. Barshay: Just a second, your Honor. How can any threat made by any other person except the defendant or his direct agent bind this defendant?

Mr. Turkus: That is what it was, the directed agent.

Mr. Barshay: I object—

Mr. Turkus: If your Honor will refer to the testimony of Rubin— I have a right even to make a defense witness mine
8640 for a point.

The Court: What part of the testimony?

Mr. Turkus: Where there was the talk between Rubin and the defendant Lepke about the general stoppage and what had to be done to engineer it. Lepke sent him out to see all the truckers, all with the exception of Cooper, whom he himself, Lepke, would take care of, and with the exception of the Branch, which he said could not be stopped, and specifically sent him to the New York & New Jersey—

8641

Mr. Barshay: Your Honor, the proof—

Mr. Turkus: —to stop them. That is what I want.

Mr. Barshay: Are you finished? May I address the Court?

The Court: What is the question?

(Pending question read.)

Mr. Barshay: Before he answers, may I direct your Honor's attention that this man was never spoken to either by Rosen. When I asked him on direct examination your Honor sustained the objection, nor is there proof—

8642

The Court: I don't want to interrupt, but I intend to sustain the objection upon the ground it is not definite as to who made the alleged threat.

Mr. Turkus: All right. I will go into that.

By Mr. Turkus:

Q. Weren't you told during the course of the stoppage or before it—

8643

The Court: By whom?

Q. —by Max Rubin that you were going to get the knee pants business and that is all, and you would have to take it whether you liked it or not?

Mr. Barshay: I object to it. Max Rubin himself said he never spoke to Blue-

8644 stein or Sobler and that he directed his remarks only to Rosen.

Mr. Turkus: There is no such testimony.

The Court: Are you sure?

Mr. Turkus: I am sure. Mr. Klein remembers the record.

Mr. Klein: Spoke to all three partners.

The Court: You say you have, according to the record, an apparent delegation
8645 of authority by Buchalter?

Mr. Turkus: Yes.

The Court: Apparently constituting agency?

Mr. Turkus: That is right.

The Court: What you are asking for is the representation making Rubin an agent. Then you have the question as to what the agent said. The question is whether or not in a criminal case a statement of the agent of that kind is admissible and binding upon a defendant. Inasmuch as the terms did not expressly
8646 authorize such a threat to be made, I don't see how you can get it in as competent.

Mr. Turkus: I am not going to put it as a threat. Rubin was authorized,—more than authorized, he was directed specifically,—to stop the New York & New Jersey, and he was specifically directed how to treat with them after he had reported back to Lepke.

The Court: Nothing that he would say in excess of the authority expressly thereby given.

8647

Mr. Turkus: This is not in excess. He told this man that he would have to take that knee pants business, which this witness has testified to is the slavery end of the business; that is what he was going to get, and that is what he would have to take.

The Court: I am trying to think of what Rubin testified Buchalter told him. Just what was the language, according to the record?

8648

Mr. Barshay: Your Honor, the only thing Rubin said on the point was that the Svirsky account would be turned over to the New York & New Jersey.

The Court: What account?

Mr. Barshay: The Svirsky account would be turned over to the New York and New Jersey. When Rosen said or is alleged to have said that, all he had of this was the little Pennsylvania business. It was neither a threat nor an intimidation.

Mr. Turkus: Will your Honor refer to page 1147 et seq. of the record? I think it comes in at that point, 1149—1147, 1148, and 1149.

8649

The Court: I will find it in my notes in a minute. According to my notes Buchalter told Rubin that Katz wanted a stoppage of all trucks, as the New York business was going to Pennsylvania, whereupon Rubin told Buchalter that he had doubts about stopping Cooper of the Garfield and also the New York and New Jersey and also the Branch Storage.

8650 Mr. Turkus: Yes, there is more than that, too.

The Court: What page?

Mr. Turkus: 1147, '48, and '49. That is at one point. I think there will be more on cross if we have a chance to search for it.

Mr. Barshay: I have it right here.

The Court: Will you wait a minute. At 1150 there is quite an answer.

8651 Mr. Turkus: It continues along. I just gave your Honor a starting point.

The Court: Yes, at 1150 particularly, because there he is reporting when he came back, and apparently what he told Lepke, because 1149-A says:

"Relate what you told us you said to Lepke. A. Regarding the New York & New Jersey?

"Q. Yes."

Then on the next page he tells. It appears therefore, by what I have just read, to mean that he told what was related on

8652 1150 to Lepke.

The objection is overruled.

Mr. Barshay: Exception. I call your Honor's attention to the record directly that Lepke gave no other instructions to Rubin except to see them and report back, and he does not say anything about "Go out and threaten them," and if Rubin acted beyond his authority, that is Rubin's business.

The Court: No, he said more than that. The answer was on page 1148: "He told

me to go out and see what I could do." That, of course, is vague and general.

Mr. Barshay: That is right.

The Court: That alone would not admit of this answer which is now sought, but in view of the alleged report back and Buchalter accepting it, the answer may now be given.

Mr. Barshay: But, your Honor, he had never sent for this witness or the partner, Bluestein, thereafter. He said, according 8654
to the testimony here, "You tell Rosen I want to see him."

Mr. Turkus: He did not have to send for them any more. He only had Rosen to deal with.

Mr. Barshay: I am talking for the record.

The Court: I would not let this in if I did not think it was safe.

Mr. Barshay: I take an exception.

(Pending question read.)

8655

A. Not before; I was after the stoppage, about three or four days after the stoppage, when the thing was settled—

Q. We did not hear your answer. A. I was told—

Q. Yes. A. I was not told before or in the stoppage, but I was told after the stoppage, when they settled up, when they settled.

Mr. Barshay: Did you finish your answer?

Q. Did you finish? A. Yes.

8656 *Nat Sobler—For Defts.—Cross*

Q. Didn't you say, on page 4 of the affidavit, which you read in the comfort of your own home, alongside of your brother-in-law, Sam Richter, the following: "On that Saturday Max Rubin told Bluestein and me that we are going to have the New Jersey knee pants business and the New York accounts which we had. The knee pants business was the slavery business. The rest of the New Jersey business was the gentleman's business, which consisted of coats, pants, and
8657 vests. I argued with Rubin and told him that he was leaving me the slavery business and that I could not make a living with it, but Rubin told me that is what I was going to get and I would have to take it. I remember on that occasion that I fainted."

Did you say that and swear to it?

Mr. Barshay: I object to that as not binding on the defendant Buchalter.

The Court: Overruled.

Mr. Barshay: It is in excess of Mr.
8658 Rubin's authority. It is binding only on Rubin.

The Court: Overruled.

Mr. Barshay: Exception.

A. Can I answer now?

Q. Yes. A. Everything is right, but I don't know how you got that in on Saturday. Max Rubin told me about three or four or five days later.

Q. You mean during the stoppage it happened? A. After the stoppage.

Q. Let me go along point by point: Did Max

8659

Rubin tell Bluestein and you that you and Bluestein were going to have the New Jersey knee pants business and the New York accounts that you had? A. Right.

Mr. Barshay: I object to it. It is not binding on the defendants.

The Court: Overruled.

Q. You understood that when you said that? A. Right.

8660

Q. Did you say this: "The knee pants business was the slavery business. The rest of the New Jersey business was the gentleman's business"? A. That is right.

Q. "Which consisted of coats, pants, and vests." Did you say that?

Mr. Barshay: I object to that. It is not inconsistent with what he said on direct.

The Court: Overruled.

Mr. Barshay: It is merely repetitious, sir, and does not add weight to it.

8661

The Court: Overruled.

Q. Did you say that? A. Yes.

Q. Did you say in your affidavit: "I argued with Rubin and told him that he was leaving me the slavery business and that I cannot make a living with it"? A. Right.

Q. And could you understand that when you said it? A. Right.

Q. Did you also and did you understand this:

8662 "But Rubin told me that is what I was going to get and I would have to take it"?

Mr. Barshay: I object to it, sir. It is not binding on the defendant Buchalter and hearsay as to him.

The Court: Overruled.

A. Right.

Q. Did you understand this when you said this
8663 under oath: "I remember on that occasion that I fainted"?

Mr. Barshay: I object to it. That is not binding on the defendants. There is no proof that as the result of that conversation he fainted. He almost did here. He is a sick man. It would have a bad impression to leave with the jury.

The Court: Overruled.

Mr. Turkus: Don't worry so much about him.

8664 Mr. Barshay: I am worried about my defendant, not to be prejudiced in anything. He fainted because somebody else told him.

Q. Do you remember saying that? A. What?

The Court: That you fainted.

Q. That you fainted on that occasion.

Mr. Barshay: I object to it.

A. Yes, I did.

8665

Q. You fainted because you were winding up with the slavery business, isn't that right?

Mr. Barshay: I object to it.

The Court: Sustained.

Mr. Turkus: All right, let the jury figure it out.

Redirect examination by Mr. Barshay:

8666

Q. As a matter of fact, Mr. Sobler, before you signed this affidavit at your home on the 29th of July, 1941, you already had been to the office of Wegman & Climenko on July 15, 1941? A. That is right.

Q. And you told them a story there, did you not? A. Yes.

Q. And that was the same story, substantially, you told Mr. Turkus? A. That is right.

Q. And as you told here? A. That is right.

Q. And you were subpoenaed as a witness to tell your story? A. That is right.

8667

Q. You did not dictate this affidavit to a stenographer, did you? A. No.

Q. You were asked questions and made answers? A. Yes.

Q. Is that so? And as a result of the questions and answers, someone in the District Attorney's office dictated the substance of what you were asked and answered, isn't that so? A. That is about. Can I answer that in my own way?

Q. Go ahead, answer it in your own way. A. Everything is about right there but Mr. Max did not tell me during the strike or in the strike

that, that i am going to take, but he told me about three or four days when Joe Rosen was out of the picture altogether, "That you are going to get and no more."

Q. In other words, he told you after the strike? A. Yes.

Q. But he told it to you? A. Yes.

Q. Did Buchalter ever threaten you? A. No.

Q. How long do you know him? A. I know him from about, I think it was, 1927.

8669 Q. Did Buchalter ever put you out of business? A. No.

Q. The business of Rosen at Pennsylvania, was it a paying proposition or a losing proposition? A. No, that dragged us all in the expense we had; we could not make it pay.

Q. In other words, what Rosen brought in bogged the concern down?

Mr. Turkus: I object to that. We have had Mr. Barshay testify to everything on redirect so far, and it is not inconsistent

8670 with the cross-examination. It is improper.

Mr. Barshay: I do not understand you, Mr. Turkus.

Mr. Turkus: You have been testifying with leading questions.

Mr. Barshay: It is the only way you can prove redirect unless you forget about the rule. I am sorry.

The Court: Overruled.

Q. At any time while Rosen was connected

with your concern, Mr. Sobler, did you draw $100 every week? A. No.

Q. Did Rosen ever draw $100? A. No.

Mr. Turkus: I object to it. This is improper redirect. Nothing like that brought out on cross.

The Court: Overruled.

Q. Wasn't it a fact that when you finally gave up the Pennsylvania business, which is the only 8672
thing Rosen put in, that your concern began to make a living? A. Right.

Q. And even that living, did that amount to $100 a week? A. No.

Q. At any time did it amount to near $100 a week? A. No, I don't think—

Q. When you gave up the concern— A. —that it—

Q. Do you recall ever getting $100 a week? A. No.

Q. Or $75 a week? A. Yes, we had weeks we draw $75, after. 8673

Q. After when? A. After Rosen withdraw.

Q. In other words, then, there were only two partners? A. Two partners.

Q. But when Rosen was there— A. No.

Q. You did not draw that? A. We did not draw a cent.

Q. As a matter of fact, Mr. Sobler, when you wound up the New York & New Jersey, did you pay your telephone bill? A. No.

Q. Did you have money to pay it, the corporation, not you?

8674 Mr. Turkus: Your Honor, this is a reconduct of the direct examination all over again. Nothing touched on cross.

Mr. Barshay: I am showing the insolvency of the concern before, during, and after Rosen left, that is all.

Mr. Turkus: This was all gone over on direct.

The Court: After he left is of no consequence, but it does not contradict what
8675 has already been testified to, that the business went down hill following the conference off of Broadway, which was on or about the month of July. Sustained.

Q. From the time Rosen entered your concern with the Pennsylvania business, did your concern show a profit with respect to what Rosen brought in?

Mr. Turkus: Objected to as already answered on direct examination. This is
8676 not an issue in the case.

Mr. Barshay: Just a second.

The Court: I sustain the objection, but not on that ground.

Mr. Barshay: Exception. Your Honor has suggested that the business went down after a certain alleged conference. I say the proof from this man has been entirely to the contrary.

The Court: If you will think a second about your question, you will see it is incompetent, because it said with respect to what Rosen brought in. Nobody knows

8677

what that kind of a question means, and an accountant might have a hard job figuring it out.

Q. Mr. Sobler, up to the time Kelly left, was your concern earning a livelihood? A. No.

Q. From the time Kelly left up to the time Rosen left, was your concern earning a livelihood? A. No.

8678

Mr. Turkus: I object to this, Judge. This is a repetition of redirect after a cross.

The Court: It is now a repetition. That was the very purpose of the direct. Sustained.

Mr. Barshay: I only put it, sir, in answer to your Honor's suggestion that the business began to slide down after a certain alleged conference.

The Court: I did not make any suggestion, just gave a reason for a ruling.

8679

Mr. Barshay: I beg your pardon. Maybe the word "suggestion" was a word ill advised. Whatever you may call it—

The Court: Words of wisdom.

Mr. Barshay: Words of wisdom, and through this witness it has been proved that was not the fact at all. The business was bad during Kelly's presence there, after Kelly left; after Rosen left it began to show a livelihood.

The Court: The jury has to figure when the business was not paying anyone why

8680 *Nat Sobler—For Defts.—Recross*

people who had to eat all that time continued it for a year and a half.

Mr. Barshay: I am not even concerned with that angle of it.

Q. Did you at any time after Rosen left have any substantial balance in the bank?

Mr. Turkus: That is the same as direct.

The Court: Sustained.

8681

Q. Did you at any time have enough money there to even draw the agreed earnings under the contract?

Mr. Turkus: That is objectionable. It has been gone over on direct.

The Court: Sustained.

Mr. Barshay: Exception.

Mr. Turkus: I have one final question.

Mr. Barshay: Excuse me, Mr. Turkus.

8682 By Mr. Barshay:

Q. Had you ever been arrested in your life? A. No.

Q. Had you ever been convicted of any crime? A. No.

Recross-examination by Mr. Turkus:

Q. The Svirsky Clothing, that is an account of the R. S. & Z., isn't it? A. Right.

Q. Which you say is your wife's business? A. That is right.

Q. How long has Svirsky been on account either for you or your wife? A. Well—

Q. How long, that is all. A. Well, I could not say how long. At least you give me a chance to explain how long.

Q. No, just tell me the number of years. A. I can't answer.

Q. All right, then don't answer.

Mr. Barshay: That is all, Mr. Sobler. Mr. Baker. 8684

Mark this for identification. That is Mr. Sobler's affidavit, signed in July, 1940.

Mr. Turkus: That is an improper statement on the record. When a paper is offered for identification, it should not be characterized in the presence of the jury.

Mr. Barshay: Judge, he brought it out; I did not bring it out.

Mr. Turkus: The witness is off the stand.

The Court: What did he call it?

Mr. Turkus: He called it an affidavit. 8685

Mr. Barshay: Signed on the date it is signed.

Mr. Turkus: There should not be any characterization of the instrument.

Mr. Barshay: What do you call it, Mr. Turkus?

Mr. Turkus: Please, Mr. Barshay, I have a right—

The Court: What did he call it now?

Mr. Turkus: Just say, "I offer this to be marked for identification." You don't

8686 characterize it or its contents for the benefit of jury consumption.

Mr. Barshay: Who ever said anything about the contents? I urge your Honor to look at this paper. I said, "I offer this for identification, sworn to." I called it an affidavit.

The Court: This is simply bickering.

Mr. Barshay: That is right.

Mr. Turkus: It is not simply bickering
8687 at all. Your Honor will read what he said.

The Court: He called it an affidavit, didn't he?

Mr. Barshay: Yes.

The Court: No harm done. Mark it for identification.

(Paper marked Defendant's Exhibit Z-8 for identification.)

The Court: Whose testimony does Mr. Baker's testimony refer to?

Mr. Barshay: The testimony of Allie
8688 Tannenbaum.

Ellsworth Baker—For Defts.—Direct 8689

ELLSWORTH BAKER, residing at Monticello, New York, called as a witness on behalf of the defendant Buchalter, being first duly sworn, testified as follows:

Direct examination by Mr. Barshay:

Q. Mr. Baker, are you an attorney at law duly admitted to practice law in the State of New York? A. I am.

Q. Since when? A. 1905. 8690

Q. 1905? Where is your office? A. Monticello, New York.

Q. How long has it been there? A. Been there since '26. Prior to that time it was in Hurleyville, about six miles from Monticello.

Q. Are you admitted to practice in other courts in the United States? A. In the Southern District of New York.

Q. Was there a time when you were the duly elected District Attorney of Sullivan County? A. There was.

Q. When? A. I was elected about a year, one 8691
or two years, after I was admitted to the Bar.

Q. How long did you serve? A. One term.

Q. Thereafter you continued in the practice of law? A. I did.

Q. You knew the Tannenbaum family? A. I knew Albert Tannenbaum's father and I probably knew his son, the witness here, although I doubt if I would recognize him until this matter came up in Sullivan County in 1940.

Q. Who retained you on behalf of Allie Tannenbaum in 1940? A. His father, Samuel Tannenbaum, first communicated with me.

8692 *Ellsworth Baker—For Defts.—Direct*

Q. And after you were retained by his father, did you consult with the defendant then, the witness here, Allie Tannenbaum? A. I consulted with him after talking with his father. I am not certain that his father retained me. He talked with me about it and then afterward I talked with Allie Tannenbaum and I think it was as the result of conversations with both that I agreed to represent him. Subsequently I was assigned by the Court to represent him.

8693 Q. So that no other person except his own father retained you to represent Tannenbaum? A. Except at that time himself and afterward designation by the Court.

Q. I mean no outside source? A. No.

Q. I want to get that straight. A. I did not understand your question.

Q. Now in the course of your preparation of Mr. Tannenbaum's defense in Sullivan County on the charge of murder, did you prepare an affidavit? A. I did.

Q. What was the affidavit? A. An affidavit
8694 accompanying a notice of motion for an inspection of the minutes of the Grand Jury which had found the indictment.

Q. Did you draw that affidavit on behalf of Mr. Tannenbaum after consultation with him? A. Yes, sir.

Q. Did you submit it to him? A. I did.

Q. Did you do that personally? A. I did.

Q. Where? A. In the County Jail.

Q. And in your presence what did he do with the affidavit? A. Read the affidavit, signed it, swore to it.

Q. Did you also act as a notary? A. I did.

Q. You are a notary, too? A. I am.

8695

Q. Was anyone else present? A. No one. No one, except this signing was in a small room which opens on a corridor and I think a jailer was out in the corridor. No one was in the room at the time.

Q. No other people? A. No.

Q. Did you tell Mr. Tannenbaum when you handed him the affidavit what it was for? A. I told him previous to that what the affidavit was to be prepared for.

Q. Tell us what did you tell him.

8696

Mr. Turkus: I object to this. There is nothing inconsistent here. I cannot understand the purpose of calling this witness.

Mr. Barshay: I will tell you briefly. Mr. Tannenbaum said under oath—he admitted it right here—that in New Jersey, in the trial of Workman, he said under oath then, charging this man Mr. Baker, a former District Attorney of that county, with handing him a paper and saying this was a bill of particulars.

8697

Mr. Turkus: Oh, that is utterly nonsensical. That never happened in this trial at all.

Mr. Barshay: I did not say in this trial; I said in the Workman trial. It was repeated here on cross-examination.

Mr. Turkus: He admitted he thought the paper in New Jersey was a motion for a bill of particulars. That is a motion for inspection of Grand Jury minutes. To a layman it may be synonymous.

Mr. Barshay: That explanation may be

8698 acceptable to you but not to a man who has practiced law that long.

Mr. Turkus: Don't switch the trial. We are trying Lepke. I object to this. We have a murder indictment here, not anybody's personal feelings.

The Court: What difference does it make?

Mr. Turkus: I cannot understand—

8699 By the Court:

Q. You told him the nature of the paper and he understood it and swore to it, didn't he? A. I told him the nature of the paper and I had every reason to believe he understood it.

Q. And he read, signed and swore to it? A. Yes.

Mr. Barshay: That is all I want.

By Mr. Barshay:

8700 Q. You never told him it was a bill of particulars? A. Oh, no.

Q. You never misled him, that is the point?

Mr. Turkus: I object to that. There is no contention he was misled.

Mr. Barshay: Then I am satisfied, Mr. Turkus. That is all.

Mr. Turkus: Thank you, Mr. Baker.

Carl Shapiro—For Defts.—Direct 8701

CARL SHAPIRO, residing at 3301 Springdale Avenue, Baltimore, Maryland, called as a witness on behalf of the defendant Buchalter, after being duly sworn, testified as follows:

Direct examination by Mr. Wegman:

Q. Mr. Shapiro, what is your business? A. Clothing business, men's clothing business.

Q. And are you connected with a corporation engaged in that business? A. Yes, sir. 8702

Q. What is the name of that corporation? A. Raleigh Manufacturers, Incorporated.

Q. What office do you hold? A. Treasurer.

Q. Are you in direct charge of the operations of that business? A. Yes, sir.

Q. And have you been in charge of those operations since the year 1936, including the year 1936? A. I have been in charge of that business since the inception, which was in 1935.

Q. Did that business occupy an office in the building at 200 Fifth Avenue? A. Yes, sir.

Q. And have you, at my request, produced the lease under which that office was occupied? A. 8703
Yes, sir.

Q. Did that lease come out of the files and records of your corporation? A. Yes, sir.

Q. And to your knowledge that is the lease covering the premises? A. Yes, sir.

Mr. Wegman: I offer it in evidence.

Mr. Turkus: This is a lease for Room 1011, commencing on the 1st of February, 1936, and terminating on the 1st of May, 1937. It is objectionable. It has no com-

8704 petency, materiality or relevancy to anything brought out on the People's case.

The Court: What is it?

Mr. Wegman: If your Honor pleases, it has a direct bearing on testimony in the People's case.

The Court: By whom?

Mr. Wegman: By means of this lease, that would be the office that was occupied in that building and demonstrate that it

8705 was on the floor different from the floor testified to by witnesses for the People who said they were there.

Mr. Turkus: It says on the tenth story, Room 1011 on the tenth story. Will your Honor read this?

The Court: What was testified to?

Mr. Wegman: They testified the seventh floor.

Mr. Turkus: They did not. They said the tenth floor.

Mr. Wegman: What?

8706 Mr. Turkus: They said the tenth floor. Why, that is in corroboration of the People's witnesses. That lease corroborates the People's witnesses.

Mr. Wegman: I press it.

Mr. Turkus: Go ahead, press it. I withdraw the objection. Thanks for the exhibit. I could not get it.

Mr. Wegman: You could by asking for it at any time, and you know that. You know you have the power of subpoena and it is a New York corporation.

The Court: Take it.

8707

Mr. Turkus: I get something from you?

The Court: I suggest that you check over your minutes and see what the stenographer took down.

Mr. Wegman: I will do that, but there is a further purpose for the offer.

(Lease received and marked Defendants' Exhibit 7, in evidence.)

8708

Mr. Turkus: The exhibit should be read to the jury as long as it is in evidence now.

The Court: What room is it?

Mr. Turkus: Room 1011, on the tenth floor.

The Court: You do not want to read all that lease. Can't you paraphrase it, tell the jury what it is?

Mr. Wegman: All right, Mr. Turkus, perhaps you and I can agree that this is a lease dated January 29, 1936, between the Fifth Avenue Building Company and Raleigh Manufacturers, Inc., covering premises known as Room 1011, as shown by the red ink lines on plan attached hereto, on the tenth story of the building known as the Fifth Avenue Building, to be used solely as a wholesale showroom for men's clothing and for no other purpose whatsoever, for the term of one year and three months, to commence on the 1st day of February, 1936, to end on the first day of May, 1937, at a rental of $1560. There

8709

8710 *Carl Shapiro—For Defts.—Direct*

is not anything else in here that you want me to read, is there?

Mr. Turkus: No.

Mr. Wegman: Perhaps, however, we might read this to the jury: "It is understood and agreed that upon the execution and delivery of this lease, the lease heretofore made to the tenant of Room number 911 in the Fifth Avenue Building, dated December 10, 1935, is hereby terminated, and the sub-lease made by the tenant of said room 911 from Murray Knitwear Company, Inc., is terminated as of February 1, 1936."

8711

Mr. Turkus: That part is not necessary, but it has been read. It does not make any difference. It has no application.

Q. Mr. Shapiro, using this court room for the purpose of estimation, will you describe to his Honor and the jury about how large that office was?

8712

Mr. Turkus: Just a minute. I object to it. The exhibit is the best evidence and it speaks for itself. Defendants' Exhibit 6, in evidence, is the best evidence of the size of the office.

The Court: Does it state it?

Mr. Turkus: It is put on there in red ink on the diagram.

The Court: This does not seem to identify Room 1011.

Mr. Turkus: Well, if you read the text

of the lease, your Honor, you will see that it refers to that portion of it marked in red ink on the exhibit which you have just turned over. If you will look at the exhibit, then read the lease, you will see that from the language of the lease that exhibit is incorporated therein and made part thereof and identifies the portion of the premises leased to the Raleigh by the landlord.

The Court: I see one that has figures "11". It does not give dimensions. 8714

Mr. Wegman: It does not give dimensions and that is what I am trying to get from the witness, if your Honor pleases, approximately by comparison with this room so that the jury may have an idea of the size of that office.

The Court: There is a dimension stated here, showing from the outside wall to the courtyard wall, sixty-eight feet. That divides two lines of offices and has a central hallway. 8715

Mr. Wegman: It does not indicate, however, the size of the portion of that width occupied by the Raleigh Company.

By the Court:

Q. Do you know the dimensions? A. I would say approximately eighteen by twenty-five feet.

By Mr. Wegman:

Q. Mr. Shapiro, were there partitions in that office? A. Yes, sir.

Q. And how did those partitions divide the room? A. Well, the door opening from the hallway where all offices opened out, there was outer office which I would say approximately eight feet, and the entire width of the office, that was our outer office where we had a desk, a bookkeeper, and a receiving set-up there. Then there was a partition from that part on. The balance of the office was divided in two equal offices. There were partitions of sheet steel and glass,
8717 and to the best of my recollection, they were about eight feet or nine feet high.

Q. You were in that office regularly during the time that Raleigh occupied it?

Mr. Turkus: I object to counsel leading.

The Court: I do not know what "regularly" means. You mean at regular intervals?

Mr. Wegman: No, I mean regularly in the sense of every week and during the entire time of occupancy, not necessarily
8718 every day, but substantially so. I will reframe the question.

Q. Did you spend a great deal of your time in that office, Mr. Shapiro?

Mr. Turkus: I object to counsel leading.

The Court: Overruled.

A. In managing this business it necessitated my being some of my time in Baltimore and

some of my time in New York, and it was a matter of habit with me and a regular routine layout; I spent ordinarily from Wednesdays including Saturdays, Wednesdays, Thursdays, Fridays and Saturdays, in the New York office, so that I could spend the week end with my family, and Mondays and Tuesdays, and sometimes on a Wednesday, I spent in Baltimore.

Q. When you were in New York you spent your time at the office during the business hours of the day? A. Except when I had to go out and 8720
attend to other matters which required my attention.

Q. During that time you heard many conversations in that office, did you not? A. Very often.

Q. Were conversations in any part of that office audible in every other part of the office?

Mr. Turkus: I object to this. He would have to be an expert on sound and sound engineering.

The Court: The jury has to figure out the question of fact and also the question 8721
of—

Mr. Turkus: Acoustics and sound engineering.

The Court: Not only that, but the attention that is being given to another.

Mr. Turkus: And how loud the speaker talks.

The Court: Chiefly, whether or not you pay any attention.

Mr. Turkus: And whether the telephone bell is ringing, and other things.

The Court: If everybody in this world

8722 *Carl Shapiro—For Defts.—Direct*

was all the time listening to what other people were saying, there would be a riot.

Q. Did you hear conversations when you were in one part of that office which were held in another part of the office?

Mr. Turkus: I object to this. Objection.

The Court: The jury can figure it out.

8723 Do you want to prove he heard a specific conversation? You may ask him.

Mr. Wegman: I did not hear your Honor.

The Court: Repeat.

(Remarks of the Court read.)

Mr. Wegman: On the direct— Your Honor I want to prove it was impossible to have a conversation in that small room without everybody in the room hearing it.

The Court: That does not mean anything. The jury can figure it out. They

8724 have the size and they have the partitions. There cannot be a presumption that everybody in the room, in an office divided into three rooms, is pricking up ears at everything that goes on that does not concern them. That is nonsense.

Q. Was it a matter of frequent comment among you and other employes of the company that conversations could not be held in that office without being overheard by everybody in the place?

Mr. Turkus: Objection.

The Court: Sustained.

Mr. Wegman: Exception.

Q. Mr. Shapiro, have you examined the records of Raleigh Manufacturers, Inc., for the purpose of refreshing your recollection as to whether or not you were in the New York office at Room 1011, in 200 Fifth Avenue, New York City, on September 11, 1936? A. Yes, at your request.

Q. And having refreshed your recollection 8726
from those records, are you now able to state whether or not you were at that office on that date? A. I was. I was in that office on that date.

Q. September 11th? A. September 11, 1936.

Q. And it was your custom to be at that office—

Mr. Turkus: May we have the witness testify? We are getting down to something now that the witness should speak.

The Court: What is the date? 8727

Mr. Turkus: September 11, 1936, the Friday before Rosen was murdered.

A. After checking my records I found that I was absolutely in the office for the reason—

Mr. Turkus: Wait a minute. I object to him talking about records that are not in evidence.

Mr. Wegman: You cannot state the reason, Mr. Shapiro.

8728 *Carl Shapiro—For Defts.—Direct*

Q. Do you know Allie Tannenbaum? A. Yes.

Q. Do you know Max Rubin? A. Yes.

Q. Did you see either Allie Tannenbaum or Max Rubin in the office of Raleigh Manufacturers at 200 Fifth Avenue at any time whatsoever during the entire period of time that that office was occupied by Raleigh Manufacturers? A. No, I did not.

Q. And are you certain that you did not see either of them there on Friday, September 11, 1936?

8729

Mr. Turkus: Just a minute. There is no claim in any part of the case that Tannenbaum was there September 11th.

Mr. Weiman: I beg your pardon. If you will state that—

Mr. Turkus: I am not stating anything. Oh, I had the wrong month. I am sorry. You are still referring to Friday, September 11th.

The Court: The Friday before the al-

8730 leged murder.

Mr. Turkus: Yes.

The Court: The specific incident the witness is alleged to have referred to, as testified to by Tannenbaum, briefly, that Rubin and Lepke were together.

Mr. Turkus: Yes.

The Court: Lepke was flushed and looked angry, and he said to Rubin he had given Rosen money to go away with but he always came back and there was one so-and-so who would never go down to Dewey and talk about him, and Rubin

tried to pacify him, and Lepke said, "You told me that before, and this is the end of it." I take it that that is the conversation referred to, and that this is an effort to show it did not occur by showing that this man did not notice it, if he was there.

Mr. Wegman: May I go further than that, if your Honor pleases? This man has testified— I have not asked him whether that conversation occurred be- 8732
cause my other question was all embracing.

The Court: Go ahead with your question.

Mr. Wegman: I shall come to that specific question.

Q. Did you hear any such conversation in that office on Friday, September 11th? A. No, sir.

Q. Did you ever hear it at any other time? A. No, sir.

Mr. Turkus: Put the year in. 8733

Q. 1936? A. No, sir.

Q. Did you ever see either Allie Tannenbaum or Max Rubin in that office either on Friday, September 11, 1936, or any other time? A. No, sir, never saw them up there.

Q. And when you were in New York, did you spend the greater part of the business day in that office? A. Yes, sir.

Mr. Turkus: I object to this. Why

8734 *Carl Shapiro—For Defts.—Direct*

don't we have the witness testify to what he did September 11, 1936?

The Court: Sustained.

Q. On Friday, September 11, 1936, what part of the day did you spend at that office? A. I usually come in the morning—

Mr. Turkus: Just a minute.

The Court: Let us get his answer,
8735 then we will know what it means.

Mr. Turkus: I object to what his usual custom was.

The Court: Why don't you wait until you get the rest of it and see what he is basing his statement on?

Mr. Turkus: I am supposed to object at the proper time.

The Court: Finish your answer. You usually what?

A. (Continued) I would come in in the morn-
8736 ing, open my mail, and take care of my correspondence; take care of a customer if he came in, some of the women salesmen when they come in in the business course of the day and wait to be waited on and see their lines; prepare lines; work on advertising, sign checks, and so on, an ordinary business course of events.

By the Court:

Q. So your mind is pretty well occupied at all times by your own business? A. Yes, sir.

Q. Do you have time to listen to other peo-

ple's business? A. No, your Honor. If there is an argument there, I could absolutely hear that.

Q. Unless there was a disorder to take your mind off your own business, you would not hear what was going on? A. Yes, your Honor, or I could hear if a customer in one of the other rooms was objecting to a line.

Q. From time to time a voice is raised in that office in the course of the day? A. Yes.

Q. Nothing unusual about that? A. Nothing 8738
unusual about that.

By Mr. Wegman:

Q. Was it usual or unusual for the defendant Buchalter to raise his voice? A. Mr. Buchalter as a rule rarely raised his voice, in fact, I don't believe I ever heard him raise his voice.

Q. Is it now your best recollection at this time that you never heard him raise his voice? A. That is right. Mr. Buchalter had very little to say at all times. 8739

Q. Mr. Shapiro, who else was employed in that office at that time, referring now to September, 1936? A. Our office manager, Frank Cohen, our credit man who handled the credits and did other work, Irving N. Siegel, and a young lady who is a niece of mine who has since passed away.

Q. Her name was Naomi Shapiro? A. That is right.

Q. And she died in July, 1939? A. She died in 1939.

Q. Mr. Shapiro, on Friday, September 11,

8740

1936, were those three employees at that office? A. Yes, sir.

Q. Was there a rule in force in the regular course of business of Raleigh Manufacturers that there was never to be a time during any business day when either Frank Cohen or Irving Siegel was not in the office?

Mr. Turkus: I object to it. It is not the rule we are concerned with.

8741 The Court: Sustained.

Q. Did you as the executive head of this business instruct Frank Cohen and Irving Siegel that one or the other of them must be in the office at all times?

Mr. Turkus: Objection.

The Court: Sustained.

Q. Do you recall, Mr. Shapiro, a single instance of any time during the month of September, 1936, when during the office hours of the 8742 day either Frank Cohen or Irving Siegel was not in that office?

Mr. Turkus: By his own testimony it would be an impossibility. Here is a man that is down to Baltimore; he is out with a lot of accounts and business in the city, not in the office all the time. How can he state what goes on the in office when he is not there?

The Court: Sustained.

Mr. Wegman: I respectfully except.

Q. Was that office to your knowledge ever left unattended by either Frank Cohen or Irving Siegel?

Mr. Turkus: Objected to. That is an impossibility for the man to tell what goes on when he is not there.

The Court: Sustained.

Q. Was there ever a time within your experience when you found or learned that that office was not attended by either Frank Cohen or Irving Siegel at any time during the business day? 8744

Mr. Turkus: Objected to; hearsay.

The Court: Sustained.

Q. Within your knowledge and recollection, Mr. Shapiro, do you know of any time or any occasion when either Frank Cohen or Irving Siegel was not in that office?

8745

Mr. Turkus: Same objection.

Q. During the business hours of the day?

Mr. Turkus: That is hearsay. They would have to tell him these things.

By the Court:

Q. Was it the usual thing for one of them to be there? A. The office had to be attended to at all times.

Q. We assume that. A. That is a fact.

Q. But mistakes will happen in the best regulated offices. A. Well, we never know when a customer would come in, your Honor.

Q. During business hours somebody was supposed to be there? A. Somebody was supposed to be there.

Q. And so far as you know that was followed? A. That is right.

Q. You never came there and found the office vacant during business hours? A. That is right,
8747 and at no time did any customer ever tell me that he came in and there was nobody there.

Mr. Turkus: That is hearsay.

The Court: What difference does it make? It is business usage.

Mr. Turkus: That is the trouble with it. What good is it?

The Court: It is for the jury to figure out as to what the listening likelihood is.

Mr. Wegman: If your Honor pleases, I go further than that. I say that you cannot hear a non-existant person, or someone
8748 who was not there. I am demonstrating now, I believe, that these people were never in that office, and so the conversation could not have been held to be overheard by anybody.

Mr. Turkus: Let the jury determine that demonstration.

The Court: The jury will figure that. I will take the evidence.

Mr. Wegman: That is what I am attempting to demonstrate now.

By Mr. Wegman:

Q. So far as you know, Mr. Shapiro, was there any time whatsoever on Friday, September 11, 1936, when either Frank Cohen or Irving Siegel was not in that office during business hours?

Mr. Turkus: I object to it. How could he tell that unless he was there during the whole business day?

Mr. Wegman: He said he was there, 8750
Mr. Turkus.

Mr. Turkus: From start to finish?

By the Court:

Q. Do you remember anything about it, Mr. Witness? A. I cannot exactly say if I spent every minute of my time that day in that office, but I know that the office—

Q. Does your mind record so as to carry all these years whether or not either of those men were there that day? A. They were there, and so was Naomi Shapiro. 8751

Q. How about Tannenbaum? Do you remember if he was there or not? A. He was not there.

Q. You mean you do not remember, or what? A. He was not there.

By Mr. Wegman:

Q. Mr. Shapiro, will you please keep your voice up so that we can hear you? We did not hear any part of your answers to his Honor. A. Mr. Tannenbaum was not in that office at any time.

Q. That day or any other day? A. Or any other day.

8752 *Carl Shapiro—For Defts.—Direct*

Q. And how about Max Rubin? A. He was not there, or any other day, not that day or any other day.

Q. Do you know the defendant Weiss, Mendy Weiss? A. I have seen Mendy Weiss.

Q. He is the gentleman in the brown suit here, the second from the left.

Mr. Turkus: Just a minute. The witness may not need counsel to point out
8753 Mendy Weiss to him. Let us find out from him what the extent of it is. He said he had seen him. I object to it in that form.

By the Court:

Q. Do you know Weiss? A. Yes, sir.

By Mr. Wegman:

Q. Did you ever see Mendy Weiss at that office at 200 Fifth Avenue? A. No, sir.

8754 Q. In the month of September, 1936, or any other time? A. No, sir.

Q. Positive of that? A. Positive.

Mr. Wegman: You may examine.

The Court: Do you want to examine now?

Mr. Turkus: Well, I cannot complete it.

Mr. Wegman: Pardon me.

By Mr. Wegman:

Q. Mr. Shapiro, did you see either Rubin or

Tannenbaum at any time on Friday, September 11, 1936, at any place, at any other place? A. No, I did not. I don't believe I did. I am pretty sure of it.

Mr. Wegman: You may examine.

The Court (To witness): You be here tomorrow morning at 10:00 o'clock.

Mr. Turkus: Will your Honor direct the witness to bring with him the records he used to refresh his recollection? 8756

Mr. Wegman: I have those and I shall be glad to mark them for identification at this time. If you want them in evidence, you can see them. That is the rule. I will be glad to offer them in evidence. I now offer them in evidence.

The Court: You be here tomorrow morning at 10:00 o'clock for cross-examination.

Mr. Wegman: May I be indulged by the Court to ask one single question more?

The Court: We are taking a recess now. What is it you wanted? 8757

Mr. Wegman: May I ask one single question now and then I am through?

The Court: Do it in the morning.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it. Keep your minds open. Follow all other admonitions heretofore given which are continuous through the trial of the case. The jury may go out the main door. The witness will go out this way.

(Ten checks were marked Defendants' Exhibit Z-9, for identification.)

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Mr. Wegman: Now, if your Honor pleases, may I ask your Honor to direct the District Attorney to have Rubin and Tannenbaum available tomorrow morning for the purpose of identification?

Mr. Turkus: Yes.

The Court: Do you want the witness to return?

Mr. Turkus: They were here today.

Mr. Wegman: We could not get to it.

8759 Mr. Turkus: I thought you were going to have him identify them.

Mr. Wegman: I do not want anybody to identify them. I just want them to be seen by certain witnesses who will take the stand, and we could not get to those witnesses today.

The Court: Do you want the same announcement made today as yesterday in regard to witnesses?

Mr. Wegman: If your Honor will please do so.

8760 The Court (To Clerk): Make the announcement.

Court Clerk: All witnesses under subpoena by defendant Buchalter will return here tomorrow morning at 10:00 o'clock without further notice.

The Court: Have that shouted in the corridor by the attendants.

(Defendants remanded.)

(Thereupon an adjournment was taken to November 19, 1941, at 10 a.m.)

8761

Brooklyn, N. Y., November 19, 1941.

TRIAL RESUMED

CARL SHAPIRO, a witness in behalf of the defense, resumed the stand and testified further as follows:

Direct examination by Mr. Wegman (continued):

8762

Q. During the year 1936 and particularly in the summer and fall of that year, having particular reference in mind the occasion and month of December, 1936, did you see police officers in the office of the Raleigh Manufacturing Company at 200 Fifth Avenue? A. Yes.

Q. Will you tell his Honor and this jury how often they were there? A. Sometimes they came as often as once a day.

Q. Were police officers regularly in the hall outside of that office, in the hallway of the building outside the office? A. Yes, sir.

8763

Q. You are a brother of Jacob Shapiro? A. Yes, sir.

Q. Sometimes known as Charlie Gurrah? A. That is right.

Cross examination by Mr. Turkus:

Q. You are not only a brother of Gurrah, but you are the front for Lepke and Gurrah in the Raleigh, aren't you?

Mr. Wegman: I object to the question and I ask your Honor to instruct Mr.

8764 *Carl Shapiro—For Defts.—Cross*

Turkus not to repeat any such question. I ask your Honor to instruct the jury to disregard it. It is an unwarranted insult, for which there was no justification or basis whatsoever.

The Court: Objection overruled.

Mr. Wegman: I ask for the withdrawal of a juror and the declaration of a mistrial on the basis of your Honor's ruling.

The Court: Motion denied.

8765 Mr. Wegman: Exception.

A. I happen to be a brother of Jacob Shapiro —I happen to be.

Q. Are you the front in the Raleigh for Gurrah and Lepke? A. I am not the front.

Mr. Wegman: I object to the end of the question. I again ask your Honor to instruct Mr. Turkus to desist from that sort of questioning, and to instruct the jury to disregard the question.

8766 The Court: That is an unwarranted interruption. The Court has previously ruled on that. The sole purpose of this is to give the witness a chance to think.

Mr. Wegman: I respectfully except to your Honor's statement, and I renew my motion for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied. You are directed to take your seat.

Mr. Wegman: I take an exception to that.

Q. (Question repeated by the stenographer.) A. No, sir.

Q. What office do you hold in the Raleigh? A. Treasurer of the corporation.

Q. Who are the other officers? A. Nathan Borish, president, and I am also the secretary.

Q. The Raleigh employs hundreds of people, doesn't it? A. Seven hundred, approximately.

Q. Who are the stockholders of the Raleigh? A. Nathan Borish, Carl Shapiro, Samuel Smith.

Q. Samuel Smith? A. Yes, sir. 8768

Q. You were a member of Greenberg & Shapiro, weren't you? A. Yes, sir.

Q. When did you terminate your connection with Greenberg & Shapiro? A. Greenberg & Shapiro were liquidated in 1935.

Q. Where did Greenberg & Shapiro maintain its office? A. 935 Broadway.

Q. Was there a Fifth Avenue number? A. 200 Fifth Avenue.

Q. You were in the embroidery business, weren't you, previous to the clothing business? A. Yes, sir. 8769

Q. I am talking about when you were with Greenberg & Shapiro, you were in the embroidery business? A. No, sir.

Q. What was the business of Greenberg & Shapiro? A. Men's clothing business.

Q. For how long? A. A little more than two years.

Q. What was the portion of men's clothing? A. All men's clothing.

Q. That was two years' experience you had with Greenberg & Shapiro? A. Yes, sir.

8770

Q. Before that what was your business? A. Pleating and stitching.

Q. And that was your business exclusively? A. Yes, sir.

Q. Now, when you maintained offices at 200 Fifth Avenue with Greenberg & Shapiro— A. That is not so.

Mr. Wegman: I object to the question, stating facts not in the record and con-

8771 trary to the evidence.

The Court: Objection overruled.

Mr. Wegman: Exception.

Q. What was the Fifth Avenue address of Greenberg & Shapiro? A. That was 935 Broadway.

Q. Did it have a Fifth Avenue entrance? A. Yes, sir.

Q. What was the Fifth Avenue entrance, the number? A. The building had a Broadway and a Fifth Avenue entrance.

8772 Q. That was an office in which Lepke and Gurrah hung out? A. They were there, yes, sir, but not hanging out.

Q. Not only were they there, but that was their hangout. A. No, sir.

Mr. Wegman: I ask the witness be permitted to answer the question. Mr. Turkus broke in with a following question before the answer was complete. I ask the witness be given an opportunity to complete his answer for the record and for the hearing of the jury.

The Court: The interruption clearly indicates a desire to give an opportunity for the witness to think over his answer.

Mr. Wegman: I except to your Honor's statement. I consider it a personal insult. I desire to note my exception on the record. There was no such intention, and I resent the attack on my integrity.

The Court: Just please sit down. Objection overruled.

Mr. Wegman: Exception. 8774

Q. In the two years that you were associated with Greenberg in this firm of Greenberg & Shapiro, on an average of how many times a week did Lepke and Gurrah come in those offices? A. Lepke was up there very seldom. My brother, Jacob Shapiro, was there on an average of—

Q. (interrupting) That place was a hangout for Lepke and Gurrah also? A. No, sir.

Q. How many times did you see Charlie Workman, alias Charlie the Bug, up at the office of Greenberg & Shapiro? A. Hardly ever. 8775

Q. How many times would you say that is, hardly ever? A. He was there once or twice.

Q. You know Charlie Workman? A. Yes, sir.

Q. You know he is known as Charlie the Bug? A. That is right.

Q. You know he pleaded guilty to the murder of Dutch Schultz?

Mr. Wegman: I object to the question, if your Honor please, and ask that the jury be instructed to disregard it utterly. It is immaterial and has nothing to do with

8776

the credibility of this witness or any of the issues in this case. I ask your Honor to instruct the jury to disregard the question in its entirety, and I again request that Mr. Turkus be instructed to desist from that sort of questioning.

The Court: Objection overruled. Motion denied.

Mr. Wegman: I renew my motion for the withdrawal of a juror and the declaration of a mistrial because of the prejudice necessarily carried with that statement.

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The Court: Finish everything you want to say and then the Court will give one ruling, which will cover it all.

Mr. Wegman: That is all I have to say.

The Court: Objection overruled; motion denied.

Mr. Wegman: May I rise to take exception to your Honor's remarks?

Q. (Pending question read by the reporter.)

8778

A. I don't know that.

Q. You never heard that? A. No, sir.

Q. You read the newspapers? A. Yes, sir.

Q. Who was Charlie the Bug up to see in the office of Greenberg and Shapiro on the occasions you remember? A. He might have come up to see my brother; and then again I might not be so positive he was there at all.

Q. Now you are not sure he was up there? A. He might have been there and he might not.

Q. From where did you know Charlie the Bug if it was not from Greenberg & Shapiro's? A.

I have been brought up in New York practically the greater part of my life.

Q. You did not associate with Charlie the Bug? A. No, sir.

Q. You did not belong to any lodges or clubs with him? A. No, sir.

Q. You did not visit his home, socially? A. No, sir.

Q. He was not a caller at your home? A. No, sir.

Q. You had no social contacts with him? A. 8780
No, sir.

Q. You certainly had no business with Charlie the Bug? A. No, sir.

Q. Well, then, wasn't it at Greenberg & Shapiro's that you met him? A. I don't say that.

Q. You are not sure of that? A. No, sir, I said I did not say that.

Q. You don't frequent pool rooms, do you? A. When I was a kid, yes, sir.

Q. Did you know Charlie the Bug when he was a kid? A. I might have known him when I was 8781
about 12 or 13.

Q. It is not what you might have done. Don't you remember where you met Charlie the Bug? A. No, sir, I do not.

Q. Let's see: Philip Cohen, alias Little Farvel, how many times was he up to Greenberg & Shapiro's? A. I don't believe he was ever.

Q. You know Little Farvel? A. I may have when I was 10 or 11 or 13 years old while living on the East Side and some of these boys lived there and that is how I knew a good many of them.

8782 Q. You did not go to school with Little Farvel? A. No, sir.

Q. You did not play on the streets of the East Side with Farvel? A. No.

Q. You did not go out socially with him? A. No, sir.

Q. You did not have him to your home for dinner, did you? A. No, sir.

Q. You did not belong to any club or clubs? A. No, sir.

8783 Q. You certainly had no business with Farvel Cohen? A. No association.

Q. Refreshing your recollection, aren't you sure now that you met him at Greenberg & Shapiro's? A. I don't think I did.

Q. Well, let us get along to Allie Tannenbaum. How many times was Allie Tannenbaum up to Greenberg & Shapiro's? A. Quite a few times.

Q. Quite a few times in the two years is your estimate as to that? A. Well, I would not know the number, but he was there from time to time.

Q. Often? A. No, sir, not often.

8784 Q. Allie Tannenbaum did not come to see you socially? A. No, sir.

Q. And you did not visit Allie's home? A. No, sir.

Q. You did not invite him to your home? A. No, sir.

Q. You had no business with Mr. Tannenbaum? A. No, sir.

Q. Who did Tannenbaum come up to see at Greenberg & Shapiro's? A. My brother.

Q. He did not come up to see Lepke? A. He was not there often.

Q. But on the few occasions when Lepke was there, Tannenbaum did not see Lepke, did he? A. I could not answer that, I would not know.

Q. You cannot remember a single occasion when Tannenbaum was in conversation with Lepke together? A. To be honest, I don't think I ever saw them together.

Q. You don't think you saw Tannenbaum there? A. Together with Lepke, was your question.

Q. You are sure you saw him with your 8786
brother? A. Yes, sir.

Q. Of course, your brother does not appear in this case as a defendant, does he?

Mr. Wegman: I object.
The Court: Objection overruled.
Mr. Wegman: Exception.

Q. (The Court) You know he is not a defendant? A. I know he is not a defendant.

Q. How many times was Louis Kravitz up at Greenberg & Shapiro's? A. He was there a few 8787
times.

Q. And during the two years can you estimate the number of times he was there? A. That would be a guess—I could not answer that.

Q. Of course, Louis Kravitz did not come to see you socially; he was not one of your social intimates—he did not visit your home or you his; you did not belong to lodges together? A. No, sir.

Q. You did not go to school together? A. No, sir.

Q. Did Louis Kravitz come up to visit Lepke

at Greenberg & Shapiro's? A. Lepke was there very seldom.

Q. Do you remember Louis Kravitz being together with Lepke at Greenberg & Shapiro's? A. Considering he was there so seldom, I could not say.

Q. Who did he see up at Greenberg & Shapiro's? A. He came up to see my brother.

Q. By your brother, you mean Gurrah? A. Yes, sir.

8789 Q. You saw Emanuel (Mendy) Weiss up at Greenberg & Shapiro's a number of times? A. No, sir, I did not.

Q. Never? A. I don't believe I ever remember seeing him in Greenberg & Shapiro's place at 935 Broadway.

Q. In the two years the office was maintained there you don't recall a single instance when you saw Emanuel (Mendy) Weiss in Greenberg & Shapiro's? A. That is right.

Q. You knew Emanuel (Mendy) Weiss when you took the stand—how long did you know him? A. Back to the time I was a kid.

8790 Q. You and Mendy Weiss did not go to school together? A. No, sir.

Q. You did not play marbles together on the East Side? A. No, sir.

Q. You did not fly kites together? A. I did not have much time to play in those days those games.

Q. You have not been to Mendy Weiss's home? A. No, sir.

Q. And he does not visit your home? A. No, sir.

Q. You do not belong to clubs together? A. No, sir.

Q. You do not go out socially together? A. No, sir.

Q. Through whom did you meet Mendy Weiss? A. As I brought out before, through the neighborhood we were brought up in, and I saw him around the streets.

Q. But you never once saw Mendy Weiss in either of Greenberg & Shapiro's offices or the Raleigh office at 200 Fifth Avenue? A. I don't believe I did.

Q. Does your memory need any refreshing? 8792
Would it help you any? A. If you can help me, all right.

Q. At the times you saw Charlie the Bug and Farvel Cohen and Louis Kravitz, didn't you perchance see Mendy Weiss with them? A. No, sir.

Q. How many times did you see Sam Feinstein up in the office? A. That name does not sound familiar.

Q. Toots Feinstein? A. I don't recall that name.

Q. Don't you remember the fellow who dis- 8793
appeared from his home—do you remember him—Sam (Toots) Feinstein?

Mr. Wegman: I object to the question as improper. The witness said he does not remember the name, does not recognize the name, and the implication in the statement that Mr. Turkus has made is an improper implication.

The Court: Objection overruled.

Mr. Wegman: Exception.

Mr. Climenko: I move for the with-

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drawal of a juror and the declaration of a mistrial, on the grounds of prejudice.

The Court: Motion denied.

Mr. Climenko: Exception.

(Pending question read to the witness.)

A. That does not bring any recognition to me.

Q. Well, how many times did you see Izzy Bartfield up there? A. I have a remote remembrance of Izzy Bartfield, but I cannot place
8795 him. Whether or not you are referring to—this goes some time back.

Q. I am going back to Greenberg & Shapiro's. That is not so far back; that is two years before you went to the Raleigh. A. That would be nine or eight and a half years ago. I remember the name but I cannot place the individual.

Q. You did not go to school with Bartfield? A. I could not answer that.

Q. You did not play marbles with him? A. I could not answer that; I do not remember the individual.

8796 Q. You remember merely the name of Bartfield? A. The name is familiar.

Q. How about Sidney Salles, how many times was he to the office? A. I cannot place that individual.

Q. Possibly you can remember him by the name of Shimmy. A. That has a familiar sound, but I cannot place the individual.

Q. Didn't you answer that Shimmy was a visitor at the office of Greenberg & Shapiro? A. I could hardly answer that.

Q. Take it in conjunction with Charlie (the Bug) Workman and Farvel Cohen and Louis

Kravitz. Do you have any recollection of seeing Sidney Salles in their company at Greenberg & Shapiro's? A. The name does not sound familiar at all.

Q. Take a look at this picture and see if it refreshes your recollection about it, about Shimmy. A. I cannot say I do, from that picture.

Q. You do not deny, do you, that Mr. Salles was a visitor at Greenberg & Shapiro's? A. Not knowing the party, I could not deny anything. 8798

Q. Now, Danny Fields, how many times was Danny Fields up to Greenberg & Shapiro's? A. Very often.

Q. Of course, Danny Fields did not come to see you socially? A. Well, Danny Fields represented the union, I believe.

Q. He did not come up to see you socially? A. No, sir.

Q. Danny Fields and you did not go to school together on the East Side? A. No, sir.

Q. No social, home contacts? A. No, sir. 8799

Q. No club affiliations? A. No, sir.

Q. Who did Danny Fields come to see at Greenberg & Shapiro's? A. He came up to see me sometimes with regard to cutters.

Q. To visit you? A. My brother.

Q. And Lepke? A. No, sir, Lepke was seldom there.

Q. Did you see Danny Fields at the same time that the Bug was up there, and Cohen and Kravitz? A. That I could not say.

Q. Well, think. A. He was up there. Whether

8800 they were there at one given time, I could hardly answer that, to be truthful.

Q. Yeggy Feinberg, how many times was Yeggy up there? A. I don't believe he was ever up there, if we are referring to the same party.

Q. Yeggy Feinberg. A. That goes back a good many years. In fact, prior to nine years ago, before we were in the clothing business.

Q. You know Yeggy Feinberg? A. I knew
8801 him.

Q. Did you see him? A. I could not say; I don't believe he was up there.

Q. The name is familiar to you? A. That name is familiar, yes, sir.

Q. Of course, Paul Berger frequently came up to Greenberg & Shapiro's? A. No, sir, he did not.

Q. He never came there at all? A. No, sir.

Q. You never saw Paul Berger in Greenberg & Shapiro's? A. I would meet him in the street.

Q. But never in Greenberg & Shapiro's? A.
8802 I don't recall ever seeing him up there.

Q. On direct testimony in this case you were asked whether or not you saw Paul Berger at 200 Fifth Avenue on September 11, 1936, weren't you?

Mr. Wegman: I object to that as improper in form, prejudicial in its casting, and asked for an improper purpose.

The Court: Objection overruled.

Mr. Wegman: Exception.

Q. (Pending question read to the witness.) A. I cannot recall that being asked.

Q. Yesterday, when counsel for Lepke questioned you, you were not asked whether you saw Paul Berger on Friday, September 11, 1936, were you? A. I don't recall that question.

Mr. Wegman: If your Honor please, the witness answered before I had a chance to put any objection on the record. I did object to the same question previously. 8804

The Court: Objection sustained.

Mr. Wegman: I move to strike out the answer.

The Court: He had answered it previously, that he does not recall whether he was asked that question.

Q. Did you attend the Bar Mitzvah of Lepke's son? A. Yes.

Q. How long ago was that? A. Well, it is a matter of years. I do not recall the exact years. 8805

Q. About seven years ago? A. If it was seven years—maybe it is seven years ago.

Q. That is a ceremony when a Hebrew reaches the age of thirteen? A. That is right.

Q. At the Bar Mitzvah you saw various of the persons whose names we have discussed, didn't you?

Mr. Wegman: I object to the question.

The Court: Objection overruled.

A. I met many people there.

8806 Q. See if I can recall whom you met at the Bar Mitzvah. Where was it held? A. I cannot recall that.

Q. Was the Bug at the Bar Mitzvah? A. I could not say.

Q. Was Mendy Weiss at the Bar Mitzvah? A. I don't know.

8807 Mr. Wegman: Before Mr. Turkus asks the next question, because I do not want your Honor to make any further accusation of my method, or any attack on my integrity, may my objection stand to this entire line, beginning with the original question about the Bar Mitzvah as having nothing to do with this case and as being improper and having no bearing whatever on the credibility of this witness? May my objection stand to the entire line, so I do not have to interrupt each question?

The Court: I so understand it.

8808 Q. Do you remember seeing Louis Kravitz there? A. I don't believe I spent very much time there. I was in there a short period and may have been at the Bar Mitzvah.

Q. Do you remember seeing Toots Feinstein, Izzy Bartfield, Shimmy, Sidney Salles, Irving Friedman, alias Danny Fields, Yeggo Feinberg, Paul Berger, Willie Alberts, Allie Tannenbaum, —any of those individuals? A. I could not really answer that question. I met a lot of people there.

Q. Was Gurrah there? A. Yes, sir.

Q. Let us go back to the place of Greenberg

& Shapiro. Do you remember seeing Max Rubin there? A. Maybe once or twice.

Q. Who did Max Rubin come to see? A. He came up to see my brother.

Q. Never Lepke? A. Lepke was seldom there.

Q. When Max Rubin was there did you ever see any of the other individuals whose names we discussed? A. I could not answer that.

Q. Did Greenberg & Shapiro have a union or N.R.A. label when you were operating? A. Yes, sir. 8810

Q. Wasn't Max Rubin up there with great frequency? A. No, sir.

Q. Didn't he have business with you? Didn't you sell him suits? A. No, sir.

Q. Didn't you sell him suits with an N.R.A. label in them? A. He was never in the retail business.

Q. I am talking about you. A. No.

Q. Would you recognize your merchandise, your N.R.A. label? A. There was only one N.R.A. label.

Q. Haven't they numbers assigned? A. I 8811 cannot recall—they have a serial number.

Q. Would you remember the product of the Greenberg & Shapiro house? A. If I do, I will tell you. Garments can be bought in New York City.

Q. Greenberg & Shapiro's garments can be bought elsewhere? A. In New York City, elsewhere.

Q. Won't you take a look at it? Maybe you can refresh your recollection on the incident. A. I hardly think I could.

Q. Take a look at this garment and see if you

8812 can remember having any business dealings with Max Rubin when you sold him that. A. Yes, sir, this is one of our garments.

Q. This would help to refresh your recollection? A. No, sir.

Mr. Turkus: For the record, it is a white suit identified by the witness. I will not offer it in evidence.

The Witness: That garment could be
8813 bought in any one of the states in the country.

Q. It could be, but I want to know whether it was not bought by Rubin right in Greenberg & Shapiro's. A. I could not answer that.

The Court: It is a palm beach suit.

Mr. Turkus: It is a linen suit.

The Court: A white linen suit.

Mr. Turkus: There are two suits.

The Witness: I don't recall this gar-
8814 ment. I don't believe we made the garment this way. I will explain to you why if you want to see it—I mean for identification. The inside vest pocket is different.

By the Court:

Q. What is there about it? A. Can I see it?

Mr. Wegman: May the record show the witness says one of the two garments

8815

produced by the District Attorney was manufactured by Greenberg & Shapiro and the other was not?

Q. How do you identify it? A. Just in the manner of the way it is made.

The Court: I suggest that this suit be marked for identification. That can be done on the inside of the lining.

8816

The Witness: As you will notice, this is a pocket that is made different. It is basted—a piece of piping.

Mr. Wegman: I think we ought to mark both for identification. One we say was not Greenberg's manufacture.

Mr. Turkus: I have no objection, but do not mark it where it is not visible. I suggest we tie a tag on it.

(Marked Defendants' Exhibit Z-10 for identification—identified garment.)

8817

Mr. Wegman: I have no objection, but I would like it marked as a People's exhibit.

The Court: Yes.

("Defendants' Exhibit Z-10 for identification" scratched off and garment marked People's Exhibit Z-24 for identification.)

Mr. Wegman: May the record show that these two garments were brought in and produced by the District Attorney?

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The Court: Yes—People's Exhibit Z-24 alleged to be manufactured by Greenberg & Shapiro house.

(Other suit marked People's Exhibit Z-25 for identification.)

By Mr. Turkus:

Q. Referring to People's Exhibit Z-24 for
8819 identification, that has the N.R.A. label on inside, isn't that the inside pocket of the garment? A. Yes, sir, that is. I can see it from here.

Q. That is the label that is put on when it is manufactured under the Men's Clothing Code Authority? A. That is right.

Q. That label has a number? A. I cannot see that.

Q. Take a look at it. Don't you remember from this—you say you are in business with 700 employees. Don't you remember you had a code number under N.R.A.?

8820

Mr. Wegman: Objected to as argumentative and improper in form.

A. That is not one number—that is a serial number. In other words, the next coat after that would have another number, would be 1581721, and next to that 22, 23, 24 and 25.

Q. Isn't that number assigned to Greenberg and Shapiro, isn't that one of your numbers? A. Those are labels we receive from the retail people and they sell them to whoever asks for them.

Q. So the retail people have a record of the labels they sell, and the numbers? A. Mr. Turkus, you don't seem to realize. This number is not a number given to the manufacturer. This is a serial number and they are bought in rotation.

Q. Nobody else has that number on their merchandise? A. No, there is not another garment with this number on.

Q. So that the garment can be identified by number as being the product of Greenberg and Shapiro? A. This garment is a product of 8822
Greenberg and Shapiro.

Q. And the number will identify it as Greenberg and Shapiro's product? A. In this case it does.

Q. How many years ago was it you manufactured that garment? A. This garment was manufactured for the spring—I cannot be certain about it—but it was in 1934.

Q. Doesn't that garment with the number in it—

Mr. Wegman: I object. 8823
Mr. Turkus: I have not finished.
The Court: Finish your question.

Q. (Continuing) Doesn't that garment with the number in it, a product of Greenberg and Shapiro, now refresh your recollection that you sold it to Max Rubin on one of the occasions he was there at Greenberg and Shapiro? A. No.

Mr. Wegman: My objection is to the one phrase in the question but not to the rest of the question. The witness testi-

fied that the number has nothing to do with Greenberg and Shapiro, it is only one of the serial numbers on the label and does not identify Greenberg and Shapiro at all.

Mr. Turkus: Let the jury figure that out.

Mr. Wegman: I move that the District Attorney be instructed to reframe the question without including that. It is
825 a trick question with that in it, tending to get on the record that the statement from the witness that the number had something to do with Greenberg and Shapiro, where the witness testified it has not.

Mr. Turkus: The "trick" is in the objection.

The Court: There is a little confusion, but I think that what the witness tried to say was, being familiar with his own serial number, he could identify approxi-
826 mately the year in which the garment was purchased. We have the same situation here with indictment numbers. This indictment number is 23855. There is no other indictment by that number—that is a serial. A person can tell by looking at the number, and being familiar with the serial number of the indictment, without looking at the date of the indictment, approximately the year the indictment was returned. That is the situation here with this witness. This is causing too much talk.

Mr. Turkus: For the sake of clarifying the record, may I ask your Honor to inquire of the witness whether your Honor's analysis is correct, or whether the witness said something else.

Mr. Wegman: This is an attempt to drag out cross-examination with speech after speech.

The Court: Every time the Court tries to clarify a situation, counsel picks it up and wrangles about it. 8828

Mr. Wegman: May I take an exception to the suggestion that I am wrangling, and Mr. Turkus' suggestion just stated. I am not attempting to do anything but conduct myself in a perfectly proper legal manner and in accordance with my duties and obligations, and right, as an attorney.

The Court: Proceed.

Q. Let me see if I can refresh your recollection about the Bar Mitzvah. Do you remember 8829 the name of Lepke's son, or step-son, who was Bar Mitsvahed? A. Yes.

Q. What was his first name? A. Harold.

Q. Was it at a church or a synagogue at 72nd Street and Columbus Avenue? A. I think it was.

Q. Was the reception thereafter at the home of Lepke? A. I was not there.

Q. You went to the church? A. I went to the synagogue.

Q. Do you remember now, having the place

8830 fixed, what other persons were there at the Bar Mitzvah? A. I could not honestly say.

Q. Getting back to the officers of the Greenberg and Shapiro, how many times was Oscar Frankel up there? A. The name is familiar, but I cannot place the individual.

Q. Did you ever see Murray Weinstein up there? A. No, sir.

Q. You know Murray Weinstein? A. By sight.

8831 Q. Was Sam Katz ever up there? A. Yes, sir.

Q. And Sam Katz was a union official with the Amalgamated? A. That is right.

Q. Holding a job which is immediately under the job that Murray Weinstein had? A. That I would not know.

Q. Benny Levine, how many times was Mr. Levine up at Greenberg and Shapiro's? A. I don't recall.

Q. Let me see if you can remember any visits to Greenberg and Shapiro by one "Joe Strawberry"? A. I cannot recall.

8832 Q. Is the name familiar? A. It sounds familiar, yes, sir.

Mr. Wegman: One half of the witness' answers are not audible. I would like the witness to keep his voice up.

The Court: Yes, speak loudly.

Q. Is it familiar through Greenberg and Shapiro? A. No, sir.

Q. Is it familiar through something else? A. No, sir.

8833

Q. It is just a familiar name? A. It is a name I have heard.

Q. You don't recall where you heard it, or to what person you associate that name? A. The name sounds familiar, but just where I could put my finger on it, I cannot tell you.

Q. It was not in the public school? A. No, sir.

Q. It was not playing marbles or flying a kite?

Mr. Wegman: Now, if your Honor please, I object to that. There is no evi- 8834
dence in this record that this witness ever flew a kite or played marbles.

The Court: Objection overruled.

Mr. Wegman: Exception.

Q. I assume you did, when you were a boy, play marbles? A. You see, I have been working since I have been seventeen.

Q. Yes or no. A. I don't recall if I ever did.

Q. And you don't remember flying kites? A. I did fly kites.

Q. You did not fly kites with Joe Strawberry? 8835
A. No, sir.

Q. You did not visit Joe Strawberry at his home? A. No, sir.

Q. Or he at your home? A. I don't recall that individual.

Q. I am trying to refresh your recollection to find out in what way the name Joe Strawberry is familiar to you. A. I cannot honestly say. I might put my finger on him.

Q. How often was Joe Riccobone up there? A. I don't recall that name.

Q. Is the name Joe Riccobone familiar? A. No, sir.

Q. Hymie Yuran, did he ever come up? A. The name sounds familiar.

Q. Hyman Yuran did not go to school with you? A. I don't think he did, no, sir.

Q. The familiarity is not due to any social or club contact or affiliation? A. No, sir, I just heard the name somewhere; I cannot just place it.

8837 Q. Can you refresh your recollection as to where the name Hymie Yuran became familiar to you? A. I cannot put my finger on it.

Q. At the office of Greenberg and Shapiro? A. No, sir.

Q. Would you say you were familiar with the name from something other than the office of Greenberg and Shapiro? A. I cannot say.

Q. Now, how many times was Moe Wolinsky, or "Dimples", up there— Morris Wolinsky, alias "Dimples"? A. I cannot recall.

Q. Is the name familiar to you? A. "Dim-

8838 ples", yes, sir.

Q. I am not asking you about dimples on anyone except Mr. Wolinsky, who was called "Dimples". A. I got your question. The name of "Dimples" sort of brings to me the fact I have heard the name before.

Q. You did not go to public school with "Dimples"? A. I don't believe I did.

Q. Have you been to "Dimples'" home? A. No, sir.

Q. Or he to yours, or any club contact? A. No, sir.

Q. Doesn't the office of Greenberg and Shapiro

jog your memory now as to your familiarity with "Dimples"? A. That sounds very far back.

Q. Do you place "Dimples'" face? A. No, sir.

Q. Take a look at this and see if it refreshes your recollection.

Mr. Wegman: I would like to put on the record the display of these pictures in the presence of the jury. It is calculated to prejudice—pictures of persons the witness has not identified and has not said 8840
he knows. And in the form in which these pictures appear, it is intended and calculated to create a prejudicial effect.

The Court: Objection overruled.

Mr. Wegman: Exception.

Mr. Turkus: May the record show that the jury does not see these pictures? The pictures are held with the back towards the jury.

Mr. Wegman: The pictures are displayed on the District Attorney's table right in front of the jury. 8841

Mr. Turkus: That is assuming the jury is looking at the District Attorney's table instead of at the witness. That is an implication against the jury.

The Court: It makes no difference. Go ahead.

(Pending question read to witness.)

A. I cannot recall that.

Q. Well, take the name of Tannenbaum, and Buggsy Workman, Louis Kravitz, and Farvel Cohen, doesn't Dimples Wolinsky come back to

8842 your mind as having been in Greenberg and Shapiro's?

Mr. Wegman: I object to that as argumentative, impairing the witness' answer that he does not know the individual. It is a collateral matter and the District Attorney is bound by the answer.

The Court: Objection overruled.

Mr. Wegman: Exception.

8843 (Pending question read to witness.)

A. It does not.

Q. Is the name Cuppie familiar, a familiar name? A. Yes, sir.

Q. Is that Kopplewitz? A. I did not know the second name.

Q. Didn't you see Cuppie at Greenberg and Shapiro's? A. The name is not very familiar.

Q. But, Mr. Shapiro, doesn't it help to refresh your recollection as to familiarity with the name Cuppie, to associate it with "Dim-
8844 ples", and "Bugs", and "Little Farvel," doesn't that help you fix Greenberg and Shapiro's as the place of familiarity? A. No, sir.

Mr. Wegman: I object to that as improper in form, argumentative, improper cross examination on a collateral matter, having nothing to do with the issue in this case, or the credibility of the witness.

The Court: Objection overruled.

Mr. Wegman: Exception.

Q. Bruno Belea, is that a familiar name? A. No, sir.

Q. You never heard the name of Bruno Belea? A. No, sir.

Q. You have been in the clothing business for two years with Greenberg and Shapiro, and since 1935 with the Raleigh? A. Yes, sir.

Q. And you never heard the name of Bruno Belea? A. No, sir.

Q. Isn't he an organizer for the Amalgamated Union? A. I don't know. 8846

Q. You are non-union? A. Today, yes, sir.

Q. Today—well, the Raleigh was always non-union? A. No, sir.

Q. We will come to that a little later. How about Meyer Luckman, is that a familiar name to you? A. No, sir.

Q. Take it in association with Max Silverman and Greenberg and Shapiro, doesn't that help you to refresh your recollection? A. The name Max Silverman sounds familiar, but I cannot place the individual.

Q. Concerning the familiarity with Max Silverman, he is a man in the late fifties, isn't he? 8847
A. I don't know.

Mr. Wegman: I object. I have been trying to state that this question is on a collateral matter. The witness has answered and the District Attorney is bound by that answer. The question is improper.

The Court: Objection overruled.

Mr. Wegman: Exception.

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Q. Well, let us see if you can refresh your memory with the name Wolfy Goldis, if you will? A. It sounds familiar.

Q. Don't you link Wolfy Goldis and Max Silverman and Meyer Luckman as visitors at Greenberg and Shapiro's? A. I could not say.

Mr. Wegman: I object to the question. The witness has already answered the question but I should like the record to
8849 show my objection to this entire line of procedure of questioning—questions of the nature of the one just asked. My objection is based upon the ground that the nature of the question is such that it is intended for the purpose of creating prejudice, creating atmosphere, and the answer to the question binds the District Attorney. As a matter of law, these questions do not affect the credibility of the witness in the slightest degree. They are wholly collateral to the issue on
8850 trial and they have simply that one purpose of trying to create atmosphere by the recital of a list of names. I ask your Honor, in order that I may not have to get up repeatedly with these objections, to rule on that objection, and to instruct the District Attorney not to follow these questions up.

The Court: You take much time in stating a simple objection that could have been put in a half a dozen words. The purpose of cross examination is thwarted with this constant interruption,

which is calculated to give the witness a chance to think over.

Mr. Turkus: And there has been a signal to the witness about being bound by the answer.

The Court: The Court knows the purpose of this.

Mr. Wegman: I except to that remark, and I ask the record to note my exception to your Honor's remark and to Mr. Turkus remark. I say to your 8852
Honor this, my conduct is not improper, or unethical, or illegal, or anything other than my obligation as an attorney and my duty as such. Your Honor may, here and now, excuse the jury and let us try out that issue.

The Court: Stop your nonsense. Sit down.

Mr. Talley: I wish to take exception on behalf of the defendant Weiss to your Honor's comment and criticism of counsel at this stage of the case. 8853

The Court: Constant interruption of cross examination for no legitimate purpose must stop. Objection must be stated simply and the Court will rule simply without this constant delay, and colloquy which gives an obvious breathing time to a witness in which his mind has a chance to turn over. I want to have no more of this interruption except it is legitimate.

Mr. Talley: I take exception to your Honor's remarks as prejudicial, not only

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to Mr. Wegman's client, but to all the clients, all the defendants in this case.

The Court: Does any other counsel wish to be heard?

Mr. Wegman: May I note on the record a motion for the withdrawal of a juror and the declaration of a mistrial on the ground of prejudice created by your Honor's remarks, and may I also note on the record my personal resent-

8855 ment to those remarks as an unwarranted reflection on me. And I request the Court that this issue be tried out, because I am not accustomed to having my integrity attacked.

The Court: Sit down. Motion denied.

Mr. Wegman: I except.

The Court: Now, the motion for the withdrawal of a juror and a mistrial.

Mr. Wegman: I make that motion.

The Court: Motion denied.

Mr. Wegman: Exception.

8856

By Mr. Turkus:

Q. How many times was Henzy Teitelbaum up to Greenberg and Shapiro's? A. He was there quite a few times.

Q. In two years, how many times would you say? A. I could not answer that.

Q. Often? A. He was up there from time to time.

Q. From time to time, on an average of how many times a week? A. I could not say.

Q. His visits were quite regular, weren't they? A. No, sir, they were not regular.

Q. Spasmodic? A. Spasmodic.

Q. During the two years you were up there, can you estimate the number of visits that were made by Henzy Teitelbaum? A. No, sir.

Q. Would you say ten? A. Yes, sir.

Q. Would you say twenty? A. I could not put a figure on it.

Q. We got an average of ten. Less than fifty? A. I can hardly answer that. 8858

Q. Can you encompass it between ten and twenty? A. I would not begin to put a figure on it.

Q. Henzy Teitelbaum did not come to see you up there? A. No, sir.

Q. When you saw Henzie Teitelbaum up there, did you see him with The Bug, and Little Farvel and Louis Kravitz? A. He was there. Just when and who was with him I cannot answer.

Q. He did not come up to see you? A. No, he did not.

Q. He did not come up to see Gurrah? A. 8859
Yes, he would see Charlie.

Q. Wasn't Henzie Teitelbaum Lepke's chauffeur? A. He drove Louis around, yes.

Q. Then wasn't he up there to see Louis? A. Louis was up there seldom.

Q. The chauffeur was up there ten times or more and Louis the boss, was up there seldom, is that it? A. Yes.

Mr. Wegman: I object to the question.

Q. And the chauffeur was up visiting your

brother? A. No, he would sit around sometimes; whether he came up to visit him or converse with him I could not answer.

Q. That was not driving his automobile in the office of Greenberg and Shapiro, was it? A. Not very well.

Q. Whom did he visit up there? Can't you remember who Lepke's chauffeur visited on these occasions? A. No, I would not know.

Q. Is it that you would not remember or you
8861 cannot remember? A. I cannot answer a question like that.

Q. Julie Martin—how many times did Julie Martin come up? A. I don't recall that name or individual.

Q. Julie Martin— A. I would not know.

Q. Let us see if I can refresh your recollection. Did Dutch Schultz ever come up? A. I don't believe so.

Q. Do you know Dutch Schultz? A. No, I don't.

Q. You know of him through something or
8862 other, don't you? A. Publicity.

Q. Does it refresh your recollection when I tell you that Julie Martin was the chief lieutenant for Dutch Schultz? Does that refresh your recollection?

Mr. Wegman: I object to that, if your Honor pleases.

Mr. Turkus: You object when I finish and then you will have a proper objection.

Q. Does it refresh your recollection that Julie Martin was up at the office of Greenberg & Shapiro?

8863

Mr. Wegman: Now may I note my objection?

The Court: Overruled.

Mr. Wegman: May I have the record note that I am refraining from elaborating on the grounds of objection because of the Court's earlier remarks.

The Court: You are making a speech nevertheless and that takes time and the Court objects to being used in this manner.

8864

Mr. Wegman: I except to your Honor's remarks and I move for the withdrawal of a juror and a declaration of a mistrial both because of the question that was asked and because of your Honor's remarks.

The Court: Anybody else? Overruled. Denied.

(Pending question read.)

A. I don't know that individual.

8865

Q. And the name of Julie Martin is not at all familiar? A. No, sir.

Q. Since I have conducted this interrogation about The Bug and Kravitz and Farvel Cohen and Sam Feinstein, Izzy Bartfield, Shimmy, Danny Fields, Yeggo Feinberg, Berger and Rubin and Benny Levine and Joe Strawberry and Riccobone and all of these names, has your memory since that time been refreshed as to their appearances in Greenberg & Shapiro? A. That is a very broad question. I cannot answer that.

Q. Any of the names? A. Some of the people were up there that you mentioned, yes.

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Q. Willie Alberts, did Willie ever visit up there? A. The name sounds familiar.

Q. Well, is not the familiarity due to Greenberg & Shapiro offices? A. I don't know.

Q. Well, Willie Alberts was not a school mate? A. No.

Q. Not a social acquaintance? A. I cannot place the individual. I could not answer that.

Q. Let us see if we can place it this way. Lepke and Gurrah and The Bug and Farvel
8867 Cohen and Louis Kravitz, does that help fix your recollection that Willie Alberts was up there in their company at Greenberg & Shapiro? A. The name sounds familiar but I cannot place it. Whether I know him or not, I don't know.

Q. The suggested names are of no help? A. No.

Q. In your recollection?

Mr. Wegman: If your Honor pleases, is not the purpose of the District Attorney too obvious, a little bit too obvious, in the
8868 constant recital of these names as to which the witness has answered repeatedly? I object to that form of question and I again ask your Honor to instruct the District Attorney to desist from it.

The Court: Overruled.

Mr. Wegman: Exception.

Q. To bring it right into a short sentence, wasn't the office of Greenberg & Shapiro a hangout? A. No, sir.

Q. When did you dissociate yourself from your partner Greenberg? A. Early in 1935.

Q. And that is when you joined the Raleigh, isn't that right? A. That is the time we formed Raleigh and took up the assets and liability of Leo Greenberg and Shapiro.

Q. What time in 1935 did the people whom you described as "we" form the Raleigh? A. It was May or April, 1935.

Q. How many employees did Greenberg & Shapiro have? A. Well, we had a few because we did not manufacture direct.

Q. But tell me how few the few were? A. Oh, 8870
less than fifty.

Q. And Greenberg & Shapiro was wound up, wasn't it? A. Dissolved.

Q. The "we" did not include your former partner, Greenberg, as coming into the Raleigh, did it? A. No, it didn't.

Q. And the Raleigh was formed before the Dewey investigation, wasn't it? A. That is right.

Q. Who were the original stockholders? A. In Leo Greenberg & Shapiro?

Q. No, Raleigh. A. Nathan Borish, Carl Sha- 8871
piro and Sam Smith.

Q. Is Sam Smith a relative? A. Yes, he is my brother-in-law.

Q. Your brother-in-law? A. That is right.

Q. Are you married to his sister? A. No, he is married to my sister.

Q. So that he is a brother-in-law to Gurrah as well? A. That is right, Jacob Shapiro.

Q. Did Lepke and Gurrah never have an interest in Raleigh financially? A. No.

Q. Gurrah only? A. No. I was going back to Leo Greenberg and Shapiro.

8872 *Carl Shapiro—For Defts.—Cross*

Q. Greenberg & Shapiro, did Lepke have an interest in that? A. No, my brother had an interest in Leo Greenberg and Shapiro.

Q. What interest did Gurrah have? A. He had a twenty per cent interest.

Q. And when that firm was liquidated and the assets, as you described, transferred to the Raleigh, what happened to Gurrah's twenty per cent interest? A. That was adjusted between Jacob Shapiro and myself.

8873 Q. So that you and Gurrah adjusted that personally? A. I satisfied that.

Q. You are not fronting for him now in Raleigh, are you? A. No, sir; nor did I ever front for him.

Q. You have seen him recently, haven't you? A. In a visit, yes.

Q. Talked this case over with him? A. No, sir. I have not seen him now in over a year.

Q. Oh, you have seen him more recently than that, haven't you? A. No, sir.

Q. Haven't you seen him in the last few months?

8874

Mr. Wegman: If your Honor pleases, let the record show that the District Attorney is in a position to know that his question supposes a state of facts directly contrary to the fact. The fact of the matter is, and richly ascertainable by the District Attorney, that Jacob Shapiro has not been permitted to have visitors for over a year, so that he could not have seen him in that time. It is immaterial, it is collateral, it has nothing to do with the

credibility of the witness, and it is intended to prejudice.

Mr. Turkus: Why not substitute witnesses here? Would you rather sit up there?

Mr. Wegman: If you want me to, Mr. Turkus, and call me to the stand, I will be glad to testify.

Mr. Turkus: I will get as much out of you as out of him.

Mr. Cuff: I object to that. 8876

Mr. Wegman: That is perfectly all right, Mr. Cuff. This witness is telling the absolute truth and you will get that from me and if you are implying that I do not tell the truth or that the witness is not telling the truth because he will testify as I would testify, let us have that on the record, Mr. Turkus.

Mr. Turkus: I am sorry I started that.

Mr. Wegman: I paid ten dollars the other day for contempt of court—

Mr. Turkus: I am ready to proceed. 8877

The Court: Mr. Wegman said something I want repeated here. I do not know if I understood it correctly. What was that about Mr. Wegman vouching for the truth of the witness?

(Remarks of Mr. Wegman read.)

The Court: Mr. Turkus, according to Mr. Wegman he knows these things himself.

Mr. Wegman: That is not so, your Honor.

The Court: That would place his posi-

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tion a little beyond the relation of attorney and client in this case. You may consider that an offer by him seriously to testify in this case.

Mr. Wegman: If your Honor pleases, there was no such implication in my statement. Mr Turkus asked me if I wanted to take the stand. I said if he wanted me to do so to call me, I was perfectly willing to take the stand, and if he asked me
8879 questions the answers he would get would be the absolute truth and I stated my belief—

The Court: Wait a minute. You said something there which is not quite consistent with the halo. Resume the trial.

Mr. Wegman: I take exception to the remark. May it be clear that my reference was to the visits between this witness and Jacob Shapiro.

The Court: The Court interprets your comment to mean you have knowledge of
8880 these matters yourself

Mr. Wegman: Then the Court's interpretation is wrong.

The Court: —more than your relation as attorney, and if you claim to have knowledge of these matters you are properly a witness in this case and could be called by either side.

Mr. Wegman: The Court's interpretation is wrong. The Court has no basis for that interpretation, in my humble opinion. I made no such statement. I certainly have no personal knowledge of

any of the facts that are involved in this case as a case. I do have knowledge about the fact that this witness has not visited his brother in a number of months because I have had something to do with that. I have personal knowledge as to that. If the Court wishes to imply something else from my statement, the Court's mind is wrong on that and misinterprets my statement. I should like to have it made clear. I say again that if Mr. Turkus— 8882

The Court: You said it once. That is enough.

Mr. Wegman: —calls me, I am willing to take the stand.

The Court: Let us have peace, as General Grant said. It does not occur to you, by any possible chance, that you should withdraw what you said and which the Court caused the stenographer to repeat?

Mr. Wegman: May I make clear my meaning on the record?

The Court: Yes or no. 8883

Mr. Wegman: I did not hear all your Honor said.

The Court: Oh, you were not listening! Please repeat.

(The remarks of the Court starting with "It does not occur to you" were read.)

Mr. Wegman: May I say—

The Court: Yes or no?

Mr. Wegman: If it carries that implication, I withdraw it, but I don't believe it carried that implication.

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The Court: The Court does not construe but the Court knows the meaning of plain English language.

Mr. Wegman: Well, the Court and I may differ on that, with all due respect to the Court.

The Court: Wait a minute. I did not believe my ears when I heard that said. I had to get the stenographer to repeat it before I could realize that a member of
8885 the Bar had said it. Now let this be an end to the incident.

Mr. Wegman: May I have an exception to your Honor's remark?

The Court: Let this be the end, but the halo fell from your head.

Mr. Wegman: What is that?

The Court: The halo that you claim.

Mr. Wegman: I have never claimed a halo. I do not know whether we are trying this case for the defendants or whether your Honor has put counsel for
8886 defendants on trial. I should like to have that made clear on the record.

Mr. Turkus: I am sure the jury is not confused as to who is being tried. Let us get along with the case.

The Court: Counsel has got up repeatedly and said he was trying this case on a highly ethical plane.

Mr. Wegman: I believe I am.

The Court: Will you please keep still while the Court is talking and will you please take your seat? (To reporter) What was I saying?

(Remarks of the Court beginning "Counsel has got up repeatedly" were read.)

The Court: I would say a hundred per cent. The Court listened to that and for that reason was rather astonished when that statement was made which is now repudiated by counsel who made it. That is what the Court meant by the "halo". Let it go at that. There is no halo.

Mr. Wegman: May I ask whether that 8888
remark was intended by the Court to indicate that I am trying this case on anything other than a highly ethical plane, because, if it is, I ask that that issue be tried out summarily.

The Court: Please sit down and behave yourself. Continue.

By Mr. Turkus:

Q. The firm of Greenberg & Shapiro, was that a New York corporation? A. Yes, sir. 8889

Q. The Raleigh, however, was a Maryland corporation? A. No, the Raleigh Manufacturers is a New York corporation.

Q. Formed under the laws of the State of New York? A. That is right.

Q. As a corporation. You know Whitey Deutsch, don't you? A. Yes.

Q. How long do you know Whitey Deutsch? A. Oh, that is getting back to the time I was about 12 or 13 years old.

Q. I know, but your familiarity with him kept up through the years, didn't it? A. Yes.

8890 Q. You and Whitey Deutsch are friendly? A. I have not seen him in quite some time but we are not unfriendly.

Q. And the last occasion you saw him was a business occasion, wasn't it? A. Yes.

Q. You had business with Whitey Deutsch? A. Yes, he is—

Q. Just answer yes or no. We will get along very nicely. A. A clothing manufacturer.

Q. And was Whitey Deutsch a visitor up at
8891 Greenberg & Shapiro? A. Very seldom. He was a competitor.

Q. The manufacturing plant of the Raleigh was never located in New York City, was it? A. Well, few clothing concerns are located—

Q. I am talking about the Raleigh. The Raleigh itself never had its manufacturing plant in New York City, did it? A. The Raleigh?

Q. Yes. A. No, never did.

Q. Where was the first plant? A. The first and only plant is in Baltimore, Maryland.

Q. Why, didn't they have a plant in Egg
8892 Harbor, New Jersey? A. Not Raleigh.

Q. Who had the plant in Egg Harbor? A. Leo Greenberg and Shapiro. That was a contract shop.

Q. What about the plant in Vineland, New Jersey; which outfit had that? A. We had a plant—

Q. When you say "we" which is it? A. Leo Greenberg and Shapiro. I am sorry.

Q. Was it through Murray Weinstein that the Raleigh opened up its manufacturing plant in Baltimore? A. No, sir.

Q. Wasn't it Whitey Deutsch who set up the

machinery in Baltimore for the Raleigh? A. Well, he supervised in setting up this plant.

Q. You had only had two years of experience in clothing, hadn't you? A. Two and a half years.

Q. All your life before that had been devoted to embroidering? A. Cleaning, stitching.

Q. Cleaning, stitching, and embroidering? A. Yes.

Q. That is an entirely different field from clothing, isn't it? A. Very far. 8894

Q. So Whitey Deutsch who had been your competitor supervised the set-up of the machinery for the Raleigh in Baltimore? A. At that time we were negotiating to merge.

Q. Did Whitey Deutsch ever merge with the Raleigh? A. No, sir.

Q. The only thing that the Raleigh had in New York was that office which consisted of a show-room only; isn't that right? A. It is a buying office and show-room.

Q. It was that three room office at 200 Fifth Avenue? A. That is right. 8895

Q. All you had there were some swatches and a couple of samples of garments? A. That is right.

Q. When was the Raleigh plant established in Baltimore? When was all the machinery installed and the plant starting to go? A. Well, I believe the first completed garment was some time in January, 1936.

Q. The books of the Raleigh Company were not kept in the show-room, were they? A. No, they were kept in—

Q. Baltimore? A. Duplications of it, yes.

8896 Q. Why, weren't the books of the Raleigh kept in Baltimore to thwart a Dewey investigation?

Mr. Wegman: I object to that.

A. That is very unfair, Mr. Turkus. We conducted our business in Baltimore and the buying, that is in New York.

Q. Just answer me that question, didn't you keep the books of the Raleigh in Baltimore to
8897 keep them out of Dewey's hands? A. No, sir.

Q. Did the Raleigh books ever reach Dewey's office? A. No, sir,—yes, sir, I think they did.

Q. What books? A. I think at some time they were subpoenaed and we delivered them to the officers.

Q. What books were those that were delivered to Mr. Dewey's office? A. Books of Raleigh Manufacturers, if I remember correctly.

Q. What books? Describe the books. A. The books that were asked for. I will check it
8898 back and let you know.

Q. Have you got the Raleigh books in the New York office now? A. Sure we have.

Q. All of the Raleigh books? A. No, not all, no.

Q. All of the Raleigh checks? A. No. Checks written in New York are in New York and then in turn sent down to Baltimore.

Q. The checks written in Baltimore in Baltimore? A. That is right.

Q. And the things written in books in Baltimore are still in Baltimore? A. Sure.

Q. And the things written in New York are in New York? A. That is right.

Q. But the Baltimore books never got up to Dewey's office, did they? A. Some books were called for.

Q. From Baltimore? A. Yes, sir, I believe so.

Q. The books that you wanted to produce? A. Any books that were asked for, Mr. Turkus; in fact, I will let you have them now, if you want them. 8900

Q. The Baltimore books? A. Any books.

Q. Back to 1935? A. Whichever records we have.

Q. Have you got the records for 1935 when the company was formed, including the complete set-up of your stocks and your finances, and showing the complete financial arrangements and each and every check that cleared through the Raleigh's books anywhere? Have you got those books? A. Sure.

Q. And will you kindly bring them up? A. If you want them. 8901

Mr. Turkus: The invitation is accepted.

Mr. Wegman: If your Honor pleases, Mr. Turkus is certainly welcome to examine those books.

Mr. Turkus: He said so. He does not need any help from you.

Mr. Wegman: I have a right to make a statement on the record.

The Court: You have not. Sit down.

Mr. Wegman: I except. Do I have a right to make an objection?

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The Court: Object and say nothing more.

Mr. Wegman: I object to Mr. Turkus' request of this witness on the ground that it has nothing to do with this case.

The Court: Overruled. Sit down.

Mr. Wegman: Exception.

Q. Now, when you opened up and you turned out your first garment of the Raleigh,
8903 you were running non-union, weren't you? A. Yes.

Q. And your brother at that time was with others representing the union in making union shops in New York? A. That I could not answer.

Q. You don't know that? Wasn't that the purpose, with the request to the union, to avoid argument with other manufacturers, that your plant was moved down to Baltimore? A. No, sir: in fact, the union is trying to organize us and has been trying to organize us for years.

8904 Q. But they have not succeeded, have they? A. That is the will of the people.

Q. Now, we will go right into that. I am very glad that we opened that up. And at the time that the union was trying to organize Baltimore, the Raleigh in Baltimore as a union shop, when was that, the first time? A. They never were a union shop.

Q. I know, but when the union was trying to organize and make the Raleigh a union shop, when was the first time? A. From the very inception.

Q. Right. And when it started, when the

8905

union started, didn't you send Paul Berger over to Murray Weinstein to pull the union off? A. No, sir.

Q. That never happened? A. No, sir.

Q. And didn't Paul Berger come back with the message, "Wait until Gurrah gets out of the can and it will be adjusted then"? A. No, sir.

Q. The fact is that the Raleigh has never as yet been unionized, has it? A. No.

8906

Q. Leo Greenberg, your former partner, came down to Baltimore, didn't he? A. No, sir.

Q. Why, didn't Leo Greenberg open up a shop in Baltimore? A. Not for Raleigh.

Q. Don't you know that? A. Not for Raleigh.

Q. No, not for Raleigh, for himself? A. That I would not know.

Q. Do you know Blumberg? A. I met Mr. Blumberg.

Q. Who is Mr. Blumberg? A. He is an official of the union.

8907

Q. In Baltimore? A. In Baltimore.

Q. Yes. Why, didn't you get somebody from New York to come down by a plane to Baltimore and get to Blumberg and shut up Leo Greenberg because he was not union? A. That is hardly the facts and I resent that.

Q. Did Danny Fields come down to Baltimore in an aeroplane? A. I don't know a thing about that.

Q. You do not know the first thing about it? A. No, sir; that is not the truth.

8908

Q. Do you know whether that was done for you? A. No, sir.

Q. When Greenberg and Shapiro were present once, when a lady by the name of Ida Schachter came in? A. The name is not at all familiar.

Q. Do you remember the name of Harry Greenberg alias Big Greenie? A. That is far back.

Q. Yes, as far back as 1935? A. Further than that.

8909

Q. Wasn't Big Greenie's wife in and didn't she hold a conversation with Lepke when you were there, in Greenberg and Shapiro? A. I would not know.

Q. See if this refreshes your recollection: Wasn't there some talk that Big Greenie was coming back from Poland? A. I would not know that.

Q. Unless he got some money? A. I don't know a thing about that.

Q. Are either Lepke and Gurrah directly or indirectly receiving any funds or benefits from

8910 the Raleigh Clothing?

Mr. Wegman: I object to the question, the form of the question, and also to the intent of the question.

The Court: Overruled.

Mr. Wegman: Exception. May I ask your Honor to have the stenographer repeat it verbatim for you so that your Honor may rule?

Mr. Turkus: I have no objection. Read it. If it is objectionable we will revise it.

(Pending question read.)

Mr. Turkus: It may be confusing in that way.

A. None whatever.

The Court: It is not confusing.

Mr. Turkus: He has answered, none whatsoever.

Q. Is any person in behalf of either Lepke or Gurrah getting any money or any benefits directly or indirectly from the Raleigh? A. The wife of Louis Buchalter is a stockholder in our Baltimore corporation. 8912

Q. Oh! I see. I forgot to talk about the Baltimore corporation. What is the set-up there? Who are the stockholders there? A. Nathan Borish, Samuel Smith, Betty Buchalter, Anna Shapiro.

Q. What is the other Shapiro? A. Anna Shapiro, my sister-in-law; and Carl Shapiro.

Q. Baltimore is where the manufacturing plant is, isn't that right? A. That is right. 8913

Q. Baltimore is where the seven hundred employees are? A. That is right.

Q. Baltimore is where you get all the cloth and manufacture the garments? A. That is right.

Q. Baltimore is where you get the money for the sale of the garments? A. Well, no.

Q. You get that in New York? A. No.

Q. Both places? A. No; there is two corporations, if you want me to make that clear, Mr. Turkus, I will be glad to.

Q. Wait, let me see if I cannot make it clear

8914

myself. I want to help myself as much as I can. The Baltimore corporation, that is under the laws of the State of Maryland? A. That is right.

Q. That is a usual place for incorporations where people don't like corporate trouble, isn't that right?

Mr. Wegman: I object to that, if your Honor pleases.

8915

A. That is ridiculous.

The Court: Sustained.

Mr. Turkus: Excuse me, your Honor, the form was rather bad.

Q. But I mean all Maryland corporation laws are rather loose, aren't they? A. I don't know, I am not a lawyer.

Mr. Wegman: I object to that.

8916

The Court: Sustained.

Q. Let me ask it in this way: Isn't Baltimore a favorite place for incorporations?

Mr. Wegman: I object to that.

The Court: Sustained. Nothing more on that.

Mr. Turkus: Yes, your Honor.

Q. In the Baltimore set-up what is it incorporated for? A. As I explained to you earlier in the day—

Q. How much is it incorporated, fifty thousand, a hundred thousand? What is the incorporation? A. Well, it was incorporated for twenty thousand dollars, that is paid in capital. It is incorporated for a much larger—just how much I could not say.

Q. How much? A. Paid in capital was twenty thousand dollars.

Q. What is the amount of the incorporation, a hundred thousand, five hundred thousand? A. I would not know. I would have to check it. 8918

Q. Well, the net worth of the Baltimore corporation is over a quarter of a million, isn't it? A. No. Ridiculous.

Q. Did you ever have any ratings from Dun & Bradstreet's?

By the Court:

Q. What is the authorized capital stock? A. Your Honor, I am sorry, but I don't know that. It is beyond twenty thousand dollars.

Q. That is an important thing and you should know it. A. Well, it is true, I should know it. 8919

Q. Secretary and treasurer. A. No, of the Baltimore corporation I did not hold an office until lately. I was just a stockholder.

Q. Do you sign the reports? A. I did. Just lately. As far back only as two years ago.

Q. Don't the shares of stock contain the authorized capitalization? A. Not on the stock itself. I think it is capitalized for over a hundred thousand dollars but the paid in capital is twenty thousand dollars.

Q. You said that before, but the authorized capital is over a hundred thousand? A. I believe it is.

8920

Q. Is it a million? A. No, I don't think it is.

By Mr. Turkus:

Q. Let me ask you this: Did you ever submit a report to Dun & Bradstreet's? A. There was no need for it. No, we did not.

Q. You don't need any credit? A. Not for anything that the Baltimore corporation requires.

8921

Q. Well, did you submit any Dun & Bradstreet report for the New York corporation? A. Yes.

Q. Did you in that report say the assets of the New York corporation were in excess of a quarter of a million?

Mr. Wegman: I object to it, if your Honor pleases; improper question, has no relation at all to the credibility of the witness.

The Court: Overruled.

8922

Mr. Wegman: Improper in form, and collateral matter.

The Court: Overruled.

Mr. Wegman: Exception.

Q. Is the name Philip Kasacove familiar? A. Yes.

Q. He was the accountant for the Raleigh, wasn't he? A. Yes.

Q. He was at one time secretary of the Raleigh, wasn't he? A. He is today.

Q. What is the net worth of the New York corporation?

8923

Mr. Wegman: I object to that, if your Honor pleases, immaterial, irrelevant.

The Court: Overruled.

Mr. Wegman: I object on the further ground it has nothing to do with the credibility of the witness; collateral matter.

The Court: Overruled.

Mr. Wegman: Exception.

Q. As secretary and treasurer do you know it? A. Yes. 8924

Q. What is it? A. The net worth is about $275,000.

Q. $275,000? That is more than a quarter of a million. A. You asked me on the Baltimore corporation.

Q. Oh, all right. Now let us get to the Baltimore corporation. What is the net worth of the Baltimore corporation where all the machinery is, where the plant is, where all the clothing is, and the seven hundred employees?

Mr. Wegman: If your Honor pleases, 8925
I object on the same grounds as I urged an objection to the previous question with relation to the New York corporation. It is a collateral matter, wholly immaterial, irrelevant, and has no possible bearing on the credibility of the witness.

The Court: Overruled.

Mr. Wegman: Exception.

The Court: You see, Mr. Turkus, in corporation affairs there can be any number of subsidiaries, including ownership of the plant.

8926 Mr. Turkus: I would like the witness to testify, Judge.

The Court: He has not said that. He has not said that the ownership of the plant and its values was included in the twenty thousand paid in capital.

Mr. Turkus: I am trying to find this out.

The Court: That could be a lease matter.

8927 Mr. Turkus: Has your Honor sustained the objection?

The Court: No, I am just suggesting this to you.

Mr. Turkus: I will go into that very quickly but may I get an answer to this question?

The Court: I think you are a little confused in what you are just asking between the comparatively small amount of actual paid in capital and the size of the plant.

8928 Mr. Turkus: I am not confused.

The Court: That must employ six or seven hundred hands.

Mr. Turkus: I am not confused when I see these figures, Judge. I am not a child.

By Mr. Turkus:

Q. Will you answer that question? A. What was the question?

(Pending question read.)

8929

A. The net worth of the Baltimore corporation today is about sixty or seventy thousand dollars.

Q. Sixty or seventy thousand? A. That is right.

Q. That is the one in which Louis Buchalter's wife has the interest? A. That is right.

Q. The sixty or seventy thousand dollars? A. That is right.

Q. She has no interest nor has he in the $275,000 corporation? A. No.

8930

Q. Greenberg and Shapiro—what was the net worth of that when it was wound up, or was it a liability? A. It was not a liability. It was around eighty thousand. I am not quite sure on the figures.

Q. What interest has Betty Buchalter in the sixty or seventy thousand dollar corporation?

Mr. Wegman: I object to that, if your Honor pleases, not relevant, immaterial, wholly collateral, has nothing to do with the credibility of the witness.

8931

The Court: Overruled. What did the witness say was the net worth of Greenberg and Shapiro?

Mr. Turkus: About eighty thousand.

Mr. Wegman: He said he was not sure of it.

The Court: You may now answer the last question.

(Pending question read.)

A. Twenty-five per cent interest.

Q. That twenty-five per cent interest, does it

give her $400 a week? A. I could not answer that from a weekly basis but at the end of the year I would say that the dividends of that corporation exceed $10,000.

Q. So that—

Mr. Wegman: Pardon me, Mr. Turkus. The witness answered, if your Honor pleases, before I had a chance to state my objection. I should like to have the record note my objection to the question and my motion to strike out the answer on the ground that the question is wholly immaterial, irrelevant, incompetent, and has no bearing whatsoever on the credibility of the witness. It is a wholly collateral matter, not related to this case whatsoever.

8933

The Court: The Court takes the view that when the witness takes the stand and testifies that a certain conversation was not held on a specific date several years ago, at the office of the Raleigh in New York, and that certain people were not there on that day, that his credibility may be attacked upon the ground of interlinking or interlocking financial interests, not only with the defendant or any defendant but with the wife of any defendant. Overruled.

8934

Mr. Wegman: I take an exception. I should like to, if I may, direct your Honor's attention to the fact that the witness did not testify that those people were not there, that that conversation was not held.

He said he did not see them there and they were not there while he was there and he heard no such conversation.

The Court: Let it go that way.

Mr. Turkus: Let me get back to what I am doing here, if I may, your Honor.

Q. What did we get, $10,000 a year to Betty Buchalter? A. In excess.

Q. In excess of $10,000 a year? I know it may be hard to refresh your recollection about this 8936
but, in round numbers, in 1935, what did Betty Buchalter get out of the Raleigh?

Mr. Wegman: May we have an objection to this line so that I do not have to get up with each question?

Mr. Turkus: Yes, your Honor, I wish you would grant it.

The Court: Yes, you may an objection.

Mr. Wegman: That is to this entire line of questioning, and my exception.

8937

A. In 1936?

Q. Yes. A. I would say that her share of the dividends in the Baltimore corporation were about ten to twelve thousand dollars.

Q. And in 1937? A. A similar amount.

Q. 1938? A. That was a bad year.

Q. All right, would it be somewhere around $10,000? A. It was a lot less than $10,000.

Q. 1938 was a bad year? Would you say $7500. A. Yes, I would say $7500. That was a bad year. '37 was the bad year. I am sorry.

Q. All right, 1937 what did she draw? A. About $7500.

Q. 1939, that was a bad year too toward the end? A. No, 1939 was a good year.

Q. All right, how much? A. In excess of $10,000.

Q. Would you say between ten and twelve thousand or between ten and fifteen? A. It might have even been more than twelve.

Q. It might have been fifteen? A. No, I don't think so.

Q. 1940, what did she draw? A. More than
8939 fifteen thousand dollars.

Q. It would be pretty close to twenty, wouldn't it? A. That I could not say.

Q. In 1941, to date, what has she drawn? A. It has been a very good year.

Q. It would be more than twenty this year, wouldn't it? A. No, it won't be more than twenty. We don't know our figures. Our sales for the calendar year 1941 are three million dollars.

Q. So on the basis of three million dollars worth of sales, what is the interest of 25 per
8940 cent worth by way of dividends? A. That is a very profitable business, I am happy to say.

Q. Well, as secretary and treasurer, and familiar with figures, give us a rough estimate? A. It would be around twenty thousand.

Q. That New York corporation, does that pay dividends? A. Yes.

Q. Does it pay it in the same proportion as the Baltimore corporation? A. Yes.

Q. In other words, would you say that the dividends in the New York corporation are about four times larger than the Baltimore corporation? A. No, would not be larger.

Q. How much larger? What is 25 per cent interest worth in the New York corporation? A. There is nobody that owns a 25 per cent.

Q. What does 25 per cent throw off? A. That is hardly a question I can answer because—

Q. What is the smallest, please? A. Mr. Turkus, please—

Q. In the New York corporation. A. Let me make this plain. We pay the Baltimore corporation a certain amount to make a unit, and if there is sufficient work there is larger profits. 8942

Q. I am not interested in the technique. A. Excuse me, please.

Q. All right. A. The New York corporation does the buying and does the selling, will sometimes have to take losses on merchandise that does not move and the governing of profits from the Baltimore corporation as to the New York corporation are not relevant.

Q. Well, are they interlinking directorates, the New York and Baltimore corporation? A. I happen to be the general manager of the Baltimore corporation as well as the New York corporation. 8943

Q. And you work for the New York corporation and you work for the Baltimore corporation? A. Yes, I direct both corporations.

Q. Are there any other interlocking officers or stockholders? A. No, excepting Mr. Borish and Mr. Sam Smith.

Q. Sam Smith is married to the sister of Jacob Shapiro and yourself? A. Yes, sir.

Q. So he is an interlocking director? A. Yes, he is. Mr. Borish is not related to us.

Q. This Betty Buchalter interest, isn't that the Lepke interest?

8944 *Carl Shapiro—For Defts.—Cross*

Mr. Wegman: I object to that, if your Honor pleases.

A. That is hardly fair. Mrs. Buchalter happens—

The Court: Overruled.

Q. Is it, yes or no? A. No, I cannot answer it.

Q. Then don't answer it if you cannot answer
8945 it yes or no. I do not want the answer. If you cannot tell me whether that is the Lepke interest, yes or no, I do not want the answer. Can—

Mr. Wegman: I object to that question, argumentative, improper in form, and I submit to your Honor that since your Honor has permitted the inquiry to this point that the witness should be permitted to answer in his own way.

The Court: Yes. I am puzzled as to how the witness could possibly know the
8946 private arrangements between husband and wife—

The Witness: Mr. Turkus—

Mr. Turkus: Don't volunteer.

The Court: —unless a defendant told him so.

Q. I just want to get this from the New York corporation. What are the dividends of the New York corporation? A. Well, the dividends of the New York corporation—

Q. Take this year. A. This year I hope that we will have more than $20,000, $30,000.

Q. And that will be split up, the twenty or

thirty thousand dollars; does that go to all the stockholders? A. Yes.

Q. All right. A. That would be an individual dividend.

Q. You mean twenty thousand dollars apiece or twenty thousand dollars for all? A. No, apiece.

Q. And how many stockholders are there in that one? A. Three stockholders, of course that is relative to the amount of stock that each individual has. 8948

Q. So the three stockholders get the $90,000? A. No, there is the minority stockholder and then there is one who has a little more.

Q. I mean all the stockholders all together. A. It would not amount to $90,000.

Q. How much? A. Possibly $50,000.

Q. And this year you estimate that the Baltimore corporation, all the stockholders together will get about $80,000? A. No. There are minority holders there too.

Q. You estimated $20,000 for the 25 per cent interest and the other 75 per cent— A. But there are minority holders there who will not proportionately draw. 8949

Q. At least the total profits of the Baltimore end of the corporation this year will be at least $80,000? A. No.

Q. How many thousand do you estimate? A. Oh, around sixty, something like that, fifty, or forty. I would not know.

Q. Between the two corporations, the profits will be around a hundred thousand or better for 1941? A. I think so.

Q. Now, having gotten yourself into a very

lucrative business starting January, 1936, didn't you devote much time down in Baltimore? A. Yes, about 50 per cent of my time.

Q. In 1936, what hotel did you stop at when you were in Baltimore? A. I stayed at my sister's place.

Q. What is the name of your sister? A. Laura Smith.

Q. And what was the address in 1936 where you stopped? A. 3716 Liberty Heights.

8951 Q. Is that a very fashionable section of Baltimore? A. Well, I would say it is a nice section.

Q. Where does Laura Smith live now? A. She lives on Springdale Avenue. I don't know the number.

Q. You don't stop there any more? A. Oh, sure.

Q. Don't you stop at any hotel? A. In Baltimore?

Q. Yes. A. There was no need for it.

Q. You told Mr. Wegman that you had refreshed your recollection so that you could tes-

8952 tify that you did not see Tannenbaum or Rubin on September 11, 1936, a Friday, because you had refreshed your recollection from certain papers of the Raleigh?

Mr. Wegman: I object—

A. That is hardly the facts.

Mr. Wegman: Mr. Shapiro, please. when I make an objection—

Q. Answer it yes or no.

8953

Mr. Wegman: Mr. Turkus, I have a right to object before there is an answer. Now, please. If your Honor pleases, I object to the question. It is improper in form. It misstates the record. It misstates the testimony of the witness on direct.

The Witness: That is right.

The Court: Overruled.

Mr. Wegman: Exception.

8954

Q. Yes or no. A. That was not the question asked me by Mr. Wegman.

Q. It was not? A. No.

Q. Did you before you came to court refresh your recollection from certain records of the Raleigh? A. That I was in New York at that date?

Q. Yes, that you were in New York that day. A. Positively.

Q. And those records—

8955

The Court: Pardon me just a minute. On the Court's notes appears the following concerning your direct testimony: "Did not see Rubin or Tannenbaum there September 11th."

The Witness: That is right.

By the Court:

Q. Did you so testify? A. Yes, sir.

Q. And did you testify that you know that because you refreshed your recollection by certain papers?

8956 *Carl Shapiro—For Defts.—Cross*

Mr. Wegman: No, that is not the testimony.

A. I know I was in New York that day because of certain records. That is what I said.

By Mr. Turkus:

Q. Were you asked this by Mr. Wegman, referring to page 2830 of the present record:

8957 "By Mr. Wegman:

"Q. Mr. Shapiro, did you see either Rubin or Tannenbaum at any time on Friday, September 11, 1936, at any place, at any other place? A. No, I did not. I don't believe I did. I am pretty sure of it."

Did you hear that? A. Yes, sir.

Q. Did you hear then Mr. Turkus say: "Will your Honor direct the witness to bring with him the records he used to refresh his recollection?" A. That is right.

Q. Did you hear Mr. Wegman say: "I have

8958 those and I shall be glad to mark them for identification at this time. If you want them in evidence, you can see them. That is the rule. I will be glad to offer them in evidence. I now offer them in evidence."

Did you hear that discussion? A. Yes, sir.

Q. Now, the papers that you refreshed your recollection from were checks, weren't they? A. That is right.

Q. And from those checks, that is how you told that you were in New York on September 11th, Friday, 1936? A. Yes.

Q. May I see the checks? Perchance, do you have a diary? A. No.

Q. Why, a business that makes a hundred thousand a year profit, you have no diary?

Mr. Wegman: I object to that.

A. My secretary has a diary.

Q. An office diary? A. My secretary has a diary.

Q. Did you use the diary to refresh your 8960
recollection? A. No, these checks.

Q. Just these checks, Defendants' Exhibit Z-9 for Identification? A. Can I show you?

Q. Yes, you look them over. A. I will be glad to show you.

(Mr. Turkus hands checks to witness.)

The Witness: Here is a check—

Q. Wait. I do not want you to volunteer anything. It is from those checks—

8961

Mr. Wegman: If your Honor pleases—

Mr. Turkus: Will you sit down and keep quiet, please, and stop getting so excited?

Mr. Wegman: I am not excited.

Mr. Turkus: I merely asked the witness if that bundle of checks, Exhibit Z-19, was used by him to refresh his recollection.

The Witness: Yes.

Mr. Turkus: Now, let me have them back.

8962 *Carl Shapiro—For Defts.—Cross*

Q. And you have already told us you did not look at the office diary to refresh your recollection? A. I have no office diary. My secretary has.

Q. You did not look at the diary that your secretary keeps? A. No, I didn't. I would not know where it is.

Q. You did not look at the office records to see if there were any stubs for trains going down to Baltimore that you may have used? A.
8963 I never keep those stubs.

Q. Did you look at the office records? A. I could not say.

Q. What? A. I did not look at that, no.

Q. Who was the first person that spoke to you about coming into this case as a witness? A. I was called in by attorneys Wegman and Climenko.

Q. You did not go back to your office after the discussion in the office of Wegman and Climenko, to look for any record of stubs or any other railroad record to show the trips you took
8964 to Baltimore in 1936? A. That might have been an oversight on Wegman's part. If he had asked me to bring that, I would have looked for it.

Q. I see. That never occurred to you? A. I just brought what Mr. Wegman asked me to bring.

Q. You knew you were just coming here to say that you did not see Rubin and Tannenbaum in the office on September 11, 1936, didn't you? A. Mr. Turkus, you asked me—

Q. Now answer that yes or no. Didn't you know that you were coming hereto testify that

on Friday, September 11, 1936, before Joe Rosen was killed in Brooklyn, you did not see Rubin and Tannenbaum up at 200 Fifth Avenue? Didn't you? A. I could not anticipate questions. I came here as a witness.

Q. You did not anticipate the direct questioning by Mr. Wegman? A. Mr. Wegman—

Q. Yes or no? A. That question?

Q. Yes. A. Any question I cannot anticipate.

Q. Did you not know that Mr. Wegman was going to ask you who was in the office of the 8966
Raleigh on Friday, September 11, 1936? A. That was some of the questions he asked me in his office.

Q. But didn't you anticipate it? A. I don't know what he would ask me, Mr. Turkus.

Q. You don't know what Wegman and Climenko asked you in the law office when you were there as a prospective witness in the Lepke case?

Mr. Wegman: He did not say that.

8967

A. I cannot be accountable for any questions that might be asked of me and I cannot answer them.

Q. I am asking you that when you took this witness stand here yesterday as a witness for Lepke, whether you did not know you were going to be asked about your movements on September 11, 1936. A. No more than I would know what question you would ask me next.

Q. So that you came here completely surprised when you were asked about September 11th? A. No, sir.

8968 Q. Why, you dug out the checks of September 11, 1936, to refresh your recollection, didn't you? A. I brought all the checks dated as of September 11th, written in the New York office.

Q. 1936? A. 1936, as requested.

Q. Then you understood when you took this witness stand that September 11, 1936, had significance in this case, didn't you? A. That is right.

Q. And you knew you were going to be here
8969 to testify about September 11th? A. As to the facts.

Q. 1936? A. Yes.

Q. And you knew you were to be here to testify that you did not see Tannenbaum or Rubin in that office? A. That is the truth.

Q. And you did not look for railroad stubs to see if you had been in Baltimore; you did not look in the secretary's diary; you only looked at Z-19, the checks? A. We don't keep railroad stubs; they are given to the conductor when they collect the—

8970 Q. When the tickets are purchased, isn't there a record of the ticket? A. They pick that up.

Q. What about a Pullman? Did you ever ride in a Pullman, with a $100,000 profit? A. Sure I did.

Q. Did you ever hear of Pullman tickets? A. I do not ride the Pullman from Baltimore to New York.

Q. Oh, I see. And never did in all the trips you took down from 1936 to date, you never once rode the Pullman? A. Sleeper, yes, but not the Pullman.

8971

Q. You know there are sleeper records? A. When I didn't take the sleeper I went by coach.

Q. Other than these checks, Exhibit Z-9 for identification, did you refresh your recollection from anything under the sun? A. I was not asked to bring anything.

Q. Did you, sir? A. No, sir.

Mr. Turkus: I am through.

Redirect examination by Mr. Wegman:

8972

Q. Mr. Shapiro, referring first to the last thing that Mr. Turkus got so excited and vehement about, is it possible for you to tell from these checks that you were positively and certainly in New York on September 11th? A. Yes, sir.

Q. Is it necessary to refer to any other records when you have these checks to demonstrate the fact that you necessarily were in New York on that day? A. That is very conclusive.

8973

Q. Now will you please tell his Honor and this jury, and inform Mr. Turkus for his edification, how you can tell from those checks you were in New York on that day without the necessity of looking at any other records? A. There is one check here marked "Payroll, September 11, 1936, for $132." The only signature required is mine, Carl Shapiro. It is endorsed, "Carl Shapiro, O. K. for cash," and was cashed by Naomi Shapiro. That proves conclusively that I was there on that date.

Q. It was cashed on that day; is that correct? A. It was cashed on that day. Here are other

8974

checks here that was written on the same day, by the same bookkeeper, and I signed every one of those checks.

Q. And some of those checks cleared the bank on September 11th? A. Yes. I don't know all, but some. One of them it has, here. Some of these were given to other parties.

The Court: May I see that payroll check?

8975

Mr. Turkus: Your Honor, will you reserve the question until I get one question on record?

The Court: I am not asking a question. I am going to ask a question in a minute. Go ahead, Counsel.

Mr. Turkus: I think I wanted to ask the same question.

The Court: Go ahead.

Mr. Wegman: I have been waiting for Mr. Turkus to get through.

The Court: You were standing up.

8976

Mr. Wegman: Yes, I am questioning the witness on redirect.

Mr. Turkus: Have you finished?

The Court: That is what I asked you.

Mr. Wegman: I am not through with my redirect. I am waiting for your Honor to get through.

The Court: I asked for this check because I wanted to see if it had been folded as though it had been put in an envelope and gone through the mail. I see a crease mark in the check.

By the Court:

Q. Did you sign that in Baltimore and mail it back to New York? A. No, your Honor. That check was written on the 11th and to send it from Baltimore would take at least a day to get to the New York office.

Q. You cannot account for that crease mark? A. Anybody would fold a check and put it in a pass book in making a deposit, and our bank account was in New York. 8978

Q. I am just asking you if that refreshes your recollection on that point. A. No; that check was written in New York and cashed in New York on the very same day.

Q. Did you ever mail checks from Baltimore to New York? A. Baltimore checks.

Q. When you were in Baltimore, did you always come back to New York on week-ends and sign payroll checks? A. Yes.

Q. They never mailed payroll checks to mail back to New York, to save you the trouble? A. I always spent my week-ends in New York, and 8979 we always paid on a Friday.

By Mr. Wegman:

Q. You lived in New York at that time, didn't you, Mr. Shapiro?

Mr. Turkus: That has been brought out on direct.

Mr. Wegman: May I have the checks, please?

8980 *Carl Shapiro—For Defts.—Redirect*

Q. In answer to his Honor's question, you testified, Mr. Shapiro, that checks were sometimes mailed from Baltimore to New York; in response to that you said those were Baltimore checks. Will you please explain to his Honor and this jury the difference between New York checks and Baltimore checks? A. They are two different colors. The Baltimore check was an entirely different color than the New York check.

8981 Q. And the Baltimore checks, when you say Baltimore checks, you mean checks of the Baltimore company? A. No, even of the New York corporation. All checks written in Baltimore for the sake of easy identification as far as the bookkeepers' records are concerned, are a different color than New York checks of the same corporation. The Baltimore checks were white.

The Court: We will continue at 1:30. Everybody kindly remain in order.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you

8982 about it. Keep your minds open.

First the witness may leave.

Now the jury pass out the other door.

Now the defendants are remanded.

(Whereupon a recess was taken to 1:30 P. M.)

(Afternoon Session. Trial Resumed.)

CARL SHAPIRO, resumed the stand and further testified, as follows:

Mr. Wegman: Before I proceed questioning, I now renew the offer of these checks in evidence.

Mr. Turkus: Consented to.

(Ten checks received in evidence and marked as one exhibit, Defendants' Exhibit 7.) 8984

Re-direct examination by Mr. Wegman:

Q. Now, Mr. Shapiro, these checks came from a regular book of checks, didn't they? A. Yes, sir.

Q. And the checks in the book are numbered in rotation? A. Yes, sir.

Q. So the serial number on the checks shows their disposition in the book? A. Yes, sir.

8985

Mr. Wegman: If your Honor please, may I suspend questioning long enough to identify these checks to the jury. We have them in evidence.

The Court: Yes.

Mr. Wegman: These checks, a series of ten checks, all dated September 11, 1936, start with the serial number 584, and then continue, 585, 586, 587, 588, 589, 590, 591, 592 and 593. Checks numbered 588, 590, 592 and 591 have a bank perforation showing they cleared through the bank on

8986 *Carl Shapiro—For Defts.—Redirect*

September 11, 1936. The other checks bear various cancellation dates, and there are various payees named on the checks. Each check bears only the signature on it, "Carl Shapiro".

Q. Do you know in whose handwriting these checks are made out? A. Yes, sir, I know the writing of Naomi Shapiro.

Q. Every one of them is in her handwriting?

8987 A. Yes, sir.

Q. In the Baltimore office of the business there were checks of the New York corporation? A. Yes, sir.

Q. Those checks that you testified to were of different color than the checks from New York? A. Yes, sir.

Q. And when the occasion arose for you to sign a check while you were in Baltimore on the New York account, that check was written in Baltimore and signed by you there on this other color? A. Yes, sir.

8988

Mr. Turkus: May we have the witness testify? That is leading.

Q. Were checks sent to you in Baltimore from New York for you to sign in Baltimore? A. No, sir.

Q. And the checks were signed by you on the dates the checks bear? A. Yes, sir.

Q. Now, when were you at my office the other day did I ask you substantially the same questions I asked you on your direct examination here?

8989

Mr. Turkus: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Wegman: Exception.

Mr. Wegman: May I point out to your Honor that on cross-examination Mr. Turkus asked this witness whether he knew what he was going to testify to here, and I submit I have the right to elicit for the jury the fact he was asked the very questions he was asked here, and then what happened after that.

8990

The Court: You mean in your office?

Mr. Wegman: Yes, at my office.

The Court: Objection sustained.

Mr. Wegman: Exception.

Q. Did I ask you, Mr. Shapiro, to check your records to see whether there was any indication you were in New York on Friday, September 11th, which would satisfy you as to whether or not you were actually in New York on that date?

8991

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Wegman: Exception.

Q. When I completed my interrogation of you, did I then tell you I would want you to testify at this trial?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Wegman: Exception.

8992 *Carl Shapiro—For Defts.—Redirect*

Q. Did I ask you to bring with you at this trial the lease of the number 200 Fifth Avenue office and the checks which showed you were in New York on that date?

Mr. Turkus: I object.
The Court: Objection sustained.
Mr. Wegman: Exception.

Q. And did I tell you I would ask you the same
8993 questions on the witness stand that I had asked you at my office?

Mr. Turkus: Objected to.
The Court: Objection sustained.
Mr. Wegman: Exception.

Q. When you asked on examination by Mr. Turkus concerning anticipation of questions and you stated in response that you could not anticipate the question that might be asked, did you refer to the questions that were asked you or the questions that Mr. Turkus might ask you?

8994

Mr. Turkus: Objected to.
The Court: Objection sustained.
Mr. Wegman: Exception.

Q. Well, Mr. Shapiro, you have been in direct charge and complete charge of the operation of the business of Raleigh Manufacturers, Incorporated, from 1936? A. Yes, sir.

Q. Since that time, since the late spring of 1937, did the defendant Buchalter, or your brother Jacob Shapiro, participate in any way, or have anything whatsoever to do with the operation of that business? A. Never did, no, sir.

Q. In any way whatsoever? A. No, sir.

Q. And your business today is approximately three times as great as it was in 1936? A. Yes, sir.

The Court: Judge Talley has to absent himself from the room for a few moments.

Mr. Turkus: That will leave the defendant Weiss without counsel in the meantime. 8996

The Court: Will it be agreeable for Mr. Barshay to act in behalf of your client in the meanwhile?

Mr. Talley: Yes.

Defense Counsel: We have no objection.

The Court: It has come to the Court's attention that a situation, a critical illness on the part of one of defense counsel, makes it advisable for the Court to proceed no further this afternoon. His condition has gone to the extent of an 8997 ambulance and a priest, so for that reason it would be indecent to continue this afternoon, even though other counsel are present representing that defendant.

The Court (addressing jury): Tomorrow is Thanksgiving Day. There will be no session. We will resume Friday morning at ten o'clock. Please do not discuss the case, nor let anybody talk to you about it. Keep your minds open. Follow all the other admonitions heretofore given. First, the witness may go. The

8998 *Carl Shapiro—For Defts.—Redirect*

witness will return on Friday morning at 10 o'clock. Now, the jury may leave.

(The jury retired from the courtroom.)

Put on the record that the illness has no relation to the trial, but to a chronic condition from which counsel has been suffering for a long period of time; it is
8999 purely dietary.

The defendants are remanded.

(Adjournment was thereupon taken to Friday, November 21, 1941, at 10: a. m.)

Brooklyn, N. Y., November 21, 1941.

TRIAL RESUMED

9000 CARL SHAPIRO, a witness in behalf of the defense, resumed the stand and testified further as follows:

Mr. Barshay: In the absence of Mr. Wegman, I just want to ask one question, your Honor.

The Court: All right.

By Mr. Barshay:

Q. Mr. Shapiro, you spoke of the firm of Greenberg & Shapiro being in 936 Broadway. A. 935.

The Court: Was not Mr. Wegman conducting the redirect?

Mr. Barshay: I said I don't want to wait for Mr. Wegman.

The Court: I think we had better wait.

Mr. Barshay: I have only one question.

The Court: It is a quarter past ten.

Mr. Barshay: It is up to your Honor. I thought I would save the Court's time.

The Court: I don't want a motion for 9002
a mistrial.

Mr. Barshay: Can we withdraw this witness, and I will put a very short witness on?

The Court: I don't want a motion for a mistrial when Mr. Wegman comes in.

Mr. Talley: May I address the Court, please? I have a witness here, Major Kleinman, who is here from Camp and must get away. He must get away, he says, by 11 o'clock. He is a very short witness. I was going to interrupt the wit- 9003
ness now and put Major Kleinman on so that he can get a plane to go South to his regiment.

The Court: In order to avoid confusion, the Court is taking the defense of each defendant separately, and in the order in which the names appear on the indictment.

Mr. Talley: I do not know whether this is the last witness to be introduced at this time by defendant Buchalter's counsel. In any event, I am confronted with the

situation of an Army officer, taken away from maneuvers down there, and I expected to call him on Wednesday afternoon and had him here. Now he has got to get back. He says he must be out of this building by 11 o'clock. I just present my dilemma to you.

The Court: If it is possible for him to come in the proper order, that is to your interest as well as all other defendants'.

9005 Mr. Talley: I appreciate it, but I am just confronted with that situation.

The Court: Where is Major Kleinman?

(Major William W. Kleinman approaches the rail.)

The Court: (to Major Kleinman) Come right up. We have not seen you in a long time. See if you can arrange your Army time.

Major Kleinman: I have made reservation on a plane, your Honor, so as to return to Atlanta on the 12 o'clock. I had

9006 my leave extended by one day. The last plane I can make is one which leaves at noon today.

The Court: How long will this testimony be?

Mr. Talley: My direct examination will be no more than five minutes.

Mr. Turkus: I doubt if it will be that long, because it will be something concerning which Major Kleinman has no knowledge, that is, no personal knowledge.

The Court: That remains to be seen. All right, gentlemen of the jury, this is

9007

on the defense of Weiss. Of course, all evidence which is put in the case in defense of one defendant operates as a defense of all in so far as it applies to the others, but the present witness is withdrawn momentarily from the stand while Major Kleinman, a former attorney, testifies as a witness for the defendant Weiss.

9008

MAJOR WILLIAM W. KLEINMAN, Camp Wheeler, Georgia, called as a witness on behalf of the defendant Weiss and being first duly sworn, testified as follows:

Direct examination by Mr. Talley:

Q. Are you a Major in the United States Army at the present time? A. I am.

Q. And your regiment is located where at the present time? A. We are at Camp Wheeler, Georgia.

9009

Q. And you came up here in response to a request to testify in this trial, did you? A. I did.

Q. In the year 1940 were you practicing law here in the Borough of Brooklyn? A. I was.

Q. You have been a member of the Bar of the State of New York how many years? A. Since 1925.

Q. In the month of April, 1940, were you attorney for the defendant Emanuel Weiss? A. I was.

Q. And in that month do you remember tal-

9010 ing with Mr. Turkus, the Assistant District Attorney in charge of this prosecution? A. I do.

Q. And was it with reference to the defendant Weiss? A. It was.

Q. Was Weiss brought to the District Attorney's office at that time?

Mr. Turkus: Objected to. That is something he does not know of his own
9011 knowledge.

The Court: Sustained.

Q. Did you have a talk with Mr. Turkus about Weiss at that time? A. Yes.

Q. Will you state what it was?

Mr. Turkus: That is objected to.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you see Mr. Weiss, the defendant Weiss, in the District Attorney's office at that
9012 time? A. I did not.

Q. Was he here in the Borough of Brooklyn—Weiss? A. I did not see him, Judge.

Q. Did you talk with him? A. Not until later that afternoon.

Q. Later that afternoon—but I am speaking now of the month of April—did you talk with Weiss in April? A. Yes.

Q. Of 1940? A. Yes, sir.

Q. And was it here in the Borough of Brooklyn? A. Yes, sir.

Q. What were the circumstances which brought about your meeting with Weiss at that time?

Major William W. Kleinman—For Defts.—Direct

9013

Mr. Turkus: That is objected to.

The Court: Sustained as calling for a conclusion.

Q. Where did you see Weiss? A. In my office at 66—

Q. In the Borough of Brooklyn? A. 66 Court Street, Brooklyn, New York.

Q. Had he been brought to the District Attorney's office at that time?

9014

Mr. Turkus: That is something that the witness cannot testify to.

The Court: He can tell whether or not he saw him there.

Mr. Turkus: He says he did not see him there.

The Court: Sustained.

Q. Did you talk with Turkus about Weiss's being in the District Attorney's office?

9015

Mr. Turkus: That is objected to.

The Court: Sustained.

Mr. Talley: Exception.

Q. Do you remember when in the month of April it was that you talked with Mr. Turkus? A. In the latter part of the month of April. I cannot recall the exact date.

Q. Would you say on or about April 25th? A. I cannot say definitely as to any date.

Mr. Talley: Is it conceded by Mr. Turkus that on April 25th this witness had a talk with him, Mr. Turkus?

9016 *Major William W. Kleinman—For Defts.—Direct*

Mr. Turkus: The Court has ruled that out.

Mr. Talley: I am asking if you will make that concession as to the date, that is all.

Mr. Turkus: Yes, I can tell the date. Let me have the file.

I have a date noted in my file. I want to check it to be accurate. The date that
9017 I have now in my file is 3/28/40. That would make it March 28, 1940, but I am going to check that with the office records.

This testimony is incompetent anyway, and immaterial at this time, and it is taken out of order. I think it disrupts the defense.

Q. Did you see Weiss at or about that time, March or April, 1940? A. Yes, sir.

Q. Where did you see him? A. In my office at 66 Court Street, Brooklyn.

9018 Q. Did you advise Mr. Turkus that you would produce him at any time that he was wanted?

Mr. Turkus: That is objected to.

The Court: Sustained.

Mr. Talley: Exception. If your Honor pleases, I promise to connect this testimony with other direct evidence, if you will allow me to put it in subject to connection. I certainly have not brought this Major Kleinman up from Georgia without a very definite purpose, and I ask you to let me put in this evidence, which is very brief, wholly within the knowledge of Mr. Turkus, and I promise to connect it.

9019

The Court: The trouble is that my own experience in the practice of law causes me to sense what the connection would be and that it is incompetent and it may be improper to get it before the jury for that reason. I cannot let you do that.

Mr. Talley: You have taken evidence, you will recall, subject to connection here in this case.

The Court: No.

9020

Mr. Talley: Your Honor should know I would not trifle with the Court and make a statement of that kind unless I knew I could carry it out, and it is of very vital importance to this case, this particular evidence.

The Court: I cannot let you do it.

Mr. Talley: You will not permit it?

The Court: That is a ruling.

Q. Were you, at a later date, that is, a few days after the date upon which I have been inquiring when you saw the defendant Weiss, were you present with him in a restaurant here in the Borough of Brooklyn?

9021

Mr. Turkus: We'd better fix the date that he speaks of.

The Court: Overruled.

Mr. Talley: I asked you to fix it, if you could.

Q. You say the latter part of April, according to your best recollection? A. It was either the latter part of April or the beginning of May.

9022 *Major William W. Kleinman—For Defts.—Direct*

Q. At or about that time, after the interview you say you had with the defendant Weiss in your office, were you in a restaurant with defendant Weiss? A. I was.

Q. And were you and he seated at a table? A. We were. There was one other with us.

Q. At that time were there any police officers in that restaurant that you saw, that were known to you? A. There were two who were known
9023 to me, one other who was a policeman by introduction, who was unknown to me.

Q. Who were the two that were known to you? A. There was Commissioner Valentine was the one whom I knew definitely. The other gentleman I knew by sight, but I cannot recall his name. He was either Deputy Chief Inspector or one of the Inspectors of the Police Department. The other gentleman to whom Commissioner Valentine introduced me was also either an Inspector or Deputy Chief Inspector, and, if I am not mistaken, there was one civilian, one
9024 other gentleman, with Commissioner Valentine's party who was not a police officer.

Q. How near were they to the table at which you and Weiss sat? A. Oh, perhaps within 10 feet or 12 feet.

Q. Have you any knowledge of the fact that they saw Weiss with you that day and knew it was Weiss?

Mr. Turkus: Your Honor, there is an objection.

The Court: I do not understand the question.

(Pending question read.)

The Court: Sustained.

Major William W. Kleinman—For Defts.—Direct

9025

Q. Were they at any time at your table, or was Weiss at the table they were at? A. No, at no time.

Q. Was there any conversation between you and them? A. Yes, sir.

Q. With respect to Weiss? A. No, sir.

Q. Did Weiss take part in the conversation at all? A. No, sir.

Q. And when you say they were seated 10 feet away from your table, would you indicate 9026
from where you sit, Major, to whatever juryman would indicate the distance? A. The room in which we were seated—it was the newer part of Peter Luger's Restaurant—is a rather square room. We were sitting about in the center, that is, Weiss, a lawyer who was my assistant at that time, Mortime Saffer, and I were in the center of this square room. Police Commissioner Valentine and his party were along the side of the room. I have estimated it to be about 10 or 12 feet away, from about where I am to the gentleman, the alternate juror.

9027

The Court: Broadway at Driggs Avenue?

The Witness: Yes, sir.

A. (continued) And there were perhaps only three or four other people in that portion of the restaurant at the time, and the Police Commissioner and his party entered after we had been eating for some time. I think I have answered your question.

Q. Major, did you say anything to any of these policemen about Weiss being in your company? A. No, I did not mention Weiss. When I saw

9028 *Major William W. Kleinman—For Defts.—Direct*

Commissioner Valentine and his party come in, I mentioned that fact to Weiss and I then arose from my table and walked over and shook hands and spoke to Commissioner Valentine. I don't recall the conversation. It had nothing to do with Weiss.

Q. Is it your recollection that you and Weiss were not in the District Attorney's office together at any time during that period? A. I am rather
9029 certain that it was not Weiss whom I saw in the District Attorney's office. Weiss came to me after I went to the District Attorney's office for him.

Q. When you went to the District Attorney's office for him, did you have a talk with Mr. Turkus? A. Yes, sir.

Q. Was Mr. Weiss in the District Attorney's office at that time or not? A. I could not see.

Q. Was he in custody at that time, do you know? A. I am only assuming, Judge.

9030 Mr. Turkus: I object.
The Court: Sustained.
Mr. Talley: Exception.

Q. After you talked with Mr. Turkus, Weiss was not in custody, was he?

Mr. Turkus: Just a minute. There is an objection.
The Court: Sustained.
Mr. Talley: Exception. This witness was his attorney.

Q. How long after the day that you communicated with Mr. Turkus about Weiss were you

9031

in the restaurant with him? A. Well, my best estimate of the time would be within a few weeks.

Q. How long after the day that you went to the District Attorney's office and talked with Mr. Turkus about Weiss, how long after that day was it that Weiss was in your office? A. I cannot recall definitely the time. He was in my office quite frequently after that day, and I should imagine for at least a few weeks after that.

9032

Q. But you know of your own knowledge, as his attorney and from observing him, that he was not then in the custody of the District Attorney or anybody else? A. He was with me.

Q. Free to come and go? A. Apparently.

Q. Did you write a letter to the District Attorney's office, Major, in connection with the Weiss matter at that time? A. I don't believe it was in connection with Weiss that I wrote the letter. I spoke to Mr. Turkus in connection with Weiss personally.

Q. Did you, in a letter, advise the District Attorney, that you would produce Weiss whenever he was wanted? A. I cannot say definitely. I have asked Mr. Price, who was then my associate, to find out if there was such a letter. I have not been able to determine.

9033

Q. But you do know that you made that offer orally to Mr. Turkus? A. Yes.

Q. Was that made to Mr. Turkus in his office?

Mr. Turkus: I cannot understand Judge Talley's attitude. Three times the conversation has been ruled out, and now Judge Talley is testifying to the conversation.

9034 *Major William W. Kleinman—For Defts.—Cross*

The Court: What is it?

Mr. Turkus: It is an objection, of course.

The Court: Sustained.

Mr. Talley: Exception.

By the Court:

Q. Major, some lawyers keep an office register
9035 for use in making up their bills, and it contains the amount of work done from day to day, in diary form. A. Yes, sir.

Q. The register stating what clients called, how long they talked, and what they talked about. Did you ever keep an office register? A. No, nothing like that, sir.

Q. Did you ever keep a callers' book? A. Just telephone calls, sir.

Q. You don't keep a callers' book to show when people came into your office? A. Sometimes that has happened, but we don't keep it as an office routine.

9036 Q. Did you have such a book? A. No, sir.

Mr. Talley: I wish to take a general exception to your Honor's refusal to allow me to present this evidence through this witness, subject to my offer to connect it. I except to your Honor's attitude and ruling in that matter. I have no further questions of this witness.

Cross-examination by Mr. Turkus:

Q. Major Kleinman, you at one time were Assistant District Attorney in Brooklyn? A. I was.

Major William W. Kleinman—For Defts.—Cross

9037

Q. Judge Taylor asked you whether you had any office register. I suggest to you the date of 3/28/40 to refresh your recollection as to the date when Weiss was in your office. Does that help you any? A. If you have any means of believing that that is the date that I spoke to you, I will accept your suggestion.

Q. That is the notation in my file. A. I have no recollection.

Q. That would make it March 28th. A. I have 9038
no other recollection of it except that I attempt to fix it by the time or around the time we were moving our office from one floor to the other.

Q. At any rate, the date that Weiss was in your office was the date that you had the conversation with Assistant District Attorney Turkus; is that correct? A. That is correct.

Q. You had the conversation with Turkus earlier in that day, and later in the day you saw Weiss? A. That is correct.

Q. And within how many weeks after that was that restaurant incident that you met 9039
Weiss? A. I cannot say. I have testified that I thought it was about two or three weeks, but my recollection is very hazy about that.

Q. At any rate, since that restaurant incident you have not seen Weiss again until you saw him in court? A. No, I saw him after that, but I cannot say for how long after that. I know that that was not the very last time I saw him.

Q. It was a very short time after that that was the last time? A. Not long after that.

Q. And the next time you saw him after that last occasion was when you saw him in court? A. Today.

9040 *Carl Shapiro—Recalled for Defts.—Redirect*

Redirect examination by Mr. Talley:

Q. When did you go out with your regiment, Major? A. I left Brooklyn around January 28, 1941.

Mr. Talley: I have no further questions, Major. Thank you very much.

The Court: Major Kleinman says he can come back any time next week, if notified.

9041

Mr. Talley: Thank you.

The Court: Defense of defendant Buchalter resumed.

CARL SHAPIRO, a witness in behalf of the defense, resumes the stand and testifies further as follows:

By Mr. Wegman:

9042 Q. Mr. Shapiro, when Mr. Turkus was questioning you about the assets of Greenberg and Shapiro, 935 Broadway, he asked you about an entrance to that building on Fifth Avenue. You did not recall the number on Fifth Avenue. Was that the same building as 200 Fifth Avenue? A. No, it is not.

Q. It is several blocks away from 200 Fifth Avenue? A. Yes, it is two blocks away.

Q. And on the other side of Fifth Avenue? A. It has a freight entrance on Fifth Avenue.

Q. The main entrance to the building is on Broadway? A. 935.

Q. There is no connection between that building and the building at 200 Fifth Avenue? A. None whatsoever.

Q. The business that was located at 935 Broadway was the business of Greenberg & Shapiro, is that correct? A. Yes, sir.

Q. Did the defendant Buchalter have any interest in that business? A. None whatsoever.

Q. I asked you on your direct examination about whether you saw certain individuals at the office at 200 Fifth Avenue in the month of September, 1936. I shall now extend that time. I ask you to tell his Honor and this jury whether any of those individuals ever came to the office in 200 Fifth Avenue at any time during the year 1936. 9044

Mr. Turkus: What individuals does he mean?

Mr. Wegman: Do you want me to specify them?

Mr. Turkus: Yes, certainly.

Mr. Wegman: I said the ones that I asked him about on direct examination, Tannenbaum and Rubin. 9045

A. I don't believe they ever came up there.

Q. And during the entire year of 1936—

Mr. Turkus: The answer is, "I don't believe." That is an improper answer to the question.

The Court: What do you want to do?

Mr. Turkus: Strike it out.

The Court: Make a motion.

Mr. Turkus: I do.

The Court: Strike it out.

Mr. Wegman: I don't take any exception to that striking out, if your Honor pleases. I shall now reframe the question.

Q. Did you ever see Tannenbaum or Rubin at the office of 200 Fifth Avenue during the year 1936? A. No, I did not.

Q. During that year did you frequently, almost daily, as a matter of fact, see police officers come into that office and in the hall outside that office? A. Yes.

Mr. Wegman: That is all.

Recross examination by Mr. Turkus:

Q. During your examination you testified that the 25 per cent interest in that Baltimore corporation was Carl Shapiro, Anna Shapiro, Betty Buchalter, and Nathan Borish; is that correct?

Mr. Climenko: If your Honor please, we object to this as improper recross-examination.

Mr. Turkus: I want to get one interest straightened out that has not been—

The Court: Discretionary. Overruled.

Mr. Climenko: Exception.

Q. You did not testify to that? A. Nathan Borish has a 25 per cent interest in the Baltimore corporation; Betty Buchalter has 25 per cent interest in the Baltimore corporation; Samuel Smith has a 12½ per cent interest in the Baltimore corporation, and Carl Shapiro has a 12½

per cent interest in the Baltimore corporation, that is on stock distributed—

Q. That is 75 per cent. Who has got the other 25? A. That is—

Mr. Wegman: May we have the answer repeated, if your Honor pleases.

The Witness: Let me explain that this way:—

Q. We have a question now. Where is the other 25? A. There is 100 per cent of the stock distributed amongst these five individuals. 9050

Q. Who are the five? A. Anna Shapiro.

Q. You did not give me her interest? A. 25 per cent.

Q. That is what I said. Who is Anna Shapiro? A. My brother's wife.

Q. You mean Gurrah's wife? A. Jacob Shapiro's wife.

Q. So that Lepke's wife has a 25 per cent interest and Gurrah's wife has a 25 per cent interest? A. That is right.

Q. And Gurrah's wife will get about $20,000 this year as her interest? 9051

Mr. Climenko: If your Honor pleases, that is objected to on the ground it is improper recross-examination and on the further ground that the matter is immaterial to the issues here.

The Court: Overruled.

Mr. Climenko: Exception.

A. I approximated that amount at that time.

9052 *Carl Shapiro—Recalled for Defts.—Recross*

Q. At any rate, let me ask you this: She will get the same as Betty Buchalter? A. That is right.

Q. And she did get the same as Betty Buchalter since the formation of the Raleigh? A. They have equal shares.

Q. When is pay day in Baltimore? A. Friday.

Mr. Turkus: May I have those checks, Defendants' Exhibits?

9053

Q. Your payroll down in Baltimore is for about seven hundred employees, isn't it? A. That is right.

Q. Your payroll in Baltimore amounts to approximately how much per week? A. That varies. I would say our expenses in Baltimore are about $25,000 a week.

Q. And the greater share of it is disbursed on Friday? A. Yes.

Q. Up in New York you disbursed $132.50 payroll in September, 1936, isn't that right? A. If that is what the check calls for.

9054

Q. Take a look at it, Defendants' Exhibit 7, payroll. A. That is weekly payroll of the New York office.

Q. The payroll down in Baltimore to the employees, that is cash, isn't it? A. Yes.

Q. And you are the one that signs the checks? A. I sign all checks but there is just one check made out for payroll there.

Q. Yes, and that is a substantial check? A. That is right.

Q. Approximately $25,000? A. Not at that time, no.

Q. Well, at that time approximately how much? A. I would say about a little less than half.

Q. About $12,000 then? A. I cannot put a figure on it but it was a lot less than $25,000.

Q. Well, about fifty per cent of what it is today? A. No. Less than fifty per cent.

Q. Approximately? A. About $9,000, $8,000.

Q. In all the experience that you have had with the Raleigh, did you ever sign a post-dated check in your New York office? A. I don't be- 9056
lieve I ever did.

Q. Well, do you mean that since the formation of the Raleigh you never signed checks in anticipation of going out of town? A. Not in the New York office, no.

Q. Did you in the Baltimore office? A. Yes, sir, not post-dated.

Q. I assume then— A. Not post-dated.

Q. Not post-dated? A. No, sir.

Q. I don't mean from the standpoint of not having funds and desiring to anticipate the check; I mean in anticipation of being elsewhere? 9057
A. In the Baltimore corporation if I had—

Q. Yes or no, that is all it calls for. A. Let me hear that question again, please?

(Question read.)

A. I signed blank checks, yes.

Q. Didn't you ever sign blank checks in the New York office? A. No, sir.

Q. Was it a blank check for the $9,000 payroll that you signed down in Balitmore? A. That is right.

Q. Well, is it your testimony then that you signed the $9,000 blank check and did not sign the $132.50 blank check up in New York for the payroll here?

Mr. Wegman: Objected to, highly objectionable, argumentative.

The Court: Overruled.

Mr. Wegman: Exception. May I call your Honor's attention to the form of

9059 that question specifically?

The Court: You don't have to.

Mr. Wegman: Exception.

Q. Just yes or no, sir.

Mr. Wegman: Now, if your Honor pleases, I submit that question cannot be answered yes or no and the witness is entitled to answer it fully.

The Court: He can answer it yes or no.

Mr. Wegman: Exception.

9060

A. Not very well, Mr. Turkus.

Q. What? A. I cannot answer that yes or no because—

The Court: The lawyer has been telling you.

Mr. Wegman: I take exception to that remark.

The Court: Read the question again.

(Question read.)

Mr. Wegman: I submit to your Honor that that question cannot be answered—

The Court: You have already submitted. This is another interruption. Sit down. There will be no more rulings on it. (To reporter) Read it again.

(Question read.)

A. It is quite customary to sign blank checks in Baltimore—

Q. Yes or no. A. I cannot answer it yes or no.

Q. Then don't bother with it. This other exhibit here, Defendants' Exhibit 7 in evidence, Carl Shapiro, that is the check you made out to yourself, isn't it? A. I did not make out this check but this check is made out to me. 9062

Q. You signed it? A. That is right.

Q. You signed it with all the other checks that you spoke of— A. That is right.

Q. —to Mr. Wegman? A. That is right, but not a blank check.

Q. No, that was not a blank check when you signed it? A. No, sir.

Q. Who is the lawyer for the Raleigh Clothing? A. We have about three lawyers. 9063

Q. I mean, do you see any of the lawyers for the Raleigh in the court-room?

Mr. Wegman: I made it clear on the record that the firm of Wegman & Climenko are the attorneys for Raleigh Manufacturers, Inc., and have been for some time.

The Court: Would you mind sitting down and letting the witness answer the question?

9064 *Carl Shapiro—Recalled for Defts.—Redirect*

Q. Now that Mr. Wegman, who examined you on direct examination, has made that statement for the record, which is the first intimation that he was counsel on the record—

Mr. Wegman: I object to that, if your Honor please.

Q. How long has he been the lawyer for the Raleigh? A. Wegman & Climenko have been
9065 on retainer basis with us since the beginning of this year, 1941.

Q. And prior thereto? A. There is a lawyer who still is—

Q. I am talking about Wegman & Climenko. A. They were not our lawyers on a retainer basis.

Redirect examination by Mr. Wegman:

Q. Mr. Shapiro, I call your attention to check No. 592, serial number 592, a part of Defendants' Exhibit 7, made out to the order of "Pay-
9066 roll," and call your attention to the reverse side of that check. I ask you whether that indicates to you one way or another whether you were in New York on the day that that check was cashed?

Mr. Turkus: That has been gone over on direct and redirect.

The Court: Not specifically at that point. Overruled.

A. This check bears my endorsement "Carl Shapiro" and to insure cashing it on that day it

has "O.K. for cash" and has been cashed by Naomi Shapiro on that very same day.

Q. That day is September 11, 1936? A. That day is September 11, 1936, and that positively assures me that I have been in New York on that day.

By the Court:

Q. It has been cashed by whom? A. By the bookkeeper, Naomi Shapiro. 9068

Mr. Turkus: That does not positively assure anything.

Q. Naomi (spelling) N-a-o-m-i? A. Yes.

By Mr. Wegman:

Q. The Naomi Shapiro you testified is now dead? A. She is dead, yes.

Mr. Wegman: That is all.

9069

Recross-examination by Mr. Turkus:

Q. You say that this check 592, the payroll, for $132.50, because it has "Carl Shapiro, O.K. for cash" on it positively assures you that you were in New York on September 11, 1936? A. Absolutely.

Q. Why, couldn't you have signed it, September 11, 1936, payroll check, on the first day of September if you wanted to? A. Mr. Turkus—

Q. Yes or no, couldn't you?

9070 Mr. Wegman: The question was "Why", if your Honor pleases. I submit the witness has a right to answer more than yes or no when the question asked for "Why".

The Court: Again you are getting the witness to balk at an answer. You interrupted before and told the man he could not answer yes or no.

Mr. Wegman: I submit that the question could not be—

9071 The Court: Will you keep still until the Judge is through? Sit down in your seat. I will tell you when you can get up.

Mr. Wegman: All right, I shall wait for your Honor's permission to arise.

The Court: When a question was asked which plainly admitted of a yes or no answer, you got up with an interruption which instructed the witness. The witness then would not answer yes or no and the purpose of the question was balked. Now you are doing the same thing again. Now

9072 you come to order. Take your exception and go ahead.

Mr. Wegman: May I arise now, your Honor?

The Court: This called for a yes or no answer.

Mr. Wegman: May I arise now, your Honor?

The Court: Yes.

Mr. Wegman: And put an exception on the record and tell your Honor that the question I objected to before asked him

about a $132 blank check and I submit again—

The Court: Don't argue about it.

Mr. Wegman: —that assumed a state of facts not in the record and could not be answered yes or no.

The Court: Now you sit down again.

Mr. Wegman: Exception.

The Court: This question will be asked and will be answered yes or no.

Mr. Wegman: I take an exception to 9074
that direction.

(Pending question read).

A. I have never done that.

Q. All of these checks, September 11, 1936, Friday, aggregate substantially under $500, don't they?

The Court: Just a minute. (To reporter) Will you read that question again?

(Question beginning, "Why, couldn't you have signed it—" read). 9075

The Court: "Why", comma after "Why." That was a preliminary and disjointed word the same as if the counsel had used the word "Well". The Court noted the manner in which the question was asked.

Mr. Wegman: May I take an exception to the Court's editorial comment?

The Court: Yes.

Mr. Wegman: And editorializing of the record.

The Court: I know just exactly what you are up to.

9076

Mr. Wegman: May I take exception to that remark?

The Court: Yes, take a hundred. Proceed. The question as asked, and asked in the manner in which the diction is understood by the Court and by anybody else in the court-room who heard it, and whether counsel for the defense concedes it or not, called for a yes or no answer. Now sit down and behave yourself.

9077

Mr. Wegman: I take an exception.

Q. Couldn't you have signed Exhibit 7, the 592 numbered check for $132.50, representing the payroll, in New York, on September 11th? Yes or no. A. Not in this case, no.

Q. Not in this case? A. Or any other case.

Q. This September 11, 1936, $9,000 payroll check in Baltimore, you signed that some day other than September 11, 1936, didn't you? Yes or no. A. There is fifty checks signed at this time in Baltimore for checks to be issued daily.

9078

Q. Will you, sir, answer questions yes or no without making a speech? A. I cannot see where I can answer the question that way.

Q. If you cannot see it, tell me that.

The Court: Mr. Witness, you can answer that yes or no and you are instructed to do so.

Mr. Wegman: I except.

A. I could, yes.

The Court: Please answer it yes or no

Mr. Wegman: May I have my exception on the record, please?

The Court: Yes.

Q. Your answer is that you did sign the $9,000 September 11, 1936, payroll check in Baltimore some day other than September 11, 1936, is that right? A. Yes.

Q. And you signed it, then, sometime prior to September 11, 1936? A. Yes.

Q. So that you signed it in anticipation of 9080
the $9,000 payroll in Baltimore? A. That check could have been distributed for any reason.

Q. Not what it could have been. Yes or no? A. In this case, yes. In this instance, yes.

Q. So that, sometime earlier than September 11, 1936, you signed a $9,000 payroll check to be cashed and distributed in Baltimore; isn't that right? A. Yes.

Q. And on the back of that check you had to write, "O. K. for cash", didn't you? A. No, sir.

Q. Where is that check? A. I will get it for you any time you want it. 9081

Q. I know, but on Wednesday you told me you were going to bring me books. Are they here?

Mr. Wegman: I object to that, if your Honor pleases. There was no request that the books be brought here today.

The Court: Sustained.

Mr. Turkus: Yes, there was. There was an invitation that he bring them.

Mr. Wegman: Not for today. A couple of trucks to bring books up here. For what purpose?

Q. When did you extend the invitation to bring the books? A. At your request, if you wanted them, and if you still want them I will give them to you.

Q. But since Wednesday you brought nothing else but these ten checks? A. Our Baltimore office was closed. It was Thanksgiving Day. Any time you want these checks you can have them.

Q. I mean the New York records or books,
9084 you brought nothing except these checks that were received in evidence on Wednesday? A. I was not asked to bring anything else.

Q. What other checks were signed down in Baltimore dated September 11, 1936, that were signed on some other date? A. There might be a few. I would not know that until I checked my records.

Q. Have you any idea approximately how much the face value was of the checks that you signed in Baltimore as of September 11, 1936 on some other date? A. Not the remotest.

9084 Q. So that never since the Raleigh has been in existence have you on a Friday been down at Baltimore when the $9,000 payroll in 1936, and now aggregating $25,000 in 1941, was distributed?

Mr. Wegman: I object to that.

A. That is a question I can hardly answer.

Mr. Wegman: Mr. Shapiro, please, when I am objecting, wait until I get my objection stated.

The Witness: I am sorry.

Mr. Wegman: I object to the question on the ground first, that it is argumentative; second, it assumes a state of facts not in evidence.

The Court: It is argumentative.

Mr. Wegman: And contrary to the evidence.

The Court: But he has answered it.

Q. Can you recall any Friday since the Raleigh went into existence when you were down at 9086
Baltimore tending to the Raleigh's business? A. I could not say.

Q. Were you down any Friday since 1935 to date? A. It is possible. Today I live in Baltimore, now.

Q. What? A. I live in Baltimore now, but that thing has been changed.

Q. Wait. When did you move to Baltimore as a permanent address? A. On Armistice Day in 1936, November 11th.

Q. That was November 11, 1936? A. I moved to Baltimore.

Q. And you have been living there ever since? 9087
A. That is right.

Q. And you do not know a single Friday that you were in Baltimore at the Raleigh plant or its office? A. When I moved to Baltimore—

Q. Do you? Answer that yes or no. A single instance? A. Mr. Turkus, will you permit me to let me answer you in a—

Q. I want you to answer yes or no when it is susceptible of yes or no A. I am sorry, I cannot answer yes or no to that.

Q. But you can answer "yes" that upon the

9088 *Carl Shapiro—Recalled for Defts.—Redirect*

basis of the payroll check, No. 592 for $132.50, because it is your signature, because you marked it "O. K. for cash," and it cleared the bank on September 11th, that tells you that you were here in New York September 11, 1936? A. Positively.

Redirect examination by Mr. Wegman:

Q. Mr. Shapiro, will you please explain to the jury and to his Honor the custom that prevailed
9089 prior to November 11, 1936, and the custom which prevailed after November 11, 1936?

Mr. Turkus: I object to it on two grounds. First, it has been covered, and, second, he says he recalls this specifically because of that exhibit. No more custom now.

The Court: Sustained.

Mr. Wegman: I respectfully except. I direct your Honor's attention to the fact that this is matter gone over by Mr. Turkus just immediately before I arose to
9090 take the witness on redirect. I submit that I have a right to have that custom explained, as it depends upon this question of where he was on a particular Friday or on any Friday, and the custom that pertains with respect to the signing of checks. That was all matter brought out for the very first time in this case on the cross-examination of Mr. Turkus which immediately preceded my arising at this time. We objected to it on the ground it was improper recross because it did not relate to matter previously testified

to. I submit that I have a right to clear the record on that point. The record is now not clear.

The Court: The Court in its discretion did not allow it in as recross, but as a resumption of original cross. That is discretionary, but the question of custom was not brought up. That is why the Court deems it to be incompetent. The witness's answers have been specific as to recollection.

9092

Mr. Wegman: I respectfully except. I submit that the custom followed by this witness has a direct bearing on recollection and on practice. Mr. Turkus asked him—

The Court: To cut this short, let him state the custom. Now you have it.

By the Court:

Q. What was the custom? A. At the time I lived in New York I always spent my week-ends home, and for that reason I knew I was in the New York office. Today the situation is reversed. 9093
As of the time that I moved to Baltimore and I always continued to spend my week-end with my family, and at that time, from then one, it was in Baltimore.

Q. Fly or take the train? A. Train from Baltimore to New York.

Q. Train time how long? A. Three hours, three hours and fifteen minutes, three and a half hours.

By Mr. Wegman:

Q. Now, Mr. Shapiro, are you the only one

9094 that signs checks in the Baltimore office? A. I am the only one that does, but someone else has a right to sign checks, too. That is Mr. Borish.

Q. In the Baltimore office check books were maintained covering both the New York account and the Baltimore account; is that correct? A. Yes, sir, that is why those numbers are changed.

Q. And in the New York office there were checks on the New York account? A. Yes, just a few, though.

9095 Q. And the checks in the New York office had a different color from the Baltimore checks; is that correct? A. That is right.

Q. So that by picking up a check and looking at it, you can tell whether the check was written in New York or was written in Baltimore?

Mr. Turkus: Just a minute. I object to that.

The Court: We have been all over that. Sustained.

9096 A. Your Honor, I can clearly bring this out. I have here checks from Baltimore and from New York, and they are different colors at this very instant. These are the colors of this very day, which signifies the different check-books in the office.

The Court: Show them to the lawyer.

Mr. Turkus: May it be noted on the record that they were produced out of a wallet by the witness?

Mr. Wegman: I ask that these be marked for identification.

Mr. Turkus: I ask that they be marked in evidence.

Mr. Wegman: Very gladly—as separate exhibits, please. Suppose we take one of each.

Mr. Turkus: No, let us take them just as they were produced.

(Two green checks received and marked Defendants' Exhibit 8 in evidence. Two pink checks received and marked Defendants' Exhibit 9 in evidence.) 9098

Q. Mr. Shapiro, these checks marked Defendants' Exhibit 8 and Defendants' Exhibit 9 are checks of what corporation? A. The New York corporation.

Q. Will you please tell us which of the two, Defendants' Exhibit 8 or Defendants' Exhibit 9, are the checks written in the New York office, and which are the checks written in the Baltimore office? A. These checks today are in the New York office.

Q. What is the exhibit number on that? A. 9099
Exhibit 9.

Q. Those are checks that are written in the New York office? A. That is right.

Q. And the others? A. These are today in the Baltimore corporation, in the Baltimore office of the New York corporation. That is Exhibit 8.

Q. Let me get that clear. I am afraid that your answer was not entirely clear. Exhibit 8 are checks— A. Of the New York corporation, that is kept in Baltimore.

9100 Q. So that if you have to sign checks of the New York corporation in Baltimore while you are in Baltimore, you sign them on— A. Exhibit 8.

Q. That is the green color? A. That is right.

Q. And if you are in New York and you sign a check of the New York corporation, that would be Exhibit 9, that is, this pink color? A. That is right.

Q. And in 1936 was there a difference in the
9101 colors? A. Yes, there was.

Q. They were not, however, the same colors? A. They were not the same colors, but I am bringing that out as a distinction of the different checks.

Q. So that if, while you were in Baltimore, you had occasion to sign a check of the New York corporation, you would have signed it on the color kept in the Baltimore office? A. That is right.

Mr. Turkus: That is objectionable. That is obvious, but not all-conclusive.

9102 The Court: Overruled.

Q. And these checks which are marked Defendants' Exhibit 7 are the color checks— A. In the New York office of the New York corporation.

Q. We are talking about 1936, and you are limiting your answer to that; is that correct? A. That is right.

Q. One other question: What was your custom in Baltimore with respect to signing checks on the Baltimore corporation for use in Baltimore for payroll and other matters, in September,

1936? A. I just recall— No, I have got that twisted. Like today I am here, I have some blank checks signed in Baltimore. Anything that would come up would necessitate being paid, they would have blank checks that are signed so they can continue with the every-day course of matters that come up. We happen to have someone trustworthy there and bonded, and that is our policy and has been since the inception of the business. There is today signed blank checks there, but never did we have a similar situation 9104
in the New York office.

Q. In other words, you never had signed blank checks in the New York office? A. No, sir.

Mr. Wegman: That is all.

Recross-examination by Mr. Turkus:

Q. The New York office, you had your niece, Naomi Shapiro, there? A. That is right.

Q. You would not leave her with a $132.50 check—yes or no? A. I would leave her anything she wanted. 9105

Q. Answer the question yes or no. A. We did not leave signed checks in the New York office.

Q. Only in the Baltimore office? A. Only in the Baltimore office.

Q. Didn't you produce these exhibits, Defendants' Exhibits 8 and 9, out of your wallet? A. That is right.

Q. Didn't you tell us that the Baltimore office is closed Thanksgiving? A. I have carried these checks for weeks.

Q. Answer the question. A. One is not relative to the other.

Q. You let the jury decide that. Don't be judge and jury. You answer questions, Mister. (Question read) Didn't you tell us that? A. Yes, I did.

Q. So that you had these checks, the green, in advance of yesterday? A. That is right.

Q. And in advance of Wednesday? A. That is right.

Q. You have been carrying them in your wallet? A. That is right.

9107 Q. And they were taken out of your wallet and they bear the numbers 9668 and 9669? A. That is right.

Q. What in the world would stop you from writing this check out in New York? A. There is ten checks you have there, and I have two checks here.

Q. Answer the question. A. That is not the case; that is not the situation.

Q. You don't decide this case. Let the jury decide it. What in the world would prevent you from right up here in New York writing out

9108 these checks, the Baltimore checks, the green colored checks, which clear through a New York bank? A. For the simple reason—

Q. Will you answer that? Is there anything in the world that would stop you? A. There is no sense to it.

Q. And what in the world would stop you when you get the pink-colored checks from the New York check book down in Baltimore, from signing it down there? A. These checks are for my own convenience, Mr. Turkus, and please let me explain that to you.

9109

Q. You can explain when Mr. Wegman, who represents the Raleigh, goes over this matter. Explain to me what in the world would stop you down in Baltimore from taking these pink-colored checks, Defendants' Exhibit 9, out of your wallet and signing them in Baltimore? A. Nothing, but I do not do it.

Mr. Turkus: All right, that is all I wanted to know. The jury can see they are both blank. May I exhibit these checks to the jury.

9110

The Court: Pass them around. All right.

Redirect examination by Mr. Wegman:

Q. Mr. Turkus said you could explain when I questioned you. I now ask you to explain.

Mr. Turkus: Explain what? Just a minute.

The Court: Be definite.

9111

Q. In response to Mr. Turkus' question as to why couldn't you sign the New York office checks in Baltimore and the Baltimore office checks in New York, since you had both kinds in your wallet, you said that you wanted to explain. Mr. Turkus said he wanted a yes or no answer, but you could explain when I questioned you. I now ask you to explain. A. These checks I carry solely in case of an emergency that I should need additional funds for one reason or another, like going out an evening with a buyer or some

unexpected expense when I am not in the office of either New York or Baltimore corporations. They are strictly for convenience of my personal self.

Q. So that if you should happen to be out in Baltimore, you have got the Baltimore blank checks to use, and if you happen to be out in New York, you have the New York checks? A. Not necessarily. That does not mean anything. I could use either one of them. That does not

9113 imply anything.

Q. And those checks that you carry with you are not checks which are ever used for the ordinary course of business? A. No, sir.

Mr. Turkus: Just a minute. That is Mr. Wegman's testimony, to which the witness has just said, "No, sir."

The Court: Overruled.

Mr. Turkus: I tried to get an objection in.

The Court: Overruled.

9114 Mr. Wegman: That is all.

JOHN J. CANEVARI, residing at 2401 Cortelyou Road, Brooklyn, New York, called as a witness on behalf of the defendant Buchalter, and being first duly sworn, testified as follows:

Direct examination by Mr. Barshay:

Q. Mr. Canevari, you are a stenographer attached to the District Attorney's office of Kings County? A. I am.

Q. And you have been also a stenographer attached to the office of Kings County District 9116
Attorney in the prior administration? A. That is correct.

Q. When were you appointed? A. I was sworn in on January 4, 1937.

Q. And you have continued since? A. That is right.

Q. You have taken statements of witnesses and defendants since you have been attached to the D. A.'s office as stenographer, have you? A. Yes, sir.

Q. All together how many times? A. Roughly 9117
I would say approximately about a thousand statements.

Q. A thousand statements. While you were in the office were you attached to what you would call the squad which goes out and leaves the office under an Assistant District Attorney and take down notes of whatever the Assistant District Attorney asks of people and the answers those persons make? A. Yes, sir.

Q. Is that so? A. That is right.

Q. Whether you were at home or in the office,

9118 *John J. Canevari—For Defts.—Direct*

if you were on duty, that was your job? A. That is right.

Q. You carried with you a notebook for that purpose? A. Yes, sir.

Q. A notebook which was kept in the regular rotation and had to be filed when finished in the office of the District Attorney? A. Yes, sir.

Q. Will you explain to this Court and jury what procedure you followed when you were acting as a stenographer for any Assistant Dis-
9119 trict Attorney on any investigation? What was your work?

Mr. Turkus: I object to this. It is incompetent, irrelevant, immaterial.

The Court: Sustained.

Mr. Barshay: Exception.

Q. You were the stenographer who took the statement of Mr. Rubin in Mr. Hogan's office of Dewey's staff on December 16, 1937, referring specifically to Exhibit Z-16 for identification; isn't that so? A. Yes, sir. I do not know the
9120 exhibit number.

Mr. Barshay: Well, Mr. Turkus gave it to me.

Mr. Turkus: Gave you the exhibit number.

Mr. Barshay: That is right.

Q. Was it not the custom for any of the witnesses you questioned or any of the defendants you questioned, to sign and swear to the statements that you transcribed?

Mr. Turkus: I object to this. It is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Barshay: Exception.

Q. On this particular night when you took the statement or the particular day, did you transcribe the statement for Rubin in Mr. Dewey's office? A. I did not.

Q. In the ordinary course of events and in the carrying out of your duties, wasn't it a fact 9122
that all your transcriptions were made when you got back to the office of the District Attorney in Brooklyn?

Mr. Turkus: I object to it. The custom is nothing in this case.

The Court: Sustained.

Q. Wasn't it the custom for witnesses and defendants who were questioned by Assistant District Attorneys and whose statements you later transcribed, not to transcribe— I cannot 9123
hear with all this noise. I withdraw the question.

Q. Wasn't it the practice that after you took the notes, acting as stenographer, for you to go back and transcribe those notes in the office? Wasn't it?

Mr. Turkus: I object to it. Custom has nothing to do with it.

Mr. Barshay: I am going to show your Honor that the custom in practice then was followed out in this case, to show

9124 that Mr. Rubin did not sign that statement because that was not the practice in the D.A's office. That is all I am trying to prove.

Mr. Turkus: So what? Nobody said he signed any statement. That is not part of the People's case. I object to this, please the Court. It has nothing to do with the case at all.

The Court: Sustained.

9125 Mr. Barshay: Exception. I just want to prove to the Court that there was no exception made in this case, that is all.

The Court: This is nothing for the jury.

Mr. Barshay: Why, of course it is.

The Court: It only tends to confuse.

Mr. Barshay: I beg your Honor's pardon.

The Court: I know the custom as well as you do. When you get a little smattering of this before the jury and some

9126 juryman goes off the handle on it—

Mr. Barshay: I make an offer of proof, your Honor, so that Mr. Turkus—

The Court: Don't make offers of proof. Ask your questions and the Court will rule.

Mr. Barshay: I have done it. I do not want to be put in the false position of having Mr. Turkus say this statement was not sworn to, and I have a right to prove that no statement is sworn to or signed by any witness, not only Rubin.

Mr. Turkus: I am not going to talk about that statement not being sworn to.

Mr. Barshay: You are not?

Mr. Turkus: Of course not.

Mr. Barshay: Witness withdrawn.

Mr. Turkus: Wait a minute. There may be something I want to bring out. Will your Honor just give me a moment?

Cross-examination by Mr. Turkus:

9128

Q. Mr. Canevari, you have worked on this Lepke case, haven't you, for some part of your time? A. I have.

Q. This Exhibit Z-16, concerning which Mr. Barshay referred, will you take a look at that (handing papers to witness)? Just sufficiently to see whether that is the statement that you typed up. A. It is.

Q. Mr. Canevari, when you typed it up, how many did you make, of Z-16, an original and how many copies? A. Original and two copies.

9129

Q. What was done with the original and the two copies? A. I filed the two copies in our regular file room, and the original was given to Mr. Dore, chief clerk, at that time.

Q. Since the file came into the possession of Mr. Joseph, Mr. Klein and Turkus for preparation, were you asked to find Z-16, the original and the two copies? A. I was.

Mr. Barshay: I object to what he was asked. Just a second.

The Court: I think I know what this is. Overruled.

9130 *John J. Cancvari—For Defts.—Cross*

Mr. Barshay: Exception.

Q. Did you find the original?

Mr. Barshay: I object to it, sir.
The Court: Overruled.
Mr. Barshay: Exception.

A. I did.
Q. Did you look for the two copies? A. I did.

9131

Mr. Barshay: I object to it.

Q. Have you ever succeeded in finding the two copies of Z-16?

Mr. Barshay: I object to it, sir.
The Court: Sustained.

A. No.

Mr. Turkus: That is all.

Mr. Barshay: I have a request for the
9132 marking of certain exhibits for identification, your Honor, referring specifically to Exhibit Z-18 for identification. It has been marked as one exhibit, your Honor, and I should like permission to have certain documents within this file marked specially as exhibits for identification.

The Court: What is this?

Mr. Barshay: These are the records which were subpoenaed by counsel for defendant Buchalter concerning the surveillance of the defendant Buchalter.

The Court: You mean police records?

Mr. Barshay: Yes.

Mr. Turkus: They contain other matters. Your Honor may recall the incident in the absence of the jury that we had with Mr. Wegman regarding the contents of those papers.

The Court: The question is now simply to mark for identification on the record?

Mr. Turkus: They are already marked 9134
up and bundled up.

Mr. Barshay: These records contain, I am informed, the reports of policemen over an extended period of time. I should like to have marked for identification now these records, if there are any in here, for September 11, 1936, September 12, 13, all the way up to the 20th, specifically.

Mr. Turkus: The whole bundle is marked for identification.

Mr. Barshay: I know that, Judge, but I don't control this bundle after the trial 9135
of this case, but neither does Mr. Turkus.

Mr. Turkus: I'll tell you what we can do, if you are worried about it. We can seal it now. We will put some sealing wax on it and seal it.

The Court: That is a good suggestion.

Mr. Barshay: Any way you please, Judge.

The Court: (to clerk) Will you get some sealing wax, Mr. Clark? Let these remain on Mr. Clark's desk until the recess, and then Mr. Turkus may take them, be-

9136

cause the clerk will assume no responsibility.

Mr. Turkus: They are under our responsibility.

The Court: But in the meantime send to the office for sealing wax. If there is none there, send out and get some at once, and see that they are sealed before the noon recess, in the presence of the Court.

Mr. Turkus: May we put this statement on record: that pursuant to the order of your Honor the police may have access to them under the Court's supervision?

9137

Mr. Barshay: That I objected to.

The Court: The policeman may have access to them with the Court's permission and in the presence of the Court.

Mr. Barshay: That I consent to.

Mr. Turkus: That is all I asked for. It was my suggestion.

The Court: Only in the presence of the Court.

9138

Mr. Barshay: Defendant Buchalter rests.

The Court: Take the defense of defendant Weiss.

Mr. Talley: I ask the District Attorney to produce Harry Cohen for examination. I wish to call your Honor's attention to the fact that at one of the preceding sessions we called upon the District Attorney to produce certain police forms known as D.D. 4's and D.D. 5's. Your Honor turned them over to the District Attor-

9139

ney to look them over and then indicate to you something with respect to their contents. I ask that that now be done.

The Court: Which do you want first, Cohen or these D.D. 4's and 5's?

Mr. Talley: I thought while waiting for Cohen to be produced your Honor might pass upon these.

Mr. Turkus: It won't take long. He will be right in.

Mr. Talley: I would like to have, if 9140
we are going to get those D.D. 4's and D.D. 5's, I would like to have them this morning.

HARRY COHEN, residing at 32 Glenmore Avenue, Brooklyn, New York, called as a witness on behalf of the defendant Weiss, and being first duly sworn, testified as follows:

Direct examination by Mr. Talley:

9141

Q. Cohen, on Thursday, October 30th of this year you were brought into the court-room while this trial was in progress, the court-room adjoining this one, and you gave your name and address in the open court. Do you remember that? A. I did.

Q. The day before that, which would be October 29th, Wednesday, you were picked up by detectives from the District Attorney's office, were you not? A. I did.

9142 *Harry Cohen—For Defts.—Direct*

Q. Where did they get you, at your home? A. That is right.

Q. Was that in Bristol Street? A. That is right.

Q. And have you been in the custody of the District Attorney's office or the Police Department since that date? A. That is right.

Q. And where have you been confined? A. Hotel Bossert.

Q. And you have been living at the Hotel Bossert since October 29th; is that right? A. That is right.

9143

Q. You sleep at the Hotel Bossert; you take your meals there; is that right? A. That is right.

Q. When before October 29th of this year did you last see Sholem Bernstein, who was a witness in this case? A. At the District Attorney's office.

Q. When?

Mr. Turkus: I object to it if that is a collateral matter that he is going into.

9144

Mr. Talley: Collateral nothing.

Mr. Turkus: Just a minute.

The Court: Will you wait just a minute?

Mr. Turkus: Don't get so perturbed.

Mr. Talley: What is your Honor's ruling?

The Court: Wait a minute.

Mr. Talley: Pardon me.

The Court: What is the question?

(Question read.)

Mr. Turkus: I object to it—collateral.

The Court: You mean it was not in this matter?

Mr. Turkus: No, it is a collateral matter, having in mind the testimony of Bernstein. On cross-examination Mr. Talley asked Bernstein about seeing this man in the District Attorney's office. He was bound by the answer as a collateral matter.

The Court: Sustained.

Mr. Talley: I except, if your Honor pleases. I never heard of a situation such as is presented to your Honor by the District Attorney. A witness is called for the prosecution here to give certain evidence. 9146

The Court: Judge, that rule of evidence is as old as the hills.

Mr. Talley: I know how old it is and I also know its application and I respectfully submit the rule that your Honor apparently has in mind has no application here at all. Here is one of the most vital things in this case, where Bernstein describes this man as an automobile and a radio thief and tells us when he saw him, and I call this man to get his version of when he saw him. 9147

The Court: Don't argue the law. Don't argue a point of evidence in the hearing of the jury. It is too plain. It is calculated to throw the jury off. No more of it.

Mr. Talley: I have no objection to your Honor dismissing the jury for the purpose of this. It is of vital importance.

9148 *Harry Cohen—For Defts.—Direct*

The Court: No, the point is too simple.

Mr. Talley: That is what amazes me at your Honor's ruling, it is so simple.

The Court: Maybe it does amaze you but it is perfectly clear to the Court. No more colloquy.

Mr. Talley: I except to your Honor's ruling, to your Honor's statements.

Q. When you saw for the last time Sholem
9149 Bernstein in the District Attorney's office, was Mr. Turkus present?

Mr. Turkus: I object to it. It is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: Exception. Will your Honor indulge me for a moment, please?

The Court: Judge Talley, insofar as your questions have relation to an attempted contradiction on a pure matter of collateral impeachment, they are out; but if you have a purpose in showing some-
9150 thing that is competent evidence that happened between this witness and someone in the District Attorney's office and it has a bearing upon the issue to be decided by the jury, you may do that.

Mr. Talley: I cannot do that, your Honor, unless I can get the time fixed when he saw Bernstein in the District Attorney's office. I have got to get the time fixed, the occasion.

The Court: Precisely what is it you wish to show?

Mr. Talley: The witness Bernstein testified that this man stole the automobile which was used in connection with the killing of the deceased—

The Court: I know what he testified to. But just what do you want to show?

Mr. Talley: You will have to let me make this statement to you to be intelligible.

The Court: All right.

Mr. Talley: He testified that he had 9152
not seen this witness since he himself was taken into custody in May of 1940. That is not collateral matter. That is fundamental. This man, he says, was an accomplice of his in the murder.

The Court: Don't argue it. Just tell me what you want to show.

Mr. Turkus: Judge Talley is stating things on the record where he is completely involved. He is getting all balled up.

The Court: The Court cannot rule in-
telligently unless the purpose of the pro- 9153
posed evidence is lucidly and calmly stated.

Mr. Talley: I am about to state it now. I will state it as simply as I can. Bernstein says he has not seen this man since May, 1940. I have reason to believe that this witness can testify that he saw Bernstein in the District Attorney's office, in the presence of Mr. Turkus, this year, 1941, a year after the witness testified and tried to make this jury believe since he has seen this witness Cohen. That

9154 certainly is not collateral matter. That goes right down in the essence of the case. I certainly have a right, if a false statement of that kind is made by an accomplice witness, to contradict him. It is not collateral.

The Court: Is that all?

Mr. Talley: I have reason to believe the testimony given by Bernstein with respect to this witness' participation in the theft of that car was false and that this witness will tell us so.

9155

The Court: On the former point you are bound by the rule as to collateral evidence. You are bound by the limitation which is established thoroughly by law. On the latter point you may inquire.

By Mr. Talley:

Q. Did you see Mr. Turkus in the District Attorney's office with respect to this case?

9156 Mr. Turkus: Object to it; your Honor has just sustained it.

The Court: That is what I will not permit but I will permit you to inquire into the other matter.

Mr. Talley: Will you just let me get it plain without attempting, as your Honor designates it, to argue?

The Court: No, there has been enough of it and I have ruled.

Mr. Talley: Exception to your Honor's ruling.

9157

Q. Did you make a statement to the District Attorney in reference to this case, in May of 1941, this year? A. I did.

Q. And who was present when you made the statement?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: Exception.

9158

Q. In May of 1941 did you see Sholem Bernstein in the District Attorney's office?

Mr. Turkus: That has been objected to and sustained already.

The Court: Don't persist in that. You are out of order.

Mr. Talley: Exception.

The Court: I respect you, Judge Talley, and I want to show you every possible courtesy. Please don't persist in that. The Court is having quite a strain trying this case.

9159

Mr. Talley: Counsel is having quite a strain keeping up with your Honor's rulings, let me assure you of that.

The Court: Very well. As long as you keep within the rulings you will have no strain. You may cross-examine as to any matters testified to by Sholem Bernstein in his direct, in connection with this witness— I mean you may examine.

Mr. Talley: One of the things that Sholem Bernstein testified to was the time he last saw this witness.

9160

The Court: Please don't argue any further.

Mr. Rosenthal: May I take an exception to that ruling?

The Court: Which ruling?

Mr. Rosenthal: To the ruling that we may only cross-examine this witness in so far as—

The Court: I did not say cross-examine. I say you may examine and I

9161

did not say "only" either. That is what made me wonder what you are excepting to, if you are excepting to the Court's suggestion as to what may be the subject of examination. The Court is not making that an exclusive ruling. The questions will be ruled upon as asked but once ruled upon counsel will be in order and take his exception and let it go at that and not engage in wrangling.

Mr. Turkus: May the record show, your Honor, there has been no exclusion

9162

of cross-examination?

Mr. Rosenthal: I cannot hear you.

Mr. Turkus: May the record show there has been no exclusion of cross-examination yet by any of the defendants?

The Court: It is not cross-examination.

Mr. Turkus: No, it is direct examination by Mr. Talley but there are other counsel in the case who may cross-examine, and may the record indicate—

The Court: It is perfectly plain that the Court, by slip of the tongue, at one time said "cross-examine". This was

almost immediately corrected. Don't make a mountain out of a mole hill.

By Mr. Talley:

Q. When you were brought to the District Attorney's office, did you talk with Mr. Turkus? A. I did.

Q. And was Bernstein present when you talked with him?

Mr. Turkus: That is the fourth time, 9164
Judge.

The Court: Yes. The jury is excused.

(The jury retired from the court-room.)

The Court: The court-room will remain in order until the Judge comes back. Counsel will remain in their places. Judge Talley will think it over.

(Judge Taylor retired from the court-room.) 9165

(Judge Taylor returned to the bench.)

The Court: Sometimes when we get old we incline to be quarrelsome but nevertheless with age comes wisdom and I am not dealing with the rashness of youth. I am dealing with a man I respect highly and who I think respects me and I think that possibly if I just send for the jury and resume, it won't be neces-

sary for me to say anything more except this, that when rulings are made and exception taken, there must be no repetition. When a somewhat younger lawyer at an earlier stage of the trial repeated a question after the Court had ruled, the Court allowed itself to become unduly annoyed. I am not going to permit myself to be so annoyed again. Bring the jury back.

Mr. Talley: Will your Honor look at
9167 the close of the cross-examination of Bernstein, one of the last questions asked on the cross-examination of Bernstein with respect to when he last saw this witness? If your Honor will look at that, my position might be a little clearer to you.

The Court: That was on October 30th?

Mr. Talley: October 30th, yes, sir.

The Court: Mr. Turkus, have you volume two?

Mr. Turkus: This is volume one.

The Court: I cannot bring all these
9168 books in all the time. They are getting too voluminous. You mean your cross-examination?

Mr. Talley: Yes, sir.

The Court: That is in volume one. That was on October 28th, beginning with page 741, ending with 745. You mean the last question. There are several pages will have to be reviewed. I will read them now.

Mr. Talley: There is only one question and answer with which we are concerned.

The Court: Not the last one. The

last question and answer was: "That was four years after Rosen was killed which was in September of 1936."

Mr. Turkus: That is a different Cohen, Judge. That Cohen from 741 to 745 is a different Cohen, not this witness Cohen.

Mr. Talley: Bernstein is the testimony to which I am referring. The question was, "When did you see Muggsy Cohen last?" He said, "I have not seen him since I was picked up." 9170

The Court: I have to refer back to see what he is talking about.

Mr. Talley: That is what he is talking about.

The Court: If you will just be patient. Is this Irving Cohen, this witness?

Mr. Talley: No. This witness has been referred to by the name of Muggsy during part of the examination. There is only one Cohen being talked about.

Mr. Turkus: You spoke about more than one. 9171

Mr. Talley: That is Muggsy Cohen who he said stole the car.

Mr. Turkus: Nobody can get along with you. If you want to hold the floor go ahead. I am trying to help you.

Mr. Talley: I may have the minutes and, if you will indulge me, I will point out the question.

The Court: Begin at page 743 and read on to and including 745. You will see, "Were you asked those questions and did

you make those replies on the trial of Irving Cohen in Monticello?"

Mr. Talley: No, no, that is not it at all, sir.

Mr. Turkus: That was your cross-examination.

Mr. Talley: That was the Gangi Cohe trial up in Monticello.

The Court: Pardon me, I am referring to something you asked me to look at.

9173 I found something that is right here. May I make a suggestion that is practical? If you desire, as I thought you said, to have this witness contradict any testimony by Sholem Bernstein in relation to the alleged murder car, why don't you take that up now because we have only eighteen minutes to go before the recess and then during the recess you can straighten this out on the record as to the rest of your examination.

Mr. Talley: The only thing we have

9174 to straighten out, sir, is to find that question that I put to him and his answer. We can do that in two minutes.

The Court: I think I would go ahead with the other and do the other and read the record during the noon recess.

(The jury returned to the court-room.)

By Mr. Talley:

Q. After you were questioned by Assistant District Attorney Turkus, Cohen, you were not put under arrest, were you? A. No, sir.

 9175

Q. Were you questioned about the killing of Joseph Rosen?

Mr. Turkus: Objection as to form. It is incompetent.

Mr. Talley: I have a right to show it was in connection with this case. That is all I want.

The Court: Overruled.

Mr. Turkus: The question was, was he spoken to about the automobile. 9176

Q. What is your answer, Cohen? A. Please repeat that.

(Pending question read.)

A. I wasn't.

Q. You were not? A. Was not.

Q. What were you questioned about? A. About the automobile.

Q. About the automobile that was used in the killing of Joseph Rosen? A. There was not anything mentioned about Joseph Rosen, just about the automobile on this particular day that was stolen. 9177

Q. Yes, and what particular day was that? A. I don't remember the exact date.

Q. Was it about the 11th of September, 1936? A. I think it was.

Q. And you told them all you knew about that, did you? A. I did.

Q. And after you told them what you knew about that, you were allowed to go home? A. I did.

9178 *Harry Cohen—For Defts.—Direct*

Q. You were not taken in custody from that time up to the day before you were brought here in this case which was October 30th of this year, last month? A. That is right.

Q. Have you ever been charged with the theft of the automobile that was used in the killing of Joseph Rosen?

Mr. Turkus: Objection. What has this got to do with the issue of the case?

9179 Mr. Talley: Everything.

The Court: Overruled.

A. I wasn't.

Q. Have you ever been charged with participating, being a principal or an accomplice, in the murder of Joseph Rosen? A. I was not.

Q. On what charge are you being held now? A. No charge to my knowledge.

Q. No charge to your knowledge? And since you have been held you have not been in any prison, have you? A. I was not.

9180 Q. You have been in the Hotel Bossert?

Mr. Talley: Now, with due deference to the Court, I ask permission to ask this witness when he was in the District Attorney's office but we have had so much confusion about that that I am putting it to your Honor before I ask the witness.

The Court: Will you wait just a minute? He said, didn't he, that in May, 1940, he made a statement in the District Attorney's office?

Mr. Talley: May, 1941, I am quite sure.

The Court: You have the date?

Mr. Talley: May, 1941. If your Honor will give me about three minutes, I will find that question and answer. May we just keep this witness on the stand?

The Court: Surely.

Mr. Talley: For that length of time?

The Court: Yes.

Mr. Talley: Will your Honor look at page 696 of the record, 696 and 697?

The Court: Yes. 9182

Mr. Talley: May I read them to you as I was going to do when the record was taken away from me?

Mr. Turkus: Do you want to read them to the Judge?

Mr. Talley: I did at the time you grabbed it.

Mr. Turkus: I think he reads English.

The Court: The Court is already reading it. Proceed with your questioning.

Mr. Talley: In view of your Honor's ruling, which I accept with great respect, 9183 having noted my exception, I accept because I must; I accept it because I think it is erroneous; I have no further questions unless your Honor will let me pursue that line.

The Court: Do you propose to cross-examine as to any of the matters brought out by the District Attorney in which this witness' name was mentioned?

Mr. Talley: Not at this time.

The Court: By Bernstein. You have a right to.

9184 Mr. Talley: Your Honor has denied me the right that I insist is mine and was the main reason of my calling this witness.

The Court: There is testimony here as to the alleged stealing of the automobile.

Mr. Talley: Yes, sir.

The Court: Do you wish to cross-examine on it?

Mr. Talley: Not at this stage of this

9185 case.

The Court: All right. In reference to the stealing of the radio or any of the collateral circumstances?

Mr. Talley: I have no more questions at this time. It may develop later on but at this time I do not propose to question this witness.

The Court: That is all right.

(To Witness) You may leave the stand.

Mr. Turkus: Just a minute, your Honor, there are other defendants that

9186 may want to ask—

The Court: Does anybody else want to examine him? There is nothing to cross-examine on, is there?

Mr. Turkus: I know what this picture is very well.

The Court: Anybody else wish to question?

Mr. Climenko: Not I, your Honor.

Mr. Rosenthal: I have no questions.

Mr. Turkus: As to the District Attorney I will ask your Honor to recess now

9187

It is five minutes before the scheduled time.

The Court: There is practically nothing here.

Mr. Turkus: I know, but there is something I may want to make in the way of a motion or there is something I may want to do. I ask for a recess at this time.

Mr. Talley: May I ask the Court to direct that neither the District Attorney nor anybody else interview this witness while he is on the stand. I suggest that the examination proceed now. It cannot be very lengthy.

9188

The Court: Proceed.

Mr. Talley: According to your Honor's limitation rather than have this recess.

Mr. Turkus: The first motion is to strike out his entire testimony.

The Court: Denied.

Mr. Turkus: As having no relevancy in the case.

9189

Cross-examination by Mr. Turkus:

Q. You were in the District Attorney's office, Cohen, on April 30, 1941, weren't you? A. I was.

Q. How many days after that was it before you were taken to Talley's office? A. Between three and four weeks.

Q. In the District Attorney's office you made an affidavit, swore to it and signed every page, didn't you? A. I did.

Q. Speak up so everybody can hear you. After

9190 the signing of the affidavit in the District Attorney's office, were you at Amboy Street near East New York Avenue? A. I was.

Q. Did a man drive up in an automobile and introduce himself to you? A. That is right.

Q. Is that the man who brought you up to Talley's office at a later time? A. That is right.

Q. Who is that man? A. Sidney Weiss.

Q. The brother of the defendant Mendy Weiss, is that right? A. That is what he told me he

9191 was.

Q. When Sidney Weiss came over in that automobile or called you over to the automobile, didn't he? A. He did.

Q. Speak up so we can hear you. Your answer is "He did". In that automobile were two other men besides Sidney Weiss, weren't there? A. There was.

Q. You did not know those two other men? A. Did not.

Q. And Sidney Weiss said to you, didn't he, "I heard that you were in the District Attorney's

9192 office"?

Mr. Talley: I object, if your Honor pleases, upon the ground this is not proper cross-examination and unless the District Attorney is making this witness his own witness, he cannot proceed with these questions under the theory of cross-examination.

The Court: You will have to make him your own witness on that.

Mr. Turkus: As to that conversation?

Mr. Talley: As to all of these matters.

Mr. Turkus: You see, Judge, that is why I asked for a recess. I wanted to study this direct testimony.

The Court: There is not much to study.

Mr. Turkus: Well, I know, but it is a maneuver and I wanted to study it. I knew what I was doing when I asked for time. I have no hesitation in bringing out everything that is pertinent in the case but I wanted five minutes to study the record that was apparent needed studying and 9194
that was denied me. Now I ask for the recess now. There is only two minutes to go.

The Court: He has testified briefly that he was brought in for identificatio.. on October 30th. We all know that. That identifies him as Muggsy. Then he said in May, 1941, he made a statement in the District Attorney's office. This was allowed in because I thought maybe they wanted to try to confront him with a statement or to use it at the proper time if and 9195
when it would be made competent under the rules of evidence. Then he said he was not questioned about the killing of Rosen; he was questioned about the stealing of the auto; that he has never been charged with the murder of Rosen or held for the theft of the auto. There it rests.

Mr. Turkus: I move to strike it out. That motion was denied.

The Court: That stays in the record. But you are now making this man your own witness.

9196 *Harry Cohen—For Defts.—Cross*

Mr. Turkus: Well, it is now a minute to go and I ask for the recess.

The Court: Go ahead.

Mr. Cuff: I join in the request, Judge, for personal reasons.

The Court: I am not playing favorites.

Mr. Turkus: Weiss' lawyer just asked for the recess.

Mr. Cuff: You might call me by my name. I think you know my name.

9197 Mr. Turkus: I did not mean it that way.

The Court: That request is, I understand, on a different basis. That is on a purely personal basis.

Mr. Cuff: I said that.

Mr. Turkus: I wanted to show there was a dual request.

The Court: When Mr. Cuff wants a recess he can get it at any time during the trial, for personal reasons. Then we will take the lunch now.

Gentlemen of the jury, please do not discuss the case, let nobody talk to you about
9198 it. Keep your minds open. We will resume promptly at 1:30. Everybody remain seated while the witness leaves the stand.

Mr. Talley: Your Honor's direction to this witness and his attendance on the District Attorney, I trust has to be given?

The Court: Yes, but the Court has no supervision. I don't value those instructions. They are too easily violated.

Mr. Talley: But your Honor can give them.

Mr. Turkus: They will not be violated on this end.

The Court: I give them but I assume no responsibility.

Now the jury out the other door.

Defendants are remanded.

(A recess was thereupon taken to 1:30 P. M.)

9200

(Afternoon Session. Trial Resumed.)

HARRY COHEN, resumed the stand, and further testified, as follows:

Mr. Turkus: The recess provided me sufficient time to study the purport of the direct examination. At this time, there is no further cross-examination by the District Attorney. I say, "At this time".

Redirect examination by Mr. Talley: 9201

Q. Cohen, just before recess the District Attorney asked you if you had signed a statement in the District Attorney's office, do you remember that? A. Yes, sir.

Q. You said you did? A. Yes, sir, that is right.

Q. When was that statement signed? A. Around about six months ago; I do not remember the exact date.

Q. Do you make that about May, do you think, this year? A. I guess so.

9202 *Harry Cohen—For Defts.—Redirect*

Q. Who was present at the time you made that statement to the District Attorney?

Mr. Turkus: That is the same question we went over on direct.

The Court: That very thing was sustained.

Mr. Talley: May I say this to your Honor--

The Court: No.

9203 Mr. Talley: I respectfully except to your Honor's ruling on the ground that the statement—

The Court: Not upon the ground—the grounds need not be stated.

Mr. Talley: I take exception to your Honor's ruling which refuses to allow me to state the grounds of my objection. I thought your Honor might sustain the objection.

The Court: The jury may leave.

Mr. Talley: I ask you not to let this jury go.

9204 The Court: The jury may leave.

(The jury leaves the court room.)

The Court: You may now finish what you wanted to say.

Mr. Talley: This question, I respectfully submit, is made competent by reason of the fact that the door was opened to it for examination along that line by the District Attorney when he asked this witness if he had not made a statement and an affidavit. He said, "In his office."

9205

That having been introduced by the District Attorney, I submit I have a right to inquire into the circumstances under which that statement was made.

The Court: The ruling on the last question stands.

Mr. Talley: I respectfully take exception to your Honor's ruling. That is all I can do.

Mr. Turkus: May I say this for the record—

9206

The Court: No.

Mr. Turkus: It is important that we have the record straight.

The Court: Go ahead.

Mr. Turkus: He said, "Under the circumstances under which it was secured." That was not the purport of that question. The purport of the question was to attempt to impeach Sholem Bernstein on a collateral matter, not "circumstances".

Mr. Talley: The statement had nothing to do with the impeachment of Sholem with what I claim.

9207

The Court: The Court understands the situation. It was not the first time that the Court has faced it. It has gotten used to it. Bring back the jury.

Mr. Talley (Addressing Mr. Turkus): Are you finished?

Mr. Turkus: Judge Talley begins to ask a question of me in the absence of the jury. He says, "Are you finished?" He is on re-direct. I will be finished when he gets through with his re-direct.

9208 *Sidney Weiss—For Defts.—Direct*

(The jury then returned to the court room.)

Mr. Talley: I have no further questions of this witness.

SIDNEY WEISS, residing at 10 Monroe Street, Borough of Manhattan, City and State
9209 of New York, called as a witness on behalf of the defense, after being duly sworn, testified as follows:

Direct examination by Mr. Talley:

Q. Are you a brother of Emanuel Weiss, one of the defendants on trial in this case? A. Yes, sir.

Q. Who do you live with? A. My mother and my brother.

Q. Your brother is living with you? A. Sammy Weiss.

9210 Q. Sammy Weiss, the boy who is in the Army? A. Yes, sir.

Q. Where do you live? A. Number 10 Monroe Street, New York.

Q. How long have you been living at number 10 Monroe Street, Manhattan? A. Six and one-half years.

Q. Do you remember the night of the 12th of September, 1936? A. Yes, sir, I do.

Q. Did you see your brother Mendy Weiss on that day or evening? A. Yes, sir, I did.

Q. In the evening, at what time did you see him? A. At ten o'clock.

9211

Q. Where did you see him? A. In my brother Sammy's store.

Q. Where was your brother Sammy's store? A. At that time it was on East Broadway.

Q. What kind of a store was it? A. An automobile store.

Q. Will you relate the circumstances under which you saw your brother Mendy at that time, on this Saturday night, September 12th? A. Yes, sir.

Q. What are the circumstances under which you saw your brother Mendy that night? A. We were going out to celebrate my birthday, my twenty-sixth birthday.

9212

Q. When was your birthday? A. My birthday, September 13, 1910, I was born.

Q. You were born on the 10th, this was your twenty-sixth birthday? A. Yes, sir.

Q. On Sunday, the 13th? A. Yes, sir.

Q. Was a party arranged to celebrate it? A. Yes, sir, it was.

Mr. Turkus: I object. Let the witness testify.

9213

Mr. Talley: That is what I called him for.

Q. Will you state what happened on that night, did you meet him at Sammy's store? A. Yes, sir.

Q. Who was present at Sammy's store that night? A. My brother and Sammy.

Q. Were you there before they came? A. My mother and Sammy were there before I came

Q. Was Mendy there when you arrived or did he come later? A. He came later.

9214 *Sidney Weiss--For Defts.—Direct*

Q. And what time did he come? A. Around ten o'clock.

Q. Who was with him when he came? A. His wife and Dottie.

Q. What is Dottie's other name? A. Eisenstein.

Q. Eisenberg—is she a friend of Mrs. Weiss?

Mr. Turkus: Just a minute. There have been two names given, one by the witness and one by the lawyer.

9215 Mr. Talley: Let the witness tell us the name. What is Dottie's name?

The Witness. Dottie Eisenstein, I think.

Mr. Turkus: May we have it spelled by the witness.

Q. Can you spell it for the District Attorney? A. No, sir.

Q. Did you go any place from there? A. Yes, sir.

Q. Where did you go? A. To a restaurant.

9216 Q. Who was in the party? A. Who was in the party?

Q. Yes, who was in the group that went from Sammy's store to the restaurant? A. My brother, Mendy, myself, my mother, Blanche, and Dottie.

Q. Did you go by automobile from Sammy's store? A. Yes, sir, we did.

Q. Where did you go? A. To the restaurant.

Q. Where was the restaurant? A. The Brass Rail.

Q. Where was that? A. 7th Avenue and 49th Street.

Q. Did you all go in there? A. Yes, sir, we did.

Q. Who was driving the car you went there with? A. My brother Mendy.

Q. Did he park the car somewhere before you went in the restaurant? A. We got out of the car and he went to park the car.

Q. Did you wait for him in front of the Brass Rail Restaurant? A. Yes, sir.

Q. Then did you all go in and have something to eat and drink? A. Yes, sir.

9218

Q. At what time do you say it was Saturday night when you got to the Brass Rail Restaurant? A. Sometime around 10:30.

Q. How long did you stay there? A. It was over an hour.

Q. That would bring you around past 11:30, would it? A. I think a little latter than that.

Q. Nearer to 12:00 o'clock? A. That is right.

Q. Where did you go when you left the Brass Rail? A. We went to a movie.

Q. Do you know what movie it was? A. Yes, sir, the Capitol movies.

Q. At the Capitol Theatre? A. Yes, sir. 9219

Q. That is about a block away from this Brass Rail? A. A block or two away.

Q. Did you walk from the restaurant to the Capitol Theatre? A. Yes, sir.

Q. Were you going to the midnight show there? A. Yes, sir.

Q. Did you all go into the Capitol Theatre? A. Yes, sir, we did.

Q. Did you see the entire performance? A. Yes, sir, we did.

Q. What time was it when you came out of

the Capitol Theatre? A. I would say some time after 2:00.

Q. After 2:00 o'clock in the morning? A. Yes, sir.

Q. And these same persons were with you in the theatre and came out of the theatre with you? A. Yes, sir.

Q. Then, did somebody go after the car? A. My brother Mendy went for the car.

Q. You waited for him in front of the theatre? A. Yes, sir.

9221 Q. Then he came back in the car? A. Yes, sir.

Q. Did you all get into the car again? A. Yes, sir.

Q. Was any suggestion made by anybody about taking a ride? A. I think it was made by my mother.

Q. What did she say? A. It was a little warm, and she said, "We will take a ride."

Q. And did you take a ride? A. Yes, sir.

Q. Where did you go? A. I think we took a ride through the park.

Q. Through Central Park? A. Yes, sir.

9222 Q. After you drove around Central Park, where did you go? A. We went downtown.

Q. To another restaurant? A. Yes, sir.

Q. What restaurant did you go to? A. To Ratner's Restaurant on Delancey Street.

Q. Ratner's is a favorite and popular place over there on the East Side? A. Yes, sir.

Q. It is a great restaurant for Jewish people down there, isn't it? A. Yes, sir.

Q. They specialize in Jewish types of food? A. Yes, sir.

Q. Were the same persons in the group at this restaurant? A. Yes, sir.

Q. And how long did you stay there? A. Close to one hour.

Q. And what time do you say you came out of the Capitol Theatre, that was about 2:00 o'clock, what did you do? A. It was after 2:00.

Q. What time was it when you got down to the restaurant downtown? A. It was almost 3:00 o'clock.

Q. You went into the restaurant of Ratner's and had something to eat and drink there, did you? A. We had something to eat. 9224

Q. There were no drinks served there? A. No, sir.

Q. How long do you say you remained in Ratner's Restaurant? A. Close to an hour.

Q. That would bring it up to what time when you were leaving? A. I would say something around 4:00 o'clock, before 4:00 o'clock.

Q. Where did you go then? A. I went home.

Q. With your mother? A. Yes, sir.

Q. Who drove you home? A. My brother Mendy.

Q. Was Mrs. Weiss and Dorothy in the car when you took your mother home? A. Yes, sir. 9225

Q. That was to Monroe Street? A. Yes, sir.

Q. Did you remain at your mother's house or did you go out— Question withdrawn.

Q. Just you and your mother went up to your house, is that right? A. That is right.

Q. Where did Mendy go? A. He went home.

Q. Still driving the car? A. Yes, sir.

Q. When you last saw him, was his wife and Dottie with him? A. That is right.

Q. And you left them at the door of your home in Monroe Street? A. Yes, sir.

Q. And you and your mother went upstairs and went to bed? A. Yes, sir.

9226 *Sidney Weiss—For Defts.—Cross*

Q. At what time would you say it was when you left Mendy and Mrs. Weiss and Dottie? A. 4:00 o'clock.

Q. About 4:00 o'clock on Sunday morning, September 13th, is that right? A. Yes, sir.

Q. Did you see Mendy again on that Sunday after you parted with him at 4:00 o'clock in the morning? A. No, sir.

Q. Was this party for your birthday a special occasion? A. Yes, sir.

9227 Q. Why? A. It was my twenty-sixth and we were celebrating.

Q. Was it arranged by your mother? A. Yes, sir.

Q. And at her suggestion, was it her suggestion? A. Yes, sir, that is right.

Q. Had you ever celebrated your birthday before that twenty-sixth by going out to a restaurant and a movie? A. No, sir.

Q. Was there a particular reason for this one, did you and Mendy have a little row before this? A. Yes, sir.

9228 Q. Did your mother suggest that he give a party and make up with you, is that how it happened? A. Yes, sir.

Mr. Turkus: May this paper be marked for identification.

(Received and marked People's Exhibit Z-26, for identification.)

Cross examination by Mr. Turkus:

Q. What is your business? A. Music business.

Q. Where is it located? A. 58 Lewis Street, Manhattan.

Q. What is the name of the company? A. The Klick Vending Company.

Q. How do you spell Klick? A. K-l-i-c-k.

Q. How many years have you been in the music business with the Klick Vending Company? A. I own the business.

Q. How many years have you owned the business? A. Around seven years.

Q. Now, in addition to music machines, do you 9230
rent any other machines from the Klick? A. Yes, sir.

Q. What kind of machines? A. Pin games.

Q. Pin ball machines? A. Yes, sir.

Q. Music machines, what are they—are they jute boxes? A. Yes, sir.

Q. Distributed in saloons, bars and grills? A. And luncheonettes, and candy stores.

Q. And the pin ball machines, where are they located? A. In candy stores.

Q. Your efforts are limited to New York City, aren't they? A. No.

Q. Are they up in Sullivan County? A. I 9231
never went there.

Q. Did you ever have Klick Vending machines in Sullivan County? A. No, sir.

Q. Who else was in this Klick Vending Company besides yourself? A. I own the business myself.

Q. No one else interested? A. No, sir.

Q. How many jute boxes have you? A. Sixty.

Q. Every one of them in New York City? A. Well, a few in Brooklyn.

Q. How many in Brooklyn? A. Not many.

9232 *Sidney Weiss—For Defts.—Cross*

Q. Well, how many is that? A. Around ten, I would say.

Q. The ones you have in Brooklyn, where are they? A. In saloons, bars and grills and candy stores.

Q. In what bars and grills have you got these jute boxes? A. Well, not the bars and grills.

Q. Tell me. You own the business and certainly ought to know that. A. Off-hand, I can tell you one on Broadway and Driggs; Have-
9233 meyer, right off Broadway; one on Third Avenue and sixty some odd street.

Q. Where? A. Sixty some odd street. I cannot remember them all off-hand. I can give you my files to show you.

Q. Have you any around Borough Hall? A. No, sir.

Q. Any around Pineapple Street? A. No, sir.

Q. How many pin ball machines do you say?

Mr. Talley: I object to this as incompe-
tent, immaterial and irrelevant, has no
9234 bearing upon anything brought out on direct examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Around ten.

Q. Where are they located? A. Different parts of the city.

Q. In Brooklyn? A. One.

Q. Where is that? A. Havemeyer and Grand Street Extension, in Williamsburg.

Q. Do you know Jack Drucker? A. No, sir.

Q. You never met him? A. No, sir.

Q. Did you have any business with him in slot machines up-State? A. I never had any slot machines.

Q. Pin ball machines? A. Not up-State.

Q. Is your telephone number "Drydock 4-8150"? A. The telephone number is Gramercy 5-8630.

Q. Was it ever "Drydock 4-8150"? A. Yes.

Q. When? A. Before the number was changed.

Q. When was the number changed? A. Over a year or a year and a half ago. 9236

Q. Do you know a man named Yiddle Lorber? A. Yes, sir.

Q. How long have you know Yiddle Lorber? A. All my life.

Q. Do you know a man named Engelson? A. Yes, sir.

Q. How long have you known him? A. A number of years.

Q. Did you meet him through Mendy?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. 9237

The Court: Objection overruled.

Mr. Talley: Exception.

A. I met him through Abe.

Q. Abie Lorber? A. Yes, sir.

Q. What business were you in before you went into jute boxes and pin balls? A. No business.

Q. How old were you when you left school? A. Around sixteen.

Q. From sixteen to twenty-four, what did you do? A. I was in no business. I worked for different concerns.

9238 *Sidney Weiss—For Defts.—Cross*

Q. What kind of jobs did you have? A. When I left school I was an errand boy, and I worked for a dress house; I worked for a trucking concern.

Q. For eight years you did these things? A. Off and on, yes, sir.

Q. Who put you in the jute box and pin ball business?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

9239 The Court: Objection overruled.

Mr. Talley: Exception.

A. Nobody; I went in myself.

Q. Did you have any partners? A. No, sir.

Q. No associates? A. No, sir.

Q. Yet you operated those ten machines? A. Sixty music machines.

Q. I show you People's Exhibit Z-26, for identification, and ask you if you can identify that picture. A. Yes, sir.

Q. Whose is it? A. My brother Sammy.

9240 Q. Did you take that picture? A. No, sir.

Q. When did you see it before you just saw it now? A. I never seen it.

Q. This is the first time you have seen that picture? A. Yes, sir.

Q. Is that of your brother Sammy when you testified about when Judge Talley was asking you questions? A. Yes, sir.

Q. You did not snap that picture? A. No, sir.

Q. How far is number 58 Lewis Street from Lewis and Grand? A. About two and a half blocks.

Q. And from Lewis and Cannon? A. From where?

Q. From 58 Lewis Street? A. Lewis and Cannon? There is no Lewis and Cannon.

Q. How far is it from this Gold candy store? A. Gold?

Q. Yes. A. Where is Gold's?

Q. Lewis and Grand, up near the police station, don't you know that? A. Lewis and Grand —police station—there is no police station there.

9242

Mr. Talley: Are you talking about Manhattan or Brooklyn?

Q. Manhattan, near your place? A. My place is Lewis near Delancey Street.

Q. How far away from Lewis and Grand Street is it? A. About two and a half blocks.

Q. Do you know Gold's candy store? A. No, sir.

Q. Is there a restaurant, or was there a restaurant on Lewis and Grand? A. Yes, sir.

Q. What is the name of that restaurant? A. I don't know. 9243

Q. Was it a restaurant where you got service —not a cafeteria? A. It was a bar.

Q. And a restaurant, where you got service by a waiter, somebody waiting on the tables? A. I don't know.

Q. Were there any hangers-on in that Klick Vending Machine Company?

Mr. Talley: I object to it as improper cross examination, and as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what you mean by hangers-on.

Q. Did you ever see Bugs Workman there? A. No, sir.

Q. Did you know him? A. Well, I seen him, but I did not know him.

Q. Where did you see Charlie the Bug? A. I was born and brought up on the East Side; I lived all my life on the East Side.

Q. You did not go to school with the Bug? A. No, sir, I am not sure; I seen him.

9245 Q. Where did you see him? A. I used to pass in a car and seen him on Cannon Street.

Q. Cannon and where? A. Cannon and Stanton.

Q. Did you ever see him with Mendy? A. Not as I can recollect.

Q. Did you ever see him with Allie Tannenbaum? A. I don't know Allie Tannenbaum.

Q. You know Little Farvel? A. Yes, sir.

Q. How long have you known Little Farvel? A. For a number of years.

Q. How many years is that? A. Say around ten years.

9246 Q. Where did you see Little Farvel?

Mr. Talley: I object to that as having no bearing, not proper cross-examination, improper, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I seen him downtown.

Q. In the ten years you have known little Farvel, did you know him socially? A. Well, yes, I knew him, not socially; I was born and brought up on the East Side.

Q. I know that, but in the ten years did you ever go out with him socially? A. Well, I would not say—no, I did not go out with him; I knew him.

Q. Were you ever in his company? A. Yes, sir.

Q. How many times have you been in the company of Farvel Cohen? A. I could not say.

Q. More than ten? A. Well, yes.

Q. More than twenty? A. I don't know; lots of times I was.

9248

Q. Can you give me an estimate? A. No, sir.

Q. It was more than ten at any rate? A. Yes, sir.

Q. On those occasions when you were in the company of Little Farvel, was Mendy with you? A. A few times.

Q. And was Charlie the Bug with you on those occasions?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, improper cross examination.

9249

Q. Who else besides Mendy was with you and Little Farvel?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, improper cross examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Well, I don't remember any particular times seeing them together. I know him for a number of years. I was actually brought up in the neighborhood.

9250 Q. We have this all now. A. I could not tell you how many times I seen him, but it was a number of times.

Q. Who else besides Mendy was with you and little Farvel? A. Well, I cannot remember any particular time.

Q. Let us see if I can refresh your recollection. Did you Louis Kravitz? A. No, sir.

Q. Sometimes known as Louis Kay? A. No, sir.

9251 Q. Did you know Sam Feinstein? A. No, sir.

Q. The fellow they call Toots Feinstein? A. No, sir.

Q. Did you know Izzy Bartfield? A. No, sir.

Q. Did you know Sidney Sales, Shimmy? A. Yes, sir.

Q. Did you ever see Mendy and Bartfield and Shimmy together?

Mr. Talley: Objected to as improper cross examination; incompetent, immaterial and irrelevant.

9252 The Court: Objection overruled.

Mr. Talley: Exception.

A. I think I seen them.

Q. Were you out with Shimmy? A. No, sir.

Q. Danny Fields, did you know him? A. Yes, sir.

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. How about Benny Levine?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Do you know him? A. No, sir.
Q. Well, now Dimples—Moe Wolinsky?

Mr. Talley: I object.
The Court: Objection overruled.
Mr. Talley: Exception.

9254

Q. Did you know Dimples? A. No, sir.
Q. Did you know Tom Kopplewitz? A. No, sir.
Q. You did not know Cuppie? A. No, sir.
Q. You never met Jake Drucker?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.
Q. Did you know Paul Berger? 9255

Mr. Talley: The same objection.
The Court: The same ruling.
Mr. Talley: Exception.

A. No, sir.
Q. Didn't you ever work for Paul Berger? A. No, sir.
Q. You told us you were on a truck, do you remember? A. I worked for a trucking concern.
Q. Was it the clothing trucking? A. No, sir.

9256 Q. What kind of a trucking concern? A. It was trucking shoes.

Q. You never trucked clothes? A. No, sir.

Q. Were you on the payroll of any clothing trucker, without working? A. I was never on nobody's payroll.

Q. I am asking you. A. No, sir.

Q. Do you know Henzie Teitelbaum?

Mr. Talley: I make the same objection.

9257 The Court: Objection overruled

Mr. Talley: Exception.

A. I think I seen him, I don't know.

Q. Aren't you sure you know Henzie Teitelbaum? A. No, sir. I know lots of people that are born over on the East Side, I know lots of people.

Q. We understand that. Would you say Teitlebaum was Lepke's chauffeur? Does that help you? A. No, sir, but I think I know him.

Q. Where do you know him from? A. From

9258 the East Side.

Q. Have you seen him with Mendy? A. Not as I can recall.

Q. Did you see him with Farvel Cohen? A. Not as I recall.

Q. Or with Charlie the Bug?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not as I can recall.

Q. Were you and Mendy friendly? A. Yes, sir.

Q. You live at number 10 Monroe Street? A. Yes, sir.

Q. Where did Mendy live in September of 1936? A. 301 East 21st Street.

Q. In Brooklyn? A. In Manhattan.

Q. Where did he live in 1937? A. I don't know.

Q. Where did he live in 1938? A. In Brooklyn. 9260

Q. Where, in Brooklyn, the number, what street? A. I think he lived at Park Place, I am not sure.

Q. Let me give you a number, and see if that will help you, 230 Park Place? A. I think so.

Q. Did you ever visit that apartment? A. Yes, sir.

Q. Do you know whether it was on the third floor of 230 Park Place? A. I don't know what floor.

Q. How many times were you to 230 Park Place? 9261

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not many times.

Q. Under what name did your brother live at 230 Park Place?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

9262 *Sidney Weiss—For Defts.—Cross*

The Court: Objection overruled.
Mr. Talley: Exception.

A. Hoffman.

Q. He was living there with his wife as Mrs. Hoffman? A. I guess so.

Q. Don't you know that Mendy and his wife were living at 230 Park Place as Mr. and Mrs. Hoffman?

9263 Mr. Talley: What year is this?
Mr. Turkus: 1937, according to his testimony.
The Witness: I did not say 1937.
Mr. Turkus: 1938, excuse me.
Mr. Talley: I object to it as too remote, two years after the alleged crime.
The Court: Overruled.
Mr. Talley: Exception.

A. Yes, sir.

Q. On the occasions when you visited at 230
9264 Park Place did you see friends of Mendy's up there? A. No, sir.

Q. On any occasion that you visited, did you see an outside person there who did not belong to the family? A. I don't remember.

Q. Don't you know whether Allie Tannenbaum was a visitor there when you were there? A. I don't know Allie.

Q. And Bugs, Charlie Workman?

Mr. Talley: I object again to this enumeration of names—The man told him he knew nothing of them.

9265

The Court: Objection overruled.
Mr. Talley: Exception.

Q. Does that help to refresh your recollection? A. I never seen him.

Q. You never saw Charley there? A. No, sir.

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

9266

Q. Can you remember one person outside of Mendy and his wife whom you saw at 230 Park Place? A. My mother, my brother Sammy, and different members of my family.

Q. I mean outside of the family circle, did you ever see outsiders up there at 230 Park Place, when you visited there? A. Yes, sir, I saw Dottie.

Q. How do you spell Dottie's last name? A. I don't know.

Q. You knew Dottie since before 1936—how many years before that did you know this Dottie? A. I knew her for a number of years.

9267

Q. How many years is a "number"? A. I cannot tell you.

Q. She was attending an intimate affair, a birthday party of yours that you remembered away back in 1936, how long before that did you know this Dottie? A. I know her for a number of years.

Q. She was not there as your girl friend, was she? A. I said I knew her for a number of years.

9268

Mr. Talley: I object to it.

The Court: Objection overruled.

Mr. Talley: Exception.

Mr. Talley: He has not finished his answer.

Q. Do you want to say anything further than that? A. No, sir.

Q. She was at this birthday party as your girl friend, was she? A. No, sir.

9269

Q. She was not there as Sammy's friend? A. No, sir.

Q. She certainly was not there as Mendy's girl friend? A. No, sir.

Q. What business is that Dottie in? A. She is a girl friend of Mendy's wife.

Q. What is her business? A. I said—

Q. What is that? A. I said nothing.

Q. Answer the question. You are supposed to say something. A. I did not get a chance.

Mr. Turkus: I ask to have the question read.

9270

(Pending question read.)

Q. What is her business? A. I know she is married: I don't know if she has any business.

Q. Do you know her husband? A. Yes, sir.

Q. What is his name? A. I know him, Yonkel.

Q. Yonkel was not at the birthday party with his wife? A. No, sir.

Q. Did you invite Mrs. Eisenstein to the birthday party? A. No, sir.

Q. Now, at 301 East 21st Street, where Mendy lived, what name was he living under in that house? A. Weiss.

9271

Q. When first to your knowledge did he change his name? A. I don't know.

Q. You know he changed his name at 230 Park Place? A. He lived under the name of Hoffman.

Q. Well, now, when for the first time did you know that Mendy had changed his name from Weiss to some other name?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; improper in form.

9272

The Court: Objection overruled.

Mr. Talley: Exception.

A. As far as I know, the time he had the apartment.

Q. The time he took the apartment at 230? A. Yes, sir.

Q. How many times did you visit him at 301 East 21st Street? A. Not many times—Can I have a drink of water?

(Witness handed glass of water.)

9273

Q. You know Yonkel is a pickpocket, isn't he?

Mr. Talley: Objected to as highly improper.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know.

Q. Why, you had this woman at your birthday party; didn't you know her husband was a pickpocket?

9274 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. I did not know.

Q. After your brother lived at 230 Park Place, Brooklyn, where did he live? A. He lived in 12th Avenue and 46th Street, in Brooklyn.

Q. Do you know the number? A. No, sir.

Q. What was the name? A. The name was
9275 Newman, I think.

Q. And Blanche lived there as Mrs. Newman, is that right? A. He lived there under the name of Newman.

Q. Did you visit him there when he lived there under the name of Newman? A. A few times.

Q. On the few occasions did you see Blanche there? A. Yes, sir.

Q. Who else did you see besides the members of your family when Mendy lived under the name of Newman?

9276 Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't think I seen any.

Q. Did you ever see Lorber up there?

Mr. Talley: I make the same objection.
The Court: The same ruling.
Mr. Talley: Exception.

A. I did not.

Q. Did you see Engelson? A. I don't know him.

Q. Did you ever see a man up there named Shafer?

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. I don't know.

Q. Do you remember seeing any of Mendy's associates when he was living under the name of Newman, at his apartment? 9278

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't think so.

Q. Now, after he moved out of the place where he was known as Newman, what was his next address? A. I don't think he had any more apartments.

Q. Where did he live? A. I do not know. 9279

Q. Well, you and he are brothers; you and he were friendly. Didn't you know where he lived?

Mr. Talley: Objected to as argumentative, not proper cross-examination.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not know that.

Q. Did the members of your family, including

your mother, visit Mendy when he lived under the name of Newman on 12th Avenue?

Mr. Talley: I object. He can testify as to his own visits, but I don't know how he can testify to any others.

The Court: He can say whether or not he saw them there. The objection is overruled.

The Witness: Yes, sir.

9281 Mr. Talley: I except.

Q. Under the name of Newman? A. Yes, sir.

Q. Did Mendy ever tell you why he was living in Park Place under the name of Hoffman—yes or no?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

9282 Q. Did you ever ask him—yes or no?

Mr. Talley: I object to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Did Mendy ever tell you why he was living under the name of Newman?

Mr. Talley: Objected to.

The Court: Objection overruled.

9283

Mr. Talley: Exception.

A. No.

Q. Did you ever ask him? A. No.

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

Q. Did you know Cuppy? A. Yes, sir.

9284

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. How long did you know Cuppy? A. For a number of years.

Q. Well, that is very indefinite. Can you give me a better estimate? A. Say around nine or ten years.

Q. Did you associate with him? A. Well, I knew him. I was a friend.

Q. Did you associate with him? A. I was his friend.

9285

Q. Was he an associate of your brother Mendy's? A. He knew him.

Q. Did you see them together? A. Yes, sir.

Q. What was Cuppy's right name? A. Migden.

Q. (Spelling) M-i-g-d-e-n? A. Yes.

Q. Were you connected with the Texas Centennial Fair? A. No, sir.

Q. Wasn't Cuppy your partner at the Texas Centennial Fair? A. He was never my partner.

Q. Did you have any machines there operating,

9286 *Sidney Weiss—For Defts.—Cross*

vending machines, operating at the Texas Centennial Fair in 1935 or 1936?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; I cannot see what possible bearing that has on the issue here.

The Court: Objection overruled.

Mr. Talley: Exception.

9287 A. I was operating machines in the city.

Q. And not at the Texas Centennial Fair? A. No, sir.

Q. Did you ship any there to Migden? A. No, sir.

Q. What is Migden's wife's name?

Mr. Talley: Objected to as immaterial, incompetent and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't think he was ever married.

9288 Q. Did you know Ruth Migden? A. His sister?

Q. Is that his sister? A. Ruth Migden, yes, sir.

Q. Ruth Migden is Cuppy's sister? A. Yes, sir.

Q. Weren't you in Texas during the course of the Texas Fair? A. I was never in Texas in my life.

Q. Didn't you leave Migden in Texas during the Texas Fair, either in 1935 or 1936? A. I was never in Texas in my life.

Q. Where did your brother move from the address where he lived under the name of Newman? A. I don't know.

Q. What year was that he moved out of there, do you know? A. I would say sometime in 1940; I don't know; I believe it was around 1940.

Q. In September, 1936, under what name was Mendy living?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. 9290

The Court: Objection overruled.

Mr. Talley: Exception.

A. Weiss.

Q. Did you see Cuppy in either 230 Park Place, the apartment where your brother lived under the name of Hoffman, or at 12th Avenue, where he lived under the name of Newman? A. I don't remember.

Mr. Talley: I make the same objection.

The Court: The same ruling. 9291

Mr. Talley: Exception.

Q. During the early part of March, 1940, when did you call a man named Benjamin Portman on his home telephone—

Mr. Talley: That is objected to as improper cross-examination, incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. What month?

9292 *Sidney Weiss—For Defts.—Cross*

Q. The early part of March, 1941. A. I know I called him. I don't know whether it was March or April.

Q. You did call Benjamin Portman on the long distance phone, you remember? A. Yes, sir.

Q. Where was Benjamin Portman when you called him, what city?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

9293

A. Kansas City.

Q. Kansas City, Missouri? A. Yes, sir.

Q. In that telephone conversation did you say you were Sidney Bell from New York City?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination.
The Court: Objection overruled.
Mr. Talley: Exception.

9294 A. No, sir.

Q. You did not? A. No, sir.

Q. Did you ask Benjamin Portman for "Big Jim"?

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. No, sir.

Q. Didn't you, in that telephone conversation with Benjamin Portman in Kansas City, Mis-

souri, say you were Sidney Bell of New York City, a brother of Big Jim? A. No, sir.

Q. Didn't you tell Portman you would like to contact Big Jim immediately?

Mr. Talley: I make the same objection.
The Court: The same ruling.
Mr. Talley: Exception.

A. No, sir.

Q. Didn't Portman say to you he did not know where to pick up Big Jim, and he hung up the receiver? 9296

Mr. Talley: I make the same objection, and on the further ground that apparently the District Attorney is trying to put in evidence telephone calls, which I think are illegal. This wire-tapping business the law does not permit any more.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No. 9297

Q. On the occasion when you spoke to Portman on the telephone where were you?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. In the city.

Q. What city? A. New York City.

Q. Before you telephoned Benjamin Portman, had you ever met him in your life?

9298 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Yes, sir.

Q. Where? A. In Kansas City.

Q. When did you meet Portman in Kansas City, Missouri? A. In 1940.

Q. What month in 1940? A. Sometime in October.

9299 Q. Now, in October of 1940, after you say you met Portman for the first time—who introduced you to him?

Mr. Talley: I make the same objection, not proper cross-examination.
The Court: Objection overruled.
Mr. Talley: Exception.

A. My brother.

Q. Your brother Mendy? A. Yes.

Q. At the time you were introduced to Benjamin Portman, was your brother's wife, Blanche

9300 Weiss, with him? A. Yes, sir.

Q. At the time you were introduced to Portman, your brother Mendy Weiss was living in Kansas City, Missouri, under the name of Bell, wasn't he? A. That is right.

Q. James Bell, wasn't he? A. Bell.

Q. Didn't you know the first name your brother Mendy was using? A. No, sir.

Q. You did not know, in Kansas City, when you were there with him, that he was under the name of Jim Bell or James Bell? A. I know he was under the name of Bell.

Q. You did not know the first name he was using? A. Not as I remember.

Q. This "Big Jim," wasn't he known as Big Jim Bell? A. No, sir.

Q. Can you remember now the first name your brother was using in Kansas City, Missouri, when you were there? A. No, sir.

Q. Weren't you introduced to Portman under the name of Sidney Bell, a brother of brother Mendy? A. I was introduced to Portman by the name of Sidney.

9302

Q. Weren't you introduced by the name of Sidney Bell? A. I was introduced by the name of Sidney.

Q. With no last name? A. No, sir.

Q. How many times did you meet Portman while in Kansas City? A. Three times.

Q. Now, the first time was the introduction in the presence of Blanche. What was the second time? A. I think around January, 1941.

Q. In between the first visit to Kansas City and the second time you met Portman, were you living in Kansas City? A. Yes.

9303

Q. How long did you stay in Kansas City on the first trip? A. Around two days.

Q. Where did you stay for the two days you were in Kansas City? A. At my brother's house.

Q. Where was your brother's house located? A. I think the address is somewhere on 46th Terrace, or something, in Kansas City.

Q. Terrace Drive? A. Something like that.

Q. In January, 1941, on your second visit, where did you stay? A. At my brother's house.

Q. Still on this Terrace Drive, in Kansas City? A. No.

9304 *Sidney Weiss—For Defts.—Cross*

Q. Where? A. I think at 48th Street, Kansas City.

Q. Was that Highland Avenue? A. I don't know.

Q. Was there a woman named Fay Diily living there? A. No, sir.

Q. Do you know Fay Dilly? A. Not as I remember.

Q. See if I can refresh your recollection—she was Benny Portman's girl friend, wasn't she?

9305 A. Not as far as I know.

Q. Did you ever hear of her with Benny Portman? A. I don't know who she is.

Q. In January, 1941, who did you stop with, Mendy? A. I did.

Q. Still living under the name of Bell? A. I think he lived under the name of Miller.

Q. Are you sure that was in Kansas City, where he lived under the name of Miller? A. I think Kansas City.

Q. Let us see. Was that outside of the city limits? A. I don't think so.

Q. Let us see if we can get the first address.

9306 Was it 420 West 46th Street Terrace, where you stopped for two days in Kansas City? A. I know it is 46th Street Terrace.

Q. Does 420 West 46th Street Terrace, Kansas City, Missouri, refresh your recollection? A. I don't know the number.

Q. Now, the place where he was living under the name of Miller, was that at West 48th Street? Was it 700 West 48th Street? A. I think so.

Q. How long did you stop there on that occasion? A. Just a few days.

Q. Wasn't your brother living in Apartment 30 in that building under the name of Miller? A.

I don't know what apartment; he lived under the name of Miller.

Q. Did you stop in the apartment? A. Yes, sir.

Q. Wasn't Cuppy there? A. No, sir.

Q. Didn't you see Jacob Migden, alias Cuppy, right in the apartment where your brother lived under the name of Miller at 700 West 48th Street, Kansas City? A. No, sir.

Mr. Talley: I object to the cross-examination of his own witness. Your Honor must hold he has made this witness his own now, and as such he cannot cross-examine him. 9308

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Did you at any time while you were in the apartment on West 48th Street where your brother was living under the name of Miller, see Cuppy? A. No, sir.

Mr. Talley: Objected to as already answered, not once, but twice. 9309

The Court: He has answered it.

Q. Was there a colored superintendent there named Henry Horton? A. I don't know.

Q. Who is Rose Weiss? A. Rose Weiss?

Q. Yes, Rose Weiss. A. That is the sister-in-law of mine.

Q. What is her husband's name? A. Max Weiss.

Q. Did you see Rose Weiss there when your brother was living under the name of Miller?

9310 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. How long did you stay in Kansas City at the time you were visiting Mendy under the name of Miller? A. A few days.

Mr. Talley: Objected to as already answered.

9311 The Court: Objection sustained.

Q. How many is a few days? A. Two days.

Q. Now, when was the third time you went to Kansas City, Missouri? A. I think in April.

Q. April of what year? A. 1941.

Q. How long did you stay in Kansas City during the month of April, 1941? A. One day.

Q. On your first trip, that was the time you met this Portman? A. Yes.

Q. And on the second trip did you meet Portman again? A. Yes, sir.

9312 Q. Did you meet Portman, under the name of Bell, on the second trip? A. No, sir.

Q. What name did Benny Portman call you when he spoke to you? A. Sidney.

Q. Any other name, last name? A. No, sir.

Q. Now, on the third trip to Kansas City did you meet Portman?

Mr. Talley: Objected to as already answered.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't think so.

9313

Q. Were you aiding and abetting your brother, Mendy Weiss, in maintaining and concealing himself as a fugitive from justice under the name of Miller and Bell? A. I don't understand what you mean.

Q. Didn't you know your brother was a fugitive from justice on the occasions you visited him in Kansas City, Missouri?

Mr. Talley: That is objected to as incompetent, immaterial and irrelevant.

9314

The Court: Objection overruled. This comes under Section 2 of the Penal Law, and therefore is competent on the question of knowledge.

Mr. Talley: It certainly calls for a conclusion and is improper as evidence.

The Court: I am weighing that—that is a borderline. He cannot say whether he knows, but, on the question of impeachment, he can say whether or not he so believed.

Mr. Talley: That is objected to, and if the question is put in that form it is objectionable again, and I object to it on the grounds already stated, with respect to the preceding question.

9315

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Did you believe at the time you visited him in Kansas City, Missouri, where he was living under the names of Miller and Bell, that he was a fugitive from justice? A. When I seen him in Kansas City—

9316 *Sidney Weiss—For Defts.—Cross*

Q. Did you—yes or no? A. I cannot answer it that way. I have to explain.

Q. Can you answer whether you believed him to be a fugitive from justice when you visited him under the circumstances you have related to this jury?

Mr. Talley: I object on the grounds already stated.

The Court: Objection overruled.

9317 Mr. Talley: Exception.

Q. Can you answer that yes or no? A. I cannot answer it yes or no.

Q. Well, don't answer it at all. When you were in Kansas City did you meet a man named Morris Saul?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I do not think so.

9318 Q. Did you meet a man named Morris Solwinsky?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember. I met a few people, but I do not remember their names.

Q. Well, let us see if I cannot help to refresh your recollection. Did you meet this fellow Saul and his wife at the Portman home?

9319

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I met Portman at Portman's home.

Q. Do you remember a man named Morris Saul, true name Morris Salinsky? A. I do not.

Mr. Talley: I object.
The Court: Objection overruled.
Mr. Talley: Exception.

9320

Q. Did you meet one Walter Rainey? A. I think so.

Q. Now, Benny Portman is a big-time gambler in Missouri, and known to you to be such?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I do not know his business.

Q. Do you know it now? A. If you say so. 9321

Q. Not if I say so. Do you know it? A. No, sir.

The Court: The objection is good unless he knew at the time of the alleged association.

Q. Were you introduced at Portman's home as Sidney Bell? A. No, sir.

Q. Before going out to Kansas City on your third trip, did you speak to Portman on the telephone, the long distance, from New York?

9322 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination.

The Court: Objection overruled.

A. I did not get the question.

Q. I will take it piece by piece and we will get along: You told us you made three trips to Kansas City? A. Yes, sir.

Q. If I understood you correctly, your first trip was in October, 1940? A. Yes, sir.

9323 Q. That you stayed there for a couple of days? A. Yes, sir.

Q. That your brother was then living under the name of Bell, at this Terrace address? A. Yes, sir.

Q. That your next trip was in January, 1941, when your brother was living on West 48th Street under the name of Miller? A. Yes, sir.

Q. You stayed a couple of days on that? A. Yes, sir.

Q. Didn't you make a third trip to Kansas City, Missouri, sometime in April, 1941, when

9324 you say you spent a day there? A. Yes, sir.

Q. Just before you went on the third trip to Kansas City, in April of 1941, did you make a long distance call to Portman? A. Yes, sir.

Q. Did you tell this Benny Portman that you were going to fly out by plane immediately? A. Yes, sir.

Q. Did you take a plane from New York and its environment to Kansas City, Missouri? A. Yes, sir.

Q. Did you call at Portman's residence? A. Yes, sir.

Q. Did you take an automobile that Mendy

9325

Weiss had been riding around in in Kansas City, Missouri? A. Yes, sir.

Q. Did you drive that automobile back to New York City? A. Yes, sir.

Q. Did you drive back with you Blanche? A. Yes, sir.

The Court: Blanche who?

Q. Blanche, referred to as the defendant Mendy Weiss's wife; is that correct? A. Yes, sir.

9326

Q. During the first week of August, 1941, didn't you call Morris Salinsky, sometimes known as Morris Saul, on the telephone?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.

Q. Don't you remember you did call Morris Saul on the telephone and he hung up on you?

9327

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.

Q. You don't remember calling Kansas City, Missouri, and having somebody hang up on you?

Mr. Talley: How does this witness know, what a man in Kansas City did? I object to it as incompetent, immaterial and irrelevant.

9328 *Sidney Weiss—For Defts.—Cross*

The Court: The point of the objection is you cannot guess as to who calls, with an interruption.

Q. Without guessing, let us ask it this way: Did you endeavor to speak to Morris Salinsky, sometimes known as Morris Saul, on the telephone and have the connection abruptly terminated?

9329 Mr. Talley: How does he know?
The Court: Were you suddenly cut off?
Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.
The Witness: I don't remember if I called.

Q. Let us see if this refreshes your recollection—Didn't you then telephone Walter Rainey at his home?

9330 Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I think I called.
Q. You understand you are under oath? A. Yes, sir.

Mr. Talley: I object to the question in that form.
The Court: Objection overruled.
Mr. Talley: Exception.

9331

Q. Did you call up Walter Rainey on the long distance telephone on or about the first week in August, 1941?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. You just said you think you did, now you don't remember, which is it? A. Who are you referring to?

9332

Q. Walter Rainey. A. Yes, sir, I called him.

Q. Didn't you say, or ask Walter Rainey how things were in Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

The Court: In August of this year?

Mr. Turkus: Yes, August of 1941.

9333

The Witness: I don't remember what I said to him about.

Q. You don't remember the conversation? A. I mean that conversation.

Q. You are calling up long distance in Kansas City and you don't remember what you are talking about, is that your testimony?

Mr. Talley: I object to that as argumentative.

9334 *Sidney Weiss—For Defts.—Cross*

Q. (Continued) What you were saying? A. What are you saying what?

Q. Didn't Walter Rainey say to you, "You guys got us in a hell of a lot of trouble, and everything is red hot"?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

9335

A. I don't remember that conversation.

Q. Didn't you ask Walter Rainey why Portman and Morris Saul would not talk to you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; assuming something which is not in evidence; improper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

9336 Q. And didn't Rainey then say to you, "I don't why why they won't, but I don't give a damn, I am in the middle anyway"?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember the conversation.

Q. Do you remember what you said to Walter Rainey on the long distance telephone?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Talley: Exception.

A. I don't remember the conversation I had.

Q. You called up in the first week of August, 1941, and spoke to a man on the long distance telephone in Kansas City and you don't remember what you said to him, do you? A. I know I called him up; I don't remember the month; 9338
I called him up this year.

Q. You don't remember what he said or you said? A. I don't remember the conversation you are telling me now.

Q. I am asking you if you remember the conversation you had with Rainey? A. I mean the same thing.

Q. "I mean", is nothing.

Mr. Talley: I object to the comment of the District Attorney. It should not be permitted. There should be a limit. 9339

Mr. Turkus: I am not appealing to the Court to give me protection from any of these witnesses. I will handle them myself, and I want them to handle the questions.

Mr. Talley: You said you needed no protection from any witness?

The Court: Objection sustained as to the comment.

Q. Can you tell us what you said to Walter

9340 Rainey on the long distance 'phone in August of 1941, and what he said to you; yes or no?

Mr. Talley: Objected to as already answered several times.

The Court: Sustained. He can say whether or not he knew the subject matter of the conversation.

Q. Do you remember the subject matter of
9341 that call?

Mr. Talley: Objected to as already answered.

By the Court:

Q. What was it about? A. I don't remember.

Q. You don't remember that either? A. No, sir.

By Mr. Turkus:

9342

Q. Did you, in August, 1941, endeavor to reach Portman on the long distance wire to Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, what he endeavored to do.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. See if this refreshes your recollection—

didn't you call Portman in Kansas City, Missouri, and was not that telephone connection abruptly terminated?

Mr. Talley: I object as already gone over.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Were you in Colorado in the year 1940? 9344
A. No, sir.

Q. At any time during the year 1940 were you in the State of Colorado? A. No, sir.

Q. At any time during 1940 did you see your brother Mendy Weiss in any place other than Kansas City, Missouri? A. In 1940?

Q. Yes. A. Yes, sir, I seen him in the city.

Q. When did he leave the city and go out of town, do you know?

Mr. Talley: I object to that as improper cross-examination, incompetent, immaterial and irrelevant. 9345

The Court: Objection overruled.

Mr. Talley: Exception.

A. I seen him in the city; I don't remember what month.

Q. Didn't he leave the city suddenly?

Mr. Talley: Objected to as a conclusion, and not proper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not as far as I know.

9346 *Sidney Weiss—For Defts.—Cross*

Q. Did you know he was leaving? A. No, sir.
Q. Were you told by him with whom he was leaving?

Mr. Talley: Objected to as hearsay; incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.
Q. There was no farewell party for him when
9347 he was leaving New York City, was there?

Mr. Talley: I object to that as highly improper; incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.
Q. No bon voyage party?

Mr. Talley: I except to that.
9348 The Court: Sustained as to that.
Mr. Talley: I withdraw my exception, then.

Q. How long after the newspapers carried an article about Allie Tannenbaum was it that you for the first time knew that Mendy was out of New York City?

Mr. Talley: Objected to as highly improper; incompetent, immaterial and irrelevant.
The Court: Objection sustained.

9349

Q. Refresh your recollection. Wasn't your first notice that Mendy was no longer in New York City some time in May of 1940?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember when he left the city; I don't remember what month he left.

9350

Q. What is the business of Walter Rainey whom you met in Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't know.
Q. Did you ever ask him his business?

9351

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; calling for hearsay evidence.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.
Q. Did he ever tell you his business?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

9352 *Sidney Weiss—For Defts.—Cross*

Q. How many times were you in Walter Rainey's society in—

Mr. Talley (Interrupting): I make the same objection.

Q. (Continued) In Kansas City, Missouri?

The Court: Objection overruled.
Mr. Talley: Exception.

9353 A. Once or twice.

Q. On which visit, the first or the second or the third? A. I don't remember if it was the first or the second I seen him.

Q. Either the first or the second visit? A. I seen him on the third visit, too.

Q. Can you remember Morris Wolinsky, asking certain questions of him on the long distance telephone calls, does that refresh your recollection about Morris Saul or Morris Wolinsky?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
9354 Mr. Talley: Exception.

A. No, sir.

Q. Did you at any time see Cuppie in Kansas City, Missouri, on any of your visits?

Mr. Talley: Objected to as already answered; incompetent, immaterial and irrelevant; improper cross-examination.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Never seen him.

Q. Did you ride back with Blanche Weiss and any of the personal effects of Cuppie?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. In your presence, was your brother Mendy Weiss called "Big Jim" by anybody in Kansas City, Missouri?

9356

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. I don't remember anybody.

Q. In your presence, was he introduced as vice-president of the Chihuahua Tungsten Company?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

9357

A. I don't know.

Q. Did your brother Mendy Weiss have any talk with you about his driving cards being in the name of Bell?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

9358 *Sidney Weiss—For Defts.—Cross*

Q. Did your brother Mendy Weiss ever have any talk with you that he had a bank account in the Security National Bank, Kansas City, Kansas, under the name of Bell?

Mr. Talley: I make the same objection; highly improper.

The Court: Objection overruled.

Mr. Talley: Exception.

9359 A. No, sir.

Q. Did your brother Mendy tell you he was vice-president of the Chihuahua Tungsten Corporation, a mining and development company, at Black Hawk, Colorado? A. He said he had something to do with a mine there.

Q. He told you that? A. Yes, sir.

Q. Did your brother tell you he had fallen off a horse and been injured at Rocky Ford, Colorado?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

9360 Mr. Talley: Exception.

A. I don't know where it was; he had an accident, I know.

Q. He told you about that? A. The accident.

Q. Did he tell you he was at St. Francis Hospital in Colorado? A. No, sir.

Q. When was the first time that you learned that your brother was leaving New York City in the year 1940 to go west?

Mr. Talley: I object as already gone over.

 9361

The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember when he left.
Q. When did you write to him the first letter?

Mr. Talley: Objected to as immaterial; incompetent; not within the issue here; not proper cross-examination.
The Court: Objection overruled.
Mr. Talley: Exception. 9362

A. I never wrote him a letter.
Q. In all the time that you knew your brother was living in Kansas City, Missouri, under the name of Bell, and under the name of Miller, you never wrote a single letter? A. No, sir.
Q. When was the first letter you received from your brother from Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; the District Attorney is going pretty far afield now, it seems. 9363
The Court: Objection overruled.
Mr. Talley: Exception.

By the Court:

Q. Do you remember it? A. I don't remember what month. I know I received a letter from him.

By Mr. Turkus:

Q. What year? A. 1940.

9364

Q. What part was it in, spring, fall, summer or winter, or when? A. In the summer.

Q. And did you answer the letter? A. No, sir.

Mr. Talley: Objected to as immaterial, incompetent, irrelevant, not proper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

9365

Q. In that letter was the name Bell used? A. Yes, sir.

Q. Was the address listed in that letter?

Mr. Talley: The same objection, if your Honor please; not the best evidence, not proper cross-examination; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes.

Q. Where is that letter?

9366

Mr. Talley: I make the same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I must have destroyed the letter.

Q. When was the next letter received?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Around the last part of the year, around December.

Q. What happened to that letter? A. I don't know, I must have destroyed it, I guess.

Q. Didn't you destroy it intentionally? A. I don't know; I must have destroyed it after I read it.

Q. Don't you know whether you destroyed those letters with the intent to destroy them and cause their destruction?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. I object to the form of the question. 9368

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. At any time were you in long distance telephone communication or conversation with your brother at Kansas City, Missouri?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

9369

A. No, sir.

Q. Now, when you got the second letter in the summer of 1940, was that from Colorado?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I got the first letter from Kansas City.

Q. Did you ever get a letter from Colorado? A. No, sir.

9370 *Sidney Weiss—For Defts.—Cross*

Q. Where was the second letter from? A. Kansas City.

Q. Was there a third letter? A. No, sir.

Q. No third letter? A. No, sir.

Q. Did you send your brother, Mendy Weiss, under any name he may have been using, any information concerning the activities in the east here?

Mr. Talley: Objected to as incompetent,
9371 immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. By activities, I mean the progress of any investigation?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I never sent him nothing.

Q. Did you indirectly send him any informa-
9372 tion as to the progress of any investigation in New York City?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I never sent him nothing.

Q. Were your visits to Kansas City, Missouri, for the intention on your part to help your brother to remain a fugitive from justice?

9373

Mr. Talley: Objected to as calling for a legal conclusion.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. At the time you made your first visit to Kansas City, Missouri, did you know or believe that your brother was a fugitive from justice?

9374

Mr. Talley: Objected to as already answered. Your Honor passed upon that about a half an hour ago.

The Court: Objection sustained.

Q. Did you aid or abet your brother in any respect to remain and continue as a fugitive, concealed under a false name, in Kansas City, Missouri?

Mr. Talley: Objected to as calling for a conclusion.

The Court: Objection overruled.

9375

Mr. Talley: Exception.

A. No, sir.

Q. Did you destroy the letters which you received from your brother with the intention to cause obliteration and destruction of evidence which might be used against him?

Mr. Talley: Objected to as already answered and as calling for a conclusion.

The Court: Objection overruled.

Mr. Talley: Exception.

9376 *Sidney Weiss—For Defts.—Cross*

A. I don't remember. I destroyed the letters, that is all I know.

By the Court:

Q. When did you destroy them? A. I don't remember.

Q. In Brooklyn or New York? A. New York.

Q. In the Borough of Manhattan? A. Yes, sir.

9377 By Mr. Turkus:

Q. To whom were the letters addressed?

Mr. Talley: I object. That was already gone over. It is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. To me.

Q. And what was the address where you re-

9378 ceived them? A. At my place of business.

Q. The Klick Vending? A. Yes, sir.

Q. How soon after the receipt of them were they destroyed?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; already gone over.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Was it immediately thereafter?

Mr. Talley: I make the same objection.

The Court: Same ruling.

Mr. Talley: Exception.

A. I could not tell you.

Q. Is it you could not tell me or you won't tell me? A. I could not tell you.

Q. When you visited in Kansas City, Missouri, and your brother told you he had a mining interest in the Chihuahua Mining Company, 9380
and you 'phoned him there, living under the name of Bell, did you ask him why he was living there under that name?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, assuming evidence which is not in the record.

The Court: This is competent under Section 2 of the Penal Law, on the question of impeachment. Objection overruled.

Mr. Talley: Exception. 9381

A. Yes, sir.

Q. Did you ask him why? A. Yes, sir.

Q. When you talked to him in Kansas City, living under the name of Miller, did you ask him why he was living under that name?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9382 *Sidney Weiss—For Defts.—Cross*

Q. Did you ask your brother when he left New York City?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't know if I asked him or not.

Q. Did you ask your brother when he was going to return to New York City?

9383

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you ask your brother why he had only written you two letters since he was away?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

9384 A. No, sir.

Q. Did you ask your brother why he had not written the family since he had been away?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you ask him why his wife was living under the name of Rose Bell?

Mr. Talley: I make the same objection.

9385

The Court: Objection overruled.
Mr. Talley: Exception.

A. I do not understand the question.

Q. You do not understand that question? A. No, sir.

Q. Did your brother take you to the mine which he had an interest in when you were out there? A. No, sir.

Q. You were not out there for mining business after you went out? A. No, sir.

9386

Q. You went out to see your brother? A. Yes, sir.

Q. You went out to bring him information, didn't you? A. No, sir.

Q. Didn't you go to bring him information that you did not want to entrust to the mail or telephone? A. No, sir.

Q. Was your purpose in visiting Kansas City, Missouri, for two days a social visit? A. Well, he wanted to know how the family was, and everything.

Q. Did he want to know how the O'Dwyer investigation was getting on? A. No, sir.

9387

Q. He only wanted to know how the family was? A. Yes, sir.

Q. He did not ask you if the O'Dwyer investigation or the detectives were looking for him, did he? A. No, sir.

Q. Not once in the conversations in which he spoke to you in the two day trip to Kansas City did he mention anything about the O'Dwyer District Attorney investigation in Brooklyn?

Mr. Talley: I object.

The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did he ask you a single question about any investigation going on in Brooklyn?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; improper cross-examination.

9389 The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. While you were out there in Kansas City, Missouri, did your brother mention the name of Lepke? A. No, sir.

Q. Did he mention the name of Farvel Cohen? A. No, sir.

Q. Did he mention the name Lou Capone? A. No, sir.

Q. Did he mention the name of Allie Tannenbaum? A. No, sir.

9390 Q. Did he mention the name of Abe Reles? A. No, sir.

Q. Or Pittsburg Phil Strauss? A. No, sir.

Q. Or Harry (Happy) Maione? A. No, sir.

Q. Or "The Dasher" Abbendando? A. No, sir.

Q. Or Buggsy Goldstein? A. No, sir.

Mr. Talley: I object, your Honor, to all this enumeration; it is highly improper. I think your Honor should stop it. I have tried to stop it several times.

The Court: I know the question of as-

sociation is always competent. Objection overruled.

Mr. Talley: I take an exception, as long as your Honor understands the purport of my objection.

Q. Did he mention the name of Cuppie? A. No, sir.

Q. Did he mention the name of Max Rubin? A. No, sir.

Q. Or that of Paul Berger? A. No, sir. 9392

Mr. Talley: I have my objection, I take it, to all this line.

The Court: Yes.

Mr. Talley: And I except.

Q. In the two days you visited there, all he wanted to know was how the family was, is that it? A. And different things.

Q. Different things did not include anything I asked you?

Mr. Talley: I object to the question, to the form of the question. It is already answered very fully. 9393

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Before your brother left town did he tell you he was going to Chicago?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled

9394

Mr. Talley: Exception.

A. No, sir.

Q. Do you know people by the name of Unger? A. Yes, sir.

Q. Where is the Unger apartment? A. Now?

Q. Where is it now? A. I don't know.

Q. Where was it when you knew the Ungers? A. 101st Street, Manhattan.

Q. Were you up there with Yiddle Lorber, weren't you? A. I was there; I don't know who I was with.

9395

Q. Let us see if I cannot refresh your recollection. I am talking about the year 1940, before Mendy went west, you understand? A. Yes, sir.

Q. Weren't you up to the Unger flat with Yiddle Lorber before Mendy went west? A. I don't remember. I don't remember who I was with. I know I was there.

Q. Do you remember whether Mendy and Blanche were up there when you were up there? A. Yes, sir.

9396

Q. Didn't Mendy say he was going to Chicago? A. No, sir.

Q. In the Unger flat? A. No, sir.

Q. When was it you were in the Unger flat with Mendy and Blanche? A. Some time in 1940.

Q. Was it some time in April? A. It could be April.

Q. Could it have been some time in May, having in mind when the newspapers mentioned the name of Allie Tannenbaum?

Mr. Talley: I object to the form of the

question on the ground it is incompetent, immaterial and irrelevant.

The Court: Sustained as conjectural.

Q. I will revise it. Was it sometime in May when the newspapers were mentioning the name of Tannenbaum as a prospective O'Dwyer witness?

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception. 9398

A. I don't know.

Q. Didn't your brother tell you he had to leave town the minute word got to him that it looked like Allie Tannenbaum might open up? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. That is nothing reflecting on the character of this witness. I can understand something to impeach on cross-examination a witness, 9399
but he is not seeking to impeach this witness by reason of association or anything else. He is on very dangerous ground in trying to extract from this witness information.

The Court: It opens up a right to inquire as to whether or not this witness had, under Section 2 of the Penal Law, knowledge, as having a bearing upon his credibility; because, logically, if he is guilty of a crime under Section 2 of the Penal Law in secreting what he believed

9400 to be or was informed to be a criminal—the language of the statute is quite extensive—then it would be within the province of the jury to say, provided they find themselves justified in finding such to be the fact, would the same motive tend to cause this witness to give false testimony as to an alibi?

Mr. Talley: That is pretty far-fetched, your Honor.

9401 The Court: Maybe it is and maybe it is not, but I am telling you so you will understand the ruling.

Mr. Talley: I except to your Honor's ruling, and I except to your Honor's comment in connection with that ruling.

Q. Do you know Dorothy Walker? A. No, sir.

Mr. Talley: I make the same objection, incompetent, immaterial and irrelevant, improper cross-examination.

The Court: Objection overruled.

9402 Mr. Talley: Exception.

Q. Did you ever see your brother in Chicago? A. No, sir.

Q. Did you ever communicate with Mendy Weiss while he was in Chicago during the year 1940?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9403

Q. You said that your brother, when you went out to Kansas City, Missouri, spoke to you about the family, as to how they were, and other things, do you remember that? A. Yes, sir.

Q. In the two days you were there what were the other things he spoke to you about?

Mr. Talley: Objected to as calling for a conclusion.

The Court: Objection overruled.

Mr. Talley: Exception.

9404

A. He said he went away because he was afraid some witnesses were going to frame him on a Federal charge.

Q. He said he thought some witnesses were framing him on a Federal charge? A. Yes, sir.

Q. And that was why he was living under the name of Bell? A. I guess so.

Q. Did you know that your brother had a money belt on his person with $3,000 in cash?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination. 9405

Mr. Turkus: When you were there.

Mr. Talley: Just a moment. Let me object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you know your brother had a belt buckle, a gold belt buckle with a diamond emblem on it in the shape of a six-pointed star?

9406 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: I object. It assumes something that is not in evidence. It may have been glass so far as the testimony shows. It might have been from Woolworth's. It is highly improper.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You did see a diamond belt buckle? A. No, sir.

9407

Q. Did you see a big ring he had on his finger?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, meaning nothing exactly; you can buy a ring for a quarter.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you ask your brother how he was earning his livelihood while staying in Kansas City, Missouri, keeping away from that Federal frameup?

9408

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you ask him where he was getting the money from to stay in hiding on a Federal frameup?

9409

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you ask him if he had any money to defray expenses?

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Exception.

9410

A. No, sir.

Q. Did you bring him any money out? A. No, sir.

Q. Not one dollar? A. No, sir.

Q. Did you ask him if he had enough money to buy a meal and eat it?

Mr. Talley: I object to the form of the question.
The Court: Objection overruled.
Mr. Talley: Exception.

9411

A. I did not ask him that.

Q. Did you ask him if you could help him in connection with this alleged Federal frameup that he was worrying about?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. When your brother told you he was worried about a Federal frameup, and he was living

9412 *Sidney Weiss—For Defts.—Cross*

under an assumed name, did you offer to do anything to help him?

Mr. Talley: I make the same objection. It calls for a conclusion.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you go to the United States District Attorney in Kansas City, Missouri? A. No, sir.

9413

Mr. Talley: Objected to as improper cross-examination, incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Did you go to the head of the United States Government agency in charge of investigation?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
9414 Mr. Talley: Exception.

A. No, sir.

Q. Did you appeal to the Attorney General of United States?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you appeal to any Government agency or any Government official to help your brother

9415

in connection with this frameup that some Federal office was trying to put over on him?

Mr. Talley: I object. There was nothing said as to a Federal office.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9416

Mr. Talley: There is nothing in the testimony about a Federal office. The question is highly improper. The witness said there were some witnesses that he was afraid were going to frame him up. He said "witnesses."

The Court: That is right.

Mr. Talley: Does your Honor sustain my objection to that question?

The Court: Yes, on that ground. Strike out the answer.

9417

Q. Did you appeal to any Government agency or any Government official to help your brother in connection with this alleged Federal frameup by some witnesses?

Mr. Talley: I object again: that is not a Federal frameup.

Mr. Turkus: A frameup on a Federal charge.

The Court: You had better reframe your question.

Q. Did you appeal to any United States official or agency to help your brother in connection

9418 *Sidney Weiss—For Defts.—Cross*

with an alleged frameup of witnesses against him on some Federal matter?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you advise or counsel your brother as to what he should do under the circumstances
9419 where there were some witnesses who were trying to frame him on a Federal matter?

Mr. Talley: Objected to on the same ground.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you advise and counsel your brother to, himself, go to some Federal agency in connection with the alleged frameup?

9420

Mr. Talley: I make the same objection, already answered.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you counsel and advise your brother to appeal to some person in connection with the Federal Government, or some agency thereof in connection with this alleged frameup?

Mr. Talley: I object to that on the same ground.

The Court: You have been sufficiently over that situation.

Q. Did you appeal to your brother to surrender himself at once?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

9422

A. No, sir.

Q. Did you counsel your brother to remain in hiding under an assumed name?

Mr. Talley: Objected to.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Well, when your brother told you about this alleged frameup of witnesses in conjunction with the Federal matter, what advice did you give your brother? 9423

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No advice.

Q. Now, what other things besides the alleged frameup of witnesses in the Federal matter did your brother Mendy Weiss speak to you about on the occasion of your first two-day visit to Kansas City?

9424 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He said he was looking for some kind of a business to go into.

Q. What kind of a business did he say? A. He did not say.

Q. What else did he say about business? 9425 Did he say how much he wanted to invest? A. No, sir.

Q. Did he discuss the nature of the business? A. No, sir.

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. When he told you that he was looking for some business to go into, was that before he told you about the alleged frameup by wit- 9426 nesses in the Federal matter or afterwards? A. I don't know.

Q. But it was during the conversation? A. Yes, sir.

Q. When he said he was looking for a business to go into, didn't you remind him of this frameup of witnesses?

Mr. Talley: Objected to as improper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9427

Q. Did he state with whom he was going to go into business?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did he say he was going to go into some business to keep up the false front of "Jim Bell", to aid him in concealing himself?

9428

Mr. Talley: Objected to as improper in form.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Mr. Talley: I also object on the ground it is incompetent, immaterial and irrelevant.

The Court: Same ruling.

9429

Q. Did he tell you he had put $500 into the Chihuahua Tungsten Corporation to get the vice-presidency, to aid him in keeping up the disguise of "Jim Bell"? A. No, sir, he said he invested some money in a mine.

Q. He did not say he put $500 in it to get the vice-presidency? A. No, sir.

Q. Was that the business that he spoke to you about investing money in when you were first in Kansas City? A. No, sir.

9430 Q. Was it some other business he discussed getting into? A. Yes, sir.

Q. Do you remember any of the details of that discussion? A. He said he was looking to get into some business that is good.

Q. Did you ask him what kind of a business it was? A. He said he was looking for a business to go into.

Q. After the two-day visit in Kansas City you came back home with knowledge that your
9431 brother, Mendy Weiss, was afraid there were some witnesses trying to frame him on a Federal matter; is that correct? A. Yes, sir.

Q. He had told you that? A. Yes, sir.

Q. After you got back to New York City did you attend at a law office of any lawyer? A. No, sir.

Mr. Talley: Objected to as improper; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

9432 Q. Did you go to any Federal or State agency?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you go to any Federal or State prosecutor?

Mr. Talley: Same objection.

The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you go anywhere or do anything in reference to the facts your brother disclosed to you, about the alleged frameup of witnesses in a Federal matter?

Mr. Talley: I make the same objection. 9434
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you send your brother any money after you heard he was afraid of a frame-up by witnesses in a Federal matter?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception. 9435

A. No, sir.

Q. Did you send him any advice, either by money, telephone calls, telegraph, or any other way?

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. The second visit you made to Kansas City, was that a social visit?

9436 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: Objected to as already gone over in detail; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I went to see him.

Q. Did you go to see him socially? A. Yes, sir.

Q. Did you bring any money out with you?

9437 A. No, sir.

Q. Did you bring any information about the alleged frameup by witnesses in the Federal matter?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you bring him any information about the progress of the O'Dwyer investigation? A.

9438 No, sir.

Q. When you got out there did you ask your brother how he was feeling? A. Yes, sir.

Q. Did you ask him anything else except the state of his health? A. He wanted to know how the family was, mother and brothers and everybody.

Q. He wanted to know how the family was? A. Yes, sir.

Q. Did you ask him why he did not communicate with the family?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you tell him how the family was? A. Yes, sir.

Q. Did he want to know anything else from you? A. No, sir.

Q. You spent two days on that trip, too? A. 9440
Yes, sir.

Q. On the occasion of this second trip did you ask him whether he was still worrying about the witnesses framing him up in this Federal matter? A. No, sir.

Q. How far apart were these two trips?

Mr. Cuff: I object to that as having already been gone over.

The Court: What year?

Mr. Turkus: 1940, and one in 1941. I want to know how far apart the two trips were. 9441

Mr. Cuff: I object to that as having been already gone over and answered.

Mr. Turkus: Tell me the answer and I will withdraw it.

The Witness: One was in October.

Q. When was the other one? A. Toward the end of the year.

By the Court:

Q. You mean December? A. December or January.

9442 *Sidney Weiss—For Defts.—Cross*

Q. When was the first? A. October.

Q. The first was October, and the second when? A. Some time in December or January.

Q. When was the third one? A. In April.

Q. These were all social, purely social visits? A. Yes, sir.

Q. Did you go by aeroplane each time? A. By train, too.

Q. How many times did you fly? A. Once.

Q. Once you flew, then you drove the car back,
9443 and the rest of the time you went by train? A. Yes, sir.

Q. What line did you go by? A. At the Penn Station.

Q. You mean the train to Chicago and then you went by the Santa Fe from there? A. The Penn to St. Louis and then I had to take a different train; I changed to Kansas City.

Q. That is the Union Station? A. Yes, sir.

By Mr. Turkus:

Q. On the occasion of the second trip out, did
9444 you bring any money out with you? A. No, sir.

Q. Did you bring any jewelry out with you? A. No, sir.

Q. Did you bring anything that could be readily converted into cash with you? A. No, sir.

Q. When you got there on the second trip, other than speaking about the health of the various members of the family, did your brother speak to you about anything else?

Mr. Talley: Objected to.

The Court: Objection overruled.

9445

Mr. Talley: Exception.

A. Just in general.

Q. Just in general. Did he mention anything about witnesses who were allegedly trying to frame him on a Federal matter? A. No, sir.

Q. Was that subject ever brought up by either one of you on the second visit? A. I don't remember.

Q. Think, you may, see if you can remember.

9446

Mr. Talley: I object to the form of the question and to admonishing the witness, which is highly improper in the form of a question to this witness.

The Court: It occurs to me that time would be saved instead of taking each one separately, to ask him about any visit when that was discussed.

By the Court:

Q. Did you ever discuss with him that subject? A. No, sir.

9447

Q. Did you ever ask him for the particulars? A. No, sir.

By Mr. Turkus:

Q. Did you ever ask him any of the details? A. No, sir.

Q. Or did you ever offer to help him by seeing a lawyer, or seeing the witnesses and trying to fix things up? A. No, sir.

Q. You got nothing beyond that? A. No, sir.

9448 *Sidney Weiss—For Defts.—Cross*

Q. And you say all these visits, these three visits within approximately six months, were purely social? A. I only seen him twice.

Q. Once you went there and he was not there? A. No, he was arrested.

Q. Once you went there after he had been arrested? A. Yes, sir.

Q. That was a social visit, too? A. I went to take his wife home.

Q. You went to bring his wife home after he
9449 was arrested? A. Yes.

Q. Are you older or younger than Mendy? A. Younger.

Q. Where were you born? A. New York City.

Q. Do you know where Mendy was born? A. In New York City.

Q. Do you know how old he is? A. Around thirty-five, I think.

The Court: You have the birth certificate with you, Mr. Cuff?

Mr. Talley: We have it in court; if the District Attorney wants to see it we will
9450 allow him to see it.

Mr. Turkus: I would like to see it.

Mr. Talley: Counsel hands District Attorney certificate, copy of birth certificate of Stanley Weiss.

Mr. Turkus: I meant Mendy Weiss.

The Court: I inquired as to that. I wondered if there had been a check-up on the birthday.

Mr. Talley: This is a check-up on the birthday.

Mr. Turkus: We probably misunderstood one another.

Mr. Talley: I did not misunderstand

the Court. The Court was asking about the birth certificate. I have that.

The Court: Counsel, do not try to get the Court in bad before the jury. I asked him if he had here a record of the birth.

Mr. Talley: Whose birth?

The Court: And you said you have it.

Mr. Talley: I have it.

The Court: You know perfectly well you have a right to put it in, but you are not going to pass the buck to the Judge. 9452
We will now take a recess until 10:00 o'clock tomorrow morning.

Mr. Talley: Just a minute, if your Honor please—

The Court (Addressing the jury): Gentlemen, do not discuss the case nor let anyone talk to you about it. Keep your minds open. Remember the other admonitions given you by the Court.

Mr. Talley: May counsel make application before you dismiss the jury?

The Court: No.

Mr. Talley: Exception. 9453

(Jury retired from the court room.)

Mr. Talley: I wish to address your Honor before the defendants are remanded. I think counsel join with me in an application to your Honor not to compel us to come to court tomorrow, Saturday. There is no doubt, apparently, that this case will be concluded during this coming week. By not sitting tomorrow it will enable us to go over the record.

9454 *Sidney Weiss—For Defts.—Cross*

The Court: The Judge is very, very easy, easier than I have been in any other case I ever tried. I have indulged counsel. The defendants are remanded.

(Adjournment was thereupon taken to Saturday, November 22, 1941, at 10:00 A. M.)

9455 Brooklyn, N. Y., November 22, 1941.

(TRIAL RESUMED)

SIDNEY WEISS, resumed the stand and testified further, as follows:

Cross-examination by Mr. Turkus (continued):

Q. How did you learn Mendy's address in Kansas City when you went out to see him? A. He sent me a letter.

Q. Did the letter have his address in it? A.
9456 Yes, sir.

Q. Didn't it have some person to contact? A. No, sir.

Q. It did not have Benny Portman to contact, or Rainey to contact? A. No, sir.

Q. Or Fay Dilley? A. I did not know her.

Q. It had the name of James W. Bell and the address in it? A. The name and address.

Q. How was the letter signed?

Mr. Talley: I object to that as being incompetent, immaterial and irrelevant.

The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.

Q. Did it have "Mendy" on it? A. I just don't remember.

Q. How did you know the letter was from Mendy? A. Well, I got the letter from him; I do not know the details of the letter.

Q. How did you know the letter was from Mendy, don't you understand that? A. He put 9458
his name in.

Q. What name? A. I just don't remember.

Q. You say that it had "Bell" and the address? A. I did not say— He had the name and address, I said.

Q. And from the name "Bell" and the address, you knew it was Mendy? A. I don't know the details of the letter.

Q. Now, let us go back to March of 1940. In March of 1940, did Mendy Weiss tell you he was brought into the District Attorney's office in Brooklyn?

9459

Mr. Talley: I object. That is a direct effort to try to elicit testimony he is not entitled to. It is pretty dangerous for the District Attorney to do that, if your Honor wants to know what is in my mind.

The Court: I want to think about it. Yesterday we had that. Up to yesterday morning there was not a particle of evidence of flight and hiding by Weiss, prior to last summer. Are you going to a date before that? In the cross examination

9460 yesterday of this witness it was brought out, as far back as 1938, Weiss was living in Brooklyn under the name of Hoffman. Later on, in the same year, he lived in Brooklyn under a still different name. But there is nothing to indicate that that has any specific relation to the Rosen case. Now—and follow me closely—ordinarily, if a crime is committed and the person thereafter flees and hides, you do
9461 not have to prove what was in the person's mind. In the absence of any other evidence, there may be a presumption that flight and hiding has relation to the crime. Therefore, the inference to be drawn from flight and hiding applies, so the jury may, in its discretion, apply it. Here, you have a different situation. The record indicates that there may have been more than one motive for flight and hiding. You cannot nail it down to the Rosen case, in view of that evidence.

9462 Mr. Turkus: That is not the theory under which I am propounding the question.

The Court: Pardon me. Because, when the act is purely circumstantial it is capable of interpretation on two hypotheses. So far as the specific motivation is concerned, the defendant is entitled to the benefit of the innocent hypothesis. Have you followed me?

Mr. Turkus: Yes.

The Court: I think you are treading on dangerous ground.

Mr. Turkus: May I disclose to your Honor what I am driving at? I am coming to the point of credibility on the fabrication of evidence. I intend to show this was a fabricated alibi made as far back as 1936. I want to show other fabrications by this witness. I want to show his efforts to destroy the People's case by interfering with other witnesses. This is going to his credibility.

Mr. Talley: I object to the statement 9464
of the District Attorney and ask you to instruct the jury to disregard it.

Mr. Turkus: What the District Attorney says is not evidence. That is what I mean to prove.

Mr. Talley: That is what you are trying to prove and that I am trying to prevent you from proving. You are trying to get the jury to see that now by your making the statement.

The Court: What has been said by the District Attorney that he intends to prove 9465
is not evidence. You will completely disregard it. There is not a particle of evidence in the case that Weiss, in connection with the Rosen murder, was sought at the time you mentioned.

Mr. Turkus: I have stated my theory, which I intend to prove through his own lips.

Mr. Talley: He cannot prove credibility by these series of questions.

Mr. Turkus: Doesn't that affect the credibility of a witness if he fabricates

9466 *Sidney Weiss—For Defts.—Cross*

evidence, if he helps to build up a false and fictitious alibi at the time the crime was committed?

The Court: Do not argue this any further. Repeat the question.

(Question read by reporter, as follows: Did Mendy Weiss tell you he was brought into the District Attorney's office in Brooklyn?)

The Court: Objection sustained.

9467 By Mr. Turkus:

Q. In or about the end of March, 1940, did your brother Mendy Weiss tell you that he told the District Attorney of Brooklyn that he lived at number 10 Monroe Street, New York City, your house?

Mr. Talley: I object. He has no right to elicit that testimony. This is an endeavor through this witness to elicit a statement made by the defendant which
9468 he is not entitled to have before this jury. The objection is based generally upon the ground it is incompetent, irrelevant and immaterial.

Mr. Turkus: This is a preliminary question.

The Court: The trouble is, it looks to me really an attempt to get something before the jury that, by means of an answer to the question—

Mr. Turkus: I am going to call detectives who brought him in, in rebuttal.

The Court: That is a different proposition.

Mr. Turkus: I want to show efforts of this witness to fabricate in this case and to collude with his brother—I want to show it through his lips. This goes to his credibility, if that is the fact.

The Court: Please, I want no more discussion about this. Anything in March of 1940 was prior to the time, so far as the record discloses, Weiss was being sought in connection with the Rosen 9470 case, or was even under adequate suspicion.

Mr. Turkus: That is not the theory. Am I precluded from pursuing that line?

The Court: It will only confuse the issue. I have to rule in the same way against you as against the defendants. Only yesterday morning I excluded evidence from Major Kleinman on that point, which tended to lead up to the same nature of confusion. This is a complicated case. There are a great many rami- 9471 fications. It is hard for the expert mind to follow. You must not confuse it before the jury or we will have a confused verdict. The objection is sustained.

I will add this, for clarification. The only reason that the Court has permitted the evidence of living under an assumed name prior to the summer of 1940 is as having a bearing upon this witness' credibility.

Mr. Turkus: That is right.

9472 *Sidney Weiss—For Defts.—Cross*

The Court: But it must not be prejudicial to Weiss.

Mr. Turkus: Naturally, everything is on the theory of this witness' credibility, who comes here and speaks of a 1936 alibi.

The Court: All right.

Mr. Turkus: I will not proceed on that line as the Court has ruled it out.

By Mr. Turkus:

9473 Q. Mr. Unger, whose apartment you visited, that was at number 3 East 101st Street, Manhattan? A. It was 101st Street.

Q. Do you remember the address, number 3 East 101st Street? A. I remember 101st Street.

Q. And what other street? A. East of Fifth Avenue.

Q. Right off Fifth Avenue, wasn't it? A. I said east of Fifth Avenne.

Q. Now, did you visit Unger before that in the Trenton State Prison?

9474 Mr. Talley: I object to that as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You knew that Unger was a jail bird and an ex-convict when you visited him at 101st Street, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. I also object to the form of the question.

The Court: Objection overruled. Leave out "jail bird", call him "ex-convict". Be polite.

Mr. Talley: Exception.

A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. You saw Yiddle Lorber up there, didn't you? A. I don't know.

Q. Let me remind you, wasn't Yiddle Lorber up there, with Al Engelson and your other brother, Chick Weiss, and Sidney Weiss, yourself? 9476

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, tending to prejudice this jury.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember Weiss being there.

Q. You know Al Lorber, don't you? A. Abie Lorber.

Q. The fellow that you called Yiddle Lorber, you knew him? A. Yes, sir. 9477

Q. How long did you know him? A. All my life.

Q. You knew him as a fixer, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

9478 *Sidney Weiss—For Defts.—Cross*

Q. Didn't you know he was a hanger-out around courts and also a fixer?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He was in the bonding business, I know.

Q. He was in the narcotic business, too, wasn't

9479 he?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: If the witness knows.

A. Not as far as I know.

Q. You knew him all your life? A. Yes, sir.

Q. You know he has been convicted for narcotics, in a narcotic case, don't you?

Mr. Talley: What possible bearing has that upon the issue we are trying here?

9480 Somebody who is not in the case at all, as far as I have been able to ascertain.

The Court: The question is whether at the time of association he knew it. You used present tense.

Q. Didn't you know at the time you were at East 101st Street, in Unger's apartment, that Abie, or Yiddle Lorber was mixed up in the narcotic traffic?

Mr. Talley: I object.

The Court: He says he does not remem-

9481

ber if Lorber was there. Sustained. But he can say at the time of general association whether he knew it.

Q. At the time you were up at East 101st Street did Mendy Weiss live at 4520-12th Avenue? A. I know he lived on 12th Avenue and 46th Street; I do not remember the address.

Q. Let us see if I can refresh your recollection. Wasn't there a deal made in Unger's apartment that Mendy Weiss' furniture be moved out of 4520-12th Avenue by a furniture man named Kelly?

9482

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I never heard of it.

Q. Wasn't it arranged that Blanche, his wife, was to go and move in with Rose Simons?

9483

Mr. Talley: I object to the form of the question.

The Court: The form could be the subject of revision.

Mr. Turkus: The question is, if he knows. I withdraw it.

Q. In your presence, and with you as part of the conversation and the conspiracy, wasn't it arranged that Blanche was to move it with Rose Simons?

9484 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Who was Rose Simons? A. Blanche's sister.

Q. After the meeting in Unger's house, didn't Blanche, to your knowledge, move in with her
9485 sister Rose Simons on the west side of Manhattan, at an 84th Street address?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. There was no such meeting; I don't know what you are talking about. There was no such meeting. I went to see him at 101st Street, that is all. There was no such meeting that you are talking about.

9486 Q. After your visit at Unger's flat on East 101st Street, isn't it a fact that Blanche moved in with her sister, Rose Simons, on the west side of Manhattan, at the 84th Street address?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know.

Q. Isn't that a fact that after you visited

Unger's flat at number 3 East 101st Street that Mendy Weiss went out to Chicago and left his wife here in New York City?

Mr. Talley: I object. He is trying to tie up two things together that have no relation.

The Court: How would he know that Mendy went to Chicago?

Mr. Turkus: I am asking him if he knows it. He can say if he does not know. 9488

The Court: You mean after he heard of it?

Mr. Turkus: I will go further than that.

The Court: If he had first hand knowledge of it?

Q. Wasn't there a deal made in the Unger flat between you and your brother Mendy Weiss, Yiddle Lorber and Unger, that your sister-in-law Blanche was to move in with her sister on the west side of Manhattan, and that Mendy Weiss was to go out west? 9489

Mr. Talley: I object to that as already answered, and as incompetent, immaterial and irrelevant.

By the Court:

Q. Were you there? A. I was there, but there was no such party there. I don't know

9490 what the District Attorney is trying to bring out.

By Mr. Turkus:

Q. Were you there in April of 1940? A. I was there in 1940, but what the month is, I don't remember.

Q. In relation to the time that Mendy Weiss went west, when were you in the Unger flat?

9491 Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I was there in 1940, but what month I do not remember.

Q. In relation to the time that you went out by train to Kansas City, Missouri, when was the meeting in George Unger's flat?

9492 Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: I also object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I said there was no such meeting. I don't know of any such meeting.

Q. In relation to your visit at the Unger flat, when was it you went out to Kansas City, Missouri, to see your brother?

9493

Mr. Talley: I object to that on the same ground.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't understand the question.

Q. Don't you understand the question—How long after that meeting was your visit? A. I am telling you there was no such visit at all.

Q. How long after your visit to the Unger flat at number 3 East 101st Street, or on East 101st Street, east of Fifth Avenue, was it that you went out to see your brother Mendy Weiss in Kansas City? A. I don't know how long.

9494

Q. How long after the meeting—Question withdrawn.

Q. How long after your visit to the Unger flat on East 101st Street was it that you received a letter from Mendy Weiss, a letter which brought you out to Kansas City? A. I don't remember.

By the Court:

9495

Q. I think you told us it was in October? A. October, yes, sir.

Q. You made your first visit? A. Yes, sir.

Q. To Kansas City? A. Yes, sir.

Q. You told us it was in the summer preceding October that you received a letter from Mendy? A. Before I made the trip.

Q. Some time in the summer? A. Yes, sir.

Q. Not in the fall? A. No, sir.

9496 *Sidney Weiss—For Defts.—Cross*

By Mr. Turkus:

Q. Did your brother Mendy Weiss, in the early part of 1940, come to you and ask you to state falsely that he was living with you and working with you in jute boxes and pin ball machines?

Mr. Talley: I object to that as trying to elicit testimony he is not entitled to
9497 elicit, and as incompetent, immaterial and irrelevant.

Mr. Turkus: I will withdraw it in that form.

Q. Did you agree with any one to falsely testify and state that your brother Mendy Weiss was living with you at number 10 Monroe Street, New York City, and was engaged with you in jute boxes and the pin ball machine business? A. No, sir.

Q. Now, do you know a man named Frankie,
9498 in relation to your jute boxes and pin ball machines?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. What is Frankie's last name? A. Schneider.

Q. Where does Frankie live? A. In the Bronx.

Q. What address? A. I don't know.

Q. What is Frankie in relation to your jute boxes and pir ball business? A. He works for me.

Q. Isn't he a partner? A. No, sir.

Q. Is he about thirty-two years old? A. He is somewheres around that.

Q. Is he about five feet, six, or five feet, seven? A. A little taller.

Q. Does he weigh about 150 pounds? A. I don't know. 9500

Q. How long has Frankie been working with you? A. About five years.

Q. Is he smooth-shaven? A. I don't understand what you mean.

Q. Has he a mustache? A. No, sir.

Q. Has he a beard? A. No, sir.

Q. Is he smooth-shaven, without hair on his face? A. Yes.

Q. Has he sandy hair? A. No.

Q. What color hair has he got? A. It looks like black to me.

Q. Has he gray eyes? A. I don't know; I never looked into his eyes. 9501

Q. Let us see about Frankie. Wasn't Frankie with you in the narcotics business? A. Mr. Turkus, I was never in the narcotic business.

Q. You were not in Kansas City making contact with John Jay, out there, for narcotics?

Mr. Talley: I object to that as too far afield. Are you going to let the District Attorney go on like this?

A. No, sir.

9502 *Sidney Weiss—For Defts.—Cross*

The Court: The witness has answered.

Q. Did you meet John Jay out in Missouri? A. No, sir.

Q. Well, didn't you meet him when he was introducing Mendy as one of his relatives? A. I did not even know him.

Q. Didn't you have a piece of a crap game at Norfolk off Delancey Street four years ago?

9503 Mr. Tailey: Objected to as incompetent, immaterial and irrelevant, too remote.

The Court: There is no moral turpitude in play crap.

Mr. Turkus: There is no moral turpitude in it but there is the law against gambling, play crap is gambling.

The Court: The Court does not know what you mean by "piece".

Mr. Turkus: I withdraw the question in that form.

9504 Q. Weren't you, in violation of the law of the State of New York, operating a crap game at Norfolk off Delancey Street, where you were taking a cut from the players?

Mr. Talley: Objected to as calling for a conclusion; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Didn't you have an interest, a financial interest in a bar and grill at Lewis and Grand Streets, known as the Lewis Bar and Grill, which was a hangout for gangsters?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, simply intended to prejudice the jury against this defendant.

The Court: It contains two propositions. Objection sustained. 9506

Q. Didn't you have a financial interest in a bar and grill and Lewis and Grand Streets, known as the Lewis Bar and Grill?

Mr. Talley: Objected to as immaterial, incompetent and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Was the Lewis Bar and Grill one of your hangouts? 9507

Mr. Talley: Objected to as immaterial.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. How many times have you gone into the Lewis Bar and Grill?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. It is not affecting this man's credibility. It does

9508 *Sidney Weiss—For Defts.—Cross*

not do anything at all except to becloud the issue in this case.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. More than ten? A. I don't know.

Q. More than twenty? A. I don't know.

Mr. Talley: I object to that.

9509 The Court: Objection overruled.

Mr. Talley: Exception.

Q. More than a hundred? A. I don't know.

Mr. Talley: Objected to.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. More than two hundred?

Mr. Talley: Objected to.

The Court: Objection overruled.

9510 Mr. Talley: I must have an exception in each case.

A. I don't know.

Q. Well, when you heard the District Attorney say in the first part of that double question that that was a hangout for gangsters, did that cause you to know how many times you were in there?

Mr. Talley: I object to the question as improper.

The Court: Objection sustained.

9511

Q. Can you estimate whether you have been in the Lewis Bar and Grill five hundred times?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; already answered.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9512

Q. How long do you know Schlermer Katz?
A. I know him about eight years.
Q. In the eight years you have known him, how many times have you been out in his company?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Never in his company.

9513

Q. Were you ever in the company of others who were with Schlermer?

Mr. Talley: I make the same objection.

The Court: You mean with Schlermer as a member of a group?

Mr. Turkus: Schlermer was a "finger man".

Mr. Talley: If your Honor please, you see how improper and how persistent the efforts of this District Attorney are in trying to get something before the jury. I move for the withdrawal of a juror,—I think this is the first time I have made

9514 *Sidney Weiss—For Defts.—Cross*

this application,—and for a mistrial, upon the ground that the District Attorney has persistently made statements that your Honor has ruled against him in connection with evidence he is trying to elicit, with the attempt to prejudice this jury against these defendants. And the persistence with which that is done makes it impossible for this defendant to get a fair trial—in view of the statements of that
9515 kind deliberately and persistently made by the District Attorney.

The Court: The motion is denied.

Mr. Talley: Exception.

Mr. Turkus: Will you look at the testimony of Berger?

The Court: The evidence on that point is specific as to an alleged talk between Berger and Weiss at Clinton and Broome in relation to Rubin,—that he wanted the witness Berger to point out Rubin to Schlermer, to be "hit." Schlermer's real
9516 name was Katz. It was not Sam Katz. That Weiss then said he would have Schlermer get in touch with him. Then there was a meeting with Schlermer at Stanton and Cannon, and Schlermer said that Weiss wanted him, Schlermer, to see the witness Berger. Now, that does not make Schlermer the finger man. As I understood, the finger man was Berger—but that may be more or less immaterial.

Mr. Talley: It is very material whether Berger, whose testimony your Honor has referred to, was the finger man or not.

9517

He said he was. This question assumes anything that Berger may have said might be true, which we do not admit.

The Court: Repeat the question.

(Question read by reporter, as follows:)

Q. Were you ever in the company of others who were with Schlermer?

The Court: I will allow it.

Mr. Talley: Exception.

9518

A. No, sir.

Q. Do you know Ben (Bugs) Siegel? A. No, sir.

Q. Were you running those jute boxes and pin ball machines for yourself or for someone else? A. Myself.

Q. Do you know Meyer Lansky, sometimes known as Jake Lansky, sometimes known as Meyer Lansky? A. No, sir.

Q. You are not operating pin balls and jute boxes for Meyer Lansky and Ben (Bugs) Siegel, are you? A. No.

9519

Q. Didn't you work for Ben (Bugs) Siegel on the pin balls?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, too remote.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You never met Ben (Bugs) Siegel in your life? A. No, sir.

Q. Or Lansky? A. No, sir.

9520 Q. How long do you know Hymie Siegel?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know him. I see him, but I never spoke to him.

Q. Where did you see him? A. In the East Side.

9521 Q. How many years have you seen him on the East Side? A. I don't know.

Q. Why, weren't you and Hyman Siegel and Cuppie Midgen engaged in the wholesale distribution of narcotics through a dealer named Fillipo Naty?

Mr. Talley: I object to that as incompetent.

The Court: Objection overruled.

Mr. Talley: Exception.

9522 A. No, sir, Mr. Turkus, you know very well I was never in the narcotic business. You know that.

Q. Do you mean that? A. Certainly.

Q. Was your sole visit out to Kansas City, Missouri, to see Mendy socially?

Mr. Talley: Objected to as already answered and gone into at great length, mostly yesterday.

Mr. Turkus: The witness has invited me as to what I know now.

The Court: Objection overruled.
Mr. Talley: Exception.

A. Yes, sir.

Q. You have not forgotten the telephone calls you made to Kansas City, Missouri, because of any narcotic business that was out there, have you?

Mr. Talley: Objected to.
The Court: Objection overruled. 9524
Mr. Talley: Exception.

A. No, sir.

Q. Did you ever see this person before (indicating a person who entered the court room)? A. Yes, sir.

Q. What is her name? A. I know her name as Ruth.

Q. Is that the one you were with when she was with Cuppie and you in Texas? A. I was not in Texas, I said.

Mr. Turkus: Your name, for the record, please? 9525

Person Addressed: Ruth Siik (spelling).

The Witness: Mr. Turkus, why don't you ask her if I was in Texas?

Mr. Turkus: I wish the law permitted me to do so.

The Witness: You know very well I was never in Texas.

Mr. Turkus: You know very well you were.

9526 The Court: Just a minute— The remark by Mr. Turkus is stricken out. The jury is instructed to disregard it. Mr. Turkus is admonished not to do a thing like that again.

Mr. Turkus: Your Honor admonished the witness not to make a statement.

The Court: No matter what the witness says, don't you engage in any retort that may prejudice the jury.

9527 Mr. Talley: I make the same application, that your Honor instruct the jury to disregard the last remark of the District Attorney, even after your admonition to [illegible].

The Court: I don't know if it amounts to anything, but I will so advise the jury.

Q. Were you told before you took the stand that on a collateral matter the District Attorney was bound by your answer? A. No, sir.

Q. Did you ever hear that expression before you took the witness chair? A. No, sir.

9528 Q. Now, that girl that was brought in here, Ruth Siik, was she Cuppie's sweetheart?

Mr. Tailey: Objected to as incompetent, immaterial and irrelevant. I don't know how that is within the knowledge of this witness.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. You associated with Cuppie and with her?

9529

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You never went out in their company together? A. No, sir.

Mr. Talley: I make the same objection.

The Court: Overruled.

Mr. Talley: Exception.

9530

Q. On or about June 5, 1941, did you, together with a man named Oscar, visit the Brownsville section of Brooklyn? A. I did not know no man named Oscar.

Q. Did you on or about June 5, 1941, visit the Brownsville section of Brooklyn?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, "about June". It is too indefinite.

The Court: Objection overruled.

Mr. Talley: Exception.

9531

A. I visited the Brownsville neighborhood; I don't know the month it was; I was there.

Q. You have been in Brownsville many times during 1941? A. I was there quite a few.

Q. Were you there on or about the month of June, 1941, and contacted one Naty Katz?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. I also object to the form of the question.

9532 *Sidney Weiss—For Defts.—Cross*

The Court: Objection overruled.
Mr. Talley: Exception.

A. I spoke to him.

Q. You know Naty Katz? A. Not before I spoke to him.

Q. Were you introduced to him? A. Yes, sir.

Q. By whom? A. By somebody in Brownsville.

Q. Who is the "somebody in Brownsville"?
A. I don't remember.

9533

Q. Why, it was just the past summer, wasn't it? A. I don't know who took me over to him. I spoke to a lot of people in Brownsville in reference to this case.

Q. Not so fast. Who else took you to Naty Katz, who was present? A. I don't remember who took me over. I spoke to lots of people.

Q. But I know—lots of people didn't take you over to Naty Katz? A. I spoke to lots of people in reference to this case.

Q. Was there one person who took you over to Naty Katz, or were there lots of people? A.
9534 I don't remember.

Q. Had you ever seen Naty Katz before you were introduced to him on that occasion? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: He said no.
Mr. Talley: Exception.

Q. After you met Naty Katz on that occasion did you meet with him again? A. I guess so.

9535

Q. Well, cannot you be a little more definite. A. Yes, sir.

Q. When you had sought an introduction to Naty Katz, you knew he was a Brownsville hoodlum, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; calling for a conclusion.

A. The only reason I spoke to him was because I knew he knew people from Brownsville that knew they were framing my brother. That is why I spoke to him. I wanted to get some information.

9536

Mr. Turkus: Will your Honor admonish the witness?

By the Court:

Q. The District Attorney wants to know this, at the time you spoke to Naty Katz, you knew that he was a disreputable character? A. No, sir.

9537

Q. You did not know that? A. The only reason I went to Brownsville—

The Court: We heard what you said.

By Mr. Turkus:

Q. On the second meeting you had with Naty Katz, did you know then he was a disreputable character?

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Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not; I never asked him; I did not know.

Q. You did not know anything about Naty Katz after the first or second meetings with him in regard to his social standing in the com-

9539 munity?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant—his social standing or anybody else's has no bearing here.

The Court: Objection overruled.

The Witness: The only reason that I went to see him—

The Court: Repeat the question.

(Question repeated by stenographer, as follows: You did not know anything about Naty Katz after the first or second meet-

9540 ings with him in regard to his social standing in the community?)

A. No, sir.

Q. Now, did you make a deal with Naty Katz to get one George Gunther to testify falsely, and when he refused it, did Naty Katz, with your approval, break his jaw?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I made no deal with nobody. All I had in mind to look for was to look for the truth. That is all.

Q. Were you present when Naty Katz attacked this George Gunther? A. You know I was not present.

Mr. Turkus: Will your Honor direct this witness to answer and desist from that?

The Court: Yes. 9542

Mr. Talley: He has given an answer.

The Court: I am trying to get a word in edgewise. When he answers the question make no retort.

Mr. Turkus: I ask that the answer be stricken out.

The Court: Read the question and let it be answered.

(Question read by reporter, as follows: Were you present when Naty Katz attacked this George Gunther?)

A. No, sir. 9543

Q. You were in Brownsville in the interests of justice, then, is that it? A. Yes.

Q. Did you go to Brownsville on one occasion in an automobile with two men?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, too general.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. See if I can refresh your recollection. How

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many trips to Brownsville have you made in the interests of justice? A. Lots of trips.

Q. How many is "lots of trips"? A. Many trips; I did not count them.

Q. Would you say twenty? A. I would not say nothing; I know I made many trips.

Q. Did you make one trip in an automobile with two men? A. I made lots of trips and I took along somebody with me for company.

Q. Was "somebody" two men on each oc-
9545 casion? A. No.

Q. Do you remember one specific occasion when you went to Brownsville with two men? A. Maybe I went, I don't know.

Q. Do you remember the month of May, 1941, going with two men in an automobile to Brownsville? A. No, sir.

Mr. Talley: I object to that as too general and too indefinite. I ask that the time be fixed. The witness has a right to have his attention directed to some-
9546 thing.

The Court: You say May, 1940?

Mr. Turkus: 1941.

The Court: Objection overruled.

Mr. Talley: Exception.

A. May of this year.

Q. Did you go to Brownsville in an automobile with two men, and on a Brownsville corner meet one Harry, alias Muggsy Cohen? A. The only time I seen Muggsy Cohen—

Q. Yes or no; don't make a speech. A. That is the only way I can answer it.

Q. If you cannot answer yes or no, tell the

jury— A. (Interrupting) That is the only way I can answer that question.

Mr. Talley: I ask your Honor again to ask the District Attorney not to make a statement of that kind, threatening and bull-dozing this witness. It is contemptible. I have never, in all my experience, seen an exhibition or talk such as we have been listening to in the last day or two from this District Attorney.

9548

Mr. Turkus: That is ridiculous.

Mr. Talley: I ask your Honor to direct the District Attorney to keep within the bounds of just plain ordinary decency in the trial of this case.

Mr. Turkus: May we have summations at the proper time?

The Court: Answer the question yes or no.

The Witness: Not then, I never seen him then.

9549

Q. Did you in an automobile see one Harry, alias Muggsy Cohen on a Brownsville corner in or about the month of May, 1941? A. Yes, sir.

Q. Did you see Harry Muggsy Cohen in Brownsville any month in the year 1941? A. Yes, sir.

Q. What month was it? A. It was the Saturday before the case started.

Q. That was the first time you saw him? A. The first time I saw him.

Q. When you say, "before the case started",

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do you mean— A. (Interrupting) September 15th.

Q. Did you say to Muggsy Cohen, "I heard that you were in the District Attorney's office"?

Mr. Talley: I object to that as being purely collateral. Your Honor will recall that I was prevented from having that testimony elicited yesterday with relation to Muggsy Cohen, on the ground it was a
9551 collateral matter, and here we are going into it again. If your Honor allows this witness to testify and allows me to present my witness, I have no objection to it. I do not want to be foreclosed and allow these questions to be asked of this witness. I would like to find out all there is about Muggsy Cohen when he was in the District Attorney's office.

The Court: There is so much confusion with this speech making it is difficult for me to keep the evidence together. All you have to do is to make an objection on legal
9552 grounds and try to forget there is a jury here. Just address the Court.

Mr. Talley: I cannot forget there is a jury here.

Mr. Turkus: We will have a talk.

Mr. Talley: I am listening to these improper remarks given by the District Attorney.

The Court: The jury will disregard them. The objection is overruled.

A. No, sir.

9553

Q. Did you ask Muggsy Cohen what happened in the District Attorney's office? A. No, sir.

Q. Did you say to Muggsy Cohen, "I want you to meet me tonight and talk to a lawyer"? A. I said to him—

Q. Did you, yes or no? A. I said I would call him up. I cannot answer that question yes or no. I will tell you what I said to him.

Q. Tell me yes or no. A. That is the only way I can tell it to you.

9554

The Court: Repeat the question.

(Question repeated by reporter, as follows: Did you say to Muggsy Cohen, "I want you to meet me tonight and talk to a lawyer"?)

The Witness: All I said was I would call him Saturday and if he wanted to see my lawyer I would call him Saturday evening and I would make an appointment for eight o'clock.

By the Court:

9555

Q. To see if he would go to your lawyer? A. Yes.

Q. Your lawyer? A. My brother's lawyer.

Q. Who was that? A. I asked him if he would see Mr. Cuff, Mr. Kleinman, or anyone.

By Mr. Turkus:

Q. Did you say to Muggsy Cohen, "I want you to meet me tonight and talk to the lawyer," yes or no? A. No, sir.

Q. Did you tell Muggsy Cohen to meet you

at Weiner's Bar and Grill on Amboy Street near Pitkin Avenue at seven o'clock that night? A. I said I would 'phone him there.

Mr. Turkus. Will your Honor direct this witness to be responsive?

The Court: He has already answered that that Saturday night he was to telephone Muggsy—was to telephone him and let him know if he would see the attorney for the defendant Weiss, not mentioning any specific name of the attorney.

9557

Q. At seven o'clock on the night you met Mr. Cohen on a Brownsville corner did you telephone Weiner's Bar and Grill and have a talk with Muggsy Cohen? A. I never met him at seven o'clock that night.

Q. Did you at or about seven o'clock that night telephone Muggsy Cohen at Weiner's Bar and Grill? A. Yes, sir.

Q. Did you tell Muggsy Cohen that you could not meet the lawyer that night and that you

9558 would call him back the next night at the same place at the same time? A. The next afternoon.

Q. So you did tell him that you could not meet the lawyer that night and you would call him back the next afternoon? A. That is right.

Q. Now, did you call back at Weiner's Bar and Grill when you said you would? A. Yes, sir.

Q. Did you adjourn or lay off the appointment for one o'clock in the afternoon two days later? A. Yes, sir.

Q. And two days later, at about one o'clock in the afternoon, did you telephone the same

bar and grill and speak to Muggsy Cohen? A. Yes, sir.

Q. Did you say to Muggsy Cohen, "I want you to come and meet me in front of number 40 Wall Street, New York; take a cab and I will pay for it"? A. I asked him if he wanted to go and see Talley—Judge Talley. He said, "Yes." I said, "Come down to 40 Wall Street." You want to know everything. I am telling you the truth.

9560

The Court: Answer the question.

Q. Answer yes or no— Did you in that talk say to Muggsy Cohen, "I want you to come and meet me in front of number 40 Wall Street, New York, take a cab and I will pay for it"? A. Part of that is right and part is wrong.

Q. What is wrong? A. I asked him if he wanted—

Q. What is wrong with the two sentences—the one that you were to meet in front of 40 Wall Street, New York, "Take a cab and I will pay for it,"—which is wrong? A. "I want you." I did not command him to come down. I asked him if he wanted to come down, and he said, "Yes." I said, "Meet me in front of 40 Wall." He said he had no money. I said, "Jump in a cab, and I will pay for it." 9561

Q. So you gave Muggsy Cohen no order? A. No, sir, I did not give him any order.

Q. It was a request? A. No request, he said he would be glad to come to the office; he said he would be very glad to come to the office.

Mr. Turkus: Will your Honor admonish this witness? I think he has been encouraged that he can answer the District Attorney any way he sees fit.

The Court: Proceed.

Q. Did you request Muggsy Cohen to come to 40 Wall Street? A. I asked him if he wanted to come and he said yes.

Q. Yes or no? A. Yes, sir. If you want it that way, all right.

9563

Q. I want it yes or no. A. I cannot answer you that way.

Q. You did all right on direct examination, didn't you?

Mr. Talley: I object to that and move it be stricken out.

The Court: Objection sustained. Strike it out.

Q. Did Muggsy Cohen say to you, "Is it all right if I take a friend along with me?" A. No,

9564 sir.

Q. Did you say, "Yes, that is all right"? A. No, sir.

Q. Now, did Muggsy Cohen meet you in front of 40 Wall Street? A. Yes, sir.

Q. Did he have a man with him named Blacky? A. He had a man with him; I don't know what his name was.

Q. Was it Blacky? A. I don't know.

Q. You never met him before and have never seen him since? A. No, sir, that was the second time I saw Muggsy myself.

Q. Now, you paid for the cab? A. Yes, sir.

Q. Then did you say to Muggsy Cohen, "I think it is too early yet, Talley is out to lunch"? A. I think so, yes, sir.

Q. Then did you say to Muggsy, "I would like to buy you a drink"? A. Yes, sir.

Q. Did Muggsy say, "I am not hungry, but I will have a drink"? A. Yes, sir.

Q. Did you walk for a couple of blocks and go into a bar and grill and have a drink? A. Yes.

Q. All of you? A. Yes, sir.

Q. That is, you, the unknown man, and Muggsy? A. Yes, sir. 9566

Q. You paid for the drinks? A. Yes, sir, one drink.

Q. One drink for three, or three drinks? A. One drink apiece.

Q. A round of drinks? A. Yes, sir.

Q. Did you walk Muggsy Cohen over to the Talley law offices? A. Yes, sir.

Q. Before going into Mr. Talley's office did you ask him, Mr. Talley, whether or not you could have a room along with Muggsy Cohen, to talk to him? A. No, sir.

Q. Did Mr. Talley say "Yes" to that? A. I 9567 didn't ask him that.

Q. Did you get a room alone with Muggsy Cohen first? A. No, sir.

Q. Did you, in the room alone with Muggsy Cohen, tell him you wanted to know what happened in the D. A.'s office? A. No, sir.

Q. Did you ask him to tell you everything from the beginning, so that he could get everything straight and you could get everything straight? A. I told him to tell me the truth, that is all I asked him, just for the truth.

Q. Didn't you say to Muggsy Cohen in the

9568 room along in Talley's law office to tell you everything that happened in the D. A.'s office; that you wanted to get everything from the beginning so you could get everything straight? A. No, sir.

Q. Did you, after talking alone to Muggsy Cohen, bring him into Mr. Talley's private room? A. No, sir.

Q. Did you, after talking to Muggsy Cohen alone in a private room, bring him into Mr.
9569 Talley's private room and have him dictate a statement—that is, Muggsy Cohen dictate a statement—to a stenographer? A. No, sir.

Q. Was a statement taken in Mr. Talley's private room from Muggsy Cohen to a stenographer? A. Yes, sir.

Q. Was this man whose identity you do not know sitting in the outer office? A. In the waiting room.

Q. And after Muggsy Cohen's statement was taken through the stenographer, was Muggsy Cohen handed Mr. Talley's card by Mr. Talley?

9570

Mr. Talley: Listen, I haven't had a card in thirty years.

Mr. Turkus: Is that from the witness?

Mr. Talley: That was from me. I don't use cards in my business or profession. I want you to get that straight.

Mr. Turkus: I will take that answer from Judge Talley in lieu of the witness.

Mr. Talley: You had better take it. I am no ambulance chaser, handing out cards.

Mr. Turkus: We are trying a murder

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case; you are not on trial for anything; don't be putting yourself in the place of your client.

Mr. Talley: Now, your Honor—

Mr. Turkus: One is in competition with the other.

The Court: I will stop this.

By Mr. Turkus:

9572

Q. Let us go back to what happened in the office—

Mr. Talley: Come back to it quickly.

Mr. Turkus: Will your Honor instruct him to stop hissing in my ear.

The Court: Both stop.

Q. What was Muggsy Cohen told by Mr. Talley—"in case you remember something you did not tell me, get in touch with me"? A. No, sir.

9573

Q. Did the unknown man and Muggsy Cohen leave the office together? A. Yes, sir.

Q. Did you take Muggsy Cohen and the unknown man, and drive Muggsy Cohen home? A. Yes, sir.

Q. Now, out in Missouri, when you were told by your brother Mendy that he was afraid witnesses were going to frame him in a Federal Court, you did nothing about it? A. That is right.

Q. Back here in New York City, you got the idea that somebody was trying to frame your brother in a murder case, is that it? A. Yes, sir.

9574 Q. You went out in the interests of justice to help him? A. Yes, sir.

Q. Did you go to the Governor? A. No, sir.

Mr. Talley: That has been already gone into at great length.

Mr. Turkus: This is on this frame-up—Judge Talley is twisted or has forgotten the evidence.

Mr. Talley: I object to it as incompe-
9575 tent, immaterial and irrelevant.

The Court: I think the question is frivolous. Sustained.

Q. Did you go to Judge O'Dwyer, the District Attorney of the County?

Mr. Talley: That is objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

9576 Q. Did you go to any law enforcement agency in the interests of justice?

Mr. Talley: I make the same objection, and also as to the form of the question.

The Court: That might be a normal reaction and again it might not, to go to a so-called law-enforcement agency. Most people don't know what they are or where they are located until election. The objection is sustained. The Court recognizes those only who are officially authorized to administer the law, and not self-

appointed organizations that do not understand and tell public officials how to do their work when they don't know anything about it whatever.

Mr. Turkus: Am I precluded from going any further on that?

The Court: I think that part is too far-fetched.

Q. Other than personally going to Brownsville in the interest of justice, did you do anything about the alleged frameup? A. I spoke to people and tried to bring out the truth. 9578

Q. That you did all on your own? A. Yes, sir, sure; I wanted to find out.

Mr. Turkus: I ask that this photograph be marked for identification.

(Received and marked People's Exhibit Z-27 for identification.)

Q. I show you People's Exhibit Z-27 for identification and ask you if that is a photograph of Yonkel. A. Yes, sir. 9579

Q. Yonkel is the husband of this woman whom yesterday you called Eisenstein, is that right? A. Something like that.

Q. You called her Eisenstein yesterday, didn't you? A. Something like that.

Q. What was something like that you called her yesterday? A. What you just said.

Q. Eisenstein? A. Yes.

Q. That is a woman you know for how many years? A. A number of years.

Q. How many is the "number" that you know her? A. A number of years.

9580 Q. Well, is it one? A. Around ten years.

Q. Nine or ten years? A. Yes, sir.

Q. Don't you know that the name furnished the District Attorney on the bill of particulars was Dorothy Isaacson, 148 Clinton Street, Borough of Manhattan, unemployed? A. No.

Q. Well, is the name Eisenstein or Isaacson? A. Isaacson.

Q. My question to you is, just refresh your recollection as to the name. A. I cannot pronounce it; I still cannot.

9581 Q. Didn't you say "Isaacson"? A. Isaacson or something like that.

Q. So that it was your inability to pronounce "Isaacson" that caused you to say Eisenstein?

The Court: Oh, don't quarrel about that.

Q. Did you ever know this Isaacson woman under the name of Levine? A. No.

Q. Did you ever know her husband, Yonkel, under the name of Levine? A. No, sir.

9582 Q. How many times have you been out with Yonkel? A. Never.

Q. Never out with Yonkel? A. No.

Q. Only out with Mrs. Isaacson, is that it? A. That is right.

Q. Did you ever know her under the name of Rosen? A. No, sir.

Q. Did you ever know her under the name of Roth? A. No, sir.

Q. Did you ever know her under the name of Greenberg? A. No, sir.

Q. Did you ever know her under the name of Mirrin?

Mr. Talley: I object to the manner in which this examination is being conducted before the jury. The District Attorney, reading ostensibly from the back of a photograph, asking this witness to identify, and underneath a yellow sheet. I think that method of examination should be stopped by your Honor. The question 9584
is objected to and the manner of examination is called to your Honor's attention. It is obvious, too—the District Attorney is standing within a foot of the jury box and endeavoring to do that—he does not look at the paper from which he is examining, but is holding it in sight of the jury.

The Court: My impression would be that Mr. Turkus is quite a few feet away.

Mr. Talley: He is within one foot of the jury box.

The Court: You will have it as one on the record. The Court is not interested. 9585
Go ahead.

Mr. Talley: Your Honor declines to comply with my request?

Mr. Turkus: May the record show that Mr. Turkus is facing the witness and that he is holding the picture—which I doubt is visible to the jury—face behind, although it has been identified by the witness as Yonkel, that I am reading from the back of the picture and that I have some yellow pages in my hand, which are not visible to the jury but only to me.

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Mr. Talley: The top of the paper is headed "Police Department," and it is a yellow sheet.

Mr. Turkus: He cannot see that.

Mr. Talley: I can see "Police Department."

Mr. Turkus: You can, but the jury cannc

Mr. Talley: The sheet you are reading from is the well-known yellow sheet of the
9587 Police Department.

Mr. Turkus: It is familiar to Judge Talley.

Mr. Talley: It is. I have handled a thousand of them.

The Court: Please stop this colloquy. The Court did not notice it until Judge Talley spoke of it—the papers or what the papers were. Certainly the jury would not have knowledge of what those papers are if Judge Talley had not told them. Judge Talley is on the other side of Mr. Turkus, from the direction of the jury.

9588 Mr. Talley: I take exception to the refusal of my request.

The Court: You are not going to have this record distorted, if I can help it.

By Mr. Turkus:

Q. Do you know her by any other name than Isaacson? A. No, sir.

Q. You told Mr. Talley yesterday that your 26th birthday was the only birthday you celebrated; is that right? A. That is right.

9589

Q. Of all the birthdays in your life the 26th was the only one you celebrated? A. That is right.

Q. What was there of peculiar significance about your 26th birthday as contrasted with all the other birthdays in your life? A. I don't understand you and I told you that was the only birthday—

Q. You do not understand me and you told me. Who did you tell Judge Talley was at the 26th birthday, the only birthday in your life

9590

when you had a party? A. Who did I tell?

Q. Yes. Don't you understand me? A. No, I didn't hear what you said. I am sorry.

Q. Yesterday you told Judge Talley that you only had one birthday party in your life. A. That is right.

Q. Your 26th birthday. A. That is right.

Q. And you remember about going to the moving pictures, and what time you came out, and what restaurant you ate in, the Brass Rail, and that you went to Ratner's restaurant, and that you met in Brother Sammy's automobile store,

9591

and that mother was there.

Mr. Talley: I object to the form of the question, if your Honor pleases.

Q. Didn't you remember that? A. Yes.

Mr. Talley: I object to the form of the question. I ask your Honor to rule upon it.

The Court: Overruled.

Mr. Talley: Exception.

9592 *Sidney Weiss—For Defts.—Cross*

Q. On this only birthday party in your whole life, who did you say was present? A. My mother, Dottie Eisenstein, Blanche, Mendy and myself.

Q. Why, you had Sammy in there yesterday?

Mr. Cuff: I object to that.

Q. Didn't you? A. No, sir.

Q. You are not leaving Sammy out on account of that picture I showed you yesterday, are you?

9593

Mr. Talley: If your Honor pleases, Sammy was not put in the birthday party yesterday. If the District Attorney was familiar with his record, he would know. He is now referring to a picture that he marked for identification. That is not right, to refer to any picture that is not in evidence. The question is highly objectionable and I press my objection and I ask you to direct the District Attorney not to ask that type of question again.

9594

The Court: If I recall correctly, in his direct testimony he said that the Sam who was with him that night was his brother Sam.

Mr. Turkus: Yes, that is right.

The Court: Is that the one you mean now?

Mr. Turkus: Yes.

The Court: That is not the picture you showed him?

Mr. Turkus: No, not this picture, but yesterday I showed him a picture which

was only marked for identification, a picture which he identified as a picture of his brother Sam.

The Court: Was that marked for identification?

Mr. Turkus: It was, your Honor. Would you like to see it?

The Court: Yes, I would like to see it.

Mr. Turkus: (To reporter) Will you read the question to which Mr. Talley has taken such violent objection? 9596

Mr. Talley: I said that the testimony yesterday was that Sam was not at the restaurant, was not at the theatre, was not at the birthday party, had nothing to do with it except that they met—the family met—at Sam's place of business. That is the testimony from this witness yesterday. Now the District Attorney is trying to make it appear that this witness yesterday said that Sammy was at the party.

The Court: I thought that was what he said. 9597

By the Court:

Q. What was the fact? Did Sam go to the party? A. No, sir.

Q. You mean you left him at ten o'clock and went to the party and he stayed in the store? A. Yes, sir.

Q. Your brother Sam did not go to the party? A. No, sir.

9598 *Sidney Weiss—For Defts.—Cross*

By Mr. Turkus:

Q. You testified yesterday that you all met in brother Sammy's automobile store, didn't you? A. That is right.

Q. That he was present when your mother was there, when Mendy was there, and this Dottie whom you called Eisenstein was there. Do you remember that? A. We met in the store.

9599 Q. Didn't you say Sammy was present? A. He was present at the store.

Q. All right, Sammy has been around this court for how long, out in the corridor? A. The last time—

Q. How many days or weeks has Sammy been outside? A. Sammy is in the army.

Q. Yes, but he has been standing out in the corridor in his army uniform? A. He has been in the last four days.

Q. And he was brought up as a witness, wasn't he?

9600

Mr. Talley: I object to that, if your Honor pleases.

The Court: How does he know?

Q. Wasn't he brought up here as a witness, to your knowledge, and when you saw this picture, People's Exhibit Z-26 for identification, Sammy is no longer a witness; isn't that it?

Mr. Talley: I object to that, incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Talley: And most improper.
The Court: The jury will disregard it.

Q. Was Sammy to your knowledge brought up here as a witness?

Mr. Talley: Object to that as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

9602

A. Can I see that picture? Can I see the picture again?
Q. Never mind the picture. The question is, was Sammy to your knowledge brought up here as a witness?

Mr. Talley: It was objected to. Your Honor has ruled upon it.
The Court: Overruled. You may answer that without seeing the picture.

A. Yes, sir.
9603
Q. He was brought up as a witness. And he was brought up from some army camp, wasn't he? A. That is right.
Q. And he has been around the court, waiting to take the witness-stand; isn't that right?

Mr. Talley: Objected to—not permitted in the court-room.
The Court: I have here page 2989 of the minutes of yesterday on matter which is in dispute. According to that, in the group at Sammy's store: "Q. Yes, who

9604 *Sidney Weiss—For Defts.—Cross*

was in the group that went from Sammy's store to the restaurant? A. My brother"—apparently referring to Sammy because he had just been spoken of on the previous page—page 2988; "Q. Who was present at Sammy's store that night? A. My brother and Sammy." This shows a distinction between brother Mendy and Sammy. "Q. Were you there before they came? A. My mother and
9605 Sammy were there before I came." The following page: "Q. Yes, who was in the group that went from Sammy's store to the restaurant? A. My brother, Mendy, myself, my mother, Blanche, and Dottie."

Mr. Talley: There is no significance to that comma after "brother". My brother Mendy, was the testimony.

The Court: In view of the previous question and answer on the previous page, I am calling that to your attention
9606 because there there is a distinction which refers to his brother and Mendy.

Mr. Talley: No question about his testimony yesterday, Judge. He testified they met at Sammy's store.

The Court: The jury can figure that out. There has been a colloquy as to what was meant. Here is the record. The jury can figure what it means.

Mr. Talley: I object to the command of the Court and the interpretation of the record.

The Court: The jury will interpret.

Mr. Talley: It is not the proper interpretation and it is not the testimony given by this witness in the manner your Honor has sought to interpret.

Mr. Turkus: We won't quibble about that. He said he was in the store, that he was intended to be called as a witness, and I have a question which this colloquy has yet prevented the answer from being recorded.

The Court: Let us have the question. 9608

Mr. Talley: Will your Honor read the record as to this witness' testimony as to who went up to the restaurant uptown, when they got to the Brass Rail? You are trying to convey that Sammy Weiss was present at the restaurant and theatre and so forth. He did not say that yesterday and I am trying—You know it already but I am reminding you what the testimony is.

The Court: Judge Talley asked for something further on on page 2989, following what the Court just read by question and answer, as to who constituted the group that went from Sammy's store to the restaurant, so I will read the next few questions and answers: "Q. Did you go by automobile from Sammy's store? A. Yes, sir, we did. Q. Where did you go? A. To the restaurant. Q. Where was the restaurant? A. The Brass Rail. Q. Where was that? A. Seventh Avenue and 49th Street. Q. Did you all go in there? A. Yes, sir, we did." 9609

9610 *Sidney Weiss—For Defts.—Cross*

Mr. Turkus: There is a pending question.

(Pending question read.)

Mr. Talley: Objected to.

The Court: He cannot say that.

By Mr. Turkus:

Q. To your knowledge hasn't Sammy been out in the corridor for the past four days, waiting to take the witness-stand after you got through?

9611

Mr. Talley: Objected to, if your Honor pleases.

The Court: He can state whether or not he has been in the corridor, he has seen him in the corridor, in the last four days.

A. Yes, sir.

Q. Do you know now of your own knowledge that Sammy won't take the witness-stand?

Mr. Talley: Of course, nothing could be more clearly objectionable than that.

9612

The Court: Sustained.

Mr. Talley: I am almost ashamed to interpose an objection to it in a court.

The Court: You have the ruling. Sustained.

Q. Has there been any conversation between recess yesterday and this morning between you and the lawyers in reference to Sammy taking the witness-stand? A. No, sir.

Q. Did you tell the lawyers between recess

yesterday and the start of court this morning about that picture?

The Court: Don't show it.

Q. Z-26 for identification? Yes or no. A. No, sir.

Q. You said not one word to any of the counsel for your brother about this picture, Z-26 for identification? A. No, sir.

Q. The picture of your brother Sammy? A. No, sir. 9614

Q. Did you tell Sammy about the picture Z-26 for identification?

Mr. Talley: I object, if your Honor pleases, to any further questions upon a paper that is not in evidence.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you tell any member of your family or any one of the lawyers who represent your brother as to the picture of your brother Sammy, Z-26 for identification? A. No, sir. 9615

Q. So that as far as you are concerned, what is portrayed on that picture is in your mind only? A. That is right.

Mr. Talley: I object to that, if your Honor pleases. I am not objecting to anything about his conversations with any attorneys in this case.

The Court: Overruled.

Mr. Talley: But I certainly do object to

9616 that type of examination and to that question.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Turkus: May I have Judge Talley seated I think we can get along much nicer. We can get along much nicer if he sits down.

Mr. Talley: Is that all that is bothering you?

9617 Mr. Turkus: It bothered you.

Mr. Talley: Not in the least. I had to make so many objections to your absurd questions I could not be getting up and down.

The Court: Those things happen in the best of trials.

Mr. Talley: This is not the best of trials.

Mr. Turkus: Not for Judge Talley, it is not. I agree with you.

Mr. Talley: I never saw such a thing, never; never dreamed of listening to any-

9618 one like you.

Mr. Turkus: I am only a beginner.

The Court: These things happen in the best of trials and, as Judge Talley said, also in the worst of trials. Now proceed.

The Witness: Can I say something, your Honor?

The Court: No.

By Mr. Turkus:

Q. The family consists of yourself, Sidney

9619

Weiss; is that right, the Weiss family? A. Consists of who?

Q. Yourself, Sidney? A. That is right.

Q. Your brother Sammy? A. That is right.

Q. A third brother Maxie? A. That is right.

Q. A fourth brother Solomon? A. That is right.

Q. A fifth brother Mendy? A. Yes.

Q. A sixth brother Mannie Weiss? A. Murray.

Q. Is he sometimes called Mannie? A. No, sir.

9620

Q. And your mother, Mrs. Weiss? A. That is right.

Q. On this birthday of all birthdays, your 26th, was Maxie Weiss at the party? A. No, sir.

Q. Was Solomon Weiss at the party? A. No, sir.

Q. Was Murray Weiss at the party? A. No, sir.

Q. And did Sammy Weiss go on to the moving pictures and the various restaurants? A. No, sir.

Q. But there was one outsider, this Mrs. Isaacson, on this birthday of all birthdays? A. That is right.

9621

Q. Wasn't this alibi about being at your birthday party on September 12, 1936, cooked up by you and others as far back as 1936?

Mr. Talley: I have to object to that question, as much as I dislike to do it. It is incompetent, irrelevant, immaterial; so improper that I am almost ashamed to have to make the objection to it.

Mr. Turkus: Don't be so sensitive.

Mr. Talley: I am over-sensitive about lawyers who don't know how to conduct themselves in a court. You are one of them.

Mr. Turkus: I work for Judge O'Dwyer, not Judge Talley.

Mr. Talley: Judge O'Dwyer is welcome to you, I tell you that.

Mr. Turkus: I can see I am not very welcome to you.

9623 Mr. Talley: You certainly are not. I like a lawyer to be a gentleman.

Mr. Turkus: The feeling is mutual.

Mr. Talley: And know how to conduct himself, and you don't.

Mr. Turkus: I think you have trespassed more than anybody.

The Court: Will this ever stop?

Mr. Turkus: All right.

The Court: The Judge is not ashamed to overrule the objection.

Mr. Talley: Is the inference that your Honor would be ashamed to sustain it?

9624 Mr. Turkus: It looks like it.

Mr. Talley: I am not ashamed to take an exception to it, I tell you that.

The Court: Please.

Mr. Turkus: Now that we have gotten through with all of the sensitivity here, may we have an answer to the question?

(Pending question read.)

A. No, sir.

9625

The Court: "Cooked up" means fabricated.

The Witness: No, sir.

Q. Why, wasn't the alibi fabricated so that you could have an outsider, in addition to the members of the family, to give support to it?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

9626

A. No, sir.

Q. Why, this Dottie Isaacson or Eisenstein as you call her, she has been in the society and company of Blanche Weiss for years, hasn't she? A. That is right.

Q. And she has been befriended and she is obligated to Blanche Weiss, for years, isn't she?

Mr. Talley: Objected to as calling for a conclusion; incompetent, irrelevant and immaterial.

The Court: Overruled.

9627

Mr. Talley: Exception.

A. No, sir.

Q. Why, hasn't Blanche Weiss sheltered her in her own home when her husband Yonkel was in jail?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Improper. Exception.

A. I would not know.

9628 *Sidney Weiss—For Defts.—Cross*

Q. Didn't Blanche and Mendy Weiss buy this woman clothes at the Gold Craft Clothes, 714 Broadway? A. I would not know it.

Q. Didn't they provide her not only with lodging and shelter but with food on the occasions when her husband, the pickbocket, was in jail?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

9629 The Court: Sustained as assuming something not on the record.

Mr. Talley: Prejudicial and decidedly improper.

Q. Wasn't Yonkel a pickpocket?

Mr. Talley: Objected to.

A. I don't know.

Q. Didn't Mendy Weiss and Blanche Weiss furnish this Isaacson woman with clothing and with shelter and with food on various occasions

9630 when Mrs. Isaacson's husband Yonkel was in jail?

Mr. Talley: Objected to.

The Court: He said he did not know.

Q. Why, you can even tell us right now the name of the moving picture you saw in September, 1936, can't you? A. No, sir.

Q. Why, didn't you check that up at the Capitol? A. I did not check nothing.

Q. Why, didn't you check up at the Capitol

9631

that the Capitol show September 12, 1936, got out at exactly 2:00 A. M., the midnight show? Didn't you check that? A. No, sir.

Q. You remembered then from September, 1936, that you emerged from the Capitol theatre at 2:00 A. M. in the morning, didn't you? A. I did not get that.

(Question read.)

A. Yes, sir.

9632

Q. On this outstanding birthday of all birthdays, can't you remember now the picture you saw? A. No, sir.

Q. Did you, between September, 1936, and the time you took the witness-stand, either directly or indirectly check up on the name of the picture playing at the Capitol on September 12th? A. No, sir.

Q. Maybe I can help you. Wasn't it "The Gorgeous Hussy"? A. I don't know.

Q. And wasn't Robert Taylor playing one of the star leads? A. I don't know.

9633

Q. Your birthday was on September 13th, a Sunday, this birthday of all birthdays? A. Yes, sir.

Q. And you celebrated on Saturday? A. That is right.

Q. You celebrated on Saturday because Monday morning you had to get up to go to work early and you did not want to be out late: is that it? A. No, we celebrated Saturday night.

Q. Now, in between September 12, 1936, and the time that you took the witness-stand, how

9634 *Sidney Weiss—For Defts.—Cross*

many times have you seen Dorothy Isaacson? A. September 12, 1936?

Q. Yes. A. Until now?

Q. Yes. A. A number of times.

Q. Many, many times? A. That is right.

Q. Between September 12, 1936, and the time that you took the witness-stand, did you and Dorothy Isaacson ever talk over the alibi? A. I asked if she remembered 1941—

Q. Just yes or no first.

9635

Mr. Talley: I ask that the witness be allowed to answer the question.

The Court: That is what the Court wants him to do.

Q. Yes or no first. Then we will find out when the conversation was.

The Court: Listen carefully to the question and answer it.

(Pending question read.)

9636 A. Yes, sir.

Q. How many times? A. I took her to Judge Talley's office.

Q. How many times did you talk over the alibi with Dorothy Isaacson? A. I took her twice to Judge Talley's office.

Q. That does not help us. You may have talked to her other times. A. I asked her once before if she remembered at my birthday party.

Q. When was that that you spoke to her about the alibi for the first time? A. In the summer of 1941.

Q. Where did you find Dorothy Isaacson in the summer of 1941? A. Downtown.

Q. Where downtown? A. I just don't remember.

Q. Why, you are the man who, in the interests of justice, were going into Brownsville to get witnesses; can't you remember as far back as the summer of 1941 where you were to meet the only outside alibi witness for your brother on a murder charge?

9638

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. I seen her downtown. I don't know just where. Maybe I seen her on Grand Street; maybe I seen her on Clinton Street. I don't remember.

Q. Not "maybe". A. I don't remember. I am telling the truth. I seen her some place downtown.

9639

Q. Was it in a saloon? Was it where? What kind of premises? Was it a house? Was it a saloon? Was it a gambling joint? What kind of a place was it that you saw her? A. I just don't remember where I seen her.

Q. Can't you remember the character of the premises where you met the only outside witness to an alibi in your brother's murder charge?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

9640 *Sidney Weiss—For Defts.—Cross*

A. I just don't know where I seen her.

Q. Did you go looking for her? A. Yes.

Q. Don't you remember where you looked for her and found her in the summer of 1941? A. I went looking for her. I don't know where I found her.

Q. What place did you look for her? A. On Grand Street—

Mr. Talley: Objected to, incompetent,
9641 irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Pretty far afield now.

The Court: The Court is allowing it on the question of memory, in view of the fact he has testified in such detail as to something which happened five years ago.

Mr. Talley: Most of the witnesses have been testifying to things they say happened five years ago.

The Court: That has nothing to do with the Court's ruling.

(Last question and answer read.)

9642

A. And Clinton Street.

By the Court:

Q. Do you mean on the street or in a residence? A. On the street.

By Mr. Turkus:

Q. When you started out to search for her, did you look in the saloons? A. I did not search for her any particular day.

9643

Q. How many days did you search for her before you found her? A. You are asking me questions which I can't answer you

Q. I can see that. But on this particular day that you found her, into what kind of places did you go looking for her? Were they saloons? Were they gambling joints? A. No saloon.

Q. All right, candy stores? A. Candy stores.

Q. Restaurants? A. Candy store.

Q. Only candy store? A. In a candy store, yes, sir.

9644

Q. What candy store did you look for her in? A. On Grand Street.

Q. Grand and where? A. Grand and Pitt.

Q. Did you know where she lived? A. Yes.

Q. Did you go to her house? A. No, sir.

Q. Where did she live in the summer of '41? A. Clinton Street, I guess.

Q. What number? A. I don't know.

Q. Did you go to the house in which you guessed she lived? A. No, sir.

Q. You did not look for her in her home but you looked for her in a candy store? A. That is right.

9645

Q. Did she hang-out in a candy store?

Mr. Talley: Object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. She stood there sometimes.

Q. Was that candy store a hang-out for East Side people?

9646 *Sidney Weiss—For Defts.—Cross*

Mr. Talley: Object to the form of the question.

The Court: Overruled.

Q. Had you ever been to that candy store before? A. I seen her there before.

Q. What is the name of the candy store? A. I don't know.

Q. Was it Gold's? A. I don't know.

9647 The Court: He said Grand and Pitt. Wasn't Gold's at Grand and Lewis?

Mr. Turkus: It was my error in saying Gold's. It could not have been at that address that he gave.

Q. Was that the first time that you had seen this Dorothy Isaacson in reference to being an alibi witness? A. Yes, sir.

Q. That was after you had talked things over with some other people, wasn't it? A. No, sir.

9648 Q. Did you go out in search of Mendy Weiss' alibi witness, Dorothy Isaacson, without talking to anybody else about it? A. That is right.

Q. You did not tell your mother about it? A. I don't remember if I told her before or after. I asked her if she remembered the incident—

Q. That is susceptible of yes or no. A. That is the only answer I can give you. I am giving you the truth.

Q. I can see that, too. Let us get along with this. Did you tell Sammy you were going out for this alibi witness? A. No, sir.

Q. Did you tell Blanche you were going to go out looking for Dorothy Isaacson? A. No, sir.

Q. Did you keep it a secret that you were going out to look for Dorothy Isaacson? A. I didn't have to look for her. I just went to see her. I asked her if she knew about it.

Q. I know that. You told us that. But did you keep it a secret from the others in the family? A. No, sir.

Q. That you were looking for Dorothy Isaacson? Whom did you tell in the family? A. I don't know who I told, if I told anybody or not.

Q. This is the summer of '41? A. That is 9650
right.

Q. When you met Dorothy Isaacson at this candy store, did you tell her what happened September 12, 1936? A. No, sir.

Q. Did she remind you what happened September 12, 1936? A. I asked her if she remembered—

Q. Answer yes or no.

Mr. Talley: I object to him being interrupted and I ask that the witness be allowed to answer the question without 9651
interruption.

Mr. Turkus: Without interruption from Judge Talley. I join in it.

Mr. Talley: Mr. Turkus stops the witness.

The Court: (To reporter) Read it.

(The following was read: "Did she remind you what happened September 12, 1936? A. I asked her if she remembered— Q. Answer yes or no.")

Mr. Talley: Then he was interrupted.

9652 *Sidney Weiss—For Defts.—Cross*

The Court: I think it is an illuminating answer.

Mr. Turkus: All right.

Q. And did she then and there outside the candy store tell you everything that happened September 12, 1936? A. No, sir.

Q. No? A. I asked her if she remembered we went out on a birthday.

Q. And what did she say? A. She hesitated
9653 awhile and then she said yes, she remembered.

Q. So that after she hesitated for a short time, she remembered that on September 12, 1936— A. I asked her if she remembered which birthday it was. She said my 26th birthday.

Q. She remembered your 26th birthday? A. Yes, she remembered my 26th birthday.

Q. And she remembered that you went to the Brass Rail to eat, didn't she? A. I asked her—

Q. Wait. Did she remember that without your telling her? A. At that time, I don't know.

Q. Did she remember that she went to the
9654 Capitol movies with you? A. At that time I don't know. I asked her if she remembered my 26th birthday.

Q. Don't volunteer. A. Well, only way I can tell you.

Mr. Turkus: Will your Honor admonish the witness not to volunteer?

Mr. Talley: The witness does not need any admonition.

Mr. Turkus: Judge Taylor presides, not Judge Talley. I ask for an admonition to him not to volunteer.

9655

The Court: I did not quite understand. Did she suggest it was your 26th?

Mr. Turkus: He has already testified to that.

By the Court:

Q. Or did you suggest that to her? A. I asked her if she remembered my 26th birthday.

Q. If she remembered your 26th birthday?

9656

Mr. Turkus: He has given a contrary answer to your Honor than he stated on cross-examination.

The Court: I understand.

Mr. Talley: That is not so.

By Mr. Turkus:

Q. Didn't you just testify, before Judge Taylor asked you the question, that Dorothy Isaacson said she remembered your 26th birthday? A. I asked her if she remembered my birthday party.

9657

Q. Didn't you just testify? A. I asked her if she remembered my birthday party.

The Court: Please. (To reporter) Will you go back a few questions?

(Questions and answers read as directed.)

Q. After she told you she remembered your 26th birthday, did she say she remembered eating in the Brass Rail restaurant? A. I don't remember.

9658 Q. Did you suggest to her that you ate in the Brass Rail restaurant? A. No, sir.

Q. Did you suggest to her that you went to the Capitol theatre? A. No, sir.

Q. Did you suggest to her that thereafter you went to Ratner's restaurant on Delancey Street? A. No, sir.

Q. Did you suggest to her that you met in Sammy's automobile store? A. No, sir.

Q. Did you suggest to her that your mother
9659 was there; that Blanche Weiss was there, that Mendy Weiss was there; and that Sammy Weiss was there? A. No, sir.

Q. Did she suggest those items to you? A. No, sir.

Q. And after that conversation you took her to the lawyer's office? A. Not right away.

Q. How long after? A. I don't know.

Q. How many days? A. I don't know.

Q. How many weeks? A. I don't know.

Q. How many months? A. It must have been a few months, I guess.

9660 Q. After you had that conversation in which you asked Mrs. Isaacson if she remembered your birthday party and she said she remembered your 26th birthday and a few months elapsed thereafter before you took her to a lawyer's office, did you tell anybody else about your conversation with Dorothy Isaacson? A. No, sir.

Q. You kept that a secret?

Mr. Talley: I object to the form of the question.

A. There is no secret.

9661

The Court: Overruled.

Mr. Talley: Exception.

Q. Who was the first person that you told that Dorothy Isaacson remembered your 26th birthday? A. Nobody.

Q. Nobody at all? A. No.

Q. You mean this Court and jury were the first ones told by you? A. No, sir, no, sir. I didn't have to tell it to nobody. I just asked her if she remembered my birthday.

9662

Q. To whom did you report that? A. To nobody. I didn't have to report it to nobody.

Q. Isn't Mrs. Isaacson out in the hall? A. Yes.

Q. Is this Court and jury the first— A. No, sir. If you want to know if I took her to the lawyer's office—

Q. Don't anticipate the answer. A. I don't know what you are trying to do. Too bad I didn't have much of an education so I can tell you something. I could answer your questions properly.

9663

Q. No, it does not take education. It takes candor; it takes truthfulness. A. That is what I am telling you.

Mr. Talley: May we have this discussion cut short?

Mr. Turkus: The witness has waxed philosophical and I tried to discuss philosophy with him.

The Court: Let it be stopped. Mr. Witness, just answer questions.

Q. Here is the question. Listen. A. Slow, please, let me get it so you won't confuse.

Q. If I say something you do not understand— A. You are liable to jump down my throat.

Q. I won't jump down your throat. A. Just take it easy.

Q. You are not afraid of me, are you? A. No, sir.

Q. All you have to do is to speak slowly. We will get along very nicely. Is this Court and jury the first persons who heard you report
9665 what Dorothy Isaacson told you outside the candy store in the summer of 1941? A. No, sir.

Q. Who was the first person that heard that report from you? A. You mean after I spoke to her?

Q. Yes. A. Mr. Cuff.

Q. How long after you spoke to Mrs. Isaacson was that? A. I don't know.

Q. Was it two months, three months? A. A few months. I don't know.

Q. Did you and Mrs. Isaacson and Sammy and Blanche sit down together at any time and talk
9666 over the alibi? A. First time was in Mr. Cuff's office.

Q. Where you all sat down and discussed the alibi? A. Yes. Sammy was not there.

Q. Then Blanche was there, Dorothy was there, and you were there? A. That is right.

Q. And the three of you discussed the alibi? A. We told it to Mr. Cuff.

Q. The three of you had a conference together? A. We told it to Mr. Cuff.

Q. One reminding the other? A. No; Mr. Cuff was asking us questions.

Q. Were the three of you questioned together in the same room? A. Yes, sir.

Q. And did the three of you compare notes with each other? A. We had no notes.

Q. Well, I mean comparing mental notes, each one refreshing the other about what happened on this outstanding 26th birthday?

Mr. Talley: I object to the question and the form of the question.

The Court: Overruled. 9668

Mr. Talley: Exception.

A. No, sir.

Q. Did you remember every detail at the time that you were in Mr. Cuff's office, that you met in Sammy's automobile place, that you ate in the Brass Rail, what time you left the Brass Rail, what time you got at the Capitol for the midnight show, what time you got out of the Capitol, where you went to Ratner's restaurant, who drove the car, and what happened afterwards? Did you know all of that yourself? A. No, sir. 9669

Q. Well, who helped you remember that? A. I spoke to Blanche. I spoke to Dottie and I got the story.

Q. Isn't it a fact that long before you ever reached Mr. Cuff's law office, and going way back years ago, you and Blanche and Dorothy Isaacson and your brother cooked up this alibi? A. No, sir.

Mr. Talley: Objected to, if your Honor pleases.

The Court: Overruled.

9670 *Sidney Weiss—For Defts.—Redirect*

Mr. Talley: The form of the question is highly objectionable. I take an exception.

Redirect examination by Mr. Talley:

Q. Were you present in my office with Muggsy Cohen on the day that the District Attorney was referring to that you met him in front of my place with your sister? A. Yes, sir.

9671 Q. Did you hear him make a statement to me? A. Yes, sir.

Q. Did you hear him tell me that he had been in the District Attorney's office—

Mr. Turkus: Just a minute, your Honor.

Q. —in May of 1941—

Mr. Turkus: Your Honor, this is objectionable.

Mr. Talley: Let me finish my question.

9672 Mr. Turkus: Oh, no, you cannot put before the jury something improper.

Mr. Talley: I ask to have my question upon the record before there is any objection.

The Court: Finish the question. Then the objection will be taken without disturbance and the Court likewise without disturbance will rule.

Mr. Turkus: Your Honor, it is obvious from—

The Court: Finish the question.

9673

Mr. Turkus: It is improper what he heard.

(Pending question read.)

Q. in the month of May, 1941?

Mr. Turkus: It is improper.

The Court: Sustained.

Mr. Talley: Exception. I call your Honor's attention—

The Court: Don't argue.

9674

Mr. Talley: I don't think it will be necessary.

The Court: Don't call attention. I will excuse the jury if you are going to do that because I know why you are doing it.

Mr. Talley: Can't I state to the jury—

The Court: I told you to take your exception and let it go at that. I know the rules of evidence. The jury does not.

Q. Did Cohen tell you that he had been in the District Attorney's office and talked with Bernstein in May of 1941?

9675

Mr. Turkus: Objection.

The Court: Sustained.

Mr. Turkus: This is improper.

Mr. Talley: Exception.

Mr. Turkus: And reprehensible under the ruling of the Court.

Q. Did he tell you that in May, 1941, he saw Mr. Turkus there in the presence of Mr. Bernstein?

9676 *Sidney Weiss—For Defts.—Redirect*

Mr. Turkus: Just a minute. Will your Honor admonish counsel?

The Court: Do you object?

Mr. Turkus: I certainly do, most vehemently.

The Court: Objection sustained.

Mr. Turkus: And I ask further—

The Court: I cannot talk against you, Mr. Turkus. The objection is sustained and counsel for the defendant Weiss is

9677 admonished to go no further with this line of questions.

Mr. Talley: Exception.

The Court: It is grossly improper.

Q. The District Attorney asked you about your interviews with Muggsy Cohen. Do you remember that? A. Yes, sir.

Q. Will you tell us what Muggsy Cohen said to you?

Mr. Turkus: It is objectionable.

The Court: Sustained.

9678 Mr. Talley: Exception.

Q. Did you see the statement given to me by Maggsy Cohen, taken by a stenographer in my office?

Mr. Turkus: Objection. It is incompetent, irrelevant and immaterial.

The Court: Overruled. Just answer yes or no.

A. Yes.

Q. And you personally were in my room during

9679

the entire time that Muggsy Cohen was talking to me? A. Yes, sir.

Q. There was nobody else present except yourself, Cohen, my stenographer and myself; is that right? A. That is right.

Mr. Talley: In order that my record may be complete, does your Honor wish me to understand that I can ask no further questions as to the conversations had between this witness and Muggsy Cohen, in view of the fact that the District Attorney, reading from a statement—

9680

The Court: Wait a minute. The jury is excused.

Mr. Talley: —a typewritten statement, interrogated this witness.

The Court: The jury is excused. See how far you go.

(The jury retired from the court-room.)

The Court: All right.

9681

Mr. Talley: If your Honor pleases, it is apparent to me that I have been unable to make my position clear to your Honor.

The Court: Perfectly clear.

Mr. Talley: If I had made it clear to your Honor, your Honor could not make the rulings that you are now making.

The Court: Perfectly clear.

Mr. Talley: The District Attorney in his cross-examination of this witness—

Mr. Turkus: May the witness be excluded during this discussion of law?

The Court: Yes.

9682 *Sidney Weiss—For Defts.—Redirect*

(Witness leaves the court-room.)

Mr. Talley: —asked him as to the details of a conversation that he had with Muggsy Cohen. He asked him what Muggsy Cohen had said to him and what he said to Muggsy Cohen. He read from a typewritten statement what was apparently a statement which he claims or would represent to be a statement given to him by Cohen in the District Attorney's
9683 office. The door was flung wide open by the introduction of that matter, that statement, and the questions asked of this witness. The door was opened to give defendant the right to question this witness at length as to what the complete conversation was. The District Attorney, by well recognized rules of evidence, has no right to elicit part of a conversation and then attempt to close the door, with the Court's aid, to the complete conversation which would give the jury an opportunity
9684 to understand the entire picture that is being presented. The District Attorney elicited from this witness that he brought Muggsy Cohen to my office; that a statement was made by Muggsy Cohen to me. He brought out that it was made in the presence of a stenographer. I submit that you cannot close the door upon that entire transaction, that it would be rank injustice to this defendant for you to do it; it would be unfair to put the responsibility on this jury of interpreting these things unless they get them in their entirety.

9685

The Court: The argument is so at variance with the rules of evidence that the Court takes a view that it is really addressed to the gentlemen of the press. Are you through?

Mr. Talley: I don't think I ought to be called on to say anything more after that insult that I have just received from your Honor. What do I care about the press in this case? I am concerned with the client whom I represent here and I object and I resent that statement which your Honor has made before. I care nothing about the gentlemen of the press here or what the newspapers say. I am only concerned with one thing and that is to see that this man, Mendy Weiss, gets a fair trial and he is not going to get it with your Honor making statements like that about counsel. I except to your Honor's statement, to your Honor's comment. It is highly improper and untrue.

9686

The Court: The Court's patience and forbearance will continue. Are you all through? Are you through?

9687

Mr. Talley: I am through arguing the point that I have been attempting to make plain to your Honor, that the door has been opened to the admission of this testimony. On that I am finished for the moment.

The Court: Bring back the jury.

Mr. Talley: And I want to note upon the record my objection to your excusing the jury on these occasions when I have attempted to state my position upon these

9688 matters of evidence, what I claim to be your Honor's erroneous rulings.

The Court: All right.

Mr. Talley: That is prejudicial in itself.

Mr. Turkus: May the record note that Muggsy Cohen—

The Court: Let us have an end to this.

(The jury returned to the court-room.)

9689 The Court: Bring in the witness.

(The witness resumed the stand.)

The Court: All right. Proceed.

By Mr. Talley:

Q. Did you hear all that Cohen said to me? A. Yes, sir.

Q. You were asked about a conversation you had over in Brownsville with Cohen when you
9690 asked him to come over to your attorney's office? A. Yes, sir.

Q. And tell what happened. Do you remember that? A. Yes.

Q. Tell us all that conversation, please. What did he tell you?

Mr. Turkus: I object to this.

The Court: Sustained. This is strictly under the rules of collateral impeachment.

Mr. Talley: Exception.

The Court: And that rule will be upheld strictly.

9691

Mr. Talley: You cannot uphold that rule against the defendant where it is elicited on cross-examination.

The Court: The jury is excused again. Gentlemen of the jury, this time I will give you lunch. It is not worthwhile bringing you back for five minutes. Do not discuss the case, let nobody talk to you about it. Keep your minds open.

Mr. Talley: I object to the jury being excused at this juncture of the case as being prejudicial. 9692

The Court: You want the jury to hear your speech and they are not going to hear it. The jury may leave.

Now the defendants are remanded.

(A recess was thereupon taken to 1:30 P. M.)

AFTERNOON SESSION

TRIAL RESUMED 9693

The Court: Judge Talley, before recess you objected to the exclusion of the jury during a discussion on points of evidence. On second thought, the Court was of the opinion there might be something to that —the jury might form an impression that these were occasions of discord between the Court and counsel. For that reason I simply recessed.

The jury is now here and the witness is out of the room. If you will be patient

9694

and take your seat, I will try to straighten out that situation, and, possibly, to your satisfaction. At any rate, I think you will understand that the Court is trying to rule according to the laws of evidence. With the question of counsel raising his voice and adopting a truculent attitude in his manner of address to the Court, the Court will overlook that. The Court realizes that this trial involves unusual stress, and

9695

even counsel with great legal training and learning are human, and when anything in the way of disorder occurs the Judge must try his utmost to keep his head and not permit himself to be sensitive or annoyed. So that will be just forgotten.

Now, referring to my notes of the cross-examination in regard to the incident in your office, I find nothing there which in any way reflects upon you or upon the conduct of your own office. I shall read you precisely what I put down and can assure you that anything I did not put

9696

down I considered of no evidentiary value whatever. "Saw Muggsy early September: admitted suggesting to Muggsy he meet Weiss's lawyer: later contact Muggsy same matter. They met in front of 40 Wal Street at Talley's office. Muggsy had a man with him: had a drink, and then all went to Talley's office. Denies asking Muggsy in a private room what had occurred in the District Attorney's office. Took Muggsy home." Now, that is all I took down.

9697

Of course, the prosecution, under the rules of evidence, was entitled, in cross-examination, to develop, if it could, anything in the way of collateral impeachment arising from this incident. But it did not do so, because, under the rules of collateral impeachment, when the witness who is being cross-examined says "No," that closes the book on that point and the cross-examining counsel may not thereafter put anybody on the stand under the theory of collateral impeachment and try out that issue. He is bound by that answer.

9698

(At this point the defendants entered the courtroom.)

The Court: I did not notice the defendants were not in while I was calling that to your attention. I do not think you want to make any point of their absence. If anybody makes the point, we will have it read.

9699

Mr. Talley: I make no point of the absence of the defendants during your Honor's statement.

Defense Counsel: No objection.

The Court: Of course, putting myself in the position of counsel sitting in the trial of a case, having this brought out before the jury, I know I would feel, if I was the lawyer in the case, that my honor was, in the eyes of the jury, impugned. But looking at it as a judge, that is not correct; and

9700 *Sidney Weiss—For Defts.—Redirect*

I so instruct the jury, that it does not reflect on your office in any way whatsoever.

Now, had the witness under cross-examination on that inquiry given affirmative answers as to anything alleged to have been related to counsel for Weiss, then that would, to a certain extent, possibly to a full extent, open the door by way of contention, of other matter for disclosure of the interview which would shed a light upon a further explanation of what the witness admitted. But the witness admitted nothing except what I have just read, and from my notion it does not go to the extent of collateral impeachment because of the negative answers of the witness. After all, soliciting Muggsy to go to your office was proper. Either side has the right to seek out anybody and quiz him and take him to the lawyer's office. The lawyer has a right to quiz him—a witness does not belong to either side, and there is no impropriety in that. There is no impropriety in having a drink, certainly; and there is no impropriety, so far as I can see, in taking home a witness who had to go all the way from Brownsville to No. 40 Wall Street.

9701

9702

Now, the Court has really tried to be in good faith. I think maybe it would be a good thing if you just allowed the matter to rest there. But if you are not satisfied, if you still challenge the good faith of the Court, the Court would be obliged to patiently permit you your right to take an exception to what the Court has said or done.

9703

Mr. Talley: Judge Taylor, I have at no time attempted or designed to impugn the good faith of the Court. I do quarrel with your rulings upon this matter, because I do not agree with them, and I do not think they are correct and proper rulings. I at no time was concerned with the fear that my good faith or my—what shall I use—my integrity was being impugned by any of these suggestions. The point I was trying, apparently ineffectually to make, 9704
was that the witness, being interrogated about conversations which he had with Cohen, the District Attorney established an open door for me to present to the jury the entire conversation and the statement which was made in the presence of this witness in my office. I am willing to offer in evidence the statement he made to me then and there. I tried to lay the foundation for that when Cohen was on the stand. Now that Cohen has left the stand this witness was interrogated in detail, but 9705
from a written statement, ostensibly and apparently a statement given to the District Attorney by Cohen himself. When that door was opened, I had the right to present to the jury the entire statement that was made in my office in the presence of that witness, as to what Cohen said of the actual happening. Despite what your Honor has just stated, I am still of the opinion that the law of evidence permits me to do that precise thing. The door has been opened by cross-examining into it. There is just one more thing: It is

not the question of my attempting to impeach any witness—or my own witness on the stand, Weiss; I am endeavoring to bring out all the details of the conversation by the witness, emanating from Muggsy Cohen. That is not an attempt to impeach this witness, and I submit, respectfully, I have a very definite and precise right to bring that out, and that your Honor, in preventing me from bringing it out, is committing a serious error
9707 in your ruling in this case.

The Court: The Court will instruct the jury, when a witness is under cross-examination and impeachment is sought, and the witness answers in the negative to any question which, if answered in the affirmative would tend to impeach, that the jury will disregard the question and form no impression from it, whether read from a paper—whether apparently read from a paper—or otherwise. Under the rules of evidence, this method of cross-examina-
9708 tion cannot be avoided.

Now, Judge Talley, you have your exception, and I think that your Honor has been vindicated. I have never known you to do a dishonorable act. I am sure you are incapable of doing a dishonorable act, so please do not be sensitive about anything brought out in relation to that incident in your office.

Now, there was a possibility of this having been developed: that, had the witness admitted that preliminary to your examination of Muggsy he had taken him

into a private room and had given him instructions as to what he was to say—that then another rule of evidence would come in—a rule as to fabrication. But that has not been developed. That will have to be disregarded.

Suppose we go ahead with the case? I think with that explanation, possibly everybody is in better poise now than before lunch.

Mr. Talley: May I note an exception to 9710
your Honor's statement of what your Honor regards is the law in this case?

The Court: Yes.

Mr. Talley: And I want to express my appreciation of your Honor's expression of confidence in me. I assure you I was not concerned about that at all.

The Court: I am more concerned, Judge, with mutual esteem and friendship between counsel and the Court than with the many things in connection with this case, because it will soon be over. But I hope that the friendship between the 9711
Court and counsel will be lasting.

Mr. Talley: I have no fear or doubt on that score, I assure you.

SIDNEY WEISS, a witness in behalf of the defense, resumed the stand and testified further as follows:

Mr. Talley: I offer in evidence a certified copy of a birth certificate of the witness Sidney Weiss, certificate dated June 12, 1941, certified by the Acting Assistant Registrar of Records, City of New York.

9712 *Sidney Weiss—For Defts.—Redirect*

(Received without objection and marked Defendants' Exhibit 10.)

Redirect examination by Mr. Talley:

Q. This twenty-sixth birthday celebration of yours is impressed upon your mind because you had a quarrel with Mendy just before that?

Mr. Turkus: I object to that as leading, suggestive, and brought out on direct.

The Court: That was answered. Ob-
9713 jection sustained.

Mr. Talley: Exception. I have no further questions. Perhaps I had better indicate what this is to the jury.

The Court: Yes.

Mr. Talley: This, gentlemen of the jury, is a birth certificate in the usual form issued by the City of New York, Department of Health, Bureau of Records. It certifies: "The foregoing is a true copy of the record in the custody of the Registrar of Records." I need not read it in
9714 full. It says, "Below is a photostatic copy of certificate filed in the Bureau of Records, Department of Health, City of New York," and certifies as to the birth of Sidney Weiss, as being September 13, 1910. The residence of the mother is given as 415 East 3rd Street. Then it gives other details. Of course, it is subject to your inspection, but the important thing shows that he was born the 13th of September, 1910, which would make him 26 years old on the 13th of September, 1936.

(Continued in Volume V)

Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED {DECEMBER 30, 1942. JANUARY 2, 1943. JANUARY 5, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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6.—(Admitted in Evidence as Ex. 7) Original lease between The Fifth Avenue Building Company and Raleigh Manufacturing Inc., dated Jan. 29, 1936, together with diagram	2903	4016

* Not printed pursuant to stipulation on pages 4022 to 4028.

	ADMITTED PAGE	PRINTED PAGE
*7.—Ten Checks	2995	.....
8.—Two green blank checks of Raleigh Manufacturers, Inc., Nos. 9568 and 9569, respectively	3033	4018
9.—Two pink blank checks of Raleigh Manufacturers, Inc., Nos. 1121 and 1122, respectively	3033	4020
*10.—Copy of birth certificate of Sidney Weiss, certified June 12, 1941	3238	.....
*11.—Map showing layout of streets in connection with Rosen Candy Store, Rosen Residence, Long Island Railroad, etc.	3489	.....

* Not printed pursuant to stipulation on pages 4022 to 4028.

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9715

SAMUEL WEISS, residing at No. 10 Monroe Street, in the Borough of Manhattan, City and State of New York, called as a witness in behalf of the defendants, after being duly sworn, testified as follows:

Direct examination by Mr. Talley:

Q. You are a brother of the defendant Mendy Weiss? A. Yes, sir.

Q. Are you presently in the service of the United States Army? A. Yes, sir.

9716

Q. You are what is generally known as a private? A. Selective draft.

Q. You are attached to your regiment where? A. At Fort Jackson, 13th Infantry.

Q. Fort Jackson is in South Carolina? A. Yes, sir.

Q. How long have you been in the service? A. March 29, 1941.

Q. You were drafted at that time? A. Yes, sir.

Q. You did not avoid the draft? A. No, sir.

Q. You did not try to be deferred? A. I did try to be deferred for two months or so.

9717

Q. After that you presented yourself and were selected for service? A. Yes, sir.

Q. Do you remember the night of the 12th of September, 1936? A. Yes, sir.

Q. Where was your place of business at that time? A. 226 East Broadway, New York.

Q. What was the business you were engaged in? A. Automobiles.

Q. How long prior to your being brought into the service were you in that business? A. Well,

9718 *Samuel Weiss—For Defts.—Direct*

I was in that business since 1935 to 1938, but before I was brought in the service I was not in business.

Q. Where did you say your place was? A. 226 East Broadway.

Q. Were you living at your mother's home at that time? A. Yes, sir.

Q. And where was that? A. No. 10 Monroe Street.

Q. How far generally was No. 10 Monroe
9719 Street from 226 East Broadway? A. About seven or eight blocks.

Q. Were you in your place of business at 226 East Broadway at or around ten o'clock or 10:30 o'clock on Saturday night, September 12, 1936? A. Yes, sir.

Q. Did you see your mother there? A. Yes, sir.

Q. Did you see your brother Sidney Weiss? A. I did.

Mr. Turkus: I object to the leading questions.

9720 The Court: Objection sustained.

Q. Who did you see at your place of business that night? A. My mother came in; I saw my brother Sidney, and at about 10 o'clock or so my brother Mendy came in.

Q. Your mother was the first one to arrive? A. Yes, sir.

Q. Then who came next? A. My brother Sidney.

Q. Then, after Sidney came, and your mother

was there, you say Emanuel came in? A. Yes, sir.

Q. Did he come in a car? A. He pulled over in a car and he came in alone.

Q. He came in your shop alone? A. Yes, sir.

Q. Did you see who was in the car he came with?

Mr. Turkus: Objected to. The witness said he came alone.

9722

Q. I am speaking about the car—he said he came in his place of business alone.

Mr. Turkus: I object to that as leading.

The Court: Objection sustained.

Q. Was anybody in the car with your brother Mendy when he came there? A. Yes, sir.

Q. Who? A. His wife and her friend Dotty.

Q. Did you see them drive away? A. Yes, sir.

Q. Was Mendy driving the car? A. Yes, sir.

9723

Q. Who was in the car when he drove away? A. My mother, my brother Sidney Weiss, Mendy's wife, this girl friend Dotty, and Mendy himself, driving.

Q. They drove away, you don't know where they went? A. No, sir.

Q. You remained in your place of business? A. Yes, sir.

Q. At what time do you say it was when they drove away? A. About 10 o'clock.

9724 *Samuel Weiss—For Defts.—Cross*

Q. How do you fix in your recollection this night?

Mr. Turkus: I object to the form of the question.

The Court: Objection overruled.

A. It was my brother Sidney's birthday, and they were going out to celebrate.

9725 Mr. Turkus: People's Exhibit Z-26 for identification is offered in evidence.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not properly identified, not proper cross-examination.

Mr. Turkus: It has been identified by the preceding witness as a picture of this man, his own brother.

Mr. Talley: There is no theory upon which that can be admitted that I ever heard of.

9726 The Court: There is a theory, but it has not been developed.

Objection sustained.

Cross examination by Mr. Turkus:

Q. Look at the picture, Z-26 for identification, and tell this Court and jury if that is not your picture. A. The face is mine in the picture.

Q. The face is yours? A. Maybe—it is even darker than the rest of the picture. That is not my picture.

Q. You examined so much of People's Exhibit Z-26, for identification, as showed the face, that is your picture? A. The face is my picture.

Q. The body and the rest of the material thereon is not yours? A. No, sir.

Q. Didn't you take this picture yourself? A. I don't know the picture.

Q. Aren't you an amateur photographer? A. Yes, sir.

Q. Have you taken pictures of yourself? A. Sure, I have. 9728

Q. Isn't People's Exhibit Z-26, for identification, the face, body, and everything on it, one of the pictures you took yourself as an amateur? A. Is that the number you just called it?

Q. Yes. A. That is not my picture, sir.

Q. Did your brother Sidney Weiss talk to you after recess yesterday about this picture? A. He did not have—

Q. Yes or no, did he? A. I cannot answer that yes or no; he said the picture was—

Q. Just a minute. After recess yesterday—cannot you answer yes or no whether or not 9729 your brother spoke to you about a picture of you that he saw when he was on the witness stand? A. No, sir, I cannot say yes or no.

By the Court:

Q. What can you say? A. With an explanation I can say.

Q. Go ahead. A. He said the picture is covered and the face as shown, it looked like me

9730 because it had glasses. He did not know, he said he was not convinced.

By Mr. Turkus:

Q. The picture was not covered at all? A. That is what he said, just from the glasses.

Q. He said the picture was covered? A. He said it was held in such a way it was covered; all he could see was the glasses.

9731 Q. What was covered? A. That is the only thing he spoke to me about, the picture, and I know I had some pictures, not this kind, made in the regular process, that were stolen from the house—in fact, a lot of things were stolen from there. And I thought it may have been that picture, but I just discovered it.

Q. Didn't your brother say to you—now, answer this yes or no—that he saw a picture while he was on the witness stand yesterday? A. Yes, sir.

Q. Didn't he tell you that he identified that
9732 picture as your picture? A. He did not say identified—he said—

Q. Yes or no. A. I cannot answer that; it is impossible.

Q. If you cannot answer yes or no, say so, and we will get along very well. A. I cannot answer it yes or no.

Q. Did you talk with anybody after you spoke to Sidney Weiss in connection with a picture which he saw in the court room? A. No, sir.

9733

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Is the answer no? A. I said no.

Q. So the only one concerning whom you had a conversation yesterday with regard to the picture exhibited to your brother Sidney in court was Sidney himself, is that correct? A. That is right.

9734

Q. You say you have taken pictures of your own before? A. That is right.

Q. Pornographic pictures?

Mr. Talley: I object.

A. Pornograph?

Q. Don't you know what a pornographic picture is?

The Court: Indecent.

9735

A. No, sir. I have never taken indecent pictures.

Q. Did you ever take any lewd or indecent pictures of yourself?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. The suggestion conveyed in the District Attorney's question is improper and should not be permitted.

The Court: Objection overruled.

Mr. Talley: Exception.

9736 *Samuel Weiss—For Defts.—Cross*

A. No, sir, no indecent pictures.

Q. You say certain papers were stolen from your home? A. That is right.

Q. Pictures of you? A. Pictures of me, yes, sir.

Q. Do you know who the thief was? A. No, sir.

Mr. Talley: I object.

The Court: Objection overruled.

9737 Mr. Talley: Exception.

Q. Don't you know— A. (Interrupting) Now, wait a minute, I said stolen. They were taken by the police authorities. I am sorry I said "stolen". I meant they were taken without my consent or without the consent of anybody. That is what I meant by "stolen".

Q. Were those police officers government agents? A. I don't know who they were.

Q. Was the picture, People's Exhibit Z-26, for identification, one of the pictures removed from your home by the government agent? A.

9738 No, sir.

Mr. Talley: I object. He said it was not his picture.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you recognize the background of the picture?

Mr. Talley: I object.

9739

The Court: Objection overruled.
Mr. Talley: Exception.

A. Just a chair.

Q. Do you recognize the chair? A. I do not see it complete.

Q. What part of it that you do see do you recognize? A. It may be one like we have at home; it may be, I am not sure.

Q. Look at that again and see if it is not one of the chairs you have home. A. I cannot see; 9740
that is a very poor picture.

Q. That does not tell you, and you yourself are an amateur photographer—you have taken better pictures? A. Yes, sir.

Q. Better pictures of that style? A. No, sir, not of that style; I never took that picture.

Q. Do you recognize the portion of the chair nearest the foot of the person on People's Exhibit Z-26, for identification—the lace on it—as being a piece of lace on a chair in your home? A. I do not recognize it.

9741

Mr. Talley: I object. He is trying to get before the jury the contents of a paper not in evidence.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Look at it. A. I do not recognize it.

Q. The chair that you have at home or did have at home, that looks similar to the chair in this portrait, does that have lace on it? A. No, sir.

9742 *Samuel Weiss—For Defts.—Cross*

The Court: Is that a tidy, an old fashioned tidy?

Mr. Turkus: You can look at it, Judge.

The Court (Examining picture): A tidy over the back of a barrel chair.

Q. At the Court's suggestion, do you recognize the thing called a tidy on the back of that chair?

9743 Mr. Talley: I object to this entire line of questioning while the paper is not in evidence in the case.

The Court: Objection overruled.

Mr. Talley: Exception

(Question repeated by reporter.)

A. I do not.

The Court: There is another name for that besides barrel— I think it is "channel" back.

9744 Q. You are familiar with your body, aren't you?

Mr. Talley: I object. That is a silly question in the first place, and incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

The Witness: Of course, I am.

Q. Look at the chest and see if you recognize that in People's Exhibit Z-26, for identification.

Mr. Talley: I object, referring to a paper not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot see much of the chest.

Q. Look at it. A. I cannot see it

Q. I can see plenty of it. Look at it.

The Court: Look at the breast bone. Can you see that?

The Witness: I can see it, but I would not say it is mine. 9746

Q. Do you deny it is your chest?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you deny that the chest and the breast bone on People's Exhibit Z-26, for identification, is yours? 9747

Mr. Talley: I object to the testimony, inquiring about a matter not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. It is not mine.

Q. Have you got hair on your chest similar to the hair on the chest of People's Exhibit Z-26, for identification?

Mr. Talley: I think that emphasizes

9748 *Samuel Weiss—For Defts.—Cross*

the force of the objection I have made, and I object to it now.

Mr. Turkus: That is not an objectionable part of the picture.

Mr. Talley: The objection is he is endeavoring to get before the jury the contents of a paper not in evidence.

The Court: That part of it will do no harm. Objection overruled.

Mr. Talley: Exception.

9749 Q. Look at the formation of the hair on the chest.

Mr. Climenko: May I have a general objection to this line, and an exception to the admission of the answers to these questions?

The Court: Yes.

The Witness: That is not mine. I have more hair than that.

Q. Look at the hair down to the stomach and
9750 see if you recognize that as being the hair on your own stomach.

Mr. Talley: Don't you see what we are getting before the jury—an attempt to get before the jury the contents of this paper which is not in evidence.

Mr. Turkus: We will not go any further on that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Now, you wear glasses? A. Yes, sir.

Q. Did you ever sit in a channel chair of that type, nude?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, particularly upon the ground I stated before, that he is endeavoring to acquaint the jury with the contents of a photograph not in evidence in this case.

The Court: Leave out nude.

Mr. Talley: I object to the question. 9752

Mr. Turkus: I withdraw the question.

Q. Did you ever sit in a chair like that?

The Court: That is not an ordinary chair.

Q. Did you ever sit in a chair in your own home? A. I think we have something similar to it now.

Q. How long have you had such a similar chair in your own home? 9753

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot say it is a picture of this chair there—we have something like that, a back like that. We have one like that since 1934.

Q. Look at the rest of the picture and see if you can identify the rest of it as belonging to

your body—all of it. A. Absolutely no; only the face, that is all.

Q. You have had quite a bit of experience as an amateur photographer? A. No, sir, very little.

Q. Enough to take pictures of yourself? A. Yes, sir.

By the Court:

9755 Q. How do you do it? Tell the jury. A. I don't know what you mean. Your own picture?

Q. Yes. A. There is a self-timer on the camera—a self-timer is set and after the lapse of about ten seconds it will go on. It is built into the camera.

Q. You mean after setting it for ten seconds you would have to quickly take a pose? A. When the picture is taken, if there is any motion to your body, there is a failure.

Q. You don't have to use a pneumatic tube to squeeze? A. Yes, sir.

Q. What kind of a camera is it? A. What?

9756 Q. The one you used? A. At present I own an Ikonta B.

Q. How long have you used it? A. A short while.

Q. Before that what did you have? A. I had some other cameras.

Q. You always changed them? A. I can give you a list.

By Mr. Turkus:

Q. Have you ever posed for nude, incedent, pornographic pictures?

9757

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, an attempt to get before the jury something which is not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Can you identify the handwriting on the back of People's Exhibit Z-26, for identification, the portion of it which has a name on it? A. The handwriting?

9758

Q. Yes. A. No, sir.

Q. Or the name? A. The name is my name.

Q. Do you know in whose handwriting it is? A. No, sir.

Q. Look at the front of the picture and see if you can identify the numbers on the front as anybody's handwriting. A. No, sir.

The Court: Let me see that handwriting.

9759

By the Court:

Q. What is the size of that picture? A. About three inches by four and one-half.

Q. Do you have a camera of that size? A. No, sir.

Q. Did you ever have one of that size? A. No, sir.

Q. How many cameras have you had? A. Maybe seven or eight, maybe six; the smallest I had was two and a quarter by three and a

9760 *Samuel Weiss—For Defts.—Cross*

quarter—the one I have at the present time is two and a quarter square.

Q. You are in the Army, you have no time now, have you? A. It is a good size negative, two and a quarter square.

Q. That is quite small? A. No, sir, they have cameras thirty-five millimeters.

Q. You mean in the Army you cannot carry a large camera? A. No, sir.

Q. What size do you say this is (indicating
9761 photograph)? A. This is about three by four and a quarter.

The Court: Three and a half by four and a half—one-eighth inch less than four and a half.

The Witness: That may be due to the size of the paper on which the print is—the negative may be larger.

Q. Were you present at your home when a United States Government agent removed pack-
9762 ages? A. No, sir.

Q. Who was, do you know? A. My mother and a friend of mine.

Q. Who is your friend? A. Louis Keltz.

Q. Where does Louis Keltz live? A. 2149 Clinton Avenue, Bronx.

Q. What is his business? A. He is in the auto rental business now.

Q. Did you ascertain whether the pictures were removed from your room as you heretofore stated? A. Well, he told me that many things were taken; he does not know what they were; they would not let him see.

Q. But, from your room? A. My pictures are kept in a desk.

Q. In your room? A. In the living room where I sleep.

Q. You slept in the living room and the pictures which were taken by the government agent were removed from the room in which you slept? A. Yes, sir, pictures and other things.

Q. Now, as an amateur photographer, how do you account for your head being on the rest of this picture, People's Exhibit Z-26, for identification? 9764

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, too far afield.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Perhaps the District Attorney can explain. There is such a thing as trick photography. There is a lot of framing done. I did not do that. 9765

Q. So that you can account for it as being based on trick photography? A. I don't know; it may be. There are a lot of things that can be done with photographs. You can take ten pictures and make one out of them; you can add clothes to it where there originally were not any clothes.

Q. (By the Court) Do you know how that is done? A. No, sir, I have never done it. I have read about it.

Q. Look at People's Exhibit Z-26, for identification, can you say if you cannot recognize

9766 *Samuel Weiss—For Defts.—Cross*

some of the background as being the background of the picture of your own living room?

Mr. Talley: I object to that as already gone over.

A. Yes, there was a dark background there.

Q. What about that which appears to be a curtain, does that refresh your recollection?

9767 Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I see no curtain.

Q. In the back of the head? A. There is no curtain in the back of the head.

Q. To the side of it—

Q. (By the Court) Is that there a tidy? A. That is no curtain; there is a tidy on the back of the chair and a tidy also on the arm of the chair.

Q. What other background do you recognize
9768 there? A. What looks like a curtain. There is no curtain in the picture. That is peculiar, in place of a curtain.

The Court: It is not a curtain, that is a tidy.

Q. Before you took the witness stand today had you ever seen that People's Exhibit Z-26, for identification? A. Is that the picture (indicating)?

Q. Yes. A. Never.

Q. Do you recognize the left arm as being your left arm?

Mr. Talley: I object. It is an attempt to get before the jury the contents of a paper not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. The picture is not very clear and I cannot tell. I would say no.

The Court: Let us see the left arm. Do you mean the left arm or the right arm? 9770

Mr. Turkus: First we are asking about the left arm; then we will get to the right arm later.

Q. (By the Court) Do you recognize the arm? A. I think I answered that.

Q. Do you know whether it was necessary for a nude man to take this picture? A. I do not know who it was; I never saw him.

Q. Look at the fingers on the right hand. Does that help refresh your recollection as to whose hand it is? 9771

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot tell; it is not mine.

Q. How do you account for the picture of your head, which you admit was taken, with your eyes closed?

Mr. Talley: I object. He is not called upon to account for it; it is incompetent, immaterial.

9772 *Samuel Weiss—For Defts.—Cross*

The Court: Objection overruled.
Mr. Talley: Exception.

By the Court:

Q. Can you account? A. I can.

By Mr. Turkus:

Q. Can you account how the eyes in the picture, People's Exhibit Z-26, for identification,
9773 are focused upon some other part of the picture, People's Exhibit Z-26, for identification, if the head alone is yours?

Mr. Talley: I object. It is an effort to get before this jury the contents of a paper which is incompetent, immaterial and irrelevant.
The Court: Objection sustained.
The Witness: Can you see the eye?

Q. Did you at any time assume the position
9774 and do the act portrayed on People's Exhibit Z-26, for identification?

The Court: No, not that.
Mr. Talley: I object to it as highly improper. I think your Honor should terminate this type of examination.
The Court: The Court terminates it right now. That is as far as you can go.
Mr. Turkus: I am through with the witness then.
Mr. Talley: If your Honor please, in view of this persistent examination that

has been conducted by the District Attorney, I move for the withdrawal of a juror and the declaration of a mistrial because it is so highly prejudicial and I don't believe a fair trial can be given to these defendants hereafter.

The Court: Motion denied.

Mr. Talley: Exception.

DOROTHY ISAACSON, residing at 148 Clinton Street, Borough of Manhattan, City and State of New York, called as a witness on behalf of the defense, after being duly sworn, testified as follows: 9776

Direct examination by Mr. Talley:

Q. Mrs. Isaacson, do you know the defendant Mendy Weiss? A. Yes, sir.

Q. And you know his wife? A. Yes, sir.

Q. How long have you known his wife? A. Over twelve years. 9777

Q. Were you brought up in the same neighborhood together? A. Yes, sir.

Q. Down in the lower East Side of New York, in the Borough of Manhattan? A. Yes, sir.

Q. Have you kept up your acquaintance with her during the past twelve years? A. Yes, sir.

Q. You and she are very good friends? A. Yes, sir.

Q. Do you remember the night of September 12, 1936? A. Yes, sir.

Q. In whose company were you that night? A.

Blanche, Mendy Weiss, his mother, Sidney and myself.

Q. Where were you before ten o'clock on that night? A. At Blanche's apartment.

Q. Blanche is Mrs. Mendy Weiss? A. Yes, sir.

Q. Were you visiting her there? A. Yes, sir.

Q. Had you frequently visited her there? A. Yes, sir.

Q. Did you stay at her house previous to that date? A. Yes, sir.

9779 Q. And over night? A. Many times.

Q. You are a frequent visitor there? A. Yes, sir.

Q. What happened that evening with respect to your going out any place? A. Well, Blanche told me that Mendy was going to pick her up later in the evening and we were going out to celebrate Sidney's birthday.

Q. She invited you to go out to celebrate Sidney's birthday? A. Yes, sir.

Q. Did you and Mrs. Weiss leave the house together? A. Yes, sir.

Q. With whom? A. With Mendy.

9780 Q. Did he call for you? A. Yes, sir.

Q. Do you remember at what time he called for you? A. At about nine o'clock.

Q. At night? A. Yes, sir.

Q. Did he have a car? A. Yes, sir.

Q. Did you and Mrs. Weiss—

Mr. Turkus: I object to counsel leading the witness now; it is leading and suggestive.

The Court: Sustained. Reframe your question.

Q. Did you go somewhere with Mendy Weiss? A. Yes, sir.

Q. Where did you go? A. We got into the car and we drove down to Sammy Weiss's store.

Q. Who was driving the car? A. Mendy.

Q. You and Mrs. Weiss got in the car? A. Yes, sir.

Q. You drove to Sammy's place? A. Yes, sir.

Q. Do you remember where that was?

Mr. Turkus: Objected to as repetitious and leading. 9782

Mr. Talley: It is not leading if you ask where the place was. Nothing can be less leading that that.

The Court: Objection overruled.

A. Yes, sir.

Q. Where? A. On East Broadway.

Q. When you got there did Mendy do anything? A. Yes, sir.

Q. What did he do. A. He walked out of the car and over to the store.

Q. What store did he walk to? A. To the 9783
place, the auto rental.

Q. Is that Sammy's place of business? A. Yes, sir.

Q. Did you and Mrs. Weiss remain in the car? A. We did.

Q. Did you see Mendy go into Sammy's place? A. Yes, sir.

Q. Did anybody come out of Sammy's place and get into the car? A. Yes, sir.

Q. Who did? A. Mendy's mother and Sidney.

Q. Then did Mendy get into the car? A. Yes.

9784 *Dorothy Isaacson—For Defts.—Direct*

Mr. Turkus: Objected to as leading and suggestive.

The Court: Objection sustained.

Q. Who got in the car?

Mr. Turkus: Objected to as already answered.

Mr. Talley: You object to it first as leading, and then when I ask a question to lead up to it, you object.

9785 Mr. Turkus: She said the mother and Sidney got in the car.

Q. Who get in the car with Mendy? A. Mrs. Weiss and Blanche.

The Court: Let us get this straightened out. Who did you say it was? Mrs. Weiss, the mother, Blanche and Mrs. Weiss and yourself?

The Witness: At Blanche's home?

9786 By the Court:

Q. Yes. A. Just Blanche and myself and Mendy came and called for us.

By Mr. Talley:

Q. I think we had better call Mendy's wife Blanche and Mrs. Weiss, the mother; there are two Mrs. Weisses. Bear in mind one is Mendy's wife and the other the elderly Mrs. Weiss, the mother of these boys.

Q. Now, do you know at what time it was

when you drove away from Sammy's place? A. It must have been about ten o'clock, somewheres around that time.

Q. Where did you go? A. We drove uptown.

Q. Who drove the car? A. Mendy.

Q. Where uptown did you go to? A. We went to the Brass Rail.

Q. Do you remember where that was? A. 7th Avenue and 49th Street.

Q. 49th Street? A. Around that place.

Q. Now, when you got to the Brass Rail at Broadway and 49th Street—that is Manhattan? 9788
A. Yes, sir.

Q. What did you do? A. Blanche, Sidney, Mrs. Weiss and myself got out of the car, and Mendy went to park the car.

Q. Then, did Mendy come back without the car? A. Yes, sir.

Q. Where did you go then? A. We went into the restaurant.

Q. Do you know what time it was you got into the restaurant? A. I could not remember just what time we got in the restaurant.

Q. What is your best estimate of the time? A. 9789
It must have been about a quarter to 11 o'clock, around that time.

Q. Did you have something to eat in the restaurant? A. Yes, sir.

Q. Were all those persons you have mentioned present in the restaurant? A. Yes, sir.

Q. Sitting at the same table? A. Yes, sir.

Q. How long did you remain in the Brass Rail Restaurant? A. Over an hour it must have been.

Q. That would bring it to approximately 12 o'clock? A. About that.

Q. At 12 o'clock did you go any place? A. Yes, sir.

Q. Where do you remember going? A. To the movies.

Q. What theatre? A. The Capitol Theatre.

Q. That is on 7th Avenue? A. Broadway and 50th Street.

Q. Did you ride or walk to the Capitol The-
9791 atre from the Brass Rail? A. We walked.

Q. Did you all, all that you have named, go into the moving pictures? A. Yes, sir.

Q. Mendy was with you? A. Yes, sir.

Q. And the elderly Mrs. Weiss? A. Yes, sir.

Q. And Sidney? A. Yes, sir.

Q. And Blanche? A. Yes, sir.

Q. Did you remain for the entire picture? A. Yes, sir.

Q. What time did you get out? A. I don't know; I do not remember exactly.

Q. What is your best recollection? A. It must
9792 have been past two o'clock.

Q. You saw the entire program, did you, in the Capitol Theatre? A. Yes, sir.

Q. Then, after you came out of the Capitol Theatre, at the time you say must have been two o'clock, where did you go? A. We took a drive through the park, Central Park.

Q. This was September 12, 1936? A. Yes, sir.

Q. Was the weather warm, cool, cold, or rainy or what? A. I don't remember what the weather was.

Q. When you took the ride through Central

Park where did you go then? A. Then we drove downtown.

Q. After you left *Central Park*? A. Yes, sir.

Q. How far downtown did you go and where did you go? A. We went to the East Side, we went to a restaurant, Ratner's.

Q. Where is Ratner's? A. On Delancey Street.

Q. That is away over on the extreme East Side of lower Manhattan? A. Yes, sir.

Q. Did you go into the restaurant? A. Yes, 9794
sir.

Q. How long did you remain there? A. Anywheres from three-quarters of an hour to one hour.

Q. What time would you say it was when you came out of that restaurant? A. About four o'clock.

Q. Were all of you still together in the party? A. Yes, sir.

Q. Were you celebrating Sidney's birthday? A. Yes, sir.

Q. After you came out of that restaurant at 9795
approximately four o'clock, where did you go? A. We drove Mrs. Weiss and Sidney home.

Q. When you say Mrs. Weiss, you mean the elderly Mrs. Weiss and Sidney? A. Yes, sir.

Q. Do you remember where they lived? A. Yes, sir.

Q. Where? A. At No. 10 Monroe Street.

Q. That is in the lower East Side also? A. Yes, sir.

Q. Did you deposit Mrs. Weiss and Sidney at that address? A. Yes, sir.

Q. You left them there? A. Yes, sir.

Q. Was Mendy still driving the car? A. Yes, sir.

Q. Did anybody drive that car that night except Mendy Weiss? A. No, sir.

Q. After you left the elder Mrs. Weiss and Sidney at their home on Monroe Street, where did you go then? A. Then we drove up to Blanche's home.

Q. Blanche's home was Mendy's home? A. Yes, sir.

9797 Q. Where was that? A. On 21st Street.

Q. And what avenue? A. 2nd Avenue.

Q. In Manhattan? A. Yes, sir.

Q. Did you then go upstairs to Mendy's apartment? A. Yes, sir.

Q. At what time was it when you arrived there? A. It was about four o'clock.

Q. What did you do after you got into Mendy's apartment? A. We spoke for a while and then we started to prepare to go to bed.

Q. Did you go to bed? A. Yes, sir.

Q. Where did you sleep that night? A. I
9798 slept in the living room.

Q. On a couch? A. Yes, sir.

Q. Had you slept there before? A. Yes, sir.

Q. What did you see Mendy and Blanche do there? A. Well, they went to the bedroom and got undressed and went to bed too.

Q. Was the bedroom adjourning the living room? A. Yes.

Q. Did you see Mendy Weiss go in the bedroom? A. Yes, sir.

Q. Did you see Blanche go in the bedroom? A. Yes, sir.

Q. You say this was after four o'clock? A. Yes, sir.

Q. Did you go to sleep? A. Yes, sir.

Q. When you woke up what happened? A. When I woke up Blanche was already up.

Q. Was she getting breakfast? A. She was starting to prepare it.

Q. Did you see Mendy there? A. Yes, sir.

Q. When? A. I was still lying on the couch when Mendy walked into the living room and I pretended I was asleep and he started playing around with me. 9800

Q. That evoked laughter from the rear of the court-room. Will you tell us what you mean by that? A. He started pulling my hair and tickling my toes and tried to get me off the couch.

Q. Tried to get you up? A. Yes, sir.

By the Court:

Q. What time was that? A. That was about near 12 o'clock.

Q. Noon? A. Yes, sir.

By Mr. Talley: 9801

Q. That would be around 12 o'clock noontime, Sunday, September 13th? A. Yes, sir.

Q. Did you then get up? A. Yes, sir.

Q. Did you have your breakfast? A. I did.

Q. Did you have it with Blanche and Mendy? A. Yes, sir.

Q. Where did you have your breakfast? A. In the dining alcove.

Q. That is adjoining the kitchen and living room? A. No.

Q. Adjoining the kitchen? A. Yes, sir.

Q. How long did it take for your breakfast at that time? A. It must have been an hour or so.

Q. Then where did you go then, do you remember? A. Then we all started to get dressed.

Q. Yes. A. And they brought me downtown, and Blanche and Mendy went to visit her father.

Q. Where did they leave you? A. In front of my house.

9803 Q. You were still in Mendy's car, were you? A. Yes, sir.

Q. When you last saw them, Mendy and Blanche were in the car together? A. Yes, sir.

Q. Did you see them drive off? A. Yes, sir.

Q. What time do you say it was when they left you at your house? A. It must have been after two o'clock.

Q. On Sunday afternoon? A. Yes, sir.

Q. Mrs. Isaacson, at this time, September 12th, September 13th, 1936, you were married? A. Yes.

9804 Q. And on that precise date where was your husband? He was away.

Q. Where? You mean in prison? A. Yes.

Q. You say you had frequently stayed overnight with Mrs. Mendy Weiss? A. Yes, very often.

Q. In that house? A. Yes.

Mr. Talley: You may examine.

Cross-examination by Mr. Turkus:

Q. Madam, what month, what day, and what year was it that Mendy Weiss tickled your toes

and pulled your hair? A. He did that all the time.

Q. What? A. He did that all the time.

Q. Oh, that was not unusual for him to be so playful? A. No.

Q. Can you remember the particular month, the particular day and the year that Mendy Weiss tickled your toes in the living room when you pretended to be asleep? A. Well, I said he did that all the time that I stayed over there.

Q. Did you always pretend to be asleep when Mendy came out? A. I don't know whether I always pretended but I know I did it quite often. 9806

Q. You were a little coy about it?

Mr. Talley: I object to that, if your Honor pleases, manifestly improper.

The Court: Sustained.

Mr. Talley: Let us get down to this lawsuit.

Q. Picture Z-27 for identification, is that a picture of your husband?

9807

Mr. Talley: I object to that as immaterial, incompetent, irrelevant; cannot see what possible bearing that would have upon this case.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. How do you spell your last name? A. (Spelling) I-s-a-a-c-s-o-n.

Q. How many years are you married? A. Eighteen.

9808 *Dorothy Isaacson—For Defts.—Cross*

Q. During the eighteen years that you have been married, how many different names did you live under? A. None.

Q. Did you live under the name of Levine with your husband? A. Never.

Q. Did you live under the name of Rosen? A. No.

Q. Did you live under the name of Roth? A. No.

Q. Did you live under the name of Greenberg?
9809 A. No.

Q. Under the name of Mirrin? A. No.

Mr. Talley: I object, if your Honor pleases, to any further enumeration of these names. The witness has stated she never lived under any other name than her own.

Mr. Turkus: Cross-examination.

Mr. Talley: That does not justify it.

Mr. Turkus: I am trying to refresh her recollection.

Mr. Talley: That is not the way to
9810 do it.

The Court: Overruled.

Mr. Talley: Exception.

Q. Did you ever live at 342 East 5th Street? A. No.

Q. Where did you live in 1936? A. 235 Henry Street.

Q. East Side, Manhattan? A. Yes.

Q. Do you live there with your husband now? A. Yes.

Q. You say you know Mendy Weiss and Blanche Weiss for about twelve years? A. Yes.

9811

Q. Did there come a period of time when you did not visit at their home frequently? A. No.

Q. Did you visit at their home between April, 1940, and April, 1941? A. No, I did not see them at all at that time.

Q. I don't hear you. A. I did not see them at all at that time.

Q. Did they tell you that they were leaving town? A. No.

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial. 9812

The Court: Sustained.

Q. When before April, 1940, was the last time you visited at the home of Mr. and Mrs. Mendy Weiss? A. Must have been in January.

Q. And where did they live in January of 1940? A. 46th Street in Brooklyn.

Q. 46th Street in Brooklyn? A. Yes.

Q. Do you know what other avenue it was? A. I think it was 11th or 12th. I don't remember.

Q. Did they live there under the name of Newman? 9813

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Not proper cross-examination. Exception.

A. Yes.

9814 *Dorothy Isaacson—For Deft's.—Cross*

Q. You visited them there knowing that they were living under an alias? A. Yes.

Q. Did you visit at 230 Park Place when they lived there under the name of Hoffman?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

9815 A. Yes.

Q. How often did you visit Mendy Weiss and his wife Blanche when they were living under the name of Newman? A. Once or twice a week.

Q. Did you sleep at that 46th Street apartment in Brooklyn? A. No, that was the only apartment I had never stayed over at.

Q. Did the alias Newman have anything to do with that? A. No.

Q. If you had been invited to sleep over when they lived under that alias, you would have accepted?

9816 Mr. Talley: Objected to as being purely conjecture.

The Court: Sustained.

Q. At 230 Park Place when they were living as Mr. and Mrs. Hoffman, you visited there knowing they were living under an alias? A. Yes.

Q. You slept there at 230 Park Place? A. Yes.

Q. In all how many times did you sleep at Park Place? Was that about once or twice a week? A. Maybe.

Q. During the frequent times that you visited, without including the times you slept over, did you see visitors at the home of Mr. and Mrs. Mendy Weiss? A. A family of his.

Q. Other than the family? A. No.

Q. Do you know Charley (The Bug) Workman?

Mr. Talley: I object, if your Honor pleases, incompetent, irrelevant and immaterial. We are going to have this enueration of names again. 9818

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Never heard of him? A. I have read about him.

Q. See if you remember seeing him in the apartment. I will show you a photograph which may refresh your recollection. Take a look at this photograph and see if you recognize that as the face of a man you saw in the Weiss apartment? 9819

Mr. Talley: I object to it, if your Honor pleases, incompetent, irrelevant, immaterial. I likewise object to a display of photographs numbering at least twenty that are now on display on the table of the District Attorney, in plain view of the jury, obviously Rogues Gallery photographs, the table upon which they rest being exactly up against the rail of the jury box. I would like your Honor to look at them. They have been gone over

one after the other in the presence and in the sight of the jury before this question was asked.

Mr. Turkus: Will your Honor note the fact that the table is below the rail and that this is no display intended for the jury's eyes at all.

The Court: They are in a disordered heap but just the same I suggest you keep them in a pack like playing cards and have them covered.

9821

Mr. Talley: Now I ask your Honor to rule upon my objection to this question.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. You don't remember? Don't you remember seeing him at 230 Park Place?

Mr. Talley: I object, if your Honor pleases. The witness has seen a photograph, not identified, not in evidence, has

9822

testified she had never seen the subject of that photograph. Any further examination upon it is improper.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. How long do you know Allie Tannenbaum?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial.

A. I don't.

Q. Take a look at this picture and see if you knew him as a visitor at the Mendy Weiss home when he lived under the name of Hoffman in Park Place?

Mr. Talley: I make the same objection. There is no evidence as to whose photograph it is. The paper is not in evidence, improper method of cross-examination, improper question.

The Court: Overruled.

Mr. Talley: Exception. 9824

A. No.

Q. Never saw that man before? A. In Mrs. Weiss' apartment?

Q. Anywhere? A. No.

Q. What was the question intended to mean "In Mrs. Weiss' apartment?" A. I don't know.

Mr. Talley: Objected to, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled. 9825

Q. Were you in doubt?

Mr. Talley: Let me have a ruling, please?

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know.

Q. You asked me "In Mrs. Weiss' apartment?" Were you in doubt? A. I thought that

that was what you meant, whether I had seen him in Mrs. Weiss' apartment.

Q. Yes. A. Well, I have not.

Q. Or anywhere else? A. No.

Q. Do you know Farvel Cohen? A. Yes.

Q. How long do you know Farvel Cohen? A. A few years.

Q. How many years? A. I don't know just how many.

Q. Speak up. A. I don't know just how many

9827 years.

Q. More than ten? A. No.

Q. More than five? A. About that.

Q. How many times did you see him as a visitor up in the Weiss' home?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial. It was not her home; she was visiting there.

The Court: Overruled.

Mr. Talley: Exception.

A. I never saw him up there either.

9828 Q. Where did you see Farvel Cohen in the five years that you have known him? A. I see him around in restaurants I used to come into downtown.

Q. What restaurants downtown? A. Ratner's.

Q. Yes. A. Blum's, that's all.

Q. How about the one at Grand and Lewis? Did you ever see him in Lewis Bar & Grill? A. I never went to that one.

Q. Did you ever go out in the society or company of Farvel Cohen?

9829

Mr. Talley: That is objected to, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Was your husband with you on those occasions? A. Not on all of them.

Q. Were there any other gangsters in the party when you were with Farvel Cohen?

9830

Mr. Talley: I object, if your Honor pleases, to the form of the question as being improper, incompetent, irrelevant and immaterial.

The Court: Sustained as to form.

Q. Were there any other disreputable people in the party?

Mr. Talley: Same objection.

The Court: People known to her to be disreputable or so understood by her, she can answer. In its present form that is objectionable. Sustained.

9831

Q. Who were the other people with whom you went out when you were in the company of Farvel Cohen?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. His wife.

9832 *Dorothy Isaacson—For Defts.—Cross*

Q. Anyone else? You went out with Farvel Cohen and his wife when you were not out with your husband? A. Yes.

Q. Any other man in your company? A. No.

Q. Any other men in the party? A. No.

Q. Did you know Dimples Wolinsky?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

9833 Mr. Talley: Exception.

A. No.

Q. Look at this photograph and see if you recognize it?

Mr. Talley: Make the same objection that I made to the previous photograph.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Climenko: If your Honor pleases, may I have a general objection and exception to this line of interrogation?

9834

The Court: Yes.

Mr. Climenko: So that I may not interrupt.

The Court: Yes, and a standing exception.

Mr. Climenko: Thank you, sir.

Q. Do you recognize the individual on that photograph? A. I don't.

Q. Did you know Cuppie Migden? A. No.

Q. Did you know any other persons from the East Side of Manhattan?

9835

Mr. Talley: Same objection, if your Honor pleases. Rather ludicrous question it seems to me; incompetent, irrelevant.

The Court: She lived there.

Q. Did you know any persons from the East Side of Manhattan who visited Mr. and Mrs. Mendy Weiss?

Mr. Talley: Same objection.

9836

Q. On the occasions when you were there?

Mr. Talley: Same objection, too general; incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Outside of the family, do you know a single visitor who visited Mr. and Mrs. Mendy Weiss on the occasions when you were there?

9837

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you ever ask Mr. or Mrs. Mendy Weiss why they were living on 46th Street in Brooklyn under a false name, Newman?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

9838 *Dorothy Isaacson—For Defts.—Cross*

The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. Did you ever ask Mr. and Mrs. Mendy Weiss when they lived at 230 Park Place why they lived there under the false name of Hoffman?

Mr. Talley: Same objection.
The Court: Overruled.
9839 Mr. Talley: Exception.

A. No.

Q. Were you at all interested in their conduct?

Mr. Talley: Same objection, if your Honor pleases, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. I approved of their conduct.

9840 Q. So that you approved of the conduct of Mendy Weiss and Blanche Weiss? A. Yes.

Q. And it met with your full approval that they lived in various places in New York City under aliases?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, whether she did or not.
The Court: Overruled.
Mr. Talley: Exception.

A. If they did I never asked them the reason why but they probably had their own reasons.

9841

Q. Yes, and whatever those reasons were they met with your approval? A. I did not know their reasons. I never asked.

Q. Did you make any inquiry as to their reasons?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: She said she never asked.

9842

Q. Did you ever ask anybody concerning the reasons — answer this yes or no — that your friends were living under the aliases in different parts of the city?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. Did the business in which Mendy Weiss was engaged meet with your approval?

9843

Mr. Talley: I object to that. It is incompetent, irrelevant and immaterial. It would not make any difference whether it did or not.

The Court: Overruled.
Mr. Talley: Exception.

A. I did not know his business.

Q. And not knowing his business, it met with your approval that you slept over at his home and visited there?

9844 *Dorothy Isaacson—For Defts.—Cross*

Mr. Talley: I object to that.

Q. Is that it?

Mr. Talley: False conclusion. It has no bearing upon the impeachment of this witness.

Mr. Turkus: May we have simple objections, your Honor?

Mr. Talley: It is an erroneous question, should not be permitted.

9845 The Court: Sustained.

Q. Did you at any time in the twelve years that you knew Mendy Weiss and Blanche Weiss and visited there once or twice a week and slept over-night, know Mendy Weiss' business?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

9846 A. No.

Q. Did you have the slightest interest in what business he was engaged when you were a constant visitor at his home?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Was it any of your concern with whom Mendy Weiss associated?

9847

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

Mr. Turkus: As affecting her credibility.

The Court: Sustained.

Q. This friendship of twelve years that you had with Mendy Weiss and Blanche, did you hear anything from them by way of letters, telephones, or telegrams from April, 1940, until April, 1941?

9848

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you get a single letter, post card, or other communication of any kind, nature, or description, directly or indirectly, from your twelve year friends?

9849

Mr. Talley: I object to it and object to the form of the question. I object to it on the ground that it has already been answered: incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you make any efforts to locate your friends of twelve years between April, 1940, and April, 1941?

9850 *Dorothy Isaacson—For Defts.—Cross*

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. No.
Q. Did you make any inquiry as to the whereabouts of your twelve year friends, Emanuel and Blanche Weiss?

9851 Mr. Talley: Same objection.

Q. During the period of April, 1940, to April, 1941?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. The only time—
Q. Did you, madam, make any inquiry? Yes or no. A. How can I say yes or no when I want to tell you how I inquired when I did?
9852 Q. Well, if you did inquire the answer is yes; if you did not inquire the answer is no. A. Yes.
Q. From whom did you make inquiry and when?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. From her family.
Q. Her family? Did you go to Rose Simon's, her sister? A. No.
Q. Who in her family did you go to?

9853

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I met her other sister.

Q. What is her name? A. Jennie.

Q. Jennie what? A. I don't remember her second name.

Q. Where did you meet Jennie?

9854

Mr. Talley: Objected to as immaterial, irrelevant, too remote.

The Court: Overruled.

Mr. Talley: Exception.

A. On the East Side.

Q. Where on the East Side did you meet Jennie?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

9855

A. I don't remember just where.

Q. Well, that was between the period of April, 1940, to April, 1941, far less than 1936. Can't you recall?

Mr. Talley: Object to the question. The form of the question is argumentative.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. I do not hear you, madam. A. No.

Q. Was it in a house? Was it on the street? Was it in some kind of premises? A. On the street.

Q. Was the meeting with Jennie a coincidence? A. Yes.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

9857

Q. You were not searching for Jennie? A. No.

Q. Where had you met Jennie before that? A. Her home.

Q. At Jennie's home? A. Yes.

Q. Do you remember her last name now? A. I just can't think of it.

Q. Meeting Jennie in this coincidental meeting as it were, did you ask for the whereabouts of Emanuel and Blanche Weiss?

9858 Mr. Talley: Object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Is that the only inquiry you made about their whereabouts? A. The only one I can remember.

Q. Were you furnished with an address by Jennie?

Mr. Talley: I object to that, hearsay

9859

information at best but incompetent and immaterial.

Mr. Turkus: That only calls for a yes or no answer.

Mr. Talley: Never mind what it calls for. It is an improper question.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. You did not go to the home of Mendy Weiss' mother for the address, did you?

9860

Mr. Talley: Objected to.

A. No.

Q. You did not go to the home of Sidney Weiss, whose birthday party you attended, for the address of your twelve year friends?

Mr. Talley: Same objection, as immaterial and irrelevant what she did.

The Court: Overruled.

Mr. Talley: Exception.

9861

Q. Did you? A. No.

Q. When for the first time did you see Mrs. Blanche Weiss, the wife of Mendy, after April of 1941? A. During the month of April.

Q. Yes, when during the month? A. I don't remember just what day.

Q. The early part of the month? A. No, it was the latter part of the month.

Q. And where did you meet her? A. I met her in Atlantic City.

9862 *Dorothy Isaacson—For Defts.—Cross*

Q. Were you there with your husband? A. No.

Q. What hotel were you at?

Mr. Talley: Objected to as immaterial, irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. At the Breakers.

9863

The Court: When was this?

The Witness: The latter part of April.

Mr. Turkus: Latter part of April, 1941.

Q. Under what name were you registered?

Mr. Talley: Objected to as immaterial and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. I did not stop there.

Q. Where were you stopping? A. Well, 9864 Blanche checked out too and then we went to some small place.

Q. Blanche checked out of the Breakers? A. Yes.

Q. Where had you been registered before she checked out of the Breakers? A. I had just come into Atlantic City.

Q. Was she alone? A. Yes.

Q. And from the Breakers, when she checked out, where did you and Blanche go to? A. We went to some small hotel.

9865

Q. What is the small hotel? A. I don't remember. It was not even a hotel. It was a boarding house.

Q. What street was the boarding house on? A. I don't remember.

Q. What was the name of the proprietor of the boarding house? A. I don't remember.

Q. Is there any way you can identify the boarding house that you stayed in from any other boarding house in Atlantic City? A. Not unless I went there.

9866

Q. How long did you stay at the boarding house? A. Ten days.

Q. Don't you know what street it is on? A. I just can't remember. I think it was Atlantic Avenue.

Q. Near what other street was it? A. Pacific Avenue.

Q. During the ten days can't you tell us a better location than that? A. No.

Q. That is the best you can do with it? A. Best of my recollection.

9867

Q. During that ten day period that you were down in the boarding house in Atlantic City, did anybody else join the party?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; has no bearing upon anything here.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Both of you stayed down there alone for that ten day period? A. Yes.

Q. During that ten day period, did Blanche discuss with you the alibi for September 12, 1936?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. She did not.

9869 Q. She did not? A. No.

Q. You knew where Mendy Weiss was when you were down in Atlantic City with Blanche, didn't you?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. At no time during that ten day period was there any discussion with Blanche Weiss as to

9870 what occurred on September 12, 1936? A. No.

Q. When you came back from Atlantic City, madam, where did you go to live? A. Home.

Q. What was your home address? A. 148 Clinton Street.

Q. With whom did you live there? A. My husband.

Q. On the occasions when he was in jail, who lived with you at 148? A. I did not live at 148.

Q. Where did you live then? A. With my sister.

Q. Did you ever live with Blanche Weiss on

the occasions that your husband was in jail? A. No.

Q. How many times has he been in jail?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial. No matter how many times, it is no reflection upon this woman.

The Court: She can state. Of course it has a bearing. If he was a regular criminal during a lengthy married life and she stayed with him, it would have a bearing. Overruled. 9872

Mr. Talley: Exception.

A. I don't know.

Q. Don't you know how many times your husband has been in jail since you have been married?

Mr. Talley: Objected to as already answered.

The Court: Overruled.

Mr. Talley: Exception. 9873

By the Court:

Q. Since you have been married to him. Try to figure it out. A. About three times.

By Mr. Turkus:

Q. And were they long stays in jail?

Mr. Talley: Objected to as immaterial, irrelevant, incompetent.

9874

The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. Did you know that your husband was a pickpocket when you continued to live with him after these jail terms?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.

9875

Mr. Talley: Exception.

A. Yes.

Q. And did you continue to live with him, knowing he was a convicted pickpocket?

Mr. Talley: I object, if your Honor pleases. Don't answer when I object, madam, please.
The Court: Overruled.
Mr. Talley: Exception.

9876

A. Yes.

Q. And did you live with him on the fruits of his criminal activities?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.
The Court: The jury can figure that out. Sustained.

Q. Did you live with him knowingly on the fruits of his criminal activities?

9877

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: That is a matter of deduction for the jury. Married eighteen years.

Mr. Turkus: Twenty-four I thought she said.

The Witness: No, I said I was married eighteen years.

The Court: And she knew he was a pickpocket and she continued to live with him.

9878

Mr. Talley: She has not said that. She said she knew he was sent to jail.

Mr. Turkus: She said she knew he was a convicted pickpocket and continued to live with him knowing it.

The Court: That is what she said.

Mr. Talley: She did not say it.

Mr. Turkus: Will you please be seated?

Mr. Talley: I object to that.

The Court: She said that, Judge. (To reporter) Read it.

Mr. Talley: I take an exception. I need not have it read back. I have your Honor's ruling.

9879

The Court: Never mind then.

By the Court:

Q. He supported you? A. Yes, your Honor.

By Mr. Turkus:

Q Did you associate with your husband's

9880 associates during the eighteen years you have been married to him?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. Yes.

Q. And among those associates were there other pickpockets?

9881

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Calling for a conclusion.

A. No.

Mr. Talley: Exception.

Q. Were there any thieves among the associates of your husband that you have been going out with in the eighteen years of your marriage?

9882

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. No disreputable characters—

Mr. Talley: I object.

Q. Or exconvicts were in your party when you went out with your husband on any occasions?

Mr. Talley: Object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. Not that I know of.

Q. Did you know Unga, George Unga, at East 101st Street?

Mr. Talley: Objected to, if your Honor pleases, incompetent, irrelevant and immaterial. 9884

The Court: Overruled.

Mr. Talley: Exception.

A. Who?

Q. George Unga at 3 East 101st Street? A. I don't know.

Q. Does the name Horty Unga mean anything to you by way of refreshing your recollection? A. Yes.

Q. Did you know Horty Unga? A. Yes.

Q. Did you go out with her? A. No.

Q. Where did you know her from? 9885

Mr. Talley: I object to it as immaterial, incompetent and irrelevant, no foundation having been laid for that.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. I met her through Blanche.

Q. Have you been up to the Unga house at 3 East 101st Street? A. No.

9886 *Dorothy Isaacson—For Defts.—Cross*

Q. Where did you meet this Horty Unga with Blanche?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. I don't know. I don't remember where I met her.

9887 Q. Did you meet at the home of this woman Horty Unga? A. No.

Q. Can you recall where you met her? A. No.

Q. Did you associate with her after you made her acquaintance? A. No.

Q. Did you meet Yiddle Lorber and Al Engelson?

Mr. Talley: Object to it.
The Court: Overruled.
Mr. Talley: Exception.

A. I knew them, yes.

9888 Q. Where did you know them from? A. Brooklyn.

Q. Williamsburg in Brooklyn? A. Yes.

Q. Who introduced you to Yiddle Lorber and Al Engelson?

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Exception.

A. Nobody did. I just knew him.

Q. The meeting? A. I had met him. I met him through business.

Q. You met him through business? A. Yes.
Q. Yidale Lorber was a fixer, didn't you know?

Mr. Talley: I object to that, if your Honor pleases, vague, general, does not mean a thing as far as I can see.
The Court: We will see. Overruled.
Mr. Talley: Exception.

A. I met him as a bondsman.
Q. And Al Engelson, how did you meet him? 9890

Mr. Talley: Objected to on the same grounds.
The Court: Overruled.
Mr. Talley: Exception.
A. With—
Q. With Lorber? A. Yes.
Q. And go out socially with Lorber and Engelson? A. Never.
Q. Did you know Chick Weiss?

Mr. Talley: Same objection.
The Court: Overruled. 9891
Mr. Talley: Exception.

A. No.
Q. Outside of Mendy Weiss and Sidney Weiss, did you know any other Weiss of that family? A. Yes.
Q. Who? A. Sammy Weiss, Murray Weiss.
Q. Yes. A. Solly.
Q. Solomon? A. Yes, and Maxie.
Q. Do you know whether any one of them is called "Chick"? A. No.

9892 *Dorothy Isaacson--For Defts.—Cross*

Q. What people other than Horty Unga were you introduced to by the Weisses?

Mr. Talley: Object to that, incompetent, irrelevant and immaterial, too general; very remote from anything that I can see.

The Court: (To reporter) Will you read that?

(Pending question read.)

9893 The Court: Overruled.

Mr. Talley: Exception.

A. I cannot tell.

By the Court:

Q. Were there many? A. Yes.

Q. It was a long period you knew them? A. Yes.

Q. Did they introduce you to many people? A. Some.

9894 By Mr. Turkus:

Q. Madam, during the eighteen years that you have been married to your husband, have you knowingly associated with people who are exconvicts?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

9895

A. I don't know what you mean by knowing that they were exconvicts.

Q. Yes, that is it exactly. Knowing that they were ex-convicts, did you associate with them? A. With whom? Whom do you mean?

Q. Anybody who was an ex-convict, that you knew to be such did you knowingly associate with them when you were with your husband during these eighteen years? A. No.

Q. No ex-convicts at all?

9896

Mr. Talley: It has been already answered, if your Honor pleases. I object to it.

Q. Will you answer it, please?

Mr. Talley: I object to it.
The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. During the eighteen years of your married life, have you knowingly associated with people who were violating the law?

9897

Mr. Talley: Objected to as already answered.

The Court: I think that is embraced more or less.

Mr. Turkus: An ex-convict is one who has violated in the past.

The Court: Sustained as to form.

Q. Did you knowingly associate with people

9898 *Dorothy Isaacson—For Defts.—Cross*

who were engaged in the commission of organized crime?

Mr. Talley: Same objection, if your Honor pleases, as to form; incompetent, irrelevant and immaterial; already been answered.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

9899 Q. You were introduced to a man named Berger by Mendy and Blanche Weiss, weren't you? A. I don't remember.

Q. You don't remember? Do you know Paul Berger? A. No.

Q. Were you taken to the Gold Craft Clothes at 714 Broadway by Blanche Weiss? A. I don't remember.

Q. Didn't Blanche Weiss buy you clothes at the Gold Craft Clothes, 714 Broadway, Manhattan? A. She did not buy me clothes.

Q. What did she buy you?

9900

Mr. Talley: May we have the time?

A. We exchanged gifts but never clothes.

Q. Didn't she buy you a mannish suit or more than one at Gold Craft Clothes, 714 Broadway, Manhattan, operated by Paul Berger?

Mr. Talley: May we have the time fixed, if your Honor pleases?

Q. Any time.

Mr. Talley: Objected to.

A. No.

Q. What? A. No, she did not.

Q. Didn't you get Paul Berger to intercede for your own brother who had some difficulty in New Jersey?

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Exception.

9902

A. My brother never had any difficulty in New Jersey.

Q. Have you got a brother about fifty years old? A. No.

Q. How old is your brother? A. About 37.

Q. Is his hair turning grey? A. No.

Q. Did you have any trouble in Jersey a year and a half ago and did you get Paul Berger to try to help you out?

Mr. Talley: Objected to, if your Honor pleases, already answered; incompetent, irrelevant and immaterial. 9903

The Court: Overruled.
Mr. Talley: Exception.

A. No.

Q. Before you took this witness-stand, did anybody between recess yesterday and your appearance on the stand talk to you about your testimony? A. No.

Q. Did anybody tell you what they had testified to before you took the stand? A. No.

Q. Did you compare notes out in the hall or

9904

any place else with any witness who had preceded you to the stand? A. No.

Q. Now we have it that down in Atlantic City, when you were there ten days with Blanche Weiss, nothing was said about September 12, 1936; is that right?

Mr. Talley: I object to the question and form of the question and upon the ground this has already been answered.

9905

The Court: Overruled.

Mr. Talley: Exception.

A. That is right.

Q. Between the time that you were down in Atlantic City with Blanche Weiss and the time you took the stand in court, who was the first person that spoke to you about the night of September 12, 1936? A. Sidney Weiss.

Q. And that conversation took place outside a candy store on the East Side? A. I don't know whether it was outside a candy store.

Q. It was not in your home? A. No.

9906

Q. When was it that Sidney Weiss spoke to you for the first time about September 12, 1936? A. In the summer. During the summer.

Q. During the summer of 1941? A. Yes.

Q. In between the Atlantic City trip with Blanche Weiss and the summer of 1941, did anybody speak to you about the night of September 12, 1936? A. No.

Q. When Sidney Weiss came over to you in the summer of 1941, did he tell you that September 12, 1936, was his 26th birthday, that he had been in certain restaurants, the Brass Rail; that he had gone to a moving picture and then

Ratner's, and who was with him? A. No, he did not tell me.

Q. When Sidney Weiss spoke to you about September 12, 1936, and he mentioned that it was his birthday, you remembered, did you not, right then and there where you had been? A. No, not right then and there.

Q. How long did it take you to remember? A. It took me a little while.

Q. Well, what would you say; fifteen minutes? A. Maybe that or more.

9908

Q. A half an hour? A. Yes.

Q. During that half an hour, did Sidney Weiss prompt you as to occurrences?

Mr. Talley: I object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Well, he asked me—

Q. Yes or no, madam, did he prompt you?

9909

Mr. Talley: I ask the witness be allowed to answer the question without interruption.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Did he prompt you that it was his 26th birthday? A. He asked me whether it was.

Q. What was it that he prompted you with? A. He did not prompt me with anything.

Q. You just said he did.

Mr. Talley: I did not understand her to say that, Mr. Turkus.

Mr. Turkus: It is funny you and I understand things so differently.

Mr. Cuff: Be fair with her.

Mr. Turkus: Now we have Mr. Cuff.

Mr. Cuff: I know what is in her mind.

Mr. Turkus: If you had been fair with her you would not have put her on the stand.

9911 Q. Did you misunderstand the word "prompt", madam? A. No, I did not misunderstand but you made me answer to it "Yes."

Q. I made you answer "Yes"? A. I wanted to answer it my way and you would not let me.

Q. Well, was it that he did not prompt you? A. He didn't prompt me.

Q. Then the answer is "No" then; is that right? A. That is right.

Q. I cannot make you say "Yes" if you want to say "No", can I? A. I know we had spoken about it.

9912 Q. The question was, "did he prompt you?" and to that did I compel you to say, "Yes"? A. No.

Q. I gave you election between yes and no.

Mr. Talley: May we proceed with the examination?

Mr. Turkus: May we have an understanding with the witness? I want to be sure nobody is confused here, that I can compel her to answer questions "Yes" when they should be "No".

A. No, he did not prompt me.

Q. Who was the first one that suggested Sammy's place of business in this talk that you had with Sidney?

Mr. Talley: I object to that as being too indefinite, too vague, too uncertain. I ask that a time be fixed.

The Court: Overruled.

Mr. Talley: Also assumes that somebody suggested or made a suggestion; perfectly improper from a dozen different points of view. I take an exception to your Honor's ruling. 9914

A. I don't know what you mean.

The Court: By this time she has forgotten.

Q. (Pending question read.)

Mr. Talley: That is assuming that somebody did suggest it.

9915

A. I don't remember anybody suggesting it.

Q. Listen, madam. After a half an hour talk with Sidney Weiss, your memory was very clear about September 12, 1936; isn't that right? A. It was not very clear, but he did refresh my memory.

Q. Yes, it was very clear here on the witness stand, wasn't it? A. Yes.

Q. You have not any doubts about September 12, 1936, when you related your story to this jury under questioning by Mr. Talley? A. No.

9916 *Dorothy Isaacson—For Defts.—Cross*

Q. Now, how many times was your memory refreshed before you took the witness stand?

Mr. Talley: I object to that, if your Honor pleases. Improper in form.

The Court: Overruled.

Mr. Talley: Exception.

A. Well, I was up at Mr. Cuff's office once.

Q. Never mind Mr. Cuff's office.

9917

Mr. Talley: Let her answer.

Mr. Cuff: Ask the witness.

Q. Tell us all about Mr. Cuff's office. You went up there when? A. We went up there.

Q. Who is "we"? A. Sidney, Blanche, and I.

Q. Yes. How many times? A. Once.

Q. And the three of you spoke together? A. We spoke to—

Q. And you were interviewed by Mr. Cuff with the three of you being present? A. Yes.

Q. How long after the incident of meeting Sid-
9918 ney on the East Side was that? A. About a month.

Q. And when was the next time you got together with anybody on your testimony? A. I think it was in September.

Q. September of this year? A. Yes.

Q. Where was this? A. In Judge Talley's office.

Q. Who was present then? A. Sidney, Blanche, Mrs. Weiss, and myself.

Q. You mean the elderly Mrs. Weiss? A. Yes.

Q. The mother of the defendant. And did the

9919

four of you answer questions in each other's presence? A. Yes.

Q. And did the four of you talk about the occurrence of September 12, 1936, in each other's presence on that occasion? A. Yes.

Q. In all, how many times did you have discussions with the other witnesses in the case concerning the occurrences of September 12, 1936?

9920

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. Just those three times.

Q. Between April, 1941, when you spent that ten days with Blanche Weiss in Atlantic City, until the time you took the stand, how many times were you in her house? A. I was not in her house at all.

Q. Never since April, 1941? A. No.

Q. Do you know where she lives now? A. Yes.

9921

Q. And you have never visited her there? A. She has visited me.

Q. At your home? A. Yes.

Q. How many times? A. Very often.

Q. And in all of these very often visits, how many times did you discuss the occurrences of September 12, 1936? A. Almost every time we would be together.

Q. Almost every time? What did you remember when Sidney Weiss first spoke to you on the East Side?

9922 *Dorothy Isaacson—For Defts.—Cross*

Mr. Talley: I object to the form of the question, if your Honor please.

The Court: About the birthday party?

Mr. Turkus: Yes, the occurrences of September 12, 1936.

The Court: Overruled.

Mr. Talley: Exception.

A. He asked me whether I remembered being out with him and the others on his birthday, his
9923 26th birthday, and after a while I did remember.

Q. There was something very significant about his 26th birthday, wasn't there? A. To me there was.

Q. To you there was. Where were you on your 26th birthday? A. I don't know.

Q. When he spoke to you about his 26th birthday, which to you had significance, what did you first remember about it? A. It was the only time I had ever been out in Sidney Weiss's company.

Q. Well— A. And celebrated a birthday.

Q. And what? A. And celebrated a birthday.

Q. If that was the only occurrence, that you
9924 had been out celebrating a birthday, what was the significance of the birthday? A. His 26th birthday, that they told me it was his 26th birthday.

Q. And when he spoke to you then on the East Side, you remembered that? A. Yes.

Q. When he spoke to you on the East Side in 1941, you remembered that five years ago that was his 26th birthday that you attended? A. Yes.

Q. What else did you remember as he spoke to you on the East Side street there? A. Well, he asked me whether I remembered spending that

9925

night with him, his birthday, and I said I did, and then we went along and we kept talking about what we did that night, and then—

Q. Not so fast now. Now, when you say, "We kept on talking," who did the talking? A. Sidney and I. We both.

Q. Back and forth? A. Yes.

Q. Each one refreshing the other as to a detail? A. Maybe so.

Q. Not "maybe so," what happened, madam? A. Well, he asked me whether I remembered

9926

going out that night.

Q. Yes, and you said you remembered it? A. I said I did.

Q. All right. After you remembered that, what was the next thing he asked you? A. Then he told me that sometime later he would take me up to Mr. Cuff's office.

Q. When you said that you remembered going out with him that night, he said he would take you up to Mr. Cuff's office? A. Yes.

Q. Did he ask you if you remembered going down to Sammy's place of business? A. I don't remember whether he asked me.

9927

Q. Look, madam, you are remembering back to 1936. Let us see if you cannot remember back to that little meeting on the East Side.

Mr. Talley: I object.

Q. In 1941.

Mr. Talley: I object to the statement of the District Attorney, the form of the question, if it is intended to be a question.

9928 Mr. Turkus: Objection before I had the question.

The Court: What is the question?

Mr. Turkus: (to reporter) Read the one before the objection.

(Question read.)

Mr. Talley: That statement is objected to. It is not a question.

Mr. Turkus: I will never get a question finished with this machine-gun fire of objections, if they come in between the time
9929 I start and finish the question.

Mr. Talley: If you asked proper questions—

Mr. Turkus: Gives the witness an awful long time to ponder.

Mr. Talley: May I have a ruling to stop this torrent? Rule one way or the other, but rule, please.

The Court: I have been trying to find a chance. Overruled.

Mr. Talley: Exception.

9930 Q. Now think. Did Sidney tell you anything about Sammy's automobile place of business in 1941, in the summer, when you were on that East Side street talking it over? A. I can't remember.

Q. In the summer of—

The Court: Please interrupt me if anybody objects to this:

By the Court:

Q. Was there anything particular about 26 that made you remember it as being different

from 25 or 27? A. Your Honor, he said it was his 26th—

The Court: Yes or no.

Mr. Talley: I object to the question, if your Honor pleases. It does not demand a yes or no answer.

The Court: I withdraw the question.

Mr. Talley: Thank you.

Mr. Turkus: What was the answer that you gave before the objection was interposed? 9932

The Court: I meant, how did it happen to register it was 26 all these years.

Mr. Talley: She has endeavored to tell and has been prevented.

Mr. Turkus: That is an improper statement.

By Mr. Turkus:

Q. Let us get back to the summer of '41 in this East Side street where you are talking with Sidney. Did Sidney speak of who drove the automobile that night? A. I don't remember. 9933

Q. Did he mention his brother's name, Mendy Weiss, as being in the party that night—yes or no? A. I can't remember.

Q. Did he mention the Brass Rail Restaurant on 7th Avenue and 49th Street or 50th Street in Manhattan? Yes or no? A. I don't remember.

Q. Did he mention the Capitol Theatre movies on that little East Side street in the summer of 1941? A. I don't remember.

Q. And did he mention the automobile ride through the park? A. I don't remember.

Q. Did he mention the automobile ride to Ratner's Restaurant on the East Side of Manhattan? A. I can't remember those things.

Q. You can't remember those things? Those things took place in the summer of 1941. Am I correct? A. That is right.

Q. Let us come a little closer to the time that you took the witness stand. Who was the first
9935 person, if anyone, who mentioned about the Brass Rail Restaurant? A. I don't remember that.

Q. Was it you? A. Might have been.

Q. Not what it might have been. We are not here to speculate. A. I don't remember, then.

By the Court:

Q. Do you remember this: Did you eat a light snack or did you eat a big meal then? A. I don't remember.

Q. When you got to Ratner's, did you eat a
9936 light snack or a big meal? A. I had coffee. It was late.

Q. You were there an hour? A. Yes.

Q. Just coffee? A. And cake.

Q. Just a light bite? A. Yes.

Q. Before going to the East Broadway place and from there to the Brass Rail, did you have your regular dinner at home? A. No, I had had a light bite up at Blanche's house in the afternoon.

Q. What time in the afternoon? A. About 5:30 or 6 o'clock.

Q. 5:30 a light bite. You don't remember

whether at 10 o'clock at the Brass Rail or 11 o'clock you had a full meal or a light snack? A. I don't.

Q. But you do remember that three hours later, at Ratner's, it was just a bite? A. Yes.

The Court: All right.

By Mr. Turkus:

Q. Who was the first person, if you can remember, who spoke of Mendy Weiss being in the party of September 12, 1936? A. I don't remember. 9938

By the Court:

Q. At that time did the Brass Rail have a front on it or was it wide open to the street? A. I don't remember, your Honor.

Q. Have you been there on any other occasion? A. Yes.

Q. How many times? A. A number of times.

Q. About how many times? A. I don't know just how many times. 9939

Q. Many? A. Yes.

By Mr. Turkus:

Q. Where in the Brass Rail was it that you sat? A. I don't remember where I sat.

Q. Downstairs, upstairs, what floor? A. I can't remember where I sat. I don't know.

Q. This birthday party of September 12, 1936, don't you remember what floor you were on? A. No.

By the Court:

Q. You know there is a great big bar there on the ground floor? A. Yes.

Q. You know that, a very big bar? A. Yes.

Q. Have you any recollection at all as to where you sat? A. No.

By Mr. Turkus:

9941 Q. Was there a birthday cake, madam, at the table? A. No.

Q. No birthday cake.

By the Court:

Q. Were there any candles to count so as to fix that 26 in your mind all these years? A. No, our Honor.

Q. Yes or no? A. No.

By Mr. Turkus:

9942 Q. Who was the first person, if you can remember, who spoke about eating in Ratner's restaurant? A. I don't remember.

Q. But these all happened since the summer of 1941, these talks? A. I don't remember who spoke about it first.

Q. It was not you? A. I don't remember who it was.

Q. You do not even know whether it was yourself who first suggested it? A. No, I don't.

Q. Was there anything outstanding about the Brass Rail in September 12, 1936?

Mr. Talley: I object to that as being too indefinite, too vague, uncertain. I do not know what counsel means by "outstanding". I ask the question be made more plain.

By the Court:

Q. Anything in particular you remember?

The Court: I suppose that is what you mean? 9944

Mr. Turkus: That is it.

A. No.

Q. Was there any discussion or anything in particular that makes 26 the outstanding number that lodges in your mind? A. No.

Q. Did it make any difference to you whether it was his 25th or his 26th birthday? A. It did not make any difference, with the exception that they told me it was his 26th birthday.

Q. For some reason that lodged in your mind? A. The only reason is because that was the only time I had ever been out with Sidney Weiss. 9945

Q. Speak loud. The jury cannot hear you. A. That was the only time I had ever been in Sidney Weiss's company, was his 26th birthday.

Q. So 26 stuck in your mind? A. Yes.

Q. I am asking you that because, according to the birth certificate, his Saturday birthday was his 25th birthday, the year before.

Mr. Talley: Will your Honor let us hear your question?

9946 Mr. Climenko: I do not understand the question.

Mr. Talley: I do not get your Honor's question at all. He was 26 years old on—

The Court: Sunday, not Saturday.

Mr. Talley: They were celebrating from Saturday into Sunday, his birthday.

Q. Did you understand that Saturday was not his birthday, but the day before his birthday?

9947 A. Yes.

By Mr. Turkus:

Q. When did you understand that? A. They had told me that that night.

Q. Did you remember that since 1936? A. After Sidney refreshed my memory I did.

Q. I see. Now, after having your memory refreshed, you remembered that on Sidney's 26th birthday you went to Sammy's place of business, is that right? A. Yes.

Q. That is clear? A. Yes.

9948 Q. And that you met there Mrs. Weiss, Blanche Weiss, Sidney Weiss, and Mendy Weiss? A. No.

Q. That is not clear? What is clear about the meeting in the place of business? A. At Sammy's place?

Q. Yes. A. Blanche, Mendy, and myself drove down there.

Q. Yes, the three of you. A. And it was there that we picked up Mrs. Weiss and Sidney.

Q. Under what name was Blanche Weiss and Mendy Weiss living at the time in 1936?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Weiss.

Q. Where were they living then? A. 301 East 21st Street.

Q. What borough? A. Manhattan.

Q. You remember after refreshment that you drove down to that place? A. Yes.

9950

Q. You remember every occurrence that took place from that time on, don't you? A. From that night on.

Q. What? A. That particular.

Q. From that time on. You know what time it was that you met there, isn't that right? A. Yes.

Q. What time was it? A. It was 10 o'clock we had the appointment for.

Q. And you knew you got there at ten o'clock? You remembered that? A. If we had the appointment for that time I suppose we got there.

9951

Q. Do you remember that you got there at 10 o'clock? A. I could not say I remembered. I knew we were supposed to meet him at 10 o'clock and we drove down to meet him.

Q. When you testified on direct examination, when Mr. Talley asked you questions, you remembered that it was about 10 o'clock that you got there. A. I said "about."

Q. And it was about 11 when you got to the Brass Rail? A. Yes.

Q. And that it was about 12 when you left the Brass Rail? A. Yes.

Q. And that it was shortly after 12 that you got to the Capitol Theatre? A. Yes.

Q. And that it was about 2 o'clock in the morning when you got out of the Capitol? A. That's right.

Q. And that there was a ride in Central Park down to Ratner's Restaurant? A. Yes.

Q. And that you got in Ratner's Restaurant
9953 about 3 o'clock? A. Yes.

Q. And that you left Ratner's Restaurant about 4 o'clock? A. Yes.

Q. Those are all things you remember? A. Yes.

Q. You could even remember the picture that was playing, couldn't you? A. No, I don't.

Q. Now think. Think hard and see if you cannot even remember the picture that was being played. A. No.

Q. See if I can refresh your recollection. Wasn't it "The Gorgeous Hussy"? A. Yes, it was.

9954 Q. And the man who played the lead was who, in "The Gorgeous Hussy"? A. Robert Taylor.

Q. And the lady star who played the co-lead was who? A. Joan Crawford.

Q. When I said the name "Gorgeous Hussy" to you, you remembered both stars who played in it? A. Yes.

Q. And you remembered that all the way back to September 12, 1936; is that right? A. Yes.

Q. So, by the way, you can even remember what that picture was about, can't you? A. No, I don't.

Mr. Turkus: That is all, sir.

By the Court:

Q. Can you remember anything about the play itself? A. The picture?

Mr. Turkus: Your Honor, I omitted certain questions. I have been reminded that I have not covered them. I will be very brief with this, and I think I will finish by four o'clock.

By Mr. Turkus: 9956

Q. Mrs. Isaacson, you are indebted to Mendy Weiss and Blanche Weiss, aren't you?

Mr. Talley: I object.

A. No, I am not.
Q. I don't mean financially.

The Court: Overruled.

Q. You are indebted to them for having been permitted to sleep in their home and being fed by them and being clothed by them at times when your husband was in jail; is that correct? 9957

Mr. Talley: I object to the form of the question.

The Court: You mean whether she feels under—

Mr. Turkus: Yes, feels under an obligation.

The Court: I think the question as to whether there is an obligation she may

9958 *Dorothy Isaacson—For Defts.—Redirect*

have an impulse to repay is one for the jury, not for the witness. Judge Talley's objection is sustained.

Q. Let me just ask you this question: Mrs. Isaacson, wasn't this alibi cooked up in 1936 with you a party to it, way back five years ago? A. No.

Mr. Talley: Object to the form of the
9959 question, if your Honor pleases.
The Court: Overruled.
Mr. Talley: Exception.
Mr. Turkus: I am through.
Mr. Talley: I have no further questions.
The Court: Just one thing.

By the Court:

Q. Think very hard. Have you the slightest recollection of what that play was about? A. I can't remember.

Q. You can always read up a title and those
9960 who played the leading parts. A. Yes.

Q. But can you remember anything about what the picture was about which you saw? A. I think it had a lot to do with the Civil War itself and the time of the Civil War, if I remember correctly.

Redirect examination by Mr. Talley:

Q. Mrs. Isaacson, who is your favorite movie actress? A. Joan Crawford.

Q. Was it you who suggested going to see

Joan Crawford in that picture that night? A. Yes.

Mr. Talley: I have no further questions.

Recross-examination by Mr. Turkus:

Q. Robert Taylor your favorite male lead? A. No.

Mr. Turkus: That is all.

The Court: We will recess until 10 o'clock on Monday morning. Everybody remain seated until the jury passes out. 9962

Gentlemen, please remember all previous admonitions. They are continuous throughout the trial. Do not discuss the case, let nobody talk to you about it. Keep your minds open. Read nothing about it. Don't listen to the radio about it.

The defendants are remanded.

(Adjournment taken to Monday, Nov. 24, 1941, at 10 a. m.) 9963

9964 *Blanche Weiss—For Defts.—Direct*

Brooklyn, N. Y., November 24, 1941.

TRIAL RESUMED

BLANCHE WEISS, residing at No. 10 Monroe Street, in the Borough of Manhattan, City and State of New York, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

9965 *Direct examination by Mr. Talley:*

Q. Will you tell us where you are now living? A. Yes, sir.

Q. Where is it? A. No. 10 Monroe Street.

Q. In the Borough of Manhattan? A. Yes, sir.

Q. And in the City of New York? A. Yes, sir.

Q. Are you the wife of Emanuel Weiss, the defendant? A. Yes, sir.

Q. How long have you been married to him? A. Eight years.

9966 Q. Do you remember the night of September 12, 1936? A. I do.

Q. Did you go anywhere from your place of residence with your husband that night? A. I did.

Q. Where did you go? A. I went over to my brother-in-law Sammy's store.

Q. Who was with you? A. My husband and Dotty.

Q. Dotty Isaacson? A. Yes, sir.

Q. Do you know at what time you got to Sammy's store? A. Well, I believe it was 10

o'clock, because we had a 10 o'clock appointment.

Q. You mean an appointment to be there at ten o'clock? A. Yes, sir.

Q. With whom was the appointment made? A. My husband had told me about this appointment. He said my mother-in-law and my brother-in-law Sidney would be at the store; that we were to meet them at 10 o'clock.

Q. At 10 o'clock? A. Yes, sir.

Q. Where were you living at that time? A. 301 East 21st Street. 9968

Q. In the Borough of Manhattan? A. Yes, sir.

Q. Did you go from there to Sammy's store? A. Yes, sir.

Q. And where was that? A. That was on East Broadway, right off—

Q. Did you go in an automobile? A. Yes, sir.

Q. Who went with you, your husband and Dotty? A. Yes, sir.

Q. And you got to Sammy's place of business at about 10 o'clock that night? A. Yes, sir. 9969

Q. Did you get out of the car? A. No, sir.

Q. Did you and Dotty remain in the car? A. That is right.

Q. Did Mendy get out of the car? A. He did.

Q. What did you see him do? A. I saw him walk into the store and talk to my mother-in-law and Sidney, and Sammy.

Q. Then did they come out? A. Well, Sammy came over to the car first.

Q. And spoke to you? A. Yes, sir, saying, "Hello," and "How are you?"

Q. Then, did Mendy and his mother and Sidney get into the car? A. That is right.

Q. Did you then drive away? A. That is right.

Q. Who drove the car? A. Mendy did.

Q. Where did you drive? A. We drove uptown to a restaurant.

Q. Do you remember what restaurant it was? A. Yes, sir, it was the Brass Rail.

Q. Do you remember where it was? A. On
9971 7th Avenue and 49th Street.

Q. What did you do when you got to the Brass Rail, did you wait outside? A. Yes, sir, we waited outside and my husband went to park the car.

Q. Then did he come back? A. Yes, sir.

Q. Walking? A. Yes, sir.

Q. Then did you go into the restaurant? A. We all went into the restaurant.

Q. Who was in the party that went into the Brass Rail Restaurant? A. Well, there was Dotty there, my mother-in-law, Sidney, my brother-in-law, and my husband and myself.

9972 Q. What time do you say it was when you got into the Brass Rail? A. Well, I could not say exactly. I believe it was before 11 o'clock.

Q. What is your best recollection? A. I would say around 11 o'clock.

Q. Then you remained there for how long a time? A. Well, I don't know just how long, but I know we got out in time to make the midnight picture.

Q. Did you have something to eat and drink in the Brass Rail? A. The only thing I can remember is we did have a few drinks.

Q. I don't want to know what you had. Did

you have something to eat or drink, or both? A. Yes, sir.

Q. Then you went to a show at 12 o'clock? A. Yes, sir.

Q. What theatre did you go to? A. We went to the Capitol Theatre.

Q. Did you ride from the Brass Rail or walk, to the Capitol? A. No, we walked there.

Q. And the Capitol Theatre was where? A. 50th and Broadway, or 51st, I don't remember which.

9974

Q. Did you go in to see a picture there? A. Yes, sir.

Q. Did you remain until the picture was finished? A. Yes, sir.

Q. Do you remember what the picture was? A. No, I don't.

Q. What time was it when you came out of that theatre? A. I should say it was about 2 or—

Q. Was Mendy with you? A. Yes, sir.

Q. And the other Mrs. Weiss? A. Yes, sir.

Q. And Sidney? A. Yes, sir.

Q. And Dotty? A. Yes, sir. 9975

Q. The same party that was in the Brass Rail was in the Capitol picture place? A. That is right.

Q. And came out together? A. That is right.

Q. You say that was about 2 o'clock in the morning? A. I think it was around that.

Q. What did you do then? A. We then proceeded to take a drive through the park.

Q. Was it a warm night? A. I believe it was.

Q. When you say you believe, that doesn't mean anything. Do you recollect whether it was

or was not? It was a clear night, anyhow? A. Yes, sir, it was a clear night.

Q. Did you take the drive through the Park? A. Yes, sir.

Q. Where did you go then? A. After we got through going through the Park we started for downtown.

Q. Did you go downtown? A. Yes, sir.

Q. Where did you go? A. We went into a restaurant on Delancey Street.

9977 Q. Is that Ratner's Restaurant? A. Yes, sir.

Q. The same party was with you? A. Yes, sir.

Q. Mendy was with you, and your mother-in-law, and Dotty and Sidney? A. Yes, sir, that is right.

Q. Do you know what time it was when you got into the restaurant, Ratner's Restaurant? A. Well, around three o'clock.

Q. You remained there how long? A. About one hour.

Q. Did you have some food or refreshment there? A. Yes, sir.

9978 Q. What time would that make it, when you left Ratner's Restaurant? A. I would say around about 4 o'clock.

Q. Did you leave together? A. Yes, sir.

Q. Was Mendy still driving the car? A. Yes, sir.

Q. Where did you go? A. We went to take my mother-in-law and Sidney home.

Q. Did you take them home? A. Yes, sir.

Q. And deposit them at their door? A. Yes, sir.

Q. And then where did you and Dotty and Mendy go? A. We went to my apartment.

Q. Where was it then, 21st Street? A. Yes, sir.

Q. East 21st Street? A. Yes, sir, East 21st Street.

Q. That is in Manhattan? A. Yes, sir.

Q. Did Dotty go with you? A. Yes, sir.

Q. And Mendy? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. What time was it do you say when you got to your apartment on 21st Street? A. It was sometime after 4 o'clock.

9980

Q. What did you do when you got to your apartment? A. When we got to the apartment we started in to get ready for bed and spoke for a while.

Q. What do you mean, you sat down and chatted for a while? A. Yes, sir.

Q. Then you got ready to go to bed? A. Yes, sir.

Q. Did you go to bed? A. Yes, sir.

Q. Where was Dotty sleeping? A. She was sleeping in the living room.

Q. Where were you sleeping? A. I was in the bedroom.

9981

Q. Was Mendy there likewise? A. Yes, sir.

Q. Did you have a single bed or one double bed? A. We had one bed.

Q. Did you and Mendy sleep in that room? A. Yes, sir.

Q. That morning? A. Yes, sir.

Q. You got to bed about what time, you say? A. I should say it was near 5 o'clock, I would not be sure of the time: I would say it was around 5 o'clock.

Q. Dotty was sleeping on a couch in the living room? A. Yes, sir.

9982 *Blanche Weiss—For Defts.—Direct*

Q. At what time did you get up? A. I got up about 12 o'clock.

Q. 12 o'clock noon on Sunday, September 13th? A. Yes, sir.

Q. When you woke up was Mendy there? A. Yes, sir.

Q. Was Dotty there? A. Yes, sir.

Q. What did you do when you got up? A. I went into my kitchenette and started to prepare breakfast.

9983 Q. Did you? A. Yes, sir. I then asked Mendy whether he was ready to eat.

Q. Did he get up out of bed? A. Yes, sir.

Q. Was he undressed? A. Yes, sir.

Q. Did he have his breakfast? A. Yes, sir.

Q. Did Dotty have breakfast with you also? A. Yes, sir.

Q. How long were you engaged in breakfast? A. I would say over one hour.

Q. Where did you go, if any place, after that? A. Sometime in the afternoon we got dressed and we went down—we drove to see my sick father.

9984 Q. Where was he? A. Out in Brooklyn.

Q. Was Dotty still with you or did you leave her home? A. No, we dropped her off at her home.

Q. Where was that? A. On Henry Street.

Q. Was that on Henry Street, Manhattan? A. Yes, sir.

Q. Was that on your way to your father's place in Brooklyn? A. Well, it was maybe a few blocks out of the way.

Q. You left your house to go to Brooklyn? A. Yes, sir.

Q. And instead of going directly there, you

dropped Dotty off on your way; that is what I mean. A. Yes, sir.

Q. When you were en route, on the way to Brooklyn, you dropped her off at her house? A. Yes, sir.

Q. And you got to your father's house when? A. Sometime late in the afternoon.

Q. Where was that? Where was your father's house? A. In Brooklyn.

Q. Was it your custom to visit him every Sunday? A. Yes, sir, we go there every Sunday. 9986

Cross-examination by Mr. Turkus:

Q. You were picked out of the court-room here and identified by a narcotic agent as Rose Bell? A. Yes, sir.

Q. You have been sitting through this trial for weeks? A. Yes, sir.

Q. You sat through the testimony of every alibi witness that took the stand?

Mr. Talley: I object to the form of the question. And I think the District Attorney should now state that Mrs. Weiss was sitting here during the latter part of this trial with his consent, and at the direction of the Court—and with the permission of the Court, and at my request. I do not want any innuendo conveyed as to her being present at the trial. 9987

Mr. Turkus: There is no innuendo.

The Court: There is no innuendo. The Court authorized it because she was simply an alibi witness. That was about two weeks ago.

Mr. Talley: Yes.

9988 Mr. Turkus: And at the request of Mr. Talley.

Mr. Talley: Yes.

Mr. Turkus: There is no innuendo about it except the jury is entitled to know she heard the testimony of every alibi witness that preceded her on the stand.

Mr. Talley: Certainly, she was here with your knowledge and with the permission of the Court, but at my request.

9989 Mr. Turkus: Why is there objection to the question?

Mr. Talley: Because there is a suggestion there that she was in this court-room solely for the purpose of hearing other witnesses in this case. You know what the suggestion is.

Mr. Turkus: Having made your explanation to the jury, is there any objection to the question?

Mr. Talley: Yes, I object to the question as incompetent, immaterial and irrelevant.

9990 The Court: Objection overruled.

Mr. Talley: I wanted the jury to know what the facts were. I except.

The Court: If I recall correctly, this is what happened: I thought it better, at Judge Talley's request, to have the wife of the defendant present during the trial instead of kept in the corridor. It would be inhumane and unreasonable to keep her out in the corridor simply because she would be an alibi witness. While Mr. Turkus opposed it, the Court prevailed

upon Mr. Turkus to overcome his objection, and the Court directed she be permitted to sit here during the trial, as the wife of any defendant should be permitted to do. Proceed.

Q. You sat here during the testimony of every alibi witness who took the stand? A. Yes, sir.

Q. What is your maiden name? A. Blanche Langsam.

Q. You have a married sister? A. Yes, sir. 9992

Q. What is her name?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I have three married sisters.

Q. Have you one, Simon? A. Yes, sir.

Q. What is her name? A. Rose Simon.

Q. Where does she live? A. 147 West 79th Street.

Q. That is in Manhattan? A. Yes, sir. 9993

Q. When, in the month of April, did you spend two weeks with Rose Simon—April, 1940?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant; not proper cross-examination. If this line of questioning is to be continued, it can only be by the District Attorney making this lady his own witness.

The Court: Objection overruled.

Mr. Talley: Exception.

A. In April, 1940?

9994 *Blanche Weiss—For Defts.—Cross*

Q. Yes. A. I do not remember.

Q. Let me see if I can refresh your recollection. Did Mendy tell you that he was to the District Attorney's office on March 28, 1940, and questioned, in Brooklyn?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and upon the further ground to which I direct your Honor's particular attention—I might as well do it now as at any other time in the
9995 case. I object to the question on the further ground it is an attempt on the part of the District Attorney to compel this witness to testify against her husband, in violation of the law of this State. I direct your Honor's attention to the provisions of the Penal Law, Section 2445, which says: "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled
9996 to disclose a confidential communication, made by one to the other during their marriage." Section 349 of the C.P.A., which is analogous, provides, in part, as follows, and I quote: "A husband or wife shall not be compelled or without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage." And the leading case on that subject is People against Wood, 126 N. Y., which holds that, "no confidential communication between

husband and wife may be disclosed by one spouse if objected to by the other."

As attorney for the defendant Weiss, I put upon the record the objection. I now object to this witness testifying to anything arising out of the matrimonial state. May I call your Honor's attention to the analogy between these two sections of the Code, showing the intent of the law in this case. Section 347 of the Civil Practice Act, which provides: "A person in- 9998
terested in the event shall not be examined as a witness in his own behalf, or interest—" The language is as follows: "Concerning a personal transaction or communication between a witness and the deceased person, except where the executor or administrator is examined in his own behalf." That is a section of the law which is generally invoked where, as your Honor will recall, a claim is made against the estate of a deceased person and the person making the claim is not 9999
permitted to testify. It most frequently arises in the Surrogate's Court. A person making a claim is not permitted to state any conversation or transaction he has had with the deceased person. And the Court of Appeals, in passing upon that section, in Griswold v. Hart, at 205 N. Y., page 384, defines this as a transaction which is prohibited. "Whatever he (the witness) derives from the personal presence of the deceased by the use of his senses is a communication from the

10000 deceased to him within the meaning of the statute."

I submit that is the law applicable here in this State and to this examination; that this witness cannot be compelled to testify to any transaction or any communication—or anything she saw or heard—anything that she acquired knowledge of by the use of her senses—she cannot be compelled to testify in this case against
10001 the defendant Weiss. That is the law.

Mr. Turkus: The law can hardly be so ridiculous that a woman can testify to an alibi and then avoid cross-examination.

Mr. Talley: That is my objection, bearing in mind this District Attorney is now making this witness his own witness once he departs from cross-examination on the alibi and brings out anything not disclosed by the direct examination, he makes her his own witness.

The Court: Cross-examination, particu-
10002 larly on collateral impeachment is largely composed of blank cartridge shooting. There may be no damage done by all this sort of shooting, but anything that hits the mark is one of the difficulties the Court has to face in taking notes of cross-examination. Of course, on the direct, everything is known in advance and everything is solid meat. At first the Court was under the impression that this was purely in the nature of a collateral impeachment, but the Court senses that what it is really in the nature of doing is to

specify an intent to show that Weiss' flight in the month of May, in or about, or later on, was because of the Rosen case and not because of the Dewey investigation, and not because of any Federal matter. So far on the record all we have is the testimony—we have the testimony of Paul Berger—

Mr. Turkus: The Tannenbaum incident.

The Court: —that in May, 1940, he 10004
read in the newspaper something about Tannenbaum and then he had a talk with Weiss about it the next day, and Weiss said, "It looks like Allie is talking and I will have to take a duck," which is something if the jury believes it and it is connected up to the jury's satisfaction, as a motive for alleged flight. Then flight may be considered on the question of guilt under a proper charge on that point of law by the Judge.

Now, it impresses me that this is an 10005
attempt to obtain from this witness testimony that her husband made some sort of admission to her, and for that reason I think it is improper and the objection is sustained.

Mr. Turkus: I will revise the question.

By Mr. Turkus:

Q. Do not answer this until the Judge rules on the objection. Did Mendy, in the presence

10006 *Blanche Weiss—For Defts.—Cross*

of others, tell you that he had been in the District Attorney's office on March 28, 1940?

Mr. Talley: I make the same objection on the same grounds stated to the last question.

The Court: "In the presence of others", takes it out of the class of confidential communication.

Mr. Talley: I submit it does not, with
10007 great respect.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. I will revise it. Did Mendy, in the presence and hearing of any other person besides yourself, tell you he had been in the District Attorney's office March 28, 1940? A. I don't remember.

Q. Don't you remember whether your husband told you, in the presence of someone else, and in the hearing of someone else, he had been ques-
10008 tioned in the Brooklyn District Attorney's office?

Mr. Talley: I object to the form of the question. The question, "Don't you remember", assumes something happened that might be remembered. It is a question which should not be permitted in that form.

The Court: You might specify who the others are: maybe then she would remember.

Mr. Turkus: I withdraw the question. There has been objection to it.

Q. Where were you living in April, 1940? A. In 12th Avenue and 46th Street.

Q. What address? A. I think it was 2045, I am not sure.

Q. Had you been living there in March, 1940? A. Yes, sir.

Q. Under what name?

Mr. Talley: I object, if your Honor pleases, again on the ground that this witness cannot be compelled to testify against her husband under this section of the law I have quoted. 10010

Mr. Turkus: This goes to her credibility.

Mr. Talley: It cannot possibly affect her credibility. It cannot be adduced in evidence properly in any court.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Under what name? A. The name of Newman.

Q. Had you lived any other place before that under a fictitious name? 10011

Mr. Talley? Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Where was the place you lived, or the places you lived under a fictitious name or names? A. At 230 Park Place.

Q. That was Hoffman? A. Yes, sir.

Q. What other places?

10012

Mr. Talley: I make the same objection, if your Honor please, upon the same grounds.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Just those two.

Q. Did you ever live under the name of Klein?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

10013

Mr. Talley: Exception.

A. No, sir.

Q. When did you live in 230 Park Place under the name of Hoffman?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I think it was in 1938.

Q. You lived there a year? A. I lived there

10014 more than a year.

Q. For how long? A. About 18 months, it might have been 1937.

Q. Did you break the lease in moving out?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and upon the same ground urged to the other questions.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Out of 230 Park Place?

 10015

Q. Yes. A. I don't know whether you would call it breaking a lease. They told me to move because of my husband being arrested in that building.

Q. You had a lot of visitors there, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the same grounds urged before.

The Court: Objection overruled.

Mr. Talley: Exception.

10016

A. I don't know what you mean when you say "visitors".

Q. Others than the members of your family, for example, wasn't Charley "Bugs" Workman a visitor there? A. No, sir.

Q. Wasn't Allie Tannenbaum a visitor there? A. No, sir. They were not.

Q. When did you move out of the 12th Avenue address in Manhattan that you say you lived in in April of 1940 under the name of Newman? A. In April.

Q. Were you present when the furniture went out? A. No, sir. 10017

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. What date in April did the furniture go out?

Mr. Talley: Same objection.

The Court: Objection overruled.

10018

Mr. Talley: Exception.

A. I don't remember.

Q. Who made the arrangements for taking the furniture out? A. My husband.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10019

Q. Where was the furniture taken to?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Mr. Turkus: May I suggest at this point that Judge Talley have a continual objection instead of having to interpose an objection to each question? There is an objection to every question, which seriously breaks up the cross-examination. If it can be done, I would like him to do it.

10020

The Court: That is the right of counsel.

A. It was taken to a storage house.

Q. What storage? A. I think it was the Regal.

Q. It is still there? A. Yes, sir.

Q. Now, having that background, is your memory refreshed about living with your sister in the 79th Street house of Rose Simons, for about two weeks?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I don't remember.

Q. Don't you remember this occasion, that while Rose Simons was at work—and does she work, by the way? A. Yes.

Q. Where does she work?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, a sister of this witness, trying to bring her into 10022
the case.

The Court: Let us find out. Objection overruled.

Mr. Talley: Can't you see the harm and injustice that might be done?

The Court: I don't see any harm.

Mr. Talley: I object to the form of the question because of the implication in the part that says, "Don't you remember," assuming something happened that was to be remembered. Let the witness testify, if your Honor compels her to, as to the 10023
fact.

Mr. Turkus: I wish you would let her testify.

Mr. Talley: Stop until I finish. —and not to be asked about remembering something that may not have happened at all, that nobody could remember.

The Court: Take your exception.

Mr. Talley: I except.

Q. Where did she work? A. I don't know the address.

Q. It is a millinery business? A. No, sir.

Q. What kind of a business? A. Dress business.

Q. Is it not a fact that while Rose Simons was away at work Mendy came and took you away?

Mr. Talley: I object. This witness cannot be compelled to testify against her husband, because of the marital rule. It is incompetent, immaterial and irrelevant also.

10025

The Court: Reframe the question. Leave out the word "took", and see whether she went away

Q. Is it not a fact that one day during the month of April, 1940, while Rose Simons was away at business, that Mendy came to the apartment and you and Mendy departed therefrom?

Mr. Talley: I make an objection on the same grounds as heretofore stated.

The Court: Overruled.

10026 Mr. Talley: Exception.

A. I don't know what you mean by that.

Q. You don't understand me? A. I don't understand you to that effect.

Q. Don't make speeches, madam, if you don't understand.

Mr. Talley: May I ask your Honor, in behalf of the witness, if your Honor requires her to answer, may I ask the District Attorney to restrain his zeal to the

extent of allowing this lady to finish her answer?

The Witness: I don't remember being there.

Q. You don't remember being in Rose Simons' apartment at any time during the month of April, 1940? A. I know I was there, but just when I was there—I have been there so many times that I cannot recall the month or anything.

Q. Let us see, you testified in Mr. Talley's 10028
examination as to something that allegedly occurred in September, 1936. I am bringing you up to 1940, in April, less than two years ago. Don't you remember an occasion when your husband came to Rose Simons' apartment while she was away at business and that the both of you departed from the Simons' apartment? Don't you remember that?

Mr. Talley: I object to the form of the question, primarily because of the use of the words, "Don't you remember." There 10029
has been no evidence to indicate that what the District Attorney is referring to ever happened outside of his imagination or misinformation. The witness should not be required or asked to answer a question of that kind.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I do not remember that occasion.

Q. Do you deny it happened?

Mr. Talley: I object to the form of the question.

10030 *Blanche Weiss—For Defts.—Cross*

The Court: Objection overruled.
Mr. Talley: Exception.

A. I do not deny because I do not remember.

Q. Now, does this refresh your recollection? Do you know the Ungers? A. Yes, sir.

Q. What is his first name? A. George Unger.

Q. Was his wife's name Horty? A. Yes, sir.

Q. You were in court when you heard the other witness testify about the Ungers, weren't you? A. Yes, sir.

10031

Q. How long have you known George Unger? A. Say about 10 years.

Q. How long have you known his wife Horty? A. His wife Horty I have known since their marriage.

Q. How long is that? Well, five years, two years, one year? A. I think about five or six years.

Q. Are you friendly with the Ungers? A. Yes.

Q. Have you been in the society of George Unger, and his company, on various occasions?

10032

A. I don't know what you mean when you say "company"?

Q. Have you been out with your husband when Unger was out, either with his wife or some other person? A. I remember being out with him and his wife, but I do not remember anybody else there.

Q. On numerous occasions were you out with the Ungers? A. No, sir not very often.

Q. You visited at their home? A. Yes, sir.

Q. And they visited you at your home? A. Yes, sir.

10033

Q. You knew George Unger was an ex-felon, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, as well as the grounds already urged—requiring this witness to testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes.

10034

Q. You knew he served time in the State Prison in New Jersey for robbery, don't you?

Mr. Talley: Objected to as incompetent, immaterial and irrevelant, and upon the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I know he served time; I don't know for what.

10035

Q. Knowing he had served a term in prison, you associated with him and his wife?

Mr. Talley: I object to that on the grounds already urged; it has been already answered in addition to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. When was your last visit to the Unger apartment—look at me—when was your last visit to the Unger apartment?

10036

Mr. Talley: I object to it on the same grounds as herefore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. The last visit?

Q. Yes. A. I think it was in the middle of April.

Q. 1940? A. 1940.

Q. The Ungers lived at No. No. 3 East 101st Street? A. That is right.

10037

Q. Right off of 5th Avenue? A. Yes, sir.

Q. Did you and your husband stay in the Unger apartment and sleep there?

Mr. Talley: I object to that on the grounds already stated; this witness cannot testify against her husband, and on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10038

A. Yes, sir.

Q. How long did you and your husband stay and sleep at the Unger apartment?

Mr. Talley: I make the same objection upon the same ground; and on the further ground it is not proper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Just a few weeks.

Q. Two weeks? A. About that.

Q. You left there very hurriedly?

10039

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the grounds already urged against this witness testifying to any of these matters.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You owned a mink coat at that time, didn't you?

10040

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the same grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did.

Q. You left that mink coat at the Unger apartment at the time of your departure?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, no bearing upon this issue, and upon all the other grounds stated. 10041

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did; it was sometime in the spring; I did not need my mink coat then.

Q. That was no indication that you left hurriedly, was it?

Mr. Talley: Objected to as calling for a conclusion.

The Court: Sustained as argumentative.

Q. You never got the mink coat back?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

10043 Q. It was put in pawn by your friend, George Unger, who hocked it, wasn't it?

Mr. Talley: I object.
The Court: Sustained as irrelevant.

Q. Now, going back to Rose Simons' apartment, has your recollection now been refreshed that you stopped there with your sister on 79th Street before you went to the Unger apartment in April of 1940? A. I don't remember that.

Q. Can you remember the day that you and
10044 Mendy left the Unger apartment, the date? A. I cannot remember the exact date.

Q. To the best of your recollection, what date was it? A. I think it was the middle of April.

Q. Wasn't it your recollection you spent two weeks in the middle of April at the Unger apartment? A. I don't know.

Q. Didn't you, in previous answers, tell me you spent about two weeks at the Unger apartment? A. Yes, sir.

Q. Was it your previous testimony that you got to the Unger apartment about the middle of April? A. No.

Mr. Talley: I object. That was not her testimony.

Mr. Turkus: The witness has answered no, and that should be sufficient.

Mr. Talley: She did not answer that way.

The Court: She has answered.

Mr. Talley: Exception.

Q. Your recollection is you left the Unger apartment about the middle of April, 1940, is that correct? 10046

Mr. Talley: I object to the form. That is an objectionable question. "Do you understand now?" "Do you remember now?"

Mr. Turkus: I didn't ask her that. That is apparently a filibuster.

Mr. Talley: What kind of a statement is that? I object to it and I ask the Court to instruct the jury to disregard it. It is an offensive remark.

Mr. Turkus: I withdraw it. I am sorry it happened. 10047

Mr. Talley: You ought to be sorry.

The Court: The jury will disregard it.

Q. Is it your recollection you left the Unger apartment with Mendy about the middle of April of 1940? A. That is right.

Q. Does this help fix your recollection? When you left the Unger apartment, the day after you left the Unger apartment, did some story appear in the newspaper that attracted your interest?

Mr. Talley: Objected to as incompetent, irrelevant, and immaterial, too general; an attempt apparently to cross-examine his own witness, and certainly he has made Mrs. Weiss his own witness, and, having made her his own witness he cannot impeach her by questions like this.

The Court: Objection overruled.

Mr. Talley: Exception.

10049 A. No, sir.

Q. After you left the Unger apartment did you learn from any source that Mendy had been indicted in the Rosen murder? A. No, sir.

Q. When did you learn that for the first time? A. The night he was arrested in Kansas City.

Q. That was the first knowledge you had? A. Yes, sir.

Q. Now, you left the Unger apartment with Mendy in a Buick car, didn't you? A. I don't remember what kind of a car it was.

Q. It was an automobile? A. Yes, sir.

Q. Whose automobile? A. I don't know.

10050 Q. Who did you leave with? A. I left with my husband.

Q. Hadn't you ever seen that car before? A. I don't remember.

Q. You have been married eight years? A. Yes, sir.

Q. And you don't remember whether you had ever seen that Buick car in which you departed? A. I don't remember if it was a Buick; I don't remember the car.

Q. Had you ever seen your husband with that particular car before you left the Unger apartment with him in 1940? A. I don't remember it.

Q. How many cars did your husband own in 1940 when you left the Unger flat?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He did not own any.

Q. Well, when you left in this automobile from the Unger flat, who was in the car? A. Just my husband and myself. 10052

Q. Did you ask him where he got the car? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination; an attempt to make the witness testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. You had your suitcases packed up? A. Yes, sir. 10053

Q. And your belongings with you? A. My clothes.

Q. Well, that is your belongings. Did your husband have suitcases with him?

Mr. Talley: Objected to on the grounds already urged; the witness is not capable to testify to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Did you drive to a hotel in New Jersey?

10054 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: I make the same objection on the same grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Well, this is only April of 1940. Do you remember where you went to live after you left the Unger flat?

10055

Mr. Talley: I object on the ground this is a cross-examination of his own witness.

The Court: He has a right to test her memory. She testified to a lot of detail as to herself and as to people present five years ago.

Mr. Talley: I take an exception to your Honor's statement as prejudicial.

A. We were traveling and we stopped in many places; I don't remember just exactly where.

Q. Cannot you remember your first stop from the Unger flat when you left?

10056

Mr. Talley: I make the same objection.

The Court: Do you mean they registered there and lived there, in Jersey City?

Mr. Turkus: I said did they go to a hotel in New Jersey. I do not want to tell this witness.

The Court: A person who goes in to telephone or buys a package of cigarettes, that would not make him a resident.

Mr. Turkus: I mean, stayed over night.

The Witness: I don't remember when

the first stop was; we stopped in so many places I don't remember where it was.

Q. Did you know your destination when you left the Unger flat?

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.
The Witness: I knew we were going out West.

10058

Q. Did you know where in the West?

Mr. Talley: I make the same objection.
The Court: That comes a little close to a confidential communication. Objection sustained.

Q. Did you go to a hotel around Newark the first night out of the Unger flat?

Mr. Talley: I make the same objection.
The Court: Objection overruled. 10059
Mr. Talley: Exception.

A. I don't remember that.
Q. Do you remember going to the city of Chicago? A. Yes, sir.
Q. Now, where did you live in Chicago?

Mr. Talley: I object to that on the grounds already stated; she cannot be compelled to disclose that.
The Court: Objection overruled.
Mr. Talley: Exception.

10060 *Blanche Weiss—For Defts.—Cross*

A. I don't know the name of the hotel.

Q. How long did you stay at a hotel in Chicago?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember; I think it was just a short—

10061 Q. (interrupting) Two days, three days, four days, a week, or how long? A. I think about three days.

Q. You met people in Chicago, didn't you? A. Yes, sir.

Q. Who did you meet in Chicago?

Mr. Talley: I object again on the grounds already urged, and on the further ground it is incompetent, immaterial and irrelevant, and not proper cross-examination.

The Court: Objection overruled.

10062 Mr. Talley: Exception.

A. I met a lot of people there; I don't remember just who they were.

Q. Did you meet a man in the liquor business?

Mr. Talley: That is objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you meet Dorothy Walker?

Mr. Talley: I object to that on the grounds already urged, and as incompetent, immaterial and irrelevant.

Mr. Turkus: You look at me, never mind looking over there.

Mr. Cuff: I object. That insinuation is not proper.

Mr. Turkus: I did not intend to insinuate.

Mr. Cuff: He said, "Look at me, not over there." He meant towards Mr. Talley and myself. 10064

Mr. Turkus: How did you know that?

Mr. Cuff: I know what you said.

Mr. Turkus: I said, "Don't look over there; look at me."

Mr. Talley: You said, "Don't look over there." A lot of witnesses have a habit of looking at other people besides the examiner.

The Witness: The only time I looked over there was when I heard an objection. It sort of attracts my attention toward the person that is objecting. 10065

Mr. Turkus: Now we will have the question read.

By the Court:

Q. Did you meet Dorothy Walker? A. Yes, sir.

By Mr. Turkus:

Q. Did you meet her son, Milton?

10066 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: I make the same objection on the same grounds as heretofore stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. At that time Chick Weiss was present? A. No, sir.

Mr. Talley: I object on the same grounds.

10067

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Before you took the witness stand did anybody discuss with you—anyone—that the District Attorney was bound by certain answers? Did you hear that expression used? A. No, sir.

Q. You know what an objection is? A. Yes, sir.

Q. Now, in Chicago, didn't you meet a man named Simey Friedman?

10068

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Is it not a fact that the first person you and your husband Mendy contacted in Chicago was Simey Friedman, who conducted a liquor store?

Mr. Talley: I make the same objection; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

10069

Mr. Talley: Exception.

A. I don't know.

Q. Wasn't Simey Friedman a man who put you and Mendy in contact with Dorothy Walker?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination, and objectionable upon the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10070

A. I don't know anything about that.

Q. Was Dorothy Walker a friend of yours? A. No.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. A friend of your husband's?

10071

Mr. Talley: The same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know; he knew her; I would not call her a friend.

Q. You knew her from Manhattan? A. Yes, sir.

Q. Had you visited her at her home before you met her in Chicago? A. No, sir.

Mr. Talley: I make the same objection.

10072 *Blanche Weiss—For Defts.—Cross*

The Court: Objection overruled.
Mr. Talley: Exception.

Q. Had she visited you at your home? A. No.

Q. Did you have her address in Chicago when you left New York?

Mr. Talley: I make the same objection on the grounds already urged.
The Court: Objection overruled.
10073 Mr. Talley: Exception.

A. No, sir.

Q. Did you get the address in Chicago from someone?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not get it from no one.

Q. Do you know who got it?

10074

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No.

Q. When you met the Walkers, who was in your company?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Just my husband.

10075

Q. Where did you meet the Walkers in Chicago?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. We went over to her house.

Q. Where was her house? A. I don't remember.

10076

Q. From the house did you go to a hotel to eat together?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Didn't you go to see a moving picture together? A. That was not the same day.

Q. What day was it you went to the movies? A. It may have been the following day.

10077

Q. Was that the day you ate dinner at the hotel? A. I don't ever remember eating a dinner in a hotel.

Q. Do you remember having drinks in the hotel, or anything to eat or drink in a hotel with the Walkers? A. No, sir.

Q. Was there a conversation between the Walkers and Mendy and yourself?

Mr. Talley: I object to that on the grounds already stated.

The Court: Objection overruled.

10078 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Exception.

A. Yes, sir.

Q. The Walker woman at that time had a flat on Foster Avenue, in Brooklyn, didn't she?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

10079 A. I don't know.

Q. You don't know? A. I hardly ever saw her.

Q. Was there any conversation in Chicago with the Walker woman about her apartment on Foster Avenue, Brooklyn?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

10080 Q. Was there any conversation in your presence about the Walker woman staying in Chicago and keeping away from New York?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Was the conversation merely social?

Mr. Talley: I object to the form of the question, and on the grounds already stated.

10081

The Court: Objection overruled.
Mr. Talley: Exception.

A. Yes, sir.

Q. So that your visit to the Walker woman and Milton Walker, whom you knew by having visited at her home, or their home, was simply casual and confined to social matters?

Mr. Talley: I object to that.
The Court: Objection overruled.
Mr. Talley: Exception.

10082

A. Yes, sir.

Q. Was any business discussed?

Mr. Talley: I make the same objection, as I have already urged, and as having been already answered.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

10083

Q. At no time while you were in Chicago did you see Chick Weiss?

Mr. Talley: Objected to on the grounds already urged.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Do you understand that you are under oath?

10084 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: I object to the question, and I ask your Honor to direct the District Attorney not to repeat it. He has tried that before.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you know Chick Weiss? A. Yes, sir.

Q. What is his right name? A. Ben.

Q. In the automobile rental business? A. No,

10085 sir.

Q. Any relation to Mendy Weiss? A. Yes.

Q. A cousin? A. No.

Q. What relation? A. His sister is married to my husband's brother.

Mr. Talley: While there is a change in the guards, may I ask the Court to direct the officer to stand back from the witness, not directly behind the witness as the last officer did? May we have the court officer removed, or if he stands there, that

10086 he stand back against the wall and not against the chair of the witness?

The Court: That is incorrect in several details. He is behind the witness and almost flat against the wall.

Mr. Talley: The last officer who was just relieved stood within three inches of the back of the chair of this witness.

The Court: You should have called the Court's attention to it then.

Mr. Talley: I did not want to interrupt.

The Court: If your observation was

accurate. It occurred to me just as was just stated.

Mr. Turkus: This is about the same situation that we had on Saturday, with certain papers on my desk, and the record does not indicate there is a rail here which blocks the view of the papers on my desk.

The Court: Please proceed with the examination.

Q. Referring to the individual named Friedman in Chicago, does the first name, "Sammy" refresh your recollection? A. No, sir. 10088

Q. While you were in Chicago you took the Walkers for a ride, didn't you? A. Yes.

Q. In an automobile? A. Yes.

Q. The same automobile you left the Unger flat in? A. That is right.

Q. What was the make of the automobile, can you remember now? A. I don't remember.

Q. Was it a sedan? A. A sedan car with four doors?

Q. A sedan may have two doors. Is it a hard top vehicle, all enclosed? A. Yes, sir, it was all enclosed. 10089

Q. Four door? A. I don't remember that.

Q. Black, in color? A. I don't remember that.

Q. This was April, 1940, as you say, can't you remember whether it had four doors or whether it was black in color?

Mr. Talley: I object to the cross-examination of his own witness.

Mr. Turkus: My witness?

Mr. Talley: Yes, you made her your

10090 *Blanche Weiss—For Defts.—Cross*

witness on these matters; whether the Court says so or not, that is what you are doing.

The Court: Judge Talley has ruled. You may now proceed.

Q. Do you remember whether the car was black in color? A. No, I do not.

Q. Do you remember what State the license plates were from?

10091

Mr. Talley: I make the same objection as urged before; one cannot be compelled to testify; on the ground it is incompetent, immaterial and irrelevant; cross-examination of his own witness.

The Court: It is a memory test. She had been in it every day, or got in it frequently. How correct is she in her memory?

Mr. Talley: It is not the purpose of testing memory, Judge. You should know that by this time.

10092

Mr. Turkus: I object to that statement.

Mr. Talley: I know it and the jury knows it. It is not the purpose of attacking her memory at all. It is an attempt and an effort to bring out testimony he is not entitled to. I had hoped your Honor had seen it. I don't know how I can make it clear any more than I have tried to.

The Court: Thank you. Proceed.

Q. Do you remember what State the license plates were from? A. Yes, sir.

Q. What State? A. New York.

Q. Before you went to Chicago in the car, hadn't you been up-State around Albany with Mendy?

Mr. Talley: I object on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Hadn't you visited people or friends who conducted a cabaret about twenty miles outside of Albany, before you went to Chicago? 10094

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you in a steak house before you went to Chicago? A. I don't know whether it was steaks. I might have been in a restaurant.

Q. But "steak house" does not refresh your recollection? A. No, sir. 10095

Q. A cabaret, twenty miles from Albany, does that refresh your recollection? A. I was to no such place.

Q. You took the Walkers for a ride in this car, didn't you? A. About once or twice.

Q. And you spent considerable time with the Walkers, didn't you, in Chicago?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the same grounds already urged.

The Court: Objection overruled.

10096 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Exception.

A. I would not say very much time.

Q. Who else did you entertain in Chicago besides the Walkers, if any one?

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

10097 A. We did not entertain anybody.

Q. You entertained the Walkers, didn't you? A. We saw them. I don't know what you mean.

Q. You took them to the moving pictures, didn't you?

Mr. Talley: Let her finish her answer.
The Witness: They went with us.

Q. They were guests, weren't they? A. I would not call them guests.

Q. Your husband paid, didn't he? A. Well, it would only be natural with a woman there that
10098 my husband should pay.

Q. Naturally or not, he did pay all the expenses for the entertainment, didn't he? A. I did not watch him that closely.

Q. Who else did you and your husband take out while you were in Chicago than those you stated?

Mr. Talley: Objected to on the grounds already urged.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Nobody else.

10099

Q. You had no friends in Chicago? A. I had friends, yes, sir.

Q. Your husband had no friends or relatives in Chicago, did he?

Mr. Talley: I object to that on the grounds already urged.

The Court: She can say if she knows. Objection sustained as to form.

Q. To your knowledge, did your husband have any friends or relatives in Chicago?

10100

Mr. Talley: I make the same objection as urged; she should not be compelled to testify.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not relatives, but I know he knew people there.

Q. Did he visit people? A. Not as I know of.

Q. So the only one he visited in Chicago was Mrs. Walker, Dottie Walker and Milton Walker, is that correct?

10101

Mr. Talley: I object. That is not calling for her knowledge.

The Court: So far as you know.

The Witness: Yes, sir.

Q. From Chicago, where did you go?

Mr. Talley: The same objection, if your Honor please, on the ground she cannot

10102 *Blanche Weiss—For Defts.—Cross*

be compelled to testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception. And on the further grounds already urged— Exception.

A. We made so many stops, Mr. Turkus, I just cannot remember every little place.

Q. I know that, I don't expect you to remem-
10103 ber every little thing that happened in 1940 on a trip, but what was the next city you stayed at, the hotel?

Mr. Talley: I object to the form of the question, and on the grounds formerly urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot remember the places.

Q. When you stopped at the Chicago hotel, under what name were you living? A. I don't
10104 remember.

Q. Well, it certainly was not Weiss, was it? A. No.

Q. Well, can you remember what name you used in Chicago when you stayed there for several days on this trip?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. My husband registered. I don't know what name he put down.

10105

Q. What did the bell boy and the other people in the hotel call you, Mrs. what?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant, and on the same grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Did you use so many different aliases when you went around with your husband that you cannot remember them?

10106

Mr. Talley: Objected to as highly prejudicial; incompetent, immaterial and irrelevant; and on the grounds already urged.

The Court: Objection sustained.

Q. Before you left the Unger flat, and while you were living there, did Yiddle Lorber visit there? A. Yes.

Q. Did Al Engelson visit there?

10107

Mr. Talley: I make the same objection there and if we are going to have an enumeration now of names such as have been plastered through the trial, I ask to have—

Mr. Turkus: I don't plaster anything in this trial. They are his client's associates, not the District Attorney's.

Mr. Talley: Will you let me finish my objection, please?

The Court: Overruled.

10108

Mr. Talley: Exception.
(Pending question read).

A. Yes.
Q. Did Chick Weiss visit there?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

10109

A. Yes.
Q. Did Sidney Weiss visit there? A. Yes.
Q. Did Farvel Cohen visit there?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.
Q. You knew Farvel Cohen? A. Yes, sir.
Q. How many years? A. About twelve years.
Q. Visit at his home? A. Yes.
Q. He visited at your home? A. Occasionally.

10110

Q. You knew him as Little Farvel?

Mr. Talley: Same objection, if your Honor pleases.
The Court: Overruled.
Mr. Talley: Exception.

A. Yes, sir.
Q. Did you know his business? A. No, sir.

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

Q. In the twelve years of acquaintanceship with Farvel Cohen, did you ever know his business?

Mr. Talley: Same objection.

A. No, sir. I was friends with his wife.

Mr. Talley: When I object, Mrs. Weiss, will you wait until the Court rules, please?
The Court: Overruled.
Mr. Talley: Exception. Now go ahead. 10112

Q. When Yiddle Lorber was in the apartment, was Mendy Weiss in the apartment?

Mr. Talley: Same objection, if your Honor pleases, upon the ground first urged. She cannot be compelled to testify—
The Court: Sustained.

Q. Did you know Yiddle Lorber's business?

Mr. Talley: Same objection. 10113
The Court: Overruled.
Mr. Talley: Exception.

A. I knew he was in the bonding business.

Q. How many years did you know him? A. I know him a very long time. I don't remember just how long.

Q. Fifteen years? A. Maybe more.

Q. And all you knew of him was that he was in the bonding business? A. Yes, sir. I was not intimate with him.

Q. Did you know Allie Engelson's business?

10114 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Same objection, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I took it for granted he was in the same business.

Q. As Lorber? A. That is right.

Q. Did you know that Yiddle Lorber had a
10115 place out in Williamsburg, in Brooklyn?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. You spoke with these men when they came to the Unga flat? A. Yes, sir.

Q. Any other men visitors at the Unga flat while you were stopping there?

Mr. Talley: Same objection, incompe-
10116 tent, irrelevant and immaterial; on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you know that Yiddle Lorber was a fixer?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

10117

Mr. Talley: The question means exactly nothing. Exception.

A. No, sir.

Q. When he came to the Unga flat, did he come with anyone?

Mr. Talley: Objected to as calling for a conclusion; also the grounds already urged.

The Court: Sustained upon the first ground.

10118

Q. In your hearing and presence did Lorber report some information?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, and also upon the grounds previously urged.

The Court: You may answer yes or no.

A. Can you repeat that question?

(Pending question read.)

10119

A. What kind of information?

Q. Some information allegedly in connection with the O'Dwyer investigation in Brooklyn.

Mr. Talley: Objected to as requiring this witness to testify against her husband.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

10120 *Blanche Weiss—For Defts.—Cross*

Q. How long after Yiddle Lorber's visit was it that you and Mendy left the Unga flat?

Mr. Talley: That is objected to upon the ground it is compelling this witness to testify contrary to law.

The Court: Sustained.

Q. How long after Yiddle's visit was it before you left the Unga flat?

10121

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; upon the grounds already urged.

The Court: Sustained.

Q. All along this route from the Unga flat until your final destination, you went under an alias or assumed name other than your true name; is that correct?

Mr. Talley: That is objected to on the grounds of being compelled to testify con-

10122 trary to law.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Can you remember any of the names you used enroute, on that trip?

Mr. Talley: Objected to upon the grounds already stated.

The Court: Overruled.

Mr. Talley: She and her husband were

alone on this trip, I beg to remind your Honor. I take an exception.

(Pending question read.)

A. No, sir.

Q. Not a single name?

Mr. Talley: Objected to as having been already answered.

The Court: She has answered that.

10124

Q. From Chicago, what was the next big city you stopped at?

Mr. Talley: That I object to, if your Honor pleases; already being gone into.

The Court: She has answered that.

Mr. Turkus: I did not hear the answer. Will the Court remind me of the answer? I did not hear any.

The Court: I thought she said she did not remember the next place where she stopped.

Mr. Turkus: I did not ask her the next 10125
place; I asked her the next big city.

The Court: Next big city.

Mr. Talley: Exception. That is compelling her to testify, and I take an exception to your Honor's ruling.

The Court: Overruled.

A. The next place I remember was Colorado Springs.

Q. Colorado Springs? Where in Colorado Springs did you stop?

10126 *Blanche Weiss---For Defts.—Cross*

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. At first we stopped in sort of a place where they have cabins.

Q. That was a tourist place? A. Yes.

Q. How long did you stay in the tourists cabins?

10127 Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. I don't remember.

Q. Were you there a week, a day, a month?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. I don't remember how long we were at the cabins.

10128

The Court: You were not asked "we". You were asked about yourself. Please limit your answers accordingly.

Q. Do you know how long you were at the cabins?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. I don't remember.

10129

Q. Have you no recollection of the period of time at all, whether it was a day, a week, a month, or a year?

Mr. Talley: Same objection, upon the ground it was already answered.

The Court: It could not have been a year.

Mr. Turkus: I am trying to give her something—

10130

By the Court:

Q. Was it over a week? A. I think it was.

Q. Was it as much as a month? A. I could not remember.

By Mr. Turkus:

Q. Under what name were you living at the various cabins?

Mr. Talley: Same objection, if your Honor pleases.

10131

The Court: Overruled.

Mr. Talley: Exception.

A. I am not sure but I think it was the name of Bell.

Q. When for the first time did you live anywhere under the name of Bell, to the best of your recollection?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

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A. Well, I don't know whether that was the first time or whether I used it before, or not.

Q. You don't remember whether you used "Bell" before? A. That is right.

Q. You mean some other year, on that trip? A. No, I mean on that trip.

Q. Your first name is Blanche? A. That is right.

Q. And you took the name of Rose Bell, is that right?

10133

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. Is that right? A. That is right.

Q. Anywhere en route from the Unga flat to Chicago, did you meet Chick Weiss?

Mr. Talley: Same objection, on the grounds already urged.

The Court: Overruled.

10134 Mr. Talley: Exception.

A. No, sir.

Q. Anywhere from Chicago en route to the West did you meet Chick Weiss?

Mr. Talley: Already answered. It is objected to on the previous grounds.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

10135

Q. Did you meet Farvel Cohen in Chicago? A. No, sir.

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

Q. From the tourist cabins where you lived under the name of Rose Bell, where did you move next?

10136

Mr. Talley: Same objection, upon the grounds urged.
The Court: Overruled.
Mr. Talley: Exception.

A. We rented a small house.
Q. And where was this small house? Don't use the expression "we". When I ask you something, answer that way.

10137

The Court: The District Attorney is permitted to ask these questions only in relation to yourself. Please remember that.
Mr. Talley: The witness has testified, if your Honor please, that she was with her husband all the time.
The Court: Now you have said something that I would not let the District Attorney bring out.
Mr. Talley: It is quite apparent that they were together.
The Court: Proceed.
Mr. Talley: I take an exception to your Honor's remarks and rulings

10138 Q. Where was this small house that you lived in? A. In Colorado Springs, in the mountains.
Q. Do you know the address of it?

Mr. Talley: Make the same objection as I made to the previous questions. Take an exception.

The Court: Overruled.

Mr. Talley: Exception.

10139 A. No, sir.
Q. How long did you live in this little small house in Colorado Springs?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I remember the street now.
Q. What street? A. I think it was Red Rock, or something like that. They were all new to me.
Q. Was it 204 South 7th Street, Rocky Ford, Colorado? A. No, sir.
10140 Q. How long did you live in this small house?

Mr. Talley: Same objection.

The Court: May I suggest that you don't go too far on memory tests. When you have enough, pass on to something else.

Mr. Turkus: I am going very quickly now, Judge. The time is not consumed by the District Attorney.

The Court: I know that.

Mr. Talley: Judge, this is not the memory test.

The Court: Will you wait just a minute? The Court views this as proper on the memory test, but, of course, there must be some limitation. It may also be considered as proper under question of traveling under an assumed name.

Mr. Turkus: That is it.

The Court: And on the question of associations.

Mr. Turkus: You know this could be gone over very rapidly if I could get answers. 10142

Mr. Tainey: This witness has answered every question asked, promptly and intelligently. Every question has been answered by this witness.

The Court: It has not been promptly because nearly every one has been interrupted by objection and argument.

Mr. Talley: Certainly I must object when I think questions are not proper.

The Court: I am not saying you cannot. I cannot stop you. 10143

Mr. Talley: I take an exception.

(Pending question read.)

A. I believe about two months.

Q. Did you live there under the name of Rose Bell?

Mr. Talley: Same objection as previously made.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

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Q. Did you communicate with your friends and relatives, or any of them, any time from the time you left the Unga flat until you got to this small house in Colorado Springs?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial; on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

10145

A. No, sir.

Q. Did you tell anyone that you were at Colorado Springs?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. From that house, where did you go next?

Mr. Talley: Objected to upon the
10146 grounds already urged. Certainly it is not any memory test.

The Court: This goes beyond memory test. The Court is not writing a thesis on the various rules of evidence under which this is permissible. I have not made this exclusively applicable to memory test. Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. We rented another house.

10147

Q. Colorado Springs? A. Yes.

Q. Did you live there in that other house under the name of Bell? A. Yes, sir.

Q. Rose Bell? A. Yes, sir.

Q. How long did you live in this other house in Colorado Springs? A. I think it was towards the end of September.

Q. While you were in Colorado Springs, did you visit St. Francis Hospital? A. No, I did not go there.

10148

Q. You did not visit there? A. No.

Q. Did you know anybody who was a patient in the hospital?

Mr. Talley: That is objected to.

The Court: Sustained.

Q. From that little house where did you go?

Mr. Talley: That is objected to upon the grounds already stated.

The Court: Overruled.

10149

Q. I should say the other little house. A. From there we went to Kansas City.

Q. Did you ever live at 204 South 7th Street, Rocky Ford, Colorado?

Mr. Talley: Objected to, if your Honor pleases. Already past that. On the grounds already urged, it is objected to.

The Court: Sustained.

Mr. Turkus: We have not passed that, your Honor.

Mr. Talley: You are out of Colorado weeks ago.

10150

Mr. Turkus: This is a very important question in regards to a very important exhibit in the case. It has never been touched on.

Mr. Talley: Object to the statement, if your Honor pleases.

The Court: You cannot refer to a paper that is marked for identification.

Mr. Turkus: No, in evidence; People's Exhibit 50 in evidence.

10151

The Court: Let me see it. Tell me briefly what it is.

Mr. Turkus: It is the operator's license found in the possession of this defendant, in the name of James William Bell, 204 South 7th Street, Rocky Ford, Colorado; date of issue June 6, 1940.

The Court: That is what I had in mind when I ruled against you. Objection is sustained.

Q. Where did you go from Colorado to Kansas? A. Kansas City, Missouri.

10152

Q. Where did you live in Kansas City, Missouri? A. On 46th Street Terrace.

Q. Under what name? A. Under the name of Bell.

Q. Did you also live at 700 West 48th Street, Kansas City?

Mr. Talley: Same objection as already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

 10153

Q. Under the Terrace Drive address and the West 48th Street address, did you live under the name of Rose Beli?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.
Q. What name? A. Name of Miller.
Q. Where did you live under the name of Miller? 10154

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. On 48th Street Terrace.
Q. That was 700 West 48th Street, Kansas City? A. Yes.
Q. What was your first name when you lived there under the name of Miller?

Mr. Talley: Same objection. 10155
The Court: Overruled.
Mr. Talley: Exception.

A. Rose.
Q. Rose Miller? Did you hear other witnesses interrogated whether Cuppie Migden lived at 700 West 48th Street, while you were a spectator in court?

Mr. Talley: Object to the form of the question.
The Court: Overruled.

10156 Mr. Talley: Exception.

A. Yes, I did.

Q. Was Cuppie Migden living there? A. No, sir.

Q. Was the manager one Mrs. A. W. Farney at West 48th Street? A. Yes.

Q. Did Cuppie Migden at any time pose as your brother?

10157 Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

A. No, sir. He was never there.

The Court: She has answered.

Q. Did you at any time ever introduce Cuppie Migden as your brother?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

10158 Mr. Talley: Exception.

A. No, sir.

Q. Did you move into apartment 302 at West 48th Street, Kansas City, Missouri?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember the number of the apartment.

Q. Third floor. A. Yes.

10159

Q. Didn't you live there from December, 1940, and leave on April 6, 1941?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. Yes, sir.

Q. Do you recall that you occupied apartment 302? A. I don't remember the number of the apartment.

10160

By the Court:

Q. You mean you did know it but you have forgotten? A. I did know it but I don't remember it.

Q. You have forgotten it? A. Yes, sir.

By Mr. Turkus:

Q. You lived there December, 1940, January, February, March, April, that would be six months in that apartment; is that correct?

10161

The Court: Five months.

Q. Five months rather. A. Yes, that would make it that much.

Q. Having lived in that apartment for five months, you cannot recall now that it was apartment No. 302?

Mr. Talley: Object to that, the form of the question. Already answered.
The Court: Overruled.
Mr. Talley: Exception.

10162

A. No, I cannot remember the number.

Q. You remember everything about September 12, 1936?

Mr. Talley: I object to that, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. Don't you? A. Yes.

10163

Q. Wasn't there a janitor there by the name of Henry Horton, a colored janitor? A. I only knew his first name.

Q. Henry? A. That is right.

Q. Didn't you tell Henry that there was a death in the family and you were going to leave to go to Denver, Colorado, on April 6, 1941?

Mr. Talley: I object, if your Honor pleases, on the grounds already stated. She is now being compelled to testify to something that she is not required; not binding upon anybody or anything. Upon

10164

all the grounds previously urged I object to the question.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember that.

Q. Don't you remember as far back as April 6, 1941, I mean as recent as April 6, 1941, that you told the colored janitor there, Henry, that there was a death in the family; you had to leave immediately to go to Denver?

Mr. Talley: I object to the question,

10165

the form of the question, asking if she remembers something that is not in evidence and so far as anybody in this case knows never happened.

The Court: That is quite recent, on something that is more than casual, being in relation to alleged death in the family.

Mr. Talley: The form of the question I object to.

The Court: The question, on the point of memory, is permissible. Overruled.

10166

Mr. Talley: I take exception to your Honor's ruling and statement.

A. What is the question?

Mr. Talley: Is your Honor permitting that question?

The Court. You have had the ruling.

By the Court:

Q. Answer.

10167

Mr. Talley: I take an exception to it.

Q. Do you remember that? A. No, sir.

Q. Do you remember whether you did or not tell that to the janitor? A. No, I don't.

Q. You do not remember one way or the other? A. I don't think I told that to him..

Q. You don't think so? A. No, sir.

By Mr. Turkus:

Q. You did have a talk with the janitor, Henry,

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before you left that apartment, didn't you? A. Yes.

Q. And there was a man who paid the janitor money before you left the apartment, wasn't there? A. No, sir.

Q. Who paid the janitor the money?

Mr. Talley: Objected to.

A. There was no money coming there—

10169

The Court: Sustained.

Q. Wasn't there any money coming to the Farney woman?

Mr. Talley: I ask the answer be stricken.

The Court: Strike it out.

Q. Did you have a talk with this colored man, Henry, before you left the apartment?

Mr. Talley: Objected to as already answered; incompetent, irrelevant and immaterial.

10170

The Court: She said, "Yes"

Mr. Turkus: If it has been answered—I get so many objections back here I did not hear the answer.

The Court: She said, "Yes".

Q. Was it in reference to paying money? A. No, sir.

Q. Was it in reference to leaving the apartment? A. It was in reference to leaving the

10171

apartment but not paying any money because I didn't owe any money.

Q. Was that conversation in the presence of Cuppie Migden? A. No, sir.

Mr. Talley: Objected to.
The Court: Overruled.
Mr. Talley: Exception.

Q. Did Cuppie Migden in your presence pay Henry, the colored man, any money for the use of the apartment?

10172

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; upon all the grounds previously urged.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you, while you were living in that West 48th Street apartment under the name of Miller, tell Mrs. Farney and the colored man, Henry, that you were a Government agent?

10173

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; on all the grounds previously urged.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you speak with Mrs. Farney while you lived there?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

10174 *Blanche Weiss—For Defts.—Cross*

The Court: Overruled.
Mr. Talley: Exception.

A. Very seldom.

Q. Did you speak with Henry while you were there? A. Yes.

Q. Did you say to Henry that you were a Government agent? A. No, sir, I never did—

Mr. Talley: Objected to as already answered.

10175

A. (Continued)—to anybody or to Henry.

Q. When you lived under the name of Rose Bell, at 46th Street Terrace, was the manager of the apartment hotel Miss Evelyn Timms? A. Yes.

Q. And was it from that place that you moved to 700 West 48th Street where you used the name "Miller"? A. Yes.

Q. While you were at West 48th Street, did you get chickens delivered to you from Martin's Indoor Poultry Farm?

10176

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained—I will let that in on the question of memory. You may answer that.

Mr. Talley: I take an exception.

By the Court:

Q. Did you do your own cooking there? A. Yes.

Q. You were the housewife? A. Yes.

10177

Q. You did the buying? A. Yes.

Q. Did you buy any chickens from Martin's Poultry Farm? A. Yes.

By Mr. Turkus:

Q. And were they delivered to the apartment by Martin himself?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

10178

The Court: Overruled.

Mr. Talley: Exception.

A. Just once or twice at the very most.

Q. And he brought the chickens right up into the apartment, didn't he?

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. And there were people in the apartment besides yourself when he delivered the chickens?

10179

Mr. Talley: Objected to.

Q. On those occasions?

The Court: Overruled.

Mr. Talley: Exception.

A. Not that I know of.

Q. Were you alone when Martin delivered the chickens to the apartment?

10180 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Objected to.

A. My husband might have been there.
Q. But somebody else—

The Court: Be specific. Was Cuppie there?

Q. Was Cuppie there? A. No, sir.
Q. How long do you know Cuppie?

10181

Mr. Talley: I object to it upon the grounds already stated, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I know him many years.
Q. Visit at his home? A. No, sir.
Q. He visited at your home? A. I believe he was there once.
Q. You know him many years. Do you know him from going out socially with him? A. No.

10182

Q. You did not know him from going to school with him? A. No.
Q. Where did you know him from? A. I knew him through my brother-in-law Sidney and through my husband.
Q. Yes? A. That is all, and from the neighborhood.
Q. While you were in Kansas City, Missouri, did you meet a man known as John Jay?

Mr. Talley: Same objection, if your Honor pleases, upon the same grounds.

10183

The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you, while you were in Colorado, meet John Jay?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Go through the telephone book at this rate.

10184

Mr. Turkus: No, that is where they went through, Judge.

A. Yes, sir.

Q. John Jay is a man about 65 or 66 years of age? A. Yes, sir.

Q. John Jay lived at 204 South 7th Street, Rocky Ford, Colorado, didn't he?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial; upon all the grounds previously urged; not proper cross-examination.

10185

Q. Didn't he? A. Yes, sir.

Mr. Talley: Wait a minute.
The Court: Overruled.
Mr. Talley: I take an exception.

Q. You visited John Jay at that adress, didn't you? A. Yes, sir.

Q. Did you meet Frankie Carbo there on the visit?

10186

Mr. Talley: Same objection, on the grounds previously urged.

A. I don't know him.

Q. Frank Carbo—

The Court: I don't recall that name. Is that on association?

Mr. Turkus: Yes, a name I brought in for the first time in this case.

10187

Mr. Talley: Exception.

The Court: Is this on association?

Mr. Turkus: That is right.

The Court: Will you connect it up?

Mr. Turkus: I am going to try to connect it through her.

Mr. Talley: Can't do that.

Mr. Turkus: I can't now, of course not, not after I was compelled to make that statement. It was too late.

Q. Did you meet a girl up there known as Betty? A. No, sir.

10188

Mr. Talley: I object, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. Were you introduced by John Jay as a relative?

Mr. Talley: I object to that as incompetent, irrelevant and immaterial.

A. Was I introduced?

10189

Mr. Talley: Just a minute, please.

A. (Continued) To John Jay?

Q. No, were you introduced by John Jay as a relative?

Mr. Talley: Mrs. Weiss, will you kindly refrain from answering when I get up?

The Court: Overruled.

Mr. Talley: Exception. Now go ahead and answer.

10190

A. No, sir.

Q. How many times did you visit John Jay?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. About two or three times.

Q. While you were with John Jay, were you brought in contact with a Mrs. Marie Hormann at Manitou Springs, Colorado?

10191

Mr. Talley: Object to the form of the question on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. What is the name?

Q. (Spelling) M-a-r-i-e H-o-r-m-a-n-n, a woman who conducts a renting agency for apartments?

Mr. Talley: I object, if your Honor

pleases, to the District Attorney testifying who she is.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember the name. It might be the woman that I rented the house from.

Q. Yes. A. The second house.

Q. And did that woman live or maintain a business place at Manitou Springs, Colorado?

10193 A. I can't remember whether it is that woman or not.

Q. Wasn't the cottage that you rented rented at $50 a month? A. No, I believe it was the other one that I rented was from this woman. The name sounds familiar and yet it is not clear to me.

Q. The one in which you lived from July, 1940, until September, 1940, wasn't that one rented from Mrs. Marie Hormann at $50 a month? A. Well, they were both at $50 a month. Both houses were at $50 a month.

10194 Q. Let me ask you this: Did you ever leave a forwarding address when you vacated from any of these premises?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know.

Mr. Talley: On the grounds already urged.

The Court: You mean with the Post Office?

Mr. Turkus: Yes, or with anyone.

Mr. Talley: Is there any evidence—

The Court: Overruled.

Mr. Talley: Exception.

A. Forwarding address?

Q. Yes. A. No, sir.

Q. You never left a forwarding address, is that what you mean? A. I don't remember.

10196

Q. You don't remember? A. I don't remember leaving a forwarding address.

Q. Do you deny that you didn't?

Mr. Talley: Object to the form of the question.

The Court: Sustained. She has answered.

Q. Don't you remember as far back as 1940 and 1941 that you didn't leave forwarding addresses when you moved?

10197

Mr. Talley: Objected to. Already been answered.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't think I did.

Q. That is the best answer you can give?

Mr. Talley: I object to that question.

A. I am almost positive.

10198 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Wait a minute.

Q. Now you are almost positive. Are you positive that you didn't?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

10199 A. I am almost positive.

Q. Were you introduced by John Jay as a daughter-in-law?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Were you introduced to Mrs. Marie Hormann by John Jay as his daughter-in-law?

10200 Mr. Talley: Same objection and already answered.

The Court: Overruled.

Mr. Talley: Exception.

A. I was never introduced by him as a daughter-in-law.

Q. Did you say that you were interested in opening a moving picture theatre in Manitou Springs?

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.
Mr. Talley: Exception.

A. To who?
Q. To anybody, including Mrs. Hormann? A. No, sir.
Q. Why did you ask me "To who?"

Mr. Talley: I object to that, if your Honor pleases, highly improper.
The Court: Overruled. 10202
Mr. Talley: Exception.

A. I don't know why.
Q. You don't know why you asked that question? A. I just wanted to know to who you were referring to.
Q. If you had never spoken to anyone, why was it that you asked me "To who?"

Mr. Talley: Objected to. It is highly argumentative, decidedly improper in form and substance.
Mr. Turkus: Merely asking for an explanation. 10203
Mr. Talley: Should not be permitted. I object to it.

By the Court:

Q. Can you answer that?

Mr. Talley: I object to that.

A. I spoke—

The Court: Overruled.

Mr. Talley: Exception. I object to your Honor's question. Take an exception likewise.

The Court: Overruled.

Mr. Talley: Exception.

Q. You may answer, if you can.

By Mr. Turkus:

10205

Q. You just started to say you spoke and then you were stopped.

Mr. Talley: Let her answer.

Mr. Turkus: Don't you straighten it out. Let her straighten it out.

Q. You just started to say to Judge Taylor you spoke. Now go ahead and finish it. A. There was nice moving pictures in Colorado Springs—

Q. Liberty Theatre?

10206

Mr. Talley: May I have the witness finish the answer?

A. No, it had sort of an Indian name.

Q. Yes. A. And I always like that theatre. I used to talk about it to my husband. I said, "That would be a nice business."

Q. Didn't you speak to anyone about the Liberty Theatre, which was vacant at the time, to rent it and run it as a moving picture theatre?

Mr. Talley: I object to it, incompetent, irrelevant and immaterial; has no bearing upon any of the issues. It is objected to upon all the grounds urged in objections.

The Court: It is improper because what was said may call for a conversation with her husband.

Q. Any one except him.

Mr. Talley: Same objection.
The Court: Overruled. 10208
Mr. Talley: Exception.

A. I did not.

Q. You met Bennie Portman out in Kansas City, didn't you?

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Talley: Exception.

A. Yes. 10209

Q. How many times were you out in the company of Bennie Portman? A. Many times.

Q. You met Walter Rainey out there, too, didn't you? A. Yes, sir.

Q. And you met Maurice Saul out there, too, didn't you? A. Yes, sir.

Mr. Talley: Same objection to all these questions.
The Court: Overruled.
Mr. Talley: Exception.

10210

Q. And Maurice Saul is affiliated with the Cleaners & Dyers Union of Kansas City, Missouri, isn't he? A. I don't know anything about that.

Q. You have been out many time with the three of them, haven't you? A. I used to come to the Portman's home.

Q. That is right, and he used to go out with Fay Dilly? A. Who did?

Q. Bennie? A. No, sir.

10211

Q. Who went out with Fay Dilly?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial; upon the grounds already urged. Certainly cannot allow this in.

Mr. Turkus: This will all be connected very quickly.

The Court: Sustained.

Q. Didn't you go out with Fay Dilly? A. Yes.

10212

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

Q. And on the occasions when you went out with Fay Dilly, who was her male escort?

Mr. Talley: That is objected to.

A. We did not go out.

Mr. Talley: Just a minute, Witness. I asked you not to answer—

The Witness: Excuse me, Judge Talley.

Mr. Talley: Your Honor has made a ruling bearing upon this precise matter of the District Attorney and he is now taking another cut around to evade your ruling. It is objected to on the ground this woman cannot be compelled to testify against her husband.

Mr. Turkus: Fay Dilly was not out with her husband and nobody contends that.

10214

Mr. Talley: That is what you are trying to elicit.

Mr. Turkus: I am not.

The Court: Read the question again.

(Pending question read).

The Court: Sustained.

Q. Where did Portman live? A. On Olive Street.

Q. What city? A. Kansas City, Missouri.

Q. You also met him in Colorado Springs, didn't you? A. Yes.

Q. Did you visit him out at Colorado Springs? 10215

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. How many times? A. Very often.

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

10216

Q. The answer is "Very often". Did he visit you at the cottages in which you lived in Colorado Springs? A. I don't think so.

Q. Did you visit him at his establishment?

Mr. Talley: Same objection, if your Honor pleases.

Q. At Colorado Springs? A. Yes.

10217

The Court: Overruled.

Mr. Talley: Exception.

Q. What kind of an establishment did Portman have at Colorado Springs when you visited him? A. I visited him in a cottage.

Q. In Portman's cottage? A. Yes.

Q. Where was that located? A. That was in Woodland Park.

Q. Do you know the address? A. No, I don't think it was Woodland Park either. I am not familiar with those places. The first time in my life I have been around this place and I am all

10218 mixed up with the names.

Q. I see. But at any rate you visited him at his cottage, wherever it was located, in Colorado Springs? A. Yes.

Q. Did you meet Rainey in Colorado Springs as well?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

10219

Q. And did you meet this Maurice Saul in Colorado Springs as well?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Where did you meet Rainey and Saul in Colorado Springs?

10220

Mr. Talley: Same objection on the grounds already urged.

The Court: Sustained.

Take the noon recess now. We will reassemble at 1:30. The court-room please be in order.

Gentlemen of the jury, please remember the previous admonitions. Do not discuss the case, let nobody talk to you about it. Keep your minds open.

First, the witness may leave. Come back at 1:30.

10221

The jury pass out the other door.

Defendants are remanded.

(A recess was taken to 1:30 P.M.)

10222 *Blanche Weiss—For Defts.—Cross*

AFTERNOON SESSION

TRIAL RESUMED

BLANCHE WEISS, a witness in behalf of the defense, resumed the stand and testified further as follows:

By Mr. Turkus:

10223 Q. After the morning recess you were talking to your mother-in-law and Dotty out in the hall, weren't you? A. No, sir, I was talking to my mother-in-law, but not to Dotty.

Q. Wasn't Dotty right there with you? A. No, sir.

Q. How far away from you was she? A. She has not been here.

Q. She has not been here today? A. I did not see her.

Q. Who was the woman alongside of you when you were talking to your mother-in-law? A. This afternoon?

10224 Q. When the court recessed at 12:30. A. 12:30, I was talking to my mother-in-law.

Q. Who was the other woman? A. Oh, that was my niece.

Q. Who introduced you to John Jay?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, also on the grounds already urged.

The Court: Objection sustained.

Q. When was it you met John Jay?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Sometime in the summer.
Q. Of 1940? A. Yes, sir.
Q. Did you, knowingly, associate with people with criminal records?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled. 10226
Mr. Talley: Exception.

A. I did not ask them if they had criminal records.
Q. Didn't you associate with people whom you knew to be convicted criminals?

Mr. Talley: Objected to on the same ground as heretofore urged.
The Court: Objection overruled.
Mr. Talley: Exception.

10227

A. I don't know what you mean by that.
Q. You knew that Unger had been convicted, didn't you? A. Yes, sir.

Mr. Talley: Objected to as not the proper way of proving it.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. You associated with him, didn't you? A. Yes, sir.
Q. You knew that your friend Dotty's hus-

10228 *Blanche Weiss—For Defts.—Cross*

band, Yonkel, was a convicted pickpocket, didn't you?

Mr. Talley: I make the same objection as heretofore urged.
The Court: Objection overruled.
Mr. Talley: Exception.

A. He was not always a pickpocket.
Q. How long did you know him? A. I knew
10229 him I should say about 15 years.
Q. And in the 15 years you have known him, wasn't he, in 1937, in jail for one year and three months to two and a half years for grand larceny, to your knowledge?

Mr. Talley: Objected to as incompetent and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember what he was away for. I remember him having a restaurant at one time.
10230 Q. How many times do you remember him having been away to jail, to your knowledge?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember how many times; I did not count the times.
Q. Let us see if I can refresh your recollection. On August 11, 1936, wasn't he away in the workhouse for 3 months for policy, to your knowledge?

10231

Mr. Talley: I object to this. What has this got to do with this trial, getting this before the jury?

The Court: Sustained in that form.

Q. Wasn't he, to your knowledge, away in the workhouse in August, 1936?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10232

A. He was away; I don't remember for what.

Q. Away where? A. He was away in jail.

Q. At that time you were associating with his wife?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. That is right.

Q. A woman whom you knew lived on the proceeds of crime, isn't that right?

10233

Mr. Talley: I object to the form of the question, assuming something not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what she lives on.

Q. You knew the woman more than 12 years? A. Yes, sir.

Q. You did not know what she lived on? A.

10234

I know at times her husband had a restaurant, and once he had sort of a beer saloon.

Q. About the times he was in jail, what was she living on, do you know?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10235

A. She was living with her sister.

Q. Did you know he was in the workhouse in 1934?

Mr. Talley: I object to that as highly incompetent and immaterial.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not look up his record.

Q. I know you did not look up his record, but did you know he was in jail in 1934 when you were associating with his wife?

10236

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember the date.

Q. Was he in jail in 1933, in the workhouse, to your knowledge?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10237

A. I could not say exactly when he was away.

Q. How many times do you remember him being in jail?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot remember the times; I did not keep it in mind.

10238

Q. Didn't you know when you were associating with him that he was a criminal?

Mr. Talley: That is objected to on the same grounds as heretofore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. When I first met Dotty he had a restaurant.

Q. Will you swear that during the 12 years you have been associating with Yonkel Isaacson you did not know he was a criminal?

10239

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. You knew many other people you associated with were criminals, didn't you?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

10240

A. I would not say many others.
Q. How many others? A. I don't know.

Mr. Talley: I make the same objection.
The Court: Overruled.
Mr. Talley: Exception.

Q. Is it so many you cannot estimate? A. No, it is not so many. I don't ask people whether they are criminals or not.

10241

Q. To your knowledge, don't you know that many of your associates were criminals, crooks, thugs? A. No, sir.

Mr. Talley: I object to the form of the question and on the grounds already stated.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. When you were out in Kansas City, Missouri, you were out there with the intent to avoid the arrest of a fugitive from justice, weren't

10242

you?

Mr. Talley: Objected to as a conclusion, incompetent, immaterial and irrelevant, and on all the other grounds I have recited; especially the one I stated the law to you on.
The Court: That is too dangerous. Objection sustained.

Q. Were you there as part of a conspiracy to avoid the arrest and apprehension of a fugitive from justice?

Mr. Talley: Objected to.
The Court: Objection sustained.

Q. Were you aiding and abetting fugitives from justice when you were out in the West, to maintain themselves in hiding and concealment?

Mr. Talley: I make the same objection. I think it ought to be stopped.
The Court: Objection sustained. No more along that line. It is for the jury to figure out. 10244

Q. While you were in the West you bought a car, didn't you? A. Yes.
Q. In your name? A. Yes, sir.
Q. Through what agency? A. I think it was Ralphman—I am not sure of the name.
Q. Was it the Grausman Ford Agency? A. Yes, sir.
Q. Did you pay $1,000 in cash for it?

Mr. Talley: I object to it as incompetent, immaterial and irrelevant. 10245
The Court: Objection overruled.
Mr. Talley: Exception.

A. Yes, sir.
Q. You bought Kansas City, Missouri, plates for it?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, and upon the grounds previously asserted.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not buy them.

10246

Q. What? A. I did not buy them.

Q. You did not buy them, the plates, you mean? A. Yes, sir.

Q. John Jay was with you when you bought the plates?

Mr. Turkus: Question withdrawn.

Q. John Jay was with you when you bought the car?

10247

Mr. Talley: I object to that on the same ground.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. And so was Albert Anastasio with you when you bought the car? A. No, sir; I don't know him; I never saw him in my life. Don't be accusing me of anything—

Q. Were you ever at the Grossman Agency in connection with the purchase of an automobile

10248 in the company of Joseph Lorino?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on all the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know him; I never heard of the name.

Q. Now, you were introduced to Otto M. Blake, who operates a filling station in Black Hawk, Colorado, on that western trip?

10249

Mr. Talley: Objected to as incompetent, immaterial and irrelevant and on all the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you introduced as the daughter-in-law of John Jay to a man named Otto M. Blake, who operated a filling station in Black Hawk, Colorado?

10250

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds previously stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Were you in Black Hawk, Colorado? A. No, sir.

Q. Were you introduced to Harry S. Blake, the owner of the Chihuahua Tungsten Mining Company?

10251

Mr. Talley: Objected to on all the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you meet Charles M. Beck on your Western trip?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

10252 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Exception.

A. No, sir.

Q. Were you present when $500 was passed over for an interest in the Chihuahua Tungsten mine?

Mr. Talley: I make the same objection.
The Court: Objection sustained.

10253 Q. Now, Portman's home was at 3543 Olive Street, in Kansas City, Missouri? A. Yes, sir.

Q. That is a place you frequented, isn't it? A. That is right.

Q. And Benny Portman was a notorious gambler in Kansas City, Missouri, wasn't he?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, and upon all the grounds previously urged.

The Court: You mean a professional gambler?

Mr. Turkus: Yes.

10254 The Court: Objection overruled.

Mr. Talley: Exception.

A. Not to my knowledge.

Q. Didn't you visit professional gambling joints run by Portman in Colorado and Missouri?

Mr. Talley: Objected to on the ground it is incompetent, immaterial and irrelevant, and also on the grounds previously stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

10255

Q. What business was Portman in?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Well, I know he had one place of electrical supplies, lamps, and things like that; and that he was also interested in some place that made medicine.

Q. Yes. A. That is all I know of.

10256

Q. What business was Rainey in?

Mr. Talley: I make the same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. I don't know.

Q. What business was Saul in?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

10257

A. I don't know.

Q. Didn't you, in Kansas City, Missouri, under the name of Rose Bell, join a ladies' society?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. If you mean knitting for the Red Cross and the British—

Q. I mean Bundles for Britain. You joined that under the name of Rose Bell? A. Yes, sir.

Q. That was to give a color of legitimacy to the use of the name Rose Bell?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10259 A. It was not to give any color; it was because I wanted to do it.

Q. That was not to hide your identity, was it? A. No, sir.

Q. You were not concealing your identity from anybody, were you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10260 A. I was known as Rose Bell.

Q. When you were known as Hoffman, was it Blanche Hoffman, or Rose Hoffman, which? A. Blanche.

Q. When you were known as Miller, what was it, Rose, or Blanche Miller?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Rose.

Q. When you were known by the name of Newman, was it Blanche, or Rose Newman?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Blanche.
Q. Did you have those aliases to hide and conceal your identity?

10262

Mr. Talley: Object to the form of the question.
The Court: Let the jury figure that out. Objection sustained.
Mr. Turkus: I ask to have this paper marked for identification.

(Received and marked People's Exhibit Z-28 for identification.)

Q. I show you People's Exhibit Z-28 for identification and ask you if that man was not at Grausman's agency when you were negotiating 10263
for the purchase of a car in Missouri.

Mr. Talley: I object to that on the grounds already stated.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.
Q. Do you know who that man is? A. No, sir.

Mr. Talley: I object to that as not the proper way of identifying a photograph.

10264 *Blanche Weiss—For Defts.—Cross*

Q. Was that man ever in your society and company? A. I never saw him in my life.

Mr. Turkus: May the record indicate it is being put in the District Attorney's pocket? (referring to last exhibit for identification)

Mr. Talley: I might make a remark on that, but I will not.

10265 Q. Did you knowingly associate with people engaged in criminal activities in Kansas City, Missouri?

Mr. Talley: I object to that on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you ever visit Leavenworth Prison while you were in Kansas City, Missouri?

10266 Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you know how far away from Leavenworth Prison Kansas City, Missouri, was, when you lived there?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant, what difference does it make?

The Court: Same ruling.

Mr. Talley: Exception.

A. No, sir.

Q. On April 6, 1941, you left Kansas City, Missouri? A. Yes, sir.

Q. And you left in an automobile? A. Yes, sir.

Q. An automobile you bought at the Grausman Agency? A. That is right.

Q. There was a driver at the wheel? A. Yes, sir.

10268

Q. The driver was Sidney Weiss? A. Yes, sir.

Q. You drove back to New York City? A. Yes, sir.

Q. Where did you go when you came back to New York City?

Mr. Talley: Objected to on the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I went to see my family. 10269

Q. After you saw your family, where did you go to live?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I was not feeling well and I went to Atlantic City.

Q. Now, when you bought that car in Grausman's Agency, what name did you give?

10270 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: Objected to on the grounds previously stated; already testified to.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Rose Bell.

Q. Did you give the address, 204 South 7th Street, Rocky Ford, Colorado?

Mr. Talley: I make the same objection
10271 on the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not give any address.

The Court: Pardon me just a minute. I am trying to think of two things at once. I will sustain the objection.

Q. Did you give the address of John Jay as your address when you bought the automobile at Grausman's Agency?

10272

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. All I remember doing is I signed my name.

Q. You don't remember giving any address? A. No, sir.

Q. That was in 1940, when you bought the car? A. I think my husband gave the address.

Q. Don't talk about "think." A. I did not give it. I cannot tell you I gave it.

10273

Q. You don't remember giving it, or didn't you give it? A. I did not give it.

Q. You should have said that and nothing else. Did you buy a 1941 tag at Kansas City, Missouri, for your car?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10274

A. I did not.

Q. Did you buy insurance from E. R. Dragow in Kansas City, Missouri, for the car?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not.

10275

Q. At any time before April 6, 1941, did you directly or indirectly, by telephone, letter, telegram, or any other way, communicate with a single one of your relatives? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Did you at any time prior to April 6, 1941, communicate directly or indirectly, by telephone, Western Union, letter, or any other means, with

any single friend of yours back in New York City? A. No, sir.

Mr. Talley: Objected to on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Who is Alice?

10277

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I have a niece named Alice, but she did not go with me.

Q. Who is the Alice you used to pal around with, you and Dotty Isaacson?

Mr. Talley: I object to the form of the question.

10278

The Court: Objection overruled.

Mr. Talley: Exception.

A. I once had a friend by the name of Alice.

Q. What was her last name? A. Eisenthal.

Q. How do you spell that? A. (spelling) E-i-s-e-n-t-h-a-l.

Q. How many years have you known Alice Eisenthal?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10279

A. Ever since I have been a child.

Q. Where does she live?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know; I have not seen her in years.

Q. How many years is that you have not seen her? A. I believe four years.

Q. Where did she live four years ago?

10280

Mr. Talley: I object to it as too far afield. That is what it seems to me to be.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know; I was not even intimate with her at that time.

Q. You went to Atlantic City with Dotty? A. No, I went by myself.

Q. You met Dotty in Atlantic City? A. Dotty met me there.

Q. Was it by coincidence or appointment? A. 10281
Not at all. When I left I told my brother-in-law, Sidney, to tell somebody to come out and stay with me because I did not feel well.

Q. You left a message with Sidney to send someone to join you? A. Yes, sir.

Q. And the one that joined you was Dotty Isaacson? A. Yes, sir.

Q. You heard Dotty Isaacson testify in this court? A. Yes, sir.

Q. Where was the boarding house? A. It was on State Street.

Q. Not Atlantic and Pacific? A. No.

10282 *Blanche Weiss—For Defts.—Cross*

Q. Atlantic and Pacific are parallel streets? A. Yes, sir.

Q. Where on State Street was the boarding house?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10283 A. Well, it was right off the Boardwalk; it was a little ways off, between, I should say—the next street was Pacific.

Q. Did you at any time during the Atlantic City stay, stay with Dotty Isaacson on State Street between the Boardwalk and Pacific?

The Court: (interrupting) State Street is between the Boardwalk and Pacific?

The Witness: Yes, sir. This boarding house was on State Street off the Boardwalk; the next street, I believe, is Pacific.

10284 By the Court:

Q. Between the Ocean and Pacific? A. Yes, sir.

Q. Pacific is one long block back; is that right? A. Yes, sir.

Q. That is at the North End, isn't it? A. I don't know just where it is.

By Mr. Turkus:

Q. When you were in Kansas City, Missouri, before you departed with Sidney Weiss for New

10285

York State, did you talk with a man known as George Green?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Was Cuppy Migden introduced by you, before your departure for the East with Sidney Weiss, as George Green?

10286

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not see Cuppy Migden.

Q. At Atlantic City, when you were there with Dotty, how many days did you spend with her? A. Ten days.

Q. What period of time was that, in April or May of 1941? A. In April.

10287

Q. You knew where your husband was at that time—yes or no?

Mr. Talley: I object to that on the grounds heretofore stated.

Mr. Turkus: This is not testimony; this is only as to her knowledge, if she knew where she was.

Mr. Talley: If it is not testimony, don't ask it.

10288 *Blanche Weiss—For Defts.—Cross*

The Court: She may answer that yes or no.

Mr. Talley: Exception.

A. Yes.

Q. During the ten days you were there with Dotty did you speak at all about the occurrence of September 12, 1936?

Mr. Talley: Objected to as incompe-
10289 tent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Not one word was mentioned by you or by her? A. I spoke about my husband being away and about the case, but nothing in reference—

Q. September 12, 1936? A. No.

Q. You had been to your husband's lawyer's office, hadn't you?

Mr. Talley: Objected to as incompetent,
10290 immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not at that time.

Q. When you were in Atlantic City with Dottie and spent ten days with her, did it occur to your mind that you had spent September 12, 1936, with Dottie Isaacson?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

10291

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not at that time.

Q. When was the first time that occurred to your mind where you were September 12, 1936? A. When Sidney came over to speak to me.

Q. When was that? A. That was about in the month of July.

Q. 1941. A. Yes, sir.

Q. You remembered it immediately as soon as he mentioned it? A. No, sir, I did not remember it immediately. What I did remember was—

10292

Q. (Interrupting) Did you, yes or no? A. I have to explain it.

Q. You can explain that to Mr. Talley. Did you? Answer yes or no.

Mr. Talley: That does not necessarily follow. I think you should let the Court rule on that. I ask that the witness be permitted to finish her answer to the question.

10293

Mr. Turkus: The question is susceptible of a yes or no answer, and I am entitled to it as such.

The Court: Just answer yes or no.

The Witness: I cannot answer it that way; I have to explain.

Q. Where were you September 12, 1935? A. I don't remember.

Q. Where were you September 13, 1935? A. I don't remember.

Q. Wasn't September 13, 1935, Sidney Weiss' birthday as well? A. Yes, sir.

10294 *Blanche Weiss—For Defts.—Cross*

Q. Do you know what day of the week it was, September 13, 1935? A. No, sir.

Q. Don't you know that was a Saturday?

Mr. Talley: I think we may object to that on the ground it was not a Saturday.

Mr. Turkus: Now the question may just as well be withdrawn; the testimonoy having been given by Mr. Talley.

Mr. Talley: The question should never
10295 have been put.

Q. Did you ever attend any birthday party given to Sidney Weiss except the one you say you attended on September 12, 1936? A. No, sir.

Q. That was Sidney's twenty-sixth birthday? A. Yes, sir.

Q. That is how you remember the party? A. Yes, sir.

Q. Did you ever attend any birthday party of Sammy Weiss?

Mr. Talley: Objected to as incompe-
10296 tent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you attend any birthday party of Maxey Weiss? A. No, sir.

Q. Did you ever attend a birthday party of Solomon Weiss? A. No, sir.

Q. Did you ever attend a birthday party for Murray Weiss? A. No, sir.

Q. Did you ever attend a birthday party of Mrs. Lena Weiss? A. No, sir.

Q. So the only birthday party of any of the Weisses you ever attended was Sidney's twenty-sixth birthday? A. That is right.

Q. How long do you know Paul Berger? A. I don't know him.

Q. Never was up to his place of business, the Gold Craft? A. No, sir.

Q. You heard Dottie interrogated about that? A. Yes, sir.

Q. Do you deny you took her to the Gold Craft and bought her a mannish suit? 10298

Mr. Talley: I object to that.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I do.

Q. Do you deny knowing Paul Berger? A. Yes, sir.

Mr. Talley: Objected to as already answered.

Q. Do you deny that during the time when Yonkel was in jail you clothed, fed and sheltered Dottie Isaacson? 10299

Mr. Talley: I object to that, to the form of the question as asked.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I never clothed Dottie.

Q. Did you feed her? A. No, sir, never.

Q. Did you shelter her? A. Never.

Q. You never fed her her breakfast? A. Like

anybody else that would come in the house, I would offer them something to eat.

Q. I am not talking about anybody who came in the house. I am talking about Dottie, tell us about her, did you feed her at your house when her husband was in jail? A. I cannot answer that question that way. She has had breakfast in my house; she has had lunches, and she has had suppers, but I have not fed her.

Q. Let us go back when Yonkel was in jail,
10301 didn't you shelter her then? A. No, sir.

Q. Didn't you feed her then? A. No, sir.

Q. Didn't you buy her clothes then? A. No, sir, then or at no other time.

Q. Why, she was your closest female friend, wasn't she? A. Yes, sir.

Q. During the time that Yonkel was in jail, didn't she live with you? A. No, sir.

Q. Now, you can remember that birthday party of 1936? A. Yes, sir.

Q. Can you remember where you were in 1935?

Mr. Talley: I object to that as already
10302 having been gone over.

The Court: She said she cannot.

Q. You told us this morning that you had never been out of town before? A. I did not say I had never been out of town before. I said I had never been in those places before.

Q. You have been out of town many times, haven't you? A. Yes, sir.

Q. And in 1935 were you in Hot Springs?

The Court: Virginia or Arkansas.

10303

A. I know I was in Hot Springs; I do not remember the year.

Q. You do not remember the year? A. No, sir.

Q. Did you ever have a girl friend named Betty? A. No, sir.

Q. Betty Cooper? A. No, sir.

Q. Didn't you ever have a girl friend named Betty who was a shoplifter?

Mr. Talley: Objected to as highly improper; incompetent, immaterial and irrelevant. 10304

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not have a friend named Betty Cooper.

Q. Now, weren't you in Hot Springs in 1935, do you recall that? A. I know I was in Hot Springs.

Q. Weren't you there when you were in Hot Springs in the company of Lucky Luciano?

10305

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you there in the company of Frank Costello?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

10306 *Blanche Weiss—For Defts.—Cross*

Q. Weren't you in the company of Dixie Davis?

Mr. Talley: Same objection.
The Court: Same ruling.
Mr. Talley: Exception.

A. No, sir.

Mr. Turkus: I ask to have this photo-
10307 graph marked for identification.

(Received and marked People's Exhibit Z-29, for identification.)

Q. Were you in the company of any man on that Hot Springs, Arkansas, trip who left the party and went to Florida?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

10308 A. No, sir.

Q Now, do you remember whether you were in Hot Springs in the fall of 1936? A. No, sir.

Q. Can you remember what year you were in Hot Springs? A. I think it was 1935.

Q. Didn't you eat at a place called Studie's?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I may have.

10309

Q. Didn't you eat at a place known as the Bungalow operated by a mother and daughter?

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I do not remember.

Q. Didn't there dine with you at the Bungalow, Charley (Lucky) Luciano, Frank Costello, Charlie Wooley, Dixie Davis and Cuppy?

10310

Mr. Talley: I object; intended to be prejudicial; objected to as incompetent, immaterial and irrelevant.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. After dining at the place known as the Bungalow, did you go to a place known as Jacob's Road House?

10311

Mr. Talley: Same objection; assuming something the witness has denied.
Mr. Turkus: It is withdrawn in that form.

Q. Do you deny you ever dined at a place known as the Bungalow, operated by a mother and daughter?

Mr. Talley: I object to the form of the question.
The Court: Objection overruled.
Mr. Talley: Exception.

10312

A. I don't remember the place was there.

Q. Do you remember Jacobs' Road House?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

The Court: Is it your purpose to show that on September 13th he was in Hot Springs?

10313

Mr. Turkus: No, I don't want to announce my purpose because that would be to defeat the purpose.

The Court: All right.

Q. Do you remember Jacobs' Road House? A. No, sir.

Q. Wasn't there a road house in Hot Springs where you used to go for drinks?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

10314

Mr. Talley: Exception.

A. There may have been.

Q. Do you remember having your picture taken at a bar in Hot Springs?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I had my picture taken; I don't remember where.

Q. Don't you remember it was in a bar? A. There was a photographer that had one of those bars fixed up.

Q. A simulated bar? A. Yes, sir.

Q. Who took the picture with you when you took the picture at Hot Springs?

Mr. Talley: I object to the form of the question on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception. 10316

A. Bee Cooper.

Q. I call it "Betty". Is that what the name was? A. I don't remember any such name.

Q. Bee Cooper was a thief, wasn't she? A. I don't know what she was.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. She was in Hot Springs with you, wasn't she? A. I did not know her to be a thief. 10317

Q. Bee Cooper was your friend? A. I was not very friendly with her. I had just started in to be friends with her at the time.

Q. You met Bee Cooper in the east? A. Yes, sir.

Q. What were you doing with her in Hot Springs? A. She came along with us.

Q. In your party? A. Yes, sir.

Q. That was a pretty friendly party? A. I did not know she was a thief.

Q. You did not know it then? A. No, sir.

10318 Q. Is this the picture you had taken in Hot Springs, People's Exhibit Z-29, for identification? A. Yes.

Mr. Turkus: I offer it in evidence.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. It is meaningless.

The Court: Sustained at this time. It may be offered later if connected up.

10319 Q. Now, who was in this party at Hot Springs?

Mr. Talley: I object to that on the grounds already stated.

The Court: She has seen the picture; she has seen somebody in it.

Q. Yes, who else was in that party.

Mr. Talley: Objected to on the same grounds.

The Court: Objection overruled.

10320 Mr. Talley: Exception.

A. Bee Cooper, my husband and Cuppie.

Q. That is Cuppie Midgen? A. Yes, sir.

Q. And the trip to Hot Springs was so that Bee Cooper could visit her husband in Leavenworth Prison, Isn't that right?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10321

A. She said she wanted to take a rest and at the same time try to go and see her husband.

Q. At Leavenworth Prison? A. Yes, sir.

Q. Now, you knew when you were associating with Bee Cooper that her husband was then presently in jail, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10322

A. Yes, sir.

Q. And you went all the way to Hot Springs and spent time with her there, knowing that, didn't you?

Mr. Talley: I object to the form of the question; incompetent, irrelevant, immaterial.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not go there for her sake.

10323

Q. Never mind that, but you went with her knowing her husband was presently in jail, didn't you?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Think back—tell me what year it was you went on this Hot Springs trip.

10324 *Blanche Weiss—For Defts.—Cross*

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I think it was in 1935.

Q. Are you sure it was not in 1936? A. It may have run into 1936.

Q. Are you sure it was not the latter—the fall of 1936 you were in Hot Springs? A. I am sure it was not.

10325 Q. Where did you stop in Hot Springs? A. We stopped at a small hotel.

Q. Were you in communication with any friends or relatives when you were in Hot Springs, by mail, telephone, telegraph, or any other means of communication?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. This is 1935. It cannot be identified with the matter at issue here. I also object on the grounds already urged.

10326 The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes.

Q. With whom and by what means?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what you mean, "with what means".

Q. With whom were you in communication, and by what means?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I may have written cards or letters.
Q. Under what name were you living in Hot Springs?

10328

Mr. Talley: Objected to— This is 1935—on the grounds already advanced.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.
Q. What happened to the car in which you rode out to Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, as having nothing to do with the issue being tried.
The Court: Objection overruled. 10329
Mr. Talley: Exception.

A. I don't know.
Q. To whom did you give that picture, People's Exhibit Z-29, for identification?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.
Q. How many pictures did you have taken

10330 *Blanche Weiss—For Defts.—Cross*

similar to People's Exhibit Z-29, for identification?

Mr. Talley: I object. We have gone far enough on this, I think.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. It might have been three or four.
Q. Now, to whom did you give a copy of the
10331 picture?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I don't remember.
Q. Did you give one to Cuppie?

Mr. Talley: Objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

10332 A. I don't remember who I gave them to.
Q. Did you keep one for yourself? A. I don't remember.
Q. You did not give this picture to the District Attorney, People's Exhibit Z-29, for identification, did you?

Mr. Talley: I object.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.
Q. Would you hesitate to lie for Mendy?

10333

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I would not, but I am telling the truth now.

Q. Now you are telling the truth? A. Yes, sir.

Redirect examination by Mr. Talley:

10334

Q. Mrs. Weiss, you have been asked by the District Attorney about Hot Springs in 1935, were there any of Mendy's family there at that time? A. Yes, sir.

Q. Who? A. My mother-in-law.

Q. The elder Mrs. Weiss? A. Yes, sir.

Q. Anybody else? A. I think Mendy's aunt was there, too, at the time.

Recross examination by Mr. Turkus:

10335

Q. You did not go much with the family, did you? A. Certainly, I did.

Q. Mendy's family in Hot Springs? A. With my mother-in-law and my aunt?

Q. I don't mean that. Who did you live with on the trip? A. With my mother-in-law and my aunt out there.

10336 *Helen A. Hazley—For Defts.—Direct*

HELEN A. HAZLEY, residing at 871 Pavonia Avenue, Jersey City, New Jersey, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

The Court: This witness got up from the audience.

Mr. Talley: Yes, she sat there at my request. She is a stenographer in my office, in no way connected or identified with this matter. I expected to put her on

10337 immediately after we convened.

The Court: That is perfectly all right.

Direct examination by Mr. Talley:

Q. Are you a stenographer in the employ of Alfred J. Talley? A. I am.

Q. On September 17, 1941, did you take a statement from a man who gave his name as Harry Cohen, who said he lived at No. 85 Bristol Street, Brooklyn, New York? A. Yes, sir.

Q. Did you, after taking the statement, tran-

10338 scribe it from your stenographic notes? A. Yes, sir.

Q. I ask you to look at the paper I hand you and ask you if that is a correct transcript of the statement made that day by Harry Cohen. A. Yes, sir, that is my work.

Q. That paper was typed by you and you have compared your stenographic notes? A. Yes, sir.

Mr. Talley: I ask the paper be marked for identification.

10339

(Received and marked Defendants' Exhibit Z-10 for identification.)

Mr. Talley: I offer in evidence the exhibit marked for identification Defendants' Exhibit Z-10.

Mr. Turkus: It is an unsigned statement and is objected to as incompetent, immaterial and irrelevant.

The Court: I do not have to read it. Sustained. That is a rule of law.

10340

Mr. Talley: Exception.

(Witness excused.)

LENA WEISS, residing at 10 Monroe Street, New York City, called as a witness in behalf of the defendants, after being duly sworn, testified as follows:

Direct examination by Mr. Talley:

10341

Q. You live at 10 Monroe Street? A. Yes, sir.

Q. That is in New York, Manhattan? A. Yes, sir.

Q. How long have you lived at that address? A. Over 7 years.

Q. With whom do you live there? A. I live with Sidney and Sammy.

Q. Your son Sidney and your son Sammy? A. Yes, sir.

Q. You are the mother of Mendy Weiss? A. Yes, sir.

Q. Those are three sons. How many other sons have you? How many boys all together? A. I have six boys.

Q. Do you remember the night of September 12, 1936? A. Yes.

Q. Was that a Saturday night? A. Yes, sir.

Q. Did you have a party that night? A. Yes.

Q. What was the occasion for the party? Why was there a party that night? A. It was Sidney's birthday, 26th year birthday.

10343 Q. Your son Sidney's 26th birthday? A. Yes, sir.

Q. Did you have anything to do with arranging that party? A. Yes.

Q. What did you have to do with having the party given? A. Sidney and Mendy—

Mr. Turkus: I object to this as improper.

Mr. Talley: Merely fixing the occasion in her mind as to that particular day.

The Court: Objection overruled.

10344 Q. Tell us what you had to do with arranging that party. A. That was the 26th birthday of Sidney. So a couple of days before Mendy came in the house. I said to Mendy, "I hear you and Sidney had some argument. I did not know what it was, but I want you should make up. It is going to be Sidney's 26th birthday; I want you should make up with him." He said, "Yes, Ma."

Q. Then did he say anything about giving a party? A. Yes.

Q. What was said? A. I said, "I want you should make up." He said, "All right, Ma, you

be in Sammy's store Saturday night at 10 o'clock."

Q. Were you in Sammy's store at 10 o'clock? A. Yes, sir. He said, "You and Sidney should be at 10 o'clock in Sammy's store."

Q. Did you go to Sammy's store that night? A. Yes, sir.

Q. Were you there at 10 o'clock? A. Yes.

Q. Did you get there before 10 or after 10? A. A little before 10.

Q. Was Sammy there? A. [illegible]

10346

Q. How did you go down to the store? A. I took a bus and then down to the store.

Q. When you got to Sammy's store who was there? A. Only Sammy.

Q. Who came along after that? A. A little while Sidney coming in the store.

Q. Anybody else? A. A couple of minutes later Mendy came in.

Q. Now, did you go any place with Mendy and the others? A. Yes.

Q. Where did you go and how did you go? A. We stood a little in Sammy's store for a couple of minutes. Then Mendy said, "Are you ready? Get in. Get on." So I and Sidney went out in Mendy's—he had a car.

10347

Q. Was anybody in the car when you got into it? A. Yes.

Q. Who else? A. Blanche, my daughter-in-law Blanche, and her friend Dotty.

Q. Then you all got in the car? A. Yes.

Q. Who was driving the car? A. Mendy.

Q. What time was it when you left Sammy's place? Do you know that? A. Exactly I don't know. Maybe—

Q. What is your best recollection? A. Half past 10.

Q. It was after 10 o'clock? A. Yes.

Q. You all got in the car and drove away. Where did you drive? A. He drove to a restaurant.

Q. Where was the restaurant? A. I don't remember where the restaurant was.

Q. Was it uptown or downtown? A. Uptown.

Q. Do you know about what part of uptown
10349 it was? A. I don't know. It was very bright lights.

Q. In the theatrical district? A. Yes, sir.

Q. Was it around anywhere near 50th Street and Broadway, or 7th Avenue? A. Yes.

Q. What is your best impression of what street it was, how far uptown it was? A. About 50th Street.

Q. Was it in the center of the theatres there, a lot of theatre lights? A. Yes, sir, all lights from the theatre.

Q. After you had gotten there what happened?
A. After we got there near the restaurant, we all
10350 went out from the car, and Mendy said, "You wait here and I am going to park the car."

Q. Did you wait for him then? A. Yes, sir, we all waited for him.

Q. Where did you wait? A. Near the restaurant.

Q. On the sidewalk? A. Yes, sir.

Q. Then when Mendy came along did you go into the restaurant? A. Yes, sir, he came along and said, "Let us go in the restaurant."

Q. Did you have something to eat and drink there? A. Yes, sir.

Q. How long did you stay there? A. I cannot remember how long; we had something to drink and eat.

Q. What is your best impression or recollection as to how long you stayed there? A. It could be about one hour.

Q. When you left the restaurant where did you go? A. When we left the restaurant I said—Mendy said, "All right, let us go to the movies."

Q. To the picture show? A. Yes, sir.

Q. Do you know what theatre you went to? 10352
A. No, sir.

Q. Was it one of the big theatres on upper Broadway? A. Yes, sir.

Q. Or 7th Avenue? A. Yes, sir.

Q. Was it a very large theatre? A. Yes, sir.

Q. Do you know about what time it was when you got into the theatre? A. I didn't look—it must have been around 12 o'clock.

Q. Did you remain in the theatre during the entire showing of the picture? A. Yes, sir.

Q. Did you wait for the picture to be finished? A. Yes, sir.

Q. Then did you all go out together? A. Yes, 10353
sir.

Q. The same ones who went in the theatre came out with you; is that right? A. Yes, sir.

Q. Mendy and Sidney and young Mrs. Weiss and Dotty and yourself? A. Yes, sir.

Q. Have you any idea how long you spent in the theatre or what time it was when you came out? A. I cannot remember. We went through the whole show.

Q. You waited for the whole show? A. Yes, sir.

Q. How long did the show take? As long as two hours? A. Yes.

Q. What is your best recollection or impression as to the time it was when you came out of the theatre? A. About two hours or more.

Q. About two o'clock would you say? A. Yes.

Q. Did you make any suggestion to them when they came out of the theatre? A. Yes.

Q. What did you say? A. I said, "Mendy, it is nice night, let us go for a little ride."

10355 Q. You said that? A. Yes, sir.

Q. Did you go for a drive? A. Yes, sir.

Q. All of you? A. Yes, sir.

Q. Where did you go? A. Around the park.

Q. Central Park? A. Yes, sir.

Q. Then when you got through the drive where did you go? A. We went downtown to Ratner's Restaurant.

Q. Did you go into the restaurant? A. Yes, sir, we all go in the restaurant.

Q. All that you have named? A. Yes, sir.

Q. Including Mendy? A. Yes, sir.

10356 Q. You all went to the restaurant? A. Yes, sir.

Q. Then did you have something to eat and drink there? A. No drink there.

Q. You mean no liquor served? A. No, sir.

Q. They serve tea or coffee or milk? A. Yes, sir. I don't remember. It was too late.

Q. You did have some refreshments? A. Yes, sir.

Q. Did the others have something to eat and drink? A. Yes, sir.

Q. Do you know how long you stayed there? A. We stayed there, I cannot remember.

Q. What is your best recollection, if you have any, as to how long you stayed in the restaurant? A. We stayed there three-quarters of an hour or an hour.

Q. You think about three-quarters of an hour? A. Yes, sir.

Q. When you left there where did you go? A. Home.

Q. Who took you home? A. Mendy.

Q. When you left the restaurant did you all get in the car? A. Yes, sir.

10358

Q. Then they took you and Sidney home to your home in Monroe Street? A. Yes, sir.

Q. That is in the Lower East Side, New York City? A. Yes, sir.

Q. Then did you and Sidney go upstairs and go to bed? A. Yes, sir.

Q. You left the others downstairs? A. Yes, sir.

Q. Now, can you tell us about the time it was that you got home? A. Yes, sir, when we came in the house I said to Sidney, "Look, it is near four o'clock. I did not know it was so late."

10359

Q. It was four o'clock by your clock in your house? A. Yes, sir.

Q. Now, Mrs. Weiss, you know this was Sidney's 26th birthday you are talking about? A. Sure.

Q. There is no doubt in your mind about that? A. Because—

Q. No. There is no doubt in your mind he was 26 years old on the 13th of September? A. Yes, sir, on the 13th.

Q. That was a Saturday and Sunday you were out? A. Yes, sir.

10360 Q. Did you want to say something as to your remembering it was the 26th birthday? A. Yes, sir.

Q. What? A. Because my husband left me five months before; I was left with five children and I had a business.

Q. You had a baby five months after he left you? A. Yes, sir.

Q. That baby was Sidney? A. Yes, sir, that is how I always remember.

10361 Q. You always remember Sidney's birth by the fact he was born five months after your husband left you? A. Yes, sir.

Q. Now, do you remember any other birthday parties of Sidney's which you had? A. No, sir. That's only one birthday party.

Q. You remember that because Sidney and Mendy had a little quarrel before then? A. Yes, sir.

Q. You wanted the boys to make up? A. Yes, sir.

Mr. Talley: That is all.

10362 Mr. Turkus: I have no questions to ask of the defendant's mother.

Mr. Talley: At this juncture I want to ask the District Attorney about the D.D.4's and D.D.5's we requested many days ago. Those police reports.

The Court: I take it you want to get the description?

Mr. Talley: Yes, sir.

The Court: As given of the man who went in to buy cigarettes?

Mr. Turkus: I have had Mr. Joseph go through this bundle of D.D.4's which is

marked as Defendants' Exhibit Z-19, and only two that could possible refer to any identification by Mrs. Rosen of the defendant Mendy Weiss are contained in these, which Mr. Joseph has put together. I will not only hand those two up, but the entire bundle as well.

The Court: I want you to pick out the one that is wanted. It is not reasonable to ask the Court to wade through a bulky record when counsel can point out what is wanted. 10364

Mr. Turkus: It is elementary what has to be done.

The Court: Who made this, Detective S-u-r-f-t?

Mr. Turkus: Senft.

The Court: Or Detective William J.—

Mr. Turkus: The one that is on the left-hand side is the detective who makes the 5.

The Court: It says "The undersigned". There are two "undersigns".

Mr. Turkus: I think, as a matter of police routine, a commanding officer signs the bundle of these D.D.5's. 10365

The Court: He takes them upon the signature of the detective. I will excuse the jury for a few minutes. Don't discuss the case.

(The jury retired from the court-room.)

The Court: Is Detective Senft here?

Mr. Joseph: He is not here but he is still in the department, I believe.

10366 *Colloquy*

The Court: He is available?

Mr. Joseph: Yes.

The Court: How about Mrs. Rosen?

Mr. Turkus: Not in the building now but we can get her.

The Court: Is she available? In connection with the resumption of cross-examination of Mrs. Rosen, and as a basis for attacking her identification of Weiss as the man who came into the store, Judge Talley and other defense counsel are entitled to an inspection of this D.D. 4.

10367

Mr. Turkus: I think it is a "5", isn't it?

The Court: 5.

Mr. Turkus: I will find out how quickly we can get her here.

The Court: Have her here at ten in the morning.

Mr. Turkus: Maybe we can finish it today. This is the tenth week or eleventh week—

The Court: Never mind about that. With her here she can be examined, and this is matter not of collateral but of specific impeachment—

10368

Mr. Turkus: I will try to get her here now.

The Court: Pardon me. Therefore, if she denies having said to the detectives any of these things, defense counsel are entitled to put the detective on the stand and prove that she did.

Mr. Talley: May we examine the paper in question?

The Court: You may.

(Paper handed to Judge Talley.)

Mr. Talley: Have the detective here is, I understand, your direction to the District Attorney?

The Court: The direction is that both of them be here at ten o'clock tomorrow morning.

Mr. Talley: May I look at this now?

The Court: Yes.

Mr. Talley: Thank you.

Mr. Turkus: May we not continue with the balance of the defense? 10370

The Court: We will straighten this out before we go any further. I mean to say now Judge Talley and other counsel are reading a paper and will have every opportunity to study its contents.

I should add as to the rights of the defense that if the detective should deny such statements, then the detective may be confronted and cross-examined on the D.D.5 and, in event that becomes necessary, it may be offered in evidence at that time, not before. 10371

It is obvious to me, from this D.D.5, that the attempted corroboration given by Mrs. Rosen of Weiss having gone into that store that night is rendered worthless as evidence. I cannot even submit it to the jury on the charge as being worthy of consideration on a point of corroboration.

Mr. Talley: Do I understand—Mr. Joseph, will you remain here because the District Attorney quoted Mr. Joseph as stating those are the only two papers in

10372 *Colloquy*

that file of D.D.4's and D.D.5's that have any relation to the identification by Mrs. Rosen of defendant Weiss—is that Mr. Joseph's statement in addition to that of Mr. Turkus?

Mr. Joseph: Yes.

Mr. Talley: Now, in 1936, is there not a statement in which she described Weiss to one of the detectives who interviewed her at her home or place of business, in
10373 1936, immediately after the killing of Rosen, in which she gave a description of the man she says was in the store, and gave a description of him as being 136 pounds and about five foot six in height? That is the paper that I want.

Mr. Joseph: I read these over last week. I don't recall it now.

Mr. Talley: That is the first investigation that was made immediately after the murder, when a description was given, we are given to understand, by Mrs. Rosen of the man who came into the store the
10374 night before.

The Court: Did she say she gave a description that night?

Mr. Talley: Gave a description to one of the detectives.

Mr. Cuff: Not that night.

Mr. Talley: She testified before the Grand Jury, as I understand it.

Mr. Turkus: He is confused with that.

The Court: I don't recall that.

Mr. Talley: What I want is the statement that she made, if she made one, the day of the killing or immediately there-

after, to the detectives, in which she gave a description of the man whom she says came into the candy store the night before, in his shirt sleeves. That is the D.D.4 and D.D.5.

Mr. Turkus: Will you turn to the testimony and show me where there is any testimony in the record—

Mr. Talley: What?

Mr. Turkus: I am trying to help you. Go ahead, do what you want.

10376

Mr. Talley: You are trying to help me?

Mr. Turkus: Wait a minute, Judge, you read the wrong name or we helped you read it. The signature of the detective on the second one of the D.D.5's is Henry G. Swift, not Senft, and the first detective is Vincent G. Giordano.

Mr. Joseph: I understand he is retired, Judge, and he is in Florida.

Mr. Talley: Is there anything in that report that you now have indicating a description given by Mrs. Rosen?

10377

The Court: I find nothing in my notes about her having said that she gave a description of the man at that time. I have that when, some considerable time thereafter, Weiss was in custody and was brought into a Federal room by two detectives, she was not at that time sure because he had fattened up. That apparently has relation to the D.D.5. That was two years ago.

Mr. Turkus: That was in 1939, the date of the report.

10378 *Colloquy*

The Court: The jury is not here. Frankly, the impression I gather is that in this case the wish is the father to the thought, that the likelihood is that she did not link this trifling incident of the man buying a penny cigarette at that time with the murder. Customers come and go in those little stores on a Saturday night. An incident of that kind would not sensibly attract her attention. I did not swallow
10379 that when she gave the testimony. There was nothing significant about a man buying a penny cigarette and walking out. It is more likely that if Weiss was in there, he had no reason at all for walking into the back of the store. He could look in from the street. I thought the wish was father to the thought; that as time went by and she felt under the necessity of trying to hook up some sort of corroboration of an accomplice's testimony, that she was giving this in order to help out.

Mr. Talley: You remember that she
10380 said she was brought into this court-room to have Weiss pointed out to her after the trial started in?

The Court: Yes.

Mr. Talley: Which would indicate that she made no identification.

The Court: I have had enough practical experience and observation of the way things are done to form an impression that a shop-keeper would not attach any importance whatever to a thing of that

kind, with the numerous customers that come in on a Saturday night.

Mr. Turkus: Will your Honor look at paragraph 6 of that report, that D.D.5?

The Court: Yes.

Mr. Talley: Will you let us, in the presence of your secretary, look over those reports, if your Honor please? I think it would be very helpful and satisfactory.

The Court: You cannot do that. These are secret.

10382

Mr. Talley: This trial is practically completed now. We can gain no information from those reports.

The Court: But there are other trials all through there. These D.D.4's contain lots of matters that are not connected with this trial.

Mr. Talley: My contention is this, that immediately after that crime she was interrogated by some of the officers and that she gave a description, assuming she had any one in mind at all, of the man she says

10383

came into the store the night before, and that description could not possibly agree with an adequate description of the defendant Weiss. Those are the things that we are seeking and that we are entitled to, not a report made in 1939 or statement made in 1939; one made in 1936.

The Court: If that D.D.4 is here, it would be the first one in the case.

Mr. Talley: Yes, sir.

The Court: Let the Judge have it.

Mr. Turkus: What file are you referring to?

10384

The Court: The first one. If she gave a description of the man who bought the cigarettes, it would be in the first D.D.5. No. 6 refers to something that has not come out in the evidence in this case.

Mr. Turkus: That may have been the confusion.

Mr. Talley: Confusion on whose part?

Mr. Cuff: There could not have been any confusion about that.

10385

The Court: She has lost her husband and she wants a conviction. That is the story.

Mr. Turkus: That is acting upon the basis that the D.D.5 is accurate. I have information what went on in that room where Major Williams was, what Mrs. Rosen did, from the Federal people. You are proceeding on the theory that that is accurate.

The Court: I am assuming accuracy.

Mr. Turkus: I want the defendants to have any paper or anything that they think

10386

can help them in the case but I am telling you I know what the Federal people say went on in that room.

The Court: In other words, you mean if Mrs. Rosen is examined and if the detective is examined to impeach her, if she denies this, and then if the report itself is put in to impeach the detective in case he denies it, that then you will challenge the word of the detective by putting the Federal agents on the stand?

Mr. Turkus: As to what happened in

that room while they were present, yes, on that time of identification.

Mr. Cuff: She denied being in Major Williams' office.

Mr. Talley: Does the District Attorney take the position that he attacks the accuracy of the police report in this case?

The Court: See if you have that other D.D.5 or 4.

Mr. Turkus: I had Mr. Joseph look through every D.D.4. I will go over them myself personally, if you want. 10388

The Court: Will you look over them right now and pick out the one that is closest to September 13th?

Mr. Talley: The first statement she made.

Mr. Turkus: That is not the way D.D.5's are run. You cannot have me produce something that does not exist.

The Court: Mr. Turkus, will you please give me the one closest to September 13th?

Mr. Turkus: Here it is. Here is September 13th. Here is another one September 13th. Here is another September 13th, and another one, and another one. Here is another one, and two more. 10389

The Court: Mark this one for identification.

(Paper marked People's Exhibit Z-30 for identification.)

The Court: Let me have the others. The first one shown makes no reference to it at all.

10390

Mr. Turkus: Here is another September 13th.

Mr. Talley: May we look at it?

The Court: You don't have to. Take the Court's word for it. Just mark it for identification. Mark the next one for identification. This likewise makes no reference to Weiss.

Mr. Talley: Neither one? Then no need of marking them.

10391

The Court: If this case should be a conviction and go to the Court of Appeals you might be asking that body to look at it. The good faith of this Court will not be challenged.

(Paper marked People's Exhibit Z-31 for identification.)

Mr. Talley: As to the record—

Mr. Turkus: In order to keep the record straight, that D.D.5 dated 9/8/39 and the D.D.5 dated 9/14/39 may refer to matters

10392

which occurred outside the office of the Federal people. I do not know.

The Court: Don't argue about it. Can you see anything else on the 13th?

Mr. Talley: Is your Honor marking the paper that you handed to me to examine? Has that been given a number?

The Court: Mark that now.

Mr. Talley: D.D.5 or D.D.4, containing two sheets, which the Court permitted me to read. I want marked for identification so we will know what we are talking about.

The Court: Mark it for identification.

10393

(Two sheets marked People's Exhibit Z-32 for identification.)

Mr. Turkus: Here is another paper that is a resume of the homicide case under date of September 13, 1936.

The Court: Mark this for identification. It has nothing to do with the subject matter.

(Paper marked People's Exhibit Z-33 for identification.)

10394

Mr. Talley: Have you any report made by Captain McGowan, Mr. Turkus, on this case? I would like to have that shown to the Court, if you have.

The Court: One thing at a time.

Mr. Turkus: Do you want me to continue to look for September 13th first?

Mr. Talley: Finish.

Mr. Turkus: I am doing this for you.

Mr. Talley: I told you what I wanted.

10395

Mr. Turkus: Don't be so sensitive. Tell me what you want.

Mr. Talley: I am going to tell you again—

Mr. Turkus: Don't make a speech. Tell me what you want.

Mr. Talley: I would like to tell you where you can go.

The Court: Come to order, please.

Mr. Turkus: That was very cute.

I have examined the rest of the file of the D.D.5's and I found none under date

10396

of September 13, 1936, that is date of report under that date.

The Court: Now the 14th.

Mr. Turkus: Yes, here is one from the 14th.

The Court: That is probably in more detail.

Mr. Turkus: I ask that it be marked for identification.

The Court: These are not the papers.

10397

Mr. Turkus: No, the other papers do not refer to this matter. They refer to the defendant Lepke and others.

The Court: I think, in view of the situation, I had better take the time to look through all.

Mr. Talley: That would be more satisfactory to the defendants.

The Court: The Court has asked counsel to avoid conversation. If this is not obeyed, the Court will be compelled to recess and go into another room. I cannot follow these papers accurately if there

10398

is a buzz of conversation among counsel in disregard of the Court's request.

Mr. Turkus, I would like the stenographic report of Mrs. Rosen's interview with Assistant District Attorney McCarthy of September 23, 1936. Was there a transcript?

Mr. Turkus: Papers consisting of 18 pages, taken by Assistant District Attorney William E. McCarthy on September 23, 1936, is herewith handed—

The Court: While I am reading these, will you please look through that and see

if she gave a description there? Sit down and take your time.

In these papers it says nothing more on that point, but there is one report dated September 13th in which a description, given by whom is not disclosed, is noted as to one of the four men. I would judge it is a description of either Bernstein or Ferraco. I will read it. It does not say who gave this description. It is signed by Detective King. "25 years, 5-7, 140, dark complexion, clean shaven, sharp profile". 10400
That is what makes me think it is probably Bernstein. And then the way the man was dressed, of course, is nothing that means anything here: "Powder blue suit, soft gray hat, collar of shirt open at neck, no tie, either Italian or Jewish." That looks like either one of those two. It could not apply to either Strauss or Weiss. No description of other three.

Mr. Talley: I don't see that that helps either side.

Mr. Turkus: People's Exhibit 31 for 10401
identification—

The Court: I am not obliged to tell you that. All other papers have been duly examined.

Mr. Turkus: People's Exhibit 31 for identification, on the back has a description of the persons wanted. That is under date of September 13, 1936, and it is substantially what your Honor read just a moment ago.

The Court: Well, it is sensible that the

10402

person whose appearance was noted was a sidewalk or wheel man, not a shooter.

Mr. Turkus: Your Honor has asked me to read the McCarthy statement of September 23, 1936. I have read it in its entirety. The only thing that might remotely be suggestive of the subject under inquiry, I put a check mark alongside of it.

The Court: Pass it up.

Mr. Turkus: That is not helpful, and after your Honor gets through with it I would like to have that marked for identification.

10403

The Court: Have you read it carefully?

Mr. Turkus: Yes, your Honor. I sat over in the other jury box and read it.

The Court: Cannot afford any mistakes.

Mr. Turkus: No mistakes. If you have any doubt about it, you can read the 18 pages. I read it.

The Court: I think this is a fair statement then, that Mrs. Rosen did not, on being examined by Mr. McCarthy, state the incident of the man coming in, buying a cigarette, and looking around the place. That was not related.

10404

Mr. Talley: The date of that statement was September 23, 1936, is that correct?

The Court: Right. Taken by John F. Matthews, stenographer.

Mr. Talley: Have I the date correctly stated?

The Court: Yes. Mark this for identification.

(Statement marked People's Exhibit Z-34 for identification).

Mr. Turkus: I ask your Honor to look at Defendants' Exhibit C for identification, which is the Grand Jury testimony of Esther Rosen on October 14, 1936, and specifically page 16 thereof.

The Court: Didn't we take that up before?

Mr. Turkus: I want you to read about that. 10406

The Court: What date is this?

Mr. Turkus: October 14, 1936, a month after the murder.

The Court: Didn't counsel see this?

Mr. Talley: No, sir, we did not see it.

The Court: Suppose we read it. It all tends to confirm.

Mr. Turkus: That is consistent with her testimony in the case.

The Court: Yes.

Mr. Turkus: And who it was that bought the cigarettes. 10407

The Court: Where is the little girl now? Is she available as a witness?

Mr. Turkus: She is available as a witness but she does not remember the incident now.

The Court: There is something else here.

Mr. Turkus: She could not identify him. That identification, if you will note, was within a month of the homicide, by picture.

The Court: In reading this to counsel,

10408

I will have to leave out the first part of one answer because that relates to something that is not disclosed.

Mr. Talley: Do you want the record to take this?

The Court: I think it is just as well. "I seen him between eleven and twelve. Q. And he came in to buy one cigarette at a time? A. He was looking behind the counter. I thought nothing of it."

10409

One more thing here. Yes, I remember counsel saw this. I remember. Something else here reminds me of it.

Mr. Cuff: That is about the money, isn't it, Judge?

The Court: Yes, that is what follows. This was shown up at the bench in the other room at the early part of the trial.

Mr. Cuff: We read it.

The Court: This is further up on the page, before what has just been read: "Next Saturday night I seen some fellow, now that he was killed Sunday, some fellow

10410

walked in Saturday night but when I saw the fellow's picture I identified that fellow. He walked in and bought a single cigarette each time." Then follows something else which is hearsay.

Now, gentlemen, I think the procedure is the matter to be discussed. Of course, the routine technical procedure is the one outlined. If you want to short-cut and redirect it on the D.D.5 to the record after I bring back the jury, you may avoid that necessity. But there are certain

things in the D.D.4 which are prejudicial so that all of it cannot go in.

Mr. Talley: All I would want would be just the paragraph pertaining—

The Court: Then suppose you pass it over and I will see what seems to be admissible?

Mr. Talley: There are two paragraphs, I think, on separate pages.

The Court: I am assuming this. Of course, the District Attorney has a right 10412
to show that the detective was mistaken, but for the District Attorney to challenge a D.D.5 in the trial of a case where the District Attorney and police have to collaborate might tend to confuse the juridical mind. No. 6 is what I thought was prejudicial. "At 2:30 P. M. September 7, 1939, Mrs. Rosen, accompanied by the undersigned, appeared at Room 816, 90 Church Street, in the office of Major Williams, where Weiss was viewed by Mrs. Rosen." Then follows an identification of Weiss, but in a different connection. 10413

Mr. Turkus: In connection with the premises or adjacent to the premises.

The Court: But not something that has come out in the trial of this case. Do you know what I mean?

Mr. Talley: It is not quite plain to me but it is plain that there are two paragraphs in there which pertain to her identification or failure to identify the defendant Weiss. Those are the two that I think should be read.

The Court: Do you want this to go in?

10414

She stated that Weiss resembled the man who was sitting in an automobile parked near her store a week before her husband was killed, in company with Max Rubin, Lepke, and Gurrah, who had ordered her husband to get out of town if he knew what was good for him. You don't want that, do you?

Mr. Talley: No, that does not belong in at all and has nothing to do with it.

Mr. Cuff: It is imagination anyway.

10415

The Court: Maybe it is and maybe it is not.

Mr. Cuff: Because Rubin testified here and he gives the lie to that.

Mr. Barshay: Judge, I don't want that to appear in the record, jury or no jury. I think it should be stricken from the record.

The Court: Strike it out but put in the record that on the first page, paragraph No. 6 of exhibit was read to counsel and counsel do not wish it to be read to the

10416

jury.

Mr. Cuff: We don't want that in the record.

The Court: I have stricken it from the record but I don't propose, in case this goes to the Court of Appeals following an appeal from a conviction, to have the Court of Appeals find it in the record and then think that I failed to disclose it.

Mr. Turkus: What number is that?

Mr. Talley: Z-32 for identification.

The Court: I am passing this back. I put a pencil bracket on the upper part of

No. 2 on the second page; ask counsel for defense to examine it and see if that is what they want and if that is all that they want. The rest of that paragraph refers to what was just stricken out.

Mr. Talley: In addition to the paragraph indicated by your Honor, and I would like you to look at it again, which terminates with the word "before his murder", that is as much as we desire to have in.

10418

The Court: Let me see that.

Mr. Talley: Just a moment. In addition to that, that "murder" is in the middle of paragraph 2 that your Honor designated, in addition to that we want to have read paragraph 4 of the first sheet down to the word "kill", paragraph 4. Will you look at that, please, and on the other page we seek to terminate the brackets after the sentence, "the night before his murder."

Mr. Turkus: I think it ought to go down, as far as D.D.5, People Exhibit Z-32 for identification is concerned, that is the second 5 attached to Z-32 for identification, it ought to go down to "her husband's death" if that is submitted to a jury.

10419

The Court: Have you got those photographs referred to in paragraph 4 on page 1? When it comes to identifying by photographs—

Mr. Turkus: I was not there then. I do not know.

The Court: Isn't it in the record?

10420 *Colloquy*

Mr. Turkus: Judge, there were a lot of photographs.

The Court: People change in appearance.

Mr. Turkus: I know.

The Court: The photograph may not look like a person when shown a long time after.

Mr. Turkus: The only one that could explain that would be the detective Giordano.

10421

Mr. Cuff: King.

Mr. Turkus: No, Giordano.

The Court: I think, Judge Talley, that 4 is admissible, provided the photographs are produced or can be found to be used in connection with it so the jury can look at the photographs and look at Weiss as he appears today.

Mr. Talley: No, sir, I would not care to have that. She said she could not identify him. Then they have some photographs presented and she says yes. That would not do at all.

10422

The Court: I will rule out four.

Mr. Talley: All of four?

The Court: Yes.

Mr. Talley: Let me note an exception to your Honor's refusal to allow me to read—

The Court: For that reason. The photographs are not here for the jury to compare with the defendant's appearance.

Mr. Talley: Don't have to say anything to the jury about the photographs.

The Court: And they are not authenticated.

Mr. Talley: I am taking just that statement in that paragraph which is quite separate and distinct from the photographs. I am not interested in the photographs.

Mr. Turkus: As it is, the defendant is getting the benefit of hearsay testimony.

Mr. Talley: It is not hearsay at all.

Mr. Turkus: What, then, is it?

Mr. Talley: It is the statement she made in the course of the investigation of the Rosen killing. 10424

Mr. Turkus: That should be something to cross-examine the witness by, not read in something a detective wrote on a report. You are getting every break in the world. You don't seem to realize it.

Mr. Cuff: Mr. Turkus, we know what we are getting and we know what we want.

The Court: Can't this stop? It is hard to think with all this going on.

It has been requested that the bracketed matter include, "candy store of her husband the night before his murder". That is correct? 10425

Mr. Talley: Yes, sir.

The Court: That was meant to be included.

Mr. Talley: In the brackets there, now I request—

Mr. Turkus: At this point, your Honor—

Mr. Talley: Now I request that that portion—

10426 *Colloquy*

Mr. Turkus: Somebody else has a right to request.

Mr. Talley: Request that that portion of paragraph four that I have indicated to your Honor, terminating at the word "kill" be likewise read to the jury.

The Court: I have stated my notion concerning four, but really this is a matter for agreement. This is legalized as evidence in this form, which is irregular, only by agreement, but if formalities are
10427 waived, and Mr. Turkus objects, I shall sustain an objection to four and then you can take your exception.

Mr. Talley: Does Mr. Turkus object to having that report read to the jury?

Mr. Turkus: Let me see what is being done here. I am trying to tell him he is getting a break, but he does not want to listen.

The Court: Can't this colloquy stop?

Mr. Turkus: Yes, your Honor, it will.

Mr. Talley: It can be stopped by your
10428 Honor, nobody else.

The Court: Pardon me.

Mr. Talley: I say it can be stopped by your Honor.

The Court: Without a gavel?

Mr. Talley: You don't need a gavel. Just tell him to sit down and not make childish statements. That might stop it. I don't think it will.

The Court: I don't think it is childish. I think it is a sound objection because the failure to identify there is based upon photographs which are not produced.

10429

whereas in paragraph two of the second page, it is based upon the face to face meeting between the defendant Mendy Weiss and the witness. All right, I will put the marks around it. It can be read in evidence.

Mr. Talley: Both paragraphs or only one?

The Court: The one.

Mr. Talley: Just one?

The Court: Yes. Before the jury comes back, take your exception on the other one.

10430

Mr. Talley: I take exception to your Honor's refusal to allow me to read paragraph four—

The Court: I want no discussion on evidence when the jury comes in.

Mr. Talley: —in the Detective Bureau report marked People's Exhibit Z-32, for identification. When the jury comes back I am going to read to it that portion of the report which is marked in the brackets by your Honor.

10431

The Court: It has been marked all around now in the border.

Mr. Talley: All right, let me see it, please, before they come in.

The Court: She had admitted under cross-examination by Mr. Talley that she was not sure at that time because Weiss had fattened up, but, you see, I am letting this in because it goes further than saying she is not sure. She says definitely it was not the man.

Mr. Turkus: That is a statement, your

10432

Honor, that was made by Henry G. Swift, a detective, which is hearsay. I have been deprived of the right to cross-examine him.

The Court: Not deprived. This is not going to be read to the jury unless you consent to it. That is made clear. If you don't consent to it, you will have to go through the regular formalities which have been previously outlined and with which you are familiar.

10433

Mr. Turkus: That will delay the trial another two days.

The Court: Not necessarily. You can decide that.

Mr. Turkus: I will reserve the right until tomorrow morning to put on the detectives and bring the Federal men here.

The Court: Let us know, then, tomorrow morning.

Mr. Turkus: Yes.

The Court: Let the matter remain open tonight and in the morning let us know what you decide to do.

10434

Mr. Cuff: If you are going to have the Federal man, get the photographs.

Mr. Turkus: I was trying to tell you something.

Mr. Talley: You can save that by having it read to the jury and you can attack it in your summation.

The Court: I tell you, Judge Talley—of course, the jury is not here—we know how these things are taken down. We know how easy it is for a person to get the wrong impression as to what is said and have that wrong impression right

10435

away or have it later. There have been constant wrong impressions as to what the Court said throughout this trial. It is quite possible that at the time of the examination referred to in the D.D.4, and Weiss being brought in for identification, that she did say she was not sure, and the detective afterwards put it in as a negative answer in his D. D. 5. I would not put that past anybody as a mistake that can easily be made.

10436

Mr. Talley: Don't you think the reasonable assumption is that these reports are correct?

The Court: There is no assumption. But let us end this. Bring back the jury. We will recess until the morning.

(The jury returned to the court room.)

The Court: Gentlemen of the jury, it has been necessary to read through a substantial mass of police reports. That is the reason for the delay. That work has now been completed. At ten o'clock tomorrow morning we will proceed with the examination of witnesses.

10437

Please do not discuss the case: let nobody talk to you about it. Keep your minds open and follow all other admonitions heretofore given.

Let the jury go out first.

The defendants are remanded.

(Adjournment was thereupon taken to November 25, 1941, at 10:00 A. M.)

10438 *Colloquy*

Brooklyn, N. Y., November 25, 1941.

TRIAL RESUMED

The Court: I have just been reviewing the testimony of Mrs. Rosen, beginning around page 50, including page 61. I think that is sufficient to use as a basis, if you wish, for specific impeachment.

Mr. Talley: Yes, sir.

10439 The Court: Do you want to use her or do you want to use the detective?

Mr. Talley: I just want to introduce that in evidence, that is all.

The Court: Have you reviewed this since last night, from pages 50 to 61?

Mr. Talley: Yes.

The Court: It seems to me that lays a basis and you could put the detective right on the stand.

Mr. Talley: I am quite in accord with you.

10440 The Court: There is sufficient here already, because this is not a positive identification.

Mr. Talley: Then I don't require her.

The Court: The only question is the detective's conclusion, whether that is based upon something he can recollect she said in order to establish the conclusion as correct—that it went further than an uncertainty.

Mr. Turkus: With reference to People's Exhibit Z-32 for identification, the first page—the date of the report, 9/8/39

—the detective who made this D.D. 5 is Vincent Giordani. Mr. Giordani is no longer a member of the Police Department, and his whereabouts, from what I can gather, are somewhere in the State of Florida. However, with respect to Paragraph 4 thereof, Detective King, of the 75th Squad was present with Giordani when the occurrence took place and is available as a witness. In addition to that, with respect to D.D. 5, the date of 10442
the report, 9/14/39, also Z-32, the identification of Major Williams, of 90 Church Street office, he is no longer there. He is with the United States Army at Fort Benning, Georgia, having first been in M. I. However, we have produced and have available for court testimony Agent White, who was present when the occurrence in Paragraph 2 of that report took place. In addition, we have available the detective, Harry G. Swift, who made the D.D. 5 dated 9/14/39, Z-32 for identification. 10443
All those witnesses are in court, available for any use that any of the defendants may wish to put them to.

Mr. Talley: We asked at least three or four weeks ago for these reports. Several times we called attention to the fact they had not been received. If we had received them when we asked for them, we could have gotten Giordani or the rest of them here to identify it. I think the right thing to do is to put those reports in evidence.

10444 *Colloquy*

Not all of them, but so much of them as we now have under discussion.

Mr. Turkus: The right thing to do is to call living witnesses.

The Court: Who signed the exhibit for identification?

Mr. Turkus: Z-32 for identification, the date of the report, 9/8/39—was signed by Giordani,—the first page. But in Paragraph 4 it says that Detective King was

10445 with him when the occurrence took place.

The Court: I just asked a simple question. I am trying to figure out what it is best to do.

Mr. Turkus: The witness, in accordance—

The Court: Wait just a minute. Paragraph 4 states the officer's conclusion; it does not state what Mrs. Rosen said.

Mr. Turkus: That is right.

The Court: The jury is the one to draw conclusions.

10446 Mr. Turkus: I am going to answer—

The Court: Please. I do not want any interruption. Please sit down while I am talking. Now, in reviewing the evidence, as I stated, Mrs. Rosen was unable to make a positive identification. Let me refer to that particular part, at page 59:

"Q. Then did you say, 'That is the man who was in my candy store,' or did you say, 'I cannot identify him as the man'? A. I said to him, 'He looks much heavier. He was not as heavy in the store. I have

not seen him in a few years. He was slimmer when he came in my store.'

"Q. Were you in doubt as to whether he was the man?"—now please bear this very clearly in mind as I read—

"Q. Were you in doubt as to whether he was the man? A. If he was slimmer, I would definitely say he was the man."

Mr. Talley: I think that is sufficient to show that she was not definite as to her identification, and, as I stated, an identification that is not definite is no better than no identification. 10448

The Court: Now, of course, the detective put something in the nature of a conclusion—he goes further than that in his conclusion. But Giordani is not here, and I am facing a practical situation. Why not, if you wish, Judge Talley, consider if you wish to call those who are here and cross the bridge when you come to it.

Mr. Talley: The only man whose testimony would be worth anything in connection with this report is Giordani, who made it, and Major Williams, who was there in his presence, in whose office the statement was made. I don't want any— 10449

Mr. Turkus: Detective King is here.

Mr. Talley: It does not make any difference how many are here.

Mr. Turkus: The agent is here. They were both present on both of those occurrences.

The Court: Let me see if I am correct

10450

in my impression—I was wrong about that. I was wrong in the impression. If Giordani was here he could be asked directly as to that.

Mr. Turkus: Will your Honor look at Paragraph 4?

The Court: I read it.

Mr. Turkus: Did you see about Detective King?

Mr. Talley: It seems a very simple matter to me, if I read to the jury those two paragraphs.

10451

The Court: It seems simple to me, too, but it cannot be done except by agreement.

Mr. Talley: I ask that an agreement be made. The District Attorney agrees, in view of the fact that these witnesses are not here, that that report be read in evidence to the jury.

Mr. Turkus: There was no agreement made by any District Attorney to read the D.D. 5.

10452

Mr. Talley: I said nothing about you making an agreement—nothing. I am proposing that the District Attorney consent to read to the jury the two paragraphs of those reports he has in his possession.

Mr. Turkus: I counterpropose—

The Court: Please stop quarreling. Only when we agree on an orderly course of procedure can I rule. If that paragraph is offered in evidence, and if objection is made, the Court will be compelled to rule according to law.

Mr. Talley: I offer in evidence from the paper marked Z-32 for identification, which is designated a supplemental complaint—"Report. Police Department, City of New York,"—and is dated September 13, 1936, the date I refer to as indicating the date of the first report, September 13, 1936. This report is dated September 8, 1939. Now, I offer in evidence so much of the first page of the two pages of this exhibit as is indicated by 10454
the numeral "4," being the fourth paragraph, and I offer in evidence so much of said Paragraph 4 as ends with the word "killed." I offer in evidence supplemental report dated September 14, 1939, as is contained in Paragraph No. 2 thereof and as is indicated by pencil markings made by the Court, the last word of that portion offered being, "murder."

Mr. Turkus: Objected to on the ground it is incompetent, immaterial and irrelevant, and on the further ground Detective King and Agent White and other wit- 10455
nesses are available to be called to the stand.

The Court: I sustain the objection.

Mr. Talley: I take exception and I ask for an opportunity to try to locate these two witnesses.

The Court: Of course, you understand the Court's view. I have tried to make it clear by quotations from the record and the comments therein, that even if this

had not been objected to and had gone in it would be error.

Mr. Talley: It is not necessary, in your Honor's opinion, that the report be put in?

The Court: I don't think it is.

Mr. Talley: Your Honor will charge the jury at the proper time that there has been no identification at all?

The Court: There has been no ade-
10457 quate, no satisfactory, identification by Mrs. Rosen.

Mr. Talley: Your Honor will charge the jury to that effect?

The Court: I will—I told you that yesterday. If you want to find out what Mrs. Rosen said you can bring other witnesses in here, if you wish.

Mr. Talley: I want that report. The witness is the only witness who will validate it. I have nothing further to offer except an offer to get hold of the wit-
10458 ness. I could have had him here if these reports had been given to me when demanded and not held until the extreme end of this trial, until yesterday.

Mr. Turkus: That is an outrageous statement.

Mr. Talley: I want the District Attorney stopped.

Mr. Turkus: He made a very improper statement.

Mr. Talley: You held them for two weeks. Two weeks ago I asked for these reports, and you know it.

10459

Mr. Turkus: That is an absolute misstatement of fact. I cannot turn over confidential police files unless directed to do so by the Court.

The Court: These statements to the jury have to be stopped. None of these reports are permitted in evidence under the law. They are confidential police reports and the law is clear on them. That is the law. The rest is all play before the jury.

10460

Mr. Talley: I asked for them so they might be examined.

The Court: I will say the last word, or there will be nothing more said. I will excuse the jury and let you argue it out if you wish.

The Court asked Mr. Turkus to subpoena these PD.4's, which are incompetent as evidence, in your behalf, because they are confidential police records, and it is not the policy of the law to permit them to be seen by the defense, and, at the proper time, for you to see them. It

10461

was yesterday you asked for their production. In the meantime they have been handed by the police to the District Attorney, which avoided the necessity of having the policemen here every day with those exhibits. Now, there is nothing disreputable about that on the part of Mr. Turkus. There will be no further exchange of compliments permitted.

Please proceed with the case.

Mr. Talley: I ask for the production of the men of the route.

10462

Mr. Turkus: Having in mind the Court's statement, I hand the same to you.

Mr. Talley: I offer in evidence map designating street layout bounded by Pitkin Avenue, etc.

Mr. Turkus: Consented to. Do you have any objection if it is marked as a People's Exhibit on your offer, since it is our exhibit?

10463

The Court: What is the date on that layout? Does it show traffic directions and signals? Those change from time to time.

Mr. Turkus: It shows the one-way street—obtained from the official records of the Chief Engineer for the Police Department, City of New York, as of September 13, 1936.

The Court: All right.

Mr. Turkus: The map contains matters which are self-explanatory.

10464

The Court: Does it show the traffic lights as they existed on that date?

Mr. Turkus: No, it does not. The policeman's testimony shows that, but it does not show which lights were in use at that time.

The Court: This was before seven o'clock in the morning?

Mr. Turkus: Yes. The only practical effect is it shows the layout of the streets in connection with the Rosen candy store, the Rosen residence, the Long Island Rail Road, the B.M.T., the I.R.T., and the

route taken on the getaway, as testified to by the People's witnesses. It is data supplied by the official authorities of the Police Department as of September 13, 1936.

The Court: Do they check up with the matters testified to?

Mr. Turkus: Yes.

(Map received and marked Defendants' Exhibit 11, produced by the People.) 10466

Mr. Talley: I ask for an opportunity to endeavor to get Detective Giordani, who made the report indicated on People's Exhibit Z-32 for identification, and also to produce in court Major Williams, referred to in said report, so they may testify as to important questions.

The Court: Better think that over during the day and give it more mature consideration. Personally, I don't think you will want them, I do not think it is of any value whatever because already you have 10467 everything you need.

Mr. Talley: Does your Honor deny my application, for the purpose of the record?

The Court: No, I am suggesting that you give it more thought. Renew it later if you still think you want them.

Mr. Talley: With the consent of the Court—I will not renew it—I suppose I should renew it later as an application which has been made.

I have no further evidence to offer, then.

The Court: Then do I understand you

10468 *Colloquy*

wish the Court to adjourn for a few days until you can, under due process, bring these witnesses up here?

Mr. Talley: That is right.

The Court: Do you seriously mean that?

Mr. Talley: This is very serious business for me, Judge Taylor—the entire trial—terribly serious.

The Court: Of course it is, for the
10469 Judge, too, and it is for the jury.

Mr. Talley: It could be so easily obviated by the method I suggested; then I would not have to make this suggestion. It is an important application, and I ask your Honor to pass upon it.

The Court: Personally, I don't think their evidence is worth anything in view of what the Court has said it would charge. How long will it take to get them up, after procedure.

Mr. Talley: I have no idea of where
10470 they are, or who they are. The first thing I knew of it was from the District Attorney's disclosure this morning as announced by him.

Mr. Turkus: Mr. Joseph informs me that he was told yesterday. We may be able to get rid of this thing if you will listen to me for a few minutes.

The Court: How?

Mr. Turkus: I am not going to have anything put in evidence which I don't think is fair to Mrs. Rosen, because of the facts that I know, but I will ask your Honor to charge the jury that the jury do

10471

not consider her identification of Mendy Weiss buying cigarettes in the store the night before the murder at all,—take it out of the case.

The Court: Does that satisfy you? Do you still want to adjourn?

Mr. Talley: I still want the report in evidence.

Mr. Turkus: That is sheer obstinacy. At page 3385 of the record last night—

The Court: No more of that before the jury. The Court cannot speculate as to the underlying methods. The Court can only consider the reasonableness of the request. In view of the fact the Court has stated what it would charge the jury on this point, is such evidence of any further value? I think it is purely a matter of superfluity.

10472

The Court would not be justified in leaving the jury for several days and nights in a condition of inactiveness during the session of this trial. There are a multitude of reasons; and it would work against an accurate decision of the issue. I am going to take the responsibility right now and deny the application.

10473

Mr. Talley: Exception.

No further evidence on behalf of the defendant Weiss.

The Court: I will take the defense of Capone.

Mr. Rosenthal: The defendant Capone, with the exception of one stipulation, which I requested of the District Attorney on the direct case and which was partially

10474

agreed to—namely, the questions and answers which were read from other records, were correctly read by me, and all questions and answers of the particular witness in those various records—is that correct?

Mr. Turkus: That is satisfactory.

Mr. Rosenthal: Then I rest on the question of law which I raised to your Honor. We have no proof to offer whatever.

10475

The Court: To be specific in this stipulation, may I add that you try, if possible, to say in respect to what examination of what witness?

Mr. Rosenthal: In so far as the defendant Capone is concerned, the stipulation would be in the form of, if the stenographer were called from the Cohen trial, he would testify that the questions and answers taken from that record, in so far as they are applicable to Sholem Bernstein, are true and correct. If the stenographer were called from the Grand Jury, he or she, whoever it might me, would testify

10476

that the questions and answers read from the extracts of those minutes, which your Honor furnished, pertaining to Sholem Bernstein, are true and correct.

The Court: Correct testimony?

Mr. Rosenthal: Yes. And if the stenographer were called in the Strauss and Goldstein trial, which has been referred to particularly in the minutes, the same concession would be in force and effect so far as it affects the testimony of Sholem Bernstein. And in respect to the witness Ma-

10477

goon, if the stenographer were called that presided in the case of the People against Magoon, that he would testify in a similar manner to the previous concession. I think that covers it.

Mr. Turkus: For the sake of expedition, so stipulated.

Mr. Rosenthal: And likewise in the Strauss and Goldstein case.

Mr. Cuff: And that applies to the questions and answers read by Judge Talley from the record in the Cohen case.

10478

Mr. Turkus: So stipulated.

JAMES P. MALONE, Shield No. 1797, Manhattan Grand Jury, Borough of Manhattan, City and State of New York, called as a witness in behalf of The People, in rebuttal, after being duly sworn, testifies as follows:

By Mr. Turkus:

10479

Q. Are you a detective in the employ of the Police Department of the City of New York? A. Yes, sir.

Q. How many years have you been so employed by the Police Department? A. Eleven years.

Q. How many years have you been a detective? A. About four years.

Q. On March 5, 1940, what command were you assigned to? A. Manhattan Grand Jury Squad.

Q. Is that the Grand Jury Squad attached to

the office of District Attorney Thomas E. Dewey? A. Yes, sir.

Q. Was your immediate superior and commanding officer Captain Bernard Dowd? A. Yes.

Q. On March 25, 1940, did you receive a direction or command from your superior officer, Captain Dowd? A. Yes, sir.

Q. Did you execute the order or command? A. Yes, sir.

10481 Q. On March 28, 1940, was that the date the order was executed, or was it prior thereto? A. March 28, 1940, at one a. m.

Q. Who did you take into custody? A. Mendy Weiss.

Q. When did you bring Mendy Weiss to the District Attorney's office of Kings County? A. About 3 p. m., March 28, 1940.

Q. When you took him to the District Attorney's office, do you recall into whose room you took him, or what Assistant District Attorney, at any rate, was in the room when you brought him in? A. To your room—Mr. Turkus.

10482 Q. When you brought him into my room, did you see anybody in my room at that time? A. Yes, sir, there was a gentleman sitting at your desk, or standing, I am not just sure, but he was present with you, and Johnny Whalen, who was my partner, I asked—

Q. You cannot bring in any talk. What was that man who was in the room doing when Mendy Weiss came in? A. He shook hands with Mendy Weiss and he said, "Hello, Mendy. Your brother Murray retained me for you. If you want me, you know where I will be."

Q. Did that man then depart from the office? A. Yes, sir.

Q. Was the defendant Mendy Weiss questioned by Assistant District Attorney Turkus in your presence? A. Yes, sir.

Q. Did you make notes of that interrogation? A. No, sir, I did not.

Q. Did you make any memorandum in connection with some of the answers that Weiss gave? A. No, sir.

Q. Let me ask you this: Was Mendy Weiss asked his age? A. Yes, sir. 10484

Q. Did you then say something to Mendy Weiss? A. Yes, sir.

Q. What did you say? A. I said, "Why don't you stop lying and tell the man the truth?"

Mr. Talley: I move to strike that out and I ask your Honor to instruct the jury to disregard it.

The Court: Strike it out. The jury will disregard it. It is on the borderline, Mr. Turkus.

10485

Q. Did you say something on top of that?

Mr. Talley: I object to that as too general, indefinite, and not proper rebuttal. This witness is called in rebuttal.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember, Mr. Turkus.

Q. When I asked him his address, and he stated he lived at No. 10 Monroe Street, New York City, you said something which the Court

has stricken out. You cannot repeat that. Did you say something afterwards to him?

Mr. Talley: I object to that as not proper rebuttal.

Mr. Turkus: Specifically bringing your attention to the address.

The Court: Objection overruled.

Mr. Talley: Exception.

10487 A. I said, "Why don't you tell him your correct address is 4520 Twelfth Avenue, Brooklyn?"

Mr. Talley: I object to that and move the answer be stricken out as not responsive.

The Court: Objection overruled, motion denied.

Mr. Talley: Exception.

The Witness: (continuing) He turned around to you and he said, "Why don't you ask him all the questions? He knows all the answers."

10488 Q. Did you state at the time you furnished the address, 4520 Twelfth Avenue, under what name this defendant was living?

Mr. Talley: Objected to as not proper rebuttal.

A. I did.

Q. What did you say to him about his name?

Mr. Talley: I take an exception to the last ruling.

The Court: How is this rebuttal?

Mr. Turkus: It is preliminary to what went on—

Mr. Talley: It should not have been asked at all; if it is not rebuttal we cannot have a preliminary of what is going on. The detective is told what he did. I take an exception.

The Court: Objection overruled.

Mr. Talley: Exception.

10490

Q. What did you say to him about his name? A. I said, "Isn't it a fact you and your wife are living there under the name of Joseph Newman, in Apartment 5-C?" and it was then he turned around to you and said, "Why are you asking me questions? Ask him, he knows all the answers."

Q. By "him," he was referring to you, Detective Malone? A. Yes, sir.

Q. Was he asked where he worked?

Mr. Talley: I object to that as leading and not proper rebuttal— 10491

The Court: How is this rebuttal?

Mr. Turkus: I will come right to the point. That was just a preliminary question.

Q. At the time this defendant Mendy Weiss was being questioned, did he have certain documents and papers in his possession? A. He did.

Q. First, where did you apprehend him?

Mr. Talley: Objected to as incompetent,

10492 *James P. Malone—Rebuttal for People—Direct*

immaterial and irrelevant, not proper rebuttal.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He was driving a 1940 Chevrolet coupe, license 3 L 1108, N. Y. It was registered as Abraham Lorber's, alias Little Yiddle, of 128 Marcy Avenue, Brooklyn—outside of 4520 Twelfth Avenue, Brooklyn.

10493 Q. In the District Attorney's office did you see the registration certificate for 3 L 1108, and did that come from the possession of the defendant Mendy Weiss?

Mr. Talley: Objected to as not proper rebuttal.

The Court: How is this rebuttal?

Mr. Turkus: As your Honor will remember, the testimony in connection with Lorber—

The Court: Come down to that.

10494 Mr. Turkus: The name of Lorber has been linked up, and I am showing that at the time he was brought to the District Attorney's office he was driving this man's car and had Little Yiddle's license with him.

The Court: That is part of your main case.

Mr. Turkus: There was no opportunity to develop that until the defense.

Mr. Talley: There is no foundation for that.

The Court: Point out where in the defense the foundation was laid.

Mr. Turkus: Association by defense witnesses with this Little Yiddle.

The Court: Their admission—I took it by way of collateral impeachment, to show he was known mutually by them and by the defendant Weiss.

Mr. Turkus: That is not collateral impeachment.

The Court: Under what theory is it offered?

Mr. Turkus: That I have the right now, in view of the testimony of Kleinman, to 10496
show the date when Emanuel (Mendy) Weiss was brought into the District Attorney's office, which has now been established as of March 28, 1940; and further facts in connection with the search by this detective for Emanuel Weiss at a certain time when he received a command and order to find him; that a subsequent search was made, which I will bring out from this witness. I want to show what papers he had in his possession and also show what search was made for his whereabouts. 10497
This goes on the theory of flight.

Mr. Talley: I move to strike out the statement of the District Attorney unless you instruct the jury they are not to take that in evidence, that it is simply a statement he makes, which is of no value to them.

The Court: I am trying to figure out what is a rebuttal and what is really an attempt to reopen the case. Frankly, I don't understand how this is rebuttal.

10498

Mr. Turkus: Then I move to reopen the People's case for the purpose of this testimony.

The Court: Why wasn't it offered before?

Mr. Turkus: Because I did not see any legitimate opportunity before this defense to offer it. At any rate, I now move to reopen the People's case for this testimony.

10499

Mr. Talley: That was all available before; he had five weeks to put in all the evidence.

Mr. Turkus: Kleinman's testimony opened my eyes to something they put in the record.

The Court: Kleinman's testimony did not amount to anything.

Mr. Turkus: I know that, but I know what will be done in summation.

The Court: In that respect, the Court ruled that out—in that respect—but Kleinman's testimony stands in relation to the

10500

value, if any, of the fact that Police Commissioner Valentine allegedly, sometime in the latter part of April, happened to be several tables away, in Peter Luger's, eating a steak, when Mr. Kleinman and Mr. Weiss went in to eat at another table. There is no evidence there that Police Commissioner Valentine either knew Weiss or was aware of his presence, or if Weiss at that time was even suspected of the Rosen murder, because there is testimony by another witness—which is preliminary

to the alleged flight of Weiss—that at a subsequent time Weiss said that Tannenbaum was squawking, or words to that effect, and he would have to lam, or words to that effect. The remarks in the District Attorney's office in March were considered by the Court to be incompetent, immaterial and irrelevant at the time it was offered by the defense, and the same rule applies to you.

Mr. Turkus: I wanted to fix the date. 10502
Mr. Kleinman said he was hazy on the date, and I want to show he was brought in on March 28, 1940.

The Court: You have that.

Mr. Turkus: Then your Honor precludes me from offering any evidence as to what Mendy Weiss had in his possession?

The Court: Yes, I think it had admittedly nothing to do with the Rosen murder. If the inference I draw is correct, Tannenbaum was, according to Weiss's statement, the one who started 10503
this, and that was at a later date.

Mr. Turkus: At any rate, I fix the date of his appearance in the District Attorney's office. As to what documents he had in his possession, I am not permitted to go forward on?

The Court: No, sir. You are not. That ends that.

Mr. Talley: I ask your Honor to strike out the testimony of this witness in its entirety as not proper rebuttal.

The Court: The date may remain, and

also the correction of testimony as to residence, although that is really a matter that may be argued as discretionary.

Mr. Talley: I ask your Honor to instruct the jury to disregard the testimony of this witness except the date.

The Court: The date and the correction of residence.

Mr. Turkus: What about traveling in Yiddle's automobile?

10505 Mr. Talley: That is immaterial and not rebuttal.

The Court: Sustained as to that. The jury will disregard it; it makes no difference.

By Mr. Turkus:

Q. On April 30, 1940, or thereabouts, did you pursuant to a command and instructions, look for the defendant Mendy Weiss?

10506 Mr. Talley: Objected to as not proper rebuttal; incompetent, immaterial and irrelevant.

The Court: This goes to the question of flight; this is different. I will let him testify to that.

Mr. Talley: Exception to your Honor's ruling.

A. Yes, sir.

Q. Where did you look for him? A. In the vicinity of the Federal Court on Foley Square, Manhattan.

Q. Did you find him there? A. No, sir.

Q. Did you look other places on the East Side? A. Yes, sir.

Q. You had made the acquaintance of Mendy Weiss before March 28, 1940, hadn't you?

Mr. Talley: Objected to as not proper rebuttal.

A. Yes, sir.

Mr. Talley: Just a minute. When I object, you know enough to wait. 10508

Mr. Turkus: This is based on the search he made for him.

The Court: Being able to know his man?

Mr. Turkus: Yes.

The Court: Objection overruled

Mr. Talley: Exception.

Q. Where did you search for him?

Mr. Talley: Objected to.

The Court: Overruled. 10509

Mr. Talley: Exception.

A. In the vicinity of the Federal Court Building at Foley Square, in Manhattan.

Q. And subsequently, where did you look for him?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Different parts of the East Side; the lower East Side of Manhattan.

10510

Mr. Turkus: I ask that this card be marked for identification.

(Received and marked People's Exhibit Z-35 for identification.)

Q. When Mendy Weiss was being questioned in the District Attorney's office in Brooklyn on March 28, 1940, was People's Exhibit Z-35 for identification produced by him from his person and taken by the Assistant District Attorney?

10511

Mr. Talley: Objected to as not proper rebuttal.

The Court: Objection overruled. Answer yes or no.

The Witness: If your Honor will permit me to refer to my notes that I have in reference to it—

The Court: Yes.

A. Yes, sir.

10512

Mr. Turkus: It is offered in evidence.

Mr. Talley: I object to it, if your Honor pleases, being incompetent, irrelevant and immaterial, and I ask that the sheets that have just been referred to be marked for identification. Objection is made on the further ground it is not proper rebuttal.

The Court: Mark the sheets for identification.

Mr. Talley: I would like to see them, if your Honor pleases.

The Court: Yes.

Mr. Talley: Let me have them all.

The Witness: That was the sheet I referred to.

Mr. Turkus: There may be some other police information regarding someone else. He said that is the sheet he referred to.

The Court: Do you object?

Mr. Turkus: I do object.

The Court: Sustained.

Mr. Turkus: The one sheet he referred to, I have no objection to.

10514

Mr. Talley: Exception. He looked at all the sheets.

The Witness: I beg pardon, I had to look through my sheets. I had to look for that particular sheet that was at the end of these. However, what is in here, the records on these sheets, relate to the defendant Weiss.

The Court: Let Judge Talley see the card.

Mr. Talley: I object to the admission of the card in evidence.

The Court: Sustained.

10515

(Paper marked People's Exhibit Z-36 for identification.)

Q. Between March 28, 1940, the time when you brought Mendy Weiss to the Brooklyn District Attorney's office, until you saw him in court on this case, did you see him on any other occasions?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial, not

proper rebuttal. This witness might have been anywhere during that period. The fact that he did not see him means exactly nothing.

The Court: Sustained.

Mr. Turkus: That is all.

Cross-examination by Mr. Talley:

Q. Malone, you are connected with the Grand
10517 Jury in New York County, aren't you? A. Yes, sir.

Q. And you are working under the directions of District Attorney Dewey? A. Yes, sir.

Q. And you were in 1940? A. I beg pardon?

Q. And you were in April, 1940? A. Yes, sir.

Q. And you looked for Mendy Weiss in the vicinity of the Federal Court House over in the Borough of Manhattan, didn't you? A. Yes, sir.

Q. Was that at the direction of someone connected with District Attorney Dewey's office? A. That I looked for him in that vicinity? No, sir.

10518 Q. Whose direction was that at? A. Just my own initiative.

Q. Your own initiative? A. Yes, sir.

Q. On your own initiative did you learn that he was due or expected to be at the Federal Court on that day, March 28th? A. March the 30th.

Mr. Turkus: That is the wrong date. I object to it.

Q. April 30th? A. Now between—

Q. Will you answer my question? Did you hear it? A. I am trying to do the best I can.
Q. Did you hear the question? A. Will you read it?

(Pending question read.)

A. Not on that particular day but I am saying around that day.
Q. When you went there on the 30th day of April, didn't you learn that he had been there? Weren't you told that? A. No, sir. 10520
Q. You were not told? A. I beg pardon?
Q. Weren't you told that he was there in that court that day? A. No, sir.
Q. Did you ask the clerk of the court about it? A. Yes, sir.
Q. Didn't he tell you that he had been there? A. No, sir.
Q. Why did you go there in the first place?

Mr. Turkus: That is a "why" question.

10521

A. That is a question that is pretty hard to answer without upsetting things.

Mr. Turkus: It is a "why" question. He invited the answer.

Q. You were told—

Mr. Turkus: Just a minute. There is a "why" question pending.

A. If you want me to answer the question the way it should be answered, Mr. Talley, I will.
Q. Just answer this question—

Mr. Turkus: There is a "why" question pending.

Mr. Talley: I have withdrawn it because you got so excited about it.

Mr. Turkus: It is a good thing I did.

Q. Were you told he was in the Federal Court Building or to be in the Federal Court Building on that day? A. I sat around that particular day, Mr. Talley, and I am pretty sure it was

10523 April 30th.

Q. April 30th is the day you stated. You are not certain about it? A. There was several days he was due.

Q. You only told us one day, the 30th. A. I was not asked that.

Q. That was set out by the District Attorney. A. You specified one day.

Q. Were you there on the 30th? A. I was.

Q. Are you sure you were there on April 30th? A. Yes, sir.

10524 Mr. Talley: No further questions.

Redirect examination by Mr. Turkus:

Q. Are you sure it was March 28th, 1940, that you brought him to the Brooklyn D. A.'s office? A. Yes, sir.

Mr. Turkus: That is all. Detective Whalen.

John J. Whalen—Rebuttal for People—Direct 10525

JOHN J. WHALEN, shield No. 1746, attached to the Grand Jury Squad, Manhattan, called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Detective Whalen, are you a police officer employed in the Police Department of the City of New York? A. Yes, sir.

Q. How many years have you been attached to 10526
the Police Department? A. I was appointed April 1st, 1932.

Q. And how many years have you been a detective? A. Since August 5th, 1935.

Q. On March 25th, 1940, what was your command or assignment? A. Acting Captain Bernard Dowd of the Main Office ordered Detective James Malone and I to apprehend Mendy Weiss.

Q. In pursuance of that command or direction, on March 25th, 1940, did you execute that command on the 28th day of March, 1940?

10527

Mr. Talley: Objected to upon the ground that it is not proper rebuttal.

The Court: Sustained.

Mr. Turkus: The date is of great importance.

Mr. Talley: It is not proper rebuttal.

Mr. Turkus: It is rebuttal of Kleinman's testimony who did not know the date he was in District Attorney O'Dwyer's office. That date was very significant in this case. Will your Honor read that testimony of Kleinman if there is any doubt about it?

Mr. Talley: Your Honor said there was nothing in Kleinman's testimony at all that called for rebuttal.

Mr. Turkus: Then why be alarmed about it?

Mr. Talley: I am not alarmed at all but I want to keep this trial with some degree of regularity.

Mr. Turkus: So I noticed, with your request for the adjournment.

Mr. Talley: Is that what you said?

10529 Mr. Turkus: What else do you call it when you want to go down to Florida?

Mr. Talley: I told you it was an attempt to make up your failure to give me the papers that were demanded months ago.

Mr. Turkus: Sit down.

Mr. Talley: Don't tell me to sit down.

Mr. Turkus: If you want to stand up, I will sit down.

The Court: Sustained.

10530 Q. Did you take the defendant Mendy Weiss to the office of District Attorney O'Dwyer on March 28, 1940?

Mr. Talley: Objected to as not proper rebuttal.

The Court: Overruled on that.

Mr. Talley: Exception.

A. Yes, sir.

Q. When you brought Weiss into the office of District Attorney O'Dwyer, did you see Assistant District Attorney Turkus? A. Yes, sir.

Q. When you saw him, was there someone with him? A. Yes, sir.

Q. Who was that person with him? A. William Kleinman.

Q. Did you know William Kleinman from before? A. Yes, sir.

Q. Where did you know him from?

Mr. Talley: Objected to, if your Honor pleases, quite unnecessary.

Mr. Climenko: I object to this, if your Honor pleases, as improper, incompetent, and not proper rebuttal.

10532

Mr. Turkus: This is the identity of Kleinman.

Mr. Talley: He says he knows Kleinman. That is sufficient for his identity.

Mr. Climenko: I have a separate objection to the specific question.

The Court: Sustained.

Q. Was it William W. Kleinman? A. It was William Kleinman.

Q. You don't know about the "W"? A. No, sir.

Q. Did you see William Kleinman do anything 10533
when the defendant Mendy Weiss was brought into the D. A.'s office and did you hear him say anything?

Mr. Talley: Object to it, not proper rebuttal.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. What did you see him do and what did you hear him say?

Mr. Talley: Same objection, sir.
The Court: Overruled.
Mr. Talley: Exception.

A. When I entered the office—

Mr. Talley: Just answer the question, will you, please? What did he say or do?

A. (Continued) —he rose. He was seated on the left-hand side. He was seated on a green
10535 sofa and he rose and he greeted Mr. Weiss and he said, "I have been retained by your brother Murray. If you want me you know where to get me."

Mr. Talley: I move to strike it out as not proper rebuttal.

The Court: The only way that I can figure it can come in on rebuttal is, Mr. Kleinman testified that while he did not remember the exact date of the meeting at Luger's that it was several weeks after the meeting in Mr. Turkus' office. Now,
10536 in the absence of any evidence that Commissioner Valentine knew Weiss, noticed that he was there at a nearby table or several tables away, knew that he was wanted for something which does not appear by the record of this case to have been in Commissioner Valentine's mind or that of his associates, I don't see how this is relevant.

Mr. Turkus: Your Honor has missed the point I am trying to make. The vitally important thing is the date that this de-

fendant Mendy Weiss was in the District Attorney's office, as fixing it as March 28, 1940. The purpose of identifying Kleinman and having Kleinman and Weiss together is to show that that was the one incident that Kleinman spoke about concerning which his memory was hazy.

The Court: Why is the date of any importance whatever?

Mr. Turkus: When we get to the jury on that I will explain it. I am going to 10538
meet with a roar of objections if I discuss it now in front of the jury. The date is vitally important.

The Court: I am going to let it stand because it is not prejudicial, even though I don't see the point at this time. Objection is overruled.

Mr. Talley: I take an exception to your Honor's ruling.

Q. Did Kleinman then shake hands with Mendy Weiss and depart from the District Attorney's office? A. Yes, sir. 10539

Q. Between that day, March 28, 1940, and until you saw Mendy Weiss in this court-room, have you seen him?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: I will take it although I don't see what it means.

Mr. Talley: Exception.

A. No, sir.

Q. Do you work with Whalen as partners? A. My name is Whalen.

Q. Pardon me, with Malone? A. Well, we did at that time.

Q. On April 30, 1940, did you look for Mendy Weiss? A. Yes, sir.

Q. And subsequent thereto did you look for him? A. Yes, sir.

Q. Where did you look subsequent to April 30, 1940?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial, not proper re-
10541 buttal. It certainly is not proper rebuttal.

The Court: I am trying to figure out how it can be rebuttal.

Mr. Turkus: If there is any doubt about it, I won't press the question. Your witness.

The Court: You have your evidence in already about the Western trip?

Mr. Turkus: Yes, your Honor.

The Court: Covering a period of several months and about the alleged threat—

Mr. Turkus: I won't press it, your
10542 Honor.

The Court: To "lam" on account of Tannenbaum having talked about the Rosen case.

Mr. Turkus: Yes, sir. The witness is offered for cross-examination.

Cross-examination by Mr. Talley:

Q. Whalen, were you alone what police call "the arresting officer"?

Mr. Turkus: I object to that.

The Court: In what case?

Mr. Turkus: I don't know what he is talking about.

Mr. Talley: Of course, in this case, referring to March 27th and March 28th, the case he has just been testifying about under the leading of the District Attorney. What other case could it be?

Mr. Turkus: I don't know. You ask me questions? I don't understand you sometimes.

10544

Mr. Talley: Well, you don't understand English if you can't understand my questions which are pretty plain.

The Court: No, but both sides have discussed collateral matter in connection with Weiss. It is dangerous ground. Sustained.

Mr. Talley: Exception.

Q. You state that you arrested—you and Malone arrested Weiss on March 28th? A. We took him into custody.

Q. You did not arrest him? A. Well, yes, you 10545
can call it an arrest because he was deprived of his liberty.

Q. Where did you take him when you first laid hands on him? Where did you take him? A. 156 Greenwich Street.

Q. What is that, the Greenwich Street police station? A. Yes, sir.

Q. What is the number of the precinct? A. Second.

Q. You did not book him in that station house that night as a prisoner at all, did you? A. No, sir.

Q. You kept him there overnight? A. Yes, sir.

Q. You had no warrant for his arrest, did you, officer? A. No, sir.

Q. You just took him, put him in a cell, put him in jail, and there was not any charge pending against him, was there? A. He was not placed in any cell, sir.

Q. There was not any charge pending against him, was there? A. No, sir.

Q. And the next day you say you brought him
10547 over, which would be March 28th according to your testimony, you brought him over to see Mr. Turkus in the District Attorney's office in Brooklyn; is that right? A. That is correct.

Q. Then that day he was released from custody, wasn't he? A. Yes, sir.

Q. What? A. Yes, sir.

Q. How long were you in his presence from the time you arrested him, which would be the 27th, wasn't it? A. No, it was on the 28th, at about one o'clock or one-thirty in the morning.

Q. One o'clock in the morning. That is pretty close to the 27th. An hour after midnight on the
10548 28th you took him into custody, as you say? A. Yes, sir.

Q. Then he was kept in the Greenwich Street police station until you brought him over to the District Attorney's office? A. That is correct.

Q. And then he was released. My question is what time was he released? A. Well, Jimmy and I left the D. A.'s office at half past three in the afternoon on the 28th day of March and we surrendered the defendant Weiss to a patrolman named Bronstein.

Q. When you say "Jimmy" you mean Jimmy Malone? A. Yes, sir.

John J. Whalen—Rebuttal for People—Redirect 10549

Q. The last witness who was on the stand before you? A. Yes, sir.

Q. But you know that Weiss was discharged from custody, don't you? A. Yes, sir.

Mr. Talley: I have no further questions of this officer.

Redirect examination by Mr. Turkus:

Q. Detective Whalen, when you left the D.A.'s office, Weiss was still there? A. Yes, sir. 10550

Q. In Greenwich Street, what room was he kept in before he was brought over to the D.A.'s office? A. It is on the second floor and our office is known as the Bureau of Criminal Information.

Mr. Turkus: That is all. Any further cross-examination?

Mr. Climenko: No cross.

Mr. Talley: If your Honor pleases, I move to strike out the testimony of Detective Malone and Detective Whalen, the last two witnesses who appeared, upon the ground that it is highly prejudical; it is incompetent, irrelevant and immaterial, and not proper rebuttal. 10551

The Court: Denied.

Mr. Talley: It has to do with an arrest, taking into custody, and should be stricken out and the jury should be instructed to disregard it. I take an exception to your Honor's ruling.

The Court: I instruct the jury as to

both of these witnesses not to be prejudiced by the fact of Weiss being allegedly in the statica house for the purpose of being questioned. That could happen to anybody and it does not discredit anybody to have it done.

Mr. Turkus: The only purpose of the offer was to fix the date.

The Court: Yes, but Judge Talley called attention to something that I
10553 thought required special instruction to the jury.

Mr. Turkus: That is something he brought out himself on cross-examination.

VANCE NEWMAN, residing at 55 Pierrepont Street, Brooklyn, N. Y., called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

10554

Q. By whom are you employed? A. United States Government, Treasury Department, Bureau of Narcotics.

Q. And how many years have you been in the employ of the United States Government? A. Nearly five years.

Q. And how many years have you been with the Narcotic Division? A. Nearly five years.

Q. I show you People's Exhibit Z-26 for identification, and ask you if you have seen that photograph before (handing photograph to witness)? A. Yes, sir, I have.

10555

Q. Where did you find it? A. In the Weiss apartment at 10 Monroe Street, New York. New York.

Mr. Talley: I object to it, if your Honor pleases, not proper rebuttal. Move to have the answer stricken.

The Court: I do not know whether it is or not yet. Denied at this time.

Mr. Talley: Exception.

10556

Q. On what date did you find that photograph, People's Exhibit Z-26 for identification? A. August 26, 1940.

Mr. Talley: I object to it, if your Honor pleases, on the same grounds.

By the Court:

Q. Weiss apartment at where? A. 10 Monroe Street, Manhattan.

Q. What date? A. August 26, 1940.

10557

The Court: Denied at this time.

Mr. Talley: This is certainly on a collateral matter, if there is such a thing in this case.

The Court: I cannot tell.

Mr. Turkus: This is corroborative of the cross where the picture came from.

Mr. Climenko: If your Honor pleases, in view of Mr. Turkus' statement, may I have a general exception to this line of testimony now being elicited from this witness?

The Court: Yes, but I don't know what it is all about. I will rule at the proper time.

By Mr. Turkus:

Q. Where, in the Weiss apartment, did you find People's Exhibit Z-26 for identification? A. In a sort of a writing desk.

10559 Mr. Talley: Same objection.

Q. Was it among other photographs and papers? A. Yes, sir.

Q. Did you take that photograph with you? A. Yes, sir.

Q. Is that photograph in the same condition now as it was the day you found it under the circumstances related? A. Yes, sir.

Q. To whom did you turn over possession of that photograph? A. I showed it to the District Supervisor in our office and put it in the files of the office.

10560 Q. Have you seen Agent Greenfeld outside in the corridor? A. Yes, sir, he is out in the hall.

Q. Who was present at the time that you found that photograph? A. Agent Irwin Greenfeld and Agent George Miller.

Q. Were any of the Weisses present? A. Mrs. Weiss was present.

The Court: What Weiss apartment? There are lots of Weisses.

Mr. Talley: This is Sidney Weiss' apartment.

Mr. Turkus: The Sammy Weiss apartment.

The Court: Is this the celebrated photograph?

Mr. Turkus: Yes, your Honor.

The Court: So there won't be any time wasted on that, the Court does not consider the possession or taking of that photograph as impeaching the credibility. The only condition under which it could be received in evidence would be from the sale of it, commercializing. It has nothing to do with truth or falsity as a habit of 10562 the person who may have it.

Mr. Turkus: No further questions.

Mr. Talley: I move to strike out the evidence of this witness.

The Court: Strike it out.

Mr. Talley: And ask the jury to disregard it.

The Court: Disregard it. I know the photograph.

Mr. Turkus: The People rest.

The Court: Too far fetched.

Mr. Turkus: Do you know whose picture that is? 10563

The Court: I do.

Mr. Turkus: The People of the State of New York rest the case.

The Court: Let me see it again, to make sure that it is the photograph I referred to. I said "celebrated". Yes, that is the one I mean. That does not edify the jury.

Gentlemen, supposing you make your motions. I will excuse the jury for motions. (To jury) Do not discuss the case.

10564 *Colloquy*

Then you can make the motions in the order in which the names appear on the indictment.

Mr. Talley: May I make a suggestion we take a recess now until one-thirty, whatever our time is, and make the motions then? It is merely a suggestion.

The Court: May I suggest this: In so long a trial, the Court is not going to squeeze counsel into rushing into summations. That may result in confusion. You are entitled to sensible pause
10565 to get your thoughts properly assembled on the summations. You are entitled to this afternoon for that. Before excusing the jury, suppose we have an understanding that summations begin tomorrow morning at ten o'clock: first, someone on behalf of the defendant Buchalter; then someone on behalf of the defendant Weiss; then someone on behalf of the defendant Capone, in the event of the motions being denied. So you will understand just where you are at, the Court's disposition is not to limit time for summations but to leave it to the discretion of each
10566 counsel, one counsel summing up for each defendant, but I will appreciate if you can give me a fair estimate as to what each of you think will be the time consumed so that I will know just about when to be prepared to make the charge. Who sums up on behalf of Buchalter?

Mr. Climenko: Your Honor, that will be done by Mr. Barshay. He is not in this room at this moment. He is only a moment away from this room.

The Court: Has he stated how long he will take?

Mr. Climenko: I think that approximately should be made by him. I will have it for you in a moment.

10567

The Court: Judge Talley, how long will you take? You are not bound by this.

Mr. Talley: I know, but before I make my reply to you, the thought occurs to me if counsel are ready to make the motions, why not let—

The Court: I was going to let the jury go out to lunch and then directly back to where they are staying.

Mr. Talley: I will say about two hours at the outside would be sufficient.

The Court: How about the defendant Capone?

10568

Mr. Rosenthal: I imagine about three hours or two and a half hours.

The Court: And how about the District Attorney?

Mr. Turkus: I assume that I will have about six hours to answer of debate. I think I can conclude in an hour or an hour and a half. I will make it as rapid as I can.

The Court: There is going to be no pressure. If you start to press things in your summation, with the evidence in this complicated situation, it will tend to confuse the jury. Clarity must be sought for and plenty of time is essential for that. There will be a decent pause between each summation so that the jury won't get intellectual indigestion.

10569

Mr. Rosenthal: Might I add, your Honor, so that the summation can be intelligent, whether in making our motion in respect to the limitation of testimony in respect to certain people, whether we can have your Honor's ruling on that and then we will know just what is supposed to apply to each particular client.

The Court: You won't have to go into it as finely as that just now.

10570 The jury are excused until tomorrow morning at ten o'clock. Gentlemen, please do not discuss the case, let nobody talk to you about it. Keep your minds open and follow all other admonitions heretofore given, including those which are on the typewritten paper with captain of the court officers.

Mr. Turkus: Your Honor, there is one paper that I wanted marked for identification that I neglected, before the motions are made.

10571 The Court: Mark it.

(Two papers (affidavits) marked People's Exhibit Z-37 for identification.)

The Court: The jury may go now.

(The jury retired from the court-room.)

The Court: Now, motions for defendant Buchalter.

Mr. Climenko: Before I begin that, for your Honor's information and merely by way of ap-
10572 proximation, the summation of defendant Buchalter will take about three to four hours.

The Court: Counselor, when I was practicing law I formed an impression which still persists, that a lawyer who knows his business should not be crowded in summation; he should be permitted to argue his case fully, whether it is tiresome or not. That is up to him.

Mr. Climenko: I have just been given that approximation.

The Court: Frequently I have resented being curtailed in the time which I thought was

necessary for a proper argument of the cause that I represented. As a Judge I have always given that courtesy to the lawyers who tried cases before me.

Mr. Clmenko: We certainly appreciate that in this case, your Honor, and I know that your Honor will realize that we devoted hou.s in an effort to condense it.

If your Honor pleases, at this time the defendant Buchalter, at the close of the entire case, renews the motions made at the end of the People's case to dismiss the indictment upon the ground that the People failed to prove a prima facie case, for a directed verdict of acquittal upon the ground that the People failed to prove the guilt of that defendant beyond a reasonable doubt, and upon the further ground that no testimony was tendered against that defendant except through witnesses who are accomplices as a matter of law. That was the generic motion made by the defendant Buchalter at the end of the People's case and it is renewed at this time. 10574

Does your Honor desire me to make all of these motions seriatim or to await rulings after each has been made? 10575

The Court: That is denied.

Mr. Clmenko: Exception. The defendant Buchalter moves to strike from the record all of the testimony of the witness Harold Rosen—and I may say that that testimony which I now will refer to appears at approximately pages 255 to 265 of the stenographer's minutes—that testimony being to the effect that that witness, Harold Rosen, was employed by the New York and New Jersey Clothing Transportation Com-

10576 *Motion on Behalf of Defendant Buchalter to Strike Out*

pany, and all of his testimony as to the condition of that business during the period of his employment and within six months thereafter, upon the ground that it is remote, speculative, and not binding on the defendant Buchalter.

The Court: You mean that you wish to strike out Harold Rosen's testimony which purports to relate to the financial soundness of the business?

10577 Mr. Climenko: That is right, your Honor.

The Court: Strike it out.

Mr. Climenko: The defendant Buchalter moves to strike from the record the testimony of the witness Harold Rosen appearing approximately at pages 265 to 270 of the stenographer's minutes, dealing with the alleged meeting of the defendant Buchalter with the decedent Joseph Rosen, upon the ground that it is remote and upon the further ground that it is so speculative and uncertain that it should not be submitted for the consideration of the jury.

10578 The Court: This was a pantomime. The subject of discussion is not revealed but occurring on or about the month of April, that in relation to other parts of the record appears to be placed as on or about the time that Kelly withdrew. It may stand but there may be no speculation as to what was said. The Court will instruct the jury on that point. If it is overlooked, you may make a request at the proper time.

Mr. Climenko: At this point, your Honor, I deem it my duty to refer to my own recollection of the condition of the record which is in some contradiction with that of the Court. Your Honor says that this incident occurred about

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the time of the withdrawal of Kelly from that business. This record shows, in so far as it shows anything on that subject, that Kelly withdrew in April, specifically on April 27, 1932. No precise date is given by the People's witnesses for this alleged meeting but they agree, in so far as they fix it at all, that it occurred in the summer of 1932. I don't pretend that I know what significance your Honor's mind gives to that date but, since you referred to the date, there is

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that condition of the record.

The Court: I will tell you because it was testified to, if I recall correctly, by Harold Rosen that about six months after this alleged pantomime his father withdrew from the business, and because his daughter testified that he withdrew from the business about September. Take six from nine, it leaves three. That is about April, close to it anyway.

Mr. Climenko: Before I leave that particular motion may I understand does your Honor grant it in substance?

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The Court: No, I am not striking it out. For what little it is worth it may remain in, but the jury will be properly instructed, I hope.

Mr. Climenko: Well, I reserve any exception. I don't want to take an exception to such a ruling.

The Court: All right, although in a capital case you do not have to take any exceptions.

Mr. Climenko: I had in mind the fact that your Honor's ruling will probably, as your Honor intimates, cover the matter properly. Therefore I don't want to note an exception at this time.

10582 ***Motion on Behalf of Defendant Buchalter to Strike Out***

The defendant Buchalter moves to s ike from the record the testimony of this same witness, Harold Rosen, as it appears at page 271 of the record, to the effect that the business of that same corporation ended six months after the meeting alleged to have occurred at the Broadway Central Hotel, upon the ground that it is remote, speculative, and confessedly hearsay, and that it deals with an incident, even if it did occur, which is not binding on this defendant.

10583 The Court: I think that is dilatory. It should have been made when he was examined and cross-examined. Denied.

Mr. Climenko: Exception and exception to the Court's ruling that the motion as made now is dilatory.

The defendant Buchalter moves to strike from the record the testimony of this same witness, Harold Rosen, with respect to the efforts of his father to obtain employment after the severance of the decedent's association with that same corporation, and that is testimony which appears

10584 at page 272 of the stenographer's minutes, upon the ground that it is hearsay and that its nondependability is established by other testimony elicited by the People.

The Court: I did not even make note of it, attached no importance to it. Now I will turn to page 272. The Court sustained the objection to that. That is of no evidentiary value whatever. It is stricken, if there is anything to strike out.

Mr. Turkus: There is nothing there.

Mr. Climenko: The motion as made is granted?

The Court: That is just a decoy duck.

Motion on Behalf of Defendant Buchalter to Strike Out

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Mr. Climenko: The point is, your Honor, he did make those statements.

The Court: It is of no value. It is stricken, if there is anything to strike out.

Mr. Climenko: Thank you.

I have only a few of these motions, your Honor, and I will be quick with them.

The defendant Buchalter moves to strike from the record the testimony of the witness Sylvia Greenspan, as it appears approximately from pages 357 to 379 of the record, dealing with the alleged meeting of the defendant Buchalter with the decedent Joseph Rosen at an unspecified time in the year 1932 and at an unspecified place, upon the ground that the incident, assuming that it did occur, is so remote from the crime alleged that the testimony ought not be submitted for the consideration of the jury.

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The Court: Denied.

Mr. Climenko: Exception.

The Court: The Court, in denying this, is not conceding the premises as just related.

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Mr. Climenko: Premises as what?

The Court: I am denying it because I know what is on the record, whether your conception of it or interpretation of it is correct or not.

Mr. Climenko: You mean my reference to an unspecified place?

The Court: Yes.

Mr. Climenko: I make no point of that and I don't ask the Court to adopt—

The Court: The time was fairly well designated as the summer. I think it was nailed down to July, at one place.

Mr. Climenko: I would not want to dispute

10588 *Motion on Behalf of Defendant Buchalter to Strike Out*

the proposition that the time as specified is within the season.

The Court: The record is here. What is the use of talking about it? Denied.

Mr. Climenko: The defendant Buchalter moves to strike from the record all of the testimony of the witness Max Rubin to the effect that he was shot, upon the ground that by the hypothesis of the People's theory that testimony is not binding on the defendant Buchalter.

10589 The Court: His testimony that he was shot came in on his being subsequently called back, after proper basis had been laid and the chain of circumstances which made it competent being put on the record. Denied.

Mr. Climenko: Exception.

The Court: Its application, however, is a matter for the Court's charge.

Mr. Climenko: May I proceed, sir?

The Court: Is that all?

Mr. Climenko: That was all as to that. I just asked your Honor whether I might proceed.

10590 The Court: Yes, proceed.

Mr. Climenko: The defendant Buchalter moves to strike from the record all of the testimony of the witness Max Rubin to the effect that he left his home in or about October or November, 1936, and thereafter concealed himself in various places, upon the ground that it is not shown that he fled in consequence of a fear that he might be implicated in this case.

The Court: Denied.

Mr. Climenko: Exception.

The defendant Buchalter moves to strike from the record, or in the alternative requests the

Motion on Behalf of Defendant Buchalter to Strike Out

10591

Court to instruct the jury as an alternative application here, that this testimony about to be referred to is not binding on the defendant Buchalter; that the testimony of the witness Berger with respect to the acts which he did and the statements which he made subsequent to June, 1937, the last date on which he said he saw the defendant Buchalter, is not binding on that defendant.

The Court: Denied.

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Mr. Climenko: Exception. As a constituent of that motion, the defendant Buchalter moves to strike from the record that portion of the testimony of the witness Berger in which he related his efforts to shoot or to assist in the shooting of the witness Rubin, as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Climenko: Exception.

The Court: You understand in denying motions to strike out it is because the Court takes the view that it must either strike out for all purposes of the trial or leave in for the particular application that the evidence has. An application of each and every point of evidence as to specific defendants has to be carefully studied out by the Court in preparing its charge. That work is under process now. I am not in a position to state the application of each and every point of evidence at this time without the likelihood of error.

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Mr. Climenko: I understand that.

With respect to the testimony of the witness Magoon, if your Honor pleases, the defendant Buchalter moves to strike from the record that

portion of the testimony of that witness in which he said, in effect, that on an occasion in 1938 the defendant Capone said to him, "We must hit Rubin because he is hurting Lep," and upon the ground that that statement is as against the defendant Buchalter hearsay and inadmissible since it refers to a proposed act to be committed after the termination of the conspiracy to commit the crime charged in this indictment. The
10595 testimony that I refer to appears at pages 2346 and 2347.

The Court: Denied.

Mr. Climenko: Exception.

As to the witness Maguire, the defendant Buchalter moves to strike his testimony in its entirety from this record upon the ground that it is not binding on the defendant Buchalter for the reason that there is no proof in this record that that witness Rubin was induced to flee this jurisdiction or did flee in consequence of fear that he might become involved in the investiga-
10596 tion or prosecution of this case.

The Court: Denied.

Mr. Climenko: Exception. That, if your Honor pleases, completes all the motions to be tendered on behalf of the defendant Buchalter.

Mr. Talley: If your Honor pleases, the following motions are made on behalf of the defendant Weiss. I renew all the motions made at the close of the People's case and ask that they be granted.

The Court: Denied. You might, if there is any special motion that I don't recall at this time, call my attention to it. I take it you refer to the usual motions that are made in these cases.

Motion on Behalf of Defendant Weiss to Strike Out

10597

Mr. Talley: I renew all the motions made to strike out evidence, motions made during the course of the trial. They are now and here renewed. There are too many of them for your Honor to read now.

The Court: I would rather then you repeat them because I don't want to make an error on this ruling.

Mr. Talley: I am not prepared at this time to point out all of the motions to strike out the testimony that were made during the trial. I simply make this blanket motion.

10598

The Court: Do you recall this, whether or not there was any motion in which I temporarily made a ruling, that is, made a tentative ruling?

Mr. Talley: There were some, but I am unable to give them to you now. I expected there would be a little time intervene between the close of the case and making the motions. I have not had an opportunity to examine the record for them.

The Court: You can let me know later.

Mr. Talley: Yes, I will, if I can have that privilege.

10599

The Court: For the present it will be denied, subject to counsel having the right to call attention to specific matters and obtaining a revision of the ruling.

Mr. Talley: The Court will note my exception to the first motion and the denial thereof, made by me. Now you will note my exception to the ruling of the Court made on this second motion.

The third motion is, I move to strike out all the testimony given by Mrs. Rosen with respect to the identification, alleged identification, made

by her of the man who came into her shop on the night before the murder.

The Court: Granted.

Mr. Talley: Upon the ground it is too indefinite and too uncertain, and it is not of sufficient credible value to submit to a jury.

The Court: Granted.

Mr. Talley: I move to strike out all the testimony of the witness Rubin upon the ground
10601 that it had no application in any form or manner to the defendant Weiss.

The Court: Denied.

Mr. Talley: Exception. I move to strike out all the testimony of the witness Magoon upon the same ground.

The Court: Denied.

Mr. Talley: Exception. I move to strike out all evidence in this case as to flight as being subject to two interpretations, one an interpretation that would be favorable to the defendant, the other that might be unfavorable. There is no testimony in the case that any flight sought to be
10602 proved by the District Attorney was flight by the defendant Weiss from the Rosen killing, indictment, or fear of apprehension in connection with the Rosen case.

The Court: Denied.

Mr. Talley: And the jury must indulge in the more favorable inference to the defendant upon the presentation of that evidence.

The Court: There is sufficient evidence, in my judgment, to show that it was directly related to the Rosen killing. Denied.

Mr. Talley: Exception. May I just interpolate and say, has your Honor's view changed on that since you expressed it today? I under-

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stood you yesterday to indicate very plainly that there was no evidence that the flight was from the Rosen killing or the Rosen indictment.

The Court: Will you refer me to the record on that point?

Mr. Talley: No, but I understood that was the statement you made.

The Court: I think you may be confused on that point.

Mr. Talley: It may be the day before.

10604

The Court: Because last night, in reviewing the record in part, I made mental note of evidence that connected it with the Rosen killing.

Mr. Talley: I take an exception to your Honor's denial of my motion.

The Court: Pardon me. I am still trying to think of the basis for what you just said.

Mr. Talley: You used that expression—

The Court: Wait a minute, I can think better if you don't talk.

Mr. Talley: I don't know when you are finished speaking.

10605

The Court: There was a comment made when Mrs. Weiss was testifying, wasn't there?

Mr. Talley: I cannot recollect who was on the stand.

The Court: No, it was when Sidney was on the stand.

Mr. Talley: But you did make that comment, that it was subject to two interpretations and that you would have to charge the jury, if it went to them, that they would have to indulge the favorable presumption to the defendant.

The Court: That was solely related to the basis of Sidney Weiss' testimony. It did not

10606 *Motion on Behalf of Defendant Weiss to Strike Out*

relate to the rest of the record. The remark had that application only.

Mr. Talley: I take it your Honor denies my motion, and I note an exception to it.

I join in the motions, insofar as they apply to the defendant Weiss, made by counsel for defendant Buchalter, and the motions which are about to be made on behalf of the defendant Capone.

10607 The Court: They are all denied.

Mr. Talley: I move to strike out all evidence that has been introduced as to the—

Mr. Turkus: Capone's motions have not been made yet. He is trying to predicate a motion on motions that have not been made yet.

The Court: The same rulings that are made on the Capone motions will apply to all. The same exception will apply to all. I don't regard an exception in a capital case more than as an expression of disapproval to the Court for his ruling.

10608 Mr. Talley: Judge, it is not always safe to go up to the Court of Appeals and be asked, "Did you take an exception to that ruling?", and say, "No, I relied upon the theory I did not have to." The invariable ruling is, "You should have taken an exception."

The Court: In a capital case?

Mr. Talley: Yes, sir. They frequently take the view that the Court has the right—and I think they are right, too—I think the Court has a right to be advised of dissent of counsel on a ruling so that he may possibly reconsider it and be shown he was in the wrong.

The Court: I was not aware of that attitude, that policy.

Motion on Behalf of Defendant Weiss to Strike Out

10609

Mr. Talley: It is true. I move to resume the business of the day.

I move to strike out all the evidence that has been presented on the so-called spoliation theory insofar as it is attempted to apply to the defendant Weiss.

The Court: I deny it at this time, and will charge the jury as to application of it to specific defendants at the proper time.

Mr. Talley: Exception. That is all my motions at the moment.

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Mr. Rosenthal: Before making my general motion, your Honor, I move to limit the testimony of Mrs. Rosen to defendants other than the defendant Capone. My purpose here in making my motions is to see whether the Court agrees with me as to the applicability of certain testimony to defendants other than whom I represent, before I predicate my final motions which I intend to make to your Honor. I now move to limit, knowing that it is testimony in the case, the testimony of Mrs. Rosen to defendants other than the defendant Capone—to defendant or defendants, I will put it that way—other than the defendant Capone.

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The Court: That is really a request to charge. That may be made at the proper time. Denied at this time.

Mr. Rosenthal: I then will, in general form, make the same motion as to Harold Rosen, Sylvia Greenspan, Edward Maguire, Albert E. Aman, Joseph Bell, James E. Ryan, Thomas J. Winne, and the three detectives who were called in rebuttal, or two detectives and one government agent called in rebuttal, as well as the witnesses Berger, Tannenbaum and Rubin.

10612 *Motion to Dismiss Indictment against Defendant Capone*

The Court: Denied at this time. You may make the proper request to charge later, if the main charge of the Court is not satisfactory on those points.

Mr. Rosenthal: Now, then, I respectfully move to dismiss the indictment and for the direction of a verdict of acquittal upon the grounds which I have previously urged at the time of the close of the People's case, and upon the further
10613 ground that it now affirmatively appears from the evidence that outside of the testimony of the accomplice, who is an accomplice as a matter of law, the only thing relied upon by the District Attorney in this case is an isolated statement alleged to have been made three or four years subsequent to the killing, in which the words, "I werked on the Rosen thing right on Sutter Avenue and I was not made. I hung around there, too," contained on page 2360 of the record.

As I started to say before I quoted, the District Attorney relies upon this isolated state-
10614 ment to furnish the so-called corroboration insofar as it affects the defendant Capone. It is insufficient as a matter of law, I contend, and I renew the motions which I made at the close of the People's case and ask for a direction of a verdict of acquittal.

The Court: Motion denied.

Mr. Rosenthal: I respectfully except.

The Court: The jury will be properly instructed, I hope, on that point.

Mr. Rosenthal: I don't assume that your Honor wishes me to argue the insufficiency of a statement of that character before the submission of the fact of the guilt of the defendant

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whom I represent to this jury. There is no time specified in it—

The Court: Mr. Rosenthal, the conditions under which the statement is made amplified it, show the pattern. What I have in mind is this, that on one occasion where there was nothing whatever in the case to connect a specific defendant with having committed the crime other than an alleged squad room admission that he was the one who committed the crime, and I granted a certificate of reasonable doubt as to

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the defendant's guilt after conviction upon the ground that as a matter of law there is reasonable doubt where the evidence is no more than that; the Appellate Division upon appeal unanimously upheld the verdict. That came to my attention a few days ago. That application was made to have me join in and give approval upon an application for clemency by that defendant who is now serving his term.

Mr. Rosenthal: However, the People against Joyce, in the Court of Appeals, which is a capital case, where the rules probably are a little

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more stringently applied than they might be in a case where the sentence involved is that of only a few years of a man's life, where there was an absolute admission and where it subsequently came out that there was nothing corroborative of the admission, was reversed by the Court of Appeals and the indictment was subsequently dismissed. Here you have the word—

The Court: You and I know that there are many reversals by the learned Court of Appeals which go right to the roots of essential justice in the particular case involved and which are

not to be taken as a rigid guide in all other cases where the same point is presented purely as a matter of legal philosophy.

Mr. Rosenthal: Excepting that in this case, sir, you have the arrest of this man Magoon, his failure to disclose, although he says he made a number of statements, until a year after his arrest, this alleged episode or incident; and then the episode or incident which he re.:tes might mean anything, unless your Honor is going to
10619 permit the jury to speculate what the word "thing" means as related to Rosen, where there are episodes in this record which show a connection—an alleged connection, I should put it—insofar as other defendants are concerned, with Rosen as far back as 1932, as being the corroborative testimony which would warrant a jury in speculating the guilt of this defendant.

The Court: I have thought carefully on that point, in fact, I have thought a bit while lying awake nights during this trial. I am going to deny your motion.

10620 Mr. Rosenthal: And I am going to respectfully except.

The Court: All will remain seated while the defendants are remanded until tomorrow morning at ten o'clock.

Mr. Rosenthal: Judge, before the defendants leave, I want to put one other motion on the record.

The Court: I ? the defendants be seated. Let us have order.

Mr. Rosenthal: Throughout the trial I have renewed these motions made on behalf of the defendant Capone in line with the original motion

made prior to the commencement of the trial, for a severance, on the ground that the testimony adduced on this trial which does not affect him is of a nature which is prejudicial to his interest, and I now renew the motion and ask for the withdrawal of a juror and the declaration of a mistrial insofar as he is concerned on the ground that the state of the evidence is such it is impossible for him to procure on his own behalf a fair trial.

The Court: Denied.

10622

Mr. Rosenthal: I respectfully except. Thank you.

The Court: I will try to clarify the evidence so far as Capone is concerned to the utmost of my ability.

Mr. Rosenthal: I don't contend that your Honor is not going to be fair. I contend that the jurymen are men of limited intelligence, the same as all of us are, from various walks of life, and to ask men to be able to take out of their minds things which may prejudice them because of their happening is a herculean task, which I think should not be left to any twelve human beings.

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The Court: Judges have to do that. A Judge sits in many a case knowing in advance that a man is guilty, but he does not show it.

Mr. Rosenthal: The Judge is trained in the law, sir.

The Court: This is a blue ribbon jury and it looks like a pretty intelligent one.

Mr. Rosenthal: I agree with you, they look very intelligent, but they are still human beings and we all have prejudices and likes and dislikes.

Mr. Talley: I have another motion, if you will hear me.

10624 *Colloquy*

The Court: Yes.

Mr. Talley: I move for the declaration of a mistrial and the withdrawal of a juror upon the ground that the defendant Weiss has been so prejudiced that a fair and impartial trial is now impossible to him, by reason of the fact that the Assistant District Attorney, in opening this case, said he was going to prove that Rubin was shot at the direction and the instance of the defendant Weiss. Your Honor surely must recollect
10625 that, and no evidence in the case has been adduced to support that.

The Court: I don't, and if I may measure the jury's intelligence by my own, I assume the jury possibly falls in the same category, if that was in fact said. I don't think it is prejudicial at all.

Mr. Talley: How about the declaration by the District Attorney that the defendant Weiss is guilty of another attempted murder, another crime?

Mr. Turkus: Who said that?

Mr. Talley: There is not any evidence to that
10626 effect in this record.

The Court: I do not even remember it.

Mr. Talley: I remember it very distinctly. He said Rubin was shot at the direction and instance of the defendant Weiss.

The Court: Motion is denied.

Mr. Talley: Exception.

The Court: Is that all?

Mr. Talley: That is all.

The Court: The defendants will be remanded.

(Thereupon an adjournment was taken to November 26, 1941, at 10:00 A. M.)

Proceedings, November 26, 1941.

(Trial Resumed.)

The Court: Just a word of caution. Gentlemen, you will try to confine yourselves to the record—remember that at all times, and secondly, try to respect one another's rights to proceed without interruption.

Mr. Rosenthal: May we have an understanding that we reserve the right, so we are not considered dilatory, on anybody's summation, to the conclusion of the summation, to object to such portions as we may consider either inflammatory or not borne out by the evidence. 10628

The Court: I have only uttered a word of caution against squandering the right of interruption on matters that really do not need to be interrupted. If anything of sufficient importance arises, that really justifies an interruption of counsel, use discretion, but try to respect one another's rights, because no lawyer likes to be interrupted unless it is absolutely necessary. I think in any summation there are points of view in regard to evidence which we cannot agree on. The jury will have to figure that out. 10629

(Mr. Barshay then made his closing address to the jury in behalf of defendant Buchalter, as follows:)

With your Honor's permission, associate counsel, Mr. Turkus, Mr. Foreman, and gentlemen of the jury:

10630 You can rest assured there is one thing in this case that the prosecution and the defense agree upon. That is, that the case is over and all are glad of it. I know it has been a hard and long and arduous fight, and I am reminded of the king who sent for his philosopher one day and said in one sentence: "You let me know what answer I should give to any problem that arises," and the philosopher said, "This is my sentence--'And this, too, shall pass away.'" I know there
10631 were times when all of us thought this case would never end, but it has, and no one is gladder than I am.

There were a lot of unkind things said in this case. Well, maybe on the spur of the moment, gentlemen, things are said and things are done, but they really do not bear upon the issues in this case.

I want to thank you, each and everyone of you, for surrendering your ordinary pursuits of life and making sacrifices. Your duty was plain to you and your sacrifices were plain to you—just
10632 like the soldier who has to sacrifice his pursuit in life in order to serve his country. You had to do that when you were chosen as jurors in this case. We have faith in your intelligence, in your honesty, in your courage, and we still have faith that you will do your job as gentlemen of intellect, without fear, without favor, without prejudice, without bias, without sympathy to any side on this case. I have faith that you shall go into this laboratory like scientists and there search for the truth. And you shall search for the truth in accordance with the law as his Honor will give it to you, and in accordance with the

facts which you have heard and believe from the witness stand. We did not oppose your choice as special jurors because it was our position that we needed men of intellect, so we have faith in you as jurors and I think one may be confident that, no matter what verdict you will have rendered, it is because you believe you have done your duty in the light in which each and everyone of you thought.

Now, you know, in choosing you, we asked you to consider the evidence in the case with respect 10634
to each defendant separately. It is difficult to do that in a long and arduous trial, but somehow I am sure you will. I asked you, in choosing you, to be independent—each one to be independent of the other. That was not with the intent of getting a hung jury, don't let that be said. I asked you to reason with your fellow jurors and talk to them, not to be obstinate in any way, to give your viewpoint, to listen to your fellow jurors' viewpoints, and to then come to a reasonable, sensible conclusion based upon the believable evidence in this case. I did not want in advance anybody to give you the idea that all 10635
we sought here was for the jury to disagree. I did not want that at all, and I do not want it now.

I represent in this case only one defendant. I represent no group. I represent no combination. I represent no outside interests. I have no other client. I owe no duty to any single person outside of the defendant Buchalter. I represent him in no other matter but this one —in no other transaction but this one. I laid eyes upon him first when my associates in this case, the firm of Wegman and Climenko,

retained me to assist them in the trial of this case. That was in June of 1941. I never tried, gentlemen, to give you the impression throughout the entire case here that I represented any angel. Do not be mistaken about that. I will speak about it as I go along. But it was not very long after I had been in the case and after I had commenced my investigation, together with my associates, for whose work I am very thankful, that I realized I was not only in the case but
10637 I represented a cause. I wanted to feel sure that every man, regardless of his reputation and his past life, could come into this court and feel that the scales of justice were equally poised. Every man is entitled to a fair and impartial trial by a jury of his peers, be he Buchalter or any other person, be he one of bad reputation or good reputation, be he white or colored, be he rich or poor, be he Protestant or Catholic, or Hebrew, be he male or female. In this court room everyone is entitled to equal justice. When I said I did not represent an angel, I meant just
10638 this: I condemn the defendant Buchalter's past life with as great vehemence as I possess. I am not in sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid—because some of them hoped.

by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. I condemn every act of the defendant Buchalter's past life. His activities were in the Borough of Manhattan, but the diligent and energetic young Mr. Dewey had put finis for all time to those activities. I do not doubt that the defendant is where he belongs, but are we trying that issue? Are we trying him again? Are we trying his union activities? Are we trying the union? Are we 10640
trying the Weinsteins, or the Katzes, or the Raleighs, or the Fields? We are not. We came here to try but one issue, a simple issue—did he or did he not commit the crime charged against him in this indictment. And yet—and yet—this murder, which occurred in 1936, was presented here with a preface and a prologue that commenced in 1917—ten years before. By all the evidence in this case, the defendant Buchalter even came near the Amalgamated union. Oh, I remember Mr. Turkus picked up the indictment when choosing you and saying, "We are trying 10641
the defendant Buchalter for the killing of Rosen, no more and no less." Yes, he said that. But, gentlemen, the trial was not on very many days before I realized that, in my opinion, he really did not mean, because if we tried the Rosen case, the latest we should have started was in the period of 1932. But, no, we have 1917, the organization of the Amalgamated, its make-up, its officers. I objected strenuously, and on cross-examination, when I tried to show the other side of the picture, there was the objection, "I object, this has nothing to do with the Rosen kill-

ing." Do you remember that? Of course, it had nothing to do with the Rosen killing; it had nothing to do with it on direct, and it had nothing to do with it on cross. And if we had adhered to the issue of the Rosen killing here, this case would have been over within a period of two weeks. But we must have atmosphere in the case. Those things were presented to you because the District Attorney, in his mind, thought it would help him to sow a background of pas-
10643 sion, and hatred and prejudice, and it was planted from the very inception. Sure, this union was domineered by racketeers, but that is not the issue. You heard about 1917—how they got into the union—who controlled it—how they ran strikes—how they profited. We had a background, a background that gave you a general insight as to what goes on every single day in your lives. While you may have heard of it, still you paid no attention to it. This is the background from which the District Attorney hopes some juror in this case would draw a prejudice
10644 in the direction of the defendant. You see, he did not create those conditions—they were there long before he came on the scene. There was Abie Slabow, Johnny Spanish, Terry Burns, and a whole lot of guerrillas and gangsters and strong-arm men who were present long before Buchalter came on the scene. He did not create it, but I have no sympathy for him, I do not apologize for him, because from 1927 he came in and profited by it—he was just as bad. But that is not the issue here.

Immediately upon the trial of this case the defendant was referred to as "Lepke". Now,

I don't care, gentlemen, really what name you refer to him by—I don't care at all. My idea of the meaning of "Lepke" is that it is a Jewish name for Louis, but to the unknowing, the name "Lepke" is an evil connotation; and maybe to you gentlemen who do not know the meaning of the word, it has an evil connotation like those started during the last war, when instead of referring to the German they referred to him as a "Hun". Yet, they refer to Buchalter as "Lepke". If the District Attorney thought that 10646
that would not help him, he never would have referred to him as "Lepke". What if he is called "Lepke"? What has that got to do with his guilt or innocence in this case? If you want to call him "Lepke", go ahead and call him "Lepke". But draw no evil inference from the use of that name.

There was brought out in the opening of this case something to start you off with some inflammatory passion against the defendant—the shooting of Rubin. We objected to that. We are not on trial for that. But by the very open- 10647
ing you can see, gentlemen, that it has not even an application to the defendant Buchalter. This Rubin was shot—and I am not unsympathetic of his physical plight—somewhere in the County of New York where he was shot, there are men, honest men, who will do their duty at the proper time and see to it that those who are responsible for that act will be punished. At the head of the District Attorney's office in Bronx County there is a Mr. Foley, whose reputation is great. Let us not try his problem here—let us not do his work in this court—let that not stand in your

deliberations of the guilt or innocence of the defendant Buchalter here. He had nothing to do with—it is no part of this case with respect to him. I shall let other counsel make mention of that fact, if it has anything at all to do with the respective interests of their clients.

Oh, how simple this issue would have been had we stuck directly to the charge in the indictment, which was simply this: Buchalter, the Grand Jury accuse you of the shooting and
10649 killing of Rosen on September 13, 1936, by the means set forth in the indictment. The defendant said, "Not guilty", and when he said, "Not guilty," he meant he did not kill him—he had no reason to kill him—he did not participate in the killing—he got nobody else to do the killing—he was absolutely innocent of that charge. That is what the plea of "Not guilty" meant. It meant he denied each and every accusation set forth against him by the District Attorney. It meant that he had no motive to kill him, no reason to kill him. It meant that he denied
10650 every sentence, every accusation of Rubin. It meant he denied each and every allegation of Berger. It meant he denied each and every piece of testimony of Tannenbaum. It meant he denied he ever met Rosen at the Broadway Central Hotel in 1932. It meant he denied that there was any meeting on 19th Street where the "law was laid down" to Rosen. It meant that he denied that in the Raleigh office, in 1936, there was any talk with Rubin, with Tannenbaum present. It meant he denied he sent Mr. Rubin to get Mr. Berger. It meant he denied he went with Berger to get Weiss. It meant he de-

nied he had any conference with Weiss at any time or at any place with respect to the shooting of Rosen. It meant he denied he had any talk in the presence of Tannenbaum three or four days later when he patted Weiss on the back. It meant he denied he induced Rubin to flee from this crime. It meant all those things just as forcefully as if he took the stand and from his own lips uttered each and every one of these denials, and to those denials, I might add, strength. It said to him, as it says to every de- 10652
fendant who comes into this court, "You are presumed innocent of the charge and the burden is on the District Attorney to prove the charge, and it is his beyond a reasonable doubt, by competent and by believable evidence." The law says that, "You, Mr. District Attorney, must prove the charge beyond a reasonable doubt." That presumption of innocence is his now—it is evidence in his favor. It also meant, gentlemen, that there was no requirement for the defendant Buchalter to prove his innocence or to disprove a single one of those accusations, or to explain 10653
away any charge or any accusation offered from the witness stand against him. And his failure, and his neglect, or his refusal, be it in his judgment or that of his counsel, to take the stand and make an explanation, shall not be drawn as an inference or presumption against him. His Honor shall so charge you.

So we go into the case itself with these preliminary explanations. I say to you that this case became a cause with me after investigation when I realized that the entire case was built on a movable foundation—on a layer of quick-

sand—a foundation that could not be anchored. That it was framed by a revengeful Rubin, aided and abetted by a cornered Berger and a trapped Tannenbaum. Do not let it be said by the assistant in charge here that I make any accusations toward him or his office. I have no such charge to make. I have no quarrel with him about this case at all. I do not want him to say to you in summation that, "If you believe that O'Dwyer, or Klein, or Josephs, and all the rest
10655 of us worked honestly and diligently in this case to frame this man, you acquit him." I make no such charge against them or anyone of them, and I make no such inference or innuendo against them. My quarrel is with the "architect" in this case—a revengeful, spiteful, hateful Rubin. Now, you may say to yourselves, gentlemen, "Would the District Attorney fall for such things?" I don't know. A District Attorney presents such evidence as he has and is given to him. He must do that. If he does not do it, you have complaints to the Governor. It is his
10656 job to present what he gets and leave to you jurors to determine whether or not it is worthy of belief. He neither guarantees the truth of any statement offered here by any witness or the truth of any exhibit that he offers here. He makes no personal guarantee—neither is he allowed to do it, nor am I allowed to do it. I have no personal guarantee to make for any single fact in this case and neither has he. As I said, you might say, "Would he fall for such a story?" Well, suppose he did. That does not necessarily follow that you have to. Suppose he did believe them? That does not matter. His

belief nor my disbelief, nor my belief, or his disbelief, can invade the province of you gentlemen. It is for you to decide. I propound this theory, and I am hopeful that by giving you an interpretation of the evidence as I see it, you shall believe and give weight to my version of this story. I say to you, if the District Attorney in summation says, "Judge O'Dwyer has presented to you fifty-five witnesses and one hundred exhibits, to convince you beyond all reasonable doubt, and all doubt, that the defendant Buch- 10658
alter is guilty—" I say to you, gentlemen, that you say to yourselves that Judge O'Dwyer's integrity and reputation and honesty has nothing to do with this case. It is not in issue at all. He does not sign the back of this note and guarantee that anything that his assistant presented here is the truth. We must not consider in anywise the integrity of Judge O'Dwyer's office for one single second, lest you be throwing into the scales of justice the great weight of authority, dignity, honesty and energy that stands behind Judge O'Dwyer. That would not be a fair trial 10659
for the defendant. Such weight of testimony no defendant could overcome. And I dare say I do not yield in my admiration for the District Attorney of Brooklyn to anyone, not even to Mr. Turkus, because it has been my pleasure when he was a Judge to try cases before him; and it has also been my pleasure when he was a Judge to try cases before him when Mr. Turkus was my opponent—and he was a tough but fair fighting adversary—I say a foeman worthy of his steel. There is nothing personal here, it is not a battle of wits—not at all. He

represents his side and I represent mine. The law demands of him a fair presentation of the evidence, and the law demands of me the same. If at some time I should find reason in my summation to make criticism of something he did, it is perfectly logical, it is perfectly reasonable, and I assure you it is absolutely nothing of a personal nature, because when I want to talk to Mr. Turkus on a personal nature it will be outside of the court room, in plain, simple, under-
10661 standable language. That has nothing to do with the case.

I will show you that the District Attorney himself, quite unwillingly, and perhaps by force of the right of the defendant in this case, produced evidence on his case which showed that Buchalter is innocent of this crime. Well, it will take a little while as I analyze the evidence, step by step, to prove that point, but with great confidence do I say that.

Now, gentlemen, we will go directly, directly to the issue, as I see it, plainly and simply. We
10662 have to deal, before we start with the direct case, a little with the family—just a little bit. You see, the family must, of necessity, have a say in this case. There must be the identification of the body. There must be some little background. There must be something given to you which would lead you to understand why Rosen was killed. Now, it is not my job to prove that someone else did kill Rosen. It is not my job to prove to you who else could have done it. It is not my job to prove to you why should someone else do it. It is not my job to prove any of those things. It is not even my job

to prove that Buchalter did not do it. But I have undertaken it, and I have undertaken it from the evidence in this case. The background, as presented here by the family, is that Rosen was a truckman and he was in business. Once he was a truckdriver, then he went into business for himself. He went into business with a man named Kelly, and his business took him to small towns in Pennsylvania where work was being taken out of the City of New York. That was away back in 1931. Apparently, from the pic- 10664
ture painted here, he had no trucks—he had no employees—he had no money—but he had a burning desire to build a route through little towns in Pennsylvania. And so he went out there and visited chambers of commerce, and he hooked up with this Mr. Kelly, who is absent in this case. And presently we get the financial picture of himself and Kelly, himself and Kelly's partnership, long before the name of Lepke is even mentioned. When the partnership joined the New York and New Jersey Company in 1931, according to the agreement we cited then, in evidence before you, there is an acknowledgment 10665
by Rosen already of indebtedness to Kelly in the sum of $4,750. It is acknowledged right in this agreement, drawn before anybody ever dreamed of the fact that Rosen, or Buchalter, or any other such thing that was to take place in 1936. We have Sobler and Bluestein doing business under the New York and New Jersey Corporation in New Jersey, and in New York, Kelly and Rosen beginning to compete. Sobler and Bluestein knew Rosen, according to the evidence here. The competition, sometimes is not heavy and

sometimes it is—it was not then—and it was decided, according to the evidence here, that Sobler and Bluestein, of the New York and New Jersey, shall take in Kelly and Rosen, their competitors. This was in 1931. The agreement was reduced to writing. Kelly and Rosen were to contribute the sum of $1,000., to be payable in two instalments, $500. in one instalment and $500. in another. Kelly, apparently, had a garage. Kelly agreed to contribute his trucks
10667 into this new set-up, and he did. Sobler and Bluestein contributed $1,500.—that is the testimony—and so this company starts up—Sobler's trucks, Kelly's trucks, and Rosen's efforts to build up a business in Pennsylvania. Before the stoppage—this is 1931, mind you. These agreements were not drawn with the view that Rosen is going to be killed in 1936. They were not drawn with the view that there shall be a stoppage in 1932. So we can take into consideration the picture that existed before the stoppage, the financial condition of Rosen in 1931 and in the early part of 1932, before the stoppage. You
10668 have heard here testimony that each was to draw $75. a week, and that after the first month the money was gone. Do you think, if this was a going concern, gentlemen, a progressive concern, a successful concern, that Kelly would not have had his rent paid for the garage that he contributed to this partnership? Do you think he would not have had the money to put in as part of the instalment he agreed to pay? Do you think he would have filed a petition in insolvency in 1932, if that was a good paying business? In disgust, Kelly files a petition, and he sets forth that his wages were not paid, his

rent was not paid, he wants to get out. And he does get out. By agreement drawn in 1932—the 27th day of April, 1932—this, more eloquently than any piece of evidence in this case, should prove to you that there is not any proof in the charge here that Buchalter forced Rosen out of a going business. It was not a going business in the sense it was going up, but it was a going business in the sense it was going, going, going down. It was a dead and dying business. It did not give him a livelihood except 10670
for the first month, and that was not earned—it was drawn from the contributed capital. And you may study this document and its contents to prove to yourselves how badly off this organization was when Kelly was through. What did he get out of it when he got out? What did he get out of this going concern in April of 1932? $100. in cash—not a penny more—two notes, $304. being the total of them, sub-divided in two instalments, one to be paid in sixty days and the other in ninety days. That is the kind of a progressive business this was. And in the agreement there is a provision—and this illus- 10671
trates the faith that Kelly had in the financial stability of this concern—that for $304. he was willing to take $250. in cash rather than to wait those sixty or ninety days. Kelly's judgment was good, because those notes were protested. He would rather have the $250. in cash than wait sixty or ninety days. And this agreement further shows that the money that Rosen owed Kelly, the $4,750., apparently an obligation that accrued to Kelly during his own relationship with Rosen, was cancelled. It is right here in this agreement.

A man does not throw away $4,750. if there is any thought or idea—if there is only a chance in a million—to get it. A man sues for the money, a man duns for the money, a man gets a judgment for the money—men are examined in supplementary proceedings when a money judgment is obtained. A judgment is good for ten years, and, if docketed, is good for another ten years. But Mr Kelly, seeing the set-up of Rosen and his partners then, especially Rosen, cancelled
10673 this indebtedness of $4,750. So, gentlemen, Kelly is out of the business. "Good riddance," he probably said to himself. And Rosen, and Sobler, and Bluestein, continue the New York and New Jersey.

Well, let us see the picture. When Kelly goes the partners' drawings are reduced. You might think business would start on the up, but it does not. Garage bills are not paid, finance companies seize the trucks, there is proof here. Bank balances? Bank balances for that concern? Dividends for that concern? Gentlemen, this
10674 was one of the most thoroughly investigated cases on the part of the District Attorney's office I have ever seen. Do you think that anywhere in this State, or in New Jersey, or in Pennsylvania, or in Texas, there was a bank balance which would show a progressive nature and financial stability of the New York and New Jersey, that Mr. Turkus would not have had it here? Oh, he would—he would. He had Dun and Bradstreet's report of the Raleigh—he had the financial set-up of the Raleigh. It is a compliment to the efficiency of the District Attorney's office that they neglect nothing in unearthing

evidence, and if they had it in this case it would have been here to contradict the contention that the business of the New York and the New Jersey was financially unstable long before the stoppage. You might say, "Well, why didn't you bring it?" Again, I say to you, that would be shifting the burden of the District Attorney's. I need not bring testimony—I need not explain anything or bring any exhibit in here. But you can draw the rightful inference that, if there was such a bank balance, or bank statement, or any financial statement, to disprove our contention, you would have had it here. The fact you did not means it adds to the strength of our argument. But Sobler's testimony on that point was the Gospel truth. The company was absolutely down and out. 10676

I will illustrate further as I proceed on that point. When Rosen got out of this concern and went to work for the Garfield, at the conclusion of the stoppage, remember, he had in this corporation a fifty per cent interest. Well, I should not say a fifty per cent interest, but fifty shares of stock. And Kelly, having sold out, he had a one-third interest. That is more accurate. He had fifty shares. He goes to work for the Garfield. There is back pay due him from the New York and New Jersey. If that company, as the District Attorney would have you believe, was a going concern and paid a good living for everyone, do you think, gentlemen, that Rosen would not have insisted on the value of the shares of stock in that company by claim or by law suit? Is there any proof here that after Rosen disassociated himself from this concern he made any demand upon the New York and New Jersey 10677

for the value of his shares of stock? Was there a law suit started? If there was, if he deemed it of value, even to the extent of $100., Rosen, who was financially down and out, would have demanded his share, or the value of it, or his back wages. Again, the dockets of this county, or any county, or any State, would have been searched. The family would have told you that Rosen made some claim for the fifty shares of stock. But he did not, and they did not give
10679 any such evidence because there is no such evidence. Rosen, in his own mind deemed it absolutely valueless and worthless, because this agreement recites that any retiring partner has the right to demand the book value of the shares of stock he holds, or else he can consent to sell it in the outside market. Did he do that? I will tell you why he did not do it. He thanked God to get a job at $100. a week net as distinguished from his sad plight when he was in this company, drawing only $75. the first month and thereafter drawing whatever he could get. It
10680 was suggested here, "How could he live if he did not make any money?" He can. It is not my province to prove to you how people live. We know people who don't work. We know people who manage unsuccessful businesses, and yet they live. I can only say that people can borrow, people have friends, people can pawn, people can hock, people can sell jewelry. I don't know how people live, and I don't have to answer that. "Living" is a relative term. Some people live one way, some people live another way. That is not my problem, gentlemen. How do you live? I don't know. For the purposes of

this case, and I do not say it unsympathetically —for the purpose of this case it does not seem to matter at all. It is strange, isn't it, that the son and the daughter, who say they worked there, did not know a single thing about the financial set-up of the New York and New Jersey. They did not know about the office, the unpaid bills, the head checks, the employees; they did not know the salaries of the respective people. 10681

Let us go into it in more detail with respect to each witness— Let us analyze this—because from the family's point of view, and how Rubin got them to play a part in this case, we are confronted very, very fortunately with the truth, no matter how you wish to conceal it and disguise it and hide it. Somehow or other it gets out, even from the State, by the District Attorney. Their own inconsistency proves the falsity of some of the statements made by the family. The first one offered—Mrs. Rosen—let us see whether or not she colors the testimony and let us see whether or not she starts off with the thought, "I will say something here, I will say something here," from the very beginning, "which shall leave in the minds of the jurors as the case goes on a little dart of poison against Buchalter." You see, Mrs. Rosen—and again do not misunderstand me—I have the greatest sympathy in the world for one who has lost a dear one—the killing of Rosen was barbaric—it was unwarranted, it was unjust—there is no doubt about that. But you don't punish anybody because of that. Certainly, how easy it is for the District Attorney to say, "Did they give Rosen a fair trial—did he have twelve jurors—did he 10682 10683

have a court—did he have a reasonable doubt—did he have two or three or ten weeks within which to try his case?" Well, such an argument is pleaded because the barbarians who slew Rosen did it in the manner in which they did—but that does not mean that we have to reach the same level. This court is not a court of vengeance—it is not run for anybody's benefit. We have got to proceed according to law. And when I refer to Mrs. Rosen's testimony, I must analyze it
10685 from the point of view of whether or not she has told the truth in this case, irrespective of my sympathy for her as the widow of the man who was the victim in this case.

First, what is Mrs. Rosen's status in this case? Her residence is all of a sudden at the Half Moon Hotel. I shall never forget the Half Moon Hotel. The last three months she says she has been residing at the State's expense at the Half Moon Hotel. I do not criticize the District Attorney for handling his witnesses. He may handle them any way he wishes. For my part and for your part, if the taxpayers want to pay a
10686 Waldorf bill, she could live at the Waldorf. But we must consider the treatment of witnesses in the light of whether or not such treatment induces people to falsify in this court. We must not swallow every word they say. We must consider whether or not that treatment has induced, or is conducive to the witness, first, to associate with others, and, secondly, whether or not it induces her to tell this story. Why is she living at the Half Moon Hotel? It may be said, if it were assumed she were to be intimidated, she would be threatened, she would be injured. But you cannot speculate as to that, gentlemen. If

it was true that she was intimidated and threatened, you would have the evidence right here.

Mr. Turkus: I must object; the intimidation of witnesses cannot be in the case unless it can be attributed specifically to the defendants.

Mr. Barshay: We know that.

The Court: Gentlemen of the jury, in your absence the Court struck out, or granted the motion to strike out the testimony of Mrs. Rosen on the alleged identification by her of Weiss as the man who came in and bought cigarettes. That identification was stricken out, so there need be no argument on that. Likewise, there has been stricken out upon motion such part of the testimony of the son and the daughter of the deceased Rosen as had to do with the alleged financial condition of the business, this because, obviously, they had no real knowledge on that point, and you are not permitted to guess, to take their guess on it. So that need not be argued, either. 10688

Mr. Barshay: It is plain to the Court, your Honor, I am not arguing about any identification. 10689

The Court: Gentlemen, it would confuse you, and I don't want to confuse you.

Mr. Barshay: I was not going into that.

Mr. Barshay (Continuing): I am not concerned with any identification, gentlemen, by Mrs. Rosen of anyone in this—

The Court: That is out of it. Her identification was no more than no identification at all.

Mr. Barshay (Continuing): I am not concerned with that at all, gentlemen, and I am sure I have not proven the instability or the

financial instability of the New York and New Jersey through any testimony of young Rosen or the daughter. But on the question of whether or not Mrs. Rosen's being confined at this hotel, at the Half Moon Hotel, I have a right to comment. I say Mr. Turkus is right. It cannot be shown unless it was attributed to the defendant or his authorized agent. But even at that, there is not a scintilla of evidence in this case—you see, all the time from 1936 until three months
10691 ago, we have no proof she lived at any hotel under guard, but I am worried about her living at that hotel for the reason of possible association with the Rubens or with the Tannenbaums and with the other witnesses who made the Half Moon Hotel their living quarters. Ah, you may say to this, "But they are under guard, under constant supervision, twenty-four hours a day, no communications, detectives were there." Well, that theory has gone out of this case forever. Another man shall speak of that, but the best proof of it is one that I might mention, that Bernstein was forced by Mr. Rosenthal to
10692 admit that he had an opportunity to write or mail six letters. You will be illuminated by that able gentleman on that situation. That is why I spoke about Mrs. Rosen's presence at the Half Moon Hotel, sojourning in the summer home of the "architect", Mr. Rubin, who was there at the same time.

And what does she say that is material with respect to Buchalter in this case? She says she went to Cooper—she went to Cooper with Rubin and she said to Cooper, "My husband is an honest man, worked hard all his life, you dis-

charged him without any reason whatever." Gentlemen, she had a right to say that. She had a right to uphold the honor and integrity of her husband. She had a right to complain and seek redress from Cooper. She had a right to know why he fired him. I don't find any fault with that. But what I do definitely find fault with, as you must, is the truth of her testimony when she gives an answer in this court which, by the District Attorney's own proof, is a damnable lie. She said that Cooper said to her, "Don't blame me, Mrs. Rosen, it is not my fault, go and see Lepke." That is the fault I find with her testimony. She came here with a deliberate lie on her lips, not realizing, not realizing that the truth would come out through a co-witness of hers, because no matter how hard you try, no matter how perfect everything is of importance in this case, no matter how good Rubin is at manufacturing a story in 1940, he could not fit the characters in absolutely perfect. Rubin told you— Rubin told you that he took Mrs. Rosen to Mr. Cooper. And Rubin told you what Cooper said, "I don't want him back, he bit the hand that fed him." Rubin told you—the District Attorney's witness told you, that it was Buchalter that got him the job—it was Buchalter who went time and again and pleaded with Mr. Cooper—dozens of times —to take Rosen, and after he learned of his discharge to take Rosen back, but Cooper was adamant, he did not want to do it for reasons of his own; he did not want to take Rosen back. The truth is that Buchalter tried with might and main— I don't care what reason is ascribed for his trying, but I do know it cannot be to

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appease Rosen, because it was 1933, and there was no Dewey on the horizon as special prosecutor in 1933. He did not come into the picture until June of 1935, or July of 1935. So, you see, gentlemen, she comes here to stick a poisonous dart into the defendant Buchalter. She tried with might and main to benefit her husband and she says, "Blame Lepke, it is not my fault." Cooper said no such thing—no such thing. Every chance that Buchalter had to do something for Rosen in getting him employment, Rubin tells you
10697 Buchalter did, and when you catch a person in so vital a lie, it finally gets out and goes to the very credibility of this person's testimony, plus what the Court said, plus what I proved, and you have a right to ask is the rest of her testimony in this case of any value. She said her husband showed her $200. and that he went to Reading for a week-end. Some innocent things are very easy to interpret in a criminal way. Fathers do go to visit their sons out of town for a week-end—it can happen—it has happened —it does happen, and it is going to happen in
10698 every family. So they see an opportunity to make the visit to the son in Reading, Pennsylvania an element of a threat to flee and stay out of town, "until we want you to come back."

Let us see if that is an honest interpretation of that visit by Rosen to his son. If Dewey were looking for Rosen, and there is no proof he was—but let us say if he was—the easiest place in the world to look for a man is, first, find his family, and then through the family trace him. Any intelligent police officer knows when he is looking for "A", he goes to the wife.

or daughter, or son, and through them he tries to find where the missing individual is. What was the use of his going to Reading to hide?

Mr. Turkus: Mr. Barshay is talking about something not in the evidence.

Mr. Barshay: I said, "If he was looking for Rosen." I did not say he was. I will argue from the two points.

The Court: That does not call for interruption. Each side speaks for the side it represents. (Addressing the jury:) You heard the 10700
evidence and you know what to take and what not to take. Unless there is a wide departure from the evidence, the Court will not interrupt.

Mr. Barshay (Continuing): Or, if you take it Mr. Turkus' way—if he wanted Rosen to stay out of town until he is told to come back—and, mind you, this is in 1936, the Dewey situation going great guns, he gets $200. to stay away until he gets told to come back. How long can a man stay away with $200.? Is there any other arrangement made for the subsequent payment of money? Is there any deal made, "You go 10701
here, I will send you money every week," as in the instance of Rubin when he was fleeing, I say, from Mr. Dewey's office. If you are going to have a man run away and stay out of town, you are going to make some arrangements, aren't you? You are going to say, "Now, here, you got there, from Orlofsky you get $50. every week, and from us you will get $25., I will take care of your wife, I will take care of your family." It was useless to have Rosen go away under the conditions, because if Rosen went away forever, it would not make any difference. There had

to be one more person taken care of in this picture to give Mr. Buchalter the complete protection which the District Attorney wants you to feel he sought from Dewey. You must not forget that at the so-called conference on 19th Street, when Gurrah said, "Go here, go there, don't go here, don't go there," it was not only Rosen that was present, but his daughter, Miss Rosen. If Rosen never said a word, she could have, she could have explained to the Grand
10703 Jury, or to the police, or to the District Attorney, all that happened in that room. She was just as important and vital a witness as anyone in the room who wanted to testify against the defendant Buchalter.

But, now, let us go back to Mrs. Rosen. She does admit, she does admit after much pressure that her husband did have some heart condition, or a complaint, I should say, about his heart condition. So, gentlemen, she, the first witness in this long drawn out case, starts you jurors off with prejudice, that in 1932 Buchalter was re-
10704 sponsible for the firing of her husband. Off the stand she goes, but sitting throughout the trial for fear that the poison, the talk, the thought she expressed was sinking, sinking constantly into the minds of the jury. And you cannot have any love under those conditions for a defendant. It is natural we all have prejudice, and she came here digging that prejudice deeper, deeper and deeper into your hearts. I don't know if such a thing can be disproved, even twenty days later, or four weeks or five weeks later. You have it now, gentlemen, with respect to Buchalter, that Mrs. Rosen told an absolute

and complete lie, proven not by me, but by the District Attorney himself.

So we go quickly to young Rosen. To judge whether or not a person tells the truth, how are we going to judge? Well, we must take next into consideration—first, what would be the normal reaction of a family whose father has just been the victim of a brutal shooting? As you know any family, and as I know any family, and I say it fairly and respectfully, they are incensed, they are vengeful, they go to the authori- 10706
ties, the police, the District Attorney, and to the Governor, if necessary, and they want to bring to justice those whom they think are responsible for their plight. That is normal. They don't sit back calmly and coolly and say to the assistant in charge or to the detective in charge, "Ask me questions and I can give you answers." They tell the authorities every single thing that occurred that may give the authorities some light, some light, in order to bring to justice the perpetrators of this crime. Well, the authorities themselves in those days, in 1936, were 10707
stumped. What is my authority for that statement? Mr. Turkus is my authority for the statement. This is what he said in his opening: "The murder was committed; the killers fled from the scene in a stolen car; they abandoned the car at a railroad bridge, and escaped without identification." No clues; the authorities have had no human being who could identify any one of the participants in the commission of that crime. And you cannot manufacture witnesses whether you are a District Attorney under the old administration or under the new adminis-

tration. Mr. Turkus said, "Without identification," and he went through this case with a fine-tooth comb, and I dare say he questioned every human being connected with this case, but still it remains, "They escaped without identification." And so the authorities, then, have no aid from any human being to point out who the killers were. He goes further. He gets not a single fingerprint clue that was found on the murder car. In other words, there wasn't any
10709 evidence through which they could trace, or to show a fingerprint clue, through which they could trace the participants in this murder. Only one of the guns was found in the killing, but had the serial numbers obliterated, blocking trace of its sale or ownership. I say he speaks with authority, gentlemen, because everything he said must have been done by the police in order to find the perpetrators of this crime, and he gives final approval to what I say here in this sentence—"In short, the killers had made a clean getaway and left no clues in their wake." And
10710 so, no matter who the District Attorney was, no matter who the Police Commissioner or his men were, on Mr. Turkus' own statement, the perpetrators of this crime left not only a shred of evidence through which they could be gotten, but you do not abandon the case, gentlemen, because of even that. You cannot say, "That is the end of the case, there are no fingerprints or clues." There are other ways. What are the other ways? There is always a background—the family, the intimates, the business associates. And so I take it, in the normal reaction of the family, they would have told anything and every-

thing connected with the father's business or his personal or private life to draw in people who might be involved in this case, in the hope that someone would spill the beans, and then maybe the confession of a person could be had to prove, substantially, that maybe someone was threatening. I gather that was done, because the family was sent for.

So, young Rosen testified in the Grand Jury, and while I asked for the Grand Jury minutes, the Court looked at them, in accordace with the 10712
law, and said nothing was asked in it, and, consequently, nothing was answered. I am talking about the 1936 Grand Jury when the investigation was going on. Nothing asked and nothing answered in the Grand Jury. Do you think that if a loved one was murdered the way Rosen was that you would have to wait to be asked to volunteer such a vital piece of information as the pantomime that went on in the Broadway Central, on the basis that maybe Lepke was connected with this case? You would give it to a lawyer, you would give it to a cop, to a District Attorney, a policeman, anybody who would 10713
question you and who would say in going about the investigation, "Give me what happened in 1931 and in 1932, and what happened in 1933, 1934 or 1935." Was this done? Were questions asked and answers made? You could not keep a son quiet nohow. But he did not say a word. He did not volunteer, I should say, a single word about this Broadway Central Hotel, this pantomime that he saw through the door from fifteen to twenty feet away.

Now, think of the inconsistencies in his story. He remembers now, in 1941, or in 1940, some-

thing which he failed to state in the Grand Jury in 1936 about the pantomime in the Broadway Central Hotel. I don't understand it. Maybe you do. Ask yourselves this question— In one breath they try to paint Buchalter as a man whose word was law in the underworld when connected with unions, and that by one snap of the finger, or the batting of an eye-lash, he could have the Tannenbaums and the Bergers and people of that kind do his bidding. In the
10715 next breath they want you to believe, with Mr. Maguire's talk, the threat of intimidation would be undertaken personally by the so-called king of local racketeers—that he would attend to it personally. Well, if he attended to it personally he would not have done it at one of the many offices he is alleged to have had, but he would do it in the public lobby of a public hotel, when everybody was looking on. They were in there forty minutes—I take it they were in a room, if they were there. But there is no register shown here that there was any such meeting. There was, with Rubin—the All Saints Hotel and
10716 the Shelton Hotel—they can get everything that suits them—that is all right—but Mr. Lepke, Mr. Buchalter could be pointed out standing in the lobby surrounding himself with Rosen, moving forwards and backwards, without anyone knowing what went on. Nobody invited him there, and they have not told you what went on. It has nothing to do with the case, gentlemen. I think the Court put it very well when it said, "The jury cannot be permitted to conjecture about what was said—about the alleged pantomime—it has to depend upon evidence." That is there

for an extra arrow to thrust the poison dart into the heart of the defendant Buchalter. That is all it is.

But the thing that interested me more about the Rosen testimony was really something that had no bearing upon the main issue in this case. That gives me a chance to comment on the question of whether or not it is really intended to present this case in its true light. The very last question asked of Rosen by Mr. Turkus was, "Mr. Rosen, tell me, did anybody in this court room visit you in 1941?" Mr. Rosen said, "Yes, those men over there," and he pointed to the venerable James I. Cuff and myself. Well, there are a lot of people who have the idea that a defendant's lawyer has no right whatever—that we have no right whatever to investigate cases—that we have no right to interview witnesses. And if people hear of a lawyer for a defendant wanting to see a witness for the People, for the prosecution, why that lawyer isn't any good—he is there for an illegal purpose—he is there, perhaps, to suborn perjury. But they do not know the ethics of the profession. Do you remember the Judge sustained me when I read to you each and every word of Section 39 of the Code of Ethics of the Bar Association and of the American Bar? Don't you recall that? Why should Mr. Turkus have done that? Do you think that helped him in the case? He did it because he thought it would leave in your mind a thought that the defense was up to something crooked. I would not be half a lawyer if I did not try to see the witnesses in this case—and, if the cops did not bar me at the Half Moon, I

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would go to Reles, or Bernstein, or Tannenbaum, or Rubin, or Berger, I would go anywhere, even into the association's office, because under the law I have the right to do so. I have not the power to subpoena a man and compel him to come to my office, and the District Attorney has not the power to subpoena a man to come to his office. But the people do not know that, so the District Attorney sends out a detective, who puts his hand on your shoulder, and says, "You come
10721 to the District Attorney's office." The only power he has is to subpoena before the Grand Jury. But the man in the street does not know that. So he brings them there—he brings a man from his business, from his house, from any place. That is because you don't know your rights, but it happened to be that Jim Cuff and I knew about it, and if there was anything surreptitious about our visit, you would have heard it, and then you could attribute to the defendant that, being his lawyer, my acts could be attributed to him. But I did not like it. I was astonished and surprised. It was the first un-
10722 pleasantness I had with my young adversary in all the years he and I fought each other when I was an assistant prosecutor.

(A ten minute recess was taken at this point, at the request of Mr. Barshay, the jury being admonished as to their demeanor during recess.)

(After a short recess the jury returned to the court room and the summation was resumed.)

Mr. Barshay (Continuing): Again, gentlemen, we go back to the Rosen family, and we

take the last of the family, Mrs. Greenspan, and we analyze her testimony. Briefly, I must repeat, I take it that she, too, at the time this happened in 1936, was of a vindictive mind. She had a right to be. Her father was killed. She had a right to, and judging from her attitude on the stand she illustrated she was vindictive. She had a right to be, and she was vindictive. She is the type of an individual who would rip up the Police Department, she would rip the District Attorney's office apart, if they 10724
did not do everything possible to bring the perpetrators of this crime to justice. And, sure, she was right, too. And, feeling that way, she, too, would have then told the authorities everything that helped in view of the fact that no identification and no clue of any kind was left. She, too, would have told everything she knew in order to enlighten the authorities to a successful investigation of this case.

Now, we asked the aid of the Court for her prepared statement to Mr. McCarthy. You would think that in that statement to Mr. McCarthy she would have said something about a 10725
meeting in 1932, which in this case is the very basis of a motive to kill Rosen—the threat to Mr. Rosen to put him out of business and the threat of Rosen to tell Dewey—it was so vital, it was so important. She was present—she was the only member of the family present in 1936 to hear everything on that proposition. Again, the Court said, substantially, "I have examined the statement and I find that nothing is in it—nothing was asked and nothing was answered." And, again, I repeat to you, how could McCarthy, or any human being say to her investi-

gating this case, "What happened in 1932?" What would prompt that question? Mind you, this is the same Mr. McCarthy whom Rubin described as the person who was going around, according to Buchalter, "Yelling his head off, and saying, 'I am going to make the biggest collar of my life.'" It would have been— "I am going to catch big fish—I am going to catch Lepke and Gurrah—" It would have been. He was ambitious like every young assistant district
10727 attorney. He wanted his reputation enhanced. He is going to catch Lepke and Gurrah. Rubin would have you believe that statement was made to him by Buchalter—that it scared Buchalter to the point where he said, "You, Rubin, get out of town." That is how much they feared him, according to the record here. We can go by no other testimony than the record here. But she had to wait to be asked about the 1932 meeting. She did not recall exactly when it happened—1931, she said—the spring of 1932—the fall of 1932, and she described it at the place of some coat company or canvas company,
10728 subsequently better identified by Mr. Rubin as the Perfection Coat Company owned by Wiener.

Well, I said to you that Rubin was planning this case and avenging himself on the defendant Buchalter. He was shot in the head. He waited his time. He blamed it, unjustifiably, I say, on the defendant Buchalter, and he was picking his cast. It was a cast hard to choose, and it took him a long time to choose, but one thing is certain—he anticipated very little difficulty with the Rosen family. But prior inconsistent statements made in court might be the "bone" in his throat, and I dare say in this instance, they

were. You see, he had no access to the testimony of the Rosen family away back in 1936. He did not know that she never volunteered a single word about this meeting in 1932, so he said, "Who was it, Gurrah?" Do you think I would let Buchalter call Gurrah as a witness for him? He is alive, but Danny Fields, who was there, is dead. But, Rubin, the paragon of virtue, we will talk about him later.

Now, the Rosen family—the jury will be sympathetic—they will believe her, she is the daughter of the victim. The prior inconsistent statement, for it is inconsistent, and I say it is inconsistent because she would have told it if it were true—but let us go further along that line. You have had corroboration on lots of things in this case. If a man finds a gun, they have a picture of the spot where the gun was found. If a man describes a garage, they have a picture of the garage where the car was stolen from. If a man has a car stolen from the street, they have a picture of that—a fine, thoroughly investigated case. But where is there someone from this coat company—this Wiener from the Perfection, or whatever they call it, on 19th Street or 17th Street, whatever the address is—there is no proof that he is dead. There is no one in this court room to prove to you that Lepke had a right to use that office. There is no Wiener. I know, he may say, "You could have called him, he was just as available to you." Well, he was just as available to him. Then, again, you may answer, "If there is a law that the burden is with him," you jurors are forced to enforce that law. I need not call any Wiener, or anybody else. I need not disprove anything in this case,

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but you have the right to infer, if there was a meeting of that kind, there would be a Wiener, or some other person connected with that office to give independent proof of the existence of such a meeting. I say she has a right to be vindictive, yes, but we must judge her testimony if her vindictiveness induced her to utter falsehoods from this witness stand. Is she vindictive, is she afar from the truth in this case? I shall illustrate to you. But one more word about that
10733 meeting. Picture again that meeting. Rosen is sent for, and Gurrah points to this customer and to that customer, to this one and to that one—I take it, it is about the time of the stoppage, because Rubin, who goes from the very foundation of this case, ascribes no other reason for Rosen being sent for other than the stoppage. The stoppage, he says, took place in August, 1932. Well, can a person be mistaken about time? She says September—she says this and that date—she says her father worked three months after this meeting in New Jersey, when the proof is absolute that during the stoppage,
10734 or immediately thereafter, Rubin says that he, Rosen, went to work for the Garfield. So, it could not be that he was in business three months—he could not be in business two days after that meeting, or at most a week. He could not be in business and work for the Garfield at the same time. He was there, she said, twenty minutes. Again, I say, either they paint Lepke as the damndest fool in the world, or they paint him as one of the smartest racketeers in the world—I don't know. If he is the damndest fool in the world, that is one thing, and it is inconsistent with their theory that he became the

kingpin in the so-called crime center of the flour industry and all the rackets of which he is accused. Do you think he would, if he was violating any law, or making threats, or uttering intimidations, or forcing people out of business, he would let an additional witness, a daughter of Mr. Rosen, be present? Nobody on the part of the defendant in the group of men there asked her to leave. Nobody. Rubin said so—He said so— The only one that asked her to leave was her own father, which indicates to 10736
you, gentlemen, that there was no desire on the part of the defendant or his associates there to get rid of her and to obviate a witness being in the room. It indicates he did not care whether she heard all the words, or a single word, or anything he said. He did not look for witnesses, if he is such a thief and racketeer. Assuming he could not delegate this part of the business to Rosen, and she describes that entirely different from Rubin. Rubin was there all the time. She said that Gurrah said, "You cannot go here, you cannot go there." He did not speak with excitement and threats. As a matter of fact, 10737
Rubin said that Buchalter said, "You have a lot of business, Rosen, don't kid me, but if you are in any trouble, you come to us and we will help you." That is what the record says. She says her father got white with excitement—that he paced up and down, and that he defied Mr. Lepke, and Mr. Gurrah, and Mr. Rubin, and Mr. Danny Fields, and he said, "Nobody will take what I have in Pennsylvania." What did he have in Pennsylvania? What did he have that anybody could take? Rubin said, "One customer." My witness, Sobler, said, "Four or

five customers." Whether he had four, or five, or ten, or twenty customers, the fact is that financially it was a complete and total loss. But she is in this room—nobody but her father asked her to leave.

Gentlemen, by her own testimony she is not called by the District Attorney's office until 1941. She says when she took the stand that she first communicated with the District Attorney's office a few months ago. What does that
10739 mean in plain language, when she says she was not sent for until a few months ago? I will tell you what it means—it is most significant in this case. Lepke was indicted in 1940. Rubin saw McDermott, O'Dwyer, and Turkus, and Hefferman, and Klein, and Josephs, around that time. If Rubin told, even in 1940, about this meeting, even in 1940, mind you, when he was no longer afraid of anybody, about this meeting in 1932 when Sylvia was present, do you think this young, efficient, thoroughly competent, assistant district attorney, or Judge O'Dwyer, or Captain Bals, or his staff, would not have sent forthwith,
10740 forthwith, for the daughter of the deceased? Oh, yes, they would. Do you think they would allow all these months from 1940 to pass without sending for Sylvia Greenspan to corroborate Rubin on a vital and important part of this case—the basic motive in this case? They would have. But Rubin did not mention it— Rubin, the planner and schemer, the man who resides at the Half Moon Hotel, it takes him a long time to pick his cast. Berger, they did not "case" until June 5, 1941. Berger, whom he says was in it in 1936, was not arrested, charged, or questioned in this case until June 5, 1941. It takes

him a long time to pick this cast. Rubin says, "Maybe I would not be believed by a jury." Rubin is in the Half Moon Hotel and Mrs. Rosen is in the Half Moon Hotel, and young Mrs. Greenspan visited her mother—maybe they did not talk to each other, but the mere sight of young Mrs. Greenspan by Rubin would give him a thought. "I got it, I got it, I will have no trouble with his daughter to talk about the meeting in 1932." That is how she comes into this case. She is a witness of the 1941 vintage, 10742
and for no other reason. Her attitude—listen to what she says, when asked, "Did Buchalter get a job for your father with the Garfield?", and her answer, "I don't believe it." She doesn't believe it, but isn't it true, gentlemen? You see how much she knows about this. She did not even know that Sobler was a partner in this business. On direct examination they said there were three partners, Kelly, Bluestein and her dad. On cross-examination she was prodded and prodded, and finally the name of Sobler was suggested to her, and then she says, "I think he was a partner." That is how much she re- 10743
members of these by-gone days. "Did Larry Cooper fire your father in 1936, or did he quit voluntarily?", and the answer was plain, she said, "He did not quit voluntarily, I don't believe that."

So I say she has a right to be vindictive, but you have a right, too, to reject her testimony if you find that her vindictiveness in this case induced her to swear to untruths. And that rule applies to her even if she is the daughter of a man who was brutally murdered, Mr. Rosen.

Now, what happened in this room. I am going

to give the District Attorney the best of it. Assuming that an argument took place—and I do not concede it, gentlemen, but I do want to make my point clear, so that for the sake of agrument—I will concede only for the sake of argument that this meeting took place in 1932 in Wiener's—I hope you, gentlemen, will not mistake the fact that I concede it for any other purpose but for the sake of argument. What did Lepke have to fear that Mr. Rosen
10745 could tell to Dewey? The Court said we should be bound by the record in this case. Buchalter is charged with forcing Rosen out of business; that there in the room the fact was accomplished — the basis for it was accomplished—the starting point to force Rosen out of business was there. I searched the Penal Law, and I am not an authority on the law, but I have had some experience—I have instructed law at the Police Academy, the same as Mr. Klein is doing now, for several years. I had some experience as an Asistant District Attorney and as a lawyer. I
10746 wanted to know what is it that Mr. Dewey could prosecute Buchalter for in forcing Rosen out of business, assuming it were true. What crime was it? I searched diligently—maybe I am wrong—I am going to ask the Court at the proper time either to corroborate me by charging the jury on this point, or he may refuse to do that, I don't know, but I hope I will be allowed to make my point clear by way of argument because it is based upon this record, the ordinary inferences from this record. I found 530 of the Penal Law, which is called "Coercion". Briefly and substantially, it says, "A person who with a view

to compel another person to do or abstain from doing an act which that other person has a legal right to do, or abstain from doing, wrongfully or unlawfully uses or attempts intimidation on such person, by threat, or force, is guilty—" of what? Of a misdemeanor. In other words, Rosen, according to this section, like any other person, had a right to be in his business if it was the worst business in the world, even if it did not pay five cents in wages to him, he had a right to be in business. I don't deny that. A 10748
man can own a candy store or a big business—he can lose his shirt—but he has a right under the law to maintain himself there the best he can, and no Buchalter, or anybody else, can put him out of that business, without law or right. But the law says that Buchalter, or anyone else who puts a man out of business, is guilty of what—he is guilty of a misdemeanor, mind you. I think the Court shall charge, and I hope it does, that the maximum penalty for a misdemeanor, which is the lowest form of crime, is three years. I think the Court will charge you, and I hope it will, that the Statute of Limitations for a mis- 10749
demeanor is two years. So that, if Buchalter committed a crime, I say, conceding for the sake of argument that he did force him out of business, the only crime he committed punishable by law, because there was no physical assault upon Rosen according to this record—I mean he was not beaten, nobody laid a hand on him, or you would have heard it—I mean that is practically conceded by its not having been proven—so the threats were, according to their testimony, the forcing out of business of Rosen. The Statute of Limitations for a misdemeanor, I must repeat,

is two years, so that if it happened in 1932, Buchalter could not be punished beyond two years after 1932—let us say three years. There is no proof here that Buchalter ran out of town prior to his final running out. There is no proof here. Rubin says he was always around. Berger says he was around. Tannenbaum says he was around. But if you are not so satisfied, the limitation is increased by the time you are out of town. The statute does not run, and we will
10751 give him the benefit of the doubt and say to you, let us say, it is three years—Buchalter would have nothing to fear from Dewey by way of Rosen in that regard. I say the Statute of Limitations has run, but before it was amended he would have to fear the three years penalty. So, gentlemen, do you get my point—that Buchalter, who was being looked for by Dewey as king of the flour racket and king of the crime racket—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible mis-
10752 demeanor? I say, "Possible misdemeanor" at the hands of Rosen. What proof is there in this case by anyone that Rosen was roaming the streets of Brownsville threatening to go to Dewey? What could he tell Dewey? Nothing. Because, in telling Dewey that four years ago Buchalter drove him out of business, I take it he would also have to tell Dewey the good traits of Buchalter—that he got him a job—that he tried to get him another job—that he effectuated transfers and that he got him $100. and $125. a week. What was there that Buchalter had to

fear at the hands of Rosen with thousands of complaints running to Dewey in extortion totaling a half a million dollars? Would he worry about Rosen, an ordinary poor truck driver?

Well, I know Mr. Turkus is making a very good note about this because he will have to answer to you. It is sound reasoning that I shall anticipate what Mr. Turkus will answer. I may be wrong, but have you any better answer from the facts as he gave them to you? There isn't any evidence other than the speech of the unbelievable Rubin that maybe Buchalter thought 10754
it would be a warning to the rest of the trade. There is no proof of that here. You cannot speculate. If that is his answer, I don't know, but I cannot think of any other argument he can give. But, again, I must remind you that the killing of Rosen, if that was the thought, would not be sufficient to make peace for Buchalter, because there was a daughter, there was a daughter still present and outstanding during the intimidation and threats to force out of business. And you could not keep her down with an army, and I would not blame her for not being 10755
kept down with two armies. So that is not the answer he can furnish from the evidence.

What was it that Roser wanted, according to Rubin? Was it another job? Well, if he feared him so much, the great Buchalter, the great racketeer, he could not find a job, even if it was necessary to use force, he could not have found a job for Rosen? The great Weinstein who dominated 25,000 members of the Amalgamated could not find a job for Rosen some place? But Rosen already had a job at $50 a week—that is a reasonable pay for a truck driver. Nobody fired

him out of that. That is the evidence here—nobody fired him out of that. From the conditions, as described here, he certainly did not want to go back to driving a truck. What did he want from Buchalter? $700 to buy a dyeing and cleaning business, if that is true. He gave him, too, Rubin claims, another five to keep the fellow quiet. How weak the story. You may say to yourselves, "Who else could have killed Rosen or have him ordered to be killed?" I
10757 don't know who else could have done it. It is not my job to answer that. I don't know anything about Rosen's private life, or his associations or doings with Rubin, Berger, or anybody else. I can only say to you that the evidence shows that Buchalter had no reason—he had no motive to kill him—he is insignificant in the great tangled web that Dewey was throwing around this man. But Dewey got him, and maybe he was right in getting him. Let us not consider anybody else's job—let us consider this case, as Mr. Turkus said, the Rosen case—no more, no less.

10758 So, I leave the Rosen family, and briefly refer to the man who was on the stand for five days, a complete examination, a complete direct examination, a complete cross-examination, and I would say a very lengthy cross-examination.

The Court: You are now starting on something which will require considerable time, and I take it you desire no interruption. We will now take a recess for lunch.

The Court (Addressing the jury): Gentlemen, we will now take a recess and we will reassemble at 1:30. Please do not discuss the case, keep your minds open. First, the jury may go out. Now, the defendants are remanded.

(Afternoon Session. Trial Resumed.)

(Mr. Barshay continues his summation, as follows:)

Mr. Barshay (Continuing): Before recess here, step by step, I tried, and I hope successfully, at least to some degree, to establish a reason for doubt in your minds. I shall now proceed along the same line, hoping that my reference to the evidence and the logical inferences that flow therefrom, may result in reason for 10760
doubt which under the law you must give to the defendant.

Now, speaking in behalf of Buchalter, and only in his behalf, again I urge in my argument, because other counsel do not even have to be consistent with my thoughts in this case, as though we were receiving a separate and distinct trial. That is our position, sirs. I speak only for Buchalter and nobody else when I urge the argument—I cannot stress that too much, because someone may say, "Well, Mr. Rosenthal said this—Judge Talley said that—Mr. Barshay 10761
said this—it does not coincide, and consequently counsel are in disagreement among themselves and it leads to confusion." I know you are doing your best to keep in mind that each one speaks for himself.

When Bernstein took the stand—and I shall refer very briefly to him—he claimed he was an accomplice in this case, and he goes on and recites the part he played, from A to Z. I take it you shall be told that the physical facts in the case, that is, the finding of the body, the shouting, the yelling, the chasing, the finding of

the gun, et cetera, and the pictures in evidence —you shall be told those things do not tend to make the defendant Buchalter in any respect a party in the commission of the crime. I am sure his Honor will tell you that is the law. He said once that he was not an accomplice. I will let other counsel make comment about that. But he did say one thing that is most significant on behalf of Buchalter, and he left out something which I say is very significant
10763 in behalf of Buchalter, because I take it that the District Attorney offered him to tell the entire story, and I take it, too, that he did not offer him to leave out anything disadvantageous to any defendant in the case, which under the law he could properly get from the witness. For instance, one of the important things he said here is the element involving the time when he said he, on Friday, September 11, 1936, was told to steal the automobile subsequently connected with the commission of this crime. Now, you may say to this, "What difference does it make whether he stole the car at four o'clock,
10764 or five o'clock, or one o'clock?" Ordinarily, the question of hours five years ago would be no important point. I admit that myself. I have been wondering how these witnesses could even remember what happened five years ago in such great detail. You see, gentlemen, even a stenographer has to refer to his notes when the lawyer argues about testimony given here on the witness stand a few days ago. The Court has a trained mind—lawyers have trained minds—but we constantly have to keep referring to the minutes because it is humanly impossible to retain in your memory all these things. You do

not live exclusively for the five minutes of September 11, 1936, and divest yourself of any thought of anything else. But they all have remarkable memories. I don't know. So the element of time becomes important in this respect, with respect to Buchalter. We contend that throughout this case he was the subject of surveillance by Mr. Dewey's office and the Police Department of the City of New York. We have no right to assume that the Police Department or Mr. Dewey's office did not do a 10766
thoroughly good job, too. You know that Lepke was not just an ordinary racketeer. When Dewey lays his fingers on a man of the size, of the importance, of the magnitude of Lepke, you can rest assured of having an excellent job, check books are sought, and people are watched —especially people like this defendant—so he set a twenty-four hour guard, or surveillance, I should say. What right have we to assume that they lost him when they watched him? What right have we to assume without proof of speculation, that the Dewey men and the New York City detectives would allow him to 10767
sneak away? What proof is there in the record? It is speculation. The presumption in law is that an officer does his duty imposed upon him by law until it is proven to the contrary. We subpoenaed the record of that surveillance. The Court, in its wisdom, excluded that from perusal. It was marked only for identification. I could not see it, you cannot see it, you cannot speculate what is in it, but I have a right to comment, I think, on this part before I even had them in this court; and after I had them in this court I even asked that they be marked for identifica-

tion. Mr. Turkus, the District Attorney, already had the right to see them, but that is not a privilege which is accorded to a private lawyer. But the P. D. and the D. A. cooperate with one another, they interchange information; they help each other. You saw Mr. Dewey's assistant here, and I take it that you have a right to infer relations between Judge O'Dwyer's office and Mr. Dewey's office, and the various departments, police and otherwise, are very good. I take it
10769 you have a right to draw conclusions by the constant presence of Mr. Horowitz, the law assistant of Mr. Dewey, that there is cooperation between Judge O'Dwyer and Mr. Dewey; by reason of the indictment involved in this case it is reasonable to accept such cooperation to exist. I take it Mr. Turkus, and you have that right to infer, knew what the police reported with respect to the activity of Buchalter that day, if they missed him, if he sneaked from them, if he succeeded in getting away from the watchful eyes of the Dewey and the Police Department men. Mr. Turkus would know that,
10770 I take it, from the watchful eyes of the Dewey and the Police Department men. Mr. Turkus would know it, and I take it in all fairness to the defendant who claims he was watched twenty-four hours a day, and was not able to sneak away, we should have had some proof from the cops assigned that day from the Dewey office, or from the Police Department, to testify to the fact that they watched him, but that the clever Buchalter sneaked away. That is a logical inference.

Mr. Turkus: There is not a scintilla of evi-

dence in the record that Buchalter, or Lepke, was under a twenty-four hour surveillance that day.

The Court: As I called attention before, if an editing process is going to be carried out as to accuracy of all details referred to by counsel during summation, it is going to disturb the trend of thought of counsel and interfere with the proper presentation of argument to the jury. Please do not do it again. This applies to all sides. I know how it is by counsel jumping up and spoiling a speech; there must be both gold and ivory in a summation as well as in the Judge's gavel. 10772

Mr. Turkus: I will not do that again.

Mr. Barshay: I do not think Mr. Turkus had any thought of disturbing my thought and trend, so I will continue with my thought.

Mr. Barshay (Continuing): And so you see, gentlemen, we have a right to have some proof as to whether or not he was under surveillance that day, two hours a day, five hours a day, eight hours a day; all we wanted was to know what the hours were. You might say, "What is the matter, Mr. Lawyer, couldn't you have subpoenaed them?" Well, there are two answers to that. I did not know who to subpoena— I cannot subpoena 18,000 policemen. Those assigned to Mr. Dewey's office were assigned in a confidential manner. Yes, I could have gone to the Police Department, written a list, and I could have asked the Police Commissioner, and by a process of elimination I might have gotten it, but it is not my job to do that. Again, I say to you, the District Attorney has to sustain the 10773

burden of proof imposed upon him by law—not by me but by law—and this is a court of law. Rubin tells you that Buchalter told him that the cops were watching him, and Berger said so, too. They even said that they would have to sneak away, which goes to show that the cops were watching them, even if they did sneak away. But we wanted to know the truth. Where were they watched? And if they were watching him, gentlemen, you have the right to say to yourselves, would he, who had every reason in the
10775 world to sneak away from the clutches of Dewey, because he knew what it meant if Dewey caught him—would he, knowing he was being watched, associate in the public streets with Mendy Weiss, or Tannenbaum, or Berger, or Rubin? Is he a fool altogether? Was he so powerful that he could defy the Dewey men who were around him? Haven't they eyes? Haven't they arrest records, and reports to make every single day? That is why it is important to know whether in the early afternoon Mr. Rubin was at the Raleigh—whether Tannenbaum was at the
10776 Raleigh—whether in the late afternoon Berger was at the Raleigh. What right have we to assume that the police assigned to do their duty were not watching at least the front entrance of number 200 Fifth Avenue, the side entrance, or the one in the rear? Well, as Shapiro said, policemen would come up into the hallway, because Buchalter would stop and talk to people in the hallway, and they would annoy—as Mr. Turkus called them harassing sleuths. Even if such was the case, they would have to make some report. We want to know what time it was that Berger got there. Oh, how quickly he took the hint when

it was asked of him, "Did you look at a watch?", and his answer, "I did not look at any watch; I did not look at any watch." Do you remember Berger? Watch or no watch, it was dark—it was dark—absolutely dark when he landed in Brownsville. He gave the time as 9:00 to 9:30, and he described that day as finishing his work at 5:00 o'clock and going to a certain place, and then going to the Raleigh, and then going to the East Side, then eating for an hour and a half, then waiting for Mendy Weiss, then taking a 10778
car, and then traveling to Brownsville. It was dark when he started across the Williamsburg Bridge. Let us say it was 9:00 o'clock—he said it was 9:30. Bernstein's testimony is that since the advent of Judge O'Dwyer he has not lied. Well, I will let other counsel comment on that. But he does not lie when he said it was in the early afternoon. Once he said 1:00 o'clock; once he said he could not tell, but he certainly said, and it is there, 1:00 o'clock or 4:00 o'clock, he could not remember. So, Berger has Mendy Weiss present in Brownsville, giving directions
to steal a car on this murder hours before, hours 10779
before that, gentlemen. Berger says he left the East Side for the purpose of going with Mendy Weiss to the candy store. That is why it is important.

And there is one more phase of Bernstein's testimony that to me is mighty important—I should say, rather, his lack of testimony on that point. He was five days on the stand, direct and cross. Isn't it strange that a man like Bernstein, who is trusted by a so-called group, mentioned as being a participant in this crime,

trusted to participate in a murder, trusted to steal a car, and talk to the people—to sleep in the house and stay overnight—to ride in the car to the scene, and from the scene, through streets and out of streets—I am not conceding it is true, gentlemen, don't mistake me—I am saying it for the sake of argument, because, if I say it is true, other counsel might find fault with me. I am using his testimony for the sake of argument. Standing in the hallway, waiting
10781 for Rosen to come out, fleeing from the scene, disposing of the weapon, an association that commenced prior to September 11th and finished after the murder of Rosen—almost thirty hours, if not more. Not once, not once, does the name of Buchalter, or Lepke, come forth from the lips of Bernstein. This murder, which they want you to believe was done on behalf of Lepke, on behalf of and for the benefit of Buchalter. Is it conceivable, if that were true, that some time during all this preparation, some time before the execution, before the flight, someone would not
10782 have whispered, "Well, Lep will be satisfied," or, "Buchalter will be happy. We did it for Lep," or some such remark. It is such a natural —it is such an expected thing—to have the remark. To say Bernstein is only a middle layer —he was trusted—he was not a menial, if he is interested from the beginning to the end and he is right there when the murder is taking place. He said he was one of the parcels of that group combination. And how is it the name of Buchalter is not mentioned once? I will tell you. Once again I will tell you that I do not care who did it, or whether they did it, or whether

they had a motive, or did not. The name was not mentioned because Buchalter had absolutely nothing to do with the commission of this crime, and the District Attorney produced the evidence better than I could ever hope to do.

And, now, they introduce Magoon—Magoon, who has nothing to do with our case at all—consider that, gentlemen, when you are looking for a reasonable doubt. I don't say I admit the truth of what he said, because the Judge will tell you, I think, that the speech of any participant in any case after the consummation of the act or 10784
conspiracy, after it is all finished, within certain limits, are binding only on the doer. I shall ask the Court to so charge you, and I think he will. Now, let us look at the record. He said that Capone said, "We got to hit Rubin for Lep." He mentioned the name. Bernstein, however, surely, positively, irrevocably, is silent. He does not even say he is an accomplice of Buchalter, but that someone in the group, in the combination, may have been. It was the most natural thing in the world, if he were involved, if it was done for him, that the name Lepke, or Lep, or 10785
Buchalter, or some other name would have been used indicating, "Well, it is our job, we did it for him." Tannenbaum also did not mention it, and I will tell you why. I will leave Bernstein to the discretion and consideration of far abler lawyers than I will ever be. I say to you now—I am coming to Rubin—the Rosen murder was committed in 1936. Rubin was motivated at least by vengeance—there may be some other reason which I do not know—but from the record, at least, by vengeance, hate, and a desire

to get even with and punish Buchalter because he wrongly attributed his own shooting to Buchalter, and he began to plot and plan this case in 1940. I must repeat, it took him a long time to pick an act, and to pick the right actors. He had to pick someone from people who associated with Buchalter in his past life. He could not pick you, or me, or someone who did not know him. He knew his cue. When Tannenbaum is in the clutches of the law ready to burn for six
10787 murders he admitted out of his own mouth, Rubin says to him, "Tannenbaum, an associate of Buchalter, that fellow—he is my man—he has something to gain from the State, never mind the District Attorney—Tannenbaum, he is my man." I will speak of that in a few minutes.

But in all the case there is still a flaw, and when he learns somehow, somewhere, some place, that Berger was the man who was responsible for fingering him when the bullet went through his head—you see, before that he had very little on Berger of any consequence—"He is my man—Berger is my man—June 5, 1941—I will com-
10788 plete the cast." I wonder what Rubin's face looked like when he learned that Paul Berger was the man who fingered him on two occasions? I wonder what he said to himself about Paul Berger— He who says on the stand, "I will help anybody," when I asked him about the financial transaction he had with Berger in 1938, when he says he had somebody named Ike Brown loan him $200. He did not loan it, but he arranged it, or something like that. He defended Berger—he lunched with Berger—he tried to put him on the payroll of the expressmen's associa-

tion. I wonder how he felt—he who was dealing with Berger in the presence of a police guard after he was shot, which was furnished him by Dewey. And now he is on the same team with Berger. I will illustrate how false and how rotten this Rubin frame-up is. Mr. Turkus said that the case was broken from the inside. Was it? Well, it was not framed from the inside—the case was broken from the outside by Rubin—it was not only broken, but in your presence, on this witness stand, by evidence they produced 10790
it was smashed and shattered and has fallen to pieces by its own weight. Rubin! I don't know how many people he in his lifetime has been able to fool. Again, I say, and don't misunderstand me, I in nowise justify any harm that came to Rubin. Nobody has a right to be shot or be hurt, or threatened, or intimidated. But that is not the point in this case now. There will come a day for whoever is responsible to answer that charge in the proper court, in the proper tribunal, before a proper Judge and a proper District Attorney, a Man soft-spoken in
manner, but only for a while. You see, in the 10791
preparation of this case I read the flour record. This is not his first performance against Buchalter—this is his second performance against Buchalter. And, carefully reading the record, I practically knew what to anticipate from him. I said that here when he took possession of the court momentarily—he thought he was still on a box in Union Square—he forgot he was in the witness box, and the soft-spoken, mild-mannered Rubin rancored, and raved, and cursed, and hurled invectives. I said that I would not roll

in the gutter with him. He admitted that he never saw me in his life—I don't care whether he did or did not—but I never saw that man in my life. I said it then. But that is not the point. I take it that he anticipated, if he took the witness stand, and made a remark about being shot, that he would gain the sympathy of the jury. Well, he is entitled to smypathy, but that has nothing to do as to judging his credibility in this case. You see, when Mr. Turkus had
10793 him on direct examination, carefully following his Grand Jury testimony, and actually prepared with questions and answers, he was asked concerning matters which were for my cross-examination. You see, if Mr. Turkus is going to beat me to the punch and show Mr. Rubin in his true light, it will not be effective. So I asked the same questions again, and so Mr. Turkus, when the Judge sustained him and not me, properly, Mr. Turkus said, "Well, I want to present Rubin in a true light." All right— Did he present Mr. Rubin in a true light on direct examination? You search your memories, gentle-
10794 men—he did not. There was no real true light on Mr. Rubin on direct examination. I will recall it to your attention from the record furnished—a matter of Rubin's participation in flour extortion—his own participation in extortions totaling $400. to $700. each and every week, and sometimes more. Was that brought out on direct examination? It was not an oversight. My able adversary does not commit those things as oversights. I will tell you what was in the mind of Rubin. He had an idea that perhaps—he is experienced with courts—do you remember when I said to him about flight in the flour case,

he said, I spoke of a subject pertaining to the jurisdiction of New York? He was no stranger to these things. He is above the average intelligence. It was Rubin's thought, you see, that maybe in cross-examination I would not ask him about those things for fear that I may open the door and put the defendant Buchalter, by his answers—though I did it on behalf of putting the defendant Buchalter in a worse light than he appeared already. So you did not get Rubin in his true light, did you? I had to bring that out myself. Well, you have never seen Rubin in any 10796
true light, but some days, to quote Rubin himself, as to what he said to McCarthy in 1937, he said to McCarthy, "Hope for a break. It will come." And I say, "I hope for the break. It will come." And we shall see Rubin not in a discolored false light, but in his true light. We only have him partially here, and that is bad enough—this gentleman who said, lifting his hands, "With hands like these you cannot work, so you must use your mouth, and I use my mouth." He did all right—he did. You might think from his testimony, as he presented 10797
himself, that the defendant Buchalter made of him a union man, a racketeer, a gangster, an extortioner; that before he ever met Buchalter in 1927 he was lily-white. Why, gentlemen, from 1917, 1918, or 1919, until 1927, when he said he knew Buchalter from 1932, and he became intimate with Buchalter, according to his own language—let us look at him— Who is he—Is he a paragon of virtue, is he a clean man who was taken from a clean life and dipped in the mud by Buchalter? He did not fool me and I

think he did not fool you. He knew Noya and Slobow; he knew who was interested in the unions—he was on all kinds of committees, finance, control, joint executive, and otherwise; he knew who was controlling and dominating the Amalgamated labor union. He knew who was betraying it up to 1927. He was willing to profit by it and live by it, and attend their meetings and associate with them, attend to their strikes. Nobody compelled him at the point of a gun to
10799 lead that kind of a life. He was not a cutter or a truck driver; he used strong-arm activities when he saw an easy dollar, and he saw what a free spender he could be by being a business agent on the executive board. How did he get into the union? He went into the bathrobe firm, did he? Well, by his own admission, he told you how much he knew about bathrobes before Berger gave him away. There were two ways, then, he said, to get into the union—one by being a member of the trade, and the second way was if you had underworld influence. And he denies
10800 that underworld influence got him into the union. So I pressed him with his testimony in the flour case, and what did he say in the flour case? He said there that Noya was instrumental in getting him into the union (page 1092 of flour record). No lily-white, Mr. Rubin. He knew who associated with it—he knew who dominated it—he knew the racketeers who controlled the union then. I know it is no excuse that Buchalter subsequently got in himself, but the point is Rubin. He is asking you to weigh his credibility. You must consider those things in weighing his credibility—what were his associates—who were

they—did he know what they were doing? He could have, if he was a decent man, left that field and gone into other fields. He did not have to be a racketeer with them—not Rubin. He said in 1932, when Buchalter made mention of the fact that Luciano, or somebody, whoever it may have been, said, "This one has to go, this one has to stay." "All the business agents were to stay and were going to get a year's pay," what do you think the lily-white Rubin said? "What about me?" You see, who does 10802
he care about— "What about me, me me?" All his life. He did not retire—he did not go the way of decent people, and say, "Well, my hands are deep in filth." He wanted to stay—he loves it—he loves glamour—he loves the underworld—he loves the glamour of stuffing in his pocket $400. to $700.—he loves the tips, and they are pretty good. But men in the shops, men who drive trucks, men who don't get anywhere in the bosom, they are the victims of the street corner orator, the "American" Rubin, who says when he was a young man he was
speaking on soap boxes in Union Square, espous- 10803
ing Marxian theories of economics— Rubin, who when called to the colors of his country, did not go. I say this most respectfully to his Honor when he referred to William Penn as a Quaker— William Penn was a Quaker— Max Rubin was a faker. It goes to his credibility whether or not when he registered, like all human beings had to then on behalf of their country —it goes to his credibility when he says that he was living with Mrs. Ada Coglin—married to her, and therefore was entitled to deferred classi-

fication in 4-A. He hid behind the skirts of a woman in order to avoid service to his country. It goes to his credibility, I say, because he was not living with her, he was not supporting her. And she complained to the Government because no Coglin would stand for that Union Square loafer hiding behind her skirts and refusing to answer the call of his country. I can understand her make-up. She complains, and they reclassify him. But Union Square—still anchored himself to Union Square—he would not go even when
10805 called, the cowardly Marxian theory— I have another name for it. He betrayed labor, he betrayed his wife, he betrayed the country that harbored and kept him and gave him a chance to earn a livelihood. It was not a mere accident —it was not just foolishness on his part.

I do not bring this out to prejudice you, gentlemen, against him, but I dare say when a man betrays the flag under which he lives you have a right to believe him or disbelieve him, and to consider that in accepting or rejecting his testimony. If it was a plain scheme on his part
10806 to avoid service to his country, it is indicated, not as an accident, but as a plain scheme. I don't know the reason why he went to Germany, and I don't care, but he forged, knowingly, his brother's name; he swore, knowingly, that his name was Benjamin Rubin, and he lived there under that name—and he did it for one purpose, that is clear—to avoid detection and arrest and possible prosecution by the Federal Government. There, in Germany, he still engages in the transmission of money to the Soviet Government—that Soviet blood which flows within Rubin so con-

spicuously that even when he is hiding in 1936 or 1937, whenever it was, in Brooklyn, he had to assume a name—he adopted an unpronounceable Russian name. He cannot get away from his early ideals and from his early ideas. He calls it Marxian economics, but I have another name for it. The Rubins don't fool me, gentlemen. His history itself is a reason for doubt. Let the workmen work, he lives while he talks; let American soldiers die—he still hides— That is Rubin.

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In 1927 he disassociates himself from the Cutters' Union. He will have you believe that Sneaky Levine—Red Levine—who was brought here and put on the stand, in the custody of the Sheriff, or somebody, and who was put on the stand, voluntarily gave up being a business agent and went back to driving a truck with his hands and feet and body, and dirty himself, so that Rubin should become business agent. But he was not satisfied yet with being a business agent of one local, 240; there soon came a time when Local 138 began, and that was $25. a week more, and with the tips and all, I must repeat, would average $400. and $700. a week, and some weeks more. He was an active participant. He was never arrested on the charge—he was never brought up on the charge—he was never punished for the charge—and he never will be punished for the charge. But you have a right to consider his motive on the kind of testimony that he wants you to consider as the Gospel truth. And even after Thomas E. Dewey was appointed in 1935, he continued to participate and shake down firms, and even when he fled from Dewey—

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and I say from no other place—before he fled his pal Berger, the fingerman Berger, was taken around by him and introduced to prospective victims of a shakedown. It is no defense when they say that was done at Buchalter's command or suggestion. They could have quit whenever they wanted to. But the fact is that he paid his penalty and they are on the streets free, unharmed, protected by your money—that is the Rubins and the Bergers who live at hotels and spend their summers at the Half Moon.

You have to consider those things when you consider the truth or falsity of their testimony. Now, let us get down to the stoppage. You see, Rubin is no fool altogether—he is a Jekyl and Hyde. There are times when he has to tell the truth; he cannot help it. He talks about stoppage. There was a stoppage and he cannot deny it. But who called it? Who do you think would call a stoppage? The stoppage was not called for Rosen—the stoppage was not called for the benefit of any one person or any individual person. The Court has told you that stoppage is a lawful means used by unions, and it is used now. So there are things that he tells you about stoppage which have to be true. He says that he told Buchalter, when discussing the stoppage, that he anticipated trouble with some, and he mentioned who they were, one of which was the Branch Storage. And he leads you to believe that Buchalter was interested financially in the Branch Storage to have you men draw the conclusion that Buchalter, although an officer, did not favor his own company—that he did not have the power—that even Mr. Buchalter did

not have the power to eliminate his own concern from this stoppage. I have gone over the facts with you as to what happened in the Svirsky place once before, and I shall not repeat it again. But he gives a very interesting side-light which has a bearing upon this case. You see, he wanted to convey the impression to you what a kindly soul he was—he who had the right and the power to place workmen here and there and shift them from one place to another place. And he had a right to anticipate, "Well, you as business agents of this local, couldn't you have placed Rosen some place else yourself?" And so he says, "Yes, I tried—not only I tried but Buchalter tried; we went to dozens of places; we went through the entire industry, because unemployment was not a problem with respect to truck drivers in those days." But what is the matter? Why is it that Rosen is discriminated against? Why is it? Rubin gave you the answer. He said, "If you want me to amplify it—Rosen was considered a chiseler." 10814

Now, gentlemen, don't mistake me, I am not disparaging the victim of a vicious murder. I am merely telling you Rubin's language describing Rosen, for the purpose of convincing you that if Rosen was out of employment it had nothing to do with Buchalter. As a matter of fact, he had all to do with himself, despite Buchalter's efforts wherever he went. Rubin says he was unsuccessful. Was there any reason lest somebody believe Buchalter was the one responsible for him not even having bread in his mouth? Rubin says, at page 1468, that Rosen was a chiseler, and, "If you want me to amplify 10815

it, he would go to a tailor shop and he would take $25. from the tailor and he would promise to get him some work, and he would not get him any work; and he would go to a manufacturer and he would take a suit of clothes and he would promise to pay and he would not pay—just petty larceny stuff—Joe Rosen had that reputation." That was the reason the trucking industry refused to re-employ Rosen. In the name of Heaven, gentlemen, Buchalter was not responsible for that condition, if people in the trade did not want Rosen after all the efforts made in his behalf. This was before Dewey, mind you. Don't let it be urged that this was a matter of appeasement—this was before Dewey. He could not work. Maybe Cooper was right when he said, "Rosen bit the hand that fed him." I don't know. And even after Larry Cooper gave him employment, there was difficulty. Cranes was working—Larry Cooper could not fire Cranes. Cranes had to be looked after. And again Buchalter is called in, and spoke to Mr. Cooper—"If you don't want Rosen, don't take Rosen, but take Cranes. Rosen is going to work." He quits that job of his own accord. That was not Buchalter's doings.

Now we come to the very crux of this case. I will skip things here but I will come back to them later, but in the order of my plan, I say we now come to the crux of this case. That is the statement which Rubin made to Mr. McCarthy. What a document! What truth there is in that statement which is consonant with the evidence here. Bernstein not mentioning Lepke's name once, not even repeating the conversation

that others mentioned. And a document given after Rubin was shot, not before—after; according to Mr. Turkus, Lepke is on the loose, that is Mr. Turkus said, or on the "lam", I don't know which—a fugitive from everybody. And when I say "everybody", I mean everybody in Manhattan, because the evidence is positively silent and clear that no one in Brooklyn ever looked for him in this case. Where is that statement made? If you are going to consider whether it is true or not—he admits having made it, but 10820
now he comes with his answer, "It is a lie because I was shot." I am not quoting his exact language. You remember it. The Judge allowed the question to be put in a certain way, and I am giving you the substance of it—"It is a lie because I was shot." I took it that Rubin believed, when he was shot, that Buchalter was responsible for his plight. He said he rolled in the gutter with a bullet, or something like that. He was vicious; he was vengeful; he had already testified against Buchalter, and he says to you that is the reason he was shot. His testimony was irrevocable before the Grand Jury. His 10821
own lawyer, Maguire, took him to Dewey, not to Brooklyn. He took him there and he gave his testimony under oath. And he was under police protection—he was at the hospital—he was shot. I can just imagine how he hated Buchalter, and he was right in hating him if it were true. He would lie then—surely, he would, but not in favor of Buchalter. He would lie his head off against Buchalter. He would tell every contemptible lie he could possibly think of to pour forth his hatred and vengeance against a man whom he

supposedly thought was responsible for his plight. He would not lie in favor of Buchalter —He was afraid—afraid of what? If he was afraid that Buchalter would personally shoot him, he had a bad guess, because there were racketeers then, but he does not implicate—he does not try to infer, rather, that he would do it personally—he would do it through his agents, because he had a gang. It is so easy to get rid of a man who would involve Buchalter in the Rosen
10823 case—Berger, number one; Tannenbaum, number two—two gunmen off the streets, actually where they belonged, might poison his supper—with them out of the way I have something on them. Oh, no, because they were no part or parcel of this case. He had nothing on Berger then, he had nothing on Tannenbaum then. Only when he found he had them in the groove, then he suggested to turn voices into the perjury you heard on this witness stand. Why, he saw Berger in 1938—he saw him in the street—he was protected by police—he tells us the police would stand aside
10824 while he talks to Berger. The evidence is replete with proof that this same Berger attempted to induce Rubin to give false testimony against a Dewey assistant, and to threaten him with violence if he failed to do so. Berger was arrested for that and was in the "can". That was the time then to look him up for the Rosen case. He did not do it because that charge then was insignificant—it was a misdemeanor—and he could not put sufficient pressure upon Mr. Berger then: so he waits until Berger is in a pretty sad plight himself—in 1941—and then he implicates him. Nobody else does. He saw Tannenbaum in the

Federal Grand Jury in Manhattan when he, Mr. Rubin, was under policy guard, and Tannenbaum was a witness there alone and unattended. Well, Mr. Tannenbaum is grabbed and thrown into jail. And with a little bit of luck he is out of the way—my person becomes more safe. He was afraid, was he? Let us see? Did he have confidence in the people who were in that room? You remember who they were—Dewey's officer. He said he had great faith in him after he met him, though not before. He did not even have 10826
faith in Dewey before he met him, because he said, "How could you have faith in a man before you meet him?" He would not have faith in him until there was a personal introduction and he personally saw and supervised his work —then he had faith in Dewey, but not before. It was Frank Hogan, then, who joined the assemblage. He was liked so much that everybody wanted him as District Attorney, and he had no opposition. That was the same Hogan, the same Hogan in whom Rubin had such faith, the same Hogan to whom he was taken by Mr. Maguire
when he testified against Lepke. Then there was 10827
a policeman by the name of Giordano, a member of the Police Department, unattached to the District Attorney—a member of the Homicide Squad; there was a stenographer there, and there was testimony against Lepke there and there was testimony against Lepke in the flour case, because the other cases had already been in. He was under guard. He was not under physical restraint. And then Brother McCarthy—the same McCarthy who put such a scare into Mr. Buchalter, or Lepke, or whatever you want to

call him, that he said, "This McCarthy is going around, he is going to make a big collar, he is going to catch big fish, get out of town." The same McCarthy, the same McCarthy who begs him—offers him immunity; the same McCarthy who is faced with the situation that Mr. Turkus revealed in his opening. There was no clue—there were no fingerprints—there were no witnesses— What can I do? But maybe you, Rubin, you can tell me, you can help me. We want to
10829 solve this case. The same McCarthy who frightened Buchalter to the point where later he claims —and I don't say it is true—that, "McCarthy is going to be pushed out of the case—" I suppose because of some innuendo against him—"but McCarthy is going to be pushed out of the case." I don't know who could do the pushing.

Well, I don't want to say anything more about that. But I tell you that Rubin was under all the atmosphere in the world wherein he could, if he had any truth to tell, have told the truth. And he did tell the truth because he had confidence in everyone. Now, let us see. If, out
10830 of fear of Lepke, or Buchalter, McCarthy was lied to by Rubin, I take it he had so much faith and regard and respect for Hogan, that as soon as McCarthy left he would have said to Hogan, "You don't think I am going to tell him." Possibly, and this is an inference, gentlemen—it is a logical inference that I draw from this—you can accept it—you may draw the same inference and you may not—he would have said something to the eminent Mr. Hogan out of his own self-respect, like, "I am afraid of Lepke. That is why I told this fellow a lot of lies."

Well, if that was so, you would have had the great pleasure of seeing Mr. Hogan here. I take it, it did not happen. Let us go into the statement to decide then whether or not he had the opportunity to tell the truth. As the Court commented, after seeing the statement, "The witness failed—" in the statement I am speaking of—"in any way to implicate Lepke; on the other hand, he went out of his way to give assurance that if he could, he would." That is the Court's interpretation of the contents of 10832
that statement to McCarthy in the presence of Mr. Hogan and a stenographer.

Gentlemen, is there any reason for doubt? If there is no other reason for doubt, and I say there is, here it is— Vengeful, spiteful, hateful, Rubin, he goes out of his way to say, "If I could, I would." But he did not. Afraid of Lepke? He already had every reason in the world to be afraid of him, if what he had in mind was being afraid of the false testimony in Brooklyn and of afraid of the testimony in Manhattan. He, under guard, afraid of him? If he was afraid of him, he would have been in 10833
a hotel—he would have made known his position —he would have made known his fear, he would have made known his thoughts, he would have told Hogan, or someone in Mr. Dewey's office. But, no, he does not. He never made any attempt to go across the Bridge in the custody of guards and walk into the office of the District Attorney himself. Oh, no, he does not. Let us see what McCarthy was there for. He says, "You know you were at the store of Rosen. We don't want to prosecute you. The fact you

were at Rosen's store is already known to the Grand Jury. Even if you are involved, we are not going to prosecute you." In other words, McCarthy, uncertain then whether Rubin was involved or not, says, "It is not you—" by implication he says—"we don't want you. You are just Rubin, the small fry. We want the man responsible for this, the man behind this, the Lepkes, the Gurrahs, and nobody else." That is what Mr. McCarthy infers to Rubin.

10835 "We don't want you. We will give you immunity." He rejects it—he rejects it. Then, as to the store— "I was only over to the store once, and that was on the invitation of Louis Feinberg." Well, that is what he testified to here, so that is not a lie to McCarthy, is it? That is the truth. He was in the store once. He said so to McCarthy in 1937 and he said so here. The evidence bears him out. And so, you see, the first statement is not a lie to McCarthy. He said, "I went to see Joseph Rosen once, a little girl came in and out." That is the truth, isn't it? That is his testimony here.

10833 He had a talk with Rosen for about three-quarters of an hour. That is the truth—he did not lie to McCarthy, did he, that Rosen complained about business? Isn't that the truth? Everybody says so, that he complained about his candy store business. And Rubin said that he said to Rosen, "You had no right to quit the job without letting me know." That is true, isn't it, gentlemen? Isn't that the testimony? That is not a lie to McCarthy. And McCarthy said, "Quit what job?" And Rubin said he was working for Larry Cooper. That is the

truth, isn't it? There is no lie to McCarthy there. He was working for Larry Cooper. McCarthy said—you see, there being two Coopers— "You mean that is the fellow from New Jersey?"—meaning Cooper from the Garfield, I take it—and Rubin said, "No, that is not the Cooper. This Cooper has a brother in the Homicide Squad. That is a Brooklyn Cooper." That was true, wasn't it? So, he did not lie to McCarthy, did he? Rosen had jumped off this job without letting anybody know—he quit 10838
of his own accord. That was the truth—he did not lie to McCarthy. Rubin said to McCarthy that Rosen told him he had heart trouble and that was why he left the job. That is what the testimony here is. So, you see, he did not lie to McCarthy. And Rosen said, "I want to go in another business." That was the truth, wasn't it? That was not lying to McCarthy. Rubin told McCarthy he was a business agent for Local 240. That was not a lie, was it? That was the truth. And he said he did not see Rosen from the day when he saw him with Feinberg until he read he was shot. Isn't that the truth, 10839
gentlemen? There is no lying to McCarthy there. McCarthy said to him, "Didn't you leave town?" And Rubin said to him, "Yes, some time in November," and then he volunteered himself, "But not on account of that." That was the truth, gentlemen, wasn't it?

I am struggling in this case to prove to you that he had no reason to flee from Brooklyn, but he did have lots of reasons to flee from Dewey in Manhattan, because there he was a participant in extortion. So that is the truth. And I will

show you how that is the truth, that he fled not from Brooklyn but from New York. Then he said to McCarthy, "Yes, but not on account of that." That is something he volunteered. It speaks eloquently, gentlemen, in favor of the defendant. McCarthy said to him, "Did you know Lepke and Gurrah?", and he said, "Yes, very well." Well, that is the truth, isn't it? I am going sentence by sentence. He did not lie to McCarthy, did he? He denies he told Rosen
10841 to leave town, or that he gave him any money to go away with, except fives or tens. That is exactly what I have been trying to prove throughout. Why should Rosen be sent away? What for? What could he do? What could he say? What harm did Buchalter do? What penalty could he suffer? And he denies he told Rosen to leave town. Then he was asked, "Don't you know anything about the Rosen murder at all?", and he said, "No." Now, he wants you to believe that sentence is a lie. Of course, he did not know about the Rosen murder,
10842 because, listen to this, gentlemen, listen to what McCarthy offered him—"I am giving you immunity." Rubin said, "I don't need immunity. I was never taken into anybody's business or confidence, rather, on any murder case—that was always one thing." That is the truth. That is the truth, gentlemen. He doesn't know anything about the Rosen murder; he doesn't want immunity, because he doesn't need immunity. He said himself he did nothing in the Rosen store; he did not threaten or intimidate; he did not do anything for which he had to worry about, or pay the penalty for. And his explanation of why did you say so much, he said, "I was afraid

some District Attorney may frame me." Now he has the District Attorney framing him. He said, "District Attorney, District Attorney, District Attorney," they were framing me. Gentlemen, District Attorneys framing Rubin? You know in a desperate situation here I would not dare charge that anybody from the District Attorney's office would try to frame my client. And the District Attorney would "frame" Rubin! Then McCarthy said to him, "Tell me, is there anything else you want to say?" That 10844
gave him carte blanche to say anything. You know there is a stenographer there, there is Mr. Hogan there, there is a policeman there, a perfect record is being made. "Tell me, is there anything else?" Here is Rubin, who had every motive in the world then to get every witness in the case off the street, the Tannenbaums, the Bergers, if they were part of this case, and he says, "All you got to do with me is pray for a break—it will come—and if I can be of any help, and if you find that my story deviates one bit from what I told you, you can do what you want." He challenges the District Attorney, 10845
"If I deviate one single moment from the truth, you can do what you want, and you will find in the long run we will get many of them." Well, now, Lepke, he knew him, but I don't care what "them" means, it does not mean Buchalter and it does not mean Lepke. He would have said so, this vengeful, hateful, spiteful person, when he was in the presence of his best friend, Hogan, and he passes the remark and says, "You will see more of the cop in me today then any cop in the department." You see, he had been shot,

he is with the law now—he is apparently imagining himself that some assurance will be given him that he will not be prosecuted, and he says, "You will find a better cop in me than any one on the force." And the Court commented at the conclusion of reading this: "The witness failed in any wise to implicate Lepke; on the other hand he went out of his way to give assurance that if he could, he would."

I say, gentlemen, the case was not broken from
10847 the inside but from the outside. This document establishes the truth of our defense. It is the finest, unsurmountable reason for doubt, sane, reasonable, logical, and flows from the evidence, and in every speech. I don't want any sympathy for this man, but I want justice. I want a fair day in a fair court for him. I do not care what else he did, or where else he is going to be, or what else is going to be done to him. This is my cause. Now, you can see why I say this is my cause. I cannot let this go unchallenged without saying the crux of the case is Rubin here,
10848 when he had every reason and opportunity offered him, saying, "I was afraid of Lepke." He was not afraid of the damage he had done in New York. He was not afraid of his sworn testimony he gave in New York. He was not afraid when he swore positively in the flour case and he said nothing about Tannenbaum and nothing about Berger, on June 5, 1941. That is the Rubin who offers himself as a witness in a murder case.

(At this point, at the request of Mr. Barshay, a recess of five minutes was taken, the Court and the jury remaining in the court room.)

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Mr. Barshay (Continuing): Another point, gentlemen, on this Rubin. You remember one occasion about September 11, 1936, his own words were, "I remember that day vividly." That is his adjective, "vividly". In other words, the whole day is brought to his mind. If a man remembers that fact vividly, he ought to remember what he does especially with respect to that portion of the day. This man, whose memory is so vivid that he went to get Berger—I don't want any mistake about it—at the Expressmen's

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Association on 17th Street—he, who remembers it vividly, and knows exactly where he went to get Berger, at the Expressmen's Association on 17th Street— You have heard what Berger said. Apparently, he had no business at the Expressmen's Association. He did have business at the Clothing Cutters' Union. You remember Berger saying, "I went to Weinstein's Friday night, the fellows played cards, before I go home, at the Clothing Cutters' Union—" blocks away. Someone is lying. That is what we get, gentlemen, when a man fabricates a story in 1940

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when he puts the characters in the cast here and the location there. You cannot crush the truth, no matter who you are.

Do you remember on direct examination Mr. Rubin being led through by Mr. Turkus very skillfully about the vivid recollection of September 11th—"Who was there when you had this so-called talk with Buchalter—description of dictaphones, office help, and all that—who was there?" He did not say a word about Tannenbaum in the direct examination, not a word. I had to draw it out of him on cross examination.

He had hoped to God that it was never brought out, because he was on the spot. He remembers that so vividly, such an important conversation, the inception of a proposed murder which was to take place, where he is simply to participate, willingly or unwillingly, knowingly or unknowingly, he forgets about Tannenbaum altogether in the direct examination. Remember, here he said he was fleeing from the Rosen case. Oh, what a job I had with him. I guess you needed
10853 a Steuer to handle him on that point. In New York, the same flight from Dewey; in Brooklyn, the same flight from Brooklyn. If he testified tomorrow somewhere else in some other charge against Buchalter, you can guarantee then the same thing, that it will be a flight from some place else. A movable foundation—you cannot anchor Max Rubin. And how positively he claimed here he ran from the Rosen case and not from the Dewey investigation at first, and then later when he saw his mistake, he said, "From both". Is he cute? But before he had
10854 a chance to be cute, I cornered him through a prior sworn contradictory statement, when I quoted from the flour record, "Then the lawyer asked you, and I believe you testified that that was to avoid being questioned by Mr. Dewey, or his staff," referring about his, Rubin's flight, and he said, "That is right." And then later on in the same record he changed and said that Lepke told him to go away. "Did you testify here that he told you to go away on account of the Dewey investigation? A. That is right." So, you see, we have a little luck. In some places

he is anchored, but when you get him anchored finally, he has got to say, "That is right."

In Washington, in March of 1937, which is the last day he saw Buchalter in the hotel, in the bathroom, Buchalter said to him then, he claims, "If you get into any trouble in New York, don't come to me." At that time the evidence is clear that not a soul in the world from Brooklyn was looking for Rubin—that is his own testimony. He is at his home when he comes in—he is at the office when he comes in—in no place is there 10856
word left for him that anybody from Brooklyn is looking for him. Why flee? Why flee when your existence is not even known?

New York—there is no explanation that it meant New York State or the New York metropolitan area. It meant, "New York", the very place where Mr. Rubin was committing his crime. I did not impute to him any wrongdoing in the Rosen case, but his own conscience was bothering him and he did not like the way I was questioning him, and he laughed at me and he said, "Maybe your conscience is bothering you—" 10857
when my whole proof in the case is he did not know anything about the Rosen case. Why should I try to implicate him when I know that a statement is in existence exonerating him? But I did not know his own mind bothered him. He fled from New York—he fled from Dewey—he fled from Manhattan—the only place in the world he had reason to flee from. And all of a sudden I said to him, "Did you ever tell anyone that you were fleeing from Brooklyn?" He said, "No." Because Berger was trapped, he said that Rubin told him that the D.A.'s office in

Brooklyn and the Police Department were looking for him. And the Judge said to him, "Was the Rosen case mentioned specifically," and Berger fell into the trap—I don't say intentionally—and he said, "Yes, the Rosen case was mentioned by Rubin or Buchalter, or both—" to Berger. What a lie! They were not looking for him, and when finally the Police Department did come to his home it was a Dewey man—a Dewey man—not anyone from Brooklyn, not
10859 because they wanted to spare him, not because he was a favorite citizen—oh, no. They were looking for anyone and everyone in the solution of this case through a force other than fingerprints or clues. But he did not figure in the case, and that is why I say his statement to McCarthy is true—that they did not let him in on anything—"I don't know anything about the Rosen case. I fled, but not from that case." And the best proof of all is that when he finally surrenders, he, who now claims he fled from the Rosen case—when he finally surrenders through his own lawyer, to whom does he surrender? He surrenders
10860 to Dewey's office—the only office that is looking for him—the only office from which he fled.

I know it is desperate; I know the attempt will be made to show you that inducement of flight is evidence of consciousness of guilt. The Court will have something to say about that, and, if there is any doubt in your minds, gentlemen, from where he fled, you must resolve that doubt in favor of the defendant. You were told that when you were chosen. When the proof of any fact is at issue, you can interpret it in two ways. But I will let the Court tell you about that, but I say to you, gentlemen, you have to

apply that rule here because he fled from the only place where he himself committed a crime and he surrendered to the only place where he himself committed a crime; and so the evidence of inducement of flight is hardly believable.

Another thing about Mr. Rubin, he wants to add, on and on and on—six feet deep is not enough for him. There is a lot of evidence or testimony in the flour case that I want to make reference to. He said that when he left Maguire's office—in the hallway, mind you—after 10862
he left Maguire's hallway—he would have you believe that Buchalter would say: "I did not want to tell you this in front of Maguire, but you have nothing to worry about. The case in Brooklyn is to be thrown out of the window." What case? What case is to be thrown out of the window? What window—what case? Mr. Turkus himself told you there was no clue, no identification, no witnesses. What case was to be thrown out of the window? What window could it be thrown out of? The Grand Jury was investigating the matter—the likes of Rubin and the lack of corroboration—or the truth, which- 10863
ever way you may term it, of the Rosen family. What could they proceed on? The case is going to be thrown out of the window! Then he gives McCarthy another boost—McCarthy is not going to take care of it any more. In other words, Jacobs is going to be put in, and Jacobs is going to be "pushed". And somewhere else, in another building, the case will die. Well, you are speaking of a big man when you are speaking of Ralph Jacobs, the second assistant in the office. There was only one man above him. No Rubin will dare to attack the integrity of that

man—not if I have a mouth, or the strength, or an ounce of strength in me. That is Rubin, gentlemen. But in the flour case, the same conversation in the same hallway, the same hallway, the same building, here is what he said—at page 967—"Buchalter," said he, "told me—he told me I have nothing to worry about, everything would be O.K., and I should trust him." He was asked further, "Anything else that you can remember?", and he said, "That is all." That
10865 is the time, I believe, he made the explanation that if something was asked about the Rosen case the lawyer for Buchalter would move for a mistrial. He knows what the lawyer would do! Maybe he would, maybe he would not. But the point is, "That is all I can remember—that is all." Now, that he wants to make "flight" a part of this case and dig a little deeper against Buchalter, he gives us an amplified, confounded, lying statement. But even if he said what Rubin claims he said, "Brooklyn is O.K.," why did he run away from Brooklyn if he believed Lepke? I say that there you have him. You have him
10866 because you are dealing with a man who has vengeance and hatred which knows no bounds. He is not satisfied with the incarceration of the defendant—maybe he wants to smell the burning flesh. But that care is not Rubin's care, or my care, or any person's care—the State seeks no vengeance—the State seeks simply justice—that is what the State wants.

The District Attorney will answer me in a lot of things I say, but it will be his interpretation, his personal interpretation, and not out of the evidence. Is there a reasonable doubt, gentlemen? I shall take but a minute with the testi-

mony of Mr. Maguire, the lawyer. Do you expect a lawyer to advise a fellow to flee? Do you remember the statement, "If there are no witnesses, there are no investigations"? Well, how about Sylvia Rosen? She is here, isn't she, a witness? Nobody asked her to leave; there is no evidence of that; she is a witness at the very inception of this whole scheme. There was no effort made to get her out of town—no effort to buy her off—no effort to intimidate or threaten her. "No witnesses, no investigation!" 10868
Finally, they stretch the word "investigation" in a manner that would lead you to believe that perhaps Rubin fled from two investigations. Well, that is stretching it quite a bit. You see, Dewey was beginning lots of investigations—the flour, in which he was connected; crimes in which he was connected; and this, in which he was connected. They were under lots of investigations. Rubin was involved definitely in the flour case—that is out of his own mouth. Maguire said, when Buchalter was up there—and he never saw him before— Buchalter was up there, and when Rosen was not even mentioned in the con- 10869
versation between Rubin and Maguire, there was not a word about it. He said the Rosen case may have been talked of in passing, evidently a remark like, "I read in the paper something about the Rosen case. He was formerly a member of the union—" something which you might read would be passed upon by men in the same trade. But a lawyer like Mr. Maguire, I don't think he came hereto lie—by no means—not by a long shot, do I impute the integrity of any witness like that. But we had him in court because, in the flour case, he gave testimony. You

see, he knew of the Dewey investigation. Where his office was, that is where the business was, but with the Rosen case he said he only assumed —"only assumed", that is his language. "Q. Well, then, Mr. Maguire," this is in the flour case, "you don't know what investigations were pending, do you, Mr. Maguire?", and his answer is, as plain as day, "I know that the Dewey investigation was pending then." But not a word like "Rosen" in the answer—not a word
10871 like "Rosen" in the answer. The next question put to him was: "How about the investigation in Brooklyn, in connection with the Rosen shooting?", and the Court made this comment, addressing Mr. Kleinman, who was the lawyer then for Buchalter, "He just said he did not know." Of course, he did not. You see, the Rosen investigation was all over the newspapers. It just happened that Dewey was hammering away, getting closer, and closer and closer, and snatching these men in the net, and Rubin was there with him and could be used against them, and he bought his freedom by turning State's evidence.
10872 We are not concerned with that case.

Now, we have the actor, Paul Berger. He is a fine gentleman, Berger, the cutter. Well, he was a cutter—he was not only a cloth cutter, he was a face cutter—one of the best. When he boasted of his cutting ability, I don't know what he was passing out—whether face cutting or clothing cutting, but he sure was a cutter, and he knew the gangsters, and the guerrillas, and the strong-arm men long before Buchalter appeared on the scene, long before he was with the union, since 1917. He acted as a strong-arm man—he was in the International strike in 1925

—he was on the trolley car with six others when they cut Mr. Johnson in the Borough of Brooklyn. They went to his home, they followed him—he should not go to his place because he did not go out on strike. That is a year or two years, at least, before he said he knew Buchalter. He was the slugger. There was no corruption of Berger by the defendant Buchalter. I take it he is a whole lot older than him. He had a varied career, all right. I asked him about the assaults and beatings and sluggings, and he said, 10874
"If it is in the book, it is there, don't go uptown, downtown, if it is there." He took possession of this court—this 1941 witness—who never hid, or concealed himself, or disguised himself, or used any alias while living here. The only alias he used was when arrested. And even after Buchalter was convicted he was around, even after Mr. Rubin saw Mr. O'Dwyer and Mr. McDermott and Mr. Turkus he was around. Why didn't they pick him up, such a vital and important witness in the case? Did Rubin lose his memory? Oh, no. Again I repeat—afterwards he learned that Berger was the fingerman, and 10875
he said, "He is, is he? Well, I am surprised." Then Berger, who asserted his constitutional rights and waived them and re-asserted them—this same Berger, who never was in trouble, he sent to the union—always the union—for money, for compensation for the lawyers, when he is arrested in this case. He sends for the union. Well, let the union be responsible for him. He did not send for Buchalter. There is no obligation on the part of Buchalter to him. His friend is the union. Damn the union—what do we care for the union? Let them answer—let

the Weinsteins and the Katzs, and all the other officers of the union answer for that. You are not going to make him the goat for the union—not in a court of justice, anyway.

So this Mr. Berger casts a slur upon his Jewish people. A fine defender of the Jewish people is Berger. There he is around—nobody picks him up—Berger, the man who holds an interest in a firm which has a Government contract, drawing $150. a week. I dare say that has a bearing
10877 in this case when you have the likes of him drawing $150. a week, living in a hotel—Berger—driving a car at the hotel. Again, I say, it is not my business how the District Attorney treats witnesses, but are you going to allow a murderer to be at the wheel of an automobile driving through the city streets with detectives in his car—detectives, honest, fine detectives, subject to the whim of a man like Berger? Well, maybe that has induced him to give false testimony. You may say to yourselves, "Why does Berger implicate himself?" What has he got to lose, gentlemen? He is smart—his lawyer sat in the
10878 box—his lawyer was always in the box—when he was arrested by Dewey away back in 1937, he was in the box then. Sending to Weinstein for money. He got immunity. You cannot touch him any more. He is free—as free as anyone from this charge. He would not sign any waiver of immunity—not Berger, with his lawyer in the box. There is no worry that he will be responsible for the assault with intent to kill upon Rubin, on the second attack. Do you think he is going in the Grand Jury, waiving immunity and subjecting himself to prosecution? Not Berger, gentlemen. He seeks nothing—he just

lives at the hotel, drawing $150. a week. As for income tax, you and I pay it, but not him. This alien, who thinks he is a citizen! Well, I guess if you are on the District Attorney's side, you can do lots of things, from the mere drawing of $150., getting yourself immunity, asserting your constitutional rights, and I gather he will be there on the witness stand before Dewey and he will have immunity before he utters a word of testimony.

Of course, they begin to agree on this. This 10880
Berger, who had the audacity to say to Judge Talley, "You are ridiculous." To such a fine man, a man of such high integrity as Judge Talley, who has to stand there and take the "advice" of a Berger. "Ridiculous," he said to him. Upon that testimony, gentlemen, you are asked to believe the defendant to be guilty beyond a reasonable doubt. Well, he definitely says that he was with Weinstein of the Cutters' Union, he was not at the Expressmen's Association. But that man even wants to volunteer more than is asked of him. Not again do we get a bit of truth. The Judge asked him, "Did 10881
Rubin ever say they were looking for him because of the Rosen case, specifically using the name Rosen?", and the witness, "He did." He did. Well, gentlemen, there are all kinds of truths from all kinds of people—there are all kinds of standards, but we trust to your intellect and to your honesty, we trust that you will keep your promise that you owe no duty to the District Attorney, no duty to the defendant, no duty to anybody, except to render a verdict that reflects the truth. Truth spouting forth from the character of a witness I have just described?

Rubin, who knows that Berger participated in this September 5, 1936, discussion with him in the presence of cops? Was that the truth? Berger, who says on the stand, when he is asked, "Did you pay the $200. to Rubin?"— "What proof have I—what proof has he got that I owe it to him?" That is the kind of a fellow Berger is, Berger who induces this very Rubin to say that the Dewey assistant made him swear falsely in a case where he was a defendant! Truth!

10883 I ask you to consider whether or not that sort of testimony is polluted. You said you would, and I have faith that you will. I think those are reasons for doubt.

And now we have the final character in this drama, created, written, produced, prepared by the Marxian, Rubin—Tannenbaum—Mr. Tannenbaum—the little Caesar. Never have I seen in a court room, and I spent twelve years in this very court room prosecuting cases, a little Caesar. Where do these men get their clothes? How well dressed they are? How well groomed and well

10884 mannered, how soft spoken? Where has all this training come from? Where do they acquire these manners? At the Half Moon Hotel? "Yes, sir," "Yes, sir," "No, sir," "No, sir," cavorting around places like the hotel? What is this business? Who do you think they are fooling—these murderers? Who? Where do they get these newly acquired clothes, manners and speech? In the street, if they passed you and tackled you, they would leave you half dead before they stopped. Little Caesar—Mr. Tannenbaum—the 1940 vintage. He sees Rubin in the Grand Jury, outside—"Hello, Max." "Hello, Allie." The fellow who was in the room when he heard the

murder being plotted, but says nothing. But when Rubin hears that Tannenbaum is up in Sullivan County awaiting a murder charge, and when Rubin feels that the back seat of Tannenbaum is being readied for the electric current—Allie, he says, is an associate of Lepke, and I will get him—he will talk as I tell him now that he has turned State's evidence. Who is this Tannenbaum—a Brownsville guerrilla, used before he knew the defendant Buchalter—used before. Yes, he knew the Shapiro brothers—he 10886
knew about the gang, as to who was to predominate in the Brownsville section—Abe Reles or the Shapiros. "But he had no part in it!" Not he—he was an honest, clean, working boy, helping his father in the hotel up in Loch Sheldrake Country Club. No less—the Loch Sheldrake Country Club. And long before the defendant comes up there, a lot of gentlemen are there, so-called "guests", in the Loch Sheldrake Country Club—gentlemen who take a seashore dip in the afternoon and summer at the Loch Sheldrake Country Club. It was a burial ground for Mr. 10887
Tannenbaum's victims. That is all it was. It is not a "country club"—it is a large unlicensed cemetery. And that is from his own mouth.

He is arrested after he comes from Florida, he getting his $100. while the defendant, whom he claims was sending it to him, is already in prison. Rubin has already spilled his guts to the District Attorney, McCarthy, and this fellow sending money. Well, he is around all the time and he is arrested by the Dewey office, and you know the procedure they go through. He is questioned and questioned; he is asserting his constitutional rights. Sure, he has rights, too—the likes of him

are entitled to constitutional rights—I must say that. But why, we want to know, was he ever questioned and given a chance to assert his constitutional rights with respect to the Rosen case? I don't care about any other case. But, oh, no, not one word, not one word was put to him in March of 1940, or in April of 1940, or in the early part of May, 1940, long after Rubin had already made his statement—not one word was put to him about the Rosen case until the sec-
10889 ond Sunday in May, after he pleaded not guilty and signed an affidavit. "Who, me?" "I am not a murderer—I don't know nothing about murders—not me—I am innocent. I can prove it." I will talk about that in a minute or two. This Mr. Little Caesar Tannenbaum takes active participation in this trial. "I take orders from the mob," or something like that. Well, but there is a way of looking up things, gentlemen, in the public records, and to confront those gentlemen who took the stand who want to try to blame everything on Buchalter. "He is in the hoose-
10890 gow anyway, let's give it to him."

Now, let's see about him. There is a little matter that he attended to on his own, with a gun, on his own, when he took a man whom he knew as Alfred Eisenberg and with a loaded gun robbed him. He admitted it here. But, apparently, the victim did not want to be a further victim, and so there was no jail for Mr. Tannenbaum. You cannot charge it to him. Well, now, the Shapiros—maybe he learned it from them. I don't know. This same Mr. Tannenbaum, who goes up to a summer resort and works for his father during the summer, and he says again

and again that the guerrillas came up there and spent a lot of money, and he is attracted by it. Nobody made him—nobody put a gun to his back and said, "Come on, work for us." He said, "Big Greeny gave him a job in New York." He was snatched, kidnapped, and forced and compelled to work for them, but he did not want to do an honest day's work. He had already felt the feeling of the "rod" in his pocket, and how easy it was to take a gun, put it in his pocket, and put it up against a man and take his money. 10892
Now, he is taking something like $35. a week. He admitted a hundred sluggings he participated in, and never went to jail; one hundred stench bombs he threw and never went to jail. And the odor of the stench bombs have left his testimony unworthy of belief. This is the 1940 Tannenbaum. What a model? Then all of a sudden, all of a sudden, we have Tannenbaum in 1940 accidently dropping in, by the purest accident, on September 11, 1936, and overhearing a talk between Rubin and Buchalter. I don't know where he was before—we don't know where he 10893
was after—we don't know what he did the morning or the night of the day before the day, or where he got the word, but accidentally he dropped in just as the proper moment to overhear this talk. Rubin saw him there, if it is true that Rubin was there, and spoke about that talk—away back in 1937, you would have remembered it away back in 1940, in the early part of the investigation. But, oh, no, you see, Tannenbaum is not ready for this cast until he admitted six murders on his own account. What a memory he has? Gentlemen, try to think back, any one

of you, to some business deal you have had away back in 1936 or 1937, and see whether or not you can remember any of the details as this man Tannenbaum remembers, although everything else in his mind is blank. We will show you what a fine memory this Tannenbaum had. He hears the name of Rosen, he hears the name of Dewey, then he nonchalantly walks out. He knows the "bulls" are around watching Lepke, but he doesn't care, he walks out, he does not make any
10895 effort to conceal himself, or hide, or sneak away —he walks out; and then he reads in the newspaper about the murder of Rosen, and he sees the Rosen name and the Dewey name, and he puts two and two together, and he remembers, not just accidentally, but exactly, the time measured to the second, when Mendy Weiss is there, and again to overhear a conversation, he with his dictaphone mind. Well, here is a record that he keeps intact until 1940 when he himself is surrounded with six electric chairs. He has a great memory. Well, if he has such a great
10896 memory, let us see. He said, like Bernstein, that since Judge O'Dwyer took hold of him he would not tell a lie. Mr. Tannenbaum becomes a roving witness—in California he is a witness—in Newark he is a witness—he got himself a little immunity on the side, you know, but he was a witness—not a witness to the Dutch Schultz killing, participation in it, but he is a witness, and a player for Mr. Rubin—he would put him in any spot he wants—he would coach him and he would put him in, and he would remember, even if he has to be refreshed. They say they don't see much of each other at the Half Moon—they just bunk into each other,

and say, "Hello, Max," "Hello, Allie," and that is all. A fine situation. If he remembered the testimony in Newark only in June, 1941, when he testified there, and he was asked there about the affidavit, "Did you sign it?", first he said to me, "I was not asked about it." When I showed him the record that he was asked about it, he said, "If it is in the book." All the witnesses know is the one answer in response to Mr. Rosenthal, "If it is in the book, it must be there." Well, it is in the book—irrevocably in 10898
the book. But when he is cornered in that case, he says, "Becker told me it was a bill of particulars, I don't remember signing it, I signed it as a bill of particulars." So he was making a liar out of an ex-Assistant District Attorney, like the gentleman who represented the family at this time and was assigned by the Court to defend him in Sullivan County then. But he remembers 1936. So I had to call Mr. Becker here—not because I believed Mr. Turkus charged anything against Mr. Becker, by no means, but I would not let that schemer leave the stand un- 10899
challenged by Mr. Becker, and I brought him down to take the stand. And I want to thank Mr. Turkus when he said, "No questions." In other words, he himself did not believe in impugning Mr. Becker's integrity in this case before September 11, 1936.

Judge O'Dwyer goes up there and he is questioned in Sullivan County—Mr. Tannenbaum is not asked a word about the Rosen case. So he is not given a chance—so Mr. Turkus said, "Wasn't Saul Price your lawyer—wasn't Saul Price attorney for Farvel Cohen?" And not

10900 even Tannenbaum would lie about that, because if there was no Farvel Cohen in this case, there was no intimation of this case; there was no Saul Price present when the affidavit was drawn, as you heard from the witness stand there. You cannot confuse the issue that subsequently Saul Price was the attorney for Farvel Cohen. We lawyers have a right to accept retainers in cases. There is no other way that I know how to make a living. Mr. Price, Saul Price, at a later time
10901 had the right to represent Farvel Cohen, but he was not the attorney then. You cannot be confused about this—no, sir. There was no Farvel Cohen then; there was no intimation that Saul Price told this fellow to keep his mouth shut. And he signed this affidavit, did he? "I don't know anything about any murder. I did not do any murder. I did not commit any murder." What is an oath to Little Caesar Tannenbaum?

Then he is brought here again to a hotel. Well, do whatever you want, Mr. District Attorney, with your prisoner—that is your concern, it is
10902 not mine. But it is if—if the treatment of the prisoners results in their coming here and rendering false testimony. I wish that I had the announcing ability of Red Barber when he broadcasts baseball games—in Eastchester, Long Island, or wherever it was—it was in Long Island, and there are these unpunished murderers playing a game of baseball. I know what he would have said: "Tannenbaum at bat—batting average six murders—using the stick, lots of experience—he knows how to slug, he knows how to run. Reles, pitching." Can you

imagine that? "Reles can shoot the ball at the plate like a bullet—lots of experience." That is what Red Barber would have said. A pleasant thing—handing a murderer a bat to crush the brains of a detective assigned to guard him, because he does not like him. I know you will say to me, "The cops had guns, they would kill him, and he would be dead already." I don't want to criticize my friend in the District Attorney's office for the treatment of these prisoners. Putting a bat in the hands of a six time murderer— 10904
leaving detectives at the mercy of these men right out there, and getting recreation, seeing their wives—like shouting a clarion call to all the youth of Brooklyn, "Murderers and killers seeing the world, playing baseball, and squealing against the big fish." I do not want to criticize that practice, but I do not want my money or your money to go to the maintenance of these creatures, and I do not want such treatment to be conducive to their subsequent falsehoods in this court room. Reasons for doubt? The case is full of them, gentlemen. Now, that is for 10905
Tannenbaum.

With respect to my client, I think that is the major portion of the case. Now, we have our defense—very brief to talk about—but I go into it. Just another reminder.

(At the request of Mr. Barshay a five minute recess was then taken. The court room remains in order, the Judge, counsel and jury remain in their places.)

Mr. Barshay (Continuing): But even I cannot say that you must remember where the burden

of proof lies. Even if you do not like a person's defense, it still does not mean that the People have sustained the burden of proof. I am not suggesting to you that you should not like my defense because it is only the question of lacking opportunity and motive, or the lack of both. The burden is still with the prosecution. That is the law. It never shifts. I cannot go into the jury room with you, but you must not forget it. The burden is with the District At-
10907 torney to prove beyond a reasonable doubt the guilt of the defendant—that never shifts. We need not explain nor disprove.

So Carl Shapiro was called. What a Roman holiday with Carl Shapiro. But it was not unexpected. Do you think the defense would call Carl Shapiro and not expect Mr. Turkus to conduct an excellent job of cross examination? Don't you think we had sense enough to know that when we called Carl Shapiro, that you gentlemen would know he was Gurrah's brother? We knew that. We knew it was an opportunity
10908 for Mr. Turkus to bring into this case names and associations of the brother's friends and the extensiveness of their business, and the 700 employees and the $275,000 place in Baltimore, and the place in New York. The Raleigh is not on trial. This young man was not even asked if he was ever convicted of a crime. I take it that this very industrious District Attorney knew that he was not—at least one member of the Shapiro family is salvaged, one that should be thankful for the fact that he was able to wake up and disassociate himself from the loafers who ran the factory in Baltimore as part owner.

What has that got to do with the case? What care I how much the Buchalter family drew from this business? What has that got to do with the Rosen killing? Rosen did not enter into the Raleigh situation all through, he had nothing to do with it. But that made atmosphere and prejudice. What did we call Shapiro for? You will get very briefly our purpose in calling Shapiro. There was testimony that the girl, Naomi, was dead, so we made an effort to bring someone who does not say that Tannenbaum 10910
was not there, who does not say he did not know Tannenbaum, who does not say that Rubin was not there, who does not say that Berger was not there. That is why we called him. He did not deny knowing these people. If he denied knowing them, you would have a right to say to yourselves, "He is a contemptible liar, we don't believe him at all," and throw it in the scales of justice and see what it weighs. All he says is, "I did not see them while I was there." And the best proof he was an honest person, no matter how stupid he looked on the stand, was 10911
checks here and checks there, and all that kind of by-play, giving the District Attorney a chance for atmosphere to show riches in comparison with the poverty of Rosen. That has nothing to do with this case. And look at what he says, at page 2629—he says, "I cannot say exactly I spent every minute of my time that day in the office." You see, there was no effort on the part of the defense to have Mr. Carl Shapiro at certain places, watching who comes in and who goes out and then swearing to you, gentlemen of the jury, "I was there from 9:00 o'clock in the morn-

ing until 10:00 o'clock at night, I did not see him," drawing the conclusion that he was not there. But we had the right to a reasonable acceptation of the purpose of Shapiro's testimony to be that, in view of the fact there were so many police around watching who and where and why Lepke associated with other people and gangsters—that is all. So he says, "I did not see him—I did not see him." And so much play is made— Don't you know what you came here
10913 for? Of course, he knew what he came for. Lots of the biggest business men take the stand and they cannot enumerate little items. That was made so important by the District Attorney. He knew what he came here for, of course, but that does not mean he knew what questions were to be put to him, in what specific language, in what specific order, whether it be by his own lawyer or by Mr. Turkus. The fact is that he came here simply to say that, "While I was there I did not see him." He did not say, "I did not go out to lunch that day." He did not
10914 say, "I did not go to the bath room that day." He did not say, "I did not go to the barber's that day." He did not say, "I did not walk out on the street that day." He simply said, "While I was there I did not see him."

Rubin already has proven to you that it was not Tannenbaum who was there—that there was no Berger there—that there was no Weiss there. Well, how are we going to know about 1936, investigating the case. If a man goes to Baltimore, from New York to Baltimore, it is reasonable to say, "Is there something you can refresh your memory by as to being in the place?" And

you pick out some checks, not to prove that he stayed there every single part of the day and watched who came in and who went out, no, just as to the fact that he was in New York in the normal course of events, that is all. What a Roman holiday was made of it! Did you save your railroad ticket—did you save your Pullman ticket? Who saves Pullman tickets? Who saves railroad tickets? If he said, "Yes, I did," and he pulled them out, you might say, "Ah, ha, you knew that some day you would have to testify to an alibi." Who saves railroad tickets? Do you keep them? 10916

Now, the law is that it is not our duty to prove that; it is always the burden of the People. I felt sorry for Shapiro. This set-up had nothing whatever to do with this case, except that someone wants to prejudice you in that direction.

Then we called Mr. Sobler. Again, I was not bound to call him. He, an old man, cheating the insurance company out of $12.50 a week. That is what he is doing. He does not want to admit it—but that is not my business. He is cheating the insurance company, so therefore Lepke is guilty of murder. He is hiding behind his wife—she is the front of the business—he is the owner—this old man. Let the insurance company worry about that. There are District Attorneys—let them go to the District Attorney, if there is any violation of the law. We are not here to worry about the insurance company. You see, he was to the lawyer's office before he went to Mr. Turkus, and he went to Mr. Turkus and he signed an affidavit. Still, we used him. 10917

Why? We had a right, Mr. Turkus, to say to Philly Buchalter, to take him to the lawyer's office and have him sign an affidavit. Who am I, not to go? Who are Wegman and Climenko not to go? Who better than the brother would be interested in going out to get witnesses, who? I haven't any detective— I know them, but they would not go if I sent them. You see, there is our staff—there is Mr. Wegman and his associate. What is wrong about it? There he is,
10919 Buchalter, sitting right there, Philly Buchalter. If it was wrong, he would be right in jail—he would be interfering with this trial. We have a right to get witnesses and speak to them and get their statements. We cannot drag them off the sidewalks to come to the lawyer's office. Where should I see a person—where else? If I saw them somewhere else, they would say, "What is the matter with your office?" Either way they get you. Because they do that, you gentlemen will be left with the impression that it is wrong for a lawyer to investigate a case.
10920 It is not wrong for a lawyer to investigate his case. I never undertake any case unless I can make the fullest investigation at my command. The City of New York has trained me well and paid me well to do that, and I do not take matters that are left in my hands unless I investigate cases, no more than a surgeon would when he sterilizes instruments when someone is brought in on the operating table. There is nothing wrong about that.

Now, Mr. Turkus did a pretty good job himself, and rightfully so. What was it the old man testified to after some questions were put

to him about Dutch Schultz? "Like me would be associated with Dutch Schultz?" This old man faints, he almost fainted here. The Court said his emotions were so great that they overcame him. Dutch Schultz would pick him to be an associate? He has a brother-in-law, one Richter, but there is no proof he associated with Dutch Schultz, his brother-in-law, in this case. But I would not care if his brother-in-law was Dillinger himself, it has nothing to do with this case, except that it goes before the jury with 10922
the hope that some juror may say, "Ah, the brother-in-law goes with Dutch Schultz, therefore I cannot believe this old man."

We have these documents, drawn long, long before there was a contemplation of any case like the Rosen case. Are they forged documents? They are originals, and there is no doubt about it. And what does he tell you? The story I told you originally—bad business on account the Pennsylvania route didn't pay. Kelly got out. He drew $75. a week and then there was a stoppage, "And Rosen came to me, 10923
he pleaded, he wanted to quit to work for the Garfield." And he said to Rosen, "Well, Louis Cooper will not take you." "I know," Rosen said, "Buchalter is interested in the concern, and he will take you," which happens to be the truth. Is there any question that when Rosen quit this concern there was a demand for back pay, or the commencement of a law suit for the value of the shares or the block of stock that were Rosen's? There was not. But speaking of the paper drawn, in the affidavit drawn in the District Attorney's office, all of a sudden

we get stenographers in the District Attorney's office. Up to that time there was no stenographer in the District Attorney's office. "Tannenbaum, did you make a statement?"— No stenographer present. "Magoon, did you make a statement"— No stenographer present. Mrs. Rosen, did you make a statement?"— No stenographer present. I know the answer perfectly, gentlemen, but before I give it to you, I will tell you what happens to all the steno-
10925 graphers in the District Attorney's office. They have not been fired. In the budget there still remains stenographers for the District Attorney's office. But, you see, under the law, as his Honor shall tell you, when a person makes a statement in question and answer form, and then he is offered as a witness, the Court has the right to look at that statement and see if there are any prior inconsistent statements. In other words, if Rubin came in and made a statement to the District Attorney's office —you see that done time and time again,
10926 gentlemen—any person who made a statement away back in 1936, there were stenographers there—now there are not any. The Judge looks at the statement and he says, "Counsel for the defense, you have a right to look at portions, the sixth, the seventh, the eighth lines, or whatever it is, and ask a question of the witness whether or not there is anything prior." As I said, this case was built on a movable foundation: you cannot anchor it. You cannot know what he told the first time, whether Tannenbaum, Magoon, Berger, anybody else—you cannot know, because there are no statements,

because he knows that the law is that if he told a falsehood then, I might be able to show it upon the stand. But they took private notes of just the sum and substance of what those people stated. Pretty clever—pretty clever, I say. Ah, but when there is a defendant's witness that visited the District Attorney's office, up pops a stenographer. Then they get him. Mr. Turkus will say to you, "Sure, there are other cases pending. What do you want, the lawyers in this case to find out by an examination of the statement what the evidence may be in another case?" That is not the answer, gentlemen. The Judge is the only one who looks at the statement, and he gives me only that what I am entitled to, not a word or a syllable more, and you can trust the integrity of the Judge that he would not show me, or Mr. Rosenthal, or Judge Talley, a single syllable of the testimony that has something to do with another case. That is the answer that Mr. Turkus will give you, but that is not the real answer, and I am nobody's fool with respect to experience in that type of work. I could not find out anything about any other case hidden there in the old statement. The Judge said, the sixth line, the seventh line, the eighth line, or the ninth line, you can have that, and nothing else but that which pertains to this case. But this case is on a movable foundation, gentlemen—a three card monte—not clean.

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Sobler made his statement, but Sobler's statement is not in question and answer form, so we do not get what was asked or what was answered, or what was given as an explanation—we only know the conclusion and the interpreta-

tion of the Assistant District Attorney wh put down the results of a long conversation with Sobler. Now, for example, Mr. Turkus said to Sobler, "Didn't you say that Bluestein took you into the New York and New Jersey?" He said, "I did not say so." He reads in the affidavit—it says, "Sobler or Bluestein took me into the New York and New Jersey." But the old man says, "No, he did not take me in, we organized it together, there was no New York and New Jersey,
10931 we simply organized it together." So, you see, the meaning is the same, but the interpretation of the assistant who gives his conclusions in the form of an affidavit, whether signed on every line with pencil or ink, had nothing to do with the case. The point is, the way to get a statement from a man so a jury can have it, is by question and answer form. That is the way to do it, and that is the way it has been done for years. What does he say? "One was a slavery business, one was a knee-pants business, one was a gentleman's business." One was a slavery
10932 business. Was there a good living after Kelly got out? Well, you see, there is no date as to when they had a good living. Look at the affidavit, or have that testimony read to you. It is pretty clever. Is Bluestein over here, or Kelly over here? There is no proof they are dead. If they had testimony to give contrary to this old man Sobler's, you would have had them here like they had the man from Kansas, Missouri, Oshkosh, or from any place in this world. How powerful the District Attorney's office is—they can snatch people off the streets, from here and there, if they can only prove the defense is lying.

Well, it was quite a paying business, as he said—it certainly did not net any one of them $100. or $75. a week. Nobody forced them out of business after the stoppage. Sobler continued for six month and then they separated—that is the sum and substance. He was only called to show you what we contended throughout—that he was not forced out of anything that he had—he had nothing and was given something better.

Now, gentlemen, when I sit down I shall feel 10934
the most tormented person in this court room. I know I have not done half as good a job as could be done with an interpretation of the evidence here. I will think of a thousand things I should have said that I did not say. But I am only human— I am not a Tannenbaum— I haven't such a memory; I am not a Berger; I am not a Rubin; I have no such faculties. My thoughts are just going out of my mind and out of my mouth to you jurors here. I know there are rules which permit Mr. Turkus to answer me, but I cannot answer him— I cannot because the law does not allow it; not that I could not 10935
offer proof, because there isn't any argument that he can give in this case, based upon this record—and I do not say this braggadocioally—that I could not answer, but there must be an end some place.

Now, you gentlemen are not bound only by the answer of counsel; if there is any reason you can give in answer to the argument by Mr. Turkus, you give it—you do not owe him the duty to be a convicting jury, no more than you owe me a duty to be an acquittal jury. I want you to consider the evidence fairly, fairly as

against each defendant separately. I want you to know that myself and associate counsel for Buchalter tried to do a reasonable, good job—a fair, honest job; and I want you to know that, in my judgment, when I told Buchalter not to take the stand, it was my judgment, and you have no right to draw an unfavorable inference because of that.

The burden of proof is on the District Attorney—he has not sustained it, gentlemen, in this
10937 case. Irrespective of who he is, or what he is, he is entitled to his day in court. I have faith and confidence that the verdict which you will render will reflect truth in this case, based upon the evidence as you heard it and upon the law as his Honor shall give it, with respect to Buchalter, and that you shall say, courageously, fearlessly, and honestly. "Not guilty".

The Court: There will be no further summations today, because summations must not be continued to a point of losing the attention of the jury. The jury must be able to listen and digest
10938 arguments, so we will continue tomorrow morning, and at that time, the other summation by the attorney for the defendant Weiss, first.

In the meantime, gentlemen of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open, and remember, follow all the other admonitions heretofore given.

The jury will first leave.

Now the defendants are remanded.

(Recess was thereupon taken to November 27, 1941, at 10:00 A. M.)

Brooklyn, N. Y., November 27, 1941.

TRIAL RESUMED

(Defendants present; jury not present.)

Court Clerk: Judge Taylor is confined to his room with a heavy cold. On his telephoned instructions, and unless there be objection by counsel, the trial will resume tomorrow morning at ten o'clock.

Mr. Rosenthal: No objection. 10940

Court Clerk: Hearing no objections, this case stands adjourned until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken to November 28, 1941, at 10 A. M.)

Brooklyn, N. Y. November 28, 1941.

TRIAL RESUMED 10941

(Mr. Talley, on behalf of the defendant Weiss, summed up as follows:)

Mr. Talley: May it please the Court, Mr. Foreman, and gentlemen of the jury:

This has been a long and difficult trial for everybody concerned, not the least for you gentlemen, who have had to make such sacrifices to carry out your obligations as citizens of this community. Counsel desire to express their thanks to you for the careful, constant attention

that you have given to the presentation of the evidence in this case. As my responsibilities come to an end, yours are about to commence, and they are pretty heavy, because you are going to be asked to do an extremely difficult thing. It is a difficult thing for one man to be called out of his ordinary avocation of life to sit in a jury box and pass upon the guilt or innocence of another fellow man. It is so hard to find truth in all this panoply of court-room justice,
10943 Judge on the bench in his robe, counsel, court officers. They are all created for the purpose of ascertaining the truth, that is all. That is all it comes down to. You know Pilate asked that question many hundreds of years ago, "What is truth?" and it has not been answered to this day.

It is a pretty heavy burden to put upon twelve men called from their homes and occupations, to give them the power to say what is the truth and what are the facts pertaining to any particular case, but it is our method of ascertaining the truth, of trying to. It is our method of
10944 trying to live up to our reputation of being, as a nation, and a people, no respecter of persons. We like to feel that it is a tribute to American life to say that every man, no matter how poor, humble, or benighted or corrupt, no matter how high his position or how influential, or how rich he may be, all men are equal before the law; all men are entitled to the same consideration when they come into a court of justice.

That is why the figure of Justice is blindfolded. She is not supposed to see the identity or recognize the identity of the suppliant that comes before her. She holds at even balance the

scales of justice, because they must be held at even balance; they must not be weighed down by power or might or influence of the State on the one hand, or by any consideration affecting a defendant in a case on the other. That is why the symbol of Justice means something.

When you were selected on this jury—and it seems a long while ago, doesn't it—there were certain principles of law indicated to you in your examination as talesmen which now become of very serious and significant importance to you, 10946
because you did not deceive counsel who asked you if you would take these considerations of law into the jury room with you, and this is the time for us to check up with you and see that you are going to, in your jury room, after you have heard the argument of counsel and of the District Attorney and the charge of the learned Court, and apply these principles of American law.

You remember you were asked about your understanding of the American doctrine of presumption of innocence. We are coming back to that now at the conclusion of this trial, and the 10947
learned Court—and I hope it is a well Court this morning—the learned Court will charge you at the proper time in this case the significance and importance of the doctrine of the presumption of innocence, and it means, as you will recall, that under our system of justice, in every state of our Union, a defendant charged by the State with the commisson of crime is presumed to be innocent until his guilt is proven, and then, as an extension of that doctrine, his guilt must be proven beyond a reasonable doubt, but we will

speak first of his presumption of innocence. It means that merely because an indictment is found by a Grand Jury, that the finding of that indictment carries with it no implication that the man or woman is guilty of the crime that is charged in that indictment. It is simply an accusation in writing, and it is the first thing that starts the wheels of justice moving in a criminal case, but it means this: It means that a man does not have to come into an American court and prove
10949 his innocence. Let us get that perfectly clear in our minds. Were you and I charged with crime, we would not have to proclaim our innocence of that crime from the housetop and say, "I am innocent; I am innocent." Remember the great dramatic story of Dreyfus, charged with treason in France, when the chevrons were stripped from his shoulders and the sword broken over a knee in the public courtyard, as they marched him around in disgrace, this captain of the French Army, who screamed at the top of his voice, "I am innocent! I am innocent! I am innocent!"

10950 You do not have to do that in American law. The State says you are guilty of a crime. Here is a paper that gives you the date and details as to the time of the commission of the crime, but we have to prove you are guilty, and the Court must see that you are proven guilty by credible evidence, in an open court-room, before any jury of twelve men will be permitted to find a person, charged in this country with crime, guilty.

See what a tremendous thing that is, tremendous. We are proud of it here in the United States. It is our system of jurisprudence, and it

is the result of centuries of experience where free people must be given some power to resist the power, the majesty, the might of the State. That means a ruling power. Whether he be king or emperor or dictator or president or governor of a state, there must be restrictions upon his power over the individual, else we are not free men, and this is one of the things, and it is of tremendous and vital importance when we consider our heavy responsibilities, yours as jurors, mine as counsel, in a case like this.

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The Court, as I said, will charge you about the presumption of innocence, but it is going to come to you, I make bold to say to you, in a rather battered condition, rather battered. In this case it has received its body blow—I am not quarreling with anybody about this—from this host of policemen in uniform and out of uniform in the halls and the corridors where you could see them every day and two or three times a day, in the court-room, in the corridors, placed here, placed there, either in uniform or with their badges conspicuously showing. Even yesterday, the force of policemen on the floor above, where you gentlemen were, uniformed policemen. Why? I do not know. These defendants—these defendants, presumed to be innocent, brought into this court-room with handcuffs on them and paraded before you three or four times a day. What is the purpose of that? What do you think?

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Now, we must have proof beyond a reasonable doubt. That you will be charged at the proper time. That means that there must not only be proof given in the form of documents or myriads of photographs, but the testimony from witnesses. Before you can find a defendant guilty

in our courts of law, you must be satisfied of his guilt beyond a reasonable doubt. Just let that seep into your mind. You will see why I speak of the terrific responsibility that you twelve gentlemen have. If there is any doubt in your mind that a witness is telling the truth, or has told the truth, if there is any doubt in your mind as to whether these defendants did the things that these witnesses have said they did, that doubt must be resolved in favor of these defend-
10955 ants. That is what proof beyond a reasonable doubt means. You have got to be satisfied beyond a reasonable doubt. The law says not any doubt, but beyond a reasonable doubt, the kind of a doubt that a man might have about the ordinary affairs of his business and domestic life, and if you are not convinced beyond that, then your duty under your oaths and obligations is to free these defendants.

There is another important element about which I would like to remind you and that I am sure the Court will charge you—I know he will
10956 if we request it; I think he will even if we don't—and that is that if you believe—this is again our American law—if you believe that any witness has wilfully testified falsely about any material point in the case, you are at liberty to disregard his entire testimony. Now, understand that. His entire testimony may be simply blotted out of your mind and out of your consideration if you are satisfied, after hearing him testify, that he has wilfully lied about any material matter that affects this case. And on that subject, let me, in passing, say this: It is a supposition, I hope not a vain supposition, that

honest people or dishonest people—it makes no difference who they are, once the power of the State has been leveled against them and charged them with crime—have a great measure of protection, because we require every person who comes to the witness stand to take an oath that he or she will tell the truth. I wonder if to you men, during the progress of this trial, seeing it administered to so many witnesses, I wonder if it lost its significance. It never has to me, with all the years that I have seen it taken. It is a 10958
terrible solemn thing. We raise our hand up to heaven and we call upon the Divine Creator, Master of all our lives and fortunes, who holds the destinies of each one in the power of His hand to crush like that—we call upon Him to come into this court-room, stand beside the witness chair, and witness that this person is telling the truth. What a solemn thing that is. It is a far cry from this court-room, 1941, to the 17th of September, 1796, but it is not so far in distance from the place where this sentiment was uttered, in Faunce's Tavern, right down here in 10959
Broad Street, Manhattan—you can get there in five minutes from this court-room—when Washington, laying down his duties, his responsibilities as the purest patriot this country ever saw, delivered an address which we are told took two years to prepare, and in which he said this: "Let it simply be asked, Where is the security for property, for reputation, for life, the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?" That was Washington's comment of warning to people he loved so much, in the

country for which he had done so much: "Where is the security for property, for reputation, for life, the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?"

Well, I had to shudder when I heard the oaths taken by the witnesses who have been called by the prosecution in this case. It just gave me a creepy feeling, that all the experience I have had in the court-room has never taken away and

10961 never will.

Your responsibility, gentlemen of this jury, is in being called upon to pass upon the question of whether these men shall live or die, because that is the result of your verdict, as you know. The terrible responsibility that is yours is placed upon you by the prosecution in this case in asking you to render a verdict of guilty of murder in the first degree on the testimony of the vilest array of murderers, sluggers, perjurers, that have ever sat in a court-room in the course of one trial, in my opinion. There is

10962 your responsibility, and I don't think it is a fair responsibility to have placed upon the shoulders of any twelve men in this county, that they bring, one after another, these men who confessed that on other occasions, in other court-rooms as solemn as this and on occasions as important, when men were on trial for murder, these men admit that they have committed perjury, that they have lied under oath, that they have called upon the Almighty to witness truth of what they say, and then in the face of His majestic presence, His omnipotent power, they have lied to deceive other jurors. What, in

heaven's name, is the assurance that we have here that they are telling the truth here? They perjured themselves in other cases; why not here? Where is the sense of religious obligation that I have quoted to you that should and must accompany an oath in the case of these men who admit six murders—imagine, admit six. If they admit six, how many have they committed? And they told of the different parts they played in them. They fingered this victim; they drove the car for this victim; they threw a body in the 10964
lake in this murder case; they stood as a look-out while in a field up in Sullivan County the body of a murdered man was dropped into a hastily-made grave.

It is a pretty tough thing, I am telling you, gentlemen, for any District Attorney to bring before you, seeking and yearning to get the truth, the testimony of men of that type, and then ask you to believe it. That is what they have asked you to do in this case. And how you can possibly do it is more than I am able to see or will be able to see, because you are supposed to bring 10965
into the jury room, as you are supposed to bring into the jury box, your experience and your common sense in the ordinary affairs of life. You do not hang those on a hat rack with your hat and coat when you become a juryman. You are supposed to see these things in the light of your own experience, your knowledge of men, your knowledge of things. Would you take the word of any of those people who have been called here—any of them—in any ordinary affairs of life? If you had any business transaction with any of them, would you trust them as far as you

could see them? You would not. And yet you are asked in this case to believe what they say in this new, regenerate time. What has happened to them? They have all reformed. They have all become white as the driven snow. They were dark as the depths of hell before, but now they are all white.

Little white lies! They told you in their lives, they blushingly admitted that they had told little white lies. They would not lie to save themselves, according to their reformed, purified dis-
10967 position now. They ask you to believe that they are telling the truth, and in the back of their low, degenerate cunning minds is that native, primal instinct that even the animals possess, to save themselves. That is the background that looms behind all this wicked testimony that has been given. They want to save themselves, and, up to now, they have been quite successful by their method in doing it, quite successful.

It is against the canons of ethics that govern reputable lawyers to seek clients and solicit busi-
10968 ness. We cannot do that. We cannot advertise like Abraham & Straus advertise the Christmas business. We have got to wait for our clients to come to us, and I am going to violate that right here, now, out in public, and take the consequences. I would like one client who would be a taxpayer here in the County of Kings that would retain me—and I offer my services, believe it or not, without compensation if a taxpayer will retain me to break up for all time this menace, terribly dangerous idea, of locking murderers and criminals and crooks and perjurers, not locking them up behind prison doors, where they belong, but by letting them luxuriate in the best hotels

that we have in the county, not on prison fare, but dining in their living room, served by waiters, with dainty cups and dishes, not hotels on the riverfront or down on the Bowery, not the Mills Hotels or the lodging houses where humble people go, not at all. These people are put up in the Waldorf of Coney Island, the Half Moon, with an ocean view in summer, and, I suppose, the exposure to the sun in winter; put up in the Bossert Hotel here in Brooklyn, the Towers Hotel. Just imagine it!

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I say that no district attorney nor any other official has the right to spend taxpayers' money pampering these criminals in hotels in the city. What is the effect of it? It is not the mere spending of money. This is an extravagant town, extravagant nation. Officials don't care how they spend people's money these days. We used to stagger at millions; now we don't blink an eyelash at billions in appropriations. But here is the menace of that. They are gathered together in one hotel, on the eighth floor; their rooms are adjoining—this is testimony in this case—twenty-four hours a day they are there; 10971
they dine in community; they don't have to sit in the cell with a tin dish. Oh, no. They dine in their living room. Who was it told us that? Tannenbaum. And, of course, they have an opportunity to talk, and they are given a year and a half in this case—more than that,—May, 1940, or thereabouts—to get their heads together and fit in, fit in the various bits of evidence so as to try to make a complete, unassailable story. There is the terrible menace of that kind of incarceration for people who say, "Why, these fellows are in jail, in the Federal House of De-

tention; they are behind bars twenty-four hours a day; their food is passed in to them through a steel grating. We are here at the Half Moon Hotel. We are taken out for exercise, for entertainment. Our wives are allowed to come to see us,"—eleven o'clock at night, you heard one of them testify, he saw the wife of Reles.—"This is the best side of the fence for us to be on. Let them sweat; let them suffer; let them burn. We are going to live in the best hotels
10973 that Brooklyn can afford. Just for what? Why, for trying to save ourselves and tell the story that the District Attorney's willing ears would like to hear, and we will try and fit in these loose ends together, and while we are playing cards or eating our hotel meals, why we will just check up our various stories and see if they all fit in." There is the menace of this new, 1941, streamlined method of handling crooks and criminals. See the terrible inducement that is offered to these men to lie and perjure themselves. Why, they were not even indicted for the crimes which they admitted to the District
10974 Attorney a year and a half ago they committed, not even indicted. We have seen them here, not even accused of crimes which they admit, and we see them now, fully confident that because of the testimony that they give in this case—and they are quite willing to give it in others—they will soon be walking the streets as free as you or I, while the victims of their perjury are in prison or in their graves.

Now, I was going to discuss the witnesses as soon as possible in the order in which they appeared, but I cannot do that because I don't

want to take any longer than this morning's session. I don't want to asphyxiate you men with too much legal oratory. I want to keep your minds clear, but I must point out to you some of the important things that have been said and the more important things that have not been said in the progress of this case. You remember the information that was conveyed to you when this case opened, about the rule that you cannot convict upon the testimony of accomplices, men who themselves participated in the 10976
crime, and that you must have evidence independent of any accomplices' before you can convict a man of crime. That again has a background of centuries of experience. That again is supposed to be a protection that we in America have against the informer, the informer who is trying to gain something for himself, some benefit to himself, the safety of his own skin, by talking against somebody else.

Mrs. Rosen's testimony about the man who came in was so much lighter in weight than the defendant Weiss, that that is out of this case. 10977
The Court has already informed you of that. That might have been regarded, if you believed it, as some measure of corroboration coming from one who is not an accomplice. That is out of the case. There is only one bit of corroboration that will be attempted to be impressed upon you in this case from other than accomplices in the murder, and that comes from this unspeakably horrible looking Tannenbaum, you remember, the man who looked like a death mask the day he appeared—terrible looking—Tannenbaum. So that that question about the man who came into the store the night before and looked

around, that is out of the case and you cannot consider it.

Was it to induce that identification, or attempted identification, of the defendant Weiss that Mrs. Rosen, the widow of the man who was killed, was made a guest at the Half Moon Hotel where these other witnesses who were prepared to try and convict Weiss in this killing were located and stationed? Did you ever hear of such a thing, putting up the widow of a mur-
10979 dered man in a hotel and keeping her there as a guest? For what? It would be a natural thing for her to have all the resentment in the world, wouldn't it, against the men she believed had been responsible for the death of her husband? Did she need any inducement? Did she need any price? They wanted some corroboration and they brought her into this court-room while you were being selected as jurors, and had her look at Weiss so as to make sure that she would not pick out the wrong one of these three defendants when she came in. That is how sure they were about identification. A very much
10980 lighter man, she says, this man in shirt sleeves, this man that came in, walked around the store, walked around. Why, you would think it was Macy's or Loeser's that she was talking about. This store is not much bigger than this jury box. You remember one of the men described it in the other room. I think he stopped and pointed about where you sit (indicating). He said that is as long as the store was, and that is all it is. It is the smallest thing you ever saw. It would be absurd for anyone to walk in and look at it

at all. All you had to do was walk past and you could see every cubic inch of that store, as you can today, tonight. A brilliantly lighted street, Sutter Avenue. Ridiculous, the contention that it was necessary for anyone to come around that store to have Rosen pointed out, as they say they had to point Rosen out to Weiss. It is a single-man business, single-man store, a candy store, a hole in the wall, that is about what it is, despite this gorgeous photograph that every day was put on the stage for you gentlemen to look 10982
at as the place of the murder. Just a hole in the wall with one of these open windows where they could serve soda or candy or cigarettes to anybody on the sidewalk without leaving the store. You know the type of men that stand behind the counter, just hand it out through the window, and yet they go through an elaborate story here of people bringing over Weiss to show him Rosen, what he looked like. He could not possibly mistake him by just walking past that stand. He was the only man there in that store. But, however, that is part of their case.

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The first witness of the type that you are asked to believe—the others were all preliminary—was Mr. Bernstein. Bernstein—I do not know whether you remember his appearance; it seems almost like ancient history since he opened this case with his testimony—Bernstein is the man who said he stole the car with the aid of one "Muggsy" Cohen and, in order to put his friend "Muggsy" Cohen in as bad as he possibly could, he says "the best automobile and radio thief in the business," like George M. Cohan says every song-and-dance man thinks

he is the best song-and-dance man in the world. "Muggsy" Cohen, and Bernstein, who admits having stolen fifty automobiles, and my point is these are not modest gentlemen. If they stole fifty, you can bet your life that the real number would be nearer a hundred and fifty. That beautiful expression of "Blue Jaw" Magoon "stole a hundred or better." A hundred automobiles or better. Realize, a hundred automobiles, probably more than they will have in the
10985 next automobile show. A hundred automobiles would block up this street outside this court house, take them an hour in single file to pass by; give them one minute to go by and only sixty could go by in an hour. A hundred automobiles he stole, or better. Bernstein says that he, with his record of fifty automobiles that he stole, had to go out and engage a gentleman named "Muggsy" Cohen to steal this particular automobile. See the deviltry of it! Did not want to put himself in this murder as an accomplice, stealing a murder car, so he puts it on "Muggsy" Cohen. And he, Bernstein, tells
10986 us he gave his story about this killing to the District Attorney in April or May of 1940, not this year, last year, April or May, before the summer of a year ago. Two summers have passed since he gave himself up to the District Attorney and, of course, with his innate honesty, he must be presumed to have told the District Attorney of this county all the truth about this killing. Well, it seems to me if I was District Attorney and a man told me he would engage another to steal an automobile for use in a murder, I would hustle out and get that man that stole the car and slap him in. Not so "Muggsy"

Cohen. A year ago last May, we must assume—because Mr. Bernstein, according to the District Attorney, is an honorable man—we must assume that he told the District Attorney all the story, but lo and behold you, Mr. "Muggsy" Cohen did not appear upon the scene until you had heard Bernstein testify for at least two days, and then, for some curious reason or other,—surely it could not have been the theatrical effect,—young "Muggsy" was brought in and stood at the foot of the jury box to have his 10988
old friend Bernstein pick him out, as if Bernstein did not know him. Never had been arrested up to that time. Was not arrested then, but he was put into custody in, I think, the Towers Hotel, in custody, a man who had stolen the automobile, taken the radio out of it, turned the car over in the dead of night—one o'clock, Mr. Bernstein said it was, one a. m. He was not brought in here until he could be paraded before you gentlemen as the villian in a Punch and Judy show is brought before children. It was not any more necessary than bringing 10989
an elephant from Barnum's Circus, bringing "Muggsy" Cohen and saying, "Is this 'Muggsy' Cohen?" "That is 'Muggsy' Cohen." I had to call "Muggsy" Cohen, although they had him in the custody of the police officials, and when I did call him and had him sit in that chair, the District Attorney did not dare ask him a word, not a word, about the theft of that car. But there is this much in the evidence in this case that I was able to get out of that episode,—and it is rather disconcerting, and I would like

10990 the District Attorney in his address to you to answer and explain to you, because it is inexplicable to me,—Bernstein told you positively—I am sure you remember; you may remember my insistence in having him answer definitely—that he had not seen "Muggsy" Cohen from the time he gave himself up in May, 1940, until he saw him standing in the court-room when we were then conducting this trial. I hope you remember that testimony. It is very vivid in
10991 my mind. He said, "I have not seen him since I was picked up in May, 1940." Well, I did not have much success under the rulings of the Court, under the objections of the District Attorney, in getting what I wanted in the way of testimony from "Muggsy" Cohen. The Court sustained the objections, I have to say rightfully, because the Court is presumed to know the law, but I could not get it in except to this extent: that "Muggsy" Cohen admitted that he had been in the District Attorney's office in April of 1941; that he had given a statement to the
10992 District Attorney at that time, which was referred to by Mr. Turkus as an affidavit; and "Muggsy" Cohen also testified here that he had been in the District Attorney's office and had seen Mr. Bernstein.

Now, it does not interest me whether "Muggsy" Cohen is telling the truth or whether Bernstein is telling the truth, on general principles, but they both could not be telling the truth, and I say to you that Bernstein and Cohen met in the District Attorney's office in May of this year, and I point to the evidence and record in this case to satisfy you of it. The

point is that the District Attorney sat in this court-room, in your presence, and allowed Bernstein to testify under oath that he had not seen Cohen since May, 1940. This was not a matter that he had to take anybody else's testimony about; this was a matter that the District Attorney knew about, because he was there, and I want to know if that is fair dealing with a jury of twelve men, torn with anxiety to get the truth and do the right thing, that I know you want to do, and that kind of testimony is al- 10994
lowed to appear and go by unchallenged. All he had to say is, "Stop, Bernstein. That is not the truth, and you know it is not the truth. You know that you saw him in my office in April, 1941." Oh, no. That was allowed to go by, and that is a pretty serious situation.

Now, of course, the Cohen business was dragged in solely from the distorted idea of Bernstein that he ought to have some corroboration by somebody that was not connected with the crime, as he thought, to back up his story of the stealing of that automobile, and that is why he brought Cohen in. I say it is perfectly 10995
ridiculous that an automobile thief with Bernstein's admitted record, fifty cars or more, should have to engage anybody else, particularly a little crook of the type of "Muggsy" Cohen, to steal this automobile. He did steal fifty others, he said; why couldn't he have stolen this one? You remember his testimony of how carefully he had gone over the route seven or eight times through streets where he had been brought up as a boy. He knew them even better than he knew how to steal automobiles. They had

to rehearse this proceeding seven or eight times, in this automobile, over the route in the city. He knew this car was to be used for a murder; he knew that as well as I know that I am now addressing you gentlemen, and yet he was ready to go out and steal the car; he was ready to go out and get the drop; he was ready to sneak in in the middle of the night, with his flashlight, you remember, screwdriver and flashlight, taken out of his car. Wonderful how these fellows
10997 all have automobiles, wonderful. Maybe, if you can steal them as well as they can, it is not so wonderful. They all seem to have automobiles to ride around in, their own or somebody else's. He not only stole the car and got the place to keep it the night before, but he drove the car there and waited outside of Rosen's place for this killing to be done, waited with his engine going, his doors open, so that the murderers could rush back into the car and get away. He says he heard shots fired, saw the men come out, and he drove away. If that is not cold-blooded, premeditated murder, there never was cold-
10998 blooded, premeditated murder. This man Bernstein is as guilty of the killing of Rosen, on his own admission, as the man who fired the shot. A look-out who stands outside of a building while his confederates are upstairs burglarizing, the law says, is just as guilty, just as guilty of that crime on the seventh floor of an apartment, as though he was there himself, and if the occupant of that apartment house, on the seventh floor, is killed during the robbery, the man downstairs, the look-out, is equally guilty with the man who does the killing on the seventh floor. That is the law. And yet this admitted accom-

plice in this murder is the man who was brought here and whose integrity is vouched for by the District Attorney, else he should not have called him.

Now, let us see this Bernstein who would not tell a lie. Why, he admitted being in a hold-up before he ever met Mendy Weiss, before he ever knew him. He admitted a hold-up with a gun, and he was ready to kill a man if he resisted. Remember the horrible story of his walking nonchalantly around Sullivan County and he is accosted and is asked to get into a wagon and 11000
ride with a dead body of a man named Yuran; rode along with this body of the murdered man, along the roads somewhere up around Monticello, Sullivan County. He rode with the body and then went into the field where they buried it, buried it like you would bury a dead dog, while he stood look-out guard. He gets himself as far away from the actual killing as he can, but he is willing to admit that he acted as look-out, a ghoul, a grave digger, a thing that gives the normal man the creeps even to think about it, and while these murderers buried the body 11001
of Yuran, Mr. Bernstein, the District Attorney's witness, stood looking down this road, down that road, to see if anybody was coming to interfere with the ghoulish job of burying this body. Horrible! That is merely one of his adventures.

The important thing for you to determine is, Is this man, despite his murderous propensities, telling the truth here? Let us put an acid test on that. He admits that he perjured himself in this trial in Monticello, in what is known as the Gangi Cohen case, where he denied any participation, in any form, in this particular Rosen

killing that you gentlemen are impaneled to listen to. He perjured himself when he said that, that he had no participation and knew nothing about it. That is his sworn testimony in that case. Now, if he perjured himself there, what assurance have we got or have you got that he is not perjuring himself here? It just does not make sense. Why should he lie up there and tell the truth here? He was in the same situation up there as he is here. He was trying to
11003 save himself from participation in or knowledge of that murder, and, gentlemen, he takes an oath to tell the truth and lies to that jury, tries to deceive them. Who is going to stand here and say that he was not lying and trying to deceive you in giving the testimony about this case? Things don't change that quickly. Men do not become suddenly vile and neither do men become suddenly virtuous. If he testified falsely once before, I say you have every reason to believe he is lying falsely here now in this case. What is the reason? See how adroit these fellows think they are. What reason does he give for
11004 the perjury in Monticello? Very ingenious, but how silly. He says he did not want to tell the jury in that case the truth, even though he swore to tell the truth, the whole truth and nothing but the truth, because some of the accused in the Rosen case had not yet been apprehended, had not yet been put under arrest. What business was that of his? Who gave him the right, if it was so, and of course it was not, who gave him the right to determine how much of the truth he would tell and how much he would keep away of the truth from the jury that was listening to that

case? A man's life was at stake in that case just as much as three men's lives are at stake here, and yet he goes on and falsely testifies and tries to deceive that jury up there—he has to—so that they will believe him. "Oh, no, I had nothing to do with the Rosen case. I am not that bad. You saw me raise my hand, and you must believe what I said." And when we asked him why he testified falsely there, that is the answer he gave, and bear in mind that he talked to the District Attorney of Sullivan County and 11006
the District Attorney of this county in Sullivan County, in Monticello, before he went on to testify. Now, was he committing perjury?

Let us see another instance of it referred to by Mr. Barshay in his able address to you—and there cannot be any mistake about this perjury. You remember he said he was held incommunicado in his luxurious hotel? It is not a bad hotel, either, the Half Moon—pretty good. His expression was, wherever he got it, "We had no intercourse with the outside world, no communication with the outside world." That is the ex- 11007
pression that stuck in my mind, "outside world." And yet the counsel in this case was able to show you that he had sent out at least six different letters from that hotel, after trying to make you believe that not only was he not allowed to talk with anybody, but he was not allowed to send out any communications; and so apparent was his perjury in this case that even this honorable Court denounced it from the bench, and I ask that he be committed for perjury right here and now, in this court-room, as an example to him and others who are brought

here to perjure themselves to save their worthless lives.

Do you need any further assurance about whether to believe Mr. Bernstein in anything he says or not when even that situation was presented to you in this court-room? Are you going to let these people pull the wool over your eyes, these desperate characters and liars and murderers and strong-arm men, stink bomb throwers? Are they going back to their luxuri-
11009 ous sitting room in the Half Moon Hotel and laugh their heads off at the way twelve business men of the Borough of Brooklyn are fooled by their story? I don't think so; I don't think so.

Remember, there always comes a place where these perjuries must stop. You remember his story about spending the night in Farvel Cohen's apartment, waiting for the coming of the dawn to do this murder. He said he slept on a rug. Bear in mind he could not describe the apartment, did not know how many rooms there were in it, did not know who else slept on the rugs,
11010 did not know who slept in the beds, knew nothing whatever about it. That is something he had not figured on, that he would be asked to describe that apartment. Knew nothing about it, could not describe it. The reason was he was not there. That is why he could not describe it. If he had been there he would have given you a very accurate description. That is Bernstein. I think it is a great injustice to you gentlemen to be asked by the District Attorney of this county to believe the testimony of a man of that kind. It seems to me it is unthinkable that with his record as a thief, as an accomplice in mur-

ders, as a look-out over the grave of a victim of a murder, it is a great injustice to ask you to believe anything that this man says, and I am convinced that you are not going to. Don't leave your common sense and your judgment outside of this court-room. Here is where we all need it. The people of this city, the people of this county, need your common sense now more than they may ever need it again. Don't be fooled by this kind of testimony from murderers, sluggers, perjurers.

11012

I am going down the line. Since it takes so long to go over one of them, I am so afraid of burdening you by too much talk.

Probably the most horrifying witness of all the witnesses on this point was one who did not implicate the defendant I am representing at all, Weiss, so much so that we did not even cross-examine him, but if ever their was a villian that showed it in every line of his face, it was this smooth, oily, Communistic, Union Square orator, Max Rubin, who could not restrain his vindictiveness and could not restrain his desire—and he was a great actor—David Warfield, about whom I read this morning in the paper, never had anything on Mr. Rubin as an actor—the sudden outburst of anger, his tear-flushed eyes, great, great; this clothing cutter that could not cut a baby's pinafore and yet was going around dictating to decent men in the clothing business what they should do and how they should conduct their business; this cold-blooded, crafty perjurer, Rubin. I hate a crook. I am a lawyer. I am called upon to defend men charged with crime. I prosecuted them. I have defended

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them. I have judged them, and I hate them, but I think I hate a coward more; and you have this fellow Rubin coming here to tell you that even in the last war, desperately serious war for the nation then as this one is now, that he not only dodged his duty when he was called in the draft, but he ducked, as Mr. Barshay indicated to you, behind a woman's skirts; he hid behind a neglected, abandoned wife, and gave as his reason that he could not go to the war
11015 with all the rest of our sons or brothers that he had to support a wife, and then this woman—and I would like to shake hands with her sometime, this outraged woman—what is it that Shakespeare said? "Hell hath no fury like a woman scorned"—came forward and said, "This man is not entitled to an excuse. This man is not supporting me nor my child," and the Draft Board immediately shot him up from 4-B, or something like that, to 1-A. He was caught then in that lie when he could not have been more than about half the age he is now. Coward!
11016 Then he was drafted along with all the other decent boys that had to go to that last war. Did he then do his duty? Did he feel sorry that he had perjured himself in trying to evade the draft in the first instance? He did not. He ran away. He deserted his country. He deserted his flag. He ran away and hid himself, so that he could not be called on to take his place in the ranks with the hundreds of thousands of other American boys that had to go to that war and many of whom lie there yet in Flanders Fields. Coward! Coward!

We find him a few years later, curiously enough, in Germany for two years, our enemy then as our enemy now, Germany doing some business with Russia, mind you, Russia, with which we were on most unfriendly diplomatic relations at that time. There is the start that this favorite witness of the District Attorney had in his adventure in life—Benedict Arnold—coward and shirker and draft dodger. Oh, if he had ended his vileness and criminality then, that would be bad enough, but, oh, no, he be- 11018
comes a cool, calculating villain that he has shown you, but not villain enough to be barred out of the Bossert Hotel in Brooklyn in March, 1940, and I think he has been there since, March, 1940, or at least that is the time he talked at that place with the District Attorney of this county, and he has been at the Half Moon Hotel too. Did he tell Judge O'Dwyer the truth then about this case and about his record? If so, if he told him what he had done in this case, why wasn't he indicted? The indictment here is available for you to examine. His name is 11019
not on it. Tannenbaum's is not on it Berger's is not on it. Why wasn't he indicted then? Why wasn't he put in jail? Why wasn't he even put before the Grand Jury that found this indictment in May, 1940? That is the curious thing. He was not even called before the Grand Jury. I don't know how this thing works out. Witnesses have been called here to testify that they knew all about this Rosen killing, not put before the Grand Jury until this case was actually on trial before you men, actually on trial, the indictment found, the trial commenced; then

they are put before the Grand Jury sitting in the months of October and November, 1941. The indictment had been found by that time. Was it because it was thought expedient to let these men gather in the Half Moon Hotel, fraternize together, play cards, dine together, play baseball, so they could get their stories fixed up before they would be put under oath to tell it? Is that the reason they were not put under oath any place to tell their story until this
11021 trial was in progress, and were they put before the Grand Jury thirty days ago and less so that they could be told, "Now, if you do not tell this story you have told us before, not under oath, we are going to have you for perjury in addition to this other"? I never heard of such proceeding. I don't think anybody else heard very much about that kind. A murder indictment found a year ago and the principal witnesses, upon whose testimony the District Attorney relies to get a conviction, not called before the Grand Jury until the case is almost
11022 coming to a close. I cannot figure that out. Maybe you can.

Now then, the next witness whose testimony I want to revert to is that of Max Berger. You remember Max Berger did not like his name, as though it made any difference what kind of a name a villain like him carried. You remember his calm admission that he had been a slugger and a strong-arm man all his life; and I say a slugger of the type that he meant and was, who calmly admits that he did the slugging in more than a hundred cases, oh, more than a hundred, was a potential murderer every time he struck

one of those men who were trying to earn a living at the time he assaulted them. He did not care whether he killed them or not. He did not care whether, when he left them lying in the gutter, they ever arose with a spark of life in them or not. A slugger. Always available, always ready. You saw his violence on the stand. Do you think you would like to believe him about any business affair you had? Would you like him testifying against anybody that was near and dear to you, upon any sub- 11024
ject, in a civil suit or a criminal suit?

How in the name of heaven can any intelligent District Attorney ask twelve men of your type to credit anything these fellows say? You would not do it outside of the jury box, you know you would not, and, gentlemen, you have no right to do that inside the jury box if you would not do it outside the jury box.

Now, this Berger, never arrested, never indicted for anything here, admits—I don't have to argue these things; I am only reminding you of the testimony in this case—admits that he 11025
was what they, in their parlance, call the finger man in this Rosen killing; admits that he pointed out Rosen, he says, to Weiss. I have told you it is incredible that Weiss would need anybody to point Rosen out. All he had to do was go and see the man in the store. He could get his description. One-man store, that is all; no clerks, no bookkeepers, no attendants, no counter man—what shall I say, salesman—just this man in this poor little hole-in-the-wall store, and yet Berger tells you an elaborate story that he pointed Rosen out when he came out to fix his newspapers on the stand in front of his shop;

and he knew violence was going to be done; he knew he was going to be murdered, if he were fingering, which he was not, and he tries to let himself down because he thought he was going to be "schlomed", I think the word was, by beating him over the head, a skull fractured, a brain destroyed in its God-like utility forever. That is all he thought, he was not going to be killed. What nonsense! Fifty to a hundred men he said his assaults have been on others.

11027 My question is, if Berger told the District Attorney his part in this case, it made him an accomplice. He was as much the murderer of Rosen as the man who fired the shot, once he admitted that he had pointed him out to people he claimed were the killers or prospective killers of Rosen. If he told his story to Mr. O'Dwyer, as he said he did, isn't it fair and reasonable for you as citizens to expect that the District Attorney of this county would have put that man immediately under arrest and would have caused his indictment as one of the accomplices and, having indicted him and having shown him that

11028 he was facing responsibility for the murder, then if he wanted to talk, let him talk. But no, that was not the method used in this case, not the method used at all. He could have been called in at any time. He was under $35,000 bail, he said, as a defendant in an investigation being conducted by the District Attorney of New York County. He could have been produced at any time, but he was not, until the summer of 1941, this year, when, instead of being put in jail, he was sent to the Half Moon Hotel and kept there, possibly to be pampered and fattened up for his appearance in this trial.

Let me remind you just of this thing: Was he telling the truth, Berger, or was Rubin telling the truth? I hope you distinguish the two of them. I myself get them confused once in a while. Berger was the big, burly, violent fellow who went through the dramtic episode there, banging the Judge's desk. Was he telling the truth or was Rubin telling the truth about the receipt of money by Rubin? You remember Rubin testified that every week he got $50 sent to him; when he was in Salt Lake City, or wherever else he 11030
was, he got the $50 sent to him. Berger testified that he handed that same money to Rubin right here in Brooklyn or Manhattan—very definite and very positive about it—gave it to him when Rubin came back from Salt Lake City, handed it to him; repeatedly said he never sent him any money by cash or check or money order but always handed it to him here in New York; whereas Rubin went right down the line, asserting that every $50 he got was sent to him by somebody in Salt Lake City; so they cannot both be true. One or the other is lying. It simply 11031
indicates that they slipped up on their story in that detail. They had not expected that would come out, but it just shows you their propensity to lie. Take either horn of the dilemma, take either one you like, one of them is lying, and if he lied about that, what is to prevent him from lying about the more important things in this case? The important thing in their case is try to satisfy the District Attorney about the defendant Weiss, for whom I am speaking, in this killing. That is what they wanted to do. That is what they are trying to do. In back of it

all looms their intense anxiety to save themselves as well as to keep out of jail since 1941.

Why Berger was not indicted for this crime is pretty difficult to understand. He was allowed to walk around from the time the investigation was started up to the summer of 1941, and I, for the life of me, cannot understand this—this is testimony that The People brought forward now—Rubin, Max Rubin, fleeing to Salt Lake City, being reprimanded for not staying there,
11033 going somewhere else, and coming back again. Here Berger was the finger man in this case. Berger was the man that knew more about the case, according to his own statement, than Rubin did. Why wasn't he the one that was sent away to flee the jurisdiction of Brooklyn or New York? He floated around New York, large as life, with his automobile. No question about his going away. No question about Lepke or Weiss or anybody else sending him out of town. Oh, no. He just sauntered around until the summer of 1940, when Coney Island looked pretty good to him, and he had himself, at the expense of the County
11034 of Kings and the taxpayers thereof, lodged as a guest in the Half Moon Hotel. I don't know why Rubin was the man that had to do the fleeing, while Berger stayed around here in the City of New York with his $150 a week. Pretty good money. I employ some pretty fine lawyers in my office for much less than $150 a week, college graduates, trained men. Berger, getting $150 a week!

I don't know whether I can make this plain to you out of the mass of testimony, but it is of tremendous significance. I want you to recall Berger's testimony of being in Brooklyn with

Weiss until after eleven o'clock on the night that he bluntly admits that he fingered Rosen. I hate their expression, but that is theirs—you have heard it so often—pointed him out as a prospective victim. Bear in mind that he testified that he lived in Brooklyn. He swore that when he and Weiss finished their business in front of Rosen's place, this pointing out of Rosen, that Weiss drove him back to New York. Then when he, Berger, remembered that he had testified that Lepke had brought him down in a 11036
taxi to meet Weiss on the East Side, he tried to cover that up by testifying that he had left his car on the East Side; had to go back to Manhattan, although he lived in Brooklyn, that night after eleven o'clock; although he had to go back to Brooklyn he testified he came up to get his car, which he testified he left on the East Side of Manhattan, which East Side he described as 12th Street and Broadway. 12th Street and Broadway I know and you men know has never been described as the East Side of New York since Peter Stuyvesant was stamping around in
Dutch Colonial New York. It just could not 11037
happen but he felt he caught himself in a trap. They had not checked up on that between themselves, and that is how he covered himself up.

Let me tell you another discrepancy that I want you to bear in mind as of tremendous importance, and because of the hours and the dates here I have got to read this: Rubin testified that he saw Lepke in the early afternoon of September 11th, Friday, this day we are talking about of Berger going over there to the car, in the car with the lights lighted, after he and

Weiss had arranged to go over there. During that conversation he says that Lepke hinted that Rosen should be killed—why I still don't know, still don't know; it has not developed in this testimony—that Rosen should be killed to stop him from talking. No evidence here that he had done any violent talking. The District Attorney of Manhattan's representative was here and said they did not know and never heard of him so far as their records were concerned. Rubin then
11039 suggested that he would go to see Weinstein, a Union official, and find out whether Weinstein could do something to stop Rosen from talking. Rubin then left Lepke, so he says, and saw Weinstein and returned and said Weinstein would do nothing, and it was then, according to Rubin's testimony and apparently the prosecution's theory, that it was determined that Rosen should be killed and that Lepke gave Rubin, he says, the truthful Rubin, a message for Berger, that he wanted to see Berger, which he did. That is Rubin.

11040 Berger then testified that Rubin delivered the message from Lepke and he saw Lepke on Friday at about 5 p. m.; that Lepke and he took a cab to the East Side, where they met Weiss at about 6 p. m., six o'clock in the evening, at which time Berger was told to finger Rosen for Weiss. According to Berger's testimony, Lepke then left, and Berger and Weiss went into a restaurant, had something to eat. You remember he said it was getting dark about that time. He testified further that it was absolutely dark when he and Berger reached the neighborhood around Rosen's store; he stated that the lights

were lit on the way to Brooklyn. Berger then pointed out Rosen to Weiss, and then they drove back to the East Side, 12th Street and Broadway, where they arrived at about eleven or twelve o'clock at night. Of course, if there was any truth in that story, after Berger had gone with Weiss all the way over to Sutter Avenue, the locality of the Rosen place, Weiss would have driven him home here in Brooklyn. You know Berger did not figure on that, and so he had himself being driven back all the way to 11042
12th Street and Broadway to get his car that he said he left there.

You cannot reconcile that testimony of Berger's with the testimony of Bernstein. It just cannot be done, because Bernstein—let me bring you back to one of the earliest days of this case—Bernstein testified he was seated in his car about one o'clock in the afternoon, talking to Strauss—remember?—at Sackman and Livonia, in Brooklyn, and that Weiss, the defendant Weiss, together with Capone and Farvel Cohen approached his car—that was Friday, Septem- 11043
ber 11th; the killing of Rosen was on Sunday, September 13, 1936—and it was then at one o'clock in the afternoon, says Bernstein that Strauss told him, Bernstein, to steal a car and to provide a drop, a depository for the stolen car; and Bernstein further testified that he met "Muggsy" Cohen about three o'clock in the afternoon and made an appointment for one o'clock the next morning to steal that car. One o'clock in the afternoon, three o'clock in the afternoon.—but that was long before, according

to Rubin's testimony, it had been determined at all to kill Rosen. That all happened at one o'clock or two o'clock or three o'clock in the afternoon, whereas, according to Berger's statement, he was told to meet Weiss and finger Rosen late that evening, six or seven o'clock; it was dark when they started out to go to Brooklyn. You just cannot fit those times in. One story or the other is false. You take your pick as to which you believe. I say you cannot be-

11045 lieve either. I say that it is incredible that Weiss could have made any arrangements with Bernstein, Strauss, or Capone Friday afternoon because he was not finished with Berger until eleven or twelve o'clock that Friday night on the East Side of Manhattan, according to his description. And so we leave Mr. Berger. I don't think you can believe him. I don't see how, in heaven's name, you can believe anything that he or any of the rest of them say, and if you do not believe them you cannot convict these defendants.

11046 Now, I do not know whether you got the shock that I got when this man Tannenbaum appeared on the stand. He looked like a tragic mask, a long yellow face. Tannenbaum is relied upon, curiously enough, as the main corroborating witness in this case against Weiss, and unless you put full credence and belief in what Tannenbaum says, of course, under the instructions of the Court, you cannot convict. How about Mr. Tannenbaum as a corroborating witness to anything? Remember that yellow, ghastly face that he had when he appeared here? He is the man that participated in six murders,

he says. He says in the murder of Solomon Goldstein he helped to dump the body into a lake after the murder. In the Ashkenas case he admits doing the shooting. In the Yuran case he admits driving the murder car. In the Plug Schuman case again he admits that he drove the car. In the Harry Greenberg case, the murder of Harry Greenberg, he says he covered the car for the man who actually fired the shot which killed Greenberg. With them, covering the car means to be ready to interfere with any pursuit 11048
that gets in the way, even though there be a smash-up with the police car that is pursuing; block off anybody who he thinks interferes with the escape of the murderer, ready to do murder in that instance if necessary, crash any car, destroy anybody's life, in order to let murderers get away. That is what these gentry call covering a car. He admits he did that in the case where Harry Greenberg was murdered. He admits that he pointed out the victim in the Whitey Friedman murder and that he was the finger man in the Diamond murder. Imagine a man coming before twelve men—when I say twelve, 11049
I hope you alternate jurors won't take offense, because only twelve of you are going to decide this case—coming before gentlemen of your type and asking you to believe, and recounting these kind of things that I am now retailing to you. It just does not seem credible. It does not seem as if we are living in the Borough of Brooklyn, in a civilized community, when men can come on the stand and in one breath ask you to "believe what I say," and in the other breath say, "and these are the murders I am admitting that I committed." Lord knows how many others

that they don't admit, but these are the ones they admit. Finger man in the Diamond case, and the District Attorney is going to ask you to believe what he says about this case. How can you do it? How can you do it? Allie Tannenbaum! I am wondering if it is not Tannenbaum who killed Rosen, the man who is lighter in weight than Weiss that was described by Mrs. Rosen when she came on the stand. I am wondering if he was not trying to save himself from possible consequences of his seventh murder by putting it on Weiss in order to distract attention from himself. One more murder, or one murder more or less is not going to make any difference in his young life.

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Is this the reason that they are testifying as they are in this case, to distract attention from some of their own mob, some of the people who are either in the hotel with them or have been, by seeing to it that others are convicted of the crime which they themselves committed or knew who did commit? I am telling you, when you get to analyze the motive that these men have in testifying as they do, and when you consider that they are doing that to save their own lives and the consequence of their acts, you cannot have any greater inducement for the commission of perjury than what you have had in this trial. As I say, I am oppressed with the responsibility that is being put upon you when you are to be asked, as you will be asked from this table, to believe the testimony of these murderers, these devils that have been testifying here under the mockery, sham, the sacrilege of the oath which they took to tell the truth.

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This man Tannenbaum is the man who was

talking to District Attorney O'Dwyer long before Weiss was taken into custody at all and long before Weiss was interviewed by the District Attorney. Did Tannenbaum tell the District Attorney of this county the truth when he was talking to him over a year ago? If he did, Weiss would never have been permitted to walk around the streets of New York or to go to Chicago or California or anywhere else. He would not have been permitted to dine in a restaurant with Major Kleinman, with a group 11054
of policemen around, including the Police Commissioner, and walk out of that restaurant without handcuffs on his wrists. Let us just, if we can— I cannot; I don't think you can—pass over for a moment the six murders that he admits, this man Tannenbaum, the corroborating witness. How about his additional crime of perjury in addition to his six murders, or possibly seven murders? How about his being a perjurer? Well, the record shows that he admits perjuring himself before the Federal Grand Jury right here in your county. He testified
that he knew Weiss only slightly in September, 11055
1939, and here were the questions he was asked and the answers that he made on this point—this is before the Grand Jury in 1939, having taken the oath to tell the truth, all of the truth, and nothing but the truth:

"Q. Didn't you testify before the Federal Grand Jury that you only knew Mendy Weiss slightly? A. Yes, sir.

"Q. That was false, you say now? A. Yes, sir.

"Q. That was a deliberate false statement you made to the Federal Grand Jury? A. Yes, sir.

"Q. Do you remember when it was? A. September, 1939."

If he was telling the truth then, he only knew Mendy Weiss slightly, and Mendy Weiss, if he only knew Tannenbaum slightly, was not likely to be implicating himself, Weiss, in with Tannenbaum, a man who was almost a stranger to him. Either that was true or it was false. He says

11057 it was false, and, if it was false, he knew that he was committing perjury before the Grand Jury. Now, what is the difference between committing perjury, swearing falsely, before that Grand Jury in 1939, and committing perjury, swearing falsely, before this jury in 1941? You see, they are like rats. They are cornered everywhere they turn. You see, they are able to point out things of this kind to you, and I ask you how in God's name you are going to believe anything they say. How are you going to do it? This man Tannenbaum they have had in custody

11058 since March, 1940, a long while to work up a story, a long while for him to figure out with these others that are there how he is going to get out of this situation he is found in, how he is going to save his own worthless self. Since 1940 he has been in custody, a man who was taken up-state and visited there by the District Attorney and by his Assistant, Mr. Turkus, and then later went before the Grand Jury and testified falsely and committed perjury. Of course, he has been in a hotel. This seven-time murderer never served a day in jail in connection with any of the seven murders, never. He, as far as I

know, never was indicted, never even had to answer an indictment, and seven murders,—pretty good. I don't think Bluebeard did very much better than that, did he? Jack the Ripper only had one, and he was desecrated by the world for many years, when I was considerably younger. Seven murders! Not in jail! Oh, no. In the Half Moon Hotel, witr Bernstein, with Reles, with Sycoff, with Rubin, with Berger, occupied the room next to Reles, if you remember, the very next room, the night before he was 11060
called here to testify. Tannenbaum! Gentlemen, you cannot, you cannot and would not convict the proverbial yellow dog on the testimony of a man like Tannenbaum. Any District Attorney should be ashamed to ask you to do it. It is too much of a burden to put upon men of your type. You had to give up your homes, your business, the ordinary comforts of life that we all enjoy, for all these weeks, sitting in this jury, instead of being home and coming in here every morning to do your duty, as you are willing to do. No, you are segregated from the rest of 11061
humanity. Who is going to attack you? Who is going to approach you? Who—

The Court: Please. I must interrupt this.

Mr. Talley: I am sorry that you feel that you must.

The Court: This must be stopped.

Mr. Talley: The heaviest burden is placed upon you by being asked to believe the testimony of witnesses such as this type that you have seen, you have heard. I am merely trying to recall them to you.

The Court: Pardon me just a minute.

Gentlemen of the jury, the purpose in your

segregation is not that the Court wanted to impose a hardship at all. It is to keep you from becoming prejadiced against the defendants by reading newspapers and listening to expressions of opinion. This is for the benefit of the defendants and to assure that they will have a fair trial, so that you will judge the case solely upon the evidence and have discussions among yourselves, not among members of your family and friends.

11063 Mr. Talley: Will your Honor advise the jury, if your Honor pleases, that this segregation was not at the request of the defendants or any of their attorneys?

The Court: I don't have to advise that. The Court does not have to ask the consent. The Court is here to administer justice and is not subject to attack upon summation. Don't do that again.

Mr. Talley: The next in this array of witnesses was Seymour Magoon. You remember him, the swarthy little "fifty-or-better" man. Something happened to Seymour Magoon. He
11064 did not make the hotels. He is being held in Bronx County, in the Bronx County Jail, because he was unfortunate enough, the poor boy, to be implicated in a murder in the Bronx. I think they have a good hotel up at the Grand Concourse in the Bronx. They must have several in the upper part of the Bronx. This criminal is not lodged in a hotel. He was lodged in the County Jail. He was a more ignorant type than the other witnesses who were called by the District Attorney but none the less cunning. He is the man who said he dressed himself up as a

laborer and for five days hung around in front of Rubin's house to get a line on his habits and customs, knowing that he was to be killed. He is the man that went into Child's Restaurant while Berger, cold-blooded Berger, sat down and had a meal with the man whom he was to point out to Magoon, sat down, broke bread with him, solely for the purpose of indicating that Rubin was the man to be shot. This is Magoon. Day after day sat around in what he regarded as disguise, a laborer's dress that ought to have 11066
been an honor to him to wear instead of the fancy clothes that he and his type always manage to effect. He is the man who met in Child's Restaurant his proposed victim and then went with a man named Cuppie Migden to find Rubin. He followed him with a car, went up to 17th Street and 5th Avenue. He followed Berger. Again, they both had cars. In that neighborhood Rubin was pointed out to him; stayed around all that day and saw Rubin return at five o'clock in the afternoon; tried to tie Weiss into this case, because that is why he was called, by stating conversations that he said he had with Weiss 11067
about the Rubin attack, and you are asked to believe what he says Weiss said. There is no easier way for this type of perjurer to give testimony than by saying he said something to him. You don't have to describe a room or a place or a store, the physical facts about which could be demonstrated and shown that he was telling a falsehood. The easiest way is to get an admission, to have him testify that the defendant said this or said that to him. Nobody can contradict that, you see. They say, "He said

this, he said that." When I say nobody can, I mean no physical facts can contradict that.

So the first thing you have got to question yourself about Magoon, is he worthy of belief? It all comes down to this in the case of all the witnesses. Here is a man who admits he stole fifty automobiles or better and admits that he participated in murders in Brooklyn and the Bronx. He admits that he was the driver of the car in the Friedman murder and he participated
11069 in the Bronx murder of Penn, upon which he is now being held, but, with the charm that exists about these so-called informers, although implicated in the murder by his own admission, he is only being held as a material witness, the same as you or I might be held in a case in which we might happen to be an innocent bystander. He says on September 4, 1939, he participated in the killing of Irving Feinstein and helped the defendant in that case to dispose of an oil can, the contents of which had been used to burn the body of their victim. This is the man who naively
11070 stated he would not tell a lie to save himself, just one, and that during all his life he had never told anything except little white lies. That expression coming from that gorilla I never will forget to the rest of my days. He never told anything but little white lies, and he expected you to believe it, the same as he expected you to believe—and there are a thousand reasons why he should expect you to believe—he is vouched for by the District Attorney—he expected you to believe that statement just the same as he and the others expect you to believe their story

about the participation of the defendants in this case.

What fools we must all be taken for. Maybe Puck was right, sitting on the top of a cowslip, looking over the world and saying, "What fools we mortals be." What fools they must take us for, to think that any jury would believe the testimony coming from the polluted, blackened lips and hearts of men of that type.

He testified that the first one he spoke to in O'Dwyer's office was Mr. Turkus and Mr. Klein, 11072
in 1941, and at that very moment he was involved in the murder in the Bronx in which he admits participating. Is he making what he regards as a pretty good deal for himself by getting freedom from responsibility in the Bronx killing by testifying here? He thinks he is, but there is one part of the deal he has not yet reckoned on, and that is this jury here. He thinks he is going to be credited and he believed and then for the service he has rendered The People, the District Attorney of Brooklyn will convey his compliments to the District Attorney of the 11073
Bronx and say he rendered great service, he fooled this jury, he made them believe his lying utterances, despite his record as a murderer and a thief, and so we will have to give him consideration.

I must hurry along, because I want to finish before the usual recess hour, and that I will do. I want to call your attention, in passing, to Special Agent Albert Aman, who was called here solely for the purpose of—and this will be made much of by the District Attorney—proving flight.

The District Attorney is going to tell you that only guilty men flee. Of course, that is not so. He is going to tell you that flight is confession. That is not so either, as has been demonstrated thousands and thousands of times. But they are going to say, "Well, the corroboration"—pretty solemn testimony we have here from these liars and perjurers and crooks and thieves and murderers, but we have got corroboration now; Weiss was running away. Well, I ask you
11075 to consider the testimony of Special Agent Aman as evidence that if Weiss was running away it was from nothing having anything to do with this Rosen killing. There was some testimony given here about a Federal charge against Weiss. These agents were interested. These men who are sitting on either side of Weiss now are Federal agents; they are not New York police officers; they are not under the control of the District Attorney; they are Federal agents. The testimony indicates that he is brought here every day from the Federal House
11076 of Detention in West Street, Manhattan; he is in the custody of Federal agents, and I say that this testimony of Aman shows that Weiss, if he was trying to keep out of New York—and I don't dispute that he was—and as such was using an assumed name, because, as one of the witnesses said, he was afraid he was framed—he was being framed by a witness in a Federal case.

Aman made this significant statement, and he was backed up by his associate, Agent Bell: that when Weiss was apprehended in, I think, Kansas City, I am not sure, he waived extradition, and

both of them say that they asked him whether he wanted to be brought to New York or Texas and both said that he said he wanted to be brought to New York.

Now, is it within the range of probability or possibility—and you have a right to consider the probabilities in this case at every point; that is where your experience comes in as business men—is it within the range of probabilities that if Weiss was fleeing from a murder case he would have asked these Federal agents to 11078
bring him back to New York, the City of New York, the Borough of Brooklyn, precisely where he would be amenable to the authorities in Brooklyn? Oh, no. You know that he would have said, "Take me out to the Lone Star State of Texas. I will do better out there on this Federal charge. It is not murder. I will do better out there with the Federal Court than I will in New York if I have got to face a murder charge." So that I submit to you that there is no evidence in this case, no credible evidence, that will justify you in any way in inferring 11079
that Weiss was out of town in 1940 or 1941 because of the Rosen case. They tried to hook that up rather definitely, very definitely, by having someone say that Weiss said, "Tannenbaum was talking and I will have to beat it" or "take it on the lam." That is the way they hooked that in. Here is the evidence. That is what Tannenbaum said. As against that is the evidence of these two Federal agents who said he was quite content to be brought to New York instead of going out to Texas on this Federal charge. I think that evidence is of tremendous importance.

11080 Now, Weiss says that he was not present at the Rosen store on Sunday, September 13th, and through the lips of his wife, his two brothers, his wife's friend, and his mother, he gives you the testimony as to where he was. Sunday, the 13th, the day upon which Rosen was killed by somebody, maybe somebody that had testified from that witness stand, that day was his birth day. I had not launched on that testimony for five minutes before the Court said, "Have you
11081 got a certificate of his birth?" Well, I was hoping somebody would ask me that, and the Court obliged me, and we had it, and it is in evidence. It shows he was born here in the City of New York on the 13th of September. And you heard the testimony that they remembered this birthday, his twenty-sixth birthday, on September 13, 1936, because the old mother, the old lady, said that Mendy and Sidney had had a little row a couple of weeks before and she wanted the boys to be friendly and patch it up, and she suggested that they have a party.
11082 They started their party, as is the custom of that type of people—nobody will deny that—on Saturday night rather than Sunday, that is, they started at ten o'clock on Saturday night, the 12th, and carried it on until the morning of the 13th. You heard the testimony; you had an opportunity to look at the witnesses. Are you going to believe these murderers and cut-throats, these finger men, these perjurers? Are you going to believe them in preference to these people who testified as to where Weiss was that night? I don't see how you can. Of course, it will be said that to prove his alibi he had to

bring his own family, those who were nearest and dearest to him: his mother, his wife, his brothers, his wife's friend. Of course they are willing to testify falsely in his behalf. That is human nature. You almost have to blame human nature for that. But you saw them and you heard them. No record of perjury with them. No record of murder with them. No fingering victim with proposed crimes with them. No thefts of fifty and hundreds of automobiles with them. They were just people, true to the type 11084
of the East Side of New York or what you have in a similar section here in Brooklyn. Who else could be called upon to testify about a birthday party except our intimate friends and our family? We don't celebrate our birt iday parties with strangers, do we? We celebrate them with those who are near and dear to us. And that is what this family was doing on that night. You have no right to reject their testimony. You will be asked to regard it with suspicion, but, as I say, gentlemen, who else is there that he could call to testify except the members of his own family. He was there with his old 11085
mother, who was pleased and happy that the row had been patched up between the two boys, and she was going to be a sport that night, in her joy and jubilation, and not only go to the restaurant and moving pictures, but take a ride through Central Park. She lives over here in Brooklyn. So don't be swayed by the argument that he had to call his immediate friends and relations and those closest to him to prove what will be scornfully referred to as alibi, which is just a Latin word meaning "elsewhere," that

is all. Because the fact remains, gentlemen, that it was his birthday. It was his birthday. And the records of the Department of Health of the City of New York show it was his birthday. Nothing they say is going to change that. This thing was not grabbed out of the air. It does seem to me, in the last analysis, that the thing for you to consider is, Whom are you going to believe? Whom are you going to believe? Are you going to throw their testimony
11087 out as false and perjured, and are you going to take the testimony of these murderers and thugs who have testified to a condition of affairs that, if true, if true, would show that Weiss, instead of being at his home, with his mother, with his wife, with his wife's friend, the poor creature,—believe the murderers,—believe Weiss was over at Rosen's place; believe these; you will say he was there where they say he was, and back of that looms the certificate, which you may take into the jury room with you, showing he was born on the 13th of September, about 1910.

11088 Gentlemen, I have about finished all that I wish to impose upon you in this case of The People against Mendy Weiss. Bear in mind that we are in the same position here as if he was the only defendant in this case. We wanted a separate trial for him. The Court in his wisdom determined they would have to be tried together. It would have been very much easier for us to try this case with one defendant than with three, would not have had all this panoply of power, policemen with gold shields and handcuffs. I have done the best I can for him. My responsibility is about at an end. Your re-

sponsibility is about to commence. I say that it would be a very terrible thing for this County of Kings, this Borough of Brooklyn, your home, and this City of New York, if the crooks and criminals of the type that have testified in this trial are going to be given notice by your verdict that they can perjure, they can steal, they can murder, with impunity, so long as they reach the District Attorney's ear first.

We are living in weird times, weird times. We are living in danger, dangerous, hazardous 11090
times for the well-being of this country, and I know nothing is going to undermine the foundations of our American system of government more certainly and with more deadly effect than just that, a notice that twelve gentlemen of your type would be led to believe the testimony of men whom nobody would believe and nobody should be asked to believe, whose records, whose admissions, whose character, whose appearance, whose everything, belie every attempt of those who called upon them to testify to be believed as honest or reputable or decent men should be
believed. Don't be carried away, gentlemen, by 11091
the things you have seen in this court-room. Just stick to the evidence in this case. That is what I want you to do, just stick to the evidence in the case. Remember the character of the people who have given it to you. Remember that you are now called upon to use your common sense—oh, I insist upon that so much—and weigh that common sense in the light of the probabilities in this case. Consider the animus that these men have, the motive they have for testifying falsely, that greatest, that is, the most

overpowering of all motives, to save their own worthless lives. This life of ours that can be snapped off so suddenly, and how we struggle to save it. To men of this type, nothing will stop them, they who will murder, they who will call on God to witness the truth of what they say and then lie; nothing will stop them in their endeavor to save themselves, and that is what they have been doing in this case.

Gentlemen, I am very grateful to you for your
11093 attention to me. I am sorry I have had to take up so much of your time in reviewing this testimony. I know you are going to do the fair and decent thing. You will try to do the fair and decent thing. I ask you that your verdict will be a verdict of not guilty so far as the defendant Weiss is concerned.

The Court: The Court will remain in order. We will recess for lunch until 1:30, and I am going to ask you, in order to avoid too much crowding this afternoon, if we may all be here promptly at that moment.

Gentlemen of the jury, please do not discuss
11094 the case, let nobody talk to you about it. Keep your minds open.

Defendants are remanded.

(Whereupon a recess was taken for luncheon, until 1:30 P. M.)

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AFTERNOON SESSION.

TRIAL RESUMED.

Mr. Rosenthal summed up to the jury, on behalf of the defendant Capone, in the following language:

Mr. Rosenthal: May it please your Honor, Mr. Foreman and gentlemen of the jury, I would also be remiss in my duty if I did not, just as the Judge, Mr. Turkus, and all of counsel will 11096
do and have done, thank you gentlemen for the long and arduous task that you have had and for the great attention which you have paid to the testimony in this case. You have not seen much of me during the trial but I hope that you will bear with me in the summation which I intend to give on behalf of the defendant Capone and Capone solely, he being the person to whom I am responsible and he being the man whom I will direct all of my argument to you about.

When you were taken,—it took a very, very long time to select fourteen men who will sub- 11097
sequently be reduced to twelve,—from the vast majority of the citizenry of Brooklyn who said at the time that irrespective of any opinion that they may have formed or anything that they may have read, they on their oaths as jurymen and on their conscience as men will fairly deliberate the guilt or innocence of each and every defendant in this trial. For the defendant represented by me, that is all I ask. Counsel have already taken care of the defendants represented by them.

A number of men have never been called to

serve on juries before so that it would not be remiss for me at this time to, in some brief manner, remind you of some of the things which you might have given very little thought to and to remind you of some of the questions which were originally asked of you before you were accepted as jurymen. At that time possibly you may have thought the questions a little bit ridiculous but now you can see the reason motivating each counsel in having addressed you and asking
11099 you the questions they did. This trial is divided, in reality, into four parts, the part played by the District Attorney, the part played by defendants' counsel, the part played by the Court, the part played by you. Each one has a responsibility. The greatest responsibility is yours. All the District Attorney had to do was to present to you what was given to him, the Grand Jury having found an indictment which at this time is meaningless, as will be explained to you by the Court in charging you on the law, and if those witnesses fell down, he cannot be heard to
11100 complain. All defense counsel is called upon to do is to fairly and adequately represent the cause which they espouse and each one has conscientiously done that. The District Attorney is a paid advocate. He is paid by the State. He is paid with your money, my money, the defendants' money, the Court's money. He may be paid by individuals and, at times, we are not paid at all but the cause which we represent is just as great as the cause he represents. These defendants are an integral part of the State of New York which you represent and which he represents and so, passing that, we come to the

defense counsel who presents such evidence as he may see fit to present and conduct the trial as best he sees fit to conduct it. I have conducted this trial on behalf of my client in the manner which I considered was the proper manner in which it should be presented. In deliberating in your jury room—and this may sound asinine—there is no reason why you should permit the entity of counsel to enter into your deliberations at all. We are not on trial.

The third branch is the branch of the law. If 11102
the Judge makes a mistake,—and you have probably heard us except on numerous occasions to his rulings,—a stenographer is taking down that mistake. We feel that this case should not be reviewed any place but in the case where the error committed by the Judge is of a substantial nature, if it perchance leads a jury into finding a verdict of guilt, there is a way of remedying that mistake because it is impounded upon the record and the exception of the counsel is open to review at a subsequent time. So you see the defendants are protected as against 11103
the Court who, using all its conscientious endeavors, may still err, because none of us know all of the law—I know but little; as long as I have been in it I find that I know very little because if that were not the fact we would not continuously argue among ourselves as to what is right or what is wrong in so far as a principle of law is concerned. But we are protected against such a mistake and, once Mr. Turkus sits down, his job is finished and once I sit down my job is finished, and once the Judge tells you the law, whether you like it or whether you

don't like it, you must accept that when you go into your jury room and apply it to the evidence as you see it. But once the three responsibilities are over, then the hard job begins because you men, taken from all walks of life, moulded into one thought, if possible, are the ones who have the final say as to whether the facts in this case, the believable facts, warrant you in justifying a verdict which you will subsequently render either of guilt or innocence; and as to that ver-
11105 dict, it is not open to censure, it is not open to complaint, it is not open to scrutiny, it is not open to ridicule, if it is based upon your conscience and there is no outside influence which in any way caused you to determine in the manner in which you did. So you see in the final analysis, the greatest responsibility in this case is going to be yours.

I won't go any further. Judge Talley explained in great detail on that particular point and the difficulty in a case where there are three separate counsel is that one counsel may
11106 have to repeat one or two or more matters in the interests of his client and then it might become boresome to the jury, but it does not add any greater weight because Mr. Rosenthal said it and Judge Talley has said it before. So I am going to try, in defining this evidence, to keep away, in so far as is physically possible, from the things that have been dwelt on by competent counsel who have preceded me, Mr. Barshay and Judge Talley.

You are called from what they call a special panel. Due to the fact that some of you have never served before, it might not be amiss to

tell you that the word "special" has no meaning or significance other than the fact that, by calling men of a particular type, time is saved in the examination of jurymen; whereas, if men who had not signed a questionnaire, were called, taking into consideration the length of time that it took to get a jury in this case where men are called from a special panel, the probabilities are we still would be questioning the jurymen rather than having the case coming near its conclusion; but once you are accepted as a juryman, the word "special" must be excluded from your mind. You are now juryman, no more, no less. Your deliberations must be in calm, cool, deliberate manner, laying aside anything except evidence and law as charged by the Court. You are going to take the evidence from the witnesses, not from what I say, not from what Mr. Turkus says, and not even from what the Court says, because, as I told you before, the case is divided into four parts. The Judge's only province is to tell you the law. In telling you that, he may refer to some isolated instances of what he believes to be the facts but he will tell you that that is not binding on you; you are the judges of the facts. You are just as much a judge in this case as his Honor, Judge Taylor. He decides the law exclusively, whether you like it or not, and you decide the facts exclusively, and I say this in no term of disrespect, whether he or anybody in this court-room likes it or not. So that, in judging the evidence, you are going to say what you consider to be important and you are going to say what you consider to be unimportant.

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Passing that, how is it that you are brought from your business to this particular court? You are brought because an indictment has been found charging these defendants with a crime. When the defendants entered a plea of Not Guilty, they raised every issue that was set forth in that indictment. The Court will tell you that indictment is meaningless except as a means or mode or orderly way within which to bring people to trial, the same as is done in a
11111 civil case where, if someone were to contend that you owed him money whereas you in your own mind knew that you did not, the orderly way of proving it is by him serving you with a summons and complaint charging you with the money that is supposed to have been loaned to you and you put in a denial and then it comes into a court. So, I say, that the indictment must be dismissed from your minds. Well, then, if that is dismissed from your minds, what is the next consideration which should be in your minds? In viewing this case, gentlemen—and we cannot question the wisdom of years and
11112 years of experience of men such as Judge Cardoza and other learned men of the bench, Bar and Legislature as to the rhyme or the reason why these things happen, but you can take it for granted that there is a mighty good reason,—even as these men sit here now, your mind must be free and open and you must presume their innocence. That presumption follows them even into the jury room and can only be removed when twelve of you agree among yourselves that it has been removed because the District Attorney has taken a burden, assumed it and

proved it. That burden which he has assumed is one to prove the guilt of the defendant beyond a reasonable doubt. Well, the Court will charge you what a reasonable doubt is and anything that I might say as to the law you will disregard. My only reference to the law, gentlemen, is to better enable you to follow the analysis of the testimony as I intend to give it to you and better enable you to see whether or not the District Attorney has, as he has promised you at the outset of the case he would do, met that 11114
burden of proof which the law places upon him to prove each and every defendant's guilt beyond a reasonable doubt. When that is done it is not only the question whether you are in the jury room of determining what witnesses have been called. You can also take into consideration the failure to call witnesses that may be available. You will see the significance of that remark as I go on in the summation which I intend to make. You can take into consideration the demeanor of the persons on the stand, their contradictions, their background, their motives, their interests, anything that would enable you 11115
to better sift the evidence and ascertain where the truth lies in this particular case. To better enable you to follow me, the Court will charge you, in substance, that no man can be convicted upon the uncorroborated testimony of an accomplice. There is nothing mysterious about a definition of that character. It means this, that when the Judge tells you that Bernstein is an accomplice as a matter of law, the Judge means that if that is all the evidence that you were to find in this case that was believable, assuming

that you did believe Bernstein, that even then you could not find a defendant guilty because our law does not permit one to speculate on the truth of an uncorroborated accomplice's testimony and so it is that if two or more accomplices were to tell you the same story, there still could be no conviction in your minds. You must look to an unpolluted source for evidence tending to connect the particular defendant with the crime before you can find him guilty.

11117 I told you at the outset that my defendant is being tried for this crime, and that I am here to defend, that and that alone. He is not being tried for any association claimed by the District Attorney, if he so claims, anything that may or may not have been brought into this case in an attempt to prejudice the atmosphere or your minds against any particular defendant at all. He is being tried for this crime and for this crime I am defending him. Your minds individually must be convinced of his guilt, and never mind any statement that the District Attorney may make to you about the fact of hung

11118 jury and so forth. If it were not for the fact that the law presumed that twelve men's opinions should be moulded into one, there would be no necessity of having twelve men. We could just as well have taken one juror, the foreman, and let him decide the guilt or innocence of the defendants. Don't let him fool you by any statement or summation he may make that the defendants are looking to hang the jury. I say openly to him and to anybody else that any juryman who has an opinion in this box who would take that opinion and throw it aside merely because numbers might be against him

is not worthy of the oath which he takes and would be a moral coward because it is his conscience that is involved when he goes into that jury room to vote on the guilt or innocence; but I say further than that, any juryman who will not listen to the reasoning or logic of any other man to see whether or not, perchance, his opinion might be wrong, or will not try to convince the other man that the opinion which he has gained is a correct one, would be just as much a moral coward. So that when you go into 11120
the jury room be sure of one fact and one fact alone, that what your duty is is to find on your conscience where the truth lies and whether it substantiates the charge or does not substantiate the charge.

Oh, I anticipate what Mr. Turkus is going to do. You see the difficulty that defense counsel are under is quite an unsurmountable task. Three defense counsel get up and they tell you their theories of what is or what is not proven in this case and Mr. Turkus, rightfully, takes a paper and a pencil and, whether he is doing a cross word puzzle or whether he is actually 11121
writing down what we say I do not know, but in any event the pencil is on the paper and he is writing, and when he gets up he will say, counsel did not tell you about this. Why? And counsel did tell you about this. This is my theory. The answer to the "why" question, if he says that we did not tell you about it, is this: In two or three hours' time we could not very well tell you everything that happened in about five weeks, could we, so we take what are called the high-lights; and if he tells you that

when we said so-and-so the answer to it is so-and-so, well, the answer to that is that maybe his logic is founded on a wrong theory and ours is on the right theory. In the final analysis, that is going to be your job to determine whether what I say is borne out by the evidence or what he says is the conclusion drawn by him is borne out. But what he is going to do, if I know him, as soon as I am finished—and I don't think that will be today, as far as his job is concerned—
11123 there are going to be 56 photographs lined up, down here, probably extend to here, and he is going to shuffle papers out in front of you and then he is going to say to you, "Look at the trial that Buchalter, Weiss and Capone got. Now compare it, gentlemen, with the trial that Mr. Rosen got in his candy store on the night of such and such, and such and such, when this episode occurred." There can be only one reason or motive for that, sir. I am going to answer it. I anticipate that. He will probably leave it out this time because now, being wise to him, I am answering it; but in the event he does
11124 not leave it out, we are not interested here in any trial that Rosen got because I will tell you, and I will state this on behalf of my client and myself, I am not in accord with anything that happened to Rosen; but the issue in this case, Mr. Turkus, is whether my client Capone had anything to do with it. The method of procedure used by the killers of Rosen has nothing to do with the issue in this case. It is whether Capone had anything to do with the killing that is the issue. Then he is going to tell you about the line of photographs and the number of wit-

nesses and the parade which was had before you. That being his job, now my job is to show you what that parade amounts to, in so far as my client is concerned.

There are about 4,000 pages of testimony in this case out of which, I dare say, that if I were to read it—and I was only interested in getting the transcript of two of the witnesses so I am not able to read it verbatim,— I could take the lines out of less than a hundred pages and quote where the issue is supposed to affect my client. 11126
Yes, I am exaggerating; I am exaggerating. I think that I would be safe in saying less than forty pages have a line or two—and when he writes, I am going to answer that; I am going to guess what is in his mind; he is going to tell you, well, the testimony of Mrs. Rosen, the identification of the body, the killing and all of that, affects Mr. Capone. It only affects him if you believe Mr. Capone had something to do with it. It does not affect him at all because the issue in this case, when you come down to it, is threefold. The District Attorney must first prove by competent evidence what we term the corpus 11127
delicti. That would apply to any one in the world. In other words, he must prove that there is a dead body and that Rosen was a live man. So that that does not apply to my defendant Capone at all. It applies to Bernstein even who admits that he was one of the killers of Mr. Rosen. The District Attorney must then prove to you the killing itself. Well, you have that from the mouth of Bernstein, whom I am going to talk about in a few minutes, so that only unless you believe Bernstein's testimony and only unless you believe the alleged corroboration

which I will also come to, would that affect my client. To make myself clear, when I made mention of the fact that less than forty pages applied to my client, I meant in which his name was directly mentioned in connection with anything arising out of this case, as I will demonstrate before I am finished.

Let us briefly review the witnesses. There were 36 witnesses called by the People. I am going to lessen his necessity for summing up
11129 by telling you some of the things he will tell you and so he will be able to take less time. Mrs. Rosen testified to nothing concerning Capone. She does not even know Capone. Harry Regenbogen is the man who conducted the candy store and heard the shooting and looked into the candy store and saw a dead man. He does not know my client. Louis Stamler is the tailor who looked from across the street in the window and saw the dead body on the floor across the street. He does not know my client. Patrolman Cappadora is the man who heard the cries of this Stamler for the police and responded. He does
11130 not know my client. Dr. Marten described the autopsy and the taking of the bullet from the body. He does not know my client. Detective Walsh is the man who responded to the scene and described what he found in the presence of the medical examiner. He does not know Capone. Detective Dumont, who was formerly in the Ballistics Bureau, received the bullets from the medical examiner and gave them to Detective Butts. He does not know my man. Detective Schaeffer is the man who received the bullets from Detective Butts and returned them to the

medical examiner. He does not know Capone. Detective Scheisser found the abandoned automobile on September 13th at Van Sinderen Avenue and described the automobile as a two-door Chevrolet and he saw Detective King there when the pictures were being taken. He told you that this automobile was about fourteen blocks from the scene of the crime. He does not know Capone. Hirsh Merlis, the proprietor of the candy store down there at the B. M. T. station who saw four or three unknown men walk up a trestle, he does 11132
not know Capone. Captain McGowan who took pictures of the abandoned car said there were no fingerprints. He does not know Capone. Samuel Pearl, the man in the embroidery business, who, while he was out looking for a piece of real estate, found a gun which he subsequently turned over to Patrolman Nelson, he does not know Capone. Patrolman Nelson who was the man who took the gun and brought Pearl over to the station house, he does not know Capone. Detective King, the man who went to where the automobile was abandoned and was the one to 11133
whom the gun was turned over by Pearl, he does not know Capone. Sergeant Butts, the man who told you about his ballistic efforts in determining whether the bullets were fired from the gun, he does not know Capone. Max Kaufmann, the owner of the Chevrolet automobile that was parked outside of his house, that was stolen by the eminent Mr. Bernstein with the aid of the ace auto and radio crook Cohen,—whom I will come to in a few minutes also,—he does not know Capone. Detective Jarvis says that the car was stolen and reported to him by Kaufmann

as having been stolen. He does not know Capone. Detective Ambraz who investigated the ownership of the license on the abandoned Chevrolet—same answer. Abe Waxman who was the owner of the Ford from which the license plates were stolen—does not know Capone. Harold Rosen, the son of the deceased, who testified in relation to his father's business and the identification of the body he does not know Capone. Hyman Barron, Anthony DeSario, the draftsman and
11135 the architect, they described blueprints which were put in evidence here showing the description of the store—nothing about Capone. Sylvia Greenspan, the daughter of the deceased—she did not know Capone. Edward Maguire, the labor lawyer, he never even heard of Capone. Albert Aman, Joseph Bell, Thomas Wynne, the one the supervisor for the Government, the other the Government agent who testified about the arrest of Weiss in Kansas City, and the custodian over in New York—they do not know Capone. The three rebuttal witnesses used by
11136 the District Attorney, Detectives Malone, Whalen and Federal Agent Newman, they don't know Capone.

By now I suppose you are tired of listening to me. Who does know Capone is what you are wondering. When we narrow the evidence down, the only ones who have mentioned Capone in this case in any way whatsoever are five witnesses, one, Sol Bernstein; 2, Seymour Magoon; 3, Berger; 4, Tannenbaum, as an afterthought, and 5, Rubin as to a memory of years ago. I am going to take these five witnesses apart in discussing them because every thing I tell you gentlemen when I start to analyze the facts, I

am going to give Mr. Turkus pages for everything I tell you and when he come back tomorrow, having bad time to look up where I give you the quotations from, I want him to answer whether anything which I have said is not borne out by the evidence in this case. Never mind casting reflections against lawyers, clients or otherwise. I am going to stick to the evidence. I am not going to characterize anybody except, perchance, one or two of the witnesses but outside of that there is a lot of food for thought in respect to 11138
characterizations. I will just give you one illustration. I saw Mr. Turkus writing down when Judge Talley was summing up and saying about the Half Moon Hotel down by the seashore and the segregation of witnesses there. I anticipate what Mr. Turkus is going to say about that subject. He is going to tell you of the necessity of keeping these people together under guard so that they cannot be tampered with and so they cannot be touched. Before this case, gentlemen, that theory could not be exploded but one little thing happened in this case that explodes that whole theory and I am going to tell you 11139
what it is before I go into the direct part of my summation.

Magoon is a witness for the People not only in this case but others, according to the testimony. Magoon is just as much essential to this prosecution in Brooklyn as the baseball players out in Heckscher Park. Mr. Barshay forgot to tell you about foul balls. I wonder when they were playing ball whether they hit any foul balls. I wonder in the court-room the same thing. But let us take the evidence to see

whether or not some foul balls were not struck, not by the District Attorney but by the witnesses who are such good baseball players that they have twelve on a side instead of nine when they go out on their tours on Long Island. But I am diverting from the subject. Magoon is not getting sirloin steaks with waiters with the towels over their arms, and playing cards and visiting or having his wife come in at eleven o'clock in the evening, or any of the things that
11141 you heard admitted here as to the rendezvous down at the Half Moon Hotel. Oh, no, Magoon is in the regular prison and has been there for months. Well, then, ask yourselves this when he expounds that theory which he is going to give to you about segregation of witnesses, sirloin steaks—and I am interrupting myself again—he will tell you that the prisoners need exercise. I admit that. So do vicious bulldogs need exercise but they put a muzzle on them when they take them out on the street and they put a leash on them too. They do not allow
11142 them to roam out in Heckscher Park playing baseball. Again I am drawing away from my subject. The subject is that if that is a theory which is worthy of your consideration, give thought to the fact that Magoon who is a witness in this case is confined in an ordinary jail where he has been confined, eating ordinary prison food, and he is still able to be a witness for the People in the prosecution against these three defendants. So the theory now is a little bit exploded. It is a little bit more exploded, as I will show you when we come to Mr. Bernstein and the letter writing episode.

Now then I finished the testimony of those who do not affect me, and when I say me I mean my client. Let us take the exhibits. Why, he has put a parade of exhibits in here 56 in number. He has even got a card from a chicken farm out in Kansas City. Photographs, maps of every type and description. Don't let it fool you, gentlemen. None of these exhibits are worth anything when you come to deliberate this case in the light in which the Court is going to charge you. These exhibits are only worth what 11144
they are worth to prove that a crime was committed by someone but have no corroborative value whatsoever in so far as any one of the defendants on trial is concerned. They are not the evidence which the law says is necessary to tend to connect the defendants with the crime, so that for all purposes, when you get into your jury room to deliberate, the only value that can be attached to those exhibits is two-fold, one, that you will be able to ascertain that Rosen was killed, and nobody doubts that by now; two, you will be able to judge that he was killed 11145
at a particular place, in a particular manner, and we don't dispute that. I don't dispute it on behalf of my client. But when it comes down to the crucial test as to who killed Rosen, you have a different story involved and none of these exhibits are worth that much in enabling your mind to determine whether or not any of these defendants is guilty, much less the defendant whom I represent.

So we will pass that now and go to one other thing. I know you are anxious, as you must be, but I am going to say this at the outset, gentle-

men, a little bit unlike Judge Talley and his fear that you may be bored. I have a man's life and liberty in my possession and that is a big responsibility and, until I feel that I have amply presented to you what I consider to be sufficient for you on your conscience to come in with a verdict that is Not Guilty, I don't intend to stop. It is not going to take me too long and I don't want to bore you but I trust, because I would like to conclude today in as brief a time as I
11147 physically can, that you will bear with me because this part of my summation is meaningless. The balance of it, as soon as I pass one or two other points, will be of grave interest to you in trying to ascertain whether the People have sustained their burden in this case.

Well, Mr. Turkus will say to you, well, if these men did not kill Rosen, who did. If he should say that to you—you see I have to guess what he is going to say—he may fool me now, having heard me tell you the things which I have heard him say before, and not tell you them at all and
11148 then you go into the jury room and say, Mr. Rosenthal was wrong again: Turkus did not even mention a word about it—but I am not taking that chance. He may say to you, "Well, who else would have a motive?" I am not here to ascribe a motive to anybody but I could answer it just as logically as he could answer the motive which he attributed to Mr. Barshay's client, because the very secretiveness of Bernstein. Bernstein the shylock who says he did not even know the brother of Abe Reles, the shylock: Sandy Reles, the shylock: Seymour Magoon,

the shylock; Seymour Magoon, the man who says that although he knew that Reles' brother Sandy was a shylock in East New York, would not be pinned down to the corner of Ardie's luncheonette which is right across the street from Rosen's candy store; and we had to get from Mrs. Sylvia Greenspan, a woman who should never even know of the existence of any of these men, the fact that Sandy Reles not only existed but he existed right across the street from her father's store. I don't know. Do 11150
you want to look for motive? Rosen, according to Mr. Turkus in his opening address, was starving for money. Who knows, maybe he borrowed from the shylocks. Seymour Magoon and Bernstein, the only two shylocks in the world that did not beat the people within an inch of their lives so that they even almost surprised the Judge out of the chair, so that the Judge had to make the statement, "Why anybody knows what shylocks do"— "Yes", says one, "I threaten but I don't hit. I charge somebody a little bit more"—Seymour Magoon, 11151
"Oh, I would not even threaten anybody. I don't think so much of money that I would threaten a man." That shylock, soft, smooth. I wonder if he is so soft and smooth out on the street if you met him on a dark night. But let us pass that and let us come to the facts in this case.

So that if you are looking for motives, he is the one that must ascribe the motive. He is the one that could prove that this defendant Capone had some reason. So we will pass that ques-

tion and we will come to the question of the evidence.

I am almost ashamed to take your time on Mr. Bernstein. I am almost ashamed to take your time. Mr. Bernstein who says, "I am a rat." I wonder if they feed him cheese down in the Half Moon Hotel. But Abe Reles is only a mouse. I wonder if there is any distinction in his mind between a mouse and a rat. A mouse a little rat maybe, or he is a grown up
11153 mouse. Is that what he meant? I do not know the distinction but those are his words, not mine, "I am a mouse, no, Abe Reles is the mouse, I am a rat." Now let us look at the rat, and before I go to that there is one other thing. You see Mr. Turkus is going to say I am a good lawyer. I will say he was on a par with Mr. Rosenthal before 1940, on this side of the fence; now he exceeds Mr. Rosenthal on the other side of the fence. I have been unfortunate. Most of the people involved in this case have their personal titles or ex titles. I
11154 am a plain ordinary lawyer, without titles; but his experience before the Bar and the causes which he espoused were just as great as the causes which he is espousing now on the other side. You see sometimes jurymen get the opinion, because of their inexperience, that a District Attorney wears a cloak of saintliness. I wish he becomes District Attorney because he is a good friend of mine outside of the courtroom; inside not so good, but outside he is a good friend, but had Judge O'Dwyer been elected Mayor and somebody came in, maybe he would be counsel with me on this side of the

fence next year; so don't let that impress you, the entity of the District Attorney. You see what I am worried about is the false issue here being raised about the holiness of the District Attorney's office, the sanctity of it, the false issue of perjury or subornation of perjury on the part of the District Attorney, which is not an issue here at all. He has got to take what is given to him. He took it when he was on the other side of the fence and believed it and presented it honestly and fairly as we are 11156
doing and he has got to do it on the other side of the fence and nobody finds any fault with him, with his actions, or with Judge O'Dwyer who happens to also be a club member of mine and a good friend of mine; so don't let them create any false issue in this case. I am not attempting to try Judge O'Dwyer or Assistant District Attorney Turkus or anybody else. I am asking you, irrespective of the entity of the persons in the District Attorney's office, to make them satisfy you under the legal rules of evidence of the guilt of my man before you convict him. 11157

Now Bernstein—you see I won't be so long now because I have only got Bernstein and Magoon to talk about. As a preamble to my talk about Bernstein, it really should not be necessary to talk about Bernstein for this reason: The Judge will tell you that the uncorroborated story of Bernstein is of no value, that if you go into your jury room, even if you were to believe Bernstein—and I am laughing up my sleeve—even if you were to believe him, that you could not convict unless there was outside

unpolluted evidence tending to connect the defendant with a crime, but the alternative of that is this, that you must seek other evidence of a dependable nature tending to connect the defendant before you can believe Bernstein. You see you have a two-fold duty. If you disbelieve Bernstein, irrespective of whether you think there is some evidence, the case falls. You must both believe Bernstein and you must believe that there is other evidence tending to connect the
11159 defendants before you can find the defendants guilty, and that is the reason why I must spend time on Bernstein, to show you that even though you were to believe that there was some outside evidence, that Bernstein is so unworthy of credence at your hands that even then you could not convict the defendant Capone.

I usually analyze pretty thoroughly. I have divided Bernstein into a number of parts—that should have probably happened to him long ago but I am merely dividing him mentally and on paper, on his own admissions. I see Mr. Turkus writing down again. I wish I knew what
11160 he was writing because I would give you the answer.

The Court: Please.

Mr. Rosenthal: Yes, h wrote down "it should have happened to him long ago." Well, in any event he may say, and I agree with him, that it should have happened to a lot of people long ago. Don't think that any lawyer standing up in a court, whether he be a defense lawyer or a prosecution lawyer, has any use for murderers or criminals. Don't get that idea at all. I consider my reputation as good as that of Mr. Turkus

or anyone in this court-room at the Bar and I think that is known generally. The cause that we are espousing is a cause and that has been demonstrated to you by Mr. Barshay. As long as I fairly present to you the arguments which I conscientiously believe are applicable to the particular case, that is my duty, the same as Mr. Turkus' duty is to conscientiously present the evidence which he has at hand.

Now, let us first take the background, because when you are going to judge a witness and when 11162
you are going to judge whether you are going to believe him, you first want his background, isn't that true? I got his background—and I say this to you so as to save time—as to everything I am telling you I have a page. It will take time to repeate these pages but I will cheerfully give them to Mr. Turkus and hand them to him at the conclusion of my summation for him to verify before tomorrow morning. He stole 75 cars. In 1930 he pleaded guilty to unlawful entry although he was charged with a felony. In October, 1933, he stole a car without anyone's assistance,
pleaded guilty first to a felony, was allowed to 11163
withdraw the plea, then pleaded guilty to a misdemeanor. His first theft was 1930, when he was 18 or 19 years old. His second was in 1933. Those both were before he ever heard of Capone. This is the man who said he is taking orders from somebody. When that man was 22 years of age—remember first he denied, when Judge Talley questioned him as to there being any guns in that car, but on my cross-examination I was able to prove from his own lips that he was a potential murderer before he attained his major-

ity, that he went out with two known stickup men before he had ever met Lepke or any other person connected with this case, with the intention to kill a man in the event the man was to resist being tied up and held up. That is his word and it is in the record and we can find it on pages 748 down through to page 752, and 855 to 856 of the record. In other words, this man went out when he had just attained his majority, having done no lawful work of any character
11165 after he had lost his third job, and he did not even remember whether he was in a job when he did this, and with guns in the car, with ropes in the car, with known stickup men, went out deliberately, when he was fortunately apprehended by a policeman, to kill a man if he resisted being held up and robbed of his money. That is not all. That is not all. He helped to dispose of the body in the Yuran murder. He was a shylock, gambler, bookmaker, on his own account and then, if you remember those significant words when I asked him before he met Capone about these questions he says, and that is on page 587,
11166 "I was not an angel. Does that satisfy you?"

This man that had ten, twenty customers, this man that was a small shylock, was able to borrow $50,000 in his youth, endorsed by Meyers' signature. For what? To run his shylock business, this angel who only charged two a week instead of one a week and who never threatened, or threatened but never hurt anybody. Well, what else? Then he suffered a lapse of memory. You remember he forgot that his benefactor, his benefactor Meyers, the man who endorsed the back of his notes, stopped loaning him money. He denied that he assaulted this man's daughter

but he did not remember whether in court, where he was brought, she did not withdraw the complaint and say that it was an accident that he assaulted her. He was a strong-arm man in a gambling place. He threatened people who owed him money and, now here is the significant thing, this man who was utilized as a People's witness, up in the mountains in Monticello, admitted way back, way back, he was asked by this man Strauss to take a gun and go out and kill Cohen in California. Of course he did not kill him but 11168
he did go to California. Use your common sense. And then to justify his going to California, he said he even got Cohen the job in the movies. Do you remember that? Well, then, whom did he go to California with? Well, he fumed and he fretted and he did not know about Hershel Bernstein until the Judge said to him, "Why, wasn't Hershel Bernstein a notorious burglar and crook?" and then for the first time he remembered that his companion on the way out to California was the burglar and crook, Hershel Bernstein.

Well, believe him or not, he followed carnivals 11169
all over the country—no, excuse me, only as far as Maryland; he did not go all over the country. On all of his trips to California and all over the country he did not burglarize and steal. He was merely a "schil" for a carnival. That is his story, and this saintly creature then buys himself a candy store which he runs as a blind for his crooked and for his loan shark business. I am only repeating that to show you, when the District Attorney tells you about his taking orders, this is the man who takes orders. You can

11170 imagine him taking orders. And then he drove Fat Kupperman, his friend, to a doorway—of course he did not put him on the spot, oh, no, but he says he did not meet Fat Kupperman by accident that night, oh, no, but Fat Kupperman, his friend, did not live any more after he delivered him at the doorway of his home.

Now, why go further? There are other things he did. But now let us analyze it further. That is his background. Who is this man who sits
11171 before you? Well, you have a right to say, in view of all these things that are known, is he in jail, instead of in the Half Moon eating steaks and chops, charged with something? Oh, no. No charges of any kind are pending against that man up to the minute that he left the stand. In other words, he got immunity before the Grand Jury in the Yuran case. You understand what immunity is. It means that he can never be prosecuted for the crime, so he is out of that, isn't he? He testified before the Grand Jury in this case. He got immunity in this case before the Grand
11172 Jury, so he can never be prosecuted for that. And his answer, on pages 962, 3 and 4, when he was asked by me the question as to whether theer were any charges pending against him, was the words, now no charges pending against him of any kind, of any kind. As far as this man is concerned, as far as you are concerned, he is merely in protective custody so that right now, close to Christmas of 1941—what a Christmas present he is getting, what a motove for a man to go on the stand and lie, but I will show you that that motive is mild to what else there is in this case in so far as Bernstein is concerned.

Remember a man was being tried for his life Monticello. A man was on trial for his life just as my client is on trial for his life now. Twelve men were put in a box. I do not know whether they had alternates or not in that trial.

The Court: You may not discuss it.

Mr. Rosenthal: I respectfully except, sir. I am not discussing anything.

The Court: If there is anything further said, I will excuse the jury.

Mr. Rosenthal: I respectfully except, sir. This 11174
man, as I will show you from the evidence of his contradictions between his mountain testimony as borne out by the evidence in this trial, swore in a trial in Monticello before the ever living God that he would tell the truth, the whole truth and nothing but the truth. This man on this trial, as I will show from a quotation from the evidence, told you that he deliberately lied before the jury in Monticello in a court of similar jurisdiction. Let me get to his contradictions between his mountain testimony and here. I intended to go into the contradictions which comprise all of these pages but I will run them 11175
through fast so that I do not take too much time. This is his testimony on page 778 of this record: "Q. You were under oath in the Gangi trial, weren't you? A. Yes, sir. Q. Swore the same way as you did in this court-room, didn't you? A. Yes, sir. Q. To tell the truth? A. Yes, sir.

Q. A man's life was at stake, wasn't it? A. Yes, sir.

Q. And you had a jury similar to this, sitting there listening to your story? A. Yes, sir. Q. And in the court you told the jury, I am telling you the truth? A. About the case."

At page 866: "Q. Now, then, do you recall now at this time whether or not you were not directly asked the question in the mountains, in the Gangi Cohen trial: 'Q. You want to make sure every word you say is heard? A. I am telling the truth. Q. You were coached to answer? A. Telling the truth.' Have you any recollection of whether or not you did not make, in form or substance, that statement in the presence of the Court and the jury in the Gangi
11177 Cohen trial? A. About Gangi, yes, sir.

"Mr. Rosenthal: I move to strike out the answer as not responsive.

"By the Court:

"Q. Do you remember those questions and answers, yes or no? A. If it is in the book."

If it is in the book. And so I say to you, as appears in this record, he admits to you that before a jury similar to you, in the mountains, he deliberately faced them and swore that he was telling the truth. He lied. Oh, they are
11178 going to tell you some of the men were on the lam. Why, that man deliberately tried to put the issue on to Mr. Turkus' shoulder or the District Attorney of the Catskill Mountains because he says, "I was told by some one in the District Attorney's office." Oh, the Judge rightfully said to me at that time, "You don't want to make an issue between the District Attorney". No, I don't. That man is a deliberate unqualified liar and would lie to anything to save himself. I know that Mr. Turkus or Mr. O'Dwyer or any District Attorney would not tell that man to con-

ceal the truth where a man's life was at stake. Now, let us take for instance, his statement that he was told to conceal because men were on the lam. Try to believe that. Conceal what? Conceal what? Conceal that he knew about this case. I will show you that that is even a falsity because in the mountain testimony he swore he never used an alias. Whom would that affect? Would that affect the Rosen case? That would affect his credibility. Here he admits that he did. In the mountain case he said he was not 11180
a thief. Did not the jury in the mountains have a right to know whether they were talking to the man who had stolen 75 cars? Who was that protecting? Who was that protecting? Bernstein. In the mountains he swore he never committed a murder in his life or never saw one. Did that affect the men that were on the lam? Whom did that affect? Did the jury in the mountains have a right to know that they had a murderer on the stand, a thief on the stand, and thereby be able to weigh his testimony so as to be able to determine for themselves whether he
was telling the truth? So we will pass that by. 11181
There are a number of other things. When he tells you that he lied under oath in the mountains to conceal outside persons, he lied there; he lied here, and he will lie hereafter. Because the things that he lied about, which I will show you from the record, only affected himself and no other persons.

Let us briefly then go to his contradictions because I have got them analyzed here, gentlemen, his contradictions between here and the mountains, his contradictions between here and the

testimony before the Grand Jury in this trial, his contradictions between his direct examination and his cross-examination. I have got them all analyzed. I am only going to briefly annotate them because it will take too long to give you the illustrations, although I have got them word for word here. Now let us go ahead. In the mountains—oh, that will ring in my ears after this case is over—if it is in the book, I said it—if it is in the book I said it. Whoever told you
11183 to say that? Nobody. Well, how did you know that it was in the book? Who would know it was in the book? Well, you are reading from something. Anyhow that is the reason. Cagey, cagey. If it is in the book, I said it. So, as I go into these contradictions, you will find this, never would he say, yes, I said this in the mountains. If it is in the book I said it. Then I would have to turn to Mr. Turkus: "Is it in the book?" "Yes, it is in the book." "Here, mister, it is in the book". "Well, if it is in the book, I said it." So, let us go to the "If it is in the book, I said it".

11184 In the mountains he swore he never had a bank account, never had a bank account. "Did you keep a bank account? (on page 15)? A. No, sir. Q. Never? A. No, sir."

Lo and behold, what do we prove on this trial?

"Did you have a bank account? A. Yes, sir. Q. Where? A. Manufacturers Trust Company."

I have to read this one. This is a good one.

"Did you think of that expression 'If it is in the book, I said it' "—this is on page 779 and 780: "Nobody told me anything.

Q. You thought of that yourself, did you? A. What do you mean, I thought of it myself?

Q. Did you think of that expression 'If it is in the book, I said it' by yourself or were you told by somebody to say 'If it is in the book, I said it'? A. Nobody told me anything.

Q. So you thought of it yourself, did you? Did you think of it yourself? A. I myself, sir.

"Q. How did you know there was a book? A. You are reading a book, aren't you, sir?

"Q. So that you thought of it when you got 11186
on the stand, is that it? A. You are reading a book."

Now, let us just take that for a minute. Whom was he hiding? Who was on the lam, so-called, or on the run, that would have been affected by his telling the jury in the mountains that he was a loan shark, borrowing $50,000, and had a bank account? Anybody? No. He is an innate, inborn liar and he could not tell the truth. Let us take the next.

In the mountains—I am going to run through them quickly without quotation but I am going 11187
to give the pages so Mr. Turkus can verify. 775 to 777, in the mountains, he swore, never threatened anybody in his life in the shylock business. What? Did not threaten anybody? Here, well, he admits that he threatened them, after the Judge had asked questions about the methods of shylocking, but he never hit them. Whom was he hiding in the mountains when he said he did not threaten?

As to his alias, page 779, he was asked in the mountains whether he ever used any other name. **No.**

11188 "Q. When you say you did not want to give out any information, do you mean information about yourself and the aliases that you had used? Is that what you mean? A. Yes, sir:" Was not the jury entitled to know that in the mountains? Was he hiding something because somebody was on the lam?

Now, about his employment. He even contradicted himself about the employment, and now here is the significant thing; here is the signi-
11189 cant thing. In the mountains he said he did not know Buggsy Goldstein. In the mountains he did not know Buggsy Goldstein. In this trial he did know Buggsy Goldstein. That is page 832. In the mountains he knew Reles very well; Abie Reles he knew him very well. Here his answer is that he did not know him so well but if it is in the book, it is in the book, and if it is in the book, it is so.

Page 841, 842. In the mountains he swore that he was a reformed thief, that he had only stolen one car in his life. Here he swore he
11190 stole 75 cars, mind you, gentlemen, up to 1940, up to the date almost that he was testifying in the mountains, and there he had he had not stolen a car since 1930. Was the jury entitled to know that? Was he hiding somebody that was on the lam or was he putting himself in a false light?

In the mountains, in regard to guns—and now this is a very important thing—you see it takes a little longer than I thought—this is very important and I want you to listen carefully because the Judge will charge you on reasonable doubt. Reasonable doubt arises not

only from the evidence itself but from the lack of evidence. You know in this trial he told you about these guns that were handed out on the corner. You remember that, don't you? He not only told you about the guns that were handed out on the corner; he told you about the guns that were used in the stickup when he was almost a boy. He told you about the gun that was shown to him by Harry Strauss when he wanted to go out and kill Gangi Cohen, the very man whose life—maybe he did not have 11192
the courage to put the gun up against him but he had the courage to testify against him. In the mountains this man testified—and this I am going to read:

"'Q. You know what muscles are? A. Yes, sir.

"'Q. You know what guns are? A. Yes, sir.

"'Q. Have you seen a gun many times? A. No, sir.

"'You have never in your life seen a gun? A. Yes.

"'Q. Why did you say at first 'No, sir'? A. 11193
I just reminded myself.

"'Q. How many times did you see a gun? A. Once.

Q. What year was it? A. I don't know what year it was. I seen it.'"

"Were you asked those questions in the mountains and did you give those answers? A. I can explain about that.

"Q. That was not true that you had only seen a gun once in your life when you told that to the jury in the Gangi Cohen trial? A. No, sir."

Now, let us analyze that. If a man would have the temerity to take the witness-stand, whether it be in this court or any other court, and swear before a jury that he had only seen a gun once in his life and then when it was shown to him in 1937 by Harry Strauss, what assurance have you got that when he now says that he has seen them many times and when it has been brought out from the evidence that he not only saw them but was willing to use them when he was almost an
11195 infant in arms, what assurance have you got upon which you can rely on a man's testimony of that character?

I have only skimmed the surface. Why, there are reams and reams of his contradictions and I am only going to pass them as quickly as I can so as not to bore or tire you because I think, even by now, it is clear that that man's story is unworthy of belief in any court-room.

Oh, he admitted that in the Cohen trial. He said he had taken five or six trips with loan shark money for his vacations. Here the story changes. He trips to California and it was not
11196 with loan shark money but if it is in the book, it is in the book. He admitted to Judge Talley that he used the name of Jackie Berman in Miami. And admitted that that was not true.

Here is another very important thing, another very important thing. Why, in the mountains, in the mountains, this man had the temerity to tell a jury that he did not know Tannenbaum, that is, that he did not have any business with Tannenbaum. Can you imagine that? Can you imagine that, when the man has the temerity to come here and admit that he not only went out

on jobs with him but that he did everything but commit murder with him, the Yuran, the carrying the body, and so forth? Can you imagine him telling a jury that he never had any business with Tannenbaum, under oath; the same oath as he takes in this court he took in that court. Need I go further? Oh, but I will. Those are only mild. They are only mild compared to some of the things. Why, he said here he did not point out to the police anything about where the pick or the axe were buried, not he, not Bernstein; but he forgot that under oath in the mountains, under oath in the mountains, was the very statement of his that he did point them out. 11198 Another little bit. You think that that is bad. You think that is bad. I think I should stop going through this record when I take the next one, because the next one is applicable to this case and this case alone. When asked in the mountains whether he ever was connected with any murder, including Rosen, he definitely said no. No. Why, can you imagine this Judge here is going to charge you as a matter of law that this man is a murderer in this case, that this 11199 man is an accomplice, admitted, by law. Up in the mountains, why, he never saw a murder committed, not the innocent Mr. Bernstein.

Should I waste your time and go through these contradictions? Should I go through the contradictions between his testimony now and as it appeared in the Graund Jury? Should I go through the contradictions between the testimony on his direct and cross-examination? What more need you have in front of you? What more need you have than the deliberate, downright perjury

committed by this man? I think it would be an insult to your intelligence. I really do. And even though I have spent nights and days getting up these contradictions of a material nature, I think I should pass on. I really think that I should take the brunt of this situation.

Now I am going to give you two or three more and I am going to throw all of this away. I am going to give you two or three more, if you need more. This man deliberately said on this stand
11201 about "Muggsy" Cohen. Now, remember that "Muggsy" Cohen was in the District Attorney's office, according to "Muggsy" Cohen, in April of 1941. If this car was stolen in September of 1936, I am going to ask the Court to charge you that the Statute of Limitations regarding the arrest of the individual does not expire until five years pass, so it was within the time of the Statute of Limitations. If the District Attorney believed Bernstein, that "Muggsy" Cohen was out on that job with him, and if "Muggsy" Cohen when he was in the District Attorney's office in April and was let go, admitted that Bernstein
11202 was telling the truth, then "Muggsy" Cohen would be behind bars now, charged with the theft of that automobile. But that unmitigated liar had the temerity, even here, to tell you that he has never seen Cohen since 1940, when he took a trip to Florida; he has never seen Cohen; where Cohen takes the stand and says that in the District Attorney's office he was confronted with him. Now, say you to yourself, "What significance did that have?" Oh, it has got great significance. and I will give you the page if there is any question about it, Mr. Turkus. Cohen,

11203

when he was called on the stand by Judge Talley, testified that in 1941, in the presence of Mr. Turkus, in the District Attorney's office, he confronted Bernstein. That is his testimony. If there is any question, I will take it from the record. And Cohen was let go and Cohen was not used as a witness to verify. Why? Is there a doubt in your mind as to whether he would say that he was with this man? Well, if he was not with him, then Bernstein is a liar.

To add everything up,—and to do what I said I would do with all of these records, because I 11204
had no idea it would consume the length of time that it has, and I see then the necessity for shortening,—the thing that stands out in this trial is this. This man, in the safety of the Half Moon Hotel never thought, never thought that his acts would ever be discovered. The theory of the prosecution—oh, how he said in his opening and how he described it when the witness took the stand: bars on the windows, bars on the doors, shot guns around, policemen sleeping here, mirrors in the hallway, mirrors here, guns out, a regular Wild West proposition to guard these 11205
witnesses; men sitting at the bedside when they are asleep, that is the testimony, sitting up all night alongside of the bed of Mr. Bernstein, so he could not talk. That is the testimony. Why, they even sat up all night watching this poor, innocent man sleep. How his conscience let him sleep, I don't know, but that is none of my affair. In any event, with the thought of the power of the State behind him, he goes on this stand, and little did he know that he would be exposed; he was tied down by me as to whether

he ever wrote a letter, whether his wife ever took one, whether he ever had a stamp, whether he had an envelope, whether it was ever secretly taken out, whether a policeman was always at his side. I had the mountain testimony to know what a crawler he was, and I was not going to let him crawl. I gave him every opportunity in the world to crawl from under, and you can have the testimony read if there is any doubt in your mind, because this has been a long trial.

11207 Oh, did I give him time to crawl from under: "Did your wife ever write or did you ever secretly get it out? Did a policeman ever see you? Did you ever use a stamp?" And I used him and I tied him and I tied him and I let him go. And he thought he got away with it. He thought he got away with something. Because little did he imagine that there was anybody in the world that could find out that he had the power to send out letters, send out letters. Now, if he would have told you yes, he sent letters, you could not have found any fault with that, because even if he was in protective

11208 custody, there would be no harm sending a legitimate letter to a nice character, to the ordinary individual. Unfortunately, and that is a rule of law which the Court applied, to which I excepted, the contents of the letter is none of your concern at this time. However, the fact remains that he deliberately told you this. Let me wind up with it. If this has not convinced you—and I have, as I say, a hundred more even more important contradictions, if there could be such, because there is a great deal of significance to this—you may not see the significance—the

District Attorney says police watching him, they cannot even talk. They sit down to eat. I suppose the detective sits in between them so that they cannot look at one another. You see, that negatives the opportunity to concoct. You see, if I cannot talk to you and if he is always around, we could not concoct a story together, could we, so we have got to have detectives with bars, shotguns, sleeping in the room, standing up while we are asleep, and everything else. But the bottom falls out. The bottom falls out be- 11210
cause that shows an opportunity to concoct, the ability to write the type of letters which he wrote and the things which he said and the things which he secreted, so you do away with that theory they could not concoct a story between themselves; and what would there be to prevent their being separated from one another? Anything? But they are all together, playing cards.

Now, finally—I am quoting from page 1071 of the record, 1084 of the record, 598 of the record, and 682—and in this regard, when counsel was 11211
cross-examining Mr. Bernstein, this is the remark which the Court passed: "The rest of the letter must be submitted before the Court can pass on it. He has admitted now that he lied. You do not have to establish that:" (at 1071) "It is established that the witness testified under previous cross that he did not send out a letter, and now he admits that he did."

"Mr. Talley: Your Honor has stated from the bench that this witness has testified falsely with regard to sending the letter.

"The Court: Yes.

"Mr. Talley: Your Honor stated—I think the language was—that he had lied before this jury.

"The Court: Yes. That is obvious."

At 598:

"By the Court:

"Q. Did you testify in the trial of Gangi Cohen to anything that was not true? A. Yes, sir." • • •

"Q. Did you fail to testify to some things
11213 that were true? A. Yes, sir."

Page 682—well, that is only repetition.

So, to sum it all up before I go to his story, to sum it all up, he not only admits he lies, the records not only show he lies, but you have even the statement of the Court that he has lied.

Well, as Mr. Turkus started to say when we started this case, "What has that got to do with the Rosen killing?" Now we will come to his testimony in so far as it affects my client. I have subdivided that, gentlemen—and this, of course, is of importance:

11214 The first meeting, not that we admit it, but the first alleged meeting between Bernstein and my client was, according to him, in the year 1932 or 1933, when he says that he met my client at the Coffee Pot and was introduced by Mike Sycoff. You see, I am going to analyze each thing from now on of what was said in this case about my client. You remember—maybe you forgot—Mike Sycoff is one of the baseball players. He is down in the Half Moon Hotel. He has been down there eighteen months. He is still down there. I do not know, like the others, whether he has any charge against him.

but he is one of the team that was down at Heckscher Park and he is one of the bosom companions of Bernstein. Say to yourselves, "Why wasn't Sycoff called to verify this proposition?" They put in photographs that are meaningless, smile as much as you will; they put in photographs that have no meaning in the ordinary case. All they would have to do is say, "A car was stolen." They do not need license plates and this and that, and men to hand the bullets back again, the photograph of the sidewalk, the 11216
grass that was on it. Why, then, if they are so particular, don't they bring Mike Sycoff to show that he introduced—because I assume the purpose of that is to try to show association of my client with somebody. Now, assuming that you believe him, because he says that my man—I am going to show you how ridiculous it is—was one of the crowd, but isn't it a funny thing that he became a gambler and a shylock in 1930? He says in 1930 he borrowed money (at page 485) while he was working, and he became a gambler and a shylock and a convicted thief 11217
three years before he ever saw my man, if he ever saw my man in his life. Now, just let us compare, because we have got to compare. When I make reference to any of these witnesses that may affect any of the other defendants, it is with no desire in any wise to say that I believe their testimony, but only for the purpose of comparison. Tannenbaum was supposed to be a man who had access to Buchalter's office five times a week and was on his payroll, according to him, for many years, ten, eleven, since 1931. Tannenbaum was brought up in Brownsville,

and Tannenbaum is supposed to be one of the mob. Now, if what Bernstein says is true, how under the sun is it that Tannenbaum says that he never met Capone until the year 1938, two years after this crime? Two years after. The first time Tannenbaum ever saw Capone in his life was in 1938. Tannenbaum, the six-time murderer, Tannenbaum, the alleged member of the Combination; Tannenbaum, the man who hangs out on the street corner; Tannenbaum, who was
11219 always present in Mr. Buchalter's office; he never saw Capone until 1938, never saw him in his life. Well, whom do you believe? I am not believing either, but I say that there explodes the theory of Capone, but they have got to put him in some way.

Let us go to the next point in the case. Oh, it is very funny; there are so many of these things that it is impossible to analyze all of them. I just want to take the highlights. What took me nights and nights of ferreting to get out of the record so as to be sure that what I say
11220 is founded on fact, I don't want to burden you with by taking the same amount of time. If there is any doubt of the testimony, on 2425 and 2426 of the record it appears that Tannenbaum met Capone for the first time in 1938. He frequented this neighborhood continuously from the year 1933 and, according to the witness Magoon, was a member of the Combination. Now, isn't that peculiar? If my client had anything to do —and I don't admit there is a Combination— but if he had anything to do, as this liar Bernstein would have you believe, with this alleged Combination, why didn't Tannenbaum know?

Does that create a doubt? Let me pass that, even though I have a number of other things on the same subject. I will tell you why: Atmosphere. Atmosphere. Not facts—atmosphere.

Let us go to the next thing: Bernstein says that he met the defendant Capone on September 11th at Sackman and Livonia, between twelve and one o'clock. I am taking this from the record. He said that while he was waiting for Mike Sycoff—all of these meetings, by the way, are accidental; I never saw so many accidents in 11222
my life as I did in this case—he was waiting for Mike Sycoff to come along. He never came along. Around one o'clock, accidentally, Harry Strauss came along, accidentally got in the car in order to have a general conversation, when accidentally along came Capone and the other men and accidentally they left, and accidentally they came back, and then he got his orders. That is his testimony. Let us analyze it for a minute. This testimony is palpably false, because you have got to weigh one with the other. He says that at one o'clock in the afternoon of Friday—and I am 11223
not going to give you his contradictions about his changing it, went from four back to one to seven o'clock and all that—that is all in the record, and I have discarded that already; I don't want to go back and bore you by giving you all those talks, but listen to this: According to the others, Tannenbaum, Berger, and Rubin, the plan to kill Rosen was only perfected at five o'clock at night, and the alleged meeting with Capone—and I am coming to that—took place around nine-thirty at Sackman and Livonia. I will come to that when I come to Berger's story. Well, which

is true? If the plan to kill did not start until
five, six, seven hours after the alleged meeting,
how could the alleged meeting discuss the plan
to kill? If, as the witness said, he tried to plead
that the defendant Buchalter give him another
chance and went over to Weinstein, and came
back, and Rubin and Berger and all of that hap-
pened, how is it, then, at 12:45 in the afternoon,
before the murder was even conceived of, this
alleged meeting happened? Does that raise a
11225 doubt as to whether it actually happened? Well,
you can have the testimony read. Berger did not
leave New York, according to him, until five
o'clock. It was not decided that they were go-
ing to go ahead and finger this man until that
time. He did not go over from New York, where
he was supposed to be taken in a taxicab by
Lepke to meet Weiss in New York, and leave
and come over until nine-thirty, when the finger
was supposed to have been placed on this man
Rosen, and it was only accidentally—another ac-
cident—and I will come to that when I come to
11226 his testimony—that they saw Capone alone on the
street, but he heard no conversation, but he said
"Hello" to him. That is inference. Association.
You are supposed to convict a man of murder in
the first degree on an inference of that character.
But we will come to that. However, is there a
doubt created in your mind as to the truth of the
statement, if you need any more about the truth
of the statement of Bernstein, when I say to you
that this alleged meeting in which was discussed
the question of the killing, the stealing of the
car, took place five hours before it was even
thought of that they were going to kill him?

Now let us go to the next point: Well, the next point is the question of his attempt to get the drop and his effort to steal the car. Well, poor "Muggsy" Cohen. Or should I say lucky "Muggsy" Cohen? You know, when I say "atmosphere," I say it advisedly. If "Muggsy" Cohen, when first confronted with Bernstein after this indictment, or prior to this indictment, in any wise verified the story, then he should have been one of the baseball players along with the rest of them, with Mike Sycoff, Allie Tannen- 11228
baum, and the rest of that team. But no, he walked out of the District Attorney's office, and the only time that you see him is when I brought out from Bernstein on cross-examination about Cohen, out go the detectives, in comes Cohen. To testify? N-n-n-n-n-n. Just like the handcuffs and other things. You have to have effect. So he stands back here. "Bernstein, who is that man standing in the court-room?" "'Muggsy' Cohen." "Right." Cohen, out. What is that for? What is that for? You see, if Cohen was not put on the stand by Judge Talley, you would 11229
think that Cohen was in custody, wouldn't you? And you would have a right to think it, and you would say to yourself, "That substantiates Mr. Bernstein," wouldn't you, and you would have a right to say it. So you don't know that Cohen was just grabbed off the street and put in the Hotel Bossert, smoking big cigars, and steaks also. You don't know that. Oh, no. And I would like to lay a bet he is not there now. You don't know that, and you would never know it, because they did not think counsel for the defendant, Judge Talley, would have the temerity

to call a man who was in the custody of the District Attorney, but he did, and you found out that Cohen is under no charge, that Cohen was only picked up after Bernstein testified, although he had been picked up a year ago and let go. Figure that out, whether there is a doubt created by that.

Now let us pass on, with his drop. Oh, wait. This man testified in the Grand Jury that Cohen went back with him the next morning. I did
11231 not read that to you. Here he said Cohen was only with him the night. He did not want to get poor Mr. Cohen in trouble, so he took the radio back to him. Stole seventy-four cars alone, some of which were used in murders, and he knows this one was going to be used in a "schlomming" job, so he went to "Muggsy" to get the radio. I am wasting time on that. However, we will get to the next proposition.

When is he supposed to see Capone? Now, he is supposed to see Capone the next day. Here is the first time for Capone in the case, on September 11th. At 4 p. m. he is supposed to see
11232 Capone. Let me tell you this, gentlemen, and this is important: In the Grand Jury he said it was 7 p. m. Once it is light, the other time it is dark. The Grand Jury—don't confuse yourself—was no more than a year ago, so his memory now is no better than then, but when you manufacture a story you get a little bit mixed up sometimes, and hours do not make so much difference. This, to me, is the most laughable thing of anything. Remember, he never gives Capone a conversation at all. Weiss orders him to do this; Strauss orders him to do that, but in this

trial, because the District Attorney in his opening told you Strauss is dead, so we have to have a live substitute for a dead man, and it appears that he said in the Grand Jury these different things took place through Strauss, he just changes the name. What is in a name for Mr. Jackie Berman of Miami, who forgot he used the alias when he was testifying in Monticello? So he changes it from Strauss, who is dead, and he put in Capone, who is alive. That is taken from the Grand Jury. Oh, how you could send 11234
anybody even to jail on a disdemeanor charge on testimony of that character is more than I can say. But the most ridiculous thing of all—and I am not going to take time doing it because it will take too long—is this man, born and brought up in Brownsville, who on his examination tells you that he knows every street there by heart, he has got to rope him in, so Capone took him eight times over the route. You take the map in the jury room. I don't want to waste time. The route consists of about this, that is about all, about one or two turns, that is all the route consists of, so he had to take 11235
a man who knew Pennsylvania Avenue and Blake Avenue and Van Sinderen Avenue, and he took him eight times, back and forth, back and forth, back and forth, and then he gives the conversation.

"There is a man going to be killed." You know what the purpose of that is? That is the purpose to show that Capone was in on the murder.

Let us pass that; let us pass that. The most significant thing of all is the alleged next meet-

ing. I am not going to waste time. In the Grand Jury he said Strauss told him to steal the plates. In the Grand Jury he said he drove the car, he, Bernstein, drove the car over the route. Here he says Capone drove the car and "I sat alongside of him." You cannot make those kind of mistakes. Either you drove it or he drove it. If you drove it over the route, he would have to tell you the streets; if he drove it over the route, you would just watch the route,
11237 but that was not a good enough story that he told to the Grand Jury, because if he, Bernstein, drove the car, Capone would have to say, "Turn here, turn there," so he has got to put Capone at the wheel. "Capone always has my car, so Capone sat at the wheel," but either he lied to the Grand Jury of this county or he lied to you, and you can take your choice, whichever one you want.

Now let us go to the next proposition. What I am trying to figure out is this: You know in his examination how mysteriously Capone dis-
11238 appears from the picture when he forgets about it, is more than I can conceive of. You know when he came to going to the park, "Where is Capone?" Oh, Mr. Turkus had to direct his attention. "Wasn't he there?" "Yes, he had my car, so he must have been there," was his original answer, but here is the point: There is no Capone any place. They go to the park. There are supposed to be guns distributed. Capone is not there. That is his story. They look over the place and he stays in the park. Capone is not there. They then arrange to delay it until the next morning, and Capone is not there. And

what am I asking myself is this: There is one little loophole in this man's whole story about Capone, "How did Capone know to be on Junius Street on Sunday morning at six o'clock?" Figure that one out. How did he know to be on Junius Street at any time? There is nothing in this conversation or alleged conversation that Capone said, "I will be waiting with a car," in fact, the testimony is that when they left the park he went over and delivered the car and when he came back everybody was in Cohen's 11240
house. That is his testimony. There is no question that anybody went to Junius Street and said, "Here, don't wait here any longer. We are going to do it on Sunday." There is no testimony that anybody left the house all night, in fact, he says he did not sleep all night, in fact, they gave him a sandwich and they left, and so how in the world did Capone know to be at Junius Street on Sunday after the alleged killing? Well, Mr. Turkus, the only answer I can see to that is, "How do we know that somebody unbeknown to Bernstein did not go over 11241
and tell him? How do we know that Capone did not have a telephone? How do we know this? How do we know that?" But I say to you that I am going to ask the Court to charge you that you cannot speculate a man's life away. You are bound by the evidence in this case, and there is nothing in this case that at any time Capone agreed to wait on Junius Street, and there is nothing in this case to show that Capone at any time knew that they would be on Junius Street on the following morning, assuming that the killing is true.

Well, the District Attorney says he has a system. "We have a system," says he. You know, gentlemen, if a man signs a written statement, if a man is questioned and he gives answers, under our law as it now exists, we have a right to demand that that statement be handed to the Court to see if any inconsistencies exist, and if so, it is the duty of the Court to hand so much of the inconsistencies to counsel as he, the Court, sees fit. You saw that happen when
11243 I got the Grand Jury minutes of Bernstein. What is this system of the District Attorney's office? What is this system that takes no statement from murderers—confessed murderers? What is this system that does not take down in question-and-answer form from confessed murderers, so that counsel may be able to confront them with their original story; but they stayed eighteen months together, eating, sleeping, playing baseball, and concocting; and what is in this system that makes the District Attorney take affidavits, sworn ones, from persons who are not
11244 confessed murderers? Oh, he took a sworn statement from Sobler. Did that violate his system? He was tickled to death to bring that out when Mr. Sobler took the stand. He took a sworn affidavit, if not two of them, from "Muggsy" Cohen. He showed it to you. He asked "Muggsy" Cohen about it. Was the system violated then? Oh, no, nothing from Bernstein, nothing from Tannenbaum, nothing from Magoon. N-n-n-n-n-n-n. No statements, no signing, no questions, no answers, only from men who might be telling the truth and who made affidavit and who are not being confined down

in the Half Moon Hotel, eating steaks, Mr. Cohen and the rest. What is this system? I don't understand it. I don't understand it.

Well, I think I have pretty well covered Bernstein. I could have covered him much better. Oh, even remember the race track. You know, I knew what I had in mind. I made a statement to you as to what I intended to do when I opened this case, I mean in the formal questioning. My opinion changed subsequently and I take the responsibility that the defendant has offered no 11246
evidence, the defendant Capone. Judge will charge you that that cannot be used at all. Counsel is responsible for that. I accepted that responsibility, and I still accept it. But when, at the outset of this case, Bernstein took the stand, I asked him about whether he had ever been to the race track in Queens. What is so hard about a question, "Were you ever to the race track?" "What do you mean?" The Judge said, "You have to make your question more specific." So as soon as I said, "Were you ever to the race track when Louis Capone—" "Oh, sure I was. Sure I was to the Queens race 11247
track plenty of times with Louis Capone." What is another little lie for him? This man's testimony so reeks with perjury that I cannot see, even if there were outside evidence, how you gentlemen could in any wise give him any credence whatsoever.

Well, we will pass to the next man. I think the Judge is going to charge you in this case—of course, you are going to be bound by his charge—that the only evidence tending to connect the defendant Capone with this trial is the

evidence of Seymour Magoon. I think you are going to get that charge. In other words, as far as your verdict is concerned, the liberty of Louis Capone is going to rest on that hair-line alleged conversation. I am coming to that Seymour Magoon. So it becomes my duty to talk to you about Magoon. As I said, I could talk for hours more about this man Bernstein and tell you contradictions. I would tire you, I would tire myself, and I don't think I would accom-
11249 plish any more than I have accomplished by showing you these contradictions.

Now let us take a peek at the next character and the only character who affects us, so that you won't be bored. He is not going to take as long as the other fellow. Seymour Magoon. Well, he started off life pretty nice. "I want to be truthful with you, Counsellor, I never was interested in work or school." Why, he started when he was in public school. He says he knows the defendant Capone for seven or eight years, but he was in public school twice that long, if not more. He started when he was in public
11250 school. He did not need any tutors. It is remarkable how these men all of a sudden take orders, take orders, these mild mannered men who are led astray by some great criminal who gave them orders. Mr. Bernstein, the guy who takes a gun when he is twenty years of age and wants to kill a man without orders. How unfortunate is their life, that they were misled by others. He started when he was thirteen years of age. He does not even know when. He even lied when he testified to you when he left school. One time he said sixteen, another fourteen. He

did not even know the difference between sixteen and fourteen. Well, in 1928, that is thirteen years ago, years and years before he ever heard of Capone, at 1:30 in the morning, he committed a robbery on William J. Kennedy, a poor bricklayer whom he had never seen before, and with a fellow named White, and he stole the automobile, made him drive him some place, beat him up, robbed him,—force and armed—when a kid, before he ever heard of any of these defendants. That is the start of his background. He, take 11252
orders? That man who admits that in addition to that he has never served a day in his life, that he waived immunity on that charge and had it dismissed against him? I wonder did he tell the Grand Jury in that case a little white lie, the man that never told a lie, only little white lies? Can you remember my asking him, "Did you falsify? Did you testify fasely before that Grand Jury in 1928?" Remember he got out of that? He now admits that he stuck up William Kennedy, this bricklayer, at 1:30 in the morning. He admits that now. You know why he admits it now? Five years have passed. He cannot be 11253
prosecuted. He admits that now. But what did he tell the Grand Jury that led them to let him go? He does not remember, says he, whether he testified falsely then. He started pretty early, but he said, "Counsellor, I told little white lies." He did not even tell big ones, only little white lies. Do you remember his expression?

Again, he took the employees of Max Udell & Son. This was in 1930, before he ever heard of this defendant, according to him. You remem-

bered they robbed the goods from the concern and everything and, lo and behold, he had a good detour during the few minutes that he might have seen my friend, the illustrious Mr. Bernstein. Here is his answer to that: "If you say so, Counsellor." You remember that is when I told the Court he was getting too nice to me and I said, "We'd better adjourn for the day." I asked him, "Isn't it a fact that you threatened these people, these Udell people?" "If you say
11255 so, Counsellor, it must be so." That is when I said, "Don't say if I say so." "He is getting too affable. Let us take an adjournment." He was starting to agree with me.

He was a shylock for years, roughly. He was in business with this fellow Burns. He was familiar with the vicinity. He had a fight with a patrolman by the name of Murphy. He knocked him unconscious. He rented a garage—there is another one—this is very important in this case. Mr. Bernstein told you—I do not know why I passed it, because this is applicable to this case—
11256 Mr. Bernstein told you in this case that the guns he thinks were delivered by Joe Pilch and he thinks Joe Pilch delivered the guns, and on cross-examination I brought out that he told the Grand Jury that it was Joe Pilch delivered the guns and on cross-examination I brought out that he knew Joe Pilch for years and there was no question. If Joe Pilch is in custody, why wasn't he brought to substantiate Mr. Bernstein about the delivery of the guns? I will tell you why: Because Mr. Bernstein now changes his story and Mr. Pilch's probably would not stand up to it, so we have no Pilch in the court-room here, be-

cause the story is changed. Think that over. Does that create a doubt? Well, we had passed Bernstein. I thought I would not have to go back to him.

This fellow has never been convicted of a crime in his life except vagrancy, and he admits participating in a crime of murder in Brooklyn, in the Bronx, and about the oil can in the death of Shulman; he helped get rid of the body of Feinstein—oh, I forgot, I forgot—way back before he knew any of these defendants, and I don't admit 11258
he knows any of them, but before he says he knows the defendants, he was a little playful and he shot one fellow by the name of Whitey Whelan and never was prosecuted. I wonder if he told a little white lie that time—and another fellow whose name was Jerry, whose last name he does not even know, both of them were shot in this Borough of Brooklyn, never prosecuted for that—maybe they feared to prosecute him, and that was long before he was supposed to have known any of these defendants. I wonder if he told little white lies to get himself out of those 11259
scrapes. Well, maybe he did. But let us come to what he says here. What is his present status? Because in order to get the background you must know the status of the individual. His present status is the same as Bernstein's. There are no charges against him at this time—no charges. The murders which he admits he committed, he has no charge against him for, even the one in the Bronx where he says he signed a waiver of immunity; he is only held as a material witness. Pretty good pay-off for a man to go on that stand and lie about somebody else to protect his

own hide, pretty good pay-off, pretty good motive, pretty good incentive for an act of perjury.

Well, you have to have somebody to furnish corroboration, so it might as well be Magoon. Now let us see. I do not know whether you noticed how dissatisfied Mr. Turkus was at the beginning by Mr. Magoon's testimony. I do not know whether you noticed how he struggled to get Magoon to give a conversation. I do not know whether you noticed how Mr. Turkus
11261 asked him was the word "luck" used and Magoon answered, "Not that night, the next night." And, lo and behold, if you seek the testimony, nothing was ever said about an alleged conversation, about the word "luck" after that question had been asked him. I do not know whether you noticed any of those things or not. I do not know whether you noticed Mr. Turkus walk over to Mr. Klein, his assistant, and start to talk to him, and go back. I do not know whether you noticed that Mr. Turkus even threatened he was going to impeach his pet witness, Mr. Magoon,
11262 when I went ahead and raised an objection. I do not know whether you noticed any of those, but they all took place in this court-room, and finally, by a dint of a great deal of strategy, we have two things that Magoon said, two things, and upon those two things you are asked to find a verdict of guilty against this man. The one is a conversation alleged to have been had in the fall of 1938; the other is a conversation alleged to have been had in the defendant's home in 1939. Now, remember, gentlemen, that it is the contention of the prosecution—and I am not going to cover that portion of the testi-

mony at all—that Magoon was asked to follow this man Rubin. Isn't it significant—and you can have this testimony read; I am not quoting verbatim, to save time, because it is in my memory and it would take too long to give you the pages, but if there is any doubt as to whether what I am telling you are the actual facts, borne out by the written testimony here, that is, briefly, having taken the length of time that it did, you can have it read over. That is clear. That you are entitled to. Mr. Magoon 11264
says that in the fall of 1938, first it was Weiss that spoke to him; then it was Strauss that spoke to him. He got orders from Weiss and he got orders from Strauss, and as he was leaving, Capone is supposed to have said something. Here is a peculiar thing. Magoon says that when he was told by Weiss (this is at 2325 to 2327) in the presence of Capone to go to Ratner's Restaurant tomorrow morning, that Magoon testified that he knew Berger for two years. Now, get this in your mind. Magoon said that when he was asked by Weiss to go to 11265
Ratner's Restaurant he had already known Berger for two years, so there was no necessity at all of anybody saying anything about who Berger was. He knew him. But Berger testified when he had the conversation, the alleged conversation, with Weiss, that he, Berger, was asked by Weiss, "Do you know Magoon?" and Berger said, "Maybe if I see him I might be able to recognize him." One said he knew him for two years. Poor Magoon is not getting steaks and chops. He is up in the Bronx. Berger and the rest of them are in the steak and chop

department down in the Half Moon, so they cannot tally as well, so (1) Berger, he does not even know Magoon, but maybe if he sees him he might be able to recognize him. Magoon wants to add it on, lay it on thick, because he only tells little white lies. That is a little white lie, just to add on he knows him when he does not know him. To him that is a white lie. So he said yes, he knew him. That is only the beginning of the conversation. Here:

11267 "Q. What else did Weiss say? A. He says, 'After you find out what is what, come back on the corner and we'll see what we have to do'—not in those words, but to that effect."

"Q. After the defendant Weiss gave you those instructions, what did he do? After he told you this that you have just told the jury, to meet Berger in Ratner's restaurant, and the other instructions, what did Weiss do? A. I don't know. I left the corner."

This was where Mr. Turkus started to try and get this conversation.

11268 "Q. Before you left the corner, did you have any talk with either Capone, Reles, or Strauss? A. Not that night."

Compare that. Compare that. It is a physical impossibility that this man is telling the truth, because, according to the testimony of Berger, Berger said that he, Berger, went to East New York that night with Weiss, picked up Harry Strauss; but, of course, Louis Capone is alive, Harry Strauss is dead—he picked up Harry Strauss and then went to Cohen's house, and after leaving Cohen's house Weiss then asked Berger whether he knew Magoon. How do you

account for it? Berger, the man whom he is supposed to have been meeting, this alleged conversation on the street corner is happening at the same time that Berger says that he went to East New York and went to Cohen's house, in respect to the same subject-matter. It cannot be.

Well, what is the next thing? The next thing is, the following morning he, Magoon, is supposed to have gone to Cuppie's restaurant. This is only an insignificant thing but just shows you how far they go. You remember Berger testified that Cuppie went in the machine with Magoon when they left the restaurant to go up Fifth Avenue. No. You see one is in a jail and the other is in the hotel. Magoon did not get the story right so Magoon's story is that Cuppie went in a car with Berger. Berger's story is that Cuppie went in the car with Magoon. Each one of these is trying to shove it on to the other fellow and they have not had time to tally. But, here is a peculiar thing. Magoon had testified that Goldstein and he and Strauss and a few others were buddies for fifteen years; they visited one another socially; they were out almost every night together; that he and Reles practically slept together and were socially bosom companions. You notice that neither Reles nor Goldstein is brought into either of these conversations. His boss is never around. His boss is never around.

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The Court: Mr. Rosenthal, I will excuse the jury. The jury is excused. Do not discuss the case.

Mr. Rosenthal: I except to the Court excusing.

11272 *Summation on Behalf of Defendant Capone*

(The jury retired from the court-room.)

The Court: I don't want to cause you any loss of face. Don't you want to take that back about Reles?

Mr. Rosenthal: Maybe you misunderstood me. In these conversations alleged to be had, it is funny that Goldstein and Reles were never around. That is in the testimony. I am not saying anything about Reles at this time.

11273 The Court: I thought you meant around here, in court.

Mr. Rosenthal: No; read what I said.

Mr. Turkus: The words were "brought in" that I heard.

The Court: If I understood it that way—

Mr. Rosenthal: You misunderstood.

The Court: —the jury would be quite apt to understand it that way.

Mr. Rosenthal: You misunderstood me. My intention was this, that these conversations they are alleged to have had on this street corner, that neither Reles nor Goldstein were around or

11274 brought in.

The Court: Isn't that far-fetched anyway?

Mr. Rosenthal: No, it is in the testimony that Goldstein was never around. I asked Magoon that particularly. That is one of the questions.

The Court: What about?

Mr. Rosenthal: Because it is contended by Magoon that he, Strauss, Reles and these people are close bosom companions and members of a combination.

The Court: I will undertake this responsibility. In order to avoid confusing the jury, which has not been informed of Reles' tragic death

during the course of this trial, which is a matter notorious throughout this city, I will instruct you to make no reference to Reles unless there is something in the record showing that he was away. You can take your exception.

Mr. Rosenthal: As long as we are here, the point that I am trying to bring home,—

The Court: I understand your point. What may confuse the Court may confuse the jury.

Mr. Rosenthal: I except.

The Court: I saw Mr. Turkus jump up just 11276
as if he responded mentally in the same way.

Mr. Rosenthal: I did not mean it as your Honor understood.

The Court: You know how I stand. Do not refer to that again.

Mr. Rosenthal: I won't. I have enough other things to refer to. Does the same thing apply to Goldstein, because it is in the record that I asked him whether Goldstein was there?

Mr. Turkus: Goldstein was electrocuted.

The Court: It is worthless as an argument.

Mr. Turkus: That is the way it sounded.

Mr. Rosenthal: I will take your Honor's ruling. 11277

The Court: I would not mention it. That is my judgment.

Mr. Rosenthal: I will take your Honor's ruling. It is in the record so I cannot help mentioning it.

The Court: Bring back the jury.

Mr. Rosenthal: The opening of Mr. Turkus said that Strauss is dead.

Mr. Turkus: Let me just say this, Judge, for the record. It was brought out, I think by Mr. Rosenthal—

11278 The Court: Will you let me interrupt, please? Mr. Rosenthal, you understand the danger of this. If, by any possibility, through the grapevine, possibly by passing a newsstand and seeing the screaming headlines about Reles' death and features on the first page, so much as one juryman has been able to get that fact to the jury it will prejudice your argument and it will cause you to lose face with the jury, if you appear to be in the position, even though
11279 mistakenly, of misleading the jury.

Mr. Turkus: May I say this: More than that, the record of this trial indicates that from October, 1934, to October, 1936, Reles was in jail so that he could not possibly have had any connection with this homicide. It is a very dangerous situation.

Mr. Rosenthal: As long as your Honor took this recess, suppose you take five or ten minutes, Judge?

The Court: It will disorganize the court-room.

11280 Mr. Rosenthal: I want to review and leave some of the things out which I have.

The Court: You won't have any trouble about that.

Mr. Rosenthal: If you give me five minutes, I won't.

The Court: Bring the jury back.

(The jury returned to the court-room.)

Mr. Rosenthal: In respect to this conversation, gentlemen, of 1938, in the Fall, I want you to keep in mind this, that it was supposed to have been had with Weiss and with Strauss but

the allegation is that Capone is supposed to have been there. Now, how are you going to ring that in to Capone? He is not supposed to have given any orders. He is not supposed to have given any directions. So, after struggling for a while and trying to get him—did Capone say anything? Did Capone say anything? Did Capone say anything?—they finally got him to say, "Capone said he is hurting Lepke and you got to hit him in the head." Remember, there are three conversations, lasting three nights, during which all of this is supposed to have been gone into; direction, go uptown, go downtown, go to Ratner's, stay up there, come back—given orders, given directions —all this time the defendant Capone is supposed to be a silent observer but here is where Magoon, stationed in the Bronx, away from the Half Moon Hotel, again did not jibe with the other man because he wanted to add, he wanted to add, so he said he told Weiss that there was a cop guarding this man and Weiss said, "We will have to whack the cop, too." What he forgets—in the same conversation that he told Weiss or Weiss told him that as long as there was a cop they did not want to hurt any cop so that they should not do anything to Rubin. Do you remember that? How do you coincide with them? Each one of them is telling the truth. That is the point at issue.

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As far as this man Magoon is concerned, just like I have with the others, I have a number of contradictions which I have not even bothered to tell you of, not only on this trial but on the trial in which he has testified before.

So that conversation, I think the Court is going to charge you, in so far as it affects the defendant Capone, is not what we would term corroboration.

Then, say you, why is Capone here and why do we have to judge him? The reason why you have to judge Capone is because Mr. Magoon says that in April, 1939, he went to Capone's home to get a little advice. Isn't it significant, gentlemen, he does not even know where Capone
11285 lives. He thinks it is on Avenue K. He thinks it is a couple of blocks away from Utica Avenue. He thinks that it was in 1939 he lived in Avenue K. He merely thinks. He is supposed to be a great friend of this defendant. Why, he went to him for advice. Even though Mr. Strauss and the rest of them were his close friends and buddies with whom he had committed crimes, according to the record here, Mr. Tannenbaum was in on a murder with him, according to the record, and I don't know whether Mr. Bernstein was or not, but he is supposed to have gone for advice. "Mr. Capone, I don't want anything
11286 from you; all I want is advice." "Why ask me?" he says, so he says, "Well, I do not ask you. I only came to you for you to advise me." Three years after this killing, this man Magoon is supposed to have walked into this man's house at an address which he does not even know to this day and upon that this man's life—

Well, let us see. When he spoke of Capone, according to him, Capone said to him, "What are you worried about?" He said, "I worked in the Rosen thing and it was right on Sutter Avenue and I was not made." Get these words. Upon this and this alone rests your verdict in

so far as it affects the defendant whom I represent. Even if you were to believe this man Bernstein, because if you don't believe him then of course even this does not amount to anything and if you do not believe this, that does not amount to anything, but whichever way you take it, this liar Bernstein and this isolated sentence are all you have in this whole case with the exception of three little items which I will talk about as soon as I finish this—"I worked on the Rosen thing and it was right on 11288
Sutter Avenue and I was not made."

Well, now, according to this man Bernstein—let us go back and see whether we believe his story. Let us see whether we believe his story. Did Capone work on Sutter Avenue? Was Capone on Sutter Avenue? Why, all that is alleged by Bernstein that Capone did was to drive in an automobile on Sutter Avenue and as he was driving along, not even stopping the automobile, he pointed out a store and said, "There is where a man is going to be killed," and drove around through Pennsylvania, Blake 11289
and Van Sinderen Avenue and drove around again and again and again and again, so he was not on Sutter Avenue. How could he be made? If this statement is true, how could he be made? What else did Capone do, according to Bernstein, the perjurer, even if you believe him? Why, he stood over on Van Sinderen Avenue, 14 blocks away from Sutter Avenue, 14 blocks away, with an automobile. Are those the only two things which it is alleged by the prosecution that this man did? Then, what is the meaning of this sentence: "I worked on the Rosen thing

and it was right on Sutter Avenue and I was not made"? Why, the very conversation, all the alleged conversations that were had, were never had on Sutter Avenue. He did not go and watch from a doorway. He did not watch from a park. He did not go over and look at the store. He did not go in and shoot the gun. He did not have the motor running in front of the door. All it is alleged in this case that he is supposed to have done, which is ridiculous, is that he is sup-
11291 posed to have taken this man Bernstein on a ride in Bernstein's own automobile—with a change of face; one time it is supposed to be him driving, the other time Bernstein—and did not even stop in front of the door, according to Bernstein, and pointed out a store and said, "A man is going to be killed." So he was not on Sutter Avenue and if he was not on Sutter Avenue, how could he be made? So you see the ridiculousness of the entire conversation, and upon that a man's life is at stake in this courtroom because that is all that there is, even if
11292 you believe Mr. Bernstein, even if you believe Mr. Bernstein. Why, this man who says that when he was first questioned—let us take the background of this man for a second because upon this—I have left all these contradictions and other things out, gentlemen—I cannot leave this out—

"Q. You do not expect to be electrocuted for any of the murders you have committed, do you? A. I hope not.

"Q. You do not expect to be? A. I hope not.

"Q. Would you lie to save your own life? A. No, sir.

"Q. Your answer is you would not lie to save your own life, is that right? A. Yes, sir.

"Q. Did you ever lie in your life? A. Little white lies.

"Q. White lies? A. Little white lies.

"Q. You have been telling little white lies pretty nearly all your life, haven't you? A. No, sir.

"Q. Well, from the time you went to public school and started to steal you told little white lies, didn't you? A. Yes, sir. 11294

"Q. And you continued on telling little white lies all the way through? A. Just at intervals.

"Q. But you never told anything but little white lies? A. Yes."

There should be wings sprouting from that man. Little white lies! Never interested in school. Never interested in work. Started off from infancy, without the aid, dictation, help, suggestion, or instigation of anybody—the little white lies. Well, let us see about the little white lies. He was questioned way back in 1940. Did he do anything about the Rosen case? Oh, no, not he. Through pages of testimony it appears that this man says that he definitely, both for Judge Foley in the Bronx and for Judge O'Dwyer in Brooklyn, signed a written statement, a written statement he says, with a stenographer present, not one, not two, twenty or more. And he told me—and it is in the record here—I will use their words—it is in the record —it is in the book—he told me that he signed a statement for Judge O'Dwyer, signed it. Where is it? Where is that statement, because you have a right to believe that if he lied once he has put the integrity of Judge O'Dwyer and 11295

11296 Mr. Turkus in issue here. If he lied then, what assurance have you got that he has not lied to you? Oh, I believe Mr. Turkus. I believe Judge O'Dwyer. He lied. That is what we say, he lied, but what difference is there if he lied about my client or he lied about Judge O'Dwyer and Mr. Turkus? Can you tell me the difference? Little white lies. Little white lies. But the fact is that there is no statement. Oh, there is no statement from any of these men because state-
11297 ments would have to be turned over to the defense and would show whether there has been a concoction among these criminals in the last 18 months while they have been eating their steaks and playing baseball.

Well, I could tell you about Mr. Magoon's associations and I could tell you about a number of things, but, before I pass to the three short witnesses who made cursory reference to my client, I want to show you this. You know Magoon and Tannenbaum have been close friends since 1933. I want you to get the sig-
11298 nificance. Magoon says—and I am quoting, Mr. Turkus, from 2425 of the record:

"Q. Did you meet him"— I am referring to Tannenbaum; this is Magoon's testimony—

"Q. Did you meet him (meaning Tannenbaum) at Saratoga and Livonia Avenue at any time? A. Yes, sir.

"Q. Did you see him at Saratoga and Livonia Avenue frequently during the years 1933, '34 and '35? A. Yes."

Then the Court asked a question:

"Q. Was he a member of the combination? A. Yes, sir."

Do you see the significance of this? Magoon says that Allie Tannenbaum hung out on the corner, hung out on the corner of Saratoga and Livonia, where this defendant is supposed to have been since 1933 and was a member of the combination. Magoon says that he saw him frequently on that corner since 1933 and yet Allie Tannenbaum says that he never knew Louis Capone in his life until the year 1938. Figure it out. Tannenbaum is not trying to help Capone but Magoon is stationed up in the Bronx 11300
and is not one of the baseball players so there is no time to tally, there is no time to tally with Allie, so Allie tells the truth in this one instance and has Capone entering the picture in 1938, two years after the killing, but Magoon has got to put him there in 1932 in order to have a conversation in 1939, three years after the killing.

What more can I say, gentlemen? I say that the life of my client hangs on this alleged conversation three years after a murder, supposedly had in his home, without solicitation of any character by him of the man coming there, and then the man says, he says, "I was 11301
in on Sutter Avenue on the Rosen thing", whereas the fact is that he never was on Sutter Avenue so how could he be made, excepting that he rode past in an automobile. Well, let us pass that. I think I have made that impressive enough.

Well, the District Attorney is going to yell to you, association, association. Let us see. You know it is a pretty far-fetched proposition in this case. You have to get Capone associated some way with the defendant Lepke, don't you, or Buchalter? Well, according to Allie Tannen-

baum, Allie Tannenbaum, the man who says that he had been working for the defendant Buchalter since 1931, and has been in his office day after day, four or five times a week, and collecting a salary up to 1937, 1938, 1939, says that he never saw Capone in his life, which means either at the place of business of the defendant Buchalter or in East New York, but they have to slip something in so the versatile Mr. Rubin goes on the stand and—listen to this— I think I am
11303 insulting your intelligence— "Do you know the defendant Capone?" "Yes." Never introduced to him. Never saw him in his life except twice. He tried to stretch it to three times on cross and went back to twice. Well, you would think he had a conversation or he was introduced, or something. "What is the first time you saw him?" Now in 1932, gentlemen, in 1932 he saw him walk into a place, had no conversation with him, was not introduced to him, does not know where the place is. I finally pinned him down to the small City of New York with its six mil-
11304 lion inhabitants and its thousands of miles of streets, including Central Park, but that is as near as I could get him to any particular place, but he saw him walk into a place unknown, the name of the place unknown, the place unknown, the hour, the day, the year, the month, all unknown, but he saw him walk in and—here comes the dirty part of it—suspicion—oh, they are not trying to get the jury to be unfair to these defendants, oh, no—they don't want any outside influences; they don't want any suspicions to put a man's life away. Oh, no. He walked in—remember this—he walked in with Buggy Gold-

stein, he walked into a room and he saw him for a fleeting glance, fleeting glance. Why, could you remember any person that you saw ten years ago walk into an office and where he walked into? So he is going to say, yes, somebody told him about him; but the point is this, that, according to Rubin, nobody told him anything about him. He was not even introduced and he did not even know who the man was and he does not even today know who he was. The next time he saw him was in the Fall of 1935. 11306
I merely asked him one question, did it have anything to do with this case. No. So you see on this man's testimony Mr. Turkus has offered an association between the defendant Capone and the other defendants.

Well, Mr. Rubin has been taken care of by other counsel. He does not affect me at all, excepting that he says he saw—and remember that in the millions of people that exist, with all the millions of people that exist, nobody ever saw this man any place either in the Raleigh or any other place, nobody.

Oh, Mr. Turkus, you are just as cute for the 11307
D. A. as you were for the defense. He asked witness after witness, Shapiro, Mrs. Isaacson, Mrs. Weiss, oh, I don't know how many, "Do you know Farvel Cohen?" "Yes." "Did you know Buggsy Goldstein?" "Yes." Did you know this one and the other one? All the different names, all had aliases. That was done for a purpose. Alias so-and-so. The only one he forgot about was Bill Cody and forgot to call him "Buffalo Bill," but he never asked anybody. "Do you know the defendant Louis

Capone?" Think it over. Think it over. Sobler —any one of them? Any one of them? He asked Shapiro did he know Weiss. He asked Shapiro did he know Cohen. He asked Shapiro did he know Tannenbaum. He asked Sobler. He asked every one of them. Ah, did not ask anybody about Capone. Now, then, he gives me a winning smile. I suppose he is going to say, why didn't I ask him. I am going to give him a good answer to that. It is not my duty to prove
11309 lack of association. It is very, very, very safe to assume that if any one of these men whom he questioned before they got on the stand or after they got on knew the defendant Capone, that would have been the first question that he asked them. But, again, even if I did not ask, you cannot take suspicion; you cannot conjecture; you cannot surmise; you cannot read in. The fact is that according to this testimony it is barren about any association in any of these places.

All right, the next witness was Berger. Well,
11310 Berger is the "hello" conversation, if you remember. Berger said he knew Capone and at eleven o'clock of a night—and I have discussed that before—while riding in Brooklyn with Weiss, Weiss got out of the car and Weiss walked over to Capone; Weiss walked over, they had a conversation outside of his hearing, and then Capone walked back to the car and said "Hello, Berger," and Berger said, "Hello, Capone," and he went away. What is that for? That is to show that somebody saw him talking to Weiss on September 11th. Another suspicion, another circumstance, but you cannot speculate

as to what was said there. Are you going to speculate a man's life away on what might have been said? Oh, you cannot do that. And even if you were going to do it as to Berger or Rubin, let me tell you this; they are both, in my opinion, accomplices to this crime from their own admissions, from their own admissions, and if they are accomplices they must be corroborated. And why do I say they are accomplices? They got a good pay-off in this case and this cannot be disputed. I want to ask the District Attorney, 11312
and I defy him to answer. My defendant was indicted in 1940. That Grand Jury is out of existence. Why, in 1941, after this trial started, after the trial started, after you men were suffering, being taken away from your homes and your families, was it that some unknown Grand Jury that had nothing to do with this case were permitted to have these two men appear before them? I will tell you why.

The Court: Will you pardon me a minute? Whom are you arguing about?

Mr. Rosenthal: Berger and Rubin. They both 11313
appeared. I will give you the pages—

The Court: Wait a minute.

Mr. Rosenthal: —before the Grand Jury after this trial started.

The Court: You are on a question of law now and for that reason, to avoid confusion, the Court may have to make a preliminary ruling.

Mr. Rosenthal: May I state what the purpose is to your Honor?

The Court: Yes, but you may not argue it to the jury.

Mr. Rosenthal: I can state it up there.

The Court: In addressing the Court, I will let you state it, without oratory, from where you are. The jury will disregard this.

Mr. Rosenthal: I will go up there. I don't want to have it said I said it in front of the jury. Let Mr. Turkus come up.

Mr. Turkus: There has already been a challenge handed to the District Attorney about a Grand Jury proceedings.

The Court: This does not call for colloquy.

11315 Berger was the finger man?

Mr. Rosenthal: That is right.

The Court: I am going to charge the jury that he was an accomplice as a matter of law. You need not argue that to the jury.

Mr. Rosenthal: May I state the purpose that I had in mind? The purpose is to show that he procured immunity if he appeared before the Grand Jury and testified.

The Court: You do not have to argue that he was an accomplice. It is a close question because he says he did not know there was going to be a murder, that he thought it was going to

11316 be a "schlam", but I am giving the defendant the benefit of the doubt and I am charging the jury that he was an accomplice.

And Rubin, I am going to charge the jury, that I find no evidence justifying the Court in submitting the question of accomplice to the jury as to Rubin; that he must therefore be viewed as a non-accomplice witness.

Mr. Rosenthal: Of course, that is the other defendants. I have no interest in that.

The Court: Yes, I am going to charge that.

Mr. Rosenthal: I won't waste any time.

The Court: Berger and Bernstein are the two accomplices and the others are not. That is a question for the Court, not for the jury, because no question of accomplice as a matter of fact is going to be submitted to the jury.

Mr. Rosenthal: All right, then, may I just say this. The Court now has informed us of his attitude in respect to the witness Berger.

The Court: The charge has been prepared and I am just anticipating part of the charge.

Mr. Rosenthal: All right, sir. That being so, 11318
his testimony again must be viewed like Bernstein's, in other words, it has to be corroborated; but the point that I wanted to bring to your minds was this, that these men did not appear before the Grand Jury until after this trial started and if they were questioned regarding this particular crime, they were given immunity if they did not sign any waiver. Why? You have a right to think. Why did they wait until the trial started and take these two men before the Grand Jury? You think it over. I leave that to you.

Now, the only one left is the man Allie Tannan- 11319
baum and I have already discussed that he said he only met my client in the year 1938. You can take your choice but you cannot speculate. If Tannenbaum was where he said he was, namely, in Buchalter's place of business, every day of the week as well as frequenting Saratoga and Livonia Avenues and a member of the so-called combination as far back as 1932, and frequently on that street corner, and if Tannenbaum never saw or heard of the defendant Capone until 1938, then you can judge for yourselves whether or not

Bernstein or Magoon is telling the truth because the two things could not be true.

Now, regarding Magoon, before I pass on to almost the conclusion, I want to call another thing to your attention. You know Tannenbaum told you that when he was questioned up in the mountains he told everything he knew to Judge O'Dwyer. Each one of these witnesses told all he knew when he once determined to talk. Not so Magoon. Magoon said nothing about the
11321 Rosen case until 1941. He was questioned twenty times. He could not fix the dates. It was between January and June, 1941. It was after January and he was questioned, questioned, questioned, questioned and questioned and the first time he ever mentioned the Rosen case to the District Attorney of Kings County was in 1941, a year after his arrest. A year after he had been questioned concerning his participation in other matters, and he is the only one who was not asked and did not volunteer. Think that over when you try to give credence to the statement which he made.

11322 Now, I have covered the testimony in so far as it affects my defendant. You know there are some very peculiar things in this case in so far as it affects my client. Mr. Turkus started out with Judge O'Dwyer starting war on the mob and everybody gets an alias. He started out by giving everybody an alias. I don't know Weiss from a hole in the ground. I don't know what his first name is. It is Emanuel, I understand here, but I know that if your name were Emanuel somebody would call you Mendy. My name is Sidney. Somebody calls me Sid. But they give

aliases to everybody, alias Mendy Weiss, alias this one, alias that one, alias the other one. I don't know why it is, why we escaped observation. Capone has no alias. His name is Louis Capone. It was that when he was born. It stiil is that and he is the only one on the indictment that has not got some kind of a cognomen pinned to him. I forget some of these names. I tried to remember them. They certainly are good. Tear-eyed this one, Buggsy the other one, Cuppie the other one, Cock-eye the other one,—all kinds 11324
of names, but, thank God, they have not pinned any on my client. Now, that is number one.

Everybody is running all over the world, Tannenbaum, Bernstein—Florida, California, God knows where. They even have Weiss—and his lawyer has explained the reason, Kansas City, Denver, Texas—you have the map of the whole United States and everybody is running, everybody. Tannenbaum ran, Bernstein ran, everybody. There is no proof that Louis Capone was not home with his wife and his children until his arrest. He did not run. He did not run. 11325

Well, everybody is connected with unions. I heard figures so great in this trial that I started to get dizzy. I had to walk outside when I thought that I was supposedly educated, went to school and the years that I have studied and the work that I have done; it made me dizzy I confess. But is there a word of anything concerning Capone in any of them?

Well, another thing struck me. Why didn't Rubin, Berger or Tannenbaum say that in any of the conversations allegedly had with either Weiss or Buchalter that Capone's name was men-

tioned? Not a word throughout. Why, even there is an alleged conversation with the defendant Buchalter in which it was said or alleged to have been said, "Why do you worry?"—I think to Rubin—"They are looking for Cohen and Weiss and Shimmy." No mention of Capone, assuming that that conversation actually took place. I am now taking the face value of these alleged conversations.

Well, the witnesses, Mrs. Isaacson, Sidney
11327 Weiss, Blanche Weiss, Sobler, Carl Shapiro, and Berger, even Berger—you remember how Berger said that he hung out in Blum's candy store next to the station house over in New York, you remember that—and he was asked who hung out there and then you had another description of your Allie Tannenbaums, this one, that one, the other one. No Capone. Not one of these persons who took the stand, questioned—oh, I think one of the defense witnesses, Shapiro, that was called was questioned, I do not know, for a day or a day and a half—but not one word by Mr. Turkus, "Do you know the defendant Capone?",
11328 not one word, not one word.

Well, of course, Berger says he would lie to save himself from prison but not from the electric chair. Tannenbaum at least is truthful enough to say that he would die to escape the chair. But Magoon, n-n-n-n-n he would only tell white lies. He would not lie, not that big, soft-hearted Magoon. He would not lie to escape the chair.

Well, by now you should be tired of listening to my talking. I think I have spoken longer now than I have throughout the whole trial, with

the exception of the time that I examined Mr. Bernstein and the time that I examined the little white liar. I think that would make a good one for Walt Disney. I might be able to make a little money on it. I have tried to keep you interested, gentlemen. I may have appeared facetious at times. If I did outwardly, I don't inwardly. The task which any man has, whether it be the District Attorney or defense counsel, is a very trying one. It is trying on their nerves. Even the Judge gets irritated. We all do. We 11330
are human beings. I do not know whether I have covered the things or not. As I lay awake last night, knowing that I had to sum up to this jury, a million thoughts went through my mind. There is any amount of things which I have not covered which I feel in my mind would convince any ordinary man, and I am only concerned in so far as my defendant is concerned, of the innocence of my client; but then, when you get up on your feet, you look at twelve men who have sat here, tired, want to go home, being kept away from their families, their friends, their asso- 11331
ciates, you wonder whether or not you could not over-do a situation by trying to impress things on them which they as ordinary common-sense individuals would ordinarily think of anyway.

You see there is nothing strange about jury duty, even though you have got a tough job. There is nothing strange about it. Why do we take twelve, as I said at the outset, rather than one? You know it is a moulding of opinion which makes the United States what it is in this troubled world, moulding together of the opinions, the thoughts, into one because if that were

not true, there would be no necessity. How easy it would have been for me, if we would have had a separate trial. There would have been no five week jury; there would have been no five week trial, because, as far as the evidence in this case is concerned, our evidence would have been in in less time than it takes to snuff out a candle, practically or figuratively speaking.

You men are all of different walks. Each one of you has had different experience. That experience fits you to pit your mind against the
11333 other man's. That experience gives you the power to analyze in a different method than your fellow man. So that when you go in there and you argue among yourselves, without stubbornness, without rancor, without bitterness, you can see the light as others see it and you can see whether there is a fallacy in your argument and whether the argument advanced by others is a better argument, and then when you finally come down to moulding, moulding, moulding into the final form, you are able to say whether the State has proved its case. Well, I
11334 would rather the job was yours than mine. It is a disagreeable duty to anybody. I imagine it is disagreeable to Mr. Turkus or any Assistant District Attorney to have in his charge the prosecution where a man's life, finally pronounced by the Judge, may be at stake. It should be a hard job but, in the final analysis, whatever he thinks, whatever I think, whatever the Judge thinks, has nothing to do with you. The facts remain with you and you alone. That is our law and if that is carried out, gentlemen, no man can be heard to complain.

Now I say, and I think the Court will agree, I want you to listen carefully because law is foreign to most of you men, but the law in this case is a very important thing to me because if, when you listen to the Judge charge the law, he says to you: "Gentlemen, if you disbelieve Bernstein and if you believe or disbelieve the outside or alleged outside evidence, or if you believe either of them, you must acquit; if he says to you that there must be other evidence of an independent nature which you believe, 11336
tending to connect the defendant with the crime or you must acquit; if he says that in so far as the defendant Capone is concerned the People only seek to prove his guilt by the isolated statement of the little white liar Magoon and that even though you may believe Bernstein, which I consider to be physically impossible, even though you may believe him, if you disbelieve the statements or if it is insufficient to convince you that it is of such a nature as tends in your mind to connect this defendant with the crime, you must, whether you like it or not, 11337
whether you like his associates, whether you like his past life, whether you like his record, which of course is not in issue here, no matter what it may be, whether you like his face, whether you like my face, whether you like his wife, whether you like his children, whether you like his nationality, whether you like his religion, it does not make any difference what you like, it does not make any difference what you dislike, if in this case the Judge charges you that there is but one and one thing only that would justify you in finding a verdict of guilt in so far as it

affects Capone and that is the statement of the little white liar Magoon, supposedly issued three years after the murder, in a house where he does not know where it is or where it is not, in the presence of nobody, and in the uncertain manner in which he has already testified, you must acquit this defendant."

All I ask of you is, when you listen to the Court charge you as I am sure the Court is going to charge you, that as far as the de-
11339 fendant Capone is concerned, there is nothing in this case except the word of an alleged accomplice Bernstein who alone cannot convict and the alleged statement to Magoon whom you must believe in its entirety and be convinced of the truth beyond a reasonable doubt before you can convict, if you hear that from the Court and if you have agreed with my interpretation of what the evidence is in so far as it affects, (1) the man who had the temerity to sit before a jury in a box and say, "I am telling the truth" as he did in this case and then tell you that he deliberately perjured himself, and the man who
11340 had the temerity to sit in this box and tell you he was telling the truth and then had the temerity to perjure himself, so that even the Judge said he is a liar; (2) Magoon, a man who would not lie and never lied in his life except little white lies, acquit this defendant; and I expect, gentlemen, knowing the attention which you have given to the evidence and to me, that you will do that.

I want to thank you sincerely for your attention.

The Court: Gentlemen of the jury, tomorrow

is Saturday and we will resume at ten o'clock in the morning. I just want to say this. Please listen very carefully. This is a lengthy and very important case. It is desirable that your deliberations will not be forced, will not become hasty at the last minute from natural desires to be at the family firesides. I feel the same way as you do. I am very anxious to get through with the case, but the thing to have uppermost in our minds is that regardless of all other considerations, the steadiness and the deliberate 11342
procedure which has been followed up to the present time is necessitated by the importance of the issue in a case in which substantially a million words of testimony and otherwise are on the record. So we cannot get fussed at the last minute and have an abortive verdict. I hope that the case will go to you tomorrow. I hope that I may see things shape up so that it goes to you tomorrow so that you may deliberate. The law permits it to go on Saturday and permits the taking of a verdict on Sunday. The law does not permit the Court sitting on 11343
Sunday to take evidence or to charge. If, in the event that we don't finish tomorrow, because I cannot absolutely promise it, I am going to ask you to all be good soldiers for a little while longer. I am apt to go on vacation when this is through and it is delaying me the same as it is your anxiety to remain home. If by any mischance this case does not go to you tomorrow, then something has come up which may necessitate that on Monday morning we won't be able to work. One of the counsel has to be in the Court of Appeals and that takes precedence over this trial. However, I am with you heart

11344 and soul and hoping for the best results. My main worry is whether or not my voice will hold out for the charge. If it holds out for the charge, you will have the case tomorrow, but I cannot give a hasty charge in this case. It is going to be a lengthy charge. I will do my best.

Do not talk about the case, let nobody talk to you about it. Keep your minds open. Remember all other admonitions.

The jury may go.

11345 The defendants are remanded.

(Thereupon an adjournment was taken to November 29, 1941, at ten a. m.)

PROCEEDINGS, November 29, 1941.

(TRIAL RESUMED.)

The Court: There must be no interruption at any time during the summation.

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(Mr. Turkus made closing address to the jury, as follows:)

May it please the Court, Mr. Foreman, gentlemen of the jury:

No one who has sat through this trial can avoid being cognizant of the fact that for the past eleven weeks, in devotion to the performance of your duty as jurors, you have made sacrifices. You have been away from your personal affairs, deprived of the comfort and society of your loved ones at home, in devotion of your

duties as jurors, to the end that the People of the State of New York may live without violence and without outrage at home, in peace and security, and the right to live without spoliation.

I trespass upon your time for just a moment to express my appreciation to Judge O'Dwyer for designating me to conduct this prosecution and to express my gratitude to my associates, Mr. Klein and Mr. Josephs, and to all law enforcement agencies, agents of the city, county and Federal, who have participated in the gathering of the evidence in this, a five year old 11348 murder.

Counsel for the defense are to be complimented for giving all their talent and energy to the most difficult, and I might say hopelessly difficult, case for the men at the Bar, to the end that the defendants on trial may have given to them and secured to them every legal and constitutional safeguard that the law of the land permits.

Never before in the history of criminal jurisprudence has there been brought to the Bar of justice at one time the "boss"—the man behind 11349 the scene—described by his own lawyer as the czar of the industrial rackets, with a half a million dollar take on one racket alone; number two, behind the scene, who directed the murder; and, number three, Lepke's lieutenant and triggerman, who fired the lethal shot. Never in the annals of criminal jurisprudence has the District Attorney so conclusively and irresistibly, fact upon fact, established a moving picture, a veritable moving picture reenactment, of the crime of murder in the first degree, as was portrayed to this jury in this court room in the

five weeks of testimony by thirty-five witnesses and fifty-eight exhibits.

Can five weeks of testimony be erased from the jury's mind by the talents of defense counsel, whose technique was an education to the members of the Bar who sat through, week after week, in that other jury box. Every legal stratagem that the law of the land afforded was employed in behalf of Lepke, Capone and Weiss. It is true, as Mr. Talley said, that justice has
11351 been portrayed by the figure of a woman with a blindfold, as she evenly balances the scales of justice. That is something he lifted from my summation without benefit of the author in the Goldstein and Strauss case, but, nevertheless, it is true.

The Court: No, just confine yourself to the record.

Mr. Turkus: That record is before the Court. However, that is a symbol, gentlemen—a symbol with us that justice does not differentiate between the high and the low, the strong and the
11352 weak, or the poor and the rich. Yes, justice is blind to these things, but that does not mean that justice is deaf, dumb and blind, nor are jurors either. It is unthinkable that sometimes orations or talks of counsel can so befuddle an American jury that they can blot out of your minds week after week of testimony and make the evidence meaningless. There is only one issue in this case—only one—are these defendants at the Bar guilty as charged or are they innocent? That is the issued that has to be decided with common sense and understanding, and I hope, as I go on, that my personal feel-

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ings are not reflected in anything that I say to you, for it is not my personal feelings that matter, nor my inferences that I draw from the testimony, but yours and yours alone. And if there is anything that I say that does not agree with your concept of the evidence, disregard it. I tell it to you as an inference as I see it.

What is more powerful than the facts? Five weeks ago the District Attorney set forth what he said the proof would reveal in this court room. Let us analyze and reason. I will take you through the opening statement, sentence by sentence, paragraph by paragraph, to refresh your recollection, if that, indeed, needs any, that every fact stated therein has been conclusively proven and that the guilt of Lepke, Capone and Weiss has been established beyond the shadow of a doubt. Five weeks ago the District Attorney said he would establish that shortly before seven o'clock on the morning of Sunday, September 13, 1936, a uniformed police officer who was patrolling his beat on Sutter Avenue suddenly observed a man in the middle of the street frantically waving both arms, shouting, "Police, murder." The police officer ran to his side. The civilian quickly blurted out a story. The officer dashed into the candy store located at number 725 Sutter Avenue. Inside he saw a ghastly sight. There on the floor of this little candy store lay the proprietor, Joseph Rosen, flat on his back, with his arms outstretched, his face, neck and shirt were drenched with blood, pools of blood flowed from the body in the direction of the counter. Scattered newspapers were strewn on the floor. The body was at an angle; he was facing toward the rear; feet facing to-

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ward the front and side, legs spread apart. The eyes of the corpse were wide open, staring toward the ceiling. That is paragraph number one. Has that been proven beyond the shadow of doubt? Is there one person in the court room that can deny each and every fact therein stated has been proven? There it is—a visual picture of it, taken the day of the murder.

Continuing with the opening—"The police officer questioned the civilian. He was a tailor
11357 who lived across the street. At approximately 6:45 A. M. the tailor heard a series of shots ring out of the quiet of that Sunday morning. The tailor looked out the window. He saw an automobile pull away from in front of the Rosen candy store and start down Sutter Avenue. As the car drew away from in front of the store, the tailor saw the body of a man lying on the floor of this candy store. Whereupon, the tailor followed the car with his eyes to get the license number. As the car was going down Sutter Avenue, and before it reached the
11358 corner of Wyona Street, into which it turned, the tailor memorized the license number of that car. The policeman then telephoned an alarm: an alarm for a black sedan, license number 'L-1677', with four occupants." Hasn't that been established beyond all question? Is there a single individual in court who doubts a single sentence or paragraph of that representation of proof? Can you forget the tailor, Stamler, the grocer, Regenbogen, the officer who gave the alarm?

Continuing with the opening: "Radio cars converged at the store, detectives and command-

ing officers arrived. The ambulance surgeon who responded pronounced the victim "Dead on arrival". The body and the scene of the murder were guarded and remained untouched and undisturbed pending the arrival of the Medical Examiner. Photographs were taken by detectives of the photo gallery of the Police Department." Is there a single word, a single sentence, that has not been proven beyond a reasonable doubt in that paragraph? There are the pictures, every one of them, before your eyes, taken at the time of the homicide. The ambulance surgeon did pronounce him, "Dead on arrival"; the body was removed to the Morgue.

Continuing with the opening—representative of the proof that the District Attorney of this county said would be submitted to you—"Doctor Marten, Deputy Chief Medical Examiner of the City of New York, arrived and made an examination and inspection of the corpse at the scene. He then ordered the removal of the body to the Kings County Morgue, for autopsy. There, and prior to the autopsy, Harold Rosen viewed the body and identified it as being that of his father, Joseph Rosen." True?

And from the opening: "The autopsy revealed that Joseph Rosen had virtually been riddled with bullets—his body had been pierced with seventeen entrance and exit bullet holes." True? "One bullet entered the left side of his face near the ear and came out in the back of his neck on the right side." True? "The second bullet entered at the lower left jaw, passed through the brain and lodged itself in the temporal muscle on the right side of the head,

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where it was recovered by the Medical examiner." True? "A third bullet entered on the left side of the neck, went from left to right almost horizontally, and imbedded itself in the back of his neck. This bullet was likewise recovered by the Medical Examiner." True? "There were thirteen other entrance and exit wounds where bullets had punctured and penetrated the chest, shoulder and neck of the victim." True? Do we have to take the autopsy
11363 report and medical testimony of Doctor Marten and trace it again, bullet by bullet?

Continuing with the opening—and this, gentlemen, is factual—factual—not any summation, not any oration appealing to hatred and race—not any race appealing to baser motives in behalf of Lepke, Capone and Weiss. That is something that rancored me for three days, this summation which went on—eleven hours of oratory. I had to sit here three days listening to it, and those three days of summation were more telling on me than the entire twelve weeks of this trial. I will come to that in a moment. So, if
11364 I appear to you to be unduly protracted in this summation, may I receive your indulgence. I am not here to wrap Lepke in an American flag, or drape the hammer and sickle around Rubin. I am here to talk facts, through the opening. "Two bullets," as stated, were recovered by Doctor Marten on autopsy. The bullets are in envelopes and I can bang them on the desk here—there they are, the two bullets. "Four bullets were pried out of the floor directly beneath the victim's body," and the four bullets that were pried out of that floor were here described as being within a nine inch circle. Bear that in

mind—four bullets removed from underneath the body, about in a nine inch circle—some marksmanship. "Another was extracted from the floor near the body, and still another bullet which passed through the wall of the candy store was recovered on the floor in the millinery shop next door." The recovered bullets were sent to the ballistic bureau of the Police Department for examination. There they are (indicating). Is there a single sentence, or is there a single word, in the representation of proof that 11366 has not been established beyond the shadow of doubt?

Continuing with the representation of proof by the District Attorney: "At approximately 10:40 that very Sunday morning, on Van Sinderen Avenue, about twenty-five or thirty feet north of Livonia Avenue, in the Brownsville section of Brooklyn, a detective discovered an abandoned automobile bearing license plates, 'L-1667, N. Y., 1936,' the very car for which the alarm had issued." True? The photograph taken on the day of the murder and the discovery of the 11367 car—another view—and the detective's testimony. "This car was a Chevrolet, two door—" the two door is important, because one of the defense counsel said—and by the way, I am not here to apologize for the character of any witness that the People of the State of New York put on the stand. Who did you expect the People to bring into this court room after the voire dire, or preliminary questioning of the jury? Did the District Attorney conceal a single thing from you? Did you expect that he world go to the halls of Harvard University

11368 and from there bring down professors to talk of these men? Or, perchance, to bring choir boys here to speak of them? We brought men here to speak of them who knew them—men to speak of them who associated with them—men to speak of them who broke bread with them and who committed this murder with them. And the responsibility for the production of those characters upon the stand does not rest with the District Attorney; it does not rest with the
11369 Court, or with you. It rests with them—the three of them. They alone were responsible for the production of those characters in the court room. It is not their character we are here to ferret out. The thing is, do their past associates speak the truth of them on the Rosen murder.

Let us get along with the representation of proof, sentence by sentence, paragraph by paragraph, facts—facts: "This car was a Chevrolet, two door, four passenger, hard top vehicle, black in color, now commonly called a coach. The place of abandonment of the vehicle was close
11370 by the I. R. T. and B. M. T. station and railroad bridge at that location." True? Look at it. You heard the testimony. There it is, the picture, taken the day of the murder. True? Is there a single person in this court room that doubts a single sentence or paragraph?

Continuing— And this, gentlemen, I am reading verbatim from the opening statement of the representation of proof, sentence by sentence, word by word, paragraph by paragraph: "The operator of the candy store and newsstand at this station actually saw this car abandoned at about 7:00 o'clock that Sunday morning. Four

men got out of the car and walked up the stairway to the left of his stand. This stairway permitted access to the I. R. T. station and to a bridge which crossed over the railroad tracks, and had an exist a block away on the other side. The newsstand operator paid no special attention to the men and could effect no identification of any of them." True! Is there a single representation there not proven conclusively! Here is the picture—there is your entrance—not only to the I. R. T. but the B. M. T. and the rail- 11372
road—the bridge across the railroad tracks with the exit on Junius Street. Is there a single man that doubts that Merlis, the operator, saw four men get out of that abandoned car, and that he saw them go up that stairway, and that he could effect no possible identification of any of them! Was that a good spot for the abandonment of the car! In the event the police pursued—mind you, if Cappadora, that patrolman of the Honor Legion of the Police Department, had come by ten minutes before as he was patrolling Sutter Avenue, and that black Chevrolet careened down 11373
with those four killers in it, what do you think would have happened to Cappadora! And assuming there were other police that took up the pursuit, gentlemen, what do you think about that for ingenuity, for a place of abandonment of a getaway car in a murder! A waiting car on the other side of the bridge—two of them—for a getaway, to get lost in the subway, to get lost at the railroad. Does that look like the work of amateurs! That showed the brutality—that showed the cunning—that showed the cold-

hearted planning and deliberation and premeditation.

To continue with the factual opening, and the representation of proof: "The abandoned Chevrolet coach was a stolen car; it had been stolen from the Crown Heights section of Brooklyn some time between midnight of Friday and 9:00 o'clock in the morning of Saturday, from in front of 621 Lefferts Avenue, where it had been parked overnight by the owner, near his residence. The
11375 discovery of its theft and the report thereof was made by the owner on Saturday morning, and a police alarm then sent out for its recovery." True? Didn't we bring from Peoria, Illinois, the owner of that automobile? Didn't the District Attorney bring here the policeman who received the alarm? Isn't there a picture of the very spot where the car was stolen from? True? Is there a single person in the court room who can legitimately doubt a sentence of that representation of proof?

To continue with the opening: "The license
11376 plates, L-1667, affixed to the Chevrolet, were not the license plates which had been issued for the car by the Bureau of Motor Vehicles." Is that true? "The license plates, L-1677, also had been stolen, but from a different vehicle, namely a Ford, which had been stored in a private garage on East 96th Street, in the Brownsville section of Brooklyn. The owner of the Ford automobile had last seen it the day after Labor Day when he put the car away and locked the garage doors. The discovery of the theft of the plates was made the very morning of the murder when detectives came and interviewed the owner of the

plates. Accompanying the detectives to the private garage, the owner discovered for the first time that the padlock had been broken and the plates were missing." True? Is there a single human mind that can dispute a single factual representation in that paragraph? Didn't you have the barber here, who owned the car? Gentlemen, he told you how he locked it up, in the garage. Didn't he tell you how Detective Ambraiz came and went to the garage with him, and that he discovered for the first time that 11378
the plates were missing? They talk about atmosphere. Captain Ambraiz, formerly Detective Ambraiz, from the New York City Police Department—the commanding officer of the Military Intelligence Corps of the United States Government in the Second Corps Area, was brought here to the stand in his civilian suit. They talk about "atmosphere" when they even put that Sammy on the stand in his Army uniform—forgetting entirely the "Major" (Kleinman), whose contribution to this case was nil. And they talk about "atmosphere".

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Continuing with the opening—and these are facts, gentlemen—fact on fact: "Under the direction of Captain John J. McGowan, the commanding officer of the Brooklyn Homicide Squad, in charge of all detectives in the Homicide Division in the Borough of Brooklyn, photographs were taken of the stolen car. In addition, under his supervision and direction, a chalk and mercury mixture was dusted on the windshield, the body of the car, the license plates, the inside mirror, and all other places where there might likely be fingerprints, in an endeavor to bring

11380 out fingerprint evidence. The search for fingerprint clues was fruitless." True? Is there a single individual in the court room within the hearing of my voice, who recognizes candor and sincerity, who can doubt a single one of the representations of that proof by the District Attorney? Hasn't that been established beyond the shadow of doubt? That is significant, because that shows, too, when there are no fingerprints, when there are no clues, that this was
11381 done by somebody with cunning, somebody with a coldblooded, brutal mind.

Continuing with the factual representations: "Far away from the place where the murder car was abandoned, a pedestrian, shortly after 11:00 o'clock, the very morning of the murder, walking along Ralph Avenue, at a point about one hundred feet north of Church Avenue, discovered a gun in the grass, near the sidewalk. He picked up the weapon, looked at it, and carried it over to a police officer directing traffic in that vicinity. Quickly, notification of this
11382 find was given to the detectives working on the Rosen case. The gun was sent to the Ballistic Bureau of the Police Department for inspection and examination." I want to show you that I am taking it word for word, fact by fact, so as to show you conclusively that every representation of proof was carried out by the District Attorney. Is there a single individual who can deny that? The finding of the gun. Here it is (indicating). Police officer Nelson, who testified in court, corroborated the finding. Is there a single individual in this court room that can

doubt his very senses? You can have it, here it is (indicating).

Continuing with the representation of proof: "The Commanding Officer of the Ballistics Bureau personally conducted the examination and inspection of the weapon. This gun was a Colt 38-caliber, police positive, special." True? "In an endeavor to trace the serial number of the gun this ballistics expert made an examination of the gun at the three points where the serial numbers should have been." True? 11384
"There he discovered that the numbers had been mechanically removed and obliterated, so that they were not visible either to the naked eye or with a magnifying glass. Then with acids he attempted to bring out or restore those serial numbers by etching, that is, bringing to view a ghost-like number which then gives you what the number was before it was obliterated." True? "The obliteration, however, had been too thorough and the expert was unable to bring out the serial number or enough of it so that a trace could be made." True? "In addition to 11385
the obliteration of the numbers, the gun had received other mechanical treatment after it had left the factory. At the muzzle end of the barrel a thread had been cut." True? "This had been cut for the attachment of a 'silencer' to muffle or do away with the sound of a report." True? "The 'silencer' was not affixed to the gun but the threading for it was covered by a 'collar'." True? Not the usual kind of a gun found in an empty lot!

Continuing with the opening—

The Court: Keep that weapon in its place on the desk.

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Mr. Turkus: May the record indicate, so there will be no misunderstanding, the only time I held that weapon was while I was going over the opening and going over the factual parts of it.

The Court: When you made your last reference, that is correct.

Mr. Turkus (Continuing): Continuing with the factual representations: "As I have already related, eight bullets were now at the Ballistics
11387 Bureau for examination. Of the eight, you will remember, two of the bullets had been extracted from the body of Joseph Rosen by the Medical Examiner, and the remaining six bullets had been found at the scene of the murder." True? "Four of these eight bullets were half metal-case bullets and the other four were copper-coated bullets." True? Four of the eight bullets were half metal-case bullets and the other four were copper-coated bullets. True that there were two different types of ammunition? "One of the bullets recovered from the body of Joseph
11388 Rosen by the Medical Examiner was a half metal-case bullet, and the other was a copper-coated bullet." You remember the distinction --half-metal case is a metal jacket over the lead nose, and copper-coated is copper plating over the entire lead nose of the bullet. Two different types of ammunition, although of the same calibre. "The eight bullets were microscopically examined and tests made. The tests revealed that the four half metal-case bullets were fired from the very gun found in the lot—" the gun which I just turned over to the clerk--"whereas the four copper-coated bullets had been fired

from another gun, of similar make. The gun, however, which fired the four copper-coated bullets, was never recovered." True? Is there a single factual reference not conclusively established in that paragraph and in that representation of proof?

Continuing: "Thus, briefly, the proof discloses that in advance of the murder an automobile was stolen from the Crown Heights section of Brooklyn; the license plates were stolen from another car in the Brownsville district, 11390
the stolen plates were switched to the stolen car; the murder was committed; the killers fled from the scene in the stolen car; they abandoned the car at the railroad bridge, and escaped without identification." True? Is there a single person in this court room who disputes a sentence of that? "Not a single fingerprint clue was found on the murder car; only one of the guns used in the killing was found, but that with the serial numbers obliterated, blocking trace of its sale and ownership. In short, the killers had made a clean getaway and left no clues in their 11391
wake." True? True, of September 13, 1936? And one lawyer wanted to make capital of that isolated sentence, and read to the jury, "In short, the killers had made a clean getaway and left no clues in their wake," to confound and confuse. As of September 13, 1936, when the blood drenched body of Rosen lay in the candy store," that was true, the killers—the men who fired the shots—the four men who made their getaway, made a clean one and left no clue in their wake. True?

And to continue: "This is the point, gentle-

11392 men—" remember, too, that we discussed this five weeks ago when I said, "This is the point, gentlemen." So I will repeat, "Where we naturally ask ourselves what is the proof as to why the proprietor of a penny business should be the victim of a brutal murder, carried out with flawless technique. Who was this Joseph Rosen?" And one of the defense lawyers gets up and criticizes the technique of the murder. It was good enough to be an unsolved murder for
11393 four years. That is how good that "technique" was. The lawyer finds fault with the experts who did it. "Who was this Joseph Rosen?" Do you remember how I said that five weeks ago, after five weeks spent in the selection of a jury?

Continuing with the representation of proof by the District Attorney: "Joseph Rosen had been a candy store owner in the Brownsville district only a few months. All his adult life he had been in the clothing trucking business, starting as a driver and working up to a partnership
11394 in the business." All right—I used the word "partnership" five weeks ago. The trucking concern in which he was a partner was disrupted. Rosen was forced out. Had he only been in the Brownsville district as a candy store proprietor a few months? Had he been a truck driver? Had he worked himself up to a partnership? Was the business disrupted? Was Rosen forced out? I don't care whether Rosen's business was worth five cents or $50,000, from the standpoint of motive in this case, and we will discuss that as we go along. They talk about atmosphere, and bring in here a lot of

"contracts" and a lot of papers to tell you that the business was poor, wobbly. What difference does it make? But I will point out to you, Rosen, if he had a five cent business, was a truckman who had to be dealt with. We will come to that in a moment.

Let me continue: "The defendant Buchalter and others manipulated the deal." I will go into that a little later when I "break" it from within. "Rosen, through Buchalter and a union official, was put to work as foreman." Gentleman, you 11396
heard Lepke's lawyer in the examination of the People's witness try to bring out that Lepke, the undisputed czar of rackets, as his lawyer painted him, became a public benefactor and put Joe Rosen to work. "Several months later Rosen was discharged." True? "Then he walked the streets endeavoring to reinstate himself in the clothing trucking industry, complaining that Buchalter had put him out of business." True? Didn't he make complaint? Have you forgotten what he said to Rubin? Have you forgotten how his wife came to the clothing district and how it was reported to Lepke again and 11397
again that he had been heard squawking, "about us"? Did he make complaints? Do you think that is the only complaint he made to people in the clothing district? Use your heads. Did he make complaints? "Finally, Buchalter and this union official put Rosen to work again, but this time as a truck driver." You now know that this "union official" was Max Rubin. True? The defense starts off with the boss, Larry Cooper, who put him to work as a truck driver, and who admitted he had to make a switch, just like Rubin

said, and take Max Cranes, the little guy that Louis Cooper did not want but was forced to take after Lepke said so—took him, Cranes, away from Larry, and switched him to Louis, and put the victim, Joseph Rosen, to work for Larry. True? Is there a man in the court room that doubts that? "This job lasted only a short time and again Rosen was out of employment." Ah, you talk about atmosphere, you talk about a "smoke screen", you talking about trying to con-
11399 fuse a jury. Gentlemen, they are too smart to think they can "finagle" twelve; they only want to get one or two with a little doubt. You have been together twelve weeks, you have been locked up five; throw a "smoke screen", get one or two confused get the jury fighting with each other, get them mad at one another, break the whole thing up, hang the jury, play for one or two, you cannot fight twelve. Are you going to fall for that kind of a "smoke screen"? So they try to work on one or two. Get the jury fighting. Ah, yes, "technique"—that is "technique". But, as
11400 I said, justice is not deaf, dumb and blind, nor are jurors.

"Ultimately, Rosen ended up in the little candy store in Brownsville at 725 Sutter Avenue." True?

Continuing with the factual opening: "In the latter part of the year 1935, the Honorable Herbert H. Lehman, the Governor of the State of New York, appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into: (1) Any and all acts of racketeering and vice; (2) Any and all acts of organized crime or any other crime; (3) Any

connection between such acts and any law enforcement officials, committed or alleged to have been committed by any and all persons, including public officers, within the County of New York, in violation of, and so forth. Thomas E. Dewey was the Special Prosecutor designated to conduct the investigation." True? You know that of your own knowledge, and if the Court does not take judicial notice of it, there it is—photostatic, exemplified, certified photostats, and everything you want. Proof of it? True? When Dewey 11402
was appointed, do you think that Lepke's lawyer, who designated him in this court room as no "angel", but who, in fact painted him as he was—the czar of industrial rackets—do you think that meant something to Lepke, with half a million dollar take, that his lawyer talks about now? Oh, you talk about "atmosphere"! Oh, is Lepke running away from Dewey when you get Rubin on the "lam" at Lepke's instigation—making him run from Dewey! Next month when he is over in Manhattan, he will have somebody running from O'Dwyer.

What is the difference, gentlemen? Can you 11403
conceive of this Rubin situation? I will come back to that in a minute. If a prospective Dewey witness, do you think that Dewey is going to let that go by? Brooklyn—New York; Brooklyn—New York. Is he running from Brooklyn or from New York? If somebody has two things on you, one in Brooklyn and one in New York, and you put him out on the "lam", common-sense is that you put him out on the "lam" for both—particularly when they are away. Calling a Dewey witness in Brooklyn a prospective Dewey witness

in Brooklyn, and then coming in here and juggling—having mental acrobats, or tight-rope walkers, to confuse and finagle twelve men? Not on your life. One or two is the hope.

Continuing with the factual opening: "Several months after the Dewey investigation got under way, Joseph Rosen threatened to go to Dewey and tell what he knew." True? Does anybody deny that? "In an attempt to silence him, $200. was turned over to Rosen in his candy store, and
11405 he was told to go out of town and stay out until everything blew over." True? With $1.20 in the bank, Rosen came home to his wife with $200. and had to leave town. That was known in 1936, but you cannot establish that fact, because if the wife testified as to what the husband told her, the law is that is hearsay—it is no good. But that was known in October, 1936. That is significant, because even in 1936 there were certain things known—not enough to bring the case into court—not even enough then to get an indictment, to establish what is known in law as a prima
11406 facie case. "Rosen took the $200. and he did leave town, but he stayed away for only a few days and then came back." Is that true? Did he leave Brooklyn? Did he go to Reading, Pennsylvania? Did he speak with his son? Have you forgotten the testimony of Mrs. Rosen on the telephone call, the condition of her health and then Rosen came back? Is there a single human being with an ordinary mind who disputes a single representation of that proof?

Continuing: "Thereafter, Rosen again threatened to talk. On September 13, 1936, in the manner that I have already described—" Do

you remember how I said that? "—Rosen's lips were forever sealed." Weren't they? Weren't they? And then I said to you five weeks ago, "Nothing happened; weeks passed; in fact, year after year went by—still nothing happened." True? True? "In May, 1940, something did happen. The case was broken from the inside." Ah, some lawyer said, "Let them prove that." How glad I am he said that, because, if by now he himself is not convinced—
and if he did not have his tongue in his cheek 11408
when he said it, like one of them said, "The District Attorney is a paid advocate." Are the three of them here for their health? Is the pay I get from the County of Kings tainted, in comparison to what pay they have gotten from Lepke, Capone and Weiss? Is there a million dollars that would make me, a young man with the blood of life going through my veins, understanding all that it means to live and breathe—is there a million dollars that would make me frame the three of them? A flower in one hand —these lawyers—the greatest preparation I
ever saw. "The great District Attorney's office. 11409
Judge O'Dwyer, a man of unquestioned integrity." I would not say a word about Talley, a flower in one hand, and the defendants with a stiletto in the other. An "architect" was Rubin! He was an "architect". That kind of an accusation, gentlemen, is what had me this morning, and that is what had me for the last three days of this summation. Think of it, gentlemen, when they don't do any damage with a flower, Talley just came out with a hatchet. Think of it, accusing Judge O'Dwyer and Burt

11410 Turkus and Sol Klein and Lewis Joseph and every law enforcement agent that had something to do with this case, of murder, of an attempt to kill them. That is what it is, if one-fiftieth of their insinuations are true as to the manufacturing of this case, sticking witnesses together to compare notes, and framing them. If one-fiftieth is true, take O'Dwyer, Turkus and the rest of us, tar and feather us, and run us out of town on a rail, and put us in jail. That is
11411 where we belong—not here representing the People of the State of New York. Think of it, gentlemen. It is monstrous—that kind of "atmosphere". A hopeless case—if they did not know it when they got their retainer, there is no lawyer in the court room that does not know it, when all of the evidence was in, that there are three guilty men at this Bar of Justice. They accuse the District Attorney of a frame-up and when the case does not dove-tail on the point they yell: "Ah, it is subornation of perjury!" But one of them exploded a theory—one man is
11412 in jail in the Bronx and the others are in a hotel, so they did not get together.

The Court: You must not discuss what you think or believe, or what anybody else in the court room thinks or believes. The jury will disregard about what other lawyers think.

Mr. Turkus (Continuing): They said to you, in substance, gentlemen, when the case did not hinge—a five year old murder—when it did not dove-tail minutely, point by point, that it was a case of subornation of perjury which was not done properly. That was an unanswerable inference to their argument. That is what they try to

throw as a "smoke screen"—put the District Attorney's office on trial. Let the jury forget that Lepke, Capone and Weiss are on trial. Anything to confound, confuse, create "atmosphere" —not to ball up twelve—they are too smart for that—one or two—get them fighting.

Now, let us continue. I said, "In May, 1940, something did happen. The case was broken from the inside. Then on May 28, 1940, the Grand Jury of Kings County handed down an indictment for murder in the first degree against 11414
these defendants, Buchalter, Weiss and Capone, together with others, for the murder of Joseph Rosen." True?

"The indictment duly found by the Grand Jury reads:

'County Court of the County of Kings.

'The People of the State of New York,
Plaintiffs,
against

Louis Buchalter, alias 'Lepke', Emanual Weiss, 11415
alias 'Mendy Weiss', Harry Strauss, alias 'Pittsburgh Phil', James Feraco, Philip Cohen, alias 'Little Farvel', Louis Capone,
Defendants.

'The Grand Jury of the County of Kings by this indictment accuse the defendants of the crime of murder in the first degree, committed as follows:

'The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloni-

11416 ously and of malice aforethought, shot and killed Joseph Rosen, with revolvers.

William O'Dwyer,
District Attorney.

'A true bill.
John B. Malone,
Foreman.'

"The defendant Harry Strauss, alias 'Pitts-
11417 burgh Phil', is no longer alive. Insofar as the defendants Philip Cohen, alias 'Little Farvel', and James Feraco, are concerned, the indictment against them has been severed by this Court, which means they will not be tried together with these defendants at the Bar."

A "severance", the Court will charge you, is something concerning which the jury exhibits no concern.

Then I said, "The testimony to be given in open court will show you what the Rosen killing is all about." And now, let us talk about
11418 that; let us talk about Sholem Bernstein. Now, there has been a great "smoke screen" put about Sholem Bernstein. To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed? After five days of cross-examination by highly touted, capable lawyers, did they shake him on one material fact in connection with the Rosen murder? Let me show you that they did not. Now, the significance of Sholem Bernstein is not

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so much through the standpoint of jury proof, it is from the standpoint of investigation, and I will show you why. The Rosen murder, on January 1, 1940, was a challenge to Judge O'Dwyer and the entire office, as it would be to any decent public prosecutor. Do you remember Sholem Bernstein's testimony, how the District Attorney and the police swept down onto the Brownsville and East New York area of Brooklyn, and that people went to the four winds, including Sholem? How he went south—how he

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went west—how he went from here to there—until finally he came and gave himself up? Do you think that there was police activity here? Do you think that when the investigation went on Judge O'Dwyer sat down, and out of seven million people in New York City, or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt? Is that a "smoke screen", too? Is that "atmosphere"?

Now, let us go back to Sholem. Sholem, on April 12, 1940, was arrested, and shortly there-

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after he "talked". On May 20, 1940, he was taken before the Grand Jury investigating the Rosen murder—a Grand Jury conducted under the auspices of Judge O'Dwyer. Now, from the standpoint of investigation, we are now beginning to get somewhere. Did you see, when defense lawyers got the Sholem Bernstein Grand Jury minutes, what happened? They asked him four or five questions and dropped him like a red hot stove, because an inference is inescapable that, just like Sholem Bernstein said, on May 20th of 1940, when he went before the Grand

Jury, he told his story just as he told it to you. Four or five insignificant questions on cross and they dropped him like a red hot stove. Oh, sure, keep on the "fringes" of Sholem Bernstein's testimony—make him out to be a car thief—make him out to be a shylock. Did I paint him out as an angelic character? I did not. Didn't I submit him to you in his true light? Did you expect the chauffeur of the Rosen murder—their associate—to be a pious gentleman who goes to
11423 his synagogue every Saturday? Oh, they kept on the "fringes". Let me show you about Sholem's significance there. Now, when you have the chauffeur of a murder car under investigattion, do you see what that adds up to? Now, you know that Sholem Bernstein stole the car, stole the plates, put the car in a garage for safe-keeping, how they met in Lincoln Park —how they watched the victim the Saturday night before the murder—how they developed the plot in the hallway of the apartment. One witness said, "Until the 'rat' came out," re-
11424 ferring to the victim. How they followed him to his little candy store—how they riddled him with bullets—how they made their getaway—where they abandoned the car—who picked him up at the other end. Now, you have there only an accomplice, but you are getting somewhere in the Rosen murder investigation when Sholem opens up. Ah, then, you are getting somewhere, but you certainly are not getting anywhere with the men behind the scene—not yet, not yet. What do they do on cross-examination? "You wrote letters from the Half Moon Hotel?" He said, "I did not." Well, they had photostatic copies

of letters. You can imagine who Sholem wrote to when they had photostatic copies of letters. Nobody said he was an angel. If he were sweet, angelic creature, he would not have been useful to them. What did they need him for? Have they got any use for you? Do they come to your house? Do they have any business with you? Of course, not. It is with the Sholem Bernsteins, and such tools—the men who have dipped their fingers in crime, who like the feel of easy money. They are useful to them—not 11426
you. Well, he wrote letters. What is that, to get the jury all confused—that he lied when he said he did not write letters? And to add it all up, suppose he did write letters? He did write them, suppose he had told you? No harm in that. Even in Sing Sing Prison, where you are a convict, you can write letters. What is wrong about that? Sholem, this misguided man, wanted to protect some employe in the hotel, and he denied it until they brought here the photostatic copies of letters. Then he had to admit it. Ah, said defense lawyers, denying the truth of such 11427
things, destroys his credibility beyond all doubt. Then they have another plea to destroy his credibility: "Didn't you go up to the mountains—weren't you sworn under oath?" I conceded, for the purpose of saving time, that the testimony up in the mountains, if given by the stenographer up there, would be the same as it was read.

Now, let us talk about the mountains. "He raised his hand up to Almighty God and testified falsely." Did he testify falsely to one single sentence against Gangi Cohen up in the moun-

tains. Not on your life. Even Mr. Rosenthal, the canniest, the wiliest of lawyers, admitted that. "And he told lies about himself," said Rosenthal. He went up to the mountains and gave three pages of direct testimony. Who was the lawyer up in the mountains who cross-examined Sholem Bernstein? The lawyer for Gangi Cohen—the lawyer who on March 26, 1940, before Sholem gave himself up had advised Tannenbaum to stand on his constitutional rights
11429 when Tannenbaum was picked up and brought to the District Attorney's office—the same lawyer, who by coincidence, later became the lawyer for Little Farvel Cohen, a defendant in the Rosen murder. That is the lawyer who cross-examined for seventy-five pages to try and create any doubt about Sholem's three pages of testimony against Gangi Cohen. Not on your life. It was a fishing expedition. Now, watch. He has got to go to Sullivan County. Sholem was sent to cooperate with a lot of enforcement agents there. He was told to discuss only, ac-
11430 cording to his testimony, only the murder up there—nothing else. Is the District Attorney justified in trying to prevent leaks about other matters when, as Sholem Bernstein says, and as the evidence in the case proves, at the very time when he was up there testifying, one of the fugitives was in Kansas City, Missouri, in flight —one of the fugitives in this Rosen murder! Unfortunately, there was no Assistant District Attorney in the court room from Brooklyn when that went on, because we would have stopped it up there, because, obviously, Sholem Bernstein, and I am not trying to condone a falsehood

under oath—you cannot condone that, and nobody can—I do not do it—I do not condone it—but I am showing you an explanation of that kind of testimony as he gave it from the stand and the reasonableness of it. He thought—with the situation as he knew it—with the fugitives out—of the necessity of secrecy in the progress of the investigation, that he would disclaim knowledge of something he had already testified to in detail before the Grand Jury in Brooklyn one month before he went to the mountains. 11432

Now, whether he was right or wrong—and I admit he was wrong in doing it—that was his explanation. And you can see it was reasonable for that kind of a mind, because as long as Sholem Bernstein was to give one word of testimony in the mountains, it would expose him to the purge of cross-examination about anything and everything under the sun in which he was in, no matter how many investigations were going on. He should have told the truth—there is no question about that. But this is all the "fringe". Has there been one lawyer in the five 11433 days of cross-examination who was able to even get you doubting as to the stolen car, who stole the plates, who did the "casing"—he said he was innocent of the murder. And doesn't the rest of the proof show that Capone and Mendy Weiss were the ones with him?

Now, let us go back a minute. This "architect" that somebody spoke about. He meant subornation of perjury, not architecture. "Rubin," he said, "Ah, he is a two-timer—this is the second time he has testified against Lepke." But

the proof shows that Rubin is Lepke's nemesis, inescapabably, inescapably—Rubin.

The Court: I think at this point we will give the jury a five minutes recess. Gentlemen, return in five minutes. Remember the admonition. The court room will remain in order.

(Jury returned to court room after a short recess and summation continued.)

Mr. Turkus (Continuing): At the point of recess I got to where we were discussing the
11435 breaking of the case from within, and I told you about the break that came when Sholem gave himself up. There came a break before that The "break" before that was Max Rubin. You remember the testimony of Rubin, not only brought out on direct, but brought out with a great deal of force and effort by defense counsel on cross-examination, because they read from the very record that was then made by William W. Kleinman, who was then Lepke's lawyer in that case.

The Court: That is not in the record, is it?
11436 Mr. Turkus: It is, it has been read in.

The Court: All right, proceed.

Mr. Climenko: May I take exception to Mr. Turkus' answer?

Mr. Turkus (Continuing): If it is not in the testimony, gentlemen, throw it out. That is my recollection of it. If it is not, then you disregard it. And I say to you, with every degree of candor and fairness, if there is anything I say to you that differs from the way your understanding and common sense sees it, if it does not pertain to the issue, the single issue here, disregard it. It is your decision that counts,

not my interpretation of the evidence, or anybody else's—it is yours. If there is anything I say that does not square up with the facts, throw it out of your mind entirely. With that understanding, I will continue.

You remember Rubin's testimony how shortly after the trial of Lepke, which was in February of 1940, he met Police Inspector McDermott, and through Police Inspector McDermott Rubin was brought to meet Judge O'Dwyer. That would make it, he said, I think, a month after the trial; 11438
that would make it in March of 1940 that Rubin had a talk with Judge O'Dwyer and another Assistant District Attorney by the name of Heffernan on that occasion, and that notes, memorandum notes, were taken by either Judge O'Dwyer or Assistant District Attorney Heffernan. That is a pretty good way to get secrecy. They talk about a "new system". What do you mean, a "new system"? Are you children? Is that the kind of business meant to confound or confuse one or two jurors, to think there is a doubt? Do you think we have to put information we 11439
gather on confidential investigations in the public press, or put it where there may be some prying fingers or some lurking eyes that may see it? Let us be sensible. We are dealing, when we investigate a Rosen murder, with men whose fingers are dipped in the blood of Rosen—whose very act shows they would stop at nothing. Do you think we used any discretion in being secretive with our investigation?

Now, let us go back to March. The case then broke from within. They tell you Rubin is the "architect". Why, isn't his own testimony un-

disputed on direct and cross? Rubin, after a few preliminary interviews in March of 1940, never came back to the District Attorney's office again until 1941. That is the "architect", who has engineered this. Judge O'Dwyer put in his record and background. Who do you think he is? A fool? Do you think he is going to permit witnesses to run his investigations, as one lawyer insinuated? Now, it is so significant on an investigation like this. They want to be
11441 shown how it was broken from the inside—as if they did not know. But since they raise it, let us say a little more. Do you see the significance of March, 1940? You remember Magoon. Now, we have Rubin in. Do you remember Magoon—do you remember Tannenbaum? Now, watch. In March of 1940 the defense lawyers themselves bring out from William W. Kleinman that Mendy Weiss was brought into the office of District Attorney O'Dwyer—March 28, 1940. They brought it out because Mr. Kleinman was a little hazy on memory on that point,
11442 but rebuttal detectives fixed the date as March 28, 1940, Rubin putting us on the right track. Mendy Weiss was brought in prematurely. That was a blunder, gentlemen, I am going to tell you right now—Mendy Weiss was brought in too fast—brought in only on suspicion—and Sholem had not opened up till April. Now it is March. So they take him in, and what happens? Look at this picture in the District Attorney's office. Here we are, January, 1940. Sholem Bernstein told you what went on in that office. Do you think we were sleeping during the days? Do you think every night we went to bed? You just use your head as to what

went on in the District Attorney's office from January 1, 1940, when we saw a challenge like the Rosen case and other matters we wanted to investigate. What do you think was going on—a pink tea? Now, watch. March 28, 1940, I am in the District Attorney's office, and I will show you, going back to March, 1940, I am supposed to have some kind of a memorandum book when Kleinman was on the stand. I did not remember that Kleinman came to my office before Mendy Weiss. I did not remember that 11444
Kleinman was sitting in the office with me when he shook hands with Mendy, when Mendy was brought in, when he said, "I have been retained by your brother Murray, you know where to get me when you want me." And then he walked out. Kleinman did not remember, because Kleinman said he did not see Mendy Weiss in the District Attorney's office. That is something that happened in March of 1940, and we have a five year old murder that the witness is talking about now. If it doesn't fit like that (indicating), they lie: and if there are any
material facts, irresistibly they fall back on the 11445
District Attorney suborning perjury.

Now, let us go back to this investigation, as disclosed by the evidence. Here is Kleinman in my office even before Mendy Weiss arrives. Then Kleinman goes out and I am left with Mendy. You use your head as to how much I could get out of Mendy, because he was released March 28, 1940. That is a very significant factor from the standpoint of the investigation. Now, watch this: In March of 1940 Rubin was in the office. They tell you, "Isn't it a coinci-

dence that Rubin and Tannenbaum remember the conversation in Lepke's office?" March 26, 1940, after Rubin, we bring in Allie Tannenbaum, and the record shows what happened. We sat him at the desk. To everything we asked him, "I refuse to answer on the ground it might tend to incriminate me; I have constitutional rights." March, 1940. And then Allie goes up to Sullivan County. His "constitutional rights" in Brooklyn step out for a
11447 while. But do you remember the testimony of Allie that the first or second Monday in May be opened up? Ah, now we are beginning to get somewhere. Allie opens up in May. Do you remember Magoon? We will talk about him a little later. Now comes the "break" from within. After Allie opens up, what happened to Mendy Weiss? Ah, look at this for "atmosphere". Mr. Police Commissioner Valentine is in a restaurant in April, they tell you, eating a steak, and Mendy Weiss came in with a lawyer. Ah, they want you to infer first that the Police
11448 Commissioner should know every wanted man in town. We did not want Mendy Weiss until after Allie opened. Then we had something. Then you have corroboration, which you will hear the Judge talk about—corroboration. You cannot convict on the uncorroborated testimony of an accomplice, even though they are telling the Gospel truth—you would be as helpless as a new born babe—you have got to have corroboration. Look at the inference. Do you think that Police Commissioner Valentine would suspect anybody who was having dinner with a lawyer in a public restaurant? Look at the inference

they want to bring forth and draw from that. But we do find this: That Mendy when he hears that Allie is going to open up, tells Berger, "I have got to 'lam'—I have got to duck—it looks like Allie is opening." Even jails have grapevines, gentlemen—things do get out sometimes. And what do we find with Mendy? Mendy hears that Allie has, or is about to "open". On June 6, 1940, he is established, by undisputable, documentary evidence—and you certainly can believe your own eyes—as being a new creature, a 11450
"James W. Bell," vice-president of the Chihuahua Tungsten Mines, with an operator's license from Colorado, with a phoney driving card. Oh, they get up here and they wrap the Star Spangled Banner around Lepke; they want to wrap a red sheet around Rubin—they want to take men who have served the United States Army to prejudice you—because they are on trial—to prejudice you against witnesses because they evaded military service. Where was Mendy Weiss in this emergency? In Kansas City, safe, with a phoney driving card. That is only to 11451
bring "atmosphere" in here.

Now, when you are prepared to push a case you get an indictment and then you want to arraign defendants—that is your next move—that is common sense. We did not arraign Lepke in this until May, 1941, although it was a May, 1940, indictment. Processes had to be gone through. The indictment, which is an integral part of this case, shows the date of the arraignment before Judge Martin, where he stood mute and a plea of not guilty was entered for him. Mendy Weiss was not even caught until April 6, 1941. He cannot be arraigned before you

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catch him. And Judge Taliey speaks about the Federal officers and all the officers that are here—about his having been apprehended by the United States Government. The due process of law requires his detention there and his production in court by them here when needed for trial. That is why there are other policemen here that he speaks of. And they talk of "atmosphere". The defendants have been arraigned—arrangements having been made to arraign them in prep-

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aration for trial before that, which was the spring of 1941. The case is ready for trial. And then Mr. Rosenthal says, "Ah, Magoon—I will explode the theory." They take him down from the Bronx; they give him chops; they give him steaks; and in January—between January and June of 1941—they get something out of Magoon. Gentlemen, we gave you everything we could give you in the case. It is true that some defendants leave themselves a little more open than others. Why, the evidence in his case shows you that, as cunning and as smart as was Lepke in New

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York, his cunning, shrewdness and trickery was equally matched by Louis Capone, of the combination in Brooklyn. I will show you how cute that man was—how he left a minimum opening—a minimum number of openings.

Do you realize, gentlemen, that we have two of the men behind the scene, as well as the triggerman, in here? Men behind the scene—not actors who can be identified.

Now, let me go ahead with the opening, sentence by sentence, paragraph by paragraph, and don't let anybody tell you that any witness manufactured this case for us. You don't think the

evidence walked into Judge O'Dwyer's hands, do you—a four years unsolved murder in 1940? Do you think that dropped as manna out of the Heavens into District Attorney O'Dwyer's hands? All right let us go on to the testimony, sentence by sentence, paragraph by paragraph, and see if I have not irresistibly established guilt beyond a reasonable doubt—irresistibly and logically. But before I do that, there is one point I do not want to pass on. The lawyers have told you of the great and grave responsibility. "Would you 11456
do business with these witnesses?" Of course, you would not do business with them any more than you would have them do business with you. One of them went so far as suggesting, "Suppose it was some member of your family who was on trial, would you believe them?" Well, members of your family, gentlemen, do not associate with them. Responsibility! I have a responsibility in this case—Judge O'Dwyer has a responsibility—the responsibility of a prosecutor to fearlessly, courageously and with honesty, to present all the evidence in the case. Your responsi- 11457
bility! Don't let anybody put on your shoulders what does not belong there. Your only responsibility is to decide the single issue of fact. Has guilt been proven beyond a reasonable doubt, or are Lepke, Weiss and Capone innocent? The Judge himself, in all the majesty of the law, garbed in the black robe of justice as he is, has no more responsibility with this case than doing his job of instructing the jury on the law, conducting the trial, and doing what the law says. Don't let anybody insidiously try to get you thinking about punishment. That is not your

responsibility. It is their responsibility, for if they had not been three of the killers of Rosen, you would not have them sitting here. That is where the responsibility is—with them—and don't let anybody fool you on that.

Quoting from the opening representation of facts: "In the days when Rosen was a partner in the clothing trucking business the defendant, Lepke, together with certain officials of the Amalgamated Clothing Workers of America, set out to
11459 run that industry, to their liking and benefit." True? They talk about "atmosphere", to bring in "unions". Why, you had the spectacle here of Lepke's lawyer saying to you that the situation between the unions and the gangsters was monstrous. He said that, to put it in for "atmosphere"? We only put in this case what the law of the land permitted, the association of Lepke with crooked union officials, and to show that Lepke and these crooked officials were like that (indicating). We did that because the law permits it on motive, and Judge Talley gets up
11460 here and tells you, admittedly in violation of the Canon of Ethics, "I hereby, in public court, advertise for a taxpayer to bring to a halt, to scuttle the O'Dwyer investigation," and to be a signal that he, a former Judge, has a right to scuttle, to sabotage, the investigation of a duly elected District Attorney of this county. "Atmosphere"—confound and confuse! Get one or two mixed up.

Then Lepke's lawyer, "Ah, I know all about the other figures and racketeers who infested the unions. I am against them," he said. Gentlemen, this goes for me and for me alone—no in-

sinuation or innuendo with reference to anyone else—any resemblance to anybody living or dead, purely coincidental. Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me 11462
alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it. And that ends it.

Mr. Barshay: I make objection to that most respectfully. That is giving testimony here from the floor as to what this gentleman would do in the future. It has nothing whatever to do with this case, or the issue in this case, and it is not based upon any record.

The Court: We will have no further interruption. That applies to Mr. Turkus and applies to all other counsel in the case. The rule 11463
will be impartially applied as to every counsel. The Court may interrupt and will, if it deems it proper. As to all other matters, you will be covered by your exceptions taken at the conclusion of the summation.

Mr. Turkus (Continuing): "In the days when Rosen was a partner in the trucking business, the defendant, Lepke, together with certain officials of the Amalgamated Clothing Workers of America, set out to run that industry to their liking and benefit." Did they? Wasn't the most eloquent admission of that in the summation of

11464 Mr. Lepke's own counsel, that after Weinstein, Katz and Lepke, after prior negotiations which I do not have to go into, after the Hillman and Orlofsky situation—after the Lucky Luciano meeting—they sat down to run the industry, the clothing trucking, to their liking and benefit. True? Have you forgotten that, to the benefit of those crooked union officials, it was to their benefit to keep the trucking industry here in New York—not to let it go to Pennsylvania,
11465 and that Lepke said, "If the business goes out of town," he could not make a dime. Can you forget that day after day of testimony, how it was shown that the stoppage was done by crooked union officials and Lepke operating as one—each one hand in glove with the other? What more of a confession of guilt would you want than the summation of his own lawyer in that regard?

"To effectuate this, Rosen was one of the clothing truckers who had to be dealt with and who, as I have already stated, ultimately wound
11466 up running a penny candy store." What is the difference whether the New York and New Jersey had a lucrative business or whether it was just another business concern. Through the lips of Sobler, produced by the defense, you see, complete corroboration that Rosen was a man of vision—never mind him being a chiseler—at least, he had this much vision, that if you operate in Pennsylvania you get away from the racketeers in New York, who were operating then, and it was brought out by one of his own lawyers, even after Mr. Dewey took office. Did you hear what Sobler, brought by the defense,

said about the Pennsylvania business? The New York and New Jersey business was fine—that was the cream of the business; the Pennsylvania was not doing so good, but doing good enough —doing good enuh to worry the Weinsteins and the Katzes and the Lepkes that there was something in the wind; that the New York manufacturers were sick of paying tribute; that Pennsylvania was a field of production to honest American labor and industry—a way out to save the enslavement of American laboring industry. They 11468
talk about taxpayers' money—every suit you had on your back was part of that—the enslavement of American industry and labor. Why, they provided complete corroboration of the motive, with their own witness. Sure, Rosen had to be dealt with. If he had money in the business, if he had trucks, Rosen would not have made a fight, not against him (indicating). But what stood behind him? All Rosen had was his two hands and vision—Pennsylvania. That is why he fought. That is why he was dealt with in the Broadway Central Hotel. That is why 11469
at the meeting books were produced, with Lepke in the background, Gurrah at the desk, and Rubin and Fields. That is why he was given a job as foreman with Louis Cooper. Not any public benefaction on the part of Mr. Lepke. What are we, children? Didn't he wind up ultimately in a penny candy store?

Again, the representations on the opening of the prosecutor: "Rosen, however, was bitter. He complained endlessly against Lepke for his plight. When the Dewey investigation got under way Rosen threatened to get even." Didn't he?

Didn't he complain? Didn't they have to send people down from the local of the truck drivers' union to patronize the store? Didn't he threaten to get even, to go to Dewey? You could have a seven year old child sum this case up to a court and a jury. The case, gentlemen, is a power house, a power house of proof, and there is no person in the court room that is not cognizant of it.

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"To keep Rosen's mouth shut, it was the de-
11471 fendant Lepke who ordered Rosen to get out of town and stay out until the Dewey investigation blew over. Max Rubin, the business agent of Local 240 of the Clothing, Drivers and Helpers Union, and a trusted aide of the defendant Lepke, was sent by Lepke to do this job. It was Max Rubin who delivered Lepke's message and the $200. to Joseph Rosen. It was at Lepke's orders that Rosen left town, but, as you now know, Rosen came back." True? Didn't Max Rubin come down there with $200.? Didn't he deliver the message? Didn't Rosen go to Read-
11472 ing, Pennsylvania? Ah, watch this maneuver of clever defense lawyers. When I brought out that Harold Rosen were visited by Mr. Cuff and Mr. Barshay, do you think I imputed any base motive to a lawyer interviewing the son of the victim of one of the most vicious and brutal murders I ever heard of? Of course, not. They visited Harold Rosen a year ago. I made a mistake. Do you think they would have gone down there if they thought the testimony of Harold Rosen as to the meeting in the Broadway Central Hotel and the pantomime there connected, and the visit of Lepke, and the visit of Lepke

with the limousine in their place when the father went with him the second time—this visit was significant. Do you think, as Mr. Barshay called him, the venerable Mr. Cuff, for whom I personally have the greatest respect, would have gone with Mr. Barshay down to Reading, Pennsylvania, if there was not something about Harold's testimony that was vital? That is the purpose of bringing that out. Don't let us have any "atmosphere" about that. "The Dewey investigation was under way". It certainly was. 11474
Ah, ha, somebody says, Lepke—the smart Lepke —with the Dewey investigation under way, with cops around, do you think he would continue? Why, that was from the lawyer who brought out from Rubin that the flour racket was going on right while Dewey was investigating. Do you think the investigation did any more than hamper Mr. Lepke for a while? His lawyer says—"He calls him 'Lepke' ". I call him "Lepke"! Why, he was called "Lepke", gentlemen, when I went to public school. That is what his associates called him, "Lepke". Once he was "Murphy", 11475
on the telephone, and his partner was "Callahan". What did he want us to do, call him "Murphy", or "Lepke"? I call him as his associates call him, "Lepke". That, they say, is "atmosphere".

Continuing with the opening: "The Dewey investigation was under way. Word that Rosen was back and again threatening to tell all that he knew, reached Lepke. Then it was that Lepke ordered the execution of Joseph Rosen; the murder to have a double-barreled effect; an object example to all others who might dare to

11476 talk; and to forever end Rosen's threat to go to Dewey." Was that proven? What was the first thing that Lepke wanted to know from Paul Berger after the murder of Rosen? "How did they take it in the market?" The report was they were scared to death—even Weinstein and Katz would not go to meet Lepke in the Hotel Governor Clinton any more at that time. That was the effect in the market. 1940 was the time of the Dewey talk. That incident was in Septem-
11477 ber, 1936. Figure it out for yourselves. Were people scared? Did that have a double-barreled effect? Did word reach Lepke? You heard Rubin, Rubin who was not an accomplice, as a matter of law—you heard what he said, corroborated by Tannenbaum, who in this case is not an accomplice, as a matter of law. And I will talk about Tannenbaum later. Has that been proven beyond a reasonable doubt? Now, here is where we get the logic of the defense lawyers. From the opening, I quote: "Even moved with rapidity. Weiss was assigned to handle the
11478 details by Lepke; Lepke personally furnished Weiss with the man to 'finger' Rosen." And, Judge Talley: "A little candy store, why did they have to 'finger' Rosen in a little candy store? Why, he could be the only man behind the counter in a little candy store," says Mr. Talley. A "little place"—look at the photograph, look at the diagram, and see how little it was. "Who needed to 'finger' Rosen?" This murder, gentlemen, was to seal the lips of Rosen and to have a double-barreled effect by frightening all the witnesses in the market. Did you ever hear of a wrong man being killed? That is why he is

"fingered" by somebody who knows him, so that there will not be any mistake on the part of the employe. That is why Lepke, personally, personally, took the "finger" to Mendy Weiss, so there would be no mistake. And, believe me, gentlemen, the evidence shows there was none. They "hit" the right man. Now, you know what "hit" means, by now.

I will continue with the opening: "Lepke personally furnishing Weiss with the man to 'finger' the victim, that is, to point out the victim to Weiss. Capone, 'Pittsburgh Phil' Strauss, Feraco and 'Farvel' Cohen went to work with Weiss. 'Sholem' Bernstein was brought in. The conspirators made their plans. The preliminary details, namely, the theft of the murder car and plates and a 'drop', or garage for its concealment until needed, were properly attended to." Now, watch this—One of the defendant's lawyers, if not two, says, "Look at this fatal flaw in the People's case," and they dig a hole in the People's case. Do you remember he said to you that Berger 'fingered' Rosen to Weiss late on Friday night. Do you remember from the testimony that plans to steal a car were under way before the 'fingering'? Thus, they argue, inescapably, the logical conclusion that somebody is lying. Ridiculous—ridiculous. Look at it: Lepke on the fatal Friday, September 11, 1936, that usual soft-spoken Lepke, raised his voice, even his face was flushed, when he spoke to Rubin. He had his mind made up when he spoke to Rubin that Rosen had to go. That was the tenor of his statement to Rubin. And when Rubin—and I do not say that Rubin

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is any angelic creature—he has lived on the sweat and toil of others—I don't paint him as any angel—but he was the perfect tool, the perfect man for Lepke; outwardly he looks good, talks well, is well-mannered, but had larceny in his heart—a perfect tool for Lepke. But Rubin does not go in for murder, that is too much for Rubin, and Lepke knew it. So when Rubin wanted to run to Weinstein and Katz to try to straighten the thing out by getting Rosen out
11483 of the picture, Lepke let him go ahead; but Lepke had his mind made up right then and there that Rosen was "going".

Is there any such thing as organized crime—Lepke having a messenger go down and give word that a car would be needed before the "fingering" was done, and getting that under way? Let us be sensible, gentlemen. Can an American jury be "finagled" with that kind of logic, the timing is not right? Preliminary details could be—someone could be sent to Brownsville and arrange for the car before the actual
11484 "fingering". What flaw in the People's case is that? What kind of logic is that? You could even do that on the 'phone, and say, "Get a car right away." Somebody says Dewey's detectives and police surrounded the whole place. If there had been that kind of surveillance of Lepke, they would have caught him—I don't mean that—I mean the law enforcement would have caught them red-handed, the whole bunch of them. Oh, yes, they talk, they say, "Tannenbaum is no good, Berger is no good, Magoon is no good, Bernstein is no good." They say because you convict the "finger man", Berger, and

the chauffeur, Bernstein, let those three out—that is logic—that is their logic. If you cannot get the tools, Bernstein, the tool, the chauffeur, and Berger, the "finger man", if you cannot get them, their logic is you have them stuck in hotels, acquit the three killers of Rosen. I would love to convict the whole caboodle of them—I would like to have every one of them at the defense table who had their fingers dipped in Rosen's blood, but you cannot do it, gentlemen, you have to break from within, you have to open 11486
somebody up—otherwise the District Attorney would have an unsolved murder right as I talk to you now.

They talk to you about the taxpayers' money. What is there concerning the taxpayers' money? One of the lawyers inferentially let it slip out of his mouth that Bernstein should have been cut up long ago. That was his thought—that was Capone's thought. Sure, if you had Bernstein cut up, you would have gotten no where near to Capone, who surely hid in the background. And he talked about him as the "come-on". Sure— 11487
electrocute the witnesses, the tools—that would make O'Dwyer a great District Attorney, according to them. Take Sholem Bernstein, take Berger, get their admissions of guilt, and put them in the electric chair. That is great prosecution for which the taxpayers should give hosannahs to O'Dwyer, so that those three could get out. "Kill all the witnesses," so the three big shots can get out—that is logic.

Then, Judge Talley, of Manhattan, threatened to undertake a taxpayers' action. Don't you worry about the taxpayers' money. The Court has supervision of the holding of witnesses.

11488 Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use com-
11489 mon sense here. What kind of rubbish is being handed out to you? "We will have to get one or two—not all—one or two, a little confused." The victim was "fingered" to Weiss. Capone schooled Bernstein as to the route to be used for the getaway, driving Bernstein, who was to be the "wheelman", or the driver, all over the route, again and again, until Bernstein knew it by heart from beginning to end—the end being the place of the abandonment of the car at the railroad bridge. Oh, he talked about the association of Capone. Why, didn't you hear in the
11490 testimony, when Sholem Bernstein spoke to Capone, he called him "Sir"? When Magoon described the combination in Brooklyn, he described Capone as his "boss". Talk about association! Forty pages of testimony out of three thousand—they take a million words from this record and they go through it with a microscope and get a couple of inconsistencies, and try to trip up a witness.

Then came one lawyer—the great detective—only forty pages of testimony. Well, those forty pages of testimony show that Capone was a cowardly, shrewd, conniving, individual, who hid

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pretty safely behind the scenes and left very little to nail him. He did not have the physical courage of the loathsome character like Weiss, who at least pulled the trigger and took his chances with Cappadora, or any policeman who may have come down to block him. Talk about Capone—your responsibility to him in this case! Why let me show you how cunning was this Capone in this Rosen case, as disclosed by the evidence. His lawyer said he did not hang around Sutter Avenue. You can bet your bottom dollar he did not. When he drove around there, it was not in his car— it was in Bernstein's car. The murder was in preparation and he even kept Bernstein's car with him. I will show you the significance of that. This director, behind the scenes—this director, behind the scenes, picking an appropriate spot for the abandonment of the getaway car. Did he leave any opening other than being with Bernstein on Sutter Avenue? So what? If Capone had been seen riding on Sutter Avenue with Bernstein—so what? Does that put the director behind the scenes in the Rosen murder? Have you forgotten the preliminaries here when Mr. Rosenthal said, "The fact that Capone may know some of these People's witnesses, may have associated with them, are you going to hold that against him?" No, you don't hold it against him unless he was associating with them so that his fingers were dipped in the blood of Rosen along with the others. Then you hold it against him. That is your sworn duty to do so then—but not for just holding social intercourse with them.

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Continuing: "The stage having thus been set,

the conspirators set out to kill their victim. Briefly."—and then I say parenthetically, "For the details will be given you in the testimony—the victim was followed from his home to the little candy store that Sunday morning, September 13, 1936." And let me show you, then I proved more than that—far more. Have you forgotten "Lincoln Park"? Have you forgotten Ardy's candy store on the corner? And have you forgotton that twice Mendy Weiss went over
11495 to look things over, as testified to by Bernstein, to see if it was all right to "take" Rosen Saturday night. Have you forgotten Cappadora's testimony that, on his way to work, around ten o'clock, or thereabouts, he stopped at Rosen's candy store for cigarettes? Maybe—I should not say "maybe"— but see if there is an connection with that and the return of Mendy Weiss, that it was not wise to go ahead; that there were people around Ardy's who might "make" them —identify them. From Sholem Bernstein's testimony you figure out who was the man who
11496 prowled around in the Rosen candy store September 12, 1936. You see, they leave Lincoln Park and they go to Farvel Cohen's apartment —scheming, conniving, planning how to cut down a man with a hail of bullets. And when they got there, they were eating—mind you, they were eating. They gave Bernstein a sandwich—

The Court: That reminds me; we had better take lunch now and resume promptly at 1:30. Gentlemen of the jury, please do not discuss the case, let no one speak to you about it; keep your minds open; remember the previous admonitions. The court room will remain in order. Let the

jury first go out. The defendants are now remanded.

(Recess was thereupon taken until 1:30 P. M.)

(Afternoon Session. Trial Resumed.)

(Mr. Turkus continues his closing address, as follows:)

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Mr. Turkus: Continuing with the factual discussion in my opening statement, a representation of the proof: "Briefly, the victim was followed from his home to the little candy store that Sunday morning, September 13, 1936. Pursuant to plan and agreement, Weiss and Strauss entered for the 'kill'. Armed with a loaded gun, Feraco stood outside as the 'lookout'. Bernstein sat at the wheel of the getaway car, motor running. Weiss and Strauss pumped shot after shot into Rosen. They made sure he would never reach Dewey's office." They made an ob- 11499
ject lesson of Rosen—a death burial certificate. "Into the waiting getaway car they piled. Weiss and Strauss gave instructions, but Bernstein adhered to the route that Capone had drilled into him the day before. The car, as planned, came to a half at the railroad bridge, where it was abandoned. Out stepped the four, Weiss, Strauss, Feraco and Bernstein. Past the newsstand, up the stairs, and over the bridge across the tracks to the Junius Street side they walked, to keep their rendezous with Capone and Farvel Cohen." One of the defense lawyers says, "How

11500 did Capone know to be on the Junius Street side?" Well, Bernstein didn't hear that—they sent him away Saturday night to put the car in a "drop". Where was the flaw in that? Was he told? That is proven by the fact that he was there. And while Weiss and Strauss were pumping shot after shot into Rosen, where was the "behind the scenes director, Capone"? Just where you would expect a cute, cunning boss—fourteen or fifteen blocks away. And where was
11501 Lepke? Not at the scene—I should say not. And they tell you, gentlemen, Capone was in Bernstein's car on the Junius Street side—not Capone's car—so that if anybody got the license number, it is Bernstein that gets the rap as an accomplice. An accomplice without corroboration is not worth a nickel. Does that show the cunning, shrewd Louis Capone, who is called "Sir" by his employees? Capone has no alias, says the lawyer—that is too bad, Capone not to have an alias. If this case was not broken from the inside, Capone never would have been ex-
11502 posed either to you or to the rest of the world.

Suppose there had been pursuit by the police with Mr. Capone in Bernstein's car, waiting on the Junius Street side of the bridge? Think that over a minute—would he have waited for them?

Continuing: "There, in wait, were Capone and Cohen—with two automobiles." Lying in wait, protected by Bernstein's car. "Weiss passed his gun to one of his confederates, for destruction." He did, and the gun was destroyed. "The killers separated—Weiss, Capone, Strauss, and Farvel Cohen fleeing in one of the waiting cars in one direction." And

there again is the cute Capone—no longer in Bernstein's car—a different car, a legitimate car. "While Feraco and Bernstein fled in the second car in a different direction." Now, Bernstein is in his own car. "Weiss' gun was destroyed." You heard the testimony. "The second gun was flung into the lot, where it was subsequently discovered." I have no witness who saw it thrown in the lot, but the unmistakable and inescapable conclusion is since that was one of the murder guns, it was flung in the lot, be- 11504
cause the gun that was found in the lot checks up by ballistics as one of the guns that pumped bullets into Rosen. A conclusion—irresistible. "The murder having been successfully completed, Weiss duly made his report to Lepke." After making the report and getting a pat on the back, somebody tells you, "Ha, would Weiss be fool enough," they say, "to talk to Tannenbaum about the part he played?" Tannenbaum was not there to play tiddlewinks—Tannenbaum was there on business. He was there on business in Lepke's office. Weiss even told the Fed- 11505
eral agents who picked him up in Kansas City, Missouri, that he would have gone back to Brooklyn when O'Dwyer was out of office. Well, if he talked like that before the Federal agents, how do you think he would talk to Tannenbaum? Do you think those boys held any secrets from each other?

"Lepke set out to insure—" Still quoting from the opening, and we are taking sentence by sentence and paragraph by paragraph—"Lepke set out to insure that there would be no arrest and prosecution in the Rosen case—no arrest

and prosecution of himself and his accomplices. Lepke maintained contact with the movements and happenings in the Rosen investigation. To thwart and frustrate all investigations, Lepke sent witnesses out of the jurisdiction, keeping some out—permitting others to be questioned when he was satisfied that it was safe to do so." Have you forgotten that he sent Mendy out? Mendy might be "made" in front of that store. Mendy is a big, husky fellow, whom you
11507 might not be able to miss. Maybe Mendy was "made" by the boy at the newsstand. But he thinks he is not "in"—the shrewd Lepke—Shimmy Sales who was not even in the murder—and Little Farvel, who was with Capone fourteen blocks away on the other side of the railroad bridge. Who could identify Capone and Little Farvel in the Rosen case? Oh, no, he did not want Mendy "in"—I should say not. "Lepke soon decided" quoting from the opening, "investigations must collapse if witnesses are not available." In line with that decision,
11508 he ordered Rubin to leave town. Is there a single man in this court room who disputes that? Oh, you have the same mental juggler—"What would he leave town for?" If a witness knows of two things, he is sent out of town—he is sent out of town on both. And if there is any doubt about accepting Rubin's word for it, the cleanest witness in the whole case, Maguire, admitted to the United States Supreme Court of America to practice, a labor lawyer of refinement, and culture, and respect, and decency—you can see that from his very demeanor—and what does the counsel for Lepke bring out?—That before Lepke

went to Maguire's office Rubin consulted Maguire about leaving town on both matters, the Rosen and the Dewey. That we could not bring out, because that conversation was not admissible against the defendant. But by cross-examination it was opened up by Lepke's counsel. Do you believe Maguire when he says that Lepke said, "If witnesses are not available, investigations must collapse." Why, the very killing of Rosen, the very murder of Rosen, is concrete proof of that philosophy. A move to 11510
frighten off others at the same time. Concrete proof of the philosophy of Lepke.

Continuing: "At Lepke's insistence and direction, Rubin was at times hidden and concealed in the City of New York and at other times shuttled from city to city, throughout the nation. This continued until Rubin could no longer stand the continuous flight and concealment. Contrary to Lepke's order he, too, came back to New York City, to stay." Is there any doubt in anybody's mind about that having been proven? 11511

Somebody talked to you about money. Do you remember those checks I picked out of the check book and had marked in evidence here? The very union that Rubin was business agent for. Do you think that Rubin could have been out on the "lam" and collecting money as business agent for services not rendered unless he and Lepke were that close (indicating): unless, as the proof and evidence indicate, Rubin was then his trusted lieutenant? Have you any doubt about that? And think of Mr. Barshay's summation when he described Lepke's activities in

11512 Manhattan. Three days after Max Rubin testified, this is quoting right out of the opening, before the Grand Jury in New York County—and mind you, gentlemen, Grand Jury proceedings are secret—and this was a Grand Jury in Manhattan under the auspices of Mr. Dewey and the Court of General Sessions—a bullet was fired into the back of his head which emerged at the bridge of the nose, in close proximity to his eye. Did Rubin roll in the gutter with a
11513 bullet in his head? Weren't his nerves and speech affected, his head crooked—on one side, permanently? Is there any doubt about it?

Continuing: "This shooting was directed and planned by the defendant Mendy Weiss, who had learned that Rubin was 'talking'." Is there any doubt about that from the testimony in this case—how Rubin was "cased"—how he was followed from his place of business, stood up in Child's Restaurant, and run down as if he was a dog, and injured permanently? That is what they did with Rubin. Hunted him down, tracked him
11514 down, set him up in a restaurant.

Continuing from the opening: "Miraculously, however, Rubin was more fortunate than Rosen." Wasn't he? He lived. "Unlike Rosen, Rubin's lips were not sealed. Rubin survived, and will testify at this trial," I told you, "the trial for the murder of Rosen," and didn't he? Wasn't it a miracle? A bullet from the back of the head, out of the eye—thirty-eight days in the hospital. Wasn't it miraculous that he lived? Yes. But his lips were not sealed.

And then I said, in conclusion, in my opening statement: "Mr. Foreman and gentlemen of the

jury: The proof that you are about to receive in this court of justice will establish to your satisfaction, beyond all doubt, that these defendants, Louis Buchalter, alias "Lepke," Emanuel Weiss, alias "Mendy Weiss", and Louis Capone, in combination are three of the killers of Joseph Rosen." And didn't I? And I concluded the opening representation of proof of evidence: "For the People of the State of New York, the interests of justice will require a verdict of guilty as charged—guilty of murder in the first 11516 degree."

There I have taken you, sentence by sentence, word by word, and paragraph by paragraph, of that opening statement to you, and I have not only proved every word of it, but more—but more: Flight on the part of Mendy Weiss, spoliation of evidence on the part of Mendy Weiss, attempted spoliation of evidence on the part of Capone. These are the things which I represented to the jury would be established in my representation of proof, and those matters were established.

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Let me show you how canny this whole situation has been arranged. One lawyer got up and he said, "Our defense"— What a true word he said, "Our defense". Those three were together, irrevocably interwoven. They talk about "atmosphere". Because one counsel sits at one table and the other at another table, is that a separation of these three? Let me show you how each one of the defenses were put in, and then you can consider the summation of Mr. Rosenthal in the wind-up and see if he did not pay back for what Lepke and Mendy did for Capone in the

defense. Now, watch this: To start with, there is no obligation on the part of any defendant to interpose any defense, not at all. The burden of proof rests exclusively upon the District Attorney. But Lepke started a defense—let me show you what I mean—the three interlinked and interwoven in the Rosen murder, as the evidence shows. Sobler—there is a fine one for you. Instead of being outraged by the violent death of his partner, he visits, in June or July, 1940, the
11519 lawyer's office on Broadway and 35th Street—the lawyer is still unidentified in the record—and he says the next time he went to his office it was on Wall Street, and at that time it slipped out of his mouth, "but not under orders." The first time, Philly Carver, sometimes known as Buchalter, took him there. When the District Attorney, in proper investigation and conduct of the murder of his own partner, sends down a detective—I brought him into court here for you to see—my personal aide in this investigation—Detective Frank Gray—and out of the lips of that Sobler came about "kidnapping me". Sobler was com-
11520 pelled to admit that Gray stood by while thousands of dollars, hundreds of thousands, I think it went past a hundred thousand dollars worth of merchandise, was loaded in the Svirsky Clothing; and when Sobler said, "My heart is not good, I cannot ride in the subway," Gray took him to the District Attorney's office by taxicab and paid the bill. When he got to the District Attorney's office he was questioned and sent home in an automobile, taken in privacy and afforded security, to his own home, where he put on his own glasses, and in the presence of his brother-

in-law, Sam Richter, read every single word of the statement, made corrections, and then signed every page, and swore to it. And that is the outraged partner who tells you that the District Attorney "kidnapped" him.

Now, let us see the significance of Sobler. You see, if Sobler in this case were believed by the jury, the three defendants are "out", because if Sobler had been believed, there would have been no motive, and if Lepke had no motive —you see, if the Pennsylvania business thing 11522
was knocked out, if there was nothing to take away from Rosen, if there was no reason that he had to be dealt with, there could be no motive. If Lepke had no motive to kill Rosen, Capone had no reason or motive to direct the murder behind the scenes, and Mendy Weiss had no reason for firing a shot. Destroy the motive and the three are "out". And what did happen to Sobler? They talk about lying witnesses! That man jumped off the stand, he started to walk out of the place. I took him line by line, paragraph by paragraph, of his own affidavit 11523
made in the sanctity and safety of his own home, and then he categorically admitted it. If they could have done a job like that on any of the People's witnesses in the case, I would like to see it. The difference was that Sobler told the truth on cross-examination when he was compelled to tell the truth.

Now, let us see the next character they bring in, and if you believe him, the three defendants are "out". Now, the technique—watch this one. Here is what I call the three card Monte—Carl Shapiro—now you see it, now you don't. Checks,

11524 here, there, everywhere. $132. payroll in New York—he has a relative in the business. He can sign checks for the $9,000. payroll in Baltimore. That is intrusted to strangers. But the defense lawyer gets up and says, "What did the Raleigh have to do with the case?" Greenberg and Shapiro was the hangout for the mob. Greenberg and Shapiro became the Raleigh, and at the Raleigh, the mob went there when required on business. That is the inescapable in-
11525 ference from the testimony. Not to hang out and look at Greenberg and Shapiro, but to the Raleigh when required by business—at the smaller office which could not be glutted up, but when required by business they were there. What has the Raleigh got to do with it? It was right in the Raleigh office that the murder order was given by Lepke. It was in the Raleigh office that the $100,000. a year dividend—$40,000. to Mrs. Lepke and to Mrs. Gurrah, and to somebody else. What has the Raleigh got to do with it? Well, figure it out. What has the Raleigh
11526 got to do with it, when an order, right in the Raleigh office, is given, when Berger is sent for, when he leaves, Lepke with Berger, to meet Weiss to "finger" the victim? What has the Raleigh got to do with the case? Did he come here with any diary or any office record? He came here with cancelled bank checks, and if you look at the cancelled bank checks which they produce—the very check made out to Carl Shapiro did not clear September 11th—the check to himself for $50., that cleared two days later. Do you get the significance of that? That was not cashed September 11, 1936, when it was drawn

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—his own check. What would preclude anybody, with the ease and facility of this fellow, pulling blank checks right out, from signing all those checks in advance of going to Baltimore, and leaving them there? The whole caboodle didn't amount to more than five or six hundred dollars. But the purpose of Carl Shapiro was, if he had you believe it, that he never went to lunch, he did not go to the barber shop, he never even went to the bath room, he just sat there as a sentinel, on September 11, 1936, and if the 11528
jury, not all, but one or two, could swallow the idea, why, then, of course, the order could not have been given out, because Rubin and Tannenbaum could not have been there. Berger could not have left there, if Carl Shapiro did not see them. That being the case, it would fall, this case, against all three defendants—if you could believe Shapiro.

But after Shapiro's cross-examination, after the damaging admission as to what went on in Greenberg and Shapiro's, after other things were dragged from this unwilling witness' lips, 11529
not another witness took the stand for Lepke. Did you notice that? That ended it. One almost jumped out of the chair—the other put in damaging admissions—and that ended the defense. When the lawyer tells you, "Oh, we could not bring the employees on—we could not bring the employees on. Who would believe them? That is why I ended the defense." Figure it out for yourself, if we might not have gotten some more damaging admissions from them, if the defense did not conclude. Oh, they had no obligation to make a defense, but having started it, they fell

flat, and having started it, it provided additional corroboration to the People's case. Had that defense been successful, the Rosen case would have been successfully sabotaged against all three defendants.

Now, let us look at Weiss' defense. Let us see how the interlinking interests went along, one with the other. Yes, an all-time low, this is. The evidence portrays Mendy Weiss to be what he is—I am not giving him any "titles,"
11531 when I say it portrays him as a vicious, loathsome creature, as this evidence shows him to be. But there was brought to the stand, Lena Weiss. I had no questions to ask of this mother. He, Mendy Weiss, puts his mother on in the eve of her life—not far away from the sundown of life. He puts that poor soul on the stand to lie for him. Who would have the heart to cross-examine her? What mother would not lie for any one of us under any circumstances?

Then we have Sidney Weiss. I want to show you the effect of this alibi, what it would have
11532 done to this case, if believed, for all three. Sidnew Weiss, the man with the twenty-sixth birthday—the birthday of birthdays in his life, the twenty-sixth birthday. This late anniversary. Sidney Weiss, who drove Mendy's car back with Blanche with him from Kansas City, Missouri. The man who made the first visit to the only outside alibi witness in the case, Dottie Isaacson—not to her house—not to Blanche who spent ten days with her in Atlantic City, but Sidney, of the late anniversary the one who was interested in the interests of justice—who went to Brownsville in the interests of justice—he meets Dottie

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Isaacson on the East Side, on the sidewalk near a candy store; his concern over his brother in the Federal "frame-up"; his calls to Portman and Rainey out in Kansas City, Missouri—the color of that "interest in justice". Sidney Weiss, if believed, would have been the saboteur of the People's case, because if Mendy Weiss was at this birthday party, Mendy Weiss could not have been pulling the trigger. If Mendy Weiss did not pull the trigger, Lepke could not have sent him. Where is the case? All three, "out".

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Sammy Weiss, the second Weiss to work on the "frame-up"—this amateur photographer. Listen to this: "Now, as an amateur photographer, how do you account for your head being on the rest of this picture, People's Exhibit Z-26, for identification? A. Perhaps the District Attorney can explain."

The Court: You cannot go into this. The picture was ruled out.

Mr. Turkus: But the question and answer were not.

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Mr. Turkus: (Continuing): I will just get through in a couple of sentences. He has disgraced the uniform which he discredits—the United States Army can do well without Sammy—the amateur photographer. Captain Ambraz of the Second Corps, can come in a suit. Sammy, with his United States Army uniform—that is enough of Sammy.

Blanche Weiss, on the alibi! Blanche Weiss, Blanche Hoffman, Blanche Newman, Rose Miller, Rose Bell—take your pick. You heard her associates from her own lips. And here is

Mendy Weiss, putting on member after member of his family—not content, not content with the part he played in it, let them get dirtied up, so he can try to sneak out. Sacrificing the whole family, from the mother down—disgracing them, so he can hide. The damaging admission that came from Blanche Weiss, though, is important. She was in Hot Springs with Mendy. Do you remember the picture I had of her in Hot Springs, and I asked her how many copies there were, and who she gave them to? That forced the admission—she thought Cuppie may have given it up—so she admitted Cuppie was in Hot Springs in 1935 and 1936 with Mendy and her—that they all went together. This is Cuppie, gentlemen, who with Magoon, was sent by Weiss on the second attempt to kill Rubin. This is the same Cuppie Migden who was referred to when Rubin was rolling in the gutter with a bullet in his head. That was the damaging admission taken from her. That is the woman, Blanche, who accidently met the only outside alibi witness in Atlantic City and spent ten days with her. There was not a word said about the case, although the indictment in this case came out in May, 1940, and Mendy was apprehended April 6, 1941. She is in Atlantic City with a woman who was allegedly at this birthday of birthdays. You don't hear from Dottie Isaacson until Sidney Weiss, interested in law and order, and justice, finds her on the East Side of New York, in front of a candy store. She is the woman who left New York after first spending time at the Unger flat and when west via Chicago. I don't have to go into associations there, only up in Rocky

Ford, Colorado, and Kansas City, Missouri, and her meeting many characters out west. This is the woman who under the guise of Rosen Bell, started to knit bandles for Britain—even disgracing that lovely charity, so she could have a "cover-up" of identity, just like her husband with the documents in his pocket. Dottie Issacson, the only outside eye-witness—that poor unfortunate thing dragged in here—dragged in here for no use at all—a poor, disreputable little creature whom you cannot help but feel sorry 11540
for in retrospect. I did not feel sorry for her on the stand because she tried to sabotage this case, and possibly I went at her a little too strong—but, in retrospect, as I look at her now, I have nothing but pity for her, the wife of a pickpocket, the so-called wife of a pickpocket, I will put it that way—going back eighteen years in her associations—eighteen years through a life of crime—a miserable pickpocket—and the only outside witness to the alibi, who was met on the street, on the East Side, by Sidney. She has a lapse of memory as to everything that 11541
happened on the East Side of Manhattan this year, but she has a remarkable memory as to what happened on September 13, 1936—she remembered the birthday of all birthdays, the twenty-sixth birthday. She even remembered it was Joan Crawford and Robert Taylor who played in the picture, I think, so that poor soul, to pay off an obligation, and Mendy Weiss sat by and let that go in, too, to save him—he let that miserable little creature perjure herself, too. But if she had been believed—that she was having her toes tickled and her hair pulled,

when, in fact, Mendy Weiss was pumping bullet after bullet into the victim in this case—if that alibi was believed—Capone did not direct the murder—Weiss could not have been there to pull the trigger—Lepke did not give the order in this murder. That was Weiss' defense, backed very neatly in summation by Capone's counsel, who tried to break the People's witnesses in every detail, even when they did not affect Capone. If he summed up for Capone alone, that
11543 would be one thing, but his summation was to pay back, to pay off, even when it did not affect his client. Think that over.

Says Lepke's lawyers—"The Rosen family, the Rosen family." That is simply putting the dead man on trial. Let the jury forget all about the defense here—put the dead man on trial. And Harold Rosen, and Sylvia Rosen—oh, Sylvia is a vicious, vindictive woman who lied about the meeting with Lepke, Gurrah, Fields and Rubin, about the bringing in of the books. Let me tell you something—think this over—anybody
11544 in the clothing business as was Rosen—poor but for the Grace of God, say his children on the stand—let me tell you about the Rosen family—contrast the treatment accorded to the widow of the victim of this brutal murder when she went on the stand with the treatment accorded Mrs. Lena Weiss, the mother of the defendant, when that mother was on the stand. Contrast the difference in treatment, not only by questioning, but in summation. Here is one of the lowest legal punches in the case—Judge Talley—do you remember his cross-examination of Bernstein—and this is in the record, gentlemen, this

is in the record—he said to him, Bernstein, "Muggsy Cohen, if there is such a person—Muggsy Cohen, if there is such a person." That is why, gentlemen, I walked Muggsy Cohen into the court room in answer to that—"If there is such a person." And, mind you, Judge Talley asked those questions, "If there is such a person," knowing full well that there was, because Sidney Weiss had brought Muggsy Cohen to his own law office. And he asked Sholem Bernstein, "If there is such a person." That is in the record. 11546 Now, watch the legal manouver on that. Why didn't the prosecutor question Muggsy Cohen? Does anybody in the world doubt that Sholem Bernstein stole this car, stole the plates, and placed this car, as he said he did, in the "drop"? What was the value of Muggsy Cohen's evidence? Another car thief—cumulative evidence that does not tend to connect a single defendant in the case? So what does Judge Talley do? He puts him on the stand and leaves him there. Did he or any other defense counsel ask Muggsy Cohen if, in fact, he did not 11547 steal the car with Sholem Bernstein? Not on your bottom dollar. That was manouvering—that is why I asked for a recess to think it over, and that is why I did not ask Cohen a question after recess, which happened to be after lunch. That was the smartest legal manouver in the case, to confuse the jury. Muggsy Cohen—why didn't any single defense lawyer ask a question? What did they have to lose if Muggsy Cohen, in fact, did not help Bernstein with the car?

Now, a few words about Capone. Watch these mental gymnastics of a legal mind: How

could Rubin remember—how could Rubin remember—that Capone, together with Buggsy Goldstein, was in Lepke's office on the occasion before the Rosen murder? Do you remember when we picked the jury, that there was one juror here who even remembered seeing Lepke in a night club?

The Court: No, no reference to that.

Mr. Turkus (Continuing): The visit by a member of the combination—Capone—to Lepke's
11549 office, registered with Mr. Rubin. Those things usually do register, you remember something like that. Oh, Paul Berger—there is nothing to that! Paul Berger—how does he remember Capone? Paul Berger met Capone that Friday night, that fatal Friday night when the word was sent out that Rosen had to go. When Berger was brought over to meet Mendy Weiss, when he and Mendy Weiss went over so that Berger could "finger" Rosen, that is the night he met Capone, with Mendy Weiss—the night that Mendy Weiss and Capone spoke off at a distance. Sure, the cun-
11550 ning, shrewd Capone—not in front of Berger—not on your life; but afterwards he condescended to go over and recognize Paul Berger and say, "Hello". For a big shot behind the scenes like Capone, that is something that Berger remembered, and don't you forget. That was an outstanding event which he would not forget. Capone's importance in the combination was strikingly illustrated by Weiss' visit with Capone in Brownsville, even before Berger "fingered" Rosen—before the "fingering" of Rosen was done Capone was seen by Mendy Weiss. Figure that out. From the evidence,

and in the case, from this witness, you have heard—you saw the respect—the "sirs" that they gave to Capone. That might help you to figure out his status.

Oh, I cannot go into all this testimony and continue here ad infinitum. You cannot have forgotten it all. Let me go one point here in regard to Capone that was made so much of—Capone's lawyer: "They did not tell Bernstein that this was a job for Lepke." When the combination gave Bernstein an order to steal a car, 11552
I believe Bernstein when he said that at that time he did not know what it was to be used for, because he stole a car with two doors; that if he knew it was going to be a homicide at that time, it would have been four doors, so they could easily pile in and out quickly. But after he saw Capone—after he saw what was going on by way of the combination meeting and the orders he was getting, nobody had to tell Bernstein soon after that what the car was going to be used for. He could figure that out for himself. Now, Capone, they say—"Why should 11553
Capone in the presence of Magoon say that they were to do a favor for Lepke and 'hit' Rubin in the head and get rid of him?" That was a different story. Here they had Magoon "casing" a man who was being protected by a police guard. That gave it a different status. When you want a man to "case" a victim who is being protected by a police guard, you have got to show a very important reason for "casing" him and trying to "hit" him on the head. That is why it was said, "That is for Lepke, we have to do Lepke a favor, he is hurting Lepke, he

has got to be 'hit' in the head." That explanation was due Magoon, if he had to go out and follow a man, "case" him, for a murder, even when a man was protected by a police guard. Even that was due Magoon, lower on the ladder than Capone though he was. And Mendy Weiss was there and said, "We will have to walk away, too," when they saw the narrow escape Magoon had, when he was stopped by the police in a laborer's clothes, and Mendy Weiss said, "We
11555 will leave it lay a while." Capone's lawyer wants to make a mountain out of this. The record shows that when I asked Magoon about his social contacts with Capone, all I was allowed to bring out on the record, there is an objection by Mr. Rosenthal and it was sustained—all I could bring out was that Magoon continued his watching—that is all I was permitted to bring out. Is it a fair argument that they had no contact? Rosenthal argued that he could not have even been in Capone's house—he did not know the street address. Did you hear Magoon describe it? Did you hear him describe the en-
11556 trance and the very room he was in—the parlor? Didn't you hear him offer to take Rosenthal right to the house—and if this was a case which the District Attorney padded, don't you think I could have slipped Magoon the address? We had a picture of the house. That is the kind of atmosphere to confuse. He would have taken him right to the house.

And then he said, "Oh, why should Capone leave himself open with Magoon on an admission, as it is called?" This was in 1939. Rosen's murder was in '36. Forgotten—practically. Nothing certainly was being done, you

see that from the evidence, from the standpoint of prosecution.

Now I will read this from the record: "In Capone's parlor I asked him if he thought it was advisable that I work on the Friedman thing, because I hung out about a block away and I thought I would be recognized.

"Q. When you said that you hung out about a block away and 'I thought I would be recognized,'—when you said that you hung out about a block away and it was sort of off Sutter Avenue, did Capone say anything to you? A. Yes, sir. 11558

"Q. What did he say? A. He said, 'What are you worried about?' he said, 'I worked on the Rosen thing and it was right on Sutter Avenue, and I was not made.' Then Magoon said, 'I am not worried, Louis, I am asking for your advice.'"

There is the shrewd, conniving Capone. It is all right to put Magoon in jeopardy, but not Capone. He worked on the Rosen thing; he admitted that all right. But who could talk about him? Bernstein? An admitted accomplice. 11559 And then when you bring in Magoon, the lawyer says, "What can you tack upon Capone?" Did you ever see such creatures? Did you ever see such characters?

What does he expect me to bring here,—people who Capone associated with? He is the one who is responsible for their production here—Capone himself. Sure, let Magoon get made. What did he care about Magoon? But he admitted, "I worked on the Rosen thing, and I was not made." He was not the man—because

when he went by on Sutter Avenue it was in Bernstein's car—there wasn't much of a chance of picking him, or his being made. It is true he was not "made," and there was not much of a chance—he did not leave much room. The slip-up Capone made was in trying to do Lepke a favor a second time, to kill Rubin, and his admission to Magoon, who addressed him, "Yes, sir," and against whom he felt pretty safe from incrimination. And then Capone's lawyer:
11561 "Isn't it miraculous that Capone and Tannenbaum never met?" So what? Tannenbaum belonged in New York; Capone operated, as the evidence shows, in Brooklyn—pretty big by the way he ordered the men around in Brooklyn. So they never met. That made Tannenbaum frame it. So what? Does that explode the case? Does that explode the case? Capone and Tannenbaum never met. So what? So what? What is the significance?

Oh, yes, why didn't they bring Pilch, somebody hollered—the man who was present when the guns were passed? Why, all they had to do
11562 was, to procure the production of any witness the District Attorney has in custody, get his Honor to sign a subpoena and the witness is here. What do I gain by bringing Pilch here? Another one of those characters who said he saw the guns passed—it would be cumulative—what does it mean? Did they bring him into court or ask for his production and put him on the stand? What did they have to lose?

Mikey Sycoff: why wasn't he brought down? He is in the People's custody. Does that hook Capone up with corroboration? Is it anything

more than cumulative? Did they ask for Mikey to be brought here? What have they got to lose? They could have put him on the stand and asked him, but they didn't even do that. They talk about not producing witnesses. Oh, yes, get the jury guessing. Baseball game, somebody said. Well, that is one baseball game that Lepke didn't manage—that is one baseball game that Capone didn't captain—that is one baseball game that Mendy Weiss didn't do any hitting on. So what? The witnesses played baseball. 11564
So what? That is their interest in the taxpayers' money. Talk about a fair and impartial trial! Look what they get: Mr. Rosenthal told you I would say that, but that does not prevent me from reminding you about it. They got everything. They got twenty-three men in the Grand Jury to hear the evidence. They got an indictment. They got nine lawyers, a former Assistant District Attorney, a former Assistant United States Attorney, a former Judge of the Court of General Sessions, and one of the lawyers said, "I have no title." But he has been a 11565
lawyer since before I went to public school. He has not title? He is one of the wiliest, one of the smartest lawyers in the court-room. He doesn't need any title.

Look what a trial Rosen got! No Grand Jury deliberated for him, when the verdict was rendered against him. Oh, yes, there is another thing which has been said:

"Why didn't Berger go in hiding?" Berger was the finger man. Nobody saw Berger finger him. What was there to go in hiding for, for Berger? Berger was safe until either Lepke or

11566 *Summation on Behalf of People*

Mendy Weiss opened up in the drama of 1936, because he certainly figured Rubin, the trusted aide, would not open up. But when the evidence started to come into our office, in June, 1941, when Berger was confronted in the District Attorney's office, as the evidence shows, held on a murder charge in the Rosen murder, as the finger man, then Berger opened. That was a different story.

11567 One of the lawyers said—talking about atmosphere and prejudice— "No Coughlin would stand for a Union Square fakir." Well, no decent man on this evidence will stand for a Lepke or a Capone or a Weiss.

And now they talk about Rubin's statement, which misrepresents him. We will get through with this in about five minutes—in order not to miss a single question, give me ten minutes:

11568 "Rubin"—says the defense lawyer—I do not know the descriptive adjective he tacked onto Rubin—"the architect." I can remember that. Judge O'Dwyer and the rest of his staff—would they sit by and let a Rubin or anybody pick three men out of seven million and send them up on a false murder charge? "Architect!" December, 1937, Rubin made a statement to Assistant District Attorney McCarthy in Frank S. Hogan's office, where he not only failed to incriminate Lepke in the Rosen murder, but in fact went out of his way to throw suspicion off him. That was a great point they raised here, to show that Rubin, who had every reason to feel vindictive, exonerated Lepke. There was a recess, and I was permitted to put one question

and I got one answer, and the explanation was that he was afraid of Lepke.

Now let us see what the evidence disclosed in reference to Rubin's state of mind at the time he made that McCarthy statement, which, by the way, you will remember, gentlemen, was a statement that at the end of Rubin's direct testimony I had marked for identification, and then asked was it true or false, and the answer was blocked.

Let us get to this McCarthy statement. Do you remember the forecast that Lepke made 11570
about the Brooklyn investigation? Do you think that stuck in Rubin's mind? This isn't any insinuation or innuendo against any public official in the past. Public officials in the past were as honest and decent as they have been, but sometimes they are betrayed.

Whether it was the boast of a kingpin like Lepke that he has an "in"—"What difference does it make?"—the forecast came out on the Rosen matter. Everything he predicted came true. Did Rubin have reason to be afraid to talk? What was his state of mind after he rolled 11571
in the gutter? Do you think he had reason to be afraid? Were his fears justified. Haven't you heard with your very ears and seen with your very eyes that even after Rubin had been shot once an attempt was made to kill him while even under police guard? Now, this is taken verbatim from counsel's summation, referring to Rubin: "I did not impute to him any wrongdoing in the Rosen case, but his own conscience was bothering him and he did not like the way I was questioning him, and he laughed at me and said, 'Maybe your conscience is bothering

you,' when my whole proof in the case is he did not know anything about the Rosen case."

Now listen to this: "Why should I try to implicate him when I know that statement is in existence exonerating him?" That statement was not put in evidence until long after the Rubin cross-examination on the main story. Then later, when Rubin was recalled to the stand to connect up the final link in an endeavor to spoliate evidence by shooting him through the
11573 back of the head—it shows conclusively that Lepke knew of the Rubin statement on the very summation of counsel.

Did Rubin have reason to believe he had an "In"? We need not have much difficulty in finding out what was what in connection with Rubin. Inspector McDermott prevailed on him to come over and have a discussion with Judge O'Dwyer. Rubin was not the kind of a witness that ran to help law-enforcement agents. He was, as he said, a reluctant witness, and you can see that from the stand, and when he was
11574 asked by one lawyer, "Aren't you vindictive against Lepke?" he said, "I have every reason to be, but I am telling the truth about him." And the evidence in this case shows that he did.

Gentlemen, I told you I would finish up at "nine" on the clock. I will keep my promise.

This was no killing in the heat of passion—it was not a killing for the possession of a woman or an article of value. This was not even the killing of a corner thug on a stick-up who shoots his victim when there is resistance. This was a well-plotted, cold-blooded, brutal murder, to

silence Rosen and to frighten others—a murder to silence the man and to frighten off others.

The District Attorney would like to convict every one of them in this matter—every one whose fingers are dipped in the blood of Rosen—that goes for the chauffeur; that goes for the finger man; but you cannot. You just cannot. Because if you do not use the finger man and you do not use the chauffeur, the three top-notchers, the three principals, would escape. The only way to bring a solution to this cold- 11576
blooded murder was to break it from within. You cannot let the three killers of Rosen escape here—the three king-pin men in the murder of Rosen—the two behind the scenes and the one firing the lethal shot, because the tools, like the chauffeur and the finger man, cannot be convicted. It would be monstrous, absolutely monstrous. It is unthinkable that such logic can be urged before a jury. Four degrees of homicide will be charged to you by the Judge. Four degrees: Murder in the first, murder in the second, manslaughter in the first, and manslaughter 11577
in the second. That is the law that must be charged to the jury in this case. That is not an indicated, that is not a signal to you to look for any compromise verdict in this case. There is no compromise with this kind of murder—the Rosen murder.

Take the corroboration—you are going to hear the law on corroboration—take that corroboration tending to connect the defendants with the commission of the crime. There is nothing "tending" here. They are connected—irresistible and conclusively—fact on fact, by witness

11578 *Exceptions to Court's Refusal to Permit Objections During People's Summation*

after witness. It is unthinkable that five weeks of testimony can be blotted out by the orations of defense counsel with weaseled words trying to show you the holes and flaws in the case where none exist.

Gentlemen, the four degrees to be charged here are not a signal for compromise. The Rosen murder is not a case to be compromised. Bring in a verdict, a verdict that is consonant
11579 with our principles of American justice—a verdict that is consonant with the facts that have been so irresistibly and conclusively established here. There is only one verdict the law of the land will permit here on the facts by the jury and that is "Guilty," that is the guilt of Lepke, Capone, and Weiss of murder in the first degree—that is the verdict.

The Court: (addressing the jury) Gentlemen,
11580 we will now take a recess for 15 minutes. Please do not discuss the case in the interim. This is to allow you a little time to relax so that you will not be thinking about the summation and possibly confusing it with the charge. I do not want the two to conflict. The jury may leave.

(The jury thereupon left the court-room.)

Mr. Barshay: First, your Honor, I respectfully except to the Court's refusal to permit counsel to make or take objection to the summation of the District Attorney during his summation at a time when counsel thought there

Exceptions to Court's Refusal to Permit Objections During People's Summation

11581

was a proper reason and ground for the objection.

Secondly, I respectfully except to your Honor's excluding the jury now and taking these objections and exceptions in the absence of the jury, on the ground that the damage already has been done and the jury will be in no position to know whether or not the Court has ruled.

The Court: Do not argue, just take your exception.

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Mr. Barshay: Now I move for the withdrawal of a juror on the ground that by the District Attorney's unfounded and baseless statements and wrongly-interpreted statements when he wound up his summation with "Lepke knew of the existence of such a statement made by Rubin to McCarthy," and when he further said that "the statement was not offered here until two weeks after Rubin left the stand and was recalled," when the evidence specifically shows that on direct examination of Rubin Mr. Turkus personally offered the statement in evidence, which was properly objected to and sustained.

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I further move for the declaration of a mistrial on that ground.

The Court: Motion denied.

Mr. Barshay: Exception.

I object to that part of the summation of the District Attorney which was purely an appeal to prejudice and passion and not founded upon facts or a fair inference therefrom, and on the ground it contained improper statements and conclusions and improper inferences therefrom, and on the further ground that he brought, in his summation, into issue the integrity of the Dis-

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triet Attorney and his Assistants, who were not on trial. On that ground I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

May I point out specifically some of the things which are prejudicial in nature and use them as the basis of a motion for the withdrawal of a
11585 juror and the declaration of a mistrial? For example, when he urged in his summation this point: "What would have happened to Patrolman Cappadora if he came along at the time?"

The Court: If there is much of this, you had better submit it in writing and put it on the record later.

Mr. Barshay: That is all right. I will dictate them separately.

The Court: If any attempt is made by each of counsel to review the entire summation and to make motions based on each and every point
11586 on which they do not agree, it is going to take a very long time and it will serve no useful purpose. It simply is not done—I have never found it to be done.

Mr. Barshay: We will do it your way, Judge.

The Court: There are plenty of places where counsel on both sides crossed the line. Due latitude for encroachment is recognized in summation. I never heard one that was strictly fair to anyone else.

Mr. Barshay: I will reserve my rights in accordance with your Honor's instructions.

Mr. Talley: I ask that all the objections made to the summation by either or both other counsel

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11587

in this case apply to the defendant Weiss. I have one or two objections which I would like to urge now, which will only take a couple of minutes.

The Court: Yes.

Mr. Talley: I except to your Honor's direction to counsel that there be no interruption of the summation of the District Attorney. I object to the District Attorney's summation upon all the grounds presented and to be presented by counsel for the defendant Buchalter.

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I ask that an exception be granted on each and every one of those grounds, if denied.

I object to the summation of the District Attorney upon the ground it is based solely—or rather, the appeal was based solely upon passion and prejudice, to the prejudice of the defendants.

I object to that part of the summation which constituted an attack—because it was so unjustifiable and unjustified—upon defendants counsel. For instance, reference to the defense of Weiss, and in reference to the episode of calling the witness Muggsy Cohen, a witness in the direct custody of the District Attorney, as "the lowest bunch in the case."

11589

I object to all reference by the District Attorney to the shooting of Rubin as being perpetrated by Weiss, upon the ground there is no credible evidence to justify that contention. In any event, it was a reference and discussion in an attempt to persuade the jurors with reference to a separate and distinct crime from that which was named in the indictment.

I object further to the misquotation of evidence and to reference to matters by the District Attorney not in the evidence at all.

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I move for the withdrawal of a juror and the declaration of a mistrial upon those grounds.

The Court: Motion denied.

Mr. Talley: Exception.

Reference was also made by the District Attorney as to money being paid to defendants' counsel being tainted. I take an exception to your Honor's failure to not only warn but to stop the District Attorney from making remarks
11591 of that kind.

The Court: Motion for a mistrial; denied.

Mr. Talley: Exception.

Mr. Rosenthal: May I have it appear at this time that I have refrained from interrupting the District Attorney's summation when I considered, at times, it was highly improper, merely because of the Court's admonition not to do so, and that I will submit, in accordance with the Court's statement to Mr. Barshay, in written form, various items which I consider were improper in this case and which I would have had
11592 reason to object to, had I not had the Court's admonition not to interrupt, and upon that written statement which I intend to submit I ask for the withdrawal of a juror and the declaration of a mistrial because the appeal, in so far as the defendant Capone is concerned, was purely to prejudice and passion, and not in any wise founded upon the evidence, but merely and clearly avoidance on the part of the District Attorney to in any wise attempt to justify from the evidence facts sufficient to warrant the jury in finding a verdict as against him.

The Court: Motion denied.

Mr. Rosenthal: Exception.

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11593

I understand I have permission to submit these in writing to the stenographer, so they may be spread on the record?

The Court: I will take them now. I will take the motion now.

Mr. Rosenthal: I did not mean the motion; I meant the statement.

The Court: Before this jury comes back, whatever you say is going to be on the record.

Mr. Rosenthal: I thought your Honor said we could submit. 11594

The Court: I am not going to give permission, after the trial is over, to argue an appeal on a padded record.

Mr. Barshay: I will put mine on the record very quickly.

I object to the statement of the District Attorney with respect to "What would have happened to Patrolman Cappadora if he had come along when Weiss and the others were outside of Rosen's candy store?

I object to the reference by the District Attorney in his summation, to this part, where he said, "Do you think that Rosen had only that complaint to make?" 11595

I object to the constant reference by the District Attorney that counsel for the defendants were seeking to confuse one or two jurors for the purpose of obtaining a disagreement or a hung jury.

I object to the Assistant District Attorney's reference to that part of the activities of counsel with respect to Rubin's testimony: "If, next month, the defendant Buchalter will be in Man-

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hattan, his lawyers will have him running from O'Dwyer."

Mr. Turkus: I never said that at all.

Mr. Barshay: We object to the reference of counsel for the People to the fee we received in this case, saying that it was "tainted money," as compared to the fee which the City pays him, or words substantially to that effect.

11597 I object to counsel for the People urging to this jury that counsel for the defense asserted or insinuated by direct evidence or by inference that we accuse Judge O'Dwyer or his Assistants of framing the defendants, or that they suborned perjury, or that they have committed subornation of perjury, and that we put the District Attorney's office of Kings County on trial, when the facts show directly to the contrary.

The Court: Do not argue. This is all out of order. It has never been done in any trial before. I have indulged you to the utmost throughout this trial, and that is the only reason I am allowing you to do it.

11598 Mr. Barshay: I object to the District Attorney's charge that counsel for defense is accusing the District Attorney's office of attempting to murder these defendants.

I object to the statement of the District Attorney that counsel knew, when they were retained, that the defendants were guilty.

I object to the statement that the lawyers in the court-room knew the defendants were guilty and that the people in the court-room knew the defendants were guilty, and on that score may I say to your Honor, while there is not any evidence, there is some talk that relatives of the

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11599

jurors have been in this court-room during part of this trial.

The Court: Strike that out. It is wholly unwarranted. If you make any more misstatements like that, I will direct you to take your seat. You have no right to make such a statement. That is manufacturing a record.

Mr. Barshay: I take an exception.

The Court: When counsel sum up in the course of three days, it stands to reason the summation steps on somebody's toes over and over again.

11600

Crying over it after it is all over is not nice. You never get anywhere in this world by crying.

Go ahead with your exceptions.

Mr. Barshay: I take an exception.

I object to the District Attorney saying in summation, referring to his own office, the reason they did not take a stenographic statement was because there were prying fingers or lurking eyes who can see it, and therefore they made memoranda on pads; and at the same time that they knew they were dealing with men whose fingers were steeped in blood.

11601

I object to the District Attorney saying in summation that while he was questioning Tannenbaum, Tannenbaum kept on saying, "I assert my Constitutional rights," when the evidence shows he never questioned Tannenbaum on the Rosen case.

I object to the insinuation by the District Attorney that Lepke was indicted in 1940 and was not arraigned until 1941, as innuendo that may

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lead the jury to the conclusion that Lepke was in flight, when the fact is—

The Court: Do not argue; take your exception.

Mr. Barshay: All right, I except.

I object to the District Attorney saying, "If they had not been"—referring to the defendants —"killers of Rosen, you would not have to sit here."

11603 I object to the District Attorney saying that Rosen had the foresight to run to Pennsylvania from the New York racketeers, on the ground there is no proof in this record to that effect.

The Court: I will not hear any more argument. After mentioning the ground, the rest is entirely out of order.

Mr. Barshay: I take an exception.

May I argue that?

The Court: No, sit down. We will indulge in no more disorder.

It only demonstrates that the Court was wise in not permitting the sabotage of any summa-
11604 tion, but enforced from the beginning the request that due courtesy be shown by one counsel to the other in permitting orderly argument.

Mr. Barshay: I take exception.

Mr. Talley: In addition to the objections I have urged upon your Honor, I object to the reference made by the District Attorney about money paid to the defense counsel as contrasted with the compensation that he receives as Assistant District Attorney.

I object further to the reference that he made that counsel for the defendant Weiss was willing and ready to interfere or "sabotage," to use his

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11605

word—with the investigation being conducted by the District Attorney.

I make the further objection, with great respect, to your Honor permitting a blown up photograph, being about 4 feet by 5, or 4 by 4, let us say, affixed to a board about 5 by 6, placed behind the witness chair, in full view of the jury just at the time of the beginning of the summation of the District Attorney.

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The Court: That is another statement for the purpose of manufacturing a record. The Court did not know of it until you attracted its attention just now. The exhibit is of no value whatever and it could not possibly influence the jury. You saw it throughout. If you wanted to object you could have stood up and called attention to it. You are now accusing the Court of permitting it to be there or permitting it to be used, and that is untrue.

Mr. Talley: Surely your Honor does not say you have not observed it; that board was directly behind you.

11607

The Court: My back was turned to it; you were facing it throughout.

Mr. Talley: I note an exception to your Honor's remarks in regard to the photograph.

The Court: This is disorderly.

Mr. Talley: Note my exception.

Mr. Rosenthal: I intend to make a general objection, without quoting from the summation itself.

I object to the summation of the District Attorney upon the ground that it places before this jury a false issue, the integrity of the District

11608 *Exceptions to Court's Refusal to Permit Objections During People's Summation*

Attorney; further upon the ground there were statements made by him not contained within the record of this trial; further upon the ground that by his summation he drew, indirectly, an inference as to Capone's failure to take the stand, contrary to law; further as to his unwarranted characterization of defense counsel; further, his reference to "combinations" of people outside of the jury box; and further, his reference, in so
11609 far as attempted spoliation of evidence is concerned, with respect to the defendant Capone.

The Court: Now the Court instructs the court officer to remove from the room all of those enlarged photographs and to put them in an adjoining room. I have not eyes in the back of my head. I will not have any more manufacturing of the record that is impugning the honor of the Court. I also instruct the Clerk to find out who put it there at the beginning, or whenever it was put there this afternoon.

Clerk Clark: This is the first time I noticed it, Judge.

11610 The Court: You did not notice it either?

Clerk Clark: No, sir.

The Court: I want to find out who gave the tip-off to put it there, because, obviously, it was for the purpose of manufacturing a record.

The Jury then returned to the court room.

11611

The Charge of the Court

Taylor, J.—Members of the Jury, the case is submitted to you today, even though it involves a late charge of the Court, because the time is now 3:20. It is done because one of the counsel for the defense has to be in the Court of Appeals in Albany on Monday, and that takes precedence over the trial of this case. I do not think it advisable to let you be for two days idle under simply a direction by the Court not to discuss the case. Forty-eight hours is a long time to 11612
keep people together after summations by all sides. It therefore seemed better to charge the jury today.

Under Section 5 of the Judiciary Law, a verdict may be taken on a Sunday, so there will be no interruption of your deliberations.

I wish to impress upon you this: When you go to the jury room just put entirely out of your minds any desire that any of you may feel to be back with your families or back in your homes. You will be a good many years, I hope, in the company of your families, but after being for so many weeks in the trial of this case, the issue 11613
in this case is of paramount importance. Just now it completely overshadows the matter of personal convenience of any member of the jury or of the Court. The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy.

In one of the summations you were told that the only reason for a special jury is in order to save time in the selection of the jury. That is not strictly correct. The fundamental statutory

purpose of the special jury is to get men who are above the average in both intelligence and character to determine issues presented on trial in either civil or criminal cases, where those issues come under the provisions of that statute, and thereby indicate the advisability of having a jury above the average in intelligence and character. I think that is a fair statement.

At the outset of this trial, when you were selected, you took an oath to render a true ver-
11615 dict upon the evidence. That means upon the believable evidence and the case and upon the legitimate inferences which may by law, within the province of the jury, be drawn therefrom.

The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both—fairly, without prejudice or sympathy to either the defendants or to The People of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of
11616 a case in court, according to accepted standards, means.

Of course, gentlemen, after the evidence is in, each side has a right to argue its case. This presents practical difficulties, because there is a tendency for anybody, in arguing his own side of the case, to step across the line; but the argument of a case, that which is known as the summation, must not be a fight among counsel. Each side is entitled to state its argument without interruption. Of course, when there is an overstepping, I trust that you recognize it. You will not be inflamed by anything that is said,

and you will not be misled by departures from the record. You will apply such parts of the argument as received from any counsel only as it affects the record, the evidence in the case, and use it only as your guide, if it meets your own common sense and judgment.

At the outset I asked all counsel to respect one another's rights, and on the first two or three objections by the District Attorney, I put an end to any further interruptions. I tried, fairly and without playing favorites, to notice certain things 11618
that required judicial interruption. That is different because the Judge is not fighting either side. The Judge is trying to avoid being knocked down by both parties to the fight. The Judge is like a referee, rushing in between combatants. He takes a chance of being hit, but he does not hit back.

The question of application of the rule of fairness is not one of mere apportionment; it is one of applicability according to wherever those rules indicate truth and justice lie. Decide the case upon the believable evidence as you find it 11619
to be established.

As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice.

If it is not established beyond a reasonable doubt that the defendants, or any of them, are guilty, there shall be an acquittal of such defendant or defendants. If beyond a reasonable doubt you find the case to be established as one

11620 *The Charge of the Court*

of guilt as to any or all defendants, you will announce that verdict at the conclusion of your deliberations.

Questions of law are for the Court. It is not the purpose of the Court, in making any allusions to evidence, to do so for the purpose of refreshing recollection or particularizing in order to emphasize one point as against another. You heard the witnesses. You heard the evidence exhaustively discussed by counsel. The Court
11621 placed no time limitation upon the discussion, simply tried to preserve order and dignity, two qualities which are inherent in the administration of justice, and which it is the duty of the Judge to do.

It is the record of the evidence that counts, and that is left to your memory, to be refreshed in such particulars, if any, as you may desire, by a re-reading of minutes on any particular point, should that be necessary.

When I said that questions of law are for the Court, that means that you must eradicate from your minds any interest in the rulings of the
11622 Court upon objections of counsel. There is a little way that lawyers have, regardless of which side they represent, of arguing back when the Court rules on points which are so simple that they know as well as the Judge does that the Judge is right. It is a pardonable trend, but, if the Court permitted it, it might presently get some jurymen thinking, "I wonder if this Judge is giving a fair trial? If I were the Judge, I would rule so and so." Well, of course, the answer is that the Judge has a lifetime of study and experience in learning the rules of evidence, and the jury is a lay body with no knowledge

of the law of evidence, so the jury has nothing to do with that.

If the Judge makes a mistake—and to err is human—there is another way of its being corrected, if correction be necessary.

The law requires the Court to charge, for one thing, that the jury shall not consider the question of punishment. That is not the responsibility of the jury. That is the responsibility of the law of The State of New York or, in a lower degree than murder in the first degree, 11624
it is to a certain extent within the discretion of the Judge. I say that because the law says the Judge shall so charge the jury. There is a good reason for it. In a capital case the jury must get out of mind that it is fastening the punishment. It is the law that fastens the punishment. With the spectre of punishment before the juror's eyes, he may think that he is disinclined to view the case impartially, logically, and honestly, in accordance with his oath of office; so I charge you that your sole responsibility is to decide whether or not the defendants, or any of them, 11625
are guilty, and consider that the question of punishment is not in your province but is that of the law and of the Judge.

The indictment charges murder in the first degree, committed as follows:

"The defendants, on or about September 13, 1936, in the County of Kings, wilfully, feloniously, and of malice aforethought, shot and killed Joseph Rosen with revolvers."

You will not be concerned with the severance as to one of the defendants, in fact, you will not be concerned with any of the procedural matters connected with the trial of this indictment. Just

have this in mind, that is the indictment, and that is what each of these three defendants is charged with.

Under the law which permits the three defendants to be tried together, you will have to consider in connection therewith the definition of the word "principal" as set forth in Section 2 of the Penal Law, which reads as follows:

"A person concerned in the commission of a crime, whether he directly commits the act con-
11627 stituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a 'principal'."

You see how broad that is. A principal means, of course, that he is guilty, if he is a principal. It includes not merely the man who does the shooting; it includes the lookout, the wheel man, the finger man, and the man who, even though at a distance, gives the directions.

The law provides that where one degree of
11628 crime is charged the Judge shall charge the jury as to all other degrees and for that reason the Court is charging you in this case as to two degrees of murder and two other degrees of homicide, to wit, manslaughter, but instructs you that your verdict, if one of guilty, shall be of such crime and of such degree of crime as is shown by the evidence to be the one that was committed. Do not compromise. Find your verdict according to the evidence.

The law says that no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the

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fact of the killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

The former is what is known as "corpus delicti." There, you see, direct proof is necessary. It would never do to convict somebody of murder and then find out, after the penalty of the law had been carried out, that the alleged victim was still alive. You cannot take chances on that. You need direct proof.

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For that reason, during the first part of the trial, considerable time was taken up in proving what is known as the corpus delicti, consisting of the testimony of the Medical Examiner and of those who found the body and identified it to the Medical Examiner, knowing it to be the body of Joseph Rosen.

I charge you now that the difference between murder and manslaughter is this: With murder there is an intent to kill; with manslaughter there is a killing, but without intent to kill. The intent to kill may be inferred from the act itself because it may be reasonably assumed, under given circumstances, that a person intends the reasonable and natural consequences of his act.

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You will not consider manslaughter at all unless you find that there was a killing but not with an intent to kill and that the killing was done by these defendants or any of them.

I am charging you on these different points because the law says I must. Don't think it is a cue to compromise. I have charged you not to compromise. Your verdict shall accord with the evidence.

11632 *The Charge of the Court*

The difference between murder in the first degree and murder in the second degree, broadly speaking, is that murder in the first degree is done with premeditation and deliberation, whereas murder in the second degree may be killing with intent to kill but without premeditation and deliberation, and so you find murder in the first degree as applied to the alleged facts in this case to be defined as follows: "from a deliberate and premeditated design to effect the
11633 death of the person killed."

On the question as to what is necessary as premeditation and deliberation, I charge you that all the law requires is this: There shall be some reflection and some thought which precedes the act. If there is thought, if there is reflection on the act, and if there is a choice and determination as the result of these mental actions, then there is sufficient deliberation within the law. It is only essential that the period of premeditation shall be long enough for the perpetrator to decide between doing and not doing the act. Nevertheless, I charge you that in your applica-
11634 tion of that, the period must not be simply such as to permit a conviction in the first degree upon a microscope or infinitesimal consideration and conclusion so far as the time element and deliberative element are concerned. Deliberation means a very real thing. It means an act of the intellect. It means something in the nature of a cold-blooded decision, rather than a hot-blooded, irresistible act.

Murder in the second degree is defined, as applied to the alleged facts in this charge, as follows:

"Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed but without deliberation and premeditation."

But deliberation and premeditation, as with intent to kill, may be, I charge you, inferred from the act, and where there is evidence of preparation, evidence of a preconceived intent, and that evidence is unmistakable, or, at least, I should say if it is established beyond a reasonable doubt, that is murder in the first degree and is not murder in the second degree. 11636

Manslaughter in the first degree, as applied to the alleged facts embraced in this charge, is stated by law as follows:

"Such homicide is manslaughter in the first degree when committed without a design to effect death, in the heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon."

Manslaughter in the second degree—and only such part of the definition as could possibly be construed as having application to the alleged facts in this charge—is defined as follows: 11637

"In the heat of passion, but not by a dangerous weapon of by the use of means either cruel or unusual, or by any act or procurement of any person which, according to the provisions of this article, does not constitute the crime of murder in the first degree or murder in the second degree, nor manslaughter in the first degree."

I charge you that the verdict as to each defendant and your consideration of the evidence as to each defendant shall be separate, because, from place to place on the record of this trial,

is evidence applicable to one or two defendants only. These three defendants are tried together because that is provided for by a statute of this State. We cannot question the wisdom of that statute. It was passed by the Legislature and signed by the Governor. It is the law. But that does not lessen your responsibility in seeing that the evidence as against each is properly segregated and applied only as to him.

I shall have to later come back, and in a sort
11639 of way which I hope will be fair, attempt to point out certain parts, possibly the bulk, possibly all of the points of evidence in connection with the defendant or defendants to whom they apply. I will do that as a safeguard against your own confusion, but when I do it, remember it is your own recollection of the record that counts. Try as hard as I may to be fair in epitomizing for the purpose of segregation from, as I said, approximately a million words of record, I do not guarantee it to be true, because I cannot give assurance against the human frailty of making mistakes.

11640 Your verdict, as I have charged, shall be separate as to each. In announcing it, I wish you would bear in mind to make your announcement in substantially the following form—please remember this, Mr. Foreman—in returning your verdict, say it something like this:

"We find the defendant Buchalter"—and then announce "guilty" or "not guilty" or "disagree":

"We find the defendant Weiss"—and then announce "guilty" or "not guilty" or "disagree":

"We find the defendant Capone" "guilty" or "not guilty" or "disagree."

But remember, as to disagreement, that while the law permits that you may agree as to one or two and disagree as to one or two, it is in the discretion of the Court to keep you out longer than you may think necessary in an effort to harmonize you and to get you to agree as to those whom you have thus far or up to that point failed to agree on.

I charge you that when the evidence approaches such a point, and only if it approaches such a point as to establish a conspiracy, a 11642
coming together of minds and an agreement and an overt act pursuant thereto for the purpose of doing a homicide, only when and if that point is reached may the act of one person be binding upon and become the act of another, but if that point is reached then from that moment on, from the moment of coordination and joint action as evidenced by an overt act—and only one overt act is needed—then the act of any defendant pursuant to such conspiracy, may be binding upon the other or others, and bring them all within the provisions of Section 2 of the Penal 11643
Law defining principal. This does not apply, however, to anything that may be done after the commission of the crime or anything that may be admitted by one and not by another concerning what is alleged to have been done. On the latter point, let me specifically say that if, after the commission of a crime, a defendant runs away, that counts against him but it does not count against those who do not run away.

If a defendant causes a witness to run away, that comes under the law known as spoliation of evidence, and that counts only against such de-

fendant as causes the witness to run away. This applies likewise to hiding.

If a defendant tries to kill off a witness, that comes under spoliation of evidence and it counts only against such defendant as is in on it. It does not count against those who are not shown by the evidence to be in on it.

Likewise, if after the commission of a crime one or more defendants admit guilt or make any admissions along the line of guilt, those may be counted as evidence only against the one
11645 who makes them, and are not binding upon or applicable to any of the others. Please bear that in mind. I emphasize it because it is a very important point in this trial.

It is alleged in this trial, and is submitted to you on the evidence, that Weiss ran away and he ran away after a declaration that "It looks like Allie was talking and I will have to duck," and that when he was picked up in Kansas City he made a statement to a Federal agent in which he specifically referred to O'Dwyer and to the position he would be in, sitting between O'Dwyer
11646 and Dewey, and that it had been his intention to return after O'Dwyer was out of office, which, as implied by the evidence, would be after a reasonable length of time. Of course, that is up to you to figure out.

As to the alleged Rubin spoliation, that is, getting Rubin to run away and hide in various places in the United States and secrete himself in various places in the city under assumed names and, at times, in disguise, and the alleged conversations between Buchalter and Rubin in connection therewith, and the bringing in or al-

leged bringing in by Buchalter of Berger to take charge of it, under Buchalter's supervision or direction, that has nothing to do with anybody except Buchalter, because there is not a scrap of evidence that either Weiss or Capone had anything to do with that, but—and this is very important for you to bear in mind—the alleged shooting of Rubin through the head was months after Buchalter was last seen in town. When he was last seen in town, he is alleged to have made a statement to Berger that he would have to get 11648
out, things were getting too hot, or words to that effect. So you see there is no evidence connecting Buchalter with that shooting. That would come down to Weiss and Capone. The evidence for you to consider in connection with that I will have to come back to later, because I want to be accurate. It concerns both Weiss and Capone, that is, so far as your consideration is concerned, but without any hint from the Court as to how you shall decide the truth or the falsity of the evidence on that point or what inference you consider legitimate to infer 11649
from the evidence on that point.

The law says, concerning overt acts, that no agreement amounts to a conspiracy unless some act besides the crime be done to effect the object thereof by one or more of the parties to such agreement.

The defendant in a criminal case is presumed to be innocent until the contrary be proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. So that is the task which you have to face; that is the task to which you must give

all of the intelligence that is in you, in order to accomplish an accurate solution.

It has been said, I believe, in the course of this argument, that a reasonable doubt is one for which you can give a reason. That, however, is not strictly clear, because there may be good reasons and there may be bad reasons. The law does not mean a doubt the reason for which it is unsound or whimsical. It means a sound, sane, intelligent doubt existing in the
11651 mind of a man who has brains which he is willing to use and does use in an earnest application of them whereby to arrive at an accurate conclusion from the evidence.

I will read you something on the question of reasonable doubt from an authority. I think it is considered good law, because this is quoted from the case of Holt v. U. S. It was in the United States Supreme Court, and I am reading from the opinion (218 U. S. 245):

"A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to
11652 all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit."

Gentlemen, in quoting from what an appellate judge writes, that only reflects his own expression, but it comes from a high source and,

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even if it may be debatable as to an accurate statement of text, it is worthy of consideration because of the high source from which it comes.

Now I will quote from People v. Trimarchi, 231 N. Y., from an opinion in the Court of Appeals:

"The rule is that all the evidence, when considered by the jury, must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of the defendant's guilt. The evidence of facts and circumstances, in order to justify a conviction, must all be consistent with and point not only to the guilt of defendant, but they must be inconsistent with his innocence."

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I think that is enough on the point. You have brains and I trust you will use them.

On the question of accomplice turning State's evidence, we have a statute which reads as follows:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

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Bear in mind this part of the text: "as tends to connect". That is all that is required.

Gentlemen, this is very important in this case. Please follow me closely. Don't let your attention deviate. I will read it again:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

In connection with the meaning of the word "accomplice" I will read again Section 2 of the Penal Law defining "principal", because when

11656 that statute was enacted in this State it threw together both the common law meaning of "principal" and "accomplice" under the head of "principal."

Under that statute in this state an accomplice has to be found, in order to be an accomplice, to be a principal. In common law the principal was the man who did the actual act. A man who met any of the other requirements of this statute was known as "accessory before the fact." But, as I say, these two have been united in this

11657 statute. I will read it again:

"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

That is what is meant by the law when it says "accomplice". The law says that the question is one of law, and the Judge must decide it unless there is a dispute of fact. In the latter

11658 event, there can be a decision either one way or the other by the jury as to whether or not a man is an accomplice within the meaning of the law as charged by the Judge, but if there is no dispute of fact on that point, the Judge must instruct the jury as to whether or not the witness is an accomplice. If there is a dispute of fact, that is, a contradiction or conflict of or in the evidence, or if there is any evidence from which the jury may find, directly or as a legitim te inference, that the witness was an accomplice, and that is an issue, so that if certain evidence is accepted the witness may be an ac-

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complice or if certain evidence is, on the other hand, accepted, he is not an accomplice, then the question is one for the jury to decide, as to which evidence is true and which evidence is false, or what is the inference to be drawn from uncontradicted evidence which is capable of more than one construction but is sufficiently ambiguous to require an application of the jury mind in determining the question.

Here is what the law requires, according to the accepted authorities of the learned Appellate Courts of this state. 11660

"The other evidence required to corroborate the testimony of an accomplice need be no more than as tending to connect the defendant with the commission of the crime."

It is enough if it tends to connect the defendant in such a way as may reasonably satisfy the jury that the accomplice is telling the truth. The corroboration is not restricted to any particular point. Its connection with the defendants' own statement and denials, if any, should be considered where by witnesses an issue is created, or 11661 if the statements or denials are put in as having been made prior to the trial and therefore in the nature of admissions.

It may vary in its nature according to the circumstances of the particular case. It is not necessary that corroborative evidence should of itself be sufficient to show the commission of the crime or to connect the defendants with it, but it is sufficient if it tends to connect the defendants or any defendant with the commission of the crime.

As stated substantially in a leading authority

in this state, People v. Cohen, in the Court of Appeals, the statute does not require that the whole case be proved outside of the testimony of the accomplice. It simply requires evidence from an independent source of some material fact or facts tending to show that a crime has been committed and that the defendant was implicated in it.

I now charge you that both Paul Berger and Solomon Bernstein are accomplices as a matter
11663 of law. Please bear this distinctly in mind. I am mentioning the names of Paul Berger and Solomon Bernstein, but they are the only ones in the case who are accomplices as a matter of law. Therefore, the law as to accomplice corroboration which I have read applies as to their testimony. They must be corroborated by such evidence as tends to connect the defendants or any of them with the commission of the crime, but it is not required that the whole case as testified to by Berger and by Bernstein be proved outside of their testimony. It simply
11664 requires evidence from other witnesses who are not accomplices, of some material fact or facts tending to show that a crime has been committed and (I stress the word "and") that the defendant or defendants were implicated in it.

I now charge you that I find in the record no evidence from which I can be justified in submitting to you that either Rubin, Tannenbaum, or Magoon is an accomplice in the murder of Rosen. You cannot guess at it. To submit the question of either Rubin, Tannenbaum, or Magoon being an accomplice in the Rosen mur-

der, there must be something in the record to submit to you so that you may find them or any of them to be accomplices as a matter of fact. There is no such evidence in the record. I cannot charge that to you and must therefore charge you to treat their evidence as coming from witnesses who are not accomplices. Remember that, now: Berger and Bernstein are accomplices. Rubin, Tannenbaum, and Magoon are not accomplices in the Rosen murder.

The statute as to accomplices does not apply 11666
as to collateral matters. Unquestionably, if you accept Rubin's testimony that he ran away and hid to protect Buchalter, that makes him guilty of attempted spoliation of evidence, flight and hiding, making evidence unavailable without which investigations collapse, but that does not come under the accomplice act. He does not have to be corroborated for that. If you believe him, you can take his testimony as true, without corroboration.

Likewise with Magoon. Magoon is a crook, 11667
murderer, and he, according to the evidence, if true, was hooked up with an attempted spoliation of evidence by attempted assassination of a witness. That is another matter. That is not the Rosen murder, and the accomplice statute does not apply to that, so he does not have to be corroborated as to that unless you independently find that he has, in order to satisfy yourselves as to the truth of his statement.

The same way as to Tannenbaum. Tannenbaum testifies as to certain alleged admissions, hooking up Weiss, but, according to the record, there is nothing to show that Tannenbaum was

in any way connected with the Rosen murder; therefore you have a right, if you see fit to accept Tannenbaum's evidence without corroboration, to do so.

Of course, the law never charges a jury that it must have no corroboration. That would be foolish. The law leaves it to the jury to say in any case whether it accepts the testimony, or any part thereof, by a given witness or witnesses without corroboration, or to require cor-
11669 roboration if it deems that necessary; or, if corroboration has been given, whether or not to require further corroboration. That is within the province of the jury on all points, in all cases, regardless of the question arising out of the accomplice statute. That has always been so. It was so long before the accomplice statute was even thought of.

It is for you and you alone to say whether the evidence on a point required to be corroborated, given by the non-accomplice witnesses, is true or whether, on the other hand, it is not suffi-
11670 ciently shown to be true, this because you are the sole judges of the facts; but if you find such corroborative evidence to be true, to be duly established to your satisfaction, then it is for you to say whether such as you find to be established constitutes evidence tending to connect the defendants or any of them with the commission of the crime as provided by the statute to which your attention has been directed.

Now, the law as to spoliation of evidence: The act of intentionally destroying or fabricating evidence has always been regarded with suspicion. It is a circumstance indicating a weak cause.

One's conduct in thus destroying evidence may be attributed to a belief that the truth would have operated against him. The unfavorable inference will not arise unless the destruction was intentional.

It is well said that the deliberate destruction of written evidence, or, you might say, any evidence, gives rise to the inference that the matter destroyed is unfavorable to the spoliator. This unfavorable presumption will not dispense with the necessity of the other party's introducing 11672
some other evidence. The force of the inference is rather of deliberative than of probative value, of subjective rather than objective relevancy.

The law as to fabrication of evidence is the same as spoliation.

The law as to running away and hiding, you may say, has substantially the same force as an inference on the fabrication of evidence or the suppression of evidence in this respect: that it is of deliberative rather than probative value, but it may be of probative value, depending on the circumstances, and, if correctly hooked up, 11673
that is up to the jury to say.

Obviously, a person running away may fairly be said to run due to an impulse of fear; but we come to the next question: What is he afraid of? Is he afraid of being caught and convicted because he is guilty, or is he afraid of being caught and convicted because he may be framed, or because, upon fabricated evidence, he may be convicted of a crime of which he is not guilty?

You see, that is an open question, so it all depends on the particular case involved and the

facts thereof as to what the legal effect or inferential effect is of the alleged flight.

It has been stated, and it may be fairly considered, that flight from justice and its analogous conduct have always been deemed indicative of a consciousness of guilt. It is today conceded that the fact of an accused's flight, escape from custody, resistance of arrest, concealment, or assumption of a false name and related conduct are admissible as evidence of a consciousness of
11675 guilt and thus of guilt itself, but the weight which the jury is entitled to give it depends, as I have stated, upon the circumstances of the individual case.

I will read from text, just for guidance, not as a necessarily accurate statement of the law, but as an expression from an opinion of the court of last resort in this state, People v. Florentino (197 N. Y.):

"Evidence of flight is competent because, when unexplained, it tends to show consciousness of guilt, though standing alone it raises no legal
11676 presumption thereof. When the crime is proved, but the identity of the criminal is in doubt, it depends somewhat on the question of identity. Ordinarily it is of slight value, and of none whatever unless there are facts pointing to the motive which prompted it and, hence, any explanation of the accused should always be considered in connection therewith."

The points of alleged spoliation of evidence which may be considered will be reviewed further on in this charge.

When a witness takes the stand to be cross-examined, he submits not merely to ordinary

questions, but to leading questions. The lawyer who puts the witness on the stand for direct evidence is not, ordinarily, permitted to ask leading questions, although the trial court may, within sound discretion, so permit, and it has not been the policy of the Appellate Courts to disturb it when the discretion is fairly exercised, but, ordinarily, the asking of leading questions is permissible only on cross-examination and in certain circumstances, as I have mentioned, which are discretionary in direct examination. 11678

Also, we have two rules of evidence which counsel is entitled to use on cross-examination, if he sees fit. This is a little technical. I am telling you of it, not in submitting it to you as an issue, but in order to clarify your minds on rulings of evidence which you have listened to, so that you will not intrude upon the Court's function in that respect.

One of these is known as specific impeachment and the other is known as collateral impeachment. Specific impeachment would occur in a case where a witness, taking the stand, is asked 11679 by counsel if on a previous occasion he said or did something which contradicts anything that he has just testified to on the stand. If the witness says yes, the witness thereby becomes specifically impeached. It simply means that what he says on this occasion is impeached by something he said in contradiction thereof or in variance therewith at another time, whether wilfully untrue or due to memory fault. If the witness says no, then the lawyer is entitled to later put witnesses on the stand to prove that he did on a certain occasion say thus and so

which is in contradiction of or variance with the present testimony, or to read testimony given by the witness on the previous occasion covering the point and shown to be contradictory, that is, inconsistent with the testimony presently given on direct examination. That is the reason why stenographer's minutes of other trials or hearings where questions and answers are used may be made a method of cross-examination.

11681 The usual method is to say, "On such and such an occasion were you asked the following question and did you give the following answer?" Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing. We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, "Answer yes or no," about something that he

11682 testified to a long time before, you get a normal response sometimes, "If it is in the book, it is so." There is a concession of the accuracy of the minutes the witness is not disputing. I am just calling your attention to it. That is a matter of application of sound common sense.

Concerning what we know as collateral impeachment, however, we have a narrower rule in one respect. If a witness says no, that ends it. Counsel can cross-examine until Doomsday, but when a witness says no and sticks to it, counsel is not permitted to put any witness on

the stand or to introduce any other evidence to prove that the "no" answer is not correct.

Now, you see there is a sound reason for that. If you allowed the actual trial of collateral points, the jury would get so mixed up it would not know what the case was about. The law has for a long time recognized that and has said, when the witness says no on a collateral matter, that is binding. Both sides must accept it whether they like it or not.

In collateral impeachment we also have al- 11684
leged misdoings and previous criminal convictions of the witness who is testifying. Anything that depends upon his honesty should be considered in determining whether or not he is likely to be telling the truth. You are entitled to know who is being examined and take that into consideration in judging the worth of his testimony.

The only condition under which the witness's "No" may be contradicted is where he denies a criminal conviction, and the only reason that there is an exception there is that the statute
was passed in this state which permits it. It is 11685
the only exception. In cross-examining a witness he is not permitted to be cross-examined as to prior arrests. An arrest is no disgrace. It happens in the best of families. There are a great many arrests which are unjust. It would be quite unfair to cross-examine a man and try to impeach him on that basis, so he must be impeached on crime either on the basis of actual conviction of crime or as admitting the commission of crimes for which he has not been convicted; but if, when he is asked if he committed

a certain crime for which he has not been convicted, he says no, that ends it. That issue cannot be tried.

This is well settled, gentlemen, but it may remove a little puzzle that may be in your minds on account of the frequent wrangling that took place concerning the Court's rulings, wrangling which was entirely out of order and is not tolerated and not usually indulged in in most trials.

But there is always a danger that when a wit-
11687 ness is asked whether or not he did a certain disreputable thing, even though he says no, the jury may have a lurking idea that there was something to it or he would not be asked the question. I charge you to not have that lurking idea. You consider yourselves bound by the "No." You have to, in order to be fair.

The sole reason why a previous conviction of a witness for crime is admissible is as having a bearing upon credibility. This applies likewise to admitted crimes or anything which has a bearing upon the likelihood of a witness's being a truthful man. The jury is entitled to know, is
11688 this a clean, honest man; has he a clean record; is he a good citizen, or is he a criminal; is he a man who has been convicted of crime; is he a man who, although not convicted, has been, by his own admission, guilty of other crimes, of wrongdoing, of grossly immoral acts; is he a man who has had prison contacts while a convict under confinement?

Please consider the interest of witnesses in weighing their testimony. In deciding who tells the truth and to what extent and what are the reasonable inferences from established facts, you have to consult your native intelligence as to

motive for either wilfully false testimony or wilfully false coloration of testimony. This includes the question of self-interest. This is not limited to money interest. It may be interest based upon anything that stimulates a desire to testify one way or the other. It may be based upon gaining immunity from prosecution for crime; it may be based upon relationship, that is, kinship; it may be based upon marriage; it may be based upon friendship; it may be based upon official position. In short, it may be based upon 11690
a witness's interest, whatever it may be. There are such a multitude of things on the subject of interest that the Court leaves this entire question for the jury to determine. You will say whether or not a witness who has testified in the case has an interest, and, having such interest, whether or not he has been actually influenced thereby into giving false testimony and to what extent, or in giving testimony which is at variance with the truth, regardless of extent.

If any witness testifies wilfully falsely on a material point, but not a collateral point, not a 11691
casual point, the jury has a right to throw out the witness's entire testimony as unworthy of belief, but only, as I say, if the testimony is, first, on a material point, and secondly, being on a material point, is wilfully false. Even though on a material point, if the falsification is not wilful, the entire testimony may not be thrown out. Truth is sometimes found in strange places. It is the jury's duty to search for it. Likewise, if the testimony is on an immaterial point, not a determining, but a minor point, then even though it be wilfully false, it does not warrant throwing out the entire testi-

mony of the witness. In such event you will try to sift the wheat from the chaff; you will try to find where, if anywhere, there is truth, and be guided thereby, disregarding the false; so please be guided by that which you find to be true and reject that which you find to be false.

Naturally, people remember some things more than others. We are not superhuman. The mind of the individual does not click with one hundred per cent accuracy. The outstanding
11693 things are those which tend normally to favor our observation and favor recording by the human mind. Nevertheless, in cross-examination, counsel have a right to go into matters of purely collateral observation and recollection, and this is more or less on the basis of memory test.

In weighing the relative importance of accurate memory as directly related to the issue itself, as contrasted with memory of things not related, but only collaterally relevant, please put your brains to work in figuring out how much by way of observation and memory a human
11694 being of normal intelligence should be charged with. If errors of observation and recollection occur in matters which are purely collateral or of comparative insignificance which obviously fall short of being wilful falsification on material points, you are not justified in throwing out the witness's entire testimony as unworthy of belief.

Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark—it might better be characterized as a fool remark—by one of the

witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule, I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule. It must be decided on a basis of reason. I dare say there is not one of us who has not at 11696
some time or other made a foolish break which caused him to lose face due to the ridicule of others; but ridicule, gentlemen of the jury, is a childish trait. This case has to be decided by grown-up, serious men, who will decide it upon an adequate comprehension of the record. Ridicule is an emotional reaction. It works contrary to reason. It is a bad substitute for reason. It is primeval. That is why I say it is childish. It is something that appeals to and activates the immature mind, but does not and should not affect intelligent men whose minds are mature. 11697
Of course, like every other part of the record, that is something to be considered, but do not let it blind you to reason based upon all of the record of the case and all of the work of this trial. A stupid answer like that should not be the turning point. The case is far too serious.

Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it

may take ten weeks to get all of the evidence before a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. You will just disregard it. The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here.
11699 Bear that in mind. Don't be misled by that argument.

There has been considerable confusion in the argument, so far as your receptivities are concerned mentally, on the question of the housing of witnesses. Gentlemen, I charge you the District Attorney does not house those witnesses. The District Attorney has not charge of those witnesses. Those witnesses are in custody under a court order, which the jury may not question, because you don't know the reason why that order was made in each case, and I would
11700 not dare to tell you: I would not be allowed to tell you. Sufficient unto the judgment of the Court which had the facts before it, such orders were made because the Court deemed it to be a case where the witnesses should not be kept in the House of Detention or in prison. I am not permitted to tell you the reasons. They were not guests of any hotel, as alluded to by the summation. Don't fool yourselves on that. They could not come and go; they could not mingle with anybody; they could not go out to take a walk. They were prisoners, held under rigid guard. All of this argument about their having

eaten fare provided by the hotel instead of fare sent up from Raymond Street Jail will be disregarded. They were held prisoners in the hotel, and, of course, they had to get their food in the hotel, in their rooms.

This practice is not novel to this case. This practice is taken from the manner inaugurated in the Dewey investigation in New York. I believe it was Supreme Court Justice McCook who had charge of that. We borrowed that practice and used it over here. In the Court's 11702
judgment it is sound, but I cannot tell you why. All I can tell you is to disregard it. Don't be fooled about all this stuff about beef steaks. In prison, the one who is confined gets his daily recreation, exercises in the corridor, but those who are confined in hotels cannot exercise in the hotel corridor. They are in their rooms twenty-four hours a day, but they have to be kept alive; they have to have exercise. The Court and those who are in authority under the Court and have the custody of these witnesses must provide them with reasonable exercise, and it is no 11703
more a sin to play baseball when held as a witness under a material witness order signed by the Court, than it is for the prisoners in Sing Sing to play baseball. That is in the interests of health and reasonable recreation. It is only in the event that you find, instead of being a hardship, the imprisonment in the hotel was a treat to such an extent that the witnesses were so entranced by it that they were persuaded to alter their testimony or color their testimony by reason thereof, that you will take any stock

in this argument. Otherwise you were simply misled.

Now, gentlemen, I don't like to review testimony in a long record. I don't think it is humanly possible, with this enormous amount of text, for a judge to do this, no matter how fairly he tries to do so, without being accused of trying to color it.

Just as with an anthology, any epitomization of record is terribly personal with the person
11705 who prepares the epitomization. I know it has to be done in some cases. I will do it if counsel for the defense request it. This has been a long trial. Witnesses have been put on in certain order. I don't know how much of the record you remember and how much you don't. A lot of it has been discussed in the summations from the viewpoint of counsel who argued. However, there are certain points of the evidence to which I feel under the necessity of calling your attention, first, because where more than one defendant is tried for a crime and the evidence is different as against the different defendants in its
11706 applicability, there should be some sort of an attempt at segregation by the Court as an aid to you otherwise you might apply evidence against one defendant as against the others, and that would be unfair. That is the purpose of this epitomization. Please do not gain any impression that it is warranted to be perfect. It is simply intended as a fair summary, and, I hope, a substantially accurate one.

Also, I express no opinion as to the believability of any of the witnesses on any of the points mentioned.

Also, this particular summary is not a general one; it is merely a segregation of evidence to keep you from misapplying it as against certain defendants.

The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while 11708
direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it.

Let me say at the outset of this, please scrutinize with suspicion and accept with caution 11709
and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence put in by the other side which tends to contradict or discredit it. Then decide, if you can, is the witness telling the truth now. Put your brains to work on that, because you will need them.

There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out, it is a wise man's delight;

11710 so, while the Court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now? If you are not reasonably satisfied that they are telling the truth now, you may not accept and be guided by their testimony, but if you are reasonably satisfied, having viewed with suspicion and accepted with
11711 caution their testimony, taking into consideration its impeachment, then you will be guided by it.

In segregating the points of evidence applicable to each defendant, we will take first the evidence which may be considered in relation to Buchalter. Gentlemen, this is very brief. It is only touching the surface, just the high spots. You have the testimony of Bernstein as to the alleged arrangements for the actual killing of Rosen. These depend upon the evidentiary value of the other evidence in the case
11712 in order to bring Buchalter in on the killing as a principal, under the provisions of Section 2 of the Penal Law, which I will now read to you again because you must keep this in mind and have a clear recollection of its provisions in order to follow what will come thereafter.

"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

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I am not reviewing the testimony of Bernstein. I don't think I have to, but if it becomes hooked up by other witnesses with Buchalter, then all of the evidence as to the killing becomes applicable to Buchalter. As to this other evidence, in making this connection, we have the testimony by both Rubin and Tannenbaum, who I have charged you are not accomplices, about the alleged conversation between Buchalter and Rubin a few days before Rosen's death.

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If I recall correctly, and, if not, I will be corrected at the proper time and I will reinstruct you, the alleged conversation was supposed to occur between Rubin and Buchalter with Tannenbaum walking in on them, noting Buchalter was excited and noting what he said. Buchalter is alleged to have alluded to Rosen's return to the city after being given money to go away, and saying, in part, that there was one so and so who would not go down to Dewey and talk about him and that this was the end of it.

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You may consider that, if that is true. What did it mean? Now bear in mind, according to my recollection, no hour of the day is stated as to when this alleged act took place, what part of the day it was. It may have come out on cross-examination, but, if so, it slipped my mind. There was evidence there that Rubin asked for another opportunity to straighten it out with a third party and was told that he could try; that he was told by Buchalter to send Berger to him, Buchalter; that he came back and reported his inability to straighten things out through the medium of this third party.

11716 In connection with this, you have Berger's testimony that he received such message from Rubin and that he responded to that message by going to see Buchalter; that Buchalter then took him to see Weiss on the East Side for the purpose of pointing out Rosen to Weiss, and that he did actually go with Weiss to Brooklyn and point out Rosen.

In view of the fact that this was particularly discussed in reference to hour of the day, and it
11717 was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which preceded the pointing out, that that proved that the testimony did not hitch.

Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case
11718 is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.

Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

Apparently, in the argument that was offered, counsel assumed that Buchalter waited until

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after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you 11720
have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled.

At page 1190 of Volume 2 of the record, the witness testified Lepke said to him:

"'I have stood enough of the crap that you 11721
have been handing me. That so and so, that so and so is going around Brownsville and shooting his mouth off that he is going down to Dewey. Well, he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all.'" Then follows the protest: "I said, 'Louis, don't be rash; don't be foolish; don't do something that will get us into trouble. I can straighten it out. He is harmless. Leave him to me.'"

Reply: "'No, I have stood enough.'" Further protest: "'Let me handle it. I will run over to Murray Weinstein. I am sure that Murray Weinstein will do something about it. Give me a chance to straighten the thing out. Don't forget I was in the store in July.' He said to me, 'I don't care where you go. Straighten the guy out.' I ran as fast as I could to Murray Weinstein."

On page 1192: "Q. Did you go back and talk
11723 to Lepke after you had the talk with Weinstein? A. I did.

"Q. Relate that talk to the Court and jury that you had with Lepke after the visit to Weinstein. A. I said to Lepke—I come back from Murray Weinstein and I told Murray Weinstein that—I just don't know how to put it—

"Q. Tell us the best of your recollection what you said to Lepke after you had the talk with Weinstein. A. I told Lepke that I went to Murray Weinstein and asked him to do something for me about Joe Rosen, and that Murray Wein-
11724 stein said he can't do anything.

"Q. Did you say anything to Lepke about an invitation from Weinstein? A. I then told him that Murray Weinstein said I should not worry, that the Local 4 baseball team was playing a baseball game in Vineland, New Jersey, and that he invited me out there to attend the game. The game was to take place Saturday afternoon, which is September 12, 1936.

"Q. After you told Lepke that you could not get Weinstein to do anything, what did Lepke say? A. He said, 'Go ahead to the game.'

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"Q. Do you know a man named Paul Berger? A. I do.

"Q. Is that Paul Berger the one whom you earlier in your testimony described as an intermediary between Lepke and the union? A. He is.

"Q. Was Paul Berger's name mentioned that Friday, September 11, 1936? A. He told me to get Paul Berger and send him up to him right away.

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"Q. Did you go to see Berger? A. I did.

"Q. What did you tell Berger? A. I told him Lepke wants to see him."

Now, gentlemen, in going over the text, those are the only questions and answers that I can find covering that point in the direct. It is possible that I have overlooked something that is in the cross. I will be glad to instruct you on that by a quote if my attention is called it, but, so far as the time element is concerned, you will note there is nothing there to indicate whether or not Buchalter had contacted in preparation, with the Brooklyn end, for the proposed murder before or after Rubin ran in on him and found him in that state and making those declarations, if that testimony be true—and please remember what the Court said to you about that—no speculation.

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You have also the testimony by Rubin that the day after the alleged murder he said to Buchalter, "Now I am in real trouble. I was there in July", and that Buchalter responded, "Brooklyn is all right. You have nothing to worry about."

You have also the testimony by Tannenbaum that a few days after the Rosen murder he saw

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Weiss and Buchalter together; that on that occasion Buchalter asked, "Is everything all right?" and that Weiss replied, "Yes, except as to Strauss, who shot Rosen after he fell on the floor", to which Buchalter responded that it was all right as long as a good job was done and they got away with it.

This, of course, is applicable to both Buchalter and Weiss, but is not applicable to Capone. Bear that in mind. And, as you see, it makes
11729 direct reference, if true, to this specific murder and may, if you see fit, be found to be enough to connect up Buchalter with the actual murder, under Section 2 of the Penal Law.

The evidence as to the later relations between Buchalter and Rubin, concerning Rubin's alleged flight with money supplied and under directions and from time to time alleged comments by Buchalter tending to show the applicability of the flight, are usable only as against Buchalter. They are not applicable as against Weiss and Capone. They are competent both as implied
11730 admissions and under the law as to spoliation of evidence by inducing a witness to flee and hide. This part of the evidence covers a large amount of detail. I trust you will remember it.

Rosen's murder is specifically mentioned in several of the alleged conversations. If true, that hooks it up, if in your judgment it is sufficient for that purpose.

Also in this connection you may consider the testimony by Rubin that his photographs were allegedly removed from his room as a precaution against police search and getting his photograph. I do not recall whether he went so far as to

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say the latter part. Also testimony by Rubin as to a misleading letter written by his wife to the Union on Buchalter's instructions, to the effect that there was a separation between the two. Also the use of false names and the facial disguise, in connection with the alleged instructions.

You may also consider as against Buchalter the alleged conversation during a rain storm, under an awning, in which, Rubin tells you, Buchalter asked his age, and on being told "Forty-eight" remarked, "That is a ripe age." 11732

Berger testifies likewise on many of these details. Rubin's testimony on those may be considered, if the jury sees fit, as corroborative of Berger's testimony, Berger, being an accomplice and Rubin being a non-accomplice.

Now, the actual shooting, or, I should say, alleged shooting of Rubin has not been carried by the evidence as far as Buchalter's door because that alleged shooting was in the fall of 1937, and you will recall Berger's testimony that as early as June of that year Buchalter told him that things were getting too hot and he was going to lam, after which he did not see Buchalter again. 11733

So far as the evidence is concerned, Buchalter drops out of the case as an entity beginning then until the time that he is arrested.

The particular so-called "lamming" has no evidentiary value because it has not been specifically connected with the Rosen murder and may therefore have been, under the rules of evidence, because of the Dewey investigation. You see, he did not say "too hot in Brooklyn";

11734 *The Charge of the Court*

he just said "too hot". Therefore, under the rules of evidence, I must charge you that that particular "lamming has not been connected with the Rosén case and may not be considered as against Buchalter. It is insufficient anyway as evidence of flight. It is merely a declaration of intention.

You may consider as against Buchalter the testimony of Rubin and Maguire and what was allegedly said to Buchalter about the legal infer-
11735 ence of guilt from flight, following the alleged consultation between Maguire and Rubin in which the Brooklyn matter was discussed.

Counsel for one of the defendants asked him whether he found from the facts related in the conversation between himself and Rubin about the Rosen murder that Rubin was in any way hooked up with it. The District Attorney could not have brought that out. That was asked on cross-examination. Maguire said he did not find him to be hooked up.

I was a little surprised that that was asked,
11736 but I charge you that that simply means that, as Rubin's attorney, Maguire expressed his judgment that he was not in effect an accomplice. I charge you that Rubin was not an accomplice under this evidence.

I also charge you that notwithstanding that Maguire gave that testimony under cross-examination, you should not consider it as having evidentiary value. The only reason I am charging you about it is to keep you from being misled by the answer and making a misapplication of the lawyer's alleged advice to a client or his opinion thereon.

You may consider against Buchalter the alleged reply by him to Maguire, "All I know is when there is no witness around there cannot be a case", or words to that effect.

The evidence as to Rubin's alleged flight and hiding is not applicable against either Weiss or Capone because they have not been shown to have had anything to do with it; but the later intended murder of Rubin a year later, if true, is applicable, as I have stated, against Weiss and possibly Capone. 11738

Berger's testimony is also applicable to Buchalter on the alleged events leading up to and causing the Rosen murder. Others who have testified for the People on this point are Rubin, Sylvia Greenspan, nee Rosen, and, very slightly, by Harold Rosen, and also by the decedent's widow. I shall not review this. It covers quite a ramified field, but I charge you as follows:

The testimony by members of the Rosen family as to the financial status of the business is too sketchy to have value as evidence. For that reason it has been stricken out. 11739

So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business apparently, and the grudge relating particularly to Rosen's severance with the business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities.

11740 *The Charge of the Court*

That is enough as motive evidence, if you find these facts to be established to your satisfaction reasonably, but I charge you that motive need not be shown if the case is otherwise sufficient.

When I mentioned Weiss and Capone, please bear strictly in mind what I said at the start, that this is purely a segregation to guide you against misapplication of evidence as against defendants to whom it does not apply. It is not a discussion of evidentiary values; it is not an
11741 expression of belief by the Court as to whether or not you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case. It is strictly and only a segregation.

The testimony of Berger as to the alleged fingering of Rosen to Weiss, following the automobile trip from the East Side, New York, over to Sutter Avenue, is followed by the testimony of Bernstein as to Weiss's alleged active participation both in the preparation for and in the
11742 actual doing of the Rosen murder, also the escape.

You have Berger's testimony that a year later, about September, 1937—this is several months after Buchalter had dropped out of the scene, but after Rubin had returned to the garment district—that he, Berger, met Weiss, and Weiss said that he had information that Rubin was squealing and would "have to be hit", and that Weiss asked Berger to point out Rubin to Schlermer. He says he contacted Schlermer and finally Rubin; that about two months later he met Weiss, who said, "Look how lucky that so

and so is. He was hit in the head but is still alive. We will catch up with him yet." He said that several months after this, Weiss asked him to point out Rubin to Magoon, saying, "The next time the so and so ain't going to be so lucky."

The alleged second fingering, according to this witness, was to both Magoon and Cuppie, but you are told that nothing came out of it because of police activity interfering. I shall not go into these details. They cover a substantial part of 11744 the record.

About May, 1940, according to Berger, there was something in a newspaper about Tannenbaum. He said that he went to Weiss with the paper and talked to him about it, and Weiss said, "It looks like Allie is talking and I will have to duck." You have a right to consider that only as against Weiss and only as having a bearing upon the reason for the alleged flight to Kansas City and Colorado Springs, and only because it states as a reason that this was about Tannenbaum, and Tannenbaum, gentlemen, is a 11745 witness in this case, which is the Rosen case.

The foregoing covers direct evidence which, if true, may be accepted by you as involving Weiss in the preparation and shooting, also in the attempted spoliation of evidence, also in declaration of intended flight; but, as to Bernstein and Berger, they being accomplices, you must see what, if any, other evidence there is from non-accomplices tending to connect Weiss with the commission of the crime. For that reason I have just charged you, in part, about the testimony by Rubin and by Tannenbaum.

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Now, we will go further. Tannenbaum, who is not an accomplice, says that three or four days after the Rosen murder he saw Weiss and Buchalter together. I charge you this a second time because it has an application to a different point. Buchalter asked, "Is everything all right?" Weiss said, "Yes, except as to Strauss, who shot Rosen after he lay on the floor", to which Buchalter responded, "All right, as long as a good job was done and they got away with

11747 it." This, gentlemen, is applicable not only to Buchalter, but Weiss, but not to Capone.

Tannenbaum then said he went to a coffee house with Weiss. There he had a conversation. He told you that Weiss told him that he had just got through with a piece of work himself and that he, Tannenbaum, said in effect, "Yes, I just heard you talking to Louis about it. Who is Rosen?" That Weiss's explanation was that Rosen had threatened to go down and tell Dewey about Louis.

Now we come to Magoon, who is not an ac-

11748 complice in the Rosen murder, and see what application his testimony has to Weiss. He says that he was told by Weiss about the fall of 1938 that Berger would finger Rubin; that this was allegedly in the presence of Capone, Strauss, and Reles. He tells how the alleged fingering was done and how he claims to have tailed Rubin, even to the use of a disguise as a laborer, but that he was frustrated by police activity. He said there were two more meetings with Weiss, Capone, Strauss, and Reles, when they went into a huddle—he used the word "huddle"—as he made his reports and received instructions.

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In one of these Weiss is reported to have said, "Then we will have to whack him and the cop."

Rubin, who is not an accomplice, testified that he was shot through the head in September, 1937, but this may be considered as against Weiss only and then only if found to be sufficiently connected with Weiss's alleged later declaration on this point, provided that declaration was true.

Magoon says that he had seen both Weiss and Capone in Buchalter's Company and had also seen Weiss in Farvel Cohen's company, but I 11750
charge you that these unrelated meetings are not connected up with the Rosen murder. At the most, they go simply to the matter of association of the individuals mentioned.

Federal agents Aman, Bell, and Winne gave the evidence on Weiss's alleged flight and hiding following his alleged declaration to Paul Berger, about May, 1941, "It looks like Allie is talking and I will have to duck." I will not here review the details of that flight to the West and hiding. If you find that it occurred, you may accept it as evidence solely applicable to Weiss, not ap- 11751
plicable to Buchalter and Capone, but applicable to Weiss only, provided that you find it to be motivated either wholly or in part by a desire to flee from arrest in connection with the Rosen murder and not from the Dewey investigation alone.

On that point you have Agent Aman's testimony that Weiss said he "hated to sit between O'Dwyer and Dewey and that O'Dwyer had been in St. Louis trying to make a big shot of himself" about him—twice. Also that Weiss said

11752 *The Charge of the Court*

he "had intended to surrender himself at a later date when O'Dwyer would be out of office."

You may also consider, on the question of why Weiss fled and hid, if that be the case, Tannenbaum's testimony that he had talked to O'Dwyer's men and having thereafter testified before a Brooklyn Grand Jury in the spring of the year when Weiss made his alleged flight. Take that, if true, in connection with Berger's testimony, if true, that about May, when he
11753 showed a newspaper to Weiss, the latter remarked that apparently Allie was talking and he would have to duck.

Now as to Capone and please pay strict attention, gentlemen, on this point; it is quite important. In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone. Most of the evidence against this defendant came from the accom-
11754 plices Berger and Bernstein. Berger testified that when he rode with Weiss to Brooklyn for the purpose of fingering Rosen, Weiss first stopped the car for a few minutes at Sackman and Livonia, where he left the car and walked across the street and there talked to Capone. He did not hear what was said, but Capone and Weiss then re-crossed the street, where Weiss re-entered the car and drove to th place where Rosen was pointed out by the witness, but Capone was left behind. We do not know what was said and cannot speculate as to what

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was said in the alleged interview between Weiss and Capone. It is valuable, if at all, only on the question of contact.

Sol Bernstein went into much detail as to Capone's alleged active participation in the alleged preparation for the murder, including several rehearsals of the escape route and in pointing out the Rosen candy store, saying, "Here is where somebody is going to be killed." Also that Capone was waiting with Bernstein's car the next day following the escape, and in

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the course of the alleged escape, on the other side of the foot-bridge over the Long Island Railroad tracks, and that Capone assisted in the escape, he, Capone, being first seated in Bernstein's car, which was a stolen car, but then getting out and riding in the other car with Cohen, Strauss, and Weiss, after telling Bernstein to take Ferraco in the stolen car.

That is substantially Bernstein's testimony as to Capone, but, as I have told you, both Berger and Bernstein are accomplices as a matter of law and you must look to other evidence in the

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case to see if there is evidence tending to connect Capone with the commission of the crime outside of the evidence of these accomplices.

Now, what is it? It comes down to Magoon. It depends on whether or not you believe that Magoon told the truth when he gave the testimony which I shall now refer to. If you believe he told the truth and you accept it as evidence tending to connect Capone with the commission of the crime, then it will be sufficiently corroborative, according to your finding, and you will then, if you accept the testimony of the

accomplice witnesses in the light of this alleged corroboration, apply it against Capone.

If you do that, you will be entitled to convict, if there is no reasonable doubt in your mind as to Capone's guilt based upon that.

Magoon testified that Capone was in the Weiss group which went into what he calls "huddles" at the corner of Saratoga and Livonia Avenues, when he received instructions in regard to the fingering and tailing of Rubin in the fall of
11759 1938. According to this witness, the group consisted of Weiss, Capone, Strauss, and Reles. He says he met Berger at Ratner's Restaurant following this first huddle, or meeting, I should say, to go with him for the fingering. He says that usually Weiss did the talking, but once it was Strauss, on which occasion Capone took part by saying, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him."

Magoon also testifies that in April, 1939, he went to Capone's residence and stated an objection to working on a matter which he called the
11760 Friedman matter, upon the ground that he himself hung out about a block away from Friedman's place, and that Capone replied, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made."

Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration. You will have to ask yourselves, "Is it true?" Possibly it would be better in view of the great importance of this feature of the case,

if, instead of depending on what I have just said, I use just a few minutes more and refer to the exact text of the record, because this must not be carelessly decided; it must be intelligently decided.

Voume 3, beginning at page 2327, we have this on the examination of Magoon:

"Q. What did the defendant Mendy Weiss say to you in the presence of the defendant Louis Capone, and Strauss and Reles? A. He says, 'Go to Ratner's Restaurant tomorrow 11762
morning and meet Paul Berger and another fellow. He will point out Rubin, Max Rubin, and you tail him and find out all his habits and see if he has a police bodyguard with him.'"

Page 2330:

"Q. What else did Weiss say? A. He says, 'After you find out what is what, come back on the corner and we'll see what we have to do'—not in those words, but to that effect."

Then on page 2337, after Magoon testified to having followed Rubin all the afternoon, and the alleged fingering of Rubin, in which Berger said 11763
in connection with it, "Maybe it is the law."

"Q. All afternoon did the man that you had seen with him on the corner when Berger whispered, 'Maybe it's the law,' or 'It is the law'—whichever he said—did that man remain with Rubin all afternoon? A. Yes, sir."

Further down on page 2338:

"Q. That night whom did you see at the corner? A. Weiss, Capone, Strauss and Reles.

"Q. Was there a talk on the corner between all of you? A. Yes, sir.

"Q. What was said at the corner that night,

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and by whom? A. Weiss spoke to me. He said, 'Tomorrow morning put on old clothes and here is Rabin's home address and go up there and watch his house, see who he comes out of the house with, how he walks over to the subway, who walks with him, and so forth.'

"Q. Now, when he said, 'Here is his address,' did he give you anything? A. Yes, sir.

"Q. What did he give you? A. An address.

"Q. Can you remember what the address was?

11765 A. It was some address on Gunhill Road.

"Q. In the Bronx? A. In the Bronx.

"Q. Was that said by Weiss to you in the presence of Capone? A. In the group.

"The Court: How close? We want to know if he could hear.

"The Witness: A foot away."

At page 2341:

"Q. Was anything else said in connection with what you were to do the next morning up at Gunhill Road? A. Yes, find out all his habits, I would say."

At page 2342:

11766 "The Court: What other clothes did you wear?

"The Witness: I wore overalls, a lumber jacket, old pants, a slouch hat, and he says, 'Use a pipe.'

"Q. Who said 'Use a pipe'? A. Weiss."

Further down:

"Q. And were you told that the night before? A. Yes, sir.

"Q. And was that in the presence of Capone? A. Yes, sir."

At page 2344:

"Q. Did you that evening go to a saloon? A. Yes, sir.

"Q. Do you know where that Saloon was located? A. On Grand Street.

"Q. East Side of Manhattan? A. Yes, sir.

"Q. Do you know the other street? A. I think it was Lewis Street.

"Q. Did you there at that saloon see one of the defendants? A. Yes, sir.

"Q. Which one? A. Weiss. 11768

"Q. Did Weiss ask you a question? A. Yes, sir.

"Q. What did he ask you? A. He said, 'What happened?'

"Q. Did you tell him? A. Yes, sir.

"Q. After you told him what had happened up there in the Bronx, did Weiss say anything else? A. Yes, sir.

"Q. What did he say? A. He says, 'Go back to Brooklyn and see Harry Strauss, and he will give you further instructions.'"

I am reading that, gentlemen, because that connects up and makes applicable to Weiss what- 11769
ever Strauss said.

"Q. Did you go back to Brooklyn that night? A. Yes, sir.

"Q. Did you go to the corner? A. Yes, sir.

"Q. Whom did you see at the corner? A. Strauss, Capone, and Reles."

Further down:

"Q. Tell us who spoke and what was said. A. Strauss spoke and he said, 'What happened up there?'

"Q. Was this in the presence of Capone and Reles? A. Yes.

11770 "Q. Were you all close to one another when you were talking? A. Yes, sir.

"Q. State where you were in proximity to one another. Do you know what that means? A. Yes, sir.

"Q. All right, tell us. A. About arm's length away from one another.

"Q. Continue to tell us what was stated there. A. He asked me, 'What happened up there?' and I explained to him exactly what happened. He

11771 says, 'Well,' he says, 'go up there again tomorrow morning and watch him again and stay around there until about 7:30 and see if he comes out of the house after supper; if he does come out of the house, where he walks to and with whom.'

"Q. At that time did Capone say anything? A. Yes, sir.

"Q. What did he say? A. He says, 'That Rubin is hurting Lep, and we got to hit him in the head and get rid of him.'"

At page 2349:

"Q. What did you tell Weiss? A. I told him

11772 once more that he has a guard with him at all hours, at all hours that I was there; he walks out of the house with the guard and back into the house with the guard; he has the bodyguard with him at all times.

"Q. Had you ever seen Rubin leave the house by himself? A. No, sir.

"Q. And from your observation of him, had he always been with the bodyguard every time that you saw him? A. Yes, sir.

"Q. When you told that to Weiss, that he was always in the company of the cop or the body-

guard, what did Weiss say? A. He said, 'Then we will have to whack him and the cop.'

"Q. After Weiss said about what would have to happen to Rubin and the cop, did you say anything about the incident of the policeman? A. Yes, sir.

"Q. What did you say? A. I explained what happened, that I was stopped up there that morning and questioned off a cop.

"Q. Did you tell them what the cop asked you? A. Yes. 11774

"Q. And did you tell him what you said to the cop? A. Yes, sir.

"Q. How close together were you, Mendy Weiss, Capone, Strauss, and Reles, when this talk went on? A. All in a huddle.

"Q. And were you in a huddle when Weiss said about watching Rubin and the cops? A. Yes, sir.

"Q. And were you in a huddle when you made your report as to what you had seen up in the Bronx in connection with Rubin and the cop? A. Yes, sir. 11775

"Q. Tell us what you said in that huddle to them in relation to your experience with the uniformed police officer that stopped you and questioned you."

That question was revised.

"Q. Tell the Court and jury what you said about that incident. A. I told him that as I was sitting on the curb a police officer walked over to me and he saw me sitting there, and says, 'What are you doing here?' I says, 'I am a plumber and I work upstairs and I am waiting

for my boss.' So he says, 'Well, leave it go for a while, drop it for a while.'

"Q. Who said, 'Leave it go for a while,' then? A. Weiss."

Gentlemen, I think that is the text applicable thereto, unless there was something on cross-examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone
11777 in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses.

If you believe that testimony, and it is for you to say whether you believe it or not, then you may ask yourselves is it sufficient as tending to corroborate Berger and Bernstein. If it is, you may convict. If you do not believe it, or,
11778 believing it, you don't deem it sufficient as tending to connect, you will have to acquit Capone, because if Capone was in a huddle there and was a conspirator in the proposed trailing or tailing of Rubin for the purpose of another attempt at assassination, then that may be used as evidence of guilt on the part of Capone.

But, please do this fairly, honestly, and intelligently.

Now, gentlemen, just a word of caution: Remember that I told you brains shall decide the case. It is hoped that there will be no stubborness creating a closed door of prejudice when

you retire. The jury is presumed to, or at least should, use good judgment in determining what are seeds of truth and to pick them out and check up on the story. See what there is which you believe that tends to connect these defendants with the commission of the alleged crime, from witnesses who are not accomplices, provided the crime itself is made out and provided the proof be beyond a reasonable doubt. I have charged you as to the meaning of that. As reasonable men, you should know it. That is what you have to do. 11780

The Court will read to you a certain section of the law. It is Section 393 of the Code of Criminal Procedure of this State. The Court is not permitted to comment on that statute. The furthest it may go is to read it to you and then keep still about it.

"The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

We are not concerned with the question of the policy of the prosecutor's office. It is an unfortunate thing that in the administration of criminal justice, criminal courts may from time to time deem it necessary to use the testimony of accomplices under either expressed or implied promise, hope, or expectation of reward of some kind by reason thereof. This is a tool used at times in the administration of criminal justice. You can see that there may be cases where a notion of necessity may activate the use of testimony of accomplices. Just what the wisdom or lack of wisdom may be on the part 11781

11782 *The Charge of the Court*

of the prosecuting official in taking the testimony of accomplices is his responsibility. It is not for the Court to judge it; it is not for you to judge it. The prosecutor's office is not on trial. What you have to do is to use your intelligence in determining what, if any, seeds of truth are there. Use them if you find them. See what proof there is. Scrutinize it carefully.

Just a word of caution. Remember what the
11783 Court said about the real purpose, as far as the Court can disclose, of witnesses being housed elsewhere than in the jail. Do not concern yourselves with that unless you find, as I say, that it went to such an extent as to be deemed by the witness not a hard deal but a luxury and therefore persuasive, and as being a sensible reason for actuating false testimony here on the stand against these defendants.

Now, in every-day life you are called upon to decide who tells the truth and to what extent and what are the reasonable inferences
11784 from established facts. You have little difficulty many times in so determining. You have constantly to say who tells the truth and to what extent. Use your native intelligence in so determining in this case. The common sense and judgment you use in every-day life is a fair cross-cut of what is believed to be more than normal intelligence in a jury of twelve selected here. You have to determine that question.

The administration of criminal justice is not pleasant. It is a task. It is a strain on those who are charged with its administration. This trial has been a strain on all of us. It is par-

ticularly a strain on the jury, because the jury has not the opportunity or experience that those who are engaged in that line every day have. It is a responsibility of doing justice and doing it accurately. It is the responsibility of finding the truth and then announcing it, regardless of which way it hits.

If, under the strain of this trial, there has been any evidence of nervousness or strain on the part of counsel or Court, if there have been interchanges which may have shaken the decorum 11786
of the court-room, if there have been arguments and recriminations which may seem unnecessary, please overlook and disregard them in coming to your verdict. This includes the Court. The Court is human. It has to be strict, in accordance with the responsibility of its job, whether it likes to be strict or not, but if I have spoken sharply at any time, just forget it. The Court is trying to be fair. It is trying not to express any opinion or to give any impression as to what its own notion is concerning the guilt or innocence of any of these defendants. It is trying 11787
to see that the case is kept within reasonable bounds, although it has given a great deal of latitude in this trial. It is trying to see that the jury has it fairly and fully presented as a case so that it may properly decide it.

I charge you that the law presumes every defendant innocent unless proven guilty beyond a reasonable doubt, the language of the statute being:

"A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt

whether his guilt is satisfactorily shown, he is entitled to an acquittal."

Gentlemen, a reasonable doubt is not any doubt; it is not a foolish doubt; it must be reasonable. It must be a doubt that is reasonable, existing in the mind of a man who has brains sufficient to be properly applied to the trial and determination of the issue. You have brains. Please apply them soundly, sensibly, and accurately.

11789 If you find that the case has not been proven against the defendants or either one of them beyond a reasonable doubt, return a verdict of not guilty as to such defendant or defendants.

But if you find that guilt has been proven beyond a reasonable doubt as to any or all defendants, you will find such by your verdict.

It will be separate as to each, as instructed. Obviously, it will have to be the same degree as to each, in the event of conviction of more than one, because it is just one crime and can be only one degree. It would be either—that is,

11790 in the event of finding the defendants guilty, or any of them

Guilty of Murder in the First Degree, as to such as are guilty, or

Guilty of Murder in the Second Degree, or

Guilty of Manslaughter in the First Degree, or

Guilty of Manslaughter in the Second Degree, but bear in mind that if the crime was committed, the nature of the conviction, provided the crime was committed by the defendants or any of them, must correspond with the evidence as to how the crime was committed and as to whether or not, in the event of murder being

11791

shown, there was premeditation and deliberation. In the latter event it will be Murder in the First Degree—nothing less.

Now, gentlemen, it is about half past six. I don't want to confuse requests to charge with the charge as just concluded. I am going to have a brief recess before listening to requests, and I think you will be glad to have it.

Please do not discuss the case, because in a little while you are coming back here. I will pass on requests, and after that you will go out and decide the case. First you will get your dinner. The jury may retire.

11792

Mr. Talley: Judge, may I suggest that you take a recess for dinner? You have been charging for three hours, and the requests and exceptions will be a couple of hours. I merely make the suggestion that I think it would work out very much better if we could go out now and get some dinner and come back in an hour. The exceptions and so forth will take a considerable length of time. There are three of us.

The Court: All right.

11793

(To the jury) Do not discuss the case; let nobody talk to you about it. Keep your minds open. Dinner will be provided.

We will reassemble in just one hour, at half past seven.

Defendants are remanded.

(Recess)

11794 *Requests to Charge and Exceptions*

EVENING SESSION

(Trial Resumed)

The Court: I will hear for defendant Buchalter first. May I suggest that you speak slowly and clearly. I will have a better chance to think and follow your requests.

Mr. Climenko: I understand your Honor desires requests first?

11795 The Court: Yes, because the exceptions involve reconsiderations of questions on the record, that may involve discussion.

Mr. Climenko: May it please your Honor, the Court is respectfully requested to instruct the jury that at no time in a criminal cause is it incumbent on a defendant to prove his innocence, but that at all times it is incumbent on the District Attorney by competent proof to prove the guilt of the defendant beyond a reasonable doubt before the jury can convict.

The Court: So charge. That is already charged. I charge it the second time.

11796 Mr. Climenko: I respectfully request your Honor to charge the jury that the burden of proof is always on the prosecution and never shifts to the defendant.

The Court: That is already charged. I charge it the second time.

Mr. Climenko: I respectfully request your Honor to charge the jury that there is no proof in this case that the defendant Buchalter abandoned his defense or failed to call any other witness.

The Court: I so charge. I will put it in this

form: No matter what you may think on the subject, it has no evidentiary value. You will dismiss it from your minds.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the jury may draw no unfavorable inference because of the defendant's failure or neglect to call any particular witness.

The Court: I so charge.

Mr. Climenko: I respectfully request your Honor to instruct the jury that each defendant 11798
is presumed to be innocent and that the presumption of innocence is evidence in his favor and is with him right now.

The Court: Yes, it has probative force and continues until and unless, upon all of the evidence being in, the jury is satisfied beyond a reasonable doubt as to the defendant's guilt. I so charge.

Mr. Climenko: May I respectfully request your Honor to charge the jury that any charge now given, in response to a request, becomes a part of the charge with the same effect as though 11799
originally charged by your Honor in the main charge.

The Court: I so charge; only try to avoid repetition so that the jury can get upstairs; it is so late. May I ask, in the meantime, Mr. Rosenthal—

Mr. Rosenthal: Yes, your Honor.

The Court: Will you look over your written requests and cross out those that you think are sufficiently covered?

Mr. Rosenthal: I am doing that.

Mr. Climenko: I respectfully request your

Honor to instruct the jury that if any juror is satisfied upon his own conscience, from the evidence adduced in the case, that there is a reasonable doubt as to the guilt of the defendants, or any of them, it is that juror's duty to vote for an acquittal unless such doubt is removed by discussion with the other jurors upon the evidence adduced on the trial, and that only, and that the juror should not change his opinion and must vote for the acquittal of the de-
11801 fendant Buchalter, or other defendant so affected, as to whose guilt he believes there is a reasonable doubt.

The Court: That is so, except this, that he does not have to be persuaded. He may change his mind of his own volition.

Mr. Clinenko: That is right.

The Court: He may change his viewpoint. So charge, otherwise.

Mr. Clinenko: I respectfully request the Court to charge the jury that the testimony of an accomplice is not to be weighed or considered
11802 or judged in the same manner as the testimony of other witnesses, but that it is to be viewed with suspicion and subjected to careful scrutiny and caution, and that in weighing the value of the testimony of the accomplice, the juror must consider any inducement held out to him for his testimony.

The Court: I have already so charged. I charge it again.

Mr. Clinenko: I respectfully request your Honor to instruct the jury that the fact that a homicide occurred and that Rosen was the victim in and of itself is not to be considered as

proof or even as the basis of a suspicion that the defendant Buchalter conspired to cause that homicide.

The Court: That is obvious. So charge.

Mr. Clinenko: I respectfully request your Honor to instruct the jury that the physical facts proved in this case do in no wise connect the defendant Buchalter with the commission of the crime and that the jury may not consider the physical facts proved as corroboration of the testimony of any accomplices.

11804

The Court: You mean the physical facts attending the killing?

Mr. Clinenko: That is right, your Honor.

The Court: So charge.

Mr. Clinenko: I respectfully request your Honor to instruct the jury that one accomplice cannot corroborate the testimony of another accomplice.

The Court: I will modify it in this respect: He may not corroborate it, standing alone, to an extent sufficient to entitle the jury to accept the other accomplice's word. The corroboration by outside testimony which tends to connect the 11805
defendant with the commission of the crime must come from a non accomplice, but the testimony of every accomplice witness, other than as aforesaid, may be considered by the jury for what probative value it is worth, but not as sufficiently corroborative to accept another accomplice's testimony.

Mr. Clinenko: I respectfully request your Honor to instruct the jury that in evaluating the credibility of the witness Rubin, the jury may take into consideration his own past admitted criminal activities for which he has gone

unpunished, his hope of reward, his prior perjury, and his criminal evasion of military service in 1917, and his motive and his desire for revenge.

The Court: If I recall correctly, Rubin's criminal activity was as a graft collector, that is, an extortionist in the trade, for some alleged group, with which he has mentioned Buchalter. Now, what was the rest of that? He did not admit participation in any murders or other
11807 crimes that I can recall. The testimony, if I am correctly quoting, is that he waived immunity, so he gained no immunity. What is the next part?

Mr. Climenko: I was referring, if your Honor please, to the fact that he admitted that he had committed perjury in or about 1919, and also his criminal evasion of military service in 1917.

The Court: One thing at a time. What was that perjury in 1919?

Mr. Climenko: At that time, if your Honor please, he knowingly perjured himself in the obtaining of a passport under the name of a
11808 member of his family rather than his own name.

The Court: Yes, I charge you you may consider that for what, if anything, it is worth.

The next was what? Failure to report for the draft. You may consider that for what, if anything, it is worth as having a bearing on credibility.

Mr. Climenko: And his own admission, if your Honor please, that he has never been punished or even arrested for any of the crimes which he admitted, including the extortions which he admitted he participated in.

The Court: That does not mean anything yet. If he is getting immunity from the extortions in consideration of his testimony, you may consider that for what, if anything, it is worth.

Mr. Climenko: Well, specifically, if your Honor please, I respectfully request your Honor to charge the jury that he did gain immunity by virtue of the testimony he gave in that case.

The Court: Would you mind telling me in what respect?

Mr. Climenko: He gave testimony in that case, such as the proof in this record, your Honor, by reference to the other record. 11810

The Court: What case is that?

Mr. Climenko: The flour extortion case in New York.

The Court: I don't recall the evidence on that point.

Mr. Climenko: Well, if your Honor please, he was asked whether he had not testified against Buchalter in a prior case. He said that he had, and he said that he testified in that case.

The Court: That does not apply to this case. Decline to so charge. 11811

Mr. Climenko: Exception.

I respectfully request your Honor to charge the jury that if the jury believe that the witness Rubin fled from the Dewey investigation in the Borough of Manhattan, then his flight or the fact that he had been induced to flee by the defendant Buchalter cannot be considered as evidence against the defendant Buchalter as a consciousness of his guilt in the Rosen case, and on that point they must consider his statement to Assistant District Attorney McCarthy

on December 10, 1937, to the effect that he fled, but not on account of the Rosen case.

The Court: I charge the jury in this form, and I have already charged it. There is evidence here on which the jury can find that one of the causes, at least, was the Brooklyn case, the Rosen case. There is evidence there that the jurors' attention has been called to. On the second point of that request, he did not testify before McCarthy at all. He was not under oath. I decline to so charge.

11813 Mr. Climenko: I respectfully except, your Honor.

The Court: That is not perjury. That is a contradiction, and he has explained it. He says he had been shot once through the head because of testifying before the Dewey Grand Jury, and he was afraid to give McCarthy any information about the Rosen case for that reason.

Mr. Climenko: I respectfully except to your Honor's observation, and I now respectfully request your Honor—

11814 The Court: I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before McCarthy. If it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction and evasion, admittedly so before McCarthy, really amount to anything at all. He was under no obligation to give any evidence—it was not evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory.

Mr. Climenko: I now respectfully request your Honor to instruct the jury that, by the

concession of the District Attorney, in the trial of this case no point was made about the fact that that statement made by Rubin in the presence of Assistant District Attorneys Hogan and McCarthy was not signed or was not sworn to, and I respectfully request your Honor to instruct the jury that it is for them to decide whether Rubin then spoke the truth when he made that statement, and that, in deciding his credibility at that time they may consider the fact that he was then under triple police guard and that 11816
the statement was made in December, 1937, after the Grand Jury testimony which he said he gave in August, 1937.

The Court: I do not know whether he was under triple police guard or not, but he says he was afraid to tell McCarthy what he claims was the truth and what he claims he is telling here is the truth. It is up to your common sense to decide if it is worth anything by way of contradiction or impeachment. Otherwise I decline to charge as requested.

Mr. Climenko: Exception.

I respectfully request your Honor to charge 11817
the jury that in this connection they must consider the testimony of Rubin himself that the authorities of Brooklyn, both the police and the District Attorney, never looked for him, and the further fact that he and his counsel—

The Court: Never what?

Mr. Climenko: Searched for him, sought him.

The Court: He does not know whether they did or not.

Mr. Climenko: No, if your Honor pleases, as I understand the record he said they did not, neither the police nor the District Attorney.

11818

The Court: Pay no attention to that. He does not know what the police do behind his back. He is not the Police Commissioner. I decline to so charge.

Mr. Climenko: Exception. I respectfully request your Honor to instruct the jury in that connection that, as to that, they may take into consideration the further fact that Rubin and his counsel concluded that Rubin had not done anything in the Rosen case for which he had reason to flee.

11819

The Court: I charged the jury on that point for a particular reason. I wanted them to avoid confusion that would arise if I charged them in the form you request.

Mr. Climenko: I respectfully except.

The Court: He did not say that at all. He could not say what was in Rubin's mind by way of fear of being apprehended and falsely accused. The most that the attorney could advise him, and that is as far as this goes, is that upon the statement of facts made by Rubin to the lawyer that Rubin was not responsible for

11820

the Rosen murder, he should not flee because that would be evidence of guilt; the best thing he could do would be to go back to the garment district and resume his old occupation and forget it. I am not saying that that is in the evidence, but I think that request is so confusing I have to clarify the situation because I saw what counsel was driving at when that point came up in the course of the trial, and I anticipated just this thing. I decline to charge other than I just have charged on that point.

Mr. Climenko: Exception. I respectfully re-

quest your Honor to instruct the jury that if the jury entertain a doubt as to which jurisdiction Rubin fled from, either the Dewey investigation or the Brooklyn investigation, then and in that event they must completely disregard Rubin's testimony with respect to flight.

The Court: I decline to charge in that form. I will charge in this form:

Gentlemen, there is evidence that I called your attention to and there is evidence which you remember which, if true, directly connects 11822
flight with the alleged Rosen murder fear and also on instigation from Buchalter because of the Rosen murder. If there was another cause, that does not lessen it. It is enough if the Rosen murder was one cause, and only in event that you are not satisfied beyond a reasonable doubt that the Rosen murder and fear in connection therewith and instructions in connection therewith from Buchalter were in part connected with the flight, may you disregard that evidence.

Mr. Climenko: I respectfully except to your Honor's comment. I respectfully request your 11823
Honor to instruct the jury that in determining the reason which prompted Rubin to flee, it must consider his testimony and that of the witness Maguire that when Rubin voluntarily surrendered in August of 1937, he surrendered to the District Attorney's office in Manhattan and he was never surrendered to the Brooklyn District Attorney's office.

The Court: I decline to so charge.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury on that same subject of the flight of Rubin that the jury may consider his own tes-

timony as to when he fled and as to why he fled, as given in the flour case in New York.

The Court: A little more slowly and clearly.

Mr. Climenko: I respectfully request your Honor to instruct the jury that in considering the question of Rubin's flight the jury may consider Rubin's testimony as to why he fled, as he gave that testimony in the flour case and which testimony he admitted in this case.

The Court: They may weigh that for what,
11825 if anything, it is worth on the question of impeachment only.

Mr. Climenko: I respectfully request your Honor to instruct the jury that if the jury believe the witnesses Rubin and Sylvia Greenspun in so far as their testimony relates to a meeting alleged to have been held in the summer of 1932, on 17th or 19th Street in Manhattan, and that on that occasion the defendant Buchalter used or attempted intimidation by threats against Rosen to force him from business, then Buchalter's act on that occasion constituted a violation of Sec-
11826 tion 530 of the Penal Law, which was a misdemeanor, and it was outlawed by the Statute of Limitations after two years, and therefore the defendant Buchalter could not be prosecuted for this crime after the summer of 1934 and that he could not have been prosecuted for it by the Special Assistant to the District Attorney of New York County, Thomas E. Dewey, for the reason that Mr. Dewey did not become such Special Assistant District Attorney until sometime in July, 1935.

The Court: I decline to so charge.

Mr. Climenko: I respectfully except.

11827

I respectfully request your Honor to instruct the jury that evidence of mere association of the defendant Buchalter with alleged co-defendants, at a time before or after the commission of the crime, is not sufficient proof on which to predicate a verdict of guilty.

The Court: I so charge.

Mr. Climenko: On that same subject, may I respectfully request your Honor to read to the jury Section 530 of the Penal Law with respect to the one before the next preceding request?

11828

The Court: Declined.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the proof tendered against the defendant Buchalter is largely circumstantial and that if the jury find that such circumstantial proof is consistent with innocence, it must acquit the defendant Buchalter; and that if the proof is susceptible of more than one inference, the jury must draw that inference which is most favorable to the defendant Buchalter and that the jury may find that defendant guilty only of the circumstances are such as to exclude by a moral certainty every hypothesis except that of guilt.

11829

The Court: I will charge it in this form: that any evidence by way of circumstance must, in order to be applicable, point only to guilt. A person may do something which may have an innocent interpretation and may have a guilty interpretation. You may not be able to decide as to which interpretation applies, so I charge you, when the alleged circumstance is capable of interpretation on either a hypothesis of in-

11830 *Requests to Charge and Exceptions*

nocence or guilt, that the defendant is entitled to the benefit of the hypothesis of innocence.

Mr. Climenko: I respectfully except.

I respectfully ask your Honor to instruct the jury that mere association by the defendant Buchalter with alleged co-conspirators is not proof in any degree that the defendant entered into a conspiracy to commit the crime charged.

The Court: No, you cannot base a case on association alone. That is only just a part of
11831 a case. It just stands on its own bottom. It is evidence of association, that is all, to be applied in connection with other evidence as the common-sense requirements of the case indicate.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the character of the defendant Buchalter's associates and the reputation of the defendant Buchalter are not issues in this case and that his association with persons of good or bad character is not proof in any degree that he committed any crime.

The Court: I so charge.

Mr. Climenko: I respectfully request your
11832 Honor to charge the jury that the statement of the witness Magoon, even if believed, to the effect that the defendant Capone said, "We got to hit Rubin because he is hurting Lep," is in no way binding on the defendant Buchalter and the jury must completely disregard it as to him.

The Court: I have already so charged. I charge it again.

Mr. Climenko: I respectfully request your Honor to instruct the jury that evidence corroborating the testimony of an accomplice must tend to connect the defendant with the commission of the crime charged and not merely con-

nect the defendant as an associate or an acquaintance of the person said to have committed the crime.

The Court: That is ordinary common sense. I so charge. If you convicted everybody of crime who happens to meet a confessed criminal, there would be very few people out of jail.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the failure of the District Attorney to call any representative of the Dewey office or of the Police Department 11834
to show the surveillance by those authorities of the defendant Buchalter on September 11, 1936, that there has been such a failure in this case, and that they may infer from that failure to call such witnesses that if they were called those persons would have given testimony favorable to the defendant Buchalter.

The Court: Oh, no. There is nothing to indicate that such witnesses should reasonably have been called. Declined.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the jury believe that Rubin 11835
told the truth to Assistant District Attorney McCarthy, it must acquit the defendant Buchalter.

The Court: Obviously, gentlemen, if you don't accept Rubin's testimony that he shied off on McCarthy because he had been shot and was afraid, if you really believe his answers to McCarthy, his statements to McCarthy, that impeaches his testimony. I won't charge you that you can go so far as to acquit. That only goes to his credibility. Unless counsel calls my at-

tention to a specific part and lets me read it, I will have to let this specific charge stand just as it is.

Mr. Climenko: Your Honor, I do respectfully call your attention—

The Court: If you have the exhibit, pass it over and point out—

Mr. Climenko: We do not have the exhibit, but we do have the testimony.

The Court: What page?

11837 Mr. Climenko: Beginning at page 2282.

The Court: All I have in my notes is, in December he was questioned by McCarthy of Mr. Geoghan's staff but failed to disclose that he had been in flight and hiding because of the Rosen murder and failed to disclose any of Lepke's alleged connections with that crime. In these and in other ways the statement is inconsistent with his testimony here. He explains these inconsistencies by stating that they were due to fear because of having been shot following his secret testimony before the Dewey Grand Jury. Refer me to the page.

11838 Mr. Climenko: Page 2290 in the testimony of November 14th.

The Court: What question and answer?

Mr. Climenko: The first question from the top of the page, your Honor.

The Court: "Q. Is it not a fact that in that statement you, on the other hand, went out of your way to give assurance to the Assistant District Attorney then that if you could implicate Lepke you would? A. Where did you get that inference from?"

Mr. Climenko: The question is finally answered at the bottom of the page.

The Court: "A. I did."

I think "out of your way" is improper in form. What is the request in connection with that? All I can see in that is an attempted concealment, which is quite consistent with his explanation of fear.

Mr. Climenko: I except to that, if your Honor please.

The Court: I am trying to figure out how I am justified in charging as you request. Will you repeat that?

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Mr. Climenko: I will repeat the request which I have submitted to your Honor, that if the jury believe that Rubin told the truth to Assistant District Attorney McCarthy, it must acquit the defendant Buchalter.

The Court: No, I decline to so charge.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that in determining the truth of Rubin's story they must consider the date when Berger was arrested, which was June 5, 1941, and the date of Tannenbaum's arrest.

The Court: I don't understand it, frankly. 11841

Mr. Climenko: May I explain it to your Honor?

The Court: Yes.

Mr. Climenko: Rubin said that he told the truth in March, 1940, to a police official by the name of McDermott and to Judge O'Dwyer. Berger was available at all times until the date of his arrest, but that did not happen until June 5, 1941. Tannenbaum was not questioned about this case.

The Court: No, no, I decline to so charge. That is quite out of place.

11842 *Requests to Charge and Exceptions*

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the jury believe that there is one or a single reasonable doubt arising out of the evidence as to the guilt of the defendant Buchalter, they must resolve that doubt in favor of the defendant Buchalter and acquit him.

The Court: I have already charged thoroughly on reasonable doubt. I don't see why I should keep on repeating.

11843 Mr. Climenko: I respectfully except.

Mr. Cuff: I have a few requests to make on behalf of the defendant Weiss. I ask your Honor to instruct the jury that the testimony of the People's witness Berger, cannot be considered as corroborating the testimony of the accomplice Bernstein.

The Court: That comes under the charge and also the request heretofore made. It may not be sufficiently corroborative. It is not sufficiently corroborative, standing by itself, to permit conviction. Both of them have to be sufficiently corroborated under the accomplice statute by one or

11844 more non-accomplice witnesses. One is enough, if you consider that sufficient, and the corroboration is required to go only to the extent that it tends to connect that defendant with the commission of the crime. It does not have to go into each and every detail. Otherwise denied.

Mr. Cuff: I respectfully except to your Honor's refusal to charge as requested and to the comment and charge as qualified by the Court.

I respectfully ask your Honor to instruct the jury that if, upon the considering the testimony of People's witness Bernstein, they have a rea-

sonable doubt as to its truth, they must acquit the defendants.

The Court: That is too broad. He testified on many points. It all depends. If you have a reasonable doubt as to whether any of it is true, then you must acquit. Obviously, if you have a reasonable doubt as to whether any of it whatever is true, you have to throw it all out.

Mr. Cuff: May I respectfully except to your Honor's denial of the charge in the language requested and to the qualification made by your Honor? 11846

The Court: Yes.

Mr. Cuff: I ask your Honor to instruct the jury that if, upon considering carefully the testimony of People's witness Tannenbaum, they have a reasonable doubt as to its truth, they must acquit the defendant Weiss.

The Court: Not the truth of any one part. If they have a reasonable doubt as to the truth of all of it. If you distrust all of it, sensibly throw it all out.

Mr. Cuff: May I respectfully except to your Honor's refusal to charge in the language requested and to the qualification of the charge as made. 11847

I ask your Honor to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi.

The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:

First, no defendant is obliged to prove an alibi, but when he undertakes to prove it, it is up to the jury to decide whether or not it is true. Obviously, if the alibi is true, then he was not where it is claimed he was but, if the alibi is untrue, it does not amount to anything. You are the judges of the facts and will say whether it is true or untrue. The evidence on that point runs into quite a large part of the record.

11849 Mr. Cuff: May I respectfully except to the charge which your Honor has just made and to the refusal to charge in the language requested. May I also ask your Honor to instruct the jury that if the proof as to the alibi, taken in connection with all the other proof, raises a reasonable doubt as to the defendant's presence at the place of the crime, the jury must acquit the defendant Weiss.

The Court: You mean even if the alibi is not believed? If the alibi is believed, you don't have to go any further. If you believe the alibi, you don't have to go any further, gentlemen;

11850 just throw out Weiss, let him go; but if you don't believe the alibi, that is a different story. I decline to charge in that form.

Mr. Cuff: May I except to your Honor's refusal to charge as requested and to the qualification of the charge as made?

The Court: Yes.

Mr. Cuff: I ask your Honor to charge the jury that an alibi need not be established beyond a reasonable doubt, but that, when established to the satisfaction of the jury, it is as conclusive a defense as can possibly be interposed.

The Court: That is right, if it is true, if the witnesses told the truth. I so charge.

Mr. Cuff: I respectfully except to your Honor's refusal to charge in the language requested and to the comment and qualification made by your Honor.

I ask your Honor to instruct the jury that in passing upon the credibility of any witness they may take into consideration all the crimes which the witness admitted that he has committed, whether he was ever arrested or convicted for them or not. 11852

The Court: I have already so charged on that point, but I will charge it again.

Mr. Cuff: I ask your Honor to instruct the jury that the accomplices who have testified for the prosecution here, in connection with the testimony of the accomplices here, that the jury has the right to infer that they are incriminating the defendant or defendants in the hope of reward or consideration to be extended or that has already been extended to them.

The Court: That is already covered by the charge, but I will charge it again. 11853

When you get right down to the fine point, the question is whether or not, notwithstanding hope, promise, or payment of reward, they told the truth.

Mr. Cuff: May I respectfully except to your Honor's refusal to charge in the language requested and to the qualification of the charge as made.

The Court: Yes.

Mr. Cuff: I think that is all.

11854 *Requests to Charge and Exceptions*

Mr. Talley: May I add just one or two requests?

The Court: Yes, Judge.

Mr. Talley: I ask your Honor to charge the jury that any denial of motions made by the Court, any rulings by the Court denying motions made by counsel for the defense, is not to be taken by the jury as carrying any inference of your Honor's belief as to the guilt or innocence of these defendants, or any of them.

11855 The Court: Gentlemen, that is so. When the Judge denies the motion to dismiss, all he passes upon is this: whether or not there is evidence to present to the jury which, if found true by the jury, will justify the jury to bring in a verdict of guilty.

Mr. Talley: I ask your Honor to charge that your reference to certain portions of the testimony is not to be regarded by them as a stressing on your part of one part as against any other part of the record.

The Court: I so charge. I tried to make that
11856 clear because if there is any one thing I am sensitive about in this trial it is to have my position understood as being fair. To that extent, at times, I even leaned backwards in my treatment of the Assistant District Attorney, rather than appear to show favoritism.

Mr. Talley: I ask your Honor to charge that with respect to Rubin, Tannenbaum, and Magoon that you leave to them the determination of whether they are accomplices or not, leave to the jury the determination as a matter of fact as to whether they are accomplices or not.

The Court: I decline. There is no evidence on which to submit that.

Mr. Talley: I except to your Honor's refusal to charge in the language requested.

The Court: You cannot decide any case on guesswork, and that applies to both sides.

Mr. Talley: I except to your Honor's comment in response to my request. Reserve the exceptions until after.

The Court: Have you checked those off, Mr. Rosenthal?

11858

Mr. Rosenthal: Yes, I did, your Honor.

The Court: How about No. 1?

Mr. Rosenthal: May I first make this statement, so that we can abbreviate it as much as possible? So many requests as your Honor has denied and exception taken by other counsel, may I have an exception to them? That will avoid the necessity of repeating the particular items which I may have incorporated in the requests which I handed up to your Honor.

The Court: Yes. Just tell me the first one you wish me to charge.

11859

Mr. Rosenthal: As to No. 1, so that the jury may clearly understand the request which your Honor grants or says, "I so charge," that is merely to inform the jury that that is just as much a part of the law in this case as though your Honor had charged it in your original statement to this jury.

The Court: I so charge.

Mr. Rosenthal: No. 2 is out. It has been charged, but there was one thing that I omitted, thinking that your Honor would charge it. I know as soon as I state this to your Honor, you

will, to inform the jury that an indictment—usually your Honor does state that in your charge, but in this particular charge you have not—has no meaning or probative value and must be dismissed from the minds of the jury in considering the guilt or innocence of any of the defendants.

The Court: I charge that an indictment is merely an accusation and is not evidence. It has no probative value.

11861 Mr. Rosenthal: 3 is out, has been sufficiently charged.

4 has been sufficiently charged.

5—shall I read it, Judge?

The Court: Do you want me to charge it?

Mr. Rosenthal: Yes, your Honor.

The Court: Gentlemen, I charge that no presumption of law arises from the failure of a defendant to take the witness stand, nor can you draw any unfavorable inference because of such fact, and in determining the guilt or innocence of the defendant you are precluded from in any wise discussing or considering on the question of

11862 his innocence or guilt the failure on his part so to do.

Mr. Rosenthal: And will your Honor charge 6?

The Court: I charge that at no time in a criminal case is it incumbent upon the defendant to prove his innocence, but that at all times it is incumbent upon the District Attorney, by competent proof, to prove the guilt of the defendant beyond a reasonable doubt before the jury can convict.

Mr. Rosenthal: 7 has been charged.

11863

The Court: That is withdrawn?

Mr. Rosenthal: That is withdrawn. 8 has been requested by other counsel, and I except to your modification, unless your Honor desires to charge—

The Court: You are covered by your exception. I will just mark this "withdrawn".

Mr. Rosenthal: 9 has been covered by your Honor's charge.

Your Honor has partially covered 10, but I would like your Honor to charge in the language which I requested.

11864

The Court: Well, there are just a few words I do not agree with, the words "in such a way as may be."

Gentlemen, I charge you that the corroboration of the testimony of an accomplice becomes sufficient only if it tends to connect the defendant with the commission of the crime reasonably to satisfy the jury that the accomplices are telling the truth.

Mr. Rosenthal: May I except to the modification?

11865

11 I think is covered by your Honor's statement, so I withdraw that.

I ask your Honor to charge 12.

The Court: I will read that because I have a different ruling. It reads, "I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them."

The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.

Mr. Rosenthal: May I respectfully except?

The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.

11867 Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.

The Court: I find that it is not. I find it is all guesswork.

Mr. Rosenthal: Then I respectfully except.

The Court: The jury is not permitted to guess.

Mr. Rosenthal: May I respectfully except.

The Court: You go by evidence, not by guess-
11868 work. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.

Mr. Rosenthal: I don't want to enter into any discussion with your Honor, excepting that I have a different view and it is too late and I don't want to enter into a discussion as to the fact. I merely except.

The Court: That would be sloppy police work, to permit discussion.

Mr. Rosenthal: I could answer, but I don't want to reopen the case. May I ask that 13 be charged, on the burden of proof, which your Honor has not charged in your original charge.

The Court: I charge it so many times—

Mr. Rosenthal: But not in this case.

The Court: I charge it so many times I am ashamed to look at it again, but I will charge it again, even if it is No. 13.

I charge that in all criminal cases, including the case at bar, the burden of proof always remains the same and rests upon the prosecution. A defendant may be convicted only if the evidence, in accordance with the law laid down by this Court, satisfies the jury beyond a reasonable doubt of the defendant's guilt. 11870

Mr. Rosenthal: On the question of 14, that applies to the defendant Capone. I would ask that your Honor charge it.

The Court: You read the request.

Mr. Rosenthal: All right. I ask your Honor to charge the jury that if, after considering the evidence, they find it is susceptible of two constructions, one indicating the defendant Capone's guilt and the other his innocence, they must give the defendant Capone the benefit of the construction most favorable to him and must acquit him, and if the jury find that the two constructions are evenly balanced, then The People have not met the burden imposed upon them and the jury must acquit the defendant Capone. 11871

The Court: I take it, gentlemen, this goes to the question as to whether the language which is alleged by Magoon to have been used by Capone is susceptible of interpretation on the hypothesis of innocence. I have taken great care

11872 of Capone's end of the case because of the difference between the corroborative evidence as to him and as to the others. It is so limited in record content, I even went to the extent of quoting verbatim from the record, so there would be no mistake about it. You know the text. Of course, if you think that that is capable of interpretation on the hypothesis of innocence, why, follow that and acquit him. If you think it hooks him up and it is not capable of in-

11873 terpretation on the hypothesis of innocence, and you believe Magoon in that testimony, then you have a right to consider whether or not it corroborates sufficiently to tend to connect Capone with the commission of the crime, the details of which, as against Capone, were testified to by Bernstein and by Berger, which go into considerable detail. Of course, if this alleged corroborative testimony is found to be true and so tends, you are entitled to convict. Otherwise acquit.

Mr. Rosenthal: May I respectfully except to the modification.

11874 The Court: It is not a question of how many pages of record: it is a question of how many ramifications it goes into. It is a question of what it is worth. You are the judges of that.

Mr. Rosenthal: In line with that, may I ask your Honor to charge No. 15 in the language I request, that reasonable doubt is that state of mind that you cannot say that you have an absolute conviction to a moral certainty of the truth of the accusation against the accused.

The Court: That reads to me like an obiter dictum. Can you quote the authority for that language?

Mr. Rosenthal: Right now, no, but it is followed by the Court of Appeals at almost every case that you want to read, without restriction, and also by—

The Court: That is only the language of the judge; it is not the language of the judge that counts, but what the decision holds.

Mr. Rosenthal: That is true, but if you take—

The Court: Different people express things in different ways. There have been millions of sermons preached on the same Biblical text by different preachers, all in different forms. No two are exactly alike. 11876

Mr. Rosenthal: That is true.

The Court: I cannot adopt the language. I decline to charge in that particular language.

Mr. Rosenthal: I respectfully except.

The Court: I can see something there that I differ with, with due respect to whoever wrote it. If you will only refer me to the authority, I will read it and then charge it. If you have a case—

Mr. Rosenthal: That was the reason why I handed this to your Honor beforehand, because if I thought there was any doubt, I would have had the authority. 11877

The Court: I think it is up to you not to hook me that way. I think it is up to you to be frank. If the Court of Appeals, where you appear so often, says that every time, please show me a case, and I will read it right now.

Mr. Rosenthal: I will do that when the jury retires.

The Court: Do it now. I have the authorities within a minute.

Mr. Rosenthal: I am not going to attempt to quote a page or a particular case.

The Court: The judge is not required to charge in the language of opinion, so held by the Court of Appeals.

Mr. Rosenthal: May I respectfully except, so that we can get ahead, sir.

No. 18: I ask your Honor to charge the jury that where a person testifies before a Grand Jury without executing a waiver of immunity,
11879 he gains immunity for all crimes and matter inquired into from him.

The Court: I think that request is incomplete in form. He gains immunity for all matters concerning which he is examined before the Grand Jury, but not matters inquired into from him in the District Attorney's office or before any other official.

Mr. Rosenthal: My request was only confined to what he testifies before the Grand Jury.

The Court: I thought that is what you meant, but it does not say so.

11880 Mr. Rosenthal: That is what I intended, but I accept your Honor's qualification of the statement.

The Court: I qualify it in accordance with your concession.

Mr. Rosenthal: That is right, so we both agree on it.

I ask your Honor to charge 19, that mere association, suspicious circumstance, or even opportunity to commit crime, are not of themselves sufficient ground upon which to base criminal responsibility.

The Court: That is true, but the crux of that request is "not of themselves". So charge.

Mr. Rosenthal: I ask your Honor to charge 20, that the jury, in weighing the credibility or probative value of the testimony of any witness, may take into consideration so much of that witness's testimony, either before the Grand Jury or on any prior trial in which they may have testified, as those witnesses were confronted with on this trial and which is deemed a part of the evidence in this case.

The Court: Only in so far as, in the other trial or at the hearing before the Grand Jury, 11882
questions were asked which called for those answers and, in that event, the answers given were contradictory of or otherwise at variance with testimony given at this trial. To that extent it is charged.

Mr. Rosenthal: On 21, Judge, I ask your Honor to charge the jury that mere association or acquaintanceship of the defendant with any of the accomplices in and of itself is not proof of guilt of the defendant on this charge.

The Court: That is so charged, but the crux of that is this part: "in and of itself."

11883

Mr. Rosenthal: I except to the modification of the request.

The Court: Gentlemen, don't misunderstand this: I don't say that in every case mere association or acquaintanceship of the defendant with any of the accomplices is proof of guilt. It may or it may not be. It all depends on the common sense application: it all depends on the specific case.

Mr. Rosenthal: 22. I ask your Honor to charge the jury that corroborative evidence must be evidence from an independent source of some

material fact tending to show that the defendant was implicated in the crime. Therefore, corroborative evidence is insufficient if it tends only to establish the credibility of the accomplice.

The Court: I so charge.

Mr. Rosenthal: 38. I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Solomon Bernstein, if they disbelieve the testimony of Seymour Ma-

11885 goon, they must acquit.

The Court: I have already charged that and, as the jury knows, I have gone particularly into that point. It is all up to the testimony of Seymour Magoon. Do you believe it? If you do believe it, it is one thing; if you do not believe it, it is another.

Mr. Rosenthal: May I have the converse of it in the next request?

I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Seymour Magoon, if they disbelieve the testimony of Solo-

11886 mon Bernstein, in so far as it affects the defendant Capone, they must acquit.

The Court: I so charge. That is obvious. Wait a minute. I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made." I think that is too indefinite. I will charge that unless they believe the testimony of

Bernstein connecting Capone, that Capone must be acquitted.

Mr. Rosenthal: There are just a few more. In line with that, may I ask your Honor to read 395 of the Code of Criminal Procedure in so far as it affects the weight of an admission allegedly made by a defendant?

The Court: Yes. I know it by heart, but I will read it.

Mr. Rosenthal: I know your Honor knows it by heart. 11888

The Court: I charged it a thousand times, so much so that I have forgotten the number of the section.

Mr. Rosenthal: 395. That is all I remember, is the number.

The Court: "A confession of a defendant, whether in the course of judicial proceeding or to a private person, can be given in evidence against him"—I will omit what directly follows because it is not in this case—

Mr. Rosenthal: That is correct, sir.

The Court: —"but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed." You note it does not say "committed by him". Committed by anybody, it means. If you get a confession that is sufficiently explicit, you do not need anything more, providing the crime is proved. 11889

Mr. Rosenthal: May I ask your Honor to charge these two last? First, before that, I will jump to 44 and leave out 43.

I ask your Honor to charge the jury that in determining what weight, if any, they will give to the witness Magoon's testimony, they have a right to take into consideration not only his pre-

vious convictions but the admissions which he made upon the witness stand of participation in or commission of other crimes, including murder, and if, after taking such convictions and admissions into consideration, they believe that such witness is incapable of or has failed to testify truthfully in this case, they have a right to disregard his entire testimony or so much thereof as they believe to be untrue.

The Court: I so charge.

11891 Mr. Rosenthal: I do not know whether your Honor wants me to read these. Those are questions of law which I contend apply to the defendant in this case.

The Court: Which are they?

Mr. Rosenthal: 40, 41, and 42. I don't want to read them in the presence of the jury. If you are going to deny them, I will merely take my exception.

The Court: 40, I had this penciled notation: There is also testimony of Magoon as to Capone being involved in preparation for intended assassination of Rubin.

11892 Mr. Rosenthal: I intend to except to that. I don't want—with your Honor's permission—

The Court: The way you frame this, if you want to read it, go ahead and read it.

Mr. Rosenthal: 40. I ask your Honor to charge the jury that the only alleged corroboration of the accomplice Solomon Bernstein's testimony in so far as the defendant Capone is concerned, is the alleged oral statement made by the defendant Capone to Seymour Magoon in the year 1939, at the home of the defendant, in which the defendant is alleged to have stated, "I worked on the Rosen thing right on Sutter Ave-

nue, and I was not made. I hung around there too. What are you worrying about being made?"

The Court: Denied.

Mr. Rosenthal: Respectfully except.

I ask your Honor to charge the jury, in so far as the alleged statement which I have just read is concerned, that the jury has no right to speculate, surmise, or add to such alleged statement, but if they believe same must determine that in their opinion it is sufficient independent evidence tending to connect the defendant Capone with the crime charged, or they must acquit. 11894

The Court: I will have to think about that one. Now you are getting into a deep question of law.

Mr. Rosenthal: That is why I said to your Honor I did not want to read it out loud.

The Court: I will so charge, that the alleged preparation, if it occurred, in which Capone is alleged to have participated, for the second attempted assassination of Rubin, is of value only in connection with and in event of the declaration previously alleged to have been made by Capone being truthfully testified to by Magoon. 11895

Mr. Rosenthal: Thank you very much.

That is all, sir.

Mr. Turkus: Judge, there are just two corrections of testimony. Your Honor said that the letter to the Union was sent by Rubin's wife. Page 1275 of the record shows the letter was sent by Rubin himself, not his wife.

The Court: I correct it in that respect. Reasonable latitude for human error goes right through the trial of every case and applies to everybody. Nobody is infallible.

Mr. Rosenthal: Judge, may I correct a couple

of statements which I think you made by oversight?

Mr. Turkus: There is another one I have.

The Court: The furthest I can go is, nothing intentional was misstated. The jury must be guided by its own recollection.

Mr. Turkus: At the foot of 544, your Honor stated that when Capone was on the other side of the railroad bridge at Junius Street with a car, that that was a stolen car. That is not the
11897 testimony.

The Court: I was mistaken about that. I was confused. It was Bernstein's car but I was under the impression when I charged it that it was the stolen car. The stolen car had been abandoned. I was so fatigued when I charged it that my mind was slowing up.

Mr. Rosenthal: There was another thing, Judge. I think it was an oversight. When you were charging the jury originally you made reference to the fact that as to the defendant Capone there were statements of two non-accomplice witnesses. Of course, you correct
11898 that now by stating to the jury that it is the testimony of Magoon, but I thought it was an error at that time.

The Court: It all depends on the testimony of Magoon.

Mr. Rosenthal: I thought in fairness I ought to tell your Honor so that you could correct it.

The Court: Pardon me. I charged as to what Berger had testified to. I charged what Bernstein had testified to. Then I crossed up to Magoon, looked over to Magoon's testimony for the corroboration of those two.

Mr. Rosenthal: But you made an error, and I

wanted to correct your Honor. You said two non-accomplices. You probably meant the one, Magoon.

The Court: Yes, that was a slip of the tongue, purely. It is a wonder to me, with all the names that have been brought into this case, that the human mind is able to keep track of them separately.

Mr. Rosenthal: Your Honor also said Magoon said he saw Capone in Buchalter's company.

The Court: In Rubin's company. 11900

Mr. Rosenthal: I am only telling you.

The Court: Will you repeat that again?

Mr. Rosenthal: Your Honor, in addressing the jury, said Magoon said he saw Capone in Buchalter's company. I am only doing this to correct you. There is no such evidence.

Mr. Turkus: That was the wrong name.

The Court: That should be Rubin.

Mr. Rosenthal: I say this in order that your Honor may correct it.

The Court: That is just stenographic error in my notes.

I suggest this: When it comes to the discussion of exceptions, I wish to go conscientiously 11901
into exceptions with a view to revision, where necessary. I want to be perfectly free to discuss questions of evidence without the hearing of the jury, and my mind will operate better if I do that, but in sending the jury out during the taking of exceptions, I am letting a court officer stay in the room with the jury to see that the Court's instruction not to discuss the case until they are brought back, is followed, not that I distrust the jury but that I want a record in the case that cannot be questioned or raised on this case.

Mr. Talley: If your Honor please, I object to the dismissal of the jury while exceptions to your Honor's charge are being presented by counsel.

The Court: Overruled.

Mr. Talley: I ask that the jury be allowed to remain here while we are taking our exceptions to your Honor's charge.

The Court: Overruled.

Mr. Talley: Exception.

The Court (to the jury): Go out in the custody
11903 of the court officer, and I will bring you back as soon as possible.

(The jury retired from the court-room.)

Mr. Climenko: Your Honor may I state seriatim my exceptions?

The Court: Yes, slowly, because I want to follow.

Mr. Climenko: On behalf of the defendant Buchalter we respectfully except to so much of your Honor's charge—and I am now referring to the matter almost at the outset of the charge—in
11904 which your Honor said in substance—

The Court: Will you pardon me just a minute, if I may interrupt?

Mr. Climenko: Surely.

The Court: There is one point in the charge that there must have been something about that was wrong, because all of a sudden counsel all started to confer with one another. Can you point that out now and let us get that correct?

Mr. Climenko: I am not confident that I have that exact wording.

Mr. Turkus: We thought it was "dilemma".

You say, "When rogues fall out it is the wise man's delight."

Mr. Rosenthal: "When rogues fall out it becomes the wise man's delight" is what some counsel said they heard, and I thought you said "dilemma", and therefore the discussion between counsel. We did not know what your Honor said.

Mr. Climenko: There was no discussion; we just asked each other.

The Court: Suppose we pass it up and let your exception be there for what it is worth.

11906

Mr. Climenko: We except first to so much of your Honor's charge in which your Honor said, in substance, that there is another way to correct the Judge, if that is necessary. I assume, your Honor, you do not want me to assign the reasons for these exceptions?

The Court: No, I do not.

Mr. Climenko: Then I will go right ahead and state them.

The Court: Yes.

Mr. Climenko: We except to so much of your Honor's charge in which your Honor said, in substance, to the jury: "I am charging you on the degrees"—referring to the degrees of homicide—"because the law says that I must. Don't compromise."

11907

We except to so much of your Honor's charge in which your Honor said that it was in the discretion of the Court to keep the jury out in order to avoid a disagreement, even though the jury might think that it ought not be required to stay out for so long a time.

We except respectfully to so much of your Honor's charge in which your Honor, in referring to the probative value of Rubin's testimony as to

his own flight, made some explanation on that point to the jury without explaining to the jury the need for showing the identity of one who might have induced flight or as to whether there was a connection with the flight and this case.

We respectfully except to so much of your Honor's charge as is devoted to the question of reasonable doubt, and I now refer to that portion of your Honor's charge in which, as I understood it, your Honor set up an objective standard of
11909 sanity and reasonableness as being the definition for a reasonable doubt.

We respectfully except to so much of your Honor's charge as dealt with the abstract question of corroboration and that portion thereof which dealt with and gave to the jury, as I understood it, merely a series of negative definitions. I make this reference to it, your Honor, only so that it may be identified.

The Court: Yes. Go ahead.

Mr. Climenko: We except respectfully to so much of your Honor's charge in which your
11910 Honor instructed the jury, without further identifying or commenting on the character of the witness Tannenbaum, that it might believe Tannenbaum without corroboration if it saw fit.

The Court: Pardon me. May I inquire something right here?

Mr. Climenko: Yes, sir.

The Court: Didn't I make a blanket charge covering all witnesses on that point? Yes, I did, distinctly.

Mr. Climenko: At some point your Honor did.

The Court: Yes, I did, and that covers a multitude of sins. Go ahead.

11911

Mr. Climenko: We respectfully except to so much of the Court's charge on the question of spoliation in which the Court stated to the jury that spoliation was an act of destruction of evidence and was tantamount to an admission that the truth would have been unfavorable, and to so much of your Honor's charge as said, with respect to the topic of spoliation, that the jury might believe that the witness Rubin may have fled because he feared that he might be framed, and to the definition generally of spoliation as given by the Court's charge.

11912

The Court: I think you misunderstood what I was driving at.

Mr. Climenko: That may be, your Honor.

The Court: Because what I said was distinctly in your favor. I was pointing out that there may be a reason to flee which is entirely consistent with the flight, which has no relation to guilt or innocence.

Mr. Climenko: I had another construction on it, Judge, which I thought was possible, and that is the reason for the exception.

11913

The Court: I read from the highest text that we have on the subject, but personally, I don't agree with the extent to which the text goes as to probative force. I think it is over-written and, in fairness to defendants, that the jury should be allowed more liberality or indulgence towards the defense on the question of flight and spoliation. I gave the defendants the benefit of that construction.

Mr. Climenko: I noted this exception, if I may say so respectfully, because I did not think as the

language of the charge was cast it conveyed that thought to the jury.

The Court: There has been too much said in legal text that is copied from Biblical text, where Solomon said, "The wicked flee where no man pursueth." The converse is not so, that the wicked flee because they are wicked. You can flee for any number of other reasons. The real motivation of flight is fear. It is for the jury to find out what the fear is and whether or not it
11915 carries a consciousness of guilt. It all depends on the circumstances. I would hate to be convicted because I ran away from something. Boys in the old days lit bonfires and ran from the police, or played baseball and ran away from the police. They were not feeling a bit guilty. They thought they were a hundred per cent right, but they ran because they did not want to be hit with the thong of the night-stick across the calf of the legs. There are lots of reasons for flight.

Mr. Climenko: We respectfully except to so much of your Honor's charge in which your Honor said, in substance, perhaps more or less in
11916 these words, that it is an unholy thing to put on a witness the burden of remembering what he testified to in a trial long ago, and in which the Court substantially, by its charge, approved the repeated answer of some witness called by The People in the words "If it is in the book, it is so," and in which the Court, in this same connection, said that it was obviously necessary for counsel to obtain the minutes of the day's proceedings in order to fortify the memory of those professional gentlemen.

The Court: It has been necessary for me, while listening to these requests, to refresh my memory

from the text, and that has not involved the necessity of remembering the specific language of the text.

Mr. Climenko: Well, it was only the connection of those thoughts.

The Court: The careful man carries a memorandum book, does not trust to memory.

Mr. Climenko: I was excepting, not to your Honor's present comment, but to the instruction given to the jury.

The Court: Purely philosophical. 11918

Mr. Climenko: We respectfully except to that portion of the Court's charge in which the Court stated, in substance, to the jury that the failure of a witness called in this trial to say something before the Grand Jury in the past which he had testified to here, was to be disregarded by this jury because that past failure was meaningless and that therefore the jury should disregard any argument founded by counsel on that circumstance.

The Court: You understand I am not called upon to argue the accuracy of what was stated in your exceptions. 11919

Mr. Climenko: That is right, your Honor.

The Court: I concede no accuracy.

Mr. Climenko: I am merely trying to identify. And in view of your Honor's last comment, generally, we respectfully except to your Honor's statements with respect to the housing of People's witnesses and your Honor's comment on that subject.

The Court: I could not possibly tell the jury the real reason, but the danger of assassination is the reason, as is well known. There would

be no trial here had those witnesses been kept in the jail. So far as Bronx County Jail is concerned, that is a Bronx County matter, not subject to order here, and that is a thoroughly modern jail. There is no comparison between that and the Raymond Street Jail or the old Tombs where these witnesses had to be kept had they not been housed in hotels. An experience in another case shows it would be utter folly to send any material witness to Queens County
11921 Jail because of what happened in the Maione-Abbandando case, involving the bribery of the lone jailer at night.

Mr. Climenko: We except to so much of the Court's charge as said, in effect, "When rogues fall out it is a wise man's delight."

The Court: Do you want me to particularly withdraw that? Do you think it did any harm? I will be glad to withdraw it.

Mr. Climenko: I certainly don't want to be put in a position to ask your Honor to recall the jury for that purpose, but I don't know. It
11922 is one of those things which was unintelligible to me.

The Court: It is just one of those things that do not amount to anything.

Mr. Climenko: I do not know what was intended by it.

The Court: No harm done.

Mr. Climenko: If that is the only matter on which your Honor is disposed to rule—

The Court: I withdraw it.

Mr. Climenko: —I do not want to be placed in the position of asking the Court—

The Court: I withdraw it because, on second

consideration, the word "rogues" might be considered as referring to the defendants on trial. That was not the intention of the quotation. It was general in its application. It has no specific application to these defendants.

Mr. Climenko: We respectfully except to the Court's charge in so far as the Court, in the charge, read for three times the provisions of Section 2 of the Penal Law.

We respectfully except to the form and the content and the emphasis in the Court's reference 11924
to the epitomization of the facts as the Court said it was giving such epitomization to the jury in the charge.

We respectfully except to so much of the Court's charge as contained a disparagement of the argument of counsel for the defense in his summation with respect to a point of discrepancy in time as between the narratives of two witnesses called by The People.

We respectfully except to so much of your Honor's charge in which your Honor said, in substance, that there was no evidence in this 11925
case as to the time when the defendant Buchalter asked to have the preparatory work done. That is the only one on which I want to make any reference, your Honor.

The Court: Do you know of any part of the record that shows what the time was?

Mr. Climenko: I go beyond that, your Honor.

The Court: Can you refer to the page?

Mr. Barshay: Immediately after lunch.

The Court: Can you refer to the page of the record? I will be glad to go into that.

Mr. Climenko: I wanted to bring another mat-

ter to your Honor's attention with respect to that same matter. There is an assumption implicit in that statement to the jury that there was an earlier communication between the defendant Buchalter and somebody else about preparatory work, and I know of none in this record.

The Court: I tried to make clear they could not speculate on that. They cannot assume there was none. That is the difference.

11927 Mr. Climenko: I take exception to that portion of the charge because under it the jury is asked to speculate that there was one

The Court: Counsellor, the whole argument of counsel—I think it was Mr. Rosenthal's argument, wasn't it?

Mr. Climenko: I think it was argument tendered by all summations.

The Court: Whoever did it, the whole argument was based upon an alleged presumption that there was no communication. There is no such presumption. Go ahead.

11928 Mr. Climenko: At page 1483 the time is fixed as one o'clock. That is in the cross-examination of the witness Rubin.

The Court: I am glad you called my attention to that.

Mr. Climenko: May I add another reference, your Honor, on the same subject?

The Court: Yes.

Mr. Climenko: We also take exception in this connection to that portion of your Honor's charge in which your Honor said, in substance, that counsel assumed that Buchalter waited until after the fingering, referring apparently to

the so-called preparatory work, and in which your Honor said in substance that the jury may assume that he gave such orders with respect to preparatory work.

The Court: They cannot assume one way or the other. The case is blind on that point. I will straighten that out.

Mr. Climenko: And your Honor also said the jury has the right to reconcile the testimony of Berger and Rubin and Bernstein as to time. All of that about reconciling the testimony of those 11930
witnesses as to time was immediately preceded, as I recall your Honor's charge, by these suggestions, that the jury might assume, in spite of argument of counsel, that Buchalter did some preliminary act, and I represent to your Honor on my recollection of this record that there is no such thing here.

The Court: Take your exception. I will straighten it out.

Mr. Climenko: Thank you. Shall I proceed, your Honor?

The Court: Yes.

Mr. Climenko: We respectfully except to so 11931
much of the Court's charge as included a reading of pages 1190 and 1192 of the testimony to the jury and in that connection we respectfully except to the Court's failure to remind the jury of the contradiction by the witness Rubin in his statements to Assistant District Attorney McCarthy on December 16, 1937, in the presence of then Assistant District Attorney Hogan, and also the failure of the Court to refer, in connection with that reading, to Rubin's apparent failure to mention Berger until June, 1941.

We respectfully except to so much of the

Court's charge as referred to the alleged meeting between Buchalter and Weiss after the murder.

We respectfully except to so much of the charge as stated, without qualification, that the proof about Rubin's flight was admissible as against Buchalter and that it was competent as an implied admission and was admissible also under the law of spoliation.

The Court: Did I say "implied admission"?

11933 Mr. Climenko: That is my note, your Honor. The words that I copied were that your Honor said it was competent as an implied admission.

The Court: Go ahead.

Mr. Climenko: We respectfully except to the form of the charge in so far as it gave an example of the binding effect of certain testimony, upon the ground that in the giving of that example there was set forth before the jury by the charge only those facts which were apparently incriminatory of the defendant Buchalter.

The Court: I do not recall what it was. That is all right. Go ahead.

11934 Mr. Climenko: We respectfully except to the Court's remarks about the cross-examination of the witness Maguire.

The Court: The cross-examination of what?

Mr. Climenko: Cross-examination of the witness Maguire.

The Court: The only reason I mentioned it was because of the twist that was sought to be given, the twist of misconstruction. I want to straighten that out. It has no probative value whatever against the defendants, but it certainly does not discredit.

Mr. Barshay: Except that it was asked with a specific view in mind—

The Court: It was just one of those little things that lawyers do in the trial of cases, with which I am quite familiar. Suppose we go on to the next exception.

Mr. Climenko: We respectfully except to the instruction that the jury might hold against the defendant Buchalter his statement, "When witnesses disappear, investigations collapse," in connection with the testimony of flight of the 11936
witness Rubin.

We respectfully except to the Court's statement as to what might constitute a motive for the defendant Buchalter; and we except also to the Court's statement that as to the defendant Buchalter motive need not be shown.

We respectfully except to the method incorporated in the charge of showing specific items of evidence as binding only on specific defendants, because the effect of the method used was to specify every incriminating item of evidence seriatim against all the defendants.

We respectfully except to that portion of the 11937
recital of testimony, to the repetition of an alleged conversation between the defendant Buchalter and the defendant Weiss.

We respectfully except generally to the Court's charge in its entirety as being preponderantly devoted to a consideration of those matters and circumstances which might justify a conviction.

We respectfully except to that portion of the Court's charge which in effect reviewed matters incriminatory against the defendant by reason of the failure in that review to make any reference to matters elicited on cross-examination.

11938

Mr. Barshay: Is there any use in going back to that issue of the talk between Rubin and O'Dwyer?

The Court: I think you brought it on yourself. The trick was tried and it did not work out. I do not think any Appellate Court, in event of conviction, understanding that trick, will give you any advantage of it

Mr. Barshay: That is the exception. It was planned to show flight from Dewey and not from Brooklyn, and it was not a trick.

11939

The Court: Counsel, I know the way it is done.

Mr. Barshay: May I have the exception?

The Court: It is done among the best of lawyers.

Mr. Barshay: Except the jury, from the comment of the Court, may get a wrong view.

The Court: I saw to it the jury did not get the misconstruction.

Mr. Talley: On behalf of defendant Weiss, I except to so much of your Honor's charge as charged the jury as a matter of law that neither

11940

Rubin, Tannenbaum, nor Magoon was an accomplice.

I except to so much of your Honor's charge as, in substance and effect, advised the jury about the housing of witnesses in hotels and the recital of the Court as to what they can do or cannot do under those circumstances, as not being evidence in this case.

I except to so much of your Honor's charge as informed the jury that you did not dare tell the jury why witnesses of this type were put in hotels.

11941

The Court: Judge, I will be glad to modify that, the word "dare." That means lest it be erroneous. That is the meaning of the application of the word "dare."

Mr. Talley: I doubt very much if the jury took that interpretation of it.

The Court: If you think the jury may interpret that as meaning something terrible, that would mean a sort of a calamity to somebody, I will be glad to correct it.

Mr. Talley: I think that is what they understood. I except to that.

11942

The Court: I will try to straighten that out. I am not sure I used the word "dare." I am taking your word for it.

Mr. Talley: That is the word you used.

I except to so much of your Honor's charge as advised the jury not to take stock in the argument of defense counsel that witnesses in hotels who are kept in the manner indicated in testimony, might change or alter their testimony.

I except to so much of your Honor's charge as charged that the cross-examination is simply for the purpose of breaking down the testimony given on direct, and your failure to advise the jury that the real purpose of cross-examination is to ascertain the truth.

11943

The Court: I always understood, when I was practicing law, that the purpose of cross-examination was to try to win my case.

Mr. Talley: I am quoting, as far as possible, your Honor's language. I say it was an erroneous instruction as to the purpose of cross-examination and highly prejudicial to the defendants in this case.

11944 I except to your Honor's reading of the record as extensively as your Honor did on the ground that in its effect it was an argument by the Court.

The Court: You mean on Capone?

Mr. Talley: No, on the three defendants, the reading of the record, portions of the record that you gave, under the statement that you were doing it merely for the purpose of advising them as to the segregation of the testimony as

11945 to one against the others.

The Court: The only place where I read from the record was an extract on page 1190

Mr. Talley: Oh, no, sir.

The Court: The rest, if I recall correctly, all had to do with Capone. You may have formed the impression I read from the record, but I did not, that I can recall.

Mr. Talley: You were quoting the record and gave the pages from which you were reading, as counsel understood it.

The Court: That was under Capone.

11946 Mr. Talley: No, sir, that was on defendant Weiss.

The Court: All right, let it go at that.

Mr. Talley: It applied to all of them. I will give you the pages your Honor said you read from.

The Court: All right. I was just a little puzzled. I do not want to get into an argument about it.

Mr. Talley: Shall I note the pages of my exception?

The Court: No, don't bother. It is too late.

Mr. Talley: I will just begin again, so that I get my exceptions straight.

The Court: You go ahead with the exceptions. I am sorry to interrupt.

Mr. Talley: I except to your Honor's reading of the record and citing the various pages from which you read, on the ground that it was, in fact, an argument by this Court and was intended by the Court to answer certain contentions of defendants' counsel and was highly prejudicial to the defendants and highly favorable to the contention of the prosecution in this 11948
case.

The Court: I recall now, in regard to Capone, in order to assure that there would be no confusion and that the paucity of evidence of corroborative nature against Capone would be correctly understood, I did read from the record at different pages a number of questions and answers with which Weiss was connected, but that was not in my charge in which the specific segregation as to Weiss was referred to.

Mr. Talley: I submit that had nothing to do 11949
with Weiss.

The Court: No harm done anyway; I had a right to, but you take an exception.

Mr. Talley: That is all. I want the record to note my exception.

The Court: I was a little puzzled.

Mr. Talley: I want the record to note my exception to your Honor's reading in the manner that you did.

The Court: Yes.

Mr. Talley: I except to so much of your Honor's charge as indicated to the jury that

11950 certain testimony which you read specifically from pages 2341, 2342, and 2344 was followed by the comment that that testimony connected the defendant Weiss—"connects up" was the language the Court used—the defendant Weiss, no matter what Strauss said, as indicated in those pages.

I except to so much of your Honor's charge as indicated to the jury, in substance, the fact that evidence as to the attempted murder, to
11951 use your Honor's language, of Rubin is applicable to the defendant Weiss.

I think that covers my exceptions and I join in the exceptions already presented by counsel for defendant Buchalter.

The Court: Yes.

Mr. Talley: I also join now in the exceptions to be noted by the counsel for the defendant Capone.

The Court: Yes.

Mr. Barshay: Will the Court allow us to join in Judge Talley's exceptions already taken and Mr. Rosenthal's, which will be taken?
11952

The Court: Yes.

Mr. Rosenthal: I won't repeat any of the exceptions that have been taken by other counsel who preceded me.

I except to your Honor's definition of the meaning of a special jury and the purpose for which it is called. I think that you should advise them that once they have been called, irrespective of their intellect, that they then become the same as any ordinary jurymen, so that they don't get a sense of exaggerated ego about their actions.

I except to your Honor's charging the law of

conspiracy, in so far as it affects the defendant Capone, in the manner in which you did, upon the ground that there is no competent evidence to show that the defendant Capone entered into any conspiracy.

I except to your Honor's statement—and I think it may have been an error on your part, and that is why I am calling it to your attention—in referring to the question of the Rubin episode your Honor stated in effect that in respect to the Rubin shooting, and then I quote, "That 11954
would come down to Weiss or Capone." The evidence here, even though I except to that portion in which you even leave that to the jury, is in respect to an episode which is supposed to have followed the Rubin shooting and has nothing to do with the Rubin shooting.

Mr. Turkus: "Attempted." Your Honor said, "shooting" and should have said "attempted."

The Court: Do you remember that?

Mr. Turkus: Yes. That was the shooting that did not—

Mr. Rosenthal: You are not summing up 11955
here.

Mr. Turkus: We want to keep the record straight.

Mr. Rosenthal: I am making it straight.

Mr. Turkus: All right.

Mr. Rosenthal: I except to your Honor's charge on the law of spoliation and your Honor's statement of the construction of such law in so far as it applies to any evidence.

I except to the Court's explanation of the value of questioning in respect to evidence given

on a former trial and its meaning, as an invasion of the jury's province.

In this, I think your Honor was addressing yourself to me. I respectfully except to your Honor's characterization of the summation of counsel and your statement regarding wrangling at that particular time and then your wording, "Much has been said about a fool remark of a witness," and then regarding mockery, ridicule, childish trait, stupid answer, and so forth. That,
11957 I imagine, is an invasion of the jury's province, since it is up to them to determine whether or not a man who persists in the statement that he never told anything but a little white lie is not telling them a major lie which would warrant their disregarding his entire testimony and not a point for interpretation by the Court; so I respectfully except.

Then, again, your Honor's interpretation in your charge regarding the failure or non-failure of a witness to state things before a Grand Jury which had been stated here and your explanation
11958 as to the fact of the small amount of time necessary to be consumed in the Grand Jury room as analogous to the great amount of time which is spent in the court.

I also except to your Honor's invasion of the jury's province in interpreting for the jury the question as to whether or not an arrangement had been made at the, what you call, Brooklyn end prior to the time when the conversation was allegedly had between the defendant Buchalter and Rubin.

Then a statement which your Honor made in which you said that you were leaving to the

jury the question of this attempted murder as applicable against Weiss and possibly against Capone. By virtue of your Honor's own statement, the matter should not have been left to the jury if there was a question in your Honor's mind as to its applicability to the defendant Capone.

Mr. Turkus: I think that was a bad choice of a word.

The Court: I would have to instruct the jury on that. I will withdraw the word "possibly," 11960
although I don't know why you object to it. It was simply a poor choice of diction.

Mr. Turkus: That is all.

Mr. Rosenthal: I have honestly stated to your Honor these things. It is not a question of objection. It is a question of apprising your Honor of any error in the choice of words, so that I may—

The Court: Go ahead. It is late. It is ten o'clock.

Mr. Rosenthal: I am going to finish right now, sir. In line with my objection throughout 11961
the trial, I except to your Honor's reference, in quoting the alleged conversation between Magoon and the defendant Capone, to the so-called Friedman matter. I have objected to that throughout the trial. We had that long dispute about its admissibility into the evidence, and to preserve that same objection, I except to your Honor's reference to the Friedman matter.

Mr. Turkus: I don't think your Honor referred to the Friedman matter in the charge.

Mr. Rosenthal: You did, and I am excepting to that portion.

11962 I except to the charge in which your Honor states that all defendants must be found guilty of the same degree. That question is before the Court of Appeals, and I am now excepting to it for what it is worth.

That is all

The Court: Bring back the jury.

May I ask this: Supposing the jury should, before the Court will accept an announcement of disagreement as to one defendant, be ready with
11963 a verdict as to one or two of the others, what shall I do?

Mr. Talley: I think the proper procedure, if I might suggest, would be to have whatever verdict is rendered, rendered together.

The Court: Do you know of any law on the subject?

Mr. Talley: I don't know; it is simply my practice, that is all. That is the custom, to have the jury render the verdict together and not render it in part. I am just instinctively against rendering verdicts in part.

The Court: It may be a moot question if not
11964 decided heretofore, and I am trying to get what another person's reaction would be.

Mr. Talley: My reaction would be it would be highly improper.

The Court: That is only a conclusion. Suppose a jury comes in here to render a verdict and the foreman stands up and says, "We agree on so and so," mentioning the first, then gives a verdict: "We find as to so and so," mentioning him by name, and then gives the verdict: "As to so and so we don't agree": hasn't the Court a right to say that the verdict is accepted

as rendered as to the two but sends back for reconsideration as to the third?

Mr. Talley: I would not think it would be the best practice.

The Court: That is as far as you will go, it would not be the best practice. Logically, it seems proper to me, but never mind, bring the jury back; they want to get to work.

(The jury returned to the court-room.)

11966

The Court: Gentlemen, I will give you these few corrections, and then you may go to work.

At one place during the charge I quoted an old saw, "When rogues fal. out, wise men delight." That was intended o have general application. It was not intended as calling the defendants names, but, lest it be misunderstood as having specific application to the defendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it.

I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the 11967 record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: "Sometime about one o'clock, I imagine, in the afternoon."

My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brook-

lyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I
11969 will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will hold and will not be error—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails. I am not
11970 afraid of that charge. There is an exception to all of the defendants on this modification.

My attention has been called to the use of the words "implied admission of guilt as inferable from Buchalter's alleged procurement of Rubin's flight." The law is so finely cut on the point of inference of guilt from flight, or evidence, I should say, of guilt from flight, that I think these two words are unsafe, and I withdraw them: I withdraw "implied admission," and leave to you the rest of the charge in connection with spoliation of evidence which I read from opinions in the United States Supreme Court

and in the Court of Appeals of the State of New York. We will let it go at that. I do not think I have to review it. I think you remember what I read in that respect.

On Weiss, my attention is called to the fact I used the word "dare" in connection with "I would not dare to state to you the reason the Court had for housing witnesses in hotels." The word "dare" was not intended to mean that I was afraid, or that there was anything about it of such an appalling nature that you should 11972
feel it was something that would make you shudder if it was revealed. The word "dare" means that, under the rules of evidence, if I dared to tell you that, I believe it would be regarded or might be regarded by an appellate tribunal, in the contingent event of this case having to come up for review, as reversible error. To avoid that, I withdraw the word "dare."

In reference to Capone, in discussing his connection with the plan or scheme apparently started for the purpose of attempting a second assassination of Rubin, I used the words or expression, "the Rubin shooting." That would 11973
appear to make my remarks refer to Capone having a connection with the shooting of Rubin through the head. Capone's connection, according to the record, if true, applies only to what happened several months later, that is, sometime after he had been shot and came out, when it is alleged that Magoon went on the job, as you recall, with a view to making another attempt that would be more successful. That is what that referred to, and I trust that this straightens the record out.

Is that satisfactory, Counsel?

Mr. Talley: I have no comment to make, sir. I stand on my exceptions.

The Court: Gentlemen, the law requires that when the case is submitted for decision and the jurors go out to deliberate, the Court shall discharge the alternate jurors, so the alternate jurors have a "Good night" from the Court with thanks for their generous service.

(The alternates withdrew from the jury box.)

The Court: How about the exhibits. The exhibits cannot go to the jury room unless both sides agree.

11975

Mr. Turkus: So stipulated.

Mr. Talley: We have no objection as far as the defendant Weiss is concerned to the exhibits being sent for by the jury as the jury require. If they want any of them or want any of the record read—

Mr. Climenko: If they want them, of course, we will be glad to have them have them.

The Court: The reason for that ruling is sometimes they do not come back and sometimes they are mutilated. I have even known them to be torn up for ballot slips. Exhibits are sacred, and if they are brought to the jury room they must be accounted for with accuracy.

11976

Mr. Talley: Is it our understanding that the clerk retains possession of them and will send them in if requested?

The Court: Is it agreeable to all counsel?

Defendants' Counsel: Yes.

The Court: (to the jury) You may retire, gentlemen.

(At 10:15 p. m. the jury retired to deliberate.)

11977

Mr. Climenko: I would like to say for the record that we stand on our prior exceptions.

The Court: Of course you do.

Mr. Climenko: And I do want to note an exception to your Honor's additional reference to an appellate tribunal.

The Court: The defendants are remanded.

11978

(At 2:40 a. m. the jury returned to the courtroom and, through their foreman, rendered the following verdict:)

"We find the defendant Buchalter guilty, the defendant Weiss guilty, and the defendant Capone guilty."

The Court: Of what?

The Foreman: Of murder in the first degree in each case.

Mr. Barshay: With your Honor's permission, may we poll the jury?

The Court: Yes.

11979

(The Clerk asked each juror if that was his verdict, and each juror answered affirmatively.)

Mr. Barshay: May we reserve motions, your Honor, until the day of sentence?

The Court: Yes.

Mr. Barshay: On behalf of all defendants.

The Court: I think you had better make your motions now.

Mr. Talley: This is Sunday morning.

The Court: Yes, you are right. I am glad you called my attention to it. It would not be legal.

11980 *Motion on Behalf of Defendant Buchalter to Set Aside Verdict*

(The pedigree of each defendant was taken by the Clerk.)

Mr. Rosenthal: I do not think your Honor is permitted to take pedigrees.

The Court: Well, if not permitted, we will take them over again later on.

Sentence on Tuesday, December 2, 1941.

Defendants remanded.

11981 ———

Brooklyn, N. Y., December 2, 1941.

(Defendants arraigned for sentence.)

(Louis Buchalter arraigned.)

Mr. Barshay: In behalf of the defendant Buchalter I move to set aside the verdict on the ground that it is contrary to law, contrary to the evidence, cont ary to the weight of evidence, and on all the grounds set forth in Section 465 of the Code of Criminal Procedure. On the further
11982 ground that the Court erred in the rejection and admission of testimony during the trial. Upon the further ground that the Court erred in its charge. Upon all the exceptions taken during the trial. On the further ground that this Court did not duly acquire jurisdiction of the defendant Buchalter.

The Court: Motion denied.

Mr. Barshay: Exception.

The Clerk: Louis Buchalter, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

Motion on Behalf of Defendant Weiss to Set Aside Verdict 11983

Mr. Barshay: Nothing to say.

The Court: Louis Buchalter, you are hereby sentenced to the punishment of death, and that within ten days from this date, subject to any legal impediments that may be in the way, naturally, the Sheriff of the County of Kings shall deliver you, together with a warrant of this court, to the agent and warden of the Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week 11984
beginning with Sunday, January 4, 1942; that upon some day within the week so appointed, the agent and warden of the said Sing Sing State Prison as Ossining shall do execution upon you in the mode and manner prescribed by law.

(Emanuel Weiss arraigned for sentence.)

Mr. Talley: With respect to the defendant Weiss, I move to set aside the verdict on the ground it is against the law, contrary to the 11985
evidence, contrary to the weight of evidence, on all the exceptions taken by counsel during the course of the trial, and on the ground that the Court erred in the admission of testimony, to which objection was duly taken, and in the rejection of other evidence which was duly objected to in the course of the trial. On the further ground that the Court erred in its charge to the jury; that it charged them erroneously in matters of law and erroneously in matters of fact. I move that the verdict be set aside.

The Court: Motion denied.

Mr. Talley: Exception.

11986 *Motion on Behalf of Defendant Capone to Set Aside Verdict*

The Clerk: Emanuel Weiss, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

Emanuel Weiss: All I can say is, I am innocent—that is all I can say.

The Court: Emanuel Weiss, you are hereby sentenced to the punishment of death, and that within ten days from this date the Sheriff of the

11987 County of Kings shall deliver you, Emanuel Weiss, together with a warrant of this court, to the agent and warden of Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning with Sunday, January 4, 1942, and that upon some day in the week so appointed, the agent and warden of said Sing Sing State Prison at Ossining shall do execution upon you, the said Emanuel Weiss, in the mode and manner prescribed by law.

11988 The Court: Now as to Louis Capone.

Mr. Rosenberg: As to the defendant Louis Capone, I hereby move to set aside the verdict and for a new trial on the grounds set forth in Section 465 of the Code of Criminal Procedure. More particularly on the ground that the verdict is contrary to law and clearly against all of the evidence. I further move to set aside the verdict on all the exceptions taken throughout the trial and on the refusal to grant the defendant Louis Capone a severance of trial. On the rulings made with respect to the examination and excuse of talesmen and jurors, and to the denials of mo-

11989

tions made at the close of The People's case and the defendants' case, on the ground that the evidence fails to warrant the submission of the case to the jury as a matter of law. On the inflammatory and prejudicial summation of the District Attorney, which was not based upon or borne out by the evidence. Upon the statements made by the Court throughout the trial and upon the exceptions taken to the charge of the Court and to the Court's refusal to charge the requests made.

11990

The Court: Motion denied.

Mr. Rosenberg: Exception.

(Louis Capone arraigned before the bar.)

The Clerk: Louis Capone, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

Mr. Rosenberg: Nothing to say.

The Court: Louis Capone, you are hereby sentenced to the punishment of death; that within ten days from this date the Sheriff of the County of Kings shall deliver you, Louis Capone, together with a warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning with Sunday, January 4, 1942, and that upon some day within the week so appointed, the agent and warden of the said Sing Sing State Prison at Ossining, New York, shall do execution upon you, Louis Capone, in the mode and manner prescribed by law.

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People's Exhibits 1 to 55

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this record.

Defendants' Exhibits 1 to 3

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this
11993 record.

Defendants' Exhibit 4

THIS AGREEMENT, made this 28th day of October, in the year of Our Lord, One Thousand Nine Hundred and thirty-one; BETWEEN MORRIS BLUESTEIN and NATHAN SOBLER, of the City of Passaic, County of Passaic and State of New Jersey, parties of the first part, AND MARTIN F. KELLY INC., a corp. of N. J. and JOSEPH ROSEN
11994 of the City of , County of and State of , parties of the second part,

WITNESSETH: That for and in consideration of the sum of One Dollar and other good and valuable considerations, each to the other in hand paid, receipt hereof is hereby acknowledged, the parties hereto agree as follows:

That whereas, the parties of the first part are all the holders of all the shares of stock of the New York and New Jersey Clothing Transportation Company Inc.,

Defendants' Exhibit 4

11995

That whereas, the parties of the first part are also the owners of four certain trucks which were used in the trucking business of the said New York and New Jersey Clothing Transportation Company Inc., which said trucks are known as follows;

Model #621—3 ton white truck; Model #61—2 ton white truck; Model #60—1½ ton white truck; Model #51—2½ ton white truck

11996

That whereas, there is still due on the said trucks certain notes which are payable monthly, and the said New York and New Jersey Clothing Transportation Company Inc., also have a certain amount of good will in their said trucking business.

That whereas, the parties of the first part are desirous of combining with the parties of the second part in the said trucking business under the name of NEW YORK and NEW JERSEY CLOTHING TRANSPORTATION COMPANY INC.

11997

That whereas, the parties of the second part have heretofore and still are in the said trucking business and also have a certain amount of good will in their said business.

That whereas, the parties of the second part are also the owners of five trucks which have been used in the conduct of their trucking business, which said five trucks are as follows:

One—2 ton Brockway Truck; Two—2½ ton Garford Trucks; One—2 ton Auto Car; One—1 ton ford truck.

11998 *Defendants' Exhibit 4*

That whereas, there are still certain unpaid monthly notes due on some of the trucks hereinabove mentioned.

That whereas, Martin F. Kelly, Inc., has also the authority and use of a certain garage in the rear of premises known as #9 Catherine Street, Elizabeth, New Jersey, which he has used in the conduct of his said trucking business.

That whereas, the parties of the second part are desirous of joining in with the parties of
11999 the first part in the operation of the business heretofore conducted by the New York and New Jersey Clothing Transportation Company Inc.

Now, Therefore, in consideration of the mutual promises and agreements herein contained, the parties hereto agree to the following:

1. That the parties of the first part will surrender to the New York and New Jersey Clothing Transportation Company Inc., all its shares of stock and on November 2nd, 1931, reorganize the said corporation, so that new shares of stock
12000 will be issued to the following: Martin F. Kelly —50 shares; Joseph Rosen—50 shares; Nathan Sobler—50 shares; Morris Bluestein—50 shares, and these 200 shares will constitute all the outstanding shares of said corporation.

2. That the said corporation shall do business with $20,000.00 actual paid in, being the aggregate value of the combined assets of all the parties hereto.

3. That a meeting of the parties hereto will be held at the offices of Henry H. Eisenberg,

Defendants' Exhibit 4

#60 Broad Street, Elizabeth, N. J. on the 2nd day of November, 1931, at which time the by-laws governing the conducting of the said corporation business will be prepared and adopted and the election of officers will take place. It is herein mutually agreed that the officers of the corporation will be as follows:

Martin F. Kelly—President,
Joseph Rosen—Vice-President,
Nathan Sobler—Secretary,
Morris Bluestein—Treasurer.

4. That the corporation will do business with the BANK OF AMERICA, at its Broadway and 3rd Street Branch, and that the President, Martin F. Kelly and Secretary Nathan Sobler, shall be the only authorized signatures on the checks or other instruments in writing to be issued by the corporation, and that at the meeting of November 2nd, proper resolutions to that effect will be prepared.

5. That the corporation will hold monthly meetings on the second Saturday of each and every month and that dividends by the said corporation will be declared quarter annually.

6. The corporation shall also make contracts of hire with the parties hereto, which said contracts will be in full force and effect as long as the respective parties to said contracts shall retain control or ownership of their shares of stock in said corporation, said contracts will provide for payment of $75.00 weekly salary to each of the parties hereto and said contracts will

12004 *Defendants' Exhibit 4*

contain a restrictive covenant, which will prevent the respective parties to the contract from directly or indirectly canvassing from the customers of the said New York and New Jersey Clothing Transportation Company Inc., should the parties of the respective contract quit their job or sell out their interest in the said corporation, for a period of five years, from date of quitting their job or disposing of their shares of stock.

12005

7. That the corporation shall not go into any enterprise or any undertaking whatsoever without a vote of all the shareholders as it is the intentions of the parties hereto that all the shareholders of the corporation must consent to any undertaking of the corporation involving the expenditure of any monies.

8. That the constitution and by-laws will also provide that should any of the shareholders desire to dispose of their shares of stock in the said corporation, that individual shall first offer

12006 his shares of stock to the corporation, who is to pay for the same according to the book value thereof or at such price as can be mutually agreed between the seller and the corporation, and should the parties be unable to come to an agreement as to the price of those shares, the said shareholder shall have the opportunity of attempting to dispose of his shares to some third party and the price offered by the said third party shall be submitted to the corporation for a competitive bid, and the said corporation is to have the first privilege of purchasing the said shares of stock, if the corporation offer is equal to or

12007

larger than that third parties bid, and should the corporation fail or refuse to make said purchase after the offer is made, then the shareholder shall have the privilege of selling to that third party and said third party will step into the shoes of the retired shareholder with the same rights and privileges as said retiring shareholder had in the corporation.

9. That the by-laws will also provide that should one of the parties hereto decease, then 12008
the widow of that party shall receive the salary of her husband out of which salary the widow is to pay for the services of a man who will substitute for and do the work of her husband in said corporation, providing such salary does not exceed the sum of $40.00 per week, on condition, however, that should one of the parties hereto prepare a will and designate some other person than his wife to receive that benefit, that person so designated will receive that benefit in accordance with the wishes of the deceased shareholder.

12009

10. That the parties of the first part will lease without any expense to the corporation their four white trucks hereinabove enumerated until the 15th day of December, at which time a bill of sale will be issued by the parties of the first part direct to the corporation, for the said trucks.

11. That the parties of the first part will cause all unpaid notes on the trucks up to November to be paid so that the corporation will

12010 *Defendants' Exhibit 4*

only assume the balance of the notes due on the trucks on or after November 2nd.

12. That the parties of the second part will lease without any expense to the corporation their five trucks hereinabove enumerated until the 15th day of December, at which time a bill of sale will be issued by the parties of the second part direct to the corporation for the said trucks.

12011 13. That Martin F. Kelly will give a lease to the corporation on his said garage for a period of one year at a rental of $50.00 per month, which said lease will contain a privilege in favor of the corporation for the renewal of the said lease for an additional period of one year at the same rental of $50.00 per month, said lease to commence on November 1, 1931.

14. That the parties of the second part will pay or cause to be paid all notes that may be due on their trucks prior to November 2nd, 1931, and the corporation will take over the obligations
12012 of the parties of the second part on said trucks, falling due on and after November 2nd, 1931.

15. That whereas, the parties hereto agree that after an adjustment of all equity of the respective interests of the parties of the first part and the parties of the second part, there is a balance in favor of the parties of the first part in the sum of One thousand Dollars which the parties of the second part agree to pay as follows: On May 1, 1932 $500.00 and on November 2nd, 1932, balance of $500.00.

Defendants' Exhibit 4

12013

16. The parties of the first part represent that the balance due on the trucks which were used in the conduct of the business of the New York and New Jersey Clothing Transportation Company Inc., is not in excess of $7000.00 and should there be an excess of that amount they as individuals agree to pay the same.

17. The respective parties to this agreement hereby agree that the obligations of this corporation that are to be assumed by the respective parties shall be only those pertaining to the unpaid balance due on trucks and for work done on the bodies of the said trucks, all other obligations, such as gas, oil, wages, garage rent, tires and etc., shall be paid by the respective parties hereto and not charged upon the corporation, and the parties of the first part represent, that the New York and New Jersey Clothing Transportation Company Inc., are not indebted in any amount whatsoever, except for balance due on the trucks and for balance that may be due for body work on the trucks.

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In the Place of Paragraph 8 the following clause is to be substituted:

That should any of the shareholders desire to dispose of their interest or shares of stock in this corporation or quit their job, then and in that event that retiring shareholder shall sell his shares of stock to the corporation who are to pay for the same one hundred per cent of the book value of said shares at that time the seller is offering the same for sale and said one hun-

12016 *Defendants' Exhibit 4*

dred per cent is to be paid in cash at the time the said shares are surrendered.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

MORRIS BLUSTEN (L. S.)
NAT SOBLER (L. S.)

12017 MARTIN F. KELLY, INC.
By: MARTIN F. KELLY
President

JOSEPH ROSEN (L. S.)

Signed, sealed and delivered
in the presence of

HENRY H. EISENBERG

Attest:

12018

Secretary

12019

Defendants' Exhibit 5

THIS AGREEMENT, made this 27th day of April, in the year of Our Lord, One thousand Nine hundred and thirty-two: BETWEEN MORRIS BLUESTEIN, NATHAN SOBLER and JOSEPH ROSEN, as individuals, of the City of Passaic, County of Passaic and State of New Jersey, and NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY Inc., a corp. of New Jersey, parties of the first part, and MARTIN F. KELLY INC. a corp. of N. J. and MARTIN F. KELLY, as an individual, of the City of Elizabeth, County of Union and State of New Jersey, parties of the second part

12020

WITNESSETH: That for and in consideration of the sum of ONE DOLLAR and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

That whereas, on the 28th day of October, 1931, Morris Bluestein and Nathan Sobler, who were all the shareholders of the New York and New Jersey Clothing Transportation Company Inc. and Martin F. Kelly Inc. and Joseph Rosen, agreed under the agreement above mentioned to consolidate and form one corporation, to be known and designated as the New York and New Jersey Clothing Transportation Company Inc. a true copy of which said agreement is attached hereto and made a part hereof and marked Agreement A.

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That whereas, all the parties hereto have carried out said agreement and consolidation and

12022 *Defendants' Exhibit 5*

each of the parties hereto have performed their share in the said formation of the newly formed organization, the New York and New Jersey Clothing Transportation Company Inc.

That whereas, the parties hereto mutually agreed that it is for the best interest of all the parties hereto that the parties of the second part herein, to wit, Martin F. Kelly Inc. and Martin F. Kelly, individually, to be paid out as and for
12023 his interest in the said corporation, so that the remaining interest in the said corporation will be held by Nathan Sobler, Morris Bluestein and Joseph Rosen.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained which the parties hereto admit is valuable consideration, the parties hereto agree as follows;

That the said New York and New Jersey Clothing Transportation Company, Inc. do convey to the parties of the second part or to one whom they may designate, the four trucks which the
12024 said Martin F. Kelly Inc., heretofore conveyed to the corporation in the agreement above mentioned and marked agreement A;

One—2 ton Brockway Truck; One—2½ ton Garford Truck;
One—2 ton Auto Car and One—1—ton Ford Truck.

That the parties of the first part assume all the outstanding obligations of the said New York and New Jersey Clothing Transportation Company Inc. except those which will hereinafter be

Defendants' Exhibit 5 12025

specifically enumerated and save the parties of the second part harmless by reason of any indebtedness of the said New York and New Jersey Clothing Transportation Company Inc. except the following:

Labor, and also protested check to Mr. P. Leib	$ 261.62
Due to Jannelli for 5 months repairs on trucks	310.00
Ford notes	135.00
Hire truck to Long Branch	6.00
Hire truck to New York from Point Koski	9.50
Petty cash advanced to Rosen	9.00
Cash advanced to Bluestein	5.00
To American Oil	23.00
Notes on Brockway Truck	231.00
Lost Silk	286.00
Garage rent	200.00
Linden Sales for truck shaft	8.00
Straightening Chassey	10.75
Tire Rebuilding	5.50
John Carr, battery and ignition service	21.10
Total	$1521.47

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12028 *Defendants' Exhibit 5*

To meet these obligations the said New York and New Jersey Clothing Transportation Company Inc. are to give to the parties of the second part in addition to the trucks above enumerated the sum of $852.97, which said amount is to be paid in the following manner: $448.20 collection due on the route, worked on by the parties of the second part and $100.00 in cash this day and the balance of $304.37 by two promissory notes, one in the sum of $154.37 due 60 days after the
12029 date of its making and one note in the sum of $150.00 due 90 days after the date of its making, both of said notes are to be made by the corporation and to be endorsed by the individuals herein mentioned as the parties of the first part, and as security for the repayment of said notes the parties of the first part agree and hereby do assign all their outstanding accounts, subject however, to the right the parties of the first part retain in collecting the said moneys and pay the said notes out of the first moneys collected, so that said notes will be paid prior to their due date and should the moneys be collected by the parties of
12030 the first part, the party of the second part hereby designates each and all of the parties of the first part as his or its agent for the collection of the said moneys due on said outstanding accounts, and the first moneys collected on said outstanding accounts are to be applied to the repayment of the balance of $304.37, representing the total amount due on both notes, which the parties of the first part represent they will do and will not use the said funds until said notes are paid, for any other purpose, and the parties of the second part is not to notify or collect any

moneys on the said accounts due to the parties of the first part, unless he ascertains that a default has been made in this covenant.

The parties of the first part represent that there is no indebtedness due on the trucks to be conveyed to the parties of the second part as above mentioned, except such indebtedness as the parties of the second part has knowledge of, which is represented to be arrearages on notes to the finance company, damages to the body on a large Brockway truck and such other items as 12032
is enumerated on the list herein before enumerated, as items that are to be paid for and assumed by the parties of the second part.

Morris Bluestein and Nathan Sobler, two of the parties of the first part herein are to give a release to the parties of the second part for $1000.00 mentioned in the agreement hereto attached and marked agreement "A" which was to be paid by the parties of the second part to the said Morris Bluestein and Nathan Sobler, as an additional investment by the parties of the second part in the said New York and New Jer-
sey Clothing Transportation Company Inc. being 12033
the amount designated and agreed upon as a difference in equity.

The parties of the second part are to execute a release to the New York and New Jersey Clothing Transportation Company Inc., releasing it from any and all indebtedness due it by reason of its former association in the said corporation and Martin F. Kelly as an individual is to release the said New York and New Jersey Clothing Transportation Company Inc., from the

12034 *Defendants' Exhibit 5*

contract of hire formerly given by the corporation to Martin F. Kelly.

The parties of the second part are also to release one, Joseph Rosen, who was formerly associated with the parties of the second part, by reason of all indebtedness due from Joseph Rosen to the parties of the second part, which said indebtedness amounted to approximately $4750.00.

The parties of the first part hereby assign to the parties of the second part the following out-
12035 standing accounts, which are the accounts above mentioned, given as security for the repayment of the two notes represented to be the balance due to the parties of the second part and the moneys collected on the accounts are to be first paid to the parties of the second part; the following are the accounts mentioned:

Standard Trouser	$ 45.64
Red Bank Co.	27.80
Ledgin	145.18
Schwartz & Starg	205.00
12036 Finn	256.00
Ideal Paid $12.00	27.00
Pisteal Mfg.	42.36
Princeton	36.01
Kramer & Son	49.74
Passaic Clothing	181.31
Garfield Vest	24.92
Frourvante	19.08
Estein	4.02
Condina	62.70
Duratex Mfg.	11.60
Ferrere	340.50
Capital coats, Newark	31.45

Defendants' Exhibit 5

12037

Best Make	37.00
Carbondale Clothing	71.74
Cortland	46.46
Plainfield	373.00
Enterprise	39.21
Fashion paid 86.05	170.54
Rosenberg	17.51
Rel Clothing	80.00
Umansky	121.91
Weekes Barre	90.93
Bon Weiss	29.08
Superior Quality	44.25

12038

The parties of the second part is to assign to the three individuals mentioned as parties of the first part the 50 shares of stock held by it or him in the said New York or New Jersey Clothing Transportation Company Inc. which said stock, before the assignment becomes effective shall be held in escrow by J. Bernard Saltzman, attorney for the parties of the first part, until such time as the notes above mentioned are repaid or the parties of the first part refuse or neglect to pay, the moneys that may be collected by them or it on the accounts outstanding, or any breach of this agreement on the part of the parties of the first part, and should the parties of the first part fail to comply with these provisions or any of them in any measure whatsoever, then the said J. Bernard Saltzman, is to redeliver the said 50 shares of stock to the parties of the second part, said redelivery to be made by the said J. Bernard Saltzman, immediately upon receiving notice that the agreement or any part of it

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Defendants' Exhibit 5

has not been properly performed by the parties of the first part or either of them.

The parties of the second part is to immediately, upon receipt of the notes in question, deliver a resignation as officer and director from the said corporation, and the parties of the second part is to sign a check which will be drawn on the First National Bank of 580 Broadway, New York City, which said check will be in an amount representing the balance in said bank
12041 and the said New York and New Jersey Clothing Transportation Clothing Company Inc. is to draw under the direction and supervision of the parties of the first part and proper representations that a check so signed represents the balance held in said bank.

The 50 shares of stock above referred to as those being assigned to J. Bernard Saltzman are to be held in escrow by him and the said J. Bernard Saltzman shall have full power to vote said stock as if he were the original owner thereof, provided, however, that the said J. B. Saltzman
12042 shall not consent to the filing of a voluntary petition in bankruptcy and not consent to the appointment of an equity receiver.

The parties of the first part in lieu of the sum of $304.73, being the balance due to the parties of the second part, shall have the privilege of paying the sum of $250.00 in cash, in lieu of said sum of $304.73, provided, however, said $250.00 is paid on or before, Tuesday, May 2nd, 1932.

Defendants' Exhibit 5

12043

IN WITNESS WHEREOF, the parties have hereto interchangeably set their hands and seal the day and year first above written.

NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY INC.
By: JOSEPH PRICE
President
NAT SOBLER
JOSEPH ROSEN

12044

MARTIN F. KELLY INC.
By: MARTIN F. KELLY
President
MARTIN F. KELLY

Signed, sealed and delivered
in the presence of

Attested:

NAT SOBLER
Secretary

12045

Attested:

.....
Secretary

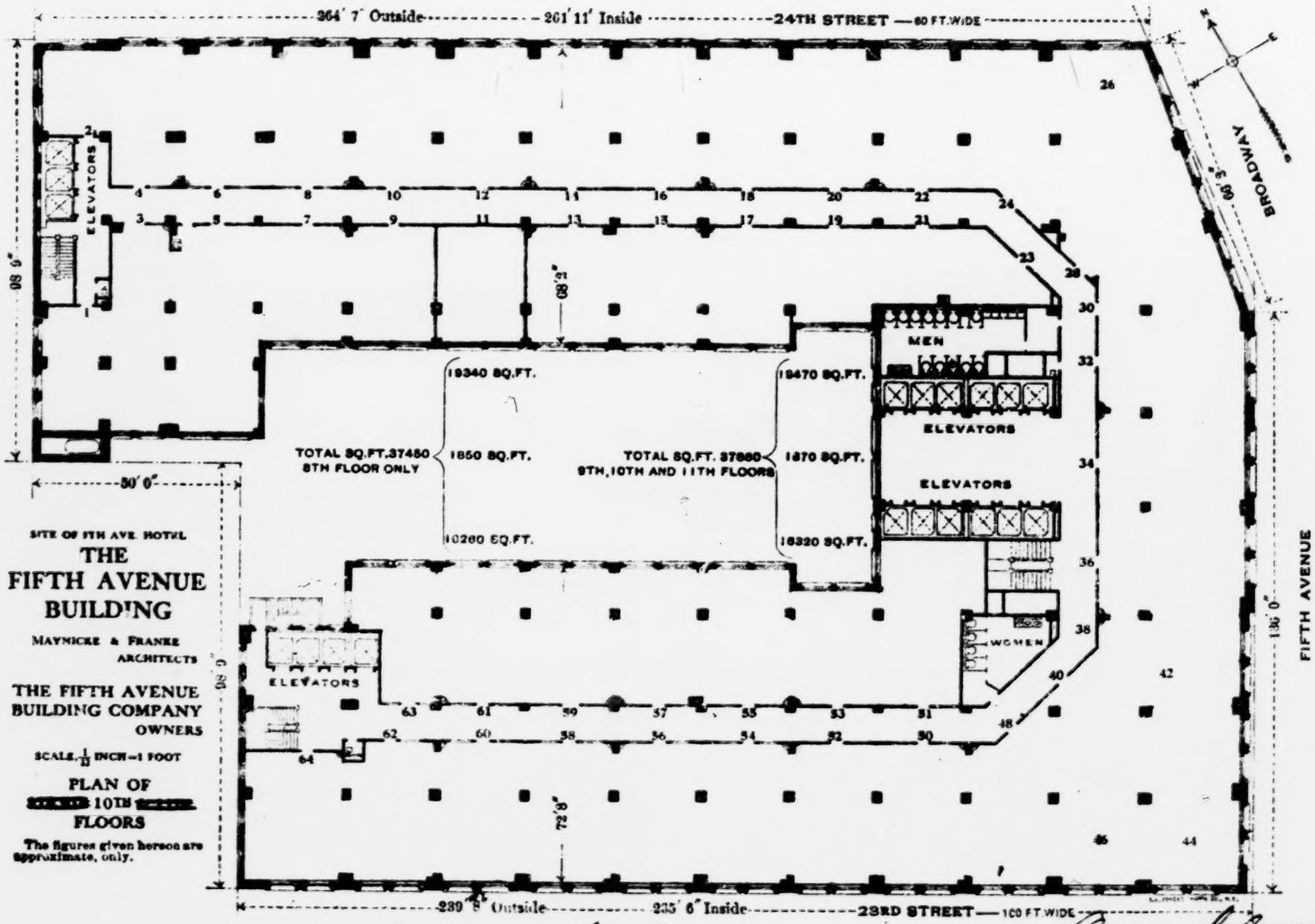
Defendants' Exhibit 6

Original Lease between The Fifth Avenue Building Company and Raleigh Manufacturing Inc., dated Jan. 29, 1936, together with diagram.

(See Opposite)☞

Defendants' Exhibit 7

The printing of this exhibit is omitted pursuant to stipulation on pages 4022 to 4028 of this record.



Tenant Sign Here

Julegat "In Duc"
Cal Shapiro Trg & Sec

THE FIFTH AVENUE BUILDING COMPANY

GENERAL MANAGER

4016

Landlord and Tenant

This Agreement, made this twenty-ninth - day of January - - - - - - -One thousand nine hundred and thirty-six - - -between THE FIFTH AVENUE BUILDING COMPANY, a corporation organized and existing under the laws of the State of New York, hereinafter referred to as the Landlord, and RALEIGH MANUFACTURERS INC. - a New York - - - - - - corporation hereinafter referred to as the Tenant.

Witnesseth, that the Landlord hereby lets and rents unto the Tenant, and the Tenant hereby hires and takes from the Landlord the room numbered 1011 - - - - - - - - - - - - - - - - - - -

Default

1. The Tenant shall pay to the Landlord, or to its agents, the said specified rent, at the times and in the manner above provided, and in case of the non-payment of the said rent at the times and place above stated, or in case the said leased premises shall be deserted or vacated, this lease, at the option of the Landlord, shall become void, or, if the Landlord so elect, the Landlord shall have the right to enter the premises as the agent of the Tenant, either by force or otherwise, without being liable to any prosecution for entry, and to re-let the said premises as the agent of the Tenant, and to receive the rent therefor, and to apply the same to the payment of the rent due by this lease, holding the Tenant liable for any deficiency, and in case suit is brought to recover any rent due and in default, the Tenant agrees to pay, in addition to any statutory costs, an attorney's fee of ten per cent on the amount of rent in arrear.

Assignment or Sub-Letting

2. The Tenant shall not assign this lease nor let nor underlet the said premises, or any portion thereof, nor use nor occupy the same, nor permit the same to be used or occupied, for any other purpose than as above mentioned, without the written consent of the Landlord or its legal representatives first endorsed hereon, for each and every assignment, letting, underletting, or use; and if so assigned, let or underlet, used, or permitted to be used, without such written consent, the Landlord may re-enter said premises either by force or otherwise, without being liable to prosecution or any claim for entry, and re-let the said premises, this lease by such unauthorized act becoming void if the Landlord shall so elect and determine.

Fixtures

3. The Tenant shall take good care of the demised premises and fixtures, and make good any injury or breakage done by the Tenant, or any agent, clerk, servant or visitor of the Tenant, and all damages caused by the overflow or escape of water, steam or gas resulting from the negligence of the Tenant or any agent, clerk, servant or visitor of the Tenant, and at the expiration or other termination of the term, shall surrender the said premises and fixtures in as good condition as reasonable use thereof will permit; and the Tenant shall remove all its property from the premises, and leave them clean and free from rubbish and waste material. And the Tenant shall not make any alterations, additions or improvements to said premises without the written consent of the Landlord. All alterations, additions or improvements which may be made upon the demised premises, except movable office furniture and trade fixtures, put in at the expense of the Tenant, shall be the property of the Landlord and shall remain upon and be surrendered with the premises, as part thereof, at the termination of this lease, without disturbance, molestation, or injury.

Fire

4. The Tenant shall, in case of fire, give immediate notice thereof to the Landlord, and in case said premises hereby leased, or the building of which the same are a part, shall be partly damaged by fire or other element, without the fault or neglect of the Tenant or any agent, clerk, servant or visitor of the Tenant, the injury shall be repaired as speedily as possible at the expense of the Landlord. In case the damage shall be so extensive as to render the said premises wholly unfit for occupancy, the rent shall cease until such time as the premises hereby leased and the means of access to them shall be put in repair. In case of the total destruction, by fire or otherwise, of the said building containing said premises hereby leased, the rent shall be paid to the time of such

destruction, and at that time this lease shall cease, provided, however, that such damage or destruction be not caused by the carelessness, negligence or improper conduct of said Tenant, or any agent, clerk, servant or visitor of the Tenant. The Landlord shall not be liable for any damage by reason of inconvenience, annoyance or injury to business of the Tenant arising from the necessity of making any alteration, reconstruction or repairs of any portion of the building, however the necessity may arise.

Damage

5. The Landlord shall not be liable for any damage to any property or person at any time in said premises or building from steam, gas or electricity, or from Croton or other water, rain or snow, which may leak into, issue or flow from any part of said building, of which the premises hereby leased are a part, or from the pipes, or plumbing works of the same, or from any other place or quarter. The Tenant shall give to the Landlord, or to its agent, prompt written notice of any accident to or defects in the water pipes, gas pipes, steam pipes, electric light or other fixtures or heating apparatus, and repairs thereto shall be made by the Landlord with due diligence, provided the necessity for such repairs shall not have been occasioned by the negligence of the Tenant, or any agent, clerk, servant or visitor of the Tenant.

Inspection of Premises

6. The Landlord and its agents and servants shall have the right to enter the leased premises at reasonable hours of the day to examine the same, or to make such alterations, repairs or redecoration as it may deem necessary without any liability to the Tenant by reason of the entry; and, during the three months next preceding the time of the expiration of this lease, shall have the right to exhibit said premises to applicants to hire, and to put on said premises the usual notice "To let" which notice shall not be removed by the Tenant, or by any officer, agent, clerk or servant of the Tenant, during said period; and in the event that the Tenant shall vacate the premises before the expiration of the term, the Landlord may, without constituting an eviction or releasing the Tenant from liability for rent, make such alterations in the premises as shall be required to prepare the same for a new tenant, or such as shall in the judgment of the Landlord render the premises more readily rentable.

Repairs

7. The Landlord covenants to keep such portions of said building as it may be necessary for the Tenant to use in the enjoyment of the demised premises, in good order and substantial repair, so far as the use of said building by the Tenant is concerned, but no liability of the Landlord to the Tenant shall accrue under this covenant unless or until the Tenant has given notice in writing to the Landlord, or its agent, of the specific repairs required to be made.

Rules and Regulations

8. The rules and regulations in regard to the said building, printed at the end of this lease, shall be taken and considered as a part of this instrument, and as such shall, during the said term, be in all respects observed and performed by the Tenant, and by the clerks, servants, agents and visitors of the Tenant. If for any reason the Tenant, by consent of the Landlord, shall temporarily occupy premises in said building other than the premises described in this lease, all the terms and conditions of said lease, including the rules and regulations forming part of same, shall be applicable to the Tenant's occupation of such temporary premises.

Additions

9. The Landlord shall have the right to build any additions to the Fifth Avenue Building and to erect any additional building or buildings upon any neighboring premises, and to erect and maintain such scaffolding or other temporary structures as may be necessary or convenient in connection with such building operations, without any liability to the Tenant therefor.

Defaults and remedies

10. The Tenant further agrees that all the covenants herein contained to be kept on the part of the Tenant shall be deemed conditions as well as covenants, and that, if default be made in the performance or observance of any of such covenants and conditions, this lease shall thereupon become null and void, if the Landlord so elect, and the Landlord shall have the right to re-enter the demised premises, either by force or otherwise, and dispossess and remove therefrom the Tenant and other occupants thereof and their property and effects, and to hold said premises as if this lease had not been made, without any liability either at law or in equity for any consequent damages; and the Tenant hereby expressly waives the service of notice of intention to re-enter or to institute any legal proceedings to that end. No right of redemption shall be exercised under any present or future law in case the Tenant shall be dispossessed for any cause, or if the Landlord shall in any other manner obtain possession of the premises in consequence of the violation of any covenant of the Tenant herein contained. The Landlord may restrain any threatened breach of the covenant to observe the conditions of this lease or of any other covenant herein contained, but the mention herein of any particular remedy shall not preclude the Landlord from any other remedy it might have either in law or equity; nor shall any consent or acquiescence, which may be equivalent to a waiver of redress for one violation of any covenant or condition, prevent a similar subsequent act from having all the force and effect of an original violation.

Re-entry

11. Whenever the right to re-enter is mentioned in this lease, it shall be deemed to include the right to enter and remove the Tenant, and those claiming under the Tenant, by means of summary proceedings, as prescribed in the Civil Practice Act, and the Landlord shall have the right to invoke any other remedy provided by law, in case of breach of any of the covenants of this lease by the Tenant, as if express consent to re-enter and to take summary proceedings were not given.

Special provisions

12. No shelving shall be erected in such a fashion as to obstruct the corridor lights. No mark, sign or device of any kind shall be placed on the window shades, nor shall any sign or advertisement be placed or exhibited so as to be visible through the windows. The door into the corridor shall not be left standing open. The Tenant agrees that at the request of the Landlord it will desist or refrain from any use of the name of the Fifth Avenue Building in advertising or otherwise which the Landlord may deem objectionable.

13. No stock of goods on sale shall be carried, and shipping shall be limited to samples in and out.

14. No reduction in rent shall be allowed on account of delay in completion of alterations or other construction work requested by the Tenant.

15. Interest at the rate of six (6) per cent per annum shall be charged against the Tenant on all sums of rent remaining unpaid for more than five (5) days, such interest to commence on the day such rent is due and payable, and the Tenant hereby agrees to pay said interest as additional rent for said premises.

16. In the event that the leasehold interest of the Tenant herein be levied on under execution, or if proceedings be begun in any court of competent jurisdiction to declare the Tenant bankrupt, or if an assignment for the benefit of creditors be made by the Tenant, or if a Receiver be appointed for the Tenant, then and in that case the Landlord may, at its option at any time thereafter, upon notice in writing addressed to the Tenant at said premises, terminate this lease.

17. Charges for electric current, and other service charges that may be called for by this lease, shall be deemed in addition to and collectible in like manner as rent for said premises.

18. The provisions hereof shall bind and benefit respectively the parties hereto, their executors, administrators, successors and assigns.

19. If proceedings be begun in any court of competent jurisdiction for the reorganization of the Tenant under any law, the Landlord may at its option at any time thereafter, upon notice in writing addressed to the Tenant at said premises, terminate this lease.

20. It is understood and agreed that upon the execution and delivery of this lease, the lease heretofore made to the tenant of room No. 911 in the Fifth Avenue Building, dated December 10th, 1935 is hereby terminated, and the sublease made by the tenant of said room No. 911 from Murray Knitwear Company, Inc., is terminated as of February 1st, 1936.

In Witness Whereof, The Fifth Avenue Building Company has caused its corporate seal to be hereunto affixed and this instrument to be signed by its proper officer, and the said Tenant has executed this instrument, the day and year first above written.

THE FIFTH AVENUE BUILDING COMPANY,

By ..... General Manager.

Attest:

..... Secretary.

Tenant Sign Here

Raleigh Mfrs. Inc
Carl Shapiro Treas + Sec

Corporate Seal Here

Attest:

..... Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 5 day of Feb, in the year 1936, before me personally came George Chapman, to me personally known, who, being by me duly sworn, did depose and say that he resided in Mt. Kisco, N.Y. that he was then the General Manager of THE FIFTH AVENUE BUILDING COMPANY, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

Celia Dallas
..... NOTARY PUBLIC, Queens County
Queens County Clerk's No 1432
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No. 7 T 25
Commission Expires March 30, 1937
Notary Public.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 4th day of Feb., in the year 1936, before me personally came Carl Shapiro to me personally known, who, being by me duly sworn, did depose and say that he resided in Brooklyn, N.Y.; that he was then the Treas + Sec. of RALEIGH MANUFACTURERS INC., a corporation described in and which executed the foregoing instrument as the Tenant; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

Celia Dallas
NOTARY PUBLIC, Queens County
Queens County Clerk's No 1632
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No 7 T 25
Commission Expires March 30, 1937
Notary Public.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 4th day of Feb. , in the year 1936, before me personally came Earl Shapiro to me personally known, who, being by me duly sworn, did depose and say that he resided in Brooklyn, N.Y. ; that he was then the Treas & Sec. of RALEIGH MANUFACTURERS INC. , a corporation described in and which executed the foregoing instrument as the Tenant; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

Celia Dallas
NOTARY PUBLIC, Queens County
Queens County Clerk's No. 1632
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No. 7 T 25
Commission Expires March 30, 1937
Notary Public.

In Consideration of the letting of the premises mentioned in the foregoing lease to the Tenant named therein, and the sum of One Dollar paid to the undersigned by The Fifth Avenue Building Company,

, guarantor,

does hereby covenant and agree to and with said The Fifth Avenue Building Company, and its legal representatives, that if default shall at any time be made by the said Tenant or the assigns of said Tenant in payment of the rent and the performance of the covenants contained in the within lease on the part of said Tenant, to be paid and performed, the said guarantor

will well and truly pay the said rent or any arrears thereof that may remain due unto the said The Fifth Avenue Building Company, and also all damages that may arise in consequence of the non-performance of said covenants, or any of them, without requiring notice of any such default from The Fifth Avenue Building Company.

Witness hand and seal this day of in the year one thousand nine hundred and

Witness

RULES AND REGULATIONS FORMING PART OF LEASE.

1. Except as specifically permitted, tenants are not allowed to occupy, or permit to be occupied, any portion of their premises as an office for a public stenographer or typewriter, or for the sale of liquors, tobacco or cigars, or as a barber-shop or manicure-shop or as an employment-bureau. Tenants shall not allow laborers on the demised premises, except those actually working on said premises for the tenant; nor engage nor pay help, except office help, on said premises; nor advertise for help giving an address in the building. No auction sale shall be conducted on the premises.

2. The sidewalk, stoops, areas, entry, vestibules, passages, corridors, halls, elevators and stairways shall not be encumbered nor obstructed by any of the tenants, their agents, clerks, servants or visitors, or be used by them for any other purpose than for ingress and egress to and from their respective premises.

3. All injuries to the building or fixtures caused by moving the property of the tenant in and out of the building shall be repaired by the tenant.

4. The doors, skylights, and windows that reflect or admit light into passageways or into any place in said building shall not be covered or obstructed by any tenant.

5. The water-closets, wash-closets, urinals and other water apparatus shall not be used for any purposes other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals, refuse from electric batteries, or other substances shall be thrown therein. The expense of repairing any damage resulting from a violation of this rule shall be borne by the tenant by whom, or by whose agents, clerks, servants or visitors, the damage shall have been caused.

6. No tenant shall mark, paint, drill into, drive nails into, or in any way mutilate or deface, any walls, ceilings, partitions, floors, wood, stone or iron work of the building. Workmen employed or designated by the Landlord must be employed by the tenants for repairs and other similar work that may be done on any part of the building.

7. No sign, advertisement or notice shall be inscribed, painted or affixed on any of the windows or doors or on any other part of the outside or the inside of the said building, without the prior consent in writing of the Landlord or its agents. Directories will be at the expense of the Landlord. The Landlord will name painters who must be employed for all sign painting and other painting, at the expense of the tenant.

8. No tenant shall do anything or permit anything to be done, in said premises, or bring or keep anything therein, which will in any way increase the rate of fire insurance on said building, or on property kept therein, or obstruct or interfere with the rights of other tenants, or in any way injure or annoy them, or those having business with them, or conflict with the laws relating to fires, or with the regulations of the fire department, or of any fire or casualty insurance company, as regards said building or any part thereof, or in respect to any elevator or apparatus therein, or conflict with any of the rules and ordinances of the City of New York, or of the Board of Health, or of any of the departments of said city, or with any laws of the State of New York.

9. The Landlord shall in all cases have and retain the power to prescribe the weight and proper position of all safes, and they shall in all cases stand on plank strips, two inches thick, to distribute the weight; and all damages done to the building by taking in or putting out any safe, or other freight, or during the time it is in or on the premises, shall be repaired at the expense of the tenant.

The moving of safes shall occur at such times as the Landlord shall designate upon previous notice to the Chief Engineer; and the persons employed to move the safes in and out of the building must be acceptable to the Landlord. No freight, furniture, or bulky matter of any description will be received into the building, or carried up or down, except during hours designated by the Landlord.

Tenants shall not, on the first three floors of the building, place a load to exceed 150 pounds per square foot, nor, on any other floor, a load to exceed 75 pounds per square foot, evenly distributed.

10. Each tenant must, upon the termination of the tenancy, restore to the Landlord all the keys of offices, rooms and toilet-rooms which shall have been furnished the tenant or which the tenant shall have had made, and in the event of loss of any keys so furnished, shall pay the Landlord therefor. Tenants shall not obtain or use any keys for any doors in the building except the keys which are provided by the Landlord.

11. The tenant shall keep the premises occupied by him in a proper condition of cleanliness, and no tenant shall permit any person or persons other than persons employed by the janitor of the Landlord to clean or take charge of such premises; but it is understood and agreed that the Landlord shall be in nowise responsible to any tenant for any loss of property from the leased premises, however occurring, or for any damage done to the furniture or other effects of any tenant by the janitor or any of his employees, or others.

12. The passenger elevators shall be run during the ordinary business hours of the day, from 8 A. M. to 6:30 P. M., except on legal holidays, Sundays and at night, when one elevator will be subject to call as the convenience of the tenants may require.

The Landlord shall use due diligence in operating the elevators and furnishing heat and light, but shall not be responsible for interrupted elevator service, or interrupted heat or light supply, nor for any accident in the operation of the elevators, or heating or lighting apparatus, from any cause whatsoever.

13. Tenants, their agents, clerks, servants or visitors, shall not make or cause any improper noises in the building, or interfere in any way with other tenants or those having business with them, and the Landlord may exclude from the building any tenant or any employee of, or visitor to a tenant, who is intoxicated or disorderly, so as to be obnoxious to other tenants.

14. Nothing shall be swept or thrown by the tenants or by their agents, clerks, servants or visitors, out of the windows or doors into the corridors, halls, stairways, elevators or light-shafts, or upon the skylights of the building, or into or upon any heating or ventilating registers, or plumbing apparatus in said building, or upon the street. Nor shall carpets, rugs or other articles be hung or shaken out of any window of said building.

15. No animals or birds shall be kept in or about the premises.

16. Tenants shall not be permitted to use or keep in the said building any kerosene, camphene, burning fluid, or other illuminating material, except candles. No cooking is permitted.

17. All awnings and their fixtures are to be supplied by the tenants at their own expense, but of the quality, design and color which shall first be approved by the Landlord. Such awnings and fixtures may be obtained by the tenants of the Landlord, at cost price thereof, if the tenants so desire. Tenants shall not obtain any towel supply service or ice service except from persons designated by the Landlord, nor obtain drinking water for delivery on the premises from any source not approved by the Landlord.

18. Telegraph, telephone and other wires and instruments shall not be introduced by the tenant without previous notice to the Landlord and with its approval. The electric current shall not be used for power, unless written permission for such use shall first have been obtained from the Landlord.

19. In case it shall become necessary or proper at any time, by reason of accident, or for the purpose of improving the condition or operation of any elevator, heating or lighting apparatus, boiler or machinery, or any appurtenance thereof, to suspend the operation of the same until all necessary repairs or improvements thereto shall have been made and completed, the Landlord shall be at liberty to do so without in any manner or respect affecting or modifying the obligations or covenants of the Tenant herein contained, but, in such case the Landlord shall use due expedition and diligence to make and complete the repairs, improvements or reconstructions.

20. The rent of any space above the first floor shall include janitor's services, and heat from October 10th to May 1st each year, and shall also include, unless otherwise provided in the lease, electric light not to exceed one ordinary sixteen candle power incandescent lamp or its equivalent, for each five hundred cubic feet of space occupied. The janitor's services shall include the general care and cleaning of the offices, halls and toilet rooms.

21. The rent of any space on the first floor shall include heat from October 10th to May 1st each year. The Landlord does not furnish as part of the lease, electric light for any such space, but will provide such light upon terms to be agreed upon with the tenant.

22. During Sundays and holidays, and on other days outside of ordinary business hours, the supply of heat shall only be to such extent as shall, in the judgment of the Landlord, be sufficient to prevent damage to the building. Should a supply of heat to a further extent than as above provided be required by a tenant at any time outside of ordinary business hours, or on Sundays or holidays, the Landlord will, if practicable, furnish the same, at a charge based upon the additional expense involved.

23. Tenants should see that all lights are out and all windows and transoms closed, and that all corridor doors are closed and locked, when leaving their offices each evening.

24. The Landlord shall not be responsible to any tenant for the non-observance or violation of these rules and regulations by any other tenant.

25. The Landlord reserves the right to rescind any of these rules and regulations and to make such other and further rules and regulations, as in its judgment may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein, except that the Landlord shall at all times furnish such light, heat and elevator and janitor service as is hereinbefore provided for, subject to the right to make necessary repairs and improvements as herein provided.

THE FIFTH AVENUE BUILDING

Lease No. _____

Room No. 1017

Term, ~~one~~ five years three months { From ~~May~~ Feb 1, 1936 / Expires May 1, 1937

Yearly Rent $1560.00

Monthly Rent $130.00

Dated, January 29th 1936

THE FIFTH AVENUE BUILDING COMPANY

TO

Raleigh Manufacturing Co.

Lease.

COUNTY COURT, KINGS COUNTY
Pltf. Ex. Deft. Ex. 6
J. A. McGowan, Stenog

F202A-10-25-32—300 (Corporation)

Defendants' Exhibit 8

Two blank checks of Raleigh Manufacturers, Inc., Nos. 9568 and 9569.

(See Opposite)☞

Defendants' Exhibit 8.

Raleigh Clothes

149 FIFTH AVENUE

No. 9568 A

NEW YORK 19

PAY TO THE ORDER OF ..... $ .....

..... DOLLARS

RALEIGH MANUFACTURERS, INC.

THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK
BROADWAY AT 38TH STREET
NEW YORK

1-774

PRES

TREAS

Raleigh Clothes

149 FIFTH AVENUE

No. 9569 A

NEW YORK 19

PAY TO THE ORDER OF ..... $ .....

..... DOLLARS

RALEIGH MANUFACTURERS, INC.

THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK
BROADWAY AT 38TH STREET
NEW YORK

1-774

PRES

TREAS

4018

Defendants' Exhibit 9

Two blank checks of Raleigh Manufacturers, Inc., Nos. 1121 and 1122.

(See Opposite)☞

Defendants' Exhibits 10 and 11

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this record.

Defendants' Exhibit 9.

Raleigh Clothes

149 FIFTH AVENUE

No. 1121 A

NEW YORK ..... 19..

PAY TO THE ORDER OF ..... $ .....

..... DOLLARS

THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK
BROADWAY AT 38TH STREET
NEW YORK

1-774

RALEIGH MANUFACTURERS INC

..... PRES

..... TREAS

Raleigh Clothes

149 FIFTH AVENUE

No. 1122 A

NEW YORK ..... 19..

PAY TO THE ORDER OF ..... $ .....

..... DOLLARS

THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK
BROADWAY AT 38TH STREET
NEW YORK

1-774

RALEIGH MANUFACTURERS INC

..... PRES

..... TREAS

12064

Stipulation as to Exhibits

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

12065

LOUIS BUCHALTER, EMANUEL WEISS,
LOUIS CAPONE,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the originals of the following exhibits received upon the trial herein may be produced, used and referred to on the argument of the appeal herein with the same force and effect as if reproduced in the case on appeal, and it is stipulated and agreed that the reproduction of the same may be dispensed with.

12066

PEOPLE'S EXHIBITS.

1. Photograph showing body of Joseph Rosen.

2. Photograph of Rosen Candy Store

2a. Small sized photograph of People's Exhibit 2

Stipulation as to Exhibits 12067

3. Photograph of Louis Stamler's house

4. Photograph showing Rosen Candy Store as viewed from a window of Louis Stamler's house

5. Bullet labeled "M.M."

6. Bullet labeled "M.R."

7. Bullet labeled "F.W. 2" 12068

8. Bullet labeled "F.W. 1"

9. Bullet labeled "F.W. 3"

10. Bullet labeled "F.W. 4"

11. Bullet labeled "F.W. 5"

12. Bullet labeled "F.W. 6"

13. Photograph showing plate number L-16-67, N. Y., 1936, of automobile 12069

14. Photograph of automobile

15. Photograph of candy store

16. Photograph showing walk across the railroad leading from Livonia and Van Sinderen side to Junius Street side of tracks

17. Photograph showing Junius Street side of walk over connecting up from the entrance to the stand

12070 *Stipulation as to Exhibits*

18. Photograph showing place where Samuel Pearl was walking

19. Gun found by Samuel Pearl in a lot and initialed "WK" in presence of the policeman

20. Photograph showing premises in which Max Kaufman lived, and the surrounding locale

12071 21. Photograph showing locale as it was in September 1936

22. Photograph showing garages including the one in which the Ford automobile was stored

23. Photograph of car of Abraham Waxman

24. Diagram showing the candy store as it existed in September 1936

12072 25. Photograph of Ardies' Soda, Candy and Luncheonette Store

25a. Small sized photograph of People's Exhibit 25

26. Photograph showing Sackman Street near where the car was parked

27. Photograph showing house and alley as it were when the drop was rented by Sol Bernstein

Stipulation as to Exhibits

12073

28. Photograph of garage

29. Photograph of house to which Mendy Weiss told Sol Bernstein to go

30. Photograph of an apartment house at Wyona and Belmont Streets

31. Photograph showing corner of the park at Bradford and Blake Avenues

12074

32. Photograph showing garage where the gun was hidden in the cellar

33. Order of Appointment of Extraordinary Special and Trial Term of the Supreme Court, etc.

34. Appointment and Oath of Thomas E. Dewey

35. Bank account of Max Rubin in the Bank for Savings, 4th Avenue

12075

36. Registration record of Max Rubin in the Hotel New Orleans

37. Registration record of Max Rubin in the Hotel Bossert, Brooklyn

38. Check for $60, from Clothing Drivers & Helpers Union, etc. to Esther Rubin

39. Check for $60, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, dated Nov. 13, 1936

12076 — *Stipulation as to Exhibits*

40. Thirty-two checks of $60 each, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, various dates

41. Eight checks of $60 each, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, various dates

42. Operator's License, State of Colorado, No. A 9 6138

12077

43. Two sheets consisting of check and stub

44. Bank book of Security National Bank, Kansas City, Kansas, in name of James W. Bell, deposits, Oct. 1, 1940, $1000

45. Card taken from Mendy Weiss

46. Social Security Card No. 500-14-1906 bearing name of James William Bell

12078

47. Registration Certificate for Selective Service issued to James William Bell

48. Motor Vehicle License Receipt No. 35629

49. Prescription blank of Dr. Geo. Wm. Bancroft

50. Copy of Operator's License, State of Colorado, No. A 9 6138

51. Driver's License No. 1078237 bearing name of James W. Bell

52. Motor Vehicle Driver's License, Kansas City, Mo. No. 153827 bearing name of James W. Bell

53. State of Colorado, Application for a Title for a Motor Vehicle, made by Rose Bell

54. Receipt for $40.00 from Geo. W. Bancroft, M.D. to James Bell, dated Sept. 23, 1940.

55 Receipted Bill from St. Francis Hospital and Sanatorium to James Bell, dated Aug. 29, 1940 12080

56. Receipt for $11, from Standard Finance Company to Rose Bell, dated July 24, 1940

57. Card of Martin' Indoor Poultry Farm

DEFENDANT'S EXHIBITS.

1. Envelope in the handwriting of Sol Bernstein 12081

2. Affidavit of Albert Tannenbaum, sworn to April 3, 1940

3. Affidavit of William J. Kennedy

7. Ten Checks

10. Copy of birth certificate of Sidney Weiss, certified June 12, 1941

12082 *Stipulation as to Exhibits*

71. Map showing layout of streets in connection with Rosen Candy Store, Rosen Residence, Long Island Railroad, etc.

Dated, Brooklyn, N. Y., April, 1942.

WILLIAM O'DWYER,
District Attorney, Kings County,
Attorney for Plaintiffs.

12083 Refuses to sign.

.....
Attorney for Defendant, Buchalter.

Refuses to sign.

.....
Attorney for Defendant, Weiss.

Refuses to sign.

12084

.....
Attorney for Defendant, Capone.

12085

Clerk's Certificate

State of New York }
County of Kings } ss.:

I, Francis Sinnott, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, do hereby certify that the foregoing consists of true copies of the notices of appeal and of the judgment roll in the case of The People of the State of New York against Louis Buchalter, alias 12086
"Lepke", Emanuel Weiss, alias "Mendy Weiss" and Louis Capone, convicted of the crime of murder in the first degree, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said Court this 12" day of May, in the year of our Lord one thousand nine hundred and forty-two.

12087

Francis Sinnott,
Clerk of Court.

(Seal)

[fol. 4030] PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE, Appellants

(Decided October 30, 1942)

APPEALS from judgments of the Kings County Court (HAYLOR, J.) rendered December 2, 1941, upon verdicts convicting each of the defendants of the crime of murder in the first degree.

I. Maurice Wormser and *Jesse Climenko*, for appellant *Louis Buchalter*.

Alfred J. Talley, James I. Cuff, M. M. Kreindler, Harry G. Anderson and *Samuel Bader* for Emanuel Weiss, appellant.

Sydney Rosenthal, Benjamin J. Jacobson, Leon Fischbein and *Emanuel Rosenberg* for Louis Capone, appellant.

Thomas Craddock Hughes, Acting District Attorney (*Solomon A. Klein, Burton B. Turkus, Henry J. Walsh* and *Edward H. Levine* of counsel), for respondent.

CONWAY, J.:

The defendants were indicted with three others for the crime of murder in the first degree. They were represented by able counsel during a trial which lasted about eleven weeks. The record of the trial consists of more than four thousand pages in addition to the twenty-seven hundred pages containing the examination of talesmen.

The questions of law presented by defendants' counsel may best be examined against the background of the facts as found by the jury and the facts are therefore set forth with reasonable fullness as a preface.

The deceased Joseph Rosen was present in his small candy store on Sutter avenue in Brooklyn on Sunday morning September 13, 1936. An automobile was driven up to the door of his store. The occupants riddled the body of Rosen with bullets. There were ten wounds of entrance. One Stamler, a tailor, at the sound of the shooting, looked through his window across the street, saw the automobile pull away and took the license number. A few minutes later an automobile turned the corner of Livonia and Van Sinderen avenues so quickly that the brakes or tires

screeched somewhat and attracted the attention of Merlis who had a newspaper stand there. The automobile came to a stop about forty feet from the corner and four men emerged. They walked toward the newspaper stand and up over the trestle which crossed the L. I. R. R. track at that point and which led down into Junius street. The automobile thus abandoned,—a black two-door, Chevrolet coach,—had the license number which had been taken by Stamler.

The theory of the prosecution's case was that the defendant Weiss was one of the slayers; that the defendant Capone was one of those who had arranged for the murder, who had laid out the route to be taken by the automobile used in it and that he and others were waiting with two cars at the other side of the trestle on Junius street, to assist in the escape of the slayers; that the defendant, [fol. 4031] Buchalter, referred to as Lepke by the witnesses throughout the trial, had ordered the death of Rosen through fear that he would testify against him in the so-called Dewey investigation, involving racketeering and extortion. There were three others named in the indictment: Harry Strauss, who had been executed prior to the trial (see *People* v. *Goldstein*, 285 N. Y. 376), James Ferraco, who had not been apprehended, and Philip (Farvel) Cohen as to whom a separate trial had been granted by consent.

All of the defendants were represented by experienced counsel. Lepke and Weiss were each represented by two attorneys, each of whom was permitted by the court to participate actively in the trial. It is important, for the purpose of discussing one of the law points affecting the charge of the court, and for no other purpose, to indicate and comment upon the defenses interposed by each of the three defendants on trial. The defendant Capone did not testify and called no witnesses. The defendant Weiss did not testify but called witnesses. He called his mother, his two brothers, his wife and a family friend to testify to an alibi covering the period prior to and at the time of the murder. He also called another witness to impeach the credibility of a prosecution witness, Bernstein. The defendant Lepke did not testify but called witnesses for the purpose generally of establishing that the deceased was a person of no importance financially or in the business world; that the testimony of the wife, daughter and son of the deceased as

to the business venture of the deceased and its financial condition was unbelievtable, whereas the position of the defendant Lepke was so important that it was incredible that there was any reason for the defendant Lepke to order or direct Rosen's death. This was more clearly shown from the language of counsel for the defendant Lepke in his summation as follows: "I said I did not represent an angel, I meant just this: *I condemn the defendant Buchalter's past life with as great vehemence as I possess.* I am not in sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid—because some of them hoped, by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. *I condemn every act of the defendant Buchalter's past life.*

. . . . . .

So, gentlemen do you get my point—that Buchalter, who was being looked for by Dewey *as king of the flour racket and king of the crime racket*—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible misdemeanor? I say, "Possible misdemeanor" at the hands of Rosen. What [fol. 4032] proof is there in this case by anyone that Rosen was roaming the streets of Brownsville threatening to go to Dewey? What could he tell Dewey? Nothing. Because, in telling Dewey that four years ago Buchalter drove him out of business, I take it he would also have to tell Dewey the good traits of Buchalter—that he got him a job—that he tried to get him another job—that he effectuated transfers and that he got $100 and $125 a week. What was there that Buchalter had to fear at the hands of Rosen *with thousands of complaints running to Dewey in extortion totaling a half a million dollars? Would he worry about Rosen, an ordinary poor truck driver?*

At least one of the witnesses called by Lepke corroborated in important details the testimony of Rubin, the principal prosecution witness (see *post*).

The defendant Lepke also called witnesses for the purpose of showing that conversations testified to by some of the witnesses for the prosecution could not have been held, with the accompanying anger and excitement to which testimony was given, because the office in which they were held was small and because others were present therein or in adjoining offices at the times mentioned who would have heard the conversations if they had occurred. Such were the defenses. No time limit was placed by the court upon counsel for the defendants for their summations and the presentation of those defenses.

Facts

On Max Rubin became an executive board member and one of the finance committee of Local No. 4 of the Cutters Union of the Amalgamated Clothing Workers of America (hereinafter called Amalgamated). Murray Weinstein was business agent and later manager of the local and executive board member of Amalgamated. As an official of the Amalgamated, Rubin came to know the defendant and was with him almost daily. He also worked for Lepke in connection with Local 138 of the Flour Truckmen's Union and the Greater New York Tailors Expressmen's Association. Later Rubin became business agent of Local 240 of the Clothing Drivers and Helpers Union, which was also affiliated with Amalgamated. In 1931 a dispute arose between two groups in Local No. 4 of Amalgamated. Lepke supported one group, which gained control. Rubin arranged a meeting between the leader of the opposing group and Lepke, and certain officials were given a year's pay and withdrew from the union. Rubin, however, was continued by Lepke as business agent of Local 240. Rubin was present at the meeting, at which it was arranged by a general organizer for Amalgamated, that one Danny Fields and Paul Berger (the "finger man" in the Rosen murder) should be the intermediaries between the Amalgamated and Lepke.

In 1932 Lepke told Rubin that the union wished a stoppage on a specific date of all the trucks which carted clothing in and out of New York city. Rubin told Lepke that

he believed he could stop all the trucks except those of three concerns: Garfield Express Co., Branch Storage and New York and New Jersey Transportation Company (the com-
[fol. 4033] pany of Rosen), (hereafter called N. Y. and N. J. Co.), which handled both union and non-union work. The Garfield Express, hereinafter called Garfield, owned by Louis Cooper, was located at Passaic, New Jersey, was non-union, and operated in competition with N. Y. and N. J. Co. in Passaic. N. Y. and N. J. Co. did business in New York, New Jersey and had a little business in Pennsylvania. Lepke said that the Pennsylvania business had to be abandoned. Rubin visited the N. Y. and N. J. Co. officers and then returned and advised Lepke that when he told Rosen that he would have to give up the Pennsylvania business Rosen said that that was the only thing he had in the business; that he had no money investments but that he had brought in the Pennsylvania business; that Rosen's two associates also objected.

Lepke told Rubin he wished to see Rosen and they met in the office of one Weiner, a former business associate of Lepke. Rubin, Danny Fields and one Gurrah were present. Rosen told Lepke that the Pennsylvania business was the only thing he had in the N. Y. and N. J. Co., and that if that were lost that he would lose everything. Lepke then said he wished to see Rosen's books. In response to a telephone message, they were brought by Rosen's daughter, Sylvia, who was a witness upon the trial. Lepke and Gurrah then went over the books and told Rosen what business he could not take. Rosen said he would be ruined. Rubin told him "not to hit his head against a stone wall." Lepke then promised that they would do something for him and Rosen left.

As to Louis Cooper, of Garfield, Rubin testified that when Lepke ordered him to stop his trucks, Cooper refused, saying that he had been double-crossed by the Amalgamated once and did not intend to be double-crossed again. Lepke said "you have nothing to do about worrying now, I am the Amalgamated, they will not double-cross you this time;" that then Cooper agreed to stop if Lepke would become his partner in Garfield to which the latter agreed.

The stoppage occurred and Rosen was forced out of N. Y. and N. J. Co. The Garfield Express Co. profited materially as a result. Later Rubin had a talk with Rosen

in which the latter complained that everyone else had returned to work after the stoppage but that he was "on the street." When this was reported to Lepke he asked what could be done and Rubin suggested that Rosen had once worked for Louis Cooper as a foreman and they might get him back there. That Lepke arranged. About eight months to a year later Cooper discharged Rosen and refused requests both of Rubin and Lepke to take him back. Rosen was then out of work for sixteen months during which period he complained to Rubin that he was a married man with a family and that they had nothing to eat.

After the appointment of Mr. Dewey as Special Prosecutor, Rubin had a talk with Rosen. Rubin then told Lepke [fol. 4034] that they had a desperate man on their hands; that they had to get him a job; that he was doing much talking and that they were likely to get into a lot of trouble but that Rosen was willing to work for anything. Lepke then arranged to obtain another job for him.

In the spring of 1936 Rosen opened a candy store on Sutter avenue. In June of 1936 Lepke told Rubin that Rosen was going around Brownsville (in which Sutter avenue is located) "shooting off his mouth that he is going down to Dewey's office." Rubin told Lepke that he would get the members of Local 240 to patronize Rosen's candy store. Lepke said he did not care what he did so long as Rosen kept quiet. Rubin called a meeting of the executive board and arranged for the spending of money in Rosen's store.

In July of 1936 Lepke again told Rubin that Rosen was threatening, in Brownsville, that he was going to Mr. Dewey's office and was going to testify about Lepke. Rubin told Lepke that there was nothing to worry about; that Rosen must be up against it. Thereafter, Sylvia Rosen Greenspan asked Rubin to visit her father. Rubin told Lepke that he thought it was a good opportunity to straighten Rosen out; Lepke told him to take two hundred dollars to Rosen and to tell him to stay out of town until he was told to return. Rubin gave Rosen the two hundred dollars and the latter said he would go to his son's place at Reading, Pennsylvania.

The next time Lepke spoke to Rubin about Rosen was on Friday, September 11, 1936. Lepke complained that Rosen had stayed at Reading, Pennsylvania, only for a

few days and had double-crossed them. He said that Rosen was going around Brownsville threatening to go down to Mr. Dewey. Lepke said: "Well he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all." Rubin begged Lepke not to be rash, to remember that he (Rubin) had visited Rosen's store in July and to permit him to handle it, saying that he would go over to see Murray Weinstein. Lepke said he did not care where Rubin went but to straighten Rosen out. Rubin rushed over to Weinstein and asked him to do something about Rosen but Weinstein said he could not do anything. Rubin returned and told that to Lepke. Lepke then directed Rubin to get Paul Berger and send him to him right away. Rubin found Berger and told him that Lepke wanted him. Rubin then left to attend a ball game of the union at Vineland, New Jersey, and stayed at Atlantic City until Sunday noon.

Within forty-eight hours after Lepke sent for Berger, Rosen was murdered.

Rubin read about the murder on the Monday morning after its commission. He talked with Lepke about it, pointing out that he had visited Rosen in July and was therefore worried. Lepke reassured him telling him that he had nothing to worry about so far as Brooklyn was concerned since Brooklyn was all right. In September, Rubin called Lepke's attention to an article in a New York news-[fol. 4035] paper, stressing the fact that it did everything but mention Rubin's name and that in effect it made him a principal in the murder. Again Lepke told him that he had nothing to worry about because the police were looking for Farvel Cohen (the defendant Philip Cohen, named in the indictment), Shimmy Salles and the defendant Weiss and that, when he was ready, he would send in the first two mentioned for identification purposes, but would not send in Weiss.

In early October, Lepke told Rubin that an Assistant District Attorney named McCarthy "was going around saying that he is going to make one of the best pinches he has ever made; he is going to collar Lepke and Gurrah for the Rosen murder." He told Rubin to leave town as things were "very hot in Brooklyn;" to go to Glens Falls and to stay with Danny Fields who was hiding there;

to take Paul Berger around and to introduce him to the business concerns from whom he was collecting. Rubin returned after a week and saw Lepke at a hotel in Manhattan. Lepke told Rubin that he would have to go away again, but in the meantime to stay out of sight of everyone in the clothing industry; that Brooklyn was not yet straightened out and that the Dewey investigation was closing in on everyone. Shortly thereafter Lepke told Rubin to go to Salt Lake city. Rubin then consulted the lawyer for Local Union 240, Mr. Edward C. Maguire, and thereafter told Lepke that Mr. Maguire wished to see him.

Rubin and Lepke visited the offices of Mr. Maguire who was the attorney for the International Brotherhood of Teamsters. Mr. Maguire told them that it was unwise for any man to become a fugitive while an investigation was pending and that it would be ridiculous for a married man with a child to go off as a fugitive indefinitely; that Rubin was a representative of a union and that no union would stand for its representative being off in some unknown place and that the membership would oust him. Mr. Maguire testified that Lepke interrupted during the early part of the talk and said "If witnesses are not available, investigations collapse." At the conclusion of the talk Lepke said "I will see about it" and he and Rubin departed.

After they left Mr. Maguire's office, Lepke told Rubin that he had not wished to say it in the office but the case in Brooklyn would be thrown out; that Assistant District Attorney McCarthy would not handle it any more and that another Assistant District Attorney would be put on it and then pushed on to something else in another building and that the case would die. Rubin then agreed to go to Salt Lake city. He left on October thirtieth and stayed there at the Carlton Hotel. During the month while he was there he received four fifty-dollar money orders through Western Union. He then returned to New York city and told Lepke that he was too lonesome to stay longer; Lepke told him he should not have returned as Brooklyn was not straightened out and investigations were getting very serious. Rubin stayed in New York until early in December when he was told by Lepke to go to New [fol. 4036] Orleans and that he would send him money there. Rubin went to New Orleans but returned in a week without telling Lepke. Then he telephoned Paul Berger and later received a visit from him. Berger told the witness

that Lepke wished to see him, waited while he dressed and then drove him to a place where Lepke was waiting under an awning. Rubin told Lepke that he could not stay in New Orleans. Lepke then asked Rubin how old he was and, being told, said, "It was a ripe age." He was then told to go to Philadelphia to meet one Zenreith, alias Bartfield. The latter and Rubin took an automobile trip which lasted seven weeks during each of which the witness received fifty dollars in cash from New York.

Rubin next saw Lepke in Washington and told him he was anxious to get back to New York. Lepke told him he could not come back. After further conversation Lepke told the witness to go to a Brooklyn hotel where Rubin registered under an assumed name. He was paid fifty dollars a week by Berger during that period. He then took an apartment in Brooklyn. He stayed in that apartment until August. He again talked with Mr. Maguire and then went down to the office of Mr. Dewey at 120 Broadway where he talked with Mr. Hogan (now District Attorney of New York county) and Mr. Ten Eyck, two of Mr. Dewey's assistants. That interview was arranged by Mr. Maguire. Following the interview he went back to work as business agent of Local 240. By that time Lepke had fled from the State.

Toward the end of September, 1937, Rubin testified before a grand jury in New York county in the Dewey investigation. On October first, four days later, as he was walking toward his home he was shot through the head.

On December 16, 1937, Rubin was examined by Assistant District Attorney McCarthy in the presence of Assistant District Attorney (now District Attorney) Hogan of New York county. He then testified that he never told Rosen to leave town, never gave him any money to go away and that he knew nothing about the Rosen murder.

In amplification and extension of the testimony of this confidant, as well as intermediary and messenger, of Lepke, of the testimony of those who heard the murder shots, who saw the car driven from the scene and who later saw it abandoned on Van Sinderen avenue by the four perpetrators of the deed and of the testimony of the lawyer for the labor group to whom Lepke revealed his method of conduct in circumventing the law—"when a witness is not around there cannot be a case"—there was the

testimony of some of those actively concerned in the murder.

I shall take first that of Paul Berger for whom Lepke sent when he finally lost patience both with Rubin and Rosen. Berger was employed by Local No. 4. He acted as a go-between for Lepke and Weinstein. On the Friday before the murder Rubin gave him Lepke's message that the latter wished to see him. Berger went to No. 200 Fifth avenue to see Lepke. Lepke said "Do you know that Joe Rosen." Upon receiving an affirmative reply he said "I [fol. 4037] want you to point him out." He and Lepke then took a cab to Suffolk and Grand streets. Lepke walked along Suffolk to Broome street and told a man he met there to tell the defendant Mendy Weiss that he wished to see him. Weiss came and Lepke talked to Weiss for five or ten minutes apart from Berger. Then Lepke brought Weiss over and told Berger to point Rosen out to Weiss. Berger took Weiss to Brownsville in Brooklyn and, after Weiss had spoken to the defendant Capone, Berger pointed out Rosen to Weiss at the candy store. The murder occurred approximately thirty-six hours later.

Berger read of the murder in the newspaper and later talked with Lepke about it. Lepke told him that it would be advisable for Rubin to leave town until things cleared up in Brooklyn. Still later, after Rubin's return from New Orleans, Rubin telephoned and Berger told Lepke that Rubin was at his home in the Bronx. That was the night that Rubin and Lepke talked under the awning near Amsterdam avenue. Later Lepke and Rubin came back to the automobile and he heard Rubin say: "Listen, Lep, I got to be around somewheres where I can be near my wife and kid." It was then arranged for Rubin to go downtown to stay at a hotel. Berger then drove Rubin home, waited until he obtained his clothes and then drove him downtown where Rubin checked in at a mid-town hotel. Subsequently Berger saw Rubin while the latter was living in Brooklyn disguised by a moustache and glasses. He told Lepke how funny Rubin looked and was directed to keep "pepping him up." In June, 1937, Lepke told the witness that "things were getting too hot, he will have to lamm," and then fled.

In the fall of 1937 the defendant Weiss talked with Berger about the fact that Rubin was "squealing" and asked

Berger to point him out to one Schlermer and to work with the latter. Berger then took Rubin to lunch in order that Schlermer might see him. Schlermer reported that he had trailed Rubin to a down-town building. Schlermer also said "that he has got to pick him up again tomorrow around the clothing market and when he goes in to the subway to go home he has got to get in touch with somebody in the Bronx." Then Rubin was shot as he walked toward his home in the Bronx.

Six or seven months later Berger drove with defendant Weiss to Livonia avenue, Brooklyn. Weiss said that he wished Berger to point out Rubin to Magoon. "This time the s of a b ain't going to be so lucky." The following morning Berger met Magoon and pointed out Rubin. There was delay in shooting Rubin a second time because he was under police protection and it was desired to shoot him without shooting the policeman. Magoon watched in the vicinity of Rubin's house, dressed as a laborer. A policeman questioned him and no further attack on Rubin was made.

In May, 1940, the defendant Weiss fled from the State because of his belief that one of Lepke's men named Tan- [fol. 4038] nenbaum (a witness at the trial) was talking. Weiss was arrested by federal narcotis agents in Kansas City, Mo., on April 6, 1941. He was living under the name of James W. Bell and had cards printed under that name purporting to indicate that he was vice-president of a mining company. He told the agents that he did not mind going back to New York except that he hated "to sit between O'Dwyer and Dewey." He also said he: "had intended to surrender himself at a later date when O'Dwyer would be out of office." He had with him some diamonds and twenty-seven hundred odd dollars in cash. Berger was arrested in June of 1941 and charged with the murder of Rosen.

The witness Tannenbaum went to work for Lepke in 1931 at thirty-five dollars a week. He took orders from Lepke and was told by the latter to obey the directions of Gurrah and the defendant Weiss. Tannenbaum's salary was increased from thirty-five dollars to one hundred and twenty-five dollars a week between 1931 and 1936. Two days before Rosen's death Lepke told Rubin in Tannenbaum's presence that Rosen was one "who will never go down to talk to

Dewey about me." He heard Rubin tell Lepke that he would see Murray Weinstein to see if the matter could not be straightened out. Three or four days later Tannenbaum was in Lepke's office when the defendant Weiss reported on the Rosen murder. Weiss related that everything had proceeded properly except for the fact that the defendant Harry Strauss to whom Weiss had given strict orders not to do any shooting, began shooting at Rosen as he lay on the floor after having been shot by Weiss. Lepke said: "All right, what's the difference as long as everyone is clean and you got away all right?" and patted Weiss on the back. Over coffee, shortly afterward, in response to a question Weiss explained that Rosen was "some fellow used to be in the trucking business and that he was threatening to go to Dewey and talk about Lep."

While Tannenbaum had never been convicted of a crime he admitted he had engaged in crimes such as robbery with a gun, sluggings, strike-breaking, throwing stink bombs and in six murders.

Seymour Magoon was a witness who testified that he was employed by Harry Strauss, Buggsy Goldstein (both executed, see *People* v. *Goldstein*, 285 N. Y. 376), the defendant Louis Capone and one Abe Reles (now dead). While he had received his first conviction in 1940, and that for vagrancy, he had stolen fifty or more automobiles and participated as the "wheel-man" in two murders, had shot several persons and committed several assaults. In the fall of 1938 the defendant Weiss in the presence of the defendant Capone, Strauss and Reles asked him to go to meet Paul Berger and another man on the following morning. Weiss said that Berger would point out Rubin and for him to follow Rubin, to find out his habits and to see if he had a police bodyguard with him. On the following day Berger pointed out Rubin and after following him and his bodyguard during that day Magoon talked that evening to the defendants Strauss, Weiss, Capone and Reles. The defend- [fol. 4039] ant Weiss told him to put on old clothes and to watch Rubin's house in the Bronx. On the following night the defendant Capone, said "that Rubin is hurting Lep and we got to hit him in the head and get rid of him." Magoon followed Rubin for the next three days during which on one occasion he was questioned by a police officer while watching Rubin's house. Magoon reported that incident and the

continued presence of Rubin's body-guard. Weiss said "then we will have to ... hack him and the cop." That was in connection with the preparation for the second projected assassination of Rubin.

One Sholem Bernstein worked for the defendant Capone. On the Friday [redacted] the Rosen murder the witness was in his automobile talking with defendant Harry Strauss. The defendants Capone and Weiss and one Philip (Farvel) Choen (a defendant also named in the indictment but as to whom there has been a severance, *talking with defendant Harry Strauss. The defendants Capone and Weiss and one Philip (Farvel) Cohen (a defendant also named in the indictment but as to whom there has been a severance,* (*supra*), approached. They called Strauss from the car. About three-quarters of an hour later they returned and Strauss said "steal a car and get a drop"—a "drop" is a garage in which to place a stolen car. Strauss also told Bernstein, after he had stolen the car and had arranged for the "drop" to meet him at four o'clock on the following afternoon. Without going into details, Bernstein rented a "drop" and with the aid of one Muggsy Cohen, stole a black two-door Chevrolet. On the following day at four o'clock he kept his appointment. The defendant, Capone, complained of the fact that a two-door instead of a four-door car had been stolen but nevertheless showed the witness the route to be followed from Rosen's candy store, where, as Capone said, "here is where somebody is going to be killed." He showed the route through the various streets to Van Sinderen and Livonia avenues where the car was to be abandoned. Capone went over it seven or eight cars. Then the defendant Capone told the witness to steal plates from a car that would not be missed and after the plates had been put on, to return with the car at ten-thirty o'clock that night. When he returned that night Strauss brought a package with pistols in it and that was put in the compartment of the car. After watching Rosen's store for a period of time it was decided that it would be safer to murder him in the morning when he opened his store. The witness, after putting the car away, went to the home of Farvel Cohen on Eastern parkway. He was told to get some sleep because he would have to be up at five in the morning. The defendant Weiss awakened him and told him to get the automobile and the guns. All then went to the

hallway of an apartment house about a block from Sutter avenue. The witness, curiously enough, did not know that it was Rosen to be killed. He had never heard his name. After an hour's wait the witness was instructed by the defendant Weiss to get the car and to stop it in front of [fol. 4040] Rosen's store and to make certain that the motor was running. Before he drove over he saw the defendants Weiss, Strauss and Ferraco (not apprehended) walk toward the store. Then Weiss and Strauss walked in. Ferraco stayed outside. He heard a number of shots and Weiss and Strauss came running out and with Ferraco entered the car. He followed the route as outlined to Van Sinderen avenue and Livonia avenue. He took the key out of the car and all four got out and walked over the bridge down into Junius street. There Capone had the witness Bernstein's car and Philip (Farvel) Cohen had his own car. Weiss gave the witness his gun and told him to break it and throw it away. Capone told him to take Ferraco and drop him off. Then the defendants Capone, Weiss and Strauss drove away in Cohen's car.

After District Attorney O'Dwyer took office and in February, 1940, this witness fled the State. He stayed for a few weeks at Miami Beach, came back to Brooklyn and then left for Los Angeles. Curiously, Bernstein came to Brooklyn from Miami in March, 1940, in order to see a lawyer. He went to the lawyer's home. There he saw also another lawyer who had been the witness' "regular" lawyer for many years. Those two lawyers are two of the three who represented the defendant Capone upon this trial. Then in turn he went to San Francisco, Dallas, St. Louis and Chicago. He then returned to Brooklyn and surrendered himself to District Attorney O'Dwyer. After he talked with Mr. O'Dwyer he testified before the grand jury in Brooklyn. He also testified before a grand jury in Sullivan county against one Gangy Cohen and on the latter's trial.

He was not cross-examined by counsel for Lepke whose name he had not mentioned in his testimony. On cross-examination by counsel for the other defendants, he said that the Rosen murder was the only one in which he took part. He testified that he had helped dispose of a dead body by burial but had not been present when the deceased, one Yuran, had been killed. He testified that at the trial of Gangy Cohen in Sullivan county for the murder of one

Walter Sage he had testified truthfully to what Gangy Cohen had told him in Los Angeles, Calif., but admitted that he had testified falsely as to some matters because he did not wish to give information to the "mob" all of whom had not as yet been arrested; that someone in the District Attorney's office, he could not recall whether in Kings county or Sullivan county, had told him not to tell everything for that reason. Apparently the matters about which he did not tell the truth were those involved in the Yuran murder case and the instant case. The indictment in the *Yuran* case had not been tried at the time Bernstein was cross-examined in the *Gangy Cohen* case.

It is of moment that the attorney for Gangy Cohen who cross-examined Bernstein in Sullivan county was the attorney for Philip (Farvel) Cohen, one of the defendants in this case, who has not yet been tried and whose name has been mentioned from time to time (*supra*). At the time of the cross-examination in Sullivan county there were many [fol. 4041] witnesses who were not under the protection of the District Attorney and many fugitives at large. Bernstein's direct examination in Sullivan county in the *Gangy Cohen* case as to the conversation which he had had with the latter in California took from three to five minutes. His cross-examination by counsel for Gangy Cohen and Philip (Farvel) Cohen took three or four hours. These facts were elicited in the instant case by the District Attorney undoubtedly for the purpose of arguing to the jury that the cross-examination during the Gangy Cohen trial as to facts affecting the Yuran murder and the Rosen murder, which apparently involved members of the so-called "mob," was to learn about other cases for future use and that there was some justification for Bernstein's concealment of facts. That of course could be no excuse. Be that as it may the facts involving Bernstein's concealment in this regard were placed squarely before the jury. It was for them to weigh the question of whether Bernstein testified truthfully as to being the driver of the murder car in this case and as to the others whom he named. The trial court charged before taking up the facts: "Let me say at the outset of this, please, scrutinize with suspicion and accept with caution and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence

put in by the other side which tends to contradict or discredit it. Then decide if you can, is the witness telling the truth now. Put your brains to work on that, because you will need them." We are not the jury and we cannot say that this testimony was unbelievable as a *matter of law*.

There was another instance of falsification in Bernstein's testimony to which I shall refer. He was kept in a hotel and he said that no communication was permitted among those who were kept there or with the outside world. It was shown that he wrote three or four letters threatening his former partner that unless Mrs. Bernstein received the sum of $200 he would inform against him. Bernstein then admitted that he had written the letters. They were not received in evidence after that admission. The court took the position that having admitted his untruthfulness, his credibility was impeached and the letters were irrelevant. The court said the witness had "-lied." This ruling was correct but even if incorrect did not constitute reversible error.

The defendant Buchalter called several witnesses to testify to the financial condition of the deceased, and of the N. Y. and N. J. Co. Among those witnesses was one Nat Sobler, an associate of Rosen and secretary of that company. Rosen had been vice-president. He testified that Rosen put no money into the company but brought in the Pennsylvania accounts; that when the stoppage occurred in 1932, to which reference has already been made, Max Rubin told him that he (Sobler) and one Bluestein were to have the New Jersey knee pants business and the New York accounts; that Rubin said that that was what the witness was going to get and that he would have to take it; Sobler [fol. 4042] said that when he heard that, he fainted; that Rubin told him "*That you are going to get and no more.*" Sobler testified that the stoppage began about Monday and that Rosen quit N. Y. and N. J. Co. on Saturday; that on that day Rosen said he was getting a job with the Garfield Express at $100 to $125 a week; that Rosen said "*Louis Buchalter, or Lepke, got in as a partner there and he told Louis Cooper to take me back to work.*" It will be remembered that this was a witness called by Lepke who, to the extent indicated corroborated Rubin, the chief witness for the prosecution.

LAW

It is urged that the court committed error in its charge that the jury could reconcile the testimony of Rubin, Bernstein and Berger in connection with the conduct of Lepke and the so-termed preparatory work on September eleventh. The point is this. The witness Rubin testified that on that day he saw Lepke at No. 200 Fifth avenue at about one o'clock in the afternoon. Lepke then complained that Rosen was again talking. Rubin said that he would see Weinstein. That he did and later reported to Lepke that Weinstein could do nothing. Rubin testified that that report was in the early part of the afternoon and that then Lepke told him to send Berger to him. Rubin said he gave Berger the message at a time which may have been about two hours after his talk with Lepke and thus well on in the afternoon. Berger testified that he saw Rubin at Union Square at about five P. M. and then walked uptown to Lepke's office; then that he and Lepke went downtown where they met the defendant Weiss at about six or six-fifteen P. M. and Lepke then told Berger to point out Rosen to Weiss. So much of Berger and Weiss. Now the defendants turn, in support of their argument, to the testimony of Bernstein. He testified that he was in his automobile at Sackman street and Lavonia avenue with Strauss at a time between twelve forty-five and one-fifteen P. M., when the defendants Weiss and Capone and Philip (Farvel) Cohen came up and called Strauss from the car; that they left him (Bernstein) seated in his car and returned three-fourths of an hour later. Strauss then told Bernstein, in the presence of the others, to "steal a car and get a drop." That would be about two P. M. The complaint of the defendants is that the court charged, after referring to the argument of one of the counsel that the testimony did not "hitch," as follows:

"Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, *if at all*, Buchalter communicated in reference to the preparation work. *The case is blank on that. There is no way of knowing.* We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received

the alleged instructions to steal car and hire a drop, which was earlier in the day. Taken in connection with the other [fol.4043] facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit. Apparently, in the *argument that was offered*, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but under the record I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. *I don't say you have a right to draw an inference that he sent such an instruction over the telephone*, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled." (11717-20.)

The court then read questions and answers from the testimony and then said: "Now, gentlemen, in going over the text, those are the only questions and answers that I can find covering that point in the direct. It is possible that I have overlooked something that is in the cross. I will be glad to instruct you on that by a quote if my attention is called to it, but, so far as the time element is concerned, you will note there is nothing there to indicate whether or not Buchalter had contacted in preparation, with the Brooklyn end, for the proposed murder before or after Rubin ran in on him and found him in that state and making those declarations, if that testimony be true—and please remember what the Court said to you about that—no speculation."

Exception was taken to that portion of the charge upon the ground that there was an assumption implicit in the statement that there was an earlier communication between the defendant Buchalter, and somebody else about preparatory work. Further exception was taken because under it the jury had been asked to speculate. The court then said

he would straighten the matter out recalled the jury and charged as follows: "My attention has also been called to a possible co ofusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the *argument of one of the counsel* for the defense in attacking the time tables as told by Bernstein as incon- [fol. 4044] sistent with Rubin's testimony and Berger's testimony is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will not be error that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the *argument* attacking the time table fails. I am not afraid of that charge. There is an exception to all of the defendants on this modification."

That which the court said failed was the "*argument* (of counsel) attacking the time-table." In effect what the court said was that there was no presumption either way. That was correct.

Both the charge and portion "straightening it out" were correct. "It is elementary that, in all cases of conflicting testimony, the first step in the process of inquiry should be to ascertain whether the apparent inconsistencies it presents may not, without violence, be reconciled." (2 Moore on Facts, § 1142, p. 1280.) Accordingly, "Juries are constantly instructed to reconcile evidence, where they can do so, without the imputation of perjury of any witness." (*Savannah etc., R. R. Co.* v. *Gray*, 85 Ga. 825, 829, per Chief Justice BLECKLEY.) We have said that it is the duty of the jury "to reconcile, if possible, conflicting statements as to material facts." (*Smith* v. *Lehigh Valley R. R. Co.*, 170 N. Y. 394, 400-401.) Here the statements were reconcilable, and if reconciled, were consistent with the testimony.

Surely, the court properly charged that the jury should endeavor to reconcile the testimony of Rubin, Berger and Bernstein. It may very well be that Lepke, due to the anger in which Rubin found him at about one P. M. on September 11, 1936, had already sent word to Weiss and Capone that Rosen was to be silenced. It may be that Strauss and Capone and Weiss had their own reasons for telling Bernstein to steal a car and get a "drop" and that those reasons had nothing to do with the slaying of Rosen. Later on that day, when Berger and Weiss had their instructions from Buchalter as to the slaying of Rosen, the previous order to Bernstein to steal a car and get a "drop" may have been made to fit into the new plan. A jury could have so found. In that event or in the event the jury found that Buchalter had set the machinery in motion before Berger was sent to him, or even before talking with Rubin, the testimony was reconcilable.

That Bernstein did not know that the automobile he was told to steal was to be used for a murder is made evident by his answers that if he had so known he would not have permitted Muggsy Cohen to take the radio out of the car. After the murder he searched out Cohen, obtained the radio, broke it into pieces and disposed of it. For the same reason he said he would not have taken the handle off the door of the car and had a key made for it. He said he though- the automobile was to be used in a "schlamming" (striking on the head with a lead pipe).

[fol. 4045] It is urged that it was error to permit Rubin on re-direct examination to give an affirmative answer to the question, "Did you give untruthful answers to Mr. McCarthy due to fear of Lepke on your part because of the fact of having been shot, following your testimony before the Dewey Grand Jury?"

Here was a witness who had made untruthful answers to an Assistant District Attorney's questions. He had been shot through the head four days after his testimony before the grand jury either because, as the defendant Weiss stated to Berger, "We got some information that Max Rubin is squealing and he has got to be hit" or as the defendant Capone told Magoon, "Rubin is hurting Lep and we got to hit him in the head and get rid of him." He had been one of the intermediaries between Lepke and Rosen. There had been a scene in the court while the jury was absent in which Rubin had lost control of himself when asked for

the reason for his untruthful answers to the Assistant District Attorney. The court felt that counsel was seeking to provoke an outbreak in order to move for a mistrial. It was to prevent a further outbreak that the court framed the leading question which the District Attorney was to ask. There was nothing objectionable in that question. It was necessary and proper for the District Attorney to elicit the reason in the witness' mind for his conduct. The "impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it." (3 Wigmore on Evidence [3rd ed.], § 1044, p. 737.) As the court said in *People* v. *Chapleau* (121 N. Y. 266, 277): "Here the witnesses, in testifying to facts, of which upon the preliminary examination they had denied knowledge, or which they had suppressed, may have been moved or deterred as they swore they were by motives of fright; and they appear to have been perfectly free from improper instigation, or motives to swear falsely. At any rate, it was for the jury to decide whether they were to be believed or not." See also, *People* v. *Weldon* (111 N. Y. 569, 576).

The important factor was the reason which operated upon Rubin's mind. That reason might be a good one or a poor one. It might have a foundation in fact or no foundation at all. The fact that it was in Rubin's mind was no proof that it had any foundation. All it was offered to prove was that that reason, good or bad, motivated the conduct of the witness. In this instance he had testified before the grand jury and had been promptly shot through the head. He believed that Rosen had been killed because he had not kept quiet. He believed that that killing had occurred pursuant to the orders of Lepke. Lepke had told him that the *Rosen* case was to be taken away from the Assistant District Attorney who was even then examining him and given to another and that the latter was to be given other work and sent to another building; that the Rosen case would die. It was Rubin's state of mind that was being inquired into. That state of mind was no proof that Lepke had anything to do with the shooting of Rubin. [fol. 4046] No one claimed it was proof of that fact. But that belief did enter into the mind of Rubin and that was the reason he did not tell the truth to Assistant District Attorney McCarthy. The question was a proper one.

It is said in the dissenting opinion: "On request of counsel for Capone, the trial judge said to the jury: 'I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted.' The gist of such connecting testimony was the ungarnished word of Bernstein that the getaway route over which he drove the murder car had been taught to him by Capone the day before the killing of Rosen."

We think that there was more than that and that it is unfortunate that error must be predicated upon one sentence occurring at the end of two interdependent paragraphs contained among the requests to charge *and having application to but one defendant*. The context containing the one sentence which is said to be error is found in full on page 22. Especially is this so when this sentence was uttered by the trial judge in order to be fairer to the defendant Capone than his counsel requested. If the court had stopped with the words "I so charge" the defendant Capone would have no complaint to make.

First as to the facts. Bernstein's testimony in brief was as follows: On the Friday before the Rosen murder he was at Sackman street and Livonia avenue in his automobile talking with Harry Strauss. Along came *Louis Capone*, Mendy Weiss and Philip (Farvel) Cohen (a defendant as to whom there was a severance). Harry Strauss was in the car with him. They called Strauss out of the car. Mendy Weiss spoke to Strauss. Before Strauss stepped out he told the witness to wait around and not to go away. *Capone* had introduced him to Cohen and Weiss a year before. In about three-quarters of an hour they all came back and Strauss said "Steal a car and get a drop." Strauss asked if he could get one and when he answered "Yes" Strauss said "After you get that, come over tomorrow afternoon at four o'clock on Sackman Street and Livonia Avenue, I want to see you." He went away and rented a "drop" at Lincoln place and Ralph avenue at eight dollars per month.

About one o'clock the following morning he stole an automobile in the East Flatbush section with Muggsy Cohen, a car and radio thief. They stole a black, two-door chevrolet. They drove it to the "drop" and Muggsy took the radio out. On Saturday morning he took the handle off the door and had a key made. He then had an appointment at

four p. m. on Saturday at Sackman street and Livonia avenue with *defendant Capone* and Strauss which he kept. *Capone* asked if he had the automobile in the drop and then what kind of car and complained of the fact that it was a two-door car. Then *Capone* said "Come on, I will show you the job you have to do." Then *Capone* showed him the route; Capone said: "Now watch—this is going to be your job, what to do." As they drove, he showed the witness [fol. 4047] the candy store (Rosen's) and said: "Here is where somebody is going to be killed." He showed the route through the various streets to Van Sinderen and Livonia avenues. *Capone* went over the route seven or eight times. *Capone* said "This is the place where you drop the car off." Then they went back to Sackman street and Livonia avenue. Strauss came over and *Capone* told him to steal plates—to make sure to take plates at a place where the car would not be missed and after the plates were on to bring the car at ten-thirty o'clock that night to Sackman street and Livonia avenue. He left his automobile with *Capone* after taking out a flashlight, a screwdriver, a pair of pliers and a pair of gloves. He broke into a garage and stole plates. He put the plates on the car he had stolen, broke up the old plates and disposed of them. He waited around and then drove the stolen car to Sackman street and Livonia avenue. He parked it a few doors away and it was inspected by Weiss, Strauss and *Capone*. Weiss started complaining: "What the hell is the matter with you? Why did you get a two door car for?" "You know for a job like this you need a four door car."

After Rosen had been shot Weiss and Strauss came running from the store and with Ferraco jumped into Bernstein's car. He drove along the route to Van Sinderen and Livonia avenues. He took the key out of the car and all four stepped out and walked over the bridge down into Junius street. There Capone was waiting with Bernstein's car and Cohen had his own car. Weiss gave the witness his gun and told him to break it and throw it away. *Capone* told him to take Ferraco and drop him off and *Capone*, Weiss and Strauss went away in Cohen's car.

The portion of the charge containing the sentence quoted is as follows: "*Counsel for Capone:* I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of

Solomon Bernstein, if they disbelieve the testimony of Seymour Magoon, they must acquit. The Court: I have already charged that and, as the jury knows, I have gone particularly into that point. It is all up to the testimony of Seymour Magoon. Do you believe it? If you do believe it, it is one thing; if you do not believe it, it is another. Counsel for Capone: May I have the converse of it in the next request? I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Seymour Magoon, if they disbelieve the testimony of Solomon Bernstein, in so far as it affects the defendant Capone, they must acquit. The Court: I so charge. That is obvious. Wait a minute. I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, 'What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made.' I think that is too indefinite. I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted. Counsel for Capone: There are just a few more. * * *" The charge was correct.

[fol. 4048] It is next urged as error requiring reversal that the court failed to analyze the evidence in the case so as to present to the jury fairly the conflicting claims of the People and the defendants but on the contrary expressly disavowed that duty. The case cited is *People* v. *Montesanto* (236 N. Y. 396). The last paragraph is no doubt the reason for the citation. We do not think it is justified by the paragraph in question which reads as follows: "In our opinion, *in view of these two matters, taken in connection* with the failure of the court *generally* to analyze the evidence in the case so as to present to the jury fairly the *conflicting claims* of the People and the defendant, the latter was not accorded a fair trial." (p. 407.) That is as far as we have ever gone. Surely it must depend on all the circumstances of the particular case.

We shall now quote the language of the charge upon which defendants must rely in support of this contention:

"Questions of law are for the Court. It is not the purpose of the Court, in making any allusions to evidence, to do so for the purpose of refreshing recollection or particularizing in order to emphasize one point as against another.

You heard the witnesses. You heard the evidence exhaustively discussed by counsel. The Court placed *no time limitation* upon the discussion, simply tried to preserve order and dignity, two qualities which are inherent in the administration of justice, and which it is the duty of the Judge to do.

It is the record of the evidence that counts, and that is left to your memory, to be refreshed in such particulars, if any, as you may desire, by a re-reading of minutes on any particular point, should that be necessary."

* * * * * * *

"These three defendants are tried together because that is provided for by a statute of this State. We cannot question the wisdom of that statute. It was passed by the Legislature and signed by the Governor. It is the law. But that does not lessen your responsibility in seeing that the evidence as against each is properly segregated and applied only as to him.

"I shall have to later come back, and in a sort of away which I hope will be fair, attempt to point out certain parts, possibly the bulk, possibly all of the points of evidence in connection with the defendant or defendants to whom they apply. I will do that as a safeguard against your own confusion, but when I do it, remember it is your own recollection of the record that counts. Try as hard as I may to be fair in epitomizing for the purpose of segregation from, as I said, approximately a million words of record, I do not guarantee it to be true, because I cannot give assurance against the human frailty of making mistakes."

* * * * * * *

"Now, gentlemen, I don't like to review testimony in a long record. I don't think it is humanly possible, with this enormous amount of text, for a judge to do this, no matter how fairly he tries to do so, without being accused of trying to color it.

[fol. 4049] Just as with an anthology, any epitomization of record is terribly personal with the person who prepares the epitomization. I know it has to be done in some cases. *I will do it if counsel for the defense request it.* This has been a long trial. Witnesses have been put on in certain order. I don't know how much of the record you remember and how much you don't. A lot of it has been discussed in the summations from the viewpoint of counsel who

argued. However there are certain points of the evidence to which I feel under the necessity of calling your attention, first, because where more than one defendant is tried for a crime and the evidence is different as against the different defendants in its applicability, there should be some sort of an attempt at segregation by the Court as an aid to you *otherwise you might apply evidence against one defendant as against the others, and that would be unfair. That is the purpose of this epitomization.* Please do not gain any impression that it is warranted to be perfect. It is simply intended as a fair summary, and, I hope, a substantially accurate one.

"Also, I express no opinion as to the believability of any of the witnesses on any of the points mentioned.

"Also, this particular summary is not a general one, it is merely a segregation of evidence to *keep you from misapplying it as against certain defendants.*

"The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

"Unless, there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it.

"Let me say at the outset of this, please scrutinize with suspicion and accept with caution and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence put in by the other side which tends *to contradict or discredit it.* Then decide, if you can, is the witness telling the truth now. Put your brains to work on that because you will need them."

* * * * * * *

"So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business

grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business apparently, and the grudge relating particularly to Rosen's severance with the business, and apparently blaming Buchalter for it, Buch- [fol. 4050] alter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities. That is enough as motive evidence, if you find these facts to be established to your satisfaction reasonably, but I charge you that motive need not be shown if the case is otherwise sufficient. When I mentioned Weiss and Capone, please bear strictly in mind what I said at the start, that this is purely a segregation to guide you against *misapplication of evidence as against defendants to whom it does not apply.* It is not a discussion of evidentiary values; it is not an expression of belief by the Court as to whether or not you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case. It is strictly and only a segregation."

* * * * * * *

"*Now as to Capone*—and please pay strict attention, gentlemen on this point; it is quite important. In mentioning the points of evidence applicable *to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone.* Most of the evidence as against his defendant came from the accomplices Berger and Bernstein."

"*Those two items, as I have said, are the only evidence from non-accomplice witnesses* which can be submitted on the question of corroboration. You will have to ask yourselves, 'Is it true?' Possibly it would be better in view of the great importance of this feature of the case, if, instead of depending on what I have just said, I use just a few minutes more and refer to the exact text of the record, because this must not be carelessly decided; it must be intelligently decided."

Then the court read questions and answers from the record, giving the page numbers at which they occurred. The

questions and answers so read take approximately five pages of the charge. Then the court continued:

"Gentlemen, I think that is the text applicable thereto, unless there was something on cross-examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses."

. . . . . .

"If, under the strain of this trial, there has been any evidence of nervousness or strain on the part of counsel or Court, if there have been interchanges which may have shaken the decorum of the court-room, if there have been argument and recriminations which may seem unnecessary, please overlook and disregard them in coming to your ver- [fol. 4051] dict. This includes the Court. The Court is human. It has to be strict, in accordance with the responsibility of its job, whether it likes to be strict or not, but if I have spoken sharply at any time, just forget it. The Court is trying to be fair. It is trying not to express any opinion or to give any impression as to what its own notion is concerning the guilt or innocence of any of these defendants. It is trying to see that the case is kept within reasonable bounds, although it has given a great deal of latitude in this trial. It is trying to see that the jury has it fairly and fully presented as a case so that it may properly decide it.

I charge you that the law presumes every defendant innocent unless proven guilty beyond a reasonable doubt, the language of the statute being: 'A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.'"

I referred (*supra*), to the defense interposed by the defendants and to the witnesses called by them in order that I might refer thereto at this point.

This claim of error comes to this: there should be a reversal in this lengthy trial where the guilt, at least of Lepke

and Weiss was clearly established, because after eleven weeks of trial the court did not analyze the evidence so as to present the conflicting claims of the defendants and the People. We have never before said that that was indispensable or constituted reversible error. However, we shall now examine the conflicting claims.

As to the defendant Capone the court told the jury of the "paucity of the corroboration from non-accomplice witnesses" (*supra*), and read the questions and answers relating thereto from the record. Capone had not testified and had called no witnesses. What were the conflicting claims of the People and Capone which should have been analyzed? The defendant claimed to be not guilty and the prosecution witnesses to be untruthful and those claims were surely known to the jury.

As to the defendant Weiss, his defense in substance was an alibi. The court properly charged as to that defense.

As to Lepke his defense was that he was not guilty, that the deceased was of too little importance for him to direct or order his death and that certain conversations testified to by prosecution witnesses had not occurred. I have quoted from his counsel's argument to the jury to indicate that the jury understood that Lepke claimed to be innocent and that Rosen was so unimportant that there was no reason or motive for Lepke to direct his death. His counsel argued at length upon the fact that the prosecution witnesses who testified to conversations in the rooms at No. 200 Fifth avenue were unworthy of belief. His counsel's summation covers one hundred and three pages of the record. The claims of Lepke were before the jury during the whole of the long trial. Of the facts presented here we do not find any error affecting the substantial rights of defendant Lepke in the failure of the court to analyze his claims after [fol. 4052] they had been presented at such length by his counsel prior to the charge. On the contrary, so weak was his defense that great harm might have been occasioned to Lepke if the court had attempted to analyze the testimony of the witnesses called by him.

We shall now examine the corroborative evidence as to Capone which is discussed in the dissenting opinion.

Magoon testified that in April, 1939, Capone spoke to him with reference to one Friedman. A few days later Magoon saw Capone at the latter's home and asked him "if he thought it was advisable that I work on the Friedman thing

because I hung out about a block away and I thought I would be recognized" to which Capone replied: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made" (identified).

Cross-examination developed little on this phase. After detailed questioning of Magoon on matters affecting credibility the court said that the witness "has already admitted previous crimes, a number of murder combinations and various crimes, it looks to the Court as if it comes down to a flat foot proposition whether or not the jury will, notwithstanding the facts just mentioned, believe he is telling the truth in this particular occasion concerning this particular crime. That is all. The jury requires no further persuasion he is a criminal or that he is a murderer."

Counsel for Capone argues that that could not be considered as corroboration, and I shall take that up later, but assuming for the moment that it could be so considered, he says that that was the only item in Magoon's testimony which could be so considered. Therefore, he argues, that the court erred when it submitted the item which may be referred to as the participation of Capone in the "tailing" of Rubin by Magoon in preparation for another attack on him and Capone's statement on an occasion when Magoon was reporting thereon, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him." Originally the court submitted those two items, saying: "Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration."

As to the complicity of Capone in the "tailing" of Rubin for what the court referred to as the second attempted assassination, I think, it could well be argued that that was corroboration of the testimony of Bernstein and Berger because it evinced consciousness of guilt of Capone in that, knowing that he, Buchalter and Weiss were all implicated in the murder of Rosen, it was necessary for Capone to become concerned in the spoliation of evidence against anyone of those three because what might become harmful to Buchalter might lead thereafter to the apprehension and conviction of Capone. A jury might find that when Capone put it upon the ground that the witness was to be destroyed because he was hurting "Lep," Capone was thinking of himself but using the name of one of the other guilty men rather than his own name.

I do not think that is necessary so to argue here because of that which occurred during the requests to charge and [fol. 4053] which, I think, disposes of this item of the "tailing" of Rubin for the purpose of having him killed. The following I quote: "The Court: 40, I had this penciled notation: There is also testimony of Magoon as to Capone being involved in preparation for intended assassination of Rubin. Counsel for Capone: I intend to except to that. I don't want—with your Honor's permission—The Court: The way you frame this, if you want to read it, go ahead and read it. Counsel for Capone: 40. I ask your Honor to charge the jury that the only alleged corroboration of the accomplice Solomon Bernstein's testimony in so far as the defendant Capone is concerned, is the alleged oral statement made by the defendant Capone to Seymour Magoon in the year 1939, at the home of the defendant, in which the defendant is alleged to have stated, 'I worked on the Rosen thing right on Sutter Avenue, and I was not made. I hung around there too. What are you worrying about being made?' The Court: Denied. Counsel for Capone: Respectfully except. I ask your Honor to charge the jury, in so far as the alleged statement which I have just read is concerned, that the jury has no right to speculate, surmise, or add to such alleged statement, but if they believe same must determine that in their opinion it is sufficient independent evidence tending to connect the defendant Capone with the crime charged, or they must acquit. The Court: I will have to think about that one. Now you are getting into a deep question of law. Counsel for Capone: That is why I said to your Honor I did not want to read it out loud. The Court: I will so charge; that the alleged preparation, if it occurred, in which Capone is alleged to have participated, for the second attempted assassination of Rubin, is of value only in connection with and in event of the declaration previously alleged to have been made by Capone being truthfully testified to by Magoon. Counsel for Capone: *Thank you very much.*"

That, it seems to bring the corroboration, under the charge down to the one item of conversation in which Capone said that he had worked on the "Rosen thing" and had not been "made" and thus that Magoon need not worry about the "Friedman thing."

Counsel for Capone argues that in order to have that corroboration of the story of the accomplices, the jury must

have found that the words "on the" means "implicated in" and that the "Rosen thing" mean the "Rosen murder."

We shall assume that to be correct. That was for the jury. The sentence must be read in the light of its setting. Murder is a harsh word. No doubt murderers prefer to use another word. "Implicate" is a lawyer's or a judge's word and not that of a Magoon or a Capone. It was well said in *Weathered* v. *State* (129 Tex. Cr. 514), which was in turn quoted in Wigmore on Evidence ([3rd Ed.] Vol. VII, § 2094, p. 473): "We cannot agree that it is proper to so mutilate a statement made. The setting of a word or words gives character to them, and may wholly change their apparent meaning." In *Towne* v. *Eisner* (245 U. S. 418, 425), HOLMES, J. said: "A word is not a crystal, trans- [fol. 4054] parent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Let us examine the circumstances and time: (1) Capone, on the day before the murder took Bernstein in an automobile, passed Rosen's candy store on Sutter avenue and said "Here is where somebody is going to be killed;" (2) he showed Bernstein the route to be taken after the murder seven or eight times; (3) in making the quoted statement, Magoon was talking of "work on the Friedman thing" which was to take place "sort of off Sutter Avenue" and Magoon "hung out about a block away;" (4) Capone then said "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made;" (5) Rosen had been shot and killed on Sutter avenue.

It was for the jury to say under section 399 of the Code of Criminal Procedure whether Capone's statement to Magoon tended to connect him with the commission of the crime. Counsel argues that it would not and says: "The conversation could only be admitted as a circumstance to be considered in determining whether the defendant was implicated in the crime, and would, like other circumstantial evidence, have to lead irresistably to a conclusion of guilt, to the exclusion of every other reasonable hypothesis to the contrary to a moral certainty. (Wharton's on Criminal Evidence, [10th ed.] § 622-b; *People* v. *Bennett*, 49 N. Y. 105.) Otherwise, it would not constitute corroboration." That is not the rule as to corroboration. (*People* v. *Reddy*, 261 N. Y. 479, 484; *People* v. *Kress*, 284 N. Y. 452, 460;

People v. *Cohen*, 223 N. Y. 406, 426; *People* v. *Elliot*, 106 N. Y. 288, 292; *People* v. *Hooglikerk*, 149 N. Y. 162; *People* v. *Everhardt*, 104 N. Y. 591, 594.)

Although that is not the rule, nevertheless, the court was asked to charge and did charge as follows: "Counsel for Capone: All right. I ask your Honor to charge the jury that if, after considering the evidence, they find it is susceptible of two constructions, one indicating the defendant Capone's guilt and the other his innocence, they must give the defendant Capone the benefit of the construction most favorable to him and must acquit him, and if the jury find that the two constructions are evenly balanced, then the People have not met the burden imposed upon them and the jury must acquit the defendant Capone. The Court: I take it, gentlemen, this goes to the question as to whether the language which is alleged by Magoon to have been used by Capone is susceptible of interpretation on the hypothesis of innocence. I have taken great care of Capone's end of the case because of the difference between the corroborative evidence as to him and as to the others. It is so limited in record content, I even went to the extent of quoting verbatim from the record, so there would be no mistake about it. You know the text. Of course, if you think that is capable of interpretation on the hypothesis of innocence, why, follow that and acquit him. If you think it hooks him up and it is not capable of interpretation on the hypothesis of innocence, and you believe Magoon in that [fol. 4055] testimony, then you have a right to consider whether or not it corroborates sufficiently to tend to connect Capone with the commission of the crime, the details of which, as against Capone, were testified to by Bernstein and by Berger, which go into considerable detail. Of course, if this alleged corroborative testimony is found to be true and so tends, you are entitled to convict. Otherwise acquit."

Let us return now for a moment to the quoted portion of the examination about the "Rosen thing". In *People* v. *Feolo* (284 N. Y. 381) the following was said by the defendant Brabson, "On a murder charge that happened about six years ago in New York City. I thought it blew over, but finally I am going back to New York on that charge." We were unanimously of the opinion that that statement

was a sufficient corroboration of the accomplice, if believed by a jury, and was sufficient to take the case to the jury.

Now we go back to the meaning of the "Friedman thing". The counsel in the case knew what working on the "Friedman thing" was. Counsel for Capone argued at one point in the trial, as follows: "May I add just one more thing before the jury comes back. I understand from other counsel, which I did not know, that this man (Magoon) is charged with the Friedman killing and they are going to bring it out on cross-examination, which would make the error still more harmful." Thereafter counsel for Weiss, asked Magoon the following questions and received the following replies: "Q. You helped to kill a man named Whitey Friedman, did you not? A. I drove the car on that occasion as well. Q. And you knew that Whitey Friedman was to be killed? A. Yes, sir. Q. When you drove the car? A. Yes, sir. Q. You knew what the job was that night, didn't you? A. Yes, sir. Q. And you drove the men who did kill Whitey Friedman to where Whitey Friedman was? A. The man who killed him. Q. The man who did it. And then you drove that man away, did you, after Whitey Friedman was killed? A. Yes, sir. Q. How was he killed? Was he shot? A. Shot."

In addition, Tannenbaum had already testified: "Q. In the Whitey Friedman murder, what part did you play? A. I fingered him."

Counsel for Capone argues in his brief that if the District Attorney should contend that Magoon in his question to Capone regarding the "Friedman thing" referred to a "Friedman murder": "Then Magoon's question would constitute proof of another crime, and the admission of this testimony would be error. (*People* v. *Molineaux*, 168 N. Y. 264; *People* v. *Dolan*, 186 N. Y. 4; *People* v. *Katz*, 209 N. Y. 311.)" The question of Magoon to Capone as to whether he (Magoon) should "work on" the murder of a man named Friedman, would certainly be no proof of another crime by Capone and the mere statement of the proposition is its refutation.

The defendant Weiss also urges that it was reversible error to receive the testimony concerning the alleged attempts of Weiss to have Rubin killed.

[fol. 4056] It appears that after the murder of Rosen, defendant Weiss stated, according to the testimony of

People's witness Berger, that "We got some information that Max Rubin is squealing and he has got to be hit." Magoon testified that after the Rosen murder defendant Capone stated "that Rubin is hurting Lep and we got to hi*m* him in the head and get rid of him." These statements by defendants Weiss and Capone are some evidence that they feared the "squealing" of Rubin and that they feared they would be implicated if Rubin continued to "squeal" or to hurt Lepke. I have already indicated that Rubin was a key witness in the trial of the instant case, because of his position as a go-between Lepke and those who were affected by Lepke's union activities, Rosen for example. Rubin's past conduct in that capacity had been such that when Lepke thought it was best for Rubin to get out of town after the Rosen killing, he told Rubin to introduce Berger to the men from whom Rubin was collecting money for Lepke, evidently intending to use Berger as a go-between successor of Rubin. Defendant Lepke's efforts to keep the witness Rubin out of town, as indicated in Rubin's testimony, indicate that Lepke as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, or any charge which might lead the District Attorney to the uncovering of those responsible for the Rosen murder. There was, therefore, clearly some evidence to indicate not only that all the defendants here were implicated in the shooting of the witness Rubin, but that that attempted murder was made necessary in their eyes by the murder of Rosen and the threats and grand jury testimony of Rubin. From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Lepke's statement to Mr. Maguire that, "If witnesses are not available, investigations collapse." It is true that the court charged that the shooting of Rubin and the subsequent "tailing" of him by Magoon was not to be considered against Lepke but might be considered, if believed, only against Weiss and Capone but that was a ruling favoring Lepke.

In *People* v. *Place* (157 N. Y. 584), the defendant was accused of killing her step-daughter and the prosecution was allowed to prove an assault by the defendant upon her husband, the father of the murdered girl. This court said, at page 598: "The prosecution was allowed to prove an

assault by the defendant upon her husband when he returned home, and when the death of Ida could no longer be concealed unless he was removed or his life destroyed. The demeanor, conduct and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, an anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. (Citing cases)." In *People* v. *Thau* (219 N. Y. 39, 42), this court said, quoting with approval from an opinion of Mr. Justice BREWER (afterward an associate justice of the Supreme Court of [fol. 4057] the United States) in *State* v. *Adams* (20 Kans. 311, 319): "And, on the other hand, it is equally clear that whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. *A party cannot by multiplying his crimes diminish the volume of competent testimony against him.* A man may commit half a dozen distinct crimes and the same facts or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts as testimony that they also tend to prove his guilt of the others." (Emphasis supplied.) See also, *People* v. *Peckens* (153 N. Y. 576, 594; *People* v. *Katz*, 209 N. Y. 311, 328-329). In *People* v. *Peckens* (*supra*), at page 594 this court said: "The contention of the appellant, that the evidence of other transactions by the defendant and his confederates was inadmissible, because it tended to prove that they were guilty of other crimes, cannot be sustained. It is well settled by the decisions of this court that while evidence of the commission of one crime is not admissible to establish a party's guilt of another, yet, that is not inadmissible because it tends to prove another crime if it is otherwise material and relevant. That such evidence is admissible where its purpose is to show intent or guilty knowledge, or where the transaction proved had some relation to or connection with the transaction upon which the indictment was based, or where it formed a link in the chain of circumstances or facts which led up to the transaction involved, we think there can be no doubt under the authorities as they exist in this state. (*People* v. *McLaughlin*, 150 N. Y. 386).

This case clearly falls within the exceptions to the general rule, and as the evidence was relevant to the issue it was not inadmissible simply because it tended to prove the defendant and his confederates guilty of other crimes."

In addition, we may say that the rule of *People* v. *Molineaux* (168 N. Y. 264, 291), is primarily applicable to a wholly independent crime when there is no connection between the two crimes. (*People* v. *Katz*, 202 N. Y. 311, 327).

Clearly Weiss' attempts to have Rubin killed were directly relevant to the issue on trial. In *People* v. *Spaulding* (309 Ill. 292, 302-306), it was said: "Evidence that the accused has attempted to destroy evidence against himself is always admissible for the purpose of showing consciousness of guilt, (*People* v. *Fox*, 269 Ill. 300) as is also evidence tending to show an attempt to bribe witnesses. (Citing cases). In *People* v. *Roberts*, 306 Ill. 240, evidence showing that the defendant arranged for a conveyance out of the state of the prosecuting witness and gave her money to remain away from the county during the trial was considered admissible for the purpose of showing consciousness of guilt. *State* v. *Keith*, 47 Minn. 559, 50 N. W. 691, and *Blair* v. *State*, 72 Neb. 501, 101 N. W. 17 are similar cases and the holdings are the same. In *Bowman* v. *United States* (267 Fed. 648), the defendant was convicted of murder. It was held proper to prove that he [fol. 4058] threatened to kill the only eye-witness to the murder and that he had assaulted the witness with intent to kill." When Rubin returned to the city in violation of Lepke's instructions Weiss told Berger "we got some information that Max Rubin is squealing and he has got to be hit. I want you to point him out to Schlermer and work with Schlermer." When Weiss was arranging for a second attempt to eliminate Rubin he said "Look how lucky the s of a b is. He gets hit in the head and he is still alive. But we will catch up with him yet." Finally when arrested after flight Weiss said "I don't mind going back to New York except that I hate to sit between O'Dwyer and Dewey" and that "I had intentions of surrendering at a later date when O'Dwyer would leave office." He feared the squealing of Rubin because conscious of his guilt in the slaying of Rosen and desired to have Rubin destroyed.

It is urged that it was error for the court to charge: "The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct is largely hit or miss: it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute. Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it."

We find no error in that charge. The cross-examination of the witness Bernstein, for instance, covered approximately five hundred pages. One cannot set out cross-examination as one can set out direct examination.

It is then urged that the following charge was incorrect: "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out, it is a wise man's delight; so while the court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now? If you are not reasonably satisfied that they are telling the truth now, you may not accept and be guided by their testimony, but if you are reasonably satisfied, having viewed with suspicion and accepted with caution their testimony, taking into consideration its impeachment, then you will be guided by it."

When exception was taken the court offered to withdraw it but counsel said he did not wish to be put in the position of asking the court to recall the jury for that purpose and *that it was one of those things that was unintelligible* to [fol. 4059] him. Nevertheless, after the jury was recalled the court said: "At one place during the charge I quoted an old saw, 'When rogues fall out, wise men delight.' That was intended to have general application. It was not intended as calling the defendants names, but, lest it be

misunderstood as having specific application to the defendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it."

Counsel for defendants confronted the People's witnesses with their testimony upon other trials. Many or all of them said in substance "if it is in the book it is so" or something similar (the word 'book' referring to the record on the cross-examination). In the charge the court referred to that as a normal response and used the sentence, "Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing. We have a court reporter here to supply daily minutes in this case because counsel forget overnight the questions and answers in text form of the day before, * * *." What the court said was helpful to the jury.

Defendants urge that they are entitled to a reversal because the court directed that the issues be tried before a special jury. The answer to that is that it is recited in the order granting the motion for a special jury that the District Attorney appeared in support of the motion and that each attorney for each defendant consented to the granting of the motion.

Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants claim for a number of reasons.

In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * * or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify

as a witness in his behalf shall not create any presumption against him." A similar provision was incorporated in Laws of 1886, chapter 378, and in Laws of 1901, chapter 602. The statute is constitutional (*People* v. *Dunn*, 157 N. Y. 528) and was properly applicable upon proof that the defendants had been indicted for the crime of murder in the first degree. (*People* v. *Hall* 139 N. Y. 184). The statute further provides, in subdivision 7, "The rulings of the trial court, how-[fol. 4060] ever, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final." Those provisions have been pronounced constitutional by this court. (*People* v. *Dunn, supra; People* v. *Wolter*, 203 N. Y. 484.)

The motion was addressed to the sound discretion of the court. We are not prepared to say on this record that its denial was an abuse of discretion. (*People* v. *Hyde*, 75 Misc. 407 [opinion by Mr. Justice LEHMAN, now Chief Judge of this court]; affd., 149 App. Div. 131; *People* v. *Brindell*, 194 App. Div. 776, 781; *People* v. *Hines*, 168 Misc. 453, 470; *People* v. *Sarvis*, 69 App. Div. 604.) This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance.

The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believed the testimony of a witness who corroborated the accomplices. That witness was a criminal. The court properly left to the jury the question whether they would believe or disbelieve him. That was peculiarly a jury question. We cannot say that the jury was bound as a matter of law to disbelieve him.

The judgments of conviction should be affirmed.

LEHMAN, Ch. J. (concurring). Joseph Rosen was killed on September 15, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the nefarious purposes of the gang. Almost four years later these defendants were indicted for the murder. The trial took place five years after the murder.

At the trial, witnesses, produced by the District Attorney, testified that they were members of a criminal combination, or gang, or, at least, had friendly and intimate relations with members of a criminal combination or gang which

preyed upon the public and which without hesitation and without questioning obeyed the orders of its leaders. According to their testimony violence and murder were ordinary methods of carrying out their criminal purposes. Some of these witnesses, confessed members of this hideously criminal gang, testified that they actually took part in the murder of Rosen in 1936. Others testified that though they were members of the gang and had callously taken part in other murders, they had no criminal connection with the particular murder of which the defendants have been found guilty. Still others, though denying criminal connection with the gang, claimed, or at least admitted, intimate business and social relations with the leader of the gang. Witnesses who had no relations of any kind with the gang or its leader, and whose credibility has not been impeached, showed the manner in which the killing was perpetrated and the circumstances surrounding it. Their testimony is not challenged, but it throws little, if any, light upon the identity of the killers, nor does it in any manner tend to connect the defendants with the crime or to corroborate the testimony of the witnesses who admit that they are professional [fol. 4061] criminals. The only testimony which might serve to cast upon these defendants even serious suspicion of complicity in the crime was given by witnesses who, as matter of law, were, according to their own admission, accomplices in this killing, or men who, according to their admissions were accomplices in other killings by the same gang or, at least, had intimate relations—guilty or otherwise—with its leaders. There can be no question that the only proof against these defendants comes from witnesses who in their testimony against these defendants proved their own guilt of the murder of Rosen and from other witnesses who, though denying guilty complicity in the Rosen murder admitted guilty complicity in other murders and hideous crimes.

The facts *which the People claim* were established by the testimony of these witnesses are exhaustively stated in the opinion of Judge Conway. It would serve no purpose to repeat them or, at this point, to analzye in detail their effect. I point out here only that in any discussion of the questions presented upon this appeal we should bear in mind that all the essential facts which the People claim demonstrate beyond reasonable doubt the guilt of these

defendants are proven, if at all, only by the testimony of degraded criminals whose credibility is impeached, if not completely destroyed, by a cross-examination in which they admitted a callous disregard of every law, human and divine—including the provisions of both the penal law and of the divine commands against bearing false witness against their neighbors.

The jury is the arbiter of the credibility of the witnesses and of the weight of the evidence produced by the People. It must determine whether that evidence proves the guilt of an accused beyond a reasonable doubt. Whether that evidence is sufficient to overcome the presumption of innocence and to remove all reasonable doubt of guilt is, nonetheless, a question of law which this court may, in all cases, review (*People* v. *Glurk*, 188 N. Y. 167), and when the judgment is one of death this court must also pass upon the question whether the verdict is against the weight of evidence and whether justice requires a new trial. (Code Crim. Proc., §529.) "While no one doubts that in the great majority of cases the character and credibility of witnesses and the believeability of testimony should be left to the final determination of a jury, yet the fact that the statute imposes upon us the absolute duty of deciding whether a verdict in a murder case is against the weight of evidence would seem to make it equally plain that the law contemplates the possibility that a jury may be swayed or led into giving an unjust and unwarranted verdict and requires us to correct the error when it does occur." (*People* v. *Becker*, 210 N. Y. 274.)

An accused, however degraded, is entitled to a fair trial before an impartial jury to whom all competent and material evidence relevant to the charge has been presented and from whom all irrelevant evidence, tending to prejudice it against the defendant, has been withheld. The accused is entitled to demand that the issues of fact be submitted to the jury in a charge which correctly defines the questions [fol. 4062] upon which the jury is the arbiter and the rules of law which bind the jury and is calculated to assist the jury in its deliberations. These are fundamental rights of all accused, guaranteed by the Constitution and part of the freedom which this country is now desperately fighting to defend. To the extent that the trial court errs either in its rulings or in its charge or fails to safeguard the rights of the accused to a fair trial or intrudes upon the field

reserved to the jury and withdraws from the jury questians upon which the jury is the sole arbiter, the verdict of the jury is tainted and is not a conclusive finding of guilt.

We are admonished by the Legislature to disregard technical errors or defects or exceptions which do not affect the substantial rights of the parties. All of us heed that admonition and recognize wholeheartedly its wisdom. Sometimes, perhaps, we need more an admonition to remember that it is the jury, not the court which weighs the guilt or innocence of the accused, and that errors or defects which taint the finding of guilt by a jury indubitably affect the substantial rights of the accused even though the judges of an appellate court may be of the opinion that guilt has been clearly established. The trial of the defendants has been long. They have been zealously—even hotly accused by an experienced prosecutor, and they have been zealously—even hotly—defended by experienced council. Sometimes zeal greatly exceeded discretion. In such a trial it is not easy for the presiding judge to maintain decorum and to rule correctly at all times. Some lapses and errors are almost inevitable and such indiscretion of speech or conduct, though regretable, are entirely venial. It is not the duty or function of this court to pardon or to censure; it is its duty to determine whether errors or defects, if any, have tainted the jury's verdict and may have deprived the accused of his right to a judgment of a jury of his peers, arrived at after a fair trial conducted in accordance with the law. After the court has determined that errors or defects are present, it must appraise their effect in their setting at the trial.

Errors and defects must be viewed and weighed as an incident of the trial and in relation to all the other incidents of the trial including all the rulings of the trial court. In weighing them the judges of the appellate court must, so far as they can, form a picture of the whole trial. They must endeavor to see that picture as the jurors saw it. Errors which loom large to a judge, learned in the law and trained to administer justice in strict accordance with the law, may be scarcely visible to the lay juror. On the other hand, some errors or defects and perhaps especially, those due to excess of zeal of court or prosecuting attorney may be too easily disregarded by an appellate judge who knows from experience the difficulty of restraining speech

and ruling correctly on all questions of law in the heat and hurry of a criminal trial.

The possible effect of error or defect upon the substantial rights of a defendant cannot be measured by any rule of [fol. 4063] thumb—determination there depends upon the judgment of each appellate judge, and often there is room for difference of opinion.

The errors and defects in this case are, it seems clear to me, many. Judge LOUGHRAN has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights. Only careful, I might almost say prayerful, consideration can remove that hesitation.

Upon such consideration I have found it impossible to accept the contention that the record presents few, if any, errors, and that any errors or defects that might conceivably be found should be disregarded as trifles, when weighed in the balance against the mass of evidence produced to establish the defendants' guilt though that evidence comes from a polluted source. With characteristic self-restraint, Judge LOUGHRAN has understated the fact that the proof against the defendants comes from the lips of witnesses of such "low, moral caliber" that "uncertainty concerning the guilt of the defendants is produced to such an extent as to render substantial and reversible an error of law which, under other circumstances, might be regarded as harmless." I shall refer briefly to that "uncertainty" hereafter. I content myself now with the statement that even if the proof were far stronger it would still remain true that "the question of substantial right is not the abstract question of guilt or innocence. A guilty man is entitled to a fair trial and a trial is not fair if the verdict may be related to errors in the judge's charge. Error is substantial when we can say that it tended to influence the jury." (*People* v. *Sobieskodo*, 235 N. Y. 411; opinion by POUND, J.) On the other hand, after consideration of the record I feel constrained to appraise the effect of the errors committed at the trial differently from Judge LOUGHRAN, and I shall state as briefly as I can the reasons for my conclusions.

I take up first the failure of the trial judge to analyze the evidence so as to present to the jury fairly the conflicting claims of the People and the defendants, and the complete omission by the trial judge of any "review of cross-examination or of any of the evidence on the several defendants' side of the case." The issue of the guilt of the defendants depends, as I have already indicated, almost entirely upon the credibility of the witnesses of the People. If Bernstein, Berger and Rubin honestly tried to tell the truth there could be no doubt of the guilt of Buchalter and Weiss and perhaps no substantial doubt of the guilt of Capone. I do not think that it is possible that the jury was misled into the belief that any substantial question was involved other than the credibility of these witnesses. True the defendant Weiss produced some witnesses to sustain his claimed alibi, but it is impossible, I think, to read this long record without reaching the conclusion that the [fol. 4064] jury undoubtedly understood that, in final analysis, the vital question which they were called upon to decide was whether the People's witnesses were truthfully fastening upon these defendants a guilty share in the murder of Rosen, or whether they were testifying falsely for the purpose of avoiding, in whole or in part, the penalty which they richly deserved for their own participation in that murder or in other murders. Some of the judges of this court may think that in the exercise of a wide discretion the trial judge should have pointed out to the jury those considerations which might tend to justify reliance upon the testimony of confessedly degraded witnesses, and those considerations which might lead to the conclusion that there is no truth in such witnesses. It is the function and duty of the trial judge to explain to the jury the questions of fact which the jury must decide and the rules of law which the jury must accept and apply. He must be accorded a broad discretion in the selection of testimony which might support the contention advanced by the parties and also the emphasis he should place in his charge upon the contentions of either party in order to make the issues clear to the jury so that it may not be misled after a long trial. A charge which refers to the evidence produced and the arguments advanced by one side alone may tend to mislead the jury into the belief that little can be said for the other side. That would at times constitute an abuse of

discretion so serious as to require a new trial in a capital case. I do not find that in this case the failure of the trial judge to review the cross-examination of the People's witnesses, or to review the evidence produced by the defendants could have such effect.

Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony. Nor is it clear that any review of the cross-examination of the People's witnesses would have been helpful to the defendants. The cross-examination of the important witnesses continued for days and no summary could be entirely satisfactory. The omission, even so, would be serious if in contrast the trial judge in his charge has referred to the claims of the People, and the evidence produced by the People in manner which would tend to impress upon the jury the strength of the People's case. I do not find in the charge such contrast. The trial judge was bound to refer to evidence of the People tending to show an admission of guilt or, at least, consciousness of guilt upon the part of individual defendants, in order to warn the jury that such evidence could not be considered against the other defendants. He attempted little more. At the same time, the trial judge explained why he did not review the cross-examination of the People's witnesses or refer to testimony which might be favorable to the defendants. I might wish that the charge had been different. I have concluded nevertheless, that the defect here, if any, could not have misled the jury and does not affect the substantial rights of the defendants.

[fol. 4065] There are some errors and defects which cause me far more concern. As Judge Loughran has, in my opinion, completely demonstrated, the trial judge erred at times in ruling on evidence and at times usurped the function of the jury to draw inferences from the evidence and to determine the facts. I shall refer in this opinion only to those errors and defects which are perhaps the most serious. (1) The exclusion by the trial judge of the letter which the witness Bernstein wrote while in custody with other witnesses, and (2) the charge of the trial judge concerning the "argument attacking the time-table fable." Though I do not refer to each of the other errors and

defects set forth in Judge Loughran's opinion because I consider them less serious, they are not to be cast aside completely. As Judge Loughran has pointed out, the ultimate question which we must decide is not whether any error or defect standing alone be sufficient to justify the conclusion that it affected a substantial right of the defendant, but rather whether the cumulative effect of the combination of errors and defects resulted in depriving the defendants of a fair trial.

An inordinately long trial was followed by long summation of counsel and the prosecuting attorney had the last word. The District Attorney admitted in his summation that the principal witnesses for the People were men of evil character and counsel for the defense did not attempt to picture the defendants as honest, law abiding citizens. The accusing witnesses and the defendants were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac. Counsel for the defense, of course, did not fail to point out to the jury that the witnesses for the People were, on their own admission, at least as bad as the defendants on trial and that the jury might infer that the reward offered to them for testifying as they did was a promise that they would escape the penalty for their admitted crimes. The prosecuting attorney was justified in attempting to argue in answer that such criminal gangs cannot be destroyed unless through fear of punishment and hope to escape extreme punishment, some members of the gang could be induced to confess in order to save their own worthless lives and to give testimony against other members of the gang. It is difficult, however, to justify the statement of the District Attorney in his summation: "Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the courts and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want." In those words there is implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts.

Conscious as I am that there can be no certainty of the guilty of these defendants since the credibility of the wit- [fol. 4066] nesses against them is so seriously impeached, and recognizing as I do that errors and defects at the trial are many, I still reach the conclusion that the verdict of the jury was not influenced by these errors and defects and should not be set aside because of them. The rulings of the trial judge in the admission and exclusion of evidence may have kept from the jury some evidence which would demonstrate the evil character of the witnesses, but the evil character of the witnesses was so clearly demonstrated by other evidence that additional impeachment could, I think, have had no possible effect upon the jury. Nor could any ruling or statement of the trial judge in regard to the bad character of the defendants make the jury more certain of the evil character of the defendants, for that had been overwhelmingly proven by other evidence. The verdict of the jury rests, it is plain, or the conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. Some support for that conclusion may be found in testimony which is not seriously challenged concerning the previous relations of these defendants with the members of the gang and, in the case of Buchalter to a lesser degree with the murdered man. That testimony is far from sufficient to prove the defendants' guilt. It does not even tend to connect the defendants with the crime, but it is a circumstance which fits into the picture of the crime as drawn by these witnesses whose credibility has been irretrivably impeached. It justifies at least strong suspicion and jurors, quite naturally, are more prone to base a finding upon evidence otherwise lacking in force, but which tends to support a strong suspicion than are judges trained to decide questions of fact solely upon competent and relevant evidence. The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on this appeal may have affected that appraisal.

True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if

he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. It has found the defendants guilty, and though I might have been unwilling, if I had been a member of the jury, to concur in the verdict, I cannot as a judge say that the verdict is against the weight of the evidence.

I cannot refrain from repeating in conclusion that I find the errors and defects numerous and I have hesitated long in reaching the conclusion that they may be disregarded, [fol. 4067] especially since three of my associates are convinced and have argued persuasively that they affect the substantial rights of the defendants. I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the trial judge. Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects affected the verdict. Even if I were entirely convinced of the defendants' guilt I should vote to reverse if I found room for doubt that the jury would have reached the same conclusion if all error had been avoided. Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm.

LOUGHRAN, J. (dissenting):

Early on the morning of Sunday, September 13, 1936, Joseph Rosen was shot to death in a store kept by him at 725 Sutter avenue, Brooklyn. A jury have found that the homicide was the result of a conspiracy among the three defendants—Buchalter, Weiss and Capone—and that the crime was murder in the first degree.

Buchalter was said to have feared lest Rosen make complaint against him to the District Attorney of the county

of New York. For that reason—as the People asserted—Buchalter had commanded Weiss to have Rosen done away with. There is evidence that Weiss killed Rosen with the aid of Capone, Harry Strauss, James Ferraco, Farvel Cohen, Paul Berger and Sholem Bernstein. Strauss, Ferraco and Cohen do not appear in this record either as parties defendant or witnesses. Berger and Bernstein testified for the People.

(1) The testimony of Bernstein is all-important. He was the chief of the prosecution witnesses. Put into direct discourse, his story in substance was this: In the early afternoon of Friday, September 11, 1936, Strauss, who was then accompanied by Cohen and Capone, met me on a street in Brooklyn where Strauss told me to steal an automobile and find a drop [garage] for it. I did this on that same day. On the next day—Saturday September 12—Capone pointed out Rosen's store to me as a place where someone was to be killed and then taught me a getaway route. Early the next day—Sunday, September 13—I drove the stolen car to the vicinity of Rosen's store, as Weiss had told me to do. I saw Weiss, Strauss and Ferraco walk toward the store. I stayed behind the wheel of the stolen car with the motor running. I heard a lot of shots. Weiss, Strauss and Ferraco ran from the store into the car. I started on the route Capone had shown me. I drove to Van Sinderen and Livonia avenues where we abandoned the stolen car. Capone and Cohen met us there with other cars.

These judgments of conviction necessarily rest upon the finding that the above-stated recital by Bernstein was credible evidence. At his own word, Bernstein is a long-time professional criminal. As we shall see in a moment, he is a former perjurer who perversely and flagrantly lied [fol. 4068] again to the jury on this present trial. By the doubtful testimony of a witness of such low moral fibre, uncertainty concerning the guilt of the defendants is produced to such an extent as to render substantial and reversible an error of law which, under other circumstances, might be regarded as harmless. (*People* v. *Pignataro*, 263 N. Y. 229. See *People* v. *Cashin*, 259 N. Y. 434.) From that point of view, we take up the exceptions of the defendants.

(2) In his testimony, Bernstein did not mention Buchalter. Two other witnesses for the People (Rubin and

the accomplice Berger) swore that Buchalter had ordered Weiss to bring about the death of Rosen. Rubin and Berger fixed the time when that order was given as well along in the afternoon of Friday, September 11, 1936, after Rubin (as he said) had reported to Buchalter, "that I went to Murray Weinstein to do something for me about Joe Rosen and that Murray Weinstein said he can't do anything." On the other hand, Bernstein swore it was earlier in the afternoon of that day when Strauss had requested him to steal the murder car. As to this surface inconsistency in the proof of the People, the trial judge in his charge said to the jury: "There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day. Taken in connection with the other facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit."

After the jury had retired, the judge recalled them and further charged upon the same subject in this manner: "The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will hold and will not be error—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails."

Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the People as matter of law. This was obvious error. "What the evidence is—also what it proves—what credit a witness

is entitled to and all like things, are [in criminal cases] exclusively for the jury; and any charge is ill which takes this from them, or in any degree obstructs their free action thereon" (2 Bishop's New Criminal Procedure, [2d ed.], pp. 819-820.)

[fol. 4069] (3) For more than a year prior to this trial, Bernstein had been kept in custody at a hotel as one of a group described by him as members of "the mob." The main contention of the defense was that Bernstein's testimony against the defendants had been there fabricated by this group in an endeavor to shift the incidence of the death penalty for the killing of Rosen. This contention went to the heart of the People's case. (*People* v. *Becker*, 210 N. Y. 274, 308-309.) As an answer, Bernstein testified that during his confinement in the hotel he was under surveillance day and night by the police. Though that testimony was uncorroborated, the trial judge refused to let the jury pass upon its credibility. More than that, the judge certified to the trustworthiness of that testimony in this way: "You cannot lock criminals together when they are waiting their turn to be called to testify and let them put their heads together and maybe plot something behind the backs of the police. That would be sloppy police work, to permit discussion." The judge was without power so to invade the province of the jury.

(4) On cross-examination, Bernstein denied any letter had been written or sent by him while he was in custody at the hotel. Confronted then with three letters written in his own hand upon the hotel stationery, he owned he had lied. The quality of these documents is exhibited by the following excerpt: "Do you know how many guys are pinched just for conversation. Why do you make me write like this. I don't want to hurt you. Again I want t know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that away. So *Cherry* you are *making* me do this that I don't want all for $200 dollars. I just want to remind you *years* don't mean anything to me." (The emphasis was first hand.)

The trial judge refused to receive these letters in evidence. Here again there is need to remember how the case for the People hangs on the credibility of Bernstein as a witness. Once more there is need also to keep in mind the

theory of the People that at the hotel Bernstein was never free to concert with others in respect of his role upon this trial. In both aspects, these letters were proximately relevant evidence on the side of the defendants. We think the text thereof should have been put before the jury. (See *People* v. *Becker*, 210 N. Y. 274, 298.)

(5) After Rosen had been killed but before the trial of the present case, Bernstein was a prosecution witness on a trial held at Monticello, Sullivan county. On that trial, he tried to swear away the life of one Gangy Cohen who was there accused of another murder. As regards his former testimony in the *Cohen* case, Bernstein was examined on the present trial as follows: "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong. Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong. * * * Q. Were you asked these questions and did you give these answers? A. My mind is very clear. Go ahead. * * * '*Question:* And you had nothing [fol. 4070] to do with any murder on any occasion? *Answer:* That is right.' Q. Were you asked that question and did you give that answer? A. Yes, sir."

It was manifestly the duty of the trial judge to warn the jury specifically of the necessity of wariness on their part in consequence of this confession by Bernstein that where another life depended on his oath he had corruptly suppressed his participation in the murder here ascribed by him to two of these defendants. (Cf. *Dunn* v. *People*, 29 N. Y. 523.) The judge said: "The answer given to the question you have just read in the other trial could be viewed as being meant to be true if the witness considered it referred to the actual shooting. It would be untrue in relation t his being a principal under section 2 of the Penal Law, in the other work than killing." This animadversion was very much in the nature of a charge to the jury. (*People* v. *Wood*, 126 N. Y. 249, 269.) In our judgment, the exception taken thereto is valid.

(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." In the declared opinion of the trial judge, the statement so re-

ported by Magoon was "too indefinite" to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the burden of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of this court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. (See *People* v. *Crum*, 272 N. Y. 348.) On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. (*Law* v. *Merrills*, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, [3rd ed.] § 2094, p. 468.) Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone. For the purpose of this opinion only, we shall assume that the finding of Capone's guilt is not against the weight of the evidence; but we stress this phase of the record as a strong contradiction of any as-[fol. 4071] sertion of the conclusive quality of the proof for the People.

(7) On request of counsel for Capone, the trial judge said to the jury: "I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted." The gist of such connecting testimony was the ungarnished word of Bernstein that the getaway route over which he drove the murder car had been taught to him by Capone the day before the killing of Rosen.

During Bernstein's cross-examination on that critical issue, the trial judge made rulings as follows: "*Mr. Rosen-*

thal [Capone's counsel]: Q. You turned where on Pennsylvania Avenue, what turn left or right? A. Left. Q. How many blocks did you go then? A. One block, sir, to Dumont, made a right turn on Dumont. Q. And then you went straight down Dumont, didn't you? A. Yes, sir. Q. For six blocks? A. I don't know how many blocks. I went to Snediker Avenue, sir. Q. You knew Snediker Avenue— A. Yes, couldn't miss that because it was a one way street. Q. Will you please wait until I finish the question. You knew where Snediker Avenue lay from Pennsylvania, didn't you? *Mr. Turkus* [the trial prosecutor]: Objected to. Just answered it was a one way street • • • *Mr. Rosenthal:* Q. Did you know where Snediker Avenue lay from Pennsylvania Avenue, going down on Dumont Street? *Mr. Turkus:* Objected to as repetitious. *Mr. Rosenthal:* I have not asked it yet. *The Court:* Sustained. *Mr. Rosenthal:* Exception. • • • Q. Did you go slowly over the route? A. What do you mean slowly? I came from the store and the turns, that's where I had to watch myself, sir, them turns—the only thing I really had to know, sir, them turns. Q. As you were coming from the store, on this Saturday, did you slow up at each turn? A. Yes, sir. Louis Capone drove the car, sir. He drove my car all the time, sir. Q. Did he drive slowly over the route? *Mr. Turkus:* Objected to as repetitious. *The Court:* Sustained. *Mr. Rosenthal:* I respectfully except, sir. • • • Q. After you had come to a stop at Van Sinderen Avenue, was there any talk between you and Capone? A. While riding in the car, he told me, 'watch' • • • He says, 'This is the route you are going to take.' • • • Q. Is that all he said? A. Then he went over the route again and showed me, to make sure. Q. I first asked you is that all he said while you were at that point. Is that all he said? A. I didn't have a book and wrote down everything what he said to me, sir. Q. Is that all you remember he said? *Mr. Turkus:* Objected to as repetitious. *The Court:* Sustained. *Mr. Rosenthal:* Exception."

We think these exceptions are not without merit. Mr. Wigmore says: "Repeating precisely the *same allowable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, *after an original false answer or refusal to answer*, is a process which not only savors of intimidation and browbeating, but also

tends to waste time. Nevertheless, when used sparingly [fol. 4072] and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference * * *. Simple as the expedient seems, it rests on a sound psychology; and the annals of our trials demonstrate its power." (3 Wigmore on Evidence, [3d ed.] § 782, p. 146. See, also, 1 Chamberlayne, The Modern Law of Evidence, § 553.)

The cogency of this view was here proved again when the testimony of Bernstein before the grand jury came to light. He had there sworn it was he—Bernstein—who drove the car in which he learned the getaway route. Faced with that self-contradiction, Bernstein said: "That is a mistake, sir. I made the mistake, sir." This was not the only particular in which Bernstein's evidence before the grand jury was at variance with his recital on this trial of the part played by Capone in the murder of Rosen. The case against Capone, we repeat, had no foundation other than the testimony of Bernstein to which the foregoing cross-examination was directed. No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testimony.

(8) Early in his summation, the Assistant District Attorney posed these queries to the jury: "To begin with did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?" Since none of the defendants was a witness, the whole point of that argumentation was its erroneous accent upon the assertion by them of their constitutional privilege against compulsory self-incrimination. In our judgment the exception taken thereto is valid. (See *People v. Watson*, 216 N. Y. 565.)

As the opinion of the chief judge shows, the trial prosecutor in his summation gave to the jury an unfounded pledge as to the future of the accomplice witnesses. This pledge was buttressed by the trial prosecutor in these words: "Whatever my lot in life may be, whether I go out of office or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy,

would ever be used in any way with any of you to make you feel that I had discredited you or myself or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of situation, I would like it. And that ends it." When objection was made to this plea, the trial judge said: "We will have no further interruption." A majority of this court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument may have unduly prejudiced the jury against the defendants. (See *People* v. *Mull*, 167 N. Y. 247; *State* v. *Clark*, 114 Minn. 342.)

(9) Numerous exceptions to the charge of the trial judge are pressed upon us. For instance: the cross-examination of the People's witnesses concerning prior contradictory [fol. 4073] statements made by them was not ineffective, as we have seen. In that connection, the trial judge said to the jury: "Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing."

Again: The trial judge said this to the jury: "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns State's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out it is a wise man's delight." Although the jury were brought back from their deliberations and advised to disregard the epigram last quoted from the charge, we are still left with the vexed question whether the belated admonition of the court sufficed to remove the obvious intimation which was conveyed to the jury by so pithy a dictum from the bench. (Cf. *People* v. *Robinson*, 273 N. Y. 438.) But we pass the exceptions to these matters, because in any event the charge as a whole fell below the requisite standard.

The trial judge at least was bound generally to analyze the evidence in the case so as to present to the jury fairly the conflicting claims of the People and the defendants. (*People* v. *Montesanto*, 236 N. Y. 396.) He expressly disavowed that duty. In defining the scope of his instructions to the jury, he said therein: "This is purely a segregation to guide you against misapplication of the evidence as against defendants to whom it does not apply. It is not a discussion of evidentiary values; it is not an expression of

belief by the Court as to whether you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case."

In keeping with that announced purpose, the charge made no reference whatever to any one of the above-stated impeaching facts that were brought out during the cross-examination of witnesses for the People. That aspect of the case was dismissed by the judge in this fashion: "cross-examination is almost impossible to correctly state in such a manner that two people will agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, it is largely hit or miss; it is blank cartridge shooting. Once in a while you find that a bullet had hit, but whether there is a hit or not may be a matter of dispute. Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it."

As an inevitable consequence of these conceptions of his function, the judge's treatment of the proofs took on the character of a summation for the People. We will not say such a charge was right. (See *People* v. *Becker*, 210 N. Y. 274, 307.)

(10) Nor do we think the one-sidedness thereof was corrected when counsel for the defendants requested further instructions in respect of specific items of the self-impeachment of witnesses for the People. In response thereto, the judge in some instances made this oblique remark to the [fol. 4074] jury: "You may consider that for what, if anything, it is worth." In other instances, the request brought forth a commentary which aided the People by toning down the contradictory statements of their witnesses. For example—

The main proof against Buchalter came from the witness Rubin whose testimony makes up a large part of "the facts" which Judge Conway has marshalled in his opinion. On cross-examination, Rubin he was confronted with a statement made by him in December, 1937, to Mr. McCarthy (then an assistant district attorney) covering this *Rosen* case. Conceding the verbal correctness thereof, Rubin acknowledged that this statement "did not implicate the defendant Buchalter, or Lepke, in any respect whatever."

When counsel for Buchalter requested that the jury be directed to take notice of Rubin's contradictory statement to Mr. McCarthy, the trial judge said: "On the second point of that request, he [Rubin] did not testify before McCarthy at all. He was not under oath. That is not perjury. That is a contradiction and he has explained it. He says he had been shot through the head because of testifying before the Dewey grand jury, and he was afraid to give McCarthy any information about the *Rosen* case. I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before Mr. McCarthy. If it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction, admittedly so before McCarthy, really amounts to anything at all. He was under no obligation to give any evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory." This argument in support of Rubin's credibility was inadmissible. Evidence of a prior self-contradiction by a witness, "is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief." (SHAW, C. J., in *Commonwealth* v. *Starkweather*, 10 Cush. [Mass.] 59, 60.) Hence the fact that Rubin had not sworn to his contradictory statement to Mr. McCarthy was immaterial. (3 Wigmore on Evidence, [3rd ed.] § 1044, p. 727.)

(11) Rubin's testimony was offered to show the alleged motive for this crime,—fear lest Rosen vent a business grievance by instigating a criminal prosecution of Buchalter. To the same end, members of the family of Rosen endeavored by their testimony to show his prominence in the commercial field in which Buchalter was active in labor affairs; but the trial judge struck out that testimony as being "too sketchy to have any value as evidence." As a result there was no contradiction of witnesses for Buchalter who testified to the indifference of Rosen's success as a man of business. In that state of the case, Buchalter at least was entitled to have the jury consider whether he was right in his claim of the absence of any compelling reason [fol. 4075] why he should have been greatly afraid of the

enmity of so inconspicuious a person as Rosen. (*People* v. *Becker*, 215 N. Y. 126, 135.)

On this issue, the trial judge in his charge said to the jury: "So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities." But the next phrase of the judge was this: "That is enough as motive evidence, if you find these facts to be established to your satisfaction, reasonably." The judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again, there should have been a presentation of both sides of the issue,—and the question of the weight of the evidence also should have been submitted to the jury.

In the preceding subdivision 2 of this opinion, we indicated another important issue of fact which was even more strongly ruled against Buchalter by the trial judge. On the whole, we find ourselves unable to perceive how the basic finding of Buchalter's distant connection with the actual shooting of Rosen can be taken to have been made by the jury alone.

(12) For a final word: We believe the foregoing combination of errors cannot rightly be looked upon as a technical defect. Of course this crime was an atrocious thing and the defendants apparently were men of past bad moral disposition. But these considerations are nothing to our purpose: it is for us to keep to the question whether the trial was fair. This last, as has so often been said, is the great requirement of this court's own function in all capital cases,—even when, as in this instance, the evil life of an accused may be an influence to warp the less responsible judgment of others. (*People* v. *Marwig*, 227 N. Y. 382, 389.)

Through many generations, common law practice in criminal cases has been governed by certain fundamental rules, namely: "The jury is the final arbiter of every question of fact." (*People* v. *Pignataro*, 263 N. Y. 229, 240.) "The

court's charge is of supreme importance to the accused. It should be the safeguard of fairness and impartiality and the guarantee of judicial indifference to individuals." (*People* v. *Odell*, 230 N. Y. 481, 487.) On the present trial this historic practice was virtually declared away. We do not see how the conviction of the defendants can be affirmed, without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the trial judge in his charge may entirely ignore the evidence and the contentions of the accused unless in the end some request is made for a different handling of the issues.

Since there is abundant reason for doubt of the guilt of any of the defendants, we cannot assume that no doubt thereof existed in the jury room. A long sequence of faulty rulings had materially strengthened the case for the People. With the sanction of the court, the People's representative had urged his personal integrity as a factor against the defendants. It is not for us to say that such substantial errors had no influence on the jury, for this is beyond our finding out. (See *Stokes* v. *People*, 53 N. Y. 164, 184; *People* v. *Bonier*, 179 N. Y. 315.)

[fol. 4076] We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury.

Rippey, J. (dissenting). I agree with all that Judge Loughran has said concerning the errors committed during the progress of the trial, that such errors were prejudicial and cannot be overlooked. Reference might have been made to other errors. Among those was the charge substantially to the effect that the burden rested upon Weiss to establish his innocence on the basis of his alibi defense. (*People* v. *Vaccaro*, 288 N. Y. 170.) I also agree with Judge Loughran that the trial was unfair. In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. It does not follow that a new trial should be ordered. There was insufficient legal

evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed. In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt.

The judgments of conviction should be reversed as to all of the defendants and the indictments dismissed.

FINCH and LEWIS, JJ., concur with CONWAY, J., LEHMAN, Ch. J., concurs in result in separate opinion; LOUGHRAN, J., dissents in opinion in which DESMOND, J., concurs; RIPPEY, J., dissents in separate opinion.

Judgments of conviction affirmed.

[fol. 4077] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding;
John Ludden, Clerk

REMITTITUR—October 30, 1942

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

ag'st

LOUIS BUCHALTER, Alias "LEPKE", Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Louis Buchalter, alias "Lepke," the appellant in this action, came here unto the Court of Appeals, by Wegman & Climenko and Hyman Barshay, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings, And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard [fol. 4078] this cause argued by Mr. I. Maurice Wormser of counsel for the appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings appealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, October 30, 1942.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers orginally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4079] IN COURT OF APPEALS

STATE OF NEW YORK:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

LOUIS BUCHALTER, Alias "LEPKE", Appellant

The defendant herein, Louis Buchalter, alias "Lepke" having been heretofore and on the thirtieth day of November, 1941, convicted of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and the defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect;

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which [fol. 4080] the original sentence of death shall be executed upon the defendant herein.

In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed

hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge. John T. Loughran, Edward R. Finch, Harlan W. Rippey, Edmund H. Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4081] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding; John Ludden, Clerk

REMITTITUR—October 30, 1942

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

ag'st

EMANUEL WEISS, Alias "MENDY WEISS", Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Emanuel Weiss, alias "Mendy Weiss," the appellant in this action, came here unto the Court of Appeals, by Alfred J. Talley, James I. Cuff and M. M. Kreindler, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court [fol. 4082] of the County of Kings, And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Alfred J. Talley of counsel for the

appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings, appealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 4083] Court of Appeals, Clerk's Office,
Albany, October 30, 1942:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4084] STATE OF NEW YORK:

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October, A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

EMANUEL WEISS, alias "MENDY WEISS" Appellant

The defendant herein, Emanuel Weiss, having been heretofore and on the thirtieth day of November, 1941, convicted of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect;

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which the original sentence of death shall be executed upon the defendant herein.

[fol. 4085] In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to

be affixed hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge; John T. Loughran, Edward R. Finch, Harlan W. Rippey, Edmund H. Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4086] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur October 30, 1942.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

ag'st.

LOUIS CAPONE, Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Louis Capone, the appellant in this action, came here unto the Court of Appeals, by Leon Fischbein, Emanuel Rosenberg and Sydney Rosenthal, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings, And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 4087] Whereupon, The *siad* Court of Appeals having heard this cause argued by Mr. Sydney Rosenthal of counsel for the appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings ap-

pealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, October 30, 1942.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4088] State of New York:

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October, A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

The People of the State of New York, Respondent,

against

Louis Capone, Appellant

The defendant herein, Louis Capone, having been heretofore and on the thirtieth day of November, 1941, convicted

of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and the defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect;

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which the original sentence of death shall be executed upon the defendant herein.

[fol. 4089] In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge; John T. Loughran, Edward R. Finch, Harlan W. Rippey, Edmund H. Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4090] State of New York:

Court of Appeals

Clerk's Office

I, John Ludden, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copies of the Notice of Motion for reargument dated November 12th, 1942 and returnable November 23rd,

1942 and the brief in support thereof with admission of service thereon by the District Attorney of Kings County dated November 12, 1942 in The People of the State of New York, Plaintiffs-Respondents, against Louis Buchalter et al., Defendants-Appellants with the original on file in this office, and that the same are correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this eighteenth day of December, 1942, A. D.

John Ludden, Clerk, by Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4091] Court of Appeals, State of New York

The People of the State of New York, Plaintiffs-Respondents,

against

Louis Buchalter, et al., Defendants-Appellants

Notice of Motion and Brief for Re-Argument

Wegman & Climenko, Attorneys for Defendant-Appellant, Louis Buchalter, 60 Wall Street, Borough of Manhattan, New York City, N. Y. I. Maurice Wormser, J. Bertram Wegman, Jesse Climenko, of Counsel.

Due and timely service of a copy of the within Notice of Motion and Brief for Re-argument is hereby admitted, this 12th day of November, 1942.

Sol Klein, Acting District Attorney of Kings County, By E. McNamara, Clerk.

[fol. 4092] NOTICE OF MOTION FOR RE-ARGUMENT

COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-Respondents,

against

LOUIS BUCHALTER, et al., Defendants-Appellants

SIR:

Please take notice that upon the record and briefs herein, filed and submitted to the Court upon the argument of the appeal, upon the notice of motion herewith, and upon the decision and opinions of the Court dated the 30th day of October, 1942, affirming the conviction of defendant Buchalter, and upon the brief hereto annexed, a motion will be made in the Court of Appeals at its Court House, in the City of Albany, on the 23rd day of November, 1942, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for a re-argument of said appeal upon the following grounds:

1. The Court misapprehended the facts and the law concerning the errors assigned by appellants to the rulings below denying the motions for a change of venue and the motions for an adjournment of the time of the trial.

[fol. 4093] 2. The Court misapprehended the facts and the law concerning the errors assigned to the rulings of the trial Court upon the challenges to prospective jurors and to jurors impaneled, and the remarks of the trial Court during and in the course of the impaneling of the jury; and particularly that the Court misapprehended the law in holding that the rulings of the trial Court upon the challenges to prospective jurors and to jurors impaneled were not subject to review in a capital case by the Court of Appeals.

3. The Court misapprehended the facts and the law concerning the errors assigned, or overlooked the errors assigned, to the refusal of the trial Court to make available to the defendants and to permit the use by them of certain official records of the Police Department of the City of New York.

4. The Court misapprehended the facts and the law concerning the errors assigned to the rulings and comments of the trial Court upon and during the cross-examination of the People's witnesses Rubin and Berger.

5. The Court misapprehended the facts and the law concerning the errors assigned to the rulings, comments, charge and conduct of the trial Court, as more specifically set forth in the brief attached hereto.

6. The Court misapprehended the facts and the law concerning the errors assigned to the refusal of the trial Court to rebuke and repress improper and prejudicial statements by the prosecutor in his summation to the jury whereby the jury was misled.

[fol. 4094] 7. The Court misapprehended the facts and the law concerning the errors assigned to the conduct and the course of the proceedings in the trial Court, which resulted in a denial and a disregard of the rights of the defendants to a fair and impartial trial and to due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And upon such other and further grounds as are set forth in the attached brief.

And for such other and further relief as may seem just and proper.

Dated, New York, November 12th, 1942.

Yours, etc., Wegman & Climenko, Attorneys for Appellant Buchalter, 60 Wall Street, Borough of Manhattan, City of New York.

I. Maurice Wormser, Counsel for Appellant Buchalter.

To: Hon. Thomas Craddock Hughes, Acting District Attorney, Kings County, Municipal Building, Brooklyn, N. Y.

[fol. 4095] COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, Respondents,

against

LOUIS BUCHALTER, et al., Defendants-Appellants

Brief for Appellant Buchalter in Support of Motion for Re-Argument

STATEMENT

This is a motion by appellant, Louis Buchalter, for a re-argument of the appeal from the judgment of the County Court of Kings County, dated December 2, 1941, convicting appellant of the crime of Murder in the First Degree.

On the 30th day of October, 1942, this Court handed down its decision of the said appeal, affirming the judgment of conviction.

This motion is made upon the ground that this Court overlooked and misapprehended certain material and important facts and principles of law decisive of the case.

The procedure adopted herein follows the precise precedent of the motion for re-argument by the District Attorney of Kings County in *Peo.* v. *Nitzberg*, which motion was entertained by this Court and decided January 15, 1942 (287 N. Y. 754).

[fol. 4096]

Point I

This Court misapprehended the rule regarding a review of the denial of a motion for change of venue, overlooked the facts thereon, and disregarded the error in denying the application for adjournment of the trial.

Forcing the defendant to trial at a place where and a time when a fair trial was impossible, violated due process of law.

The only reference in the opinions of the Judges who voted for affirmance of the judgment of conviction, concerning appellant's argument that it was error to deny the motions for a change of venue, is to be found in the opinion of Judge Conway concurred in by Judges Lewis and Finch. It was said there was no merit in appellant's argument because (1) the trial was by a "special jury"

and (2) the motion was addressed to the discretion of the Court below, and the Judges of this Court were not prepared to say that the denial was an abuse of discretion.

With all due respect, it is submitted that this Court thereby misapprehended the true situation. That there was a "special jury" ordered for this trial is no answer to the argument that no jury, special or otherwise, could be obtained in the County of Kings, uninfluenced by the widespread local prejudicial publicity, newspaper articles (some of them obviously inspired) charging the defendant with guilt of this and countless other crimes, and assuming that his conviction in this case was a foregone conclusion, and the striking coincidence of the local election campaign in which both the trial judge and the District Attorney were party candidates. While ordinarily it is true that subse- [fol. 4097] quent events may not be used as an argument in support of an earlier application, here it is clear from the subsequent events that the application was well founded. Even this special panel of jurors, supposedly above the average in intelligence, was found to have been influenced to such an extent by the newspaper publicity that five weeks were consumed in an effort to obtain a jury, and even then an impartial jury was not impaneled. And even the trial judge said that the newspaper articles played havoc with the talesmen.

The error became the more glaring when, over the objection and exceptions of the defendants, the trial court insisted upon the trial proceeding at a time when both the trial judge and the District Attorney were candidates for public office, and in the very midst of their campaign for such offices. Of the fact that it was a heated campaign this Court may take judicial notice. Of these facts no mention is made in the prevailing opinions, and they appear to have been overlooked.

In a capital case such as this, the review by this Court is not restricted to a mere determination of whether there was an abuse of discretion. By direction of the New York State Constitution, in a capital case this Court is required to consider the facts as well as the law and to determine whether justice was done. By the requirements of the Fourteenth Amendment of the Constitution of the United States, this Court is enjoined to ascertain whether "due process of law" was observed. Surely the fundamental law demands at least this much (cases cited *post*).

It is of the essence of "due process of law" that defendants be accorded a fair and impartial trial by fair and impartial jurors free of influences extraneous to the evi- [fol. 4098] dence adduced. It is the duty of this Court to inquire not merely whether "due process of law" was denied in express terms, but also whether it was denied in substance and effect. *Norris* v. *Alabama*, 294 U. S. 587; *Whitney* v. *California*, 274 U. S. 357.

It is not enough therefore for this Court to say that the motions for a change of venue were addressed to the discretion of the court below. It is the bounden and definite duty of this Court to say whether, upon the facts pr ented, the motion should have been granted.

Here there were submitted as exhibits a series of violent, sensational newspaper articles, limited in circulation to the County of Kings, denunciatory of this appellant, widely distributed throughout that County at a time immediately before, and up to, and even after, the commencement of the trial,—the vicious effect of which was fully demonstrated in the course of examination on *voir dire* of prospective jurors.

It was a grave and substantial error to require the trial to proceed in the County of Kings at that time under those circumstances as well as a denial of "due process of law".

Point II

This Court erroneously refused to consider the rulings of the trial court upon challenges to the jurors, which should have been reviewed. Due process of law was denied both by the rulings of the trial court and by such refusal to review them.

The majority of this Court cast aside the argument of appellant that a fair and impartial jury was not impaneled [fol. 4099] and that there was error in the overruling by the trial court of challenges to prospective jurors, with the statement in the opinion of Judge Conway, that, by statute, such rulings of the trial court were final, and that such statute, in so providing, had been pronounced constitutional, citing *Peo.* v. *Dunn*, 157 N. Y. 528. The majority of this Court (with great deference and respect) misapprehended the law on this subject. In a *capital* case at least, that provision of the statute is not constitutional, nor is

it consistent with "due process of law". The majority of this Court overlooked the fact that the reason given for the decision in *Peo.* v. *Dunn* (*supra*), was that there is no constitutional guaranty of the right of appeal, and that such right may be abrogated or modified by the legislature. But, in capital cases, the legislature may not interfere with the right of appeal. In a capital case that right is fully guaranteed, both as to the law and as to the facts, by the provisions of the Constitution of the State of New York, Article VI, Section 7 (*People* v. *Crum*, 272 N. Y. 348).

Thus this Court should have examined and passed upon the rulings of the trial court upon the challenges.

Furthermore "due process of law" encompasses the impaneling of a fair and impartial jury, and it is the duty of this Court to inquire whether the jury here impaneled was in fact fair and impartial, and whether the substantial and constitutional rights of the defendant were observed in that impaneling. If, as is the fact here, challenges for cause were improperly and erroneously overruled, whereby the defendants' peremptory challenges were exhausted before a jury was selected, so that the defendants were [fol. 4100] denied the right of peremptory challenge to jurors impaneled, "due process of law" has not been observed.

Since the jury that was chosen was obtained as a result of erroneous rulings by the trial court, and since at least as to two of the jurors sworn, positive doubt existed as to their impartiality and lack of bias, "the doom of mere sterility was on the trial from the beginning" (Cardozo, *J.*, In *Clark* v. *U. S.*, 289 U. S. 1, 11).

The castigation by the trial judge of prospective jurors who expressed doubt that their impressions adverse to the defendants could be laid aside, necessarily resulted in a reluctance by others to reveal such mental bias because of their justified fear of the consequential denunciation by the trial judge. The remarks of the trial judge during the impaneling of the jury must necessarily have tended to suppress a free expression on the part of the talesmen being examined. Hence, this Court can never be sure that any of the talesmen approached his duty with a free, open and unbiased mind, and in the case of at least two of the jurors that doubt affirmatively appears.

Point III

This Court misapprehended and overlooked the fact that this jury was improperly influenced and misled throughout the proceedings below, and the verdict undoubtedly was influenced thereby. This misleading of the jury *per se* requires reversal.

The learned Chief Judge, in his opinion, frankly expresses his own reasonable doubt of guilt, but because he states that he believes the jury had the right to reach the conclusion that it did, he has voted to affirm.

[fol. 4101] It is respectfully submitted that the Chief Judge has misapprehended the fact that the jury was *misled* and *unduly influenced* from the *very inception* of the trial,—and, indeed, were predisposed to convict by impressions derived *dehors* the record even *before* they were sworn (Point I, *ante*).

These were supposedly intelligent jurors, a "special panel", chosen for their greater capacity of understanding and appreciation They were presumably qualified to examine, appraise and evaluate evidence under proper instructions, and doubtless would have been burdened with the *very same doubts* which have assailed the mind of the learned Chief Judge, had this trial been fair and had they been properly instructed, and had they approached the evaluation of evidence with free minds. The difference is that the Chief Judge has applied his mind to the evidence *untrammeled by the poisonous atmosphere engendered in the trial court*, and divorced from the influence of the regrettable rulings of the trial judge and the regrettable and unprofessional excesses of the prosecuting attorney, which, in at least one instance, overstepped the boundary line of truth.

Our point is that the jury would have had the same doubt as remains with the learned Chief Judge after considering the record, if those other extraneous elements had not intervened prejudicially to prevent calm and dispassionate consideration and deliberation.

Considering, then, that these jurors were not "trained to decide questions of fact solely upon competent and relevant evidence" and that, as all know, a jury generally tends to accept unquestionably the expressed opinions of the judge who presides, how can it be said that the appraisal of the

[fol. 4102] evidence by the jury was not affected by the numerous incidents, remarks and rulings at the trial which should never have intervened? The Chief Judge regrets these, *but the jury was misled by them!*

A review of some of these is submitted to emphasize the argument, and because such a review will demonstrate the invidious influences which indubitably led the jury to a verdict of guilt where reasonable doubt in fact existed.

(1) The "time table".

It is said in the opinion of Judge Conway that the statements of Bernstein were reconcilable with the statements of Rubin and Berger. But if reconcilable at all, it is only by pure speculation; there is *no* such evidence. In a capital case the jury has no right to speculate. Here they were not only invited to speculate, they were instructed by the trial judge that the defendant's argument was unworthy of any consideration whatever. They were not permitted to exercise their intelligence in appraising the testimony and whether or not the statement could be reconciled; the simple fact is that they were instructed in such a manner as to require them to assume that the seeming contradictions were no contradictions at all, were not inconsistencies and were entitled to no consideration in their deliberations. Thus, there was effectively ruled out from their consideration a matter which, in and of itself, may have caused them to have a reasonable doubt of the verity of the testimony.

(2) Rubin's prior inconsistent statement.

It was demonstrated that the witness Rubin had stated, upon an earlier examination, that the defendant Buchalter [fol. 4103] had nothing to do with the murder of Rosen. Here the trial court not only failed to permit the jury to consider that statement as affecting the credibility of Rubin,—substantial error though that is,—his error was much more grievous. He assumed, and he impressed upon the jury, that this earlier statement of Rubin's was untrue. The vice here is not merely that the jury should have been permitted to consider whether Rubin's prior statement was untrue but excusable because engendered by a putative fear, not merely that the trial court palliated the assumed falsity by suggesting "*Les Miserables*" as a parallel—but, much more, the jury should have been instructed that they

were entitled to credit that prior statement as a truthful statement, and if they believed it to have been true, then Buchalter was entitled to an acquittal.

Can it be reasonably said that this grievous error did not influence the verdict? The whole case of the People against Buchalter depended upon the testimony of Rubin. Was not the jury misled, and their verdict thereby influenced, by the shrewdly calculated attitude and instructions of the trial court that this prior exculpatory statement was not alone untrue but a venial untruth? Had the jury been told that they had a right, if they so wished, to credit this prior inconsistent statement of Rubin as the truth, the jury thereby would have been given the right to disregard Rubin's testimony implicating Buchalter in the murder. It should not have been submitted merely as a matter bearing upon Rubin's credibility,—and yet it was not even submitted in that limited form; it should have been submitted to the jury, as a question for their decision, whether Rubin in fact told the truth to Mr. Hogan and to Assistant Dis- [fol. 4104] trict Attorney McCarthy, so that (in that event) his whole testimony implicating Buchalter on this trial was false and unworthy of credence. Cf. *Hull* v. *Littauer*, 162 N. Y. 569. Even here, this Court apparently assumed (quite erroneously) that this prior statement was untrue, and considered only whether the jury was properly instructed concerning the effect of its untruth upon Rubin's testimony in the case at bar.

(3) Rubin's flight.

In appraising the truth of Rubin's testimony concerning the participation by Buchalter in the Rosen murder, the jury was permitted to consider the fact that Rubin had, at Buchalter's alleged instance, fled the jurisdiction. If the jury entertained a reasonable doubt that Rubin's flight was engendered by fear of the investigation of the Rosen murder, they should not have considered that flight as an element bearing upon guilt. Since the fact of Rubin's flight was undisputed, the jury was misled in its consideration of the probative force of that flight by the instruction that Rubin's testimony as to flight was binding on the defendant unless the jury affirmatively found that fear of the Rosen case was not the motive. Thus, in effect, the jury was erroneously instructed that Buchalter bore the burden of disproving the connection between that flight and the Rosen case, whereas

the true rule is that that flight should not have been considered against Buchalter if the jury reasonably doubted the connection.

(4) Bernstein and Tannenbaum.

The jury was in effect instructed by the court to assume that the People's witnesses had not conferred in advance of [fol. 4105] the trial. This was a matter which should have been left to the jury, particularly in the light of the cross-examination of Bernstein. Had the jury been permitted to consider whether or not this story had been concocted by the People's witnesses in conference, they might have been unwilling to place credence in it. But they were told by the court that there were no such conferences among the witnesses and were misled to believe that the testimony was not the result of collaborative effort. The vice of this instruction is obvious.

(5) The summation of the prosecutor.

Whether the testimony of the debased characters which made up the People's case,—so polluted a source that the evidence therefrom failed to remove from the mind of the Chief Judge a reasonable doubt of the defendant's guilt,—was induced by hope of reward or indulgence from the District Attorney was a proper matter for the consideration of the jury. Yet the jury was falsely misled to believe that there was *no* such inducement for the testimony, and the trial court apparently sanctioned that deception. The Chief Judge, in his opinion, has frankly deplored the statement of the prosecuting attorney ("which the prosecuting attorney could not properly or truthfully make") putting in issue his own integrity. It was improper for him so to make the promise even if true; *it was the gravest wrong for him to dissemble.* And time has demonstrated how false was the assertion that these witnesses were uninspired by hope, and how false the promise that, in due time, they would receive their just desserts, for each of them,—Bernstein, Tannenbaum and Berger,—has been given his freedom, wholly unpunished for his confessed crimes. There is only one way to justly characterize such testimonial transactions: [fol. 4106] bought and paid for: (Cf. *Peo.* v. *Nitzberg*, 287 N. Y. 183). Is it conceivable that the jury would have en-

tertained no doubt of their veracity had that expectation of "consideration" not been denied? A jury has, and is entitled to have, full confidencee in the honesty and good faith of the prosecuting attorney. The jury was bound to be influenced by his glib assurances. "In these circumstances (says the highest court of our country) prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *U. S.*, 295 U. S. 78.

(6) The omission of the trial judge to review the cross-examination.

With facile plausibility, the trial judge sought to excuse his review of all of the supposedly incriminating evidence, without any reference to what was developed on cross-examination, by ascribing to himself a purpose merely to "segregate" the testimony (*sic*) so that it might not be misapplied by the jury. The majority of this Court has held that this either was no error or that it was not error which misled the jury. Perhaps that might be so, if all that had been done was to omit reference to the cross-examination. But this Court has misapprehended or overlooked the fact that there was far more than a mere omission to refer to the cross-examination. There was a deliberate and illegal belittling of that cross-examination; it was nonchalantly waved aside as of neither moment, nor consequence, nor effect. Inevitably this cavalier treatment of the cross-examination must have misled the jury into attaching little, if any, weight to what was developed thereon. This was the grave vice of the Court's device. The cross-examina-[fol. 4197] tion was not merely omitted from his discussion, —it was deprecated and depreciated. Thus did he invade the province of the jury and thus did he mislead it. Neither fair, nor square, nor "due process of law".

Point IV

The learned Chief Judge, whose vote was decisive of the appeal herein, overlooked the rule that his own reasonable doubt of guilt necessarily required a reversal of the conviction.

The learned Chief Judge, in his opinion, concurring in the affirmance, with characteristic fairness, has unmistak-

ably expressed his own reasonable doubt of guilt. With the utmost deference, it is respectfully suggested that the Chief Judge inadvertently has misapprehended the law governing consideration of an appeal in a *capital* case, in limiting his review to the question of whether the jury heard enough evidence (even though truly it was unworthy of credence) to justify a verdict of guilt. *Where the evidence leaves a reasonable doubt in the mind of this Court, the rule is that the conviction in a capital case should be reversed and a new trial granted.* *Peo.* v. *Crum*, 272 N. Y. 348, 350.

This Court must find the evidence of such weight and *credibility* as to convince the court, before it may be said that the jury was justified in finding a verdict of guilty.

If that is the law, as it was said by this Court to be in *Peo.* v. *Crum*, the persisting reasonable doubt, which the People's evidence from such polluted sources has failed to remove from the mind of the Chief Judge, requires a reversal here.

[fol. 4108] Point V

This Court overlooked the error in the refusal of the trial court to accord defendant access to the official records of the Police Department of the City of New York.

Ordinarily, perhaps, the omission of this Court to discuss in its opinion an error assigned is no indication that consideration was not given to the point. Yet here the opinions are so extensive and exhaustive—and the point is of such importance—that such omission of discussion apparently indicates an omission to consider it.

This particular error is fully discussed in the brief submitted by appellant Buchalter upon the appeal, in Point V extending from pages 106 to 117, and citing authorities in point.

In a case where the judgment of conviction rests upon the testimony of such disreputable characters as Berger and Tannenbaum, it is a denial of "due process of law" to deprive the defendants of an opportunity to demonstrate conclusively, by the official, regularly kept records of the New York City Police Department, that neither of these men saw (or could have seen) Buchalter at 200 Fifth Avenue, on Friday, September 11, 1936, thus corroborating defendant's

ss Shapiro; or, at the very least, to demonstrate that is little or no likelihood that these men could have th re as they falsely testified. With their credibility ch at issue, the defendant was entitled to the benefit idence bearing upon so vital a point. Here he was l the right to the *record itself*, admissible as a record *rly kept* in the course of *official* business, and as well l the opportunity to identify the police officers who those records so that those officers might have been [109] summoned by us as witnesses to tell what they ved or did not observe.

s conceded that Buchalter was kept under constant surveillance during the time in question. Is it not us, therefore, that what was observed in the course of lay by the officers who had him under surveillance, l have weighed largely with the jury in determining redibility of the prosecution witnesses?

s Court has misapprehended or overlooked the fact he refusal to make available to the defendant those l records which were concededly in the possession of rosecution, was a denial of "due process of law".

Conclusion

e process of law is no mere form of words. Therein is npassed the whole of those priceless liberties for the rvation of which we are now engaged in mortal strug- "Thus all fundamental rights comprised within the 'liberty' are protected by the Federal Constitution invasion by the states" (Brandeis, J., in *Whitney* v. 274 U. S. 357, 373).

s not "due process of law" that the form be preserved the substance is denied.

re the Court has misapprehended the essential vices en' in the proceedings below. It has overlooked the hat the defendant was brought to trial at a time and dace when and where existed a public clamor from the of which no jury could have been immunized, and ury was not. The attitude of the trial judge displayed nimus against defendants and their counsel and a 'olent tenderness toward the prosecution and its wit- s which created an atmosphere so hostile to the de- as to preclude the possibility of fair consideration

by the jury. In such an unwholesome atmosphere, the [fol. 4110] jury was directly misled—and in fact invited—into giving exaggerated importance to the prosecution's direct evidence, and to minimize, if not disregard, the evidence adduced upon cross-examination and by the defendant's witnesses.

In denial of due process of law, the value of the evidence was distorted so that the bias of the trial court was communicated to a jury already conditioned to convict.

"*Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime*" (Pound, J., later Chief Judge, in *Peo.* v. *Barbato*, 254 N. Y. 170, at 178).

Those great principles, this Court has said, "must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a *great criminal*, and yet be invoked for the purpose of sheltering an innocent man. *In the eye of the law all are innocent until convicted in accordance with the forms of the law and by a close adherence to its rules*" (Peckham, J., *Peo.* v. *Sharp*, 107 N. Y. 427, at 476-477).

The motion for re-argument should be granted in the interest of sound law and public policy.

Respectfully submitted, I. Maurice Wormser, J. Bertram Wegman, Jesse Climenko, Of Counsel for Appellant, Louis Buchalter.

[fol. 4111] Court of Appeals, State of New York

Clerk's Office

I, John Ludden, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of The Respondents' Brief in Opposition to Motion for Reargument submitted by the District Attorney of Kings County in The People of the State of New York, Plaintiffs-Respondents, against Louis Buchalter, et al., Defendants-Appellants, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this eighteenth day of December, A. D. 1942.

John Ludden, Clerk, by Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4112] Court of Appeals, State of New York

The People of the State of New York, Plaintiffs-Respondents,

against

Louis Buchalter, Alias "Lepke", Emanuel Weiss, Alias "Mendy Weiss", Louis Capone, Defendants-Appellants

Respondents' Brief in Opposition to Motion for Reargument

Statement

On October 30, 1942, this Court affirmed the judgment of the County Court of Kings County, dated December 2, 1941, convicting the appellants of the crime of Murder in the First Degree.

This motion for reargument of the appeal is made only by the appellant Buchalter. His motion is made upon the alleged ground "that this Court overlooked and misapprehended certain material and important facts and principles of law decisive of the case".

[fol. 4113] Point First

The motion for reargument is devoid of any merit.

In arriving at decision, this Court wrote exhaustive majority and dissenting opinions, which clearly show a most careful and conscientious consideration of the points raised by the appellants. The briefs on the appeal presented every conceivable point that could be made in their behalf. Buchalter's brief was 166 pages in length; Weiss' brief was 78 pages; Capone's main and supplemental briefs covered 284 pages. The oral argument of the appeal consumed approximately six hours. In both the briefs and the oral arguments the appellants were represented by exceptionally capable and highly experienced counsel, who

made a very forceful and thorough presentation of the facts and the legal principles involved in the case.

A reading of the notice of motion and the brief now submitted by the appellant Buchalter in support of his motion for reargument shows that he is merely reiterating, in different form, the arguments previously submitted. The moving papers and the brief contain nothing new, nor do they show that any point decisive of the case was ignored, misapprehended or overlooked.

1. Buckhalter's first point, concerning his motions for a change of venue, was exhaustively discussed and argued at pages 7 to 12 and 52 to 88 of his brief. The answer to his arguments was presented at pages 45 to 49 of the people's brief. And the point was specifically discussed in the opinion of Judge Conway.

2. The same is true as to the second point. The argument now presented is a reiteration of the discussion ap- [fol. 4114] pearing at pages 154 to 161 of Buchalter's brief and at pages 1 to 66 of Capone's brief. Here again the contentions were specifically discussed in the opinion of Judge Conway.

3. Buchalter's third point is likewise a reiteration of the arguments made on the original appeal. Those arguments were exhaustively developed at pages 97 to 153 of Buchalter's brief, at pages 55 to 64 of Weiss' brief, and at pages 84 to 87 and 99 to 107 of Capone's brief. The majority and dissenting opinions of this Court show that the points raised and the law applicable thereto were neither misapprehended nor overlooked.

4. Buchalter's fourth point is that Chief Judge Lehman "overlooked the rule that his own reasonable doubt of guilt necessarily required a reversal of the conviction". This is, indeed, a very amazing assertion. Chief Judge Lehman, in his concurring opinion, as set forth in the "unrevised and uncorrected" report, said:

"The verdict of the jury rests, it is plain, on the conclusion that the story of the people's witnesses is credible and furnished proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * It has found the defendants guilty, and though I might have been unwilling, if I had been a member

of the jury, to concur in the verdict, I cannot as a judge say that the verdict is against the weight of the evidence. * * * Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects [fol. 4115] affect the verdict. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

The decision of Chief Judge Lehman is in accord with the settled law applicable to capital cases. In *People* v. *Cignarale* (110 N. Y. 23) this Court, per Andrews, J., said at page 27:

"It is a cardinal principle in our jurisprudence that the jury is the ultimate tribunal for the investigation and determination of questions of fact. It is no more the province of an appellate court than of the court of original instance to determine controverted questions of fact arising upon conflicting evidence. Neither can lawfully usurp the appropriate function of the jury, and neither can substitute its own judgment for that of the jury where the facts are reasonably capable of diverse or opposing inferences."

Similarly, in *People* v. *Seidenschner* (210 N. Y. 341) this Court said at pages 358 to 359:

"Notwithstanding the testimony was somewhat unsatisfactory, and in some particulars contradictory, the conclusion had to be reached by determining the credibility of the witnesses produced, and as to which of two sets of witnesses were to be believed. The jury was required to make a determination upon the testimony before it. It is the province of the jury and not of the court to determine the truth from conflicting testimony, and within well-defined bounds to determine the relative weight of testimony.
[fol. 4116] "This court in *People* v. *Taylor* (138 N. Y. 398, 406) say: 'Under our system of criminal jurisprudence, it becomes the exclusive province of the jury to determine whether the evidence pointing to the guilt of the accused is so lacking in convincing force as to leave an intelligent and discriminating mind in doubt as to the truth of the charge contained in the indictment. When the jury, by their verdict, have declared that no such condition of

mental uncertainty has arisen from a contemplation of the evidence, the prisoner has had the full benefit of the rule of law which protects him from punishment, unless his crime is established beyond a reasonable doubt, and the question is not open for review in this court, unless the case is so weak that the verdict should be set aside because against the weight of evidence, or for other sufficient cause.' (See *People* v. *Katz*, 154 App. Div. 44-47; affd., 209 N. Y. 311; *People* v. *Egnor*, 175 N. Y. 419-425; *People* v. *Rodawald*, 177 N. Y. 408-419; *People* v. *Decker*, 157 N. Y. 186-195.)

"In *People* v. *Ferraro* (161 N. Y. 365, 377) this court, referring to a determination of a question of fact, say: 'It would be hazardous for seven judges of the law * * * to say that the twelve judges of the fact were wrong * * *. It is impossible for us to say, and the nearest approach to justice that can be made is to leave such questions to the jury.'

"In *People* v. *Sanducci* (195 N. Y. 361, 367) this court say: 'The credibility of witnesses is necessarily for the twelve jurors who looked into their faces and heard them testify rather than for the seven judges who simply read the printed record of what they said'."

[fol. 4117] In *People* v. *Katz* (154 App. Div. 44; affd., 209 N. Y. 311), cited with approval in the *Seidenschner* case, *supra*, the rule is clearly stated as follows:

"It is not our duty to usurp the functions of the jury and to examine the evidence *de novo*, with a view to determining whether or not, on the same evidence, we should have arrived at the same result as that at which the jury arrived. So long as the verdict is not clearly against the evidence, as we think it is not in this case, * * * we cannot feel that it is our duty to reverse the conviction because, perchance, if we had been sitting as jurors we might have decided differently."

We say, therefore, that the appellant's fourth point is thoroughly lacking in merit.

5. Buchalter's final point was also previously argued and fully discussed in the original appeal. The discussion appears at pages 106 to 117 of Buchalter's brief and at pages 73 to 74 of Weiss' brief.

It is submitted that the motion papers and brief in support thereof are obviously insufficient. There is no showing "that some question, decisive of the case, and duly submitted by counsel, has been overlooked by the Court, or, that the decision is in conflict with an express statute, or, with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel". (*Mount* v. *Mitchell*, 32 N. Y. 702; *Marine National Bank* v. *National City Bank*, 59 N. Y. 67, 73; *Fosdick* v. *Town of Hempstead*, 126 N. Y. 651, 652.)

On the subject matter under consideration, this Court in *O'Brien* v. *Mayor, etc., of the City of New York* (142 [fol. 4118] N. Y. 671) declared, with striking applicability to the pending motion, as follows:

"The appellants upon this motion for a reargument have availed themselves of the opportunity to in effect reargue their whole case. In their ground for their application they have stated several reasons why such motion should be granted, but in truth they have failed to show any reasons exist for a reargument other than the claim that the court has plainly erred in its construction of the contract in question. We might, therefore, deny the motion on the ground that no reason recognized by the court has been shown for granting the motion (*Fosdick* v. *Town of Hempstead*, 126 N. Y. 651) * * *. The arguments contained in them, however, are nothing more than a reiteration and amplification of those which were addressed to us upon the original argument."

No inference that a point was overlooked, as contended by the appellant, can be drawn from the fact that it was not discussed in detail in the opinion. In *Terry* v. *Waitt* (56 N. Y. 91, 94) this Court emphasized that a reargument will not be granted because it failed to notice in its opinion every point urged, saying at page 94:

"Counsel are very apt to fall into the error of supposing that every point and suggestion in cases which they argue, is overlooked by the court when not specifically discussed and answered in a written opinion, and this error has, in several instances, led to applications like the present. They should reflect that *before a case is decided, the court is in* [fol. 4119] *the habit of deliberately considering it in all its*

hearings, and that when sanctioning a former decision the mere omission to notice and discuss in the opinion, supposed distinctions, if not sufficient to warrant the supposition that they have escaped observation."

Point Second

The motion for reargument should be denied.

Dated, Brooklyn, N. Y., November, 1942.

Respectfully submitted, Thomas Cradock Hughes, Acting District Attorney, Kings County. Solomon A. Klein, Henry J. Walsh, Assistant District Attorneys, of Counsel.

[fol. 4120] Unrevised and Uncorrected—Not for Publication

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,

v.

LOUIS BUCHALTER et al., Appellants

(Decided November 25, 1942.)

Motions by Appellants Louis Buchalter, Emanuel Weiss and Louis Capone for reargument and motion by Appellant Louis Capone for a stay.

Per CURIAM:

This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The records in question were deposited with this court at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. The reports established that the defendant could and did elude the police at will. The ruling of the trial court was correct. (See *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24.)

This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter

of law by the County Judge in denying the motion for a change of venue. A majority of the court is of the opinion that the discretion was properly exercised.

This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, Cons. Laws, ch. 30 art. 18-B;) the defendant appeared by attorney and consented to be tried before such special jury, a majority of this court is of the opinion that he thereby consented also to the statutory provision that rulings of the trial court upon challenges for actual bias are final and not appealable.

Motions denied.

[fol. 4121] In Court of Appeals, State of New York

At a Court of Appeals for the State of New York, held at Court of Appelas Hall in the City of Albany, on the twenty-fifth day of November A. D. 1942.

Present, Hon Irving Lehman, Chief Judge, Presiding.

The People &c., Respondent,

vs.

Louis Buchalter, Alias "Lepke", Emanuel Weiss, Alias "Mendy Weiss" and Louis Capone, Appellants

A motion for re-argument of the above cause, having been heretofore made upon the part of the appellant Buchalter herein, and papers having been submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4122] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

No.

LOUIS BUCHALTER, Petitioner

v.

PEOPLE OF THE STATE OF NEW YORK

It is agreed by the attorneys for the petitioners and the District Attorney of Kings County of the State of New York, that so much of the record herein as consists of the voir dire examination of talesmen may be submitted to the Supreme Court of the United States, in connection with the petitioners' application for a writ of certiorari, in typewritten form, in which form it was heretofore, pursuant to the order of the Court of Appeals of the State of New York, made a part of this record and submitted to the Court of Appeals and in which form it was considered by the Court of Appeals.

For the purpose of identifying the typewritten transcript of the voir dire examination of talesmen here referred to, it is agreed that it is the typewritten transcript as reported by Julia A. McGowan and Thomas F. Darcy, Official Stenographers of the County Court of Kings County, that it consists of 2783 typewritten pages, in which are recorded the proceedings in the County Court of Kings County, Part 11, on August 4, 1941 and August 5, 1941, and of all the further proceedings had in this case in the said Court from Sep-
[fol. 4123] tember 15, 1941, to and through October 17, 1941.

Dated: New York, N. Y., December 15, 1942.

Thomas Cradock Hughes, Acting District Attorney, by Henry J. Walsh, Assistant District Attorney; Jesse Climenko, J. B. Wegman, Attorneys for Petitioner, Louis Buchalter; Arthur Garfield Hays, Alfred J. Talley, Lang & Anderson, Attorney for Petitioner Emanuel Weiss; Sidney Rosenthal, Attorney for Petitioner, Louis Capone.

[fol. 4123] [Stamp:] Office of the Clerk, Supreme Court, U. S., Dec. 26, 1942

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

EMANUEL WEISS, Alias "Mendy" Weiss, Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK, Respondent

It Is Hereby Stipulated and Agreed by and between the attorneys for the aforesaid Emanuel Weiss, alias "Mendy" Weiss, and the District Attorney for the County of Kings that the record on appeal in the above entitled matter in this Court include, in addition to the exhibits therein contained, the following, true copies of which are hereto annexed:

1. Order to show cause dated July 16, 1941 for a change in the place of trial, made on behalf of the aforesaid Emanuel Weiss;
2. Affidavit of James I. Cuff in support thereof dated July 15, 1941;
3. Copy of indictment attached thereto; and
4. Order of Mr. Justice Peter M. Daly dated August 1, 1941.

Dated: New York, December 23, 1942.

Arthur Garfield Hays, Attorney for Emanuel Weiss;
Thomas Cradock Hughes, Acting District Attorney for County of Kings, State of New York.

[fol. 4124] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

In the Matter of the Application of EMANUEL WEISS, to Remove the Trial of the Action of The People of the State of New York vs. Louis Buchalter, Alias "Lepke", Emanuel Weiss, Alias "Mendy Weiss", Harry Strauss, Alias "Pittsburgh Phil", James Feraco, Philip Cohen, Alias "Little Farvel", Louis Capone, to Another County

Upon the annexed affidavit of James I. Cuff sworn to the 15 day of July 1941, and the indictment herein duly filed the 28th day of May 1940, and all the proceedings heretofore

had herein, let the District Attorney of Kings County show cause before this court at the Supreme Court held in and for the County of Kings at the courthouse thereof located at Fulton & Joralemon Streets, in the Borough of Brooklyn, City of New York, at a Special Term Part I thereof on the 18th day of July, 1941 at 10 o'clock in the morning of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein removing the trial of the indictment herein from the County Court of Kings County to the Supreme Court, held in another county, outside the City of New York, pursuant to Sections 344 and 346 of the Code of Criminal Procedure, and for such other and further relief as may be proper.

Let service of a copy of the within papers on the District Attorney of Kings County or one of his assistants or deputies, on July 16th 1941 be deemed sufficient.

[fol. 4125] Dated: New York, July 16th 1941.

Peter L. Daly, Justice of the Supreme Court.

[fol. 4126] Supreme Court of the State of New York,
County of Kings

In the Matter of the Application of Emanuel Weiss to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county

State of New York,
County of New York, ss:

James I. Cuff, being duly sworn, deposes and says:

I am attorney for Emanuel Weiss, named as a defendant in the indictment, a copy of which is annexed hereto and marked Exhibit "A" hereof.

This affidavit is made in support of a motion for an order removing the above entitled action from the County Court of Kings County for trial in a county outside the City of New York on the ground that a fair and impartial trial cannot be had in Kings County.

I respectfully submit that a fair and impartial trial cannot be accorded the defendant Weiss, named in this case

as a co-defendant of Louis Buchalter, and who is accused with that defendant and others of having participated in the murder of one Joseph Rosen.

This application is for a change of venue and is made coincidentally with the making of an identical application on behalf of the defendant Buchalter.

[fol. 4127] I have read the affidavits of Hyman Barshay and Benjamin D. Fernbach, both sworn to the — day of July 1941 and the exhibits annexed thereto, to be submitted in support of the motion for change of venue on behalf of the defendant Buchalter. I believe, after reading the facts set forth in those affidavits and from my knowledge of local opinion, that a fair trial cannot be accorded the defendant Buchalter in this jurisdiction at this time. I believe also that any person who like the defendant Weiss whom I represent, must proceed to trial as a co-defendant of the defendant Buchalter, cannot obtain a fair trial in this jurisdiction at this time.

I believe that the defendant Weiss will be prejudiced by the mere assertion embodied in the indictment that he acted in concert with the defendant Buchalter.

I believe that the public generally has been taught that the defendant Buchalter is an arch criminal and that anyone who is alleged to have acted in complicity with him must therefore be regarded as presumptively guilty.

I believe, that if the defendant Weiss is required to stand trial in Kings County in the month of August, 1941, and this case is now set for trial on August 4th, 1941, that a jury would regard him as presumptively guilty rather than presumptively innocent. I believe that the doctrine of the presumption of innocence would be no more than an empty doctrine were this trial to be held at that time and place.

[fol. 4128] I believe that a defendant is not accorded a fair trial if local conditions are such as to require him to demonstrate his innocence. I believe that the tenor of public opinion in Kings County at this time is such that unless a defendant, like the defendant Weiss, who must stand trial as an alleged associate of the defendant Buchalter proves his innocence, he will be found guilty. In such circumstances, the fundamental principle that a defendant is presumed innocent unless proved guilty beyond a reasonable doubt, has no practical value.

For these reasons I respectfully submit that a fair trial cannot be accorded my client in Kings County at this time,

ese reasons I respectfully submit this affidavit
of the application for a change of venue.

application for this or any similar relief has
on behalf of the defendant Weiss.

olication is made by order to show cause rather
the giving of the ordinary notice of motion for
that the trial of this action is now scheduled
day of August 1941, and I desire to make this
as expeditiously as possible and to have it
his court as long before the 4th day of August
y be possible.

James I. Cuff.

orn to before me this 15 day of July, 1941. Claire
chultz, Notary Public, Queens County. Queens
o. Clk's No. 8806, Reg. No. 4233. N. Y. Co.
lk's No. 2114, Reg. No. 281232. Commission Ex-
ires March 30, 1942.

] County Court,
County of Kings:

People of the State of New York, Plaintiff,

against

Chalter, Alias "Lepke," Emanuel Weiss, Alias
y Weiss," Harry Strauss, Alias "Pittsburgh
James Feraco, Philip Cohen, Alias "Little Far-
omis Capone, Defendants

rand Jury of the County of Kings, by this indict-
use the defendants of the crime of murder in the
ree, committed as follows:

efendant on or about September 13, 1936, in the
of Kings, willfully, feloniously and of malice afore-
shot and killed Joseph Rosen with revolvers.

William O'Dwyer, District Attorney.

ment filed May 28, 1940. John B. Maione, Foreman.

0] At a Special Term, Part I of the Supreme
the State of New York, held in and for the County

of Kings, at the Courthouse thereof, Borough of Brooklyn, City of New York, on the 1 day of August, 1941.

Present: Hon. Peter M. Daly, Justice.

In the Matter of the Application of EMANUEL WEISS to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county.

The above-named defendant, Emanuel Weiss, having applied to this Court for an order granting a change of venue of the trial of this action, and the said application having duly come to be heard on the 18th day of July, 1941,

Now, on reading and filing the order to show cause, issued out of this Court on the 16th day of July, 1941; the affidavit of James I. Cuff, duly verified the 15th day of July, 1941, submitted in support of said order to show cause; the affidavits of Solomon A. Klein and Burton B. Turkus, both duly verified the 21st day of July, 1941, submitted in opposition to said application, and upon all other papers and proceedings had herein, and after hearing James I. Cuff, Esq., of counsel for defendant, Weiss, in support of said application, and Solomon A. Klein, assistant district attorney, in opposition thereto, and upon filing the opinion of [fol. 4131] the Court, and due deliberation having been had, it is on motion of William O'Dwyer, District Attorney of Kings County,

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter,

Peter M. Daly, J. S. C.

Granted August 1, 1941. Francis J. Sinnott, Clerk.

Filed August 5, 1941.

[fol. 4129] COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-Respondents,

against

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE, Defendants-Appellants

SIR:

Please Take Notice that upon the record and briefs herein filed and submitted to the Court on behalf of the appellant Emanuel Weiss, and upon the notice of motion herewith, and upon the decision and opinions of the Court dated the 30th day of October, 1942 affirming the conviction of the appellant Emanuel Weiss, and upon the brief annexed to the notice of motion for reargument on behalf of the appellant Louis Buchalter, the said motion being returnable simultaneously herewith, a motion will be made in the Court of Appeals at the courthouse in the City of Albany on the 23rd day of November 1942 at two o'clock in the afternoon, or as soon thereafter as counsel may be heard, for a reargument of said appeal upon the ground set forth in the notice of motion submitted on behalf of the appellant Louis Buchalter on the said motion for reargument.

Dated: New York, November 17th, 1942.

Yours, etc., Alfred J. Talley, 40 Wall Street, Borough of Manhattan, New York City; James I. Cuff, 99 John Street, Borough of Manhattan, New York City; M. M. Kreindler, 51 Chambers Street, Borough of Manhattan, New York City, Attorneys for Defendant-Appellant, Emanuel Weiss.

To: Honorable Thomas Cradock Hughes, Acting District Attorney of Kings County, Municipal Building, Borough of Brooklyn, New York City.

[fol. 4130] State of New York,
In Court of Appeals:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall, in the City of Albany, on the twenty-fifth day of November A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

The People &c., Respondent,

vs.

Louis Buchalter, Alias "Lepke"; Emanuel Weiss, Alias "Mendy Weiss",

and

Louis Capone, Appellants

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the appellant Weiss herein, and papers having been duly submitted thereon, and due deliberation therupon had:

Ordered, that the said motion be and the same hereby is denied.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4131] Supreme Court of the United States, October Term, 1942

No. 606

Order Granting Certiorari—March 15, 1943

On Petition for Writ of Certiorari to the County Court of Kings County, State of New York.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 4132] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 610

ORDER GRANTING CERTIORARI—March 15, 1943

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 4133] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 619

ORDER GRANTING CERTIORARI—March 15, 1943

On Petition for Writ of Certiorari to the County Court of Kings County, State of New York.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.

Vol. VI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED | DECEMBER 30, 1942.
JANUARY 2, 1943.
JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

SUPREME COURT OF THE UNITED STATES

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PART I

Indictment Number 23855

THE PEOPLE OF THE STATE OF NEW YORK

against

LOUIS BUCHALTER, alias LEPKE, Defendant
Murder, First Degree

Brooklyn, New York.
May 9, 1941.

Before Hon. George W. Martin, County Judge

Appearances:

For the People: Burton Turkus, Esq., Assistant District Attorney.

Julia A. McGowan, Official Stenographer.

[fol. 3] The Defendant: I would like to talk to the Judge, first.

The Court: Yes?

The Defendant: I do not know what this is all about. I would like permission to see my family about getting counsel.

The Court: It won't make any difference this morning. You are not going to be tried. You won't take any plea but Not Guilty.

The Defendant: I would like to have permission to see my people about having counsel.

The Court: You are entitled to have counsel, but I do not think you need them on your arraignment.

(To Mr. Turkus) Isn't he entitled to that?

Mr. Turkus: I take the position that he is entitled to have counsel at all stages of the proceedings.

The Court: What day do you want?

Mr. Turkus: Will your Honor permit him in a safe place, pursuant to the jurisdiction vested in you by the United States Government and the law enforcement agencies in whose custody he is, to see his people to the end that he may secure counsel as speedily as possible for a prompt arraignment?

[fol. 4] The Court: That is all right. I think the opportunity, Mr. Turkus, for him to see his counsel over there is such that it is pretty hard to talk with him and it is pretty hard to get to them. I had some experience with what they do over there and I know it is pretty hard to sit down and discuss matters. I am going to allow him and his family to go into this room, with one or two officers, to talk.

(To defendant) Whom do you want to talk to?

The Defendant: My wife and brother.

The Court: Are the wife and brother of this man here?

(A man and woman stand in the court-room.)

The Court: Come up here. Take them into this room * * * I do not know how a man can talk to his family with ten men there listening to every word he says. He is not going to jump through a window. Let a couple of men——

Mr. Turkus: Your Honor, may I say this? Louis Buchalter, alias Lepke, is in the custody of the United States Marshal. He is brought here in cooperation with the law enforcement agencies of the United States Government and the District Attorney of this county.

The Court: That is all right.

[fol. 5] Mr. Turkus: Pursuant to a writ of habeas corpus ad prosequendum. His custody at all times when he is not on trial in this court-room is vested in the United States Marshal and the United States law enforcement agencies. Under the circumstances, you can appreciate that there must be a heavy guard over this man.

The Court: A heavy guard would be all right. Two or three men in there with pistols and a few other things ought to be able to take care of him. How can a man talk to his family and have any conference with ten men standing around?

Mr. Turkus: You see, under the writ of habeas corpus ad prosequendum which brings him here, we are not responsible for the set-up in that room. He is in the custody of the United States Government and what efforts they deem fit and proper to safeguard him while he is in this court-room are theirs.

The Court: Mr. District Attorney, there is nobody who wants him to be safeguarded more than I do. I do not want him to get away, but that is ridiculous. There are ten men in there. How can he talk to his wife and his brother about [fol. 6] getting a lawyer with ten people standing around?

Anybody who can do that is marvellous. I do not want them to let him walk around the room.

Mr. Turkus: You see the attitude that the District Attorney of this county took the minute this man said he wanted to consult his family——

The Court: I am with you on this proposition. I know you want to be fair about it. How can he talk in there with ten people standing around? I could not talk and I am a pretty good talker.

Mr. Turkus: I think all he wants to discuss at this point is the obtaining of counsel. It is a large room. They can get them into a corner.

The Court: It is just big enough for about twelve people. I do not want to give him any different treatment than anybody else. As far as I am concerned, he is a bad man, and he has a bad record, and he is a dangerous man, but at the same time he is entitled to a fair opportunity to talk to his people; he is entitled to an opportunity to get counsel; he is entitled to a fair and just trial, which I know you will give him. It does not make any difference to me, but why we should make such a great hullabaloo I do not know. He is [fol. 7] just another man who walks through the door. I am not afraid anybody is going to take him out of the courtroom. If they take him out, they will have to take me with him. How they are going to go in there and talk, I do not know. I know you are not responsible for it, but maybe I am.

Mr. Turkus: The District Attorney is.

The Court: I am not directing any of my remarks toward you, regarding getting a fair deal and all that. That is ridiculous. I know you too long and I know you too well and I know you will give it to him, but what I am interested in is giving him an opportunity to talk to his wife.

Mr. Turkus: That is what regulates the procedure.

The Court: It does not regulate me in my courtroom, as to who should be with him. United States courts may have authority to take care of him but they certainly have no right to tell me where I shall let him stand or where I shall let him sit, because I won't let them tell me anything of that kind.

(Defendant's brother speaks to Mr. Turkus.)

Mr. Turkus: May we bring him out?

The Court: Yes, bring him out.

Mr. Turkus: Pursuant to the conversation which your [fol. 8] Honor permitted in the ante-room of the court-room, the defendant has sent word to the District Attorney that he desires one week within which to get counsel to appear for him on the arraignment. That is satisfactory to the District Attorney, subject to the approval of the Court.

The Court: Give him a week.

The Defendant: Thank you, your Honor.

The Court: And I return him to the custody of the United States authorities.

[fol. 9] PEOPLE

vs.

LOUIS BUCHALTER alias LEPKE

Brooklyn, N. Y. May 16, 1941.

Hearing on Arraignment

George Rea, Official Stenographer.

[fol. 10] Before Judge Brancato

(The defendant is arraigned for pleading to indictment charging murder, first degree)

The Clerk: What is your name?

Mr. Wegman: The defendant stands mute.

The Clerk: What is your name?

(No response)

The Clerk: Have you a lawyer?

Mr. Wegman: I am his lawyer.

The Court: Have you filed a notice of appearance, has notice of appearance been filed?

Mr. Wegman: With the District Attorney.

The Court: With the court?

Mr. Wegman: Not with this court.

The Court: File it now with the court before I take the plea.

Mr. Wegman: We are not going to enter any plea, your Honor.

The Court: You are going to talk for this defendant, aren't you?

Mr. Wegman: Yes.

[fol. 11] The Court: File notice of appearance in this court first.

Mr. Chemiski: May I be heard? I would like to have the record note——

The Court: The record will note nothing until you first file notice of appearance and say you are appearing for the defendant.

Mr. Chemiski: This is not on behalf of the defendant, but for myself.

The Court: Then I have nothing to say to you or you to me. I have called the case of People vs. Buchalter. He either speaks for himself or through counsel. If he speaks through counsel, counsel must first identify himself. You file notice of appearance, otherwise I will not listen to you. That is the ruling, sir; no argument about it.

Mr. Wegman: May I ask if the stenographer is making a record of that ruling?

The Court: You have heard what I said. We will have no argument about it. If you are attorney for the defendant you have to appear, and appear in this court.

Mr. Wegman: Does your Honor doubt that I am the attorney?

The Court: I doubt your word until you file notice of appearance. I want no argument from you or I will put you out of this court in about two seconds, because you are becoming impudent. The rule is elementary that there must be notice of appearance filed in court by counsel. It is very simple. I don't know why you want to evade doing it.

[fol. 12] Mr. Wegman: There is no question of evasion.

The Court: You have heard it, that's all, that is the ruling of the Court. File your notice of appearance and then speak for the defendant; otherwise you cannot.

Mr. Wegman: I am surprised at your Honor's statement. I have a very distinct recollection of a time when your Honor came to me and asked me to take your word for something, and I took your word.

The Court: Counsel, will you claim that you are not within the jurisdiction of this court?

Mr. Wegman: I don't know, your Honor. That question has not been determined. We have not been able to determine for ourselves whether we want to raise that question. It may be that we will want to raise it.

The Court: I don't see how your notice of appearance in this court is going to in any way prejudice your client's rights. You appear for the defendant, and if the Court has no jurisdiction in the premises you certainly cannot be hurt by an appearance, not in a criminal court.

The Clerk: Notice of appearance filed. (The clerk reads the indictment)

Mr. Wegman: I ask your Honor to adjourn the hearing under this indictment until the twenty-ninth of May. I ask for the twenty-ninth, I cannot ask for two weeks because [fol. 13] two weeks would bring it on a holiday. The reason for that is that until yesterday I had never seen or talked with or met this defendant. Until a week ago my partner had never met nor seen the defendant. This as your Honor probably can realize from the nature of the proceedings is a very complicated matter and there are many angles and many questions involved. Our presence in the case has been entirely too brief for us to attempt to assimilate all that may be involved and we require that additional time before we feel we can competently advise this defendant whether he ought to raise the question of law before a plea is entered or whether he ought to enter his plea and then proceed from that point on. It is a very serious question and a matter for careful consideration.

The Court: It should not take much time for you with your experience in the practice of federal law.

Mr. Turkus: Your Honor, this is a mile stone in law enforcement. After fifteen months of investigation by Judge O'Dwyer we have succeeded in bringing before your Honor at this bar of justice Louis Lepke on a charge of murder in the first degree, the man who pulled the strings. The district attorney of this county will zealously safeguard every constitutional right of this defendant in order that when there shall be final judgment it will be conclusive. Since counsel is in a dilemma as to his rights and remedies in the [fol. 14] situation, in order that even Lepke may have every constitutional right safeguarded, the district attorney will interpose no objection to the adjournment on arraignment to the time requested.

The Court: Well, I don't know that Louis Lepke to me means anything more than another murder case, that is all it means so far as I am concerned, who he is, what he is, or anything else. If counsel wants until May twenty-ninth I will give him a little more time to think it over. He can't

plead guilty to murder in the first degree; he has to plead not guilty.

Mr. Turkus: It is not the province of the district attorney to advise in the premises, but if there is no jurisdiction, then not even an adjournment would be valid.

Mr. Wegman: That is exactly what I have in mind, so that your Honor will not think that the application for an adjournment is a whim or fancy. Once this defendant enters a plea of not guilty, which is the only plea that can even be considered as being entered, but once he has entered that plea, he has surrendered to this court to try him. So far as the jurisdiction of the crime, there is no question about this court's jurisdiction, but if this defendant voluntarily pleads, he has surrendered his person to this court; that is the point: it is a question of his surrender.

[fol. 15] The Court: It does not make any difference how he gets in the jurisdiction; he could be kidnapped and brought here, and once he is here he is in the jurisdiction of this court and can be tried. We are not going to discuss that.

Mr. Wegman: If this court took custody of him that would be true; but this court is not taking custody of him. He is being kept by the federal authorities and until yesterday he was kept incommunicado for all practical purposes.

The Court: Once he is here, he is here under our jurisdiction and we have all rights.

Mr. Turkus: In justice to the federal authorities, the system under which counsel was permitted to confer was the same system used at all federal prisons, and when the situation was called to the attention of the authorities at the federal detention pen by counsel for Lepke, that the facilities were not suitable for proper conference, appropriate and satisfactory arrangements were made for interviewing of counsel in an interview room, so that that point is settled. I merely say that to preserve the state of the record.

Mr. Wegman: That is correct, and I want to say that so far as Mr. Turkus and Judge O'Dwyer are concerned, they have been very careful and very fair in their attitude towards this matter; but unfortunately, and without reflection in any way on them, the rules of the federal detention head-
[fol. 16] quarters were such that it was impossible for counsel to confer with the defendant.

The Court: May twenty-ninth. Go ahead.

Mr. Wegman: May I ask your Honor to permit this defendant to consult with his wife and brother.

The Court: He will be taken upstairs to the pen first. Captain Gannon is over there and he has charge of prisoners. If he says it is O. K. with him, it is O. K. with me. That is his province, not mine.

[fols. 17-18] County Court, Kings County, Part I

Indictment Number 23855

The People of the State of New York

against

Louis Buchalter, Alias Lepke, Defendant

Murder, First Degree

Brooklyn, New York, May 29, 1941.

Before Hon. George W. Martin, County Judge

Appearances:

For the People: Burton Turkus, Esq., Assistant District Attorney.

For the Defendant: J. Bertram Wegman, Esq., Jesse Clemenko, Esq. and Hyman Barshay, Esq.

[fol. 19] (The defendant was arraigned, the Court Clerk reading the indictment to him.)

Mr. Wegman: If your Honor pleases, with all due deference to this Court and a full measure of respect, defendant stands mute. I would like to explain the reason for that to your Honor, so that you will know it is not intended in any way as a reflection on this Court. We seriously doubt that this Court has any jurisdiction to try this defendant for this offense under the present conditions of his incarceration. He is not here in the custody of this Court or in the custody of the power of the State of New York. He is here, brought in by Deputy Marshals as a prisoner of the United States Government. It is perfectly true that when a defendant is before the Bar of this Court, it makes no dif-

ference how he got here or by what means he was brought here, even though he were kidnapped or anything else, but that means he is in the custody of this Court, and this Court has power of jurisdiction over his person. This defendant lacks that. We intend to preserve that.

The Court: Isn't the answer to that, he is produced here on my order in court?

Mr. Wegman: If your Honor pleases, he is produced by [fol. 20] virtue of the kindness or the voluntary act of the Federal Government.

The Court: Supposing he is produced here under an order of this Court, he is here. There might be some question in my mind—maybe I would like to argue with you the proposition—maybe they could bring him here, but he got here. In other words, taking him from Alcatraz, for instance, to bring him in here, that might be debatable ground, but once having appeared in the court, the method of his transportation here to the Court while in the City of New York, what difference does it make?

Mr. Turkus: May the District Attorney be heard?

The Court: Yes. Hear him first.

Mr. Wegman: The essential difference is this, if your Honor pleases, the Supreme Court of the United States has held that the office, the executive offices, of the Federal Government have no right to recognize a writ of habeas corpus issued by a State Court as against a Federal prisoner. If the Attorney General of the United States delivered this prisoner into the custody of this Court——

The Court: He waives the right. Can he waive it?

[fol. 21] Mr. Wegman: He cannot waive it, and that is the constitutional question that we propose to raise, and that we are raising by these motions, and this is the only means by which we can presently raise it. If this defendant were now to enter a plea on this indictment he might, by that act——

The Court: Probably submit himself to the jurisdiction of the Court.

Mr. Wegman: That we do not do. That is what we propose to reserve.

The Court: You have a perfect right to use any defense, any means, or any action that you think will protect the interests of this man. What have you got to say?

Mr. Turkus: The business of the day is to arraign this defendant, join issue, and fix a date for trial. I may make

this observation, that if there is a point of jurisdiction, there is nothing for them to be alarmed about; in fact, Lepke should be elated, because even if convicted, he would cheat the electric chair. The People have no qualms as to the propriety of his appearance, and we are here to join issue, to have a plea entered, so we may fix a trial date before a [fol. 22] jury.

Mr. Wegman: The People have no qualms about lots of things; for instance, the prejudicial statement made by Mr. Turkus. The defendant's name is Buchalter, though he is referred to as Lepke and we have no offense at the use of that name, but when the District Attorney speaks of him in court and on the record he is entitled to be called by his legal name. Beyond that, however, it seems to me that it is a gross abuse of the power of the District Attorney for him to stand here and tell this Court that this defendant is going to cheat the electric chair. There is no case against this defendant; he is not guilty in any sense of this crime, and I think nobody knows that better than the District Attorney, and the statements that have been made in the newspapers, and the accounts that appeared in the Press are highly prejudicial; they indicate something which is definitely not the fact.

Mr. Turkus: The name Lepke is the name that he adopted. The expression used was that "if he was convicted."

The Court: Do not exercise yourself much about that. [fol. 23] Mr. Turkus: I am not. That is the name he used——

The Court: Do not exercise yourself about that. It is all right for the attorney to take that attitude, but I would not exercise myself about it, if I were you. There is no question about that. The only difficulty about this case, as I see it, they raise a question. How can I compel him to submit to the jurisdiction of the Court, to enter a plea or join?

Mr. Turkus: He is properly before the Court on your own order. He is brought here for arraignment. The position that he can take is that he stands mute, as he did in New York County, the same position urged there, and the Court entered the plea.

Mr. Wegman: There was an essential difference there.

The Court: At that time he was a United States prisoner, arraigned in a United States Court.

Mr. Wegman: But he had not been committed on his sentence of the United States Court. That was a substantial difference.

Mr. Turkus: Your Honor signed the order that brought him here. He is before the Court on a charge of murder [fol. 24] in the first degree. He is here on arraignment. The arraignment has been adjourned now three weeks. It is about time that issue was joined to the end that a trial date may be fixed. If this Court has no jurisdiction, as I pointed out in the manner in which he took offense, but which would give his client the "break," as the expression goes, if he were convicted, and the Court had no jurisdiction, he would cheat, as I said, the electric chair. If the Court has no jurisdiction, all proceedings are a nullity. We are satisfied the Court has jurisdiction, satisfied to bring him to trial.

The Court: All the proceedings, counselor, would be void ab initio, from the start, if I should enter his plea and he should be tried, and your contention is correct, wouldn't it?

Mr. Wegman: That is correct.

The Court: The proceeding would be entirely of no value because the Court has not jurisdiction. Not having been able to acquire jurisdiction, the judgment of the Court could not be enforced.

Mr. Wegman: That is the reason we raise the point.

[fol. 25] The Court: But at the same time that is true, isn't is?

Mr. Wegman: Yes.

The Court: Where will he suffer then, if I enter a plea for him of not guilty? Where does he suffer in the event it shall be determined you are right in your theory, and, if you are right, you can stop this man from trying him. If you raise the constitutional question you can stop him, because the United States Courts are superior in their jurisdiction with their prisoners to the State Courts. You can stop his trial and I am not so sure on your motion before the United States Court, whether or not that would not act as a stay.

Mr. Wegman: I think your Honor is correct. I agree with everything that your Honor has said. There is no doubt about that.

The Court: How can he be hurt? He is here. He has been here three weeks, and it is essential and necessary that

some kind of a plea or some disposition of this case. If this plea that he was going terfere with you in going ahead with what , I would not take it. I will say that. I do is, or what he is, he is entitled to a fair and deal He is going to get that with me, but e, I still think if I enter a plea myself, if I ve and enter a plea of not guilty and set that if you go through with the proceedings already brought or are going to bring, I say lf acts, first, as a stay of this case; second, are right in your contention—and I am not or you are not; I have not looked into it, e thought about it sometimes—if you are ontention then the whole proceeding is of Court not having acquired jurisdiction, the ne; the judgment of the Court is invalidated.

: May I say this, your Honor? So far as ncerned, I must object to your Honor enter- I think that if your Honor enters a plea, the erved. The point I raise is that if I consent a plea——

do not ask you to consent. I say if you do waive it.

: That is right.

Court: If he submits himself to take this plea the jurisdictional question involved in the

: That is right.

ow, while I enter a plea for him of not guilty,

: That is right.

I have the right, where he stands mute, to hether it is right or wrong. Suppose every I should say, "I refuse to enter a plea," right or ridiculous, or absurd; I still would have t. Under the theory of the case that you not quarrel with that; there may be some it in my mind—the responsibility, after all, District Attorney and not with me. That is ases where the responsibility rests with the ey and not with me, so therefore that respon- rs, not mine; so under the circumstances I

think I am bound to enter a plea of not guilty and set the case down for trial. What date do you want?

Mr. Turkus: Judge O'Dwyer directed me a few days ago [fol. 28] to set the date of July 14th for trial.

Mr. Wegman: May I be heard on that?

The Court: Yes. If he consents to a date for trial, or he picks out a date for trial, then he is submitting himself practically to the jurisdiction of the Court.

Mr. Wegman: May I suggest, your Honor, that in order that this constitutional question may be raised, and because of the fact that today is May 29th and the question is one which will necessarily have to go to the Supreme Court of the United States for ultimate decision, without consenting to a date for trial and without waiving the objection to the jurisdiction, I suggest that the case ought to go over until September at the earliest.

The Court: What do you say to that? Suppose I do this: I am not going to try this case, so consequently I am not in any position to argue about the date. Suppose I do this: Suppose I set this case down for trial before Mr. Justice Taylor, who I understand from the District Attorney's Office is going to try it—is that correct?

[fol. 29] Mr. Turkus: That is my information, too. May I say this, that the trial date will be set upon the application for a special panel. The reason I mentioned the date of July 14th is that this defendant and his counsel may be apprised of the fact that Judge O'Dwyer has directed me to try this case on that date, so they will have ample time to get themselves ready.

The Court: I am going to set it down for July 14th. Of course, as I said before, the mere fact that I set the case down for July 14th does not hinder you, because the trial judge before whom it comes on July 14th will have to pass on it as to whether he shall go on or not. All the questions are just as valuable before him as they are before me.

Mr. Wegman: May I have an order from your Honor on the minutes of this proceeding that further action taken by counsel for this defendant in connection with the proceedings in this Court shall be without prejudice to the right of the defendant to question the jurisdiction of this Court in the manner that I have specified?

[fol. 30] The Court: You have not taken any part in the proceedings. I do not see that you are entitled to an order.

Mr. Turkus: As a matter of fact, even his appearance was well worded.

The Court: Mr. Turkus, you have to expect that when men are employed as lawyers to defend men, no matter who they are or what they are, or what they are charged with, they must exercise every legal technicality.

Mr. Turkus: I did the same thing.

The Court: Some day you and I will do that. You did.

Mr. Turkus: You did too, and very capably.

The Court: And I know you did, and very capably, so it is all right. It cannot do any harm. I will give it to you. I will have the stenographer write out what you ask to have written out, and I will give it to you.

Mr. Wegman: The suggestion has been made by my associate, Mr. Barshay, that we note on the record the fact that we presently object to July 14th, that we know that that will not give us an adequate opportunity to prepare for [fol. 31] the defense if the case is to be tried; that it is very much too soon.

The Court: I should think you would be in a much better position if you did not do anything. Now you are taking part in the proceedings.

Mr. Wegman: No, I am not.

The Court: You are saying, "We won't be ready on that day." That is an indication that you are not going to be ready. I will give you what you want. You may have it.

Mr. Wegman: Thank you.

The Court: I will have it noted on the record, just what you said.

Mr. Wegman: Now, may I ask your Honor for one thing more, not having to do with this arraignment. May I ask your Honor to direct that this defendant's wife and brother may be permitted to see him while he is in this Court?

The Court: Certainly.

Mr Wegman: Together with counsel.

[fol. 32] County Court, Kings County, Part II

Indictment No. 23855, Murder, First Degree

The People of the State of New York

against

Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Philip Cohen, alias "Little Farvel" and Louis Capone, Defendants

Brooklyn, N. Y., August 4th et seq., 1941.
Thomas F. Darcy, Julia A. McGowan, Official Stenographers.

[fol. 33] Before: Hon. Franklin Taylor, County, Judge, and a Special Jury

Appearances:

For the People: Hon. William O'Dwyer, District Attorney, by Burton B. Turkus, Esq., Solomon A. Klein, Esq., Lewis Joseph, Esq., Assistant District Attorneys.
For the Defendant Buchalter: Hyman Barshay, Esq., Bertram Wegman, Esq., Jesse Climenko, Esq.
For the Defendant Weiss: Alfred J. Talley, Esq., James J. Cuff, Esq., M. M. Kriendler, Esq.
For the Defendant Cohen: Saul Price, Esq.
[fol. 34] *For the Defendant Capone:* Leon Fischbein, Esq., Emanuel Rosenberg, Esq., William Murphy, Esq.
Julia A. McGowan, Thomas F. Darcy, Official Stenographers.

Mr. Turkus: The District Attorney, sir, is ready.
Mr. Talley: Defendant Weiss is ready.
Mr. Barshay: I have a statement to make for the record which I would like to make not within the hearing of the jury. I can read it directly to Miss McGowan.
The Court: Step up—all counsel.

(The following occurred at the bench, not within the hearing of the jury.)

Mr. Barshay: The defendant Buchalter objects to the jurisdiction of this Court. He has never acceded to this Court's jurisdiction and maintains that this Court did not

and could not acquire jurisdiction over this defendant. This defendant, by an order and judgment of the United States District Court for the Southern District of New York, is incarcerated in the United States penitentiary at Leavenworth, Kansas, for a term now of fourteen years before [fol. 35] the commencement of this trial. While serving the said term in the said penitentiary this defendant, against his will and without his consent, was removed therefrom by a United States Marshal on or about May 7, 1941, and was deposited in the Federal House of Detention on West Street in the Borough of Manhattan, City and State of New York. He has been and still is confined there. This Federal House of Detention is not a United States penitentiary. Upon the arraignment of this defendant on the charge of murder in the first degree as set forth in this indictment, counsel for defendant in open court challenged the jurisdiction of this Court and refused to submit to this Court's jurisdiction over him. He refused to plead to the indictment and over his protest and against his will and against the will of his counsel there was entered on the record of this court a plea of not guilty to this indictment. This defendant has not been pardoned by the President of the United States nor has his sentence been commuted by the President of the United States.

This defendant refuses to answer ready, because he has not been afforded a reasonable opportunity to properly prepare his defense. He, by virtue of that, maintains that he cannot receive a fair trial.

Counsel for this defendant and this defendant, after a thorough investigation, have deemed it necessary, in order [fol. 36] to prepare properly for the trial here, to interview one Jacob Shapiro, a former business associate of this defendant, now a federal prisoner. Counsel have applied for permission to interview the said Jacob Shapiro to the Director of the Bureau of Prisons in Washington. Jacob Shapiro, in the opinion of counsel, could and would give information vital and essential to the defendant's defense. Said permission was arbitrarily refused. By virtue of such refusal the defendant has been deprived of a fair opportunity to prepare his case.

We may further add, sir, that we obtained a petition and writ of *habeas corpus* which was argued before a judge of the Federal Court, and he denied our application and an appeal was made to the Circuit Court and the learned

judge there advised us that all the rights and all the points to protect our rights that we raised there were a matter for the State courts and should be raised here. Whether it is right or wrong, we are not passing upon. We raise those points here now, sir, and we ask permission to offer in evidence here a copy of the petition and writ of *habeas corpus*, which we have already printed and which will be here very shortly.

The Court: You may consider it marked. Where is Shapiro?

Mr. Barshay: Shapiro is in the Federal penitentiary [fol. 37] out West.

The Court: Where?

Mr. Barshay: Springfield, Missouri.

Mr. Turkus: Is that an institution for mental defectives?

Mr. Barshay: No, sir, not to my knowledge.

Mr. Climenko: If an answer to Mr. Turkus's question is appropriate, I may say this, if your Honor please: I understand that the institution in which Shapiro is presently incarcerated is in the nature of a hospital prison, but there is no basis for any inference or intimation that Shapiro is not thoroughly mentally competent.

Mr. Turkus: How long has he been in that institution?

Mr. Wegman: The writ of *habeas corpus* was sued out in Atlanta, Georgia, for Shapiro, who was at that time incarcerated in the Federal penitentiary in Atlanta. The United States District Court expressed the opinion that the incarceration of Shapiro in the Federal penitentiary was improper, his sentence was such that his incarceration should have been in a jail and not in a penitentiary, so before an order was made on the writ, the Director of Prisons transferred Shapiro from the penitentiary at Atlanta to the Federal Prison at Springfield, Missouri, which [fol. 38] is not a penitentiary, and where his incarceration would have been proper under the sentence which was imposed. It has never been suggested otherwise, and there can be no question about it, Shapiro is mentally competent. It has never been intimated otherwise.

The Court: If that is a hospital prison, do you know for what he was hospitalized?

Mr. Wegman: If your Honor wants an expression of our opinion, it was because the writ of *habeas corpus* would have required his transfer out of the penitentiary, and he was put in there as a device to avoid such an order on the

writ. He is perfectly competent mentally, and from the conference I had in Washington with the representative of the Attorney General, there was no suggestion whatsoever that there was any reason other than the fact that they said that they did not believe that they were required to grant it, and unless an order of the court required them to, they would not. No suggestion was ever made that it was because of his condition, because other prisoners have seen him.

The Court: He is held incommunicado?

Mr. Wegman: Incommunicado.

The Court: Has anybody attempted, on behalf of this defense, to interview him at the prison?

Mr. Wegman: We have asked permission for such an [fol. 39] interview and have been refused that permission specifically, flatly, bluntly.

The Court: In writing?

Mr. Wegman: In writing as well as orally.

The Court: Are there any regular visiting days?

Mr. Wegman: Only to those who have been granted permission. One cannot visit a Federal prisoner without permission, unless it is a member of the immediate family, and even members of his immediate family have been required to obtain permission in advance.

The Court: Have you made formal application to be advised as to the pathology?

Mr. Wegman: No question about pathology.

The Court: But it is a hospital prison.

Mr. Wegman: It is a prison and also used as a hospital.

The Court: There must be a clinical record if he is a patient.

Mr. Wegman: When I spoke to Mr. Bennett he told me there was absolutely nothing wrong with him.

The Court: To whom?

Mr. Wegman: Mr. Bennett, Federal Director of Prisons.

The Court: Have you made application in writing to be advised if there is a pathology?

[fol. 40] Mr. Wegman: We made application in writing for permission to visit him, and we were told they could not see why that privilege should be afforded. I will be glad to offer that letter in evidence.

The Court: That is all right, of course, but what I am trying to get at is whether what you state as to your opinion concerning the reason for the transfer is with some

sound basis or whether it is merely a suspicion. The question is, have you checked up on any clinical record that there may be in the files of the institution?

Mr. Wegman: When the statement was made in the answer to the writ of *habeas corpus* in the Federal Court, that Jacob Shapiro was incarcerated in a hospital for mental defectives, I challenged that statement, and there was prompt assurance given by the United States Attorney that it was not intended to intimate that there was anything whatever wrong with Jacob Shapiro.

The Court: But you do not know whether there has been any Binet-Simon test, and if so, what the intelligence quotient is?

Mr. Wegman: I do not know whether there has been any clinical record whatsoever. I cannot answer your Honor on that.

The Court: Is that all on behalf of this defendant?

Mr. Barshay: One more thing, sir: We have also applied [fol. 41] for permission for the defendant Buchalter to interview his co-defendant Weiss, who was incarcerated in the same Federal house of detention. That permission was applied for in Washington, and that permission was denied.

Mr. Turkus: But I understand that was mandatory.

Mr. Barshay: It was denied. No permission was ever given to defendant Buchalter to interview the defendant Weiss, and to this day they have not had any opportunity to consult and properly prepare their defense. We did not ask for permission to see Mr. Weiss. That was an answer by way of compromise that the Director of Prisons gave to us. He said, "You will be permitted to interview Weiss." We did not want to, nor did we seek to interview Weiss. We wanted defendant Buchalter, who was there in the identical building and who had an interest in properly preparing his defense, to interview the defendant Weiss. That permission was denied.

The Court: You mean, in addition to the right of the defendant to confer with his own counsel, that he is entitled to interview witnesses or co-defendants?

Mr. Barshay: Co-defendants.

The Court: That that is an inherent right?

Mr. Barshay: We press that, sir.

Mr. Climenko: I think we might examine witnesses too, [fol. 42] unless there was some reason having to do with

the safety of the prisoner, or the manner of his incarceration might be endangered by such an interview. Unless some such reason should intervene, I think that a prisoner charged with murder in the first degree ought to be allowed to interview prospective witnesses on his behalf.

Mr. Barshay: Those two things, your Honor, were specifically sought and were specifically refused. We say that was an arbitrary refusal.

The Court: You do not concede, then, that it is possible that the defendant's right in regard to interviewing of co-defendants and witnesses is properly reposed in counsel?

Mr. Climenko: There are some things that counsel cannot do.

The Court: You mean defendant is entitled to directly interview co-defendants and witnesses?

Mr. Climenko: The charge is that this murder was committed just about five years ago. We feel that since that time many things fade out as the years go by. Counsel knows nothing about them. In a review of anything connected with the life of each of the defendants at and about the time, all that counsel can do is listen to the defendant's recollection, but one defendant talking to another defendant with whom he was associated at the time, or defendant [fol. 43] brought to a witness with whom he was closely associated at the time, may have his recollection refreshed, and that may work the other way, too, as to events which transpired which may be of vital importance to the defendants. We are not talking about a crime that was committed last week or last month.

The Court: Is that all that you desire to state for the purpose of the record?

Mr. Barshay: That is correct.

The Court: To see that Buchalter's rights are fully protected?

Mr. Barshay: That is correct.

The Court: As to Weiss?

Mr. Talley: I answered ready on Weiss, but I join in the application that has been just made on behalf of defendant Buchalter on the ground of jurisdiction.

The Court: That is for any collateral benefit?

Mr. Talley: For any benefit of any kind, direct or collateral. We have not been permitted to confer one with the other, that is, Buchalter has not been permitted to confer

with Weiss and vice versa, in the detention pen in which they have been confined since their arrest.

Mr. Turkus: That does not include the Shapiro——

Mr. Talley: On the general ground on which the applica-[fol. 44] tion is made, for defendant Weiss, I join in the application.

The Court: Philip Cohen?

Mr. Price: Ready, subject to a motion for a severance, which I intend to make as we go along.

Mr. Talley: The answer of "ready" on behalf of Weiss is dependent upon the same motion, with the Court's permission. A motion for severance shall be made at the proper time.

Mr. Price: The defendant Cohen also joins in the Buchalter motion in so far as jurisdiction is concerned, so far as the matter may in any way collaterally adhere to his advantage or otherwise.

The Court: Louis Capone?

Mr. Fischbein: Defendant Capone joins in that motion made by defendant Buchalter with the same force and effect that the others have indicated. I also move at this time for a severance of the indictment as against Louis Capone, and for a separate trial.

The defendant made a motion some time ago before Judge Brancato, who heard the application, and he also heard the application of opposing counsel—I believe it was Mr. Turkus who appeared in opposition. That motion was denied, with leave to renew before the trial. Judge, there was an [fol. 45] order entered to that effect. I am renewing that application.

The Court: Have you a copy of that order?

Mr. Fischbein: No, I have not. It is already on file with the Court.

The Court: With leave to renew?

Mr. Fischbein: With leave to renew without prejudice, and I am submitting another affidavit in support of that motion besides the affidavits and the exhibits that have been originally submitted on behalf of that motion.

The Court: But other than the jurisdictional objection, in which you join, and the motion for severance, you are otherwise ready?

Mr. Fischbein: I am otherwise ready, except that I am joining generally in the motions made by other counsel as they apply to the defendant Louis Capone.

The Court: Very well. I take it in regard to Buchalter that apart from the jurisdictional objection the defendant is ready?

Mr. Climenko: Preserving our record.

The Court: The same applies to Philip Cohen?

Mr. Price: Ready subject to the motion that I intend to make for a severance.

The Court: Very well. Suppose we first take the motion for severance by Philip Cohen.

Mr. Price: I have discussed the matter with the District [fol. 46] Attorney in great detail. It was my opinion that the interests of justice as far as two defendants are concerned, and particularly the defendant Cohen, could best be served by consenting to a separate trial as far as Philip Cohen is concerned. I therefore, without stating any further reasons at this time, make the motion on behalf of Philip Cohen for a separate trial and a severance as to him.

Mr. Turkus: May the District Attorney state his position?

The Court: Yes.

Mr. Turkus: I am reading over a paper that Mr. Barshay read from.

Mr. Barshay: I did not follow word for word.

Mr. Turkus: May I inquire through the Court of counsel for the defendant Buchalter whether or not any application was made to this Court for an interview with the alleged witness Jacob Shapiro on behalf of Buchalter?

Mr. Wegman: If your Honor pleases, the answer to that is no, and the reason for that is manifest. The reason is that both the defendant Buchalter and the witness Shapiro are persons who are prisoners at this time. Then, the defendant Buchalter is in the custody of the United States Government, and they are subject to the control of Mr. Bennett, the Director of Federal Jails, and if I understand the [fol. 47] position of Mr. Turkus's office, they have stated that their office and that the State authorities generally could not intervene in that situation. With the greatest respect to your Honor's court, I do not see how this Court could control that situation, so no application has been made. As we understand it, there would have been no possible efficacy in making such application.

Mr. Barshay: We also had a parallel, sir. When I was first retained in this case and filed my notice of appearance in this court, I was refused permission for a period of three

weeks to see my own client. I did not get permission from this Court, nor could I seek it. I had to get permission from Washington, and I did get it only after the argument before Judge Conger, who suggested to the United States Assistant District Attorney in charge of the argument that forthwith I be given permission, and then it was given. This Court could not and did not give permission to counsel.

The Court: The question, of course, is an interesting one and maybe I can state a hypothetical case, Counselor, and get your reaction to it. Supposing a man, having committed a capital crime and fearing detection, indictment, and conviction, commits a crime for which a term of imprison- [fol. 48] ment may be imposed, for the purpose of procuring his incarceration until such time as, by reason of the death or other possibility, of witnesses, a conviction may be impossible of the major crime, that is the capital crime, would it be the policy of the law, should it be the policy of the law, to permit such manipulation?

Mr. Wegman: With the State there is no question. I assume that your Honor's question was based on a prisoner or a person who committed an offense so as to be incarcerated in a Federal penitentiary in order to avoid a trial in a State court on a capital charge, because if they were both State courts there would be no question about it, both State offenses, that the State court could try him for the capital offense.

In the case of Ponzi v. Fessenden it is ruled specifically that the Attorney General of the United States has the authority and the discretion and the power to turn a Federal prisoner over to a State court for trial in the State court of an indictment there pending, but the Supreme Court of the United States said that he could do so only upon condition that he provide the prisoner with the full opportunity to prepare and present his defense, that subject to that limitation he could turn him over for trial.

The Court: But he cannot give him absolute freedom. [fol. 49] Mr. Wegman: Oh, no, but he has to give him a full opportunity to prepare his defense. Our contention here is that in this instance, in the case of this defendant, the Attorney General has not acted within the limitation of the ruling of the Supreme Court in the *Ponzi* case; that he has turned him over to this Court for trial, but that he has deprived him of the opportunity to prepare and present his defense.

The Court: Well, the question concededly is one as to what is meant by "opportunity to prepare and present his defense." There are certain restrictions placed upon prisoners, and the Court cannot go into the reason for those penal restrictions. May it not be fairly assumed that reasonable restrications are permissible and that so far as a defendant is concerned who is presently under incarceration, serving a sentence, he cannot be heard to complain if the restrictions are reasonable, because he himself is estopped as a matter of law by his own conduct in committing the crime that is the subject of the restriction, because of the restriction?

Mr. Wegman: May I answer your Honor on that?

The Court: Yes, I am only asking a question.

Mr. Wegman: Yes, and I would like to suggest my answer to that question, and that is that the Attorney General can take his choice: either he can refuse to deliver the [fol. 50] prisoner over for trial on the other indictment because he wants to subject him to restrictions having to do with his then present incarceration, or he can waive those restrictions to the extent that such a waiver is necessary in order to permit that prisoner to prepare his defense against the other indictment. The Attorney General cannot, with the one hand, hand the prisoner over to the State court and say, "Here, try him," and with the other hand prevent that prisoner from an opportunity to prepare his defense, as it necessarily would have to be prepared if he is to have a fair trial. I suggest, your Honor, that it is of the essence of a fair trial that proper opportunity for preparation be given and if that proper opportunity be not given, there cannot be a fair trial, no matter how impartial the presiding judge may be; no matter how eminently fair his rulings may be, no matter how perfect his conduct of the trial may be, there cannot be a fair trial without a proper opportunity to prepare a defense to present.

Mr. Talley: I want to make my motion for severance when your Honor is prepared.

Mr. Klein: There have been several statements made that might be misleading. I would, with your Honor's permission, like to state the proceedings that have taken place, and state them briefly, on these very questions be- [fol. 51] fore today.

When the Attorney General of the United States turned over Buchalter to the New York City detention headquarters for the purpose of trial on this murder indictment in Kings County, two lawyers appeared for him, Mr. Wegman and Mr. Climenko. The regulations of the Federal jail require that only two lawyers be permitted to visit the defendant. Thereafter, Mr. Barshay became a third counsel, and for a temporary period of time he was not permitted to interview Buchalter. Now, the next step, your Honor, that was taken was this: A writ of *habeas corpus* was sued out in the Federal District Court in which writ it was argued that Buchalter could not be tried in Kings County on the ground that we could not acquire jurisdiction over him. It was also contended that he was denied the right to a fair trial because Mr. Barshay was not permitted to interview Buchalter. Now, the writ of *habeas corpus* was dismissed, and the opinion was written by District Judge Conger.

Parenthetically, I may suggest that if any papers have been filed in the Federal proceedings, that opinion be included in the papers.

Mr. Wegman: I have no objection to your filing it, Mr. Klein.

Mr. Klein: In that opinion Judge Conger in substance [fol. 52] stated that we do have jurisdiction, and the authority on which the decision was based was Ponzi v. Fessenden, which was decided by the Supreme Court of the United States.

Incidentally, the argument of Mr. Wegman, counsel for Buchalter, on the ground that there was no jurisdiction, was based upon the contention that Buchalter is to be kept in the penitentiary and that New York City had no penitentiary, therefore he could not be transferred here.

After the decision of Judge Conger dismissing the writ, Mr. Barshay was permitted to interview Buchalter together with his co-counsel, the privilege being granted to them despite the jail regulations.

Thereafter they sued out an appeal to the Circuit Court of Appeals of the United States Circuit, and on that appeal, your Honor, they included additional arguments why the trial should not proceed in Kings County. In addition to the point that this Court had no jurisdiction, they then, for the first time, on appeal, added the ground that they could not interview Jacob Shapiro. I was present at the

udge presiding was Judge Learned Hand.
from the bench that the arguments raised
were extremely absurd. In answer to
that they wanted the right to interview
hapiro and that the denial of the right
em of a fair trial, Judge Learned Hand
nch that that is a point that can be ad-
and taken care of by the State Court.
statement, I suggest to your Honor that
were made to this Court requesting the
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ies would honor the order of this Court
ter's counsel to interview Jacob Shapiro,
iate. They have not disclosed what the

e Court cannot make the order; the Court
uest.
d I think that request would be honored.
e request is made. Put that on the record.
elieve I tried to straighten out the record
ll the facts. One other statement I would
at in the appeal to the Circuit Court of
st tried to get a stay of this trial. Judge
lismissed the writ of *habeas corpus* and
to stay the courts of the state of New York.
May I answer that, if your Honor pleases,
Ir. Klein has served to confuse the record
tive misstatements of fact which have no
at, oever, and which ignore what actually
houl! like to have your Honor have the
I should ; e to state them, and I would
's permission to have Mr. Klein interrupt
make one statement that is the least bit
line of fact, so that there will be no ques
will be glad to have him interrupt me from

lace, on the petition for a writ of habeas
in suggests that I argued that this Court
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ed in the Federal penitentiary, and he was
l penitentiary. Mr. Klein neglects to state
e point very clear in the argument at the
t was so understood by Judge Conger, and

by everybody, presumably, except Mr. Klein, that that point was being raised only because of the fact that technically it appeared to be sound, and therefore ought to be put in the record, but it would be waived if we could get this permission to interview Jacob Shapiro, if the defendant [fol. 55] Buchalter could have permission to interview witnesses.

Mr. Klein says that I put that in the application to the Circuit Court of Appeals for the first time. Mr. Klein is mistaken. Let him read the papers. Let him read the petition for the writ, and he will find it is there very definitely. He may have overlooked it, but it is there. There was nothing that was set forth in the application to the Circuit Court of Appeals that was not contained in the writ, and, what is more, we did not ask the Circuit Court of Appeals to stay this trial. That was not our application. I should like to have that understood. We asked there, in the alternative, either a stay of the delivery of the prisoner or the immediate argument of the appeal on the merits, and I had then in court, two days after Judge Conger's order was signed, the papers on appeal, ready to submit to the Court.

The Court: Isn't this somewhat academic?

Mr. Wegman: It is.

The Court: Because I am not interested——

Mr. Wegman: That is correct.

The Court: —in that writ.

Mr. Wegman: I state it only because Mr. Klein has misstated and perverted those facts and has attempted to create an atmosphere and an inference which is unwar- [fol. 56] ranted.

The Court: It means nothing.

Mr. Wegman: Very well, your Honor.

Mr. Climenko: I want your Honor to understand there has been no appeal on the merits in the Circuit Court from the order of Judge Conger dismissing the writ and one part of the application that we did make to Judge Learned Hand was for an immediate hearing, and that application was denied. I know this is really in general academic, but I did not want your Honor——

The Court: There has been no application for writ of error?

Mr. Wegman: There cannot be.

The Court: I did not think there could be.

Mr. Clmenko: There has been no hearing on the merits in the Circuit Court.

The Court: Has everybody been heard? I want you all to have every opportunity to get in the record everything you want to get in. When you are through let me know.

Mr. Talley: Will your Honor hear my motion for severance?

The Court: Yes.

Mr. Talley: On behalf of defendant Weiss I now do move that indictment be severed from that of the others [fol. 57] that have been called for trial, and a separate trial be granted the defendant Weiss, upon the ground that it would not comport with the administration of justice to have Weiss, the client whom I represent, tried together with Louis Buchalter, generally known as Lepke, who is hailed throughout the press of not only this county but of the city, and I dare say the country at large, as the leader of a band that has been designated and is being designated today and for the past months as what has been known in newspaper parlance as "Murder, Incorporated." The publicity that has been given to the defendant Buchalter is such that it would undoubtedly prejudice the rights of the defendant Weiss if put upon trial with him. I therefore and upon that ground move that there be a severance of the Weiss indictment from that of the Buchalter indictment.

The Court: As to one person it has not registered, because I have not even read the indictment. I do not know just what this charge is yet. So far as the jury is concerned, of course, it may be fairly anticipated that there will be a great many challenges for cause which will have to be sustained, but in the weeding-out process of jurors it may be fairly assumed that twelve men will qualify if we work long enough in the selection of the jurors. If everything has been said——

[fol. 58] Mr. Fischbein: The affidavit that I submitted to the Court, may I have that made part of the record in this case?

The Court: Yes, it will be filed now with the clerk and entered on the clerk's minutes, but I want to read it. If everything has been orally stated——

Mr. Moe Levy: This is academic, but the indictment contains the name of Harry Strauss——

The Court: That is not academic.

Mr. Levy: In this trial, and I, having been assigned by your Honor, want to make an application that the indictment be severed and presumably dismissed.

The Court: Personally I know nothing about it. I think I know why you make that motion.

Mr. Levy: There will be no application made, Judge.

Mr. Talley: Will your Honor pass upon my motion, or are you reserving decision?

The Court: I did not want to hold counsel here before making an announcement because I want nothing said.

Is everybody through?

Mr. Barshay: Yes.

Mr. Klein: On the motions for severence, as your Honor knows, Judge Brancato denied Cohen's motion with leave to renew. There is no authority for granting a separate trial upon the grounds urged by defendants' [fol. 59] counsel. I submit the motion should be denied.

Mr. Talley: There is ample ground for the Judge to grant a severance whenever in his judgment justice requires.

The Court: You have no papers?

Mr. Talley: Mine is an oral motion.

The Court: Then, if counsel will be seated, I will read this affidavit.

(All counsel returned to the counsel table.)

The Court: Are there any answering affidavits?

Mr. Klein: No, your Honor.

Mr. Barshay: It was just served at the time they were handed to the Court, and the District Attorney had no opportunity to respond.

Mr. Fischbein: Your Honor, I had intended to make this orally, but this morning, because of the time I had, I prepared this affidavit.

The Court: Is there any objection to reasonable opportunity for answering affidavit?

Mr. Fischbein: No objection to that.

The Court: Submit today.

The jurisdictional objection is overruled as to each defendant.

All motions for severance are denied.

Mr. Talley: May I note an exception to both your [fol. 60] Honor's rulings?

The Court: Yes.

Mr. Talley: In both cases on behalf of defendant Weiss.

Mr. Wegman: If your Honor pleases, may we on behalf of defendant Buchalter note exception to your Honor's ruling?

The Court: Yes.

Mr. Fischbein: On behalf of defendant Capone may I note an exception to your Honor's ruling?

The Court: Yes.

Mr. Price: I should like to step up to the bench for a moment with the District Attorney.

The Court: No, you do not have to. This is only exception.

Mr. Price: I note my objection to your Honor's ruling and also note my exception.

The Court: Are the defendants seated in the order in which the names appear upon the indictment?

The Clerk of the Court: Yes.

The Court: How many jurors have answered?

The Clerk of the Court: 224.

The Court: The case is marked ready as to all defendants who are here.

In calling for excuses of jurymen we must avoid [fol. 61] confusion. For that reason, no juror will be permitted within the rail to present his excuse until the Court so announces, and then only one at a time.

First the Court calls for those who have legal excuses to stand and remain standing until counted by a court attendant. Will the court attendant please count those who are standing? Be sure to be accurate.

The Court Attendant: 84.

The Court: Please be seated.

Now will the clerk ask those who have not been able to get into the room because of overcrowding, who have excuses, to please step into the room?

The Court Attendant: 3 from the other room.

The Court: One thing more, the Court asks that those whose excuses are based solely upon vacations will now stand, solely by reason of summer vacation.

Now will the clerk count those?

The Court Attendant: 22.

The Court: Then according to the Court's figures, of the 250 talesmen, 224 have appeared, 26 have not appeared and no reason is given for their non-appearance. Added to those 26 we have 87, making 113 have not appeared or, ap-

pearing, offered excuses. This constitutes a 44 per cent of the panel. In regard to those whose excuses are for summer vacation only, the Court sympathizes with [fol. 62] those who want vacations, because the average man takes only a summer vacation, and that is the mecca to which he looks during eleven months of work per year, but the Court cannot grant that indulgence except in individual cases, much as the Court would like to grant those excuses. One at a time those offering excuses will step within the rail at the end indicated by the jury box, one at a time. All others will remain seated.

To avoid confusion, the Court will hand back to each juror his notice and note the excuse. I am reserving decision on all.

(Excuses of talesmen were then offered to the Court.)

The Court: A recess will be taken to two o'clock. The defendants are remanded.

(A recess was thereupon taken until two o'clock.)

[fol. 63] Afternoon Session (Trial resumed)

Mr. Fischbein: During this proceeding of listening to excuses of jurors, I want to know whether the defendant Louis Capone can be excused; he is being treated for a cardiac condition at the present time.

The Court: How can I excuse him when the defendants are on trial?

Mr. Fischbein: This is not part of the trial.

The Court: I am taking no chances on an objection being made and an exception taken on that point.

(From 2:10 p. m. to 4:20 p. m. excuses from the panel were heard.)

The Court: State on the record that on each application the ground therefor has been noted by the Court. At the present time there are 16 denials, 18 excuses, reserved decision on 95; total 129. Did not answer, 26. Grand total 155. This leaves only 95 present and agreeing to serve out of a panel of 250. On those where decision has been reserved, the reasons will have to be classified and an announcement made after proper consideration has been had. This cannot be done this afternoon. The Court can, this afternoon, start the trial by calling one juror, and then the case can go over until tomorrow morning for announce-

[fol. 64] ments in matters where decision was reserved, but the juror will not be examined this afternoon. Call one juror.

(Clerk Childs calls Woolsey W. Conlin—2576.)

The Court: The examination of this juror will proceed in the morning after the Court shall have made announcements on those applications which are yet undecided. Those who have presented excuses meritoriously—and many of them are meritorious—the Court sympathizes with them, but thinks that many of the excuses that were offered are because people do not want to work in August. Defendants remanded.

Mr. Talley: May I make application, if your Honor please, with respect to the defendant Weiss? May I have your Honor's permission that he be interviewed very briefly by a brother and another who are here who would like to confer with him? May they confer with him before he is taken out of the building? I refer to the defendant Weiss, whom I represent.

The Court: Is he kept in Raymond Street Jail?

Mr. Talley: No, he is in the Federal House of Detention, in Manhattan.

The Court: Have they been able to confer with him there?

Mr. Talley: Yes, sir, once a week.

The Court: How long will this conference take?

[fol. 65] Mr. Talley: I would say fifteen or twenty minutes, probably.

The Court: It will have to be under guard, you know that?

Mr. Talley: Yes, I know that.

Mr. Turkus: We have no objection.

The Court: Speaking about arrangements, there is a private pen upstairs that is used for women. Weiss can be taken in there so as to be segregated.

Mr. Talley: Will your Honor so instruct the clerk or officer?

The Court: Yes, the conference not to exceed half an hour.

Mr. Talley: Yes.

Mr. Barshay: I would like to make a similar application as to Buchalter. You can limit it to fifteen minutes, if you want to.

The Court: Can you wait until tomorrow?

Mr. Barshay: She has been waiting in the hall all day.

Mr. Turkus: We will consent to it, your Honor.

The Court: I am trying to accommodate, as far as physically possible, but of course precautions will have to be taken so there will be a proper distance between them, the [fol. 66] same as at the jail, where there is a fine screen. Consultation to be held at a certain distance, so there will be no passing of anything, and under guard, in the women's pen.

Mr. Turkus: Will you state the names on the record, please?

Mr. Talley: Sidney Weiss and Blanche Weiss, the wife.

The Court: Everybody else will return at ten o'clock tomorrow morning.

(A recess was thereupon taken until Tuesday, August 5, 1941.)

[fol. 67] Brooklyn, N. Y., August 5, 1941.

Trial Continued

Mr. Turkus: There are several applications that the District Attorney would like to make without the hearing of the panel and at the bench and I ask that your Honor ask counsel to group at the bench as they did yesterday when defense motions were made.

The Court: All right.

(The following took place at the bench, not within the hearing of the jury).

Mr. Turkus: It might reasonably be expected when the case was set down for a summer session there might be some reasonable difficulty in selecting the jury. The situation that developed yesterday was unprecedented. More than half the panel desired to be excused. Under the circumstances I think the interest of justice is conducive to an adjournment of the case until after Labor Day. In addition, there was an application made to your Honor and an exception taken to a ruling in connection with one Jacob Shapiro, alias Gurrah, at one time an associate of the defendant Louis Buchalter, alias Lepke. In that connection it was stated here that the Attorney General of the United States arbitrarily refused to permit counsel for the defendant Buchalter to interview Gurrah or Shapiro.

Mr. Wegman: It would be much easier to call him Jacob Shapiro.

[fol. 68] Mr. Turkus: I cannot understand the sensitivity on the alias. The District Attorney is addressing the Court.

The Court: There is no jury here.

Mr. Turkus: Nobody can be biased.

Mr. Talley: Do not start off so early in the case.

Mr. Wegman: Reserve that for later on.

The Court: What is the point?

Mr. Turkus: The point is this: I ascertained from inquiry that no application had been made to this Court for a permissive order to interview Gurrah or Shapiro. If that application is made in good faith, and if the defense, that is the defense in so far as the defendant Buchalter is concerned, are making a bona fide attempt to interview this man Shapiro on the theory that he may be a witness and is a vital and necessary and material witness for the defense, then by all means the District Attorney will consent to the granting of a permissive order of this Court, not a mandatory order because as it was pointed out this Court has no power to grant a mandatory order. The situation may be entirely different with a permissive order of the Court consented to by the District Attorney and I do not want the record here to stand with an exception to the defendant Buchalter which may jeojardize the record of the case in the event that there is a conviction.

The Court: But the man is out in the far West. That [fol. 69] adds to the difficulty of counsel. Why cannot he be brought to Lewisburg which is only a few hours away by automobile?

Mr. Turkus: That is something that can be arranged by the Attorney General.

The Court: It will be arranged if you request it.

Mr. Turkus: We are willing to do everything on our part to expedite the interviewing of this man who they say is a material witness, if in fact this is a bona fide contention.

The Court: What kind of a record would there be, should there be a conviction, that would go up with the statement that witnesses were held incommunicado so far as the defense is concerned? He should be aivailabie as a witness.

Mr. Turkus: The record may not indicate that.

The Court: It should be avoided.

Mr. Turkus: The Attorney General, as I understand, has exclusive jurisdiction over his prisoners.

The Court: You will make a request, will you not?

Mr. Turkus: If the application is made here for a permissive order to interview Shapiro, the District Attorney will consent to it.

The Court: Will you request to have him brought to the nearest available place of Federal confinement?

Mr. Turkus: We will certainly make that request.

Mr. Climenko: It is right in the Borough of Manhattan.

The Court: That is better still.

[fol. 70] Mr. Turkus: We will make any request of the Attorney General which will make it less difficult for defense counsel to interview a man who they say is a material witness, if that is a bona fide request.

Mr. Climenko: May I ask Mr. Turkus to call the Attorney General this morning? We have made many telephone calls and trips to Washington.

Mr. Turkus: The District Attorney has not so much as made an application for a permissive order.

The Court: If the application is made, it will be granted.

Mr. Turkus: And it will be consented to by the District Attorney.

Mr. Wegman: May I ask what is before your Honor at this time?

The Court: What is that?

Mr. Wegman: Is Mr. Turkus discussing Shapiro?

Mr. Turkus: Yes, discussing both matters.

Mr. Wegman: We will submit such an order and one of defense counsel will go to Springfield, Missouri, if that is necessary, or the prisoner may be brought to New York. It will take at least three or four days to impanel a jury. Mr. Klein made a statement in the Supreme Court, in open court, in which he accused us of seeking delay.

The Court: Who had it set down for August?

Mr. Wegman: The District Attorney insisted on July [fol. 71] 14th. I asked to have it go over because that was an inadequate time. We were then charged with using the process of the court in order to get an adjournment. When we made our motion for a change of venue, Mr. Klein in the Supreme Court charged us with making the motion not in good faith but wholly because we wanted delay. Every time we have been in court, that speech has been made for the benefit of the press and it has appeared in the press repeatedly. We have now decided we will not be accused any further. We are as ready as we will ever be and if we

can get permission to interview Jacob Shapiro, we will not delay the trial one minute.

Mr. Talley: I cannot quite appreciate the Shapiro application as a ground for adjourning this case in behalf of the District Attorney. That can readily be taken care of, possibly before the case goes into trial at all.

The Court: I do not understand it as a ground. That is supplementary.

Mr. Talley: As to the application for the adjournment, I respectfully submit in the greatest seriousness, it has given me much concern. If this case is adjourned at all, if it does not go on delay—there is a juror in the box; he is there; the District Attorney has been responsible for setting this case at this time in the month of August—I submit this to your Honor, if this case goes over at all, I ask that it go over until the November term and my reason for [fol. 72] making that request is this, that it is very much against the interests of justice, the substantial fundamental interests of justice, that this case be tried at this time for the reason that the distinguished District Attorney of this county, primarily because of the publicity that has come to his office through cases that would be claimed to be allied with this, has been nominated for the office of Mayor of the City of New York and from now on, from today up to Election Day, will be necessarily and properly engaged in a campaign for successful election to the high office for which he has been nominated.

I object to this case, in behalf of my client, being made a football of a political situation here in this county and city. I do not think your Honor with your innate sense of fitness should be made to go on. Even this morning, as I did yesterday morning, I bought the New York American and there I find the glorification of Mr. O'Dwyer as the man who broke up Murder Incpor-orated, which will be claimed in the very opening of this case to be identified with the defendants that are now on trial. If the case goes over until September, it certainly can skip one term thereafter and go over until November. I will be ready the day after Election. I will be ready to proceed to trial.

Of the talesmen here called in this room, many of them if not most of the citizens of Brooklyn, read these stories, [fol. 73] rather lurid, in the American which has been running them for the past four or five weeks, and in yesterday's edition and in Saturday's edition the names of persons

who will be called or identified in this case have been mentioned, and I say it is too great a risk to take, for your Honor to take, and certainly too great a risk for us to take with our responsibility representing the defendants. The minds of jurors will be influenced by the fact that the prosecutor in this case is a candidate for Mayor, that all of the matters that will be sought to be developed by his able assistants in this trial have been published in a lurid fashion in one of the New York papers. Undoubtedly, and whether they admit it or not, they have read or heard about this case.

Going out of this courtroom yesterday afternoon I saw in a shop near the court large placards of the theatrical type advertising this particular paper, for which I have the highest regard and for its management I have the highest regard, truly, advertising the life of Bill O'Dwyer, in the language of the poster; and I find tacked on telegraph poles throughout the city and on the sides of trucks, in very large lettering, the story that is identified with this trial, published daily in the newspaper with no doubt the exaggeration that we might assume newspapers give about this case. I say it is too important when men are indicted by the District Attorney of this or any other county for murder [fol. 74] in the first degree, it is too important to the fundamentals of American justice as you see it and as I see it to have the possibility of any inference where four men are on trial on a charge of murder in the first degree.

Let us get down to fundamentals. The District Attorney insisted upon this trial going on in August. All of us have been discommoded more or less. Our summer plans are all prepared for this particular month. This question about the jurors, with all due respect to my friend Mr. Turkus, we can go ahead and pick a jury. I am satisfied. I did not want to try this case in the month of August. My experience has been it is extremely difficult for the attorneys and jurors and for the Court himself to try cases in the month of August. I once tried it in the Court of General Sessions in New York. We thought we would clear up a prison calendar by sitting in August. The result was almost nil. You could not get the witnesses, or policemen were on vacations; everybody was hot and tired. Whatever is said about that, both weather and jurors, may apply in the month of September which is a summer month just as much as the month of August.

I think your Honor must give consideration to this. If the case goes on, we are ready. If the case goes off, by all means have the District Attorney put it off until November.

Then there is another matter which I submit with the greatest deference, and I do not have to add that last clause [fol. 75] to your Honor: Your Honor is a candidate and I am very much delighted to know that you are, but you are a candidate for reelection and you should not have anybody suggest that you are presiding in a case with any thought or likelihood of its effect upon you.

Mr. Turkus: Is there any other objection?

Mr. Talley: I am serious. That is a bad situation and I say that if the case goes over at all, it should go over until after Election and we can proceed without any consideration of its effect on the political fortune of the District Attorney.

The Court: Mr. Barshay.

Mr. Barshay: The counsel for defendant Buchalter join in the comments of Judge Talley and adopt his reason for requesting an adjournment as our own. In addition I may briefly relate to your Honor that even before the notice of motion for a blue ribbon jury was served upon counsel for defendants, before they were drawn, Mr. Climenko and I appeared at the office of Judge O'Dwyer. I believe Mr. Turkus was present too. We begged for a later date and we learned that July 14th was supposed to be the date upon which the trial was to commence. We even wanted to waive certain rights which we had, certain technicalities which we subsequently raised, if the trial would be adjourned. Of course it goes without saying our request was refused. There- [fol. 76] after, on a motion for a blue ribbon jury we strenuously opposed July 14th as the date.

Mr. Turkus: And urged September.

Mr. Barshay: There we were accused of seeking delay. That has been said. On a motion for a change of venue, both orally and subsequently under oath we were again accused of using dilatory tactics in seeking delay.

I have had experience as Mr. Turkus has had and we anticipated the difficulty of getting a fair jury in the summer time; we anticipated the difficulty of even getting any kind of a jury in the summer time and we anticipated and we should have anticipated the plans of the prospective jurors

in making their business arrangements for their employees' and their own vacations. All those things were known to the prosecution and we opposed them strenuously at every turn. Now it is apparent to me that an adjournment is wanted by the District Attorney for more reasons than are being said here. However, we will go along, Judge, providing this matter is adjourned subsequent to the Election. It is difficult enough to try a case where the person who sponsors the prosecution is a candidate for District Attorney but when he is a candidate for Mayor—and there may be a time in this case when even the District Attorney may be a witness. You can understand the difficulties under which we shall labor.

[fol. 77] The Court: May be a witness?

Mr. Barshay: Yes, may be a witness. I do not know but there are lots of ways I can think of.

The Court: Fantastic.

Mr. Barshay: It is not fantastic. They may be caused to call him in rebuttal if we raise certain issues which we have in mind. I do not say it is fantastic. It is part of our plan.

The Court: Do you intend to call him?

Mr. Barshay: I did not say that. I say it may be necessary for them to call him in rebuttal.

The Court: Naturally he would take the stand.

Mr. Barshay: I do not say he would not but I do say this, there comes a time when credibility from any person involved may present itself in the trial but Judge O'Dwyer being a candidate for Mayor, we do not want to be faced with that additional burden if he should have to take the stand in this case.

Yesterday it was called to my attention that some of the jurors came to the court with O'Dwyer buttons. That is all right.

The Court: Who told you that?

Mr. Barshay: People. I did not see it myself.

The Court: I have not seen an O'Dwyer button yet.

Mr. Barshay: Judge, the entire county is full of O'Dwyer [fol. 78] buttons, but that is proper, that is all right. Some of us have them concealed in the inside anyway, but you can just understand the difficulties which we shall face in the interest of justice and you should adjourn this case until after Election.

The Court: Counsel for defendant Cohen.

Mr. Turkus: May we have the other lawyers?

The Court: Counsel for Cohen.

Mr. Price: Judge, I am primarily concerned and I intend to renew my application before a jury is sworn for a separate trial on behalf of my client. I therefore take the position that it is immaterial as far as Philip Cohen is concerned when he is tried so long as he can get a separate trial. If the District Attorney wants to try him today, tomorrow, I am ready.

The Court: You do not care?

Mr. Price: I do not care so long as I can get a separate trial for him which I believe he is entitled to.

Mr. Talley: May I call your Honor's attention to this day's issue of the New York American? The name in the headline is the name we expect to be probably the principal witness for the prosecution. His name is in the headline of that paper, and yesterday some of these defendants were named and Saturday the same way.

The Court: Isn't this about the Maione and Abbandando [fol. 79] trial?

Mr. Turkus: Whatever that paper is and whatever it says——

The Court: Judge, let me ask you something. Of course you know that when the jury is in custody, which will be from the outset of the trial, that newspapers are not permitted. You know that?

Mr. Talley: I know that but this has been going on for the last, I think, eight or ten days.

The Court: They will remember this after Election just as much as before.

Mr. Talley: I do not think so. They will not be influenced. The District Attorney is a candidate for Mayor of the city which has five boroughs, is a resident and a favorite son as he should be of the Borough of Brooklyn, and these jurors are all citizens of the Borough of Brooklyn.

Mr. Turkus: May I say this to your Honor——

Mr. Talley: There is the complete answer.

Mr. Turkus: Your Honor has heard several counsel for each defendant with the exception of the counsel for Capone. May he be heard?

Mr. Fischbein: With respect to the defendant Louis Capone, of course I join in the remarks that were made by Mr. Barshay and by Judge Talley. I hardly believe, how-

ever, that Judge O'Dwyer or even your Honor would in any way use this trial as a means of bolstering up a campaign [fol. 80] which is being waged at the present time. I am more or less concerned with one thing and that is a fair and impartial trial, with jurors who can really weight the evidence in this case with a view towards doing substantial justice. Because of the heat and because of the weather conditions of this month, especially this month, I hardly believe that these jurors would be in a frame of mind where they could be in a receptive mood to evidence which is of a highly technical nature. I believe that the law on the subject is highly technical and in order for them to be able to follow your Honor in his charge to the jury I believe they should be not only in a good frame of mind but in a good frame of body as well.

The Court: No question about that.

Mr. Fischbein: They will be held in custody unquestionably.

The Court: Counsel, of course, have the hardest work because they have to work after hours every night.

Mr. Fischbein: That is true, Judge, and I believe for the convenience of the jurors as well as the convenience of the Court and the lawyers this case should go over until some time after Election Day.

The Court: There is just a little matter referred to by Judge Talley and that is in relation to this present panel being influenced by these newspapers. I take it that you mean that on account of being on the panel their attention, their interest, will be particularly directed?

[fol. 81] Mr. Talley: It undoubtedly has been directed.

The Court: I submit this for consideration. In the event of the case being continued until after the extremely hot weather and until bearable trial weather, regardless of when it is, that if all counsel for the defense agree, then the Court would be agreeable to drawing of additional talesmen and upon those talesmen coming here the Court will then, the counsel for all defendants agreeing, discharge the present talesmen, but those talesmen will not have to be drawn right away and their attention would not therefore be particularly directed, their interest would not be particularly directed, by being drawn as talesmen, to the stories now being carried in the New York American. You don't have to commit yourselves. That is only food for thought.

Mr. Talley: The same thing would apply to any talesmen

drawn at this time, proximity to the publication of those articles which shall go on, I take it, for another week or ten days and they have been going on for the past week.

The Court: I would not entertain any application for the drawing of additional talesmen as long as these articles are published.

Mr. Talley: They are articles that are likely to be remembered.

The Court: They will be remembered after Election, Judge. They will be remembered a year from now. Those [fol. 82] stories stick like the story of Dick Whittington, Lord Mayor of London.

Mr. Talley: It is the Election influence now.

The Court: You think it grips the panel?

Mr. Talley: More or less, yes.

Mr. Fischbein: Suppose these articles appear up to the day of Election? There is a possibility of that happening, too.

The Court: There is not enough material.

Mr. Fischbein: With Judge O'Dwyer I believe there is a lot of material.

Mr. Turkus: Your Honor, may I continue?

The Court: Yes, Mr. Turkus.

Mr. Turkus: May we have one counsel for each defendant address the Court so that we can have an orderly discussion?

The Court: We have gotten along nicely.

Mr. Barshay: One more point, Judge. If your Honor sets this case down for some time in September, the best selling point for Judge O'Dwyer as a candidate for Mayor will be his successful prosecution of the murder. Every street corner speaker, every radio speaker, every platform speaker, will urge that as the best point in his behalf.

The Court: How will that get to the jury?

Mr. Barshay: The radio especially will be used every single day and night of the week.

The Court: There are no radios permitted in the jury rooms.

[fol. 83] Mr. Barshay: Just a second. I did not say that the radio will be on in the jury room but I do say this, that in the picking of a jury, during the trial your Honor cannot at night, if they are locked up in the Knights of Columbus, or any other place, stop the radio from going on and they

may listen just as well if they have not already before they are locked up.

The Court: There would not be even telephones in their rooms. They would not be permitted to have contact with one another. They will have separate accommodations.

Mr. Barshay: Your Honor, they can go into a restaurant. As they go through the building——

The Court: They cannot. They are not permitted. The rule of segregation is rigidly enforced. There is nothing to which exception can be taken in that respect. They are not even permitted to take a swim without everybody else being ruled out of the pool.

Mr. Barshay: Your Honor, I have seen blue ribbon jurors watching a basketball game.

The Court: It could not be done here because they will be segregated. There would not be an opportunity for conversation unless with members of the panel.

Mr. Barshay: Judge, the fact remains there will be some opportunity before the trial and during the choosing of the jury, at the heat of the campaign. If it will take one week [fol. 84] to choose a jury, why they shall have been filled with all this glorious publicity about the candidate for Mayor, which they have a right to listen to. He will be in court as a spectator or a witness. They shall be and they must be influenced by all that they hear and read.

Mr. Talley: You cannot dissociate this case with this campaign. We all know that Judge O'Dwyer came forward as a candidate for Mayor primarily because it was identification with this type of case.

Mr. Turkus: May I be heard, your Honor? There is not a reasonably minded person in this courtroom who is not aware of this important fact, it would be in the interest of justice where there are 129 jurors out of 226 who are unwilling and recalcitrant——

The Court: Haven't we been over that, Mr. Turkus?

Mr. Turkus: I think the whole thing simmers down to the adjourned date.

The Court: Pardon me. I think you fully covered it. I do not want to have a repetition. Any more counsel for defense?

(No response.)

The Court: Then I would like to cogitate.

Mr. Talley. Will your Honor take that publication and have the stenographer mark it?

The Court: Yes, mark that for identification.

[fol. 85] ("New York Journal-American" of August 5, 1941, marked Defendants' Exhibit A for identification.)

Mr. Talley: I offer it as part of this motion. In support of my motion I offer today's copy of the Journal-American with particular reference to the page which is headed "Bill O'Dwyer—Life Story of the Man Who Smashed Murder, Inc."

Mr. Turkus: Referring to the New York Journal-American of Tuesday, August 5, 1941.

The Court: Personally I am against any delay because I came here to work and am fully prepared to work and I have omitted work that I should have performed during the month of July in anticipation of being tied up here in this case. If there is going to be any adjournment, it is not going to be for a resurrection of the case in hot weather.

Mr. Turkus: That is true and no one else wants it. It would be inimical to the interests of justice to have a balky jury.

The Court: Counsel will be seated.

(His Honor retired from the bench and upon his return stated):

The Court: This jury situation is unprecedented. It is practically a run-out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit in that position. To arbitrarily combat it would smack of coercion and would tend to undermine [fol. 86] that quality of jury service which is essential for a fair trial of this case. Both sides have expressed themselves as being agreeable to putting the case over for that reason. The question becomes apparently one of date. The Court will grant the motion for a continuance of the trial until after Labor Day but it cannot go over until after Election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable. Any delay of trial in any case involves hazards in relation to witnesses, in relation to evidence. Therefore any delay of any trial must be weighed against those hazards. No prejudice can come from trying the case before Election because, sensibly, no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case.

The trial is continued until September 15, 1941. By that time the hot weather should be over.

The August term of Part 2 of this court is continued for that and for all other purposes of this trial.

Decision is reserved on all pending applications for excuse from jury service. All members of the jury panel are directed to return on September 15, 1941, in this part, at 10 a. m.

The prisoners are remanded.

This action has no relation to the personal convenience of the Court as the Court will remain in session for the trial of other cases throughout the summer. The jurors [fol. 87] are urged to withdraw their objections and to serve willingly on the date fixed. Should a new panel be desired, counsel for all of the defendants should agree on that. Defendants are remanded.

Mr. Talley: Will your Honor hear me for a moment?

The Court: Not any further argument.

Mr. Talley: No further argument, no, sir. I wish to note my exception on behalf of the defendant Weiss to your Honor's refusal to put the case over until after Election for the reasons urged in our application, and I further wish to correct an erroneous impression, conveyed by your Honor's remarks, that defendants' counsel all consented that this case go over. For myself I did not consent that this case go over except upon condition that it go over after Election. My objection is specifically based upon that statement that if the case was to go over or not to go on today, and we were ready to go on, I have no objection to it going over if it went over until after Election, and that is the condition which I stated to the Court.

The Court: That will make the record clear on that point. I did not accurately understand that your consent was conditional.

Mr. Talley: Yes, sir, correct, and my exception to your Honor's ruling I trust the Court has noted.

The Court: Yes.

[fol. 88] Mr. Wegman: If your Honor pleases, on behalf of the defendant Buchalter we should like the record to show that we take exception to your Honor's granting of the motion for the continuance and we take exception to the adjournment of this trial until the date set by your Honor, and, if your Honor pleases, we should like to have noted upon the record that we did not consent to any

adjournment and that if any adjournment were ordered it is our request to your Honor that the adjournment be set for a day past Election.

The Court: Let me understand, because I have not yet fully memorized the representations by various counsel. Whom do you represent?

Mr. Wegman: I speak for the defendant Buchalter, if your Honor pleases.

The Court: I thought that you all agreed. I think the record speaks for itself. Miss McGowan took it even though it was not audible to the courtroom. All right, you take an exception.

Mr. Fischbein: Your Honor, on behalf of the defendant Louis Capone may I note my exception to your Honor's ruling in regard to the adjourned date, that the defendant Capone did not consent to the case being adjourned except that it be adjourned until after Election Day.

The Court: None of you made that clear, that it was conditional. I thought it was only an argument as to the [fol. 89] date to be fixed. You had all agreed on the desirability of not trying it now. However, the record speaks for itself.

Mr. Price: No comment.

The Court: The defendants are remanded.

(Adjourned until September 15, 1941, at 10 a. m.)

[fol. 90] Brooklyn, N. Y., Sept. 15, 1941.

Trial Resumed

(Sidney Rosenthal, Esq., appears as associate counsel with Leon Fischbein, Esq., and Emanuel Rosenberg, Esq., for the defendant Louis Capone.)

Mr. Rosenthal: The defendant Capone, if the Court please, has an application to make.

The Court: Is the defendant Buchalter ready?

Mr. Barshay: Subject to your Honor's hearing the application of Mr. Rosenthal.

The Court: Is the defendant Weiss ready?

Mr. Cuff: Ready.

The Court: Is the defendant Cohen ready?

Mr. Price: Ready, subjejct to a motion for severance. For the reasons heretofore stated, the defendant Cohen renews his motion for a separate trial.

The Court: Is that motion opposed?

Mr. Turkus: In the interests of justice, the District Attorney consents to the application for a severance with respect to the defendant Philip Cohen, alias "Little Farvel".

Mr. Barshay: I object to the phraseology of the District Attorney. I objejct to the motion being made in the pres-[fol. 91] ence of this jury.

The Court: On what ground?

Mr. Barshay: On the ground of prejudice to the defendant Buchalter.

The Court: That objection is overruled.

Mr. Barshay: Exception.

The Court: Severance granted as to Cohen.

Mr. Turkus: May I at the same time, with respect to the defendant James Ferraco, move for a severance? He is a defendant who has not as yet been apprehended.

The Court: Motion granted.

Mr. Rosenthal: Before making an application, which I do, for an adjournment, I want to supplement a motion which was heretofore made by Mr. Fischbein on behalf of the defendant for a severance, with these additional papers which I have here and which I intend to hand up to the Court, and which I wish to have marked in evidence and deemed part of the motion which I am now renewing for a severance, which your Honor has denied.

The Court: These are all "Mirror" articles?

Mr. Rosenthal: Yes.

The Court: Mark them.

(Received and marked Defendants' Exhibit B for identification.)

The Court: Do you wish to say anything else?

[fol. 92] Mr. Rosenthal: I do not wish to press the argument on that particular motion any further other than to submit the papers to your Honor. Your Honor is familiar with the record made before you.

The Court: Motion denied.

Mr. Rosenthal: The papers which I submit are now marked as part of the record, I take it.

On behalf of the defendant at this time I am going to ask for an adjournment, for two reasons:—one may not be as forceful as the other. The first reason is I have recently been retained to defend and have not had time to thoroughly familiarize myself with the facts and circum-

stances, and to consult with other counsel representing the other defendants. The second is a more important reason: If this trial commences right now there must be three delays in the trial. Tomorrow is Primary Day, and the most religious holidays in the Jewish faith are approaching now, which will necessitate the incarceration of the jury and a delay in the trial on three separate occasions; that will unnecessarily prolong the trial. Now, most of the people engaged in this particular trial are of the Jewish faith, your Honor.

The Court: I am prepared to rule on that now in your favor as far as the Jewish holy days are concerned. Counsel and members of the panel are informed that the Court [fol. 93] will not sit on Jewish holy days and that provisions will be made for attendance at religious services by members of the jury according to their religious convictions. This is to safeguard against racial discrimination in the make-up of the jury.

Mr. Rosenthal: The only fault with that proposition is that men of Jewish faith, if they are called, on these particular holidays they are not supposed to ride or do a number of things.

The Court: The Court, having ruled on that point, will not permit argument on it. Any further argument seeks to embarrass the Judge.

Mr. Rosenthal: I respectfully except to that remark. There is no such intention on counsel's part.

I ask that this case be adjourned over past the Jewish holidays so as to provide for the convenience not only of the jury——

The Court: The motion is denied.

Mr. Rosenthal: Exception.

The Court: This Court always respects Jewish holy days. My family has two Jewish intermarriages in it. My secretary is a Jew. When I practiced law all of my partners were Jewish. I have no discrimination, no prejudice.

Proceed.

[fol. 94] Mr. Rosenthal: That is my motion for an adjournment.

The Court: Motion denied.

Mr. Rosenthal: Exception.

The Court: Are there any other motions?

(No response.)

The Court: The defendant Cohen is remanded.

Mr. Barshay: Your Honor, in view of the series of prejudicial articles which have appeared daily in the New York "Daily Mirror" concerning the defendant Buchalter, I ask your Honor to adjourn this case at least until a reasonable time passes, so that if any of the prospective jurors have read or been influenced, or have been spoken to about the contents of those articles, a reasonable time should pass to have them overcome it. And I think, your Honor, in the interests of justice, should postpone the case for a reasonable time to overcome any effect these articles may have had.

The Court: Do any other counsel wish to be heard?

(No response.)

The Court: This trial was commenced on August 4th. Prior to its commencement a motion was made and denied for a change of venue and transfer to the Supreme Court. On the first morning of the trial preliminary motions were made and ruled upon. The Court then took excuses of jurors and ruled upon some and reserved decision as to [fol. 95] others. The following day, August 5th, because of difficulty in the jury situation due to warm weather and a great multitude of applications for excuses, the trial was, upon motion by the District Attorney—there being no opposition other than as to date—set down to be continued today. The trial is now on.

In the meantime these further publications have appeared, and, as the Court is informed, have been made the subject of another motion in the interim in the Supreme Court for a transfer of the indictment and a change of venue. That motion was denied last week.

Under the circumstances, this Court has no alternative other than to deny the motion, but I will add this: The longer the delay the greater is the publicity hazard. When the human mind registers, it is not likely to readily forget its impression. It will be difficult to select a jury in this case. There is no doubt about that. The Court will allow abundant latitude to all counsel to make searching examination of every member of the panel who is drawn, for the purpose of determining whether such member has any prejudice that will prevent a fair and impartial trial of these defendants. The motion is denied.

Mr. Barshay: Exception.

Will your Honor permit us to mark for identification [fol. 96] these various articles as they appear daily since the denial of the motion?

The Court: Mr. Rosenthal has already put those in.

Mr. Rosenthal: Those are in already.

Mr. Barshay: I am talking about those that shall continue while the trial is in progress. If it is merely a duplication, I am sure your Honor will not mind it.

The Court: I cannot rule on that now because I cannot anticipate what will be done. Application was made to the Court informally by counsel to consider the question of taking action in regard to publications which might embarrass the trial, but upon consulting the law on the subject I think we all are agreed that the law in this state is inadequate to enable dealing with such a situation.

Mr. Barshay: Then you will not foreclose us from renewing our motion?

The Court: You may renew the motion if you wish, if occasion so indicates. Of course, the jurors who are selected will be safeguarded against reading any publications, and all members of the panel will be admonished not to read during the process of selection of the jury.

On application for excuses heretofore made, the Court will call the numbers of certain jury notices. As each number is called, the juryman having the corresponding notice may step forward.

[fol. 97] (Disposition was then made by the Court of excuses heretofore made.)

The Court: The Court will new entertain applications from those who have not heretofore applied, providing only that the ground of application is something that has come into being since August 4, 1941.

(At 1:00 P. M., all of the requests not having been acted upon, a recess was taken until 2:00 P. M., at which time the panel of jurors was ordered to return.)

(Defendants are remanded.)

[fol. 98] Afternoon Session—Trial Resumed

(From 2:10 P. M. to 4:20 P. M. excuses from the panel were heard.)

(Woolsey W. Conlin takes seat No. 1 in the jury box.)

The Court: Only this juror will be examined this afternoon. I am starting the examination of jurors so as to be absolutely sure that no more applications will be made.

Mr. Turkus: May we limit it to the name and address, your Honor? This has been a very wearisome day.

The Court: For whom?

Mr. Turkus: Not only for the Court but for counsel. We have endeavored to follow this. In addition, there are many jurors who are not in the room who should hear some of the questions. I think it extremely inadvisable to go on at this time.

The Court: We can start in. I don't intend to overwork counsel. I am not pushing you. You can start in. Bring the other jurors in now.

(Woolsey W. Conlin was then examined as to his qualifications to serve as a juror.)

By Mr. Turkus:

Q. Mr. Conlin, do you reside at 711 East 24th Street?

A. I do.

Q. Is that in the Flatbush section of Brooklyn?

A. That is right.

[fol. 99] Q. Are you, sir, familiar with the nature of the charge in this case. Do you understand that this is a charge of murder in the first degree wherein these defendants at the bar, Louis Buchalter, Emanuel Weiss, and Louis Capone are charged with killing Joseph Rosen on the 13th day of September, 1936, in this county by willfully, feloniously, and with malice aforethought shooting and killing Joseph Rosen with revolvers? Do you understand the nature of the charge?

A. I do.

Q. Is there anything about the nature of the charge that would prevent or hinder you from being a fair and impartial juror, fair both to The People of the State of New York and to these defendants on trial?

A. I have read considerable about the case, but I am quite sure that while I could not help but form an opinion on it, I am quite sure that I could dismiss that from my mind if selected as a juror.

Q. In other words then, Mr. Conlin, do I understand you correctly when you say that you have formed some impression from reading articles in various newspapers; is that correct?

A. That is right.

Q. By the same token, that you can banish that impression and decide the case on the merits?

A. Yes, sir.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Are you satisfied, if the evidence convinces you beyond a reasonable doubt that these three defendants, Buchalter, [fol. 100] Weiss, and Capone, are guilty of murder in the first degree, are you satisfied to vote that way knowing what the punishment is?

A. If I am satisfied, yes.

Q. So then you have no reluctance, no scruple, or no principle against capital punishment, do you understand that?

A. I have reluctance that would not——

Mr. Talley: We do not hear you.

A. I say I have reluctance, but that would not prevent me from trying to decide the case on the evidence.

Q. Would that interfere with your judgment of the case on the facts?

A. No, sir.

Q. In other words, if you are satisfied beyond a reasonable doubt that the defendants are guilty, you will vote that way; is that correct?

A. Yes, sir.

Q. On this trestle board you are listed as a C. P. A. I take it that means Certified Public Accountant.

A. That is correct.

Q. Have you been in that line of endeavor for a number of years?

A. I have.

Q. Is your practice of your profession in Manhattan or in Brooklyn?

A. Manhattan, Long Island. We go all over.

Q. May I inquire, sir, are you in business for yourself or with a firm?

A. I am with a firm.

Q. Does your business bring you into any contact, directly or indirectly, with the Brownsville-East New York section of Brooklyn?

A. No.

[fol. 101] Q. None at all? Do you have any connection, directly or indirectly, by way of business with the garment district in Manhattan?

A. No.

Q. Or the clothing district?

A. No.

Q. Does business bring you in contact directly or indirectly with anybody on the Brooklyn waterfront?

A. No.

Q. Or on the Manhattan waterfront?

A. No.

Q. None of the accounts that you are an accountant for have any such business connection to your knowledge; is that correct?

A. That is correct.

Q. Do you know anyone in the clothing trucking business or have you any contact, directly or indirectly, in business with clothing truckers?

A. No.

Q. Have you heretofore served as a juror in any court of record?

A. I have.

Q. Has it been in this county?

A. It has been in this county, but always in civil cases.

Q. You have never had any experience, then, as a juror in a criminal case?

A. That is correct.

Q. In those civil cases where you sat as a juror, did you have the benefit of receiving the Judge's instructions on the law?

A. I did.

Q. The case went to a conclusion?

A. Yes.

Q. Does your business bring you into any contact, directly or indirectly, with any officials of the Amalgamated Cloth-

[fol. 102] ing Workers of America?

A. No.

Q. Is the name of Jacob Potofsky, secretary or treasurer of the Amalgamated Clothing Workers of America, familiar to you?

A. No.

Q. Is the name Murray Weinstein, manager of the Clothing Cutters Union, Local 4, of the Amalgamated Clothing Workers of America, familiar to you?

A. No.

Q. The name of Sam or Samuel Katz, the business agent of Local 4 of the Clothing Cutters Union of the Amalgamated Clothing Workers of America, is that familiar to you?

A. No.

Q. Is the name of Bruno Belia, an organizer of the home office of that Amalgamated, familiar to you?

A. No.

Q. Is the name of Salvatore Marizano familiar to you?

A. No.

Q. Or the name of Abe Beckerman?

A. No.

The Court: I think that will be enough. We have definitely started so there cannot be any argument about it.

(To Mr. Conlin). Please be in your place at ten o'clock [fol. 163] tomorrow morning. Let nobody talk to you about the case; keep your mind open. Do not talk to anybody about it and, above all, do not listen to the radio and do not read any newspaper about it. Do you understand?

Mr. Conlin: Yes, sir.

The Court: You won't talk to any member of your family?

Mr. Conlin: They will know that I have to come back tomorrow.

The Court: Do not talk about this case.

Mr. Conlin: I won't discuss it.

Mr. Talley: May I renew the application I made, and I make it now, that I might have permission to have the brother of the defendant I represent see him now a few minutes before he leaves the building?

The Court: I will do that in just a moment.

(To talesman). You may go now and be back tomorrow at ten o'clock. Before the defendants are remanded, all other members of the panel are admonished not to read anything in any paper or magazine about this case and not

to discuss it with anybody, not allow anybody to talk about it to them, and not to listen to anything about it over the radio. You may return tomorrow morning at ten o'clock and the names on whom decision was reserved will be announced at that time for definite decision. The jurors may [fol. 104] pass out.

Mr. Talley: Defendant Weiss, I want him to see his brother who has just come up from camp.

The Court: It is purely personal?

Mr. Talley: Yes.

The Court: Who else?

Mr. Talley: There were two of the brothers here at recess. I do not know if they are here now.

The Court: Weiss' brothers may see him under supervision, of course.

Mr. Rosenthal: I had a similar application as to Capone's wife for permission of the Court to see him for a few moments.

The Court: That does not want to get confused with this other.

Mr. Rosenthal: No, I just wanted, before your Honor left the bench——

The Court: If there is no woman in the women's pen, he can be put in the women's pen for the purpose of that interview. The other, Weiss, will be in the men's pen. Where is the U. S. marshal? (To marshal) Weiss is under your jurisdiction. His brother wants to greet him personally, not discuss the case.

The Marshal: He can see him until our wagon comes.

The Court: Whereabouts, in the pen?

[fol. 105] The Marshal: Yes.

The Court: You go up there with him. The defendants are remanded.

(A recess was thereupon taken until Tuesday, September 16, 1941, at 10:00 A. M.)

[fol. 106] Brooklyn, N. Y., September 16, 1941.

Trial Resumed

The Court: I have a communication from the Department of Justice which counsel may see, and if they desire it may be put on the record (handing counsel a paper).

Defendants' Counsel: May it please your Honor, with respect to the communication, may counsel have an opportunity during the recess to confer with each other about it before they make any request of the Court?

The Court: Have it marked for identification and hand it to the Clerk.

Mr. Climenko: I think a copy of your Honor's communication to which this is a reply should accompany it if it should go on the record at all. If it should go on the record at all I think it should go with your Honor's communication.

Mr. Talley: I join in counsel's request that we be allowed to reserve determination on that question.

The Court: All right, let me know at two o'clock. I think the law requires, this being Primary Day, the court shall recess at three o'clock; that means a short day.

[fol. 107] Mr. Cuff: May I request that a recess be declared at one o'clock on account of Primary Day?

The Court: I will think it over.

(Letter from Department of Justice dated September 6, 1941, addressed to the Honorable Franklin Taylor, marked as Exhibit 1 for identification by the Court.)

(Woolsey W. Conlin, talesman, was then examined as to his qualifications.)

By Mr. Turkus:

Q. I think we got to a place yesterday when you told me you had no contact, directly or indirectly, with anybody in the Brownsville or East New York section of Brooklyn, the Brooklyn waterfront, the clothing and garment districts in Manhattan and the Clothing Truckers; is that correct?

A. Yes.

Q. Did your business at any time in the past bring you in contact with any place, either residing in or having any business in those particular lines, that is, in the clothing and trucking, garment or cloak and suit business?

A. Not as I recall.

Q. Since you received your notice that you were a prospective juror, did anybody speak to you about this case?

A. Well, a friend who had seen my name in the paper had mentioned it.

Q. Has that comment been limited only to the fact that your name was seen in the paper by a mutual friend?

A. Yes sir.

Q. No discussion whatever as to the merits or any con-[fol. 108] nection with anybody at all in the case?

A. That is correct.

Q. I take it you are in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, I am, in sympathy with the enforcement of the law.

Q. By such sympathy, such state of mind, you would not permit a guilty man to escape?

Mr. Talley: I object to that as an improper form of examination.

The Court: Objection sustained. He will have to be proved guilty beyond a reasonable doubt.

Q. Is your state of mind such that if you were satisfied beyond a reasonable doubt the defendants were guilty, with the law enforcement always with you, would you permit such a guilty individual to escape?

The Court: That should be further qualified by being limited to his hearing the evidence.

Q. Based upon the evidence in the case and pursuant to the instructions of law given by the trial judge, you have reached a conclusion and you are satisfied beyond a reasonable doubt that the defendants and each of them are guilty of murder in the first degree, as charged, is your state of mind such that by sympathy with law enforcement you mean you would not permit such guilty defendants to escape?

A. I would.

Mr. Talley: Furthermore, that is objectionable, it is not up to the juror to determine whether a man escapes or not. [fol. 109] The province of the jury is to determine beyond a reasonable doubt as to the guilt of a defendant and to bring in a verdict accordingly. I object specifically to the expression of "allowing a guilty man to escape." That is no part of the juror's business at all.

The Court: The word "escape" may be objectionable. I would not use the word "escape." The word "escape" implies flight or may imply flight. The juror can be asked

whether, if a case is proven to his satisfaction beyond a reasonable doubt, he would bring in a verdict of guilty—provided it is so proven against the defendants on trial.

Q. Inquiring particularly as to your state of mind with respect to law enforcement, is it such that if a defendant and each of these defendants on trial are established to be guilty beyond a reasonable doubt upon credible evidence and pursuant to the Judge's charge, you will render your verdict in consonance with guilt?

A. I will.

Q. Did you know the district attorney who went out of office December 31, 1939, or any member of his staff?

A. No.

Q. Do you recall whether or not you knew any member of the staff of that District Attorney?

A. I did not know any as I recall.

Q. The defendant Louis Buchalter, who is seated first of the defendants, the third man to the left, is represented by Hyman Barshay, a former Assistant District Attorney. [fol. 110] Do you know Mr. Barshay or any member of his office staff?

A. I do not.

Q. Another counsel for Louis Buchalter is Mr. Wegman, a former Assistant United States Attorney. Do you know Mr. Wegman?

A. No.

Q. A third lawyer for Louis Buchalter is Mr. Jesse Climenko. Do you know him?

A. No, sir.

Q. The defendant, Emanuel Weiss, who is seated alongside of Buchalter, who has his fingers up to his face, is represented by former Special Sessions Judge Talley. Do you know Judge Talley?

A. No, sir.

Q. Another counsel for Emanuel Weiss is James I. Cuff, at one time an Assistant District Attorney in the County of Kings. Do you know Mr. Cuff?

A. No, sir.

Q. Or Mr. Murray Kriendler, the third lawyer for Weiss, do you know him?

A. No, sir.

Q. I believe he was a former Assistant United States Attorney. The defendant Capone, who is seated in the

rear directly behind Buchalter, is represented by Mr. Sidney Rosenthal; do you know him?

A. No, sir.

Q. The second lawyer for Capone is Mr. Leon Fischbein: he is seated right alongside the officer (indicating). Do you know him?

A. No, sir.

Q. The third lawyer is Emanuel Rosenberg, a partner of Mr. Fischbein. Do you know him?

A. No, sir.

Q. Do you know any member of the bar who practices [fol. 111] criminal law as a specialty?

A. I cannot think of any.

Q. Do you know an attorney named William W. Kleinman?

A. No.

Q. Or his associate, David Price?

A. No.

Q. Do you know a lawyer named Sol Price at one time a former Assistant District Attorney of Manhattan?

A. No, sir.

Q. Will you, as directed by the Court, follow the instructions of the Court with respect to the law, implicitly and without qualification?

A. Yes.

Q. That is, you will take the law entirely from the Judge?

A. Yes.

Q. If you are instructed to give the defendant the benefit of the presumption of innocence, will you follow that instruction?

A. Yes, sir.

Q. If you are told the law of reasonable doubt, that is charged to you by the Judge, you will follow the Judge's instructions as to the law of reasonable doubt?

A. Yes, sir.

Q. Will you give the defendants everything that the Judge says that they should have from the standpoint of the benefits given to them by law?

A. Yes, sir.

Q. Is your state of mind such that you have any bias or prejudice against the prosecution if it avails itself of the use of accomplice testimony?

A. State that again.

Q. Is the word "accomplice" troublesome?

A. No, sir.

Q. Have you any bias or prejudice against the use of accomplice testimony by the State against the defendants [fol. 112] on trial?

A. I have no bias.

Q. Is your state of mind such that by "accomplice" you understand it to be one who committed the crime, who participated with others in the commission of the crime?

A. Yes, sir.

Q. So then——

Mr. Talley: I object to the definition.

The Court: It is a question of law. Objection sustained. The talesman has to sit sidewise. I think he would be more at ease in the witness chair.

(Talesman takes the witness chair.)

By Mr. Turkus:

Q. The District Attorney of this County will call, on the trial of this indictment, an individual who will testify he was a participant with these defendants in the commission of the crime charged. Will you close your mind to the testimony of such an individual solely because he was an accomplice or participant in the crime?

A. I would not close my mind to it, no sir; I would consider it.

Q. In other words, may I assume that you have no inherent bias or prejudice against the prosecution for availing itself of accomplice testimony?

A. No.

Q. Now, with respect to the weight to be given such testimony, namely, the testimony of an accomplice, and the nature of the corroboration required, will you follow the instructions of law as given to you by the Court implicitly?

A. Yes, sir.

[fol. 113] Q. Have you any bias or prejudice against testimony of experts, be they medical, handwriting, or otherwise?

A. I have testified myself as to that.

Q. Do you know District Attorney O'Dwyer or any member of his staff?

A. No, sir.

Q. I take it you do not know the gentleman who is addressing you, Mr. Turkus?

A. That is correct.

Q. Or my associate, Mr. Joseph, or Assistant District Attorney Klein?

A. No, sir.

Q. I do not recall whether we got to the point yesterday where I spoke to you about any possible familiarity with the names of officials who were connected with Local 240 of the Clothing Drivers & Helpers Union.

A. I don't know of any of them.

Q. Is the name of Max Silverman of Local 138 of the Flour Truckmen's Union familiar to you?

A. No, sir.

Q. Is the name of Wolfie Goldis familiar to you?

A. No, sir.

Q. Is the name of Willie or William Alpert, a bondsman, familiar to you in any respect?

A. No, sir.

Q. Is the name of Phillie Buchalter or Phillie Karwar in any wise familiar to you?

A. No, sir.

Q. Is the name of Peter Monat of the Joint Board of Control familiar to you?

A. No, sir.

Q. Or any person named Belianca, or Tosco, are those familiar to you?

A. No, sir.

[fol. 114] Q. Is the name of Mendel Yudelowitz, a man in the kneepants business, familiar to you?

A. No, sir.

Q. If you are selected as a juror, and thus automatically become foreman of the jury, will you be guided solely by the evidence developed during the course of the trial and by the law as his Honor will instruct you on it?

A. I will, but I hope I am not selected.

Q. If you are selected as a juror in the case, will you approach the issue in the case with common sense and understanding?

A. I will.

Q. Will you endeavor——

Mr. Turkus: Comments are out of order; whether they are pleasant or not to the defense is no concern of mine. I ask your Honor to admonish counsel.

Mr. Bashay: There was no comment made at this table.

Mr. Turkus: There was an audible snicker that emanated from Mr. Cuff's lips.

Mr. Cuff: I made comment about the question because I think the question is improper.

Mr. Turkus: Then your province is to get up and say so to the Judge, and not to endeavor to district the District Attorney by side remarks.

Mr. Cuff: I object to the word "snicker" because I did not make any snicker, and it is not my practice to do so, much as Mr. Turkus may think so.

[fol. 115] The Court: Let us try to get along without friction.

By Mr. Turkus:

Q. If you are selected as a juror, will you endeavor to put forth every conscientious effort to arrive at a true verdict?

A. Yes, sir.

Q. And if selected as a juror, will you listen to fair and reasonable argument by other jurors when the case is deliberated in the jury room?

A. Yes, sir.

Q. And if you are sworn as a juror and accepted in this case, after you have heard all of the testimony completely from the witnesses in the case, and you have had the benefit of the Judge's instructions on the law, and you have deliberated with your fellow jurors, and you are satisfied that these three defendants, Buchalter, Weiss, and Capone are guilty of murder in the first degree, and you are satisfied beyond a reasonable doubt, would you hesitate to say so in your verdict?

A. No, sir.

Mr. Turkus: No challenge for cause.

By Mr. Bashay:

Q. You were asked whether or not you had any knowledge of any men who practice criminal law as a specialty, and you said you did not. Now, have you at any time had any business dealings with any member of Judge O'Dwyer's staff before they became members of his staff?

A. Not as I recollect.

Q. At any time, sir, did you come in contact with Mr. Turkus or Mr. Klein, now in charge of the prosecution, who

[fol. 116] before they became Assistants, were specialists in the practice of criminal law?

A. No, sir.

Q. Did you ever hear of them lecturing before audiences in clubs or societies?

A. No, sir.

Q. Did you ever see some slide lectures given by any Assistant in Judge O'Dwyer's office?

Mr. Turkus: I object. I doubt if there has been any such thing done; in fact, I know it has not.

By the Court:

Q. Do you know anything about it?

A. I have seen slides years ago. I don't know who was the District Attorney at the time.

By Mr. Barshay:

Q. At any rate, did you ever come in contact with any police officers of the Police Department of the City of New York?

A. I have been very well acquainted with a former Police Commissioner.

Q. May I know his name?

A. George McLoughlin.

Q. Did you ever discuss investigation or prosecution of cases with the Commissioner?

A. I have not seen him in recent years.

Q. Do you know anybody else connected with the Police Department in a high or low position?

A. I cannot think of any.

Q. Were you ever a member of any Grand Jury?

A. No.

Q. Were you ever a member of any law enforcement society?

[fol. 117] A. No.

Q. Were you ever a member of any society for the prevention of crime?

A. No.

Q. Did you ever testify for the prosecution in any case?

A. No.

Q. Were you ever the victim of any crime?

A. No.

Q. Was any member of your family at any time the victim of any crime?

A. No.

Q. Have you ever been called by a special panel before?

A. I was called years ago on what was known as a struck jury before Judge Cropsey.

Q. Were you ever called to serve as a Grand Juror?

A. No, sir.

Q. Federal or State?

A. No, sir.

Q. Now, sir, this murder is alleged to have occurred in 1936. Did you read about it then?

A. No, sir, not as I can recall; I probably saw it or something about it, in the paper.

Q. Nothing of that remains in your mind?

A. Not from 1936.

Q. Do you know that the Grand Jury in 1936 investigated this case?

A. No, sir.

Q. Did any member of the Police Department or the Grand Jury Association or the District Attorney's office ever discuss this case with you at that time?

A. No.

Q. Have you retained any recollection of any of the facts that may have appeared in the press at that time?

A. No, sir.

Q. Now, since this indictment in this case, have you read [fol. 118] about the case?

A. Yes, sir.

Q. Particularly in what paper?

A. I think there was an article in the *Journal* and there have been articles in the *Mirror;* I have seen them, I think, in the *Brooklyn Eagle* and in the *Sun.*

Q. Without prying into your personal business, are you a reader of the *Daily Mirror*?

A. No, sir.

Q. Has it come to your attention at times?

A. Yes, sir.

Q. Does any member of your household read the *Daily Mirror*?

A. No, sir.

Q. Did you ever discuss the contents of the articles in the *Daily Mirror*?

A. General articles?

Q. No, with respect to this case and any of the defendants involved in this case.

A. Since I received my notification to come here as a juror, I have made it a point not to discuss the merits of the case with anyone.

Q. But before that, sir, had you read about this case or any of the defendants allegedly involved?

A. I read about it but have no particular interest in it.

Q. Did you say yesterday you formed some opinion with respect to this case?

A. From the articles that I have read I could not help but feel influenced.

Q. I take it your influence is not in favor of the defendants but against them?

A. That is the way the articles read.

Q. I take it that some of them made a real impression [fol. 119] upon you to the detriment of the defendants.

A. They did while I read them.

Q. Now you have been questioned about them, your memory has been refreshed as to the contents of some of these articles, isn't that a fact?

A. I don't recall the details; I recall the general impression I got.

Q. Now, you would require, wouldn't you, the defendants or any of them, to furnish some evidence here to dissipate the impression you formed by reading those articles?

A. I would try not to carry the impression with me.

Q. It would be an effort, wouldn't it?

A. Yes, it would be an effort, but honestly, I think I could put it aside.

Q. Would you require the defendant whom we represent to furnish some evidence with respect to his innocence in this case?

A. Well, I would try to weigh the evidence. I don't know just how to answer that question.

Q. I am trying to find out whether or not you are absolutely able to dissipate from your mind an impression you obtained by reading those articles, whether it is possible for you to do so.

A. I would try to do so.

Q. That is a fair answer; you do not know whether you could succeed?

A. I would try.

Q. And if there came a question of testimony from what you heard on the witness stand, and there was some doubt about it, you could not stop subconsciously from your con-
[fol. 120] sideration something you read in the paper?

A. I think I could.

Q. In other words, the defendants start off with some handicap with respect to what you read in the newspaper?

A. I don't think so, no, sir; I would try to be absolutely fair on the evidence.

Q. I think you would make an honest effort, but I am trying to find out whether or not there might creep into your mind at any time any of the things you read which you would use, subconsciously or otherwise, in determining the evidence in this case.

A. I feel I can divorce those from my mind.

Q. Well, the impression you formed, was that one of guilt in this case?

The Court: Do you really want an answer to that before this panel?

Mr. Barshay: All right.

Q. Now, have you read about "Murder, Incorporated," in general?

A. I have not read much about it, no, sir; I have seen it casually in the papers.

Mr. Rosenthal: On behalf of the defendant Capone I object to that question.

Q. Have you been influenced, to the prejudice of the defendant Buchalter, by reading those articles?

A. No, sir.

Q. You know, of course, that the District Attorney of this county is a candidate for public office?

A. Yes, sir.

Q. Are you a member of any committee for his election?
[fol. 121] A. No, sir.

Q. Have you contributed to the compaign, or do you intend to contribute to the campaign?

A. I have not been contributing; I have not been approached.

Q. Is it your intention to do so?

A. I do not expect to.

Q. Would that fact influence you in the prosecution of this case?

A. No, sir.

Q. You would not take that into consideration at all?

A. No, sir.

Q. Do you know that every defendant charged with crime is presumed innocent under the law?

A. I do.

Q. Do you know it is a substantial presumption and a substantial right given to every defendant by the law?

A. Yes, sir.

Q. You know the burden of proof in every case is solely and strictly and only upon the prosecution?

A. Yes, sir.

Q. And that it never shifts?

A. Yes, sir.

Mr. Turkus: I object to the form of the question. The juror is being put through a legal test; he is not expected to be a lawyer.

The Court: Yes.

Q. I will reframe the question. If the Court should charge you that the burden is strictly and solely and only on the prosecution and never shifts to the defendant, will you follow that law which the Court shall so charge you?

A. Yes, sir.

Q. Even if you think the law is otherwise, you will follow [fol. 122] the instructions of His Honor?

A. Yes, sir.

Q. On that or on any other subject?

A. Yes, sir.

Q. Do you know that the defendant, if the Court shall charge you, need not prove his innocence; you will take that law?

A. Yes, sir.

Q. If the Court shall charge you that the defendant need not explain a single accusation against him or disprove a single fact against him, you will follow that law too?

A. Yes, sir.

Q. If the Court shall tell you that if the defendant sits silently and makes no answer other than his plea of not guilty, already entered, because of that fact you shall draw no unfavorable inference against him, will you follow that law?

A. Yes, sir.

Q. When the law is, as his Honor shall tell you, that the defendant Buchalter is presumed innocent of this charge against him, as any person in this court-room, will you follow that law?

A. Yes, sir.

Q. Even during your deliberations?

A. I will follow the Judge's instructions to the best of my ability.

Q. To every end?

A. Yes, sir.

Q. The District Attorney has said that he shall offer testimony of people who claim to be accomplices. Will you evaluate with caution and care such testimony?

A. Yes, sir.

Q. You will weigh very carefully what each person in that category says before you shall accept it?

A. Yes, sir.

[fol. 123] Q. If the Court shall charge you on the question of corroboration, you will follow that law, irrespective of any opinion you may have with respect to it?

A. Yes, sir.

Q. So that if there is any testimony of accomplices and there is any other testimony in the case tending to connect the defendant with the commission of the crime, or any of them, you will have the courage to acquit if the Court shall tell you that is the law?

A. Yes, sir.

Q. You will take into consideration the motive of each person; this applies whether he admits he has a motive or not?

A. Yes, sir.

Q. You will take into consideration the hope of reward any witness has for giving the testimony he gives?

A. Repeat that.

Q. You will take into consideration the hope of reward that any witness may have in giving his testimony? Do you understand that?

A. Yes, sir.

Q. The District Attorney has read to you some names which you said you did not know; I may call upon the District Attorney for the purpose only of finding out whether the jury knows any of the witnesses who may be called, to present to the jury a list of those names, and for that pur-

pose only, to see whether or not he knows any of them. I now make a demand on Mr. Turkus through the Court.

Mr. Turkus: The demand has been made through the Court that the District Attorney present to the prospective [fol. 124] juror a list of witnesses; that is the proof of persons whom he intends to establish the guilt of the defendants beyond a reasonable doubt—to a prospective juror?

Mr. Barshay: That is right—to see whether or not he knows them.

The Court: The law does not so require.

Mr. Barshay: May we have the position of the District Attorney? Does he want to give it to the juror?

The Court: The District Attorney is not required to answer, because the law protects him on that. That is the reason why the law was changed. Witnesses for the prosecution are no longer on the back of an indictment.

Mr. Barshay: Perhaps, your Honor, the District Attorney mistakes my position. I do not want to see them. He read a list of names to find out whether or not the prospective juror knew any of them—I guess, on the theory that he might be influenced by their testimony. Now, I would like to have the juror see—I don't want to see them—any of the names of the witnesses he intends to call, for the purpose of knowing whether this juror knows or had any dealings with those witnesses.

The Court: Counselor, you yourself may ask similar questions of this prospective juror, but that does not limit you as to what witness you see fit to put on the stand at any time during the trial. You are not required, as you well [fol. 125] know, to give a list of your witnesses to the District Attorney. That has never been required. Just take your exception and don't argue it.

Mr. Barshay: I take an exception.

By Mr. Barshay:

Q. There are three men on trial. Under the law, as the Court shall tell you, each one is entitled to a separate verdict; you understand that?

A. If you say so. I don't know.

Q. If the Court shall charge you, will you follow it?

A. Yes, sir.

Q. In other words, a conclusion with respect to the defendant need not be the same; you understand that, if the Court so charges you?

A. If the Court so charges.

Q. You have no objection to such law?

A. I have no objection. I would not know.

Q. Will you consider the evidence separately as against each defendant in accordance with his Honor's instructions?

A. Yes, sir.

Q. Unless the Court tells you you can do so, you will not borrow from the evidence of one defendant and use it against the other?

A. That is right.

Q. Have you any prejudice at all in this case against any defendant?

A. No, sir.

Q. Have you any prejudice at all in this case against Mr. Buchalter?

A. No, only I said I read the articles in the paper, which [fol. 126] I said I would try to divorce from my mind.

Q. Those are things you told us you would try to dismiss from your mind if you are chosen as a juror?

A. Yes, sir.

Q. At the present they have not been dismissed, as yet?

A. I have to weigh—If I was a juror and had to weigh the evidence in the case, I would try to shut my mind to all of those things.

Q. In other words, first you will have to see the evidence, weigh it carefully, then you will try to dismiss what you read from your mind, isn't that so?

A. Well, I will put it this way: I will try to dismiss it at the start.

Q. Up to this very second you have not dismissed it from your mind as yet; isn't that so?

A. Yes, sir.

Q. That is true?

A. Yes, sir.

Q. You were here yesterday, you are here this morning, you gave the matter some thought last night, as you knew you were going to be questioned this morning, and up to this second you have not dismissed the things you read prejudicial to the defendant Buchalter from your mind?

Mr. Turkus: I object.

The Court: Objection overruled.

A. I have not dismissed them, but I do not believe I have been required to; I do not think the case is started.

Q. In other words, until you are sworn as a juror, you feel that you are not required to dismiss that prejudice from [fol. 127] your mind, which has formed in your mind before coming here?

A. I have not thought of it in just that way.

Mr. Barshay: I think, your Honor, it is time to move to challenge this juror for cause.

Mr. Talley: I join in the challenge on behalf of the defendant Weiss.

The Court: I will hear counsel for all defendants when they complete their examination before any challenge is tried.

By Mr. Talley:

Q. You told us very frankly yesterday that something you had read about this case had created in your mind an impression about the guilt or innocence of these defendants; is that correct?

A. About the guilt or innocence? I would say a general impression in the various articles of the activities of the defendants as mentioned in the paper. I have no particular case in mind.

Q. But as a result of what you read in the paper, you have formed an impression about this case?

A. Yes.

Q. Now, if you were sworn in as Juror No. 1 in this case, you would still have that impression, would you, at the opening of the case?

A. I would try to dismiss it from my mind.

Q. I did not ask you that; I am not questioning your good faith in the matter at all. The fact is, however, you would, when you became Juror No. 1 in this case, you would [fol. 128] have an impression in your mind about these defendants, wouldn't you?

A. I would dismiss it at that time.

Q. You would dismiss it?

A. I would try to be open-minded.

Q. But you would have the impression?

A. Yes, sir.

Q. Five minutes from now, if you are accepted, as a juror, you would have the same impression you had about this case yesterday morning?

A. That is right.

Q. And it would require something to remove that impression, wouldn't it, it would not just disappear in thin air—it would require something to remove it, wouldn't it?

A. I would remove it through my efforts to decide the case on the testimony and the instructions given in the court-room, and in the court-room only.

Q. But you could not do that until you heard some testimony, could you?

A. I would try to start off with a clean slate.

Q. But the impression in your mind, until you heard the testimony in this case, you could not remove that impression, could you?

A. I would say I would start at the commencement of the trial, and I would try to put that to one side.

Q. But you are not so sure you could unless you heard testimony that would remove it, isn't that a fact?

A. No.

Q. You mean by your answer what?

A. I mean you would not have to prove anything to have me divorce it from my mind.

Q. What would cause its dismissal from your mind unless [fol. 129] there were some testimony offered on behalf of the defendants?

A. I would try to dismiss it in an effort to be fair and honest.

Q. But in order to assist you in being fair and honest and removing that impression, you would have to hear some testimony, wouldn't you?

A. I don't think so, no, sir.

Q. You think that impression you formed by reading the newspaper account of this case you could remove before you became a juror, without hearing any evidence in the case at all?

A. I would try to disregard it, to put it aside.

Q. Are you quite sure you would succeed in putting it aside without effort—you are a little doubtful about that, aren't you?

A. I can only say I would try to do it.

Q. That is as far as you will go?

A. I cannot do any more than try.

Q. What I mean is, you are not so sure, despite your effort to remove it, you are not so sure you could get it out of your mind?

A. I am quite sure I could.

Q. Then, have you got an impression or haven't you got it?

Mr. Turkus: Objected to as already answered.

The Court: He says he has an impression, but so far he has not said anything about having an opinion.

By Mr. Talley:

Q. Have you any opinion as to the guilt or innocence of these defendants from what you read in the newspaper?

A. I would not put it as strong as that.

[fol. 130] Q. That is the word the Judge suggested that I use. I am following his suggestion. How strong would you put it?

A. I don't know enough about it to have a definite opinion.

Q. Of course you don't, but you did form an opinion from what you read in the newspaper, didn't you?

Mr. Turkus: I object.

The Court: Impression and opinion are two different things. Even though we, as practical men of mature experience, know that we must take everything we read in the newspapers with a grain of salt, nevertheless, for the practical purposes of life we are compelled to be guided by impressions. When it comes to responsibility, that is a different thing. We may or may not say it is an opinion—there has to be an impression. An impression, being tentative and not being definite, of specific purpose, that is why I mentionel that the witness up to the present moment has said nothing about an opinion. He has spoken only of impression.

Mr. Talley: The word used was impression. That is the term that the witness used when he was interrogated.

The Court: His impression may be based upon fragmatic assumption of newspaper accuracy.

Mr. Talley: Whether he makes any presumption as to accuracy or not, the important thing is——

The Court: I said fragmatic.

[fol. 131] Mr. Talley: Even so, he has formed an impression about this case; and what counsel is endeavoring

to find out is whether or not it would require some evidence to remove that impression. It is quite apparent to me it would.

The Court: The Court has expressed no opinion.

By Mr. Talley:

Q. From what you read in the newspaper did you form an opinion about the guilt or innocence of any of these defendants?

A. No.

Q. What did you mean when you said you had formed an impression about this case from your reading about it in the newspaper?

A. I was influenced by the articles, but I would not say I had formed an opinion, because I don't think I know enough about it to form an opinion at this time.

Q. What do you mean when you say you were influenced by what you read?

A. I was impressed.

Q. Impressed by what?

A. By the articles I read.

Q. And as a result of that impression you did form an opinion about the guilt or innocence of these defendants, didn't you?

A. I would not say I formed an opinion.

Q. What did you form an impression of; it must have been of something? Did you understand the question?

A. State it again.

Q. What did you form an impression of?

[fol. 132] A. Well, that is rather difficult. It created an unfavorable impression. It generated an unfavorable impression in the reading of the articles, but I did not try to form an opinion on each part of the evidence that was stated in the paper.

Q. You just regarded it generally?

A. A general impression.

Q. That general impression about these defendants was an unfavorable impression?

A. That is correct.

By Mr. Rosenthal:

Q. You read certain articles; that is correct?

A. Yes, sir.

Q. The purpose of getting a jury, as you understand, is to get men who, in their opinion, consider they can be fair and impartial to both sides. That is clear?

A. Yes, sir.

Q. Those articles, you say, made an impression with you?

A. That is right.

Q. You qualified that statement by saying it does not go as far as an opinion, but it is an impression that was made on you?

A. That is right.

Q. And the impression was very unfavorable to certain of the defendants; is that correct?

A. That is correct.

Q. Now then, the question that raises itself is this: The impression which you formed remains with you right now; is that correct?

A. Nothing has happened to change it.

Q. And you said it would remain with you even until you got in the jury box and were sworn as a juryman, because you did not see any reason why you should change [fol. 133] that impression until then; isn't that correct?

A. Yes, sir.

Q. Then it is that you would first try to remove from your mind merely because you were accepted as a juryman, the impression which now is with you as you are sitting as a prospective juror, isn't that correct?

A. Yes, sir.

Q. So that then the position which you would try to assume would be to try to be fair?

A. That is right.

Q. The most you could go in any of the answers that you gave, either to Mr. Barshay or Judge Talley, is that from the time you were actually accepted you would try then to remove the impression which remained with you and has remained with you during the entire time that you have read the articles, and even during the time that you were called as a juryman, during the time you were called in the box in August, and up to the present minute; that is a correct statement?

A. I will ask you to repeat it.

Q. I will withdraw the question and put it this way: You were called as a prospective juryman in the box away back in August?

A. That is right.

Q. You were called as a prospective juryman in this case how long before that—July, was it?

A. Approximately July.

Q. You knew from the articles you read in the paper that the case involved certain of the defendants that you were being called to sit as a prospective juror on?

A. That is right.

Q. And notwithstanding that fact, in July, when you [fol. 134] received that notice, you had an impression unfavorable to some of the defendants?

A. That is right.

Q. And in August, when you were called as a prospective juryman, you still retained that unfavorable impression?

A. That is right, and for that particular reason I have not discussed the case with anybody since.

Q. I am not finding fault with you.

A. I only want to say I realized that and for that reason I have not discussed the case or committed myself in any way.

Q. In other words, any discussion you had after you read the newspaper articles and prior to the time you were called as a juror?

A. Yes, sir.

Q. You did have a discussion prior to that time, which you had a right to have, which helped form an impression you had which was unfavorable to some of the defendants?

A. I don't recall I had any discussion of any case; I may have had, but I was not particularly interested; it was just general news in the paper.

Q. That refraining, as you did, from discussion, that being from the time you were called, you still entertain an unfavorable impression, and you do so retain that impression even as you are sitting here now being questioned by the lawyers?

A. If you put it that way, yes; I heard the charge, but I can dismiss it.

Q. Did you add anything to the answer you gave me?

A. Yes.

[fol. 135] Q. What was the answer you made, that you would try to dismiss it?

A. That is what I make now.

Q. Not before Mr. Turkus told you, did you say you would try to dismiss it; isn't that right?

A. I don't remember the exact word I used, but that is what I had in mind; I don't remember the exact word.

Q. So what you had in mind, after you answered my question, was that although you have divorced the impression right now against these defendants, if you are called and when you are called and after you are sworn, you would try to dismiss that impression?

A. Yes, sir.

Mr. Rosenthal: I join in the challenge.

Mr. Barshay: On behalf of all the defendants, I challenge this juror for cause. In this challenge all counsel join.

Mr. Turkus: May I try the challenge?

The Court: Swear the juror. The Court simply wants to call attention to the fact that in all the questioning by counsel up to the present time the witness has not been asked as to whether he formed an opinion as to the truth and accuracy of the newspaper report which he read.

Mr. Barshay: He was not asked that question in that particular form, but he volunteered the answer, so he obviated the necessity of asking it.

The Court: I am simply calling attention for counsel [fol. 136] to consider in trying the challenge. Try the challenge.

Woolsey W. Conlin, residing at 77 East 24th Street in the Borough of Brooklyn, City and State of New York, being sworn on the challenge, testified:

By Mr. Turkus:

Q. Did I understand your responses correctly to the defense lawyers when you said you had read some newspaper articles, some general newspaper articles, in which the names of the defendants in this case were mentioned?

A. Yes, sir.

Q. And that impression did not reach the stage of being an opinion; is that correct?

A. That is correct.

Q. Am I correct in saying that the tenor of your responses to defense lawyers was that you had no opinion as to the guilt or innocence of the defendants on trial; is that correct?

A. That is correct.

Q. Am I also correct in understanding the tenor of your responses to mean that if selected here as a juror you would endeavor to lay aside impressions and decide this case upon the merits, that is, upon the evidence you hear in the courtroom and the charge given by the Judge on the law?

A. That is correct.

Q. Now, am I further correct in understanding the tenor of your responses to defense lawyers to mean that as soon as you received your notice as a juror you engaged in no specific conversation in connection with the merits of the case?

[fol. 137] A. That is true.

Q. Did you, in reading the articles, pay any particular heed to the accuracy of the events set forth in the articles, and by that I mean did you analyze and look over the articles with any view of determining the truth or falsity of the articles?

Mr. Talley: I object to the form of the question; I don't see how it would be possible for anybody to look over any paper and determine whether the articles were true or false, without knowing what the real facts were.

The Court: Objection overruled.

Mr. Talley: Exception.

By the Court:

Q. Did you form any opinion as to whether the articles were true or false?

A. No, sir.

By Mr. Turkus:

Q. Do you understand that the District Attorney of the State is required by law to establish the guilt of the defendants beyond a reasonable doubt upon testimony adduced in the court-room and not upon any newspaper articles?

A. I do.

Q. If selected as a juror in this case can you lay aside whatever impression you have and decide the case simply upon the evidence adduced in the court-room, in consonance with the Judge's charge on the law?

A. Yes, sir.

By Mr. Rosenthal:

[fol. 138] Q. You have not in any wise changed from the position you took when you answered the question of de-

fense counsel in which you said you would endeavor or try to dismiss from your mind when you were deciding this case, the guilt or innocence of these defendants?

A. I said, if I recall, I thought I could do it, and I still think I can.

Q. Let me interrupt you there. That implies a doubt. Isn't that what you meant when you said you thought you could do it? That you were in doubt as to whether you would be able to do it; isn't that what "thought" means?

A. It probably does, yes.

Q. I am trying to figure your mind. You said you "thought" you could do it. That implies there is a doubt in your mind as to your ability to carry out your "thought."

A. I feel quite certain I could dismiss it.

Q. Now, you say you feel quite certain. That implies a doubt also in your mind, doesn't it, as to your ability to carry out what you honestly would try to carry out? Let me put it this way:—I withdraw the question. Isn't it true that when you read those papers, even though you did not analyze them, you assumed the truth of the statements in order to form an impression?

A. I assume that some of them—I probably assumed that some of it was true.

Q. And in order to form the impression, as you read the paper you assumed what you were reading was true about some of these matters?

A. Yes.

[fol. 139] Q. Now then, is it not a fact that, having read and having assumed the truth of the statements which you read in the paper, and having formed an impression, that even if you were called as a juryman it would require a greater amount of evidence on the part of these defendants, or a lesser amount of credible evidence on the part of The People than would otherwise be necessary had you not formed an impression as to the guilt or innocence of these men; isn't that true?

A. No.

Q. In other words, although in your answers to my questions you now say that you can only try to dismiss what you read, is that true?

A. I feel—I think I can dismiss that.

Q. Now you say you "think," you use that word, and you say you will try to dismiss it.

A. I say I am quite sure.

Q. That you are "quite sure" and that you "think," all of these expressions of yours imply a doubt in your mind as to your ability to carry out what you would honestly attempt to do in the jury room; isn't that true? They imply a doubt, don't they?

A. Yes, sir.

Q. You were conscious of your answers when you made them in three different ways to me—"quite sure," "try to think," when you made them in answer to my questions you were deliberating in your mind the answers you were giving when you used those three expressions?

A. I am trying to make a fair statement; I am not quibbling.

By the Court:

[fol. 140] Q. Those words are lacking in substance as to your ability to dismiss any impression.

A. Those words are, yes, sir.

Mr. Rosenthal: I urge the challenge, in which all of the defendants join.

By Mr. Turkus:

Q. Are you confident of your ability to lay aside your impression and decide the guilt or innocence of these defendants on the evidence you hear in the court-room and on the Judge's charge of the law?

Mr. Rosenthal: I object.

The Court: It is a legal question and if the answer to the question is "Yes," it would contradict his other answer. The challenge is sustained.

(Edward A. Anderson, residing at 339—73rd Street, in the Borough of Brooklyn, City and State of New York, examined as to his qualifications.)

By Mr. Turkus:

Q. You reside in the Bay Ridge section?

A. Yes, sir.

Q. You have lived in that section for how many years?

A. Since 1908; for a few years I lived in Long Island.

Q. As you sat out there with prospective jurors, did you hear the nature of the charge that these defendants, Buchalter, Weiss, and Capone are charged with, Murder in the First Degree?

A. I did.

Q. Is there anything about the nature of the charge which [fol. 141] would hinder or impair your service as a juryman?

A. I am more or less opposed to this type of defendants. I am prejudiced against these kind of people.

Mr. Rosenthal: On the statement of the juror I challenge for cause.

The Court: The challenge cannot be tried until the questioning is completed by all sides.

Mr. Rosenthal: We have no further questions.

Edward A. Anderson, was then sworn on the challenge.

By Mr. Rosenthal:

Q. You have just made a statement——

Mr. Talley: Your Honor takes the position you will not permit counsel to consent to a juror being excused?

The Court: If we do that we will get in trouble.

Mr. Talley: Why?

The Court: That is my experience.

By Mr. Turkus:

Q. Does your business bring you into the Brownsville and East New York section of Brooklyn?

A. No, sir.

Q. Or in the garment district in Manhattan?

A. No, sir.

Q. Does your business bring you in contact with the clothing trucking industry in Manhattan?

A. No, sir, it does not.

Q. Have you any contact, directly or indirectly, with any of those sections or industries I have mentioned?

A. No, sir.

[fol. 142] Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. I am.

Q. Do you know any of the lawyers in the case who represent these defendants?

A. No, sir.

Q. You heard the names mentioned to the other jurymen?

A. I did.

Q. Do you know Judge O'Dwyer or any member of the District Attorney's staff, specifically, do you know Mr. Turkus, Mr. Klein, or Mr. Joseph?

A. No, sir.

Q. If selected as a juror will you take the law in the case exclusively from Judge Taylor?

A. Yes, sir.

Q. And from nobody else in the case?

A. No, sir.

Q. If selected as a juror will you listen to fair argument and discussion by the other jurors in deliberating?

A. Yes, sir.

Q. If Judge Taylor charges you on the law of reasonable doubt and the presumption of innocence, will you accord all of these points of law in favor of the defendant in consonance with the Judge's charge?

A. Yes, sir.

Q. Since your name appeared on this list did anybody speak to you about the case?

A. No, sir

Q. There was something you said at the outset; I do not want a repetition of it, but is it something that affects your state of mind with respect to these defendants—yes or no?

A. Yes, sir.

[fol. 143] Q. Is that state of mind of yours reduced to an opinion—is it that strong—in the point of an opinion or an impression?

The Court: On what? You cannot express an opinion here as to what you think of the accused, but you may say whether or not you have an opinion.

The Witness: I was not exactly referring to these defendants when I made that statement. It was general.

By Mr. Turkus:

Q. Is it an opinion or an impression?

A. I said it is a conviction in my mind.

Q. Does it relate to the question of crime or does it relate to the question of guilt or innocence of the accused?

A. No, sir, it is on the crime.

Q. Have you formed any opinion as to whether or not the defendants are guilty or innocent?

A. No, sir.

Q. Of this charge?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise against the soundness of the law that the death penalty must be invoked where a verdict is murder in the first degree?

A. No.

Q. If you are satisfied beyond a reasonable doubt upon all of the evidence in the case, after hearing the law as given by the judge, that these three defendants are guilty of murder in the first degree, would you hesitate to say so in your verdict?

A. No, I would not.

[fol. 144] Q. Have you any bias or prejudice against the prosecution which avails itself of the use of accomplice testimony?

A. What does accomplice testimony mean exactly?

Q. Assuming that The People of The State were to bring here a witness or individual who participated in the commission of the crime with the defendants—that person would be known as an accomplice—without going into any extended legal requirement—have you any inherent bias or prejudice against the prosecution because it uses and avails itself of the use of that type of testimony?

A. I do not believe I can pay much attention to such testimony by such a party.

Q. Do you mean, then, that you would close your mind to the evidence produced in such a case?

A. Yes, sir, I would.

Q. Absolutely close your ears to it?

A. Absolutely.

Q. And disregard it?

A. Yes, sir, I would not be influenced by it.

Mr. Turkus: Now we are in an awkward position, the District Attorney will press the challenge for cause at the same time. Nobody wishes to try this challenge any further.

The Court: Challenge sustained.

(Raymond J. Cunningham, No. 2649, residing at 474 Marlborough Road in the Borough of Brooklyn, City and State of New York, examined as to his qualifications as a talesman.)

[fol. 145] By Mr. Turkus:

Q. Do you reside in the Flatbush section?

A. Yes, sir.

Q. I take it you have heard some of the questions which have been put to the other jurors.

A. I have.

Q. Are you familiar with the nature of the charge in this case?

A. I believe I am.

Q. Is there anything about the nature of the charge, that is, the charge of murder in the first degree, which would impair or prevent you from conducting a fair and impartial trial of the case?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. I have not.

Q. So, if the evidence in the case, after you have heard the Judge's charge, satisfies you beyond a reasonable doubt that Buchalter, Weiss, and Capone are guilty of murder in the first degree, you would have no hesitation or reluctance in saying so in your verdict; am I correct?

A. Yes, sir.

Q. Does your business bring you into contact with individuals in the Brownsville and East New York section or around the Brooklyn waterfront?

A. No, sir.

Q. Have you any contact, directly or indirectly, with any persons or firms in that area?

A. No, sir.

Q. Have you at any time had any business connections with anyone in the garment or clothing district of Manhattan?

A. No, sir.

[fol. 146] Q. Or with any clothing truckers?

A. No, sir.

Q. Or with the clothing trucking industry?

A. No, sir.

Q. Have you any connection by way of business now, directly or indirectly, or have you had in the past, any connections with any Brooklyn waterfront section?

A. No, sir.

Q. Have you heretofore had service as a juror in criminal cases?

A. I never had.

Q. Would this be your first experience?

A. Yes, sir.

Q. Have you heretofore had service as a juror in a civil case?

A. Never did.

Q. So at no time have you had the benefit of having the Judge's instructions on the law?

A. I never had.

Q. If accepted, would you follow the judge's instructions on the law implicitly and without qualification?

A. I would.

Q. Since your name appeared as a prospective juror in this case did anybody speak to you about the case?

A. No, sir.

Q. Are you in sympathy with the enforcement of the penal law of the state?

A. What do you mean by that?

Q. Are you in sympathy with law enforcement?

A. Oh, yes, indeed I am.

Q. Do you know Mr. Barshay, who was an assistant District Attorney for a number of years, ending December 31, 1939?

A. No, sir.

Q. Do you know Mr. Wegman, who was at one time an Assistant United States Attorney?

A. No, sir.

[fol. 147] Q. Or his associate, Mr. Climenko?

A. No, sir.

Q. Do you know anyone in the office or connected with any of the lawyers I have just stated?

A. No, sir.

Q. Do you know former Judge Alfred J. Talley, who represents Weiss?

A. No, sir.

Q. Or Mr. James I. Cuff, who was at one time an Assistant District Attorney in this county?

A. No, sir.

Q. Or Mr. Murray Kreindler, who was at one time an Assistant United States Attorney?

A. No, sir.

Q. Do you know anybody who was connected with their respective offices?

A. No, sir.

Q. Do you know Mr. Sidney Rosenthal?

A. No, sir.

Q. Mr. Rosenthal is the attorney who stands at my left side; do you know him?

A. I have seen him before.

Q. In court?

A. This morning.

Q. Other than this morning you have never seen him before?

A. Never seen him before.

Q. Do you know Mr. Leon Fischbein or Emanuel Rosenberg, partners, and associated with Mr. Rosenthal in the Capone case?

A. No, sir.

Q. Do you know intimately any member of the bar who practices criminal law as a specialty?

A. No, sir.

Q. Do you know whether you have ever come in contact with a man named Kleinman?

A. If I have ever come in contact with him? No.

[fol. 148] Q. Do you know him or his partner, David Price?

A. No, sir.

Q. Or a lawyer named Saul Price, at one time an assistant District Attorney in Manhattan?

A. No, sir.

Q. Is the name Murray Weinstein, manager of the Clothing Cutters Union, Local No. 4, Clothing Makers of America, familiar to you?

A. No, sir.

Q. Is the name of Sam or Sammy Katz, business agent of Local No. 4 of the Clothing Cutters Union, familiar to you?

A. No, sir.

Q. Is the name Barney Bellanca, an organizer attached to the Amalgamated, familiar to you?

A. No, sir.

Q. Is the name Salvatore Marazzano familiar to you?

A. No sir.

Q. Do you know any union official of Local 240 of the Clothing Drivers Helpers Union?

A. No, sir.

Q. Is the name of Philip Orlofsky, one-time manager of the Clothing Cutters Union, Local No. 4 of the Amalgamated, familiar to you?

A. No, sir.

Q. Or the name of Peter Monat, of the Control Committee of the Amalgamated, familiar to you in any way?

A. No, sir.

Q. Or the name of Max Silverman, of the Flour Trucking Union, or Wolfie Goldis?

A. No, sir.

Q. Or the name of Yudelowitz, a man in the knee pants business; is that familiar to you?

A. No, sir.

Q. If accepted as a juror and the Judge instructs you on the doctrine of reasonable doubt and the presumption of [fol. 149] innocence will you follow the Judge's instructions implicitly and give the defendants the benefit of this doctrine of law as to reasonable doubt and the presumption of innocence?

A. Yes, sir.

Q. By the same token, if you are satisfied that The People of the State of New York have established their cause by believable evidence beyond a reasonable doubt, will you say so and reflect that in your verdict?

A. Yes, sir, I will.

Q. Do you find any fault with the District Attorney of this county calling to the stand men who participated in the commission of crime with the defendants, and availing himself of the use of that type of testimony?

Mr. Barshay: I don't believe anybody finds fault with the District Attorney's doing that.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. No, sir, I do not.

Q. Then may I assume you have no bias or prejudice against the District Attorney or against the prosecution which uses testimony of accomplice witnesses?

A. No, sir, I have not.

Q. With respect to any defense that may be invoked, will you take the law specifically from the Judge with regard to that?

A. I will.

Q. For example, if any defendant pleads an alibi, will you take the law specifically from the Judge on that point?

A. I will.

[fol. 150] If selected as the first juror in the case, such selection would automatically make you foreman of the jury, and, if accepted as such, would you endeavor to work conscientiously with the other jurors and endeavor to arrive at a verdict which will do justice in the case?

A. I will.

Q. Will you listen to reasonable argument and discussion of the other jurors?

A. Yes, sir.

Q. Will you use common sense and understanding in weighing the issue in the case?

A. Yes, sir.

Q. Is the name of William Albert, a bondsman, familiar to you in any respect?

A. No, sir.

Q. Or the name of Emanuel Buchalter, Philip Buchalter, or Philip Kowas?

A. No, sir.

Q. If selected, is there any reason why you cannot hear the evidence in the case, listen to the Judge's instructions on the law, and render a verdict in consonance with justice in the case?

A. Not as I know of.

Q. If selected will you try to do justice in this case?

A. I will.

By Mr. Barshay:

Q. May I know with whom you are connected in your profession or business?

A. I am with the Kopper Coke Company.

Q. How long have you been with the Kopper Coke?

A. Nine years.

Q. Frankly, I may say that when I was an Assistant Dis-
[fol. 151] trict Attorney I had some official business with your company, do you recall that?

A. I would not know that.

Q. You never came in contact with me?

A. No, sir.

Q. Were you at No. 16 Court Street then?

A. Yes, sir.

Q. Are you still at No. 16?

A. Yes, sir.

Q. Do you remember some correspondence with the office of the District Attorney of Brooklyn at that time?

A. I never knew about that.

Q. You don't know anything about it?

A. No, sir.

Q. Do you know any of the defendants that are named in this indictment?

A. No, sir, only through the newspaper.

Q. Only by what you read?

A. Yes, sir.

Q. Having read about them in the newspapers, as you did, does that refresh your recollection at any time you may have known their family or them?

A. No, sir.

Q. Or had business with them?

A. Never did.

Q. Or if your concern dealt with them in selling coal?

A. Not as I know of.

Q. You have no such knowledge?

A. No, sir.

Q. Have you read about them in the *Daily Mirror*?

A. I do not read the *Daily Mirror*.

Q. Or the *New York Journal*?

A. No, sir.

Q. Or any other publications?

A. I read about them in the *Tribune*.

Q. Often?

A. No, I would not say often.

[fol. 152] Q. Have you read about them before you received your notice in this case?

A. I did read some, yes, sir.

Q. You read about them since?

A. No, sir, not since.

Q. Have you formed any impression about them from what you read about them in the newspaper?

A. No, sir, I cannot say I have, truthfully.

Q. You cannot say you have? Is there some doubt in your mind that you may have?

A. No, there is not any doubt.

Q. Do you believe what you read?

A. To tell you the truth, I did not think of it enough to really believe or disbelieve it.

Q. Is that the only publication you read?

A. About the only.

Q. Have you read about it in the *Eagle?*

A. Yes, sir.

Q. Had you read about them before you received your notice?

A. Yes, sir, I did.

Q. And after you received the notice?

A. Yes, sir.

Q. Had you formed any impression by reading the *Eagle* with respect to the defendants?

A. Well, yes, I have formed an impression, yes.

Q. You were going to mention that yourself?

A. Yes, sir.

Q. And the impression or opinion you formed was prejudicial to the defendants?

Mr. Turkus: I object to the form of the question. "Impression" and "opinion" are two different things. The juror said he had an impression.

The Court: It is a double question.

[fol. 153] Mr. Barshay: I will accommodate you.

Mr. Turkus: I object to Mr. Barshay going into it to accommodate anybody.

Q. Have you formed any impression as a result of reading the *Eagle* with respect to this defendant?

A. It is a general impression, yes.

By the Court:

Q. Have you formed that impression as to whether or not the defendants or any of them are guilty?

A. Oh, yes, to some extent.

By Mr. Barshay:

Q. That is your impression, personally?

A. Yes, sir.

Q. And it would necessitate proof to dissipate that impression?

A. That is true.

Q. That is your honest opinion?

A. That is true.

Mr. Barshay: On behalf of the defendant Buchalter, I challenge this juror for cause.

The Court: Try the challenge.

Mr. Talley: On behalf of the defendant Weiss, I join in the challenge.

(Raymond J. Cunningham was then sworn on the challenge.)

By Mr. Barshay:

Q. You are still of that opinion, while you are under oath?

A. What opinion?

[fol. 154] Q. Now that you are under oath, do you repeat now what you said to me a few seconds ago?

A. Do I repeat it? Yes, I do.

Q. That is you opinion now?

A. That is right.

By the Court:

Q. It would require evidence to eradicate it from your mind?

A. I believe it would, yes, sir.

Q. That is, on behalf of the defense?

A. Yes, sir.

The Court: Challenge sustained.

(William C. Pape, No. 2732, residing at No. 955 New York Avenue, Brooklyn, New York, interrogated as to his qualifications.)

By Mr. Turkus:

Q. Is that in the Highland section?

The Court: Near Vandeveer Park.

Q. Have you lived in that section a number of years?

A. Yes.

The Court:

Q. That is down by the waterworks?

A. Yes, sir.

Q. Have you been in this room while the other questions were being asked of prospective jurors?

A. Yes, sir.

Q. I take it you understand the nature of the charge, that these defendants, Buchalter, Weiss, and Capone, are charged with murder in the first degree?

A. Yes, sir.

Q. Is there anything about the nature of the charge, that is, the charge of murder in the first degree, which would impair or prevent your service as a juror, fair to the People [fol. 155] of the State and to the defendants on trial?

A. No, sir.

Q. Have you any conscientious or other scruples against the requirement of the law that the death penalty must be imposed in the case where the jury finds a defendant guilty of murder in the first degree?

A. No, sir.

By the Court:

Q. How far are you from where New York Avenue is interrupted by the waterworks?

A. About half a mile.

Q. Near what street are you?

A. Near Church Avenue.

The Court: I had a reason for asking that because a witness in another trial lived on the very corner where the waterworks interrupts the street. Go ahead.

By Mr. Turkus:

Q. Have you heretofore had any jury service in civil or criminal cases?

A. Yes, sir.

Q. Was it a civil case?

A. Civil and criminal.

Q. With respect to the criminal case, has that been in recent years?

A. About a year or so ago.

Q. Was it in this county Court that you served as a juror?

A. Yes, sir.

D. Did the case go to a conclusion?

A. Yes, sir.

Q. Did you, accordingly, have the benefit of listening to the Judge's instructions on the law?

A. I did.

Q. And if accepted as a juror in this case will you follow the Judge's law—that is, the law given by the judge [fol. 156] here, Judge Taylor, implicitly and without qualification?

A. I will.

Q. Since your name appeared on this list as a prospective special juror in this case, has anyone spoken to you about the case?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

Mr. Barshay: I object to that as an improper question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I am.

By the Court:

Q. Was your father in business on Court Street near Joralemon?

A. No, sir.

Q. Years ago?

A. No, sir.

Q. That was William Pape.

A. I don't remember the name.

By Mr. Turkus:

Q. Do you know Mr. Barshay, who was an Assistant District Attorney for a number of years up to December 31, 1939, in this county?

A. No, sir.

Q. Or Mr. Bertram Wegman, who was at one time an Assistant United States Attorney?

A. No, sir.

Q. Or his associate, Mr. Jesse Climenko?

A. No, sir.

Q. They are the attorneys for Buchalter. You know none of them; is that correct?

A. Yes, sir.

[fol. 157] Q. Do you know anyone attached to their office or associated with them in the practice of law?

A. No, sir.

Q. Do you know former judge Alfred Talley?

A. No, sir.

Q. He represents the defendant Weiss.

A. No, sir.

Q. Or Mr. James I. Cuff, who was at one time an Assistant District Attorney in this County?

A. No, sir.

Q. Or Murray Kreindler, a former Assistant United States Attorney?

A. No, sir.

Q. So you know none of the lawyers who represent the defendant Weiss?

A. I do not know them.

Q. Do you know any person associated with them in the practice of law or connected in their law office in any way?

A. No, sir.

Q. I will ask you the same questions with respect to Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg, who are the lawyers for the defendant Capone. Do you know any of them or anyone attached to their office?

A. No, sir.

Q. Do you know intimately or personally any member of the bar who practices criminal law as a specialty?

A. I do not.

Q. Do you know Mr. William W. Kleinman?

A. No, sir.

Q. Or David Price, a lawyer?

A. No, sir.

Q. Or Saul Price, at one time an Assistant District Attorney in Manhattan?

A. No, sir.

Q. Do you know Judge O'Dwyer or any member of his staff?

A. No, sir.

[fol. 158] Q. Specifically, do you know Turkus, Klein, or Joseph, who are trying this case?

A. No, sir.

Q. If accepted as a juror in the case and the Judge, as he will, charges you on the doctrine of presumption of

innocence and on the law of reasonable doubt, will you take those laws and doctrines implicitly from the Judge?

A. Yes, sir.

Q. And will you apply them to the benefit of the defendant as the Court instructs they should be applied?

A. Yes, sir.

Q. By the same token, if the evidence in the case overcomes the presumption of innocence and you are satisfied beyond a reasonable doubt on the evidence in the case that Louis Capone, Buchalter, and Weiss are guilty of murder in the first degree, will you say so in your verdict?

A. I will.

Q. Without fear or reluctance?

A. Yes, sir.

Q. Have you heard the discussions we had with several of the prospective jurors with regard to accomplices—is that word familiar to you now?

A. Yes, sir.

Q. Do you find any fault or have you any prejudice against the District Attorney who avails himself of testimony of such an individual against defendants on trial?

A. No, sir.

Q. So you start off without any prejudice or bias against the prosecutor or against the prosecution for the use of that type of testimony; is that correct?

A. Yes, sir.

Q. Did you know the former District Attorney of this county?

A. No, sir.

[fol. 159] Q. Or any member of his staff?

A. No, sir.

Q. Do you know the present District Attorney of this county?

A. No, sir.

Q. Or any member of his staff?

A. No, sir.

Q. Are you acquainted with any official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is the name of Murray Weinstein, manager of the Clothing Cutters Union, Local No. 4, familiar to you?

A. No, sir.

Q. Or Samuel Katz, business agent of that local of Cutters affiliated with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is the name of Jacob Potofsky, an official of the Amalgamated Clothing Workers of America, familiar to you?

A. No, sir.

Q. Or the name of Bruno Belia, an organizer attached to the home office of the Amalgamated, familiar to you?

A. No, sir.

Q. Or the name of Salvatore Marazzano?

A. No, sir.

Q. Do you know any official connected with Local 240 of the Clothing Drivers Helpers Union?

A. No, sir.

Q. Or any officials of the Flour Truckmens Union?

A. No, sir.

Q. Or any former officials?

A. No, sir.

Q. Or any of the Amalgamated Clothing Workers of America, of Local 240, or the Clothiers Pressers Helpers, or Flour Truckmens Union?

A. No, sir.

Q. Is the name of William Albert, a bondsman, familiar to you?

A. No, sir.

[fol. 160] Q. I take it that you have never been a party to any suit, civil or otherwise, even as a witness, in any type of litigation?

A. That is right.

Q. Are the names of Emanuel Buchalter or Phil Buchalter familiar to you?

A. No, sir.

Q. Phillie Korvel?

A. No, sir.

Q. Is the name of Bellanca or Tosca familiar to you in any way?

A. No, sir.

Q. In the event that any defendant should invoke the defense of alibi, will you take the law with respect to alibi implicitly from Judge Taylor, if selected?

A. Yes, sir.

Q. If you should become the foreman of the jury by reason of your selection as the first juror, will you endeavor to work and listen with the other jurors, to reasonable arguments and discussions of the case, as it is discussed in the jury room?

A. Yes, sir.

Q. Will you listen to fair argument of the other jurors?

A. Yes, sir.

Q. If selected, will you endeavor to arrive at a just verdict in consonance with justice?

A. Yes, sir.

Q. Will you use common sense and understanding in applying it to the issue in this case?

A. Yes, sir.

By the Court:

Q. What business are you in?

A. I am employed in the Federal Reserve Bank.

[fol. 161] Q. The main office?

A. Yes, sir, the New York office.

By Mr. Turkus:

Q. Is the name of Peter Monat, of the control committee of the Amalgamated, familiar to you?

A. No, sir.

Q. If selected as a juror, after you have heard the evidence in the case and you have heard the argument of counsel for the defense and the inferences drawn by the District Attorney after the conclusion of the testimony, and you have the benefit of the Judge's instructions on the law, and then you are satisfied beyond a reasonable doubt that Buchalter, Capone, and Weiss have committed the crime of murder in the first degree, would you hesitate, would you be fearful or reluctant to say so in your verdict?

A. I would not.

Mr. Turkus: No challenge for cause.

By Mr. Barshay:

Q. If there is a reasonable doubt as to the guilt of any of the defendants, you would not hesitate to say, "Not guilty," would you?

A. No, sir.

Q. You do not owe a special duty to either side in this case?

A. No, sir.

Q. You are a federal employee?

A. I am.

Q. Civil service?

A. Well, it is not directly, but indirectly.

Q. Indirectly you are?

A. Yes, sir.

Q. How long have you held that position?

A. Twenty years.

[fol. 162] Q. Can you tell us what you do there, please?

A. I am in the Auditing Department. I am involved in transactions which involve securities and paper money. We have to check them in and out, and take a record, and be there when the transaction takes place.

Q. Do you know anyone at all named in the indictment?

A. No, sir.

Q. Did you know anyone at all in Judge O'Dwyer's office?

A. I do not.

Q. Did you have any contact, directly or indirectly, with Assistant District Attorney Turkus or Assistant District Attorney Klein, both of whom are specialists in criminal law, before they became Assistants on January 1, 1940?

A. I was working on a criminal case, I think last year——

Mr. Turkus: There is just one point objectionable. I object to the statement by Mr. Barshay that Messrs. Turkus and Klein are specialists in criminal law.

Q. Was Mr. Turkus prosecutor?

A. I think Mr. Klein was the prosecutor, to my best recollection.

Q. Did that make an impression upon you so that you would be favorable to him irrespective of the evidence in this case?

A. No, sir.

Q Was it a homicide case?

A. Yes, sir.

Q. Did it reach a conclusion?

A. It did.

Q. Was it a blue ribbon jury that you were a member of?

[fol. 163] A. It was not a blue ribbon jury.

Q. It was an ordinary jury?

A. Yes.

Q. Is that your only experience at the criminal bar?
A. I think that was my first experience.
Q. You have not had any since?
A. No, sir.
Q. Did you know the deceased, Rosen, Joseph Rosen?
A. I did not.
Q. Do you know any member of his family?
A. No, sir.

Q. This is alleged to have occurred September, 1936, in the East New York section of Brooklyn. Were you a resident of Brooklyn then?
A. Yes, sir.

Q. Did you read about the case?
A. I do not recall specifically.

Q. Has your memory been refreshed since receiving the notice to serve as a juror in this case, whether you read about it before then?
A. No, sir, I do not think it has been refreshed.

Q. Were you a member of the Grand Jury at any time in this county?
A. No, sir.

Q. Were you ever called on a special jury at any time?
A. No, sir.

Q. Did you ever hear any lecture by any of Judge O'Dwyer's assistants on the subject of crime?
A. No, sir.

Q. Did you ever read any magazines with respect to the same subject?
A. No, sir.

Q. Did you ever hear any of their speeches, if there were [fol. 164] any, on the radio?
A. No, sir.

Q. Have you read the serial in the *New York Journal* with respect to Judge O'Dwyer's life?
A. No, sir.

Q. Have you read the serial now being published in the *New York Daily Mirror*?
A. No, sir.

Q. You never read the *Mirror*?
A. Yes, sir.

Q. Have you read it recently?
A. No, sir.

Q. Have you read anything at all with respect to any of the defendants?

A. Yes, sir.

Q. Was it before or since you received your notice?

A. Before.

Q. Long before you received your notice?

A. I should judge so, yes, sir, to the best of my recollection.

Q. May I know in what publication you read it?

A. It would be in—it would be the *Tribune*.

Q. Any evening paper?

A. I do not read many papers.

Q. Do you read the *Brooklyn Eagle*?

A. Very seldom.

Q. Do you read any evening paper?

A. Not as a rule.

The Court:

Q. Are you married?

A. Yes, sir.

Q. Does the paper come into your home?

A. No, sir.

Q. No evening paper?

A. No, sir.

Q. As a result of what you read, no matter where it was, have you formed any impression with respect to any of the defendants?

A. Not any specific impression.

Q. Have you formed any impression, specific or general, [fol. 165] with respect to any of the defendants?

A. I cannot say.

Q. You do not know?

A. No, sir.

Q. Your mind is not clear on it one way or the other?

A. That is right.

Q. Now, sir, since you have been sitting here and heard the prospective jurors questioned, has it refreshed your recollection as to whether or not you formed, general or specific, an impression concerning the defendants?

A. It has not.

Q. Did you form an impression as to the truth or accuracy of whatever you may have read?

A. I don't think so.

Q. One way or the other, you don't know?

A. I don't know.

Q. Just at present is there any prejudice in your mind as to the defendants, or any of them?

A. No, sir, I have not.

Q. Is your mind free and clear of any bias at the present time?

A. Yes, sir.

Q. There is no doubt about it?

A. Absolutely.

Q. Sitting here, presently, is there an assumption in your mind present now that each of these defendants are innocent?

A. I did not hear you.

Q. Do you assume now as you sit here that each defendant sitting here now is innocent of the crime charged?

A. Absolutely.

Q. You feel that way?

A. I feel that way.

Q. You know the law gives them the presumption of innocence, which is theirs by right and not by privilege?

A. Yes, sir.

[fol. 166] Q. And you must guard them with that right throughout the entire trial if you are chosen as a juror, you know that?

A. Yes, sir.

Q. Do you know that the burden of proof rests solely and only with the prosecution in this case?

A. Yes, sir.

Q. That, too, is in the Penal Law, the Criminal Code, you know that?

A. Yes, sir.

Q. You will compel the prosecution at all stages of this trial to prove each of the defendants guilty beyond a reasonable doubt, won't you?

A. That is right.

Q. And should there be a reasonable doubt arising out of the evidence in this case, to whom would you give it?

A. The defendants.

Q. No doubt about that?

A. No.

Q. And that is irrespective of how many jurors may be against you, if there are jurors against you; isn't that so?

A. Yes, sir.

Q. In other words, you will render individual judgment in this case based upon the evidence as you hear it and determine it?

A. Yes, sir.

Q. In the matter of time, that has nothing to do with your conclusion, isn't that so?

A. Yes, sir.

Q. In other words, you would not yield and compromise and be pleasant to your fellow jurors if you believed there was a reasonable doubt in this case arising out of the evi- [fol. 167] dence, that duty you not only owe to this defendant whom I represent but to every defendant in this case; there is no doubt about that?

A. No, sir.

Q. The definition of reasonable doubt which will be given you, you will follow that as his Honor shall instruct you?

A. Yes, sir.

Q. If the Court shall tell you that the burden of proof never shifts to the defendant and that the defendant need not prove his innocence, you will follow that law implicitly?

A. Yes, sir.

Q. And you will fight for it?

A. Yes, sir.

Q. If the Court shall tell you that neither defendant in this case need prove a single charge against him or explain away a single accusation against him, you will follow that law?

A. Yes, sir.

Q. Should all defendants remain absolutely silent, the Court shall tell you that from that fact no unfavorable inference shall be drawn against defendants. You will follow that law implicitly?

A. I will.

Q. You will guard it jealously?

A. Yes, sir.

Q. And no member shall overpower you on this jury by reason of argument or any other way if you personally believe that to be the law?

Mr. Turkus: You will not listen to reason? Maybe you misunderstood the question. You would not hang a jury? [fol. 168] Mr. Barshay: Maybe you misunderstood the question. May I ask your Honor at this time to instruct

the jury and the balance of the panel that may be here, that I did not intend, nor did I say a word in my question which would warrant Mr. Turkus in saying I am trying to hang a jury.

The Court: Objection sustained.

Mr. Barshay: And I except to it.

Q. If there is a reasonable doubt——

The Court: Questions of law are not for the jury to speculate on, but only for application by the jury. You must take the law from the Court.

The Talesman: Yes, sir.

The Court: The jury does not debate about the law.

Mr. Barshay: That is exactly what I was trying to say to you.

Q. You will follow the law on that point, if his Honor shall give it to you?

A. Yes, sir.

Q. If his Honor shall charge you that if you should find a reasonable doubt arising out of the evidence you must give it to the defendants, will you follow that law?

A. I will.

Q. That is clear to you?

A. Yes, sir.

Q. You know an indictment in and of itself has no probative value; it is not proof?

A. Yes, sir.

Q. It simply starts the trial?

A. Yes, sir.

Q. And when the defendant says, "Not guilty," it raises [fol. 169] an issue to be proven by the District Attorney beyond a reasonable doubt for you to decide?

A. Yes, sir.

Q. Do you think you would have the courage to render a verdict of "Not guilty" if you are convinced beyond a reasonable doubt—if you are not convinced beyond a reasonable doubt?

A. I have courage.

Q. And you will exercise it?

A. I will.

Q. Will you apply the evidence in accordance with his Honor's instructions—each defendant, as it is given from the witness stand, only against the defendant to whom it applies, unless his Honor shall charge you otherwise?

A. I will do that.

Q. And unless his Honor so charges the jury, you will not borrow the testimony against one defendant and charge it against the other.

A. Yes, sir.

Q. While you are trying them together, each one is entitled to a separate and distinct verdict under the law in this case.

Mr. Turkus: I object to that as an ambiguous question.

Q. You will not use the evidence given against one defendant against another defendant in the case if it has no application to the other defendant and his Honor shall so charge you?

A. As the Court rules.

Q. There has been some talk about the testimony of alleged accompli-es; you heard that?

A. Yes, sir.

Q. If his Honor shall charge you that the testimony of [fol. 170] an accomplice alone, uncorroborated by any other evidence tending to connect the defendant Buchalter with the commission of this crime, is insufficient as a matter of law, will you follow that law?

A. I will.

Q. Before you accept the testimony of a person who says he is an accomplice, you will find out for yourself, from the evidence, who that person is who is giving that testimony?

A. Yes, sir.

Q. His criminal record, if it comes out?

A. Yes, sir.

Q. You will weigh with caution, won't you, the testimony of the person who says he is an accomplice, if he says on the stand that he himself has been a murderer—you will weigh that man's testimony with caution?

A. Yes, sir.

Q. You will weigh it very carefully?

A. Yes, sir.

Q. Before you accept it?

A. Yes, sir.

Q. You will find out, if you can, from the evidence in this case, what motivates him to give such testimony, what he hopes to gain as a result of giving such testimony?

A. Yes, sir.

Q. You will weigh it very, very carefully before you accept it, there is no doubt about that, is there?

A. No, sir, no doubt.

Q. Even if you come to the point where you do believe the testimony of this alleged accomplice, if there is nothing else in the case tending to connect the defendant Buchalter with the commission of this crime, and his Honor shall say [fol. 171] to you you must acquit, will you do so?

A. Yes, sir.

Q. No doubt about it?

A. No, sir.

Q. Now, do you know any police officials intimately?

A. No, sir.

Q. Did you ever know them?

A. No, sir.

Q. Do you know any police officials who are now connected with the District Attorney's office?

A. No, sir.

Q. Did you ever know of any?

A. No, sir.

Q. Did you ever read about them?

A. I recall some, but I do not know the names: I could not say one way or the other.

Q. If a police officer should take the stand and he is one of high rank, that fact alone will not so impress you as to lead you to the conclusion that he must be telling the truth?

A. Not necessarily.

Q. You will treat all witnesses alike?

A. Yes, sir.

Q. No doubt about that?

A. No doubt.

Q. In accepting those witnesses who admit out of their own mouths their past criminal activities, you will be careful with that?

A. Yes, sir.

Q. Did you ever hear Reles testify?

A. No, sir.

Q. Did you ever read his testimony in any place?

A. No, sir.

Q. Did you ever read about Allie Tannenbaum?

A. No, sir.

Q. Or Sholem Bernstein?

A. No, sir.

Q. You never read about them at all?

A. Not to my recollection.

[fol. 172] Q. If, during the trial, you shall hear some testimony which should refresh your recollection as to having read something about it, you will subordinate what you read and dismiss it from your mind?

A. Yes, sir.

Q. And apply only that which you hear from the witness stand?

A. Yes, sir.

Q. And if, at the conclusion of the case, there is one reason for doubt that arises out of the evidence which you find, you will give it to the defendant Buchalter?

A. Yes, sir.

Q. No doubt about that?

A. No, sir.

Mr. Talley: On behalf of the defendant Weiss I have no questions.

By Mr. Rosenthal:

Q. Did I understand you to answer Mr. Barshay, in respect to your reading of articles concerning some of these defendants, that you are not sure now whether it left an impression or it did not leave an impression?

A. No impression in my mind now. I don't remember much, if anything, about it.

Q. When you were asked the question by Mr. Barshay, you said you did not know whether it left an impression or not.

A. Something like that.

Q. Do you recall whether or not you did or did not answer the question when he propounded or put it to you in the fashion which you recall his asking you, whether you read articles concerning any of these defendants?

[fol. 173] A. I recall the question, but I know I had no impression, no definite impression in this case as far as I know.

Q. But you did not remember whether you had an impression or not? Am I correct in making that statement? That was your answer?

A. I did not have any impression; I did not read about the case.

Q. You did read about the case, didn't you?

A. I could not say any specific case; I very seldom read the papers.

Q. How do you keep busy when you are not working?

A. I don't as a rule read the papers.

Q. Do you go to the clubs or play cards to kill time?

A. I go to church.

Q. You are affiliated with church organizations, your activities are there?

A. Yes, sir.

Q. Are you a member of any law enforcement society, or have you ever been?

A. No, sir.

Mr. Rosenthal: May I, in view of the nature of the case, go into his former service—usually we are not allowed to inquire into a particular case, but in view of the nature of this case I think we should be apprised of what homicide he sat on a year ago. Your Honor understands.

By the Court:

Q. Do you remember the name of the case?

A. No, sir, I do not recall.

Q. Who defended it?

A. Mr. Klein—no, not Mr. Klein.

[fol. 174] Q. Who was the judge?

A. Judge O'Dwyer.

By Mr. Rosenthal:

Q. Was it before Judge O'Dwyer was District Attorney or since he has been District Attorney?

A. Before he was.

Q. It was tried before Judge O'Dwyer, who was then a county judge?

A. Yes, sir.

By Mr. Turkus:

Q. I think you have mistaken Mr. Barshay for Mr. Klein.

A. I think it was the man in the brown suit; is that Brother Klein?

Mr. Hurkus: That is Mr. Rosenberg.

Mr. Rosenthal: No further questions.

By Mr. Turkus:

Q. That case was a murder case some years back?

A. Yes, sir.

Q. Judge O'Dwyer was presiding judge at the time?

A. Yes, sir.

Q. The case went to a conclusion and you heard Judge O'Dwyer's instructions on the law?

A. Yes, sir.

Q. The gentleman with the brown suit whom you indicated is one of the lawyers who represents Capone in this case. His name is Emanuel Rosenberg. Do you remember whether he was a participant in the case as a defense lawyer?

A. Well, the gentleman from the District Attorney's office had the appearance of that gentleman there.

Q. He was never in the District Attorney's office. But at any rate, that will have no effect upon your deliberations [fol. 175] in this case—your experience in that case or with any of the lawyers who are now in the court-room who may or not have been in that case, that will have no effect on your determination of this case?

A. No, sir.

Q. Mr. Barshay spoke to you about accepting with care and caution the testimony of accomplices. Will you take the definition of law given by the Judge as to the credibility to be given to certain evidence of witnesses?

A. Yes, sir.

Q. What I want to make sure of it, have you any inherent bias or prejudice against the prosecutor, Judge O'Dwyer, or against the prosecution which uses that type of testimony against defendants, namely, one who commits the crime with him, and uses him to testify against him, have you any inherent bias or prejudice against the prosecutor for using him, or against the prosecution which employs him?

A. No, sir.

Mr. Turkus: The juror is satisfactory.

Mr. Barshay: All counsel join in peremptorily challenging this juror.

(Talesman excused.)

The Court: We will now take a recess until two o'clock. Members of the panel are instructed, the same as yesterday

[fol. 176] afternoon, to avoid discussing the case and avoid reading anything about it.

Mr. Cuff: Will your Honor kindly adjourn until tomorrow because of the Primary Day?

Mr. Ronsenthal: I was going to ask your Honor when you adjourned today to adjourn until Thursday, in view of the fact that no juryman has been chosen. I have a slight cold, and I would like to avoid any complications. No juryman has been placed in the box.

The Court: There are nine lawyers for the defense, and this is a season for colds. Would it be agreeable to you if either Mr. Rosenberg or Mr. Fischbein conducted the examination.

Mr. Rosenthal: It would be agreeable to me, but it would not be agreeable to my client. This is one of the most essential parts of the trial, and I do not think it is fair to my client not to be present.

The Court: I do not want to set a precedent, because there may be a lot of colds result.

Mr. Rosenthal: If one develops hereafter, I will stay here.

The Court: I will give you until Thursday to get over your cold. If you do not get over it by Thursday morning at ten o'clock, other counsel will have to continue the questioning. We will recess until Thursday. The talesmen [fol. 177] are excused in the meantime, but before the talesmen go out, the defendants will be remanded.

(Adjourned until Thursday, September 18, 1941, at ten o'clock a. m.)

[fol. 178] Brooklyn, N. Y., September 18, 1941.

Trial Resumed

The Court: I am sorry to have been delayed, but there were matters regarding this case which had to be taken up in chambers, which could not be taken up in the court-room. The trial will proceed.

(Paul W. Wolf, of 2 Grace Court, Brooklyn, New York, was then examined as to his qualifications to serve as a juror.)

By Mr. Turkus:

Q. Mr. Wolf, do you reside at Grace Court?

A. Correct.

Q. That is in the Brooklyn Heights, that is the Columbia Heights section of Brooklyn?

A. Yes, sir.

Q. Have you lived in Brooklyn a number of years?

A. Since December, 1935.

Q. In the interrogation of the other prospective jurors in the case, did you hear the nature of the charge?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would impair or hinder your service as a juryman in the case?

A. No, sir.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Would you permit the question of punishment to enter into your deliberations in the jury room if you were selected [fol. 179] as a juror?

A. No, sir.

Q. Does your business give you any contact in the Brownsville-East New York section of Brooklyn?

A. No, sir.

Q. Have you had any business or social or any type of contact, directly or indirectly, with any persons or firms in the Brownsville-East New York section of Brooklyn?

A. No, sir.

Q. Do you have any business contacts in the garment district in Manhattan?

A. No, sir.

Q. Or in the clothing district?

A. No, sir.

Q. Did business ever bring you into any contact, directly or indirectly, with any firms or corporations doing business in the garment or clothing districts in Manhattan?

A. No, sir.

Q. Do you have any contacts, by way of business or otherwise, direct or indirect, with people or firms on the Brooklyn waterfront?

A. No, sir.

Q. Have you had any contact, direct or indirect, with anyone in the clothing trucking industry?

A. No, sir.

Q. Do you know or do you have any contact, directly or indirectly, with any official of the Amalgamated Clothing Workers of America?

A. No.

Q. Do you know or do you have any contact, direct or indirect, with any official of Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. In the past have you had any business or other connection, direct or indirect, with any official of the Amalga-[fol. 180] mated or with Local 240 of the Clothing Drivers & Helpers Union?

A. No, sir.

Q. Is the name of Jacob Petrofsky, an official of the American Clothing Workers of America, familiar to you?

A. No.

Q. Is the name of Murray Weinstein, manager of the Clothing Cutters Union, Local 4, of the Amalgamated, at all familiar to you?

A. No, sir.

Q. Or is the name of Sam or Samuel Katz, business agent of Local 4, at all familiar to you?

A. No, sir.

Q. Is the name of Bruno Belia, an organizer attached to the home office of the Amalgamated, at all familiar to you?

A. No, sir.

Q. Is the name of Salvatore Marazzano at all familiar to you, sir?

A. No, sir.

Q. Is the name of Philip Orlofsky, one-time manager of the Clothing Cutters Union, Local 4, of the Amalgamated, at all familiar to you?

A. It is not.

Q. Or the name of Abe or Abraham Beckerman?

A. No.

Q. Or the name of Mendel Yudelowitz?

A. No, sir.

Q. Did business contact or any other contact, directly or indirectly, bring you in contact with any officials of Local 138 of the Flour Truckmens Union?

A. No.

Q. Are you familiar with the name of Max Silverman, a one-time official of the union?

A. No, sir.

Q. Is the name of Wolfie Goldis familiar?

A. No, sir.

[fol. 181] Q. Is the name of one William or Willie Alberts familiar to you?

A. No, sir.

Q. Do you know or have you had any contact, direct or indirect, with a dentist by the name of Emanuel Buchalter?

A. No, sir.

Q. Is the name of Philip Buchalter or Phillie Kowas at all familiar?

A. No.

Q. Are the names of Belanco and Tosca familiar?

A. No, sir.

Q. Have you, Mr. Wolf, had any prior service as a juryman in a court of record?

A. Yes.

Q. Has it been in this state?

A. Yes.

Q. Was it in the County Court or Supreme Court?

A. It was a civil case, I think in the Supreme Court, I am not sure.

Q. Did that case go to a conclusion, and by that I mean did the Judge charge the jury on the law?

A. Yes.

Q. Have you had any experience as a juror in a criminal case?

A. No.

Q. Mr. Wolf, since your name appeared as a prospective juror in this case, did anybody speak to you about the case?

A. No. Yes, sure, it was mentioned in my presence.

Q. Was that at your place of employment?

A. It was not discussed; it was mentioned.

Q. By that I take it there was no discussion by anyone with you as to the merits of the case?

A. No.

Q. Are you in sympathy with law enforcement?

A. Yes, sir.

[fol. 182] Q. There are various lawyers in the case, to be exact, nine lawyers for the defense, three representing

each defendant. Mr. Barshay, an Assistant District Attorney up to December, 1939, Mr. Bertram Wegman, a former Assistant United States Attorney, and Mr. Jesse Climenko are counsel for the defendant Buchalter. Do you know any of the three whose names I have mentioned?

A. No, sir.

Q. Do you know anyone who is connected with them in their office?

A. No.

Q. The defendant Emanuel Weiss is represented by former General Sessions Judge Alfred J. Talley, former District Attorney James I. Cuff, and former Assistant United States Attorney Murray Kreindler. Are you familiar — or do you know any of those three lawyers?

A. No, sir.

Q. Do you know anyone associated with them or connected with their office?

A. No, sir.

Q. The defendant Louis Capone is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg. Do you know any of those three lawyers?

A. No, sir.

Q. Or anyone connected with their offices?

A. No, sir.

Q. Is the name of William W. Kleinman or David Price familiar to you?

A. No, sir.

Q. You know neither Kleinman nor Price?

A. I do not.

Q. Do you know a member of the bar by the name of Saul Price, at one time Assistant District Attorney in Manhattan?

[fol. 183] A. I do not.

Q. Do you know any member of the bar who specializes in the trial of criminal cases?

A. No.

Q. If accepted as a juror in this case will you take the law exclusively from the trial judge in the case, Judge Taylor?

A. Yes, sir.

Q. If accepted as a juror and the trial judge charges you, as he will, on the presumption of innocence and the

doctrine of reasonable doubt, will you give the defendant the benefit of those presumptions, and each of the defendants, if you are so instructed by the Court, as you will be?

A. Yes, sir.

Q. Have you any bias or prejudice against the prosecutor of this county, Judge O'Dwyer, or against the prosecution which avails itself of accomplice testimony against these defendants at the bar?

A. No, sir.

Q. With respect to the degree of corroboration or the degree of proof required, will you take the law exclusively from the judge, that is, Judge Taylor? Have I made that clear?

A. Yes, I think so.

Q. With respect to any defenses which may be invoked by any of the several defendants, for example, if one defendant should use the defense of alibi, will you take the law with respect to that defense solely from Judge Taylor, who presides at the trial?

A. Certainly.

Q. If accepted as a juror in this case, you will auto-
[fol. 184] matically become the foreman of the jury, and if accepted will you endeavor to listen to reasonable and fair discussion by the other jurors in the case?

A. Yes, sir.

Q. In weighing the issue in the case, the issue being the guilt or innocence of these three at the bar, will you use common sense and understanding in deciding that simple issue?

A. I would try to.

Q. You will listen to fair argument and reasonable discussion in the sanctity of the jury room when the case is being deliberated, will you not?

A. Yes, sir.

Q. If accepted as a juror in the case, will you endeavor to do justice in the case?

A. Yes, I will try.

Q. Mr. Wolf, I neglected to ask whether you know the former prosecutor of the county, Mr. Geoghan, or any member of his staff.

A. No.

Q. If accepted as a juror, Mr. Wolf, and you hear all the evidence in the case and you hear the defense lawyers draw the inferences from the testimony and then you hear

the prosecutor draw his inferences from the testimony, and then you have the benefit of the Judge's instruction on the law and then reasonable discussion with your fellow jurors and you are satisfied beyond a reasonable doubt from the evidence in the case that Buchalter and Weiss and Capone are guilty of murder in the first degree, will you have any fear, hesitation or reluctance in so saying in your verdict?

A. No, sir.

[fol. 185] By Mr. Barshay:

Q. Mr. Wolf, may I know, please, for whom you are a salesman?

A. The bond department of the Harris Trust & Savings Bank of Chicago.

Q. May I know the office address?

A. 14 Wall.

Q. Has it any branches up in the garment center?

A. No, sir.

Q. And to your knowledge do you know any flour merchants who had accounts in your bank?

A. No.

Q. You do not know?

A. I do not.

Q. It is reasonable to assume that the names Mr. Turkus read to you have no accounts in your bank at all?

A. I would not answer for that.

Q. You do not know?

A. I do not know.

Q. Do you know Judge O'Dwyer personally?

A. No.

Q. Do you know him at all?

A. I heard him speak in a private meeting.

Q. Was it on the subject of crime?

A. Yes.

Q. May I know how long ago?

A. About eighteen months, I think.

Q. Eight or nine months ago?

A. I say about eighteen months, I recall it.

Q. Was that before he was a District Attorney?

A. No; after.

Q. Since he was a District Attorney?

A. Yes, sir.

Q. Would you mind telling me where you heard him speak?

A. At a church men's meeting, church dinner for men.

[fol. 186] Q. Was it a long speech, sir?

A. No.

Q. You were impressed by that talk, I take it?

A. Yes.

Q. I take it, too, you were impressed by the man himself?

A. Yes.

Q. Did you reach the conclusion that anything that gentleman sponsors must have merit in it?

A. That would be for me to decide, I think.

Q. I beg pardon?

A. I would not say that anything he sponsored I would agree with, no.

Q. Would the fact that District Attorney O'Dwyer is the gentleman whose name is signed on this indictment, would that create an unfavorable inference against our defendant?

A. I don't think so.

Q. You don't think so?

A. No.

Q. Is there some doubt in your mind, sir, about that?

A. Not with reference to the fact that District Attorney O'Dwyer would be sponsoring the case, no, sir.

Q. As you sit here now, sir, is there any prejudice against any of the defendants?

A. Not against them individually.

Q. I heard you say "not against them individually"?

A. Them.

Q. Is there any prejudice against them collectively?

A. I doubt if I could give them a fair trial, to be honest about it.

Q. That is your honest opinion?

A. That is my honest opinion.

Mr. Barshay: In behalf of all counsel for the defense. [fol. 187] I challenge this juror for cause.

The Court: Try the challenge.

Paul W. Wolf, of 2 Grace Court, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Now, Mr. Wolf, that you have been sworn, is the answer to the question I have just asked before you were sworn the same as if I ask it again?

A. That is true.

Mr. Barshay: I Press, your Honor, the challenge for cause.

Mr. Rosenthal: Defendant Capone joins in.

Mr. Talley: Defendant Weiss joins in.

The Court: Anything, Mr. Turkus?

By Mr. Turkus:

Q. You have given, sir, an honest expression of opinion, that you doubt you can give the defendants a fair trial?

A. That is true.

The Court: The challenge is sustained.

(Albert C. Bender, of 1661 Hendrickson Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.)

By Mr. Turkus:

Q. Mr. Bender, do you reside at Hendrickson Street?

A. That is right.

[fol. 188] Q. In what section or district of Brooklyn is that?

A. I would say the Flatlands district.

Q. Have you lived in Brooklyn a number of years?

A. Practically my lifetime.

Q. Do you live anywhere near Filmore Avenue and East 52nd Street?

A. Not too far away from it.

Q. Is there anything that may have occurred in that neighborhood that would impair your service as a juryman in this case?

A. Not to my knowledge.

By the Court:

Q. Near what street are you?

A. I am at Flatbush Avenue and Quentin Road. Filmore is two blocks over and some odd—I would say about ten blocks away from me.

By Mr. Turkus:

Q. I take it, Mr. Bender, that you are familiar with the nature of the charge.

A. Yes.

Q. Is there anything about the nature of the charge, namely, a case of murder in the first degree, which would impair or prevent you from serving as a juror in the case?

A. I don't think so, not to my knowledge.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No.

Q. Would you permit the question of punishment to enter into your deliberations in the jury room as to the guilt or innocence of these defendants?

A. No.

[fol. 189] Q. On the trestle board, Mr. Bender, you are listed as a clerk, and no further description. By whom are you employed?

A. Metropolitan Life Insurance.

Q. Are you employed in Manhattan?

A. That is right.

Q. Do your duties confine you to the office or do you go about the city?

A. In the office only.

Q. Have you any contact, directly or indirectly, with any person or firm in the so-called Brownsville or East New York district or section of Brooklyn?

A. No.

Q. Have you had any by way of business or any other way at any time with any person or firms in the Brownsville-East New York area?

A. Only as to buying a couple of electrical fixtures, that's all.

Q. Has that been sometime in the past?

A. Within a year and a half somewhere.

Q. It has not been since May, 1940?

A. No, sir.

Q. Have you any contacts, directly or indirectly, with any person or firm in the garment district in Manhattan?

A. No, not to my knowledge.

Q. Can you recall whether you have had any contacts in the past in that district?

A. No.

Q. Have you any connection, directly or indirectly, with any person or firms on the Brooklyn waterfront?

A. No.

Q. Did business or any other situation bring you into [fol. 190] contact with anyone connected with the clothing trucking business?

A. No.

Q. Or the clothing business or clothing district in Manhattan?

A. No.

Q. Since your name appeared or notification was given to you that you were a prospective juror in this case, did anybody speak to you about the case?

A. Well, only in the office.

Q. Was that fellow employees?

A. That is it.

Q. In connection with the time that might be spent?

A. Reporting in and out, they knew what I was attending to, naturally.

Q. No discussion on the merits of the case?

A. No.

Q. Are you in sympathy with law enforcement?

A. Absolutely.

Q. Do you know Judge O'Dwyer or any member of his staff?

A. No.

Q. Specifically, do you know Turkus, Klein, or Joseph, Assistant District Attorneys?

A. No.

Q. The defendants are represented by nine lawyers, Mr. Barshay, Mr. Wegman and Mr. Climenko representing Buchalter. Do you know any of the three?

A. I only know Mr. Barshay through serving in previous cases.

Q. Was that at a time when he was an Assistant District Attorney?

A. That is right.

Q. On Mr. Geoghan's staff?

A. That is right.

Q. Do you know Mr. Geoghan or any other member of the staff?

A. I know Fred Kopf.

[fol. 191] Q. Intimately?

A. We belong to the same club.

Q. Since Judge O'Dwyer came into office have you had any discussions as to cases with Mr. Kopf?

A. I believe not.

By the Court:

Q. You live around where the car barns are on Utica Avenue?

A. Yes, not too far from there. That is Avenue N and 49th Street.

Q. That is on the way to Bergen Beach?

A. That is right.

Q. I take it you belong to the Midwood on Kings Highway?

A. No, I don't, I belong to——

Q. Kings County Lodge.

Mr. Cuff: Judge, we cannot hear what the juror is saying.

Q. Kings Highway Lodge on Bedford Avenue, of which Mr. Kopf was formerly Master.

By Mr. Turkus:

Q. Mr. Bender, that discussion you had with the Judge was not quite audible to the defense counsel, and I confess not quite audible to the District Attorney either.

The Court: He says he belongs to Kings County Masonic Lodge, which meets on Bedford Avenue and has its own temple. Mr. Kopf was formerly Master of that lodge.

The Talesman: I doubt that very much, your Honor. I believe Mr. Kopf was Master of the Midwood Lodge.

The Court: I made a mistake, but he was District Deputy [fol. 192] Grand Master of that Masonic district; is that correct?

The Talesman: I believe that is correct, sir.

By Mr. Turkus:

Q. Have you been a close friend of Mr. Kopf?

A. I would not say so. We belong to the same club, not the lodge, but a club, and I have associated with him in minstrel shows and such stuff.

Q. Would there be any embarrassment in your service on a case as a juryman in connection with a murder which happened in 1936 and which is being prosecuted now by Judge O'Dwyer?

A. No.

Q. The defendant Weiss is represented by three lawyers, former Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kriendler. Do you know any of the three?

A. No.

Q. Or anyone connected with their offices?

A. Not to my knowledge.

Q. Defendant Capone is represented by Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg. Do you know any of the three?

A. No.

Q. Or anyone connected or associated with their law offices?

A. Not to my knowledge.

Q. Do you know Mr. William W. Kleinman or David Price, lawyers in Brooklyn?

A. No.

Q. Anyone connected with their office?

A. Not to my knowledge.

[fol. 193] Q. Or Mr. Saul Price, former Assistant District Attorney in Manhattan, now practicing law?

A. No.

Q. Do you know intimately or closely any member of the bar who specializes in the trial of criminal cases?

A. Not except Freddie Kopf, if he is doing that now. I do not know whether he is.

Q. Having seen Mr. Barshay, you have seen him in this County Court, then?

A. That is right.

Q. How long ago, sir, was that?

A. I would not be sure of the time, but I would say it was about three years ago.

Q. Do you recall who the judge was before whom you served?

A. I think it was Judge Brancato.

Q. Was it a capital case? By that I mean was it a murder case?

A. Not murder, no, sir.

Q. Did the case go to a conclusion, that is, did the judge charge the jury and did the jury render a verdict?

A. Yes, the jury rendered an undecided verdict; I mean there was a split. There was not a decided verdict given. The Jury——

Q. Disagreed?

A. —disagreed.

Q. Is that the only service that you had, Mr. Bender?

A. No, I have served at other times, but usually it never got as far as the jury room. It was pleading to a lesser degree.

Q. Routine dispositions of cases?

A. That is right.

Q. At any rate, in this specific case in which Mr. Barshay [fol. 194] was then acting as prosecutor, you had the benefit of listening to Judge Brancato's charge on the law to the jury?

A. Yes.

Q. I take it that you understand that is your state of mind, is it not, that the Judge has the exclusive province in the court-room of telling the law to the jury?

A. Yes.

Q. And will you accept the law in all its aspects from the trial judge in this case?

A. Yes.

Q. When the Court charges on the presumption of reasonable doubt, you will accord that presumption to the benefit of the defendant, will you not?

A. Yes.

Q. And each of the defendants, correct?

A. Yes.

Q. And when the Judge charges on the presumption of innocence, you will permit that presumption to inure to the benefit of each of the defendants as the law says they shall have it, will you not?

A. I will.

Q. Do you find any fault or do you have any bias against the District Attorney of the county or against the prosecution which avails itself of the testimony of co-participants in the crime with the defendants and uses that testimony against the defendants on trial?

A. No.

Q. With respect to the degree of proof of corroboration that is required, will you take the law exclusively from the Court and apply the principles of law as given by the Court?

A. Yes.

Q. You would not, would you, arbitrarily refuse to listen [fol. 195] to one who participated in the commission of

the crime with defendants solely because he was an accomplice, would you?

A. No.

Q. And may I understand, then, that you have no inherent bias or prejudice against the prosecutor of the county or against the prosecution which avails itself of accomplice testimony?

A. No.

Q. Have you any bias or prejudice against the use of expert testimony or against expert testimony, whether it comes from a physician, a fingerprint expert or handwriting expert or any other type of expert?

A. No.

Q. Should defendants invoke any defense, for example, should one or more invoke the defense of alibi, will you take the law exclusively from the trial judge as to the law applicable to such a defense?

A. Yes.

Q. Through your business connections or any other way, did you come in contact with any officials of the Amalgamated Clothing Workers of America?

A. No.

Q. Or with any officials connected with Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Or with any officials of the Clothing Cutters Union?

A. No.

Q. Or of Local 138 of the Flour Truckmens Union?

A. No.

Q. Specifically, is the name of Jacob Petrofsky, an official of the Amalgamated Clothing Workers of America, familiar to you?

[fol. 196] A. No.

Q. Or that of Murray Weinstein, manager of the Clothing Cutters Union, Local 4, of the Amalgamated?

A. No.

Q. Or Sam Katz, the business agent of that local and union?

A. No.

Q. Are you familiar with the name of Bruno Belia, an organizer at the home office of the Amalgamated?

A. No.

Q. Or the name of Salvatore Marrazzano?

A. No.

Q. Is the name of Philip Orlofsky, one-time manager of the Clothing Cutters Union, Local 4, connected with the Amalgamated, familiar to you?

A. No.

Q. The name of Abe or Abraham Beckerman or Mandel Yudelowitz; is that familiar to you?

A. No.

Q. May Silverman or Wolfie Goldis of the Flour Truckmens Union, Willie or William Alberts, a bondsman? Is the name of Emanuel Buchalter familiar?

A. No.

Q. Phillie Buchalter or Phillie Kowas?

A. No.

Q. Anybody by the name of Weiss in the automobile business up on Park Slope?

A. No.

Q. The name of Bellanca or Tosca?

A. No.

Q. If accepted as a juror in the case would you endeavor to work in harmony with the other jurors, and by harmony I mean to listen to common sense and reason in the jury room?

A. Yes.

Q. May I ask, was there any rancor in that other case?

A. Pardon?

[fol. 197] Q. Was there any rancor among the jury in that other case?

A. There was, yes. I assume you mean——

By the Court:

Q. Anybody stubborn?

A. Well, who knows who is stubborn? There was about nine by three and maybe the three thought the other nine were stubborn. It is according to whom you are asking the question.

Q. It is always the other fellow?

A. I think so, regardless of the number for and against.

By Mr. Turkus:

Q. Mr. Bender, without unduly prying, you can understand that this case may be a lengthy case. It is important not only to The People of the State of New York, but important to these three defendants, and we are trying to get a

jury that will be fair and impartial, fair to The People of the State of New York and, by the same token, fair to the defendants at the bar. Would you listen to reasonable discussion, and I take it from what you said to the Judge you did listen to reasonable discussion in another case?

A. Yes.

Q. Was that some felony case that you presided in?

A. Yes, burglary and grand larceny hooked up in some way. I do not know the way they charge——

Q. In other words, the indictment had several counts?

A. Yes.

Q. Larceny, burglary. How long was that jury out?

[fol. 198] Mr. Talley: I object to that, if your Honor pleases. I think counsel has gone far enough.

The Court: Sustained.

Mr. Turkus: I did not receive a direct answer to the question as to whether or not there was any bitterness in the jury room.

Mr. Rosenthal: May I object upon the ground of its seeking to inquire on secret deliberations of a juryman in the jury room?

The Court: He said there was rancor; that is enough.

Mr. Turkus: Not that there be any impression created to the contrary, your Honor. I am merely endeavoring to secure a jury here that will deliberate the case and use reason one with the other.

The Court: You mean you are trying to estimate this gentleman's emotions and his emotional reaction.

Mr. Turkus: That is true.

The Court: Look at him. He gets along with his fellow men; he belongs to fraternal societies.

Q. Mr. Bender, do you know of any reason concerning which I have made no inquiry which would impair or hinder you from serving as a juror in the case, fair to The People of the State of New York and fair to the defendants at the bar?

A. Not to my knowledge.

Q. If you are selected as a juror in the case, will you [fol. 199] endeavor conscientiously to arrive at a fair and impartial verdict in the case, a verdict that will do justice in the case?

A. Yes.

Q. If sworn as a juror will you listen to reasonable discussion with the other jurors in the case?

A. Yes.

Q. Will you, if accepted as a juror, listen to the testimony in the case, the arguments or inferences drawn by defense counsel in their summations to the jury, the inferences drawn by the prosecutor in his summation to the jury, and the law as given by the Court, and then with reason and common sense deliberate with the other jurors in the case, and if you are satisfied then upon all the evidence in the case beyond a reasonable doubt that there are three guilty men at the bar of justice, Buchalter, Weiss, and Capone, would you hesitate, would you be fearful, would you be reluctant to say so in your verdict?

A. No.

By Mr. Barshay:

Q. Mr. Bender, did you ever see me in Mr. Kopf's house?

A. No, I have not.

Q. Did you ever see me at Mr. Kopf's lodge, Masonic lodge?

A. No.

Q. Were you present when both of his sons were inducted into the lodge?

A. No, I was not.

Q. You know Mr. Kopf, you say, quite intimately?

A. Yes.

Q. Did you know any other members of Mr. Kopf's staff [fol. 200] at that time?

A. No.

Q. Other than your seeing me in the court-room, had you known me at all?

A. No.

Q. You never had any business with me, isn't that so?

A. That is right.

Q. Did you hear Mr. Kopf give his lectures accompanied——

A. With photo slides.

Q. And those were concerning the prosecution of crime, were they not?

A. Yes.

Q. Did you see them more than once?

A. Yes, I saw them a couple of times.

Q. Some of the pictures were of men shot?

A. Yes.

Q. Some of the bodies apparently were tortured?

A. That is right.

Q. And acompanying the showing of the slides, you heard Mr. Kopf speak about it?

A. That is right.

Q. And tell me, sir, did you form any impression about the prosecution of crime then favorable to the prosecution?

A. Well I could not say that.

Q. Were you influenced at all by either his speech or the showing of the slides?

A. It was very interesting.

Q. Did they impress you?

A. Yes.

Q. Did they arouse in you a desire or a zeal for the prosecution——

Mr. Turkus: I object to the tenor of the question. Every-[fol. 201] one has a right to prejudice against crime.

The Court: Finish the question.

Mr. Barshay: I am too, Mr. Turkus.

(Pending question read.)

Q. —or to be somewhat part of the machinery of the prosecution?

A. I was very much interested, and I appreciate what they were doing, yes.

Q. And would that now result to the detriment of any of the defendants here?

A. I don't think so.

Q. I beg pardon?

A. I don't think so.

Q. When you say you don't think so, sir, is there a doubt in your mind?

A. No, not to the extent that it has anything to do with this particular case.

Q. Remembering Mr. Kopf's slides, I know they showed in great detail the operation of the prosecutor's office and the Police Department.

A. That is right.

Q. He sort of gave you a behind-the-scenes attitude, did he not?

A. That is right.

Q. So that you were enriched by that experience far more than those who did not either listen to the lecture or observe the slides, isn't that so?

A. That is true.

Q. And subconsciously, if you were chosen as a juror, would those things that you heard and saw come up, creep into your mind, so that some of the things you saw and heard would give you a greater experience and an advantage over [fol. 202] the other jurors who did not hear or see them?

A. It would be hard for me to answer that question.

Mr. Turkus: I don't think that it can be answered, because——

Mr. Barshay: Mr. Turkus, he said he cannot answer. I will try to reframe it.

Mr. Turkus: I object to the question because it is impossible of answer.

Mr. Barshay: He is the judge of that.

Mr. Turkus: No, he cannot tell what experience other jurors have had, and you have asked him if he had more experience than the other jurors, and I think the question was not susceptible of an answer.

The Court: Will you reframe it?

Mr. Barshay: I will reframe it, sir.

Q. Mr. Bender, do you feel now that you have a greater education in crime and the prosecution of crime because of your experience with Mr. Kopf?

A. Yes.

Q. You might say you are more of an expert than the layman?

A. I would say that I know a little more than the average layman.

Q. And would that knowledge be carried into the jury room?

A. I doubt it.

Q. At any rate, there is a doubt in your mind, isn't that so?

A. I could not be sure.

Q. And if a question arises in the jury room with respect [fol. 203] to procedure in the Police Department or the Dis-

trict Attorney's office, maybe that doubt will resolve itself in favor of the prosecution?

A. It may.

Q. It might, isn't that so?

A. It might.

Mr. Barshay: I challenge the gentleman for cause.

The Court: Try the challenge.

Albert C. Bender, of 1661 Hendrickson Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Mr. Bender, would you answer under oath the same way the questions that I asked you as I asked before you were sworn?

A. I will.

Mr. Barshay: May I press it at this time without any further questions?

Mr. Talley: Counsel join in the challenge.

Mr. Turkus: The question, as I understand it, was: If a question arose with respect to procedure in the District Attorney's office or the Police Department, would that be resolved in favor of the prosecution? Is that correct?

By Mr. Turkus:

Q. Mr. Bender, as I understand the purport of your answers to Mr. Borshay, they were that during the time that Mr. Kopf was chief Assistant District Attorney in Kings County he gave certain lectures on crime, accompanying [fol. 204] which he had some slides; is that correct?

A. That is true.

Q. Other than that you have had no experience with the prosecutor's office or with members of the Police Department in the apprehension of criminals or the prosecution of cases; is that correct?

A. Well, also a member of the club is Henry Bauer. He is a Deputy Inspector, and of course, as club members—this is not the lodge, this is a Masonic club—and of course, at times there are discussions.

Q. In the discussions that you had with Mr. Koph or with the Deputy Inspector, at any time was the murder of Joseph

Rosen discussed; that murder took place on Sunday, September 13, 1936?

A. I don't think so.

Q. Were there any slides that Mr. Kopf had in connection with the Rosen case which you saw?

A. I don't think that either. No, not to my knowledge.

Q. So that whatever slides or whatever material you listened to by way of discussion had absolutely no connection with the murder of Joseph Rosen on September 13, 1938, in a little candy store at 725 Sutter Avenue, Brooklyn; is that correct?

A. No.

Q. So that some of the discussion and some of the slides,—you may be familiar with the procedure adopted by the District Attorney's office and by the Police Department in the apprehension of criminals, and their prosecution; is that correct?

A. That is correct.

Q. Is there anything that you have learned from the [fol. 205] prosecution of cases which would prevent you from giving the defendants on trial a square deal?

A. Not to my knowledge. That would require deliberation. I do not know just what I did gain from them that might become of importance in the development of this case. But, as I sit here now, I do not feel that way.

Q. Is there anything that you have seen of the slides or anything that Mr. Kopf spoke of in his discussion on crime which has impaired your ability to be fair to three defendants who were charged with the crime of murder in the first degree?

A. No.

Q. If the Judge charges you on the law that the defendants and each of them, Buchalter, Weiss, and Capone, are presumed to be innocent, until their guilt is established beyond a reasonable doubt to your satisfaction upon credible evidence, would you follow the instruction of the Court and would you give the defendants the benefit of the presumption of innocence?

A. Yes.

Q. And if the Judge should charge you that throughout the case the burden is upon the District Attorney and the District Attorney accepts the burden of establishing guilt beyond a reasonable doubt, will you follow that instruction?

A. Yes.

Q. The question you were asked was with respect to procedure. Having in mind that the defendants have no burden at all by way of proof, that the burden is entirely upon the prosecutor and, on the contrary, the defendants have a presumption of innocence, would you give the prosecutor any [fol. 206] edge of the case, would you give him any edge because of the slides you have seen or the discussions on crime that you have heard?

A. I don't think so.

Q. And if the Judge tells you the District Attorney must establish guilt beyond a reasonable doubt with respect to the procedure in the District Attorney's office or the Police Department, whatever that may mean or whatever it may tend to mean, would you give the District Attorney or the Police Department any advantage, to the detriment of the defendants?

A. No.

Q. Do you feel, as you sit in the jury box now, that you could take your place in the trial of this case and render justice, justice to The People of the State and justice to the three at the bar?

A. Yes.

By Mr. Barshay:

Q. Mr. Bender, in reply to Mr. Turkus's question with respect to giving the District Attorney an edge in this case, your answer was, "I don't think so"?

A. No, I don't think so.

Q. Was your answer, "I don't think so"?

A. Yes.

Q. That implies some doubt, doesn't it?

A. Well, I can't be sure of that. That is, the certainty of it. I can't be sure whether that would become involved in the case or not.

Mr. Barshay: I press my challenge, your Honor, for cause.

The Court: Let other counsel examine if they wish.

By Mr. Rosenthal:

[fol. 207] Q. Mr. Bender, you made an answer to Mr. Turkus that as the facts in this case develop you might call upon what you have learned from the outside by reason of

these slides and talk in aiding you and in arguing to the jury. Isn't that the import of your answer?

A. It may enter into discussions.

Q. So, in other words, if the facts as they unfold in this case have any similarity to what you have learned through slides and Mr. Kopf's talk, your attitude then may be unfair to the defendants, isn't that true?

A. It might enter into it.

Mr. Rosenthal: I press the challenge.

Mr. Barshay: We all press the challenge, sir.

The Court: Anybody else wish to question?

Mr. Talley: I have no questions to ask.

Mr. Turkus: May I ask one further question?

The Court: No. What the juryman states has no specific application to the alleged crime stated in the indictment. It has relation only to the normal functioning of jury psychology on the subject by acquired general knowledge of the individual, on the subject of collective usages and procedures. This is a normal condition and does not signify prejudice. It is a psychology which is omnipresent in the jury system and legally offers no basis for sustaining the challenge. The word "edge" is ambiguous. I do not know what it means. It does not imply partiality. The challenge is overruled.

[fol. 208] Mr. Barshay: We take an exception, your Honor. May we pursue the questioning a little further along the line——

The Court: Yes. Not along that. You tried that issue.

Mr. Talley: All counsel have an exception to your Honor's ruling, I take it?

The Court: Yes, an exception by any counsel is available to all throughout the trial of this case. This applies likewise to objections.

By Mr. Barshay:

Q Mr. Bender, about how many slides did you see all together?

A. Well, I do not know how many slides. There were several cases.

Q. You do not recollect the name of any of the those cases, do you?

A. By name, no.

Q. You don't recollect how many cases Mr. Kopf spoke of?

A. No, I don't.

Q. All you do remember is the pictures of the victims of crimes or perpetrators of crimes, detectives, and police?

A. That is right.

Q. It may be, sir, that one of the pictures you saw had some connection with this case, isn't that so?

A. It may have.

Q. And if that should occur during the trial your recollection may be refreshed, isn't that so?

A. It may.

Q. And if your recollection is refreshed it may influence [fol. 209] your mind in this case to the prejudice of these defendants, would it not?

A. It may without my even knowing it.

Q. Isn't that a fact?

A. It may.

Q. Did you ever see a lecture accompanied with slides that I gave at your club?

A. No, I didn't, unless you were there the night Freddy Kopf was there.

Q. Exclusive of Freddy Kopf, did you see my series at that time?

A. I saw some series there. I might have seen that too, but I would not be sure.

Q. You have no independent recollection of that, have you?

A. No.

Q. So that if during the deliberation of the jury or during the course of this trial there is something in this case which in your mind is connected with—they refresh recollection of the lecture or slides you saw then—you might be influenced by that fact and determine the specific issue to the detriment of these defendants; isn't that so?

A. It might be.

Mr. Barshay: May I renew the challenge for cause at this time, sir?

The Court: Are all other counsel through?

Mr. Talley: Yes.

Mr. Cuff: All counsel are.

The Court: This is purely guesswork and speculation. Mr. Kopf was chief assistant under Judge O'Dwyer's

predecessor as District Attorney, served under Mr. Geoghan, [fol. 210] and during that administration nothing relating to this case had cropped up. The challenge is overruled.

Mr. Barshay: We take an exception, your Honor. May we disagree with your Honor's conclusion that nothing cropped up in that administration concerning this case?

By Mr. Barshay:

Q. Now, Mr. Bender, were you ever a member of the Grand Jury?

A. No.

Q. Do you know or do you recall now reading about the Grand Jury investigation conducted in 1936 with respect to this case?

A. Not to my knowledge.

Q. Do you recall reading about it at the time of its occurrence? Do you recall reading about it since its occurrence?

A. The investigation or the case?

Q. The case itself.

The Court: There was no case, Mr. Barshay. The Grand Jury investigation of the alleged murder was secret. It was not in the newspapers as to any of the defendants.

Mr. Barshay: I again beg to differ with the Court and say of my own personal knowledge, sir, that there was lots written about the investigation of this case at that time.

The Court: Nothing in relation to any of the defendants.

Mr. Barshay: I will not answer that, sir.

[fol. 211] By Mr. Barshay:

Q. Now, Mr. Bender, do you read the *Daily Mirror?*

A. No.

Q. Some member of your family read it?

A. No.

Q. Somebody in your office read it?

A. Yes.

Q. Did you ever look at it?

A. Yes.

Q. Since you were called as a juror here did you see the *Daily Mirror* in your office or any other place?

A. Yes.

Q. More particularly, were you attracted to the headlines therein concerning this case?

A. Yes.

Q. About how many times, Mr. Bender?

A. Well, I read one article in the life of one of the defendants.

Q. And did that particular article, sir, influence you to the detriment of these defendants or any of them?

A. I don't think so. I mean it has hurt his character.

Q. It had hurt his character?

A. The article I read had, yes.

Q. So that article did impress you to some extent to the detriment of at least one of the defendants, without mentioning any name?

A. That is right.

Q. And you are of that impression right now?

A. As to character, yes.

Q. Now I will ask you this question: If the Court should charge you that the character and the reputation of any defendant is not at issue here at all unless that defendant chooses to put it in issue, would you follow that law?

[fol. 212] A. I wish you would repeat that question.

Q. If the Court should charge you in this case that the character or reputation of any defendant is not at issue here at all unless he himself chooses to make it an issue by putting evidence of good character or reputation in evidence, will you follow the Court's instructions with respect to that law?

A. Yes.

Q. You will? Keeping that in mind, sir, would you be influenced by the fact that you have already formed some opinion by virtue of what you read in the *Mirror* which is detrimental to any one of the defendants' character?

A. I would try not to.

Q. You still use the word "I will try." There is some doubt in your mind?

A. I could not be sure.

Q. I beg pardon?

A. It may creep into my unconscious mind to the extent that it may influence me regardless.

Q. On that point alone, sir, there may arise something in the case which would creep in detrimental to any of the defendants; isn't that so?

A. It may.

Q. And it may creep in to the extent that it would influence your own decision, isn't that possible?

A. I suppose that follows right along the same lines. It may.

Q. And it would be difficult to dissipate the impression you gained from having read that particular article which you say was detrimental to the character and reputation of one of these defendants?

A. I suppose that may be so.

Q. And it may require evidence on the part of that par- [fol. 213] ticular defendant in your mind to dissipate that impression, isn't that so?

A. I will answer that the same way. It may. I do not know.

Mr. Barshay: I renew my challenge for cause, your Honor.

The Court: Swear the witness on the trial of this challenge.

(Albert C. Bender, being duly sworn, testified as follows:)

By Mr. Barshay:

Q. Now, under oath, sir, would you answer the questions the same way if I asked them in the same way, as you did before you were under oath?

A. I would.

Mr. Barshay: We renew our challenge for cause, sir, on behalf of all counsel.

The Court: Any questions by the other counsel?

Mr. Talley: No, sir.

The Court: Sustained.

(Joseph A. Cole, of 292 Covert Street, Brooklyn, New York, was then examined as to his qualifications.)

By Mr. Turkus:

Q. Mr. Cole, what section of Brooklyn is Covert Street?

A. It is called the Bushwick section.

Q. Have you lived in the Bushwick section of Brooklyn a [fol. 214] number of years?

A. Yes.

Q. Is your home in close proximity to Jefferson Avenue or Jefferson Street?

A. Yes, Jefferson Avenue, I think it is.

Q. Would that be between Evergreen Avenue and some other street?

A. It runs a different way.

Q. Did anything occur on Jefferson Street while you were a resident which might impair your service as a juryman in this case?

A. Not that I remember.

Q. Mr. Cole, I take it that you understand now the nature of the charge in the case?

A. Yes.

Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would impair or prevent your service as a juror in the case?

A. No.

Q. Would you permit punishment to enter into your deliberations of guilt or innocence?

A. I did not get that.

Q. Would you permit the question of punishment to be argued in the jury room when you are deciding the question of guilt or innocence?

A. Yes.

Q. You would permit punishment to be argued?

The Court: That is a question of law. He may think that he should.

Mr. Turkus: That is true. I did not look at it in that light. I will withdraw it in that form.

Q. What I am specifically trying to ascertain is this: Have you any conscientious or other scruple against capital [fol. 215] punishment?

A. No.

Q. In deciding the issue of guilt or innocence, you will not permit anybody to talk punishment in the jury room, will you?

A. No.

Q. Have you heretofore served as a juror in a criminal case?

A. No.

Q. Have you served as a juror in a civil case?

A. No.

Q. At any rate, I think that you understand by now, do you not, that the Judge, the trial Judge, is the ex-usive one on the law?

A. Yes.

Q. That the jury takes the law from the trial Judge without question or qualification?

A. I do.

Q. If selected as a juror in this case will you do that? Will you follow the law as given by Judge Taylor?

A. Yes.

By the Court:

Q. 272 is near what street?

Mr. Turkus: 292.

A. Is between Knickerbocker and Irving.

Q. Knickerbocker and Irving is about over a half a mile from Evergreen and Jefferson?

A. There is a Jefferson Avenue and a Jefferson Street.

Q. I am talking about Jefferson Avenue.

A. I always get confused between the two.

Q. Jefferson Avenue parallels Fulton Street.

A. And Jefferson Street does, too.

[fol. 216] Q. Yes, but that is a long distance away.

A. It is Jefferson Avenue I live near.

Q. How far away are you from Jefferson Avenue?

A. I would say perhaps a mile and a half.

Q. You are up near Evergreen Cemetery?

A. Yes.

Q. Just off the edge of the cemetery?

A. Yes, that is right.

Q. That is the district of two-story-and-basement homes?

A. Primarily.

By Mr. Turkus:

Q. Mr. Cole, on the trestle board you are listed as a bookkeeper.

A. That is right.

Q. Is that the correct listing?

A. Yes.

Q. By whom are you employed?

A. By attorneys, Appleton, Rice & Perrin.

Q. And their offices are in Manhattan?

A. Yes.

Q. Are you in a specific branch of the work, that is, do you work on books exclusively?

A. And trust accounts, yes, of that type now.

Q. That is books and trust accounts handled by this firm of lawyers?

A. That is right.

Q. Clients of theirs, I assume?

A. Yes.

Q. In the nature of banks would they be?

A. Yes, they are banks.

Q. These lawyers do not specialize in the trial of criminal [fol. 217] cases?

A. No.

Q. Do you know whether or not there is any criminal case pending in the office?

A. There is not as far as I know.

Q. Their work is exclusively trust work and corporation work?

A. Yes.

Q. This may be repetitious but it is imperative that we go through these various questions. Have you any contact, directly or indirectly, with any person or firm in the Brownsville-East New York section of Brooklyn?

A. Yes.

Q. An individual?

A. Individual and some employees of a particular place.

By the Court:

Q. You represent labor unions?

A. No, not any connection with labor unions.

By Mr. Turkus:

Q. You say you have Brownsville-East New York contacts?

A. Yes.

Q. Have you had them for the last few years?

A. Yes.

Q. Are they with firms or individuals in the Brownsville-East New York area?

A. With individuals.

Q. Is it a business connection?

A. Partly, yes. I have done some income tax returns for some of the employees there.

Q. Is it partly social?

A. Yes.

Q. Income tax returns for employees of a firm?

[fol. 218] A. That is right.

Q. What firm is that?

A. Salzer & Weinsier.

Q. What type of business is that concern engaged, do you know?

A. Plumbing supplies.

Q. And is their work in that Brownsville-East New York area of Brooklyn?

A. Yes.

Q. During your contact, both social and by way of business, have you engaged in discussion from time to time with reference to certain investigations pending in this county?

A. I have a very hazy recollection of talking it over with my brother some time ago, but nothing very clear in my mind.

Q. You say you have been in and out of that Brownsville-East New York area for the last few years?

A. Yes.

Q. That is having some social and business contacts, the nature of which you described to us. Did any time anyone discuss any pending investigations in this county?

A. No.

Q. While you were in that area?

A. No.

Q. Do these people work in this Brownsville-East New York section of Brooklyn or do they reside there?

A. Work there. One or two may live there too, as far as I know.

Q. But you are definite, now, that there has been no discussion of any pending investigation with any of those contacts that you have enumerated?

A. Yes.

Q. As the result of your contact with people in that area, have you read the newspapers in regard to any pending [fol. 219] investigation?

A. Yes, I have.

Q. Have you read them at length?
A. To some extent, yes.
Q. You followed the articles with great interest?
A. Yes.
Q. Do you have any business or other connection in the garment district of Manhattan?
A. No.
Q. Anybody in the clothing district of Manhattan?
A. No.
Q. Or the clothing trucking business or industry?
A. No.
Q. The Brooklyn waterfront?
A. No.

By the Court:

Q. Do you mind giving the general character of the legal practice your firm has?
A. Yes.
Q. In the way of clientele.
A. Preparation of wills, preparation of trust accounts, probating of wills.
Q. What particular line of business?
A. Civil practice.
Q. Do a big corporation business, don't they?
A. Yes.
Q. Madison Avenue?
A. No, we are down on Wall Street.
Q. Any of the big industrial companies?
A. No, sir.
Q. Any of the big transportation companies?
A. No.
Q. What particular bank or trust company?
A. Must I answer that?
Q. There is no secret about it.
A. Bank of Manhattan is one of the clients.
Q. That keeps you pretty busy?
A. Yes.
Q. On trust accounts?
A. Yes.

By Mr. Turkus:

[fol. 220] Q. Since you received notification that you were a prospective juror in the case, did anybody speak to you about the case?

A. No.

Q. Any of the persons that you met in that Brownsville-East New York area either socially or on business, did they have any discussion with you about the case?

A. No.

Q. Are you in sympathy with law enforcement?

A. Yes.

Q. There are nine lawyers here defending these three at the bar: Mr. Barshay, a former Assistant District Attorney—you have heard him interrogate other jurors?

A. Yes.

Q. Do you know him?

A. No.

Q. Mr. Bertram Wegman, a former Assistant United States Attorney. He has not as yet interrogated any jurors, but he is seated—he was seated over here. Do you know whether his name is familiar to you?

A. No, it is not.

Q. Or Mr. Jesse Climenko?

A. No.

Q. Associate of Mr. Wegman?

A. No.

Q. Do you know anyone attached to any of the respective offices of Barshay or Wegman and Climenko?

A. I don't think so.

Q. Emanuel Weiss is represented by former General Sessions Judge Talley. Do you know Judge Talley?

A. No.

Q. Any member of his office staff?

A. I don't think so.

Q. Or Mr. Cuff, a former Assistant in Kings County?

A. No.

Q. Mr. Murray Kriendler, a former Assistant United States Attorney?

A. No.

[fol. 221] Q. Do you know anybody in the offices of Mr. Cuff or Mr. Kriendler?

A. No, I don't think I do.

Q. Capone is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg. Do you know any of those lawyers?

A. No.

Q. Or anyone in their offices?

A. No.

Q. Your work for the law firm that you have disclosed to the Court is such that you work on figures and on numbers, accounting work, more or less, and bookkeeping work?

A. Yes, now it does.

Q. You don't write briefs or discuss law?

A. No.

Q. Do you have any bias or prejudice against the prosecutor of the county, Judge O'Dwyer, or against the prosecution for using the testimony of co-participants in the crime against the defendants on trial?

A. No.

Q. Will you take the law exclusively from the Judge as to what corroboration is required of that type of individual?

A. Yes.

Q. In the event the defendant or a defendant or any of the defendants or any one or more of them should invoke a defense of alibi, will you take the law exclusively from the Judge as to the law applicable to that type of defense?

A. Yes.

Q. There were various names that I read to the other jurors. Particularly may I direct your attention to the names of officials of the Amalgamated Clothing Workers [fol. 222] of America. Are any of their names familiar to you?

A. No they were not.

Q. You do not have any contact, directly or indirectly, with those individuals?

A. No.

Q. For example, is the name Potofsky or the name of Weinstein or Katz familiar to you at all?

A. No.

Q. Officials of the Amalgamated Union?

A. No.

Q. The name of Bruno Belia, an organizer of the Amalgamated, is his name familiar to you?

A. No.

Q. The name of Salvatore Marazzano familiar to you?

A. No.

Q. Do you know any officials of the Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Do you know any officials of the Flour Trucking Union, specifically, Local 138?

A. No.

Q. Is the name of Wolfie Goldis or Max Silverman familiar?

A. No.

Q. The name of Philip Orlofsky, one-time general manager of the Amalgamated, is that name familiar at all to you?

A. No, it is not.

Q. Or Willie Alberts, a one-time bondsman?

A. No.

Q. The name of Emanuel Buchalter or Phillie Buchalter familiar?

A. No.

Q. The name of Bellanca or Tosca familiar?

A. No.

Q. The name of anyone by the name of Weiss or any company which rents out automobiles in the Park Slope district of Brooklyn, is that familiar to you in any way?

A. No.

[fol. 223] Q. Do you know intimately any member of the bar who practices criminal law as a specialty?

A. Just an attorney on the Attorney General's staff.

Q. Who is that?

A. M. B. Quint.

Q. Of Mr. Amen's staff?

A. That is right.

Q. You know no other member of the bar who specializes in the defense of criminal cases?

A. No.

Q. The name of William W. Kleinman or David Price, is that familiar to you?

A. No.

Q. Or the name of Saul Price in Manhattan?

A. No.

Q. If accepted as a juror in the case, you will take the law exclusively from the Court; is that correct?

A. Yes.

Q. If selected as a juror and thus automatically become the foreman of the jury, will you endeavor to listen to common sense and reason in the discussions in the jury room?

A. Yes.

Q. If selected as a juror will you endeavor to do justice in this case?

A. Yes.

Q. Assuming you are selected as a juror and you take your place in the jury box and you hear all the evidence in the case, then you hear the defense lawyers sum up to the jury and draw their inferences from the testimony, and their arguments, then you hear the prosecutor draw his inferences and then the learned Court address you on the law, and you discuss the case with the other jurors in the jury room sensibly and without bitterness, and you come to the conclusion that upon all the evidence in the [fol. 224] case there are at this bar of justice beyond a reasonable doubt three guilty men, Buchalter, Weiss, and Capone, will you say so in your verdict?

A. Yes.

Q. Would you have any hesitation, fear or reluctance in so finding?

A. No.

The Court: The precise location of that plumbing supply house may have some bearing on the possible familiarity of the talesman. He knows the employees.

By Mr. Turkus:

Q. At the suggestion of the Court, Mr. Cole: Do you know where Saltser & Weinsier's place is located?

A. Approximately, I know about the number. I think it is 430-something Sutter Avenue.

By The Court:

Q. Near what street?

A. I don't know the street. I know just how to go there.

Q. Would that be in the East New York or the Brownsville?

A. Brownsville.

Mr. Turkus: Brownsville.

By Mr. Turkus:

Q. The place of occurrence of the murder in this case was at 725 Sutter Avenue. Do you know whether or not you were not going to this Sutter Avenue district of Brooklyn or the Brownsville district as early as 1936?

A. No, I did not go there myself at that time, but my brother worked there. My brother still works there.

[fol. 225] By The Court:

Q. Did you make out the income tax reports at that time?
A. Yes, I did.
Q. That was only a few blocks removed?
A. That is right.
Q. Three blocks removed?
A. The employees came to my house at that time.
Q. No discussion about the murder?
A. No.
Q. Nothing ever said?
A. Yes, at that time my brother did talk about it.
Q. That was an alleged street shooting?
A. Yes.

Mr. Turkus: Store.
The Witness: Store shooting.

Q. You knew that?
A. Yes.
Q. You heard that?
A. Yes.
Q. From discussion?
A. From discussion.
Q. With your brother?
A. Yes.
Q. Where did your brother live?
A. My brother worked right in Saltser & Weinsier.
Q. That is where you got the income tax business?
A. Yes.
Q. And he came home and told you about the shooting?
A. Yes.
Q. Just answer this yes or no without going into details. Was anything discussed as to who might be responsible for the shooting?
A. No.
Q. Or as to the reason for the shooting?
A. No

[fol. 226] Mr. Barshay: If your Honor pleases, I could not hear the discussion. May I ask this question: Was your Honor interrogating the gentleman with respect to this case?

The Court: Yes, precisely.

(Questions and answers read.)

By Mr. Turkus:

Q. Am I sure, Mr. Cole, that you have no embarrassment or reluctance in serving on this case?

A. No.

Q. None of your outside contacts or connections in any kind, manner, shape, or form will have any effect on your deliberations on the one issue in the case, the guilt or innocence of the three at the bar of justice?

A. No.

Q. And specifically, if you are satisfied beyond a reasonable doubt on all the evidence that these are three guilty men, you won't have any embarrassment or hesitation in saying so in your verdict?

A. No.

Q. None of your outside connections will influence it?

A. No.

By Mr. Barshay:

Q. Mr. Cole, was Mr. Appleton of your firm ever a Magistrate?

A. No.

Q. Was it a brother, do you know?

A. I do not think any relation of his.

Q. How long have you been with the firm?

A. About nineteen years.

Q. And during the nineteen years was there ever a time [fol. 227] when any criminal matter arose in your office?

A. No, I don't think so.

Q. Was there an appeal involving a criminal matter during the years that you were there?

A. No, I don't think so.

Q. How many employees has the firm?

A. About twenty or twenty-two.

Q. And of them how many are lawyers?

A. Roughly I would say eleven.

Q. Do any of them have the privilege of practicing exclusively—— Withdrawn.

Q. They have the privilege of practicing law other than that law connected with the firm?

A. No.

Q. They all work for the firm?

A. All work for the firm.

Q. And do any of them have any criminal matters whatever?

A. No.

Q. Do you read law yourself?

A. No, I do not.

Q. Did you ever study law?

A. No.

Q. Did you ever hear any criminal cases discussed that were not in your office, in the office when you were working there?

A. I may have. I know in recent years I have not.

Q. So as far as you are concerned you have no direct contact with any part of the criminal law?

A. Yes, sir.

Q. Nor any indirect contact with it?

A. Yes.

Q. Mr. Turkus has said to you, or rather, has asked you whether you know any of the lawyers for the defense. [fol. 228] Do you *you* know any of the lawyers for the prosecution?

A. No.

Q. He said the lawyers for the defendants number nine. I may tell you the lawyers for the prosecution number about thirty-five.

Mr. Turkus: In this case?

Mr. Barshay: Yes. Only two of them are appearing in court just at present.

Mr. Turkus: I object to Mr. Barshay stating what he knows about Judge O'Dwyer's office. He is not an Assistant District Attorney now.

The Court: Go ahead with the questions.

Q. Do you know anybody in that office?

A. I don't think so.

Q. Do you know anybody in the Police Department?

A. Some of the officers, yes.

Q. Intimately?

A. Friendly with them.

Q. High officials?

A. No.

Q. Officials who are assigned to that section of Brownsville where that firm Saltser & Weinsier has its place of business?

A. No.

Q. Did you ever discuss this case with any police officials?

A. No, I have not.

Q. Is there any prejudice in your mind, sir, because the defendants here are represented by nine counsel?

A. No.

Q. Not at all?

A. None at all.

Q. Or is there any prejudice in your mind because some [fol. 229] of us have had official office before?

A. No.

Q. Only a short time ago our positions were changed. Mr. Turkus for years was a specialist in criminal law.

Mr. Turkus: I object to Mr. Barshay giving me a certificate of ability. That has nothing to do with the qualification of the juror.

The Court: It is of no consequence.

Mr. Turkus: Of course it is not.

The Court: Finish your question.

Q. That has nothing to do with the case?

A. No.

Q. Isn't that so?

A. Yes, sir.

Q. Fate decreed that the positions be changed, that's all.

Mr. Turkus: I object to it. Nothing about fate here. I was appointed by Judge O'Dwyer as an Assistant District Attorney, and that is the end of it.

The Court: That is not the end of it; that is the beginning of it.

Mr. Turkus: I hope so.

The Court: We will take a recess until two o'clock.

(To Mr. Cole) Do not discuss the case. Be back here at two o'clock, when questioning will be resumed.

The defendants are remanded.

The other jurors return at two o'clock.

(Recess taken to 2:00 P. M.)

[fol. 230] Afternoon Session—Trial Resumed

JOSEPH A. COLE resumed the stand and testified further as follows:

By Mr. Barshay:

Q. Mr. Cole, you said you are a friend of Assistant Attorney General Quint of Mr. Amen's office?

A. Yes.

Q. Are you an intimate friend of his?

A. I worked with him for about six or seven years.

Q. And have you been working with him since his appointment as an Assistant Attorney General?

A. No.

Q. Have you seen him since?

A. Yes, two or three times.

Q. And have you talked about his work there?

A. Generally. I just know a little bit of it.

Q. Mr. Cole, do you know whether or not, or can you recall whether or not you and Mr. Quint spoke about this case?

A. I don't think we did.

Q. You say you don't think you did?

A. I am quite sure.

Q. Is there a doubt in your mind?

A. I am quite sure.

Q. The fact that Mr. Quint is an Attorney General would not have any influence upon you in this case, would it?

A. No.

Q. You, of course, never heard any propositions of criminal law from him?

A. No.

Q. Never? You said that you read the papers serially with respect to this case; am I correct?

A. Yes.

Q. Was one of the papers the *New York Daily Mirror*?

A. No.

[fol. 231] Q. Was it the New York *American* or the New York *Journal*?

A. No.

Q. Was it the Brooklyn *Eagle*?

A. No.

Q. May I have from you what paper?

A. *Telegram*, it could have been the *News*, or the *Sun*. It might have been *P. M.*

Q. *P. M.* had features about this case too?

A. Yes, it was the first day or the second day.

Q. You are right, sir, the first day you were called here on August 4th, the afternoon issue had a two-page spread with pictures.

A. Yes.

Q. About this case. You read that?

A. Not entirely. I happened to pick it up and saw it and read a little bit of it and did not finish it.

Q. The picture of one of the defendants, at least, was there?

A. Yes.

Q. Without mentioning any names?

A. Yes.

Q. And a little history of the case?

A. Yes.

Q. As the result of reading that or part of it, did you form any impression with respect to this case?

A. Yes, I have.

Q. Is that impression that you formed by reason of reading that article detrimental to any of the defendants?

A. Yes, I think so.

Q. And, being under that impression, can I have you tell me whether or not you would be precluded from being a fair and impartial juror in this case?

A. Yes, I think so.

[fol. 232] That is your honest opinion?

A. Yes.

Mr. Barshay: Challenge the juror for cause.

Mr. Talley: Join in.

The Court: Try it.

Mr. Cuff: Join in.

Joseph A. Cole, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Mr. Cole, if I ask you now the same questions that I just asked you before you were sworn, would you give the same answers?

A. Yes, I would.

Mr. Barshay: May I stop here and renew my challenge for cause, sir?

By Mr. Turkus:

Q. Mr. Cole, I think when I asked you questions you said you had never sat as a juror in a criminal case. Is my memory correct?

A. Yes, that is so.

Q. Do you understand now since the questioning that the burden of proof to establish guilt rests upon the prosecutor?

A. Yes.

Q. And that guilt must be established by the evidence adduced in the court-room to your satisfaction beyond a reasonable doubt?

A. Yes.

Q. Do you feel now that your state of mind is such that you would be inclined to substitute some picture or some [fol. 233] little article that you saw in a *P. M.* newspaper or any other newspaper for the proof that the District Attorney must bring into a court-room?

A. I am afraid it might. It might put the burden on them.

Q. You mean you feel prejudiced against the defendants?

A. Yes.

Mr. Barshay: On behalf of all defendants, sir, I renew my challenge for cause.

The Court: Sustained.

(John R. Hamilton, of 317 East 29th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.)

By Mr. Turkus:

Q. Mr. Hamilton, do you live in the Flatbush section of Brooklyn?

A. That is correct.

Q. Did you make an application for excuse from jury service?

A. That is right. My firm asked that I be excused.

Q. Defense counsel have asked me to ask you to speak loudly so that they may hear what you have to say.

A. I will try to.

Q. Was that at the request of your firm? Was there a question of your health involved?

A. No, sir.

Q. So that there is nothing the matter with you physically to sit on this jury?

A. That is right.

Q. Is there anything about the nature of your work that at this time would impair your service as a juryman—[fol. 234] by that I mean is there something pressing about your excuse?

A. No, it is merely that the work is very difficult to replace, that is all.

Q. You live in the Flatbush section of Brooklyn?

A. That is right.

Q. Have you lived there for a number of years?

A. About four, approximately four years.

By the Court:

Q. That is in the vicinity of Church Avenue and Nostrand?

A. That is correct.

By Mr. Turkus:

Q. Is your profession that of an accountant?

A. And clerk.

Q. By whom are you employed?

A. The National Car Loading Corporation.

Q. It has offices in Manhattan?

A. That is right.

Q. Does your business keep you inside the office or do you work outside?

A. Inside.

Q. Have you any contacts, by way of business or any other way, in the Brownsville section of Brooklyn?

A. No.

Q. Did you ever have any such contacts with any persons or firms in that area?

A. Is that near the New Lots section?

Q. New Lots section would be part of Brownsville and East New York.

A. No.

Q. Have you any contacts in the New Lots section of Brooklyn?

A. No, I just wanted to make sure where the Brownsville [fol. 235] section was.

Q. That is out around Pitkin Avenue, Sutter Avenue.

A. No.

Q. Did business bring you into any contact with the garment district in Manhattan?

A. No.

Q. Or the clothing district?

A. No.

Q. Did you ever have any contacts with any persons or firms in either the clothing district or the garment district?

A. No, unless they ship over our lines. That I do not know.

Q. That does not bring you in any personal contact?

A. It does not bring me in personal contact.

By the Court:

Q. What is the National Car Loading Association?

A. They load cars into freight cars throughout the United States——

Q. What kind of cars do they load into freight cars?

A. All type of freights.

Q. They load freight cars?

A. That is right.

Q. Sort of a stevedoring business?

A. Not exactly, more shippers agents. Merchandise that the railroads do not handle on carload basis.

Q. Just what does your concern do with that merchandise? They consolidate them into cars and ship them to our other offices throughout the United States and distribute them.

Q. You mean that merchandise which is shipped in small lots, too small for the shippers to ship by freight?

A That is right.

[fol. 236] Q. And after accepted by the railroad is taken by your company and then the shipments of various shippers is consolidated by you into one shipment and you hire the freight car and put the stuff in?

A. That is right.

Q. And you profit by taking the difference between the carload lot rates and the less-than-carload-lot rates? That is your profit?

A. Yes, that is right.

By Mr. Turkus:

Q. Do you have any contact with clothing trucking?

A. No, sir.

Q. Did you at any time have any business contact or any other contact with people in the clothing trucking industry?

A. No.

Q. Since your name appeared upon the special panel and notification was given you that you might serve in this case, did anybody speak to you about the case?

A. No.

Q. Are you in sympathy with law enforcement?

A. Yes.

Q. In connection with your work of car loading that you have described to the Court, did you come in any contact with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Do you know any officials in that union?

A. No.

Q. Is the name of Jacob Potofsky familiar to you?

A. No, sir.

Q. Or the name of Murray Weinstein?

A. No, sir.

Q. The name of Sam Katz?

A. No, sir.

Q. Did you come in any contact, directly or indirectly, with any officials of local 240 of the Clothing Drivers and Helpers Union?

A. No, sir.

[fol. 237] Q. Is the name of Philip Orlofsky, a one-time manager of the Cutters Union, Local 4, associated with the Amalgamated familiar to you?

A. No, sir.

Q. Is the name of Bruno Belia familiar?

A. No, sir.

Q. Or that of Salvatore Marazzano?

A. No, sir.

Q. The name of Abe or Abraham Beckerman, or Yudelowitz?

A. No, sir.

Q. Did you have any contact, direct or indirect, with anybody in Local 138 of the Flour Truckmens Union?

A. No, sir.

Q. In this carloading work that you handle, do you have any shipments of flour or any shipments of clothes or clothing?

A. I am not familiar with that angle of the work at all. My work is strictly accounting.

Q. Your work is devoted to the time you spend on books?

A. That is right.

Q. That is the bookkeeping department of this company?

A. The other work is handled by another office.

Q. So that you have no personal contact with any of the shippers?

A. That is right.

Q. Is the name of Max Silverman or Wolfie Goldis familiar?

A. No, sir.

Q. Or that of Willie or William Alberts, a one-time bondsman?

A. No, sir.

Q. The name of Emanuel Buchalter familiar?

A. No, sir.

Q. Or Phillie Buchalter, Phillie Kowas?

A. No.

[fol. 238] Q. The name of Bellanca or Tosca familiar?

A. No, sir.

Q. Do you know anybody by the name of Weiss in the automobile rental business?

A. No, sir.

Q. In the Park Slope section of Brooklyn?

A. No, sir.

Q. Do you know anybody in the automobile rental business, that is, renting out cars by the hour or day?

A. No, sir.

Q. Have no such contacts?

A. That is right.

Q. There are three lawyers representing the defendant Buchalter, Mr. Barshay, a former Assistant District Attorney in this County, Mr. Wegman, a former Assistant United States Attorney, and Mr. Climenko. Do you know any of the three?

A. No, sir.

Q. Do you know anyone connected with them in the practice of the law or employed in their law offices?

A. Not to my knowledge.

Q. Defendant Weiss is represented by former General Sessions Judge Talley. Do you know him?

A. No, sir.

Q. Anyone in his office?

A. Not to my knowledge.

Q. Two other lawyers for Weiss associated with Judge Talley are former Assistant District Attorney Cuff and former Assistant United States Attorney Kriendler. Do you know any one of them?

A. No, sir.

Q. Or anybody in their respective law offices?

A. Not to my knowledge.

Q. Capone is represented by Mr. Rosenthal, Mr. Fisch-
[fol. 239] bein, and Mr. Rosenberg. Do you know any of those gentlemen whose names I have enumerated?

A. No, sir.

Q. Anybody in their law offices?

A. Not to my knowledge.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Is the name of William W. Kleinman, or David Price familiar?

A. No, sir.

Q. Or that of Saul Price, a former Assistant District Attorney in Manhattan?

A. No, sir.

Q. You have had no contacts, directly or indirectly, by way of business or by way of any social connections with anyone in the Brownsville-East New York, the garment or clothing districts in Manhattan, or the Brooklyn waterfront; is that correct?

A. That is right.

Q. Have you heretofore sat as a juror in a criminal case?

A. I never sat as a juror.

Q. In any type of case?

A. That is right.

Q. Have you ever been interrogated as to your qualifications for jury service prior to this experience?

A. No, sir.

Q. I take it that you understand that Judge Taylor is the one who has the exclusive province of telling the jury the law in the case?

A. Yes.

Q. Will you accept the law from Judge Taylor without qualification?

A. Yes, sir.

Q. If you are charged as a matter of law that defendants [fol. 240] are presumed to be innocent, that The People of the State of New York have the burden of establishing their guilt beyond a reasonable doubt, will you follow the Court's instructions?

A. Yes, sir.

Q. Have you any bias or prejudice against the prosecutor of the county or against the prosecution which uses the testimony of co-participants in the murder to testify against the defendants on trial?

A. Are you referring to the credibility of the witness?

Q. No, I am not going into credibility, because that is something that we will discuss later. First I want to find out if you have any prejudice against the prosecutor.

A. No.

Q. Or against the prosecution.

A. No.

Q. Would you close your ears to the testimony of an accomplice solely because he was an accomplice?

A. No.

Q. Would you listen to his story and apply the tests of credibility that the Court instructs you should be applied to that type of witness?

A. Yes, sir.

Q. Do you find any fault with the use of that type of testimony?

A. No.

Q. Does the prosecution start off with any handicap in your mind because that type of testimony is employed?

A. No.

Q. Have you any bias or any prejudice against so-called expert testimony?

A. No, sir.

Q. For example, you have no feeling against handwriting [fol. 241] testimony, medical testimony, that is, emanating from an expert?

A. No.

Q. Do you know Judge O'Dwyer, the District Attorney of the County?

A. No, sir.

Q. Do you know any member of his staff?

A. No.

Q. Specifically, do you know Assistant District Attorneys Turkus, Klein, or Joseph?

A. No, sir.

Q. Is there anything about the nature of the case that would prevent you from being a fair and impartial juror?

A. No, sir.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No.

Q. Would you permit the question of punishment to enter into your deliberations as to the guilt or innocence of the defendants?

A. No, sir.

By The Court:

Q. Does your concern deal with loaders?

A. Yes, sir.

Q. On the railroad platforms?

A. Some we employ, men on our own payroll, and others we hire.

Q. How are those public loaders hired?

A. That I do not know. That is the concern of the local offices. I am associated with the general office.

Q. Who is the head of your concern, the president?

A. They just had a new one, Mr. Dilhofer.

Q. Where is your office?

A. 19 Rector Street.

Mr. Talley: If your Honor pleases, it was impossible [fol. 242] to hear.

Q. That is near Church Street? That is on Rector Street near Church?

A. Rector and Greenwich, between Greenwich and Washington.

Q. The numbers run from West Street towards Broadway?

A. No, sir, they run from Broadway to West Street.

By Mr. Turkus:

Q. Did you know the former prosecutor of Kings County, Mr. Geoghan, or any member of his staff?

A. No, sir.

Q. If selected as a juror in this case, will you endeavor to listen to reason and the logical argument of your fellow jurors in the case when it is being deliberated in the jury room?

A. Yes, sir.

Q. And will you, in determining the one issue in the case, the guilt or innocence of the defendants at the bar, use the every-day business experience that you have acquired in weighing the believability of witnesses and in settling that problem according to justice?

A. Yes, sir.

Q. Do you know of any reason concerning which I have made no inquiry which would affect your qualification or ability to sit as a fair and impartial juror in this case?

A. No, sir.

Q. Do you sit in the jury box free from prejudice?

A. As far as I can tell, yes, sir.

Q. With an open mind, ready to receive the evidence in the case?

A. That is right.

[fol. 243] Q. Assuming, then, that you have heard all the evidence in the case and you have had the benefit of the defendants' lawyers summing up and drawing their inferences from the testimony and the prosecutor drawing his inferences and then the learned Court charges you on the law and you have deliberated without rancor and fairly and reasonably with the other jurors in the case and you come to the conclusion beyond a reasonable doubt that at the bar of justice there are three guilty men, Buchalter, Capone, and Weiss, will you hesitate to say so in your verdict?

A. No.

Q. Would you have any fear or reluctance to say so in your verdict?

A. No.

Q. Is there any experience you have had in your past life or any business connection that you have presently which would interfere with the rendition of that kind of a verdict?

A. No, sir.

Q. If selected as a juror in the case, will you endeavor to do justice in the case?

A. Yes, sir.

By Mr. Barshay:

Q. May I ask if you are married, sir?
A. Yes, sir.
Q. Have you ever studied law, Mr. Hamilton?
A. No, sir.
Q. Has any member of your family been a lawyer?
A. No, sir.
Q. Have you ever been on any Grand Jury?
A. No, sir.
Q. Has any member of your family been on any Grand Jury?
A. No, sir.
[fol. 244] Q. Do you know anything at all connected with the law enforcing agencies of the City or State of New York?
A. No, sir.
Q. Or of the United States Government?
A. No.
Q. Have you ever been a victim of a crime?
A. No, sir.
Q. Any close member of your family or intimate friend been the victim of a crime?
A. No.
Q. Or your employer?
A. Throughout the United States our firm has been victimized at times, but that is all.
Q. Your firm has been victimized throughout the United States?
A. Yes, sir.
Q. Any one of those instances were you closely connected?
A. No, I was not connected at all.
Q. And, Mr. Hamilton, the fact that your firm has been the victim one place or another, one time or another of a crime, has that created a prejudice in your mind against these defendants?
A. No.
Q. Or against any of them? No doubt about that? Did you read about this case at the time of its occurrence?
A. I read one article in the paper.
Q. May I know in what paper?
A. The *Mirror*.
Q. *Daily Mirror?*
A. Yes, sir.

Q. May I know how long ago?

A. Approximately a month, I should say.

Q. Was it since you were called as a juror here?

A. It was about the time I was, I guess.

[fol. 245] Q. Is that the only time you read that article?

A. That is right.

Q. And did it leave an impression with you?

A. It was not on this case at all, but it was about the defendant.

Q. Was it concerning one of the defendants involved in this case?

A. Yes, sir.

Q. According to the indictment?

A. Yes, sir.

[fol. 246] Q. Without mentioning his name, did it prejudice you against that particular defendant?

A. I don't think so.

Q. You say you don't think so. I take it that implies some doubt in your mind. Am I correct?

A. It is hard to dissociate the impression.

Q. It is hard to dissociate the impression that you gathered?

A. Yes, sir.

Q. And the impression, I take it, was an unfavorable one to that defendant, isn't that so?

A. It would be, yes, the way the article was written.

Q. The way the article was written tended to create an unfavorable impression with respect to that defendant in your mind; isn't that so?

A. I would say so.

Q. And that impression still remains with you?

A. Yes, sir.

Q. And that is an impression that is prejudicial to that particular defendant?

A. Yes, sir.

Q. And if you were sworn as a juror, it would need some proof or evidence to dissipate that impression; is that so?

A. I am afraid so.

Q. You are afraid so? So that when you said that you could do justice, you did not mean exactly that, because somewhere else in your mind——

A. I don't think it goes as far as that, Counselor.

Q. It does not go that far?

A. No, it is more or less just a vague—you know what I mean—a vague impression.

[fol. 247] Q. Do you know whether or not you believe the accuracy or the truth of those articles?

A. As far as the material, I would say yes.

Q. The substance of that article seemed to you to be the truth, isn't that so?

A. Yes, sir.

Q. And that too was to the prejudice of that particular defendant?

A. Yes.

Q. And you have not eliminated that prejudice yet?

A. Not completely, no.

By the Court:

Q. Have you relatives in Brooklyn by the same name?

A. Yes, sir.

Q. Dr. Hamilton?

A. No, sir.

Mr. Barshay: Your Honor, on behalf of all the defendants, I challenge this juror for cause.

The Court: Try the challenge.

John R. Hamilton, of 317 East 29th Street, was then sworn.

By Mr. Barshay:

Q. Now that you are under oath, Mr. Hamilton, would you answer the question that I asked you a few minutes ago in the same manner?

A. I would.

Q. As you answered them before?

A. I would.

Mr. Barshay: I urge the challenge for cause, your Honor.

[fol. 248] The Court: Any other questions by any other counsel?

Mr. Rosenthal: No further questions.

Mr. Talley: No further questions on this challenge.

By Mr. Turkus:

Q. Mr. Hamilton, I think you said, when I interrogated you, that you had had no prior experience as a juror in any type of litigation. Is my memory correct on that?

A. That is right.

Q. In other words, you have sat through no criminal case and have not had the benefit of listening to the Judge's instruction on the law?

A. That is correct.

Q. Do you find any fault with the judicial principle that defendants are presumed to be innocent when they sit down in the court-room?

A. No.

Q. And do you find any fault with our American system that the prosecutor must establish the guilt of the defendants beyond a reasonable doubt?

Mr. Barshay: Your Honor, may I object to it at this time that it is not the subject of the challenge that I made?

The Court: Overruled.

Mr. Barshay: Exception.

Q. (Pending question read.)

A. No.

Q. You agree, do you not, that he must establish such guilt by the evidence that he adduces in the court-room, that he presents before a Court and jury; is that clear?

A. I do.

Q. To the satisfaction of the minds of the jury beyond a [fol. 249] reasonable doubt that the men at the bar of justice are guilty; is that right?

A. That is right.

Q. Do you agree that no prosecutor can substitute a newspaper article for that type of testimony?

A. That is right.

Q. There was something that you read about a month ago in one issue of a newspaper, I think you said to Mr. Barshay, that caused you to form an impression concerning one defendant in the case; is that right?

The Court: He did not say concerning his guilt or innocence on this charge.

Mr. Turkus: That is right.

Q. That article, as I understand from what you said to Mr. Barshay, was not directed to the Rosen case.

A. That is right.

Q. Whatever you read in that single issue of the newspaper in regard to some matter extraneous or foreign to the Rosen case, did that give you an opinion as to the guilt of innocence of the defendants in the Rosen case?

A. No, sir, I did not mean it that way. I meant it as purely a general opinion as to his character, his former record.

Q. Do you find any fault with the principle that a defendant in a criminal case has no burden at all, the burden is entirely with the District Attorney?

A. No.

Q. Would the reading of that one issue of a newspaper prevent you from deciding the issue in the case, the guilt or innocence of the three at the bar, on a charge of murder [fol. 250] in the first degree? Would you be prevented from being fair and impartial in your judgment as a juror from the context of that one article?

A. No.

Q. Do you feel that in deliberating, in pondering over the guilt or innocence of the defendants on trial in the Rosen case, that you could banish any impression that you received from the one reading of that newspaper?

A. I think I could.

Q. You say you think you could. No one is the better judge of that than you are, Mr. Hamilton. Can you conscientiously say that you can lay aside the impression that you gathered from the reading of that one article, and decide this case on the evidence you hear in the court-room?

A. Yes.

By Mr. Barshay:

Q. Mr. Hamilton?

A. Yes, sir.

Q. You told Mr. Turkus that you are in sympathy with law enforcement.

A. That is right.

Q. That has a wide meaning. You know that. It means that a defendant is entitled to be tried by a jury of his peers, and that jury must be composed of men who are absolutely

free of sympathy for him or free of prejudice against him. Do you agree with that?

A. I do.

Q. That means that you must not only have no opinion with respect to his guilt in this case, but you must be absolutely unprejudiced against him in any respect whatever, isn't that so?

[fol. 251] The Court: Mr. Barshay, is that what it means? Doesn't it mean political peers, people with equal civil rights?

Mr. Barshay: Judge, I don't think that it means that.

The Court: I think that is the meaning of the English common law, because otherwise a commoner might be tried by members of the peerage, and they might take a view of his social status which might work against him; consequently the commoners insisted on a jury of the defendant's peers, people with equal civil rights.

Mr. Barshay: That was the origin.

The Court: Not moral rights. It does not go to the question of prejudice at all.

Mr. Barshay: Your Honor, that was the origin of the reason for the statement that every person is entitled to a trial by his peers.

The Court: It would mean that a serf would be entitled to be tried by a jury of serfs. I am talking about the British common law. It would mean that a member of the nobility would be entitled to be tried in the House of Lords.

Mr. Barshay: That is what it meant then.

The Court: That is what it means today.

Mr. Barshay: The application of the rule, then, your Honor means that this man here or any of the defendants is entitled to a trial by a jury of their peers.

The Court: People with the same civil rights.

[fol. 252] Mr. Barshay: I do not know of any distinction, sir, in any rights that people have in this community.

The Court: The discussion will not be continued.

Mr. Barshay: May I press my question?

The Court: You may ask the question, but it seems to me to be academic. If there is any objection to it——

Mr. Barshay: There is no objection to it.

The Court: It seems in the nature of an examination on a scholastic or an academic question.

By Mr. Barshay:

Q. Be that as it may, Mr. Hamilton, do you agree with the law that every defendant is entitled to a trial by men who compose a jury free of any prejudice at all against the defendant?

A. That is right.

Q. Whether it is with respect to this case, or his race or his color, or his social standing; isn't that so?

A. That is right.

Q. You do not waver on that point, do you?

A. No.

Q. But you told us a little while ago that the article you read created a prejudice against one of the defendants because of his character.

A. Merely a reflection on his character, and not a prejudice against the man as far as he stands in court is concerned.

Q. So that it caused some prejudice against that defendant, whoever he may be; is that so?

A. In that one respect, yes.

[fol. 253] Q. That is in violation of the simple rule that you must be a man free of any prejudice against the defendant; isn't that so?

A. That is right.

Q. I did not hear your answer.

A. That is right.

Q. If you took an oath to be a fair and impartial juror, ready to render a verdict without sympathy or prejudice, and you felt the way you feel now, you would be violating that oath, would you not?

A. I don't think so.

Q. You don't think so?

A. No, sir.

Q. Can you explain how you can subdivide the prejudice?

The Court: Is not that too fine?

Mr. Barshay: I withdraw the question.

The Court: Mr. Barshay, I hope you do not think I am intruding in your examination. Supposing we take a hypothetical case. Many of the defendants who are brought into this court are unkempt and they don't present a very nice appearance. It is elementary that we form quick impressions concerning character, concerning people whom we meet, by looking at them. The moment that a member

of the jury looks at many a man who is brought in here for trial, there is an impression adverse to the defendant. But nevertheless, he must be tried, and the question is, Is the juryman willing and able and does he promise to lay aside any impression of that kind and decide the case strictly upon the evidence. That seems to me to be the question.

[fol. 254] Q. Mr. Hamilton, would it take any evidence on the part of that particular defendant to remove that prejudice that you have against the character of that defendant?

A. No.

Q. It would not?

A. No, sir.

Q. Would you want him to present some evidence of good character in order to dissipate the impression you now have?

A. No, sir.

Q. Your answer is no?

A. That is right.

Q. If it came to a point where his credibility was involved, would the fact that that article caused some prejudice in your mind with reference to his character cause you to discredit that man on a given point of testimony?

A. The credibility?

Q. If that man whom you have in mind should take the stand and testify with respect to a specific issue in this case, and you are the judge of the credibility of that man, would the fact that you read that article to that man's prejudice, cause you to disbelieve him because you had made up your mind as to the bad character of that man?

A. No.

Q. You would not?

A. No, sir.

Q. You know, sir, that character is not an issue in this case at all unless the defendant puts it in issue?

A. That is right.

Q. Nor that reputation has nothing to do with this case unless the man puts it in issue?

A. That is right.

Q. Will you follow that law? No doubt about it?

A. No doubt.

[fol. 255] Q. You cannot even consider a person's character in deciding the guilt or innocence of that person unless that person puts his character in issue. Do you know that?

A. Yes, sir.

Q. Now, having formed an impression by reading that article as to the man's bad character, and having accepted, as you said, the truth of that article, wouldn't it be difficult for you to dissipate the impression you formed?

A. I would not say difficult, no.

Q. What would you say?

A. It would mean merely a matter of examination and throwing my prejudice to one side.

Q. It would be a matter of examination by whom?

A. By me.

The Court: He said, "and throwing my prejudice to one side."

The Talesman: That is determining how much my position is influenced by that and discount it.

Q. Mr. Hamilton, will it require that that person take the stand so that you can examine him, not orally, but in your mind?

A. No.

Q. Could you dissipate it without that person taking the stand?

A. Yes.

Q. Could you tell us what you shall use as a basis for your examination?

A. I was under the impression that you said his credibility would be in doubt if he took the stand.

Q. Assuming he does not take the stand?

[fol. 256] A. Then it does not matter.

Q. What?

A. Then the prejudice does not matter.

Q. Then the prejudice does not matter?

A. That is right.

Q. If he takes the stand, you say the prejudice will matter?

A. It could matter, but I could discount it. It would matter slightly, but I could discount it.

Q. So that if he took the stand, it would matter slightly, but you could discount it. It will require an effort on your part to discount it,—correct?

A. Some, yes.

Q. And it will require, naturally, that the defendant take the stand?

A. If the defendant took the stand, then I would have to take the prejudice to one side in order to determine the credibility.

By the Court:

Q. Would you be able to do that?

A. I believe so.

Q. Can you give us your promise that you would?

A. Yes, sir; I would make every effort.

By Mr. Barshay:

Q. Supposing, Mr. Hamilton, the defendant does not take the stand?

A. Then the character does not enter into it.

Q. And will you be left with the impression you gained when you read the article?

A. No.

Q. So that up to this moment you do not know whether that impression has been dissipated or not, do you? You do not know?

A. I would say that the impression was not dissipated [fol. 257] as to his character, no.

Q. Just now, as you sit here, you are prejudiced against the character of that particular person; am I right?

A. That is right.

Q. And that prejudice has remained with you since you were here last and read that article?

A. That is right.

Q. That is almost over a month?

A. About that.

Q. Have you read any further articles with respect to that particular defendant?

A. No, sir.

Q. Or with respect to this case?

A. I saw a headline that the case was put off, that is all.

Q. Did the headline contain the name of any particular defendant—yes or no?

A. Yes.

Q. And the headline was prejudicial to that particular defendant?

A. No, sir. It was merely that the case had been postponed.

Q. Do you bear the same feeling towards people who will take the stand and testify out of their own mouth that they are accomplices?

A. The feeling as to their character, their credibility?

Q. Yes, their character or credibility.

A. I would feel that under certain circumstances that the witnesses' testimony would have to be substantiated.

Q. Substantiated?

A. Under certain circumstances.

Q. Assuming, sir, that a man takes the stand and he tells [fol. 258] you all his life he had been a thief, a burglar, an extortioner, a perjurer, and a murderer.

A. A convicted man?

Q. Convicted or otherwise, but out of his own mouth he says that is how he has lived up to the time he takes the stand; he stole, he burglarized, he committed perjury in courts or in other places, would you accept or reject his testimony?

The Court: You have not told the juryman what the law is as to corroboration.

Mr. Barshay: I am not getting to that point yet, Judge. I will reframe my question.

Q. Assuming a witness for the prosecution takes the stand and out of his own mouth he says that he has lived by stealing, by burglarizing, by being a common thief would you accept his testimony with caution, whether he is an accomplice or he is not an accomplice?

A. I would accept it provisionally.

Q. Provisonally?

A. Yes.

Q. Provisionally to what?

A. To being supported with other evidence.

Q. And if the other evidence shall be furnished by a person who is not an accomplice but who, out of his own mouth, will testify here in court that he has committed six murders, he has already participated in the commission of six, would you then evaluate that testimony with a great deal of caution?

A. I would have to.

Q. You would have to?

A. I am afraid so.

[fol. 259] Q. You promise you would?

A. Yes, sir.

Q. Are you in any wise prejudiced against that type of testimony, whether it is substantiated or not?

A. That type of testimony would have to be substantiated for me.

Q. Without any doubt?

A. Without any doubt.

Q. You would not accept it, would you, without close examination?

A. I would not accept it, but I would not throw it away, either, until it has been either substantiated or not substantiated.

Q. You would not require the defendant to disprove anything that a person of that character alleges on the witness stand, would you?

A. No.

Q. You would have to find the proof in The People's case, wouldn't you?

A. Yes, sir.

Q. You would have to find the substantiation in The People's case, wouldn't you?

A. Yes, sir.

Q. No doubt about it?

A. That is right.

Q. Did you read anything at all about any of The People's witnesses in this case?

A. No, sir.

Q. At no time?

A. No time.

Q. Did you read anything about Abraham Reles?

A. No.

Q. Did you ever hear the name?

A. I have heard the name in some connection, but I don't know. I don't follow——

Q. Did you ever hear the alias "Kid Twist"? Did you ever hear about Sholem Bernstein?

A. No.

[fol. 260] Q. Did you ever hear about Allie Tannenbaum?

A. No.

Q. Did you ever hear about Seymour Magoon?

A. Who?

Q. Seymour Magoon.

A. No.

Q. Not a word?
A. Not a word.
Q. Never heard of them?
A. No.
Q. If Mr. Reles takes the stand and he testifies out of his own mouth, under oath, called by the District Attorney, and he says that he has committed eleven murders, would you be prejudiced against his testimony?

The Court: You cannot state specific names of witnesses and ask the talesman how he would resolve the testimony of that witness as to truth or falsity.

Mr. Turkus: That has already been answered in the prior question.

The Court: You have already asked that without mentioning the name.

Mr. Barshay: I take exception.

Q. Did you read about Dukie Maffatore?
A. No.
Q. Or Abie Levine?
A. No, sir.
Q. Did you read about Julie Catalano?
A. No. If these are criminal names, I don't read any of these cases at all.
Q. So that the only thing you read with respect to any of the defendants is the article in The Mirror?
A. That is right.
Q. You accepted the truth of it?
A. Yes, as to——
Q. What it said?
A. As to the facts contained.

[fol. 261] Q. So that a mere reading, without any substantiation on anybody's part, caused an impression in your mind to accept the truth of that article; is that correct?
A. That is right.
Q. But assuming the facts as I gave them to you, that these men would testify and they would admit the commission of those respective crimes, assuming that were to be the fact, if you were chosen as a juror and you heard that from the witness stand would you be prejudiced against their testimony?

The Court: Counselor, the Court will have to make a charge to that effect.

Mr. Barshay: If the Court so charges.

The Court: You mean the Court would have to make the charge. In such contingency that he may so consider as having a bearing on credibility.

Mr. Barshay: But without the Court's charge or anybody's charge, your Honor, this man has already formed an opinion with respect——

The Court: I am just cautioning you as to the law.

Mr. Barshay: I amended my question as your Honor suggested. If the Court shall so charge you.

By the Court:

Q. If the Court charges you, in the event these men take the stand and admit matters that you read about in The Mirror, that you may consider that in determining whether they are truthful witnesses, will you follow the charge of the Court?

[fol. 262] A. Yes.

Mr. Barshay: I except to that question, sir, as not the correct statement of the law.

The Court: You asked it.

Mr. Barshay: Not with respect to the person mentioned in The Mirror article.

The Court: I beg pardon. I misunderstood you.

By Mr. Barshay:

Q. Would you accept the testimony of the accomplices more readily against any of the defendants because of what you read concerning any particular defendant in the article you mentioned?

A. No.

Q. Would you use it at all in weighing the credibility?

A. No.

Q. Do you know that no defendant need take the stand to disprove a charge against him?

A. That is right.

Q. You know that every defendant in this case is presumed as innocent of the charge against him as you are?

A. Yes, sir.

Q. Do you know that?

A. Yes.

Q. And do you know that the District Attorney is required throughout the entire case to prove the guilt of the defendant beyond a reasonable doubt?

A. That is right.

Q. And you know that the defendant can remain silent in his seat and never answer the charge against him, as the result of which you have no right to draw any unfavorable [fol. 263] inference against him?

A. Yes.

Q. You know that?

A. Yes.

Q. If that should be the case here, would you then draw upon the impression that remains with you at this moment as the result of what you read in The Mirror and use it against that particular defendant?

A. No.

Q. You would not? What have you done with that impression up to this second?

A. The impression seems to me to have nothing to do until——

Q. Until when?

A. Until the character of the particular defendant is called upon. If it is not called upon, it has no bearing.

Q. So you are holding that impression in reserve, are you not?

A. No, I am not.

Q. You say "until." Until what?

A. It is just there, and I will remember that I had the impression and I will discount it accordingly.

Q. You will discount it?

A. Accordingly.

Q. At some time in the future?

A. One cannot just erase an impression.

Q. That is what I am trying to get at. Even now, after all this questioning, you have not erased the impression which is prejudicial to the defendant you have in mind; am I right?

A. As to his character only.

Q. As to his character. That would preclude you from [fol. 264] giving a fair and impartial verdict in this case?

A. I don't think so.

Q. It would not? What are you going to do with that impression?

A. I said if the character of that person is called into account; I would discount it in considering his credibility.

By the Court:

Q. By "discount," you mean put aside?

A. That is right. I do not know any other way of expressing it, your Honor.

By Mr. Barshay:

Q. So that if the trial lasts about four or five or six weeks, you will still reserve that impression until such time; is that so?

A. Yes.

Q. And you will be sitting in that box, in that jury box, and all the time you will hear this testimony and somewheres in the back of your head will be that impression waiting for you to either use it or not use it; is that so?

A. Yes.

Q. You say that under oath?

A. Yes.

Mr. Barshay: I challenge the juror for cause.

Mr. Cuff: We join in.

Mr. Turkus: I went over a lengthy——

The Court: Any other counsel for defense?

Mr. Barshay: No questions.

The Court: Any questions by other counsel?

Mr. Rosenthal: Not as to this challenge.

The Court: There is no such thing as the perfect juror. There is no such thing as a jury of isolationists [fol. 265] who never have any contact with the world and never hear anything or see anything that gives them recollection. The question is whether a juror can lay aside his impression, and I think from the entire examination that is sufficiently clear. The challenge is overruled.

Mr. Barshay: We all take an exception, your Honor.

The Court: Yes. I do not know if you recollect, Mr. Barshay, but I know that Judge Talley will, in the Becker case it was notorious that all of the members of the jury who were sworn admitted having formed impressions concerning publicity in regard to Charles Becker's activities as head of the vice squad, but that had no bearing upon the issues. It did not constitute error. That is only one case, but I call attention to it so you will understand the way that I have been trying to work out a conclusion as to my duties.

Mr. Barshay: We do not coincide.

Mr. Cuff: Judge, isn't that the fact that is what convicted him? It was just that impression that convicted Becker.

The Court: I am talking about the legal aspects. I have my own notion of that case.

Is the juror satisfactory?

Mr. Climenko: No, your Honor. May we be indulged for a moment?

The Court: What about the prosecution?

[fol. 266] Mr. Turkus: The defense have not finished their questioning.

The Court: I understood they had.

Mr. Rosenthal: That was only on the challenge.

By Mr. Rosenthal:

Q. Mr. Hamilton——

A. Yes, sir.

Q. —you said that you had read an article in the paper which created an unfavorable impression on your mind; is that correct?

A. That is right.

Q. You told us also that you could, in the ordinary case, sit as an impartial juryman and take the law from the Court and determine the facts as they apply to the law as given; isn't that right?

A. That is right.

Q. You have also told us that because of the article that you read you formed an impression at this time which is detrimental to one of the men on trial. That is correct?

A. Just as to his character.

Q. Yes, as to his character?

A. That is right.

Q. Of course, under our rules of law, you understand that a defendant may or may not take the stand, as he sees fit?

A. That is right.

Q. If he does take the stand he raises all issues concerning his character, you understand that?

A. That is right.

Q. From the answers you have given. But he may also——

Mr. Turkus: That is not the law.

Mr. Rosenthal: The character is not in issue if he does [fol. 267] not take the stand is not the law?

Mr. Turkus: Character evidence is only put in issue in one way. What is the use of mentioning it?

Mr. Rosenthal: I said his character is not put in issue if he does not take the stand.

Mr. Turkus: Judge, I must appeal to the Court to be the exclusive judge of the law. I do not want any jurors to have a misguided——

The Court: Cannot character be put in issue by character witnesses without the defendant taking the stand?

Mr. Rosenthal: Through the defense.

The Court: If the defendant takes the stand, it is credibility, not character. His credibility becomes a question. That does not rate character. The mere putting the defendant on the stand, that does not open the door for the prosecution to prove bad character.

Mr. Rosenthal: It opens the door. Well, we won't discuss the question of what it opens the door to or not at this time.

The Court: It raises only the question of credibility, not of character.

Mr. Rosenthal: I used the word character because Mr. Barshay and Mr. Turkus both used it. Credibility would be the better word.

Q. The issue of a man's credibility is raised when he [fol. 268] takes the stand. Is that clear to you?

A. Yes.

Q. But you understand also, the Court will undoubtedly charge you, that if he does not take the stand, that that fact cannot be used against him. Do you understand that?

A. Yes.

Q. At the present time you have an adverse feeling towards the character of one of the individuals on trial: is that right?

A. That is right.

Q. Assuming, Mr. Hamilton, that you had read nothing and knew nothing about any individual that is on trial here—— Let me withdraw it and put it this way: In the ordinary case, if you knew nothing about the individuals or the case, there would not be any question but what you could sit as a fair and impartial juryman without any prejudice against the individual on trial; is that right?

A. That is right.

Q. But in this particular case you have a prejudice created by what you read and what you believed when you read it as to the character of one of the men; is that right?

A. That is right.

Q. Isn't it true, Mr. Hamilton, because of that prejudice that exists in your mind in this particular case that would not exist in your mind had you read nothing, that it would either require a greater amount of evidence on the part of that defendant or a lesser amount of evidence on the part of The People to produce in order for you to be convinced as to the guilt or innocence of that particular defendant? Isn't that true?

A. No.

[fol. 269] Q. You say that irrespective of the prejudice that you have against the one man, that you would not require any greater amount of evidence?

A. That is right.

Q. Or any lesser amount from The People, is that right?

A. Yes.

Q. But you said to Mr. Barshay that you reserved that prejudice or impression until the question of his character came into issue; didn't you say that?

A. That is right.

Q. Reserving that prejudice until his character came into issue, did you mean by that that if some people came on the stand, witnesses for The People, and made detrimental statements to this man as to his character, that that would lend greater weight because of the fact that you read the Mirror article?

A. As to his character?

Q. Yes?

A. Yes.

Q. In other words, because of what you read in The Mirror as to his character, if anybody got on the stand as The People's witness and accused him or said things detrimental to his character, it would have a greater weight because of what you have read? Is that what you just said?

A. Purely in that one line.

Mr. Rosenthal: I challenge him.

Mr. Climenko: Join in the challenge.

The Court: Try the challenge.

(The talesman was again sworn.)

[fol. 270] By Mr. Rosenthal:

Q. Mr. Hamilton, before you were sworn I ask you questions directed to whether or not, having read this Mirror article and certain things that were in it, your opinion would be as you phrased it before being sworn. Do you recall the question and the answer?

A. Yes.

Q. Now that you are under oath you reiterate the same answer with the same force and effect as if I asked you the question and you gave the answer; is that right?

A. I would.

Mr. Rosenthal: That is all.

The Court: Any other counsel for defense?

Mr. Barshay: We all join in.

The Court: Anybody else wish to question the witness?

(No response.)

By the Court:

Q. You understand, Mr. Witness, that whether a man has a good character or a bad character, he is entitled to a fair trial on a specific allegation?

A. Yes.

Q. No matter how good he may be or how bad he may be, he is entitled to an absolutely fair trial when he is charged with doing a specific thing?

A. That is right.

Q. Are you willing to give it here?

A. Yes, sir.

Q. Do you understand that a man's character, when tried on a specific allegation or charge, does not come in issue unless he puts good reputation witnesses on the stand?

A. I see.

[fol. 271] Q. Who testify that he has good character, then and then only does his character come in issue.

A. Yes.

Q. Are you willing, in that event, in this case, if sworn as a juror, to completely set aside any impression you may have from what you have read?

A. On character alone.

Q. On character alone?

A. Yes, sir.
Q. Are you sure that you can?

Mr. Rosenthal: May I object to the Court's question.
The Court: Overruled.
Mr. Rosenthal: Exception.

Q. Are you sure that you can?
A. Yes, sir, I am sure.

Mr. Barshay: We have no other questions.
Mr. Turkus: Neither have I.
The Court: The challenge is overruled.
Mr. Barshay: We all take an exception, your Honor.
Mr. Turkus: Satisfactory.
Mr. Talley: Challenged peremptorily by the defense, in which all counsel join.

(John J. Maloney, of 3214 Clarendon Road, was then [fol. 272] examined as to his qualifications.)

By Mr. Turkus:

Q. Mr. Maloney, the trestle board lists your address as Clarendon Road, is that correct?
A. That is correct.
Q. That is Flatbush, isn't it?
A. That is right.
Q. Have you lived in Flatbush a number of years?
A. Oh, I would say about twelve.

By the Court:

Q. You are East 32nd Street and Clarendon Road?
A. On the corner of New York Avenue.
Q. One block from the waterworks?
A. That is correct.
Q. Is Marshall Covert a friend of yours?
A. No, I don't believe I know him.
Q. He lives on your block. He is a newspaper man.

By Mr. Turkus:

Q. I was at the point, Mr. Maloney, of interrogating as to whether you have any business or other contacts in the Brownsville or East New York area of Brooklyn.

A. I have not.

Q. Did you at any time in your experience have any such contacts?

A. No, sir.

Q. Does the same apply to the garment district in Manhattan? Do you have any connections there of any kind, nature, or description?

A. No, I have not.

Q. Have you had any in the past?

A. No, sir.

Q. Does that apply to the clothing district of Manhattan? [fol. 273] A. That is right.

Q. And to the Brooklyn Waterfront as well?

A. That is right.

Q. So that there is nothing by way of social or business contact or connection that brought you in contact with any individuals or firms in any of those areas or industries that I enumerated?

A. No, sir.

Q. Does that hold true with respect to the clothing truckers?

A. Yes, sir.

Q. According to the trestle board your profession or occupation is listed as that of a cashier.

A. That is right.

Q. I take it you handle money on the inside, somewhere in an office?

A. Money and securities.

Q. Through any of your business contacts have you come in connection with or in any wise associated with any official of the Amalgamated Clothing Workers of America?

A. I have not.

Q. No social contacts with any of those?

A. None whatever.

Q. The names of Potofsky, Weinstein, and Katz, officials of that union, familiar to you in any way?

A. I never heard of them.

Q. I assume, then, that you have no contact with any officials in Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Or with Local 138 of the Flour Truckmens Union?

A. No, sir.

Q. Has the name Bruno Belia any significance to you?
A. None whatsoever.
[fol. 274] Q. That of Salvatore Marazzano?
A. No.
Q. Or Philip Orlofsky, one-time manager of the Cutters Local No. 4, associated with the Amalgamated?
A. No, sir.
Q. The name of Abraham Beckerman?
A. No, sir.
Q. Or William Alberts or Willie Alberts, one-time bondsman?
A. No.
Q. The name of Emanuel Buchalter have any significance?
A. No, sir.
Q. Or Philip or Phillie Buch*la*ter or Kowas? The name of Weiss, associated with some automobile rentals?
A. No, sir.
Q. The name of Bellanca or Tosca at all familiar?
A. No.
Q. You have no contacts by way of business or any wise with any of the unions or the locals that I have read off to you?
A. No, sir.

By the Court:

Q. What is your concern?
A. Thompson & McKinnon.

By Mr. Turkus:

Q. Have you heretofore served as a juror?
A. Never.
Q. You have never had the benefit of listening to a judge's instruction on the law, either in a civil or criminal case?
A. No, sir.
Q. If selected as a juror in this case, will you take the law that applies to the case exclusively from the Judge?
A. I would.
Q. Are you in sympathy with law enforcement?
A. Yes, I am.
[fol. 275] Q. Do you know the District Attorney of the county, Judge O'Dwyer, or any member of his staff?
A. No, sir.

Q. Specifically, do you know Assistant District Attorneys Turkus, Klein or Joseph or any of them?

A. No, I do not.

Q. The defendants on trial are represented here by nine lawyers, three apiece. Do you know Mr. Barshay, Mr. Wegman, or Mr. Climenko?

A. I met Mr. Barshay about fifteen or sixteen years ago, but I never saw him again until I recently came into court.

Q. Was that meeting him at a social function?

A. I was introduced to him. It was with regard to a case.

Q. Was that in the District Attorney's office?

A. No.

Q. Did you meet him at his office?

A. No, I met him at a political club.

By the Court:

Q. In Williamsburgh?

A. Yes, sir.

Q. He was the Assemblyman there then?

A. I did not live there at that time. My mother lived down there shortly after I was married.

Q. Where did your mother live?

A. South Third Street.

By Mr. Turkus:

Q. Was it in connection with some case that Mr. Barshay was handling as counsel?

A. Yes, it was.

Q. Was it for some member of the family?

A. He was not acting as counsel for the member of my family.

[fol. 276] Q. Was it against some member of your family?

A. That is right.

Q. Would there be anything about that relationship that would prejudice you against his cause or against his client?

A. None whatsoever.

Q. And there would be nothing that would prejudice The People of the State of New York or its cause?

A. I beg pardon?

Q. I say, nothing in regard to that relationship which would prejudice The People of the State of New York or the prosecutor?

A. No.

Q. In other words, that would not have any effect one way or the other in your deliberations upon the guilt or innocence of the defendants at the bar of justice?

A. No, sir, it would not.

Q. You know none of the lawyers that represent the defendant Buchalter; you know neither Wegman, Climenko, nor Barshay except as you outlined to us? Do you know former Judge Tailey, or former Assistant District Attorney Cuff?

A. No, sir.

Q. Or former United States Assistant District Attorney Murray Kriendler representing the defendant Weiss?

A. No, sir.

Q. Do you know anybody in their respective offices or associated with them?

A. No, sir.

Q. With respect to defendant Capone, do you know Mr. Sidney Rosenthal or Mr. Fischbein or Mr. Rosenberg?

A. No, sir.

Q. Anyone in the office of any of those gentlemen?

[fol. 277] A. I do not.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Is the name of William W. Kleinman familiar to you?

A. No.

Q. Or that of David Price?

A. No.

Q. Or Saul Price, the former Assistant District Attorney in Manhattan?

A. No.

Q. When the Judge charges you on the law, will you give the defendant the benefit of the presumption of innocence in consonance with the Court's direction?

A. I would.

Q. And will you enforce the doctrine of reasonable doubt in consonance with the Judge's instruction on the law?

A. Yes.

Q. In regard to reasonable doubt. Have you any bias or prejudice against the prosecutor of this county, Judge O'Dwyer, or against the prosecution for employing the use of accomplice testimony, that is, employing the testi-

mony of one who participated in the commission of the crime with the defendants, against them on trial?

A. No.

Q. As to the credibility to be given to such type of witness, will you take the instructions from the Court as to the test to be applied? You won't close your ears to accomplice testimony, will you?

A. No.

Q. And there is no bias or prejudice against the prosecutor or against the prosecution which employs that type of testimony?

[fol. 278] A. No.

Q. Mr. Maloney, did you know the former District Attorney of the county personally?

A. I did not.

Q. Or any member of his staff?

A. No.

Q. Outside of Mr. Barshay?

A. Outside of Mr. Barshay.

Q. In the event that any of the defendants invoke a defense, for example, a defense of alibi, will you take the law exclusively from Judge Taylor as to the law of alibi?

A. Yes, sir.

Q. If selected as a juror in the case, will you listen to reasonable argument and discussion in the jury-room from your fellow jurors?

A. I would.

Q. If selected as a juror, will you conscientiously endeavor to arrive at a just, true verdict in the case?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would prevent you from rendering a just verdict?

A. No.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Would you permit the question of punishment to enter into your deliberations?

A. No.

Q. If, after you have heard all the evidence in the case and you have heard the various lawyers for the defendants sum up to the jury and draw the inferences that they draw from the testimony and you hear the prosecutor draw

his inferences and then the learned Court charges you on [fol. 279] the law and you have discussed the case with your fellow jurors sensibly and reasonably in the jury room, and you come to the conclusion beyond a reasonable doubt that there are three guilty men at the bar of justice, would you hesitate to say so in your verdict?

A. No.

Q. Would you have the slightest hesitation or fear in so saying in your verdict?

A. No.

Q. Is there any reason concerning which I have made no inquiry which would prevent you from rendering a verdict in consonance with justice?

A. No.

By Mr. Climenko:

Q. Mr. Maloney, you would not have any fear of expressing a verdict of "Not guilty" if you entertained a doubt of the guilt of any of the defendants, would you?

A. I would not.

Q. Have you read about this case?

A. Yes, a little.

Q. In what papers, if I may ask?

A. Well, the only papers I read are the *World-Telegram* and the morning *Times*.

Q. Because of your reading articles in those papers, have you formed an opinion as to the innocence or guilt of any of the defendants in this case?

A. Well, I don't know that I would call it an opinion. I have some sort of an impression.

Q. I am afraid that whatever distinction there may be between the word "impression" and "opinion" is one that you will have to define for me. Will you tell me how you distinguish between those two words?

A. Well, I would say that the thought in my mind is not [fol. 280] a very definite one, although I have some ideas, or I should say thoughts, in that regard.

Q. You presently have some ideas, thoughts, or impressions which are the result of your reading, and those ideas, impressions, and thoughts are adverse to one or more or the other of the defendants; is that correct?

A. Yes, I would say so.

Q. And as you sit here now as we discuss this matter, those ideas or impressions or thoughts exist in your mind?

A. Yes.

Q. And they relate to the innocence or guilt of one or the other or more than one of the defendants; is that right?

A. That is correct.

Q. Thinking about it as objectively as you can think about the operations of your own mind, do you feel that it would require affirmative evidence to be produced by the defendants to dispel those notions?

A. Well, it would require pretty conclusive evidence, I would say.

Q. You mean that that evidence, in order to correct and balance your mind on the question of innocence or guilt, would be evidence that you would require to be produced by or on behalf of the defendants or one of them?

A. Yes, I would say so.

Q. Is that correct?

A. I would say so.

Mr. Climenko: If your Honor pleases, I challenge this gentleman for cause.

The Court: Try the challenge.

JOHN J. MALONEY, of 3214 Clarendon Road, Brooklyn, New York, being duly sworn, testified as follows:

[fol. 281] By Mr. Climenko:

Q. Mr. Maloney, I have just asked you about the operation of your mind in consequence of literature, newspaper literature, that you read about one or more of these defendants. Now that you have been sworn, were I to repeat those questions would your answers be the same?

A. Yes, they would.

Mr. Climenko: I press the challenge, if your Honor pleases.

Mr. Talley: In behalf of all defendants.

Mr. Cuff: I join in it.

Mr. Turkus: May I proceed?

The Court: Yes.

By Mr. Turkus:

Q. Mr. Maloney, I think that when we discussed the matter in advance of the defense lawyers, you said you had never served as a juror before.

A. That is correct.

Q. So that if this were your case and you were in the jury box and you would listen to a charge on the law from the Judge for the first time? Do you find any fault with our American principle that the prosecutor must find a defendant guilty beyond a reasonable doubt? Do you find any fault with the principle that defendants are presumed to be innocent as they are seated in the court-room?

A. No, I would not say I do.

Q. Would you find any fault with the principle of law if the Judge were to tell you that as a member of the jury, [fol. 282] that a defendant has no burden, that he need produce no evidence at all? Would you find any fault with that instruction of law?

A. Will you repeat that?

Q. Would you find any fault with the instruction of law that the Judge will give you, that the defendant has no burden in a criminal case, and would you follow that instruction of law?

A. I believe I would.

Q. And if the Judge should instruct you on the law that a defendant may or may not take the stand, and if he does not, no unfavorable inference may be drawn against him, would you find any fault with the Judge for telling you that that was the law?

A. No.

Q. Do you find any fault with that instruction of law?

A. No.

Q. Would you follow it if the Judge told you that was the law?

A. Yes, I would.

Q. By the same token, do you understand that the prosecutor of this county comes before a jury and asks for a verdict of guilty upon evidence that he produces in the court-room? Do you understand that?

A. Yes.

Q. You would not expect that part of the proof to come from a newspaper, would you?

A. No.

Q. You would expect the prosecutor to bring the proof into the court-room and satisfy your mind and the rest of the jury beyond a reasonable doubt that there are three [fol. 283] guilty men at the bar of justice before you vote "Guilty"; isn't that right?

A. Yes.

Q. And you would find no fault with that proposition of law or that instruction of law; is that correct?

A. Correct.

Q. Can't you now take your place in the jury box and, devoid of any newspapers that you may have read, because that is not under oath, it does not supply proof, can't you sit down and listen to this case, use common sense and judgment, and decide this case on the evidence that you hear in the court-room?

Mr. Climenko: I object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Climenko: Exception.

Mr. Talley: Exception to the defendant Weiss.

By Mr. Turkus:

Q. Can't you use common sense and judgment?

By the Court:

Q. Decide the case on the evidence?

A. Well, yes, I think I could.

Q. You applied for excuse, didn't you?

A. Yes.

Q. I said no, and you are hoping to get off?

A. I won't be sorry if I do.

Q. The only papers you read are the *Times* and the *Telegram*?

A. Yes.

Q. And neither one of them has expressed an opinion. [fol. 284] Do you know where this is alleged to have occurred?

A. I believe in the Brownsville section.

Mr. Cuff: We are interested in the answers.

Q. Did you read and did you remember the address where the alleged crime is alleged to have been committed?

A. The street, I believe, was Sutter Avenue.

Q. You heard that mentioned here, didn't you?

A. I heard it mentioned here. I did remember it from the newspaper as well.

Q. Did you read anywhere in either the *World-Telegram* or in the New York *Times* that any of these defendants are, in the opinion of that newspaper, guilty?

A. No, sir.

Q. Did the *World-Telegram* or did the New York *Times*, according to your recollection, state any evidence against these defendants of this particular crime which would entitle you to form a belief as to whether they are guilty or not?

A. No.

Mr. Barshay: I object to the form of your Honor's question.

The Court: Overruled.

Mr. Barshay: Exception.

The Court: He has already answered. He said "No."

Q. Isn't it a fact you are trying to get off from the jury and so you are professing a prejudice for that purpose?

A. No, your Honor.

Mr. Climenko: I object to your Honor's question.

The Court: Overruled.

[fol. 285] Mr. Climenko: Exception.

Q. Is it a fact, when you read the Telegram and the Times that you prefer those papers because your Company carries ads in those papers?

A. No, we don't advertise.

Q. Is it a fact the first page you turn to is the stock report?

A. No, I don't believe so.

Q. Baseball?

A. Generally baseball.

Q. And then stock reports?

A. That is correct.

Q. And if you see anything on the subject of crime, it is a matter of minor interest?

Mr. Barshay: I object to the form of your Honor's question.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Talley: Exception to us.

A. As a general rule I read the front page, then after that the sporting page, and then the financial question.

Q. Do you recall at any time when either the *Times* or *Telegram* carried this case on the first page?

A. I don't recall.

The Court: Go ahead with your questioning.

(To the talesman): I think you are trying to get off.

By Mr. Turkus:

Q. Mr. Maloney, the only way that we can decide qualification to sit on the jury and to decide a case with justice [fol. 286] is to ask questions to elicit the state of mind of the prospective juror. I want to ask you very frankly, do you think you can sit in this jury and decide the guilt or innocence of the defendants at the bar of justice on the evidence that you hear in the court-room?

A. Yes, I think I could.

Q. And if selected as a juror, will you lay aside any impression you may have gathered from reading of press-reports, and decide that issue, of importance to The People of the State and, of course, to the defendants, upon the evidence that you hear in the court-room?

A. I would try my best to.

Q. Is there anything that would impair or impede your ability to decide a case on evidence?

A. I don't think so.

Q. Could you, in consonance with your oath of office which you take as a juror, render a just verdict on the evidence in the case?

A. Yes, I think I could.

Mr. Barshay: May the record show that the juror hesitated at least a half a minute before he answered that question?

The Court: I did not time him.

Mr. Barshay: That is my best impression.

Q. There seems to be some question in the mind of the Court and the defense lawyer as to the amount of time that elapsed before my question was finished and you gave your answer. Is there some doubt in your mind as to your ability to sit here as a juror, obey your oath of office, and [fol. 287] render a just verdict in consonance with the evidence?

A. As I said before, I had formed some impression. It would require a little effort for me to set that aside.

The Court: And all the time you were sitting as foreman you would be thinking of Thomson & McKinnon is that [fol. 288] correct?

Mr. Barshay: I sustain it. I thought I was doing you a favor. Excused.

Mr. Talley: I was going to take an exception to your Honor's examination and observations, but in view of your ruling he is excused, I must withhold my exception.

The Court: I do not think he would make a good juryman. I am going to sustain the challenge. I do not think his mind would be on the job.

Mr. Talley: I take exception, with great respect, to your Honor's observation as to this juror on the ground——

The Court: I withdraw it. I say he would make a good juryman; his mind would be on the case; but I will sustain the challenge, and you can guess as to the reason.

Mr. Talley: I object to your Honor's observations, because they may have a prejudicial effect on the talesmen who have not yet been called and have not been examined and who, in view of your Honor's remarks as to this talesman, may hesitate to express fully what is in their minds, and I respectfully except to your Honor's examination and your Honor's observation in regard to John J. Maloney, the last talesman called and examined.

Mr. Barshay: That is an exception as to all defendants, your Honor.

[fol. 289] The Court: Do you want to continue?

Mr. Cuff: No use starting with another man now. We have only five minutes.

The Court: We will continue at ten o'clock tomorrow morning, and I trust there will be nothing to prevent the session of the court starting promptly.

The defendants are remanded, and the jurymen are cautioned not to read anything concerning the case and not to listen on the radio, not to talk to anybody about it.

(An adjournment was thereupon taken to September 19, 1941, at ten o'clock a. m.)

[fol. 290] Brooklyn, N. Y., September 19, 1941.

Trial Resumed

The Court: Proceed. Case on trial.

(Alfred M. Silverman, of 150 East 19th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.)

By Mr. Turkus:

Q. Mr. Silverman, do you live in the Flatbush section of Brooklyn?

A. That is right.

Q. And have you lived in Brooklyn for a number of years?

A. About six years.

Q. Your business is listed as Ins. I imagine that means insurance.

A. That is right.

Q. Are you in business for yourself, Mr. Silverman?

A. No, I am with the Aetna Casualty & Surety Company.

Q. In their office?

A. That is right.

Q. Does your work bring you outside?

A. It does.

Q. Do you handle all types of insurance?

A. Principally casualty insurance.

Q. Does business bring you into the garment district of Manhattan?

A. No.

Q. Clothing district?

A. No.

Q. Brooklyn waterfront?

A. No.

[fol. 291] Q. Brownsville-East New York section of Brooklyn?

A. Yes.

Q. Frequently?

A. I am there on an average of once or twice a week.

Q. On business?

A. That is right.

Q. Have you any social contacts there too?

A. No.

Q. Are you intimate or friendly with those clients that you have in that Brownsville-East New York area?

A. I only see them on business. May see one person now and never see them again.

Q. Is that in reference to some claim?

A. That is right.

Q. In which you represent the company?

A. That is right.

Q. Have you been going to the Brownsville-East New York section for the past four years?

A. Yes.

Q. While you were there did you hear anything of the Rosen case in 1936?

A. I recall reading about it when it happened, just at the time it happened.

Q. Was the case discussed in your presence?

A. No.

Q. Since you received notice to serve on the jury or prospective juryman in this case, did anybody discuss the case with you?

A. No.

Q. Have you heretofore had prior jury service?

A. Not in this state.

Q. Some state?

A. Pennsylvania.

Q. Was it in a criminal case?

A. I never got on.

Q. You got as far——

A. I was called but never served on a jury.

[fol. 292] Q. Have you had any service in a civil case?

A. No.

Q. If accepted as a juror in this case, will you take the law exclusively from the trial judge?

A. I will.

Q. Are you in sympathy with law enforcement?

A. I am.

Q. Did business ever bring you in any of those districts or in contact with any of the industries that I enumerated?

A. No.

Q. Do you have any business of any kind, directly or indirectly, with the Amalgamated Clothing Workers of America?

A. No.

Q. Is the name of Samuel Katz or Sam Katz familiar?
A. No.
Q. Or that of Murray Weinstein?
A. No.
Q. Is there any familiarity in the name of Bruno Belia, an organizer for the Amalgamated?
A. No.
Q. Or the name of Salvatore Marazzano?
A. No.
Q. Do you have any business with anybody in the clothing trucking industry?
A. No.
Q. Do you know any official of Local 240 of the Clothing Drivers and Helpers Union?
A. No.
Q. Is the name of Philip Orlofsky, a one-time manager of the Amalgamated, familiar?
A. No.
Q. Does business bring you into any contact, directly or indirectly, with the Flour Truckmens Union?
A. No.
Q. Is the name of Max Silverman familiar to you in any way?
[fol. 293] A. I have heard the name.
Q. Is that something that you have read?
A. I think so.
Q. Is the name of Wolfie Goldis familiar?
A. Yes.
Q. Is that by way of reading in the press?
A. That is right.
Q. Have you followed any of the articles in connection with Judge O'Dwyer's investigation with any degree of interest?
A. No.
Q. Is the name of Willie or William Alberts, a bondsman, familiar?
A. No.
Q. I take it you have no connection, directly or indirectly, with any flour truckmen?
A. None at all.
Q. Is the name of Emanuel Buchalter familiar?
A. No.
Q. Or that of Philip Buchalter or Phillie Kowas?
A. No.

Q. The names of Bellanca or Tosca familiar?
A. No.
Q. Do you know anybody in the knee-pants business?
A. No.
Q. Or in clothing industry at all?
A. No.
Q. Manufacture or distribution of clothes?
A. None at all.
Q. There are nine lawyers here representing these defendants at the bar: Mr. Barshay, a former Assistant District Attorney in this county, Mr. Abraham Wegman, and Mr. Jesse Climenko. They represent the defendant Buchalter. Do you know any of the three?
A. No, I don't.
Q. Or anyone associated in their law offices?
A. Not that I know of.
Q. The defendant Weiss is represented by former General Sessions Judge Talley, former Assistant District At- [fol. 294] torney Cuff, and former United States Assistant District Attorney Kriendler. Do you know any of those three?
A. I do not.
Q. Or any member of their office force or staff?
A. No.
Q. Mr. Capone, the third defendant, is represented by Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg. Do you know any of those three?
A. I do not.
Q. Or any members of their staff?
A. No.
Q. If selected as a juryman in the case, I think you told me you would take the law exclusively from the Court in all respects, that is, from Judge Taylor presiding at the trial. Is that correct?
A. That is right.
Q. Will you give to the defendants the presumption of innocence and apply the doctrine of reasonable doubt as instructed by the Judge?
A. I will.
Q. Do you have any bias against the District Attorney of the County or any bias against a prosecution which takes people who are implicated in the crime and uses them in court as witnesses to testify against defendants in the case?
A. No.

Q. Will you listen to that type of testimony?
A. I will.
Q. Will you apply tests as given by the Judge, that should be applied to the credibility of that type of witness?
A. Yes.
Q. As to what corroboration or supporting testimony is required, will you take the law from the Judge in that respect.
A. Yes.
Q. You won't close your ears, will you, to any testimony [fol. 295] of a co-conspirator or an accomplice in the killing, will you?
A. No.
Q. Do you know any of the former Assistant District Attorneys who were attached to the office of Mr. Geoghan when he was District Attorney of the county?
A. I think I knew Mr. Madden before he was ever District Attorney, but during the time he was District Attorney I never met or talked to him.
Q. Did you know Mr. Geoghan personally?
A. No.
Q. At any time that you knew Mr. Madden did you discuss the Rosen case with him?
A. I have not seen him since that happened.
Q. Was your meeting with him through your connection in the insurance business?
A. That is right. He worked for the same firm.

By the Court:

Q. How long have you been in that business?
A. Twenty-six years.
Q. What is your firm?
A. Aetna Casualty & Surety Company.
Q. All that time?
A. Most of it.
Q. You live on East 19th Street between Albemarle and Beverly?
A. That is right.
Q. Is that nearer Beverly?
A. Yes.
Q. Is it opposite the church?
A. The church is on the corner; I am about almost half way up the block.

Q. There are apartment houses on that block?

A. Yes, sir.

[fol. 296] Q. You never lived on Tennis Court at the foot of East 19th?

A. No.

Q. Do you know Judge Healy?

A. No, I don't.

By Mr. Turkus:

Q. Mr. Silverman, do you know any member of the bar who tries criminal cases as a specialty?

A. No, sir.

Q. Is the name of William W. Kleinman familiar?

A. I have heard the name.

By the Court:

Q. I will ask one more question just to clarify the previous question. I asked you that because I knew a man named Silverman had lived in the same house with Judge Healy on Tennis Court, at the foot of that street. That is a block and a half from where you live?

A. That is right.

Q. Do you know this Silverman?

A. I don't think so.

Q. He is rather stouter than you and he belongs to the Elks.

A. I don't know him.

By Mr. Turkus:

Q. Do you know of any reason concerning which as yet I have made no inquiry, which would affect your ability to serve as a juror in the case?

A. No.

Q. Do you sit in the jury box now with an open mind on the case?

A. I do.

Q. Have you read any of the articles concerning the investigation conducted by Judge O'Dwyer?

A. No.

[fol. 297] Q. You have read nothing in the press whatsoever?

A. I have read headlines. I have never gone deeply into it.

Q. You have read nothing in the Rosen case that persists in your mind?

A. Nothing. I recall of it at the time it happened, little sketches about it now and then, nothing particular.

Q. While you were in the Brownsville-East New York area on business, did anybody discuss the Rosen case with you?

A. Never heard it discussed at all.

Q. And it was never discussed in your presence?

A. No.

Q. In the event that any defense is raised in the case by one or more of the defendants, for example, a defense of alibi, will you take the law exclusively from the trial judge with regard to such a defense?

A. I will.

Q. You say you have no prejudice against the prosecutor or against the prosecution which employs the use of accomplice testimony?

A. No.

Q. As you sit in the jury box now, have you any prejudice against any of the defendants in the case?

A. None at all.

Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would impair or preclude you from serving as a juror.

A. I think not.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No.

Q. In your business experience has there been any discus- [fol. 298] sion about Judge O'Dwyer's investigation?

A. No.

Q. You have engaged in no lengthy discussions with anyone about it?

A. I never discussed it.

Q. Never discussed it at all? And you read very little?

A. That is right.

Q. And the reading has been limited to headlines?

A. Mostly. I have read some of the articles I have seen in the paper.

Q. If selected as a juror in the case, will you listen to fair argument from the other jurors?

A. I will.

Q. Discuss the case without rancor and bitterness in the jury room?

A. Yes, sir.

Q. Use common sense and reason in applying yourself to the one issue in the case, the guilt or innocence of the defendants?

A. I will.

Q. If selected as a juror, will you endeavor to reach a just and true verdict in consonence with the evidence?

A. I will.

Q. Assuming that you have heard all the evidence in the case and you have listened to the defense lawyers draw their inferences from the testimony, and then the District Attorney draw his inferences, and you have had the benefit of the learned charge of the Court on the law, and you discuss the case with reason and common sense with the other jurors, and then you, Mr. Silverman, are satisfied beyond a reasonable doubt that there are three guilty men [fol. 299] at the bar of justice, will you hesitate to say so with your verdict?

A. No.

Q. Would you have any fear or reluctance in so doing?

A. No.

Q. Is there anything about your business connections which would in any wise impair your service on the jury?

A. No.

Q. In the event that the trial is protracted, are business conditions such with you that you can devote your mind exclusively to the issue of the case?

A. Yes, sir.

By Mr. Climenko:

Q. Mr. Silverman, I did not quite understand what you said, if you did any, your duties were with the insurance company.

A. I am a claim adjuster.

Q. Does that mean that in the course of your duties you yourself investigate crimes?

A. That is right.

Q. Consult with attorneys about them?

A. Yes, sir.

Q. And you have been doing that for some time?

A. Twenty-six years.

Q. Any particular type of crime that you specialize in the investigation of?

A. Liability claims.

Q. Does that mean negligence in the operation of motor vehicles?

A. No, that is in connection with accidents in buildings and on the streets, public accidents.

Q. The maintenance of real property?

A. That is right.

Q. And not with automobile liability?

A. None at all.

Q. You specialize only in this real estate liability business, then, is that right?

A. If that is what you call it. It is called public liability, [fol. 300] has to do with accidents in buildings, apartments, stores.

Q. I do not pretend to know the right name for it. I am just trying to get the subject that you do deal with. That is it—real estate?

A. That is right.

Q. In the course of your duties you consult with lawyers?

A. I do.

Q. In consequence of those discussions, you know many lawyers, don't you?

A. I know a lot of negligence lawyers.

Q. Those discussions have never brought you into communication with lawyers who have discussed this case with you?

A. Most of the lawyers I met do not know anything about criminal law.

Q. You have read about this case?

A. Off and on.

Q. Is that correct?

A. That is right.

Q. In what newspapers?

A. I generally read the *News* in the morning and the *Post* in the evening.

Q. Have you read about any of the defendants in those newspapers?

A. I think I have.

Q. In consequence of your reading about them, have you formed any opinion about the defendants?

A. No.

Q. When I say "opinion," have you formed any opinion with respect to their alleged guilt or their innocence in this case?

A. No.

Q. None whatsoever?

A. No.

[fol. 301] Q. When is the last time that you read about any of these defendants?

A. I think about the time I was first called for jury duty.

Q. That is the first literature that you are conscious of right now relating to this case, that you read?

A. The first, did you say?

Q. The first newspaper articles that you read that you can remember about this case were at the time you were first called here?

A. I thought you said the last time.

Q. I beg your pardon. I am told that I did say last time. Is that the last time you read about it, was when you were first called here?

A. That is right.

Q. You have not read about it since?

A. No.

Q. And that was an article in the *News* or the *Post?*

A. I do not recall which paper—one or the other.

Q. You have also read from time to time about Mr. O'Dwyer, who is the District Attorney of Kings County; is that right?

A. Nothing particular. I may have seen his name in the paper. I do not recall what it had reference to.

Q. The fact that Mr. O'Dwyer—Mr. Turkus calls him Judge O'Dwyer when he refers to him—is the District Attorney of Kings County is not a factor which would affect your consideration of this case one way or the other, would it?

A. Absolutely not.

Q. The fact that at one time the District Attorney was a [fol. 302] Judge would not affect your consideration of the matter one way or the other, would it?

A. No, sir, it would not affect me.

Q. If you were charged as a part of the law by the Court that the mere bringing of an indictment, the lodgment of an indictment against any defendant is in and of

itself no indication whatsoever of guilt, would you have any difficulty in following that law?

A. No, sir.

Q. Would you have any difficulty in following that law?

A. No, sir.

Q. In other words, you realize, when I translate that into practical language, that the mere fact that an accusation is made is no indication of guilt whatsoever. You understand that clearly, don't you?

A. I do.

Q. So that as you sit here now with your mind on this case, your assumption is that the defendants are innocent; is that correct?

A. That is right.

Q. And if you were sworn as a juror, that would be your attitude, htat the defendants are assumed to be innocent?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And then if the Court should charge you that as a matter of law the defendants are presumed to be innocent unless they are proved guilty beyond a reasonable doubt, you would have no hesitation in accepting that as law, would you?

A. No.

Q. And, translating that again into practical meaning, [fol. 303] you would have no hesitation in accepting the guidance of the Court on the proposition that you cannot arrive at a verdict of guilt unless beyond a reasonable doubt you are convinced of guilt? You understand that?

A. Yes.

Q. And you have no quarrel with that concept of law?

A. None at all.

Q. And you can understand that that is one of the fundamental principles that affects the trial of a case; isn't that correct?

A. Yes.

Q. Mr. Turkus has asked you about people who he says may be called as witnesses, who may have participated in the crime, and he has asked you whether or not you would believe them; is that correct?

A. That is right.

Q. You say that you would have no prejudice against the prosecution because such a witness was called by the prosecution?

A. Absolutely not.

Q. Assuming that is so, at the same time would you weigh the credibility of that witness, having in your mind at the time that you weigh it as one of the factors affecting his credibility the fact that he admitted the doing of such an act?

A. I would weigh the credibility of the witness.

Q. You would?

A. Yes.

Q. And, in weighing the credibility of any witness, would you give due regard to the admission, if such an admission were made, that that witness had on a prior occasion com-
[fol. 304] mitted perjury?

A. I would consider who the man was.

Q. I beg pardon?

A. I would consider who the man was.

Q. Of course, we always consider who a man is and his identity, but I am saying more specifically: Assume that a man takes the stand in this case and he swears to tell the truth, and then after he has taken that oath he admits that in a prior proceeding, some other case, he also took the oath to tell the truth and now, today, he admits that on that former occasion he lied after he had taken that oath, would you consider that circumstance in affecting his credibility?

A. Certainly.

Q. Would you reject his testimony by reason of that circumstance, or would that circumstance have substantial weight with you in weighing the credibility of his testimony?

A. Your question is so long that I lost track of it.

Q. I withdraw it. Would the fact that a witness who takes the stand in this case, swears to tell the truth, admits that in some independent trial that has gone by he also took that oath, swore to tell the truth, and now admits for the first time that he did not tell the truth on that prior occasion, on the contrary, he tells you today that he lied on that prior occasion, if he made such an admission would that admission weigh heavily with you in assessing the credibility of that witness?

A. I think it would, yes.

Mr. Climenko: That is all.

[fol. 305] By Mr. Cuff:

Q. Mr. Silverman, do you read the *Mirror*?

A. No.

Q. And then, I gather, you have not read any of the articles referring to this case that have been published in the *Mirror*?

A. Never read any of them.

Q. Do you prepare cases for trial?

A. No.

Q. That you investigate?

A. No.

Q. You don't go to court for your company at all?

A. Only as a witness in some cases.

Q. Sometimes as a witness, to contradict statements made by parties whom you have interviewed; is that right?

A. That is right.

Q. And your office is where—151 William?

A. That is right.

Q. And how long have you been doing that type of work?

A. Twenty-six years.

Q. In New York City?

A. No, only the last seven years in New York. Prior to that in Pennsylvania.

Q Are you assigned to a particular district in the investigation of these general liability cases?

A. Yes.

Q. That is the type of work that you specialize in; is it not?

A. That is right.

Q. And what district is your present assignment?

A. East New York, Brownsville, Coney Island, Brighton Beach.

Q. How long have you been assigned to the East New [fol. 306] York and Brownsville district?

A. Six years.

Q. During those six years have you read anything about the conditions there?

A. Yes.

Q. You know what I mean?

A. Oh, yes.

Q. And in what papers did you read these things?

A. Usually the *News* or the *Evening Post*.

Q. Did you read all of the articles in those two papers that you mention about the Rosen case after it occurred?

A. I don't read the articles in their entirety. I usually just glance at the headlines.

Q. Not particularly interested, is that it?

A. That is right.

Q. Did any of this reading, particularly while you were assigned and working in the Brownsville and East New York district, create any impression in your mind one way or the other about this case or any of these defendants?

A. No.

Q. Mr. Turkus asked you about the doctrine of reasonable doubt. I understand you have never served on a criminal case as a juror in a criminal case; is that right?

A. Never.

Q. And, of course, you have never heard the doctrine of reasonable doubt explained by any judge, have you?

A. No.

Q. And if the Court should instruct you that a reasonable doubt is something that exists, arising from the evidence or some omission in the evidence or in the prosecution's case, you would follow that instruction?

A. I would.

[fol. 307] Q. And you would not hesitate, would you, Mr. Silverman, if you found a reasonable doubt, to acquit?

A. I would not.

Q. And if you were convinced, after a careful study of the evidence, after considering the arguments of the lawyers and the charge of the Court, that there was a reasonable doubt, would you have the courage to say it by your verdict?

A. I would.

Q. And to maintain it?

A. I would.

Q. I understand that you say that your business will not cause you any uneasiness if you are here in a protracted trial; is that right?

A. As far as I know.

Q. And when you were questioned about giving the defendants the benefit of the presumption of innocence, do you know that that presumption must be given to the defendants throughout the entire trial and while you are deliberat-

ing and until you are satisfied of the guilt of the defendant or the defendants beyond a reasonable doubt?

A. I do.

Q. And if you are selected, will you give that presumption to these defendants during that time?

A. I will.

Q. Mr. Silverman, you realize, do you not, that each defendant is entitled to a separate verdict in this case?

A. I do.

Q. And you will consider carefully the evidence as it affects each defendant and only the evidence that affects that particular defendant?

A. I will.

Q. On the question of the testimony of an accomplice, [fol. 308] you appreciate such testimony must be weighed and considered with extreme care and caution?

A. I do.

Q. And if there is testimony of an accomplice or accomplices in this case, will you weigh it just that way?

A. I will.

Q. And if you find that that evidence is not corroborated, as the Court will instruct you, by other independent testimony that you believe and which tends to connect a defendant or the defendants with the crime, will you vote to acquit?

A. I will.

Q. Do you realize that if there is only testimony of accomplices that is not corroborated by some other testimony that tends to connect the defendant with the commission of the crime, that you must vote to acquit?

A. I know that as a matter of law.

Q. You have read that before, have you, and you have heard it discussed before?

A. Yes.

Q. Where did you find that out, in your discussions, lawyers?

A. By associating with lawyers, I guess.

Q. And if you are selected in this case, you will adhere to that, follow that rule of law as it will be instructed by the Court?

A. That is right.

Mr. Cuff: I think that is all.

By Mr. Rosenthal:

Q. Mr. Silverman, you understand that the reason why different lawyers are addressing you is that each represents [fol. 309] a separate person on trial here?

A. I can't hear you.

Q. I say, do you understand that the reason why three separate lawyers have questioned you is that each one represents a separate person on trial?

A. I understand.

Q. Nobody has asked you whether or not you have any relatives on the police force. Have you any such?

A. No.

Q. Have you any close friends among the police?

A. No.

Q. Do you know Captain Bals?

A. No.

Q. Or Lieutenant Osnato?

A. No.

Q. And to your knowledge at this time you have no close friend or relatives who are attached to the Police Department; is that correct?

A. None at all.

Q. Without trying to inquire into your private life, do you belong to any men's club of any synagogue?

A. No.

Q. Have you ever heard either Mr. Turkus or any of the members of Mr. O'Dwyer's staff speak at any place in reference to crime?

A. I have not.

Q. Have you ever read any articles purporting to relate to crime by any of the Assistant District Attorneys?

A. I think I read a little bit of an article in the *Journal* one time.

By the Court:

Q. Do you belong to Beth Emeth?

A. I do not.

Q. That has an active men's organization.

Mr. Rosenthal: I did not want to specify any specific organization.

[fol. 310] The Court: I know the organization. That is in the vicinity of where he lives.

Mr. Rosenthal: That is right, Church and Beverly, I think.

By Mr. Rosenthal:

Q. How long ago was it that you read this article, Mr. Silverman?

A. It must be six or seven months ago.

Q. And do you recall who was the sponsor of the article?

A. No.

Q. Was it in relation to any of the defendants who are on trial?

A. No.

Q. Did it make any impression of any character upon you either as to the guilt or innocence of any person?

A. None at all.

Q. You never sat on a jury before, although you have been called? Am I correct in that statement?

A. That is right.

Q. Have you ever been called on a Grand Jury or sat on a Grand Jury?

A. No.

Q. Of course, you realize that the defendants are brought here by an indictment which charges them with having committed a certain act. You realize that?

A. Yes, sir.

Q. The mere fact that they have been indicted, does that raise any presumption in your mind as to their guilt?

A. None at all.

Q. Having had experience in accident work, you know [fol. 311] that even if a man has a false claim, there is nothing to bar him from serving a summons and complaint on your assured and claiming something definitely untrue; isn't that so?

A. That is right.

Q. And the only method that you on behalf of the insured would have of disproving it would be by putting in an answer denying the claim, isn't that right?

A. That is right.

Q. Then the issue is tried before a jury?

A. That is right.

Q. That is the same method of procedure following an indictment. The minute the defendants plead not guilty, you understand that raises——

Mr. Turkus: Just a minute. That is not the same procedure, about the filing of any false claim.

Mr. Rosenthal: Let me withdraw it and put it this way:

Q. The method of disproving, or the method that the District Attorney must assume once a defendant pleads not guilty, you understand, is by proving to your satisfaction beyond a reasonable doubt all of the allegations which they have made against the defendant. You understand that?

A. I do.

Q. Do you further understand that although these three men are being tried together at your hands, each one is entitled really to a separate trial; do you understand that?

A. I do.

Q. You understand that you may find the three men guilty, two men, one man, or you may acquit all of them—that is your province?

A. Yes.

Q. Do you further understand if you are accepted as a [fol. 312] juryman that it is your absolute duty to weigh each person's guilt, separate, distinct, and apart from the other persons' charged in the indictment? Do you realize that?

A. I do.

Q. Of course, the law you are going to take from the Court; is that correct?

A. That is right.

Q. Merely because the District Attorney may claim in this case that a man is not an accomplice, if the Court were to charge you as the law in the case that it is your province under certain conditions to determine for yourself as a fact his complicity, will you, merely because of the fact that the District Attorney says he is not, take his word for it, or will you deliberate in your own mind whether the person is an accomplice or not?

A. I will deliberate that in my own mind.

Q. Assuming that the Court were to charge you as the law that if the District Attorney relies upon the testimony of accomplices in determining the guilt of the individuals on trial, there must be other independent evidence tending to connect the individual before you can find a verdict of guilt—I say, assuming the Judge tells you that that is the law—would you without fear or favor currycomb the evidence to ascertain in your own mind whether you believe

there is any other independent evidence before you find a verdict of guilty?

A. I would.

Q. If the Court charges you that ten accomplices' testimony has no more probative weight than one in so far [fol. 313] as the question of independent evidence is concerned, would you follow that law?

A. I would.

Q. I want to make myself clear on that point. You may have an erroneous theory that one person, an accomplice admittedly, can corroborate or furnish the other evidence by another accomplice or more than one other accomplice. You have not any such theory at this time, have you, sir?

A. No.

Q. The law, if the Court charges it to you in this fashion, presumes that there must be other evidence other than one or more or a million accomplices, before you can convict anyone. Is that clear to you?

A. Yes.

Q. You have no fault to find with that law either, have you?

A. No.

Q. You further realize that there is not any one of these three men that are on trial for anything else in this court except for the things that are charged by the District Attorney in this indictment? You understand that?

A. I understand.

Q. You realize, sir, that if such were not the case it would be impossible for a lawyer to prepare a case, if he did not know what he was going to be charged with, that is, his client; is that true?

A. No.

Q. So that in determining the evidence here, you are going to determine, if you are one of the jurymen, what the District Attorney has proven against these men in this particular case, not what may be in your mind as to anything [fol. 314] else extraneous to the issue on trial; isn't that true, sir?

A. That is right.

Q. Mr. Turkus has asked you also, about the question of alibi, would you take the law from the Court, and you rightly answered that you would. That is true. Do you

realize that at no time does the defendant in a criminal case have to prove anything? Do you realize that?

A. I do.

Q. Do you realize that even if all of the defendants were to stand mute and were not to offer any testimony at all in this case, that it would still be the duty of the District Attorney to prove to your satisfaction beyond a reasonable doubt that they are guilty before you could find them guilty?

A. I understand.

Q. And you realize that if they stood mute, that you could not use that fact or argue about it in your juryroom?

A. Yes.

Q. That no unfavorable impression could be drawn through that? Do you feel, sir, that merely because one man charged with a crime may know or have had some association or admit that he knows one of the men who takes the witness stand as a witness, that that association alone, without other proof, is sufficient to raise a presumption in your mind of his guilt?

A. No.

Q. The point which I am trying to raise is this: There may be some witness called here whom the defendant may admit that he knew and had been in the company with at times, but whom he denies ever having had any nefarious [fol. 315] dealings with. The mere fact that he admits knowing the person, would that in itself raise a presumption in your mind that he must be guilty, because he knew or went out with this person, or that person happened to visit him at some time?

A. No.

Q. Mr. Turkus has also asked you, as well as other men, if you thought or if it was proven that there were three guilty men at the bar, would you have any hesitancy or any fear in bringing in a verdict of guilty, and you promptly answered no, that you would not. On the other hand, merely because—and you admit that you read about this case in the papers and you read headlines of articles—would you, merely because of what you may have read or what you may have heard, which you say has not made any impression upon you at all, be hesitant or afraid or fearful to bring in a verdict of Not Guilty if under your oath as a juryman, and your conscience, you felt that the District Attorney had failed to prove the charge which he makes

against either all of these men or any one of them—would you be hesitant at all?

A. No.

Q. You are positive of that?

A. Absolutely.

Q. You were also asked whether you would be arbitrary in the jury-room or whether you would argue without any rancor or bitterness, and you said you would not. You understand, do you not, sir, that every man called on a jury has a right to his own opinion as long as that opinion is based upon his conscience and what he believes the evi- [fol. 316] dence to disclose? You understand that?

A. I know that.

Q. Merely because you may be outnumbered in the jury room, because of the statement of Mr. Turkus that you should not argue with rancor and bitterness, would you change your opinion, say, "Here are eleven men against me, so there must be more force to what they say than what I say," or would you, if your opinion after listening to the reasoning of other men remained the same, would you be upright enough to retain that opinion which you formed, until you are convinced that you are wrong?

A. I have a mind of my own.

Q. I see. I take that answer to mean that you would, if you believe conscientiously in your own mind that the proof falls short of what the Court tells you is necessary, retain that opinion if after argument you have not been dis-uaded from your view; is that correct, sir?

A. That is correct.

Q. Just this one other question, sir: The District Attorney may—I do not know what because, as the Judge rightly said, even the names of witnesses are no longer on an indictment and therefore we may ask you questions now which may subsequently appear frivolous or foolish and may never arise in the case, but we must ask them in the event that they do arise. That is clear to you? The District Attorney may attempt to prove the guilt of one or more of these defendants by alleged admissions, in other words, have somebody say, "Well, this man told me that he did so and so." Is that clear?

[fol. 317] A. Yes.

Q. If such is the fact and if you are charged by the Court relating to the law of admissions, would you at this

time say that you will carefully scrutinize the source from which the alleged admissions come, find out what motive the person would have in making the statement, whether he, himself being a murderer and having never been tried, has a reason, an interest, a motive for lying in this particular instance, and weigh that carefully before you place any weight upon such alleged admission?

A. I would.

Mr. Rosenthal: No further questions.

The Court: In view of the four-day holiday recess, the Court will be agreeable to tentative acceptance of jurors today. That will enable jurors to return home for the holidays but will, at the same time, enable counsel on Wednesday to further question as to possible conversations and reading fresh reports by these gentlemen in the interim. If that is agreeable to counsel, that will be done.

Mr. Talley: Will your Honor indulge us for a moment?

(All counsel confer.)

The Court: If counsel are not prepared to decide at this time, then any juror selected today will sit in the box without being sworn until the close of the day. By that time [fol. 318] counsel can decide, and if you wish the jurors sworn, they will be sworn at that time.

Mr. Climenko: I think, your Honor, if we may be indulged for another two minutes, we will know by that time.

The Court: While counsel are consulting, I will withdraw and declare this to be a five-minute recess.

(After a short recess:)

Mr. Cuff: May we see your Honor for a moment?

The Court: No. Any more questions?

Mr. Turkus: There is, by the prosecution.

By Mr. Turkus:

Q. Mr. Silverman, some of the counsel went into an extended discussion with you on law, and one of them drew the analogy about a civil case. You understand, I take it, do you not, that there is a difference between the trial of a civil case and a murder case?

A. I do.

Q. Without wishing to be facetious, you understand this is not the trial of a negligence claim?

A. I do.

Q. This is the trial of a murder case. There has been an extended discussion about certain types of witnesses that

may or may not be produced by the prosecution in the trial of this murder case. As you sit in the jury-box now, would you expect the prosecutor to bring in as an accomplice or a co-killer the type of your assureds?

A. No.

Q. In weighing the believability of an accomplice or a man [fol. 319] who tells you he was out on the murder with the defendants, will you look at the other evidence in the case to see if the accomplice is telling the truth and if the other evidence in the case tends to connect the defendants with the murder?

A. I will.

Q. And if you are satisfied from the other evidence in the case that the accomplice who says he participated in the murder with the defendants at the bar is not only telling the truth, but that the other evidence connects each and every defendant, would you hesitate, would you be fearful, would you be reluctant to find a verdict of Guilty?

A. No, sir.

Q. In speaking of your association with Mr. Madden, was that a long-time association?

A. It was mostly through correspondence. He was in New York and I was in Pittsburgh, but we met several times on business.

Q. Both employed by the same company?

A. That is right.

Q. Did you ever come in contact with Mr. Cuff in any of your work?

A. No.

Q. Going back to Mr. Madden, do you understand that he was an Assistant District Attorney during the time that Mr. Geoghan was a District Attorney of the county.

A. Yes.

Q. This was a murder that happened in 1936, during the time that Mr. Geoghan was District Attorney. The case is now being tried on an O'Dwyer indictment. Is there anything about your association with Mr. Madden that might [fol. 320] have some influence on your verdict?

A. I have not seen him in probably ten years, I guess. I do not know anything about him personally. It would not have any effect on me.

Mr. Turkus: Peremptory.

(Parker M. Spence, of 75 Winthrop Street, Brooklyn, New York, was called as a prospective juror.)

The Court: Unless counsel are prepared to announce a decision on the Court's suggestion, the Court will make this announcement, that counsel may have all day to consider this question and that jurors will be sworn at the close of the day unless counsel agree that they need not be sworn until Wednesday.

Mr. Talley: I would say that counsel are inclined to agree to your Honor's proposition that they be not sworn until after the holiday.

The Court: Is that agreeable all around?

Mr. Talley: That if accepted they be accepted tentatively with challenge reserved until Wednesday?

The Court: I think you are apt to get more jurors that way today than if they feel they are going to be locked up [fol. 321] over the four-day holiday.

Mr. Talley: That we must avoid, and counsel is quite agreeable to your Honor's suggestion. Personally, I think it is a very good one.

Mr. Turkus: Judge Talley made a reservation about a challenge on Wednesday. Is that correct?

Mr. Rosenthal: That is subject to further questioning.

The Court: Subject to further questioning. The juror may converse or may read something about the case in the interim that should be ascertained by further questioning.

Mr. Turkus: What I am not clear about is this: Is there a reservation of a peremptory challenge, or is it only a cause challenge?

The Court: Purely a tentative acceptance, and either side may make a peremptory challenge or a cause challenge if new cause ground is developed by further questioning on Wednesday.

Mr. Turkus: If no cause ground is developed, a peremptory challenge would mean for no reason?

The Court: Exactly. That is applicable to both sides.

Mr. Turkus: And that is reserved?

The Court: Yes. The Court is very anxious to get a few jurors in the box, at least tentatively, today, because up to [fol. 322] the present time the only progress we have made has been flat failure.

(Mr. Spence was then examined as to his qualifications.)

By Mr. Turkus:

Q. Mr. Spence, do you reside at Winthrop Street?

A. I do.

Q. In what section of Brooklyn is that?

A. Flatbush.

Q. Have you lived in Brooklyn a number of years?

A. About ten years.

Q. At any time did you live in the Brownsville-East New York section of Brooklyn?

A. No.

Q. Or have any social or business or business contact there?

A. None whatsoever.

Q. I take it that from the other examinations of the jurors that you understand that this is a capital case, a charge of murder in the first degree?

A. I do.

Q. Is there anything about the nature of the charge which would preclude you from being a fair and impartial juror?

A. No, there is not.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. None whatsoever.

Q. Have you heretofore had the benefit of any jury experience either in a civil or criminal case?

A. Both.

Q. And has your experience been in the County Court of Kings County in so far as the criminal case is concerned? [fol. 323] A. Judge Brancato's court.

Q. Did the case go to its conclusion, and by that I mean did the Judge charge the jury on the law in the particular case in which you were a juror?

A. No, he did not.

Q. The case never reached the jury?

A. Never reached the jury.

Q. From sitting around the court-room awaiting your chance to be a juror, did you hear a judge's charge on the law?

A. No, I don't believe I did. I believe I was selected immediately and the case was brought up, but it never went to the jury.

Q. Did you serve a week?
A. Yes, I did.

By the Court:

Q. Was your father president of a bank on Broadway and Reid Avenue?
A. My father has been dead about forty years.
Q. That would be about the time I had in mind.
A. No, it must be a different person.

By Mr. Turkus:

Q. Mr. Spence, you are listed here as a purchasing agent. Is that a correct listing?
A. Not at the present time. I am in the sales end of the business too at the present time.
Mr. Talley: We do not hear you.
The Talesman: I am also in the sales end of the business at the present time.
Q. What is the nature of the business?
A. Ceramic chemicals that has to do with pottery, glass, tile, and so forth.
[fol. 324] Q. And is your place of business in Manhattan?
A. It is in Newark, New Jersey.
Q. At any time in your past business experience did business ever bring you into the Brownsville-East New York area of Brooklyn?
A. Never.
Q. Do you have any contacts, by way of business or social, with any person or firms in that area?
A. None at all.
Q. Has business in the past brought you in contact with any firm or individual in the garment district in Manhattan?
A. No, none at all.
Q. And you have no such connection presently?
A. No.
Q. Does that hold true with respect to the clothing industry?
A. It does.
Q. Have you had any contact, directly or indirectly, with anyone in the clothing trucking industry?
A. No, none at all.
Q. Or the Brooklyn waterfront?
A. No.

Q. Since your name appeared on this special panel and you received notification, did anybody speak to you about the case?

A. Just in a general way, that the case had come up.

Q. And I take it, then, that those discussions were at your place of employment?

A. Yes, and among my family.

Q. And that would be as to the length of possible jury service in the case?

A. That is right, and just what it meant to me.

Q. No discussions as to the merits?

A. Not at all.

[fol. 325] Q. Are you, sir, in sympathy with the enforcement of the law?

A. I am.

Q. The defendants at the bar of justice are represented here by nine lawyers, and I have read their names to the other jurors, and briefly I will repeat them to you: Mr. Barshay, a former Assistant District Attorney, Mr. Climenko, and Mr. Wegman. Are any of the three gentlemen friends of yours? Do you know any of them?

A. None at all.

Q. Or do you know any of the men in their offices or any employees attached or connected with their law office?

A. Not of those three. I met Mr. Rosenthal once out at the North Hills Golf Club.

Q. Was that recently?

A. I think that was about two years ago, possibly.

By the Court:

Q. It was not the day before yesterday?

A. No, it was not.

Mr. Rosenthal: You probably passed me on the course.

The Talesman: No, it was at one of their affairs out there.

By Mr. Turkus:

Q. Did you play golf with him?

A. No, he is too good for me.

Q. At any rate, you would not be prejudiced against his client because you met him out at North Hills?

A. Certainly not.

Q. You did not see me out there at that time?

A. No.

[fol. 326] Q. Or Judge O'Dwyer?

A. No.

Q. Then the only acquaintance that you have with Mr. Rosenthal is some knowledge of his prowess as a golfer?

A. That is right.

Q. Would not have any bearing in the case?

A. None at all.

Q. I take it by specifically mentioning Mr. Rosenthal's name that you do not know Judge Talley or Mr. Cuff or Mr. Kriendler?

A. I do not.

Q. Or Mr. Fischbein or Mr. Rosenberg.

By the Court:

Q. What is the name of that concern, ceramic chemical?

A. Ruche. They were formerly a New York concern. They moved to New Jersey.

Q. Sell to Trenton potteries?

A. Some.

Q. Hydrofluoric?

A. That is a very small item, use it in frosting glass quite a bit, but it does not come into the ceramic and pottery business much. We specialize in the colors particularly that are used on pottery and glass and chinaware and porcelain.

Q. Who is the head?

A. Mr. E. Frederick Ruche. His brother recently died. There were two brothers partners. One of them recently died.

By Mr. Turkus:

Q. Do you know intimately or socially any member of the bar who specializes in the defense of criminal cases?

[fol. 327] A. No, I do not.

Q. Do you know William W. Kleinman or David Price?

A. No, I don't.

Q. A lawyer by the name of Saul Price, a former Assistant District Attorney in Manhattan?

A. No.

Q. In any of your business or other contacts did you come in connection with any official of the Amalgamated Clothing Workers of America?

A. No.

Q. Is the name of Jacob Potofsky familiar?

A. It is not.

Q. Is the name of Murray Weinstein, manager of the Clothing Cutters Union of the Amalgamated, familiar to you in any way?

A. No, it is not.

Q. Or that of Sam Katz, the business agent of that union and associated with the Amalgamated?

A. No.

Q. Is there any familiarity in the name of Bruno Belia, an organizer for the Amalgamated at its home office?

A. None whatsoever.

Q. Or that of Abe or Abraham Becker?

A. No.

Q. Or the name of a man, Yudelowitz, in the knee-pants business?

A. Never heard of him.

Q. Any familiarity with a Salvatore Marazzano?

A. No.

Q. Do you have any connection, directly or indirectly, or have you had in the past, with Local 240 of the Clothing Drivers & Helpers Union?

A. None at all.

Q. Is the name of Philip Orlofsky, a one-time manager of [fol. 328] a cutters' union connected with the Amalgamated, familiar?

A. It is not.

Q. Do you have any present or have you had any past connection with anyone in the Flour Truckmens Union, and specifically Local 138?

A. None at all.

Q. Is the name of Max Silverman familiar?

A. No, it is not.

Q. Or that of Wolfie Goldie?

A. No.

Q. Is there any familiarity to the name of William or Willie Alberts, a one-time bondsman?

A. None at all.

Q. Or the name of Emanuel Buchalter?

A. No.

Q. Phillie Buchalter?

A. No.

Q. Phillie Kowas?

A. No.

Q. The name of Bellanca or Tosca mean anything?

A. Not a thing.

Q. The name of any man with the surname of Weiss in the automobile business familiar?

A. Not at all.

Q. I take it that you have heard some discussion by counsel in connection with accomplice testimony. Have you heard that?

A. I heard smatterings of it from the rear of the room.

Q. Do you hold any prejudice against the District Attorney of the county or against the prosecution of a case wherein that type of testimony is employed or used by the prosecution?

A. No, I don't hold it against them at all.

Q. Do you hold anything against the prosecution? Do you have any bias or prejudice against the prosecution?

A. No.

[fol. 329] Q. Will you apply the tests that the Judge tells you should be applied to that type of witness?

A. I don't know that they are.

Q. Yes, I mean will you take the law exclusively from the Judge?

A. Yes.

Q. And if he applies certain rules or tests that you as a juror may or may not use in weighing the believability or the credibility of that type of witness, will you listen to the Judge's instruction in that regard and endeavor to follow it out in your deliberations?

Mr. Climenko: I object to the form of the question.

The Court: Overruled.

A. Yes.

Mr. Climenko: Exception.

Q. I did not hear your answer.

A. I say I will endeavor to carry out his instructions.

Q. As you sit now as a prospective juror, is your state of mind such that you would reject completely the testimony of an accomplice solely because he was a participant in the crime?

A. I would not reject it; I would think it over more carefully than I would other testimony, would not give as much credence to it probably immediately.

Q. Is your state of mind such that you could not believe an accomplice under any circumstances?

A. Well, unless the instructions of the Court were able [fol. 330] to convince me otherwise. At the present time I would not put much credence in the testimony of an accomplice witness.

Q. Let me try to get a more direct answer without wishing to bind you down, as it were, to your mental state. What I want to find out is this: As you sit in the jury box now as a prospective juror, is your state of mind such that no matter what the circumstances were, you just would not believe an accomplice?

A. My present state of mind is that, not having heard anything, I would not believe it, I would not give credence to what he said unless I had a very good reason to do so. I would not reject it. I would listen to him with an open mind as much as I could, but I don't believe when he came to the stand I would feel the same towards him as I would towards another witness. I would not say I was biased, but I would be a little suspicious that he had some irons in the fire or something like that.

Q. I don't mind you looking at the testimony with care and with caution, even suspicion, when it emanates from an accomplice. What I am trying to find out, Mr. Spence, is this: Would you reject that kind of testimony solely because it came from an accomplice?

A. No, not solely because of that, no.

Q. Well, would you reject it because the testimony came from an accomplice?

A. I would be inclined to. I would not say definitely [fol. 331] that I would, because the circumstances in connection with the testimony might change my opinion that I have now, but right now I feel that testimony from an accomplice witness is not as credible as one that comes in without being an accomplice to the supposed crime.

Q. Of course, in the prosecution of crime do you understand that in some cases the District Attorney has outside witnesses, what may be termed outside witnesses?

A. Yes.

Q. People that saw the actual crime committed, for example, if it were a robbery case, the victim of the robbery and the people that were near by when the occurrence took

place. You understand that there are those types of prosecution?

A. I do.

Q. Then, of course, do you appreciate, too, that there are types of prosecution where the prosecutor must avail himself of accomplice testimony?

Mr. Climenko: I object to that question, improper in form and it assumes a state of facts not applicable, and it is not true as a matter of fact or law.

The Court: Reframe it. Use the word "may."

Mr. Turkus: I will reframe it in that respect.

Q. Do you understand, Mr. Spence, that there are certain types of prosecution for crime where the District Attorney may use the testimony of an accomplice?

A. I understand it has been done, yes.

Q. What I am trying to find out, and, of course, I cannot creep into your mind except by the questions, to ascer- [fol. 332] tain your state of mind as to whether you would reject the testimony of an accomplice because he was a participant in the crime.

The Court: You mean uncorroborated?

Mr. Turkus: No, I don't mean uncorroborated.

The Court: If uncorroborated, he would have to reject it.

Mr. Turkus: He would not even get a chance to do anything else.

The Court: He does not know that. Maybe you better make that clear. His answers have been quite fair.

Mr. Turkus: Does your Honor preclude any further questioning?

The Court: No, I am only arguing. I think you will get to the point more quickly if you will let the witness understand just what the law does require.

Mr. Turkus: All I am endeavoring to ascertain is whether the prospective juror would reject the testimony of an accomplice under all circumstances.

The Court: Whether corroborated or uncorroborated?

Mr. Turkus: Yes, Judge.

The Court: All right.

The Talesman: Would I reject it under all circumstances?

Q. Yes.

A. No, I would not.

Q. Is your state of mind such that you would not believe the testimony of an accomplice under any circumstances?

A. No, it is not.

[fol. 333] Q. Is your state of mind such that you will look at the testimony of an accomplice carefully and with caution?

A. Yes.

Q. And that you will listen to his testimony, you won't shut your ears to it, you will listen to it?

A. I will listen to it.

Q. Will you close your mind to what he says, or will you really listen to it?

A. I will listen to it, yes.

Q. Now, you get other evidence in the case, and from the other evidence in the case you are satisfied that the accomplice is not only telling the truth about this murder, but that the defendants are connected with the murder. Would you have any bias or prejudice against the prosecution for the use of accomplice testimony?

A. Not at all, not under those conditions.

Q. Do you find any fault with the prosecutor for using that type of a witness in the case?

A. No fault with the prosecutor at all.

Q. Or would you have any bias against the prosecution?

A. None at all.

Q. Of this specific case. If you were satisfied after you heard the accomplice and you heard all the other evidence in the case that the accomplice is not only telling the truth but that the defendants at the bar are connected with the murder, by the other evidence, you would not acquit the defendants because you did not like accomplices, would you?

[fol. 334] Mr. Talley: I object to that question, if your Honor pleases. He has no right to ask that.

Mr. Turkus: I have a perfect right to ask it.

Mr. Talley: As to form and as to substance.

The Court: Overruled.

Mr. Talley: Exception.

Q. Have you lost track of it?

A. Yes, I have.

Q. (Pending question read.)
A. I would not.

Mr. Rosenthal: I object to it on the ground that he not only must be satisfied, but he must be satisfied beyond a reasonable doubt. The question is improper.

The Court: Beyond a reasonable doubt and with that degree of corroboration which the law requires.

Mr. Turkus:

Q. Are you in sympathy with law enforcement?
A. I am.
Q. And if selected as a juror in the case, will you endeavor to do justice in the case?
A. I will.
Q. And render a verdict that is in consonance with justice?
A. Yes.
Q. Have you any bias or prejudice against expert testimony, whether it be medical testimony, fingerprint testimony, or ballistics testimony?
A. No bias.
Q. I believe you presented some excuse to the Court.
A. I certainly did.
Q. Is your state of mind such that you can devote your-
[fol. 335] self to the trial of this case?
A. I would try and make it that way. At the present time things are considerably upset in my business and I found myself lapsing away from things that happen here and thinking of things in other places. Of course I would do my best to keep my mind on the business in hand here.
Q. If accepted as a juror, will you listen to the evidence and banish——
A. Yes.
Q. —outside things?
A. Yes.
Q. And decide this case on its merits?
A. Yes, I will.
Q. If accepted as a juror you will undoubtedly and as a matter of law automatically become the foreman of the jury, and if accepted will you listen to reasonable discussion of the other jurors in the case?
A. Certainly.

Q. Use common sense and understanding that you acquired in your every-day business in deciding one issue in the case: Are these defendants guilty, or are they innocent?

A. I will.

Q. If any defendant comes forward with a defense, for example, the defense of alibi, will you take the law exclusively from the Judge in that regard?

A. Yes, I will.

Q. If instructed, as you will be, on the law of reasonable doubt, will you apply the instruction of law to the case?

A. I would.

Q. And when instructed on the presumption of innocence, defendants are presumed to be innocent, will you apply that [fol. 336] presumption to the case?

A. I would.

Q. To the defendants at the bar of justice?

A. I would.

Q. Do you know the former District Attorney of the county, Mr. Geoghan?

A. No, I do not.

Q. Do you know any member of his staff?

A. None at all.

Q. Do you know Judge O'Dwyer, from out at North Hills?

A. No, I never met him out there.

Q. Do you know any member of Judge O'Dwyer's staff?

A. No, I do not.

Q. Do you attend at North Hills regularly?

A. No, I am not a member. I have been a guest of a member out there on several occasions.

Q. You have no connection now with any of the industries or any of the unions that I enumerated?

A. None at all.

Q. No contact, directly or indirectly, with any of the areas that I mentioned?

A. No.

Q. Is your mind free and open now as you sit in this jury, to decide this case on the merits?

A. Yes.

Q. Have you any opinions or impressions of prejudice against the defendants?

A. No.

Q. If selected as a juror in the case, you will devote yourself to your job as a juror and endeavor to do justice in the case?

A. I would.

Q. Listen to the evidence in the case? The argument and the inferences to be drawn up by defense counsel when they sum up?

[fol. 337] A. I would listen, yes.

Q. The argument and inferences of the prosecutor when he draws inferences in his summation?

A. Yes.

Q. The law of the case as given by the trial judge, discuss the case with reason and common sense with the other jurors, without rancor and bitterness, and after you have heard all the evidence and had the benefit of listening to all the lawyers and the District Attorney and the Judge, and you are satisfied beyond a reasonable doubt that there are three guilty men at the bar of justice, guilty of the crime of murder in the first degree, will you say that in your verdict?

A. I would.

Q. Would you hesitate, would you be reluctant, would you be fearful to say so?

A. No, I would not.

Q. Is there any reason concerning which I have elicited no response from you which would preclude you from being a fair and impartial juror?

A. No, there is not.

Q. And you say unequivocally, if satisfied beyond a reasonable doubt that there are three guilty men at the bar of justice, you will render that verdict in consonance with your finding?

A. Yes.

By Mr. Talley:

Q. Mr. Spence, if you were not satisfied beyond a reasonable doubt of the guilt of these defendants or any of them, would you hesitate to bring in a verdict of Not Guilty?

A. I would not hesitate at all.

[fol. 338] Q. Do you know of any reason why you cannot sit as a fair and impartial juror in the trial of this case, any reason at all?

A. Well, only my outside affairs, that's all, if that is a reason.

Q. You mean that you might be distracted by your being away from your business?

A. That is right.

Q. That is the only thing in your mind now that might interfere with your——

A. That and the testimony of the accomplice witness would be the only doubt in my mind.

Q. Will you repeat that?

A. The testimony of accomplice witness would be the only thing that would in any way hinder me from fulfilling my duty as a juror.

Q. With regard to the testimony of accomplice witness, if the Court charges you that it is your duty to scrutinize such testimony with extreme care and caution, that you would do?

A. I would do it, yes, to the best of my ability.

Q. Yes, that is all that is expected of you or any juror, to do the best of your ability. Have you read anything about this case or any of the defendants connected with it?

A. News items telling it had come to trial and giving supposed cause of the murder, the motive.

Q. Did you form any impression from the reading of news items or anything else with respect to the guilt or innocence of these defendants?

A. Not to the guilt or innocence of them, no.

[fol. 339] Q. Do you go into the jury box with any impression about either of these defendants, one way or the other?

A. Well, yes, I do.

Q. Is that impression an unfavorable one to the defendants or any of them?

A. I would say it was.

Q. And that impression is formed solely upon what you read in the newspapers; is that so?

A. That is right.

Q. Did you read any articles in *The Mirror*?

A. I did not.

Q. Did you read the Life and Achievements of the District Attorney as set out in the Journal American?

A. No, I did not.

Q. Would it take some evidence to remove the unfavorable impression that you say you formed about these defendants or any of them from what you read?

A. Some evidence.

Q. Yes.

A. The impression that I have has nothing to do with their guilt or innocence in this particular case. I have an unfavorable impression of the defendants as men from the newspapers.

Q. You mean with respect to their character and reputation?

A. That is right.

Q. This case, then, would start with a handicap against them so far as you were concerned?

A. Yes, I think it would to some degree.

Q. And that would require some evidence, wouldn't it, adduced in this case, to change that impression?

A. It would; it would.

[fol. 340] Q. If the Court charges you that it is the law of this state, in fact, it is one of the fundamental laws of the country, that every defendant is presumed to be innocent until his guilt is proven and that in addition to that it must be proven beyond a reasonable doubt, your actions as a juror would be determined by that charge of the law, would it?

A. My efforts as a juror would be put forward in that respect. I would make every effort to discard what was in my mind and judge them solely on the evidence, and as charged by the Court.

Q. Do you think it would require some effort upon your part to do that?

A. At the present time it would, yes.

Q. It would?

A. The way I feel now, yes.

Q. And the only way that it could be removed, Mr. Spence, would be by some testimony, wouldn't it?

A. That is right, of what happened during the trial.

Q. Something during the trial? So that we would not start off with the presumption that they are innocent?

A. Yes.

Q. As far as you are concerned, would they?

A. Yes, they would.

Q. Despite your impression gathered from what you read as to their character, you still would accord them the benefit of the presumption of innocence, would you?

A. Yes, on the charge.

Q. Irrespective of the impressions you have formed from the reading of newspapers with respect to their character,

[fol. 341] you still believe that the evidence in the case might be such that would satisfy you they were not guilty of the particular crime by which they are charged; is that correct?

A. That could happen.

Q. Do you understand that an indictment for a crime has no probative force about it at all?

A. I understand that.

Q. And do you understand it is merely an accusation in writing, which is made by the District Attorney of the county?

A. That is right.

Q. And it brings them into court and starts the machinery of the trial going? That is quite clear to you, is it?

A. Very clear.

Q. And you do not attach any more importance to an indictment than just that, that it is a charge against them?

A. Not against the men on trial. I do against the accomplice witness. If he has been indicted and he is testifying, he has some reason to avoid that indictment.

Q. Or punishment for the crime?

A. That is right. I believe that.

Q. And that is why you follow the instructions of the Court to scrutinize carefully the testimony of a witness who said he was an accomplice in a crime?

A. That is right. I would make every effort to believe that he was an ordinary witness and had no purpose in being an accomplice witness, but it would be rather difficult to get that out of my mind.

[fol. 342] Q. If the Court charges you you are not beholden, you are not compelled to get it out of your mind, that would make it more uncomfortable for you?

A. If I did not?

Q. If the Court charged you it is your duty as a juror to scrutinize with great care the testimony of an accomplice, that would not make it difficult for you, would it?

A. I would follow the Court's instructions to the best of my ability.

Q. And you would scrutinize the testimony of an accomplice with great care?

A. Yes, I would. I would scrutinize the testimony of any witness with great care.

Q. But particularly of an accomplice in a crime?

A. More carefully.

Q. Yes, that is what the Court would charge you is the law in this case. You are not acquainted with anybody now attached to the District Attorney's office?

A. No one at all.

Q. Are you acquainted with any of the officials of the Police Department?

A. No officials, no.

Q. Any members of the Police Department at all are you acquainted with?

A. I have a brother-in-law who is in the Police Department.

Q. What rank?

A. Patrolman.

Q. In what borough is he working?

A. In Manhattan, Second Precinct downtown.

Q. In the Detective Bureau is he?

A. No.

Q. Have you discussed this case or any of its phases, or [fol. 343] have you discussed the defendants or any of them with your brother?

A. My brother-in-law.

Q. Your brother-in-law.

A. No, I have not seen him. I have only seen him briefly since I have been called as a juror.

Q. Do you know whether he is acquainted, from his identification in the Police Department, with Judge O'Dwyer, the District Attorney?

A. No, I don't believe he is.

Q. Would the fact that the District Attorney is a candidate for Mayor make any difference in your deliberations upon this case?

A. None at all.

Q. Could you dissociate that fact entirely from your deliberations as a juror to determine the guilt?

A. Absolutely. It never entered by mind.

Q. It would not occur to you in your mind at all?

A. No way at all.

Mr. Rosenthal: Your Honor, could I make a request? In view of the fact that it is necessary for all the defendants to join in a challenge for cause which the panel here may not know, it becomes necessary for counsel to confer together. I don't want any unfavorable impression to be gained by that fact.

The Court: There cannot be any unfavorable impressions.

Mr. Rosenthal: But the fact is that we all must join in the challenge, in the event there is one.

The Court: That is the law; you have to talk together.

[fol. 344] Mr. Rosenthal: Thank you, sir.

By Mr. Barshay:

Q. Mr. Spence, just a few questions to clear up a little odds and ends. I heard you say that a delay in this case may prejudice your business interests. Is that so, sir, to some degree?

A. Yes.

Q. I hope you won't charge that to either side in this case?

A. No, I would not charge it to them. It would be a condition that I could not avoid, but I would not hold any prejudice on it.

Q. It would not prejudice either side, would it?

A. No.

Q. By no means?

A. None at all.

Q. Is your business condition of such a nature that it would take your mind off your work as a juror, sir?

A. Well, that is one thing that I am not too sure of, that conditions in the business are considerably upset due to the death of a member of the firm. My duties have been increased to take over some of his, and it is an unfortunate time that this should occur to me.

By the Court:

Q. Priorities?

A. We are working now in connection with some naval lenses. It has gone through the laboratory stage of development, and I am more or less handling it personally.

Q. You do not make lenses?

A. We make a certain material is used in producing this [fol. 345] type of lens that the Navy is developing.

Q. Pigment in lens?

A. Yes, some metallic pigment.

Q. Is your concern a jobbing concern?

A. Manufacture.

Q. Or do you manufacture from the raw material?

A. Manufacture from the raw material, and some items we buy.

Q. You make the ceramic colors?

A. That is right.

Q. And the gold?

A. That is a nucleus of our business, and it is one of those that has been developed to a state that can be used for this particular type of lens. It has all passed through the laboratory stage and a company has been formed to go into manufacture of these lenses. That is just where we are now. As a matter of fact, I have the name of the company only last week which has been formed to produce the lenses. While nothing is in contract form at the present time, we hope to be the ones that will supply the metallic preparation.

Q. That would have to go to the American Optical Company, wouldn't it?

A. No, it is not going through that at all. You mean up in Massachusetts?

Q. Yes.

A. No, it is not being handled through them at all. As I say, a new company has been formed. As a matter of fact, the experiments did not even go through our laboratory. It went through an outside source laboratory and having been approved, then the company was formed for making——

Q. It is a secret formula?

[fol. 346] A. The formula is not secret; the process is secret.

Q. You have the process?

A. We have the material used in the process, and that is the situation as it is today.

By Mr. Barshay:

Q. Mr. Spence, of course you realize in this procedure here that some things are entirely with the Court and not with us, either Mr. Turkus or our counsel?

A. I do.

Q. You understand?

A. I do.

Q. Would the fact that the jury when chosen, if you are one of them, would be locked up for the duration of the trial at the order of the Court, would that prejudice you against any of the defendants?

A. No, it would make me resentful of the whole condition, but I don't think it would prejudice me against any individual or group of individuals.

Q. Will your resentment find a subject which is one of the defendents?

A. No, I would not take it out on anybody, so to speak.

Q. We will take your word for it. You also said, Mr. Spence, that in reading about the case you read about the motive?

A. That is right.

Q. Something in the newspaper?

A. That is right.

Q. Did you accept the accuracy of that statement in the newspaper?

A. I accepted it as fitting in. I do not accept any newspaper items as truths, but I accepted it as fitting in with my own conclusion that that could be the motive very easily, [fol. 347] what the newspaper stated.

Q. And, of course, that conclusion that you drew is unfavorable to some of the defendants, or maybe two of them?

A. At the present time it is.

Q. And by reason of that you said that it would require some evidence to remove that conclusion or opinion?

A. That is correct.

Q. Isn't that so?

A. That is correct.

Q. I take it you understand that the District Attorney would not furnish you with evidence to remove that conclusion or impression?

A. Naturally not.

Q. So you would require the defendants to furnish evidence to remove that conclusion or impression, wouldn't you?

A. Yes.

Q. I may say to you, Mr. Juror, that that conclusion, that you would require testimony on the part of the defendants, is inconsistent with the priniples of law under which we try cases, because the Court shall tell you that each defendant, if he wants to, in his own choice, may remain absolutely silent, he need not prove anything at all, he need not disprove anything at all, he need not even explain any accusation against him. Would that effect your judgment?

A. Would that affect my judgment?

Q. Yes.

A. I don't understand the question thoroughly.

Q. I will put it a different way. You said the defendants will have to offer some testimony.

A. Yes.

[fol. 348] Q. To remove that impression; is that correct?

A. That is correct.

Q. Other than speaking for the defendant Buchalter, if in the wisdom or lack of wisdom of counsel we should decide to remain absolutely silent and not offer a single word of testimony here, then you would be placing us in the position of demanding from us an explanation which the law says we need not offer; isn't that so?

A. Apparently it is, yes.

Q. Then you will hold it against us if we do not offer—

A. I would still have that opinion in the matter that I had gained from the newspaper article, what the newspaper stated, in collaboration with my own opinion in the matter. I would have received nothing to change my opinion.

Q. And that would preclude you from giving this defendant a fair trial?

A. I imagine it would in some respects.

Q. You want to be a fair and impartial juror, don't you?

A. I certainly do.

Q. Then you place the defendant Buchalter in a very unenviable position.

A. I don't do it; it is the circumstance that I happened to read the newspaper. It is my own mind. I have not a legal mind; I just read and conclude, as anybody does, draw an opinion.

Q. You have a right to find any way you want. I find no fault with your opinion at all, but it would not be fair to the defendant Buchalter, would it?

[fol. 349] A. No, I don't believe it would be thoroughly fair to him, no.

Mr. Barshay: I challenge the juror for cause.

The Court: Try the challenge.

PARKER M. SPENCE, of 75 Winthrop Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Should I ask you, now that you are under oath, the same questions that I asked you before you were sworn, would you make the same answers, sir?

A. I would.

Mr. Barshay: I press the challenge.

Mr. Turkus: No questions.

Mr. Talley: We join in.

The Court: Sustained.

CARL J. JOHNSON, of 107—80th Street, Brooklyn, New York, was then examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Johnson, do you live in the Bay Ridge section of Brooklyn?

A. Yes.

Q. Lived in Brooklyn for a number of years?

A. All my life.

Q. I believe when you were addressing the Court you said you were in the business of manufacturing window shades and other articles of that type?

A. Yes.

Q. Does business bring you into the Brownsville-East [fol. 350] New York area of Brooklyn?

A. It has, yes.

Q. Does it presently?

A. Yes.

Q. Is it with firms doing business in that district?

A. Yes.

Q. You personally go into the neighborhood?

A. On occasions.

Q. Do you have any business in the garment district of Manhattan?

A. No, but based on the questions that you raised with other jurors, I have had some business dealings with the Amalgamated Clothing Workers and Mr. Potofaky.

Q. Has that been recent?

A. Yes.

Q. Is it in connection with your own business?

A. Yes.

Q. Are any of the employees of your business in the Amalgamated as members of that union?

A. No.

Q. Do you secure material from any firm or corporation which is identified with the Amalgamated?

A. They buy it from us.

Q. The Amalgamated?

A. A gentleman that was set up in business by that union buys our materials. Based on his financial condition, I would not check his credit, and the Amalgamated Clothing Workers Union guaranteed our account.

Q. Is that the limit of your contact with that union?

A. That is the limit of my contact.

Q. Is the name of Murray Weinstein, a manager of the Cloaking Cutters Union, Local 4, of the Amalgamated, familiar to you?

A. No, sir.

[fol. 351] Q. Is the name of Samuel Katz or Sam Katz, a business agent of Local 4 of the Clothing Cutters Union of The Amalgamated, familiar?

A. No, sir.

Q. Did you ever hear the name of Bruno Belia?

A. No.

Q. Organizer at the home office of the Amalgamated?

A. No.

Q. Or of Salvatore Marazzano?

A. No.

Q. Do you know any officials of Local 240 of the Clothing Drivers & Helpers Union?

A. No, sir.

Q. Or of Local 138 of the Flour Truckmens Union?

A. No, sir.

Q. Any familiarity with the name of Silverman, Max Silverman, or Wolfie Goldis?

A. The name Silverman recalls to my mind that I saw or rather, I was on the Luckman conspiracy case, and I think I might have seen Silverman at that time.

Q. Were you a prospective juror in that case?

A. I was a juror.

The Court: Grand Juror?

The Talesman: No, I was a juror.

Q. In that case where Silverman was a defendant?

A. I believe he was one of the defendants, if I recall it correctly.

Q. Conspiracy charge, was it?

A. Yes.

Q. Is the name of Willie or William Alberts, a bondsman, familiar?

A. No, sir.

Q. That of Emanuel Buchalter or Phillip Buchalter?

A. No, sir.

Q. Or Phillie Kowas?

A. No.

[fol. 352] Q. Bellanca, or Tosca? Did you ever hear those names?

A. No.

Q. Is there anything about the nature of the charge, Mr. Johnson, which would preclude you from presiding as a trial juror in the case, namely, a charge of murder in the first degree?

A. No.

Q. Have you any conscientious or other scruple against capital punishment?

A. No.

Q. Will you decide the case on the facts and on the merits regardless of the punishment?

A. Yes.

Q. Since your name appeared on this jury panel and since you received notification, did anyone speak to you about this Rosen case?

A. My family has, yes.

Q. And that was with respect to the possibility of serving as a juror in the case?

Mr. Barshay: Your Honor, I object to the form of the question. It is leading and suggestive of an answer. Let him tell what the family spoke about.

The Court: Overruled.

Mr. Barshay: Exception.

(Pending question read.)

Mr. Barshay: There may be other reasons. That is my objection. There may be other reasons that the family spoke to him about other than the one implied in the question.

Mr. Turkus: The juror can take care of himself.

[fol. 353] Mr. Barshay: The question requires a yes or no answer.

Mr. Turkus: I wish to argue the point.

The Court: Hear what the juryman says.

A. Will you repeat the question, please?

Q. (Pending question read.)

A. Yes.

Q. Have you had any discussion as to the merits of the case?

A. Yes.

Q. With members of your family?

A. Yes.

Q. Anyone outside your family?

A. Yes.

Q. Anyone connected with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Anyone connected with Local 138 of the Flour Truckmens?

A. No, sir.

Q. The Clothing Drivers & Helpers Union?

A. No, sir.

Q. Anyone in the garment district or clothing district of Manhattan?

A. No.

Q. Anyone associated or connected at the Brooklyn waterfront?

A. No, sir.

Q. Are you in sympathy with the enforcement of the law, the Penal Law?

A. Yes, sir.

Q. Do you know any of the lawyers who are defending the men at the bar? I have read the names off. I will re-read them.

A. I don't know any of them.

Q. Is the name of William W. Kleinman or David Price familiar to you?

A. Yes, sir.

[fol. 354] Q. By reading?

A. By that conspiracy case that I was a juror on.

By the Court:

Q. That was tried in June four years ago?
A. About that, I believe, yes.

By Mr. Turkus:

Q. You don't know them other than that?
A. No.
Q. Saul Price, a lawyer in Manhattan, one-time Assistant District Attorney, have any contact with him?
A. None at all.

By the Court:

Q. Where is your place of business?
A. 225 Fifth Avenue.
Q. What is the name of it?
A. The Columbia Mills, Incorporated.
Q. Where are the mills located?
A. Minetta, New York, West Pullman, Illinois, Los Angeles, California, Saginaw, Michigan.
Q. You make window shades of fabric?
A. We make the window shade cloth.
Q. Purely a textile business?
A. Yes, sir, except for the fact we manufacture Venetian blinds also.

By Mr. Turkus:

Q. Mr. Johnson, do you have any bias against the District Attorney of the county or any prejudice against the prosecution which employs the use of accomplice testimony?
A. I do.
Q. Is that a strong prejudice?
A. Yes, sir.
[fol. 355] Q. Is the prejudice directed to the prosecutor or the prosecution, or both?
A. It has reference to my position with reference to an accomplice.
Q. Have you read of this case in the newspaper?
A. Yes, sir.
Q. Have you formed an impression or opinion in connection with it?
A. I believe so.

Q. Would you say it was an opinion or an impression?

Mr. Climenko: I object to the question.
The Court: Overruled.
Mr. Climenko: Exception.

A. I would say it was an impression.

Q. Is it an impression that goes to the merits of the case?

A. I don't understand that question.

Q. Is it an impression that goes to the question of guilt or innocence of the defendants?

A. Yes.

Q. Is it an impression that would require some evidence on the part of the defendant to remove?

A. Yes, sir.

Q. On the part of all of them, or one?

Mr. Rosenthal: That is objected to.
Mr. Turkus: Withdrawn.

Q. As you sit in the jury box now, would you expect the defendant against whom you have that opinion to present evidence to you to dispel it?

A. Yes.

Q. And unless he did so, you would have the same impression or opinion that you have now?

A. Yes, sir.

[fol. 356] Q. Even though he were under no legal obligation to do so?

A. That is right.

Mr. Turkus: Challenge for cause.

Mr. Barshay: Everybody joins in.
The Court: What is that?

Mr. Barshay: We have no questions, your Honor.
The Court: Any challenge for cause?

Mr. Barshay: The District Attorney made a challenge.
The Court: I did not hear any challenge.

Mr. Turkus: There is, your Honor. I am compelled to challenge when he has that opinion against the defendant.
The Court: I did not hear it. Try the challenge.

Carl J. Johnson, of 107 Eightieth Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Johnson, before you were sworn on this challenge, I asked you questions affecting a prejudice that you have against one of the defendants. Do you recall that?

A. Yes, sir.

Q. The responses that you made were true and sincere, were they not?

A. They were.

Q. You have that prejudice?

A. I have.

Q. That precludes you from being fair and impartial to the defendants?

A. Yes.

Mr. Rosenthal: No questions.

The Court: Sustained.

[fol. 357] John F. Fitzgerald, of 1823 East 16th Street, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Fitzgerald, are you living in this Flatbush section of Brooklyn?

A. Yes, sir.

Q. Have you lived there for a number of years?

A. About twenty-eight years.

Q. On the trestle board you are listed as an assistant treasurer. Is that with some firm or corporation?

A. Yes, sir, Postal Telegraph.

Q. Offices in Manhattan?

A. Yes, sir.

Q. And are you employed in the office in Manhattan?

A. I am.

Q. Is there anything about the nature of the charge, namely, the charge of murder in the first degree, which would impair or prevent your service as a juror?

A. No, sir.

Q. Do you have any scruple, conscientious or otherwise, against capital punishment?

A. I have not.

Q. Would you permit punishment to enter into your deliberations as to guilt or innocence?

A. No, I would not.

Q. Do you know any of the nine lawyers representing these defendants at the bar?

A. No, I don't.

Q. Do you know anyone connected with their law offices?

A. No, I don't.

Q. Do you know intimately any member of the bar who [fol. 358] specializes in the defense of criminal cases?

A. No, sir.

Q. Is the name of William W. Kleinman or David Price familiar?

A. No, sir.

Q. Or that of Saul Price?

A. No.

Q. Have you had any business or other contacts, directly or indirectly, with any official of the Amalgamated Clothing Workers of America?

A. No, I have not.

Q. Were the names of Jacob Potofsky, Murray Weinstein, or Sam Katz familiar as I read them off to other jurors?

A. No.

Q. That of Bruno Belia or Salvatore Marazzano?

A. No, sir.

Q. Or the name of Philip Orlofsky, a one-time manager of the Cutters Union, Local 4, of the Amalgamated?

A. No.

Q. Do you know or are you acquainted with any official of Local 138 of the Flour Truckmens Union?

A. No, sir.

Q. Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Is the name of William Alberts, a one-time bondsman, familiar?

A. No, sir.

Q. Or that of Phillie Buchalter, or Phillie Kowas?

A. No, sir.

Q. Emanuel Buchalter, is that name familiar?

A. No, it is not.

Q. Is the name of Weiss, running some rental agency of automobiles, familiar?

A. No, sir.

Q. The names of Bellanca or Tosca mean anything to you?

A. They do not.

Q. Did business at any time bring you into contact with [fol. 359] the Brownsville-East New York area of Brooklyn?

A. No, sir.

Q. The garment district of Manhattan?

A. No.

Q. Or the clothing district?

A. No.

Q. Or any clothing truckers?

A. No, sir.

Q. Or trucking companies?

A. No.

Q. Any connection, directly or indirectly, with anyone on the Brooklyn waterfront?

A. No.

Q. Are you in sympathy with the enforcement of the Penal Law of the state?

A. I am.

Q. Have you heretofore served as a juror in a criminal case?

A. Not in a criminal case, no.

Q. Was it in a civil case?

A. Yes.

Q. Did the case go to a conclusion, and by that I mean did you hear the Judge's charge on the law?

A. I did.

Q. In this case will you accept the law without qualification and without reservation from the trial judge, Judge Taylor?

A. I will.

Q. If the Judge charges you, as he will, on the law of reasonable doubt, will you do your best to follow that instruction?

A. I will.

Q. And when he charges you on the presumption of innocence, will you give that presumption to the benefit of the defendants?

A. I will.

Q. If, after you have heard the whole case, however, you are satisfied beyond a reasonable doubt that the defendants [fol. 360] at the bar are guilty as charged, would you hesitate to say so in your verdict?

A. I would not.

Q. Would you have any fear or reluctance in so saying?

A. No, sir.

Q. Is there anything as yet concerning which I have elicited no inquiry or no response, rather, which affects your ability to sit on this jury as a fair and impartial juror?

A. No, sir, except that the length of the trial might make me anxious of what is going on at home.

Mr. Talley: We did not hear you.

The Talesman: The length of the trial might make me think of what is going on at the office or at home.

By the Court:

Q. The Postal Telegraph Company will be there when you get back.

A. Yes, I hope so.

Q. Fifty-one years in existence, isn't it?

A. That is right.

By Mr. Turkus:

Q. I suppose your state of mind is that nobody goes looking furtively for jury duty, but if you are called to serve, you will do your job as a juror in consonance with your oath?

A. I would.

Q. So that as you sit in the jury box now there is nothing which would impair your ability to carry out your oath of office as a juror and decide this case on the evidence; is [fol. 361] that correct?

A. That is correct.

Q. Do you know Judge O'Dwyer, the District Attorney of the county?

A. No, sir.

Q. Do you know any member of his staff?

A. No.

Q. Do you know the former District Attorney, Mr. Geoghan, or any member of his staff?

A. I do not.

Q. In the event that any one or more defendants should invoke the defense of alibi, will you take the law with respect to that defense exclusively from the trial judge and apply the law that he gives you?

A. I will.

Q. As you sit in the jury box, you have no prejudice, then, either against the prosecution or in favor of it?

A. No.

Q. And you have no prejudice against any of the defendants?

A. No, sir.

Q. Do you find any fault or have you any prejudice against the District Attorney of the county for the use of accomplice testimony, that is, taking one of the participants in the crime and having him testify against the defendants on trial? Do you find any criticism, have you any prejudice against the prosecutor for the use of such testimony, or against the prosecution?

A. No.

Q. If you are satisfied from all the evidence in the case the accomplice is not only telling the truth but the other evidence tends to connect the defendants with the commission of the murder, and you are satisfied of that beyond [fol. 362] a reasonable doubt, would you hesitate to say so in your verdict?

A. No, I would not.

Q. If selected as a juror in the case, will you endeavor conscientiously to arrive at a just verdict?

A. I will.

Q. Will you listen to fair and reasonable discussion and argument by the other jurors in the case?

A. Yes, sir.

Q. Will you use the common sense and understanding that you get in your every-day business experience and daily life, in weighing the one issue in the case, the guilt or innocence of the defendants?

A. Yes, sir.

Q. If at the end of the entire case, after you have heard all the evidence and you have listened to the lawyers for the defendants at the bar of justice tell you what they think of the evidence and the inferences they draw, and you listen to the District Attorney make his summation, and then have the benefit of the discussion of law and the

charge of the learned Court on the law, you talk the case over without rancor and bitterness with the other jurors, and you come to the conclusion that you are satisfied beyond a reasonable doubt that Buchalter, Weiss and Capone are guilty of murder in the first degree, will you say that in your verdict?

A. I will.

Q. Will you say it without fear, without reluctance, and without hesitation?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Fitzgerald, are you related in any way to judge [fol. 363] Fitzgerald of this court?

A. No, sir.

Q. Are you related to Detective Fitzgerald?

A. No, sir.

Q. Or Patrolman Fitzgerald?

A. No, sir.

Q. You have no relatives by that name in the law-enforcing agencies of the City or State of New York?

A. No, I have not.

Q. Do you belong to any association with any of the assistants of Judge O'Dwyer?

A. No.

Q. Or Judge O'Dwyer himself?

A. No.

Q. Social, political, or otherwise?

A. None whatever.

Q. Church?

A. No.

Q. Did you ever hear any of Judge O'Dwyer's assistants speak on the subject of crime?

A. No, I didn't.

Q. Never?

A. Never.

Q. Or the Judge himself?

A. No, I didn't.

Q. Are you on any committee, sir, to elect Judge O'Dwyer as the Mayor of New York?

A. No, I am not.

Q. Do you intend to be?

A. I don't think so.

Q. Are you intimately familiar with any police official of the City of New York?

A. Patrolman, that is all.

Q. And do you know where they are stationed?

A. Yes, he is up in Harlem right now.

Q. Do you know him intimately?

A. Yes, very good friend.

Q. Do they reside in Brooklyn?

A. Yes, just one.

Q. And have you ever discussed the subject of the prosecution of crime with them?

A. No, I have not.

[fol. 364] Q. Or the subject of the District Attorney's office in Brooklyn?

A. No.

Q. Or any of their own particular cases?

A. Well, spoke of different men he made arrests, that's all.

Q. Nothing to do with any Brooklyn case?

A. No.

Q. Are you a member of any law-enforcing agency yourself?

A. No.

Q. Or are you a member of any society for the prevention of crime?

A. No, I am not.

Q. Were you ever a grand juror?

A. No.

Q. Were you ever the victim of a crime?

A. No, I was not.

Q. Was any member of your family?

A. I might correct myself.

Q. Yes.

A. Last summer we were robbed, burglarized.

Q. Your home was burglarized last summer?

A. Yes.

Q. As the result of that did you form any prejudice against any person accused of crime?

A. No, they never arrested anybody for it.

By the Court:

Q. This was a Flatbush burglary?

A. That is right.

Q. Kings Highway and East 16th Street?

A. Well, it was the residence of my father. At that time they were away, and I was staying over there.

Q. Where is that?

A. That is on the corner of Ocean Avenue and Avenue T.

[fol. 365] Q. That is only a short distance from where you live?

A. That is right.

Q. Do you use the Kings Highway station of the Brighton Line?

A. Yes.

By Mr. Barshay:

Q. Mr. Fitzgerald, have you read about the case itself?

A. Just the news items, and I did read one article in the New York *Mirror*.

Q. Did you form an opinion as to the accuracy of the news items?

A. No, I didn't.

Q. With respect to this case?

A. No, I didn't.

Q. Are any of the facts contained in those items fresh in your mind now?

A. Yes.

Q. Are they detrimental to the defendants or any of them?

A. Well, I don't believe they would be detrimental.

Q. You say you don't believe. Is it that you are not certain?

A. I am not certain, no, that is right.

Q. They may be detrimental?

A. That is right?

Q. And the article that you read in the *Daily Mirror*, is that fresh in your mind?

A. There was not very much of it that I did read.

Q. Whatever you read, did you determine its accuracy?

A. No, I didn't.

Q. Did you form an opinion one way or the other with respect to its accuracy?

[fol. 366] A. Well, I believe that it was written on former cases.

Q. On former cases?

A. That is right.

Q. Did you read anything at all other than what you have already told us, magazines?

A. No, I didn't.

Q. Or heard on the radio any discussion?

A. No.

Q. Did you read anything about the defendants any place at all?

A. No, sir.

Q. As you sit here now, sir, is that opinion which you say is detrimental still in your mind?

Mr. Turkus: I object to the form "now," because the prospective talesman has said that the has read nothing of the defendant on trial.

Mr. Barshay: Talking about——

Mr. Turkus: The man may have a general prejudice against the commission of crime. That does not disqualify him.

The Court: Clarify your question.

Mr. Barshay: I am repeating the language that you used yourself.

The Court: Not repeating the context.

Q. What is detrimental toward the defendant that you said you read, some conclusion that you drew from reading the article isn't that so?

A. Yes.

Q. Mr. Fitzgerald, that remains with you right now?

A. That is right.

[fol. 367] Q. And that would require some proof on the part of the defendants to remove that detrimental impression, wouldn't it?

A. That is right.

Q. And you would require the defendants to furnish that proof?

A. I believe so.

Q. Or somebody on their behalf?

A. Yes.

Q. Then you would receive personally more than the law requires of the defendants, isn't that so?

The Court: This is clearly establishing an escape medium for the juror if he does not want to serve. You are putting the words in his mouth.

Mr. Barshay: I must strenuously object to your Honor's comment.

[fol. 368] The Court: Make it doubly strenuously, but it goes just the same. You will have to frame your questions in such a way as not to constantly lead.

Mr. Barshay: I object to that, sir.

The Court: You are doing the thinking for the talesman.

Mr. Barshay: I object to that comment.

The Court: Go ahead with the case.

Mr. Barshay: You don't feel as though I am putting any words in your mouth, do you, sir? (to talesman)

The Court: It is immaterial what the gentleman thinks; it is what the Court thinks that counts.

Mr. Barshay: I object to that, your Honor. I am addressing the juror. I am seeking his determination in the matter.

The Court: Very well. We will take a recess now till twenty minutes of two. Then conduct the questioning direct.

Defendants are remanded.

Recess till twenty minutes to two.

(A recess was thereupon taken until 1:40 p. m.)

[fol. 369] Afternoon Session—Trial Resumed

JOHN J. FITZGERALD, No. 2675, residing at 1823 East 16th Street, Brooklyn, New York, was examined as to his qualifications.

By Mr. Barshay:

Q. If I am correct, let me know. Did you say that as a result of some reading some place you formed an impression which is detrimental to the defendants, and which would require dissipation by the defendants on their behalf; did you said that?

A. Yes, sir.

Q. Is that your opinion right now?

A. Yes, sir.

Q. Unless the defendants or any of them or someone in their behalf dissipates that detrimental impression, it will not be removed?

A. No, sir.

Q. That is your honest answer?
A. Yes, sir.

Mr. Barshay: I challenge for cause.
The Court: Try the challenge.

(The talesman was then sworn, on the challenge.)

By Mr. Barshay:

Q. Would you answer the same way now that you are under oath as you just answered before?
A. I would.

Mr. Barshay: All counsel press the challenge.

By Mr. Turkus:

Q. At the outset, I think I got to the point with you where you said you could obey your oath as to the evidence, as a [fol. 370] juror, and decide the case on the merits; do you recall that?
A. Yes, sir.
Q. I think you also said you had never heretofore served as a juror in a criminal case.
A. Yes, sir.
Q. So, accordingly, you are familiar, aren't you, with some of the rules of evidence in criminal cases?
A. That is right.
Q. If you were instructed by the Judge presiding at the trial that no defendant in a criminal case has any burden whatever, would you obey that instruction of law?
A. I would.
Q. And if the Judge tells you that the defendant may or may not take the stand as he deems fit, and if he does not take the stand no inference may be drawn against him, would you obey that instruction?
A. Yes, sir.
Q. And if the trial justice should charge you that every defendant has the benefit or presumption of innocence and that he is presumed to be innocent unless his guilt is established beyond a reasonable doubt by the prosecution, will you follow that instruction?
A. I will.
Q. As you sit in the jury box now, have you any bias or prejudice against the law as I have just enumerated it to you?

A. No, sir.

Q. Understanding now that the defendant has no burden whatever in a criminal case, would you, nevertheless, expect him to give you facts in the case—now you understand he has no such obligation—would you feel he must give you evidence?

[fol. 371] A. My impression I formed from reading the article, not in this case——

Q. In other words, whatever you read has nothing to do——

Mr. Barshay: Let the juror finish his answer.

The Court: Yes.

Q. In other words, whatever you read had nothing to do with the Rosen case or the Rosen murder?

A. That is right.

Q. So you have read some articles in the newspaper in connection with other matters?

A. Yes, sir.

Q. I take it you understand your state of mind is such that certain cases are publicised more or less?

A. Yes, sir.

Q. I take it when people do read certain articles they leave impression—when you read your daily paper you are left with some impression?

A. Yes, sir.

Q. Now, the test is this—and before I apply the test may I say this—should the Judge charge you the law that it is the burden of the District Attorney to establish guilt beyond a reasonable doubt and that it must be fulfilled by evidence he brings in the court-room and not upon the basis of any newspaper article, would you follow that instruction?

A. Yes, sir.

Q. Do you find any fault with such a law?

A. No, sir.

Q. That is sensible and reasonable?

A. Yes, sir.

Q. That you establish the guilt of the defendants before a Court and jury upon evidence the prosecution brings [fol. 372] into court?

A. Yes, sir.

Q. Do you find any fault with the proposition that no newspaper article can supply any proof to a jury?

A. No, sir.

Q. That is sensible?

A. Yes, sir.

Q. Now, the test is this: Knowing that the defendant has no burden in this case, knowing that the burden is with the prosecution, to establish guilt beyond a reasonable doubt upon evidence—that he cannot remedy anything and cannot supplement anything by newspaper articles, do you feel you can lay aside whatever impression you may have gathered and decide this case fairly and squarely, and give a just result and just verdict on the evidence, in consonance with your oath as a juror?

A. I would try to.

By the Court:

Q. Would you or not?

A. I think I could.

Q. We have to get something better than that. Would you or wouldn't you?

By Mr. Turkus:

Q. Let me take you step by step again. Regardless of whether you think ill or well of a person, do you realize that on a specific charge he is entitled to justice?

A. Yes, sir.

Q. To be judged upon the evidence as to that specific charge?

A. Yes, sir.

Q. And surely don't you know whether or not you are competent and capable and will actually give such justice?

A. I would.

[fol. 373] Q. Without regard to your previous notion concerning his character?

A. Yes, sir.

By Mr. Rosenthal:

Q. When you answered Mr. Barshay as to your attitude or state of mind, you had no quarrel with any of the laws of our land at that time?

A. No, sir.

Q. When you answered Mr. Barshay you had in mind the knowledge that you would get the law from the Court?

A. I did.

Q. So when you made your answer to him it was with the thought and knowledge in mind that the law should come from the Court?

A. Yes, sir.

Q. When you first answered Mr. Turkus as to your ability to be fair, you used the word that you would try to be fair, and you thought you could be fair; isn't that what you said?

A. Yes, sir.

Q. That was before his Honor addressed any question to you?

A. Yes, sir.

Q. When you said you would try to be fair, that implied there was a commitment in your mind, didn't it?

A. It did.

Q. When you said you thought you could be fair, that also implied a doubt in your mind?

A. It did.

Q. Now, what you read in the newspaper was concerning one or more of these defendants, irrespective of what case it was involved in; isn't that true?

A. Yes, sir.

Q. And it was directed toward one of the names of the [fol. 374] defendants in here, the articles which you read?

A. That is right.

Q. So that when you said your prejudice was not attached to the particular case, you had in mind, however, your prejudice was attached to one of the individuals connected with this case, wasn't it?

A. I don't think I said prejudice.

Q. Your impression was detrimental?

A. That is right?

Q. And you had in mind that this impression which you had formed was a prejudicial one against one of the defendants in this case by reason of what you read about him not connected with this case?

A. That is right?

Q. When you answered Mr. Barshay you further stated, didn't you, that because of what you had read you would re-

quire proof to remove the impression which you had in your mind?

A. I did.

Q. That was your state of mind only two or three minutes ago?

A. Yes, sir.

Q. Now, is it not a fact that because of this impression which you had gained and which you carried with you for how long a period of time—Let me interrupt the question—How long a period of time is it since you read these articles?

A. About a month.

Q. And you have carried that impression, which is prejudicial to one of the defendants, for a month?

A. Yes, sir.

Q. And you carried it while you were sitting in the court-room listening to the other jurors being questioned, and [fol. 375] you carried it while you were being questioned by Mr. Barshay—that is true?

A. Yes, sir.

Q. And is it not a fact that because of that impression which is, in its nature, detrimental to one of the defendants, that you, trying as you would to be fair, would require a greater amount of evidence either from the defense, or a lesser amount of evidence from The People, than you would otherwise require if you did not have that impression in your mind?

A. I don't think so.

Q. There is a doubt in your mind even now, isn't there; wouldn't you say? You say you "don't think so." that implies a doubt, dosen't it? So that there is even a doubt now in your mind as to whether or not, because of the adverse impression you gained as to one of these defendants, you would be able to require only the same quality of evidence you would require in a case where you had not that impression? Isn't there a doubt right now in your mind?

A. I would want to be fair and listen to the evidence.

Q. I am only questioning you—nobody can find fault with your state of mind—we are entitled to twelve fair and impartial jurors. Are you implying by your answer to my question a second ago that there was a doubt as to your ability, even as much as you would like?

A. Yes, sir.

Q. And you still have that doubt as to your ability to do so?

A. That is true.

[fol. 376] Mr. Rosenthal: I press the challenge. All defense counsel join in the challenge.

The Court: Is everybody through?

Mr. Barshay: Yes.

The Court: The trouble is, with this talesman, he says one thing and then another; then somebody else comes back and asks him the same thing and he changes his mind again. The Court is unable to find out from his answers whether he would be partial or impartial juror, and, taking that, in connection with his apparent unwillingness to serve, the Court lacks faith in the sincerity of the talesman's answers. The challenge is sustained.

Mr. Barshay: May we record an objection to your Honor's comment about his unwillingness to serve?

The Court: Supposing you take at this time a blanket objection to all the comments of the Court in the course of the trial. It will save a lot of time.

Mr. Barshay: Yes.

The Court: Because the attitude between Court and counsel throughout the trial should, if possible, at all times be dignified and marked with both respect and restraint. The Court is trying to do its part. Of course, in the heat of advocacy, counsel sometimes shouts an exception and sometimes adds a word of displeasure. That should be [fol. 377] avoided. We must treat one another with respect throughout.

Morris Leibowitz, residing at 1005 Forty-fourth Street, Brooklyn, New York, No. 2803, was examined as to his qualifications to serve as a juror.

By the Court:

Q. Are you related to Mr. William Leibowitz, the lawyer?

A. No, sir.

By Mr. Turkus:

Q. Are you related to Judge Taylor's brother on the bench, Judge Leibowitz?

A. No, sir.

Q. Do you live in the Bay-Ridge Section of Brooklyn?

A. No, sir, you call that Borough Park.

Q. The trestle board lists you as manager, without any identification. What do you manage?

A. I am in the advertising novelty business. We make these cloth—painters' caps, which different painters wear on the job, with the advertisement of the paint concern on it.

Q. Do you supply those products to these painters?

A. Yes, sir.

Q. Do you come in contact with many painters in the painters' union?

A. No, sir.

Q. Does your business bring you in contact, or is the business with which you are connected—does it bring you in contact with people in the painting union?

A. No, sir.

Q. To whom are the products sold?

[fol. 378] A. To paint manufacturers and they, in turn, distribute them to the different stores.

Q. In other words, your business contact only brings you into association with different manufacturers of paints?

A. Yes, sir.

Q. That is the sole product you manufacture?

A. Yes, sir.

Q. Have you lived in the Borough Park section for a number of years?

A. Yes, sir, for about twenty-two years.

Q. Are you familiar with the nature of the charge in this case?

A. Yes, sir.

Q. Is there anything about the nature of the charge that would prevent or impair your service as a juror in the case?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Have you been in this business of manufacturing hats for a number of years?

A. Yes, sir.

Q. More than ten?

A. Yes, sir.

Q. Is your address in the neighborhood of 10th Avenue and 44th Street?

A. Yes, sir.

Q. Have you any familiarity with the name of Irving Feinstein?

A. No, sir.

Q. You don't know of any such person?

A. No, sir.

Q. Did you ever hear his name mentioned in any discussion around Borough Park?

A. No, sir.

Q. You lived in that section in 1939?

A. Yes, sir.

[fol. 379] Q. And you never heard the name of Feinstein mentioned?

A. No, sir.

Q. Did you ever read about Feinstein in the press?

A. No, sir, I did not.

Q. Did your business bring you at any time in contact with persons or firms in the Brownsville or East New York section?

A. No, sir.

Q. Did you ever have any contact of any kind, nature, or description in that area?

A. No, sir.

Q. Or in the Brooklyn waterfront area?

A. No, sir.

Q. Or in the garment district of Manhattan?

A. No, sir.

Q. Or the clothing district or the clothing truckers.

A. No, sir.

Q. Did you have any business with unions?

A. Yes, sir, we sometimes make caps for use in their May Day parade.

Q. What union is that?

A. We have made caps for the Cooks & Countermens Union uptown in Manhattan; we have made caps for the Electric Union.

Q. Was that Local No. 3 of the Electrical Union?

A. That is right.

Q. Do you remember the local number of these Cooks & Helpers?

A. No, sir, I do not remember that.

Q. Did you come in contact with any officials of these locals?

A. Not directly; these sales were made through our sales staff. We have salesmen to get that business, and we follow [fol. 380] the orders up.

Q. Are you manager of the sales division?

A. Manage everything in the place.

Q. In other words, you are general manager in charge of production and in charge of sales and distribution?

A. Yes, sir.

Q. And the men under you came in contact with various officials of these unions?

A. Yes, sir.

Q. Since your name appeared on the jury panel as a prospective juror, did anybody discuss the case with you?

A. No, sir.

Q. Did you have any discussion with anyone about your name being on the panel for a prospective juror in the case?

A. Well, there was no discussion, but I told a few friends of mine I was going on the panel when I originally received the notice, not knowing what case it was going to be.

Q. I mean since now you have been attending in court—I believe you reported in August.

A. Yes, sir.

Q. And since then was there any discussion about your service as a juror in the case?

A. No, sir.

Q. No one, inside or outside of your office?

A. No, sir.

Q. Do you know specifically the names of officials of unions that your firm and the men of your firm came in contact with?

A. No, sir.

Q. Would you know them if you heard the names?

A. I would not.

Q. Did you ever come in contact with any official of [fol. 381] the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is the name Jacob Potofsky familiar?

A. No, sir.

Q. Are the names of officials Weinstein and Katz of the Amalgamated familiar to you?

A. No, sir.

Q. Would there be any embarrassment on your part to serve as a juror in this case because of business connections your firm had with these locals, the Electrical Union and the Cooks & Helpers?

A. No, sir.

Q. Is that a substantial business you do with these unions?

A. It is just that we get that one item a year, and in this past year we did not get the order.

Q. Is the name of Bruno Belia, organizer, of the home office of the Amalgamated, familiar to you? Does that name mean anything to you?

A. No, sir.

Q. Or Salvatore Marazzano?

A. No, sir.

Q. Do you know any persons or firms in the clothing industry?

A. No, sir.

Q. Or in the knee pants industry?

A. No, sir.

Q. Or in the Clothing Truckers?

A. No, sir.

Q. Have you lived in other sections of Brooklyn besides Borough Park?

A. No, sir.

Q. Have you heretofore served as a juror in a criminal or civil case?

A. No, sir.

Q. Is the name of Philip Orlofsky, one-time manager of the Clothing Cutters Union, Local No. 4 of the Amalga-
[fol. 382] mated, at all familiar to you?

A. No, sir.

Q. Or of any official of Local No. 240 of the Clothing Drivers & Helpers Union?

A. No, sir.

Q. In the business you are in, do you ship and truck out your products?

A. Yes, sir.

Q. Do they go out through union truckmen?

A. Well, I don't know whether the man I do business with employs union truckmen.

Q. Did you ever have any contact, directly or indirectly, with anyone in the Flour Truckmens Union?

A. No, sir.

Q. Is the name Max Silverman of Local 138, familiar to you?

A. No, sir.

Q. Or Wolfie Goldis?

A. No, sir.

Q. Are you sure you never read about Feinstein?

A. Absolutely.

Q. Is the name William L. Alberts, a bondsman, familiar to you?

A. No, sir.

Q. Or the name Emanuel Buchalter, at all familiar to you?

A. No, sir.

Q. Or Phillie Buchalter, Phillie Kowas?

A. No, sir.

Q. Have you any familiarity with the names of Bellanca and Tosca?

A. No, sir.

Q. Or with Terry Burns?

A. No, sir.

Q. Do you know District Attorney O'Dwyer or any member of his staff?

A. I do.

Q. Do you know the Judge himself?

[fol. 383] A. Yes, sir; I am a member of the same political club with him.

Mr. Turkus: I don't think the defense will like that.

Mr. Cuff: That is not a fair statement, and I object to it.

Mr. Turkus: I withdraw it.

Q. Do you know him personally, the Judge?

A. Yes, sir, I have met him on several occasions.

Q. Would you be prejudiced in favor of the prosecution because you know the Judge?

A. No, sir.

Q. Would you be prejudiced against the defendant because you know Judge O'Dwyer?

A. No, sir.

Q. Do you know any other member of his staff?

A. Yes, sir.

Q. Who?

A. Mr. David Selzer, from Borough Park.

Q. Intimately?

A. Yes, sir, personally.

Q. Would that acquaintance—and I take it it is a long-time acquaintance with Mr. Selzer——

A. Yes, sir.

Q. Did you know him before he was an Assistant District Attorney?

A. Yes, sir.

Q. And you know him since he has been on Judge O'Dwyer's staff?

A. Yes, sir.

Q. Would you be prejudiced in favor of the prosecution because of your friendship with Mr. Selzer?

A. No, sir.

Q. Would you be biased or prejudiced against any of the defendants on trial because you knew Mr. Selzer?

A. No, sir.

Q. Taking both of the facts together: Because of your [fol. 384] friendship and acquaintance with Judge O'Dwyer and Mr. Selzer, would there be anything in that relationship which would affect your deliberation on this case?

A. No, sir.

Q. With respect to the nine defense lawyers in this case: Do you know Mr. Barshay?

A. No, sir.

Q. Or Mr. Wegman, or Mr. Climenko?

A. No, sir.

Q. Do you know any members of their office staffs?

A. No, sir.

Q. Do you know Judge Talley, Mr. Cuff, or Mr. Kriendler, who represent the defendant Weiss?

A. No, sir.

Q. Do you know any member of their staff?

A. No, sir.

Q. Representing Capone are Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg. Do you know any of those men?

A. No, sir.

Q. Or any persons attached to their staffs?

A. No, sir.

Q. Do you know any member of the bar who practices the defense of criminal cases as a specialty?

A. No, sir.

Q. Do you know William W. Kleinman or Mr. David Price?

A. No, sir.

Q. Or Mr. Saul Price, once an Assistant District Attorney in Manhattan?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of this state?

A. Yes, sir.

Q. You have no scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Would you permit the question of punishment to interfere with your deliberations in the jury-room?

A. I would not.

[fol. 385] Q. Because of your knowledge and acquaintance with Judge O'Dwyer, did you follow the O'Dwyer investigation in the press with any degree of interest?

A. No, sir, I did not.

Q. Specifically, did you read anything about the Rosen investigation, the Rosen case?

A. No, sir.

Q. In every aspect, will you take the law from Judge Taylor?

A. Yes, sir.

Q. And if selected, will you endeavor to work the problem out, the issue in the case, the question of guilt or innocence, and listen to reasonable argument from other jurors in the case?

A. Yes, sir.

Q. Do you start off now with any prejudice?

A. No, sir.

Q. You have prejudice?

A. No, I have not.

Q. So you do start out now as a prospective juror free from any prejudice?

A. That is right.

Q. Do you find any fault with the District Attorney of the county, Judge O'Dwyer, or with the prosecution of a case which employs accomplice testimony against the defendants on trial?

A. No, sir.

Q. With respect to the credibility of that type of witnesses, will you take the instructions of law from the Court?

A. Yes, sir.

Q. And the tests to be applied from the judge?

A. Yes, sir.

Q. You have no bias or prejudice against the prosecutor or against the prosecution for the use of that type of evidence?

[fol. 386] A. No, sir.

Q. With respect to the law of corroboration, the supporting evidence, will you take that exclusively from the Judge?

A. Yes, sir.

Q. If you are satisfied, after hearing the accomplice, if you are satisfied beyond a reasonable doubt from the supporting or other evidence in the case, that not only the accomplice is telling the truth but that there is supporting evidence tending to connect the defendants with the commission of the crime of murder in the first degree, if you are satisfied as to that beyond a reasonable doubt, would you hesitate to say so by a Guilty verdict?

A. No, sir.

Q. Do you know Mr. Geoghan, or any member of his staff?

A. No, sir.

Q. Have you any bias or prejudice against the use of expert testimony, be it handwriting, medical, ballistics, or any other type?

A. No, sir.

Q. Is there any reason concerning which I have not elicited any response, which goes to your ability to serve as a fair and impartial juror in this case?

A. No, sir.

Q. Will you apply common sense principles and the common knowledge that you get in your every-day business in weighing the issues in this case?

A. Yes, sir.

Q. Listen with common sense and understanding and reason to the other jurors in your deliberation?

A. Yes, sir.

[fol. 387] Q. Will you, if selected, endeavor to do justice in this case?

A. Yes, sir.

Q. Is there any reason in the world at all that if you are satisfied beyond a reasonable doubt that there are three guilty men at the bar of justice, Buchalter, Weiss, and Capone, that you will say so in your verdict?

A. There is not.

Q. And if you are satisfied as to their guilt beyond a reasonable doubt, will you say so in your verdict?

A. I will.

By Mr. Climenko:

Q. I don't remember whether Mr. Turkus asked you this question, but have you ever sat on a jury in a criminal or a civil case?

A. No, sir.

Q. Never before?

A. No, sir.

Q. This would be your first experience?

A. Yes, sir.

Q. So, of course, you never heard the Judge charge a jury?

A. I never did.

Q. Well, have you read about any of the defendants in this case?

A. I did not read about it, but glancing over the paper I did see some headlines, but I never read the article, just passed it by—found no interest.

Q. What paper do you read habitually?

A. The *World-Telegram* and the *News*.

Q. You said you never read any article that was written about any one of these defendants in either of those papers?

A. No, sir.

[fol. 388] Q. But you have seen headlines about them?

A. Yes, sir.

Q. You were here on August 4, 1941?

A. Yes, sir.

Q. Since that date have you seen mention of the names of any of the defendants in this case in the *News* or the *Telegram*?

A. I don't think I noticed any of them.

Q. You read those papers every day?

A. Yes, sir.

Q. You did not restrict your attention to any particular page, as, for instance, some people read only the sporting sheets, some people read only the Stock Market?

A. I usually read the war news and sports.

Q. That is all you read?

A. That is all.

Q. You have seen—you recall seeing the names of some of these defendants in both the *Telegram* and the *News* since August 4, 1941?

A. Yes, sir, that is right.

Q. You knew you were to return here on the 15th of September, 1941?

A. Yes, sir.

Q. You did not read any of those stories?

A. No, sir, I did not.

Q. Was your interest excited by the headlines?

A. No, sir, it was not.

Q. Had you, prior to August, 1941, read any stories about the defendant Buchalter?

A. No, sir.

Q. Never?

A. No, sir.

Q. When for the first time did you ever hear the name of Louis Buchalter?

A. When did I hear the name?

[fol. 389] Q. Yes, when first, do you recall it now, that you heard the name of the defendant Louis Buchalter?

A. The first time I heard the name mentioned was when Walter Winchell mentioned that fact over the radio.

Q. That was sometime in 1939?

A. Yes, sir.

Q. Since then you have not read any stories about him?

A. No, sir.

Q. You have no impression or opinion as to his innocence or guilt in this case?

A. I have not.

Q. Now, although you have not ever served as a juror in any case, you understand, do you or not, that the defendant is presumed to be innocent of the charge mentioned in the indictment; do you understand that?

A. Yes, sir.

Q. Do you understand also that the mere bringing of an indictment is not in any degree proof?

A. Yes, sir, that is right.

Q. As you sit there now, considering this matter, you assume the defendant Buchalter is innocent?

A. Yes, sir.

Q. And your mental attitude with respect to this case is that you would not yourself or with others bring in a ver-

dict of guilty unless the proof that is adduced here satisfied you and demonstrates guilt beyond a reasonable doubt?

A. That is right.

Q. And I think the Court, in announcing the law to you on this charge, defines reasonable doubt as a doubt for [fol. 390] which you could ascribe a reason. You would accept that as a proper definition of the law?

A. That is right.

Q. So that if the proof did not demonstrate guilt beyond a reasonable doubt, as I have just tried to explain reasonable doubt, you could not and would not agree to a verdict of guilt, is that correct?

A. That is right.

Q. You realize the trial of a case is a serious matter?

A. Yes, sir.

Q. It is not a trivial thing?

A. That is right.

Q. That your oath, if you take the oath to act as a juror, is a very serious commitment that you make with the community and the State in which you live?

A. Yes, sir.

Q. You would not allow any trivial matter to interfere with your faithful performance of that duty?

A. That is right.

Q. You know Mr. O'Dwyer?

A. Yes, sir.

Q. You have had the pleasure of shaking hands with him?

A. Yes, sir.

Q. That has been a pleasure, hasn't it?

A. Yes, sir.

Q. You have been impressed by the fact that a gentleman of his eminence is within the circle of your friendship?

A. Yes, sir.

Q. You are honored by the pleasure I assume you obtain by saying hello to him?

A. Yes, sir.

Q. Now, Mr. O'Dwyer is District Attorney of Kings County.

A. Yes, sir.

Q. And Mr. O'Dwyer may from time to time be actually [fol. 391] present in this court-room.

A. That is right.

Q. Have you seen him here within the last few days?
A. No, sir, I have not.
Q. Were Mr. O'Dwyer to be present during the course of this trial, would that, to any extent whatever, affect your ability to fairly try this case?
A. I don't think so.
Q. It would not, would it?
A. (No answer.)

By the Court:

Q. Are you a member of a political club?
A. Yes, sir.
Q. Are you an officer?
A. No, sir, I am an active member; in other words, I am active as far as going out and speaking to neighbors, and so forth, in my district.
Q. Are you a district captain?
A. Well, yes, from the 4th election.
Q. How long have you been a district captain?
A. Well, I have taken an active part since Magee became leader, after Wogan left.
Q. Are you president of the club?
A. No, sir.
Q. Are you there every night working?
A. No, sir.
Q. How often do you go?
A. Well, occasionally, when there are meetings; I do not attend every meeting.
Q. Are you on any campaign committee?
A. No, sir.
Q. Do you expect to take any active part in this campaign?
A. Yes, sir, in our locality.
Q. How about any club house that would bring you in [fol. 392] contact with Mr. O'Dwyer?
A. No, sir, that was arranged between a few of our own captains, to take an active part.
Q. You are not on any committee for Judge O'Dwyer?
A. No, sir.
Q. Are you a member of the General Committee, the County General Committee?
A. No, sir.
Q. That met to ratify the ticket?

A. No, sir, my wife was a member of the County Committee.

Q. Does she hold a political position?

A. No, sir.

Q. Is she an election inspector?

A. Yes, sir.

Q. Are you?

A. No, sir.

Q. Do you receive campaign funds as district captain?

A. We call that zone leader, who has charge of five or six districts, he receives the money and distributes it to the workers.

Q. Directly?

A. Yes, sir, we instruct him who to distribute it to.

Q. You give him the names and he distributes the money?

A. Yes, sir.

By Mr. Climenko:

Q. As I understood you to say, you have made speeches for Mr. O'Dwyer?

A. No, sir, I did not say I made speeches, but we intend to do some speaking in our own locality for the District Attorney. I am one of the workers who intends to do that.

[fol. 393] Q. Would you permit your political allegiance or your personal friendship to Mr. O'Dwyer to affect an honest, faithful, serious discharge of your duties as a juror, and by that I mean, among other things, primarily, the obligation to be an absolutely impartial juror?

A. What is that question?

Q. I will repeat it. You know Mr. O'Dwyer pretty well?

A. Yes, sir.

Q. You do not think Mr. O'Dwyer would want you to be anything except absolutely fair, were you to act as a juror in this case?

A. That is right.

Q. And Mr. O'Dwyer would not want any break in the case because you happened to know him and he happened to know you?

A. That is right.

Q. He would not want you to trifle with your oath, but to be absolutely impartial?

A. That is right.

Q. You would not permit that to trifle with your oath, even though at this moment Mr. O'Dwyer is a political candidate in the forthcoming election?

A. That is right.

Q. You would not permit that to trifle with your oath, even though you are interested in the election as a party worker?

A. That is right.

Q. You would not contemplate doing that for a minute?

A. That is right.

Q. And you know Judge O'Dwyer would not want you to do that?

A. That is right.

[fol. 394] Q. You have known Mr. Selzer for some time?

A. Yes, sir.

Q. He is an Assistant District Attorney?

A. Yes, sir.

Q. For how many years have you known him?

A. About ten or twelve years.

Q. And Mr. Selzer would not want you to be anything except impartial were you to act as a juror in a capital case?

A. That is right.

Q. And were you to act as a juror in this case, you know, as it will probably be charged you, that the defendants and each of them are presumed to be innocent?

A. That is right.

Q. And, as I said before, as you sit here now you assume that they, each of them, are innocent of the charge?

A. That is right.

Q. You have no prejudice whatever as against any of these defendants at this time?

A. That is right.

Q. You would listen to the testimony as it was given, without any prejudice as against any of these defendants?

A. That is right.

Q. Because you understand, if it is so charged, that these defendants are presumed to be innocent at all stages of the trial of this case until such time as it is finally committed to you for your deliberation?

A. That is right.

Q. You have heard Mr. Turkus refer to accomplices?

A. Yes, sir.

Q. Do you know what an accomplice means, as Mr. Tur-
[fol. 395] kus used that word?

A. Yes, sir.

Q. Let us see if we mean the same thing by it—a witness who says he participated in the commission of a crime.

A. That is right.

Q. You said that you would not be prejudiced against the prosecution were it to employ that type of witness; is that right?

A. Yes, sir.

Q. Now, in assessing a group of witnesses, would you take into consideration any possible motive that the witnesses might have in giving their testimony?

A. What is that question?

Q. I withdraw it. In the ordinary course of your business you apply certain tests in deciding or passing upon for yourself the honesty or accuracy, or dishonesty or lack of accuracy, of any statement made by a person to you?

A. Yes, sir.

Q. You do that every day of your life?

A. Yes, sir.

Q. You do employ such rules?

A. Yes, sir.

Q. I suppose you will agree with me that one important rule you always invoke in your own mental assessment of the accuracy or lack of accuracy of the statement made to you is the motive of the speaker?

A. That is right.

Q. You can understand, I assume, that during the course of the trial of a case people take the stand and they make certain statements in response to questions?

A. Yes, sir.

Q. Questions put by either the prosecution or the attorneys for the defendants?

A. Yes, sir

[fol. 396] Q. You understand, of course, that one of your fundamental duties, were you to be accepted as a juror, would be to pass upon the honesty or credibility of these statements?

A. Yes, sir.

Q. Now, in weighing the credibility of the testimony of an accomplice, so-called, would you take into consideration

the motive, if any, which that witness might have in so testifying?

A. Yes, sir.

Q. Would you, therefore, in assessing or testing the credibility of that witness, seek to find out if he had a motive, and would you be particularly careful in examining the truth or lack of truthfulness of his statement?

A. Yes, sir.

Q. And if the Court should charge you that it would be your duty as a trial juror to assess or weigh the credibility of the so-called accomplice with care, with great care, would you follow that rule as the Court gave it?

A. Yes, sir.

By Mr. Rosenthal:

Q. You understand the purpose of asking questions of you is to have a personal determination of your own mind, whether you think you can be a fair man on the jury?

A. Yes, sir.

Q. You understand, in the final analysis, you are the one that is going to raise your hand and swear that when you go into the jury room, after the case is over, that on your conscience you will deliver a true and just verdict?

A. That is right.

Q. So any questions that might be asked of you, I do not [fol. 397] want you to take any offense at; it is in order to enable you to better determine whether you can act as a fair man.

A. Yes, sir.

Q. Now, you have candidly stated that you are friendly with Judge O'Dwyer, you belong to the same club, and also know Mr. Selzer, but when you were asked by Mr. Climenko as to whether or not, if Judge O'Dwyer came in the room, it would have any influence, you said you did not think so, that is correct? Now, I will put it a little more strongly: Assuming that during the course of the trial Judge O'Dwyer, as is quite possible, and as he has a perfect right to do, being that he is District Attorney, may not only come in the room and sit around where he would be seen by the jury, but he might even associate himself, as he would have a perfect right to do, with Mr. Turkus or with any of the Assistants; now, would that have any

effect on your judgment because of your friendship with him?

A. I don't think it would.

Q. I do not want you to be doubtful. You heard me tell you a minute ago I wanted you to use your own mind. I do not want to use your mind for you. It is up to you. Imagine yourself sworn as a juror, imagine yourself sitting in the box, imagine someone, while the witness being on the stand, and Judge O'Dwyer not only sitting here, as he would have have a perfect right to do, questions some of the witnesses; would that have any effect on your judgment in going into the jury room, or would that sway you [fol. 398] one way or the other?

A. No, sir, it would not.

Q. So you want to change your "don't think so" and say positively that it would not affect your judgment?

A. No, it would not.

Q. You realize that, of course, Judge O'Dwyer, nor Mr. Turkus, nor any one of the lawyers, have any first-hand knowledge of any of this case? They are not witnesses?

A. Yes, sir.

Q. They are only presenting what has been told to them either by the prosecution witnesses or the defense witnesses?

A. Yes, sir.

Q. So that the entity of the lawyers should not enter into your deliberations.

Mr. Turkus: I object. It is not only what he has been told, but what investigation he makes.

Mr. Rosenthal: I object to a speech being made here. This has no effect upon this jury.

The Court: State nothing about what has been said, just put your ground for the objection.

Mr. Turkus: The objection is Mr. Rosenthal is telling a prospective juror and stating as a fact something that is not so, that we are presenting this case upon the basis of what we have been told. We are not.

The Court: It is a fair assumption that it is based upon alleged information. Objection overruled.

Q. Let me repeat the question. You realize the information that the lawyers get—and that is including the District [fol. 399] Attorney—is from witnesses to any episode

alleged to have occurred in the facts set out in the indictment or in the defense raised against it?

A. Yes, sir.

Q. So knowing that to be the fact, you would not permit your knowledge of any individual, whether he be associated with the District Attorney's office, including Judge O'Dwyer, or any of the defense counsel, to interfere with your deliberation when it is in your hands to determine whether the man is guilty or not?

A. That is right.

Q. That you are sure of at this time?

A. Yes, sir.

Q. Although before, when you said you did not think so, you had not yet assumed giving it sufficient thought to understand what was meant; is that correct?

A. Yes, sir.

Q. Now, do you belong to any men's club attached to any Hebrew institute?

A. No, sir.

Q. Have you ever heard any assistant of Mr. O'Dwyer make any speeches on crime?

A. No, sir.

Q. What you know about any of the defendants here is superficial knowledge you gained by hearing Walter Winchell talk over the radio or seeing some headlines in the newspaper?

A. Yes, sir.

Q. Your interest in reading newspapers, I take it, is, first see how the war is going on and then to pass to the sports?

A. Yes, sir.

Q. And skip over what is in between?

A. Yes, sir.

That being so, you haven't any prejudice of any char- [fol. 400] acter at this time, as you sit here, against any of these individuals, have you?

A. No, sir.

Q. You have no impression that is unfavorable as to any of them?

A. No, sir.

Q. You realize that when a man is charged with committing a crime he only prepares himself, under our law, to meet that particular charge?

A. That is right.

Q. So that when the District Attorney, by indictment or through notice, charges that these men participated in the perpetration of the crime of killing this man Rosen, that is what we are here to meet?

A. Yes, sir.

Q. And that is what he must prove to your satisfaction beyond a reasonable doubt before you will bring in a verdict of Guilty?

A. Yes, sir.

Q. Do you realize, never having been on a jury before, that the defendant at no time, under our laws, is compelled to even open his mouth or say anything?

A. Yes, sir.

Q. In fact, even if they were not to put on a witness to rebut anything that was said by the District Attorney's witnesses, you still could not draw an unfavorable impression—I don't say it is going to be the case, but that is how far the law goes.

A. Yes, sir.

Q. So, if you are called as a juror, you are willing to state now taht you can conscientiously determine what weight you are going to give from what you hear from the People's [fol. 401] witnesses, irrespective of whether there is any defense, and render a true and a just verdict.

A. Yes, sir.

Q. You have been told by Mr. Turkus that accomplices are going to take the stand, whether it be in the singular, "accomplice," or "accomplices"—you understand from what you have heard in the court-room that no man can be convicted upon the uncorroborated testimony of an accomplice? You heard that?

A. Yes, sir.

Q. You find no quarrel with that?

A. No, sir.

Q. In fact, you have heard also stated that even if there were ten accomplices telling the same story, a man cannot be convicted on that testimony alone?

A. That is right.

Q. You do not find any fault with that?

A. No, sir.

Q. You have heard discussions before you became a prospective juryman as to the fact that accomplice testimony must be scrutinized very closely and very carefully, hav-

ing in mind what motive he may have and the interest he may have, and all the other surrounding things, to make him tell the story he is telling?

A. Yes, sir.

Q. You are going to apply the test if you are accepted?

A. Yes, sir.

Q. Now then, you have also heard discussed, I assume, if you were close enough, even though the accoustics are bad here, regarding the fact that there must be other evidence tending to connect the defendant with the crime, even assuming you believe the accomplice, you could not convict [fol. 402] the man unless there was other evidence tending to connect the defendant?

A. Yes, sir.

Q. You might go into the jury room and say to yourself, "Well, the accomplice told the truth, in my opinion," but then, if the Court w e to charge you that even if you believe that you still could not convict unless and until you found some other evidence tending to connect the particular defendant with the crime, you would not find any fault with that proposition at all?

A. No, sir.

Q. You would ferret down and look through the evidence and seek out and find out whether there was any other believable testimony to connect the defendar.t?

A. That is right.

Q. Now, again, you might come to the question, and as I stated to one of the other prospective jurymen, there is no way I know now whether we could direct our questions to a particular point and leave other points out——

A. Yes, sir.

Q. You might come to the question that some other man who admits he is a murderer, who has murdered people and done numerous other things, might say that one or more of these men admitted to him that they had committed the crime.

A. Yes, sir.

Q. If such a condition were to arise, you would have the right to weigh what particular motive that particular individual might have in making such a statement; is that clear?

A. Yes, sir.

Q. And you would have a right, for instance, he has pos-
[fol. 403] sibly committed, admittedly, some crime for which he has not been prosecuted—possibly he has some ill feeling toward the particular individual he is making the charge against—all these things might happen—you would have the right to determine whether you believed such admission or alleged statement by determining who it is who made the statement and the manner in which he made it?

A. Yes, sir.

Q. That you would do?

A. Yes, sir.

Q. You have been asked by Mr. Turkus that assuming you were to listen to all of the evidence and were finally to come to the conclusion that The People have proven their case beyond a reasonable doubt, would you hesitate to find a verdict of guilty?

A. Yes, sir.

Q. And you properly said that you wouldn't?

A. Yes, sir.

Q. Now let me ask you the question that, irrespective of what you have heard and irrespective of what you read, if in your mind you were satisfied at the conclusion of this case that any one or all of these defendants are not guilty, would you, because of what you have heard or read, or the things you have heard in the court-room about the bias of some of these men who have been excused, or their prejudice, would you, because of that, be afraid to come in and under your oath say "Not guilty"?

A. I would not.

Q. You understand you are trying these men together for convenience and that each one is entitled to a separate verdict?

[fol. 404] A. Yes, sir.

Q. Each one is entitled to a separate deliberation on the evidence in so far as it affects the particular individual?

A. Yes, sir.

By Mr. Barshay:

Q. You stated you were an intimate friend of Mr. Selzer?

A. Yes, sir.

Q. Since you received a notice to appear on this jury did you see Mr. Selzer?

A. No, sir.

Q. Have you spoken to him by phone?

A. No, sir.

Q. Have you spoken to his family by phone?

A. No, sir.

Q. Has his family visited you?

A. No, sir.

Q. Was there any communication between you and Mr. Selzer, his family or himself, directly or indirectly, with respect to your being on the jury in this case?

A. That is right.

Q. Did you ever go out with Mr. Selzer when he was on homicide cases in various precincts?

A. No, sir.

Q. So that with respect to Mr. Selzer, as far as you know, there is no knowledge on his part that you are here?

A. That is right.

Q. And it would not make any difference one way or the other?

A. No, sir.

Q. I don't know whether Mr. Rosenthal asked you, but did you ever hear Judge O'Dwyer speak on the subject of crime?

A. No, sir.

Q. In your association?

A. No, sir.

[fol. 405] Q. Or at no place at all?

A. No, sir.

By Mr. Rosenthal:

Q. I ask you, Mr. Leibowitz, I asked one of the other members the same question, assuming it develops in the trial that one or more of these defendants may have known some of The People's witnesses, may have even been in their company at times, would that fact alone in any wise prejudice you against them so you would be apt to find a verdict of guilty simply because of that fact?

A. No, sir, it would not.

Q. You realize you know a lot of people too?

A. Yes, sir.

Q. Some good and some maybe bad?

A. Yes, sir.

By Mr. Barshay:

Q. The attitude you have maintained throughout is that you are absolutely free of bias or prejudice against any of these defendants?

A. That is right.

Q. Now, sir, if it should develop from this witness stand that the defendant whom we represent, Mr. Louis Buchalter, is at present serving a sentence of not less than 44 years and not more than 70 years in a Federal prison, would that fact prejudice you against this defendant?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

By Mr. Turkus:

Q. Would the fact that Lepke Buchalter is serving that term——

Mr. Barshay (interrupting): The question is objection-[fol. 406] able in its inception as to our client's name. Our client's name is Louis Buchalter.

Mr. Turkus: His alias is Lepke.

Mr. Barshay: You have not proved it as yet, and you have no right to say it. It is said with the intention of prejudicing not only this juror but the prospective jurors who are listening. I have a serious objection to that. It is [fol. 407] deliberate on the part of the District Attorney to do that. We refrained from it. We have not opened the door. The indictment is in the name of Louis Buchalter, and deemed to be so until you present such proof; but until such proof you should be fair.

Mr. Turkus: The indictment alleges "Louis Buchalter, alias Lepke." We have had that out before your Honor on other occasions. The sensitivity of Mr. Barshay is hard to understand.

Mr. Barshay: I am protecting my client's rights. I am not sensitive about anything.

Mr. Turkus: He has been known as Lepke for years, not only to the People but to the witnesses.

Mr. Barshay: That is a matter of proof for you.

The Court: This is a brawl. Just call him Buchalter, and there will be peace in the family.

Mr. Barshay: Mr. Buchalter.

Mr. Turkus: I will not call him "Mr." I will call him Buchalter.

The Court: I would suggest you do not ask that question impulsively; be very careful.

Mr. Turkus (to talesman:) Would the fact of what Buchalter is presently serving deter you from finding him guilty of murder in the first degree if you were satisfied upon the evidence in the case beyond a reasonable doubt that he is a killer?

Mr. Barshay: I object to the form of the question.

[fol. 408] The Court: It has no specific application to this indictment.

Mr. Barshay: Your Honor, I am constrained to make a motion for the declaration of a mistrial.

Mr. Talley: All of the defendants join in that motion.

The Court: Motion denied. Exception to defendants.

By the Court:

Q. Would that affect your verdict in this case one way or the other?

A. It would not.

Q. You would judge him on the evidence in this case on this charge?

A. That is right.

Q. Regardless of whether he has served a sentence on conviction for another crime?

A. That is right.

By Mr. Turkus:

Q. Regardless of whether he has any appeal pending or not from the conviction that Mr. Barshay spoke of?

A. That is right.

Q. Now, there is just one thing I want straight. Some of the questions and answers did not reach me that you discussed with the Judge. If I heard correctly, you are presently working in Judge O'Dwyer's behalf?

A. Yes, sir, in the Borough Park section.

Q. Did I hear you correctly in saying you intended to make some speeches in his behalf?

A. Yes, sir.

Q. I want to be very fair with the situation. Could you [fol. 409] in any wise have your judgment in the case

affected one way or the other by that association with Judge O'Dwyer?

A. No, sir.

Mr. Turkus: Talesman is satisfactory.

Mr. Barshay: He is satisfactory to all counsel, in accordance with the arrangement we made before.

The Court: The juror will be accepted tentatively but not sworn, as indicated this morning. He may sit in the first seat.

(Mr. Leibowitz occupies Seat No. 1 in jury box.)

CHARLES GOLDMINZ, No. 2713, residing at No. 44 Sea Gate Terrace, Brooklyn, New York, was then examined as to his qualifications as a juror.

By Mr. Turkus:

Q. Is Sea Gate Terrace in Sea Gate, in the Borough of Brooklyn?

A. Yes, sir.

Q. Do you know Mr. William Kleinman?

A. No, sir.

Q. Do you know Mr. Max Silverman?

A. No, sir.

Q. Your business is listed as that of manager. What is it?

A. G. & G., wholesale grocers.

Q. Does your business bring you in contact with persons or firms in the Brownsville or East New York area in Brooklyn?

A. The business does, yes, sir.

Q. Daily?

A. Daily.

Q. How many years have you been going in that district?

[fol. 410] A. I have not been going there, the trucks have.

Q. Are you in general charge of distribution?

A. I am.

Q. In other words, you are the concern?

A. Yes, sir.

Q. Do your trucks go in the East New York section of Brooklyn?

A. Yes, sir.

Q. Do you have any contact in or about the garment district or the clothing district?

A. Nothing in Manhattan.

Q. Or on the Brooklyn waterfront?

A. Picking up.

Q. You pick up stuff there and then bring it to your factory?

A. To my warehouse.

Q. Has that been going on for a number of years?

A. Yes, sir.

Q. Have you heard discussions about Judge O'Dwyer in this case?

A. No, sir.

Q. Have you read about it in the newspapers?

A. No, sir.

Q. Have you any contact, directly or indirectly, with the Brownsville or East New York area besides deliveries made to people there?

A. No, sir.

Q. Do you have any connection whatever in that area?

A. Not as I can say, no, sir.

Q. Or in the garment district in Manhattan, or the clothing district?

A. No, sir.

Q. Or with clothing truckers?

A. No, sir.

Q. Or with the Amalgamated Clothing Workers of America Union, New York—do you know any of the officials?

A. No, sir.

Q. Do you do business with unions?

A. Yes, sir.

[fol. 411] Q. The trucking unions?

A. I would not call them trucking unions, no, sir.

Q. What kind of unions are they?

A. The teamster's union; they don't do any trucking for me.

By the Court:

Q. Where is the G. & G.?

A. 15 Washington Avenue, corner of Flushing.

Q. That is the old Von Glahn building?

A. In Wallabout Market; no, sir.

Q. On which corner is it?
A. Right next to Rockwell's.

By Mr. Turkus:

Q. As far as you can recall, you have no contact directly or indirectly with any person or firm in the garment clothing district or in the clothing trucking industry, in Brownsville or East New York, except in so far as your own products are delivered there?
A. That is right.
Q. Do you understand the nature of the charge in this case?
A. Yes, sir.
Q. Is there anything about the nature of the charge which would preclude you from being a fair and impartial juror?
A. No, sir.
Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. None.
Q. In the event this trial is protracted, would there be anything about a protracted duty which would interfere——
[fol. 412] A. That is the question, it might interfere.
Q. Since your name appeared on this jury panel did anybody speak to you about the case?
A. No, sir, except my wife.
Q. That was as to your prospective jury service?
A. Yes, sir.
Q. There was no discussion as to the merits of the case?
A No, sir.
Q. Have you served before as a juror in any case?
A. No, sir.
Q. Civil or criminal?
A. No, sir.
Q. Do you know any official of the Amalgamated Clothing Workers of America—I think I started interrogating at that point when I was interrupted before—do you know any officials in that union?
A. None.
Q. Is the name of Jacob Potofsky, an officer of the Amalgamated Clothing Workers of America a familiar name to you?
A. No, sir.

Q. Is the name of Murray Weinstein, manager of the Clothing Cutters Union, Local No. 4 of the Amalgamated, a familiar name to you?

A. No, sir.

Q. Is the name Abraham Beckerman, one of the joint board, a familiar name?

A. No, sir.

Q. Is the name of Sam or Samuel Katz, business agent of Local 41, Clothing Cutters Union, familiar to you?

A. No, sir.

Q. Do you know anybody in the knee pants business?

A. No, sir.

Q. Or in any clothing branch of the industry?

A. No, sir.

[fol. 413] Q. Did you ever hear the name of Bruno Belia, an organizer for the Amalgamated?

A. No, sir.

Q. Or the name of Salvatore Narazzano?

A. No, sir.

Q. Local No. 240 of the Clothing Drivers and Helpers Union?

A. No, sir.

Q. Do you know any official of that union?

A. No, sir.

Q. You did say something about the Teamsters Union, it having some effect on your business?

A. Yes, sir.

Q. Does your firm do business with the Teamsters Union?

A. Yes, sir, I do.

Q. If the name of somebody associated with the Teamsters Union was to come out in this case, would you be embarrassed in your jury service?

A. Absolutely not.

Q. Do you know any officer of the Flour Truckmens Union?

A. I heard you mention before 138 of the Flour Truckmens. That sort of struck home; that is the Teamsters Union, but I don't know of any 138 Flour Union.

Q. Your description is more correct than mine—138 of the Teamsters Union.

A. That is right.

Q. Do you know any officials of that union?

A. I only know the delegates, one or two.

Q. What is the name of the delegate?
A. One is Philip Wachtel and Abie Feller.
Q. Did you ever hear the name of Max Silverman?
A. No, sir.
Q. Or that of Wolfie Goldis?
A. No, sir.
[fol. 414] Q. Would your acquaintance with Wachtel and Feller be embarrassing to you in the discharge of your duties in this case if the names of those union officials should come out?
A. No, sir.
Q. Do you know Wachtel intimately?
A. No, sir, just in a casual business way.
Q. This man Feiler, whose name you gave, how well do you know him?
A. Only as a delegate.
Q. Since your name appeared on the panel as a prospective juryman, has anybody spoken to you about the case?
A. No, sir.
Q. Is the name Philip Orlofsky, one-time manager of Local No. 4, Cutters Union, familiar to you?
A. No, sir.
Q. Or the name of William Alberts, a bondsman?
A. No.
Q. Or Emanuel or Philip Buchalter?
A. No.
Q. Do the names Bellanca or Tosca mean anything to you?
A. No, sir.
Q. Or Cashel?
A. I heard the name mentioned.
Q. When did you hear that?
A. I don't know; that was sometime during negotiations for a new contract. Cashel, head of the Amalgamated?
Q. No, you had negotiations with the Teamsters Union?
A. Yes, sir.
Q. When they were securing a contract?
A. That is right.
Q. What is that, a yearly contract?
A. Yes, sir.
Q. The carting of produce, is that a necessary and [fol. 415] integral part of your business?
A. No, sir, not produce; groceries.

Q. What does "G. & G." stand for?
A. Grittman & Glass.

By the Court:

Q. How long have you been there?
A. About eighteen years.
Q. What particular trade do you sell?
A. All grocers—anything, like canned goods, your Honor.
Q. Do you have your own plant?
A. Yes, sir.
Q. Are you jobbers?
A. Jobbers.
Q. You are manager of what department?
A. All departments except the office.
Q. That is, you have delivery contact?
A. Yes, sir.
Q. You have supervision of the shipping clerks?
A. Yes, sir.
Q. And the receiver?
A. Yes, sir.
Q. And the stock?
A. Yes, sir.
Q. Are you an officer of the corporation?
A. No, sir.
Q. How long have you been with them?
A. Six years.
Q. You started in what capacity?
A. As selling, on the floor.
Q. As a salesman?
A. Yes, sir.
Q. How many street numbers does that building occupy? I am trying to find out the street distance.
A. We were formerly at 36, 38, 40, and 41 Wallabout market and the Government took over that property so we had to get another place. 59 Washington Avenue is a five-story building.
Q. That is a narrow building?
A. It is 45 by about 125 on the first floor and then gradually——
[fol. 416] Q. The delivery platform is in the back of the building?
A. No, sir, in the front of the building, on Washington Avenue.

Q. Is that something new?
A. No, that has been there quite a while.
Q. How tall a building is it?
A. Five stories.
Q. All of the stock is carried in that building?
A. Yes, sir.
Q. You have no other warehouse?
A. No, sir.
Q. How many employees are there?
A. All told——
Q. Outside of the truckmen.
A. About eight or nine.
Q. That includes the office?
A. Yes, sir.
Q. Then it is comparatively a small business for a wholesale house?
A. We do an average of three-quarters of a million dollars. There are many smaller ones than we are.
Q. I do not ask these questions to embarrass you, but to see how you could have contacted with the people that the prosecution asked you about.

By Mr. Turkus:

Q. How many trucks are used by your firm?
A. We have one we call our own, but we have other truckmen picking up and delivering.
Q. You use this truckman who has contact with the teamsters union?
A. No, sir, that is one; all of our men inside belong to the Teamsters Union.
Q. So that every employee of yours is a member of that Teamsters Union?
A Not the office, all the male employees.
[fol. 417] Q. The female employees are not connected with that union?
A. No, sir, no union.
Q. Are you a member of the Teamsters Union?
A. No, sir.
Q. Are you an officer, or do you have a financial interest in that firm?
A. I have a little financial interest.
Q. Do you know Judge O'Dwyer, the District Attorney of this county?

A. No, sir.

Q. Do you know any member of his staff?

A. No, sir.

Q. Do you know former District Attorney Geoghan or any member of his staff?

A. No, sir.

Q. Did you know Mr. Barshay when he was a member of Mr. Geoghan's staff, or do you know him now?

A. I do not know him now.

Q. Do you know Mr. Wegman or Mr. Climenko?

A. No, sir.

Q. Or anybody connected with their office—they are counsel for the defendant Buchalter.

A. No, sir.

Q. Have you any acquaintance with Judge Talley, or former Assistant District Attorney Cuff, or former Assistant United States Attorney Kriendler, who represent the defendant Weiss?

A. No, sir.

Q. Do you know anybody in their respective law offices?

A. I do not.

Q. Do you know Mr. Sidney Rosenthal or Mr. Fischbein or Mr. Rosenberg, who are counsel for Capone?

A. No, sir.

Q. Do you know anybody in their respective law offices? [fol. 418] A. I do not.

Q. Have you lived in Sea Gate for a number of years, in the Gate?

A. Practically the Gate, on the bay side; I should say about six years.

Q. That is actually in the Sea Gate colony?

A. Yes, sir.

Q. And you never heard of Mr. William W. Kleinman or David Price?

A. No, sir.

Q. Or the name of Max Silverman?

A. No, sir.

Q. How long have you been doing business with Wachtel?

A. I think about three or four years.

Q. Have you ever been a witness in any kind of litigation?

A. Yes, sir.

Q. Have you ever been a party to a litigation?

A. No, sir.

Q. Have you ever been a witness in a criminal investigation?

A. No, sir.

Q. As the witness in the civil litigation, in connection with what?

A. No, sir, it was in the separation of a business.

Q. An outgoing partner?

A. Yes, sir.

Q. Do you know any member of the bar who is a specialist in the defense of criminal cases?

A. No, sir.

Q. Will you take the law in all of its aspects from the Judge, if you are accepted as a juror?

A. Yes, sir.

Q. As you sit in the box, are you free from all prejudice against the defendants?

A. I am.

Q. You have no prejudice for them and no bias against them?

[fol. 419] A. That is right.

Q. Do you have any bias or prejudice against the prosecutor of the county, Judge O'Dwyer, or against the prosecution of a case wherein the testimony of an accomplice is used?

A. I have not.

Q. Would you close your ears and shut your mind to the testimony of such an individual solely because he was a participant in the crime?

A. No, sir.

Q. Would you expect the District Attorney to bring witnesses from some city of learning?

A. They must know about the case.

Q. If you are satisfied that the accomplice who testifies in the case not only knows about the case, but knows about the defendants' implication in it and tells us about it, and then there is other evidence in the case showing the accomplice is telling the truth, and other evidence tending to connect the defendant with the commission of murder, and you are satisfied of that beyond a reasonable doubt, would you hesitate to say so by finding a verdict of guilty?

Mr. Cuff: I object to that as being an incorrect statement of law—"other evidence."

The Court: Objection overruled.
Mr. Cuff: Exception.

A. I would not.

Q. Do you have any bias or prejudice against the use of expert testimony, that is, the testimony of an expert on [fol. 420] medicine, handwriting, ballistics, or whatever it may be?

A. If he is a proven expert, no.

Q. You have no bias against his testimony?

A. No, sir.

Q. Is there anything concerning which I may not have inquired which goes to your qualification as a juror in the case?

A. I don't think so.

Q. Do you feel as you sit in the jury box that your mind is free and open and you can decide the case upon the evidence?

A. Yes, sir.

Q. Free from prejudice against the defendants?

A. Yes, sir.

Q. Should any defendant or any one of the defendants, or any one or more of them enter a defense of an alibi, or some other defense, will you take the law exclusively from the Judge?

A. I will.

Q. I think you said you know none of counsel, either on the District Attorney's side or on the defense side?

A. That is right.

Q. You have no embarrassment or reluctance in serving?

A. None, once I am in.

Q. If accepted, will you endeavor to work in harmony with the other jurors, listen to reason, reasonable argument and discussion—you will listen to reason and common sense?

A. Yes, sir.

Q. Now, suppose you have heard all the evidence in the case; you have heard the defense lawyers sum up to the [fol. 421] jury, stating the inferences they draw from the testimony, and you hear the prosecutor tell the inference he draws, and the learned Court charges on the law, and after due deliberation with other members of the jury you are satisfied beyond a reasonable doubt that we have three

guilty men at the bar of justice, will you say so in your verdict?

A. Yes, sir.

Q. Will you say so without fear or hesitation?

A. Absolutely.

Q. Is there anything in your business connections or background in life that would in any wise interfere with the rendition of that kind of a verdict if you feel it is in consonance with the evidence?

A. None whatever.

By Mr. Barshay:

Q. You said you did not know anybody at all connected with the defense or the prosecution?

A. That is right.

Q. I ask you if you have in mind you do not know police officials either, who may be connected with the case?

A. That is right.

Q. So that the people you know, none at all have anything to do with this case?

A. That is right.

Q. No doubt about it?

A. Yes, sir.

Q. Do you recall when this case is alleged to have happened?

A. I don't remember.

Q. You never heard of it?

A. Never heard of it.

Q. As you sat here for three days and heard the prospective jurors being questioned, did you form any impres- [fol. 422] sion one way or the other with respect to this case?

A. I did not.

Q. Did you form any idea as to how you shall answer questions when called?

A. I did not.

Q. You do not know any of the other jurors here?

A. No, sir.

Q. Did you read about the case at any time?

A. I did not bother much about it at all; I had other business worries.

Q. That were more important?

A. Yes, sir.

Q. Do you read the *Mirror?*

A. No, sir, I do not read the *Mirror.*

Q. Or the *Journal?*

A. No, sir.

Q. Did any member of your family ever discuss this case with you?

A. Just only since the time I knew it was the Lepke case.

Q. You have no prejudice against our client?

A. Absolutely none.

Q. You said you knew Philip Wachtel?

A. Just through the business.

Q. Have you seen him lately?

A. No, sir.

Q. When did you last see him?

A. The last time I saw Phillie Wachtel I think it was about quite a number of months ago; some sort of a dispute on agreements.

Q. Do you know now that he is no longer connected with the Teamsters Union?

A. No, sir.

Q. Did he ever talk to you about any business he may have had with the District Attorney's office?

A. No, sir.

[fol. 423] Q. Or with respect to his friendship for Mr. Rooney or Mr. Math of that office?

A. No, sir, I never cared to know his business.

Q. And he never volunteered?

A. No, sir.

Q. At no time did he tell you he had anything at all to do with them?

A. No, sir.

Q. Would the fact that a person has been shot raise any prejudice in your mind against any of the defendants?

A. No, sir.

Q. No doubt about that?

A. No doubt at all.

Q. Do you know anybody on the Grand Jury in the Borough of Brooklyn?

A. No, sir.

Q. Do you know anybody who was ever a special juror?

A. No, sir.

Q. Now we are assured that you know none of the facts and that you know none of the people that may be involved in this case?

A. That is right.

Q. Do you know what an indictment is?

A. Something you are accused of.

Q. An indictment is an accusation against someone; in this particular case it is against these defendants. It is only an accusation and nothing else?

A. Yes, sir.

Q. You cannot proceed on the theory that wherever there is smoke there must be fire?

A. That is right.

Q. You file an indictment and that is how you start a [fol. 424] trial? The defendant came in and he said "Not guilty," and so did the other defendants; that is what brings this case to you, and you are chosen to decide. We start off at scratch.

A. Yes, sir.

Q. We are seeking, to be frank with you, twelve jurors who will be eminently fair; we do not want an acquitting or a convicting jury; we want a fair jury in this case.

A. I understand.

Q. So that you find no fault with any counsel here who stood here for a long time questioning prospective jurors?

A. That is right.

Q. Now, we have nine lawyers sitting at the table. Does that influence you against any of these defendants?

A. Absolutely not.

Q. As a matter of fact, I think that is the customary procedure in this court in most cases, that when a man is charged with homicide the Court supplies him three lawyers.

Mr. Turkus: I object to that.

The Court: Only when they have no money to employ lawyers.

Q. So the number of lawyers has nothing to do with it?

The Court: That is not in this case.

Q. Well, whether they have money to hire or not is not important.

A. That don't bother me.

Q. If you are chosen as a juror and you see a person take the stand and that person raises his right hand and swears to tell the truth, and he is presented as a witness [fol. 425] by the District Attorney, be he expert, policeman,

detective, officer, or a plain individual, the fact that he is offered by the District Attorney would not influence you to the point where you might say to yourself, "That fellow must be telling the truth," would it?

A. Unless he is corroborated.

Q. In other words, the mere fact a man raises his hand and says he is telling the truth does not mean that he is?

A. That is right.

Q. You will decide whether he does or does not?

A. That is right.

Q. One of the tests you will use in determining a man's credibility—that means whether or not he is telling the truth, rests with you?

A. Yes, sir.

Q. If he is a clean man and has no interest in the outcome of the case, that is one thing?

A. Yes, sir.

Q. If he is a man who, out of his own mouth, says he is not a clean man, that is another thing, and the dirtier record he has that will come from the witness stand, the more carefully and cautiously you will weigh the testimony?

A. Yes, sir.

Q. And if some man takes the stand and it is brought out here that he himself admitted before that he had disrespect for an oath and committed perjury, you are going to weigh with caution that man's testimony?

A. Absolutely.

Q. And if it develops that that same man tells you, voluntarily, that he i sa theif, a burglar, a gun toter, and a par-[fol. 426] ticipant in murder, the more he says those things, the more caution you shall use in weighing his testimony?

A. Yes, sir.

Q. If twenty men take the stand and corroborate that person, and they are no better than he, you will weigh their testimony with extreme caution too?

A. Absolutely.

Q. Numbers do not count at all?

A. That is right.

Q. If the District Attorney calls fifty witnesses and we do not call one, that would not matter if you did not believe any one of those witnesses?

A. That is right.

Q. If, in addition to those things I have described, there shall be people who will say they are accomplices, you will

still use more caution with respect to accepting that man's testimony?

A. Yes, sir.

Q. If the Court shall tell you that every defendant is presumed innocent, now, that is not just language, that is the right of every person accused of crime, that is his substantial right, that is not a privilege that is given to us, it is something no person living can take away from us. That presumption is this: Until twelve men have decided unanimously that the District Attorney has proven t defendant guilty beyond a reasonable doubt—there is no doubt about accepting that law if the Court charges you?

A. Absolutely.

Q. The law gives the defendant another right and says the District Attorney must sustain the burden throughout the case and it never shifts to the defendant to any degree [fol. 427] whatever, and if the defendant should remain absolutely silent, you must not draw an unfavorable inference against that defendant. You do not find any fault with that law?

A. No, sir.

Q. You would not expect the defendant to explain anything at all?

A. No, sir, if he did not care to.

Q. The fact of his silence would not influence you?

A. No, sir.

Q. On the question of corroboration, let us assume that you have now weighed carefully the testimony of those people whom the District Attorney has described as accomplices. You will want to know who they are, who gave the corroboration that tends to connect any given defendant with the commission of this crime. He, too, is a witness. You want to find out from that witness, who is he—Why shall we take his word for what he says? Let us look into his record. And if you find that one of these men, not an accomplice, but one of these men who says, "I am coming here to give evidence which tends to connect the defendant with the commission of the crime," out of his own mouth says to you under oath, "I myself have committed eleven murders," you will weigh his testimony with a great deal of caution?

A. Absolutely.

Q. And you will say to yourself, "What reason has that man to give such testimony here?" won't you?

A. Yes, sir.

Q. You will put it through the mill and grind it finely?

A. Yes, sir.

[fol. 428] Q. If, in addition to that man, they will offer another man, not as an accomplice but as a person who gives testimony tending to connect the defendant with the commission of the crime, or any of them, and he says, "I have committed six murders," you will want to find out why he is giving such testimony?

A. That is right.

Q. You know this murder is alleged to have occurred in 1936?

A. I do not know when it occurred.

Q. Well, it was in September, 1936. You are going to ask yourself why that person remained silent all this time, and, if he gives evidence tending to connect any one of these defendants with the commission of the crime?

A. That is right.

Q. You will render judgment individually with respect to each defendant in this case?

A. Yes, sir.

Q. You will use the evidence given against one man, and only as against him, unless his Honor shall charge otherwise?

A. Yes, sir.

Q. You are giving each defendant in reality a separate trial?

A. Yes, sir.

Q. Now, in a case of this prominence a juror must have courage one way or the other. You said to the District Attorney you have the courage, if you are convinced beyond a reasonable doubt?

A. Yes, sir.

Q. Do you think you have the courage that if you are not convinced beyond a reasonable doubt, to acquit our defendant?

A. — —.

[fol. 429] Q. And if you think that, on the evidence, you yourself, after listening and answering arguments, but not being stubborn in any respect, after sifting the evidence and the people who gave it, you find a reason for doubt in this case (you will then have the courage to say "Not guilty"?

A. That is right.

Q. And if all the other eleven should be contrary, without being obstinate or stubborn, you talking to them and listening to their arguments, are still not convinced beyond a reasonable doubt——

A. (interrupting): I would still say, "Not guilty."

Q. Only then would you be living up to your oath as a juror; do you understand that?

A. Yes, sir.

Q. If it shall develop in this case that Mr. Louis Buchalter is now under sentence of the Federal Court and the State Court, the minimum of which is forty-four years and the maximum of which, I think, is seventy years, would that fact prejudice you against him in any respect?

A. Absolutely not.

Q. No doubt about it?

A. No doubt.

Q. So now you are ready to say, if chosen, that you can render a verdict in this case which shall reflect the truth, based upon only the evidence in this case which you believe?

A. That is right.

Q. No doubt about it?

A. No doubt.

By Mr. Rosenthal:

Q. I represent the defendant Capone, together with Mr. Rosenberg and Mr. Fischbein; do you understand that?

A. Yes, sir.

[fol. 430] Q. I don't know whether you were seated in a place where you could hear all the questions I addressed to Mr. Leibowitz or not. Could you hear me?

A. Yes, sir, I was right behind you.

Q. Now I will try not to repeat questions which were addressed to you by Mr. Barshay but confine myself to other questions which he did not ask you. You understand that although all of the defendants—the three defendants are here together being tried before one jury, that each of these men is entitled to a separate trial and deliberation at your hands?

A. Yes, sir.

Q. You understand that in accordance with the Court's instructions that even though there may be a number of witnesses called and only a certain amount of them applying to certain individuals on trial, that you can only use that

evidence against that particular individual to whom it applies?

A. Yes, sir.

Q. If the Court does charge you in that manner and in the further manner that you will deliberate the guilt of each person separately, you will have no hesitancy in doing that?

A. No, sir.

Q. You do not feel that because three men are being tried together, that you must try to find a verdict of Not Guilty as to all or guilty as to all?

A. No, sir.

Q. You are able then to determine in your own mind fairly and squarely the issue as it respects each defendant?

A. Yes, sir.

Q. Have you ever had, either you or your firm, any difficulty with any union?

A. No, sir.

Q. I heard you say something about having some con- [fol. 431] tracts with unions. You work in harmony with them?

A. Yes, sir.

Q. So there would not be any prejudice or favor to either the prosecution or the defendant in view of the questions that have been asked of you by Mr. Turkus as to the number of so-called officials or members of different organizations or different unions?

A. That is right.

Q. Have you any immediate relatives or close friends on the Police Department?

A. No, sir.

Q. Have you ever heard any speeches of any character either made by Mr. Turkus or any of the officials of Mr. O'Dwyer's office?

A. I have not.

Q. You realize that lawyers for both sides have no personal knowledge of transactions involved here; you understand that?

A. I don't understand you.

The Court: Lawyers are not witnesses.

The Talesman: That is right.

Q. So you will not allow the entity of any lawyer in any wise to sway you?

A. That is right.

Q. Because Judge O'Dwyer is now District Attorney and formerly a judge and is running for Mayor, that is not going to have any effect on you?

A. Absolutely not.

Q. The issue is whether or not you believe witnesses that have presented the story to the District Attorney which was subsequently presented to the Grand Jury and is now before you for consideration?

A. That is right.

[fol. 432] Q. If it develops in the course of the trial that some of the witnesses called by the People actually know some of the defendants, or even all of them, the mere fact that they knew one another, without any other proof, would that in itself lead you to render a verdict against them?

A. No, sir.

Q. I will put it more clearly. The witness takes the stand and the District Attorney inquires as to his supposed knowledge of an alleged crime; is that clear?

A. Yes, sir.

Q. Then if the District Attorney were to ask him does he know any of the defendants, and he says, "Yes, I know the defendant Capone, I have been to his house, I used to meet with him, I attended a ball game or something else," and assuming that subsequently Capone, going on the stand and saying to you, "I know that witness," would the mere fact that he admits knowing the person, standing alone, influence your verdict to the extent that you would say, "He knew the man, therefore he must be guilty"?

A. No, sir.

Q. In judging a person who takes the stand, you are going to judge what motive that man has in testifying?

A. Yes, sir.

Q. If a man were to take the stand and say to you, "I have not only committed eleven murders, for which I have never been tried for one, I lied before the Federal Grand Jury under oath and I lied in this very court under oath where it concerned myself, but now I will tell the truth, so help me God, here," and then tells you a story, you are not going to believe that simply because of his saying, "I am [fol. 433] telling the truth"?

A. That is right.

Q. You are going to look and say, "Well, this fellow admits under examination he committed eleven murders, that he lied before several judges under oath in different cases,

and I will judge his testimony with great care and caution"?

A. Yes, sir.

Q. Assuming that some other witness gets on the stand and admits to a lesser amount of crime, but admits he was involved in murders he has never been tried for, and involved in numerous other things, and he says, "Well, one of the defendants told me that he committed the crime," are you going to judge whether you are going to believe that fellow or not?

A. Yes, sir.

Q. You are going to judge him in the light of how much force you are going to give to that testimony in view of what motive or interest he may have had?

A. Yes.

Q. You understand from what you have heard that no man can be convicted on the statement of an accomplice?

A. That is

Q. And no man can be convicted on the statement of fifty accomplices or one thousand, for that matter, you understand that?

A. Yes, sir.

Q. You also understand from what you have heard discussed by both defense and the prosecution that there must be independent evidence tending to connect the defendants, if you believe the accomplice?

A. Yes, sir.

Q. In other words, you can go on in the jury room and [fol. 434] say, "Well, irrespective of what this accomplice is, I believe his story," but even if you did that you could not convict unless and until you found other dependable, credible evidence that tended to connect the defendants with the crime?

A. Yes, sir.

Q. Would you hesitate because of what has been said about this trial and the number of men who have prejudice and otherwise, to come out into the court-room and say, "Not guilty," if you were unable, after inspecting the evidence, to find sufficient under the law of our land to warrant you in finding a verdict of guilty?

A. I am not afaid of any just verdict.

Q. In other words, you understand, as you should understand, that your verdict, if it rests on your conscience, cannot be questioned by anybody whether they like it or not?

A. That is right.

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Q. Assuming you are in the jury room and you enter into discussion with other jurymen. You are outnumbered in the thought they feel one way, whether it is guilty or innocent, and they feel the other way; you listen to all reasonable argument without rancor or bitterness; you argue your opinion and they argue their opinion; after listening and debating the question you conscientiously believe you are right, would you stick to your opinion?

A. I would stick to it.

Q. You don't feel, as has been evinced by a statement of the District Attorney to some other juryman, that simply because you stick to your opinion you are looking for a [fol. 435] hung jury, do you?

A. No, sir.

Mr. Turkus: I object to the question.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Will you, irrespective of what the District Attorney may think, if you are honestly convinced after listening to reasonable argument in the jury room that the opinion you have gained is a proper and just one, retain that opinion after listening to reason and argument, if you have not been changed by other jurymen?

A. That is right, I would.

By Mr. Turkus:

Q. Although Mr. Barshay and Mr. Rosenthal went over with you in great detail about the character of an accomplice, do you recall their questions?

A. Yes, sir.

Q. Do you expect an accomplice, one who admits himself to be part of a crime, to be a college professor or a paragon of virtue?

Mr. Barshay: I object to that.

The Court: Objection sustained.

Q. In the usual course of events, is your state of mind such that murders are not committed openly, on Broadway and 42nd Street?

Mr. Barshay: I object.

The Court: Objection sustained.

[fol. 436] Q. Do you understand that in the prosecution of crime the District Attorney may use an accomplice?

A. Yes, sir.

Q. Do you feel that because a man is a bad man, that he could never tell the truth?

A. He may tell the truth sometimes.

Q. That is going to be your job?

A. Yes, sir.

Q. Do you feel that because a criminal testifies against others who were associated with him in the commission of crime, do you feel he cannot tell the truth, that that would be impossible?

A. No, sir, it could be.

Q. Do you appreciate that sometimes crooks and killers fall out?

Mr. Rosenthal: I object to that.

The Court: Sustained as to form.

Q. Is your state of mind such that men who commit crime together sometimes testify against each other?

The Court: He says an accomplice may tell the truth.

Q. As you sit in the jury box it is going to be your job to find out if what an accomplice tells about his past associates is true?

A. Yes, sir.

Q. And if evidence in the case, other evidence in the case, shows that the accomplice is telling the truth, and other evidence tends to connect the defendants with the commission of the crime of murder in the first degree, would you expect the District Attorney to do more than that to get a conviction?

A. No, sir.

[fol. 437] Mr. Rosenthal: Objected to.

The Court: Sustained as to form.

Q. We will go at it this way: Assuming you heard the testimony of the accomplice and then there is more evidence comes in the case, and you are satisfied from the evidence that the accomplice is not only telling the truth about his past associates in connection with the charge, but you are satisfied beyond a reasonable doubt that the other evidence in the case tends to connect the defendants with the commission of the murder, would you expect the prosecution to submit more than that?

Mr. Barshay: I object.

The Court: Objection sustained as to form. That would be a hard question for a law student to answer.

By the Court:

Q. You understand, no matter how bad a man is, if he takes the stand as an accomplice, that the law requires, in order to consider his testimony, that he be corroborated by sufficient evidence which tends to connect the defendant with the commission of the crime?

A. Yes, sir.

Q. And if he is so corroborated you have a right, if you see fit, to accept his testimony as worthy of belief, and would you in that case try to be fair?

A. I certainly would.

Q. In determining whether his testimony is worthy of belief?

A. Yes, sir.

Q. What was your employment before you went in this business?

[fol. 438] A. I was a manufacturer of woodwork, personally.

Q. What kind of woodwork?

A. Cabinet work.

Q. For how long?

A. Fifteen years.

Q. That was the trade you learned?

A. Yes, sir.

Q. Are you a member of the union?

A. No, sir.

Q. You mean furniture?

A. Furniture, cabinet work, showcases.

Q. One of those concerns on Park and Flushing Avenue?

A. No, sir, not that type; we specialized in certain items of store fronts and all that kind of work.

Q. Those are the only employments you ever had?

A. That is all.

By Mr. Turkus:

Q. Mr. Barshay told you that his client Buchalter is serving a long-term sentence, and asked you if that would prejudice you against the defendant Buchalter, and you said no.

A. That is right.

Q. If he told you there was an appeal pending from the sentence, would that prejudice you?

A. No, sir.

Mr. Barshay: I object to that.

Mr. Turkus: I will withdraw the question.

Q. Supposing counsel for Buchalter went all the way and told you that from part of the sentence there was an appeal pending, or a prospective appeal pending, would that prejudice you against the defendant?

[fol. 439] Mr. Climenko: I object to the form of the question; I specifically object to the question as assuming a state of facts not in evidence.

The Court: Objection sustained.

Mr. Turkus: Am I precluded?

The Court: I don't think the question looks good on the record. I have sustained it on a different ground.

By Mr. Turkus:

Q. Would that sentence enter into your deliberation on the jury as to the guilt or innocence of Buchalter in the Rosen murder?

A. No, sir.

Q. If you are satisfied beyond a reasonable doubt that Buchalter is guilty of murder in the first degree in the Rosen case, that sentence we spoke of would have no bearing in your decision?

A. None at all.

Q. In all, how many trucks does your firm operate in which the teamsters' union has some effect on it?

A. You mean directly, of my own? One of my own, but others that we hire.

Q. How many would that be in gross—all together?

A. Well, we have two others that do work for us.

By the Court:

Q. That is the way you do business, that you have to have your own truck or hire trucks to bring merchandise from the railroad or depots?

A. Yes, sir.

Q. And that they deliver to some customers and you also do that?

[fol. 440] A. Yes, sir.

Q. But some customers, in fact, many, come with their own?

A. Yes, sir, cash and carry.

Q. They pay for their goods and take them away?

A. Yes, sir.

Mr. Turkus: Challenged peremptorily.

The Court: This trial will resume on Wednesday morning at ten o'clock. Members of the panel are cautioned not to discuss the case or read about it or listen to anything that may be said about it during adjournment. Keep your minds open.

(Addressing Mr. Leibowitz) You have been tentatively selected. Follow the same instructions as given to the remainder of the panel.

Return here at ten o'clock Wednesday morning.

The defendants are remanded.

(Whereupon an adjournment was taken until Wednesday, September 24, 1941, at ten o'clock a. m.)

[fol. 441] Brooklyn, N. Y., Sept. 24, 1941.

Trial Resumed

(Mr. Turkus and Mr. Talley confer with the Judge privately before the bench, without the hearing of the panel.)

Mr. Turkus: I had a discussion with Judge O'Dwyer as regards this talesman (Leibowitz); he is to be of assistance to him in the campaign and it might have some implication on a verdict to be rendered in the case. Under the circumstances, I am going to challenge for cause.

The Court: Do counsel for the defense wish to try the challenge?

Mr. Talley: No, we do not.

The Court: It is unanimous?

Mr. Talley: Yes, all the defendants join in it.

The Court: Then there is nothing to try and the Court has to sustain the challenge. Of course, there has to be ground for it. I am of the opinion that notwithstanding the apparent absolute honesty of this talesman and the fact that he would be an excellent foreman for this jury, he would be in an embarrassing position in the juryroom

[fol. 442] as foreman of the jury in expressing any opinion on this because of his political connection. Challenge sustained.

For the convenience of talesmen who are kept waiting day after day the Court directs the clerk to call twelve talesmen, which will fill the box, and that will, according to the standard of work done last week, supply ample material for the morning's work.

(The clerk then called Norman Kendy, No. 2595; Matthew Labden, No. 2790—no answer to the name—Samuel Cone, No. 2783; Emanuel Camachi, No. 2808, Charles E. Stevens, No. 2602; Joseph Herrick, No. 2788; John M. Pleil, No. 2819; Randolph Tyrrel, No. 2205; Andrew Merrick, No. 2684; Max Gould, No. 2817; Henry Lathrop, No. 2685; Samuel Lieberson, No. 2711; Max Oliver, No. 2724.)

The Court: All members of the panel other than those who have been called in the jury box may go until two o'clock this afternoon.

Mr. Turkus: May I respectfully suggest we continue examining in the same manner as heretofore so that all counsel may hear the questions and answers?

The Court: Yes.

[fol. 443] Norman Kendy, of 225 Sterling Place, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. According to the trestle board you live on Sterling Place. Is that the Park Slope district in Brooklyn?

A. Yes.

Q. Have you lived in that area for a number of years?

A. Three years.

Q. Prior to your residence in the Park Slope area did you live in Brooklyn too?

A. For about twenty-five years.

Q. In any particular district?

A. In Flatbush.

Q. You are listed as a secretary, without any further description. Would you mind telling me the nature of the firm?

A. Importers of crude rubber; I am an officer.

Q. Is there anything about the nature of the charge in this case, namely, the charge of murder in the first degree, which would impair your ability to serve?

A. No.

Q. I take it that you have no conscientious or other scruples against capital punishment?

A. No.

Q. That the matter of punishment will not be considered by you in the jury room nor deliberated upon when considering the guilt or innocence of the defendants?

A. That is right.

Q. Have you had any business contacts in the past that brought you in contact with any firms or individuals in the Brownsville or East New York sections of Brooklyn?

A. No, sir.

Q. I take it that you have none personally?

A. No.

[fol. 444] Q. With respect to the garment district in Manhattan, have you had any contact there, directly or indirectly?

A. No.

Q. Have you had any in your past life?

A. No.

Q. Does that also take in the Brooklyn waterfront?

A. Yes.

Q. I take it you have had no connection, directly or indirectly, at any time, either business or social, with anyone in the garment district in Manhattan, Brooklyn, or on the waterfront or in Brownsville or the East New York section of Brooklyn?

A. Yes.

Q. And does that pertain to the clothing district as well?

A. Yes.

Q. Has your business at any time brought you in contact with people in the clothing district?

A. In a social way, yes; a relative of mine has a business in the garment trade.

Q. Is he personally engaged in that business?

A. Yes, sir.

Q. Is that the manufacture of clothing?

A. No, sir, retail.

Q. So it is not, in the accepted clothing district in Manhattan, where clothes are manufactured and distributed?

A. No, sir.

Q. Has your business at any time brought you in contact with persons or firms in the clothing trucking industry?

A. Never.

Q. Have you heretofore served as a juror in a case?

A. Yes.

Q. Has it been a criminal case?

A. Yes.

Q. Was it in the County Court of Kings County?

A. Yes.

[fol. 445] Has it been recent?

A. Four or five years.

Q. Did that case come to a conclusion? Did the Judge charge the jury on the law?

A. Yes.

Q. So you are familiar with the meaning of reasonable doubt and the doctrine of the presumption of innocence?

A. Yes.

Q. Will you, in accord with the Judge's instructions, give the defendants the benefit of the presumption of innocence and the doctrine of reasonable doubt?

A. Yes.

Q. Are you in sympathy with law enforcement?

A. Yes, sir.

Q. Does your business at any time bring you in contact with any officials, directly or indirectly, of the Amalgamated Clothing Workers of America?

A. Never.

Q. Is the name Jacob Potofsky, an official of the Amalgamated Clothing Workers of America, at all familiar to you?

A. No, sir.

Q. Is the name of Murray Weinstein, manager of the Clothing Cutters Local No. 4, affiliated with the Amalgamated?

A. No.

Q. Or that of Sam Katz?

A. No, sir.

Q. Any familiarity with the name of Bruno Belia, organizer of the Amalgamated?

A. No, sir.

Q. Or with Salvatore Marazzano?

A. No, sir.

Q. Or with Philip Orlofsky, at one time manager of the Clothing Cutters Local No. 4; is that name familiar to you?

A. No, sir.

Q. Did you ever know anyone associated with Local 240 of the Clothing Drivers & Helpers Union?

A. No, sir.

[fol. 446] Q. Is the name of Beckerman or Yudelowitz at all familiar to you?

A. No, sir.

Q. Do you know any individual or any officer of the Flour Truckmens Union?

A. No, sir.

Q. Or of the Teamsters Union?

A. No, sir.

Q. Is the name of Max Silverman or Wolfie Goldis at all familiar to you?

A. No, sir.

Q. Is there any familiarity with the name of William or Willie Alberts, a one-time bondsman?

A. No, sir.

Q. Do you know anyone named Emanuel Buchalter, is that name at all familiar with that of Philip Buchalter, sometimes known as Philip Kowas?

A. No, sir.

Q. Any familiarity with the name of Bellanca or Tosca?

A. No, sir.

Q. Or Terry Burns?

A. No, sir.

Q. Do you have any inherent bias or prejudice against the prosecutor of the county, Judge O'Dwyer, or against the prosecution in this case in which the use of accomplice testimony is employed?

A. None whatever.

Q. In questioning the other prospective talesmen, Mr. Barshay, representing the defendant Buchalter, directed attention of the jury to the fact that he is serving a long term in jail and asked whether or not prospective talesmen had any prejudice against a defendant for that reason, and I ask you if you have any prejudice?

A. No, sir.

[fol. 447] Q. By the same token, do you feel that one who has been convicted of crime and served a sentence should have any sanctuary in a jail when he is charged with the crime of murder in the first degree?

Mr. Climenko: I object to that as improper in form.

The Court: I am trying to figure out what is meant by "sanctuary."

Mr. Turkus: I will withdraw it.

Q. Is your state of mind such that you would be inclined to relax or deviate from a proper verdict because the defendant is convicted of a crime and has a jail sentence?

Mr. Barshay: I object to the word "proper."

The Court: The question can be put in more direct form and you will more likely be able to get a proper response. The Court does not like the form of the question, because it assumes something which is not on the record. Now, the talesman may be apprised of the question asked by the defense.

Mr. Turkus: Mr. Barshay has brought out that Buchalter has been convicted of a past crime and is now serving a sentence.

The Court: Is that on the record, that statement?

Mr. Turkus: I have watched carefully, and I notice the stenographer is taking down every question and answer.

The Court: Well, the Court knows that was asked by [fol. 448] Mr. Barshay in open court in the presence of all the members of the panel, but that does not establish it as of the present examination. You must be careful of that.

Mr. Turkus: In questioning every prospective talesman, Mr. Barshay has addressed a question in which he has directed attention of the prospective juror to the fact that Buchalter has been heretofore convicted of crime and is now serving a long sentence in jail.

Q. I ask you would you be inclined—is your state of mind such you would be inclined to relax or deviate from a proper verdict in the case because the defendant is presently in jail for past crimes, serving a long sentence?

The Court: A past crime. That is too involved to follow.

By the Court:

Q. Would the fact that one of the defendants, Buchalter, is now serving a term of sentence under conviction for another crime, a thing that would cause you to avoid con-

victing him here if he is proven guilty beyond a reasonable doubt?

A. No.

By Mr. Turkus:

Q. In other words, your state of mind is such that no matter what his situation may be with regard to past crime on this charge of murder in the first degree, you will decide the case on the evidence presented in the courtroom and on nothing else?

Mr. Barshay: I object to the use of the words "past [fol. 449] crime," I asked specifically about two items, and if Mr. Turkus will confine himself to that I have no objection.

The Court: That refers to the conviction that the defendant Buchalter is now serving a sentence on?

Mr. Turkus: Yes.

The Talesman: The answer is yes.

By Mr. Turkus:

Q. The defendants are represented by nine lawyers. Buchalter is represented by former Assistant District Attorney Barshay, former Assistant United States Attorney Bertram Wegman, and Mr. Jesse Climenko. Do you know any of those three lawyers representing Buchalter?

A. No, sir.

Q. Do you know anyone attached to their staff?

A. No, sir.

Q. The defendant Weiss is represented by three lawyers, former General Sessions Judge Talley, do you know him or anyone connected with his staff?

A. No, sir.

Q. Former Assistant District Attorney Cuff, do you know him or anyone connected with his staff?

A. No, sir.

Q. Former Assistant United States Attorney Kriendler?

A. No, sir.

Q. Capone is represented by three lawyers, Sidney Rosenthal, Leon Fischbein, and Emanuel Rosenberg; do you know any of those three?

A. No, sir.

Q. Or anyone connected with their staffs?

A. No, sir.

Q. With respect to the District Attorney, do you know [fol. 450] Judge O'Dwyer, the District Attorney, personally?

A. No, sir.

Q. Do you know the Assistant District Attorney in charge of this prosecution, Mr. Turkus, or Mr. Klein or Mr. Joseph?

A. No, sir.

Q. Do you know any member of the District Attorney's staff intimately?

A. Yes.

Q. Who is that?

A. Mr. Helfand.

Q. Mr. Helfand is sitting in the jury box facing the prospective talesmen here. Is that the Mr. Helfand you refer to?

A. Yes, sir.

Q. Is your association with him an intimate one?

A. He is a relative.

Q. The next question that might suggest itself is this: Would your association or intimacy with Mr. Helfand in anywise preclude you from rendering a just verdict on the evidence in this case?

A. No, sir—conscientiously, it might.

Q. As the defendants are seated in court, have you any prejudice or bias against any of the three?

A. None.

Q. Have you any conscious favor for the District Attorney in the prosecution of the case because of your intimacy with Mr. Helfand?

A. No, sir.

Q. Is your state of mind such that if you were accepted as a juror you could listen to all of the evidence adduced in the court-room, discuss the case with your fellow jurors without rancor and with common sense and understanding, [fol. 451] listen to the arguments of lawyers for the defendants as they draw their inferences from the testimony, listen to the arguments of the prosecutor and the charge of the learned Court on the law, and then decide the case solely and squarely upon the evidence presented in court?

A. Yes, sir.

Q. And if accepted as a juror in the case, will you endeavor to listen to reasonable argument and discussion by the other jurors in the case?

A. Yes, sir.

Q. If selected, will you endeavor to do justice in the case?

A. Yes, sir.

Q. Assuming that you were accepted as a juror and you did hear all of the evidence in the case and listen to the lawyers for the defense draw their arguments before the jury, listen to the prosecutor and to the Court on the law, discuss the case with the other jurors in the jury room, and then, if your conscience is satisfied beyond a reasonable doubt that upon all the evidence in the case there are three guilty men at the bar of justice, would you hesitate—would you be fearful—would you be reluctant to say so in your verdict?

A. No, sir.

Mr. Turkus: No challenge.

By Mr. Barshay:

Q. You volunteered to Mr. Turkus the fact that when it came to reason this case in the jury box—I am not quoting your exact language—your knowledge of Mr. Helfand, subconsciously, might affect your judgment?

A. Yes, sir.

[fol. 452] Q. Is that what you intended to say?

A. Yes, sir.

Q. That is based upon your intimate knowledge of Mr. Helfand in connection with the prosecutor of this county?

A. Yes.

Q. And, of course, if that did occur, that would not be fair to any of the defendants, would it?

A. No, sir.

Q. You do not intend to be unfair?

A. No, sir.

Q. But subconsciously it might preclude any of the defendants or all of them from receiving at your hands an impartial verdict?

A. Maybe.

Q. So if it came to a question of testimony where the D. A.'s office would contend one thing and the defense another, that knowledge, you volunteered yourself, sub-

consciously might cause you to lean in the direction of the District Attorney's office?

A. It might.

Q. You are very honest and frank about it?

A. Yes, sir.

Mr. Barshay: On behalf of counsel, we challenge this [fol. 453] talesman for cause.

The Court: Try the challenge.

(The talesman, NORMAN KENDY, residing at 225 Sterling Place, Brooklyn, New York, was then sworn.)

By Mr. Barshay:

Q. Now that you are under oath, would you answer the question in the same manner as you did before?

A. Yes, sir.

Q. And the sum and substance is that, because of your intimate knowledge of Mr. Helfand, an assistant prosecutor engaged in work like Mr. Turkus, if it came to a matter of deciding one way or another, subconsciously, your knowledge of Mr. Helfand would cause you to lean in the direction of the D. A., to the prejudice of the defendants?

A. Subconsciously it might, yes, sir.

Q. When you say "it might," that means that you are absolutely certain that you cannot exclude from your mind that intimate knowledge of Mr. Helfand?

A. No.

Mr. Barshay: We urge the challenge.

The Court: Any more questioning by any counsel?

Mr. Turkus: None by the District Attorney.

The Court: This is purely speculative and fantastic and is a psychological question. The effect of fear—there will normally be resistance to it and a tendency to go in the other direction. There is nothing to it. The challenge is overruled.

[fol. 454] Mr. Barshay: Exception for all counsel for the defense.

By Mr. Barshay:

Q. How well do you know Mr. Helfand?

A. He is a member of my family.

Q. A relative?
A. Yes, sir.
Q. May I know how close?
A. A brother-in-law.
Q. You are married to his sister?
A. I am.
Q. And consequently you see him, then?
A. Yes, sir.
Q. Often?
A. Quite often.
Q. You have great hope in his career and for his success?
A. Yes, sir.
Q. You have talked about cases?
A. Yes, sir.
Q. He has discussed some of the work he has done?
A. In a way, yes, sir, an offhand way.
Q. Naturally you pay close attention to the progress he in making with respect to work in the D. A.'s office?
A. Yes.
Q. Not only do you talk to him, but I take it you talk to your own wife about your brother-in-law's progress in the office and his work?
A. Yes, sir.
Q. So it is more than a subconscious feeling; isn't that so?
A. It is according to the way—maybe to draw the line.
Q. It would be hard for you to draw the line?
A. Yes, sir.
Q. It would be like rooting for the team on which your [fol. 455] brother-in-law is playing?
A. That is a good analogy, yes, sir.
Q. And that would be to the prejudice of these defendants?
A. It might.
Q. You are the one who volunteered "it might"?
A. Yes, sir.
Q. I did not bring that out of you at all?
A. No, sir.
Q. You say "it might." Is that based upon the fact that you know the type of work your brother-in-law, Mr. Helfand, is doing?
A. Yes, sir.

Q. And also on the knowledge you gained from talking to Mr. Helfand about the type of work he was doing?

A. He did not discuss it.

Q. You followed that work?

A. Yes, sir.

Q. Especially the work he has done very recently, before the summer session?

A. Yes, sir.

Q. So you can honestly say that it will affect your judgment in this case?

A. It might, yes, sir.

Q. You still say, "It might." Can't you make sure about it?

A. Well, I would weigh the evidence and listen to all of the facts in the case, but when it came to a final conclusion I can say it might weigh because of the fact I am of close relationship.

Q. To the prejudice of the defendants?

A. Yes, sir.

Q. So that if the District Attorney's office contended a proposition and we argued conversely, and it became a question of good faith sometimes with respect to the [fol. 456] District Attorney's office—I don't say it will, but if it does—your judgment would lean in the direction of the District Attorney's office?

A. Yes, sir.

Mr. Barshay: I press my challenge for cause.

Mr. Turkus: I do not wish to seem presumptuous in rising at this time, but there have been some matters brought out that were not brought out on the prior challenge. I can readily understand it may be embarrassing to this prospective talesman because of the relationship with one of the prosecutor's staff—he being a brother-in-law.

The Court: Does that mean that Mr. Helfand is connected with the prosecution of this case?

Mr. Turkus: Not this present case, no, sir.

The Court: Supposing you, Mr. Turkus, brought out in examining talesmen that the brother-in-law was a lawyer who at times defended criminal cases other than this, would that be ground for challenge?

Mr. Turkus: It might not be a technical ground, but I certainly feel he would have no place on the jury.

The Court: You can challenge him peremptorily if you wish; the Court is not allowing this panel to be weeded out any more than is necessary under challenges for cause.

Mr. Barshay: May I respectfully except to your Honor's [fol. 457] comment.

The Court: The law allows a very liberal number of peremptory challenges, and they must be used in a proper case.

Mr. Barshay: May I comment upon your Honor's statement that Mr. Helfand is not directly connected with this prosecution? Every Assistant District Attorney is connected with every prosecution that goes on. Mr. Helfand has prepared and prosecuted cases in the office concerning which your Honor knows but which I shall not name; I do not know whether he had any part in the preparation of this case or on a collateral matter having something to do with this case.

The Court: Have you any such information?

Mr. Barshay: I cannot give it to you because I do not know what goes on in the District Attorney's office, but every member of the staff is part of this transaction as much as Mr. Turkus is.

The Court: Are you through?

Mr. Barshay: Yes.

The Court: The Court's ruling is unchanged.

Mr. Turkus: There is something in what Mr. Barshay says about the preparation of prosecutions, but I do not want to make any more specific reference to it.

The Court: The policy of the Court is this: The Court [fol. 458] is not going to sit from now until Doomsday, spending the taxpayers' money, in trying to save counsel from spending peremptory challenges. The Court will sustain, according to its judgment, a proper challenge for cause. The Court has overruled this challenge, and that stands.

Mr. Barshay: May we respectfully except to your Honor's comment.

The Court: If the Court follows any other policy it will undoubtedly string out the trial of this case as far as the selection of a jury is concerned. It has already consumed more time than is understandable by many people.

Mr. Turkus: May I make my position clear?

The Court: I think the defense made it clear by letting the matter stand as it is, unless you wish to exercise a peremptory challenge.

By Mr. Barshay:

Q. Have you ever gone out on homicide cases with Mr. Helfand?

A. No, sir.

Q. Has he ever been called from your home while he was on homicide duty?

A. Yes, sir.

The Court: May the Court make a suggestion?

Mr. Barshay: Yes.

The Court: I think, in the interest of fairness, if it is [fol. 459] reasonable to assume the relationship has caused discussions and family talks about this case or related cases, then the Court will apply another challenge so we may hear about the family discussions in this matter.

By Mr. Barshay:

Q. Do you remember the last prosecution that Mr. Helfand personally conducted?

A. Yes, sir.

Q. There was much discussion in your family concerning it, wasn't there?

The Court: I withdraw everything I said, because instead of facilitating the selection of a jury, it simply leads to wrangling. The Court will say nothing more, but will be an observer.

Mr. Barshay: I am handicapped through circumstances from asking questions I would like to ask, but I thought your Honor knew these things. I cannot ask them directly.

The Court: Use your own judgment.

Mr. Barshay: That is what I am doing; Mr. Turkus understands it and agrees with me.

By Mr. Barshay:

Q. There was much discussion, wasn't there, in the family circle with your brother-in-law concerning cases which your brother-in-law frequently handled?

A. Yes, sir.

Q. Now, I do not want you to mention the name of any [fol. 460] defendant, you understand that?

A. Yes, sir.

Q. But you did hear the name of Reles?

A. Yes, sir.

Q. You did hear the name of Tannenbaum?
A. Yes, sir.
Q. You did hear the name of Mrs. Walker?
A. I don't recall that.
Q. You did hear the name of Mr. Bernstein?
A. I don't recall.
Q. You did hear a lot of names which you have heard here while you were sitting in the rear of the court-room?
A. Yes, sir.
Q. In other words, there was some similarity?
A. Yes, sir.
Q. And you know, when you were sitting there, your memory was refreshed as to what had been discussed at your home?
A. Yes, sir.
Q. When you heard those questions?
A. Yes, sir.
Q. And that is why you said that subconsciously it might prejudice you against these defendants?
A. Yes, sir.
Q. Well, now, isn't it clear, subconsciously or otherwise, you will be prejudiced against these defendants if these people do testify and their testimony becomes an issue in this case, and their credibility becomes an issue in the case—you will be inclined to favor their side of the case because you have already heard the substance of the stories about like cases?
A. Yes, sir.
Q. And in that way you would be precluded from render-
[fol. 461] ing fair judgment on behalf of these defendants?
A. Yes, sir.
Q. You are honest about that?
A. Yes, sir.
Q. You do not want to be a juror who is not fair or equitable to both sides?
A. Yes, sir.

Mr. Barshay: I renew my challenge for cause.
The Court: Try the challenge.

Norman Kendy, sworn:

By Mr. Barshay:

Q. You would repeat the same answers under oath?
A. Yes, sir.

The Court: The trouble, Mr. Barshay, is that the answers were put in the witness's mouth by you.

Mr. Barshay: I take an exception to your Honor's comment, most respectfully.

The Court: Will you please proceed and try the challenge?

Mr. Barshay: I am finished.

The Court: Any questions to be asked by other counsel?

Mr. Talley: No, sir, we join in the challenge.

By Mr. Turkus:

Q. In making the responses you did to Mr. Barshay, did you make those in full candor and fairness?

A. Yes, sir.

Q. Do you honestly feel that because of your relationship with Mr. Helfand and because of your familiarity with cer- [fol. 462] tain aspects of the case, you could not be fair to the defendants on trial?

A. Yes.

Q. That is your honest opinion?

A. Yes, sir.

Mr. Turkus: I join with the defense in the challenge.

The Court: The Court is forced into the position of sustaining the challenge, although it has no basis whatever. The talesman's previous answers were all given on the basis of psychological speculation. Then answers were put in his mouth by both sides and willing assent to the suggestion that he is biased. The Court cannot try both sides. You may go. I have sustained one of the challenges only.

Mr. Barshay: Exception.

Samuel K. Cone, residing at 405 Woodbine Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Do you live on Woodbine Street?

A. Yes, sir.

Q. Is that in the Ridgewood section of Bro yn?

A. Yes, sir.

Q. Have you lived there for a number of years?

A. Seven.

Q. Prior to that time did you reside in Brooklyn?

A. Yes.

Q. In the same district or in some other district?

A. Wierfield Street, about ten blocks away.

[fol. 463] Q. Is that also known as the Ridgewood district?

A. I believe so.

Q. There have been many questions asked of prospective talesmen, some of which you may not be familiar with, so that I am obliged to reiterate them specifically to each prospective juror, so I know you will have patience with us as we go on with these matters. Has your business brought you in contact with the Brownsville or East New York area of Brooklyn?

A. No, sir.

Q. Has it in the past?

A. No, sir.

Q. So you have no connection, then, directly or indirectly, with any person or firm in that area?

A. Yes, sir.

Q. Does that also hold true with respect to the garment district in Manhattan?

A. Yes, sir.

Q. You know no one there, individual, or any member of a corporation?

A. No, sir.

Q. You have had no business with them one way or the other, directly or indirectly?

A. No, sir.

Q. With respect to the Brooklyn waterfront, would you give the same response?

A. Yes, sir.

Q. Did you have any contact, directly or indirectly, with any firm or any manufacturers in the clothing district, or with any clothing trucking industry?

A. No, sir.

Q. Are you in sympathy with the enforcement of the penal law of the State of New York?

A. Yes, sir.

Q. Is there anything about the nature of the charge, [fol. 464] namely, murder in the first degree, which would impair your service as a juryman?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Would you, if selected, permit the question of punishment to be argued by any member of the jury?

A. No.

Q. I will repeat, would you, if accepted as a juror, permit any other juror to argue the question of punishment?

A. No, sir.

Q. Have you heretofore had the benefit of listening to a Judge's charge on the law in a criminal case?

A. Yes.

Q. If accepted, will you take the law without qualification and implicitly from the trial judge?

A. Yes, sir.

Q. Will you take that law in all of its aspects?

A. Yes, sir.

Q. When you are charged on the law of reasonable doubt, will you give the benefit of that doctrine to the defendants at the bar?

A. Yes, sir.

Q. The Judge will charge you in substance that the burden is upon the prosecution to establish the guilt of the defendants beyond a reasonable doubt. Will you follow that instruction of law and apply it to the evidence in the case?

A. Yes.

Q. The Judge will likewise charge you that the defendants are presumed innocent until their guilt has been established beyond a reasonable doubt. Will you apply that presumption of innocence and give the benefit of it to the defendants?

A. Yes, sir.

[fol. 465] Q. If after you have heard all the evidence in the case you are satisfied that the prosecution has overcome the presumption of innocence and has satisfied your mind beyond a reasonable doubt there are three guilty men at the bar of justice, would you have any hesitation in saying so?

A. No, sir.

Q. Would you have any fear or reluctance about your verdict because of any impairment whatever?

A. No, sir.

Q. There are various names concerning which I want to ascertain if you have any familiarity with. For example,

do you know or do you have any connection with any officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is the name of Potlofsky at all familiar to you?

A. No, sir.

Q. Or that of Murray Weinstein, manager of the Clothing Cutters Union, Local No. 4?

A. No, sir.

Q. Or Samuel Katz?

A. No, sir.

Q. Or Bruno Belia, organizer for the Amalgamated, does that mean anything to you?

A. No, sir.

Q. Or that of Salvatore Marazzano?

A. No, sir.

Q. Have you had any business or other connections, directly or indirectly, with any officials of the Teamsters Union or Local 240 of the Clothing Drivers Helpers Union?

A. No, sir.

Q. Is the name of Bellanca at all familiar to you?

A. No, sir.

Q. Or Abraham Beckerman?

A. No, sir.

Q. Is there any familiarity in your mind with the name of [fol. 466] Max Silverman or Wolfie Goldis?

A. No, sir.

Q. Is there any familiarity with the name of William or Willie Alberts, at one time a bondsman?

A. No, sir.

Q. Or Emanuel Buchalter, or an individual named Phillie Buchalter, sometimes known as Philip Kowas?

A. No, sir.

Q. Do the names of Bellanca and Tosca suggest anything to your mind?

A. No, sir.

Q. Or that of Terry Burns?

A. No, sir.

Q. Do you know any individual in the automobile business by the name of Weiss in the Park Slope Section of Brooklyn?

A. No, sir.

Q. The defendants are represented by various counsel. I have read their names before: Former Assistant District Attorney Barshay, former United States Attorney Weg-

man, and Mr. Jesse Climenko, representing the defendant Buchalter. Do you know any of those three gentlemen or anyone connected with their office staff?

A. No, sir.

Q. The defendant Weiss is represented by former Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kriendler. Do you know any of those three?

A. No, sir.

Q. Do you know intimately any member of the bar who practices criminal law as a specialty?

A. No, sir.

Q. Do you know Mr. Sidney Rosenthal, Mr. Fischbein, or Mr. Rosenberg, who represent the defendant Capone?

A. No, sir.

[fol. 467] Q. Or anyone connected with their office?

A. No, sir.

Q. The section in which you live, is that part of the Borough of Brooklyn?

A. Yes, sir.

Q. That is not in Queens County?

A. No, sir.

Q. I ask you that because there may be a disqualification.

A. It is right on the border line.

By the Court:

Q. You are between Wilson and what?

A. Knickerbocker or Ridgewood Place. It is a short street, about three blocks long, one block off Wyckoff.

Q. Just where the City Line crosses?

A. Yes, sir, Wyckoff Avenue.

Q. You are a supervisor of what?

A. Telephone repair.

Q. For whom?

A. The Western Electric.

By Mr. Turkus:

Q. Do you know the former prosecutor of this County, Mr. Geoghan, or any member of his staff?

A. No, sir.

Q. Do you know Judge O'Dwyer, or any member of the District Attorney's staff?

A. No, sir.

Q. I take it you do not know Assistant District Attorney Turkus or Mr. Klein?

A. No, sir.

Q. (The Court:) What concern did you say you were employed by?

A. The Western Electric.

By the Court:

Q. Do you belong to a local club up there in the Bushwick [fol. 468] section?

A. No.

Q. Do you know of any local club?

A. No, sir.

Q. Do you know a place at Broadway and Woodbine Street called the Wickwack Club? That is quite some distance away from you.

A. No, sir.

Q. You never went in there?

A. No, sir.

Q. You don't know a man known as "Commissioner" up there?

A. No, sir.

By Mr. Turkus:

Q. In this transaction, do you have any bias against the prosecution for the use of accomplice testimony, if employed?

A. Why, yes, I would say yes; that type is revolting to me; that is my candid opinion. I am truthful when I say that to you. I am opposed to accepting any of the testimony of a man of that kind, of that nature.

Q. Does that prejudice and bias go to the point where under no circumstances you would accept testimony of an accomplice?

A. I would say yes to you.

Mr. Turkus: Challenge for cause.

The Court: Try the challenge.

SAMUEL K. CONE, residing at 405 Woodbine Street, in the Borough of Brooklyn, was then sworn.

By Mr. Turkus:

Q. Prior to being sworn as a proposed talesman, you made response to questions I put to you. I ask you now, did you make those responses in full frankness and full candor?

—. ——.

Q. That is your state of mind?

A. Yes, sir.

Q. You used the word "revolting." That was one of the [fol. 469] words you used?

A. Yes, sir.

Q. You stated, didn't you, and do you reiterate under oath, that under no circumstances would you accept testimony of accomplices?

A. That is right.

Q. And your bias and prejudice against the prosecution which employed the use of such testimony is such as to preclude you from rendering a just verdict in the case?

A. Yes.

Mr. Barshay: No questions from any counsel.

The Court: The inquiry is not sufficient. You did not inform the talesman as to the law on corroboration, as to how he would feel.

By Mr. Turkus:

Q. I take it, Mr. Cone, you have heard the other talesmen questioned in connection with the degree of corroboration required?

A. Yes, sir.

Q. Did you have those instructions of law in mind when you made the responses now?

A. I don't quite follow you.

Q. Did you hear when the other talesmen were in the box where you are now and being questioned, a discussion of the law of corroboration?

A. Corroboration?

Q. Did you know and were you aware of the fact that testimony of an accomplice must be corroborated?

A. Yes, sir.

Q. You knew that when you made your answers to me?
A. Yes, sir.

Q. Are you of the same opinion, that, regardless of cor- [fol. 470] roboration, you cannot render a verdict free from prejudice because of your feeling against accomplice testimony?
A. I repeat, regardless.

Q. You have a feeling against accomplice testimony that nobody could overcome?
A. Yes, sir.

By the Court:

Q. Do you realize that in the prosecution of cases District Attorneys use accomplices at times?
A. Yes, sir.

Q. Supposing there was a hold-up in your place, and supposing one of the accomplices spilled the beans, so to speak, and that was corroborated, would your view be just the same, that the case should go out of the window?
A. I would say yes.

Q. I want to find out if you are trying to get out of jury service.
A. I am honest.

Q. Please answer my question directly.
A. Would I accept the testimony?

Q. You heard what I said.
A. I would say no.

Q. I don't know what you mean by "No."
A. I would not accept it.

Mr. Climenko: I object to the question.
The Court: I will reframe the question.

Q. Supposing you were interested in the prosecution of a case, a criminal case in which you yourself were the complaining witness, would you want the case to be thrown out [fol. 471] simply because one of the participants testified as a witness for the prosecution?

Mr. Barshay: I object.
The Court: All right, objection sustained. I am sustaining the objection because I don't think the man is mentally fitted to sit on a jury.

EMANUEL CAMACHI, residing at 647 56th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Do you live in the Bay Ridge section?

A. Yes, sir.

Q. Have you lived in the Bay Ridge section for a number of years?

A. Yes, sir, about twenty-odd.

Q. I take it by now you are familiar with the nature of the charge in this case?

A. Yes, sir.

Q. You understand, don't you, that the defendants at the bar are charged with the crime of murder in the first degree? Is there anything about the nature of that charge which would prevent you from being a fair and impartial juror and rendering a conscientious and just verdict?

A. No, sir.

Q. Am I correct when I assume your state of mind is such you have no scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. If selected, you will automatically become foreman by [fol. 472] virtue of your first selection, and if selected as foreman, would you permit anybody to discuss the question of punishment in arriving at a just verdict?

A. No, sir.

Q. If selected, will you listen to reasonable argument and discussion by the other jurors?

A. Yes, sir.

Q. These question I repeat. They are all necessary and I must go into them again with each juror. You understand the reason when I tell you it is mandatory on both sides to ask certain questions of talesmen, it is mandatory with the prosecution and with the defense. Is there anything concerning which I have not made inquiry which would affect your ability to sit as a fair and just juror in the case?

A. No, sir, none whatever.

Q. You are listed on this trestle board as a sales clerk. Is that with some firm or corporation?

A. Yes, sir, R. H. Macy & Company.

Q. Have you been employed there for a number of years?

A. Six years.

Q. Prior to that were you in a different line of business?
A. Yes, sir, I was working in the Chase National Bank.

By the Court:

Q. In what department?
A. Tellers Note Department, such position I had.
Q. You are a Mexican?
A. No, sir, Spanish extraction.
Q. American-born?
A. No, sir, British-born, Spanish extraction.
[fol. 473] Q. May I ask what colony?
A. Antigua, West Indies.

By Mr. Turkus:

Q. Have you heretofore had the benefit of listening to a judge charge the jury on the law, that means to tell the jury what the law is?
A. No, sir.
Q. If accepted as a juror, will you take the law in every respect solely and exclusively from the trial judge?
A. Yes, sir.
Q. (The Court:) You are a naturalized citizen?
A. Yes, sir.
Q. Since your name appeared on this special panel as a prospective talesman, did anybody speak to you about the case?
A. Not as I know of.
Q. I take it your answer means nobody has discussed the merits of the case with you?
A. That is right.
Q. Are you in sympathy with law enforcement?
A. Absolutely.
Q. May I assume, then, at no time in your past business experience you have had any contact with firms in the Brownsville or East New York area?
A. That is right.
Q. Is that true with respect to the garment district in Manhattan?
A. Yes, sir.
Q. Is it likewise true respecting the clothing industry in Manhattan?
A. Yes, sir.

Q. Has business brought you in any contact, directly or indirectly, with the clothing cutters or teamsters of any kind, nature, or description?

A. No, sir.

[fol. 474] By the Court:

Q. You live on the block north of Sunset Park?

A. No, sir, it is quite a ways from Sunset Park. That is between 6th and 7th that I live.

Q. Sunset Park is between 5th and 6th?

A. Yes, sir. I am quite a ways away from it.

Q. You are just west of Shore Road extension?

A. Yes, sir.

Q. I am just trying to get the section.

A. Yes, sir.

By Mr. Turkus:

Q. May I proceed with the thought that you have had no connection, directly or indirectly, business or social or otherwise, with any firms in the district and the industries I enumerated?

A. That is right.

Q. Did you have any business connection at any time with any officials in the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Are you selling specialties for Macy's?

A. Yes, sir.

Q. I take it you have no familiarity with the name of Murray Weinstein or Samuel Katz, officials of the Amalgamated Clothing Union?

A. No, sir.

Q. Does the name Bruno Belia or Salvatore Marazzano suggest anything to your mind?

A. No, sir.

Q. You are completely unfamiliar with those names?

A. Yes, sir.

Q. And is that true with respect to the name of Philip [fol. 475] Orlofsky, at one time manager of the Clothing Cutters Union?

A. Yes, sir.

Q. Do you know any of the officials of Local 240 of the Clothing Drivers Helpers Union?

A. No, sir.

Q. That is a union in the clothing industry, in the delivery of clothes?

A. No, sir.

Q. Or anyone connected with the Teamsters Union?

A. No, sir.

Q. Or with the flour trucking union?

A. No, sir.

Q. Is anything suggested to your mind by the names of Max Silverman and Wolfie Goldis?

A. No, sir.

Q. Or Willie Alberts, one-time a bondsman?

A. No, sir.

Q. Is there anything suggested to your mind by the name of Emanuel Buchalter?

A. No, sir.

Q. Or Phillie Buchalter, sometimes known as Kowas?

A. No, sir.

Q. Is there anything suggested to your mind by the mention of the names Bellanca and Tosca?

A. No, sir.

Q. Or Terry Burns?

A. No, sir.

Q. Do you know the former District Attorney of this county, Mr. Geoghan?

A. No, sir.

Q. Do you know any member of his staff?

A. No, sir.

Q. I take it you do not know Mr, Barshay, former Assistant District Attorney, who is one of the lawyers for Buchalter?

A. That is right.

Q. Do you know Mr. Wegman, former Assistant United States Attorney, or Mr. Climenko, or anyone attached to the law offices of these gentlemen?

[fol. 476] A. No, sir.

Q. Does that hold true with respect to Judge Talley, and former Assistant District Attorney Cuff, and former United States Attorney Murray Kriendler, who represent the defendant Weiss?

A. That is right.

Q. With respect to Capone, who is likewise represented by three lawyers, Mr. Rosenthal, Mr. Fischbein and Mr. Rosenberg; do you know any of those three gentlemen?

A. No, sir.

Q. Do you know any member of the bar who specializes in the business of criminal cases?

A. No, sir.

Q. As you sit in this jury box, is your mind open and free to receive the evidence in the case?

A. Yes, sir.

Q. I take it you sit there without any prejudice against any of the defendants at the bar?

A. That is right.

Q. You are here to deal out even-handed justice to them and render a just and conscientious verdict in consonance with the evidence?

A. Yes, sir.

Q. We have had some discussion with other prospective jurors as to whether or not they have any bias or prejudice against the prosecution for the use of accomplice testimony. Have you heard any of those discussions with the other jurors?

A. Yes, sir, I have heard them.

Q. Have you any prejudice or bias against the District Attorney who breaks a case from the inside?

A. No, sir.

Q. And uses the testimony of accomplices against the other defendants in the case?

[fol. 477] A. No, sir.

Mr. Barshay: I object to the form of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Is your state of mind such that you will listen with care and caution, and carefully to the testimony of the accomplice?

A. Yes, sir.

Q. Is your state of mind such that you appreciate at times that even bad men can tell the truth?

A. Absolutely.

Q. And that will be your job?

A. Yes, sir.

Q. And if the prosecutor not only satisfies you that one of the accomplices and one of the co-participants with these defendants in the commission of the crime is telling the truth, and he also furnishes independent evidence from another source which tends to connect the defendants with

the commission of the crime, I take it you have no prejudice against that type of case?

Mr. Barshay: I object.

Mr. Turkus: I will withdraw it in that form.

By the Court:

Q. If the Court should charge you not to accept testimony of any accomplice unless you find it to be sufficiently corroborated by other evidence tending to connect the defendants with the commission of the crime, will you follow that instruction?

A. Yes, sir.

[fol. 478] By Mr. Turkus:

Q. I take it you will follow the instructions of the Court in every respect as to the law and that, conscientiously, you will endeavor to apply the principles of law which the trial justice gives, to the facts in the case?

A. Yes, sir.

Q. And use common sense and experience, and common knowledge, every-day business knowledge, in deciding the single issue in the case, the guilt or the innocence of the men at the bar of justice?

A. Yes, sir.

Q. When accepting principles of law, will you take the principles of law the Judge will give you with respect to any defense any specific defendant may invoke? For example, should a defendant use the defense of an alibi, that is that he was not present at the time the crime was committed, will you take the law from the Judge with respect to that type of defense?

A. Yes, sir.

Q. As you sit in the box, have you any bias or prejudice against expert testimony?

A. No, sir.

Q. That is the testimony of ballistic experts, medical examiners, handwriting examiners, whatever expert testimony there may be?

A. No, sir.

Q. In questioning every prospective talesman, Mr. Barshay brought it to the attention of prospective jurors that his client Buchalter has been convicted of a crime and is serving a long sentence. Would you be inclined, is your

state of mind such that you would relax or deviate from your [fol. 479] duty as a juror in deciding a murder case simply because the defendant is in jail for some other crime?

A. No, sir.

Q. And on this charge, murder first, you will decide that, if accepted, on the evidence in the case, regardless of where Buchalter may be?

A. Yes, sir.

Q. If the Judge charges you that the defendant in a criminal case has no burden of proof, that he may sit still and do nothing that the burden is with the prosecution at all times to establish the guilt of the defendant beyond a reasonable doubt, will you accept the instructions of law and endeavor conscientiously to apply the same to the facts in the case?

A. Yes, sir.

Q. And if accepted as a juror, will you listen to the evidence in the case, the arguments of the defense lawyers in the case, drawing the inferences they draw from the testimony, and to the prosecutor, and then to the charge of the learned Court on the law, and discuss the case without rancor or bitterness, with common sense and understanding with the other jurors, and, having done all of that, and your mind is satisfied that these defendants at the bar have been proven guilty beyond a reasonable doubt, would you hesitate to say so in your verdict?

A. No, sir.

Q. Will you endeavor conscientiously to arrive at a just verdict?

A. Absolutely.

Q. Would you have any fear, reluctance or embarrassment if their guilt is proven to your satisfaction beyond a reasonable doubt, in announcing that verdict in open court?

[fol. 480] A. No, sir.

Mr. Turkus: No challenge for cause.

By Mr. Barshay:

Q. We were not able to hear you with respect to your occupation. Will you repeat it?

A. I am connected with R. H. Macy & Company.

Q. Have you ever been a juror?

A. Never.

Q. Have you ever been called as a special juror?

A. No, sir; this is the first time.

Q. Have you ever been the victim of a crime?

A. No, sir.

Q. Have you read about this case?

A. Yes, sir, to a certain extent, but I have not read with the idea to form an opinion; I have read by way of news.

Q. Whether you read it for that purpose or not, will you tell me, what did you read, and in which paper?

A. I read several. I read the *News*, sometimes the *Mirror*, the *Post*, the *Times*.

Q. In the *Mirror*, more particularly, there was a series of articles referring to some of the complainants having "come across."

A. I think I have read one article.

Q. Was it since you have been called?

A. Yes, sir, since I have been called.

Q. I notice his Honor admonished prospective jurors not to read those articles in the *Daily Mirror*, and at this time may I make the observation that on the very front seat in [fol. 481] this court-room, where jurors were assigned to sit, there is a copy of the *Daily Mirror*. I make that observation for the record.

Mr. Turkus: Let the offensive paper be removed.

The Court: It is directly behind counsel. Maybe one of your colleagues was reading it.

By Mr. Barshay:

Q. At any rate, you are not going to form any opinion by a newspaper?

A. No, sir.

Q. Did you form any opinion by virtue of that you read?

A. No, sir.

Q. Did you determine the accuracy of what you read by reading it?

A. No, sir.

Q. Did you read about the defendants in any other paper?

A. I may have read the headlines but I did not read it to gather an impression; I read all the *News* headlines.

Q. Sometimes a person does not read for a purpose, nevertheless, the same purpose is accomplished. You may

not have formed an opinion, but did you form one whether you wanted to or not?

A. I don't believe I did; I am positive I did not.

Q. Can you tell me now that you do not know anything at all about what you read with respect to its truth or accuracy?

A. I cannot recall what I did read in the first article.

Q. You won't say now. You don't even recall what you read?

A. I will not say I recall everything I read; I certainly may recall some parts.

[fol. 482] Q. Did you believe some parts you did read?

A. No, sir, I would not say so definitely.

Q. May I know how long ago you read it?

A. Well, I read—after I came in here, because I knew nothing about this case before I came in, so I really read that after I came in and knew what case I was on.

Q. While waiting to be called, you heard other prospective jurors being questioned?

A. Yes, sir.

Q. Did that refresh your recollection as to what you read?

A. Yes, sir, the outlines I would say, yes.

Q. Are you impressed with the truth of what you read?

Mr. Turkus: I object to the form of the question. I think counsel has pursued that point sufficiently; the prospective talesman has twice reiterated he can hardly recall what he read and he made no point as to the truth or non-truth of the article.

The Court: Objection overruled.

By the Court:

Q. Have any of the questions that were put to the other jurors brought to your mind what you read?

A. Well, talking over will do that, because I did not know nothing about the case. I may say I heard it. I may say I formed some impression, but no definite impression.

Q. Can you now say whether you have any impression?

A. I would say no.

[fol. 483] Q. Do you say no?

A. I would say no, I have formed no opinion or definite impression against any of the defendants.

Q. You say "definite." Have you formed any opinion one way or the other?

A. No, sir.

Q. Are you sure about it?

A. Yes, sir.

Q. Did you hear any speeches concerning the defendants or the case any place at all?

A. No, sir.

Q. On the radio or in a club?

A. No, sir.

Q. Did you ever hear Mr. Turkus speak about crime, generally?

A. No, sir, except I heard, I heard him talk, but this is the first time I heard him speak.

Q. Did you ever hear any other prosecutor speak about crime generally in any organization?

A. No, sir.

Q. Are you prejudiced by the fact that the defendants are represented by nine counsel?

A. No, sir.

Q. No more than you would have a prejudice against the prosecution because before Mr. Turkus became an Assistant District Attorney he was one of the most eminent criminal lawyers in Brooklyn?

A. I would not know that because I did not know Mr. Turkus at that time.

Mr. Turkus: May I rise humbly and bow to Mr. Barshay.

Q. That has nothing to do with the case at all, isn't that so?

A. Yes, sir.

Q. Do you know anybody at all connected with the waterfront in New York?

A. No, sir.

[fol. 484] Q. Did you know Joseph Rosen?

A. No, sir.

Q. Did you ever hear the name?

A. Not as I recall.

Q. Mr. Turkus read a list of names to you. They mean nothing to you, you said?

A. That is right.

Q. And unless there is testimony in the case connecting them with the case itself, you will disregard the names completely?

A. That is right.

Q. As a matter of fact, you will discard them right now, the same as if I asked you if you knew Jack Dempsey or Gene Tunney?

A. I would not say that, because, to reverse the position there, Jack Dempsey and Gene Tunney I would like to hear, I would be very much interested.

Q. But they have nothing to do with this case; that is what I mean.

A. Yes, sir.

Q. The reading of the names themselves means nothing?

A. No, sir.

Q. For example, do you know Emanuel Buchalter?

A. No, sir.

Q. Is the name of Emanuel Buchalter or Louis Buchalter familiar to you, or do you know them?

A. No, sir.

Q. He mentioned also the name of Philip Buchalter, who uses the name of Philip Kowas—his right name is Philip Kowas, his name is not Buchalter; he is a step-brother of the defendant.

A. That I do not know.

Q. He has no alias whatever; you understand that?

A. Yes, sir.

[fol. 485] Q. And unless there is some connection with the testimony, you will pay no attention to the reading of those names, Potofsky and all the rest?

A. That is right.

Q. Are you a member of any political club?

A. No, sir.

Q. Do you propose partaking in this coming campaign or contributing to it?

A. No, sir.

Q. You have no interest in it at all?

A. No, sir.

Q. Do you know that this is a battle between the prosecution and defense counsel, and you will not find any fault with Mr. Turkas when he fights here, and you will not find any fault with us when we fight here?

A. That is right.

Q. You will take into consideration the number of witnesses that the prosecution has, if they outnumber the defense witnesses in any respect?

A. No, sir.

Q. If they call fifty and you don't believe them, it has nothing to do with the fact that we call none?

A. That is right.

Q. In other words, numbers do not count?

A. Numbers do not count.

Q. As you sat here listening to prospective jurors being chosen, did you form an impression which favored either side, one way or the other?

A. No, sir, I have not, because I do not know what the facts are and I cannot decide one way or the other.

Q. Irrespective of the facts, have you formed an impres- [fol. 486] sion which favors the prosecution or the defense?

A. In this particular issue, no.

Q. You know the only issue in this case is the accusation on this piece of paper called an indictment—no other issue—and when the question was asked if you would have a prejudice against my client, Mr. Buchalter, because he is now serving a long sentence, that has not been asked for any purpose except a prejudice against him in your mind, should his credibility become an issue in this case.

A. No, sir.

Q. I am not seeking any sympathy, because I am not trying him on that issue; I am only trying him on the issue before me. We want no sympathy, but we must be sure we get no prejudice from any person in the court-room.

A. Yes, sir.

Q. That is the only reason that question was asked. Do you know any of the names mentioned in this indictment?

A. No, sir. If I heard them maybe I would recall them.

Q. You do not know any of them just as you sat here and heard the jurors asked?

A. I never heard the names.

Q. You don't know them?

A. No, sir.

Q. Did you know the deceased, Joseph Rosen?

A. No, sir.

Q. Did you ever hear about the case when it first happened?

A. No, sir.

Q. Do you know anyone who sat on the Grand Jury that first investigated the matter?

A. No, sir.

Q. His Honor shall charge you that this is a piece of paper [fol. 487] known as an accusation, or indictment, that it has no meaning except it starts a trial; will you follow that?

A. Yes, sir.

Q. It has no probative force whatever; it proves nothing.

A. I understand that.

Q. When the defendant said, "Not guilty," he put something at issue for you to determine.

Mr. Turkus: I object to counsel going into an extended discourse on the law with the prospective juror, because knowledge of law is not an essential requisite for jury service.

The Court: The objection has to be to a specific question. Objection overruled.

Q. If the Court shall tell you what I just said to you, will you follow that?

A. What is that?

Q. That this has no probative force whatever.

A. That is right.

Q. And if the Court shall tell you the plea of not guilty puts the accusation in issue for you to decide, will you follow that law?

A. Yes, sir.

Q. If the Court shall tell you that with every accusation there comes a presumption of innocence in favor of the defendant and that you must apply this to him throughout the stages of the trial, will you follow that law implicitly?

A. Yes, sir.

Q. While you are deliberating, that presumption is still with the defendant, the presumption of innocence—it is a [fol. 488] substantial right that goes to every defendant?

A. Yes, sir.

Q. You will carry out that law?

A. Yes, sir.

Q. Because when the District Attorney asked you if you believed in law enforcement, you said yes?

A. Yes, sir.

Q. But that does not mean only one side of law enforcement?

A. Yes, sir.

Q. Law enforcement also includes the right which is given to the defendant, demanding of him nothing at all,

but demanding from the prosecution proof, the burden of proof, beyond a reasonable doubt?

A. Yes, sir.

Q. I shall not try to tell you what reasonable doubt is, but the Court shall define it, and you will follow it?

A. Yes, sir.

Q. If you hear it elsewhere, or you shall hear it elsewhere between now and the time you are chosen, you will disregard any other definition except his Honor's?

A. Yes, sir.

Q. Would you follow instructions if his Honor should tell you the defendant need not even explain a single accusation against him?

A. Yes, sir.

Q. Or deny any facts urged against him on the witness stand?

A. Yes, sir.

Q. The burden is only with the prosecution and shall never shift, never shift to the defendant in any respect. You will follow that law?

A. Yes, sir.

Q. And as long as there is honestly in your mind a rea- [fol. 489] sonable doubt with respect to the defendants' guilt, or any of the defendants' guilt, you will courageously urge it in his behalf?

A. Yes, sir.

Q. And if there is a reasonable doubt arising out of the evidence, no matter how many people on the jury may disagree with you because they see things differently, you will have the courage to stick to your opinion if it is based upon the evidence; you will be reasonable, you will hear argument?

A. Yes, sir.

Q. And unless you are persuaded by the evidence beyond a reasonable doubt, not from the argument, you will not yield?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Turkus: I don't want any foreman to go into the box misguided; he must listen to common sense. May the jury understand that that question was excluded by the Court?

The Court: Yes.

By Mr. Barshay:

Q. Of course, you understood that; I do not want you to be stubborn; I want you to listen to the evidence and reason with your fellow jurors, argue with them and try to make them see the light, or they may try to see the light. But in the end, the only place you shall look for reasonable doubt is from the witness chair?

A. Yes, sir.

Q. And if, from the witness chair, and from all the [fol. 490] evidence given in the case, you shall feel that the District Attorney has failed to prove our client guilty beyond a reasonable doubt, you will say so?

A. Yes, sir.

Q. You owe no duty to either side?

A. No, sir.

Q. You agree to do a juror's duty, that is, give both sides an eminently fair and square trial?

A. Yes, sir.

Q. Mr. Turkus has asked you about accomplice testimony. Would you follow the law on that point as given by his Honor if he shall charge you that you, as a juror, must accept the testimony of an accomplice with caution, if you accept it at all?

A. Yes, sir.

Q. That will be your job to decide, first, is he telling the truth, won't it?

A. Yes, sir.

Q. And you will weigh it to know whether he is telling the truth?

A. Yes, sir.

Q. You will weigh it very carefully before you shall accept a person's testimony, if he says he is an accomplice in the commission of a crime?

A. Yes, sir, very, very carefully.

Q. Would you use, in weighing the truth or falsity of his testimony, the fact that there was an occasion when the same accomplice, under oath, in another court, when asked about his being an accomplice in this case, said that he was not; would you use that in weighing the truth of his story?

Mr. Turkus: Objected to.

The Court: Objection sustained.

[fol. 491] Mr. Turkus: I ask the jurors be told to exclude that kind of a question that is made to one juror.

The Court: Yes; no specific reference to that.

Q. If, in addition to the admission of this person that he is an accomplice, you also learn from the witness stand when he is on it that he is a thief, that he was a convicted thief and a burglar, and he led a life of crime, would you consider that very closely in accepting his testimony?

A. I would only consider the evidence I heard and if it is corroborated.

Q. If the witness is shown to be a man of bad character, rather than a man of good character, would you take that into consideration in determining whether he is worthy of belief?

A. No, sir, I would not take that; I would have to hear the whole testimony so I could form an opinion whether this man was telling the truth or was not.

By the Court:

Q. You know all kinds of witnesses take the stand and some discredit themselves; you are entitled to know whether a man is a good or a bad man. Now, if a witness is shown to be a man who is dishonest and generally of bad character, would you take that into consideration in determining whether he is worthy of belief?

A. I would take that to a certain extent, but I would have to hear the evidence to decide the truth.

Q. When it came to the end of the case, to decide it, would you take a man's reputation, good or bad, into consideration [fol. 492] in determining whether or not he tells the truth?

A. That I would find out in the course of the trial, whether he is telling the truth or not.

Q. How about his character?

A. That would not enter into the question as far as this case is concerned. As far as the testimony in this case is concerned, the man may be still a bad man and yet able to tell the truth.

By Mr. Barshay:

Q. You said a man's character would have nothing to do with this case? Did I hear you correctly?

A. No, sir, I did not say it has nothing to do, as far as his testimony is concerned.

Q. You say as far as the man's testimony is concerned his character has nothing to do with it?

A. That is right, his testimony.

Q. In other words, it would not matter to you if a man takes the stand and admits he is a participant in a murder and that, in addition to that, he has led all his life a life of crime, burglary, robbery, and attempted murder; all those things you would not consider with respect to whether or not that man is telling the truth?

A. I would say that if that man told the truth on the witness stand and it is corroborated substantially, I would have to take it as the truth. I cannot consider a man's character, criminal or otherwise; I am not considering that question.

By the Court:

[fol. 493] Q. Specifically, supposing the Court should charge you that as to testimony of that witness you must consider character?

A. Then I would have to pay attention to the Court.

Q. And that if the witness is shown to have committed crime, you would consider that?

A. Yes, sir.

By Mr. Barshay:

Q. In other words, had an idea other than his Honor as to the law?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Q. You did tell the Court that if he charged you that you must take into consideration the man's character when he gives testimony, you would follow that?

A. Yes, sir.

Q. But before the Court put that question to you, you did give me the answer about the fact that his character would have no bearing at all on his ability to tell the truth?

Mr. Turkus: I don't think that has been elicited at all.

The Court: There is no use in arguing about what was said some questions back. All of us get confused at times as to our own mental reactions, but when it comes to the trial the testimony reaction is what governs us. This gentleman seems to me to be a little confused but his general

attitude toward obtaining the truth so far has been fairly satisfactory.

[fol. 494] By Mr. Barshay:

Q. I am trying to elicit from you if you could be a fair juror from the beginning.

A. Yes, sir.

Q. If the Court shall tell you you must take into consideration the motive of a man when he testifies against another, will you follow that?

A. Yes, sir.

Q. So that you shall search, as a juror, Why is this fellow saying, "I am part and parcel of this thing"? What is he going to gain by such testimony? Won't you say that to yourself?

A. I suppose I would.

Q. There must be no supposing. Do you promise you would if the Court shall so tell you, that you have a right and duty to look into the motive or hope of reward for any person's testimony in this case no matter who he is; is that clear?

A. Yes.

Q. You agree to do that if you are chosen?

A. Yes, I will go by the Judge's direction.

Q. Assuming, for the sake of argument, I am correctly stating that the Court shall say in substance that, will you follow it?

A. Yes, sir.

Q. There is no doubt about it?

A. No doubt.

Q. You said you believed in the enforcement of criminal law?

A. Yes, sir.

Q. That is for the benefit of any defendant or separate defendant?

A. Yes, sir.

[fol. 495] Q. Of course, if you do not believe an accomplice and you reject his testimony, you will have the courage to acquit?

Mr. Turkus: I object; he cannot assume what the state of proof is.

Mr. Barshay: I said, "if."

The Court: As I understand it, if he does not believe a man he will have the courage to say so.

Mr. Turkus: That is all right; I am sorry.

Q. There has been talk about corroboration. It must be corroboration which tends to connect our client, Mr. Buchalter, with the commission of this crime; you understand that?

A. Yes, sir.

Q. In other words, it does not mean if a man takes the stand and says a person was shot at such a place and time and along came the police and found the body as the person described it; that does not connect our client with the commission of the crime?

A. Yes, sir.

Q. There must be independent evidence furnished by the District Attorney?

A. Yes, sir.

Q. Coming down to independent evidence, that comes from a man who himself on the witness stand, under oath, and probably after direct examination of the District Attorney in the case,——

Mr. Turkus: May we have the jury instructed to disregard that comment?

Mr. Barshay: I withdraw it.

[fol. 496] Q. Will you look into the reputation and character of those people who furnish so-called independent evidence?

A. Yes, sir.

Q. And if one says, "I committed eleven murders," you will take his testimony with caution?

A. That is right.

Q. And in addition to that, he said, "I once committed perjury," you will still use more caution?

A. Yes.

Q. And if he goes along and tells you that all his life he has led a life of crime,—if he tells you those things out of his own mouth,—more caution you shall use in accepting his testimony?

A. Yes.

Q. And if, adding all of the testimony, you find one reason for doubt and the Court says you must give it to the defendant, you will courageously say so?

A. Yes, sir.

Q. Now, is there any reason in your mind which you can advance why you cannot render a verdict here that reflects the truth with respect to the defendant Buchalter?

A. No, sir.

Q. You are free of all prejudice against him?

A. Absolutely.

Q. Is there any member of your family who studied law?

A. He is not in the United States.

Q. Is there any intimate friend of yours with whom you have ever discussed criminal law?

A. No, sir.

Q. Is there any business associate with whom you ever discussed criminal law?

A. No, sir.

Q. So now your mind is ready to accept whatever law there is only from Judge Taylor?

[fol. 497] A. Yes, sir.

Q. Faithfully and honestly?

A. Yes, sir.

Q. These three defendants are being tried together, and each one is entitled to a separate and distinct verdict; do you understand that?

A. Yes, sir.

Q. Do you agree with that?

A. Yes, sir.

Q. In other words, if the evidence does not convince you beyond a reasonable doubt as to one or more you will say so, irrespective of how you feel about the other evidence with respect to the other defendants?

A. Yes, sir.

Q. If testimony is given here concerning one defendant but it has nothing to do with the other, even though this jury was prolonged several weeks, you would try to retain in your mind and memory the testimony as it is binding upon the given defendant and you will not use it against any other defendant unless and until his Honor says you must; you will not mix them up?

A. No, sir.

Q. Is there anything in your business connection at all which will prevent you from giving your time and attention to a long and protracted trial?

A. Not as I know of.

Q. If the Court in its discretion should cause you to be locked up in a hotel, you would not in any wise let that prejudice you against any defendant?

A. No, sir.

Q. We have nothing to do with that; you understand that?

A. Yes, sir.

[fol. 498] Q. Then you are ready to render an individual judgment, if you are chosen, with respect to our client?

A. Yes, sir.

Q. No doubt about that?

A. No doubt about it.

By Mr. Rosenthal:

Q. You say you are working for Macy's?

A. Yes, sir.

Q. How long have you been with Macy's?

A. About six years.

Q. Prior to that you were with whom?

A. The Chase National Bank.

Q. In what capacity?

A. In different departments, bookkeeping, loans, paymasters.

Q. You had charge of making loans?

A. No, sir.

Q. In answer to Mr. Barshay, before the Court asked you questions on the subject, you made a statement that you were going to judge each witness as he appears on the stand to ascertain whether he is telling the truth?

A. Yes, sir.

Q. Assuming the Court were to tell you that the law is, in determining a witness's motive in telling a story you have a right to take into consideration his background, his interest, relationship to matters, and other things; do you still feel, as you originally said to Mr. Barshay, that irrespective of that background and character, you will take your impression merely of the witness as he testified?

Mr. Tarkus: I object to the form of the question. Instructions of law are given by the Court.

The Court: I thought that was all straightened out.

[fol. 499] Mr. Rosenthal: I have repeated the question on the same subject to see whether it is straightened out.

The Court: To go over it again?

Mr. Rosenthal: I did not intend to go over it again; I am examining for the defendant Capone.

The Court: All right, go ahead.

Q. Were you able to follow the question?

A. Not quite.

Q. I will reframe it. Assuming that the Court were to charge you that in determining what weight or credibility you are to give to any particular witness, you have the right to take into consideration what motive or what interest he may have, his connection with the matter itself, his actions on the stand, and all those things. Do you still believe, as your originally did when you answered Mr. Barshay's question, that you merely are going to judge the witness from the testimony that he gives on the stand?

Mr. Turkus: The jury has a right to take those things into consideration. Defense counsel wants to know in advance what the juror will do. The juror has very properly said in all this extended discussion——

Mr. Rosenthal: I object to any speech.

Mr. Turkus: It is not a speech; it is an objection. The jury has a right to hear the witnesses; to hear all of the testimony in the case, and when he has discretionary rights conferred upon him by the Court in its charge, then he [fol. 500] decides whether he uses them—not in advance, before he hears anything. Mr. Rosenthal wants the juror to say in advance of selection that he will exercise discretionary right, and that I say he has no right to do.

Mr. Rosenthal: He stated to your Honor at large and fully what his objection is, and I ask for the Court's ruling without any further argument.

The Court: The question is complicated.

By the Court:

Q. After being so charged by the Court, would you disregard the charge of the Court and simply decide on the evidence without regard to character?

A. I would take the direction of the Court.

By Mr. Rosenthal:

Q. Did you state in answer to Mr. Barshay, before the Court asked you any question, that, after he stated to you about witnesses who may be called and who had previous

crimes, lives of burglary, false testimony, and things of that character, that you would judge the witness merely from the story he told upon the stand? Did you originally say that?

A. I don't recall saying that; I said I would listen to the testimony before deciding how much I could believe from that witness.

Q. Did you say at that time you would not take into consideration his prior life, because even a man who has led a prior life of that character may sometimes tell the truth? [fol. 501] A. Yes, sir.

Q. Now, after you made that statement to Mr. Barshay, you were questioned further regarding the taking into consideration of the prior activities of any witness.

A. Yes, sir.

Q. Do you still say, irrespective of what you have heard regarding the law, that you will merely judge the witness from the stand, by what you hear him say on the stand?

Mr. Turkus: In advance of hearing the testimony, the juror does not have to say what right he will exercise.

The Court: Objection overruled.

A. Yes, sir.

Q. By that do you mean the impression you gain from seeing the witness?

A. No, sir, from seeing and hearing him.

Q. Well, now, assuming you have heard the witness state on either examination or cross-examination that he has committed eleven murders; and assuming you heard him state he has led a shylock life, committed burglary, stabbed people, run over people, has before a Federal Grand Jury testified under oath to untruths——

Mr. Turkus: I object to this kind of a declaration.

The Court: Do not interrupt.

Q. (Continuing:) —and things of that character, do you still say you cannot take that into consideration in determining what probative force you will give his testimony?

A. I will scrutinize the evidence more closely, but if the [fol. 502] evidence is all corroborated, I naturally would have to take it as the truth.

Q. I am not going on the question of corroboration.

A. There is no other way I can say that. I would not believe, if a man got up and said a horse is black, and nobody said it was black—it is like a pig in the bag.

Q. I want to see if we understand one another. The question of corroboration is separate and distinct, and apart from the question of believability on the part of a witness as to statements which he makes under oath?

A. Yes, sir.

Q. We are talking, not on the question of corroboration nor the question of the crime, but the testimony of the individual, *irrespective of whether* or not that particular individual admits a state of circumstances of the crime, or attempts to make corroboration; is that clear?

A. Yes, sir.

Q. I am merely speaking of the witness, of the individual, irrespective of what portion of the testimony it seeks to bear out.

A. Yes, sir.

Q. Do you say that, hearing the witness, irrespective of who he is, testify to any portion of a crime, whether it be the crime itself or corroboration, that you would or would not take into consideration in determining the truth of his story, or what weight you will give to it, the fact of his past life of crime and if he has previously perjured himself under oath? Would you or wouldn't you take that into consideration in determining the weight you will give to the testimony of such a witness?

[fol. 503] A. I would to a certain extent, by scrutinizing the evidence more than anything to see just what part I can take and just what part I can throw out.

Q. In determining what part you would take, would you take into consideration his past activities?

Mr. Turkus: That has been already answered. He just said he would.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. You said you read an article in *The Mirror* and in other papers in respect to one or more of the defendants connected with this case.

A. Yes, sir.

Q. Would your reading of that article and would your remembering of it cause a greater amount of evidence to

be produced upon the part of the defendant than would be necessary hadn't you read the article?

A. I don't get that. Will you repeat it, please?

Q. Would the reading of that article and whatever you remembered of it cause a greater amount of evidence to be produced in this case on the part of any defendant than would be necessary had you not read that article?

A. No.

Q. Would it require a lesser amount of evidence on the part of The People to be produced than if you had not read the article?

A. That I would not be able to answer, because I do not know what the evidence is.

[fol. 504] Q. I will make it clear. You admit reading the article?

A. Yes, sir.

Q. You admit, in some particulars, you remember what you read?

A. Yes, sir.

Q. Would the fact that you had read an article concerning one or more of these defendants, and would your remembering of it cause The People in this case to produce a lesser amount of credible evidence than they would have to produce had you not read that article and did not know anything about the defendants?

A. No, sir.

Q. Have you any relatives on the police force?

A. No, sir.

Q. Have you any close friends attached to the Police Department?

A. No, sir.

By Mr. Kriendler:

Q. Have you or has any member of your family ever been the victim of any robbery, burglary, or any other crime?

A. Not as I know of.

Mr. Turkus: The juror is satisfactory to the People of the State.

The Court: Of course, you understand everything is tentative until the final swearing. That will enable selection of a better jury. If you want to tentatively accept the juryman, let him sit in the box.

Mr. Barshay: I understood the ruling was only pending today. If your Honor extends it it is all right to us.

[fol. 505] The Court: I will extend it so as to give both sides an opportunity for a better check-up. You may reserve peremptory challenges if you wish.

Mr. Barshay: On behalf of all counsel, we peremptorily challenge this talesman.

CHARLES E. STEVENS, residing at 1050 Ocean Avenue, Brooklyn, New York, was examined as to his qualifications as a juror.

By Mr. Turkus:

Q. What section of Brooklyn is that?

A. Flatbush.

Q. Have you lived there for a number of years?

A. I have lived in Flatbush off and on for a number of years; I have lived there now for four years.

Q. Have you lived in any other sections?

A. The Park Slope section about eight months and also the Bensonhurst section for seven years.

Q. The trestle board lists your profession as that of sales representative.

A. Yes, sir.

Q. By whom are you employed?

A. United States Envelope Company.

Q. Does it maintain an office in Manhattan?

A. New York City, Manhattan.

Q. Does your work take you on the outside?

[fol. 506] A. To some extent, not a great deal, however.

Q. I think if my memory is correct, you urged an excuse at one time that your health was bad?

A. No, sir, that is not correct. I was to have a vacation on the 1st of August, and I had a very hard year, and I thought I needed a rest.

Q. You have had your vacation and feel rested, and if you are selected, you will be ready to act as a juror in this case?

A. Yes, sir.

Q. There is nothing about your condition of health that would impair your jury service?

A. No, sir.

By the Court:

Q. What is your business?

A. Envelope manufacturing, United States Envelope Company. We have a sales office at 270 Broadway, and our factories are in the Mid-West.

By Mr. Turkus:

Q. Has your business in the past brought you into contact with firms or individuals in the Brownsville or East New York district?

A. No, sir.

Q. You have had no connection, directly or indirectly, with anybody in that area?

A. No, sir.

Q. Does your work bring you into the garment district?

A. Yes, sir.

Q. Have you had any dealings, directly or indirectly, with any firms or individuals in that district?

A. No, sir.

Q. Does that hold true with the clothing trucking in- [fol. 507] dustry, and the clothing industry?

A. Yes, sir.

Q. So that we may proceed now, may we not, with the thought in mind that you have no connection, socially or by way of business, directly or indirectly, with any firm or corporation in the areas I have enumerated, or having any business with those particular lines of industry?

A. That is correct.

Q. With respect to the Amalgamated Clothing Workers of America, are you acquainted with any officials of that union?

A. No, sir.

Q. Are the names of Murray Weinstein and Katz at all familiar to you?

A. No, sir.

Q. With respect to Bruno Belia, an organizer of the Amalgamated, is that also true?

A. I never heard of him.

Q. Or with Salvatore Marazzano?

A. I don't know him.

Q. Did you have any connection or have you had any business with any clothing drivers' or teamsters' union?

A. No, sir.

Q. Do you know any official of Local 240 of the Clothing Drivers Helpers Union of America?

A. No, sir.

Q. Is the name Philip Orlofsky, at one time manager of the Clothing Cutters Union, associated with the Amalgamated, does that mean anything to you at all?

A. No, sir.

Q. Is there any familiarity in your mind with the names of Max Silverman or Wolfie Goldis?

A. No, sir.

Q. Has the name of William Alberts any significance?

A. No, sir.

[fol. 508] Q. A one-time bondsman?

A. No, sir.

Q. Has the name Emanuel Buchalter any familiarity to you?

A. No, sir.

Q. Or that of Philip Buchalter, sometimes known as Philip Kowas?

A. No, sir.

Q. Or Bellanca or Tosca, or a man named Terry Burns?

A. No, sir.

Q. Is there anybody in the automobile business in the Park Slope section of Brooklyn that you know named Weiss?

A. No, sir.

Q. Since your name appeared on this special panel, since you received notice that you would be a prospective talesman, did anybody speak to you about this case?

A. Well, people in the office discussed my being called on the jury, and my family discussed it.

Q. But those discussions were limited to your prospective jury service, in making arrangements at your place of business and at home?

A. Yes, sir.

Q. You never discussed with anybody concerning the merits of the case?

A. Several people tried to, but I said I knew nothing about it and I was unable to discuss it.

Q. Were those people strangers?

A. No, sir, personal friends, people in the office and like that.

Q. Were those discussions had after you had attended in court?

A. Well, yes.

Q. In those discussions was the name of any defendant used?

[fol. 509] A. One.

Q. Was it in the nature of a discussion as to what your state of mind was?

A. They attempted to ascertain that, yes, sir.

Q. Was this somebody whom you knew for some time?

A. Yes, sir, people in the office whom I knew since I have been there.

Q. Was this in the nature of curiosity?

A. Yes, sir, curiosity on their part, I should say.

Q. It was nothing to interfere with or affect your deliberation of the case?

A. Oh, no.

Q. Whatever was asked of you was a matter of curiosity by somebody in the office?

A. Yes, sir.

Q. You are sure of that?

A. Positive.

Q. Are you in sympathy with the enforcement of the law of the State of New York?

Mr. Climenko: I object to the form of the question.

The Court: Objection overruled.

A. I am in sympathy.

Q. Do you know the former prosecutor of the county, Mr. Geoghan, or any member of his staff?

A. No, sir.

Q. I take it you do not know Mr. Barshay?

A. No, sir.

Q. Do you know Mr. Wegman, former Assistant United States Attorney?

A. No, sir.

Q. Or Mr. Climenko?

A. No, sir.

Q. Or counsel for the defense,—any counsel for the defendant Buchalter?

A. No, sir.

[fol. 510] Q. Do you know anybody connected with their respective law offices in any capacity?

A. Not to my knowledge.

Q. Do you know Judge Talley, or former Assistant District Attorney Cuff, or former Assistant District Attorney Kriendler, who represent the defendant Weiss?

A. No, sir.

Q. Do you know anyone connected with their office or their staff?

A. Not to my knowledge.

Q. Is that true also as to the lawyers who represent Mr. Capone, Rosenthal, Fischbein, and Rosenberg?

A. Yes, sir.

Q. Do you know Judge O'Dwyer or any member of his staff?

A. No, sir.

Q. Specifically, do you know Mr. Turkus, Mr. Joseph, or Mr. Klein?

A. No, sir.

Q. In questioning the other prospective talesmen, Mr. Barshay asked the question as to whether or not there would be any prejudice against his specific defendant, Buchalter, who is now serving a term of years in jail. Have you any prejudice against Buchalter for that reason?

A. No, sir.

Q. You would decide this case on the evidence in the case?

A. Yes, sir.

Q. Whether Buchalter is or is not serving a sentence in jail has nothing to do with your deliberations in the case on trial, as to his guilt or innocence of murder?

A. No, sir.

Q. Have you heretofore sat on a jury in a criminal case where the Judge charged the jury on the law?

[fol. 511] A. No, sir, I have not.

Q. If accepted as a juror will you take the law in the case in its every aspect from the presiding judge?

A. I would.

Q. And will you conscientiously and with common sense endeavor to apply the principles of law as given by the Court to the specific issue in this case, as to the guilt or innocence of these defendants?

A. Yes, sir.

Q. For example, should the Judge charge you that the burden of proof is always upon the prosecution to establish guilt beyond a reasonable doubt, will you follow that instruction of law?

A. I will.

Q. If the Judge should charge you that the defendants have no burden at all, that they can sit still or do what they please—they have no burden in the case—will you follow the specific instructions of the County Judge which he gives you in that respect?

A. Yes, sir.

Q. And with respect to the presumption of innocence, should the Judge charge you that every defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt, will you follow that instruction on the law of presumption of innocence that the Judge shall give you, and apply that conscientiously and with common sense in this case?

A. Yes, sir.

Q. So I take it you are free from any prejudice or bias against any or all of the defendants on trial?

A. That is——

[fol. 512] Q. As to the point of any possible bias or prejudice against the prosecution, may I direct your attention to this: Have you any bias or prejudice against the prosecution wherein it employs the use of accomplice testimony?

A. No, sir.

Q. Do you find any fault with the prosecutor who breaks a case from the inside and gets one of the killers to testify against the other?

Mr. Barshay: I object to that part of the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. I have no objection.

Q. As to the character and background of any specific accomplice in this murder case, will you take the principle of law that the Judge gives you as to rules and tests you can apply to such individual?

Mr. Climenko: I object to the term "this murder."

The Court: I thought it was a murder case.

Mr. Climenko: I know the indictment charges that crime, but I object to the form of the question.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. I would.

Q. Is your state of mind such that you feel that even a bad man can tell the truth?

A. Yes, sir.

Q. Of course, if anybody came in with a case which rested solely upon the testimony of an accomplice, no matter what you felt about the accomplice telling the truth, your duty [fol. 513] would be clear, you would have to acquit—we will let that go at that. Now, if you heard the testimony of an accomplice in the case and then there is independent proof which not only satisfies you the accomplice is telling the truth, but the evidence tends to connect the defendant with the commission of the crime, and you are satisfied as to that beyond a reasonable doubt, would you hesitate to find a guilty verdict?

A. No, sir.

Q. Should a defendant come along with a defense—for example, a defense of an alibi, will you take the law specifically from the Judge in applying it to any specific defense that may be raised by the defendant in the case?

A. Yes, sir.

Q. If accepted, should you automatically become foreman of this jury, will you listen to common-sense, logical discussion of the other jurors in the case when you deliberate on the issue of guilt or innocence?

A. Yes, sir.

Q. As you sit in the box now I take it your mind is free and open and ready to receive evidence and render a just and conscientious verdict on the evidence?

A. Yes, sir.

Q. If selected as a juror, will you endeavor to do justice in the case?

A. I will.

Q. Will you endeavor, by your verdict, to render justice in the case?

A. Yes, sir.

Q. If you have heard all the evidence in the case as an acceptable juror, and you heard the lawyers for the defense tell you how they view the evidence, and then you listened [fol. 514] to the inferences from the prosecutor, and then you had the benefit of the Judge's instructions on the law, and then in the jury room you sit with the other jurors and with common sense and understanding talk over the issue in the case of guilt or innocence of the defendants, and you should come to a conclusion and you are satisfied from the

evidence beyond a reasonable doubt that at the bar of justice there are three guilty men, Buchalter, Weiss, and Capone, guilty of murder in the first degree, would you hesitate to say so in your verdict?

A. It would be my duty to say so.

Q. Would you have any fear or reluctance in saying so?

A. No, sir.

The Court: (addressing panel) Please do not discuss the case, gentlemen. Be in your places at two o'clock.

The defendants are remanded.

(Whereupon a recess was taken until two o'clock p. m.)

[fol. 515] Afternoon Session—Trial Resumed

The Court: Suppose we move up these gentlemen and fill the other three chairs and let the rest of the jurors go?

(Three additional talesmen took their seats in the jury box. All other talesmen were excused until 10 a. m., September 25, 1941.)

(The examination of Mr. Charles E. Stevens was continued.)

By Mr. Climenko.

Q. Mr. Stevens, did I understand that you are employed by the United States Envelope Company?

A. That is correct.

Q. How many employees has it?

A. The entire company has about three thousand employees.

Q. Where is it?

A. The New York Office, 270 Broadway, corner of Chambers Street.

Q. That is the office you are connected with?

A. Yes.

Q. About how many employees of the company work there?

A. Twenty-one.

Q. You are employed in a sales capacity?

A. That is correct.

Q. And are you on speaking terms with the other twenty who are at that office?

A. Yes.

Q. You see them every day?

A. Yes.

Q. You have been employed by that company for some [fol. 516] time, I take it?

A. About nine and a half years.

Q. And most of your co-employees are persons who, like you, have a comparatively long tenure in the employ of that company?

A. That is correct.

Q. You have known them for many years?

A. That is correct.

Q. And you are intimate with them?

A. Yes.

Q. I think you said that somebody had attempted to speak to you about the case.

A. That is correct.

Q. Before that happened had you read about the case?

A. Only in connection with this particular trial, that is, I saw in the paper that this trial would take place on August 4th. It was after I received my jury summons.

Q. When did you receive your summons to appear here as a juror?

A. Sometime in July.

Q. That is all right. I don't care about the specific day, but approximately sometime about the middle of July?

A. Probably, yes.

Q. And was it at about that time that you had a discussion with one of your co-employees about this case?

A. No, it was about two weeks ago.

Q. Only two weeks ago did you have any discussion about the case?

A. As to the case, yes.

Q. And with how many persons did that conversation proceed?

A. Actually it was not a conversation, but two people asked my opinion on the case.

[fol. 517] Q. Two people asked your opinion?

A. Yes.

Q. Did you answer the question?

A. I told them I had formed no opinion.

Q. I beg pardon?

A. I told them I had formed no opinion.

Q. Was that the whole extent of the conversation?

A. Yes.

Q. Nothing more was said?

A. I told them I would rather not discuss the case under the circumstances, so they said nothing further.

Q. Nothing beyond that was said?

A. Because each day I came in the office during the examination of jurors here they would ask me whether or not I had been excused, but other than that there was no discussion.

Q. Have we now got from you the whole substance of your conversation with your co-employees about this case?

A. That is correct.

Q. Did I understand you to say when you were answering the questions put by Mr. Turkus that the name of a particular defendant had been mentioned in one of these conversations?

A. That is correct.

Q. So that a moment ago we did not have the whole substance of the conversation?

A. Well, in referring to the case, they always referred to it as a particular case, naming one of the defendants.

Q. One of the defendants was named?

A. That is right.

Q. Was there any conversation about that specific de-
[fol. 518] fendant as a person?

A. No.

Q. No conversation whatsoever?

A. Not to the best of my memory.

Q. Prior to that conversation you had read about the case?

A. Not prior to the case actually being called. In other words, I have seen one of the defendants' names in the paper for various things but not in connection with this case.

Q. When would you say was the first time that you had noticed, as you can presently recall it—and I know that you cannot remember entirely accurate,—but your best recollection as you sit here now: When is the first time that you read about any defendant in this case?

A. Well, probably August 4th.

Q. 1941?

A. Yes, sir.

Q. Before that day you have no recollection of having read about any defendant in this case?

A. Now you mention it, I recall seeing something in the *Times* saying that a plea to have the trial elsewhere had been denied.

Q. That what?

A. A plea on behalf of the defendants to have the trial held in a different section of the city or state had been denied.

Q. Aside from that, you remember having read at any time prior to August 4th about any of these defendants?

A. Not to the best of my recollection, no.

Q. So that before August 4, 1941, you were unaware of the existence of any of these defendants?

A. No, that is not so.

[fol. 519] Q. Had you read before August 4, 1941, about any of these defendants?

A. I have seen the name of one of them mentioned in the papers.

Q. In which paper?

A. Well, it must have been either the *Herald-Tribune* or the *Sun*, because I read those papers.

Q. And when would you place the earliest time when you read about that particular defendant?

A. I have no way of knowing. The name has just become familiar to me, but I have no way of knowing just when.

Q. As I understand your answers, the name of a particular defendant had become familiar to you in consequence of newspaper reading; is that right?

A. Yes.

Q. In consequence of that newspaper reading, had you formed an opinion with respect to that defendant?

A. In relation to this case, no.

Q. I beg pardon?

A. In relation to this case, no.

Q. You know nothing about this case as a matter of fact?

A. That is correct.

Q. Is that right?

A. That is correct.

Q. You are not connected with any member of the Police Department?

A. Well, I know one patrolman in the Flatbush section. He is a member of a club I belong to.

Q. What club is that?

A. The Terrace Tennis Club.

Q. It is not a political club?

A. No.

Q. It is what its name implies?

A. Exactly.

[fol. 520] Q. You did not discuss the case with that gentleman?

A. I am not on intimate terms with him. I play tennis with him.

Q. We can put it this way: that your acquaintanceship with him is restricted to his playing tennis, and that is a policeman?

A. That is right.

Q. You are not acquainted with anybody associated with Mr. Turkus in the office of the District Attorney?

A. Not to the best of my knowledge.

Q. Is that correct?

A. That is correct.

Q. Are you a member of any political organization?

A. No, I am not.

Q. And you are not politically active?

A. No.

Q. The fact that there is a political contest impending would not in any way affect your judgment about a matter in the administration of justice, would it?

A. No, it would not.

Q. You are able to distinguish between those two matters?

A. Yes.

Q. You would not let one coalesce or confuse your mind about the other—right?

A. No.

Q. With respect to the particular defendant whom you have read about, did you develop an opinion, an unfavorable opinion, of him in consequence of your reading?

A. No, I didn't, because the articles I read were simply statements of fact, that is, things which have actually taken place, and they gave no indication as to their opinion as to [fol. 521] the guilt or innocence of these men. It was purely a record of the facts.

Q. Well, the point is that whatever you may have read did not develop an opinion in your mind unfavorable to that defendant?

A. No.

Q. Is that correct?

A. That is correct.

Q. And as you sit here now do you say—— I withdraw that.

Q. Did you say you had never sat on a jury before?

A. I never have.

Q. And you have never been a party to any litigation?

A. No.

Q. And you have never been even collaterally concerned with the prosecution of a criminal case?

A. No.

Q. Never been the victim of a so-called crime; is that right?

A. That is correct.

Q. Assuming that you should be charged as a matter of law, I mean suppose that the Judge should instruct you that the defendants, all of them, are presumed to be innocent, would you be able to follow that instruction?

A. I would.

Q. Assuming as part of that instruction you were told that an indictment which charges that a murder was committed is nothing more than a charge and that in and of itself it has no value so far as evidence is concerned, would you have any difficulty in following that instruction?

A. No, I would not.

Q. None whatsoever?

A. No, sir.

Q. Well, then as you sit here now do you assume that these defendants are innocent?

A. Yes.

[fol. 522] Q. That is your mental assumption with respect to all of them; is that correct?

A. That is right.

Q. It is your assumption with respect to any defendant that you may have read about; is that correct?

A. That is correct.

Q. And you have no feeling about any of these people which would in any way interfere with your ability to assume their innocence?

A. I have not.

Q. Particularly if you were told that it is your duty as a juror to assume their innocence; is that right?

A. That is right.

Q. You referred to certain newspaper stories that you had read. You have a vivid recollection of those stories as we refer to them now?

A. Yes.

Q. Did you accept those stories as having stated the facts?

A. Yes, they were indisputable facts.

Q. I beg your pardon?

A. They were indisputable facts. The facts could not be disputed.

Q. Indisputable facts?

A. Yes.

Q. Were those facts, assuming that you accepted them as such, unfavorable to the defendant?

A. Not in any way, no.

Q. Not in any way?

A. No.

By the Court:

Q. Is William B. Stevens, Jr., your father?

A. No.

Q. William B. lives on East 21st Street, which is a block from you.

A. No relative of mine.

[fol. 523] Q. Do you go to All Souls Church?

A. No, I don't.

Q. He is one of the trustees.

A. Dutch Reformed Church on Church and Flatbush.

By Mr. Climenko:

Q. Mr. Stevens, did any of your office associates attempt to prejudice you against any defendant in this case?

A. I would not say they attempted to prejudice. The remarks they started to make, if I had interpreted them as such, might have prejudiced me; in other words, if I had accepted what they were saying as facts and absorbed them as such, I could have possibly been prejudiced.

Q. One or more of your business associates made statements purporting to be statements of fact with respect to a defendant in this case?

A. No, interpreted them as being their opinion.

Q. One or more of your business associates expressed his or their opinion with respect to at least one defendant in this case?

A. That is correct.

Q. You listened to the statement of that opinion?

A. That is correct.

Q. You could not help but hear it?

A. That is correct.

Q. In the course of civilized conduct, in relation to someone who had started to talk to you; is that right?

A. Yes.

Q. The statements that you heard under those circumstances were prejudicial against that particular defendant; is that correct?

A. That is correct, yes.

[fol. 524] Q. Were you in any wise influenced by the making of that statement or those statements by your associate or associates?

A. No, I resented their making them.

Q. You resented their making them?

A. Yes.

Q. Did you express your resentment?

A. Well, I said that I felt that the men were entitled to trial and that until they were judged guilty I did not see how anybody could make loose, irresponsible statements, such as I considered theirs to be.

Q. You said then that you thought that that was an unjust thing for anybody to say?

A. In substance, yes.

Q. That was your feeling about it?

A. Yes.

Q. You particularly resented those statements being made to you in view of the fact that your associates already knew that you had been summoned here as a prospective or possible juror in the trial of this case?

A. That is right.

Q. Is that right?

A. Yes.

Q. And, having that in mind, you were quick to express your resentment of these prejudicial remarks; is that correct?

A. Yes.

Q. But, as I understand your state of mind, you were not only quick to express the resentment, but the resentment which you expressed was an honest reflection of your state of mind; is that correct?

A. That is correct, yes.

Q. And I am right in assuming, as I interrogate you now on behalf of one of these defendants, that even if you had [fol. 525] not then held a notice from this court asking you to appear as a prospective juror, you would nevertheless have resented the making of any such statement, is that correct?

A. Probably would have, yes.

Q. Because you felt that that was an un-American statement to make, did you not?

A. Yes.

Q. And you are in favor of the policies of the law that a fair trial must be accorded all men; is that correct?

A. That is correct.

Q. And you felt that that kind of talk was unjust and unfair and illegal; is that correct?

A. That is correct.

Q. Because it might possibly prejudice a defendant and deprive him of a fair hearing upon a trial; is that correct?

A. Yes, sir.

Q. And that is your state of mind now, as you sit here?

A. It is.

Q. And were you sworn as a juror you could approach the issues in this case without any prejudice against any defendant; is that correct?

A. I feel sure I could.

Q. Yes? Now assuming that you were chosen as a juror in this case, and even though you have not had the benefit of any prior experience sitting as a juror in the trial of a case, you would know, would you not, that perhaps your main duty as a juror would be to pass on the credibility of witnesses as they testify; isn't that so?

A. That is so.

[fol. 526] Q. And by passing on the credibility of witnesses, you mean discriminating between those whose statements can be accepted as truthful and rejecting those which cannot be accepted as truthful; is that correct?

A. That is correct.

Q. You frequently have to pass on the credibility of statements which are made to you in the ordinary course of your life, do you not?

A. Yes.

Q. You have certain rules that guide you in doing that, whether or not those rules are formally set down in any book, haven't you?

A. Yes.

Q. A man has a reputation as a liar, to that extent you are on guard against him, aren't you?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Something has been asked you about accomplice testimony by Mr. Turkus. You understand what an accomplice is?

A. Yes, I do.

Q. You understand that sometimes people have a motive to tell the truth and sometimes they have a motive not to tell the truth; is that correct?

A. That is correct.

Q. People who approach you in the ordinary transactions of your daily life have to be judged as to whether or not they have a motive to tell the truth or a motive to tell a falsehood; is that correct?

A. That is right.

Q. In passing on the credibility of an alleged accomplice, would you have in mind in determining his honesty or lack [fol. 527] of honesty as to what his motives might be in testifying?

A. Examine those motives very carefully.

Q. You would?

A. Yes.

Q. Were it to develop that a so-called accomplice had a motive to falsify and a motive to testify in order to help himself, would you have that in mind in passing on his credibility?

A. I would, yes.

Q. In other words, just as self-interest is an element which you have in mind in relation to the truth or falsity of the statements made to you in your every-day life, so self-interest, perhaps of the keenest kind, may become an element, a standard that you have to use in judging the

truth of falsity of a witness who takes the stand. You understand that, do you not?

A. Yes, that is right.

Q. Reverting for a minute to those conversations that you had with your associates at the United States Envelope Company, were the participants in that conversation or those conversations your superiors?

A. No, they were my equals. In other words, in the same capacity as I am.

Q. They were sales representatives?

A. That is right, other types of the company.

Q. You would not feel beholden to anybody for the propriety of your verdict in a case of this kind, would you?

A. I did not hear the question.

Q. I say you would not be beholden to anybody for the [fol. 528] propriety of your verdict in a case of this kind, would you?

A. No, I would not.

Q. In other words, in a matter of this kind you swear to do your honest duty, assuming that you are chosen as a juror; is that correct?

A. That is right.

Q. Mr. Turkus asked you assuming that the proof might convince you beyond a reasonable doubt, etc., etc., would you be hesitant in bringing in a verdict of guilty. Do you remember that question?

A. Yes.

Q. Now I ask you, assume that after all of the testimony is elicited and assume that the Court should instruct you as a juror that you could not convict except upon a demonstration of guilt beyond a reasonable doubt, and assume that the Court would instruct you that reasonable doubt was a doubt inspired by a reason, and that you had a reasonable doubt after measuring all the proof, would you be at all hesitant in delivering a verdict of Not Guilty?

A. No, I would not.

Q. Would you feel reluctant to do your sworn duty by reason of the fact that somebody having nothing to do with the administration of justice, somebody who by accident was an associate of yours in a commercial firm, in your place of employment, somebody had perhaps intimated that he would not have agreed with that—would that influence you at all?

A. It would have no bearing on the matter.

Q. Not for a moment, would it?

A. No.

[fol. 529] Q. That was an opinion expressed by someone who had never heard the evidence?

A. That is right.

Q. And the mere fact that that opinion was expressed was, in your mind, an un-American and unfair thing?

Mr. Turkus: It has been gone over ten times now.

Mr. Climenko: Only twice.

Mr. Turkus: Same way ten times. Withdrawn. Go ahead.

Q. Assuming that you did bring in a verdict of Not Guilty, you would not be reluctant to meet with your associates again, would you?

A. No reason why I should be.

Q. You would not feel reluctant to bring in such a verdict because it might be in the back of your mind that, having done it, brought in a verdict of Not Guilty, it involved a certain mental courage on your part to meet with these co-employees who possibly harbor a different view?

A. It would have no bearing on the matter at all.

Q. Not for one minute? You would listen to this case on the proof as it were presented within this court-room; isn't that so?

A. Correct.

Q. And you would listen to this case in relation to any particular defendant solely with respect to his guilt or innocence in this particular case; is that right?

A. That is my understanding, yes, sir.

Q. And your understanding is that you are to discriminate and distinguish as between one defendant and an-

[fol. 530] other; is that correct?

A. That I may or may not, did you say?

Q. I withdraw the question. Assuming the Court should charge you that each defendant is entitled to a separate verdict; would you have any difficulty in following such instruction?

A. No.

Q. In other words, what that comes to is that although the case is tried simultaneously as against each defendant, it is a separate case, and as to each defendant you are under an obligation to pass a separate judgment; you understand that?

A. That is my understanding, yes.

Q. And with respect to any defendant in this case, you could pass fairly on the issue of this case, and the only issue is one of guilt or innocence, altogether independently of anything that you had ever read or seen about that defendant; is that correct?

A. That is correct.

Q. Whatever you may have read, seen, or heard, you know as you sit here now, as you will sit here were you chosen as a juror, that that defendant is presumed to be innocent of any charge incorporated in the indictment? You know that?

A. That is my understanding, yes.

Q. And that would be your mental attitude in listening to the proof in this case—correct?

A. Yes, sir.

Q. If, after hearing all of the proof, you had a reasonable doubt as to any defendant, you would not hesitate for a moment to say, "Not Guilty" as to him; is that correct? [fol. 531] A. That is correct.

By Mr. Talley:

Q. Mr. Stevens, do you understand that under our system of law when a man is charged, by an indictment or otherwise, with commission of a crime, that the burden is not placed upon him to prove his innocence of that charge?

A. That is my understanding, yes, sir.

Q. And you understand that the burden is always on the people who bring the charge?

A. Yes.

Q. To prove the guilt of that defendant and, going a step further, to prove it beyond a reasonable doubt. You understand that?

A. Yes, I do.

Q. And if you had a reasonable doubt, a doubt for which you could give a reason, a doubt such as you might have about the ordinary affairs of life, would you resolve that doubt in favor of the defendant?

A. That would be required of me.

Q. You would do so?

A. Yes.

Q. You stated that you understood there was no burden upon a defendant to prove his innocence. You understand

that it is not required that a defendant in a criminal case take the stand to prove anything in his own behalf?

A. I understand that, yes.

Q. And if the Court should charge you, as the Court will without question, that if a defendant does not take the stand after The People have put in their case, that you are not to [fol. 532] indulge in any unfavorable presumption against him because he does not take the stand, will you follow that direction of the Court?

A. I will.

Q. Precisely?

A. I will.

Q. And you would not indulge in any presumption unfavorable to any of these defendants if in the judgment of counsel there is no requirement for them to take the stand?

A. I would not.

Q. Is that correct?

A. That is correct.

Mr. Talley: I have no further questions.

By Mr. Rosenthal:

Q. You understand, Mr. Stevens, that each one of these defendants is represented by separate counsel?

A. Yes.

Q. And you further understand, as Mr. Climenko said to you, that the proof as to any one particular defendant is all that you personally can use in the jury room against that defendant? Is that clear?

A. That is clear.

Q. So that in determining this case, if you are accepted as a juryman, you will only apply such evidence under the Court's instructions as you feel is applicable to the particular defendant in determining his guilt or innocence; is that correct, sir?

A. That is right, yes.

Q. I take it you are not acquainted with anybody in the District Attorney's office, are you?

A. Not to the best of my knowledge, no.

Q. And you are not actively interested in the outcome of [fol. 533] the present political campaign?

A. No, I am not.

Q. Your verdict would be based solely upon the evidence without fear or favor; am I correct in that statement?

A. That is right.

Q. And you have never served on a jury before, have you?

A. No, I never have.

Q. And you have never been called, I take it, for Grand Jury?

A. No, I have not.

Q. You understand that you are entitled to your own individual opinion in the jury-room?

A. Yes.

Q. You further understand, sir, that even though you form an opinion, it is your duty to reason and listen to the other jurymen's reasoning as to any difference they may have in opinion from yours? You understand that?

A. That is my understanding.

Q. Do you further understand, sir, that if, after reasoning with your fellow jurymen, you still retain the honest, conscientious opinion which you first formed, and their reasoning has not in any wise dis-uaded you from your view, that it is your bounden duty to retain that opinion?

A. Yes.

Q. By that I do not mean that you argue or bicker or otherwise, but that you have an opinion formed on your conscience which has not been taken away by any reasonable logic or arguments of your fellow jurymen; is that clear to you?

A. That is clear.

[fol. 534] Q. Merely because of the fact that you happen to serving for the first time and others may be of a different opinion to you who may have served on other juries, would that influence you in your conscientious opinion?

A. No, it would not.

Q. Your opinion, if formed upon your conscience after listening to reasonable argument, which has not been changed, will remain the same; is that correct?

A. That is right.

Q. Numbers, hours, business, and other things would not disuade you; is that correct?

A. No.

Q. Another thing, if I recall rightly, you originally made some excuse on account of illness. Am I correct?

A. It was not illness, as I explained to Mr. Turkus. My vacation started August 1st, and I felt I needed the rest because I do work very hard during the year, and unless I were excuse- I lose that rest, which I felt I needed.

Q. My impression was that you had made some mention when you were examined by the Court of having gained eight or ten pounds?

A. Gained eight pounds; that is right.

Q. So I assume you had been ill before that?

A. I was not ill, but I was just——

Q. You feel that your health at present is such that you could, in case this trial lasts a period of time, and you are kept together in the hotel with your fellow jurymen, that it would not in any wise impair your health to a degree where you would not be able to serve properly as a juror; you feel that?

[fol. 535] A. I don't believe it would, because, as a matter of fact, I have the best record of attendance in the office.

Q. I am not finding any fault. I just want to find out from you, having in mind the fact that this may be and undoubtedly will be a prolonged trial, you feel, sir, that your health is such that it will permit it?

A. I do, yes.

Q. Mr. Turkus questioned you on alibies as a defense and asked you would you take the law from the Court. Do you recall that question?

A. No, I cannot say I do.

Q. In questioning you, however, he did mention to you that if one of the defendants or more maybe interposed a defense of alibi and asked whether you would take your instructions in respect to alibi from the Court and you answered yes, rightfully so. Do you understand, sir, that at no time does a defendant have to prove his innocence?

A. That is my understanding.

Q. And do you understand, sir, that even though a defendant may offer the defense of alibi, the burden of proving his guilt of the crime charged never shifts from the District Attorney? Do you understand that?

A. Yes.

Q. If the Court were to charge you that even though a defendant interposes a defense of alibi and even though you were not convinced of that particular defense, that nevertheless the question of his guilt or innocence must be found from the believable evidence that has been produced by The People; would you take that charge?

A. Yes.

[fol. 536] Q. You understand that I want this clear in your mind: that at no time in a criminal case does the

burden of proving any defendant guilty of a crime shift from The People?

A. That is my understanding.

Q. And even though the defendants may stand mute and offer no defense whatsoever, or not take the stand, even that fact could not be utilized by you in determining the guilt or innocence in the jury room; do you understand that?

A. Yes.

Q. You find no quarrel with that particular law, which absolves the defendants from producing any witness or taking the stand on their own behalf in order for you to judge their guilt or innocence from the evidence, do you?

A. I have no objections to that.

Q. On the question of accomplices, you understand from what you have heard here, and if you don't, please say so, that even though you may believe an accomplice, unless there is other evidence in the case, believable evidence, tending to connect any one of these defendants with the crime, you must acquit the defendant? Do you understand that?

A. Yes, sir.

Q. So that you might go into a jury room and say that "In my mind I am convinced that the accomplice has told the truth," that in and of itself would be insufficient unless in going through the balance of the evidence you were able to find credible evidence leading you or tending to connect the defendants with the crime. Is that clear?

A. Yes.

[fol. 537] Q. On the question of accepting the evidence of The People's witnesses or any witness, do you feel, sir, that in determining what weight you will give to any particular witness, that you will judge that person not only by his actions upon the stand, but by what interest or motive he may have in the outcome of the proceeding? Do you feel that way, sir?

A. Yes.

Q. And in judging what weight you will give to any witness's testimony, whether he be termed an accomplice or not an accomplice, will you take into consideration his past method of life, his past record of swearing falsely, if such be the case, his past record of criminal activities, if such be the case, and all those things, in order to better enable you

to determine whether a person of that character is apt to be telling you, the juryman, the truth?

A. Consider all those things, yes.

Q. Merely because the District Attorney may say to you that a man is not an accomplice, in and of itself will not make you say that he is not an accomplice, will it?

A. No.

Q. If the Court were to charge you in certain instances that the question of an accomplice is a matter of law, which means that the Judge tells you directly that he is an accomplice and you must accept him as such, you would do that, wouldn't you?

A. Yes.

Q. On the other hand, if the Court were to tell you that in some instances it is not the Judge's duty as the law to tell you whether a man is an accomplice, but it is your duty to find out from the facts whether you consider him an [fol. 538] accomplice—do I make myself clear so far?

A. Yes.

Q. — will you search the evidence to determine in your own mind whether that person is an accomplice or not?

A. I will.

Q. And if you find, after searching the evidence, to your own satisfaction that he is an accomplice, would you hesitate in voicing that opinion to your fellow jurymen?

A. No.

Q. And if you still retained that opinion, would you hesitate, if the Court were to charge you that under those circumstances additional evidence is required tending to connect the defendant, to ascertain whether such additional evidence exists before you entertain a verdict of guilty? Do I make myself clear?

A. The question was a little involved.

Q. As I told you before, the Judge may say to you, "This man is an accomplice as a matter of law," and you must accept that as such.

A. Yes.

Q. The Judge may say to you that as to particular other witnesses it is up to you, the jury, to determine whether this man is an accomplice as a question of fact. Is that clear?

A. Yes.

Q. You evaluate the evidence and you weigh it in your own mind, you determine that he is an accomplice as a fact. Is that clear so far?

A. Yes.

Q. If the Court were to charge you whether a man is an accomplice as a matter of law or whether you find him an accomplice as a matter of fact, once it is determined that [fol. 539] he is an accomplice, there must be other evidence in the case tending to connect the defendant with the crime before you can convict; would you look then through the evidence to ascertain whether such does exist?

A. I would, yes.

Q. And if you were unable to find to your own satisfaction that such existed, would you hesitate to resolve that doubt in favor of the defendants and acquit?

A. I would not.

Q. Just let me ask this question: You were very fair when Mr. Climenko questioned you. You said that somebody in your office started a conversation with you which you resented. Has that conversation in any wise left such an impression upon your mind that it would take any lesser amount of evidence on the part of The People than would be necessary had you never had that conversation?

A. No, it has not.

Q. Has that conversation left an impression which would require any greater amount of evidence from the defendant than if you had not had that conversation?

A. No, it has not.

Q. Of course it is clear by now that this case has had some publicity. That we all know. Isn't that true?

A. That is true.

Q. Merely because of that fact, would you be hesitant if you were conscientiously of the opinion that The People had failed in their burden of proof, namely, to prove any of the defendants guilty beyond a reasonable doubt, would you be hesitant in voicing that doubt by a verdict of acquittal?

A. I would not.

[fol. 540] Q. It may develop in the trial that certain of the individuals called as witnesses by The People may be known to my particular defendant, possibly to other defendants. Would the mere fact of association or knowledge of one another, without any further proof believed by you, be sufficient to prejudice your mind? In other words, let me

put it squarely like this: Suppose it developed that the defendant knew one of the prosecution's witnesses. The prosecution's witness says to you that that defendant had some connection with the crime. The defendant admits that he knows the individual but denies the connection with the crime. Would the mere fact of knowledge of the individual influence you to such extent——

A. Not unless it were substantiated by additional evidence.

Q. In other words, not unless you believe that, in addition to knowing the individual, the defendant actually participated in the crime; isn't that true?

A. It would have to be brought out as that, yes.

Q. But the mere knowledge of association of the individual without the belief on your part of the particular witness as to the circumstances of the crime, in and of itself would not so prejudice you against the defendant that you would be led to find a verdict of guilty?

A. No.

Q. You have been asked regarding one of the defendants serving time. Would the fact that a defendant is serving time in any wise prejudice you against one or the other [fol. 541] defendants who was on trial with him?

A. No.

Q. You understand, sir, that the bringing of three men together and trying them is a matter of convenience? You understand that, sir?

A. I do not know what the reason is.

Q. Each one is entitled to a separate verdict at your hands; is that correct?

A. Yes.

Q. And whatever may apply to one, if it is not connected to the other, must be dismissed from your mind in determining the guilt of the other; is that clear to you?

A. That is my understanding, yes.

Q. So that a verdict against any particular defendant must fall or rise upon the proof as you believe it to be against that particular man, and you must, as nearly as is physically possible, dismiss from your mind anything with respect to the other defendant if it is not in any wise associated with the particular defendant whose guilt you are then considering; is that clear?

A. Yes.

Q. On the question of admission, the District Attorney may attempt to prove that one of these men or all of them, for that matter, we not being apprised of the fact up to this time, assumedly admitted to one of his witnesses that he had some connection with the crime. Have I made myself clear so far?

A. Yes.

Q. If such happens to be the case, have I your promise, sir, that in searching this alleged admission you will find [fol. 542] from whose mouth it comes, first of all, what motive the individual may have in making the statement or the alleged statement that somebody made a statement to him, and his background, both in so far as his criminal propensities are concerned and veracity is concerned, and weigh it in that light and that light alone? Have I your promise?

A. That is right.

Q. You understand further that on the question of the so-called corroboration which you have heard so much about that if you determine that certain witnesses are accomplices as a matter of fact, in addition to those whom the Court may charge are accomplices as a matter of law— Is that clear to you?

A. Yes.

Q. — that then the law, if it is charged by his Honor, is that one accomplice cannot corroborate another. Is that clear?

A. If that is the law, I would take it as such.

Q. If the Court were to charge you even though there be a hundred people who are accomplices, that would have no greater weight than the one accomplice himself and could not be used as corroboration, you would have no difficulty in following that, would you?

A. No.

Q. You would not say to yourself, "Well the Judge charged us that one could not corroborate the other, but here we had nine accomplices and they all say the same thing, so there must be some substance to it"? You would not say that, would you?

[fol. 543] A. I would have to have further corroboration.

Q. In other words, you would follow the Court's instruction that the additional evidence must come from an untainted source?

A. Correct.

Q. Outside of accomplices; is that true?

A. That is right.

Q. Do you further understand that the defendant is being tried on what we call an indictment? In this particular instance it is only a few lines long. You understand that?

A. Yes.

Q. That is all my defendant is here to meet. Do you understand that, sir?

A. Just the one charge.

Q. Yes, sir. And that that is all we are here to meet. Do you understand that?

A. Yes, sir.

Q. So that when the evidence is brought in in this case you will confine yourself in determining whether or not the District Attorney has, by credible proof, shown you that this defendant has committed this crime. Is that true?

A. That is true.

Q. Not what you may have heard on the outside as to any defendant, whether involuntary or not, not what you have read in newspapers, not what you have heard discussed in the courtroom, but the proof as it comes from witnesses' mouths in this court-room. Is that true?

A. That is clear.

Q. And that is what you say you will do if you are accepted as a juror?

A. I will.

Q. Am I correct, sir?

A. That is correct.

[fol. 544] Q. Just this one other thing: You know, sir, that as a juryman of the State of New York that you are not only committed to justice in so far as The People are concerned, but as far as the defendant is concerned?

A. Yes.

Q. You understand the defendants are an integral part of the State just the same as The People?

A. That is my understanding, yes.

Q. So that you will deal fairly as between The People of the State, which comprise the prosecution, and the defense, is that right?

A. Try to get an impartial judgment on the case.

By Mr. Turkus:

Q. Mr. Stevens, Mr. Rosenthal in talking to you said his client has to meet an indictment that is a few lines

long, and that that is the limit of the inquiry, and you properly made response that you were going to listen to the charge in the case. Is that correct?

A. That is correct.

Q. Whether the charge is contained in an indictment of a single sentence or a million words, you know that the charge here is the crime of murder in the first degree; is that correct?

A. Yes.

Q. And it is your duty to find out whether the defendant that he represents and the other defendants have committed the crime of murder in the first degree, whether it be alleged in an indictment of a single sentence or a thousand words; is that correct?

A. That is correct.

[fol. 545] Q. Now, Mr. Rosenthal spoke to you about the false alibi. He said, assuming that you found——

Mr. Rosenthal: I object to the question. I never said anything about a false alibi at all. I said that even though he may not believe, he, the juryman, the alibi. There is no such statement on the record, and I object to it, your Honor.

Mr. Turkus: I have been interrupted in the middle of a question.

Mr. Rosenthal: You are interrupted when you make a false statement. I made no mention of any false alibi.

The Court: Finish the question.

Mr. Turkus: May the juror be told to disregard the allegation of Mr. Rosenthal about any false statement?

The Court: What is the question?

(Pending question read by the reporter.)

Q. Assuming that you found that the alibi was untrue, in words or substance, would you nevertheless require The People of the State of New York to establish guilt of that defendant beyond a reasonable doubt, and I believe your answer was "Yes."

Mr. Rosenthal: I object to the question and the preamble upon the ground it is not founded on fact.

The Court: Overruled.

Mr. Rosenthal: I respectfully except.

Q. Did you lose track of the question?

[fol. 546] A. I understood you to say would I require that you establish your case beyond a reasonable doubt.

Q. That is right, nevertheless.

The Court: If you did not believe the alibi.

A. No, I would not require you to establish more than beyond a reasonable doubt.

Q. What I am trying to find out is this: Assuming that you found a defendant interposed a false alibi, and the Judge instructed you in words or substance that the interposition of a false and concocted alibi might be found by the jury to show a consciousness of guilt on the part of the defendant who would do so, would you find that repugnant with you frame of mind as you now sit in the chair?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: I object to the injection of the matter of false alibi in this case.

The Court: You will follow the instruction?

The Talesman: I will follow the instruction.

The Court: Overruled.

Mr. Talley: Exception.

Q. And would you find such an instruction repugnant to your frame of mind now?

Mr. Rosenthal: That is objected to.

The Court: Overruled.

[fol. 547] Mr. Rosenthal: Exception.

A. No, I would not.

Q. Do you find any quarrel with that law?

A. No.

Q. Are you sure of that? Is there any doubt in your mind?

A. No, there is no doubt in my mind. I am not familiar with the law.

Q. Would the common sense of it, if a man were to put in a false and concocted alibi, do you find that the common sense of it is repugnant to the law, namely, that you can consider that consciousness of guilt?

Mr. Rosenthal: I object to that question.

The Court: Sustained.

Q. At any rate, Mr. Stevens, as you are now seated in this box, you find no quarrel with the law as I have outlined it to you in connection with alibi?

A. I do not.

Q. There has been quite a discussion about the fact that—was it two co-employees spoke to you about the case?

A. That is correct.

Q. Had your relations with them been cordial before the discussion?

A. Entirely so.

Q. And were your relations cordial after the discussion?

A. Yes.

Q. Was your—I think I may not have correctly heard the word, but what was the feeling that you said you had when there was this discussion—resentment?

[fol. 548] A. I said I resented their trying to.

Q. What I want to inquire is this: Was it a resentment that somebody who was not called for jury duty spoke to you in advance about their opinion?

A. My feeling is this: that frankly I would rather not serve on this jury, but if I am called upon to serve, it seems to me such a terrific responsibility that I can't understand why people who——

Q. Who know nothing about it?

A. Can attempt to influence a man who might have to make such a grave decision.

Q. In other words, your frame of mind now as you sit in the jury box is that this is an important case, important to The People of the State of New York as well as the defendants on trial?

A. Yes.

Q. And you did not want any outside source to in anywise affect you one way or the other in advance of hearing the evidence in the case?

A. That is right.

Q. Just because somebody happened to indicate an opinion which was unfavorable to the defendant or more of them—I do not know whether you said one or more, but whatever the case may be—would you have such pride of opinion that you would be inclined to demand more of the State of New York than had there been no discussion?

A. No.

Q. In other words, I think you said to one of the lawyers that you feel beholden to no one in the outcome of the case: is that correct?

A. That is correct.

[fol. 549] Q. You do, however, of course, feel beholden to your oath as a juror?

A. Yes.

Q. And that will be the only thing that will guide you and affect you in the determination of the issue of guilt or innocence; is that correct?

A. That is correct.

Q. In other words, may we accept that you will obey your office as a juror and endeavor conscientiously to arrive at a just result in the case?

A. Yes.

Q. One of the lawyers spoke to you about people in every-day life. Do you remember that discussion that you had with him?

A. Yes, I do.

Q. Is your frame of mind such that you expect a prosecutor in a murder case to bring in people of the type that you would meet in your every-day walk of life?

Mr. Climenko: I object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

Q. (Pending question read.)

A. I have never given that consideration of the types that might be brought in.

Q. Suppose you just take a moment out to consider that, in view of what you said. Have you any expectation as to the type of individual that will come into the court that you will expect a certain standard of character of a witness to be produced by the prosecution?

A. I cannot say I have.

Q. I think you said in response to my question that you [fol. 550] have no bias or prejudice against a prosecution which breaks a case from the inside and uses the testimony of an accomplice against the others involved in the case.

Mr. Talley: I object to the question, if your Honor pleases.

The Court: Isn't this all repetition?

Mr. Talley: Yes.

The Court: A great deal of time has been spent with one man, an hour and a half. Has not enough been learned to decide?

Mr. Turkus: If I had not thought it was proper to ask I would not have done so. Am I foreclosed from proceeding any further?

The Court: No, I am just making this as a suggestion, because unless we reasonably limit the questions at all times we run into more difficulty—You will get so tired you won't be able to continue questioning talesmen. You should make some speed here. So far all you have to show for five days work is three challenges have been exercised out of sixty. That is not promising for the future, unless we make more speed. Remember the acceptance is tentative for both sides.

Q. I believe it was Mr. Rosenthal that asked you whether or not you would examine the source of any admissions attributed to a defendant. Am I correct in that?

A. I believe he did.

[fol. 551] Q. Is your state of mind such that you feel that no criminal discusses a criminal activity with another?

Mr. Barshay: I object to the question.

The Court: Sustained.

Q. Is your state of mind——

The Court: If you question any man long enough you will disqualify him.

Mr. Turkus: I am not trying to do that.

The Court: That is the inevitable result. Just like walking in the streets. If you walk long enough and far enough you will be hit by an automobile. It is only a question of time.

Mr. Turkus: Judge, I am not trying to have any such thing happen.

The Court: I do not want you to wear yourself out.

Mr. Turkus: I won't be worn out. I want to make sure we get a fair and impartial jury, and I want to ascertain certain of the mental operations of a prospective juror.

The Court: You have nine lawyers on the other side dividing up this work, and you are doing it all yourself. Mr. Klein is not here to help you. I am not trying to nag you.

Mr. Turkus: I know you would not, because with nine against me, I should not have the Judge against me too.

The Court: The Judge is trying to be impartial, but at [fol. 552] the same time I would like progress made.

Q. Is your state of mind such that you would reject an admission attributed to a defendant because it came from another criminal?

A. No.

Q. In other words, will you look at the issue in this case where the District Attorney comes in with a murder that happened in 1936, breaks it from the inside and produces the testimony of an accomplice, one of the participants in the murder with the defendants on trial, and brings in other evidence tending to connect the defendant with the commission of the crime, and after you hear the whole thing, if you are satisfied that the accomplice is not only telling the truth but that the defendants are implicated in the commission of the crime, and if you are satisfied of that beyond a reasonable doubt, would you hesitate to say so in your verdict?

[fol. 553] Mr. Talley: I object to the question, to the form of the question, to the preamble of the question.

The Court: Sustained.

Mr. Turkus: Let me break it down, Mr. Stevens. Assuming that you are satisfied from all the evidence in the case that the accomplice is not only telling the truth but that the defendants and each of them have been connected with the commission of the crime, and you are satisfied of that beyond a reasonable doubt, would you hesitate to say so in your verdict?

Mr. Talley: Object to that as having been asked in various forms at least a half a dozen times.

The Court: Sustained.

Mr. Turkus: One of the lawyers asked you whether or not you would segregate the evidence in the case so that it would apply to the specific defendant against whom it was given. That you were asked in words or substance, and I think you properly said you would endeavor to segregate the evidence. Now if you find in all the evidence in the case that there was a conspiracy in which all the defendants joined and the Judge were to charge you that the act of

one would be the act of all, would you follow the instruction of law?

Mr. Rosenthal: I object to the question on the ground it is not a proper statement of law.

[fol. 554] The Court: Act of one in furtherance of the conspiracy.

Mr. Rosenthal: Further on the ground there is no charge of conspiracy in the indictment.

The Court: There does not have to be. Overruled.

Mr. Rosenthal: Exception.

The Court: Will you follow the instruction of the Court on that point?

Mr. Stevens: I will.

Mr. Turkus: If you find from all the evidence in the case that these defendants at the bar of justice, Buchalter, Weiss, and Capone, joined into a conspiracy with others to effect the death of Joseph Rosen and that, in pursuance of the conspiracy, Rosen was shot to death and killed, and you are satisfied of that beyond reasonable doubt, would you hesitate to say so in your verdict?

Mr. Talley: Object to that as having been asked in various forms.

The Court: Sustained.

Mr. Turkus: No challenge for cause.

Mr. Barshay: No chalienge for cause on behalf of the defendants.

Mr. Turkus: Satisfactory to the People of the State.

Mr. Barshay: Satisfactory to the defendants.

The Court (to Mr. Stevens): Take Seat 1.

[fol. 555] Joseph O. Herrick, of 667 Tenth Street, Brooklyn, New York, was called as a prospective juror.

Mr. Barshay: May we ask your Honor something on behalf of all counsel, to clarify the ruling your Honor has made with respect to the acceptance of the juror?

The Court: Yes.

Mr. Barshay: We desire, sir, if your Honor so sees fit, that the juror judged acceptable to both sides be sworn as a juror, and that process should be followed throughout the trial.

The Court: The Court is not obliged to do that until twelve men are accepted on both sides. The Court may in its discretion swear one at a time.

Mr. Barshay: Then do we understand, sir, that you leave the door open for either side to again exercise a challenge?

The Court: There is a more practical reason than that. That is the question of ultimate housing.

Mr. Barshay: Can we know, your Honor, privately, if necessary, the reason?

The Court: You go ahead with this, and I will talk about that later.

Joseph O. Herrick, was then examined as to his qualifications.

By Mr. Turkus:

[fol. 556] Q. Mr. Herrick, you live in the Park Slope district of Brooklyn?

A. That is right.

Q. And your occupation on the trestle board is listed as that of an insurance broker.

A. That is correct.

Q. You and I have met before?

A. Many times.

Q. And when was the last time that we met?

A. Oh, possibly a year or two ago, but I have known you for over twenty years.

Q. We will get right down to business very quickly. The defendants at the bar here are charged with the crime of murder in the first degree. As has been eloquently said by everybody in the case, the defendants are entitled to have a fair and impartial trial. Do you feel that because of your acquaintance and friendship with me, that you would be precluded from giving these defendants that kind of a trial, a fair and impartial trial on the evidence?

A. No.

Q. Do you know any other member of the District Attorney's staff?

A. I know Mr. Rooney, I know Harry Walsh.

Q. Do you know any of the defense counsel in the case?

A. No.

Q. I have read off the names, Mr. Barshay, a former Assistant District Attorney, Mr. Wegman, and Mr. Climenko.

A. I do not know any of them.

Q. Representing the defendant Buchalter.

Mr. Talley: If your Honor pleases, I submit this to you: Do you not think it would help in the economy of time—and Lord knows we spent enough time on this phase of the case [fol. 557] now—to take up the question of the juror's frank statement at the beginning of his examination that he has known Mr. Turkus for some twenty years and met him many times as some such acquaintance that he thought might reasonably be assumed to make it embarrassing for him possibly to sit as a juror on this case, and not go into a long examination on the part of the District Attorney and upon defense counsel, in view of that statement? It would seem to me that the District Attorney can hardly afford to take this gentleman.

Mr. Turkus: I bent over backwards when one juror was related to an Assistant District Attorney. Judge, I do not want them to always get something off to the jury without having the District Attorney respond.

Mr. Talley: Likely to take one hour.

The Court: I have known you——

Mr. Talley: Don't go back too far. Be indefinite about the time.

The Court: —but I can recall about twenty years ago in Atlantic City dining with you at the hotel where you were stopping.

Mr. Talley: Beyond my memory. I was a child in arms.

The Court: But that has no bearing on being impartial.

Mr. Talley: Of course not.

The Court: I have known all the lawyers here for many [fol. 558] years. There is no difficulty in the juryman being impartial on who he knows or does not know.

Mr. Talley: If I was District Attorney, I would not let this gentleman sit in the box, after stating he knew me for twenty years. Your Honor in his discretion should excuse this juror on that statement alone.

The Court: It is so long since you have been an Assistant District Attorney I doubt you have an adequate recollection of your policy on that point.

Mr. Talley: On the contrary, my recollection about that period is very vivid.

The Court: Proceed with the examination.

Mr. Turkus: Judge Talley seems to think there is something objectionable here. May I sit down and let him interrogate on that feature of the case?

The Court: Will you proceed, please?

By Mr. Turkus:

Q. Mr. Herrick, on your knowledge of me over twenty years, can you take my word for it that I want you to be a fair and impartial juror?

A. Yes.

Q. And if you cannot be, I don't want you in the box?

A. Yes.

Q. Looking at it in the light of Judge Talley's explanation to the Court about a twenty-year acquaintance, if by one iota you cannot be fair in the case, let me know and we [fol. 559] can dispose of this thing very quickly.

A. I will be fair. That is my duty.

Q. Let me go one step further. In the charge of importance not only to The People of the State of New York, but of course to the defendants at the bar of justice, would you be inclined to favor a verdict of guilty because the case is being submitted to the jury by Burton B. Turkus?

A. No.

Q. Will you decide the one issue in the case, the guilt or innocence of the three men at the bar of justice, upon evidence that you hear in the court of justice?

A. Yes.

Q. Does the insurance business in any wise, Mr. Herrick, bring you in contact with Brownsville and East New York?

A. Yes, I have several clients in Brownsville.

Q. In your travels through the district there, have there been any discussions on this Rosen case?

A. No.

Q. Are your clients individuals or corporations in this area?

A. They are individuals.

Q. And at no time have you heard any discussion of the Rosen case?

A. No, never.

Q. Would your jury service be affected by your knowledge of people in that area? Would there be any embarrassment or reluctance on your part to serve?

A. No.

Q. Does that hold true with respect to the garment district?

A. No business there.

Q. Have you had any in the past?

A. No.

Q. Any connection, directly or indirectly, with the gar- [fol. 560] ment district?

A. No.

Q. Does that hold true with the garment district in Manhattan?

A. Same thing.

Q. Clothing trucking?

A. No, have not got any.

Q. Since your name appeared on this special panel as a prospective talesman, did anybody speak to you about the merits of the case?

A. No.

Q. Have you heretofore served as a juror in any criminal case?

A. Civil.

Q. If accepted as a juror in this case, will you take the law in all its aspects implicitly from Judge Taylor?

A. Yes.

Q. Are you in sympathy with the enforcement of the law of the State of New York?

A. Yes.

Q. I do not recall now whether I queried you about any possible acquaintance with any members of Mr. Geoghan's staff.

A. I knew Mr. Geoghan; I knew Frank Madden.

Q. At any time while they were in office was there any discussion with you in regard to the Rosen case?

A. No.

Q. If you are charged by the Court, as you undoubtedly will be, that defendants are presumed to be innocent, will you give the defendants the benefit of the presumption of innocence?

A. Yes.

Q. And if you are charged—and you undoubtedly will be —that the prosecution must establish guilt beyond a reasonable doubt, will you follow out those instructions of law

[fol. 561] and conscientiously endeavor to apply the principles of law to the facts of the case?

A. I will.

Q. Do you find any fault with the prosecutor of the county or with the prosecution of an indictment wherein the testimony of an accomplice witness is used?

A. No.

Q. Do you find any fault with the prosecutor or with the prosecution where the prosecutor breaks the case from the inside and avails himself of the use of a co-participant in the murder as a witness against the other defendants?

Mr. Talley: Object to the question. The form of the question is improper.

The Court: Overruled.

Mr. Talley: Exception.

Q. One of the lawyers asked, in regard to his client, whether or not you would have any prejudice against him because he has been heretofore convicted of crime and serving a term in jail. Do you feel you have any prejudice against such a defendant?

A. Not at all.

Q. By the same token, because a defendant is serving a jail term for a crime, he has been convicted of, would you be inclined to relax or deviate from your duty as a juror in a case where he is charged with murder in the first degree?

A. No.

Q. I queried several talesmen about any knowledge of people with the Amalgamated Clothing Workers of America. Was there any familiarity with the names of Potofsky, Weinstein, Katz?

[fol. 562] A. No.

Q. With Bruno Belia or Salvatore Marazzano?

A. No.

Q. Any connection with Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Any teamsters' or truckers' union?

A. No

Q. Flour truckmen?

A. No.

Q. The name of Emanuel Buchalter or Phillie Buchalter at all familiar?

A. No.

Q. That of Bellanca or Tosca?

A. No.

Q. Terry Burns?

A. No.

Q. Do you know any people in the automobile rental business by the name of Weiss, operating up in the Park Slope district?

A. No.

Q. Do you have any scruple, conscientious or otherwise, against capital punishment?

A. No.

Q. If accepted as a juror in the case, would you permit anybody to discuss punishment?

A. No.

Q. Is your state of mind such that you understand and appreciate that at some time even a bad man tells the truth?

A. Yes.

Q. And is the state of your mind such that sometimes criminals do fall out and one does testify against the others?

Mr. Barshay: I object to the form of the question.

The Court: Sustained.

Q. With the defense of alibi, if it is invoked by any defendant, will you take the law implicitly from the Judge?

A. Yes.

[fol. 563] Q. Is your state of mind such that the case is of importance not only to The People of the State of New York, but to the defendants on trial?

A. Yes.

Q. If selected as a juror will you listen to reasonable and fair argument by the other jurors in the case?

A. Yes.

Q. Will you conscientiously endeavor to arrive at a just verdict in the case?

A. Yes.

Q. A verdict that will do justice not only to The People of the State of New York but to the defendants on trial?

A. Yes.

Q. After you have heard all the evidence in the case and you have talked the case over with the other jurors and your mind is satisfied beyond a reasonable doubt that there

are three guilty men at the bar of justice, Buchalter, Weiss and Capone, would you hesitate to say so in your verdict?

A. No.

Mr. Turkus: No challenge for cause.

By Mr. Barshay:

Q. Mr. Herrick, what branch of the insurance business are you in?

A. General insurance broker, all kinds, casualty and fire.

Q. Burglary insurance?

A. Burglary, automobile.

Q. Larceny insurance of automobiles?

A. That is right.

Q. And did you have any claims in the section of Brownsville?

A. No.

Q. To your knowledge, or East New York, burglary or larceny? You handle the burglary claim in stores known as [fol. 564] Abe Stark, clothier; James, the clothier; Dubrow Cafeteria?

A. No.

Q. Some other restaurants along the street where safes were blown? You never handle them at all?

A. No.

Q. You never came in contact with any claim where the name Sholem Bernstein was involved?

A. No.

Q. Are you sure about it? You don't remember that, do you?

A. I never had any claims.

Q. You don't remember it?

A. I got a music house over there.

Q. You have a music house over there?

A. Yes.

Q. Was it ever the victim of a burglary, to your knowledge?

A. No.

The Court: You have what?

The Talesman: A firm that sells musical instruments.

Q. Do you pass upon the legality of claims presented to your company?

A. I act as the broker. We service it. The company has its own claim agents, but we don't adjust their losses.

Q. I mean, have you gained an education in law with respect to burglary and larceny claims.

A. No, because we do not adjust them. We just report them to the company.

By the Court:

Q. What is the company?

A. Various companies. We do business with all the companies.

Q. Bail bond business?

A. No bail bond.

By Mr. Barshay:

[fol. 565] Q. By contact in those matters, did you gain any legal education or legal points at all with respect to burglaries or larcenies?

A. No.

Q. Or robberies?

A. No, because I never had occasion to adjust them.

Q. Then you didn't?

A. No.

Q. What companies do you write for?

A. I don't write for any company; I am a broker.

Q. With whom do you do business?

A. Various companies.

Q. Mr. Herrick, may we have some names, please?

A. Yes, you can have the New Amsterdam Casualty Company; you can have the Massachusetts Bonding Company; you can have the Hartford Accident & Casualty Company; you can have the Aetna. I will give you all you want. I can sit here a half an hour enumerating them.

Q. You are very fortunate, but we do not know those things. Do you know Mr. Kingland?

A. Mr. Kingland?

Q. Vice-president of one of the companies?

A. Joseph Kingland.

Q. Yes.

A. Yes, I know Joe.

Q. Have you ever discussed your service as a juror with him?

A. I have not seen Joe in two years.

Q. Where is your office?

A. I am not 16 Court Street, but I was in New York thirty years at 80 Maiden Lane.

Q. And do you know Mr. Turkus socially or in a business
A. I know him socially.
[fol. 566] way?
Q. Have you had any business with him?
A. Never.
Q. Have you had any business with any law firm with which he was connected?
A. No, sir.
Q. Judge Steinbrink's firm formerly?
A. Who?
Q. Judge Steinbrink's firm. Steinbrink, Delatour & Kennedy; have you had business with them?
A. No, sir.
Q. Have you had business with a Mr. Will— A lawyer who was formerly associated with Mr. Turkus?
A. No, sir.
Q. Have you had any business dealings of any kind, nature, or description with Mr. Turkus?
A. Not at all.
Q. And your knowledge of him is from the time that he was a boy up to the time he studied, practiced law and became——
A. We used to both eat in the same restaurant down here in Columbia Heights.

The Court: Where was that?
The Talesman: That was the Lido, right near the Crescent Club.

By Mr. Barshay:

Q. You have had occasion, then, to follow the progress of Mr. Turkus?
A. Yes.
Q. Take a great deal of pride in what he is doing?
A. That is right.
Q. And on occasions, sir, I take it that you made inquiries at the lunch tab'e or in the restaurant concerning some case where his name was in the newspaper?
[fol. 567] A. No.
Q. Did he ever talk about them?
A. No.
Q. I don't mean immodestly.
A. No, I never discussed them.

Q. You never talked to him about his elevation for the high office of Assistant District Attorney?

A. No.

Q. Never at all?

A. No.

Q. Did you ever hear him lecture?

A. Did I ever hear him lecture?

Q. Yes.

A. No.

Q. On any subject whatever?

A. No, sir.

Q. Did you ever go out with him socially?

A. No.

Q. At any rate, you have a very high opinion of his integrity, of course?

A. I have, yes.

Q. Supposing, Mr. Herrick, there comes a time in this case, supposing there comes a time in this case that the defense counsel tried to draw from a witness for the prosecution the fact that his testimony came as a result of his being induced to testify in order to gain some reward for himself, and supposing it came out that Mr. Turkus was one of the men who participated, if he did, in this inducement, and supposing the time came——

Mr. Turkus: I object to any such supposition.

The Court: Finish the question.

Q. —and supposing the time came for you as a juror to decide whether or not Mr. Turkus made any inducement or held out any inducement to that witness, even though he does [fol. 568] deny it, not he, Mr. Turkus, but the witness, and it became a question of the credibility of the witness, would the fact that you know Mr. Turkus and have such a high regard for his integrity, influence you in deciding one way or the other?

A. No.

Mr. Turkus: I object. Well, he has answered.

By the Court:

Q. Do you know Mr. Hughes, the Chief Assistant?

A. No. In the District Attorney's office?

Q. Yes.

A. No, I do not.

Q. He belongs to the club on your square block.
A. On my block? There is no club house.
Q. 8th Avenue?
A. You mean the Democratic club?
Q. Between 9th and 10th.
A. Yes, I know.
Q. That is around the corner from you?
A. That is right, Heffernan's.
Q. You don't belong to that club?
A. No, I do not.
Q. You live there how long?
A. Twenty-three years.

By Mr. Barshay:

Q. Do you belong to any political club?
A. No, sir.
Q. Have you ever belonged?
A. No, sir.
Q. Do you know Judge O'Dwyer?
A. Well, I only know him by his picture, that's all.
Q. You don't know him personally?
A. No.
Q. Have you, without belonging to any club, joined any independent organization for his elevation to the office of the Mayor?
[fol. 569] A. No, sir.
Q. Have you been solicited by independent folk for a contribution?
A. No.
Q. Do you intend in any way whatever to participate in the election of Judge O'Dwyer?
A. No. I signed a petition for him.
Q. I beg pardon?
A. I signed a petition.
Q. You signed a petition in the primary?
A. Yes, sir.
Q. That was because someone solicited it?
A. A neighbor.
Q. And do you partake or do you propose to partake in any organization committee for his election, irrespective of politics?
A. No.
Q. Any member of your family?
A. No.

Q. Engaged in politics?

A. No.

Q. The fact that he is a candidate, of course, I know would not affect your judgment in any degree?

A. No.

Q. He would not want that to happen. Now, Mr. Herrick, supposing it comes time in this case to sum up, let us say one of the counsel for any of the defendants interprets a fact in a way which is contrary to the way in which Mr. Turkus in his summation will sum up that same fact, he will interpret it differently—in other words, I may see an issue in one respect and he may see the same issue in an entirely different respect, would the fact that you know him for all those twenty years and have such a high regard for him influence you to the point that you may be inclined to accept the version placed upon that particular point or any points [fol. 570] or all points placed upon it by Mr. Turkus?

A. That is possible.

Q. So that in the last analysis, when you will have to weigh part of Mr. Turkus himself, not as an individual, but as a person who sponsors a given cause, then in the scale against the defendants will be the knowledge that Mr. Turkus has been known to you for twenty years, isn't that so?

A. That is right.

Q. And that may be prejudicial to any one of the defendants or to all of them?

A. That is right.

Q. You would not be table to help yourself under those conditions, would you?

A. I would be a little shaky.

Q. And that would not be fair to any of the defendants?

A. That is right.

Q. And you know now that we each represent opposite views in this case?

A. Yes.

Q. So you start off shaky, don't you, isn't that so?

A. That is right.

Q. And that would be to the prejudice of any one of the defendants? That is your honest answer?

A. That is my honest opinion.

Q. You feel that way?

A. That is the way I feel.

By Mr. Rosenthal:

Q. Isn't it true, Mr. Herrick, that the quality of proof that would be required from the defendant or from The People would be of a different degree than what would be [fol. 571] necessary because of your personal knowledge of Mr. Turkus and your belief in his integrity?

A. Yes.

Mr. Barshay: On behalf of all counsel we challenge the juror for cause.

The Court: Try the challenge.

Joseph O. Herrick, of 667 Tenth Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Mr. Herrick, if I were to ask you the same questions under oath as you were asked before you were sworn, would you make the same answers?

A. I would.

Q. Substantially to the effect that there may come a time when you would have to be prejudiced against one or all of the defendants?

A. Yes.

Mr. Barshay: Press my challenge.

Mr. Turkus: Mr. Herrick, I thank you for your high regard. I coincide. I agree that the challenge shall be sustained.

The Court: The Court has not agreed.

Mr. Turkus: That is all I can do.

By the Court:

Q. You think you will show favoritism?

A. It is possible I would.

Q. In a case where death is the penalty, you would show favoritism?

A. I am a little bit afraid.

[fol. 572] Mr. Talley: It is extremely difficult for us down here to hear everything you say. I do not like to be bobbing up and reminding you of that, Judge, but it is a great detriment to us.

The Court: It may be that there is not sufficient quiet down there. I do not know. I don't repeat, but the stenographer will.

(The stenographer read as requested.)

Q. In the years you have known Mr. Turkus he has been most of the time in the defense of criminal cases; is that not right?

A. I believe so.

Q. If you know him very well?

A. I knew him. I know him where he used to eat in the restaurant. I knew he was a promising young attorney, but I did not know whether he handled civil or criminal cases.

Q. You just know him from eating in the restaurant?

A. Yes, we used to meet there every day and talk.

Q. Talk about cases?

A. Oh, no, talk about different other things.

Q. Did he ever tell you where he lived?

A. No, he did not tell me where he lived.

Q. Did he ever tell you where he went on vacation?

A. No.

Q. Did he ever tell you whether or not he was married?

A. I don't think he is married.

Q. Did he ever tell you that?

A. No, he did not, your Honor.

[fol. 573] Q. Did he ever tell you anything of an intimate, personal nature?

A. No.

Q. Did you ever have any conversation with him of a strictly friendly nature?

A. Why, no. We talked about the weather or maybe politics.

Q. Just table talk?

A. Table talk.

Q. Do you call that friendship?

A. Well, I don't know.

Q. Don't laugh, because you made a statement here which is rather astounding, that you would allow a restaurant-table acquaintanceship to convict men of murder as a substitute for evidence. I want to know whether you are sincere in making that statement.

Mr. Barshay: I object to that question, if your Honor pleases.

The Court: Overruled.

Mr. Barshay: Exception.

Q. Will you please answer that, sir?

A. We used to sit and talk and have our dinner.

Q. I want an answer to that question.

A. What is the question, your Honor?

Q. Oh, you did not listen.

A. We had some interruption.

Q. The stenographer will read it.

(Question read by the stenographer.)

Q. Is that what you are trying to put across?

[fol. 574] A. I am not trying to put anything across, your Honor.

Q. Is that your attitude

The Court: I sustain the challenge, upon the ground the man is wholly unfit to have a job as juror. Get out.

Mr. Talley: If your Honor pleases, I, with great respect——

The Court: Sit down, please. This gentleman will leave at once, and there will be perfect order until he gets out of this room.

Mr. Talley: I object——

The Court: Exception to all counsel for the defendants.

Mr. Talley: I take the exception, if your Honor pleases, but I wish to make a further statement than that, and that is my objection.

The Court: No statement. Call the next juror.

Mr. Talley: May I not record my objection and exception to your Honor's statement to this juror?

The Court: Your exception is on the record, sir.

Mr. Talley: No, my exception is not on the record to your statement, and I move now——

The Court: The Court directs an exception be entered on behalf of all counsel for defendants.

Mr. Talley: I wish to have the record show that I object on behalf of all counsel to your Honor's statement [fol. 575] to the talesman who has just been excused, upon the ground that it has a tendency to prevent a fair expression of opinion on the part of talesmen, and it will be

difficult, and I think it makes it difficult for us, to get the fair and impartial jury that we are seeking.

The Court: Are you all through, Counsel? Please proceed with the examination.

Mr. Talley: I except to your Honor's statement and I note my exception to your Honor's statement on my objection.

The Court: Go ahead, Mr. Turkus.

JOHN M. PLEIL, of 1151 Troy Avenue, Brooklyn, was examined as to his qualifications.

Mr. Turkus: May I ask for a recess at this time? That was a distressing incident for me, your Honor.

The Court: No.

By Mr. Turkus:

Q. What section is that?
A. Flatbush.
Q. Have you lived there a number of years, Mr. Pliel?
A. About seventeen.
Q. You are listed here as an assistant buyer.
A. That is right
Q. And by whom are you employed, sir?
A. Lorillard Tobacco Company.
Q. Is that P. Lorillard & Company?
A. That is right.
[fol. 576] Q. Have you been there for a number of years?
A. Twenty.
Q. Is there anything about the nature of the charge in this case in which Buchalter, Weiss and Capone are charged with the crime of murder in the first degree which would prevent you from being a fair and just juror in the case?
A. No.
Q. Have you any scruple, conscientious or otherwise, against capital punishment?
A. No.
Q. If selected as a juror in the case, would you permit anybody to talk punishment to you?

Mr. Climenko: I object to the form of the question.

The Court: Sustained. It is a law question.

Q. Is your frame of mind such that you would not discuss the question of punishment in the jury room if selected as a juror?

A. No.

Q. And will you decide the issue in the case, the issue of guilt or innocence, upon the evidence that you hear in the court-room and nothing else?

A. That is right.

Q. Heretofore has business or social contacts brought you in touch with anybody in the Brownsville-East New York area of Brooklyn?

A. No.

Q. Or in the garment district in Manhattan?

A. No.

Q. The clothing district?

A. No.

Q. Or clothing truckers?

A. No.

Q. Since your name appeared on the special jury list and since you received your notice in this case, did anybody [fol. 577] speak to you about the case?

A. Just friends.

Q. Was that in regard to the possibility of serving on the jury.

A. Yes.

Q. Was there anything said about the merits of the case?

A. Well, some remarks was made.

Q. Were they people that you knew?

A. Yes, sure, in my office.

Q. Office employees?

A. That is right.

Q. It was a matter of curiosity on their part?

A. That is right.

Q. Was it in connection with arrangements in the event that you were selected as a juror?

A. No.

Q. Do you sit in the jury box now free of prejudice against the defendants?

A. Right.

Q. You do?

A. Yes.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Right.

Q. There are nine lawyers in the case, former Assistant District Attorney Barshay, former Assistant United States Attorney Wegman, and Mr. Climenko all representing the defendant Buchalter. Do you know any of those lawyers?

A. None of them.

Q. Anyone connected with their law offices?

A. No.

Q. Do you know any member of the bar intimately who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know former Judge Talley?

A. No.

[fol. 578] Q. Former Assistant District Attorney Cuff?

A. No.

Q. Or former Assistant United States Attorney Kriendler?

A. No, sir.

Q. Anybody connected with their law office?

A. No.

Q. Does the same hold true with counsel for Capone, Messrs. Rosenthal, Fischbein, and Rosenberg?

A. I don't know them.

Q. You do not know anyone connected with their law offices? With respect to the District Attorney of the county, do you know Judge O'Dwyer?

A. No, sir.

Q. Do you know any member of his staff, intimately?

A. No.

Q. Specifically, do you know Mr. Turkus, Mr. Joseph, or Mr. Klein?

A. No.

Q. Did you know the former prosecutor of the county, Mr. Geoghan?

A. No, I did not.

Q. Or any member of his staff?

A. No.

Q. If selected as a juror in this specific case, will you take the law exclusively from the trial judge?

A. I will.

Q. I take it that, having been seated in this box now you have heard discussion by various of the lawyers as well as the prosecutor in regard to accomplice testimony. Have you heard that?

A. Yes, sir.

Q. Do you have any bias against the prosecutor of the county for breaking a case from the inside and using the testimony of a co-participant in the crime against the remaining defendants on trial?

[fol. 579] Mr. Talley: Object to the question in substance and in form. It is objectionable on both grounds.

Mr. Turkus: Question overruled six times.

The Court: Overruled.

Mr. Talley: I ask it be overruled every time it is asked.

The Court: Same ruling.

Mr. Talley: Same exception.

Q. (Pending question read.)

A. No.

Q. Before I continue with that, I just want to make sure about any possible connection in any shape or form with officials of the Amalgamated Clothing Workers of America.

A. No, sir.

Q. Is there anything familiar to you about the names of Potofsky, Weinstein, and Katz affiliated with the Amalgamated?

A. No.

Q. Is there anything familiar about the name of Bruno Belia an organizer of the Amalgamated?

A. No.

Q. An individual by the name of Salvatore Marazzano, is there anything familiar about that name?

A. No.

Q. Is the name Philip Orlofsky, a one-time manager of the Cutters Union, Local 4 of the Amalgamated, at all familiar to you?

A. No, sir.

Q. Do you have any contact or connection in any degree, shape or form with any official of Local 240 of the Clothing Helpers & Drivers Union?

A. No.

[fol. 580] Q. Or of any Teamsters Union?

A. No.

Q. Any familiarity with the name of Silverman, Max Silverman, or Wolfie Goldis?

A. No.

Q. Or that of Willie or William Alberts, a one-time bondsman?

A. No.

Q. The name of Emanuel Buchalter, is that at all familiar?

A. No.

Q. Or Philip Buchalter, sometimes known as Philip Kowas?

A. No.

Q. Bellanca and Tosca, are those names familiar?

A. No.

Q. Terry Burns?

A. No.

Q. Is your frame of mind such that even a person of bad character may on occasion tell the truth?

A. Would you mind repeating it?

Q. Yes. Is your frame of mind such that even a person of bad character may, on occasion, tell the truth?

A. Sometime.

Q. Have you any inherent bias or prejudice against testimony coming from an accomplice which would cause you to disregard the testimony?

Mr. Rosenthal: I object to the question. The law is that he must disregard it unless corroborated.

The Court: Overruled.

Mr. Rosenthal: Exception.

Q. (Pending question read.)

A. No.

Q. You have no inherent bias or prejudice against testi- [fol. 581] mony coming from an accomplice solely because he is an accomplice; is that correct?

A. No.

Q. Will you follow the instructions of law as given by the Judge as to the weight and credibility to be given to that type of witness?

A. No.

Q. If you find that the testimony of an accomplice is corroborated by other evidence tending to connect the defendants with the commission of the crime, and you are satisfied from the evidence that the accomplice is telling the truth, that the other evidence does tend to connect him with the commission of the crime, and you are satisfied of that beyond a reasonable doubt, would you hesitate to say so by your verdict of guilty?

A. No.

Q. Is there any reason concerning which I as yet have received no response which goes to your qualification as a juror in the case?

A. What is that?

Q. I will withdraw it in that form. Is there anything that I have not yet brought out that both sides should know affecting your qualifications to sit as a juror? I will revise it again: Is there any reason why you cannot be a fair and impartial juror in the case?

A. I do not know. I read quite a few articles in the paper and talked about the case.

The Court: We will continue this tomorrow morning. Be here at ten o'clock.

The question came up before as to why the Court thinks it advisable not to swear except in group, unless it be otherwise decided during the course of the questioning of jurors. Section 387 of the Criminal Code provides "The first twelve persons to appear, as their names are drawn and called, who are approved as indifferent between the parties and [fol. 582] are not discharged or excused, must be sworn: and constitute the jury to try the issue." This is upon the selection of twelve people. Meeting that requirement would require the administration of the oath, and they would then constitute the jury. The Court in its discretion has followed the practice in other cases of swearing individually from time to time as the case progresses, but here is a practical difficulty. It is the intention of the Court, on account of the extreme delay, on account of the length of time it has taken to select the jury in this case, not to subject those who have been tentatively selected to the inconvenience of being housed. The effect of that may be to make jury service intolerable. The housing will commence when we are ready to take the evidence, not before. Allowing jurors to go home, even with the instruction of the Court against reading, against talking, and against listening to the radio, about the case, would, in event of such juryman being sworn, prevent his being later on questioned as to what might have happened by way of contact in the interim in which he was permitted to go home, and I think in this case that would be unwise. That is the reason for the Court exercising its discretion in this manner. Later on, if you make more speed—and I say this not critically—[fol. 583] the situation may develop differently, but it is a sorry production so far.

(To talesmen.) Gentlemen, you may go now, and be in your place at ten o'clock tomorrow morning.

You are admonished not to talk about the case, not to discuss it, not to allow anybody to talk to you about it. Do not read about it; do not listen to the radio or otherwise about it. Keep your minds open.

The defendants are remanded.

(Adjourned to Thursday, September 25, 1941, at 10 o'clock a.m.)

[fol. 584] Brooklyn, N. Y., September 25, 1941.

Trial Resumed

JOHN M. PLEIL, was examined further as to his qualications to serve as a juror.

By Mr. Turkus:

Q. In examination of the other prospective talesmen, one of the lawyers directed attention to the fact that there is only a single issue in the case, the issue being whether these three men at the bar of justice, Buchalter, Weiss, and Capone, are guilty of murder in the first degree, in the murder of Joseph Rosen, do you understand that?

A. Yes, sir.

Q. I think we got to the point where you stated you would be willing to take the law from the Court in all of its aspects.

A. Yes, sir.

Q. Is your state of mind such that you appreciate this is an important case, important both to The People of the State of New York and to the defendants at the bar?

A. Yes.

Q. If selected as a juror, will you conscientiously endeavor to arrive at a just verdict in the case?

A. Yes.

Q. If selected as a juror, will you deliberate with your fellow jurors with common sense, understanding, and without rancor or bitterness?

A. Yes, sir.

Q. If you are selected as a juror, and after you hear all of the evidence in the case, and after you have heard the [fol. 585] lawyers argue the inferences they draw and the

inferences the prosecution may draw with respect to the evidence, and his argument to the jury, and you listen to the learned Court on the law, will you discuss the case with fairness and with reason and with common sense with your other jurors, and when you come to a conclusion beyond a reasonable doubt that there are three guilty men at this bar of justice, three men guilty of the murder of Joseph Rosen, would you hesitate to say so in your verdict?

A. No, sir.

Q. Would you have any fear or hesitation or reluctance?

A. No, sir.

Mr. Turkus: No challenge for cause.

By Mr. Climenko:

Q. Mr. Turkus asked you a question yesterday as to whether you knew of any reason why you could not listen fairly to the evidence in this case—I don't know whether you finished your answer to that question at the time we recessed. Do you remember that question?

A. Yes.

Q. Will you answer that question now, and tell us is there any reason in your mind at the present time which would interfere with your impartial consideration of the case?

A. I said that I talked to my friends about the case.

Q. You have talked with your friends about the case?

A. Yes, sir.

Q. Anything else?

A. No, sir.

[fol. 586] Q. Have you read about the case?

A. Yes, sir.

Q. What newspaper did you read?

A. I read it in the *Mirror*, some articles.

Q. Beginning when, so far as you remember?

A. I read several articles.

Q. In what month?

A. In this month.

Q. Did you read those articles in the *Mirror* as it is distributed in the Borough of Brooklyn?

A. Yes, sir.

Q. In other words, you bought that copy in Brooklyn?

A. Yes, sir.

Q. From the reading of these articles, did you form an impression which was adverse to any of the defendants?

A. It only created some impression on me.

Q. As you sit here now do you have that impression which you gained from these articles?

A. Yes, sir, you cannot dispense all of it.

Q. You cannot completely dispense the impression you gained from reading those articles?

A. No, sir.

Q. And the opinion which you derived from the reading of these articles is one that is unfavorable to at least one of the defendants?

A. Yes, sir.

Q. As you sit here now you have that unfavorable opinion with you?

A. I still have it.

Q. Would it require the production of evidence on behalf of that defendant in order to dispense that opinion from your mind?

[fol. 587] A. Yes, sir.

Mr. Climenko: I challenge this talesman for cause.

The Court: Try the challenge.

JOHN M. PLEIL, No. 2819 was then sworn and examined on the challenge.

By Mr. Climenko:

Q. Now that you have been sworn, were I to repeat the questions I just put to you, would your answers be the same?

A. Yes, sir.

Mr. Climenko: May it please your Honor, I press the challenge.

Mr. Cuff: All of the defendants join in pressing the challenge.

The Court: Any further questions by counsel for the defense?

Mr. Barshay: No.

By Mr. Turkus:

Q. I believe when we discussed the matter yesterday you said you had had no prior jury service.

A. No, sir, I did not.

Q. Consequently you never heard a judge charge a jury with respect to a criminal case?

A. No, sir.

Q. Our law is that the defendant has no burden in a criminal case, that is, that burden is upon the prosecutor to establish guilt beyond a reasonable doubt.

A. Yes, sir.

Q. And the defendant need offer no evidence at all, and [fol. 588] if he desires he may sit mute, and if he sits mute, no unfavorable inference may be drawn; that is our system of jurisprudence here. Do you find any quarrel with that type of law—is it repugnant to your sense of justice?

A. No, sir.

Q. If you were charged by this Court this law, would you endeavor conscientiously to apply these principles of law to the case?

A. I would try.

Q. Now that you are aware that the defendant need offer no defense at all in a criminal case, would you still expect the defendant to do so?

A. Yes.

Q. In this particular case?

A. Yes, sir.

Q. Is your opinion such that you could not lay it aside and decide the case upon the evidence?

A. I don't think so.

Q. Let me take a few more steps with you and then I think we can finish this up very quickly. Of course, to establish guilt beyond a reasonable doubt, you must necessarily expect the prosecutor to give you evidence?

A. Yes, sir.

Q. You would not expect the prosecutor to take a newspaper and submit that to the jury in lieu of testimony, would you?

A. No, sir.

Mr. Climenko: I object.

The Court: Objection overruled.

Q. Cognizant of the law that the prosecutor must establish guilt beyond a reasonable doubt, upon testimony; is there anything you have read in those newspaper articles [fol. 589] that has made such an impression on your mind you could not lay it aside?

A. I read quite a bit, and my mind was made up after I formed an opinion about the defendants. I tried to cast it aside, but I cannot.

Q. You are telling me frankly and fully?

A. Yes, sir, that is my honest opinion.

The Court: Challenge sustained.

Andrew A. Merrick, No. 2684, residing at 107 Garfield Place, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. The trestle board lists your address as 107 Garfield Place.

A. Yes, sir.

Q. That is in the Park Slope section?

A. Yes, sir.

Q. Have you lived in that section for a number of years?

A. Thirty years.

Q. You likewise are listed here as having some connection with insurance. We need further information. Are you a broker?

A. No, sir, a clerk, office work only.

Q. By what company are you employed?

A. The Equitable Life.

Q. Have you worked there for a number of years?

A. Yes, sir.

Q. More than five?

A. Fifty years next February.

Q. I take it by now you are familiar with the nature of the charge, namely, that the three men at the bar of justice, [fol. 590] Buchalter, Weiss, and Capone, are charged with murder in the first degree, the murder of a man named Joseph Rosen.

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, that of murder, which would preclude you from being a fair and impartial juror in the case?

A. None whatever.

Q. I take it you have no conscientious or other scruples against capital punishment?

A. None, sir.

Q. And if selected as a juror in the case, will you decide the case from the evidence and not from the common standpoint of punishment?

A. Yes, sir.

Q. If selected as a juror, would you permit any other juror to discuss punishment?

A. No, sir.

Q. There are questions we must get from you individually. I know you will understand when I repeat them that it is a case of necessity and not of desire, as, for instance, has your business or has any social contact given you any connection with the field in Brownsville or the East New York area of Brooklyn at any time?

A. No, sir.

Q. Have you had any connection in the past or have you presently, with any person or with any firm in the garment district of Manhattan?

A. No, sir.

Q. Or with anyone connected with the clothing district in Manhattan or on the Brooklyn waterfront?

A. No, sir.

Q. Are you acquainted with or do you know any official of the Amalgamated Clothing Workers of America?

A. No, sir.

[fol. 591] Q. Specifically, is there anything in connection with the names of Jacob Potofsky, secretary or treasurer of the Amalgamated, with Murray Weinstein, manager of the Clothing Cutters Union, Local No. 4 of the Amalgamated, or Samuel Katz, business agent of the local, that suggests itself to your mind?

A. No, sir, never heard of them.

Q. Is there any familiarity about the name of Bruno Belia, an organizer at the home office of the Amalgamated?

A. No, sir.

Q. Or with Salvatore Marazzano?

A. No, sir.

Q. Have you had any contact in any way, shape, or form with any official of Local No. 240 of the Clothing Drivers & Helpers Union or of the Teamsters Union?

A. No, sir.

Q. Have you any familiarity with the name of Max Silverman or Wolfie Goldis?

A. No, sir.

Q. Is the name Philip Orlofsky, one-time manager of the Clothing Cutters Union, affiliated with the Amalgamated, at all familiar to you?

A. No, sir.

Q. Or the name of William or Willie Alberts, a one-time bondsman; does that mean anything to you?

A. No, sir, I don't think I ever heard of that name.

Q. Emanuel Buchalter or Philip Buchalter.

A. I have seen those names in the paper.

Q. Other than seeing those names in the paper, is there any familiarity with those names?

A. Well, I think I heard of them before.

[fol. 592] Q. You think you have read something?

A. I seen those names in the newspaper before.

Q. Other than the familiarity with the names you gathered from reading the newspaper, do those names mean anything to you other than having read them?

A. No, sir.

Q. Outside of reading them?

A. I saw the names in the newspaper; that is all.

Q. Have you any familiarity at all with the names of Bellanca or Tosca?

A. No, sir.

Q. Does the name of Terry Burns mean anything to you?

A. No, sir.

Q. Or Abe Slabo?

A. No, sir.

The Court: It is possible there may be a misunderstanding among counsel as to the understanding of the Court's previous ruling against the use of alleged aliases as names in advance of proof. That ruling does not go so far as to prevent counsel for either side from probing as to the impression derived by talesmen from publicity in the use of these alleged aliases. If any questions are asked in that regard, the particular defendant to whom they are supposed to apply shall not be mentioned to the talesman in advance of proof.

By Mr. Turkus:

Q. May I go along with the understanding you have had no connection with any firms or individuals in the clothing district, the clothing trucking industry, or the garment dis-

[fol. 593] trict in Manhattan?

A. That is true, I never had.

Q. Since your name appeared on this special panel, and specifically since you yourself received your notice to act as a prospective juror in this case, did anybody speak to you about the case?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, sir.

Q. There are various lawyers representing the defendants at the bar. Do you know Mr. Barshay, a former Assistant District Attorney?

A. No, sir.

Q. Or Mr. Bertram Wegman, a former Assistant United States Attorney?

A. No, sir.

Q. Or Mr. Climenko?

A. No, sir.

Q. They are counsel for the defendant Buchalter.

A. No, sir.

Q. Do you know anyone associated with them in the practice of law, or employed in their office?

A. I cannot think of any.

Q. The defendant Weiss is represented by former Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kreindler. Do you know any of them?

A. No, sir.

Q. Or anyone employed in their office or associated with them?

A. Not as I know of.

Q. The defendant Capone is represented by Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg; do you know any of those?

[fol. 594] A. No, sir.

Q. Or anyone associated or connected with their offices?

A. No, sir.

Q. Do you know Mr. Geoghan, the former prosecutor of this county, personally?

A. Yes, sir.

Q. Do you know any member of his staff?

A. Yes, sir.

Q. Who are they?

A. Mr. Kelly, Dr. O'Reilly, the Medical Examiner, he is dead some years.

Q. Did you kn w Mr. Barshay when he was in that office?

A. No, sir.

Q. Was your contact with Mr. Geoghan an intimate one?

A. No, sir, I knew him slightly; I was introduced to him and I knew him just enough to salute him on the street, and Mr. Kelly I knew fifty years; I went to school with him.

By the Court:

Q. You lived in the Heights section at one time?

A. No, sir, on Conduit Street, and he lived in that section, and I went to school with him; I knew him for years. I became acquainted with him as a schoolboy.

Q. You are now on Garfield Place?

A. Yes, sir, between 5th and 6th Avenues.

Q. What particular line of accounting are you connected with in the Equitable?

A. I have a position called Assistant Registrar, signing documents, different papers.

Q. You have been in the accounting department of the [fol. 595] Equitable for a good many years?

A. I have been in the policy department most of the time.

Q. For how many years?

A. I will be there fifty years next February.

By Mr. Turkus:

Q. I take it you started to work in your teens?

A. The first position I ever had.

Q. You were under twenty when you got that job?

A. Much younger.

Q. The reason for that is because there is an age limit.

A. There wasn't any then.

Q. You were in your teens when you went to work?

A. Yes, sir; I will tell you my age, if you want me to.

Q. No, that is all right. I think a man has Constitutional rights.

A. I started as an office boy.

By the Court:

Q. That was under Mr. McCall—that was Mr. McCall, who was afterwards a Supreme Court Judge?

A. Yes, sir.

Q. Mr. McCall was attorney for the Equitable?
A. Yes, sir.

By Mr. Turkus:

Q. Do you find any fault or have you any bias against the —— of the county, Judge O'Dwyer, or against the prosecution of an indictment where the District Attorney breaks the case from the inside and employs the use of accomplice testimony to testify against the co-conspirators in a case?

[fol. 596] Mr. Talley: That is objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. The charge here is for the murder of Joseph Rosen on September 13, 1936, at the time when there was another prosecutor. Because of your knowledge of this occasion, would you have any resentment against the prosecutor now or against the prosecution wherein this case has been broken from the inside since by the new prosecutor?
A. No.

Mr. Talley: I object to the question as improper in form and in substance.
The Court: Objection overruled.
Mr. Barshay: I object. It assumes a state of facts which are not part of the record.
The Court: Objection overruled. Exception to defendants.

By Mr. Turkus:

Q. Is your state of mind such you feel that even a man of bad character and reputation and of past bad conduct can sometimes tell the truth?
A. Yes, sir.
Q. If accepted as a juror will you use the common sense and understanding you have got in weighing the issue and in saying whether an accomplice has told the truth and whether there is other evidence tending to connect the defendants with the commission of the crime?
[fol. 597] A. I would.
Q. Will you take the law in every aspect from Judge Taylor and from nobody else?
A. I will.

Q. If selected as a juror will you endeavor, conscientiously, to arrive at a just verdict?

A. Yes, sir.

Q. If accepted as a juror will you listen to fair and reasonable discussions by your fellow jurors as you go into the jury room and deliberate upon the issue of the case?

A. Yes, sir.

Q. Do you, in your every-day business experience, have occasion to confer with others in settling disputes or problems that may arise?

A. No, sir.

Q. Is your business more or less routine work?

A. Clerical, that is all.

Q. Do you know Judge O'Dwyer, District Attorney of the county, personally?

A. No, sir, I do not know him personally.

Q. Do you know any member of his staff personally?

A. Yes, sir.

Q. Who?

A. Mr. Hughes, the Chief Assistant.

Q. You know him over a period of years?

A. Over forty years.

Q. Have you discussed any of the work of Judge O'Dwyer with him?

A. Not with him; I have not seen him in over a year.

Q. Specifically, do you know Assistant District Attorneys Joseph or Klein or Turkus?

A. No, sir.

Q. Will you endeavor, if selected as a juror, to conscien- [fol. 598] tiously apply the principles of law that Judge Taylor will give you in charging you on the facts in this case?

A. Certainly.

Q. You will listen to their discussion and argument?

A. Yes, sir.

Q. You will endeavor, conscientiously, to arrive at a just verdict?

A. I will.

Q. Assuming that you are accepted as a second juror in the case and you have heard all the evidence in the case, all the evidence presented, and then the lawyers for the defense go before the jury, as they will have a perfect right to do, and draw inferences from testimony as they see it, and then the prosecutor draws inferences from the testi-

mony as the prosecution views it, and then you have the benefit of the Judge's instructions on the law, and you go into the jury-room and talk the case over with common-sense understanding with the other jurors, and you are satisfied beyond a reasonable doubt that at this bar of justice in the County Court of Kings County are three guilty men, guilty of murder in the first degree, the murder of Joseph Rosen, would you hesitate to say so in your verdict?

A. I would not.

Q. Would you have any fear or reluctance?

A. Not the slightest.

By Mr. Talley:

Q. I believe the same thing would apply to the condition of mind you would be in at the conclusion of all the evidence, [fol. 599] if you were not satisfied beyond a reasonable doubt that these men are guilty of the crime with which they are charged, you would not hesitate to acquit them?

A. No, sir.

Q. Have you sat as a juror in a criminal case?

A. Yes, sir.

Q. Frequently?

A. In 1928.

Q. Not since?

A. No, sir.

Q. Was that in this County Court, in Brooklyn?

A. No, sir. It was in the other building, the Supreme Court, before Judge Callahan.

Q. Have you sat as a juror in civil cases?

A. No, sir.

Q. And not since 1928 have you sat in a criminal case?

A. I have not sat since then.

Q. When you sat in 1928 in a case or cases upon which you did sit as a juror, were they put in the hands of the jury for deliberation?

A. Yes, sir.

Q. You understand that the burden is always upon the District Attorney representing the People to prove the guilt of the defendants and to prove it beyond a reasonable doubt?

A. Yes, sir.

Q. And that is the burden he assumes when he undertakes the prosecution of any case?

A. Yes, sir.

Q. If the Court charges you that a reasonable doubt is the kind of a doubt a man might have about any of the ordinary affairs of life, and if after hearing that charge you are not satisfied beyond a reasonable doubt of the guilt of these defendants or any of them, you would acquit them? [fol. 600] A. Yes, sir.

Q. Although you have not seen Mr. Hughes, the Chief Assistant District Attorney, you have not talked to him for a year, you knew him pretty well?

A. Yes, sir, I went around with him years ago when he was studying law.

Q. It goes back that far?

A. Yes, sir, over forty years.

Q. And now he holds the exalted position of Chief Assistant District Attorney of the County of Kings?

A. Yes, sir.

Q. Would the fact that he occupies that important position, right next to District Attorney O'Dwyer, have any influence upon your consideration of this case?

A. Not the slightest.

Q. You are sure about that?

A. Positive.

Q. Are you a member of any political organization?

A. No, sir.

Q. Do you expect to be active in any way in the forthcoming Mayoralty election in which O'Dwyer is a candidate?

A. No, sir.

Q. Do you know anybody in the District Attorney's office besides Mr. Hughes?

A. That is all I know to my knowledge.

By the Court:

Q. Is that a church affiliation?

A. With Mr. Hughes?

Q. Yes.

A. No, sir, I went around with him about forty years ago; he lived about five blocks away from me at that time.

Q. He lives on the Park Slope now?

A. He lives on 14th Street now.

[fol. 601] Q. Near where?

A. I think between 8th and 9th Avenue. At that time he had a friend, a doctor, a young man studying medicine.

By Mr. Talley:

Q. You just keep your voice up, please.

By the Court:

Q. The fact you knew Mr. Hughes as a boy and went around together, lived within a few blocks of one another, and Mr. Hughes now lives on 14th Street between 8th and 9th Avenue, which is a little over a half a mile or a good mile from where the talesman at present lives, but in the same general section, that would not affect you?

A. No, sir.

By Mr. Talley:

Q. You're interested in Mr. Hughes' career?

A. Yes, sir.

Q. You like to see him get ahead?

A. He has gotten ahead.

Q. And you would like to see him go further than he has gone?

A. Yes, sir.

Q. If you thought the conviction of these defendants, and the prosecution of the defendants by the office of which Mr. Hughes is Chief Assistant, would help him progress, would you be inclined to consider that?

A. No, sir, I would not want to see him get ahead that way.

Q. Have you read anything about this case?

A. Yes, sir.

Q. You read quite a bit?

A. Quite a little, yes, sir.

Q. You read the articles in the *Mirror*?

[fol. 602] A. I have read some of those articles.

Q. Have you read them all?

A. No, sir, not lately.

Q. You read most of them?

A. Yes, sir.

Q. Have you read them since you have been summoned as a juror in this case?

A. I read them before that, but we were told not to read them.

Q. You have read them since you received the notice?

A. No, sir, I have not had the time since.

Q. Did you read any articles in the *Mirror* for these last three weeks?

A. Yes, sir, I have.

Q. As a result of reading these particular articles, referring to the *Mirror* articles, did you form an unfavorable impression about any of these defendants?

A. Well, I can say I did not form a favorable one, because I have been reading quite a number of articles in the newspaper at other times on other days, about certain conditions.

Q. As a result of reading those articles about the certain conditions to which they referred, did you form an unfavorable impression of any of these defendants on trial?

A. At that time I did.

Q. And nothing has happened since then to change your impression, has it?

A. No, sir, I am not on the jury yet.

Q. So you still have an unfavorable impression?

A. It is not a very favorable one.

Q. You still have one?

A. Slightly, yes, sir.

[fol. 603] Q. And the recent things you read in the newspaper have kind of reinforced the st-engths of that unfavorable impression?

A. It kind of brought certain things to mind I had read before.

Q. If you have an unfavorable impression about these defendants, or any of them, at the start, as you say you have now, it would take some evidence in this case to remove that impression, wouldn't it?

A. It will, yes, sir.

Q. And that evidence would have to be furnished by these defendants in some manner or other, wouldn't it?

A. Well, I would li-ten to both sides, and naturally render a just verdict according to my conscience.

Q. If you were accepted, in order to remove that unfavorable impression from your mind, some evidence would have to be produced?

A. Yes, sir.

Q. For you to necessarily and naturally become favorable of the defendants?

A. Yes, sir.

Q. And other than the matter about which I have just been interrogating you, is there any reason that you know of why you could not sit as a fair, impartial juror?

A. No, sir, I know of no reason.

Mr. Talley: I challenge for cause, in view of the statement your Honor has just heard.

The Court: Try the challenge.

ANDREW A. MERRICK, *a talesman, was then sworn and* examined on the challenge.

[fol. 604] By Mr. Talley:

Q. Mr. Merrick, if I repeated to you the questions which I have just asked you, particularly those dealing with your reading the newspaper accounts relating in some manner or other to this case, now that you have been sworn, if I repeated those questions to you would your answers be the same?

A. Yes, sir, the same.

Mr. Talley: I press the challenge.

The Court: Any questions by any other counsel?

By Mr. Rosenthal:

Q. You have already admitted to Judge Talley that you have an impression which is unfavorable to the defendants.

A. Yes, sir.

Q. So that quality of evidence would either have to be produced by The People or the defendants would be different than would otherwise be the case if you did not have that bad impression?

A. Yes.

By Mr. Turkus:

Q. I think you told counsel for the defense that you had prior jury service sometime in 1928?

A. Yes, sir.

Q. Of course, that is a long time ago, but do you remember the Judge charged you on the presumption of innocence?

A. Yes, sir.

Q. According to our system of law the defendants are presumed to be innocent?

A. Yes, sir.

Q. And that presumption attaches itself and it remains [fol. 605] with them until the prosecutor overcomes it by proof establishing guilt beyond a reasonable doubt?

A. Yes, sir.

Q. That is a sensible rule, isn't it?

A. Yes, sir.

Q. For a man to come into court with the presumption of innocence?

A. Yes, sir.

Q. You do not find any fault with that?

A. No, sir.

Q. It is a sensible rule that the prosecutor must establish guilt beyond a reasonable doubt on evidence he brings into court?

A. Yes, sir.

Q. Now, it is sensible also that the prosecutor must establish guilt upon the evidence and not upon articles that may appear in the press?

A. Yes, sir.

Q. Because that would be substituting a newspaper account for the collective wisdom of the jury?

Mr. Talley: I object to discussion or argumentation about these matters.

The Court: Objection overruled.

Mr. Talley: Exception.

The Court: What is somewhat puzzling is this: The talesman says he has an impression. He says that impression cannot be removed without evidence being supplied. We have not as yet gotten to the point as to whether or not he could put aside that—not to leave it out, but to put it aside and consider the evidence in the case and decide the case on the evidence.

[fol. 606] Mr. Turkus: Mr. Rosenthal's question was a question as to the quality of proof, so I have to take into consideration the proof.

The Court: But that is upon the assumption that he would not be required to put aside the impression.

By Mr. Turkus:

Q. Now that we have had a preliminary discussion, is the impression one that you have gathered from reading articles in the past which pertain to a single defendant or more?

A. Reading articles in the press pertaining to more than one.

Q. Is your state of mind such that you can give these men on trial a fair trial by laying aside the impression you formed from reading the newspaper?

A. I could.

Q. Not only lay it aside, but will you deliberate their guilt or innocence upon the evidence you hear in court?

A. Yes, sir.

Q. Completely devoid of any articles in the newspapers which you have read?

A. Yes, sir.

Q. There is only one kind of proof the law requires a prosecutor to give, and that is proof satisfactory to the jury beyond a reasonable doubt of the guilt, and that cannot be increased or lessened. Do you find any fault with that?

A. No, sir.

Q. So that degree of proof or quality of proof always remains?

A. Yes, sir.

[fol. 607] Q. The law is, and you will be charged by the Court, that the defendants have no burden in the case; they can sit mute, and their failure to produce evidence or to take the stand cannot be used against them, nor can any unfavorable inference be drawn, so there is never an obligation on the part of a defendant to produce any evidence at all. Do you find any fault with that proposition?

A. No, sir.

Q. If you are so instructed by the Court, will you conscientiously endeavor to follow the instructions of law and apply the same to the facts in this case?

A. Yes, sir.

Q. So as you sit here as a juror now, your verdict will be Guilty if and only if the prosecutor establishes to your satisfaction beyond a reasonable doubt that these three men are guilty of murder in the first degree, the murder of Joseph Rosen?

A. Yes, sir.

By Mr. Talley:

Q. You told the District Attorney that you thought you could lay aside this unfavorable impression——

Mr. Turkus: I object, he said he would.
The Court: Objection overruled.

A. Yes, sir.

Q. You told me before that, before you could lay that unfavorable impression aside or put it aside, you would require some evidence.

A. Yes, sir.

[fol. 608] Q. And that you would expect evidence to come from the defendants in some manner or other, wouldn't you?

A. I think so, yes, sir.

By Mr. Barshay:

Q. If the defendants did not offer, either through themselves or through witnesses, any evidence to dissipate the impression you have at this moment, that impression would still remain because of their failure to give such evidence to you?

A. You mean if there was no evidence introduced in their favor?

Q. Yes.

A. I would have to take that into consideration.

Q. And that would weigh?

A. Yes, sir, that would influence me.

Q. Of course it would, to the detriment of all the defendants?

A. I think so.

Q. That would preclude from carrying out your oath as a juror, to give these defendants a fair trial, isn't that so?

A. I do not say I would not give them a fair trial, but it would influence me to a certain extent.

Q. That is your honest opinion?

A. Yes, sir.

Mr. Barshay: I press the challenge.
Mr. Cuff: We all join in the challenge.

By Mr. Rosenthal:

Q. In addition to the fact you have an unfavorable impression gained from newspaper articles, you have great [fol. 609] friendship for the First Assistant District Attorney (Mr. Hughes)?

A. Yes, sir.

Q. Now, assuming that through the trial, as he would have a perfect right to do, he came into this court-room and either passively assisted in the trial or sat here where he would be noticeable, that fact together with the unfavorable impression you have gained would have some weight in your determination of this case, wouldn't it?

A. That is a fair thing for you to ask. I don't think so. The fact of his coming in the room would not influence me.

Q. But you say you do not think so. That implies you are in doubt.

A. It might have a slight effect, his presence.

Q. In other words, your feeling is that you have a doubt in your mind now in addition to the other one expressed as to your impression, as to whether that would not influence you in determining the guilt or innocence of the defendant?

A. Yes, sir.

Q. That is in addition to what you have stated to Mr. Barshay in regard to an unfavorable impression you formed?

A. Yes, sir.

Mr. Rosenthal: I press the challenge.

By Mr. Turkus:

Q. I think you told me you could lay aside the impression you gathered from reading the newspaper articles.

A. Yes, sir.

Q. I think you told Judge Talley when he spoke to you [fol. 610] about Mr. Hughes that you did not want Mr. Hughes to get ahead that way.

A. Yes, sir.

Q. Do you think it would have any effect on your determination of the guilt or innocence of the three men on the murder charge, whether Mr. Hughes walked into the court-room and sat at the counsel table or did anything in your presence?

A. I don't think that would have any influence on my verdict, if I was a juror; his presence would not count.

Q. In other words, if accepted, will you discharge your oath of office and try the case on the merits, regardless of any opinion you might have had in the past or any association you have had with one of the prosecutors?

A. I would go by the evidence.

Q. I think you told me you find no fault with the proposition of law and that you would accept the instruction from Judge Taylor that the defendant has no burden at all; that he need not offer any evidence in his behalf.

A. Yes, sir.

Q. Understanding that, would you nevertheless require him, is your state of mind such that despite the law that he need give no evidence, you would still require that he give evidence?

A. I would want to listen to some evidence before I could make up my mind.

Q. Of course you must hear the evidence of the prosecution.

A. Yes, sir.

Q. Bearing in mind the defendant does not have to give [fol. 611] you any evidence if he does not want to, and that the Judge will so instruct you, that that is the law, is your mind such that you nevertheless in this case want the defendant to give you evidence?

A. If we are instructed it is not necessary and it is not the law in the case, I would go by the orders of the Judge.

Q. Your state of mind is such you can follow the instructions of the Judge?

A. Yes, sir.

Q. And if he tells you the defendant need offer no evidence, you will not expect any?

A. No, sir.

By Mr. Barshay:

Q. As you sat here you heard before the question put to you by Mr. Turkus many times, representing that no defendant need offer proof nor explain an accusation against him?

A. I may have heard it, but I am not positive; I heard so many things.

Q. You heard so many things it may have confused you?

A. Yes, sir.

Q. And even as you sat in the chair where you are now, one of the first questions put to you by Mr. Turkus was about the presumption of innocence and the burden of proof, that the defendant need not take the stand.

A. Yes, sir.

Q. And after you answered that you heard of and you agreed with the enforcement of the Penal Law, which gives the defendants those rights, you still said that because of what you read you had formed an impression unfavor- [fol. 612] able to the defendants which would have to be dissipated only when and if the defendants or someone in their behalf would offer evidence?

A. That is true, yes, sir.

Q. So, in spite the fact you knew what the law is, having heard it both from the Court and the lawyer, you still, only a few minutes ago, told Judge Talley, Mr. Rosenthal, and myself, that someone would have to furnish, on behalf of the defendants, evidence to remove the impression you gained unfavorable to them.

A. I told you that? I must have, if you say so.

Q. That was your honest answer?

A. Yes, sir.

Q. To be frank, that even at this moment there was an influence in your mind so unfavorable to these defendants that unless someone came forth from their side and offered evidence to dissipate your impression, you still would have a feeling in your mind against them; isn't that so?

A. It is still there.

Q. Even after you answered Mr. Turkus?

A. Yes, sir.

Q. That impression unfavorable to them is still in your mind?

A. It is a hard thing to remove.

Mr. Barshay: I press our challenge.

The Court: The question seems to be not whether he can remove it, but whether he can disregard it or lay it aside.

By Mr. Barshay:

Q. It will be difficult for you to lay aside an impression unless an affirmative proof on their behalf comes forth [fol. 613] from the witness stand?

A. Yes, sir.

Q. And their failure to do so would influence your judgment to their detriment?

A. Yes, sir.

Mr. Barshay: We press the challenge.

The Court: Challenge sustained.

Max Gould, No. 2817, was then examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. The trestle board lists your address as 1st Street, Brooklyn?

A. Yes, sir.

Q. Is that in the Flatbush district?

A. Midwood.

Q. Is that between Flatbush and Sheepshead Bay?

A. No, sir, that is one block the other side of Coney Island Avenue between J and K.

Q. You are listed as a manufacturer.

A. I have been in the manufacturing business up until last June.

Q. What did you manufacture?

A. Negligees.

Q. Where was your office?

A. 1350 Broadway, 35th Street.

Q. That is pretty much in the heart of the garment district?

A. Directly across the street.

Q. Does the name Lepke mean anything to you?

A. Not a thing.

Q. What is your business now?

A. I am a designer now.

Q. Where are you employed?

A. I am not employed; I am for myself.

[fol. 614] Q. Where do you conduct your business?

A. 107 Madison Avenue.

Q. What street is that near?

A. 33rd Street and Madison.

Q. You were manufacturing negligees for how many years?

A. Seven or eight years.

Q. You must have many contacts in the clothing and garment district in Manhattan.

A. Absolutely none.

Q. Your place of business has for years been in close proximity to that area.

A. In the garment center, that is in the ladies' garment center.

Q. In all the years you have been there the name I mentioned means nothing to you?

A. Absolutely nothing, never heard of it.

Q. When you were manufacturing, did you have any business with unions?

A. I did not; I had a partrer; I had charge of the sales and designing. I had nothing to do with the manufacturing end. We had our factory in the Bronx, but I never went up there.

Q. Are you in business with this partner personally?

A. No, sir.

Q. You discuss business affairs with your partner, don't you?

A. Not the manufacturing end of it; I had nothing to do with that; that was his end of the business.

Q. Didn't you and your partner discuss business problems that arose in the manufacturing part of the business?

A. Yes, sir.

[fol. 615] Q. And in the distribution of the product?

A. I took care of the distribution and costs; I was only interested in the cost of production.

Q. You know many people in the garment district?

A. Only in my line, the negligee business.

Q. How about people in ladies' clothing?

A. I don't know a soul.

Q. Did your business bring you in contact or connection with people in Brownsville and East New York?

A. No, sir.

Q. How long have you lived in the Midwood section?

A. Four years.

Q. And prior to that?

A. 2930 West 36th Street, Sea Gate.

Q. Did you know Mr. William Kleinman?

A. I did not.

Q. Do you know people in the Sea Gate area in Brooklyn, inside of the Gate?

A. I know very few.

Q. How many years did you live in that section described as the Gate?

A. About twelve years.

Q. Did you have any contact directly or indirectly with anybody in the Brownsville or East New York area of Brooklyn by way of business, social, or any other way?

A. No, sir.

By the Court:

Q. Is that near Mermaid Avenue?

A. Between Railroad and Mermaid, a bid apartment house; I lived there about ten years in the apartment; I had business out there; I had to live there; I had connections in the bath-house business, Turkish bath; I was [fol. 616] interested.

Q. What bath was that?

A. The old Stillwell Baths.

Q. On Stillwell Avenue near Surf?

A. Yes.

Q. Didn't Jack Harvey have charge of that afterwards?

A. That was after it went into bankruptcy, it became the Harvey Baths.

Q. It had about two thousand customers?

A. We handled ten thousand customers, at least.

Q. About two thousand at a time?

A. Yes, sir.

Q. In fact, you had to employ a lawyer on a salary to defend damage suits through people slipping on the floor?

A. We had a big business, yes, sir; there was an investment in there of $800,000.

Q. It is closed now?

A. Yes, sir.

Q. It did not pay?

A. It paid, but we did not have the "architect." There were two different people at each end.

Q. What was the name of the first man that had it?

A. Sam Richman and Dr. Travis of New York, a cousin of mine and myself.

By Mr. Turkus:

Q. In those years you have been in the ladies' garment district did you ever hear the name of Gurrah?

A. Never.

The Court: I asked you about the baths not out of curiosity, but because in handling about ten thousand people a week, I take it most of your trade is local trade?

The Talesman: No, sir, we had trade from New York and [fol. 617] all over; they used to come there for hot Turkish baths.

By the Court:

Q. Did that include people in the garment business and people whose families were engaged in the garment business?

A. I never want into that; I had nothing to do with them.

Q. People who lived to the east of you on Mermaid Avenue?

A. I don't know how many of them came to the baths; I never paid any particular attention to determine that.

Q. The question is as to the character of the customers from what you found out.

A. We had some very fine customers; that we could tell by the tips.

Q. That does not mean anything. You had a pretty good Coney Island trade?

A. We had them from New Haven, Connecticut, and all over; we had people come from Saratoga and all over.

By Mr. Turkus:

Q. Did you ever hear the name of Curly Holtz?

A. No, sir.

Q. Or Terry Burns or Abie Slabo?

A. No, sir.

By the Court:

Q. A lot of people slept there over night?

A. Yes.

Q. A good, big night trade?

A. We had accommodations for about three hundred.

Q. Did they sleep in dormitories?

A. Dormitories, private rooms.

Q. Did people live there?

A. No, sir, just over night.

By Mr. Turkus:

Q. Did you manufacture anything other than ladies' [fol. 618] negligees at any time?

A. That is all.

Q. Did you belong to a union?

A. I did not have anything to do with that. Union No. 62 in our local, but I did not have anything to do with it, and I never mingled with them.

Q. In the business you are now in, as a designer, you are right in the area of the garment manufacturing center; that is, the ladies' part?

A. There are certain concerns, they knew me, and then they are st; .ing a line they they get in touch with me at my home and tell me they are ready for their fall line, and I make up, design garments, and make them patterns; that is all I do. They pay me for what I do.

Q. That is the ladies' garments?

A. Yes, sir.

Q. And of course these contacts bring you in the area, in that area largely?

A. On Broadway, around 35th Street.

Q. That is the heart of the clothing district?

A. That is the negligee, I mean the la"es' clothing.

By the Court:

Q. Where did you take a course in designing?

A. I guess it was born in me; I have been doing it for twenty years.

Q. You know they have courses in that; you never went to any school?

A. No, sir, but I guess I am inclined to be—mechanically inclined.

By Mr. Turkus:

Q. Have you read any newspaper accounts of Judge O'Dwyer's investigation?

A. No, sir.

Q. Nothing at all?

A. Never.

[fol. 619] Q. You never read the name of Lepke in any newspaper?

A. When I received the summons, that is, the subpoena, I did not know what the subpoena was, and I came up here,

and I looked at the board here, and I saw three or four names; that was the first time; then it dawned on me and I used to see in the *Times* once in a while Lepke, but I never paid attention to it.

Q. You have been around the Broadway and 34th Street area for how many years?

A. Twenty-five years.

Q. And the first time you saw the name of Lepke, to your recollection, *what* when you saw it on the board outside of the court-house and once or twice in the *Times?*

A. I saw it in the *Times*, but I never read those articles.

Q. Did you ever see the name Gurrah anywhere?

A. No, sir.

Q. Did you ever hear any discussion about those names up around Broadway and 34th Street or in that area?

A. No, sir.

Q. Were you up there personally while you were awaiting jury service?

A. I have not been in New York for two weeks.

Q. Two weeks ago, when you had the notice in your pocket, did anybody mention the name of Lepke?

A. I don't associate with those people.

By the Court:

Q. Just look at these defendants carefully. From having contact with bathers and handling so many people a week for so many years, see if you recognize any of them as customers.

A. I don't know anybody in the court-room.

[fol. 620] Q. Sure?

A. I am positive.

By Mr. Turkus:

Q. During the ten years you have been in that district did you ever hear the name of Murray Weinstein?

A. In which district?

Q. Up in this district where you were manufacturing ladies' negligees, did you ever hear the name of Murray Weinstein, manager of the Clothing Cutters Union of the Amalgamated?

A. No, sir.

Q. Did you ever hear the name of Samuel Katz, a business agent?

A. No, sir.

Q. Did you ever hear the name of Bruno Belia?

A. No, sir.

Q. Or Salvatore Marazzano?

A. No, sir.

Q. When you were in the business of manufacturing, you say your partner attended to the actual manufacturing of the article into the finished product, and you had charge of the distribution?

A. Yes, sir.

Q. Did you deliver with truckers?

A. I did not; he took care of that; I was at 1350 Broadway, where we had our display. I took care of the styles and the buying of piece goods. I could not tell you one employee who worked for us, and we had 125 girls. I could not tell you any of them; I never went up to the factory.

Q. As I understood your relationship, you were a partner in this manufacture?

A. Absolutely.

[fol. 621] Q. And even though your partner handled one specific end of the business, didn't you ever talk to him about that part of the business?

A. About the figures, the cost of production; that is all, how the factory was going, how many were working.

Q. Was there any time when there was any difficulty with the distribution, with the trucking end of the product?

A. I never heard of it.

Q. Does the name Philip Orlofsky mean anything to you?

A. No, sir.

Q. Do you know any official in the Clothing Drivers & Helpers Union, Local No. 240?

A. No, sir.

Q. Or any Teamsters Union officials?

A. No, sir.

Q. Does the name of Max Silverman mean anything to you?

A. No, sir.

Q. Do you know any people in the Gate named Silverman?

A. No, sir, but I have heard there was a fellow in the Gate there that was in the trucking business, but I did not know him.

Q. Where did you hear that from?

A. I heard people talking.

Q. People in the neighborhood?

A. Yes, sir, they said something about a fellow living in the Gate that was connected with him, but I do not know where he lived even.

Q. Did you hear the name of Silverman in court today?

A. I think I heard the name.

Q. Did you hear any other names mentioned with Silverman?

[fol. 622] A. No, sir.

Q. Does the name Wolfie Goldis mean anything to you?

A. No, sir.

Q. Or William Alberts, a bondsman?

A. No, sir.

Q. Did you ever hear the name of Bellanca and Tosca mentioned?

A. No, sir.

Q. Do you know anybody named Buchalter?

A. No, sir.

Q. Did you meet any such person in the clothing district?

A. No, sir.

Q. Do you know Philip Kowas?

A. No, sir.

Q. Did you ever hear of a man named Joe Rosen in his lifetime?

A. No, sir.

Q. At the time when there were certain difficulties in the garment district, didn't you ever hear any discussion?

Mr. Talley: I object to any further questions along that line from this talesman. He has repeatedly said he had no knowledge of any of these persons. Why press it? It cannot have any bearing on whether the man makes a competent juror or does not.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I did not.

Q. As you sit in the jury box have you any bias or prejudice against the defendants on trial?

A. No, sir.

Q. You never heard the name of Weiss, Capone, or [fol. 623] Buchalter before, to your recollection?

A. Never.

Q. Do you know any of the defense lawyers in the case?

A. No, sir.

Q. You have heard the names read off to the other jurors. Do you know any person attached to the law offices of any of counsel for the defendants in this case?

A. No, sir.

Q. Did you, at home or any place else, partake in any discussion in connection with the Rosen case?

A. Never.

Q. Or in any investigation conducted by Judge O'Dwyer, the prosecutor of this county?

A. Never.

Q. Was there ever any discussion had in your presence and hearing regarding any investigation conducted by Judge O'Dwyer?

A. No, sir.

Q. Or in connection with these defendants by Thomas E. Dewey, in connection with the garment district?

A. No, sir.

Q. Or the clothing district?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. In inquiring of the other talesmen, Judge Talley asked them whether or not they had any political connections or whether or not they were interested in Judge O'Dwyer's campaign for Mayor. I want to ask you, were you interested in Judge Talley's candidacy for the Democratic nomination for Mayor?

Mr. Talley: I object; that is not material.

[fol. 624] The Court: He can answer it. Objection overruled.

Mr. Talley: Exception.

Q. I want to know whether you were helping out Judge Talley trying to become the Democratic nominee for Mayor before O'Dwyer got the nomination.

A. I don't know him.

Q. You never heard of anybody in the case, either by way of the lawyers for the defense or anybody?

A. I will tell you, if Judge Talley was on the ticket I might have voted for him because I usually vote the straight Democratic ticket.

Q. In other words, as a juror, you are here to try a murder indictment?

A. Yes, sir.

Q. And to try out the issue whether these men are guilty of murder in the first degree, the murder of Joseph Rosen?

A. Yes, sir.

Q. Is there anything concerning which I failed to make inquiry that might affect your qualifications to sit as a juror?

A. No, sir.

Q. Would you be embarrassed in any way by service in this case?

A. No, sir.

By the Court:

Q. Wasn't Abie Reles a customer in Stillwell's Baths?

A. What?

Q. Did you ever hear that name before?

A. No, sir.

By Mr. Turkus:

Q. You never heard the name of Reles?

A. No, sir.

[fol. 625] Q. Did you ever hear the name of Pittsburgh Phil Strauss?

A. No, sir.

Q. Or Harry (Happy) Maione?

A. No, sir.

Q. Or Frank (The Dasher) Abbandando?

A. No, sir.

Q. Or Martin (Buggsy) Goldstein?

A. No, sir.

By the Court:

Q. Never heard of those names before?

A. I never did.

Q. Do you read any papers?

A. I certainly do. I read the *Times* and the *Post*.

Q. You have belonged to no Democratic clubs?

A. No, sir.

Q. You are in the 16th?

A. I used to be in the 16th; I am in the 4th now.

Q. Where do you live?

A. 1047 East 10th Street.

Q. Is that the 4th Assembly District?

A. Isn't it? I think it is. I don't know what it is; I know I was in the 16th.

Q. You are many miles away from that.

By Mr. Turkus:

Q. Did you say you belonged to a political club?

A. No, sir.

Q. None of the names I have mentioned to you have any familiarity at all?

A. No, sir.

Q. Did you never read about Reles?

A. No, sir.

Q. Or Harry Strauss, alias Pittsburgh Phil?

A. I never read about those names, as I tried to explain to you; I have seen them in the headlines, but I did not read it. If it had something to do with manufacturing, maybe I would read it.

[fol. 626] Q. Have you any opinion or impression now from anything you have read or heard with respect to this case?

A. I don't know anything about the case. I only read an article in the New York *Times* when we were dismissed for the month, and there was a little piece in the paper; it said something about a postponement until September 15th. That is as far as I know about this case. I never read this case before in my life.

Q. In regard to the people who patronize this Turkish bath, where people slept over night, did you ever see any individuals who were closely identified with Brownsville or East New York at that institution you were connected with?

A. We had a day manager and a night manager. I was a part owner. I don't know who patronized the baths. I was only interested in the deal.

Q. Was that the kind of a bath where they had "cups" they put on?

A. We had—that is in the Turkish department.

Q. While you were in this Turkish bath the only interest you had was in the deal?

A. Yes, sir.

Q. While you were in the district on upper Madison Avenue, a section approximately at 33rd, 34th, and 35th Street, you had nothing to do except with designing clothes?

A. Designing, selling, and taking care of my business; I had nothing to do with the manufacture; the minute I made a garment I put a price on it and that went to the production department, and they took care of the rest. That was all my headache. My headache was through.

[fol. 627] Q. Do you know Judge O'Dwyer, the District Attorney?

A. I just know him through campaigning; I have seen him.

Q. Have you been introduced to him?

A. Maybe I have.

Q. Do you feel favorably inclined toward him?

A. No, sir, not necessarily.

Q. Have you any bias or prejudice against him?

A. Absolutely not.

Q. Do you know any member of the District Attorney's staff?

A. No, sir.

Q. Do you know any member of District Attorney Geoghan's staff?

A. I do not, and I think I voted for Geoghan; that is all I know about it.

Q. If accepted, will you take the law implicitly from the Court?

A. Absolutely.

Q. As you sit in the jury box, is your frame of mind such that the defendant must produce evidence in his behalf?

A. They should bring in evidence. I don't know; I think you should bring in evidence.

Q. I am asking you if you would expect the defendants to bring in evidence.

A. Not necessarily.

Q. If the time came when they did not bring in any evidence, would you be prejudiced against them?

A. No, I don't get the meaning of it.

Q. Supposing the prosecutor brings in a lot of witnesses, produces a lot of testimony and evidence against the defendants, would you expect the defendants to come in with some [fol. 628] evidence?

Mr. Climenko: I object to the form of the question.
The Court: Objection sustained. It is a question of law.

By the Court:

Q. Where did you meet Judge O'Dwyer during the campaign?
A. When he ran for office he used to be in the district; I think he was at the Half Moon Hotel once.
Q. How long ago was that?
A. That is maybe four years ago.
Q. That is when he ran for judge of this court?
A. I don't quite remember what he ran for.
Q. You attended a political meeting?
A. Yes, sir, Kenny Sutherland.
Q. You know Sutherland?
A. I know him as a leader.
Q. You know him socially?
A. No, sir, but I have met him; he only lives one block from my house.

By Mr. Turkus:

Q. Have you any prejudice against the testimony of an expert?
A. No, sir.
Q. Be it ballistic, handwriting, or otherwise?
A. No, sir.
Q. Do you have any prejudice against a case where a prosecutor breaks a case from the inside and offers testimony of one of the co-conspirators in the matter against the others?

Mr. Talley: That is objected to.
The Court: Objection overruled.
[fol. 629] Mr. Talley: Exception.

A. No, sir.
Q. Who were the co-owners at Silver's Baths?
A. Dr. Travers, Sam Richmond, and another Travers from Springfield.
Q. Were you ever a witness in any litigation?
A. No, sir.
Q. In any lawsuit?
A. No, sir. Well, I had a civil case about the delivery of merchandise; it was settled out of court.

Q. Were you ever a complainant or a witness in any criminal prosecution?

A. No, sir.

Q. Has any member of your family ever been the victim of any crime?

A. No, sir.

Q. Have you been in business under any name other than your own?

A. Jean-Dell, robes.

Q. What kind of robes?

A. They are negligees and robes.

Q. Any other name?

A. No, sir.

Q. So the only names you have conducted——

A. Well, myself, I have been in May's sportswear.

Q. What kind of sportswear?

A. Negligees; we called it sportswear, but it was negligees.

By the Court:

Q. Was one of these Travis's at one time around Coney Island?

A. No, sir.

Q. Did he live toward Bensonhurst?

A. No, sir; Dr. Travers lived on Riverside Drive at 104th Street.

Q. Are you a member of the Coney Island Board of Trade?

[fol. 630] A. No, sir.

By Mr. Turkus:

Q. Are you in sympathy with the enforcement of the Penal Law?

A. Yes, sir.

Q. Do you belong to any law enforcement societies?

A. No, sir.

Q. Have you listened to any discussions on the subject of crime given by any prosecutor or anyone else?

A. No, sir.

Q. Do you know a lawyer named Price, David Price?

A. No, sir.

Q. When you were doing business in the Coney Island area, did you belong to the Coney Island Chamber of Commerce?

A. No, sir.

Q. In the years you have been in the clothing district, particularly in this negligee business, did you belong to any chambers of commerce there?

A. No, sir.

Q. Or any manufacturers' association?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Do you know Dr. Michaelson, in Sea Gate?

A. I don't know him; I heard of a Dr. Michaelson; I do not know him.

Q. Is there any reluctance on your part to proceed as a juror in this case?

A. No, sir.

Q. Have you heretofore had any jury service?

A. No, sir.

Q. In no civil case?

A. No, sir.

Q. Is this the first time your name has been drawn on this [fol. 631] special panel for this service?

A. Any service.

Q. Have you heretofore been interrogated as to your qualifications for service in a court of justice?

A. I have never been on any jury service.

Q. Since your notification was given to you that you were a prospective juror, did anybody speak to you about the defendants or any part of the case, of the District Attorney's investigation?

A. No, sir.

Q. Did anyone speak to you about having to make arrangements in the event you were selected as a juror?

A. Nobody spoke to me.

Q. You have had no discussion with anyone either with reference to your service on the jury?

A. No, sir.

Q. In the event the trial is protracted, I mean lengthy, would you be subject to any business inconvenience?

A. Not until next January.

Q. So you can go right along up until then?

A. I was inconvenienced at the time I was called, I had to go on a trip, but it was postponed; it gave me ample time for business.

Q. Do you have any prejudice against an accomplice simply because of being an accomplice, to the extent that you would reject his testimony?

A. No, sir.

Q. Is there anything concerning which I have not asked you which would affect your qualifications to sit as a juror?

A. No, sir, not any.

[fol. 632] By Mr. Climenko:

Q. Other than the article in the *Times* did you read about this case at all?

A. Never.

Q. Have you read about the defendant Buchalter at any time other than that article?

A. Never.

Q. Do you have any opinion, as you sit here now, about the innocence or guilt of any of these defendants?

A. Well, from what I know they are innocent; I don't know anything about them.

Q. You understand—assuming you were instructed by the Court that any defendant charged with the commission of a crime is presumed to be innocent; would you have any quarrel with that concept of the law?

A. No, sir.

Q. Assuming you were instructed by the Court—I am referring to the matter Mr. Turkus discussed with you—that no defendant is under obligation to elicit—I mean bring forward, any evidence whatever in a criminal case, would you have any difficulty in following that instruction?

A. Not from the Court, no, sir.

Q. Assuming by the time the trial closes a particular defendant does not attempt to adduce any proof, would you be prejudiced against that defendant by reason of that?

A. No, sir.

Q. In other words, you would have no difficulty in following the instructions of the Court as to the law on that subject?

A. Absolutely.

Q. Are you acquainted with any member of the District [fol. 633] Attorney's staff?

A. No, sir.

Q. Are you acquainted with any member of the Police Force?

A. No, sir.

Q. You have not at any time discussed this case with any of your friends?

A. Never.

Q. You hold no opinion on the case as you sit here now?

A. I don't know anything about the case outside of a little article I read that somebody was murdered on account of being a witness for Dewey; it was a little, small clipping. That was the second day I was here, when they asked for a postponement. I saw it in the New York *Times* about that day. I think that only mentioned Buchalter; I don't think it mentioned the postponement.

Q. That was the article you read about a month ago?

A. Yes, sir.

Q. From reading that article you gained no impression unfavorable to any defendant?

A. Oh, no.

Q. You have said that you were a member of a political party.

A. I am not a member.

Q. You suggested you had voted regularly for a political party?

A. As a rule I vote one hundred per cent Democratic.

Q. You regularly vote for a particular party, whichever it may be?

A. Sometimes I split a ticket.

Q. You know that we are about to have an election in the City of New York?

A. Yes, sir.

[fol. 634] Q. You would not confuse that election with the trial of the case in court here?

A. Absolutely not.

Q. By that I mean you would not yourself be confused by the fact that the election is impending with any of the issues?

A. No, sir, I am going to vote for O'Dwyer anyhow; I don't care how the election goes.

Q. The fact that you are going to vote for Judge O'Dwyer is a circumstance which would not affect the discharge of your duty as a juror?

A. No, sir.

Q. One thing has nothing to do with the other?

A. No, sir.

Q. The fact that O'Dwyer happens to be District Attorney and that the District Attorney happens to be running for Mayor would not affect your impartial consideration of the evidence in the case?

A. No, sir, not if it was my own brother.

Mr. Climenko: No further questions by the defense.

Mr. Turkus: Challenge peremptorily.

Henry R. Lathrop, No. 2685, residing at 430 Clinton Avenue, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. According to the trestle board you live in Clinton Avenue?

A. Yes, sir.

Q. Is that in the Brooklyn Heights section?

A. No, sir, the Hill section.

[fol. 635] Q. Have you lived there for a number of years?

A. About twenty-five years.

Q. The trestle board lists your occupation as that of sales promotion.

A. Yes, sir, sales and advertising.

Q. What is the product?

A. There isn't any product; it is just an advertising promoting.

Q. Advertising campaigns and promotion work?

A. Yes, sir.

Q. Did you ever have any specific connection with people in the garment or the clothing business?

A. No, sir, my work is in the grocery field.

Q. I take it we can go along with the assumption that you have had no contact, directly or indirectly, with anyone in the garment or clothing district, or clothing truckers' industry?

A. That is right.

Q. Have you had any connection, in any wise, with any persons or firms in the Brownsville or East New York area?

A. No, sir.

Q. Since your name appeared on the panel, specifically since you received your slip, did anybody speak to you about the case?

A. Not about the merits of the case. Members of my family mentioned it.

Q. About making arrangements if you were selected?

A. Yes, sir.

Q. Are you in sympathty with the enforcement of the Penal Law?

A. Yes, sir.

[fol. 636] Q. I take it I need not inquire as to any possible connection with any official of the Amalgamated Clothing Workers of America, or with any Teamsters Union, or any Truckers?

A. I have had no such connection.

Q. The names I stated to some of the other jurors, have they any significance to you?

A. None whatever.

Q. The defendants are represented by nine lawyers, Mr. Barshay, a former Assistant District Attorney, Mr. Cuff, Mr. Wegman; do you know any of those lawyers?

A. No, sir.

Q. Or anyone attached to their offices?

A. Not to my knowledge.

Q. The defendant Weiss is represented by Judge Talley and former Assistant District Attorney Cuff and former Assistant United States Attorney Kriendler; do you know any of those people?

A. No, sir.

Q. With respect to Capone, who is represented by Rosenthal, Fischbein, and Rosenberg, do you know any of those?

A. I do not know any of them.

Q. Do you know Judge O'Dwyer or any member of his staff?

A. I do not.

Q. Do you know Mr. Geoghan or any member of his staff?

A. No, sir.

Q. Do you find any fault with the prosecutor of the county or with the prosecution wherein, in order to break a case, a case is broken from the inside, to use accomplice [fol. 637] testimony, and that is availed of by the prosecution to testify against the others in the commission of a crime?

Mr. Talley: That is objected to.
The Court: Objection overruled.
Mr. Talley: Exception.

Q. Do you have any bias against the prosecutor of a county, or against the prosecution of a case wherein the case is broken from the inside and testimony of co-participants in the crime is used against others on the trial?
A. No, sir.

Mr. Talley: I make the same objection as to that.
The Court: The same ruling.
Mr. Talley: Exception.

Q. Is your state of mind such you believe that sometimes, even men of bad character or reputation and bad past habits may tell the truth?
A. Yes, sir.
Q. That will be your job, to find out if the accomplice is telling the truth and to find out if there is other evidence in the case tending to connect the defendants with the commission of the murder?
A. Yes, sir.
Q. If accepted in the case, will you listen to common sense and reasonable discussion of the other jurors?
A. I would.
Q. I take it that in your every-day business life you have occasion to discuss business problems with others in an executive way?
A. Yes, sir.
Q. And to iron out problems and disputes amicably, with [fol. 638] common sense and reason?
A. Yes, sir.
Q. You will do that, if accepted, listen to reason and arguments of other jurors?
A. Yes, sir.
Q. Have you any conscientious scruples or otherwise against capital punishment?
A. None.
Q. If accepted, will you endeavor conscientiously to arrive at a just and a true verdict?
A. Yes, sir.
Q. And if at the end of all the evidence in the case, after you have heard the lawyers for the defense tell you how they view the evidence, and you listen to the prosecution

tell you how it views the evidence, and then you have the learned Court charge you on the law, and discuss the case with the other jurors, if your conscience satisfies you beyond a reasonable doubt that there are three guilty men here, three guilty of murder in the first degree, Weiss, Capone, and Buchalter, guilty of the murder of Joseph Rosen, would you hesitate to say so?

A. I would not.

Q. Would there be any embarrassment or reluctance on your part in pronouncing such a verdict?

A. None whatever.

By Mr. Barshay:

Q. Have you ever been on a jury before?

A. Not in a criminal case. I have served in civil cases several times.

Q. Recently?

A. I think the last time was two or three years ago.

By the Court:

[fol. 639] Q. Isn't that the block that former President Ingersoll lived on?

A. He lived at Grand and Layfayette, a block difference.

By Mr. Barshay:

Q. Have you ever been a Grand Juror?

A. I was on a Federal Grand Jury in 1918.

Q. Have you ever been called to serve as a special juror, without serving, just called?

A. No, sir, this is the first time.

Q. So your only experience in the administration of criminal law dates back to February, 1919, or sometime in 1918?

A. Yes, sir.

By the Court:

Q. Are you in an apartment house there?

A. No, sir.

Q. Didn't Herman Ketz live on that block?

A. I think he did.

By Mr. Barshay:

Q. Do you recall when you were a Federal Grand Juror Henry Walsh, now chief of the Appeal Bureau in Judge O'Dwyer's office, was the Assistant in charge of the Grand Jury?

A. No, sir, I do not, it has gone almost completely out of my mind. I could not say who the man was. I do not remember at all.

Q. You do not know Henry Walsh?

A. I remember the District Attorney—the Federal Attorney who came in before the jury. I remember him in only a general way. I don't remember the name; I never seen him since.

Q. Do you know Frederick Kopf, an Assistant at that time?

A. No, sir.

[fol. 640] Q. Do you know any police officials?

A. No, sir.

Q. Do you know anyone at all that has even been associated with the prosecutor's office in Brooklyn, in this or the last administration?

A. No, sir; of course I knew Judge Cropsey at one time; he was Police Commissioner years ago.

Q. Did you know him intimately?

A. Fairly well.

Q. Did you ever discuss criminal cases with Judge Cropsey when he was Police Commissioner?

A. No, sir, never.

Q. You never made the rounds of precincts with him?

A. Never.

Q. Have you ever read about this case?

A. Only after the first session here, 4th or 5th of August, in the *Herald-Tribune* and *Sun*, to get an idea of what it was all about. I did not know when I came here what it was all about; then I saw the names of the defendants, and after that so many excuses were granted.

Q. Have you ever read about any of the defendants, irrespective of this case?

A. I don't remember having done so; I do not recall it. There is a familiarity about the name Buchalter, but I don't know—I don't remember anything besides that.

Q. As a result of what you read in the *Sun* or the *Tribune* or any other periodical, did you form any impression as to the truth or accuracy of the contents of those articles?

A. Well, there was no opinion expressed in those articles; they were just short squips, giving the facts.

Q. Did you form an impression as to the truth of those facts?

A. Why, yes, some of them were matters of record and I [fol. 641] have heard about them in court since then. What I mean to say is they were matters of record.

Q. And you believed them?

A. Why, surely, I accepted them as facts.

Q. Having accepted them as facts, did you form an impression by virtue thereof which was prejudicial to the defendants?

A. Conscientiously I have, yes, sir.

Q. You are now prejudiced against the defendants?

A. Now, under the standard of law, I think I am—I believe I am.

Q. That is your honest answer?

A. Yes, sir, absolutely.

Q. You will not be able to conscientiously lay aside that prejudice or put it aside if you are chosen as a juror?

A. I think I might be able to put it aside after I got in the jury box.

Q. But at this moment you have not as yet laid aside that prejudice which you gathered in this case against the defendants?

A. No, sir, I have not laid it aside.

Q. The best you can say is if you are chosen you think you might be able to lay it aside?

A. Yes, sir.

Q. You are not even sure of your ability to do that?

A. It would depend upon the evidence.

Q. And that would depend upon the evidence, that would have to be furnished by the defense in this case; isn't that so?

A. Or else the District Attorney would present a very weak case.

Q. In other words, you would require Mr. Turkus in this [fol. 642] case—Question withdrawn.

Q. In your present state of mind it would require a very weak case on the part of the prosecution for you to lay aside the prejudice present in your mind?

A. Conscientiously, I am afraid it would.

Q. That is not the requirement of the law, you understand that?

A. I understand that perfectly.

Q. Being an experienced and intelligent individual, and having a right to feel that way, you say that is your honest opinion?

A. Oh, absolutely.

Mr. Barshay: Challenge for cause—all defendants join in the challenge.

Henry R. Lathrop was then sworn on the challenge.

By Mr. Barshay:

Q. Would your answers be the same, now that you are under oath?

A. Yes, sir.

By Mr. Rosenthal:

Q. You have honestly stated to Mr. Barshay that you have a prejudice as you are sitting here now.

A. It is a bias, at any rate.

Q. You also said you think you might be able, if you were sworn as a juror, to lay that prejudice aside?

A. Yes, sir.

Q. Isn't it true that in the state of mind you are in, that the quality of proof which would be required either by the [fol. 643] prosecution or by the defense—the standard—because of your prejudice, would be different than what would be required by you if that prejudice did not exist?

A. I am afraid so, yes, sir.

Mr. Barshay: We all join in the challenge.

By Mr. Turkus:

Q. Do you recall the gentleman who sat in the chair before you, who was down in the area there—who said he could decide this case on the merits?

A. The one immediately preceding me, yes.

Q. Well, I understand from what you said to Mr. Barshay that you read something in the newspaper which came up since you received your notice as a special juror in this specific case and that it was simply a squib—I think that was your language.

A. Yes, sir, a very short article, one of the *Tribune* and one in the *Sun*.

Q. Bearing in mind that the Judge will charge you in the case that the burden of proof is upon the prosecution to establish guilt beyond a reasonable doubt and that that burden never lessens nor increases; would you accept such a charge of law from the Judge?

A. Certainly.

Q. Is it repugnant to your sense of fair play—I mean, is it consonant with your sense of fair play, that the prosecutor have the burden of establishing the guilt beyond a reasonable doubt and that that burden neither be lessened nor increased.

[fol. 644] A. No, I don't think that is repugnant to my belief.

By the Court:

Q. The question is whether you would be influenced by what you heard in deciding the case—the question of inability to disregard or lay aside what you have received as an impression.

A. I think I might lay it aside.

Q. That is not enough. Do you know if you would?

A. No, I do not know that I would lay it aside. I cannot say that conscientiously. I would make an effort to.

[fol. 645] The Court: That is not enough.

By Mr. Turkus:

Q. You are a man of experience; you know your own mind and your own feelings. The People of the State of New York and the defendants at the bar are entitled to have a jury of twelve men decide the case uninfluenced by anything except evidence in the case. Do you think you could take your place in this jury box and comply with your oath of office and try the case on the evidence devoid of outside influence by way of newspaper articles?

A. I do not.

The Court: Challenge sustained.

(A recess was then taken until two p. m., the Court admonishing the talesmen not to discuss the case and to remember the previous admonition given.)

[fol. 646] Afternoon Session—Trial Resumed.

The Court: The jurors who are not already in the box may go until tomorrow morning at ten o'clock. You are requested not to talk about the case; let nobody talk to you about it. Please read nothing, especially the *Mirror*. Those *Mirror* articles which are still being published seem to be raising havoc with the jurors in this case, and there is no way of the Court's stopping them under the law.

Ten o'clock tomorrow morning.

Samuel A. Lieberson, of 1947 Ocean Avenue, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Lieberson, you are listed as living at 1947 Ocean Avenue; is that correct?

A. That is right.

Q. What section of Brooklyn is that? Is that around Avenue T?

A. Avenue O.

Q. Is that near the Midwood section?

The Court: It is Kings Highway.

A. Kings Highway.

Q. Have you lived there for a number of years?

A. Thirteen years.

Q. Prior to that time did you reside in Brooklyn?

A. I lived in Brooklyn, yes.

Mr. Talley: Will you speak up, kindly, so we can hear you?

[fol. 647] The Talesman: Yes, I will, once I get my composure.

Q. The trestle board lists your profession as that of an architect; is that correct?

A. Yes.
Q. Have you been an architect for a number of years?
A. Thirty years.
Q. And are you in practice for yourself?
A. I am.
Q. Where do you maintain your office?
A. At the present time it is at my home.
Q. At 1947 Ocean Avenue?
A. That is right.
Q. Prior to that time did you have an office in an office building?
A. I was connected with the Cudahy Packing Company as architect in their construction.
Q. Did you come in contact with their counsel?
A. No.
Q. Lawyers?
A. No.
Q. Lord & Curran?
A. No.
Q. Do you know Mannie Stern?
A. No, I do not.
Q. Or Tom Curran?
A. I do not.
Q. If I understood you correctly, the office was in Manhattan, the Cudahy Packing?
A. Well, the general offices are in Chicago and I traveled considerably for them from state to state, erecting these various buildings.
Q. And refrigeration and other matters?
A. That is what I specialized in.
Q. Did you do any work down at the Fort Greene Market?
A. Yes, I did some work there.
[fol. 648] Q. I take it by now you understand the nature of the charge in this case?
A. I do.
Q. The defendants are charged with the crime of murder in the first degree for the killing of a man named Joseph Rosen. Is there anything about the nature of the charge which would impair your service as a juryman?
A. No.
Q. Have you any scruple, conscientious or otherwise, against capital punishment?
A. I have not.

By the Court:

Q. Do you live on that block with the Jewish settlement?
A. No, that is further up.
Q. That is near Quentin Road?
A. Yes. You mean the temple?
Q. It is in the middle of the block on your side of the street?
A. Yes.
Q. That is all residential along there?
A. Yes, sir.
Q. You have no office facilities except in your own home?
A. One of the rooms converted into a drafting room.
Q. Are you making a living there?
A. I have been for the past eight months. Prior to that I was engaged in small home building in Long Island.
Q. That is free-lancing?
A. Yes.

By Mr. Turkus:

Q. If I understood your response correctly to Judge Taylor, you have no further connection with the Cudahy Packing Company?
A. No, sir.
[fol. 649] Q. And you are engaging in the practice of the profession as a free-lance?
A. That is right.

By the Court:

Q. In business for yourself?
A. Whenever I can get a client. I am licensed.
Q. Do you work in a locality?
A. Anywhere.

By Mr. Turkus:

Q. As architect you come into frequent contact, do you not, with representatives of different unions?
A No, I do not.
Q. Does your work in any wise entail any conferences with union officials?
A. No, it has not so far.
Q. Do you draw plans for buildings, the erection of buildings?

A. Yes, I do.

Q. And it is upon those plans that the building is finally erected?

A. That is right.

Q. You deal directly, then, with the builder?

A. No, it is either an owner or a lessee, whoever wants the job done, that retains my services.

Q. Does the architect have any supervision of the work that is being done?

A. **The law requires an architect** or engineer to supervise construction or someone who **has had ten years of** construction experience.

Q. So that that would bring you on the job almost daily, would it not, when a job is under construction?

A. In architect supervision, not necessarily daily. He [fol. 650] makes several visits to the site.

Q. And that is pass approval upon the different states of progress, when the brickwork goes on, plaster work, electrical work?

A. That is right.

Q. And of course, of necessity, you have contact, then, with people in the building trades or unions?

A. I never have had contact with union people in construction work.

Q. Has it been all non-union work?

A. Not necessarily, but I have never had dealings with them.

Q. Have you had any contacts, directly or indirectly, at any time during your experience with persons or firms in the Brownsville-East New York area of Brooklyn?

A. No, sir.

Q. Or with any individuals or firms in the garment district in Manhattan?

A. No.

Q. Do you know anyone connected, or have you had any contact with anyone associated in the clothing district in Manhattan?

A. I have not.

Q. Or with clothing truckers?

A. No.

Q. Do you know any union officials of the Amalgamated Clothing Workers of America?

A. I do not.

Q. Has the name of Potofsky any significance to you, a union official of the Amalgamated?

A. No, it has not.

Q. Or that of Murray Weinstein, manager of the clothing Cutters Union?

A. No.

Q. Is there any significance to the name of Samuel Katz? [fol. 651] A. No.

Q. A business agent of Local 4 of the Cutters Union?

A. No.

Q. Is the name of Bruno Belia at all familiar to you?

A. No.

Q. Or that of Salvatore Marazzano?

A. No.

Q. Are you acquainted with any representative or official of Local 240 of the Clothing Drivers & Helpers Union?

A. I am not.

Q. Did you ever hear the name of Philip Orlofsky, one time connected with the Amalgamated Clothing Workers of America?

A. I have not.

Q. Did business or any other contact bring you in connection with anyone in the Teamsters Union?

A. No, it has not.

Q. Am I correct in assuming that as far as you can recall you have had no contact as yet with any union representatives or officials, even of the building trades?

A. That is correct.

Q. Is there any significance to the name of Max Silverman?

A. No.

Q. Or that of Wolfie Goldis?

A. No.

Q. Or the name of William or Willie Alberts, a one-time bondsman?

A. No.

Q. Does your work as an architect bring you in contact with lawyers, members of the bar?

A. I have relatives who are lawyers. Sometimes I have to consult with them.

Q. Is the relationship close?

A. Nephews.

Q. Are they practicing in Brooklyn?

A. Yes, they are.

[fol. 652] Q. Do you practice as a firm?

A. As a firm.

Q. Would it be the same name as yours, Lieberson?

A. No, nephews by marriage.

Q. Would you mind telling me the name?

A. One is Irving Gersten at 26 Court Street and the other one is Harry Feldman at 26 Court Street.

Q. Do you know whether Harry Feldman at one time worked for a lawyer by the name of Arthur J. Stern?

A. I know he did not.

Q. Do you know the type of practice that they engage in?

A. Well, Gersten is mostly real estate and Feldman is general practice.

Q. As far as you know, neither specializes in the defense of criminal cases?

A. I don't believe they ever tried criminal cases.

Q. Is there any significance in your mind to the names of Bellanca and Tosca?

A. I heard them in court, but I do not know them.

Q. Any familiarity with the name of Emanuel Buchalter?

A. That is the same answer. I do not know.

Q. Or that of Philip Buchalter or Kowas?

A. No.

Q. And is that true of the name of Terry Burns?

A. That is right.

Q. And an individual by the name of Abe Slabow? Since your name appeared on this special jury list and specifically [fol. 653] since you got your slip, did anyone speak to you about the case?

A. We did talk about it casually at home; but that is all.

Q. And were the discussions with respect to the possibility of your service as a juror in the case?

A. That was it.

Q. I take it, in common with the rest of us, you read newspapers?

A. I do.

Q. Is the name Buchalter familiar to you by reading of newspaper accounts?

A. That is where I first met the name.

Q. Is the name of Lepke familiar from newspaper accounts?

A. I saw that name mentioned too.

Q. And that of Gurrah?

A. I have seen that name in the papers.

Q. And I take it that you are familiar with the name of Harry (Pittsburgh Phil) Strauss?

A. I have seen that name in the papers.

Q. And that of Martin (Buggsy) Goldstein?

A. I don't recall that name.

Q. Do you remember reading of the name of Harry (Happy) Maione?

A. I don't remember that.

Q. Or Frank (The Dasher) Abbandando?

A. I heard you mention it. That is the first time I heard it.

Q. I mean press reading.

A. Sir?

Q. I mean reading from the press, from articles in the press.

A. I never seen that name in the press.

Q. Are you familiar with the name Capone or Weiss from [fol. 654] newspaper reading?

A. I have seen their names in print.

Q. And have you been reading these accounts since Judge O'Dwyer was District Attorney?

A. We were advised not to read the paper, and I tried to avoid these articles.

Q. Judge O'Dwyer has been District Attorney since January, 1940, and that was the period of time that I was directing your attention to. In other words, have you read these articles since January, 1940?

A. Yes, I have.

Q. From these newspaper accounts in which you have read these names, have you an impression?

Mr. Climenko: Object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

A. May I get that question again, please?

Q. (Pending question read.)

A. I have not.

Q. And I take it, then, that you formed no opinion from any articles you have read in the press?

A. That is right.

Q. And nothing even so definite as an impression from any reading?

A. No.

By the Court:

Q. Do you mind telling us your club affiliations?

A. I am a member of the New York State Architects Association.

Q. Any social clubs?

A. No, sir.

Q. The Capital Club is near you?

A. It is maybe four or five blocks.

[fol. 655] Mr. Talley: We do not hear the talesman.

The Court: "Maybe four or five blocks," he said.

Q. Do you ever go there?

A. I do not.

By Mr. Turkus:

Q. Did you ever attend any lecture or discussion on the apprehension of criminals and prosecution of crime?

A. I have not.

Q. I take it, then, that you belong to no law enforcement society?

A. No, sir.

Q. As a society promulgated for the specific job of advancing the apprehension and the prosecution of criminals for crime?

A. No.

Q. Are your activities, then, limited to the Architects Association?

A. Yes.

Q. And you say you have been conducting your business from your home now for the past ten months?

A. About eight months.

Q. These defendants at the bar are represented by nine lawyers. Buchalter is represented by Mr. Barshay, a former Assistant District Attorney. Do you know Mr. Barshay?

A. I do not.

Q. Buchalter is likewise represented by Mr. Bertram Wegman. Do you know him?

A. No, I do not.

Q. Former Assistant United States Attorney. Or Mr. Jesse Climenko?

A. No.

Q. Do you know anyone attached to or connected with the law offices of these gentlemen?

A. I do not.

[fol. 656] Q. Defendant Weiss is represented by former Judge Talley. Do you know him?

A. By reputation.

Q. Never came into personal contact with him?

A. I did not.

Q. Do you know Mr. James I. Cuff, a former Assistant District Attorney?

A. By reputation.

Q. Or Mr. Murray Kriendler, a former Assistant United States Attorney?

A. No.

Q. Do you know Mr. Sidney Rosenthal?

A. No.

Q. Not even by reputation?

A. Well, I have heard his name mentioned since I am on this case.

Q. Or Mr. Leon Fischbein?

A. No.

Q. Or Mr. Emanuel Rosenberg?

A. No.

Q. Do you know any person associated with those lawyers in their law offices?

A. I do not.

Q. Do you know intimately any member of the bar who specializes in the trial of criminal cases?

A. I do not.

Q. Have you heretofore had the benefit of jury experience in a criminal case?

A. No.

Q. In any type of litigation?

A. I served in Surrogate's Court in 1939.

Q. I take it that was in connection with will cases?

A. That is right.

Q. Did those cases go to a conclusion, by that, did you have the Judge's instruction on the law?

A. Yes.

Q. If accepted as a juror in this case, am I safe in assum-
[fol. 657] ing that you will take the instructions of law exclusively from the trial justice?

A. Yes.

Q. That is Judge Taylor. Nobody else in the case?

A. That is right.

Q. In your business as an architect, I take it you have come in contact with various persons associated in the City departments; is that right?

A. That is right.

Q. Your daily business brings you into the Municipal Building, does it not?

A. Yes, it does.

Q. And you frequently go to the fifth floor of that building?

A. Eighth floor.

Q. Sometimes the fifth?

A. Sometimes.

Q. Does business bring you in contact with the Corporation Counsel of the City of New York at times?

A. I have not had any contact with that office.

By the Court:

Q. When you say "architect," do you mean building architect, or do you specialize along some particular line of construction?

A. When I was with the Cudahy people I specialized in abattoir construction, buildings under refrigeration.

Q. That is all over the United States?

A. That is right; but since I have disconnected with them I have been in private practice, general practice.

By Mr. Turkus:

Q. Are you presently working on any specific enterprise
[fol. 658] as an architect?

A. Yes, I have a job going on at 39th Street.

Q. 39th Street? Is that the Borough Park section of Brooklyn?

A. I imagine that is what they call it, 39th Street and 14th Avenue.

Q. Did you ever hear of the name of one Irving Feinstein?

A. No.

By the Court:

Q. 39th Street and 14th Avenue, what is that, Continental Steel Company?

A. No, it is a section where—this happens to be a poultry slaughter house. They are going to alter the building. That is the job I have, a plan job.

Q. A railroad runs right there?

A. Yes.

Q. And those business concerns sort of cluster along that line of railroad?

A. There is freight yards there.

Q. Long Island Railroad?

A. That is right.

By Mr. Turkus:

Q. Has the name of Albert Anastasio any significance to you?

A. I saw it mentioned in the papers.

Q. Did you hear that name discussed in the vicinity of where you live?

A. No.

Q. Have you engaged in any discussions in connection with any investigation conducted by Judge O'Dwyer as prosecutor?

A. No.

Q. Have you listened to any discussions?

A. Not that I recall.

Q. Are these articles that you read fresh in your mind? [fol. 659] A. I never pay much, or lay much, stress to newspaper items.

Q. Well, of course, that does not quite answer the question. Nevertheless, even though you do not pay too much stress to newspaper articles, what I am trying to find out, is there anything of what you read that persists in your mind?

A. I remember the story in connection with the case.

Q. Does your memory go back to the time when Joseph Rosen was actually killed?

A. I did not know he was killed. I don't remember reading that.

Q. Then your memory goes back to a more recent account of the O'Dwyer investigation; is that it?

A. Yes, I believe so.

Q. What papers do you customarily read, Mr. Lieberson?

A. *Tribune, World-Telegram, Times.*

Q. I take it, then, that you read the *World-Telegram* as an evening paper?

A. That is right.

Q. I believe in excess of fifty times in the past year there were front-sheet articles on the O'Dwyer investigation in the *World-Telegram.* Do you recall that?

A. I could not say as to how many times I have seen it, but I may have seen these items mentioned.

Q. Are you left with any impression as to the reading in the *World-Telegram* in connection with the investigation?

A. Only so far as remembering the story, that is all, in connection with the item

Q. Now directing your attention to the defendants in this [fol. 660] case, is there anything that you have read that is in your mind to the detriment of the defendants on trial?

A. No.

Q. So as far as any reading matter is concerned, you are completely unaffected with these defendants, by that I mean you have no prejudice against them in any shape or form?

A. I have no prejudice or bias.

Q. In reading the various newspaper accounts did you come across the name of various persons who had been cooperating with the District Attorney?

A. I would not remember that. I would not remember the names specifically. Some names mentioned, but I could not remember them, could not repeat them.

Q. In the reading matter that you read, did you read anything of the Rosen case?

A. Recently, yes.

Q. And specifically, did you read that he at the time of his death was operating a candy store?

A. That is right.

Q. And did you read of certain alleged motive- for the killing, as set forth in the newspaper article?

A. Yes.

Q. And do you remember reading of the matter set forth in the newspaper article as to the prospective witnesses that might be called in the case?

A. I don't remember such article.

Q. Do you remember specifically reading in the articles as to the alleged part played in the murder by these defendants?

Mr. Barshay: If your Honor pleases, I object to going into great detail of what was in those articles as tending to prejudice the juror.

[fol. 661] The Court: Overruled.

Mr. Barshay: Exception, sir.

Q. (Pending question read.)

A. I do.

Q. So that those matters are presently in your mind: is that correct?

A. Well, yes.

Q. Have those articles left an impression with you?

A. They have not impressed me, but I do remember the story.

Q. Well, in order to remember the story it must have left some impression upon your mind.

Mr. Rosenthal: I object to that as argumentative.

Mr. Turkus: I have not even finished. I will withdraw it in that form.

The Court: He may not have any impression as to the truth or falsity of the story.

Mr. Turkus: That is what I am trying to elicit.

The Court: He may simply have a recollection of having read it, without forming any opinion.

Q. What I am trying to find out, Mr. Lieberson, is this: You have a distinct recollection of certain facts set forth in these articles?

A. Yes.

Q. Certain facts allegedly committed by these defendants?

A. Yes.

Q. Then you tell me that you have no impression. What I am trying to find out is just what is the state of your mind with respect to that reading matter.

A. Well, as the Judge just mentioned, I have formed no [fol. 662] opinion as to the guilt or innocence of these participants in this crime, but in so far as the story is concerned, that is public gossip; I mean, everybody —— reads newspapers sees these articles.

Q. That is true.

A. I have formed no opinion.

Q. In connection with your visitations to the Municipal Building in Brooklyn, did you make the acquaintance of

any member of Mr. Geoghan's staff in your past experience?

A. I met Mr. Geoghan at the Unity Club at a dinner given there once—was introduced to him.

Q. Is that the limit of your acquaintance with Mr. Geoghan?

A. Just the introduction; that was all.

Q. Have you attended any series of discussions at the Unity Club?

A. No, I was a guest there one evening, just one evening.

Q. Did you know any other member of Mr. Geoghan's staff?

A. No, I did not.

By the Court:

Q. That was the United Charities?

A. No, I had a friend who ran for public office, and that was the occasion—they had the dinner there.

Q. What was his name?

A. He died recently. Milton Hertz. He ran for County Judge.

Mr. Talley: Mr. Lieberson, you will do us a great favor if you let us hear what you say.

By Mr. Turkus:

[fol. 663] Q. Were you a close friend of Milton Hertz?

A. Very intimate.

By the Court:

Q. His brother-in-law was a builder right down your way, wasn't he?

A. No.

Q. He had a real estate office?

A. That is right, but not very active.

Q. Milton lived on the block behind you?

A. Directly behind me, near N on Bedford Avenue.

Q. I thought he lived on Kenmore Place, one block from Ocean Avenue.

A. Some time back.

Q. What was his father-in-law's name?

A. Lackof.

Q. His office was down by the Avenue J station?

A. That is right.

Q. And you use the Avenue L station?

A. No, I get off at Kings Highway where I live.

Q. That is the next one to N?

A. That is the next one to M, on the station stop. M, Kings Highway.

By Mr. Turkus:

Q. Were you acquainted with Mr. Hertz's partner, Charles Wilson?

A. Yes, I know him well.

Q. Did you ever discuss with Mr. Hertz any of the defense cases that he had, specifically against the Amen investigation?

A. No indeed.

Q. Did you ever discuss the progress or conduct of any [fol. 664] criminal case with any member of the bar that you know?

A. No.

Q. Do you know Judge O'Dwyer, the District Attorney of the County?

A. By reputation.

Q. Do you know any member of his staff?

A. I do not.

Q. In the Surrogate's Court did you serve for a week?

A. I was there a week.

Q. Was that before Judge Wingate in Brooklyn?

A. Wingate, yes.

Q. In any of the newspaper articles that you have read, have you read the names of accomplices in certain of the O'Dwyer investigations?

A. I don't recall; in other words, I could not mention any of those names. I don't remember them.

Q. Is your state of mind such that you can feel that on occasion even a man of bad character and bad reputation and former criminal habits can tell the truth?

A. I believe I could listen to him open-mindedly and believe it possible that he could tell the truth.

By the Court:

Q. You would scrutinize it carefully?

A. Yes indeed.

By Mr. Turkus:

Q. Have you any inherent bias or prejudice against testimony emanating from an accomplice as would cause you to close your ears to it under all circumstances?

A. I would expect his testimony to be corroborated.

Q. So does the law. If there were no corroboration of ac-[fol. 665] complices there would not be any case, but what I am asking you is this, sir: Would you close your ears to the testimony of an accomplice under any circumstances solely because that testimony emanated from a character of the type of an accomplice?

A. No.

Q. Now as to the degree of other proof, neither would you require that every single thing the accomplice said be substantiated?

Mr. Barshay: Objected to. It is a question of law.

The Court: Finish your question. I will have to rule against you.

Mr. Turkus: I am going to withdraw it, since the ruling would be adverse anyway, but I would like to complete a question before I have a ruling on it.

The Court: Complete it.

Mr. Turkus: There is no sense now. Your Honor has indicated that the ruling would be adverse.

By the Court:

Q. If the Judge charges you that under the law an accomplice must be corroborated by evidence tending to connect him with the commission of the crime, will you follow that ruling?

A. I will.

Q. And require that there be such corroboration?

A. Yes.

Q. Before you will accept his testimony?

A. That is right.

By Mr. Turkus:

[fol. 666] Q. Before you heard the rule of law, did you have any different notion? Just yes or no?

A. No.

Q. Did you understand the law just as the Judge had given it to you?

A. I have heard it so many times mentioned here since I have been in court.

Q. Before hearing it mentioned in this court-room, did you have a different notion? Just yes or no.

A. No.

Q. Did you have any prejudice or any bias against a prosecution which uses an accomplice to testify against the co-participants in the commission of the murder?

A. I have not.

Q. Do you have any bias or prejudice against the prosecutor for the use of that kind of testimony?

A. No.

Q. Do you feel that you can approach a case in which accomplice testimony is used without any bias or prejudice either way?

A. I do.

Q. Is your business such that a protracted trial would inconvenience you?

A. It would not do me a lot of good.

Q. Well, would it be such as to affect your conduct on the jury and your ability to listen to the evidence?

A. No.

Q. And by your answer, then, I think you express an indication of not being keenly desirous of serving. If you have to, all right, and if you do not have to you are content, too?

A. Yes.

Q. Will you take the law in its every aspect from the trial judge?

A. I will.

[fol. 667] Q. If any defendant invokes a defense, for example, a defense of alibi, will you take the law with regard thereto implicitly from the trial judge?

A. Yes.

Q. Do you find any fault with the requirement of law that defendants are presumed to be innocent until their guilt is established beyond a reasonable doubt?

A. I do not.

Q. Do you find fault with the proposition of law that the burden is upon a prosecutor to establish guilt beyond a reasonable doubt and that that burden is never increased nor diminished?

A. I do not.

Q. By virtue of anything that you may read in the press, would you expect The People of the State to prove more or less or just beyond a reasonable doubt?

A. Beyond a reasonable doubt.

Q. From any reading matter that you have had in the press, would you expect a defendant to come forward with evidence?

A. No.

Q. Do you find anything repugnant with the law which says that a defendant need offer no evidence in his behalf, that he may submit his verdict to the jury upon the evidence adduced by the People?

A. No.

Q. You find no fault with that?

A. No fault.

Q. Do you find any fault with expert testimony of any kind, nature or description?

A. No.

Q. Have you heretofore testified as an expert yourself in [fol. 668] any litigation?

A. I have not.

Q. Can you approach the testimony of experts with an open mind?

A. I can.

Q. Be it ballistic, handwriting, or any other type of testimony?

A. Yes.

Q. In anything that you have read, did you read the name of a Mrs. Dorothy Walker?

A. No.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. I am.

Q. You have had no contact with anyone in the prior administration in the District Attorney's office?

A. No.

Q. You have had no contact by way of politics with any of the lawyers in the case?

A. No.

Q. If accepted as a juror, can you approach the problem or the issue in this case—I should not say the word "problem," it is the issue—with an open mind, ready to deal out even-handed justice between The People of the State and the defendants at the bar?

A. Yes.

Q. Is there anything concerning which I have made no inquiry which would affect your ability to serve as a juror?

A. No.

Q. Nothing at all?

A. No.

Q. If selected as a juror, will you listen to fair and reasonable argument by the other jurors?

A. I will.

Q. In your every-day business experience, have you had occasion to decide problems in conjunction with others, make decisions in conjunction with others?

[fol. 669] A. Oh, yes.

Q. Where one opinion is sometimes subordinated to another and a compromise is effected—I mean, in your architectural work, for example, you may go up to the Building Department, he may say the law is one thing, you may say the law is the other, and do you sit down and reason it out?

A. We do that quite often.

Q. Without rancor and without bitterness?

A. That is right.

Q. If selected as a juror in this case, will you reason out the issue of this case without rancor and without bitterness, and with common sense and understanding?

A. I will.

Q. Is there anything that you feel the prosecutor should know going to your qualifications as a juror in the case?

A. Nothing more than he knows already.

Q. Let me say this to you, Mr. Lieberson: Assuming that you were accepted as a juror and you heard all the testimony in the case, you listened to the defense lawyers tell you how they viewed it, the District Attorney tell you how he views the evidence, and then the learned Court charges on the law, you talk the case over with your other jurymen in the jury room and you come to the conclusion and you are satisfied beyond a reasonable doubt that at the bar of justice in this County Court are three guilty men, guilty of the crime of murder in the first degree—Buchalter, Weiss, and Capone; would you have any fear in saying so?

A. No, I would not.

[fol. 670] Q. Have any reluctance?

A. No.

Q. Any hesitation or embarrassment?
A. No.

By Mr. Barshay:

Q. Mr. Lieberson, have you ever been a victim of a crime?
A. No, I have not.
Q. Have you any intimates in the Police Department?
A. No.
Q. Since your coming here as a prospective juror, have you with the other jurors, discussed this case?
A. We have talked about it casually on the bench there.
Q. And as the result of that discussion have you by any chance formed any opinion prejudicial to any of the defendants?
A. No.
Q. So now you are free of bias or prejudice either as the result of reading, speaking, or observation; am I right?
A. That is right.
Q. Nothing in the back of your head which in any wise could be interpreted as any indication of prejudice against any of these defendants?
A. That is right.
Q. You said, Mr. Lieberson, that you had no experience as a juror at all?
A. I did not say that.

Mr. Turkus: Surrogate's Court.

Q. Talking about criminal cases.
A. Oh, yes.
Q. Because you will find it completely different.
A. That is right.
Q. You understand that? Have you ever joined any association for the prevention of crime?
[fol. 671] A. No, I have not.
Q. Have you ever been a Grand Juror, Federal or State?
A. No.
Q. Mr. Turkus has read to you a list of names. Have they impressed you at all to the detriment of the defendants?
A. No.
Q. Unless and until any of those names have a meaning by way of evidence in this case, you will completely dismiss them from your mind, won't you?
A. That is right.

Q. You won't even let innuendo creep in with respect to the names read?

A. That is right.

Q. As a matter of fact, you will free your mind of atmosphere of any kind, won't you?

A. That is right.

Q. And so when we speak of the presumption of innocence, you will keep in mind that it is only a matter of procedure that the defendants are brought in here under guard, that is all. It raises no prejudice against them whatever; isn't that so?

A. Yes.

Q. The fact that they sit here with the marshals or guards or court attendants is nothing against them; isn't that so?

A. That is right.

Q. You believe that firmly?

A. I do.

Q. You won't use it against them?

A. No.

Q. The fact that an indictment has been filed against them is no indication in your mind that where there is smoke there is fire, is there?

A. That is right.

Q. It is an accusation?

A. Yes.

[fol. 672] Q. You understand that? And now if you are chosen as a juror, the fact that they said "Not guilty" to the accusation will raise an issue for you to determine. Am I right?

A. Yes.

Q. So our defendants start from scratch, free of sympathy for them, free of prejudice against them; is that your answer?

A. That is correct.

Q. And if the Court shall tell you that encompassed in the enforcement of the criminal law there is a presumption of innocence which remains with the defendants throughout the trial and until all of you agree that you have been convinced beyond a reasonable doubt, you will follow that law implicitly?

A. That is right.

Q. You owe no duty to either side in this case; isn't that so?

A. That is so.

Mr. Turkus: He does owe a duty.

The Court: What is that?

Mr. Turkus: Mr. Barshay is putting the words into the prospective juror's mouth, that he owes no duty to either side. He does owe a duty.

Mr. Barshay: Will you let me develop it, please?

Q. You do not feel you are obligated to either side, do you?

A. When I said yes in the previous question, that is what I mean.

Q. You mean that you are obligated to do your oath as a juror, to perform your oath as a juror, fairly and squarely?

A. That is right.

[fol. 673] Q. That is the only obligation you owe?

A. That is right.

Q. You have not any feeling that because you were called as a special juror by the State, that you have a special obligation to perform for the State?

A. No.

Q. Likewise, if the defense should accept you, I am sure you won't be beholden to them for any special obligation to them?

A. No.

Q. You will be an umpire of the facts, judge of the facts?

A. Yes.

By the Court:

Q. Will you tell us where you lived before you went to Ocean Avenue?

A. I lived on Willoughby Avenue.

Q. Near where?

A. Near Tompkins.

Q. How long ago was that?

A. That is about thirteen years ago, when I came up here.

Q. You lived there all your life before that?

A. No, that is since my marriage, nineteen years, I have been living in Brooklyn. Prior to that I lived in the Bronx. I had been traveling at the time.

Q. No other permanent address?

A. No.

By Mr. Barshay:

Q. If the Court shall instruct you that at all times throughout the prosecution—the burden of proof rests with the prosecution, will you accept that as the law?

A. Yes.

Q. Will you carry it out faithfully?

A. I will.

[fol. 674] Q. And so if any juror should say, "Well, the defendant made no explanation of this charge against him," you will reason with him and call to his attention, if that should arise, that the defendant need not prove a single thing? Isn't that so?

A. Yes.

Q. You believe that firmly?

A. Yes.

Q. The number of witnesses that the prosecution may call will have no effect upon you unless the quality of their testimony convinces you beyond a reasonable doubt of the defendants' guilt?

A. That is right.

Q. Only then?

A. Yes.

Q. So it is the quality of the proof that will determine and not the quantity?

A. That is right.

Q. And if in the face of fifty witnesses—if there shall be fifty—and the choice of counsel for defendant Buchalter there shall be no answer, you will not hold it against Mr. Buchalter if the Court shall so instruct you?

A. No.

Q. You have no feeling?

A. No.

Q. Against Mr. Buchalter, have you?

A. No.

Q. By whatever name you may have read of him, you have no prejudice against him?

A. No.

Q. The Court shall define to you what is reasonable doubt. Have you any idea of your own now as to the definition of that? Just yes or no.

A. Yes.

Q. And if you find that your definition is in conflict with [fol. 675] that of the Court, you will subordinate your own and accept the Court's, won't you?

A. I would.

Q. And may I ask you now, are you ready to dismiss all knowledge of principles of law which you have and hold yourself open to the Court's instruction on every point?

A. May you ask me?

Q. Yes.

A. Yes, sure.

Q. You are sure of that?

A. Yes, indeed.

Q. You have never discussed propositions of criminal law with anyone?

A. No.

Q. Now, Mr. Turkus has spoken to you quite frankly that he intends to use accomplice testimony—not to be over-repetitious, but briefly to review—will you see *see* who this accomplice is before you accept his testimony? Will you judge him, look at him, hear him? Will you?

A. I will.

Q. And if out of his own mouth he tells you that he is a murderer and a thief and a perjurer and runs all the way up and down the line as a person who has led almost exclusively a life of crime, then will you take and weigh his testimony with extreme caution and care? Will you?

A. I will.

Q. And if there is more than one person who says he is an accomplice, will you follow the same rule with respect to that other person?

A. Yes.

Q. And if the Court shall tell you that one accomplice cannot corroborate another, you will follow that instruction [fol. 676] faithfully, will you not?

A. Yes.

Q. And you will determine in your own mind, will you not, Mr. Lieberson, that when a man takes the stand and says, "I am going to tell the truth," and swears to tell the truth, it does not mean that he will unless and until you find from his testimony, taking into consideration his past life, that there is some truth in it; isn't that so?

A. Yes.

Mr. Turkus: May I have that question read?

Q. You will search the reason for giving his testimony: What does he expect for it? What is the price? won't you?

A. Yes.

Q. You will want to know whether or not he has a motive in giving such testimony?

A. I probably would.

Q. You will want to know whether he expects any reward, won't you?

A. Yes.

Q. And the mere fact that he may say on the stand, "I don't expect any reward; I have not been promised anything for my testimony," it does not necessarily mean that you will believe it?

A. That is a question.

Q. For you to decide?

A. That is right.

Q. Having passed that part of the testimony, we will get to the corroborating testimony, that which the law says must tend to connect a defendant with the commission of a crime. You will want to know who is offering this corroborating testimony; am I right?

A. Yes.

[fol. 677] Q. And if that person who takes the stand says that somebody said so and so to me, you will want to look into his own record, won't you, before you will accept his testimony?

A. Yes.

Q. And if he says he is a murderer and a thief and a perjurer, robber, burglar, and pimp, with each demerit mark against him you will, with greater care, weigh that testimony?

A. I will.

Q. These three men are being tried together. Will you promise, sir, to consider the evidence as against each person as it is given from the witness stand and use it against that person only, unless and until his Honor shall charge you that you may use it in another fashion?

A. Yes.

Q. And in rendering a verdict in this case, you will consider the evidence as against each individual defendant, won't you?

A. Yes.

Q. They may be tried together, but you must render a separate verdict with respect to each one; is that so?

A. Yes.

Q. In the face of a case like this, a person must have courage to be a juror in order to render a verdict that reflects the truth. Have you that courage, sir?

A. I believe so.

Q. Will you exercise that courage, sir?

A. I shall.

Q. It sometimes might take more courage to say "Not guilty" than it does "Guilty." Will you exercise that courage if you fail to be convinced beyond a reasonable doubt?

A. I will.

Q. Can the defendant Buchalter safely entrust his legal rights—that is all he wants—to you?

A. He can.

[fol. 678] By Mr. Cuff:

Q. Mr. Lieberson, if in the wisdom of counsel one or more of the defendants should not take the witness stand in this case, would that leave any unfavorable impression in your mind?

A. No.

Q. And you will not draw any unfavorable inference from the failure to take the witness stand in that case?

A. I will not.

Q. And you promise to adhere to that?

A. Yes.

Q. If, after considering the evidence and listening to the arguments of counsel and the charge of the Court, you find that there is a reasonable doubt based upon something in the evidence, or some lack in the evidence, and after listening to the argument of your fellow jurors, that reasonable doubt still remains, will you then vote to acquit, if his Honor should charge that that is your duty?

A. Yes.

Q. And you will have the courage to do so?

A. I believe so.

Q. And you will have the courage to adhere to that opinion unless and until you are convinced by reasonable argument based upon the evidence or the lack of evidence that you should change it?

A. Yes.

Q. Will you have that courage?

A. Yes.

Q. As to the corroboration, the corroborative evidence that may be proffered by the prosecution to corroborate the accomplice, will you give careful scrutiny to the character [fol. 679] of the witnesses through whom that corroboration is offered?

A. I will.

Q. And will you apply to them the same tests as to credibility, as to their credibility, that you will apply to the accomplices' testimony?

A. Yes.

Q. By that I mean, so that it will be plain, Mr. Lieberson, if there is proof of criminal activities on their part or proof of character which would impair their credibility in your mind, you will give that proof careful scrutiny, will you not?

A. I will.

Q. Of course you realize, do you not, that the jurors who are selected to try this case are the sole judges of the fact and that neither his Honor nor anybody else can invade that province? Do you realize that?

A. I do.

Q. And you will be guided by his Honor's instructions in that respect too, will you not?

A. Yes, indeed.

Q. I think Mr. Turkus asked you about if you believe in the enforcement of the Penal Law. I wonder if you realize that the presumption of innocence, about which you have been questioned and other jurors have been questioned, and the fact that no unfavorable inference can be drawn from the failure of a defendant to take the witness stand, is a part of our Penal Law. Do you know that?—our criminal law?

A. I know it now, since you mention it.

Q. You realize that now?

A. Yes.

Q. And you will follow and adhere strictly to his Honor's [fol. 680] instructions in that respect as well as in every other respect with relation to the law; is that right?

A. Yes.

By Mr. Rosenthal:

Q. Mr. Lieberson, in the questioning by Mr. Turkus you were asked whether you had heard the name of a defendant

represented by myself and my two associates, before—Capone—and you said yes. You have not got this defendant confused, have you, with an Al Capone, about whom we have all heard?

A. No, I have not.

Q. Or any thought that he is in any wise connected because of the similarity of name?

A. I do not know of their relationship, but I know it is not the same fellow.

Q. On the question of this case, you understand each one of these defendants is merely being tried for what the indictment charges them with here? You realize that?

A. Yes.

Q. And you realize that all any attorney representing a defendant is asked to do in a criminal trial is either to rebut the evidence concerning the particular crime involved and not to in any wise try to prove any acts or facts which are not a part of the particular case?

A. Yes, I realize that.

Q. And, that being so, you are going to confine yourself, are you not, simply to the evidence of sworn witnesses as to what they claim the particular defendant did in respect to this particular crime; is that correct?

A. That is right.

Q. Before and while you were in the court-room here, but [fol. 681] while other jurymen were being examined, the question of alibi was dwelt upon. Do you recall that?

A. I remember that.

Q. Assuming that an alibi is offered on behalf of one of the defendants and assuming further that the Court charges you that the law of our land does not compel any defendant to prove his innocence—is that clear as far as I have gone?

A. Yes.

Q. And that at all times the defendant's guilt must be proven by credible evidence produced by The People—Is that clear?

A. That is clear.

Q. And assuming that the Court were to charge you that it is not necessary for you to believe the alibi itself, if the alibi raises a doubt in your mind as to the guilt of this defendant, that doubt created by the alibi is sufficient to warrant you in acquitting him; would you follow that law?

A. If the Judge so charged, yes.

Q. What I am trying to bring home to you is the fact that merely because we allege or prove an alibi, we do not assume any burden by doing that. Is that clear to you?

A. Yes.

Q. An alibi is sufficient if in your mind— I withdraw that and put it this way: If the Court charges you that the proof submitted by us by the alibi is sufficient in and of itself to raise a doubt where in the absence of the alibi a doubt would not exist, if that were charged to you by the Court, you would follow that, wouldn't you?

A. I would.

Q. You realize that even though the defendant may prove [fol. 682] an alibi, that does not relieve the District Attorney of the burden which he assumes to prove guilt? Is that clear to you?

A. That is clear.

Q. On the question of accomplice you have been asked by both Mr. Cuff and Mr. Barshay; by now you realize that whether one or more accomplices are called to testify that they cannot corroborate one another. Is that clear to you?

A. Yes.

Q. That there must be other independent evidence outside of the accomplice, whether it be one or fifty accomplices, connecting each of the defendants, before you could find the defendant guilty. Is that clear?

A. That is clear.

Q. Now, from indications it may appear that in this case that the District Attorney may offer—and we ask these questions without knowledge in advance of what exact proof the District Attorney will offer as the so-called independent evidence—an alleged admission made by one of the defendants—in other words, to put it plainly to you, that somebody was told by the defendant that he, the defendant, had committed the crime or had attended or had participated. Is that clear, what I mean by admission?

A. Yes, I understand what you say.

Q. Then if such be the case, will you examine the source from which the alleged admission comes?

A. Yes.

Q. And if you find that that source is one where the person who alleges it was made has been involved in a number of murders, that he has not even been prosecuted for, has [fol. 683] committed perjury on other occasions and has led a life of crime, will you scrutinize it very, very cauti-

ously and carefully before you come to a decision as to whether it has any truth to it or not?

A. Oh, sure.

Q. In other words, in judging the testimony of any witness, you will not only judge his action and demeanor on the stand, but you will take what proof there is, not what you have read in papers, but what proof in the case there is, as to who and what that particular individual has done in the past; isn't that true?

A. Yes.

Q. You do that in business, don't you?

A. Yes.

Q. If you found that a man has been known as a person who had not told the truth on numerous occasions and he came to sell you an article, you would be a little cautious before you believed what he said to you, wouldn't you?

A. Yes, sure.

Q. More so than if you knew a particular individual who had the highest of reputation came to you and made a representation to you, you would believe him, wouldn't you, without any question, if his argument was advanced fairly to you; isn't that true, sir?

A. Yes, I guess so.

Q. So in coming to a conclusion as to what force you will give, or what weight, to any witness's testimony, you are going to use the same standard that you would use of the ordinary course of business, and you would not leave your common sense outside the jury room, would you? Isn't that true?

A. No.

[fol. 684] Q. The facts may warrant in your mind in this case a verdict of acquittal. Merely because of the fact that you have never sat on a criminal jury before and some one or more of the members who are subsequently called and sworn may have, would you allow them to substitute their opinion for you on what the facts are, because of their experience or prior experience as jurymen in a criminal case?

A. They would have to convince me.

Q. Yes. You know, sir, that whether you have been sitting on a jury for the last fifty years in a criminal court or whether you are called for the first time, your rights

as a juryman are equal to that of any other juryman in the box; isn't that true?

A. That I understand.

Q. And if, after having reasoned calmly and dispassionately your theory of what the proof does substantiate or does not, with them, and they have advanced their argument, you are not convinced as to the logic of their argument, would you, merely because of the lateness of the hour or the number that was against you or something of that character, substitute the opinion which you honestly and conscientiously have for the opinion of the majority?

A. Not unless I was convinced that I was wrong.

Q. If such were your conviction, that one or more of these defendants were innocent, you would have the same courage that the District Attorney asked you to display in [fol. 685] finding a verdict of guilty, of coming in with a verdict of not guilty, wouldn't you?

A. I would.

Q. You know that your verdict is the verdict and cannot be questioned unless there is some outside influence which causes you to make it? You know that?

A. Yes.

Q. You know that no one can question the verdict of a juryman that is rendered on his conscience? You know that?

A. Yes.

Q. And in deciding this case, if you are accepted as a juryman, you will follow the guidance of your conscience in determining the guilt or innocence of any of these defendants, isn't that true?

A. I will.

Mr. Rosenthal: No challenge for cause.

Mr. Turkus: Just a couple of questions that have been suggested.

By Mr. Turkus:

Q. Mr. Rosenthal spoke to you about an alibi. He very properly said that whether the defendant invokes such a defense or not, you will expect the State to establish guilt beyond a reasonable doubt; is that correct?

A. That is correct.

Q. In the event that you find that any defendant interposes a false alibi, would you find an instruction of law

repugnant to your sense of fair play that a defendant who concocts and submits a false alibi, that that may be deemed by the jury to be an evidence of consciousness of guilt on the part of that defendant?

A. Yes, if the Court so charged me.

[fol. 686] Q. Would it be repugnant to your sense of fair play?

A. It would not be repugnant, no.

Q. Does it appear to be common sense?

Mr. Rosenthal: I object to that question.

The Court: Sustained. I think you said— I think it is discretionary.

Mr. Turkus: Yes, with the jury.

The Court: And the application of the rule of evidence must be consistent with common sense of the individual juror.

Mr. Turkus: What I want to find out, if there is anything repugnant by that kind of a charge.

The Court. The juror is not required to take that view. The juror is simply entitled to take that view——

Mr. Turkus: If he desires.

The Court: If it seems to him to be sensible.

Mr. Turkus: That is why I am asking the question.

The Court: Because a person who is not guilty may in zeal over-reach and put in a false alibi and in that way more or less hurt his case. That is for the jury to say.

Mr. Turkus: Yes.

The Court: Will you apply the law as given by the Court on that point?

The Talesman: I will.

Mr. Turkus: Something has been said——

The Court: I think what is probably a correct statemen-[fol. 687] of the law is that such evidence, if put in, may tend to shake the confidence of the juror as to the other evidence put in by the defense.

Mr. Turkus: I will not go into any further discussion on the law. The juror has indicated he will follow the law as given by the Court, and I take it endeavor conscientiously to apply it to the facts in the case.

The Talesman: Yes.

By Mr. Turkus:

Q. Something has been said by some other prospective talesman about the sentence of the defendant Buchalter. Would you permit the fact that he has been convicted of prior crime and under sentence, would you permit that to cause you to deviate from a proper disposition of this murder charge?

A. No.

Q. In the Rosen case. Would you permit it to cause you to relax your duty as a juror in this murder charge?

A. No.

By Mr. Barshay:

Q. And of course, by the same token, you would not cause that to prejudice you against Mr. Buchalter?

A. Yes.

Mr. Turkus: Peremptory.

Max Oliver, of 362 Linden Boulevard, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

[fol. 688] Q. Mr. Oliver, the trestle board lists your address as Linden Boulevard; is that correct?

A. That is correct.

Q. Is that in the Flatbush section of Brooklyn?

A. Yes, sir.

Q. Would it be down in one of those "East" streets?

A. That is right; it is one block off New York Avenue.

Q. Have you lived in Brooklyn a number of years?

A. About twenty years.

Q. The trestle board lists your occupation as that of assistant district manager, with no other designation. Are you employed by some utility company?

A. Metropolitan Insurance Company.

Q. Metropolitan Life Insurance?

A. That is right.

Q. I am not familiar with the workings of a life insurance company. What is a district manager? Is that the man who handles policies?

A. Has charge of sales promotion, charge of the agents, office staff.

Q. Where is your branch?

A. 1 DeKalb Avenue.

Q. Is that the main Brooklyn office?

A. No, we have twenty-three offices in Brooklyn.

Q. And that is the district branch office the same as any of the other twenty-three offices?

A. That is right.

Q. Does the assistant district manager have charge of the various representatives of the company who sell life insurance?

A. He has charge of anywhere between ten and twelve agents.

Q. And those are agents who go out on the field, I take it, [fol. 689] and solicit business for the company?

A. That is right, also service previous accounts, collect accounts.

Q. Collect premiums?

A. That is right.

Q. And help the client in getting proper protection for his money etc., etc.?

A. Right.

Q. Do the men under your supervision come in contact with clients in the Brownsville-East New York section of Brooklyn?

A. You see, the men on my staff, in fact, for that matter, all men of this territory have State license. They can sell insurance anywhere in the State of New York, but the rule we confine ourselves to a particular territory. Our territory runs as far as Ralph Avenue, Brooklyn; from Nostrand to Ralph.

Q. Do you go out in the field in your work at all?

A. I do.

Q. And do you cover other territories beside the——

A. Occasionally, not as a rule. Occasionally when a man has a case off our territory and he needs assistance, I will go out and help him close a case.

Q. Do you have any business contacts, directly or indirectly in that Brownsville-East New York area of Brooklyn?

A. I have had in the past. I have been on the job for eighteen years now and then.

Q. Do you maintain any contact with people there as a general practice?

A. No, sir.

Q. People in that district?

A. No.

Q. Do you know whether you had any contact out there [fol. 690] as recently as four years ago?

A. No. I lived out there about twenty years ago.

Q. Did you live in the East New York section?

A. That is right.

Q. Have you followed the O'Dwyer investigation with any degree of interest?

A. No.

Q. Have you any contacts now in that East New York neighborhood?

A. None at all, with the exception that I am somewhat active in the Scout movement. That is the Sunrise District and they cover part of East New York section.

Q. So one of your outside activities is Boy Scout work?

A. That is right.

Q. In an official capacity, is it?

A. As an assistant Scout master.

Q. In a troop in connection with some church or social activity?

A. It is in a school house we have all our meetings.

Q. And the one in charge of the troop is a Scout master, and you are assistant to him?

A. That is right.

Q. Take the boys out on hikes?

By the Court:

Q. Is that the school corner of Bedford Avenue?

A. No, the school is East New York and Rockaway.

Q. That is a new school?

A. I really don't know how old the school is.

By Mr. Turkus:

[fol. 691] Q. The children in the troop are all children that live in that vicinity, that is, in East New York area?

A. Yes, most of them are. You see, my particular case, my boy is in that troop and I do not live in that area, but due to my boy I joined that troop.

By the Court:

Q. That is a high school, isn't it?
A. No, it is a public school.
Q. Junior high?
A. It probably is a junior high.
Q. That is a long distance from where you live?
A. Yes.
Q. You are in the Holy Cross section? You are just east of the cemetery?
A. That is correct.
Q. In fact, right up there at Church Avenue and East New York Avenue there is a monument place, isn't there?
A. That is right.

By Mr. Turkus:

Q. I do not want to unduly pry into your personal life.
A. You can go right ahead.
Q. You will understand what our purpose is?
A. I understand.
Q. I cannot gather the significance of the fact that you live out in the Holy Cross neighborhood and then you go out to East New York because your boy is in a troop.
A. I will explain that. I will make it clear. A friend of mine is quite active in the Scout movement out there, and his boy is in the same troop, and that is how he induced [fol. 692] me to bring my boy out to that particular troop, and that is how I became active in that troop.
Q. Then I take it that you and the Scout master are particularly good friends and he interested you in bringing your son out to that troop, and that is how you got interested in the Boy Scout movement.
A. That is right.
Q. Have you been going out there for the last number of years?
A. No, it is less than a year.
Q. Have you any business or social contact with people who are connected either directly or indirectly in the garment district in Manhattan?
A. No, sir.
Q. The manufacture of men's clothing?
A. No, sir.
Q. Or ladies' clothing of any kind, nature or description?
A. No.

Q. Do you know any person directly or indirectly who has some affiliation or connection with clothing truckers?

A. No, sir.

Q. Have you been engaged in this position as assistant district manager for a number of years?

A. Seven years.

Q. And prior to that what was your business?

A. An agent, also with the company.

Q. Other than insurance, have you been in any other line of business?

A. Yes, prior to coming to the insurance business I was a manager for the United Cigar Stores.

Q. Would that be in charge of a particular store?

A. That is right.

[fol. 693] Q. In what locality were the stores?

A. Stores were located in the lower part of Manhattan, Canal Street, 14th Street.

The Court: What stores?

Mr. Turkus: United Cigar Stores.

Q. Were there any in proximity to Fifth Avenue in Manhattan?

A. Well, I worked in numerous stores in Manhattan. Fifth Avenue, yes, at one time in the Flatiron.

Q. In the Flatiron building?

A. That is probably twenty-four or twenty-five years ago.

Q. Do you know any people in the Flatiron building now?

A. No.

Q. Who maintain offices there?

A. No.

Q. You say it is many years ago since you had a job that kept you in that Flatiron building?

A. That is about twenty-four or twenty-five years ago.

Q. Are you familiar with the layout of the Flatiron building?

A. Yes.

Q. With the entrances that go into the building?

A. Yes.

Q. In connection with the Flatiron building did you ever hear the name of Lepke?

A. No, sir.

Q. Mr. Oliver, have you heretofore served as a juror in any type of case?

A. No, sir.

Q. Not even a civil case?

A. No, sir.

Q. I take it you have heard sufficient questions put to [fol. 694] jurors about the obligation of the juror to take the law from the Judge?

A. Yes, sir.

Q. If accepted as a juror, will you take the law in every aspect, in every detail, from the presiding judge?

A. Yes, sir.

Q. Since you received your notice of prospective service as a juror in the case, did anybody speak to you about the case?

A. No, sir.

Q. Did you have any discussions with anyone in connection with the merits of the case?

A. No, sir, I just talked with my family and in the office that I was subpoenaed as a juror.

Q. That was, of course, merely in relation to your prospective service as a juror?

A. Right.

Q. Does the Scout work bring you out to East New York about once a week?

A. Yes.

Q. They meet once a week.

By the Court:

Q. Have you lived out there?

A. In East New York, about twenty years ago.

Q. Where did you live?

A. Ashford Street and Sutter.

By Mr. Turkus:

Q. What street did you live on?

A. 432 Ashford Street.

Q. How near to Bradford and Sutter is that?

A. Oh——

By the Court:

Q. Ashford runs from Etna, doesn't it?

A. Yes.

Q. South?

A. That is right. It is probably about——

[fol. 695] Q. Around the Snake Hill district?

A. It is probably about fourteen or fifteen blocks.

By Mr. Turkus:

Q. You are familiar with Sutter Avenue and the surrounding locale there, aren't you?

A. Somewhat.

Q. With Van Sinderen Avenue and Livonia?

A. Yes.

Q. Where that railroad bridge and cut is?

A. That is right.

Q. And you are familiar with Linton Park near Blake and Sutter? There is a park called Linton?

A. Where they have a swimming pool in there?

Q. This is a small park.

A. No, I am not familiar with that park. I know there is a park over on Blake and New Jersey, or one of those.

Q. That is——

A. Betsy Ross Park.

By the Court:

Q. Are you familiar with that particular section where that school is?

A. Yes.

Q. Are you familiar with Saratoga and Livonia; that is about five blocks away?

A. Yes.

Q. Do you know the cigar and candy store at the corner?

A. Not to that extent.

Q. Rose Gold's.

By Mr. Turkus:

Q. Are you familiar with the territory around Sackman and Livonia?

A. Well, I am familiar with all that part of East New [fol. 696] York because I live- there a few years.

Q. And of course going into that district now about once a week?

A. No, not that often. I only go as far as this particular school that I go to the Scout meeting, and that is just a couple of blocks off, or probably one block off Eastern Parkway. I don't go into Brownsville.

By the Court:

Q. Are you familiar with the Fulton Street section?

A. Yes.

Q. Fulton and Rockaway?
A. Yes, sir.
Q. Do you remember the layout? Do you know any of the stores there?
A. No.
Q. Do you ever go to any of the stores there?
A. No, sir.
Q. Do you know any of the storekeepers?
A. No, sir.

By Mr. Turkus:

Q. I think your district takes in Atlantic Avenue and Eastern Parkway too, doesn't it?
A. No, we don't go as far as that. Rockaway Avenue is our borderline.
Q. Did you ever hear the name of George Rudnick?
A. No, sir.

By the Court:

Q. By "district," you mean the 18th Assembly District?
A. No, your Honor, I mean the territory that we cover, our particular office, covers in Brooklyn.
Q. Does it cover Rockaway and Fulton?
A. Yes, sir, one side.
Q. That is Ocean Hill.

[fol. 697] By Mr. Turkus:

Q. Do you do business up in that Ocean Hill district?
A. I personally don't.
Q. I mean your men.
A. My men do business, yes.
Q. Various names must be familiar.
A. I don't know just what particular part is called Ocean Hill.
Q. You have mentioned some of the places that are called Ocean Hill. Do you know whether there is any familiarity with the name Vito Guarino or Happy Maione, Harry (Happy) Maione?
A. I saw the name in the paper.
Q. And The Dasher Abbandando?
A. Also in the newspaper.
Q. Of course, going into that area about once a week you hear discussions about the O'Dwyer investigation, don't you?

A. No, we have very little time. We get there about half past seven and we have to get the kids home by nine-thirty, so we have very little time to go into details, to discuss murders or criminal cases.

Q. As an assistant Scout master you come in contact with various of the adults interested in the troop?

A. That is right.

Q. For example, you come in contact with the parents of the various Boy Scouts?

A. Yes.

Q. And you frequently have nights when there is a parents' night?

A. That is right.

Q. They come around and watch the progress of the Scout as he goes by?

A. That is right.

[fol. 698] Q. Wearing his medals, going through the knots and the other wood carving and the other type of work that Scouts study. Hasn't there been discussion in that district by people about the O'Dwyer investigation?

A. No. In fact, I spent a few months back, I spent a fortnight hike with all the Scout leaders of the district and there was no discussion of any particular criminal investigation of any kind.

Q. Part of your job as a Scout master is to direct the youth in the right channels?

A. That is right.

Q. You do come in contact with the adults and the problems that they may have in the immediate vicinity. Do you follow me?

A. I am following you.

Q. Haven't there from time to time been discussions with those who are interested in the welfare of the Boy Scouts, particularly that troop in that East New York area of Brooklyn, as to local conditions in that section?

A. None that I remember offhand.

Q. Well, for example, aren't the various corners spoken of by parents or by others interested in the Scout troop, corners that have been a frequent hangout for certain types of individuals?

A. I have attended very few of those parents' meetings. I have devoted myself wholly to my particular troop. I believe I have attended once, and the second time was that

fortnight hike with the leaders of the troop and all the problems of the troop are talked about.

[fol. 699] Q. Well, at any rate, there are policy holders which are supervised by men under your jurisdiction who live in this Ocean Hill area that you have described?

A. Yes.

Q. I take it that you have read newspaper accounts about certain activities of people in that Ocean Hill area?

A. I have read a lot in the newspapers, stories.

Q. You have read the name of Maione and Abbandando?

A. Yes, definitely.

Q. And Pittsburgh Phil Strauss, and Martin (Buggsy) Goldstein and a lot of other characters, have you not?

A. Yes, sir.

Q. And I take it you followed those articles with some degree of interest?

A. Not necessarily.

Q. Well, some of the ones whose names I mentioned come right out of that Ocean Hill area, others come from various places in Brownsville.

A. I could not tell you where.

Mr. Climenko: I object to the question as argumentative.

The Court: It may refresh this man's memory as to whether he has ever heard neighborhood gossip which may prejudice him one way or the other.

Q. I think you may have lost track of what I was trying to find out.

(Pending question read.)

Mr. Climenko: I object to the form of the question. I do not know what the question is.

[fol. 700] The Court: This is preliminary, I take it, to the question. Frame your question.

Mr. Turkus: I have lost it twice myself.

Mr. Climenko: Then we agree on that.

Mr. Turkus: We don't agree yet.

Mr. Climenko: We don't know what the question is.

By the Court:

Q. Do you know what Mr. Turkus means is that in that Ocean Hill section there may or may not have been gossip which logically may have reached your ears concerning

matters which may cause a prejudice in this case. He wants to know if that is so.

A. No, sir.

Mr. Turkus: Have you listened to any gossip or any talk by the salesmen?

Q. Does the name Maione mean anything to you?

A. Only that I saw the name in the paper.

Q. I mean in connection with industrial insurance by the Metropolitan.

A. Maione?

Q. Maione.

A. No.

Q. You don't recall whether there are any policies in that district carried by your office for any of the Maiones?

A. No.

Q. Or if there ever have been?

A. If they are, I have no particular knowledge. It would be humanly impossible to know them all. Each office has ten to twelve thousand policy holders.

Q. That is, they are so numerous you do not carry them [fol. 701] in mind?

A. That is right.

By Mr. Turkus:

Q. You see, Mr. Oliver, what I am trying to find out is this: Having lived in this East New York district of Brooklyn and now going back frequently because of your Boy Scout work, and having in mind the guidance of youth in the proper channels, and away from certain street corners and certain influences, what I am trying to find out is, hasn't there been some natural curiosity on your part about the investigations of Judge O'Dwyer which affected certain portions of those areas in Brownsville and East New York and certain people in them?

A. No, sir, because I have been away too long from there and I have lost all personal friendly connections. I have not a friend there that I can go and spend a couple of hours with.

By the Court:

Q. Your connections center in the neighborhood of your home?

A. And the little time I spend in the Scouts; that is once a week.

Q. Do you mind telling us what other way you have of killing your time?

A. My position keeps me out approximately four to five nights a week. I go out nine-thirty or ten o'clock.

Q. You do not have to find a place to play cards?

A. If I play cards I play right in my own home on Friday or Saturday night.

Q. Not on the corner of Nostrand Avenue and Church?

A. No, sir.

[fol. 702] By Mr. Turkus:

Q. The Judge has elicited the fact that you spend four or five nights a week in the pursuit of your business.

A. That is right.

Q. And that would be done with other of the men under your jurisdiction, in helping them either service a policy or in helping them effect a sale, I take it?

A. Not all the time do I spend the time with men in the office. I have other work, other detail work to do, such as investigations or personal cases where the agent cannot service the case and requires an assistant manager to handle a particular case, and those are the cases I have to go out in the evening to service those accounts.

Q. In other words, your duty as agent for the company would require that you go out and make certain independent investigations for the company?

A. That is right.

Q. Does your work there bring you into that Ocean Hill neighborhood too?

A. Very seldom.

Q. Or anywhere on the border of the Brownsville-East New York areas?

A. On the border, yes, as far as Rockaway Avenue.

Q. Have you ever heard the name of Joseph Rosen mentioned?

A. No, sir.

Q. The candy store proprietor?

A. With the exception that I heard it in the court-room and I saw it in the paper.

Q. Did you ever hear it mentioned before you heard it in the court-room?

A. No.

[fol. 703] Q. Did you read about the killing of Joseph Rosen when it occurred four years ago?

A. If I did, it escaped my mind.

Q. So that what is in your mind now is something that you have read rather recently; is that correct?

A. That is right.

Q. What papers do you usually read, Mr. Oliver?

A. I read the *Times*, the *News*, the *Post*, and also the *Telegram*.

Q. I take it that you have read these articles in the *Telegram*?

A. No, the *Telegram* I read very seldom. As a rule, if I cannot obtain a *Post* sometimes I even read the *Sun*.

By the Court:

Q. You do not care for the *Telegram* articles?

A. No.

Q. There was another talesman examined here who lived a few blocks away from you. He lived on New York Avenue just off of Church. Do you know him?

A. No, sir.

Q. Somebody who lived a few blocks from Harry Strauss. Did you ever hear that name?

A. No, sir.

By Mr. Turkus:

Q. In reading the name of Joseph Rosen, do you recall whether or not you read that he was the proprietor of a candy store at the time of his death?

A. That is right.

Q. And that the candy store was situated on Sutter Avenue?

A. Somewheres in East New York.

Q. And did you read in the articles the alleged motive, that is, what the alleged motive was in so far as the newspaper story was concerned?

A. Yes.

[fol. 704] Q. For his killing?

A. Yes.

Q. The part that these defendants allegedly played in the killing of Rosen?

A. Yes.

Q. What they did? I take it that those details are in your mind now as we talk it over?

A. Merely as news items.

Q. As a news item is the name of Lepke familiar?

A. Yes.

Q. And that of Gurrah?

A. Yes.

Q. The name of Weiss?

A. Yes.

Q. Capone?

A. Yes.

Q. I take it that there has been some impression formed in your mind from reading of the press accounts?

A. I would not say that.

Q. The reading of the accounts showing the alleged motive and the details of the killing left no impression at all?

A. No, sir.

Q. Did the reading of any articles in connection with the name of Lepke or Capone or Weiss leave you with an impression as to those individuals, as to who they are and who they may be?

A. I don't quite know just how you mean that.

Q. Well, when you read about a man named Lepke, you read articles about him, did that leave your mind with an impression as to the character, for example, of such an individual?

A. Well, it is merely a newspaper article that these particular individuals are charged with some particular crime.

Q. But did that leave an impression with you?

[fol. 705] A. I would not say so.

Q. Mr. Oliver, I am not trying to unduly pry, but you go into this Rockaway Avenue school?

A. Yes.

Q. You have lived in this neighborhood in the vicinity of Sutter Avenue and there has been a lot of newspaper publicity about happenings in that district.

Mr. Rosenthal: I object.

Mr. Turkus: That is only preliminary.

Q. What I am trying to ascertain from you is whether there has not been a little more interest displayed by you in the reading or in anything that may have been said in that neighborhood affecting these investigations.

Mr. Rosenthal: I object to the form of the question and to the preliminary.

The Court: Overruled.

Mr. Rosenthal: Exception.

(Pending question read.)

A. No.

Q. Well, is there anything that you may have read which has given you any bias or prejudice against the defendants in this case?

A. No, sir.

Q. Is there anything that you may have heard or read that would cause you to incline to favor the defendants in any way?

A. No, sir.

Q. Is your mind completely open as to their guilt or [fol. 706] innocence?

A. Yes, sir.

Q. And if accepted as a juror, you could discharge your duty without any impression having been formed as to guilt or innocence by anything you have read or heard?

A. Yes, sir.

Q. If during the course of the trial the names of certain individuals in the Brownsville-East New York area or the Ocean Hill area should come into the testimony, would you be embarrassed in any wise as a juror?

A. No, sir.

Q. Did your business at any time bring you into contact with any individuals on Livonia Avenue or Saratoga Avenue?

A. Some years back I wrote some personal insurance there.

Q. Was it in connection with stores in that district?

A. No, just life insurance.

Q. Were they proprietors of stores?

A. No, mostly professional people or people that were employed in New York.

Q. And by professional people do you mean——

A. Dentists, doctors.

Q. Lawyers?

A. That is right.

Q. Did you know any Assistant District Attorney on the staff of Mr. Geoghan when he was District Attorney of the county?

A. No, sir.

Q. I take it, then, that you did not know Mr. Barshay and do not know him?

A. No.

Q. Did you know Mr. Geoghan personally?

A. No.

Q. Your work of investigation for the company, does that [fol. 707] bring you in contact with police officials?

A. No.

Q. Do you ever have any occasion to visit at the office of the District Attorney of the county?

A. No.

Q. Do you conduct an independent investigation for the company?

A. That is right.

Q. Without the use of any private or other detective?

A. That is right.

By the Court:

Q. Did you say your office was down ther at the Albee Building?

A. That is right.

Q. And you are the assistant?

A. Assistant in charge.

Q. Were you there when Donald Sinclair was the head?

A. Donald Sinclair was in the Dime Savings Bank.

Q. That is right where you are?

A. I am in the Albee Building.

Q. Dime Savings Bank is across the street?

A. Williamsburgh Savings Bank.

Q. He was office president of the Metropolitan?

A. He was very active in the hospital in Brooklyn.

Q. Caledonian Hospital?

A. That is right.

Q. He founded it.

A. I went to his funeral.

Q. Then you knew him?

A. Yes.

Q. A very good man?

A. Yes, sir.

Mr. Turkus: My attention has been directed to the fact it is four o'clock, your Honor, and counsel say they desire

[fol. 708] to interview their respective clients. I will be another half hour, at any rate, or longer.

Q. How long did you know Mr. Sinclair as a friend?

A. I could not call him friend——

Q. You had a very great opinion of him?

A. Yes.

Q. So much so that you went to his funeral?

A. That is right, through business, through various conferences that we had.

Q. You formed a splendid impression of him. He had good friends. I knew him many years.

The Court: It is four o'clock. We will recess until tomorrow morning at ten. Kindly do not discuss the case, gentlemen. Keep your minds open. Do not read the papers and do not listen to the radio. Have no contact with any person in connection with the case.

Defendants remanded.

(Whereupon an adjournment was taken until September 26, 1941 at 10 a. m.)

[fol. 709] Brooklyn, N. Y., September 26, 1941.

Trial Resumed

(On direction of the Court, the Clerk calls talesmen Charles Bernhardt, No. 2645; Samuel Dronkin, No. 2748; Max Pollock, No. 2807; Sig Kramer, No. 2613; John J. Tully, No. 2601; who were seated in the jury box, subject to call for examination. All other talesmen were excused until Monday, September 29th, at 10 a. m., with the same admonition as heretofore given.)

Max Oliver, resuming the stand for examination as to his qualifications, was examined.

By Mr. Turkus:

Q. What is the name of the district manager of your branch?

A. Martin Labner.

Q. Wasn't he a juror in the Knadles Nitzberg case?

A. Yes, sir.

Q. That was a case where the jury was secreted in the hotel?

A. Yes, sir.

Q. He is your immediate superior?

A. Yes, sir.

Q. I think you came to see him from time to time?

A. I saw him every day.

Q. On business, I mean, while the case was in progress?

A. No, sir, I did not.

Q. Now, did you have any discussion with the manager [fol. 710] about the Knadles Nitzberg case?

A. After the jury was discharged; he was the alternate juror.

Q. That is the case in which the mention of the names I suggested to you figured in the testimony?

A. Well, I discussed the case with him right after, sometime after he was discharged and one of these defendants' names was brought in at that particular discussion of ours.

Q. I hope you understand why I ply all these questions to you—it is encumbent upon the District Attorney not only to secure a jury fair to The People of the State, but, by the same token, which will give the defendants a fair trial. I imagine you must have watched the Knadles Nitzberg case with some interest?

A. That is right.

Q. Since your manager was on the jury?

A. Yes, sir.

Q. There was mention of the names you spoke of?

A. Yes, sir.

Q. Do you still feel you can be fair to these defendants in every respect?

A. I think so, now after I know so.

Q. Did you read any of the articles in the case of Nitzberg?

A. Just the news items; I could not say I went into the details of the articles any more than, I mean, describing the discussions I had right after he was discharged from duty, but I remember distinctly that of the defendants here—his name was brought into the discussion.

Q. There was considerable newspaper notoriety?

A. Yes, sir; there was a few more, but I could not think of their names.

[fol. 711] Q. That was earlier this year?

A. Sometime in June, I believe.

Q. If you were to serve now on a protracted trial, would that affect your business, your boss having served in June?

A. To a small extent, because there is another assistant manager in the office besides myself.

Q. In the event the trial will be lengthy, would you be handicapped in your service as a juror by the length of the trial, in view of the prior service in the Nitzberg case?

A. No, sir.

Q. Have you had discussions with anyone other than your manager, that is, the district manager, your immediate superior, and the reading in the newspaper which you told us about, have you had any discussions with reference to Judge O'Dwyer's investigations at all?

A. No, sir.

Q. Or any discussions in reference to any of the specific defendants in this or any other case?

A. No, sir.

Q. Nowhere at all with anyone?

A. No, sir.

Q. Did you at any time, while in the East New York section of Brooklyn, which you told me yesterday about, that is, about once a week, did you ever hear mentioned the names of any of these defendants in this case?

A. No, sir.

Q. In your discussions with anyone in that area?

A. No, sir.

Q. Or with any of your representatives, that is, the men who work under you, and who have business in the Ocean [fol. 712] Hill district in Brooklyn?

A. No, sir.

Q. Do you find any fault with a prosecutor who breaks a case from the inside and avails himself of the use of testimony of accomplices, that is, co-participants in a crime, and uses it against the defendants?

A. No, sir.

Q. Have you any inherent bias or prejudice against the use of accomplice testimony in the prosecution?

A. No, sir.

Q. Have you any bias either against the prosecutor or the prosecution of a case in which accomplice testimony is heard?

A. No, sir.

Q. I take it you understand what an accomplice is.

A. Yes, sir.

Q. In weighing the credibility of the testimony, emanating from accomplices, the other prospective talesmen have been asked would they weigh the character of the individual, his past life and his past history in crime, and give that consideration when they weigh his believability. Will you do the same things?

A. Yes, sir.

Q. Will you apply the test to various individuals, the test you got from experience, in weighing the believability of people when they take the stand in this case?

A. Yes, sir.

Q. Will you weigh everything in connection with what causes an individual to testify, what may motivate him to testify and every human and pertinent test you can conjure up to the effective weighing the credibility of such individual?

A. Yes, sir.

[fol. 713] Q. By the same token will you weigh the advisability of the District Attorney first getting rid of the defendants and taking care of accomplices later? Will you weigh those factors?

Mr. Climenko: As I understand it, that relates to a question of judgment; it is nothing to present to a jury.

The Court: Objection sustained.

Q. Will you use common sense and understanding in weighing every aspect of the case?

A. Yes, sir.

Q. And look over with common sense and understanding all aspects of the case like you do in your every-day affairs of life?

A. Yes, sir.

Q. Will you remember, when you are applying the tests, you are applying the tests to people in the commission of crime, not to people you meet socially and people you mingle with in your social life?

Mr. Climenko: I object.

The Court: You mean in reference to determining the issue?

Mr. Turkus: Yes.

Q. As you sit in the jury box, is there anything concerning which I have made no question which would affect your ability to sit as an impartial juror?

A. No, sir.

Q. Are you satisfied in your own mind that, from your travels in the East New York section on an average of once [fol. 714] a week, by reason of your Boy Scout activities, there is nothing you have heard and nothing in the back of your mind which you have heard through the jury service of your manager that would affect your qualifications to sit in this case?

A. No, sir.

Q. With respect to any defense that may be interposed, in the event the defendants should interpose a defense of alibi, will you take the law in respect to such defense and the law in every regard exclusively from Judge Taylor?

A. Yes, sir.

Q. Did I inquire yesterday whether or not you had prior jury experience?

A. I believe you did.

Q. I believe the answer was in the negative.

A. Yes, sir.

Q. If selected in this case, will you listen to fair argument and reasonable discussion in the jury room?

A. Yes, sir.

Q. In your business life have you problems you must iron out with other executives?

A. I did, often.

Q. Has that been going on over a period of time?

A. For about ten years.

Q. Is the name of the head of the Control Committee of the Amalgamated familiar to you at all?

A. No, sir.

Q. Did I ask you yesterday whether or not you knew Messrs. Kleinman and Price, members of the bar?

A. No, sir.

Q. Do you know Kleinman or Price, lawyers?

A. No, sir.

Q. Does your business bring you into contact with lawyers from day to day?

A. Very seldom.

Q. Do you know intimately any member of the bar who [fol. 715] specializes in the defense of criminal cases?

A. I know quite a few members of the bar, but not criminal lawyers.

Q. Are they practicing in Brooklyn?

A. Yes, sir, offices on Court Street and on Montague Street.

Q. Would it be at 185 Montague Street?

A. I believe that is the number.

Q. Who specifically in that building do you know?

A. Mr. Sparrow.

Q. On the fifth floor?

A. I have not been in his place.

Q. Is he associated with William Bernstein?

A. I could not tell you.

Q. Do you know of any other lawyers in this downtown area?

A. No, sir.

Q. Does Mr. Sparrow specialize—Question withdrawn.

Q. Is Mr. Sparrow a specialist in any type of legal work, to your knowledge?

A. No, sir, general practice; in fact, he is the gentleman that interested me in scout movements.

Q. Is he a Scout master or has he some official title?

A. He has some official title in that particular district.

Q. Is that Scout troop associated with any church?

A. No, sir, a school.

Q. Is it sponsored by any church or any society?

A. No, sir.

Q. There are troops attached to various churches and synagogues?

A. Yes, sir, even some fraternal organizations have scouts.

[fol. 716] Q. Is there any sponsor behind this particular troop?

A. No, sir.

Q. Through your scout activity, have you taken any interest in law enforcement in that area?

A. No, sir.

Q. Or any interest in any of the juvenile problems pertaining to the area of East New York?

A. No, sir.

Q. Are you brought in contact with police officials of the East New York area in regard to conditions in that district?

A. No, sir.

Q. Have you interested yourself in the problem of juvenile delinquency in and about that section?

A. Only that I met a couple of classes of the P. A. L. when the troop was formed.

Q. Have you attended any series of discussions or lectures upon the problem?

A. No, sir.

Q. Other than the work you do at night and the scout work you attend to once a week, that has been the limit, I believe, of your outside activities?

A. Yes, sir, and, of course, fraternal organizations I attend to once in two weeks.

Q. Is your state of mind such that this case is important not only to the People of the State of New York but to these defendants on trial? Do you feel this is an important case, important both to The People of the State of New York and to the defendants on trial?

A. I imagine every murder case is important to both sides.

Q. Is there any question I have asked of you that has led [fol. 717] you to favor the prosecution or aid the prosecutor?

A. No, sir. I feel it is your duty to ask these questions.

Q. I think you appreciate that in asking these questions we are endeavoring to get a jury that will be fair and impartial to both sides, although sometimes questions appear almost to be personal, but counsel cannot help that?

A. Yes, sir.

Q. If selected in the case will you endeavor conscientiously to arrive at a just decision?

A. Yes, sir.

Q. I assume that will be in consonance with justice?

A. Yes, sir.

Q. And in consonance with the evidence in the case?

A. Yes, sir.

Q. I take it you have no prejudice against any type of expert testimony, whether it be ballistic, handwriting, or otherwise?

A. No, sir.

Q. And if selected will you listen to reasonable argument from the other jurors?

A. Yes, sir.

Q. Supposing you take your place as Juror No. 2 in this case and you hear all the evidence, you listen to all the defense lawyers tell you what they think of the evidence, you listen to the prosecutor tell you his inference, and the Court charges you on the law, and you discuss the case sensibly and with reason with your fellow jurors in the sanctity of the jury room, and you come to a conclusion beyond a reasonable doubt that there are three guilty men at the [fol. 718] bar of justice, Buchalter, Weiss, and Capone, that they are guilty of murder in the first degree, the murder of Joseph Rosen—if you are satisfied beyond a reasonable doubt as to that, would you hesitate to say so?

A. No, sir.

Q. Would you have any fear or reluctance in saying so?

A. No, sir.

Q. Is there anything about your past life or present business connections that would cause you any present or future embarrassment in rendering such a verdict?

A. No, sir.

Q. It is not possible you might be bothered by any question the lawyer may ask you in this kind of examination?

A. No, sir.

Q. You said you had discussed the name of a defendant with your superior.

A. Yes, sir.

Q. At the end of the trial of a case, that was tried in Brooklyn some months ago?

A. Yes, sir.

Q. Have you discussed the defendant Buchalter, or did you at that time?

A. No, sir.

Q. Did you at any time discuss the defendant Buchalter with anybody?

A. No, sir.

Q. At no time?

A. At no time.

Q. So as you sit here now, searching your recollection, you cannot remember at any time having any conversation with any individual about Mr. Louis Buchalter?

A. That is right.

Q. You have never been personally interested in him, nor have you met those people who are interested in him, [fol. 719] whom you engaged in conversation about him?

A. That is correct.

Q. You also said that you had read articles about some defendants.

A. Yes, sir.

Q. Did some of these articles relate to Mr. Louis Buchalter?

A. Just as a news item.

Q. In what newspaper?

A. I read various papers. I read the *Times*, the *News*, the *Post*, and once in a while the *Telegram*.

Q. Did you recently read any newspaper articles about any of the defendants?

A. No, sir.

Q. In consequence of your reading any article at all, did you form an impression about any of the defendants?

A. No, sir.

Q. Have you ever sat as a juror at any time in any case?

A. No, sir.

Q. So that when Mr. Turkus and the other lawyers in the court talk about your understanding the doctrine of the presumption of innocence, it is just a form of words for you? You understand about the theory of presumption of innocence? You heard that phrase before?

A. Yes, sir.

Q. And you understand the mere filing of an indictment is nothing more than an accusation?

A. Yes, sir.

Q. It has no evidentiary value?

A. Yes, sir.

Q. Assuming the Court should charge you, as a matter of law, that the mere fact that an indictment has been filed is not to be considered by you in any manner as evidence of the commission of a crime by the defendants, would you [fol. 720] have any difficulty in following that doctrine?

A. No, sir.

Q. So that, were you to be instructed that the defendants are clothed with a presumption of innocence, you would have no difficulty in following that instruction of law?

A. No, sir.

Q. And were you to be further instructed that the defendants, one or all of them, are continuously presumed to be innocence unless they are proven guilty beyond a reasonable doubt, you would have no difficulty in following that conception of the law?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. You would have no difficulty, even though the theory of reasonable doubt were explained to you and the Court should charge you—Withdrawn.

Q. Supposing the Court were to charge you, as a matter of law, that if, after hearing all of the evidence, you entertain a doubt about the guilt of a defendant or all of them, a doubt for which you could ascribe a reason, that then you were in honor bound, under oath, to return a verdict of Not Guilty, would you have any difficulty in following that instruction of law?

A. No, sir.

Q. So, if you entertained any doubt for which you could give a reason in the operation of your mind, it would be your duty, if you are in doubt——

Mr. Turkus (interrupting): I think the instructions should come from the trial justice at the proper time. It [fol. 721] is not "any doubt."

The Court: For which you can ascribe a sensible reason.

By Mr. Climenko:

Q. Assuming the Court should instruct you, as a matter of law, that it was your duty as a juror, if, after hearing all the evidence you had a doubt, and that doubt, in turn, came from a sensible reason, if you had such a doubt about any of the defendants, that it was your duty under your oath as a juror to return a verdict of Not Guilty, would you be under any hesitation in following that instruction of law?

A. No, sir.

Q. You would accept that readily?

A. Yes, sir.

Q. Along that line I would like to ask you—Mr. Turkus referred to the fact that no doubt you, in the discharge of your duty, have had occasions where it was necessary for you to discuss matters of policy with your associates.

A. Yes, sir.

Q. And discuss reasonably and intelligently, and in a civilized way, and come to an understanding with your associates?

A. Yes, sir.

Q. Be they your seniors, equals, or subordinates?

A. Yes, sir.

Q. Now, assuming that the Court should charge you that it is your duty, and the duty of every other juror, in the consideration of the case, to make a reasonable effort to agree with your co-jurors, but that you were under no obligation to surrender your individual determination un- [fol. 722] less you were really convinced by persuasions they brought to bear in support of their arguments, and that if you were not convinced, it was your duty as a juror to adhere to your own feelings and not to scare; if you were convinced, would you have any difficulty in following that instruction?

A. No, sir.

Q. In other words, you may understand that in the course of business life it may sometimes become necessary to reach an understanding with your associates, whereas in the discharge of your duty as a juror it may become necessary for you to adhere to your own determination if you are not convinced by the arguments of your fellows?

A. Yes, sir.

Q. Now, as you sit here now, have you any attitude with respect to any of the defendants which would prevent you from hearing the testimony without prejudice against them or sympathy for them?

A. None whatever.

Q. Assuming you should be instructed, as a matter of law, by the Court, that the defendants are not under any obligation to produce any proof, and assuming, as a hypothetical question, that the defendants should, in the discretion of their counsel, not call any witness, would that prejudice you against the defendants?

A. No, sir.

Q. In other words, you understand that if the Court should instruct you that the prosecution has the burden of proof and that the defendants are not under any obligation to adduce any proof, you would have no difficulty in fol- [fol. 723] lowing that instruction?

A. That is right.

Q. Are you acquainted with any member of the Police Department?

A. In my line of business we meet numerous people in the Police Department.

Q. Have you at any time formed a firm, intimate social friendship with members of the Police Department?

A. No, sir.

Q. Have you at any time discussed this case or any other case with members of the Police Departments?

A. No, sir.

Q. So your connection with the Police Department and its members is merely a casual connection, one would expect to develop in the course of your duties?

A. Yes, sir.

Q. Are you acquainted with any member of the District Attorney's staff?

A. No, sir.

Q. Supposing, after you retire to the jury room and begin the deliberation of this case, you find that after taking everything into consideration you think the defendants are probably guilty, but you have some doubt about it, a doubt for which you can ascribe a sensible reason, would you vote to acquit?

A. I certainly would.

Q. Is there any reason at all in your mind, as you consider the inquiry Mr. Turkus and all of us are propounding, on any question, or asking about your private activities, state of mind, etc., is there any reason you can think of that would prevent you from listening to the testimony in this case impartially?

A. None whatever.

[fol. 724] Q. If, after hearing all of the proof in the case, you entertain a reasonable doubt as to the guilt of any defendant, you would not hesitate to vote "Not Guilty"?

A. No, sir.

Q. You would not feel you had to justify such a verdict to anybody?

A. No, sir.

Q. You realize, don't you, that it is not only your privilege but it is your obligation as a juror, if you are selected as one, to pass on the proof without regard to the opinion of anybody who is not a member of the jury with you; is that correct?

A. Yes, sir.

Q. You as a juror, with your own eleven jurors, are the sole judges of the facts?

A. Yes, sir.

Q. Nobody else's opinion with respect to the facts can be substituted for your honest judgment of those facts?

A. Yes, sir.

Q. You understand that you exercise your sole judgment, uninfluenced by anything else other than opinions in so far as they might be persuasive to you of the other eleven jurors in the box?

A. Yes, sir.

By Mr. Barshay:

Q. Yesterday you told Mr. Furkus that you read about the alleged motive in this case.

A. Yes, sir.

Q. Did you form an opinion as to the truth or accuracy of what you read?

A. No, sir.

Q. So that no matter what you read or how long ago you read it, you are now able to say that you can dissipate what you read?

[fol. 725] A. Yes, sir.

Q. No doubt about it in your mind?

A. No, sir.

Q. And in connection with the gentleman who worked with you who was on another jury, did you discuss with him what you read, or did he discuss with you what he heard?

A. No, sir.

Q. You said that gentleman was your supervisor?

A. Yes, sir.

Q. And you had to respect his opinion before he served as a juror?

A. Yes, sir.

Q. Do you feel you have to be a "yes" man to that gentleman?

A. No, sir.

Q. Did he try to impress his opinion upon you?

A. No, sir.

Q. Since you received your notice did he go into great details?

A. Since I received my notice, no, sir; I just mentioned I was called on jury duty.

Q. He having been in a predicament like that himself, did you discuss it with him?

A. No, sir, he just told me he felt sorry for me.

Q. Is that the length of his discussion?

A. Yes, sir.

Q. And since your coming here have you discussed the matter any further with him?

A. He has asked me whether I was picked for the jury and what I am doing. And naturally I would have to discuss it, because I am here.

Q. Has he related to you any of the propositions of law that he heard?

A. No, sir.

Q. Has he related to you any facts that he may have heard [fol. 726] since your coming here?

A. No, sir.

Q. If you should be chosen as a juror and the Court shall advise you that, pending your being sworn and locked up, you do not have any discussion at all with the gentlemen, you will follow that instruction implicitly?

A. Yes, sir.

Q. And you will, should he try to again engage you in conversation about the facts——

Mr. Turkus: I object. I submit that is an improper statement of fact, "again try".

The Court: Leave out the word "again."

Q. Should he try to discuss the facts with you or give his opinion or relate to you his experience, as a guide for you, you would not pay any attention to it at all?

A. I only will not pay any attention to it, but I do not think he is the type of man who would try to influence me.

Q. I don't think that he will do it, but, in other words, you are an independent individual, of independent judgment?

A. Yes, sir.

Q. If you saw things in a different light, irrespective of supervisors or anybody else, you are going to stick to your own judgment?

A. Yes.

Mr. Turkus: I object to that, because that would cause a juror to arbitrarily hang a jury, and that is what we do not want.

Mr. Barshay: That is the second time you said that. [fol. 727] May it be understood that nobody here is trying to get a hung jury?

Mr. Turkus: The question suggested that to me, and that is the reason I made an objection.

Mr. Barshay: May we have the Court advise Mr. Turkus not to try that again? I resent any innuendo on his part that there is an effort being made here to hang any jury, or hang anybody, unless he wants to do the hanging.

The Court: Now proceed, please.

By Mr. Barshay:

Q. You know, Mr. Oliver, yesterday we did not know about the relationship between you and certain other gentlemen; you understand that?

A. Yes, sir.

Q. This morning, through means that are acceptable to me, he was able to find it out, but I have to question you along these lines. Yesterday you also said in response to Mr. Turkus that you read about the alleged part that each defendant played in this case.

A. Read what?

Q. Read the part, the alleged part, that each defendant in this case played.

A. No, sir.

Q. Did you read anything in the newspaper about what each defendant here is supposed to have done in this case?

A. Yes, all I read in the paper was that these men were charged with a particular crime, with the murder of somebody, and that they were supposed to have gone to the District Attorney's office, or something to that effect, but [fol. 728] I have not read what each defendant claims. That is a question I could not answer honestly.

Q. Maybe I have the notes wrong, but I thought I heard you say that to Mr. Turkus.

A. No, sir.

Q. Your mind is free from any details whatever?

A. Yes, sir.

Q. If the testimony should cause you to refresh your recollection, because only testimony here shall be binding, whatever you read will be dissipated from your mind?

A. That is right.

Q. So that you shall be a juror on the sworn testimony, subject to cross-examination, and on no other outside evidence?

A. That is right.

Q. So that the reputation or the character of any of the defendants here will not be in issue unless they themselves place it in issue?

A. That is right.

Q. This indictment, which alleges certain accusations, is the only thing that we are here to meet, you understand?

A. Yes, sir.

Q. You understand we do not try men or general appearance?

A. Yes, sir.

Mr. Turkus: I object. I don't understand what that means.

The Court: Objection overruled.

Q. Mr. Turkus has said he shall use accomplice testimony. You will pardon me for being repetitious, but I have to be—— Assuming that a person who takes the stand admits [fol. 729] he is an accomplice, will you take into consideration when, out of his own mouth, we shall prove that on another occasion, under oath, he said he was not an accomplice, in weighing the truth or falsity of his testimony?

A. I would scrutinize it very carefully.

Q. And in passing on each witness's testimony who claims he is an accomplice, if there shall be brought out from the witness stand a demerit mark, a demerit mark against his character and past life, will you use those in weighing the truth or falsity of that person's testimony?

A. Yes, sir.

Q. The worse character he has, the less you will believe him?

A. That is right.

Q. No matter how much he swears to tell the truth?

A. Yes, sir.

Q. You will be very, very slow in acceptance of his testimony, won't you?

A. Yes, sir.

Q. If, in addition to his being an accomplice, a thief, a robber, a murderer, you shall find from the testimony here out of his own mouth that he had a motive in turning so-called State's evidence, you will watch that carefully?

A. Yes, sir.

Q. You will take into consideration the motive, the hope of reward that person has in becoming now a witness for The People?

A. Yes, sir.

Q. And if there shall come from his testimony the fact [fol. 730] that before he turned State's evidence he was in a jail and thereafter he was induced to turn State's evidence and changed his statement, you will find out whether or not the treatment given to him, to that person or that personage or that witness or that accomplice causes him to vary his testimony to suit his own hands?

A. Yes, sir.

Q. If you find he has been living in a hotel, seeing his wife around and going to [illegible] special food, you will take that into consideration?

A. Yes, sir.

Q. If it develops, you find that some person or persons are allowed privileges not allowed to prisoners, you will take those things into consideration?

A. Yes, sir.

Q. If it develops there are long automobile rides with a chauffeur in uniform to carry them through the City streets, you will take that into consideration?

A. Yes, sir.

Q. And if you find that they are allowed to play baseball in Long Island, you will take that into consideration?

A. Yes, sir.

Q. So all of these inducements in favor of these persons who are in prison and a person who is going to testify for them, you will consider whether or not they will tend to make that man a liar or an honest man?

A. Yes, sir.

Q. And if, in addition to all that, you find that the particular person or persons are absolutely free of any charge of crime pending against them, you will take those things into consideration?

A. Yes, sir.

[fol. 731] Q. Mr. Turkus has said that you must not consider punishment. That is the law. But you know, if a verdict in this case should be that of guilty, the law is a mandatory one and the electric chair is the punishment. Will you, together with that, take into consideration the testimony of the type of people—— I will withdraw the question.

Q. Would it cause you to weigh with great care the testimony of these people whom I just described—I do not want to repeat again what I just said—when it comes to deter-

mine the guilt or innocence of any of the defendants, keeping in mind just as well the law as fixed for the penalty, as a result of your verdict?

A. Yes, sir.

Q. These same rules you will apply to accomplices, I take it you will apply to all people who take the stand, no matter what the purpose of their testimony is?

A. Yes, sir.

[fol. 732] Q. And if someone takes the stand and says, "So and so made admissions to me five years or four years or three years later," will you take into consideration that on another occasion, under oath—under oath—represented by eminent counsel, the same individual denied any knowledge in the matter? Will you take that into consideration?

Mr. Turkus: I object, it is not legitimate to state evidence on another trial and ask the talesman about it.

The Court: Objection sustained.

Q. Mr. Turkus has said something about breaking a case from the inside. Do you accept that as truth already?

A. No, sir.

Q. You will wait until you hear from the witness stand whether that is the fact?

A. That is right.

Mr. Turkus: You don't contend Mr. Geoghan broke the case, do you?

Mr. Cuff: I object to that statement as wholly improper and having nothing to do with the issue presented by the question.

The Court: I do not understand the question to mean that.

Mr. Barshay: It had nothing to do with it. It was a gratuitous slap at a fine gentleman, a gentleman on whose staff Mr. Turkus made every effort to get.

[fol. 733] Mr. Turkus: Let us have an understanding that Mr. Barshay was an assistant in Mr. Geoghan's office when this matter happened.

Mr. Rosenthal: On behalf of the defendant Capone, not having any title or connection either with the present or any District Attorney or other office, I am strenuously objecting to this argument upon the ground it is prejudicial to my defendant. I ask your Honor to admonish Mr. Turkus to leave entities and individuals out of this trial. We are

here trying a case of murder, my defendant being charged with participating in the murder of one Joseph Rosen in 1936. I now ask your Honor to admonish Mr. Turkus to leave entities and individuals out of this trial.

The Court: It is so much gossip. Supposing we proceed with the examination.

Mr. Rosenthal: Your Honor, I except to that ruling.

By Mr. Barshay:

Q. You know now that it has nothing to do with Mr. Geoghan or anybody else?

A. That is right.

Q. I am leading to another point, about breaking the case from the inside. I said you do not accept that as the truth because Mr. Turkus said so?

A. No, sir.

Q. We are not interested about its being broken. The point is, you will not consider that in determining the guilt or innocence of any of the defendants?

A. No, sir.

[fol. 734] Q. If it shall develop that this so-called accomplice, whom I take it he will use for the purpose of substantiating from the witness stand a statement from the floor that the case was broken from the inside, if it shall develop that for months the man denied any knowledge of this case and only when it was proven to him that he himself would be a defendant in a murder case did he say anything at all, will you take those things into consideration?

Mr. Turkus: I object. That was covered by the previous question.

The Court: The question has to apply to evidence. It is not permissible. It is presupposing.

Q. Whatever is said here from the floor by either Mr. Turkus or any other Assistant District Attorney, or by any lawyer, is not evidence in the case.

A. Of course not.

Q. The evidence comes from where you are sitting, after a man has raised his hand and sworn to tell the truth.

A. Yes, sir.

Q. And it will be for you to decide whether or not it is the truth?

A. Yes, sir.

Q. Now, is your mind presently free from any prejudice or bias of any kind, nature, or description?

A. Yes, sir.

Q. Nothing shall deter you from rendering an independent judgment?

A. Nothing.

Q. You shall give our client, Mr. Buchalter, individual [fol. 735] consideration and individual judgment?

A. Yes, sir.

Q. You shall not use the evidence that is given here in this case that has no application to him, unless his Honor charges that you may?

A. Yes, sir.

Q. If his Honor should charge you during the course of the trial that some evidence given by the witness is not binding upon Buchalter, you shall never use it?

A. No, sir.

Q. Even if the evidence is given at the beginning of the trial, and the trial takes a long time, you will retain that in your mind, that no evidence not binding upon Buchalter shall ever be used or permitted to be used by others?

A. Yes, sir.

Q. You will reason with the jurors on that proposition of law?

A. Yes, sir.

Q. You know it is not here "all or nothing"?

A. Yes, sir.

Q. I mean with respect to judgment—you know what I mean when I say "all or nothing"? You can render one verdict one way and another one one way and another one another way?

A. That is the way I understand the question.

Q. Can Mr. Buchalter entrust his legal rights for determination, honestly and fairly?

A. Yes, sir.

Q. And with courage, if you find a reasonable doubt from the evidence against him—you will acquit him?

A. Yes, sir.

Q. At no time shall you demand of him that he shall prove or furnish proof of his innocence?

A. No, sir.

By Mr. Cuff:

[fol. 736] Q. Mr. Turkus asked you if your state of mind was such that you might believe that a man of bad character tells the truth.

A. I don't get your question.

Q. I think Mr. Turkus asked you if your state of mind was such that you could believe a man of bad character could tell the truth.

A. Sometimes, yes, sir.

Q. I want to ask you if your state of mind be such that you could also believe that a man of bad character is more apt to tell a lie than a man of good character?

A. Yes, sir.

Q. And you would take that into consideration in discharging your duty, with the rest of your fellow jurors, if selected, in weighing the credibility and believability of any such witness?

A. Yes, sir.

Q. And the worse his character is, you appreciate, is your state of mind such that you believe the more apt he is to falsify?

A. Yes, sir.

Q. When you discussed this other trial with your superior in your office, was it after conviction at the trial?

A. Yes, sir.

Q. After all the evidence had been taken?

A. When he was discharged from his service.

Q. He was discharged after the evidence was closed?

A. Yes, sir.

Q. Your discussion then dealt with the facts developed on that trial?

A. Yes, sir.

Q. You had respect for that man's opinion, I believe you [fol. 737] said?

A. Yes, sir.

Q. Well, now, did that discussion bring back to your mind things which you had read in the newspaper, your favorite newspaper, you told us about?

A. Not necessarily.

Q. You are the man whose mind we are inquiring into. What I want to know is whether or not all through the intimate discussion you had with your manager, after he had listened on the trial to which you refer, brought back

and refreshed in your mind things which you had read in the newspaper prior thereto.

A. I could not really give you a definite answer, because the articles I read about were so vague to me; it was just a general discussion.

Q. You took as truthful what you read in your favorite newspaper?

A. No.

Q. When you read items in your newspaper about which you know nothing, do you accept them as truth?

A. No, sir.

Q. Don't you accept anything you read in the newspaper as the truth?

A. Some of it I do.

Q. What I am trying to find out is, when you possibly cannot know the facts yourself or ascertain them, whether what you read in the newspaper is true, you generally accept what you read in the newspaper, don't you?

A. If I am interested in a particular item I try to check it up a little further.

Q. You mean to say you check up what you read?

A. The particular item I am interested in.

[fol. 738] Q. Well, now, I think you said you read the *Herald-Tribune* or the *Times* or the *Telegram*.

A. The *Post* and the *News*, the *Telegram* now and then.

Q. You did not try to check up any of the articles you read about this?

A. No, sir.

Q. Or about the other trial, which you discussed with your manager?

A. No, sir.

Q. How many times would you say you discussed it with your manager?

A. Probably twice.

Q. That is, a rather long and pointed discussion? Did he refer to the case on which he sat?

A. Not very long.

Q. Was it a pointed discussion of the facts of the case on which he sat?

A. Yes, sir.

Q. And that made a deep impression, didn't it?

A. No, sir.

Q. You are in some doubt about it; it took you some time to answer.

A. I want to search my mind before I answer a question like that.

The Court: Mr. Cuff, don't you think the Metropolitan and the Prudential, in making selections of branch managers downtown are apt to hit on a man with a rather high I. Q.?

Mr. Cuff: I think——

The Court: I think the talesman is trying to make it clear to you that he does not follow up what he reads in the newspaper.

Mr. Cuff: I am quite appreciative of what the talesman [fol. 739] has said, but I am trying to find his state of mind about a particular matter that has been brought out this morning.

The Court: The higher we go on intellectual plane, the less prejudicial we find people to be.

Mr. Cuff: I don't think they are any different than in any other walk of life.

The Court: I would rather trust your judgment today than fifty years ago, because you have gone pretty high.

Q. You appreciate I am just trying to find out what impression has been made on your mind by these discussions.

A. I find no fault with you.

Q. It is my duty to see that we get trial jurors open-minded, who are properly able to, and courageous enough to render a verdict which the evidence justifies under the rules of law.

A. Yes, sir.

Q. Something has been said about reasonable doubt being a sensible doubt. That is true, but I wonder if you appreciate that that reasonable doubt is something that must be based upon the evidence given from the witness stand or some letter in evidence?

A. Yes, sir.

Q. And if that is the basis for any doubt, if you find that after considering the evidence and listening fairly to the reasonable arguments of the jurors, based upon the evidence in the case, that you have a reasonable doubt as to the guilt or innocence of any one or all of these three defendants, [fol. 740] will you have the courage to adhere to that de-

termination unless and until you are convinced to the contrary, despite the fact that everybody else may oppose you?

A. Yes, sir.

Q. If his Honor should charge you that it is your solemn duty to adhere to a reasonable doubt so long as you are not convinced it is unreasonable, will you do that?

A. Yes, sir.

Q. Now, supposing, in the judgment of counsel, one or more of these defendants did not take the witness stand to testify in this case, would you, consciously or subconsciously, draw an unfavorable inference against that defendant or defendants?

A. No, sir.

Q. Of course, when you told Mr. Turkus you believed in the enforcement of the Penal Law, you did not know, did you, that under that law no unfavorable inference can be drawn from the failure of a defendant to take the stand?

A. Yes, sir.

Q. And you would have no hesitation in following that rule of law when his Honor will charge it to you?

A. No, sir.

Q. I want to know this: Whether you can assure me that that discussion that you had with your superior after the trial of the Blitzberg case last June left no unfavorable impression in your mind against any one of these defendants—is that right?

A. That is correct.

Q. Do you say now that is true as to the defendants you mentioned, without mentioning the name?

A. That is right.

By Mr. Rosenthal:

[fol. 741] Q. I represent, with others, the defendant Capone. You have been questioned by the attorneys for the other two defendants.

A. Yes.

Q. Now, Mr. Turkus asked you a question as to whether or not you had any prejudice against the District Attorney breaking the case from the inside.

A. Yes, sir.

Q. Do you realize it is your duty to find out whether or not this case was ever broken—you realize that?

A. Yes, sir.

Q. If you are accepted as a juror, merely because he says the case is broken, it does not mean it is broken; do you realize that?

A. Yes, sir.

Q. You realize when it comes to the question as to whether it is broken, whether the right parties are charged with the crime, that you are going to take what you believe to be the truth as you hear it from the stand and not what you hear the Assistant District Attorney or the lawyers for the defense say?

A. That is right.

Q. Now I ask you these questions in view of the fact that you have mentioned today that your manager has been on a jury in this court. Did you, in the course of your discussion with your superior, enter into entities of the individuals who testified, the witnesses who were called in that particular case?

A. Yes, sir, a few witnesses were discussed.

Q. Did you in your conversation with him or he with you comment at all about the particular witness, without reference to their names, that were called by The People in that particular case?

[fol. 742]

A. I don't quite get that.

Q. You say you discussed with your manager certain witnesses who had been produced by The People.

A. Pardon me, no discussion; he just told me the story.

Q. And in telling you the story did he mention the name of any particular individuals who had actually testified in the case itself?

A. He mentioned some, but I would not remember them.

Q. In mentioning these persons, did he in any wise intimate to you his belief or disbelief, or what they had testified to on the stand? Is that question clear?

A. Yes. No, I don't really remember so as I could give you a definite answer one way or the other.

Q. Of course, we are restricted from indulging in personalities, so the general question is put to you, and that is the way I am putting it, in this way—I will repeat it again: In discussing the names of individuals, irrespective of what names they are, did he indicate in his discussion with you his belief or disbelief of what those persons had said on the stand?

A. I really don't remember.

Q. You don't remember whether he did or did not?

A. No, sir.

Q. Did he in any wise, without mentioning the names, indicate in his discussion with you any bias or prejudice against any of the defendants who are now on trial?

A. Yes, sir.

[fol. 743] Q. He indicated in his discussion with you that he was prejudiced against one or more of the defendants now on trial?

A. Yes, sir.

Q. In that discussion that was had as between you and him, did he indicate to you or cause evidence prejudicial against that particular individual or individuals?

A. Or cause?

Q. Don't let us go into details. Did he?

A. It cannot be answered unless I am permitted to say a couple of words.

Q. Of course, we don't want to have any argument. I will put it in a different way. We do not want to have any grounds, as to the other defendants, for a mistrial or otherwise. I will put it in a manner in which you can answer it without going into a discussion. In discussing this prejudice or bias that he had, did he in any way inform you of the reason that he—your manager—had for this expression of bias?

A. Did he have any reason?

Q. Did he give you his reason in plain English? That is simple.

A. Yes, sir.

Q. Now, having given you his reason for his expression of bias or prejudice——

Question withdrawn.

Q. You have answered both Mr. Barshay and Mr. Cuff that the reasoning of your superior was always treated by you with high regard.

A. Yes, sir.

Q. Was the reasoning that he used in this particular instance given that same high regard or respect by you as his [fol. 744] reasoning on other matters?

A. No, sir.

Q. So that, in so far as this particular matter is concerned, you did not treat it with the high regard you treated his other expressions of opinion?

A. That is right.

Q. In any event, did his expression of prejudice or bias to any extent influence you at the time?

A. No.

Q. It did not in any wise alter your open frame of mind as to any of the individuals on trial; am I correct?

A. That is not clear.

Q. I say that it in no wise altered your open frame of mind as to any defendants who are on trial here?

A. That is right.

Q. Assuming that in this trial, even though you may have forgotten now at this particular time of any particular witness whom he has spoken to you about, if that particular witness was called to the stand and you then recalled that that is one of the individuals he spoke to you about, would the impression that he had gained on that particular witness in any wise influence you in determining what weight you would give to that witness's testimony in this trial?

A. No, sir.

Q. You are positive?

A. Positive.

Q. Now, on the question of the defendant Capone. Do you feel that a mere admission on the part of an individual that he knows another individual, in and of itself creates a question as to his guilt—the mere knowledge of the person?

A. No, sir.

Q. Do you feel that merely because a defendant is a de- [fol. 745] fendant in a trial and he were to take the stand and say under oath, having no prior criminal record, that he brands the prosecution's witness as a liar—that simply because he is a defendant you would disbelieve him?

A. No, sir.

Q. Of course you would take into consideration what interest he has in making the statement—you have a right to do that; and you also will listen to his story, will you not, on the stand, to judge for yourself by his answers, his manner of answering, and all the connecting circumstances, whether he is telling you the truth or not?

A. Yes, sir.

Q. And if you believe he is telling you the truth, you would not hesitate in showing that belief by a verdict which you would render?

A. That is right.

Q. Each of these defendants you have here, I suppose, as you are sitting in the court-room, although they are on trial together, are entitled to a separate trial.

A. Yes, sir.

Q. In other words, you will hear the evidence once, but there are three separate trials for your judgment.

A. Yes, sir.

Q. The evidence in so far as it affects any particular individual, under the law as given to you by the Court, is the only evidence that you will apply to that particular individual in the jury room?

A. Yes, sir.

Q. In determining whether he is guilty or innocent of a particular crime?

A. Yes, sir.

Q. You won't permit yourself to be swayed by saying, "Well, there are certain parts of the evidence which are [fol. 746] applicable to one of the defendants, and even though the Court tells me under the law I cannot use it, well, it is joined in here some way, and I will use it against the other defendants?

A. No, sir.

Q. The mere fact of what you may have read—and there is no use of our hiding that fact now—you know there has been a great deal of publicity given to this case?

A. Yes, sir.

Q. You know that from the very panel that has come here and shown papers which they have read?

A. Yes, sir.

Q. But that does not mean in your mind you would be afraid to come in here for fear of maybe some public opinion or sentiment, if you were not convinced of the guilt of the man, and say he was guilty?

A. Of course not.

Q. You realize the character of the defendants is the only thing in issue in a criminal case when he makes it an issue—in other words, if I do not explain it so that you can understand it, just tell me and I will put it in a different form, so you may understand me. The question of the character of these individuals is not what you are trying here; you understand that?

A. Yes, sir.

Q. You are trying them because The People of the State allege, through indictments, that they were one of the participants in the murder of Joseph Rosen in 1936.

A. Yes, sir.

Q. That is all you are trying?

A. Yes, sir.

Q. The mere fact that one of these defendants, according to his attorney, is or has been serving a long term in prison, [fol. 747] would not in any wise affect your judgment because the co-defendant represented by me happens to be joined in the indictment with him?

A. No, sir.

Q. In fact, it would not affect your judgment in so far as the particular issue involved is concerned at all?

A. No, sir.

Q. You know, or do you know that irrespective of the number of people who come on the witness stand here, who are admittedly accomplices, that no man can be convicted on the uncorroborated statement of an accomplice, whether it be one or many?

A. Yes, sir.

Q. Assuming the Judge were to charge you as to the law in this case and in any case in this State that before you could convict a man of a crime there must be other evidence outside of that of the one or many accomplices, independent in its source, tending to connect the defendant with the crime. Do you find any fault with that?

A. No, sir.

Q. Assuming the Judge were to charge you that there are two types of accomplices, one where the Judge says to you, "He is an accomplice as a matter of law," in which event you, as a juryman, must accept that and treat him as such——

A. Yes, sir.

Q. The other is that you, the juryman, from the facts and circumstances, may determine as a question of fact whether he is an accomplice. Is that clear?

A. Yes, sir.

Q. Would you, when you went in the jury room, simply because of the fact the District Attorney were to say to you, [fol. 748] "He is not an accomplice," take that for granted, or would you determine first, before you pass upon independent evidence, whether that man in your opinion actually is

an accomplice, even though the Judge left it to you, rather than take it upon himself as a question of law?

A. I would decide that.

Q. And if you once decided he was an accomplice, in your jury room, would you then, apply the same rules the Court laid down to you that were necessary for the corroboration of an accomplice?

A. Yes, sir.

Q. On the question of fact tending to corroborate an accomplice's part in the case, The People may rely upon one or more witnesses who allege that one or more of these defendants has supposedly admitted to this particular individual his participation in the crime—do I make that statement clear?

A. It is a little bit involved.

Q. I will put it in easier terms. If it should develop in this trial that the so-called independent evidence which the People rely upon to corroborate the accomplice is a supposed admission made by one or more of the defendants to some other person, would you, in passing upon what probative force or value you would give to that admission, firstly investigate the source from which it comes?

A. Yes, sir.

Q. If, in investigating the source from which it comes, you find an individual who alleges that this admission was made to him, a self-confessed murderer of one or more men [fol. 749] for which he has never been indicted up to the present time, and one who has committed various sorts of crimes——

Mr. Turkus: I think this type of questioning is objectionable.

Mr. Rosenthal: Let me finish the question.

Q. (continuing) —and has committed perjury on a number of occasions, and various other crimes, would you, in determining the weight you will give to that witness, take all of these facts into consideration?

A. Yes, sir.

Q. If, after hearing from this witness's mouth either on direct or under cross-examination the facts which I have just related to you, if you feel that a man of that type is not telling the truth, would you hesitate to disregard what he says?

A. No, sir.

Q. Now, that test you will apply to any and all witnesses that may be called, irrespective of whether they are called by the prosecution or the defense?

A. Yes, sir.

Q. And in going into the jury room you are not going to allow your common sense to be left outside?

A. No, sir.

Q. In other words, if a man came to you who bore the highest reputation and made some representation to you, you would be quicker or more apt to believe him than some man whom you knew as a crook or a thief and was unworthy of belief all his life came to you and told you a story?

A. Yes.

[fol. 750] Q. That is the type of common sense you will use in the jury room when you determine what weight you are to give a witness?

A. Yes, sir.

Q. From your experience in your ordinary business life, and your association with ordinary human beings?

A. Yes, sir.

Q. Now, there is no way that any defendant can ferret out through his lawyer or estimate the mind of any prospective juryman except by questioning jurymen, and then leave it to his integrity to say that he, the juryman, can fairly and truly determine the issue as between the State and the defendant without fear or bias.

A. Yes, sir.

Q. Now, you have admitted conversations with your boss and the reading of newspapers and other things.

A. Yes, sir.

Q. Various lawyers have asked you questions as to whether or not an impression has been created of any character that would be detrimental to either side or any of the defendants. Now, the physical question which I will ask you is, you in the final analysis being the man to decide, is there anything in your mind now, whether it has been reached by the questioning of the jurors, that would prevent you from acting as a fair and impartial juryman, doing justice between The People and the defendants, either one way or the other?

A. No, sir.

Mr. Rosenthal: No challenge for cause on the part of any of the defendants.

Mr. Turkus: Challenge peremptorily.

[fol. 751] ALBERT ROSENTHAL, No. 2735, residing at 1521 48th street, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. You very frankly stated to me that you were a fraternal brother of Mr. Wegman, who represents the defendant Buchalter?

A. Yes, sir.

Q. You and Mr. Wegman have talked at various times while you were waiting to be called to the box?

A. Yes, sir.

Q. I believe at the suggestion of all of us Mr. Wegman approached Judge Taylor to have you excused on that ground?

A. Yes, sir.

Q. And Judge Taylor reserved decision until you actually were brought into the box. Under the circumstances, I think, and I know Mr. Wegman joins, you should be excused.

The Court: What relationship?

Mr. Turkus: A fraternity brother. There is nothing closer than a fraternity brother except a natural brother.

Q. I think you went to Manual Training High School?

A. No, sir, Erasmus Hall.

Q. Mr. Wegman went to Manual?

A. I believe so.

Q. You belong to the same high school fraternity?

A. Yes, sir.

Q. You have known each other throughout the years since then?

A. I don't recall the last time I saw him. It is quite a long time ago.

[fol. 752] By the Court:

Q. How many years is it?

A. I should judge maybe twelve years ago.

Q. How old are you now?

A. Thirty-five.

By Mr. Turkus:

Q. For a long time, I take it, after graduation you continued to be interested in fraternities?

A. Yes, sir.

Q. And then it died out?
A. Yes, sir.
Q. Your marriage took away your boyhood activities?
A. Yes, sir.
Q. And what is the fraternity?
A. Sigma Alpha Phia.
Q. How many members?
A. I would not remember.

Mr. Wegman: If he said four hundred, I think he would be exaggerating.

The Court: You might as well challenge the man because he and counsel are both members of the American Legion.

Mr. Turkus: That is not consistent at all in my mind.

The Court: Even members of the same lodge know one another very well. That would not disqualify him as a matter of law. You will have to question the witness.

By Mr. Turkus:

Q. Some of the questions I put to you of necessity must be pointed. I think you will understand the reason. It is done without any intent of being offensive or to give you any embarrassment. There is a close relationship between [fol. 753] fraternity brothers, isn't there?
A. There is presumed to be.
Q. Well, was there between you and Mr. Wegman?
A. Yes, sir, I have a very high regard for Mr. Wegman. I think he is a little older than I.
Q. I take it you have a high regard for him? You have watched with a great deal of pleasure and interest his success in his chosen profession?
A. Naturally.
Q. You have seen him graduate from high school, a student in law school, and then become a member of the bar of the State?
A. Yes, sir.
Q. Then, from a member of the bar of the State, you have seen his talents appreciated and recognized, and he received the office of Assistant United States Attorney for the Eastern District, in Brooklyn?
A. I know that.
Q. More than that, you saw him progress and go all the way to Washington as Assistant United States Attorney?
A. Yes, sir.

Q. You have some degree of affection for him, and regard?

A. Yes, sir.

Q. And as a matter of fact, it was to such an extent that you thought it would be proper to apprise the District Attorney of it?

A. Yes, sir.

Q. And it was a mutual suggestion that application be made to the Judge to excuse you from jury service in a case in which Mr. Wegman appears as counsel?

A. Yes, sir.

[fol. 754] Q. Obviously it would be embarrassing to you to sit in on the case, wouldn't it?

A. I don't know whether it would be actually embarrassing or not.

Q. Well, at least to the extent that you would rather not serve?

A. I would rather not serve.

Q. For example, if there was an argument made to the jury and an inference drawn, because of your great interest in Mr. Wegman and your admiration for him, of necessity you would pay greater respect to the argument emanating from him than from another lawyer?

A. All counsel here are very eminent, and I don't think that would be so.

Q. If it came to a disagreement between Mr. Wegman and another lawyer on the meaning of certain evidence, wouldn't you naturally be inclined to look at it his way?

A. I don't know.

Q. Then may I ask you what was your reluctance in being in the case?

A. I thought, as a matter of course, knowing one of defense counsel so well, I would be excused, and I thought it proper to let you know about it.

By the Court:

Q. It was done in the hope that would let you out of jury service?

A. It was not in any hope; I know my obligation to serve.

Q. You would like to avoid it?

A. Yes, but not at the expense of doing what I am supposed to do.

[fol. 755] By Mr. Turkus:

Q. You sat in the box when Mr. Herrick was in your present seat, Mr. Herrick, the insurance broker?

A. Yes, sir.

[fol. 756] Q. And you remember when he was asked questions by counsel and he said he knew me from meeting me in a restaurant?

A. Yes, sir.

Q. And he had watched my career?

A. Yes, sir.

Q. Is there anything the Judge said to Mr. Herrick that may bother you in giving us answers on the stand?

A. I don't think so.

The Court: If both sides have made up their minds and agreed on excusing this talesman, it is perfectly obvious the Judge's hands are tied. Unfortunately, I made similar comments a few days ago and a newspaper headline writer sought to make his day's story by putting the Judge in the unfortunate position, by saying that both sides were "ganging up" on him. The Judge said nothing of the kind; it was a misquotation which the Court will take notice of if it occurs again. I shall not repeat anything about both sides agreeing. The Court is supposed to rule. The Court has ruled. The two of you get together and come to an agreement and assume the Court is a rubber stamp. The Court is not. Now proceed with the examination of the talesman.

(Mr. Turkus continues his examination.)

By Mr. Turkus:

Q. If it came to a close question, would you be inclined to favor Mr. Wegman?

A. I could not say now whether I would or not; I certainly [fol. 757] would not do it with intention.

Q. Might you, subconsciously?

A. I think that is a question for a psychologist; I think it is very likely that would happen.

Q. It is possible it would happen?

A. I think any relationship like that is apt to color a man's judgment without his knowing it.

Q. And, of course, having your judgment colored, there would be a variance in the quantum of proof that might ordinarily be needed?

A. It might work two ways; it might work the other way, too; I might bend over backwards.

Q. Of course, I can only deal in relative speculation, because nobody can read a man's mind. Because of your interest in him (Mr. Wegman) and your regard for him, would it vary the quantum of proof, possibly subconsciously, that might be required from the prosecution?

A. Possibly.

Q. Is it possible you might expect more proof in such a case than you would if he were not counsel, that is subconsciously?

A. I would have to be convinced some way.

Q. You have a genuine and an honest doubt as to that?

A. I think that possibly my judgment may be colored.

The Court: The Court is going to ask that no more leading questions be asked. This is becoming a travesty. The Court is ruling in good faith and wants an honest-to-goodness examination of this talesman, not words to be put into [fol. 758] his mouth by either side. If the talesman is disqualified, he does not need any help in order to show it. He will show it soon enough in the proper way.

By the Court:

Q. What is your business?

A. Manufacturer.

Q. You presented an application to be excused from jury duty?

A. I did not.

Q. What is your concern?

A. The Simplex Button Works, Inc.

Q. You are engaged in war work?

A. Not extensively; we do a little.

Q. You have no contracts to make buttons for soldiers' clothing?

A. No, sir, that is a different type of a button.

Q. You mean an electrical button?

A. No, sir.

Q. What are they?

A. Buttons for ladies' garments, among other things.

Q. What is your position there?

A. Up to about October of last year I was supervisor of production.

Q. What is your position there?
A. I do everything, check credit——

The Court: The Court will ask no further questions because the hostility on your part to questions of the Court is obvious.

The Witness: May I correct that impression, if I seem to have given it?

[fol. 759] The Court: The whole court-room is being upset by your attitude and the attitude of counsel. If one counsel challenges for cause, I will excuse for cause.

Mr. Turkus: Challenged on the ground of implied bias.

The Court: I will excuse him. The Court is being upset by the attitude of counsel and of the talesman. He may leave. I want no repetition of this. There will be no beating around the bush or substitute for excuses by consent.

Mr. Talley: We don't hear you. We would like to hear you.

The Court: Proceed.

Frank Lanzi, No. 2652 residing at 887 East 35th Street, Brooklyn, New York, a talesman, was examined as to his qualifications.

By Mr. Turkus:

Q. You are listed on the trestle board as living at 887 East 35th Street.
A. Yes, sir.
Q. What section is that?
A. Vandeveer Park.
Q. Have you lived in Brooklyn a number of years?
A. Fifteen.
Q. How many years have you lived in that section?
A. Practically the whole fifteen years.
Q. The trestle board likewise lists your profession as [fol. 760] an engineer. Are you in business for yourself or are you employed?
A. Employed by the Brooklyn Union Gas Company.
Q. How many years have you been an engineer?
A. Fifteen.
Q. To become an engineer, I take it you would have to be duly licensed?

A. No, sir, I have a degree.

Q. A college degree?

A. Yes, sir.

Q. In other words, that is a study or profession the same as law or medicine or any profession?

A. Yes, sir.

Q. I take it you have sat here for a number of days hearing much discussion about the nature of the charge in this case.

A. Yes, sir.

Q. Do you understand that the defendants at the bar of justice, Buchalter, Weiss, and Capone, are charged with the crime of murder in the first degree, the murder of a man named Joseph Rosen?

A. Yes, sir.

Q. As one of the lawyers said to another prospective talesman, that is set forth in a few lines in the indictment.

A. Yes, sir.

Q. Whether it is set forth in a few lines or a thousand lines, you understand the charge is murder?

A. Yes, sir.

Q. Is there anything about the nature of the charge which precludes you from passing judgment upon the case?

A. No, sir.

Q. May I proceed on the understanding that you have no scruples, conscientious or otherwise, against capital punishment?

A. Yes, sir.

[fol. 761] Q. If selected in the case, would you permit any of the jurors to discuss the question of punishment?

A. No, sir.

Q. When the lawyer here brought out that his client is serving a long term in jail for a prior conviction of crime and asked, and properly so, whether or not there would be any prejudice against his client for that reason, prospective talesmen heretofore said no. Is that your attitude?

A. Yes, sir.

Q. Let us go at it this way: Would you, because a man has been heretofore convicted of crime and sentenced for his offence, would that cause you to relax or deviate from

your attitude as a juror when he is charged with murder in the first degree?

A. No, sir.

Q. Since your name appeared on this special panel, has anyone spoken to you about the case?

A. Just another juror sitting in the box employed in the same business I am.

Q. Another prospective juror in this panel?

A. Yes, sir.

Q. I take it that discussion was on who maybe would get stuck for jury duty?

A. Yes, sir.

Q. Now, has business or any other contact brought you in connection with People in the Brownsville and East New York area?

A. I am connected with the transportation division of the gas company, and we have a garage at Ashford and Atlantic.

Q. Other than that connection, where you have an association with people there who are employed by your company?

A. No, sir.

[fol. 762] Q. Have you any outside contacts or association in that area?

A. No, sir.

Q. Does that pertain as well to the Brownsville district of Brooklyn?

A. No.

Q. Have you any social or other contacts in Brownsville?

A. No.

Q. Have you any contact of any kind in that area?

A. No, sir.

Q. With respect to the garment district in Manhattan, do you have any contact there directly or indirectly?

A. No, sir.

Q. Or with persons employed in the clothing industry?

A. No, sir.

Q. Or with any firms or any persons in connection with the clothing trucking industry?

A. No, sir.

Q. Do you have any contact with persons or firms on the Brooklyn waterfront?

A. No, sir.

By the Court:

Q. Ashford and Atlantic, that is in New Lots?
A. Well, that is the East New York section.
Q. Just about the boundary?
A. Yes, sir.
Q. Just about the boundary of the New Lots section?
A. Yes, sir.

By Mr. Turkus:

Q. Is there any significance to your mind in the name of any official of the Amalgamated Clothing Workers of [fol. 763] America, the name of Weinstein, or Katz; does that mean anything?
A. No, sir.
Q. By the same token, does the name of Bruno Belia, an organizer of the Amalgamated, mean anything to you?
A. No, sir.
Q. Or that of Salvatore Marazzano?
A. No, sir.
Q. Or Philip Orlofsky, at one time manager of the Clothing Cutters Union?
A. No, sir.
Q. Do you know any official or representative of Local 240 of the Clothing Drivers & Helpers Union?
A. No, sir.
Q. Or of any Teamsters Union?
A. No, sir.
Q. Does the name of Bellanca or that of Tosca have any significance to you?
A. No, sir.
Q. Or that of Terry Burns or Abie Slabo?
A. No, sir.
Q. Is there any significance in the name of Max Silverman, or Wolfie Goldis?
A. No, sir.
Q. Or the name of William Alberts, a one-time bondsman on Lafayette Street, Manhattan?
A. No, sir.
Q. Or the name of Emanuel Buchalter, does that mean anything to you?
A. No, sir.

Q. Or of any individual by the name of Weiss, in the automobile rental business?

A. No, sir.

Q. Or the name of Chevrolet sales people or the name of Weiss on the Park Slope?

A. We drive cars in there, if that means anything to you.

Q. Or the name of Philip Kowas, Philip Buchalter, does [fol. 764] that mean anything to you?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law?

A. Yes, sir.

Q. By such sympathy, do you mean you will not permit people who are guilty to escape conviction or people who are innocent to be unjustly convicted?

A. That is correct.

Q. There are nine lawyers representing these defendants. I have mentioned the names to the other jurors. Do you know Mr. Barshay, a former Assistant District Attorney?

A. No, sir.

Q. Or Mr. Wegman, a former Assistant United States Attorney, or his associate, Mr. Climenko, or anyone connected with their respective law offices?

A. No, sir.

Q. In connection with Weiss, he is represented by former Judge Talley, former Assistant District Attorney Cuff, and former United States Assistant District Attorney Kriendler. Do you know any of them?

A. No, sir.

Q. Do you likewise know anyone employed or associated with them in the practice of law?

A. No, sir.

Q. And the same holds true as to counsel who represent the defendant Capone, Rosenthal, Fischbein, and Rosenberg?

A. Yes, sir.

Q. You know no one connected in their office?

A. No, sir.

Q. Do you know intimately any member of the bar who specializes in the defense of men charged with crime?

A. No, sir.

Q. Have you heretofore known Mr. Geoghan, the prose-
[fol. 765] cutor of the county?

A. No, sir.

Q. Or any member of Mr. Geoghan's staff when he was District Attorney?

A. No, sir, I don't believe I did.

Q. Do you know Judge O'Dwyer personally, or any member of his staff?

A. I heard a member of his staff speak.

Q. Do you know that man personally?

A. No, sir.

Q. Do you recall the name of that man you heard speaking?

A. Heffernan.

Q. Have you heretofore had the benefit of jury experience in criminal cases?

A. No, sir, just civil.

Q. If accepted as a juror in this murder case, will you take the law from the trial justice?

A. Yes, sir.

Q. Will you endeavor, conscientiously, to apply the principles of law to the facts in the particular case you are trying, this murder case?

A. Yes, sir.

Q. I take it that in your line of business you have problems to work out with other engineers and other people in your division?

A. Yes, sir.

Q. You have had experience in working things out with success and understanding and in arriving at a proper decision?

A. Positively.

Q. And something has been said because of the prosecutor telling you the case is broken from the inside. That does not mean it happens. Of course, nobody contends to the contrary. Do you find any fault with the District At-
[fol. 766] torney for breaking a 1936 unsolved murder from the inside, and using the testimony of one of the co-participants in that murder against the other defendant on trial?

Mr. Barshay: That is objected to.

The Court: That question has been asked of many tales-
[fol. 767] men. Do you really think, Counsellor, that any-

body would quarrel with the District Attorney for using an accomplice as a State witness?

Mr. Turkus: That is something I want to find out about.

The Court. The policy of the District Attorney's office is not on trial.

Mr. Turkus: If a man is framing a man and he does not like that kind of thing he is going to disregard it.

The Court: I think that possibly to avoid interruption and objection, if you put it in a more subtle way—and this is simply by way of suggestion—"Are you prejudiced against the use of participants as State witnesses?"

Mr. Turkus: May I respectfully direct the attention of the Court that not less than twenty questions, identical questions, were objected to by the defense counsel, and in not less than twenty of those cases the objection was overruled.

The Court: I am becoming tired of overruling on a specific question.

Mr. Rosenthal: May I direct the Court's attention that Mr. Turkus is not correct in his statement. I am objecting to the political speech incorporated in the present question, in which he says that the District Attorney of the [fol. 768] County of Kings, unsolved murder, etc. It is not the question which Judge Talley heretofore objected to. He objected to the form of the question.

Mr. Turkus: Let me tell you I am not interested in any political election. I am here trying this murder case. If there is anybody interested in politics, I think Mr. Rosenthal must have his tongue in his cheek. I am here to try a murder case, and I am asking questions as a prosecutor in line with my duty. I resent such tactics.

The Court: We will get along much better if there is better feeling and understanding.

By the Court:

Q. Have you any prejudice against the use of accomplices as State witnesses?

A. No, sir.

Q. You would not have any feeling against the District Attorney who did that?

A. No, sir.

By Mr. Turkus:

Q. Have you any fault to find or any prejudice against the prosecution which employs the use of accomplice testimony?

A. No, sir.

Q. Will you, with common sense and understanding and with care and caution weigh the testimony of any man who is of bad character and who has committed crimes in the past?

A. Yes, sir.

Q. And in taking into consideration his bad character, [fol. 769] his bad moral habits, his commission of crimes, and the manner in which he lives, will you also take into consideration that you are passing judgment in a murder case and that there are rules and tests which the Court will give you to apply to the believability of such a witness?

A. Yes, sir.

Q. Will you use common sense and understanding in weighing the issue in the case as to the guilt or innocence of these defendants, no matter from where the testimony emanates?

A. I will.

Q. One of counsel suggested there are various tests that ordinarily apply in our respective walks of life. I take it that you too have tests to apply to various people with whom you do business?

A. Yes, sir.

Q. Now, those tests may not necessarily apply to men who are steeped in crime?

A. Yes, sir.

Q. We, in our every-day experience, do not deal with criminals?

A. Yes, sir.

Q. So that in weighing tests and believability, will you take into consideration everything that causes a man to talk about his erstwhile associates and bring them into the case, and find out are you getting the truth?

A. I will.

Q. Will you apply common sense and understanding to figure out the whole situation when you get it?

A. I will.

Q. The Court will instruct you as a matter of law that

every defendant on trial in any criminal case is presumed [fol. 770] to be innocent until his guilt is established by the prosecution to the satisfaction of the jury beyond a reasonable doubt. Will you follow that instruction of law?

A. I will.

Q. Will you endeavor, conscientiously, to apply it to the facts in this case?

A. I will.

Q. Will you follow the instructions of law that from the outset and until the conclusion the burden of proof is exclusively upon the District Attorney to establish guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Will you follow the principle of law that a defendant in a criminal case has no burden; that he may submit himself as a witness or he may not, and if he does not no unfavorable inference may be drawn, and that he may offer proof or may not offer proof, and if he does or does not, no unfavorable inference may be drawn against him? Will you follow the instructions of law in that regard?

A. Yes, sir.

Q. Will you give the defendant on trial everything the law says he may have?

A. Yes, sir.

Q. And, by the same token, if I appeal to your common sense and bring you here proof which satisfies you beyond a reasonable doubt that there are three guilty men at this bar of justice, three men who are three of the people who killed Joseph Rosen, as I read in the indictment, will you hesitate to say so in your verdict?

A. No, sir.

Q. If selected as a juror will you discuss the case with [fol. 771] common sense and reasonably with the other jurors?

A. Yes, sir.

By the Court:

Q. As a practical question here, as to the condition of your mind in relation to your business, how many people do you have there?

A. In the company at work?

Q. Under you.

A. Two hundred.

Q. When you are away what provision is made to take care of your work.

A. My assistant does that.

Q. You have one or more assistants?

A. One.

Q. A competent man?

A. Yes, sir.

Q. Can he take care of anything that comes up?

A. Yes, sir.

Q. You would not sit in the jury box and worry?

A. I cannot help but having a little worry about business.

Q. No matter who the juryman is, he is more or less worried about being on a jury, but somebody has to sit as a juror, and twelve men have to be selected. Will you be able to concentrate on the case?

A. I will do my best.

Q. Are you a college man?

A. Yes, sir.

Q. What college?

A. Northeastern.

Q. You are a man of sufficient education and culture to know how to consider and have the proper sense of value, I take it?

A. Yes, sir.

Q. Do you know the importance of a case of this kind to properly evaluate evidence and give a just decision?

A. Yes, sir.

Q. Can you do that?

A. Yes, sir.

[fol. 772] Q. Can you put up with inconvenience and take it on the chin?

A. I will if I have to.

Q. We are all more or less idealists. Are you an idealist to that extent?

A. I don't know whether I am or not.

By Mr. Turkus:

Q. At any rate, you are an engineer and you have had problems to settle yourself?

A. Yes, sir.

Q. We will have one issue, the guilt or innocence of three men in the Rosen murder.

A. That is right.

Q. And as to that you will devote your faculties as a juror?

A. Yes, sir.

Q. Since you are an expert in your line, do you have any bias or prejudice against the testimony which may emanate from experts on the witness stand, for example, whether he be ballistic, handwriting, or a medical expert; do you find any fault with that testimony?

A. No, sir.

Q. Is your frame of mind such that this case is an important case, important to The People of the State, and of course also to the defendants on trial?

A. Yes, sir.

Q. And if selected as a juror, will you conscientiously and honestly endeavor to arrive at a verdict that will be in consonance with justice?

A. Yes, sir.

Q. And will you, by your verdict, endeavor to do justice in the case?

A. Yes, sir.

Q. Assuming, in company with the other jurors, you hear [fol. 773] all the evidence in the case, you listen to everybody on the stand that has something to say about the case; you look the case over carefully, and you hear the respective lawyers for each defendant draw arguments and inferences from the testimony, and urge each and every argument they can in their wisdom, which they have to submit to the jury; and you have heard the prosecutor draw his inference; the trial judge gives you the law; you go in with the other jurors and conscientiously apply the law to the facts in the case and you come to the conclusion and your mind is satisfied beyond a reasonable doubt that there are three guilty men at the bar of justice, Buchalter, Weiss, and Capone, would you hesitate to so say in your verdict?

A. No, sir.

Q. Would you have any fear or reluctance?

A. No, sir.

Q. Is there anything about your past life or anything about your present connection which would in any wise effect a determination other than one in consonance with justice?

A. No, sir.

Q. And you would pronounce your verdict fearlessly?
A. Yes, sir.

By Mr. Barshay:

Q. Have you ever been on a jury on any occasion at all?
A. I have, in civil cases.
Q. Have you been on the Grand Jury?
A. No, sir.
Q. Do you know anybody in the Police Department?
[fol. 774] A. Well, personally, patrolmen.
Q. Are they in Brooklyn?
A. Yes, sir.
Q. Do you know them intimately?
A. Yes, sir.
Q. May I know their precinct?
A. One is in No. 1 downtown, Manhattan, and the others have been former chauffeurs in the Gas Company and now are on the force; I don't know where they are stationed.
Q. Did you ever discuss the question of crime with these patrolmen?
A. No, sir.
Q. More especially in this case?
A. No, sir.
Q. Has any member of your family ever been a juror in a criminal case?
A. No, sir.
Q. Were you ever the victim of any crime?
A. No, sir.
Q. Was your company ever the victim of any crime?
A. No, sir.
Q. You said you heard a member of Mr. O'Dwyer's staff speak on the subject of crime?
A. Yes.
Q. Was it the subject of this case?
A. No, sir.
Q. Was it the subject of homicide, generally?
A. No.
Q. Where was the address?
A. St. Vincent Ferrer's Roman Catholic Church.
Q. Did you know Mr. Heffernan personally, before?
A. No, sir.
Q. You met him that night?
A. Yes, sir.

Q. Were you introduced to him?
A. No, sir.
Q. Was that a long talk?
A. About an hour.
Q. It began with the investigation and prosecution of [fol. 775] crime?
A. Yes, sir.
Q. Were you impressed by his talk?
A. I was.
Q. He is undoubtedly an eloquent speaker, and I take it you believe what he said?
A. Positively.
Q. You formed a definite impression concerning the subject of crime as it was being handled by Judge O'Dwyer?
A. No, sir, the only objection I got is they have their troubles in bringing criminals to justice.
Q. You were in sympathy with them?
A. I was.
Q. And did the result of that talk cause you to be prejudiced against people charged with crime?
A. In a way.
Q. Did it cause you to be prejudiced against people charged with the crime of murder?
A. Right.

By the Court:

Q. You start out without knowing anything about the parties who are accused. The question is, are you prejudiced in advance against anybody who is accused?
A. No, sir.
Q. Did the speaker refer to any of these defendants?
A. No, sir.

By Mr. Barshay:

Q. You told me that as a result of the talk there was some prejudice in your mind about persons charged with crime?
A. Right.
Q. And it did not make any difference who these people were?
A. No, sir.
[fol. 776] Q. In view of the fact you are a taxpayer, you have learned how much trouble the prosecutor has with

investigations and prosecutions of crime, and that lecture increased your prejudice in a degree?

The Court: You mean against crime or against individuals?

Mr. Barshay: Against crime.

Q. Mr. Heffernan is chief of the Homicide Bureau, and that means chief of the bureau which investigates the commission of felonies in Brooklyn; did you know that?

A. I did not know that.

Q. Was he introduced as such to you?

A. No, sir.

Q. You can take my word for it, he is one of the big men in the office. Did he mention the name of Reles?

A. Nothing in connection with this case.

Q. That does not make any difference. Did he mention the name of Reles?

A. No, sir.

Q. Or Bernstein?

A. No, sir.

Q. Or the list of names Mr. Turkus read, like Maione, etc.?

A. I don't recall, no.

Q. Did he speak on a subject from the point of view of being centered in the East New York area?

A. I think he did mention it.

Q. Did some of the men whom Mr. Heffernan mentioned —are they familiar to you now?

A. No, sir.

Q. Mr. Turkus having mentioned the names, did you [fol. 777] compare in your mind the names he mentioned — the names Mr. Heffernan mentioned?

A. No, sir.

Q. Were they interchangeable?

A. No, sir.

Q. Mr. Heffernan, I take it, gave a great deal of credit to high police officials and to the District Attorney's office?

A. Yes, sir.

Q. Was Captain Bals one of them?

A. I don't recall the name.

Q. Do you know any name?

A. No, sir, not offhand.

Q. Did he pay any particular credit to Mr. Turkus and Mr. Klein and his other associates?

A. I don't remember that.

Q. Now, as a result of the prejudice that you have against crime in general, are you in any wise prejudiced against these defendants?

A. No, sir.

Q. You said something to Judge Taylor about being prejudiced because of a person's character.

A. That is right.

Q. Are you prejudiced in this case against our client, Mr. Buchalter, for any reason?

A. From the articles I have read, more or less made me prejudiced on the case.

Q. You read them in the newspaper?

A. Yes, sir.

Q. You read them often?

A. I would not say often.

Q. Fairly often?

A. Yes, sir.

Q. And you accepted the truth of those articles?

A. More or less.

Q. You say that, to the detriment of our client?

[fol. 778] A. I should say so.

Q. That would preclude you from rendering a fair verdict in this case with respect to our client?

A. Yes, sir.

Q. And you could not dissipate that impression?

A. I would try to.

Q. But you could not?

A. Well, I don't think so.

Q. You are therefore determined now that that bias is based on what you read against our client?

A. Yes, sir.

Q. And that it would require some evidence on his part to remove that bias?

A. Yes, sir.

Q. You would expect him or someone in his behalf to offer such evidence, wouldn't you?

A. I think so.

Q. Unless the bias is dissipated by some evidence forthcoming from us, it will not be removed?

A. Yes.

Q. Is that your honest answer?

A. Yes, sir.

Mr. Barshay: Challenge for cause.
The Court: Try the challenge.

FRANK LANZI, residing at 887 East 35th Street, Brooklyn, New York, was then sworn on the challenge.

By Mr. Barshay:

Q. Would you answer the questions the same way, now that you are under oath, as you answered them before?
A. I would.
Q. So I take it, Mr. Lanzi, that your state of mind is such that the quality of the proof would have to vary with respect to the defendant Buchalter because of that prejudice?
[fol. 779] A. I did not get that.
Q. The type of proof that you would want because of that prejudice would be either less on the part of The People or more on the part of the defense?
A. More on the part of the defense.

Mr. Cuff: We all join in challenging for cause.

By Mr. Turkus:

Q. I think you told Judge Taylor that you were a college graduate.
A. Yes, sir.
Q. And, in addition, I think you told me you practiced your profession as an engineer for fifteen years.
A. Yes, sir.
Q. I think you understand that in a publicised case most everybody reads something in the press?
A. Yes, sir.
Q. And that people who read newspapers sometimes for an impression from the reading matter?
A. Yes, sir.
Q. I think you said your mind is such that it is desirable to get on the jury men of experience?
A. Right.
Q. And men who can decide the case free of any outside concern except the evidence they hear in the case, and render a verdict of justice?
A. Yes, sir.

Q. At the outset you told me you had no experience as a criminal juror.

A. Yes, sir.

Q. So there are principles of law in a criminal case that you are not aware of?

A. Yes, sir.

Q. And when you answered Mr. Barshay, did you know [fol. 780] that a defendant need offer no evidence in his case?

A. I did not know until I heard it in court, in a previous case.

Q. Bearing in mind the background which you have had, the experience which you have had, if Judge Taylor should tell you in his charge to the jury that the defendant has no burden in a criminal case, would you follow his instructions?

A. I would.

Q. Would you apply those instructions to the facts in the case.

A. I would.

Q. If Judge Taylor told you the defendant need not bring any evidence in the case at all; he can sit down and say to the District Attorney, "You go ahead, you say I am guilty, prove it," and the jury can draw no inference unfavorable to him by reason of that—would you follow that instruction of law?

A. Yes, sir.

Q. If Judge Taylor told you there is only one burden in a case from the standpoint of guilt and that is with the District Attorney, to establish guilt beyond a reasonable doubt, would you rely on that and follow it?

A. I would.

Q. We are endeavoring to get the right type of juror in the case. Is your mentality such that you can take whatever you have read in the newspaper and lay it aside?

A. I would try to do that.

Q. Nobody can tell any better than you can about your capabilities. Isn't it sensible that you decide it upon the evidence you hear in court?

A. Yes, sir.

[fol. 781] Q. You find no fault with that logic?

A. No, sir.

Q. No matter who the man may be, no matter what the newspapers may say against him, do you find any fault with the logic that every defendant should get a fair trial?

A. No, sir.

Q. And that every defendant in a criminal case should have everything the law gives him, every presumption of innocence and the doctrine of reasonable doubt, and everything that the law of the land says the defendant in a criminal case should have?

A. Yes, sir.

Q. Isn't your state of mind such that you can take a newspaper article and lay it aside and decide this case and give a verdict that renders justice, on the evidence you hear?

A. I will do my best.

Q. You are the only one who can tell whether you will do all this, whether you will lay that aside. Would you expect, because somebody has a write-up in a newspaper, that the prosecutor be relieved of establishing his guilt at all, and take the newspaper and say to the jury, "Here, read it. Find him guilty"?

A. No, sir.

Q. Would you expect, because you read something in the newspaper, that the degree of proof required should be lessened on the part of the prosecutor?

A. No, sir.

Q. Or would you, because somebody wrote something in the newspaper, expect the law to be changed and that the defendant should have to come in and prove the falsity of [fol. 782] things some newspaper wrote about him?

A. No, sir.

Q. Cannot you take your place in this box and give these defendants everything the law says they should have, every solitary thing, from top to bottom, disregarding whatever you have read, view the evidence as a juror, and arrive at a verdict that reflects substantial justice?

Mr. Turkus: I object to the form of the question.

Mr. Barshay: Question withdrawn.

By the Court:

Q. Don't you think, with your cultural strength and experience, you are competent to put aside any impression you may have received and decide this case without any reference to that impression?

A. I still think I would have to have some kind of evidence to remove that impression.

Q. You still think the impression holds you and you cannot put it aside?

A. I could put it aside, but to cast it aside entirely, I don't think I could. I would have to have some proof to do that.

Q. You differentiate between thought and idea?

A. Yes, sir.

Q. You are perfectly sincere in this?

A. I am.

Q. You realize the case has got to be tried?

A. I realize that.

Q. No matter how long it takes?

A. Yes, sir.

Q. And that twelve men must be selected, and when a man with your cultural background and your mentality is found, [fol. 783] he is an asset on the jury, if he can be unprejudiced.

A. I realize that.

Q. Can't you go into the case unprejudiced?

A. I will do my best.

Q. We have to have a definite answer. We do not know what your "best" is.

A. I don't think I could.

The Court: Challenge sustained.

(A recess was then taken until 2 p. m., talesmen admonished as to their demeanor. Defendants remanded.)

[fol. 784] Afternoon Session—Trial Resumed

The Court: Without trying to hurry counsel, the Court will be gratified if at least two more jurors can be in the box before this week's work is completed.

Mr. Talley: I would like to have eleven more.

Thomas G. Jones, of 34 Cambridge Place, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Jones, what section of Brooklyn is Cambridge Place located?

A. In the Hill section between Greene and Gates Avenue.

Q. And have you lived in that section for a number of years?

A. Sixteen years.

Q. I take it you have heard the questions asked of many of the other prospective talesmen in regard to the nature of the charge?

A. Yes, sir.

Q. You understand, do you not, that these defendants at the bar of justice are charged with the crime of murder in the first degree?

A. Yes, sir.

Q. Is there anything about the nature of the charge which would impair your service as a juryman?

A. No, sir.

Q. You have, have you not, no conscientious or other scruple against capital punishment?

A. No, sir.

Q. May I proceed with the understanding that you will [fol. 785] not discuss or permit any discussion of punishment to take place in the deliberations of the jury?

A. Yes, sir.

By the Court:

Q. Was not your neighbor Dr. Hancock?

A. He lived in the neighborhood—I don't know just where.

Q. I think he lived on your block.

A. Yes, years ago.

Q. He is dead?

A. Yes.

Q. What is your business?

A. I am Y.M.C.A. secretary.

By Mr. Turkus:

Q. I take it that your business does not bring you into contact with Brownsville or East New York?

A. No, sir, I am in the Flushing area, connected with the Flushing Y.M.C.A., and before that I was connected with the old East Side Branch in New York City.

By the Court:

Q. You have been at it all your life?

A. No, sir, since the last World War.

Q. Twenty-three years.

By Mr. Turkus:

Q. May I go along with the understanding that you have no contacts, directly or indirectly, with the clothing district, garment district, clothing truckers, or any allied industries?

A. No, sir.

Q. Since your name appeared on this special panel and you received your notice of prospective service, did any- [fol 786] body speak to you about the case?

A. No, with the exception I have spoken of it at home and also in the Y.M.C.A., but there was no discussion.

Q. And then the discussion was limited to your prospective service in the case?

A. Yes, sir.

Q. Making arrangements in your place of business and at home?

A. Yes, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State?

A. I am.

Q. The defendants at the bar are represented by nine lawyers. I have mentioned their names repeatedly as we went along. Do you know any of these nine lawyers individually?

A. No, sir, I do not.

Q. Or do you know consciously anyone employed in their law offices or associated with them in the practice of law?

A. No, sir, I do not.

Q. Do you have the intimate acquaintance with any lawyer who specializes in the defense of criminal cases?

A. Not in this county. In Queens I know Judge Colden and also Richardson—I think he is in the Magistrate's Court.

Mr. Cuff: Municipal Court Judge.

A. (continued) And then I also—when I was in the New York Y.M.C.A. we used to have Harold Hastings. He was one of our members.

Q. I think he was the chief assistant at one time.

[fol. 787] A. Yes, and then I think he did run for District Attorney, but I have not seen him for a number of years, but I know him.

Q. Mr. Jones, have you heretofore had the benefit of jury service in a criminal case?

A. No, sir.

Q. If instructed by the Court that a defendant is protected by a presumption of innocence, that he is presumed to be innocent as he is seated in the court-room, and the presumption continues throughout the trial and stays with him until and unless the District Attorney overcomes that presumption by evidence establishing guilt beyond a reasonable doubt, will you apply that law to the facts of this case?

A. Yes, sir, I will.

Q. And when the Court tells you that the burden is upon the District Attorney to establish guilt beyond a reasonable doubt, will you follow that instruction of law?

A. I will.

Q. And conscientiously endeavor to apply it to the facts in this case?

A. Yes, sir.

Q. And if the Court instructs you on the law, as you undoubtedly will be instructed, that defendants may or may not take the stand as in their judgment they deem wise, and if they do not, no unfavorable inference may be drawn against them, will you accept that instruction of law?

A. I will.

Q. And will you conscientiously endeavor to apply it to this case?

A. I will.

Q. And if you are instructed a defendant has no obliga- [fol. 788] tion or burden to bring in evidence of any kind, nature, or description if he does not desire to do so, will you follow that instruction?

A. I will.

Q. In short, will you give these defendants everything that the law of the land entitles them to have?

A. Yes, sir.

Q. Getting down to the business of this specific case, do you have any bias or prejudice against a prosecution of a case wherein the use or employment of accomplice testimony is had?

A. No, sir.

Q. Will you look with care and caution, will you examine with every God-given sense you have got, the people who

testify in the case, and look them over with every degree of caution? Will you do that?

A. I will.

Q. Will you, in using and weighing all the considerations that you want to apply, or any tests that you want to apply to any witness, will you take into consideration that we are not trying any civil case between two people, but that we are trying here a criminal case, a murder case?

A. Yes, sir.

Q. And will you take into consideration that there may be types of individuals that come into a criminal case that we may not ordinarily meet in our every-day business experience? Will you take that into consideration?

A. I will.

Q. And will you weigh the whole issue in the case from a common-sense, reasonable, and understanding viewpoint?

A. I will.

Q. May I go along with the understanding that you have [fol. 789] no prejudice either against the prosecutor of the county, Judge O'Dwyer, or against the prosecution wherein accomplice testimony is employed?

A. I have none.

Q. I believe you have already stated you do not know Judge O'Dwyer, the District Attorney.

A. No, I do not.

Q. Do you know Assistant District Attorney Joseph Klein, or Turkus?

A. No, I do not know any in Brooklyn at all.

Q. So you know no member of Judge O'Dwyer's staff?

A. No, sir.

Q. Did you formerly know anybody connected with Mr. Geoghan's staff when he was District Attorney?

A. No, sir.

Q. If accepted as a juror, will you solve the issue in this case, the guilt or innocence of the defendants at the bar, with reasonable and fair discussion with the other jurors?

A. Yes, I will.

Q. Will you, if instructed by the Judge that the testimony with respect to one defendant may apply only to him, or it may apply to two of the defendants, will you endeavor conscientiously to apply the testimony in those connections as instructed by the Court?

A. Yes.

Q. And will you endeavor conscientiously, when the testimony affects every defendant in the case, endeavor to apply that testimony to each of the defendants?

A. Yes.

Q. Something has been said here about the defendant Buchalter having been previously convicted of crime and [fol. 790] serving a long-term sentence. Would you permit that to cause you to deviate or relax your duty as a juror in the determination of this issue where he is brought to the bar of justice on a charge of murder in the first degree?

A. No, sir, because I believe they have already paid for what they did.

Q. And that wipes the slate clean as far as that is concerned?

A. Yes.

Q. And on this issue——

Mr. Cuff: Let him finish his answer.

A. (continued) I say that whatever previous crime they have committed, the State has punished them for that crime, and this has nothing to do whatever with anything of that, so that they are starting with a clean slate in this trial. That is the way I feel about it.

Q. So that you are going to decide, if selected as a juror, this murder case on the evidence in this case?

A. Yes, sir.

Q. If after you have heard all the evidence in the case, you heard all of the lawyers tell you what they think of the evidence, and the prosecutor draw his inferences, the learned Court instruct you on the law, and you talk the case over with the other jurors with common sense and reasoning, and you come to the conclusion that you are satisfied beyond a reasonable doubt that at this bar of justice there are three guilty men, Buchalter, Capone, and Weiss, will you hesitate to say so in your verdict?

A. No, sir.

[fol. 791] Q. Is there any outside consideration under the sun that would affect your ability to render a true and honest verdict in consonance with the principles of justice?

A. No.

Q. And if selected as a juror, will you endeavor conscientiously to arrive at a just and honest verdict in the case?

A. I will.

By Mr. Talley:

Q. Mr. Jones, how long have you been identified with the Y.M.C.A.?

A. Since 1917.

Q. How long have you been a secretary for one of its branches?

A. I was two years with the Army in war service, and one year with the merchant marine training ship service. Then when I came back in 1920 I went to the old East Side Branch in New York, and I was secretary there.

Q. Were you in the employ of the Y.M.C.A. during those two years that you speak of?

A. Yes, sir.

Q. Were you known as a Y.M.C.A. secretary in those services?

A. Yes, sir.

Q. Have you read anything about this case or anyone associated with it?

A. In the paper from time to time I have seen the headlines, just the men's name, but I have not read anything about it. I don't care to read very much about that kind of thing.

Q. With respect to these defendants did you read anything?

A. No, sir, and I did not know anything about the case [fol. 792] until I came here and saw it on the bulletin.

Q. Is there anything that you have read about the case or anyone associated with it that has made any impression upon you at all?

A. No, sir.

Q. Have you sat as a juror in a criminal case at any time?

A. No, sir.

Q. Have you sat as a juror in a civil case?

A. Yes, sir.

Q. In what court?

A. Surrogate's Court.

Q. Is that the only court in this county?

A. No, and also in the City Court for accident cases. That is some time ago, though.

Q. But you have had no experience as a juror in a criminal case before?

A. No, sir.

Q. The Court will charge you that after hearing all the evidence, when the case is submitted for the consideration

of the jury, that you should not convict or bring in a verdict of conviction of these defendants or any of them unless you are satisfied of the guilt of these defendants or all of them beyond a reasonable doubt. If you have any reasonable doubt in your mind as to the guilt of these defendants or any of them, will you resolve that doubt in favor of the defendants?

A. I will.

Q. The Court will charge you that these defendants, as to the defendants in every criminal case, come into court with a presumption of innocence in their favor.

A. Yes.

Q. Will you indulge that presumption in favor of these [fol. 793] defendants until the evidence outweighs, that is, the evidence that The People may present, outweighs that balance?

A. I will.

Q. Against these defendants?

A. Yes, sir.

Q. And you do not think you would have any difficulty doing that, do you?

A. No, sir.

Q. Have you ever heard, in the Y.M.C.A. or any place else any of the Assistant District Attorneys of this county talk or lecture about crime or the enforcement of criminal law?

A. No, sir, I have not, but I have had charge of the program in the Y.M.C.A. where we have had a man come in from the Parole Office, and then I had a personal friend, George Dr——, but he passed on last year. He was head of the Crime Prevention Society, but those talks have all been on a constructive basis, preventive basis, to keep young people from getting into things. There is nothing discussed of the criminal nature, or there is no one at all spoken of.

Q. Are you a member of any organization that has to do with the enforcement of law, the prevention of crime?

A. No, I am not a member at all, but, of course, in my connection with the Y.M.C.A. I have perhaps associated with the different organizations in obtaining speakers, and, as I said, I know Judge Golden and some of the others, but as far as that, their influencing me, it would not, because our policy in the Y.M.C.A. is, of course, preventive policy, to help young men not to do things wrong, and

if they have done things wrong, to try and help them as [fol. 794] much as we possibly can.

Q. Yes.

A. Of course, if they break the law and then they have to undergo the punishment for what they have done—that is our policy, but we try and help them as far as we can.

Q. Do you know of any reason at all, by reason of your association with the Y.M.C.A. or from any other consideration, why you could not sit as a fair and impartial juror in this case?

A. I do not.

Q. Is the branch of the Y.M.C.A. with which you are associated here in Brooklyn?

A. No, sir, it is in Flushing.

Q. How long have you been a resident of Brooklyn?

A. Forty years.

Q. You never lived in Queens?

A. No, sir.

Q. With whom have you talked about this case before today?

A. Well, as I said, just at home, I spoke with my wife, and then out at the branch I had to speak with the general secretary to tell him that I might be called on jury duty, but there was nothing discussed about the case.

Q. Neither with your wife nor with the general secretary?

A. No.

Q. The latter——

A. When I went home I told her what Judge Taylor told us, not to read the newspaper, so when I get home at night time she reads the newspaper and she hides them from me. She says, "You cannot have that."

Q. She does not want to get in bad with Judge Taylor?

A. No.

[fol. 795] Q. Does not want to get you in bad. Did you ever hear any discussion over the radio?

A. No, sir.

Q. About any matters connected with this case?

A. No, sir.

By Mr. Rosenthal:

Q. Mr. Jones, are you in that branch of the Y.M.C.A. that is opposite the high school?

A. Yes, Northern Boulevard.

Q. Right off Main Street?

A. Yes.

Q. Do you know Judge Golden socially?

A. Well, I have met him a number of times. No, I have never been to his home.

Q. Have you been to the court where he presides?

A. No, but I have met him a number of times in a community interest. He has always lived in Flushing, and during the organization for the Queens College the group of men met at the Y.M.C.A.

Q. I was one of those men?

A. Oh, yes.

Q. Judge Golden lives in Whitestone?

A. Yes, sir.

Q. What I am trying to get at is have you had any discussion with him in relation to crime or individuals who may have come before him in his capacity as a county judge?

A. None whatever.

Q. Your relationship was due to meeting him at the various meetings that were had?

A. That, and I have heard him speak in connection with the hospital drive and the churches out there.

Q. Regarding Mr. Hastings, have you had any discussions with him in your friendship with him in relation to crimes?

A. No, I have not seen him, oh, about fifteen years or more.

[fol. 796] Q. How long have you been in the Flushing branch of the "Y"?

A. I went there when it was opened in 1926.

Q. That is about fifteen years?

A. Yes.

Q. You say you merely read headlines with respect to this case; is that correct?

A. Yes.

Q. Have you read any articles at all in the *Mirror?*

A. No, sir.

Q. What paper do you customarily read?

A. We usually read the *Tribune* in the morning and then I have the Long Island *Star* out at Flushing, and at home we have the Brooklyn *Eagle.*

Q. You do not find any articles in the Long Island *Star* about this case?

A. I have not seen any.

Q. My name is Sidney Rosenthal; my office is in Long Island City.

A. Yes.

Q. You do not know me or have not heard of me?

A. No, sir, I do not know you at all.

Q. The mere fact that The People produce people of former criminal records who, according to the District Attorney, will testify to the facts or the alleged facts concerning this crime would make you weigh their evidence a little more carefully than it would were they of a different character, wouldn't it, sir?

A. Well, I would weigh their evidence very carefully, yes.

Q. Assuming, for instance, that witnesses were called —— Let me withdraw that.

Q. You rightfully said that if a person had committed a [fol. 797] crime and had been punished for it, that that has nothing to do in this particular case, that they are on trial for, this particular crime. However, if certain witnesses take the stand who have committed crimes to the knowledge of the District Attorney and have not been punished for them up to the present time, admitting crimes of murder, perjury, and other things, that would cause you to hesitate and weigh very carefully what motive or interest they may have in making the statements that they have made; is that true, sir?

A. Yes.

Q. It would cause you to weigh more carefully, especially if you felt that although they admitted that they had committed a number of murders, they themselves were not going to be punished for those murders? Wouldn't that make you weigh it carefully?

A. I would weigh it very carefully.

Q. The testimony that they are giving. If the same were true of the person who were to supply what has been called throughout the examination of jurors this outside evidence tending to corroborate the accomplice—I suppose you heard that?

A. Yes.

Q. So often that it is familiar without my going into detail. You would also weigh in your mind the testimony of those individuals very carefully?

A. Yes.

Q. Have you in any wise prior to your being called for jury duty heard the names of any of these defendants at all in any respect?

A. I just recognize one of them that I have seen in a [fol. 798] headline, but I have never read the articles.

Q. Without mentioning the particular individual, have you ever discussed that individual with any person or persons?

A. No, sir.

Q. Did you, in addition to reading the headlines, read any of the subject-matter which was alleged to have related to that particular individual?

A. No, sir.

Q. Have you in any wise formed any impression of any character concerning any of the defendants?

A. I have not.

Q. So that at the present time your mind is free and open?

A. Yes.

Q. And you can be guided solely by the credible evidence, that is, the evidence that you believe as it is produced, the sworn evidence; is that correct?

A. Yes.

Q. You were asked by the District Attorney whether or not under the circumstances—if you were not asked, it has been asked of everybody else—whether you would have the courage of coming in with a verdict of guilty if you felt that the three men at the bar of justice of the County Court of Kings County, Part 3, were guilty in your opinion. Do you recall that question being asked in form and substance either of you or the men who preceded you?

A. Yes.

Q. Using the same preamble, without going into detail, would you have any hesitancy if you in your own mind were not convinced in accordance with the established [fol. 799] principle of law of their guilt, in coming out and saying, "Not guilty"?

A. No, sir.

Q. You would not have any such hesitation?

A. No, sir.

Q. No question, sir, that each individual juryman that is called here has a right to formulate his own opinion from the evidence? You understand that?

A. Yes.

Q. You further understand that you have a right to fairly discuss your point of view with the other jurymen?

A. Yes, I do.

Q. Without the fear of an Assistant District Attorney or anybody else accusing you of rancor or bitterness, you have that right; you understand that? And without the fear of having anybody charge that you are trying to hang a jury? You understand that, sir, too? If, after arguing and deliberating with your fellow jurymen the guilt or innocence of any one of these three defendants, they are unable to convince you of the fact that the foundation of your reasoning is wrong—is that clear to you?

A. Yes.

Q. But that, listening as you do, carefully to their interpretation of the facts you still retain the opinion that you formed, would you, merely because of the statement of the Assistant District Attorney here, before you were called, or any other person's statement, have the fear of sticking to your opinion, under the theory that you might be accused of trying to hang a jury or having rancor or bitterness—would you be afraid to hold out?

A. No.

[fol. 800] Q. Would you change your opinion merely because someone else has had prior jury service?

A. No.

Q Or, because of the length of time or the numbers that might be against you?

A. No, sir.

Q. You realize that your verdict, when it comes in, whether it is in accord with any of the other jurymen or not, is the one which is impressed upon your conscience as the righteous verdict; you understand that?

A. Yes.

Q. And you understand if it were not for that fact we would not need twelve men, we would only take one? You understand that?

A. Yes.

Q. So that you are entitled to an opinion as long as it is not an opinion which is a consideration outside of the evidence? You understand that?

A. Yes.

Q. Is there anything at all, sir, that has not been reached either by the questioning of the District Attorney or by

Judge Talley or myself that you yourself feel would incapacitate you from serving as a fair and impartial juror?

A. No, sir, there is not, to my knowledge.

Mr. Rosenthal: No challenge.

By Mr. Climenko:

Q. Mr. Jones, have you at any time read the *Christian Science Monitor*?

A. I have occasionally seen it, yes.

Q. Have you ever read anything about any of these defendants in that periodical?

A. No, sir.

[fol. 801] Q. And, as a matter of fact, you have never read anything about any of the defendants of which you have a present vivid recollection, as you think about it now?

A. No, none.

Q. And you have never sat in the trial of a criminal case?

A. No, sir.

Q. You have never studied law?

A. No, sir.

Q. So that what you may know about the concepts of our law is what you have learned listening to these questions in the last few days?

A. Yes, sir.

Q. You know, of course, from those questions that the defendants are assumed to be innocent?

A. I do.

Q. There is nothing in the background of your professional life which prejudices you against any defendant simply by reason of the fact that he is brought into a court-room like this?

A. No, sir.

Q. You know from the nature of your work that an indictment is merely an accusation?

A. Yes, I know that.

Q. That the indictment is not proof of anything; is that right?

A. That is right.

Q. You know from the teaching of your professional experience that every man is entitled to a fair trial; is that correct?

A. That is right.

Q. And you resent any invasion of that right that may ever have been made by a periodical simply in the pursuit of circulation; isn't that right?

A. Yes.

[fol. 802] Q. You understand what I mean by that question?

A. I do.

Q. You understand that one up to the hilt, don't you?

A. Yes.

Q. So that, were you to sit as a juror in this case you would not for one instant permit the fact that newspapers for circulation purpose may have mentioned any defendant by name prior to the beginning of this trial, that would not influence you at all, would it?

A. No, sir.

Q. You would listen to this case simply on the proof as it is adduced here, isn't that correct?

A. Yes, sir.

Q. The mere fact that this court is convened in the physical way that it is and that defendants are led into court in the custody of guards, would not prejudice you against any defendant, would it?

A. No, sir.

Q. You know that the question of innocence or guilt is one which is to be investigated only when the trial begins?

A. That is right.

Q. Isn't that correct?

A. Yes, sir.

Q. And you are confident that you would not permit yourself to be prejudiced against anyone charged with crime simply because he had been charged with a crime; isn't that correct?

A. Yes.

Q. Mr. Turkus has asked you whether you would have any prejudice against what he calls accomplice testimony, and you said that you would have no prejudice against accomplice testimony as such; is that correct?

A. That is correct, sir, yes.

Q. But you understand, do you not, that your duty as a [fol. 803] juror, were you selected as one, would be to pass judgment on the credibility of witnesses?

A. Yes.

Q. That is really the heart of the function of a juror?

A. Yes.

Q. To decide by the standards of his common sense, sagacity, that he has learned from his every-day experience, whether or not a man is telling the truth or lying. That is what we mean by testing credibility.

A. Yes.

Q. That is what you understand to be meant by that phrase?

A. Yes.

Q. You have to pass on such questions every day of your professional life, don't you?

A. Yes, sir, I have to have quite a number of times, when I have to decide on men, whether they are telling the truth or giving me a hard luck story or just make a story out of it.

Q. And sometimes you realize, you always realize, whether you apply it consciously or subconsciously, that in testing the truthfulness of a man's statement to you you have to look to his motive or lack of motive, isn't that true?

A. Yes.

Q. Sometimes an individual is so situated that he is motivated to tell an untruth; isn't that so?

A. Oftentimes.

Q. Now, assume that a man takes the stand and says that he is an accomplice, and assume that it develops that he has a motive for telling an untruth, could you take that into consideration in passing on the honesty or dis-[fol. 804] honesty of his statement?

A. I take everything into consideration.

Q. All right. When you say "everything," let us suppose this possible case: Supposing a man takes the stand and he says, "I committed eleven murders in Kings County and I have not been prosecuted for any one of them and I hope to obtain leniency through the assistance, the good word, of the District Attorney of Kings County." Would you take into consideration in testing the honesty or dishonesty of his statements the situation in which he is placed and the situation from which he speaks?

A. Naturally, yes.

Q. In other words, you would realize that a man thus situated had the strongest possible motive to tell a lie; is that right?

A. Well, yes, he would have a motive to tell a lie, but at the same time he may tell the truth.

Q. He might be telling the truth, but you realize that he would have a great motive to tell a lie?

A. Oh, yes, I can judge that.

Q. And in determining whether or not he was telling the truth or telling a lie, you would consider the existence of that motive, would you not?

A. I would, but yet there would have to be something else presented. You understand what I mean?

Mr. Talley: Mr. Jones, will you speak out loud?

Mr. Turkus: He wants corroboration.

Mr. Climenko: Pardon me, he did not say anything of the sort, and we are waiting for him to state what had [fol. 805] been inaudible.

Mr. Turkus: Is it your charge that I am trying to influence a prospective juror?

Mr. Cuff: May we have the answer read?

(Answer read.)

Q. Had you finished that answer?

A. No. As I have sat and listened I have heard it mentioned a number of times that the testimony of such a man would not be acceptable unless there is other information presented with it. It would be valueless unless they could produce something else. That was my feeling about it.

Q. In other words, you realize that an accomplice must be corroborated by someone who is not an accomplice?

A. Yes, that was what I meant.

Q. Following through your understanding on that, if the Court shall charge you that an accomplice cannot be corroborated by another accomplice, would you have any difficulty in accepting that instruction of law?

A. I would accept whatever the Court says.

Q. I am sure you have that readiness to do it, but do you understand the hypothetical rule that I am referring to? Suppose that thirty persons take the stand.

A. Yes.

Q. And assume with respect to all of them the Court holds that they are accomplices as a matter of law.

A. Yes.

Q. And the Court instructs you as a juror and your [fol. 896] associates in the jury box that an accomplice cannot be corroborated by another accomplice nor may one accomplice be corroborated by thirty accomplices, there must be a non-accomplice witness; would you have any difficulty in accepting that proposition of law?

A. No, sir.

Q. You now understand what I mean by it?

A. Yes.

Q. I now ask you this question——

The Court: Interrupt me if you do not want him to answer this:

By the Court:

Q. You realize that in determining who tells the truth, one of the first things we do is to ask ourselves who says it?

A. Yes, sir.

Q. If he is a man of character, we place some dependence on that. You realize that?

A. Yes, sir.

Q. If he is not a man of character, that goes out?

A. I see, yes, sir.

Q. That leaves only plausibility? You realize that?

A. Yes.

Q. Which may be subject to check-up. Now, supposing the Judge should charge you that plausibility alone is not enough from an accomplice, there must be corroboration tending to connect the defendant with the commission of the crime, there must be sufficient to satisfy the juror; will you honestly apply that, sensibly apply it?

A. I will, sir.

[fol. 807] Q. In a manner that satisfies your own conscience that you have done it adequately?

A. Yes.

By Mr. Climenko:

Q. Mr. Jones, apart from that, for one minute, as you construe your duties as a citizen, your duties were you to be accepted as a juror here would be to listen impartially to the evidence; is that correct?

A. Yes, sir.

Q. If at the conclusion of the case you entertain a reasonable doubt as to the guilt of any defendant, it would then be your duty to return a verdict of Not Guilty, is that correct?

A. Yes, sir.

Q. You have no hesitation in recognizing that as part of the obligation of the jurors' oath?

A. No, sir.

Q. And of course, also, you have no prejudice against any defendant or sympathy for him?

A. No, sir.

Q. Is that correct?

A. That is right.

Q. The same answer applies with respect to the prosecution; is that correct?

A. That is right, sir.

Q. In other words, it is not your duty as a citizen sitting in the jury box to be influenced by the fact that a witness is produced by the prosecution. You understand that?

A. I understand, yes.

Q. I will put it to you another way: Would you more readily believe a man sworn as a witness because he was produced by Mr. Turkus?

A. No, sir, I would not listen to one more than [fol. 808] the other. If Mr. Turkus produced a man and he gave the evidence and, after weighing the evidence, I thought that was right, that is what I would stand by, and also if the other side were to produce evidence that, after weighing it, I considered that evidence right, why that is what I would believe.

Q. Let us ask about that for a moment, Mr. Jones. Suppose that the other side does not produce any evidence.

A. I understand from what I have heard in the court here they don't have to produce anything, the burden is on the District Attorney to furnish that, but he would have, he has got to furnish it to the satisfaction of the juror so that the juror can decide what is right and what is wrong.

Q. To their satisfaction beyond a reasonable doubt?

A. Yes, sir.

Q. You would not be prejudiced against the defendant by reason of his election not to produce any evidence?

A. No, sir.

Q. That idea, as a principle, does that violate your sense of justice?

A. No, sir.

Q. You think that is perfectly fair?

A. I think so.

Q. Coming back to the question relating to this problem of accomplice, you said that you understood that the testimony of an accomplice would not be of any value unless it was corroborated; is that right?

A. That is right.

Q. Assume that the District Attorney should attempt to furnish corroboration from a witness, and in connection [fol. 809] with that witness you might, in the exercise of your good sense, detect the existence of motives to falsify; would you, in appraising the truthfulness or dishonesty, as the case might be, of that witness, use your ordinary common sense and your ordinary ability to appraise a narrative and distinguish between truth and falsity?

A. I would.

Q. In other words, you would not be more lenient in testing the truthfulness or the falsity of such a witness simply because, as you understand the rules of evidence, the District Attorney might be particularly dependent on that particular witness?

A. No, sir, that would have nothing to do with it whatever. The evidence would have to be presented, and I would judge according to the evidence. I would not be any more lenient because of that fact.

Q. Yes. Now suppose that this particular witness who is offered as a corroborating witness is a person who has a record, which he readily admits, of having committed perjury in other courts—you understand what the crime of perjury is, do you not?

A. Yes.

Q. Suppose that that particular man says yes, "I have sworn to tell the truth solemnly in other courts of law, and I violated that oath, I swore to tell the truth and actually I told a lie that was material to that other case when I was a witness there," would you accept that admission of past perjury as a factor in weighing his credibility as he sits here in this case?

[fol. 810] A. Yes, I would.

Q. Would you normally assume that a man who admits that he lied after taking an oath solemnly in a prior case, might well be lying in this particular case?

A. Yes, and yet he may tell the truth and there may be other evidence presented from the right source that would show that he was telling the truth.

Q. Mr. Jones, I am afraid you are ahead of me at this point, because I am talking about this man, this hypothetical man, not as an accomplice any more but as a person who is submitted to your scrutiny by the prosecution as a witness in corroboration of an accomplice. I am not talking about an accomplice.

Mr. Turkus: I object to it. The prospective talesman has properly answered the question in detail. He has even gone beyond that point.

The Court: Overruled.

Q. Understand me. It is not a question any more as to whether or not this particular man who admits to past perjury——

A. Yes.

Q. —is, in turn, being corroborated. That is not the case and the question I am trying to put to you. The question I am putting, this man is offered by the prosecution in an effort to corroborate the accomplice. The fellow who is so offered admits that on past occasions he himself has committed perjury. Would you take that fact, that admission of his past deliberate infringement of an oath to tell the [fol. 811] truth, into consideration when you passed on the problem of whether presently he was telling the truth or telling a lie?

A. I would take it into consideration. I would be very careful to gather everything that was presented, so that I could judge.

Q. Is it not an important factor to you in assessing the truthfulness of a man as to whether or not he admits that on prior occasions he has deliberately lied to you?

A. Yes, sir.

Q. That is the standard which you employ in your professional life and in your private life, isn't it?

A. Yes, sir.

Q. A man today tells you one thing and tomorrow comes back and says, "I lied to you yesterday, Mr. Jones, I did solemnly represent to you that I was telling the truth yesterday, but I lied to you," and then he tries to make a new solemn representation to you. The fact that he did lie when he was representing to tell the truth is a factor that makes you terribly suspicious of him; isn't that so?

A. Yes.

Q. It may be that, using the lawyer language, that perhaps is a little too present in my questions, I made the questions very complicated, but that is all I am asking of you. I am saying to you, suppose that in the guise of a corroborating witness Mr. Turkus produces a man who says, "Yes, two years ago or three years ago I was in such and such a court of this state; I solemnly swore to tell the truth, and I did not tell the truth, on the contrary, I lied; today I have sworn again to tell the truth. By the fact that [fol. 812] I am on the stand I am asking you to accept my testimony as true." Now, you know by that recital, part of which is implicit, you know by that recital that that man has admitted that he deliberately lied on a prior occasion that was of equal solemnity. I am asking you would you not take that into consideration as a serious factor affecting your ability to believe such a witness.

A. Yes, I would.

Q. And would the fact that that particular witness who was so burdened with the history of perjury, which he admits, is a person on whom the prosecution is depending for corroboration according to the theory of this case, would that fact of the prosecution's reliance and dependence on him induce you in any way to relax the scrutiny which you feel should ordinarily attach to appraising the honesty of a statement from such a tainted source?

A. No, sir.

Q. Not one bit?

A. No, sir.

Q. That man, because he admits having committed perjury, is a person of whom you must be particularly careful; isn't that so?

A. Yes, sir.

Q. If a private transaction between you and such a person were involved, you would be very careful, wouldn't you?

A. I would.

Q. You would not relax your carefulness by reason of the fact that you are not a party to a transaction with such a person, but, on the contrary, because you are in a situation [fol. 813] where the fate of other persons is dependent on your judgment of such a person—you would not relax your carefulness one bit, would you?

A. No, sir.

Q. On the contrary, you would increase your carefulness?

A. I do not know whether I would increase my carefulness, because I would try and be as careful as I could through the whole procedure, and I don't think if your mind is set on anything and you are doing it the best you can, that you can increase it more.

By the Court:

Q. In your Y.M.C.A. work do you have to pass on complaints concerning boys who are members of the Y.M.C.A.?

A. Sometimes, yes.

Q. And how often does that happen?

A. Not very often, but every once in a while even boys in the Y.M.C.A. get into trouble.

Q. You try to get at the real truth in those cases?

A. Yes.

Q. Does the Flushing Y.M.C.A. also have a debating association?

A. We have a speakers' guild there, yes.

Q. They have debates with judges of debates?

A. No.

Q. Have you ever acted as a judge of a debate?

A. No, sir.

By Mr. Climenko:

Q. Mr. Jones, if you were chosen as a juror, would you be affected in your consideration of the issue of innocence or guilt as against any one of these defendants, would you be affected by the fact that that defendant did or did not take the stand?

A. No, sir.

[fol. 814] Q. In other words, the fact that a defendant did not take the stand would not be a circumstance which would prejudice you against that defendant?

A. No, sir, not at all.

Q. You don't expect that he is under any obligation to take the stand?

A. So I have learned since I have been sitting here.

Q. And, having learned that, you require no difficulty in accepting that proposition?

A. No, sir.

Q. You would not the more readily believe any witness against a particular defendant by reason of that fact, that that particular defendant failed to take the stand?

A. No, sir.

Q. In other words, the question of the truthfulness or the dishonesty of a particular witness is dependent wholly on your measure of the honesty of that person and is completely independent of whether or not a particular defendant testifies in the case?

A. Yes.

Q. Is that correct?

A. Yes, sir.

Q. You understand, do you not, that a juror is the sole judge of the facts?

A. Yes, sir.

Q. And the implication of that proposition of law is clear to you?

A. Yes, sir.

Q. You are not beholden to anybody for a verdict one way or the other in the case?

A. No, sir.

Q. You understand also that although it is the obligation of a juror to participate in discussion with an open mind, with his colleagues in the jury room, that it is also his [fol. 815] obligation to adhere to his own individual opinion unless in consequence of reasonable argument and in consequence of the free working of his mind he elects to change his mind. Do you understand that?

A. Yes, I do.

Q. You understand that a juror may not be bullied by the fact that he happens to be in the minority?

A. Yes, sir.

Q. If he really reasonably entertains a doubt different from other jurors?

A. Yes, sir.

Q. And of course you also understand that not only does he have the right to entertain his own honest opinion as against everything except the persuasive arguments of other persons in the jury box with him, but certainly he cannot let that opinion be affected in any way by anything outside the case?

A. No, sir.

Q. You understand that?

A. I understand that, yes, sir.

Mr. Rosenthal: No challenge for cause.

Mr. Turkus: The juror is satisfactory to The People of the State.

Mr. Talley: Challenged peremptorily by the defense.

NATHAN JELLIN, of 8313 Bay Parkway, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Jellin, do I pronounce your name correctly?
A. Correct.
[fol. 816] Q. 8313 Bay Parkway; is that Bensonhurst?
A. That is right.
Q. Have you lived there a number of years?
A. Six years.
Q. And prior to that time in what section of Brooklyn did you live?
A. I lived in East Flatbush before. Before that I lived in Brownsville.
Q. I suppose you know some of the old Brownsville residents?
A. Very few.
Q. When you tell me about Brownsville, you sort of put me on my guard that there is something I ought to know about it.
A. Only I belong to an organization out there, fraternal organization.
Q. What is the name of it?
A. Young Fellows Lodge, Independent Order Brith Abraham.

By the Court:

Q. That is the leading Jewish benevolent organization in America, isn't it?
A. I believe it is.
Q. What is your business?
A. I was in the post office.
Q. What branch?
A. In the old General Office in New York, clerk in the post office.
Q. When did you retire?
A. Eight years ago.
Q. How many years were you there as a clerk?
A. Thirty-five years.
Q. And is that sorting clerk, or were you at the window?
A. I was assorting and also doing directory work.

Q. In your position as a sorting clerk, you had to have [fol. 817] quite a memory development?
A. Oh, yes.
Q. To know just how to place the stuff you sorted?
A. That is right.
Q. In hundreds of different ways?
A. Boundary lines, and so on.
Q. In a fraction of a second?
A. Oh, yes.
Q. So apparently you developed a mind that grasps detail quickly?
A. Oh, yes.

By Mr. Turkus:

Q. I did not hear all of the answers that you made, Mr. Jellin, because, of necessity, in responding to the Court your head was turned in that direction, but did I hear this much, at least, that you at one time were connected with the United States Government?
A. That is right.
Q. In its Post Office Department?
A. Right.
Q. As a clerk in the mailing division?
A. No, in the City division. We used to distribute City letters. The mailing division is outside the city. There is a difference there.

The Court: The sorting goes according to sections, and the moment that address is seen the clerk must know precisely where it is and where to throw the letter or parcel. That is why I asked him these questions, as having a bearing on his ability to remember details of evidence and to get them quickly.

Q. In other words, you got the mail in this City division [fol. 818] and you look at the address and then dump it in the particular pile it has to go to be sent out?
A. In the box where it belongs.
Q. That is set up in boxes?
A. That is the idea.
Q. How many years were you in the post office?
A. Thirty-five years.
Q. And you retired after thirty-five years of service?
A. That is right.

Q. And I take it that you are presently on a pension of the United States Government?

A. That is right.

Q. You specifically directed my attention to the fact that you lived out in the Brownsville district of Brooklyn at one time.

A. That is right.

Q. Have you taken any special interest in activities in Brownsville?

A. None whatever.

Q. And the Friends Lodge of the I.O.B.A., where does that meet?

A. I believe they meet at Rochester and Lincoln Place now. I have not gone to meetings in years. I am a good dues paying member, and that is all.

Q. I happened to be there one night myself, and that is what I was going to ask you about. At least you have not been there in the last two years?

A. I have not been to a meeting in ten years, probably.

Q. Do you maintain any friendships in that Brownsville-East New York area of any kind, nature, or description?

A. None whatever.

[fol. 819] Q. When the investigation of Judge O'Dwyer commenced, did you read of it because it affected certain individuals?

A. I paid very little attention to it. I paid very little attention to it.

Q. In any wise, have you had any connection with people in the garment business?

A. None.

Q. Or in the clothing industry?

A. No.

Q. Or with anyone associated or connected with the Brooklyn waterfront?

A. No.

Q. How many years have you been retired, Mr. Jellin?

A. Almost eight years. November 1st will be eight years.

Q. Do you have any outside interest at night, for example, do you belong to any particular societies or do you devote yourself to any particular hobby?

A. No.

Q. You are just taking it easy?

A. That is all.

Q. What newspapers do you customarily read?

A. I usually read the *Times*.

Q. The New York *Times*?

A. New York *Times*.

Q. That is the morning paper. Do you customarily read an evening paper?

A. I do not.

Q. Without prying into your actual age, because I am not concerned with that, but there is an age limit. You know what it is. There is no danger of us reaching that?

A. The reason I retired was because there was a special law passed when Mr. Roosevelt came into office allowing [fol. 820] men who are thirty years and over to retire if they wished to, and I availed myself of that opportunity. I was only fifty-five at the time.

Q. In connection with your duties in the post office, did you ever have occasion to appear as a witness for the United States Government against people employed in the Post Office?

A. No.

Q. Or in any wise do any business with the United States District Attorney or any F. B. I. men?

A. No.

Q. Or any post office inspectors?

A. No.

Q. Since your name appeared on this jury panel did anybody speak to you about the case?

A. No.

Q. Have you heretofore had prior jury service?

A. Yes.

Q. In what court?

A. I have had service in City Court here in this building and in the United States in the Federal Court.

Q. In the United States District Court, was that service in connection with a criminal case?

A. Yes.

Q. And did the case in which you sat go to a conclusion?

A. Yes.

Q. And did you hear the instruction of law from the Judge.

A. Oh, yes.

Q. Has that been recent?

A. Yes, this year.

Q. Were any of the counsel who represent the defendants in this case in the case in the Federal Court which you handled as a juror?

A. No.

[fol. 821] Q. And you had the benefit of listening to the Judge's instruction on the law?

A. Yes.

Q. And that has been as recent as this year?

A. Right.

Q. And heretofore you have had service in the City Court right in this building?

A. Yes.

Q. In those cases did you have instructions of law from the Judge?

A. Yes.

Q. Have you at any time been a Grand Juror in the United States Court?

A. No.

Q. Or in the County Court?

A. No.

Q. Have you heretofore served as a juror in any criminal case in the County Court?

A. No.

Q. May I proceed with the understanding that you are in sympathy with law enforcement?

A. Yes.

Q. There are nine lawyers here who represent these defendants at the bar. Do you know any of them?

A. No.

Q. Do you know anyone connected with their law offices in any capacity?

A. No.

Q. You have heard me say their names to other talesmen who occupied the chair that you do?

A. Yes.

Q. And you are familiar with the names and with the men that are in the court-room?

A. Yes.

Q. And you know none of them. Are you acquainted intimately with any member of the bar who tries criminal case as a specialty?

A. No.

[fol. 822] Q. In the Federal Court in which you served

as a juror, did the Judge comment upon the evidence to the jury?

A. Yes.

Q. In the Federal Court do you understand that that is the law, that a Judge may comment upon the evidence and express his belief or opinion with regard thereto?

A. He told us the law in the case, that is all.

Q. But did he express any opinion as to the evidence in the case?

A. Not that I heard of.

Q. Who was the judge?

A. Judge Campbell.

Q. Well, at any rate, my understanding of the Federal procedure is that a Judge may comment on the evidence, and I wanted to know whether the Judge did in the particular case that you served, whether he passed any opinion on the evidence.

A. I did not understand it that way.

The Court: As a practical matter, they don't.

Mr. Wegman: Some of the judges do, but Judge Campbell very rarely does.

The Court: Judge Campbell is old fashioned. He was a County Judge of this court.

Q. What I wanted to have clearly understood, that in the State Court system, at least, as distinguished from the Federal Court system, the judge does not comment upon the evidence or whether or not he believes or disbelieves a specific witness. That is a job the jury does here. The Judge tells them the law, they apply the law to the facts. So [fol. 823] I wanted to make sure that as we went along here we did not go along with any different notions. That was the reason for the inquiry.

Did you make the acquaintance of Mr. Geoghan when he was District Attorney, or any member of his staff?

A. No.

Q. Is there any member of your family who is a lawyer?

A. No.

Q. And the correct spelling is with a "J"?

A. Correct.

By the Court:

Q. Are you a family man?

A. Yes, sir.

Q. You live corner of 84th Street?

A. Right on the corner. New House.

Q. Miss Morrissey had a house across from you. It was torn down and an apartment built.

A. Yes.

Q. Do you belong to any organization there in Bensonhurst?

A. No organization.

Q. Do you attend any meetings at that public school that is corner 85th Street and 21st Avenue?

A. No, sir.

Q. You are not active politically?

A. Well, very little. I am a member of the County Committee; that is all. I am not very active.

Q. You are the election district captain?

A. I am not the captain; I don't belong to the club even.

Q. If you are not the captain and at the same time you are a member of the County Committee, I know what party you belong to.

By Mr. Turkus:

Q. Your job is an elective one. You are elected every [fol. 824] year?

A. Last year I was elected.

Q. Your name appears on the ballot?

A. That is it.

Q. You happen to know that your name was on the ballot?

A. I know it. I was told after it was put on. I did not even know it was going to be put on.

By the Court:

Q. Does that mean that you have a gathering place near by where you meet people and become popular?

A. No, I just happen to know who used to be the captain. I believe. Her brother is the captain.

Q. The Sutherland Club is only four blocks from you?

A. I know that. It is on Bay 25th Street. I did not even know I was going to be put on the committee. I was on it before I knew it.

By Mr. Turkus:

Q. I think the Judge was trying to inquire how you got on the County Committee.

A. I do not now how I got on it either. I was put on without being asked.

Q. I take it that Judge Taylor was trying to find out whether you attend some political club in the neighborhood.

A. I don't, very seldom; maybe once a year I might go around there.

Q. You have been around, Mr. Jellin. You know that the County Committee is usually made up by the captain?

A. I know it.

Q. Do you know the captain? I think that is possibly [fol. 825] what the Judge wanted to find out.

A. That is it.

Q. Was the captain related to you or a close friend?

A. No ways related to me.

Q. Close friend?

A. Just I happen to know her, that is all.

By the Court:

Q. Do you go to the club often enough to get really well acquainted?

A. No, I do not.

Q. Just to an occasional meeting?

A. Occasional meeting.

Q. Betweentimes you do not go to play cards?

A. Never.

By Mr. Turkus:

Q. I think I understand what puzzle is in the Judge's mind. Of course, nobody can be a mind reader, but you told us that you were retired?

A. Yes.

Q. So that you do nothing all day. How do you kill time at night?

A. I am home.

Mr. Talley: I object to that. That is definitely an improper question.

Mr. Turkus: I have withdrawn it.

Mr. Talley: It should not be asked. It is nobody's business, neither the District Attorneys nor the Court's, nor anybody else's. This talesman should be protected against questions like that.

Mr. Turkus: Your Honor, I withdraw the question. Judge Talley tries to ingratiate himself with somebody here in support of Constitutional rights. I was sorry after I asked the question and I withdrew it.

[fol. 826] Mr. Talley: I do not have to make any speeches to ingratiate myself.

The Court: The talesman has answered the question. He says he stays home.

Mr. Talley: What becomes of my objection?

Mr. Turkus: What became of mine?

Mr. Talley: I don't withdraw it. I still press it.

Mr. Turkus: He still stays home.

Q. Mr. Jellin, do you understand the spirit in which counsel on both sides intend to ask these questions?

A. I know it.

Q. Possibly in the zeal of advocacy we may overstep the bound of propriety, but you understand it is not to be offensive, nor in any wise to embarrass any juror. Is that correct?

A. Yes, sir.

By the Court:

Q. Are you an election district inspector?

A. No, sir.

Q. A poll clerk?

A. No, sir.

Q. A ballot clerk?

A. No, sir.

By Mr. Turkus:

Q. Are you in any wise active politically on Election Day or Primary Day?

A. No, sir.

Q. Do you know Judge O'Dwyer, the District Attorney of the County?

A. I do not.

Q. Do you know any member of his staff?

A. No, sir.

Q. By virtue of your service with the United States Gov-

[fol. 827] ernment, did you not know the United States District Attorney or any Assistant United States Attorney?

A. I do not.

Q. I take it that when you served in the Federal Court the Judge charged on the doctrine or the presumption of inno-

cence; is that correct? If instructed here by the Judge that defendants are presumed to be innocent and that the presumption starts with them when they come into the courtroom and stays with them even while the jury is figuring the case out, and it is overcome when The People establish guilt beyond a reasonable doubt, will you follow the instruction of law?

A. Yes.

Q. And will you give the defendants every benefit of the presumption of innocence, as Judge Taylor tells you it should be applied in the case?

A. Yes.

Q. Now with respect to the law of reasonable doubt: Did you hear that discussed in the Federal Court?

A. Yes.

Q. And in that case did Judge Campbell charge on the doctrine of reasonable doubt?

A. Yes.

Q. If instructed on the doctrine of reasonable doubt here by the trial judge, will you take his interpretation of the law?

A. Yes.

Q. And endeavor conscientiously to apply it to this case?

A. Yes.

Q. And the facts of the case? I take it you will have no difficulty in following the instruction that The People must establish guilt beyond a reasonable doubt; is that correct?

[fol. 828] A. Yes.

Q. You say you customarily read the New York *Times?*

A. That is right.

Q. Do you read any other paper?

A. No other paper.

Q. Have you read any articles in connection with Judge O'Dwyer's investigations?

A. No.

Q. Have you heard the name of Lepke, for example?

A. I have seen the headline.

Q. More than headlines; have you read any articles?

A. I read a few of the items, the news items, but I never paid very much attention to it.

Q. In all, how many articles would you say you have read?

A. I read the news items in the *Times*, and they don't give much space to it.

Q. Did you read other names in those articles?

A. Probably one or two other names.

Q. Is the name of Harry Strauss, alias Pittsburgh Phil, familiar from newspaper reading?

A. No.

Q. That of Harry (Happy) Maione?

A. No.

Q. Or Frank (The Dasher) Abbandando?

A. No.

Q. Martin (Buggy) Goldstein?

A. Only what I have heard in this court here; that is all.

Q. I am not referring to that: I am referring to newspaper reading.

A. No, I have not read any of those articles.

Q. Then the only name that you have read about has been [fol. 829] the name of Lepke, is that it?

A. It is the only one that I have taken particular notice of.

Q. And how recent was that that you read those articles?

A. The other day, only a few days—within the last few days; before the notice, I don't think I read it more than once before.

Q. So that your newspaper reading has been devoted to reading of the case since you received the notice?

A. That is it.

Q. You remember what you read?

A. Some of the things I read.

Q. I mean, you remember what you read about the name Lepke?

A. Yes.

Q. You read about that because you had an interest to read about it; isn't that right?

A. That is just it, exactly.

Q. And so what you read about that name Lepke was of interest to you. And you remember what you read about it?

A. Some of the things I remember.

Q. Of course, you never read about the name Lepke before you got your notice as a juror?

A. No.

Q. You first began to read about Lepke after you got the notice that you might be a juror; is that correct?

A. Yes.

Q. Then what you read about him you read with interest, didn't you?

A. Yes.

Q. And it has remained in your mind?

A. Yes.

Q. Has it made an impression upon your mind?

A. No.

Q. Well?

A. Just as being interested in it now, that is all.

[fol. 830] Q. That is what I am trying to talk about. If I understand you correctly, the name of Lepke had no significance to you by way of newspaper reading all your past experience until you got a notice that you might be a juror in the case?

A. Right.

Q. And then you started to read about that name Lepke?

A. That is right.

Q. So that obviously you had an interest in reading about that individual?

A. That is right.

Q. And your reading has been recent, so that the facts of what you read are still fresh in your mind, isn't that right?

A. Right.

Q. Hasn't that reading that you have done, with this interest that you have displayed in the article, left you with some impression?

A. I got the impression that such is the accusation against him; that is all, but——

By the Court:

Q. Have you formed any idea as to whether the defendants are guilty or innocent?

A. No, I have not. I have kept that in mind.

By Mr. Turkus:

Q. You mean that you conscientiously kept in mind to——

A. That is right.

Q. —to avoid forming any opinion as to guilt or innocence?

A. That is it.

Q. Of course, when you sit down here you remember what you read, don't you?

[fol. 831] A. Yes.

Q. That is going to stay in your mind, isn't it?

A. Yes.

Q. And that will stay with your mind as the case progresses from day to day, won't it? Would it require some evidence on the part of a defendant to remove that impression that you have about that particular name?

Mr. Rosenthal: I object to it on the ground he said he had no impression.

The Court: That is what he said.

A. That is what I said.

Mr. Turkus: Mr. Rosenthal has made an objection.

Mr. Rosenthal: The Judge said that is what he said.

Mr. Turkus: I have a right to be heard, too. Mr. Rosenthal has made an objection that does not even apply to his client.

The Court: Read the question.

(Pending question read.)

By the Court:

Q. What name is that?

A. The name of Lepke.

The Court: He says he has no impression.

Mr. Turkus: He told me he did.

The Court: You misunderstood him. All right.

Q. Have you any opinion as to guilt or innocence?

A. I have no opinion.

Q. Is the impression you have prejudicial?

A. No, sir.

[fol. 832] The Court: There is nothing to remove.

By Mr. Turkus:

Q. I just want to ask this: Didn't you tell us before Judge Taylor questioned you, Mr. Jellin, is it that you had an impression about this name of Lepke that would stay with you from day to day as the trial went on?

A. I simply read the story in the paper that he was accused of a certain crime.

Q. I had come to the point with you, did I not, where you had told me in response to a question that from what you have read of Lepke after you got your notice and you were

interested in that name, that that impression would stay with you from day to day as the trial went on, at least that is the way I understood it.

Mr. Climenko: I object to it, if your Honor pleases, upon the ground that it assumes a state of facts not consistent with the answer. As I heard that answer, he said in response to the leading question from Mr. Turkus that he had an impression, by which I thought he meant a recollection, of a newspaper article which might stay with him. He never said he had an impression as to the defendant.

The Court: The word "impression" is vague. Objection is sustained.

Mr. Turkus: Your Honor, may we not read the record of the testimony given?

The Court: After all, Mr. Turkus, that is a matter the [fol. 833] other side should properly develop.

Mr. Turkus: That may be true, but as a prosecutor I still have the duty of getting a fair and impartial jury.

The Court: I understand that.

Mr. Barshay: We appreciate that.

The Court: Just the same, the defense does object to the question.

Mr. Turkus: That is what makes me very suspicious.

Mr. Talley: Suspicious of what?

Mr. Cuff: I think that is not a proper statement, Judge.

Mr. Talley: What are you suspicious about?

Mr. Turkus: I am suspicious of you for objecting.

The Court: Go ahead.

Mr. Talley: I ask the Court to instruct the District Attorney not to make statements of that kind.

Mr. Turkus: You invited it.

Mr. Talley: Absolutely uncalled for. Nothing that has happened justifies that statement.

The Court: I suggest that you both forget about it at once and proceed with the questioning. We must avoid friction.

By Mr. Turkus:

Q. Mr. Jellin, as you sit in the jury box now, having read about the name Lepke since you got a notice, is there anything that you have read in the newspaper that persists in your mind now, as you are seated in the jury box?

[fol. 834] A. Nothing in particular.

Q. What did you say?

A. Nothing in particular, only such an accusation is made against the man.

Q. Is that the only thing that stays in your mind from reading the article?

A. That is the only thing that stays in my mind.

Q. Is there anything that you have read that has made any prejudice in your mind against that particular individual?

A. No.

Q. Or against anybody in the case?

A. No.

Q. Did you read any newspaper articles in which any other name was mentioned, any other defendant's name?

A. Weiss and Capone. That is the only three that I can remember.

Q. They are the only three on trial now?

A. Yes.

Q. Is there anything that you read about Weiss that leaves an impression in your mind?

A. No.

Q. Or anything that you read about Capone?

A. No.

Q. Was that reading in connection with those two defendants, like the name of Lepke, devoted after you received your notice?

A. That is right.

Q. Do you know any official or any officer connected with the Amalgamated Clothing Workers of America?

A. No.

Q. Have you any relatives who are immediately employed in the garment district?

A. No.

Q. Is there any close relative employed in the clothing [fol 835] district?

A. No.

Q. Or anywhere in the garment center in Manhattan?

A. No.

Q. Clothing trucking?

A. No.

Q. Trucking of any kind, nature or description?

A. No.

Q. Is there any significance in the name of Potofsky?

A. No.

Q. An official of the Amalgamated Clothing Workers of America?

A. No.

Q. Any significance in your mind to the name of Murray Weinstein, manager of Cutters Union, Local 4, of the Amalgamated?

A. No.

Q. Or that of Samuel Katz?

A. No.

Q. The business agent of that local?

A. No.

Q. Did you ever hear the name of Bruno Belia, an organizer at the home office of the Amalgamated?

A. No.

Q. That name has no significance at all? Are you intimate socially with anybody who is in business in the garment district in Manhattan?

A. No.

Q. Or the clothing district?

A. No.

Q. Is the name of Salvatore Marazzano familiar?

A. No.

Q. Or the name of Philip Orlofsky, a one-time manager of the Cutters Union, Local 4, of the Amalgamated?

A. No.

Q. Is the name of Max Silverman a familiar one?

A. No.

Q. Or that of Wolfie Goldis?

A. No.

Q. Do you know anybody in any Teamsters Union or Flour Truckmens Union?

A. No.

[fol. 836] Q. Is there any significance to the name of William or Willie Alberts, a one-time bondsman?

A. No.

Q. Or the name of Emanuel Buchalter?

A. No.

Q. Or Phillie Kowas or Phillie Buchalter?

A. No.

Q. Any significance to the name of Bellanca and Tosca?

A. No.

Q. Or the name of Terry Burns or Abie Slabo?

A. No.

Q. Or Hyman (Curly) Holtz?
A. No.
Q. On what street did you live in Brownsville, Mr. Jellin?
A. Osborne Street.
Q. Osborne and where?
A. Between Sutter and Belmont.
Q. Between Sutter and where?
A. Sutter and Belmont. That is quite a number of years ago.
Q. How far would that location be from Sutter and Bradford?
A. Oh, fully a mile away, I think.
Q. Are you familiar with Sutter Avenue?
A. Yes, some parts of it.
Q. And are you familiar with the railroad cut down at Van Sinderen and Livonia Avenues?
A. Yes.
Q. Where that I. R. T. and B. M. T. station is?
A. Yes.
Q. A railroad cut?
A. Yes.
Q. And the crossing over to Junius Street?
A. Yes.
Q. Are you familiar with Linton Park?
A. No.
Q. A little park around Blake and Sutter?
A. I don't think I ever went around that way at all.
[fol. 837] A. I don't think I ever went arount that way at all.
Q. Do you recall whether or not you read anything about the killing of Joseph Rosen in a little candy store on Sutter Avenue some four years ago?
A. I don't recall it.
Q. As a matter of fact, it is some five years ago now.
A. I am out of Brownsville six years, more than that—fourteen years.
Q. While you were in Brownsville did you ever hear the names of Martin (Buggey) Goldstein or Pittsburgh Strauss?
A. No.
Q. Abie Reles?
A. No.
Q. How many years did you live in Brownsville?
A. I lived there ten years, from 1917 to 1927.

Q. Do you know where Saratoga and Livonia Avenue is?
A. Yes.
Q. A candy store on the corner?
A. There is more than one there I think.
Q. But one specially known in Brownsville?
A. I did not take particular notice of anyone in Brownville while there.
Q. Well, haven't you heard about a particular candy store in Brownsville at the corner of Saratoga and Livonia Avenue as a result of your ten years of residence in the Brownsville District?
A. No.

The Court: Rose Gold. Does that bring anything to you?

The Witness: It does not.

Q. Do you know where Sackman and Livonia is?
A. Yes.
Q. After ten years of residence in the Brownsville area, [fol. 838] are you sure that you have no familiarity with any of the names I have discussed with you?
A. I do not. I used to mind my own business, go to work from there and come home.
Q. Did you hear anything about certain individuals in that area?
A. No, I did not.
Q. Didn't you ever hear any discussions, for example, about Abie Reles?
A. No.
Q. Or Martin (Buggey) Goldstein?
A. No.
Q. Or Strauss?
A. No.
Q. Or Abbandando or Maione? When you lived in that Brownsville district did you do business in the various stores there in Brownsville?
A. On Pitkin Avenue, Heyward store, Heyward's Clothing.

By the Court:

Q. Osborne is how far from Rockaway?
A. Two blocks.
Q. Two blocks east?
A. Yes, east, that is right.

Q. That is quite a congested locality, isn't it?
A. Oh, terribly congested.
Q. That is the reason you got out?
A. Well, I moved there—at the time I moved there I didn't expect the trouble we would have there. My mother-in-law was very sick there for about eight years, and my wife took care of her. I intended to get out any time, but I had to stick there.
Q. You stuck because she was too sick to move?
A. My mother-in-law finally died there.

[fol. 839] Mr. Cuff: Can't hear a word of it, Judge.

The Court: He stuck there for eight years because his mother-in-law was too sick to move, and after she died he moved because the locality was too crowded. He used the word "terribly."

By Mr. Turkus:

Q. Have you a family? And by that I mean have you children?
A. Yes, I have a married daughter.
Q. And was she residing at home while you were a resident of Brownsville?
A. Yes.
Q. You did business in the local stores, didn't you?
A. Yes.
Q. With the local merchants?
A. Yes.
Q. And are you sure that in the ten years of residence you never heard discussions of any names that I mentioned?
A. Never heard.
Q. Did you use that subway station at Van Sinderen and Livonia?
A. At Sutter and Livonia, at Sutter and I do not know what street is there. There is really only a short street there.
Q. How far was Saratoga and Livonia Avenue from your residence?
A. I will tell you, that station I used was the Rockaway and Livonia.
Q. And how far was Saratoga and Livonia from Rockaway and Livonia?
A. Oh, it is one station nearer to New York.

Q. So they are only one station apart? It is a matter [fol. 840] of a few blocks?

A. That is right.

Q. And Sackman and Livonia is still closer, isn't it?

A. No, it is further away.

Q. One block further?

A. No, Sackman is towards East New York.

Q. That would be one block further?

A. More than one block, a good many blocks, I think.

By the Court:

Q. How many blocks are there between Saratoga and Rockaway there?

A. I think it is about four blocks, four or five blocks.

Q. Can you mention the streets?

A. I don't think I could.

By Mr. Turkus:

Q. Were you living in the Brownsville district at the time you were working for the Post Office?

A. Yes.

Q. You did have occasion to patronize the local stores, as you said?

A. Yes.

Q. And you had neighbors there that you spoke to?

A. Yes.

Q. Were you a member of any organization at that time in that Brownsville area?

A. No, only the fraternal organization.

Q. And you met in a fraternal spirit with other members of the organization who lived in the Brownsville district?

A. I very seldom went to meetings, very seldom. I am a member of it thirty years. I don't believe I have attended ten meetings in that time.

[fol. 841] Q. Mr. Jellin, are you definitely sure that in the ten years you lived in Brownsville you never heard the name Rosie Gold?

Mr. Talley: If your Honor please, that has been asked and answered at least six times.

Mr. Turkus: Oh, no, it has not.

Mr. Talley: We will never progress if your Honor is going to permit this repetition and this type of questions,

and I respectfully object and respectfully submit that there has to be some curtailment of these useless questions.

By the Court:

Q. Have you dealt in any of those stores on the corner of Saratoga and Livonia?

A. Saratoga and Livonia, no. There was only a bakery there, probably I went into, near the corner.

Q. No candy and newspaper store?

A. No.

By Mr. Turkus:

Q. Did you go to moving pictures in the neighborhood of Saratoga and Livonia?

A. Yes.

Q. As you walked by the corners there to and from the moving picture—

A. Yes, I walked by there.

Q. Did you ever hear the name of Vito Guarino?

A. No.

Q. Did you ever hear the name of Al Strauss?

A. No.

Q. Did you ever hear the name of Tiny Benson?

A. No.

Q. When you walked to the moving pictures did you see men congregated on the corner of Saratoga and Livonia Avenue?

[fol. 842] Mr. Talley: That is objected to.

A. That was not my station, in the first place.

Mr. Talley: No bearing on the qualifications of this talesman.

The Court: Overruled.

By the Court:

Q. Did you ever notice people grouped right there?

A. I did not pay much attention to it.

By Mr. Turkus:

Q. Now then, there is nothing about your residence in the Brownsville area of Brooklyn that would in any wise affect your judgment in this case?

A. No.

Q. Is there anything concerning your residence in Brownsville that I have not elicited by questioning which would affect your qualification to sit as a juror?

A. Nothing.

Q. Have you any bias or prejudice against the use of accomplice testimony?

A. No.

Q. Do you know what an accomplice is?

A. Yes.

Q. Did you have any knowledge of an accomplice testimony prior to your being seated here in the box and listening to questions being asked other prospective jurors?

A. Yes, I have.

Q. Was that gathered from your Federal Court experience?

A. No.

Q. Newspapers?

A. I read all things like that, read books and so on.

[fol. 843] Q. Law books?

A. No, other books.

Q. You mean books relating to an account of the apprehension and prosecution of criminals?

A. That is right.

Q. Have you read such type of literature with any degree of interest?

A. Sometimes as a matter of pastime, that is all.

Q. And were those books written by prosecuting officials and officers of the Police Department?

A. No.

Q. Were they books or pamphlets issued by some law enforcement agencies?

A. No.

Q. What type of books were these that you read?

A. Like detective stories and stuff like that, you know.

Q. You mean the popular magazines that you get on the news-stands?

A. No, I never read that?

Q. At any rate, from whatever you have read by way of accomplice, has that given you any notion of the law with respect to accomplices that would in any wise handicap you from taking the law from the Judge?

A. No.

Q. Do you have any feeling against accomplice testimony that would cause you to reject it no matter what the circumstances were?

A. No.

Q. Do you have any prejudice against the prosecution in which that type of testimony is employed?

A. No.

Q. Have you read anything in connection with the O'Dwyer investigation in any of these books that you have read?

A. No.

[fol. 844] Q. Were those books in connection with accomplice testimony?

A. No, not particularly; I just recall reading something of that kind.

Q. Is there any bias on your part or any prejudice on your part against the prosecutor of the county for using a coparticipant in the commission of a murder against the other defendants in the case?

A. No.

Q. Will you expect the testimony of an accomplice to be supported by other evidence?

A. I want it to be corroborated.

Q. Of course, you will look at the testimony of an accomplice with care and caution?

A. Absolutely.

Q. And you will consider the character of such an individual?

A. Yes.

Q. You will consider his associates in life?

A. Yes.

Q. His past acts of commission of crime and misconduct?

A. Yes.

Q. The life of crime which he has led in the past and all of the exploits that he has committed; is that correct?

A. Yes.

Q. You will look at that kind of testimony carefully and with caution?

A. Yes.

Q. You won't arbitrarily reject it because it emanates from a source that you don't like; is that correct?

A. Correct.

Q. Is your state of mind such that you feel that even a bad man, even a criminal, even one whose past life has been steeped in crime, can sometimes tell the truth?

A. Oh, yes.

[fol. 845] Q. That is going to be your job if selected as a juror, to find out whether that individual that you are hearing in the court-room who is an accomplice is telling the truth—right?

A. Right.

Q. In weighing all of those considerations which are adverse to the credibility of an accomplice, namely, his bad character, his commission of crime, his past associations with criminals, will you also weigh all the other surrounding circumstances that may affect the believability of an accomplice's testimony?

A. Yes.

Q. Is your state of mind such that you understand that sometimes criminals fall out with one another and then tell?

Mr. Rosenthal: I object to the question.

The Court: Sustained.

By the Court:

Q. Would these names refresh your recollection of the streets between Saratoga and Rockaway: Douglas Street?

A. Yes.

Q. Herzl Street?

A. Yes, sir.

Q. Amboy?

A. Yes, sir.

Q. Hopkinson Avenue?

A. Yes.

Q. Bristol?

A. Yes.

Q. Chester?

A. That is right. Six blocks between Rockaway and Saratoga.

Q. Down towards Pitkin Avenue always Kings Highway: is that right?

A. That is right.

[fol. 846] By Mr. Turkus:

Q. Directing your attention now at this time to the name of Irving Feinstein, is there anything familiar to you about that name?

A. No, sir.

Q. Did you read anything in the press about Irving Feinstein—

Mr. Barshay: I object.

Mr. Turkus: I have not finished the question.

Mr. Barshay: Go ahead.

Q. —who was at the corner of Saratoga and Livonia Avenue shortly before some incident occurred?

Mr. Barshay: I object to it, your Honor.

The Court: Sustained.

Mr. Barshay: It has absolutely no bearing in this case.

The Court: It is not a question of having bearing, but I think that going further than the name in the presence of other members of the panel is inadvisable.

Mr. Turkus: I did not mention any specific occurrence.

The Court: I would not even hint at it.

Q. From your past connection in that Brownsville area, does the name of George Rudnick have any significance to you?

A. No.

Mr. Talley: Your Honor, he has not been in Brownsville in fourteen years.

The Court: But he has a good memory.

[fol. 847] Mr. Talley: Why not come down to the present time, not waste time asking that kind of question.

The Court: He has trained memory and orientation extraordinary. We will have to be true to our promise.

Mr. Talley: Can't we finish with this talesman today?

The Court: I am sorry, we cannot do any more today. It is much easier for all to try a case where progress is made, and so far it has been negative. I certainly hope that on Monday there will be that first row filled.

(To talesmen) Come back at ten o'clock on Monday morning, gentlemen. Please remember the previous admonition, not to read or talk or listen to the radio about the case.

(Whereupon an adjournment was taken to September 29, 1941, at 10 a. m.)

[fol. 848] Brooklyn, N. Y., Sept. 29, 1941.

Trial Resumed

(At the direction of the Court, the clerk called the following talesmen to sit in the jury box: Thomas E. Finn, No. 2626; Russell Olson, No. 2672; Chester Prentice, No. 2791; Harry Sillett, No. 2759.)

The Court: Wednesday (October 1st) will be a Jewish holy day, so there will be no court. The experience of the last two weeks shows that the number who are already in the box will be sufficient to occupy the attention of the Court for the next two days, so the talesmen who are not in the box will be excused until Thursday morning (October 2nd) at ten o'clock.

Nathan Jellin, No. 2643, residing at 8313 Bay Parkway, Brooklyn, New York, examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. I think you said before recess that you lived with your wife's people and that they were in some business in Brownsville?

A. Yes, at that time we had our own apartment.

By the Court:

Q. What business was your mother-in-law in?

A. My father-in-law I think used to buy clothing and sell it, I believe.

[fol. 849] Q. Second-hand clothing?

A. No, sir, all kinds of merchandise. I lived in the upper flat and he lived in the lower floor in his house.

Q. He is alive?

A. Yes, sir, he is still living.

By Mr. Turkus:

Q. I understood you to say you lived together.

A. No, sir, I had a separate apartment in the same house.

Q. I understood you to say Friday that you lived for eleven years in Brownsville.

A. Ten years.

Q. When you left there your mother-in-law became sick and could not move away until she died?

A. That is right.

Q. So that time she was dependent upon you?

A. No, sir, but my wife took care of her.

Q. During the time she took care of her, where was your father-in-law's place?

A. I don't believe he had any place of business; his business address was where he lived.

Q. He used his place of business for an office?

A. Yes, sir.

Q. Did he have a business card?

A. I don't believe he did.

Q. You mean he went around buying at auctions and selling?

A. Yes, sir.

Q. He did not carry merchandise in his pocket?

A. No, sir.

(A short recess was taken)

Q. I believe I understood you to say, you said to Judge Taylor, that among the other business that this gentleman conducted was clothing; is that correct?

A. It was sometimes clothing, whatever he happened to [fol. 850] buy up, dry goods mostly, though.

By the Court:

Q. Second hand?

A. No, it was not second-hand. He would buy up lots of dry goods and he would sell it to the storekeepers in the neighborhood.

Q. You do not know where he kept his stock?

A. No, I do not.
Q. Or who he bought it from?
A. No, I don't.
Q. Or who he sold it to?
A. No.
Q. Did he have a delivery wagon?
A. No, sir.
Q. Any bill-heads?
A. I never even saw a bill-head.
Q. Any employees?
A. No, sir.

By Mr. Turkus:

Q. Was he buying up job lots of clothing and other goods?
A. It was very little clothing. I don't think I ever saw clothing. I just happened to mention that, but mostly dry goods it was.
Q. When the Judge first interrogated you about the business, the first word you mentioned was clothing.
A. Because there was a clothing store downstairs. It just entered my mind at the moment.
Q. Downstairs in this place where you lived in Brownsville?
A. Yes.
Q. The particular clothing that he dealt in, in the clothing that he dealt in, was that a job lot?
A. I don't think I ever saw him have any clothing at all. [fol. 851] It was mostly dry goods.
Q. Did he have a telephone?
A. No, he never had a telephone either.
Q. Was there a warehouse or a storage place for the goods he dealt in?
A. No, he bought small goods, you see, like toweling and other dry goods.
Q. What was his method of distribution in sale of the product?
A. He would go around to these storekeepers that sold these things and sell it to them.

By the Court:

Q. What was his first name?
A. Herman.

By Mr. Turkus:

Q. Did he deal with the local merchants in the Brownsville area and the East New York area?

A. Yes, I believe he did.

Q. And you both occupied portions of the same house?

A. That is right.

Q. Do you still live together with this gentleman?

A. No.

Q. Is he alive?

A. Yes, he is in Kings County Hospital now. He is a very sick man.

Q. Prior to the time he went to the hospital did he reside with you?

A. No.

By the Court:

Q. He did not move to Bensonhurst with you?

A. Oh, no.

By Mr. Turkus:

Q. Did he remain in this Brownsville area?

A. Yes, he still owns the house there too.

[fol. 852] Q. And have you and your wife visited there frequently since? This gentleman, I understood it was your wife's father?

A. That is right.

By the Court:

Q. Mr. Jellin, do you know the relation between in-laws living practically together, together in the same building, ten years ought to be such you would have some idea as to the manner in which that business was done, where he bought his stuff and where he sold it.

A. I never knew where he bought his stuff, nor where he sold it, for that matter.

Q. Was there any reason for not inquiring?

A. No reason at all.

By Mr. Turkus:

Q. As you explained to Judge Taylor, Mr. Jellin, the relationship between you and your wife's family was very close and intimate?

A. Yes, at that time.

Q. What kept you in Brownsville at that time was the desire of your wife to be of assistance to her mother, your mother-in-law?

A. That is right.

Q. And you and your father-in-law lived and shared the same house together for all these years that you lived in the Brownsville area?

A. Yes.

Q. You came in daily contact with him, didn't you? I suppose there were mutual meals prepared?

A. I don't get that.

[fol. 853] Q. I mean by that that you all ate at the same table, I take it.

A. Oh, no, we had a separate apartment.

Q. But with that arrangement where the mother-in-law was sick and your wife was helping her, didn't you and your father-in-law eat together?

A. No.

Q. He ate in his own place?

A. That is right.

Q. Did your wife make two meals?

A. That is right.

Q. One in one apartment and one in another?

A. Yes, she had double work.

By the Court:

Q. Did the people who wanted to sell these white goods use to come to his apartment and make the offers?

A. No, he used to go around to see them, I believe, most of the time.

Q. Was not merchandise ever stored in his apartment, do you know?

A. I have seen several bundles of dry goods there.

Q. Where did he keep that stuff?

A. In the house there.

Q. Yes, we understand that. What part of the house?

A. He used to keep it in the front room.

Q. Large bundles?

A. No, not very. It was only small lots.

Q. He had his samples there to show?

A. Not samples; he had small lots of goods. He would usually buy a lot of goods and then he would go out and sell it and that would be the end of that. It was not very big lots.

Q. Carried it under his arm?

A. No, he had it delivered. It was delivered by express [fol. 854] from New York.

Q. Then he would go out with samples?

A. That is it.

Q. Take the orders?

A. Yes.

Q. When he sold the stuff then the stuff would be delivered from the apartment?

A. That is right.

Q. Was that *is* regular way of doing business?

A. Years ago he used to be in the woolen business, before I even knew him.

Q. Whereabouts?

Mr. Climenko: I object to this line of questioning, if your Honor pleases.

The Court: Sustained.

By Mr. Turkus:

Q. Is the situation that this man dealt with various manufacturers and then got the quantities or job lots of the product and distributed it around to the various stores in the Brownsville-East New York area?

A. Yes, sir.

Q. Did you come in almost daily contact with him as a result of the close relationship?

A. Yes.

Q. Did you have any discussions with him as to conditions in Brownsville?

A. Not that I remember.

Q. In talking to Judge Taylor on Friday, you used the word that Brownsville was terrible, the conditions there were terrible; is that correct?

A. That is correct.

Q. Didn't you talk about the terrible conditions there with the members of your family?

A. Certainly.

[fol. 855] Q. And it was your desire to get out of that neighborhood as fast as you could?

A. Right.

Q. There were various things, then, that you knew that were going on in the neighborhood there; isn't that correct?

A. Yes.

Q. Various conditions with respect to various corners in the Brownsville-East New York section; is that correct?

A. Yes.

Q. And various persons who frequented or hung around those corners?

A. Certainly.

Q. I mean that was general neighborhood gossip about these people. Everybody in Brownsville spoke about them.

Mr. Barshay: Your Honor, I object to what people were saying in Brownsville about other conditions; has nothing to do with this case at all nor with any of the defendants.

The Court: Overruled.

Mr. Barshay: Exception.

Q. (Pending question read.)

A. I don't know what people you refer to.

Q. Just two minutes ago we got to the point where you said you were talking about with the various members of your family?

A. Yes.

Q. About the terrible conditions in Brownsville?

A. Yes.

Q. And East New York. And then we went along with that, and you said that was in reference to certain persons who frequented or hung around corners.

Mr. Rosenthal: I object to it on the ground that [fol. 856] Mr. Turkus is the one who said it. He put the answer into the juror's mouth.

The Court: That is true, but there was no objection, and he said "Yes." Overruled.

Mr. Rosenthal: Exception.

Q. Do you remember that?

A. Yes.

Q. Then I went one step further and I wanted to find out if it was general discussion with and other neighbors about those conditions and about those occurrences in Brownsville.

A. I am going to tell you what the conditions were over there.

Mr. Barshay: Just a second.

The Court: That may cause more trouble.

Mr. Turkus: I am going to apply a challenge for cause on implied bias. If he cannot go into what the conditions were, I press the challenge for cause on the ground of im-

plied bias. Here is a man who has lived in that area for all those years.

The Court: Try the challenge.

Nathan J. Jellin, of 8313 Bay Parkway, being duly sworn, testified as follows:

Mr. Barshay: Would your Honor accept the consent of all counsel to the challenge of this man?

The Court: You had better go through the formality.

Mr. Turkus: I will just go this far——

[fol. 857] The Court: Will his testimony be the same?

By Mr. Turkus:

Q. Mr. Jellin, now that you have been sworn on this voir dire, would you make the same responses to the same questions that I presented to you before you were sworn?

A. Yes.

Q. And would those answers be true?

A. Yes.

Mr. Rosenthal: No questions.

Mr. Barshay: No questions on anybody's part.

The Court: Sustained.

Benjamin Protter, of 772 Linden Boulevard, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You look like a lawyer by the name of Mannie Protter. Is there any relatioship?

A. That is my brother.

Q. Mr. Protter, your business is listed as that of a writer?

A. Yes, I have been in the real estate business, but not in this country.

Q. I cannot hear you.

A. I am a writer, but I also have been in the real estate business but not here; that was in Paris, France.

Q. Mr. Protter, what is the nature of the writings that you do?

A. European Political Affairs, European affairs, the political situation in Europe.

[fol. 858] Q. I have a head cold.

A. I have not got a very strong voice, either. I say that my writing has been completely on European affairs.

Q. And is it for newspapers in this city?

A. Mostly I have written for the *New Leader*. I have not written since I came back in July, 1940.

Q. Have you lived in Brooklyn for a number of years?

A. I have lived in Brooklyn for two years, and previous to my departure I lived in Brooklyn for about twenty years.

Q. I take it that you spent some time in France in the real estate business?

A. Yes, sixteen or seventeen years.

Q. And were you employed by some firm or in business for yourself?

A. In business for myself.

Q. The trestle board lists the address at 772 Linden Boulevard; is that correct?

A. That is correct except I am not living there right now. I am living in a hotel in New York, Hotel Maryland, 104 West 49th, since my return.

Q. Is 104 West 49th a legal residence of yours?

A. No, it is a passing residence.

Q. Have you got furniture at Linden Boulevard?

A. Yes, I have my clothing. I have not got my furniture here. I am living with my mother there.

Q. I am not prying. I have to be careful about jurisdiction.

A. There are two reasons why I am staying at the Maryland Hotel. When I came back my mother was not back [fol. 859] from the country so I went to a hotel and since then, having been called for jury duty, I thought it best to remain away until the question is decided.

Q. Do you consider 772 Linden Boulevard——

A. My legal residence.

Q. And is that a residence from which you regularly register and vote?

A. I do. I voted at the primary elections two weeks ago.

Q. And the residence at the hotel in Manhattan is only temporary?

A. Since September 4th, that is all.

Q. And you say you merely main- that for the——

A. Convenience.

Q. Until this question of jury duty is determined?

A. That's correct.

Q. Because there is no one at the Linden Boulevard address?

A. No, my mother is back since September 16th, but, having received notice of jury duty, I thought it best to stay away until the matter is settled.

Mr. Turkus: On the point of legality of residence, if it please the Court, I think the residence is sufficient in Brooklyn at this point.

The Court: There is no question before the Court.

By the Court:

Q. You are in East Flatbush?

A. I believe that is East Flatbush. That would be right [fol. 860] behind Utica Avenue, corner East 51st Street. It is a private, two-family house.

By Mr. Turkus:

Q. Can you tell me what street that 772 Linden Boulevard is near?

A. It is right on the corner of East 51st Street.

Q. Have you had any business connections or any social contacts of any kind, nature, or description with anyone in the Brownsville-East New York area of Brooklyn?

A. No.

The Court: Where did Harry Strauss live? Only a couple of blocks away from him.

The Talesman: I have no social connections in the Linden Boulevard area either.

The Court: Was not that 50th Street.

Mr. Turkus: I believe it was East 53rd or 55th Street off Church Avenue. Linden Boulevard and Church Avenue are about a block apart. Martense Street may come in between. It is in that neighborhood.

Q. Is the name of Harry Strauss familiar to you?

A. Not at all.

Q. Have you any contacts of any kind, nature, or description in the garment district?

A. None at all.

Q. Or in the clothing district of Manhattan?

A. No, I have a brother-in-law who is a traveling salesman for Michael Stern's office in Rochester. They have an office I believe at 200 Fifth Avenue.

Q. That is the Flatiron Building?

[fol. 861] A. No, that is across the way.

Q. Do you know what floor your brother has offices?

A. On the fourth floor at 50 Court Street.

Q. That is the brother who is a lawyer?

A. My brother-in-law. He has not got offices of his own. He is a traveling salesman for Michael Stern's, and Michael Stern's has offices in 200 Fifth Avenue.

Q. Do you know what floor their offices are on?

A. I could not tell you—the 8th or 9th Floor. I went there once because I got a suit of clothing through him at that office.

Q. Do you know how many years that brother-in-law has been in that location of 200 Fifth Avenue?

A. I could not tell you because he went with them after I left for France.

Q. Do you know how many years in all he has been there?

A. I could not tell you. He has been with them for considerable number of years, but the length of time I could not say myself.

Q. Would you say more than four years?

A. I think so, yes.

Q. And the office, was it maintained for the past four years at 200 Fifth Avenue?

A. I could not tell you from my own information. I know that office has been there for the last two years or more.

Q. Do you have any contact with anyone else who is in business in the clothing or garment districts of Manhattan?

A. No.

Q. Does this brother-in-law sell to the trade in New York City?

A. No, he has a Pennsylvania district.

[fol. 862] Q. And by that he sells men's clothing in Pennsylvania as a representative of this house?

A. That is it. He is away right now on a trip to Pennsylvania.

Q. Does your brother Marcy Protter reside at 772 Linden Boulevard?

A. No, he resides on Avenue G and I think East 21st Street. I have not got the exact address.

Q. He has an extensive clientele on the Brooklyn waterfront, hasn't he?

A. I do not know. My brother and I have not had contact with each other.

Q. You have discussed none of the business of the Brooklyn waterfront with your brother?
A. Never.

By the Court:

Q. What is your brother-in-law's name?
A. David Syman.
Q. He lives in Glenmore Road and Kenmore Place?
A. 772 Linden Boulevard.
Q. I thought you said Avenue G.
A. That is my brother.
Q. That is Glenwood Road and Kenmore Place?
A. Avenue J and East 21st. I may have his address on me. I could not say the exact address.

The Court: Go ahead.

By Mr. Turkus:

Q. Do you know anyone in the clothing trucking industry?
A. No.
Q. Or have you any contacts of any kind, nature or description with anyone in the clothing trucking industry?
[fol. 863] A. None at all.
Q. Do you know any official of the Amalgamated Clothing Workers of America?
A. No.
Q. Is there any familiarity to the names of Murray Weinstein, manager of the clothing cutters' union?
A. None at all.
Q. Local 4. Or that of Sam or Samuel Katz, a business agent?
A. None at all.
Q. Is there anything familiar about the name of Bruno Belia, an organizer?
A. None at all.
Q. Or the name of Salvatore Marazzano?
A. No.
Q. Is there any significance in your mind to the name of Philip Orlofsky, a one-time manager of Local 4 of the Cutters Union?
A. No.
Q. Do you know any officials of Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Is the name of Max Silverman familiar to you in any way?

A. No.

Q. Or that of Wolfie Goldie?

A. No.

Q. Any significance to the name of William or Willie Alberts, a one-time bondsman?

A. No.

Q. Or that of Emanuel Buchalter?

A. No.

Q. Or Phillie Buchalter?

A. No.

Q. Sometimes called Kowas? Any significance to the names of Bellanca or Tosca?

A. No.

Q. Terry Burns or Abie Slabo?

A. No.

[fol. 864] Q. May I go along under the assumption, then, that other than the brother-in-law who has an office——

A. He has not an office. The office is of Michael Stern's.

Q. Whose firm has an office at 200 Fifth Avenue, you have no connection directly or indirectly with anybody in the garment district, the clothing district, the Brooklyn waterfront?

A. No.

Q. Or the clothing trucking industry?

A. None at all.

Q. Since your name appeared on this special panel and you secured a notice of prospective service, did anybody speak to you about the case?

A. No.

Q. In your work as a writer have you written for any other type of publications other than on foreign affairs?

A. None at all.

Q. Have you heretofore served as a juror in any type of litigation?

A. No.

Q. You had no jury experience on the other side?

A. None at all.

Q. I do not take it——

A. Being an American citizen.

Q. Are you in sympathy with the enforcement of the law of the State of New York?

A. I certainly am.

Q. There are nine lawyers here representing these defendants at the bar: Buchalter is represented by a former Assistant District Attorney under the last regime, Mr. Barshay. Do you know him?

A. I do not.

[fol. 865] Q. Or Mr. Bertram Wegman, a former Assistant United States Attorney?

A. I do not.

Q. Or Mr. Jesse Climenko?

A. No.

Q. Do you know anybody in the law offices of those three lawyers who represent Buchalter?

A. I do not.

Q. No employee at all?

A. Not that I know of.

Q. The defendant Weiss is represented by former General Sessions Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Murray Kriendler. Do you know any of them?

A. I know none of them.

Q. Or do you consciously know anyone employed or associated with them in the practice of law?

A. I do not.

Q. With respect to defendant Capone, represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg, do you know any of those lawyers?

A. I do not.

Q. Or anyone connected in their law offices?

A. No.

Q. Do you know intimately any member of the bar who specializes in the trial of criminal cases?

A. No.

Q. Mr. Protter, did you have any close connection with the former District Attorney, Mr. Geoghan?

A. No.

Q. Did you know him at all?

A. Not at all.

Q. Or any member of his staff?

A. No.

Q. With respect to the present District Attorney, Judge O'Dwyer, do you know him personally?

A. I do not.

Q. Do you know any member of his staff?

[fol. 866] A. Not that I know of.

Q. Specifically, do you know Assistant District Attorney Turkus, Joseph, or Klein?

A. No.

Q. When you say not that you know of, you are under the belief that possibly someone might have been appointed while you were on the other side and may not know the name?

A. What is that again?

Q. When I asked you if you knew any member of Judge O'Dwyer's staff, I think you said you do not think so, or not that you know of.

A. I said not that I know of, no.

Q. Were you in Brooklyn when Judge O'Dwyer's staff was appointed?

A. When was that?

Q. January 1, 1941.

A. No, I had gone back to France for a few months.

Q. At any rate, as you sit in the jury box you do not consciously know any of the Assistants on Judge O'Dwyer's staff?

A. I do not.

Q. Never having served on a criminal jury or a civil jury, I take it, then, that you have never heard a Judge's charge to a jury; is that correct?

A. That is correct.

Q. Waiting to be called up to the chair here, I take it that you have heard certain principles of law stated to the talesmen in the box.

A. I have.

Q. Will you take the law implicitly and in all its aspects from the presiding judge in the case?

A. I will.

[fol. 867] Q. And from no one else?

A. That is correct.

Q. If you were charged on the doctrine of reasonable doubt, that is, that a defendant is presumed to be innocent, and the presumption of innocence will stay with him throughout the trial until the prosecutor overcomes that presumption and establishes guilt beyond a reasonable doubt, will you follow the instruction of law?

A. I will.

Q. Will you endeavor conscientiously to apply the law that the trial justice gives you, to the facts in this case?

A. I shall.

Q. And will you give to each defendant on trial the benefit of the presumption of innocence and the doctrine of reasonable doubt and every other law and Constitutional right that the trial judge says defendants must have in a criminal case?

A. I will.

Q. Will you, too, look at the witnesses and look at what their character is, their background and their past life of crime and look the case over with a lot of care and caution when you examine it?

A. I certainly will.

Q. Will you give to the defendants everything, every Constitutional right they should have, as the Judge tells you you should give it to them?

A. I will.

Q. Do you have any fault to find with the prosecution of an indictment wherein the testimony of a co-participant, frequently called an accomplice, is used against defendants [fol. 868] on trial?

A. No.

Q. Do you have any bias or prejudice against the use of that kind of testimony?

A. No.

Q. Do you find any fault or do you have any prejudice against the District Attorney of the county, Judge O'Dwyer, for the use of that kind of testimony in a murder case?

A. No.

Q. As you heard mentioned, will you look at the accomplice, will you look at him from the standpoint of character, previous reputation, from the standpoint of his previous life of crime and every other aspect that would go to his believability? Will you look that over with common sense and understanding?

A. I shall certainly scrutinize the evidence.

Mr. Talley: Will you keep your voice up?

The Talesman: I will try.

Q. In considering everything and all the evidence in the case, will you consider that we are here trying a murder case, a charge of murder in the first degree?

A. What is that?

Q. In considering everything in the case——

A. Yes.

Q. —that is, the character of the accomplice, his past life of crime, all of his criminal exploits and every dirty and rotten thing he may have done throughout life, will you bear in mind that here we are calling an accomplice to testify against defendants in a murder case?

A. Certainly.

Q. And will you look the whole thing over with common sense and understanding and apply the tests to this type of [fol. 869] an issue here—the guilt or innocence of Buchalter, Weiss and Capone on a charge of murder in the first degree?

A. Certainly.

Q. Is there anything about the nature of the charge, that is, a charge of murder in the first degree, which would preclude you from giving a fair, just, and conscientious result as a juror?

A. No.

Q. You have no scruple, conscientious or otherwise, against capital punishment?

A. No.

Q. Something has been said here by one of the lawyers to other prospective talesmen, would the fact that his client has been convicted of prior crime and is serving a long term in jail, would there be any prejudice against his client on a charge of murder for that reason?

A. No.

Q. By the same token, would you, because a man has been convicted of prior crime and sentenced for the commission of those crimes, would you be inclined to relax your duty as a juror where he is charged with murder in the first degree?

A. No.

Q. Would you be inclined to deviate from the result that your mind told you was the right one?

A. No.

Q. Solely because he is in jail?

A. No, not at all.

Q. Will you decide whether or not he is guilty of murder in the first degree, for which he is brought into court, upon the evidence that you hear in the court-room?

A. Strictly upon the evidence in the court-room.

[fol. 870] Q. There shall be no relaxation or deviation from your job as a juror because he has been punished for the crimes he has committed?

Mr. Barshay: Your Honor, I object to the constant repetition. The man has answered twice no.

The Court: Overruled.

Mr. Barshay: Exception.

Q. As you sit in the chair, Mr. Protter, do you have any bias or prejudice against the testimony of a co-participant in the crime which would cause you to reject his testimony no matter what it was?

A. Not in advance, no.

Q. Will you approach that kind of testimony with an open mind, or have you any bias or prejudice about it from the start? That is what I am trying to find out.

A. No.

Q. Of course, if the prosecution really had the testimony of an accomplice or accomplices, even a thousand accomplices, and even if you believed them, even if you believe what they say about the defendants is true, even a thousand accomplices, if the District Attorney could get that many, you could not convict, the law would not let you—Do you understand that?

A. I understand perfectly.

By the Court:

Q. Are you on the staff of the *Leader?*

A. No, I am no longer connected with them.

Q. How long were you on the *Leader?*

[fol. 871] A. I wrote articles for the *Leader* from Paris.

Q. For how many years?

A. About two years.

Q. With what regularity?

A. About once every fortnight or so.

Q. And they carried you as foreign commentator?

A. Foreign commentator.

Q. Columnist?

A. Not columnist, foreign correspondent.

Q. Signed articles?

A. Signed articles, all of them.

Q. Under the name Protter?

A. Protter.

Q. Do you have any other newspaper or literary experience?

A. Yes, in France itself.

Q. What paper?

A. The *Louvre* and *de Popular Marianne*.

Q. Are they radical papers or are they——

A. Liberal.

Q. No particular——

A. Tendency to be for social reform.

Q. Yes, but to the extent of Communistic?

A. No, not at all.

Q. Just plain liberal?

A. Yes, plain liberal.

Mr. Climenko: May it please the Court, counsel would like the benefit or hearing the stenographic notes of the last five or six answers. The colloquy could not be heard.

The Court: I will try to speak louder.

Mr. Climenko: Thank you very much.

(Questions and answers read.)

Q. Did you get into any jam in France on account of your activities?

A. Oh, no, never.

Q. Your coming to this country was not the result of any [fol. 872] prosecution?

A. The Nazi invasion of Paris. I can say this: When I came here in '39 and the war started, I wished to go back because of my business affairs, the French——

Q. You carry no bitterness because of any event connected with the expression of your views?

A. None at all.

Q. Which might possibly reflect itself in the trial of the case under our system of justice?

A. None at all, sir.

By Mr. Turkus:

Q. In any of your past work on the other side, Mr. Protter, did you have occasion, in newspaper parlance, to cover the trial of a criminal case? By that I mean report it.

A. No, I handled strictly political affairs.

Q. And were those for publications written in the English language or in French?

A. Both English and French.

Q. So that, of necessity, you had a college degree?
A. I have a college education, but no degree—Columbia University.

By the Court:

Q. Which one?
A. Columbia.
Q. No foreign course?
A. No foreign course. You mean in foreign countries?
Q. Yes.
A. No.
Q. Your Columbia, that was the journalistic course?
A. No, I took up literature and philosophy.
Q. But you did not get your Doctor of Philosophy degree?
A. No, I left before.

[fol. 873] By Mr. Turkus:

Q. I was discussing the point of accomplice testimony with you, Mr. Frotter, and I think that you very properly stated that you had no preconceived notion of accomplice testimony.
A. No preconceived notion?
Q. Yes, as to whether or not you would accept it or reject it.
A. Yes, no preconceived prejudice.
Q. That is right. So that may I go along with the understanding that you would not arbitrarily reject testimony solely because it emanated from an accomplice?
A. No.
Q. And that you have no prejudice against that kind of testimony?
A. No.
Q. You will look at the character of the individual who gives it?
A. Of course.
Q. You will look at his past background, the crimes he has admitted committing, the associates he has admitted having, and all the rest of the things that go to his detriment; isn't that right?
A. Of course.
Q. Do you feel because a man has been of bad character that he cannot tell the truth?
A. He may at times.

Q. Do you believe that it is possible that he may?

A. Certainly.

Q. With respect to what is required by way of supporting or corroborative testimony, will you take the law expressly from the Judge?

A. Certainly.

[fol. 874] Q. If the Judge should give you a definition that supporting or corroborative evidence is evidence which emanates from an independent source, that is, independent of the accomplice, and tends to connect the defendants with the commission of the crime, would you accept such a definition from the Court without finding fault?

A. I did not get the first part of your question sufficiently to carry over.

Q. (Pending question read.)

A. Certainly.

Q. Is your state of mind such, Mr. Protter, that you can view the evidence in this case and render a verdict that will be consonant with the evidence and consonant with justice in the case?

A. Certainly.

Q. Is there anything that I have made no mention about or asked any question, which goes to your ability to serve as a fair and impartial juror?

A. Not that I know of.

Q. There is one point that I must go into, and it is not of nature of prying into your private life. But, have you maintained any contact at all with Marcy Protter since you came back?

A. Socially, I saw him about once every three months over at my mother's home, and when he comes down occasionally. I occasionally have been to his home, I think twice since I have been back.

Q. Have you discussed any of the situation at the Brooklyn waterfront with him?

A. No.

Q. Did you read any articles which he may have written?

[fol. 875] A. No.

Q. In regard to the Brooklyn waterfront?

A. No.

Q. Did you ever hear of the name of Peter Panto?

A. No.

Q. In any of your discussions with Marcy?

A. No, I don't discuss political situations with my brother. We are at odds on that political thing. I figure my brother is rather radical. I don't agree with him.

Mr. Talley: We cannot hear.

The Talesman: I think my brother is rather radical. Not only before I wrote for the *New Leader*, which is a strictly anti-Communistic paper, and I believe my brother has——

By the Court:

Q. He is Left and you are Right?

A. Yes.

Q. That course in Columbia on philosophy, how long did you pursue that?

A. For several years.

Q. So you are familiar with John Dewey?

A. I am.

Q. You know him?

A. Not personally, but John Dewey wrote for the *New Leader*. He also wrote for a magazine where I had an article published several years ago.

Q. I misquoted John Dewey last week. I think you heard me misquote.

A. I did not pay attention to him.

Q. I attributed to him a saying that the credit for which is due to someone else, but it has to do with jury psychology

A. I probably was not in the court-room when you said it. [fol. 876] Q. "Men possess thoughts, ideas possess men." Can you place that?

A. I cannot place it, but it is quite true.

Q. But it has to do, as you have seen, with the fact that when what is an idea rather than a thought gets ahold of you it is hard, either in the jury room or anywhere else, to let it go.

A. That is true.

Mr. Rosenthal: Judge, I do not want to appear pestiferous, but it is impossible for us to hear anything down here of what your Honor is discussing with the juror.

The Court: You will probably have to get amplifiers put in the court-room.

The Talesman: May I have a glass of water?

Mr. Rosenthal: We are below the bench here, so that the sound is drowned before we can get it. May we have that read, please.

(Questions and answers read as requested.)

Q. I do not want to prolong something that is irrelevant, but Alvin Johnson was the happy originator of that expression. You know Alvin Johnson?

A. No.

Q. You know who I mean?

A. I don't think I do.

Q. And it was the lead-off on the first essay or compilation by the editor of *The Nation*. Do you place it now? Ideas——

A. I have not read the book.

Q. You do not have to read all of it.

By Mr. Turkus:

[fol. 877] Q. I gather from the discussion which you had with the Judge about your writings that you have some very definite opinions with respect to labor unions?

A. In what way do you want me to answer that?

Q. I want to know is that so. Have you some definite——

A. I have opinions. I do not know whether they are so definite they could not be changed.

Q. Here is what I want to find out: In the event that certain names should crop up in the testimony of certain officials of a union or unions, is there anything by reason of the fact that there would be mention of certain such names as would give you a prejudice one way or the other toward either side in the trial?

A. I still cannot answer that question with a yes or no. I still don't get at what you are driving.

By the Court:

Q. Have you any prejudice on the subject?

A. No.

By Mr. Turkus:

Q. Well, for example, let me push this a little further without getting rid of it so abruptly. Should it appear that one or more officials of the union did something which a defendant in the case——

Mr. Barshay: I object to it. We are not concerned with what any official of the union did.

Mr. Turkus: Yes, we are concerned with what they did. There will be more of that before this case is over.

[fol. 878] The Court: The question will have to be finished.

(Pending question read.)

Mr. Barshay: Is the question, please——

Mr. Turkus: I am asking. Why don't you learn to disagree without being disagreeable?

Mr. Barshay: You ought to take your own advice first.

Mr. Turkus: You ought to take it. What you said last Friday——

(Pending question read.)

Mr. Turkus: I withdraw it in that form.

Q. Should it appear that one or more officials of the union were tied up with a defendant in this case in certain union activities, would you have any prejudice against the prosecution?

Mr. Barshay: I object to it.

Mr. Talley: Join in the objection.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Talley: Exception.

A. No.

Q. One of the lawyers in picking up the indictment said to one of the prospective talesmen, "It is an indictment with a few lines." Do you understand that this is an indictment for murder in the first degree?

A. Yes, I heard that in court.

Q. Whether it had a few lines or a thousand lines, it is [fol. 879] an important case to The People of the State of New York and to the defendants at the bar?

A. I understand that perfectly.

Q. Is there anything about this case in any of its aspects as you have heard by way of question or anything that you may have heard by way of questioning to the other prospective talesmen which would go to your ability to serve as a fair and impartial juror?

A. No.

Q. If selected as a juror in the case will you endeavor conscientiously to arrive at a just verdict?

A. I certainly would.

Q. In your past business life did you have occasion to discuss problems with other men and make decisions?

A. Often.

Q. Will you talk over the issue in the case—guilt or innocence—with the other jurors in the case with common sense and understanding?

A. Yes.

Q. Having in mind what your problem is in the case?

A. Yes.

Q. What the issue is, whom you are dealing with, and the nature of the charge?

A. Yes.

Q. Will you listen to common sense discussion with the other jurors in the case?

A. Certainly.

Q. Suppose you are selected as a juror and you hear every bit of evidence in the case from start to finish, you listen to the nine lawyers, or any three of them that get up and sum up in behalf of their clients, tell you everything that they see about the evidence, draw every argument and [fol. 880] conclusion that they will, and you hear the prosecutor draw his conclusions, the learned Court charges you on the law, you talk the case over with common sense and understanding in the jury room with the other jurors, and then your mind is satisfied beyond a reasonable doubt that at this bar of justice there are three guilty men, Buchalter, Weiss, and Capone, guilty of the crime of murder in the first degree, would you say so in your verdict?

A. Certainly.

Q. Would you have any fear to say so?

A. No.

Q. Any hesitation or reluctance?

A. No.

Q. If you are satisfied beyond a reasonable doubt that they are guilty, you will say so in your verdict?

A. Certainly.

Q. Would you have any fear to say so?

A. No.

Q. Any hesitation or reluctance?

A. No.

Q. If you are satisfied beyond a reasonable doubt that they are guilty, you will so say in your verdict?

A. Yes.

By Mr. Barshay:

Q. Mr. Protter, how long were you in France before you came here in 1939?

A. Sixteen years.

Q. I take it you read some American papers?

A. Occasionally.

Q. And have you read American papers within the last eight or nine years before your coming here?

A. In Paris, one American paper. Two American papers I get there usually are the New York *Times* and the *Christian Science Monitor*, and the New York *Herald-Tribune*, [fol. 881] which was published in Paris up to last June.

Q. Did you read American magazines there?

A. Occasionally.

Q. Did you meet people from New York or Brooklyn there?

A. Rarely, but occasionally.

Q. You may have discussed domestic affairs?

A. Political affairs, possibly, nothing else.

Q. Mr. Turkus has asked you and others repeatedly whether or not you knew anyone at all connected with the past administration, and he also asked you whether or not you were familiar, with a great deal of flourish about our ex-titles that we all had. That has nothing to do with the case, has it?

A. Not so far as I am concerned.

Q. It makes no impression on you?

A. None at all.

Q. He asked you whether or not you knew Mr. Turkus, and he just referred to himself as an Assistant District Attorney.

A. I never have seen Mr. Turkus before coming to this court.

Q. He is quite modest about it. You see, while I was in the past administration, he was the biggest criminal lawyer in Brooklyn. Did you hear about his fame?

A. No.

Mr. Turkus: Are you impressed now.

The Talesman: Not at all.

Q. You understand that personalities have nothing to do with this case at all?

A. Not at all.

Q. The mere fact that he mentioned a hundred names has nothing to do with this case at all?

A. Nothing at all.

[fol. 882] Q. When he mentioned Slabo and Babo and Terry Burns, they have nothing to do with the case?

A. Means nothing at all.

Mr. Turkus: I did not mention Babo. I did mention Abie Slabo.

Q. You are not in any wise impressed by any innuendo that may attach themselves to those names, isn't that so?

A. Not at all.

Q. So let us get down right to the business here.

Mr. Turkus: I object to the implication of that, let us get down to business, implication being the prosecutor is doing everything else but.

Mr. Barshay: I did not infer that, Mr. Turkus.

Mr. Turkus: Withdrawn then.

Mr. Barshay: You are doing nothing else but your job.

Q. Conditions in the particular section of Brooklyn have nothing to do with this case, have they?

A. I don't know. I don't know the case.

Q. Unless it comes out in the evidence that it has, you won't regard it?

A. Of course not.

Q. And the fact that on certain street corners certain people congregate, would have nothing to do with the case unless there was proof of it right from this witness stand?

A. Of course.

Q. All this atmosphere will be stripped from the case [fol. 883] unless it is evidence that you get from the witness stand; isn't that so?

Mr. Turkus: Atmosphere? There is no such thing as atmosphere that comes from a witness stand. I object to the form of the question.

Mr. Barshay: You did not hear, Mr. Turkus. You have a little bad cold.

The Court: Overruled.

A. I have not let mine be prejudiced by anything I have heard so far.

Q. Has your brother at any time, either by correspondence or in verbal talk, discussed the criminal cases with you?

A. No. I did not even know that he handled criminal cases.

Q. Speak up.

A. I did not even know that he handled criminal cases.

Q. And since your service on the jury have you spoken to him at all?

A. I have seen him once at my mother's house on the occasion of an aunt's death.

Q. Did you tell him you were a prospective juror?

A. I did.

Q. Did you tell the case you were called?

A. He knew it himself.

Q. Then did you talk about it?

A. No.

Q. Was anything at all said by him?

A. No, we were together for about five minutes, just taking my mother to my aunt's house.

[fol. 884] Q. Did he express any opinion in those five minutes?

A. None at all.

Q. Either about the case or the people involved?

A. No.

Q. And since then has he inquired of your progress?

A. No, I have not seen him since.

Q. Whether or not you were called or not called?

A. No, I have not seen him since.

Q. Have you spoken to him on the telephone?

A. No.

Q. I take it you have, then, your independent judgment in this matter?

A. Completely.

Q. Irrespective of your brother's views, politicaliy or otherwise; is that so?

A. That is so.

Q. You have paid attention to trials in the normal course of events went on in France while you were there in seventeen years?

A. Civil trials.

Q. Once in a while you could not escape the newspaper comment about some criminal trials?

A. Of course there has been comment in the papers on the French criminal trials.

Q. And, being a journalist, or associated with journalists, you formed certain ideas about the prosecution of crime?

A. I have a general idea, which is very vague. I have not interested myself particularly.

Q. You know the law in France in the process of criminal laws is different than here? You know that, don't you?

A. I do not know the laws in France for criminal prosecution.

[fol. 885] Q. You know there that a defendant must prove he is innocent; you know that?

A. I didn't.

Q. You never heard that?

A. No.

Q. You never heard the Napoleonic Code different from ours?

A. I have heard the Napoleonic Code, but I did not know it in relation to criminal law.

Q. You never came across that proposition, that there a man must prove he is innocent?

A. No.

Q. But you are familiar with the law that here a defendant is presumed innocent?

A. That I know perfectly.

Q. And he has no burden. Since coming here, back to this country, have you read American papers?

A. Yes.

Q. And in the last year and a half or so have you read American papers?

A. Yes.

Q. Have you read Brooklyn papers?

A. Occasionally seen the Brooklyn *Eagle*.

Q. Have you read the *Mirror?*

A. No.

Q. Have you read the *News?*

A. I have occasionally seen the headlines of the *News*, but not the paper itself.

Q. Have you read anything about the defendants? you came here?

A. Nothing whatever.

Q. Not a word?

A. Not a word. It may strike you as exhibiting surprise.

Q. Have you read anything about the defendants?

A. No.

Q. Not a word?

A. No, I did not know, when you mentioned the name [fol. 886] Lepke and Buchalter, I did not know who they were.

Q. I did not hear you.

A. I heard those names for the first time in this court.

Q. And since coming to this court the very first time you were called——

A. That was Thursday of last week.

Q. ——have you looked at the newspapers at all?

A. Yes, for the political and the international news.

Q. You skipped any reference to this case?

A. I have.

Q. Did you read about Judge O'Dwyer?

A. No. I know he is a candidate for Mayor, that is all.

Q. Did you read his very interesting life history?

A. No.

Q. In any of the papers?

A. No.

Q. Never?

A. Never.

Q. Since coming here, sir, did you discuss with your fellow jurors anything at all about the case or the defendants?

A. No.

Q. Did you discuss it with anyone at all?

A. No.

Q. Have you formed any opinion or impression?

A. No.

Q. While you were sitting hear and heard the other jurors being questioned.

A. Impression of what kind, do you mean?

Q. Of any kind.

A. I know it is a trial for murder committed in 1936, that is about all.

Q. Have you heard in the questioning by Mr. Turkus of other prospective jurors asking them whether they read about the motive and the details and so forth?

A. Yes.

Q. Have you been impressed by those questions?

A. No.

[fol. 887] Q. Have you been impressed in any way whatever since your coming here, since you are sitting in this box, to the detriment of any of these defendants?

A. No.

Q. Not in the slightest degree?

A. Not in the slightest degree.

Q. You said here, Mr. Protter, that since you got your notice you thought it was best to move from Brooklyn and live in New York at the hotel.

A. I was already living in New York, so I stayed away.

Q. Now your mother is back?

A. My mother is back.

Q. She has been back for one time, I take it?

A. Back since September 15th or 16th.

Q. You gave two reasons for staying at the Maryland Hotel, the second one being because you got a notice in this case.

A. That is it, yes.

Q. That is your own words, isn't that so?

A. That is my own words.

Q. Is there anything about this case that caused you to live separate and apart from your mother in this hotel because you had received a notice?

A. When I found out the nature of the case I wished to avoid questioning on the part of my family.

Q. Tell me, Mr. Protter, has your family questioned you about this case at all?

A. No. I have avoided the questions.

Q. You have avoided them? Have they tried to question you about the case?

A. No, they have asked me about the jury and what the [fol. 888] questions posed to the jurors, but that is all, but as to the nature of the case it is no. I have let it be known that I did not like to have them ask me questions.

Q. Has your brother questioned you about the case?

A. No.

Q. How many members in your family?

A. I have four sisters and a brother.

Q. All live there?

A. No.

Q. How many times have they questioned you about this case?

A. I hav seen one sister once. That was on Thursday of last week, or rather, of the week before, I should say. I have seen my brother Marcy once. I have seen my sister Tess once. I have seen my mother twice.

Q. Since you have been called?

A. Since I have been called.

Q. And while you were living at the hotel?

A. While I was living at the hotel.

Q. So that your living in New York does not prevent them from talking to you?

A. No, because I met them—I met my brother at my mother's home on Wednesday of last week on the occasion of the death of an aunt, and one sister lives downstairs in the house and another sister lives with my mother.

Q. You said, sir, that you are staying in New York to avoid being questioned?

A. Yes.

Q. Did you indicate to them the very first occasion that you should not and you ought not and they should desist from questioning you at all?

A. That is perfectly correct.

[fol. 889] Q. Did you do that?

A. I did.

Q. They apparently did not heed your suggestion?

A. They did, excepting for certain questions of curiosity as to the choice of jurors.

Q. Is that the reason why you are living in New York, to be away from your family because they want to question you about it?

A. That is the main reason, yes.

Q. You still see them?

A. Of course I do.

Q. And you still speak to them?

A. Of course I do.

Q. Is there anything else that causes you to live in New York other than that suggestion?

A. At the same time I am freer in my actions and I am seeking a position also in a hotel in Florida for this winter, if possible, and I thought that would help me out, staying in that neighborhood where I am.

By the Court:

Q. What hotel is that?

A. I am seeking a position in some hotel. I have not started in as yet.

Q. Any particular hotel?
A. No particular hotel.
Q. Miami Beach?
A. Miami Beach and Miami, around there.
Q. Have you had a position in a Miami Beach hotel?
A. Never.
Q. Have you applied for one?
A. I applied to an agency, but nothing has come of it yet.
Q. Do you mind telling us what kind of position?
A. Room clerk.

By Mr. Barshay:

[fol. 890] Q. Is there any fear that you have to be a juror in this case?
A. None at all.
Q. Is there anybody you want to avoid while you are here as a prospective juror in this case?
A. No.
Q. Has your brother tried in any fashion whatever, directly or indirectly, through members of your family, to talk to you about this case?
A. No.
Q. Not at all?
A. Not that I know of, no.
Q. Over the week-end did you speak about this case?
A. No, I have seen none of my family over this week-end.
Q. I take it, sir, that while you were sitting in this jury box you heard the other jurors being questioned, irrespective of their own feelings and opinions and answers, you say you still have an independent judgment?
A. Completely.
Q. And do you feel now that Mr. Louis Buchalter is as innocent under the law in this case as you are?
A. Yes.
Q. You feel that way toward him?
A. Yes, I do.
Q. Do you feel the same way about the other defendants?
A. I do.
Q. So no matter what you heard, you are free of all bias?
A. I am.
Q. And then you will expect the District Attorney to keep the promise of proving the defendants guilty beyond a reasonable doubt?
A. Yes, certainly.

Q. Will you consider this indictment merely as an accusation?

[fol. 891] A. Certainly.

Q. That is all?

A. That is all.

Q. And you will say to the District Attorney silently, "Now you go ahead, Mister; you accuse, you prove"?

A. That is correct.

Q. Do you feel that way?

A. I feel that way.

Q. And will you say further, "You prove beyond a reasonable doubt"? Did you ever hear that expression before?

A. Yes, I have heard it here quite often.

Q. And before that time have you heard it?

A. I have not been in court before.

Q. Will you accept the definition from his Honor as to what reasonable doubt is?

A. Certainly.

Q. Then you will have to go beyond a reasonable doubt won't you?

A. I do not understand.

Q. If the Judge should say to you they must prove the defendants' guilt beyond a reasonable doubt——

A. Certainly.

Q.——you will do exactly that?

A. Certainly.

Q. Would you require the defendant Buchalter to furnish any proof in this case?

A. No.

Q. Would you expect any explanation from him with respect to any charge against him?

A. No.

Q. Would you expect him to explain anything at all in this case?

A. No.

Q. Would you hold against him the fact, if the fact should [fol. 892] so develop—and this is not promised one way or the other—that he remain silent in this case, would you hold that against him?

A. No.

Q. Not in the slightest degree?

A. It is up to the prosecution to convict a man.

Q. And you will expect the prosecution to prove the guilt of this man in this case only?

A. Certainly, beyond any reasonable doubt.
Q. No other case?
A. What is that?
Q. Nothing to do with any other case?
A. Of course not.
Q. Any other condition?
A. Of course not.
Q. Any other fact?
A. Of course not.
Q. Any other association?
A. Of course not.
Q. Union or otherwise?
A. Union or otherwise.
Q. Have you heard the name of Reles?
A. Who?
Q. Abie Reles.
A. Is that the name I saw in the headline of a paper?
Q. You may have.
A. About a week or so ago.
Q. You may have.
A. I heard the name pronounced here the other day in the court-room.
Q. Any of the names that were read here by either Mr. Turkus or myself, have you any knowledge of those people at all?
A. No, none at all.
Q. Reles and Tannenbaum and Magoon and Burnstein?
A. No.
Q. Do you know anybody in the Police Department?
A. No.
[fol. 893] Q. In your writings have you come in touch with any police officials?
A. Here? No. In the United States, no. I have done very little writing since I am back.

By the Court:

Q. In your cultural background before you came to this country——
A. Before I came back.
Q. You were born here?
A. Of course.
Q. I misunderstood you. Then you had gone abroad as a writer on French papers?

A. No, I went abroad as a tourist and then stayed abroad as tourist and then later on came here.

Q. Then you did not acquire your culture under the French influence?

A. No, American.

Q. Your thought culture.

A. No, here.

Q. Did you learn to think freely while abroad writing, or before you went abroad?

A. Before and during my stay abroad.

Q. Did you follow any of the culturists or just the liberal writers in acquring your own freedom of thought?

A. Just the liberal and philosophical writings.

Q. Does that freedom of thought mean this: that while you formed opinions they are only tentative and you arrive at no decisions until the necessity of decision arises?

A. That is quite correct.

Q. That at all other times your mind remains still open?

A. That is quite correct.

Q. I take it you are too young a man to have been living at [fol. 894] the time of the Dreyfuss trial?

A. Yes, forty-one.

Q. But I assume you have studied Zola, you have read Zola?

A. I have not read Zola, but I know the Dreyfuss Trial.

Q. Have you formed any distinct impressions concerning the Dreyfuss trial that have any bearing upon the trial of criminal cases?

A. I did not go into it deep enough for that.

By Mr. Barshay:

Q. Well, you formed some impression as the result of the Dreyfuss trial, haven't you?

A. No.

The Court: He did not go into it deeply, he said.

The Talesman: In reading of it I saw it mainly as a social and political affair, rather than a criminal affair.

Q. At any rate, you have come to the conclusion that it is possible for an innocent man to be accused of crime?

A. Of course.

Q. And in this country we are fortified with the presumption of innocence?

A. Yes.

Q. You agree with that, don't you?

A. Certainly.

Q. Have you formed any opinion as Mr. Turkus was questioning the jurors with respect to accomplice testimony?

A. Did I form any opinion?

Q. Yes.

A. No.

Q. Is your mind still open on the point?

A. Completely.

Q. So you will be ready to take from his Honor your [fol. 895] instructions with respect to accepting or rejecting accomplice testimony?

A. Certainly.

Q. I take it the Court will tell you to accept it with caution and weigh it carefully. Won't you?

A. Certainly.

Q. In your own mind being a person of experience and having come in contact with lots of people there and here, will you consider each demerit mark against a person as he takes the stand? Do you understand me, sir?

A. Your question is not complete in my mind.

Q. When a man takes the stand he swears to tell the truth?

A. Yes.

Q. Sometimes he does and sometimes he fools you; is that right?

A. That is correct.

Q. You have had that experience?

A. Of course.

Q. When he comes to apply for credit sometimes he fools you too?

A. Certainly.

Q. When he comes here on the stand he really is applying for credit, you should believe him. That is what he is here for; isn't that so?

A. That is right.

Q. You will want to know who he is?

A. Certainly.

Q. And if he says to you out of his own mouth or admits out of his own mouth, "I have been a murderer and a crook and a perjurer and a robber and a pimp," with each admis-

sion that comes from his mouth or is forced from his mouth, you with greater care weigh his testimony?

A. Certainly.

[fol. 896] Q. Isn't that so? And so the mere fact that he raises his hand to tell the truth won't be accepted by you as a fact?

A. No, not at all.

Q. The more people of that character that take the stand the harder you will be to convine of their truth?

A. I would have to have sufficient evidence for that.

Q. You would not accept it so readily, would you?

A. Not on their own word.

Q. What?

A. Not on their sole word, no.

Q. And then this evidence which tends to connect the defendants with the commission of the crime which Mr. Turkus says he will offer to corroborate these men whom I describe to you, you will look into their history too, won't you?

A. Certainly.

Q. They are no better than the fellows who said they are accomplices; it will be very hard for them to convince you of their truth-telling ability, won't it?

A. Certainly.

Q. You will accept their testimony with a great deal of caution?

A. With a great deal of caution is correct.

Q. Any you will want to know why they all of a sudden appear on the prosecution's side of the case, won't you?

A. I suppose I would.

Q. You will ask yourself that question?

A. Certainly.

Q. And if you find that they are receiving extra-special treatment at the hand of the District Attorney's office, you will find out whether that extra-special treatment, in [fol. 897] addition to saving their own necks, is inducing them to lie? You would want to find that out, wouldn't you?

A. I would. I would require—I would make them subject to further caution.

Q. The more you find out about them the more caution you will use?

A. Of course.

Q. Of course, having had your experience, you know that there is such a thing as uttering a lie and repeating it and repeating it in the hope that same people will believe it?

A. Yes.

Q. You heard that philosophy on the other side?

A. Dr. Goebels' philosophy.

Q. You won't apply it here, his philosophy?

A. No.

Q. And you will reason with your fellow jurors, won't you?

A. Certainly.

Q. And you will guard the rights of Mr. Buchalter?

A. Certainly.

Q. When you said you were in sympathy with the enforcement of the criminal law, you meant the criminal law applicable to all people?

A. To all people.

Q. Including this defendant?

A. Of course.

Q. He has a stake here, too. You know that, don't you?

A. Certainly.

Q. Now, in a case like this, where more than one defendant is being tried, there will be testimony given about all defendants. You understand that?

A. Yes.

[fol. 898] Q. It will be your job to sift the evidence separately as against each defendant?

A. Certainly.

Q. Intellectually you are qualified for that, I take it.

A. I think so.

Q. You won't say, "Birds of a feather flock together," will you?

A. No.

Q. Mere association is no proof of crime, is it?

A. No.

Q. You won't use the evidence against the man unless it applies to that man?

A. Unless it applies to him, of course.

Q. And if it should slip the mind of one of your fellow jurors and subconsciously he may forget himself and use the evidence against one which did not come from the wit-

ness stand as against that one, you will fight just as hard for that legal right of the defendant involved, won't you?

A. Of course.

Q. You will call it to his attention?

A. Certainly.

Q. Does the element of time conflict with your desire to serve as a juror, if you have that desire?

A. No.

Q. You will render a judgment as against each defendant as you as an individual are convinced or fail to be convinced by the evidence?

A. What I conscientiously believe

Q. And if, out of all this mass of testimony, stripped of atmosphere, sympathy, bias, or prejudice, you find one reason for doubt which arises from the evidence with respect to the guilt of Mr. Buchalter, you will say so, won't you?

A. If it is a reasonable doubt, yes.

[fol. 899] Q. No other element can interfere with that conclusion?

A. No.

Q. Are you now of the opinion that you owe duty neither to Mr. Turkus nor to ourselves?

A. To no one except to The People.

Q. Your duty to live up to your oath?

A. That is all.

Mr. Barshay: And that is all.

By Mr. Rosenthal:

Q. Are you married?

A. Widower.

Q. Any family?

A. No.

Q. Before you received the notice in this case you lived at home with your mother; is that correct?

A. Yes, but in the summer time I was away at the Spofford Hotel as a room clerk.

Q. Is your brother the lawyer married?

A. Yes, he is.

Q. Does he live at home with your mother?

A. No, he does not.

By the Court:

Q. What hotel was that?
A. Lake Spofford Hotel, Spofford, New Hampshire.

By Mr. Rosenthal:

Q. Presently are you employed at all?
A. No.
Q. How long since you have done any writing?
A. Since I am back I have only written a few book reviews.
Q. That is, you are back here two years?
A. Yes, except I left for France again in the autumn of 1939 and arrived here in the summer of 1940.
[fol. 900] Q. And since you have returned, you say with the exception of writing a few book reviews you have done no writing at all?
A. No.
Q. Have you had any other occupation since you returned?
A. Since I returned.
Q. Yes.
A. No.
Q. And at present you are seeking employment at one of the Southern hotels as a room clerk?
A. Yes, I thought of spending the winter away from New York. That is the only way I can afford to do so.
Q. When Mr. Barshay was questioning you, you said that you left home to go to New York to a hotel so as not to be questioned?
A. No, no, I did not say that. I was working in the Lake Spofford Hotel from June 25th until September 3rd. On coming back I went to a hotel in New York where I am ever since. My mother arrived at her home on the 15th or 16th of September. I have not gone back since then.
Q. Didn't you make mention to him that when you found out the nature of the case you remained away from home in order to avoid questioning?
A. Yes, that is true.
Q. What did you mean when you say you found out the nature of the case?
A. I found it out here.
Q. When was it that you found it out here?

A. On Thursday, September 17th or 18th.

Q. Were you in court in August?

[fol. 901] A. No, I was not here. I asked to be excused by letter.

Q. And when you asked to be excused by letter, didn't you in any wise read any of the articles in the paper as to the nature of the case?

A. None at all. I did not know what case it was.

Q. You say you do read the Brooklyn *Eagle*?

A. Occasionally I have read it.

Q. Have you read it recently?

A. I have not read it in the last four or five months.

Q. Last four of five months?

A. That is so.

Q. Do you read the *Mirror?*

A. No.

Q. You recall having read in the Brooklyn *Eagle* any other names, or do you recall any of the names of any of the defendants?

A. No, because I usually read only the international news and the political news from Washington.

Q. But in answer to Mr. Barshay, you said you had a slight recollection of the name Reles.

A. I saw that in a headline on a news stand about a week or so ago and then I heard it here since, and that is the reason why that particular name comes back to my mind.

Q. With the exception of having seen in a headline Reles' names, have you seen any articles of any character that you can now recall that made reference to any of the names mentioned by Mr. Turkus?

A. No.

Q. Have you read anything at all in respect to this case?

[fol. 902] A. Nothing at all.

Q. Are you on speaking terms with your brother?

A. Yes, I am on speaking terms with him.

Q. And when you met him here recently did you in any wise or did he in any wise discuss with you the names of anybody involved in the case?

A. No.

Q. Was he one of the individuals who questioned you in respect to your duty here, or was that confined to your sister and your mother?

A. Confined to my sister and my mother.

Q. Did your brother in any wise at any time speak to you about your jury service or the contemplated questions that were being asked here of other jurors?

A. No, expecting one question. He asked me whether I had been called yet or not. I said no, and that was all. That was the only question.

Q. He merely asked you whether you had been called—accepted, I assume you mean.

A. That is it.

Q. And you answered him no; is that correct?

A. Yes.

Q. You did state that you are not in sympathy with your brother's views of life; is that correct?

A. My brother's political views.

Q. Does that include his association with individuals attached to any particular organization?

A. Yes, because when I met or occasionally run across him he has been with people of his own views.

Q. He has been with people of his own——

A. Of his own views, political views.

[fol. 903] A. Of his own views, political views.

Q. According to you—and if I am wrong, correct me—your brother has represented some people of some different unions; is that correct?

A. I don't know.

Q. Do you know anything of your brother's legal work at all?

A. I know that he has done some work for some unions. I do not know which ones or what kind of work. I imagine it is legal work, being a lawyer, but I could not state that for a fact.

Q. Well, according to Mr. Turkus, in his questioning of you, he implies, over the objection of Mr. Barshay, that the question of some unions or some union activity, I think is his word, may be brought into this case.

Mr. Turkus: I object to the form of the question.

Mr. Rosenthal: I submit that is a correct statement. He made the statement and Mr. Barshay objected to it, and your Honor overruled the objection.

The Court: Finish the question.

Mr. Rosenthal: The question is finished.

Mr. Turkus: I object to the form of the question, please the Court.

The Court: Read that again. It did not impress me as a question.

Mr. Rosenthal: Your Honor is right. I was interrupted by Mr. Turkus after the preamble and before the question was finished. I will withdraw the question and repeat it.

[fol. 904] Q. You recall Mr. Turkus mentioned to you that there would be some question of union activities of one or more of the defendants in this trial. Do you recall that?

A. I recall it.

Q. You recall at the time he made mention of that that Mr. Barshay objected to it. Do you recall that?

A. I recall that.

Q. Assuming that there were mentioned in this trial as to one or more of the defendants some question as to union activities which may or may not coincide with the views accepted by your brother as to the particular unions he may have represented, with which view you have admitted you disagree. Would that in any wise prejudice you against any of the defendants?

A. No, not at all.

Q. You feel that, irrespective of the political views of any individual, that when a person is accused of crime, that the particular crime that they are accused of must be proven by the District Attorney presenting evidence to satisfy you beyond a reasonable doubt as to the truth of the allegation; is that true?

A. Of course.

Q. You said you had no opinion as to accomplices' testimony; is that true?

A. No preconceived opinion.

Q. Assuming, sir, that the Court were to charge you the law of our state recognizes two types of accomplices, one where the Judge says to you, "I charge you this man is an accomplice"; is that clear so far?

A. That is clear.

[fol. 905] That is what would be termed an accomplice as a matter of law. Is that clear?

Q. And then another type where the Judge says, "I, as a Judge, cannot charge you as a matter of law this man is an accomplice, but you, the jurymen, have a right, taking into consideration everything he said on the stand and the circumstances, to say as a question of fact in the jury room

that this man is an accomplice." Is that clear, or shall I repeat it?

A. Please repeat it.

Q. I withdraw it for brevity and repeat it this way: Assuming the Judge tells you that the law of our State, not only in this case, but in every case, is that there may be two types or methods of determining who is an accomplice, one where the Judge says to you, "I charge you he is an accomplice." There you, the juryman, are bound to consider him as an accomplice. Is that clear so far?

A. Perfectly.

Q. The other where the Judge says to you, "I do not charge you as a matter of law he is an accomplice, but you, the jurymen, may find from the evidence as you view it, the facts and the circumstances, that he is an accomplice." Is that clear to you?

A. That is clear.

Q. Now then, if the Court were to charge you that is the law, would you feel that merely because the Court left it to you as a question of fact, the complicity of an individual, that because the Judge did not say he was an [fol. 906] accomplice as a matter of law, that therefore he could not be an accomplice?

A. No.

Q. Now then, assuming that the Judge were to tell you that one accomplice cannot corroborate another accomplice. Is that clear to you?

A. That is clear.

Q. In fact, that one or more—it goes to any number of accomplices, cannot corroborate one another— Is that clear?

A. That is clear.

Q. And assuming that the Judge left to you the testimony of certain individuals, to determine whether they were accomplices— Is that clear?

A. That is clear.

Q. Now then, if you find that they were accomplices and that was the only evidence that was in the case, determined by you as a fact in your jury room; and the Judge was to further say to you, "Unless there is independent evidence tending to connect the defendant with the crime you must acquit him," would you hesitate, if you found no independent evidence, to acquit?

A. I would hesitate.

Q. I don't think you understand me, sir. It is a long question.

A. Give me the latter part of it instead of the first.

Q. The latter part is that after you get into the jury room—and I will make it brief—the only evidence outside of accomplices is testimony which you have a right to find to be accomplice testimony—is that clear?

[fol. 907] A. That is clear.

Q. And you determine it is accomplice testimony, would you hesitate to acquit the man if the Judge were to tell you that unless you found independent evidence—

A. I would not hesitate, no.

Q. Now then, from what has been said, it may be that the so-called independent evidence in this case will be an alleged admission made by one of the defendants to one of the People's witnesses. Is that clear to you?

A. That is clear.

Q. In other words, one of the People's witnesses may go on the stand and say, in addition to the so-called accomplice, "He, the defendant, told me that he, the defendant, committed the crime." Is that clear to you?

A. That is clear.

Q. Now then, if that happens to be the case in this trial, will you, in determining the question of the truth of this witness's statement, take into consideration not only his past life of crime, but what motive or gain he may procure by having made the statement on the witness stand, the defendant told him he committed the crime. Will you do that?

A. Certainly.

Q. Now, then, if you find that that particular individual has admitted to the District Attorney that he has committed maybe five or six or more murders and numerous other crimes for which he has never been punished and for which there are no indictments, and if you find further, that he has been out playing baseball with detectives, [fol. 908] living in swell hotels and taking walks down in Coney Island, and other things, while he is waiting for these trials, would you scrutinize carefully this so-called alleged admission—

A. Certainly.

Q. —before you determined whether it was true or not?

A. Certainly.

Q. It may develop in this trial that the defendant represented by me will offer proof to you that he, the defendant, was nowhere near the crime at the time it was committed. Is that clear?

A. That is clear.

Q. That is what we term an alibi. Is that clear to you?

A. That is clear.

Q. You have heard Mr. Turkus mention to previous men that were examined the question as to whether or not on the question of alibi you will take the law from the Court.

A. Certainly.

Q. I am going to ask you this question, sir: If the Judge charges you that at no time must the defendant offer any proof at all to prove his innocence, he can sit mute, he does not have to take the stand, he does not have to call a witness, he does not have to do anything, and still you have to find, without any prejudice in your mind because of that fact, from the evidence adduced by The People his guilt before you can find him guilty, you would follow that, wouldn't you?

A. Certainly.

Q. Now then, if the Court further tells you that the offer [fol. 909] of an alibi does not change the method of proof or the burden of proof— Is that clear?

A. That is clear.

Q. —and it is sufficient if in an offer of alibi that particular alibi in itself raises a doubt in your mind— Is that clear?

A. That is clear.

Q. In other words, sir, if the Court tells you a reasonable doubt can be raised either by evidence or by lack of evidence, and a doubt may be created where one would otherwise not exist by offering certain things, you would follow that law, wouldn't you?

A. Certainly.

Q. And if in your mind, even though it is not established beyond a reasonable doubt that the alibi is correct, if in your mind the offer of proof of an alibi establishes a doubt in your mind as to whether this defendant ever committed this crime, you would resolve that doubt without hesitation in his favor, wouldn't you?

A. Certainly.

Q. Have you ever served on a criminal jury before?

A. No.

Q. On a civil jury?

A. No.

Q. Irrespective of the fact that you have never served on a jury, you know, sir, that the calling of twelve men together to decide the fate of an individual is for the purpose of moulding twelve minds into one to bring in a verdict; you know that?

A. I know that.

Q. However, you also realize that whether or not you have ever been on a jury or you have been on one, twenty [fol. 910] or fifty times, that when your opinion is once formed concerning the evidence, if it is based upon your honest, conscientious opinion, due to your logical reasoning and not an arbitrary act, that if after you reason with your fellow men and state your opinion and they state theirs, they are unable to convince you or you are unable to convince them that either one of the theories is correct—Is that clear?

A. That is clear.

Q. That then it is your duty to remain adamant and firm and fixed in the opinion which you have gained; is that clear?

A. Certainly.

Q. Merely because of your inexperience as a juryman, sir, you would enter the jury room irrespective of the thought of the District Attorney who has made a statement here about hung juries and arbitrariness and so forth—

Mr. Turkus: Just a minute. I object to that.

The Court: Finish the question.

Q. —would you have the courage—I just saw you motion to the District Attorney.

Mr. Turkus: I asked him if he would desist from his answer until I put my objection on the record, and he said he would, with his hands.

Mr. Rosenthal: Would you mind sitting down while I am addressing the juryman?

Mr. Turkus: No.

Mr. Rosenthal: I ask the Court to have him sit down [fol. 911] until I finish my question.

The Court: Finish your question; then stand up.

Mr. Rosenthal: The Court told you to sit down until I finish the question.

Mr. Turkus: Is Judge Rosenthal presiding?

Mr. Rosenthal: No, sir, the Court is presiding, and has made the statement.

The Court: I would like to hear the question finished before the objection is made. Go ahead, Mr. Rosenthal.

Q. Do you remember the question as far as I have mentioned it to you?

A. I would like to have it read.

Q. If you have once become fixed in an opinion in the jury room and you have listened to the reasoning of your fellow jurymen and they are unable to convince you that that opinion is incorrect and that opinion is founded on your conscience and not any outside consideration or other, merely because the District Attorney here has stood up at the time one or more of the lawyers were questioning prospective talesmen and said about hung juries and arbitrariness and so forth, would that dissuade you, sir, from following out your conscientious opinion and reserving that opinion and fighting for it in the jury room?

Mr. Turkus: I object to the form of the question. There were no statements made by the prosecutor.

The Court: Overruled.

A. No, that would not prejudice me.

[fol. 912] Q. The mere fact of your inexperience as a juryman, would that dissuade you?

A. No.

Q. Or hours or lateness or numbers against you?

A. No.

Q. You would still retain the opinion if it is formed on your conscience?

A. Of course.

Q. Of course you realize, sir, that it is your duty to reason with your fellow jurymen?

A. I understand.

Q. The theories. You cannot sit in a corner and say, "I have made up my mind and I won't listen to you."

A. No.

Q. It is your duty to give a reason that you have in your mind?

A. Of course.

Q. So as to enable and benefit the other jurymen with your reasoning?

A. Certainly.

Q. Maybe yours is better than theirs, and maybe they will acquiesce or possibly, on listening to them, they may have a better sense of reasoning than you and you will acquiesce; is that clear?

A. That is correct.

Q. But once that reasoning has been exhausted and you are not convinced of the fallacy in your reasoning, you will retain your opinion; is that correct?

A. That is correct.

Q. Have you listened at all to the questions that have been addressed to so many of the men who have been here?

A. Yes, I have heard quite a few of them.

Q. Assuming, sir, that it appears that the defendant knows some of The People's witnesses and that The People [fol. 913] know some of the defendants', admittedly so, the mere fact that they know one another, would that in itself prejudice you, that in itself, the admission that they know one another?

A. Prejudice me in what way?

Q. In your opinion which you arrived at in the jury room.

A. That the People's witnesses know the defendants' and vice versa?

Q. Yes.

A. It would make their statements subject to additional caution.

Q. When you say it would make their statements, do you mean The People's witnesses or the defendant?

A. The People's witnesses.

Q. So that, assuming that it were to develop, for instance, that one of the defendants had a restaurant and that some of these people who may testify visited the restaurant, the mere fact that there was knowledge or knowing of one another, without your belief of the store of any participation in the crime on the part of the de-

fendant, would that have any weight or effect on you or prejudice you against any of the defendants?

A. No.

Q. Mr. Turkus you have heard repeat on a number of occasions as to whether or not you would have any prejudice against a case being broken from the inside. You recall that?

A. Yes. He did not use that expression. He did not use that expression, but he meant the same thing.

Q. To you personally he did not use that expression?

[fol. 914] A. I heard it before.

Q. But to other jurymen while you were in the courtroom he used the exact words "broken from the inside."

A. That is it.

Q. You realize it is your job to find out whether there is any case broken at all, if you are taken as a juror?

A. Certainly.

Q. That is not his job to tell you; it is your job to find out.

Mr. Turkus: I object to that. I have a perfect right when I examine a talesman, certainly equivalent to that of the defense, to find out if there is anything in their state of mind that makes them improper jurors.

The Court: Nobody is questioning that.

Mr. Rosenthal: And I have a right to question whether it has any effect on him, the mere fact that he says it. I am not questioning his right.

Mr. Turkus: No need for shouting. If that is understood, I will withdraw the objection.

The Court: We will take a recess for lunch. Resume at two o'clock. Everybody kindly be in place at two o'clock.

(A recess was thereupon taken until 2 o'clock p. m.)

[fol. 915] Afternoon Session—Trial Resumed

Benjamin Protter resumed the stand.

Mr. Rosenthal: No further questions. No challenge for cause.

The Court: Any peremptory?

Mr. Turkus: There was a question suggested that I wanted to pursue with this talesman

The Court: This gentleman has not said whether or not he has had any previous hotel experience in Miami Beach.

The Talesman: I said no.

The Court: Have you been there?

The Talesman: No, never been there.

By Mr. Turkus:

Q. In response to a question by Mr. Rosenthal, he asked you whether if his defendant—if I remember it correctly—admitted association with an accomplice, whether you would hold any unfavorable inference against his client for that reason. I think you probably said no.

A. I said no.

Q. You would not have any prejudice against him. And then in part of your talk with Mr. Rosenthal I think that you said—as a matter of fact, I wrote it down—it may not have been exactly what you meant, but you said if a defendant took the stand and said he associated with one of these accomplices, that you would view the testimony of that accomplice with additional caution.

A. Yes, inasmuch as he is an accomplice, with added [fol. 916] caution.

Mr. Barshay: Let us find out what he said, your Honor.

The Talesman: I used the expression, "with additional caution."

Q. Do you mean exactly that if a defendant should take the stand and say that he knows and associated with an accomplice, that you would take that accomplice's testimony?

A. I did not understand that; I did not understand that part of it. That the defendant is on the stand, was that?

Q. Mr. Rosenthal was interrogating you with regard to a defendant taking the stand and admitting knowledge and association with an accomplice, as I understood it.

A. I did not understand the question that way.

Mr. Rosenthal: That was not the question, your Honor.

The Court: I did not understand that.

Mr. Turkus: I wrote down, when that was discussed with Mr. Rosenthal, that the prospective talesman——

The Court: The talesman did not so understand. Apparently we were all confused.

Q. Let me see if I have it straightened out now in so far as your mental state of mind is. In the event that a defendant should admit association with an accomplice, would you, because of the admission of the defendant, apply additional caution to the testimony of the accomplice?

A. No.

Mr. Turkus: There is one point of law that I must check in the Judiciary Law before I can say——

[fol. 917] Mr. Rosenthal: I did not hear.

Mr. Turkus: There is a point of law that I must check in the Judiciary Law.

The Court: On what point?

Mr. Turkus: There is a point of residence.

The Court: That can be raised at any time. That is jurisdictional.

Mr. Turkus: The address is a New York address.

The Court: The address is 772 Linden Boulevard on the jury notice and on the slip.

Mr. Turkus: I know, but there is testimony now that the prospective talesman resides at a New York hotel.

The Court: Yes. The President resides at the White House. Where does he vote?

The Talesman: I voted for the Primary Elections in Brooklyn.

By the Court:

Q. You voted this month?

A. This month, at the Primary Elections in Brooklyn, in a schoolhouse on Linden Boulevard.

The Court: You can say whether or not he is tentatively acceptable to both sides, subject to that.

Q. Have you always lived in Brooklyn before you went to Paris?

A. Yes.

Q. What part of Brooklyn?

A. Lincoln Place, near, I think it was near Schenectady or Utica Avenue or Troy.

[fol. 918] Q. Did you attend those Sunday evening meet-

ings that used to be held at the public school out in Brownsville?

A. No.

Q. There was an Open Forum there, liberal discussions.

A. No.

Q. Or the Brooklyn Philosophical Association down in Williamsburg?

A. No.

Mr. Turkus: I am going to exercise a peremptory chal- [fol. 919] lenge. Your Honor has overruled my challenge on residence.

The Court: Pardon me?

Mr. Turkus: I say in view of the fact that your Honor has overruled by challenge——

The Court: I have not overruled a challenge.

Mr. Turkus: I press the challenge on the theory——

The Court: I did not understand you made a challenge.

Mr. Turkus: That is what I did.

The Court: I misunderstood. You mean you challenge on the question of residence?

Mr. Turkus: That is it.

The Court: That is a different thing.

Mr. Turkus: I discussed it with my associate, Mr. Joseph, and we feel that I must press that challenge.

The Court: You mean you want to look up a question of law?

Mr. Turkus: That is it.

The Court: And submit anything you find on that challenge later? Very well. Both sides may announce a question of peremptory challenge later, but let me have any authority you find by tomorrow morning.

Mr. Turqus: I have not had an opportunity to check it, and I was playing safe with it.

The Court: You can do it this afternoon, or have it [fol. 920] done, and in the meantime the gentleman can take his seat, No. 2, tentatively, and submit to peremptory challenge later.

Mr. Turkus: All right.

Mr. Talley: That challenge must be made tomorrow morning, I understand, if it is going to be made.

The Court: Yes.

(The talesman then took Seat No. 2 in the jury box.)

CHARLES H. BERNHARDT, of 749 Eastern Parkway, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Bernhardt, what cross street is near that 749?
A. Kingston Avenue.
Q. Do you know whether that is in the vicinity of a restaurant known as the Famous Restaurant and Dubrow's Restaurant?
A. That is about a half a dozen blocks away.
Q. Do you have any contact with those restaurants?
A. No.
Q. You are listed on the trestle board as an office manager?
A. That is right.
Q. What kind of office work do you do?
A. I check credits, take care of an office.
Q. And what is the name of the firm by which you are employed?
A. Columbia Products Corporation.
[fol. 921] Q. And where is their place of business?
A. 249 McKibben Street, Brooklyn.
Q. Is that in the——
A. Williamsburg section.
Q. What is this Columbia manufacturing?
A. Powder puffs, cosmetic bags.

The Court: What address was that?
The Talesman: 249 McKibben Street, Brooklyn.

Q. Prior to living at the Eastern Parkway address did you live in another section of Brooklyn?
A. Yes, 1087 Carroll Street.
Q. What section or district of Brooklyn is that?
A. Crown Heights.
Q. Have you lived there for a number of years?
A. Yes.
Q. Did business or any other contact bring you into contact with people in the Brownsville-East New York area of Brooklyn?
A. Just relatives.
Q. Who reside there presently?
A. That is right.

Q. Do you know the streets that these relatives live on?
A. Sutter and Bristol.
Q. And how close is the relationship?
A. An aunt.
Q. Do you know how far that is from Sutter and Bradford Street?
A. No, sir.
Q. Do you visit in that area frequently?
A. About once a month.
Q. Have you any other relatives in the Brownsville area other than an aunt?
[fol. 922] A. No.
Q. Is she in business in that neighborhood?
A. No, just her residence.
Q. A housewife?
A. That is right.
Q. Has she lived there for a number of years?
A. Oh, yes.
Q. So that you have been coming into that district over a period of years on an average of once a month?
A. That is right.
Q. Do you have any contacts of any kind, nature, or description with persons or firms in the garment district of Manhattan?
A. No, sir.
Q. Or the clothing district?
A. No, sir.
Q. Have you had any in the past?
A. No.
Q. Any connection with persons on the Brooklyn waterfront?
A. No, sir.
Q. Or in clothing trucking?
A. No, sir.
Q. Did you hear anything of this case shortly after it happened out in that Brownsville district when you were out there?
A. I don't get that.
Q. Did you hear anything out in the Brownsville district when you visited there, in regard to this case?
A. No, nothing at all.
Q. Four or five years ago?

A. Nothing at all. Just went there for a short visit and that was all.

Q. Since your name appeared on this special panel did [fol. 923] anybody speak to you about the case?

A. Just at home and at the place of business.

Q. Was that in connection with prospective service?

A. That is the idea.

Q. Other than that have you had any discussion with anybody about the merits of the case?

A. No, no one at all.

Q. I take it, in common with others, you read newspapers.

A. That is right.

Q. What newspapers do you read?

A. *Mirror*, Brooklyn *Daily Eagle*.

Q. Is there anything that you have read in the press——

A. I have been a constant reader of the *Mirror* and of course the Brooklyn *Daily Eagle*.

Mr. Barshay: Would you be good enough to keep your voice up?

A. I say I read a good deal in the *Mirror* and the Brooklyn *Daily Eagle* regarding this matter.

Q. Has it been in regard to this particular case?

A. Yes, sir.

Q. You answer me rather emphatically. Do you have an opinion from some of the matter that you have read?

A. Yes, sir.

Q. Does that opinion go to the guilt or innocence of the defendants, without stating it?

A. Yes, it is an opinion, quite an opinion.

Q. And that has been an opinion that has been formulated [fol. 924] by reading of the newspaper articles?

A. That is right.

Q. Would it be that kind of an opinion that would require evidence on the part of the defendant to dissipate?

A. Very little. Will you repeat that again, please?

Q. Is that kind of an opinion that you have that would require evidence in behalf of a defendant to get rid of that opinion, to remove it from your mind?

A. No.

Q. Is it an opinion that goes to the guilt or innocence? I think you said it was.

A. That is right.

Q. Is it an opinion that would require evidence to remove?

A. I doubt very much.

Q. Do you think you can remove the opinion without evidence?

A. Remove the opinion without evidence?

Q. Yes.

A. I do not need any evidence to remove the opinion. I have already made up an opinion.

Mr. Rosenthal: I challenge for cause.

The Court: Reserve your challenge to the conclusion of the examination by Mr. Turkus.

Mr. Rosenthal: All right, sir.

Mr. Cuff: May I suggest that we would only be wasting time with this juror.

The Court: I do not understand it myself, yet.

Q. Mr. Bernhardt, you have a very definite opinion about this case?

A. That is right.

Q. And no matter what happened in the court-room you [fol. 925] would be having the same opinion?

A. That is right.

Q. That was the way I understood you.

A. That is right.

Q. So that no matter what either side did, you have your opinion so fixed that you could not be swayed one way or the other?

A. That is right.

By the Court:

Q. You mean as to the guilt or innocence of a defendant in this case?

A. That is right.

Q. On this charge?

A. Right.

Mr. Rosenthal: I challenge for cause, your Honor.

The Court: He has not shown whether or not he could lay it aside.

Mr. Rosenthal: He said he could not.

Mr. Cuff: He said he could not.

Q. You mean you cannot lay aside that opinion?

A. No, sir.

Q. You cannot decide this case on the evidence alone?
A. No, sir, the opinion I have had and read.

Mr. Cuff: I object to any statement.
The Court: Try the challenge.

Charles H. Bernhardt, being duly sworn, testified as follows:

By Mr. Rosenthal:

Q. Mr. Bernhardt, you, in anyswer to Mr. Turkus's question stated that you had an opinion which you could not remove; is that correct?
A. Right.
[fol. 926] Q. If you were asked the same questions as already propounded to you before you were sworn, would you give the same answer?
A. Identically.

Mr. Rosenthal: That is all.
The Court: Sustained.

Samuel F. Strongin, of the Hotel St. George, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

The Court: Is your brother or uncle former partner of Judge Moskowitz?
The Talesman: No, sir.

By Mr. Turkus:

Q. Do you know Sidney Strongin?
A. No, I am afraid I don't.

By the Court:

Q. Your relatives are not in the window pane business?
A. No.

By Mr. Turkus:

Q. Mr. Strongin, on the trestle board your address is listed as that of the Hotel St. George, and I think that is the address you gave to the stenographer.
A. Correct.

Q. Have you lived at the Hotel St. George for a number of years?

A. One year short a few days.

Q. So that you have lived in Brownsville recently?

A. Four out of the last five years.

Q. And are you there on a lease, a yearly lease arrangement?

A. No, I am there on a weekly arrangement, but that will be my permanent residence.

[fol. 927] Q. You are listed as an audit clerk. Is it for the St. George Hotel?

A. No, for a private firm.

Q. Do you mind stating the name of the concern?

A. The Metropolitan Tobacco Company.

Q. And where does the Metropolitan maintain its office?

A. 22 Fourth Avenue, New York City.

Q. What section would 22 come out in?

A. Right near Wanamaker's, 8th Street.

By the Court:

Q. Right opposite?

A. Yes.

By Mr. Turkus:

Q. Prior to living at the Hotel St. George did you reside in Brooklyn?

A. Well, for a few months I resided in Manhattan, and prior to that I lived in Brownsville.

Q. So that you lived in Brownsville during September of 1936?

A. That is right.

Q. What street did you live on?

A. Grafton.

Q. Near what other street?

A. Near Livonia.

By the Court:

Q. You are a neighbor of Broadway Rose?

A. I do not know whether to claim that as a distinction or not. What would you say, your Honor?

By Mr. Turkus:

[fol. 928] Q. I think what was intended was that you are familiar with the corner of Saratoga and Livonia?

A. I am.

Q. You knew the name of the proprietor of that store?

A. Right.

Q. You knew and heard various things about persons who hung out or congregated at that corner?

A. I did.

Q. And, having lived in Brownsville for the past five years, living there four years, you have seen and heard various things which made an impression upon you, I assume?

A. Right.

Q. And you have heard in that area the mention of various names that you have heard mentioned by the lawyers in the case? Having lived in Brownsville for four out of the last five years, you have some impressions about this case, haven't you?

Mr. Climenko: Object to the form of the question.

A. Persons, yes.

By the Court:

Q. How far were you from Rose Gold's place?

A. Two blocks.

Q. You were nearer Howard Avenue?

A. Well, Howard Avenue would be to the west of Grafton Street where Saratoga would be to the east of Grafton Street.

Q. Grafton Street runs into Howard Avenue?

A. It runs parallel with Howard.

Q. Doesn't it end there?

A. No. I believe that Howard Avenue runs into Kings Highway and ends over there. No, I am wrong. It runs quite a distance parallel to Grafton Street.

[fol. 929] Q. And they run together at one point, at any rate, two blocks from Saratoga and Livonia?

A. Yes, that is very definite.

Q. So you are familiar with the situation there?

A. Yes.

Q. Did you patronize that store?

A. Not to any great extent.

Q. But you have been in it?

A. Oh, surely.

By Mr. Turkus:

Q. Did you deal in the Brownsville district in other stores when you lived there, other merchants?

A. Sure.

Q. Have you an opinion in regard to the matter?

A. In regard to this case?

Q. Yes.

A. No, I still have an open mind on it.

Q. Have you any contacts in the Bronsville-East New York area of Brooklyn?

A. I have friends living there.

Q. And in what particular section of Brownsville do they live in, what street?

A. They live in East New York, not in Brownsville.

Q. Do you visit there frequently?

A. Quite frequently.

Q. At the time that Joseph Rosen was murdered, was there any conversation that you heard about the case?

A. Naturally it was a topic that concerned the neighborhood, and I suppose I did discuss it with people, friends of mine and so on.

Q. Do you have any contacts in the garment district?

A. None at all.

Q. Did you have any in the past?

A. No.

[fol. 930] Q. Do you know anybody on the Brooklyn waterfront?

A. No one.

Q. Or anyone in the clothing business?

A. No one.

Q. Clothing trucking business?

A. No.

Q. How often do you get into this Brownsville area, would you say, once a week?

A. No, not as frequently as all that.

Q. Twice a month?

A. I may still do some shopping on Pitkin Avenue, which is the main thoroughfare there.

Q. Do you have social contacts there too, people that you know?

A. At present no, none at all in Brownsville.

Q. In East New York?

A. Yes, friends.

Q. And are those friends and social contacts that you have kept up over the years of association that you had in that area when you lived there?

A. That is true.

Q. Since your name appeared on this special panel and you got your notice, did anybody speak to you about the case?

A. No, sir.

Q. How long have you been employed by the Metropolitan?

A. Oh, a matter of eleven or twelve years.

Q. And you say your work is auditing? Is that similar to accounting work?

A. There is a slight distinction in the sense that I check up other men's work, check up branch work. We have about a dozen branches, and part of my job is to check up on their records of various stores.

Q. Does that necessitate your visitation to those various [fol. 931] places?

A. It did up until about two years ago, at which time I was switched to a job which keeps me in the main office.

Q. So that your work is checking with all these branch stores?

A. I would hardly call them stores. It is offices, warehouses and office combined.

Q. The centers that distribute the products?

A. That is right.

Q. And you check on the books of those various distribution——

A. Various records of these branches.

Q. Have you had some college course?

A. I have. I have an arts degree.

Q. And has that been one of the New York universities?

A. City College.

Q. Are you married, Mr. Strongin?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the state?

A. Definitely.

Q. There are nine lawyers here representing these three defendants, and I have mentioned——

Mr. Talley: We cannot hear.

Q. I have mentioned their names to other prospective talesmen. Do you know Mr. Barshay, who was an Assistant District Attorney at the time Mr. Geoghan was District Attorney?

A. I do not; I did not?

Q. Or Mr. Bertram Wegman?

A. No.

Q. Who was an Assistant United States Attorney?

A. No.

[fol. 932] Q. Or Mr. Climenko, who is associated with Mr. Wegman?

A. I know none of the defense lawyers.

Q. None of the nine?

A. That is right.

Q. Do you know anybody who works in their offices?

A. I do not.

Q. Do you know any member of the bar intimately who practices and specializes in the defense of criminal cases?

A. No, sir.

Q. Did you know the prior District Attorney of the county, Mr. Geoghan, personally?

A. No, I did not.

Q. Did you know any member of his staff?

A. No.

Q. Do you know Judge O'Dwyer, the District Attorney of Brooklyn?

A. Do not.

Q. Do you know any member of his staff?

A. I do not.

Q. Have you heretofore had the benefit of listening to a Judge's charge on the law?

A. No, sir.

Q. I take it, then, that you have never served as a juror in a criminal case?

A. Or in a civil case.

Q. If accepted as a juror in this case, will you take the law from the Judge in its every aspect?

A. I will.

Q. And will you endeavor conscientiously to apply it to the facts in this case?

A. I will.

Q. For example, I take it that you have heard enough discussion by the District Attorney and the nine lawyers in the case about the presumption of innocence?

A. Yes.

[fol. 933] Q. Just because there are nine lawyers in the case, and three of them sum up to the jury, is it going to have three times the effect because it is thrice repeated?

A. It will not.

Mr. Barshay: I object to it. There will be no repetition. I am sure Mr. Rosenthal is very original, and I am sure Judge Talley is, too.

Mr. Rosenthal: Not only that, I represent only one defendant, so there is no repetition. I object to the form of the question.

The Court: Sustained.

Q. If you hear the same argument three times——

Mr. Barshay: I object to it again.

Mr. Turkus: I have not finished it.

Mr. Barshay: All right, go ahead, Mr. Turkus.

Q. —by any battery of counsel, will it be three times as forceful because it has been repeated?

Mr. Barshay: Same objection. He is assuming we are going to repeat, parrot-like.

The Court: Overruled.

Mr. Barshay: Exception.

A. The answer to that is no.

Q. Now, as has been frequently said here, and you do not have to take my word for it just because I ask the question, do you have any bias or any fault to find with the prosecution wherein the District Attorney breaks the case from the [fol. 934] inside and uses the testimony of a co-participant against the remaining defendants?

A. I have not.

Q. Do you have any fault to find or any inherent prejudice against the testimony of an accomplice or a co-participant in the crime as would cause you to reject that testimony under all circumstances?

A. I have no such prejudice.

Q. Mr. Strongin, is there anything about your past or present association which would in any wise cause you any reluctance or fear to render a verdict that would be in consonance with your concept of justice in the case?

A. There is nothing; there has been nothing.

Q. In other words, if the District Attorney of the county satisfies your mind beyond a reasonable doubt that there are three guilty men at this bar of justice, guilty of the crime of murder in the first degree, would you have any fear in so saying?

A. No such fear.

Q. No hesitation or reluctance?

A. None at all.

Q. So that you have no scruple, conscientious or otherwise, against capital punishment?

A. I have none.

Q. Will you let anybody talk about punishment in the jury room when you are debating the issue in the case, guilt or innocence? Do you hear me?

A. Yes, I hear you. I do not think I got the trend of the question, though.

Q. You said you will not permit punishment to influence your verdict in the case?

[fol. 935] A. You mean punishment against the people on trial?

Q. That is right.

A. No.

Q. By the same token, would you let anybody else talk punishment in the jury room when you are debating the issue of guilt or innocence?

The Court: If the Court instructs him he must not consider it—you will follow that instruction?

The Talesman: Definitely will follow such instruction.

Q. Just because a defendant in a case has been found guilty of prior crime and sentenced to a long term in jail, would you be inclined to relax your duty as a juror because of his presence in jail?

A. I would not.

Q. Would you deviate from a proper decision because of that fact?

A. No, sir.

Q. With respect to accomplices, will you look the accomplice over with care and caution, look to his background, his former associates, the crimes he committed, and everything that would go to affect his believability? Will you look that over?

A. I will consider it.

Q. Will you use all the care and caution with weighing that kind of testimony?

A. I will.

Q. And will you give to the defendants in the case every Constitutional right and safeguard that the Judge will charge you about?

A. I will.

Q. For example, will you give them the presumption of [fol. 936] innocence and the doctrine of reasonable doubt and the fact that they have no burden in the case, and every safeguard that the Judge says defendants must have in a criminal case?

A. I will give them such consideration.

Q. In looking over the testimony of an accomplice with care and caution, will you apply common sense and understanding to the situation here?

A. I will try.

Q. In other words, is your state of mind such by now that you may see some type of character that you have not had any kind of dealings with in the past or any experience with in the past; is that right?

A. Right.

Q. And with those kind of individuals and in the situation before the Court you will use common senses and understanding in looking the problem over, won't you?

A. I will try.

Q. You have had college experience?

A. Yes.

Q. Gotten a degree?

A. Yes.

Q. You are doing work of importance, checking up on the work of other men?

A. Right.

Q. Do you feel that you can do such a job?

A. I feel very definitely I can.

Q. If accepted as a juror in the case will you conscientiously endeavor to arrive at a just result?

A. I will.

Q. Will you listen to fair and reasonable discussion by the other jurors?

A. Yes.

Q. Is there anything about the nature of your work that [fol. 937] is going to make it impossible for you to devote your energies to the trial? The reason I ask you that is

that my associate slipped me a notice that you applied for an excuse.

A. Yes, on the basis of some present work which was due then.

Q. How about your frame of mind now? If taken as a juror will you devote yourself to the case?

A. Yes, it won't work any personal hardship on me.

Q. In other words, if we get you in the jury box can we count on a hundred per cent cooperation from the standpoint of mental concentration on the case?

A. Yes.

Q. Nobody wants anyone else to be a rubber stamp or to have anybody talk him into anything. But will you listen to common sense argument and reasonable argument by the other jurors?

A. I will.

Q. Without any rancor or not being arbitrary? Assuming that you are accepted as a juror in the case and you hear all the evidence and you hear the defense lawyers tell you the reasons why they say that there is a doubt in the case, and you listen to the prosecutor draw his inferences from the testimony, you listen to the learned Court tell you the law, you talk the case over, as men do with a problem, and weigh it in the jury room, and you come to the conclusion that the guilt of these defendants, Buchalter, Weiss, and Capone, has been established to your satisfaction beyond a reasonable doubt; will you say so with your verdict?

A. I will say so.

[fol. 938] Q. Without any fear, hesitation, or reluctance?

A. That is right.

By Mr. Barshay:

Q. Mr. Turkus has inquired of you whether or not the force of the argument of three lawyers would affect you to the point where the odds would be three to one. Remember he asked you that question?

A. Right.

Q. You are not influenced by the suggestion in that question, are you?

A. I am not influenced by mere numbers, no.

Q. That is right. You understand that if he wanted to he could have given us each a separate trial and he would

not have been burdened with nine lawyers. You understand that, don't you?

A. I do not understand that, as a matter of personal knowledge. I do not know whether it is within his discretion or not.

Q. It is, but it has nothing to do with this case.

Mr. Turkus: Just a minute. I object, Mr. Barshay——

The Court: Sustained.

Mr. Barshay: May I proceed, Judge?

The Court: Yes.

Q. Now, Mr. Strongin, you said a little while ago that because of what you read and discussed and heard discussed you have formed an opinion?

A. Well, yes.

Q. Is that opinion deterimental to any of the defendants?

A. It is not.

[fol. 939] Q. It is not?

A. Because, if I may say so, I also said I would listen to the case with an open mind.

Q. You came to that later.

A. I see.

Q. But any impression that you formed, any impression at all, before you receive the benefit of the Court's instructions that a juror must be of an open mind, was that impression to any degree detrimental to any of the defendants?

A. No.

Q. So that, having read the *Mirror*, do you——

A. I did not say that.

Q. I beg pardon.

A. I was not interrogated as to the papers I read.

Q. Maybe I mixed it up with the other juror. Did you read the *Mirror*?

A. Very, very rarely.

Q. Did you read any other paper?

A. The *Times* and the *Sun*.

Q. And did any of those papers, to your knowledge, contain articles concerning the defendants or the case?

A. Except as to the trial being in progress.

Q And before that?

A. Well, at the time of the commission of this deed, naturally there was a big write-up on it.

Q. And it was the subject of discussio· in places where you visited?

A. Right.

Q. Now, keeping those things in mind, sir, did you accept the truth and accuracy of those things you read or heard?"

A. I was inclined to accept them at face value.

Q. And, being inclined to accept them, I take it you [fol. 940] formed some conclusion with respect to them, have you not?

A. Probably did, yes.

Q. And is that conclusion detrimental to the defendants or any of them?

A. I still say no.

Q. Well, did anything occur which dissipated the conclusion you formed—yes or no?

A. No, nothing occurred except that I know that the trial cannot be conducted in the newspapers.

Q. In other words, you feel now, I take it, that you can lay aside any impression you may have had; is that your answer?

A. To the best of my belief.

Q. To the best of your belief? Does that indicate some doubt in your mind?

A. No, none at all.

Q. Now, sir, can we take it that you are positive no matter what you heard or read will not be part of your judgment in this case?

A. That is right.

Q. And if the testimony on the stand should in any wise conflict with what you read, you promise me, sir, that you will be able to dissipate what you read completely?

A. Yes, that is right.

Q. That is your own idea about it?

A. It is not an idea; it is a conviction.

Q. Have you given the matter some thought before you were placed in that chair?

A. Of course.

Q. And as you heard the other jurors being questioned, were you thinking along the same lines?

A. Yes.

[fol. 941] Q. Free of prejudice and free of bias?

A. Right.

Q. Now, as you sat in this part of the room day after day, and you were able to hear in great detail the questioning of the prospective jurors, were you still of the conviction that you can dissipate anything you heard or read?

A. I am.

Q. Would you require a lesser amount of proof from the District Attorney by virtue of what you heard or read?

A. That may be true.

Q So that, can we go one step further and say you may want some explanation forthcoming from the defendants?

A. I believe so.

Q. You have already heard, sir, up to this very minute many times repeated that a defendant need not come forth with any explanation of any charge against him?

A. Yes, I know that.

Q. You had that in mind when you answered my question?

A. Yes.

Q. And yet you expected that some explanation should be forthcoming from some or all of these defendants?

A. Well, when I gave the answer to your question I did not necessarily mean that the defendants themselves should provide such reason.

Q. I understand that. You mean somebody on their behalf?

A. Quite right.

Q. It happens to be that neither they nor anyone on their behalf need make any explanation at all.

A. So I understand.

Q. They can remain in the dignity of their silence. You [fol. 942] cannot draw one unfavorable inference against them.

A. Right.

Q. Are you clear about that now?

A. Very clear about it.

Q. You still expect that something should be forthcoming by someone on behalf of the defendants in explanation of the charge; isn't that so?

A. I answered that before.

Q. What?

A. I say I did answer that before.

Q. And you still are of that opinion, isn't that so, sir?

A. Yes.

Q. To make it clear, you expect someone to be offered on behalf of either of the defendants to come forth on the witness stand and make an explanation here, otherwise you would require less proof in this case against them; isn't that so?

A. Of course, you are trying to show me up as prejudiced. I still say I am not. I still say I can enter this trial with an open mind.

Q. I am sorry you come to that conclusion, sir. Frankly, you are very satisfactory to me personally. I was not trying to show you were prejudiced, because you don't look prejudiced, but you volunteered the answers, did you not, sir?

A. Not until you led me to them.

Q. You are not making this a personal issue, I take it?

A. No, of course not.

Q. You were here all the time and you knew that nobody need explain a single thing, either personally or through witnesses?

A. That is right, I know that.

Q. I did not lead you into that, did I?

A. No.

[fol. 943] Q. Knowing that, sir, without being led into it, yet you said you would require someone to offer some testimony. Didn't you say that?

A. I did.

Q. That is not fair, is it?

A. I am aware of the conflict. I realize that, but I still stick to my previous answers.

Q. For which I don't criticize you at all. You have a right to.

A. Yes.

Q. I take it you should not find fault with anyone who is trying to get a fair juror?

A. No, none at all.

Q. There is no way I can photograph your mind.

A. No.

Q. Now let me ask you, Mr. Strongin, would you require less proof because of what you read, if no explanation is forthcoming from any source whatever?

A. Would I require less proof?

Q. Yes, on the part of the District Attorney in this case because of that you read, your intimate association there?

A. No, I would not require less proof.

Q. You still require the District Attorney to sustain his burden beyond a reasonable doubt?

A. That is right.

Q. No doubt about that? How often have you been at that corner?

A. Well, as it happens, I had to of necessity be there every night on my way home, because that was the entrance or exit, from the station.

Q. Did your company do business with the owner?

A. Yes, that is right. We sold them; we sold them tobacco products and other products.

[fol. 944] Q. So you have more than a passing acquaintance with the situation?

A. Right.

Q. You told Mr. Turkus by reason thereof you formed an opinion.

A. As to the crime, no.

Q. No, not this crime. We did not get to that yet.

A. Oh. Well, I had a definite opinion as to the character of the people hanging around there.

Q. That is detrimental, is it not?

A. Not to the case at issue.

By the Court:

Q. You heard the names? You heard some of the names mentioned in questioning other jurors?

A. Yes.

Q. Did you know any of those people personally?

A. Not personally.

Q. Any dealings with them?

A. None whatsoever.

Q. They never crossed the same path, ran into one another?

A. Not to the best of my knowledge.

Q. You never had any conflict with them?

A. No, sir.

By Mr. Barshay:

Q. Well, at any rate, you formed a bad impression of them?

A. Yes, I admit that.

Q. And if their names become a part and parcel of this case——

A. That is true.

Q. —you will start off with a prejudice, won't you, because of the mention of their names, plus the fact that you [fol. 945] have gained an impression about them?

A. May I submit that the prejudice may hold true against some of the potential witnesses, true, so that is not necessarily against one side.

Q. If I knew who they were, I could answer, but I am in the dark as much as you.

A. Some of the names that have been mentioned as being called by the prosecution.

By the Court:

Q. Reles and Strauss?
A. That's right.
Q. Reles?
A. Yes, your Honor.

By Mr. Barshay:

Q. You realize, Mr. Strongin, that I mean I do not know more about this case than you do. You understand that, don't you?

A. (No answer).

Q. I mean it is a secret for the District Attorney to keep from defense counsel too. You understand that now, don't you?

A. Yes.

Q. I do not know whom he is going to use. I am guessing, and I do not know your attitude toward any one of them, good or bad.

A. Well, I say without trying to defend my own position that if there was such a prejudice it does not extend to only one side.

Q. The law is the jury should hold a prejudice against neither side.

A. Right.

Q. You are not that type of juror, are you, just at present, from your own angle?

A. Shall I substitute the word "impression" instead of prejudice?

[fol. 946] Q. I will be grateful to you if that is how you feel.

A. Very definite impression.

Q. You say you have a very definite impression about some of the people involved in this case?

A. As to the antisocial character of the people, yes.

Q. Will it cause you to weigh any of the evidence, because of that prejudice, to the detriment of the defendants too?

A. No, not to the detriment of the defendants.

Q. To the benefit of the defendants?

A. No, sir. I will weigh it very carefully.

Q. And if it should develop that someone takes the stand and speaks of association with any one of the defendants and you having an anti-social attitude toward them because of their being anti-social, would you also let it out to the defendants?

A. No.

Q. You would separate that?

A. That is right.

Q. You would be able to divide between the prosecution and the defense, would you?

A. That is right.

Q. Have you ever been a juror before?

A. No.

Q. Have you ever been a victim of any crime?

A. No.

Q. Has your company?

A. Very definitely yes.

Q. And has your company had a branch in Brooklyn which was the victim of a crime?

A. Our Warren Street branch, yes, not the branch itself, [fol. 947] but the delivery trucks have been held up any number of times.

Q. Warren near 5th Avenue; is that right?

A. That is right.

Q. Do you remember me, sir?

A. Do I remember you?

Q. Yes.

A. I do not believe I have seen you before this case.

Q. Do you know whether or not I was the one who prosecuted those defendants?

A. I would hardly be in a position to know inasmuch as I did not make any appearances in court for the company.

Q. Were you in any way a witness in that case?

A. No.

Q. Did you have anything to do with taking the inventory in that case?

A. Possibly, if I knew which one case you had in mind.

Q. The one near 5th Avenue.
A. But there have been so many cases there.
Q. I am sorry, I could not keep track of all of them.

The Court: Has that any bearing on this case?
Mr. Barshay: Maybe.

Q. By virtue of your company——

The Court: Was not that the truck taken from the Eastern Steamship Lines, drove along Canal Street?
Mr. Barshay: Not the one I had, Judge.
The Court. And when it got to Brooklyn hijacked? Had nothing to do with this case.
Mr. Barshay: That is right.

[fol. 948] Q. By virtue of your company being the victim of a crime many times, have you any prejudice against people charged with crimes generally?

The Court: On the basis of charge alone, not evidence.

A. On the basis of the charge alone, no.
Q. Mr. Strongin, if the Court shall tell you that character is not an issue in any case unless and until it is put in issue by the defendants or any of them, do you think, sir, you could follow that law?
A. I believe so.
Q. In other words, no matter what you may think about people, it has nothing to do with the charge on trial?
A. Right.
Q. Unless and until he puts his character in issue, either himself or through witnesses, and you won't consider it?
A. That is right.
Q. Have you at any time studied any law?
A. Well, I did have a course in commercial law at college.
Q. Where did you have that course?
A. Up at City College.
Q. 23rd Street Branch?
A. No the Uptown Branch.
Q. And in connection with the commercial law, did you ever have occasion to discuss criminal law?
A. No.
Q. Do you know any lawyers intimately?
A. Well, a brother of mine is a lawyer.
Q. May I know his first name?
A. Yes, Max.

Q. And his office address?

A. I really don't know, to be frank with you.

[fol. 949] Q. Is he a Brooklyn lawyer?

A. No, he practices in Manhattan.

Q. Do you go to his office often?

A. No, I have never been there.

Q. I take it you are on social terms with your brother?

A. Yes.

Q. Have you told him that you were called as a juror?

A. Oh, sure.

Q. Has he expressed any opinion with respect to this case?

A. No, no opinion at all.

Q. Did he show a familiarity with the case?

A. No sir.

Q. Or with the people?

A. I believe . . expressed some opinion concerning one of the defense lawyers.

Q. Was it the questioner?

A. Merely an opinion as to the man's ability.

Q. Opinion as to his ability?

A. That is right.

Q. My being excluded, I take it he said the rest were very good. Did you have more than one talk with your brother about this case?

A. No, sir, just one.

Q. Outside of that you say he has not discussed a single thing with respect to it?

A. Not a single thing.

Q. Did you tell him that you were going to apply for an excuse?

A. I talked with him after the excuse had been rejected.

Q. And the reason for your excuse, I take it, now has [fol. 950] been dissipated?

A. Oh, yes.

Q. So you have not talked to him any more about it?

A. No.

Q. Did your brother ever tell you about any criminal case he had?

A. No.

Q. Would you, with a great deal of care, weigh the testimony of any person who takes the stand?

A. I would.

Q. You would not give any weight to the indictment or charge against him?

A. No.

Q. Would you with a great deal of care take the testimony of people who confess, out of their own mouths, prior perjury, robbery, murder, and other crimes?

A. I would weigh it with due caution.

Q. Even if he is an accomplice or he is not an accomplice?

A. That is right.

Q. And in weighing it with due caution, will you take into consideration what prompts a man to testify for the prosecution?

A. That would come under the head of caution, I suppose.

Q. Still be additional caution?

A. I refuse to use that word, additional caution.

Q. Well, if in addition to the fact that he himself may be escaping punishment for what he himself did, he also is being given exceptional treatment, to a man who has been leading a criminal life, you would add a little caution to the caution you already used? It is all "if."

A. Well, no doubt that would be a factor in considering it and weighing it very carefully.

[fol. 951] Q. I want to know would it be an additional fact?

A. It probably would be.

Q. You would want to know, Who is he? What is the source of this testimony that is being given here? wouldn't you?

A. I would.

Q. You will ask yourself: Why should I accept it unless it meets every test that a reasonably intelligent juror places upon such testimony? isn't that so?

A. That is right.

Q. That is being fair to the defendant. And that goes for the alleged corroborating testimony too, doesn't it?

A. Yes.

Q. So that if a person takes the stand and he is offered as a corroborating witness, out of his own mouth he admits he was a perjurer before, you would give him the additional caution, wouldn't you?

A. I would.

Q. That you give to the others?

A. I would.

Q. In that way you would be looking for a reason for doubt arising out of the evidence furnished by The People?

A. Yes.

Q. Now, Mr. Turkus has brought out in response to the questions that I have been propounding to other jurors, the inquiry whether or not you would be prejudiced against our particular client by virtue of a present incarceration.

A. I would not.

Q. For a long term. That would not affect your judgment in any degree?

A. No.

Q. Except as charged by his Honor?

[fol. 952] A. If instructed by his Honor, then I would give it weight.

Q. That may go to his credibility, that is all. Otherwise you bear no prejudice against him at all?

A. None at all.

Q. And no matter what else may have happened, the only charge he is facing here is the one contained in the indictment; do you know that?

A. Yes.

Q. It takes a lot of courage, sir, to say not guilty in any case, doesn't it?

Mr. Turkus: Just a minute.

A. No, sir.

Q. Wait until I finish.

Mr. Turkus: I thought you had finished.

Mr. Barshay: You made the same mistake I did.

Mr. Turkus: I do not make mistakes that you do.

The Court: Reframe the question.

Q. Will you exercise courage in arriving at a verdict if that verdict should be one of not guilty, because you as an individual juror failed to be convinced by The People's proof that the defendant Buchalter is guilty beyond a reasonable doubt?

A. I would not be afraid to say so if I reach that conclusion.

Q. And that is so irrespective of the number of gentlemen who may disagree with you?

A. That is true.

Q. You have as much right to your opinion as anybody else. You can reason and argue without being stubborn,

[fol. 953] of course. You will guard the defendant's rights as much as you will guard the prosecution's?

A. I will.

Q. We each have an equal right here. Is that correct?

A. Yes, I understand that.

Q. If you are chosen as a juror, you will look after those rights that belong to us, won't you?

A. Right.

By Mr. Rosenthal:

Q. Mr. Strongin, you live about two blocks away from Saratoga and Livonia Avenue?

A. That is true.

Q. And you had occasion to visit the premises situated on the corner there?

A. Just to purchase an odd item.

Q. And you knew the individual that conducted that store?

A. I did not; I knew of her.

Q. You knew of her and you knew the attendant that waited on you?

A. Yes.

Q. Whoever it might be that was in charge of the store, [fol. 954] you knew by reason of the fact that you went in and purchased things; isn't that true?

A. That is right.

Q. And you knew certain individuals whose names have either been mentioned while you were in the court-room by Mr. Turkus or by some other counsel for the defense? By name you knew them?

A. Yes.

Q. And you had formed an opinion as to those particular individuals and as to their character?

A. Right.

Q. You said to Mr. Turkus at the outset that that opinion was a prejudice against these individuals. That was your own words, wasn't it? That the opinion amounted to a prejudice, isn't that what you told Mr. Turkus?

A. I may have.

Q. And then when Mr. Barshay was questioning you, you also reiterated the fact that there was a prejudice there and subsequently you said he had led you into saying that.

A. May I qualify it then?

Q. No, but just please, we will get along very quickly; if there is anything about my questions you do not understand, just tell me and I will repeat them,——

A. All right.

Q. —gladly, to you, or have the stenographer repeat them. Now, then, the issue here, Mr. Strongin, is this: Assuming now that the particular location, in view of the fact that the prosecution has mentioned it throughout in questioning jurymen, becomes a part of the issue in this case, and the individuals and the characters around there become part of the situation in this case, in view of the [fol. 955] fact that the prosecution has questioned you, unquestionably it has something to do with what might transpire; isn't that right?

A. Right.

Q. Now, isn't it a fact, candidly, Mr. Strongin, that because of your knowledge, first-hand knowledge, of the particular location and of some of the people or things that may transpire in this trial, either the amount of the evidence which the prosecution would have to adduce is less or more, or the amount which the defendants would have to produce is less or more than what it would be if you did not know any of the individuals, any of the surroundings, any of the locality? Isn't that true, sir?

A. True to a certain extent.

Q. Yes, the fact is that you would permit, subconsciously or otherwise, in the jury room, your knowledge, gleaned from a knowledge of the neighborhood and some of the individuals, to creep into your deliberations, as honest as you are?

A. Consciously I would not.

Q. But there is that possibility of your mind being in that situation? That is why you said you had a prejudice, isn't it?

A. That is true.

Q. That is true, sir?

A. That is true.

Mr. Rosenthal: I challenge for cause.

Mr. Talley: All joint.

The Court: Try the challenge.

(Samuel F. Strongin was then sworn.)

[fol. 956] By Mr. Rosenthal:

Q. Mr. Strongin, one other thing before reiterating the question. You realize there is nothing against your integrity because of your knowledge of a certain, particular surrounding——

A. I take that for granted.

Q. —for you to say candidly what is in your mind. Having that in mind, now that you are under oath, if the questions which Mr. Barshay asked you and which were supplemented by the questions that I asked you, were reiterated, you would give the same answer, is that true, sir?

A. I would.

Mr. Rosenthal: That is all.

The Court: Any more from defense counsel?

Defense Counsel: No questions.

Mr. Turkus: I submit so far it is in the realm of speculation.

The Court: Have you any questions?

Mr. Turkus: Yes, I will just ask a few.

By Mr. Turkus:

Q. I think we got to the point, Mr. Strongin, where you said you had a college degree?

A. Right.

Q. And you did this audit work?

Mr. Rosenthal: Would you mind keeping your voice up, Mr. Turkus?

Q. And I think that you told me that you could try this case upon the evidence, free from any impression or opin-[fol. 957] ion that you might have had in any shape or form.

A. True.

Q. Is that right? Now can you do that?

A. I can.

Q. Lay aside any impression that you might have had, regardless of the source, and try this case from the testimony adduced in the court-room?

A. I can.

Mr. Turkus: I argue that the cause challenge does not properly lie.

Mr. Rosenthal: And I argue to the Court that the outside knowledge of this juryman to a situation which may arise in this court, due to the questioning of the District Attorney, is of such a nature that I believe the challenge should be sustained on the same ruling as was made by the Court in the case of the juryman that Mr. Turkus challenged for cause.

Mr. Turkus: I do not understand this.

The Court: Do not argue about it. I am just waiting for both sides to complete their questioning. Everybody through?

Mr. Rosenthal: Yes.

The Court: The challenge is overruled.

Mr. Barshay: We take an exception.

Mr. Turkus: Mr. Strongin is satisfactory to The People.

The Court: Other counsel have not completed.

By Mr. Rosenthal:

Q. You are college-educated, are you not, sir?

A. Yes, sir.

Q. That fact was brought out several times by Mr. Turkus; is that correct, sir?

A. Right.

[fol. 958] Q. Now by Mr. Rosenthal, but not then. In any event, you yourself chose the word "prejudiced," did you not, sir, when you answered Mr. Turkus?

A. I really don't know.

The Court: Pardon me. The challenge was made, was tried, and was decided. Your line of questioning will have to proceed otherwise.

Mr. Rosenthal: May I respectfully except to the Court's ruling?

The Court: Yes.

Mr. Rosenthal: In view of the fact that Mr. Turkus succeeded us in the questioning and the answers are contradictory.

The Court: All had an opportunity. The challenge was fully tried and decided. That is the end of that incident.

Mr. Rosenthal: I respectfully except to your Honor's ruling.

Q. Now, on the question of the quality of the evidence, when Mr. Barshay questioned you did you not say, sir, in answer to one of his questions that the quality, the amount of evidence that would have to be produced in this case either by The People or the defendant would be different because of your knowledge of the individuals? Did you not say that in answer to Mr. Barshay?

A. I may have said so.

Q. Well, you were fully cognizant of your answer when you made it, sir?

A. Yes.

[fol. 959] Q. Were you not?

A. Yes.

Q. And did you mean that when you made that answer to Mr. Barshay?

A. Yes.

Mr. Rosenthal: I again challenge for cause.

The Court: Try the challenge. We will reserve the trial of that challenge until all questions are finished. We cannot have constant jumping up and trying one challenge after the other. We will have a general trial of challenge for cause when all counsel finish.

Mr. Rosenthal: They all join.

Mr. Barshay: We have no further questions. We will rest with Mr. Rosenthal.

The Court: You are all through?

Mr. Talley: Yes.

The Court: For all purposes? All right, try the challenge

(Mr. Strongin was again sworn.)

By Mr. Rosenthal:

Q. Mr. Strongin, you have been again sworn, and if I were to repeat the last several questions which I asked of you prior to your being sworn, would your answers be the same?

A. I believe so; I know so.

The Court: Everybody through?

Mr. Talley: All through.

The Court: There will be no further jumping up and [fol. 960] down. The Court understood the talesman. His prejudice, so-called, relates, as he stated in the course of his questioning, to a proposed witness for The People.

but does not activate against the defense. The challenge is overruled.

Mr. Rosenthal: Exception.

Mr. Talley: Respectfully except.

Mr. Rosenthal: With an exception to the Court's ruling overruling our challenge for cause, we peremptorily challenge the juror.

Mr. Turkus: Judge, I am going to ask your indulgence. There has been an epidemic of colds at this counsel table because of the fact that we are closely pushed in. I am trying this case. If anything happens to me that I go under, we won't have any trial lawyer in here.

The Court: You won't have any voice. You mean you want a recess?

Mr. Turkus: I think it would be wise. They can hardly hear me.

The Court: I have a cold too, but I don't have to use [fol. 961] my voice. You are rapidly losing yours. I think it best to rest it up until tomorrow morning.

Mr. Turkus: We have the holiday of Atonement starting tomorrow evening. You have to allow for traveling.

The Court: I will allow for traveling.

Max L. Pollock, of 50 East 19th Street, Brooklyn, called to the stand to be examined as to his qualifications.

The Court: For the reason you requested, we will recess now. The defendants are remanded.

Gentlemen of the jury, do not discuss the case, read nothing about it, listen to nothing on the radio.

Ten o'clock tomorrow morning.

(Recess taken until Tuesday, September 30, 1941, at ten o'clock a. m.)

[fol. 962] Brooklyn, N. Y., September 30, 1941.

Trial Resumed

The Court: The Court has received word that Mr. Turkus is confined to his home with a heavy cold and will not be out today. I am sorry to disappoint you gentlemen, but the

case will have to go over until Thursday (October 2nd), at ten o'clock.

Please remember the previous admonitions, gentlemen, about reading or conversing about the case.

The defendants are remanded.

(Adjourned to Thursday, October 2, 1941, at 10 a. m.)

[fol. 963] Brooklyn, N. Y., October 2, 1941.

Trial Resumed

Mr. Talley: I ask your Honor to direct the District Attorney to read the entire panel now gathered in the courtroom, the names and addresses of each individual talesman as they are called. It is a rather long list. It seems to me that the District Attorney, if he reads those names now of the entire panel, then when the gentlemen are called to ask them if they know any of the persons whose names have been read It would save five or ten minutes of the examination of each talesman.

The Court: I would ask that all counsel try to cooperate, realizing, of course, the Court is not putting on pressure, but to try to cooperate in getting more speed. I think we can make much better progress. I will have to take your request into consideration. The Court cannot enter into a debate on the subject.

Mr. Talley: I have no desire to debate this or any other subject now.

The Court: I am glad you made the suggestion. We will take three more talesmen in the jury box.

(The Clerk then called Charles W. Staite, No. 2773; Samuel Barruch, No. 2795; James F. Nagle, No. 2810.)

The Court: Now all the other talesmen may go until [fol. 964] tomorrow morning at ten o'clock.

Mr. Barshay: I take it your Honor has not made up his mind with respect to Juror No. 2 this morning?

Mr. Turkus: I thing that may just as well be disposed of now. May I suggest that counsel attend before the bench so the discussion may not be heard?

The Court: It is not necessary to go into details with the discussion, because all counsel know what is in mind. There is an element of implied bias which I think should be considered. You know what it is in connection with.

Mr. Barshay: I believe your Honor is mistaken if you say it has anything to do with implied bias.

The Court: I say you should consider it. Do not argue. When I make a suggestion I do not intend to enter into a debate with counsel, and I do not propose to have counsel come up before the bench so that press representatives will guess as to what is going on. It will be properly considered and decided without in any way prejudicing the present panel. All of us know how to avoid that.

Mr. Barshay: It is up to the District Attorney.

The Court: It is up to counsel on both sides.

Max L. Pollock, No. 2807, residing at No. 60 East 19th Street, Brooklyn, examined as to his qualifications.

[fol. 965] By the Court:

Q. Mr. Pollock, one of your neighbors was previously examined.

A. I don't know, I live in a large apartment. Where does he live?

Q. He lives between Albemarle and Beverly Road.

A. I don't know anybody in the neighborhood who has been examined.

By Mr. Turkus:

Q The trestle board lists your profession as that of being retired. When you were actively engaged in business, what was the nature of it?

A. I was a manufacturer of blouses, ladies blouses.

Q. Were you the proprietor?

A. I was one of the owners.

Q. Where was your place of business maintained?

A. 1412 Broadway.

Q. Near what cross street?

A. Broadway and 39th Street.

Q. Is that in the clothing district?

A. No, sir.

Q. The garment district, isn't it?

A. That was five years ago, I withdrew from the business then.

Q. You have been out of business for five years?

A. Yes, sir.

Q. How many years were you in that business?

A. Three years in New York.

Q. Prior to that where did you conduct your business?

A. On the Pacific Coast. I was in business in Seattle, Washington, in manufacturing.

Q. In the manufacturing of blouses?

[fol. 966] A. Cloaks and suits there. That was a long-time ago.

Q. In the three years you have been in this garment district did you make contact or connection in the garment district?

A. No, sir.

Q. With various individuals or firms?

A. No, sir. My partner had charge of the manufacturing end of the business; I had nothing to do with it.

Q. What, specifically, did you attend to?

A. I was the manager of sales, in charge of the business end of the business, the credit end, all over the United States.

Q. Now, for the past five years you have been out of business completely?

A. I travel mainly; I have been out of business entirely, yes, sir.

Q. You have not engaged in any occupation since that time?

A. No, sir.

Q. Did your business bring you in contact with manufacturers of clothing and men's garments or ladies' garments when you were there?

A. No, sir.

Q. Did you have any contact with any unions when you were in business?

A. No, sir, I did not.

Q. Did your firm?

A. Oh, yes, my partner had all of that.

Q. Would that be with the truckers?

A. No, sir, just unions in the trade; we had a union factory, a union shop.

Q. And the contract your partner had was with unions in the ladies' garment industry?

[fol. 967] A. Just what was in our own business; we were not running any other kind of business; we had a union shop and he took care of it.

Q. The delivery of merchandise, of clothing, did that go through truckers?

A. No, sir; we had everything shipped by express.

Q. How many years have you lived in Brooklyn?

A. Nearly ten years.

Q. In the ten years you have been living in Brooklyn have you lived in the Flatbush section all of that time?

A. Yes, sir.

Q. Did you have any contact, directly or indirectly, with any person or firm in the Brownsville or East New York area?

A. No, sir.

Q. Did you have any contact in connection with the Brooklyn waterfront—did you have any contact there, directly or indirectly, with any persons or firms, on the Brooklyn waterfront?

A. No, sir.

Q. Taking it as a broad, general proposition, may we proceed with the thought that you had no contact directly or indirectly with anyone employed in the clothing or garment district of Manhattan?

A. No, sir.

Q. Did you know or come in contact with any officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any significance to the name of Murray Weinstein or Samuel Katz?

A. No, sir.

Q. Did you ever hear the name of Bruno Belia, an or-[fol. 968] ganizer, before you heard that name in court today?

A. No, sir.

Q. Or with Salvatore Marazzano?

A. No, sir.

Q. Do you know any official or any representative of the Clothing Drivers & Helpers Union, Local No. 240?

A. No, sir.

Q. Is there any familiarity in the name of Philip Orlofsky?

A. No, sir.

Q. Do you know anyone in the Teamsters Union?

A. No, sir.

Q. Have you any familiarity at all with the name of Max Silverman or Wolfie Goldis?

A. No, sir.

Q. Do you know any person residing in Sea Gate?

A. I do not.

Q. Is there any familiarity about the name of William or Willie Alberts, a bondsman?

A. No, sir.

Q. Is the name of Emanuel Buchalter or Philip Kowas familiar to you?

A. No, sir.

Q. Are the names of Bellanca and Tosca at all familiar to you?

A. No, sir.

Q. Did you know Terry Burns or Abe Slabo?

A. No, sir.

Q. Are those names familiar to you?

A. No, sir.

Q. Did you in your contact in the clothing district or in the garment district come in contact with any representative of any unions by way of business?

A. No, sir.

Q. Did you talk with people about matters that were going on in the garment district?

A. No, sir, because I was in charge of a different part of the business entirely.

[fol. 969] Q. You were in that district at the time there was an investigation being conducted by Thomas E. Dewey?

A. I think I was out of business then. That was five years ago, and I went on a trip around the world; I do not remember if it was in that time.

Q. The latter part of 1935 was when the Dewey investigation started.

A. I don't remember a thing about it.

Q. Did you participate in any discussions with people in the district?

A. No, sir, none whatever.

Q. Since your name appeared on this special panel, did anybody speak to you about the case?

A. No, sir, not except my wife; I told her I was called, and she knew about it.

Q. I take it that was in connection with the possibility of service on the jury.

A. As a matter of fact, I was away when this trial started; I was in Seattle, Washington; when I received the notice I was away from the borough until August.

Q. Were you away on business?

A. No, sir, on a tour around the United States and Alaska; I went off on a trip.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. I am.

Q. Have you heretofore served on a jury in any type of case?

A. Civil cases, yes, sir.

Q. Has that been in Brooklyn?

A. Yes, sir.

Q. Recently?

A. No, sir; last year and the year before.

Q. Did you stay in Brooklyn?

A. Yes, sir.

[fol. 970] By the Court:

Q. Where did you live before?

A. The same place, 19th Street; then before that at 700 Ocean Avenue.

By Mr. Turkus:

Q. Were you a resident of Seattle, Washington, before you came to Brooklyn?

A. I lived in Los Angeles for a year and a half, and I lived on the Pacific Coast. I traveled that part of the country. When I came back in 1931 I did not leave except to go out on a trip, I made several trips.

Q. Is there any significance in your mind, referring now to Seattle, with the name Frank —— or in connection with Los Angles, with the name of Ben Siegel, sometimes called Ben (Buggs) Siegel?

A. I don't know the names.

Q. Or is there any significance in the name of Whitey Krakower (?)?

A. No, sir.

Q. Or Greenberg, sometimes called Greenie?

A. No, sir.

By the Court:

Q. Before you lived at 700 Ocean Avenue, where did you live?

A. I was in Los Angeles and then I came back. 700 Ocean Avenue was my home, and then I was with my brother-in-law for two or three months.

Q. Whereabouts?

A. He lived on—I don't remember the street.

Q. In what section?

A. I know the McCooey residence was in the back.

[fol. 971] Q. That was on St. Marks Avenue?

A. Yes, sir.

Q. When did you move in 700 Ocean Avenue?

A. I only moved in 700 Ocean Avenue about eight or nine years.

By Mr. Turkus:

Q. In reference to the Pacific Coast, is the name Murray Langson or Dutch Goldberg of any significance to you?

A. No, sir.

Q. In any of your experience in the garment district does the name of Curley Holtz mean anything to you?

A. No, sir.

Q. Is there any significance to the name of Lepke or Gurrah?

A. No, sir.

Q. You never heard those names in the clothing district?

A. No, sir, not in the clothing district.

Q. Or in the garment district?

A. No, sir.

Q. Have you any relatives, close relatives, who are engaged in the clothing or garment district, in business?

A. No, sir.

Q. When you were on the Pacific Coast were you in the same line of business?

A. Yes, sir, cloaks and suits.

Q. Did you maintain Eastern contacts when you were there?

A. Only buying merchandise, and I used to come in New York about once or twice a year.

Q. Was it solely for the purpose of buying materials and buying products?

A. Buying materials, trimmings, and once in a while samples, as is customary for manufacturers out West.

Q. Did you manufacture out West?

[fol. 972] A. I manufactured out West, yes, sir.

Q. Did you at any time on the East Coast go into the clothing business, the manufacture of clothing?

A. No, sir.

Q. You say in that district the name of Lepke and Gurrah were unfamiliar to you?

A. Yes, sir.

Q. And the names of Curlie Holtz and Weinstein?

A. I don't know any of them.

Q. I read off a list of nine lawyers who represent the defendants in this case. Are the names familiar to you by now?

A. No, sir, I do not know any except what I heard in the courtroom.

Q. So you know none of the nine lawyers who represent the defendants?

A. I do not.

Q. Do you know the former District Attorney of the county, Mr. Geoghan, or any member of his staff?

A. No, sir.

Q. Do you know the present District Attorney of the county, Judge O'Dwyer, or any member of his staff?

A. I do not.

Q. Do you know anyone who is employed in the office of counsel for the defense?

A. I do not.

Q. Do you know any member of the bar who has specialized in the trial of criminal cases?

A. No, sir.

Q. Do you know the name of William W. Kleinman as a lawyer, or David Price, as a lawyer? Are those names familiar?

A. No, sir.

Q. Or Saul Price?

A. No, sir.

[fol. 973] Q. In the civil case you participated in as a juror, did that case came to a conclusion? I mean, did the jury have the benefit of the instructions on the law from the Judge?

A. It did.

Q. At the outset, I take it you understand the charge is murder in the first degree?

A. I found that out in court.

Q. Is there anything about the nature of the charge which would prohibit you from being a fair and impartial juror?

A. Nothing.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Would you consider the question of punishment in deliberation on guilt or innocence?

Mr. Cuff: I object to the form of the question.

The Court: Sustained, because he does not know the law.

By the Court:

Q. If the Court should charge you not to consider the question of punishment, would you follow that?

A. I would.

By Mr. Turkus:

Q. After receiving such instructions, would you permit any other juror in the jury room then to discuss the question of punishment?

A. I would not.

By the Court:

Q. In the section where you live there are various civic organizations. Do you belong to any of them?

A. You mean like men's clubs?

[fol. 974] Q. Yes.

A. I belong to two of them, the Sharris Torah, on Bedford Avenue near Ralph.

Q. Has this matter been discussed at any of your meetings:

A. No, sir

Q. Or the O'Dwyer activity in connection with these matters?

A. No, sir, nothing whatever.

Q. In speakers' addresses, in the meetings you attended, was there any discussion in regard to this or any case like it?

A. No, sir.

Q. Who is the president of the Bedford Avenue Mens Club?

A. Dr anoff.

Q. There is a rather short-statured lawyer who used to be the president?

A. Yes, sir.

Q. What was his name?

A. Novick, I think.

Q. Have you discussed these matters with any of them?

A. No, sir, with nobody.

By Mr. Turkus:

Q. Will you, if selected as a juror in the case, take the law implicitly and without qualification from the trial justice?

A. I will.

Q. Is there any reason why you cannot apply to the benefit of the defendants every constitutional right and every law in their behalf the Court will instruct you they shall have?

A. No, sir.

Q. Will you give them the presumption of innocence [fol. 975] according to the instructions on the law from the Judge?

A. I will.

Q. Will you endeavor, conscientiously, to apply to their benefit, the law of reasonable doubt?

A. I will.

Q. Will you give them everything under the law they are entitled to?

A. Yes, sir.

Q. Something has been said by one of the lawyers for the defendant Buchalter that his client hasheretofore been convicted of a crime and sentenced to a long term in jail, and whether or not that fact would prejudice any juryman's mind against him. Do you feel any prejudice against him for that reason?

A. I do not.

Q. By the same taken, would you relax or deviate from your duty as a juror in this case because he has been heretofore convicted of a crime and is presently serving a jail sentence?

A. No, sir.

Q. Do you find any fault with a prosecution which uses testimony of accomplices or coparticipants in a crime against the remaining defendants?

A. No, sir.

Q. Do you have any inherent bias or prejudice against accomplice testimony, that is, one of the participants in the crime, which would cause you to reject testimony under all circumstances?

A. Not under all circumstances, no, sir.

Q. Would you reject the testimony unless every detail of it was corroborated?

Mr. Barshay: I object.

[fol. 976] Mr. Turkus: Question withdrawn.

Q. There was, to my mind, at least, something in connection with your saying, "not under all the circumstances." Did you have some mental reservation?

A. No, sir, none whatever.

Q. Is your state of mind such you feel that even a bad man, a man with a past criminal record, who is steeped in crime, and has been associating with killers, do you feel that that person can sometimes tell the truth?

A. He may tell the truth sometimes.

Q. Will you look at his testimony carefully—would you look at the testimony of such a person with care?

A. I would, very carefully.

Q. Will you look at that testimony not only with care, but with caution?

A. I will.

Q. Look at the source from whence it comes?

A. Yes, sir.

Q. And all of the circumstances in connection with it?

A. Yes, sir.

Q. Let me go along with you at this point in this manner: Do you find any fault against the prosecutor for the use of that kind of testimony?

A. Repeat that.

Q. Do you find any fault with the prosecutor for using accomplice testimony in a court-room?

A. I do not.

Q. Do you find any fault with a prosecution which breaks a case from the inside and gets one of the participants in a crime to testify against the others?

[fol. 977] Mr. Cuff: I object to that as having been already answered twice.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. I do not.

Q. If instructed by the Court that there can be no conviction only upon the testimony of an accomplice, if that happens to be the situation, will you follow that instruction of law?

A. Yes, sir.

Q. Will you follow it without finding any fault with it?

A. I would.

Q. So that as you sit there now is your state of mind such that no matter how you may believe an accomplice, if that is all there is to the case you can not convict?

A. I could not.

Q. On the other hand, if there is additional testimony coming from an independent source, that is, a source other than from the accomplice, which to your mind satisfies you and tends to connect the defendants with the commission of the crime, and you are charged that, as a juryman, you may, if you desire, find that to be corroboration, will you find any fault in following the instructions on the law?

A. I would not.

Q. Would you, if instructed that that was sufficient, require the District Attorney to prove more than that?

A. Repeat that, please.

Q. If you were informed by the Judge that the additional [fol. 978] information or additional testimony is sufficient, would you, because there is testimony of the accomplice in the case, require the District Attorney to furnish more evidence that the law requires?

Mr. Cuff: I object to the form of the question.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. No, sir.

The Court: Of course, he would have a right to require enough evidence to satisfy him as to credibility; the corroborative evidence would have to be believed and accepted by him

Q. What I am trying to find out is whether or not there exists in your mind any prejudice against testimony of an accomplice which would give you a state of mind that would require more evidence from the District Attorney than you would in any other type of case, simply because of accomplice testimony?

A. No, sir.

Q. In other words, will you endeavor, conscientiously, to apply the principles of law that the Court gives you to the facts in this case?

A. Yes, sir.

Q. There are various tests, as one of the lawyers pointed out, that people apply in their business, in their every-day business affairs, in weighing the credibility of people. Do you remember that statement being advanced to prospec- [fol. 979] tive jurors?

A. I remember. I think I was seated there.

Q. I take it you understand your state of mind. In a criminal case frequently there are characters who come into the court-room that people do not meet in their every-day business experience.

A. I understand.

Q. And that in weighing the facts in this case you have got to understand it is a murder case.

A. Yes, sir.

Q. And you are going to deal with individuals whom you have never seen before.

A. I understand that.

Q. In other words, will you use common sense and understanding in weighing the issue in the case?

A. I will.

Q. There may or may not be a defense of alibi interposed by one or more defendants. If there is such a defense interposed, will you take the law exclusively from the Judge?

A. I will.

Q. With respect to the degree of proof necessary and all instructions of law, will you take the instructions given by the Judge explicitly and without any discussion as to anything that anyone else thinks is the law?

A. I will.

Q. Will you endeavor, conscientiously, to apply that law to the facts in this case?

A. I will.

Q. Is there anything up to this point that I have not questioned you about which would go to your qualification to sit as a fair and impartial juror?

A. Nothing whatever.

Q. For example, is there anything you may have read [fol. 980] in the press, because you were once in the garment district, that lingers in your mind with respect to any defendant in the case?

A. I never read anything about it while in the district.

Q. When did you leave the district?

A. In 1936, the latter part of 1936.

Q. By that time did you read anything about the investigation of Mr. Dewey in the clothing district?

A. No, sir, I did not bother about reading anything about that at all.

Q. Did you participate in any discussions with people there in the district where you were employed?

A. No, sir, I was too busy a man, too busy with business.

Q. Do you know whether or not there was considerable discussion you may have heard about that Dewey investigation in that district?

Mr. Cuff: I object; the witness says he had no discussion. I ask that he not repeat the question.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. I did not.

Q. While you were in that district did you ever come across the name of Peter Monat?

A. No, sir.

Q. While in the clothing district or in the garment district did you ever hear the name of Danny Fields?

A. No, sir.

Q. Or that of Charles Shapiro, sometimes known as Gurrah? Did you hear the name of Charlie Shapiro?

A. No, sir, I never heard that name there.

[fol. 981] Q. So, as you are sitting in this box now you have read nothing at all about the case and heard no discussion whatsoever?

A. About this case, nothing.

Q. And as far as you are concerned, as you are sitting there, the names of the defendants mean nothing to you other than the fact you have heard them in this court?

A. Nothing whatever.

Q. You have seen nothing of it in the press and heard no discussion?

A. I was away the time this came up.

Q. If selected as a juror, will you listen to fair argument of other jurors?

A. Yes, sir.

Q. I do not mean you have to subordinate yourself and be a rubber stamp.

A. I would not do that at all.

Q. You will look the thing over in your mind and with your own eyes and ears listen to the testimony?

A. Yes, sir.

Q. Will you discuss the case without rancor and without bitterness and with common sense and understanding with the other jurors?

A. I will.

Q. Will you endeavor to do justice in the case with your verdict?

A. Yes, sir.

Q. And is your state of mind such that you will give the People of the State and the defendants a fair trial?

A. It is.

Q. And if you should hear the same argument repeated over three times by nine lawyers, when they get up and [fol 982] talk to the jury, that argument would not be made stronger because you heard it three times?

A. No, sir.

Mr. Barshay: I object to it, assuming a state of facts not present.

By the Court:

Q. Would the fact there are a lot of lawyers on one side and only one on the other make any difference to you?

A. It would not.

By Mr. Turkus:

Q. You have no bias or prejudice one way or the other?

A. I have not.

Q. As you sit in the jury box you feel you can give to the defendants everything that the law of the land says they should have?

A. Yes, sir.

Q. By the same token, do you feel you could discharge your duties to the People of the State of New York as a fair, honest, conscientious juror?

A. I do.

Q. Is there anything in your background or history or past business connection which would in any wise interfere with a verdict on the evidence in this case?

A. Nothing.

Q. If The People of the State of New York establish to your satisfaction beyond a reasonable doubt that Buchalter, Weiss, and Capone are three of the men who killed Joseph Rosen in his candy store September 13, 1936, on a Sunday morning, would you hesitate to say so?

A. I would not.

[fol. 983] Q. You would have no fear or reluctance in saying so?

A. No, sir.

By Mr. Barshay:

Q. You appreciate that every defendant is entitled to a lawyer?

A. Yes, sir.

Q. And, there being three defendants, the three defendants are entitled to respective counsel?

A. Yes, sir.

Q. So if one counsel sums up for Buchalter and another counsel sums up for Mr. Capone and another for Mr. Weiss, if, because of the narrowness of the issue, some of us may have to repeat the arguments or such arguments which they feel are beneficial to their client, you would not call them repetitious and hold them against our client?

A. Not if they had reference to that particular client.

Q. We may have a determination of the same view on the same subject. You will not charge that to our client, because we have other counsel representing the defendants?

A. No, sir.

Q. So because of the fact there are nine lawyers for three defendants and one lawyer for the prosecution, that has nothing to do with the case?

A. No, sir.

Q. As a matter of fact, the prosecution has a full staff, from Judge O'Dwyer all the way down, every employee co-

operating, and two lawyers in the prosecution of this case. That has nothing to do with this case?

A. No, sir.

Q. You won't consider that?

A. No, sir.

[fol. 984] Q. In other words, numbers and atmosphere have nothing to do with it?

A. No, sir.

Q. You have but one charge to try here?

A. Yes, sir.

Q. All those names that have been read to you, if they had nothing to do with the case, if the testimony in this issue does not involve them, you will dissipate them from your mind?

A. I will.

Q. Sitting here, is there any prejudice or bias enjoined against any defendant?

A. None whatever.

Q. As you sat here as a prospective juror for several days, did you form any opinion with respect to this case?

A. I did not.

Q. So I take your word for it that your knowledge of people involved in the case means absolutely nothing other than what you heard here?

A. That is right.

Q. You know none of the defendants?

A. I do not.

Q. You are free of bias and prejudice?

A. Yes, sir.

Q. You are ready to do your job in accordance with your oath?

A. Yes, sir.

Q. If the Court shall tell you that the character of the defendant has nothing to do with this case whatever, unless the defendant makes it an issue in this case, you will follow that instruction of the Court?

A. I will.

Q. You being a credit man, you have a lot of experience with people who seek credit?

A. Yes, sir.

[fol. 985] Q. The situation is parallel here, sir. People will take the stand who seek your credit and belief as to whether or not they are telling the truth in this case. You

know what judgment you use in giving credit to persons in your business.

A. Yes, sir.

Q. If a bankrupt pleads for credit——

A. I have very few of those.

Q. If he was a bankrupt more than once you would have a little bit more hesitation before you opened your pocket?

A. Yes, sir.

Q. There will be people here who will take the stand who all their lives will admit they are moral bankrupts and have been moral bankrupts all their lives, and so before you accept their testimony you will use your judgment the same as you use it in your business?

A. I shall.

Q. As you heard it said before, time and again, it bears repetition briefly: the worse a man's record is, if he takes the stand the less credit you will give him?

A. I would have to be more cautious.

Q. For example, a murderer or robber or a pimp or a thief or a perjurer, when he asks you to believe him, you are going to think twice before you do believe him?

A. I will.

Q. If a man takes the stand and says, "I have not been only a perjurer, but I have been a draft dodger, a dodger from duty to my country in the last war," you will have to find out whether that man is worthy of belief?

A. I would be cautious.

[fol. 986] Q. You would also look for the motive of their testimony—Why are they giving this testimony? What do they hope to gain?

A. I would.

Q. What is it that induces them to do that? The hope of gain, the hope to escape punishment, the hope to escape—you will look into that?

A. I will.

Q. And the fact that these thieves, burglars, and murderers have been living all this time at the taxpayers' expense, has that motivated them to give a certain type of testimony? You will look into that?

A. I would look into that.

Q. Keeping in your mind all the time that each defendant is presumed as innocent of this charge as any person in the world?

A. Yes, sir.

Q. And that they have not a single burden to sustain in this case, that the burden always is with the District Attorney?

A. I heard that stated here.

Q. And you believed it?

A. Yes, sir.

Q. Will you apply it?

A. I will.

Q. You will see to it, reasonably, that every juror complies with it?

A. Yes, sir.

Q. And if character testimony is no better and is less worthy of belief than even the testimony of so-called accomplices, you will weigh that with a great deal of care and caution?

A. I will be very careful.

Q. In other words, you will let nobody pull wool over your [fol. 987] eyes?

A. I do not think they can.

Q. So, giving whatever is due to the District Attorney, giving whatever is due to the prosecution, will you have the courage to render a verdict here that reflects the positive truth in this case, without fear or favor to either side?

A. I will.

By Mr. Cuff:

Q. If under instructions of counsel the defendant or either one of them should not take the witness stand, and the Court should instruct you that no unfavorable inference shall be drawn from that fact, will you follow that instruction?

A. I will.

Q. You will not be prejudiced against any defendant who does not take the stand?

A. No, sir.

Q. You promise that?

A. Yes, sir.

Q. Well, now, assuming you hear the argument of counsel and the charge of the Court on the law and you go to the jury room to deliberate, will you go over all the evidence carefully, consider it carefully, weigh it, and his Honor will instruct you to apply the law to it, if, after that, you find there is in your mind a reasonable doubt, that you would

give to the defendant or either one of them, and that reasonable doubt has been reached after listening to all of the arguments of the other jurors, based upon the evidence in the case or lack of evidence, will you have the courage to vote "Not Guilty" in accordance with the instructions of the Court?

A. I will.

[fol. 988] Q. Will you have the courage to adhere to your conscientious view, despite the fact there may be several of the jurors against you, or the majority of them against you?

A. I will.

Q. You realize, I assume from your answers, that it is your solemn obligation to vote according to your own conscience after a careful view of the evidence and the discussion I have referred to?

A. Yes, sir.

Q. And you will do so?

A. I will.

Q. Without fear or favor?

A. I will.

Q. And if you reach a conclusion, as I said, that there is a reasonable doubt, that the prosecution has not sustained the burden of establishing the guilt of the defendants or any of them beyond a reasonable doubt, you will have the courage to come in with a verdict of Not Guilty?

A. In that case I would.

By Mr. Rosenthal:

Q. Have you read anything in the newspapers at all about this case?

A. About this case I did not.

Q. Have you read anything at all in the newspapers about any of the defendants that has in any wise left any impression?

A. None whatever.

Q. What papers do you read?

A. The *Times* and the *Post*.

Q. You realize, irrespective of the fact that what you may or may not have read—, that the defendants are charged in this Court by an indictment with a specific crime?

A. Yes, sir.

Q. And it is your duty, if accepted as a juryman, to dis-

[fol. 989] miss all outside influences and direct your atten-

tion solely to what the witnesses may say on the stand as to the evidence in this case?

A. Yes, sir.

Q. You further realize that the defendants are being tried for one crime, the crime of having participated in an alleged murder of one Joseph Rosen?

A. Yes, sir.

Q. And that The People, represented by the District Attorney, must offer proof to your satisfaction, beyond a reasonable doubt, establishing that that crime was participated in—the Court will charge you the law to be—by all or any one of these defendants before you can convict?

A. Yes, sir, that is clear.

Q. The District Attorney has indicated it is his intention to use what he calls an accomplice or accomplices in part to substantiate the charge against these defendants.

A. Yes, sir, I take it that is the purpose.

Q. Of course you are going to take the law solely from the Court; that is your duty?

A. I understand.

Q. You are going to take the facts solely from the sworn witnesses on the witness stand?

A. Yes, sir.

Q. The reasoning of the law is, either in summation—that applies both to the District Attorney as well as to the defense—is only acceptable by you if you believe in their reasoning; if it coincides with your opinion?

A. That is correct.

Q. And to be discarded in the event you do not agree with [fol. 990] them?

A. Yes, sir.

Q. You rightfully said that if an accomplice takes the stand you will view his testimony with caution?

A. Yes, sir.

Q. Of course, the Judge will charge you as the law that you must view it with extreme care and caution; that is the law of our land.

A. Yes, sir.

Q. Now, if the Court charges you that, even if you were to come to a conclusion, rightfully or wrongfully, that the accomplice is telling the truth; that even then you could not convict any man under our law unless and until you were able to find from the evidence, other independent evidence, coming from the mouths of other than accomplices,

tending to connect the particular defendant with the crime —Is that clear?

A. Yes, sir.

Q. You may have heard my statement to the other men in the box to the effect that there are two types in law of accomplices, one where the Court will direct you that you must absolutely determine that he is an accomplice, that is, an accomplice as a matter of law——

A. Yes, sir.

Q. Then again the Court may say to you, "I don't charge you as a matter of law that so and so is an accomplice, but you as a juryman, from all the facts and all his statements on the stand, may find he is an accomplice."

A. I heard that mentioned before.

Q. Is it clear to you?

A. Yes, sir.

Q. Merely because of the fact that the District Attorney [fol. 991] or the Court may not agree that the particular individual is an accomplice as a matter of law, if it is left to your discretion, that will not preclude you from finding him an accomplice?

A. I will use my best judgment.

Q. So if you were to determine, if it was left to you, that the particular individual, from the testir , appears to you to be an accomplice, you will make determination known to your fellow jurors in the jury room?

A. I would.

Q. You understand that if the District Attorney were to call fifty accomplices, that, as far as weight, is no more than one—in other words, one accomplice cannot corroborate another accomplice?

A. I know that.

Q. The evidence which you must find in order to determine the guilt of the defendant or defendants must flow from an untainted source, be independent evidence?

A. Yes, sir.

Q. Now then, assuming that the District Attorney were to contend that what he relies upon as independent evidence is an alleged statement coming from the mouth of one of the witnesses, and allegedly having been made by one of the defendants, admitting his participation in the crime——

A. I wish you would repeat that.

Q. Assuming that the District Attorney were to say to you: It is my contention that this independent evidence which we are required to give to you consists of an alleged statement made by one of the defendants to the witness [fol. 992] who is on the stand; one of the witnesses for The People, who gets on the stand and says, one of these defendants said to him that on the night of so and so at such and such a place he did participate in the crime, and the District Attorney says, "We rely on that as being the independent evidence to connect this particular defendant," now, if that should be the case and if it further develops that that particular individual who makes that statement—whether on examination by the District Attorney or whether he is forced to admit it on cross-examination by the defense attorneys—finally turns out to be a man who has admittedly murdered a number of people, committed perjury in a court similar to this one, and committed various acts, before you would take his testimony to be true you would judge carefully what motive he might have behind him in making these alleged statements?

A. I naturally would.

Q. In other words, you would say to yourself, "Is this man going to be prosecuted for the murders he admitted?" "Does this man expect any favors of any character? Has he received any favors of any character, and is he trying to defeat the law in so far as it concerns him, and prevent, by telling the District Attorney these things, their prosecuting him for what he should be prosecuted for?"

A. I would give it some thought, yes, sir.

Q. If the Court were to charge you, not only should you give it some thought, but you should weigh with extreme [fol. 993] caution the testimony of any interested witness—you would give it a great deal of thought, wouldn't you?

A. Yes, sir.

Q. The District Attorney further stated to you about the fact that one or more of the defendants may offer a defense of alibi. I asked you whether you would take the law from the Court and you said you would.

A. Yes, sir.

Q. From your being seated in the court-room for a number of days, hearing questions repeated on numerous occasions, are you now acquainted with the fact that it is not encumbent upon any defendant to prove anything in a criminal case?

A. I found that out in the court-room.

Q. And if the Court were to give you that instruction, that not only need the defendant not give any evidence, he need not go on the stand himself, he need offer no proof whatever, still you would be precluded in the jury room from using that fact against him, you would follow that instruction?

A. Yes, sir.

Q. Now then, it may be that the defendant may, of his own volition, desire to take the stand and offer evidence. If the Judge tells you that, even if that is the case, that that does not shift the burden at all, you would follow that?

A. Yes, sir.

Q. Now, so as to make clear my statement, I mean this: that no matter what the defendant may say or his witnesses, the burden of proof, the burden of proving the guilt of the defendant, never shifts from the District Attorney; it stays on that side of the table all the time.

A. I understand that.

[fol. 994] Q. It is not necessary for the Court to charge you—it is not necessary, even though an alibi is offered, for you to believe the alibi, that is not necessary at all—if that alibi evidence has sufficient weight in your mind to create a doubt as to whether the defendants participated in the crime, that doubt, like any other doubt, is sufficient for you to say, "I am in doubt and I must acquit." Is that clear?

A. That is clear.

Q. So that merely because an alibi is offered on behalf of any defendant, as stated by the District Attorney, that is not going to make you change the burden of proof to the defendant?

A. No, sir.

Q. Or if, on the offer of that alibi, you become in doubt as to whether, in view of that alibi, this defendant has participated in the crime, you would not hesitate to resolve that doubt in favor of the defendant and acquit him?

A. I would not.

Q. The fact that there are a number of lawyers—each one of these defendants, you understand, is entitled to a separate trial at your hands?

A. I heard that.

Q. In other words, you are really sitting as a juryman in three cases?

A. Yes, sir.

Q. Each set of lawyers has his own responsibility; mine, with my associate, is for the defense of the defendant Capone, and Capone alone.

A. Yes, sir.

Q. So that the mere fact that three different lawyers get [fol. 995] up and tell you their views, whether they coincide or do not, you understand each one of them is merely speaking on behalf of the particular person whom he represents?

A. I understand.

Q. You would not hesitate, if you found you were unable to reach a conclusion as to one or two of the defendants, as to their guilt, to say, "I acquit every defendant that I am in doubt about"?

A. No, sir.

Q. No more than you would hesitate because of what you have seen in the court-room as to a set of men or a number of men who have a right to their opinion, or because of the publicity that may be attendant to this case, to come in, without any fear at all, if you were not convinced of the guilt of these defendants you would not hesitate to make that known in your verdict?

A. No, sir, not if I am convinced of it.

Q. You say "no, not if you are convinced." The fact is, you must be convinced of their guilt; is that clear?

A. I could not, if I am convinced.

Q. Merely because of the fact you have not served on a criminal jury before and some of the other men called may have, you are not going to allow them to substitute their opinion for your opinion?

A. Oh, no.

Q. Because your opinion, when it is once formed, finds its origin from your conscience?

A. Yes, sir.

Q. And whether there are members who disagree with you or not, you heard the District Attorney speak about being arbitrary and things of that kind, you would not [fol. 996] consider you were arbitrary if, after listening for hours and reasoning with the other men and trying to convince them, not arbitrarily sitting in a corner, but arguing the propositions back and forth the same as you would business propositions, and they were not able to

convince you that your line of reasoning was wrong, you would not hesitate to hold to your line of reasoning?

A. I would not.

Q. Have you any immediate relations on the Police Force?

A. I have not.

Q. Or any attached to the present District Attorney's office?

A. No, sir.

Q. Have you heard any discussions among the Assistants who are actually attached to this case—you see there are three actually attached to this case—let me name them as long as they have named the three lawyers for the defense: Mr. Turkus, a prominent lawyer who practiced criminal law and is now an Assistant, Mr. Joseph, sitting alongside of him, and Mr. Klein, who has been here and will be here, for all purposes, throughout the actual trial—so you see there are three lawyers for the District Attorney—do you know any of them?

A. No, sir.

Q. Do you know of any reason why you could not be fair and impartial to both sides?

A. No, sir.

Mr. Rosenthal: No challenge for cause.

Q. You say you saw my client but don't know him?

A. No, sir; I just saw him the other morning; I saw the case on the calendar.

[fol. 997] Q. You mean you saw the name?

A. Yes, sir.

By Mr. Turkus:

Q. When you left New York in 1936 you left your business in the garment district, did you go to the Pacific Coast?

A. I went on a trip around the world and came back home after six months.

Q. And you say you never worked since then?

A. No, sir, never worked since then.

Mr. Turkus: Challenge peremptorily.

The Court: Before taking up a certain matter I am going to excuse the members of the panel. They will come back together at the right time.

Do not discuss the case gentlemen.

(Talesmen in box leave the court-room.)

(After the talesmen retired, the following colloquy ensued:)

The Court: What the Court has in mind for consideration by counsel for both sides and particularly by counsel for [fol. 998] the defense is the alleged reported activity of Talesman Protter's brother, as chairman of a committee which investigated the murder of Peter Panto. It is possible the murder of Peter Panto may at some time during the course of this trial be in some way connected up or involved. I don't know. So far as the Court knows, it is a mystery, but it was, according to reports, a waterfront murder, and as one of those, on authorization—direction. Now, this brother who had charge of that investigation is very well known in the community as a Left Wing. There is a talesman of the Right Wing. The brother lives at Avenue J and East 21st Street and, on the talesman's own admission, he visits there from time to time. While he does not share the same Left Wing views as the brother, the talesman is on terms with his brother of what I judge to be the ordinary family cordiality. It further appears by examination of the talesman that while he went to live at a New York hotel during the summer, because his mother and sister had not returned from vacation, he continued his residence—I will not say residence, but he continued his sojourn at the New York hotel later because he did not want to discuss this case with his mother and sister. That is a circumstance quite unusual. I never heard of such a thing before. Putting this and that together, the [fol. 999] thought comes into the mind of the Court whether or not, regardless of the talesman's assurance that he is not biased and would not be influenced by anything that he may or may not have heard discussed at home, there is not, subconsciously, in his mind prejudice against these defendants which may not be more clearly understood or developed later on in the trial or after the trial. It would be quite unfortunate if such a condition were to come to light at a later stage, either during or after the trial. I advise counsel to consider it now.

Mr. Climenko: May I ask your Honor a question?

The Court: I will leave you alone with the thought for a minute. The Court will remain in order.

(The Judge thereupon retired to an anteroom.)

(On the return of the Judge to the bench the following colloquy ensued:)

The Court: If any conclusion has been arrived at I will hear it.

Mr. Climenko: May it please your Honor, in behalf of all of the defendants, an exception is noted to your Honor's remarks in their entirety with respect to Talesman Protter.

The Court: Is it on the record there are no talesmen here?

[fol. 1000] Mr. Climenko: The talemen were absent during the Court's remarks, and they are absent at this time, but the defendants respectfully refer your Honor's attention to the fact that so far as the defense is concerned there was no reason for anyone to anticipate any possible relationship between the so-called Panto incident and the issue in this case.

The Court: I am not entering into a debate. You have taken your exception. I think it is utter nonsense. I am giving you an opportunity, in all fairness, to challenge for implied bias if you wish to do so.

Mr. Climenko: We do not wish to do so, and I wish on behalf of all of the defendants to state the reason prompting the taking of this exception. I have not completed that statement.

The Court: I cannot stop you, but I think it is utter nonsense.

Mr. Climenko: We think it is not nonsense and take an exception to your Honor's remarks as to that.

The Court: What is the purpose of the exception? There are no talesmen here.

Mr. Climenko: If your Honor please, your Honor has referred to a matter that is foreign to the issue in this case. It has been referred to in a manner which must have, of necessity, gotten to the representatives of at least [fol. 1001] four newspapers who are present in court, although the talesmen are not. Therefore, the defense is necessarily and properly apprehensive that possibly your Honor's remarks will of necessity come to the attention of some of the talesmen at some time in the future.

The Court: The Court got its information from the newspapers, particularly the Brooklyn *Daily Eagle* publication, following the examination of this talesman.

Mr. Climenko: By the same token, talesmen must get their information from newspapers. Before your Honor spoke there was no possibility of any talesmen knowing anything about the Panto case, and its possible connection with this case. The defense asserts there is some such connection, and for that reason takes an exception to your Honor's remarks.

The Court: It looks as if the Court has stirred up something based upon a publication in the newspaper following the examination of Mr. Protter. Hereafter the Court will be obliged to exclude newspaper men when it excludes talesmen, in order to avoid any acrimony of this kind.

Mr. Climenko: I take an exception to your Honor's last remark, which was obviously directed to counsel for the defense. There was no necessity for any such remark.

The Court: The Court will ask you to come to order. [fol. 1002] Let the talesmen be brought down.

Mr. Turkus: Before you bring in the talesmen may I say that there was a newspaper article, and the newspapers have been replete with conferences with Marcy Protter and a certain group had with the District Attorney in connection with the Peter Panto case. As a matter of fact, in a newspaper which was printed over recess there was a statement made that it was divulged by the District Attorney, Mr. O'Dwyer, in proceeding with the Panto investigation, that the defendant Weiss was implicated in the slaying of Peter Panto. That was in the press over recess. There have been many such articles. There were many articles in the press too, prior to this case, in connection with the alleged participation of the defendant Weiss in the Peter Panto killing. Now, this prospective talesman said that the reason——

The Court: (interrupting) Now, please, I must call you to order. If you have a challenge for implied bias, state it.

Mr. Turkus: I have a dual challenge. I challenge first as to his qualifications to sit as a juror because of his residence in Manhattan, which is not consistent with his voting residence or actual residence somewhere else. There is also testimony—he said he was going to live in New York [fol. 1003] because he wanted no contact with people in Brooklyn who might talk of this case, referring to members of his family, Attorney Protter being one of the members. He stated further that he contemplated going to Miami, Florida. There may be some jeopardy in a verdict where

a man actually and physically resides in Manhattan. In addition, I press a second challenge of implied bias.

Mr. Talley: In view of the fact that the defendant Weiss was brought into this matter by the Assistant District Attorney two or three days ago, the defendant Weiss in connection with the Pinto case, I want to note a further exception to your Honor's reference to that case as being extremely prejudicial to the defendant Weiss. The same newspaper that printed this story last week will have ample opportunity to print the story of your Honor's reference to the Pinto case in connection with this talesman. I want it noted, in view of the fact that I am appearing for Weiss, that the exception which has already been expressed to your Honor's remarks likewise be joined in by me.

Mr. Rosenthal: In behalf of the defendant Capone, in view of this discussion which has been now engaged in, in view of the District Attorney's statement of what is alleged in the newspapers to have been divulged by Mr. O'Dwyer's office to the newspapers, and in view of your Honor's statement, I now ask for a mistrial in so far as [fol. 1004] the defendant Capone is concerned. And I renew my motion for a severance, which was heretofore made.

The Court: Denied.

Mr. Rosenthal: Exception.

Mr. Barshay: Defendant Buchalter also excepts.

The Court: Exception goes all around.

(Benjamin Protter, residing at 772 Linden Boulevard, Brooklyn, New York, after being duly sworn, was tried on the challenge.

By Mr. Turkus:

Q. Now that you have been sworn on this voir dire, would you make the same responses to the same questions that you made when you were unsworn?

A. Yes, sir.

Q. And would those responses be true?

A. Yes, sir.

Q. For example, you make the same answer as to your residence in the Manhattan hotel?

Mr. Climenko: I object to the question. There is no such testimony as residence in a Manhattan hotel.

A. I live since yesterday finally at 772 Linden Boulevard.

Q. Did you check out of the hotel?

A. Yes, sir.

Q. During the course of a prior examination I believe you said you specifically were to continue to live at the hotel because you did not desire to discuss the case with any members of your family.

A. Yes, sir. May I explain? My week's rent at the hotel [fol. 1005] was up September 18th, that was the first day I appeared in this court. I understood it was a murder case, and from the questioning of the other jurymen or prospective jurors I also understood it was best not either to talk about or be talked to, or read about the case, and that is what decided me to continue on at the hotel.

Q. As I understand your past answers, you moved to the hotel at the time when your mother was away on vacation?

A. That is right.

Q. And that you continued to reside in the New York hotel after your mother returned?

A. Yes, sir.

Q. And that the reason for your continued residence in the Manhattan hotel was to avoid any discussion with members of your family?

A. Yes, sir.

Q. In regard to this case?

A. That is right.

Q. One of the members of your family is Marcy Protter, a lawyer?

A. Yes, sir.

Q. A lawyer who represents some Brooklyn waterfront interests?

A. I don't know.

Q. Don't you know that?

A. No, sir.

Q. You have been friendly with your brother?

A. Distantly so.

Q. I understand your prior statement to mean that you have some political differences?

A. Yes, sir.

Q. Isn't there the usual cordiality of one brother to another, nevertheless?

A. I don't think so.

[fol. 1006] Q. Have you been out of contact with him completely?

A. I can say this much: that in seventeen years I have been away I received about three letters from my brother. Since coming back I was down to his house twice; neither time on any particular invitation, but taken there by one of my sisters. In 1939 when I was here I was invited once to his house for dinner.

Q. Specifically which members of the family did you wish to avoid discussing this case with?

A. I mean any member of my family. They are very curious, and of course they would ply me with questions and perhaps give me information I did not desire to hear.

Q. There were certain members of your family that had information in regard to the Peter Panto case?

A. I don't know.

Mr. Barshay: I object to that

The Court: Objection overruled.

Mr. Barshay: Exception.

The Witness: I don't know what the case was about.

Q. You say you wanted to avoid some member of the family?

A. Not some particular member, no.

Q. Do you mean that you just continued to reside in New York and that you had no intention of coming back while this case was in progress?

A. I had no intention, no, sir, but because of the objection which you brought out the other day I thought it preferable to come back.

[fol. 1007] Q. As I understand it, your original intention was not to discuss the case with any member of your family and not to receive any information from them?

A. That is right.

Q. There are some members of your family who have information as regards this or any other investigation, which you did not want to hear?

A. I don't know; I could not answer that question.

Q. If you did not know they had any information about this——

A. I mean newspaper information, that is all.

Mr. Cuff: I object to the question as argumentative and already covered.

The Court: There is an element of danger in pursuing these questions too far.

Q. Then I will qualify that these were the statements made by you heretofore when you were not under oath, and if they are true responses to the questions.

A. Yes, sir.

Q. If you were asked again would you make like answers?

Mr. Rosenthal: Objected to as already answered.

The Court: Objection sustained.

Q. Are those answers true?

Mr. Rosenthal: Objected to as already answered.

The Court: Objection sustained.

By Mr. Barshay:

Q. You are absolutely free of any bias or prejudice against either defendants?

[fol. 1008] A. I am absolutely free of any bias or any prejudice of any kind.

Q. Since your coming here nobody has spoken to you about this case?

A. No, sir.

Q. Now, at this minute, under oath, you will render a fair, impartial verdict?

A. Yes, sir.

Q. Based upon the evidence in the case?

A. Completely.

Q. Free of prejudice, free of bias, free of discussion with any member of your family or anyone except the jurors who will be sworn with you, if you are chosen?

A. That is so.

The Court: Anybody else wish to question?

Mr. Barshay: No.

The Court: So far as the residence is concerned, that challenge is overruled. So far as the other one is concerned, the Court believes that the sitting of this talesman on the jury will create a problem of implied bias which will remain throughout the trial and may affect the result.

Mr. Barshay: I respectfully except to your Honor's ruling on behalf of the defendants.

SIGMUND KRANER, No. 2613, residing at 815 Eighth Avenue, Brooklyn, New York, examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Is that on the Park Slope?
A. Yes, sir.
[fol. 1009] Q. Near 9th Street?
A. Right near the corner.
Q. How long have you lived in the Park Slope district of Brooklyn?
A. Five years.
Q. Prior to that where did you live?
A. In Williamsburg, on Greene Avenue.
Q. In the Williamsburg section?
A. Yes, sir.
Q. How many years did you live there?
A. Twelve.
Q. Is that the limit of your residence in Brooklyn?
A. No, sir, thirty-five years.
Q. Before that did you live in another section?
A. I come from Massachusetts.

By the Court:

Q. 815 is near where?
A. Near the corner of 9th Street, a house formerly owned by Mrs. Cannavan, who died recently.
Q. That is right up from the 12th Assembly District Club, on the same side of the street?
A. About a block.

By Mr. Turkus:

Q. According to the trestle board you are listed as a merchant.
A. Yes, sir.
Q. Any other explanation?
A. Yes, sir.
Q. Where is your place of business?
A. Near the foot of Court Street and Hamilton Avenue.
Q. What is the nature of your business?
A. Hardware, retail.
Q. That is adjacent to the Brooklyn waterfront?
A. Yes, sir.

[fol. 1010] Q. Have you a partner in that business?

A. My wife.

Q. Have you been in that section for a number of years?

A. Twenty-six.

Q. Is the name of Peter Pinto familiar to you from your business in that section?

A. No connection.

Mr. Barshay: We respectfully object to the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

Q. Do you do business with people on the Brooklyn waterfront?

A. Yes, sir.

Q. Is the name of Albert Anastasio a familiar name to you?

A. No, sir.

Q. Did you ever hear that name discussed?

A. No, sir.

Q. Do you do business with firms on the Brooklyn waterfront?

A. Both firms and individuals, as they may be, down at the waterfront.

Q. Is that in connection with stevedoring?

A. Some.

Q. Ship loaders and unloaders?

A. Yes, sir.

Q. Teamsters who work there?

A. I would not have any trucking business with them, but they have done work for me.

Q. Have you heard any discussion in the vicinity or from people working on the Brooklyn waterfront in regard to Judge O'Dwyer's investigation?

A. No, sir.

Q. Did you come into contact with boss stevedores?

A. Yes, sir.

[fol. 1011] Q. Is that daily contact?

A. Well, I can say so, because I may be down today and may not be down for another month, but still, we come in contact with them at times, as it is called for. That would be purely business. I would sell somebody supplies.

Q. Did you read any articles in regard to Judge O'Dwyer's investigations?

A. At the time, yes.

Q. Did you follow them with a degree of interest?

A. More or less, for reasons.

Q. What are the reasons? Do you remember about the contents of the articles?

A. Not exactly, but just to what it would bring to a certain end, an end that all investigations may lead to.

Q. I think we gathered yesterday that you had two reasons.

A. One reason, and that reason was because an intimate member of the family of the man who had been killed in this case was an acquaintance of a particular friend of our family, and for that reason I was interested in it, for that reason, to read.

Q. Then I take it you have formed some impression about it?

A. Exactly.

Q. And because of the close relationship, it would be the kind of an impression that amounts to an opinion?

A. So much so it caused me annoyance.

Mr. Turkus: I am going to challenge.

The Court: Try the challenge.

SIGMUND KRAMER, residing at 815 Eighth Avenue, Brook- [fol. 1012] lyn, New York, was sworn on the challenge.

By Mr. Turkus:

Q. Before you were sworn, and when you were called for the jury you made certain responses to questions I put to you?

A. Yes, sir.

Q. Do you recall the answers?

A. Yes, sir.

Q. Were those answers true?

A. Yes, sir.

Q. If I were to repeat the questions, would you make the same answers?

A. Yes, sir.

Q. Now that you are under oath, would those answers be true?

A. Yes, sir.

Q. In other words, because of your knowledge of one of the victims, you have a definite impression which would preclude you from being a fair juror?

A. Yes, sir.

Q. And you would have a prejudice which would inure to certain of the defendants?

A. Yes, sir.

Mr. Barshay: No questions.

Mr. Cuff: No questions by defense counsel.

Mr. Rosenthal: No questions.

The Court: Challenge sustained.

Richard J. Harmon, No. 2585, residing at 136 East 38th Street, Brooklyn, New York, examined as to his qualifications to serve as a juror.

By Mr. Turkus:

[fol. 1013] Q. What section of East 38th Street is that, East Flatbush?

A. Yes, sir.

Q. Have you lived there for a number of years?

A. Four.

Q. Prior to that what section of Brooklyn did you live in?

A. 411 East 4th Street, in the Kensington section.

Q. That would be out near Albemarle Road?

A. Yes, sir, between Albemarle and Avenue C.

Q. Did you live there for a number of years?

A. Five years.

Q. You are listed on the trestle board as a foreman, without any further designation. What were you foreman of?

A. I am a foreman of the Transportation Division of the Brooklyn Union Gas Company, the transportation end of it.

Q. Have you been employed by that utility for a number of years?

A. Twenty-eight years.

Q. Does your business bring you on the street, or do you work inside?

A. Both inside and out.

Q. Have you had any contact with any kind, nature, or description by way of social or business with the Brownsville and East New York sections of Brooklyn?

A. Well, yes, in an indirect way. We hire trucks from two or three firms in the East New York section.

Q. When you say "we," you mean the Brooklyn Union Gas Company?

A. Yes, sir.

Q. Other than that have you had any contact in that area, socially or by way of business?

A. No, sir.

[fol. 1014] Q. Does your business bring you into contact with the garment district or the clothing district in Manhattan?

A. No, sir.

Q. Or with the clothing truckers?

A. No, sir.

Q. Do you have any connections on the Brooklyn waterfront?

A. No, sir.

Q. Since your name appeared on this jury list and you received your notice as a prospective juror, did anybody speak to you about this case?

A. Home and at business.

Q. Was that in connection with your prospective service?

A. Yes, sir.

Q. There was no discussion about the merits of the case?

A. No, sir.

Q. Have you heretofore served as a juror in a criminal case?

A. No, sir, I have been called, but I never served.

Q. Was it on this special panel?

A. No, sir, it was years ago; Judge Dike was the judge.

Q. You have had no experience other than being in the courtroom when the questions were asked of the various prospective jurors?

A. No, sir.

Q. I take it from having sat in this court-room and listened to the questions being put to the prospective jurors, you understand the law comes exclusively from the trial judge?

A. Yes, sir.

Q. No matter what the lawyers or the District Attorney or anybody else say may be the law, it is not the law unless the Judge tells you?

A. Yes, sir.

[fol. 1015] Q. You are not going to take any law from any lawyer or prosecutor?

A. That is right.

Q. Whether they talk about law now or talk about law at the end of the case?

A. That is right.

Q. Will you take your law exclusively from the Judge?

A. Yes, sir.

Q. If selected, will you endeavor, conscientiously, to take the law that the Judge gives you in this case and apply it to the facts?

A. I will.

Q. Are you in sympathy with the enforcement of the Penal Law of this state?

A. Yes, sir.

Q. When the lawyers brought out, in questioning other talesmen, that their client has been heretofore convicted of a crime and served a long-term sentence, and asked the prospective jurors if they had any prejudice against the client, have you any prejudice against such a defendant?

A. No, sir.

Q. By the same token, would you deviate from proper result because the defendant has been heretofore convicted of crime and is now serving a sentence in jail for a crime he has committed?

A. I would not consider that at all.

Q. You would not relax your duty as a juror because he is in jail for some other crime?

A. No, sir.

Q. If selected, will it be your job to find out, is he guilty of murder in the first degree, as the indictment charges?

A. Yes, sir.

[fol. 1016] Q. One of the lawyers used the expression about letting anybody pull wool over his eyes, to a prospective juror. If selected as a juror, will it be your job to bring in a verdict that is in consonance with the evidence and in consonance with justice?

A. Yes, sir.

Q. You are not here to have anybody pull any wool over your eyes?

A. No, sir.

Q. You are here to find out, are these three defendants, Weiss, Buchalter, and Capone, guilty of murder in the first degree?

A. Yes, sir.

Q. There has been some statement about the character of accomplices. Do you understand what I mean by accomplices?

A. Yes, sir.

Q. Is it your idea that an accomplice is an individual who particiated in the crime and then tells about it in the court-room?

A. Yes, sir.

Q. People who participate in crimes are not usually found in a theological institution, are they?

Mr. Cuff: I object.

The Court: Objection sustained.

Q. You are going to use your common sense here to decide who is believable?

A. Yes, sir.

Q. Is your test going to be, no matter what the background is of any men, how they are steeped in crime, no matter what they have done in the past, are they in this court-room telling the truth about the murder we are in-[fol. 1017] vestigating?

A. Yes, sir.

Q. As to that, there will be no wool pulled over anybody's eyes?

A. No, sir.

Mr. Climenko: I object to that question.

Mr. Turkus: I did not start it.

The Court: Objection sustained.

Q. There has been talk about nine lawyers in the case. Do you know any of the nine.

A. No, sir.

Q. If an argument is three times repeated in summation, is it going to make it three times as strong, because you heard it?

Mr. Climenko: I object to the question.
The Court: Objection overruled.
Mr. Climenko: Exception.

A. No, sir.

Mr. Climenko: It is assuming something not in evidence.

Q. Somebody has asked prospective jurors if the District Attorney says a man is an accomplice, will you look to see if he is an accomplice?

A. Yes, sir.

Q. Do you understand from the other questioning of the other jurors that if the District Attorney only had accomplices in the case, no matter how believable their story is, the jury could not convict?

A. Yes, sir.

Q. Just because the defense lawyers get up in summation and want to have somebody believe that the witness [fol. 1018] is an accomplice, are you going to let that influence your verdict, or will you find out for yourself whether or not, under the definition of law given you by the Judge, the witness called an accomplice by the defense is in fact an accomplice?

Mr. Barshay: I object to the form of the question.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. I would take my instructions from the Court.

Q. Is your state of mind such, no matter what the accomplice may be or who he may be, that the inquiry is to find out is he telling the truth about this matter?

A. Yes, sir.

Q. Is there anything about the nature of accomplice testimony that would cause you to reject it under all circumstances?

A. No, sir.

Q. Do you find any fault with the District Attorney of the county breaking a case from the inside and using the testimony of one of the co-participants in the murder against another defendant?

Mr Barshay: I object to the form of the question.
The Court: Objection overruled.
Mr. Barshay: Exception.

A. No, sir.

Q. Do you have any bias or prejudice against the prosecution of an indictment wherein accomplice testimony is used?

A. No, sir.

Q. In other words, if you are selected as a juror, will you [fol. 1019] *you* talk the case over with common sense and understanding with the other jurors?

A. Yes, sir.

Q. Will you listen to reasonable argument and discussion?

A. Yes, sir.

Q. Of course, you will use your own common sense in weighing the matter?

A. Yes, sir.

Q. Is there any familiarity to your mind about any union official connected with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. I take it the names of Weinstein and Katz and Belia mean nothing to you?

A. Nothing.

Q. In connection one way or the other with any clothing drivers' unions?

A. No, sir.

Q. Does the name of Orlofsky mean anything, or Slabo, or Weinstein, or Max Silverman?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Have you any familiarity with the name of William Alberts, at one time a bondsman?

A. No, sir.

Q. Or Emanuel Buchalter or Philip Kowas?

A. No, sir.

Q. Or people named Weiss, in the automobile renting business?

A. No, sir.

Q. I take it the names of Terry Burns and Slabo are not intimate to you?

A. Never heard of them.

Q. Do you know the District Attorney of the county, [fol. 1020] Judge O'Dwyer, personally?

A. No, sir.

Q. Do you know any Assistant District Attorney on his staff?

A. No, sir.

Q. Did you know the former District Attorney, Mr. Geoghan?

A. No, sir.

Q. Or any member of his staff?

A. No, sir.

By the Court:

Q. You live off the Holy Cross Cemetery?

A. Between the Holy Cross Cemetery and Kings County Hospital, 38th Street runs four blocks.

Q. You are near Church?

A. I am between Linden and Lenox.

Q. That is about three blocks?

A. The first is Clarendon, the next is Lenox, Linden, Church, and Snyder.

Q. You did not know Harry Strauss from that section?

A. No, sir.

By Mr. Turkus:

Q. Is your state of mind, from listening to the questions asked of the other prospective jurors, that the burden is strictly upon the prosecutor, the District Attorney of the county, Judge O'Dwyer, to establish guilt in this case beyond a reasonable doubt?

A. Yes, sir.

Q. Is it your understanding that the defendants have no burden, that they can sit here and say to the District Attorney, "Go ahead and prove my guilt?" That they can take the stand if they wish, and if they do not, no unfavorable inference can be drawn against them; that they have no burden at all?

A. Yes, sir.

[fol. 1021] Q. Will you follow the law from the Judge?

A. Yes, sir.

Q. Will you give the defendants in this case every constitutional right and every other right they should have in a criminal case?

A. Yes, sir.

Q. Assuming you have given them every right the law says they should have, and the District Attorney brings evidence into this court-room which satisfies your conscience beyond a reasonable doubt that at this bar of justice there are three guilty men, three men guilty of murder in the first degree, would you hesitate to say so if you believe that beyond a reasonable doubt?

A. No, sir.

Q. Would you have any fear or reluctance about bringing in that verdict?

A. No, sir.

By Mr. Talley:

Q. Would you have any fear or reluctance, to use the District Attorney's language, about bringing in a verdict of Not Guilty?

A. No, sir.

Q. You would vote for that verdict if the proof offered by The People against these defendants did not satisfy you beyond a reasonable doubt of their guilt?

A. Yes, sir.

Q. And if any of these defendants did not take the stand and testify themselves, would you hold that against them?

A. No, sir.

Q. Have you read anything about this case in the newspapers of Brooklyn or Manhattan?

A. Yes, sir, I have.

[fol. 1022] Q. You have read quite a bit?

A. Yes, sir.

Q. As a result of your reading, did you form any impression about this case, as to any of the defendants on trial?

A. Yes, sir, I have.

Q. Is that inference or impression unfavorable to any or all of these defendants?

A. Yes, sir.

Q. If you were to go into the jury box, if selected as a juror, would that impression be on your mind?

A. I would still have that impression.

Q. If selected as a juror you would still have it?

A. Yes, sir, I am afraid I would.

Q. It would take evidence on the part of the defendants, or some of them, to wipe that impression out of your mind?
A. Yes, sir.

Mr. Talley: No further questions.

By Mr. Rosenthal:

Q. What papers particularly did you read?
A. The *Mirror*.
Q. You have read that both before you were called for jury service and afterwards?
A. Not afterwards.
Q. In any event, the state of your mind is such, by reason of what you have read, that the quality or quantity of evidence which would have to be produced, either by The People or the defendants, is entirely different than what would have to be produced if you had not read anything about the defendants or did not know anything about them?
A. Yes, sir.
[fol. 1023] Q. So that the standard of evidence, because of your present state of mind, is entirely different than it would be had not you read anything about the defense?
A. Yes, sir.

Mr. Barshay: No questions.
All of the defendants challenge for cause.
The Court: Try the challenge.

Richard J. Harmon, a talesman, was sworn on the challenge.

By Mr. Talley:

Q. If the same questions were put to you now that you have been sworn, would your answers be the same as they were before the clerk administered the oath?
A. Yes, sir.
Mr. Talley: Judge, we press the challenge; without anything further from defense counsel.
Mr. Barshay: He is speaking for all of us.

By Mr. Turkus:

Q. I think you told us originally that you were foreman for a utility company.
A. Yes, sir.

Q. Which means you have supervision over men?

A. Yes, sir.

Q. You have charge of them, and issue orders?

A. Yes, sir.

Q. In other words, you do work that requires some degree of understanding of men?

A. Yes, sir.

Q. Initiative, on your part?

A. Yes, sir.

Q. And an understanding of problems you are working on and the men you are dealing with?

A. Yes, sir.

[fol. 1024] Q. I take it by your responses you have had no experience in criminal cases?

A. That is right.

Q. In other words, you have never had the benefit of listening to the Judge instruct on the law?

A. No, sir.

Q. Should the Judge, in telling you the law in the case, tell you that the burden of proof is always upon the District Attorney, and that the burden can never be diminished or increased, that it is a burden to establish guilt beyond a reasonable doubt, would you follow that instruction on the law?

A. Yes, sir.

Q. And is it repugnant to your mental state? Do you find fault with it?

A. No, sir.

Q. Is your state of mind such that it is sensible that the District Attorney should prove guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Should the Judge go on and tell you further that a defendant has no burden in a criminal case, that he can sit mute if he desires, and no unfavorable inference can be drawn against him, would you follow that?

A. Yes, sir.

Q. Would you also follow the instruction of law, if the Judge should give it to you, and he undoubtedly will, that the defendant has no burden at all; he can leave the case rest with the jury on the proof of The People, that they have brought in against him, would you follow that?

A. Yes, sir.

Q. Now, should the Judge charge you that the case hinges [fol. 1025] upon credible evidence in the case, would you have any difficulty in following that instruction?

A. No, sir.

Q. You understand that what you read in the newspaper is not evidence?

A. That is right.

Q. Do you understand that there can be no substitute for evidence in a case?

A. That is right.

Q. And for that reason the District Attorney cannot take a newspaper and show it to the jury, "I am resting on this"?

A. That is right.

Q. Bearing in mind all these matters which we have now discussed, what is your state of mind with respect to taking the matters you have read in the newspaper, laying them aside, and deciding the case on the evidence?

A. Truthfully, I don't think I could banish the case altogether from my mind.

Q. Is it some reading you have had about crime in general?

Mr. Rosenthal: I object.

By the Court:

Q. The last answer you gave does not seem to indicate you understood the question. Has what you have heard caused you to form any opinion as to the guilt or innocence of any of these defendants on this particular charge?

A. Yes, sir.

The Court: Challenge sustained.

(A recess was taken at this point and the talesmen were cautioned as to their demeanor in the interim.)

(Recess until 2:00 p. m.)

[fol. 1026] Afternoon Session—Trial Resumed.

Thomas E. Finn, of 953 Park Place, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Finn, what is the nearest intersecting street to 953 Park Place?

A. Between New York and Brooklyn Avenues.

Q. Have you lived in that locality for a number of years?

A. Six years in this house.

Q. What do they call that section?

A. We call it the Bedford section.

Q. And prior to that time did you live in a different district or neighborhood?

A. Not very far away, Carroll Street and Nostrand Avenue.

By the Court:

Q. You are two blocks from the Christian Science church?

A. That is right.

By Mr. Turkus:

Q. Mr. Finn, on the trestle board you are listed as a business representative. Is that in business for somebody else or for yourself?

A. Brooklyn Edison Company.

Q. And have you been there for a number of years?

A. Twenty-eight years.

Q. Do you deal with the accounts using large quantities of electricity?

A. No, we are in the retail. Our business is service contract work.

[fol. 1027] Q. Does business bring you into contact with people in the Brownsville or East New York area of Brooklyn?

A. No.

Q. Or the Brooklyn waterfront?

A. No.

Q. Or the garment or clothing industries in Manhattan?

A. No.

Q. Then I can go along with the assumption that you have no contacts in any of those industries or districts through social contacts or connection or through business?

A. None whatsoever.

Q. Do you have any familiarity with any officials of unions, for example, the Amalgamated Clothing Workers

of America? Do you have any contact with any officer there?

A. No.

Q. Do the names of Weinstein and Katz, officials of the Amalgamated, the Clothing Cutters Union, Local 4, is that at all familiar to you in any way?

A. No.

Q. Are the names of Curley Holtz and that of Terry Burns and Abie Slabo at all familiar to you?

A. No.

Q. Do you have any contact, directly or indirectly, with any unions in connection with clothing transportation?

A. No.

Q. Clothing truckers? Is the name of Willie Alberts, a bondsman, at all familiar?

A. No.

Q. Or Bellanca and Tosca?

A. No.

Q. Or one of the organizers of the Amalgamated, a Bruno Belia?

A. No.

Q. Or Salvatore Marazzano?

A. No.

Q. Since you received your notice that you were a pros- [fol. 1028] pective juror in this case did anybody speak to you about the merits of the case?

A. None whatsoever.

Q. Have you heretofore served as a juror in a criminal case?

A. Yes.

Q. Has it been in Kings County?

A. It has.

Q. Did the case go to a conclusion?

A. Yes.

Q. And by that I mean did the Judge charge you on the law?

A. He did.

Q. I take it, then, that you are familiar, at least by way of instruction in the other case, with the law of reasonable doubt, the presumption of innocence, and the other safeguards that are given to a defendant in a criminal case?

A. That is correct.

Q. If accepted as a juror in this case, will you give every one of those to the defendants on trial here?

A. I will.

Q. Are you in sympathy with enforcement of the Penal Law of the state?

A. Yes.

Q. We have repeated the names of the nine lawyers who represent the three defendants in this case. Are any of them familiar to you by way of personal contact?

A. No, not personally.

Q. Do you know anyone employed in their respective law offices?

A. No.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No.

Q. For example, are you familiar with David Price or [fol. 1029] William Kleinman, lawyers?

A. No.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, or any member of his staff personally?

A. I do not.

Q. Did you know the former prosecutor, Mr. Geoghan?

A. Not personally.

Q. Did you know some members of his staff?

A. No.

Q. Do you have any feeling adverse to the prosecution wherein the testimony of an accomplice or a co-participant in the crime is used in the prosecution?

A. No.

Q. Do you have any bias against the prosecutor for using that kind of testimony?

A. No, I have not.

Q. In looking at the testimony of an accomplice, will you weigh everything that there is in the case, either to his detriment or to his advantage in weighing the believability of the testimony of that type of witness?

A. I will.

Q. For example, will you look carefully at his testimony, look at his past career in crime, his past association with criminals, and every vicious and immoral act he has committed in his past life? Will you do that?

A. I will.

Q. By the same token, will you keep in mind that we are trying a murder case?

A. I will.

Q. And in applying the tests that we have in the ordinary business experience, will you bear in mind that we are here to deal with some kind of characters that we do not ordinarily meet in our every-day relationship with the out-[fol. 1630] side world? Will you do that?

A. Yes, I will.

Q. Will you apply common sense and understanding to the issue and find out whether or not the accomplice is telling the truth in this particular murder case?

A. I will.

Q. May I go along, then, with the understanding that you won't shut your ears to the accomplice solely because he is a participant in the crime, but that you will look at his testimony with care and caution?

A. That is correct.

Q. And your job will be to see whether he is telling the truth in this specific case about this specific matter?

A. Yes.

Q. That you have no prejudice against the type of witness as would cause you to reject him under all circumstances?

A. I will be guided according to the charge of the Judge.

Q. At any rate, that you have no inherent prejudice either against the prosecution or the prosecutor for using that type of testimony?

A. None whatsoever.

Q. May I go along then with the understanding that you have no prejudice against a prosecutor who, to break a case from the inside, employs the use of accomplice testimony?

A. No.

Q. Is the name of Emanuel Buchalter or Philip Kowas at all familiar?

A. No.

Q. Or any person by the name of Weiss in the automobile rental business?

A. No.

Q. There has been some talk by one of the lawyers representing the defendant Buchalter about the fact that he was [fol. 1631] heretofore convicted of crime and is presently serving a jail sentence of a long number of years, and the prospective talesmen were asked if that fact would preju-

dice the juror against that defendant. Have you any such prejudice against a defendant who is serving a term in jail for the past commission of crime?

A. I have not.

Q. And, by the same token, would you deviate from a proper verdict simply because a defendant is in jail?

A. I would not.

Q. Or would you relax your duty in a murder case because he is serving time for some other crime he has committed?

A. No.

Q. Will you take the law in every respect from the Judge?

A. I will.

Q. And that is Judge Taylor, nobody else in the case—correct?

A. Exactly.

Q. If selected as a juror in the case, will you listen to common sense and reasonable discussion by the other jurors?

A. I will.

Q. Will you endeavor conscientiously to arrive at a verdict that is in consonance with the principles of justice and the evidence in the case?

A. I will.

Q. If selected as a juror in the case and you not only find that the accomplice who admits his participation with these defendants in the murder is telling the truth, but you find that there is other evidence in the case tending to connect the defendants with the commission of the murder, and you are satisfied about the case beyond a reasonable [fol. 1032] doubt, would you have any hesitation in saying so in your verdict?

A. I would not.

Q. Would you have any fear or reluctance?

A. No.

Q. If The People of the State of New York establish to your satisfaction beyond a reasonable doubt that at this bar of justice there are three guilty men, Buchalter, Weiss and Capone, would you have the slightest hesitation in announcing your verdict in consonance with that finding?

A. I would not.

Mr. Turkus: No challenge for cause.

By Mr. Talley:

Q. Mr. Finn, will you tell me just what your business is with the Edison Company?

A. Contract service work, new business, additional installation, if a man puts an additional load on his building, we take care of the contract, service work.

Q. Does your work take you outside of the office of the company?

A. Yes, it does, in and out.

Q. Have you read anything about this case or any of the defendants who are here?

A. Outside of the headlines in the paper since the trial started.

Q. Before the trial started did you read anything?

A. No.

Q. Have you talked about it with anybody other than members of your own family?

A. No.

Q. Have you formed any impression with respect to these defendants, or any of them?

A. Absolutely no impression or opinion.

[fol. 1033] Q. The Court will charge you that under our law the burden rests always upon The People to prove the guilt of the persons named in the indictment and that no burden rests upon them to prove their innocence. That is our American form of law. And that there is no burden or obligation on the part of the defendants to give any testimony or do anything, relying upon the obligation that rests upon The People to prove their guilt. You understand that?

A. I understand that.

Q. If any of these defendants, under advice of counsel, do not take the witness stand, would you form any inference unfavorable to any such defendant?

A. I would not.

Q. You understand that to be his privilege and his right under our American law?

A. I understand that thoroughly.

Q. If you have a reasonable doubt as to the guilt or innocence of these defendants from the testimony, not from anything else but from the testimony adduced in this case, will you give the defendants the benefit of that doubt?

A. Absolutely.

Q. Do you know of any reason why you cannot sit as a fair and impartial juror in the trial of this case?

A. I do not.

Q. You say you read nothing about it since this trial commenced?

A. No, sir.

Q. You mean by that since the time you received your jury notice?

A. That is right.

Q. You have not read anything?

A. Outside of the headlines about the trial not having enough jurors to go around, that's all.

[fol. 1034] Q. Nothing beyond the headlines and nothing you read has caused you to form any impression as to the guilt or innocence of these defendants; is that correct?

A. That is correct.

Q. The District Attorney has indicated to you, and the Court will charge you that if accomplices testify against these defendants, that the jury cannot properly convict any such defendant unless the testimony of that accomplice is corroborated by independent testimony. You understand that?

A. I understand that.

Q. And unless you found the testimony of such accomplice to be corroborated, supported by testimony independent of them, would you render a verdict of acquittal with respect to those defendants?

Mr. Turkus: That is not a proper instruction of the law of corroboration. He left out a very important sentence: tending to connect the defendants with the commission of the crime. It may give a juror in advance some wrong opinion of the law.

The Court: Reframe it.

Q. If after accomplices had testified and you were unable to find on a re-examination of the testimony, a recounting of the testimony as you do in the jury room, if you were unable to find that there was any evidence in the case independent of the testimony of the accomplices which tended to connect these defendants with the commission of the [fol. 1035] crime, would you bring in a verdict of Not Guilty?

A. In that case I would.

Q. And you will accept the law as the Court charges you without quarrel or question as to whether that ought to be the law or not, will you not?

A. Exactly.

Q. Have you any acquaintance with members of the Police Department?

A. No.

Q. Or the Detective Bureau of the Police Department?

A. No.

Q. Nobody connected in any capacity with the District Attorney's office of this county?

A. I do not.

Q. When did you last serve as a juror in a criminal case?

A. 1940, last year.

Q. And when before that?

A. I think about four years before that, on a criminal case, but I have served in civil cases since then.

Q. Was that also in a criminal case?

A. It was.

Q. Were you in 1940, or four years before that, were you a member of the special jury panel such as you are now?

A. No.

Q. Is this the first time you have been called as a special juror?

A. First time.

Mr. Talley: No further questions.

By Mr. Rosenthal:

Q. You say you sat, Mr. Finn, in a criminal case in 1940?

A. That is right.

Q. Before what judge?

A. Judge Taylor.

[fol. 1036] Q. And was it a homicide case?

A. I do not know whether you would call it—it was caused by an automobile accident. The boy was killed.

Q. A manslaughter case?

A. Manslaughter.

Q. And before that time you served in 1936; is that it?

A. I think so.

Q. Was that a homicide case?

A. No, seduction case.

Q. So that you have never sat, I assume, then, on a homicide or murder case?

A. No.

Q. Since you have been in court here you have heard expressions of various jurymen that preceded you as to their state of mind; is that correct?

A. That is correct.

Q. You say you read the headlines. What papers, might I ask?

A. New York *World, Tribune.*

Q. Do you read the *Mirror?*

A. No, sir.

Q. And these headlines that you read, were they prior to your being called as a juryman, or subsequent to your being called?

A. After I was called.

Q. Had you read anything at all prior to your being called as a juror.

A. No.

Q. And the headlines that you read were merely directed to the inability to speedily proceed with the procurement of a jury?

A. That is correct.

Q. You did not read any of the subject-matter of any——

A. None whatsoever.

[fol. 1037] Q. From what little you have read or heard, has any impression whatsoever been created in your mind as to the guilt or innocence of any of these defendants?

A. No, because the little I have read here could not give you any impression or any opinion.

Q. As you sit here now your mind is open, is it?

A. Exactly.

Q. And it is open to the extent that you would be able to receive the evidence from the witnesses and judge them according to what you believe is the truth of their statements; is that right?

A. That is right.

Q. Having heard, as you have, the question of accomplice, I assume by now you are familiar to a degree, as much as any layman would be, with the meaning of the word "accomplice," are you?

A. Yes.

Q. And you realize by now that if in the jury room you were only able to find in your own mind evidence which you would believe which was that of accomplices, that it would be your duty to acquit the defendants?

A. That is correct.

Q. You feel that you could follow a law of that character?

A. I feel I can follow the law right to the end.

Q. The mere fact that a defendant may admit that he knew one of the witnesses for The People who may have testified concerning some alleged fact against him, would that fact, standing alone prejudice you against the individual?

A. Would you mind repeating that question again?

[fol. 1038] Q. The mere fact that one of the defendants may admit that he knows one or more of the witnesses who are called by The People and who allege some certain fact against him, would that fact alone, that he knew those individuals and admtited that he knew them, prejudice you against the defendant?

A. No, it would not.

Q. You realize, sir, that you may know a lot of people who may know you, but you may not have anything to do with their nefarious undertakings; is that true? You may know a lot of people who may know you, but you may not have anything to do with their particular undertaking?

A. That is correct.

Q. So that the fact that one or more of the defendants may admit that they know one or more of The People's witnesses, you say, will not in and of itself prejudice you against the particular defendant who admits knowing, unless you feel the evidence warrants you in believing the truth of the particular witness's statement; is that correct?

A. That is right.

Q. Is there any reason at all that may not have been reached by the questioning of any of the attorneys, either the District Attorney or defendants' attorneys, which you feel would in any wise bias or prejudice you one way or the other?

A. No, it would not.

Mr. Rosenthal: No challenge for cause.

Mr. Turkus: Mr. Finn's satisfactory to The People of the State.

[fol. 1039] Mr. Talley: Challenge peremptorily.

Chester T. Prentice, of 315 Lenox Road, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

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PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1942.
JANUARY 2, 1943.
JANUARY 4, 1943.

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James F. Kelly	2063	1498
Fred Sittig	2076	1508
Benjamin Bergman, Jr.	2080	1512
Charles F. Wemmell	2090	1519

By Mr. Turkus:

Q. Mr. Prentice, is that the Flatbush section of Brooklyn?

A. Yes.

Q. And is that in close proximity to Bedford Avenue, where you live?

A. No, it is between Nostrand and New York Avenue.

Q. Prior to that time did you live at 440 Seventh Street?

A. Yes.

Q. That is Park Slope, isn't it?

A. That is right, near Seventh Avenue.

Q. Have you lived in Brooklyn a number of years?

A. I was born here. 1933 I moved out of here—1932. I lived in Queens for four years, and four years in Buffalo, came back here less than a year ago.

Q. The trestle board lists you occupation as that of cashier, is that correct?

A. Well, I am unemployed now, through no fault of my own.

Q. What was your employment when you were engaged in occupations? What did you do, what kind of work?

A. I was always an office man, office manager, my last job.

Q. What was the nature of the work done by the company for which you were office manager?

A. We were commission merchants.

[fol. 1040] Q. Dealing in produce?

A. In knit goods, underwear, Broadway and Worth Street.

Q. How many years have you been in that business?

A. I was there seventeen years.

Q. Is that on the edge of the clothing district in Manhattan?

A. No, it is white goods district.

Q. Did you have any contacts of any kind, nature or description in the garment center, the clothing district, the men's clothing?

A. No.

Q. Women's clothing, or any type of clothing?

A. No.

Q. When you were up in Buffalo, what did you do, Office work, too?

A. No.

Q. Was that a different type of work? Were you in a different line than knit goods?

A. When I was in Buffalo?

Q. Yes.

A. I did not do anything; I lived with my son.

Q. At any rate, the seventeen years of your life was devoted to work in this knit goods concern?

A. Yes.

Q. Can you tell me the name of the company?

A. Robert C. King & Company.

Q. Did you in your work in that knit goods concern become familiar with the name of Lepke? Did you ever hear that name?

A. No.

Q. Any familiarity with the name of Gurrah?

A. No. We just represented. Our mills were all out of town, Pennsylvania, New England, and in the South. We [fol. 1041] were selling agents for the mills; that is all.

Q. Did business keep you or put you into any kind of contact with any officials of the Amalgamated Clothing Workers of America?

A. No.

Q. Is there any significance to your mind in connection with the name of Murray Weinstein, or Samel Katz.

A. No.

Q. Or Bruno Belia, an organizer?

A. No.

Q. Salvatore Marazzano?

A. No.

Q. Did you came in any contact with people involved or connected with clothing trucking?

A. No.

Q. Do you know any officials of any clothing trucking union?

A. No.

Q. For example, do you know anybody in Local 240?

A. No.

Q. Local 204? Did you come in contact with any kind of truckers at all?

A. Only, well, we had one man done our trucking, a feilow named Joe Kyle(?), on Leonard Street.

Q. Is the name of Max Silverman familiar at all, or Wolfie Goldis?

A. No.

Q. Or a bondsman by the name of Willie Alberts?

A. No.

Q. Does the name of Emanuel Buchalter or Phillie Kowas mean anything?

A. No.

Q. Names of Bellanca and Tosca?

A. No.

Q. Or Terry Burns and Abie Slobo?

A. No.

Q. Curley Holtz?

A. No.

Q. Since you received your notice as a prospective juror [fol. 1042] in this case, did anybody speak to you about the case?

A. No.

Q. There are nine lawyers representing these three defendants: former Assistant District Attorney Barshay, former Assistant United States Attorney Wegman, and Mr. Climenko representing Buchalter. Do you know any of those three?

A. No.

Q. Anyone in their law offices?

A. No, sir.

Q. Defendant Weiss is represented by former Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kriendler. I take it you know none of those three?

A. No.

Q. Do you know anyone in the law offices?

A. No, sir.

Q. Defendant Capone is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein and Mr. Emanuel Rosenberg. Do you know any of those three lawyers?

A. No, sir.

Q. Do you know whether you know anyone associated with them in the practice of law?

A. No.

Q. Do you know intimately or closely anyone who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know a lawyer by the name of William Kleinman or David Price?

A. No.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, or any member of his staff or assistants?

A. I do not.

Q. Did you when you were a resident of Brooklyn know the former District Attorney, Mr. Geoghan, or any member of his staff?

A. No, I was in Buffalo then, when he was District Attorney.

[fol. 1043] Q. Since you have been back in Brooklyn O'Dwyer has been the District Attorney?

A. Right.

Q. Mr. Prentice, do you find any fault with a prosecution which will avail itself of the use of one of the co-participants in the crime and use that testimony against the defendants on trial?

A. No.

Q. Do you have any bias or prejudice, or do you find any fault with the prosecutor who would use that kind of testimony in a case?

A. No, sir.

Q. Have you heretofore served as a juror in a criminal case?

A. I have not.

Q. Have you had any jury experience in any type of litigation?

A. Well, civil cases.

Q. Did those cases go to a conclusion, and by that I mean did you have the benefit of listening to the Judge's instructions on the law?

A. I did.

Q. In that case I assume that you applied the instructions of law that the Judge gave you to the facts of the civil case?

A. That is right.

Q. Do you feel, if accepted as a juror in this case, that you can take the instructions of law in a criminal case and apply them to the facts in the case?

A. I do.

Q. May I go along with the understanding, then, that you have no fault with the prosecution which employs the use of accomplice testimony?

A. No, sir.

[fol. 1044] Q. And no fault to find with the prosecutor who takes that kind of testimony in to use in a case?

A. No.

Q. And may I go along with the understanding that you find no fault with the prosecutor who breaks a case from the inside by the use of accomplice testimony?

A. No.

Q. Will you apply the law with respect to weighing the believability of an accomplice or a co-participant in the commission of the crime pursuant to the instructions that the Judge gives you?

A. Yes.

Q. Will you look at who the accomplice is and look at his past associations with criminals, his past criminal acts, and every vicious and every immoral thing that the accomplice has done in his whole life, will you look them over with care and caution and weigh everything when you are trying to find out whether the truth is coming from his lips? Will you do that?

A. I will.

Q. Will you by the same token remember that we are not dealing with individuals that we frequently meet in the ordinary walks of life? Do you understand what I mean by that?

A. I understand.

Q. You were in the textile business, you met merchants and you met business men all during your life. You used certain tests which you applied to a business man as to his honesty. Will you use common sense and understanding when you are working on a criminal case where there is the [fol. 1045] testimony of an accomplice, to find out if this accomplice is telling the truth about this murder?

A. I will.

Q. And will you use common sense and understanding to see whether he is not only telling the truth about the murder, but whether or not there is other evidence in the case which links up the defendants or tends to connect them with the commission of the crime?

A. I will.

Q. No matter how you believe an accomplice, or no matter how many a District Attorney had, unless he had other evidence which tended to connect the defendants with the commission of the crime, your hands as a juror would be tied, you would have to acquit, wouldn't you?

A. I did not catch that.

Q. Is your state of mind such that you understand that even if you believe an accomplice is telling the truth, even

if you believe it, and believe from his story that he did just what he said he did, and the defendants did just what the accomplice said they did, in the commission of the murder, even if you believe that, if that is all the District Attorney has given the case, your hands are tied and you must acquit, because you cannot convict upon the testimony solely of an accomplice. Do you understand that?

A. I do.

By the Court:

Q. He means without corroboration.

A. Without corroboration.

By Mr. Turkus:

Q. In looking for the corroboration in the case, that is [fol. 1046] the other evidence not coming from the accomplice but coming from another source, and seeing whether or not that tends to hook up or connect these defendants with the commission of the crime, will you use common sense and understanding in finding out the issue in the case?

A. I certainly will.

Q. And will you devote your mental energies to finding out, is the accomplice in this case telling the truth about these defendants when he gives his testimony in this courtroom?

A. Yes.

Q. And will you apply your mental faculties in finding out are these three defendants implicated in the murder?

A. I will.

Q. If selected as a juror, will you talk the case over with the other jurymen with reason and common sense?

A. I certainly will.

Q. Will you, if selected as a juryman, listen to reasonable argument and discussion in the jury room?

A. I will.

Q. Simply because there are a lot of lawyers for the defendants, because there are three defendants, and should you hear the same argument urged three times by three different lawyers, would that impress itself in your mind with three times the effect, because you heard it thrice repeated?

A. No, it would not.

Q. Bearing in mind that there cannot be any conviction upon uncorroborated testimony of an accomplice, should some of the lawyers argue that everybody in the case is an [fol. 1047] accomplice, will you use your judgment in weighing that fact?

A. I certainly shall weigh the evidence.

Mr. Barshay: I object to the form of the question.

The Court: Overruled.

Mr. Barshay: Exception.

Q. In other words, is your frame of mind such that it is your job to find out one issue here: Are these defendants guilty or innocent?

A. Yes.

Q. And that just because somebody says a witness is an accomplice, is your frame of mind such that it is your investigation that finds that out?

A. Weigh the evidence.

Q. Something has been said here by one lawyer representing Buchalter concerning the fact that he has been heretofore convicted of crime and sentenced to a long term in jail for the conviction, and the other prospective talesmen were asked would they be prejudiced against Buchalter for that reason. Have you, sir, any prejudice against Buchalter because he has been heretofore convicted of crime?

A. Absolutely none.

Q. By the same token, would you relax your duty as a juror in the case because Buchalter is in jail?

A. No.

Q. Would you deviate from a proper verdict because he has been convicted of some past crime?

A. Certainly would not.

Q. You are going to use your mental faculties, are you not, in deciding is he implicated with these particular defendants in this murder?

A. This particular one.

[fol. 1048] Q. If accepted as a juror,—there are certain safeguards and legal rights that every defendant on trial must have under our law,—will you give to these three defendants on trial every Constitutional safeguard and every legal right that the law says they shall have?

A. Certainly will.

Q. And the law and the safeguards will be told to you by Judge Taylor. You know that?

A. I know that.

Q. You will give those defendants everything they are entitled to—correct?

A. Yes.

Q. By the same token, after you have given them every benefit that the law says they should have and you have given them every Constitutional safeguard that the law says men charged with crime shall have——

A. I will.

Q. —and you have heard all the evidence in the case and then your mind tells you beyond a reasonable doubt that there are three guilty men at the bar of justice, that Buchalter, Weiss, and Capone, are guilty of murder in the first degree, would you hesitate to say so?

A. I would not.

Q. Would you have any fear or reluctance in so saying?

A. I would not.

Q. I take it you have no conscientious or other scruple which would preclude you from being a fair and conscientious juror in the case?

A. I have not.

Q. If, after you hear all the evidence in the case and you talk it over with the other jurors, you hear the lawyers [fol. 1049] tell you how they view the evidence, and the District Attorney how he views it, Judge Taylor tells you the law, and your mind is satisfied now that there are three involved in the conspiracy here, that the three of them, acting together, are guilty of murder in the first degree, the murder of Joe Rosen, would you hesitate to say so?

A. I would not.

Mr. Turkus: No challenge for cause.

By Mr. Barshay:

Q. Mr. Prentice, you said you were a cashier. Did you handle money yourself?

A. I certainly did. That is, when I first went there I had complete charge.

Q. And were you ever a victim of any crime?

A. I have not.

Q. Has your company been the victim of a crime?

A. I have not.

Q. You volunteered the fact that your unemployment at present is not because of your own fault.

A. No.

Q. Do you attribute it to any particular cause?

A. What?

Q. I say, do you attribute it to any particular cause?

A. Only one.

Q. Do you mind telling us?

A. Chain stores.

Q. In other words, your prejudice has nothing to do with this case?

A. No, just simply that the chain stores eliminated the commission merchants.

Q. And thus they deprived you of a livelihood?

A. That is it. Then I went up to Buffalo with my son, [fol. 1050] who is in the automobile business.

Q. And so no part of this case, directly or indirectly, has anything to do with that fact?

A. No.

Q. So you are now free to serve as a juror?

A. I certainly am.

Q. Now, Mr. Prentice, have you read anything at all about this case?

A. No.

Q. Before you came here?

A. No.

Q. I take it you read newspapers?

A. I of course read the *Times* and the *Eagle* and once in a while the *News*.

Q. And you have read them for the last year and a half?

A. What?

Q. Have you read them for the last year and a half?

A. No, only for the last year. I was in Buffalo previous to that.

Q. In the last year there have been items in the press concerning the defendants, or this case, have there not?

A. I don't know. My principal thing in reading the papers is the want-ads, and after that the business section and after that the sporting section, and the others did not interest me.

Q. General headlines don't attract your attention?

A. Did not attract my attention at all.

Q. Neither the war——

A. The death notices, they might attract my attention.

Q. And since coming here, Mr. Prentice, have you read anything at all about the case?

A. Only in reference to the trial or getting the jury, [fol. 1051] that's all. I do not know the details.

Q. Do you listen to the radio?

A. Certain programs.

Q. And did you ever hear anything at all about the investigations of Judge O'Dwyer on the radio?

A. No.

Q. Or this case or the defendants?

A. Absolutely no.

Q. You have been sitting here a reasonable time listening to the prospective jurors being questioned. Have you formed any opinion with respect to this case?

A. No.

Q. Since being here?

A. Absolutely not.

Q. Has any question that was asked affected your judgment in this case, by either Mr. Turkus or by the defense counsel?

A. No.

Q. Has any juror discussed the case here with you?

A. Absolutely not.

Q. Just in casual conversation?

A. No.

Q. Has anybody in your home talked about it?

A. No, only asking how I am making out.

Q. Has anybody expressed to you an opinion about this case?

A. No, no.

Q. And you can now say with reasonable certainty, Mr. Prentice, that nothing that you read or heard or spoke about has left any impression with respect to this case?

A. Absolutely not.

Q. You are then of a free and open mind?

A. I certainly am.

Q. The number of counsel that are present in court means [fol. 1052] nothing to you?

A. Nothing whatever.

Q. There are only three here for the prosecution, but behind them there is a lot of reserves fortifying the front line. You know, the whole office has something to do with this case.

A. I understand.

Q. As my office has something to do with this case, even though they have never stepped into this court. You understand that?

A. I understand.

Q. Numbers don't count. Have you heard any radio speeches concerning the forthcoming election?

A. I don't bother with them.

Q. You have not at any time taken sides?

A. No.

Q. You don't intend to? I say you don't intend to take active sides in this forthcoming election?

A. No, I am not interested.

Q. You understand that both a prosecution and the defense handle a case as it is given to them by those involved. I am not a witness in this case, neither is Mr. Turkus. You know that?

A. Yes.

Q. And so that when Mr. Turkus says to you, have you any fault to find with a prosecutor who breaks the case from the inside, do you accept that as the fact as you are sitting here now? Do you accept that as the fact, as a true fact?

A. What?

Q. That this case was broken from the inside?

A. I don't know.

Q. You will wait until you find that out from the witness? [fol. 1053] A. Find that out. I do not know.

Q. Mr. Turkus said to you something about accomplice testimony. Will you take into consideration that the person who shall now take the stand and claim he is an accomplice has at another time and place taken the stand and said he was not an accomplice? You will take that into consideration, won't you?

A. I certainly will.

Q. In other words, if the source of the testimony is polluted, you won't be so ready to accept it, will you?

A. I did not catch that last part.

Q. I said if the source of the testimony is polluted, you won't be so ready to accept?

A. I certainly will not.

Q. And, by the same token, if the other testimony in the case which shall be offered comes from a polluted source, you won't be ready to accept that either, will you?

A. That polluted part, I do not understand.

Q. I will use the word dirty. It comes — people who themselves have led a life of crime. They are moral bankrupts, every one of them who will testify in this case, with the exception of the police and the expert testimony. That is what I mean when I say polluted.

A. I will weigh their evidence.

Q. In other words, the fact that a man comes here and says, "I will tell the truth," and raises his right hand, swears to tell the truth, that does not necessarily mean that he will?

A. No, not in my judgment.

[fol. 1054] Q. Even though he will now say, "Heretofore I have lived a life of crime, but from now on my life starts new; I am telling the truth," you will want to find out about that, won't you?

A. I certainly will.

Q. Will you expect the defendants to prove anything?

A. Would I expect the defendant to prove anything?

Q. Yes.

The Court: He does not know the law.

The Talesman: I do not know the law.

Q. Perhaps, Mr. Prentice, I should put the question this way: You have heard before other jurors being told by his Honor that the burden of proof is with the prosecution?

A. I did.

Q. You heard that?

A. Yes.

Q. I ask you, in view of that fact, would you personally expect any defendant to prove anything at all in this case?

A. Since I understand the law, it is up to the District Attorney to prove it.

Q. That is correct. I have said that. Is there anything in your state of mind, sir, that would cause you to require, irrespective of the law, that something should be forthcoming from the defense in explanation in this case?

A. Since I understand it, it is not required by the law, is it?

The Court: The question is, will you follow it?

The Talesman: I would follow the law.

Q. And will you follow it strictly and implicitly?

A. I certainly would.

[fol. 1055] Q. Sometimes people have a slight disagreement with the requirements of the law, but they must subordinate their own ideas to the demands of the law; you understand that?

A. I understand.

Q. So I take it, Mr. Prentice, that you will only live up to what the law requires?

A. I certainly will.

Q. And if the law shall be given to you by the Court that our client need not take the stand, need not explain, need not disprove, you won't demand that he shall explain or disprove or take the stand?

A. Absolutely not.

Q. And his failure to do so shall draw no unfavorable inference toward him in any regard whatever?

A. No.

Q. You understand and will follow that law?

A. I certainly will.

Q. I brought out before, our client is incarcerated for a long time.

A. I have quite a cold. I cannot hear.

Q. Your hearing is impaired just temporarily?

A. I got a little bronchitis.

Q. Can you hear me now, sir?

A. I certainly can.

Q. I said to you, our client, it has been brought out, is incarcerated for a long time because of some other matters that have nothing to do with this case, and I asked the other jurors whether or not they had a prejudice against a man who may take the stand and admit those things, and they said no. Do you say no, you have no prejudice against him?

A. I have no prejudice, no.

[fol. 1056] Q. You understand that, whatever happened at any other time in his life, it has nothing to do with this case?

A. That is right.

Q. Unless he offers himself for cross-examination, and then you will take into consideration his credibility?

A. I certainly will.

Q. You cannot come to the conclusion, sir, that because of other things, whatever they may be, you may not like a

defendant. If the defendant is not proven guilty beyond a reasonable doubt in this case, you must acquit.

A. I understand.

Q. Do you feel that way?

A. I understand it.

Q. That shall be your personal and individual opinion throughout this case?

A. Yes.

Q. Encompassed in the enforcement of the criminal law is the presumption of innocence. That is a substantial right given to every defendant. You shall give it to him if you are instructed?

A. Yes.

Q. About that there is no doubt, Mr. Prentice?

A. I will give it to him until we prove he is guilty.

Q. Beyond a reasonable doubt?

A. Beyond a reasonable do...ot, yes.

Q. And always in his favor until twelve of you agree, will you keep in mind, if the Court shall so charge you, that that presumption is with him even in the jury room as you are arguing, even if five should be against or six for him [fol. 1057] or seven against him and five for him, that presumption shall always be in his favor, isn't that so?

A. That is right.

Q. Until it is wiped out by unanimous agreement.

A. Unanimous agreement.

Q. Now, Mr. Prentice, will you take into consideration the reason that motivates every person who takes the stand and gives testimony?

A. I will.

Q. And if you find from the witness stand that someone has an all-selfish desire to help himself and by virtue thereof prostitutes his oath and gives testimony which you reject, you will have the courage to reject it, won't you?

A. I certainly will.

Q. No matter who it is?

A. Don't make any difference.

Q. Even if he takes the stand and he says, "Nobody has promised me a single hope of reward," you are not bound to accept that, are you?

A. Not bound to, no.

Q. He may even be lying about that. If you make up your mind from the evidence that he is lying, you will reject his testimony, won't you? Do you understand me?

Mr. Turkus: That is an instruction of law that is not quite accurate either. That is inquiring into the juror's knowledge of the law.

Mr. Barshay: No, I am not.

Mr. Turkus: You are.

Q. I will reframe it, Mr. Prentice: In other words, you [fol. 1058] are the only one to decide whether or not any person who takes the stand tells the truth?

A. Yes.

Q. Isn't that so?

A. Right.

Q. And so if you find that a man has raised his hand to tell the truth and he is a pampered person, living at a hotel at the State expense and getting rides and playing baseball and getting meals and collecting shylock money with the help of the authorities, if you believe that from the witness stand you will be very cautious, won't you?

A. I certainly will.

Q. Before you will say, "I accept his testimony," isn't that so?

A. I will weigh his evidence very carefully.

Q. Whether he is an accomplice or not?

A. That is right.

Q. And that goes to the corroborating witness too?

A. Yes, certainly does.

Q. That, too, is a part of the enforcement of the criminal law. You understand that?

A. I understand.

Q. Each defendant here is entitled to a separate verdict. Do you agree with that?

A. Does not the Judge charge that?

Q. Yes, I take it the Judge will tell you that. I am sure his Honor shall charge you that the verdict as against each defendant must be separate. Do you agree with that, if the Court shall so charge?

A. If the Court decides.

Q. That is an elementary proposition. And if the Court shall charge you that you can only use the evidence applicable to one defendant against one defendant, you will fol- [fol. 1059] low that instruction too?

A. I certainly will.

Q. In other words, Mr. Prentice, you cannot bunch the evidence together and out of it draw one verdict.

A. No.

Q. Unless his Honor charges you the evidence of one is applicable to the other, you shall not and will not use it, and you won't permit anybody else in the jury room to use it; isn't that so?

A. I will not, no.

Q. All that is part of the enforcement of the Penal Law. Do you agree with it?

A. Yes.

Q. Now, the District Attorney in every case speaks first. You won't make up your mind immediately, because he speaks first, will you?

A. I certainly will not.

Q. The District Attorney also has the additional advantage of speaking last. He sums up last. He answers all the arguments of counsel. And I take it, sir, you promise me now that just because he speaks first and he speaks last you will not accept his argument as final because of the position he is given by the law, will you?

A. I do not understand.

Q. You won't accept his testimony because he speaks first? You said that. I mean the opening argument of the District Attorney. Under the law he has the right and he does speak last. After all the lawyers get finished Mr. Turkus shall sum up. The position of his speaking last, that will not influence your judgment in the case?

A. It will not, no.

Q. Because we will no longer be able at that point to [fol. 1060] make any answer to any summation he makes. That is only a matter of procedure. You understand that?

A. I understand that.

Q. You don't begin to make up your mind until you rehash the testimony in the jury room?

A. Right.

Q. And until his Honor shall instruct you with respect to the law.

A. Right.

Q. Frankly, Mr. Prentice, I ask you now, can you be an impartial juror in this case to both sides?

A. I have no doubt that I can. I think I can. I have no doubt.

Q. You have no doubt that you can? Is that what you said?

A. That is right.

By Mr. Rosenthal:

Q. Mr. Prentice, have you any relatives on the police force?

A. No, not that I know of.

Q. You have no high police officials that are friendly with you or you with them?

A. No, sir.

Q. Of course, you have heard repeated a number of times practically the same questions to other men since you have been in the court-room. That is true, is it not?

A. That is right.

Q. You realize that each attorney that has addressed you on behalf of the defendant represents a different defendant on trial; you understand that?

A. I understand that.

Q. You understand the purpose of joining three men together saves the repetition of such evidence as may be against any one of them; is that clear to you?

A. That is right.

[fol. 1061] Q. However, do you further understand that in judging the evidence in your jury room you can only use so much of the evidence as against any one particular defendant as applies to that particular defendant? Is that clear to you?

A. I know that.

Mr. Turkus: That instruction of law does not take into account the proving of a conspiracy and acts done in furtherance of a conspiracy.

Mr. Rosenthal: Then that applies to him, doesn't it, Mr. Turkus? Whether it is a conspiracy or what it is, so much of the evidence as applies to the particular defendant is the only part of the evidence can be used against him.

Mr. Turkus: If there were a conspiracy to kill a man, any act done by any conspirator in furtherance of the conspiracy would be and could be accepted by the juror as against the other defendants.

Mr. Rosenthal: And that would apply to that defendant, wouldn't it?

The Court: Why not reframe the question and clarify that?

Q. The Court will charge you, Mr. Prentice, the law. You understand that? Never having sat on a criminal case before, do you also understand that the only one that can tell you the law in this case is the Judge?

A. I understand that.

Q. Do you further understand that no matter how much the lawyers talk, that is not evidence? You understand that?

[fol. 1062] A. I understand that.

Q. You only use their talk to you in the event it agrees with your idea of what the evidence is. That is clear?

A. That is right.

Q. The Judge in charging the law will tell you just what type of evidence can be utilized against what particular defendant. Is that clear to you?

A. That is right.

Q. And under the instructions of the Court will you only apply such evidence against any one particular defendant as the Court in its instructions tells you is the evidence that can be applied against him?

A. I will.

Q. You are not going to say to yourself, Here are three men on trial, and because certain people have testified against certain other people, that that in itself makes it binding against the others, unless the instructions of the Court would warrant you to do that? Isn't that true, sir?

A. Yes.

Q. On the question of the accomplices and the independent testimony, Mr. Barshay has just questioned. You recall his questions. Assuming, sir, that this so-called independent evidence, which the District Attorney tells you is independent evidence, consists of a statement, an alleged conversation which one of the District Attorney's witnesses will say he had with one of the defendants—Have I made myself clear so far?

A. Yes.

Q. In other words, one of the men goes on the stand for the People, called by the District Attorney, and he says, [fol. 1063] "I know the defendant and on such and such a

day at such and such a place he, the defendant, said to me that he had something to do with the case." Is that clear so far?

A. Yes.

Q. And the District Attorney then says to you—"This is what we call independent evidence." Is that clear so far?

A. Yes.

Q. Will you, before you accept any such type of independent evidence, search the source from which it comes?

A. Certainly.

Q. And if you find it comes from a man who has every reason in the world, even though he is under oath, to lie, will you give it the care and the scrutiny and the caution which you would do if you were called upon to judge something in your ordinary course of business?

A. I would.

Q. And if you determine that that particular individual or those individuals have theretofore under oath in a court of similar jurisdiction to this, taken the oath and with that oath in mind have lied as well as have committed numerous other crimes, will you very, very carefully scrutinize to see whether or not there is not some motive, consideration or otherwise, to make him lie here and now? Will you do that?

A. Certainly will.

Q. And if you feel that because of his former propensity for non-truth telling and because of his former activities, a doubt is created in your mind as to whether he is telling the truth, will you disregard his testimony if there is a doubt in your mind as to whether he is telling the truth, in [fol. 1064] view of his past actions and activities?

Mr. Turkus: That is a question of law. I object to it in that form.

Mr. Rosenthal: I have not finished the question. You are so quick to jump up when other people are talking, to insist on other people——

Mr. Turkus: You take care of your client; I will take care of The People of the State. Don't be so disagreeable.

Mr. Rosenthal: I object to that.

Mr. Turkus: I say you cannot take care of The People.

Mr. Rosenthal: I wish I could take care of my client as well as you did when you were practicing law.

Mr. Turkus: Thank you for the dubious compliment.

The Court: This is not the Federal Court.

Did you finish your question, Mr. Rosenthal?

Mr. Rosenthal: I did not, when I was so rudely interrupted. I was in the midst of a question, which I will withdraw and now repeat in practically the same form.

Q. If after you see this witness on the stand, or these witnesses, and if after you hear them testify and there tell under questioning by the District Attorney or are compelled to tell under questioning by defense attorneys that they have previously lied under oath and have committed numerous crimes, a doubt is created in your mind as to whether they are now telling the truth, would you hesitate [fol. 1065] to resolve that doubt in favor of the defendants?

The Court: Reasonable doubt.

Q. Is that clear?

A. Reasonable doubt.

Q. Yes. The doubt would be reasonable doubt if it is created in your mind, sir, would it not, as to the truth of the statement of the individual?

Mr. Turkus: Just a minute. That is argumentative.

Mr. Rosenthal: I withdraw it, to save time.

Mr. Turkus: Magnanimity.

Q. Now, sir, directing my question to you again and not to the District Attorney, if the only evidence in this case of an independent nature is that of a person of the type which I have already described to you, and if the Court tells you that the law of our land, not only as it applies to these defendants, but to anybody, is that there must be independent evidence tending to connect the defendant with the crime—is that clear to you?

A. It certainly is.

Q. —would you hesitate, if you were unable to make up your mind as to whether these people were telling the truth and a doubt was created by that, reasonably, because of your inability to make up your mind, would you hesitate to resolve that doubt to the benefit of the defendant and acquit him?

A. I would not.

Q. Now, you understand from being here, sir, that at no time, even though a defendant may take the stand him- [fol. 1066] self, even though he may call numerous witnesses, does he have to prove his innocence. You understand that? You understand that at no time, if he so desires, does he have to take the stand or say anything against

the evidence that is offered by The People? You understand that?

A. Yes.

Q. You heard the District Attorney say to other men, about an alibi, would you take the law from the Court? Did you hear him say that in questioning other jurymen?

A. Yes.

Q. Do you feel, sir, that because a man may take the stand and offer an alibi or offer any defense, that the burden shifts to him to prove his innocence?

Mr. Turkus: That is a question of law.

Mr. Rosenthal: I have already explained the law, and asked him does he feel——

Mr. Turkus: I have addressed an objection to your Honor.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Because a defendant—Having in mind that the Court will charge you that a defendant need never prove his innocence and need never offer any evidence of any character to prove his innocence, do you yourself feel that if a defendant does offer evidence that the burden thereby shifts to him?

Mr. Turkus: Objected to. It is a question of law.

The Court: Sustained.

[fol. 1067] Mr. Rosenthal: I respectfully except.

Q. If an offer of alibi is made by a defendant and the Court charges you that it is not necessary for a defendant to establish his innocence by a defense of alibi, but that if the alibi in and of itself raises a doubt in your mind, a reasonable doubt as to whether the particular defendant committed the crime, that doubt must be resolved in his favor and you must acquit him, would you follow that?

A. I certainly would.

Q. So that if an offer of an alibi is made by any defendant, you will look at that evidence of an alibi, is that true?

A. That is right.

Q. And if, after looking at it, that alibi creates in your mind a reasonable doubt as to whether that particular defendant committed the crime, you will resolve that doubt in favor of the defendant and acquit him; is that correct, sir?

A. If I am charged that way by the Court.

Q. I am always assuming in all of my questions that the Court will charge you that that is the law. You find no fault with the law of that character, sir?

A. No.

Q. Merely because of the fact, as is evidenced by what has transpired in this court-room, that this case has procured some publicity, would that in any wise affect your judgment in your jury room?

A. Absolutely no.

Q. You feel that you would have courage, if you on your conscience were not convinced of the guilt of any one of [fol. 1068] these men or all of them, to come in and evidence that fact by your verdict, don't you, sir? There is no question in your mind as to that, is there?

A. No.

Q. You also feel, sir, that in the jury room, if you come to a conclusion adverse to a great number of the other jurymen and that conclusion is your honest opinion of what the evidence in the case indicates in your mind, and if you reason dispassionately with these other men and they have not convinced you that your opinion is wrong, that you would have the courage and fortitude to stick to that conclusion?

A. I certainly would.

Q. You would not feel, as has been evidenced by questioning of the district attorney, that because you were in the minority, no matter which way—Let me withdraw the question—and sit down, please, and I will put another question.

Mr. Turkus: I should think so.

Mr. Rosenthal: I will put the same question, but I will leave out "district attorney."

Q. You would not feel, sir, that because—Let me withdraw that.

Q. You heard the District Attorney tell some of the jurymen about being arbitrary?

A. Yes.

Q. And quarrelsome in the jury room. Do you remember hearing that?

A. Yes.

Q. You would not feel that you were arbitrary or quar- [fol. 1069] relsome, would you, in the jury room because you formed an opinion on your conscience which was in disagreement or discord with a number of other jurymen?

A. I would not.

Q. And you would not feel that you were arbitrary or quarrelsome if on your conscience you retained that opinion after you listened to the argument of the majority and they were unable to change your opinion; if you stuck to that opinion you would not feel you were arbitrary, would you?

A. No.

Q. And you would not feel you were arbitrary and change your opinion merely because of the lateness of the hours or the disagreeable task or the number of men that were against you or the length of the trial, would you?

A. I would not.

Q. You would retain your opinion if it was formed on your conscience and if after listening to the reasoning the other men could not change it, wouldn't you?

A. Could not change it.

Q. Is there any reason, sir—Let me ask you another question before I ask you that. The mere fact that one or two of these defendants may know one or more of The People's witnesses, would that fact in and of itself prejudice you against these men?

A. Absolutely not.

Q. Is there anything that has not been reached by either questioning of the District Attorney or any of the other counsel which you in your own mind feel would in any wise incapacitate you from acting as a fair and impartial juror? Is there anything that you know of?

A. Absolutely not.

[fol. 1070] Q. Just this final question: You know if accepted as a juryman you are not making any commitment to Mr. Turkus as the representative of The People nor are you making any commitment to the defendants' lawyers; you know that, don't you?

A. I certainly do.

Q. You are only making a commitment to The People of the entire state of which these defendants are a part; you realize that? And your verdict must be based only on your conscience as you see it?

A. That is right.

Q. And that is the type of verdict you would give, isn't it?

A. That is right.

Mr. Rosenthal: No challenge for cause.
Mr. Turkus: Mr. Prentice is satisfactory to The People of the state.
Mr. Climenko: No challenge.
The Court: Satisfactory to both sides?
Mr. Turkus: Satisfactory to The People.
Mr. Talley: No challenge by the defense.
The Court: No peremptory challenge?
Mr. Talley: There is no peremptory challenge.
The Court: (to Mr. Prentice) Take Seat No. 2.

Harry Sillett, of 1716 Avenue T, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

[fol. 1071] By Mr. Turkus:

Q. Mr. Sillett—is that the correct pronunciation?
A. Yes, most people pronounce it Sillett.
Q. Is that address, 1716 Avenue T, on this trestle board, correct?
A. Yes.
Q. Is that the Sheepshead Bay section of Brooklyn?
A. It is just on the border of Sheepshead Bay between Flatbush and Sheepshead.
Q. Have you lived in Brooklyn for a number of years?
A. Since 1927.
Q. I take it you sat up here and listened to the other prospective jurors being interrogated as to their qualifications?
A. Yes, sir.
Q. Is there anything about the nature of this charge, a charge of murder in the first degree, which would impair or preclude you from being a just juror, doing a conscientious job on your oath as a juror?
A. No, sir.
Q. Have you any scruple, conscientious or otherwise, against capital punishment?
A. No, sir.
Q. Should you be charged by the Judge that the question of punishment must not enter into the deliberations of guilt or innocence, will you abide by that instruction of law?
A. Yes, sir.

Q. If so instructed, will you refuse to let anyone else talk the question of punishment in the jury room?

A. Yes, sir.

Q. It has been brought out by one lawyer for the defend- [fol. 1072] ent Buchalter that his client has been heretofore convicted of crime and sentenced to a long term in jail, the sentence of which he is presently serving, and other prospective jurors were asked would they be prejudiced against his client for that reason. Would you have any prejudice against Buchalter because he has been convicted of past crime?

A. No, sir.

Q. By the same token, would you relax your duty as a juror and deviate from a proper verdict solely because he was convicted of some other crime and is serving a jail sentence?

Mr. Climenko: I object to the form of the question.

The Court: Overruled.

Mr. Climenko: It assumes what the proper verdict is.

The Court: Would you disregard that?

The Talesman: Yes, sir.

Q. In other words, as to guilt or innocence in this murder case, that is going to be your job as a juror to find out. Am I correct in proceeding along those lines?

A. Yes, sir.

Q. Has your business in the past brought you in contact with anyone in the garment trade or in the clothing industry in Manhattan?

A. No, sir.

Q. Do you have any present connections there of any kind, nature, or description?

A. No, sir.

Q. Do you know anyone or any corporation engaged in the industry known as clothing trucking?

A. No.

Q. Do you have any contacts, presently or in the past, [fol. 1073] with persons or firms in the Brownsville-East New York area of Brooklyn?

A. No, sir.

Q. Does that hold true with respect to the Brooklyn waterfront?

A. Yes, it holds true.

Q. Has business in any wise brought you into contact or connection with any officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any significance in your mind to the names of Weinstein or Katz, officers of a Cutters Union?

A. No, sir.

Q. Is there any significance to the name of Bellanca or Belia?

A. No.

Q. Or Salvatore Marazzano?

A. No, sir.

Q. Is there any significance in your mind to the name of one Philip Orlofsky, a one-time manager of a Cutters Union?

A. No, sir.

Q. Do you know anyone engaged in clothing trucking?

A. No, sir.

Q. Or any official of any union?

A. No, sir.

Q. Is there any familiarity in your mind to the names of Max Silverman or Wolfie Goldis?

A. No, sir.

Q. Mr. Sillett, the trestle board lists your business as that of a manager. Is that an office manager?

A. Yes, manager of my branch.

Q. I think you said a bank branch?

A. Manager of my branch.

Q. Did you say "bank"?

A. No. National City Safe Deposit Company. I mention that because you mentioned bank.

By the Court:

[fol. 1074] Q. You are on Montague Street?

A. No, sir, not located there. We have branches all over the city.

Q. Where is your branch?

A. 10 Irving Place, New York City. That is the Consolidated Edison Building, in the building.

Q. It is up near the Astor Library?

A. 10 Irving Place is just a little higher than 14th Street, the corner of 15th and Irving Place, the corner of the Edison Building.

By Mr. Turkus:

Q. And does that company deal exclusively with the rental of safe deposit vaults?

A. Yes, sir.

Q. Is there any significance to the name of William or Willie Alberts, a one-time bondsman?

A. No, sir.

Q. Or that of Emanuel Buchalter or Philip, Phillie, Kowas?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, I am.

Q. Since your name appeared on this special panel and specifically since you yourself received a notice that you were a prospective juror, did anyone speak to you about the merits of the case?

A. Only just casually in regard to my jury service.

Mr. Climenko: If your Honor pleases, I cannot hear Mr. Sillett.

The Talesman: I am sorry. I said just casually in regard to my appearance as a juror, in the office and at home.

Q. So that the conversations then were limited to pros- [fol. 1075] pective jury service, in making arrangements in the event that you were commandeered in the jury panel?

A. Yes, sir.

Q. While you sat here and other questions were asked of prospective talesmen, I spoke of the nine lawyers that are in this case, former Assistant District Attorney Barshay and former Assistant United States Attorney Wegman and Mr. Climenko, who represent the defendant Buchalter. Do you know any of those three gentlemen?

A. No, sir, except from my experience here in court, my questions here in the court. I heard Mr. Barshay's name mentioned.

By the Court:

Q. How long have you been with the National City Safe Deposit?

A. About eleven years, ten and a half years in that branch.

Q. And how long have you lived down there in the Brighton Line?

A. Since 1927. I lived around the corner from where I am at the present time five years, and I have been in that house the rest of the time, almost ten years.

Q. You are about half way between the Kings Highway station and Neck Road?

A. Yes, near Avenue U station. Avenue T is one block from the station.

By Mr. Turkus:

Q. Does that hold true with respect to former Judge Talley, who represents the defendant Weiss, former Assistant District Attorney James I. Cuff, and former Assist- [fol. 1076] ant United States Attorney Kriendler, all of whom represent the defendant Weiss?

A. Yes, sir.

Q. With respect to the three lawyers that represent Mr. Capone, Messrs. Rosenthal, Fischbein, and Rosenberg, do you know any of those three?

A. No, sir, except here in court.

Q. Do you know anyone connected with their respective law offices?

A. No, sir.

Q. Do you have the acquaintance with any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Is the name of William W. Kleinman or David Price a familiar name from the standpoint of a criminal lawyer?

A. No.

Q. Or that of Saul Price, former Assistant District Attorney of Manhattan?

A. No, sir.

Q. Do you know District Attorney O'Dwyer personally?

A. No, sir.

Q. Do you know any member of the District Attorney's staff by way of an Assistant District Attorney, intimately?

A. Well, I know one gentleman, Mr. Morehouse. I think he is a member of the staff.

Q. Yes, he is in charge of the Grand Jury. Would your acquaintance with Mr. Morehead in any wise affect your ability to be a fair and square juror deciding this case on the evidence?

A. No, sir.

Q. I take it then that specifically you do not know Assistant District Attorney Joseph Klein or Turkus?

A. No, sir, except here.

[fol. 1077] Q. Did you enjoy the acquaintance of any member of Mr. Geoghan's staff?

A. No, sir.

Q. Or did you know Mr. Geoghan personally when he was the District Attorney?

A. No.

Q. Have you heretofore served as a juror in a criminal case?

A. Never.

Q. Have you served as a juror in a civil case?

A. No, sir.

Q. Then this would be, if selected, your initial experience?

A. I was called several times but excused for vacation or some reason or other.

Q. Is this the first time you have gotten as far as the present seat?

A. Yes, sir.

Q. If accepted as a juror, will you conscientiously endeavor to render a verdict that is in consonance with justice?

A. Yes, sir.

Q. Will you take the law in every aspect from the trial justice, Judge Taylor?

A. Yes, sir.

Q. Do you understand from hearing other jurors questioned that the only one in the court-room that tells the law to the jury is the presiding judge? No matter how many lawyers say what the law is, or no matter how many Assistant District Attorneys endeavor to tell you what the law is, is it your understanding you take it from one person, the presiding judge in the case?

A. Yes.

Q. If accepted as a juror, will you endeavor to apply the [fol. 1078] principles of law that the Judge gives you to the case at bar?

A. Yes, sir.

Q. There has been talk about the test to be applied to an accomplice. Did you hear some of that discussion?

A. Yes.

Q. First may I ask you, do you have any fault to find with a prosecution wherein the testimony of one of the co-participants in the commission of the crime is used against the remaining defendants?

A. No.

Q. Is your state of mind such that you would reject the testimony of a co-participant in the commission of a crime, no matter what the circumstances were? Do I make that clear?

A. As I understand, it must be corroborated.

Q. That is right. What I want to find out is this: whether or not you have some inherent prejudice or bias against the testimony of an accomplice as would cause a prospective juror to reject the testimony no matter how corroborated or no matter what the circumstances?

A. No, sir.

Q. So then may I go along now with the understanding that the prosecution, neither the prosecution of the case nor the prosecutor has any handicap by way of prejudice against the testimony of an accomplice?

A. No, sir.

Q. Of course you look at the accomplice and see who he is, will you not? If he has been steeped in crime in the past, if he has been guilty of murders, if he has been committing vicious criminal and immoral acts all his life, if [fol. 1079] he has been associating with criminals, will you take all of those things into consideration when you weigh his believability?

A. Yes, sir.

Q. That is the kind of a person whose testimony you are going to look at with care and caution; isn't that right?

A. Yes, sir.

Q. Do you have any feeling that just because a man has been a criminal or just because he has committed vicious or immoral acts, that he could never tell the truth?

A. No.

Q. If you are taken as a juror, will it be your job to see whether that accomplice or that co-participant in the crime is telling the truth about this murder case?

A. Yes, sir.

Q. Of course, as the manager in the safe deposit vaults, you meet a pretty high type of citizen that goes in and out of the building, I assume, from day to day?

A. Yes, sir.

Q. There is a certain type of tests that people apply in their every-day business experience. In every-day business experience you do not meet people who commit this kind of crime; you do not meet criminals. Will you use common sense and understanding in applying tests to the testimony of an accomplice?

A. Yes.

Q. Or a co-participant in a crime?

A. Yes.

Q. Of course, is it your understanding from the law that has been discussed heretofore with other prospective jurors, that even if you believe an accomplice, if that is the only testimony in the case, that is, testimony emanating from [fol. 1080] an accomplice, even if you believe it and even if you felt that the defendants were implicated in the commission of the crime that the accomplice says they are, even if you believe that, that is not sufficient as a matter of law, and your duty would be to acquit.

A. Yes, sir.

Q. Will you give everything to the defendants that the law of the land says men charged with crime should have?

A. Yes, sir.

Q. And you will take that law from Judge Taylor?

A. Yes, sir.

Q. Give them every Constitutional right that they are supposed to have, every safeguard and every security that the law says defendants should have?

A. Yes, sir.

Q. By the same token, if, after you have heard the testimony of an accomplice and you are satisfied that the accomplice is telling the truth in this murder case and telling the truth about these defendants, and the part that they played in the murder, and then there is other evidence in the case which tends to connect the defendants with the commission of the crime, and you are satisfied beyond a reasonable doubt that these defendants at the bar, Buchalter, Weiss, and Capone, are guilty of murder in the first degree, would you have any hesitation in saying so in your verdict?

A. No, sir.

Q. Now, something has been said here to other prospective talesmen about using independent judgment and specifically about the use of the word "arbitrary" by the prosecutor with respect to another prospective talesman.

[fol. 1081] You understand the meaning of "arbitrary," do you not, Mr. Sillett?

A. Yes, sir.

Q. As distinguished from being arbitrary, will you, if selected as a juror, deliberate the case with common sense and reason with the other jurors?

A. Yes, sir.

Q. And free, of course, from any rancor or bitterness?

A. Yes, sir.

Q. And you will use the God-given brains you have got in figuring the case out; is that correct?

A. Yes.

Q. You understand that will be your job as a juror?

A. Exactly.

Q. And of course to listen to the common sense and the experience and the beliefs, with reason, that the other jurors have?

A. Yes.

Q. I take it, then, in your every-day business experience you have problems that you must iron out in conjunction with others?

A. Yes, sir.

Mr. Climenko: I object to that question, if your Honor pleases; there are problems that have to be ironed out, and this is not akin to that situation.

The Court: Sustained.

Q. Let me ask it to you this way, Mr. Sillett: Have you had experience in discussing problems with other people and in making decisions?

A. Yes, sir.

Q. Do you understand that there is no mystery in jury service, there is nothing mysterious about your job? You [fol. 1082] are here to find out are these three men guilty of murder in the first degree, or are they innocent; is that correct?

A. Yes, sir.

Q. And if selected as a juror in the case, will you devote your mental talents to finding that out?

A. Yes, sir.

Q. If selected as a juror in the case, will you conscientiously endeavor to do justice in the case?

A. Yes, sir.

Q. If after you have heard all the evidence in the case and you are satisfied and your mind has been satisfied beyond a reasonable doubt that at this bar of justice there are three guilty men who are guilty of the crime of murder in the first degree, the murder of Joseph Rosen as charged in the indictment, would you hesitate to say so?

A. No, sir.

Q. Would you have any fear or reluctance in so saying?

A. No, sir.

Mr. Turkus: No challenge for cause.

By Mr. Barshay:

Q. Mr. Sillett, were you promoted to your present position after years of faithful service to your company?

A. Well, no, sir, not exactly. I was made manager of that branch after a short training.

Q. And may I say, complimentary, of course, that you started from the bottom and they gave you a higher job and finally they made you manager?

A. Well, not exactly. I was made manager at the time after receiving training. I was made manager of that branch and I have been manager ever since.

[fol. 1083] Q. And before you managed, sir, may I know what you did?

A. That is the safe deposit company.

Q. Did you take charge of the men who came in or the women who came in and applied for safe deposit boxes?

A. Yes, sir, that is the business, renting safe deposit.

Q. Were you armed yourself?

A. Do I carry a gun?

Q. Not now, then.

A. I have a license to carry a gun, either on person or in protection of bank property.

Q. And the gentlemen who work alongside of you also have permits to carry guns, I take it?

A. Yes, sir.

Q. Are any of them special policemen?

A. Yes.

Q. Did you ever come under that category? Did you personally come under that category, a special policeman?

A. Not in that sense, only in my position as manager that I have that permit to carry a gun.

Mr. Climenko: We cannot hear.

Q. Mr. Turkus has suggested to you that men come into your place of a better class. That was the intimation. Is that so?

A. Average class of people, most of the better class.

Q. You also have experience with men who come in and apply for vaults under assumed names, isn't that so?

A. It is possible they may.

Q. You do not know?

A. We do not know.

Q. In other words, the mere fact that a man comes in well dressed and he makes out an application and he is [fol. 1084] well spoken, you have not any way to find out that that man is giving even his right name and address?

Mr. Turkus: I object to this, has nothing to do with the qualifications.

Mr. Barshay: It may, Mr. Turkus.

Mr. Turkus: All right, I still object.

The Court: Sustained.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. Did you ever personally come across men who had later developed to have been customers of your company under fictitious names for the purpose of concealing the real truth of their identity?

A. I know there are such people.

Q. You do know?

A. Yes, sir, who use fictitious names.

Q. So that the experience you had in dealing with that type of person you shall use, if such person or a like person should take the stand and raise his hand to tell the truth?

Mr. Turkus: I object to it. There is nothing in the statement of the prospective talesman that would warrant the embracing of those facts.

The Court: Sustained.

Mr. Barshay: Exception.

Q. In other words, you don't take a man's word merely because he gives it or raises his hand to give it; isn't that so?

A. That is true, yes, sir.

[fol. 1085] Q. You said you knew Mr. Morehead. He is the head of the Indictment Bureau. Are you an intimate friend of his?

A. Well, I know him well. He is a member of my church.

Q. A member of your church?

A. Yes.

Q. Is he a member of your lodge?

A. No, sir.

Q. Is he a member of your club?

A. No.

Q. Did you know him a long time?

A. Probably two years, a year and a half.

Q. Then you know him since he has become Assistant District Attorney?

A. Yes, I knew that he was in the law business, and recently I learned that he was in the District Attorney's office.

Q. Did you ever talk to him about his cases or his work?

A. No, sir.

Q. Did you ever speak to him about the work of the District Attorney's office at your church?

A. No, sir.

Q. Did you ever hear him lecture at any time or any place?

A. Not at all, just in church matters, that is all.

Q. Of course you know, sir, that the presumption of innocence is given to every defendant?

A. Yes, sir.

Q. And I take it you know, too, a man of your experience, that the Grand Jury may indict an innocent man?

A. Yes, sir.

Q. You believe that, don't you?

A. Yes, sir.

Q. And you know that Mr. Buchalter is presumed innocent of the charge against him as any human being alive today in any place?

A. Until he is proven guilty, yes, sir.

[fol. 1086] Will you give him that presumption?

A. Yes, sir.

Q. Have you read about the case?

A. No, not at all.

Q. Never?

A. No.

Q. You now have learned that it is a highly publicised case?

A. Yes, I came here on August 4th and was told, instructed by the Judge to, not to read or to listen to anything about it.

Q. Would you mind telling me the papers you read?

A. Ordinarily the *Times* and the *Sun*, more often, occasionally the *Telegram*.

Q. And in any of those papers did you ever read about this case at all?

A. No, sir.

Q. Before you came here?

A. No, sir.

Q. Did you ever hear the name of my client before you came here?

A. Ju casually.

Q. Did mention of his name cause an unfavorable impressio .

A. No, sir.

Q. With you?

A. It could not, because I did not read anything about this case. I did not know anything about the case except that there was a murder five years ago.

Q. It is an alleged murder with respect to our clients.

A. I beg pardon.

Q. You understand that?

A. Yes.

Q. It is an alleged charge of murder with respect to our clients.

A. That is true, yes, sir; I should not say it is a murder. [fol. 1087] Q. Because at present it is merely an accusation?

A. Yes, sir.

Q. He said, "Not guilty."

A. Yes.

Q. So that am I to understand that you are free of knowledge of the facts of this case?

A. Positively, yes, sir.

Q. And that includes the time you spent here listening to other jurors?

A. I mean except the matter which has been brought out in this court.

Q. And while you were sitting here, sir, did you form any opinion?

A. Nothing at all.

Q. Did you take any sides at all?

A. No, sir. There has nothing been presented. To my mind there has been nothing presented.

Q. So you are free of bias?

A. Positively.

Q. Free of sympathy, free of prejudice?

A. Yes, sir.

Q. And you are ready to become a searcher for truth; is that so?

A. Yes, sir.

Q. That is what a juror is, a person who searches for truth, because in every court every day people take the stand and say that they are telling the truth, but only one side can be. You understand that?

A. Yes, sir.

Q. And as an individual you shall search for the truth where it lies.

Mr. Barshay: May we suspend, sir?

The Court: It is too interesting. Go ahead.

[fol. 1088] Q. Now, Mr. Sillett, sometimes testimony is subject to two interpretations. If the Court shall tell you, not I, if the Court shall tell you that any piece of testimony which is subject to two interpretations, of innocence and of perhaps guilt, you must give it the innocent interpretation, will you follow that law?

A. Yes, sir. If the Court instructs me, yes, sir.

Q. Knowing a little bit about law, I take it that the Court will charge you that, and if he does not, don't do it.

A. Yes, sir.

Q. And if the Court shall charge you that where there is a doubt in your mind which side to accept. the innocent one or perhaps the guilty one, even under those conditions you must accept the innocent one——

A. Yes, sir.

Q. —will you follow that law?

A. Yes, sir.

Q. And if the Court shall tell you that any doubt in this case based upon reason arising from the evidence must be resolved in favor of the defendants at every occasion, will you follow that law?

A. Yes, sir.

Q. Have you formed any opinion with respect to the source of the testimony that shall be presented by the prosecution?

A. No, sir, no impression.

Q. You know by now out of the questions that he himself has asked, that it is not coming from clean sources; you know that?

Mr. Turkus: Just a minute.

Mr. Barshay: I should modify it, Mr. Turkus. You are [fol. 1089] right.

Q. I am not speaking of expert testimony, police testimony or medical testimony. I am talking about that favored group of witnesses whom he shall present who admit out of their own mouths that they are criminals. That is the testimony I have reference to.

Mr. Turkus: I object to the statement implying the use of the word "favored," carrying with it implications.

The Court: You cannot make any specific assumptions as to what the evidence of your adversary may be.

Mr. Barhsay: I will leave out the word "favored."

Q. Any testimony.

The Court: You have reached the agreed time. We will continue at ten o'clock in the morning. First the court will be in order while the defendants are remanded. Members of the panel will remember the instructions previously given.

(Whereupon an adjournment was taken to Friday, October 3, 1941, at ten o'clock a. m.)

[fol. 1090] Peo: v. Louis Buchalter.

Brooklyn, N. Y., October 3, 1941.

Trial Resumed

(At the direction of the Court, the clerk called the following names to fill the jury box: Edward Groden, No. 2718; Leon Wallach, No. 2806; Paul S. Batterson, No. 2697; Alfred J. Cleary, No. 2633; William Farrell, No. 2633; Charles A. Murphy, No. 2796; Leo Ross, No. 2588.)

The Court: All other talesmen may go until Monday morning at ten o'clock. Remember the admonition of the Court.

HARRY SILLETT, No. 2759, of 1716 Avenue V, Brooklyn, New York, resumed the stand and was further examined as to his qualifications to serve as a juror.

By Mr. Barshay:

Q. You said you sat on a jury here once before, sometime in 1935?

A. No, sir, there must be some mistake.

Q. You never sat on a jury?

A. No, sir, I was called several times and was excused for some reason or other.

Q. You applied for an excuse, didn't you?

A. Yes, sir, on August 4th I applied for an excuse on account of my vacation, which started that day, and the Judge, as you know, held over all jurymen until the following morning, and then, as I understand it, the prisoners were remanded until September 15th, and all the jurors were excused and told to be here at that time.

[fol. 1091] Q. So you have had your vacation?

A. Yes, sir, I have had my vacation.

Q. Is your business of such a nature that a long and protracted trial, as this must be, will interfere with you?

A. Well——

The Court: The Court has ruled on that. Counsel may not excuse jurors.

Mr. Barshay: I respectfully except to your Honor's remark that I was seeking to excuse him.

Q. I was trying to find out whether or not your business was of such a nature that if you were here a long time your judgment might be affected.

A. Why, no, sir, personally I feel, as a citizen, it is my obligation to serve as a juror, regardless of the nature of the case, but my employers, I believe, would rather I serve at some other time, if it was convenient to the Court, on the ground of several men being away, one being sick and the others are still on vacation, but as far as I know, that is the only reason. I do not think that would affect me mentally. I don't see how it should.

Q. Your employer's attitude toward jury service will not worry you in the slightest degree?

A. No, sir.

Q. You have heard many times the question put to other jurors about the burden of proof, etc.?

A. Yes, sir.

Q. Having heard those things and having kept them in mind, would you require the defendant to offer any proof in this case?

[fol. 1092] Mr. Turkus: That is a leading question.

Mr. Barshay: I have laid the foundation without repeating it; I wanted to save time in questioning. The gentleman is intelligent.

By the Court:

Q. If the Court should charge you there is no burden of proof upon the defense, will you follow instructions?

A. Yes, sir, explicitly, if the Court should so charge.

By Mr. Barshay:

Q. If the Court should so charge you, and undoubtedly it will, do you, nevertheless, subconsciously or otherwise, expect some explanation to come forth from the defense?

A. I am afraid that if you put that question I will have to have it in connection with the other you previously asked —what was the other question? In other words, can you form it a little differently?

Q. If the Court should charge you that the defendant need not take the stand and because of that no unfavorable inference can be drawn against him, you said you would follow that rule?

A. Yes, sir.

Q. Despite the Court's charge, I ask you would you require—subconsciously or otherwise in your mind, coming to the conclusion that the defendant here ought to make some explanation of the accusation against him?

A. No, sir, I have not anything in my mind on that at all.

Q. So that at no time would you require any explanation [fol. 1093] in dispute of any fact from the defendant?

A. No, sir.

Mr. Turkus: I object; he has already answered.

The Court: Objection sustained.

Q. If the Court should charge you that the burden of proof remained always with the prosecution and that it never shifted in any respect whatever to the defendants, do you think you could follow that law?

A. Yes, sir.

Q. There will be testimony offered here in the nature of testimony tending to corroborate a so-called alleged accomplice. Will you consider the source of that corroborating testimony?

A. I certainly will.

Q. Will you accept it with the same degree of care that you would accept any alleged accomplice testimony?

A. Yes, sir.

Q. Would you look into the motive of the alleged corroborating witness?

A. Yes, sir, I feel I must regard the motive.

Q. What he is getting or what he hopes to get for his testimony. Will you take into consideration the fact that they too led a life of crime before you begin to consider the truth or falsity of the other testimony?

A. Yes, sir.

Q. So if some person says at some place, they shall pick the place, one of the defendants or more made an alleged admission, an oral admission, some years later, will you take into consideration why that testimony is now being given on the stand?

A. Yes, sir.

Q. And who it is that is giving it?

A. Yes, sir.

[fol. 1094] Q. And the treatment he has received?

A. Yes, sir.

Q. And what he said about it when he was asked about it originally?

A. Yes, sir.

Q. If you find that he himself has admitted being a perjurer, you will weigh it more heavily?

A. With due regard, yes, sir.

Q. In other words, you shall search for the truth as each witness takes the stand, no matter who he is?

A. Yes, sir.

Q. You have already heard the rule that one accomplice cannot corroborate another?

A. Yes, sir.

Q. You believe that—you will enforce it?

A. Yes, sir.

Q. Now I ask you if you will take the definition of what "tends to corroborate" means from the Court?

A. Yes, sir.

Q. If the Court shall tell you that physical facts as testified to by an alleged accomplice, for example, someone may say, "Rosen was shot," and then the police came and found the body shot, if the Court shall tell you that alone does not tend to corroborate the commission of this crime with respect to any defendant, if that is all that is shown, you will follow that law?

Mr. Turkus: Tending to corroborate—that is not the law. The law is, "tending to connect," and it has been said repeatedly now, three or four times, to the talesman, and it might give him a confused notion of the law.

Q. Did you understand the question I put to you?

A. Yes, sir.

Q. In other words, the Judge shall charge you that mere [fol. 1095] physical corroboration of a person's testimony, without any other testimony tending to connect the defendants with the commission of the crime, is insufficient. Will you follow that?

A. Yes, sir.

Q. That is what I meant when I said to you if somebody should testify that Rosen was shot, and after that a policeman may come and say, "Yes, I found the body exactly where it was described to be by the alleged accomplice," that does not tend to connect any of the defendants with the commission of the crime; you understand that?

A. Yes, sir.

Q. That is not the kind of corroboration upon which you have a right to convict, and I take it the Court shall so charge you.

A. Yes, sir.

Q. In other words, you shall look for testimony that tends to connect the defendants with participation in this crime.

A. Yes, sir.

Q. And you will be the judge of what that testimony is.

A. Yes, sir.

Q. Its weight, its truth or its falsity?

A. Yes, sir.

Q. Whether a man says he is an accomplice, it will be for you to decide, taking into consideration that heretofore he said he was not, if that should be the fact?

A. Yes, sir.

Q. If a man says he is not an accomplice, you would be the one to decide whether he is or is not?

A. Yes, sir.

Mr. Turkus: I object. The Judge may charge as a matter [fol. 1096] of law that the witness is not an accomplice.

The Court: That is true. You see—maybe I can make it plain—there may be a dispute in evidence as to whether a certain witness was an accomplice or not. There may be evidence indicating he is and there may be counter-evidence indicating he is not. In a case of that kind the Judge cannot decide whether he is or is not. That has to be left to the jury. You understand that?

The Witness: Yes, sir.

By Mr. Barshay:

Q. That is the import of my question, it will be up to you.

A. Yes, sir, I understand that in all things like that I would not receive any special instructions from the Judge.

Q. In that respect you are the judge of the true facts in this case?

A. Yes, sir.

Q. Now, if the Court shall tell you that character has nothing to do in this case unless it is placed in issue by any of the defendants, will you consider it in any respect?

A. Not if the Court instructs me, I certainly will not.

Q. Just at present the character of any person is not in issue.

A. At present, yes, sir.

Q. It may never be in issue at all.

A. Yes, sir.

Q. Will you hold anything against our client because of his past incarceration?

A. No, sir.

Q. Or his present incarceration?

[fol. 1097] A. No, sir, not in this case.

Q. You know that has nothing to do with the case whatever?

A. Yes, sir.

Q. No matter what you may think of the facts, the issue here to be tried is, "Did he shoot and kill Rosen as alleged in the indictment?" and nothing else?

A. Yes, sir.

Q. Is there a reason in your own mind which would preclude you from rendering an absolutely impartial verdict in this case?

A. Nothing that I know of.

Q. Neither your business, the element of time, your hearing the questions put to prospective jurors, or any other item?

A. No, sir, except the one I mentioned; I feel it would not affect me mentally.

Q. Because you are called as a special juror, I take it you do not feel you owe a special obligation to the community which calls you—I mean, you owe no special obligation to either side in this case?

A. No, sir, only to do what is right according to my intelligence.

Q. You will consider the evidence in this case as against the persons against whom it is given?

A. Yes, sir.

Q. And you won't use it against any other person except as charged by the Court?

A. Yes, sir.

Q. Will you take it and try, from the entire evidence, to draw one complete conclusion, or will you divide it as against each defendant?

A. As I understand it, there are three separate defend-
[fol. 1098] ants and the evidence against them will be considered individually.

Q. Sometimes it may go over a long period of time, when you hear a great number of witnesses testify, and you have to subdivide the testimony—that is why we want intelligent jurors. Do you think, based upon your experience and background in life, you can keep mental track of what is going on with respect to each defendant?

A. Yes.

Q. Because of the number of lawyers present in court, is there any bias with respect to any of the defendants?

A. Not at all.

Q. The number of lawyers has nothing to do with it?

A. No, sir.

Q. Now, a great number of names have been read to you and to other jurors by Mr. Turkus—frankly, I do not know their import now—but unless there is some connection with respect to those people and this case, you will not be influenced by those names?

A. No, sir, there is no connection in this case, as I understand it, unless it shall appear in the evidence.

Q. In other words, I take it that you can strip this case of every bit of atmosphere that may creep into it, willingly or not?

A. Yes, sir.

Q. And get down to the issue?

A. Yes, sir.

By Mr. Cuff:

Q. I don't remember whether you were asked as to prior service as a juror. Have you ever served on a jury?

A. No, sir; I have been called and excused several times, [fol. 1099] mainly on account of vacation.

Q. You have heard, while you sat here waiting to be called and during your examination, something about reasonable doubt.

A. Yes, sir.

Q. If his Honor shall charge you, providing you are selected as a juror, that reasonable doubt is a doubt founded upon the evidence or lack of evidence in the case, will you follow that instruction?

A. Yes, sir.

Q. If you find, after your consideration of the evidence and after listening to every reasonable argument of your fellow jurors, based upon the evidence or lack of it, that you have a reasonable doubt as to any or all of the defendants, do you realize that it is your solemn duty to vote for acquittal in that case?

A. Yes, sir

Q. By giving the benefit of that doubt to the defendant or defendants?

A. Yes, sir.

Q. Do I have your assurance that you have the courage to do that, *not* matter how many of your fellow jurors may be against you?

A. Yes, sir.

Q. Do you also realize that it is your solemn obligation, if that reasonable doubt is in your mind as a result of your own study of the evidence, after listening to all arguments of your fellow jurors, you still believe that you are right in entertaining that reasonable doubt, will you adhere to it [fol. 1100] despite the time it may consume or any other consequences?

A. Yes, sir.

Q. You will not be influenced by the fear of being charged with having hung a jury in that case, will you, as has been indicated here?

Mr. Turkus: I object to the gratuitous remark tacked on the rear of it.

The Court: Objection overruled.

A. No, sir.

Q. As you sit there do you have any preconceived idea as to whether or not the defendant shall take the stand?

A. No, sir.

Q. Have you ever had any idea like that?

A. No, sir.

Q. Never expressed any?

A. No, sir, I understand the privilege of law for the prosecuting attorney to do that if he wishes.

Q. I don't understand you.

A. Pardon me, will you shorten the question.

The Court: That is a bar examination question.

Mr. Cuff: I don't think it is a bar examination question, Judge. If you want to listen to the question I think you will find it is not.

The Court: If objection is made, the Court will sustain it.

Mr. Barshay: It is a legal question. I object.

The Court: Objection sustained.

[fol. 1101] Mr. Cuff: Exception.

Q. Have you heretofore expressed any opinion about the conclusion that you would draw in a criminal case if the defendant did not take the witness stand?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

Mr. Cuff: Exception.

Q. Now, if in the wisdom of counsel any one or all three of these defendants should not take the stand, and the

Court, as you understand, should charge that no juror can draw any unfavorable inference against the defendant who does not take the witness stand, would you follow that instruction?

A. Yes, sir.

Q. And will you insist upon your fellow jurors following it as well?

A. As far as in my power.

Q. You heard Mr. Turkus ask the other jurors—I don't know if he asked you—whether they would, if selected, prevent other jurors from discussing the question of punishment. You heard that question while you sat in the box?

A. Yes.

Q. I am asking you to assume the facts I assumed in the question I just asked, whether you would insist upon that situation.

Mr. Turkus: I object to that as having been already answered.

The Court: Sustained. He has no control over the discussion by his fellow jurors; he is responsible only for [fol. 1102] his own discussion.

Mr. Cuff: I was following the customs of the District Attorney, and I know your Honor permitted him to do it.

The Court: I did not hear it and I don't believe it was said. The question, if asked, would be nonsensical, and I would have interrupted it immediately.

Mr. Cuff: Exception.

Q. Are you taking or do you intend to take any active part in the present political campaign?

A. No, sir.

Q. Have you heard any of the members of the District Attorney's staff or the District Attorney himself lecture upon the subject of crime or any part of it?

A. No, sir.

Q. At no time?

A. No, sir—well, pardon me, I must answer truthfully. In 1915.

Q. I mean the present District Attorney or members of his staff.

A. Truthfully, to your question I would say no.

Q. The lecture which you heard in 1915, I assume, left no impression that you still retain?

A. No, sir.

Q. Well, now, during the course of the trial, if you are selected as a joror, you feel you can give your entire attention to the evidence and that when you go into the jury room you can consider it carefully, reasonably, draw the proper inferences from it, and return a proper verdict, uninfluenced by any other consideration except the credible evidence that you find from your examination of the testimony and the law as applied by the Court?
[fol. 1103] A. Yes, sir.

Mr. Rosenthal: I have no questions.
Mr. Barshay: No challenge for cause.
Mr. Turkus: The talesman is satisfactory to The People of the State.
Mr. Barshay: Challenge peremptorily by the defense.

Samuel Barruch, No. 2795, residing at 446 East 5th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. The trestle board lists your address at 446 East 5th Street.
A. Yes, sir.
Q. That is in Flatbush?
A. West of Flatbush.
Q. Would that be off Church Avenue?
A. That is between Beverly Road and Avenue C.
Q. Have you lived in Brooklyn for a number of years?
A. Practically all my life.
Q. This trestle board lists your profession or vocation as that of importer.
A. Yes, sir.
Q. What is the nature of the commodity you import?
A. Swiss watches.
Q. Where is your place of business?
A. 15 Maiden Lane, New York.
Q. Have you been engaged in the importation of watches [fol. 1104] for a number of years?
A. Over 25 years.
Q. I take it you are familiar with the charge in this case.
A. I am.

Q. You understand that these defendants at the bar, Buchalter, Weiss, and Capone, are charged with murder in the first degree, the killing of a man named Joseph Rosen?

A. I understand.

Q. Is there anything about the nature of the charge itself which would preclude you or impair your service as a juror in this case?

A. Not at all.

Q. May I go along with the understanding that you have no scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. And that, in so far as you are concerned, the question of punishment will not enter into your deliberations?

A. Correct.

Q. These defendants at the bar are represented by nine lawyers; in so far as Buchalter is concerned, he is represented by three, a former Assistant District Attorney named Barshay, a former Assistant United States Attorney named Wegman, and a man named Jesse Climenko, a partner of Mr. Wegman. Do you know any of those three lawyers?

A. No, sir, not directly; I know of them, though.

Q. You know of all three?

A. Two of them.

Q. Would that be Wegman and Climenko?

A. No, sir, Wegman and Mr. Barshay.

Q. Of course, you have aroused my curiosity.

[fol. 1105] A. It would not have any effect on the case. I happen to know a late cousin of Mr. Barshay's, and being affiliated in the Knights of Pythias I know Mr. Wegman.

Q. Mr. Barshay says you may be confused about his cousin. Which cousin is it?

A. Jack.

Mr. Barshay: He is not my cousin. That must be another family.

Q. Do you and Mr. Wegman belong to the same lodge in the Knights of Pythias?

A. No, sir, but I attend the lodge frequently, and he is past chancellor, the Aerial Lodge.

Q. In a broad sense, you are fraternal brothers in the Knights of Pythias?

A. Yes, sir.

Q. You state that will not affect your judgment in the case?

A. None whatever.

Q. Of course, some men in the District Attorney's office are likewise Knights of Pythias. Do you know Mr. Lustig from the Knights of Pythias?

A. I do.

Q. And Assistant District Attorney Brodsky?

A. No, sir, but I know of him.

Q. The defendant Weiss is represented by former General Sessions Judge Talley; do you know him?

A. No, sir.

Q. And former Assistant District Attorney Cuff.

A. I know of Mr. Cuff.

Q. Is that by reputation?

A. By reputation and hearing him speak.

[fol. 1106] Q. Did you hear him speak at a time when he was an Assistant District Attorney?

A. Yes, sir.

Q. Were those discussions on crime?

A. Yes, sir.

Q. The apprehension of criminals?

A. Yes, sir.

Q. Did these lectures leave any imprint in your mind?

A. None.

Q. Of those lawyers in behalf of Weiss one is former Assistant United States Attorney Kriendler. Do you know him?

A. No, sir.

Q. The defendant Capone has three lawyers, Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Rosenberg. Do you know any of those men?

A. No, sir.

Q. Do you know any lawyers or any staff assistants in the law offices of these respective lawyers?

A. No, sir.

Q. Do you know indirectly or closely any member of the bar who specializes in the defense of criminal cases?

A. Yes, sir.

Q. Who?

A. Sidney Gottesman.

Q. Did you know Mr. Gottesman at the time he was an Assistant District Attorney?

A. I did.

Q. Have you been friendly with him?

A. For over twenty years.

Q. Have you ever discussed crime and the appre-nsion of criminals or other prosecutions with Mr. Gottesman?

A. Well, in a general way; nothing specific.

Q. Has he stated cases that he has prosecuted, or discussed them with you?

A. Not in detail; I know when he was District Attorney he was prosecuting one or two cases here two years ago.

[fol. 1107] Q. Did you know Mr. Geoghan, the former District Attorney?

A. Yes, sir.

Q. Intimately?

A. No, sir.

Q. Do you know any other members of Mr. Geoghan's staff?

A. Well, I met quite a few of them.

Q. What I am trying to ascertain, is your relationship with Mr. Geoghan or any member of the staff such that you might, either consciously or subconsciously, resent the fact that this is a murder now being solved that was committed during the time Mr. Geoghan was District Attorney?

Mr. Barshay: I object to the question.

The Court: Objection sustained.

Q. What I want to know is—possibly I have stated it ineptly—will you have any fault to find with this prosecution of a murder which occurred in 1936, September, some five years ago, now that it is being prosecuted by Judge O'Dwyer, the present District Attorney of Kings County?

Mr. Barshay: I object to that.

The Court: Objection sustained. There does not seem to be any basis for it; it is too far-fetched.

Mr. Turkus: May I go into his acquaintance with the former members of Mr. Geoghan's staff any further, or am I precluded?

The Court: You are not precluded.

By the Court:

[fol. 1108] Q. You belong to men's clubs?

A. Yes, sir.

Q. Various public officials have spoken at those clubs from time to time?

A. Yes, sir.

Q. Some of the District Attorney's staff and a former District Attorney's staff?

A. Yes. I don't know just who in this present regime, but it was not only in that organization but in several other organizations I belong to. I am a former member of the Board of Governors of the West Flatbush Democratic Club.

Q. Mr. Geoghan was president of that?

A. Yes, sir, and also of the West Flatbush League.

Q. Aside from hearing Mr. Geoghan at meetings in clubs where he was a speaker, did you know him?

A. Well, from political grounds, campaigns, etc.

Q. You never played cards with him at your house?

A. No, sir.

Q. You have never visited his home?

A. No, sir.

Q. You do not know members of his family?

A. No, sir.

By Mr. Turkus:

Q. Have you any contacts, directly or indirectly, with any persons or firms in the Brownsville or East New York area of Brooklyn?

A. No, sir.

Q. Have you had any in the past?

A. Not for twenty-five years.

Q. Have you any contacts, directly or indirectly, with any persons or firms who do business in the garment dis-[fol. 1109] trict in Manhattan?

A. I know quite a few.

Q. Have you had any contacts with those people?

A. Practically social, counsel.

Q. Are they manufacturers of clothing?

A. Dress goods and ladies' cloaks and suits.

Q. In meeting these people socially did you ever hear discussed the names of Lepke and Currah?

A. No, sir.

Q. Did you ever discuss any of the business in the garment district?

A. No, sir.

Q. Since your name appeared as a prospective talesman and specifically since you received your slip, did anybody speak to you about this case?

A. Only casually—casual comment of being selected as a juror for it.

Q. Would that casual comment be at your place of business?

A. Yes, sir, it could be.

Q. Was it more than at your business or at your home, in regard to jury service?

A. It would be less at my place of business than at my home.

Q. It has been discussed at your home?

A. Yes, sir.

Q. Has there been any discussion about the facts?

A. No, sir.

Q. Or about the defendants?

A. No, sir.

Q. The discussion was limited to the liability on your part of being stuck with jury service?

A. Correct.

By the Court:

Q. There are a good many Swiss watches being imported today?

[fol. 1110] A. Yes, sir, quite a few.

By Mr. Turkus:

Q. As a matter of fact, you cannot supply the demand?

A. No, sir, but the supply is coming in bigger than it has been in the past. They are bringing over everything they possibly can.

Q. I notice you pleaded to be excused at one time when this case was called before the Court. Does that reason exist now?

A. More so now than ever.

Q. Is it of such a nature at present it will affect your deliberations in the case?

A. I think it would keep me on edge, yes, sir.

Q. Do you think it would impair your service as a juryman?

A. It is a thought, that is all; it may and may not. I could not give you a definite answer that way. It may break up my business completely, and I am in a one-man business.

Q. Of course, both The People of the State and the defendants as well are entitled to one hundred per cent service on the part of the jury in weighing the case. Is there some such matter present in your mind as would impair your service as a juryman—that is as far as I can go with the proposition.

A. No, sir.

Q. Was it a matter in connection with your business?

A. Yes, sir.

Q. Those people you know in the garment district, as I understand it, are social contacts?

A. Yes, sir.

[fol. 1111] Q. All manufacturers of men's and ladies' garments?

A. Of ladies', principally.

Q. Did you ever discuss with those people the names of any defendant in this case?

A. No, sir.

Q. Or about any investigation conducted by either Thomas E. Dewey, the District Attorney of Manhattan, or Mr. O Dwyer, the District Attorney of Brooklyn?

A. No, sir.

Q. Did you ever hear any view expressed about the Dewey investigation or the O'Dwyer investigation from people who have occupied positions in the garment district?

A. No, sir.

Q. Have you had any contact of any kind, nature, or description on the Brooklyn waterfront?

A. No, sir.

Q. Or in Manhattan?

A. No, sir.

Q. Have you had any in the past?

A. No, sir.

Q. Has business or any other type of contact brought you into connection with people in the clothing trucking business?

A. No, sir.

Q. Or clothing truckers of any kind?

A. No, sir.

Q. Or teamsters?

A. No, sir.

Q. Is there any familiarity with the name of Murray Weinstein, manager of the Cutters Union, Local No. 4, affiliated with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any familiarity with the name of Samuel Katz, an officer of the Clothing Cutters Union, Local No. 4?

A. No, sir.

[fol. 1112] Q. Do you know any official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Do you know Bruno Belia, an organizer for the Amalgamated? Does that name mean anything to you?

A. No, sir.

Q. Or that of Salvatore Marazzano?

A. No, sir.

Q. Do you know any official of Local No. 240 of the Clothing Drivers & Helpers Union?

A. No, sir.

Q. Either by way of anything you have heard or discussed, is the name of Philip Orlofsky at all familiar to you?

A. No, sir.

Q. Is there any significance in the name of Max Silverman and Wolfie Goldis?

A. No, sir.

Q. Do you have any social contact in Sea Gate, Brooklyn?

A. Well, on very rare occasions.

Q. Do you know a lawyer named William W. Kleinman or David Price?

A. No, sir.

Q. Or a former Assistant District Attorney of Manhattan, a lawyer named Sol Price?

A. No, sir.

Q. Is there any significance in your mind to the name of William Alberts, a one-time bondsman?

A. No, sir.

Q. Does the name of Bellanca or the name of Tosca mean anything to you?

A. No, sir.

Q. Or that of Hymie (Curley) Holtz?

A. No, sir.

Q. Or Abraham Beckerman?

A. No, sir.

Q. In anything you have heard discussed by people you know in the garment district, has the name of Terry Burns [fol. 1113] or the name of Abie Slabo any significance?

A. No, sir.

Q. Or the name of Emanuel Buchalter, or Philip Kowas, are they at all familiar?

A. No, sir.

Q. Or the name of anyone whose surname is Weiss, in the automobile rental business?

A. No, sir.

Q. Coming back to the officers, the Assistants, in charge of the prosecution, do you know specifically Assistant District Attorneys Joseph, Klein, or Turkus?

A. No, sir.

Q. Other than Mr. Lustig, do you know any other member of the District Attorney's office?

A. I have not followed them up; I may know them, but I do not know in what capacity they are today, so I will say no.

Q. Would the fact that you know Mr. Lustig and you enjoy membership in some fraternal organization, the Knights of Pythias, would that in any way affect your deliberation or judgment as a juror?

A. No, sir, none whatever.

Q. The same applies to him as does to Mr. Wegman?

A. Yes, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, sir.

Q. I did not quite hear what you said to the Judge in regard to some questions that were put to you about hearing lectures on the apprehension of criminals and the prosecution of crime by members of the District Attorney's staff.

A. I heard several of them, because I am affiliated with the West Flatbush League and Men's Club and attend [fol. 1114] meetings of several other men's clubs from time to time.

Q. Were those discussions given recently?

A. I have not attended one in the past eight months or more.

Q. Were any of the lectures you heard upon the O'Dwyer investigation?

A. Yes, sir, one of them was.

Q. Was that given by a member of Judge O'Dwyer's staff?

A. It was.

Q. Was there mention made of cases that had been tried in the past?

A. I do not recall specifically the minute details of it.

Q. Did that discussion leave any impression on your mind?

A. It did.

Q. Would you say the impression amounts to an opinion?

A. It does.

Q. Is it an opinion that is unfavorable to the defendants?

A. At the present moment, yes.

Q. Is it an opinion you can lay aside?

A. I can.

Q. Do you say that with all frankness you can definitely lay aside that opinion?

A. I do, in all fairness.

Q. The People of the State of New York and the defendants at the bar are entitled to a jury which will decide the case on the evidence, free from any opinion or impression that you may have formed from the outside reading of any other matter.

A. I understand that.

The Court: That is not strictly so. It must be an opinion [fol. 1115] as to the guilt or innocence of this charge, or one which could not be laid aside.

Q. In other words, The People of the State of New York want jurors who will sit in this box—and I am sure the defendants want the same thing—who will decide the case on what they hear in court.

A. That is correct.

Q. And you feel now that you can lay aside that impression which you have?

A. I do.

Q. Have you read anything in the press concerning the investigation of Judge O'Dwyer?

A. Yes, sir.

Q. What papers do you customarily read?

A. I customarily read the *Times* and the *Sun*, and I happened to read some instalments in the *Evening Journal* up to several months ago.

Q. Did those instalments refer to Judge O'Dwyer?

A. Yes, sir.

Q. Those were the ones that discussed his career when he came over to America and how he worked himself up?

A. Yes, sir.

Q. In reading any of those articles in the press, have you formulated some impression or opinion with respect to this case?

A. I have formed an opinion as to this case, yes, but, as I said before, I could lay it aside.

Q. Have you heretofore served as a juror in a case?

A. No, sir, none.

Q. Have you been seated in the jury box where you have had the benefit of listening to the Judge's instructions on the law?

A. Many years ago.

[fol. 1116] Q. I take it while you were sitting here you heard expounded by the various attorneys, including the District Attorney, the benefit of the presumption of innocence, the doctrine of reasonable doubt, the burden of proof, and other matters which are essential to a criminal case?

A. I have.

Q. Will you take the law in its every aspect from Judge Taylor?

A. Yes, sir.

Q. Regardless of who the counsel are in the case, regardless of whether it emanates from the prosecutor or the defense table, you will take the law only from the Judge?

A. Yes, sir.

Q. Now, the defendants at the bar of justice in every criminal case are entitled to a presumption of innocence. They are presumed to be innocent until their guilt is established beyond a reasonable doubt, and if you are so instructed will you follow the Court's rule?

A. Yes, sir.

Q. And give the benefit of the doubt to the defendants?

A. Yes, sir.

Q. If you are instructed that the burden of proof is always upon the District Attorney, that it never shifts, that it constantly remains with him from the start to the

finish to establish guilt beyond a reasonable doubt, will you follow that instruction of law given you?

A. Yes, sir.

Q. If you are told by the Judge that the defendants have no burden in the case, they can sit mute and say nothing, leaving the matter entirely up to the prosecution to es- [fol. 1117] tablish their guilt beyond a reasonable doubt, and that if they do sit mute you can draw no unfavorable inference against them, will you follow those instructions?

A. Yes, sir.

Q. In short, will you give these defendants at the bar of justice every Constitutional, legal right that the law of the land says they should have?

A. I will.

Q. Now, if the prosecution establishes to your satisfaction beyond a reasonable doubt that at this bar of justice there are three men who are implicated in the murder of Joseph Rosen and who killed Joseph Rosen as charged in the indictment, will you hesitate to say so?

Mr. Rosenthal: I object.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I would not hesitate.

Q. There has been some talk by the defense lawyers about apportioning evidence in the case. With respect to such evidence as applies only to one of the defendants, will you take the instructions of law as given you by the Judge?

A. Yes, sir.

Q. Should it develop there has been a conspiracy in which these defendants and others participated in the killing of Joseph Rosen, and certain things were done in pursuance of the conspiracy, will you follow the instructions of law in a manner in which you can allocate the evidence in a conspiracy case?

A. Yes, sir.

[fol. 1118] Q. Do you find any fault with the prosecution of an indictment wherein the case is broken from the inside and the testimony of co-participants in the commission of the crime is used against a defendant?

A. No, sir.

Q. Do you find any fault with the prosecutor for using that type of testimony?

A. No, sir.

Q. With respect to the weight you are going to give to accomplice testimony or participants in a crime, will you follow the instructions that may be given you by the Judge?

A. Yes, sir.

Q. Will you take into consideration everything adverse to the accomplice, namely, his character or lack of character, whom he associated with, and what kind of criminals he went out with and the kind of crimes he committed, and every black mark on his slate? Will you consider that in weighing his testimony?

A. I will.

Q. Will you consider every rotten and miserable thing, and every immoral and criminal act he has ever done in his lifetime?

A. Yes, sir.

Q. Will you, too, use your common sense and understanding in finding out whether this accomplice or these accomplices in the murder are telling the truth about these defendants and their participation in the Rosen murder?

A. I will.

Q. Now, in your every-day business, as one of the lawyers pointed out, you use various tests to apply to people you [fol. 1119] come in contact with?

A. Yes, sir.

Q. Will you keep in mind we are not dealing with wages or bankrupts, but we are dealing here with a murder case?

A. Yes, sir.

Q. And that there will be some kind of characters whom you do not ordinarily meet in your every-day life?

A. I understand.

Q. Will you give your God-given brains and understanding in finding out, "Is this individual or accomplice telling the truth about these defendants in connection with the Rosen case?"

A. Yes, sir.

Q. Even if you believe the accomplice, the Judge will tell you, even if you believe everything he says is Gospel truth, and even if you believe his testimony that these defendants were mixed up and participated in the killing of Rosen, even if you believe that, if there is no corroboration, you have got to throw the case out of the window.

A. Yes, sir, I understand.

Q. Will you take the law exclusively from the Judge as to what constitutes corroboration?

A. I will.

Q. If the Judge tells you the District Attorney does not have to corroborate by his witnesses each and every detail of the charge, will you accept that law?

A. Yes, sir.

Q. If he tells you that corroboration may be deemed sufficient by a juror if it tends to connect the defendants with the commission of the crime, will you follow that instruction of law?

A. I will.

Q. Will you endeavor conscientiously to apply that in-
[fol. 1120] struction of law to the facts in this case?

A. Yes, sir.

Q. As has been discussed with the other talesmen, there is only one inquiry here: Are these defendants at the bar guilty of murder in the first degree, the murder of Joseph Rosen, on Sunday, September 13, 1936? Do you understand?

A. Yes, sir.

Q. That is going to be your job, to look at this evidence and find out, Are they guilty or innocent?

A. Yes, sir.

Q. If any defense is invoked, whether it be alibi or any other defense, will you take the law from the Judge?

A. Yes, sir.

Q. Whether the defendants put in a defense or do not, if the Judge charges you that the burden of proof remains with the District Attorney, will you follow those instructions?

A. Yes, sir.

Q. Is there anything so far that I have failed to bring out by my questioning which goes to your ability to be a fair, just juror in this case?

A. Nothing that I know of.

Q. Will you, if accepted as a juror, use common sense and understanding in weighing the issue in the case?

A. Yes.

Q. Will you listen to reasoning and common sense and discussion by the other jurors?

A. Yes, sir.

Q. And will you talk the issue over with them in a common-sense, calm manner?

A. Yes, sir.

Q. Will you, if accepted as a juror in this case, endeavor to render a verdict that will be in consonance with justice?

A. Yes, sir.

[fol. 1121] Q. And will you, by your verdict, endeavor to do justice?

A. Yes, sir.

Q. Can I proceed now with the understanding that if you and your conscience are satisfied beyond a reasonable doubt that at this bar of justice there are Buchalter, Weiss and Capone, who are guilty of murder in the first degree, there isn't anything in your background or anything in your present business connections or any other connection which would preclude you from being fair as a juror?

A. No.

Q. You will have no fear or hesitation or reluctance, if you are convinced of guilt, to announce your verdict?

A. Not at all.

By Mr. Cuff:

Q. You said you heard me talk. Could it have been another Assistant District Attorney?

A. I think it was you—in a little church on Beverly Road and East 8th Street, some years ago.

Q. I don't remember it, but you may be right.

A. Maybe I am wrong, too.

Q. Were there slides used?

A. Yes, sir, there were.

Q. Then I think I may say you must have another Assistant District Attorney, Mr. Kopf, in mind. His name is pronounced, generally, like mine.

A. I remember the appearance, that is why I don't think of the name or the face.

Q. In those days we were of the same appearance, but [fol. 1122] not now.

A. All right.

Q. Might I inquire the name of the Assistant District Attorney that you say you heard discuss or lecture or talk about the O'Dwyer investigation?

A. I do not recall it.

Q. Was it Mr. Turkus?

A. No, sir.

Q. How long ago would you say that was?

A. About eight months ago.

Q. And that, you say, left a profound impression upon your mind?

A. It did at the time.

Q. Would that impression—and I assume it continues to this time—would that impression militate against your rendering a verdict that you say would do justice in this case?

A. It would not militate, no; it would not affect my rendering a fair verdict.

Q. Would that impression cause you to accept less proof from the District Attorney than you would otherwise require because of hearing him?

A. The answer is yes or no.

Q. In other words, there is a doubt in your mind?

A. There is a slight doubt in my mind.

Q. What I gathered from your answers to Mr. Turkus' questions was that you are the type of juror that under no circumstances would permit an unjust verdict to be rendered, and certainly you would not vote for one?

A. That is right.

Q. So, if you are selected as a juror in this case and you take your oath as such, you will live up to that oath con- [fol. 1123] scientiously throughout this trial, during the time that you are deliberating in the jury room, and consider the evidence, and until and when you render your verdict?

A. I would.

Q. Now, having heard a good deal about reasonable doubt, may I presume you have some idea, personally, as to what reasonable doubt is?

A. I think I have.

Q. And if there is any doubt about that in your mind, you would certainly take the law or definition of reasonable doubt that his Honor will give you when he instructs the jury?

A. I shall.

Q. And you will apply that definition constantly and persistently throughout your deliberation?

A. Yes, sir.

Q. You have said you would not hesitate to vote a Guilty verdict if convinced beyond a reasonable doubt. I want to ask you this: If, after considering the evidence and listening to all of the reasonable arguments of your fellow jurors, based upon the evidence or lack of it, you reach a conclusion in your mind, honestly and conscientiously, that there

is a reasonable doubt as to the guilt of the defendants or any one of them, is there anything that would prevent you from giving the benefit of that reasonable doubt to the defendant or defendants and voting "Not Guilty"?

A. Absolutely no.

Q. Do you say now that if you do have a reasonable doubt you will so vote?

A. I will.

Q. And that you will entertain and hold that reasonable [fol. 1124] doubt until you are convinced by reasonable argument that it is not?

A. Yes, sir.

Q. You realize that is your sworn duty?

A. Yes, sir.

Q. And that it is part of the law of this State that you say you are in favor of administering?

A. Yes, sir.

Q. You will not let fear of criticism or weight of numbers against you, or time, or anything else, interfere with your voting according to your conscience?

A. Will you please repeat the question?

Q. I will reframe the question: If you are selected and you have reached the point where you find, upon your consideration of the evidence and after listening to arguments of your fellow jurors, such arguments as are reasonably based upon the evidence in the case, you have a reasonable doubt, have I your assurance that you will adhere to that reasonable doubt despite fear of criticism, despite the number of jurors that may be against you, or for any other reason?

A. You have.

Q. Referring to accomplices that Mr. Turkus asked you about, I assume you know now from listening to the other statements made, that you must weigh the testimony of accomplices with extreme care?

A. Yes, sir.

Q. And you will do so?

A. I will.

Q. You know that is your duty, to examine into the motive that may inspire the accomplice to testify?

A. I do.

Q. The hope of reward that he may have in his mind when [fol. 1125] he so testifies?

A. Yes, sir.

Q. You realize that also must be taken into consideration?

A. Yes, sir.

Q. And if you find that an accomplice has committed crimes for which he has never been indicted or punished, and that the lessening of punishment may be afforded to him by the use of his testimony, you will take that into consideration in weighing the credibility of that witness?

A. I will.

Q. Of course you realize, I assume, that the question of credibility is one that is solely within the province of the jury in the case, and if his Honor tells you that is the law, you will take that?

A. I will.

Q. So I take it that, if you find that any witness, even an accomplice or other witness, has had a criminal record, including perjury and other crimes, that you will consider that record as bearing upon his credibility and his ability to tell the truth in this case?

A. I will.

Q. Merely because he raises up his hand and swears to tell the truth does not convince you he is going to tell the truth?

A. No, sir.

Q. You know that men have lied under oath, too?

A. I do.

Q. In a word, you will consider everything that is material in appraising the credibility of this witness, the accomplice and the corroborating witness alike?

A. Yes, sir.

Q. Now, this opinion you said you had you also said you [fol. 1126] could lay aside—— I withdraw that.

Q. I take it that you know that the law with respect to the presumption of innocence is not a mere composition of words, but that it is a very substantial right that inures to the benefit of every defendant in a criminal case?

A. I understand.

Q. And that it cannot be and must not be tossed aside lightly by any juror?

A. I realize that.

Q. If his Honor should charge you that you must give that presumption of innocence or the benefit of that presumption of innocence to these defendants, not only when the testi-

mony is being taken but every minute during your deliberation in the jury room and until you have reached a conclusion that the defendant or defendants are guilty beyond a reasonable doubt, will you adhere to that?

A. I will.

Q. Well, the opinion you said you entertained, in answer to Mr. Turkus's question, will that prevent you from giving the benefit of that presumption one hundred per cent to each of these defendants?

A. Not as I know.

Q. I gather from that answer that you have not laid it aside yet?

A. I cannot see how one can.

Q. Do I understand you to indicate by that that you are looking for some evidence that will justify its removal?

A. Yes, sir.

Q. And you will have to have such evidence?

A. Corroboration of evidence, I would say.

[fol. 1127] Q. You mean you would have to have some evidence produced by the defendants before you would lay aside that opinion, is that right?

A. If the line is drawn that fine, my answer would have to be that I would say yes. Will you repeat the question?

Q. You mean you would have to have some evidence produced by defendants before you could lay aside that opinion; is that right?

A. I will say no, then.

Q. You would not require that?

A. I think I get my thought confused.

Q. I will ask it again: If you are sworn as a juror on this case, you will take your seat in the jury box with that opinion in your mind?

A. No, sir.

Q. You understand the minute you are sworn, out goes that opinion?

A. Yes, sir; that is correct.

Q. Just be perfectly frank with me, that is all I ask, because I am trying to ascertain the state of your mind, and it is very, very important to my client and the other defendants. Do you really believe you can do that?

A. I can. I do believe it.

Q. You know, don't you, that if you go into the jury box with any such opinion as you have indicated, it will prevent you from enforcing the law as his Honor will give it to you?

A. I appreciate that.

Q. You will not permit any such condition to exist?

[fol. 1128] A. I will not.

Q. So I have your assurance definitely now that if you are selected there is nothing that will prevent you from laying aside that opinion and giving these defendants the benefit of every law, of every right they are entitled to on this trial?

A. That is correct.

Q. And you will do that throughout?

A. Yes, sir.

Mr. Cuff: No challenge for cause.

By Mr. Clinenko:

Q. You do not know me at all?

A. No, sir.

Q. You mentioned the fact that you might know my partner.

A. Yes.

Q. The fact that he is within the scope of your acquaintanceship would not cause you to change your opinion one way or the other, one iota?

A. No, sir.

Q. You understand that were you to be chosen as a juror in this case, you would take a solemn oath to do justice impartially?

A. I understand.

Q. So that that casual acquaintanceship, once you took the oath, would assume so unimportant an aspect in your mind that it would not be of any consequence to you?

A. That is correct.

Q. That being so, the fact that you may belong to one political party or another—I am not interested in which one—that would also be unimportant to you?

A. Yes, sir.

Q. The fact that you may have an interest in the victory [fol. 1129] of one party or another, would also become a matter of absolutely no importance in comparison with your discharging your duty under oath as a juror?

A. None whatever.

Q. Is that correct?

A. Yes, sir.

Q. So that whether or not you know anybody in the regime of this particular District Attorney is a matter which you realize is of absolutely no importance whatever?

A. That is correct.

Q. Now, you have said that you have some impression about this case, that you had read certain articles?

A. Yes, sir.

Q. You had read certain articles, as I recall your answers, in the New York *Journal* concerning Mr. O'Dwyer, whom Mr. Turkus calls Judge O'Dwyer?

A. Yes, sir.

Q. And those were articles which were in praise of that gentleman?

A. Yes, sir.

Q. Now, of course, I am not by any implication in the questions of mine, trying to disparage or belittle Mr. O'Dwyer, but you realize that there are matters of opinion and also matters of fact which are set forth in daily periodicals which we buy and read?

A. Yes, sir.

Q. And if you want to find out whether a certain ship is going to leave at a certain pier, you look at the ship news, as a question of fact; you know it must be recorded one way or the other.

A. Yes, sir.

Q. And so with respect to whether or not a particular [fol. 1130] piece of property or a particular security was sold at a particular price. There is no latitude in the newspaper business for presenting that except as it happened?

A. Yes, sir.

Q. Then you realize also that newspapers carry in them matters which are not necessary to be reflections of a specific fact?

A. Yes, sir.

Q. And you know that many times newspapers embark upon the presentation of a series of articles having nothing to do except with matters of opinion?

A. Yes, sir.

Q. And very frequently you realize that that series is presented really for the purpose of helping the circulation of the newspaper?

A. Yes, sir.

Q. And you realize that in order to advance the circulation of a newspaper very frequently a newspaper, in order

to go along with that publicity program, deviates from the truth? You realize that?

A. No, I don't realize that.

Q. You do realize that very frequently there is an effort on the part of a newspaper to make things look more florid than they actually were?

A. Yes, sir.

Q. And I am talking now about that aspect of newspaper comment which deals with matters which are not matters of specific fact.

A. Yes, sir.

Q. And you as a gentleman who has lived to maturity in this community know there are certain things in a newspaper which have to be taken as accurate facts and certain things [fol. 1131] which must be taken with a large grain of salt?

A. Yes, sir, that is so.

Q. In the ordinary exercise of your intelligence, in the reading of a newspaper you discriminate between that which is set forth in the newspaper as a fact and that which is put in there as an opinion of the editor or the policy of the editor, or for the purpose of stimulating the sale of the newspaper?

A. That is so.

Q. So that whether or not you have read, with respect to the laudatory articles about Mr. O'Dwyer, you realize that were you to be chosen as a juror in this case it would be your duty to listen to the facts as they are presented in this case and discriminate about the testimony, as to which was true or false, and to follow that mental process independently of anything you might have read in the Hearst papers?

A. That is right.

Q. And the fact that Mr. Hearst has this opinion, or his editors had that opinion about a particular man and a thought that on that particular morning in July it was of interest to relate certain facts about an office holder, and those facts were taken from his career and occurred twenty-five years ago, that would have nothing to do with the solemn discharge of your duty as a juror?

A. No, sir, none whatever.

Q. And that would be the truth as to whether or not you had ever shaken hands with a fellow named Bert Wegman [fol. 1132] or had not shaken hands with a fellow with my name?

A. Yes, sir.

Q. Nothing to do with the case?

A. That is right.

Q. So, were you chosen as a juror, any opinion you might have gained from reading these articles would be dispelled from your mind once you were told that was your duty?

A. Yes, sir.

Q. May I take it that the same answer would apply to anything else that you might have read about this case?

A. You may.

Q. Now, Mr. Turkus has asked you whether or not you are in favor of the enforcement of the Penal Law and the policy of the Penal Law in the State of New York. Of course, there is only one answer you can give.

A. Yes, sir.

Q. And that is you are.

A. Yes, sir.

Q. We all are.

A. Yes, sir.

Q. You have not heard anybody say no——

Mr. Turkus: I object. Somebody say no.

Mr. Climenko: I withdraw the question.

By the Court:

Q. Do you mind saying where you spend your vacation?

A. I spent my vacation almost all over the country; I am a traveling man.

Q. What particular resort?

A. No particular resort. I travel. I may be in Chicago, the Middle West, or up in Niagara Falls, around Buffalo; there is no particular place. I don't go anywhere at any specific time; I may occasionally go up to the Adirondacks or the Catskills.

[fol. 1133] Q. Sullivan County?

A. Yes, sir.

Q. What place?

A. Sullivan County, in Wurtsboro, and I go further up around Albany and Totem Lodge.

Q. And on the Jersey Coast?

A. Atlantic City.

By Mr. Climenko:

Q. While we are on the subject, did you say to Mr. Cuff that you did not see how you could set aside the opinion you have?

A. I don't believe he understood the answer that way. I did not draw that so fine. I understood the question was if I had formed an opinion, and I said yes, but that I could set it aside.

Q. Would that be your attitude, that you would set it aside?

A. Absolutely.

Q. Talking now about the policy of being in favor of the enforcement of the Penal Law of the State of New York, you don't presume—you are not a lawyer and you are not a student of the philosophy of law—you don't presume to be able to say, as you sit here now, what are all of the meanings of that phrase?

A. I don't.

Q. And supposing you were told that one of the meanings of that phrase that each defendant is presumed to be innocent on the charge alleged against him in the indictment, would you be able to accept that concept of the law?

A. Yes, sir.

Q. Supposing you were told also that it is part of the enforcement of the Penal Law, the policy of the State of [fol. 1134] New York, that an indictment has no significance as far as evidence—the fact that an indictment has been handed down does not mean that there is even an iota of proof that any of the defendants are in any way guilty of the charge set forth in the indictment—would you have any hesitation in accepting that statement as the policy of the criminal law of this State?

A. I would not have any hesitation.

Q. Supposing you were told further that it is also a part of that policy of enforcement—public policy—of the Penal Law of the State of New York, that a defendant who is charged with the commission of crime is presumed to be innocent even though charged, and is under no obligation to adduce in the trial anything whatever in his own behalf, would you have any difficulty in following such instructions?

A. None whatever.

Q. In other words, your interest as a proposition of law with the mechanics of trying a criminal case in accordance with the public policy of the State of New York is that after a jury has been convened it is the burden of the District Attorney to prove guilt beyond a reasonable doubt,

and if he does not do so it is a solemn obligation of each and every juror who entertains a resonable doubt to vote for acquittal and to adhere to that vote unless his doubt is removed by intellectual persuasion of his fellow jurors? You would have no difficulty in following that instruction?

A. I would not.

Q. You see, the public policy of the State on the law is [fol. 1135] that there is no burden on the part of any defendant to call any witness or to do anything in the course of the trial of a case, so if this defendant or all of them refrain from calling witnesses, would you be prejudiced against any one of the defendants?

A. None whatever.

Q. So you would not entertain an opinion adverse to any defendant once the trial of a case began?

A. Correct.

Q. Because you understand if you did entertain such an opinion your state of mind would be in direct conflict with the enforcement of the policy of the Penal Law of the State of New York?

A. I appreciate that.

Q. If you were to go in the jury box with an opinion at the inception of the case, you would be in a condition where your mere presence would be a violation of that oath?

A. I understand that.

Q. So you could not take the oath unless you were prepared to say with understanding that all of the defendants are presumed to be innocent—you are willing, not only to listen to that proposition of law, but to live by it in your intellectual process as you sit in the jury box—believing they are innocent—that is your duty; and you must continue to believe that they are innocent unless proof of guilt surpasses any reasonable doubt?

A. I understand that.

Q. You have no quarrel with the policy of that law?

A. No, sir.

[fol. 1136] Q. That is the same Penal Law Mr. Turkus asked you whether you were in favor of supporting.

A. Yes, sir.

Q. And then you may be instructed that a reasonable doubt is one which springs from the exercise of your intellect in relation to the failure to prove facts during the course of the trial——

Mr. Turkus: I object. That will not be the instruction.
The Court: Objection sustained.

Q. Supposing you were told a reasonable doubt is a doubt for which you can ascribe a reason, and that you must acquit if, within that definition of reasonable doubt, at the conclusion of the case, the conclusion of your deliberations, you do entertain a reasonable doubt; would you have any difficulty in following that?
A. No, sir.

By the Court:

Q. You spoke of the Catskills. Have you any objection to telling us what resort in the Catskills you have been at?

Mr. Climenko: I object to that question.
The Court: Objection overruled.

A. I stopped at the Mamakating Country Club.
Q. I am talking about the Catskills.
A. That is what I mean.

By Mr. Climenko:

Q. There is nothing about any place where you have ever [fol. 1137] stopped on a vacation which in any way, as you sit here now, would interfere one way or another with the proper discharge of your duties as a juror?
A. None whatever.
Q. Now referring again to this question of being in favor of the enforcement of the Penal Law of the State of New York, you realize— I withdraw the question.
Q. Supposing you were instructed as a matter of law that you as a juror were the sole judge of the facts. Would you be able to follow that instruction?
A. I would.
Q. Supposing you were instructed as a matter of law by the Court—all instructions may come only through Judge Taylor—supposing you were instructed by the Court that, as a juror, it would be your duty to pass on the credibility of evidence, which means to decide what you believe and what you do not believe, and that, after having done that, you were under a reasonable obligation in the course of intellectual conversations with your fellow jurors, to arrive at a verdict, but if you cannot, if they cannot dissuade you

from your opinion by the exercise of argument, it was nevertheless your obligation to adhere to your opinion, even though you may be in a minority, would you have any difficulty in adhering to your minority opinion, even though it may be a minority of one?

A. I would hold to my opinion.

Q. You realize that would be your obligation as a juror?

A. Yes, sir.

[fol. 1138] Q. And you realize that it would be part of public policy in enforcing the Penal Law of the State of New York that you, as a juror, cannot divide your obligation with eleven other gentlemen in the box, but that you hold to a separate, individual obligation; you understand that?

A. Yes, sir, and I realize it.

Q. That would be part of your job?

A. Yes, sir.

Q. You entertain no hesitation about your ability to discharge that part of your job?

A. I do not.

Q. You realize, I think, by this time that the business of a juror is to follow the testimony of witnesses and to test that testimony in accordance with instructions of law which the court may give you at the end of the case?

A. Yes, sir.

Q. And to arrive at a conclusion in accordance with those instructions about the testimony that you have heard?

A. Yes, sir.

Q. So that, essentially, your job as a juror and that of everybody else in the jury box is for you to use your mind as to the believability or non-believability of evidence?

A. That is correct.

Q. Now, in doing that, you would not be assuming a job you've never done before, would you? You have got to weigh the believability, honesty, and probable accuracy of what is told you every day in your life?

A. Yes, sir.

Q. Every time somebody presents you with an order and a representation about his capacity to pay for what he [fol. 1139] want, you are passing on believability?

A. Yes, sir.

Q. And you do it with a fair degree of caution, as you must in business matters?

A. Yes, sir.

Q. You realize that in this particular case the issue, and Mr. Turkus has told you that, is a serious one?

A. I do.

Q. And certainly as serious as any transaction you have ever handled in your normal life—you would be willing to concede that?

A. More so.

Q. That being so, in passing on the credibility of persons who may take the stand, you will exercise all of the care and caution that you would in the discharge of matters respecting your own business affairs?

A. I would.

Q. Because, if the Court should instruct you that every person who testifies must be approached by you, as a juror, with particular care, you would follow that?

A. Yes, sir.

Q. Now, should it appear that a witness is presented by the District Attorney, would the fact that he is called by the District Attorney, to your mind, entitle him to an easier or larger degree of credibility than if he was a witness called by the defense?

A. No, sir, not for a minute.

Q. You realize that accuracy or inaccuracy or falsity or honesty of a witness is not to be decided by any such arbitrary standard as that?

A. I understand.

Q. Supposing that in the course of the trial a witness is called for the defense and he says, "I have committed [fol. 1140] perjury," you understand what that is?

A. Yes, sir.

Q. Perjury is false swearing under oath?

A. Yes, sir.

Q. Supposing that man takes the stand and he says, "I committed perjury before," will you take that fact into account in deciding whether or not you can believe him this time?

A. I would take it into account very seriously.

Q. Very heavily?

A. Yes, sir.

Q. That is like a fellow who gives you a false financial statement in the past and now wants you to believe the financial statement he is presenting today?

A. Correct.

Q. Supposing a man takes the stand and says, "I swore to tell the truth before," but you can see from his situation that he has every inducement in the world to tell the story he does tell, whether or not it is the truth, you understand?

A. Yes, sir.

Q. Suppose that that man has, among the inducements which obviously work upon him, the desire to curry favor with a governmental office-holder who holds the fate of that man, would you take into account that inducement?

A. Yes, sir.

Q. To depart from the truth, and would you decide whether or not he did tell the truth?

A. I would.

Q. Supposing you find one of the inducements which have operated upon that witness is the fact that he has received favors from a governmental office-holder, and that that governmental office-holder has discriminated in his favor in the recent past, would you take that into consideration [fol. 1141] when you pass upon whether or not you can believe that man?

A. I would.

Q. Now, after considering this matter in those few aspects that I at least attemtped to bring to your mind, do you believe you could act as an impartial juror in the trial of this case?

A. I do.

Q. Without any prejudice against anybody in the case?

A. Without any prejudice.

Q. Without any favor for anybody in this case?

A. Correct.

Q. The mere fact there is a political campaign about starting is one of those ridiculously unimportant things which would have nothing to do with you?

A. It is unimportant.

Q. Were you to act as a juror in this case?

A. That is right.

By Mr. Rosenthal:

Q. There is one thing that is very important. You said you read some articles in the *Journal*?

A. Yes, sir.

Q. Were any of those articles, without mentioning the names, directed to the mentioning of the names of any of these defendants on trial?

A. They did.

Q. You say that you also listened to a lecture of some character around eight months ago?

A. Yes, sir.

Q. Without going into the nature of the lecture, did it in any wise apply to the supposed investigation of crime since Mr. O'Dwyer became District Attorney?

A. Yes, sir, it did.

Q. You have also honestly stated that because of what [fol. 1142] you have heard an impression has been left in your mind?

A. It has.

Q. And that impression which you have is one which is detrimental to one or more of the defendants?

A. That is correct.

Q. Now, nobody can read the mind of any prospective juror—that is clear?

A. Yes, sir.

Q. We must depend upon a man taking oath when he goes into the jury box to do a certain thing, and then his being straightforward and fearless and honest enough to carry it out.

Q. That is clear?

A. Yes, sir.

Q. I am going to ask you, if you would give that oath to act as a fair and impartial juror, would what you have heard or read be of such a nature—I will put it in plain terms so that you can understand it— Have you ever served as a juror before?

A. No, sir.

Q. Well, now, assuming that you have not served on a jury, I am giving you this hypothesis so you can understand. You know nothing about the individuals involved and have heard nothing; is that clear?

A. Yes, sir.

Q. Would your state of mind at the present time be such that because of what you have read or heard, the nature of the evidence or the quality of the evidence that would have to be produced in this particular case would be different than in the hypothetical case which I have mentioned, in which you have never heard about either defendant or [fol. 1143] anything about any supposed activity?

A. It would not—as a juror I would dismiss all my opinions and thoughts.

Q. Of course, when you were questioned by Mr. Climenko —I supposed the newspaper men were pleased at your answer—you said you believed in the truth of what you read in the paper.

A. Well, in substance, yes, sir; not every line of it.

Q. Of course, have you, during your experience, read something in the newspapers, either the death of somebody that the next day you saw walking on the street, or the serious injury of somebody who had a leg broken and was carted away, and the next day you saw them walking on the street, or a traffic accident happening, a trolley car running into a truck and the truck into a pushcart and the pushcart running over somebody else—have you ever read those things in the newspaper?

A. There are some instances you mention, yes, sir.

Q. In other words, you read in the newspaper, where it was not confined to particular things, a conception of what was reported as a true state of facts?

A. Yes, sir.

Q. When you are in a court of law, never having served as a juryman before, you do not substitute what you read in the newspaper for what you hear under oath on the stand?

A. That is true.

Q. Of course, you know there are many men, and I want to find out if you are on one side or the other, who form an opinion from what they read in the newspaper, and that [fol. 1144] opinion becomes so fixed in their mind that they honestly feel, if they seat themselves in the box, that as they are listening to the evidence either their mind will be more receptive to listening to a particular type of evidence than to listening to another kind because of what they read. Now, I take it your mind is not such?

A. It would not be such.

Q. You have noticed from the time you sat here a great many men state their attitudes and express their thoughts, who have been influenced by either what they read to such an extent they feel they would be biased jurymen one way or the other, and we heard one of them say that he would not believe an accomplice under oath. Were you in court then?

A. No, sir.

Q. The District Attorney challenged the man, and rightly so, because that is the opinion which he formed.

A. Yes, sir.

Q. You heard other men when they were in court say that because of what they read they could not conscientiously, on their honor, sit in the jury box, without allowing it to weigh on their mind.

A. I heard that.

Q. Now, your state of mind is such that if called or accepted, whatever the impression is you may have formed by what you read, it can be absolutely set aside and you would not in any wise indicate or discuss in the jury room anything other than what has been legal evidence in the case?

A. That is right.

Q. Now, I take it your answer is one hundred per cent candid, because you have already tried to be excused as a juryman.

[fol. 1145] A. And I still would like to be.

Q. So that it is not with any desire to evade duty, that you are making your answers with all honesty and candor?

A. Yes.

Q. Let me come to one or two other questions. I will make it brief. I will ask you whether you heard me express the statement to the other jurymen—if you heard me state to the other men the question as to the District Attorney's attitude in a criminal case, to furnish, in addition to the evidence furnished by the so-called accomplice, other evidence which would tend to connect one or more of the defendants with the crime.

A. Yes, sir, I heard that.

Q. Now, then, it may be in this case that what the District Attorney calls that "other evidence" will be some individual who may state he, that individual, that at some time after that crime one or more of the defendants said to him, "I (the defendant) admit to you (the witness) that I (the defendant) had something to do with the crime." Is that clear?

A. Yes, sir.

Q. Now then, that man may further state, "Although I have committed numerous crimes, including murder, as far as this particular crime is concerned, I had nothing to do with it"—is that clear?

A. Yes, sir.

Q. If such is the case, two things may happen: either the Judge may say to you as a matter of law that the man is

not an accomplice as a matter of law, but in view of what has been testified to by him on the stand he may in the opinion [fol. 1146] of the jury become an accomplice as a question of fact. Is that clear?

A. Yes, sir.

Q. Now, the meaning of the Court, if such statement is made, is that you jurymen have a right to go into your jury room and to analyze who and what he is, where he was on the particular night and what he did, irrespective of his denial of the actual complicity—actually was an accomplice. Is that clear?

A. Yes, sir.

Q. You see that is differentiated from the other type of accomplice where the Judge does not leave anything to the jury, but says to the jury, "I charge you as a matter of law this man is an accomplice."

A. Yes, sir.

Q. Now, if, after going into the jury room and analyzing the testimony of this particular individual, if such individual is called, you determine he is an accomplice and that there is no other evidence of independent nature tending to connect the defendants with the crime, as the Court tells you the law to be, would you hesitate under a state of affairs of that character to find a favorable verdict for the defendants and acquit them?

A. I would not.

Q. Even assuming you go into your jury room and you say to yourself, "Well, I am not convinced the man is an accomplice, but let us see who and what he is, and what he has to gain, what his motive may be. This man admits he has committed six murders, has he been indicted, has he been [fol. 1147] tried? He admits he committed perjury on the stand too, under oath, in a court of similar jurisdiction; he admits he has been living in hotels at the expense of the State, or out on Long Island playing baseball and other things—currying favor—what motive has that man in saying that these men are connected rather than he himself, with the crime?"

A. I would weigh that.

Q. And if you felt that that motive in itself raised some doubt in your mind as to whether or not he was telling the truth, a reasonable doubt, is the word I should use—I don't want Mr. Turkus to jump up and say I did not use it—a

reasonable doubt in your mind, would you resolve that doubt in favor of the defendants?

A. I would.

Q. Now, I will ask you, because of your lack of jury service, the same question I asked the other men: You realize that men called to serve on a jury, twelve men, that they are called because we in America believe in moulding the opinion of twelve, if it is possible, into one?

A. Yes, sir.

Q. So we take men from all walks of life, put them together—because they have different experience, different angles, than a few?

A. Yes, sir.

Q. Each one of these men is entitled to his own particular view?

A. Yes, sir.

Q. We hope and the State hopes that these twelve views, when moulded together, will result in one single verdict. They hope a guilty one, and the defendant hopes a not-[fol. 1148] guilty one. But there are times, you realize, when honest men differ in opinions?

A. Yes, sir.

Q. If, irrespective of the fact that you have never served on a jury before, you go into the jury room and you form an opinion as to the believability of any of the evidence, the credibility of any of the witnesses, which is different from that of your fellow jurymen—you have the right to do that, you understand?

A. Yes, sir

Q. However, you understand further that your duty, if you are accepted, is one to keep that opinion to yourself, or rather to discuss it with the other eleven men; it may be perhaps that after discussing with them you convince them you are right, and, on the other hand, it may be perhaps that they will convince you you are looking altogether at the wrong premise; if such is the case it is your duty to acquiesce in their thought?

A. Yes, sir.

Q. But in the event they have not been able to convince you, what I want to know from you is will you, because some man who may be on that jury says, "I have had previous jury experience," you are a busy man, you are serving here at a sacrifice to your business and yourself,

you will desire to get out--I don't say it will happen, but these things have happened—would any of those outside causes create in your mind a situation where you would say to yourself, "Well, the numbers are against me, I am going to acquiesce in what they say"?

[fol. 1149] A. It would not.

Q. Is there any reason that I may not have reached by questions, or any of counsel, which you, outside of the fact of wanting to get home—which is not a good reason, a good legal reason—could give any reason at all for not being a fair juror?

A. None that I know of.

By Mr. Turkus:

Q. Some questions have been opened up. Mr. Barshay and Mr. Cuff got to a certain point with you and then they did not continue. I would like to take it up from there. I think you said that from what you read and heard you had an opinion that was detrimental to the defendants.

A. I did.

Q. Then he started to question you this way: Would it require less evidence on the part of the District Attorney, in view of that opinion—and you said something that caused him to say to you, "You are in doubt about it?"

Mr. Cuff: I object to that as an improper recitation of what occurred.

The Court: Sustained. He made it clear. He said he would put all that aside.

Mr. Turkus: There is an answer I must go into. If you want to preclude me I will have no recourse, but I do want to go into this point. It is important.

Q. May I refresh your recollection? When I stated to you he asked you the question whether or not you would [fol. 1150] require less proof——

A. You are refreshing my memory.

Q. —then you said something to him, the exact nature of which I did not hear, but my recollection is he said to you then, "You have some doubt in your mind?"

A. I remember my answer was that I probably had at the time, but once I entered the jury box I would dispense with the opinion.

Q. I do recall you said something about corroboration.

Mr. Climenko: I object to the question in that form.
The Court: Sustained.

Q. In view of the impression you have now personally, is there some corroboration you want from the defendant?
A. No, sir, none whatever.
Q. Did you, when examined in the past, say something about corroboration?
A. I never used that word, to my knowledge.

The Court: The use of that word was obviously a slip of the tongue. The witness for the moment was apparently confused, and it was meaningless. It is surprising, with so much questioning, there has not been more confusion, but the talesman apparently is a man of unusual intelligence.

By Mr. Turkus:

Q. One thing was brought out by the Judge, that you spent time up in the Catskill Mountains.

Mr. Climenko: I object. The witness has already stated there is nothing about the geographical location which would in any way affect anything about this inquiry or as [fol. 1151] to his eligibility to serve.
The Court: There is no question as yet.

Q. Did you spend time up in the Catskill Mountains?

Mr. Climenko: I object.
The Court: He said he spent a vacation in the Mamakating Country Club, which is a very nice environment.

Q. I want to check up on certain matters in Sullivan County which may be very important.

Mr. Rosenthal: I object to the statement as to what he wants to check up or get rid of.
The Court: There is no question.

Q. Up in the mountains did you hear the name of Curley Holtz——

Mr. Climenko: I object to the recitations of these names upon the ground they are gratuitous and tend to develop inflammatory ideas; and utterly irrelevant as to anything in the background of the talesman.
The Court: Objection overruled.
Mr. Climenko: Exception to all questions along this line.

Q. Did you hear mention of the name of Goldstein?

A. No, sir.

Q. While up there in the mountains did you hear the name mentioned of Walter Sage?

A. I did not.

Q. While up there in the mountains did you hear any discussion in reference to an investigation of Judge O'Dwyer, [fol. 1152] up in Sullivan County, in conjunction with District Attorney Deckerman?

Mr. Climenko: That is objected to as irrelevant to the inquiry.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. No, sir.

Q. Those people whom you know in the ladies' clothing manufacturing, did you at any time hear discussions about the investigation of District Attorney Thomas E. Dewey in Manhattan or that of Judge O'Dwyer in Brooklyn?

Mr. Climenko: Objected to as already answered.

The Court: I don't recall it. I will allow it.

A. No, I did not.

Mr. Rosenthal:

Q. Well, in passing, did you hear anything about Franklin D. Roosevelt?

A. Yes, sir.

By Mr Turkus:

Q. You did not read about him in this case, did you?

The Court: Please.

Mr. Turkus: I will excuse him peremptorily.

The Court: These peremptory challenges are now seven—seven.

The law as to peremptory challenges may be wise or may be unwise. The Court will not express an opinion on that point. The fact remains, however, that were it not for [fol. 1153] peremptory challenges the jury box would have been filled at the conclusion of the ninth day of court work, and that two alternates would have been seated at the conclusion of the tenth day, and the case would now be on trial and the evidence in the course of taking.

So far as the Court's opportunity for observation is concerned, all those excused by peremptory challenges were duly qualified, intelligent, and unbiased talesmen.

I am making this observation solely because of a situation which has arisen in the public mind as to the length of time it has taken to select the jury, and in order to clarify that situation, and without any prejudice in the case on trial.

Mr. Talley: I respectfully take exception to your Honor's observation with respect to the selection of jurors up to now, and particularly your Honor's reference to the Court's opinion as to the qualifications of the men who have been challenged peremptorily by the defense. The defense is exercising its privilege and prerogative in using peremptory challenges when in its opinion such challenge should be exercised. Any opinion by the Court with respect to the qualifications of talesmen is no more than an expression of an opinion and might prevent the selection of the balance of the jurors in this case.

The Court: I think not. It is not so intended.

[fol. 1154] James F. Nagle, No. 2810, residing at No. 80 Willow Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. That is on the Heights?

A. Yes, sir, Columbia Heights.

Q. You are registered as a salesman. Are you employed by some firm or corporation?

A. Yes, sir, Timm & Behrens.

Q. Their office is on Columbia Heights?

A. No, sir, 190 Montague Street.

Q. I take it you sat here while these questions were being asked of other prospective jurors.

A. Yes, sir.

Q. You understand the nature of the charge? It is murder in the first degree.

A. Yes, sir.

Q. Is there anything about the nature of the charge of the crime of murder in the first degree which would preclude you from being a fair and just juror?

A. No, sir.

Q. May I proceed with the understanding you have no scruples, conscientious or otherwise, against capital punishment?

A. Yes, sir.

Q. And that you are in sympathy with law enforcement?

A. Yes, sir.

Q. Have you heretofore served as a juror?

A. Never.

Q. If accepted in this casewill you take the law exclusively and solely from Judge Taylor?

A. Yes, sir.

Q. No matter what the prosecuting or the other attorneys may say in the case, the law comes from Judge Taylor, and [fol. 1155] will you take it exclusively from Judge Taylor?

A. Yes, sir.

Q. Since you received your jury notice did anybody speak to you about this case?

A. Not as to its merits; there may have been some discussion as to prospective service, that is all.

Q. Does your business bring you in contact with people in the Brownsville or the East New York area of Brooklyn?

A. Yes, sir.

Q. Has that been in recent years?

A. Yes, sir.

Q. Are you there presently?

A. We cover the metropolitan circuit, specialists in real estate.

Q. So your contacts in that area would be in connection with industrial buildings there?

A. Yes, sir.

Q. Did you have any contact of any kind, nature, or description in the garment center?

A. We cover the garment section too.

Q. How about the clothing district?

A. Yes, sir.

Q. And the Brooklyn waterfront?

A. Yes, sir.

Q. Are these all business contacts?

A. All business.

Q. Since you received your jury notice did anybody in any of these districts or industries speak to you about your service in this case?

A. No, sir.

Q. Did you have any contact with any official of the Amalgamated clothing workers of America?

A. No, sir.

Q. Do you know the name of Weinstein or Samuel Katz, do they have any significance to you?

A. No, sir.

Q. Or Bruno Belia, an organizer?

A. No, sir.

Q. Did you have any contact with any official of the [Vol. 1156] Clothing Truckers Union?

A. No, sir.

Q. Local No. 240 of the Clothing Truckers and Helpers Union?

A. No, sir.

Q. Is there any significance in the name of Salvatore Marazzano?

A. No, sir.

Q. Or Tosca?

A. None.

Q. Do you know anyone engaged in the business of clothing trucking?

A. Not directly, no, sir.

Q. When you say, "not directly," do you mean you hav had contact with someone through real estate busine.

A. Yes, sir.

Q. Do you know the names of Terry Burns or Abie Slabo, have they any significance to you, or Hymie Holtz?

A. No, sir.

Q. There are nine lawyers representing the defense, former Assistant District Attorney Barshay, former Assistant United States Attorney Wegman, and Mr. Climenko represent the defendant Buchalter.

A. No, sir.

Q. Or anybody connected with their office?

A. No, sir.

Q. With respect to Weiss, he is represented by former General Sessions Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kriendler. Do you know any of those men?

A. No, sir.

Q. With respect to Capone, he is represented by Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg. Do you know any of those?

A. No, sir.

Q. Or anyone connected with their office?

A. No, sir.

[fol. 1157] Q. Do you know any member of the bar who specializes in the trial of criminal cases?

A. No, sir.

Q. In the event you hear some argument urged three times by three different lawyers, will it have three times the effect on you because of repetition?

A. No, sir.

Q. With respect to the doctrine of the presumption of innocence, reasonable doubt, and the burden of proof being upon the District Attorney, and the rules applicable to the benefit of defendants in criminal cases, will you take the law exclusively from the Judge?

A. Yes.

Q. Will you, in consonance with his charge, give these defendants everything the law of the land says they should have and every Constitutional right and safeguard they should have?

A. Yes, sir.

Q. And with respect to the prosecution, is there any fault you have to find or any bias you have against the prosecution which uses testimony of one of the participants in the commission of a crime against the defendants on trial?

A. No, sir.

Q. May I go ahead with the understanding you have no fault to find with the prosecutor or the prosecution which breaks a case from the inside and employs the use of accomplice testimony?

A. No, sir.

Q. Will you, as you are instructed by the Judge, follow the law very carefully with regard to the believability or credibility of accomplice testimony?

A. Yes, sir.

[fol. 1158] Q. Will you look at everything wrong with the accomplice, everything to his detriment, everything which would affect his believability, will you look at his past association with criminals and every immoral and vicious act he has done in his life, every black mark there may be against him in the course of this case, and will you use all of those things in weighing his testimony with care and caution?

A. Yes, sir.

Q. Will you remember when you are trying this issue that we want to find out one thing: Are these three at the bar of justice, Buchalter, Weiss, and Capone, guilty of murder in the first degree, the killing of Joseph Rosen—that that is the issue in the case?

A. Yes, sir.

Q. And in considering the case, will you remember that when you have accomplice testimony in a case you are dealing here with a charge of murder in the first degree, a murder that happened in September, 1936?

A. Yes, sir.

Q. Will you look at all the surrounding circumstances we bring in in connection with the case?

A. Yes, sir.

Q. If you are charged, as you undoubtedly will be, by the Court that even if you believe an accomplice's testimony, if you believe that every word he says, that the defendants participated in the murder, and the art he ascribes to each, which they did, that one of them ordered it and the other carried it out and the third was the trigger man, and you believe everything he says, if there was no other supporting evidence the law is you would have to [fol. 1159] acquit; would you follow the Judge's instructions?

The Court: Without corroboration?

Q. If there was no corroboration?

A. If I was convinced they were guilty I would do it very reluctantly.

Q. The law says you cannot be convinced of guilt upon the unsupported testimony of an accomplice, even if you believe everything he says.

A. Yes, sir.

Q. And if you are satisfied even that he tells the truth when he ascribes each part that each defendant played, if there was nothing to support it, the Judge would charge you as a matter of law that you would have to acquit.

Mr. Barshay: If it were true, what he says, the Court would direct a verdict of not guilty.

The Court: It is the usual thing in examining talesmen to simply ask if the Judge charges so and so will you follow that instruction.

Mr. Turkus: I will withdraw my question in that form.

Q. If the Judge should charge you that in addition to the testimony of accomplice there must be, before there can be a conviction, other evidence tending to connect the defendants with the commission of the crime, will you follow that instruction of law?

A. Yes, sir.

Q. Will you endeavor, conscientiously, to apply it to the facts in this case?

A. Yes, sir.

[fol. 1160] Q. With respect to the allocation of evidence, will you follow exactly what the Judge says in that connection? For example, if the Judge charges you that certain items of testimony may be accepted as, one against one or two defendants, will you follow those instructions?

A. Yes, sir.

Q. If he tells you it may be used against all three defendants, will you follow that?

A. Yes, sir.

Q. In other words, will you conscientiously endeavor to apply the law as the Judge gives it to you, to this issue, in the case of the guilt or innocence of these men at the bar of justice?

A. Yes, sir.

Q. If accepted will you use your every-day common sense in weighing the issue of the case?

A. Yes, sir.

Q. And will you discuss the case over with common sense and understanding with the other members of the jury?

A. Yes, sir.

Q. And after you have given the defendants everything that the law of the land says they should have, and you are satisfied from the evidence in the case beyond a reasonable doubt that there are three guilty men, guilty of murder in the first degree, would you hesitate to say so?

A. I would not.

Q. Would you have the slightest fear or reluctance in rendering such a verdict?

A. No, sir.

By Mr. Barshay:

Q May I know your occupation prior to the time you were actively engaged in the real estate business?

[fol. 1161] A. Yes, sir, I was in the appraisal business for insurance purposes.

Q. Were you working for yourself?

A. No, sir.

Q. Did that appraisal include the appraisal of stolen merchandise thereafter recovered?

A. No, sir.

Q. It had nothing to do with crime, or the subject of crime?

A. No, sir.

Q. Have you dealt with the City of New York in your real estate business?

A. Never.

Q. In the sale of property to them or the buying of property from them at any time?

A. No, sir.

Q. You said you had contacts in Brownsville and East New York. Did you know any of the names involved that were given here?

A. No, sir.

Q. Did you have any contacts on Pitkin Avenue?

A. Well, probably in my traveling through the city possibly I did; I don't particularly remember any.

Q. You did not discuss the matters there?

A. No, sir.

Q. Which are involved here?

A. No, sir.

Q. Were you ever on the jury before?

A. No, sir, never.

Q. Were you ever called before?

A. On one occasion, quite some years ago, but I was not called on the case.

Q. Were you ever a Grand Juror?

A. Never.

Q. Were you ever a Federal juror?

A. No, sir, I have not.

Q. So, Mr. Nagle, this is your first experience in criminal law other than what you said?

A. Yes, sir.

[fol. 1162] Q. Have you read about this case?

A. I scanned the headlines only. I did not read.

Q. Since coming here have you formed an opinion about this case?

A. I have formed no opinion, no, sir.

Q. Listening to the questioning of prospective talesmen, did you form an impression about the case?

A. No, sir, not from that source.

Q. From any source whatever?

A. Possibly from scanning the headlines I have had an impression.

Q. And that was a definite impression?

A. No, not definite.

Q. At any rate, it is detrimental to the defendant?

A. Yes.

[fol. 1163] Q. And it would require some evidence to remove that detrimental impression you formed?

A. I would not think that. I think during the general course of the trial I would be perfectly free to discard that.

Q. But at present it is not discarded?

A. That is true, yes, sir; they are not definite impressions, though; they are simply impressions I know I could discard.

Q. Whatever you may call them, thought, impressions, ideas, or opinions, no matter what terminology is used, they are detrimental to the defendants?

A. Yes, sir.

Q. So, even after all these days of listening to instructions of the Court, you are honestly of the opinion that maybe there will come a time—there will come a time when you may have to discard them; isn't that so?

Mr. Turkus: Objected to as ambiguous.

The Court: Sustained.

Q. At the present time the impressions which you say are opinions or thoughts or ideas which are detrimental to the defendant are still with you?

A. Yes, sir.

Mr. Turkus: I object to the form of the question.

The Court: It is repetitious.

(Whereupon at one p. m. a recess was taken. The defendants were remanded. The talesman were admonished as to their demeanor.)

(Recess until 2:00 P. M.)

[fol. 1164] Afternoon Session—Trial Resumed

JAMES F. NAGLE resumed the stand and was further questioned as to his qualifications.

By Mr. Rosenthal:

Q. Mr. Nagle, just before recess you told Mr. Barshay that you had some form of impression or opinion of some character which was detrimental to the defendant; is that correct?

Mr. Turkus: That is objected to. That embraces an improper statement.

Mr. Rosenthal: I am asking is that correct. He did not say opinion, he did use a third word, which escaped me.

The Court: The phraseology is inaccurate.

Mr. Rosenthal: The answer is asked of the witness by the language of the question, which says, "Is that correct?"

The Court: Objection sustained.

Mr. Rosenthal: I respectfully except.

Q. Did you prior to recess tell Mr. Barshay that you had an impression of some character or an idea which was detrimental to the defendant, as you sat in this jury box here now?

A. Yes.

Q. Did you also state to Mr. Turkus that you had some contacts with the clothing and dress and garment center of New York?

A. Very indirect.

Q. And also with the waterfront in Brooklyn?

A. Yes.

[fol. 1165] Q. Are those contacts of such a nature that you heard at any time discussed anything concerning crime or criminal activities in those particular localities?

A. In the East New York section, not the waterfont section.

Q. And how recently would you say that you had any discussions of that character?

A. I never had any discussions.

Q. Where did you glean your knowledge, from discussions of others with you?

A. Talking to employers out in that section. They have dropped inferences and things like that at various times. There has never been any discussion.

Q. In other words, it was unsolicited information that was given to you by people in that locality while you were out there on your own particular business?

A. That is right.

Q. And that, coupled with what you have read or in scanning the headlines, is your expression, I think.

A. Yes.

Q. Has been the cause of the impression which you have gained; is that correct, sir?

A. Yes.

Q. Did I also understand you correctly, in respect to a question that was asked by Mr. Turkus of you, that even if you believed an accomplice's testimony to be a hundred per cent true, that in accordance with our law it would be incumbent upon you to acquit the defendant, that your reply to that question was that you would under those circumstances do so, with great reluctance?

A. No, that I would accept the ruling of the Court with reluctance.

[fol. 1166] Q. In other words, you are not thoroughly in your own mind in accord. You are not wholly in accord with the thought that if you were to determine that an accomplice were telling you the truth, that even under those circumstances, if there were no independent evidence, that it would be your duty under our law to acquit; is that correct?

Mr. Turkus: I object to the form of the question on two grounds: first, it has already been answered the juror would follow the instruction of law and, secondly, that he has already made a response to that question.

The Court: If it is a question of accomplice as a matter of law without any corroboration, of course there would be a direction of acquittal and the juror would have no discretion. He has responded he would follow the instruction of the Court. Objection sustained.

Mr. Rosenthal: I respectfully except. My question, with all due deference to the Court, is not addressed to that particular thing. The Court may direct people under our law to do certain things, but there may be a fixed opinion [fol. 1167] in the mind of the particular juryman, and that is what I am trying to ascertain, and his answer to Mr. Turkus implies that he would have a reluctance in following any such law, even though charged by the Court. That is the answer as I took it.

The Court: The Court has ruled.

Mr. Rosenthal: I respectfully except.

Am I correct in my statement, sir, of what your answer implied to Mr. Turkus when you were questioned by him originally, that if the testimony in this case relied solely upon an accomplice whom you believed, that you would with reluctance accept the direction from the Court that it would be your duty under those circumstances to acquit?

Mr. Turkus. I object to it. It has already been answered.

The Court: Sustained as answered.

Mr. Rosenthal: I respectfully except, if your Honor pleases.

The Court: You have asked the same question two or three times and had your answer and you argue after the Court rules. The Court will maintain its patience at all times, but please don't delay the trial in this manner.

Mr. Rosenthal: I respectfully except.

The Court: The Court is trying to be perfectly fair, [fol. 1168] trying to indulge you to the utmost, but please cooperate.

Mr. Rosenthal: I must respectfully except to the Court's statement.

The Court: All this takes time.

Q. Mr. Nagle, in view of the impression which you have in your mind—let me withdraw that first. You have never had any jury service?

A. No.

Q. Assuming, sir, that you were called to serve in a case where you had not any impression, had not gained any impression concerning the individual, and never heard discussed by people in East New York anything concerning particular crime, had not scanned headlines, and had a free and open mind without the knowledge of who the person was on trial, do you say, sir, that the quality of evidence in a character of case such as I have just described to you would or would not be different than the quality of testimony that would be necessary to convince you in the case such as you now have where you have read headlines and have spoken to employers in East New York?

Mr. Turkus: I respectfully object to the question. First, it is a legal question, and, second, it embraces the statements of fact not elicited on the answers from the prospective talesmen.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. In view of your statement, sir, at the present time, is [fol. 1169] it not true that the quality or quantity of evidence that would be necessary in this case would be different than in a case where you had neither read headlines nor formed an impression concerning the particular persons on trial?

Mr. Turkus: I object to it as a legal question. The quantum of proof is a legal question.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Is it not true, sir, that as you sit here now you have an impression which is adverse to the defendant?

A. Yes.

Q. Is it not true, sir, that you have sat here a number of days and heard discussed different questions of law applicable to this case?

A. Yes.

Q. Is it not true that you have heard the Court state and Mr. Turkus and others that the defendants are presumed to be innocent until the contrary is proven?

A. Yes.

Q. Is it not true that you heard numerous discussions with other jurymen about having read papers and about impressions which they have formed? You heard discussed here?

A. No, that is not true.

Q. Have you in the time that you were present here heard other jurymen state that they have read newspapers and formed impressions?

A. Oh, yes.

Q. The impression which you now have in mind you carried with you irrespective of the questioning of other [fol. 1170] jurymen up to the present moment, sir, is that right?

A. Yes.

Q. In the event that you were accepted as a juryman, is it not true that because of the impression which you are carrying with you up to the present moment that the quality or quantity of the evidence that would be necessary for The People to give to you would be different than if you did not have that impression at this time?

Mr. Turkus: I object to the question. It is a legal question on quantum of proof and burden of proof which the juror must take from the Court.

Mr. Rosenthal: I submit to the Court that it is a state of mind of the juror as to whether or not the impression is of such a character as to imply bias as against these defendants.

Mr. Turkus: The sole test is, if he has an impression, can he lay it aside.

The Court: He has not said that he has formed any opinion as to the guilt or innocence of the defendants on this charge. Objection to the present question is sustained.

Mr. Rosenthal: I respectfully except.

By Mr. Rosenthal:

Q. The impression which you have and which you say that you have in your mind goes towards the guilt or innocence of these particular defendants, does it not, sir?

A. No, I would not say that.

[fol. 1171] Q. Well, you say that it is in the nature of an opinion or expression or idea or impression that is detrimental to the particular defendants; is that true, sir?

Mr. Turkus: I object to that, embracing a state of fact not stated by the respective talesman.

The Court: Sustained as already answered.

Mr. Rosenthal: I respectfully except.

Q. The impression that you have goes towards the question of whether or not these defendants are guilty of the particular crime, does it not?

A. No.

Mr. Turkus: Objected to.

Q. Is it of such a nature as would weigh in your mind were you accepted as a juryman?

A. Will you repeat that, please?

Q. Is it of such a nature that it would weigh in your mind if you were accepted as a juryman?

Mr. Turkus: I object to the form of the question. That is an ambiguous question. The test, as I understand it——

[fol. 1172] The Court: Don't argue these objections.

Mr. Turkus: I object to it.

The Court: Can't you reframe that question? "Weigh in your mind" is ambiguous.

Mr. Rosenthal: Does your Honor wish me to reframe it?

The Court: I wish you would.

Q. Is it such an impression as will weigh in your mind against these defendants were you accepted as a juryman?

The Court: That is the same question. Objection sustained.

Mr. Rosenthal: I respectfully except, sir.

By the Court:

Q. Is it such that it would remain in your mind and activate you in your duties as a juryman in determining the guilt or innocence of the defendants on this charge?

A. No, it is not.

By Mr. Rosenthal:

Q. In answering Mr. Barshay before—and correct me if I am wrong—didn't you express some doubt on that subject, sir, as to your ability to remove it?

Mr. Turkus: I object.

A. I don't think so.

Q. Is there any doubt in your mind as to your ability to remove the impression which you have and which you say is detrimental to the defendants, or some of them? Is [fol. 1173] there any doubt, sir, in your mind?

A. None.

Q. Whom would you expect to remove this impression were you called as a juror?

Mr. Turkus: I object to it.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Is there any thought in your mind now, if you entered the jury box, as to how this impression which you say is now with you should be removed?

Mr. Turkus: I object to it.

The Court: Sustained. He said he would do it himself.

Mr. Rosenthal: I again respectfully except to the Court's ruling.

Q. You feel at this time that irrespective of the impression which you say that you formed and have with you now, that you could lay that impression totally and wholly aside without giving it any thought or consideration in determining the guilt or innocence of these defendants?

A. Yes.

Q. Would it require any evidence to remove the impression you now have?

Mr. Turkus: Objected to.

The Court: Sustained as already answered.

Mr. Rosenthal: Respectfully except.

By Mr. Talley:

[fol. 1174] Q. Mr. Nagle, something would be required in the course of this trial to change the impression?

Mr. Turkus: I object to it. It has already been answered.

Mr. Talley: I have a right to question this talesman whether it has been answered or not.

The Court: Mr. Talley has a right to repeat. He has not previously asked the question.

A. Will you repeat it?

Q. (Pending question read.)

A. Only the ordinary course of the trial

Q. What in the ordinary course of the trial do you think would happen, would you require, in order that that impression might be removed?

A. Only the general testimony given; that is all.

Q. Then it would require some testimony, whether it was general or specific, to remove the impression?

A. Possibly.

Q. What?

A. Possibly.

Q. Not "possibly." Actually, is not that the situation?

A. No, I think I could cast it aside if I was accepted in the box.

Q. In other words, you would not go into the box with any impression. Is that what you are trying to convey?

A. I could do so.

Q. The impression would be removed in your mind before [fol. 1175] you would be accepted as a juror?

A. I think so. I am sure of it.

Q. But as you sit on that stand listening to my questions, you still have the impression, have you not?

Mr. Turkus: I object to it. It has been answered.

Mr. Talley: I have a right in behalf of my defendant to question this juror, whether it has been answered in response to any other questions or not.

Mr. Turkus: In response to Judge Talley's questions, the prospective talesman said that he could cast it aside.

The Court: That was the first question. Sustained as repetition.

Mr. Talley: Exception.

Q. How long have you entertained this impression that you have?

A. Well, I should say only since I have been called as a juror.

Q. And do you date that back to August or the actual commencement of this trial in the court-room?

A. Possibly since the start of the trial here.

Q. That impression was formed by talks you had with people about this case or these defendants?

A. And by one article that I read.

Q. In what paper?

A. I think it was the evening *Sun*.

Q. Mr. Nagle, let us be perfectly fair with each other. I am trying to be fair with you. There have been so many questions asked upon this subject I am a bit confused as to [fol. 1176] just what your state of mind is. I will put the question plainly to you: Have you or have you not an impression as to the guilt or innocence of these defendants at this moment?

A. I have a slight impression.

Q. And that impression is detrimental to the defendants or some of them?

A. Yes.

Q. And it would require something in the ordinary course of the trial, to use your expression, to remove that?

Mr. Turkus: I object to it as repetitious.

Mr. Talley: Perfectly proper question, sir.

The Court: He said he would cast it aside.

By the Court:

Q. Do you mean the guilt or innocence of this charge of murder?

A. Yes. It does not concern this charge. My impression does not concern this particular charge.

Q. So you were confused?

A. Yes.

Q. Do you wish to correct your answer? Is it just an ordinary impression, generally detrimental——

A. To the character of one of the defendants.

Q. But not as to the alleged act of which they are accused in this indictment?

A. No, I know nothing about that.

By Mr. Talley:

Q. Now do you say that your impression is about the character of one of the defendants?

A. Yes.

Q. And that impression is detrimental to him?

A. Yes.

[fol. 1177] Q. And you would be inclined to believe the testimony that was given about that particular defendant upon whom you have the impression because of your impression that is detrimental to him, isn't that so?

A. Not necessarily.

Q. What do you think would remove that impression? It would have to be testimony, wouldn't it? We have nothing else in this trial.

Mr. Turkus: I object to it. It is argumentative and repetitious.

The Court: And leading. Sustained.

Mr. Talley: Exception.

Q. What is the reluctance of which you speak in accepting the charge of the Court as to the necessity of corroborating from an independent source the testimony of confessed accomplice?

A. I understand the question at that time to be if I was convinced that defendant was guilty. I said in that case I would with reluctance accept a ruling of the Court that that testimony be disregarded.

Q. In other words, you are not quite in accord with that law as it would be announced by the Court?

A. I have never understood the law.

Q. That the testimony of a confessed accomplice must be corroborated by some independent evidence. That is the law in this country.

A. I am not familiar with the laws.

Q. We have stated to you, I think repeatedly.

[fol. 1178] A. I said that I would obey the law but it would be with reluctance if I was convinced that the defendants were guilty.

Q. Even though the testimony which convinced you came from the mouths of confessed accomplices to the crime?

A. If I was convinced that they were guilty, I would with reluctance accept such a charge.

Q. Therefore you rather take exception to the provision of law, based upon the experience of centuries, that the testimony of accomplices must be corroborated by some independent testimony——

Mr. Turkus: I object to it.

[fol. 1179] Q. ——distinct from those accomplices; isn't that correct?

The Court: Sustained.

Mr. Talley: Exception.

The Court: It is not a requirement that a talesman shall agree with the law.

Mr. Talley: It is agreed that he must accept it.

The Court: He must follow it. None of us agree with all the laws.

Q. The Court will charge you that no testimony is required to be supplied by the defendants in a criminal action and that it is the right and privilege, a very sacred right, of a defendant not to take the stand. If the Court charges you to that effect and one or any of these defendants does not take the stand after the People's case is in, would you indulge in any inference unfavorable to such defendant because he did not take the stand?

Mr. Turkus: That is a legal question.

The Court: Sustained.

Mr. Talley: Exception. It goes precisely to the talesman's state of mind.

The Court: Pardon me, Judge. Maybe I was too abrupt, because, if I recall the words of the statute, they are: "The defendant has a right to take the stand as a witness in his own behalf, but for his failure or refusal to do so no infer-
[fol. 1180] ence of guilt may be drawn against him."
Mr. Talley: Yes, sir.

By the Court:

Q. Should the Court so charge you, will you follow the instructions of the Court and draw no inference of guilt against the defendant for his failure to take the stand?
A. I would, sir, very reluctantly.
Q. But will you do it?
A. Yes.

By Mr. Talley:

Q. But you would be reluctant to accept that instruction from the Court likewise?
A. I am afraid so.
Q. You do not agree with it?
A. I am afraid not.
Q. In your judgment a defendant accused of crime should take the stand and deny what has been testified against him; is that correct?

Mr. Turkus: I object to it.
The Court: Sustained.
Mr. Talley: Exception.

Q. Mr. Nagle, don't you think that your reluctance to accept the law as it will be charged by the Court unfits you to be a fair and impartial juror in the trial of this case?

Mr. Turkus: I object to that.
The Court: Sustained.
Mr. Talley: Exception.

[fol. 1181] Q. Do you know of any reason why you could not sit as a fair and impartial juror on the trial of this case?
A. No.
Q. You do not?

By Mr. Barshay:

Q. Isn't it a fact, Mr. Nagle, that your accepting the Court's law with reluctance——

Mr. Turkus: I object to it.

The Court: The question is not asked.

Mr. Turkus: I thought it was finished. Excuse me.

Q. Isn't it a fact that your reluctance, even though you say you will do it, to accept the Court's charge on the law is based upon the impression that you have of one of the defendants' character?

A. Oh, no.

Q. Not at all?

A. Not at all.

Q. You mean your reluctance is divided from the impression?

A. No, my reluctance would be more or less that a person accused of a crime should be willing to get up and——

The Court: We want no thesis. People are divided on that point.

Mr. Barshay: May I proceed?

The Court: Not with that question.

Mr. Barshay: Your Honor, the juror has volunteered an answer which I shall base as a question, most respectfully, and then your Honor can rule and see if I am wrong. I do not do it intentionally.

The Court: The Court has properly interrupted it, I [fol. 1182] think.

Mr. Talley: May we not have the answer of the talesman upon the record, despite your Honor's ruling?

The Court: No, I have stopped it.

Mr. Barshay: Exception.

Mr. Talley: I except to your Honor's right to strike out any answer given by a talesman in answer to a question as to his qualifications. It is not testimony. He answered the question. It is on the record, and I question, with great respect, your Honor's right to strike it out. It is not testimony.

The Court: I think it is unwise. There are other gentlemen here, and I do not think it is wise to have a discussion on legal philosophy in their presence. Let the incident be considered closed.

Mr. Barshay: We respectfully except.

Mr. Talley: I except to your Honor's striking out the answer given by the talesman in answer to that question.

Q. Now, Mr. Nagle, despite every admonition of the Court which you heard, you just volunteered the fact that

you think you would require that any man charged with a crime should make some explanation of it.

Mr. Turkus: Objected to. That is a legal question.
The Court: Sustained.
[fol. 1183] Mr. Barshay: Respectfully except.

Q. Now, you said that you formed an impression detrimental to the character of one of the defendants?

Mr. Turkus: I object to that.

Q. Did you say that?
A. Yes.

Mr. Turkus: That is repetitious.
Mr. Barshay: It did not come from me.
Mr. Turkus: You started to inquire this morning.
Mr. Barshay: I yielded to an older and wiser man, Mr. Turkus, and now I want to take my place.
Mr. Turkus: I yielded to the Judge, who is the wisest in the court. As for age, we will——
The Court: The Court has acquired the utmost respect for the learning and sagacity of counsel here. I think it is a brilliant array of counsel. The question may be answered, because Mr. Barshay has not asked it before.
Q. (Pending question read.)
A. Yes.
Q. Even though it has nothing to do with this case?
A. Yes.
Q. Even though you heard many times repeated here that character is not an issue in this case——

Mr. Turkus: I object to it.

Q. Unless—Let me finish the question, because otherwise it would be illegal. —unless the defendant himself puts character in issue?

Mr. Turkus: That is a legal question, please the Court.
[fol. 1184] The Court: Sustained as argumentative.
Mr. Barshay: Respectfully except.

Q. And so that this impression as to this particular defendant's character, whoever he may be, will have to be dissipated during the course of the trial; am I correct?

Mr. Turkus: That is objected to because that has already been answered.

The Court: It has not been answered to a question put by Mr. Barshay on behalf of his particular client.

Q. (Pending question read.)

A. Yes.

Q. And I take it, sir, you understand that you don't expect the District Attorney to furnish evidence in this case to dissipate any bad impression of any defendant, do you?

A. Yes, I would think so.

Q. You want the District Attorney or you would expect the District Attorney to give here evidence as a part of his case in his effort to try to convict these defendants, to give good testimony on their behalf to dissipate any bad impression?

A. I misunderstood your question. I think I misunderstood your question.

Q. I am sorry, sir. I thought you did. What is your answer now?

A. Will you repeat that first?

Q. (Two questions read.)

A. No.

Q. Then you would expect someone to do it on behalf of [fol. 1185] the defendant involved, wouldn't you

Mr. Turkus: That is a legal question.

Mr. Barshay: That is not a legal question.

Mr. Turkus: It is.

Mr. Barshay: What has law got to do with this man's expectations?

Mr. Turkus: Of course it has.

The Court: It is psychological and impossible for anybody to rule anything out of his recollection. Those things are done by a higher power than ours. The question is whether a man can lay aside his impression.

Mr. Barshay: I will get to that.

The Court: You cannot forget things, but you can disregard them.

[fol. 1186] Mr. Barshay: I cannot do it all in one breath.

The Court: Objection sustained.

Mr. Barshay: Respectfully except.

The Court: Because the premise is improper.

Q. I take it you will be able to lay aside that impression only after someone gives you testimony as a basis for laying aside your impression?

A. Yes.

Q. So that that someone will have to be either the defendant involved or someone in his behalf, isn't that so?

Mr. Turkus: That goes right to the legal question. The juror must be instructed by the Court.

The Court: Sustained as argumentative.

Mr. Barshay: Hasn't he already been instructed by the Court?

Mr. Cuff: We except.

Mr. Barshay: We all except, your Honor, to that.

Q. And so that, sir, unless the defense, through itself or through witnesses, furnishes testimony here to dissipate that impression which you now have, it will not be dissipated in your mind, will it?

Mr. Turkus: Objected to for two reasons: It has been answered; and second, it is argumentative.

The Court: Sustained.

Mr. Barshay: Respectfully except.

[fol. 1187] Q. You tell me in your own language, sir, whom do you expect to remove that impression that you now have?

A. Well, the impression does not concern this particular trial.

Q. I know that.

A. Or the merits of this trial. It is merely a character impression that I have. I do not know how I could answer the question otherwise.

[fol. 1188] Q. Whom do you want to remove it? Whom do you expect to remove it?

Mr. Turkus: I object to it. It has been answered by the talesman on previous questions that he would lay aside his impression; that it does not affect the merits of this case has been repeated by the talesman.

Mr. Barshay: It goes to a person's credibility. How can you say it does not affect the merits of the case? I press the question.

Mr. Turkus: I object to it on the ground it is argumentative; second, it has been answered; third, it is a legal question.

The Court: Maybe a question can be asked that is perfectly proper that may clarify it.

Mr. Barshay: I asked the question in the form, most respectfully: Whom do you, sir, expect to remove that impression?

The Court: Pardon me, Mr. Barshay. So much has been said by counsel for the defense about one of the defendants being presently serving a lengthy term in prison under another conviction that maybe that is what the juryman has in mind, and, if so, if that is all it is, there would be no use in pursuing questioning on that point any further because that situation has been revealed by defense coun-[fol. 1189] sel to all of the talesmen in this case.

Mr. Barshay: I most respectfully disagree with the Court, because this gentleman here has said that the impression he has gained is not what your Honor has just said but from reading the newspapers and discussions with some people, and I would be grateful to the Court if I was at liberty to clarify that situation.

The Talesman: I beg pardon. I said it was the result of one article that I read.

Q. One article?

A. That is right.

Q. That had nothing to do with the question about one defendant's incarceration, isn't that so?

A. I did not say that. That is what it is. It is what the Judge has spoken about.

Q. It is both?

A. No, it is what the Judge has suggested, the article—Do you want me to tell the article I read?

Q. You may tell too much.

The Court: All you can say is yes or no, whether that is all there is to it.

Mr. Barshay: May we clarify the record?

Q. Which is it that gave you the impression, the fact that one defendant is serving time now on another matter, or the fact that you read something in the press?

Mr. Turkus: Objected to. He has answered that was [fol. 1190] the matter that he read.

Mr. Barshay: Then you disagree with the Court?

Mr. Turkus: I am not talking to you, Mr. Barshay. I am urging an objection to your Honor.

By the Court:

Q. Is it anything outside of that man's present conviction and sentence?

A. No, it is not.

The Court: There you have the answer.

By Mr. Barshay:

Q. In other words, his credibility is affected now by virtue of that item?

Mr. Turkus: Objected to. That is a legal question and that may affect credibility.

The Court: Sustained.

Mr. Barshay: May I put it this way?

Q. Based upon that fact, you have drawn an impression unfavorable to the defendant involved?

A. Yes.

Q. And you would require somebody to furnish testimony to remove that unfavorable impression?

Mr. Turkus: Objected to as repetitious.

The Court: Sustained as repetitious.

Mr. Barshay: We never got an answer. How could it be repetitious, your Honor?

The Court: It is my recollection of the record.

Mr. Barshay: I most respectfully except, and I urge [fol. 1191] your Honor to permit this juror to answer this question so we can get away from the subject and I can get a ruling one way or the other.

The Court: The Court has ruled.

Mr. Barshay: Respectfully except.

Q. Unless the defendant involved takes the stand and offers testimony, would that impression be removed?

Mr. Turkus: Objected to. It has already been answered.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. Are you now presently of the mind that without any testimony given on behalf of this defendant by himself or others, you would remain throughout this trial with that impression?

Mr. Turkus: Objected to, repetitious.
The Court: Sustained.
Mr. Barshay: Respectfully except.

Q. And your impression now at this time has precluded you or will preclude you from rendering the impartial verdict on the evidence unless the defendant makes some explanation?

Mr. Turkus: Objected to. It has been answered to the direct contrary.
The Court: Sustained.
Mr. Barshay: To me, sir, it has not been answered at [fol. 1192] all.
The Court: It has been sufficiently answered.
Mr. Barshay: Your Honor, we challenge this juror for cause on the ground of implied bias.
The Court: Try the challenge.

(James F. Nagle was duly sworn.)

By Mr. Barshay:

Q. Now, sir, you are under oath.
A. I am.
Q. You understand that?
A. Yes.
Q. And you have clearly in mind every question asked of you?
A. Yes.
Q. Every answer made by you?
A. Yes.
Q. Every admonition that the Court has given, both to you and to other jurors?
A. Yes.
Q. Now under oath I ask you at this very minute, do you still retain an impression unfavorable to one of the defendants in this case?
A. Yes.
Q. And you are not able to lay aside that impression unless and until, on behalf of that particular defendant, proof or testimony is given either by himself to dissipate it——

Mr. Turkus: That is a legal question. The juror should be apprised of the law by the Court.

Mr. Barshay: He has already said he has been apprised of it and he has it in mind and he has an open mind on the Court's admonition.

[fol. 1193] The Court: The question is leading and telling him what he thinks instead of asking him what he thinks.

Mr. Barshay: I respectfully except.

Q. You tell me in your own language, sir, would it require anything at all on behalf of that defendant to dissipate the impression that you volunteered you had against him?

Mr. Turkus: I object to it. That is a law question.

The Court: He said the impression was because of the [fol. 1194] present conviction and incarceration. Why should he be required to get it out of his mind? It is a fact and it is admitted by all counsel for defendants and proclaimed openly in the presence of the entire panel. The question is, will he disregard it?

Mr. Barshay: I have asked him.

The Court: A man who is under previous conviction, a man who comes into court under custody of Federal officers and bailiffs, has to be tried the same as anyone else. You cannot bar a trial simply because jurors know of his present prison status. We must get jurors who will lay that aside and judge him on the evidence in this case alone, from the testimony that they hear on the stand.

Mr. Barshay: I most respectfully except.

The Court: Regardless of his present condition as to incarceration.

Mr. Barshay: I most respectfully except to the Court's observation with respect to that fact and I want to urge upon the Court that for ten minutes now I have been trying to get from this juror an answer to the very point that your Honor has instructed me I should get, Can he lay aside that impression? and I have not been able to get an answer because the Court has sustained the objection. I am still at [fol. 1195] a loss what this juror's mind is.

The Court: He has answered it repeatedly.

Mr. Barshay: I have not heard it. If I did, I forgot it, and if I did not I am confused by the interruptions.

The Court: He has answered repeatedly he would lay it aside.

Mr. Barshay: I object to your Honor's observation of that. I did not hear that from this man's mouth, and we don't know.

The Court: The Court cannot tolerate fighting back with the Court on rulings. That is not orderly in any court of justice. It is not the way to try a case.

Mr. Barshay: I know your Honor knows I am not fighting the Court.

The Court: Don't do it. It is human nature, but don't do it.

Mr. Barshay: I am fighting your Honor here for a right I think my client has.

The Court: I admire your fighting qualities because I used to fight that way myself.

Mr. Barshay: And, frankly, I learned it from you.

The Court: I used to wish, in these cases, there were more peremptory challenges than there are, but I am a judge now.

[fol. 1196] Mr. Barshay: I may make an observation with respect to your Honor's remark, that the peremptory challenges were fixed by the State Legislature and not by me; they are given to my client as a benefit of law, as to every other client.

The Court: I am not taking them away; I respect your right to use them.

Mr. Barshay: All right, sir. I don't intend to challenge this juror peremptorily yet, until my rights on cause are exhausted.

The Court: Kindly proceed expeditiously. We are wasting time. It is becoming a public scandal.

Mr. Barshay: I take it, sir, you don't charge that to the defense, because at present——

The Court: This is not specific. I won't say more because you will take more exceptions and make more speeches.

Mr. Barshay: Let it be clear here—the District Attorney has taken as many peremptory challenges as the defense, and has exercised them before we did.

Mr. Turkus: The Court requires me to.

Mr. Barshay: I don't find fault with you.

Mr. Turkus: It sounds like it now.

The Court: May I suggest, in the interests of expedition, why don't you compose yourself and let one of the other counsel go ahead with the trial of the challenge until you do.

Mr. Barshay: Of course, your Honor assumes that I am [fol. 1197] not composed, but I am not flustered in any degree, sir. I am perfectly within my right, and I ask you

in the interest of justice, let this gentleman answer can he lay aside the impression he has or can't he, and we can save time.

Mr. Turkus: I wish I could be heard, sir. There is a legal question involved about that that may come into play——

The Court: The court-room is in disorder. The Court requests the questioning resume, and will rule on objections.

By Mr. Barshay:

Q. In accordance with his Honor's instructions, sir, I just want to ask you one question. The impression that you now have which is detrimental to one of the defendants, can you lay it aside? Yes or no?

Mr. Turkus: I object.

[fol. 1198] A. I answered it before. I said I could lay it aside and I would lay it aside.

Q. I will ask you this other question, sir: Will you lay it aside in any event, or will you lay it aside only when and if there comes something from the defendant involved to cause you to lay it aside?

Mr. Turkus: I object to it. It is repetitious, and second, it is a law question. You see, if a defendant who has been convicted——

The Court: Don't argue.

Mr. Barshay: Can we get an answer to that, and I will sit down?

The Court: Sustained as repetitious.

Mr. Barshay: In the interest of justice, sir, I say it may be repetitious. I never heard it from him.

The Court: Don't argue.

Mr. Barshay: I most respectfully except.

Mr. Talley: May I have another question?

By Mr. Talley:

Q. Mr. Nagle, you believe that any person charged with crime and brought to trial upon that charge should stand up and answer the charge preferred against him, do you not?

Mr. Turkus: I object to it. That is a discussion of the philosophy of the law.

The Court: Sustained.

[fol. 1199] Mr. Talley: No philosophy of the law involved there at all. It has to do with this talesman's state of mind. As a matter of fact, he has already stated in the course of his examination he believes that anybody charged with crime should stand up and answer that charge. There was some confusion in the record in respect to that, and I want to avoid that confusion and have a direct answer to a very direct question. I submit I am entitled to it.

The Court: The Court has ruled.

Mr. Talley: I except.

Mr. Rosenthal: I have one question.

By Mr. Rosenthal:

Q. You stated, Mr. Nagle, that it would be with reluctance that you would accept the Court's charge telling you that even though you might believe the testimony of an accomplice, that it would be your duty, if there was no independent evidence tending to connect the defendant with the crime, to acquit, it would be with reluctance that you would accept such a charge; is that true, sir?

A. No, I think I said— I think the question was asked, if I was convinced that the defendant was guilty. I said then that I would accept such a charge with reluctance.

Q. In other words, if you were convinced of the truth of the story of the accomplice——

A. Well, it might be——

Q. —as to the guilt of the defendant, is that what you [fol. 1200] mean?

A. It might be only one of the things that would lead to my conclusion of guilt.

Mr. Turkus: That is a law question, because he cannot be convinced of guilt upon that.

Q. When you said, as you did, that it would be with reluctance that you would accept the Court's charge to find a defendant not guilty even though you believed the testimony of the accomplice, if you found no corroborating evidence, did you misunderstand the question when you answered that it would be with reluctance that you would accept such a charge?

Mr. Turkus: Objected to as already answered.

Mr. Rosenthal: I am trying this now on the challenge

which has been made, and it is a preamble to a question which is perfectly proper.

Mr. Turkus: On the further ground it is a legal ground, and second, it is complicated and ambiguous.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. You did say, sir, that you would with reluctance accept the charge of the Court that you should find the defendants not guilty in the event that you were convinced of their guilt on the testimony of an accomplice soley. Did you say that?

A. No, I didn't.

Q. What was your answer, that you would with reluctance accept the charge of the Court, in answer to what [fol. 1201] particular question of law that was addressed to you, if you recall?

A. I understood the question to be, if I was convinced of the guilt of the defendant, not on any particular person's testimony, if I was convinced of the guilt of the defendant, that I would accept such a ruling from the Court with reluctance.

Q. Do you understand, sir, that the only way you could be convinced now, sitting here for a number of days, of the defendant's guilt is from the testimony that comes from the mouths of the witnesses? Do you understand that is the only way you could be convinced?

Mr. Turkus: Objected to. It is argumentative and now becomes repetitious.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Is it a fact, sir, that if you were convinced of the truth of an accomplice's testimony, because of your state of mind, that you would be more ready to accept the so-called independent evidence that has been described to you than otherwise would be the case?

Mr. Turkus: I object to it. It is argumentative, it is repetitious, and it is ambiguous.

Mr. Rosenthal: It has never been asked before and it is not argumentative.

The Court: Sustained.

Mr. Rosenthal: I respectfully except. I press the charge [fol. 1202] of implied bias along with the co-defendants.

Mr. Barshay: With your Honor's permission, I will ask just this question.

The Court: No repetition.

By Mr. Barshay:

Q. Assuming, sir, that the prosecution presents its case against our client and the defendant, in his wisdom or lack of it, chooses to rest and offer no testimony whatever, in that event, sir, would you lay aside the impression that you have?

Mr. Turkus: I object to it.

The Court: He has already said that he would lay aside his impression for the purpose of the trial.

Mr. Barshay: I never heard him say that yet.

The Court: That is the meaning of it. Sustained.

Mr. Barshay: I except respectfully. That is all. We press the challenge.

The Court: The challenge is overruled.

Mr. Barshay: On behalf of all defendants we respectfully except.

Mr. Turkus: Mr. Nagle is satisfactory to the People of the State.

Mr. Rosenthal: Peremptory.

Mr. Barshay: Peremptory by all defendants.

Mr. Cuff: Subject to exception.

[fol. 1203] Mr. Barshay: Of course, subject to the exception to your Honor's ruling. We waive no exception in this case.

Edward Groden, of 215 Corbin Place, Manhattan Beach, was examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Groden, is that the correct pronunciation of the name?

A. That is right.

Q. The trestle board lists your address as 215 Corbin Place; is that correct?

A. That is right.

Q. What section of Brooklyn is that?

A. Manhattan Beach.

Q. And have you lived in that neighborhood for a number of years?

A. Yes, sir.

Q. Have you lived in Brooklyn for many years?

A. Twenty-eight years.

Q. On this trestle board your profession or vocation is listed as that of an auditor.

A. It was at the time.

Q. Are you presently unemployed?

A. No, I am with the bank yet. I am with the First National Bank of New York.

Q. The work that you did as an auditor, was that work limited to figures?

A. Yes.

Q. In connection with books and accounts. Do you do a different type of work now?

A. No, the same.

Q. I take it that you have heard the nature of the charge in this case from the other examinations?

A. Yes, sir.

Q. Do you understand, sir, that the defendants at the bar [fol. 1204] of justice, Buchalter, Weiss, and Capone, are charged with the crime of murder in the first degree, the killing of a man by the name of Joseph Rosen?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, that it is a murder case, which would impair or impede your service as a juryman?

A. No, sir.

Q. May I proceed, then, with the understanding that you have no scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. And in so far as you are concerned, when you deliberate the question of guilt or innocence, you will do so without any notion of the punishment that follows a verdict of guilty?

A. Yes, sir.

Q. Something has been said here by one of the lawyers representing a defendant that he has been heretofore found guilty of crime and is now presently incarcerated in jail as the result of the conviction, and the question then addressed to the prospective talesman was, would there be

any prejudice against that defendant solely because he had been convicted of past crime? What is your answer to that?

A. No.

Q. Taking it one step further, would you be inclined or do you feel that you should relax or deviate from a proper verdict in the case solely because a defendant has been heretofore convicted of a past crime?

A. No.

Q. Will you decide this issue, the guilt or innocence of [fol. 1205] that defendant along with the other defendants for the murder of Joseph Rosen, on the evidence that you hear in connection with this charge?

A. Yes.

Mr. Climenko: Object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

Q. I can go through this rather hurriedly because of the nature of your business, and I will dump it altogether. Do you now have or have you ever had any contact in the Brownsville East New York area of Brooklyn, the Brooklyn waterfront, the clothing or garment districts in Manhattan?

A. No.

Q. Or with clothing truckers?

A. No.

Q. May I go ahead now with the understanding, then, that you know no union officials connected with the Amalgamted Clothing Workers of America?

A. No.

Q. That the names of Weinstein and Katz, Bellanca, Curley Holtz, and the rest are unfamiliar to you?

A. Yes.

Q. Since you received your jury notice, Mr. Groden, did anybody speak to you about the merits of the case?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, sir.

Q. There are nine lawyers here representing these three defendants, former Assistant District Attorney Barshay, former Assistant United States attorney Wegman and his partner, Jesse Climenko; do you know any of those three [fol. 1206] counsel representing Buchalter?

A. No.

Q. Do you know anybody in their law offices, employed?
A. No.
Q. With respect to the defendant Weiss, he is represented by a former judge of the Court of General Sessions in Manhattan, Judge Talley, and a former Assistant District Attorney in Brooklyn, Mr. Cuff, and a former Assistant United States Attorney, Mr. Kriendler. Do you know any of those three gentlemen?
A. I know Mr. Talley. I have known him all my life.
Q. Is that a friendship?
A. No.
Q. You mean you know of him by reputation?
A. Yes.

By the Court:

Q. Do you know him personally?
A. No, I have not seen him in a long time.
Q. Do you belong to the New York Athletic Club?
A. Yes, I did at one time.
Q. When did you leave?
A. I left about seven years ago.
Q. You are a polar bear, aren't you?
A. I was once.
Q. So was I. I thought I recognized you. How long were you a member of the New York Athletic Club?
A. I represented them four years.
Q. You were an athletic director?
A. No, I was a hand-ball player.
Q. That is why you are sunburned over the brows. Is that where you met Mr. Talley?
A. No, I did not meet him up there. He was at St. Fran-
[fol. 1207] cis Xavier's College.
Q. Most lawyers belong up there.

By Mr. Turkus:

Q. I think we got to the point, Mr. Groden, where I inquired whether or not you had ever been to dinner with him.
A. No.
Q. You don't visit him socially?
A. No.
Q. That acquaintance goes back to the time you went to the same school?
A. Practically, yes, and I followed his carrer since then.

Q. Getting right to the nub of the matter, Judge Talley represents a client in this court. Together with two other lawyers, he represents the defendant Weiss. Will the question of Weiss's guilt or innocence for the crime of murder in the first degree as set out in this indictment turn in any wise on your knowledge of Judge Talley?

A. Oh, no, no.

Q. With respect to the other lawyers representing Weiss, do you know them?

A. No.

Q. Capone is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, Mr. Emanuel Rosenberg. Do you know any of those three lawyers?

A. No, sir.

Q. Or anybody connected with their law offices?

A. No.

Q. Do you know intimately or socially any member of the bar who specializes in the defense of criminal cases?

A. I know Paul Lockwood.

[fol. 1208] Q. Paul Lockwood is with Tom Dewey?

A. Yes.

Q. Would the question of guilt or innocence of any defendant in this murder case turn on any acquaintanceship that you may have with Mr. Lockwood?

A. No.

By the Court:

Q. That again is New York Athletic Club?

A. Swimming.

Q. Swimming, down at Manhattan?

A. Yes, we——

By Mr. Turkus:

Q. Paul Lockwood is a swimming coach?

A. Yes, he was with the New York Athletic Club.

By the Court:

Q. He was the coach there?

A. Yes.

By Mr. Turkus:

Q. Will you take the law in this case exclusively from Judge Taylor?

A. Yes, sir.

Q. And will you do that regardless of what any lawyer may say the law is, whether it is the prosecuting attorney or any defense lawyer? Is it your understanding and will you take the law only from the trial justice in the case?

A. Yes, sir.

Q. And will you endeavor conscientiously, Mr. Groden, to apply the law to the facts in this case?

A. Yes, sir.

Q. With respect to the Constitutional and other legal rights of the defendant, will you take every piece of law that the Judge gives you with respect to defendants' rights in a criminal case, and apply it to the benefit of the defend-
[fol. 1209] ants in this trial?

A. Yes, sir.

Q. After you have given the defendants every benefit that the law of the land says they should have, and assuming that you feel, after you have heard all the evidence in the case, that you are satisfied beyond a reasonable doubt that these three defendants and every one of them are guilty of murder in the first degree, will you say that in your verdict?

A. Yes, sir.

Q. Do you find any fault with the District Attorney of the County, Judge O'Dwyer, in breaking a case from the inside and using the testimony of a co-participant in the commission of the murder against these men on trial?

Mr. Rosenthal: I object to the question on the ground it is bringing the personal entity of individuals into the trial—improper question.

The Court: That has been asked a great many times, but I cannot conceive of anybody answering it other than it has been answered.

By the Court:

Q. You are not sore on the District Attorney for having somebody turn State's evidence?

A. No.

Q. If that is the fact in the case?

A. No.

By Mr. Turkus:

Q. Do you find any fault, Mr. Groden, with the prosecution of an indictment wherein the testimony of a co-

participant, called an accomplice, is employed against the [fol. 1210] defendants on trial?

A. No, sir.

Q. With respect to the believability or the credibility of testimony emanating from an accomplice, will you apply the rules as given by Judge Taylor?

A. Yes, sir.

Q. And in considering the believability of an accomplice, will you look at every rotten thing the accomplice ever did in his lifetime, from the day he was born, every vicious, every criminal, every immoral act he has ever perpetrated, every criminal he has associated with, and everything on the wrong side of the ledger, in evaluating his testimony?

A. Yes, sir.

Q. Will you look at it with caution?

A. Yes, sir.

Q. By the same token, in looking the case over will you bear in mind that we are here trying a man for the crime of murder in the first degree, and use common sense and understanding in weighing the issue of guilt or innocence?

A. Yes, sir.

Q. May I go along, then, with the understanding that you have no bias or prejudice either against the prosecutor or the prosecution wherein accomplice testimony is used against defendants?

A. Yes, sir.

Q. Will you follow implicitly the instruction of law as to what corroboration is required before there can be a conviction?

A. Yes, sir.

Q. For example, if the Judge tells you that accomplices standing alone cannot supply sufficient information or sufficient testimony to warrant a conviction of murder in the [fol. 1211] first degree or to warrant the conviction of any crime, will you follow that law?

A. Yes.

Q. Should the Judge charge you that it is not necessary that the prosecutor corroborate and substantiate every little detail and every little piece of the testimony, but that the jury may find corroboration from other evidence which tends to connect the defendants with the commission of the crime, will you apply that instruction of law to the facts in this case?

A. Yes, sir.

Q. With lawyers representing the defendants, and each one having a right to talk to the jury, as they properly have, and the law says they must have, will you, if any argument is repeated three times by the lawyers, give it three times the weight because you heard it three times?

A. No.

Q. Have you any knowledge or acquaintance with the District Attorney of the County, personal acquaintance with him?

A. I belong to the Hibernians, Ancient Order of Hibernians, with Judge O'Dwyer.

Q. Would you, in the case where the charge is murder in the first degree, permit membership in an association like the A. O. H., to interfere with the proper result in the case?

A. No, sir.

Q. Do you know Assistant District Attorney Klein or Turkus?

A. No.

Q. Will you, if accepted as a juror in this case, use common sense and understanding in finding out whether the accomplice is telling the truth about the participation of [fol. 1212] these defendants in the Rosen murder and whether or not there is any corroboration from an independent source tending to connect the defendants with the commission of the crime? Will you do that to the best of your ability as the Judge explains the law should be applied?

Mr. Climenko: Object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

Q. I think you said you would; is that right?

A. Yes.

Q. If selected as a juror in the case, will you by your verdict endeavor to do justice in this case?

A. Yes, sir.

Q. Will you discuss the case with common sense and understanding and listen to reasonable discussion by the other jurors?

A. Yes, sir.

Q. If at the conclusion of the entire case, after you have heard every piece of testimony in it and every argument that the defense lawyers make to the jury, and you as one

of them, and every argument the prosecutor gives, the learned charge on the law from the Court, sensible discussion with your fellow jurors and your conscience and your mind is satisfied beyond a reasonable doubt that there are three guilty men, guilty of the Rosen murder, will you say so in your verdict?

A. Yes, sir.

Q. Would you have any fear, hesitation, or reluctance in pronouncing a Guilty verdict, if it meets with the burden that the law says is on the District Attorney, to establish [fol. 1213] guilt beyond a reasonable doubt?

A. No.

Q. Will you have any fear or reluctance?

A. No.

By Mr. Barshay:

Q. Mr. Groden, as the other juror was being questioned, did you form and bias at all against the lawyers for the defense because of what transpired?

A. No.

Q. I take it you are under the impression that we believe that we are fighting for what we think is right?

A. Right.

Q. Nothing to do with the case?

A. No.

Q. You understand that. You said you are a member of the A. O. H. Do you know Judge O'Dwyer personally?

A. Well, he has been around at meetings and here and there.

Q. You heard him speak?

A. Oh, yes.

Q. Many times?

A. Yes.

Q. Do you know his brother Paul?

A. The lawyer, yes.

Q. President or former president or organizer?

A. No, not very well.

Q. You know him, don't you?

A. I know him.

Q. Do you know John Rooney, Assistant District Attorney?

A. Very well.

Q. Do you know Mr. Hoey, an Assistant District Attorney?

A. No, sir.

Q. Do you know Kenneth McCabe?

A. No.

Q. They are all members of the A. O. H., to my knowledge.

A. It has been some time since I have been there. Rooney [fol. 1214] was president when I was there.

Q. So that Rooney and Judge O'Dwyer and his brother you know better?

A. Yes.

Q. You have heard them speak there about crime?

A. No, not about crime.

Q. Do you see Rooney socially?

A. Yes, I have known him years.

Q. He is one of the leading lawyers for Judge O'Dwyer. Do you discuss his work?

A. No.

Q. At any time have you discussed his work?

A. When he was running for the office I tried to work for him.

Q. You were a booster of his?

A. Very much so.

Q. And of course you know, sir, that he was part and parcel of Judge O'Dwyer's staff?

A. Yes.

Q. I take it, with great pride you are a booster of Judge O'Dwyer too?

A. Yes.

Q. I take it, too, that you will participate most actively in his election?

A. No, I live in the same section with Rooney. I did go out and work.

Q. Of course you did.

A. Certainly I did.

Mr. Talley: Keep your voice up, please.

Q. I take it, with a great deal of pride you have watched the success of Judge O'Dwyer?

A. Yes.

Q. And you believe the causes which he sponsored?

A. Oh, yes.

Q. And have you reached a point that Judge O'Dwyer's office would not bring about an indictment in any case [fol. 1215] unless they felt sure?

A. Positive.

Q. You are positive of that?

A. Positive of that.

Q. So that as the result of that belief did you form any impression with respect to the defendants?

A. Will you repeat, please?

Q. As the result of the belief that you said, that anything Judge O'Dwyer may sponsor, or whatever the language was, you have positive faith in, do you believe, sir, now, by virtue of the accusation against the defendants, that you have some prejudice or bias against them?

A. No, sir; no, sir.

Q. Do you say now, sir, that you are free of bias or prejudice against the defendants in this case?

A. No, I don't say that.

Q. You don't say that?

A. No.

Q. And I take it, then, that it will be most difficult for you to lay aside that prejudice and bias, won't it?

A. This bias is not based on this particular case; it is based on the general set-up of the whole.

Q. That is right. You have a right to your opinion, sir. And it would take evidence to remove that bias?

A. No, it would not. I could have that bias after this case is over, irrespective of whether these men are guilty or innocent.

Q. In other words, you have it now and you may have it after the case?

A. Right.

Q. Is that your idea?

A. That is my idea.

[fol. 1216] Q. May I know what you will do with it during the case?

A. It won't be bias in this case. It will be the general set-up will be the bias. It would not be the bias in this particular case.

Q. Supposing one of them takes the stand and his credibility, that is, whether or not he should be or should not be believed, should become an issue for you to decide; would you use that bias against him?

Mr. Turkus: That is a legal question.
Mr. Barshay: Of course it is.
The Court: Sustained.
Mr. Barshay: Respectfully except.

Q. Could you remove that bias against them then? If he takes the stand and offers himself for cross-examination, it will be up to you to decide whether or not you should believe him.

Mr. Turkus: I object.

Q. Or you should not believe him. Wouldn't the bias weigh in determining that judgment?

Mr. Turkus: I object to it.

A. No, sir.
Q. Did you read about the case?
A. Yes, sir.
Q. Often?
A. I read some of the articles in The Mirror about the case, not this case.
Q. But the defendants?
A. Yes.
[fol. 1217] Q. You read about it since you have been called as a juror?
A. No.
Q. Did you form an opinion with respect to the defendants while you were waiting here, sir?
A. Not in this particular case I didn't.
Q. Did you form an opinion detrimental to them with respect to anything at all?
A. Yes, sir, I did.
Q. And so that if these men against whom you said you formed a detrimental opinion, are accused of crime, isn't it a fact that it will take less evidence to convince you of their guilt because of that bias or prejudice?

Mr. Turkus: Object to that. That is a legal question, on the quantum of proof, which the jury must take from the Court.

The Court: Overruled.

Q. (Pending question read.)
A. No.

Q. It would not?

A. No.

Q. Would you more easily believe things said against them because of that bias?

A. No.

Q. Would you require them, if the Court shall tell you that a defendant need not prove anything at all, would you require them to offer some evidence in this case?

A. No, sir.

Q. Would you require them to explain any accusation in this case?

A. No, sir.

Q. Should they choose to remain silent, and if the Court tells you that no unfavorable inference can be drawn against [fol. 1218] them for their failure to take the stand, will you tell me, sir, will you follow that law?

A. Yes, sir.

Q. And so, is that bias that you have against them generally, something that you can wrap up and lay aside?

A. I don't know whether I can explain it, but it is not with respect to this case, this prejudice and bias, but it is a general——

Q. I know that. In other words, they don't start off in this case free and clear in your mind of any prejudice or bias with respect to anything at all. They don't start off at scratch with you, do they?

Mr. Turkus: I object to it. It is an ambiguous question and it is a double question.

The Court: It is ambiguous. Sustained.

Q. Do these gentlemen start off at scratch with respect to this case?

Mr. Turkus: I object to it. That is an ambiguous question.

The Court: Sustained.

Mr. Barshay. Respectfully except.

Q. You honestly said exclusive of this case you are biased against these men?

Mr. Turkus: Objected to. It is repetitious now.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. You know Paul Lockwood, don't you?
A. Yes, sir.
Q. How intimately do you know him?
[fol. 1219] A. I have known him intimately for years. I knew him intimately for years.
Q. You know he has been a chief assistant to the District Attorney, too?
A. I know.
Q. You have a lot of faith in him?
A. Yes.
Q. Did you discuss the matter with him?

The Court: Mr. Dewey.

Q. He knows that. You know he is assistant to Dewey?
A. I know.
Q. Did you discuss any criminals with him?
A. Oh, sure.
Q. Many times?
A. Many times.
Q. You took at face value what he said to be true?

The Court: You and he used the same locker room?
The Talesman: Well, we were very close, Judge.

Q. As the result of your association with him, have you any bias against people charged with crime?
A. Yes, sir, I have.
Q. You have it here? You have it here? You have a prejudice against people charged with crime?
A. Convicted of crime.

The Court: Against people——
The Talesman: Convicted of crimes.

Q. You have a prejudice against people convicted of crimes?
A. Yes.
Q. No doubt about that? So in this case it has been said very often that one of the defendants has been convicted of crime and is incarcerated for a long time. Have you a prejudice against him?
A. Yes.
[fol. 1220] Q. You have. And you will not be able to lay aside that prejudice?
A. That prejudice has nothing to do with this crime that is committed now.

Q. You say now that prejudice too can be wrapped up in a bundle and laid aside?

Mr. Turkus: That is argumentative.

A. Yes.

Q. Now, there may come a time when the District Attorney's office will urge upon you, if you are chosen as a juror, its interpretation of certain testimony here. They may say it totals up to A, B, or C. Lawyers for the defendant may say it totals up to X, Y, and Z. You know Judge O'Dwyer and you know Mr. Rooney and you know—we will limit ourselves to them—and you had a lot of faith in what they stand for. Wouldn't it influence you to accept the District Attorney's version of the testimony with respect to their interpretation?

A. No.

Q. It would not?

A. No.

Q. If each side contends directly opposite views with respect to interpretation of testimony already in issue in this case, wou n't you be more inclined to favor the District Attorney's version by virtue of your knowledge of those men and the faith you have in their integrity?

Mr. Turkus: Objected to. It is argumentative and repetitious. He has already said no.

[fol. 1221] The Court: He has already answered.

Mr. Barshay: May he answer again, Judge, in the interest of saving time?

The Court: No.

Mr. Barshay: Respectfully except.

Q. Supposing the time may come when one of the witnesses who takes the stand will be asked about promises made to him and hope of reward held out for him, and we say that the District Attorney's office are the people who made those promises to him, and he denies that fact, and it becomes a question for you to decide whether you shall or shall not believe him, would your knowledge of Judge O'Dwyer, or Mr. Rooney, or anyone in that office, cause you to be influenced in their direction?

A. No.

Q. Not at all?

A. Not at all.

Q. If Mr. Turkus in summation should argue that Judge O'Dwyer never promised a single hope of reward to any witness for his testimony, and we argue just the contrary, wouldn't you be inclined, because of your knowledge and faith in Judge O'Dwyer, to accept his version in preference to ours?

A. No.

Q. You would not?

A. No.

Q. Is that somewhat inconsistent with your positive persuasion that every cause Judge O'Dwyer sponsors must be correct?

Mr. Turkus: Objected to, argumentative.

The Court: Sustained.

[fol. 1222] Mr. Barshay: Respectfully except.

Q. Do you know anybody else in that office?

A. Not a soul.

Q. Did you ever hear them lecture on crime?

A. No.

Q. Did you know a Captain William Kleinman?

A. No.

Q. Never met him?

A. No.

Q. That is the William W. Kleinman whom Mr. Turkus has reference to. He left his practice to go to the Army as a captain. You do not know him?

A. No.

Q. Do you know Mr. Sol Klein, now the Assistant District Attorney actively engaged, who before he became an Assistant was associated in the practice of the law with Captain William W. Kleinman?

A. No.

Q. And Mr. David Price?

A. No.

Q. Do you know Mr. Joseph, who is both on the staff of Mr. Geoghan and Judge O'Dwyer?

A. No.

Q. Do not know him?

A. No.

Q. Have you formed any opinion up to this very minute with respect to the guilt or innocence of any of the defendants?

A. No, sir.

Q. You told Mr. Turkus that you would accept with caution the testimony of accomplices, would you not?

A. Yes, sir.

Q. He said to you, "Take into consideration all the rotten things they did," putting it mildly, "all the rotten things they did."

Mr. Turkus: I object to it as far as it has gone, "putting [fol. 1223] it mildly." I do not know how I can say it any better. I object to it.

The Court: He was not a bit mild.

Mr. Barshay: Mildly by comparison to what we shall urge, sir. I withdraw the question.

Mr. Turkus: I withdraw the objection.

Q. You said you would take into consideration all the criminal acts of those accomplices; isn't that so?

A. I did, yes.

Q. Would you take also into consideration the fact that all the acts of criminality which they admit have gone unpunished to this very day?

Mr. Turkus: I object to any such improper speech-making.

The Court: Sustained.

Mr. Barshay: Respectfully except. I did not finish the question, sir.

The Court: Finish it.

Q. If that shall be established by competent testimony from this witness stand.

Mr. Barshay: Now will your Honor rule?

The Court: Improper as to form.

[fol. 1224] Q. Would you accept that kind of testimony of men whose crimes they admit out of their own mouths are so many that it would take years ot prosecute them for each and every single crime they admit doing and for which they have not been prosecuted?

Mr. Turkus: I object to that.

The Court: Sustained.

Mr. Barshay: Mr. Turkus does not let me finish my questions.

Mr. Turkus: I am sorry.

The Court: Go ahead.

Q. Would you accept with caution the testimony of men who out of their own mouths, be they accomplice or not, have admitted the commission of so many crimes that it would take a long time to prosecute them for each and every one of the crimes they admitted; would you take their testimony into consideration if you find that for those very crimes they have been given immunity?

Mr. Turkus: Objected to. That is an improper type of question.

The Court: Yes, the length of time it would take to prosecute has nothing to do with it.

Mr. Barshay: Is that the only objection? I will strike out the length of time.

By the Court:

[fol. 1225] Q. Would you accept with caution the testimony of an admitted accomplice who gets immunity for his crimes?

A. With caution?

Q. Yes.

By Mr. Barshay:

Q. In other words, you would not be so ready to believe him?

A. No, sir.

Q. You would want to know why all of a sudden virtue has entered his system and he is becoming a witness for the prosecution, wouldn't you?

Mr. Turkus: Just a minute. I object to this.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. Well, at any rate, sir, before you as a juror will be convinced that that man is telling the truth, you will want to know, first, who is he; second, what was he; third, what does he hope to gain by giving such testimony?

Mr. Turkus: I object to the form of the question. Those are the things a juror may take into consideration, and I object to it.

The Court: Overruled.

By the Court:

Q. Would you consider everything?
A. Everything relevant.

Mr. Barshay: I do not understand that.

[fol. 1226] Q. You might put it this way: that testimony of an accomplice, admitted accomplice, should be viewed with suspicion and accepted with caution. If the Court should so charge you, will you follow it?
A. I would.

By Mr. Barshay:

Q. That goes not only to an accomplice, but to every witness, whether he is an accomplice or is one who is offered as a coroborator.

Mr. Turkus: I object to that. That is an improper statement.
The Court: Sustained.
Mr. Barshay: Respectfully except.

Q. Would you accept with caution the testimony of any witness who takes the stand here and says, "I have led a life of crime"? Would you?
A. Would I accept it?
Q. With caution.
A. With caution.
Q. What?
A. Extreme caution.
Q. Isn't that so? Now, if testimony is given subject to two interpretations, the Court tells you that then you must give defendant the innocent interpretation, will you do that?
A. Yes, sir.
Q. Will you insist that the other jurors do that?
A. Yes, sir.
Q. Do you believe, sir, that a Grand Jury can indict an innocent man?
A. Yes, sir.
[fol. 1227] Q. And so you firmly believe in the presumption of every person charged with crime—the presumption of innocence?
A. Yes, sir.
Q. You understand that, don't you?
A. Yes.

Q. Do you believe that this indictment has any evidentiary value of the Court shall tell you that it has not?

A. No.

Q. Even though Judge O'Dwyer is the person who brought about that indictment?

A. Yes, sir.

Q. Still think?

A. Yes, sir.

Mr. Turkus: There is an improper statement of law there. I don't think Mr. Barshay realizes it, but I think he will take it that the Grand Jury found the indictment, not Judge O'Dwyer.

Mr. Barshay: Well, if you want to be technical, the Grand Jury found the indictment on the presentation of Judge O'Dwyer.

Q. You understood what I mean?

A. Yes.

Mr. Turkus: On the presentation of evidence. I object to an improper construction of law. It should not come from the lawyers anyway; it should come from the Judge.

The Court: Sustained.

Mr. Barshay: I notice you have quoted considerable law.

Mr. Turkus: Well, I try to be accurate.

[fol. 1228] Mr. Barshay: I do too. We are both wrong sometimes.

Mr. Turkus: You were wrong this time.

Mr. Barshay: I am not wrong this time. The evidence was presented here by Judge O'Dwyer—a member of his staff.

Q. Does that interest you?

A. No, sir.

Q. That is in the nature of a promissory note, that Mr. Turkus will in this court-room give proof beyond a reasonable doubt of the guilt of the defendants.

Mr. Turkus: I object to the question on the ground of the preamble that that is in the nature of a promissory note. It is not.

The Court: The simile may not be accurate.

Mr. Barshay: I borrowed that expression from the greatest lawyer I know, Judge.

The Court: Wel——

Mr. Barshay: I will give it back to him.

The Court: Sometimes promissory notes are no good.

Q. And the burden of proof you will demand shall always be upon the prosecution, won't you?

A. Yes, sir.

Q. And you will never demand any shifting of the burden of proof, because that is what the law does not mean; isn't that so?

A. That is right.

Q. Now, Mr. Turkus has said would you be influenced by the fact that three lawyers will repeat the same argument.

[fol. 1229] Mr. Turkus: Objected to. That was not the statement. I used the word "if".

The Court: Finish your question.

Q. All right, "if". We will put the word "if."

A. Will you repeat it.

Q. If three lawyers repeated the argument three times, would you be more influenced by the repetition?

A. No.

Q. You said that to Mr. Turkus. You are not of the belief, are you, that the respective counsel for the defendants are here to repeat argument merely for the sake of repetition?

A. No.

Q. You have a belief that I have a right to urge whatever arguments benefit my client, don't you?

A. Yes, sir.

Q. You have a belief that Judge Talley has an equal right?

A. Yes, sir.

Q. You have a belief that Mr. Rosenthal has an equal right?

A. Yes, sir.

Q. And if it happens that the arguments coincide with one another, that would not be to our clients' detriment?

A. No, sir.

Q. You would not deem that boredom or repetition, would you?

A. No, sir.

Q. Do you believe you can hold the evidence given against one defendant as against that defendant only, unless otherwise instructed by the Court?

A. Yes, sir.

Q. Can I have your promise that you will not bunch it together?

A. Yes, sir.

[fol. 1230] Q. And draw one conclusion thereform?

A. Yes, sir.

Q. In reality do you understand that each defendant here is getting a separate trial at your hands?

A. Yes, sir.

Q. Have you ever been a victim of a crime?

A. No, sir.

Q. Has your company?

A. What kind of crime?

Q. Any kind of a crime.

A. Thefts.

Q. Has that caused a prejudice in your mind against people that are charged with crime?

A. No, sir.

Q. Have you been a juror before?

A. Yes, sir.

Q. Where?

A. Here, in this court.

Q. Were you a special juror?

A. Yes, sir.

Q. How long ago?

A. About six months ago, seven months ago.

Q. Before whom, please?

A. Judge Fitzgerald.

Q. Judge Fitzgerald?

A. Yes.

Q. Was it a murder case?

A. Yes, sir.

Q. And it came to a conclusion?

A. Yes, sir.

Q. May I know the month, please?

A. I could not remember that. I think it was about seven or eight months ago.

Q. Was Mr. Kleinman the attorney in that case?

A. Yes.

Q. Was Mr. Price one of the attorneys in that case?

A. Yes, sir.

Q. Was Judge Healy one of the attorneys in that case?

A. I don't remember that name.

Q. Was Judge Pryor one of the attorneys in that case?

A. I don't remember him.

Q. Was Mr. Turkus the prosecutor in that case?
A. No.
[fol. 1231] Q. Do you know who was?
A. Mr. Hanley.
Q. Mr. Joseph Hanley?
A. Joseph Hanley.
Q. Do you remember my name being mentioned in that case, in the testimony?
A. No, I don't remember it.
Q. Do you remember my being in court then?
A. No.
Q. That case came to a conclusion?

Mr. Turkus: That is repetitious; I object.
Mr. Barshay: I forgot I asked it, Mr. Turkus.
Mr. Turkus: All right, don't fight with me. I withdraw it.
Mr. Barshay: You are fighting with me.
Mr. Turkus: I am sorry. Go ahead.

Q. As the result of being a juror in that case, sir, have you formed any prejudice against people charged with crime?
A. No, sir.
Q. Especially murder?
A. No, sir.
Q. Did you serve on any other jury?
A. No, sir.
Q. Have you ever been called for any other jury?
A. Yes, sir.
Q. Were you on the Grand Jury at any time?
A. No, sir.
Q. Do you belong to any law enforcement agencies?
A. No.
Q. Do you belong to any societies for the prevention of crime?
A. No.
Q. Do you belong to the K. of C.?
A. No, but I lived in the clubhouse for a while.
Q. You lived in the clubhouse?
A. For about a year.
[fol. 1232] Q. At 1 Columbus Circle?
A. Yes.
Q. You are married, I take it?
A. No.

Q. Do you know people at the clubhouse?
A. Yes.
Q. How long did you live there?
A. About a year.
Q. Do you know a lot of police visit that K. of C.? Do you?
A. No.

Mr. Turkus: I object to it.

Q. Do you know any police who visit——

Mr. Turkus: Please, Mr. Barshay.
The Court: He says no.

Q. Do you know any policemen intimately?
A. Intimates?
Q. Do you?
A. Do I know them?
Q. Yes.
A. No.
Q. Do you know any detectives intimately?
A. No.
Q. Do you know Joe Ryan, head of the International Longshoremens Union?
A. No.
Q. Do you know the name of Rice and McGuire?
A. No.
Q. Nor especially Mr. McGuire of that firm?
A. No.
Q. You never met him?
A. No.
Q. Do you belong to the Grand Jurors Association?
A. No, sir.
Q. If the Court shall charge you that character plays no part in the prosecution of any case unless put in issue by the defendants or any of them, do you think you could follow that instruction?
A. Yes.
Q. Have you received definitions of reasonable doubt [fol. 12.3] from the other Judge, I take it, whoever presided at that trial?
A. Yes.
Q. Have you got it fresh in your mind?
A. Yes.

Q. In the discussion of this case, if you are chosen as a juror, would in any wise the facts that happened in the other case in which you sat as a juror come to your mind so that you could use it as an example or base any argument in this case?

A. No.

Q. If similar propositions of law were to come up as charged by the Court, and those that came from this Court may differ from the ones that you heard from Judge Fitzgerald, which one would you accept, sir?

Mr. Turkus: I object.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. You would not let your recollection of what happened in the other case have any influence in this case?

A. No.

Q. If there comes a time when you as an individual juror shall not have been convinced by the evidence in this case beyond a reasonable doubt as to one or the other of the defendants, and others have reasoned with you and talked to you and explained to you and you, without being stubborn or persistent, just felt as an individual that there is a reasonable doubt, would you yield to those jurors because they outnumbered you?

A. No.

[fol. 1234] Q. Would you fight just as much for the rights of the defendants as you would for the prosecution's rights?

A. Yes.

Q. Do you feel as though the defendants are part and parcel of The People of the State of New York, as well as you and I?

A. Yes.

Q. And that the benefits of the law are for them? Do you?

A. Yes.

Q. It takes courage to say "Not guilty" if you are not convinced beyond a reasonable doubt. You know that, don't you?

Mr. Turkus: I object to the form of the question. It does not take courage at all.

The Court: Sustained.

Mr. Turkus: If you are not convinced.

Mr. Barshay: We differ on that. I say it takes lots of courage.

Q. Whether it does or it does not, have you sufficient courage to say, "I as an individual in this jury room have a reasonable doubt and I will not vote for Guilty"?

A. Yes.

Q. You realize that nobody has a right to express an opinion with respect to a defendant's guilt or innocence other than you, based upon the evidence in this case?

Mr. Turkus: That is a double question now.

The Court: I take it you mean each man must decide it for himself.

Mr. Barshay: That is exactly what I said, Judge.

[fol. 1235] Q. You understand that, don't you?

By the Court:

Q. You will make your own decision?

A. Yes, sir.

Q. You won't let anybody else tell you what to do if you do not agree with them?

A. No, sir.

By Mr. Barshay:

Q. And so, to sum it up, you believe that Mr. Buchalter can entrust to you, to your safeguard, his legal rights, given to him by law as a right; you believe that?

A. Yes.

Q. And that is a fact even though you know Judge O'Dwyer and Mr. Rooney and all the rest?

A. Yes.

Mr. Barshay: May we suspend now?

The Court: No.

By Mr. Talley:

Q. Mr. Groden, is it your belief that a person charged with crime should stand up and defend himself against that charge?

A. No, sir.

Mr. Turkus: That is a legal question.

The Court: Sustained.

Mr. Talley: Exception.

Q. If the Court should charge you that it is the right of any defendant charged with crime through an indictment such as we have here not to take the stand, not to open his mouth, but that the burden of proving his guilt is always upon the District Attorney, and that burden carries right [fol. 1236] through the case from beginning to end, would you accept that law from the Court and act upon it accordingly?

A. Yes, sir.

Q. If a defendant did not take the stand, would you indulge in any unfavorable inference against him because he did not?

Mr. Turkus: That is a question of law.

Mr. Talley: It is not a question of law.

Mr. Turkus: I am talking to your Honor. I have an objection.

The Court: Sustained.

Mr. Talley: Exception. I must confess I am at a loss to know what the District Attorney means by objections.

Mr. Turkus: The Judge understands and sustains me. You are not the judge here.

Mr. Talley: That is a wise observation. It does not take a very smart man to say that. The Judge is on the bench.

Mr. Turkus: You said you are at a loss to understand my objections. The Court understands.

Mr. Talley: I certainly do. I am equally at a loss to understand why the Court sustains them.

The Court: I can clarify it in a minute.

By the Court:

Q. If the Court should charge you that the defendant [fol. 1237] does not have to take the stand and that no inference of guilt may be found against him because of that failure, will you follow that instruction?

A. Yes, sir.

Q. And have no prejudice against him on that account?

A. No.

By Mr. Talley:

Q. Mr. Groden, isn't it a fact that because this indictment was filed at the instance of District Attorney O'Dwyer, that you will start out in this case with the im-

pression that the indictment would not have been found unless Judge O'Dwyer thought these men were guilty of crime?

[fol. 1238] Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Talley: Exception.

Q. Did you read the account of Judge O'Dwyer's career as published serially in one of the New York newspapers recently?

A. Yes, sir.

Q. You read all the instalments, did you?

A. Not them all, no.

Q. Did you observe that any of these defendants were named in those articles?

A. I don't remember.

Q. You don't remember?

A. That they were named in the articles? I rather was impressed with the Judge.

Q. I do not hear you.

A. I was impressed with the rise in the world of Judge O'Dwyer, rather than these cases.

Q. Yes, and you formed a very favorable impression about Judge O'Dwyer?

A. Absolutely.

Q. And you have absolute confidence in his ability and integrity?

A. Yes, sir.

Q. And that confidence in his ability and integrity you would carry into the jury box, if selected in this trial, wouldn't you?

Mr. Turkus: I object to it. I don't see that that goes to qualification.

The Court: Sustained.

Q. You would be inclined to favor Judge O'Dwyer's con-
[fol. 1239] tention?

A. No.

Q. As to the guilt or innocence of these defendants, wouldn't you?

A. No.

Q. You would not place any more reliance in what one of Judge O'Dwyer's assistants would say to you about this

case than you would in what the lawyers for the defense would say about it; is that right?

A. That is right.

Q. Did you read any articles about Judge O'Dwyer or about these defendants than those which appeared in the New York Journal?

A. I read The Mirror.

Q. Anything else?

A. No, that's all.

Q. From the reading of the Mirror articles did you form any impression about these defendants?

A. Yes, I did.

Q. And was that impression unfavorable to them?

A. Absolutely.

Q. And it will take some evidence in this case to remove that impression, won't it?

A. No, sir.

Q. Well, what would remove it from your mind?

A. I don't think anything would remove it.

Q. In other words, it could not be removed?

A. That is so.

Q. That is what you mean?

A. Yes, sir.

Mr. Talley: I challenge the juror for cause.

The Court: Try the challenge.

(Edward Groden of 215 Corbin Place, Manhattan Beach, was duly sworn.)

By Mr. Talley:

[fol. 1240] Q. Mr. Groden, if I ask you the same questions, now that you have taken an oath, that I have just asked you before you took the oath, your answers would be the same, would they not?

A. Yes, sir.

Mr. Talley: I press the challenge.

Mr. Turkus: That is not a sufficient challenge.

The Court: Any other questions by anybody?

Mr. Barshay: No further questions. We all press the challenge.

The Court: Anything further by you, Judge Talley?

Mr. Talley: No other questions on this challenge.

The Court: Any by you?

Mr. Turkus: No, I contend on the basis of his question——

The Court: You do not have to argue it. He has not said it would affect his judgment in this case.

Mr. Turkus: That is right.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Barshay: To all of us.

Mr. Talley: Counsel joins me in requesting that, the time having arrived for our usual recess, we recess now.

The Court: Of course, that was the understanding, and the Court will live up to it, but I think you will be a little kind to the Court if in the next few days the jury box is not filled the Court may have to consider night sessions. Just now we will go according to the agreement made at the start of the trial.

[fol. 1241] Brooklyn, N. Y., October 6, 1941.

Trial Resumed

(By direction of the Court, the following talesmen were called to fill the jury box: Cecelia B. Schwartz, No. 2796; John J. Rose, No. 2597; Walter Odland, No. 2586.)

The Court: All other talesmen may go until five o'clock this afternoon.

Edward Grodfn, No. 2718, was then recalled to the stand and examined further as to his qualifications.

Mr. Talley: My recollection is, if your Honor please, that while the talesman was on the stand at the conclusion of the session, we asked him about the impression of prejudice he had; he was asked if he would like to have it removed by evidence, and he said absolutely not. Then I think we challenged him for cause, and I believe your Honor overruled the challenge.

The Court: Are you speaking of a recollection of the record?

Mr. Turkus: My recollection is that when the challenge had been overruled and the defense counsel come to a point

where they were making inquiry as to some impressions, that then we took a recess.

Mr. Talley: I will try to resume where my recollection left off.

[fol. 1242] The Court: Yes, there is every reason why counsel should remember examinations; there is every reason why the Court should not remember it when the challenge was tried and disposed of.

By Mr. Talley:

Q. My recollection is that when we were speaking to you on Friday afternoon you said you had formed an impression in respect to one or more of these defendants; do you remember that?

A. Yes, sir.

Q. You told us you did form an impression?

A. Yes, sir.

Q. Now, it would take evidence in the case to remove that impression from your mind if you were selected as a juror, isn't that so?

The Court: I understood the challenge had been tried and disposed of.

Mr. Talley: I am not sure about it.

The Court: We are not going to try a challenge twice. [fol. 1243] Hereafter there will be no shift in stenographers during the interrogation of any one talesman. We will wait until the stenographer arrives who took the examination on Friday afternoon.

Mr. Talley (to reporter): Will you be good enough to read the last few questions and answers that were put to this juror, Mr. Groden?

The Court: You want to find out what the challenge precisely was for?

Mr. Talley: I want to see where we left off.

(The last few questions and answers of October 3, 1941, were read by the reporter.)

Mr. Talley: I have no further questions of this talesman.

By Mr. Rosenthal:

Q. Mr. Groden, what are your actual duties with the bank, would you mind telling us?

A. It is rather general. I am a semi-official, maybe you would call that.

Q. Semi-official?

A. Yes.

Q. Just what does that mean, sir? I hate to show my ignorance of that particular line of work.

A. We deal in gigantic bond issues and things like that, and these come up from time to time and I take semi-charge of those issues.

Q. You mean you do promoting of bond issues?

A. Yes.

[fol. 1244] Q. Are you a salesman?

A. No, I don't go outside. I do the clerical work on the issue.

Q. Did you use to play handball down at Brighton Beach?

A. Yes.

Q. Did you use to play with a number of detectives down there on the beach?

A. Only one. He was not a detective.

Q. What was the name of the one that you played with?

A. I can't think of his name.

Q. Did you play with Detective McCarthy?

A. No.

Q. Do you know Detective McCarthy?

A. No, sir.

Q. What is the name of the one that you played with?

A. He is a lieutenant. He was a telegrapher in Police Headquarters. He is a member of the Trinity Club.

Q. Did you play with a number of policemen down in Brighton Beach?

A. They are always around, but I did not have anything to do with them.

Q. Have you any relatives on the police force?

A. No.

Q. Any close friends in police circles?

A. No.

Q. At the K. of C. clubhouse, where you lived, there are a number of police officers live there, aren't there?

A. No, I did not know any of them.

Q. Did you know Detective Vigiano?

A. No, sir.

Q. Were you very active in the A. O. H.?

A. No.

Q. However, you followed the activities of Judge O'Dwyer?

A. Yes, sir.

[fol. 1245] Q. You followed them with great interest, I think you told Judge Talley.

A. Yes, sir.

Q. You would like to see him elected Mayor, would you?

Mr. Turkus: Just a minute——

Mr. Rosenthal: That is preliminary to another question.

Mr. Turkus: He has no right to know how a man would vote, and I am trying——

The Court: Is there an objection?

Mr. Turkus: There is.

The Court: Sustained.

Mr. Rosenthal: Exception.

By the Court:

Q. Do you know Mr. Cuff of counsel for defense?

A. No, sir.

Q. He is quite prominent in the A. O. H.

A. I used to be.

Q. You are no longer there?

A. I am not active, but I am in. I used to be very active.

Q. Still active? You were president at one time?

A. Yes, that is right.

By Mr. Rosenthal:

Q. Do you intend to take an active part in the coming campaign?

A. No.

Q. Do you belong to any political association?

A. Beg pardon?

Q. Do you belong to any political association?

A. No.

Q. And you have read articles in The Mirror, have you not, sir?

[fol. 1246] A. Yes, sir.

Q. How recently was the last article that you read?

A. Well, when they told me not to read them before this trial I did not read no more.

Q. Was that after you had met here in September or was it when you were originally called in August?

A. Prior to when I was originally called.

Q. You say when they told you not to read them any more is when you stopped?

A. I did not read them with any degree of interest in this case.

Q. I am not asking you how much interest you displayed, Mr. Groden. You just told me that when they told you to stop reading them is when you stopped reading them; isn't that right, sir?

A. No, that is not right.

Q. Did you not just say a few minutes ago, when you were told not to read them any more you stopped reading them? Isn't that your answer to my question just a few minutes ago?

A. I stopped reading them. I stopped before that.

Q. Please. I just want to know if I——

Mr. Turkus: I object to it; it is argumentative.

Mr. Rosenthal: I am asking the man now, as I mentioned, Judge, what he formerly said.

By the Court:

Q. Mr. Rosenthal wants to know when you completely stopped reading, whether it was September or August?

A. I never read them with any degree of interest. I can't [fol. 1247] tell you when I stopped reading them.

Q. The Court first advised you not to read when the case was on about the 4th of August. I think that was the day.

A. That is right.

Q. Did you stop then?

A. I did not buy the paper to read this case.

Q. Have you read anything since about the case?

A. No.

By Mr. Rosenthal:

Q. You say you also read the Journal, did you, sir?

A. I read an account. I think it was in the Journal.

Q. How long ago was the account that you read in the Journal?

A. I can't tell.

Q. Can you give me any idea, sir?

A. I could not give you an idea when I saw this article in the Journal.

Q. You also stated that you were a special juryman and actually served six months ago, is that right?

A. I did not say six months. I said maybe six, or maybe eight, but now that I think, it is more than that. It was in the summer time of last year, the late summer.

Q. Is it less than a year ago?

A. I think it is about a year ago.

Q. Did you make any application to be excused as a juryman in this case?

A. No, sir.

Q. Did you also read any other newspapers? Did you [fol. 1248] read any other newspapers in addition to the Mirror and the Journal?

A. I read the Sun. I read the Tribune. I read——

Q. The World-Telegram?

A. Very seldom I read the Telegram.

Q. Did you read any articles in either of these three papers that I just mentioned, other tha the Mirror and the Journal in respect to any of these defendants?

A. I read headlines about them. I glanced through the paper, the same as anything else.

Q. Because of what you read and prior to your acceptance for jury service, had you formed any impression concerning any of the defendants?

Mr. Turkus: Objected to. That challenge has been tried and disposed of.

Mr. Rosenthal: I am independently questioning. I have not questioned yet, and I am questioning now on behalf of the defendant Capone, and Capone solely. I have a perfect right to question him.

The Court: The Court on the trial of the previous challenge on that very ground asked if any other counsel for defense wished to question the talesman on that challenge. You had your opportunity.

[fol. 1249] Mr. Rosenthal: I am now questioning independently, sir, for the purpose of satisfying my own mind as to whether this juryman from my standpoint, on behalf of one defendant, is satisfactory to me, and I submit that I am entitled to generally question him on all subjects. If your Honor overrules my thought, I will merely take an exception and go on to another point, sir.

The Court: The Court rules that when a challenge is tried, that all counsel must participate, if they wish, and if they don't, they waive their right on that point. The

incident then becomes closed. The Court will not permit, with so many defendants in the case, a separate challenge by each defendant upon the same point, a separate trial. That would be ridiculous. The Court sustains the objection.

Mr. Rosenthal: I respectfully except to the Court's ruling. In view of the Court sustaining the objection, I have no further questions to ask. May I have it appear on the record, the purpose of my asking the question, sir, is a general question so as to enable me in my own mind to determine whether or not on behalf of the defendant that I represent, this juryman is qualified to serve.

The Court: The Court rules, and exception may be taken, but post mortems are not permitted. The Court will strike that from the record.

[fol. 1250] Mr. Rosenthal: I respectfully except.

Mr. Turkus: Mr. Groden is satisfactory to The People's side.

The Court: Wait a minute for other counsel.

By Mr. Barshay:

Q. Since you left the stand Friday afternoon have you read about this case?

A. No, sir.

Q. Have you discussed this case?

A. No, sir.

Q. With anyone at all?

A. No, sir.

Q. And presently are you still of that state of mind which includes a prejudice against one of the defendants which no amount of evidence will remove?

Mr. Turkus: I object to it.

The Court: Objection sustained upon the ground stated when Mr. Rosenthal attempted the same thing.

Mr. Barshay: Respectfully except, sir.

Now I urge upon the Court, taking into consideration the reasoning and logic of the Court in excusing a juror by the name of Protter, that to say the least——

The Court: Please! Let us try this case in a dignified manner.

Mr. Barshay: I respectfully except to that.

The Court: If you want to criticize the Judge, go outside of the court-room.

Anything more?

Mr. Barshay: Your Honor declines to let me finish my argument?

The Court: I do.

[fol. 1251] Mr. Barshay: Respectfully except.

The Court: No expressions of displeasure on the Court's ruling are permitted.

Mr. Talley: Defense challenges Mr. Groden peremptorily.

Mr. Rosenthal: With the reservation taken to the Court's overruling of the challenge.

Mr. Barshay: That goes for all defendants.

Leon Wallach, of 850 Fortieth Street, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. Mr. Wallach, the trestle board lists your address as 850 Fortieth Street. Is that Bay Ridge or Borough Park?

A. Well, it is outside of Borough Park. I don t know the exact name of the section. It is adjacent to Borough Park.

Q. Would that be around 9th Avenue and 40th Street?

A. That is right.

Q. Have you lived in Brooklyn a number of years?

A. I was born in Brooklyn.

Q. And have you lived in that particular section for some time?

A. Three years.

Q. Prior to that where did you live, Mr. Wallach?

A. 45th Street, in Bay Ridge.

Q. You are listed on this trestle board as a department head, without any other explanation. What kind of voca-

[fol. 1252] tion is that sir?

A. Well, it is charge of distribution, examining, ticketing of the sportswear department, ladies' sportswear department.

Q. You are in the ladies' sportswear business; is that correct?

A. Yes.

Q. And you are in charge of distributing, ticketing, and of routing of the sportswear on the way to the customer?

A. To the various stores.

Q. So you are in the wholesale or manufacturing branch of the business?

A. No, I would say the jobber.

Q. Where is your place of business?

A. 360 West 31st Street.

Q. That is in the so-called garment or clothing district of Manhattan?

A. That is right.

Q. And how many years have you been in that business, ladies' sportswear?

A. Since 1929.

Q. Ladies' sportswear, would that include ladies' apparel; is that what it is?

A. That is right.

Q. And it has a specific designation.

A. Would include ladies' blouses, skirts, jackets, play suits, slack suits, ski pants, and snow suits.

Q. You are in contact with various people in the garment and clothing districts and have been since 1929?

A. And previous to that.

Q. Are the names of Lepke and Gurrah familiar because [fol. 1253] of your experience in business in the garment district?

Mr. Climenko: I object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

A. Yes.

Q. I believe you said yes.

A. Yes.

Q. I take it that you read considerable of the investigations conducted by District Attorney Dewey?

Mr. Rosenthal: I object to the form of the question as being leading and suggestive, putting the words in the talesman's mouth.

Mr. Turkus: This is a matter of saving time.

Mr. Rosenthal: When we try to save time——

Mr. Turkus: Judge, may I have a right to address the Court without the heckling?

The Court: The objection is sustained on the ground it is leading.

Q. Did you, sir, read of the investigation of Thomas E. Dewey?

A. Yes.

Q. In your experience in the clothing district did you become familiar with the names of various officials in the Amalgamated Clothing Workers of America Union?

A. In an abstract sort of a way.

Q. Did you hear the name mentioned and did you become familiar with the name of Hymie (Curley) Holtz?

[fol. 1254] A. No, I don't think I did.

Q. Did you hear the name of Philip Orlofsky in that district?

A. I may have heard that name.

Q. The names of Weinstein and Katz?

A. I think I have heard of Weinstein.

Q. The names of Bruno Belia?

A. I think I have heard that name mentioned.

Q. And Bellanca and Tosca?

A. No.

Q. Did you have discussions about various factors of the Dewey investigation with people in that district?

A. Yes, nothing definite, nothing definite that I can remember. I remember discussing it.

Q. Have you had any talks or did you listen to any discussions about the O'Dwyer investigations?

A. Yes, with business associates.

Q. Let me ask you this very frankly——

Mr. Cuff: May we have the answer?

(Answer read.)

Q. Mr. Wallach, very frankly, have you an opinion in regard to this case?

A. In regard to this case, no.

Q. Have you an opinion with respect to the defendants?

A. Yes.

Q. Is that an opinion which runs to guilt or innocence?

The Court: On this charge; guilt or innocence on this charge.

[fol. 1255] The Talesman: Not on this charge.

Q. Is the name of Abe or Abraham Beckerman a familiar name to you?

A. No.

Q. Do you know any officials of Local 240 of the Clothing Drivers & Helpers Union?

A. None that I can think of.

Q. Is the name of Sam (Sneaky) Levine, familiar, Samuel Levine, frequently called Sneaky?

A. Not that I remember.

Q. Do you in your every-day business have contact with clothing truckers?

A. I used to.

Q. How many years ago was that?

A. I would say three years, three or four years.

Q. Have you a financial interest in the concern or are you an employee?

A. Employee.

Q. Would you have any embarrassment in serving on a jury in this case which would be to the detriment of The People of the State of New York?

A. I do not understand that question.

Q. Because of your affiliations and your work in this garment or clothing district, would there be any embarrassment on your part to take your place in the jury box which would affect the welfare and the interests of The People of the State of New York?

Mr. Rosenthal: I object to the question.

The Court: Sustained. Without stating which side, he can state whether or not it would cause any embarrassment.

Q. Will you be caused any embarrassment by jury service [fol. 1256] in this case?

A. There is a possibility. It is hard to make a definite answer to that. I do not know.

Q. What I am trying to find out is this, Mr. Wallach: Is there anything because of your connections in this area and in this particular industry which would preclude you from being a juror in the case?

Mr. Climenko: I object to the form of that.

The Court: Sustained as to form.

Would that embarrassment affect you verdict?

Mr. Rosenthal: I object to the question upon the ground the juror said there is only the possibility that he might have. He has not stated he has any embarrassment.

The Court: You are right. Withdrawn.

Is that possibility of an embarrassment one which, if actual, would affect your verdict?

Mr. Climenko: I object to that question, if your Honor pleases, upon the ground that it is speculative.
The Court: Overruled.
Mr. Climenko: Exception.

A. I cannot give a definite answer to that question.

By the Court:

Q. You cannot answer that?
A. I would not know.
Q. Is there any reason why you cannot render a fair and impartial verdict, based upon the evidence and regardless of your position in the garment trade?
[fol. 1257] A. I would answer that by saying I think so. It is not definite.

The Court: You think so.

By Mr. Turkus:

Q. Do I understand the import of the answer to mean that you think you cannot?
A. That is right.

Mr. Turkus: I am going to challenge on the ground of implied bias.
The Court: Try the challenge.

Leon Wallach, of 850 40th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Wallach, heretofore, before you were sworn on this void dire, you were asked certain questions by the counsel for The People of the State and by the Court and you made responses to those questions. Do you recall making such responses?
A. Before I was called?
Q. Before you actually raised your hand and were sworn, both the District Attorney and the Court asked you questions and you made answers. Do you remember that?

A. That is right.

Q. If those questions were repeated to you now, would you make the same answers?

A. That is right.

Q. And would those responses be true?

A. That is right.

Q. Substantially, you have been in the clothing business, in ladies' sportwear and allied work, for the past eleven or twelve years; is that correct?

[fol. 1258] A. Also with the coat business within the eleven or twelve years.

Q. The manufacture of coats and clothing?

A. Yes.

Q. So that for many years past you have been in intimate contact with the garment and clothing industry; is that correct?

A. Yes.

Q. The name of Lepke and Gurrah are familiar names to you?

A. That is right.

Q. Certain of the other names I mentioned were likewise familiar, as you had heretofore answered: is that correct?

A. That is right.

Q. And in response to a question as to whether or not you had an opinion in the matter, you said you had one with respect to the defendants. What was the word you used with respect to describing that opinion?

A. Was it detrimental?

Q. And then when you were asked by the Court whether or not you could be a juror deciding the case on the evidence, you indicated, did you not, by your answer, that you had doubt that you could be such a juror?

A. That is right.

Q. And that is your frame of mind now?

A. That is right.

Mr. Turkus: Press the challenge.

By Mr. Barshay:

Q. Mr. Wallach, you have heard other jurors being questioned both by the prosecutor and counsel for the defense and sometimes by the Court. Now, can you lay aside any opinion or impression that you have or had and

[fol. 1259] render a fair and impartial verdict based upon the evidence in this case?

A. I would be willing to; however, I cannot say that I would be able to. These impressions are gathered over a number of years.

Q. Would you mind keeping your voice up?

A. These impressions are gathered over a number of years, have been pretty deep.

Q. You said they have nothing to do with this case.

A. However, I cannot say for sure that I will be able to put them aside entirely. I will be willing to try.

Q. Let us get this: You said they had nothing to do with this case at all. Didn't you say that?

A. I said they had nothing to do with the decision of this case.

Q. That is right. In other words——

Mr. Turkus: I object to the form of the question, "That is right."

The Court: Overruled.

Q. You said it will have nothing to do with the decision in this case. Is that so, sir?

A. I don't remember the way the question was put that I answered that way.

Q. Put it any way at all. The point is that you told the District Attorney that with respect to this case you had no opinion whatever concerning the guilt or innocence of the defendant. Did you say that?

A. I think I did.

Q. You did, did you not?

A. I remember I did.

Q. That is true, isn't it; you have no opinion now with [fol. 1260] respect to the guilt or innocence of the defendants in this case?

A. That is right.

Q. Any other impression you may have gathered has nothing to do with this case. That is what you said?

A. It has nothing to do with this case, but it may render me biased.

Q. It may make you biased in this case?

A. I don't know; that is something I do not know.

Q. Isn't it a fact that you are able to lay aside any impressions that you may have gained with respect to any

defendant and render a fair and impartial trial in this case, based upon the evidence?

A. Something I cannot answer. I don't know.

Q. You don't know?

A. I would be willing to try to render a fair——

Q. Will you make every effort to lay aside any impressions you have?

A. I would make every effort.

Q. And render a fair and impartial verdict, based upon the evidence?

A. That is right.

Mr. Barshay: No further questions.

The Court: Counsel for defendant Weiss?

Mr. Talley: No further questions.

The Court: Counsel for defendant Capone?

Mr. Rosenthal: No questions on this challenge.

The Court: The talesman has stated that his impression is detrimental to the defense. He has not gone so far as to state that it would prejudice his decision. Do counsel [fol. 1261] for the defense still oppose the challenge?

Mr. Talley: I oppose the challenge; yes, sir.

The Court: Overruled.

Mr. Barshay: On behalf of Buchalter, we did not oppose any challenge. We asked the Court to try the challenge without stating our position. Your Honor has refused to permit us to consent to challenges.

Mr. Rosenthal: That goes for the defendant Capone.

The Court: Are you scoffing at the Court? The Court will ask you to please assume an attitude of dignity and respect in your dealings with the Court. The Court is trying to be fair and impartial and show respect for the position of counsel.

Mr. Rosenthal: May I address the Court?

The answer of Judge Talley applies to his client

The Court: The Court has ruled.

Mr. Barshay: We except, sir.

By Mr. Turkus:

Q. All right, Mr. Wallach, let me just ask you a few more questions along this line, and then we will go right ahead. In the event that The People of the State of New York satisfy you that these three men at the bar, Capone, Weiss,

and Buchalter, are guilty of murder in the first degree, the murder of Rosen, would you have any fear in saying so?

A. No.

Q. Would you have any hesitation or reluctance in saying so?

[fol. 1262] A. No.

Q. Would your embarrassment be such as to preclude you from bringing in a guilty verdict if the evidence satisfies you that they are guilty of murder?

A. No.

Q. Do you have any contacts in Brownsville or East New York?

A. No.

Q. Can I go ahead now that every answer you have made is an honest, frank answer?

A. That is right.

Q. As you sit there you are telling me the Gospel truth, when you are making these responses?

A. That is right.

Q. I take it I can go along with the understanding that you have no scruple, conscientious or otherwise, against capital punishment?

A. That is right.

Q. That in so far as you are concerned, the question of punishment will not enter into your deliberations in ascertaining the guilt or innocence? The question of punishment will not enter your deliberations?

A. That is right.

Q. Do you understand me?

A. Yes.

Q. Have you in the past had any connections with anybody in the Brownsville-East New York area of Brooklyn?

A. No. I have some relatives living there which I infrequently visit.

Q. In that position that you occupy do you have anything to do with trucking of merchandise?

A. I did one time.

Q. I mean presently.

A. At present, no.

Q. Presently what are your duties?

[fol. 1263] A. Well, as I stated, it is department head.

Mr. Cuff: Judge, I object to this. I do not think we are interested in his duties, any business of his.

The Court: Overruled.
Mr. Cuff: Exception.

A. Well, in the sporstwear department my primary duties is to plan sales and shipments to the various stores of the chain, and then take charge of receiving, examining, checking, and the distribution of goods.

Q. Does your business——

Mr. Rosenthal: It is impossible to hear back here. This is even worse than the other court-room. Judge, may I have the answer repeated.

The Court: Yes. Try to speak a little louder.

(Answer read.)

Q. Do your present duties bring you into contact with any union officials in the trucking end of the business?

A. No.

Q. Going back to the Brownsville-East New York section, I think you said you had some relatives that live in that area.

A. That is right.

Q. Have you visited there frequently?

A. No, very seldom.

Q. Are those the only contacts you have in that district, in Brownsville-East New York?

A. That is right.

Q. Do you have anything there so far as contacts on the Brooklyn waterfront?

A. No.

[fol. 1264] Q. Have you ever had any by way of business?

A. No.

Q. Since you received your jury notice, Mr. Wallach, did anybody speak to you about the case?

A. Yes.

Q. Who was that?

A. Friends and family.

Q. When you say "friends," do you mean people in the garment district?

A. In the garment district.

Q. In their discussions did they mention the name of any defendant to you?

A. Yes.

Q. More than one?
A. Yes.
Q. Were those talks expressions of opinion?
A. Yes.
Q. Did you hear expressions of opinion passed by friends of yours in the garment district with respect to one or more of the defendants?
A. Yes.
Q. Did you express any opinion?
A. No.
Q. Had you ever discussed any business in the garment district with these friends before?
A. What do you mean by "business"?
Q. What I am trying to find out is this: You say after you received your notice some friends spoke to you about one or more of these defendants.
A. That is right.
Q. And that there was an expression of opinion passed.
A. That is right.
Q. That it was not by you, but it was by the friends. Was that after your notice had been received?
A. That is right.
Q. Was it after your name had appeared in the newspaper?
[fol. 1265] A. I am not aware that my name did appear in the newspapers.
Q. Did these people know you had this notice?

Mr. Rosenthal: That is objected to.
The Court: Sustained.

Q. Did you tell them you had a notice in this case?
A. Well, through associates with whom I worked they found out when I had to report why I was absent.
Q. Did any of these people urge an opinion upon you?
A. That is not clear.
Q. Did they urge their opinion upon you? Did they try to win you over to their way of thinking?
A. No, they expressed an opinion.
Q. The expressions that you had from members of the family, was that with respect to the length of service, or was that in regard to some defendant?
A. That was more general, about the entire jury service.

Mr. Cuff: Won't you please speak up?

The Talesman: That was in regard to serving on the jury, rather than in relation to defendants, in relation to family talks.

Q. These friends that expressed an opinion, was that an opinion as to the guilt or innocence of these defendants on this charge?

A. In some cases, yes.

Q. Was that an opinion that stays with you?

A. Not from what they told me.

[fol. 1266] By The Court:

Q. Has it influenced you?

A. No.

By Mr. Turkus:

Q. Are you in sympathy, sir, with the enforcement of the Penal Law of the State of New York?

A. That is right.

Q. There are nine lawyers in this case representing these defendants at the bar. I have repeated the names and their former connections. Do you know any of them?

A. I have heard of them, but some of them—I do not know any of them.

Q. When you say you have heard of them, has that been by way of newspaper reading and discussions with people?

A. Newspaper reading and discussions.

Q. Has any specific lawyer's name been mentioned to you since you received your jury notice?

A. A number of names have been mentioned to me, since I received my jury notice.

Q. Who made the mention?

A. Acquaintances, friends of mine, a few of them in the legal profession.

Q. Do you know intimately any member of the bar who specializes in the trial of criminal cases?

A. Not the criminal cases.

Q. Did any of the discussions that you had with friends and acquaintances with respect to any member of the bar in this case leave any lasting impression with you?

A. No.

Q. Do you know District Attorney O'Dwyer of the county personally?

A. No.

[fol. 1267] Q. Do you know Assistant District Attorneys Klein, Joseph, or Turkus?

A. No.

Q. Do you know any member of the District Attorney's staff who is an Assistant District Attorney?

A. No.

Q. Does your business bring you into contact with any officials of the Amalgamated Clothing Workers of America?

A. Officials?

Q. Yes.

A. Not that I can think of.

Q. Business agent?

A. No.

Q. Or any kind of business representatives?

A. No.

Q. Do you have any contact with them at all?

A. No.

Q. Is the name of William or Willie Alberts, a one-time bondsman, at all familiar to you?

A. No.

Q. Or that of Emanuel Buchalter?

A. No.

Q. Phillie Kowas?

A. No.

Q. Do you know any family by the name of Weiss in the automobile rental business?

A. No.

Q. Or Chevrolet sales?

A. No.

Q. Is the name of Terry Burns and the name of Abie Slabo familiar names to you?

A. No.

Q. Do you have any bias against the prosecution wherein the use of accomplice testimony is employed?

A. No.

Q. Do you understand what is meant by the word "accomplice"?

A. Yes.

Q. Is your state of mind such that an accomplice is one [fol. 1268] who states he was a participant in the crime with others, that he himself along with others participated in the commission of the crime? Do you understand that to be substantially the definition of an accomplice?

A. That is right.

Q. Do you find any fault with the prosecution of an indictment whereby the testimony of such an individual, an accomplice, is used against the remaining defendants on trial?

A. No.

Q. Have you heretofore served as a juror in any type of case?

A. Never.

Q. This will be your initial experience, then?

A. That is right.

Q. Will you take the law exclusively from Judge Taylor?

A. That is right.

Q. Now, with regard to an accomplice, will you look at all the things that are detrimental to the accomplice in weighing his testimony? For example, will you look at his past record in crime, will you see with whom he associated and every immoral and vicious and criminal act that he ever did in his lifetime—will you look those things over in weighing his testimony?

A. That is right.

Q. By the same token, will you use common sense and understanding in weighing the issue in this case, the guilt or innocence of these defendants on this murder charge?

A. Yes.

Q. I take it you appreciate that there will be certain individuals come into this court-room, types of persons that [fol. 1269] you have not met in your ordinary daily life and business experience, and if you meet that kind of an individual in this court-room will you use common sense and understanding in weighing the issue of this case, the guilt or innocence of these defendants on this murder charge?

A. I will.

Q. With respect to an accomplice, may I go along with the understanding that you will accept the testimony of such an individual with care and caution?

A. I will.

Q. And that you will use every detrimental thing against him in weighing his testimony, you will consider it in weighing it?

A. Right.

Q. May I go along too with the understanding that solely because a man is an accomplice, you would not close your ears to his testimony?

A. That is right.

Q. Should the Court charge you that no prosecutor can get a conviction upon the unsupported testimony of an accomplice, would you follow that instruction of law?

Mr. Cuff: Object to the question, if your Honor pleases, improper statement of law.

By the Court:

Q. If the Court should charge you that an accomplice must be corroborated by evidence tending to connect the defendants with the commission of the crime, will you be guided by that charge and follow it?

A. I will.

By Mr. Turkus:

[fol. 1270] Q. And will you, with respect to the charge of tending to connect the defendants with the commission of the crime, use common sense and understanding in applying that definition to the facts of this case?

A. I will.

Q. If the Court should charge you that the prosecutor does not have to corroborate each and every meticulous detail of the case, but that the jury may find corroboration if there is evidence which tends to connect the defendants with the commission of the crime or the commission of the crime, will you follow that rule of law?

A. I will.

Q. It has been said here by one of the lawyers who represent the defendant Buchalter that his client has been heretofore convicted of crime and sentenced to jail. Would the fact that one of the defendants is now serving a term in a jail, would that cause you to relax or deviate from a proper verdict as a juror in this case?

Mr. Climenko: I object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Climenko: Exception.

By the Court:

Q. Would that have any bearing on your verdict?

A. It might.

Q. Supposing the Court charges you that it has no bearing on this indictment.

A. Yes, I think I would be able to.

[fol. 1271] Q. Would you follow the ruling of the Court?

Q. Yes, I would.

By Mr. Turkus:

Q. Will you find out from the evidence in this case, if selected as a juror, whether that defendant who has been heretofore convicted of crime is guilty of this murder charge, the Rosen murder?

A. I wil' ry to.

Q. You say, Mr. Wallach, you used an expression you will try. Can you do so? Is your mental state of mind such that if you are satisfied he is guilty you will say so?

A. I am trying to give the answers as I best am able to reason them out.

Q. Is there something in the back of your mind that would prevent you from voting guilty, even if you find the evidence to warrant a conviction?

A. Will you repeat that?

Q. Is there something in the back of your mind, have you some mental reservation, that even though you were convinced the defendants were guilty of murder in the first degree, that you might not vote guilty?

A. If I was convinced, I would vote.

Q. Well, is it when you say that you will try that you bear in mind that you have certain impressions that you have gained since you have been in the garment district? Is that what you have in mind?

A. That is right.

Q. If selected as a juror in the case, will you listen to reasonable discussion by the other jurors?

A. Yes.

[fol. 1272] Q. And, going back to that question that we discussed before I went into that point, will you if you are satisfied that these defendants are guilty of murder in the first degree be able to render your verdict without considering the fact that one of them is in jail?

Mr. Talley: It has already been answered. It is objected to on that ground.

The Court: Sustained.

Q. If selected as a juror in this case, will you endeavor by your verdict to do justice in the case?

A. I will try.

Q. Mr. Wallach, I do not understand exactly what you mean by you will try. Will you by your verdict do justice in the case?

The Court: How can he say anything better than he will try?

The Talesman: I will try

Mr. Turkus: All right. I think I would have said something more definite, but I will go right along.

Q. In the event that after you have heard all the evidence you are satisfied from the evidence beyond reasonable doubt that the accomplice who testifies tells the truth about these defendants and that there is other evidence in the case which tends to connect each of these defendants with the commission of the murder, would you have the slightest hesitation, fear, reluctance, or embarrassment in so saying in your verdict?

Mr. Cuff: I object to that as already answered earlier in the examination of the talesman.

The Court: Sustained.

[fol. 1273] Mr. Turkus: I did not ask that question in that form.

The Court: I sustain it because it omits two important things.

Q. Mr. Wallach, assuming that you have heard all the evidence in the case and you are satisfied beyond reasonable doubt that the accomplice is not only telling the truth about the participation of these defendants in the commission of the murder, but from the other independent evidence in the case you are satisfied beyond reasonable doubt that there is other evidence which tends to connect these defendants with the commission of the crime, and you feel that they are guilty of murder in the first degree, would you hesitate, would you be fearful, would you be embarrassed to say so in your verdict?

Mr. Cuff: I object to the question as already asked and answered. That question was asked before the challenge was tried.

Mr. Turkus: Not in that form.

Mr. Cuff: I do not care what form. He was asked that question substantially.

Mr. Turkus: Your Honor, I am addressing the Court. I have not pressed that question in that form with respect to accomplice and corroboration.

The Court: The question is improper because it asks him concerning his feelings. Not concerning the talesman's feelings, concerning guilt or innocence.

[fol. 1274] Mr. Turkus: As to his state of mind.

The Court: As to what he finds from the evidence.

Mr. Turkus: I am asking him as to his state of mind, if he is satisfied in substance that the defendants are guilty would he be fearful?

Mr. Cuff: That is objected to.

Mr. Turkus: That is a state of mind that the prosecutor is entitled to know from a man in that district.

Mr. Climenko: Objection.

The Court: The Court will reframe it.

By the Court:

Q. If upon all of the evidence in the case and following the Judge's charge you were convinced of the defendants' guilt or of the guilt of any defendant, will you say so by your verdict?

A. I will.

By Mr. Barshay:

Q. Mr. Wallach, are you related to the Wallach brothers, who are lawyers in Brooklyn?

A. No.

Q. In no way whatever? Do you know them?

A. I have heard of them.

Q. But you never spoke to them? Now, Mr. Wallach, are you a gentleman who applied for an excuse; is that right?

A. That is right.

Q. And has the reason which prompted you to apply for an excuse now been dissipated?

A. No.

[fol. 1275] Q. And will the Court's discretion in not excusing you prejudice the defendants in any way?

A. No.

Q. You understand that was solely and only for the Court and has nothing to do with us?

A. Yes.

Q. Do you know anyone at all in the Police Department?
A. Yes.
Q. May I know whom you know?
A. There is Sergeant Moran, 66th Precinct.
Q. Did you ever discuss the case with him, this case?
A. No.
Q. Anyone else?
A. Captain Upham, of the 66th Precinct.
Q. Did you ever discuss the case with him?
A. No.
Q. Your knowledge of these officers will not influence you in any way, will it, in this case?
A. Not with these officers, no.
Q. Have you personally ever been the victim of any crime?
A. No.
Q. Has any member of your family been the victim of any crime?
A. Yes.
Q. Close to you, very close to you?
A. There was a burglary committed in my sister's home.
Q. But that will not prejudice you in this case against any of the defendants, will it?
A. No.
Q. May I know for whom you work?
A. Henry Rose Stores.
Q. Is that a chain shop?
A. It is a subsidiary organization of the Sears-Roebuck Company. They merchandise all the softer lines for the [fol. 1276] Sears-Roebuck chain of stores.
Q. How long have you worked there?
A. Since 1929.
Q. Amongst the list of names read to you was there any name there at all whom you knew personally?
A. No.
Q. Do you know Mr. Louis Waldman?
A. I seem to recollect hearing about him but I do not know him.
Q. In any event, your knowledge of him has nothing to do with this case?
A. No.
Q. Or Mr. Potofsky?
A. Nothing definite. I do not know the man. I have heard of him.

Q. Do you know Mr. Maguire of Rice & Maguire?

A. No.

Q. Do you know Mr. Ryan, the head of the Longshoremens Union?

A. No.

Q. Mr. Turkus read to you a great list of names——

Mr. Turkus: I did not read any names at all. I object to the form of the question. I let that go by a number of times, but I do not want it to appear that the prosecutor got up and read any list of names. There was no reading of names.

The Court: This gentleman was in the box and heard the list read.

[fol. 1277] Mr. Turkus: There was no list, your Honor, that I ever consciously read. I asked as to certain names, but there was not a reading of any list.

The Court: I misconstrued it. Leave out the question of list.

Q. Mr. Turkus said he did not consciously read any list of names. Well, consciously or otherwise, you heard a lot of names come forth from his lips, isn't that so?

A. That is right.

Q. All through the time you were sitting here?

A. That is right.

Q. If they have nothing to do with this case, will you discard any innuendo that may be drawn from the mere mentioning of their names?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. Will you disregard even the names themselves or any reference to them unless they have something to do with the evidence in this case?

Mr. Turkus: I object to it. The names that are discussed on the voir dire have nothing to do with the case.

The Court: They are entitled to know if the asking of those names——

[fol. 1278] Mr. Turkus: Would leave any impression.

The Court: —has prejudiced the talesman.

Mr. Turkus: As to that I find no fault.

A. No.

Q. Your answer is what?

A. No.

Q. In other words, you will strip this case of all atmosphere, won't you, and get right down to the evidence in this case and nothing else?

Mr. Turkus: I object to the form of that, carrying with it an implication and innuendo.

The Court: Overruled. Leave out "innuendo".

A. I will try to.

Q. You will do your best. That is fair, isn't it? Now, some gentlemen spoke to you about this case, you said, and some have even expressed an opinion; is that so?

A. That is right.

Q. You tell me now, did you respect the opinion of those gentlemen who spoke to you prior to their speaking to you about this case, on any subject that they spoke of?

A. Yes.

Q. In other words, you felt them competent, before them speaking to you about this case, with respect to their judgment on other matters?

A. That is right.

Q. Have you disagreed with them on other occasions?

A. Well, there has been a difference of opinion at times.

Q. Sometimes you felt you were just as right as they; is that so?

A. That is right.

[fol. 1279] Q. With respect to this case, did you accept their opinion or did you differ with them?

A. Well, I listened to their expressions. I did not try to analyze it or make up any opinion.

Q. Well, did you come to the same conclusion as they?

A. Well, they may have left impressions or deepened impressions I have had, but I did not try to come to any conclusions.

Q. In other words, you are not even sure whether they left an impression, are you?

A. No, I could not be sure whether they left an impression. It is very vague. I mean workings of my mind, sometimes very vague. I just can't analyze them. I know there have been impressions.

Q. At any rate, you know that they did not hear sworn testimony when they expressed their opinion?

A. That is right.

Q. And so now if you are chosen as a juror, you will be in a much better position because you shall hear the sworn testimony?

A. That is right.

Q. Can you tell me fairly, no matter what impression they left, if they left any, you will subordinate, you will eliminate it and be guided only by the impressions you get as you search for the truth on the witness stand?

A. I will be willing to try.

Q. You will do your best?

A. I cannot tell what weight impressions may have on my mind. I know they are there. I know those impressions are there. I shall be willing to try to put them aside, but I cannot tell how much weight they will bear.

[fol. 1280] Q. Will it require any evidence to be furnished on behalf of the defendants to dissipate that impression that may be lurking there?

A. Possibly.

Q. And if the Court shall tell you that as a juror you must take the law from the Court and that if the defendant makes no explanation or does not take the stand you cannot draw an unfavorable inference against him, will you follow that law?

A. I will try to follow it.

Q. Will you then dissipate that impression?

A. That is something I cannot answer.

Q. Well, if the Court tells you that as a juror you must, and you undertake your burden if you are chosen as a juror, and you are sworn as a juror, will you do it then?

A. I will try to; I will do my best.

Q. Mr. Wallach, no one is better fitted to tell us your state of mind than yourself. You understand that. We want an absolutely fair juror to both sides. You understand that. That requires a good deal of effort on the part of the juror. You have kept on saying all this time that you will try. In other words, is there a mental reservation in your mind as to your ability to succeed in that effort to dissipate prejudice or impression or whatever you may call it, against the defendant?

A. I think that is the state of my mind right now.

Mr. Parshay: I challenge him for cause.

The Court: Try the challenge.

[fol. 1281] Leon Wallach, a talesman, was again sworn and testified as follows:

By Mr. Barshay:

Q. Now, under oath, would you make the same answer to the question if I repeated it to you?
A. I would.

The Court: We have lost substantial time because the questions were inadequately pressed when the same challenge was raised before by the District Attorney. The blame for that is entirely with the defense. The challenge was sustained.

Mr. Barshay: We respectfully except to your Honor's comment.

The Court: Exception won't get you anywhere. I am just telling you that I have been indulging you. Hereafter you have to work and make up the time you lose in this manner.

Mr. Barshay: I submit, sir, the District Attorney should challenge him for cause to him and not for us.

Mr. Turkus: Your Honor, may the rest of the jury be told to disregard what Mr. Barshay's concept of the District Attorney's duty is?

The Court: Yes.

Mr. Turkus: I thought he was unfavorable to the defense.

The Court: Please stop.

[fol. 1282] Mr. Barshay: That is exactly what we want to avoid.

The Court: When a challenge is tried upon a specific ground, the Court requires that all counsel thoroughly try the challenge. This is the last time that a repetitious challenge will be tried. Next gentleman.

Paul S. Batterson, of 250 Ocean Parkway, Brooklyn, New York, was examined as to his qualifications.

By the Court:

Q. Are you Lincoln Batterson's son?
A. No, sir.

By Mr. Turkus:

Q. Mr. Batterson, do you live at 250 Ocean Parkway?
A. Yes, sir.
Q. And is that near Church Avenue?
A. That is.

By the Court:

Q. The Lincoln Batterson I had in mind years ago was a photographer. Are you in his family?
A. No, I never heard of him.

The Court: All right.

By Mr. Turkus:

Q. Have you lived in Brooklyn some time?
A. Yes, sir.
Q. More than five years?
A. Yes, sir.
Q. And have you lived in this particular section? Is that called part of Flatbush?
A. Yes, it is.
Q. And have you lived in that area for a number of years?
A. I lived in there almost five years.
[fol. 1283] Q. The trestle board lists your vocation as that of a bank clerk; is that correct?
A. That is right.
Q. And by what bank are you employed?
A. I am with the Serial Federal Savings & Loan Association.
Q. Where is that, in Manhattan?
A. Yes, sir.
Q. In the financial district?
A. It is in the financial district.
Q. Have you been employed by this bank for a number of years?
A. Five years.
Q. Have you any connection by way of business or any other contact with anybody in the garment industry or in the clothing industry?
A. No, I have not.
Q. Or do you deal with any people employed in their districts in which clothes are commonly manufactured and distributed?

A. No, sir.

Q. Do you have any connection, either in the past or presently, with any firms or individuals in the Brownsville-East New York section of Brooklyn?

A. Never.

Q Does that hold true with respect to the Brooklyn waterfront?

A. That does.

Q. And may I proceed, then, that it holds true with the clothing trucking industry?

A. It does.

Q. From time to time——

By the Court:

Q. Will you kindly tell us what your duties are in the [fol. 1284] bank and how long you have been employed?

A. I have been employed at this savings and loan association for five years. It is a small association, and I do practically everything, from teller to bookkeeping.

Q. Where is that located?

A. It is located at Vesey and Church Street. I prepare their advertising program, write copy.

Q. Is that at 30 Church Street?

A. 30 Vesey Street.

Q. 30 Church Street is the Terminal?

A. The Terminal, I believe, is 50 Church. That is near by.

Q. You are at the southwest corner, southeast corner?

A. No, the southeast corner is the churchyard. I am right across the street from there. I am at the northeast corner.

Q. What is the name of that concern?

A. Serial Federal Savings & Loan Association.

Q. How do you spell it?

A. S-e-r-i-a-l.

Q. Is that a New York State corporation?

A. No, it is under Federal charter.

By Mr. Turkus:

Q. That is a company, isn't it, that lends out money on mortgage and it is guaranteed by an agency of the United States Government?

A. That is right, sir.

Q. In other words, if you have an investment there it is guaranteed up to five thousand, the same as a savings account?

A. It is.

By the Court:

[fol. 1285] Q. For which you pay half of one per cent?

A. That is right.

By Mr. Turkus:

Q. Did you ever have any contact with any person living in 30 Ocean Parkway, Brooklyn?

A. No, sir.

Q. Are you in sympathy, sir, with the enforcement of the Penal Law of the State of New York?

A. I am.

Q. Since you received your jury notice did anybody speak to you about this case, that is, about the merits of the case?

A. Not about the merits.

Q. Then I take it if you had any discussion it was limited to prospective service on the jury?

A. That is about all.

Q. I have mentioned the names and the former positions held by the nine defense lawyers in the case. Do you know any of them or anyone connected in their law offices?

A. No, I do not.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, personally?

A. No, sir.

Q. Specifically, do you know Assistant District Attorney Joseph, Klein, or Turkus?

A. No, sir.

Q. Do you know any Assistant District Attorney on the staff of Judge O'Dwyer?

A. I do not.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, I do not.

Q. Have you heretofore served as a juryman in any type of litigation?

A. Yes, I have.

[fol. 1286] Q. Has it been a criminal case?

A. No, sir.

Q. A civil case?

A. Yes, sir.

Q. Did that case go to a conclusion, and by that I mean did the jury have the law changed by the Court?

A. Yes, it did.

Q. With respect to this case, this a criminal case, and the law is different than it is in a civil case. I am not going to go into any discussion of the law, because that is not my province, that is the province of the Court. Will you take the law exclusively from Judge Taylor in its every aspect?

A. Yes, I will.

Q. With respect to the prosecution, do you find any bias or prejudice against the prosecution wherein the District Attorney, in order to solve the case, accepts the testimony of an accomplice? Have you any bias or prejudice against that type of testimony?

A. No, I have not.

By the Court:

Q. Do you mind telling us your educational qualifications?

A. I am a graduate of Prehn(?) College in Chicago, and I had a year and a half at New York University School of Account.

Q. You got your Bachelor's degree at Prehn College?

A. It is only a two-year college, but I got my Associate Bachelor's degree, as they call it.

Q. And you got your C. P. A.?

A. No, sir. I have studied bookkeeping and accounting, but I never received the C. P. A.

Q. That Prehn College is not a correspondence school? [fol. 1287] A. No, sir. Prehn College corresponds with C. C. N. Y. It is a City-controlled college.

Q. You lived in Chicago at that time?

A. Yes, sir.

Q. And you have been here how long?

A. I have been here since—I have been here twelve years.

Q. And how old are you?

A. Thirty-four.

By Mr. Turkus:

Q. Northwestern is a Chicago university, isn't it?
A. Northwestern is located in Evanston, Illinois, which is a suburb.

By the Court:

Q. Do you belong to the Bankers Club at 120 Broadway?
A. No, sir, I do not.

By Mr. Turkus:

Q. I think I got to the point with you, Mr. Batterson, where you said you had no bias or prejudice against the prosecution wherein the testimony of a co-participant in a crime is used against remaining defendants.
A. I have no prejudice.
Q. Of course, will you when you are weighing the testimony of an accomplice in the case, will you look at every rotten thing in his background, every crime he has committed, every vicious and immoral act he has committed, and everything that there is that can be applied to his detriment? Will you do that?
A. I will.
Q. And will you look at the testimony of an accomplice [fol. 1288] with care and with caution?
A. Yes.
Q. May I go along with the understanding that you won't shut your ears to testimony solely because it emanates from an accomplice?
A. No, I won't shut my ears.
Q. It is going to be your job to find out is the accomplice telling the truth about these defendants; right?
A. That is right.
Q. Will you, in weighing the issue of guilt or innocence of these defendants at the bar and in passing judgment on the case, use common sense and understanding in working out that issue?
A. Yes, I will.
Q. And will you listen to common sense discussion and reasonable argument by the other jurors?
A. I will.
Q. Should the Judge charge you that there cannot be a conviction upon the unsupported and uncorroborated testimony of an accomplice, would you follow that law?

A. Yes.

Q. And should the Judge charge you that corroborating or supporting evidence may be found to be sufficient by the jury if believed by the jury when that evidence tends to connect the defendants with the commission of the crime, will you follow that instruction?

A. I will.

Q. If selected as a juror in the case will you endeavor by your verdict to render justice in the case?

A. Yes.

Q. Will you take the law in its every aspect from Judge Taylor?

A. I will.

[fol. 1289] Q. In the event and if you should hear the same argument by defense lawyers repeated three times, that somebody is an accomplice or somebody is not an accomplice, or whatever the argument may be, will you give it three times the weight because you hear it three times?

A. No, sir.

Q. It has been brought out by one of the lawyers for Buchalter that he has been heretofore convicted of crime. Would you relax or deviate from a proper verdict in this murder charge because of prior conviction and sentence?

A. I would not relax.

Q. If selected as a juror in this case, will you listen attentively to the evidence after you have heard it all, discuss the case reasonably and sensibly with your fellow jurors who are selected along with you?

A. Yes.

Q. Should The People of the State of New York satisfy your mind beyond a reasonable doubt that here at this bar of justice there are three guilty men, guilty of murder in the first degree would you hesitate, would you be fearful, would you be reluctant in so saying?

A. No, sir.

By Mr. Barshay:

Q. Mr. Batterson, do you belong to any clubs around the neighborhood where you live?

A. No, I don't.

Q. Any churches or temples?

A. Well, I belong to a church, but I am not very active in it.

Q. Has any Assistant District Attorney ever spoken at [fol. 1290] that church?

A. No.

Q. About crime?

A. Not while I was there.

Q. Did you ever hear a lecture about crime at any place?

A. I don't think so.

Q. Did you ever hear anybody on Judge O'Dwyer's office staff speak?

A. None.

Q. Did you ever hear it on the radio?

A. No.

Q. Are you actively engaged in politics?

A. I am not.

Q. Do you intend to be in this campaign?

A. No, sir.

Q. You never came in contact with any member, clerical or otherwise, of Judge O'Dwyer's office?

A. No, I never did.

Q. Have you read about this case in the press?

A. Well, I read about this case, yes.

Q. Have you read about it often?

A. No, I read about it only once.

Q. Did you believe the contents of the article you read?

A. The contents of the article were simply the nature of the charges and gave no opinion.

Q. So that you gathered no impression from any reading at all?

A. No, all I did was read the nature of the charge.

Q. While you were here listening to prospective jurors being chosen, were you impressed by either side so that you will now favor or are favoring one side or the other?

A. No.

Q. You understand argument between counsel is not personal, it is merely a representation of each opinion?

A. Yes.

[fol. 1291] Q. It has nothing to do with the case. You know that, don't you?

A. I know that.

Q. And at this point, sir, can you tell me, is there any impression in your mind with respect to the guilt or innocence of any of the defendants?

A. No, I have no impressions on this case.

Q. You are free of bias, free of prejudice?
A. Yes, sir.
Q. Free of any impression, and you start off as though you know nothing about it at all; is that correct?

Mr. Turkus: I object to the form of the question. He says he knows nothing.
The Court: Overruled.
Mr. Barshay: That is what I am saying.

A. I know nothing about the case.
Q. The names that were spoken of by Mr. Turkus are unknown to you?
A. Yes, they are all unknown to me. Of course, I have heard one or two of the names in the past, but I have never heard of them through personal contacts with anyone.
Q. And it will not influence you in reaching your verdict?
A. They are merely names to me; they do not make any impression.
Q. Some names I mentioned like Mr. Louis Waldman, Mr. Potofsky, do you know them?
A. No, I do not.
Q. Mr. Maguire, Mr. Ryan?
A. No.
Q. You do not know them?
A. No, I do not.
Q. Have you ever been the victim of any crime?
[fol. 1292] A. I have been the victim of a crime.
Q. Was it a hold-up?
A. Yes, sir.
Q. With a gun?
A. With a gun.
Q. Was it recent?
A. No, it was not. It was about thirteen years ago.

By the Court:

Q. In Chicago?
A. Yes, sir.

By Mr. Barshay:

Q. And because of that are you prejudiced against any person charged with crime?
A. No, I have no prejudice.

Q. You understand that has nothing to do with this case?
A. Yes.
Q. Now, the fact that Mr. Buchalter was mentioned heretofore as under sentence because of a conviction or two convictions totaling forty to seventy years, you say will have no bearing upon this case at all?
A. No, the fact that he is incarcerated has nothing to do with this case as far as I am concerned.
Q. You will never use it except as authorized by law should that time come; is that so?
A. That is so.
Q. No bias against him for that at all?
A. No.
Q. Mr. Turkus has asked you whether you believe in the enforcement of the criminal law, and you said yes. Have you studied law?
A. No, I have not.
Q. Any member in your family?
[fol. 1293] A. I have studied real estate law, but I have never studied criminal law.
Q. Never come in contact with that at all?
A. No, I didn't.
Q. Do you believe the Grand Jury can indict an innocent man?
A. It could be done.
Q. I beg pardon?
A. It has been and could be done.
Q. Do you believe in the presumption of innocence?

Mr. Turkus: I object to the form of the question. The question is whether jurors will follow the law.
Mr. Barshay: That is the law, isn't it?
The Court: Have you finished the question?

Q. Do you believe, sir, that the defendant Buchalter is presumed innocent of the charge under the law?

The Court: Objection sustained.
Mr. Barshay: Respectfully except.

Q. That is assuming, of course, that the Court shall tell you that.

Mr. Turkus: I object to that question.
The Court: If the Court should so charge, will you follow the charge?
The Talesman: I will.

Q. By this time you know what I am saying to you will be the result of the Court's charge, don't you, Mr. Juror?

A. I think so.

Q. You know the Court will charge you presumption of innocence, don't you?

A. I know that that is a Court charge.

[fol. 1294] Q. I wanted to save time too. Do you believe that Mr. Buchalter, now that the Court says it will charge you, is presumed innocent of this crime just as any other person in this court-room? Do you know that?

A. I know that.

Q. Will you follow that instruction?

A. Yes, sir, I will.

Q. That is a substantial right given to the defendant. You believe that?

A. I know.

Q. It is no mere phraseology or a privilege, you understand that?

A. Yes.

Q. And do you believe, if the Court shall charge you that that presumption remains with him throughout this trial until twelve of you say unanimously you are convinced beyond a reasonable doubt that the District Attorney has sustained the burden of proof beyond a reasonable doubt——

Mr. Barshay: Do you mind sitting down?

Mr. Turkus: No, I am going to object. I object to the form.

The Court: If the Court shall so charge you, will you follow the charge?

The Talesman: I will.

Mr. Barshay: You can object without announcing it by standing.

Mr. Turkus: You told me to sit down.

Mr. Barshay: I did not tell you to sit down.

Mr. Turkus: Most disagreeable——

[fol. 1295] Mr. Barshay: You know that is not right.

Mr. Turkus: You know it is true. Go ahead.

Q. Everything I asked you with respect to your belief is prefaced by the understanding that unless the Court so charges you, don't you accept it from me. You understand that?

A. I do.

Mr. Turkus: May I just register an objection, because I think Mr. Barshay does not understand what I refer to.

The Court: Overruled.

Mr. Turkus: It is not the question of the belief——

Q. If the Court shall tell you, Mr.——

A. The name is Batterson.

Q. If the Court shall tell you that at no time does the burden of proving the defendant's innocence shift to the defendant, but it at all times remains with the prosecution, will you follow that instruction?

A. If the Court so charges.

Q. So that if the Court should so charge you, will you at any time demand some explanation forthcoming from any defendant, or some explanation of the charge against him?

A. No, not if the Court has so charged.

Q. If the Court shall charge you that silence on the part of any defendant, if he refuses to take the stand or he does not take the stand in the wisdom of his counsel, his failure to do so shall draw no unfavorable inference against him from you, will you follow that?

A. I will follow that.

Q. Strictly to the letter?

A. If the Court so charges.

[fol. 1296] Q. Yes. Assuming that the Court will. And will you demand that the District Attorney sustain his burden beyond a reasonable doubt?

A. Yes, I will.

Q. What a reasonable doubt is shall be told to you by his Honor. Will you follow it?

A. I will.

Q. If the Court shall charge you that if any evidence here is subject to two interpretations, you must give it the innocent one, will you follow that?

A. I am sorry, I do not understand that question.

Q. If there is any piece of evidence here that comes from the witness stand and is subject to two interpretations, an innocent one or a guilty one, if the Court shall tell you that you must give it the innocent one, will you follow that?

A. Then I will. yes, if the Court so tells.

Q. If the Court charges you that if you in your own mind cannot decide whether it is an innocent interpretation

or a guilty one, you must give the benefit of it and make it an innocent interpretation, will you follow that?

A. That is the way I understand, yes, sir.

Q. You know you are the judge of the facts in this case if you are chosen as a juror, do you not?

A. Yes, sir.

Q. In others words, you decide where the truth lies in this case and whether or not the District Attorney sustained his burden beyond a reasonable doubt.

A. Yes.

Q. You are the one to decide that. Do you understand that?

[fol. 1297] A. I understand that.

Q. It is a very important duty. Does your youth influence you in any way as to your ability to decide that important issue?

A. Does my youth influence me?

Q. Yes. Is there anything because of your youth that will cause you to be influenced in this case, which is so publicized and so important?

By the Court:

Q. You are thirty years old?

A. Thirty-four.

By Mr. Barshay:

Q. How old are you?

A. Thirty-four.

Mr. Barshay: I did not know that. He looks——

The Court: He is the same age William J. Bryan had when he ran for the first time for President of the United States.

Mr. Turkus: Youth is something that everybody outgrows.

Mr. Barshay: That is quite obvious, Mr. Turkus.

The Court: Not always.

Q. Now, Mr. Turkus has spoken about accomplice testimony. If the Court shall tell you that you are the one to decide whether or not to believe an accomplice, you will follow that instruction, won't you?

A. I will.

Q. Will you take into consideration the character of the accomplice as he takes the stand and offers his testimony?

[fol. 1298] A. Yes, I will.

Q. And will you weigh the demerit marks in his own life, his criminal life, his robberies, whatever crimes he committed, in accepting or rejecting his testimony?

A. Yes, I will.

Q. Will you as a juror look into the motive for that man giving his testimony?

A. I will.

Q. Will you weigh it carefully, if you find that he has a motive either in saving punishment for himself or some other reason?

A. If he has a motive I will consider it.

Q. And if he says he has not a motive but you find from the facts, from his own cross-examination, from his own direct examination, even though he denies he has a motive, that he really has a motive which he is concealing——

A. Should I find from the facts?

Q. Yes.

A. If I should find from the testimony that he has a motive I will consider it.

Q. Even though he denies that he has a motive?

A. Even though he denies it.

Q. In other words, you will be the one to decide whether or not he is worthy of belief, isn't that so?

A. Yes, sir.

Q. And so his raising his right hand and his offering to tell the truth, unless he does so in your mind, you will reject it, won't you?

A. I will.

Q. So you will be the one who will search for the truth as each witness takes the stand, won't you?

A. I will.

[fol. 1299] Q. And if you find that the treatment of the prisoner, whoever he may be, as rendered to him while he is waiting to testify here was of such a nature as would induce a man or cause a man to tell a lie, you would take that into consideration before you would accept his testimony?

A. Yes.

Q. No doubt about that?

A. I would.

[fol. 1300] Q. Now, with respect to the accomplice, if you find that the man takes the stand and says, "I am an accomplice," and the proof is that he never even saw or spoke to Buchalter, you will take that into consideration, too, won't you?

Mr. Turkus: I object to that. That is too specific. It is too specific as to this particular case, and it is ambiguous as to meaning, so there is a double objection.

The Court: I do not understand it myself. Sustained.

Mr. Barshay: I will reframe it.

Q. If you find here that the man who says he is an accomplice of Buchalter has not even seen or ever spoken to Buchalter in his whole life, will you take that into consideration in deciding whether or not he is an accomplice of Buchalter? Is that clear, sir?

A. Well, if I am convinced that he has never seen——

The Court: That is not the controlling factor.

Mr. Barshay: I don't say it is.

The Court: It is a question of law. You don't have to have personal inspection of an accomplice.

Mr. Barshay: I respectfully except, sir.

The Court: Can be an accomplice at a distance.

Mr. Barshay: I respectfully except. Can I ask a question, and I will take an exception.

The Court: Notwithstanding there is no objection. I am ruling it out because it is not accurate. It is a question [fol. 1301] of law.

Q. If the Court shall charge you that character of any defendant is not an issue in this case, has no bearing at all unless the defendant particularly involved decides to put it in issue, will you follow that law?

A. I will.

Q. So that the only thing we are trying here now will be the accusation set forth in the indictment—nothing else?

A. That is right.

Q. No other extraneous matter will be used by you except as his Honor may charge you you have a right to use it?

A. Yes, sir.

Q. Is that correct?

A. That is clear.

Q. Now with respect to the evidence which may be offered tending to corroborate an alleged accomplice, will you con-

sider the source from which that comes, who is it that offers such corroborating evidence—will you?

A. Yes, I will consider all sources.

Q. And if it is a tainted or polluted source, if it comes from a man who has been a criminal himself and murderer himself, you will be very careful before you consider accepting it, won't you?

A. Very.

Q. And if you find that he, too, has a motive in escaping punishment for his own crimes, whoever he may be or how many they may be, you will be very careful, won't you, before you will accept that testimony?

A. Yes.

[fol. 1302] Q. Now, Mr. Turkus has said that there will be three summations. You understand that each defendant is entitled to have a counsel represent him and sum up for him?

A. I do.

Q. Numbers mean nothing in this case, do they, number of counsel?

A. No.

Q. Is that so?

A. The fact——

Q. I mean, you are not influenced?

A. The fact that there is one or ten makes no difference to me.

Q. That is right. That makes no difference to you, does it?

A. No, it does not.

Q. And if each counsel urges his arguments based upon the evidence, you won't call it repetitious because some of the arguments may coincide for one defendant as that of another?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Q. You said that. You understand that we are not here to repeat arguments——

The Court: This is going far afield.

Q. You understood that when Mr. Turkus said that three times an argument's repetition has no greater force? You understood that, didn't you?

A. I understood that and I answered that it——

Q. But you won't fail to heed the individual argument of each lawyer, even though it may coincide with the argument of the preceding lawyer, would you?

A. No.

Q. Each lawyer has a right to view the evidence in his own [fol. 1303] light and on behalf of his own defendant; is that so?

A. I understand that.

Q. You know that each lawyer shall be speaking for his own defendant only—you understand that?

A. Yes

Q. Do you appreciate sir, that you must render a separate verdict with respect to each defendant in this case?

A. Yes.

Q. And that in reality each one is getting a separate trial?

A. I understand that.

Q. And if the Court shall charge you that the evidence given against one defendant shall be used against him and no other, will you follow that instruction?

A. I will follow that.

Q. And even though the trial takes a long time, will you keep in mind, will you make every effort to keep in mind the evidence as it is offered against the respective defendants?

A. I will.

Q. Do you think, sir, you possess the courage to render a verdict based upon the evidence without fear or favor to either side?

A. I know I do.

Q. If you find a reason for doubt arising out of the evidence here, if the Court charges you you must give it to the defendant, will you do so?

A. Yes.

Q. Numbers of jurors will not influence your judgment if you personally, after reasoning and logic and weighing of the evidence, are not convinced beyond a reasonable doubt that our defendants have been proven guilty beyond a reasonable doubt? They won't influence you at all, will [fol. 1304] they?

A. They won't.

Q. Numbers of jurors?

A. No.

Q. And as long as you reasonably feel that there is a reason for doubt with respect to the defendant Buchalter, you will give it to him?

A. I will.

Q. No doubt about it?

A. No doubt.

Q. Can Mr. Buchalter entrust to you every legal right that he has in this case?

A. I will follow the Judge's instructions and be fair.

Q. The Judge will instruct you on the law, Mr. Batterson, but as far as the facts are concerned?

A. I will judge the facts.

Q. You will judge the facts yourself?

A. Yes.

Q. You will accept no instruction from anyone, just your own judgment will be the all-important factor in this case, isn't that so?

A. Yes.

By Mr. Talley:

Q. Mr. Batterson, what is your position in this Federal Savings Loan Association?

A. Clerk.

Q. Yet you say you do practically everything in connection with that company?

A. Yes, sir.

Q. How many employees are there besides yourself?

A. About twenty, twenty or twenty-five.

Q. What do they do?

A. We have stenographers, we have tellers, we have rent [fol. 1305] collectors.

Q. I do not hear you.

A. We have stenographers, tellers and rent collectors, cashier, executives.

Q. They do something, don't they?

A. Oh, yes.

Q. You mean, when you say that you do everything, that you do a little bit of everything that they do?

A. I should say that most of my time is taken up at the cash window.

Q. Is it essentially a loan association or is it a savings institution?

A. It is, for all practical purposes, a savings bank whose monies are used in loaning out on mortgages.

Q. Loaning out on mortgages?

A. That is right.

Q. On personal property or real estate?

A. On real estate.

Q. And you are engaged in that business presently?

A. Yes, I am.

Q. And have been for the last year?

A. Five years.

Q. Lending money on real estate in the City of New York?

A. Yes.

Q. You understand, Mr. Batterson, that it is the law that when a man is accused of crime the burden of proving his guilt is always on the People?

A. I understand that.

Q. And never shifts from the People to the defendant. Do you understand that?

A. I do.

Q. And if the Court should charge you that in the event that any of these defendants should not testify in this trial and should further charge you that you are not to indulge in [fol. 1306] any unfavorable inference against them because they do not take the stand, will you be guided in arriving at your verdict according to those instructions?

A. Yes, I will.

Q. In other words, you will not hold it against a man?

A. No, I will not.

Q. A defendant in this case, because he does not take the stand, so advised that it is not necessary?

A. No, I would not hold it against him.

Q. Is there anything in the experience that you say you had in Chicago that would prejudice you against any defendant charged with crime in this city?

A. No.

Q. Was there an arrest in that case?

A. There was.

Q. Was there a trial?

A. There was.

Q. Did you testify?

A. No, sir.

Q. Were you the victim of the hold-up?

A. I was the victim of the hold-up, yes, sir.

Q. Was there a plea of guilty entered?

A. There were other people. This man that had committed the hold-up had held up many people, and he was convicted before I was ever called to the witness stand.

Q. That is, other victims of the hold-up besides yourself testified, is that right?

A. Other victims to other hold-ups. It was not tried on my case alone.

Q. He was not tried on your case?

A. No, sir.

Q. Then your case was not tried; it was the other hold-ups [fol. 1307] that this man engaged in that were tried; is that right?

A. You are right, yes.

Q. That episode has left no impression in your mind that would be unfavorable to these defendants, has it?

A. No.

Q. Did you read nothing about this case in any of the newspapers in this city?

A. Yes, I read about the case.

Q. And in what papers did you read it?

A. I read it in the *World-Telegram*.

Q. In any other paper?

A. No, I avoided such reading.

Q. Did you read the *Mirror*?

A. No.

Q. Did you read "The Life Story of Judge O'Dwyer" in the *Evening Journal*?

A. No, I didn't.

Q. Did you see the names of any of these defendants in any account which you read in any paper?

A. Yes, in the *World-Telegram*.

Q. Did you form any impression about them, these defendants who were thus named, from the reading that you did in the *Evening Telegram*?

A. No, it was merely a statement of the charge.

Q. So that you say now that you have no impression one way or the other about any of these defendants?

A. No, I don't say that.

Q. What do you say?

A. I said that I did not gain any impression from this article.

Q. Did you gain an impression about them or any of them from any other source?

A. I have heard of the defendants before I was ever called for jury duty.

[fol. 1308] Q. And when you heard of them, or from whatever you did hear about them, did you form an impression about any of them?

A. Yes.

Q. And was that impression favorable or unfavorable to them or any of them?

Mr. Turkus: I object to the form of the question.

The Court: Overruled.

A. The impression that was formed in my mind, the impression that was formed in my mind was unfavorable to the defendants.

Q. And you still have that impression, I take it, haven't you?

A. I have.

Q. And would it require some measure of testimony to remove that impression from your mind, if accepted as a juror?

A. I have an impression of the defendants, but I would not hold that against them were I put on the jury.

Q. But you would enter the jury box with that impression in your mind, wouldn't you?

A. I will probably always have the impression.

Q. And something would be required to remove that impression from your mind, if it were to be removed?

Mr. Turkus: Objected to.

Q. Isn't that so?

Mr. Turkus: It has already been answered.

The Court: Sustained.

Mr. Talley: Exception.

[fol. 1309] Q. What would you require to have that impression removed from your mind?

A. I don't ask that it be removed.

Q. You are content to have it remain in your mind?

A. It would not affect my judgment of the case.

Q. You are sure about that, Mr. Batterson?

A. Yes, I am positive.

Q. The fact is, you went into the jury box with an unfavorable impression in your mind, but you say that impression would not affect your verdict; is that right?

A. No, I would never allow it to.

Q. Are you sure you can differentiate between the impression that you have in your mind which you say is unfavorable and your ability to wipe it out when you come to consider the guilt or innocence of these defendants?

A. I am certain

Q. Don't you think your verdict would be affected by that impression you have?

Mr. Turkus: I object to it. It has been answered three times.

The Court: Sustained.

Mr. Talley: Exception.

Q. If the evidence in this case was evenly balanced in your mind, that is, the scales were even with respect to the guilt or innocence of these defendants or any of these defendants, would that scale be tipped against them by your unfavorable impression?

[fol. 1310] Mr. Turkus: Objected to. That is a legal question.

The Court: It is repetitious. Sustained.

Mr. Talley: Exception.

Q. Whom did you talk to with respect to this case or any of the defendants here?

A. I would like to have the question again, please.

Q. With whom did you talk about this case as the result of which talks you gained this unfavorable impression that you speak of?

A. I did not say I had talked with anyone.

Q. Yes, you did tell me that, that you had talked with people and formed that impression. I am sorry, but that is what you told me.

A. I said that I had talked with people on this case after being called, but I did not say that any impressions were formed as the result of those talks. Impressions had been formed before I was ever called.

Q. All right. From what were they formed?

A. By what were they formed?

Q. From what? What source? What information did you have upon which you based those impressions?

A. I merely heard of the defendants in an unfavorable light.

Q. Heard of them from whom?

A. From probably the newspapers, possibly the radio.

Q. Have you any recollection of having listened on the radio?

A. No.

Q. To anybody who discussed this crime?

A. No.

[fol. 1311] Q. Or these defendants? You have no recollection of any of the persons from whom you heard, as you say, the things upon which you based your unfavorable impression?

A. No.

Q. But before you were called as a juror here, you did have an unfavorable impression against these defendants?

Mr. Turkus: Objected to. It has been answered.

The Court: Sustained.

Mr. Talley: Exception. I have no further questions.

By Mr. Rosenthal:

Q. When you originally were questioned by counsel for the defendant, did I understand you correctly to say that you had merely read the World-Telegram about the case itself; is that correct?

A. That is what I said, yes, sir.

Q. And when you were further questioned by counsel you had made the statement, had you not, that you had read nothing else about the case; is that correct, sir?

A. I think that is true, yes.

Q. Now, the fact is, sir, is it not, that you now don't remember whether you read the names of these defendants in newspapers prior to your being called as a juror?

A. I definitely have heard of all three individuals before I was called to the jury.

Q. Do you definitely remember, sir, whether or not you read their names or the name of any of the defendants in any newspapers prior to the time that you were called for [fol. 1312] jury service?

A. I have.

By the Court:

Q. Is your memory hazy on that?

A. My memory is hazy. I know I have read of them and I saw their names in the newspaper.

Q. Can you place what newspaper?

A. I cannot.

By Mr. Rosenthal:

Q. Have you any idea, sir, of any particular newspaper or any particular time that you read concerning any particular defendant on trial?

Mr. Turkus: Objected to. It has been answered now at length.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Do you recall whether or not now you heard and discussions over the radio in respect to any one of these defendants?

A. I recall no discussions.

Q. Do you recall any talk of any character over the radio?

A. No.

Q. In answer to Judge Talley you said that probably you had heard over the radio some mention of the defendant; is that true?

The Court: He said "possibly".

Mr. Turkus: Objected to. "Possibly." Objected to.

The Court: Objection sustained.

Q. Can you tell us or have you any idea of who it was you [fol. 1313] possibly heard over the radio discussing any of these defendants?

A. No, sir.

Q. So that when you were first called for jury duty and first ascertained that it was in respect to this particular case, at that time your state of mind was unfavorable to one or more of these defendants, is that true, because of the impression that you had gained? Is that true, sir?

A. Yes.

Q. Then subsequent to being called for jury duty and after you had learned the particular case that was involved, you had discussions, or your friends had discussion with you concerning one or more of these defendants; is that true?

A. That is true.

Q. And those discussions covered a period ending when?

A. The discussions that I had were merely with my wife and my employer and did not concern the case, that is, did not concern any individuals in the case, but concerned the possible length of time that I might be under the jurisdiction of the court.

Q. Possibly you misunderstood me. My question is directed to the answer which you gave to Mr. Barshay—and if I am wrong, correct me, sir—in which you stated that numbers of people had spoken to you and given you their impression.

A. I don't recall saying that.

Mr. Turkus: That was the other juror, the one before.

Mr. Rosenthal: I have it written down.

Mr. Turkus: That was Wallach.

[fol. 1314] Mr. Rosenthal: Was it? I am not entering into a discussion with you. I have my own notes as to what this juryman said. Let me withdraw the question and put it this way:

Q. Did you not state, in answer to questions by lawyers other than myself, that people had spoken to you concerning one or more of these defendants since you were called for jury service? What is your answer?

A. I may have.

Q. Is your memory indefinite as to whether you had stated, in answer to a question propounded by one of the lawyers, that you had spoken or people had spoken to you since you were taken for jury service on this case, concerning one or more of these defendants?

A. My recollection is that any discussion that I had on this case outside of the court-room only concerned the nature of the charges and the possible length of time that I would be kept away from my work.

Q. Do you say now, sir, that in answer to lawyer's question who preceded me——

By the Court:

Q. References have been made here to the length of the trial. You realize the trial is on now?

A. Yes, sir.

Q. So you won't be afraid of the length of the trial. It is possible that most of its length may relate to the selection of the jury.

A. Yes, sir.

Q. Not the taking of testimony. So don't be scared.

(Pending question read.)

[fol. 1315] Mr. Rosenthal: I will repeat the question.

By Mr. Rosenthal:

Q. Do you say now that you did not answer, in response to lawyers' questions who preceded me, that certain persons had discussed dith you one or more of the defendants after you had been summoned for jury duty in this case?

Mr. Turkus: I object to it.

The Court: Sustained as answered.

Mr. Rosenthal: I respectfully except. There is no answer, if your Honor please.

Q. Well, with the exception of your wife and your employers, did anybody else discuss with you or you with them anything concerning any of the defendants since you were called for jury service?

A. No.

Q. You are positive of that?

A. Yes.

Q. Was the discussion with your employer in any wise directed to an opinion which he had formed as to any of the defendants?

A. No.

Q. As you sit here now you have an unfavorable impression or an opinion formed as to one or more of these defendants, is that right, sir, as you are seated here now?

A. Yes.

Q. Your answer is yes?

A. Yes.

Q. An issue may be raised in this case as to the truth or falsity of a statement possibly made under oath by one or more of these defendants. In other words, assuming that [fol. 1316] one of the defendants were to take the stand in his own behalf and place his integrity or his truthfulness in issue as against some other person—is that clear to you as far as I have gone?

A. Yes, sir.

Q. —having in mind that as against that defendant, and as you sit here now you have an unfavorable opinion—is that clear to you?

A. That is clear.

Q. —you say now that with such an issue presented, that the opinion which you hold as to the defendants or any one of them is of such a nature that you could strictly lay it aside without allowing it to weigh on your mind whatsoever and differentiate between the opinion you have and the individual who is testifying?

A. I would set aside any impressions that I have before judging the man's guilt or innocence.

Q. Well, now, assuming, sir, that you were seated in a case where you had no impression and had never heard of the defendants——

A. Yes.

Q. —as differentiated between the state of mind which you are now in as to one or more of these defendants——

Mr. Rosenthal: Would you mind sitting down until I am finished? Will the Court direct Mr. Turkus to sit down? I am very much perturbed when he stands up.

The Court: Don't answer until the Court rules.

Q. Do you understand the question so far?

A. Yes.

Mr. Turkus: I object to it.

[fol. 1317] Mr. Rosenthal: I have not finished the question.

Mr. Turkus: Then you have asked for an answer before you finished.

Mr. Rosenthal: You do not understand English.

Mr. Turkus: Not the way you speak it, from Queens.

Mr. Rosenthal: I said as far as I have gone You are so good from the slums of Brooklyn.

Mr. Turkus: I have advanced; you have gone into the slums. You have been pretty low ever since you came here, too.

Mr. Climenko: If your Honor pleases, I object to these statements.

The Court: Please! Everybody come to order. Finish the question, Mr. Rosenthal.

Mr. Rosenthal: I will do as your Honor directs. I would not stoop as low as Mr. Turkus.

The Court: The Court asks everybody to come to order. That meant no further exchange of compliments.

By Mr. Rosenthal:

Q. Do you recall the question, sir?
A. I do.
Q. As far as I have asked? Can you state or tell me whether or not under a set of circumstances such as I have described here, the quality or quantity of evidence which you would require in order to convince you, under the Judge's charge, of what is necessary to establish a man's guilt beyond a reasonable doubt would or would not be [fol. 1318] different than the quality or quantity of evidence which would be necessary in this case because of the opinion which you now have?
Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Rosenthal: I respectfully except.

I challenge the juror on implied bias.

The Court: Try the challenge.

(Paul S. Batterson was duly sworn.)

By Mr. Rosenthal:

Q. You are now under oath, Mr. Batterson, you understand that?
A. Yes, sir.
Q. If the same questions were repeated to you as were asked of you before you were under oath, would you make the same answers?
A. I made no answer to the question that was put to me.

The Court: The questions.

Q. Those questions which were asked and which you gave answers to, if they were repeated to you now would you make the same answers as you made prior to the time of your being put under oath?
A. I would.

The Court: Anything further?
Mr. Barshay: Nothing further on this challenge.
The Court: Anything by counsel for Weiss?

Mr. Talley: I stated before, Judge—perhaps you did not [fol. 1319] hear me—that I had nothing further. I join in the challenge.

The Court: Anything by counsel for defendant Buchalter?

Mr. Barshay: We join in the challenge, your Honor.

The Court: Overruled.

Mr. Barshay: Exception.

Mr. Talley: Exception.

The Court: Any further questions?

Mr. Rosenthal: I have no further questions.

The Court: Any peremptory challenge?

Mr. Turkis: Mr. Batterson is satisfactory to the People of the State.

Mr. Talley: Challenged peremptorily by the defense, reserving all exceptions for all defendants.

Alfred J. Cleary, of 295 Maple Street, Brooklyn, New York, was examined as to his qualifications.

By Mr. Turkus:

Q. Is Maple Street part of the downtown section of Brooklyn?

A. No, that is in the Leffarts Estate, Maple and Nostrand.

Q. Have you lived in that section of Brooklyn for a number of years?

A. Yes.

Q. Are you married, sir?

A. Yes, sir.

Q. And do you reside with your wife and family?

A. Yes, sir.

[fol. 1320] Q. Have you children?

A. Yes.

Q You are listed as a supervisor. Is that a correct listing?

A. That is now, but I am assistant manager now.

Q. What type of work do you do?

A. I am in the loan business. I represent the National Loan Society in the Bay Ridge section of Brooklyn. We come under Article 9 of the Banking Act. We make personal loans.

Q. What is the name?
A. National Loan Society.
Q. Is that connected with the National City Bank?
A. No.
Q. Has it any banking connections?
A. Investment Bank & Securities Corporation. That is the parent concern.
Q. Does your job as manager bring you on the outside, or do you work inside?
A. In and outside.
Q. Do you have any contacts of any kind, nature or description in the garment or clothing industries?
A. By telephone.

By the Court:

Q. Industrial bank and what?
A. Under Article 9 of the Banking Law.
Q. What is the name?
A. National Loan Society.
Q. And what is the bank that backs it?
A. That is a little confidential information.
Q. You just gave the name.
A. Industrial Bank & Securities Corporation.

By Mr. Turkus:

Q. I think we got to the point, Mr. Cleary, where you said [fol. 1321] you have contact by telephone. Is that a telephone discussion with various manufacturers?
A. Yes, in a sense. It is really collections and investigations for people that have applied for credit.
Q. Then business does bring you into those areas of the city and in those industries in connection with credit?
A. Yes.
Q. Do you investigate people in the clothing district in Manhattan?
A. We have several accounts in the clothing district, but individuals, not manufacturers.
Q. Does your company make loans to manufacturers of clothes?
A. No.
Q. Is it one of those personal loans?
A. Yes.

Q. Small loans under Small Loan Law?

A. Yes.

Q. That would be loans up to three hundred and not exceeding three hundred?

A. Yes.

Q. Do you check credits with clothing manufacturers?

A. No, we check the employment record of employees that have applied for loans, through their employers.

Q. Do you come in contact with any persons or any individuals in the clothing trucking business?

A. Yes, we have accounts among the chauffeurs.

Q. And do you check credits there?

A. Yes.

Q. Are you familiar with any of the officials of the clothing trucking union?

A. Not personally, other than by——

Q. Reputation?

A. Yes.

[fol. 1322] Q. How long have you been in this business?

A. About eight years.

Q. Did your work bring you into contact with the office of Thomas E. Dewey?

A. None whatever.

Q. Is the name of Lepke and Gurrah familiar to you in that area?

A. No.

Q. Name of Hyman (Curley) Holtz?

A. No.

Q. Philip Orlofsky?

A. No.

Q. Abe Beckerman?

A. No.

Q. Belia, Bruno Belia?

A. No.

Q. The name of Bellanca or Tosca?

A. No.

Q. There have been various names which I have mentioned from time to time with other prospective talesmen. Through your line of work is there any significance to those names?

A. None whatever.

Q. Do you have any contacts on the waterfront?

A. Yes, we have accounts there similar to the garment district.

Q. And in those accounts do you ascertain credits of various employees?

A. Yes.

Q. With the employers?

A. Yes.

Q. Does your business in anywise bring you in contact with union officials?

A. None whatever.

Q. Have your conversations in the garment and clothing area been limited to telephone?

A. Yes, except on occasions make a personal call.

[fol. 1323] Q. Where you have gone to the manufacturing plants?

A. Yes.

Q. Have you ever discussed with any individuals any of the investigations of Thomas E. Dewey?

A. No.

Q. In the garment and clothing areas?

A. No.

Q. Or have you discussed with any individuals the investigations by Judge O'Dwyer?

A. No.

Q. Have you in these areas heard any discussions?

A. None whatever.

Q. With regard to newspapers, do you read any particular newspaper?

A. Yes.

Q. What one is that?

A. The *Journal* in the evening and the *News* in the morning.

Mr. Talley: Will you speak up?

The Talesman: I do not see any difficulty for anybody to hear if you have normal hearing.

Mr. Talley: Just keep your voice up, if you please.

Q. Have you read the articles about the life of Judge O'Dwyer?

A. I read one article on that in the *Journal*. I did not continue. One instalment.

Q. No other articles?

A. None whatever.

Q. Do you know the District Attorney of the County, Judge O'Dwyer, personally?

A. No, I don't.

Q. Or do you know Assistant District Attorney Joseph, Assistant District Attorney Klein or Turkus?

A. No.

Q. Do you know any Assistant District Attorney on [fol. 1324] Judge O'Dwyer's staff?

A. No, I don't.

Q. Is there any impression that you have in your mind as the result of anything that you have read in the newspapers?

A. Well, I have been impressed, I am impressed by everything I read, but I have not formed an opinion on this case.

Q. With respect to the names of the nine lawyers that represent these defendants here, I have mentioned their names in the former positions that they occupied—are any of those names familiar to you by way of acquaintance?

A. None whatever. I have known of Judge Talley. I do not know him personally, but I think I heard him speak one time a considerable time ago.

Q. You have never been out with him socially or been to his home?

A. No.

Q. Would that slight contact have any bearing in connection with your ability to decide this case on the evidence?

A. None whatever.

Q. Do you know anybody in the law offices of the respective lawyers?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases as a specialty?

A. No.

Q. Did you tell me you were in that business for the past ten years?

A. Eight years.

Q. And that you now——

A. Pardon me, seven years, seven and a half.

Q. And you have gone up the scale to position of assistant [fol. 1325] manager?

A. Yes.

Q. Have you heretofore served as a juror in any case?

A. Never.

Q. That would be neither civil nor criminal case?

A. Never.

Q. Will you, if accepted as a juror in this case, take the law implicitly from Judge Taylor?

A. Yes.

Q. Will you give those defendants on trial every legal right, every Constitutional privilege and immunity that Judge Taylor says defendants on trial should have?

A. Yes.

Q. By the same token will you use common sense and understanding in weighing this case?

A. Yes.

Q. Do you have any prejudice or do you find any fault with the prosecutor in solving a case by employing the use of accomplice testimony?

A. I have nothing against the prosecutor, but I would have some difficulty in accepting the testimony of an accomplice.

Q. Is that difficulty such that you would not believe an accomplice under any circumstances?

A. Circumstances alter cases. As to this case I would hesitate to a great degree in accepting the testimony of an accomplice.

The Court: We will resume at two o'clock.

Mr. Cuff: Judge, may I ask now whether you are going to hold a night session tonight, because I shall have to make certain preparations.

The Court: We are going to work late. I am not prepared to say how late. That depends upon future conduct. If capricious conduct in peremptory challenges is indulged [fol. 1326] in by either side, it will have a bearing upon the length of time which the Court will work.

Defendants are remanded.

Mr. Climenko: On behalf of the defendants, I take exception.

The Court: Order while the defendants are remanded.

Mr. Climenko: If your Honor pleases, the defendants take exception to your Honor's remarks in so far as they anticipate that possibility.

The Court: Wait just a minute. The talesmen will kindly pass out. Come back at two o'clock.

Mr. Talley: Your Honor will remember that tonight is the beginning of registration and the polls do not open until five o'clock, the hour which you called the jurors back.

The Court: The Court is ready to register on Saturday. I want the talesmen out before the Court says anything further.

Mr. Cuff: The matter which I inquired, Judge——

The Court: By the ardency of the protest just rendered by defense counsel, the Court is prompted to say something it had not intended to say, and that is that this morning has been wasted by the excusing of two obviously competent and unbiased jurors. The Court in its opinion views these as [fol. 1327] capricious exercise of peremptory challenge.

Mr. Climenko: To which remarks the defense takes exception.

The Court: Which will do you no good whatever, either now or at any time.

Mr. Climenko: The question of whether or not implied bias was shown is preserved by this record and is not foreclosed by your Honor's remarks.

(Whereupon a recess was taken until 2:00 P. M.)

Afternoon Session—Trial Resumed

Alfred J. Cleary, resumed the stand and was questioned further as to his qualifications.

By Mr. Turkus:

Q. At the point of recess, Mr. Cleary, I think in words or substance you said as to this case you have some prejudice against accomplices.

A. I believe that I would have in any case, an accomplice in any case. There would be some doubt in my mind as to an accomplice testifying against another accomplice, participant, rather.

Q. In other words, you would have a doubt as to a case in which accomplice testimony is used, solely because there is accomplice testimony given?

Mr. Rosenthal: I object to it upon the ground it is a legal question.

[fol. 1328] The Court: Sustained.

Q. Is your prejudice against accomplice testimony such as would cause you to reject the testimony of an accomplice no matter what the circumstances?

Mr. Rosenthal: I object upon the ground that it incorporates in the statement facts which have not been testified to by the prospective juror.

Mr. Turkus: I am asking him a direct question, if your Honor please, not containing any facts.

By the Court:

Q. If the Court should charge you that you have a right to accept the testimony of an accomplice provided you find that it is corroborated by believable evidence tending to connect the defendants or any of them with the commission of the crime, would you accept the testimony of the accomplice with that qualification?

A. I would, with hesitation, your Honor.

By Mr. Turkus:

Q. What I am trying to find out, Mr. Cleary, is this: Have you such a bias or prejudice against accomplice testimony as would cause you to reject it no matter what the law may be as charged by the Court?

A. No, I would not reject. I would be guided by the Court's instructions wholly, but there is a little thought that I think that I would have to have accomplice testimony corroborated. I would have to have something iron clad.

[fol. 1329] Q. The law requires that. In other words, if the prosecutor only had the testimony of an accomplice or accomplices, the Judge would have to direct you to acquit the defendants.

A. Yes.

Q. Because the law says there could not be any such conviction. I am going beside that point. Assuming that there is the testimony of an accomplice in the case, and assuming further that there is other evidence in the case tending to connect the defendants with the commission of the crime, and you believe that other evidence, and from all the evidence you believe the accomplice, I am trying to find out is your state of prejudice such that no matter what the corroboration was you would reject it?

A. No, it is not such that I would reject it wholly, but there is a certain doubt in my mind as to the credibility of an accomplice's testimony. I have a little hesitation there about accepting it. That is my own natural belief, my own honest belief.

Q. Is your state of mind such that a bad man can never tell the truth?

A. Oh, no, they can tell the truth. In some circumstances they may be telling the truth for a reason. A man does not get honest—everybody is not basically dishonest, basically bad, but there are some men that can be reckless with the truth in order to benefit themselves.

Q. Yes. Well, is your prejudice such that it would go to a point where you would exercise care and caution in [fol. 1330] weighing the testimony of an accomplice?

A. It is not prejudice, but I would weigh that especially.

Q. At least can I proceed that it is not that kind of a feeling or state of mind that you would reject it no matter how corroborated or no matter what the circumstances?

A. Not in the least.

Q. In other words, as to the item of the accomplice's testimony, will you look at the background of the accomplice?

A. Yes.

Q. Look at his past criminal record?

A. Yes.

Q. Look at his past associations?

A. Yes.

Q. Look at every vicious or immoral act that he may have committed during his lifetime?

A. Yes.

Q. And will you consider all those things in weighing his believability?

A. Yes.

Q. And will you weigh his believability with care and caution applying all of those rules?

A. Yes, but I would have a certain hesitation about it because maybe—I don't know how to express myself—it is not a prejudice.

Q. Let me take it this way: If part of The People's case rests upon the testimony of an accomplice, is your state of mind such that you could not be a fair and impartial juror?

A. Not in the least.

Q. Well, is your state of mind such that you would have a prejudice against The People's case?

[fol. 1331] A. I have no prejudice against The People's case, but there is a certain doubt in my mind about accepting the testimony of an accomplice.

Q. Well, is it such a doubt as to that as would impair your ability to serve as a juror in a case where accomplice testimony is given?

A. Not in the least. As I understand you, here is a man that has never committed a crime and he is a supposed accomplice. I would accept that testimony without hesitation. But there is a certain doubt in my mind as to considering the background and the record of an accomplice. I would accept that testimony with hesitation.

Q. Well, let me ask you this: Do you find any fault with the prosecution, in order to solve a case, to accept the testimony of a co-participant in the crime or an accomplice, against the other defendants?

A. None whatever.

Q. Is your hesitation such that you will apply care and caution to the believability of the accomplice? Is that what it is?

A. Yes.

Q. Then may I go along with the understanding that if that kind of testimony is amply corroborated under the instruction of the law, that you have no bias or prejudice which would impair your ability to serve in this case?

A. No, it would not impair my ability.

Q. Would it impair your ability to be fair to either side?

A. It is not a case of being unfair. It is just that there is a certain doubt in this particular case as to the truth or [fol. 1332] as to the reliability. I have not heard the evidence as yet and I really could not express an opinion on that. Maybe the evidence will prove, on the other hand, the opinion I have now.

Q. You say you have an opinion now?

A. Yes.

Q. Does the opinion extend to guilt or innocence?

A. Not as to guilt or innocence, but the opinion now that I have is I would be rather skeptical to accept the testimony of an accomplice of this supposed charge.

Q. Have you ever served on any jury before?

A. Never before.

Q. If part of The People's case rested upon the testimony of an accomplice, is your state of mind such that you could not be fair to The People of the State?

Mr. Rosenthal: I object on the ground he has answered twice that is not his state of mind. It is repetition.

Mr. Turkus: It is not.

Mr. Rosenthal: I am not arguing with you; I am addressing the Court.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. If I can make myself clear, in accepting the testimony, say an individual saw a crime and he was taken as a defendant in that crime and he was being tried, he never before in his life committed any crime, I would accept that [fol. 1333] witness's testimony without hesitation, but whereas the man has been accused of every crime known, committed every crime, rather, I would accept that with a little hesitation.

The Court: That is the law. That is why corroboration is required-.

The Talesman: Yes.

Q. Were you starting to say something else?

A. No, I just cannot seem to get it over.

Q. You gave me the illustration where a man saw the crime. That man who sees a crime——

A. And he has been accused of that crime. He saw a crime and he is accused of it and he is held as a defendant in that particular crime.

Q. You cannot hold the defendant——

A. There are lots of circumstances that people have been charged with a crime and——

Q. You see——

A. I will try to make myself clear, Mr. Turkus. The testimony will be offered by a man, as I have heard, that has committed every crime. There is a certain doubt in my mind as to the credibility or the reliability or the truthfulness of that particular man.

Q. Right.

A. It does not pertain to being fair or impartial in this case. I could be fair or impartial, but I cannot accept that testimony whole-heartedly as being the truth.

Q. Assuming that there was other evidence in the case which tends to show that the accomplice is telling the truth——

A. I have not seen that yet.

[fol. 1334] Mr. Rosenthal: I object to the question.

(Question read.)

Mr. Rosenthal: I object to it. It was a legal question.

The Court: That is sustained, because that is not a correct statement of the law.

(Question read.)

Q. On the last part of the answer to the question you said you could not accept that testimony whole-heartedly——
A. No.

Mr. Rosenthal: I object to it. That is not what he said at all. He said he could not accept it whole-heartedly as the truth.
The Court: Finish the question.

(Question read.)

Q. ——as the truth.

Mr. Rosenthal: I object to that. That is no question.
Mr. Turkus: I am asking him it that is what he said.

A. That is exactly what I said.
Q. Assuming there was other evidence in the case which to your mind satisfied you that the accomplice was telling the truth, would you still reject the testimony——

Mr. Rosenthal: I object to it, a question of law, and it does not properly present the question of law.
Mr. Turkus: I submit that is a very proper question to ascertain the state of mind of the prospective juror with [fol. 1335] respect to accomplice testimony where part of the case rests upon the testimony of an accomplice. There is no other way of finding out what is in his mind except by that type of question.
The Court: Isn't it possible to avoid argument on these objection-? The question is improper in form as to the law.
Mr. Turkus: I am not asking a legal question.
The Court: There must be evidence tending to connect the defendant with the commission of the crime.

Q. If the Judge were to charge you that the jury may find corroboration or support of an accomplice from believable testimony which tended to connect the defendants with the commission of the crime, would you follow that instruction of law?

Mr. Rosenthal: I object to it. That is not a proposition of law. They first have to believe the accomplice as well as finding other evidence.
The Court: Overruled.
Mr. Rosenthal: Exception.

Q. Do you understand the question?

A. Yes, as I understand your question I would be guided according to the Judge, but my bias, as you call it, has no bearing on this case. It is just that I would accept the testimony of an accomplice with hesitation, but not pertaining to this case. I tried to make that clear to you, Mr. Turkus. An accomplice's testimony is not wholly value-
[fol. 1336] less, but I would accept it with hesitation.

Q. And with caution?

A. Certainly.

Q. All that I am trying to find out is, no matter what the circumstances were, no matter how corroborated, whether your state of mind is such that you would kick it out.

A. No, it would not have any bearing on my being a fair and impartial juror, but I would doubt the testimony of an accomplice in most circumstances.

Q. Is your state of mind such that you would not accept the testimony of an accomplice no matter how it was corroborated?

Mr. Rosenthal: I object to it.

The Court: Sustained. You have been sufficiently into that point.

Q. Have you had any reading with respect to any of the accomplices in this case, any reading matter?

A. I did not delve into it.

Mr. Rosenthal: I object to it on the ground there is nothing to show who the accomplices are in this case. I object to the question.

The Court: Overruled.

Mr. Rosenthal: Exception.

A. I really have not, anything about the accomplice.

Q. Have you read anything about the investigation of this case which caused you to form an opinion of any kind or description?

A. None whatever.

[fol. 1337] Q. Is there anything that you may have heard discussed with anybody that has caused you to form an opinion of some kind?

A. None whatever.

Q. Has the impression that you have and the opinion that you have been created by some of the questions that

were asked by the defense lawyers of other prospective jurors?

A. No, sir.

Q. Is there anything that you have heard in the courtroom which has caused you to form an impression or an opinion?

A. No, sir.

Q. Did I cover with you whether or not you knew any of these nine lawyers or anyone in their offices?

A. Yes.

Q. Do you know any member of the bar who tries criminal cases, that defense has been his specialty?

A. No, sir.

Q. Do you know Judge O'Dwyer, the District Attorney of the county, or any member of his staff?

A. No, sir.

Q. In connection with your investigation work do you come in contact with any police officials of the City of New York or any police officers?

A. Yes.

Q. And is that a daily matter?

A. We have made loans to them.

Q. In checking on the credit of others, do you come in contact with the Police Department of the City?

A. Not in checking on the credit of others, in checking on the credit of the policemen themselves.

Q. Are you in sympathy, sir, with the enforcement of the [fol. 1338] penal law of the State?

A. Yes, sir.

Q. Prior to being in this loan business, what was the nature of your work?

A. I was credit manager for an importing concern.

Q. And that was the checking of credits?

A. Yes.

Q. What was the nature of the product?

A. Spanish wines and liquors.

Q. Did you come in contact with any truckers?

A. When we did our delivering. I think he was an independent trucker, however.

Q. In connection with any of the chauffe-rs of the truckmens' local, did you tell me some of the chauffeurs were making loans? Did any of them ever mention this case?

A. No, sir.

Q. Something has been said here by one of the lawyers for Buchalter concerning the fact that he has been heretofore convicted of crime and is serving a long jail sentence. I ask you would you have any prejudice against such a defendant?

A. No.

Q. Would you be inclined to relax or deviate from a proper verdict in this murder case because of the fact that he is now presently serving a jail term?

Mr. Climenko: I object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

A. No, I would not.

Q. Assuming that part of the testimony in this case [fol. 1339] comes from an accomplice, and assuming further that there is other evidence in the case which satisfies your mind beyond a reasonable doubt that the accomplice is not only telling the truth about these defendants and their participation in the murder, but you are also satisfied that the other evidence in the case tends to connect the defendants and each one of them with the commission of the murder, would you hesitate to say so by your verdict?

A. Not in the least.

Q. Would you have any fear, hesitation, or embarrassment in so saying by your verdict?

A. No, sir.

Q. Since your name appeared on this jury list, did anybody speak to you about the case?

A. Yes.

Q. Where were those discussions?

A. At home, in my office, and here.

Q. The ones at your home, were they with reference to the merits of the case?

A. No, the merits of the case were not in the discussion at all.

Q. Was the conversation at home limited to prospective jury service?

A. Yes.

Q. You say at your office. Was there any conversation with respect to the name of any defendant?

A. None whatever.

Q. Any conversation here with respect to any of the named defendants?

A. Not but among the jurors, prospective jurors, rather.

Q. Was there any of those conversations that caused you [fol.1340] to form any opinion in the case one way or the other?

A. None whatever.

Q. Will you take the law exclusively from the trial judge in every aspect?

A. Yes.

Q. In the event that you should hear the same arguments urged three times by the counsel for these defendants, will it have three times the effect because of repetition?

A. No, sir.

Q. Is there anything that I have failed to bring out by questioning which affects your qualification to sit as an unbiased and unprejudiced juror?

A. I don't think so.

Q. Is your state of mind such that you can be fair with The People of the State of New York?

A. Yes.

Q. And is your state of mind such that you can be fair with the defendants on trial?

A. I believe so.

Q. In the event that you have heard all the evidence in the case and you are satisfied from the evidence and you believe beyond a reasonable doubt that these defendants are guilty of murder in the first degree, would you have any reluctance, fear, or embarrassment in so saying in your verdict?

A. None whatever.

By Mr. Talley:

Q. Mr. Cleary, have you read anything about this case or any of the defendants named in this indictment?

A. Yes, sir.

Q. As the result of any reading that you had, have you formed any impression with respect to these defendants?

A. Well, I get an impression from everything I read.

[fol. 1341] Q. Did you get any impression that was unfavorable to any of these defendants?

A. None whatever.

Q. So that if you go into the jury box your mind is entirely free as to the question of their innocence or guilt?

A. Yes, sir.

Q. And will remain so until you hear all the evidence in the case; is that correct?

A. Yes, sir.

Q. The Court will charge you that when an indictment is found against any individual, that the burden always remains with the District Attorney to prove the guilt of that defendant or prove the facts set out in the indictment. You understand that?

A. Yes, sir.

Q. And do you understand, and the Court will so charge you, that that burden never shifts from the shoulders of The People right to the end of the case?

A. Yes.

Q. And do you understand that there is no obligation, and the Court will so charge you, on the part of any defendant to take the stand and present his side of the case at all?

A. Yes.

Q. Do you understand that?

A. Yes.

Q. If it should appear desirable on the part of the defense counsel or any of them not to call any of these defendants, relying upon that burden that the law puts upon The People, would you indulge in any unfavorable inference towards the defendant who did not take the stand?

A. No, sir.

Q. Would you require The People to sustain that burden of proving his guilt, rather than expecting him to prove [fol. 1342] his innocence?

A. Yes, sir.

Q. That is quite plain to you, is it not, Mr. Cleary?

A. Yes, sir.

By Mr. Rosenthal:

Q. Mr. Cleary, you have never sat on a criminal case before; is that correct?

A. Never.

Q. And you realize that the defendants on trial here are only being tried for the crime which is charged in the indictment? That is clear to you?

A. Yes, sir.

Q. And that irrespective of what you may have read and which you say has some impression upon your mind, that your duty if you are accepted as a juryman is to confine

yourself to the legal proof that is offered from the mouths of witnesses on the witness stand under oath; is that clear?

A. Yes, sir.

Q. And you feel you are able to do that, I assume from the answers you have given to previous questions.

A. Yes.

Q. Of course, in every criminal case, not only this, you understand that at no time is any defendant called upon to prove his innocence under our law.

A. Yes.

Q. And that it is incumbent upon the people to establish the guilt of the defendant beyond a reasonable doubt in accordance with the instructions with the Court gives as to the law?

A. Yes.

Q. Before a man can be found guilty?

A. Yes.

Q. You understand also, sir, that there are two sepa- [fol. 1343] rate, distinct entities in this court-room in so far as the law is concerned: the Judge, who has every right to tell you the law and from whom you must take the law, and you, the juryman, who have every right to determine the facts as you see it, taking instruction——

Mr. Turkus: I object to the question.

Mr. Rosenthal: I am asking it.

Mr. Turkus: There is no question: it is just an exposition and a statement.

Mr. Rosenthal: I have not finished the question.

The Court: Finish.

Q. —and you, the juryman, who has every right to take your own conception of what the facts are as they come from the mouths of witnesses.

Mr. Turkus: Objected to.

Q. Is that clear to you?

Mr. Turkus: Object to it.

The Court: Overruled.

A. Yes.

Q. The Court, of course, will instruct you, as I have just stated to you, the law on every particular branch of this case, if you are accepted as a juror. Is that clear to you?

A. Yes.

Q. You find no fault with the fact that it is the Judge's duty to tell you what the law is so that you may better be [fol. 1344] able to follow the facts? You do not find any fault?

A. None whatever.

Q. Do you promise that you will take the law from the Court, whether it agrees with your idea of what it should be or whether it does not?

A. Yes.

Q. Am I right in that assumption?

A. Yes.

Q. Three defendants are on trial, and they are each represented by different counsel. That is clear to you?

A. Yes.

Q. You understand that with the exception of so much of the law as the Judge may charge you, if it appears in this case that there is a question of conspiracy——

A. Yes.

Q. —that only so much of the evidence as applies to each defendant can be used by you in deliberating the guilt of that particular defendant, is that clear?

A. Yes.

Q. So that your verdict would be three separate verdicts, one as to each defendant; is that clear?

A. Yes.

Q. Mr. Turkus has asked you whether you would be impressed any more by the fact that three men have summed up to you and told you their conception of what the evidence proved. You remember that question, do you not?

A. Yes.

Q. Do you understand, sir, that it is the duty of each lawyer to take care of the interest of the particular client that he represents?

A. Yes.

Q. And that the summation of the particular lawyer, whether it agrees or disagrees or coincides or repeats what [fol. 1345] other lawyers may say, is in behalf of the particular man that he represents; is that clear?

A. Yes.

Q. So that if it is repeated three times by three different lawyers, it would not make it any less impressive to you, would it?

A. No.

Q. Realizing that each one is speaking on behalf of the man that he represents; isn't that true, sir?

A. Yes.

Q. On the question of the testimony, Mr. Turkus has gone at length with you about the question of accomplices, and you have given your views on their testimony.

A. Yes.

Q. Of course, the law will be charged to you by his Honor that any accomplice in any case, the testimony of that particular individual must be scrutinized with great care or caution. That is clear?

A. Yes.

Q. Assuming that the District Attorney were to rely upon the testimony of an individual who claims that one or more of these defendants admitted to him sometime subsequent to the crime that he, the particular defendant, had participated in the crime and the District Attorney tells you that that is what he relies upon as the so-called independent evidence tending to connect the defendant with the crime—that is a complicated question—I do not know whether you follow me.

A. I tried to.

Q. Now then, would you, in passing upon what weight, if any, you would give to that particular testimony, look at [fol. 1346] the background of the individual who recites it from the stand?

A. Yes.

Q. And would you take into consideration that that particular individual, if it so appeared, not only had committed a number of murders for which he has never been punished, but has committed every type of crime, he, that witness, would you take that into consideration in determining what weight, if any, you would give to the testimony of that person?

A. Yes.

Q. What he had to gain, if anything?

A. Yes.

Q. What promises have been made to him, if any?

A. Yes.

Q. If you were to finally determine at the conclusion of the case that other than the testimony of this particular accomplice that he talks about, or accomplices, that there was nothing except this so-called admission, and you did

not believe the person who told you the admission was made to him, and the Court were to charge you that under those circumstances you must acquit, would you have any fear at all of coming in and courageously saying, "I find a verdict for the defendant"? Would you?

A. Not in the least.

Q. Just this other proposition: One of the defendants—and it has not been mentioned——Let me withdraw it and put it this way, so I can be briefer:

Were you present at any time when jurymen were being asked questions by Mr. Turkus respecting an alibi and whether they would take the law from the Court?

A. No, sir.

[fol. 1347] Q. Well, in any event, if an alibi defense is interposed—and I have to interrupt myself again to ask you whether you are acquainted with the term "alibi".

A. Yes.

Q. In other words, it means, in legal phraseology, that the man can prove that he was elsewhere when the alleged crime was supposed to have been committed.

A. Yes.

Q. You understand, sir, or if you are instructed by the Court that even though a defendant is not called upon to prove anything, if he puts an alibi in, that that does not shift the proof and put the burden on him to establish that he was elsewhere? Then you would follow or be guided by the Court's instruction?

A. Yes.

Q. If an alibi—and I want to preamble that with this part—if the Court were to charge you that the offer of proof of an alibi may in itself create a doubt in your mind as to whether this defendant participated in the crime, would you weigh carefully the question of who these people were that testified in behalf of the defendant to where he was on the particular time, in order to see whether in your mind that establishes a doubt as to his guilt. Would you weigh that?

A. Sure.

Q. And if it did establish a doubt in your mind as to the guilt of that particular defendant, would you hesitate to resolve that doubt in his favor?

A. Not in the least.

Q. Is there anything at all, Mr. Cleary—and you are [fol. 1348] best able to answer this—which in your mind

at the present time would preclude you from being fair and impartial, other than what has already been discussed here and that has not been reached here possibly by any question that was addressed to you?

A. Nothing whatever.

Mr. Rosenthal: No challenge for cause.

By Mr. Barshay:

Q. Can the defendant Buchalter entrust to your care and keeping every legal right given to him by law?

A. Absolutely.

Mr. Barshay: No challenge for cause.

Mr. Cuff: No challenge for cause.

By Mr. Turkus:

Q. One question: Did you ever have any business with anybody in 30 Ocean Parkway, Brooklyn?

A. No, sir.

Mr. Turkus: Peremptory.

William H. Farrell, residing at 529 East 22nd Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. 529 East 22nd Street, is that your correct address?

A. That is my address.

Q. Is that known as East Flatbush?

A. No, sir, it is Flatbush proper.

Q. Have you lived in the Flatbush section for a number [fol. 1349] of years?

A. Yes, sir.

Q. You are listed on the trestle board as working as a clerk, without any further description. What kind of work do you do?

A. I am in the buyers' office of the book department of a distributor of magazines.

Q. What is the name of the concern?

A. The American News Company.

Q. Do you work inside, in the office?

A. Yes, sir.

Q. Do you have anything to with the deliveries?

A. No, sir.

Q. And your work is strictly as a clerk?

A. Yes, sir.

Q. Do you come in contact with any of the truckmens' unions or union officials?

A. No, sir.

Q. Or any officials of the trucking union?

A. No, sir.

Q. Have you any connection or any contact in the garment-clothing district in Manhattan?

A. No, sir.

Q. Or anyone engaged in those industries?

A. No, sir.

Q. Have you any connection with anyone on the Brooklyn waterfront?

A. No, sir.

Q. Or in the Brownsville or in the East New York sections of Brooklyn?

A. No, sir.

Q. Have you lived in Brooklyn a number of years?

A. Yes, sir, all my life, thirty-four.

Q. Have you heretofore served as a juror in criminal cases?

A. I was in Judge Fitzgerald's part one time, but the particular case I sat on was thrown out because it proved [fol. 1350] to be not criminal.

Q. Because the defendant was directed a verdict by the Court?

A. Yes.

Q. While you were in the jury panel did you hear the Judge charge the jury on the law with respect to criminal cases?

A. He did not get that far.

Q. Will you, if accepted as a juror, at any rate, implicitly take the law from Judge Taylor?

A. Yes, sir.

Q. In its very aspect?

A. Yes, sir.

Q. Are you in sympathy with the enforcement of the penal law of the State of New York?

A. Yes, sir.

Q. Since you received your jury notice did anybody speak to you about this case?

A. Just simply me having been called for the jury.

Q. You mean those discussions were limited to the possibility of serving as a juror?

A. Yes, sir.

Q. The defendant Buchalter is represented by a former Assistant District Attorney, Hyman Barshay, a former Assistant United States Attorney, Mr. Wegman, and Jesse Climenko—three lawyers—do you know any of them?

A. No, sir.

Q. Do you know anybody in their offices?

A. No, sir.

Q. The defendant Weiss is represented by a former Judge of the Court of General Sessions of New York, Judge Talley; a former Assistant District Attorney in Brooklyn, James I. Cuff; and former Assistant United States Attor-
[fol. 1351] ney Kriendler. Do you know any of those?

A. No, sir.

Q. Or anybody in their offices?

A. No, sir.

Q. The defendant Capone is represented by Mr. Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg; do you know any of those?

A. No, sir.

Q. Or anyone connected in their offices?

A. No, sir.

Q. Do you know intimately any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

By the Court.

Q. What is the number on East 22nd Street?

A. 529, between Ditmas and Newkirk.

Q. Is that right near the residence of Mr. Kopff, the former chief Assistant District Attorney?

A. I don't know; I know of his name, but I don't know him.

Q. Judge Fitzgerald is right around the corner, too; Judge Fitzgerald is on Ocean Avenue.

A. Yes, sir.

Q. That is three or four blocks away from you?

A. About four and a half.

Q. Both belong to the same church?

A. No, sir.

By Mr. Turkus:

Q. How long have you been engaged in this line of work?

A. Twelve years.

Q. That has been with the same concern?

A. Yes, sir.

Q. Do you know the District Attorney of the County, Judge O'Dwyer, or any Assistant on his staff?

A. No, sir.

[fol. 1352] Q. If you were charged by the judge, Judge Taylor, that the defendants have the benefit of the presumption of innocence will you follow that instruction of law?

A. Yes, sir.

Q. Will you follow the Judge's instruction on the law of reasonable doubt?

A. Yes, sir.

Q. And upon the law of the burden of proof being upon the prosecutor to establish guilt beyond a reasonable doubt?

A. Yes, sir.

Q. In other words, will you give the defendants on trial, Buchalter, Weiss and Capone, every constitutional right and safeguard the law of the land says the defendants on trial should have?

A. Yes, sir, I will try to.

Q. By the same token, will you apply common sense and understanding to determine the issue of guilt or innocence in this case?

A. Yes, sir.

Q. I take it you understand there will be a certain kind of people brought into court whom you have not met either in your social or business life.

A. Yes, sir.

Q. Will you, in weighing the believability of the individuals who are called, use your common sense and understanding in looking at the issue?

A. Yes, sir.

Q. Is there any bias or prejudice you may have against the prosecution which uses testimony of co-participants against remaining defendants?

A. No, sir.

Q. Do you find any fault with the prosecutor of the [fol. 1353] county, Judge O'Dwyer or any member of his

staff, in using testimony of such a nature in the trial of an indictment?

A. No, sir.

Q. Will you, if selected as a juror, consider every vicious, criminal and immoral act that the accomplice may have committed in his entire life?

A. Yes, sir.

Q. Will you consider that in weighing his believability?

A. Yes, sir.

Q. Will you consider everything that may undermine his testimony or anything that may motivate his testimony when it comes to the point of weighing his believability?

A. Yes, sir.

Q. May I go along with the understanding that you have no inherent prejudice or bias against the use of accomplice testimony as would cause you to reject it, no matter how corroborated?

A. No, sir.

Q. Will you, if accepted as a juror in this case, not only look at everything wrong that there is with the accomplices, but everything that you should view with caution and suspicion, and will you look to see whether he tells the truth about these defendants in connection with the Rosen murder which we are trying?

A. Yes, sir.

Q. Will you look to see if there is any other evidence in the case which not only substantiates the accomplice but also satisfies you, satisfies your mind, that these defendants are implicated and guilty participants in the crime? Will you look at that?

[fol. 1354] Mr. Climenko: I object to the question.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. Yes.

By the Court:

Q. Does the American News Company distribute books and magazines?

A. Yes, sir.

Q. Pictorial magazine books?

A. Yes, sir.

Q. Does it distribute "True Detective Stories"?

A. I am not in that end of it.

Q. Do you represent these periodicals?

A. No, sir, I have nothing to do with them.

Q. What part of the work do you do?

A. I am one of the assistants to the buyer.

Q. The buyer or the publisher?

A. No, sir, we do not publish them; we buy the books from the publishers and we distribute them; we distribute the books.

Q. You buy from the publishers and distribute to stands?

A. No, sir, we distribute to public branches, and they in turn sell to dealers.

Q. That is a big concern?

A. Yes, sir, very large.

Q. Is that the concern which used to be on Park Place?

A. Yes, sir.

Q. Mr. White was in that company then?

A. That was before my time.

[fol. 1355] Q. Do you know who I mean?

A. No.

Q. The American News Company is a very large concern?

A. Yes, sir.

The Court: I know it is a high class concern, highly capitalized, doing an enormous business.

By Mr. Turkus:

Q. I will repeat my last question: If accepted as a juror, will you apply your mental faculties to finding out if Buchalter, Weiss, and Capone are guilty of the murder of Joseph Rosen, murder in the first degree, as charged in the indictment?

A. Yes, sir.

Mr. Climenko: I object to that question.

Q. If accepted as a juror in this case, will you endeavor to do justice in the case?

A. Yes.

Q. One of Mr. Buchalter's lawyers mentioned the fact that his client had been heretofore convicted of a crime and sentenced to a long term in jail. Would that fact cause you to relax your attitude as a juror in this murder trial?

Mr. Climenko: I repeat my other objection. May I in the future have an objection—I do not want to trouble the

Court by repeating the objection—I would like an objection to these particular questions when they are repeated.

The Court: Yes.

A. No, sir.

[fol. 1356] Q. May I proceed, then, with the understanding that as to guilt or innocence in this murder case, your verdict will be based upon the evidence there is in the case as against him and the other defendants?

A. Yes.

Q. Will you listen to reasonable arguments and discussions in the jury room from the other jurors?

A. Yes, sir.

Q. Will you endeavor, by your verdict, to render justice in this case?

A. Yes, sir.

Q. In the event you hear all the testimony in the case, and you have heard from the lawyers in the case as to how they view the case, and you have got the law from the Judge, you talk the case over with your other jurors and then your mind is satisfied beyond a reasonable doubt that there are three guilty men, guilty of murder in the first degree, and those three are Weiss, Capone, and Buchalter, would you hesitate to say so in your verdict? Would you have any fear or reluctance in bringing in such a verdict?

A. No, sir.

By Mr. Barshay:

Q. Did you ever study law?

A. No, sir.

Q. Did any member of your family ever study law?

A. I have a cousin who is a lawyer.

Q. Is that Eddie Farrell?

A. No, sir.

Q. Practicing criminal law?

A. No, sir, never did.

Q. Are you related to Assemblyman Farrell or the leader of Queens County by that name?

A. No, sir.

[fol. 1357] Q. Do you know any policemen?

A. I should say no, although I know various men left our organization and became policemen, but I have not seen them afterwards.

Q. Do you know anybody high in the Police Department?

A. No, sir.

Q. Or anybody in any wise connected with the District Attorney's office?

A. No, si..

Q. Do you know any of the names Mr. Turkus stated, or asked were they familiar to you?

A. No, sir.

Q. The names of Belia or Tosca or Weinstein?

A. No, sir.

Q. Did you read about the case after the alleged homicide occurred, sometime back in 1936?

A. I don't recall whether I read it then or at the time of the indictment.

Q. You may have?

A. I know I read about it at the time of the indictment, at least I believe it was then.

Q. Have you formed an impression by reason of reading the newspaper?

A. I have.

Q. Is that impression prejudicial to the defendants?

A. It has been, yes, sir.

Q. Is it now?

A. Yes, sir.

Q. Is it an impression that would require evidence to remove?

A. I am afraid so.

Q. Realizing full well it may not be necessary from a legal standpoint—while you appreciate the law as you have heard it expressed so many times, you are of the frank [fol. 1358] opinion that you may not be able to dissipate that unfavorable impression which you now have?

A. I am afraid not.

Q. It may require some evidence to remove that unfavorable impression?

A. I should say yes.

Mr. Barshay: I challenge for cause, on behalf of the defense.

(The talesman was then sworn.)

By Mr. Barshay:

Q. Under oath would you give the same answers to the questions I just propounded to you?

A. I will.

By Mr. Rosenthal:

Q. That is a fixed impression at this time which would take evidence to remove?

A. Yes, sir.

Mr. Rosenthal: Defense press the challenge.

Mr. Cuff: We join in the challenge, in behalf of the defendant Weiss.

By Mr. Turkus:

Q. I believe that the only experience you had was sitting in the jury box and not having the case submitted.

A. Yes, sir. Oh, no, I have had experience prior to that in the Supreme Court. I thought you meant in the County Court.

Q. I mean in criminal cases.

A. In criminal cases, yes.

Q. Well, now, what I want to know here is this: Was the impression that you have gathered from the reading of some articles in the newspaper?

A. Yes, sir.

[fol. 1359] Q. Is that the only knowledge you had, what you read?

A. Well, that would be sufficient. I was interested in it at the time.

Q. Is it the kind of an impression you can lay aside?

A. It would be difficult. I will say no.

The Court: Challenge sustained.

Charles A. Murphy, No. 2796, residing at 1005 East 35th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You live in the Kings Highway section?

A. I live near the corner of Avenue I and Flatbush.

Q. I take it that is commonly called Flatbush?

A. Yes, sir.

Q. You are living in Brooklyn how long?

A. Over twenty years.

Q. Have you lived in this particular section for a number of years?

A. About the same number.

Q. I see you are listed on the trestle board as an accountant without any further description.

A. Yes, sir.

Q. Are you in the practice of your profession for yourself or with a firm?

A. I am connected with a company that deals in securities and also with oil companies.

Q. Does your business bring you in contact with people in the garment district?

A. No, sir.

[fol. 1359a] Q. Or the clothing industry, or the Brooklyn waterfront, or the Brownsville or the East New York sections of Brooklyn?

A. No, sir.

Q. You have no such connection?

A. No, sir.

Q. You have heard the nature of the charge in this case?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, the charge of murder in the first degree, which would prevent you from deciding the case on the merits?

A. No, sir.

Q. You have no scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. If accepted as a juror, decide the question of guilt or innocence without any question as to punishment?

A. Yes, sir.

Q. Would you be inclined to relax your duty as a juror in this specific murder charge because one defendant has been sentenced to a long term in jail for another crime?

A. No, sir.

Q. Do you know any of the nine lawyers who have the background I indicated in the other question?

A. I do not.

Q. Do you know anybody connected with their law offices?

A. No, sir.

Q. Do you know the present District Attorney of the County, Judge O'Dwyer?

A. I do not.

Q. Or any Assistant District Attorney on his staff?

A. No, sir.

Q. Have you had prior jury service?

A. No, sir.

Q. Will you take the law in this case exclusively from [fol. 1360] Judge Taylor?

A. I will.

Q. And as to the testimony of an accomplice, have you any bias or prejudice against the use of accomplice or co-participant testimony in the trial of the indictment?

A. I would take the law, as I said, from the judge.

Q. One of the things to consider about an accomplice is his past background, the crimes he has committed, the vicious criminal acts he may have done,—will you consider every one of them in passing on his credibility?

A. Very much so.

Q. Will you use caution, common sense, and understanding in weighing the testimony?

A. Yes, sir.

Q. Have you any impression or any preconceived idea about accomplice testimony as would cause you to reject it, no matter how corroborated?

A. No, sir, except that it would have to be conclusive. The corroboration would have to be pretty conclusive.

Q. Will you, in the event the Judge were to tell you that corroboration does not have to go to every detail of an accomplice's testimony, but it may be deemed sufficient by the jury if it tends to connect the defendants with the commission of the crime—would you follow that instruction of law?

A. You mean "tend to connect", or "could connect"? If that is the law, I will be governed by the law.

Q. That is the law. I take it you had a different version of what the law was.

[fol. 1361] A. I did not know what the law was, but when you say "tend to connect," I did not think that might be strong enough. I thought it would have to be "absolutely connect it."

Q. The definition of law which the Judge will give you will be "that which tends to connect."

A. Then I will be governed by the law.

Q. Have you any notions as to accomplice testimony that would make it difficult for you to follow instructions on the law?

Mr. Cuff: I object to that.

The Court: Objection overruled.
Mr. Cuff: Exception.

A. No, sir.

Q. If accepted as a juror in this case will you apply your faculties to the determination of whether the accomplice was telling the truth about these defendants?

A. Yes, I would.

Q. And if you are satisfied that there is evidence in the case that not only shows that the accomplice is telling the truth about these defendants, but there is independent evidence which tends to connect the defendants with the commission of the crime, and you are satisfied as to that beyond a reasonable doubt, would you hesitate to say so in your verdict?

A. I would not.

Q. Will you listen to a fair argument and discussion by the other jurors?

A. Yes, sir.

[fol. 1362] Q. If selected as a juror in the case, and The People of the State of New York satisfy you by evidence that the accomplice who said that these defendants were implicated in the commission of the crime with him satisfies you that he was not only telling the truth but you find there is other evidence in the case from other sources which tends to connect these defendants with the commission of the crime, and you believe that beyond a reasonable doubt, would you hesitate, would you be fearful, would you be reluctant in so stating?

Mr. Cuff: I object to that as already answered.
The Court: Objection sustained.

By the Court:

Q. Would you have any fear about it?
A. No, sir.
Q. No hesitation?
A. No hesitation.
Q. Not afraid of any talk?
A. No, sir.

By Mr. Talley:

Q. Did you read anything about this case prior to today?
A. I don't recall having read any article at any time on the merits of the case.

Q. Did you read anything about any of the defendants?

A. No, sir.

Q. Did you discuss the case with anybody?

A. No, sir, except possibly the mere fact that I might be called as a juror, maybe an explanation as to why I could not be here or there.

Q. You did not go into any discussion of the case itself [fol. 1363] as to the defendants?

A. No, sir.

Q. The Court will charge you that the burden of proving the guilt of any defendant named in any indictment always rests with the prosecution.

A. Yes, sir.

Q. And never shifts from the prosecution to the shoulders of the defendant.

A. Yes, sir.

Q. If the Court charges you that is the law, you will take that implicitly?

A. Yes, sir.

Q. And the Court will charge you that at no time in the case is it incumbent upon the defendant to take the stand and give any testimony or any explanation whatsoever. Further than that, if the defendant does not take the stand you must not indulge in any unfavorable inference against him or towards him because of the fact he has not testified in his own behalf. If the Court so charges, will you follow that instruction?

A. Yes, sir.

Q. And you will not indulge in any unfavorable inference against the defendant?

A. I did not catch that question.

Q. If the Court charges you that you are not to indulge in any unfavorable inference toward the defendant who does not take the stand, will you follow that direction of the Court?

A. Yes, sir.

Q. It is also our law that the guilt of a defendant charged with crime must be proven beyond a reasonable doubt. That rule is different from the law obtaining in the civil court, [fol. 1364] where the rule is simply that a case need be proved by a preponderance of evidence in favor of one side or the other, and that such side is entitled to a verdict. But in the criminal law it is different. The law is jealous of the rights of a defendant, so that guilt must be proven beyond

a reasonable doubt. If you are so charged, as you will be, and you have any reasonable doubt after hearing all of the testimony, as to the guilt of these defendants, would you give the defendants the benefit of such a doubt?

A. I would.

Q. You say you have not read anything about the case. Have you formed any impression from any other source, conversation or otherwise?

A. No, sir.

Q. As to the guilt or innocence of any of these defendants?

A. No, sir; that was not the question under consideration at all.

Q. Would you approach this case, if selected as a juror, with an entirely fair and impartial mind and without any nature of an impression about the defendants or any of them, or the nature or the character of the crime?

A. That is right.

By Mr. Climenko:

Q. Have you ever served on a jury before?

A. Never before.

Q. Never at any time, in any type of case?

A. Never before in any type.

Q. In spite of the fact you have had no such experience, you will accept that law in the case which is applicable and [fol. 1365] which is given to the members of the jury by the Judge, Judge Taylor?

A. Yes, sir.

Q. Your mind is clear that you are ready to accept the principles of law which may be applied from Judge Taylor as he announces them?

A. Yes.

Q. That is his function in this court-room?

A. Yes, sir.

Q. Which he shares with nobody; you understand that?

A. Yes, sir.

Q. On the other hand, you also understand, I take it, even though you have never served as a juror before, that the question of deciding what the facts are——

A. (Interrupting): Will you please repeat that?

Q. You also understand that the duty of deciding as to what the facts are is a duty for the jury?

A. Yes, sir.

Q. The jury listens to people who take the stand and makes up its mind as to who is telling the truth and who is not telling the truth?

A. Yes, sir.

Q. You also understand that that is a duty or a function or a job which nobody can share with the jury?

A. Right.

Q. You also understand, I think, that although each member of the jury is under a duty to enter into discussion, reasonable discussion, with every other member of the jury, and should arrive at an agreement if it is possible, nevertheless, if any particular member of the jury does not find that his mind is responsive to the argument of others, it is his duty [fol. 1366] to adhere to his own opinion—you understand that?

A. Yes, sir.

Q. In other words, you understand that it is an obligation under the oath of each juror to adhere to his own finding?

A. Yes, sir.

Q. Unless by the processes of reasoning he is persuaded he is wrong. So, were you to accept the oath as a juror, I assume you are confident you have the capacity to adhere to your oath in that respect?

A. Yes, sir.

Q. You do not have any mental reservations about your ability to stand up for what you think is right, even though you might be in the minority?

A. That is correct.

Q. Something has been said about the use of accomplices. I suppose you realize, in deciding who is telling the truth and who is not telling the truth, you have to pass upon the believability of each witness who takes the stand?

A. Yes.

Q. Now, you would not be prejudiced in favor of a particular witness or prejudiced against him simply because he was a witness called by Mr. Turkus?

A. No, sir.

Q. The mere fact that a witness was called by Mr. Turkus, an Assistant District Attorney, would not in your mind make you think that as a result of that fact he was telling you the truth?

A. Oh, no.

Q. He is subject to all of the tests as to credibility?

A. Yes, sir.

Q. Supposing that the so-called accomplice witness takes [fol. 1367] the stand and admits that he has in the past committed perjury—you know what perjury is?

A. Yes, sir.

Q. Would you take that fact into consideration in passing on the reliability of that man's testimony?

A. I would.

Q. In other words, you realize that such a person who says he is an accomplice swears to tell the truth and admits in other cases that he took that oath and deliberately repudiated everything, in spite of the fact that he was then under oath, that you would have to weigh those circumstances in deciding whether or not in this particular situation he was telling the truth?

A. Yes, sir.

Mr. Turkus: I object, as already answered.

The Court: That is what he said. Sustained.

Q. Supposing that the so-called corroboration that Mr. Turkus produces here is in the form of a witness who says that a defendant admitted to him that on some occasion he had something to do with the case.

A. Yes, sir.

Q. Assuming that that witness should state that such an admission was made to him, and admit that he, the witness, has in his turn in the past been guilty of perjury, would you take that situation into consideration in passing on the credibility of that so-called corroborative witness?

A. I would take all the facts into consideration.

Q. But, in taking all the facts into consideration, what I am trying to get at is would you take into consideration the [fol. 1368] fact that the man who asks you to take his word for it today, because he has taken an oath to tell the truth, has on previous occasions taken that oath and deliberately falsified?

A. I would take that into consideration.

Q. In taking into consideration those facts, would you also take into consideration the fact that the witness may have a motive, as to whether or not what he is saying is the truth?

A. Yes.

Q. In other words, if the witness is in the position where his fate, because of his admission of the commission of other crimes, is in the hands of the prosecution, and he is depend-

ent upon the prosecution's good will in the future with respect to the disposition of his fate, would you take that into consideration in deciding whether or not he has told the truth?

Mr. Turkus: I object to that as already gone into.

The Court: The man's attitude, I think, is sufficiently plain. You cannot pin him down as to how he would decide a specific point of evidence.

Mr. Climenko: I have no such purpose at all. I am not trying to pin him down to anything. I am bringing to his mind the possibility of a situation.

Mr. Turkus: The prospective juror already said he would take everything into consideration.

The Court:

[fol. 1369] Q. Would you use care to satisfy yourself as to whether or not the man was telling the truth?

A. I have already said that.

By Mr. Climenko:

Q. In deciding whether or not a man would take the stand as a witness in this case and is telling the truth, you would exercise all of the same precautionary use of your mind that you would exercise where you are dealing with a matter of facts in your own interest?

A. I would.

By the Court:

Q. By the way, what line are you in?

A. Accounting.

Q. What line?

A. No particular line.

Q. Where is your office?

A. 347 Madison Avenue.

Q. What is the name of the firm?

A. May, Kern & Murray.

By Mr. Climenko:

Q. Would you regard the job or duty under your oath of learning what the truth is as to all matters of importance equal with any transaction affecting your own welfare?

Mr. Turkus: I object to that. We have been all over that situation. It has already been answered.

The Court: Objection sustained.

Mr. Climenko: Exception.

Q. In deciding upon the credibility of the so-called accomplice, suppose the so-called accomplice admits he never at any time had ever seen or talked with a particular defendant, would you take that into consideration in deter-
[fol. 1370] mining whether or not the accomplice, so-called, was telling the truth?

A. I would take that into consideration.

Q. Now, were you to be sworn as a juror in this case you would realize, I take it, that the mere fact that the defendants have been indicted is not to be construed by you as any indication in any sense of guilt on their part?

Mr. Turkus: I object to that; that is a legal question.

The Court: Sustained as a question of law.

Q. Supposing the Court should charge you, as a matter of law, that the mere fact that an indictment has been filed is not proof in any sense or to any degree of guilt against the defendant, would you have any hesitation or experience any difficulty in following the instructions of the law?

A. I would not.

Q. And that question, assuming that those instructions were given you, would give you some intimation of what that meant, when I say the defendant is presumed to be innocent?

A. Yes, sir.

Q. And in starting your duty as a juror you would listen to evidence throughout the trial of the case with knowledge of the Court's instruction that the defendants are presumed to be innocent?

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained.

[fol. 1371] Mr. Climenko: Exception.

Q. You realize, of course, that an innocent man may be indicted?

A. Oh, yes.

Q. For a crime of which he is innocent?

A. Yes, sir.

By the Court:

Q. Is the accounting business you have with the garment trade?

A. No, sir, no connection.

By Mr. Climenko:

Q. The mere fact we are on the eve of a political campaign would not affect your thinking about this case one way or the other?

A. No, sir.

Q. It has nothing to do with the case?

A. No, sir.

Q. Is there any factor in your experience personally affecting your thinking that has not been referred to by questions of any of the lawyers, which in any way creates a mental reservation about your ability to deal impartially with the trial of this case?

A. No, sir.

Q. So as you sit here now you are confident of your own ability to listen to the evidence impartially?

A. Yes, sir.

Mr. Turkus: Objected to as already answered.

The Court: He has answered.

Q. You are also convinced of your ability, in the event you entertain a reasonable doubt as to the guilt of the defendants or any one of them at the conclusion of the case, to return a verdict of not guilt?

[fol. 1372] The Court:

Q. If you had a reasonable doubt you would acquit?

A. Absolutely.

Q. You would not have any hesitation?

A. No, sir.

By Mr. Rosenthal:

Q. I could not quite hear you from where I was seated, but I understand you are an accountant.

A. Yes, sir.

Q. And I heard you were at 247 Madison Avenue.

A. Yes, sir.

Q. A great many of these questions, you understand, have been repeated, so I will put them in brief form, and if you do not understand them I will enlarge upon them. Did you hear my explanation about the fact that each one of these defendants are entitled to a separate trial?

A. I did.

Q. You have no quarrel or fight with the law which entitles each one of these men to be represented by a separate counsel and for a separate trial at your hands?

A. No, sir.

Q. You heard also the statement, in so far as your duty as a juryman, as you enter the jury room, only to utilize such evidence against each particular defendant as the testimony of the witness may, in accordance with the instructions of the Court, be applicable to that defendant. Is that clear?

A. The question is involved.

Q. Here is what I mean: The Judge will charge you on the questions of law.

A. Yes, sir.

Q. You will also be charged as to each one of these men having the testimony weighed against them in so far as it [fol. 1373] affects them.

A. Yes.

Q. As an illustration of what I mean and to clarify the situation, if A got on the stand and only spoke about my defendant, and there was no connection of any character with the others, and the Judge were to charge you that under the law that statement could only be used against my defendant and could not be used against the other two, when you argued in your jury room you would only be permitted to use it against one; would you follow that instruction?

A. Yes, sir, three separate trials.

Q. On the question of accomplice testimony, the Court will charge you the law that every accomplice in any case—the testimony of every accomplice, I should say—must be scrutinized with great care and caution and suspicion before it can be accepted by you as the truth. If the Court were to charge you that, from the answers which you have given both to Mr. Turkus and the others, you would have no fault to find with that proposition of law?

A. No, sir.

Q. And the Court will further charge you that you must even go further, because even though you were to believe all the testimony of the accomplice, you could not convict a man unless there was other believable testimony tending to connect him with the crime. Now, do you understand that in so far as the defendants are concerned, the question

of whether Rosen died by a gun or not is not disputed, you understand that?

[fol. 1374] A. I don't understand that; I know nothing about the case.

Q. You understand, however, that defendants deny any participation by their plea of not guilty, in this particular crime?

Mr. Turkus: I object to that as a legal question.

The Court:

Q. They pleaded Not Guilty, that is the reason they are being tried.

A. Yes, sir.

Q. That sets up all the questions at issue as to the crime itself and the participation of any one of these defendants in it?

A. Yes, sir.

Q. Now then, assuming that the District Attorney says to you in the form of proof that he expects to show these defendants' guilt—that is, with so-called independent evidence consisting of alleged oral statements made by one or more of the defendants to one or more of The People's witness, in which they, the defendants, said to that witness, "I participated in this crime. Do you promise that you will ferret the source from which that statement comes, in other words, ascertain, "Who is it that says this defendant made that statement? What motive, if any, has he got for saying that the defendant made this statement? Has he committed numerous crimes? Has he been punished for them? Is there any other motive that might arise to make him make such a statement on the stand?" Would you do that?

A. Yes, sir.

Q. Simply because a defendant is a defendant, is your state of mind such that if he took the stand and swore to tell [fol. 1375] the truth, that merely because he is charged with the crime you would disbelieve him? I want to make that clear: Simply because a defendant is charged with crime, if he went on the stand and raised his hand and swore to tell the truth, and told you a story, would you, merely because of the fact that he was a defendant, disbelieve him?

A. No, sir.

Q. In other words, you would, like with any other witness, search for what interest or motive he may have in making

the statement, and if, after searching in your own mind the interest or motive, his manner on the stand, his way of answering the questions, you decide that he is telling the truth, you would give his testimony the consideration which it deserves at your hands?

A. Yes, sir.

Q. Merely because the defendant may say on the stand, "I know some of The People's witnesses," that mere fact alone, without corroborating proof that the defendant participated in the crime, would that prejudice you against any defendant—the mere fact he knew one of tthe witnesses, the mere fact that he knew or was acquainted, the mere fact that he was acquainted with any witness for The People—would that fact standing alone——

A. (Interrupting.) Will you repeat that question, please?

Q. Would the mere fact that one of the defendants knew some of the witnesses that The People used, standing alone, prejudice you against that defendant?

[fol. 1376] A. I don't get the import of that question.

Q. I will try to make it as clear as I can. Assuming that John Jones were to take the stand as a witness for The People and say, "I know"—I will use the name of my own client, the man I represent is Capone, and he should say that "I know Capone and I have been in his company at times," would the mere fact that he knew Capone prejudice you against Capone?

A. No, sir.

Q. Assuming that Capone, the defendant, took the stand and said, "I know one or more of the witnesses for The People, but I deny I had anything to do with this or any other crime," would that fact, the fact he admits knowing them, standing alone, prejudice you against him?

A. No, sir.

Q. I suppose you have heard me explain the question of alibi when I addressed one of the jurymen only a few minutes ago?

A. Yes, sir.

Q. Would the mere fact that a man offered an alibi showing that he was absent and had nothing to do with this crime, in your mind, if the Court charges you that at no time does the burden shift from the People to the defense, would the mere fact that he offers proof on his behalf raise in your mind the idea that he, the defendant, has undertaken the burden of proof?

Mr. Turkus: I object to that as a legal question.

Mr. Rosenthal: I will withdraw it.

Q. You have heard repeatedly said, since you have been [fol. 1377] here, that at no time does the burden of proof shift over to the side of the defendants?

A. Yes, sir.

Q. At all times it remains on the side of The People to prove guilt beyond a reasonable doubt?

A. Right.

Q. Now then, the mere fact that the defendant does go ahead, even though he does not have to, and offers proof to you of his innocence, would that in your mind create an opinion that the burden has shifted to him?

A. No, sir.

Q. However, if you are charged by the Court that once the defendant offers proof of an alibi, if that alibi proof raises a doubt in your mind as to his guilt of the crime, that doubt, like any other doubt, that reasonable doubt, I should say, like any other reasonable doubt, must be resolved in favor of the defendant and you must acquit?

A. I understand.

Q. And if you had a reasonable doubt created by this evidence, would you hesitate to acquit him?

A. Absolutely not, no, sir.

Q. You understand that one accomplice cannot corroborate another accomplice? Were you present at the time that I had a lengthy discussion of that question with two different types of accomplices, one where the Judge tells you, "Mr. Murphy, I charge you as a matter of law that this man is an accomplice," and then the other, where the Judge says to you, "I do not charge you as a matter of law, but you, Mr. Murphy, as a juryman"—not in my words, [fol. 1378] but in the Judge's words—"You, Mr. Murphy, as a juryman, must determine from what you heard of the evidence whether actually he is an accomplice"—were you present when I explained that?

A. I think I was.

Q. You realize, then, that if the Court were to charge you that a man is an accomplice as a matter of law, you could not find any fault with that proposition, you must in the jury room decide his evidence according to the Court's instructions?

A. Yes, sir.

Q. Now, if the Court were to charge you that you, as a juryman, have a right to determine whether another witness was an accomplice as a fact—Is that clear?

A. Yes.

Q. In other words, I want to make sure you understand.

A. I think I understand what you mean: One is a case where the Judge instructs you you must consider him as an accomplice; in other words, he gives you an opportunity to determine from the facts in your own mind whether he is an accomplice.

The Court: According to the evidence.

The Witness: That is right.

Q. Once having been given that option, if from the evidence you as a juryman are convinced he is an accomplice, would you hesitate to apply the same test which the Court tells you you must apply to an accomplice whom he charges you is an accomplice?

A. I would.

Q. I take it that you have not read any newspaper articles concerning this case?

[fol. 1379] A. Not as I recall. In fact, I did not read any newspaper articles on these items.

Q. The mere fact that the District Attorney asks you whether or not you have any objection to the crime being solved by somebody breaking it from the inside, does not convey to your mind now that this particular crime has been solved?

A. Oh, no.

Q. You know that that is your province, to determine whether it has or it has not been, and whether certain people have told them something which they leave to you to believe or not?

A. Yes, sir.

Q. Assuming further that in the course of this trial certain questions are asked of certain witnesses regarding "Didn't you do this and didn't you do that?" and the Judge were to charge you that the only time you can use that as a fact that they did or did not do certain things is when they, the witnesses, admit from their own mouths, because that would be proof of another crime? Simply because the District Attorney were to ask a particular witness, "Did you do this?" and he says, "No," that would not raise in your mind the thought that the act which he is asking about actually was committed?

Mr. Turkus: That is a question of law.
The Court: I lost that question.
Mr. Rosenthal: I will repeat it.

By the Court:

Q. Is your father in Wall Street?
A. My father is dead thirty-odd years.

[fol. 1380] Mr. Rosenthal:

Q. I will repeat it in a simple way: Assuming the Judge tells you that the law in this as in any other case is that you can only prove a particular crime either by witnesses who commit it or by admissions of an individual when he is on the witness stand. Merely because the District Attorney may say to a man who is on the stand, whether he be a defendant or whoever he may be, "Q. On such-and-such a day, at such-and-such a place, in the City of New York, or in the Borough of Manhattan, didn't you, in company with So-and-so and So-and so, commit a certain act?"—simply because he makes that statement in the form of a question, if the answer is in the negative, would you be prejudiced against the particular individual he asked the question of?

Mr. Turkus: I object to the question as hypothetical.
The Court: The law does not contemplate any such fineness in the examination of a talesman. Objection sustained.
Mr. Rosenthal: Exception.

Q. Have you any close relations on the Police Force?
A. No, sir.
Q. Or any close friends who are high police officials?
A. I happen to know just one patrolman. I have not seen him in a year.
Q. You have no association with the present District [fol. 1381] Attorney's staff?
A. No, sir.
Q. You have never served on a jury?
A. Never.
Q. You realize that, irrespective of the fact of whether you served or did not serve, you are entitled to your own opinion as it is formed on the evidence?
A. Yes, sir.
Q. You also realize that you are supposed to argue and reason with the other juryman as to the opinion which you

form, but that if, after reasoning with the other jurymen, you still retain your opinion, it is your duty to remain that way?

A. Yes, sir.

Q. And you will do that?

A. Yes, sir.

Q. Merely because of your own inexperience or for no other reason, you would not change your opinion, having formed it?

A. No.

Q. There is no outside consideration—by that, I mean the time element or the business element or things of that character—which would in any way make you change your opinion if you formed it on your conscience?

A. No, sir.

Q. Would you have any hesitation, if you were not convinced for the evidence of the guilt of any one of these defendants, to make that fact known by a verdict of Not Guilty?

A. I would not have any hesitation.

Q. Would you have any fear or reluctance—I think those are the words the District Attorney used?

A. No, sir, no reluctance.

[fol. 1382] Mr. Rosenthal: No challenge for cause.

Mr. Turkus: The talesman is satisfactory to the People of the State.

Mr. Barshay: Satisfactory.

The Court: I take it that means that all three defendants agree?

Mr. Rosenthal: May we make it clear—If you do not hear any negative, it means it is all affirmative.

The Court: I so understood, but I want the record to be clear.

Mr. Rosenthal: It is on the record that if there is no negative and we are satisfied, it means all of us have agreed.

(Talesman seated as Tentative Juror No. 3.)

Leo Ross, No. 2586, residing at 1136-A Sterling Place, Brooklyn, New York, examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You are listed as living at 1136-A Sterling Place?
A. Yes.
Q. What district or section is that in?
A. The Kingston Avenue section.
Q. Are you close to Eastern Parkway?
A. Yes, sir.
Q. Is that where the Famous Restaurant is?
[fol. 1383] A. That is about three blocks away.

By the Court:

Q. You are one block from Eastern Parkway?
A. Lincoln, St. Johns, and the Parkway.

By Mr. Turkus:

Q. Have you lived there for a number of years?
A. Yes, sir.
Q. Would it be more than five?
A. I live in that section about three years.
Q. Prior to that where did you live?
A. Franklin Avenue, and Carroll Street.
Q. Is that called the Crown Heights section?
A. Yes, sir.

The Court:

Q. You are a neighbor of Congressman Somers?
A. I don't know.
Q. Your vocation is that of credit man on this trestle board; is that correct?
A. Yes.
Q. By whom are you employed?
A. Bulova Watch Company.
Q. How long have you been with the Bulova Watch Company?
A. Five years.
Q. Is that your present job, checking credits on the outside?
A. No, sir, inside.
Q. Do you check the credits of retail jewelers?
A. Yes, sir.
Q. You have been doing that type of work for the past five years?
A. Yes, sir.

Q. Does your work require the use of accounting knowledge?

A. Yes, sir.

[fol. 1384] Q. Did you take any course in accounting?

A. I have.

Q. Was that in one of the universities?

A. The New York University.

Q. Did you secure a degree?

A. No, sir.

Q. Did you or didn't you qualify for a number of years?

A. Five years.

Q. Are you related to any lawyer named Ross?

A. No, sir.

Q. Any immediate member of your family who is a member of the bar?

A. No, sir.

Q. Has business in the past, or have you had any social contact with any individual employed in the garment or clothing trade?

A. No, sir, not at all.

Q. That has been at no time in your career?

A. No, sir.

Q. Do you know anyone socially who is connected with the clothing or garment industry?

A. I have a friend who is in the ladies' millinery business in that section whom I meet; I see him very infrequently.

Q. Is Mr. Barnet president of the concern you are with?

A. Yes, sir.

Q. Does your work bring you in close proximity with him?

A. We see each other.

Q. Do you know the name of the lawyer for the corporation?

A. Yes, sir.

Q. Do you come in close contact with him?

A. No, sir, we know each other but we have no connection.

[fol. 1385] Q. Is the lawyer Mr. Geoghan?

A. No.

Q. Do you mind telling me the name of the lawyer?

A. Cohen.

Q. Have you had any contact, social or otherwise, with any person in the Brownsville or East New York area of Brooklyn?

A. I do.

Q. Is that frequent contact?

A. Yes, sir.

Q. Is it a social contact with somebody who lives there?

A. Yes, sir.

Q. A relative?

A. Yes, sir, a relative.

Q. Do you know the street on which this relative lives?

A. Yes, sir, Howard Avenue.

Q. Do you know the cross street?

A. Sutter.

Q. Do you know how far that is from Sutter and Bradford?

A. I don't know the name of the street.

Q. Or 725 Sutter?

A. It is within four blocks.

Q. Have you been going in the area of Brownsville on more or less frequent occasions for the past five years?

A. Yes, sir.

Q. At the time of the killing of Rosen, at the time that took place, did you read anything about it?

A. I did; I most likely did; I don't recall.

Q. Did you have any discussion with anybody in Brownsville area about the matter?

A. No, sir, I do not recall.

Q. Did you hear anything discussed about the Rosen killing?

A. No.

Q. Is it a very near relative you have there in that [fol. 1386] section?

A. The whole family; I have a sister there and her family.

Q. Since the investigation of Judge O'Dwyer have you heard any discussions in reference to matters in the Brownsville and East New York area?

A. No, sir.

Q. Did you ever personally reside in that district?

A. No, sir.

Q. Have you read any of the newspaper accounts of the O'Dwyer investigation?

A. Very lately I have not paid much attention to them.

Q. In anything you may have heard or read, did you ever hear the name of Harry Strauss, alias Pittsburgh Phil?

A. No, sir.

Q. Or that of Harry Maione, alias Happy Maione?

A. I don't recall.

Q. Or Frank (The Dasher) Abbandando?

A. No, sir.

Q. Or Martin (Buggsy) Goldstein?

A. I don't recall that.

Q. Did you have any contact of any kind, nature, or description in the Brooklyn waterfront?

A. No, sir.

Q. Do you know any official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any familiarity with the name of Weinstein or Katz?

A. No, sir.

Q. Or with the name of Bruno Belia, or Salvatore Marazzello?

A. No, sir.

Q. Or any of the names I have inquired about from [fol. 1387] other names I have inquired about from other prospective jurors—was there any familiarity with any of them so far as you are concerned?

A. None whatever.

Q. Did your business bring you in contact with any clothing truckers?

A. No, sir.

Q. Or, socially, do you know anyone engaged in the clothing trucking industry?

A. No, sir.

Q. Does your business bring you in contact with any union representatives or officials of any kind?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of this State?

A. I am.

[fol. 1388] Q. Since you received your notice to serve here, did anybody speak to you about this case?

A. Outside of my relatives in Brownsville and my family.

Q. With respect to the conversation you had with relatives in Brownsville, was that with regard to any specific defendant in the case?

A. Not to me, no, sir.

Q. Was it in regard to the O'Dwyer investigation?
A. No, sir.
Q. Was it connected with the merits of the case?
A. Yes, sir.
Q. Was it the expression of opinion by relatives?
A. No, sir, there was no general expression.
Q. In any discussion you had with relatives was anybody or any individual's name mentioned?
A. None whatever.
Q. Was your conversation limited to the prospect of serving on the jury, or did it have anything to do with the case?
A. In connection with whether they knew Rosen and whether they had heard anything about it. One of them knew him as a customer.
Q. Did I understand you to say one of them knew Mr. Rosen as a customer?
A. Yes, sir.
Q. Is this relative of yours in business in Brownsville?
A. No, sir.
Q. Where is this particular relative in business?
A. In Bay Ridge, in Brooklyn.
[fol. 1389] Q. What is his line?
A. Grocery.
Q. Was this relative at that time engaged in business in Brownsville or East New York?
A. Never.
Q. Is the relationship close between you and this person?
A. Yes, sir, it is.
Q. A brother-in-law?
A. A brother-in-law.
Q. There was some discussion you had with your brother-in-law about the victim named in the indictment, the victim of the homicide, having been a customer of the brother-in-law?
A. That is right.
Q. Was there any discussion about how this man met his death?
A. No, sir, not at all.
Q. Was it limited, that talk, simply to the fact that the victim had been a customer?
A. That is the whole thing.

Q. As you are sitting in the box now, is there any impression or opinion that you may have gathered from anything you heard in the Brownsville or East New York area, or anything you may have read, which, goes to the merits of the case?

A. Just my general reading in connection with the case, that is all.

Q. Does that go to the merits of the case, any opinion you may have?

A. Yes, sir, it does.

Q. Does that opinion go to the guilt or innocence?

A. It does.

Q. Is that the kind of an opinion that would require [fol. 1390] evidence to remove?

A. Yes, sir, I would.

Q. Would you require evidence from the defendants to remove the opinion?

A. Yes, sir, it would.

Mr. Turkus: I have no other recourse but to challenge him.

The Court: Try the challenge.

(Leo Ross, the talesman questioned, was then sworn.)

By Mr. Turkus:

Q. Before you were sworn you made certain responses to questions I put to you.

A. Yes, sir.

Q. Were those answers truthful responses?

A. Yes, sir.

Q. If I were to repeat the questions to you repeat and reiterate the answers?

A. Yes, sir.

Q. Would those answers be true?

A. Yes, sir, they would.

Mr. Barshay: We have no questions, your Honor.

The Court: Challenge sustained.

(Celia R. Schwartz, No. 2596, residing at 283 East 46th Street, Brooklyn, New York, a prospective juror.)

Mr. Barshay: May we all agree to excuse this talesman?

The Court: The only reason the Court can consider that

is on the problem of the jury being locked up during the trial. It would be necessary to have women attendants, which the court at the present time is unprovided with. [fol. 1391] We have only one matron, a woman attendant, in the whole court. On that ground, and that alone, and not having any bearing on the question of qualifications, the Court will allow counsel to agree.

Mr. Barshay: We all agree.
Mr. Turkus: The People agree.
(Talesman excused.)

JOHN J. ROSE, No. 2597, residing at 246 East 32nd Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You are listed as residing at 246 East 32nd Street.
A. Yes, sir.
Q. Is that in the Flatbush district?
A. Yes, sir.
Q. Is that somewhere near Church Avenue and East 32nd Street?
A. It is out a little further, near Beverly Road.
Q. Have you lived in the Flatbush district for a number of years?
A. Yes, sir, sixteen.
Q. Are you employed in the Borough of Manhattan?
A. I am employed in the Borough of Queens.
Q. What is the nature of your vocation?
A. I am an electrical engineer of the New York & Queens Electric Light & Power Company.
Q. Being an electrical engineer, does that entail a college degree?
A. Yes, sir.
Q. How long have you been an electrical engineer?
A. 1933.
[fol. 1392] Q. I take it your business does not bring you into connection with people in the garment or clothing district?
A. No, sir.
Q. Or in the Brownsville or East New York section of Brooklyn, or the Brooklyn waterfront?
A. No, sir.

Q. Have you ever served as a juror in a criminal case?
A. Yes, sir.
Q. Has it been in the County Court?
A. Yes, sir.
Q. Has it been recent?
A. Within, I think, about two years.
Q. Were any of the lawyers who are now in court engaged in the trial of that case?
A. No, sir.
Q. Was it a criminal case?
A. No, sir.
Q. Did the case come to a conclusion? Did the Judge charge the jury on the law?
A. No, sir.
Q. In your jury service have you had experience in getting a charge on the law from the trial judge in a criminal case?
A. While sitting in court I have heard such a charge.
Q. Would you have any difficulty in taking the law in this case implicitly from Judge Taylor?
A. No, sir.
Q. If selected as a juror in the case, will you endeavor, with common sense and understanding, to apply the law to this case?
A. I will.
Q. I have mentioned the names of nine lawyers representing these three defendants a number of times. Have you heard them mentioned while sitting here.
A. Yes, sir.
Q. Do you know any of the lawyers representing Buchal-
[fol. 1393] ter, Weiss, or Capone?
A. No, sir.
Q. Do you know anybody connected with their law offices?
A. No, sir.
Q. Do you know any member of the bar who specializes in the trial of criminal cases?
A. No, sir.
Q. Since receiving your notice as a prospective juror, did anybody speak to you about the merits of this case?
A. Not regarding the merits.
Q. Has the discussion been limited to prospective service on the jury?
A. Yes, sir.

Q. Do you know the District Attorney of Kings County personally, or any member of his staff by way of Assistants?

A. No, sir.

Q. Do you find any fault with the prosecutor for solving a murder by accepting testimony of an accomplice and using that testimony upon the trial of an indictment?

Mr. Climenko: I object to the form of the question. I object on the ground it assumes a state of facts not before the Court.

The Court: Overruled.

Mr. Climenko: Exception.

A. No, sir.

Q. Do you find any fault, or have you any prejudice agaist a prosecution which employs the use of accomplice or coparticipant testimony?

A. No, sir.

[fol. 1394] Q. Will you, if accepted as a juror n the case, look at everything that the accomplice says by way of his background, his past contact with criminals, and every vicious and criminal or immoral act he has ever committed, in weighing his believability?

A. Yes, sir.

Q. Will you look at the testimony of an accomplice with caution, with suspicion, and with common sense?

A. Yes, sir.

Q. Will you apply your faculties to find out whether the accomplice has told the truth about these defendants and their participation in the crime?

Mr. Climenko: I object to that as assuming something not before the Court.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. Yes, sir.

Q. Something has been said about the allocation of testimony and applying testimony to one defendant that applies only to that defendant. Will you do that?

A. Yes, sir.

Q. For example, if the testimony of a certain witness applies to only one of the three defendants, will you limit that, in consonance with the Judge's charge, to that specific defendant against whom it is given?

A. Yes, sir.

Q. If the evidence shows a conspiracy by these defendants and the accomplice, and it shows that certain acts were done in furtherance of the conspiracy by one or more of the [fol. 1395] defendants, and if you are charged by the Judge that the jury may in that case take the testimony as against all, will you follow that instruction?

Mr. Climenko: Objected to.

The Court: It is not an accurate statement of the law. The conspiracy has to be established first. The question is too complicated for a lay talesman.

By the Court:

Q. Will you follow the Judge's instructions?
A. Yes, sir.
Q. On that and all other points?
A. Yes, sir.
Q. At the proper time?
A. Yes, sir.

By Mr. Turkus:

Q. If, pursuant to the instructions of law, you say the testimony applies to all three, will you follow the instructions of the law?

A. Yes, sir.

Q. Will you follow the instruction of the law that there must be no conviction of any defendant in a criminal case upon the unsupported or uncorroborated testimony of an accomplice?

A. Yes, sir—I don't think I got your first question.

Q. Will you follow the instruction of law that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice?

A. Yes, sir.

Q. Will you use your own mental faculties in finding out who is an accomplice and whether or not there is corroboration of the accomplice in consonance with the [fol. 1396] Judge's charge on the law?

A. Yes, sir.

Q. Just because defendants' counsel may say everybody in the case is an accomplice, that does not decide the case for you—you are going to use your own faculties?

A. Yes, sir.

Q. And by the same token, even if I say they are not, it is still your job to find out what is what in the case; and will you?

A. Yes, sir.

Q. Will you give to the defendants in this case every presumption, every legal right that Judge Taylor will tell you is theirs?

A. Yes, sir.

Q. And after you have given them the benefit of everything that the law of the land says the defendants in a criminal case should have, and your mind is satisfied from the evidence that these three men are guilty of murder in the first degree, and you believe that beyond a reasonable doubt, will you say so in your verdict?

A. Yes, sir.

Q. And will you say that without fear or hesitation or reluctance?

A. Yes, sir.

Q. Is there anything concerning which I have not elicited any response, which would prevent a fair verdict at your hands?

A. No, sir.

Q. Will you, by your verdict, try to do justice in the case?

A. Yes, sir.

Q. Talk the case over with the other jurors with common sense and use your own faculties in deciding upon [fol. 1397] guilt or innocence?

A. Yes, sir.

By Mr. Barshay:

Q. Were you ever called as a juror on a special panel before?

A. No, sir.

Q. Does the word "special panel" denote any significance to you as requiring a special duty?

A. No, sir.

Q. Other than the experience you have told us about, have you ever had any other court experience?

A. Merely serving as a juror in a civil case.

Q. You have never been a Grand Juror in either this court or the Federal Court?

A. No, sir.

Q. Did you ever study law?

A. No, sir.

Q. Is your brother or any member of your family a lawyer?

A. No, sir.

Q. There are a few lawyers by the name of Rose whom I happened to know; are they any relation?

A. No, sir.

Q. Have you ever been the victim of any crime?

A. No, sir.

Q. Have you read about this case at any time?

A. I have read various news items; I read two or three of the articles about Judge O'Dwyer.

Q. Have any of the news items or articles caused you to form an impression with respect to the case?

A. No. sir.

[fol. 1398] Q. Or with respect to the defendants in the case?

A. No, sir. I had a very slight impression with regard perhaps to their character, but not with regard to the merits of the case.

Q. An impression with respect to the character of some of the defendants?

A. Yes, sir, as a group.

Q. Did you form that by virtue of having read about or discussed the defendants?

A. Probably from reading the news items.

Q. You mean that the impression was unfavorable to the defendants?

A. Somewhat.

Q. And it is present with you right now?

A. Yes, sir.

Q. Would it require evidence to remove that impression?

A. Not regarding their innocence or guilt of this crime.

Q. Would it require evidence to remove the unfavorable impression with respect to anything?

A. No, sir.

Q. You would dissipate that impression?

A. As far as I am concerned, it does not have any bearing on the particular case.

Q. If you were listening to a man testifying and you had no impression against him, you would be more likely to believe him than if you had an impression against him?

Mr. Turkus: Objected to.
The Court: Sustained as argumentative.
Mr. Barshay: Exception.

Q. Would you be less likely to believe the person you have in mind if he should take the stand and swear to tell the truth, because of the impression you gained against him?

A. No, sir.

Q. Not at all?

A. No, sir.

[fol. 1399] Q. Would you be less likely to believe the person you have in mind if he should take the stand and swear to tell the truth, because of the impression you gained against him?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Would it require less evidence on the part of the prosecution?

A. No, sir.

Q. To prove the defendant's guilt, because of that impression you have?

A. I did not hear the question.

Q. Because of that impression you have, would it require less evidence than beyond a reasonable doubt to convince you of the defendant's guilt—the defendant whom you have in mind?

A. I haven't any of the defendants in mind; it is just the group. I don't believe I have even read about a particular defendant. I believe there was that one group.

Q. If somewheres in the back of your head there is some bias against the defendants in this case which will influence your judgment in this case——

A. I don't believe there is any bias.

Q. When you say you "don't believe," does it indicate doubt in your mind that there may be?

A. No, sir.

Q. Is there or isn't there any bias at all based on anything at all with respect to any of the defendants in your mind now.

A. I don't know if it is bias; it is an impression more [fol. 1400] or less as to their character rather than to the merits of the case itself.

Q. Well, sometimes defendants may, if they choose, put their character in issue, and when they take the stand it will be their privilege to put it in issue. Now, if they do put their character in issue with respect to your judgment, wouldn't that be swayed with prejudice against their character?

Mr. Turkus: I object.
The Court: Objection overruled.

A. Only with regard to their character.

By the Court:

Q. Can you put that aside and be guided by the evidence that is brought out in the trial?
A. I could weigh the evidence in this case fairly.
Q. Can you exclude everything else?
A. Yes, sir.
Q. Can you rule out your impression of character?
A. Yes, sir.

By Mr. Barshay:

Q. You referred, Mr. Rose, to the defendants, in your own language, you bunched them together; isn't it because they are being tried together that you bunched them together? Or is it because you read about them?

Mr. Turkus: I understood from the talesman, from his answer, that he was trying to say his impression was gone.

By Mr. Barshay:

[fol. 1401] Q. You referred to the defendants as bunched together?
A. A group.
Q. Use your own language. Whatever you may think it was, would that mean to imply that these men are members of a group—where did you get that idea?
A. I say—I may have a wrong impression, but I thought they were members of this Murder, Incorporated.
Q. And you still have that impression?
A. Yes.
Q. Right now?
A. Yes, sir.
Q. All the time you were here you had that impression?
A. That is right.

Q. You never had any proof, of course, of your impression?

A. No, sir.

Q. Isn't that why you are prejudiced against those men, against this group?

A. Yes, sir.

Q. So the defendants are included in that group?

A. That is what I thought.

Q. And just at this particular second you are still under that impression?

A. Yes, sir.

Q. Consequently you are prejudiced against them by reason thereof?

A. Not prejudiced, no, sir.

Q. Well, I will say an impression detrimental to them.

A. Yes, sir.

Q. Unless you have a better word to use.

A. Yes.

Q. So it would require some proof to dissipate that im-[fol. 1402] pression that you have?

A. I would try the case itself——

Q. Yes, but you have an impression now.

A. Not regarding the case; only as to their character.

Q. We have gone over that. We may have their character in issue. It will be our choice. We may decide to do it. You say now you have an impression they are members of a so-called group which you mentioned. Wouldn't that affect your judgment in this case if they should put their character in issue?

A. No, sir.

Q. Won't you go through this case believing they are bunched together, as you say?

A. I told you I thought they were members of this group, but I would not bunch them. I am quite sure whatever evidence would be brought out would be sufficient.

By the Court:

Q. You mean you have concluded they are or that the article in the paper put it in your head that they may be?

A. After I saw them named in the case.

Q. That is on the basis of what you read, you assumed that to be true?

A. Yes, sir.

Q. But have you formed any conclusion on that point?

A. No, sir.

Mr. Climenko: I move to strike out your Honor's last question and the answer to it because I take it the answer [fol. 1403] is inconsistent with the question that your Honor put. As I understood the colloquy between the Court and the gentleman, you asked whether or not he had any assumption, and he said he did.

The Court: The Court has ruled. Motion denied.

Mr. Climenko: Exception.

By Mr. Barshay:

Q. Having formed an impression with respect to a certain condition based upon what you read or heard, supposing somebody should take the stand, somebody on behalf of the prosecution, and say that they are members of that group, wouldn't you more readily accept that man's testimony because of the impression you formed?

Mr. Turkus: That would be impossible, because everything is limited to the indictment.

The Court: It is speculative. Objection sustained.

Q. Supposing a group of witnesses offered by the prosecution should come here and make statements under oath that the defendants are bunched together, that they knew a so-called "group", wouldn't that influence your judgment, having already formed your own impression?

A. No, sir.

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Would it require any explanation on the part of any of the defendants because of the impression you formed [fol. 1404] with respect to the charge against them here?

Mr. Turkus: I object.

By the Court:

Q. If the Court should charge you they are not required to explain anything, would you follow that?

A. Yes, sir.

Q. And disregard any impression obtained from papers you read?

A. Yes, sir.

By Mr. Barshay:

Q. Irrespective of the Court's charge—you said you would follow the Court's charge—still would there be a lingering in your mind, some suspicion, with respect to the impression you formed unless it has been explained away by the defendants?

A. Not in regard to the indictment.

Q. Supposing the defendants did not take the stand and made no explanation whatsoever, wouldn't it necessitate, in your judgment, that somebody should come here, or a group of people should come here, and say the defendants are banded together in a so-called "group"?

A. No, sir.

Q. Do you know when the defendant said, "Not guilty", he denied the accusation against him?

A. Yes, sir.

Q. And that is the only accusation against him?

A. Yes, sir.

Q. That means we deny he had any hand in this case whatever, you know that?

A. I don't know that.

Q. You know it now?

A. Yes.

Q. The plea of not guilty puts in issue every accusation [fol. 1405] against the defendants, every single one, you understand?

A. Yes, sir.

Q. Do you think you could follow the instructions of the Court?

A. Yes, sir.

Q. So that if a man says he is an accomplice of the defendant Buchalter, his plea of Not Guilty puts that fact in issue?

A. I don't understand the question.

Q. If a man takes the stand and says, "I was an accomplice of Mr. Buchalter in this case," Mr. Buchalter's plea of Not Guilty puts that fact in issue—whether or not he was an accomplice of Mr. Buchalter. The mere fact he says so does not make it so, you understand?

A. Yes, sir.

Q. So, taking into consideration the fact that the same person, never saw in his life or spoke to in his life the defendant Buchalter, you would find out whether he is an accomplice of Mr. Buchalter in your own mind?

Mr. Turkus: I object to that as an improper question.
The Court: Sustained. It has to be based upon evidence.

Q. If the evidence in this case should reveal to you that despite the fact a man says on the stand, "I am an accomplice of Buchalter," when in reality he is not, and never has seen him or never spoke to him in any way whatsoever, would you take those things into consideration if the evidence so showed?

[fol. 1406] Mr. Turkus: I object. If the evidence showed that he had nothing to do with it, he is not an accomplice.

The Court: You cannot query him as to how he will decide a specific issue that may arise in the course of the trial. Objection sustained.
Mr. Barshay: Exception.

Q. Is there any impression you have personally against my client?
A. No, sir.
Q. As to character or otherwise?
A. No, sir.
Q. None whatever?
A. Only as I said before, against this group that I thought these defendants were a part of.
Q. You are assuming my client is a member of that group?
A. Yes, sir.
Q. Can you lay that aside?
A. Yes, sir.
Q. His plea of Not Guilty says, "I am not a member of any group." Can you lay that aside?
A. Yes, sir.
Q. Will you do it?
A. Yes, sir.
Q. You will never allow it to creep back in your mind throughout this trial, if you are chosen?
A. No, sir.

The Court: The talesman can make a promise as to whether or not he would disregard it.

Q. Will you disregard it at all times?
A. Yes, sir.

Q. At any rate, he is never charged with being a member of a group; you understand that?

A. Yes, sir.

Q. He is charged with the simple accusation of alleged [fol. 1407] homicide, committed by him.

A. Yes, sir.

Q. Everything else must be dissipated from this case.

A. Yes, sir.

Q. With that goes the presumption of innocence. You will accord that to him?

A. Yes, sir.

Q. Mr. Turkus asked you whether anybody spoke to you about the merits of this case, and you said no. It will be for you to decide whether there is any merit to this case. We speak for Buchalter.

A. Yes, sir, as to his innocence or guilt or to his participation.

Q. You appreciate also that the Grand Jury can indict an innocent man?

A. Yes, sir.

Q. Will you compel the District Attorney to sustain the burden of proof of Mr. Buchalter's participation throughout the entire case?

A. Yes, sir.

Q. And if in the wisdom of his counsel, or lack of wisdom, whichever it may be, he shall choose to make no explanation whatever to himself or witnesses, will you hold that against him?

A. No.

Q. Now, the proof must be beyond a reasonable doubt.

A. Yes, sir.

Q. If you or anybody else in the jury room think there ought to be another definition of that, that other definition will be subordinated to that of His Honor?

A. Yes, sir.

Q. Not only must you be convinced of the accomplice [fol. 1408] testimony beyond a reasonable doubt, but also by evidence which is alleged to tend to corroborate the defendants' participation. In other words, every bit of evidence must be believed by you beyond a reasonable doubt. Will you consider the source of any piece of testimony offered here?

A. Yes, sir.

Q. If it is from a tainted or polluted source, will you accept it with caution, if you accept it at all?

Mr. Turkus: Objected to as already answered.

A. I will try it on the evidence.

Q. And the source from which it comes?

A. Yes, sir.

Q. So if a man has an interest in telling his story, or a motive, that motive being the treatment he has received which has inspired him to tell a lie, in his own mind, you will be careful before you accept any such testimony?

A. Yes, sir.

Q. Put it through a sieve?

A. Yes, sir.

Q. You will be the judge?

A. Yes, sir.

Q. You may reject it completely if you want to. That goes with respect to every witness who may be offered for the purpose of tending to connect the defendants with the commission of this crime.

Now, are you prejudiced against a person charged with murder merely because of that charge?

A. No, sir.

Q. Is the fact that a person has been killed, would that in any way prejudice you against the person charged with the killing, without any proof?

A. No, sir.

[fol. 1409] Q. If a person recites mere association with the defendant and nothing else, will you then bunch them together because of what you read in the newspaper?

Mr. Turgus: Objected to.

The Court: Sustained.

Mr. Barshay: Exception.

Q. If a man takes the stand and says, "I have no motive to lie," and that same person has been shown to have committed crimes for which he himself has not been punished, would the mere assertion of himself that he has no motive to lie be accepted by you, or would you weigh that testimony in the light of evidence brought out against the person from the witness stand?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. In other words, his mere saying so will not be sufficient with you?

A. No, sir, I will weigh the testimony.

Q. As the evidence goes in against the respective defendants will you bunch it together or separate it as against the defendant to whom it applies, if the Court so charges you?

Mr. Turkus: Objected to as already answered; this can go on *ad infinitum* in the trial of a criminal case.

By the Court:

Q. You will consider the evidence and give each defendant [fol. 1410] a separate trial, as it were, and the verdict will be separate as to each?

A. Yes, sir.

By Mr. Barshay:

Q. With respect to the defendant Buchalter, can you render a fair and impartial verdict based upon the evidence and from no other source?

A. Yes, sir.

Q. A verdict as to each defendant?

A. Yes, sir.

Q. Should the other members disagree with you, and the quality of the proof does not convince you beyond a reasonable doubt, you will say so by your individual verdict?

A. Yes, sir.

Q. You have that courage?

A. Yes, sir.

Q. And should that be the condition, you will exercise that courage?

A. Yes, sir.

By Mr. Cuff:

Q. Have you ever listened to any of the talks given by Assistant District Attorneys on Judge O'Dwyer's staff?

A. No, sir.

Q. Are you a member of any society that has had talks on the prevention of crime?

A. No, sir.

Q. I gather you read sufficient of the instalments that appear in one of our daily papers about Judge O'Dwyer's career?

A. Yes, sir.

Q. Do you remember whether you read the initial instalment?

A. It was fairly recently; maybe a month or so ago.

Q. It was since this trial commenced?

A. Yes, about that time.

[fol. 1411] Q. Do you expect to take any active part in the coming or present campaign for the Mayoralty?

A. No, sir.

Q. You are not a contributor to any campaign fund?

A. No, sir.

Q. Well, now, these articles you read, did they mention this group you have referred to and with which you have associated my client and the other defendants?

A. The group was mentioned.

Q. I am asking you did it mention this group which you have mentioned, these articles that you read about Judge O'Dwyer's career?

A. The group was mentioned, yes, sir.

Q. That is the group with which you have associated these defendants in your mind, isn't it?

A. That is right.

Q. And that is the group which includes these defendants against whom you have a very distinct and detrimental impression, isn't that so? Didn't you just say that it was a detrimental impression as to their character?

A. That is right.

Q. You realize, don't you, that a man's character is a very important part of his personal make-up?

A. Yes, sir.

Q. And when you have an impression against the character of a man with whom you are associated in business, that adds to his detriment, doesn't it, or is apt to?

Mr. Turkus: Objected to.

The Court: Sustained as argumentative.

Mr. Cuff: Exception.

Q. Is the condition of your mind such that you would [fol. 1412] believe that a man of bad character is more apt to lie on the witness stand than a man of good character?

Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Cuff: Exception.

Q. Well, you feel, don't you, that a man of good character, if he takes the witness stand in this case, is more apt to tell the truth than a man of bad character?

Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Cuff: Exception.

Q. Having had that impression, or whatever you call it, you would take your seat in the jury box, if you are selected, with that impression still in your mind, wouldn't you, against that group?
A. Yes, sir.

Q. And against that group with which you had heretofore and now associated in your mind these defendants?
A. Yes, sir.

Q. It is not a group that would impress you, is it, as being a favorable one?
A. That is right.

Q. And that same impression would be in your mind from the moment you listened to the testimony adduced here from the witness stand, wouldn't it?
A. The impression of the——

Q. Won't you answer my question? I am entitled to an answer.

A. The impression I have, as I said before, was against a group. I thought these defendants were members of this [fol. 1413] group.

By the Court:

Q. You told us before you would lay aside and disregard that impression. Are you still sure you can?
A. Yes, sir.

Mr. Cuff: I object to the Court's question as leading and suggestive. I insist upon the question I put being ruled on and answered by the witness.
The Court: He has answered it.
Mr. Cuff: Exception.

By Mr. Cuff:

Q. You said you had formed this impression as a result of reading and discussion?

A. No, sir, not discussion; just reading.

Q. You accepted as true what you read?

A. That is right.

Q. You have had that impression now for how long?

A. Well, since I read the article.

Q. And would you tell us when that was, or does that mean anything to you?

A. I said before I believe it was about a month or six weeks ago.

Q. And for that month or six weeks that impression has remained with you down to the time and including the time you were here and listened to the other jurors being examined?

A. That is right.

Q. And it has not grown any weaker, has it?

A. No, sir.

Q. I will ask you now, did it grow any stronger?

A. No, sir.

[fol. 1414] Q. Just the same as when you first got it?

A. Yes, sir.

Q. Did you get that impression the day you read the first instalment in the paper about Judge O'Dwyer?

A. I would say so.

Q. The other articles did not serve to discredit that?

A. Yes, sir.

Q. You believed the succeeding articles, did you?

Mr. Turkus: I object, he has already answered; he says the impression was created.

The Court: Objection sustained.

Mr. Cuff: Exception.

Q. How many articles or instalments did you read all together in the newspaper or newspapers about this?

A. Not more than three.

Q. You were quite interested in what you read, weren't you?

A. Not too much so.

Q. Were you interested?

Mr. Turkus: Objected to as already answered. He said not too much. I will withdraw the objection.

Q. Were you sufficiently interested to read those three instalments?

A. Yes, sir.

Q. And the impression that was formed at the time before you read the last one, or during the time you read the last one, you will carry with you right down to the end, will you not?

A. Yes, sir.

Q. You have heard since you have been here a good [fol. 1415] deal about the law as to presumption of innocence?

A. Yes, sir.

Q. Do you realize that that is a very vital part of the criminal law that Mr. Turkus asked you if you believed in the enforcement of?

A. I don't know whether he asked me, but I do believe it is important.

Q. He did ask you if you believed in the enforcement of the penal or the criminal law of the State of New York; do you remember that?

A. I do believe in that.

Q. Do you remember? I am asking you that.

Mr. Turkus: I object to it. What difference does it make?
The Court: Objection sustained.
Mr. Cuff: Exception.

Q. Since you have been here you have heard about the presumption of innocence. Do you realize now that that is an actual part of the criminal law of the State of New York?

A. Yes, sir.

Q. Did I understand you to say that your impression of my client and the other two defendants here being members of this group which you have heretofore referred to, that you could give them the full and complete benefit of that presumption if you were selected as a juror?

A. I do.

By Mr. Rosenthal:

Q. What newspaper did you read?

A. I read the *News*, the *Times* and the *Journal*.

[fol. 1416] Q. What newspaper did you read this article in?

A. The *Journal.*

Q. The articles you read were subsequent to your being called for jury service?

A. Yes, sir.

Q. How long after you had been called for jury service, approximately, was it before you read the first article in the *Journal*?

A. About the same time, I believe.

Q. Was it after your appearance in court and the matter was adjourned over until September that you read the first article?

A. It may have been.

Q. And then there was a lapse of time between the first and the second article?

A. I don't know.

Q. Do you know whether there were three consecutive articles you read or whether there was a lapse of time between the first and the second and the second and the third articles you read?

A. There may have been a lapse of time.

Q. What is your best impression at this time, was there a lapse of time between the various articles you read?

A. There was a lapse.

Q. The first article you read, according to your present impression, was after you had first appeared in court in August and had been told the picking of the jury was postponed until September?

A. I believe so.

Q. And the second article, then, was also nearer to the present date, and the third was still nearer than the first [fol. 1417] time you appeared in court?

A. Yes, sir.

Q. After you had read this first article—you read it through to its conclusion?

A. Yes, sir.

Q. About how large an article was it, a page?

A. Several columns.

Q. It was a good, substantial part of a page of the newspaper, the *Journal*?

Q. (The Court): Was that the life of Judge O'Dwyer?

A. Yes, sir.

Q. In the particular paper which you read concerning the life of Judge O'Dwyer was there also comment in respect to a certain group?

A. Yes, sir.

Q. And you were interested sufficiently in reading those comments after reading the second instalment?

A. Yes, sir.

Q. Then you were so much interested that you read the third instalment?

A. I read the third.

Q. Weren't you admonished by the Judge when you first appeared in court to refrain from reading any articles that were in any wise connected with any of these defendants?

[fol. 1418] A. I was.

Q. And notwithstanding that admonition of the Court in respect to refraining from reading articles of a character that were in any wise connected either with this case or these defendants, you continued to read the articles in the *Journal*?

A. There was nothing in the *Journal* in regard to this case.

Q. According to you, the articles led you to believe that these defendants, or some of them, were members of a group?

Mr. Turkus: Objected to as argumentative.

The Court: To begin with the talesman answered merely that it may have been before the trial began; he did not say it was before or after.

Mr. Rosenthal: His present impression, according to my interpretation of his answer, was that to the best of his recollection it was subsequent to the time of his appearance in court.

The Court: I don't recall any such answer.

Mr. Rosenthal: May we have it read?

The Court: How can it be read if it was not said?

Mr. Rosenthal: What has been said has been taken down.

The Court: The Court rules against you upon the basis of what the Court's recollection is.

Mr. Rosenthal: Exception.

[fol. 1419] Q. Whatever it was you read and whenever it was you read it, you formed an impression in respect to

one or more of these defendants, that they were members of a particular group?

A. I figured, I thought that all these defendants were members of that group.

Q. So in the articles you read there was a group mentioned?

A. Yes, sir.

[fol. 1420] Q. And your impression, after reading these articles, was that these particular defendants were members of a particular group, isn't that right?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. And you carried that impression that you had gained with you throughout the time you sat in the court-room?

Mr. Turkus: Objected to as already answered.

The Court: Sustained.

Mr. Rosenthal: Exception.

I am addressing my question solely in behalf of the defendant Capone. I have never questioned this talesman at any time until I stood up now, and more particularly——

The Court: The Court has ruled and will not tolerate any debate.

Q. The impression you gained, was it unfavorable to the defendants?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Rosenthal: Exception.

Q. The impression you gained you still have; is that correct?

Mr. Turkus: Objected to as already answered.

The Court: Sustained. He said so.

[fol. 1421] Q. In view of the impression which you say you now have, were certain witnesses to appear for the prosecution and allege that these defendants or one or more of them were members of the group, because of what is in your mind would you give more credence to their testimony than otherwise?

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. No, sir.

Q. You can differentiate between your impressions as to character or of these men being members of the group, and what some one person on the stand may say?

Mr. Turkus: Objected to as argumentative.
The Court: Objection sustained.
Mr. Rosenthal: I take an exception. I challenge this juror for implied bias.
Mr. Talley: We join in the challenge.
The Court: Try the challenge.

(JOHN J. ROSE, the talesman, was then sworn.)

By Mr. Rosenthal:

Q. Now, prior to your being sworn you gave some answers?
A. Yes, sir.
Q. The impression that you have now, as you sit here, before this trial opens, is one of detriment of and concerning the character of the defendants on trial?
Mr. Turkus: Objected to as leading.
[fol. 1422] A. As a member of that group.

By the Court:

Q. You mean you stated that you have not formed a conclusion; this is only an impression of the membership of a group?
A. Yes, sir.
Q. Do you still hold to that, or is your mind really open as to whether or not they are members of a group?
A. I was under the impression they were members of a group.
Q. Have you, in your own mind, come to any conclusion they are, come to a decision?
A. No, sir.

By Mr. Rosenthal:

Q. Is it the opinion you have reached at this moment that they were members of a certain group?
Mr. Turkus: Objected to as already answered.
The Court: Sustained.

By Mr. Barshay:

Q. Did the articles convey to you and have you now presently the impression that the defendants or any of them are members of that group?
A. I have the impression they are.

Mr. Turkus: Objected to.
The Court: Objection overruled.

By the Court:

Q. You mean you have formed the opinion they are or you have formed the opinion they are supposed to be?
A. I am of the opinion they are supposed to be.
[fol. 1423] Q. There is quite a distinction.
A. I am not sure; I only read two or three.
Q. You said you are not sure. You mean you have not formed any opinion?
A. That is right.

By Mr. Barshay:

Q. In so far as you formed any opinion whatever, presently you are of the opinion that they are a part of that group?
A. They are supposed to be.
Q. You think that right now?
A. Yes, sir.
Mr. Barshay: All counsel join in the challenge.
The Court: Challenge overruled.
(Exception to defendants.)
Mr. Turkus: Satisfactory to the People of the State.
Mr. Barshay: Challenged peremptorily, reserving each and every right we have to each and every exception we have for all defendants.
Mr. Cuff: May I ask for my personal guidance how long your Honor expects to sit?
The Court: It depends. We have only — juror so far, after this part of the day's work. That is altogether too small. I thought we would have four or five by this time.

(5:00 P. M.)

(The following talesmen were called to the jury box: Ralph Gluck, No. 2582; Carl A. Ryder, No. 2608; [fol. 1424] Louis J. Silverding, No. 2617; Sid J. Flamm, No. 2620; George B. Habb, No. 2623; David H. Day, No. 2627; Joseph E. Pinto, No. 2629; Arthur Meltzer, No. 2631.)

The Court: The other gentlemen I caution not to read anything about the matter or discuss it. The rest may go until ten o'clock tomorrow morning.

Water Odland, No. 2586, residing at 4323 Ninth Avenue, Brooklyn, New York, was called for examination as to his qualifications.

The Court: The defendants are remanded.

We will reassemble at 5:30 P. M.

(5:30 P. M.)

Walter Orland was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Is that the correct name—Odland?
A. Yes, sir.
Q. You are listed as living at 4323 Ninth Avenue, Brooklyn.
A. Yes, sir.
Q. Is that part of the Bay Ridge section of Brooklyn?
A. It may be. It is just beyond the Bay Ridge section.

By the Court:

Q. It is in Borough Park?
A. Yes, sir, Borough Park is generally known to be down a little further.
[fol. 1425] Q. You are in the Sunset section?
A. Yes, sir.

By Mr. Turkus:

Q. Have you lived in that section for a number of years?
A. Yes, fifteen.
Q. You are listed on the board as a bank auditor.
A. Yes.
Q. Is that for one of the banks in the City of New York?
A. Yes, sir.

By the Court:

Q. What bank?
A. The Chemical Bank & Trust Company.

By Mr. Turkus:

Q. Is an auditor one who examines records?
A. Yes, sir.

Q. Does that take in accountancy?

A. Yes, sir.

Q. Just where is the branch in which you are employed?

A. I am at the main office, 165 Broadway.

Q. Have you been with the bank for a number of years?

A. Yes, sir, eleven years.

Q. May I go along with the understanding that in your occupation you have no contact either in the garment industry or the clothing industry in Manhattan?

A. No, sir.

Q. Do you have any social contact of any kind, nature, or description in these industries?

A. No, sir.

Q. Does that hold true with respect to the Brooklyn waterfront and the Brownsville and the East New York area of Brooklyn?

A. Yes, sir.

Q. Have you heretofore served as a juror in a criminal case?

[fol. 1426] A. No, sir, not in a criminal case.

Q. In a civil case?

A. Yes, sir.

Q. There are nine lawyers here representing three defendants at the bar. Did you hear their names?

A. Yes, sir.

Q. Do you know any of the nine?

A. No, sir.

Q. Do you know anyone associated with them in the practice of law or employed in their law offices?

A. No, sir.

Q. Do you know any member of the bar who specializes in the practice of criminal law?

A. No, sir.

Q. Since your name appeared on the jury panel, and specifically since you got the slip or the notice that you were a prospective juror, did anybody speak to you about this case?

A. Not with respect to the case, no, sir.

Q. Were the discussions limited to prospective jury service?

A. Yes, sir.

Q. Do you have any connection by way of contact, or have you had any, with any union officials in the clothing center or the clothing trucking industry?

A. No, sir.

Q. Or in the teamsters union?

A. No, sir.

Q. Are you in sympathy with the enforcement of the penal law of the State of New York?

A. I am.

Q. If accepted as a juror in this case will you take the law exclusively from the trial judge?

A. Yes, sir.

Q. Will you take the law in its every aspect from the trial judge and endeavor to apply the law with common [fol. 1427] sense and understanding to the facts in this case?

A. Yes, sir.

Q. Do you find any fault or have you any prejudice against the use of accomplice testimony in a prosecution?

A. No, sir, I have none.

Q. I don't know whether you were in the jury box when I spoke about testimony of an accomplice as being the testimony of a co-participant in the commission of a crime. Did you hear that definition of it?

A. Of an accomplice?

Q. Yes.

A. Yes, I think I did.

Q. Do you find any fault with the prosecutor of the county, in order to solve a murder case, to accept the testimony of accomplices and submit it to the jury?

A. No.

Q. Do you find any fault with the prosecution in which testimony of co-participants in the commission of a crime is used against remaining defendants?

A. You mean without being corroborated?

Q. No, the law says it must be corroborated. If that is all the prosecutor has, standing alone, the testimony of an accomplice, the jury would be told to acquit the defendants, to do so summarily, but what I am talking about is, is there any bias or prejudice in the mind of a prospective juror which would cause him to reject accomplice testimony no matter what the circumstances were?

A. No, sir.

Q. And with respect to what constitutes corroboration, will you take the law exclusively from Judge Taylor?

A. Yes, sir.

[fol. 1428] Q. Should he charge you that the jury may find corroboration where there is independent evidence which tends to connect the defendants with the commission of the crime, would you accept that definition of corroboration?

A. Yes, sir.

Q. Will you endeavor courageously to apply it to the facts in this case?

A. Yes, sir.

Q. With respect to the testimony which emanates from accomplices or co-participants will you look at the background of the accomplice, his general habits, and every miserable and contemptible and illegal act he has committed, will you look at that in considering his testimony, in weighing the believability?

A. I will.

Q. Will you, if selected as a juror, apply your intelligence to ascertain if the accomplice in the case is telling the truth about these defendants when he speaks of their participation in the commission of the crime charged?

A. Yes.

Q. In applying common sense and understanding in a situation like that, will you bear in mind these are individuals or people you do not ordinarily come in contact with in your general business experience?

A. Yes, sir.

Q. Will you see whether, in this murder case, what the accomplices say about these three defendants, Buchalter, Weiss, and Capone, is true?

A. Yes, sir.

Q. And if you are satisfied from all of the evidence in the case that it emanates from accomplices and that it [fol. 1429] comes from independent sources, that not only is the accomplice telling the truth about their participation in the murder, but also there is other evidence which tends to connect the defendants with the commission of the crime, and which satisfies you beyond a reasonable doubt, pursuant to the instructions of law given on that point, that these defendants are guilty of murder in the first degree, would you hesitate to say so?

A. No, sir, I would not.

Q. Would you have any fear or reluctance in pronouncing such a verdict?

A. No, sir.

Q. Something has been said by one of the lawyers for Mr. Buchalter that his client has heretofore been convicted of a crime and is presently serving a long Federal term. Would the fact that that appeared in the case cause you to relax your duty as a juror in a case where he is charged with murder?

A. No, sir.

Q. Would you defeat a proper decision in this murder case solely because he is presently incarcerated for the commission of another crime?

A. No.

Q. There has been some talk about allocation or application of evidence to specific defendants. Will you take the rule of law given by the Court with respect thereto and apply the evidence to the particular defendant to whom it applies?

A. I will.

Q. And if the evidence applies and is applicable only to one defendant, will you, following the Judge's charge, apply it to that defendant against whom it is applicable?

A. Yes, sir.

[fol. 1430] Q. If, in consonance with and in pursuance of the Judge's charge, you find the evidence applies to all three defendants, will you apply it to those defendants in the case?

A. Yes, sir.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, personally?

A. No, sir.

Q. Do you know any Assistant District Attorney on his staff?

A. No, I do not.

Q. Will you give these defendants on trial the presumption of innocence, the doctrine of reasonable doubt, the burden of proof, and every right and constitutional safeguard that the Judge tells you the men on trial should have?

A. Yes, sir.

Q. After giving them every safeguard that the law of the land says the defendants on trial should have, in the event you are satisfied beyond a reasonable doubt of their guilt, can I go along with the understanding that you will pronounce such a verdict?

A. Yes, sir, you can.

Q. Will you endeavor by your verdict to do justice?

A. Yes, sir.

Q. Will you listen to reasonable discussion by the other jurors?

A. Yes, sir.

Q. Will you, if accepted as a juror in this case, by your verdict endeavor to do justice?

A. I will.

By Mr. Barshay:

Q. I am a depositor in your company; do you know me?

A. I do not.

[fol. 1431] Q. Do you ever go over to the 50 Court Street branch of your bank?

A. Once a year.

Q. Do you know Jack Smith?

A. I do. He is engaged in that branch.

Q. Do you ever discuss Brooklyn affairs with him?

A. No, sir.

Q. You never have?

A. No, sir. My job does not entail individual accounts; it is for records.

Q. Irrespective of that, did you ever discuss the personnel of the Brooklyn District Attorney's office with any of those gentlemen?

A. No, sir.

Q. Did you read about this case?

A. I have seen headlines. I have never read anything about the case.

Q. Did those headlines leave an impression in your mind?

A. No, sir.

Q. Not at all?

A. Not to the extent of any guilt or innocence.

Q. Irrespective of guilt or innocence, did they leave any impression whatever with you?

A. No, sir, I would say my mind would be open on that question.

Q. I appreciate that, but did it leave any impression with you?

A. No, sir, I would say no.

Q. You would not say they did?

A. No, sir.

Q. Did you read anything with respect to the life of the District Attorney of the county?

A. No, sir.

Q. Did you hear any radio speeches concerning him? [fol. 1432] A. I believe I did, by Walter Winchell, but just what it was at the time I do not know; it was several years ago.

Q. Did that leave any impression with you?

A. No, sir.

Q. Did you hear any Assistant Prosecutor speak of crime?

A. No, sir.

Q. Did you hear any official speak of crime?

A. No, sir.

Q. Do you know anyone at all connected with the District Attorney's office, clerical, professional, or otherwise?

A. No, sir.

Q. Do you know anyone in the Police Department?

A. No, sir.

Q. Did you ever discuss this case with anyone?

A. No, sir.

Q. You have heard a great many jurors being questioned?

A. Yes, sir.

Q. Did you form any opinion by virtue of what you have heard asked the other jurors?

A. No, sir, I have not formed any opinion.

Q. Do you presently have any impression at all with respect to any of the defendants?

A. No, sir, I do not.

Q. Have you formed an opinion with respect to the lawyers?

A. No, sir.

Q. I hope you don't think I am asking these questions for any personal reasons. I am trying to get a fair jury.

A. I understand.

Q. May I be assured now that you know none of the people in respect to this case?

A. Yes, sir.

[fol. 1433] Q. You know none of the facts in the case?

A. I do not.

Q. You are free of bias?

A. I am not biased.

Q. You are free of prejudice?

A. Yes, sir.

Q. By the same token I take it you are free of anything—Well, I will withdraw that.

Mr. Turkus asked you whether or not you found any fault with a prosecutor for solving a case from within. Are you now in that state of mind that, if accepted, you would accept what is contained in the questions to be the fact?

A. No.

Q. It will be for you to say whether or not with respect to our defendant this case has been solved?

A. Yes, sir, that is correct.

Q. It will be for you to say whether or not a person who claims to be an accomplice is worthy of belief?

A. Yes, sir.

Q. It will be for you to say whether or not a person who claims to be an accomplice is in reality an accomplice to our client Buchalter?

A. Yes, sir.

Q. If it should be developed from his own mouth—this so-called alleged accomplice—that as far as our client is concerned he had never seen him or even talked to him, will you take that into consideration on whether or not he is an accomplice with respect to our client?

A. I will take that into consideration.

Q. And in addition to that will you consider who is the accomplice, what has been his manner of life?

A. Yes, sir.

[fol. 1434] Q. If he has been a crook, a pimp, a murderer, a perjurer, and has committed every other kind of crime, will you apportion and look into the testimony and see whether or not you can believe it?

A. I will.

Q. Even if he says he has no motive for falsifying now, will you take those things into consideration which I just mentioned in determining whether or not he is telling the truth even on that point?

Mr. Turkus: Objected to as already answered; the juror said he would take all these items into consideration.

The Court: Let him answer.

Q. Would you?

A. I would.

Q. If more than one person claims to be an accomplice and the Court shall tell you that one does not corroborate another accomplice, will you follow that law?

A. I shall follow the instructions.

Q. In other words, will you accept quality of proof rather than quantity?

A. I would, yes, sir.

Q. Would it influence you in any respect if the prosecution should have more witnesses than the defendant Buchalter?

A. No, sir.

Q. You have heard about the burden of proof many times?

A. I have.

Q. Always throughout this trial it should be the duty of the prosecution to sustain that burden?

A. Yes, sir.

[fol. 1435] Q. Would you demand that of him?

A. Yes, sir.

Q. Will you at any time expect the burden to shift, if the Court should charge you otherwise?

A. No.

Q. If the Court should charge you otherwise, would you demand some explanation of this charge by the defendant Buchalter?

A. No, sir, I would not.

Q. So that if he chooses not to take the stand—that is not a promise that he will or will not—if he chooses not to and his Honor tells you you must not and cannot draw an unfavorable inference against him by his failure to do so, you will follow that instruction?

A. Yes, sir.

Q. Coming to the witnesses who may offer testimony which tends to connect the defendants with the commission of the crime, you will want to know who they are?

A. Yes, sir.

Q. You will ask yourselves, Why do they give such testimony?

A. Yes, sir.

Q. Will you ask yourself what kind of lives they have led before they took that witness stand?

A I would take that into consideration.

Q. Will you ask yourself the motive and what hope of reward each person has when he gives his testimony?

A. I will.

Q. If the corroborating witness himself should deny that he is an accomplice, you will look into his life before you will even accept that statement?

A. Yes, sir.

Q. In other words, that mere statement shall not be a [fol. 1436] fact with you unless you thoroughly scrutinize it carefully?

A. Yes, sir.

Q. And that shall be with respect to every witness?

A. Yes, sir.

Q. No matter who he is?

A. Yes, sir.

Q. And every piece of evidence against our client, if it shall be offered, must convince you beyond a reasonable doubt on the entire case before you shall say "Guilty"?

A. Yes, sir.

Q. In other words, that mere statement shall not be a fact with you unless you thoroughly scrutinize it carefully?

A. Yes, sir.

Q. And that shall be with respect to every witness?

A. Yes, sir.

Q. No matter who he is?

A. Yes, sir.

Q. And every piece of evidence against our client, if it shall be offered, must convince you beyond a reasonable doubt on the entire case before you shall say Guilty?

A. Yes, sir.

Q. And should you in that find one reason for doubt which arises out of the evidence, you will give it to the defendant Buchalter?

A. Yes, sir.

Q. And should you determine after listening to the evidence and arguing reasonably with your fellow jurors, that you have an intelligent doubt, will you do that?

A. Yes, sir.

Q. Mr. Turkus asked you or said to you that the law gives every defendant the presumption of innocence. You be- [fol. 1437] lieve in that law?

A. Yes, sir, I believe in that law.

Q. Do you believe in applying it to the extent that that presumption shall remain with him through every single second of this trial?

A. I do.

Q. Even if it takes weeks for the prosecutor to present his case, as each witness testifies and tells his story, if in your mind there be that legal right which is given to the defendant, the presumption of innocence——

A. Yes, sir.

Q. Will you take into consideration the fact when he says "Not guilty" it meant that he is not only not guilty of this crime, but he is not guilty of every accusation made against him with respect to this crime?

A. That is correct.

Q. That means he is an accomplice to no one in the commission of this crime?

A. That is right.

Q. You have had occasion to size up men?

A. I have.

Q. You found on occasion men who have lied to you?

A. That is true.

Q. Sometimes you had to search for the truth, irrespective of the person's statement?

A. Yes, sir.

Q. Will you constitute yourself here as a person who shall search for the truth based upon all this experience that you have had in life, no matter what they say?

A. Yes, sir.

Q. If evidence shall be presented which is subject to two interpretations, an innocence one and a guilty one, and the Court tells you that you must—you have no choice—accept [fol. 1438] the innocent interpretation, will you follow that law?

A. Yes, sir, I will.

Q. If the Court shall tell you, under the same circumstances if there is a doubt which you shall accept, innocent or guilty, you still must accept the innocent one, will you interpret that?

A. Yes, sir.

Q. Especially with respect to association with another individual who may be innocent?

A. Yes, sir.

Q. And under those conditions, you will follow the instructions of the Court?

A. Yes, sir.

Q. You have no fault to find with the privilege and right that is given each defendant to have counsel to represent him in court?

A. I have not.

Q. So, if, by coincidence, counsel shall be compelled to urge an argument previously urged by another on behalf of his own client, the force of the second urging will not be lessened?

A. No, sir.

Q. The fact that Mr. Turkus speaks first and speaks last will not influence you in any respect?

A. No, sir.

Q. I take it you know that the Grand Jury can indict an innocent man?

A. I know that.

Q. Should his Honor tell you that character is no part of this case at all, it is not in issue unless the defendant chooses to make it an issue, will you follow that?

A. Yes, sir.

Q. So that no matter what else you may think with respect [fol. 1439] to our defendant, the sole issue for you to decide is the accusation against him in the indictment?

A. Yes, sir.

Q. No other issue?

A. No, sir.

Q. Now, have you participated in any political activities in this county?

A. No, sir.

Q. Do you intend to?

A. No, sir.

Q. Does the fact that a public official urges his side of an argument weigh more heavily with you than just a plain lawyer who urges his side?

A. It would not.

Q. So can Mr. Buchalter entrust to you the keeping of his legal rights?

A. He can, to the best of my experience.

Q. Anywheres in your mind is there the slightest trace of anything at all which would preclude you from arriving at a fair and impartial verdict in this case?

A. No, sir.

Q. And one which will reflect the proof to you from the witness stand and not from any speeches?

A. That is correct.

Q. There is no doubt about that?
A. No doubt about it.

By Mr. Talley:

Q. Do you understand an indictment by the Grand Jury against anyone is simply an accusation?
A. I do.
Q. And that it does not import the guilt of any of the persons named in the indictment of the crime described?
A. That is right.
Q. And that it is valueless unless it is supported by proof brought against the defendants named in the indictment by [fol. 1440] the District Attorney?
A. That is right.
Q. You understand the guilt of the defendant named in the indictment must be proved beyond a reasonable doubt?
A. Yes, sir.
Q. And after hearing all of the evidence, if you have a reasonable doubt—the kind of a doubt you might have in the ordinary affairs of life, would you give the benefit of that doubt to the defendant?
A. I would.
Q. The Court will charge you that at no stage in this trial is it incumbent upon any defendant to make any answer or explanation of any testimony that has been adduced against him.
A. Yes, sir.
Q. If a defendant is advised, or does not take the stand, the Court will charge you you are not to indulge in any unfavorable presumption against him because of his failure to take the stand; you understand that?
A. Yes, sir.
Q. And will you follow that direction?
A. I will.
Q. Strictly and conscientiously, when it is given by the Court?
A. Yes, sir.

Mr. Talley: No further questions.

By Mr. Rosenthal:

Q. Have you had any prior jury service?
A. Yes, sir, in a civil court, but never in a criminal.

Q. This is the first time you have been called?

A. In a criminal court, yes, sir.

Q. When was the last time you had service?

[fol. 1441] A. Approximately two years ago.

Q. Was it in Kings County?

A. Yes, sir.

Q. In the Supreme Court?

A. Yes, sir.

Q. Did you actually serve?

A. Yes, sir.

Q. What paper did you read? I heard you mention Walter Winchell.

A. The *Telegram*—that was on the radio.

Q. You did not read his column in the *Mirror?*

A. No, sir.

Q. You simply listened to him at nine o'clock on Sunday night?

A. Yes, sir.

Q. And any article in the papers that you have read, you never paid any particular attention to this trial?

A. No, sir, not as to the merits of the case.

Q. You say, "not as to the merits." Did you read anything at all in the paper about any of the defendants?

A. No, sir.

Q. Was there anything in the radio news items which you have listened to, have you any recollection of hearing anything concerning any of the defendants?

A. I have not.

Q. When you were called for jury service, were the names of the three defendants unfamiliar to you?

A. They were.

Q. And whatever knowledge you have gained has been from being present in court and hearing the names discussed?

A. Yes, sir, that is right.

Q. You undertsand that the defendants on trial are charged with one crime, the crime of having participated in the alleged killing of one Joseph Rosen in 1936?

A. Yes, sir.

[fol. 1442] Q. You understand also that all the law requires them to meet, if you are accepted as a juryman, is the charge which is imputed in the indictment?

A. That is correct.

Q. And that is all they are prepared to meet?

A. Yes, sir.

Q. The mere fact that one or more of the defendants may know some of The People's witnesses, would that mere knowledge or association prejudice your mind against them unconnected with the particular crime involved?

A. No, sir.

Q. And you understand by now that no matter how many alleged accomplices testify that, in so far as the law is concerned, any number of accomplices is no better than one accomplice under the law?

A. I understand.

Q. And if the Court were to charge you that one accomplice could not corroborate another, you would take that as the law and follow that instruction?

A. Yes, sir.

Q. And you have heard me discuss with the other men the proposition that there are two types of accomplice, one where the Judge tells you——

Mr. Turkus: I object, there is no such thing as two types: the man is either an accomplice or is not. He is an accomplice as a matter of law or he is an accomplice as a matter of fact. I object to the definition of "types."

The Court: As I understand the law, if there is no dispute about it, then the Judge takes it as a matter of law and so charges the jury, but if there is evidence he is, [fol. 1443] and evidence that he is not, it is left to the jury to decide whether he is or not. But an accomplice is an accomplice, regardless.

Mr. Rosenthal: The phraseology I used is "two different types." If there is objection by the District Attorney, I will use a different word.

Q. You understand that in some instances the Court has a right and will charge you that a particular individual is an accomplice as a matter of law?

A. Yes, sir.

The Court: If the evidence is all one way, with no dispute.

The Witness: Yes, sir.

Q. In that event, you understand, you will take it to be the law in applying it to the evidence in your jury room,

that you have no discretion whatever, but must judge that individual as an accomplice?

A. I understand.

Q. Do you understand further that the law also permits, in certain instances, the Court to leave to you as a juryman whether the man is an accomplice or is not an accomplice?

A. Yes, sir.

Q. Even though that individual on the stand may say to you under oath, "I am not an accomplice," from the circumstances it is left to you as a juryman to determine whether in reality he is or not?

A. Yes, sir.

Q. And if the evidence warranted in your mind your conclusion in a given set of circumstances, finding the man [fol. 1444] an accomplice, that the Court referred to you the question on, you would not hesitate to do so?

A. No.

Q. Do you understand also that if you once find as a matter of fact, which is within your discretion, that the man is an accomplice, then the law applicable to that particular individual is the same as it is where the Judge actually says he is an accomplice as a matter of law?

A. Yes, sir.

Q. Now then, you have no fault to find with the fact that, irrespective of whether or not you were to believe an accomplice was telling the truth, even then you could not convict a man unless there was other independent supporting evidence tending to convince you beyond a reasonable doubt of the guilt of the individual?

A. Yes, sir.

Q. You have no fault to find with that?

A. No, sir.

Q. If, perchance, it appears that the so-called independent evidence relied upon by the District Attorney is an alleged oral admission, by that I mean one or more witnesses go on the stand and say this defendant on such and such a day at such and such a place admitted to him that he participated in this crime—would you, in judging what force or weight you would give to that testimony, judge the source from which it comes?

A. I would.

Q. If the source from which it comes is one where the individual, either on his examination by the District At-

torney or is forced upon cross-examination to admit that [fol. 1445] he has committed murders, which he admits he committed, and for which he has not been tried, and committed all sorts of other crimes, including perjury, falsely swearing under oath in a court of similar jurisdiction to this, would you take all those facts into consideration plus what favor you might think might be granted to him and what motive he may have, in judging what weight, if any, you would give to him?

A. I would take that into consideration.

Q. And if, after taking these factors into consideration, a reasonable doubt arises in your mind as to whether or not what he was saying under oath was the truth or not, would you resolve that doubt in favor of the defendant if the Court instructed you that all reasonable doubt must be resolved in favor of a defendant?

A. I would.

Q. You may have heard me discuss with other prospective jurors the question of alibi.

A. No, I heard a little this afternoon.

Q. Let me briefly repeat, so you can better answer the questions, which I will propound more clearly: An alibi, you will be instructed by the Court, is when certain individuals take the stand to testify that the defendant was at a place other than the place of the crime at the time when the crime is alleged to have been committed.

A. Yes, sir.

Q. Now then, if the Court were to instruct you that at no time in a criminal case it is incumbent upon a defendant [fol. 1446] to offer any type of evidence, he may stand mute, he may fail to call any witnesses, even though that were the case, it still would be the duty of the District Attorney to prove to your satisfaction beyond a reasonable doubt the truth of the allegations contained in the indictment? You find no fault with that?

A. No, sir.

Q. The mere fact that a defendant may go further than what the law compels him to do, and offer proof to you by himself and by others showing he had no connection or participation in this crime, would that, if the Court charged you that at no time does the burden shift from one side to the other, would that weigh on your mind so

that you would change the Court's charge to you and make the defendant sustain the burden?

A. It would not.

Q. Now, if the Court were to charge you that by reason of the offer of evidence on the part of the defendant of an alibi, that that proof may not in itself be sufficient in your mind to create a reasonable doubt as to whether he committed this crime, and the proof of the alibi was to raise such a doubt in your mind would you hesitate to acquit such a defendant?

A. No, sir, I would not.

Q. The mere fact that I have repeated these questions so often—I may repeat one or more to you unconsciously, although I will try not to—the mere fact there may be one or more of the witnesses who may say they know the de- [fol. 1447] fendant or have been with him at some other time, at some other place, unconnected with this crime, in and of itself would not prejudice your mind against him?

A. No, sir.

Q. Or the mere fact that the defendants or one or more of them may say to you on the witness stand under oath, "I know one or two or three of these witnesses and have been in their company on occasions, but have no connection with this crime," would not in and of itself prejudice you against the defendant?

A. No, sir.

Q. Now, simply because a man is a defendant, if he gets on that stand and holds his hand up and the oath is administered to him, and he then testifies, would you disbelieve him because of the fact that he is a defendant in the case?

A. No, sir, I would take into consideration the facts or statements he makes.

Q. You would take into consideration, as you would have a right to, the motive he may have in testifying, but you would also take into consideration his manner of testifying and the manner in which the words come out of his mouth, both on direct and cross examination, in order to judge in your mind whether you believe he is telling the truth or not?

A. Yes, sir.

Q. And once you have established in your own mind the fact that he is telling the truth, the truth from him would be just as forceful to you as from any other source?

A. Yes, sir.

Q. Now, I don't know whether you were questioned, not having had jury service, on whether the mere fact that [fol. 1448] these defendants have been indicted raises any presumption in your mind which it would necessitate evidence to remove. Have you been asked that?

A. No, sir.

Q. Assuming that the Court were to charge you that an indictment is a mere accusation and has no probative force or effect, you would follow that?

A. Yes, sir.

Q. As the defendant sits here now, so far as you are concerned, he is presumed to be innocent?

A. Yes, sir.

Q. There is nothing at this time which would necessitate their coming forward and establishing their innocence to your mind?

A. That is correct.

Q. From the very outset, if you are accepted as a juryman, you would see to it that the facts alleged by the District Attorney as being the facts in this case were proven by him to your satisfaction beyond a reasonable doubt, before you would vote guilt?

A. Yes, sir.

Q. You don't know the District Attorney of Kings County?

A. I do not.

Q. Has the District Attorney an account in your bank?

A. I don't know.

Q. Mr. Turkus has said he has an account.

A. I don't know. I have nothing to do with individual accounts.

Q. You have never had to audit his account, to your knowledge?

A. I don't know.

Q. I don't think I asked you whether you had any [fol. 1449] relatives or immediate friends who are lawyers.

A. I have a brother-in-law who is a lawyer.

Q. You have a brother-in-law who is a lawyer?

A. Yes, sir.

Q. What is his name?

A. Robert Duckenson.

Q. Is he in Manhattan or Queens?

A. He practices in Brooklyn.

Q. Does he practice criminal law?

A. No, sir, real estate mostly.

Q. He is not active politically, that you know of?

A. No, sir.

Q. I take it you have never discussed any matters with him?

A. No, sir, I have not; he does not even know I am on the jury.

Q. Have you had any immediate relations with the police department?

A. No, sir.

Q. I take it you do not know Captain Frank Bals, a police officer?

A. No, sir.

Q. Or Lieutenant Osnato?

A. No, sir.

Q. Now, you, like other men, have had no prior criminal jury service. If you were accepted here you know that your opinion in the jury room is as good as anybody else's?

A. Yes, sir.

Q. You know that merely because one or more may have had prior jury service, their reasoning as to the particular facts in this case is no better than yours?

A. That is correct.

Q. You understand, I take it, further, that it is your bounden duty to listen with reason to the reasoning by other jurors?

A. Yes, sir.

Q. It is also your duty not to arbitrarily sit in a corner [fol. 1450] and refuse to tell the reason why you come to a particular conclusion, but to openly and honestly discuss your reasoning power with your fellow members?

A. Yes, sir.

Q. Now, however, if, after doing that, pro and con, they are unable to convince you by their reasoning that the opinion which you have come to is erroneous, would you, simply because of the fact you have never served on a jury, the lateness of the hour, business, or for any other reason which is proposed against you, permit yourself to be swayed and acquiesce in their judgment in preference to your own?

A. No, sir. I would not.

Q. You understand it is definitely your duty to try, if you can, to have a decision in unison or not agree with one another?

A. Yes, sir.

Q. That it is just as much your duty not to, simply for the sake of agreeing, agree with somebody if it does not strike your conscience as being a righteous verdict?

A. I understand.

Q. And if you were not convinced at the conclusion of your argument with your fellow jurymen of the guilt of these defendants, would you have any hesitation or reluctance or aversion to saying, "Not guilty"?

A. I would not.

Q. Would you have any fear of any kind?

A. No, sir.

Q. You have been told by Mr. Turkus that you may hear the same or a similar kind of argument in the course of summation by the attorneys for the defense, and asked [fol. 1451] whether or not that would give any greater weight to the argument. Now, is it clear to your mind that each side of the attorneys here is only responsible for the safeguarding of his particular client?

A. Yes, sir.

Q. And that each set of attorneys has an independent duty to perform?

A. Yes, sir.

Q. Do you further understand that in discussing the case with you each particular attorney will discuss the evidence in so far as it affects his particular client?

A. Yes, sir.

Q. Merely because either counsel for one or the other defendants agree or disagree, will that take any effect away from the discussion, if it meets with your approval, as to a particular defendant who happens to be discussing the state of fact with you?

A. It would have no weight.

Q. There has been great stress laid upon the fact that there are nine lawyers for the defense and whether or not you know any of the nine lawyers. You have heard that asked a number of times?

A. Yes, sir.

Q. Do you know any of the thirty-three Assistant District Attorneys in the District Attorney's office?

A. No, sir.

Q. You see, The People of the State of New York are only another lawyer?

A. Yes, sir.

Q. Do you know The three active Assistants in this trial on behalf of the People, Assistant District Attorneys associated with Judge O'Dwyer—Mr. Turkus, Mr. Joseph, [fol. 1452] and Mr. Klein, who will be here in person when the trial starts?

A. I don't know any of them.

Q. The fact that there are thirty-three against nine, that is not going to weigh in your mind?

A. That has no weight.

Q. Is there any reason you know of which I have not urged by any question that will in any way affect your determination in this case?

A. No, sir.

Q. And irrespective of the argument of any of the attorneys, which includes the District Attorney and his Assistants, you understand that it is not incumbent upon you to accept our word for anything?

A. I understand.

Q. We are not under oath. We give you our view.

A. Yes, sir.

Q. Those views only become important if and when they agree with your views.

A. Yes, sir.

Q. So although the District Attorney starts off first and tells you all he is going to prove, and he winds up last and tells you all that he has proved, that is not going to make any greater impression on you than what the defendants' lawyers may say to you, if it does not meet with your approval?

A. That is correct.

Mr. Rosenthal: No challenge for cause.

Mr. Turkus: Mr. Odland is satisfactory.

Mr. Talley: Peremptorily chailenged by the defendants.

(6:30 P. M.)

Mr. Cuff: May I address the Court? The medication [fol. 1453] which I tried to have sent down, due to the fact that I was a little late calling up, is not here, and I understand will not get here tonight, and I am compelled to ask that you adjourn at this time.

The Court: It is with extreme reluctance, because the showing is poor. The Court was not impressed with [fol. 1454] the last challenge. The Court will require that, hereafter, you be prepared with your medication.

Mr. Cuff: I would have been prepared if I had been told in time.

The Court: I am doing it only because I cannot assume responsibility of anything happening to yourself due to deprivation. I understand your physical situation. This must not happen again. Tomorrow we are going to produce something more than today.

Mr. Talley: Before we adjourn court, if you will permit me, I wish to note an exception on behalf of all defendants and their counsel to your statement that you were not impressed with the work today. I submit that is highly prejudicial to the defendant, and also to the attorneys and the talesmen in the box——

The Court: Do not sum up.

Mr. Talley: I am not summing up, but I think you are entitled to my reasons for the taking of an exception. The talesmen were in the box, and those who are there are prospective jurymen, and it has been known that comments of that kind have not been made with respect to the District Attorney's office.

Mr. Turkus: Yes, they have.

The Court: (Addressing talesmen) Please do not read anything; do not listen to any discussion; do not [fol. 1455] discuss it among yourselves, nor listen to anything over the radio. The defendants are remanded.

(Recess taken until Tuesday, October 7, 1941, at ten o'clock a. m.)

[fol. 1456] Peo. v. Louis Buchalter et al.

Brooklyn, N. Y., October 7, 1941.

Trial Resumed

(All counsel answer "Present" in reply to query by the clerk.)

The Court: The Court notes that this morning no women showed up. Besides the one who was excused yesterday at the request of counsel for both sides, the Court granted no excuses. An erroneous press report has been circulated

that the Judge has excused all women from the panel. This is untrue. Application was made in court as to one woman by counsel for the defense, and it was with the consent of the District Attorney that the Court permitted that woman to be excused. A circulation of such a report in the public press is calculated to give the impression that the Court is acting arbitrarily and illegally, and discriminating against women as jurors in this case.

The Court requests that the press reports will correct this impression, and instructs the Clerk to send word to the other women on this panel to report for duty. As each woman is called, if it is desired by counsel for both sides to excuse her, that case will be dealt with individually. The [fol. 1457] Court cannot adopt an illegal and arbitrary policy—a sensational policy in this regard.

(Herman E. Selig, No. 2784, residing at 702 Fortieth Street, Brooklyn, New York, called to fill the jury box.)

The Court: All other talesmen will return at two o'clock this afternoon. Gentlemen, remember the admonition already given.

Ralph Gluck, No. 2582, residing at 1977 Eighty-Second Street, Brooklyn, New York, called to the witness stand and examined as to his qualifiactions to serve as a juror.

By Mr. Turkus:

Q. The trestle board lists your address as 1977 Eighty-second Street, is that correct?

A. Yes, sir.

Q. Is that in the Bensonhurst district of Brooklyn?

A. Yes, sir.

Q. Your profession or vocation is listed as a stamp dealer.

A. Yes, sir.

Q. What is the nature of your business?

A. Selling postage stamps to dealers.

Q. You mean cancelled stamps?

A. Cancelled and unused stamps that dealers collect.

Q. It is what they call a stamp collecting hobby?

A. Yes, sir.

Q. Have you been in the business for a number of years?

A. Yes, sir.

[fol. 1458] Q. For how many years?

A. About fifteen years.

Q. Prior to that what business were you in?
A. No business at all; I was employed.
Q. What kind of work did you do?
A. I was in the house-furnishing business.
Q. For some concern?
A. An uncle of mine.
Q. What is his name?
A. Gluck.
Q. Was the business in Brooklyn?
A. No, sir, in New Jersey.
Q. What city?
A. Norristown, New Jersey.
Q. Have you lived in Brooklyn for a number of years?
A. Yes, sir.
Q. Have you lived in any other district besides Bensonhurst?
A. No. sir.
Q. I take it you understand the nature of the charge in this case, that these defendants are charged with the crime of murder in the first degree?
A. Yes, sir.
Q. Is there anything about the nature of the charge that would prevent you from being a fair and a just juror in the case?
A. No. sir.
Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. No. sir.
Q. As far as you are concerned, will you permit the question of punishment to enter into your mind when deliberating guilt or innocence?
A. Yes.
Q. The law says that you should not consider punish- [fol. 1459] ment when you deliberate on guilt and innocence. Do you understand me?
A. No, sir, not very good.

By the Court:

Q. The law says that punishment does not concern the juror.
A. No.
Q. That is the Judge's affair.
A. Yes, sir.

By Mr. Turkus:

Q. Do you speak a foreign language?
A. Yes, sir.
Q. Is that the language you use in your every-day business?

Mr. Climenko: I object to that as improper.

(Objection overruled. Exception to defendants.)

Q. Are you somewhat unfamiliar with the English language? Is it hard for you to understand?
A. Sometimes.

Mr. Climenko: I object to the form of that question.

(Objection overruled. Exception to defendants.)

Q. As a matter of fact, you had some difficulty in following my questions?
A. That is right.

Mr. Turkus: I am going to apply a challenge.
The Court: Try the challenge.

[fol. 1460] (Ralph Gluck, residing at 1977 Eighty-second Street, Brooklyn, New York, was sworn.)

By Mr. Turkus:

Q. Before you were sworn you answered questions that I put to you?
A. Yes, sir.
Q. If I were to ask the same questions, would you make the same answers?
A. Yes, sir.
Q. Would those answers be true?
A. Yes, sir.
Q. Did you say you had some difficulty in understanding some of my questions?
A. Yes, sir.
Q. Do you speak a foreign language?
A. Yes, sir.
Q. Is that the language you speak frequently?
A. Yes, sir.
Q. You do have difficulty in understanding English?
A. Yes, sir.

Q. If you were selected, you might have difficulty in understanding the witnesses?
A. Yes, sir.

By the Court:

Q. Were you born in this country?
A. No, sir.
Q. Where were you born?
A. (Unpronounceable name.)
Q. How long have you been in this country?
A. Twenty years.
Q. Are you a naturalized citizen?
A. Yes, sir.
Q. Have you had any schooling in this country?
A. Yes, sir.
Q. What was it?
A. Public school and private school.
Q. How old were you when you came to this country?
[fol. 1461] A. Twenty-two.
Q. You went to public school?
A. Yes, sir.
Q. You mean the night school?
A. Yes, sir.
Q. How many terms?
A. Two terms.
Q. That was a foreign language class?
A. Yes, sir.

(No questions from the defense.)

The Court: Challenge sustained.

Carl A. Ryder, No. 2608, residing at 967 Lincoln Place, Brooklyn, New York, called and examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. 967 Lincoln Place, that is your correct address?
A. Yes, sir.
Q. What section of Brooklyn is that in?
A. That is, I think it is called Crown Heights, I am not sure.

Q. Have you lived in Brooklyn for a number of years?
A. Yes, sir.
Q. More than five?
A. For the past six.
Q. And have you spent some period of time in that section?
A. The past six years.
Q. You are listed as being an insurance broker.
A. Yes, sir.
Q. Are you in business for yourself?
A. Yes, sir.
Q. Is your office in Manhattan?
A. Yes, sir, 151 William Street.
[fol. 1462] Q. Does your business bring you in contact with any persons or firms in the garment district in Manhattan?
A. No. sir.
Q. Or in the clothing district?
A. No, sir.
Q. Or any one of those industries?
A. None.
Q. Does your business bring you in contact with people engaged in the clothing trucking business?
A. No. sir.
Q. Or on the Brooklyn waterfront?
A. Very seldom on the waterfront.
Q. Do you have any connection by way of business or any other connection with the Brownsville or East New York area?
A. No. sir.
Q. With respect to any acquaintance or friendship with any union officials, do you know any union officials connected with the Amalgamated Clothing Workers of America?
A. No. sir.
Q. Are the names of Weinstein or Katz at all familiar to you?
A. No, sir.
Q. Do you have any connection with any trucking officials in the truckmen's union?
A. No, sir.
Q. Have you any familiarity with the name of William Alberts a one-time bondsman?
A. No, sir.

Q. Do you know anyone named Emanuel Buchalter or Phillie Kowas?

A. No, sir.

Q. Do you know anybody named Weiss in the Chevrolet sales?

A. No, sir.

Q. Certain names I mentioned to other prospective [fol. 1463] jurors, is there any familiarity with the names that I mentioned?

A. I don't believe I heard them.

Q. Have you any familiarity with the name of Bruno Belia, an organizer of the Amalgamated Clothing Workers of America, at the home office, or Salvatore Marazzano?

A. No, sir.

Q. Or with Bellanca or Tosca?

A. No, sir.

Q. Or Abraham Beckerman?

A. No, sir.

Q. Or with Murray Weinstein, the Weinstein I referred to, or Samuel Katz of Local 4 of the Clothing Workers Union connected with the Amalgamated?

A. No, sir.

Q. Since you received your notice that you were to be a prospective juror did anybody speak to you about the case?

A. Not regarding the case, no, sir; just the prospective jury service, how long I would be away.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, sir.

Q. There are nine lawyers representing these three defendants, Buchalter being represented by former Assistant District Attorney Barshay, former Assistant United States Attorney Wegman and Mr. Jesse Climenko; do you know any of those?

A. No, sir.

Q. Or anyone connected with their offices?

A. No, sir.

Q. The defendant Weiss is represented by former General Sessions Judge Talley, former Assistant District Attorney James I. Cuff, former Assistant United States Attorney Murray Kreindler; do you know any of those?

A. No, sir.

[fol. 1464] Q. Or anyone associated with them in the practice of law?

A. No, sir.

Q. The defendant Capone is represented by Mr. Sidney Rosenthal, Mr. Rosenberg, and Mr. Fischbein. Do you know any of those?

A. No, sir.

Q. Or anyone connected with their law offices?

A. No, sir.

Q. Do you know any member of the bar who specializes in the trial of criminal cases?

A. No, sir.

Q. Have you heretofore had jury experience in criminal cases?

A. No, sir, only as a civil juror.

Q. In that case did the case go to the jury so that the Judge charged the jury on the law?

A. Yes, sir.

Q. Do you understand from your experience as a juror that the exclusive province of giving the law to the jury rests with the trial judge?

A. Yes, sir.

Q. Will you, if accepted as a juror, take the law in this case exclusively from Judge Taylor?

A. Yes, sir.

Q. Will you conscientiously and to the best of your ability endeavor to apply the principles of law to the facts in this case?

A. I will do my best.

Q. There is a different degree of proof in a criminal case than in a civil case. In a civil case I believe the Judge instructs you that a fair preponderance of evidence is sufficient. In a criminal case you will receive instructions that guilt must be proven beyond a reasonable doubt. Will you [fol. 1465] follow the instructions of law?

A. I will.

Q. Will you endeavor to follow the instruction of law that the defendant is presumed to be innocent and that surrounds him throughout the trial and is overcome when his guilt is established beyond a reasonable doubt?

A. Yes, sir.

Q. Will you also follow the instruction of law that the burden of proof never shifts in a criminal case, that the

District Attorney must prove guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Will you give the defendants on trial every constitutional right, every reasonable safeguard the law of the land says they should have—the law being given to you by Judge Taylor?

A. Yes, sir, I will do that.

Q. Give the defendants everything they are entitled to, and will you use your common sense and understanding in applying the principles of law which the Judge gives you as to every witness who takes the stand, in other words?

A. Yes, sir.

Q. Have you heard any discussion when seated in this box about accomplice testimony?

A. No, sir—I did last night, yes, sir.

Q. I guess that was the first time you heard it mentioned?

A. Yes, sir.

Q. An accomplice is one who participates in the commission of a crime with others, and his guilty participation makes him an accomplice in the commission of the crime. [fol. 1466] That will be charged to you as a matter of law, that he is an accomplice. Do you find any fault with the prosecutor of the county for solving a case by the use of accomplice testimony?

A. No.

Q. Do you find any fault with the prosecution which employs the use of the testimony of a co-participant in a crime against the remaining defendants?

A. No.

Q. Will you apply the test that Judge Taylor gives you and which should be applied as to the believability and the credibility of that type of witness?

A. Yes, sir.

Q. For example, will you consider the past criminal record of an accomplice?

A. I would.

Q. And will you consider every immoral and vicious or criminal act he has ever done in his life?

A. Yes, sir.

Q. Will you consider every rotten thing there is about him, on the stand, when you weigh his believability?

A. Yes, sir.

Q. By the same token will you weigh whatever motive or interest he may have in testifying?

A. Yes, sir.

Q. Will you weigh everything that can be weighed and look at the testimony of such an individual with care and caution, and even suspicion?

A. Yes, sir.

Q. Will you apply all of those tests and your good common sense in finding out is he telling the truth about these defendants in connection with this murder charge?

A. I will.

Q. And if you are satisfied from all the evidence in the case that the accomplice is not only telling the truth about [fol. 1467] his confederates in the commission of this murder, but you are satisfied too there is other evidence in the case which tends to connect the defendants with the commission of the crime, would you hesitate to reflect that finding in your verdict?

Mr. Rosenthal: I object to the form of the question——

The Court: Objection overruled.

Mr. Rosenthal: He should state "beyond a reasonable doubt." I take an exception.

Q. Having in mind you are satisfied beyond a reasonable doubt.

A. Yes, sir.

Q. Something has been said by one of the lawyers who represent the defendant Buchalter that heretofore his client was convicted of a crime and was sentenced for that conviction and is presently serving a long jail sentence for that past crime or crimes. Would you for that reason, because a man is serving a sentence, be inclined ta relax your attitude as a juror on this charge of murder because of his prison sentence?

A. No.

Q. Would you deviate at all from the proper result because of a sentence for past crimes?

A. No, sir.

Q. May I proceed, then, with the understanding that you have no bias or prejudice, either against the prosecutor or against the prosecution which employs the use of accomplice testimony?

A. No.

Q. That you will look with common sense and under-[fol. 1468] standing to find out whether the accomplice is telling the truth about participation in crime?

A. Yes, sir.

Q. Do you know the District Attorney of the county, Judge O'Dwyer?

A. No, sir.

Q. Do you know any Assistant District Attorney on his staff?

A. I would not say I know them. I met one of them in connection with a complaint I had made and discussed the action to be taken on that complaint.

Q. Do you remember how long ago that was?

A. Back in August of 1941.

Q. Do you remember the name of the Assistant District Attorney?

A. Either Ambrose or Androse.

Q. Was that limited communication you had with the office by way of meeting the Assistant on a complaint, would that in any wise prejudice your ability to judge this case on its merits?

A. No, sir.

Q. And with respect to the allocation of testimony, will you follow the instructions of law as given you by Judge Taylor, as to how and against which defendants testimony applies?

A. Yes, sir.

Q. For example, if the testimony obviously applies only to one defendant, will you allocate it to that specific defendant?

A. Yes, sir.

Q. If you find from the evidence in the case there was a conspiracy and under the instruction on the law you can [fol. 1469] properly allocate the testimony of the three defendants, will you apply the instruction of law to that situation?

A. Yes, sir.

Q. And if you are accepted as a juror, will you do it with common sense and understanding and talk it over with the other jurors with reason?

A. Yes, sir.

Q. And if selected as a juror, will you conscientiously endeavor by your verdict to render justice?

A. Yes, sir.

Q. If you are satisfied beyond a reasonable doubt that at the bar of justice, Buchalter, Capone, and Weiss, are guilty of murder in the first degree, if you are satisfied beyond a reasonable doubt as to that, will you have the slightest fear, hesitation, or reluctance in so pronouncing your verdict?

A. None whatever.

By Mr. Barshay:

Q. Near what street do you live?

A. Brooklyn Avenue.

Q. Do you belong to any church or club around that neighborhood?

A. No, sir.

Q. Any men's club?

A. No, sir, none at all.

Q. Did you ever visit the temple at Lincoln and Rochester?

A. No, sir.

Q. Did you ever hear any lectures about crime?

A. No, sir.

Q. Is the complaint you made to the District Attorney still pending?

A. Except for sentence.

Q. In other words, you were the victim of some crime?

A. No, sir, it was in connection with a charge I had [fol. 1470] made to the Children's Society involving an attack upon my son.

Q. The District Attorney's office handled it?

A. Yes, sir; there was no trial.

Q. And is that the only time you came in contact with the District Attorney's office?

A. Yes, sir.

Q. I take it you are very satisfied with the manner in which the prosecution was handled?

Mr. Turkus: I object.

The Court: Sustained.

Q. Your office is on Beekman Street in that insurance building?

A. Yes, sir.

By the Court:

Q. Near Beekman, on William?
A. It is on William, running from Fulton to Ann.
Q. That is the insurance section?
A. Yes, sir.
Q. How long have you been in business there?
A. About six years there.

By Mr. Barshay:

Q. Would you be influenced in any respect because of your connection with the District Attorney's office, to the prejudice of the defendant?
A. No, sir.
Q. What kind of insurance do you handle?
A. All kinds.
Q. Burglary?
A. No, sir, I leave that to my colleague. I specialize mostly in tax cases. My colleague handles the other line. [fol. 1471] Q. Has your firm anything to do with the adjustment of claims resulting from the commission of crimes?
A. We handle none of that whatsoever.
Q. Have you read about this case?
A. Yes, some items.
Q. May I know in what paper?
A. Either in the *Times* or in the *Sun*.
Q. Did you read them before you were called as a juror?
A. Not as I remember; I don't remember anything regarding the case.
Q. Did you read them since you were called as a juror?
A. Just from reading the paper, yes, sir.
Q. Do you believe in the accuracy of the contents of these items?
A. There was really nothing in there except the delay in the trial.
Q. No facts at all with respect to the case?
A. No, sir.
Q. Any with respect to the defendants?
A. None.
Q. Any with respect to the life of Judge O'Dwyer?
A. No, sir.
Q. From reading the headlines have you formed any impression?

A. None whatever.

Q. Did you listen to any speeches over the radio?

A. I listen very rarely to the radio.

Q. Have you any impression now with respect to the defendants?

A. None at all.

Q. In sitting as a juror here and listening to other prospective jurors being questioned, have you formed any impression?

[fol. 1472] A. Not as to the defendants, no, sir.

Q. About the case?

A. Well, just the delay.

Q. Would you charge that to the detriment of the defendants?

A. No, sir.

Q. Am I assured that at this time you are absolutely free of bias and prejudice of any kind or nature?

A. Absolutely.

Q. Since you received your notice has anybody spoken to you about the case?

A. Only as to the extent of how long the jury service might take.

Q. Did anyone express an opinion as to the guilt or innocence?

A. No, sir.

The Court: From present indications most of the time is in the selection of the jury; the case itself may not take so long.

By Mr. Barshay:

Q. Would the element of time enter into your deliberation?

A. No, sir, I leave my affairs entirely to my colleague.

Q. I don't know how long the case may take; that is up to the District Attorney after we get our jury.

The Court: How long do you think it will take, Mr. Turkus, your side?

Mr. Turkus: You mean the presentation of the direct case?

The Court: Yes.

Mr. Turkus: It is awful hard to tell; I can give you

[fol. 1473] this illustration: I tried one case——

The Court: I don't want an illustration. Approximately how long do you think?

Mr. Turkus: Unless the cross-examination is protracted——

The Court: No, how long will it take? Your side.

Mr. Turkus: It should take a week, that is all, for the People's case—I mean that as an estimate; I will not guarantee anything.

By Mr. Barshay:

Q. At any rate, the length of time you will be required to stay will not influence your mind one way or the other; you will not charge it to either side?

A. No, sir.

Q. When Mr. Turkus asked you whether or not you found any fault with the District Attorney who solved a case from the inside, did you understand by that, first, it is no guarantee to you that he has solved the case from the inside, but he intends it shall be proven from witnesses on the stand?

A. Yes, sir.

Q. In other words, you do not assume the truth of any contents of any question that either he or I put to you?

A. No, sir.

Q. You will wait until you hear the testimony from the witness stand and determine for yourself whether or not this case has been solved from the inside?

A. Exactly.

Q. As far as finding fault, I take it you will not find fault with either side for the presentation of the case?

[fol. 1474] A. No, sir.

Q. Mr. Turkus presents what is handed to him.

A. Yes, sir.

Q. There is no warranty on his part of everything he presents.

A. I understand.

Q. Do you know Mr. Ryan, head of the Longshoremens Union?

A. No, sir.

Q. There has been some mention made of Mr. Potofsky. Do you know anything at all about him?

A. I know none of them.

Q. Or Mr. Waldman?

A. No, sir.

Q. None of those names mentioned here are familiar to you *in any respect*?

A. No, sir, not a bit.

Q. Have you heard of the name of Reles, Abie Reles?

A. Yes, sir, I have.

Q. And Sholem Bernstein?

A. I don't remember that, no sir.

Q. At any rate, no matter what you may have heard or you may have read, it will be dissipated, and you will be open and free and weigh only what comes forth from these people if they should testify under oath?

A. Yes, sir.

Q. Do you believe, if the Court shall charge you that every defendant is presumed innocent, that you can render to him that presumption?

A. Yes, sir.

Q. In other words, do you believe now that our defendant is presumed innocent in law, just as innocent of this charge as any person in this court?

A. Yes, sir.

Q. Do you believe that a substantial right goes to every [fol. 1475] defendant?

A. Yes, sir.

Q. Will you guard him with that presumption throughout the entire trial?

A. I will.

Q. Do you believe that the indictment which the District Attorney has found against him is merely an accusation which the Grand Jury, through the District Attorney, has found against him, and is simply an accusation?

A. Yes, sir.

Q. That it merely says that "We accuse the defendants of the commission of the crime"?

A. Yes, sir.

Q. That it has no force? Do you agree with that?

A. I do.

Q. In the language of the Court, it has no evidentiary value whatever; do you understand that?

A. Yes, sir.

Q. And you are in accord with that?

A. Yes, sir.

Q. You believe, too, that the Grand Jury can indict innocent men?

A. Yes, sir.

Q. That is possible?

A. Possible.

Q. Are you in accord with the law which says that one who pleads Not Guilty to a charge as presented in an indictment denies every allegation in the case against him?

A. I do.

Q. That means he denies he had any accomplice whatsoever or that he had any part in the commission of this crime. You believe in that law?

A. Yes, sir.

Q. That goes together with the presumption of innocence?

A. Yes, sir.

Q. Do you believe in the law which says that the District [fol. 1476] Attorney assumes and must sustain the burden of proving the charge against the defendant?

A. Yes, sir.

Q. Will you compel the prosecutor to carry out that burden?

A. I will.

Q. If the Court shall tell you that at no time does the burden shift to the defense, will you implicitly follow that instruction?

A. I will.

Q. In other words, if a witness for the prosecution takes the stand, you will say to yourself, "I will wait and hear what the defendant says about this"?

A. No, sir.

Q. Do you believe in the law which says that no defendant need assert his innocence or prove his innocence or establish any proof in this case?

A. I do.

Q. That if he does not explain a single thing; if he does not take the stand himself, you may not draw any unfavorable inference against him?

A. No.

Q. Do you believe in that law?

A. Yes, sir.

Q. I am now assuming that his Honor shall so charge you.

A. Yes, sir.

Q. So that, if in the wisdom of counsel our client should not take the stand, we offer no explanation through witnesses of any charge against him, you will not draw any unfavorable inference against him by virtue thereof?

A. I will not.

Q. You will still demand that the prosecutor offer proof showing him guilty beyond a reasonable doubt?

A. Yes, sir.

[fol. 1477] Q. Now, that means you will be guided by the proof and nothing else?

A. Yes, sir.

Q. And then you will be the judge of whether or not that proof is of such a quality as you believe, beyond a reasonable doubt?

A. Yes, sir.

Q. You understand that not every person who takes the stand and raises his right hand and swears to tell the truth does tell the truth?

A. I understand that.

Q. You want to know from whom the proof comes?

A. Yes, surely.

Q. I take it that you dealt, in your regular business affairs, with men who apply for credit?

A. Yes, sir.

Q. Whether financially or just a desire to be believed?

A. Yes, sir.

Q. In other words, to believe the thing, to believe his views.

A. Yes, sir.

Q. If a man takes the stand or a group of men take the stand and say, "We are accomplices in this murder," you will take into consideration whether they are or not, having in mind that out of the mouth of at least one of them, at some time or at some place, in some court, under oath, he denied being an accomplice?

A. Yes, sir.

Q. And you will search for the truth as to whether he is or not?

A. Yes, sir.

Q. You will take all these things into consideration?

A. Yes, sir.

[fol. 1478] Q. In addition you will take into consideration the criminal life he has led?

A. Yes, sir.

Q. And each commission of crime he admits out of his own mouth, you will take that with a great deal of caution, every word he utters from the witness stand?

A. Yes, sir.

Q. If he says he is a robber, a murderer, a pimp, a perjurer, a shylock, and he admits all that, you are going to be more careful in searching for the truth?

A. Yes, sir.

Q. No doubt about that?

A. No.

Q. And will you also search for a motive or interest of the persons who come here and say they have told the truth?

A. Yes, sir.

Q. If you find they have a motive which has induced them to falsify, you will be still more careful in considering their testimony?

A. I would have to be, yes, sir.

Q. If you find that the same person or persons have been so handled awaiting trial of this case, in a manner which would cause them to further falsify, you would take that into consideration too?

A. I don't quite understand your question.

Q. If a man has been treated in a manner, such as living in hotels, taking rides, playing baseball, given the privileges that an ordinary prisoner does not get or that type of crook is not entitled to get, will you take that into consideration, if that treatment he has been receiving will induce him to falsify?

A. Yes, sir.

[fol. 1479] Q. In other words, sometimes a person may take it into his own mind, because of the manner of life he has been allowed to live in the last year and a half or so, and go on the stand and lie about things; isn't that possible?

A. Yes, sir.

Q. And it will be for you to decide whether that is the fact?

A. Yes, sir.

Q. Even if he denies he has any motive in telling falsehoods you are not bound to believe his denials?

A. No, sir.

Q. He may deny from today until doomsday; if you find there is a motive which is hidden, even if he denies it, you

will consider his testimony more carefully by virtue of even his denial?

A. I will.

Q. So, in other words, when you say to the District Attorney in your own mind, "You give us, you prove," you mean, "You prove by believable evidence," evidence that you as a juror can believe after sifting it carefully and after looking into the source from whence it comes?

A. Yes, sir.

Q. You would not drink polluted water without boiling it?

Mr. Turkus: I object.

The Court: Objection sustained.

Q. There is some other testimony, because it is admitted here that on the testimony of so-called accomplices you would not even have an issue to decide—so I take it the District Attorney, in the discharge of his duty, will offer other testimony tending to corroborate. The same rules I [fol. 1480] have outlined will apply to the people who offer this other testimony; isn't that so?

A. Yes, sir.

Q. And if they are murderers, pimps, robbers, extortionists and gunmen, you will weigh their testimony just as carefully?

A. Yes, sir.

Q. In other words, the other testimony in the nature of a guarantee of the accomplice's telling the truth, if it is no better than the source than which it came, you will consider that most carefully?

A. I have to.

Q. If his Honor should charge you that character plays no part in this case at all, unless the defendants or any of them offer it in evidence, will you follow that instruction?

A. I will.

Q. In other words, no matter what you may, subconsciously, think, unless he puts his character in issue, it will have nothing to do with this case?

A. Exactly.

Q. When we asked prospective jurors whether or not they held it against our client because he is now incarcerated for a long time, I asked it for the purpose of finding out whether or not that fact, his imprisonment and conviction, would prejudice people against him from the very

outset. There is such a possibility, you know. Will you be prejudiced by virtue thereof?

A. No, sir.

Q. In other words, what happened, happened?

A. Yes, sir.

Q. "What is the charge now?" that is all you are con-
[fol. 1481] cerned with?

A. Yes, sir.

Q. What is the proof in the case? That is all you will be guided by?

A. Yes, sir.

Q. The fact that the defendants are brought in here under guard or under the care of police and attendants, that is merely the process of bringing prisoners into court. That has nothing to do with the case, you understand?

A. I understand.

Q. That does not detract from the presumption of innocence?

A. No, sir.

Q. We have no control over that and you will not use it against him?

A. No, sir.

Q. If any evidence you hear is subjected to interpretation, one of innocence and one of guilt, if the Court shall tell you you must—you have no choice—accept the innocent interpretation, will you follow that law?

A. I will.

Q. In other words, if a man says, "I was with so and so," mentioning any defendant, and that is the subject of an innocent interpretation, you must give it an innocent interpretation?

A. Yes, sir.

Q. Even if there is a doubt as to which interpretation you shall give, you still may give it the innocent one: will you do that if his Honor shall so charge?

A. Yes, sir.

By the Court:

Q. Do you realize what counsel means? A person may do a thing which may be done innocently and may be done guiltily.

[fol. 1482] A. Surely.

Q. It can be one way or the other—there are many things like that in life. If what was done is consistent with innocence, the person is entitled to the benefit of that?

A. Yes, sir.

Q. You get the point?

A. Yes, sir.

The Court: I don't like to charge in an examination of a juror.

By Mr. Barshay:

Q. If the Court shall tell you you must consider evidence individually in this case, except he charges otherwise you will not bunch the evidence together and charge it to all three?

A. No, sir.

Q. It may sometimes be difficult to separate each bit of evidence, but will you try to do your best?

A. Yes, sir.

Q. And if there is a reason for doubt which you can derive from the evidence with respect to Buchalter, if there is that reason, will you give it to him?

A. Yes, sir.

Q. No matter how many other gentlemen may honestly disagree with you, you personally, after reasoning, logic and talk, and sifting the weight of evidence, you yourself feel there is a reason for doubt, you give it to the defendant?

A. If I have a reasonable doubt, I will give it.

Q. When a reasonable doubt arises out of the evidence?

A. Yes, sir.

Q. I take it that you will take into consideration if some- [fol. 1483] one comes and says, "I am an accomplice of Mr. Buchalter," the fact that that person has never even seen or spoken to Buchalter, that will be one of the things you will take into consideration?

A. Yes, sir.

Q. Can Mr. Buchalter entrust to you every right the law gives him?

A. He can.

By Mr. Cuff:

Q. Have you ever served on any Grand Jury, either State or Federal?

A. No, sir.

Q. You are associated with other brokers in the insurance business?

A. One other.

Q. Is that in the Aetna Life Building?

A. Yes, sir.

Q. Have you been associated with that company for some years.

A. Well, I am not really associated with the company; we established an office there for convenience.

Q. Well, now, since you have been coming to court in this case, have you had discussions with your associates or others over in the building or in that section of the city where you maintain your office?

A. Yes, as to when I would be back.

Q. Did any one of them express to you an opinion about the facts or the defendants in this case?

A. No, sir.

Q. Has anybody else, aside from your associates in the insurance business, discussed this case with you either at home, social contacts outside your home or elsewhere?

A. Only so far as to determine when I would be home [fol. 1484] and where I would be and at what time.

Q. Nothing about the merits of the case?

A. No, sir.

Q. You said you read something about Abie Reles. Can you tell us where you read that?

A. As I remember, it was in connection with another trial.

Q. In what papers did you read it, do you recall?

A. It was either in the *Sun* or in the *Times*.

Q. Do you read the *Mirror*?

A. No, sir.

Q. How many times did you read about him?

A. That would be hard to say, it is so long ago.

Q. Did you read about him more than once?

A. Probably.

Q. Did you follow the accounts of the trial to which you refer you read about Reles in that connection?

A. I followed the trial partly, only in connection with Reles himself, as I recall the name.

Q. Well, now, you cannot tell us how long ago that was?

A. No, sir.

Q. Was it more than a year ago?

A. Quite likely.

Q. Did you have any impression that affects your mind unfavorably to these defendants as a result of anything you read?

A. None whatsoever.

Q. I take it we can rely on the fact you have at present an open mind, ready to listen to the evidence presented here?

A. Yes, sir.

Q. And to weigh it carefully and decide where the truth [fol. 1485] lies?

A. Yes, sir.

Q. Now, on the question of reasonable doubt, assuming the Court will charge you that a reasonable doubt is one which arises from the evidence in the case or the lack of evidence, would the instructions as given to you and after carefully considering the evidence, the credibility of the witnesses, discussing it fairly, honestly, with your fellow jurors, you reach a conclusion in your own mind that there is a reasonable doubt as to the guilt of the defendants or any of them, will you have any hesitation, fear or reluctance in returning a verdict of Not Guilty?

A. No, sir.

Q. If the Court instructs you, as it will, I am sure, that you must weigh the evidence and have no fear, can we rely upon your adhering to your opinion unless you are convinced by reasonable argument based upon the evidence in the case that you are wrong in adhering to that reasonable doubt?

A. Please repeat that question.

Mr. Cuff: I will withdraw it.

By the Court:

Q. Other jurors will not cause you to change your mind—you will be guided by your own opinion as to reasonable doubt?

A. Absolutely.

By Mr. Cuff:

Q. And that is despite the numbers that may be opposed to you, despite the length of time you may be held, you will

[fol. 1486] hold to that reasonable doubt if it is an honest one?

A. Absolutely.

Q. You have been asked a good deal about the presumption of innocence. I would like to know if, in your deliberations, you will consider all of the evidence when you get to your jury room and you will honestly apply, in your own mind at least, that presumption of innocence which is of vital importance and which the law gives to these defendants.

A. I will do that, yes, sir.

Q. And you will do that until there is a unanimous agreement that the defendants are guilty beyond a reasonable doubt, or any of them?

A. Yes, sir.

By Mr. Rosenthal:

Q. In addition to having heard of Abie Reles, do you recall ever hearing any other names that are familiar to you now, in your reading?

A. Well, I remember in connection with the trial the last trial that was held.

Q. How often have you read about Abie Reles in the last year or year and a half?

A. Once or twice probably.

Q. Did you follow any paper in comment with respect to him?

A. Not as I remember.

Q. Assuming he were to be called as a witness in this trial, would the fact of your reading or what you have learned or heard about Abie Reles in any wise tend to influence you as to your determination of the truth or falsity of his testimony in this case?

A. No, sir.

[fol. 1487] Q. Is there any doubt in your mind?

A. None at all, just a name that I have read in the paper.

Q. In addition to being a name, that is a name which you have read in connection with some other article?

A. The previous trial.

Q. Having read that name in connection with a trial, has it left any impression concerning the individual?

A. You mean he himself?

Q. Yes. Answer yes or no to that question.

A. Not an impression, no.

Q. Well, has it left anything in your mind in connection with the individual himself?

Mr. Turkus: I object to that.

The Court: Sustained as too vague.

Q. Can you give us any idea about how long ago it was you read those articles?

A. No, sir, I cannot, honestly.

Q. Can you give us any idea of the newspaper you read them in?

A. The *Times* or the *Sun*.

Q. Have you ever read the names of any of these defendants in any paper?

A. Only in the news items of the *Times* and the *Sun*.

Q. In connection with that, you say you only read in respect to the so-called delay in the trial?

A. That is all.

Q. And the fact that there was a case with Rosen?

A. Yes, sir, that is right.

[fol. 1488] Q. At no time has anybody discussed, other than what you have read in the paper, anything concerning any of the defendants?

A. No, sir.

Q. As you sit here now have you any impression one way or the other as to the guilt or the innocence of these defendants?

A. None at all.

Q. Have you any idea of the manner in which an indictment is found?

A. I presume it is brought to the attention of the District Attorney and they ask the Grand Jury for an indictment.

Q. Are you aware of the fact that when the Grand Jury meets, a defendant is not present nor is there any lawyer in his behalf present?

A. I understand.

Q. That he has no opportunity either to hear what the people in the Grand Jury say or to cross-examine or to do anything whatever?

Mr. Turkus: I object.

The Court: Objection sustained.

The Court:

Q. If the Court charges you that an indictment is simply a written statement of a charge and has no value as evidence, will you follow the charge in that respect?

A. Yes, sir.

The Court:

Q. That is not evidence.

A. I understand that.

Q. Assuming, for instance, that the proof or evidence is offered in this case on behalf of The People, and the defendants offer no evidence, would the fact that there is an indictment, after hearing the Court's charge or statement to [fol. 1489] you now, would that in any wise weigh in your deliberations in the jury room?

A. No.

Q. You understand that The People at all times are compelled to establish the guilt of anybody accused of crime beyond a reasonable doubt?

A. Yes, sir.

Q. And you further understand that at no time is the defendant called upon to make any answer to any charge?

A. I understand.

Q. And even though no answer is made, you cannot utilize that fact in the jury room in deliberating on the guilt or innocence of an individual?

A. I understand.

Q. The mere fact that the defendant represented by myself were to offer evidence, in view of what you have heard here would that fact in your mind compel him to bear his burden of proof?

A. No.

Q. Do you understand what I mean by the word "alibi"?

A. I believe I do.

Q. Briefly, a person has a right to say where he was at a particular time when he is accused of being in some other place?

A. Yes, sir.

Q. Then, assuming proof is offered here by the defendant, represented by myself and my associates, in the nature of an alibi, and the Court were to charge you that the law is that a defendant need not prove his innocence by an alibi, but that if the proof of an alibi is sufficient to raise a rea-

[fol. 1490] sonable doubt in your mind as to whether the individual committed the crime or not, you must resolve that doubt in his favor, the same as you resolve any other doubt, and give him the benefit of that doubt and acquit him—would you have any difficulty in following that law?

A. None.

Q. You feel that is a proper law and you could follow it?

A. Yes, sir.

Q. You have heard Mr. Turkus explain that an accomplice is one who participates in a crime?

A. Yes, sir.

Q. And I assume you heard, since you have been here, that no man can be convicted on the uncorroborated testimony of an accomplice?

A. I heard that, yes, sir.

Q. Do you understand also that no matter how many persons or accomplices testify, that it is no better than one accomplice, in so far as its legal value is concerned?

A. Yes, sir.

Q. Now, you further heard discussed, and if you have not I wish you would tell me, the question that in order to convict there must be other evidence outside of the word of the accomplice, even though that word is believed by you, tending to connect each of the defendants with the crime?

A. Yes, sir.

Q. We have no way at this time of ascertaining what that evidence is; it may in a number of forms; therefore, you understand, those questions directed to you may not be finally raised upon the trial, even though we ask you about them. The evidence does not start until the witnesses take the stand.

[fol. 1491] A. I understand.

Q. Assuming that someone were to take the stand and allege that a defendant told him that he had participated in the crime—do I make myself clear?

A. Yes, sir.

Q. It would be for you then to determine, you understand, the truth or falsity of the statement of that individual that swore on the stand that such was the case?

A. Of course.

Q. Now, in determining what weight or value you would give to such testimony, would you apply all the tests which you would ordinarily apply in the ordinary course of your

business in determining what weight you would give to a statement of that person under oath?

A. Yes, sir.

Q. If you ascertain that the individual or individuals who may make these statements were men who either by virtue of their admissions to the District Attorney before their cross-examination or on cross-examination were compelled to admit that they had committed a number of murders for which they have never been punished, plus other crimes; that under oath they have falsely testified heretofore, even though it was in a court of similar jurisdiction to this; and in addition to that a motive would arise in their mind to tell a story so as to favor themselves; if such things existed, would you scrutinize carefully, with caution and suspicion, what they told you on the stand?

A. I would have to.

Q. You would do the same thing in your ordinary busi- [fol. 1492] ness if somebody even only lied to you three or four times about their assets, and then came to you the fourth time and told you a story, you would look very carefully?

A. Yes, sir, I would be inclined to.

Q. You would not consider them such a good risk—I think that is the word you use in the insurance business.

A. Yes, sir.

Q. In judging—this is more serious, because the risk in the charge of murder in the first degree is a man's life—in judging what weight or credibility you would give to the individual who would make a statement of that character, you would take the entire background plus the motive and interest he might have in making that statement?

Mr. Turkus: I object to that as already having been gone over.

The Court: Objection overruled.

Mr. Rosenthal: I will withdraw the question to save time, as long as it does not meet with the approval of the District Attorney.

Q. Assuming the defendant were to take the stand and offer himself as a witness, would that in your mind create the thought it is incumbent upon him to prove his innocence to you?

A. No, sir.

Q. Of course, if the defendant takes the stand, you understand, you will also apply the tests which you apply to other persons, what interest he may have in telling a falsehood?

A. Yes, sir.

[fol. 1493] Q. But if you once determine he was telling you the truth in respect to this particular episode, do you realize that the truth from him is just as forceful as from any other source?

A. Yes, sir.

Q. And if the Court were to charge you that his testimony, in and of itself, if it created a reasonable doubt in your mind as to any participation by him in the particular crime, must be resolved in his favor, you would follow that instruction?

A. Yes, sir.

Q. You do not believe that because the defendant comes forward and offers proof, in the event of a denial of a motion to dismiss by the Court, which is a question of law—you don't believe that merely because the defendant comes forward with proof, either his own proof by himself taking the stand, or a witness, after the Court has denied a motion to dismiss at the close of The People's case, which is a question of law, that that changes the burden of proof or puts it onto his side?

Mr. Turkus: I object.

The Court: Sustained. That is a question of law.

Mr. Rosenthal: Exception.

Q. If the Court were to charge you that its denial of the motion to dismiss at the close of The People's case is merely a question of law, and that the offer of proof by the defendant thereafter raises no presumption either in the Court's mind nor should it raise any presumption in [fol. 1494] your mind as to the guilt of the defendants, would you follow that?

A. Yes, sir.

Q. Having in mind the last question which I asked you, merely because a defendant would then offer proof to you, it would not raise the presumption in your mind that he is guilty of the crime, would it?

Mr. Turkus: Objected to as already answered.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Is there any reason that has not been reached by any question, which would, in your opinion, prevent you from being a fair and impartial juror?

A. None whatever.

Q. Have you any relatives or close friends on the Police Force?

A. No, sir.

Q. There is a Detective Ryder, I understand. Is he any relation to you?

A. No, sir.

Mr. Turkus: Satisfactory to The People of the State.

Mr. Talley: Challenged peremptorily by defense.

Louis J. Silberling, No. 2617, residing at 929 Hutchison Court, Brooklyn, New York, examined as to his qualifications to serve as a juror.

The Court: It is harder for the Court to proceed with the selection of the jury than to try the issue. Please do not delay.

By Mr. Turkus:

[fol. 1945] Q. You are listed as living at 929 Hutchison Court.

A. Yes, sir.

Q. Is that Sheepshead Bay?

A. Just about at the end of Flatbush, Sheepshead Bay section.

Q. Your vocation is that of business manager, without any specific reference to what you do.

A. I am employed by a music publisher.

Q. What is the name of the concern?

A. The Famous Music Corporation.

Q. What is their address?

A. 1619 Broadway.

Q. Is that a business of having song writers write music and then publishing it, and is it distributed through machines?

A. Publishing the music to music firms.

Q. It would be the distribution to various retailers?

A. Yes, sir.

Q. Have you been engaged in that business for some time?

A. Yes, sir.

Q. For how many years?

A. Nine years.

Q. Prior to that what was your business?

A. I was in the insurance business.

Q. Were you in business for yourself?

A. Yes, sir.

Q. As business manager, do you have anything to do with writing the songs, or just the distribution?

A. Just the distribution, supervising and preparing it.

By the Court:

[fol. 1496] Q. Do you contact radio singers?

A. No, sir.

Q. Just shop?

A. No, sir, just supervising the preparing of publications for sale.

Q. You had nothing to do with the promotion?

A. No, sir.

By Mr. Turkus:

Q. When you were in the insurance business, were you in business in Manhattan?

A. Yes, sir.

Q. Did business at any time bring you in contact with persons in the garment or clothing industry?

A. Yes, sir.

Q. Has that been at the time you were in the insurance business?

A. Yes, sir, that is right.

Q. That was sometime in 1932?

A. Between 1929 and 1932.

Q. Have you maintained any contacts socially with people in the garment or clothing trade since?

A. Yes, sir.

Q. Do you meet these people frequently?

A. Rather frequently.

Q. Have you, by virtue of your former business connection, and now by your social connections, have you ever heard the name of Lepke or Curley discussed?

A. Never.

Q. Did you hear that discussed at the time you were in business?

A. No, I don't think so.

Q. Have you heard any discussions about the investigation of Thomas E. Dewey in the garment center and clothing districts?

A. I have.

Q. Have you discussed those matters with your friends who are affiliated with the industry in the clothing center? [Fol. 1497] A. Yes, sir, occasionally.

Q. As a result of the things you have heard discussed, is the name Hymie (Curley) Holtz familiar?

A. No, sir.

Q. Is there any familiarity with the name of Bruno Belia?

A. No, sir.

Q. Or Bellanca or Tosca?

A. No, sir.

Q. Or Salvatore Marazzano?

A. No, sir.

Q. In discussions have you heard the name mentioned of Murray Weinstein, one-time manager of Clothing Cutters Local No. 4, affiliated with the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Or Samuel Katz?

A. No, sir.

Q. Or Philip Orlofsky, at one time manager of the Cutters Union?

A. No, sir.

Q. Has business in any wise brought you into contact with persons or firms on the Brooklyn waterfront?

A. No, sir.

Q. Did you ever have any contact in the Brownsville or East New York area of Brooklyn?

A. Yes, sir, I did.

Q. Has that been when you were in the insurance business?

A. No, sir, I lived there.

Q. How many years ago was that?

A. Fourteen years ago.

Q. Do you still maintain friendships with people in that district?

A. Yes, sir.

Q. Do you see them frequently?

A. I do.

Q. Have you, since the O'Dwyer investigation com- [fol. 1498] menced, had discussions with reference to investigations in those particular areas?

A. Yes, sir.

Q. Have you heard mentioned the name of Harry (Pittsburgh Phil) Strauss?

A. Yes, sir, I have.

Q. Or the name of Harry (Happy) Malone?

A. Yes, sir.

Q. And that of Frank (The Dasher) Abbandando?

A. Yes, sir.

Q. Did you, in that area, hear discussed the name of Lepke and Curley?

A. Yes, sir, I did.

Q. Without prolonging the examination too much, may I come to the point: Are there things you have heard discussed that have formed an impression in your mind?

A. Yes, sir, they have.

Q. Is that impression still retained?

A. Yes, sir, it is.

Q. Is it an impression which goes to the guilt or innocence of these defendants?

A. I would say to the guilt.

Mr. Turkus: The District Attorney has no recourse but to apply a challenge for cause.

The Court: Try the challenge.

(Louis J. Silberling, of 1929 Hutchison Court, Brooklyn, New York, was then duly sworn.)

By Mr. Turkus:

Q. Without repeating what you said to me, so the other jurors shall not hear it, would you make the same responses to me now if I were to put the same questions to you?

[fol. 1499] A. Yes, sir, I would.

Q. Were those answers frank and true?

A. Honest to God.

(Defense counsel: No questions.)

The Court: Challenge sustained.

The Court: The Court has been studying the possible psychological obstacle in the organization of a trial jury

in calling talesmen individually to the witness stand. That has been done because it is more or less customary in the trial of a capital case, but it is not required. In the interests of possible expedition the practice from now on will be to examine the talesmen in the jury box. Counsel will not be required to announce peremptory challenges until all of those in the box who have not been theretofore accepted will have been completely examined by both sides. That I think will be in the interests of expediency, because it will give counsel more of a chance for the proper deliberation and consideration of each individual case. There are quite a number of questions which may be collectively asked. Judge Talley suggested several days ago a plan which the Court said would be considered. I have considered it. I think Judge Talley's plan was to ask all members of the panel these collective questions. The objection [fol. 1500] to it was that members of the panel sitting in the back of the room were not segregated; they were sitting with spectators and relatives, etc., but with the gentlemen in the jury box it is practical. I think much time may be saved by collective questions being asked all at the same time.

Sidney J. Flamm, No. 2620, residing at 122 Langham Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror, (the witness being in the box while questioned).

By Mr. Turkus:

Q. There are certain questions which have to be asked individually.

The Court: There is a long line of questions which have been asked of each man individually which might just as well be asked of the group.

Q. Mr. Flamm, you are listed as living at 122 Langham Street.

A. Yes, sir.

Q. What section of Brooklyn is that?

A. Manhattan Beach.

Q. Have you lived in that section of Brooklyn for a number of years?

A. Yes, sir.

Q. More than five?

A. Yes, sir.

Q. Prior to that where did you live?

A. Flatbush.

Q. You are listed as a director, without any further explanation. What is it you direct?

A. Director of Radio Station WMCA, until February of this year.

[fol. 1501] Q. What is your present connection?

A. Radio.

Q. In that respect do you act for a station or are you one who buys the time?

A. Buys the time.

Q. Do you put together various shows?

A. Yes, sir.

Q. That would be dramatizing of something to go along with a speech or act?

A. Maxwell House Coffee show on WHN.

Q. Your work does not embrace the part of dramatizing any news stories in certain areas?

A. No, sir.

Q. Has your business brought you in contact with anyone in the garment or clothing industry in Manhattan?

A. From time to time we have had clothing advertisements.

Q. Are they manufacturers of clothes in the garment and clothing district?

A. I don't believe so.

By the Court:

Q. You have advertised one on Lower Seventh Avenue, haven't you?

A. Yes, we did quite some time ago.

Q. Is he a manufacturer?

A. Retail clothing, I believe.

By Mr. Turkus:

Q. That was a concern that had a Chicago factory?

A. I would not know that.

By the Court:

Q. How long ago was that?

A. About five years ago.

By Mr. Turkus:

Q. Have you heard of the Amalgamated Clothing Workers of America in your business?

A. No, sir.

[fol. 1502] Q. Do you know any officials connected with that union?

A. No, sir.

Q. Have you had any other clothing outfit?

A. Yes, sir, Howard Clothing.

Q. Has that been recent?

A. In the last two years.

Q. So that part of the manner in which you make your livelihood is to deal with these various concerns and sell radio time for them?

A. Yes, sir.

Q. Those are the ones who hire you and pay you for your service?

A. Sometimes they pay the broker's commission.

Q. At any rate, part of your livelihood is determined by the good will of the accounts you have?

A. Yes, sir.

Q. Do you have any connection with any firm on the Brooklyn waterfront?

A. No, sir.

Q. Would there be any embarrassment on your part to serve in such a case as this because of your connection with these clothing concerns?

A. Not according to that.

Q. Is there some other reason you have which would make it embarrassing for you to serve?

A. I am arranging for a political talk for Judge O'Dwyer.

By the Court:

Q. Did you arrange that directly with Judge O'Dwyer?

A. No, sir, through Mr. Henry Ughetta.

Q. He is Judge O'Dwyer's representative?

A. I believe he is treasurer.

[fol. 1503] Q. He solicited the time?

A. That is right.

Q. Just the same as if you go to a shop and buy some goods, from you as the salesman?

A. No, sir, I am arranging time on various broadcasts.

Q. Do you go out and solicit these things?
A. No, sir, I do not solicit.
Q. The application came through to you to endorse?
A. Yes, sir.
Q. There is a lot of competition?
A. Terrific competition.
Q. Those who are getting the O'Dwyer order are pretty lucky?
A. It is considered very good business.
Q. By competition, I mean competition for time.
A. As time grows nearer election, the time for speeches, yes.

By Mr. Turkus:

Q. I believe you said it would be embarrassing for you to serve.
A. It would.
Q. You feel, because of the account you are handling, it would be more fitting and proper that you be not on the jury?
A. Yes, sir.

Mr. Turkus: I think so too. I don't want anybody in who would be embarrassed because of that kind of a connection.
The Court: You mean he is challenged?
Mr. Turkus: Yes.
The Court: Try the challenge.

(Sidney J. Flamm, No. 2620, residing at 122 Langham Street, Brooklyn, New York, sworn.)

[fol. 1504] By Mr. Turkus:

Q. Prior to being sworn, I asked you certain questions and you made certain responses.
A. Yes, sir.
Q. Were those responses frank and true?
A. They were.
Q. Is it a fact that you are engaged in the business of selling radio time?
A. Yes, sir.
Q. And that you have a connection with the campaign of Judge O'Dwyer?
A. That is right.

Q. And under the circumstances would you feel embarrassed to sit as a juror in the case?

A. I would.

Q. Your mental state is it would not be proper or fitting for you to partake in the trial of a case in which Judge O'Dwyer, a District Attorney, is interested?

A. That is right.

Mr. Climenko: No questions on behalf of the defendants.

The Court: Challenge sustained.

(The talesmen then seated in the box were examined as follows:)

By Mr. Turkus:

Q. Mr. Haab, is that the correct pronunciation?

A. Yes.

Q. You are listed as living at 391 Warwick Street.

A. Yes, sir.

Q. What section of Brooklyn is that?

A. Brownsville-East New York.

Q. Have you lived there for a number of years?

A. Thirty-six years.

[fol. 1505] Your vocation is listed as that of clerk. By whom are you employed?

A. The Brooklyn Union Gas Company.

Q. Do you understand the nature of this charge?

A. I do.

Q. The defendants are charged with the crime of murder in the first degree. Is there anything about the nature of the charge, namely, the charge of murder in the first degree, which would impair your ability to serve as a juror in the case?

A. No, sir.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No.

By the Court:

Q. Warwick Street is one of the stations on the elevated railroad?

A. On the Long Island Railroad it was.

Q. Isn't that where the Kendel building is?

A. No, sir, that is at Pennsylvania and Atlantic; I am ten blocks away.

Q. You are really in the East New York section, not in Brownsville.

A. Well, no, you may say it includes East New York and Brownsville, about ten blocks away from where the crime was committed.

By Mr. Turkus:

Q. At which branch are you employed?

A. At the present time the Nassau.

Q. Is that in Mineola?

A. No, sir, 1424 Fulton Street, near Classon Avenue.

Q. Since your name was selected as a prospective juror, [fol. 1506] particularly since you received your notice, did anybody speak to you about the case?

A. No, sir.

Q. Have you heretofore served as a juror of any type?

A. Yes, sir.

Q. In a criminal case?

A. No, sir, a civil case.

Q. In that case did the case go to the jury so that it received the judge's instruction on the law?

A. Yes, sir.

Q. So you are familiar with that type of case, in applying the law as given by the judge to the facts in a civil case?

A. Yes, sir.

Q. Well, in this kind of a case on trial there is a different rule. Will you, in this kind of a trial, which has different rules, apply the rules of law given by Judge Taylor, to the facts in this case?

A. Yes, sir.

Q. Do you have any connection with anybody in the garment center of Manhattan or in the clothing district?

A. No, sir.

Q. Or in the clothing trucking industry?

A. No, sir.

Q. Do you have any connection with anybody on the Brooklyn waterfront?

A. No, sir.

Q. Are you in sympathy with the enforcement of the Penal Law of the State of New York?

A. Yes, sir.

Q. There are nine lawyers representing the defendants in this case. I will repeat the names now so that the rest of the jurors will hear them. The defendant Buchalter is

represented by former Assistant District Attorney Bar-
[fol. 1507] shay and former United States Attorney Bertram Wegman, and Mr. Jesse Climenko. Do you know any of those three?

A. No, sir.

Q. Or anyone associated with them in the practice of law?

A. No, sir.

Q. Weiss is represented by former General Sessions Judge Talley, former Assistant District Attorney James I. Cuff, and former Assistant United States Attorney Murray Kriendler. Do you know any of those three or anyone connected with their law offices?

A. No, sir.

Q. The defendant Capone is represented by Sidney Rosenthal, Mr. Fischbein and Mr. Rosenberg. Do you know any of those?

A. No.

Q. Do you know intimately or closely any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know the District Attorney of the County, Mr. O'Dwyer, or any Assistant on his staff?

A. No, sir.

Q. Have you heard discussed with the other jurors the question of accomplice testimony?

A. Yes, sir.

Q. Do you find any fault with the prosecutor who, in order to solve a murder, breaks a case from the inside and accepts the tesimony of co-participants in the crime, commonly known as accomplices?

A. No, sir.

Q. Do you find any fault with the prosecution of an indictment wherein that type of testimony is employed?

A. No, sir.

Q. Will you, in weighing the believability of accomplice [fol. 1508] testimony, look at every circumstance in connection with it?

A. Yes, sir.

Q. Will you look at every black mark there may be against the accomplice by way of background, past criminal association, and vicious or immoral criminal acts he may have committed and everything that may be brought

out in the testimony in derogation of that type of individual? Will you consider it in weighing his believability?

A. Yes, sir.

Q. Will you, in looking the case over, apply your mental faculties to finding out, regardless of his motive or of the things he has done in his life and all the immoral acts he has committed, is he telling the truth about these defendants in connection with their participation as a group in the murder of Rosen?

Mr. Climenko: I object to that as improper. He is asking them to disregard the motive. I assume, under the instructions of the Court he will be instructed regarding that.

The Court: Objection is overruled.

Mr. Climenko: Exception.

Q. I will ask it over again: Will you, in considering the believability or the credibility of an accomplice, look into everything there is? For example: Has he committed other crimes? Has he been associated with——

The Court: That is really a question that should be [fol. 1509] asked by the defense. I have heard you question a great many times, and it impresses me as tending to confuse the juror when asked by the District Attorney, because it is really a question that concerns the interests of the defense and not of the prosecution.

Mr. Turkus: The interests of the prosecution.

The Court: I will not argue any further on that. If you want to ask it, ask it.

Q. Will you, in making an examination of the testimony of an accomplice, use your faculties to find out, Is he telling th truth about the group participating with himself and the defendants in a murder charge?

Mr. Cuff: A situation develops that makes it more difficult to hear the answers of the prospective talesmen. I think the examination would be better if it were held in the chair.

The Court: Listen more attentively.

Mr. Cuff: All those questions could be asked in general of all the jurors, as your Honor suggested.

The Court: That is a collective question. General questions should be asked of all, collectively.

Q. Will you take the law in its every aspect from Judge Taylor?

A. Yes, sir.

The Court: You are losing time.

Mr. Turkus: I don't understand what I am supposed ——

[fol. 1510] The Court: You know, because you have tried a great many cases. It is the usual practice, departed from only on the concession by the Court in capital cases. In about three hundred capital cases I tried it was the usual practice, and I departed from it against my own inclination because it was the desire of counsel.

By Mr. Turkus:

Q. Will you, if selected as a juror, listen to fair argument of the other jurors in the case?

A. Yes, sir.

Q. Will you, by your verdict, endeavor to do justice in the case?

A. Yes, sir.

Q. If you are satisfied, from all the evidence in the case, that the accomplice or co-participant in the crime is not only telling the truth about the group participation of the defendants and himself in the commission of the murder, and you believe that beyond a reasonable doubt, would you hesitate to reflect that in your verdict?

A. No, sir.

Q. Is there any reason which I have not yet elicited by questioning which would impair your ability to be a fair, sensible, ordinary juror in behalf of the People of the State of New York and the defendants at the bar of justice?

A. I am afraid, yes, my contact in the Browsville section with the merchants of Brownsville.

Q. Are there things you have heard in that area?

A. That is right.

[fol. 1511] Q. Assuming Judge Taylor were to charge you that guilt or innocence of a defendant in a criminal case is to be decided solely from the evidence in the case, would you follow that instruction of law?

A. I would try to do so.

Q. Assuming Judge Taylor were to tell you that all of the defendants at the bar, under our law, no matter who they are, are, according to our principles of law, entitled to a fair trial, and that their guilt must be established

beyond a reasonable doubt by believable evidence, would you follow those instructions?

A. Yes, sir.

Q. Would you endeavor conscientiously to apply those instructions to the facts in this case?

A. Yes, sir.

Q. Assuming you are instructed by Judge Taylor that the defendants have no burden of proof, they may sit mute if they wish and say to the District Attorney, in effect "We are sitting still and we are leaving it to you to comply with the law and establish guilt beyond a reasonable doubt, otherwise we want to be acquitted." Will you follow those instructions of law as charged you?

A. Yes, sir.

Q. Will you apply every instruction of law that the judge gives you with respect to the legal and constitutional rights of the defendants at the bar of justice, and conscientiously endeavor to apply the same to the facts in this case?

A. Yes, sir.

Mr. Turkus: There is no challenge for cause of Mr. Haab. Shall I go right down the line and examine the other tales-[fol. 1512] men?

The Court: Yes.

David M. Day, No. 2627, of 71 Willow Street, Brooklyn, New York, a talesman, was then examined as to his qualifications.

By Mr. Turkus:

Q. 71 Willow Street, is that the correct address?

A. Yes, sir.

Q. That is on Brooklyn Heights?

A. Yes, sir.

Q. Have you lived in that section for a number of years?

A. About ten years.

Q. You are listed on this jury as a clerk. By whom are you employed?

A. The Central Hanover Bank.

Q. Have you been a bank clerk for a number of years?

A. Yes, sir, about twelve years.

Q. You heard the questions I put to Mr. Haab with regard to possible connection or association with anyone in

the garment or clothing trades in Manhattan or the clothing trucking industry, the Brooklyn waterfront, Brownsville, and the East New York sections?

A. Yes, sir.

Q. Have you any such contact?

A. No, sir.

Q. Have you heretofore served as a juror in any type of litigation?

A. Just in civil cases.

Q. The law is different in criminal cases. Will you follow the instructions in respect to the law from Judge Taylor regarding criminal cases?

A. Yes, sir.

[fol. 1513] Q. You heard some of the things I have stated to Mr. Haab that would undoubtedly be charged by Judge Taylor in his charge to the jury in this case. Will you endeavor conscientiously to apply the charge on the law to the facts in this case?

A. Yes, sir, I will.

Q. With respect to the testimony of a co-participant or an accomplice, have you any prejudice or bias against the prosecutor for solving a murder by employing the use of that kind of testimony?

A. No, sir.

Q. Do you find any fault with or have you any prejudice against the prosecution of an indictment wherein that kind of testimony is employed?

A. I don't follow you.

Q. Would you have any prejudice against the prosecution for using that kind of testimony on the trial?

A. No, sir.

Q. You heard certain tests that were spoken of to Mr. Haab in connection with the believability of that type of witness, for example, having been engaged in prior crimes?

A. Yes, sir.

Q. Will you consider everything you are supposed to consider in consonance with the Judge's charge on the law in regard to the believability of accomplices?

A. Yes, sir.

Q. Will you always have in mind and keep in your mind what you are here for, to find out, Is this accomplice telling the truth about these defendants as a group and their participation with him as a group in the murder charge here?

Mr. Climenko: I object to the question.

[fol. 1514] The Court: Objection overruled.

Mr. Climenko: Exception.

Q. The charge here is murder in the first degree, that is the killing of Joseph Rosen by shooting him. The proof in a murder case does not show that every man pulled the trigger. It may show other men had different parts in the commission of the murder.

A. Yes, sir.

Q. By a group of men, a conspiracy, where they get together to kill a man, each one to play his part?

A. Yes, sir.

Q. Will you, in looking his testimony over and applying all these tests, look to see if this participant in the crime is telling the truth about the group or participation in pursuit of the conspiracy to kill Rosen—do you understand me?

Mr. Climenko: I object. It employs the use of the word "conspiracy."

The Court: It is a question of law. Objection sustained.

Q. Will you, in looking over the testimony, look to see is the accomplice or co-participant in the commission of the crime telling the truth about his confederates?

A. Yes, sir.

Q. Will you have that in mind when you are weighing the case?

A. Yes, sir.

Q. Is there anything as you sit here that you can think of why you cannot be a fair juror to The People of the State in the determination of this issue as to the guilt or [fol. 1515] innocence of these defendants?

A. No, sir, there is not that I know of.

Q. Will you, if selected, conscientiously endeavor to arrive at a verdict in consonance with justice?

A. Yes, sir.

Q. Will you reason the case out with common sense and understanding with the other jurors?

A. Yes, sir.

Q. And should I establish to your satisfaction, Mr. Day, that these defendants are guilty of murder in the first degree, and satisfy you beyond a reasonable doubt, will you say so in your verdict?

A. Yes, sir.

Q. Without any fear, hesitation, or reluctance?

A. I don't like the use of the word "reluctance." I would say without any fear or hesitation.

Q. But you will do your duty as a juror?

A. Yes, sir.

Q. What I am concerned with chiefly is will you take your job and do it as a juror if you are satisfied they are guilty?

A. Yes, sir.

Q. There is one point I did not cover with you and Mr. Haab. It has been brought out by one of the lawyers for the defendant Buchalter that he has previously been convicted of a crime and is now serving a jail sentence of a substantial number of years. Would that cause either one of you to relax your duty as a juror on this charge of murder?

Talesmen Haab and Day: No, sir.

Q. Would either one of you deviate from a proper decision of the case because of his present incarceration?

[fol. 1516] Talesmen Haab and Day: No, sir.

Q. Mr. Pinto, are you related to Judge Pinto?

A. No, sir.

Q. You are listed as living at 1121 Avenue Y.

A. Yes, sir.

Q. In what section is that?

A. Sheepshead Bay.

Q. You are listed on this trestle board as a switchman.

A. Inside man in the central office of the New York Telephone Company.

Q. Have you been employed by the Telephone Company for a number of years?

A. Eighteen years.

Q. Is switchman some sort of engine work?

A. It is maintaining equipment in the office, to clear up trouble they have with dials.

Q. At any rate, that job is work requiring skill in mechanics in the telephone system and familiarity with the various apparatus and equipment of the company?

A. Yes, sir.

By the Court:

Q. That is in the Sheepshead Bay section, Avenue Y?
A. Yes, sir.
Q. Just one block from Coney Island Avenue?
A. Yes, sir.

By Mr. Turkus:

Q. Is that anywhere near Coney Island, Stillwell Avenue?
A. No, sir, that is in Coney Island.
Q. Have you heard the questions, Mr. Pinto, about contact in Brooklyn and in East New York?
A. Yes, sir.
Q. Does that pertain to you? Have you any such contacts?
[fol. 1517] A. No, sir.
Q. With respect to the garment or the clothing district?
A. No, sir, I have no connection.
Q. With respect to the Brooklyn waterfront?
A. No, sir
Q. Did your work as switchman require special study of equipment?
A. Yes, sir, you have to be trained in that particular work.
Q. You have better than the average high school education?
A. I would not say that.
Q. You have had a specialized education?
A. In that particular branch of telephone office where I work.
Q. That would be commonly called vocational training?
A. Yes, sir.
Q. Since your name appeared on this panel as a prospective juror, specifically, since you got your slip, did anybody speak to you about the case?
A. Only me and my family, my wife, that is all.
Q. Was that in connection with the possibility of service in the case?
A. Yes.
Q. Have you lived in that neighborhood for a number of years?
A. Going on eight years.

Q. Before that where did you live?
A. In Bensonhurst.
Q. How long did you live in Bensonhurst?
A. All the rest of my life.
Q. Are you related to a lawyer named Pinto?
A. No, sir.
[fol. 1518] Q. You have no connection with the legal branch of the Pinto family?
A. No, sir.

By the Court:

Q. Whereabouts in Bensonhurst?
A. I lived between 17th and 18th Avenues before I got married and when I got married I lived on 66th Street between 16th and 17th.
Q. (Mr. Turkus): I spoke about certain names——
Q. That is the section where the Long Island Railroad cuts through?
A. No, sir.
Q. Homewood?
A. Homewood, that is right.
Q. And the New Utrecht Avenue line runs through it?
A. Yes, sir, at 62nd Street and New Utrecht.
Q. How far from that section is the Long Island Railroad cut?
A. It runs all the way down towards Bay Ridge, 8th Avenue at 62nd Street—62nd and New Utrecht.

By Mr. Turkus:

Q. I mentioned to the other prospective talesmen certain names. For example, I mentioned the name of Bruno Belia, Tosca and Bellanca, and Salvatore Marazzano and others. Are any of those names familiar to you?
A. No, sir.
Q. Were any of the names I have read off before or mentioned at any time during the time you have been in the box, at all familiar to you?
A. No, sir.
Q. Is the name Capone a familiar name to you?
A. No, sir.
Q. Or the name of Jesualdo Capone, is that name familiar [fol. 1519] to you, or Zubatch or Tucherman?
A. No, sir.

Q. Did you hear the questions put to Mr. Haab and Mr. Day with respect to accomplice testimony?

A. Yes, sir.

Q. Have you any definite feeling on it other than they have?

A. No, sir.

Q. Will you, if selected, apply your mental faculties to ascertain whether the accomplices are telling the truth, the truth about their participation with confederates in the case?

A. Yes.

Q. Is there anything I have not brought out by questioning so far which goes to your ability to serve as a juror in this case, fair to the People of the State of New York and to the defendants on trial?

A. No, sir.

Q. Have you heard any discussions at all about the O'Dwyer investigation?

A. No, sir.

Q. Have you read newspaper articles in connection with it?

A. I heard more here than I ever knew about it.

Q. Of course, what you heard here was only a discussion with counsel.

A. That is all I know about it.

Q. Will you listen, if selected, to the evidence, with the idea in mind of finding out were these men confederates in the killing of Joseph Rosen as charged?

A. Yes, sir.

Q. Will you use common sense in finding that out?

A. Yes, sir.

Q. Assuming I were to establish to your satisfaction that the defendants at the bar are guilty of murder in the [fol. 1520] first degree and you were satisfied of that beyond a reasonable doubt, would you say that in your verdict?

A. I would.

Q. Would you have any fear in saying so?

A. No, sir.

Q. You would have no hesitation?

A. No, sir.

Q. Did you hear me discuss with Mr. Haab and Mr. Day a point that was brought out by one of the lawyers for

Mr. Buchalter, that he was previously convicted of some crime?

A. Yes, sir.

Q. Would the fact that he has been previously convicted of past crimes and is now serving a penalty for the conviction, would that cause you to relax your duty or deviate from a proper decision in this case?

A. No, sir.

Q. With respect to allocation of evidence, I will take that up together: Will you apply the evidence to the defendants in accordance with the law Judge Taylor gives you?

A. Yes, sir.

Q. If obviously the testimony fails as to one defendant; then you apply it to them specifically, do you?

A. Yes, sir.

Q. If by common sense and logic and in consonance with the Judge's charge, the testimony applies to two or three defendants, will you apply it that way?

A. Yes, sir.

Q. Something has been said about the fact that defendants' lawyers each have a summation, so in all they will have three summations. It may be they may repeat or reiterate arguments—I don't say they will do it intentionally—they have a right to handle their case any way they see fit—if you may hear the same argument three [fol. 1521] times, may I proceed with the understanding that if repetition occurs three times it will not increase the force of the argument three times?

A. That is right.

Q. Can I pass along with the understanding that there is nothing by way of any reading matter or what you have heard nothing by way of any acquaintance or connection that would permit you to render a verdict not in consonance with justice?

A. Yes, sir.

Q. And if your mind tells you the verdict should be Guilty, you will not be afraid to say so?

A. No, sir.

ARTHUR HELTZER, residing at 2387 Ocean Avenue, Brooklyn, New York, was interrogated as to his qualifications.

By Mr. Turkus:

Q. You are listed at living at No. 2387 Ocean Avenue.
A. Yes, sir.
Q. Is that a part of Sheepshead Bay?
A. I guess it is. It is between Avenue S and T.
Q. Have you lived in that district for a number of years?
A. Two years.
Q. Prior to that where did you live?
A. On East 23rd Street.

By the Court:

Q. You are really in the Kings Highway section?
A. Yes, sir.
Q. You use the Kings Highway station?
A. Yes, sir, Kings Highway or Avenue U.

[fol. 1522] By Mr. Turkus:

Q. Your business is listed as that of manager.
A. I am manager of a retail jewelry store.
Q. Where is it located?
A. 480 Fulton Street, Brooklyn, right next to Loeser's.

By the Court:

Q. That is Peter's?
A. Yes, sir.

By Mr. Turkus:

Q. Have you been in the jewelry business for a number of years?
A. Yes, sir.
Q. More than five?
A. Oh, yes.
Q. Has it been all your business experience?
A. Well, pretty near.
Q. How long have you been with Peter's?
A. Twelve years.
Q. Have you heretofore served as a juror in any kind of a case?
A. No, sir.

Q. You heard the questions I put to Mr. Haab and Mr. Day and Mr. Pinto, about taking the law from Judge Taylor?

A. Yes, sir.

Q. Will you, if selected, take the law only from the trial judge and from nobody else?

A. Yes, sir.

Q. Will you, if selected, conscientiously endeavor to apply those principles of law to the facts in this case?

A. Yes, sir, I will try.

Q. You heard me speak about connections in various industries, the garment industry, the clothing industry, and [fol. 1523] the clothing truckers' industry. Have you any connection with any of those three industries or with persons engaged in those districts where the manufacture and dealing in clothing is?

A. None.

Q. With respect to the Brownsville-East New York—and Brooklyn waterfront sections, have you any connections there of any kind?

A. No, sir, none whatever.

Q. Have you had any in the past?

A. None whatever.

Q. I take it by now you are familiar with the discussion of the facts with respect to a case which rests in part upon the testimony of an accomplice?

A. Yes.

Q. Do you understand an accomplice to be one who participates in a crime with confederates?

A. Yes, sir.

Q. Will you, if selected, apply every common sense and reasonable rule to the believability of that type of an individual? Here is what I want to find out: Do you start off with any inherent prejudice against the use of that type of testimony, which would cause you to reject it under any circumstances?

A. There is a possibility.

Q. We have to know better than that. What is your present state of mind? Do you feel that if the case rests upon the testimony of an accomplice you would reject it no matter how it was submitted?

A. I may. It is a question whether I can take the word of the accomplice.

Q. I don't understand you exactly, but we will try to [fol. 1524] straighten it out. Of course, we all expect that you will view the testimony of an accomplice with a great deal of caution. Is your state of mind such that you could never believe that kind of a person, no matter what the circumstances might be?

A. I would not say definitely no; there is a possibility. I can listen to reason, if that is what you mean.

Q. I know you are trying to be fair.

A. There is one reason why——

Q. (The Court): Cannot you put that aside?

A. To be very honest with you, no, sir.

By the Court:

Q. Cannot you concentrate on this case?

A. No, I cannot.

Q. Your jewelry store will be there when you get back.

A. An awful lot depends upon me.

Mr. Turkus: I will apply a challenge.

The Court: Try the challenge.

Arthur Meltzer, residing at 2387 Ocean Avenue, was duly sworn on the trial of the challenge.

By Mr. Turkus:

Q. When you were sitting in this jury box Judge Taylor asked you certain questions and you made certain responses.

A. Yes, sir.

Q. If you were to be asked the same questions by me as you were asked by Judge Taylor, would you make the same responses?

A. Yes, sir.

[fol. 1525] Q. Would those responses be true?

A. Without question.

Q. And frankly, too?

A. Yes, sir.

Q. Is your state of mind such that you cannot listen to the evidence in the case and listen to it as a juror because of something you have on your mind?

A. Yes, sir.

By the Court:

Q. Is it a fact that because of your desire to get back to the jewelry store and supervise the reappraising of your stock of merchandise due to the new Federal tax, that you sort of stretch the point as to your alleged prejudice against the defendant?

A. No, sir, that is not the main reason. I have nothing to do with bias. There is a tremendous amount of work that has to be done before the holidays.

Q. That does not go to your ability to sit and listen?

A. I haven't got a free mind. My mind is not on this case at all.

Q. You mean you are so flustered you cannot listen?

A. Without question.

Defense Counsel: No questions.

The Court: Challenge sustained.

Herman E. Selig, No. 2784, of 702 Forty-fourth Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. The trestle board lists your address as 702 Forty-
[fol. 1526] fourth Street. That is Seventh Avenue and 44th Street?

A. Yes, sir, right at the corner.

Q. What is that, Bay Ridge or Borough Park?

A. Bay Ridge.

Q. You are listed as being a sales manager?

A. Yes, sir.

Q. Supervisor?

A. Yes, sir.

Q. What is the nature of your vocation?

A. Life insurance.

By the Court:

Q. What is the name of the company?

A. The John Hancock Insurance.

Q. Do you collect in the industrial line?

A. No, sir, there are agents that do the collecting.

Q. You are the sales manager. What does that mean?

A. I am the supervising assistant manager, not the sales manager?

By Mr. Turkus:

Q. What are your duties?

A. Supervising eight or nine men.

Q. In other words, your line of business brings you in contact with various people throughout Brooklyn?

A. Yes, sir.

Q. You assist, with other salesmen who procure life insurance, in closing deals?

A. Yes, sir.

Q. If a man is closing a deal and cannot put it over, you go in to help him close it out?

A. Yes, sir.

Q. Are you brought into contact with persons in Brownsville or the East New York area?

A. Very seldom.

Q. Do you have any contact there by way of social or business connections, personally?

A. No, sir.

[fol. 1527] Q. Have you had any in the last five years?

A. Two or three.

Q. Two or three social?

A. No, sir, business connections.

Q. Have they all been in connection with the selling of policies?

A. Yes, sir.

Q. Do you sell industrial or life insurance?

A. Straight life—mostly ordinary life. We do not make a practice to go out and solicit industrial insurance.

Q. You do not go out for the collection of any premiums?

A. Only when the man is away on vacation or the inspector is gone.

Q. On those two occasions you had business connections in Brownsville and the East New York area, have they been in the last two years?

A. Yes, sir. You said in the last five years. I said in the last two or three years.

Q. Have you had any connection in the garment trade, the clothing industry, did you ever have such a connection?

A. Not in the last twelve years.

Q. Were you in the business twelve years ago?
A. No, sir, I was selling garments.
Q. Have you heard the names of Lepke and Gurrah?
A. Yes, sir, I have.
Q. Over a period of years?
A. Yes.
Q. Did those names leave an impression with wou?
A. Yes, sir, the names do leave an impression.
[fol. 1528] Q. If the name of Lepke applies to a defendant in this case, would it leave some impression with you?
A. None whatever.
Q. In other words, can you decide the guilt or innocence of these defendants on the evidence in this case?
A. Yes, sir.
Q. And free of any concept you may have gathered about the names of Lepke and Gurrah?
A. Yes, sir.
Q. As a result of what experience you have had in the district, are you familiar with the name of Murray Weinstein, manager of the local Cuite: Union, affiliated with the Amalgamated Garment Workers of America?
A. No, sir.
Q. Or with Samuel Katz, who also holds an office with that local, affiliated with the Amalgamated?
A. No, sir.
Q. From time to time I have mentioned witness's names. For example, the name of Philip Orlofsky, at one time manager of a union affiliated with the Amalgamated. Is that a familiar name?
A. No, sir.
Q. Are you connected with any union official in the clothing trade or the clothing trucking industry?
A. No, sir.
Q. Do the names of Bellanca and Belia and Tosca mean anything to you?
A. No, sir.
Q. Or the name of Hymie (Curley) Holtz?
A. No, sir.
Q. I have from time to time mentioned the names of the nine lawyers who represent these defendants. Are those names familiar to you?
A. No, sir.
Q. Do you know any of those nine?
A. No, sir.

[fol. 1529] Q. Do you know anyone associated with them in the practice of law?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Have you heard some discussion about accomplice testimony?

A. Yes, sir.

Q. Have you any bias or prejudice against the prosecutor of a county who, in order to solve a murder, employs the use of accomplice testimony against the other perpetrators of a crime?

A. No, sir.

Q. Do you find any fault with the prosecution of an indictment on the sworn testimony of an accomplice used against the other perpetrators?

A. No, sir.

Q. Will you apply all the tests that Judge Taylor says should be applied to the believability or credibility of that type of witnesses?

A. I will.

Q. You will be asked by the defense lawyers whether you will not consider this factor and that factor—you have heard the factors they want considered. Will you do that and consider all factors that should be properly considered in conjunction with the believability of accomplice witnessss?

A. Yes, sir.

Q. Will you by the same token employ your faculties to find out is this accomplice telling the truth about the co-perpetrators of the crime?

A. Yes, sir.

Q. Will all the tests you apply be for the purpose of [fol. 1530] finding out does he tell the truth about the group participating in the commission of the crime?

A. Yes.

Mr. Climenko: I object on the same ground.

The Court: Objection overruled.

Mr. Climenko: Exception.

Q. Is there anything I have failed to urge by questions, which would go to your ability to try this case with justice and fairness?

A. No, sir.

Q. Did you hear me discuss with Messrs. Haab, Day and Pinto about the fact that one of the lawyers for Buchalter brought out that he had been convicted of past crimes and as a result of his conviction has been sentenced to jail for a substantial number of years?

A. Yes, sir.

Q. Would you relax your duty as a juror in this murder case because he has been punished for crimes he has committed in the past and is now serving a jail term?

A. No, sir.

Q. Would that deviate from a proper result, his past conviction and prison sentence?

A. No, sir.

Q. Will you devote your faculties to find out whether or not all these three defendants were part and parcel of a group that killed Joseph Rosen?

A. Yes, sir.

Q. And should the prosecutor satisfy you beyond a reasonable doubt that Buchalter, Capone, and Weiss are three guilty men, guilty of murder in the first degree, will you say that in your verdict?

A. Yes, sir.

[fol. 1531] Q. Will you have any fear in saying that?

A. No, sir.

Q. Will you have any hesitation in pronouncing your verdict?

A. No, sir.

Mr. Turkus: No challenge for cause.

Mr. Barshay: Mr. Haab, I heard you say that your contact with merchants in Brownsville may prejudice you in this case. Maybe you did not use that language, but that was your intent?

The Talesman: Yes, sir.

By Mr. Barshay:

Q. I take it that prejudice will go to the defendants?

A. It may go to either side.

Q. Mr. Turkus is very able to take care of his side, and I will do my best for my side, but it may prejudice you with respect to our defendants?

A. Yes, sir.

Q. And that prejudice, or the possibilty of it, is now in your mind?

A. There is a possibility.

Q. And it may require evidence to remove that prejudice?

A. That is right.

Q. Unless such evidence is furnished to remove the prejudice, it may remain?

A. That is right.

Q. You are not able to lay it aside?

A. No, sir.

Mr. Barshay: Challenge for cause.

The Court: Try the challenge.

George P. Haab, No. 2623, of 391 Warwick Street, Brook- [fol. 1532] lyn, New York, was duly sworn on the challenge.

By Mr. Barshay:

Q. Mr. Haab, now that you are under oath, would you make the same answers to the questions as you did when you were asked and were not under oath?

A. Yes, sir.

By Mr. Rosenthal:

Q. The impression you have, which you stated to Mr. Turkus and Mr. Barshay, who just addressed you, is of such a nature that it goes to the guilt or innocence of the defendants in this case; is that correct?

A. Yes, sir.

Mr. Rosenthal: No other questions.

Mr. Turkus: No questions.

The Court: Challenge sustained.

David M. Day, No. 2627, was then examined by Mr. Barshay as to his qualifications.

By Mr. Bashay:

Q. Have you ever had any prior jury service?

A. Yes, sir, in civil cases.

Q. Recently?

A. About two or three years ago.

Q. Have you ever been a Grand Juror or a Federal juror?

A. No, sir.

Q. Have you been called, without serving, as a special juror?

A. No, sir.

Q. Have you read about this case?

A. Yes, sir, news items.

Q. Have you read about it since you were called?

A. No, sir.

[fol. 1533] Q. Have you formed any impression by virtue of what you have read?

A. No, sir, not in regard to the defense.

Q. Nor to their guilt or innocence?

A. No, sir.

Q. Have you always kept in mind that they are presumed to be innocent under the law?

A. Yes, sir.

Q. And you agree with that?

A. Yes, sir, I agree with that sincerely.

Q. While sitting here being questioned have you formed any impression in this case?

A. Not in regard to the defendants.

Q. In regard to anything?

A. Well, yes, I have formed my impression.

Mr. Turkus: I object to this. Nobody can sit through this without getting some impression.

Q. Have you formed an impression with regard to the case?

A. No, not as regards the innocence or guilt of the defendants.

Q. To be frank, tell us, what impression did you form?

A. Just a general impression that it takes a long time to get along with this thing and it goes along and seems to go through a lot of rigamarole.

Q. You are not charging us with that?

A. No, sir, I am not charging one way or the other; it would have no bearing on my part in the case if I was chosen as a juror.

Q. I take it you understand that we believe we have certain rights and Mr. Turkus believes he has certain rights.

A. Yes, sir, I can appreciate you gentlemen must be very careful.

[fol. 1534] Q. In other words, you understand that a person's life is entrusted to my care?

A. I appreciate that from the defense point of view.

Q. Other than that, I take it you would be absolutely free of bias or prejudice of any kind, nature, or description?

A. Yes, sir, that is the way I feel.

Q. Our clients start off at scratch?

A. Yes, sir.

Q. You have already said you know none of the personnel or the defendants' counsel?

A. No, sir.

Q. I take it that the title that one has will have no bearing in this case, an ex-judge *an* an ex-United States District Attorney?

A. No, sir.

Q. No more than if Mr. Turkus and Mr. Klein were both judges?

A. No, sir.

Q. Both gentlemen who participated in the practice of criminal law. I opposed them when they represented defendants. That does not make any difference?

A. No, sir.

Q. The reading of all the other names Mr. Turkus read or recited or mentioned, they have nothing to do with the case unless from the witness stand they testify their names were connected with this case itself?

A. That is right.

Q. The fact our clients come here into court with so many people around them, that is a matter of procedure; it has nothing to do with the merits?

A. It has nothing to do with the case.

Q. You believe the Grand Jury can indict innocent men?

[fol. 1535] A. I think that is possible.

Q. You will agree to give our clients the presumption of innocence?

A. Yes, sir.

Q. If a man comes in here and declares himself and says, "Mr. Buchalter is my accomplice"—our plea denies not only our participation in this case or that we are an accomplice to any one—if that particular person whose name I have read, whose name is Mr. Sholem Bernstein, so states, will you take into consideration in deciding

whether or not he is an accomplice to us, that he never even saw or spoke to the defendant in his life?

Mr. Turkus: That specific question asks for an advanced opinion.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Then I will ask, if we prove to you that Mr. Sholem Bernstein has been a piece man all his life and declares himself in other people's business, and he is now declaring himself as our accomplice, and you find that fact is not so at all from the evidence, you will take that into consideration?

Mr. Turkus: I object to that.

The Court: Sustained.

Mr. Barshay: Exception.

Q. In other words, the mere fact that he says or any- [fol. 1536] one says they are accomplices to Mr. Buchalter, that will not make it so?

A. No, sir.

Q. Especially when you shall consider, if it comes from the witness stand, that there was an occasion when he denied he had anything to do with this matter at all?

Mr. Turkus: I object.

The Court: Sustained. You cannot question as to a reaction concerning a specific witness.

Mr. Barshay: Exception.

Q. You will take all things into consideration that we shall endeavor to get out of Mr. X, Y, or Z, whoever it may be?

A. I don't get you.

Q. You will consider everything that is brought forth from these witnesses, whether they claim they are accomplices or corroborating witnesses or not; we will try to draw the truth from them, and you will consider those things which we succeed in drawing from them, won't you?

A. I will carefully consider any evidence presented by an accomplice. I will carefully weigh them as to their credibility.

Q. In other words, you will search for the truth?

A. Yes, sir.

Q. And the raising of their hand is no warranty for their telling the truth?

A. No, sir.

Q. You look at the business side they have, people who apply for credit?

A. Not directly.

[fol. 1537] Q. You know the experience you would have if you had a person apply for credit?

Mr. Turkus: Object to the question.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Mr. Turkus himself asked you if you would use your common sense and understanding and business experience when you come to accept or reject a person's testimony.

A. Yes, sir.

Q. And that is what I want you to do. You will use what experience you have had or may have had when a person on the stand says he is a witness in this case and is applying for credit from you: Is it believable or not?

A. Yes, sir.

Q. And if you find he is not worthy of credit by virtue of his past or because he has a motive or interest in giving such testimony, you will consider it before you give him any credit?

A. Yes, sir, as I said before I will weigh carefully any evidence presented, the way it is presented, how it is presented, the person's background, and every other consideration. I would consider any sort of evidence.

Q. And should you decide he is not worthy of belief, you will reject it?

Mr. Turkus: I object. The juror has already indicated that he will consider everything about every piece of testimony in the case.

The Court: Objection sustained.

[fol. 1538] Mr. Barshay: Exception.

Q. You will make every effort to make a search for the truth?

Mr. Turkus: Objected to as already answered and repetitious.

The Court: Objection overruled.

A. Yes, sir.

Q. And that will go too with those who say they have evidence for you which will tend to connect the defendants with the commission of the crime?

A. Yes, sir.

Q. While we are being tried with others, we do not hold out ourselves as being part of any group. Groups have nothing to do with it unless and until the testimony which is believed by you connects Mr. Buchalter with the commission of this crime.

A. I understand.

Q. Being a member of a group has nothing to do with this case.

A. I understand.

Q. His connection will have to be proven by competent and believable evidence?

A. Yes, sir.

Q. We are not trying him as a member of any group.

Mr. Turkus: I object. He cannot ask the witness that.

Mr. Barshay: I will reframe the question.

Q. You understand he is being tried as an individual?

A. Yes, sir.

Q. And he has a right to a trial and the consideration [fol. 1539] of evidence against him separate and apart from the other defendants?

A. That is right; each defendant must be considered separately.

Q. You will consider the evidence, if any, against Mr. Buchalter solely which tends to prove some connection on his part?

A. Yes, sir.

Q. You will not borrow or use evidence given against one defendant and apply it to another defendant?

A. No, sir.

Q. That is the case as to all defendants?

A. Yes, sir.

Q. If the evidence does not convince you beyond a reasonable doubt with respect to Mr. Buchalter's guilt, you will have the courage to say "Not guilty"?

A. Yes, sir.

Q. There is no doubt about it?

A. No doubt about it.

Q. So far as you are concerned, Mr. Day, Mr. Buchalter can place his legal rights in your keeping?

A. I believe so.

JOSEPH PINTO, No. 2629, a talesman, was then examined from the jury box as to his qualifications.

By Mr. Barshay:

Q. Mr. Pinto, have you had any prior experience?

A. I have had, in civil cases, but not in criminal cases.

Q. Have you read about the case?

A. Only since I have been here, about the trial.

Q. Have you accepted what you read as true?

A. I have not read anything about this particular mur- [fol. 1540] der case; only what is going on in here.

Q. Have you formed any impression with respect to the defendants' guilt or innocence?

A. No, sir.

Q. So your mind is absolutely free of bias and prejudice?

A. Yes, sir.

Q. We can start off from scratch?

A. Yes, sir.

Q. As does Mr. Day, do you believe in the presumption of innocence?

A. Yes, sir, until they are proven guilty.

Q. You will not require the defendants to prove their innocence?

A. No, sir.

Q. Or explain any charge against them at all?

A. No, sir.

Q. The Court will instruct you in that respect?

A. Yes, sir.

Q. If we do not call a witness, if we do not explain it here, you cannot charge that against us?

A. No, sir.

Q. Will you do that?

A. Yes, sir.

Q. No doubt about it?

A. No, sir.

Q. So, if anyone— No one has brought forth to your mind any reason why you cannot be a juror here?

A. Not as I know of.

Q. Will you render a verdict separately in each case on the evidence that is presented with respect to each defendant?

A. Yes, sir.

Q. On the question of accomplice, will you use the care and caution that is required of you if His Honor shall charge you, before accepting it?

A. Yes, sir.

Q. I do not have to repeat the details; I have already [fol. 1541] mentioned them to the other gentlemen.

A. No, sir.

Q. And if there is one reason for doubt which arises out of the evidence, you will give it to the defendants?

A. If the Court so charges; I will take it from the Judge.

Q. Take it from me, you will take it from him.

A. I don't know, I would have to take it after I was charged what to take and not to take; I don't know nothing about it.

Q. If you should find I am right in saying the Judge will charge that if there is one reason for doubt which arises out of the evidence, you must, you have no choice?

A. Yes, sir.

Q. If the evidence is subject to two interpretations, innocence and guilt, and the Court shall tell you you must give it the innocent one, you will do that?

A. Yes, sir.

Q. And if there is a doubt in your mind as to which you shall accept, you will still give the benefit of it to the defendant, because the Court shall so charge you?

A. Yes, sir.

Herman E. Selig, No. 2784, a talesman, was then examined by Mr. Barshay as to his qualifications from the jury box.

By Mr. Barshay:

Q. May I know the names in your company?

A. Cohen & Feldman they are the dealers.

Q. You said you heard the names that Mr. Turkus mentioned. Have they formed an impression upon you at all?

A. No.

[fol. 1542] Q. That has nothing to do with the case?

A. No, sir.

Q. Have you read about it?

A. Yes, sir, I read about it.

Q. Have you formed an opinion by virtue thereof?

A. No, sir.

Q. Has anybody spoken to you about this case?

A. No.

Q. Have they expressed an opinion?

A. No.

Q. Are you now free of any prejudice or bias of any kind or nature against these defendants?

A. Yes, sir.

Q. And at your hands they can now feel as though they can get a fair trial?

A. Yes, sir.

Q. Do you believe in every law that has been explained here to prospective jurors?

A. Yes, sir.

Q. And you will enforce them if the Court so charges?

A. Yes, sir.

Q. Is there anything I asked of these other gentlemen in the box that you would answer differently?

A. No, sir.

Q I take it the rules with respect to accepting or rejecting an accomplice's testimony would be strictly applied by you?

A. Yes, sir.

Q. And if they have a motive, if they have denied it, you will consider that?

A. Yes, sir.

Q. In other words, you will ask the District Attorney to prove his case, as the law demands he shall, by competent and believable evidence, not by any kind of evidence, but prove it beyond a reasonable doubt?

A. Yes, sir.

Q. And it will be for you to believe or disbelieve any of [fol. 1543] the witnesses who say these things?

A. Yes, sir.

Q. Will you demand an explanation by any of the defendants of the charge against him if the Court tells you that the defendant need not prove or disprove any charge against him?

A. No.

Q. In other words, you will take this case, and if the People have failed to prove him guilty beyond a reasonable doubt, and the Court tells you you have no right to draw an unfavorable inference against him, you will not do so?

A. No, sir.

Q. The burden shall always be with the prosecution?

A. Yes, sir.

Q. If Mr. Buchalter should take the stand and, as you already know, testify that he is now incarcerated for a considerable number of years, I think forty or seventy, will you hold that against him in this case?

A. No, sir.
Q. No doubt about it?
A. No, sir.
Q. You will try here the case contained in the indictment?
A. Nothing else.
Q. Will you hold yourself strictly to that issue?
A. Yes, sir.

(A recess was taken until two o'clock p. m., and talesmen admonished as previously as to their demeanor. Defendants are remanded.)

[fol. 1544] Afternoon Session—Trial Resumed

(All defendants represented by counsel.)

The Court: You may proceed.

(Interrogation of talesmen in the jury box continued.)

By Mr. Barshay:

Q. Just one question, Mr. Pinto. Did you read anything about this case other than the items you mentioned in the paper?
A. No.
Q. No place else did you hear about this case?
A. No, sir.
Q. Speeches or radio or something like that?
A. I happen to be working 4 to 12, so I am not at home to hear them.

By Mr. Talley:

Q. I understand that none of you gentlemen have served on a criminal jury before.
A. (By a Talesman): I have.
Q. Mr. Day, do you understand that an indictment is merely an accusation in writing?
A. I do.
Q. It carries no import of guilt of the defendants named therein?
A. I understand.
Q. And do you understand that the burden of proof of the facts of that indictment always rests on the People, who bring that indictment?
A. Burden of proof rests with the District Attorney.
Q. Do you understand that?

A. Yes.

Q. Do you understand that that burden never shifts at any part of the trial from the shoulders of The People [fol. 1545] onto the shoulders of the defendants?

A. I understand.

Q. If the Court should charge you that it is the right of a defendant either to take the stand or not take the stand as he sees fit, and if any of these defendants should not take the stand that you should not indulge in any presumption against them because of their failure so to do, if the Court charges you, will you give each of those defendants, if there are such, that presumption in their favor?

A. Yes, I will.

Q. And you understand that the law goes a step further and requires that before a jury can convict they must be satisfied beyond a reasonable doubt as to the guilt of that defendant before such conviction can be found properly and conscientiously? Is that your understanding?

A. That is my understanding, yes.

Q. And if you have, after hearing all the evidence and having weighed it and discussed it with your fellow jurors, if there is a reasonable doubt in your mind—and the Court will tell you what a reasonable doubt is—if there is a reasonable doubt in your mind will you resolve that doubt in favor of the defendants?

A. Yes, I will.

Q. You have no impression as to the guilt or innocence of these defendants from anything you have read or said or heard said?

A. No.

Q. Up to this moment; is that correct?

A. No, I have not.

Q. Mr. Pinto, do you understand our law about an indictment?

[fol 1546] A. Yes, sir.

Q. It is nothing more than a paper, which is an accusation?

A. Yes.

Q. And that it does not carry with it, because an indictment has been found, any presumption?

A. Yes.

Q. That the defendants named in that indictment are guilty of what the indictment sets forth and that that

indictment must be proven and proven by the People to your satisfaction beyond a reasonable doubt?

A. Yes, sir.

Q. If you have a reasonable doubt after hearing all the evidence, as to the guilt of any of these defendants, will you, without hesitation or fear, find a verdict in their favor?

A. I will.

Q. And on all these matters involving the rights of every defendant in our courts, to require the District Attorney to sustain the burden which he assumes when he brings a defendant into court charged with any crime, and if the Court charges you that that guilt must be established beyond a reasonable doubt in your mind, will you follow implicitly the instructions of the Court?

A. I will.

Q. And if a defendant does not take the stand, advised by counsel or otherwise not to do so, or there is no necessity for his doing so, and if the Court charges you that you are not to indulge in any presumption against him because of his failure to take the stand, will you follow that in-
[fol. 1547] struction of law?

A. I will.

Q. And you will not hold it against them?

A. No, sir.

Q. If they do not take the stand, realizing under the instructions of the Court that that is the right of every defendant in every criminal trial; is that correct?

A. Yes.

Q. Mr. Selig, does the same thing apply to you?

A. Yes.

Q. You realize the burden the District Attorney has of proving the guilt. It is not at any time under our law up to a defendant to prove his innocence. There is the distinction. The law gives, the District Attorney, as prosecutor, must prove their guilt. You understand a defendant can stand mute and remain silent, exercising the right which the law gives him, without a juror or jury assuming that he must be guilty because he has not taken the stand. You understand that? And if such a defendant does not take the stand you will not indulge in any presumption adverse

to him solely because of his failure to take the stand; is that correct?

A. That is right.

Q. You have no impression, have you?

A. None at all.

Q. About the guilt or innocence of these defendants in any respect?

A. None at all.

Q. Nothing you have read or heard has influenced you one way or the other with respect to the guilt or innocence of these defendants; is that correct?

A. That is right.

Mr. Talley: No further questions.

[fol. 1548] By Mr. Rosenthal:

Q. Do any one of you three gentlemen know anybody connected with the District Attorney's office?

A. No, sir.

Q. Or have you any relatives or close friends on the Police Force?

A. (By a Talesman): I have a brother-in-law.

Q. What is he, a policeman?

A. Policeman.

Q. Uniformed officer?

A. No, he is associated with traffic, an officer.

Q. Have you discussed police matters with him at any time?

A. No, sir.

Q. The fact that you have a brother-in-law on the Police Force would not affect your determination in this matter, would it?

A. No, sir.

Q. Addressing myself to you, Mr. Day, you realize that although these three men are being tried together and you are only going to hear the witnesses once, that in reality each lawyer representing a particular defendant has a separate and distinct task? You understand that?

A. Yes, I understand that.

Q. So that, whereas it may appear to you that certain questions are repeated by different lawyers and thereby prolong the trial, that, you understand that that is the duty of the particular lawyer, to ascertain on behalf of his

client what he considers is a favorable circumstance to his particular part of the case? Do you understand?

A. Yes.

[fol. 1549] Q. Appreciating that and knowing the hardship that it is for any man to serve on the jury and thereby take himself away from his business, you are not going to hold against any defendant the fact that lawyers in their zeal, advocating their particular cause, whether it be the District Attorney or defense counsel, have what might appear to your mind repeated the same thing twice?

A. No, that would not have any effect.

Q. No force and effect of me in asking you questions now, repeating something that Mr. Turkus or Judge Talley or Mr. Barshay, but you realize that I am doing that because my mind is operating in a particular way and theirs is operating, because——

A. I understand.

Q. You, I think, said that you have not read anything of any concern in the newspapers about this case. Am I correct in that assumption?

A. Just items describing what took place in the court since the trial started.

Q. And that has left no impression of any character on your mind which would be detrimental to The People or to the defendants; am I correct in that statement?

A. You are correct.

Q. It has been indicated in the questioning of jurors that in all probabilities in this case the prosecution will rely on what they call an accomplice. That has been gone over with you and with others, so that I think by now you are pretty familiar with what the term accomplice means. Am I right in that statement?

A. Yes.

[fol. 1550] Q. You understand that your duty is not to find out whether or not the accomplice is telling the truth about himself? In other words, if an accomplice got on the stand and says he admits killing Rosen, your job is not to find out whether he is telling the truth about what he did, your job is to find out whether he is telling the truth about what he said others did. That is the difference. Is that clear to you?

A. Yes, that is clear.

Q. In other words, it could be fairly possible, is that not so, that a man may go on the stand and admit that he

killed somebody and be telling the truth as to what he did but he might involve somebody else and be telling a lie as to that?

A. That is quite true.

Q. So that the job which you have and which you will direct yourself to is the job of ascertaining not only as to whether he is telling the truth concerning his participation in this particular crime, but as to whether he is telling the truth at all as to anything that he may say about others being involved; is that true?

A. That is true.

Q. I have asked other men, and I want your reaction to the question. The Court will charge you, of course, that no man can be convicted on the uncorroborated testimony of an accomplice, even though you might believe that accomplice. The law goes even that far as to say even if you believe a person who admittedly was an accomplice, that [fol. 1551] you still could not convict any man under our laws unless there were other evidence in the case satisfying you beyond a reasonable doubt and tending to connect the defendant accused with the crime itself. Is that clear to you?

A. That is very clear, yes.

Q. Do you understand by now that that evidence cannot be furnished by a number of accomplices; there must be others than accomplices to testify; is that clear?

A. That is clear.

Q. And do you further understand, sir, that although the law, the Judge may say to you as a matter of law where there is no dispute—So-and-so has taken the stand and I charge you as a matter of law he is an accomplice—that under those circumstances you must take that to be the fact and must, in determining in your jury room, say to yourself, "This man has been charged by the Judge as a matter of law to be an accomplice"; is that true?

A. That is clear.

Q. Now then, do you understand further that there may be a dispute as to the participation of certain witnesses called by the District Attorney in the crime? In other words, there may be evidence which leaves it open as to whether or not he actually is an accomplice or he is not an accomplice? Do I make myself clear?

A. It is up to me to decide.

[fol. 1552] Q. Then it is up to you. Even the Judge will say it is up to you, the jury, to decide from what you believe, from his actions, from his demeanor, from his motives, from his testimony, from his activities, his close proximity to the crime, and anything that might be said or done on the witness stand, whether you as a juryman say as a question of fact that he is an accomplice; is that clear?

A. It is clear.

Q. Is it very clear to you, sir, that if you once determine in your jury room that a man is an accomplice, whether the Judge has told you as a matter of law he is an accomplice or whether you determined it as a question of fact, that the same principles of law surround him as surround the man who the Judge said was an accomplice as a matter of law; is that clear?

A. Yes, that is clear.

Q. I don't intend to repeat these questions if I can avoid it, and if there is anything in the mind of you, Mr. Pinto, or Mr. Selig, which would in any wise be different from what Mr. Day says, then if you will keep it in your mind I will direct my question that way, and in that way I can save time and avoid repetition of the same questions.

Now then, if you once determine that these people are accomplices, you understand that it is then your duty to ferret and sift through the evidence to ascertain whether [fol. 1553] there is other evidence satisfying you that the proof establishes facts tending to connect the particular defendant with the crime that you happen to be deliberating on at the time? That is clear?

A. That is clear.

Q. The Court will, of course, charge you that because a man an accomplice, says, "I know that a defendant committed the crime and shot and killed him and left him on the roadway," that the proof that he was left on the roadway supplied by somebody and the proof that he was shot is not evidence which connects or tends to connect the defendant.

Mr. Turkus: I object to it.

Mr. Rosenthal: This is preamble to what I intend to find out, whether the juryman will follow the Court's instruction on the law.

Mr. Turkus: I have an objection, your honor.
The Court: Finish the question.

Q. Let me withdraw it and put it this way: If the Court were to charge you that the mere fact that an accomplice, in telling you his story, says that the man was shot, and, of course, it is proved that he was shot and that he was left on a certain corner dead, and it is proved that he was dead and was on the corner, is not the evidence which is required, the independent evidence that is required to connect the particular defendants with the crime, would you follow that law?

[fol. 1554] Mr. Turkus: Objected to. This is a discourse on the law.
The Court: Overruled.

By the Court:

Q. The proof of the murder does not prove who did it. Do you understand that?
A. Yes, I understand.
Q. So corroboration of the fact that a man was murdered does not corroborate as to who did it?
A. That is right.

By Mr. Rosenthal:

Q. That is the point. Now then, in looking through the evidence to find independent evidence, you are going to find what believable independent evidence there is, if any, which tends to show that the defendant Capone, whom I represent, had something to do with the particular murder isn't that true, sir?
A. Yes, that is true.
Q. Now then, assuming that the District Attorney relies upon what is termed an admission, to supply this independent evidence, in other words, some men or man go on the stand and say that in a talk they had with the defendant Capone, he, Capone, said that he committed the crime, and the District Attorney then says to you that is the independent evidence, will you, if such happens to be the case, carefully scrutinize the source from which this alleged admission comes?
A. Yes.

Q. And determine whether the particular individual has [fol. 1555] committed a great many crimes of any and every degree, for which he has never been punished, and where and when he is supposed to have had this conversation, and when and where he is supposed to have divulged it, and whether he has ever been under oath before and whether he told the truth when he was under oath and whether he lied, and everything, including his actions, his demeanor on the stand, and everything which you see in this court-room in ascertaining in your own mind and according to your own conscience whether you believe that what he says is the truth or not? Would you do that?

A. Yes, I would.

Q. And that, I assume, the three of you would; is that true?

A. Yes.

Q. If you once were in doubt of the veracity of that particular individual or those individuals, and had a reasonable doubt as to the truth of his statement, and that was the evidence which The People relied upon, the independent evidence, and the Court were to charge you that if a reasonable doubt is created by anything, either the evidence itself or the lack of evidence, that you must resolve that doubt in favor of the defendant, would you hesitate to come in and resolve the doubt in his favor and acquit him?

Mr. Turkus: I object to extended discussion as to the possibilities of the proof.

The Court: Overruled as to this.

[fol. 1556] A. If that was the only evidence, I would not find the defendant guilty.

By the Court:

You cannot say how you would find the defendant. These questions are purely in the abstract. You cannot announce a decision before you try the case.

A. No.

Q. The question is whether you will fairly consider the evidence and use common sense in determining who tells the truth and what are the reasonable inferences you will accept as true.

By Mr. Rosenthal:

Q. The point is, in asking all these questions, and the reason for the repetition, you understand is to see whether or not, under the principle of law which we say the Judge is going to charge to you, that your reaction would be such that you would accede to those principles without any mental reservations or hesitation in the jury room.

A. I would have no——

Q. Whatever principle it may be. Some men disagree with the law as it is, and that disagreement is of a nature where they would be biased one way or the other in the jury room, and for that reason we ask you these different questions. I take it from your answer that such would not be the case with you.

A. I would abide——

Q. By the law as charged to you by the Court?

[fol. 1557] A. That is right.

Q. Subordinate any knowledge you might have to the law which the Court charges?

A. That I would try to do.

Q. You may have heard, while you were in the courtroom here, the question of alibi discussed. Were you present?

A. Yes, I heard that.

Q. Merely because a defendant were to take the stand, offer himself as a witness, that fact alone would not in your mind brand his testimony as untrue, would it?

A. No.

Q. The mere fact that he is a defendant. You, of course, will apply all the tests that apply to anybody else in determining for yourself whether he tells the truth; am I right in that?

A. Yes.

Q. And, having once found that he has told the truth, if you so find, the truth from him is just as valuable as from any other source, isn't that true?

A. Yes, if I believe what he said.

Q. Do you understand that the offer of an alibi does not in any wise shift the burden of proof over to the defendants' side of the case? Do you understand that?

A. I understand that, yes.

Q. Do you further understaad—and whenever I make this statement it is always with the preamble that if the Court

instructs you in the manner in which I am asking the question, then you will follow it, otherwise you would disregard [fol. 1558] it—do you further understand that if a reasonable doubt is created in your mind as to the guilt of any defendant, brought about by testimony of an alibi, that you must resolve that doubt in his favor, the same as you would any other reasonable doubt, and acquit him? Do you understand that, sir?

A. Yes, I understand.

Q. Do you further understand and are you willing, in the event that you are charged in that manner, that if a doubt is created of a reasonable nature by reason of the testimony which is adduced on behalf of the defendant regarding his presence elsewhere, and his not being connected with the crime, and that that doubt, or that reasonable doubt, must be applied to the defendant the same as any other reasonable doubt in your mind? Would you follow such instruction?

A. Yes, if I had a reasonable doubt as to being where the crime was committed, I would.

Q. Resolve that doubt in favor of the defendant. I take it that—and I might ask this question of the three of you—do you happen to know Lieutenant Osnato?

A. No. No.

Q. Or Captain Bols?

A. No, sir.

Q. I take it none of you are going to actively engage in the political campaign which is now under way.

A. Except to vote.

Q. That is your duty. Probably if you had not voted, you would not be here today, because you would not be on the [fol. 1559] list. I mean other than to vote for whoever you choose to vote for, that you will not take any active participation?

A. No.

Q. The District Attorney stated about breaking a case from the inside. You understand, Mr. Day—and this applies to the three of you—that your job here is to ascertain whether any case is broken, inside or outside. You understand that? Is that clear to you?

A. Yes.

Q. The mere statement of a District Attorney or an Assistant to you that a case is solved—that is the word he used—have you any objection to a District Attorney solv-

ing a case by breaking it from the inside—you fully realize that it is your duty to say whether or not, as far as these defendants are concerned, it has been solved; isn't that true?

A. It is our job to decide whether they are guilty.

Q. Which means the solution as far as this defendant is concerned, isn't that true?

A. I suppose so.

Q. It may be true that he solved it as far as the particular individual who said that he participated in the crime. That is clear, isn't it?

A. Yes.

Q. But when it comes to the question of the testimony of that individual on the stand that he was aided or assisted by others, and names the others, you understand that it is your duty to ascertain whether or not he is telling the truth in respect to that and whether, with the other questions of law that I have already stated to you, it has been estab- [fol. 1560] lished beyond a reasonable doubt before you can find any defendant guilty—you understand that?

A. Yes.

Q. You are not impressed, are you, sir, by the fact that the District Attorney has told you or has intimated that this case has been solved from the inside?

Mr. Turkus: I object to it. The juror has already been asked that.

The Court: Sustained.

Mr. Rosenthal: I have not asked that question at all of this juryman, whether he is impressed by that statement.

The Court: I don't think it is competent anyway. Sustained.

Mr. Rosenthal: Exception.

Q. Is there any impression in your mind existing at the present time which would in any wise require evidence on anybody's part to remove by reason of the statement made by the District Attorney in respect to solving a case from the inside?

Mr. Turkus: Objected to. It has already been answered.

Mr. Rosenthal: I have not asked the question.

The Court: I sustained the previous objection because I cannot conceive of any juryman accepting a preliminary question by counsel for either side as proof in the case.

Mr. Rosenthal: I am not asking about proof. I told him it is not proof——

By the Court:

[fol. 1561] Q. You realize when Mr. Turkus asked you that question that it is not proof that the case was broken from the inside?

A. Yes.

Q. You all realize that?

A. Yes.

By Mr. Rosenthal:

Q. Let me just ask you this other question: The mere fact that a defendant were to know some of the prosecution witnesses or the mere fact that they may have been in there together at some time or other, that fact standing alone, would that prejudice you against the defendant if you were not satisfied that the defendant participated in the particular crime? Is that question clear to you, Mr. Day?

A. It would have no bearing on my decision of guilt or innocence.

Q. How about you?

A. The same way.

Q. And how about you?

A. Same.

Q. Is there any reason why any one of you three gentlemen know, is there any reason that you know of, that has not been reached by questioning by any of the counsel that you feel would in any wise incapacitate you from acting as fair and impartial jurors?

A. No.

Mr. Talley: All three jurors are satisfactory to the defendant and all defendants.

Mr. Turkus: Mr. Day is satisfactory to The People of the State. Peremptory on the other two.

(David M. Day takes Seat No. 4 in the jury box.)

The Court: Fill the box.

(The following talesmen took their seats in the jury box: Iver Bae, of 920 Fifty-second Street; Walter C. Petterson, [fol. 1562] of 480 East 21st Street; Herbert A. Horland, of 4727 Bedford Avenue; Sam Silfen, of 495 Schenectady

Avenue; Clinton T. Eckstein, of 136 Herkimer Street; Theodore A. Bartholomew, of 1550 East 17th Street; John E. Fuller, of 850 East 31st Street; Henry T. Gill, of 818 Fifty-seventh Street, Brooklyn.)

The Court: The other members may return at seven o'clock.

Mr. Climenko: If your Honor pleases, may I ask what time your Honor intends to recess?

The Court: Well, my present intention is that the seven o'clock jurors would come in after supper time.

Mr. Climenko: I am trying to ascertain, your Honor, at what time I should be able to have my own dinner and communicate with my office.

The Court: I intended to have the supper recess at six.

Mr. Climenko: Thank you, sir.

The Court: That breaks up the day nicely. It means three hours' work in the morning; it means four hours in the afternoon. That is rather tiresome, but after an hour's recess everybody will feel better.

Mr. Climenko: If I may say so, your Honor, it constitutes something of a hardship to those who must look to their offices.

[fol. 1563] The Court: I have had worse hardships than that.

Mr. Climenko: Of course, this one I feel more keenly. Of course your Honor does not.

The Court: Just take it on the chin. Proceed.

(The eight talesmen who took their seats in the jury box were then examined as to their qualifications.)

By Mr. Turkus:

Q. Mr. Bae, there are certain questions which I will ask through you which apply to the other members of the jury and there are others that apply just to you. I will try to get through with those which apply specifically to each juror, and then I will go into those that apply——

You are listed as living at 920 Fifty-second Street; is that right?

A. Right.

Q. Is that the Bay Ridge section of Brooklyn?

A. That is right.

Q. And you are listed as a draftsman?

A. That is right.

Q. By whom are you employed?

A. Consolidated Edison.

Q. And how long have you worked for the Edison?

A. Twelve years.

Q. Prior to working for the Edison what kind of work did you do?

A. Same thing.

Q. Was that for some other utility?

A. Well, branch of it.

Q. A branch of the Edison Company?

A. That is right, or it was not exactly a branch, but it is considered as a branch.

[fol. 1564] Q. Subsidiary of some sort?

A. Yes.

Q. Do you understand the nature of the charge since you have been coming into court as a juror, that the defendants at the bar here are charged with the crime of murder in the first degree?

A. I understand that, yes.

Q. Is there anything about the nature of the charge which would prevent you from being a fair and just juror?

A. No.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No, not exactly scruples, no.

Q. Is there something in your mind about that?

A. If it should come as a rule. As it is the law, I would stick up for it.

Q. You mean you are not in favor of capital punishment?

A. Not in general, no.

Q. Would that attitude of yours have some bearing on your deliberations in the case?

A. No.

Q. Would you consider the question of punishment in deliberating in your own mind about the guilt or innocence of the defendants?

A. Certainly.

By the Court:

Q. That is a question of law. The law is that you shall not. Will you follow that instruction?

A. (No answer.)

Q. The law is that you shall not consider the question of punishment. Will you follow that instruction?
A. Yes, sure.

By Mr. Turkus:

[fol. 1565] Q. Even if the Judge tells you that you should not consider the question of punishment, would the state of mind which you have, which is contrary to capital punishment, still enter into your deliberations?

Mr. Rosenthal: I object to the form of the question.

A. No.

The Court: He says no.
Mr. Rosenthal: I withdraw it.

Q. One of the defendants' lawyers has pointed out that he has been heretofore convicted of past crimes and sentenced to a long jail term. Would you be inclined to relax your duty as a juror because of that fact?
A. I don't believe I quite get that.
Q. One of the lawyers has pointed out that his client has been convicted——
A. Yes.
Q. —of crimes that he committed, other crimes, and sentenced to jail for that. Do you understand that part of it?
A. Yes.
Q. Would you permit the fact that that man is in jail to cause you to relax your duty as a juror in this murder charge?
A. No.
Q. Would you permit that fact to cause you to render any other but a proper verdict in the case?

Mr. Climenko: I object to the form of the question.
The Court: Overruled.
[fol. 1566] Mr. Climenko: Exception.

Q. Do you understand that?
A. Will you repeat that last part?

By the Court:

Q. Would you permit that to affect your verdict?
A. No.

By Mr. Turkus:

Q. What kind of work is it that you do for the Edison, Mr. Bae?

A. Power station.

Q. Is it a foreman's job or workman's job?

A. No, it will be workman's job. Have a foreman, one who is in charge of it.

Q. Is it the type of work that you require some particular skill and prior schooling?

A. Yes, sure. Have to go to school and get a lot of experience.

Q. And was that some college or vocational school?

A. Well, it is college, partly college anyway. It is called an engineering college. Pratt Institute I have been going to.

Q. Since you received your notice did anybody speak to you about this case?

A. Well, it has been mentioned. At work, of course, it has been mentioned. Nobody spoke to me specifically about it. I would not say that, no.

Mr. Talley: Mr. Bae, keep your voice up so that we can hear you.

Q. Did anybody express an opinion about the case?

A. Not on this particular charge, no.

Q. Was any opinion expressed in regard to any defendants?

[fol. 1567] A. On previous charges, yes.

Q. Did you take part in the talks?

A. No.

Q. Did you express any opinion?

A. No.

Q. Of previous cases?

A. No.

Q. Other than that, nobody has spoken to you about the case?

A. No.

Q. Are you in sympathy with the enforcement of the penal law of the State?

A. Yes.

Q. There are certain industries that I want to make mention about. Do you have or have you had any contacts

with anyone in the garment industry or the clothing industry?

A. No.

Q. Or with respect to anyone in the clothing trucking industry?

A. No.

Q. Did you have or have you now any contacts in the Brownsville-East New York section of Brooklyn?

A. No.

Q. Or on the Brooklyn waterfront?

A. No.

Q. Have you served as a juror before?

A. No.

Q. Is this the first time you have been in the jury box as a prospective juror?

A. That is right.

Q. Have you heard discussed the question of accomplice testimony?

A. No.

Q. Mr. Bae, do you speak some foreign language?

A. Yes, sir.

Q. Is it a language that you speak in your every-day walks of life?

A. Partially, at home.

Q. Do you feel—and I do not want to be offensive or in [fol. 1568] any wise embarrassing to you at all—do you feel you may have some difficulty in following testimony?

Mr. Climenko: I object to the question on the ground it is obviously improper.

The Court: He can say whether he has any language difficulty which would make it difficult for him to understand witnesses and counsel.

A. With regard to legal phrases and so forth, yes. I have never been in the court-room before, and what is going on has been strange to me so far. It is really hard to understand part of it. That is a fact.

Q. And because of that language difficulty do you feel you may have difficulty in following the objections of law?

Mr. Cuff: I object. He does not say he has any language difficulty. He specifically referred to legal phrases, and I think the man is intelligent.

The Court: Sustained.

By the Court:

Q. You are a Scandinavian?
A. That is right.
Q. A Norwegian?
A. That is right.
Q. Been in this country how long?
A. Twenty-seven years.

By Mr. Turkus:

Q. Do you feel that because of language you may have difficulty in following the testimony of witnesses?
A. No.
Q. Do you feel you may have some difficulty in following [fol. 1569] counsel?
A. Yes.

Mr. Turkus: I am going to press a challenge for cause.
The Court: He explained that is just technical words. The only difficulty he has, he carries his own dialect, but that does not mean he does not understand.
Mr. Turkus: There are people who do find difficulty in following a court-room proceeding, and it is important to The People of the State of New York and the defendants.
The Court: Of course, I must try the challenge. Try it.

Iver Bae, of 920 Fifty-second Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. B e, did I understand you correctly to say that you are familiar with a foreign language?
A. Yes, sir.
Q. And that language you speak every day at your home?
A. Partially, yes.
Q. And is that the foreign language that you have been talking ever since you came to this country?
A. Yes, sir.
Q. Did you say to me that you had some difficulty in understanding the proceedings here while you were seated here?
A. Yes, phrases the lawyers are giving are pretty hard to understand, some of them, I know that.

Mr. Talley: Hard for the lawyers to understand them.

Mr. Cuff: They do not, as a matter of fact.

Mr. Turkus: This is no time for jesting. I object to the [fol. 1570] remarks. This is a serious inquiry.

Mr. Talley: You bet it is.

By the Court:

Q. You are how old, Mr. Bea?

A. Forty-nine.

Q. Then you were twenty-two years old when you came to this country?

A. Yes, practically.

Q. What part of Norway did you come from?

A. Western part.

Q. What particular place?

A. The nearest city would be Christiansen.

Q. How far from Christiansen?

A. Four or five miles.

Q. You lived in a fishing settlement?

A. No, industrial settlement.

Q. And what was the industry?

A. Manufacturing wooden ware.

Q. And I take it the school system there was pretty well organized?

A. Yes, the elementary school, yes.

Q. Did you have an elementary school education?

A. Yes.

Q. Did you complete it?

A. Yes.

Q. And we concede that the Norwegian elementary school system is good. Did you carry that through to high school?

A. No.

Q. I take it that you have read. Do you read books?

A. Oh, yes.

By Mr. Turkus:

Q. The books that you read, are they any technical books?

[fol. 1571] A. No, any kind of books.

By the Court:

Q. And now that you are in this country you have your neighborhood and your church affiliations?

A. Yes.

Q. And you meet a nice class of people?

A. Yes.

Q. And you talk this language simply because they are fellow Norwegians?

A. That is right.

Q. And are you able to understand English as it is spoken by those who do not speak the Norwegian dialect?

A. Yes, sir.

Q. You have no difficulty whatever?

A. No.

Q. When you said that you had difficulty, did you refer to legal terminology?

A. Yes, the way it is spoken here in the court-room. I have never been in a court-room before.

Q. There have been some technical terms used that are new to you?

A. That is right

By Mr. Turkus:

Q. Is this your first experience in a court-room?

A. That is right.

Q. You have never been in a court-room in a civil case either as a witness or a spectator?

A. No, sir.

Q. Or a participant? And you have never been in a criminal court-room as a juror, as a witness, nor as a spectator?

A. No, sir.

Q. If the Court were to instruct you that an accomplice is one who is a co-participant in a crime, could you follow [fol. 1572] that instruction of law?

A. Yes.

Q. Do you understand what it means?

Mr. Cuff: I object to that. It has nothing to do with the challenge.

Mr. Rosenthal: I object to the question. We are trying out, as I understand it, a challenge as to his ability to comprehend the English language.

By the Court:

Q. Do you know the meaning of a co-participant?

A. Yes, partner.

Mr. Rosenthal: That is pretty good.
Mr. Turkus: That is very good.

Q. You went to Pratt Institute how long?
A. Evening school only for six years.
Q. That was all an English course of instruction?
A. No, it was technical instruction.
Q. But in English?
A. In English.
Q. You understood the instruction?
A. Oh, yes.
Q. All English textbooks?
A. Yes, sir.
Q. And I take it now as a draftsman that you draw the plans for conduit routes and switchboard routes and so on?
A. Yes, sir.
Q. Anything technical, where work has to be done by the Edison Company?
A. That is right.
Q. First a plan has to be drawn, and it is your job to [fol. 1573] draw it?
A. Yes.
Q. Are the notations on those plans in English?
A. Certainly.

Mr. Turkus: I am going to withdraw my challenge, your Honor.
The Court: You may step back there.

(Mr. Bae resumes his seat in the jury box.)

By Mr. Turkus:

Q. Mr. Bea, would you have any prejudice against a prosecutor or against a prosecution because a challenge had been applied?
A. No.
Q. I mean, you sit there now without any resentment either to The People or to The People's case; is that correct?
A. Yes.
Q. There are nine lawyers here representing these three men at the bar of justice, former Assistant District Attorney Barshay, former Assistant United States Attorney Wegman, and Jesse Climenko. They are three lawyers who

represent the defendant Buchalter. Do you know any of those three lawyers?

A. No, sir.

Q. Do you know anybody in their law offices or associated with them?

A. No.

Q. With respect to the defendant Weiss, who is seated over there, he is represented by a former Judge of the Court of General Sessions in Manhattan, Judge Talley. Do you know him?

A. No, sir.

Q. He is assisted by Assistant District Attorney—former [fol. 1574] Assistant District Attorney James I. Cuff and former Assistant United States Attorney Murray Kriendler. Do you know any of those gentlemen representing the defendant Weiss?

A. No, sir.

Q. Or anybody connected with their law offices?

A. No, sir.

Q. The defendant Capone, he is the one seated in the back, he is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Rosenberg. Do you know any of those three lawyers?

A. No, sir.

Q. Or anybody connected with their law offices?

A. No.

Q. Do you know any member of the bar intimately who specializes in the defense of criminal cases?

A. No.

Q. The District Attorney of the county is Judge O'Dwyer. Do you know him personally?

A. No, sir.

Q. Or do you know any Assistant District Attorney on his staff?

A. No, sir.

Q. Have you in any wise secured the acquaintance of any union official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. And when I ask these questions and names I will, with respect to the admonition given by the Court, ask the other members of the jury to listen to the names to see if they have any familiarity as we go down the line. Does the name

of Murray Weinstein, manager of Cutters Local No. 4, affiliated with the Amalgamated, have any significance to you?

A. No.

[fol. 1575] Q. Or the name of Samuel Katz?

A. No.

Q. Is there any significance in your mind to the name of Bruno Belia, an organizer of the Amalgamated Clothing Workers of America?

A. No.

Q. In any wise do you know any official who is connected with Local 240 of the Clothing Drivers & Helpers Union?

A. No.

Q. Is the name of Max Silverman or Wolfie Goldis familiar in any way at all?

A. No.

Q. Or the name of Salvatore Marazzano?

A. No.

Q. William or Willie Alberts, a one-time bondsman?

A. No.

Q. Is there any familiarity to the name of Emanuel Buchalter?

A. No.

Q. Or that of Philip Kowas?

A. No.

Q. Or the names of Bellanca and Tosca?

A. No.

Q. Hyman (Curley) Holtz?

A. No.

Q. Or Terry Burns, Abie Slabo—any of those names at all familiar?

A. No.

Q. What newspapers do you customarily read, Mr. Bea?

A. *Tribune* and *Journal.*

Q. Is there anything that you have read in the *Journal* regarding this case, or in the *Tribune?*

A. Well, ordinary news about the case, yes, the case cal'ed and case adjourned, something like that.

Q. Did you read any of the facts of the homicide or the murder?

A. No.

[fol. 1576] Q. In the articles?

A. No.

Q. Is there any newspaper reading that you did in which the name or names of defendants were mentioned?

A. Newspaper reading.

Q. Yes, did you read it?

A. In the news that I read, yes, the names are mentioned, sure.

Q. How recent was that?

A. About a week ago.

Q. Before that had you read any of the names of any defendants?

A. Yes. In the news items about the trial.

Q. Did any of the readings that you had leave any impression with you as to the guilt or innocence of the defendants?

A. No.

Q. Is there anything which came to you from an outside source, whether it be by reading or hearing, that gave you an impression as to guilt or innocence of the defendants?

A. No.

Q. If the Judge should charge you in words or substance that an accomplice is a co-participant in the commission of the crime, will you accept that instruction of law?

A. Yes.

Q. Do you find any fault with the District Attorney of the county, Judge O'Dwyer, in taking the testimony of one of the perpetrators of a crime and using it against the others?

A. I have no opinion about that.

Q. I mean by that, do you find any fault with the prosecutor for using the testimony of one of the perpetrators against the others?

A. No.

[fol. 1577] Q. Would you have any fault or any prejudice against a prosecution which would employ the use of the testimony of one of the perpetrators against the others who were in the group?

A. No.

Q. Do you understand me as I go along?

A. Yes, I understand.

Q. If selected as a juror in the case, will you listen to fair argument by the other jurors?

A. Yes.

Q. Will you endeavor, with common sense and understanding, to apply the principles of law that the Judge gives you to the facts in this case?

A. Yes.

Q. Will you by your verdict endeavor to do justice in the case?

A. Yes.

Q. Is there anything that I have not asked you that would go to your ability to be a fair and impartial juror?

A. No.

Q. Do you feel as you sit here now that you can pass judgment on this case and do justice to the People of the State of New York and the defendants at the bar?

A. I think so, yes.

Q. Have you any doubt about it?

A. No.

Q. Mr. Petterson, do you live at 480 East 21st Street?

A. That is right.

Q. Is that the Flatbush section of Brooklyn?

A. That is right.

Q. Is that in the close vicinity of Church Avenue or Albemarle Road?

A. It is about four blocks away.

[fol. 1578] Q. How long have you lived in Flatbush?

A. About fourteen or fifteen years.

Q. You are listed here on the trestle board as a repair man. By whom are you employed?

A. New York Telephone Company.

Q. How long have you been engaged in that vocation?

A. In that particular vocation about five years. I work for the Telephone Company sixteen.

Q. I take it, then, that your type of work requires some specialized knowledge of mechanics?

A. Yes.

Q. And that you have had some vocational course either by the Telephone Company or some outside school?

A. Five years.

Q. You heard, I believe, the questions that I addressed to Mr. Bae about any knowledge of any person or firm in the industries that I mentioned, the garment, the clothing, and the clothing truckers. Have you any connection there?

A. No.

Q. Have you had any in the past?

A. No.

Q. With respect to Brownsville-East New York, is that true too, that you have no connections there at all?

A. That is right.

Q. With respect to the nine lawyers in the case, do you know any of the nine?

A. I do not.

Q. Anybody connected with their law offices?

A. No.

Q. Or any member of the bar who specializes in the trial of criminal cases?

A. I do not.

Q. I believe you have been here sufficiently long to under- [fol. 1579] stand that the three defendants at the bar, Buchalter, Weiss, and Capone, are charged with murder in the first degree. Do you understand that?

A. Yes.

Q. Is there anything about the nature of the charge which would prevent you from acting fairly as a juror in a criminal case?

A. No.

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. I have not.

Q. Since you received your jury notice, did anybody speak to you about the case?

A. Yes, my fellow employees.

Q. Was that on the question of possible length of service on the jury?

A. That is right.

Q. Are you in sympathy with the enforcement of the penal law?

A. I am.

Q. Do you know the District Attorney, Judge O'Dwyer, or any assistant on his staff?

A. I do not.

Q. Sir, have you any fault to find or any bias or prejudice against the prosecution for taking one of the perpetrators of the crime and using him as a witness against the others?

A. I have nothing against the prosecution but it would be hard for me to believe the testimony of a confessed accomplice.

Q. I want to go into that and see just what your statement is. Is your state of mind such that no matter what the circumstances were you would not believe an accomplice?

[fol. 1580] Mr. Rosenthal: I object to the question, if the Court please, one of law, and the talesman has not been apprised of what the law is on the subject.

Mr. Turkus: Will you read back the question that the juror answered and then this question, so the Court may have it before it?

Mr. Rosenthal: The Court was here. I do not understand that the Court needed it.

By the Court:

Q. Have you a prejudice against the testimony of an accomplice so strong that you would rule it out even though it is corroborated?

A. Yes, sir, it would be hard for me to believe that sort of testimony.

Mr. Turkus: Challenge.

Q. You mean in any case where there is an accomplice, you would not believe the accomplice?

A. It would be in my mind that he is getting some gain from that.

Q. That is in everybody's mind. The question is whether you would treat his testimony sensibly and try to decide whether it is true or not or whether you would decide even before hearing him that he cannot tell the truth because he is an accomplice.

A. It is my opinion it would be hard for me to believe that testimony.

Mr. Turkus: Challenge for cause.

The Court: Try the challenge.

[fol. 1581] Walter Charles Pettersen, residing at 480 East 21st Street, Brooklyn, New York, being duly sworn, testified as follows:

By the Court:

Q. Near Cortelyou Road?

A. Dorchester Road. Between Dorchester and Cortelyou.

Q. What line of work are you in?

A. Repairman.

Q. What line of work?
A. New York Telephone Company, repairing telephones.

By Mr. Turkus:

Q. Mr. Pettersen—am I correct in the pronunciation of your name?
A. That is right.
Q. You made no application for any excuse, did you?
A. I did not.
Q. The questions that were put to you by the Court and the District Attorney and to which you made response, were they truthful answers?
A. They were.
Q. And do they honestly represent your state of mind, sir?
A. They do.
Q. If the questions were repeated, would you make the same answers?
A. I would.
Q. And would the answers be truthful?
A. They would.

Mr. Turkus: Press the challenge.

By Mr. Rosenthal:

Q. Mr. Petterson, do you know anything about the law in [fol. 1582] respect to accomplices? Do you know anything at all about the law, the law of our State?
A. I do not know much about any law.
Q. Have you ever served on a jury before?
A. I have.
Q. In criminal cases?
A. Yes, I have.
Q. Then you have had the benefit of having the Judge instruct you as to the law of that particular case?
A. I have.
Q. And when the Judge instructed you, you followed the Judge's instructions, didn't you?
A. I served on one criminal case. It never came to a conclusion.
Q. Did you serve on any civil case?
A. I have.

Q. You got the benefit of the Judge's charge in the civil case?

A. I did.

Q. And you followed that charge of the law, irrespective of what your opinion was, didn't you?

A. To the best of my ability, yes.

Q. If the Court were to charge you that as respect to any accomplice it is the duty of a juryman to always view with suspicion, care, and caution the testimony of an accomplice, you would have no difficulty in doing so in your present frame of mind, would you, of being suspicious, careful and cautious? Is that true?

A. That is right.

Q. And if the Court were to charge you, and you would follow that charge of the Court, wouldn't you, sir, to the best of your ability?

A. I would.

[fol. 1583] Q. Then if the Court were to tell you that you could not convict any man on the uncorroborated testimony of an accomplice, you would have no difficulty following that either, would you; that is, if his testimony was not corroborated, it would be your duty to acquit a defendant; you would have no trouble in doing that, would you?

A. No, I would not.

Q. And in the event that the Judge were to charge you that before you can convict any man, not only these defendants, but any man, that there must be other evidence in a case besides the testimony of accomplices, which would tend to connect the defendants with the crime, you would have no difficulty in following that, would you, under the instruction of the Court?

A. I don't think so, no.

Q. You would follow what the Judge would tell you is the law in respect to accomplices and what is necessary before you can convict on accomplice testimony before you decided on your conscience what your verdict should be; wouldn't you do that, sir?

A. I would try, yes.

Q. Well, to the best of your ability you would follow out the instructions of the Court on what the law is in respect to accomplices and the necessity of their testimony being corroborated?

A. That is right.

Mr. Rosenthal: That is all.
The Court: Anybody else?
Defense Counsel: No questions.

[fol. 1584] By Mr. Turkus:

Q. Mr. Pettersen, if after these questions have been asked by Mr. Rosenthal, if Judge Taylor and I were to repeat to you the questions we put at the outset, would you still make the same answers?

Mr. Rosenthal: I object to the question.
The Court: He has already answered that.

By the Court:

Q. You were born in Brooklyn?
A. Yes, sir.
Q. What part of Brooklyn?
A. It is in the downtown section. What street it is I don't remember. It is one of the old streets down there.
Q. Your folks born in Brooklyn?
A. My mother was. My father was born in Norway.
Q. I ask you because there used to be, under the old law of Brooklyn, there used to be a Justice of the Peace named Pettersen.

Mr. Climenko: I object to your Honor's question on the ground it is immaterial to the challenge.
The Court: Don't be stupid. Sit down.
Mr. Climenko: Exception to your Honor's remarks.
The Court: Sit down. Just fussy.

A. No relation of mine.
Q. That is the reason I asked you. It was not to be inquisitive. The question the Court has to decide is this: [fol. 1585] whether or not the prejudice that you have stated is such that you would not give the prosecution a fair, intelligent attitude as to whether or not an accomplice is telling the truth.
A. It is in my mind.
Q. Speak out loudly so counsel can hear you.
A. It is in my mind. It would be hard for me to believe that type of testimony.

The Court: Sustained.
Defense Counsel: Respectfully except.

By Mr. Turkus:

Q. Mr. Horland, do you live at 4727 Bedford Avenue? Have we met before? You look familiar to me.

A. I went to Boys High School.

Q. I went to Manual Training. 4727 Bedford Avenue is in what district?

A. Sheepshead Bay section.

Q. Have you lived there for a number of years?

A. One year.

Q. Where did you live before that?

A. Eastern Parkway and Utica.

Q. Is that near the Famous Restaurant and Dubrow's Restaurant?

A. Yes, sir.

Q. Have you patronized those restaurants?

A. Yes, sir.

Q. How far is that from the Brownsville-East New York section of Brooklyn?

A. Five minutes.

Q. You are listed here as a merchant. What type of merchandise do you sell?

[fol. 1586] A. I buy new and used musical instruments.

Q. And where do you maintain your place of business?

A. 110 Park Row, New York City.

By the Court:

Q. That is near William Simpson's old place?

A. That is correct.

By Mr. Turkus:

Q. Are you in business for yourself?

A. Yes.

Q. Did you ever live in the Brownsville-East New York section of Brooklyn?

A. Yes, sir.

Q. How many years?

A. Ten years.

Q. Are the names of Harry (Happy) Maione familiar to you?

A. From newspapers.

Q. Is there any familiarity to the name of Harry (Pittsburgh Phil) Strauss?

A. I have read of him.

Q. Martin (Buggsy) Goldstein?

A. Yes, sir.

Q. Abie Reles?

A. Yes, sir.

Q. Vito Guarino?

A. That I don't remember.

Q. Did you ever partake in any discussions with people you know in the Brownsville-East New York area on the O'Dwyer investigation?

A. I sell the I. W. O. and the I. O. G. W. O. They have organizations of musical companies, and we sell them their instruments, to these unionists on part payments, and I see these people all the time.

Q. You are referring now to the union in connection with [fol. 1587] ladies' garments?

A. And the Independent Workers Order.

Q. Have you talked about the Dewey investigation or the O'Dwyer investigation?

A. To some of the customers that come into the store.

Q. Did you, because of your business contacts with those specific people, follow the Dewey investigation with any interest?

A. Well, as a citizen, just to read the papers.

Q. Did you follow Judge O'Dwyer's investigation with any degree of interest?

A. Yes, sir.

Q. What newspapers do you read?

A. *Tribune*, *P. M.*, and the *Telegram*.

Q. *P. M.* and the *Telegram* and the *Tribune*. Are you related to Commissioner Herland?

A. No, my name is spelled Horland.

Q. From the conversations that you have had with people and from the things you have read, have you formed any opinion?

A. Formed a definite conclusion, yes, sir.

Q. Does that conclusion go to the guilt or innocence of these defendants?

A. To the guilt.

Q. You should have said yes or no. I have no recourse but to challenge.

The Court: Try the challenge.

HERBERT A. HORLAND, residing at 4727 Bedford Avenue, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

[fol. 1588] Q. Mr. Horland, before you were brought into your present chair and sworn, you made response to questions that I put to you. Were those responses true?

A. Yes, sir.

Q. And do they truly reflect your state of mind?

A. Yes, sir.

Q. If I were to ask you the same questions, would you make the same responses?

A. Yes, sir.

Q. And were the sources of your information, the items that you mentioned to me in response to the questions, which has caused you to form an opinion, without stating what it is now?

A. That is correct.

By Mr. Barshay:

Q. You applied for an excuse when you were first called?

A. I did.

Q. Because of your business reasons, isn't that so?

A. That is correct, sir.

The Court: Any further questions?

Mr. Rosenthal: No questions on behalf of Capone.

Mr. Talley: No questions.

The Court: Sustained.

By Mr. Turkus:

Q. Mr. Silfen; is that correct?

A. That is correct.

Q. You are listed as living at 495 Schnectady Avenue: is that right?

A. That is correct.

Q. Is that the Brownsville section of Brooklyn?

A. It is very close to it. It is what they call East Flatbush.

[fol. 1589] Q. Have you lived in that neighborhood for a number of years?

A. About twelve years.

Q. How many blocks away would you say that neighborhood is from the Brownsville-East New York section?

A. Oh, I would say about three-quarters of a mile.

Q. Prior to living at 495 Schnectady Avenue, were you a resident of Brooklyn?

A. Yes.

Q. What section did you live in?

A. Six years prior to that I lived over in Flatbush. Prior to that I lived in East New York.

Q. You are listed on the trestle board as a department manager by vocation. Is that a correct listing?

A. That is correct.

Q. And by whom are you employed?

A. The United Cigar and Whelan Drug Stores.

Q. Have you been with them a number of years?

A. Twenty-six years.

Q. Do I understand your position correctly as that of the manager of a store?

A. Department manager.

Q. I am sorry, I guess you hold a job that I don't understand. Does that mean you are the head of some departments, supervising the stores?

A. Well, it is display and window-trimming department, which works for the stores.

Q. In other words, your activities bring you, by way of business, to stores in various sections of the county?

[fol. 1590] A. Occasionally. Mostly inside, preparing.

Q. Do you have men under your jurisdiction?

A. Yes, sir.

Q. Are there stores in the garment and clothing districts which you have visited in recent years?

A. Yes.

Q. And stores in the Brownsville-East New York area which you visited in recent years?

A. Well, there is a store at St. Johns and Utica. I do not think that is considered Brownsville.

Q. I do not think so.

A. It is right on the borderline.

Q. Did you hear the questions that I put to Mr. Bae and through him to all the other jurors about any association or connection with anybody in that garment district or clothing district?

A. Yes.

Q. Have you any such connections of any kind, nature or description?

A. None at all.

Q. Do You know people in the Brownsville-East New York area of Brooklyn?

A. Just some old friends that I have not seen in years. I formerly lived there.

Q. Was there any familiarity to any of the names of union officials or others that I read, mentioned?

A. Not union officials, but you mentioned the name of Buchalter.

Q. Yes.

A. That is a dentist. I do not know him personally, but my mother-in-law has used him as a dentist, whether that would apply here.

Q. Do you know whether or not he has visited at the home [fol. 1591] of your mother-in-law?

A. Never.

Q. Has their connection been solely that of dentist and patient?

A. That is all.

Q. What papers do you customarily read, Mr. Silfen?

A. The *Times*, *World-Telegram*, and *News*.

Q. Have you read of Judge O'Dwyer's investigations?

A. Yes, occasionally, not thoroughly.

Q. Did you read of any persons mentioned in connection with the East New York and Brownsville sections of Brooklyn?

A. Just some of those names you mentioned before.

Q. Did you read of Harry (Pittsburgh Phil) Strauss, for example, and Martin (Buggey) Goldstein?

A. Yes.

Q. Harry (Happy) Maione?

A. Yes.

Q. Frank (The Dasher) Abbandando?

A. That one is not so familiar.

Q. Vito Cuarino?

A. No.

Q. Albert Anastasio?

A. No.

Q. Did you ever, from any of the contacts that you may have had, hear their names mentioned in any discussions?

A. No.

Q. Since you received your jury notice, did anybody speak to you about the case?

A. Nothing of interest; just the usual.

Q. When you say "usual," do you mean you might be stuck for jury service?

A. That is it.

Q. Is there anything that you have read in the press or anything that you have heard while you have been in that [fol. 1592] East New York area, that leaves an impression with you as you are seated in the box now?

A. There is a slight impression, slight impression.

Q. Is that an impression that goes to guilt or innocence?

Mr. Fischbein: May we have that answered just yes or no?

The Talesman: Yes.

Q. And is that an impression that goes to guilt or innocence in this case?

A. Yes.

The Court: He says yes.

Q. Is it that kind of an impression that would require evidence on the part of a defendant to remove?

A. Not necessarily on the part of the defendant.

Q. A defendant?

A. No.

Q. All defendants

A. All the defendants.

Mr. Turkus: I am required to challenge.

The Court: Try the challenge.

Sam Silfen, residing at 495 Schnectady Avenue, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Silfen, while you occupied chair No. 8, I asked you certain questions. Do you recall that?

A. Yes.

Q. And in response to my questions you made answers?

A. Yes, sir.

Q. Did those answers truthfully reflect your state of mind?

A. Yes, sir.

[fol. 1593] Q. If I were now to ask the same questions, now that you are under oath, would you make the same answers?

A. Yes, sir.

Q. And would they be truthful?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Silfen, have you ever had an instruction with respect to law?

A. No.

Q. While you were waiting to be called did you hear the Court speak of presumption of innocence, or the lawyers?

A. Yes, sir.

Q. Did you hear that every person who sits in the jury box must accept the law from his Honor?

A. Yes.

Q. Do you agree with that?

A. Yes.

Q. You told Mr. Turkus that you believe in the enforcement of the penal law.

A. That is right.

Q. You meant that?

A. Yes, sir.

Q. The enforcement of the penal law also implies the presumption of innocence for any person charged with crime. Isn't that so?

A. Yes.

Q. Do you believe in that law? And so if his Honor shall tell you that the defendants in this case are presumed innocent under the law and you must accord to them that presumption, you will accept that law from the Court, won't you?

A. I will, sir.

Q. And you have also heard the Court charge or say, or the District Attorney or myself say that no defendant need [fol. 1594] prove his innocence, he may rest on the People's case?

A. Yes.

Q. And his failure to take the stand shall draw no unfavorable inference on your part toward him. You believe that, don't you?

A. Yes.

Q. That, too, is included in the enforcement of the penal law, with which you have sympathy. If the Court shall charge you that in this case, that neither defendant need offer a single bit of proof or testimony, either through themselves or through others, to prove their innocence or disprove an accusation against them, will you accept that law from his Honor?

A. I would accept it from his Honor.

Q. And then if you accept it in all good faith, you will not require any defendant to assert or prove his innocence, will you?

A. No.

Q. So that now, as you sit here, if the Judge should charge you that the defendants need not take the stand if they do not want to, need not prove their innocence, and you may not hold it against them—the language of the Court may be a little different—will you follow and accept that law implicitly?

A. I will do the best I can.

Q. That is all that is expected of anyone, to do the best that his brains allow him to do—right? You are willing to try to do the best you can?

A. I am willing to try.

Q. And so that you won't require any defendant here to prove his innocence, will you?

A. No, if the law states so.

[fol. 1595] Q. I assume now that the Court will charge you that; frankly, I can guarantee it will. So that this slight impression that you have you can lay aside and accept the law from the Court?

A. I will try to.

Q. Well, are you willing to undertake to do it?

A. Yes, I am willing to undertake to do it.

Q. You understand that it is not fair to judge a person by what you read about him?

A. I understand that, but you still cannot just dismiss something from your mind completely. Some of it just sticks there.

Q. Of course, every person has the right to feel the way he does toward a fellow man—rightfully or wrongfully; you understand that? What I want to know from you, sir, honestly: Can you dismiss this slight impression against the defendants, which you now have?

A. I will make every effort to do it.

Q. Is that the best you can say?
A. I am under oath; I cannot tell you anything more.

By the Court:

Q. 495 Schenectady is near what street?
A. Between Maple and Midwood Streets.

By Mr. Barshay:

Q. Would it require any proof at all on the part of the defendants, despite the instructions of the Court, for you to lay aside whatever impression you have?
A. It is pretty hard for me to answer that question. That would depend entirely on the progress and how the case [fol. 1596] continues, just what comes up which I do not know of.
Q. You know better than I do your own mind, sir. We cannot quarrel with you.

By the Court:

Q. I asked you the location, because reference has been made here to a restaurant on Eastern Parkway and Utica Avenue, which is a block from Schenectady Avenue.
A. That is right.
Q. Do you go there?
A. Occasionally.
Q. You and your family patronize that restaurant? It is an all-night restaurant?
A. That is right. It is about nine blocks from my home.

Mr. Barshay: No further questions.
The Court: Any other counsel?
Defense Counsel: None.
The Court: Sustained.

By Mr. Turkus:

Q. Mr. Eckstein, your address is listed on this board as being 136 Herkimer Street, is that right?
A. Right.
Q. What do they call that district?
A. Bedford section.
Q. Have you lived there for a number of years?
A. About four years.

Q. And before that where did you live, Mr. Eckstein?

A. At 754 Macon Street. I imagine that would be—that is between Ralph and Howard Avenue.

[fol. 1597] Q. Have you lived in Brooklyn a number of years?

A. Practically all my life.

Q. You are listed here on this sheet of paper as an etching assistant.

A. That is right.

Q. By whom are you employed?

A. Neil Gravure Printing Company.

Q. Where is their office?

A. 601 West 26th Street.

Q. Is that down toward the riverfront?

A. Yes, that is the Starrett-Lehigh Building.

Q. Did you hear the questions that were put to the other prospective talesmen about any connection in the Brownsville or East New York area of Brooklyn?

A. Yes, I did.

Q. Has life in the past brought you in connection with any persons in that area?

A. None whatever.

Q. Do you know any persons who are presently residing there?

A. I do not.

Q. May I go along with the understanding you have no connection there?

A. No connection.

Q. Never had any in the past?

A. No.

Q. There were other questions put to other talesmen about possible connection with the garment or clothing industry.

A. None whatever.

Q. The etching work that you do, does that have anything to do with distribution among these manufacturers of men's and ladies' clothes?

A. No, it is a printing process. We do the colored roto [fol. 1598] section of the Sunday *Mirror*, the New York *Times*, the Boston *Herald*, and other newspapers.

Q. So that may I go along now with the understanding that you have no connections by way of business or social

contacts with any persons interested in any part of the Amalgamated or clothing trades?

A. None whatever.

Q. Or Clothing truckers?

A. No.

By the Court:

Q. Is that the Scripps-Howard?

A. No, that is the Cuneo Printing Corporation.

By Mr. Turkus:

Q. Do you come into any contact with persons on the Brooklyn waterfront?

A. None whatever, except about fifteen years ago I was employed as cashier of the American-Hawaiian Steamship Company, and their pier was at Pier 6, Bush Terminal.

Q. Other than that, did you have any contacts in the Brooklyn waterfront?

A. None whatever.

Q. Is there any familiarity, for example, to the name of Albert Anastasio in your mind?

A. No, sir.

Q. I have spoken to other jurors about certain names of union officials, like Weinstein and Katz, and at one time Philip Orlofsky, a former union official. Was there any familiarity to any of those names?

A. No.

Q. Or any familiarity to any of the names, Curley Holtz, and those other individuals?

A. No.

[fol. 1599] Q. Since you received your jury notice did anybody speak to you about the case?

A. Just generally, such as the length of service.

Q. That has been limited to possibly being inveigled into jury serving?

A. Right.

Q. What newspapers do you customarily read?

A. Well, we receive all copies, naturally, of the *Mirror*, the *Times*. Personally, I read the *World-Telegram* and the *Herald-Tribune*.

Q. Are you married, sir?

A. Yes, sir.

Q. Do you reside with your family?
A. Yes.

By the Court:

Q. Are you a son of George Eckstein?
A No, sir.

By Mr. Turkus:

Q. I take it the type of work you do requires some special knowledge in your field, does it not?
A. Well, yes.
Q. And do you have any special vocational training?
A. No.
Q. Has it been training that you have acquired in the industry?
A. Yes.
Q. Are you in sympathy with the enforcement of the penal law of the States?
A. I am.
Q. Is there anything about the charge, the nature of the charge, namely, murder in the first degree, which would impair your ability to serve as a fair juror in the case?
A. None that I know of.
Q. Have you any conscientious or other scruple against [fol. 1600] capital punishment?
A. No, I have not.
Q. With respect to the nine lawyers in the case, do you know any of those nine lawyers?
A. I do not.
Q. Or anyone associated with them in the practice of law?
A No, sir.
Q. Do you know any lawyer who specializes in defending criminal cases?
A. I do not.
Q. Do you find any fault with the prosecutor of the county for accepting the testimony of one of the perpetrators of a crime and using it against the others in order to solve the case?
A. No.
Q. Do you find any fault with the prosecution which uses the testimony of one of the perpetrators, which is commonly known in the law as an accomplice?
A. I do not.

Q. With respect to the tests to be applied to that kind of an individual from the standpoint of whether he has a motive or whether or not you should believe him because of his past association with criminals and being steeped in crime himself, will you take the definitions of law from the Judge?

A. I will.

Q. And will you with common sense and understanding endeavor to apply that to the facts in this case?

A. To the best of my ability.

Q. Do you feel that you have any trouble in doing that?

A. No.

Q. Will you exercise your mental faculties to find out [fol. 1601] is this accomplice telling the truth about the complicity of these defendants in the murder? Will you do that?

A. Yes.

Q. And will that be one of the searches that you make in the case to find out is this perpetrator telling the truth about the participation of the others in the group with him?

A. Yes.

Q. Should the Judge charge you that there cannot be a conviction upon the unsupported testimony of a perpetrator of a crime, namely, an accomplice, will you follow that instruction of law?

A. I will.

Q. And should the Judge tell you that the prosecution need not substantiate each and every item of the testimony given by an accomplice, but that the jury may find corroboration from other or independent evidence which tends to connect the defendants with the commission of the crime, will you follow that instruction of law?

A. Yes.

Q. And will you endeavor conscientiously to apply it to the facts in this case.

Q. For example, if you are convinced beyond a reasonable doubt that the perpetrator who testifies against the others and tells you of the participation of this group in the killing of the victim and you believe that beyond a reasonable doubt, and you find beyond reasonable doubt further evidence tending to connect the defendants with the commission of the murder, will you reflect that finding in your verdict?

[fol. 1602] Mr. Climenko: I object to that question by reason of the use of the word "group."

The Court: Overruled.

Mr. Climenko: Exception.

A. I would.

Q. In other words, if you are satisfied beyond a reasonable doubt that the participant tells the truth about the participation and the part that each of the defendants played in the commission of the murder, and you are satisfied of that beyond a reasonable doubt and you find corroboration and supporting evidence there tending to connect the defendants with the commission of the crime, will you reflect those findings in your verdict?

A. I will.

Q. Something has been said here by one of the lawyers for Buchalter that Buchalter has been convicted of past crimes and sentenced by the Court to a long term in jail for the commission of those crimes. Would you, if accepted as a juror, relax your duty to find a proper verdict in this case solely because a defendant is incarcerated for commission of past crime?

A. I would not.

Q. Will you look to whether or not he is guilty or innocent of the Rosen murder from the evidence in the case?

A. I will.

Q. And will you decide that issue of guilt or innocence upon the evidence that you hear in the court-room?

A. I will.

[fol. 1603] Q. You may not be familiar, and undoubtedly you are not, with some of the types that you may see in the court-room. Will you nevertheless use common sense and understanding to find out are these individuals telling the truth when they testify?

A. To the best of my ability.

Q. And will you, by your verdict, Mr. Eckstein, endeavor to do justice in the case?

A. I will.

Q. Will you listen to fair and reasonable discussion by the other jurors in the case?

A. I will.

Q. In so far as allocation of evidence is concerned, that is, applying the evidence to the defendant or defendants

against whom it is given, will you endeavor conscientiously to apply the rules of law given by the Judge?

A. I will.

Q. For example, if obviously the testimony applies only to one defendant, will you apportion that evidence to that specific defendant?

A. I will.

Q. If, on the other hand, it applies to two or more or all three of the defendants, will you endeavor conscientiously to apply it in that fashion?

A. I will.

Q. In short, Mr. Eckstein, should The People of the State of New York, as represented by District Attorney O'Dwyer, in this court-room establish to your satisfaction beyond a reasonable doubt that Buchalter, Capone, and Weiss are three men who are guilty of murder in the first degree, will you say that in your verdict in this case?

A. Yes.

[fol. 1604] Q. Will you do that without fear or hesitation?

A. Yes.

Q. Mr. Bartholomew, you live at East 17th Street?

A. That is right.

Q. 1550, is that in the Kings Highway part of it?

A. Yes.

Q. Have you lived there for a number of years?

A. All my life.

Q. Are you married, sir?

A. Yes, sir.

Q. I cannot quite make out the listing here. It is "repres." Does that mean a representative?

A. That is right.

Q. Would you tell me by whom you are employed?

A. New York Telephone Company.

Q. Then you represent the Telephone Company in installing telephones, that is, making arrangements for the installation with the customer?

A. Yes.

Q. In other words, you arrange for the installation of the phone as the customer's representative of the Telephone Company?

A. That is right.

Q. Have you been doing that type of work for a number of years?

A. Well, I have been on that approximately five years. I was off for a short while and came back on again.

Q. In the meantime you were, or were you, engaged in some other occupation?

A. I worked at the World's Fair for the Telephone Company.

Q. That is the kind of work that brings you into contact with various people and various walks of life; is that it? [fol. 1605] A. Yes.

Q. I take it that you have heard all these questions that I have asked about the garment district, the clothing district, and clothing truckers. Have you had any connection by way of business with people in that industry or in that area?

A. No, sir.

Q. Do you know anybody there or have you known in the past anybody engaged in the manufacture of ladies' and men's clothing?

A. No, sir.

Q. Or with any clothing truckers of any kind, nature, or description?

A. No, sir.

Q. Was there any familiarity to your mind with the names of the union officials that I mentioned?

A. No, sir.

Q. Has business in the past brought you into contact with anybody in the Brownsville-East New York area of Brooklyn?

A. Not to my knowledge. I cannot tell who is calling on the telephone.

Q. I do not mean it that way. By "contact", I mean actually going into the neighborhood and seeing people and discussing things with them there.

A. No, sir.

Q. So that you have no connections there by way either of business or any other contact in that area in Brooklyn?

A. No, sir.

Q. Does that hold true with the Brooklyn waterfront?

A. Yes, sir.

Q. Since you received your jury notice, did anybody speak [fol. 1606] to you about the case?

A. Nothing except mention the fact of the duration, "How long you are on," and the period of time I might be on.

Q. So that I can go along here understanding there has been no discussion about the merits of the case?

A. Yes, sir.

Q. I take it that you are in sympathy with law enforcement?

A. Yes, sir.

Q. And that you have no scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. In so far as you are concerned, do you find any fault with the prosecutor who, in order to solve a case, will accept the testimony of one of the participants in the crime and use that testimony against the others?

A. No, sir.

Q. Do you find any fault with the prosecution which uses accomplice testimony?

A. No, sir.

Q. In applying the tests of what belief or what credibility you are going to give to a man who admits that he participated in this crime, will you use the tests that Judge Taylor says the law permits jurors to use?

A. Will I use the tests?

Q. That the Judge gives you.

A. Yes, sir.

Q. Will you consider all of the circumstances in connection with what may motivate or what may animate the individual from testifying, and anything about his past, to aid you in finding out if he is telling the truth?

A. Yes, sir.

[fol. 1607] Q. For example, will you consider that he may have committed past crimes, that he has committed possibly a vicious or immoral act or whatever things in abrogation there are of his believability, will you weigh all of those things in summing up is he telling the truth in this particular case?

A. Yes, sir.

Q. In looking every test over that you apply to the believability of an accomplice witness or one of the perpetrators of the crime, will you exercise your mental faculties to find out, Is this individual telling the truth about the perpetration of the crime and the participation of all the

defendants and himself as a group in the commission of the crime?

Mr. Climenko: I object to the question. It is bad in form and repetitious.

The Court: Overruled.

Mr. Climenko: Exception.

Q. Did you follow it?

A. I followed it, yes, sir.

Q. Without being extraordinarily blunt, may I just say it this way: Even though there may be individuals that we do not ordinarily see in our daily life, in the court-room, will you use common sense and understanding in finding out are they telling the truth about these defendants and themselves in this case?

A. Yes, sir.

Q. Now, with respect to that point, do you feel any dif- [fol. 1608] ferently because Buchalter has been convicted of crime and sentenced to a term of years in jail for the past convictions? Would you relax your duty as a juror in this case?

A. No, sir.

Q. If accepted as a juror in this case, will you discuss the case with common sense and reason with the other jurors?

A. Yes, sir.

Q. If after you hear all the evidence in the case and all the lawyers for the defendants tell you what they think of it and the prosecutor tells you how he views the evidence, the Judge tells you the law, you talk it over with the other members of the jury, and your mind is satisfied beyond a reasonable doubt that there are three guilty men at this bar of justice, will you say so in your verdict?

A. Yes.

Q. Will you say it without fear and without hesitation?

A. Yes.

Q. Mr. Fuller, do you live at 850 East 31st Street?

A. Correct.

Q. Is that East Flatbush or Flatbush proper?

A. Flatbush.

Q. Have you lived in Flatbush a number of years?

A. (Answer inaudible.)

Q. And prior to that time did you live in Brooklyn?

A. Yes, about twelve years I have been in Brooklyn.

Q. Did you live in some other district in Brooklyn?

A. I lived in the Heights and Park Slope.

Q. Is there any familiarity to your mind in the name of [fol. 1609] Weiss, people that may be in the automobile rental business or Chevrolet sales?

A. No.

Q. You are listed here as an engineer; is that correct?

A. That is right.

Q. And what kind of engineering is your profession?

A. Electrical.

By the Court:

Q. You live right at the water works?

A. No, sir, that is right adjacent to the Long Island Railroad.

Q. This is 850?

A. That is right. The water works is about Ditmas Avenue.

Q. You are near what street?

A. Avenue I. 850 East 31st, Avenue I.

By Mr. Turkus:

Q. Are you married, Mr. Fuller?

A. Yes.

Q. I take it you reside with your family?

A. That is right.

Q. Since you received your jury notice did anybody speak to you about the case other than any prospective length of time you might serve on the jury?

A. No.

Q. I take it by nature of your contacts that you have no connections with anybody in the garment or clothing trades?

A. No.

Q. Or in the clothing trucking business or with any of the unions that I mentioned?

A. No.

Q. Do you have any connection of any kind, nature or [fol. 1610] description on the Brooklyn waterfront or Brownsville-East New York areas?

A. I might have occasion to go some place on the job.

Q. What I meant by a connection was, was there any connection that you have had in the past, or presently do you maintain a contact in these districts which you maintain either by way of social or in business?

A. Well, in business I might contact a customer, say, for instance——

Q. Do you go into any of those districts with any frequency?

A. No.

Q. May I go along with the understanding that you are in sympathy with law enforcement?

A. That is right.

Q. Do you know any of the nine lawyers that represent these defendants?

A. No.

Q. Getting to the point of accomplice testimony, or the testimony of one of the perpetrators, do you find any fault with the prosecutor who, in order to solve a murder case, accepts the testimony of one of the perpetrators and uses it against the entire group?

A. No.

Q. Do you find any fault with the prosecution of an indictment wherein the testimony of one of the perpetrators is used against the others?

A. No.

Q. Will you apply all the tests that you apply to that type of witness pursuant to the instruction that the Judge will give you?

A. Yes.

Q. There will be things about the accomplice to the ac- [fol. 1611] complice's detriment naturally, the fact that he has been a perpetrator, one of the perpetrators, of the crime here charged, he may have been involved in other crimes, and all the things in derogation of him,—will you consider that as bearing upon his believability?

A. I did not follow that.

Q. You see, an accomplice is one who has participated in the commission of a crime, and I think that you have already told me that you find no fault with the District Attorney for using that testimony; is that right? And that you find no fault with the prosecution itself wherein the testimony of an accomplice is part of the case. The Judge will tell you that there cannot be a conviction upon the testimony of an accomplice standing alone, that there must be other evidence which tends to connect the defendants with the commission of the crime. Do you understand me as I say that?

A. Yes.

Q. Will you follow that instruction of law?

A. Yes.

Q. And apply it to this case to the best of your ability?

A. I will.

Q. Is your state of mind such that you appreciate that even a bad man can at times tell the truth?

A. Yes.

Q. Will you, if accepted as a juror in this case, devote your mental faculties to see whether the accomplice who tells you of his participation in the crime with these defendants is telling the truth about this group who participated in the crime? Will you do that?

A. Yes.

[fol. 1612] Q. And will you, when you apply your mental faculties to it, take into account that these may be kinds of persons that we do not ordinarily meet? Will you use common sense in weighing the believability with respect to this particular crime?

A. I will.

Q. Do you feel, as does Mr. Eckstein and Mr. Bartholomew, that the fact that one of the defendants has been heretofore convicted of past crimes, that that will play no part in your deliberation as to his guilt or innocence of this murder charge?

A. That is right.

Q. You will not relax or deviate from a proper verdict of jury service because of that present incarceration, will you?

A. No.

Q. With respect to weighing what testimony is to be allocated or apportioned to the defendants, if the Judge tells you that each defendant is entitled to a separate consideration in the case against him, will you do that?

A. Yes.

Q. And in the case where obviously part of the testimony applies only to one particular defendant, will you apply that portion of the testimony specifically to that defendant?

A. Yes.

Q. With respect to the other testimony, which may apply to two or all of the defendants, will you allocate that portion which applies to all of them to the three of them?

A. Yes.

Q. In other words, will you use common sense and understanding in weighing the evidence as it applies to each spe- [fol. 1613] cific defendant in the case?

A. I will.

Q. If accepted as a juror, will you talk the case over sensibly with the other jurors?

A. Yes.

Q. And will you endeavor by your verdict to reflect justice in the result?

A. Yes.

Q. If the prosecutor of the county, Judge O'Dwyer, establishes to your satisfaction by the credible evidence of persons in this court-room that these defendants, Buchalter, Capone, and Weiss, are three guilty men, guilty of murder in the first degree, will you say it in your verdict?

A. Yes.

Q. Will you have any fear or hesitation in pronouncing that verdict?

A. No.

Q. Mr. Gill, is the address 818 Fifty-seventh?

A. That is right.

Q. Pardon me. I forgot if I asked you if you knew Judge O'Dwyer, the District Attorney of the county. Do you, Mr. Bartholomew?

A. No, sir.

Q. Do you, Mr. Eckstein?

A. No, sir.

Q. Or do you know any Assistant District Attorney on the staff?

A. (No answer.)

Q. The reason I brought that up, you live in the Bay Ridge district, don't you?

A. That is right.

Q. Do you know Judge O'Dwyer?

A. I do not know him personally, no; I have heard of him.

Q. Have you lived in the Bay Ridge district for a number [fol. 1614] of years?

A. Bay Ridge and South Brooklyn all my life.

Q. And you are listed, sir, as a commercial agent.

A. Yes.

Q. Is that for some utility?

A. Savan-ah Line, ocean steamships.

Q. Does your business bring you into contact with people on the Brooklyn waterfront?

A. I represent the Savan-ah Line on Manhattan Island, 23rd Street and Canal Street on the East River and North River, and I also represent them throughout the entire Borough of Brooklyn.

Q. Is the name of Albert Anastasio a familiar name to you?

A. No.

Q. In representing the company, do you deal with the shippers of merchandise?

A. Shippers and receivers, yes.

Q. And is it part of your duty to see that the goods is loaded on the boat and unloaded?

A. (Answer inaud. ble.)

Q. And that it is delivered to the boat and delivered from the boat to its point of destination?

A. That is right.

Q. Does your business bring you into contact with any union officials?

A. Not often.

Q. I spoke to the other jurors, Mr. Eckstein, Mr. Bartholomew, and Mr. Fuller about possible connection or acquaintance with anybody in the Amalgamated Clothing Workers of America. I take it you have no connection?

A. No.

Q. Or with any clothing truckers?

A. Well, we are represented on Manhattan Island—— [fol. 1615] (inaudible). They do pick up freight for us from wholesale clothing dealers and make deliveries to us at our pier, Pier 26.

Q. I was referring to people who are engaged in clothing trucking industry. That is a specific type of work where they truck men's clothes.

A. I have no connection there whatsoever.

Q. May I go along, then, with the understanding that except as you have indicated to me, you have no connection on the waterfront, the Amalgamated Clothing industry or Brownsville-East New York section of Brooklyn, except as you have told us?

A. No. I cover the Brooklyn waterfront, that is, solicitation of freight. I have a number of accounts at the New York Dock Terminal and Bush Terminal and waterfront area.

Q. And you have been doing this for the past twelve years?

A. Twelve years, yes.

Q. And your contact there, it has been part of your duty and part of your business as representative of the Savan-ah Line?

A. That is right.

Q. I have mentioned the name of the nine lawyers that represent these defendants at the bar. Do you know any of those nine lawyers?

A. No.

Q. Do you know anyone connected with their law offices?

A. No.

Q. Or any lawyer who specializes in the defense of criminal cases?

A. No.

Q. May I go along with the understanding that you are in [fol. 1616] sympathy with the enforcement of the law?

A. Yes.

Q. And may I go along with the understanding that you three gentlemen, too, and you, Mr. Gill, will give to the defendants every legal and constitutional right the Judge says they shall have?

A. Yes.

Q. Do you feel the same as the other three jurors, Mr. Eckstein, Mr. Bartholomew and Mr. Fuller, about accomplice testimony, or do you differ from the way they feel about it?

A. I think you will have to make that a little clear.

Q. I will go along with you this way: Do you find any fault with the District Attorney of the County, Judge O'Dwyer, who, in order to solve a murder case, accepts the testimony of one of the perpetrators of the crime and uses that against the others who were in the group?

A. Have to use that, yes.

Q. You find no fault with the District Attorney doing that?

A. No.

Q. Will you find any fault with the prosecution for employing the use of that kind of testimony?

A. No.

Q. With respect to the tests that you apply to the believability of one of the perpetrators of the crime, will you always keep in mind and will you use your mental faculties

to find out is this accomplice telling the truth about the group participation of these defendants and himself in the murder?

A. I will.

Q. And even though you may see here individuals that [fol. 1617] you do not ordinarily meet, will you use common sense and understanding in weighing the issue in this murder case?

A. I will.

Q. Will you take the law in its every aspect exclusively from Judge Taylor?

A. Yes.

Q. And will you endeavor conscientiously to apply it to the facts in this case?

A. I will.

Q. With respect to the allocation of evidence, do you feel, as do the other three jurors, that obviously if the testimony applies only to one defendant, you will apply it to that specific defendant?

A. I will.

Q. That if, by the very nature of the testimony, it applies to all three defendants or two of the three, you will apply it in the way which common sense tells you the testimony should be applied?

A. Yes, sir.

Q. If accepted as a juror in the case, will you listen to fair argument?

A. I will.

Q. And will you discuss the case—and I do not want to repeat it; I do not want to be too blunt and of course not offensive—will you use common sense in weighing this issue of guilt or innocence in this case?

A. Yes.

Q. After you have heard all the evidence in the case, should you hear the three lawyers—and I say "should", because they may or may not repeat some of the arguments—but if three of the lawyers should use the same argument, that a man, for example, is an accomplice, would the fact [fol. 1618] that you heard the argument three times give it three times the force with you?

A. Yes, sir.

Q. Maybe I misled you. I do not want to get you into that. We will do it over. You see, it may be, because there are nine lawyers in the case, three representing each de-

fendant, each of the defendants has a right to have the jury listen to his lawyer on summation. Is that clear to you?

A. Yes.

Q. In other words, the lawyer gets up and he draws inferences from the testimony. He may argue to you, "I view the case this way." The second lawyer, for another defendant, who has, of course, a proper and a legal right to argue the case to the jury, he may say, "I see it the same way as does my friend, the other defense lawyer," and the third one may get up and say, "I see it the way those two do." Just because you hear an argument three times, will that be three times as strong in your mind?

A. I will use my best judgment.

Q. That is it. So that no matter how many times—and I don't say that they will repeat it, but there may, in the nature of things, be a repetition of argument, you will use your best judgment in finding out this issue of guilt or innocence; is that right?

A. Yes.

Q. Have you any brothers in Brooklyn, Mr. Gill?

A. I have one brother.

Q. Do you know what his business is?

A. Maritime electrical.

Q. Do you recall his first name?

A. John J.

[fol. 1619] Q. Does he live in Bay Ridge?

A. He lives in Flatbush.

Q. Mr. Gill, assuming that you have heard all of the facts in the case and you have heard all of the defense lawyers draw the inferences and the arguments that they draw from the testimony, and you hear the prosecutor draw his inferences from the testimony, and then the Judge tells you what the law is, and you and the other jurymen go into the jury room, into the sanctity of the jury room, and you talk the case over, and your mind is satisfied beyond a reasonable doubt that there are three guilty men, three men guilty of murder in the first degree, would you be afraid to say so by your verdict?

A. I would not.

Q. Would you have any hesitation in rendering that verdict?

A. No.

Q. Is there anything in your present connection of any nature or description that would affect your ability to render a verdict in consonance with justice?

A. I know of none, no, sir.

Mr. Barshay: May we have a recess for a short while, your Honor?

The Court: A ten-minute recess. Do not discuss the case. Defendants remanded.

(A short recess was thereupon taken.)

[fol. 1620] (Iver Bae was examined as to his qualifications.)

By Mr. Barshay:

Q. Mr. Bae, do you read any newspaper?

A. Yes.

Q. Do you read the *Mirror*?

A. No, sir.

Q. Do you read the *News*?

A. Occasionally.

Q. Suppose you tell me what newspapers you do read.

A. The *Tribune* and the *Journal*.

Q. Do you read them very often?

A. Yes, sir.

Q. Did you read the life of Judge O'Dwyer in the *Journal*?

A. No, I saw the heading.

Q. It ran for a considerable time, in instalments.

A. No, sir, I did not read it—a few paragraphs.

Q. Day after day?

A. No.

Q. Did you read anything at all in those paragraphs with respect to the defendants in this case?

A. No.

Q. Did you ever read anything about them at all?

A. I have, I read something about them; I don't know where.

Q. Before you received your notice?

A. Yes, sir.

Q. Did you continue to read about them after you received your notice?

A. Not in regard to the case.

Q. Did you form any impression with respect to any one you read about?

A. Yes.

Q. You got some idea about them, didn't you?

A. Yes.

Q. And you carried that idea with you when you came [fol. 1621] here as a prospective juror?

A. Yes.

Q. And that idea about them became stronger as you sat here and listened to the other jurors being chosen?

A. No, sir.

Q. It remained the same?

A. It don't have any bearing on it.

Q. The impression you had gained, was it unfavorable to the defendants?

A. It is.

Q. And would it require some evidence to remove?

A. Yes.

Q. If the Court should tell you that the defendants need not prove their innocence, would you expect some evidence on their behalf, from them or from witnesses on their behalf, to remove that impression?

A. Yes.

Q. You would insist on that even though the Court says they do not have to?

A. I believe so.

Q. That is your honest opinion right now?

A. Yes, sir.

Q. That unless they offer evidence, that impression which you say is detrimental to them will not eradicate itself from your mind?

A. No, sir.

Q. Is that right?

A. Yes, sir.

Mr. Barshay: I challenge for cause.

The Court: Try the challenge.

IVER BAE, No. 2673, residing at 920 Fifty-second Street, Brooklyn, New York, was sworn on the challenge.

By Mr. Barshay:

Q. Now that you are under oath, will you answer the [fol. 1622] questions in the same way if I ask them in the same way?

A. Yes, sir.

By Mr. Rosenthal:

Q. You remember the answers you gave the other lawyer?

A. Yes, sir.

Q. Of course, the impression which you have goes to the guilt or innocence of the defendants; is that true?

A. Yes.

Q. On this charge?

A. Yes, sir.

Mr. Talley: No further questions from any counsel. We press the challenge.

Mr. Turkus: No questions for the prosecution.

The Court: Challenge sustained.

CLINTON T. ECKSTEIN, No. 2752, residing at 136 Herkimer Street, Brooklyn, New York, a talesman, was then examined as to his qualifications.

By Mr. Climenko:

Q. Mr. Eckstein—is that the proper pronunciation?

A. Yes, sir.

Q. When Mr. Turkus asked you questions he asked you whether you had ever served on a jury before. I now ask you that question.

A. Yes.

Q. How many times?

A. Supreme Court, City Court; I also was called once, I believe, by one of the Judges—I don't know which court. [fol. 1623] Q. In the City Court, that was a civil case?

A. Yes, sir.

Q. And presumably in the Supreme Court, the same?

A. Yes, sir.

Q. Both in Brooklyn?

A. Yes, sir.

Q. And in both of those cases did the cases extend to the point where the Court charged the jury on the law in the case?

A. Yes, sir.

Q. In these civil cases, if you recall, did the Court charge you and the other members of the jury that the plaintiff, in order to recover, had to sustain a fair preponderance of proof, and that a verdict is given on a fair preponderance of proof?

A. As far as I recall.

Q. You recall that rule of law?

A. The Judge gave the usual charge.

Q. Assuming that in this case, a criminal case, the Court should charge you by a different rule—that there can be no conviction unless there be proof to your satisfaction of guilt beyond any reasonable doubt; would you adopt that?

A. Yes, sir.

Q. Of course, you understand there is a difference between those two rules?

A. Yes, sir.

Q. In other words, there is a difference between proving a case by a fair preponderance of proof and proving it beyond a reasonable doubt?

Mr. Turkus: I object. That is a legal question.

The Court: Objection sustained.

[fol. 1624] Mr. Climenko: Exception.

Q. Do you understand, assuming the Court should charge you that there can be no conviction except upon proof beyond a reasonable doubt, that you as a juror, if you are selected as a juror, will follow that instruction?

A. Yes, sir.

Q. Even though it may differ from the rule you might have heard in the civil case, you would have no quarrel with it?

A. On that point I don't recall anything; I accepted the charge as the Judge presented it at that time. I recall nothing of that charge. This case is entirely by itself, separate. I don't see any connection with it.

Q. I grant you that. The point is, there is nothing in your experience in any court-room which would in any wise invade your ability to follow such instruction?

A. Not as I know of.

Q. Have you read about this case?

A. Well, to be perfectly frank, what I know about this case is reading about the Dewey investigation some time ago. As far as this particular case goes, I recall reading nothing on this matter.

Q. Did you read about any of the defendants in this case?

A. Yes, in a general way.

Q. Do you recall where you read about any of the persons named in this case?

A. I cannot tell you that now.

Q. In consequence of any or all of your reading of the case, do you have any opinion with respect to any of the [fol. 1625] persons in the case?

A. Well, I have a general opinion, yes; I don't see how anyone can be otherwise.

Q. Is that an opinion which is adverse to any of the persons in this case?

A. Naturally.

Q. It is a detrimental opinion?

A. Naturally.

Q. You have that opinion now?

A. Yes.

Q. As I am sitting here and I am asking you questions; is that correct?

A. Yes.

Q. It is an opinion which you have entertained for some time?

A. Yes.

Q. It had its origin when you read about some activities by Mr. Dewey?

A. Yes.

Q. It goes back a few years?

A. Yes.

Q. So over that period you have had and still have right now an attitude or opinion which is adverse to one or more of the persons in this case?

A. Well, if you put it that way, yes.

Q. No, I don't want to proffer any language for you to adopt; I am only trying to get the state of your mind. Is that a fair statement of your mental condition about one or more of the people in this case?

A. I think it is.

Q. Now, in consequence of that being a fair statement of the condition of your mind, would it require the production of some proof on behalf of the person or those persons in order to establish that point of view you have?

[fol. 1626] A. No, sir, not necessarily.

Q. If you were sworn at this time as a juror, would you continue to have that point of view about one or more of these defendants?

A. Yes and no; I would endeavor to judge the case to the best of my ability.

Q. But you would realize that in making that endeavor you would start in with a handicap?

A. Naturally.

Q. And that handicap, if I can put it in these words—stop me if I am not doing it accurately—that handicap refers again to that state of mind you have about one or more of these defendants?

A. Yes.

Q. And this is what has been called a capital case?

A. Yes, sir.

Q. You understand what those words mean, I am sure.

A. Yes, sir.

Q. Now, that being so, you don't seem proud about your ability to act with complete impartiality as a juror in this case?

A. Well, I would not put it that way, no.

Q. You do have this adverse opinion about some of the persons in the case?

A. Well, it is a general opinion; it is natural every law-abiding citizen has an opinion of that kind.

Q. And you feel, of course, that you are a law-abiding citizen?

A. As far as I know, yes, sir.

Q. As a law-abiding citizen you entertain an opinion adverse or prejudicial to one or more of the persons on trial [fol. 1627] in this case?

A. Yes, sir, a general impression.

Q. A general impression?

A. That is from what I gathered in the newspapers; naturally I understand you cannot believe everything you read in the newspaper, but nevertheless, we have to use our thoughts, as a guide.

Q. You have used, even though you discounted some of the things you read in the newspaper, you have used the remaining part as a guide in forming an opinion?

A. Well, an impression, not an opinion.

Q. Whether the word is impression or opinion, it is one detrimental to one or more persons on trial in this case?

A. Yes, sir.

Q. That is an opinion which you have entertained for a long time?

A. Well, that is an opinion I have entertained since I know the difference between right and wrong.

Q. Having that opinion and being guided, because of your knowledge of the difference between right and wrong, you have an opinion adverse to one or all of these defendants?

Mr. Turkus: I object to that as speculation.

The Court: It seems to be repetition. He has already said so. He already said he has an impression adversely.

Q. In consequence of your opinion or impression, would you require the production by the District Attorney of a little less evidence against one or more of these defendants in the course of the trial of this case?

[fol. 1628] Mr. Turkus: I object. The burden of proof is a legal question.

The Court: We are entitled to know if the gentleman is able to put that impression to one side and judge the case on the evidence. Objection overruled.

The Witness: Yes, sir, I believe I could set it aside.

Q. In view of the fact that you harbor that attitude with respect to one or more of the persons on trial in this case, would you, in consequence of the fact that you have that feeling, impression, or opinion, require the District Attorney to produce less evidence than he would otherwise be required by your mind to produce in order to demonstrate the guilt of one or any of these persons?

Mr. Turkus: I object. The juryman can lay aside his impression, he says. It is a legal question now.

The Witness: No. That is, by that I mean, as you put it, I would require equal evidence on both sides. I would not necessarily accept evidence in preference to the defendants'.

By the Court:

Q. The question is whether you would be influenced by your impression by reason of what you read.

A. No, sir, I don't think I would.

By Mr. Climenko:

Q. Did I understand you to say you would require the production of equal evidence on both sides?

[fol. 1629] A. Well, in a sense, yes.

Q. Now, may I know what you mean?

A. In amount, I would say, one against the other.

Q. Well, what would you weigh on the one side as against the other?

A. I would have to hear.

By the Court:

Q. Mr. Eckstein, the law does not require the defendant to give any evidence.

A. I understand that. I am just speaking in general terms.

By Mr. Climenko:

Q. Now, would the impression you entertain about one or more of the persons on trial in this case, inure to the detriment of those persons during the course of this trial?

A. It would not necessarily.

Q. When you say "not necessarily," do you imply that you entertain some doubt?

A. Only what I said before.

Q. Disregarding what you said before, I ask you that question: Would the prejudice or the opinion you have, or the impression you have with respect to any of these defendants, inure to their detriment in your mind during the course of the trial of this case?

A. It would not.

Q. Then that opinion which you have, or that impression, that detrimental impression, does not affect your thinking about any of these defendants at all?

A. No, sir; I would try to weigh the evidence to the best of my ability.

[fol. 1630] Q. In weighing the evidence to the best of your ability, would one of the components in your mind be that detrimental impression you had about one or more of these persons on trial?

Mr. Turkus: Objected to as already answered in the negative.

The Court: Sustained as repetitious.

Mr. Climenko: Exception.

Q. About how many articles did you read about one or more of these persons on trial?

A. I really cannot say; I don't recall.

Q. When did you first form the opinion which you say is detrimental, or this impression which is detrimental to one or more?

A. During the Dewey investigation. I believe one of the defendants had disappeared, and at that time they could not locate him.

Q. At that time you formed a detrimental impression of that particular person?

A. Well, naturally.

Q. Since then have you read anything about that particular person?

A. Yes, sir, generally; nothing pertaining to this case.

Q. At the present time you hold that detrimental impression of that person?

Mr. Turkus: Objected to as already answered.

The Court: Sustained as repetitious.

[fol. 1631] Mr. Climenko: I challenge the juror for implied bias.

The Court: Try the challenge.

Clinton T. Eckstein, a talesman, was sworn on the challenge and examined:

By Mr. Climenko:

Q. Now that you have been sworn, I direct your mind to those questions I put to you about your reading about one or more of the persons on trial in this case, and I also direct your attention or invite your attention to the answers you made to those questions. I am now asking you this question: Assuming I were now to repeat all those questions

on that subject, would your answers be the same now that you are under oath?

A. They would.

Mr. Climenko: I press the challenge.

[fol. 1632] By Mr. Rosenthal:

Q. You say that the *Mirror* is delivered to your place of business?

A. Yes, sir.

Q. You say that here, under oath, you have never read any articles in the *Mirror?*

A. No, just generally, naturally I glanced through the *Mirror;* I did not buy it.

Q. No, but it is delivered to your place of business.

Mr. Turkus: Objected to as argumentative.

Mr. Rosenthal: He does not have to buy it to read it. Some people pick it up in the court-room. I am asking him the question as to whether he reads it. I will withdraw the question.

Q. Irrespective of whether you buy the *Mirror* or you get it through delivery to your office, do you read the *Mirror*?

A. I do not.

Q. Did you just state to me a moment ago that you glance through it generally?

A. I glance through it casually; to be perfectly frank with you, I look at the comics, that is about all.

Q. You said in answer to Mr. Climenko first that there was an opinion that you had. Aren't those your words?

A. An opinion or an impression, whichever you——

Q. I am not trying to quibble with you; I am trying to find out whether or not I am correct in my assumption that the word which you used in answer to Mr. Climenko's [fol. 1633] question when he first directed it to you was that you had an opinion which was adverse to one or more of the defendants.

The Court: He said "impression."

Mr. Rosenthal: I wrote it down when he said it. The word he first used was "opinion"; subsequently, in answer to your Honor's question, when you said, "impression," he said "impression."

By the Court:

Q. Do you recall the word that you used?

A. Yes, sir; as I recall it I said an impression or opinion.

Q. Have you any opinion as to the guilt or innocence of these defendants on this charge?

A. Well, I said I had a general impression.

Q. Have you any opinion as to this charge?

A. No, I recall nothing whatever about this crime.

Q. So far as you recall, did you ever read anything about this particular charge?

A. No, sir, I believe I said I did not.

By Mr. Rosenthal:

Q. In answer to Mr. Climenko you first said you believed you could put your impression aside.

A. Yes, sir.

Q. That meant, didn't it, according to your interpretation of the English language, that you had—that there was a doubt in your mind as to your ability—isn't that what you meant by that expression?

A. Well, what I meant was this—I said it several times—that I would endeavor to the best of my ability to weigh [fol. 1634] whatever evidence was presented by both sides.

Q. Do you remember saying that you did not think, you did not think you would be influenced by the opinion—weren't those your exact words?

A. Yes, sir.

Q. Doesn't that imply, in your interpretation of the English language, a doubt as to your ability to put such an opinion aside?

A. Well, I think, if you want to draw it that fine, yes.

Q. I am asking you for your interpretation. Your answer is "Yes"? Did you just say "Yes"?

Mr. Turkus: I object to the argument. The juror said if that is the way he wants to interpret it.

The Court: The question was one appertaining to the meaning of language, as to what was in the witness's mind—the particular language he used.

Q. When you said in answer to Mr. Climenko that you don't think you would be influenced, did that imply in your mind a question of doubt as to your ability?

The Court: Any doubt?

The Witness: Well, to be perfectly frank with you, putting the question that way, this may be confused.

By the Court:

Q. Now, do you think it is necessary that this case should be decided by twelve impartial men upon all of the evidence [fol. 1635] alone and without any prejudice whatsoever?

A. Well, I believe I said that before.

Q. You are stating what you think or believe, but you have not stated whether or not you will definitely put aside your impression and decide the case fairly upon the evidence disclosed.

A. If I recall rightly, I did say that.

Q. Is that your present mental attitude?

A. Yes, sir.

Q. Will it stick?

A. Certainly.

By Mr. Rosenthal:

Q. At the time you made that statement you said you would view the evidence on both sides.

A. Naturally.

Q. You have been in court for how many days listening to the questioning of the jurors?

A. To be perfectly frank, it has only been a very few days; I have been excused most of the time.

Q. Have you heard the Judge repeatedly tell the jurymen that are in the box and were in the box that at no time in any criminal trial is it necessary for any defendant to offer any proof concerning his innocence of a criminal charge? Have you heard the Judge repeatedly mention that?

A. Yes, sir.

Q. Now then, because of your frame of mind and because of the impression which you gained, isn't it true that if the defendant saw fit, through his attorney, not to offer any evidence offsetting what the District Attorney may offer, that that impression which you gained would be stronger [fol. 1636] and sway you in determining the guilt or innocence of the particular defendant who failed to offer evidence? Isn't that true?

A. Not necessarily.

Q. No, not necessarily again implies a doubt in your mind, doesn't it?

A. Well, it might. You might think that it might imply a doubt.

Q. It is not what I think, it is what you think in answering my questions, not what I think; doesn't your answer to my question—and we are not questioning your integrity—any man is entitled to an opinion, you know that—you should not be afraid to voice an opinion. Now, is your opinion, as voiced by your answer to me, "Not necessarily," or does it imply a doubt as to your ability—that is all we are asking you, nothing else——

A. If you say it does, it does.

Q. I am not saying it does at all. I am not under oath. I am simply asking you a question: Do you say it does? That is the question. As evidenced by your answer, "Not necessarily."

A. I will change my answer to "No," then.

Mr. Rosenthal: I renew the challenge, on the ground of implied bias.

By Mr. Turkus:

Q. I will try to simplify it, if I can: You say you will weigh the evidence on both sides in this case?

A. Yes, sir.

Q. And after having weighed the evidence you feel that [fol. 1637] this impression you have may be confirmed or dissipated?

A. I feel—I just changed my answer from "Not necessarily," to "No."

Q. You don't mean to answer "No" to my question—you say after——

Mr. Rosenthal: I must object to that question.

The Court: That is a difficult objection to rule on, because the question is a little subtle.

Mr. Turkus: I will withdraw it.

The Court: The talesman said that his answer on the question of being influenced by an impression is "No." Now you ask him if he would lay it aside upon receipt of the evidence. That would be a contradiction of exactly what he just said. I say the question is subtle, because it might tend to cause a perfectly honest, intelligent talesman to blunder into a confused answer. Objection sustained.

Q. You used the expression that you would weigh the evidence on both sides.

A. Yes, sir.

Q. You mean to convey by that that after you had weighed the evidence you might be able to put aside this impression you now have?

The Court: You mean you would retain the impression until you got all the evidence?

A. No, sir. I stated before, my answer was "No," I [fol. 1638] would weigh the evidence as it was presented.

Q. Without regard to your impression?

A. Yes, sir, that is what I meant. I don't know whether they understood me. Perhaps they did not.

By Mr. Talley:

Q. Now, are we all out of step but you?

The Court: Don't answer that.

Q. You said you had an impression.

A. Yes, sir.

Q. You designate it "impression" or an "opinion"?

A. Yes.

Q. You have it now as I address you—you have what you call an impression or an opinion?

A. Yes, sir.

Q. And something has got to happen in the course of this trial to either remove or confirm that impression; isn't that so?

A. Yes, sir, naturally.

Q. May I know what has got to remove or confirm that impression?

A. That I cannot say; I don't know.

Q. Can you suggest anything else than evidence in the case that will remove it or confirm it?

A. Such as anything else, do you say?

Q. Yes, other than testimony or evidence.

Mr. Turkus: I object to the form of the question.

The Court: Sustained. I do not understand it.

Mr. Talley: Exception.

Q. What do you expect to remove that impression you [fol. 1639] have in your mind, or, if it is not removed, what will confirm it?

Mr. Turkus: I object, it is a double question.

The Court: The talesman can say whether or not he can put it aside and disregard it; he has already answered that question.

Q. Who do you expect will remove that impression, if it is removed, the prosecution or the defense?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Talley: Exception.

Q. Is it not a fact that you would require some proof in order to remove from your mind the impression which you now have?

Mr. Turkus: Objected to as already answered.

The Court: He has not said he could remove it; he said he could disregard it.

Mr. Talley: May I have an answer to my question, or does your Honor sustain the objection?

The Court: The objection is sustained.

Mr. Talley: Exception.

Q. Do you require the defendants or any of them to give testimony to remove that impression?

Mr. Turkus: I object.

The Court: Answer yes or no.

The Witness: Yes.

[fol. 1640] The Court: Challenge sustained.

(Mr. Bartholomew was then examined as to his qualifications to serve as a juror.)

By Mr. Climenko:

Q. I understand you are employed by the New York Telephone Company?

A. Yes, sir.

Q. I do not remember if the question was asked whether you have served on a jury before you were called here.

A. The question was not asked, but I answered yes; I have.

Q. What court?

A. The Supreme Court. I did not serve, but I did serve in the Municipal Court.

Q. That was a civil case?

A. Yes, sir.

Q. You never have served on a jury in a criminal court?

A. No, sir.

Q. You understand that the mere fact that a person has been indicted, would that fact in and of itself be an indication of guilt?

A. No.

Q. The indictment is merely a paper which makes an accusation?

A. Yes.

Q. And assuming the Court shall instruct you the mere fact that the defendant is charged by indictment is no proof in any sense that he is in any sense guilty, would you have any difficulty in accepting that instruction of law?

A. No, sir.

Q. Of course, you realize the Grand Jury may indict an innocent man?

A. I don't ever judge the intent of what the Grand Jury [fol. 1641] does in regard to an indictment except for what my father told me, who has served on these Grand Juries, that they hear one side of the case, that is all.

Q. The defendant is not afforded an opportunity to be heard before that body?

A. Yes, sir.

Q. So that the Grand Jury is composed of Grand Jurors who hear only the evidence offered to it by the District Attorney?

Mr. Turkus: Objected to as repetitious.

The Court: It is incompetent. Sustained.

Mr. Climenko: Exception.

Q. Did you read about this case before you were summoned here for jury duty?

A. No, sir.

Q. Had you ever read about any of these defendants?

A. Not to my knowledge; I do not recall reading about them.

Q. Did you read during the course of this summer about District Attorney O'Dwyer and his career, as it was depicted in the pages of, I think, the evening *Journal-American*?

A. No, sir.

Q. I take it you did not read anything in the *Mirror* during the course of the summer?

A. No.

Q. You don't generally read the *Mirror* anyhow?

A. No, sir. As a matter of fact, I don't buy any paper at all. That is a frank statement. I have had occasion to look at the *Tribune* while I am in the office.

Q. That is perfectly reasonable. I guess we understand [fol. 1642] each other. The *Tribune* is the only paper normally you do see, and you see that only for a little while?

A. Yes, sir.

Q. You have no impression about any of the persons on trial in this case?

A. No, sir.

Q. You have heard Mr. Turkus asking about accomplice testimony?

A. Yes, sir.

Q. Do you have any prejudice against a witness simply because he is an accomplice?

A. No, sir.

Q. Assuming, however, that the Court should instruct you, as a matter of law, that in the event you were chosen as a juror here it would be your duty and the duty of everybody else in the jury box to regard any statement made by an accomplice, even though made under oath, with caution and with suspicion, and with great care; would you have any difficulty in following that instruction on the law?

A. No, sir.

Q. In other words, if you were told that you were to be more wary about accepting the truthfulness of the statement of a man who takes the stand and says, "I was a party to this crime," if you were told it was your duty as a juror to attach a different standard of examination, a more stringent and careful standard of examination in relation to what such a man tells you, would you have any difficulty in accepting your instructions on the law?

Mr. Turkus: Objected to as repetitious.

By the Court:

[fol. 1643] Q. Just yes or no—would you weigh such evidence with caution?

A. Yes, I would.

Q. Scrutinize it carefully?
A. Yes.
Q. And accept it only if you believed it to be true?
A. Yes.

Mr. Climenko: Your Honor, may I request your Honor to permit the talesman to finish his answer that he was about to give?
The Court: No.
Mr. Climenko: Exception.

Q. Supposing that a witness takes the stand, is offered as a witness by Mr. Turkus, the Assistant District Attorney, would the fact that his admission to the witness chair, so to speak, was sponsored by the Assistant District Attorney, motivate you to be influenced in his favor?
A. No, sir.
Q. It would not have any effect at all?
A. No, sir.
Q. Supposing a man takes the stand and admits he has committed perjury. Now, in other words, he admits that on prior occasions he took the solemn oath to tell the truth in the court and he immediately proceeded to violate it by telling an untruth in that court—he says, "That is part of my record," "That is one of the crimes I have committed." Supposing such a person takes the stand here, will you, in appraising the believability of his testimony, take into account the fact that he is an admitted perjurer?
A. I would consider it very carefully—it would not influ-[fol. 1644] ence my attitude.
Q. You would listen to it and you would take into consideration the fact that maybe he is lying now, because he admits he lied on prior occasions?

Mr. Turkus: Objected to as already answered.
The Court: Objection sustained.
Mr. Climenko: Exception.

Q. Is the fact that such a witness admits he has committed perjury in the past a factor you would take into consideration in passing on his trustworthiness?

Mr. Turkus: Objected to as already answered.
The Court: Objection sustained.
Mr. Climenko: Exception.

Q. Supposing that an accomplice were to take the stand and admit he, that accomplice, has in the past committed many other crimes, committed perjury, would you take that into consideration in passing on the trustworthiness of the statement of that witness?

Mr. Turkus: Objected to as already answered.

The Court: The Court already sustained objection to that as repetitious.

Mr. Climenko: The question I am interested in is an accomplice who has committed perjury.

The Court: Please abide by the ruling of the Court. I [fol. 1645] do not wish to debate with you on whether the rulings are right or not. Take your exception and ask on some other point.

Mr. Climenko: I take an exception to the ruling and I object to your Honor's comment.

Q. Now, suppose that the District Attorney attempts to produce as a corroborating witness; that is, one who attempts to support an accomplice witness, a man who admits on the stand that he has committed many crimes in this jurisdiction of Kings County and that he has not been prosecuted for those crimes, would you take into consideration the motive of that so-called corroborating witness in passing on his credibility?

A. I don't understand what you mean by motive.

The Court: Getting immunity. If a witness is getting immunity for turning State's evidence, will you take that into consideration in determining if he had a motive for telling an untruth?

The Talesman: No, sir.

By the Court:

Q. You would not take that into consideration? The law requires that you should.

A. I did not quite understand.

Q. The law says that you should scrutinize every witness's testimony carefully in determining whether or not it is true, because the man is a criminal and admits he has turned State's evidence and he has not been prosecuted himself, his motive for giving his testimony may have a strong bearing upon whether or not he is telling the truth. [fol. 1646] A. Yes, sir, it may have a bearing, but I am not in a position to scrutinize it.

Q. Would you consider it in determining whether or not you beli ved it?

A. Yes, sir, I would.

By Mr. Climenko:

Q. You would take into consideration his motive for immunity, in other words?

Mr. Turkus: I object. He said he would take it into consideration. It is repetitious.

Q. You would take that into consideration?

A. Yes.

Q. Now, if you were selected as a juror in this case, assuming that the Court should instruct you that it would be your duty as a juror to pass on the facts of the case and do that without any reference to what you thought somebody else outside the jury box might feel about the case, would you have any hesitation or reservation about your ability to do that?

A. No.

Q. Assuming that at the close of the case and after deliberation with other members of the jury, you entertained a reasonable doubt about the guilt of the defendants or any one of them, and your fellow jurors were unable to dissuade you from your state of mind, would you adhere to your determination, even though you were in the minority?

A. Yes, sir.

Q. Even though, in adhering to it, you might cause impediment to yourself or to others?

A. Yes, sir.

[fol. 1647] Q. In other words, you realize your duty as a juror is one which you cannot share with anyone else?

A. Yes, sir.

Q. Outside of the jury box——

Mr. Turkus: I object. The juror indicated he would use his independent judgment.

By the Court:

Q. Counsel wants to know if you realize your duty as a juror does not go beyond the jury box, that your deliberations will be confined to members of the jury?

A. Yes, sir.

Q. And in arriving at a final conclusion you are limited to a discussion with members of the jury?

A. Yes, sir.

By Mr. Climenko:

Q. And if you entertained a doubt as to the guilt of the defendants or any one of them, you would not hesitate to reflect that doubt in your verdict of Not Guilty?

A. Yes, sir.

Q. You also understand that the defendants and each of them is presumed to be innocent?

A. Yes.

Q. You understand also the defendants are under no obligation to adduce any proof in this court?

A. Yes.

Q. That the District Attorney, who makes the accusation through indictment, is under an obligation to demonstrate guilt beyond a reasonable doubt?

A. Yes.

Q. That, whether or not the defendants or any of them produce any witnesses, that duty always remains with the District Attorney?

A. Yes, sir.

[fol. 1648] Q. And that whether or not he has sustained that duty is a problem to be decided by you without any reference to whether or not the defendants have offered any witnesses?

A. Yes, sir.

Q. So that if, in the wisdom of counsel, the defendants or any of them do not proffer any witnesses here, that is a circumstance which with you will not inure to their detriment in your mind?

A. Right.

Q. Is there any matter in your mind, any reason, any fact in your experience which creates in your mind a reservation about your ability to be a fair juror in passing upon the evidence in this case?

A. No.

(Talesman Fuller was then interrogated as to his qualifications to serve as a juror.)

By Mr. Barshay:

Q. Mr. Fuller, I did not get the name of the company with which you are affiliated.

A. The Consolidated Edison Company.

Q. You gave your occupation as engineer?

A. Yes.

Q. May I know with what concern?

A. The Consolidated Edison.

Q. Have you had any prior jury service?

A. I was called for the Grand Jury, but I never served.

Q. Did you ever serve as a Grand Juror?

A. No, sir.

Q. Were you ever the victim of any crime?

A. No, sir.

Q. Was anyone very close to you a victim of any crime?

A. No, sir.

[fol. 1649] Q. Do you know anyone in the Police Department?

A. No, sir.

Q. Is your office on 14th Street?

A. No. 380 Pearl Street, Brooklyn.

Q. Is that a branch of the New York company?

A. Yes, sir.

Q. I take it that you know that the Consolidated in Manhattan was the victim of a very large robbery?

A. Yes.

Q. Very recently?

A. A year or so ago.

Q. Maybe a little more?

A. Yes.

Q. Did you have anything to do with that?

A. No, sir.

Q. Would that fact prejudice you against anybody accused of crime?

A. No, sir.

Q. Have you ever come in contact with anyone in the District Attorney's office?

A. No, sir.

Q. Do you propose to take an interest in this forthcoming election?

A. No.

Q. Are you a member of any political club?

A. No.

Q. Are you a member of any men's club; that refers to your church.

A. I belong to a club.

Q. You have had no speakers who spoke upon the subject of crime and its prosecution?

A. No.

Q. Did you ever hear any District Attorney speaking of crime, or any other official?

A. No, sir.

Q. What club is that?

A. A club in Alabama.

Q. You are from Alabama?

A. Yes, sir.

Q. How long have you been here?

A. Twelve years.

[fol. 1650] Q. Do you belong to any club in Brooklyn or Manhattan?

A. The company's club.

Q. Sometimes they invite gentlemen to speak, don't they?

A. Yes.

Q. Have you ever had the good fortune to listen to any Assistant prepound the subject of crime?

A. No, sir, I never attended any of their meetings.

By the Court:

Q. You live about two blocks west of Flatbush Avenue?

A. One block—yes, two blocks.

Q. New York Avenue near 33rd Street?

A. Yes, sir.

Q. You are right alongside the Long Island Railroad cut?

A. Yes, sir.

Q. That is a community of private homes?

A. Yes, sir, it has four apartment houses right there.

Q. At 34th Street?

A. Yes, sir, 32nd and 31st Street.

By Mr. Barshay:

Q. Have you read the daily papers recently?

A. I get the paper in the morning.

Q. May I know which paper you prefer?

A. The evening paper, the *Telegram*.

Q. Have you read about the defendants in the paper?

A. I read a short article in the *Telegram*, after we were dismissed in the case, trying to find out why the postponement.

Q. Is that the only article you read?

A. Yes, sir.

Q. Did you find out?

[fol. 1651] Mr. Turkus: Objected to.

Q. You don't charge the defendants with that?

A. No, sir.

Q. And you will not?

A. No, sir.

Q. Have you heard any radio talks?

A. No, sir.

Q. Is it your answer you know none of the facts in this case, you know nothing against the defendants that are being tried?

A. That is right.

Q. Have you formed any opinion or impression since coming as a juror?

A. No, sir.

Q. I take it you say you are free of bias or prejudice against the defendants for any cause whatsoever?

A. I am.

Q. And the answers that some of the jurors made to certain questions propounded by either counsel have not influenced your judgment with respect to them?

A. No, sir.

Q. So you are of free and open mind?

A. Yes, sir.

Q. You know that the defendants are merely charged or accused of murder?

A. Yes, sir.

Q. You have heard the gentleman say who is next to you that he believes the Grand Jury may indict innocent men. And that is true?

A. Yes, sir.

Q. In addition to that fact, the law presumes Mr. Buchalter innocent of this crime; do you understand that?

A. Yes, sir.

Q. Are you in accord with that thought?

A. Yes, sir.

Q. That this gentleman, Mr. Buchalter, is as innocent of this crime now as any person in the court-room? Do you [fol. 1652] feel that way?

A. Yes, sir.

Q. And the substantial right given to him and which you must accord to him throughout the trial and until the twelve of you are convinced beyond a reasonable doubt that the District Attorney has sustained the burden of proof, will you accord him that right?

A. Yes, sir.

Q. When he pleaded Not Guilty to this accusation he put at issue the charge, you believe that?

A. Yes, sir.

Q. He put at issue the charge in this case which you must decide?

Mr. Turkus: That is a legal question.

By the Court:

Q. You understand that?

A. Yes, sir.

Q. That when a man says Not Guilty, then the case must be tried?

A. Yes, sir.

By Mr. Barshay:

Q. Not only did he say Not Guilty, but he denied by his plea of Not Guilty every accusation made against him, one of them being that he is an accomplice to anyone that may testify here; you understand that?

A. Yes, sir.

Q. That means that the District Attorney must present evidence to you to convince you beyond a reasonable doubt of this man's guilt?

A. Yes, sir.

Q. And you are in accord with that?

A. Yes, sir.

Q. You want to know what type of evidence he gives you [fol. 1653] from which you can draw a conclusion?

A. Yes, sir, I will have to know.

Q. You won't accept any type of evidence, but you shall accept credible and believable evidence?

A. Yes, sir.

Q. If it is not believable, you will reject it?

A. Sure.

Q. And the way to determine whether or not a person is giving you believable evidence is to find out who is that person?

A. Yes, sir.

Q. You will search for the truth as it comes from the witness stand?

A. Yes, sir.

Q. "Who is that person?" means what he has been in the past, what has been his life; isn't that so?

Mr. Turkus: I object. The jury gets instructions on the law, and they apply it to the facts.

The Court: You may reframe your question.

Q. When a person takes the stand and raises his right hand to tell the truth, you understand that does not necessarily mean he is tellin the truth?

A. Yes, sir.

Q. When you are a juror, you are the one to determine whether or not he is telling the truth?

A. Yes, sir.

Q. And in order to determine whether or not a person is telling the truth, you want to know who he is?

Mr. Turkus: I object. That is not an infallible test, who he is; even a bad man may tell the truth. It is the jury's province to find out.

[fol. 1654] By the Court:

Q. If any man takes the stand and swears to tell the truth, will you consider anything and everything concerning the man which has any bearing on the question of truth?

A. Yes, sir.

Mr. Barshay: I am not putting something new to the juror. There has not been any objection for three weeks now. I think I ought to be allowed to qualify the juror as I have been allowed heretofore.

The Court: You mean the Court should shade its ruling?

Mr. Barshay: No, but the District Attorney is objecting.

The Court: I think you are getting confused because it is getting late.

By Mr. Barshay:

Q. Mr. Juror, is there anything in my questions that has created a confusion in your mind? Be fair with me.

The Court: Don't try out the Judge's remarks. I withdraw the word "confused." Maybe everybody is getting a little bit peeved because it is getting late.

Q. Assuming the witness takes the stand, a witness offered by the District Attorney, and he says, "I have been a murderer eleven times in my life; I have been a pimp, I have been a perjurer, I have been a robber, I have been an extortionist, I have been a burglar, I have been an assaulter, I have been an ex-convict," you would weigh that gentleman's testimony, if I may call him that, with a great deal of caution and care?

[fol. 1655] Mr. Turkus: I object.
The Court: Objection overruled.

A. Yes, sir.
Q. If the District Attorney offers a series of men of that character and description, you will weigh that testimony with care too?
A. Yes, sir.
Q. You will also take into consideration whether or not the same individual or group have any hope of reward for their testimony they are offering now?
A. Yes, sir.
Q. And even though they deny they have any hope of reward, if you in your own mind know they are concealing some hope of reward, you will take that into consideration?
A. Yes, sir.
Q. If you find also that the treatment they have been receiving, these gratuities I have just described, from the authorities, is of such a nature as living in hotels and taking automobile rides and going to baseball games and allowed to see their women, would you take those things into consideration before you accepted their testimony?

Mr. Turkus: That is objected to.
The Court: Objection overruled.

A. I will take everything into consideration.

Q. There may come a time when one of these men may claim he is an accomplice of the defendant Buchalter—that will be his claim—will you take that into consideration, plus the fact that he has never seen or spoken to Buchalter, [fol. 1656] in deciding whether or not he is an accomplice of Buchalter?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. There may come a time when the evidence of so-called witnesses or a witness will be offered tending to corroborate the accomplice. Will you give them the same test as you did the accomplice?

A. Yes, sir.

Q. In other words, you want to know who they are and what is the cause for their——

Mr. Turkus: (Interrupting) I object. Accomplices are not in the same category with the other witnesses.

Mr. Rosenthal: I object to the speech.

Q. You will honestly decide for yourself on all of the evidence whether or not it is true or false?

A. Yes, sir.

Q. There has been some talk about Judge O'Dwyer. You understand that Judge O'Dwyer is District Attorney of the county and as such is engaged in the prosecution of all crime?

Mr. Turkus: I object, engaged in the prosecution of all crime.

Q. I mean in charge of the investigation of all crime. You will not use the ability of Judge O'Dwyer or his reputation for integrity in deciding the guilt or innocence of these defendants?

A. I don't know anything about him.

Q. We are assuming he is, and I will vouch for it, a man [fol. 1657] of excellent reputation, but that has nothing to do with the guilt or innocence of these defendants.

Mr. Turkus: I object.

The Court: Objection sustained.

Q. In other words, that has nothing to do with their case? He may be a better prosecutor than the defense, but that has nothing to do with the case. It is these facts in the case that show up?

A. Yes, sir.

Q. That is all you will be guided by?

A. Yes, sir.

Q. The Court shall tell you that no defendant need prove his innocence. Will you follow that law?

A. Yes, sir.

Q. And if the Court tells you he need not explain any charge or any accusation or any fact or detail, will you accept that?

A. Yes, sir.

Q. If the Court should tell you that a defendant who fails to take the stand—you cannot draw any unfavorable inference against him by reason thereof, will you accept that?

A. Yes, sir.

Q. If the Court shall tell you that character is never an issue in this case or in any case unless the defendants decide to put it in issue by calling character witnesses, will you follow that?

A. Yes, sir.

Q. So that, whatever may be the opinion of anyone in the jury room with respect to anybody's character, unless it is put in issue it will be no part of this case; is that so?

A. Yes, sir.

[fol. 1658] Q. So the fact that my client is now incarcerated for a considerable period, from forty to sixty years

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Mr. Turkus: You said seventy-seven before.

Q. That is right. ——forty to seventy-seven years, you will not hold that against him?

A. No, sir.

Q. That has nothing to do with this case?

A. That is right.

Q. So do you feel that you are now qualified to protect the rights of the defendant Buchalter in every respect and in every degree?

Mr. Turkus: Protect or preserve? He is not required to protect—he is required to preserve.

Q. If you do that, I will feel you did protect him, so that is all right.

Mr. Turkus: What difference does it make how Mr. Barshay feels?

The Court: Objection overruled, if such it is.

Q. There will be evidence given here which may involve one defendant and exclude another. Will you use your intelligence to see that you apply it only against the defendant who is concerned?

A. Yes, sir.

Q. And even if the trial takes a long time, there are a great number of witnesses to give such testimony, in your mind you shall allocate it to the person to whom it applies?

A. Yes, sir.

Q. While they are being tried together, you understand [fol. 1659] each one is in reality being tried separately and is entitled to a separate and distinct verdict from you?

A. Yes, sir.

Q. There is no group being tried, although they are being tried together, so there is nothing in your mind either by way of element of time or any other item which would preclude you from rendering a verdict which will reflect the truth as you see it in this case?

A. No, sir.

The Court: The defendants are remanded.

Recess until seven o'clock.

(Talesmen were admonished as to their demeanor in the interim; defendants remanded.)

[fol. 1660] Evening Session—Trial Resumed

(All defendants represented by counsel.)

(The examination of talesmen in the jury box was continued.)

By Mr. Barshay:

Q. You are Mr. Gill?

A. Yes, sir.

Q. Do you know Mr. Ryan, the president of the Longshoremens Union?

A. No, I do not personally; I have heard of him.

Q. Do you know the firm of Rice & McGuire, especially Mr. McGuire of that firm?

A. No.

Q. Do you know any of the people mentioned either by Mr. Turkus or other counsel?

A. No.

Q. Did you read about this case, Mr. Gill?

A. I did read in the early part of July two or three articles concerning District Attorney O'Dwyer, and some mention was made of crime in general, but I have not a practical recollection or thought of any mention being made about this particular case.

Q. Were the defendants mentioned?

A. I don't recall if they were or not.

Q. Have you ever read about them at all, irrespective of this case?

A. No, I do not believe I have.

Q. Have you ever heard anything about them by way of discussion with someone?

A. No.

Q. Since you received your notice did anyone speak to you about this case or the defendants?

[fol. 1661] A. We spoke about it; as a matter of fact, I did, to my superior officer, but that was in a casual way. We did not go into details about it.

Q. Casually did you express an opinion?

A. I did not.

Q. Did your superior?

A. He did not.

Q. Since being here have you formulated an opinion with respect to the defendants or the case?

A. I have not.

Q. You heard other jurors being questioned. Your opinion is still free of bias and free of prejudice and free of sentiment of any kind?

A. It is.

Q. Are you active politically?

A. No, sir.

Q. Do you intend to participate in the coming election?

A. No, sir.

Q. Did you ever hear any of the Assistants speak about crime?

A. No, sir, I have not.

Q. You do not know anyone in Judge O'Dwyer's office, do you?

A. No, sir.

Q. Do you know any police official?

A. No, sir.

Q. Have you ever been the victim of any crime?

A. No, sir.

Q. I take it you know none of the lawyers?

A. I do not.

Q. It is a little inaccurate to say that the defendants are represented by nine lawyers. Each defendant is represented by his own counsel. In other words, the nine do not represent any particular defendant, you understand?

A. I understand.

Q. You did not know Mr. Turkus or Mr. Klein when they were both practicing criminal law?

A. No, sir.

[fol. 1662] Q. You say you do not know the facts and you do not know the people and you do not know anything at all about the surrounding circumstances, do you?

A. I do not.

Q. Have you had prior jury service?

A. Yes, sir.

Q. Was it in a criminal case?

A. Mostly civil, off and on for the last twenty years.

Q. Any time criminal?

A. There was one, an extortion case. That was about seven or eight years ago.

Q. In Brooklyn?

A. In Brooklyn.

Q. Did I happen to be the prosecutor?

A. No, sir, the prosecutor was an Assistant District Attorney from Mr. Geoghan's office. He was District Attorney at the time.

Q. I was on the staff for twelve years, so that includes your seven. I do not know you; you do not know me.

A. I don't recall the prosecutor at the time.

Q. Was Mr. Turkus one of the counsel for defense?

A. No.

Q. Or Mr. Klein?

A. I don't recall. The only thing I do recall who was handling the case for the defendant was Judge Leibowitz at that time, but the case never did come to trial. There was some sort of a settlement between the defendants and the prosecution, as I recall.

Q. Was that your only service?

A. Well, as I said, off and on for twenty years I have been in accident cases.

Q. I mean in criminal cases is that your only service?

A. Yes.

[fol. 1663] Q. Of couse, that will have nothing to do with this case?

A. Absolutely not.

Q. Do you believe in the law of the presumption of innocence and reasonable doubt?

A. I do.

Q. I don't have to go into the same great detail as I went with your brother jurors, do I?

A. I hope not.

Q. I will just ask you a very few questions. You heard about accomplices, and this gentleman made some answers with respect to the receipt of their testimony. Do you feel as your brother prospective juror does?

A. I do.

Q. In other words, I take it if I asked you the same questions that I asked this gentleman substantially you would make the same answer?

A. I would.

Q. And at your hands we can expect a fair and impartial verdict?

A. Yes.

Q. One that shall reflect the truth?

A. Yes.

Q. Has there anything occurred to you which would preclude you from being a juror in this case, something that I have not thought of or any other lawyer?

A. No, sir.

Q. The element of time has nothing to do with it?

A. Would not interfere with it.

Q. Can Mr. Buchalter entrust to you the preservation of his legal rights?

A. Yes, sir.

By Mr. Talley:

Q. I just have one or two questions that I would like to [fol. 1664] burden you gentlemen with. Mr. Bartholomew, what was your employment at the World's Fair?

A. I was a supervisor for the A.T.&T. building there. We used to conduct the various departments, such as the Long Distance Board. I had charge of that certain periods of the day. Then I would move over to the poultry room.

Q. That is in connection with your telephone work?

A. Yes, a telephone employee.

Q. You were a telephone employee assigned to the World's Fair?

A. That is right.

Q. I will address you three gentlemen together so as to save time, if possible. Are you all aware that the burden of proving the guilt of these defendants is always on the District Attorney, representing The People?

A. Yes, sir. Yes. Yes.

Q. And that burden never shifts from the shoulders of The People, represented by the District Attorney, to the shoulders of the defendant; do you understand that?

A. Yes. Yes. Yes.

Q. The Court will charge you that if you have a reasonable doubt—and he will define what a reasonable doubt is—it is a doubt that reasonable men might have or could have about any of the ordinary affairs of their business or social or family life—if the Court charges you that if you have, after hearing all the testimony, if you have a reasonable [fol. 1665] doubt as to the guilt of these defendants, is there any reason why you would hesitate to bring in a verdict of Not Guilty against them?

A. No, sir. No, sir.

Q. The Court will charge you that at no time during the progress of this case is the burden cast upon any of the defendants to take the stand and testify in their own behalf. That is the law. My question to you gentlemen is this: If any of these defendants do not take the stand, will you indulge in any unfavorable inference directed against them because they do not take the stand?

A. No. No, sir.

Q. I have your agreement on that? You will not say to yourselves or your fellow jurors, "Well, in view of the

testimony that has been given, as you heard, by accomplices generally, that if they are innocent they would have taken the stand and denied it''?

Mr. Turkus: I object to the preamble to the question.

The Court: Sustained for that reason.

Mr. Talley: Exception.

Q. What I wish to ascertain I think you have already answered. You will not require them to take the stand and make any explanation of anything that is said in this case if the Court charges you that the burden of proving the guilt remains on The People; is that correct?

A. That is right.

Q. In other words, it is our law that the defendant can remain silent and rely upon the requirement of the law that [fol. 1666] The People shall prove the guilt. We do not have to prove the innocence of the defendant. When I say that, I mean anybody charged with crime does not have to prove his innocence. The burden remains upon The People to prove his guilt before the jury can convict him. Will you abide by that direction of the Court, which will be given to you, and require The People to meet that burden which is placed upon them of proving the guilt of defendants before a jury can say that they are guilty of a crime? Can I rely upon you gentlemen to follow that provision of the law as defined by the Court, whether you agree with it or not? Will you follow that direction of the Court, Mr. Bartholomew, Mr. Fuller, Mr. Gill?

A. Yes.

By Mr. Rosenthal:

Q. Mr. Bartholomew, I think you said your father served on the Grand Jury?

A. That is right.

Q. How long ago?

A. My recollection, that was approximately twelve years ago.

Q. The reason why I am asking is to find out if it was of recent date.

A. No.

Q. And possibly he may have sat in this case. The last time was about twelve years ago; is that right?

A. Yes.

Q. There was another telephone man that was excused here, Mr. Pettersen. Did you know him?

A. I met him down here. That is how I know him.

Q. He was a repair man that worked for your company. [fol. 1667] While you met him down here did you exchange any views in respect to the trial?

A. We did not exchange any views except the fact of the duration.

Q. I am not interested in any views expressed as to the Telephone Company or the duration of the trial. I mean, I think you were in the box when he was questioned and told his opinion regarding a particular type of testimony, without going into it. The question which I am addressing to you is purely along whether his views as to the nature of testimony was had with you by him, or you with him?

A. No, we did not discuss that.

Q. You merely being from the same company probably discussed your duties in the company and possible length of time that you might be away. However, and this is one reason why I ask you the question, when Mr. Barshay was questioning you he asked you regarding the testimony of accomplices and the way you would view that testimony. I do not recall his asking you concerning that, Mr. Barshay being the first—Mr. Climenko was the one who addressed you?

A. That is right.

Q. I assume by now you understand as nearly as any layman can understand the meaning of the word accomplice, and do you understand further, sir, so that I can get it clear in my mind, that an accomplice can be one where the Judge tells you absolutely as a matter of law that he is an accomplice, in which event you must take the law from the [fol. 1668] Court, and in determining what weight you will give to his testimony definitely say he is an accomplice; is that clear?

A. Yes, sir.

Q. Is it also clear to you, sir, that there may be witnesses that go on the stand where there is a dispute? They may deny they are accomplices, but from the very evidence and the nature of their evidence it appears that there is a question as to their complicity. In that event the Judge will say to you it is up to you, the juryman, to determine as a

question of fact whether this man is an accomplice or not. Is that clear?

A. Yes, sir.

Q. In that event, merely because of the fact that the Judge leaves it to you and does not tell you as a matter of law that he is an accomplice, would that in any wise sway you from determining for yourself the question of his complicity in the crime?

A. No.

Q. If you once determined that he was an accomplice,—and, Mr. Fuller and Mr. Gill, I notice that you are listening, but I do not intend to repeat the question,—if there is any question in your mind as to whether you would answer it the same way, why just reserve it mentally and when I come to you tell me what fault you may find. Once you determine he is an accomplice, then, of course, you will apply the same rules of law that the Judge lays down for the accomplice which he has charged as an accomplice, is that true?

A. Yes, sir.

Q. There was some misunderstanding, and I want to get [fol. 1669] straight on the subject as to whether you understood Mr. Climenko's question or not respecting the force or effect that you would give to anybody's testimony who has previously been convicted of crime and who possibly may have a motive in going on the stand and testifying to certain alleged facts concerning these defendants. Now will you, sir, in determining what weight you will give to anyone's testimony, whether he be the accomplice or one who says he is not an accomplice, in weighing what value you will give to the testimony, take into consideration all of the surrounding facts and circumstances as to that particular witness? For instance, if perchance, he has committed murder and never been punished, if, perchance, he has been in a court of jurisdiction of this character and sworn he would tell the truth to the jury in a similar situation, and it has been ascertained that he told an absolute falsehood, if, perchance he has been given immunity, which means that he is not to be punished because he has been permitted to testify before a Grand Jury without waiving immunity for the particular crime which he admits he committed, and if a number of other things, his actions, his demeanor, his refusal to answer questions, his hesitation, the manner in which he answers, all of those things, will you

take those things into consideration in determining what weight, if any, you would give to that man's testimony?

A. That is the same question I answered before.

[fol. 1670] Q. There was some misunderstanding. You answered it in the negative before, and then the Judge asked you a question, so I want to clarify my own mind as to whether or not your state of mind is such that you will scrutinize with care and caution and suspicion the testimony of any individual who may have a motive for telling an untruth.

A. Yes.

Q. You answered Mr. Barshay "No," and I assumed that you had misconstrued the meaning of his question to you, but I wanted to clarify in my own mind whether you did or whether you meant the answer which you gave.

You can readily understand, sir, and the Court will charge you, not only in this case but in any case that in so far as the testimony of an accomplice is concerned, it not only must be scrutinized with care and caution, but must be scrutinized with suspicion.

Mr. Turkus: I object to it. The juror says he will take all those things into consideration. This is sheer repetition.

The Court: What is the question?

Mr. Rosenthal: I have not finished the question. I am waiting until Mr. Turkus gets finished to finish the question.

Q. And if that is done by the Judge in this particular case, you understand, sir, that that is not the law of this case, don't you, that it is our general law of the land?

A. Yes, sir.

Q. And in so far as any person is concerned, whether he [fol. 1671] be an accomplice or not, do you understand that where the testimony shows that he has something to gain or a motive for testifying in a certain way, that that person's testimony should be scrutinized with care and caution?

A. Yes, sir.

Q. If it develops in this case that there are one or more persons in that category, you will do that, won't you?

A. Yes.

Q. You have heard also the question of independent evidence tending to connect the defendant with the crime. You

heard that discussed before you got into the witness box and probably while you were in the box, haven't you?

A. Yes.

Q. That independent evidence which the District Attorney has at the present time is unknown to us and will be disclosed when the case starts, and so you understand some of these questions that we ask may never occur within the case? You understand that, don't you?

A. Yes.

Q. We must ask questions under the assumption, you understand, that possibly that is the case here. Do you understand that?

A. Yes, sir.

Q. Now then, assuming that in this particular case the independent evidence is supposed to consist of something that my client is alleged to have said to some one of the witnesses for The People. Assume that. And assume that that particular individual had every motive for testifying on the stand, including the various things which I mentioned before, such as murders that he committed and [fol. 1672] things of that character, in weighing what weight you will give to that alleged oral statement supposedly made to him, will you take all the facts and circumstances in consideration before you accept it as true?

A. Yes, sir.

Q. If a doubt arises in your mind—I put the word "reasonable doubt"—that a person of that character was telling the truth, do you understand that that reasonable doubt must be resolved in favor of the defendant? Do you understand that?

A. Yes, sir.

Q. In so far as the defendant represented by myself is concerned, it may be possible that after the conclusion of the People's case, if the Court decides as a matter of law that there is sufficient to warrant the case going to your hands, that we then will offer evidence. The mere fact that we do come forward and offer evidence does not imply in your mind that the burden shifts over to us to prove we are innocent; does it?

A. No, sir.

Q. You understand that if the evidence which we offer, whether it be so-called alibi evidence, is enough to raise in your mind a doubt as to the guilt of the defendant, based

upon the fact that here is such testimony, and that doubt is founded on reason, that that doubt, like any other doubt, must be resolved in favor of that defendant and he must be acquitted. Do you understand that?

A. Yes.

Q. And you will follow that instruction. Now, one of the [fol. 1673] attorneys here has discussed, in so far as his client is concerned, he is serving a term, a long term, in prison. The mere fact that that has been disclosed to you by counsel for one of the defendants is not going to in any wise prejudice any one of you against the defendant represented by me?

A. No, sir.

Q. The fact is that you understand that as far as the defendant represented by myself is concerned, it is my duty merely to establish to you his innocence, and I have no part as to the other two defendants, even though they are on trial with us. Is that clear to all? We are entitled to a separate trial at your hands and to be judged upon the evidence in so far as it affects us and us only; is that clear?

A. Yes.

Q. Now then, the mere fact that a defendant takes the stand, would you, because of the fact that he is indicted, feel that, being a defendant and necessarily having an interest in the matter as any defendant would have, to resist conviction, that that fact alone would brand his testimony as a falsehood—the fact that he is a defendant? Is that your state of mind, either one of you?

A. No.

Q. Is that your state of mind?

A. No, sir.

Q. Let me make it clear to you, Mr. Gill: I said the mere fact that the man is a defendant, if he takes the stand, would the fact that he is a defendant convey to your mind that he is necessarily telling a falsehood when he swears to tell [fol. 1674] the truth?

A. No, sir.

Q. You understand further that the truth from the defendant is just as valuable as the truth from any source? That is natural, because truth is truth; isn't that right?

A. Yes.

Q. So that if you once believe the defendant's story, and that story raised a doubt in your mind as to his guilt, a

reasonable doubt, would you resolve that doubt in his favor and give him the benefit of it and acquit him?

A. Yes.

Q. You have been asked by Mr. Turkus, the words that he used, I think are fear and reluctance—I do not know what other word he uses——

Mr. Turkus: Hesitation.

Q. Would you have any fear or hesitation or reluctance in coming in——

Mr. Turkus: No more reluctance.

Q. Would you have any fear or hesitation in coming in with a verdict of Not Guilty if you were not convinced beyond a reasonable doubt as to the guilt of these defendants?

A. No.

Q. I think you said, Mr. Bartholomew, that you had not read practically anything concerning this case. Am I right on that?

A. That is right.

Q. So that necessarily you formed no opinion as to the guilt or innocence of the defendant; is that right?

A. Yes.

Q. I think you, Mr. Fuller, said that you read the *Tribune* and the *World-Telegram*.

A. Right.

[fol. 1675] Q. Did you also say that you were called for service on the Grand Jury?

A. Yes.

Q. How long ago was that?

A. Last year.

Q. About a year?

A. Yes.

Q. In the County Court in Brooklyn?

A. Civil case.

Q. That would not be the Grand Jury.

A. It was not Grand Jury, then; it was an accident case.

Q. You mentioned to Mr. Barshay Grand Jury, and then that you never served. The Grand Jury is the one that would sit on criminal cases and find indictments. You were in error as to that?

A. Yes.

Q. You mean some civil case?

A. Yes.

Q. I think you said you read some articles in the *World-Telegram* and the *Tribune*.

A. I read one article.

Q. That article in the *World-Telegram*, was it since you were called for jury service?

A. Yes, it was after the postponement.

Q. I recall now you told us you were inquisitive to ascertain the reason for the adjournment; is that right?

A. That is right.

Q. And the paper explained the cause of the adjournment. That, of course, has no effect upon you as the trial progresses here that would in any wise incapacitate you from being fair and impartial?

A. (No answer.)

Q. Mr. Gill, you mentioned to Mr. Turkus that you had a [fol. 1676] great deal to do along the waterfront in Brooklyn. I do not know whether the waterfront has anything to do with this matter. All I know is that every juryman that got in this box was asked by Mr. Turkus whether he had any connections along the waterfront.

Mr. Turkus: Objected to.

Mr. Rosenthal: I submit——

Mr. Turkus: Please.

Mr. Rosenthal: Wait until I finish the question, please, before you make an objection.

The Court: Finish the question.

Q. Now, that being the case——

Mr. Turkus: Will you refrain from answering until the Court rules?

Q. That being the case, sir, I want to know whether or not, if it does develop in this case that there is something about the waterfront, your connections or associations are such along the waterfront that you would in no wise be embarrassed or prejudiced or biased against either The People or the defendant. It does not make any difference, does it? That is the question. Now you may object.

Mr. Turkus: There is a preamble to the question, your Honor.

Mr. Rosenthal: I submit the preamble is proper in view of the fact that that is the only reason why I can ask any [fol. 1677] question concerning it. It is brought out by the

District Attorney. He asked every man about the waterfront, did he cover the waterfront, or something like that.

Mr. Turkus: I ask your Honor to have that remark stricken from the record, "Did he cover the waterfront?" There is no such discussion with any juror.

The Court: The gentleman said that he was employed by the Savannah Line.

Mr. Rosenthal: That is right.

The Court: And in the course of his business he dealt with certain people located along the waterfront.

Mr. Rosenthal: That is right.

By the Court:

Q. Anything to do with stevedores, the labor unions at all—no contacts whatever?

A. No, sir.

Q. Then I take it there is nothing in the waterfront business that has any relation to this case?

A. None at all.

Q. Or affects you in any way?

A. No, sir.

By Mr. Rosenthal:

Q. The question which I am asking you, sir—and wait until there is an objection, if there is one—is that Mr. Turkus has mentioned waterfront—what connection, if any, it has to do with this case I do not know. You have mentioned waterfront and your connections with it. If something should develop in this case that involves the water-[fol. 1678] front, would your connection with the waterfront be such that you may be either embarrassed one way or the other or biased as to either side?

Mr. Turkus: I object to it. It is sheer speculation.

The Court: Sustained.

Mr. Rosenthal: I respectfully except, sir. No further questions.

Q. You have no relatives in the Police Department, have you?

A. I have not.

Q. There is another gentleman on the panel—I think his name is—he is James F. and you are Henry T. You are no relation to him?

A. No.

Mr. Rosenthal: No challenge for cause.

Mr. Barshay: None for cause.

Mr. Turkus: May we make the pronouncements with respect to jurors one by one? The first juror, Mr. Bartholomew, is satisfactory to The People of the State.

Mr. Barshay: I thought your Honor would require both the District Attorney and counsel to act with respect——

The Court: I am just puzzled as to the reason for that. I think it is best to announce all three.

Mr. Turkus: All right. Mr. Fuller is satisfactory to The People and Mr. Gill is satisfactory to The People of the State.

Mr. Talley: If your Honor pleases, the juror Henry T. [fol. 1679] Gill is satisfactory to defendants. Peremptory challenge as to Mr. Bartholomew and Mr. Fuller.

(Henry T. Gill takes Seat No. 5 in the jury box.)

The Court: Call seven more.

(The following talesmen were called and took their places in the jury box: Jacob A. Fortunoff, Granada Hotel; Robert F. Smith, 143 East 31st Street; James B. Cummings, 1045 East 31st Street; Ianar A. Gritting, 1411 West 7th Street Lawrence A. Sifeet, 1060 Carroll Street; George E. Carlson, 550 Seventy-fourth Street; Herman F. Bell, 1821 Glenwood Road, Brooklyn, New York.)

The Court: The other gentlemen may go until tomorrow morning at ten o'clock.

By Mr. Turkus:

Q. Mr. Fortunoff, is that the pronunciation of the name?

A. That is right.

Q. In impaneling the jury under the system we now have, the idea is to expedite the selection of the jury, and so some questions that pertain to all the prospective jurymen are asked of one juror so that all of the other jurymen may hear it; so that you will understand that although I speak to you in such close proximity, I raise my voice so that all the other jurors can hear the questions.

According to the address you have listed, you reside at the Granada Hotel; is that correct?

A. That is right.

[fol. 1680] Q. How long have you lived there, Mr. Fortunoff?

A. About two years.

Q. Prior to that time where did you reside?

A. St. Marks Avenue.

Q. What section of Brooklyn is that?

A. St. Marks and New York.

Q. Bedford section. Did you live there for a number of years in the Bedford section?

A. Yes.

Q. More than five?

A. Yes.

Q. Prior to that time did you live in some other section of Brooklyn?

A. Yes.

Q. What district was that? Would that be on the side of the park?

A. Montgomery and Albany.

Q. Is that Crown Heights?

A. That is right.

Q. Your vocation or business is listed as cotton goods; is that correct? Do you manufacture the product?

A. Manufacture.

Q. Are you the proprietor of the place?

A. That is right.

Q. 443 Broadway is near what cross street?

A. Near Grand Street.

Q. That is one block from Canal?

A. That is right.

Q. How far is that from 5th Avenue and Grand? It does not go through?

A. Ten blocks.

Q. That is the district that is commonly known as the cotton goods district, isn't it?

A. That is right.

Q. Do you manufacture linings for clothes?

A. No.

[fol. 1681] Q. Do you have any connection of any kind, nature, or description in the garment district?

A. To a certain extent.

Q. Does that extent go to the point where you sell merchandise in the garment district?

A. Yes.

Q. You have accounts that you deal with in that area?
A. That is right.
Q. Are those persons manufacturers of clothes?
A. Yes.
Q. And does business bring you in frequent contact with these people?
A. Yes.
Q. In other words, you have access, then, to the garment district in the clothing center in Manhattan by way of business?
A. That is right.
Q. How many years have you been having that contact?
A. About twenty-five.
Q. Is that a substantial portion of your business?
A. Yes.
Q. In going into the garment district, have you heard people discuss the Dewey investigation?
A. Yes.
Q. In the discussions that you have heard have you heard mentioned the names of Lepke and Gurrah?
A. Yes.
Q. Have you heard mention of the O'Dwyer investigations?
A. Yes.
Q. And have those points of information that you secured been from people in the garment and clothing district?
A. Not exactly.
Q. People familiar with conditions there?
A. Yes.
[fol. 1682] Q. Have the things that you have heard caused an impression to form in your mind?
A. No.
Q. In anything that you have heard, have you formed an impression about the name Lepke?
A. No.
Q. Or about the name Gurrah?
A. No.
Q. Am I correct in understanding that you have been in that area now for twenty-five years?
A. That is right.

Q. Have you read anything in the newspapers with regard to the Dewey investigation?

A. Yes.

Q. Have you read anything in the newspapers with regard to the O'Dwyer investigation?

A. Yes.

Q. By virtue of your contact there on business, which is a substantial part of your business, have you read any of those articles with any degree of interest?

A. No.

Q. Is there anything impressed on your mind as the result of reading articles in the press?

A. No.

Q. Is the name of Hyman (Curley) Holtz a familiar name to you?

A. No.

Q. Do you know officials associated or connected with the Amalgamated Clothing Workers of America?

A. No.

Q. Through business or in any other way did you have any connection in clothing trucking?

A. No.

Q. People engaged in the clothing trucking business?

A. No.

Q. Or any of the officials of a clothing trucking union?

A. No.

[fol. 1683] Q. Are you married, Mr. Fortunoff?

A. Yes.

Q. And I take it you reside with your wife and family?

A. Yes.

Q. Do you now or did you ever have any connection with any official at all of the Amalgamated Clothing Workers of America, Local 240, of the Clothing Helpers & Drivers Union or any other union which does business in the garment and clothing districts in Manhattan?

A No.

Q. Do you have your products trucked out by trucking?

A. Some of them.

Q. Do you have any contact with trucking unions as the result of the trucking that you have done?

A. No.

Q. Do you operate your own trucks or do you hire trucks?

A. We have an individual truckman who owns his own truck.

Q. How many manufacturers do you deal with in the clothing district?

A. Quite a few.

Q. I believe you said it was a substantial part of your business.

A. That's right.

Q. Is that business dependent upon the good will of these people engaged in the clothing business?

Mr. Climenko: I object to the question, if your Honor pleases.

The Court: Overruled.

Mr. Climenko: I except.

Q. Does it depend upon the good will of people who main- [fol. 1684] tain businesses in that district?

A. No.

Q. Do I understand you correctly that you supply merchandise to people engaged in that area in the manufacture of garments?

Mr. Climenko: I object to that as repetitious.

The Court: Overruled.

Mr. Climenko: Exception.

Q. Is that business that you have there with the people engaged in the ladies' garments, is that dependent upon the good will of those manufacturers?

A. Which manufacturers?

Q. The people that buy the stuff from you.

A. The people who buy from me, bears upon their good will.

Q. Do you know any members of the International Ladies Garment Union?

A. No.

Q. Should the name of some person engaged in the manufacture of ladies' garments enter into the testimony in the case, would you be embarrassed in jury service?

Mr. Climenko: I object to that question as entirely too hypothetical.

The Court: Overruled.

Mr. Climenko: Exception.

A. I don't imagine.

Q. If that person were a customer would you be embarrassed?

A. No.

Q. In connection with the names of Lepke and Gurrah, [fol. 1685] have you had any conversations with anybody in the ladies' garment industry?

A. No.

Q. Did you hear any talks about the names of Lepke and Gurrah while you were there in that business?

A. No.

Q. Is the only knowledge that you have of those names limited to newspaper reading?

A. That is all.

Q. Have you had any past business connection or any other contact of any kind, nature or description with persons in the Brownsville-East New York section of Brooklyn?

A. No.

Q. The Brooklyn waterfront?

A. No.

Q. Mr. Forturoff, is your business taking cotton and manufacturing it into cloth?

A. Taking cloth and working it into manufacture for ladies' garments.

Q. So your entire product is sold to people manufacturing ladies' garments?

A. That is right.

Q. Is there any familiarity in your mind with the name of Murray Weinstein, manager of Clothing Cutters Local No. 4, a Cutters Union affiliated with the Amalgamated Clothing Workers of America?

A. No.

Q. Is the name of Samuel Katz as an official of the Clothing Cutters Union a familiar name to you?

A. No.

Q. Did you at any time in your twenty-five years of experience in connection with those industries, hear the name of Bruno Belia, an organizer of the Amalgamated?

A. No.

Q. Or that of Salvatore Marazzano?

A. No.

[fol. 1686] Q. Or the name of Abe or Abraham Beckerman?

A. No.

Q. Or that of Philip Orlofsky, one-time manager of the Cutters Local Union 4?

A. No.

Q. Is there any familiarity to the name of Mendel Yudelowitz or that of Max Silverman or Wolfie Goldis?
A. No.
Q. Do you have any friends who reside in Sea Gate section of Brooklyn?
A. No.
Q. Is there any familiarity in your mind with the name of William or Willis Alberts, a one-time bondsman?
A. No.
Q. Or that of Emanuel Buchalter?
A. No.
Q. Phillie Kowas, a dentist?
A. Yes.
Q. You know him? You know him socially?
A. Yes.
Q. You visited at his home?
A. No.
Q. He visits your home?
A. We visited at a friend's.
Q. When is the last time you saw him?
A. A couple of months ago.
Q. Since you received your jury notice have you had any discussions with anybody about this case?
A. No, sir.

(Jacob A. Fortunoff challenged for cause by Mr. Turkus.)

The Court: Try the challenge.

Jacob A. Fortunoff, No. 2767, residing at the Granada Hotel, Brooklyn, New York, was duly sworn.

By Mr. Turkus:

Q. While seated in No. 6 in the jury box, I asked you certain questions and you made responses?
A. Yes, sir.
Q. If I were to repeat those questions to you now, when you are under oath, would you make the same responses?
Yes, sir.
[fol. 1687] Q. Would they be true?
A. Yes, sir.

The Court: The Court does not know what they were, because the witness was speaking in a very low tone while in the jury box. His voice is barely audible here.

Q. Now, this is in substance what you told me, didn't you: that for the past twenty-five years you have been engaged in the manufacture of goods?

A. Yes, sir.

Q. And that the entire output of your factory has been sold in the garment district?

The Court: I understood it was a challenge for implied bias on account of intimacy with one of the defendants' brothers. Why not come down to that?

Q. Do you know Buchalter's brother?

A. Yes, sir.

Q. Do you visit his house?

A. No, sir.

Q. You visit at a mutual friend's house?

A. Yes, sir.

Q. And play cards?

A. Yes, sir.

Q. Together?

A. Yes, sir.

Q. How long has that been going on?

A. Several years.

Q. Do you eat and drink together?

A. Yes, sir.

Q. Has that been going on for several years?

A. Yes, sir.

Q. I take it he is one of your intimate personal friends.

A. Yes, sir.

The Court: Is there anything else?

By Mr. Barshay:

Q. Do you also know Mr. William Siegel, an Assistant [fol. 1688] District Attorney?

A. Yes.

Q. He is also an intimate friend of yours?

A. Yes, sir.

Q. You visit at his house?

A. Yes, sir.

Q. And he visits yours?

A. Yes, sir.

Q. And that would cause you embarrassment in this case?
A. Yes, sir.

Defense Counsel: No questions.
The Court: Challenge sustained.

Robert F. Smith, residing at 143 East 31st Street, Brooklyn, New York, (No. 2734), was then interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Smith, you reside in East 31st Street?
A. Yes, sir.
Q. Have you lived in Brooklyn for a number of years?
A. Yes, sir.
Q. Would you say for more than five?
A. Yes, sir.
Q. Has that residence been in the Flatbush district in Brooklyn?
A. Yes, sir.
Q. On this card on which we have the name of the juror, your vocation is listed as a safety engineer; is that correct?
A. Yes, sir.
Q. Are you employed by some firm or corporation?
A. Yes, sir.
Q. What is the name of it?
[fol. 1689] A. Mutual Casualty Company of Illinois.
Q. Have you been employed by that concern for a number of years?
A. Yes, sir.
Q. Is the work of safety engineer a technical job?
A. Yes, sir.
Q. Are you required to have a specialized knowledge of mechanics?
A. Yes, sir, to have a degree.
Q. In other words, you have had college training?
A. Yes, sir.
Q. And you received your degree?
A. Yes, sir.
Q. These questions may not apply to you, but I will just use you as through whom the rest of the jurors may get the rest of the questions. I am interested in knowing whether or not, by way of any connection whatsoever, social or

business, you come in contact with anybody in the garment or clothing district or industries in Manhattan.

A. I did, but not for the last four or five years, but previous to that I did; as an inspector for insurance companies, I contacted various manufacturers.

Q. Would that be an inspection of their equipment?

A. Liability insurance.

Q. As a result of any business dealings you have had, did you make any social contacts?

A. Not particularly, no, sir.

Q. Was that the limit of your connection with the people in those industries?

A. That was all.

Q. By way of business did you have any connection with [fol. 1690] anybody in the Brownsville or East New York sections?

A. Yes, sir.

Q. Was it along the same lines, an inspection of equipment?

A. Yes, sir.

Q. Did you have any other contact with people in that area other than that?

A. My work at the present time is on the waterfront; I am an engineer for the insurance company, inspecting stevedoring and looking after goods for insurance, to see that the material is handled properly.

Q. Is the name of Albert Anastasio familiar to you?

A. No, sir.

Q. Or the name of Peter Pinto?

A. No, sir.

Q. So that your work in the particular district in the City of New York has been that of inspecting equipment, as you pointed out?

A. Yes, sir.

Q. I take it you are familiar with the charge in this case, that it is a murder case?

A. Yes.

Q. And that these defendants, Buchalter, Weiss and Capone, are charged with the crime of murder in the first degree?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would impair your serving as a juryman in this case?

A. Why yes, I am not one hundred per cent for capital punishment.

Q. Did you qualify as a special juror?

A. I did.

Q. Have you had a change of feelings?

A. Yes, sir.

Q. Has that change come about since you qualified as a [fol. 1691] special juror?

A. That is right.

Q. When you were before the Commissioner of Jurors and qualified, did you make answer that you were against capital punishment?

A. When I qualified I answered I was not against capital punishment. Since that time I read stories, and it changed my opinion.

Q. Have you such a feeling in relation to capital punishment or against capital punishment that it would prevent you finding a defendant guilty, even if the evidence should prove guilt beyond a reasonable doubt.

A. I would be reluctant in making any decision for the electric chair.

Mr. Turkus: I challenge for cause.

The Court: Try the challenge.

Robert F. Smith, No. 2734, residing at 143 East 31st Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. If I were to ask you the same questions I asked you while you were occupying Chair No. 7 in the jury box, would you make the same responses?

A. Yes, sir.

Q. Would they be truthful answers?

A. Yes, sir.

Q. And do they truthfully reflect your state of mind?

A. Yes, sir.

(No questions from defense counsel.)

The Court: Challenge sustained.

[fol. 1692] James B. Cummings, of 1045 East 31st Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Are you in the insurance business as an adjuster?
A. Yes, sir.
Q. By what company are you employed?
A. The General Accident, Fire & Life Insurance Corporation.
Q. That is quite an impressive title?
A. Yes, sir.
Q. Does your work bring you in contact with lawyers from day to day?
A. Only in Nassau and Suffolk Counties.
Q. Is that the territory to which you are assigned?
A. Yes, sir.
Q. That is part of your business, the adjustment of claims?
A. Yes, sir.
Q. In that capacity you represent the insurance company?
A. Yes, sir.
Q. And lawyers represent the claimants or the ones who have been injured or alleged to have been injured?
A. Yes, sir.
Q. You and the lawyer, if you can, make a settlement, and that closes the case, and if you cannot, there is a lawsuit?
A. Yes, sir.
Q. Is 1045 East 31st Street the correct address?
A. Yes, sir.
Q. Is that what is known as the Flatbush Section?
A. Yes, sir.

The Court:

Q. Is that near Avenue L?
A. Between J and K.

[fol. 1693] Q. Is the office of the General Accident Company on William Street?

A. They were until six months ago, when we moved to 99 John Street.

Q. The defendants at the bar, Buchalter, Weiss, and Capone, are charged with the crime of murder in the first degree. Is there anything about the nature of the charge which would prevent you from doing justice in this case?

A. No, sir.

Q. May I go along with the understanding that you have no conscientious or other scruples against capital punishment?

A. Yes, sir.

Q. And that in deliberating the question of guilt or innocence, in so far as you are concerned, the question of punishment will not enter into your mind?

A. Yes, sir.

Q. These defendants at the bar are represented by nine lawyers. They have a right to be represented by as many lawyers as they wish. They are divided up into pairs of three—I will mention the names to you, so that the other jurors may hear them and see if there is any acquaintanceship with any counsel. The defendant Buchalter is represented by former Assistant District Attorney Hyman Barshay, former Assistant United States Attorney Bertram Wegman, and Mr. Jesse Climenko, who is a partner of Mr. Wegman; do you know any of those three?

A. No, sir.

Q. Or do you know anyone connected with their offices?

A. No, sir.

[fol. 1694] Q. In respect to the defendant Weiss, he is represented by former General Sessions Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Murray Kriendler. Do you know any of those three?

A. No, sir.

Q. Did you at any time come in contact with Mr. Cuff? I believe he represents or did represent some insurance company at that time.

A. I heard his name, but I never came in contact with him.

Q. With respect to the defendant Capone, he is represented by Sidney Rosenthal, Mr. Fischbein, and Mr. Rosenberg. Do you know any of those?

A. No, sir.

Q. Do you know anyone connected with their law offices?

A. No, sir.

Q. Did you maintain intimate acquaintanceship with any lawyer who practices the defense of criminal cases as a specialty?

A. No, sir.

Q. May I understand you are in sympathy with law enforcement?

A. Yes, sir.

Q. Since your name appeared on the jury panel, and more specifically since you got your notice as a prospective juror, did anybody speak to you about the case?

A. No, sir.

Q. Do you know the district attorney of the county, Judge O'Dwyer, personally, or do you know personally any member of his staff?

A. No, sir.

[fol. 1695] Q. In this case there is a question of accomplice testimony as being part of the case. Have you heard any discussion from where you were, with the other talesmen about accomplice testimony?

A. No, sir.

Q. Do you understand an accomplice is one who was a perpetrator or co-participant in the commission of a crime, with others?

A. Yes, sir.

Q. Do you find any fault with the prosecutor of the county in solving a case, a murder case, by accepting the testimony of one of the perpetrators of the crime and using that against the others?

A. No, sir.

Q. Do you find any fault or do you have any prejudice against the prosecution which employs the use of co-participant testimony?

A. No, sir.

Q. There will be many questions put to you with reference to things to be considered when you weigh the believability of accomplices. Do you follow me?

A. Yes, sir.

Q. If it appears that an accomplice has had a life of crime and associated with criminals, and there are other factors in derogation of him, will you consider all those things when you weigh his believability?

A. Yes, sir.

Q. Will you consider every evidence of every immoral act that may be attributed to him?

A. Yes, sir.

Q. Will you, nevertheless, if accepted as a juror, use your mental faculties to find out is this accomplice telling the [fol. 1696] truth about the group of defendants with him, whom he says committed this crime with him? Will you do that?

A. Yes, sir.

Q. Even an insurance adjuster who goes around on claims and sees lawyers may sometimes not come in contact with some of the kind of people you will hear in this case, if you are accepted. But will you at all times use your mental faculties and use your common sense and understanding in applying it to the facts in this case?

A. Yes, sir.

Q. Will you find out, from all of the tests you can conjure up, what is sensible and fair, to apply to the accomplice who speaks of his complicity with others in this group of defendants on trial—is he telling the truth—will you do that?

A. Yes, sir.

Q. Will you accept the instructions of law from the Judge?

A. Yes, sir.

Q. You understand that there can be no conviction upon the uncorroborated or unsupported testimony of an accomplice?

A. Yes, sir.

Q. Will you conscientiously endeavor to apply that to the facts in this case?

A. Yes, sir.

Q. Should the Judge charge you that corroboration need not be as to every single item testified to by an accomplice, will you follow that instruction of law?

A. Yes, sir.

Q. And if the Court should charge you that the jury may find corroboration insufficient upon credible proof, which [fol. 1697] tends to connect the defendants and each of them

with the commission of the crime, will you follow that instruction of law?

A. Yes.

Q. And will you endeavor conscientiously to apply it to the facts in this case?

A. Yes, sir.

Q. Will you, if selected in this case, endeavor to adjust your mental faculties to center upon the point to see whether or not the accomplice speaks the truth when he tells of a combination of these defendants and himself who perpetrated this crime?

A. Yes, sir.

Q. And the part that each one played in it?

A. Yes, sir.

Q. Bearing in mind that there can be no conviction upon the unsupported testimony of an accomplice, will you use your own judgment in finding out who is an accomplice in the case?

A. Yes, sir.

Q. Would you, merely because the three defense lawyers agree with themselves and with each other that everybody is an accomplice, will you substitute their opinion for your own?

Mr. Barshay: I object. It is assuming something that cannot be true.

The Court: Objection sustained.

Q. Will you use your understanding in finding out the part that each person played in the perpetration of this crime?

A. Yes, sir.

Mr. Rosenthal: Do what?

[fol. 1698] The Court: "What part, if any." Reframe your question.

Q. "If any," in the perpetration of this murder?

A. Yes.

Q. In the event—I do not say it will happen—but in the event that the three lawyers should sum up—and they have a right to sum up for their clients—if they should all urge a similar or the same argument with respect to pieces of evidence, will you, because you hear it three times, be inclined to give it three times the force and effect?

A. No, sir.

Q. In other words, you will use common sense and understanding in weighing the one issue in the case, the guilt or innocence of these defendants on trial?

A. Yes, sir.

Q. Now, with respect to the other jurors who have been selected and the others who have been questioned, one of the lawyers for the defendant Buchalter pointed out that in the past Buchalter was convicted of crimes he had committed and is now serving a jail sentence for the commission of this offense.

A. Yes, sir.

Q. Bearing in mind that this man is presently in jail, would you relax your duty as a juror in this murder case solely because he has been convicted of other offenses?

A. No, sir.

Q. Would you deviate from a proper result?

A. No, sir.

Q. With respect to the allocation of evidence in the case, will you, if the evidence obviously pertains only to a single defendant, apply that evidence to the defendant against whom it was given?

A. Yes, sir.

[fol. 1699] Q. Where the evidence obviously applies to two or three of the defendants, will you apply that evidence as to those against whom it applies?

A. Yes, sir.

Q. I believe I went through the questions of the Brownsville and East New York sections and the Brooklyn waterfront and the garment and clothing contacts with you?

A. You did not, but I have none.

Q. You heard of the industries I mentioned and some of the names, I take it, of the union officials that I have mentioned; is there any familiarity with any of those names I mentioned to you?

A. No, sir.

Q. You have no contact with any of the industries in any of the districts I enumerated?

A. No, sir.

Q. Are you ready, if selected as a juror, to take your seat in this jury and do justice by the verdict you would render in the case?

A. Yes, sir.

Q. And if selected, will you talk the case over with common sense and understanding with the other jurors?

A. Yes, sir.

Q. After you have heard all the evidence in the case, every argument the defense lawyers give you as to the inferences they draw from the testimony, and you hear the prosecutor tell you the inference he draws, and the Judge tells you the law, and your mind is satisfied beyond a reasonable doubt that Buchalter is guilty of murder in the first degree, and that Weiss is guilty of murder in the first degree, and that [fol. 1700] Capone is guilty of murder in the first degree, will you hesitate to say so in your verdict?

A. No, sir.

Q. Will you have any fear in so saying?

A. No, sir.

Einar A. Grytting, of 1411 West 7th Street, Brooklyn, New York, was interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Is West 7th Street where you live?

A. Yes, sir.

Q. Your name is listed as that of builder.

A. Yes, sir.

Q. Have you lived in the Flatbush district for a number of years?

A. That is Bensonhurst.

Q. Have you lived in the Bensonhurst district for a number of years?

A. Yes, sir.

Q. How long have you been a builder?

A. Twenty years.

Q. Are you in business for yourself?

A. Yes.

The Court:

Q. Is that West 7th Street and 14th Avenue?

A. West 7th Street and Avenue O.

Q. Did you hear me mention the districts of East New York and Brownsville and the Brooklyn waterfront?

A. I have.

Q. And the garment center in Manhattan?

A. I did.

Q. Do you have any contacts there?

A. No, sir.

Q. Did you ever have any contacts in any of those particular localities with any persons in the industries I mentioned?

A. No, sir.

[fol. 1701] Q. Are you presently building anything under construction?

A. No.

Q. Have you done any building at all in the Brownsville or East New York area?

A. No, sir.

Q. I mentioned to Mr. Cummings and to Mr. Smith, who are alongside of you, about contacts with union officials connected with the Amalgamated Clothing Workers of America. Are any of the names of those Union officials familiar to you?

A. No, sir.

Q. Have you had any contact with any officials of the Amalgamated Union?

A. No, sir.

Q. Or with the Clothing Truckers & Drivers Union?

A. No, sir.

Q. Do you have any present dealings with any building trades unions?

A. No, sir.

By the Court:

Q. Is that the Kings Highway section where you are?

A. Yes, sir.

Q. Near the Culver Line?

A. Sea Beach.

Q. You are building there now?

A. No, sir, I was not for ten years.

Q. You still have an office there?

A. No, sir, only my home.

By Mr. Turkus:

Q. Are you in sympathy with the enforcement of the Penal Law?

A. Yes, sir.

[fol. 1702] Q. Since your name appeared on the jury panel and particularly since you received a notice as a prospective juror, did anybody speak to you about the case?

A. No, sir.

Q. Do you know any of the nine lawyers whose names I mentioned?

A. No, sir.

Q. Or anyone attached to their law offices?

A. No, sir.

Q. Do you know any lawyer who practices criminal law as a specialty?

A. No, sir.

Q. Do you know the District Attorney of the County, Judge O'Dwyer, or any Assistant District Attorney on his staff?

A. No, sir.

Q. Did you hear the view expressed by Mr. Cummings as to accomplice testimony?

A. Yes, sir.

Q. Are you familiar with the testimony of accomplices, and what an accomplice is and what it means?

A. I understand what it means.

Q. Do you find any fault with the prosecutor of a county who, in order to solve a case, employs the use of the testimony of an accomplice and co-participant in the crime?

A. No, sir.

Q. Do you find any fault with the prosecutor of a case wherein accomplice testimony is used?

A. No, sir.

Q. Will you look at the testimony of accomplices, in pursuance to the Judge's instructions, with care and caution?

A. Yes, sir.

Q. Is your state of mind such that you believe that even a [fol. 1703] bad man can tell the truth?

A. Yes, sir.

Q. If accepted as a juror in this case, will you look at every bad thing there is in connection with an accomplice? I will not go into all of the bad things you will hear about it before the case is over, but will you look at his past criminal record and anything there is that can be used against him, and will you consider those things?

A. Yes, sir, everything that is admitted.

Q. By the same token, if accepted, will you devote your mental faculties to finding out whether this accomplice is telling the truth about the perpetration of the crime by these defendants and himself as a group or combination?

A. Yes, sir.

Q. Will you use common sense and understanding in finding that out—I don't mean to be facetious, but I mean in all fairness—I don't mean to be offensive, but will you use common sense in figuring that out when you hear the testimony, and weigh all the facts?

A. I will.

Q. Will your efforts be devoted to a determination of whether or not what the accomplice says about the commission of this crime is true, with respect to the part played by the defendants and himself?

A. Yes, sir.

Q. The Court will instruct you that the testimony of an accomplice or co-participant must be corroborated; will you follow that instruction of law?

A. Yes, sir.

Q. Will you endeavor to apply it to the facts in this case?

[fol. 1704] A. Yes, sir.

Q. Should the Judge tell you, in words or substance, that it is not the duty or the burden of the prosecutor to corroborate each and every item in the case that an accomplice testifies to, but that independent testimony, if believed by the jury, may be accepted as corroboration when it tends to connect the defendant with the commission of the crime, will you apply that instruction of law to the facts in this case?

A. Yes, sir.

Q. Do you find any fault with that instruction on the law?

A. No, sir.

Q. You did say you would follow the instructions that the Judge gave you?

A. Yes, sir.

Q. Is your state of mind such that the instruction on the law is contrary to some idea you have now?

A. No.

Q. In other words, may I go along with the understanding that, in so far as the law is concerned, you will take it exclusively from Judge Taylor in its every aspect?

A. Yes, sir.

Q. And that you have no bias or prejudice against accomplice testimony that would cause you to reject testimony solely because it came from an accomplice?

A. No, sir.

Q. When I spoke to the prospective juror alongside of you, I directed his attention to the fact that one of the lawyers for the defendant Buchalter brought out that his client had been convicted for a past crime and is now serving a long term in jail—do you follow me?

[fol. 1705] A. Yes, sir.

Q. Would you relax your attitude as a juror in this case solely because a man has been convicted for a past offense and is paying the penalty?

A. No, sir.

Q. Would you deviate from a just result in a murder charge solely because he is in jail for another offense?

A. No, sir.

Q. In other words, I may go on that there will be no sanctuary in jail because he is serving time for the past offenses, for the commission of this crime?

Mr. Barshay: I object.

Mr. Turkus: I will not press it. Disregard it.

Q. With respect to the allocation of testimony in the case, if you find the testimony pertains to all of the defendants in a group and you find that, because the Judge explains the law to you, will you apply it to all three?

A. Yes, sir.

Q. If you find, after you hear the law from the Judge, that certain items of testimony apply to only one defendant, will you apply it that way?

A. Yes, sir.

Q. To certain pieces of testimony?

A. Yes, sir.

Q. If you find that certain other pieces of testimony apply to two defendants, will you apply that to the two against whom the testimony is received?

A. Yes, sir.

Q. In short, if accepted as a juror in this case, will you endeavor to do justice by your verdict?

A. Yes, sir.

Q. Will you talk the case over fairly and reasonably with [fol. 1706] your other jurors?

A. Yes, sir.

Q. After you have heard the evidence in the case and are satisfied beyond a reasonable doubt that Buchalter, Capone and Weiss are guilty of murder in the first degree, will you say that in your verdict?

A. I will.

Q. Will you say that without fear or hesitation?

A. Yes, sir.

Lawrence A. Sifert, of 1060 Carroll Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You corrected the address on your prospective service slip?

A. You have the right address. About twenty-five years ago I lived there.

Q. Your address is listed as Carroll Street. I think the Clerk read out the wrong address. At any rate, is Carroll Street part of the Crown Heights district?

A. Yes, sir.

Q. Have you lived there for a number of years?

A. Yes, sir.

Q. I think you said prior to that you lived in Bay Ridge.

A. We used to call it Kensington.

Q. You are listed on this board as an investment adviser; is that correct?

A. Yes, sir.

Q. Has that got something to do with securities?

A. Yes, sir.

Q. You advise people on the purchase of securities?

A. Yes, sir.

[fol. 1707] Q. Have you been doing that for a number of years?

A. Twenty years.

By the Court:

Q. You live near Washington Avenue?

A. Between Bedford and Washington.

By Mr. Turkus:

Q. Do I pronounce your name right, Sefert?

A. Sifert.

Q. Don't hesitate to talk loudly, so the stenographer can hear you. I take it you heard the questions about the garment industry and the clothing industry and the clothing trucking industry?

A. Yes, sir.

Q. Does your business bring you into contact with any people in those industries?

A. No, sir.

Q. Or with any persons within the area in which these industries are located?

A. No, sir.

Q. Have you any contact in Brownsville or East New York or on the Brooklyn waterfront?

A. No, sir.

Q. You have no connection with union officials or with officials of the Amalgamated Clothing Workers of America, or the Clothing Truckers Union or with any of the Teamsters Unions?

A. No, sir.

Q. With respect to the nine lawyers representing the defendants, do you know any of them?

A. No, sir.

Q. Something has been said by one of them that they are working independently of one another—I don't make mention of that because the defendants can have as many law- [fol. 1708] yers as they want. I simply say that to find out if you know anybody connected with those lawyers or employed in their offices.

A. Not as I know of.

Q. Do you know intimately any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know Judge O'Dwyer, the District Attorney of this county, personally?

A. No, sir.

Q. Or any Assistant District Attorney personally who is on his staff?

A. No, sir, not to my knowledge.

Q. At any rate, in this prosecution there is Mr. Joseph and Mr. Klein, who has been coming into the room—coming

in and out most of the time, and myself—my name is Turkus. Do you know any of those names?

A. No, sir.

Q. There will be certain doctrines of law charged to the jury with regard to the constitutional rights and safeguards that every man who is charged with crime is given under our law. Do you follow me?

A. Yes, sir.

Q. Would you apply the instructions of law that the Judge gives you with respect to the facts in this case?

A. Yes, sir.

Q. Would you give the defendants on trial the benefit of every presumption, every doctrine, and every principle of law that Judge Taylor says they should have?

A. Yes, sir.

Q. (Addressing other jurors in box): Will you, Mr. Cummings, and you?

A. Yes, sir.

Q. Have you heard us talking about the testimony of [fol. 1709] accomplices?

A. Yes, sir.

Q. Is there anything in your mind now that would cause you to reject the testimony of an accomplice solely because he was an accomplice?

A. No, sir.

Q. Do you find any fault with the prosecutor of the county who, in order to solve a murder case, accepts testimony of an accomplice and uses it against other perpetrators of a crime?

A. No, sir.

Q. Do you find any fault with the prosecution of an indictment wherein the testimony of an accomplice is used against the remaining perpetrators on the trial?

A. No, sir.

Q. There will be many questions put to you by the lawyers representing the defense about all the items to be considered in connection with the testimony of an accomplice. I will not go into that because it will only be repeated and it will serve no beneficial or useful purpose, but I will make some mention of it so you will know what I am talking about.

Will you consider the fact that an accomplice has a past criminal record and he has had past criminal associations,

and he has done every bad and immoral thing in his entire life and background, in weighing his believability?

A. Yes, sir.

Q. Will you follow the Judge's instructions on the law that, with respect to accomplice testimony, the jury must accept that testimony with care and caution?

A. Yes, sir.

Q. Will you devote your mind to ascertaining whether [fol. 1710] what an accomplice says about the group or participators in the commission of this murder is true?

A. Yes, sir.

Q. Will you use common sense and understanding in applying yourself to the problem to find out is he telling the truth about the part which he says he and each of these defendants played in the murder?

A. Yes, sir.

Q. Will you follow the Judge's instructions on the law that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice?

A. Yes, sir.

Q. Will you follow the instructions of law, if it is in words or substance, that even if the prosecutor had one thousand accomplices, the purpose is not served any better than with one, and that if the case only rested upon the testimony of an accomplice it would be your duty to acquit—would you follow those instructions?

A. Yes, sir.

Q. Now, with respect to the corroboration of an accomplice that is required by law, should the Judge charge you in words or substance that it is not necessary for the prosecution to corroborate and support by independent proof every detail of the testimony given by an accomplice, will you follow that instruction of law?

A. Yes, sir.

Q. Would you endeavor conscientiously to apply it to the principles in this case and the facts in this case?

A. Yes, sir.

Q. Should the Judge charge you in words or substance that the jury may find corroboration from credible evidence [fol. 1711] which tends to connect the defendants and each of them with the commission of the crime, will you follow that instruction of law and conscientiously endeavor to apply it to the facts in this case?

A. Yes, sir.

Q. Have I made myself clear as to those principles?
A. Yes, sir.
Q. Where is your office, Mr. Sifert?
A. The firm I was with dissolved at the end of August, sir.
Q. Where was that firm?
A. No. 63 Wall Street.
Q. What was the name of the firm?
A. Lord——
Q. Where were they?
A. 63 Wall Street.
Q. How long were they in business?
A. Twenty-three years.
Q. You said you were an investment adviser?
A. They were investment advisers.

By the Court:

Q. Were they licensed as private bankers under the State Law?
A. No, sir, not private.
Q. Incorporated as a bank?
A. They were partners.
Q. Licensed by the State Banking Department?
A. No, they do not come under that; they are investment bankers and members of the Exchange.
Q. The Big Board?
A. The Little Board, the Curb.
Q. They are a curb house; they take no money on deposit, they do not discount negotiable bills or notes?
A. No, sir.

Mr. Turkus: Even though you want us to go into the ex-[fol. 1712] amination of the jurors at once, I am not in the best of shape. I am not saying that for any excuse, but I want to be in a condition where I can finish the trial in which I am engaged. May we now have an interruption? This is a difficult task, and I am under the doctor's care now.
The Court: You mean you would like to sit down a while?
Mr. Turkus: Yes, and let somebody else work.
Mr. Barshay: I think it is pretty late now.
The Court: Oh, no, we will continue.
Mr. Barshay: I have work to prepare.
The Court: This is just a matter of one counsel obliging another.

Mr. Barshay: We have been on our feet since ten o'clock.
The Court: Continue.

By Mr. Turkus:

Q. Is the work you are doing now the work of handling estates, investments of estates?
A. Yes, sir.

By the Court:

Q. Were you on the Exchange or were you in the office?
A. In the office.
Q. Your duties amount to what?
A. Investment buyer.
Q. You mean a customers' man?
A. That was my real province.

By Mr. Turkus:

Q. I don't know whether I inquired of you whether or [fol. 1713] not you would take a prejudicial attitude as a juror in this case solely because one of the defendants has been convicted of past crime and is now paying the penalty for this conviction.
A. You did not ask me that.
Q. With respect to the allocation of evidence in the case, will you, when you get the law from the judge, will you weigh what testimony applies to one defendant, and will you apply it against that defendant alone?
A. Yes, sir.
Q. And obviously, in applying the principles of law, where you see the evidence applies to all defendants as a group, will you apply it in that shape?
A. Yes, sir.
Q. Nevertheless, you understand, don't you, that you will follow the instructions of the Court that each defendant has a right to and must have a separate consideration of the case against him?
A. Yes, sir.
Q. Will you two gentlemen (indicating other talesmen) do likewise in appraising the testimony?
A. Yes, sir.

Q. And if selected in the case, Mr. Sifert, will you endeavor by your verdict to do justice in the case?

A. Yes, sir.

Q. Will you talk the case over reasonably and with common sense with the other jurors?

A. Yes, sir.

Q. After you have heard all the evidence in the case and you are satisfied beyond a reasonable doubt that there are three guilty men at this bar of justice, Buchalter, Weiss, and Capone, would you have any fear or hesitation in so [fol. 1714] saying in your verdict?

A. No, sir.

(9:07 P. M.)

Mr. Talley: On behalf of counsel for the defense, I do not think there will be any opposition from the District Attorney, I make the request we now adjourn. We have been engaged here since ten o'clock this morning, and we cannot do justice to our clients' interests by being compelled to work any longer in this matter of selecting a jury. It will take an hour for most of us to get home, and we have to be here tomorrow at ten o'clock. We are quite as anxious as your Honor to get this jury selected.

The Court: I think the Judge is just as tired as any lawyer in the case, but we will have to continue for the present to justify the expense of the night session. We have hardly begun it.

Mr. Rosenthal: Except the Judge can go home when he is finished, whereas I have to look in the office.

The Court: We will not argue it. The Court rules the case must proceed.

Mr. Talley: I respectfully request that it be noted on the record that this request was made at nine o'clock.

The Court: It is not reviewable.

Mr. Rosenthal: It was several minutes after nine when this request was made.

The Court: The Court is trying to see that some degree [fol. 1715] of expedition it achieved.

Mr. Talley: The delay has not been due to counsel on either side.

The Court: Say nothing more, because we will proceed.

Mr. Talley: All right. I respectfully object to your Honor's refusal to adjourn at seven minutes past nine o'clock.

GEORGE E. CARLSON, of 550 Seventy-fourth Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Carlson, do you live in the Bay Ridge section?
A. Yes, sir.
Q. Is "salesman" a correct listing?
A. Yes, sir.
Q. What kind of business?
A. Wholesale woolens, material for men's wear.
Q. Where is your place?
A. 18 West 46th Street.
Q. Does your business bring you in the garment district of Manhattan or the clothing district?
A. You mean manufacturing?
Q. Let me ask you it this way: Does your business bring you in contact with manufacturers of ready-to-wear suits, for example?
A. No, sir.
Q. Or of ladies' garments of any kind?
A. No, sir.
Q. Or of any clothing truckers?
A. No, sir.
[fol. 1716] Q. Are your woolens sold to individual dealers throughout the City to make up suits to order?
A. Yes, sir.
Q. So that you then have no connection with manufacturers in the clothing or garment district?
A. No, sir.
Q. Do you know any of the names, or is there any familiarity in your mind with the names of union officials connected with the Amalgamated Clothing Workers of America?
A. Not at all.
Q. Do you in your line have any contact with union officials connected with the clothing industry?
A. No, sir.
Q. Or with clothing trucking?
A. No, sir.

By the Court:

Q. You sell to Manhattan dealers only?
A. Manhattan dealers only.

Q. What is the name of your concern?
A. William Ack & Company, Inc.
Q. And the address?
A. No. 18 West 46th Street.

By Mr. Turkus:

Q. I mentioned certain names to the various prospective talesmen. Are you acquainted with those names?
A. No, sir.
Q. What particular line of woolens do you specialize in?
A. Clothes, for men's wear.
Q. Was there any familiarity in your mind with any of the names I mentioned?
A. No.
Q. I take it you are in sympathy with the enforcement [fol. 1717] of the Penal Law.
A. Yes, sir.
Q. And that you will give, as instructed by the Court, every presumption and every constitutional, legal safeguard to the defendants that the law says every man on trial should have?
A. Yes, sir.
Q. Do you know any of the lawyers in the case?
A. No, sir.
Q. Do you know anyone connected with their office?
A. No, sir.
Q. Do you know the prosecutor of the county, Judge O'Dwyer, or any Assistant District Attorney on his staff?
A. No, sir.
Q. Do you know any lawyer or member of the bar who specializes in the defense of men charged with crime?
A. No, sir.
Q. With respect to your feeling about the prosecution which employs the use of accomplice testimony, have you the same idea, as have the other jurors alongside of you?
A. Yes, sir.
Q. In other words, is your state of mind such that you understand that even a bad man can tell the truth?
A. Yes, sir.
Q. Will you apply your mental faculties to find out is the accomplice telling the truth about the part that each of these defendants played with him in committing this murder?
A. Yes, sir.

Q. Will you, like the other jurymen, use common sense and understanding in finding that out?

A. Yes, sir.

Q. Will you apply every legitimate and reasonable test to the believability of the accomplice witness that should be [fol. 1718] employed?

A. Yes, sir.

Q. Will you consider everything to his disadvantage, everything that goes in derogation to his believability in weighing his testimony?

A. Yes, sir.

Q. Will you accept the instructions of the Judge that you use care and caution in weighing the believability of accomplice testimony?

A. Yes, sir.

Q. Nevertheless, will you devote your entire energies and mental faculties to find out if what this accomplice is saying about these defendants and the part that each one of them played in the crime is the truth?

A. Yes, sir.

Q. Will you follow the Judge's instructions on the law that there can be no conviction upon the unsupported testimony of accomplices, no matter how believable the accomplice's story is?

A. I will.

Q. And if the case rested only on the testimony of accomplices, you would have no recourse—if they were accomplices—as a matter of law the Judge would direct you to find a verdict of Not Guilty, or if they were accomplices and you found them to be accomplices, and that is all you had in the case, you would have no recourse, no matter how much you wanted to, you would still have to acquit under the Judge's instructions. And will you use common sense and understanding in finding out who is an accomplice in the case?

A. Yes, sir.

Q. Will you, in the event that all three lawyers should [fol. 1719] urge that everybody in the case who testifies against their clients are accomplices, will you make up your mind who the accomplices are for yourself?

A. Yes, sir.

Q. Do you believe, the same as Mr. Cummings and the others jurors, about the incarceration of the defendant

Buchalter, that you will not relax or deviate from your duty as a juror in this case because he has been punished for past crimes?

A. Yes, sir.

Q. If selected, will you by your verdict endeavor to do justice in the case?

A. Yes, sir.

Q. And if the prosecution satisfied you from all of the evidence in the case, and you are convinced beyond a reasonable doubt that Buchalter, Weiss, and Capone were the three killers of Joseph Rosen, as alleged in the indictment, will you hesitate, will you be fearful to say so?

A. No, sir.

HERMAN F. BELL, of 1821 Glenwood Road, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Have you lived in Flatbush for a number of years?

A. In that location about four years.

Q. Prior to that did you live in some other district?

The Court:

Q. You live on the corner of East 19th Street, the northwest corner.

A. Yes.

[fol. 1720] Q. On the trestle board your position is that of certified public accountant.

A. Yes, sir.

Q. In order to become a certified public accountant you went through college?

A. Yes, sir.

Q. And received various degrees?

A. Yes, sir.

Q. Your work has been such that you have been using your mind and applying it to that particular business for many years?

A. Yes, sir.

Q. Are you in business for yourself or is that a firm?

A. I am a member of a firm.

Q. Do you have any connection with any of the industries I mentioned to the other jurors?

A. Yes, sir, we have clients in practically all the districts.

Q. In the garment center district?

A. Yes, sir.

Q. Are they manufacturers of clothing?

A. I said before we have them practically all over.

Q. Do you come in contact with any manufacturer of men's or ladies' clothing?

A. I have at times.

Q. Has that been recent?

A. Well, we have some firms now who manufacture ladies' garments, as I say.

Q. Has your contact with those clients been limited to the work you do or your firm does as certified public accountants?

A. Yes, sir.

Q. You have made no social contacts with any persons in these industries?

A. No, sir.

[fol. 1721] Q. Is that true with respect to the Brownsville and East New York areas of Brooklyn and also the waterfront?

A. I would say so.

Q. Do you come in personal contact with any of your clients in these areas?

A. I have, at some time or other.

Q. Have you had any recent talks with clients in Brownsville or the East New York area?

A. No, as I recall.

Q. Have your contacts been limited to your work or the work of your firm as a certified public accountant?

A. Yes, sir.

Q. Would you make the same response as the other jurors did with respect to any acquaintance with any of the names I mentioned?

A. Yes, sir.

Q. You have no connection or no contact with any persons by the names I mentioned?

A. Yes, sir.

Q. Are you in sympathy with the enforcement of the criminal law?

A. Yes, sir.

Q. Will you follow the Judge's instructions on the law in the case and give the defendants the benefit of every constitutional right and safeguard that the law says they should have in criminal cases?

A. Yes, sir.

Q. Will you, if you are satisfied that the proof establishes guilt beyond a reasonable doubt, say so in your verdict?

A. Yes, sir.

Q. Do you have any bias or prejudice against the prosecution which uses the testimony of one perpetrator of a [fol. 1722] crime against the others?

A. No.

Q. Do you have any fault to find with the prosecution of an indictment wherein accomplice testimony is used?

A. No sir.

Q. Will you devote your mental faculties in ascertaining whether an accomplice speaks the truth about the participation and the part that each of the defendants played in the commission of this murder?

A. Yes, sir.

Q. Will you follow the instructions on the law with respect to corroboration, or the supporting evidence that is required?

A. Yes, sir.

Q. And if the testimony of an accomplice, standing alone, would not be sufficient to warrant a conviction, and you were so instructed by the Court, to acquit in such a case, would you do it?

A. Yes, sir.

Q. Should you be instructed by the Court that corroboration of an accomplice need not go to every single piece and parcel of the accomplice's testimony, but that, on the contrary, belief by the jury of independent evidence which tends to connect the defendants and each of them with the commission of the crime may be deemed sufficient by the jury, would you accept that instruction of law?

Mr. Barshay: I object.

By the Court:

Q. Would you follow the instructions of the Court in that respect?

A. Yes, sir.

[fol. 1723] By Mr. Turkus:

Q. Do you feel, as do the other jurors with respect to the incarceration of the defendant Buchalter, that you will not relax your duty as a juror or deviate from a proper decision simply because he has been convicted of other crimes?

A. No, sir.

Q. And with respect to the allocation of testimony, will you, like the other respective talesmen, when you get the law from the Judge and when the testimony only applies to one defendant of the three, apply it to that particular defendant?

A. Yes, sir.

Q. And where it applies to all three of the group or combination, will you apply it that way?

A. Yes, sir.

Q. Will you endeavor by your verdict to do justice in this case?

A. Yes, sir.

Q. If the People of the State of New York establish to your satisfaction beyond a reasonable doubt not only that the accomplice is telling the truth as to the part that he and each of these defendants played, if you are satisfied beyond a reasonable doubt with the other supporting evidence, that the defendants are involved in the commission of this crime, will you say so by your verdict?

A. Yes, sir.

Q. And if you are satisfied by the testimony that Buchalter, Capone, and Weiss are the three killers of the victim named in the indictment, will you say so in your verdict, if you are satisfied beyond a reasonable doubt?

A. Yes, sir.

[fol. 1724] Q. Without fear or hesitation?

A. Yes, sir.

Q. Mr. Carlson, did I understand that you said you were employed by William Haas & Company?

A. I did not say the first name—By Haas & Company, Incorporated.

Q. You mentioned William—that is the way I got it.

A. Yes, sir.

Q. Is Alfred Haas a person interested in that corporation?

A. That I do not know.

Q. Are you acquainted with him?

A. No, sir.

Q. Do you know of any relationship between the two?

A. I only know Harry Haas.

Q. Let me bring it to your attention: Assuming that Alfred, if I may say so, is a brother of Harry, the man whom you know, and let us assume I was to tell you that in the past I have frequently represented that gentleman, would that knowledge in any wise embarrass you in the discharge of your duty as a juror here?

A. No, sir.

Q. In any event, you are now informed of that?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Bell, haven't you been on the Grand Jury in Brooklyn?

A. No, sir.

Q. Never?

A. No, sir.

Q. Or a special jury?

A. No, sir.

Q. Have you been a juror in any criminal case?

A. I was called for jury — a number of years ago in the court over which Judge Taylor was presiding, and I was [fol. 1725] put on one of these juries but no case was tried. I was on the petit jury.

Q. Were you ever on the Federal Grand Jury?

A. No, sir.

Q What is the name of your concern?

A. Lybing Roch Bros.

Q. And the address?

A. No. 90 Broad Street, Manhattan.

Q. Has your firm ever done any special work for the City of New York?

A. I am not quite sure; I don't recall.

Q. Which branch of the City of New York is it that your concern did work for?

A. About twenty-two years ago we did a considerable amount of work for the State Engineering Department, widening the Erie Canal, during the World War.

Q. Any other customers?

A. I don't know. I was on that job myself; that is why I know about it.

Q. Have you read about this case?

A. Nothing except the notice of trial.

Q. Have you read about it in the newspapers?

A. The first time I heard of the case is when I was called here as a juror.

Q. Have you heard about the Rosen case?

A. No, sir. I know practically nothing about the case except what was set forth in the indictment as I understand it.

Q. In other words, some place you read that these three defendants were accused of crime?

A. Yes, sir.

Q. Specifically mentioned in this indictment?

A. Yes, sir.

Q. Have you heard it discussed any place?

A. No.

Q. Have you formed any opinion with respect to this case?

A. No, sir.

[fol. 1726] Q. Have you ever read about the defendants?

A. Somewhat, yes, sir.

Q. May I ask when and where?

A. I read two articles in the *American* or *Journal* and some articles in the *Mirror*.

Q. May I know when you read those articles?

A. Between August 4th and September 15th.

Q. By virtue of reading those articles you gained some impression about the defendants?

A. Not particularly.

Q. Did you gain any impression?

A. No, sir.

Q. Have you formed any idea about them?

A. No, sir.

Q. Do you accept what you read as true?

A. I do not.

Q. Have any of the facts remained in your mind?

A. I think I remember what I read.

Q. Whatever you read, do you remember it now?

A. Yes, sir.

Q. Have those facts influenced you to form some idea about the case?

A. No, sir.

Q. Did you read something with respect to the life of Judge O'Dwyer?

A. As I recall, yes, two articles in the *American*.

Q. Were the names of the defendants mentioned in that article?

A. I think the names of two defendants were mentioned.

Q. Would that influence your judgment with respect to them?

A. No, sir.

Q. Are those articles impressed on your mind now?

A. Not particularly so; I read them a number of weeks [fol. 1727] ago, like every thing else I read.

Q. Just at present, whether you read about them or you did not, or whether you heard about them, have you any idea about the defendants at all?

A. No, sir.

Mr. Barshay: May Mr. Rosenthal address the Court?

(Mr. Rosenthal appeared before the bench with Mr. Turkus and conferred with the Judge without the hearing of the panel.)

The Court: We will take a recess until tomorrow morning at ten o'clock. The jurymen, tentatively and otherwise, are admonished not to read about or discuss the case. The defendants are remanded.

(At 9:35 P. M. a recess was taken until Wednesday, October 8, 1941, at 10:00 A. M.)

[fol. 1728] Brooklyn, N. Y., October 8, 1941.

Trial Resumed

(At 10:00 A. M. a conference was held in the chambers of the Judge, at which all counsel for the defendants and Mr. Turkus, representing The People, were present. The conference was in relation to the defendant Capone's physical condition. The Court directed that Dr. Nash or some other competent medical man make an examination and report on Capone's present condition and on the prognosis as to recurrence.)

(At the convening of court, Judge Taylor announced to the talesmen:)

The reason for the delay in coming on the bench was that a matter arose which necessitated a discussion between Court and counsel. We will now proceed.

HERMAN F. BELL, a talesman, was then interrogated as to his qualifications to serve as a juror.

By Mr. Rosenthal:

Q. Mr. Bell, Mr. Barshay started last night questioning you, so I will continue where he left off. You made an application, didn't you, to be excused from jury duty?

A. On August 4th.

Q. Has the reason or cause for that application been dissipated?

A. No, sir; I asked to be excused by reason of pressure [fol. 1729] of work.

Q. That has been cleared up now?

A. To some extent.

Q. When you say "to some extent," is the situation now of such a nature that if you are called to serve here you could lay aside your business and devote your entire attention to the testimony in the case?

A. I think I can.

Q. Of course, it is your state of mind that I am trying to inquire into. I have no way of ascertaining that except by your answers. The question is, have you the ability—it is up to you. Have you the ability, in view of the pressure, as you say, of your work, to lay your thoughts of your work aside so as to be able to devote your attention strictly to the testimony of the witnesses, having in mind once the trial begins you are, in all probability, going to be kept together and housed together?

Mr. Turkus: I object to that as having been already answered.

The Court: Objection sustained.

Mr. Rosenthal: Exception.

Q. Have you the state of mind at this time where you, in the event you are called as a juror, would be able to de-

vote your attention solely to the testimony of the witnesses without having in mind this pressure of work which you say you have?

Mr. Turkus: Objected to as already answered.

The Court: Repetitious. Objection sustained. He does [fol. 1730] not have to be persuaded he cannot.

Mr. Rosenthal: I am asking him whether that is his condition. I still wish to know his state of mind.

Q. Will you be able to lay aside your business so as to be able to concentrate solely upon the evidence as it is brought forth in this trial?

A. Yes, sir.

Q. You say that you have business transactions in the garment center and all over—that is, in accordance with your work?

A. I did not say "the garment center," I said the garment district.

Q. By that you mean in and about the locality of New York, where the garment trade is?

A. That is a part of that section, yes, sir.

Q. Do you know of any individual clients you may have there?

A. Now or in the past?

Q. At present or within the last two or three years.

A. Most of the buyers in the district that I have been in direct connection with are in the retail business.

Q. What are they, garment makers or just sellers at retail of made-up clothes?

A. Primarily ready made.

Q. You say you read two articles in the *Journal*?

A. I think so.

Q. Do you distinctly remember that the articles which you read were after you were first called for jury service?

A. Yes, sir.

Q. In other words, you were called on August 4th, and [fol. 1731] did you appear in court?

A. Yes, sir.

Q. Were you in court during the entire session until it was adjourned on that day?

A. Yes.

Q. Until the Court excused the jurors?

A. Yes, sir.

Q. Then after you were excused you read the two articles in the *Journal*?

A. Not on that day, sometime.

Q. Between the period commencing August 4th and ending when you came here on the second occasion?

A. Yes.

Q. In addition to reading the article in the *Journal*, you also read the articles in the *Mirror*?

A. Some articles in the *Mirror*.

Q. Prior to your being called for jury service you had not read any article either in the *Mirror* or in the *Journal*?

A. About the defendants?

Q. Yes.

A. No, sir.

Q. Was it because of the fact you had been called as a juryman that you then read the articles?

A. Well, I never heard of some of these people before.

Q. You wanted to find out who they were?

A. I read the article.

Q. Was it for the purpose of ascertaining in your mind before they were called who they were?

Mr. Turkus: Objected to as already answered.

Mr. Rosenthal: Question withdrawn.

Q. You say you had never heard of the defendants before?

[fol. 1732] Mr. Turkus: Objected to as already answered.

The Court: Objection overruled.

A. I said I never heard of two of the defendants.

Q. You had never interested yourself in any articles in the *Mirror* before, had you?

A. I had never seen any articles.

Q. Are you a subscriber to the *Mirror*? Is that one of the papers you read?

A. Not regularly. Sometimes my wife brings the paper home.

Q. After you had been called as a juryman you read the articles, a few articles, in which the names of some of these defendants were mentioned?

A. Yes, sir.

Q. You read them through from beginning to end?

A. Yes, sir.

Q. What was your reason for reading them, the fact of not having heard of the men before, you wanted to acquaint yourself with who or what they were?

A. Well, it was interesting reading, yes.

Q. What you read in the article in the *Mirror* you first saw interested you to such an extent you then, in your own mind, figured you would read several more articles?

A. I read some more.

Q. Was it because of the interest you took in what you read in the first article of or concerning any one of these defendants that you continued to read the other articles?

A. Yes.

Q. Was it also because of the fact that you are a regular subscriber to the *Journal*?

[fol. 1733] A. My daughter takes it once a week Saturday.

Q. Did your daughter call your attention to the fact that after you had been called for jury service the names of one or more of these defendants were mentioned in the article concerning Judge O'Dwyer, in the Journal?

A. I think so.

Mr. Turkus: Objected to.

The Court: Objection overruled.

Q. When she called your attention to the fact that there was a description in the *Journal* that contained the name of one or more of these defendants, did she also call attention or say to you in words or substance—whatever she calls you, "Pop," or "Father, here are the names of some of the men in the case where you expect to serve as a juror"? Did she direct your attention to that?

A. I don't know how she did it.

Q. What?

A. Yes.

Q. And when she did that you read the article through with interest?

A. Yes, sir.

Q. Then, being very interested in what you read, you again read a subsequent article or two on the same subject?

A. One more, I think.

Q. You digested thoroughly what you read of that in the Journal and the Mirror; in so far as the names of any one of these defendants were mentioned, didn't you?

A. I don't know what you mean by "digested."

Q. You retained it in your mind—you thoroughly read [fol. 1734] anything that was in either of these articles or any of these articles concerning any of the defendants?

A. I read the articles.

Q. And the reading of those were for the purpose of acquainting yourself with the names and the alleged activities of some of those defendants, before you were actually called here?

Mr. Turkus: I object.

The Court: I think you have gone into that enough. He shows apparently his curiosity was inspired after he was summoned as a juror.

Q. Did you hear the Judge tell all the prospective talesmen in the case on August 4th that it was their duty to refrain from reading any articles in which the names of the defendants were or discussing anything concerning them?

A. I heard him say that on September 15th. I have read nothing since.

Q. Who was it, if anyone, who told you there were articles in the *Mirror* which directed yourself to one or more of these defendants?

A. Simply someone in my household; they knew I was called for the jury and they mentioned the fact there was an article on the subject.

Q. Then did you discuss it with the members of your family?

A. No, sir.

Q. They simply handed you the articles as they appeared and told you, "Here are articles concerning men whom you [fol. 1735] are called to serve on the jury for?

A. Yes, sir.

Q. And then after reading one article, they did the same thing when the other articles appeared, to the extent of your reading them?

Mr. Turkus: I object to that as ambiguous.

The Court: Overruled.

Q. Did you see a few in the *Mirror*?

A. Yes, sir.

Q. Did you see two in the *Journal*?

A. I think one or two.

Q. On each of the occasions was your attention directed by some member of your family to the fact that there were articles in the *Mirror* or in the *Journal* which mentioned the names of one or more of these defendants?

A. The first article they did.

Q. And as to the other articles, you read them of your own volition without having your attention called?

A. Yes, sir.

Q. Was that because at the bottom of one it said that the succeeding articles would be printed on the following day or so?

A. Yes.

Q. Having read below, or noticing the fact there would be succeeding articles, then, of your own volition, you read the succeeding articles?

A. Some of them.

Q. Did you read the headnote also that preceded the articles in the *Mirror?*

A. I suppose so; I cannot say; I glanced through them. I think I did.

Q. In the headnote was also a full description of some of the men on trial here, what they were supposed to have [fol. 1736] done; isn't that so? I will withdraw that question.

There was a headnote which preceded the article proper in the *Mirror?*

A. I think there was.

Q. And in the headnote was there an alleged description of the activities of one or more of these defendants?

A. I don't recall, except I think it said these prisoners were on trial for an alleged crime.

Q. You believed substantially what you read in that arrticle?

A. I did not affiliate it in any way, shape, or fashion.

Q. Can you tell me the reason why you continued to read them?

A. Simply interesting, like I read a novel.

Q. You read them because it was interesting to follow, and appealed to you as sort of being novel?

A. Yes.

Mr. Turkus: Objected to as repetitious.

The Court: Objection overruled. Do you offer a challenge?

Mr. Rosenthal: I think in view of the Court's statement I will.

Herman F. Bell, residing at 1821 Glenwood Road, Brooklyn, New York, No. 2680, was sworn and examined on the challenge.

By Mr. Rosenthal:

Q. Now you are sworn and under oath?
A. Yes, sir.
Q. And were I to repeat the various questions which I asked you when you were sitting in No. 12 in the jury box, [fol. 1737] would you answer them in the same manner as you did at that time?
A. Yes, sir.

Mr. Rosenthal: I challenge for cause.

By Mr. Turkus:

Q. Did any of the newspaper articles you read—did they leave any impression in your mind as to the guilt or innocence of the defendants?
A. No, sir.

The Court: The Court feels this way about it: According to my recollection, the instructions were given on August 4th—I believe that was the date. Apparently this man did not hear the instruction, but nevertheless, it was important that that instruction be observed in order to get an impartial jury. This was not a simple, casual reading of one article, or glancing at the headlines, but was done for the purpose of obtaining information, and it would not make a nice-looking record if this man were taken on the jury. The challenge is sustained.

George E. Carlson, a talesman, was then examined as to his qualifications to serve as a juror.

By Mr. Rosenthal:

Q. You work for Haas & Company?
A. Yes, sir.

Q. I think you said last night you are importers of woolen goods.

A. Woolens.

Q. You sell in the garment district, do you?

[fol. 1738] A. No, I sell to individual dealers, Manhattan dealers.

Q. In other words, you sell the tailor who makes up the suit of clothes?

A. Yes, sir.

Q. You have no connection whatever in the garment district?

A. None whatever.

Q. Is this your first jury service?

A. No.

Q. Have you served on a criminal case before?

A. No.

Q. Only civil?

A. Yes.

Q. Was that in Brooklyn?

A. Yes.

Q. I assume in the Supreme Court?

A. Yes.

Q. Did you, in the case where you served, have the benefit of the Court's charge and did the case go to the jury?

A. I did.

Q. Have you read any articles at all in respect to any of the defendants on trial?

A. I don't know anything about the case and did not before August 4th when I came in here. There was a short resume in the *Sun* that the case had started, and it said who the principals were in the case. That is what I read about the case.

Q. Are you a regular subscriber to the *Sun*?

A. Yes, sir.

Q. Do you read any other newspaper?

A. The *Times*.

Q. Did you appear here on the 4th of August?

A. I did.

Q. Was it subsequent to your appearance here that you read in the *Sun* about this?

A. It was during the day I was here, in the afternoon edition of the *Sun*.

Q. In the afternoon edition you saw the article?

[fol. 1739] A. Yes, sir, a short article.

Q. Did the article simply described three men were on trial charged with having participated in the killing of one Joseph Rosen?

A. That is right.

Q. Prior to that time had you at any time, either heard or discussed the name of any of the defendants or had you read anything concerning them?

A. Never.

The Court: There will be a recess for about half an hour. Gentlemen, please be in your places at a quarter of 12 o'clock. Remember the admonition heretofore given. This is necessitated by something which cannot be stated in open court for the record. The defendants are remanded. Talesmen who have not been called into the box may go until two o'clock.

(A short recess was taken.)

After Recess.

(The following took place in the chambers of Judge Taylor, all counsel being present, as well as Dr. Nash, Medical Assistant District Attorney.)

The Court: Doctor, will you state for the record what your examination was and what you found about Capone?

Dr. Nash: October 8, 1941, 11:20 A. M. At the request of Honorable Franklin Taylor, examined in my office, Room 704, Central Courts Building, Louis Capone, 43 years of age.

Chief Complaint: Says he has pain commencing between [fol. 1746] his shoulders, extending over the front of chest and down the left arm and sometimes both arms. Says he has dyspnea on exertion, that is, shortness of breath.

He produced two boxes of tablets, one labeled "Nitroglycerin", no strength of tablet noted; another tablet labeled "614", which he says was the number of his cell in the House of Detention, "Copen, one when necessary, Dr. Torre."

The Court: He took two of those last night before he [fol. 1741] got sick.

Dr. Nash: Physical examination: A healthy-appearing male adult of 43 years, about 5 foot 7 inches tall, weight

about 170 pounds, black and gray hair, eyes brown, fixed small pupils which react very sluggishly to light. Mouth hygiene is good. Teeth in good state of preservation. Chest: A well developed male chest cage, with equal lung expansion both sides; no rales heard throughout the lung or at the bases. Heart normal in size and position; rate 78 per minute, rhythm regular, no murmurs. Blood pressure, systolic, 150, diastolic 88.

The Court: What is that?

Dr. Nash: Systolic pressure is when the heart contracts, and diastolic is when it is relaxed, when we speak of high pressure.

The Court: Pulse pressure?

Dr. Nash: Pulse pressure in this case shows the heart reserve itself good.

The Court: That is about normal, isn't it?

Dr. Nash: Yes. The radial and temporal arteries are quite flexible, the latter showing slight signs of sclerosis, which is to be expected at his age.

The Court: By "radial", you mean what?

Dr. Nash: Over the radius in the wrist, where they usually take the pulse.

[fol. 1742] The Court: Where the artery divides and goes into the fingers?

Dr. Nash: That is right. The radial artery is the one we always take the pulse from.

The Court: Flexible?

Dr. Nash: Quite flexible.

The Court: No sclerosis?

Dr. Nash: The temporal artery shows slight signs of sclerosis, which is to be expected at his age. In January, 1941, he claims he was X-rayed and electrocardiograms were taken at Riker's Island.

Conclusion: From the above physical findings I see no reason why he is not physically fit to go on with his trial. I would advise he be prevented from carrying on his person both nitroglycerin and an unknown tablet, and that what medicines are found necessary be given by his keeper under medical advice. He has with him a lethal dose of nitroglycerin on his person which he could take with fatal result an overdose of.

The Court: He took a dose of nitroglycerin this morning.

Dr. Nash: He says he did not take it this morning.

The Court: I saw him take it.

Dr. Nash: Your Honor, that is a dangerous thing for a man to be carrying around with him, a box of nitroglycerin [fol. 1743] that he does not know the grains.

The Court: He brought it up from the direction of the lower pocket and he put it in his mouth this way and then he proceeded to chew it. Then I called the confidential attendant who was in the side jury box. I said, "Watch him and see if he takes more and let me know." He reported afterwards that he took no more but he continued to chew that one.

Dr. Nash: He could not chew a nitroglycerin tablet very long because it dissolves in a few seconds. They usually put it under the tongue. He does not know what these other tablets are, and "One when necessary" are the only directions.

The Court: What is the shape?

Dr. Nash: It is a round tablet. It might be anything, but it is a round tablet, and there is no mark on it. It might be bicarbonate; it might be anything. I think he should be deprived of those tablets for his own sake.

The Court: The Court cannot do that. He is under Federal custody.

Dr. Nash: No, Capone is not.

Mr. Talley: You do not find any heart condition at all, Doctor?

Dr. Nash: No.

[fol. 1744] Mr. Rosenthal: According to the cardiograms, they show a definite sclerotic condition.

Dr. Nash: So would you show it on X-ray and cardiogram.

Mr. Rosenthal: I assume he told you that those pills are not his wish, but were prescribed by the doctors and given to him under the doctors' orders in the jail, and were given to him principally because of the fact that there is no chance of medication in that jail, and between certain hours a man could pass out before he could get a doctor.

Dr. Nash: All material witnesses in the County of Kings happen to come under my supervision, and they are distributed in all the five boroughs and when it is my duty to prescribe medicine I always see that one of the keepers is in charge of that and that he gives him the required dose

at the required time, but never put the medicine into the hands of the witness or prisoner.

Mr. Rosenthal: I am not finding fault with you. I am only telling you what the doctors in the jail have done with him. Of course, possibly they do not put the name on it not to apprise him of what it is.

Dr. Nash: He has nitroglycerin marked.

Mr. Rosenthal: They must have in the jail a prescription book kept by the doctor which would show what the ingredi-[fol. 1745] ents are. How otherwise would they keep track of what they give?

The Court: May I suggest something? It can be done right away. Check up on those reports and on the cardiografus, because those cardiograms are largely speculative.

Dr. Nash: Yes.

Mr. Talley: Doctor, you do not find any abnormal condition of him at all?

Dr. Nash: I don't.

Mr. Talley: He looks pale.

Dr. Nash: So would I if I were confined for nineteen months.

The Court: I suggest this, it is apparently O. K. to go ahead with the trial and be on the watch. I cannot assume the responsibility of depriving him of medication in view of what may happen and the interpretation that would be put on it, but whatever he takes is his own risk, and if he blows up, it is his own lookout. In the meantime, you check up on those reports.

Dr. Nash: Yes, I will.

The Court: And let us have something further, and we will get that on the record, and we will know more where we are and we will know whether or not to provide a medical attendant to sit with him and give him medication.

[fol. 1746] Mr. Rosenthal: Do you feel that the length of the day's work is more apt to bring on the condition, if he has it as they say he has, than if he had a normal day's work and could recline and rest for a greater period of time?

Dr. Nash: He is not under any physical exertion.

Mr. Rosenthal: No.

Dr. Nash: He is under mental strain, possibly, but it would not make any difference, it seems to me, unless the hours are too prolonged. That is something I would not

be qualified to say, how long the session should last. I should say perhaps it would be more advisable if——

The Court: Last night it happened at 9:30.

(In the courtroom—Trial Resumed.)

The Court: Gentlemen, a word of explanation is due. One of the participants in the trial was under the apparent necessity of a physical examination and report from a medical officer. The trial will now proceed.

(Mr. Rosenthal resumed questioning of the talesman.)

By Mr. Rosenthal:

Q. Mr. Carlson, I think I just finished asking you about the newspaper when a recess was declared. Other than what you described, I assume you read nothing concerning the defendants any place; is that right?

A. That is right.

[fol. 1747] Q. You heard nothing over the radio? Has what you heard discussed here since you have been a juryman meanwhile affected your mind to the extent where any impression has been formed detrimental to one side or the other?

A. No.

Q. So that your mind now is free and open. Am I right in that assumption?

A. Right.

Q. Do you know anyone that is attached to the District Attorney's office?

A. No.

Q. And have you any relatives or immediate friends who are on the police force of the City of New York?

A. No.

Q. You understand that merely because the defendant—and I might make this clear to the four men who have not been examined, I don't wish to repeat these questions over again excepting in so far as in the mind of any one of you the answers that Mr. Carlson gives would be contrary to the answer that you give—there are just a few direct questions that I would like to direct to you individually, but generally speaking, on the propositions of law they would be the same if they were directed to you, and unless you disagree with Mr. Carlson you can make that fact known when

I address each one of you. I assume that is clear to you, is it not?

The mere fact that the defendants have been indicted here, does that raise any presumption in your mind as to their guilt?

A. No.

Q. You understand that that is merely a formal accusa-
[fol. 1748] tion put in writing, and that the minute a defendant says "Not guilty" he raises all the questions which are set forth in that indictment, and from that time on the District Attorney is the one that must prove those allegations to your satisfaction beyond a reasonable doubt before you can in any wise enter a verdict of guilty. That is clear to you?

A. Yes.

Q. You have heard a great deal about the question of accomplice, that has been mentioned both by the District Attorney and by defense lawyers. From all indications in the questioning of the District Attorney it is his intention to use what he terms is an accomplice to the defendants in establishing their guilt. That is clear?

A. Yes.

Q. Merely because the District Attorney says he is an accomplice of the defendants, that does not establish in your mind the complicity of the defendants with the particular individual, does it?

A. No.

Q. You realize that a man can be taking the stand who actually committed a crime and actually know all the details because he was there and he committed it, so that he would be able to say everything about a crime, but then he might make some mention of you, me, or some other person as being one of the participants, and that would not make us a participant; isn't that clear?

A. Yes.

Q. So that, under our law, as the Court will instruct you, in no case can a man be convicted on the uncorroborated
[fol. 1749] testimony of an alleged accomplice. I use the word "Alleged" accomplice. Mr. Turkus uses the word "accomplice." You have no fault to find with the law of that character?

A. No.

Q. The law even goes further, and the Court will charge you that even if you were to believe that an accomplice was

telling you the truth, that even then you could not convict any man under our laws unless there was some other type of evidence independent of the word of the accomplice tending to connect the particular defendant with the crime. That is clear to you?

A. Yes.

Q. You find no fault with that, I assume?

A. No.

Q. There are numerous ways of introducing evidence which, in the estimation of the District Attorney, would tend to connect the defendant with the crime. One of the ways would be, and as I have stated and you probably heard, we don't know what their contention is until they open up and say, "Well, the defendant Capone committed this crime with this man on this corner, and admitted to somebody that he did commit it," if that is their proof; I do not know what it is. But, assuming that that is the case, and again at the expense of repetition, we have got to assume some of these things which may never come to pass in this case, but, being in the dark at this time, you realize that the questions are addressed in the event that such a circumstance does come about. That is clear?

A. Yes.

Q. In the event that the District Attorney were to rely [fol. 1750] upon an alleged, we call it an admission assumedly made to one person or more persons by the defendant, in which the defendant is supposed to have said to that person, "I, the defendant, admit to you, the witness, that I, the defendant, did participate in that crime"—is that clear as far as I have gone?

A. Yes.

Q. It then would be your duty, you understand, to ascertain the source from which this alleged admission comes. That is clear?

A. That is clear.

Q. If upon investigation of the source, either whether the man admits it because of the questions asked of him by the District Attorney or is compelled to admit it on the cross-examination of one or more of the lawyers, it develops that that particular individual has been granted immunity so that he could not be prosecuted for a crime of murder in the first degree, or more than one crime of murder in the first degree, as well as numerous other crimes, including false swearing under oath in a court of competent juris-

diction similar to this, in which he appeared before a jury similar to the one that will preside in this case, you promise that you will take into consideration all of those facts plus the motive which that man may have in accusing the defendant of having participated or made the admission to him. Will you do that?

A. Yes.

Q. If after investigating into the background and the motive and the reason why that man would make that state-
[fol. 1751] ment, plus his association with the other witnesses in this court and his opportunity to concoct a tale, for instance, if it were to appear that this man was housed in a hotel with other witnesses who claim that they were accomplices, over a period of time, where they had opportunities to rehearse what they might want to say on the stand, all those things, everything, including his manner, his demeanor, would you take that into consideration?

A. Yes.

Q. In determining what truth you would give to this case. If that was the form of the independent evidence, and a reasonable doubt was raised in your mind as to whether or not that individual was telling the truth by reason of the motive that he would have to lie, would you resolve that doubt in favor of the defendant, if a doubt was raised in your mind by reason of his motive and the other things which I have discussed?

A. Yes.

Q. You would not have any fear of finding a verdict for the defendant if the proof did not warrant a conviction, would you?

A. No.

Q. In other words, you realize that your duty when you are called here as a juryman is not only to the People of the State but to the defendants—you understand that?

A. That is right.

Q. You understand that defendant is one of The People of the State of New York, and you are trying an impartial issue in which you as one of The People of the State of New York direct the District Attorney, who is your representative, to prove to your satisfaction beyond a reasonable
[fol. 1752] doubt the accusation which he makes against another of The People of the State of New York. You understand that?

A. I understand.

Q. Your duty is to both. It is an equal duty.

A. That is right.

Q. Do you understaad further that irrespective—and, being a human being, it is natural that you heard other jurymen with prejudices and other things, that, having heard them, in the back of your mind there may be some slight thought or impression, that irrespective of what you may have heard, and by now you have heard that there has been articles in the *Mirror* and the life of Judge O'Dwyer in the *Journal*—naturally you must know that because you have heard it discussed—irrespective of what you may have heard, the proposition which is confronting you is that the defendant, not only mine, but each one on trial, is entitled to be tried for this crime. I would not care what the defendants may have done or may not have done. I would not care what they may have paid their penalty for. They are being tried for a specific thing. They could be guilty of anything, but are they guilty of this, is the task that you have, and no other task. That is clear?

A. That is clear.

Q. And the only task that any of the lawyers are undertaking in this case is the task of establishing to your satisfaction even though it is the duty of the District Attorney to establish to your satisfaction beyond a reasonable doubt [fol. 1753] the guilt, we are only undertaking one specific thing, the defense of our particular client on this, and this crime alone; is that clear?

A. That is clear.

Q. If there are any other crimes, they will be heard at different times and different places, and different men will be called upon to hear whether or not they are guilty. Is that clear to you?

A. Yes.

Q. So that if you are called as a juryman here, you will confine your duty solely to the task of ascertaining whether or not any one of these defendants participated in accordance with the instruction of law laid down by the Court, with the so-called accomplice called by the District Attorney, in committing this crime. Is that true, sir?

A. Yes, sir.

Q. Some of these names that have been read may or may not be familiar to you. There are two or three of them, and they have been observers here in the court-room, and

therefore I want to direct your attention to them to see whether or not you know either of them or know them. Do you know Captain Bals?

A. No.

Q. Do you know Lieutenant Osnato?

A. I do not.

Q. Or Paddy Meehan?

A. No.

Q. Or John McDonough?

A. No.

Q. You have heard other names. I cannot remember them—Slabo and a million other kinds of names.

A. I don't know any of them.

[fol. 1754] Mr. Turkus: Not a million.

Mr. Rosenberg: Each time you got a new one, so I have not been able to keep track of them. That might be a little exaggeration. We will withdraw the million.

Mr. Turkus: All right.

Q. In any event, has that impressed you?

A. Not at all.

Q. You know, I could ask you whether you know President Roosevelt, you know Governor Lehman, you know Mr.——

Mr. Turkus: I object to it. They have nothing to do with this inquiry.

Mr. Rosenthal: That is what I am coming to.

Q. But the mere fact that I mention the names of any individual, unless from the witness stand they have some connection with this trial, I assume has not been made to you by the District Attorney for the purpose of influencing you, but in any event, has it influenced you to any degree, the mention of so many names, with nom de plumes attached to some of them, has that in any wise influenced you in this case at all?

A. No, sir, not at all, because I don't know them.

Q. Not having sat on a criminal jury before, I assume you understand that you have a right to your opinion as formed by the evidence?

A. Yes.

Q. You understand that neither the Judge nor Mr. Turkus nor any of the lawyers have a right to convey to you their

impression of the facts and bind you to it unless your con-
[fol. 1755] scientious idea of the facts agrees with what they say?

A. That is right.

Q. I may get up in summation and speak about the facts as I see them and it may be wholly in accord with the operations of your mind. In that event, of course, you will receive them for the value and aid that they may give to you. Then again I may get up and while I am talking you may be turning over in your own mind that your theory is entirely different than the one that I have. Your theory is the one that is controlling. You understand?

A. I understand.

Q. There are two distinct duties here, one the Judge taking care of the law, which you must take from him irrespective of your opinion—that you will do?

A. I will do that.

Q. The other the question of fact, which you take from nobody except the witnesses as they appeal to you. That is clear?

A. Yes.

Q. You understand that in the course of having sat in a civil case you might have heard a Judge in the course of his charge to you on the law take certain illustrations from the fact, and you may remember he told you, however, that he has no opinion as to the facts, he is only citing these instances to give you a better analogy to what the law really is, but your impression of the facts, nobody else is the one to find it. That is clear?

A. Yes.

Q. If in the jury room you come to a conclusion that the
[fol. 1756] facts are, as they appeal to you, different than the facts are as they appear to other jurymen, you know that it is then your duty not to keep it quietly within your own mind but to immediately expose your reasoning to the other men and to quietly, calmly, and dispassionately listen to their reasoning. If after reasoning at length you are not convinced that your line of reasoning is erroneous, would you, merely because of your inexperience as a juryman in a criminal trial, or because perhaps numbers are against you or the hour is late, or pressure of business or some other thing of that character, would you change the opinion that you formed, or would you retain it?

A. No.

Q. You would retain your opinion; is that correct?

A. That is correct.

Q. You understand that the verdict of the jury, if it is based upon their conscience, is sacred. That is their job. They are swearing that they are going to honestly and truly deliberate. No one else in the court-room, and nobody can be heard to complain what the verdict is as long as it is based upon reasoning from the evidence and not from any outside influence. That is clear to you?

A. That is right.

Q. Now, merely because the District Attorney may tell you that a man is an accomplice, that in and of itself is not going to convince you that he is?

A. No.

Q. You probably heard me explain to other men the fact [fol. 1757] that the Court may define certain witnesses as accomplices as a matter of law. He may say to you, "Witness So-and-so took the stand. I charge you, Mr. Carlson"—of course, he won't say "Mr. Carlson," but I am addressing you—"Gentlemen of the jury, I charge you as a matter of law that in considering the evidence of So-and-so, Mr. A, he is an accomplice, but I also say to you that as to Mr. B, there is evidence which warrants the submission to you of the question as to whether he is an accomplice or not." Is that clear?

A. That is clear.

Q. Will you, merely because the Court leaves to you the question of complicity of a particular individual, accept it as a fact that he is an accomplice, or will you ferret out his testimony in order to ascertain in your own mind whether he is an accomplice?

A. I will decide in my own mind.

Q. If you once determined he was an accomplice, would you view his evidence in the same light that the Court told you the evidence of the accomplice who he charged you as a matter of law was an accomplice was viewed? Is that clear?

A. I don't get that.

Q. If a man is once determined an accomplice, then the law is the same as to him whether the Judge tells you he is an accomplice or whether you find in your jury room he is an accomplice; is that clear?

A. Yes.

Q. So that if you determine he is an accomplice, will you apply the same rules of law laid down by the Court as to the [fol. 1758] accomplice which he charged you as a matter of law?

A. Yes.

Q. Now, regarding the question of the District Attorney—and before going to that I want to make sure, because jurymen were in and out of the court-room—I do not know if they have heard these questions or not—you realize that no man can be convicted, that the independent evidence which the District Attorney must have is not supplied by one accomplice corroborating another one? You understand that?

A. I understand that.

Q. If there were fifty or a hundred men here who said that they admitted participation in the crime and they all took the stand and said that the defendant Capone also was with them, that in law would be insufficient. You understand that? There is no greater weight attached to the piling up of accomplice testimony: is that clear?

A. That is clear.

Q. So that in ferreting through the evidence, if the case is finally submitted to you, you understand your job will be to find out whether there is any independent, believable evidence which would tend to connect the defendant with the crime. That is clear? Do you feel, sir, that the mere knowing of an individual by the defendant and having been in his company, in and of itself would prejudice you against this defendant, irrespective of the testimony as to his alleged complicity?

A. No.

Q. Making it clear to you, if a defendant were to take the stand and say, "Yes, I know some of these witnesses: they have visited a restaurant that I have, I have seen [fol. 1759] them, in fact, maybe I have been in a dice game or something, but as far as this crime is concerned, I had nothing to do with it"—would the mere admission of having known these persons or even having been in their company at some other time so influence you or prejudice you against that man that, irrespective of your belief as to the evidence, you would find a verdict of Guilty? That is the question.

A. No, I would not.

Q. Do you feel, sir, that when a defendant takes the stand, that his testimony is any less valuable than that of any other individual?

A. No.

Q. You don't feel that because he is accused of crime and then takes the stand, that the minute he offers himself that he has got to prove he is innocent?

A. No.

Q. You understand, sir, that if we saw fit, as the counsel for these men, we could say, "We rest upon what the law says is a substantial right, namely, that the defendant stand mute, offer no proof, and insist that the District Attorney establish to your satisfaction the guilt before you can convict." Now, when a defendant offers himself as a witness, of course you will take into consideration the interest that he might have and the motive. Naturally, he has an interest. He is here to resist a conviction, but that does not necessarily imply to your mind that he is lying, does it?

A. No.

Q. You understand that truth from the defendant is just as valuable as the truth from any other source?

A. Yes.

[fol. 1760] Q. Assuming that the defendant goes further and brings witnesses who have no past career of crime, and sets forth facts through those witnesses that creates a doubt in your mind as to whether this particular defendant did commit this crime; you would resolve that doubt in his favor?

A. Yes, I would.

Q. You won't feel, sir, that merely because we go forward and offer proof to you, that that in any wise shifts the responsibility of the District Attorney and puts any responsibility on our part to prove our innocence?

A. Am I correct in that assumption? Do you understand, sir, also, that an accomplice may be telling us the truth as to himself, for reasons best known to himself, and as to his complicity in any crime, and the truth as far as he is concerned regarding himself may be a hundred per cent—you understand that?

A. I understand.

Q. But you understand also that his statement as to others may be a hundred per cent false? That is clear?

A. That is clear.

Q. Now, the independent facts which you are required to seek—let me put it differently, so there is no objection—if the Judge were to tell you that the independent evidence which you are required to find in this case before you can find a verdict of guilty does not consist of the fact that there was a murder, and, to make it clear, this alleged accomplice goes on the stand and says, "Rosen was shot [fol. 1761] and killed in front of some place or other," and then witnesses go on and say that Rosen was shot and killed at some place or other—if the Judge tells you that is not the independent evidence at all, the independent evidence that you must find is not that he was shot and killed as described by the accomplice, but that this defendant had something to do with it, that there was other evidence tending to connect this defendant with the crime itself, you would not find any fault with that instruction of law, would you?

A. No.

Q. And you would follow it clearly and conscientiously? Have you any fear or reluctance in finding a verdict of Not Guilty, if the facts warrant it?

A. No.

Q. Why I ask you that is, you have been asked, as all the men by Mr. Turkus—"reluctance" is out and "hesitation" is in—have you any fear or hesitation in finding a verdict of Not Guilty? Mr. Turkus asked every juryman if he had any fear or hesitation in finding a verdict of Guilty if he finds at the bar of justice, and so forth and so on. I ask it in the other way: Have you any fear or hesitation? There is no use hiding the fact—this case has received publicity—but, whether it has or whether it has not, these men are entitled to jurymen of courage who have the courage to bring in a verdict according to their conscientious conviction as to the guilt or innocence of the individual on this and this charge alone—is that clear to you?

A. That is clear.

[fol. 1762] Q. Have you any fear or hesitation, in the event that the District Attorney did not convince you by competent, believable proof, truthful evidence, beyond a reasonable doubt of the guilt or participation by either one of these defendants in this crime, to come out and say so fearlessly, by pronouncing a verdict of Not Guilty? Have you any such fear or hesitation?

A. No, I have not.

The Court: There will be a dinner order, but I will ask the attendants who take the gentlemen out to please be sure to have them back at two o'clock sharply. The jury may retire. Do not discuss the case.

(The jury retired from the court-room.)

The Court: During the trial, each defendant remanded by reason of mealtime shall be detained in the court pen. All meals for prisoners shall be served in the pen under purchase and supervision by an officer designated for such purpose by the Chief or Assistant Chief Court Attendant. No gifts, either of food or otherwise, shall be permitted at the pen.

Defendants are remanded.

(Recess until 2:00 P. M.)

Afternoon Session—Trial Resumed

(All defendants represented by counsel.)

The Court: Proceed, Mr. Rosenthal.

(Mr. Rosenthal resumed questioning of the talesmen in [fol. 1763] the jury box.)

By Mr. Rosenthal:

Q. Mr. Carlson, just one other question: How long did you—(inaudible).

A. Three years.

Q. What was your business before that?

A. I am in the woolen business for the past thirty years.

Q. Were you connected with some other firm?

A. It was decided——

Q. Mr. Sifert, of course you listened to the questions which I asked Mr. Carlson. Is there any proposition which I advanced to him in my questioning where your answers would have been any different if they had been directed to you?

A. No.

Q. Would you mind, sir, telling me what papers you read?

A. The New York *Times*, New York *Sun*.

Q. And have you at any time read anything concerning this case, either before or subsequent to your being called for jury duty?

A. I suppose I read the headlines, if there were any, on the front pages.

Q. Have you any recollection of having read anything either about the case or about any of the defendants?

A. Not in the papers.

Q. I any other place?

A. No, just from what I learned here.

Q. So that whatever you have learned has been since you have been sitting here?

A. You lawyers have told me.

[fol. 1764] Q. And has that left any impression in your mind whatsoever, one way or the other?

A. As to guilt or innocence?

Q. If I am right, I think you made some sort of excuse at the time you were called for service, did you not?

A. Hay fever.

Q. Have you got that now?

A. No, the season is past.

Q. So that there would be no impediment at this time as to your jury service? Am I correct in that statement?

A. Correct.

Q. Without the necessity of repeating the questions which I addressed to Mr. Carlson, do you know of any reason at all why you could not be fair and impartial? There has been no unfavorable impression gained by you in the course of the discussions as between lawyers, or the statements made by prospective jurymen who were excused?

A. No.

Q. Mr. Gritting, you heard the questions that I addressed to Mr. Carlson also, did you not?

A. I did.

Q. And if I directed those questions to you, would you answer them in the same manner?

A. Yes.

Q. May I ask what papers you read?

A. *Tribune* and the *Sun*, the only papers I read.

Q. Have you read anything at all at any time about this case or about the defendants in this case?

A. No, only headlines that the trial was to start.

Q. You mean merely those headlines that were devoted to the question of the picking of the jury or anything that was in any article in respect to any of the defendants? What do you mean?

[fol. 1765] A. No, I mean picking the jury.

Q. Just the advancement in picking the jury?

A. Yes.

Q. Have you gained any impression one way or the other as to the guilt or innocence of any of the defendants on trial?

A. No.

Q. Has there been any opinion or impression formed in your mind due to statements made by other prospective jurymen while you were seated in the court-room?

A. No.

Q. Your mind is free and open now?

A. Yes.

Q. I don't think I asked either you or Mr. Sifert whether or not you knew anybody attached to the District Attorney's office?

A. No.

Q. Have you ever heard any discussions or discourses on the subject of crime by any Assistant District Attorney?

A. No.

Q. In any club or over the radio?

A. No.

Q. Have you any immediate relations or close friends in the Police Department of the City of New York?

A. My son-in-law has a brother. I have not seen him.

Q. That is no relation. Is he merely a patrolman in the Police Department?

A. He is a detective.

Q. Do you know where he is attached?

A. Poplar Street.

Q. Would you mind telling me what his name is?

A. Edward Norris.

Q. The District Attorney assures me he has no connection with this case, so I won't ask you the question I in- [fol. 1766] tended to ask you, but I will ask you this question: Have you ever discussed police affairs with him?

A. No.

Q. And that is the only one that you now recall having any connection with the Police Department; am I correct?

A. That is all.

Q. Mr. Gritting, do you know anybody attached to any police station?

A. No.

Q. Any police official?

A. No.

Q. And you have no relations?

A. No.

Q. Have you any knowledge of any of the Assistants connected with Judge O'Dwyer's office?

A. No, I have not.

Q. Do you intend to take any active part in the coming political campaign?

A. No, only to vote.

Q. Outside of voting. I mean active part. There you will only pull the lever. Either one of you gentlemen taking an active part?

A. (By No. 12): I am chairman of my Election Board.

Q. That would, of course——

A. Supervisory work.

Q. You, Mr. Sifert?

A. No.

Q. Mr. Cummings, again asking you if I directed the questions to you that I directed to Mr. Carlson, would your answers be the same?

A. They would.

Q. And have you any immediate relations on the police force?

A. No.

Q. Any close friends with the present District Attorney's [fol. 1767] staff?

A. No.

Q. Do you intend to take any active part in the present political campaign?

A. No.

Q. Now, addressing the four of you collectively: Do any one of you know of any reason why you could not be fair and impartial to both The People and the defendants? Do you, mister? You, mister? You, Mr. Sifert?

A. No.

Q. Or you, sir?

A. No.

By Mr. Talley:

Q. I will address you collectively, gentlemen, as far as is possible. The Court will charge you that it is the law of our land that no defendant in a criminal trial may be convicted unless a jury is satisfied—that means each in that jury—is satisfied beyond a reasonable doubt of the guilt

of such defendant. If, after the presentation of all of the evidence in this case there is a reasonable doubt in your mind; that is, a doubt that has some reason on which it can be based, the kind of a doubt that a man might have about the ordinary affairs of life, if there is such a doubt in your mind as to the guilt of these defendants or any of them, will you give these defendants the benefit of that doubt?

A. Yes.

Q. No question in your mind about that? The Court will charge you that the burden of proving a defendant's guilt is always upon The People, always upon the District Attorney. Under our law it is not required, because a man's name [fol. 1768] is put in an indictment charging him with a crime, that he must prove his innocence of the crime. That is not our law, the result of centuries of experience. And the Court will further charge you that because that burden is placed upon the District Attorney there never comes a time when the obligation rests upon the defendant to take the stand in his own behalf. If, for good reason or bad reason, any of these defendants do not take the stand and the Court charges you that you are not to indulge in any unfavorable inference against them, no unfavorable inference against them because of their failure to take the stand, will you follow the direction of the Court in that respect and not hold it against the defendant who does not take the stand? Is that plain to you, and to you, and to you, and to you?

There is nothing in your minds as you sit there which makes you feel that you could not give these defendants a fair trial under our law as it is charged to you by the Court? If there is, this is the time to say it. We both want a fair, impartial jury. That is what we want, taking this time trying to get it. Is there any reason of any description that exists in the minds of you four gentlemen because of any impressions formed, any conversations had, any reading of newspapers or other things that would prevent you from requiring The People to sustain the burden they were undertaking when they brought these people into court to answer this charge?

[fol. 1769] Is there any reason why you cannot require the District Attorney to give these men a fair trial?

A. No.

Q. That applies to all of you? No further questions.

Mr. Barshay: No questions.

Mr. Turkus: Each talesman is satisfactory to The People of the State of New York: Mr. Cummings, Mr. Gritting, Mr. Sifert, and Mr. Carlson.

Mr. Talley: Mr. Cummings is satisfactory to the defense. The other three gentlemen are challenged peremptorily.

(James B. Cummings takes Seat No. 6 in the jury box.)

(The following talesmen were called: Myron Gillespie, of 316 Beverly Road; George B. Hall, of 138 Seeley Street; [fol. 1770] James F. Gill, 266 Washington Avenue; Edna F. Branower, 75 Ocean Avenue, Brooklyn.)

Mr. Turkus: May it please the Court, the counsel on both sides are fully cognizant of the respect that the Court holds for women jurors. They feel the same way themselves. Unfortunately, in this situation we have not the facilities by way of matrons for the proper safeguarding of a woman's rights in the jury room. Since the jury is to be segregated in the hotel, women have the right of protection, the right to have their names protected as well as all other protection. Under the circumstances, where we have not got a single matron, that would be impossible. Under the circumstances, we have heretofore consented to excuse one lady juror, and through some inadvertence I believe all the other lady jurors felt the excuse applied to them.

The Court: I think that was the impression given by the clerk, but the Court had no jurisdiction to act in more than that specific case.

You say both sides consent?

Mr. Rosenthal: Yes, we all agree, because of the conditions.

The Court: The Court can do no more than go along with you, because it is based on good ground.

Mr. Turkus: To safeguard the women from staying here, [fol. 1771] the other prospective lady jurors, may we now have the consent as to all, to save them the bother of returning day after day?

The Court: If it is on consent, yes. Then the Court has jurisdiction.

Mr. Rosenthal: Mrs. Cohen, Mrs. Miller, and Mrs. Mahler.

The Court: I understand these whom you have named are excused by consent?

Mr. Rosenthal: In addition to the one that is in the box, Mrs. Branower.

I am just handed another slip by the clerk, who says one of the ladies appeared today, Mrs. Annie Rothblatt. If that is so, that will be included in the consent.

The Court: Is that all right?

Mr. Turkus: It is. Does that include all the prospective lady jurors?

Mr. Rosenthal: Mrs. Annie Rothblatt of 1652 East 12th Street, No. 2593.

The Court: You understand the position of the Court. The Court had no jurisdiction to act other than in the one case that was before it. You understand that if it appeared on the record that the Court acted in other cases, that might be considered as substantial error in the record.

[fol. 1772] Mr. Turkus: Yes, your Honor, I understand that.

The Court: That had to be avoided. In the next place, it must be clearly understood that there is no prejudice against women jurors. The service of women jurors has been of great benefit in this court.

Mr. Turkus: The only thing we had in mind was the safeguarding of the reputation of the ladies in hotels without the matrons to segregate them.

The Court: This is not the action of the Court; this is the agreement of counsel which the Court simply approves because of the consent.

(The following talesmen were called into the jury box: Robert Kafker, 526 East 54th Street; Philip Strober, 69 Tehama Street; George B. Haaf, 2248 East 47th Street, Brooklyn.)

Mr. Barshay: Judge Taylor, before you address the other jurors, may I call your attention to the fact that one of the gentlemen who entered the box, I have represented his family for a considerable number of years.

The Court: What member of his family?

Mr. Barshay: Once his brother, once his father, in civil litigation.

The Court: He may still be a good juror.

Mr. Barshay: I just want to acquaint your Honor with [fol. 1773] that fact.

Mr. Turkus: We may be able to save some time if we have a substitution. Mr. Barshay is a skilled lawyer, and if he calls something to the attention of the Court——

The Court: I want to know more about it. The other gentlemen may come back at five o'clock.

(Mr. Turkus then examined the talesmen who had entered the box as to their qualifications.)

By Mr. Turkus:

Q. Mr. Gillespie, under the procedure that we are now adopting in order to expedite the selection of the jury, we take one juror and address many questions through him while the other jurors listen to questions, and then we go down and we find out if the responses would be the same. In that way we save time, and you will understand why I address my questions to you.

According to the listing on the board, Mr. Gillespie, you reside at 316 Beverly Road.

A. Yes.

Q. Is that correct?

A. That is right.

Q. Is that the Flatbush section of Brooklyn?

A. Yes, West Flatbush.

Q. And you are listed as "R. E. Insurance." Does that mean real estate and insurance?

A. Yes, sir.

Q. Are you in business for yourself?

A. Employed.

Q. Who is your employer?

A. Harry M. Lewis.

Q. Is his office in the Montague section of Brooklyn?

A. 189.

[fol. 1774] Q. Is he related to Judge Lewis, do you know?

A. Not that I know of.

The Court: He lives on the same street. He lives on Second Street, near Judge Steinbrink.

Q. How long have you been in that business of real estate and insurance?

A. I have been a licensed real estate broker for approximately twenty years and—I mean insurance broker, and a licensed real estate broker for about a year, and prior to that a licensed real estate salesman about four years.

Q. How many years have you been with the Lewis firm?
A. Over nine years.
Q. And prior to that were you with some other concern?
A. Yes, sir.
Q. In Brooklyn?
A. New York, 46th Street.
Q. And by whom were you employed then?
A. Glad & Nichol.
Q. Have you lived in Brooklyn a number of years?
A. On and off about twenty years.
Q. Have you lived in other sections of Brooklyn besides West Flatbush?
A. In the Borough Park section.
Q. And how many years did you live there?

By the Court:

Q. You are very close to Borough Park now?
A. Yes.
Q. You are on Dahill Road?
A. I am near Ocean Parkway. 316 is near Fourth: Ocean Parkway is Sixth. Dahill is the other way.
[fol. 1775] Q. Dahill is west?
A. Dahill is west.
Q. You are near the corner of Fourth?
A. Dahill is past Gravesend Avenue, or McDonald Avenue.
Q. That is right. Church Avenue runs in right there?
A. That is right.
Q. Then Borough Park begins?
A. I do not know.

By Mr. Turkus:

Q. Mr. Gillespie, I take it that you understand that the defendants are charged with the crime of murder in the first degree, do you?
A. Yes, sir.
Q. Is there anything about the nature of the charge, namely, a charge of murder in the first degree, which would impair your service as a juryman?
A. Not that I know of.
Q. Have you any scruple, conscientious or otherwise, against capital punishment?
A. No, sir.

Q. The lawyers must hear the answers too, and I will understand when you speak up louder. Have you had any business or other connection with anybody in the clothing or garment trades in Manhattan?

A. No, sir.

Q. For example, when you were in the real estate business in Manhattan, did business bring you into contacts with any individuals or firms engaged in the manufacture of clothing?

A. When I was in business in Manhattan it was primarily insurance.

Q. Have you had any business or other connection, or do you presently have one with anyone in the clothing trucking industry?

[fol. 1776] A. No, sir.

Q. With respect to people or firms in the Brownsville-East New York area?

A. Well, management of property, tenants.

Q. Do you specifically supervise the properties in that locality?

A. I go down there and I make inspections of different properties and then I take over other supervisors' properties in connection with collection of rents and preparing leases.

Q. And how often are you in that area or dealing with people who are in the Brownsville-East New York area?

A. During the summertime I am there for about two weeks at a time, or three weeks at a time, and then I won't be there for about a month.

Q. So that your business then brings you into that district intermittently, and by that I mean are you there for a period of time and then you are away for a short period and then you are back again?

A. That is right.

Q. On what streets are those properties that you visit?

A. One is on—Do you want the address?

Q. Tell me the streets.

A. One is on Junius Street.

Q. Is that on the other side of that railroad cut?

A. It is 1 Junius Street, the loft building.

Q. Is that right rear Livonia Avenue?

A. We have one on 901 Livonia Avenue.

Q. I mean the one on Junius Street.

A. No, that is corner East New York.

Q. East New York Avenue?
A. That is right.
[fol. 1777] Q. That would be about a block from Van Sinderen?
A. That is right. We have one, you mentioned Livonia, one at 901.
Q. Would that be near Sackman Street?
A. Where the station is.
Q. Saratoga and Livonia?
A. I go by numbers.
Q. Is there a candy store in it?
A. Shoe store. There is a candy store across the street.
Q. And it is right at the station?
A. It is almost at the station.
Q. And then there is a moving picture?
A. That is it.
Q. That is Saratoga and Livonia all right.
A. We sold that one.

By the Court:

Q. Do you go to that candy and cigar store?
A. No.
Q. Never go there?
A. No reason to.
Q. Do you know Rose Gold?
A. Don't know anyone but the tenants in my building. We did manage a property at 455 New Lots in that particular neighborhood. That was sold I think early in the spring. And on Winthrop Street and Rutland Road.

By Mr. Turkus:

Q. That will be enough. And how many years have you been going into those sections and visiting these properties?
A. Since I work for Lewis.
Q. That has been the past nine years?
A. Call it eight years. I work there nine, over nine.
[fol. 1778] Q. Of course, when you were in that neighborhood, you had conversations with people?
A. Tenants.
Q. Did you hear any discussions about conditions in Brownsville and East New York while you were there?
A. Not that I recall.

Q. Well, in so far as real estate is concerned, you have knowledge of conditions in that section?

A. That is right, and insurance conditions too.

Q. When the O'Dwyer investigation started did you read about it?

A. I believe I did.

Q. And did you read in the press the names of Harry (Pittsburgh Phil) Strauss?

A. Yes, sir.

Q. Martin (Buggsy) Goldstein?

A. That is right.

Q. Abie Reles?

A. That is right.

Q. And various others?

A. Some time ago.

Q. It has been since 1940, since January 1, 1940?

A. Yes.

Q. You may have heard the names before that?

A. No, I don't think so.

Q. As the result of the knowledge that you have of that area and the reading that you have done, have you any impression?

A. No, sir.

By the Court:

Q. You live near the West Flatbush Democratic Club. Do you belong to it?

A. The West Flatbush Democratic Club, the one you have in mind, on Third Street near Church?

[fol. 1779] Q. Yes.

A. That has been torn down about two years ago. Where they moved to I do not know.

By Mr. Turkus:

Q. What papers do you customarily read, Mr. Gillespie?

A. The *Tribune* and the *Sun* and once in a while the *Telegram*.

By the Court:

Q. There was a lecture given on this subject at that club. You do not belong there?

A. No political party or association or society.

By Mr. Turkus:

Q. In 1936 were you going into those neighborhoods, Brownsville and East New York?

A. Going into those neighborhoods since 1920.

Q. Did you go and visit that place at Junius Street in 1936?

A. '36? No. I think Junius Street, we have that for about three and a half or four years. If I looked the records up——

Q. Do you still maintain a supervision of that property?

A. I have been covering that building about all of January and February of this year and during the summer months. I was back there recently.

Q. Did you read anything in the press about the killing of Joseph Rosen?

A. Yes, sir.

Q. Did you read many articles?

A No, just that he was murdered, that was about all.

[fol. 1780] Q. Did you read anything of the killing back in 1936?

A. I don't remember.

Q. Is there anything that you remember reading that makes the Junius Street significant to you?

A. Except the locale.

Q. How far is that house—there is a trestle or a passover from Junius Street, from Livonia to Junius Street, and Van Sinderen. There is an I. R. T. and B. M. T. station and a railroad trestle. You can walk over the trestle and come out on Junius Street side. If you walk up one way——

A. Always went by car.

Q. At any rate, is there any significance in your mind about that location of Junius Street from anything that you have heard or read?

A. Only the building we have to manage there.

Q. In your contacts with any people in the buildings that you supervise, did you ever hear mentioned any of the names of persons living in the Brownsville-East New York area or frequenting that area?

A. I don't know. I would say no.

Q. You had one property which is a short distance from the Saratoga and Livonia corner, the one you described to me as having the shoe store near one corner, the moving picture and the candy store?

A. Yes, sir.

Q. Did you hear anything about the candy store?

A. The only thing I ever did is park the car and go across the street.

Q. Did you ever see people hanging around on the corner of that candy store?

A. Sure, a number of times. There is a bus stop there [fol. 1781] too.

Q. May I go along, then, that you have no impression about this case from your knowledge of the real estate conditions in the neighborhood and your visitations there?

A. That is all.

Q. You have no impression at all?

A. None at all.

Q. And nothing from your reading matter?

A. No, sir.

Q. Does business bring you into any contact with the Brooklyn Waterfront?

A. What do you call the waterfront? What I mean by that, the waterfront I know is to be where all the wharfs are.

The Court: Shipping.

The Talesman: Shipping and the only thing we have around, we did have, is a piece of property on Bridge Street and another on—Bridge Street was about the nearest thing to it.

Q. Then other than going to Bridge Street, which was the nearest to the waterfront, may I go along with the understanding you have no contacts, socially or by way of business, with the waterfront?

A. That is right.

Q. Do you know any officials in the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any familiarity to the name of Murray Weinstein, manager of Cothing Cutters Union, Local 4 of the Amalgamated?

A. No.

Q. Or that of Sam or Samuel Katz?

A. Never heard of him.

Q. Is there any familiarity to the name of Bruno Belia?

A. No, sir.

[fol. 1782] Q. Or Salvatore Marazzano?

A. No, sir.

Q. Did you at any time do any insurance work in the area in which the garment center is comprised and the clothing section of the city?

A. No.

Q. Do you have any contacts, directly or indirectly, with any teamsters' unions or clothing trucking unions?

A. The only thing we have in trucking—I don't know what they truck—are garages, that we rent.

Q. I mean your contact, do you personally have contact with any clothing truckers?

A. No.

Q. Do you know any manufacturers of men's or ladies' garments?

A. Yes, sir.

Q. Do you know them personally?

A. No, sir.

Q. Do you know them by way of business?

A. That is it.

Q. And where are their manufacturing places located?

A. One is on 5th Avenue and 16th Street. That is gents' furnishings.

Q. Men's clothing?

A. Yes. And then I know a couple of furriers.

Q. Who is it that you know in the men's clothing?

A. Mr. Weder(?).

Q. Do you know his first name?

A. No, in fact, I think he sold out to his partner, I think the first of the year. They had that Style Pledge Clothes.

Q. Whom do you know in the fur industry?

A. Mr. Lovett.

Q. Do you know the trade name?

[fol. 1783] A. I think he went under—if I recall, now that you ask me, he is under his own name and he is foreman—he went out of business and he is foreman or shop steward in another shop; I don't recall what name.

Q. Do you know other people in the fur industry?

A. Neighbor next door, but I have not anything to do with him.

Q. Is the name of Lepke and Gurrah familiar to you? You never heard of those names?

A. Yes, recently I heard.

Q. In conversations or in reading matter?

A. Some items that I read has connection with the investigation.

Q. Did you hear anybody say anything about Lepke and Gurrah in discussions?

A. Not that I recall, no, sir.

Q. Has any of the reading matter, the names of Lepke and Gurrah, left any impression with you?

A. No impression.

Q. Did you follow the investigations of Thomas E. Dewey in the press?

A. No, sir.

Q. Do you have any contacts in Sea Gate of any kind, nature or description?

A. Yes, we manage some property out in 4001 Neptune Avenue. That is in Sea Gate, and then we have a row of houses on the Bay side. It is called Bayview Avenue, sixteen houses.

Q. And does business bring you into the Gate?

A. The last time I was in the Gate I think was just before they started their season. That was on inspection.

Q. Do you know a lawyer by the name of William W. Kleinman who maintains a residence in Sea Gate?

A. No.

[fol. 1784] Q. Is there any familiarity to the name of Max Silverman, a one-time resident of Sea Gate?

A. No, sir.

Q. Or that of Wolfie Goldis?

A. No, sir.

Q. Do you know anyone by the name of Buchalter?

By the Court:

Q. Where is your office?

A. 189 Montague.

Q. Mr. Kleinman's office is 215.

A. Down the corner.

Q. David Price, do you know him?

A. I heard David Price's name, but I don't know him.

By Mr. Turkus:

Q. The last address of Mr. Kleinman was at 66 Court Street. He was at 215 at one time.

I do not know whether I had a response to the question I put to you about familiarity with the name of Buchalter or Kowas. Are those names at all familiar to you?

A. Buchalter is familiar outside of hearing it recently; the other one, no.

Q. And when you say you have heard the name Buchalter, you mean you have heard it in court or you have read of it?

A. That is right.

Q. Is there any familiarity to the names of Bellanca or Tosca?

A. Never heard of them.

Q. Or Hymie (Curley) Holtz?

A. Never heard of him.

Q. The name of William or Willie Alberts, a bondsman—a one-time bondsman, I should say.

A. No, sir.

Q. Do you know anybody by the name of Weiss in the [fol. 1785] automobile rental business, or Chevrolet sales agency business?

A. No, sir.

Q. Since you received your notice did anybody speak to you about the case?

A. No, sir.

Q. There are lawyers representing the defendants here. There are nine lawyers in all. I will say the names now, so that all the other jurors can hear them, and then when I inquire about any knowledge of counsel, they will be in a position to answer. When I say "nine", please understand that I have no fault to find with it. Defendants may have as many lawyers as they want or as few as they want, so there is nothing said there to find fault with defendants for having them.

With respect to defendant Buchalter, he is represented by former Assistant District Attorney Hyman Barshay, former Assistant United States Attorney Abraham Wegman, and Mr. Jesse Climenko, a partner of Mr. Wegman. Do you know any of those three lawyers?

A. No, sir.

Q. Or anybody in their law offices?

A. No, sir.

Q. With respect to the defendant Weiss, he is represented by former General Sessions Judge Talley, former Assistant District Attorney James I. Cuff, and former Assistant

United States Attorney Murray Kriendler. Do you know any of those three lawyers?

A. No, sir.

Q. Or anyone associated with them in the practice of law?

A. I do not know who they employ, so I cannot tell you.

Q. That is what I want to know. Do you know any of [fol. 1786] the three lawyers who represent the defendant Capone? They are Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg.

A. No, sir.

Q. Do you know whether you consciously know anyone associated with those three lawyers in the practice of law?

A. No.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Does your business bring you into contact with members of the bar?

A. Oh, yes.

Q. Are those contacts limited to so-called real estate lawyers?

A. No, not only real estate. Some in the general practice of law, negligence cases.

Q. Did you have any discussions with any members of the bar about any of the defendants in this case or about Judge O'Dwyer's investigation?

A. No, sir.

Q. Did you ever hear any discussions take place?

A. No.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, personally?

A. No, sir.

Q. Do you know any Assistant District Attorney on his staff?

A. Personally?

Q. Yes.

A. No, sir.

Q. Of course, when you hesitated, you have me curious. Do you know one of the Assistants?

A. No. I tell you what I have in mind, well, in our office we did have something go wrong, and of course, as secretary of the company I went to the District Attorney and

[fol. 1787] made a charge. Now I am trying to think of his name.

Q. Would it be Mr. Rapel?

A. Got a Ryan there?

Q. You mean Miles McDonald? I am trying to get as near to Ryan as you can. Could it have been Mr. Riley?

A. A young fellow.

Q. Yes.

A. That may be.

Q. I take it that whatever contact you have had with the District Attorney's office has left your state of mind such that you could not be a fair juror in this case.

A. That was purely business.

Q. Have you been the complainant in a criminal case?

A. That is it.

Q. And is that case ended?

A. No, sir.

Q. Still pending?

A. Yes, sir.

Q. Awaiting trial?

A. Well, yesterday I got a call from the probation officer.

Q. That case is ended then.

A. He has not been sentenced yet.

Q. If you got a call from the probation officer he must have entered a plea of guilty.

A. You are telling me; I do not know.

Q. That is what I suspect from that. However, is there anything about the connection that you have had with the District Attorney's office that would impair your ability to serve in this case?

A. We did have one more. That Bridge Street property [fol. 1788] about two years ago, the police gave us quite a bit of trouble. They found a body in the rear building which they attributed to, so they told me, to Murder, Incorporated.

Q. They were trying to solve the case?

A. They gave us trouble. They may be trying to solve the case, but the trouble I mean is the violations they had put on the building.

Q. Well, from your contact, as you have just mentioned it, and I won't repeat the phrase you used, do you have some impression about the O'Dwyer investigation in that connection, with the expression that you used?

A. No, all I know there has been an investigation, but I never followed it up.

Q. Not even the one where that body was found?

A. That is not the only one. About seven years ago Mrs. Diamond was found in one of our buildings.

Q. Which Diamond?

A. Legs Diamond's wife. That was at 1641 Ocean.

Q. These bodies have been found in the properties that you manage?

A. Yes.

Q. I take it that whatever zeal was used by the Police Department in reference to the particular bodies that were found in these properties that you have some control over by way of management, has not prejudiced you against the Police Department of the City of New York or the prosecutor's office, has it?

A. No.

Q. By the same token, is there some prejudice that you may have with people charged with crime because of those experiences?

A. No.

[fol. 1789] Q. Have you heretofore served as a juror in a criminal case?

A. I was called, but never served.

Q. Did you get as far as the jury box?

A. No, sir.

Q. Your name was not pulled out of the wheel?

A. Not, fortunately.

Q. I take it then you have never heard a judge's charge on the law in a criminal case?

A. Not in a criminal case.

Q. Should the Judge charge you in substance in a criminal case that the burden of proof rests entirely upon the prosecution to establish guilt beyond a reasonable doubt, will you accept that definition and instruction of law?

A. Yes, sir.

Q. And will you conscientiously endeavor to apply it to the facts in this case?

A. Yes, sir.

Q. Do you live close to a man by the name of Gottesman?

A. We had a Gottesman for a tenant at 330 Ocean Parkway.

Q. Do you know anyone else by the name of Gottesman?
A. Coney Island Avenue—a gas station.
Q. I was referring to a lawyer.
A. No.
Q. I won't reiterate the expression, if the Judge should charge you thus and so, but in my questions you will understand that when I ply them to you it is with the understanding that the Court will substantially direct you that that is the law in the case. For example, do you find any quarrel or do you find any fault with the proposition of law that defendants on trial are presumed to be innocent until their guilt is established beyond a reasonable doubt?
[fol. 1790] A. I understand that.
Q. And will you accord that presumption to the defendants in this case?
A. Yes, sir.
Q. In consonance with the Judge's charge, will you give to the defendants on trial every legal and constitutional safeguard that a defendant should and must have under our law?
A. Yes, sir.
Q. Have you heard any discussion while you were waiting to be called into the jury box about the testimony of an accomplice?
A. Yes, sir.
Q. Are you, then, familiar with what an accomplice is?
A. Yes, sir.
Q. Is it your understanding substantially that an accomplice is one who participated in the commission of crime together with others?
A. That is right.
Q. Do you have any inherent prejudice or bias against an accomplice as would cause you to reject his testimony no matter what the circumstances were?
A. Will you repeat that?
Q. If it is complicated, I will do it over.
A. Not complicated.
Q. (Pending question read.)
A. That is hard for me to answer.
Q. I will try to bring it out so that we can get along. Assuming that part of the State's case rests upon the testimony of an accomplice, that is one who participated in the

commission of the murder with others. Do you follow me on that?

A. Yes.

[fol. 1791] Q. Is your state of mind such that you would reject testimony coming from an accomplice, no matter what the circumstances were? Have you such a feeling against an accomplice?

A. It would be what the testimony shows up. In other words, if the testimony is of that nature that is acceptable.

Q. What I want to know is this: Would you close your ears to the testimony of an individual who was in the category of an accomplice?

A. No.

Q. Because of some bias or prejudice that you may have?

A. No.

Q. Against those individuals. Do you find any fault with the prosecutor of the county who, in order to solve a murder case, will accept the testimony of one of the co-participants in the crime and use it against the others?

A. No, sir.

Q. Do you find any fault with the prosecution of an indictment wherein the testimony of an accomplice is used against the other defendants in the case?

A. No.

Q. There will be certain rules or certain tests that you can apply to the believability of an accomplice. Do you understand that?

A. Yes.

Q. They will undoubtedly be given to you by the trial judge in his charge to the jury.

A. Yes.

Q. I take it that you understand that in the ordinary case an accomplice is not usually a theological student.

Mr. Climenko: I object to the question, if your Honor [fol. 1792] pleases.

The Court: Yes.

Mr. Turkus: Withdrawn in that form.

Q. I take it that you understand, Mr. Gillespie, that the accomplices sometimes are the kind of individuals that we don't ordinarily meet with in our daily experiences and every-day walk of life.

A. Yes, sir.

Q. Should the Judge charge you that no prosecution may result in a verdict of guilty if it rests only on the testimony of an accomplice, would you follow that instruction of law?

A. Yes, sir.

Q. And should the Judge charge you that where part of the State's case rests upon the testimony of an accomplice, the testimony of the accomplice must be supported or corroborated, is that clear?

A. I understand perfectly.

Q. And that the supporting evidence, to be deemed sufficient by the jury, must be believable. Do you follow me?

A. Yes.

Q. And it must tend to connect the defendants with the commission of the crime. Will you follow that instruction of law?

A. Yes, sir.

Q. Should the Judge tell you that the testimony of an accomplice need not be corroborated in its every detail, would you follow that instruction of law?

Mr. Climenko: I object to the form of the question and [fol. 1793] its substance, if your Honor pleases.

By the Court:

Q. Supposing the Judge charges you that the corroboration need only be such as tends to connect the defendant with the commission of the crime, will you follow that instruction?

A. Yes, sir.

Q. As to the extent of the corroboration required?

A. That is right.

By Mr. Turkus:

Q. Something has been said here by one of the lawyers to the other prospective jurors, and properly so, that they are here to meet only one charge, the guilt or innocence of the defendants on this murder charge. Is that clear to you?

A. Yes.

Q. That is your understanding, isn't it?

A. That is right.

Q. And is it your understanding, too, that the only obligation or the only burden upon the prosecutor, by the same token, is to establish guilt of the commission of this crime, the murder of Joseph Rosen?

Mr. Climenko: If your Honor pleases, I object to the form of the question.

The Court: Overruled.

Mr. Climenko: Exception.

A. Yes.

Q. There may be many tests that you can apply to the believability of an accomplice. Do you follow me on that?

A. Yes, sir.

[fol. 1794] Q. For example, it may be discussed with you by the defense lawyers that you should look at the past criminal record of the accomplice; that is, the crimes that he has committed in the past, the criminals that he has associated himself with in the past, and every vicious and immoral act that he may have committed throughout his lifetime; is that clear?

A. Yes, sir.

Q. Will you look at those things when you weigh the believability of an accomplice?

A. Yes, sir.

Q. And will you, if the Judge tells you to, look and view the testimony of an accomplice with care and with caution; will you do that?

A. Yes, sir.

Q. And will you, if he tells you, even look at it with suspicion, do that?

A. Right.

Q. And will you devote your mental faculties and all the tests that you apply in the case to the accomplice witnesses or, as a matter of fact, to any witness, to see whether that witness is telling the truth; is that right?

A. Yes, sir.

Q. In other words, is your state of mind such that even a bad man can tell the truth?

A. Yes.

Q. Even a man who has committed crime and had vicious and immoral acts and many other things in his past life, can sometimes tell the truth, isn't that your state of mind?

A. That is right.

Q. And so will you devote yourself to find out, is he telling the truth, the accomplice, is he telling the truth when he [fol. 1795] comes into this court-room and speaks of the group participation of these three defendants and himself in the killing of the victim named in the indictment?

A. Yes, sir.

Q. And will you devote all your mental faculties and energies to find out is this accomplice telling the truth about the manner in which they all combined and the part which they all played in the murder of the victim? Will you do that?

A. Yes, sir.

Q. It may be that you may not like an accomplice, you may look at him and you may not like him—if you do not like him, nobody will find any fault with you. Nevertheless, will you look to find out from all the evidence in the case, is this person telling the truth?

A. Yes, sir.

Q. Even if you do not like the accomplice, even, as a matter of fact, if you detest him, if you are satisfied he is telling the truth about the group participation of these defendants and himself in the commission of the murder, and you are satisfied of that beyond a reasonable doubt, will you say so in your verdict?

A. Yes, sir.

Q. For example, is your state of mind such—to cut it short—that no matter how you dsilike or no matter how you may detest an accomplice, if you believe him, he has told the truth about the participation of this group in the murder, and from the other supporting evidence you are satisfied beyond a reasonable doubt that the three defendants played the parts that they were supposed to have played according [fol. 1796]to the testimony of the accomplice, and you are satisfied beyond a reasonable doubt that they are guilty, is your state of mind such that because you detest or you dislike the accomplice you would permit three guilty men to escape?

A. I understand.

Q. Would you permit three guilty men to escape?

A. No, sir.

Q. Or would you permit three guilty men to escape if the District Attorney cannot convict everybody who was part and parcel of the murder?

Mr. Barshay: I object to that.

Q. If you are satisfied beyond a reasonable doubt that the three defendants are guilty.

Mr. Barshay: If your Honor pleases——

The Court: It is an ambiguous question.

Mr. Barshay: May the D. A. refrain from the use of the word "escape."

The Court: Yes. It is much simpler to ask the juror if he would convict if he were satisfied beyond a reasonable doubt.

Q. I think I got to the point where you agree with me that you have no prejudice against a prosecution which uses the testimony of an accomplice in order to solve the case. Remember that?

A. That is right.

Q. And that you understand that an accomplice is one who is equally guilty, that he is a co-participant in the crime and he is guilty of the crime?

A. That is right.

[fol. 1797] Q. Assuming that the prosecution here satisfied you beyond a reasonable doubt that the three defendants are guilty of the crime, and assuming further that because of the use of the accomplice testimony we cannot convict the accomplice too, would you be inclined to relax or deviate from a proper verdict in this case because we cannot convict the accomplice?

Mr. Barshay: Your Honor, I object to that. That is an absolute misstatement of the law.

The Court: Sustained.

By the Court:

Q. Do you belong to the Brooklyn Club?

A. I don't belong to any club or association.

Q. Do you belong to Beth Emet?

A. No, no clubs at all.

By Mr. Turkus:

Q. Is your state of mind such that you would acquit three men who you are satisfied beyond a reasonable doubt are guilty of the crime charged, solely because you were unable to convict the accomplice?

Mr. Cuff: I object to that.

Mr. Barshay: I object to that. We cannot convict the accomplice because he is not a defendant here, and that is a superfluous question.

The Court: I think it is confusing. Sustained.

Q. Bearing in mind that there can be no conviction upon the unsupported or uncorroborated testimony of an ac- [fol. 1798] complice—is that clear to you so far?

A. Yes.

Q. Would your state of mind be such that solely because lawyers should argue that everybody in the case is an accomplice, that you would be inclined to follow that, or would you use your own judgment and find out who is an accomplice in the case?

Mr. Cuff: If your Honor pleases, I object on the ground that the subject has been fully covered in its previous question and we are going to wear out everybody if we just harp on this one thing.

By the Court:

Q. Will you figure that out and be guided by the charge of the Court?

A. Yes, sir.

By Mr. Turkus:

Q. Something has been said by one of the lawyers for the defendant Buchalter that his client has been heretofore convicted of crimes and has been sentenced for the convictions and is serving a long jail term. Would you, because that defendant is presently incarcerated, relax or deviate from a proper determination in this case?

A. No, sir.

Q. Will you decide the guilt or innocence of the defendant Buchalter and every defendant in this case upon the evidence adduced in the court-room in connection with this indictment?

A. Yes, sir.

Q. Will you, sir, if selected as a juror in the case, devote yourself to find out are these three men, Buchalter, Capone, [fol. 1799] and Weiss, guilty of murder in the first degree, or are they innocent?

A. Yes, sir.

Q. Will you, if selected as a juror, talk the case over with the other jurymen?

A. Yes, sir.

Q. Reasonably and sensibly?

A. Yes, sir.

Q. Listen to fair argument and discussion?

A. Yes, sir.

Q. If the prosecution satisfies you beyond a reasonable doubt that these defendants and each of them are guilty of murder in the first degree, will you say that by your verdict?

A. Yes, sir.

Q. Is there anything in your past life or your present connections that would prohibit or prevent you from saying so fearlessly and courageously?

A. Not that I know of.

Q. And without any hestitation?

A. Yes, sir.

Q. Is there anything which I have failed to elicit by questioning which goes to your qualification to be a fair and just juror? Is there anything which I failed to bring out by questions which goes to your ability to be a fair and just juror in the case?

A. Not that I know of.

Q. And will you, if selected as a juror, endeavor by your verdict to do justice in this case?

A. Yes, sir.

Q. Mr. Hall, you live at 138 Seeley Street?

A. Yes.

Q. The reason I say that is once we had a wrong address.

A. 138.

Q. That is commonly known as Windsor Terrace, isn't it?

[fol. 1800] A. That is it.

By the Court:

Q. Calderville?

A. It is both, your Honor.

By Mr. Turkus:

Q. Have you lived in Windsor Terrace for a number of years?

A. All my life, Park Slope section.

Q. And your business is listed as that of a credit manager.

A. Credit man.

Q. And by whom are you employed?

A. R. H. Macy & Company.

Q. So your job is to check credits for the concern by which you are employed?

A. The instalment accounts.

Q. How long have you been with Macy?

A. About six years.

Q. I take it you have heard the questions that I have put to Mr. Gillespie about the garment industry, the clothing industry, clothing truckers, the unions connected with those industries and operating in those areas?

A. Yes.

Q. Was there anything familiar to you about any of the names of union officials? Do you know any manufacturers; do you have any contacts of any kind, nature, or description in the industry or in those areas?

A. No, sir.

Q. Does that hold good with respect to Brownsville-East New York?

A. Yes.

Q. And the Brooklyn waterfront? Since you received your notice, Mr. Hall, did anybody speak to you about the case?

A. No, outside of just a chance remark.

[fol. 1801] Q. Was that in connection with the possibility that you may be inveigled into the jury box as a juror and have to serve?

A. Just that I have been on my way to court, just a chance remark.

Q. There has been no discussion in which you participated as to the guilt or innocence of the defendants?

A. No.

Q. Are you in sympathy with the enforcement of the penal law of the State of New York?

A. Yes, I am.

Q. I mentioned the names of the counsel in the case. Do you know any of those lawyers who represent the defendants?

A. No.

Q. Or anyone connected with them in the practice of law?

A. No, I do not.

Q. Or any member of the bar who specializes in the defense of criminal cases?

A. No, sir, I do not.

Q. Do you know Judge O'Dwyer, the District Attorney of the county, or any Assistant District Attorney on his staff?

A. No, I don't.

Q. Did you hear me discuss with Mr. Gillespie that defendants in a criminal case have certain rights and safeguards that goes to every defendant who is charged with the commission of crime in the State of New York, be he rich or poor, be he weak or strong, no matter who he is, he comes in here with certain rights that the Court and the jury gives him in every charge of crime. Do you understand that?

A. I do.

Q. And will you take the definition of what those legal rights are exclusively from Judge Taylor?

A. I will.

[fol. 1802] Q. And not from anybody else in the courtroom, but take them from the Judge in his charge to the jury?

A. Right.

Q. And will you in this case give to the defendants every one of those legal rights and safeguards that the law says they shall have?

A. Yes, sir.

Q. Did you hear me talk over with Mr. Gillespie about accomplice testimony?

A. Yes, I did.

Q. Do you have any different views on accomplice testimony than he had? Is your view any different than the views he expressed?

A. That would be rather difficult to answer. There was quite a series of questions.

Q. That is right. Were there some that you disagree with?

A. No, generally speaking I agree with the answers that Mr. Gillespie had.

Q. I will make it very brief with you. I take it that you have no inherent bias or prejudice against testimony which emanates from an accomplice as would cause you to shut your ears to whatever he says? You have no such prejudice as would cause you to throw out, no matter what he said?

A. No, I have not.

Q. If selected as a juror in the case, you will use all your intelligence to find out is that accomplice telling the truth about the part that each of these three defendants played in the murder together with him? Is that what you will do?

A. Yes.

Q. And in all the tests that we have, whether a man has a [fol. 1803] motive to talk, whether he even has a grudge

against somebody, or whether he got immunity, or no matter what he got or no matter who he is or no matter what he is, will you uppermost in your mind keep fresh in your mind that your job is to find out not whether you like or dislike the accomplice, but is he telling the truth about this murder charge and about the participation of these defendants with him in the commission of that crime?

Mr. Climenko: I object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Climenko: Exception.

Q. Did you follow me?

A. It was a long question, but I would cooperate with the Judge's charge in so far as it applied to any witness.

By the Court:

Q. Will you try to decide fairly whether or not the accomplice is telling the truth, taking into consideration in so doing the bad elements of his character?

A. Yes, your Honor, I would.

Q. And, of course, viewing his testimony with suspicion and accepting it, if at all, with caution? Will that be your attitude?

A. I would weigh the testimony of every witness, your Honor.

Q. For what it is worth, the quality and character and [fol. 1804] everything else.

By Mr. Turkus:

Q. If the Judge should charge you that you view the testimony of an accomplice with care and caution, will you apply that test to the witness in this case?

A. Yes.

Q. May I go along, then, with the understanding that you have no bias against the prosecutor of the county nor against the prosecution of an indictment which accepts or avails itself of the use of accomplice testimony?

A. I have not.

Q. And that it will be your job to find out is this accomplice telling the truth?

Mr. Cuff: I object to that, if your Honor please, as already asked and answered.

Mr. Turkus: I have not even finished.

The Court: Finish.

Mr. Turkus: I will withdraw it.

By the Court:

Q. What is your business?

A. I work for R. H. Macy, your Honor.

Q. What department?

A. In the credit department.

Q. Accountant?

A. No, I have charge of collecting the accounts.

Q. With Macy that is a new job?

A. It is, your Honor.

By Mr. Turkus:

Q. Something has been said by one of the attorneys for [fol. 1805] defendant Capone, and properly so, that he and the other defendants are here to meet only one charge, the charge in this indictment, and is that your state of mind, that that is what they are here for, to meet this single charge in the indictment?

A. Yes.

Q. Should the Judge charge you that the burden is upon the District Attorney to establish guilt beyond a reasonable doubt, will you endeavor conscientiously to apply that rule of law to the facts in this case?

A. Yes, I will.

Q. And will you apply your mental faculties to see whether the District Attorney has established guilt beyond a reasonable doubt on this charge and only this charge?

A. Yes, I will.

Q. And you understand that that is the only obligation of the District Attorney?

A. Yes, I do.

Q. If selected as a juror, will you listen to fair argument?

A. Yes, sir.

Q. Talk the case over with common sense and understanding?

A. I will.

Q. Even though there will be people the like of which you have not seen in every-day business, will you use common sense and understanding to find out if they are telling the truth?

A. Yes.

Q. Will you, by your verdict, endeavor to do justice in the case?

A. I will.

Q. Is there any reason why, if the prosecution satisfies [fol. 1806] your mind beyond a reasonable doubt that these three men are guilty of murder in the first degree, that you cannot say so?

A. No.

Q. And will you say so without any fear, and will you say so courageously?

A. I will.

Q. Mr. Gill, you have a namesake on the jury, and I understand that you are not related.

A. Not so far as I know—way back, perhaps, in the family tree.

Q. You live at Washington Avenue? Is that the Hill section?

A. Hill section.

Q. Have you lived there for a number of years?

A. About twelve.

Q. Prior to that time did you live in Brooklyn?

A. Massachusetts.

Q. Have you lived in the Hill section for the years that you have spent in Brooklyn?

A. The entire twelve, yes.

Q. And your business is listed as that of assistant secretary?

A. Yes.

Q. What is the name of the concern?

A. I am with the Manufacturers Trust Company.

Q. You are assistant secretary to some official of the bank?

A. No, among other officers in the bank are assistant secretaries. I guess we have twenty or thirty of them. They are not administrative officers. My work is largely personal for the chief. He has many interests.

[fol. 1807] Q. And how many years have you been with the Manufacturers Trust?

A. Eight.

Q. I don't suppose you have had any contacts with the garment needle trades, clothing industry, clothing truckers?

A. On trucking, for your information, my chief is a member of the board of directors and also a member of the executive committee of the United States Trucking Corporation.

Q. What I referred to was clothing truckers, men who truck finished clothes and unfinished clothes. It is a particular branch of the trucking industry that I know that the U. S. Trucking does not do. So that none of the names of union officials would mean anything to you?

A. Not a thing.

Q. And I take it that none of the other names that I mentioned have in any wise come in contact with you through business or any other way?

A. The attorneys here? No, I never heard of them until I came to this——

Q. And the names of others that I have mentioned?

A. All foreign to me.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No.

Q. I take it, sir, that you are in sympathy with the enforcement of the penal law?

A. I am.

Q. It has been brought out by one of the lawyers for Buchalter that his client was previously convicted of crimes, that is, he was found guilty of these crimes and sentenced to [fol. 1808] jail and is presently serving a jail sentence for those offenses.

Mr. Barshay: Not found guilty on both; pleaded guilty.

Mr. Turkus: Same thing.

Q. He was found guilty either on his plea of guilty or the finding of a jury. Whatever the situation is, he is serving, as was pointed out by one of his lawyers, a long term in jail for these crimes that he has committed. Now, would you be inclined to relax or deviate from a proper determination of this charge because he is in jail for some other offenses?

A. No.

Q. You will decide his guilt or innocence of the murder charge on the evidence that you hear in the court?

A. That is correct.

Q. Something has been said by another lawyer, and I discussed it with the other prospective jurors, that his client is here only to meet the charge in the indictment.

A. Yes.

Q. And, by the same token, that it is the obligation of the prosecutor to establish guilt beyond a reasonable doubt only on the charge in this indictment, nothing else?

A. That is clear.

Q. Now, with respect to accomplices, is your state of mind substantially as that of Mr. Gillespie and Mr. Hall?

A. It is.

Q. So that, if selected as a juror, you will apply your mental faculties to find out is this accomplice telling the [fol. 1809] truth about the guilty participation of the three defendants and himself in the commission of this crime?

A. That is correct.

Q. And that in looking at all the tests, whether they extend to motive, whether they extend to even vengeance, or no matter what they extend to, that in weighing all of the probabilities of the case you will have in your mind uppermost to find out is what the accomplice telling in this courtroom the truth about these defendants and their connection with the Rosen murder?

A. That is correct.

Q. So that I can go along, may I not, with the understanding that you have no bias or prejudice against the prosecutor for solving a murder by accepting the use of accomplice testimony?

A. None.

Q. And I take it, then, that your state of mind is such that you feel that even a bad man can, on occasion, tell the truth; it is possible?

A. Yes.

Q. That you will accept the Judge's charge on the law with respect to an accomplice, you will look at his testimony with care and with caution, even with suspicion, if you will. Will you follow that instruction?

A. Follow the instruction of the Court.

Q. If selected as a juror in the case, will you endeavor by your verdict to do justice in this case?

A. I will.

Q. And if The People of the State of New York establish [fol. 1810] to your satisfaction beyond a reasonable doubt

Capone and Weiss and Buchalter are all guilty of murder in the first degree, will you say that is your verdict?

A. I will.

Q. Without any fear or hesitation?

A. None.

Q. Is there anything concerning which I have failed to bring out by question which would affect your qualifications to do justice in the case?

A. The only thing I thought, we have a branch in Brownsville. I do not even know the manager. We have sixty-four branches, and I am not on the operating end.

Q. If that is the only thing?

A. That is all.

Q. Mr. Hall, I forgot to ask you that question: Is there any reason that I failed to bring out by questions which would prevent you from doing justice in the case?

A. None whatsoever.

Q. Mr. Kafker, at the outset Mr. Barshay indicated, and very frankly—

According to this board the next juror is Robert Kafker. Is that your name?

A. That is right.

Q. Mr. Barshay very frankly told the Court and the prosecutor that there was or possibly is, if I understood him correctly, a relationship of attorney and client in civil matters between members of your family and himself. Is that known to you?

A. Well, I don't recall that, but our firm did employ the firm of Gittelson & Barshay.

Q. Have you personally come in contact with either mem- [fol. 1811] ber of the firm?

A. Gittelson. I have seen Mr. Barshay and talked to him too.

By the Court:

Q. What was that, damage suits?

A. Law suits, your Honor.

Q. For personal injury?

A. No, our firm suits. We sued somebody, or somebody sued us. It is a corporation. I am president of it.

Q. What business?

A. Chemical manufacturers of automobile supplies.

Q. Anti-freeze?

A. Yes, sir, that is one of the items.

Q. Where is it?

A. 37 Preston Court, Brooklyn.

Q. Where is that?

A. That is near 54th Street and Kings Highway. It is a small street.

Q. That is between the Sea Beach and Culver Line?

A. No, it is far away. There is no subways there. The only thing that passes it is the Utica Avenue car.

By Mr. Turkus:

Q. I take it, then, that you have had a close association with Mr. Gittelson or Mr. Barshay or both?

A. Association, yes.

Q. And that in representation of attorney and client you have had the usual friendly relation of a lawyer with his client?

A. Yes.

Q. Would there be embarrassment on your part to serve on a case wherein Mr. Barshay is counsel?

A. No.

[fol. 1812] Q. Would you be embarrassed to render a verdict contrary to his client's interests?

A. Yes.

Q. Don't you think that that might go to your fitness in this case? I do not mean to be offensive or in any wise embarrassing to you, but don't you feel, because of your relationship with Mr. Barshay and his partner, that it would be most embarrassing for you to render a verdict against his client?

A. No. I only had a business relationship with him. It has nothing to do with this. If I thought he was wrong, I would tell him he was wrong; if I thought he was right, I would tell him he was right.

By the Court:

Q. Does that relationship still continue?

A. Well, we have not taken Mr. Barshay for a number of years.

Q. You did not visit one another?

A. No, sir.

Q. Did not introduce members of your family?

Mr. Barshay: I knew members of his family long before I knew him. He was handled by my partner, sir. I never handled his matters.

Q. Is that place near Bay Parkway?

A. No, that is ten miles away, East 54th Street.

Mr. Turkus: Mr. Barshay has been very frank, and I certainly don't want to embarrass him.

Q. You live out near Brownsville, East Flatbush?

A. Yes, it is near East Flatbush section.

[fol. 1813] Q. In the neighborhood of Utica Avenue?

A. That is right.

Q. And these automobile chemicals are made up in your own home?

A. We have a three-story factory; we employ seventy men.

Q. The same place where you live?

A. No, this is a factory.

Q. It says here 526 East 54th.

A. I am about ten streets away. That street runs a certain way, and it just happens to cut into that.

By Mr. Turkus:

Q. Is that factory of yours, Mr. Kafker, on the fringe of Brownsville-East New York?

A. I believe it is, yes.

Q. And you say you employ seventy men?

A. Around that.

Q. Are there employees who live in that area?

A. There may be.

Q. Are you the boss, or one of the bosses?

A. I am one of the bosses.

Q. Is it a closed corporation? By that, is it composed of your family?

A. No, members of my family, but there is really two partners, fifty-fifty.

Q. I certainly don't want to be embarrassing or offensive in any wise to Mr. Barshay, but is there anything that has occurred between your relationship that would incline you to go against him for any reason?

A. No.

[fol. 1814] Q. Your relationship is cordial?

A. That is right, sir.

Q. And I can go along then, with the frank understanding that because he has been your lawyer in the past, it will have no bearing on the determination of this case?

A. Yes, sir.

Q. I think Judge Taylor asked you if he is presently representing your concern.

A. He has not for about two years or three years.

Q. Do you know whether he is presently representing members of your family?

A. I don't believe so. In fact, I never knew him to represent anybody in my family. I may have heard years ago.

Q. Or his firm?

A. I don't remember.

Q. East 54th Street, I think the Judge brought out, is somewhere near Utica Avenue, isn't it?

A. That is right.

Q. What would be the other streets near there?

A. Kings Highway, Foster Avenue.

Q. That is right on the fringe of Brownsville, too, isn't it?

A. It is quite some distance from Brownsville.

Q. Brownsville-East New York?

A. It is about two miles, to be exact.

Q. Have you lived in that neighborhood for a number of years?

A. Yes, I have.

Q. Your factory is closer to the Brownsville-East New York area?

A. No, my home is closer.

Q. Have you distribution points?

A. Yes, sure.

[fol. 1815] Q. Somewhere else, in other sections of the city?

A. We distribute throughout the entire world, to be exact.

Q. Do you have distribution in Brownsville-East New York area?

A. Yes, we have.

Q. Through the waterfront, any distribution?

A. I believe we have, yes, sir.

Q. Contact with truckers in the distribution of merchandise?

A. We may.

Q. Are you familiar with the restaurants known as the Famous and Dubrow's Restaurants?

A. Yes.

Q. Have you been in those places occasionally?

A. Yes.

Q. Do you know where Saratoga and Livonia Avenue is?

A. Yes, I do.

Q. And do you know the railroad cut down an the Van Sinderen and Livonia, the I. R. T.?

A. I have seen it.

Q. And the trestle across?

A. I have seen it.

Q. Are you familiar with Livonia and Sackman Streets?

A. Yes.

Q. And Sutter Avenue?

A. Yes. I lived on Snediker Avenue four years ago.

Q. Snediker near where?

A. Dumont.

Q. Snediker and Dumont is pretty close to that railroad cut, that I. R. T.-B. M. T. and the railroad bridge over Junius Street?

A. About ten or fifteen blocks.

Q. How long did you live in Brownsville?

[fol. 1816] A. About four years.

Q. How long ago is that?

A. That was about four years ago.

Q. Of course, the names of Abie Reles and Martin (Buggsy) Goldstein, Pittsburgh Strauss, are familiar to you?

A. I have heard of them.

The Court: Strauss lived on one of those, 53rd Street.

Q. The name of Harry (Happy) Maione?

A. No.

Q. Dasher Abbandando, Vito Guarino?

A. No.

Q. Living in that area, did you ever visit the candy store at Saratoga and Livonia?

A. That was far away. I have never been there.

Q. You heard the name of the proprietor mentioned, I think, by the Judge?

A. Yes, I did.

Q. Is that name familiar to you?

A. No, sir.

Q. By hearsay or by reading?

A. No, sir.

Q. Are you familiar, by reading or by hearsay, about the persons who hang around or congregated on that corner of Saratoga and Livonia?

A. No, sir.

Q. When you lived in that area—I think you said four years ago, is that right?

A. About four years ago.

By the Court:

Q. Is your business done by selling to service stations?

A. We sell mostly to jobbers, but we do have service stations.

Q. Did you sell to the Sunrise Garage?

A. I could not recall.

Q. Atlantic Avenue near Eastern Parkway?

[fol. 1817] A. I do not recall. I don't believe we did.

By Mr. Turkus:

Q. Are you married, Mr. Kafker?

A. Yes, I am.

Q. Have you children?

A. Yes, I have.

Q. How many years ago did you move out of Brownsville, four years ago?

A. Four years ago. It will be five years.

Q. You moved out in 1936?

A. Yes, sir.

Q. I suppose you moved when your lease was up? That would be September 30th?

A. No, I just moved; I lived on an open agreement.

Q. Do you remember whether you moved around the renting season?

A. No, I do not.

Q. Do you remember whether you lived in Brownsville when the Rosen murder occurred? It happened September 13th, on a Sunday, 1936.

A. I don't remember it at all.

Q. Do you remember reading of it?

A. I might have, but I don't remember now.

Q. After having lived in Brownsville for four years, and the O'Dwyer investigation started and mention was made of various names, did you read of the investigation?

A. I might have read about it, but I have no recollection of it at all.

Q. You have no recollection of any reading at all?

A. I say I may have read about it, but I don't recall it at this time.

Q. The familiarity with the names of Abie Reles and [fol. 1818] Martin (Buggsy) Goldstein and Harry (Pittsburgh Phil) Strauss, did they come to you from having lived in Brownsville?

A. Well, sitting here and the names were called, I remember reading about them.

Q. Do you remember hearing about them in Brownsville?

A. Never heard about them. Tell you the truth, we never used to stay around there at all.

Q. I know that, but didn't you, in Dubrow's and in the Famous hear those names?

A. I go with my family.

Q. Of course, you have contact with neighbors and others who live in the Brownsville-East New York section?

A. Yes, I have.

Q. What I am trying to find out, while you were living there for these four years, didn't you hear those names mentioned?

A. I said before I might have heard them. That is how I recall the names now, when you ask me about them.

Q. Is your state of mind such that because you have lived in Brownsville and you have heard of these names being mentioned and read of the names in the O'Dwyer investigation, that you have an impression formed?

A. No, I have not.

Q. At nights, do you spend time in the Brownsville-East New York area of Brooklyn?

A. I might have, yes, sir.

Q. I mean in the four years that you lived there, you spend evenings in that neighborhood?

A. Yes.

Q. You were familiar with conditions there more or less? [fol. 1819] Mr. Rosenthal: I object to that, if the Court please.

Mr. Turkus: I am going to challenge on implied bias, on the ground of his having been represented by one of the lawyers.

The Court: Try it.

Robert Kafker, residing at 526 East 54th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Kafker, when you were seated in Seat No. 10 I asked certain questions of you and you made certain responses. Do you recall that?

A. Yes, sir.

Q. And specifically the response that you made to the questions concerning the relationship of yourself and your firm with the law firm of Barshay & Gittelson. Do you recall those?

A. Yes, sir.

Q. And if I were to repeat those, would you make the same answers?

Q. Substantially it is this: That in the past you and the other member of your firm have been represented by the law firm of Barshay & Gittelson?

A. Yes, sir.

Q. In civil suits, in which you or your firm has been either plaintiff or defendant; is that correct?

A. Yes, sir.

Q. And that your relationship with that law firm and with Mr. Barshay is still cordial?

A. Yes, sir.

Q. There has never been any difficulty between you?

A. No, sir.

[fol. 1820] Q. You have no present litigation pending in which the law firm of Barshay and Gittelson are counsel?

A. No, sir.

Q. Is there any reason why, if you have any future litigation, you will not re-employ that law firm?

Mr. Cuff: Object to that.

The Court: Overruled.

A. What was that again?

Q. Is there any reason?

A. No.

By the Court:

Q. Who is your present lawyer?

A. Cohen.

Q. How long have you had them?

A. We have had them for about two years.

Q. Then I assume for some reason you became dissatisfied with Mr. Barshay?

A. Not dissatisfied, just change. He was very efficient.

Q. You like the other people better?

A. That is right; sometimes pull certain considerations that you have to take them.

The Court: Is that all?

Mr. Turkus: That is all.

The Court: Challenge overruled.

Mr. Turkus: Peremptory.

By Mr. Turkus:

Q. Mr. Strober, I do not take it that you had any lawyer in the court-room that represented you?

A. No, sir.

[fol. 1821] Q. Tehama Street, where is that?

A. That is just adjacent to the Borough Park section.

Q. That is near Dahill Road?

A. Yes.

Q. It is off Fort Hamilton Parkway?

A. Yes.

Q. Have you lived in that district for a number of years?

A. Nine or ten.

Q. Before that did you live in some other district?

A. Yes.

Q. Where?

A. Borough Park.

Q. Somewhere in the 40's.

A. I lived at 43rd Street between 16th and 15th, and then on 17th and 50th and on 52nd between——

Q. When you lived in Borough Park did you know any family by the name of Feinstein?

A. I did.

Q. Did you know about Irving Feinstein?

A. I did.

Q. Was he a friend of mine?

A. No, he was not a friend of mine, but they lived on 47th when I lived on 43rd, and I had a speaking acquaintanceship with his brother.

Q. Is there any impression that is left in your mind as a result of your knowledge of the Feinstein family that would be prejudicial to these defendants?

A. No.

Q. Do you have any contacts of any kind, nature, or description in that Brownsville-East New York area?

A. We have some customers. We do business in that section.

Q. Would those be stores, merchants, or are they private persons?

A. Those are stores; I mean, they are contractors. Their [fol. 1822] type of work takes them outside their stores, but they store their materials and they have offices and business addresses.

Q. I see you are in the roofing business.

A. Jobbing of roofing materials.

Q. Where do you maintain your factory or your plant?

A. On New Utrecht Avenue and 41st Street, Brooklyn.

Q. What do they call that district out there? That is not Bath Beach, is it?

A. No, that is the section that comes in between Borough Park section on one side and Bay Ridge on the other side. That is just where 10th Avenue and 41st Street and New Utrecht Avenue come together.

Q. Do you do business under your own name or under a firm name?

A. Under a firm name, Mansfield Supply.

Q. Are you a partner?

A. Yes.

Q. And you hold a financial interest in the business?

A. Yes.

Q. Have you been in that business for a number of years?

A. Ever since I was twenty or twenty-two years old.

Q. Is it more than ten?

A. I know I have been in that——

Q. Yes.

A. I have been in that business for twenty-one years.

Q. What is your partner's name?

A. It is my father and another brother.

Q. It is a family group in this business?

A. Yes.

[fol. 1823] Q. What are those contacts that you speak of in this Brownsville-East New York area? Are they in connection with roofers that you supply?

A. They are people who maintain places of business in various parts and Brooklyn. Some are in Brooklyn and East New York.

By the Court:

Q. Just what do you supply?
A. Roofing materials.
Q. Metals?
A. Yes, metals also.
Q. Tar paper?
A. That is right, shingles.
Q. Tar?
A. That is correct.
Q. In that section where you are, what is the cross avenue? What avenue crosses New Utrecht about that point?
A. Well, there is an avenue, 10th Avenue cuts New Utrecht Avenue about where 40th Street intersects; in other words, the corners of 40th Street, 10th Avenue, and New Utrecht Avenue all intersect.

By Mr. Turkus:

Q. That is right at the corner of Greenwood Cemetery?
A. No, that is about ten or fifteen blocks from the Greenwood Cemetery.
Q. South?
A. You have got me.

By the Court:

Q. There is a little manufacturing place there in the section around Fort Hamilton Parkway and 39th Street.
A. That is not far away from where we are.
Q. You are substantially in that section?
A. That is right.
[fol. 1824] Q. I think the Continental Steel has a bottle cap manufacturing there.
A. I don't know them.

By Mr. Turkus:

Q. Mr. Strober, may I go along, then, with the understanding that you have no contacts in Brownsville or East New York except as you have indicated, with roofers that you supply with material?
A. That is right.
Q. That you have never lived in the area or had social or other contacts except as you have described to me?
A. Correct.

Q. Did you hear the questions I put to the other talesmen with respect to any connection in the garment industry or in the clothing industry or clothing truckers?

A. Yes.

Q. Did you ever have any connection with them?

A. No, none whatsoever.

Q. Was there any familiarity with the names of any of the union officials?

A. No.

Q. The Amalgamated or the Clothing Truckers & Helpers Union?

A. No.

Q. So that may I go along with the understanding that in so far as you are concerned there has been absolutely no connection with anybody in the industry or in the areas that I mention?

A. That is right.

Q. Brooklyn waterfront, garment district, clothing center?

A. That is correct.

[fol. 1825] Q. With respect to the nine lawyers in the case, do you know any of them?

A. No.

Q. Or anybody connected in their office?

A. Not that I know of.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No.

Q. Since you received your jury notice did anybody speak to you about this case?

A. No, only in an offhand. They knew I was a member of the panel, and there was some questions they asked back and forth; but nothing pertaining to any merits of this case.

Q. In other words, was it limited to the prospect that you might——

A. That I might serve on the jury.

By the Court:

Q. Is Fay Strober your father?

A. No, that is my wife, Faye.

Q. Is the business in her name, or is that incor-prated?

A. The business is not a corporation. The business is Mansfield Supply Company, in which there are three part-

ners, Samuel Strober, who is my father, Benjamin Strober, who is my brother, and myself.

By Mr. Turkus:

Q. That is the business of filing a certificate with the County Clerk under the law?

A. That is right. There is such a certificate on file.

[fol. 1826] Q. And that is filed with the County Clerk and it lists the names of all the persons interested who transact business as the law requires?

A. That is right.

Q. I do not know whether you have ever been a juror in a criminal case. Have you?

A. I have.

Q. Has it been in this county?

A. About eight or nine years ago I served in Judge Martin's part.

Q. Were any of the lawyers now in the court-room engaged in the trial of that case?

A. No.

Q. Did that case go to a conclusion, and by that I mean did the Judge charge the jury on the law?

A. He did.

Q. I take it that in the eight or nine years you have forgotten all the law you heard in that case?

A. Pretty nearly.

Q. Whether you did or not, will you take the law in this case exclusively from Judge Taylor?

A. I will.

Q. And will you do that in its every aspect?

A. Yes.

Q. No matter who talks law to you, the only one who has the legal right to talk law to you and the only one you will listen to is the Judge?

A. I understand that.

Q. I take it you have heard some of our discussions with reference to an accomplice. Do you have any bias or prejudice against the testimony of an accomplice as would cause you to shut your ears to it?

A. No.

Q. Do you find any fault with the District Attorney who, in order to solve a murder case accepts the testimony of an [fol. 1827] accomplice and uses that against the others in the commission of the crime?

A. No.

Q. Have you followed me?

A. I understand what you mean.

Q. I understand, then, that you have no bias against the prosecutor for the use of that kind of testimony; is that correct?

A. Yes.

Q. Do you have any fault to find with a prosecution which rests in part upon the testimony of an accomplice? Is that clear to you?

A. Yes.

Q. Do you find any fault with that kind of a prosecution?

A. No.

Q. Will you give to the defendants in the court-room who are on trial the benefit of everything that the law of the land says they should have?

A. I will.

Q. And what those things are will you take from Judge Taylor?

A. Yes.

Q. With respect to the tests that you apply to the accomplice to find out if he is telling the truth, will you use the rules and the guides that Judge Taylor gives you?

A. I will.

Q. For example, if he tells you that you should view the testimony of an accomplice with care and with caution, will you do so?

A. I will.

Q. And will you endeavor to apply sensibly all the tests that he gives you to be applied to an accomplice witness?

A. To the best of my ability.

[fol. 1828] Now, in weighing the believability of an accomplice, will you consider the past criminal acts of the accomplice?

A. Yes.

Q. Any vicious or immoral act that he may have committed?

A. Yes.

Q. Any motive or reason that he may have for testifying?

A. I will.

Q. And everything that you can use to conjure up in your own mind as a fair, equitable test as to whether he is telling the truth?

A. To the best of my ability, I will try.

Q. That is not beyond your capabilities?

A. I don't think so.

Q. You are a business man?

A. That is right.

Q. You deal with roofers, and selling the merchandise you meet people and you have contacts in your every-day walks of life, isn't that right?

A. Yes.

Q. And you have handled your business without any difficulty. Nothing mysterious about being a juror?

A. I understand.

Q. Will you devote your mental faculties to find out whether the accomplice in this case is telling the truth about these defendants and the part that each one of them played in the commission of this murder? And will that be the reason for which you apply all these tests to ascertain is he telling the truth about these men on trial and himself?

A. Right.

[fol. 1829] Q. Is that right?

A. That is right.

Q. It may very readily be that you may not like an accomplice, you may not have any use for him, you may detest him, when you see him on the stand and you hear the things he says you may not like him at all. Will you permit any feeling of like or dislike to sway your judgment as to whether or not he is telling the truth?

A. I would not.

Q. In other words, no matter whether you detest him or you shall have no use for him, your job is to find out, is he telling me the truth about these men on trial and himself?

A. That is what I understand.

Q. Is your state of mind such that even a bad man can at times tell the truth?

A. Oh, yes.

Q. Mr. Rosenthal, in speaking of his client Capone, very properly stated that Capone is here to meet only one charge, namely, the charge of murder in this indictment.

A. Yes.

Q. He asked that of other jurors. That is what he is for, isn't that right?

A. Yes.

Q. By the same token do you understand that the duty and obligation of the District Attorney is co-extensive only

with that, to establish guilt beyond a reasonable doubt of the crime of murder in the first degree alleged in this indictment? Do you understand that?

A. I understand.

Q. One of the lawyers for Buchalter has pointed out that Buchalter has been convicted of crimes either on a plea of [fol. 1830] guilty or conviction by a jury, and is serving a sentence for the commission of those offenses, a long sentence. Would you permit yourself to relax your duty as a juror in this case because Buchalter is being punished for other offenses?

A. I would not.

Q. Or would you deviate from a proper result in this murder charge because he is being punished for other offenses?

A. No.

Q. If selected as a juror in this case, will you endeavor conscientiously to arrive at a verdict that does justice in the case?

A. I will.

Q. Is there anything about your business connections that might cause you some hesitation in your desire to sit as a juror in the case?

A. No.

Q. Can you, if accepted as a juror, render a verdict that to your conscience appeals as justice in the case, free of any fear of any claim, nature, or description?

A. Yes.

Q. In other words, if you are satisfied beyond a reasonable doubt that these three men at the bar are guilty of murder in the first degree, can I understand that you will bring in that verdict courageously and without any hesitation?

A. Without any hesitation.

Q. I can go right along with that understanding?

A. Yes.

Q. Mr. Haaf, is that the correct pronunciation?

A. Haaf.

Q. You live at 224-A East 47th Street; is that correct?

A. There is a correction there. That is properly known [fol. 1831] as Schenectady Avenue.

Q. What is the cross street nearest to it?

A. It is between Avenue O and Schenectady Avenue and Flatbush Avenue.

Q. Is that where all those streets come together?

A. Schenectady, Avenue O, Flatbush Avenue, and on the opposite side of Flatbush Avenue——

Q. What do they call that district?

A. Flatlands.

Q Is that anywhere near Fillmore and East 52nd Street?

A. Well, I have been there about one year, so I am not familiar.

Q. Where did you live before that?

A. At Linden Boulevard and New York Avenue, 322 Linden Boulevard.

Q. That is what is known as East Flatbush, is it?

A. Flatbush section.

Q. Did you live in that district for some number of years?

A. About nine years.

Q. Are you married?

A. I am.

Q. And you reside with your wife and family?

A. Yes.

Q. You are listed here as a tester. Is that with one of the telephone companies?

A. That is with the Brooklyn Edison Company. I am in the — division.

Q. Is that something that has to do with the conduit of power?

A. No, I am presently employed in our 41st Street office. We are concerned with the maintenance and operation——

Q. That is a specialized type of work?

A. Yes.

[fol. 1832] Q. And is it that type of work that required some background by way of college or vocational training?

A. Not necessarily. We have men who do not have degrees.

Q. And how long have you been with the Edison?

A. 11 years.

Q. Can I go along with you as rapidly as we may? I do not suppose by any contacts that you have had with the Edison that you have ever come in contact with any of the people in the garment, clothing district or the other industries that I have mentioned?

A. No.

Q. Do you know anybody engaged in the manufacture of clothes and clothing or the trucking of clothes? Any of

the union officials whose names I have mentioned at all familiar to you? Do you have any contacts with union officials in the Amalgamated or with any clothing truckers?

A. No.

Q. With respect to the other areas, Brownsville-East New York, do you have any contacts there?

A. No.

Q. Any on the Brooklyn waterfront?

A. No.

Q. I take it that none of the names that I have mentioned have been at all familiar to you by way of any contact or past association?

A. No.

Q. Since your name appeared on this jury panel and you received your slip notifying you that you would be required to be in court, did anybody speak to you about the case?

A. Yes.

Q. Was that in regard to jury service, that is, the length [fol. 1833] of jury service?

A. Yes.

Q. The time that you may spend in the court-room?

A. That is right.

Q. Did it have anything to do with the merits of the case?

A. No.

Q. I take it you are in sympathy with the enforcement of the law of the State of New York?

A. That is right.

Q. Have you served as a juror in a criminal case before?

A. No.

Q. As the other jurors indicated, will you, too, take the law exclusively from Judge Taylor?

A. Yes.

Q. And take it from him in its every aspect?

A. That is right.

Q. Do you find any difference, that is, on the subject of accomplice testimony, as they did?

A. No.

Q. Or would you answer substantially the same?

A. I would.

Q. And would you, in applying every test that you can conjure up which is fair to be applied to an accomplice, see

whether he speaks the truth about the combination or the group which he says committed this crime?

A. I would

Q. As was pointed out by Mr. Rosenthal, and properly so, of course, his client and other defendants are here to meet one charge, guilt or innocence on the indictment here, the Rosen killing. By the same token, do you understand [fol. 1834] that is the only obligation the prosecutor has, to establish guilt of the Rosen killing beyond a reasonable doubt and nothing else? Do you feel the same as the other prospective jurors, Mr. Haas, as have expressed with respect to the sentence for which the defendant Buchalter is now serving for other crimes that he has committed? Do you feel the same as they do, that they will not relax or deviate from a proper verdict because he is being punished for other offenses?

A. Yes.

Q. Do you feel the same?

A. Yes.

Q. Is there anything I failed to bring out by questioning which goes to your ability to render a fair and honest verdict?

A. I have a problem about the duration of this trial. My wife at the present time is sick. My wife and myself come from upstate. We have no relatives whatever in the city, and I feel if I am selected as a juror there will be some question in my mind about my family. There is the question.

Q. Is that something that you took up with the Judge at the time excuses were reached, or is that something that occurred since?

A. The question of sickness.

Q. I think you better address that to the Judge.

Mr. Turkus: This juror has a problem which has arisen yesterday, as I understand it, and if I don't say it accurately Mr. Haas, you explain it to the Judge as you stated to me. He comes from upstate, he has no relatives here in Brooklyn. His wife was taken ill yesterday, and if the trial will [fol. 1835] take a long time, while he does not feel it will impair his state of mind such that he could not render a proper result on the evidence, he would feel much agitated if he had to be with the jury in the case.

By the Court:

Q. What is the trouble?

A. It is a minor trouble. It is a heavy cold with a badly inflamed throat, and she is now under the doctor's care, and there is a question of whether—it is not only a question this particular illness would be involved, but my problem is that if serving as a juror for a long duration of time should anything arise, my wife is in the city alone with no relatives to call on, and there are no other relatives that could be called into the city at the present time.

Q. You mean if she still had the cold?

A. Yes.

Q. As the selection of jurors is tentative at the present time, all we have to do now is to ascertain whether both counsel agree on the jury. Can that question remain open? It will take a few days before we really know when we will start in with the case. In the meantime you are going home.

A. There is still a question in my mind. I feel that I owe a duty to The People to serve as a juror; I also have a duty to my family.

Q. Yes.

A. And in view of the nature of the trial it will probably prolong duration. In view of the fact my wife is not in [fol. 1836] good health——

Q. You mean your wife wants you home. Your wife objects to your being a juror?

A. Not exactly that.

Q. You want to be a juror and your wife does not want you to be a juror?

A. No, I would not say that.

Q. You see that an ordinary cold, most people have them at this time of the year and they get over them quite rapidly. You will know by the end of the week if she is well or not. It is not likely that we will take the evidence until next week.

A. There is still a question in my mind——

Q. Do you live out there towards Bergen Beach section?

A. I am just beyond Avenue N and immediately off Flatbush Avenue.

Q. It is south of Kings Highway?

A. Yes.

Q. Do you live in an apartment house?

A. No, I live in a two-family house.

Q. You have no children?

A. I have one child.

Q. How old is the child?

A. Eight years of age.

Q. Your wife's health is good other than this cold?

A. No, I would not say that. She has been under the doctor's care previously, this spring. She is not in good health.

Q. What is that, a nerve condition?

A. Yes. She has a number of different tests without discovering anything in particular.

Q. Are they trying to find out what is the matter with her?

[fol. 1837] A. Yes.

The Court: All right.

Mr. Rosenthal: We consent.

Mr. Talley: We consent to his being excused in the discretion of the Court.

The Court: I can understand the feeling.

Mr. Turkus: Excused by consent.

The Court: Had they been a resident of the county some time, the family would have friends.

Mr. Talley: Yes, it would make a difference, but he should not be here worrying about his family.

Mr. Barshay: May we have a few minutes' recess?

The Court: We will have to have a recess when the other jurors are walking in, because there will be a disturbance. There will be a recess then.

By Mr. Barshay:

Q. A few questions, gentlemen, collectively: The District Attorney has been gracious enough to ask a few questions which properly belong to me, but he has a right to ask them, and that is all right. Do any of you gentlemen know anybody at all in the Police Department?

A. (By No. 11) I know a Detective Grady, attached to the Parkville Precinct. I have known him for fifteen years, but I would not call him friend.

Q. Do you know his commanding officer?

A. No. The reason I saw I know him, when he was walk-

[fol. 1838] ing a beat he had on his beat a drug store in

which a friend of mine was proprietor, and in going to see this friend of mine in the drug store I used to see this patrolman, and it was only two days ago that I was walking into the building and ran across him and found out he was a detective.

Q. It does not figure in the case?

A. No.

Q. Have you any such friend?

A. I know two men in the financial district, but we call them a nickname.

A. (By No. 8) I have friends and neighbors, but no intimate friends. Daniel—in the Parkville section, I went to school with.

Q. Ever speak to him about his work?

A. I have not seen him for a year or two.

Q. Have you anybody in the Police Department?

A. (By No. 7) A former neighbor in the Police Department lived next door, in the mounted police in Borough Hall section, Mr. Morris, and I forget the other one's name.

Q. Do you know Mr. Donohue of the Police Department?

A. No.

Q. Well, at any rate, that won't affect your judgment in this case?

A. No.

Q. Have any of you gentlemen any acquaintance with anybody in the District Attorney's office, be they assistants or on the clerical staff?

A. (By No. 7) Mr. Moorehead.

Q. He is chief of the Indictment Bureau. How well do you know him?

A. He is in my building. He has his office in 189.

[fol. 1839] Q. Did you ever have any business with him?

A. No, no business.

Q. Have you a social acquaintance with him?

A. No, just greet him.

Q. Did he ever speak of his work?

A. No.

Q. So that your knowledge is merely that of a passing acquaintance?

A. That is right.

Q. Did he help you in your complaint in the D. A.'s office?

A. Did he help me or I help him?

Q. Either way.

A. Yes.

Q. Would that affect your judgment in this case at all?

A. I don't know why it should.

Q. I say it should not, but I am asking you.

A. I do not know why it should.

Q. I take it none of your business with the D. A.'s office will influence you in their direction in this case?

A. No.

Q. Even if the D. A.'s office should contend a proposition adverse to our own, you won't be influenced in their direction by virtue of the business dealings you had?

A. That's right.

Q. I am sure not even they would want you to do that.

A. That is right.

Q. Gillespie, have you read about this case at all?

A. Yes, when it happened.

Q. 1936?

A. Well, I don't know the year, but I read about it when it happened.

Q. And at that time did you form any opinion with respect [fol. 1840] to the alleged perpetrators?

A. No.

Q. Have you read about it since?

A. Since 1936?

Q. Yes.

A. Yes.

Q. May I know in what papers?

A. Well, the only thing I read of it is the case coming up and the papers I read are the *Herald-Tribune* and the *Sun*, and occasionally the *Telegram*.

Q. Did you read anything about the facts of the case?

A. No, no facts. I would not say I read anything about the case at all. The only thing I read is that it happened.

Q. Did you ever read anything about the defendants?

A. Yes.

Q. Was it before or since your being called to serve?

A. Before.

Q. Did you read about them often?

A. Well, what I actually did read that I can recollect is about the defendant Buchalter when they were looking for him and he finally gave himself up. That is about all.

Q. That is a considerable time ago?

A. When it happened.

Q. That had nothing to do with this case?

A. No.

Q. You understand that?

A. That is right.

Q. Did you form an impression unfavorable?

A. I do not know anything about the case. How can I form an impression?

Q. Sometimes people have said right here in your presence that they formed impression without knowing anything at all about the case. You may be one of them. I hope you are not. Which is it?

[fol. 1841] A. I cannot answer you that.

Q. Well, have you formed an impression with respect to the defendants, irrespective of this case?

A. To be honest with you, I find it a tough question to answer.

Q. You may make up your mind with respect to the gentleman you read of.

A. You may think unfavorably of an individual at one time, and then another time you won't. It depends what facts you know.

Q. We will take it step by step, Mr. Gillespie. Did you ever think unfavorably of Mr. Buchalter?

A. No, I don't know how I could.

Q. Do you think of him unfavorably now?

A. No.

Q. In any way? Do you?

A. No.

Q. Is there some doubt in your mind?

A. I don't know. No, there is no doubt. You are talking now where this particular case is concerned.

Q. Well, it may go a little deeper. He may take the stand and you may have to judge him from the testimony he gives.

A. Then I will judge him on the testimony he gives.

Q. What I want to know is whether there is something outside of this case?

A. No.

Q. Which you may use in judging him, which will be to his detriment. You are the best judge of that, Mr. Gillespie.

A. No, there won't be.

Q. Not at all?

A. I will be definite.

[fol. 1842] Q. That is fair. And so that you will judge him on the merits as you see him in this issue only?

A. That is true.

Q. Now, the fact that he has been referred to by the District Attorney by the name of Lepke, does that influence you against him?

A. No, sir.

Q. Or the fact that, while it has, in my opinion, nothing to do with this case, he has been referred to as Lepke and Gurrah; would that influence you?

Mr. Turkus: Just a minute. I object to that question. Defendant Buchalter has never been referred to as Lepke and Gurrah. It is two different people.

Q. Part of the combination as Mr. Turkus questioned you—— I wrote it down, "Do you know Lepke and Gurrah? Did you read about or hear about Lepke and Gurrah? Isn't that what Mr. Turkus said?

Mr. Turkus: That is two different people.

The Court: We understand, two different people.

Q. I mean that the reference does not interest you?

A. Not at all.

Q. As a matter of fact, Gurrah has nothing to do with this case at all?

A. I would not know.

Q. But the reference to those names has nothing to do with the case?

A. No.

Q. His name is Louis Buchalter.

A. I know that.

Q. You understand we are not trying here conditions in [fol. 1843] Brownsville, any conditions in Brownsville or any people in Brownsville whose names were read, but we are only trying Mr. Louis Buchalter for this charge. That is clear, isn't it?

A. Perfectly.

Q. And we are not concerned with corners, and who owns candy stores on those corners and who congregates, unless it is part of the evidence in this case and has a bearing on this case, isn't that so?

A. That is so.

Q. Have I your word, sir, that you formed no opinion of any kind, nature or description with respect to the guilt or innocence in this case?

A. That is true.

Q. And, along with that, do you believe that the Grand Jury can indict an innocent man?

A. Yes.

Q. And along with that, are you in accord with the presumption of innocence accorded to every defendant?

A. Yes.

Q. That is not a privilege; that is a substantial right of every defendant. Mr. Turkus has asked you if you are in sympathy with the enforcement of the penal law. I will go a little further. There is a Criminal Code and there is a State Constitution and there is a United States Constitution, and there are lots of rights on those books. His Honor shall tell you about them. Are you in accord with them, too?

A. Yes, sir.

Q. They benefit the defendant, as they benefit every defendant. You are in accord with that, aren't you?

[fol. 1844] A. Supposed to benefit every individual.

Q. Mr. Turkus has asked you whether you find any fault with the prosecutor for doing certain things. I take it you do not find any fault with any of the counsel in this case on either side.

A. No, I don't.

Q. For any reason. The counsel have nothing to do with this case with respect to your finding fault with us or any, have they?

A. No.

Q. The point is, Mr. Turkus will do his best and we will do our best; isn't that so?

A. Right.

Q. There is nothing personal in this between the prosecutor and the defense counsel. You understand that? This is not a game of wits; you understand that?

Mr. Turkus: I object to that.

Q. Is it?

Mr. Turkus: No, this is not a game of wits.

The Court: Overruled.

Mr. Barshay: That is what I said.

Q. He is not a witness in this case any more than I am a witness to my client's defense, you understand that?

A. Yes.

Q. But he presents what has been handed to him, and I present what has been handed to me.

A. That is right.

Q. That is fair, isn't it? Mr. Turkus has asked you whether or not you knew Mr. William W. Kleinman. He is Captain Kleinman, Judge Advocate in the United States [fol. 1845] Army, stationed at Fort Wheeler in Georgia. Do you know him at all? He was a partner of David Price. One of the gentlemen who shall assist Mr. Turkus in the prosecution of this case is Mr Klein, who was formerly associated with Mr. Price and Mr. Kleinman. Do you know him?

A. No, sir.

Q. Did you ever know Mr. Turkus when he was practicing criminal law?

A. No, sir.

Q. You said something about property belonging to you being the place where certain things happened.

A. Managed by us.

Q. We heard what they were.

A. Yes.

Q. Would that influence your judgment in this case to the detriment of these defendants?

A. Would not influence my judgment in this case, but at the time those things happened they were not any too favorable.

Q. I take it you do not charge that to these defendants?

A. No.

Q. That unfavorable impression which you gained then when it did happen, is it present now?

A. No.

Q. You can dismiss that, can't you?

A. That is right.

Q. It has nothing to do with the defendants?

A. No.

Q. You understand that?

A. They are different cases.

Q. No connection whatever with this case?

A. Not that I know of.

Q. Or with the defendants?

A. Not that I know of.

[fol. 1846] Q. And you won't let that past unfavorable impression carry over in any respect whatever, is that so, Mr. Gillespie?

A. Yes.

Q. Have you ever had prior service as a juror?

A. Yes.

Q. In a criminal case?

A. I was called but never served.

Q. Was it in this court?

A. It was in this building and in the County Court. All I did was come there. No one called and I think four days I was excused.

Q. You were put in he box and excused?

A. No, my name was never reached from the drum.

Q. I was not the prosecutor, was I, then?

A. I don't remember anyone.

Q. Was Mr. Turkus the defense attorney then?

A. If you were there seven years ago.

Q. I was there twelve years ago.

A. Too early.

Q. You did not see him, either?

Mr. Turkus: I never had a criminal case eight years ago.

Q. Were you ever called for the Grand Jury?

A. No, sir.

Q. Or for the Federal Jury?

A. No, sir.

Q. Were you ever a victim of a crime personally?

A. What do you mean, held up, or something like that?

Q. Or burglary or stealing of a car?

A. Our home was robbed twice, outside of being pickpocketed; that's about all.

Q. Was the man caught?

A. I did not get my money back, if he was.

[fol. 1847] Q. You are not prejudiced against people charged with crime by virtue of your sad experience?

A. No.

Q. Mr. Turkus has asked you whether or not you find fault with the prosecutor who accepts the testimony of an accomplice, and you said no. The fact that the District Attorney has accepted the testimony of an accomplice will have no bearing on your accepting or rejecting that testimony?

A. That is absolutely true.

Q. What he does is his job; what you do is yours; is that correct?

A. Yes.

Q. You may have different tests to apply, is that so?

[fol. 1848] A. At that particular time.

Q. You may have different standards. He may be forced to accept it, and you are not forced; is that so?

Mr. Turkus: I object to that question. That carries with it some sort of an implication unfavorable to the District Attorney's staff.

The Court: It is ambiguous. Sustained.

Mr. Barshay: Respectfully except.

Q. In a question put to you it was suggested that they cannot convict an accomplice. Of course, you cannot convict anybody who is not mentioned in the indictment. You know that?

Mr. Turkus: I was ruled out on this question. If this will permit me to open it up with the next jurors, I will have no objection.

Mr. Barshay: Your Honor, maybe some impression was left with that statement, even though it was ruled out after objections three times put to the question.

The Court: Finish the question.

(Pending question read by the reporter.)

Mr. Turkus: I was not permitted to go into that theory.

The Court: Is there an objection?

Mr. Turkus: Yes.

The Court: Sustained.

[fol. 1849] Mr. Barshay: Exception, sir.

Q. You understand that if the District Attorney desired, whoever the accomplice may have been could have been indicted in this case?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. At any rate, you will consider, when he takes the stand, whoever that accomplice may be, whether or not his failure to be indicted causes him, as a hope of reward or as a received reward, to give testimony in this case against these defendants, won't you?

A. That is right.

Q. I take it you now know that the indictment in this case is merely an accusation?

A. Yes, sir.

Q. It has no probative value? It is not evidence in the case, you understand?

A. That is right.

Q. In other words, you do not proceed on the theory that where there is smoke there must be fire?

A. I know what an indictment is.

The Court: We will take a little recess now. Defendants remanded. We will reassemble at five o'clock.

(Whereupon a short recess was taken.)

(5:00 P. M.)

Trial Resumed

By Mr. Barshay:

[fol. 1850] Q. Now, Mr. Gillespie, were a man to take the stand and claim he is an accomplice, if his name—I will tell you, his name is Sholem Bernstein—do you know that man?

A. No, sir.

Q. Will you take into consideration that that same man—if that is he—had at one time testified in another court under oath, and there he denied he was an accomplice in this case? Will you take that into consideration?

Mr. Turkus: I object.

The Court: Objection sustained. It is too specific.

Q. If any people take the stand and you discover, after they are examined and cross-examined, you believe in your own mind that is the fact, that at one time or another when they had an opportunity to say whether they were or were not accomplices in this case they said "No," will you take that into consideration?

A. Yes, sir.

Q. And then you will want to find out why they changed again, if there is a change—don't take my word for it——

A. Yes, sir.

Q. You will want to find out who those accomplices are before you shall accept their testimony?

A. That is right.

Q. You understand the job which you have here is to search for the truth?

A. Yes, sir.

Q. You know it is for you to say which part you accept and which part you reject, or which you shall reject entirely?

[fol. 1851] A. Yes, sir.

Q. Mr. Turkus has asked you to use reason and logic in deciding this case. I ask you if you will use reason and logic in determining whether or not any person tells the truth.

A. Yes, sir.

Q. And if the Court shall tell you you must view the testimony of an accomplice with care and caution and suspicion, will you accept that?

A. Yes, sir.

Q. Will you do that?

A. Yes, sir.

Q. So it is reasonable to assume you shall take into consideration when a person takes the stand and says he is an accomplice, what has been his life?

A. Yes, sir.

Q. Has it been a clean one or a dirty one?

A. Yes, sir.

Q. Has he committed any murders himself for which he has not been and can no longer be punished? You will consider that if that is the fact?

A. Yes, sir.

Q. Has he been a robber, a gunman, a shylock, a pimp—you will consider that?

A. Yes, sir.

Q. With every demerit mark that he admits you, by the same token, will weigh his testimony according to the Court's instruction?

A. Yes, sir.

Q. That is your job?

A. Yes, sir.

Q. So if he says that he is now an accomplice, if he declares himself to be one, and he says that he participated in the killing of Rosen, even though you accept the fact he [fol. 1852] did participate in the killing of Rosen, you will want to find out whether or not he is telling the truth as to whether or not Buchalter was an accomplice?

A. Yes, sir.

Q. You may believe him. As Mr. Turkus said, a bad man can tell the truth. You may believe him with respect to that, that he participated in the killing of Rosen?

A. Yes, sir.

Q. And then you will go to the next point: Is it true that he is an acomplice of Buchalter? Isn't that so?

A. Yes, sir.

Q. And then will you take into consideration, in deciding whether there has been any conspiracy between him and Buchalter, whether he ever saw or spoke to Buchalter in all his life?

A. Yes, sir.

Q. And if you find he never saw him, never spoke to him, never had anything to do with him, you will consider that in accepting or rejecting his testimony when he says, "I was an accomplice with Buchalter"?

A. Yes, sir.

Q. You will take into consideration that all his life, if he admits it, if it is true, if you find it is true, he has been declaring himself in on other people's business, in accepting or rejecting his testimony?

A. Yes, sir.

Q. So, no matter what else you may believe, if you find there is a reasonable doubt as to whether or not Buchalter is his accomplice, you will say so by your verdict?

A. Yes, sir, that is right.

[fol. 1853] Q. So it does not necessarily mean that Rosen was at such and such a place on such and such a date killed with a gun and the cops came there and found the body, that has nothing to do with Buchalter?

A. No, sir.

Q. Unless and until, beyond a reasonable doubt, by evidence which you believe, he has connected Mr. Buchalter with the commission of this crime.

A. Yes, sir.

Q. All the while you will be giving to Mr. Buchalter the presumption of innocence, because that is what the Judge shall tell you to do?

A. Yes, sir.

Q. Now, the fact that the District Attorney opens up his case, presents his side of the case first, it may take a week, as he says, before putting a witness on the stand, you would not be accepting that testimony before the entire case is Completely finished?

A. No, sir, that is right.

Q. And if you find in the motive of any witness who takes the stand here some hope that he has for himself, or as to future punishment or incarceration, you will consider that too?

A. Yes, sir.

Q. And if you find that the witnesses, since they confessed their own participation in the crime, have lived in hotels, ate of the best, rode out days, rode at night, allowed their women to come up and visit them, went to baseball games and participated in baseball games, all at the taxpayers' expense, will you consider that as an inducing motive [fol. 1854] for them to come in here and say something against the defendants in this case?

A. Yes, sir.

Q. In other words, because of the treatment they got and the hope of future like treatment may have induced them to testify here?

A. It is hard for me to answer that.

Q. You are the one to find out, what is he giving testimony for? Is it in exchange for something that he has got or hopes to get?

Mr. Turkus: Objected to as speculative.

The Court: Objection sustained. You are trying to find out how he would decide the case.

Mr. Barshay: Exception. Mr. Turkus himself told the jury that——

The Court: No argument after the Court rules.

Q. Is it conceivable to you that any person may be induced to testify falsely by the very treatment he gets?

Mr. Turkus: I object. He has already answered that.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Did I understand you to say you answered any and all these questions I asked?

A. Yes, sir.

Mr. Turkus: I object.

Q. Well, summing it up in one question, do you appreciate that in the ordinary course of life people may have reasons to depart from the truth and falsify?

A. Yes, sir.

[fol. 1855] Q. You shall be the one who will find that out as each person takes the stand?

A. Yes, sir.

Q. Individually and separately from any other juror?

A. Yes, sir.

Q. Now, even if he denies that that is the motivating reason, you will be bound to accept that denial, and you shall decide whether that denial is true or false?

A. Yes, sir.

Q. Especially, will you consider the fact that by telling his story the person who tells it is trying to gain his own liberty?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

The Court:

Q. I understood you to say previously that you would scrutinize the motive of any alleged accomplice.

A. That is right.

By the Court:

Q. Any and all inducements which may have a bearing upon the credibility of his testimony?

A. Yes, sir.

Q. Including the gaining of immunity, providing that is done?

A. Yes, sir.

By Mr. Barshay:

Q. Along that line I ask you further, you won't require me to prove to you, or you would not expect him, whoever he may be, to admit to me that he is getting any immunity— [fol. 1856] you will be the one to decide whether or not that is so.

Mr. Turkus: I object.

The Court: The case is going to be decided on the evidence. Objection sustained.

Mr. Barshay: Exception.

Q. If you believe that the person who takes the stand is lying with respect to that, you will take that into consideration?

Mr. Turkus: Objected to as already answered.
The Court: Objection sustained.
Mr. Barshay: Exception.

Q. If you believe from the evidence that this man is hoping for some reward because of the testimony he is giving, you will take that into consideration too.

Mr. Turkus: Objected to as repetitious.
The Court: We have been all over that, Mr. Barshay.

Q. Because a man takes the stand and says, "I shall tell the truth," it does not mean that he will, does it?
A. I understand.
Q. It is for you to say whether you believe or you do not believe that man on any subject that he gives testimony on?
A. Yes, sir.
Q. That covers evertything?
A. Yes, sir.
Q. Now, to get away from accomplices—we will go to the people who are offered here with a view of giving testi- [fol. 1857] mony tending to connect our defendant or any defendant with the commission of this crime—you know that is necessary?
A. Yes, sir.
Q. Without it you will not have anything to do. Will you use the same tests with respect to accepting or rejecting testimony of those people as you will use in accepting or rejecting the truth of those who say they are accomplices?

Mr. Turkus: I object. That is asking the juror to take the instruction of law that may not apply to that type of witness.
The Court: Objection sustained.

Q. Will you view with caution and care the testimony of any person who is offered here for the purpose of tending to corroborate an accomplice's testimony, if you find that person himself has been leading a life of crime and has been convicted and has been in jail?
A. Yes, sir.
Q. You would not accept testimony of that kind of an individual as readily as you would the testimony of a clean man?

Mr. Turkus: I object.

The Court: I don't know why these questions are asked over and over again. It just strings out the examination of the talesman and makes a longer session.

Mr. Barshay: Your honor, Mr. Turkus has questioned for two and a half hours. I have only gone twenty-five minutes. I cannot help it if he has taken my questions and [fol. 1858] addressed them to the jurors.

The Court: Are you insinuating the Court is unfair in its rulings?

Mr. Barshay: No, not at all.

The Court: Then please come to order and follow the Court's ruling.

By Mr. Barshay:

Q. You know what I am driving at?

A. Yes, sir.

Q. They are going to offer witnesses——

The Court: You ask the same questions over and over again, and you are losing time. Your colleague wants to get away, but he has got to sit here during the time you are wasting.

Mr. Barshay: Exception.

The Court: You may take your exception, but you are not going to get the Court to lose its judgment. I am willing to sit here until ten o'clock tonight. If you have any questions to ask on subjects that you have not already covered and received an adequate answer on, go ahead with Mr. Gillespie further, otherwise pass on to the next question.

Mr. Barshay: I urge the Court that I have not asked Mr. Gillespie one question about corroborating witnesses.

The Court: Do not argue, proceed.

Q. If you find that the men who offer the corroborating testimony of these accomplices who have received immunity [fol. 1859] from the District Attorney for the crime which they have committed, have committed numerous crimes, which they will admit themselves, will you carefully weigh their testimony before you accept it?

A. Yes, sir.

Q. So, with respect to them, you will find out their interest in the case in the giving of this testimony?

A. Yes, sir.

Q. Irrespective of the accomplice—we are finished with him for a while.

A. Yes, sir.

Q. I have said before that Mr. Buchalter is incarcerated for a long time, only to find from you whether or not you would be prejudiced against him by virtue thereof.

A. I previously said no.

Q. That would have nothing to do with this case unless you are otherwise charged on the law?

A. That is right.

Q. If the Court should charge you that no defendant need explain any charge against him or disprove any accusation against him or prove his innocence, will you accept that from his Honor?

A. Yes, sir.

Q. If a defendant should decide to rest on The People's case and not offer a single witness in explanation of anything, you will still search the evidence to find out whether or not beyond a reasonable doubt there has been proof against the defendant Buchalter?

A. Yes, sir.

Q. And his failure to explain, either through himself or [fol. 1860] through witnesses, if the Court shall tell you, shall not be used by you in an unfavorable light, but in the light the Court will charge you, will you do that?

A. Yes, sir.

Q. To sum it all up, you will say to the District Attorney, "You accuse, now you prove beyond a reasonable doubt"?

A. Yes, sir.

Q. Now, if the Court shall tell you, as I am sure it will, that character is no part of this case at all, will you follow that?

A. Yes, sir.

Q. Of course, unless the defendant chooses to put it into issue?

A. Yes, sir.

Q. Only then have you the right to consider it.

A. I understand.

Q. You know there is no one living who has a right to criticize a verdict you render?

A. Yes, sir.

Q. Once you render your verdict you are not subject to criticism, no matter what that verdict is?

The Court: What do you mean by that?

Mr. Barshay: I except to the Court's comment.

The Court: I asked you a question. I ask you to qualify your question. If there is any such law I would like to be informed of it.

Mr. Barshay: The Civil Rights law says that.

The Court: I beg your pardon. I call your attention to Article 2 of the Civil Rights Law A juror may not be ques-
[fol. 1861] tioned, but individuals are free to criticize everything in the world, if they do not agree.

Mr. Barshay: That is exactly what I mean.

The Witness: That is the way I understood it.

Q. You would not have to explain to anyone finding fault the way you rendered a verdict in this case?

A. That is right.

Q. You would not be afraid of any subsequent question or criticism that might come? You will not be afraid when you are deciding this case on the merits; that is what I mean.

A. Yes, sir.

Mr. Turkus: I object. There cannot be any criticism if it is on the merits.

The Court: Sustained. That is too far afield.

Mr. Barshay: Exception.

Q. There may be testimony which may be given against one defendant which will not be binding on another defendant; will you be able to keep the testimony separate and use it against the defendant to whom it applies?

A. Yes, sir, against the individual.

Q. While they are being tried together, you understand that each one is being tried separately?

A. Yes, sir.

Q. For merely a matter of convenience they are being tried together?

A. Yes, sir.

Q. May I have your word and assurance that you will not
[fol. 1862] use the testimony which applies to one defendant against another unless his Honor says you may?

A. Yes, sir. You have my word that all the testimony that applies to the three of them I will apply to the three of them, and that which applies individually applies individually.

Q. All I ask you to do is to consider it against the person to whom it applies and against no other person.

Mr. Turkus: I object.

The Court: It is a question of law and subject to construction by the Court on a complicated point of law. It is improper. Sustained.

Q. The defendant Buchalter is entitled to a separate verdict based upon the evidence presented in this case; if the Court shall tell you that, will you follow it?

A. Yes, sir.

Q. Are you willing to undertake to do that?

A. If the Court instructs, yes.

Q. (The Court:) You will decide separately as to each?

A. Yes, sir.

Q. If, after discussing with your fellow jurors, you find and personally feel that Mr. Buchalter has not been proven guilty beyond a reasonable doubt, you will say so?

A. Yes, sir.

By Mr. Barshay:

Q. Now, Mr. Gill, do you know anybody at all connected [fol. 1863] in this case?

A. I do not.

Q. I don't know whether or not you said you had prior jury service.

A. No, sir; but I have had prior jury service.

Q. Did your case come to a conclusion?

A. It was not my case, it was a case in the Supreme Court.

Q. You were never in a criminal case?

A. Yes, sir, on one occasion; I don't know whether it was before Judge Martin or Judge Nova, in the County Court, five or six years ago.

Q. Whatever it may have been, there is no impression with you now?

A. No, sir, it was not a very important case.

Q. Have you read about this case?

A. Not extensively. I have read headlines.

Q. Have you read about the defendants?

A. No, sir, I have not.

Q. By virtue of reading these headlines, have you formed any opinion or impression?

A. No, sir.

Q. Personally, is there anything in your mind prejudicial to the defendants?

A. No, sir.

Q. Does the fact that a person has been shot influence your judgment at all?

A. No, sir.

Q. I take it you do not favor either side in this case now?

A. No, sir.

Q. Did you discuss this case with anybody else?

A. Not since my jury notice.

Q. Did you discuss the defendants with anyone at all?

[fol. 1864] A. No, sir.

Q. As you listened to prospective jurors being questioned, have you formed any impression one way or the other?

A. No, sir .

Q. Has the fact that there have sometimes been arguments between counsel influenced you at all?

A. No, sir, none whatever.

Q. Have the questions put to any other jurors or any answers made by any other jurors, influenced you?

A. No, sir.

Q. Do you appreciate that counsel have a right, in their belief, to try within the rules of law to get their juries?

A. Yes, sir.

Q. You do not know Mr. Buchalter?

A. No, sir.

Q. Has the name Lepke or any other name by which he may have been called anything to do with this case?

A. No, sir.

Q. Were you ever the victim of any crime?

A. No, sir.

Q. There are some rules that have been laid down or will be laid down by the Court with respect to the acceptance or rejection of the testimony of accomplices. You heard that?

A. Yes, sir.

Q. Are you fully in accord with that?

A. I have not heard the rule.

Q. It has been suggested to Mr. Gillespie, regarding the caution, care and suspicion you must put upon accomplice testimony.

A. Yes, sir; I will take that into consideration.

Q. Are you in accord with those rules?

[fol. 1865] A. In so far as the Judge's charge is concerned.

Q. You can rest assured the Judge will charge you about it. Will you accept it?

A. Yes, sir.

Q. You have no prejudice against any rule which may be propounded by the Court, no matter what it is?

A. No, sir.

Q. As to the acceptance or rejection of accomplices' testimony?

A. I don't know the rules.

Q. You heard me say to Mr. Gillespie that if the Court should charge the jury that before they accept an accomplice's testimony they must look upon it with caution and with suspicion and with care and consider the source from which it comes, and the motive with which it is given, and the inducement held out, and the hope of reward that the accomplice may have—that sums it up briefly—if the Court shall so charge you, is that clear——

A. Yes sir.

Q. —will you accept those rules?

A. Yes, sir.

Q. You have no bias against such rules?

A. No, sir.

Q. And that reason applies, if the Court shall charge you, to the testimony of any witness who has a motive or a prior conviction or admits the commission of murder and other crimes.

A. Yes, sir.

Q. In other words, will you search for the truth as each witness takes the stand?

A. Yes, sir.

Q. And if, after consideration of all of his testimony, you yourself having talked it over, that is, the facts, decide for [fol. 1866] yourself, in true conscience, that as far as the defendant Buchalter is concerned there is a reasonable doubt, will you give it to him?

A. I will.

Q. Having heard the same questions put to the other jurors with respect to the defendant not having to prove his innocence, will you demand it, if the Court charges you, that nobody need prove his innocence?

A. I understand

Q. You will not demand it?

A. No, sir.

Q. You won't demand a defendant to prove his innocence if the Court charges?

A. I will presume a defendant innocent until proven guilty beyond a reasonable doubt.

Q. Would you have any prejudice against Mr. Buchalter because of his present incarceration?

A. No, sir.

Q. That is gone?

A. Yes, sir.

Q. You will try only this issue?

A. Yes, sir.

Q. You will take into consideration, I take it, if someone claims to be his accomplice, whether or not he really is his accomplice?

A. Yes, sir.

Q. And one of the facts you will consider is the fact, if it is proven here, that that person never saw or spoke to the accomplice, never in his life; isn't that so?

A. Yes, sir.

Q. And if the Court shall tell you that character is not in issue in this case, you will accept that from his Honor?

A. Yes, sir.

Q. Can Mr. Buchalter entrust to you the keeping of his [fol. 1867] legal rights, or the preservation of his legal rights?

A. Yes, sir.

Q. And that goes for every single right given to the defendant?

A. Yes, sir.

Q. Will you render a verdict based upon the evidence with respect to Mr. Buchalter, one that reflects the truth in this case?

A. Yes, sir.

Q. You will have the courage to do so?

A. Yes, sir.

Q. Is there anything in the case that has been put before the other jurors by way of questions, which have not been put to you, which would preclude you from rendering an impartial verdict here?

A. No, sir.

Q. Mr. Gil', do you know anyone at all in this court-room?

A. No, sir.

Q. Who is a depositor. Is the District Attorney's office a depository with your office?

A. I could not say. I know certain deposits of the City are there.

Q. At any rate, Judge O'Dwyer's office has no business in connection with you?

A. No, sir.

Q. Have you had any prior jury experience?

A. I appeared before Judge Dunn in the Supreme Court once.

Q. Have you ever been in the Grand Jury?

A. No, sir.

Q. Or the Federal jury?

A. No, sir.

Q. Have you personally been the victim of any crime?

A. Not yet.

[fol. 1868] Q. May I know the name of your chief in your place of business?

A. Mr. Gibson.

Q. Have you read about the case?

A. A week prior to the time, but I read nothing outstanding. The only things that stay in my mind are two editions, one was one of the tabloid sheets, I cannot recall, and the other was *P. M.* I read it casually, as I did the other.

Q. Did they impress you?

A. Well, it is difficult to read anything of that nature without getting an impression.

Q. Did they impress you?

A. They did.

Q. Were those impressions unfavorable to the defendants?

A. It was a superficial one, yes, sir.

Q. Is it present now?

A. Nothing has occurred to change it.

Q. Will it require some testimony to change your impression?

A. Well, in a case of this nature I would expect testimony, yes.

Q. Will you require it to come from the defense?

A. As an ordinary layman I should say so, yes, sir.

Q. That is your honest impression now?

A. Yes, sir.

Q. And if it does not come forward from the defense, I take it the impression will still remain?

A. I suppose so.

Mr. Barshay: Challenge for cause.

The Court: Try the challenge.

JAMES F. GILL, No. 2799, residing at 266 Washington Avenue, Brooklyn, New York, was sworn on the chal- [fol. 1869] lenge.

By Mr. Barshay:

Q. Now, being under oath, would you answer the questions in the same way as you answered them before?

A. I would.

Q. Would they be honest answers?

A. They would be honest and true answers.

By Mr. Rosenthal:

Q. You candidly said that you have an impression now in your mind by reason of certain articles you have read and certain pictures you have seen?

A. Yes, sir.

Q. And that impression which you have goes to the guilt or innocence of the defendants in this case?

A. Yes, sir, that is exactly what I meant to convey.

Q. I am not finding any fault with you; I am just trying to get the state of your mind. That is true, notwithstanding the fact that you have been in court here and understand from the questioning of other jurors and from the statements of the Court and of Mr. Turkus the rules of law governing a criminal case?

A. Yes, sir, I do; I understand.

Q. You understand the defendant is presumed innocent and never has to prove his innocence—that it is up to the District Attorney to prove his guilt beyond a reasonable doubt, and all those things which have been explained to you?

A. Exactly.

Q. And notwithstanding that fact, the state of your mind [fol. 1870] at this time is one of prejudice which goes to the guilt or innocence of the defendants or some of them in this trial?

A. I don't like the word "prejudice."

Q. I will not use the word "prejudice." The impression you have is of such a nature it goes to the question of guilt or innocence of one or more of the defendants on trial in this case?

A. Yes, sir.

By Mr. Turkus:

Q. I think in discussing the case with the lawyers you said you had a bank connection.

A. Yes, sir.

Q. You do some executive work, if I remember, for one of the officials of the bank?

Mr. Cuff: I object. That does not go to the question of the challenge.

A. I would not say executive work, but I do some work for the executives.

Q. So, in doing this work, whatever it is, it entails the operation of your mind?

A. Yes, sir.

Q. You don't run it alone with your hands, you run it with your head?

A. Yes, sir.

Q. Now, has it been explained to you that in a criminal case the defendant has no burden at all?

A. Yes, sir.

Q. The burden is entirely upon the District Attorney to establish guilt?

A. Yes, sir, that is my clear understanding.

Q. To establish guilt upon the believable evidence he [fol. 1871] proves in the court-room?

A. Yes, sir.

Q. And that there is no burden on the defendant in a criminal case to do anything: he can sit down and remain mute, and if he does, no unfavorable inference can be drawn from his failure to even take the stand?

A. I know.

Q. Bearing in mind that the guilt or innocence charge is determined in the court-room upon the evidence, do you feel that you can lay aside whatever impression you have gathered from seeing tabloids and reading articles in *P. M.*?

A. I believe I am intelligent enough for that.

By the Court:

Q. You have not told us whether or not your opinion as to the guilt or innocence is related to this specific charge. Is your impression as to guilt or innocence general or specific?

A. No, sir, it is general—that is, superficial.

Q. Did you read anything about this specific charge?

A. No, sir. What I did read was read very casually. Ordinarily I don't have much time to spend time on anything like that. I will tell you how I happened to read the tabloid. I was coming back from Massachusetts and I read it——

Q. It is not an opinion as to the guilt or innocence of the defendants?

A. No, sir.

Q. Or any of them, in this case?

A. No, sir.

Mr. Rosenthal: I except to the Court's answer. The question propounded by me was specifically as to whether or [fol. 1872] not the opinion gained or the impression had by the talesman was as to the guilt or innocence of the defendants on this charge, and the answer to that question was "Yes."

The Court: You may think you did, but I noticed you did not. You may ask it now, if you wish.

By Mr. Rosenthal:

Q. When I questioned you, Mr. Gill, before, I questioned you as to whether you had an impression at this time in respect to one or more of the defendants, and you said, "Yes."

A. I think perhaps it was on the——

Q. In any event, as you sit here now, the matters which you read and the tabloids with the articles are still fresh and present in your mind?

A. They are in my mind, but I cannot say how fresh.

Q. They are in your mind to such an extent that at this moment you have a prejudice against one or more of the defendants—that impression is detrimental to one or more of these defendants; isn't that true?

Mr. Turkus: I object. That is a double question.

Mr. Rosenthal: I withdraw it.

Q. I say, you have an opinion or impression detrimental to the interests of one or more of the defendants on trial, isn't that true?

A. I am not judging these men at all; I have had an impression, but I am not familiar with the case; I read of it in a casual way—I cannot make it clear.

[fol. 1873] Q. Didn't you say your impression was of such a nature it goes to the guilt or innocence of one or more of the defendants in this charge?

A. Yes, sir, I did.

Q. We are talking about this specific charge.

A. Yes, no other charge.

Q. And you mean you formed an opinion as to the guilt or innocence?

A. I formed a strong impression.

The Court: Challenge sustained.

Phillip Strober, was examined as to his qualifications to serve as a juror.

By Mr. Barshay:

Q. Mr. Strober, I will speak loud to you so that you can hear me. Have you had any previous jury service?

A. Yes, sir.

Q. How recently?

A. Eight years ago.

Q. Have you read about this case?

A. This particular case?

Q. Yes.

A. Only the fact that certain people were being held for an alleged murder of a certain person.

Q. Has that left any impression with you?

A. No, sir.

Q. No matter what else you may think, as far as this case is concerned, you will accord the presumption of innocence to the defendants?

A. Yes, sir.

Q. You will not expect us to prove their innocence or explain any charge against them?

A. No, sir.

Q. Will you consider the fact that one of the men is serv-[fol. 1874] ing a long term in prison against him?

A. I would not.

Q. So we will start off from scratch. You know none of these people?

A. No, sir.

Q. All the rights that his Honor says belong to the defendants at all times you shall give to them?

A. Yes, sir.

Q. You are familiar by this time with the questions put to you as to how to accept or how to reject accomplice testimony?

A. Yes, sir, I will take it from the Judge's charge. Whatever he tells me is the law, I would apply.

Q. If he told you you must accept it with caution and care?

A. No matter what the Judge charges, I will try to abide by it.

Q. I am asking now if you will take his instructions.

A. Yes, sir, if he charges, I will take them.

Q. And if after a consideration of all of the evidence in the case, you feel as an individual juror, after having heard and talked and reasoned with your fellow jurors, that somewhere in the evidence there is a doubt with respect to the defendant Buchalter's guilt, will you say so?

A. Yes, sir.

The Court: Reasonable doubt; it must be a reasonable doubt.

The Witness: I think he really meant reasonable doubt.

Q. I can rely on you being a judge of the facts?

A. Yes, sir.

Q. And accepting the law from his Honor?

A. Yes, sir.

Q. And whatever verdict you render will be a fair and [fol. 1875] impartial one?

A. That is as far as I am concerned.

Mr. Talley: (Addressing jurors in box) Gentlemen, I will put my questions to you collectively as far as possible. You, by this time, I think, understand the law in this case. There is a difference in other countries, but in this country a man is indicted and thereby charged with a crime. The burden does not rest upon him, as it does in other countries, to prove his innocence. The Court will charge you that the law in this country is that a man must be proven by The People to be guilty, represented by the District Attorney. Then it goes a step further. He must be proven, to the satisfaction of a jury, guilty beyond a reasonable doubt.

My question to you gentlemen is, may I rely upon the fact that, if accepted as jurors, you will require the District Attorney to sustain that burden and prove the guilt of any of these defendants beyond a reasonable doubt? May I rely upon that?

The Jurors (Collectively): Yes, sir.

Q. That means this: If you have a reasonable doubt after hearing all of the testimony and weighing it carefully in your own minds, discussing it fairly with your fellow jurors, if you have a reasonable doubt as to the guilt of these defendants, will you give them the benefit of that doubt?

A. (By the talesmen collectively.) Yes, sir.

[fol. 1876] By Mr. Rosenthal:

Q. Mr. Gillespie, most of the questions which I am going to ask you three men are going to be individual ones, since most of the questions, the legal questions, have been covered by Mr. Bayshay; I remember you stated both to Mr. Turkus and to Mr. Barshay that you had read a number of articles when Judge O'Dwyer came into office, in respect to crime. Did you tell Mr. Turkus you believed you read those articles when Judge O'Dwyer's investigation started?

A. I read something on his investigation, yes, sir.

Q. Was it at that time or prior to that time you learned of the name of Reles—I think that was one of the names Mr. Turkus mentioned—Strauss was another—Goldstein was another—you say you heard of the name of Goldstein?

A. I read it, but I do not remember the names.

Q. I do not want to discuss what you read; I want to find out whether I am correct in quoting you. You said in answer to Mr. Turkus—did you, at the time read concerning persons bearing the names of Reles, Strauss, or Goldstein, or all three of them?

A. I have read about the investigation; I have read a number of names. It may have been three or more. The exact names, you may be right in mentioning them, but I do not want to say something and then be wrong.

Q. No, I am only trying to ascertain whether, when you made answers to Mr. Turkus, when he asked you if you had [fol. 1877] heard of the names of Reles, Strauss, & Goldstein, you said you had.

A. Yes, sir, I have.

Q. I am not finding fault with your memory.

A. It may have been in those articles in connection with the investigation, or another article.

Q. Did you hear those names prior to this so-called investigation in and about Brownsville?

A. You are going back some time. I cannot say exactly whether it was prior or after.

Q. Can you give me an idea about approximately what year it was you first heard any of those names, how many years ago?

A. Three, four.

Q. Judge O'Dwyer went in office January 1, 1940. That was the source of your hearing those names three or four years ago, the comment of individuals in and about Brownsville in conversation with you?

A. I don't know.

Q. Have you any idea at all about where you first heard the names of those individuals that you told Mr. Turkus you heard?

A. No.

Q. Can you recall whether or not it was in discussion with tenants of your buildings that were situated in the Brownsville area?

A. I cannot tell you that, because most of my relations with tenants is in the collection and the paying of rent, and anything that may come up I listen to and take it as part of the conversation.

Q. Well, was it in connection with this statement you [fol. 1878] made regarding some bodies that were in the premises you owned that you heard the name of Reles discussed?

A. That I know, definitely.

Q. When was it you heard Reles' name discussed in connection with these bodies that were found on your premises?

A. I don't know if the name was mentioned at that time. All I can tell you is—this happened, I think it was short of two years ago—I would not be exact unless I referred to the files—the officer came up to our building and wanted to find out who owned the building and he told us the whole story, and he gave us his idea.

Q. Don't let us discuss it, because, in any event, it was in connection with that that you heard Reles' name mentioned?

Mr. Turkus: Objected to as already answered and gone into in detail.

The Witness: I am not certain.

Q. That is your best impression at this time, isn't it?

A. I cannot answer that. I might answer you one way or another.

Q. I am not trying to quibble; I am trying to see if you can recall from my questions certain things. When I asked you a minute ago as to where you heard Reles' name mentioned, you said it was in connection with dead bodies, didn't you?

A. No, sir, I don't believe I did.

Q. Didn't you then say that the policeman had come to [fol. 1879] you and had discussed with you about it?

A. Yes, sir, he told me a body was found.

Q. He had a conversation, without going into it?

A. Yes, sir. But I don't believe he mentioned any names other than the type of murder it was.

Q. After you had heard this name of Reles, you read certain articles in the paper concerning it?

Mr. Turkus: I object. The juror has not said he heard the name of Reles under those circumstances.

Mr. Rosenthal: He said he heard it only he can't remember where he heard it.

The Court: He answered you he read the name of Reles somewhere but does not know where.

Q. Have you any idea as to whether or not you read any articles in the *Mirror* in which Reles' name was mentioned?

A. Unless I picked the *Mirror* up in the subway.

Q. Of course you would know, if you have a habit of picking the *Mirror* up in the subway.

A. I have.

Q. Have you any recollection whether or not you ever picked a *Mirror* up in the subway and whether you read any article in the *Mirror?*

A. No.

Q. Have you any recollection as to whether or not you ever read anything in any newspaper, any article, in which was mentioned the name of one or more of these defendants?

A. At one time or another I would say yes.

[fol. 1880] Q. Have you any idea as to what particular paper you read, regarding them?

A. As I understand, I buy the *Tribune* in the morning and the *Sun* in the afternoon, and occasionally the *Telegram*.

Q. And in addition to that reading matter you just told us about, you pick up other papers in the subway?

A. Yes, when I leave the train.

Q. Now, you made another statement, I believe, to Mr. Turkus in answer to a question in which he asked you whether you were familiar with the candy store, which I think he said was situated at Saratoga and Livonia Avenue, and you said in the course of your going to and from the house to take the car, you were familiar with that particular corner?

A. I know the store.

Q. He also asked you a question as to whether when pass*ed* that corner where that candy store is, whether you saw people congregating around the corner there at times, and you said you did.

A. Yes, it was a bus stop.

Q. You added to it there was a bus stop there also?

A. Yes, sir.

Q. Assuming that it is the contention of the District Attorney, brought out by somebody here, an accomplice, so-called, or other person, that one or more of these defendants stood around that particular corner, and that one or more of these people whom he may call—would your [fol. 1881] knowledge of that particular corner lead you to give greater weight to the evidence than you would otherwise give, because you knew that corner?

A. I don't know how to answer that.

Q. Of course, if you cannot, you cannot; I am asking for the operation of your mind.

A. I know every block there.

Q. You know every block; you know the situation as it exists there?

A. Yes, sir.

Q. The Court will charge you that in all cases your knowledge, your decision as to the guilt or innocence of any person must come from what you find out under oath and learn under oath from the mouths of witnesses.

A. Yes, sir.

Q. Now then, will the fact that you have a particular knowledge, if it develops in this trial, and I don't know what will develop, you understand?

A. Yes, sir.

Q. The only thing I can direct myself to are the questions which the District Attorney asks.

A. Yes, sir.

Q. He asked you about the candy store and people hanging around in front of it.

A. Yes, sir.

Q. If it develops in this trial that what he asked you has some significance, which I do not know of at this time, would your knowledge of that particular corner be of such a nature that you would supply that knowledge and not confine yourself to the testimony of witnesses, and be influenced by your knowledge?

A. I would have to be guided by the Court.

Q. I know these questions are hard, but as different [fol. 1882] conditions arise I must ask different questions. What I am trying to find out is, you know that in any case the jury sitting in the box here listen to what the witnesses say under oath?

A. Yes, sir.

Q. Have you ever sat as a juryman before?

A. Yes, sir.

Q. You know that witnesses are called and they swear to a certain condition or certain facts?

A. Yes, sir.

Q. And the basis of your findings is what is told from that witness stand, taking the law as the Judge gives it to you?

A. Yes, sir.

Q. Now, then, the District Attorney has asked you a question about a corner in some crowded locality, and you have admitted you have been on that corner and observed the crowd of people there?

A. Yes, sir.

Q. If it develops in this trial that there is some testimony about a gathering on that street corner by a particular class of people on the side of The People, would your knowledge of that corner be such that you would supply that knowledge and take it in preference to the testimony of the witnesses concerning the condition?

A. No, sir.

Q. Do I make myself clear?

A. Surely.

Q. Now, you understand this is not a question of whether you like an accomplice or don't like him—that was a question asked by the District Attorney.

A. Yes, sir.

Q. We don't care whether you like him or don't like him. [fol. 1883] The point you are to decide is whether a man of that character which he will be depicted to be, having in mind what he is gaining by sitting there and saying he is telling the truth, is one who could ever tell the truth in your opinion.

A. I don't know what you mean by one who could endeavor to tell the truth.

Mr. Turkus: I object to this. It is going into the realm of speculation.

Q. You met different tenants in the course of your travels?

A. All day long.

Q. Do you remember a tenant, in the course of your experience and association, telling you to come back at five o'clock in the evening and he would have the rent for you when you came back at about five o'clock, and then you would not see the tenant for six days afterwards?

Mr. Turkus: I object.

The Court: Sustained.

Q. You have had experiences such as this which have taught you who you can rely upon and who you can believe?

A. Oh, sure.

Q. Outside of tenants, there are other people you come in contact with and you have different means of ascertaining their truth-telling qualities?

A. At times.

Q. When you see an accomplice, so-called, on the stand, whether you like him or not, you understand your duty will be to ascertain whether a man of the particular character [fol. 1884] of that individual is such that he could tell the truth under oath, under any circumstances, in order to judge what weight you will give him?

Mr. Turkus: I object.

The Court: Objection overruled.

By the Court:

Q. Do you consider yourself competent from your experience to judge whether a person tells the truth or not?

A. Yes, sir.

Q. Taking everything into consideration?

A. Yes, sir.

Q. How old a man are you?

A. Forty-two.

Q. I take it you have been for about twenty years engaged in deciding who tells the truth and who does not as a matter of daily occupation?

A. I don't know.

By Mr. Rosenthal:

Q. In any event, putting it as plain as I know how, you realize that the question as to whether a man is telling the truth on the witness stand is one you are to decide?

A. Yes, sir.

Q. You realize, in deciding that, the Judge will tell you that you must—whether you like it or not—view with extreme caution and suspicion the testimony of an accomplice and be very wary?

A. Yes, sir.

Q. That is under any circumstances?

A. Yes, sir.

Q. Having that in mind, will you also take into consideration in judging whether he is telling the truth or not what he may expect to gain by testifying, what crimes he [fol. 1885] may have committed for which he will go unpunished, whether he has been given immunity, the opportunity he has had to talk to others and concoct the details, and all the other facts and circumstances which might aid you in determining the weight you would give his testimony?

A. Yes, sir.

Q. Does the same hold true in so far as—Have you heard me explain to the other men before you came in the box the question about this so-called evidence tending to connect a defendant with a crime?

A. I don't know.

Q. In any event, if the individual or individuals who are called on behalf of The People to furnish this so-called "other evidence tending to connect the defendants" are

people of similar type to the so-called accomplices, will you weigh their testimony carefully and scrutinize it in order to find out what motive, if any, they would have in saying what they do say on the stand?

A. Yes, sir.

Q. If, after weighing it you do not believe their testimony, would you hesitate under those circumstances to find a verdict of Not Guilty, if you do not believe the independent testimony?

A. I don't understand it.

Q. What I mean is this: You know you cannot convict any man on the uncorroborated testimony of an accomplice?

A. Yes, sir.

Q. By now, having heard it said so often, I assume you know that there must be other evidence tending to connect them with that particular crime—that is clear?

A. Yes, sir.

[fol. 1886] Q. If you do not believe this other evidence because of the motive or whatever it might be regarding the person who furnishes it, would you hesitate to say that and to show that fact by bringing in a verdict of Not Guilty?

A. I would.

The Court:

Q. Provided you were so instructed, would you follow those instructions?

A. Yes, sir.

Q. The time may come when the Judge may say that he denies the motion to dismiss and in other words, he allows the case to go to you to decide. The fact that the Judge does that, if he tells you that that raises no presumption in his mind at all, he is only here to determine questions of law, would that fact weigh in your mind against the defendants?

A. No, sir.

Q. The fact that it is left to you?

A. No, sir.

Q. Is there any reason you know of that has not been urged by questioning that would prevent you from being a fair and impartial juror?

A. I don't know.

Q. You are the only one who would know.

A. No.

Q. Your answer is "No"?

A. No, sir.

Q. I notice you hesitated a little bit before.

A. No, sir.

Q. Is there something in the back of your mind which causes hesitation?

A. No, sir, nothing in back of my mind. You ask me the question and I have to think back.

Q. You mean you would try to think back?

A. No, sir, I don't know of anything I may have told you.

Q. You would not bring in a verdict that is not fair?

A. No.

[fol. 1887] By Mr. Rosenthal:

Q. Now, Mr. Hall, I don't want to repeat all these questions. I notice you were listening very attentively.

A. Yes.

Q. Do you understand the questions which I asked?

A. Yes, sir.

Q. If I addressed those same questions to you would your responses have been any different, substantially, from his?

A. They would be the same.

Q. Did you say you had the opportunity of reading any articles concerning these defendants?

A. I have not read any articles; I have seen the headlines, by-products of headlines, maybe, leading up to the article itself.

Q. Was that before you were called for jury service?

A. No, I don't recall seeing anything before I was called for jury service. I have seen comment in the daily papers that I have read since August 4th, I think it was, in relation to the trial.

Q. Were those comments which you read confined to the progress of the selection of jurors, or did they in any wise refer to any article that has been spoken of here as being in the *Mirror*?

A. No, sir; they were very short; they have been in the *Times*; they would merely say that So-and-so was selected.

Q. Other than that, you have read nothing concerning any of these defendants?

A. Yes, sir, that is right.

Q. So, as you sit in the box you have no impression what-[fol. 1888] ever which would be either detrimental to the rights of The People or to the defendants?

A. No, sir.

Q. There was one other thing I heard you say, which was not explained. You said something about "on the way to the court somebody might chance a remark to you," as I recall your statement. Do you recall having been asked by Mr. Turkus regarding whether you had spoken to anybody or anybody had spoken to you, and you used the words that "Nothing except a chance remark" on your way to court?

A. I do not recall that answer. In substance, the remarks that have been discussed might have been remarks, but there was no discussion.

Q. Have there been any remarks of any character passed through you after you were called to come as a juryman by anybody on your way to court with respect to any of these defendants?

A. No, sir, only in respect to my jury service.

Q. Is that what you meant when you said there were chance remarks passed?

A. I do not recall making that remark.

Q. Having your attention called to it, because I wrote it down at the time, your mind may not have been in accord with the way I took it, but just turn over in your mind whether or not you have been spoken to by anybody in respect to any of these defendants or in respect to the case ifself which you have been called upon for jury service other than the question of how long you might be out.

A. That is the substance of the discussion I had.

[fol. 1889] Q. Nothing has been discussed derogatory to any of the defendants or about the merits of the case itself?

A. That is right.

Q. Do you know any reason that has not been urged by questions that would prevent you from being fair?

A. No, sir.

By Mr. Rosenthal:

Q. Mr. Strober, I notice another man on the panel here who lives at 131 Tehama Street. Are you acquainted with him?

A. No, sir.

Q. The name is John J. Petty. Is that on the same block with you?

A. What is the number?

Q. 131.

A. No, sir, that would be a block apart.

Q. Without repeating the questions, are you in accord with the answers that have been given in respect to the questions which I asked of the other talesmen, or is there any mental reservation in your mind?

A. No, sir, there is no mental reservation in my mind. The only thing is I cannot answer your questions—you asked me whether I agreed with each gentleman—only as to the principles of law. I did not follow them.

Q. Did you follow the questions I asked as to the matter of corroboration and the matter of accomplice testimony and the weight to be given?

A. Yes, sir.

Q. And about the question of the admissions by a man [fol. 1890] who admits he is a criminal, etc.?

A. Yes, sir.

Q. With respect to those particular questions, I am not asking you about anything they said about newspapers or questions that were directed to them personally, merely on the legal questions would your answers be substantially the same if I directed them to you?

A. According to what you asked them, would they take the Judge's law.

Q. I also meant this: I assume that an accomplice will take the stand. Suppose that after he has testified, or while testifying he admitted either by direct or being forced to admit on cross-examination that for this very crime he admits he committed he has had immunity and that for other crimes he has immunity, that he has lied under oath, that he has had association with other witnesses which has given him an opportunity to concoct a story, and a number of other things; would you take all of those things into consideration in determining what force or weight you would give to the accomplice's testimony?

A. I would listen to the accomplice's testimony.

Q. You understand that as far as the accomplice is concerned the Court will charge you that in any case, irrespective of the admission of this character, where an accomplice is concerned his testimony must be viewed with caution and suspicion and the jury must be wary of it?

A. I understand that.

[fol. 1891] Q. That is the reason why I differ between the accomplice and others. When you go to other so-called evidence, I assume you were in court when I explained it, you do not know what the District Attorney may attempt to

prove or what you may judge from his questions, and we must ask questions—now, you will understand by now that unless there is so-called corroborative evidence there would be no case in law?

A. Yes, sir.

Q. You understand the question of corroborative evidence can never be determined by the Judge as law. It must be left the the jury to determine the facts?

A. Yes, sir.

Q. And if this corroborative evidence, so-called, consists of alleged statements or admissions supposedly made by the defendant to this particular witness, and it develops that that witness has committed numerous crimes for which he has never been punished, has denied knowledge of this particular crime, and a number of other things—I will not limit you to any particular state of facts—including his hesitation, maybe, in answering questions, his manner in answering, etc.—would you take that into consideration in determining what weight, if any, you would give to his testimony?

A. Yes, sir.

Q. And if you once determined that by virtue of the motive he had here or the reward which is coming, that he was not telling the truth and there was a doubt as to his telling the truth, would you have the courage to say so in your verdict?

[fol. 1892] A. I would be bound to, and I would also have the courage.

Q. The only reason I use those words is because the District Attorney has asked everybody, "would you have any fear or hesitation?" I used the word "courage," which implies you would not have fear or hesitation.

A. That is right.

Mr. Rosenthal: No challenge for cause by the defense.

Mr. Turkus: Each and every prospective talesman is satisfactory; Mr. Gillespie, Mr. Hall, and Mr. Strober.

Mr. Talley: Mr. Strober and Mr. Hall are satisfactory to the defense. Mr. Gillespie is challenged peremptorily.

(Mr. Hall assumed Seat No. 7 in the jury box, and Mr. Strober assumed Seat No. 8.)

The Court: Call four more talesmen.

(The following talesmen were called for examination: Frank X. Butler, No. 2690; William A. Stephens, No. 2667; Philip Brill, No. 2756; Joseph J. Flanagan, No. 2822.)

The Court: All others may go until twelve o'clock tomorrow:

(Addressing tentative jurors and talesmen in box):

Gentlemen, you may go until ten o'clock tomorrow morning. Please do not discuss the case. Read nothing about it. Do not listen to any discussion about it. Keep your minds open.

[fol. 1893] The Court is recessing at a quarter to seven o'clock, partly because of an engagement which was explained to the Court by Mr. Rosenthal, and, quite properly, because of the recommendation by Dr. Nash that one of the defendants (Capone) shall not be placed under the strain of a later session just now. But the defendants will have to have their dinner, and I assume it is too late to go to the House of Detention. They will have to have their dinner in the pen. Those in charge of the pen, including the officers and extra guard, will wait until after they shall have finished their dinner and have been taken from the building. There must be no dining in restaurants.

Defendants remanded.

(Whereupon an adjournment was taken to Thursday, October 9, 1941, at ten o'clock a. m.)

[fol. 1894] Peo. v. Louis Buchalter et al.

Brooklyn, N. Y., October 9, 1941.

Trial Resumed

(All defendants represented by their counsel.)

Frank X. Butler, a talesman, interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Butler, you are listed as a clerk. Where are you employed?

A. In the Telephone Company.

Q. (Addressing Mr. Stephens) You are a stock broker in business for yourself?

A. No, sir, I am employed by a member of the Stock Exchange.

Mr. Turkus: I want to find out some of your occupations so that it will take in a lot of questions and I will not waste time.

Q. (Addressing Mr. Brill) Mr. Brill, you are a contractor?

A. Yes, sir.

By the Court:

Q. (Addressing Mr. Butler) Steuben Street, That is in what section of Brooklyn?

A. Near Fort Greene Park.

Q. That is between Nostrand and Marcy?

A. No, sir, nearer Grand Avenue.

By Mr. Turkus:

Q. How long have you lived in that neighborhood?

A. About six years.

[fol. 1895] Q. Where did you live prior?

A. Clinton Avenue, approximately near that.

The Court:

Q. No. 45 School is just about where Steuben Street is?

A. That is right.

Q. Mr. Butler, have you listened to the questions I put to the other jurors while you were here?

A. Yes, sir.

Q. How long have you been with the Telephone Company?

A. About nineteen years.

Q. That takes in all the time you have been engaged in business, or have you had any other employment?

A. The Telephone Company.

Q. Did you go in there when you were a boy?

A. Yes, sir.

Q. You understand we are here trying an indictment for murder in the first degree in which these defendants, Buchalter, Capone, and Weiss, are charged with the murder of Joseph Rosen. Is there anything about the nature of the

charge which would prevent you from rendering full service as a juror?

A. No.

Q. Have you any scruples, conscientious or otherwise, against capital punishment?

A. No.

Q. There may be a lot of questions I may ask you that may not apply to you because of the place where you reside and the business which you are in, but I have to mention it so the other jurors may hear these questions, and if it applies to them they will be able to tell me. In your background, in any way, shape or form, through social contact, [fol. 1896] did you ever come into contact with anybody in the garment industry or clothing industry, or the clothing truckers?

A. No, sir.

Q. Do you know any union officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is there any familiarity with the name of Weinstein or Katz, officials of the Amalgamated Clothing Company of America, or Philip Orlofsky?

A. No, sir.

Q. May I go along with the understanding that through no business or social contact do you know anyone engaged in the manufacture of clothes, either men's or women's, or in the distribution of clothes through truckers?

A. No, sir.

Q. Have you had any contact of any shape or form in the Brownsville or East New York areas?

A. No, sir, no contact. At one time I held a job and I had to go up to Brownsville.

Q. How many years ago was that?

A. About six or seven.

Q. The only contacts were by seeing representatives of the Telephone Company?

A. Yes.

Q. Does the same apply to the Brooklyn waterfront?

A. I have not been there.

Q. Since receiving your jury notice, did anybody talk to you about the case?

A. No, sir. Casually they asked me what case I was on, but I tried to discourage any talk.

The Court:

Q. Steuben Street begins at Fulton Street?

A. It begins at Fulton, and I am between Willoughby and DeKalb.

Q. May I understand that nobody has discussed the [fol. 1897] merits of the case with you?

A. That is right.

Q. Have you heretofore served as a juror in any case?

A. No, sir.

Q. Will you take the law in this case, if you are selected, exclusively from the trial judge?

A. Yes, sir.

Q. You understand that is the duty of the Judge who presides at the trial, to instruct the jury on the law?

A. Yes, sir.

Q. And it is the juror's duty to apply the instructions on the law to the facts. Will you follow that if you are so instructed, and will you, to the best of your ability, apply the law to the facts in this case?

A. Yes, sir.

Q. May I proceed with the understanding you are in sympathy with law enforcement?

A. Yes, sir.

Q. I must repeat the names of the lawyers who represent the defendants, because I doubt if anybody was in the box at the time I mentioned the names to the other jurors. May I say that the defendant Buchalter is represented by three lawyers, former Assistant District Attorney Barshay, United States District Attorney Wegman, and Mr. Jesse Climenko. Do you know any of those three?

A. No, sir.

Q. The defendant Weiss is represented by a former Judge of the General Sessions, Judge Talley, by former Assistant District Attorney Cuff, and by former Assistant United States Attorney Murray Kriendler. Do you know any of those?

A. No, sir.

Q. The defendant Capone is represented by Sidney Ro- [fol. 1898] senthal, Mr. Fischbein, and Mr. Rosenberg; do you know any of those?

A. No, sir.

Q. Do you know anyone employed in the law offices of any of those nine?

A. No, sir.

Q. Do you know any member of the bar who specializes in the trial of criminal cases for defendants?

A. No, sir.

Q. Not having sat in a criminal case for the period indicated, you will accept the law exclusively from the Judge, will you, when you are charged that the defendants and all defendants on trial are presumed to be innocent until their guilt is established beyond a reasonable doubt. Will you follow that instruction?

A. Yes, sir.

Q. If you are charged in this criminal trial that no defendant in a criminal case has any burden of proof, that the burden always rests upon the District Attorney, will you follow that?

A. Yes, sir.

Q. That the defendant may sit mute during the trial, he may choose not to take the stand, and that if he does not take the stand, no inference may be drawn against him?

A. That is right.

Q. Will you take that instruction of law?

A. Yes, sir.

Q. In short, will you give the defendants the benefit of every law that the Judge says a man on trial should have?

A. Yes, sir.

Q. The presumption of innocence, the burden of proof, [fol. 1899] the doctrine of reasonable doubt, all the principles of law the Court will give you that inure to the benefit of the defendants on trial—will you endeavor to apply them to the facts in this case?

A. Yes, sir.

Q. Have you heard any discussion about accomplice testimony?

A. As I sat here.

Q. Do you understand that an accomplice is one who was a co-participant in the crime—that he was one of the perpetrators of the crime—one of the guilty perpetrators? Do you understand that?

A. Yes, sir.

Q. In the event that part of the State's case rests upon the testimony of an accomplice, I would like to know if you have any fault to find either with the prosecutor or the prosecution—I will try that again—do you find any fault with the District Attorney of the county, Judge O'Dwyer, who,

in order to solve a murder case, accepts the testimony of one of the men who perpetrated the crime with others, and uses that against them?

A. No, sir.

Q. Do you have any bias or prejudice against the prosecution, part of which rests upon the testimony of an accomplice—do you have any prejudice against a prosecution which uses the testimony of an accomplice against others?

A. No, sir.

Q. In other words, may I understand you have no inherent bias or prejudice as would cause you to shut your ears to testimony of co-participants in the trial simply be- [fol. 1900] cause he is an accomplice?

A. That is right.

Q. May I understand that your mental state is such that you feel that even a bad man on occasion can tell the truth?

A. Yes, sir.

Q. With respect to weighing the believability you are to give the testimony of an accomplice, will you accept the instructions of law the Judge gives you and apply them to such individual?

A. Yes.

Q. Should the Judge tell you you must view the testimony of an accomplice with care and caution and suspicion, will you do so?

A. Yes, sir.

Q. Will you, if accepted, keep uppermost in your mind that you apply all of these tests to ascertain is this accomplice telling the truth?

A. Yes, sir.

Q. And that a function for applying tests to the accomplice is to view his testimony with care and caution to find out is he telling the truth?

A. Yes, sir.

Q. Will you, if selected, view or find out is this accomplice telling the truth?

A. Yes, sir.

Q. Will you devote your mental faculties to finding out is he telling the truth about a group or combination participation in murder by these defendants and himself?

A. Yes, sir. You mean is he telling the truth about the group?

Q. Yes, if part of the defendants' case rests upon the testimony of an accomplice and is that those defendants

[fol. 1901] joined in the conspiracy to kill the victim named in the indictment, will you use your mental faculties to find out whether the accomplice is telling the truth about the part that the defendants each played in the murder, including the part that the accomplice played?

Mr. Barshay: I object to the question in that form.

Q. Assuming that part of the case of the prosecution rests upon the testimony of one of the men who admits to you he participated in the commission of the murder.
A. Yes.
Q. Will you devote your mental faculties to see if that co-participant, the guilty perpetrator of the murder, tells the truth about the part that each of the defendants played in the murder?
A. Yes, sir.
Q. Will you, in applying all the tests that you apply to the believability of accomplice witnesses, see whether he tells the truth about the guilty combination and the group participation of each and every one of these defendants on trial with him in the commission of that murder?
A. Yes, sir.

Mr. Climenko: Same objection.
The Court: Objection overruled.
Mr. Climenko: Exception.

Q. It may be, after you see the accomplice on the stand, the person who admits he was a conspirator with these men to kill the victim named in the indictment, you may not like him—you may dislike him or have some strong feeling [fol. 1902] against him personally. Do you realize that is not the test—whether you like him or not—but that the test is, Is he telling the truth about each of these defendants and the part they played?
A. I will.
Q. Will you apply all the tests you use to find out yourself, Does he tell the truth about these men on trial and the part each one played in the group or combination and in the killing of the victim?
A. Yes.

By the Court:

Q. What position do you hold?
A. Senior clerk.

Q. What department?

A. Installation department, service. It has to do with the assignment of lines for phone purposes—for work done with the phones.

Q. How long have you been at that?

A. About five years.

Q. And before that?

A. I was an agent for the Company, right-of-way agent, which means the procurement of permits from property owners to allow us to proceed.

Q. How long have you been in the Telephone Company?

A. Going on nineteen years.

Q. I am asking you these questions on account of another man named Butler, who had a very intimate friend who made his life career in the Telephone Company, and I wondered if you are his son.

Q. He lived in the Bushwick section, around Marcy Avenue.

A. No, sir.

[fol. 1903] By Mr. Turkus:

Q. You are married?

A. Yes, sir.

Q. You reside with your wife and family?

A. Yes, sir.

Q. It has been properly said by Mr. Rosenthal, in speaking to the other jurors, that his client, Capone, is here to meet but one charge, the charge in this indictment; that it is the function of the jury to find out is he guilty or innocent of that charge and that charge alone.

A. Yes, sir.

By the Court:

Q. The name of that man was Warner.

A. No, I don t know anybody named Warner.

By Mr. Turkus:

Q. You understand the obligation of the District Attorney is only co-extensive with that—that it is the job of the District Attorney to establish the guilt on this indictment and on this indictment only?

A. Yes.

Q. And that the burden of the District Attorney never shifts?

A. Yes.

Q. Will you, if accepted, devote your mental faculties to finding out are these three defendants at the bar guilty of murder as alleged in this indictment, or are they innocent?

A. Yes, sir.

Q. Will you endeavor to do justice by your verdict if selected?

A. Yes, sir.

Q. Do you understand the function of the jury is to deter-[fol. 1904] mine the facts in the case and find out whether or not from all the facts in the case the defendants at the bar are guilty or innocent?

A. Yes, sir.

Q. In discussing the problem in the jury room—juries talk these things over, and talk the facts over with one another and endeavor to arrive at a verdict?

A. Yes, sir.

Q. The reason I tell you that is because you said you have never been on jury service before?

A. Yes, sir.

Q. From the contacts you have had in your every-day life, particularly from that part of it where you went out as a representative of the Company, you have had occasion to interview people?

A. Yes, sir.

Q. Will you, if accepted, logically reason out the facts with the other jurors?

A. Yes, sir.

Q. There has been one point brought out by another lawyer who represents the defendant Buchalter. He has pointed out to the other prospective jurors and those already selected, that his client, Buchalter, for crimes he has committed, has been convicted and is paying the penalty for the conviction of those crimes by prison incarceration—in jail. I want to know this: Realizing that such is the case, would you be inclined to relax your duty in this case because Buchalter is serving a term in jail for other crimes he has committed?

A. No, sir.

Q. Would you deviate from a proper decision in this [fol. 1905] murder case because of that?

A. No, sir.

Q. In other words, will you, if accepted in this case, decide the guilt or innocence of Buchalter and the other defendants upon the evidence you receive in this court?

A. Yes, sir.

Q. I mean on the evidence alone—and you will in no wise relax or deviate from a proper or just result because of any present incarceration of the defendant?

A. Yes, sir.

Q. With respect to the allocation of evidence—that may be more or less legal—but the Judge will give you certain rules to apply; as a result of hearing his rule you will obviously see that in some instances a piece of testimony will apply only to one defendant, or to all three. Will you, where it is obvious from the Judge's rule, apply that evidence only to that defendant?

A. Yes.

Q. You will apply every rule that the Judge gives you?

A. Yes, sir.

Q. And you will see, from the rule that the Judge gives you, that obviously a piece of evidence will apply to all three of the defendants; and in that case will you apply it, according to the instructions, against all three?

A. Yes, sir.

Q. Do you know the District Attorney of the county, Judge O'Dwyer, or any Assistant District Attorney on his staff?

A. No, sir.

Q. Should the Judge instruct you as a matter of law [fol. 1906] that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice, will you follow that instruction of law?

A. Yes, sir.

Q. It will be your job at the same time, possibly, during the trial to find out as a matter of fact whether a certain person is or is not an accomplice. Do you understand that?

A. Yes, sir.

Q. Will you figure that thing out for yourself?

A. Yes, sir.

Q. Obviously, there cannot be any conviction upon the uncorroborated testimony of an accomplice. It may happen, I do not say it will, that the defense lawyers will argue every witness is an accomplice. I want to find out if you

will use your judgment in deciding for yourself what this case is all about?

A. Yes, sir.

Q. I don't say it will happen; it may. But if it does, you will find no fault with it, where there are lawyers for each defendant and they all have a right to a separate consideration of the case?

A. Yes, sir.

Q. The case as against them is being tried together. They are being tried jointly so that the prosecutor, for the saving of time, can try together where the charge is they all participated in the crime together.

A. Yes, sir.

Q. And because each is entitled to a separate consideration, each is, of course, entitled to his own counsel?

A. Yes, sir.

Q. They can have as many lawyers as they want, but it [fol. 1907] may be that the lawyers for the defense may, among themselves, agree upon a certain argument to the jury, and it may be that some of their arguments coincide. Would you, if you heard the same argument repeated three times by defense lawyers, give it three times the weight because you heard it three times?

A. Repeat that, please?

Q. There being three lawyers who will talk to the jury in summation, you not having been on a jury, I wonder if you understand that at the end of all the evidence in the case each defendant has a right to have his lawyer get up and tell the jury how he values the evidence in the case as against his client.

A. Yes, sir.

Q. And when all the defense lawyers are finished the prosecutor tells you how he views the facts.

A. Yes, sir.

Q. These are arguments the defense lawyers give to you and the inferences they draw from the testimony.

A. Yes, sir.

Q. And that is supposed to be helpful and a guide to the jury as to their defendant. It may be helpful or not, but, after all, the job of the jury is to find out, are the defendants guilty or innocent?

A. Yes, sir.

Q. Sometimes—I do not say it will happen, but if it does—where there is more than one defendant on trial—the de-

fense lawyers use the same argument. For example, both may say that "This witness is unbelievable" and "This witness is an accomplice," or some other argument, in which they all stress that side of it, one after the other, to [fol. 1908] the jury. Do you follow me?

A. Yes, sir.

Q. I do not want to be offensive in asking the question to embarrass you, but it may sound like a simple question, but will you keep in mind, even if you hear argument from three defense lawyers on the same point, it is still one argument and is not three times as strong?

A. No, sir.

Q. Will you, if accepted, listen to all the evidence and endeavor conscientiously to apply the rules of law which Judge Taylor gives you to the facts in the case?

A. Yes, sir.

Q. And if at the conclusion of all the testimony and after the defense lawyers have urged their arguments and you have heard the prosecutor draw inferences as he sees them, and you talk the case over with your other jurors, after hearing the law, and your own conscience, your mind, is satisfied beyond a reasonable doubt that the three men at the bar are guilty of murder in the first degree, will you say that in your verdict?

A. Yes, sir.

Q. Will you say it without the slightest hesitation, if you are satisfied of their guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Is there anything I failed to ask or bring out by questioning that would go to your ability to render a verdict that would do justice in this case?

A. No, sir.

By Mr. Turkus:

[fol. 1909] Q. (Addressing Mr. William A. Stephens.) No. 1 Plaza Street, is it? That is in the Prospect Park Section?

A. Yes, sir, right at the Circle.

By the Court:

Q. You live right next to the Union Temple?

A. No, the other side, on the corner of Flatbush, Eighth Avenue and the Plaza.

Q. That is a new apartment house where the riding and driving club was?

A. No, just exactly across the street from the garage, the other side of Flatbush Avenue.

Q. The odd numbers run on the west side?

A. Yes, sir.

Q. And the even numbers on the east?

A. Yes, sir.

Q. Is your apartment house a skyscraper?

A. Yes, sir.

Q. Next to the Montauk Club?

A. Yes, sir.

By Mr. Turkus:

Q. Have you lived there for a number of years?

A. Four years.

Q. Prior to that where did you live?

A. In Bensonhurst section.

Q. Was that in proximity to Bath Beach?

A. Yes, sir.

Q. Did you have any contact in Bath Beach of any kind or nature?

A. Very few.

Q. Did you live in any other district or section of Brooklyn?

A. No, sir; those two.

Q. Alone?

A. Yes, sir.

[fol. 1910] Q. Do you reside with your wife and family?

A. Yes, sir.

Q. Your profession is listed as a stock broker. I think you told me you are employed by some firm in Wall Street.

A. I am employed by a firm that are members of the Stock and Curb Exchange, and I work on the Curb Exchange.

Q. (The Court): What firm?

A. Gude, Windel & Company; members of the Stock Exchange.

Q. How long have you been in that business?

A. Fifteen years.

Q. I think we can go along very rapidly now. Have you any contact in the garment or clothing trade. I take it you have none.

A. My answer would be almost exactly as Mr. Butler's

with one exception: I know a man named Mr. Reid, a broker, engaged in trucking hats between New York and Danbury, Connecticut.

Q. I am interested in the clothing truckers. That is the particular branch of the clothing industry where they take clothes in their unfinished state or in their finished state.

A. No, sir.

Q. You know no one in the clothing or trucking business connected with the Amalgamated?

A. No, sir.

Q. I take it, as Mr. Butler said, you, too, are in sympathy with the enforcement of the law?

A. Yes, sir.

Q. With respect to the nine lawyers who represent the defendants, do you know any of them?

A. No, sir.

[fol. 1911] Q. Do you know the District Attorney of the county, or any Assistant District Attorney personally?

A. No, sir.

Q. Do you know any one engaged in the practice of criminal cases especially?

A. I didn't hear you.

Q. Do you know anybody connected or associated with anybody of the nine lawyers in the practice of the law?

A. No, sir.

Q. Did you hear the discussion I had with Mr. Butler about the testimony of an accomplice?

A. Yes, sir.

Q. Do you understand from the conversation we had, or from the questions and answers, that an accomplice is one of the perpetrators of a crime?

A. Yes, sir.

Q. Do you have any inherent bias or prejudice against an accomplice's testimony which would cause you to reject it under all circumstances?

A. No, sir.

Q. Do you believe—is your state of mind such that even a bad man can tell the truth?

A. Yes, sir.

Q. Will it be your job to find out is he telling the truth about the group or combination participating in the murder by these defendants?

A. Yes, sir.

Q. Will you use your faculties to find that out?

A. Yes, sir.

Q. Will you use common sense and understanding in weighing and applying all these tests to accomplice witnesses to find that out?

A. Yes, sir.

Q. In other words, do you appreciate it is not whether you like or do not like an accomplice or whether you have [fol. 1912] any use or no use for him as an individual, or for any other purpose; the thing you want to find out is, Does he tell the truth about the part that each of these defendants played in the commission of the murder?

A. Yes, sir.

Q. That is the purpose of applying every test that the human mind can figure out that is reasonable or sensible to apply to that kind of witness?

A. Yes, sir.

Q. That is why we look at the testimony of a participant in a crime with care and caution and suspicion to find out is he telling the truth when he implicates himself and others in the commission of a crime?

A. Yes, sir.

Q. Will you keep uppermost in your mind that the inquiry is, no matter what the test is you apply to find out, Is he telling the truth about the complicity of the defendants in the commission of the crime?

A. Yes, sir.

Q. You will be instructed that even if you believe the accomplice, every word he says, that would not be enough to warrant a conviction?

A. Yes, sir.

Q. There must be supporting evidence which is believed by the jury and tends to connect the defendants with the commission of the crime—that will be the instruction on the law, either in words or substance.

A. Yes, sir

Q. If the Judge should tell you and Mr. Butler, too, that the corroboration or the supporting proof need not go to every single point that the accomplice testifies to, but may be [fol. 1913] deemed to be sufficient by the jury, if believed, when it tends to connect the defendants with the commission of the crime, will you accept that instruction on the law?

A. Yes, sir.

Q. And will you (addressing Mr. Butler)?

A. Yes, sir.

Q. Will both of your endeavor conscientiously to apply that instruction of law to the facts in this case?

A. Yes.

Q. I discussed with Mr. Butler the fact that, as Mr. Rosenthal pointed out, his client and the other defendants are here on the only charge in this indictment, which is the charge of the Rosen murder.

A. Yes, sir.

Q. Do you understand, too, that it is only the obligation and duty of the District Attorney to establish the guilt of the defendants of the Rosen murder beyond a reasonable doubt?

A. Yes, sir.

Q. That he is only bound to establish the guilt on this particular charge beyond a reasonable doubt?

A. Yes, sir.

Q. It has been pointed out by Mr. Buchalter's lawyer that Mr. Buchalter has been convicted of other crimes and is paying the penalty for those convictions by sentence. Would you be inclined to relax or yield from the proper verdict in this murder charge because Buchalter is in jail for some other offense?

A. No, sir.

Q. Will you devote all your mental faculties to finding out, if selected as a juror, whether these defendants at the bar are guilty or innocent of this murder charge?

A. Yes.

[fol. 1914] Q. I take it in your business you have occasion almost daily to discuss matters with reason and common sense with people employed with you, and to analyze and figure things out sensibly and logically?

A. Yes, sir.

Q. Will you, if accepted as a juror, use your common sense and understanding in applying the law of this case to the facts in the case?

A. Yes, sir.

Q. Will you listen to reasonable discussion by the other jurors?

A. Yes, sir.

Q. And will you, by your verdict, endeavor to do justice in the case?

A. I will try to do justice.

Q. Is there anything in your state of mind which would preclude you from doing justice by your verdict?

A. No, sir.

Q. If, after you hear all the evidence in the case, you are satisfied from the testimony that these defendants are guilty of murder in the first degree, you feel that you are satisfied that by the evidence it establishes that in your mind beyond a reasonable doubt, will you pronounce that in your verdict?

A. Yes, sir.

Q. Would you have any fear or hesitation in finding Buchalter, Capone and Weiss guiity of murder in the first degree if the evidence satisfies you of their guilt beyond a reasonable doubt?

A. No, sir.

By Mr. Turkus:

Q. Mr. Brill, are you any relation to Judge Brill?

[fol. 1915] A. No, sir.

Q. What do they call that section in Decatur Street?

A. Bushwick.

Q. Have you lived there for a number of years?

A. About twenty-two years.

Q. Is Jefferson Avenue in the Bushwick section?

A. Yes, sir.

Q. Is there any occurrence which took place in the neighborhood of Jefferson Avenue fresh in your mind?

Mr. Barshay: I object.

Mr. Turkus: I withdraw it.

Q. (The Court): Near what street is that?

A. Between Bushwick and Evergreen Avenue.

Q. (The Court): That is a traffic street right there that takes traffic off Cooper Avenue?

A. I believe so.

By the Court:

Q. Cooper Avenue goes out to Queens?

A. Yes, sir.

By Mr. Turkus:

Q. Are you married?

A. Yes, sir.

Q. Do you reside with your wife and family?
A. Yes, sir.
Q. Is this a private house you live in?
A. A two-family.
Q. I believe as I went down the line discussing vocations that you told me you were a contractor in business for yourself.
A. Yes, sir.
Q. What is it you do?
A. The last five or six years I have been doing reconditioning work for the H. O. L.
[fol. 1916] Q. What did you do before that?
A. General contractor, electrical contractor.

By the Court:

Q. What is the name of your firm?
A. Phil Brill.
Q. What is the address?
A. 1070 Decatur Street.
Q. I mean the business address.
A. I operate from my own home.
Q. The name you use as a contractor is your first or last name?
A. Phil, for short.
Q. I thought it was a trade name.
A. No.

By Mr. Turkus:

Q. Did your business in the past bring you in contact with electrical unions?
A. No, sir.
Q. Do you have any contacts now with any officials in any unions in the building trade?
A. No, sir.
Q. Did you hear me discuss with the other jurors about any contract or connections with any union officials, unions in the garment trade or clothing truckers—does that apply to you? Have you any connection whatsoever with them?
A. No, sir, not with me.
Q. Or with someone else?
A. I know some people in the garment district.
Q. Who are manufacturers of clothing?
A. Yes, sir.

Q. Do you know many of them?
A. I know one.
Q. What is the name?
A. Rosenthal.
[fol. 1917] Q. Do you know where his place is?
A. No, sir.
Q. Has he a trade name under which he manufactures garments?
A. Well, he works as partners—some special partnership, I think, I am not sure.
Q. Do you know a Mr. Edelstein?
A. Yes, sir.
Q. He was a partner of Rosenthal's.
A. Yes, sir.
Q. Do you know other people who manufacture clothes in the district?
A. Yes, sir.
Q. Do you see them socially?
A. No.
Q. After the investigation of Mr. Dewey commenced in the district in connection with certain people in the garment business, did you read about it?
A. I might have. It is not clear in my mind.
Q. Did you hear anything discussed by anybody about the Dewey investigation, any of your acquaintances in the garment district?
A. No, sir.
Q. Did you ever hear any discussion at all by anyone about the Dewey investigation?
A. It is so long back I don't recall it now.
Q. Did you, more recently, when the O'Dwyer investigation began, hear any discussion about that investigation?
A. No, sir.
Q. Since you received your jury notice did anybody, particularly any of these people you know in the garment district, speak about the names of Lepke or Gurrah?
A. No, sir.
Q. Did you ever hear the defendants' names mentioned?
[fol. 1918] A. Yes, sir, not Gurrah, but Lepke.
Q. Was it in conversation with people you knew in the garment district?
A. No, sir.
Q. With others?
A. Yes, sir.

Q. Was it by way of newspaper reading?

A. It might be.

Q. Is there any impression in your mind about a man who bears the name of Lepke?

A. What impression?

Q. Have you an impression in any respect about him from what you have heard or read?

A. I know of Lepke.

Q. Do you have any impression of him that is detrimental to him?

A. Not in this case.

By the Court:

Q. Are you active politically?

A. No, sir.

Q. Doesn't Bernard Christ, Jr. have a building at that corner?

A. That is on Schafer and Bushwick.

Q. He owns that building. Now, did you do any business with him in connection with reconditioning?

A. No, sir.

Q. He does a Federal loan business.

A. I have not any contact with him.

By Mr. Turkus:

Q. Do you get your busneiss through banks?

A. Through the last five or six years it has been from loan associations; I am on their list.

Q. Do I understand it correctly—this is a matter of curiosity—the Home Owners' Loan sends you certain work [fol. 1919] to bid on and you bid, with others, on the building work that the Home Owners' Loan wants done, by way of repair work and reconditioning?

A. Yes, sir.

Q. Do you see people who have business in the garment district frequently?

A. No, sir.

Q. These people you do know socially, do you visit at their homes?

A. One belongs to the family circle, and I see him perhaps every two months.

Q. Do you know any people who reside in the Brownsville or East New York areas?

A. Yes, sir.

Q. Do you know them socially?

A. My brother lives there, and my aunts.

Q. Have they lived there for a number of years?

A. Yes, sir.

Q. What part of that section does your brother live in?

A. On Hendrix Street.

Q. Where does you aunt live?

A. She lives there.

Q. Do you know the nearest cross-street to that?

A. I believe it is Blake Avenue.

Q. Is Blake Avenue and Hendrix Street near Blake Avenue and Sutter?

A. It is not far.

Q. Is the name of Harry (Pittsburgh Phil) Strauss familiar to you?

A. No, sir.

Q. Or that of Martin (Buggsy) Goldstein?

A. No, sir.

Q. Or Abe Reles?

A. No, sir.

Q. Did you read anything about the Rosen murder when [fol. 1920] it occurred in 1936?

A. No, sir.

Q. Did you hear the names of any of the defendants discussed by anybody in the Brownsville or East New York area when you were in that district visiting?

A. No, sir.

Q. Do you know where Livonia and Sackman Streets are?

A. Yes, sir.

Q. Livonia and Saratoga Avenues?

A. Yes, sir.

Q. Is your mind clear about the candy store on Saratoga and Livonia Avenue?

A. No, sir.

Q. Have you been in such a store?

A. No, sir.

Q. Do you know where the Interboro and the B. M. T. station is at VanSinderin Avenue, particularly where they have a railroad passover?

A. Yes, sir.

Q. At any time while you were in that area, particularly since you received your notice, did anybody mention the

names of any of the defendants or any persons who were under investigation by Judge O'Dwyer?

A. No, sir.

Q. Is that impression of the man known as Lepke still in your mind—you said it did not go to his guilt or innocence in this case, I think—but whatever impression you had, is it still in your mind?

A. In what respect?

Q. Whatever the impression is, is it presently in your mind and have you retained that impression—have you had it for some time back?

A. Yes, sir.

Q. Having had it for some time back, is it still with you? [fol. 1921] A. Yes, sir.

Q. Did you hear my discussion with Mr. Butler and Mr. Stephens, that discussion we had about accomplice testimoney? Is there anything that they have said to me or I have said to them about accomplice testimony that you find different?

A. No, sir.

Q. I presume you have a state of mind in which you understand that even a bad man can tell the truth?

A. Yes, sir.

Q. You have no bias or prejudice either against the prosecutor or the prosecution for using or accepting that kind of testimony?

A. Correct.

Q. In other words, you find no fault with the prosecutor who, in endeavoring to solve a murder, accepts the testimony of an accomplice?

A. No, sir.

Q. Will you, in applying all the tests that the Judge will give you to apply, apply the rule of caution, care, and suspicion, keeping in your mind uppermost that your job as a juror is to ascertain, Does this accomplice tell the truth about the participation of each of these defendants in a murder case?

A. Yes, sir.

Q. And will that be your job if selected?

A. Yes, sir.

Q. Do you believe, as they do, that it is not a question of whether we like or dislike an accomplice, it is a question of whether or not he speaks the truth as to the Rosen murder?

A. That is right.

[fol. 1922] Q. As has been pointed out by Mr. Buchalter's lawyer, if it should appear from the testimony that Buchalter is also known as Lepke, and that he has been convicted of other crimes and is presently paying the penalty for these illegal acts, would you relax your duty as a juror to ascertain his guilt or innocence on this charge?

A. No, sir.

Q. Would you deviate from a proper result?

A. No, sir.

Q. Will you, in considering his guilt or innocence of this charge, exclude from your mind that he is paying a penalty for other offenses?

A. Yes, sir.

Q. If accepted as a juror, you will find out, Is he guilty of this murder too? Do you understand that?

A. Yes, sir.

Q. It has been pointed out by Mr. Barshay that he was guilty of other offenses—I do not want you to do anything to prejudice his rights, but will you give him every reasonable right and safeguard under the law?

A. Yes, sir.

Q. By the same token, I don't want you to give him any sympathy, because he is entitled to no sympathy for having committed other offenses for which he is in jail; you understand that?

A. Yes, sir.

Q. In other words, if you are accepted, can The People of The State of New York understand that you will render a verdict that will be a just verdict?

A. Yes, sir.

Q. A verdict that will reflect justice?

A. Yes, sir.

Q. With respect to the allocation of evidence, that may be a legal form which you may or may not be familiar with—[fol. 1923] the Judge will give you rules of law on the evidence in which he will say that a certain piece of testimony will apply to a certain defendant—you do not prove a case through one witness—one witness may speak about the act of a single defendant and under the instructions of law that obviously can be applied only to that defendant about whom the witness speaks?

A. That is right.

Q. It may be, in the course of the testimony, that one or more of the witnesses may, in their testimony by common sense obviously apply to each and every defendant in the case.

Mr. Barshay: I object.

The Court: After all, isn't that a question that is properly for the defense?

Mr. Turkus: I want to find out because of a statement of the allocation of evidence where under the law you give them rules to apply.

The Court: It is not practical to question jurymen even on the basis of a hypothesis. The most the juryman should be obliged to state is whether he will take the law from the Court and apply it as to the facts.

Q. In other words, if you are a juror in the case, will you use common sense and understanding in applying the rules of law that the Judge gives you to the testimony which you hear in court?

A. Yes, sir.

Q. Will you use common sense and understanding in [fol. 1924] finding out the sole issue in the case—there is only one thing to find out?

A. Yes, sir.

Q. Are these defendants and each and every one of them guilty of murder as charged in the indictment?

A. Yes, sir.

Q. Will all of your faculties be devoted to ascertaining that—are they guilty of this murder or are they innocent of this murder?

A. Yes, sir.

Q. Is there anything concerning which I failed to make any mention or recieve any response from you because I did not question you about it, that would go to your ability to render justice in this case?

A. No, sir, I know Phil Kapakov, who was an accountant for Buchalter.

Q. Is he one of your close friends?

A. He was in the same lodge.

Q. When you say "lodge," is that some fraternity?

A. Yes, sir.

Q. Are you still members of that fraternity?

A. No, sir, I have not seen him in years.

Q. At the time you knew this man Kasof——

A. Kapakov, Philip.

Q. Did you have any talks with Philip Kapakov abou Buchalter?

A. No, sir, he worked for Buchalter.

Q. Do you know whether he is presently his accountant?

A. No, sir, he may be.

Q. Do you know whether or not he is connected or has anything to do with some clothing concern in Baltimore?

[fol. 1925] Mr. Climenko: I object to that; it has nothing to do with this case.

Mr. Turkus: The juror has told me in all frankness when I asked him about anything I had not brought out that he was a lodge brother of Philip Kapakov, an accountant for Buchalter.

Mr. Climenko: Eight years ago. My objection goes only to the specific question; it is not binding.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. I don't know.

Q. Did you ever hear of the name of Raleigh Clothes, from Mr. Kapakov?

Mr. Climenko: I object.

Q. Does your lodge meet at the temple?

A. Yes, sir, Masonic, the James W. Huston Lodge.

Q. Did you and Mr Kapakov ever discuss the matter of Kapakov's working for Buchalter?

A. No, sir.

Q. I am puzzled as to how you came to know that.

A. At the time of Kapakov's trial I heard it through my friend—one of my friends,—one of my friends.

Q. How long ago would that be?

A. About three or four years ago.

Q. The reason I ask you is because it is rather unusual for a person to know another person's business connections unless there is something that brings it out rather conspicuously.

[fol. 1926] A. There was a trial in this case in connection with the Buchalter case.

Q. Then it is just a matter of gossip?

A. I believe it was in the newspaper.

Q. That did not influence you in any way?

A. No, sir.
Q. How close are you attached to him?
A. I have not seen him in eight years.
Q. Were you very close then?
A. No, sir, just a lodge member.
Q. I think you have been exceedingly frank in directing it to my attention, Mr. Brill. Is there anything about that association that you have had, which you have explained, only as a lodge brother, that would prevent you from rendering a just verdict, that would be just to the People of the State of New York and to the defendants?
A. No, sir.
Q. You can render a fair verdict?
A. Yes, sir.
Q. You can be fair and just to your duty as a juror if accepted?
A. I can.
Q. Then we can go along with the understanding there is nothing I failed to bring out by questions which would affect your ability to render a fair, just, and true verdict in this case based upon your oath of office, if selected?
A. Yes, sir.

JOSEPH J. FLANAGAN, a talesman, was examined as to his qualifications.

[fol. 1927] By Mr. Turkus:

Q. They list you as living on 16th Avenue.
A. Yes, sir.
Q. Is that the part they call Bath Beach?
A. I think that is known as Maplewood.
Q. That is in Brooklyn?
A. Yes, sir.
Q. Is that 64th Street?
A. Between 64th and 65th Street on 15th Avenue.
Q. Have you lived there for years?
A. Two years.
Q. Before that where did you live?
A. 101 Lafayette Avenue, downtown.
Q. Had you lived in that section for some time?
A. One year.
Q. Before that where did you live?

A. Bay Ridge, 445 Fifty-first Street.

Q. Do you reside with your family?

A. Yes, sir.

Q. Your business is listed as electrical. By whom are you employed?

A. The Public Service Electrical.

Q. Have you been employed there for some time?

A. About four years.

Q. Prior to that what did you do? Electrical work?

A. I was employed by the City department.

Q. I take it your work requires some sort of special or [fol. 1928] preliminary training?

A. Yes, sir.

Q. You have had that preliminary training?

A. Yes, sir.

Q. I don't suppose you have had any contact by way of business or otherwise with the needle or clothing trade, or the clothing truckers' business?

A. No, sir.

Q. Or that you have ever had any?

A. No, sir.

Q. With respect to any individuals who do business in those districts or in those industries, have you had any contact or do you know any?

A. No, sir.

Q. Including the Brownsville or East New York section?

A. No, sir.

Q. Or the Brooklyn waterfront?

A. No, sir.

Q. (Addressing Talesman Brill.) I forgot to ask you about the Brooklyn waterfront.

A. No, sir.

(Examination of Mr. Flanagan continued by Mr. Turkus.)

Q. May we go along, Mr. Flanagan, with the understanding, you know none of the officials connected with any clothing industry or any clothing trucking industry?

A. Yes.

Q. You have not had contact of any kind, nature, or description, either in the industries or districts we have described?

A. No, sir.

Q. I take it that you are in sympathy with law enforcement?

A. Yes, sir.

Q. Since receiving your notice, has anybody spoken to you about the case?

A. Just casually, nothing in detail.

[fol. 1929] Q. Were those casual discussions in reference to prospective service on a jury which may take time, if selected, in connection with your employment or home, or was it some other discussion?

A. At home.

Q. Was that in regard to prospective service?

A. Well, yes, not in detail, just a casual remark, more or less in a joke, about public service.

Q. At any rate, since you received your notice, nobody has tried to tell you anything about the defendants or anything about the case?

A. No, sir.

Q. I have mentioned the names of nine lawyers representing these defendants. Do you know any of them or anyone connected with the practice of law?

A. No, sir.

Q. Do you know the District Attorney, I mean Mr. O'Dwyer, personally, or any member of his staff?

A. No, sir.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. No, sir.

Q. Have you served before?

A. 1920.

Q. Was that in a civil case?

A. A civil case.

Q. You have had no experience in criminal cases?

A. No, sir.

Q. Will you, as the other prospective jurors indicated they would, take the law exclusively from Judge Taylor in every aspect of the case?

A. Yes, sir.

Q. Will you endeavor, conscientiously, to apply the law that Judge Taylor gives you to the facts in this case?

[fol. 1930] A. Yes, sir.

Q. Will you endeavor, conscientiously, to ascertain by your verdict, are these defendants guilty or are they innocent of the crime charged in the indictment?

A. Yes, sir.

Q. Now, did you hear the talk about accomplice testimony which we had?

A. Yes, sir.

Q. Do you differ with any of the three gentlemen who have been questioned before you in any of their answers?

A. No, sir.

Q. If I questioned you would you make substantially the same answers?

A. Yes, sir.

Q. You understand the test to be applied to ascertain whether or not accomplices tell the truth to the part that each defendant played in the commission of the crime?

A. Yes, sir.

Q. It is not whether we like or dislike accomplices, but, is he telling the truth? We are here to find that out.

A. Yes, sir.

Q. Your state of mind is such that you appreciate even a bad ma non occasions can tell the truth?

A. Yes, sir.

Q. And you have no bias or prejudice against the prosecutor or against the prosecution of an indictment where a murder is broken from the inside and the testimony of accomplices is accepted?

A. That is right.

Q. If accepted will you use all of your mental faculties to find out is the accomplice in this case telling the truth about a group or combination, the participation of these [fol. 1931] defendants and himself, in murder?

A. Yes, sir.

Q. There will be certain rules of law given you by Judge Taylor with respect to the burden of proof, the presumption of innocence, the fact that the defendants need not take the stand, and if they do not no unfavorable inference may be drawn against them, and other rights that every defendant in a criminal case must have. You see, the law is that whether a man is rich or poor, weak or strong, no matter what his station in life may be, when he is at the bar of justice on a criminal charge there are certain rights and safeguards the law says every person accused of crime must have.

A. Yes, sir.

Q. When the Judge tells you what those things are, will

you use your common sense and understanding in applying those principles to this case?

A. Yes, sir.

Q. And give each defendant the benefit of every law in the land that they should have?

A. Yes, sir.

Q. Will you bear uppermost in your mind at all times that our inquiry here of the jury is to find out whether the three defendants are guilty or innocent of murder?

A. Yes, sir.

Q. No man is guilty until the jury finds him guilty beyond a reasonable doubt, you understand that?

A. Yes, sir.

Q. Do you understand we do not speculate as to a man's rights in a criminal case—the duty is on the District Attorney by evidence to establish guilt beyond a reasonable doubt?

A. Yes, sir.

[fol. 1932] Q. Do you understand, when I put the questions to you that your job is to find out, are these three defendants guilty or innocent?

A. Yes, sir.

Q. You have no misunderstanding about that?

A. No, sir.

Q. It has been pointed out by Mr. Rosenthal that his client is here to meet only one accusation charged in this indictment, you understand that?

A. Yes, sir.

Q. And by the same token do you understand that the duty of the District Attorney is co-extensive only with that to establish guilt beyond a reasonable doubt of the murder charge in this indictment, and that is all?

A. Yes, sir.

By the Court:

Q. You are just off the Borough Park section?

A. Just about, yes, sir.

Q. You are between Borough Park and that section where the Street Cleaning Department has a stable or a barn—the Street Cleaning Department garage is on 60th Street and 16th Avenue, and you are on 64th?

A. Yes, sir.

Q. What street is that?

A. That crosses 60th Street at about 16th Avenue; there is the Culver- there and the freight line runs underneath.

Q. New Utrecht Avenue crosses diagonally in the immediate neighborhood?

A. It crosses 16th Avenue at about 71st Street I think.

Q. And the section I speak of begins around 71st Street? [fol. 1933] A. Yes, sir.

Q. That is the Street Cleaning Department plant?

A. Yes, sir.

Q. You are an electrical designer for what?

A. Public Service Companies and the Electric of Newark, New Jersey.

Q. How long have you been connected there?

A. The present employment I have been for four years; prior to 1931 I was seven years there.

Q. That is the Newark office?

A. Yes.

Q. That is a very big job you have?

A. I am responsible for designing, especially now that the business program is springing up over night.

The Court: Do not start that; I am only trying to measure your qualifications as to the making of a good juror.

By Mr. Turkus:

Q. You are to be charged as to the law, either in words or substance, that there can be no conviction upon the unsupported testimony of an accomplice, no matter how believable that testimony may be.

A. Repeat that.

Q. You may be charged by the Court that that is the law, that even though you believe everything an accomplice says, if that was the only evidence in the case the Judge would direct you that you would have to acquit the defendants.

A. Yes, sir.

Q. Would you follow the instructions on the law? Should the Judge tell you there can be no conviction on the unsup- [fol. 1934] ported testimony of an accomplice, will you accept that?

A. Yes, sir.

Q. And the Judge will also tell you in words or substance—he may not use the same language as the prosecutor does—but should he tell you that corroboration of unsup-

ported evidence need not go to every single point of the accomplice's testimony—do you follow me?

A. Yes, sir.

Q. And that it may be found to be sufficient by the jury if the supporting evidence is believed and if it tends to connect the defendants with the commission of the crime?

A. Yes, sir.

Q. If he tells you that, will you endeavor to apply that instruction of law to the facts in this case?

A. I will.

Q. As I discussed with the other lawyers, you may or may not hear arguments by them in their summation—May I understand as I go along, if you hear the same argument repeated three or more times, it is still only one argument?

A. Yes, sir.

Q. And it does not deprive any defendant of separate consideration of the facts; under the jury system where a crime is charged to have been committed jointly, the men charged with the commission of the crime are tried together; nevertheless, the Judge will instruct you that each one has a right to have a separate consideration of the facts as they apply to him, at the hands of the jury?

A. Yes, sir.

Q. Will you use the rules of law the Judge gives you as to the application of the testimony as against the defendants, whether it applies to one, two, or three?

A. Yes, sir.

[fol. 1935] Q. Is there anything I failed to bring out by questioning which would go to your ability to be a fair juror, to render a verdict that will do justice?

A. I have read some articles in the paper prior to my coming as a juror.

Q. Let me tell you this, as you are seated here, do you understand now that the burden of proof is upon the District Attorney to establish guilt beyond a reasonable doubt?

A. I do.

Q. To establish guilt in a criminal case, it is the burden of the District Attorney to establish that guilt by believable evidence in court?

A. Yes, sir.

Q. Of course, I take it you understand that no District Attorney will take a newspaper or the words in a newspaper, and submit them to you or to a jury, in lieu of proof?

A. That is right.

Q. I take it you understand, at least, if the Judge charges you, that a defendant has no burden in a criminal case to establish anything—he does not have to prove his innocence—the burden is upon the District Attorney to establish guilt beyond a reasonable doubt—you will have no difficulty in following that?

A. No, sir.

Q. Let me go a step further. The People of the State of New York and the defendants on trial here are entitled to have the case disposed of only on the evidence in the court-room.

A. Yes, sir.

Q. Not on any outside consideration, either of sympathy [fol. 1936] or prejudice—that would not be fair—you have to prove the guilt of the defendants by evidence.

A. Yes, sir.

Q. You have worked—I think you discussed with the Judge the type of work you have been doing.

A. Yes, sir.

Q. You have been doing that type of work for a number of years?

A. Yes, sir.

Q. Have you that kind of a mind—I do not want to be offensive—have you that kind of a mind that you can lay aside impressions you got in the newspapers and do your job as a juror in this case and decide the guilt or innocence on what you hear in the court-room?

A. Yes, sir.

Q. Should I satisfy you by evidence in the case that there are three guilty men in this court-room, Capone, Buchalter, and Weiss, will you say so in your verdict?

Mr. Barshay: Will you include "beyond a reasonable doubt"?

By Mr. Turkus:

Q. Beyond a reasonable doubt.

A. Yes, sir.

Q. You know when I am talking to you I mean "guilty beyond a reasonable doubt"—no speculation or wish—it is something you have to have in your mind from the evidence to satisfy you beyond a reasonable doubt.

The Court: Will the juror follow the instructions of the Court as to what is meant by a reasonable doubt?

The Witness: Yes, sir.

Q. In talking to you, I mean, if you are satisfied, under [fol. 1937] the instructions on the law, that the District Attorney has met the burden and established their guilt beyond a reasonable doubt, will you say that in your verdict without any fear or hesitation?

A. I will.

Mr. Turkus: I understand several of the men in the jury box would like a five-minute intermission so they can attend to certain matters.

The Court: We will take a ten-minute recess. The defendants are remanded. Let the jury pass out first.

(At 11:40 a. m. a ten-minute recess was taken. The tentative jurors and talesmen were admonished as to their demeanor.)

After Recess—Trial Resumed—(12 noon)

(The jury and the defendants returned to the court-room and the questioning of Mr. Flanagan was resumed.)

By Mr. Cuff:

Q. In passing, I just want you to understand that I am interested in one of these three defendants, that is, Emanuel, Weiss, so I just want to question you as to him. I think I understood you to say, in answer to one of the questions asked you, that you had an impression, that you thought you could disregard it if evidence of proper weight were submitted.

A. Yes.

Q. You had that impression ever since you sat in court, fol all the time you sat in court, as I understand?

A. Yes, sir.

Q. And this impression is unfavorable to the defendants, [fol. 1938] or some of them, I assume?

A. Slightly. I would not say detrimental.

Q. It is an impression you gained from reading articles in the paper?

A. Yes.

Q. How long would you say you have held that impression?

A. Before receiving my jury summons.

Q. How long would that be?

A. About three months.

Q. It is still in your mind?

A. Slightly, yes, sir.

Q. It is one which you said yourself you would require evidence of proper weight to remove?

A. Yes, sir.

Q. Of course, you know that we are here to inquire as to the frame of mind of each one of the jurors selected.

A. Yes, sir.

Q. Now, might I ask which one of the papers or what papers you read?

A. The Journal-American as a rule, the Eagle, and The Mirror, which I pick up sometimes at home.

Q. Only once?

A. Only once or twice.

Q. You read the article in The Mirror?

A. I read the articles casually.

Q. Mr. Flanagan, I asked you if you read the articles in the Mirror.

A. Yes.

Q. Did they help to form this impression you have?

A. Yes.

Q. There were special articles that related to this particular case, weren't there?

A. They were.

Q. These articles helped you form this unfavorable impression you have which you referred to in your answer to [fol. 1939] Mr. Turkus?

A. Yes.

Q. So, if selected in this case as a juror, you will have to have evidence to remove that unfavorable impression, will you not?

A. I believe I will.

Q. That is your honest impression?

A. Yes, sir.

Mr. Cuff: Challenge for cause.

The Court: Try the challenge.

JOSEPH J. FLANAGAN, residing at 6407 Sixteenth Avenue, Brooklyn, New York, No. 2822, was then sworn and examined on the challenge by Mr. Cuff and testified as follows:

By Mr. Cuff:

Q. Before you were sworn I asked you certain questions and you made answers to them.

A. Yes, sir.

Q. Would your answers to those questions be the same if I propounded them to you again now that you have been sworn?

A. Yes, sir.

Mr. Cuff: I press the challenge.

By Mr. Rosenthal:

Q. You have been sitting in the court-room here off and [fol. 1940] on listening to remarks both by counsel for the People and for the defendant?

A. Yes, sir.

Q. In respect to the law as it exists now?

A. Yes, sir.

Q. You have heard the Judge on a number of occasions instruct or state to the jury what the law of our State is?

A. Yes, sir.

Q. Notwithstanding that fact, the answers which you made to Mr. Cuff were true and correct as to your present frame of mind?

A. Yes, sir.

Q. And your present frame of mind is such that your impression or opinion goes to the guilt or innocence of the defendants in this case here?

A. Yes, sir.

Q. That is due to the fact that you have read articles of a nature that were addressed to the guilt or innocence of the defendants in this trial?

A. Yes, sir.

Q. There isn't any question that is your honest state of mind?

A. Honest state of mind.

Mr. Barshay: No questions.

By Mr. Turkus:

Q. Mr. Flanagan, you said in response to Mr. Cuff's questions that you read the *Mirror* once or twice?
A. Yes, sir.
Q. Did you say you read the article casually?

Mr. Rosenthal: I object to the leading of this witness and putting the answer in his mouth.
The Court: Objection sustained.
[fol. 1941] Q. What did you do—did you say in response to Mr. Cuff's question that you read the articles in the *Mirror* casually and did not digest them?

Mr. Cuff: That is objected to as leading and suggestive.
The Court: Is that your understanding of the examination?
Mr. Turkus: Yes, he said that to Mr. Cuff.

By the Court:

Q. Was that your answer?
A. It was. Mr. Cuff stopped me.

By Mr. Turkus:

Q. Mr. Cuff stopped you when you said yes and you wanted to go into details?
A. Yes, sir.
Q. What were the details you wanted to go into?

Mr. Cuff: I object.
The Court: Overruled.
Mr. Cuff: Exception.

Q. Tell me what you wanted to say.
A. I was going to say I did not go into details enough in the article to have a substantial effect on my impression.

By the Court:

Q. Was it concerning a murder case?
A. I believe it is.
Q. Do you recall definitely whether it did or not?
A. Not definitely, no.
Q. Are you anxious to get off the jury because of business?
A. No, sir, that impressed my opinion, but I could

[fol. 1942] dispel my impression and have willpower enough to give a fair decision in the case.

Q. It had no bearing on the trial of this case?

A. No, sir.

By Mr. Turkus:

Q. I believe you started to tell your lawyer—stop me if I am not right—you did not read enough of the *Mirror* article to form any impression at all.

A. No, sir.

Q. Is that true?

A. That is true.

Q. You were referring to something else you read—did you read something else?

A. As I say, I did not read it in detail; I am not sure whether it had to do with this case or not.

Q. Whatever reading you had is so hazy in your mind you don't remember whether it mentioned the Rosen case or not?

A. No, sir.

Q. There is nothing you have read in the *Mirror*, at least that you can recall, that had anything to do with the Rosen case?

A. No, sir.

Q. That, of course, you understand, is the charge that we are trying here?

A. Yes, sir.

Q. The murder of Rosen?

A. Yes, sir.

Q. Did I understand you correctly when you said to Mr. Cuff that you had read some articles in the New York *Journal-American*?

A. Yes, sir.

Q. Were those articles that dealt with the life of [fol. 1943] Judge O'Dwyer?

A. Yes, sir.

Q. What articles you read, they were confined to the career of Judge O'Dwyer?

A. No, I know there were some besides that.

Q. Ones besides the career of Judge O'Dwyer, that is, his rise from his coming to this country and about offices he has held, did they have anything to do with the Rosen case?

A. They did make reference to it, yes, sir.

Q. Do you recall whether or not the name of any defendant was mentioned in the article you read?

A. Yes, sir, I believe it was.

By the Court:

Q. Mr. Flanagan, this has not been brought out: Is that an opinion or is that an impression?

A. Well, I would say it is an impression.

Q. Have you formed an actual opinion as to the guilt or innocence of any of the accused?

A. No, sir.

Q. Is the impression one that you can say with absolute confidence you can thrust aside—not that you can forget it—that you can thrust aside and disregard in the trial of this issue?

A. Yes, sir, I can answer that I can dispel it.

Q. It is important to know for sure whether you absolutely will dispel it.

A. I believe I have the willpower.

Q. Not "believe"; "believe" implies an uncertainty.

Mr. Rosenthal: May I object to any further inquiry [fol. 1944] upon the ground that the juror has said three times, both in answer to Mr. Cuff, myself, and your Honor, that he only "believes," which implies a doubt, and where there is a doubt, I submit there should be a challenge for cause sustained.

The Court: If it is only a belief——

Mr. Rosenthal (interrupting): He said that both to Mr. Cuff, myself, and Mr. Turkus, and to your Honor.

Q. Is it only a belief, or are you sure?

A. As I say, I am sure I have the willpower to dispel it.

Q. Are you sure you will exercise that willpower and dispel it in the trial?

A. Yes, sir.

Q. And disassociate it from your consideration of the evidence in this case in deciding the issue?

A. Yes, sir.

Q. And not let it influence you in any way whatever?

A. Yes, sir.

Q. Will you give us your word on that?

A. Yes, sir.

Mr. Cuff: He said he would dispel it if he had evidence of proper weight.

The Court: Yes, there is another point. Mr. Turkus is not finished.

By Mr. Turkus:

Q. Do you recall in our discussions that we had that the defendant has no burden to submit any evidence?

A. Yes, sir.

Q. Have you got the intelligence and the willpower that [fol. 1945] you can put aside the impression you gathered completely from your mind and decide the case upon the evidence in the case?

A. Yes, sir.

By the Court:

Q. But you said, counsel recalls, that you would require evidence to dispel the impression. Would you require evidence in order to enable you to use your willpower to thrust aside the impression?

Mr. Barshay: I object.

A. No, I don't think I would require——

Q. Not what you think, that implies a doubt, but do we have your word on that point?

A. Yes, sir.

Mr. Cuff: May I have a ruling on my objection?

The Court: Objection overruled.

Mr. Cuff: Exception.

By Mr. Turkus:

Q. Will you take the impression out of your mind completely and disregard it completely without any evidence being presented?

A. Yes, sir.

Mr. Barshay: I object to inquring any further.

The Court: Objection overruled.

Mr. Barshay: Exception.

By Mr. Rosenthal:

Q. First you were questioned by Mr. Turkus.

A. Yes, sir.

Q. When he questioned you you had in mind that you [fol. 1946] were seated here—when he questioned these other four men?

A. Yes, sir.

Q. You heard him ask different propositions of law of those men?

A. Yes, sir.

Q. You followed carefully what he had said?

A. Yes, sir.

Q. You had heard, previous to your coming in the box, the Judge say on innumerable occasions that the defendant never has to prove his innocence?

A. Yes, sir.

Q. That that presumption of innocence was always with him?

A. Yes, sir.

Q. That he never even had to take the stand or offer evidence?

A. Yes, sir.

Q. And all those things that have been discussed since you have been here as a juryman?

A. Yes, sir.

Q. Notwithstanding that fact, when you were first questioned by Mr. Turkus is it not a fact that you said that you had read articles in the paper prior to receiving your jury summons—that you had read the *Journal-American*—that you had read the *Mirror*, which your wife brings to the house and which you pick up—one or two articles relating to this crime? Isn't that what you told Mr. Turkus?

A. Yes, sir.

Q. Now then, didn't you say that you "think" you could dispel that impression with evidence of a proper weight?

A. Yes, sir, I said that.

[fol. 1947] Q. And when you said that you had in mind the fact that the defendants need never prove anything, didn't you, in an ordinary case where a man's mind is free of opinion?

A. I did lose sight of that fact at the time I made the statement.

Q. When you were next asked by Mr. Turkus did you then say that you "believed" that you could dispel the impression?

A. I meant I thought I had the willpower.

Q. You "thought" you had?

A. Yes, sir.

Q. That implied a doubt, didn't it?

A. Well, I guess everybody has some doubt to some extent of their willpower.

Q. I just want to get your state of mind. That implied a doubt when you answered that question, isn't that true?

A. It may have to a slight degree.

Q. Then Mr. Cuff questioned you, you recall, and when he questioned you you used the word again that you "thought" you would be able to dispel, didn't you?

A. Yes, sir.

Q. That implied a doubt also, didn't it?

A. I suppose so.

Q. Did it, that was your frame of mind?

Mr. Turkus: I object to the question as ambiguous.

Mr. Rosenthal: I will withdraw it.

Mr. Turkus: I don't care whether you withdraw it or not, I object to the question.

Mr. Cuff: I object to that statement in view of the fact that the question has been withdrawn.

The Court: The question has been withdrawn.

[fol. 1948] Q. When you used the word you "thought," that you "thought" you would be able to do something, did you imply that there was a doubt by the use of the word you "thought" you would?

Mr. Turkus: I object. May I argue the point?

The Court: Overruled.

Q. Is that right?

A. Yes, sir.

Q. Then I got up and questioned you?

A. Yes, sir.

Q. And when I questioned you I also asked you in respect to this impression you had whether it went to the guilt or innocence of any one of the defendants in this case, and you said it did, isn't that right?

A. I said, "Slightly," yes, sir.

Q. Well, "slightly" meant that it did go somewhat to the guilt or innocence of the defendants in this case; isn't that right?

A. Yes.

Q. Then again, when you said that, you were questioned by the Court, and to the Court you said you did not "think" you'd need evidence to remove this opinion. Do you recall saying that to the Court?

A. Yes, sir.

Q. You do recall saying to the Court, using your own words, "I don't think I need evidence"?

Mr. Turkus: I object.

The Court: Objection overruled.

A. Well, I expressed the fact I thought I had the will [fol. 1949] power to dispel it and throw it out.

Q. I am not finding fault with you, but when you said again you "thought" to the Court, you still implied a doubt by the use of the word "thought," didn't you?

A. I suppose so.

Mr. Turkus: I object.

The Court: Objection overruled. This is losing too much time.

Q. You said you "suppose," that is what you said?

A. I suppose it contained an element of doubt.

Q. That was the state of your mind when you were first questioned by Mr. Turkus, when you were questioned by Mr. Cuff, when you were questioned by myself, and when you were questioned by the Court?

A. That is right.

By Mr. Turkus:

Q. Have you got any doubt in your mind now about your ability to lay this impression aside and try the case on the evidence?

Mr. Rosenthal: I object.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

Q. That is my question. Consider it carefully. Have you any doubt as to your ability to lay aside any impression and consider this case on the evidence?

A. I have the willpower to lay aside any impression I have.

Q. Will you do it if you are taken as a juror?

A. Yes, sir.

[fol. 1950] The Court: Challenge overruled.

Mr. Cuff: Exception.

Mr. Rosenthal: Exception to all defendants.

The Court (Addressing talesman): Step back in the jury box.

(Mr. Butler was then examined as to his qualifications.)

Q. Have you discussed this case with anybody prior to your selection or entrance into the jury box?

A. No, sir.

Q. Have you read aaything in the papers about it?

A. No, sir.

Q. Not at all?

A. Not about the case.

Q. What papers do you usually read?

A. The Brooklyn *Eagle*. I get the *News* at night, the next morning's edition.

Q. Have you read anything in those papers about this case before you came to court?

A. No, sir.

Q. Do you read the *Mirror?*

A. Yes, sir.

Q. Have you read any articles in the *Mirror* about it?

A. About the case?

Q. Yes.

A. No, sir.

Q. Did you read the *Mirror* while you were in court here, about the case?

A. No, sir.

Q. Have you read anything in the *Mirror* about the case?

A. I read in the *Mirror* about the case going to trial last August.

Q. Did you read anything in the *Mirror* since August, about the case?

A. No, sir.

[fol. 1951] Q. Are you sure about that?

A. I am positive.

Q. You feel there is no doubt in your mind about that?

A. Absolutely no doubt in my mind about that.

Q. During the time you have been coming to court have you had any discussions?

A. No, sir.

Q. About the case or about the defendants?

A. No. About the case, in business they asked me how long would I be here and different questions, but not pertaining to the merits of the case.

Q. Is that true about the time you have been here recently?

A. That is during the time I have been on the jury here.

Q. Now, Mr. Turkus has asked you many questions about the accomplice situation. Do you recall?

A. Yes, sir.

Q. Did the statement he made with reference to participation of the defendants in the commission of this crime convey an impression to you that they did participate in the crime?

A. No.

Q. And presently, as you sit in the jury box, do you have an impression that they participated in the crime?

A. I have no impression at all.

Q. As you sit there you feel, don't you, that it is incumbent upon the District Attorney, upon The People in this case, to prove beyond a reasonable doubt that the defendants did participate in the commission of this crime?

A. Yes, sir.

Q. And you will insist upon it?

A. Yes, sir.

[fol. 1952] Q. And that is not an idle or unimportant idea in your mind, is it?

A. No, sir.

Q. That is an important rule of law in the case, isn't it?

A. Yes, sir.

Q. If his Honor charges you that the burden is upon The People always, every minute of the time, in this case, until you reach a unanimous conclusion in the case, you will insist upon it?

A. Yes, sir.

Q. You realize, Mr. Butler, that, if selected as a juror in this case, there is a solemn obligation and a grave responsibility resting upon each juror?

A. Yes, sir.

Q. With respect to an examination of the facts in the case?

A. Yes, sir.

Q. And you will accept that responsibility?

A. I will

Q. You will discharge it to the best of your ability under your conscience?

A. I will.

Q. Now, Mr. Turkus has asked you whether you are in sympathy with the enforcement of the penal law of this state.

A. Yes, sir.

Q. And you said, properly, that you are?

A. Yes, sir.

Q. Now, one of the laws of this state is that every defendant charged with the commission of a crime is presumed to be innocent.

A. Yes.

Q. Now, that is a vital and important part of the basic law of this state, and if his Honor should so charge, will you [fol. 1953] give it all of the weight that the law of this State says it is entitled to in behalf of the defendants in this case?

A. Yes, sir.

Q. So I have your assurance that, if selected, when you go into the jury room and up to the time that the twelve of you agree upon a verdict, you will insist that that presumption shall inure to the benefit of the defendants?

A. Yes, sir.

Q. And you will do so?

A. Yes, sir.

Q. Now, should it appear during the course of the testimony or of the trial that the accomplice to which Mr. Turkus referred in his questioning is a man of depraved character and of criminal record, would you consider that in appraising the value of his testimony and the weight to be given to his testimony, as to its credibility and believability?

A. Yes.

Q. Will you consider that?

A. Yes, sir.

Q. With the other facts?

A. Yes, sir.

Mr. Turkus: I object to the form of the question.

A. Yes, sir.

The Court: Objection overruled.

Q. You have answered the question?

A. Yes, sir.

Q. So I will go to another question. Mr. Turkus has asked you, I think, or the other three jurors that have been taken here, whether your state of mind is such that you could believe that a man of bad character might tell the truth.

A. Yes, sir.

Q. Is your state of mind such that you could readily believe a man of bad character could not tell the truth?

A. Yes, sir.

[fol. 1954] Q. And when you find a man of bad character appearing as a witness in the case here, in this case, testifying for The People, you will take his character into consideration in every aspect of the case so far as you are discussing it in the jury room?

A. Yes, sir.

Q. And if you find a man of bad character testifies in this case, you will take that bad character into consideration in appraising his testimony, will you not?

A. Yes, sir.

Q. Now, a reasonable doubt will be defined to you by the Court and you will apply that definition to the case in your deliberation in the jury room, will you not?

A. Yes, sir.

Q. And if a reasonable doubt in this case applies to the defendants or any of them, under the law that his Honor will charge, it is your duty to give the benefit of that reasonable doubt to the defendants—will you do so?

A. Yes, sir.

Q. And when there is—there usually comes a time in this case, after weighing the evidence and giving to it the serious consideration that his Honor will say it is entitled to, you will have reached the point where there is in your mind at least, after you have thought about it in every aspect, discussed it with your fellow jurors—as I say, there comes a point where you yourself have a reasonable doubt as to the guilt or innocence of the defendant or defendants on trial, which you have not been able to dispel by the arguments, and his Honor charges you that in that case it is your duty to [fol. 1955] adhere to it, will you do so?

Mr. Turkus: I object—I withdraw the objection.

A. Yes, sir.

Q. In that case his Honor will charge you, I assume, and I know he will, that it is your duty to give the benefit of

that reasonable doubt that exists in your mind to the defendant or defendants, will you do so?

A. Yes, sir.

Q. Now, Mr. Butler, in appraising the testimony—and I am not referring to accomplices now—of any witnesses in the case, if he has a motive for testifying, will you give due consideration to the motive in the case?

A. Yes.

Q. And if it should appear in this case that there are witnesses here testifying for The People who have committed murders, who have committed robberies, who have committed burglaries, who have committed perjury, and who are not being prosecuted for those actions, will you consider the motive that they may have for testifying here and whether they are testifying falsely, as well as any other witness—will you consider that?

A. Yes, sir.

Q. You will take this ex-robber, burglar, perjurer, into consideration in appraising the weight to be given to the testimony of any such witness?

A. Yes, sir.

Q. And you will take into consideration the hope of reward, the freedom from punishment, that that witness may expect in this case?

A. Yes, sir.

[fol. 1956] Q. And as to any witness in the case, if his Honor should charge you that the expectation of reward or immunity from punishment that attaches to the crime of any witness in the case, if you find that that hope of reward or immunity from punishment attaches to those crimes I have referred to, may be considered by you in your jury room, will you do so?

A. Yes, sir.

Q. As to ascertaining the truth in the case?

A. Yes, sir.

Q. And if you are selected as a juror, Mr. Butler, may I expect that you will give to this case and to each defendant every law, the benefit of every law, in his favor?

A. Yes, sir.

Q. And if his Honor should charge, as I think he will, that each defendant on trial in a criminal case is entitled to the benefit of the presumption of innocence every minute

of the time until there is proof beyond a reasonable doubt of his guilt, will you do so?

A. Yes, sir.

Q. You know that is not an idle thought, and idle presumption; will you give it the weight his Honor says it is entitled to?

A. Yes, sir.

(12:45 P. M.)

Mr. Cuff: May I ask your Honor to adjourn at this time? This is a matter I am asking for myself.

The Court: I understand, yes.

(Addressing tentative jurors and talesmen in the box): Gentlemen, do not discuss the case. Read nothing about it. [fol. 1957] Let no one talk to you about it.

Be back promptly at two p. m.

I want the defendants to remain. Now, the other members of the panel may go until two o'clock.

(After panel has left the room):

The Court: Dr. Nash reports concerning an electrocardiogram report from Rikers Island Hospital concerning the defendant Louis Capone; it is a coronary condition and is not of a serious nature. That he left the hospital of his own volition. This is the Court's comment: Apparently he preferred a cell to the hospital restrictions.

The full communication is under date of October 8th:

"At 1:45 P. M. today I telephoned the medical superin- [fol. 1958] tendent of Rikers Island Hospital and was given the following report on Louis Capone: 'Confined in Rikers Island Hospital in January, 1941; electrocardiogram showed coronary changes, inversion T. waves of second and third ribs. Diagnosis: Coronary disease, not of a serious nature. Did not stay in the hospital as long as he was supposed to. Signed himself out.' "

In view of the statement by Dr. Nash, which is a matter of record, taken in chambers, all counsel being present, that under the authority or alleged authority of the prison physician this particular defendant is carrying on his person a lethal quantity of poisonous medication, meaning a sufficient quantity to enable him to commit suicide at will, and that he carries this, of course, with him, and has it with him while under detention in the cell, the Court asks the clerk to communicate at once with Dr. Nash and request

him to get in touch with the prison physician and state the Court's direction that this defendant shall not be permitted to have on his person at any one time during the progress of this trial any more medication than is necessary for his present needs; that no lethal quantity will be permitted.

Mr. Rosenthal: I ask that the Court records show that whatever the defendant may have on his person—so that [fol. 1959] the record is clear—is medication given to him—he not being a physician—where he has been incarcerated in jail, by the physician in the employ of the City of New York and not in his employ.

The Court: I think that is clear.

Mr. Rosenthal: I want it clearly on the record that whatever he has been taking has been taken under advice of a competent physician employed by the City of New York.

The Court: I don't know as to his competency.

Mr. Rosenthal: He has a certificate to practice the same as we have. We may not be competent, either.

The Court: Whether due to coronary trouble or whether due to mental depression based thereon, if this particular defendant were to commit suicide with the poison now in his pocket, it would reflect on the proper trial of this case. The Court is bound to step in and see that the doctor is requested to limit the quantity to the necessity of the case.

Mr. Rosenthal: The only thing I find fault with and except to is the thought that the idea might be permitted to go out in the newspapers or otherwise that this defendant has any intention at any time to commit suicide, because if he ever had any such intention it probably would have been [fol. 1960] long before now. What he has been doing has been to preserve his life rather than destroy it. That is what I want strictly understood, not that anybody gets an erroneous impression.

The Court: Very well.

Mr. Barshay: We join in that.

(A recess was then taken until 2 P. M. The talesmen and prospective jurors were duly admonished. Defendants remanded.)

Afternoon Session—Trial Resumed

(All defendants represented by counsel.)

(Mr. Cuff examined the talesmen in the box as to their qualifications, as follows):

By Mr. Cuff:

Q. Mr. Butler, I just have a few questions. Now, assuming that you are selected as a juror here, you have heard all the evidence and the summation of counsel, each one seeking to have the inferences drawn that they think justified from the evidence and proof, and you have heard his Honor charge the law, and you go to your jury room knowing that it is your duty to discuss reasonably and rationally the evidence with your fellow jurors, and you do that, and after all that and after giving careful consideration to all of the evidence, having scrutinized the witnesses from their manner of testimony, you reach the conclusion in your mind and [fol. 1961] under your oath and on your conscience that there is a reasonable doubt as to the guilt of these defendants or any one of them, will you by your verdict reflect that reasonable doubt, if his Honor tells you that it is your absolute duty to do so?

A. Yes, sir.

Q. You will have the courage to do so?

A. Yes.

Q. And you will do so, as Mr. Turkus says, without fear, reluctance, or hesitation? I can rely upon that if you are selected?

A. Yes.

Q. And you realize that that question of that reasonable doubt is one that concerns you and you alone; is that right?

A. Yes.

Q. And that once you have reached the conclusion that there is a reasonable doubt out of which you cannot be reasoned by anything based upon the proof in the case, that it is your absolute duty and your right as well to adhere to that view despite the number that may be opposed to you? Do you realize that?

A. Yes, sir.

Q. And you will do so, Mr. Butler?

A. Yes.

Q. Of course, you realize that what we are seeking is twelve men who are going to be fair, conscientious, and honest in the performance of their civic duty as jurors. You realize that?

A. I do.

Q. And you also realize the importance of the obligation you assume when you take your place in a jury in any sort

of a case, particularly in a capital case? You realize that, [fol. 1962] I assume?

A. Yes.

Q. You realize, too, do you not, that no one has the right to question your verdict in this case at any time; is that right?

A. Yes.

Q. I think his Honor will charge you that, and if he does you will be guided by it as you will by every other rule of law that his Honor gives you, will you not?

A. I will.

Q. Now then, if in the wisdom of counsel my client should not take the witness stand, if I should deem it, or Judge Talley and Mr. Kriendler and I deem it, he should not take the witness stand or need not take the witness stand, and his Honor will charge you, as I assume he will, that you cannot and must not draw any unfavorable inference from his failure to take the witness stand and testify, will you be guided by that rule of law just as rigorously and rigidly as you will by every other rule of law that his Honor will give you?

A. I will.

Q. And you will not—I can rely that you will not draw any unfavorable inference against my client if he should elect not to testify under our advice?

A. Yes, sir.

Q. Mr. Stephens, have you read anything about this case at all?

A. Yes, I have.

Q. Was that before you were selected and you got your notice?

A. No, it was before and after August 4th.

Q. Might I ask what papers you read usually?

A. I usually read the *Tribune*, *Times*, *Telegram* and *Mirror*.

[fol. 1963] Q. And I assume, then, that you read whatever appeared in those papers about this case prior to the time you got your notice?

A. Yes, sir.

Q. And then you came down here on August 4th, did you?

A. I was not here on August 4th.

Q. Were you here on August 5th?

A. Yes, sir.

Q. And did you read those same papers after August 4th and August 5th?

A. Yes, I did.

Q. And did you read what appeared in the papers after August 4th and August 5th about this case?

A. Yes, I did.

Q. And that included the *Mirror*?

A. Yes, sir.

Q. And you read everything in the papers about this case that appeared during that period of time?

A. That came to my notice, yes.

Q. There were articles in the *Mirror*. You read them, did you?

A. I read part of the series of articles which appeared in the *Mirror*, yes.

Q. You say you read part of the series. Was it the earlier part or the latter part of the series?

A. I would say to the best of my knowledge I read about seven articles.

Q. In the *Mirror*?

A. Yes, sir.

Q. And they dealt with the defendants in this case, did they not?

A. Yes, sir.

Q. And did you read the articles in the *Journal* about the career of the present District Attorney?

[fol. 1964] A. No, sir, I did not.

Q. Did you read other articles in the *Journal* or the *American* about these defendants and this case?

A. No, I don't read that paper.

Q. I beg pardon. It was the *Herald-Tribune*?

A. That is right.

Q. Did you read articles in that paper about these defendants and the case during the same period that you described having read the *Mirror*?

A. I think I read a few small items about it, yes, sir.

Q. You read everything that was called to your attention or that you noticed in those papers during that period, didn't you, about this case?

A. Yes, sir.

Q. And after you got your jury notice, your interest was accentuated on the articles that you read, wasn't it?

A. To some extent, yes, sir.

Q. In other words, you were then concerned to find out something about these defendants, weren't you?

A. Well, I don't think my reading was any more——

Q. Please, won't you answer my question, Mr. Stephens? I am trying to find the frame of your mind now. You having gotten a notice to serve on this jury, you were eager to find out what you could about the case and about the defendants, and you read the articles for that purpose.

Mr. Turkus: I object to it. The juror intended to offer [fol. 1965] an explanation of what his interest was, and he was precluded by the reframing of the question in its second form.

The Court: Overruled.

Q. Is your answer "No" to that?

A. I am not just sure what the question was.

Q. I will withdraw it and see if I can shorten it and make it clearer. After you got your jury notice, and knowing you were going to serve in the case in which these defendants were to be tried, your interest in the articles was heightened, I should say?

A. Yes, I would say yes.

Q. And you read them after you got your notice in that frame of mind, did you not?

A. Yes, sir.

Q. And you paid closer attention to what was in them than you would have paid had you not been served with the notice, isn't that the fact?

A. Yes, sir, it is.

Q. Now, as the result of your reading did you form an impression about these defendants?

A. Yes, I did.

Q. And that impression was unfavorable, I assume, to the defendants?

A. It was.

Q. And didn't it amount to an opinion about these defendants that was unfavorable?

A. I would call it an impression rather than an opinion.

Q. Can you tell me when you first started reading about these defendants and this case?

[fol. 1966] A. Well, about the defendants I would say a period of years ago.

Q. And from the very beginning you had formed that unfavorable impression as the result of that reading, I assume; is that right?

A. Yes, I would say so.

Q. And it did not grow any weaker as the time went on until you got your notice, did it?

A. No, it did not.

Q. It got stronger, as a matter of fact, the more you read about it?

A. Yes.

Q. And then the time came when you received the notice that ripened your interest in these defendants and this case, and you read whatever you came across in your papers after that; is that right?

A. Yes, I did.

Q. And that has still further strengthened the unfavorable impression, did it not?

A. I would say so, yes.

Q. So that as you sit there you now have that definite unfavorable impression about these defendants, or some of them, in your mind?

The Court: Is there a challenge?

Mr. Cuff: I do.

The Court: Try the challenge.

William A. Stephens, residing at 1 Plaza Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Cuff:

Q. Mr. Stephens, if I were to propound the same questions [fol. 1967] to you that I propounded before you were sworn, would you make the same answers to them?

A. I would, yes, sir.

Q. And those answers, do they reflect your honest opinion and your state of mind at the present time in so far as these defendants are concerned?

A. Yes.

Q. And that opinion or impression which you described in your answers to those questions goes to the guilt or innocence of these defendants on this case, does it not, on this charge?

A. I don't know what "go to the guilt or innocence" means. I have heard that phrase before.

Q. I will withdraw it.

The Court: The impression the Court has is sufficient. This reading was not merely casual.

Mr. Cuff: I press the challenge.

The Court: This reading was avidly sought out and digested.

Mr. Cuff: Yes.

The Court: And it would be improper for this gentleman to serve. The challenge is sustained.

By Mr. Cuff:

Q. Mr. Brill, may I ask what papers you read?

A. *Post, Journal,* and lately I read the *News.*

Q. You please understand that I am not a busybody or prying into your affairs. We are just trying to find out [fol. 1968] the frame of mind of the jurors, and I trust you won't hold it against me that I have to ask you these questions in discharging my duty to my client. Before you got your notice, did you read anything in the paper about these defendants or any one of them?

A. I probably did years ago, but I don't recall that.

Q. I think you did tell Mr. Turkus that you don't recall or you have no definite idea what you read years ago?

A. That is right.

Q. Since you got your notice, since you came down here on August 4th, did you read something about it?

A. Well, on August 4th I read the *Mirror* in this room. I read one article about it.

Q. And, of course, having been called here as a possible juror in the case, you naturally, I assume, were more interested in reading that article? It was accentuated in your mind; is that right?

A. I suppose so.

Q. Did you read anything else about it after August 4th?

A. No, sir.

Q. You obeyed the intention or the direction of the Court?

A. That is correct.

Q. You heard that and you obeyed it?

A. I heard that August 5th.

Q. Besides the reading, did you have any talks with anybody either at home, in connection with your business as-

[fol. 1969] sociates, or even in the court-room or on your way to and from the court-room have you had any discussions?

A. Not discussion about the case.

Q. As the result of what you have read or heard here in the court-room or elsewhere, have you formed any impression in so far as these defendants or any one of them are concerned?

A. In this case?

Q. Yes.

A. Not this case.

Q. Now, you say "not in this case." Does that mean that you have an impression that does not apply to this case?

A. Yes.

Q. And is that impression unfavorable to one or more of these defendants?

A. Not to this case.

Q. I am separating that. I said aside from the fact that it does not refer to their guilt or innocence on this charge, that is what you meant, it an impression that is unfavorable to the defendants, or one of them, in some respect: isn't that right?

A. Yes.

Q. So that if you were selected on the jury, you would start out with that unfavorable impression, would you not?

A. Well, after what I have heard while sitting in the jury, I would say no.

Q. You mean now that you know that a juror has no right to sit in the jury box—I withdraw it.

Mr. Turkus: May I step out of the room for a moment? [fol. 1970] Judge O'Dwyer has something he wishes to say to me.

Q. Mr. Brill, I will start over again about that last question. You believe, do you not, that if his Honor instructs you that you must decide this case solely and only upon what you believe of the evidence here, you will do so?

A. I will.

Q. And if you are selected as a juror in this case, may I rely, so far as my client is concerned, Mr. Weiss, Emanuel Weiss, upon your ability, your willingness, and your power

to dispel any impression that you may have except such as will be based upon the credible evidence here?

A. You may.

Q. You will? Thank you. Now, is there any reason that occurs to your mind? You know what is in your mind better than anybody else in the world. Is there any reason that occurs to your mind now that would prevent you from discharging the solemn oath which a juror in this case will take?

A. No, sir.

Q. To decide this case fairly, honestly, and squarely upon the evidence and the law?

A. No, sir.

Q. You do not?

A. No, sir.

By Mr. Turkus:

Q. Now, Mr. Flanagan, you have heard something here about reasonable doubt, have you not?

A. Yes.

Q. Having in mind what you told us this morning, if you [fol. 1971] come to the point, after considering all the evidence in the case and the law that his Honor will give you, and the summation of counsel, where you entertain a reasonable doubt as to the guilt of any one of these defendants or of all three of them, do you feel that you will be able and will give them the benefit of that reasonable doubt?

A. I will.

Q. You know that that is one of your duties or one of your obligations if you are selected, that you must decide that on your own conscience, under your own oath, for yourself?

A. Yes.

Q. That nobody else has a right to decide that for you except that you are bound to listen to reason and argument based upon the evidence, but if after listening to that reason and argument and after considering all the evidence and applying the law to it, you have a reasonable doubt as to the guilt of any one of these defendants, have I your assurance that you will not let any impression or any other thing interfere with giving them the benefit and recording your vote as Not Guilty?

A. Well, I think that the reasonable doubt would call for an explanation on the part of the Court.

Q. Is there some doubt about your ability to do it?

A. No.

Q. His Honor will define what reasonable doubt is, and if he should tell you that a reasonable doubt is something [fol. 1972] based upon the evidence in the case, for example, the question of accomplice—suppose you have an accomplice who is, as I have stated, proven out of his own mouth to be an utterly depraved character, and you have a reasonable doubt as to the truth of any part of his story or the whole of it, you would have the right and it would be your duty to reject it, would you do so?

A. Yes.

Q. If his Honor should charge you you are bound to reject in that case, then the case would have to fall; do you realize that?

A. Yes.

Q. And would you give the benefit of that doubt to the defendants?

Mr. Turkus: Objected to. It is improper, because the testimony in the case may not rest only upon the testimony of an accomplice.

Mr. Cuff: I will assume that.

Q. If the testimony in the case as to the defendants' participations, if they did participate in the commission of this crime charged in the indictment, depends entirely upon the testimony of an accomplice, and that in examining the testimony and the character and the motive of that accomplice you found there was a reasonable doubt as to the truth of his story, if his Honor should charge you that in that event it would be your bounden duty under your oath to give the benefit of that doubt to the defendants and to [fol. 1973] return them Not Guilty, would you do so?

A. I would.

Q. And so far as this charge is concerned, you appreciate, do you not, that the indictment is just a written charge against these defendants upon which they must be tried, and no other; you realize that?

A. Yes.

Q. I think Mr. Turkus said to one of the jurors—I do not know whether you remember it or not—he used Mr. Capone's name, Mr. Rosenthal's client—he did not intend to convey to you—he did not intend to convey to you, I think, that that applied only to Mr. Capone, but that these

defendants, all three of them, each one of them, my client, Mr. Barshay's client, and Mr. Rosenthal's client are here only upon this charge and upon no other, and will you insist that we be confined to this charge and this only?

A. Yes.

Q. And to consider the evidence as it applies only to this charge? So that I also may rely upon your ability to discharge any unfavorable impression you have and to decide this case on nothing else but what you believe about the testimony that will be adduced here under oath; is that right?

A. That is right.

By Mr. Rosenthal:

Q. Mr. Butler, in answer to a question I think you said among the newspapers you read was the *Daily Eagle*, the *News*, and the *Mirror*. Am I right in that? Did you say [fol. 1974] the *Mirror* also?

A. I say that I do read the *Mirror*, but I would not say I was a steady reader.

Q. Have you read the *Mirror* recently, sir?

A. Yes, I have read it.

Q. How recently?

A. I read the *Mirror* the night before last.

Q. Have you read it within the last month or month and a half to any degree of regularity?

A. Yes, I have.

Q. In reading the *Mirror* within the last month or month and a half, have you noticed any articles or series of articles in the *Mirror?*

A. Pertaining to what?

Q. Pertaining to various people in connection with Judge O'Dwyer's investigation of crime.

A. Yes, I did.

Q. And how many articles have you read in the last month or two in that particular series? All of them?

A. Have I read?

Q. Yes.

A. In the *Mirror*, the series of articles?

Q. Yes.

A. I never read any of them.

Q. Then maybe you misunderstood the question that I asked you. I asked had you read any of those series of articles in the last couple of months.

A. I misunderstood you then. I thought you said did I see any articles. I did see the headlines on those papers as I skimmed through *it*.

Q. In the last couple of months would you read the headlines of those articles?

A. Why, yes.

[fol. 1975] Q. And in reading the headlines at any time was the name of any of these defendants mentioned?

A. Truthfully, I could not say that the defendants were mentioned. They may have. As a matter of fact, I don't get the *Mirror*—I buy the papers for certain feature writers.

Q. I am not quarreling with you. I read it once in a while myself. I am not quarreling with what papers you read. I am only trying to ascertain whether or not certain things have developed in your mind which might or might not preclude you from being a fair and impartial juryman. I am not trying to pry into whether you like Walter Winchell or Nick Kenny or whom you might like or dislike, or even Jimmy Fiddler. The question is, have you in any wise read anything in any of these papers in the last month or two which in any way mentioned the name of any one of the defendants on trial? That is what I am trying to get.

A. I would say no. When you say reading, you mislead me. If it is looking at the headlines, I would say yes.

Q. Of course, the word "reading" implies that whatever you say, whether it consisted of ten words concerning a defendant, or five words or a hundred words, whether you read it or whether you did not read it.

A. In that case, Counselor, I did read.

Q. Can you recall at this time whether or not—and let me see whether I disagree with your interpretation of [fol. 1976] headlines—do you mean the headlines, or the head notes to these particular articles?

A. The thick type captions in the paper.

Q. These thick type captions which you have read, can you tell me now whether any one or more of them were in any wise devoted to any of the defendants on trial?

A. Yes, they were.

Q. Do you recall now whether there was any statement in these head notes of a character which conveyed the alleged participation of any of these defendants in any particular crime?

A. No. As I recall it, no, there was not anything about the case. What I read was concerning the trial being continued, and as per instructions, I thought it was best to pass those things by.

Q. So as you sit here at this time—Withdrawn.

Q. You say you read the *Eagle* also?

A. Yes, sir.

Q. Do you only take certain feature sections out of the *Eagle*, or do you read the news section?

A. Just the feature sections out of it.

Q. Have you read anything within the last month or so in the *Eagle* concerning any of the defendants on trial?

A. Just about as much as I read in the other papers.

Q. In reading the *Eagle*, was there, to your recollection now, was the name of any of the defendants mentioned in any article that you may have read?

[fol. 1977] A. I am inclined to say it was.

Q. Was anything said in regard to the alleged participation of any of the defendants in this crime in the article that you read, or articles that you read?

A. I could not say that.

Q. You mean that although you may have read it, it left no distinct impression upon you in what the reading matter consisted of, is that what you mean?

A. Yes.

Q. In the *News* did you read any article concerning the defendants?

A. I did not have the *News*.

Q. By reason of anything that you may have read, sir, is there any impression that has been created in your mind insofar as any of the defendants are concerned?

A. Absolutely not.

Q. You have never sat on a jury before, have you?

A. No, sir.

Q. Have you any relatives on the police force?

A. No, sir.

Q. Any close friends attached to the Police Department?

A. No.

Q. Your name is Butler. There is an Inspector Thomas Butler. He is no relation of yours, is he?

A. No.

Q. Do you know any of the persons in the District Attorney's office, any of the lawyers or attaches?

A. No, sir.

Q. Have you ever heard, either over the radio or in any public forum, any speeches made by any Assistant District Attorney in relation to crime?

[fol. 1978] A. Any Assistant District Attorney? No, not in relation to crime.

Q. A great deal has been said by Mr. Turkus and by Mr. Cuff in relation to legal questions that may arise in this case, and which have given your answers. You understand that my associates and I represent Mr. Louis Capone over here, one of the defendants? You understand that?

A. Yes.

Q. And as far as our particular endeavors are concerned, they are directed to that particular defendant. Do you understand that, sir?

A. Yes.

Q. Naturally, in representing a particular defendant it may be necessary, when either I examine a witness or even when I sum up, that I may have to go over a part of the ground that same other lawyer went over in respect to his own client. You understand that?

A. Yes, sir.

Q. The mere fact that it may be necessary, because of the fact that these three men are on trial together, rather than separately, that the length of time that is going to be consumed might to you appear to be prolonged because one lawyer may be asking a similar question to what the other lawyer may have asked, having an entirely different purpose in mind when he asks it—is that clear?

A. Yes, sir.

Q. That is not going to prejudice you against my client?

A. Of course not.

Q. No more than, as Mr. Turkus says, because it happens [fol. 1979] to be repeated three times it is going to make it three times as important, and you said that it would not?

A. That is true.

Q. As far as the defendant represented by me is concerned, it may develop in this case that he will take the stand, and it may also further develop that he will offer proof in addition to taking the stand. The mere fact that he is a defendant on trial, is that going to brand in your mind his testimony as untrue, merely because he is a defendant?

A. No.

Q. Of course you are going to apply tests to his testimony the same as you would apply to anybody else. He has a reason for testifying. He is anxious to resist conviction in this case, but because of that fact it does not necessarily mean that he is lying under oath, does it?

A. No.

Q. In addition to that, he may call other witnesses to substantiate his statements. The mere fact that we may offer proof is not going to make you believe that the principles of law which you heard discussed here regarding the necessity on the part of the District Attorney to establish in every case the guilt of a man beyond a reasonable doubt before you can convict, and that at no time must a defendant offer any proof nor need he offer any proof to establish his innocence the mere fact, as I started out to say, that we do go forward and offer proof, although unneces- [fol. 1980] sary under our law, is not going to create in your mind the thought that we must prove our innocence because of that, is it?

A. No, sir.

Q. Commonly speaking, it is not going to shift the burden over to us to establish our innocence, because of the fact that we started out with proof to offset what may have been said about us by those called by The People; is that right?

A. I understand.

Q. Of course, you have already stated—I don't believe you have, but other men in the box—that your knowledge of the fact that an indictment is merely a formal written accusation which is the means, the orderly means, of bringing a person to trial—is that clear to you?

A. Yes.

Q. And the fact that three men are on trial together does not rais- in your mind the thought, does it, that because of the fact that, as the District Attorney has said, they have been grouped together, that in reality there is such a group as the District Attorney claims? The mere fact that they are on trial together does not raise that thought in your mind, does it?

A. No, sir.

Q. You understand that, for the purpose of convenience, the law permits a number of individuals charged with the

same crime to be tried in one forum, such as here, but that in so far as the law is concerned each one of these individuals must be proven guilty separately by you beyond [fol. 1981] a reasonable doubt before you can find him guilty. You understand that?

A. Yes.

Q. So that you are not going to raise any inference in your mind that here are three men that have been charged together in an indictment, and because it has been charged that way actually it is that way—is that right—unless, of course, the proof substantiates the charge, in which event under the law it does substantiate it, it would be your duty to convict, no question about it, but you are not starting out with that inference, are you?

A. No, sir.

Q. Not having had any experience in jury work, at a certain time in the case the People, represented by Mr. Turkus, will say, "We rest," and certain motions are made of a legal nature to the Court to dismiss the indictment. The Court may or may not dismiss, but in the event that it is not dismissed, you realize, if the Court tells you, that that is merely a question of law. Do you understand that, that the Judge has no right to determine facts—do you understand that, sir, and that it merely means that the Court in its wisdom considers that there is a sufficient amount of facts involved in the case to warrant the submission of those facts to twelve men, and that is the only thing. Do you understand that?

A. Yes.

Q. If you are told by the Judge that no inference adverse to the defendant can be drawn because of the fact [fol. 1982] that the motions have been denied, you will keep that out of your considerations in your jury room when you come to deliberate on the guilt or innocence. Am I correct in that?

A. Yes.

Q. Of course, you have heard, as I said, the question of accomplice and the fact that no man can be convicted on the uncorroborated testimony of an accomplice. You remember hearing that proposition?

A. Yes.

Q. Are you also acquainted with the fact that this so-called corroboration cannot consist of a number of accom-

plices attempting to corroborate one another? You understand that?

A. Yes.

Q. You cannot go into the jury room and say, "Here, John Jones says they did it, and he admits he is an accomplice. Pete Smith said they did it, and we find he is an accomplice, but, being that there are two, that one can corroborate the other." You cannot do that. You understand that? Even if you were to believe what the accomplice may say to be the truth, you understand that the law not only as to this case but as to every case is that every accomplice must be viewed with suspicion. You must be wary. You must use a great deal of caution in determining whether the man is telling the truth in so far as it respects other persons. Is that clear?

A. Yes.

Q. You may determine that the man is telling the truth [fol. 1983] about himself, that he, the accomplice is actually a murderer and did commit the murder; you may find that, but you understand that your duty goes further, not in determining what he may be telling about himself as to whether it is true, but as to whether it is true what he is attempting to tell you about somebody else; is that clear?

A. Yes.

Q. If you ever were to believe that he was telling you the truth, you understand that then it becomes your duty to ascertain whether there is any independent evidence tending to connect the particular defendant—in my instance it would be the defendant Capone who erroneously has been called Caponie throughout the trial by Mr. Turkus—whether or not it tends to connect that defendant with the crime. Is that clear?

A. Yes.

Q. There are numerous ways that the District Attorney may contend that he has furnished to you that proof. Being in the dark at this time, I cannot mention all the ways, but I can mention one that may appeal to him and that is the one where he may have some individual come in here and claim that one of the defendants or the defendant told that individual that he, the defendant, did commit the crime. Is that clear? If such is the case here, and you find that that particular individual has committed murders for which he has procured immunity, which means that he cannot be pun-

ished, has committed perjury, false swearing under oath, [fol. 1984] and numerous other things, will you, in trying to determine the truth of what that man or men may say, try to find out whether or not the motive which he has is of sufficient importance to make him lie? Will you do that?

A. Yes.

Q. If in your own mind you are of the belief that the interest and motive that the individual has in resisting or to resist his own punishment is sufficient to make him say anything under oath without regard or respect to the truth and thereby you do not believe him, would you hesitate, if that is the only evidence outside of the accomplice, to find a verdict in favor of the defendant?

A. No, sir.

Q. Of course, there are two ways of finding out who is an accomplice. The one is—and I do not know whether you heard this explanation and that is the only reason why I am repeating it; I do not intend to repeat it to you two gentlemen; I am picking on Mr. Butler because he happens to be No. 1 here—the one is where the Judge will say to you, "Gentlemen, so-and-so has taken the stand, and I tell you that that man is an accomplice as a matter of law." The Judge, being the judge of the law, you understand that, binds you definitely when you go in the jury room to start off and say, "This man is an accomplice; unless there is other corroborating testimony, we cannot find a guilty verdict." Then the case may come where the person who took the witness stand himself may deny he is an accomplice, [fol. 1985] but from all the facts and circumstances you, the jurymen, believe he is an accomplice. And in such an instance the Judge would say to you, "There are other witnesses here who I do not charge you as a matter of law are accomplices, but who I leave to you to determine their complicity." Is that clear?

A. Yes.

Q. Then it becomes your duty to ascertain whether or not in your own mind and from your own reasoning and from the evidence, that particular individual is an accomplice. Is that clear?

A. Yes.

Q. Once having determined that he is an accomplice, then you understand that your duty is the same as it is in respect to the accomplice charged by the Court to you as a matter of law to be one. That is clear?

A. Yes.

Q. Not having served on a jury before, do you realize that your opinion, once it is gained and once it is expressed in the jury room, reasoned out from the evidence, is just as valuable as any one of the other eleven men on the jury? Do you understand that?

A. Yes.

Q. Do you further understand that it is your duty not to sit arbitrarily in the corner and say, "I have made up my mind to so-and-so, and I dare you change it," and refuse—and that has been done—and refuse arbitrarily to argue with other men? It is your duty to say, "Here, I have determined, because of so-and-so, so-and-so, so-and-so, that these are the facts in the case, and that is the reason why [fol. 1986] I am sticking to my view," and then you will listen to the other men, to their reasoning. But if, on your own conscience, after they are finished reasoning with you their logic, you still retain the impression that your logic is the proper logic applied to the evidence, merely because of your inexperience as a juryman or because of numbers against you or for any other reason would you change your opinion?

A. No, sir.

Q. You understand that in that event you are not committing an arbitrary act at all; you are committing an act which you are supposed to do under your oath as a juryman, namely, to decide upon what your conscience dictates is the truth from the evidence adduced on the trial. Of course, if you can reconcile your views with the others, then it is your duty to reconcile it and acquiesce, or they, on the other hand, to acquiesce with you.

Merely because the District Attorney may get up and say to you, "So-and-so is not an accomplice," that, in and of itself, is not going to make you yourself, if the facts warrant it, say that he is not an accomplice; is it?

A. No, sir.

Q. Merely because the Court leaves to you the question of whether a man is an accomplice or not, that in itself is not going to make you say he is not an accomplice?

A. No, sir.

Q. If you find the facts warrant that he is; is that right? [fol. 1987] Now, sir, on the question of the defendant represented by me, assuming that some witness or witnesses get on the stand and say they know this defendant, they

met him at times, and this defendant goes on the stand and admits to you that he knows some of these People's witnesses and has met them on occasions at several places, but denies definitely and absolutely any participation in this crime. The mere fact that one may know the other, would that raise in your mind the presumption that, merely having known one another, that he must be guilty?

A. No, sir.

Q. Of course, you have a right to take into consideration, in determining the guilt or innocence, the association of any individual, just like you have the right to take into consideration the association of The People's witnesses in a hotel, segregated together over a period of months, where they could concoct any kind of a story they wanted to, if they felt like doing it. All those things may be taken into consideration.

Mr. Turkus: I object to that.

The Court: This is summation. Sustained.

Mr. Rosenthal: Exception.

Q. Do you know any detective by the name of Meehan or McDonough or any detective by the name of McCarthy or Swift?

A. No.

Q. Do you know Captain Bals or Lieutenant Osnato?

[fol. 1988] A. No, sir.

Q. You have been asked a great many questions. Let me ask you just this other question or just two or three other questions. One is in respect to the question of alibi. Have you, while you have been present in the court-room, at any time heard that discussed with other men that were on the jury?

A. I don't believe I have.

Q. I will just repeat it again. You see, a defendant, in offering evidence, may offer evidence of what is termed an alibi. An alibi in law is where witnesses or people go on the stand and establish the fact that the defendant was at a place with them at a time when this crime is alleged to have been committed. Is that quite clear to you?

A. I understand.

Q. Do you understand, sir, that even though an alibi is offered, that all that is necessary on the part of the defendant when he offers an alibi is to have that alibi create

in your mind a reasonable doubt as to his guilt? Is that clear to you?

A. Yes.

Q. You understand that he does not, once he offers an alibi, undertake to shift the burden from this side of the table over to that side of the table? The burden still stays here; is that clear? But that if the proof of the alibi is sufficient to create a doubt in your mind where, in the absence, none would otherwise exist, that doubt must be resolved in [fol. 1989] favor of the defendant the same as any other reasonable doubt. Is that clear?

A. Yes.

Q. Another thing is the question of the District Attorney repeating about the solution of a crime by the use of accomplice. The mere fact that somebody who admits his own participation in the crime has told the District Attorney or the Grand Jury a story upon which the District Attorney predicates his question to you, that does not raise in your mind the thought that this particular crime has been solved, does it?

A. No, sir.

Q. You realize that the question of the solution, in so far as it affects these defendants, not the man that he brings here who admits that he maybe killed the fellow, but as far as it affects these defendants are concerned is your job to determine; isn't that right?

A. That is correct.

Q. Is there any question in your mind at all which I may not have reached through questioning that would in any wise incapacitate you in your opinion from being fair and impartial?

A. No, sir.

Q. Mr. Brill, of course, the answers which you gave were confined mostly to a defendant not represented by me in so far as your having read articles and knowing somebody, and so on. That is correct?

A. Yes.

Q. So I will leave that job to the man who is paid to undertake it. I am interested purely in the defendant Louis [fol. 1990] Capone. In so far as he is concerned, have you at any time read anything about him of any character?

A. No, sir.

Q. As you sit here I know that you have listened to the questions I addressed to Mr. Butler?

A. Yes.

Q. Would your answers, if I addressed them to you, be substantially the same as he gave?

A. Yes.

Q. Do you know of any reason so far as the defendant represented by myself and associates is concerned why you could not be fair and impartial to the defendant Louis Capone?

A. No, sir.

Q. You never sat on a jury?

A. I did.

Q. Criminal case?

A. Yes, sir.

Q. In this court?

A. It was before Judge Taylor in Oxford Street.

Q. That is a few years ago?

A. Yes.

Q. Was that a capital case?

A. It did not go——

Q. The person pleaded guilty?

A. Yes.

Q. Is that your only jury service?

A. No, in civil cases.

Q. Of course, you realize the law in civil cases is entirely different from that in criminal cases.

A. Yes.

Q. Whereas in a civil case the person only has to prove the case by a fair preponderance of the evidence, in a criminal case, where the possibility of life or liberty is involved —it is the duty of The People to establish guilt beyond a [fol. 1991] reasonable doubt before there can be a conviction. Mr. Brill, I was just in the midst of asking the last question. Do you know of any reason why you could not be fair and impartial?

A. No.

Q. Mr. Flanagan, you have heard the questions I asked— You have already been examined on the—which you say you have by reason of certain things which you read. You know now, sir, that under our criminal law, it is never the duty of a man to prove himself innocent?

A. I understand.

Q. And you understand, sir, that an indictment which is found by a Grand Jury behind closed doors is merely an accusation against a man which, when he says "Not guilty,"

raises all the questions concerning the evidence. You understand that?

A. Yes.

Q. Do you feel, sir, that because of your condition or state of mind that the quality of evidence that would be necessary for the District Attorney to produce in this case would be less than what would ordinarily be true were you sitting in a case where you did not have any impression against the defendants.

Mr. Turkus: Objected to. That is a question of law.

Mr. Rosenthal: That goes to the state of mind of the individual, in view of his statements.

Mr. Turkus: I have an objection pending, your Honor.

The Court: What I am thinking of is this: that there was [fol. 1992] the trial of a challenge in which all counsel participated and in which this was a proper question.

Mr. Rosenthal: That was not directed to that particular phase, sir. We were confined on the challenge to the particular point which was raised, as I take it, for the particular challenge, not as to qualifications that might arise as to other causes which were not even inquired into at the time [fol. 1993] of the challenge. That was my theory in questioning at the time. I believe that is the rule on the trial of a challenge.

The Court: Wasn't the trial of the challenge based upon impressions received from what was read?

Mr. Rosenthal: Yes, and whether he could lay it aside. Now I am directing myself to the question of the quality of the evidence that may be required in this case because of the impression which he has, as differentiated from what would be required as a standard of law in a case where he has never read.

Mr. Turkus: That is splitting hairs.

The Court: I think it is.

Mr. Rosenthal: I will take the Court's ruling on the subject.

The Court: I think you are splitting hairs. I think you are reopening something that you had an opportunity to ask and which was embraced in the trial of the challenge.

Mr. Rosenthal: I, of course, take a different view than your Honor, but your Honor is supreme, and I am waiting for your Honor's ruling on the subject one way or the other.

The Court: I will sustain the objection.

Mr. Rosenthal: I respectfully except. I have no further questions, if your Honor rules that the challenge has been [fol. 1994] tried. Is that ruling, I assume, as to all the defendants, your Honor?

The Court: The ruling has been made heretofore, and you know what it is. I think it is reasonable to avoid repetition in the trial of challenges. Try it once and for all with all counsel having free range participation.

By Mr. Barshay:

Q. With respect to you, Mr. Brill, are you related to a gentleman by the name of Brill who was a former Assi ant Attorney General, Joseph Brill?

A. No, sir.

Q. You are the person who volunteered kindly to Mr. Turkus that you are friendly or you knew once a man by the name of Kasacove?

A. Yes.

Q. And you are also the gentleman who said you had some impression with respect to Buchalter?

A. Yes.

Q. May I know where you gained that impression, sir?

A. Well, that was the time that we discussed Kasacove.

Q. That was about three years ago?

A. Yes.

Q. Have you retained that impression?

A. Yes.

Q. Has it been fortified by the reading of any articles?

A. No, sir.

Q. Has it been fortified by the hearing of the matter being discussed with respect to this case?

A. No, sir.

Q. May I know from you, is that impression unfavorable to the defendant?

A. To a certain extent, but not in this particular case. [fol. 1995] Q. Well, is it such an impression that would require some testimony to remove?

A. No.

Q. Assuming that Mr. Buchalter should take the stand and subject himself to cross-examination and thus make you the person to decide whether or not he is telling the truth in this case, will you use that impression against him?

A. No.

Q. Assuming, sir, that Mr. Buchalter does not take the stand, having in mind that the Court will charge you that no defendant need prove his innocence, will you hold that impression against him then?

A. No, sir.

Q. Is that impression present with you now?

A. Well, I would say no.

Q. You say you would say no. Does that indicate a doubt in your mind?

A. No. I will say no.

Q. Is that your definite answer?

A. That is right.

Q. You said you heard the name attributed to him, Lepke. Did that fact draw an unfavorable impression with you toward him?

A. What I had before.

Mr. Barshay: May I challenge the gentleman for implied bias, your Honor?

The Court: Yes, try the challenge.

What is that based upon? You tried one challenge. What is this based upon?

[fol. 1996] Mr. Barshay: We never tried a challenge with respect to this gentleman, your Honor.

The Court: I beg your pardon.

PHILIP BRILL, residing at 1070 De[illegible] Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Mr. Brill, would you answer under oath the same way as you answered when you were not under oath, if I should put the same questions to you as I did before?

A. I would.

Mr. Barshay: No further questions.

The Court: Any other counsel for defense wish to question the talesman?

Mr. Talley: No further questions by any counsel.

Mr. Turkus: In view of the fact that this man Kasacove was a defendant in one of the cases——

The Court: I did not hear you.

Mr. Turkus: The matter that was elicited was that Kasacove was an accountant for Buchalter and a defendant in a case, and that the information came to the prospective talesman through the Kasacove matter—I think it might be wise, so that there would be no question about a verdict in the case, that I do not oppose the challenge. I do not.

The Court: You would like to save a peremptory challenge if the Court would let you.

Mr. Turkus: I am not trying to save them anything, except I want to have a jury here that is fair. I want to make sure when the verdict is rendered it will be a lasting verdict.

[fol. 1997] The Court: The Court has to be persuaded. I want to hear you on that. I would like more than what you just said. So far I don't see it.

Mr. Turkus: Mr. Barshay has urged a challenge for implied bias.

The Court: I know what he has urged. Don't tell me what anybody has urged. I ask that counsel argue the point.

Mr. Barshay: With respect to myself——

The Court: Yes.

Mr. Barshay: ——your Honor, I have said all I can say on the subject.

The Court: You tried to argue it, and the Court does not see the point, so you prefer to get an exception rather than give the Court an answer to straighten it out in the event of your being right. If you are working for the record, rather than immediate results, go ahead; you have a right to refuse to argue the point.

Mr. Barshay: I stated our position, sir.

The Court: I still do not know what it is. I have to conclude that you are not trying to enlighten me, but you are trying to get an exception on the record.

Mr. Barshay: Judge, maybe we did not understand each other.

[fol. 1998] The Court: I do not know what it is all about. I am entitled to know.

Mr. Barshay: All right, sir, I will tell you. The gentleman has said that he has formed an impression at a time when he knew and spoke about a certain individual.

The Court: What individual?

Mr. Barshay: Mr. Kasacove, who happened to be an accountant for Mr. Buchalter.

The Court: Many years ago?

Mr. Barshay: Yes, but he spoke about that fact only a few years ago when the matter happened, when that Mr. Kasacove was involved in some litigation.

The Court: Was it this case?

Mr. Barshay: Of course it was not this case.

The Court: Was this case discussed?

The Talesman: No.

The Court: When you say the matter happened, what matter happened?

Mr. Barshay: I prefer not to say, sir. I will say it to you right at the bench, together with Mr. Turkus. I will be glad to do that.

The Court: It has been proclaimed to every member of the panel by yourself, so there is no use in secrecy in that respect. Your client is at present serving a sentence. Has it to do with that conviction?

[fol.1959] Mr. Barshay: No, sir, something other than what has been brought out in this court, and I will be glad to tell it to your Honor if you will listen.

The Court: Then step up and tell it and the reporter will step up and take it.

(The following occurred at the bench, not within the hearing of the talesmen.)

Mr. Barshay: Mr. Kasacove was charged with harboring this defendant and was convicted and the conviction was reversed. This defendant was not a co-defendant in that case.

The Court: When he was sought on what charge?

Mr. Barshay: In the Federal Court.

The Court: On the charge for which he is now convicted?

Mr. Barshay: Yes, he pleaded guilty to that.

The Court: That is the conviction that the panel is already aware of in respect to your client. The defendant being a fugitive, then followed the charge against Kasacove that he harbored him?

Mr. Barshay: That is correct.

The Court: And the conversation between this man, the talesman——

Mr. Barshay: And friends of Kasacove——

The Court: —was in relation to the harboring?

[fol. 2000] Mr. Barshay: That is correct. That is what he said.

The Court: We are not trying Kasacove.

Mr. Barshay: I know that, but I do not want this jury to know that this defendant was a fugitive from justice. That is the only reason I did not want to make comment about it.

The Court: Do you think he can be prejudiced, in view of the admission that he is serving a sentence of more than 70 years on conviction of crime? Do you think he can be blasted any worse by saying that at one time he was a fugitive?

Mr. Barshay: The question of flight may be important.

The Court: Not flight on this charge. The charge of the Court in relation to flight applies only to the evidence in the case on which the man is convicted. The Court wants to be fair. I think this is going too far. If you want to exercise a peremptory challenge, you may do so.

Mr. Barshay: I won't.

The Court: All right.

(Mr. Barshay and Mr. Turkus then resume their places at the counsel table.)

The Court: Any other counsel wish to be heard?

Mr. Talley: I do not.

Mr. Barshay: Will you bear with us a second?

[fol. 2001] The Court: Certainly. The challenge is overruled.

Mr. Barshay: Exception.

Mr. Talley: There are no further questions.

Mr. Turkus: I will have to peremptorily challenge you, Mr. Brill. The other jurors are satisfactory. Mr. Butler is satisfactory to The People of the State, and Mr. Flanagan is satisfactory to The People of the State.

Mr. Rosenthal: As to Mr. Flanagan, reserving the exception which we took to the Court's ruling on the overruling of the challenge for cause, we now peremptorily challenge.

The Court: All right.

Mr. Rosenthal: We also peremptorily challenge the other, Mr. Butler.

(The following talesmen were called and took their places in the jury box: Morton Halperin, of 789 St. Marks Avenue; George F. Wilkens, of 342 Park Place; Harold F. Cross, 878 Fifty-third Street; Harry J. Kane, of 319 Eighty-second Street.)

By Mr. Turkus:

Q. Mr. Halperin, you did reside at 135 Prospect Park West?

A. Southwest.

Q. Is that down near 10th or 11th Street or Seeley Street?

A. That is right.

Q. Have you lived in that neighborhood for some years?

[fol. 2002] A. About six years.

Q. And prior to that time where did you live?

A. 1362 President Street.

Q. Is that Crown Heights?

A. Yes.

Q. The present address, St. Marks Avenue?

A. That is right.

Q. What section of Brooklyn is that?

A. I imagine that is Crown Heights, too.

Q. You are listed on this trestle board where the names and addresses and employment are listed on these slips of paper that are provided counsel, that you are a real estate manager; is that correct?

A. Yes.

Q. Are you in the real estate management business for yourself or for somebody else?

A. For somebody else.

Q. What is the name of your employer?

A. The Halmor Properties Corporation.

Q. In the real estate management did you have a building on Eastern Parkway?

A. I used to manage buildings on Eastern Parkway.

Q. Was the name of Philip or Farvel Cohen familiar to you from the management of the property?

A. I had a tenant by the name of Farvel there.

Q. Did his tenancy abruptly terminate?

A. While I was manager?

Q. Yes.

A. Yes.

[fol. 2003] Q. He was one of the defendants against whom this indictment has been severed. I can tell you that now, because that is something I think should be in your mind. Would your knowledge of the fact that he was a tenant in that property affect your judgment of this case?

A. I would not exactly know.

Q. Well, of course, you did tell me how his tenancy abruptly terminated. You knew that?

A. Yes.

Q. Should his name appear in the testimony— Of course, I will have to withdraw it. I cannot tell you about the case before we start—but should his name figure in this case some way, will you have any prejudice against any of the defendants? That is about as far as I can say.

A. I might have.

Q. Did you notice whether you saw Philip Cohen in court?

A. Yes, on the first two days.

Q. Of course, the indictment having been severed against him means that the trial proceeds against the other defendants, and in so far as he is concerned, he is not being tried now jointly with them. Of course, you know the state of your mind best. Do you feel if his name is brought out into the testimony, from what you know about his tenancy, that you may be prejudiced against these defendants? That is-as far as I can go at this point.

A. I did not know much about his tenancy.

[fol. 2004] Q. Have you got some impressions or some notions as a result of this man having been a tenant in that Eastern Parkway house?

A. No, I don't think so.

Q. Were you interviewed or did you have any talks with any police officers?

A. With Mr. Joseph.

Q. In so far as this Philip Cohen incident is concerned, is there anything in your mind that may be to the disadvantage of the defendants in the case?

A. I believe so.

Q. Excuse me, Mr. Halperin, we will come back to you later, when another one of the lawyers comes in.

Mr. Wilkens, is that your new address, 342 Prospect Place?

A. Yes.

Q. Is that somewhere near Underhill Avenue?

A. That is right.

Q. Have you lived there for a long time?

A. Since last February.

Q. Prior to that time you resided at 34 Butler Place?

A. Yes.

Q. That is right around that section there?

A. That is right.

Q. I suppose that is commonly called the Hill section up there?

A. Park Slope.

Q Did you live in any other section in Brooklyn?

A. Flatbush some years back.

Q. And you have never lived in the Brownsville-East New York area of Brooklyn?

[fol. 2005] A. No.

Q. There are certain industries that I have to make inquiry about, and I will make all the inquiries through you, and when I go down the line I won't have to repeat it with the other jurors. We are trying to speed the selection up, if we can. In any shape or form, have you through business or otherwise come in contact with persons engaged in the garment industry or the clothing industry?

A. I have.

Q. Is your business an accountant, as listed here?

A. That is right.

Q. Are you in business for yourself?

A. At the present time, no. I am comptroller of a brick corporation.

Q. Where is this company operating from?

A. Park Avenue, New York.

Q. Prior to that time were you an accountant for someone else or for yourself?

A. No, I was connected with the Government, the Treasury Department.

Q. You mean that you have had contact in that area on official business?

A. That is right.

Q. You don't maintain social contacts with anybody who manufactures men's or ladies' clothing, do you?

A. Not socially, but I know quite a few of the Manufacturers.

Q. Manufacturers of ladies' clothes?

A. Both in the clothing and—

Q. Does your livelihood depend now in any wise at all [fol. 2006] with any of those contacts in that center there, the garment center or clothing center?

A. No.

Q. So that in so far as you are concerned, there would be absolutely no embarrassment to render a verdict in this case which is in consonance with justice?

t is right.
h respect to the clothing truckers, did you have
et with clothing truckers?
direct, no.
ou understand what I mean by clothing truckers?
ing truckers that I refer to are those who trans-
nen's clothing to the manufacturers and from the
urers out for distribution. In other words, they
es that have been cut and ready to be sewed up
ace and deliver from that place after the clothes
assembled somewhere else. It is a peculiar type
ng that is used particularly in the garment and
listricts.
ver had anything to do with it.
he Brownsville-East New York section, do you
contacts there?

he Brooklyn waterfront?

you know intimately or do you know socially any
icial of the Amalgamated Clothing Workers of
?

ll, not socially or not in business, but when I was
Government, I had dealings with—I don't know
ition he held in the union.
at was his name?
n't know.
] Q. So that, whatever that contact was, it was
l you have not even remembered the name?
not even hear the name.
you have any social acquaintance with any offi-
he Clothing Trucking Union?

re you in court when I asked the names of certain
cials?
as.
s there any familiarity to any of those names?

ke it you understand that these defendants here
ged with the crime of murder in the first degree.
anything about the nature of the charge, namely,
r case, that would prevent you from being a fair
ir to the People of the State of New York and
dants at the bar?

A. No.

Q. I take it, then, that you have no scruple, conscientious or otherwise, against capital punishment.

A. No.

Q. These three defendants have nine lawyers, and when I mention the number of lawyers, to be sure, I find no fault whether they have one, nine, or fifty-nine. Men charged with crime have a right to have counsel, the kind of counsel they want and the number of lawyers they want. You understand that?

A. Right.

Q. And the District Attorney finds no fault with them. Did you hear me state the names to the other jurors of the nine lawyers in the case?

A. I have.

[fol. 2008] Q. And their past connections?

A. I have.

Q. Do you know any of these nine lawyers?

A. No.

Q. Or anyone associated with them in the practice of law?

A. No.

Q. Or any member of the bar who specializes in the defense of criminal cases?

A. No.

Q. Since you received your jury notice, did anybody speak to you about the merits of the case?

A. No.

Q. I take it you are in sympathy with law enforcement.

A. Yes.

Q. Have you heretofore served as a juror in a criminal case?

A. I have.

Q. Has it been in the County Court?

A. Yes, in Oxford Street.

Q. And did the case go to a conclusion, by that I mean did the judge charge on the law?

A. He did.

Q. Did you in that case follow the Judge's instruction on the law?

A. I did.

Q. And did you apply it to the facts in the case?

A. I did.

Q. If selected as a juror in this case, will you do that,

take the law from the Judge and apply it to the facts in the case?

A. I will.

Q. Did the case you had rest in part upon the testimony of an accomplice?

A. I don't believe so.

[fol. 2009] Q. Did you hear discussions about accomplice testimony?

A. In court here?

Q. Yes.

A. I have.

Q. I will make this thing very brief: Do you find any fault with the District Attorney of the county, Judge O'Dwyer, or with the prosecution, which, in order to solve a murder case accepts the use of the testimony of one of the perpetrators of the crime and uses that against the remaining defendants?

A. No.

Q. I take it, then, that your frame of mind is that you understand that even a bad man can at times tell the truth?

A. Yes.

Q. And that with respect to any accomplice in the case it will be your job to see if he tells the truth; is that right?

A. That is right.

Q. In other words, is he telling the truth with respect to the group or combination participation in the commission of this murder with these defendants? Is that right?

A. Yes.

Q. The Judge will give you tests that you apply to the testimony of an accomplice. The law requires that he instruct the jury on the tests to be applied to the accomplice witness. Do you follow me on that?

A. Yes.

Q. Those tests require that the jury look at the testimony and view the testimony of an admitted accomplice, [fol. 2010] an admitted perpetrator, or one who, in fact, is a perpetrator or an accomplice, with care, caution, and suspicion. Do you follow that? Will you take that instruction of law and apply it to the facts in this case?

A. I will.

Q. Will you keep uppermost in your mind and will you use your mental faculties to ascertain is this accomplice telling the truth as to the complicity of the defendants and himself in the commission of the murder?

A. I will.

Q. You see, that is the reason that you apply these tests to find out is he telling the truth about these defendants.

A. That is right.

Q. Do you understand that?

A. That is right.

Q. The Judge will also tell you that even if you could believe the testimony of the accomplice and even if, in fact, you did believe everything the accomplice said about the defendants, that still is not enough, and would direct you to acquit them. Would you follow that instruction?

A. I will.

Q. Suppose the Judge, in telling you what other evidence is needed, instructs you in words or substance as follows: Suppose he says corroboration or independent evidence need not support and corroborate the accomplice in every detail of his testimony. Do you understand that?

A. Yes.

Q. But that it may be deemed sufficient by a jury when believe and it tends to connect the defendants with the commission of the crime. Do you follow me on that?

A. Yes.

[fol. 2011] Q. Will you accept that instruction?

A. I will.

Q. Now, it may be that you may not like an accomplice, you may listen to his testimony and you may not like him as a person or as an individual, you may not like him for a lot of reasons, because of his admitted participation in the crime, because of his past criminal history, and because of other things about him, as a matter of fact, you may have an utter contempt for him. Will you, nevertheless, understand and keep your mental faculties alert to ascertain not whether you like him or dislike him, but whether he is telling the truth about the men on trial; is that correct?

A. Yes.

Q. You see, if you are satisfied that the defendants are guilty of murder in the first degree beyond a reasonable doubt, whether you like the accomplice or not or whether you can do something to the accomplice or not, you understand what your duty is with respect to the case?

A. I do.

Q. Of course, in business as an accountant I take it that you have problems that you work out by the exercises of your mental faculties?

A. Right.

Q. That is how you earn your bread and butter?

A. That is right.

Q. Will you use common sense and understanding in weighing the issue of this case, the guilt or innocence of these defendants on the charge of murder in the first degree?

[fol. 2012] A. I will.

Q. It has been said by one of the lawyers for the defendants, and properly so, that the defendants in this case have only one charge to meet, the indictment, the Rosen murder charge.

A. That is right.

Q. Do you follow that? Do you understand by the same token that the burden of the District Attorney to establish guilt is likewise limited to that charge and the charge alone?

A. That is right.

Q. And that if you are satisfied from the proof in this case that these defendants are guilty of the Rosen murder as charged in the indictment, and you believe that beyond a reasonable doubt, you understand what your duty is as a juror, do you not?

A. That is right.

Q. It has also been pointed out by one of the lawyers representing the defendant Buchalter that Buchalter has been found guilty of crime, as a matter of fact, of crime, as he said, and that he is now paying the penalty for those crimes by way of present incarceration. Would you, because a man is paying the penalty for crimes he has been convicted of, relax your duty with respect to the criminal charge here?

A. No.

Q. Or would you deviate from a proper result because he is presently in jail for some other crime he has been convicted of?

A. No.

[fol. 2013] Q. In other words, Mr. Wilkens, will you use your mental faculties to find out is Buchalter and the other defendants established guilty of this murder charge beyond a reasonable doubt?

A. That is right.

Q. I should, in passing, of course, ask whether you know the District Attorney of the county, Judge O'Dwyer, personally.

A. No.

Q. Or do you know any Assistant District Attorney on the staff?

A. No.

Q. With respect to the application of testimony in a case where there is more than one defendant on trial, the Judge will give you certain rules of law, and will you follow those rules of law?

A. I will.

Q. Where you see that by applying the rule of law, part of the evidence which emanates from one witness or another applies to only one defendant, will you apply it to that particular defendant?

A. I will.

Q. And where, in pursuance of the instruction of law, you see that the testimony applies to two or all three of the defendants, will you, of course, apply it where it belongs, in consonance with the rules charged?

A. I will.

Q. Will you, if selected as a juror in the case, endeavor by your verdict to render justice in the case?

A. I will.

Q. Will you, if selected as a juror, discuss this problem in a common-sense, logical way with the other jurors [fol. 2014] in the case?

A. I will.

Q. And will you, if selected as a juror, keep uppermost in your mind and keep your mental faculties alert to the one issue that we have in the case: Are the three defendants guilty of murder as charged in the indictment, or are they innocent? Will you do that?

A. I will.

Q. And in applying every test and every rule to the believability of witnesses and in watching the evidence and in guiding yourself as to what you hear here, will you keep your mind attuned to the fact that that is your job, to find out are they guilty or innocent of the murder charge?

A. That is right.

Q. After you have heard all the evidence in the case and the presumption has satisfied you by believable evidence that these defendants, Buchalter, Capone, and Weiss, are guilty of murder in the first degree, will you reflect that finding in your verdict in the case?

A. I will.

Q. And will you do so without fear or without hesitation?
A. I will.
Q. Mr. Cross, you are listed as living at 878 Fifty-third Street; is that correct?
A. Yes.
Q. Is that commonly known as Bay Ridge?
A. Yes.
Q. Have you lived in Bay Ridge for a number of years?
A. I have.
Q. More than five?
A. Yes.
[fol. 2615] Q. Before you lived in Bay Ridge did you live in some other district of Brooklyn?
A. Always in Bay Ridge.
Q. You are listed here as a draftsman.
A. That is right.
Q. Is that the drawing of plans?
A. Yes.
Q. Are you employed, or do you do that as a profession for yourself?
A. I am employed.
Q. Who employs you?
A. Consolidated Edison.
Q. I take it that the drawing of plans requires the operation of the mind in setting your mental operations down on paper so they are visible for somebody else to do the work from?
A. That is right.
Q. Have you served as a juror before?
A. I have.
Q. Has it been a criminal case?
A. No.
Q. Civil case?
A. Yes.
Q. Of course, there is nothing mysterious about the job of a juror, is there?
A. No.
Q. You are here to find out are these men guilty or innocent of the charge?
A. Yes.
Q. And if accepted as a juror in the case, will you apply your mental faculties to find that out?
A. I will.

Q. I will go along with you very rapidly because you must have heard the questions that I put to Mr. Wilkins. If I were to ask you the questions that I asked him, would you make substantially the same answers?

A. I would.

[fol. 2016] Q. Can I be assured that, as I go along, that you have no bias against Judge O'Dwyer, the District Attorney of the county, or against the prosecution of an indictment wherein the testimony of an accomplice is used against other defendants?

A. No.

Q. That you will listen to the testimony of an accomplice and find out is the accomplice telling the truth about these defendants and himself when he speaks of their connection with this case?

A. I will.

Q. Should the Judge charge you, as I told Mr. Wilkins the Court will, with respect to the degree of care and caution and suspicion that you examine the testimony of an accomplice, will you with common sense and understanding apply the rules the Judge gives you to the testimony in the case?

A. I will, yes, sir.

Q. Will you also bear in mind that our inquiry is not as to whether anybody likes or dislikes an accomplice, that is not what we are here to determine, whether you like or dislike the accomplice. You may have an intense dislike for him, I do not know, after you hear the case, but your inquiry is directed to find out does he tell the truth about these defendants on trial. Do you understand that?

A. Yes.

Q. And will you, sir, if accepted as a juror, apply your mental faculties to find out that, does this accomplice [fol. 2017] tell the truth about the group or combination participation of these defendants in the murder charged in the indictment?

A. I will.

Q. As has been pointed out by Mr. Rosenthal in one of his questions, the defendants here are required to meet only one charge, the charge set forth in this indictment, the Rosen murder charge. Do you understand that?

A. Yes.

Q. And do you understand by the same token that the District Attorney is obligated to establish beyond a rea-

sonable doubt only one charge, that is, the Rosen murder charge? That is the limit of the inquiry before this jury; that is all we go into, is guilt or innocence on this charge. You understand that?

A. Yes.

Q. With respect to the past crimes which Buchalter has been convicted of and for which he is now serving a jail term, as has been disclosed by his attorney, would you be inclined, because he is now in jail for other crimes he has been convicted of, to relax your duty as a juror in this murder charge?

A. I would not consider it.

Q. You are going to find out, Mr. Cross, are you not, whether the guilt of Buchalter and each and every defendant in this case, Capone and Weiss as well as Buchalter, has been established beyond a reasonable doubt on this charge?

A. Yes.

Q. Do you know Judge O'Dwyer personally, or any mem-[fol. 2018] ber of his staff?

A. No.

Q. Do you know any of the nine defense lawyers?

A. No.

Q. Or any member of the bar who tries criminal cases as a specialty?

A. No.

Q. If you are selected, Mr. Cross, as a juror, will you endeavor by your verdict to do justice in the case?

A. I will.

Q. Will you listen to reason and common sense from the other jurors?

A. Yes.

Q. Talk the case over with them logically?

Should you, after you have heard all the evidence in the case, come to the conclusion and be satisfied that the guilt of the defendants, Buchalter, Capone, and Weiss, has been established beyond a reasonable doubt to your satisfaction, will you say that in your verdict?

A. I would.

Q. Would you be afraid to say it?

A. No.

Q. Would you hesitate?

A. No, sir.

Q. Mr. Kane, do you live at 319 Eighty-second Street?

A. That is right.
Q. I guess that is Bay Ridge too?
A. Yes.
Q. By whom are you employed?
A. Brooklyn Trust Company.
Q. How many years have you been working there?
A. Ten years.
Q. I have asked a lot of questions of other prospective talesmen that you may have heard while you were in this box or while you were seated out there.
[fol. 2019] A. One of the questions you asked, Mr. Turkus, was was there any reason why—I am a bachelor. I live with my mother, an old lady eighty-five years of age, in very poor health, and if I am kept away from the home for any length of time——
Q. I understand the circumstances. I am in the same boat. We will see what the Judge says about it.

The Court: I did not hear a word.
Mr. Turkus: Mr. Kane has advised me that he lives with his mother, who is elderly, eighty-five, and that if he is kept away from his home it will work a hardship on this elderly woman who is, of course, in consequence left alone.

By the Court:

Q. Nobody else there?
A. Nobody else there, your Honor. I have a lady during the day, until I get home at night.
Q. Did you apply for excuse?
A. I did not. I thought maybe I would be able to serve, your Honor, but in the last few weeks she has had a couple of weak spells, and I could not concentrate.
Q. Is that the answer, you would not be able to give attention to the trial of the issue if you sat there and were sworn as a juror?
A. I could not.

The Court: Does anybody challenge?
Mr. Barshay: We consent.
[fol. 2020] The Court: That is a bad precedent.
Mr. Rosenthal: We challenge and we have no questions.

* * * * * * *

HARRY J. KANE, residing at 319 Eighty-second Street, Brooklyn, New York, being duly sworn, testified as follows:

By the Court:

Q. Would all of your answers be the same?
A. What do you mean?
Q. That you would not be able to concentrate?
A. No.
Q. Your mother is really very sick?
A. Eighty-six years old.

The Court: Sustained.

(A ten-minute recess was taken, during which the defendants were remanded.)
(After recess the examination of talesmen continued.)

By Mr. Climenko:

Q. Mr. Halperin, I will address these questions exclusively to you for the moment. Did you say that you were employed by the Halperin——
A. Halmor Properties Corporation.
Q. May I ask the names of your employers in that corporation?
A. What do you mean by the employers?
Q. Are you a principal in the company?
A. No.
Q. What is the name of your employer, if I may ask?
A. You mean the officer of the corporation?
Q. That is right.
A. Louis Halperin, Emanuel Halperin.
[fol. 2021] Q. Are you related to Meyer Halperin of 26 Court Street?
A. Yes.
Q. Did I understand you to say that you manage some real estate and building of which somebody by the name of Cohen was a tenant?
A. Yes.
Q. In consequence of that incident, do you have any impression or opinion about anybody else in this case?
A. Not about anybody else, no.
Q. Do you have any feeling about any defendant in the case by reason of your experience as a real estate agent?
A. No.

Q. Have you read about this case?

A. Just one article in *P. M.*

Q. Was that on August 4, 1941?

A. Some time, about.

Q. About the time you first appeared here to serve as a juror, is that right?

A. About.

Q. Did you gain any impression about any person in this case from the reading of that article?

A. I don't think so.

Q. As you sit here now have you by reason of any experience in your past life or anything that you have read, any prejudice against any defendant in this case?

A. No.

Q. Are you acquainted with any member of the police force?

A. No.

Q. Have you ever discussed this case or any of the defendants in it with any person?

A. Yes.

[fol. 2022] Q. I mean any of the defendants presently in this case.

A. No.

Q. Have you ever listened to any conversation carried on by other persons about any of the defendants presently in this case?

A. No.

Q. You have no opinion with respect to the innocence of any of the defendants in this case?

A. I had a conversation with Mr. Joseph here.

Q. When was that?

A. That was about four or five months ago, maybe longer.

Q. You mean Mr. Joseph, who sits with Mr. Turkus?

A. That is right.

Q. An Assistant District Attorney in the office of Mr. O'Dwyer?

A. I do not know what office he holds.

Q. At any rate, he is the gentleman now seated at the counsel table?

A. Yes.

Q. Did you discuss or did he discuss with you this case or this indictment in that conversation?

A. Yes.

Q. He did?
A. Yes.
Q. In consequence——

Mr. Rosenthal: We challenge for cause.
The Court: Try the challenge.

Mortin Halperin, of 789 St. Marks Avenue, Brooklyn, New York, being duly sworn, testified as follows:

[fol. 2023] By the Court:

Q. Are the answers heretofore given true?
A. Yes.

Mr. Climenko: We press the challenge.
Mr. Turkus: I want to get the record straight, because Mr. Joseph——

By Mr. Turkus:

Q. That was in pursuance of an investigation conducted by Mr. Joseph with respect to the piece of property on Eastern Parkway wherein you had a tenant by the name of Philip or Farvel Cohen?
A. I would not know his first name.

By the Court:

Q. And official business?
A. Yes.

The Court: But it disqualifies you. You are excused.
Challenge sustained.

By Mr. Climenko:

Q. Mr. Wilkens, do I understand that as an accountant you more or less recently worked for the Federal Government?
A. That is right.
Q. In its Treasury Department?
A. That is right.
Q. How recently did you sever that connection?
A. 1939.
Q. And how long had you been in the employ of the Treasury Department?

A. Four years.

Q. Before that had you engaged as an accountant on your own behalf?

A. That is right.

Q. Did you specialize in any particular type of work [fol. 2024] for the Government, the Treasury Department?

A. I did.

Q. Will you tell me?

A. Excise taxes.

Q. Of course, even with respect to excise taxes there are fields of specialization, are there not?

A. That is right.

Q. Did you specialize in any particular field?

A. The excise, and, if necessary, the income tax.

Q. Were you ever connected with the Miscellaneous Tax Unit?

A. That is the Miscellaneous Tax Unit.

Q. Did your work bring you into what is called the fur section of New York?

A. That is right; fur and cloak and suit, women's cloak and suit.

Q. In so far as they made use of furs?

A. That is right

Q. And the special taxes going to the Federal Government in reference to the use of furs in garments?

A. That is right.

Q. Had you read about this case at any time?

A. Yes, at the time it happened.

Q. In 1936, you mean?

A. That is right.

Q. Have you read about it since?

A. Not to any extent. When I received the subpoena prior to August 4th I was just anxious to know what the case was, being it was the summer time. Then I discovered what the case was.

Q. And you discovered that from the reading of what, Mr. Wilkens?

A. Some newspaper article.

Q. Do you recall in what paper?

A. It would either be the *Tribune* or the *Sun* or the *World-*[fol. 2025] *Telegram.*

Q. So that you read in one of those papers about this case on that day, on August 4, 1941?

A. Yes.

And did you thereafter read anything about this case
newspaper?
No, not to any extent. Maybe just glanced at the
g.
Well, without trying to define any extent for the mo-
did you read about it in any other newspaper or any
time?
No, no other newspaper.
So the only time you read about this case in the
aper was on August 4, 1941?
Yes.
You have not read about it since?
No.
Have you read about any of the defendants?
Prior to August 14th? I did.
n consequence of your reading did you develop an
sion or opinion about any of the defendants in this

Well, at the time I read about them it was not per-
to this case at all.
understand, but I am now asking you generally,
spect to all the reading, the reading about this case,
ding about the defendants. In consequence of that
g generally, have you formed an impression or opin-
ut any of the defendants in this case?
Well, not alone from the reading, no.
You mean what might also have contributed to the
926] formation of an impression or opinion may have
me other activities, such as conversation?
That is right.
n other words, you were a participant in conversa-
ith others about this case or about some or more
defendants; is that correct?
That is right.
Those conversations recent, Mr. Wilkens?
No.
How long ago?
Around 1936.
ince 1936 have you had any conversation about any
defendants in this case?
That is hard to say. Maybe casually there may have
discussion at the time of some other case before
rts.

Q. Some other case about perhaps one of the persons on trial in this case?

A. That is right.

Q. Have you ever heard about these defendants in other ways besides conversations and reading?

A. No.

Q. In consequence of the conversation and the reading an impression or opinion has been formed in your mind about one or more persons in this case; is that correct?

A. That is right.

Q. Is that an impression or opinion?

Mr. Turkus: I object to the dual expression. Let us find out what it is, whether it is an impression or an opinion.

Mr. Climenko: I will wait your Honor's ruling. I will do it either way.

The Court: Sustained for that reason.

[fol. 2027] Q. Do you have an opinion about any of the people in this case from your reading and your conversations?

A. I would not say an opinion; I would say an impression.

Q. Now, is that impression adverse to any of the persons on trial in this case?

A. Yes.

Q. When did you first form that adverse impression?

A. Well, I would say at the time that the defendant that I am talking about was taken in custody.

Q. At that time you were working for the government, were you not?

A. That is right.

Q. So that your attention was perhaps centered on that circumstance?

A. That is right.

Q. And so you formed that adverse impression at least some substantial period ago?

A. That is right.

Q. And you have entertained it all the time, have you not?

A. That is right.

Q. The mere fact that you received a summons to come here, perhaps act as a juror, that fact in and of itself did not reject that feeling from your mind, did it?

A. No.

Q. You still have it as you are here now?
A. That is right.
Q. And nothing has happened in the interim over that period of time to eliminate it from your mind?
A. No.
Q. Is that correct?
A. That is right.

Mr. Climenko: Now, if your Honor pleases, I respect-[fol. 2028] fully challenge Mr. Wilkens for implied bias.

The Court: Try the challenge.

George F. Wilkins, residing at 342 Park Place, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Climenko:

Q. Mr. Wilkins, I have just asked you before you were administered the oath about your reading in the past and your conversations about one or more persons who are on trial in this case, and my question to you now, sir, is this: If I were to repeat those questions to you now that you are under oath, would your answers be the same under oath?
A. They would.

Mr. Climenko: I press the challenge.

By Mr. Rosenthal:

Q. Mr. Wilkins, at the time that you formed this impression you were in the employ of the United States Government, is that right?
A. Well, I cannot say that I formed the impression against the defendant at that time.
Q. You had formed an impression— Withdrawn.
Q. How long were you with the United States Government?
A. Four years.
Q. And what did those four years consist of, what period of time?
A. The early part of '35 to 1939.
Q. So that when you first read was in 1936; is that right? [fol. 2029] A. I did not read it first. I heard about it first.

Q. You heard about it. Now then, with respect to the particular individual that you have in mind, diiscussions were had while you were in the employ of the Government concerning him, is that it?

A. That is right.

Q. And then you said, I think, on your examination by Mr. Climenko, that at the time that he was taken into custody you had other discussion?

A. Yes.

Q. Was that with Government employees, some of your discussion?

A. No, not with Government employees.

Q. With outside persons?

A. That is right.

Q. In respect to the particular person whom you are talking about?

A. That is right.

Q. In your official capacity as a Government employee, was that one of the things involved?

A. I don't get——

Q. I say, was part of your talk with these persons outside of your place of employment in respect to your duties as a Government employee?

A. It was outside of my connection with the Government.

Q. Maybe I don't make myself clear. You said you were with the Tax Department of the Government; is that right?

A. That is right.

Q. You said that you had connections up in the garment center due to your duties as a tax man for the Government. [fol. 2030] A. That is right.

Q. The persons that you spoke to in respect to the particular individuals, were they in and about the garment center?

A. That is right.

Q. And it was in connection with your duties as a—Withdrawn.

Q. You were a special agent, weren't you?

A. That is right. I was in the Intelligence unit.

Q. With the Intelligence?

A. That is right.

Q. And it was as a part of your duty in the Intelligence Unit that you went out to investigate, wasn't it?

A. That is right.

Q. And that is where you gained your information, part of it?

A. The information about what?

Q. About this particular individual.

A. No, I did not go out for the purpose of getting information about this individual.

Q. But you did, while you were in the Intelligence Unit of the United States Government, doing work in the garment center, have conversations with individuals in respect to this particular individual?

Mr. Turkus: That is objected to. It is already answered.

A. That is right.

The Court: The Court is satisfied this man should [fol. 2031] not sit on the jury.

Mr. Turkus: That is the end of it.

The Court: His occupation, taken in connection with information that he is alleged to have received, disqualifies him just as much as if he were a policeman or a detective in the employ of the City of New York. Anything more?

Mr. Rosenthal: No further questions.

The Court: Sustained.

By Mr. Clemenko:

Q. Mr. Cross, when we first met here in August or in the middle of September did you make application to be excused?

A. I did.

Q. Did the reason which impelled you to make that application, has that reason since been dispelled?

A. That is right.

Q. Have you ever read about this case or any of the defendants named in it?

A. No, sir.

Q. What newspapers have you read?

A. I read the *Telegram*. I read the *Times* in the morning and the *News*.

Q. And you have never read about this case in any of those papers?

A. No, sir, I avoided it.

Q. In other words, if your eye ever met any printed matter in connection with it, you deliberately avoided it?

A. That is right.

Q. Prior to the time that you obtained the notice to [fol. 2032] appear here as a special juror, had you ever heard of any of the defendants named in this case?

A. No, sir.

Q. At no time?

A. No.

Q. So that not until the time you actually came to this court-room had you heard of any of the people named as defendants here?

A. That is right.

Q. And you had never heard any discussions about them?

A. No, sir.

Q. And of course you had never participated yourself in any discussions about them?

A. No, I have not.

Q. Are you acquainted with Mr. O'Dwyer, the District Attorney?

A. No.

Q. Are you acquainted with any member of his staff?

A. No.

Q. Are you acquainted with any member of the police force, particularly here in Brooklyn?

A. No.

Q. You said, I think, that you had once served as a juror in a civil case; is that correct?

A. Yes.

Q. But you never served in a criminal case?

A. No, I have not.

Q. You work for the Edison Company?

A. That is right.

Q. And you have been there for some years?

A. Twenty years.

Q. Have you from time to time attended lectures given for the associations or employees of that company?

A. No.

Q. You have never attended any lectures under the [fol. 2033] auspices of your employer, the Edison Company?

A. I attended school, educational course.

Q. No, I did not mean that.

A. Then I would say no.

Q. The only lectures you attended there were technical in connection with the actual doing of your draftsman work?

A. Yes.

Q. Did you ever attend any lecture given by any member of the District Attorney's staff?

A. No, sir.

Q. Never heard any of those gentlemen speak?

A. No.

Q. Is there anything in your experience which in your mind would interfere with your listening impartially to the testimony in this case?

A. No.

Q. There is not?

A. No.

Q. Assume that the Court shall instruct you as a matter of law that the defendants or any of them, none of the defendants is under an obligation to adduce any testimony in this case. You understand that?

A. To testify.

Q. No defendant has to testify at all if he elects not to. Assume you were instructed as a matter of law and assume that at the conclusion of the trial a particular defendant may have elected not to testify, would you hold that against that particular defendant?

A. No, sir.

Q. Suppose the Court should instruct you as a matter of law that you could not bring in a verdict of guilty against any defendant unless you were convinced of his guilt beyond [fol. 2034] a reasonable doubt, would you have any difficulty in solving that instruction of law?

A. No, sir.

Q. Suppose in explaining that rule of law to you the Court might define it by saying that a reasonable doubt is a doubt which you obtain or which resulted in your mind by reason of something in the evidence in the case, if you had a reasonable doubt about the guilt of any defendant you were under a conscientious obligation under your oath to return a verdict of Not Guilty against that particular defendant, would you have any difficulty in following that instruction of law?

A. No.

Q. Assume that in the course of the case the Court should instruct you that the testimony of any witness offered by the District Attorney as a co-called accomplice should be tested by you with suspicion and in any event with great

care; would you have any difficulty in following that instruction of law?

A. No.

Q. You understand substantially what is meant by all those lawyer-like words?

A. I have an idea.

Q. The idea is that anybody who comes into this courtroom and says, "I took part in a particular crime," is somebody against whom you must exercise all the suspicion that is reasonable for you to entertain against such a person; do you understand that?

A. Yes.

Q. Now, assume that during the course of the trial a so-[fol. 2035] called accomplice not only says that he took a part in the commission of the crime, but says that in the past he has committed the crime of perjury, would you take that factor into account in testing whether or not you could believe him?

A. Yes.

Q. In a general way is there anything that you know of that I have not reached by any question that I have put to you which creates a mental reservation in your mind as to your capacity to sit impartially in this case?

A. No.

Q. You do not have any such mental reservation?

A. No. I think I could be a fair juror.

Q. Can the defendant Buchalter entrust to you the keeping of his legal rights in the course of this trial?

A. Yes, in the case of a doubt.

Q. Assuming—You would respect those rights as they were so defined to you?

A. Yes.

By Mr. Talley:

Q. Mr. Cross, our law requires the District Attorney to prove the guilt of every defendant brought in here under an indictment, and goes a bit further and says the District Attorney must prove the guilt of such defendant beyond a reasonable doubt. That is the burden that the District Attorney takes when a defendant is brought into our American courts. Without passion or prejudice, do you think you can require the District Attorney to sustain that burden?

[fol. 2036] A. I don't quite get the question.

Q. In this country when a charge is made of crime against anybody, no matter what their estate is, high or low, it is our law that the people bringing that charge, as represented by the District Attorney, must prove the guilt of a defendant. To put it in another way, under our law a person charged with crime is not required to prove his innocence. You understand that?

A. Yes.

Q. My question to you is, Are you quite certain that if selected as a juror here you will require under the charge of the Court, The People, represented by the District Attorney, to sustain that burden of proving the guilt?

A. Yes, sir.

Q. Of the defendant?

A. Yes, sir.

Q. And that you will not regard it as your duty as a juryman to require him to prove his innocence?

A. No.

Q. You know the distinction?

A. Yes.

Q. It is not that way in other countries. In European countries when the charge is made——

Mr. Turkus: I object to it. We are trying a case in America, in Brooklyn.

Q. In some countries it is required when a man is charged with crime he must come in and proclaim or prove his innocence. I am merely citing that to make a contrast between that system which prevails and that which prevails [fol. 2037] throughout this land. Here the burden rests upon the District Attorney to prove the guilt, and you will require them to do that if you are selected as a juror in this case?

A. Yes.

Q. And then the law goes a step further and says the guilt of a defendant must be proven beyond a reasonable doubt, which means that if a juror has in his mind after hearing and weighing and honestly considering all the testimony, if then he has a doubt in his mind for which a reason could be given which is based upon reason, which is the kind of a doubt which a man might have about his ordinary family or business affairs of life, the law requires

if a juror has that kind of a doubt he must exercise it in favor of the defendant. Is that quite plain to you?

A. Yes, sir.

Q. And if, after hearing all the testimony, you have that kind of a doubt, you will resolve it in favor of these defendants, will you not?

A. Yes, sir, I will.

Q. And the law further requires as part of our system in criminal cases, that it is the right of a defendant to take or not to take the stand and testify as he sees fit or is so advised, and it is the law that you shall not indulge in any unfavorable inference against a defendant because he does not take the stand. If in this case any of these defendants do not take the stand, do you agree that you will not indulge in any unfavorable inference against him be- [fol. 2038] cause of his failure to take the stand?

A. No.

Q. There is no impression, there is no opinion in your mind with respect to the guilt or innocence of any of these defendants as you sit here now?

A. No.

Q. That is correct? And there is no reason, domestic, business, or any other reason in your mind why you could not sit as a fair and impartial juror in the trial of this case; is that correct?

A. That is right.

Mr. Talley: I have no further questions.

By Mr. Rosenthal:

Q. Mr. Cross, I do not know how many questions you have heard or how many you have not heard, but, however, I have to repeat so many of the questions as may apply to the particular client I represent. You understand that?

A. Yes.

Q. Have you in connection in your business had any business in Brownsville?

A. No.

Q. Or East New York?

A. No.

Q. Your business with the Edison did not take you into that territory?

A. No.

Q. What is yours, inside work?

A. Yes.

Q. That doesn't give you much time to read the newspapers?

A. I read going to business and back.

Q. Did you read anything about a man by the name of Abie Reles?

A. No.

Q. Did you read anything about Sholem Bernstein or [fol. 2039] any of those names that Mr. Turkus mentioned at the outset of the trial?

A. Never heard of them.

Q. Did you ever hear or have you any knowledge of a Lieutenant Osnato in the Police Department?

A. No.

Q. Or a Paddy Meehan?

A. No.

Q. McDonough?

A. No.

Q. McCarthy, Swift, Captain Bals—seated over there?

A. No.

Q. You never heard of him either?

A. No, I have not.

Q. The defendant that I represent is Mr. Capone. You understand that each one of the counsel here have their own task in representing their own defendant?

A. Yes.

Q. Have you discussed about the fact that the three men are brought in here together because the indictment charges them with having participated in the same crime? Is that clear to you?

A. Yes.

Q. You understand that that is for convenience, that they are brought in on one trial rather than three trials, so that, involving the same crime and the same people testifying, that it would not be necessary to repeat and take three juries; do you understand that?

A. Yes.

Q. It may be that some of the witnesses that are called in the case by the District Attorney—I do not know whether it will be or not, we do not know anything about that yet—may testify as to one particular defendant and some par- [fol. 2040] ticular thing that that one particular defendant may have done; is that clear to you?

A. Yes.

Q. We won't go into the questions of law. The Judge will tell you sometimes even though you testify against one man, if there is a conspiracy and if the act is in furtherance, it can be used against all of them, but at other times where it is an act of the individual himself it can only be used against him; is that clear?

A. Yes.

Q. Of course, the law on that subject you will take at the conclusion of the case from the Judge. That is clear?

A. Yes.

Q. But you understand that even though three men are on trial together, if any particular part of the testimony is only devoted legally to one man, that when you got into the jury room you can only use it against that particular man?

A. I understand.

Q. Without going into detail have you heard discussed the question of an accomplice's testimony?

A. Yes, I did.

Q. By now, then, you understand that whether there be one accomplice or a hundred accomplices, one is no better that a hundred or a hundred is no better than one as far as the law is concerned?

A. Yes.

Q. Do you understand that there must be other evidence, independent in its source, which must tend to connect the defendant with the crime and believed by you, of course, [fol. 2041] before you can find the defendant guilty; is that clear?

A. Yes.

Q. So far you have nothing in your mind which is adverse to those principles of law, have you?

A. No.

Q. This other evidence—I do not know whether you have heard it discussed or not, may consist of one or more different types of things. What it is in this case we don't know at this time. It may be that the District Attorney may claim that this other evidence consists of someone having said something to somebody of some thing. There are a million different ways. What it is is impossible to determine now, but this much I can ask you at this time, no matter what the source is or no matter what it is that it is contended by the District Attorney constitutes this inde-

pendent evidence, will you, when it comes to looking at that evidence, look at the source from which it comes?

A. Yes.

Q. Now then, if it develops that the particular source, whatever the type of evidence, comes from an individual or individuals who themselves either under examination by the District Attorney admit, or who, because of cross-examination are forced to admit their participation in numerous crimes for which they have either received immunity or don't expect any punishment, and who at one time or another have denied that they even knew the people involved in this alleged crime or their own participation or [fol. 2042] anything of that nature, will you look not only at the source but the motive which the individual may have in telling you the story which he does tell you from the witness stand?

A. Yes, I will.

Q. If, after considering the motive and if after considering the individual and if after considering what he has gained by reason of his going on that stand, you are in doubt as to whether that individual is telling you the truth, would you hesitate then to disregard his testimony?

A. Yes, I would hesitate.

Q. You would not hesitate to disregard it?

A. No, I would not.

Q. And if you disregard it in that form, the independent evidence, and the Judge told you that under those circumstances you must acquit, you would not hesitate to acquit, would you?

A. No.

Q. Now, then, as far as the defendant Capone is concerned, at the present time it is my judgment that he will take the stand, understand, in his own behalf.

A. Yes.

Q. Merely because he is charged with murder does not raise the presumption or idea in your mind that he, being a defendant, necessarily is going to tell you an untruth, does it?

A. No.

Q. Of course, like any other witness for The People or for the defendant, you will consider his background, his motive, or whatever there may be that develops which will [fol. 2043] aid you in determining whether he in this courtroom is telling the truth?

A. I will consider it, yes.

Q. If you believe that he is telling you the truth, the truth from him is just as forceful as it is from anybody else; is that true?

A. Yes.

Q. He may also call witnesses to substantiate. You will study these witnesses also, won't you, their background, whether they have ever been in any trouble for which they have been convicted, or whatever it might be?

A. Yes, sir.

Q. And if these people are in the nature of an alibi—Let me interrupt myself. Did you hear me discuss that question, the question of an alibi?

A. I don't think I have.

Q. I have to go through it again. You understand what the ordinary term Alibi means, don't you?

A. Yes.

Q. Of course, legally, an alibi set up by a defendant means that witnesses take the stand to testify that the defendant was at some other place at the time that the crime is alleged to have been committed. That is an alibi. You do not feel, sir, that merely because a defendant does offer you testimony, that that changes the burden and makes him prove his innocence, do you?

A. No.

Q. Do you understand, sir, at this time, having heard it, that if the evidence of the alibi is sufficient in itself to raise a reasonable doubt in your mind as to whether the defendant is guilty, that doubt, like any other doubt, must [fol. 2044] be resolved in his favor, and you must acquit him?

A. Yes, sir, that is right.

Q. So that if, after listening to the persons who testify on behalf of the defendant as to where he was, you have a reasonable doubt created in your mind as to whether or not this defendant was where these accomplices may say, you will resolve that doubt in his favor?

A. That is right.

Q. Would the mere fact that the defendant might know some of the witnesses who are called by The People and have been in their company at times, would that fact standing alone so influence or prejudice you against the defendant?

A. No.

ou can understand, sir, that you may know a lot of
in your life who subsequently may do acts which
neet with your approval?
es, sir.
nd so the mere fact that you may know an indi-
or even be associated with him, in and of itself
ot prove that you know what particular activity
re engaged in at a particular time, isn't that right?
es.
o you see that the mere knowledge or association,
you are convinced that that association itself had
ing to do with this crime—of course, if you are con-
of that, that is different—but the mere association
would not influence you to the detriment of the
ant, am I right?
es.
ou heard the District Attorney also say about
045] whether you have any objection to the case
solved from the inside, broken from the inside—he
veral expressions. You heard that?
es, I did.
o you realize that when an accomplice so-called—
not admit he is an accomplice of ours but the law
is an accomplice of those who were engaged with
the crime—that is clear—when the so-called accomp-
ces the stand and admits that he committed the act
of the acts which resulted in the dath of this man,
be telling the truth, unquestionably he is telling
th concerning his activity; you understand that to
es.
ut you understand your duty is not to find out
r he is telling the truth about himself, namely, that
ed a man; your duty is to find out whether he is
the truth about the defendant?
hat is right.
hen he says that they helped him?
hat is right.
o that even though you may believe what the
dice says he himself did, you may still disbelieve
e said about others; is that true?
es.
nd, having that in mind when you listen to him on
nd you will give all of these tests which the Court

will subsequently tell you you should give to what you will give to his testimony; do you understand?

A. Yes.

Q. Do you understand further than that, sir, that the [fol. 2046] minute a man goes on the stand and proclaims himself an accomplice that you, sitting in this box, that the law tells you it is your duty to be suspicious of him from the very beginning, be wary of him, view him with extreme caution and suspicion? That is what the law says your duty is, not only when you go into the jury room—you understand that?

A. Yes.

Q. But when he goes on that stand and says, "I, So-and-so, killed that man," you look out, and the law says you have got to be wary, suspicious, and cautious of everything he says from then on; is that so?

A. Yes.

Q. And you will do that?

A. I will.

Q. Leaving out the reluctance, have you any fear or hesitation?

A. No, I have not.

Q. In pronouncing a verdict of Not Guilty in the event that you are not convinced of the defendant's guilt beyond a reasonable doubt?

A. No.

Q. There is a new word used by Mr. Turkus, "Have you got the courage to come in"——

Mr. Turkus: I did not say that.

Mr. Rosenthal: Yes, you did.

Q. Have you got the courage to come in with a verdict of Not Guilty?

A. I have.

Mr. Turkus: Mr. Cross is satisfactory to The People of the State.

Mr. Cuff: Satisfactory to the defendants.

[fol. 2047] (Harold F. Cross takes Seat No. 9 in the jury box.)

(The following talesmen were called and took their places in the jury box: John J. Patten, of 131 Tehama Street;

Philip Geth, of 207 East 93rd Street; James F. Kelly, of 535 Seventy-fourth Street.)

Mr. Turkus: May I inquire as to the length of time the Court will work?

The Court: It is very unfortunate Mr. Klein does not come over here to relieve you.

Mr. Turkus: I want to select the jury myself. I do not want Mr. Klein to select the jury.

The Court: I know, but you are entitled to reserve your strength for your work in the trial so that it may proceed without interruption.

Mr. Turkus: There is no way I can do that. If I want to pick the jury, I cannot have Mr. Klein pick the jury.

The Court: There are nine lawyers for the defense, and they divide up the work, and there is no reason why the prosecution cannot decide to divide up the work. It is done in trials constantly. I think there is such a thing as being——

Mr. Turkus: Stubborn about it.

The Court: Maybe too ambitious in wearing yourself out. Supposing you try to go ahead.

Mr. Turkus: How long will you work, Judge?

The Court: Don't worry about that.

[fol. 2048] Mr. Turkus: I ate a very light lunch. My brain is tired. Now I need something to eat.

The Court: Get a glass of Coca-Cola.

Mr. Turkus: All right, if that is the way you want to do it, we will go to work.

The Court: Mr. Turkus, I sympathize with you because you look tired, and I feel sorry for you.

Mr. Turkus: I will go right ahead.

The Court: Don't let it disturb you. Do the best you can. When you cannot go any further let me know. I am not going to be a hard taskmaster.

Mr. Turkus: I will finish this job with the three jurors and stay here as long as you will.

By Mr. Turkus:

Q. Mr. Patten, do you live on Tehema Street?

A. Yes.

Mr. Talley: Judge, we family men have some domestic arrangements that have got to be considered. I would like

to know as soon as it is convenient to your Honor whether we are going home or whether we have to say we won't be home.

The Court: I think I sense what the source of worry is. You will recall in the conference that was in chambers yesterday when Dr. Nash was there that notwithstanding his findings he cautioned that in regard to one of the defendants it might be wise, in fact, it would be unwise to have night sessions, and take a chance with his health.

[fol. 2049] Mr. Talley: Yes, sir.

The Court: As it might cause undue strain.

Mr. Talley: Yes, sir.

The Court: For that reason I did not intend to sit after the supper hour, because we don't want a mistrial, but I did intend to try to put in an honest day's work. I have been so tired the last few nights I have not been able to eat a meal. I have had to be satisfied with a couple of eggs, and I know how counsel feel and sympathize with you. It is a nerve strain all around. If you understand I am entirely in sympathy with all of you, I think we will all get along better. If you really are tired, Mr. Turkus——

Mr. Turkus: I can take it if I have to. I am tired. The thing gets monotonous. Sometimes you ask these questions when you get home at night. This thing is getting terrific.

The Court: You try those three men.

Mr. Turkus: I cannot finish three men in less than an hour.

A Talesman: Your Honor, may I say something?

The Court: You have started something.

No. 11: I have a very, very severe headache. I cannot even see very well.

The Court: Members of the press were so tired that one of the press representatives applied some time ago in my medicine closet for some aromatic am-onia to stimulate [fol. 2050] him to do his work.

Mr. Turkus: In a half hour's time what are we going to gain? One juror has a headache, I am tired; they are all disgusted. We want to go home. Mr. Barshay worked all night, he tells me, on some other matter. I think enough is enough.

The Court: I would like to finish this jury by tomorrow night.

Mr. Rosenthal: We would like to, too, but you must realize, out of 250 men there are only a few left, and ninety per cent of them are cause. That is not the fault of anybody. They are entitled to their opinion and we are entitled to the truth. It is not anybody's fault.

The Court: I will direct the drawing of an additional sixty, because there are only five outside of the box remain- [fol. 2051] ing for examination. Those five, together with the three gentlemen in the box, I think will be reasonably taken care of tomorrow. The drawing cannot occur, of course, in time to get the rest here before the beginning of next week. If the jury is not completed with those in the room by tomorrow night, we will have to take the end of the work out of a new panel. I am directing the drawing of sixty, because many will have business and personal reasons and want to be excused, and I would like to accommodate them as far as possible.

Mr. Rosenthal: Why not draw a hundred, your Honor? You might get fifty excuses out of sixty men.

The Court: All right, if you wish it.

Mr. Rosenthal: We want to get through with this thing also. Why not draw a hundred and see how many you get out of it.

The Court: Draw a hundred. Will you have the order prepared and sent over?

Mr. Turkus: Yes, your Honor. Will it be on consent of all counsel?

The Court: That is agreeable all around. All right, send the order this afternoon and I will wait for it.

Mr. Turkus: You want it this evening?

The Court: If I sign it tonight, the notices can go out in the morning so that they will be delivered by tomorrow [fol. 2052] afternoon's mail.

Gentlemen, please do not discuss the case, let nobody talk to you about it. Keep your minds open. Be in your places at ten o'clock in the morning.

Let the defendants be remanded first.

(Whereupon an adjournment was taken to Friday, October 10, 1941, at 10:00 A. M.)

[fol. 2053] Brooklyn, N. Y., October 10, 1941.

Trial Resumed

Mr. Turkus: (referring to the drawing of additional jurors.) There will have to be a valid, five-day notice.

Mr. Talley: I would consent to accept short notice on an application to the Court. I will not consent to the entry of the order, but I will accept and consent to short notice.

The Court: On application by the District Attorney for the further drawing of talesmen, do all counsel waive statutory notice?

Mr. Rosenthal: Yes, preserving the rights which are ours so far as our previous objections were concerned in motion form.

The Court: All other rights are reserved; all other exceptions are extended to cover this application.

Is there a waiver of notice by all counsel?

Mr. Talley: We waive notice.

Mr. Rosenthal: I agree on behalf of the defendant Capone.

The Court: Do you agree, Mr. Barshay, on behalf of Buchalter?

Mr. Barshay: Yes.

[fol. 2054] Mr. Turkus: Will your Honor take notice as to the presence now of all the defendants in the court-room?

The Court: They don't have to be in the court-room because it can be consented for them.

Mr. Rosenthal: The District Attorney intended to move for an additional panel of one hundred.

The Court: The Court stated sixty would suffice.

Mr. Rosenthal: And I suggested a hundred, in view of the fact that out of 250 men there were only about 33 peremptories.

The Court: See if you can agree.

Mr. Rosenthal: Because of the various motions that have been made for a change of venue, etc., counsel did not want to consent to anything, but they agree to accept and waive any notice of the application, preserving the rights they may have under their previous motions.

The Court: That is, to waive the statutory notice. That applies to all counsel for the defense?

Mr. Talley: Yes.

Mr. Barshay: Yes.

Mr. Rosenthal: Yes.

Mr. Turkus: Does the record indicate that counsel for every defendant has waived notice?

Mr. Rosenthal: Yes, counsel have waived notice in open court. We have waived the statutory notice.

[fol. 2055] The Court: I understand the order may now be signed?

Mr. Talley: Yes.

Mr. Barshay: Yes.

Mr. Cuff: Yes.

Mr. Rosenthal: Yes.

The Court: Is it consented to or opposed?

Mr. Rosenthal: It is not opposed and it is not consented to. We are passive. We urged the same ground as we urged to previous applications.

The Court: All counsel for the several defendants having waived the statutory notice for the application in open court, three o'clock this afternoon set for the drawing of jurors, returnable on Tuesday, October 14, 1941.

JOHN J. PATTEN, was then examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. The method we have adopted is to ask a question of one juror with the other jurors listening, so it will save time and the repetition of questions which will be similar.

Have you lived at your present address for a number of years?

A. Yes, sir.

Q. Prior to living there where did you reside?

A. I lived in Brooklyn all my life.

Q. Did you ever live in the Brownsville or East New York [fol. 2056] section of Brooklyn?

A. No.

Q. Did you hear the questions put to the other prospective talesmen as to the garment industry and the clothing industry?

A. I did.

Q. Do you have any connection with anyone in those industries?

A. No, sir, I do not have any connection with them but I accept business from brokers and from agents.

Q. At any rate, you have no personal contact or social contact with anybody who manufactures clothes, or ladies' garments, or who trucks clothes in any form?

A. I know people that do it; I do not visit at their homes; it is just an acquaintance.

Q. What I am getting at is, is your livelihood dependent upon the good will of anybody in that district?

A. No, sir.

Q. Are any of the names of the union officials of the Amalgamated Clothing Workers of America familiar to you?

A. No, sir.

Q. Or any of the officials of the clothing drivers' and helpers' union?

A. No, sir.

Q. Did anybody speak to you about the merits of the case since you received your notice?

A. Nothing in connection with the case.

Q. In other words, the discussions you have had were relative to prospective service as a juryman?

A. I have in the office with me—I don't know whether this [fol. 2057] is the proper time to say it or not. I don't want to say anything. I will answer your questions categorically.

Mr. Turkus: Something may come out that will affect the other jurors we have already, and it has taken a long time to get them; we do not want to lose them.

Q. Do you understand that these defendants at the bar, Buchalter, Capone, and Weiss, are charged with murder in the first degree?

A. Yes, sir.

Q. Have you any conscientious or other scruples against capital punishment?

A. No, sir, not against capital punishment.

Q. If selected as a juror in the case, will you determine the guilt or innocence upon this indictment without any reference to punishment in the case at all?

A. Well, as I say, so far as accepting the testimony, I think my mind was confused on account of a certain thing.

Mr. Turkus: The juror has endeavored, in all frankness, to tell counsel something, and at the same time does not want to say anything that may interefere with the

prospective members of the panel and with the jurors that have already been selected. I ask that we consult with your Honor before the bench, not within the hearing of the jurors who have already been accepted. May I suggest that the talesman and counsel appear before the bench before your Honor and find out what is in his mind?

[fol. 2058] By the Court:

Q. What is your business?
A. Fire insurance.
Q. And your office is where?
A. 150 William Street.
Q. General?
A. What do you mean by "general"?
Q. A general agency?
A. We are head of the office.
Q. What company?
A. The Royal group.
Q. That is fire insurance?
A. Yes, sir.
Q. What office do you hold?
A. I am City underwriter, having charge of the agency business for New York City and Long Island City for two of the companies.
Q. Where is 131 Tehama Street?
A. Tehama Street is a continuation of Albemarle Road, west, towards 36th Street, and it is about two blocks south of Greenwood Cemetery.
Q. That is over toward 30th Street?
A. Yes, sir, 36th Street, practically 12th Avenue and 36th Street is the location.
Q. Buildings cluster around there?
A. Yes, it is fairly well built up.

The Court: All right, step over here.

(Talesman Patten, Mr. Turkus, and all counsel appeared before the bench, and the following occurred without the hearing of the panel.)

Talesman Patten: My fellow worker, that is, my working partner, was on the jury when one of these defendants was concerned—he spent several weeks on the jury, and [fol. 2059] at that time I was very much interested in

reading the testimony, and after he came back I discussed with him what happened.

Q. What case was that?

A. Gurrah and Lepke case.

Q. You mean in Manhattan?

A. Yes, sir.

Q. The one that was tried in the Federal Court?

A. Yes, sir.

Q. I asked you particularly about that Tehama Street section for this reason: There was a certain establishment very close to where you are, and I was trying to guess as to what it might be. There is a man there who is the general manager of the establishment who was one of the talesman in the Abbandando and Maione trial. He was excused. He was also actively interested in a business way, on account of a strike in his plant, where guerrillas were brought in from the outside, and these guerrillas had been hired from a certain gangster. That case found its way into this court.

The Court: (Addressing Mr. Rosenthal.) If this gentleman is challenged for cause, it seems to me the challenge should be sustained.

Mr. Rosenthal: I challenge for cause.

The Court: Try the challenge.

JOHN J. PATTEN was then sworn on the challenge.

By Mr. Rosenthal:

[fol. 2060] Q. If the same questions were addressed to you now as were addressed to you at the bench, would you give the same answers now that you are under oath?

A. Yes, sir.

The Court: Challenge sustained.

PHILIP GETH, a talesman, was interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You live at 207 East 93rd Street?

A. Yes, sir.

Q. Is that what they call Kings Highway?

A. Yes, sir.

Q. That is on the fringe of Brownsville and East New York?

A. Yes, sir.

Q. You are listed as a manager?

A. Yes.

Q. What do you manage?

A. Radio appliances.

Q. Where is your office?

A. Lynbrook, Long Island.

Q. For whom do you work?

A. For a corporation that has stores——

Q. They have stores in Hempstead, Rockville Centre, Freeport and Lynbrook?

A. Yes, sir.

Q. The president of your concern is a friend of mine. Did you hear the questions asked of the other talesmen while you were sitting in the chairs waiting to be called?

A. Yes.

Q. Is there anything about the nature of the charge of murder in the first degree which would impair or prevent you from rendering conscientious jury service?

[fol. 2061] A. Yes, sir, there is.

Q. Is there something, you say, that may affect the other jurymen if you say it out loud?

A. Yes, sir.

Mr. Turkus: I think we should hear that before the bench.

The Court: I don't want to start a parade up to the bench. This may be more imaginary than real. Suppose you go ahead with specific questions, and you may find out it is not harmful.

Q. Your job is to decide the question of the guilt or innocence of the defendants upon the evidence.

A. Yes, sir.

Q. Is there something that you know about the case?

A. Not about the specific case, no, sir.

Q. Is there something you know about the defendants?

A. Yes, sir.

By the Court:

Q. By direct knowledge?

A. By direct knowledge.

The Court: Then you may step up here.

(On motion of Mr. Turkus, the talesman, together with counsel for the defense and Mr. Turkus appear before the bench, without the hearing of the panel.)

PHILIP GETH, residing at 207 East 93rd Street, Brooklyn, New York, was questioned.

By the Court:

[fol. 2062] Q. What is the trouble?

A. I have a tenant living at my house that has been associating with one of the defendants.

Q. In what way?

A. I don't know what way, but I know the defendant, as a matter of fact; I know one of the defendants; I met him—I don't know him personally, but I saw him.

Q. What is his name?

A. Buchalter. I met him at a wedding reception about five or six years ago.

Q. Where?

A. In Brownsville.

Q. What hall?

A. I don't recall. I think it was one of those halls along Blake Avenue.

Q. Were Abbandando and Maione there?

A. No, sir.

Mr. Barshay: That could be five or six years ago.

The Talesman: About five or six years he was there.

Q. Were strauss and Reles there?

A. Shapiro.

Q. Were Strauss and Reles there?

A. I don't remember.

Q. Shapiro was killed since.

A. Gurrah is the man, he was there.

Q. Shapiro was there?

A. Yes, sir.

Q. Shapiro was killed.

Mr. Rosenthal: No, that is not this Shapiro.

The Talesman: That was Jacob Shapiro.

Q. Is that a brother?

A. No, sir.

Mr. Turkus: That is a different Shapiro.

Q. One of the Shapiros was killed and then there was a [fol. 2063] backfire when a tire was being changed.

A. I have relatives that live in Brownsville and the East New York section all their lives, the Ruben brothers.

Q. You have too intimate a knowledge—As I recall it, when Shapiro was killed in a rival pinball racket, Buggsy Goldstein and Abbandanda, one or the other, was behind the automobile in front of Rose Gold's candy store one night when a car containing members of the New York gang drove up and opened fire and shot—and I think Buggsy was shot in the neck and Shapiro was killed, if I recall correctly.

A. This is not the same Snapiro.

Mr. Rosenthal: Counsel for defense challenge for cause.

Philip Geth, a talesman, was sworn on the challenge.

By Mr. Rosenthal:

Q. If you were asked the same questions now that were asked by the Court before the bench, would you give the same answers?

A. Yes, sir.

The Court: Challenge sustained.

James F. Kelly, a talesman, was then interrogated by Mr. Turkus as to his qualifications.

By Mr. Turkus:

Q. You live at 575 Seventy-fourth Street?

A. Yes, sir.

[fol. 2064] Q. Is that in Bay Ridge?

A. Yes, sir.

Q. You are listed as a teller.

A. Yes, sir.

Q. By what bank are you employed?

A. Bay Ridge Branch of the Savings Bank.

Q. Have you been doing that work for some time?

A. Yes, sir.

Q. Were you in some other line of endeavor?

A. Yes, sir. I was an agent in New York; they handled the output of cotton goods and things like that.

Q. While you were there did you have any contact with people in the garment or clothing industry?

A. No, sir.

Q. I suppose you did office work?

A. Yes, sir.

Q. You have been nine years with the bank?

A. Yes, sir.

Q. Is this your first experience as a juror in a criminal case?

A. No, sir.

Q. Have you served in the County Court?

A. No, sir.

Q. In what court?

A. In the Federal Court.

Q. I take it I can go along with you very readily because of that fact. I suppose you have no contacts in the garment industry or the clothing industry or with the truckers?

A. No, sir.

Q. May I understand you have had no contact in the Brownsville or East New York section of Brooklyn or on the Brooklyn waterfront?

A. No, sir.

Q. So the names I spoke of would not be familiar to you?

A. No, sir.

[fol. 2065] Q. May I go along with the understanding you have had no contact with union officials either in the Amalgamated or the Clothing Truckers or Truckers Union, or any other union?

A. No, sir.

Q. You understand the nature of the charge is murder in the first degree?

A. Yes, sir.

Q. Is there anything about the nature of the charge, namely, murder in the first degree, which would prevent you from being a fair juror in the case?

A. No, sir.

Q. Do you have any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Since you were listed for jury service, has anybody spoken to you about the case?

A. Not about the case, just about attendance.

Q. Whatever conversations you had were limited to prospective service as a juror?

A. Yes, sir.

Q. Have you heard me mention the names of nine lawyers.

A. Yes, sir.

Q. Do you know any of them?

A. No, sir.

Q. Or do you know anybody connected with the practice of criminal law?

A. No, sir.

Q. Do you know any member of the bar who specializes in the practice of criminal cases?

A. No, sir.

Q. I take it your hesitation was because you knew some members of the bar?

A. Yes, sir.

[fol. 2066] Q. Do they handle civil cases?

A. I know one.

Q. What is his name?

A. James McGough, Assistant District Attorney.

Q. Do you know Judge O'Dwyer?

A. No, sir.

Q. Do you know any other member of his staff?

A. No, sir.

Q. Is your acquaintance with Mr. McGough such that you can decide this case on the evidence?

A. Yes, sir.

Q. Would you be inclined to run in favor of the prosecution because Mr. McGough is an Assistant District Attorney?

A. No, sir.

Q. I will cut this right down to the bone so we will not waste any time. I take it that you understand by now that part of the State's case rests upon the testimony of co-participants in the commission of this murder?

A. Yes, sir.

Q. And that kind of an individal is known in the law as an accomplice.

A. Yes, sir.

Q. And there are certain rules to be applied to his believability or credibility?

A. Yes, sir.

Q. Will you take those rules and the tests which the Judge gives you?

A. Yes, sir.

Q. Will you, if you are instructed to weigh that testimony with care and caution, do so?

A. Yes, sir.

Q. With regard to the testimony of an accomplice, will you, if selected as a juror in the case, devote your mental faculties to ascertaining does this accomplice speak the [fol. 2067] truth about participation in this murder by the defendants and the part that each in this group or combination played in the commission of that murder?

A. Yes, sir.

Q. You follow what I mean?

A. Yes, sir.

Q. Will you, when you apply those tests, use your mind to find out is this man, the accomplice, telling the truth about these defendants?

A. Yes, sir.

Q. And is he telling the truth about them as a group or combination who committed this murder?

A. Yes, sir.

Q. If it is not clear to you, don't hesitate to say so.

A. It is clear.

Q. Do you find any fault with the District Attorney who, in order to solve a murder case, will avail himself to accepting testimony of an accomplice against the other perpetrators of the crime?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Do you find any fault with the prosecution that uses the testimony of an accomplice against the other perpetrators of a crime?

A. No, sir.

Q. Do you understand it is not a question of whether you like or dislike an accomplice, the thing you have to find out as a juror is, Does he tell the truth about participation [fol. 2068] of these men with him in the commission of murder?

A. Yes, sir.

Q. Will you, if accepted, make that your job, to find out?

A. Yes, sir.

Q. Counsel have been speculating about many things in the proof here, and in asking jurors whether, if they had a reasonable doubt, they would not resolve that in favor of the defendant and bring in a verdict in accordance with that doubt.

A. Yes, sir.

Q. I take it you would bring in such a verdict if you felt there was a reasonable doubt?

A. Yes, sir.

Q. All I want to know from you is this: When we get through giving you all the evidence in the case, and you do not hear speculations that are brought about before you hear the evidence—and your mind is satisfied beyond a reasonable doubt that Buchalter, Capone, and Weiss committed this murder, will you say so in your verdict?

A. Yes, sir.

Q. Will you say that without any fear and without any hesitation?

A. I would.

Q. One of the lawyers for Buchalter brought out that his client has been convicted of a crime and is serving a long jail term as a penalty for the commission of that offense. Would you as a juror in this murder charge relax your duty to The People of the State because a man has been punished for other crimes committed?

A. No, sir.

Q. Would you deviate or go off to a wrong result be- [fol. 2069] cause of this punishment?

Mr. Barshay: I object to the form of the question.

Mr. Turkus: I withdraw it.

Q. Would you deviate from a proper result solely because he is paying the penalty for other crimes?

Mr. Barshay: I object.

The Court: Overruled.

Mr. Barshay: Exception.

A. No.

Q. You see, I think you understand from all the discussions we had, when I talk of guilt, I mean proved guilt beyond a reasonable doubt.

A. Yes, sir.

Q. My attention has been attracted to the fact that you made an application to be excused.

A. Yes, sir.

Q. Was that in August?

A. Yes, sir.

Q. I take it that whatever reason impelled you to ask for an excuse then has disappeared now?

A. Yes, sir. My folks lived in Jersey, but I would like to do my duty as a juror—although I would like to be excused if possible.

Q. You know you are putting me in a tough spot, because that is not my job. I have to find out if you are qualified. You see, if you are accepted, you have to go along and take these hardships.

A. I know that.

Q. Can you, if selected, apply your mental faculties to a decision in the case?

A. Yes, sir.

[fol. 2070] Q. Will you, if selected, keep uppermost in your mind that what you want to find out is Are these defendants guilty or are they innocent of the crime of murder in the first degree?

A. Yes, sir.

Q. Is there anything I failed to bring out by questioning thus far that goes to your ability to render proper jury service on this trial?

A. No, sir, nothing that I know of.

Q. If selected, will you listen to reasonable argument and discussion of your fellow jurors?

A. Yes, sir.

Q. Taking all instructions of law from Judge Taylor and nobody else in the case?

A. Yes, sir.

Q. Not forming any impression from anything that has been said during the jury selection, either by the defense or the prosecutor, forming your conclusion on the evidence you get in the court-room?

A. Yes, sir.

Q. Do you understand, as was said by one of the lawyers for Capone, and that, of course, applies to all of the defendants, that the defendants are here to meet one charge?

A. Yes, sir.

Q. The charge in this indictment?

A. Yes, sir.

Q. And, by the same token, the obligation of the District Attorney is one equally co-extensive, and that is to establish guilt beyond a reasonable doubt on this charge and nothing else?

A. Yes, sir.

Q. And if the evidence in the case satisfies your mind [fol. 2071] beyond a reasonable doubt that there are three guilty men at the bar of justice, Weiss, Capone, and Buchalter, and you are satisfied of that beyond a reasonable doubt, will you say that in your verdict?

A. Yes, sir.

Q. Courageously and without any hesitation?

A. Yes, sir.

By Mr. Talley:

Q. You said you had done previous duty as a juror in a criminal case?

A. Yes, sir.

Q. How long ago?

A. About twelve years ago.

Q. You were a juryman?

A. Yes, sir.

Q. In this court?

A. No, sir, in the Federal Court.

Q. Did you sit there through the entire term of that court?

A. I believe two weeks, if I recall.

Q. Is this the first time you have been called in the County Court of Brooklyn?

A. The first time.

Q. Without going into details, will you give us generally the character of your friendship with Mr. McGough?

A. I would not call it a friendship; I only know him to speak to.

Q. Do you meet frequently?

A. No, sir, in fact I have not seen him for several years, until I bumped into him in the corridor here several weeks ago.

Q. Did you ever discuss any criminal matters or matters which have come under his attention since he has been a member of the District Attorney's staff?

A. No, sir.

Q. Did you ever talk about the defendants with him?

[fol. 2072] A. No, sir.

Q. Are you acquainted with any members of the Police Department?

A. I am not.

Q. Have you read anything about this case or about any of the defendants?

A. I have.

Q. In what papers did you read this?

A. I read an article in the *Telegram* and I saw several small excerpts in the *Times*, about the selection of jurors.

Q. Did you read any extended accounts?

A. No, sir.

Q. Any of the tabloids?

A. No, sir.

Q. You read nothing about these defendants?

A. No, sir.

Q. Have you discussed this case, the defendants in the case, with anybody?

A. No, sir.

Q. Have you formed, from any source, any impression about these defendants?

A. Well, no, I have not formed any impression about them. Of course, I read the articles, but that was much prior to this indictment; the only impression I got, I said to myself—but as far as the crime itself was concerned, I did not have any impression whatsoever.

By the Court:

Q. Everybody is supposed to be in favor of law enforcement, one law as well as all laws, but the question is as to your impartiality in the administration of the law where a specific charge is made, so that fair judgment will be rendered.

A. I could be fair, your Honor.

[fol. 2073] Q. What business are you in?

A. Banking.

Q. What bank?

A. The Lincoln Savings Bank of Brooklyn, the Bay Ridge Branch.

Q. What position do you hold in the bank?

A. Teller.

Q. How long have you been there?

A. Nine years.

Q. That used to be the Jamaica Savings Bank?

A. No, sir—Oh, yes, sir, you are correct; the reason I did not know that was that I worked for the Fort Hamilton Savings Bank and they merged into the Lincoln. Of course, I did not know its past history.

Q. The name of the bank was changed twenty-three years ago.

A. That is right, yes, sir.

By Mr. Talley:

Q. Have you formed any impression at all about the guilt or the innocence of these defendants?

A. Not on this indictment, no.

Q. Irrespective of the indictment, outside of the indictment, have you formed any impression about the defendants or any of them?

A. No, I cannot say that I have.

Q. Do you mean that you have not?

A. No, I have not.

Q. There isn't any doubt in your mind?

A. No, sir.

Q. Do you understand that under our law the District Attorney is required to prove the guilt of these defendants beyond a reasonable doubt, before the jury can find a verdict?

A. Yes, sir.

[fol. 2074] Q. When the Court charges you, as he will, that if you have a reasonable doubt after hearing all of the evidence, you must give them the benefit of that doubt, would you do so?

A. Yes, sir.

By the Court:

Q. Is Gus Hasenpflug the president of that bank?

A. No, sir, Mr. Brundage.

Q. Is Mr. Hasenpflug a branch manager?

A. He is not.

Q. Do you say that that was formerly, your branch—that that was the Bay Ridge Savings Bank?

A. No, sir, the Fort Hamilton Savings Bank.

Q. You see, Gus Hasenpflug was at one time for several years connected with this court—and if he was in your

branch I wanted to find out if he discussed any problems with you.

A. No, sir.

Q. I think he is the head of the Bay Ridge.

A. That might be true.

By Mr. Talley:

Q. Do you know of any reason why you cannot sit as a fair and impartial juror in this case?

A. No, sir. But, as I said before, because of my family I would like to be excused.

Q. May I ask, without going into details, just what you mean?

A. My wife has three or four children—I have a baby about three months old. I do not like to leave them.

Q. And all the weeks she will be alone if you were on [fol. 2075] this trial?

A. Yes, sir.

Q. You have no one to stay with her?

A. No.

The Court:

Q. No one at all?

A. No, sir, the family live in Newark, New Jersey.

By Mr. Talley:

Q. You think that situation might distract your mind from a complete, adequate consideration of the issue that will arise in this case—do you think you will be thinking of your wife?

A. As a juror, I would put that out of my mind, because I have a wife and children.

By the Court:

Q. Would your mind be on the home?

A. I think it might be.

Q. You might not be listening intently to all of the evidence?

A. There is that possibility.

Mr. Talley: I think this juror should challenge for cause.

The Court: You might as well be merciful. Try the challenge.

JAMES F. KELLY, residing at 535 Seventy-fourth Street, Brooklyn, New York, was duly sworn on the challenge.

By Mr. Talley:

Q. Before trying this challenge you have not been under oath?

A. Yes, sir.

Q. Now that you are under oath, if I asked you the same [fol. 2076] questions as you are sitting in the witness chair, that I asked you before the oath was administered, would your answers be the same?

A. Yes, sir.

Mr. Talley: I press the challenge.

Mr. Turkus: No objection.

The Court: Challenge sustained.

(At the direction of the Court, the following talesmen were then seated in the box: Fred Sittig, No. 2703; Benjamin Bergman, Jr., No. 2763; Charles F. Wennell, No. 2666.)

FRED SITTIG, was then examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Sittig, do you live on Lincoln Place?

A. No, sir, Lincoln Road.

Q. Have you lived in Flatbush for a number of years?

A. Yes, sir.

Q. More than five?

A. Yes, sir.

Q. What is your vocation or business?

A. I am now in the printing business.

Q. At some other time were you in some other business?

A. Yes, sir.

Q. Did you have anything to do with the clothing or clothing truckers' business?

A. No, sir, nothing whatever.

Q. Was there trucking?

A. Yes, sir.

[fol. 2077] Q. Whom were you employed by?

A. R. C. Williams & Company, wholesale grocers.

Q. Your work would be limited to the trucking of groceries to the various dealers, bought from salesmen?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Do you reside with your family?

A. Yes, sir.

Q. You understand the nature of the charge in this case?

A. Yes, sir.

Q. I want to go along with you very rapidly on contacts in Brownsville, East New York, the garment, the clothing, and the clothing truckers. Did you hear the questions put to the other prospective jurors?

A. Yes, sir.

Q. Do you have any connection with people manufacturing clothes?

A. Only very little.

Q. Would those be for your own use?

A. Yes, sir.

Q. Any other contacts with any manufacturers of garments?

A. No, sir.

Q. In the Brownsville or East New York sections or the Brooklyn waterfront?

A. No, sir.

Q. Were the names of any of the union officials I mentioned familiar to you?

A. The only official I remember is a man named Cashel.

Q. Mike Cashel?

A. Yes, sir.

Q He is a trucker. Do you know him intimately?

A. No, sir. He was with the union for some time as an official.

[fol. 2078] Q. At any rate, the earning of your livelihood does not depend upon selling to anybody connected with these industries I mentioned?

A. No, sir.

Q. Or in connection with any union officials?

A. No, sir.

Q. Can you, if selected, try this case and render a verdict in consonance with justice?

A. Yes, sir.

Q. Will you, if accepted, do that, render a verdict consonant with justice in this case?

A. Yes, sir.

Q. Since you received your jury notice did anybody speak to you about the merits of the case?

A. Yes, sir.

Q. Was it some member of your family?

A. Yes, sir.

Q. Did you express any opinion as to the guilt or innocence of the defendants?

A. Not me, no, sir.

Q. Did you hear one expressed?

A. Yes, sir.

Q. Was it from someone who knew anything about the particular case or was it by way of an ordinary conversation?

A. Police officers.

Q. Do you know any member of the bar who specializes in criminal cases?

A. Yes, sir.

Q. What is his name?

A. Michael Kern, Mr. Heller, Mr. Geoghan.

Q. Have you an opinion as to the guilt or innocence of the defendants?

A. I have an impression.

By the Court:

Q. You live near Mr. Geoghan?

A. A neighbor.

Q. You live on Lincoln near Bedford?

[fol. 2079] A. I live on Lincoln Road. I live just three doors away from Mr. Geoghan.

Q. Is this two doors from Mr. Geoghan?

A. Three houses.

Q. The house between you is Mr. Todd?

A. Mr. Geoghan and the two Todd houses, and mine.

By Mr. Turkus:

Q. Are you very friendly with Mr. Geoghan?

A. Yes, sir.

Q. From time to time did you discuss criminal cases with him?

A. Many times.

By the Court:

Q. Did you play cards at his house?

A. Not his house, but he has been entertained in my home and I met him outside socially.

Q. Entertained in your house, at dinner parties or card parties?

A. Yes, sir.

Q. Semi-formal affairs, where everybody talks?

A. Yes, sir.

Q. Did you hear anything spoken of in those conversations about the killing of Joseph Rosen, which happened Sunday, September 13, 1936, in a little candy store at 725 Sutter Avenue?

A. Not after we were instructed by the Court to refrain from discussing this case.

Q. Did you before that?

A. Yes, sir.

Q. Did you hear the facts about the case?

A. Yes, sir.

Q. Were those facts given to you by Mr. Geoghan or some law enforcement agent you had some connection with?

A. Not by Mr. Geoghan, but by others.

[fol. 2080] Q. You know something about the facts in the case?

Mr. Rosenthal: I object, as calling for a conclusion.

Q. Mr. Geoghan did not talk about this case?

A. No, sir, Mr. Geoghan never mentioned the Rosen case, but he has mentioned people in criminal cases from time to time.

Q. Has the mention of them caused a definite impression in your mind, somewhat deeper than a casual impression?

A. Yes, sir.

Mr. Rosenthal: I challenge for cause.

The Court: Try the challenge.

Fred Sittig, residing at 105 Lincoln Road, Brooklyn, New York, was sworn on the challenge.

By Mr. Rosenthal:

Q. You were asked certain questions by the Court and Mr. Turkus while you were sitting in the box?

A. Yes, sir.

Q. Now that you are sworn, would you give the same answers that you gave to those questions?
A. Yes, sir.

Mr. Rosenthal: I press the challenge.
The Court: Challenge sustained.

Benjamin Bergman, Jr., a talesman, was interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You live at 466 Rockaway Parkway?
A. Yes.
[fol. 2081] Q. That is around East New York?
A. Yes.
Q. Have you lived there for a number of years?
A. I have.
Q. Would you say more than five?
A. Yes.
Q. Did you ever live in any other section?
A. Yes.
Q. What section?
A. I lived in Brownsville, I don't know what section you would call Lincoln Place.
Q. Would it be the far side of Prospect, from Crown Heights?
A. No, sir, the other side. I think they call that Crown Heights.
Q. For how many years did you live in Brownsville?
A. For a period of about twelve or fourteen years.
Q. When did that period end, somewhere in 1930?
A. Before that, it would be about 1928.
Q. Since then for the most part you have lived on the fringe of Brownsville and East New York, in the Rockaway Avenue district?
A. It would be slightly more than the fringe.
Q. You are listed as a manufacturer. What do you manufacture?
A. I am not doing that now. I was at that time a manufacturer of clothing and then I went in the customs tailor business. I am not doing that now.
Q. You were manufacturing clothing during what years?
A. During 1929.

Q. Did you go up to 1932?

A. No, sir, I think I stopped.

Q. Were you in the garment district in Manhattan?

A. No, sir, in Brooklyn.

[fol. 2082] Q. Did you employ clothing truckers?

A. No, sir.

Q. Did you yourself do some part of the work?

A. We did everything in our own plant.

Q. What did you manufacture?

A. Ladies' garments and cloaks.

Q. Did you make production entirely in your own factory?

A. Yes, sir.

Q. Of course, you had to ship it?

A. Yes, sir.

Q. Didn't you have to have truckers?

A. No, sir, we only shipped through cab or subway.

Q. Having lived in Brownsville and East New York for all the years when you lived in Brownsville, and you now live in the East New York section, are the names Harry Strauss, Pittsburgh Phil, familiar to you?

A. Well, I heard the names through the newspapers only.

Q. Is the name Martin (Buggsy) Goldstein familiar?

A. I heard it from the same source.

Q. What business were you in besides the manufacture of ladies' garments? What did you go in when you left that?

A. I was secretary for a man for a little while, I had a process serving agency.

Q. That put you in contact with various lawyers and with various defendants whom you served with papers?

A. Well, it put me in slight contact.

Q. I am coming to the point. You have an impression, [fol. 2083] haven't you?

A. I have no impression.

Q. After this job as a process server, what did you do?

A. I went back in the clothing trade.

Q. What years were you in the clothing trade?

A. Up to about last year, up to about a year ago.

Q. So you have not been in the clothing trade now since 1930?

A. I said up to a year ago.

Q. When did you go back into it?

A. I went back about 1933 or 1934.

fou have been in that business up until last year?
fes, sir.
Now, while you were in the clothing business before
hile you were on the other occasion, did you hear the
of Hyman (Curley) Holtz?
No, sir.
Or Philip Orlofsky?
No, sir.
Do you know any officials of the Amalgamated Cloth-
orkers of America?
No, sir.
Didn't you have dealings with union officials?
No, sir.
Did you have a non-union shop?
Yes, sir.
What business do you do now?
I am working with a corporation, Martin's, on Fulton
.
That is run by Zeitz?
Yes, sir.
Did you follow the investigation of Mr. Dewey in the
apers?
I did not follow it; I read some accounts.
I mean particularly ones about these industries.
084] A. No, sir.
They went on while you were in business.
I did follow some accounts of some investigation. I
know what particular one.
From your knowledge of the clothing business and
you have heard and what you have read, is the name
pke familiar to you?
Not from that source; it is familiar from other
s.
The name of Lepke is familiar?
Yes, sir.
Is the name Gurrah familiar?
I heard that.
Do you have some impression as to the name of
?
I have, from what I have read.
Is it an impression about Lepke as a man?
I have no impression; I have none.
I don't want you to say anything——
I want to say exactly the way I think.

Q. You might say something that would cause a lot of trouble for the jurors, and that is why I am careful.

By the Court:

Q. Supposing we put it this way: Near what street do you live on Rockaway Parkway?

A. Near Church Avenue.

Q. You are not far from Saratoga Avenue and Livonia?

A. No, sir, I get off there, that is the station I get off at.

Q. Have you stopped from time to time at Rose Gold's store?

A. Yes, sir, I have.

[fol. 2085] Q. You purchase there?

A. Yes, sir.

Q. Do you st there?

A. No, sir, I don't believe so, unless I probably meet somebody that I know.

Q. You would stop and chat?

A. Yes, sir.

Q. Are you sure you have not met any of the people whose names have been mentioned here?

A. No, sir, I have not.

By Mr. Turkus:

Q. When you were in the store around that corner did you see people there, men standing around the store or standing on the corner?

A. I saw people standing on the corner.

By the Court:

Q. Inside, around the counter?

A. I generally would make purchases outside, of newspapers.

By Mr. Turkus:

Q. Did you make purchases when Rose Gold was the proprietor?

A. I don't know whether or not I made purchases.

Q. Didn't you read in the newspaper about Rose Gold?

A. I don't know.

Q. You know the one they called Midnight Rose, who kept her store open twenty-four hours, Rose Gold, at Saratoga and Livonia—did you read about her?

By the Court:

Q. Did you know the place was kept open all night?
A. No, sir, I Did not.

By Mr. Turkus:

[fol. 2086] Q. Do you know where Sackman and Livonia is?
A. I know where it is; I am not familiar with it.
Q. You were living adjacent to that district when the Rosen murder happened in 1936, weren't you?
A. I was.
Q. And people in the community were talking about this murder, weren't they? Did you hear things said?
A. I don't think I heard anything. I may have heard it at that time, but right now my memory tells me I did not.
Q. I know you were trying to tell me something. I understand what is in the back of your mind.
A. No, I am trying to remember, but I do not remember.

By the Court:

Q. Have you ever met any of the people at any place whose names have been mentioned here?
A. I have not.
Q. Or any of their relatives?
A. I have not.
Q. Did you know any of them by sight?
A. No, sir; I don't know anybody; if I did know them I would not know their names, so I would not know if they were those people or not.

By Mr. Turkus:

Q. Is there anything in your past experience that has caused you to have a prejudice against any of the defendants at the bar?
A. No, sir.
Q. You have been in the clothing business on all the occasions you told me about?
A. Yes, sir.
Q. And you are familiar with the names of Lepke and [fol. 2087] Gurrah by reading?
A. Yes, sir.
Q. That would be newspaper reading?
A. Yes, sir.

Q. That would be reading, I take it, during the time when Thomas E. Dewey was conducting an investigation?

A. I don't know whether it was during that time or not.

Q. Was it when Judge O'Dwyer was conducting his investigation that you read the names of Lepke and Gurrah?

A. It might have been.

Q. How long ago was it that you read the names of Lepke and Gurrah?

A. About three or four years ago.

Q. And that was before Judge O'Dwyer was District Attorney? He was District Attorney in January, 1940, so your reading must have been while the Dewey investigation was going on. Would that refresh your recollection.

Mr. Rosenthal: I object to what it must have been.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. It does not refresh my recollection. I know I read something.

Q. Do you remember what you read about Lepke and Gurrah?

A. I have a slight idea. I told you I did not go into these things in detail.

Q. Do you want to be a juror in this case?

Mr. Barshay: I object to that.

Q. Have you any desire to be a juror?

[fol. 2088] Mr. Rosenthal: I object.

The Witness: I will say this: It will inconvenience me.

The Court: I think from previous questions and answers there might be something in the back of the juror's mind based upon recollection.

Q. Would that affect your ability to pass on the evidence in the case?

A. It would not.

Q. Would you be embarrassed by jury service in this case?

A. No.

Q. As you sit in the jury box now have you any impression about Harry (Pittsburgh Phil) Strauss?

Mr. Rosenthal: I object.

The Court: Objection overruled.

A. I have.

Q. Is it one that is derogatory to him?

A. It is.

Q. That name will figure in the testimony—I just tell you that as a thought—that is about as far as I can go. Have you some idea about Abe Reles?

Mr. Rosenthal: I object.

The Court: Objection overruled.

Mr. Rosenthal: Exception.

A. I have not.

Q. Now, did you presently get off at the corner of Saratoga and Livonia Avenue going to and from work?

A. I do.

Q. How many years have you been getting off at that station?

[fol. 2089] A. Over six years.

Q. Have you any knowledge of the character of that corner?

A. I have.

Mr. Turkus: I will have to challenge this talesman for implied bias, because of his knowledge of the conditions on the corner there.

The Court: Try the challenge.

Benjamin Bergman, Jr., residing at 466 Rockaway Parkway, Brooklyn, New York, sworn on the challenge.

By Mr. Turkus:

Q. While seated in Jury Seat No. 11 I asked you certain questions and you made some responses to me.

A. Yes, sir.

Q. Would those be true now that you are under oath?

A. They would.

Q. In addition to that there was something that you were trying to tell me that I asked you to refrain from because of the other members of the jury that had been selected.

A. It was not anything I tried to tell you; you may have thought I tried to.

Mr. Turkus: I press the challenge.

Mr. Talley: No questions by the defense.

The Court: Challenge sustained.

(The Court then directed that the box be filled with the two remaining talesmen: Arthur S. Funk, No. 2765, and John Furlan, No. 2660.)

[fol. 2090] CHARLES F. WEMMELL was questioned as to his qualifications.

By Mr. Turkus:

Q. Do you live at 1041 Hancock Street?
A. Yes.
Q. Have you lived there for a number of years?
A. Going on six years; before that I lived for eighteen years in the same district.
Q. I think they called that the Bushwick section.
A. Yes, sir.
Q. Your business is salesman. What do you sell?
A. I am in the printing business; I am doing some investigation of my own at the present time in regard to a Surrogate's case in which I am involved, looking up some heirs.

By the Court:

Q. You are not in the Bushwick section, you are in the Stuyvesant Heights.
A. They call it the Bushwick section.
Q. This side of Broadway?
A. Yes, sir.
Q. You are near Patchen Avenue?
A. No, sir, toward Evergreen Avenue.
Q Between Broadway and Bushwick?
A. Closer to Evergreen.
Q. Are you active in Mr. Toomey's club there?
A. I do not belong to any organizations.
Q. You are not connected with the campaign?
A. No, sir.

By Mr. Turkus:

Q. This litigation you speak about, that is, as I under-
[fol. 2091] stand it, pending in the Surrogate's Court?

A. It has to be administered. He is trying to get some additional data on heirs, and I am investigating.

Q. Is it litigation in which you have some personal interest?

A. Yes, sir, my own family have the same name.

Q. You are trying to secure sufficient evidence to persuade the public administrator to give you a fund left by this deceased?

A. I am trying to locate missing heirs.

Q. This brings you in the Municipal Building in Brooklyn frequently?

A. No, sir.

Q. Have you a lawyer who represents you on the matter?

A. No, one of the parties involved has.

Q. Do you come in frequent contact with this member of the bar?

A. No, sir, not very often. I saw him twice this year.

Q. What is his name?

A. Harold Bakerman, 15 Park Place, Manhattan.

Q. You stated you were in the printing business until recently. What did you do before that?

A. I was still in the business.

Q. Is that your vocation for most of your adult life?

A. Twenty years.

Q. I take it they were just minor jobs you held before that?

A. Yes, sir.

Q. What is the name of the printing concern?

A. Eakin & Shetter, 263 Ninth Avenue.

[fol. 2092] Q. Do you know Joe Sullivan? He represents some printing outfit.

A. I don't know any of them.

Q. Did any of your business bring you in contact with anybody in Brownsville or East New York area?

A. No, sir.

Q. Or in the garment or clothing district?

A. No, sir.

Q. Or with the clothing truckers?

A. No, sir.

Q. Are any of those names familiar to you?

A. No, sir.

Q. I will come back to you and try to get that thing straightened out, because if that is the only difficulty in the case, let me know it.

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Vol. VIII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

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ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED {DECEMBER 30, 1942. JANUARY 2, 1943. JANUARY 4, 1943.

CERTIORARI GRANTED MARCH 15, 1943.

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JOHN FURLAN, 4418 Foster Avenue, Brooklyn, New York, was interrogated as to his qualifications.

By Mr. Turkus:

Q. You are an insurance broker?
A. Yes, sir.
Q. Your address is 4418 Foster Avenue?
A. Yes, sir.
Q. Have you heretofore served as a juror in any case?
A. Yes, sir.
Q. A criminal case?
A. Yes, sir.
Q. In this court?
A. Yes, sir.
Q. How recent was that service?
A. Seven or eight years ago.
Q. Were any of the lawyers who are in court now engaged in the conduct of that lawsuit?
A. No, sir.
Q. Do you know any of the nine lawyers who represent [fol. 2093] these defendants?
A. No, sir.
Q. Or any member of the bar who specializes in the defense of criminal cases?
A. No, sir.
Q. Was this case you served on in the County Court a capital case?
A. No, sir.
Q. Who was the judge in the case?
A. Judge Nova.
Q. Did you hear the judge charge the jury on the law?
A. Yes, sir.
Q. Do you know anybody on Foster Avenue named Walker—Dorothy Walker?
A. No, sir.
Q. Is that considered Flatbush?
A. That is East Flatbush.

By the Court:

Q. You are up near the swimming pool?
A. About two blocks away.

By Mr. Turkus:

Q. Where is your office?

A. My home address.

Q. How long have you been in the insurance business as a broker?

A. Twenty years.

Q. Do you have neighborhood trade or does your business take you all over the city?

A. All over the city.

Q. Do you have clients?

A. Customers. Clients are for lawyers.

Q. Do you have any business connection with people in the East New York section of Brooklyn, Brownsville and Ocean Hill?

A. No, sir.

[fol. 2094] Q. Do you know what I mean by Ocean Hill, that is around Eastern Parkway and Atlantic Avenue?

A. I understand.

Q. Did you have any business connection with people in the garment district?

A. I have.

Q. People who manufacture clothes?

A. I have.

Q. How frequently do you see those people?

A. When I get renewals.

Q. That is either once a year or once in three years?

A. Once a year.

Q. You say you have been in business thirty years?

A. Close to that.

Q. And it must be for a number of years you have been having contacts with people in the garment and clothing business?

A. Yes, sir.

Q. I suppose when you were in that district you heard things discussed?

A. Yes, sir.

Q. Was the name of Lepke and Gurrab familiar to you?

A. Yes, sir.

Q. Have you an impression about the name Lepke?

A. Yes, I have, I should say I have an opinion.

Mr. Rosenthal: I challenge for cause.

The Court: Try the challenge.

JOHN FURLAN, No. 2660, residing at 4418 Foster Avenue, Brooklyn, New York, was sworn on the challenge.

[fol. 2095] By Mr. Turkus:

Q. When you occupied Seat No. 12, you told me in substance that you had business or contacts with people in the garment district of Brooklyn?

A. Yes.

Q. The names of Lepke and Gurrah are familiar to you?

A. Yes, sir.

Q. I asked you if you had an impression and you told me you had an opinion about Lepke.

A. Yes, sir.

By the Court:

Q. As to guilt or innocence on this charge?

A. No, not as to the merits of the charge, but as to the character of the defendant.

Q. Is that such an impression that you could not lay it aside?

A. No.

Q. You could not lay it aside?

A. No, sir.

Q. Are you positive it would influence your judgment in the decision of this case?

A. Yes, sir.

Mr. Barshay: No questions.

The Court: Challenge sustained.

ARTHUR S. FUNK, No. 2765, residing at 1256 East 13th Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You live on East 13th Street?

A. Yes.

[fol. 2096] Q. Is that near Avenue L?

A. That is the corner of Locust Avenue, a short street that comes in between Avenue L and M.

Q. Is that known as the Kings Highway section?

A. Yes, sir, it is near Kings Highway.

By the Court:

Q. That is in the Elmwood section?
A. I suppose so. There is Elm Avenue near there.
Q. You use the Avenue M station?
A. Yes, sir; I am only there a week or so.

By Mr. Turkus:

Q. I think you told the Judge you only live there a week or two?
A. Yes, sir.
Q. Mr. Rosenthal correctly informed me that you are listed as at Avenue K.
A. Yes, sir.
Q. You did live there?
A. Yes, sir.
Q. How many have you lived in that neighborhood?
A. Four years.
Q. That is what would be commonly called Kings Highway?
A. That is further away from Kings Highway.

By the Court:

Q. Are you related to Dr. Funk?
A. No, sir, I am not.
Q. His office is near you?
A. That is right. I know him.

By Mr. Turkus:

Q. Did you live in some other district of Brooklyn before [fol. 2097] you lived at Avenue K?
A. I lived on Ocean Parkway and Albemarle Road, and prior to that on Linden Boulevard.
Q. You are an insurance broker?
A. Yes, sir.
Q. Are you in business for yourself?
A. I am a member of a corporation.
Q. So you have a financial interest in the company?
A. Yes, sir.
Q. What is the name of the company?
A. L. V. Funk & Son, insurance, 44 Court Street.
Q. You are right here in the downtown district?
A. Yes, sir.

Q. Do you know anyone working for them in their office?

A. Well, my business does not bring me into much contact with lawyers.

Q. Does your business bring you in contact with people throughout Brooklyn, in various sections of Brooklyn?

A. Yes, sir.

Q. Do you know any of the nine lawyers in this case?

A. No.

Q. Or anybody connected with their law offices—Mr. Barshay has a very nice law office in Court Street.

A. No.

Q. Do you know anyone working for them in their office?

A. No, sir.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. I know Dave Price.

Q. A partner of William W. Kleinman?

A. Yes, sir. I used to go to school with him twenty years [fol. 2098] ago. I had contact with him six years ago in the County Court, in a case which he was defending. I have not seen him since.

Q. Do you know Mr. Kleinman or Mr. Price?

A. No, sir, I do not.

Q. Mr. Kleinman is now a Captain in the United States Army, he is not now practicing law, and Mr. Price is maintaining their office at No. 66 You do not know either one?

A. No, sir.

Q. Has business brought you in contact with the East New York area of Brooklyn?

A. No, sir.

Q. Or the Ocean Hill section?

A. No, sir.

Q. Or the Brownsville area?

A. Slightly.

Q. Are you familiar with the corner of Saratoga and Livonia Avenues?

A. Yes, sir.

Q. The corner, when I say the corner, I mean where the candy store is; do you know that corner?

A. I don't know what business is located there. Once or twice I had to get off that subway station, but otherwise I do not know what the business is or anything else.

Q. Do you know people who live in that district?

A. The closest I know anybody there would be Hopkinson Avenue and Riverdale.

Q. That is in the heart of Brownsville?

A. Yes, sir.

Q. Would that be sort of a social contact?

A. A social contact.

Q. How long have you known this person, over a period of [fol. 2099] years?

A. Yes, sir.

Q. Would there be some reason you would not want to disclose to me?

A. No, sir, not at all.

Q. Who is it whom you know?

A. It happens to be an attorney employed by the Modern Industrial Bank.

Q. Since it is in that area, I wanted to know something about the name, and there is a reason I asked that for.

A. I understand, Mr. Opperman.

Q. I suppose you know Mr. Opperman over a period of years?

A. Yes, sir.

Q. Does business bring you into any contact with the manufacturers of clothing, either ladies' or men's clothing or boys' clothing?

A. We have just one client, a ladies' dress contractor.

Q. What is the name of the man?

A. Hyman Block (?).

Q. Where is his place of business?

A. I think that is on West 36th Street, Manhattan.

Q. Did you have any other contract in the clothing district?

A. That is the only one.

Q. Does business bring you in frequent contact with the Block people?

A. No, sir, about twice a year.

Q. As a result of any acquaintance you have had, either in Brownsville or in connection with your business in the garment district, did you ever hear any discussion about either the Dewey or the O'Dwyer investigations?

A. No, sir.

[fol. 2100] Q. Is there anything you have heard or read about the name of Lepke and Gurrah which makes it familiar to you?

A. Yes.

Q. Has anything you have heard or read caused you to form an impression about those names?

A. I heard the names. Nothing I have read has caused me to form any impression, but I have heard of the names from various sources and I may say it has caused some impression.

Q. Would they be impressions detrimental to the people who bore those names?

A. Yes, sir.

Q. If people by those names were to figure in this case would you start off with a prejudice against them?

A. Yes, sir, I would have a prejudice; that is right.

Mr. Turkus: We will have to try a challenge on this.

Arthur S. Funk, No. 2765, residing at 1256 East 13th Street, Brooklyn, New York, sworn on the challenge.

By Mr. Turkus:

Q. You told me while sitting in Chair No. 11 that you had social contact in the Brownsville section and that you have had business contact in the garment center in Manhattan.

A. Yes, sir.

Q. That you have heard certain things in connection with the names of Lepke and Gurrah.

A. Yes, sir, that is right, but I did not give you the im- [fol. 2101] pression that it was through contact.

Q. No, but from some source you have heard things about Lepke and Gurrah?

A. Yes, sir.

Q. Which caused you to form an impression detrimental to the people who bear those names?

A. Yes, sir.

Q. The impression you cannot remove from your mind?

The Court: He does not have to remove it, he is only asked to disassociate and put it aside and disregard it.

Q. At any rate, I have gone into it in detail before the prospective juror was sworn.

If I asked you the same questions I did when you were in the chair, would you make the same responses?

A. Yes, sir, I would.

By Mr. Barshay:

Q. You understand Gurrah has nothing to do with this case, don't you?

A. Yes, sir.

Q. You said you had some prejudice against the other name. Is it one that goes to the guilt or innocence of the defendant?

A. Not bearing upon this specific case.

Q. Have you an abiding opinion or impression that is adverse to him in any respect?

A. Yes, sir.

Q. Is it one that may affect his standing with respect to you in this case?

A. It might make it easier to believe certain unfavorable things.

Q. Against him?

A. That is right.

[fol. 2102] Q. So you would require some evidence forthcoming from him or on his behalf to remove whatever impression you have?

A. I would require pretty strong evidence.

Q. And it would have to come from the defendant?

A. Yes, sir.

Q. If it did not, you would hold it against him?

A. Yes, sir.

Q. The nature of the proof that would be required against him on behalf of the prosecution would naturally be less because of the prejudice you have?

A. Naturally.

The Court: Challenge sustained.

By Mr. Turkus:

Q. Mr. Wemmell, Mr. Price was a lawyer in a certain case which I cannot mention now. Did he talk to you about any such case?

A. No, sir.

Q. Did you follow any of the cases in which he appeared as a defense lawyer against me when I was the prosecutor?

A. No, sir.

Q. Was that a special jury you were on?

A. It was on a bribery case, last November, Michaels Brothers.

Mr. Barshay: That was my case.

Q. Were you on the jury in that case?
A. I was not called.
Q. Was Mr. Barshay one of the defense lawyers?
A. Yes, sir.
Q. Not Mr. Price?
A. No, sir.

By the Court:

Q. How long is it since you contacted Mr. Price?
[fol. 2133] A. About six years ago.
Q. Were you personally interested?
A. No, sir. I had not seen him since forty years ago; I used to go to school with him in East New York.
Q. Since then you have not had any contact with him?
A. Up to about six years ago; I was drawn on the panel in a case he was defending, and I saw him.
Q. Do you recall anything about the case?
A. No, sir.
Q. You were excused?
A. Yes, sir.
Q. Was that a special jury case?
A. No, sir, a regular jury. I think it was before Judge Fitzgerald.
Q. That would not make any difference in this case?
A. I would say not.

By Mr. Turkus:

Q. In connection with your knowledge of Mr. Price did you ever hear the names of Harry (Happy) Maione or Frank (The Dasher) Abbandando?
A. No.
Q. Or Martin (Buggsy) Goldstein or Pittsburgh Phil Strauss?
A. No, sir.
Q. Since receiving your jury notice did anybody speak to you about the case?
A. My wife, that is all.
Q. Was that with respect to an opinion on something with respect to jury service?
A. Jury service.

By the Court:

Q. What school was that you went to?

[fol. 2104] A. Public School 76, on Wyona Street.

By Mr. Turkus:

Q. Was there any discussion, when you saw the gentleman, about the defendants in the case?

A. No, sir, just taking it as a whole—just mentioned I was called.

By the Court:

Q. Where did you live at that time?

A. In East New York. Atlantic Avenue between Georgia and Sheffield, right near Piel Brothers Brewery.

Q. That is forty years ago?

A. Yes, sir.

Q. Brownsville had not been built up?

A. No, sir, it was only starting. They used to call that New Lots.

Q. That was farm land?

A. Yes, sir.

By Mr. Turkus:

Q. I think you told the Judge you lived on Atlantic Avenue between Georgia and Sheffield?

A. Yes, sir.

Q. Is there anything about the name of George Rudnick which is familiar to you?

A. No, sir.

Q. Did you hear anything about an accident that took place in 1937 on Atlantic Avenue near Eastern Parkway in a garage?

A. I cannot recall that.

Q. None of the names I have mentioned, Maione, Abbandando, Strauss, or Goldstein are familiar?

A. No, sir.

Q. From anything you read in the newspapers or heard discussed?

A. No, sir.

[fol. 2105] Q. Did you read anything about the O'Dwyer investigation?

A. A little.

Q. Was that starting in January, 1940, when Judge O'Dwyer became District Attorney?

A. I don't know.

Q. Was it in connection with certain investigations he conducted in Brownsville and East New York?

A. It was.

Q. Do you retain any impression of what you read from those articles?

A. No, sir, I read the paper just for one reason, the war news and the sports.

Q. What paper do you read?

A. The *World-Telegram* and the New York *Times*.

Q. The *World-Telegram* since January, 1940, on over fifty occasions had a front sheet story about the O'Dwyer investigation. Did anything you read in the *World-Telegram* leave any impression?

A. No, sir, absolutely not.

Q. Are the names Lepke and Gurrah familiar names to you from reading?

A. No, sir.

Q. From what you have read, is there any impression in your mind as to the men Lepke and Gurrah?

A. No.

Q. You have no impression about them at all?

A. No, sir, I have not.

Q. Is there any connection at all—or have you had any contact with anybody in the clothing or garment center?

A. No, sir.

Q. Did you maintain any contact, social or otherwise, in [fol. 2106] Brownsville or East New York?

A. No, sir.

Q. Or in Oceanview?

A. No, sir.

Q. Are you devoting yourself now to an investigation?

A. No, sir, off and on.

Q. When you are not conducting investigations what do you do?

A. I am home most of the time.

Q. Have you retired from active business?

A. No, sir.

Q. Do you mean by that that if you got a good job you would take it?

A. Yes, sir.

Q. I want to find out if you spend all your time investigating.

A. No, sir.

Q. Have your investigations brought you in contact with any police agency or any law enforcement agency?

A. No, sir.

Q. At no time have you been a witness or a participant in any litigation?

A. No, sir.

Q. In any lawsuits?

A. No, sir.

Q. Do you know the DistrictAttorney of the county or any member of his staff?

A. I do not.

Q. Do you belong to any societies?

A. No, sir.

Q. In your spare time in the evening, do you devote that how?

A. I listen to the radio.

Q. Did you hear anything on the radio in connection with the O'Dwyer or the Dewey investigations?

A. No, sir.

Q. Or about Lepke or Gurrah?

A. No, sir.

Q. Did you listen to the Walter Winchell program?

[fol. 2107] A. Yes, occasionally.

Q. Did you hear the name of Lepke mentioned on that program?

A. No, sir.

Q. Have you at any time during your past life had any outside contact by way of fraternities or societies?

A. Yes, sir. I used to belong to the Knights of Pythias, years ago, but I am not in it at the present time.

Q. Are you a Past Commander?

A. A Past Chancellor.

Q. Do you know the name of the lodge?

A. 108, Allegheny.

Q. That would be upstate?

A. No, sir, on Broadway.

Q. I doubt if that lodge is in existence now.

A. I don't know, I have not been in it in twelve or fifteen years.

Q. Do you know Counselor Lustig?

A. No, sir.

Q. Or any of the present officials or Grand Officers of the Lodge?

A. No, sir.

Q. You maintain no contact at all with them?

A. No, sir.

Q. Do you know any Assistant District Attorney on the staff of Judge O'Dwyer?

A. No, sir.

Q. Do you know any police officials?

A. No, sir.

Q. Did you ever belong to any law-enforcement agency or society?

A. No, sir.

Q. Or mingle with any officers of the law-enforcement agencies?

A. No, sir.

Q. Have you heard that part of the case may rest upon the testimony of an accomplice?

A. Yes, sir.

[fol. 2108] Q. As you sit in the jury box now, do you have any bias or prejudice against the defendants?

A. No, sir.

Q. Do you have any bias or prejadice against the prosecution which employs the use of one of the perpetrators of a crime against the other defendants on trial?

A. No, sir.

Q. Do you find any fault with the prosecutor of the county accepting testimony of an accomplice and using it against the other participants in the crime?

A. No, sir.

Q. Do you understand that in weighing the believability of an accomplice's testimony, that Judge Taylor, who presides, will give you instructions on the law?

A. Yes, sir.

Q. And that it will be your duty to apply these instructions on the law to the facts and to the witnesses in this case?

A. Yes, sir.

By the Court:

Q. You live quite a distance from the Brownsville and East New York section now?

A. Yes, sir.

Q. How long ago did you live in that section?

A. I lived in the same section, 91 Cornelia Street, for thirteen years. I have only made three moves in thirty years.

Q. How long ago is it since you lived in Atlantic Avenue?

A. Thirty years ago.

Q. That was just before the elevated structure was built?

A. Yes, sir.

By Mr. Turkus:

Q. Did you live in the Bushwick section at that time?

[fol. 2109] A. At the present time.

Q. Have you lived there for more than four years?

A. I live there for thirty years, in the same section.

Q. Is there any occurrence which took place that is at present in your mind, either by way of knowledge or newspaper reading?

A. No, sir.

Q. Specifically, the place in front of 1190 Jefferson Avenue.

A. No, sir, I do not recall it.

By the Court:

Do you belong to any clubs in Bushwick?

A. No, sir.

Q. You are not far from the Turn Verein?

A. No, sir, not a great ways. I understand that building has been sold to the Salvation Army, at Gates and Bushwick.

By Mr. Turkus:

Q. Are you in sympathy with the law enforcement?

A. Yes, sir.

Q. Anything that has occurred by virtue of your investigation or conduct or contact with this litigation in the Surrogate's Court has in no wise impaired your ability to be a fair and impartial juror in a case in which the People of the State of New York are a party?

A. No, sir.

By the Court:

Q. But you are within one block of Jefferson Avenue?

A. Yes, sir.

Q. Do you have any personal recollection of something [fol. 2110] happening there a few years ago?

A. No, sir.

By Mr. Turkus:

Q. Did you ever hear of any individual, by reading about it, by the name of Feinstein, or one named George Rudnick, in connection with the occurrence that took place on Jefferson Avenue near Central?

A. I cannot recall those names.

Q. I will just go one step further. I will mention the fact of an automobile. Have you any recollection?

A. No, sir.

By the Court:

Q. That was only two blocks from where you live.

A. It might be, but I have no recollection.

By Mr. Turkus:

Q. There was a good deal of Newspaper publicity about the accident, and you read nothing about it?

A. That is all I recall.

Q. I think we got to the point where you said you had no bias or prejudice against the prosecutor or the prosecution wherein accomplice testimony is employed?

A. That is right.

Q. You will follow the tests given you by the Court in applying it to that type of testimony?

A. Yes, sir.

Q. Will you, when you apply the tests, no matter whether they apply to motive or anything else, keep uppermost in your mind that your job is to find out is this accomplice telling the truth about the defendants and the part that each one of them played in the commission of the murder? Does [fol. 2111] that sound sensible to you, to apply that test?

A. Yes, sir.

Q. Should the Judge tell you that there cannot be a conviction only on the testimony of an accomplice or one of the perpetrators of the crime, and that there must be independent proof that need not support the accomplice in every point he talks about, but independent proof may be deemed sufficient by the jury when believed if it tends to connect

the defendants and each of them in the commission of the crime?

A. Yes, sir.

Q. Is that understandable to you?

A. Yes, sir.

Q. And will you endeavor conscientiously to apply it to the facts in this case?

A. I will.

Q. Will you keep in mind, keep your mental facualties down to the fact it is not whether you like or dislike an accomplice, it is does he tell the truth about the group or combination participation of the defendants and himself in the commission of the crime?

A. Yes, sir.

Q. In other words, does he tell the truth about these defendants and himself, about the group or combination that committed the murder?

A. Yes, sir.

By the Court:

Q. When you went to the Public Administrator, do you mean in Brooklyn?

A. No, sir, in New York County.

Q. Is that somewhat of an old estate?

A. Yes, sir, it is about thirty-five or forty years old.

Q. Who are the lawyers?

[fol. 2112] A. A party named Bakerman draw up the figures.

Q. John J. Bakerman.

A. No, sir. I forget his first name. He is at No. 15 Park Place—Howard Bakerman.

By Mr. Turkus:

Q. What is the name of the estate?

A. William E. Wright Estate.

Q. Where did this man die?

A. He died in Manhattan, and we came across it by reason of a savings bank account.

By the Court:

Q. There were no lawyers in that case who might be connected with this?

A. Absolutely none. He only drew up the papers.

Q. Is the sole asset of the estate some bank account?

A. Yes, sir, about forty years ago, a savings bank account, and we really found out about it five years ago.

Q. Are you represented by counsel in your endeavor to secure that asset of the estate?

A. No, sir.

Q. You are doing that yourself?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Wemmell, have you done any other investigating work?

A. No, sir, that is my first.

Q. May I know your business before that?

A. I was a salesman in the printing line.

Q. Did you ever do any court work?

A. Never.

Q. Do you do field work for lawyers?

A. No, sir.

Q. Commercial printing?

A. Yes, sir.

[fol. 2113] Q. Were you ever the victim of any crime?

A. No, sir.

Q. Or was any member of your family?

A. No, sir.

Q. Did you ever serve as a federal juror?

A. No, sir.

Q. Have you served as a grand juror?

A. No, sir.

Q. You just have the recollection of my being in the last case?

A. I have a faint recollection. I could not say what the charge was.

Q. Do you read the newspapers?

A. Well, yes.

Q. I mean any particular newspaper?

A. Yes, sir, the New York *Times*, the *Evening Journal*, and now and again the *Telegram*.

Q. Did you read about the defendants in this case?

A. To some extent.

Q. Was it before you were called for service?

A. Yes, sir.

Q. Did you read more than one item about them before you were called for service?

A. Perhaps I read a few, not more, because, as I said before, I am not interested in that kind of reading.

Q. Did the first item cause you to have any impression?

A. No, sir, I was disinterested.

Q. Was the interest carried over so that you wanted to read something else?

A. No, sir.

Q. The first impression you had, was that pertaining to the defendants?

A. It was.

Q. Were they impressions you had by virtue of reading [fol. 2114] these articles?

A. Yes, sir.

Q. Were they favorable or unfavorable to the defendants?

A. I should say half way.

Q. You did not make up your mind?

A. No.

Q. At any rate, they were slightly unfavorable; put it that way.

A. Somewhat.

Q. When you were called for jury duty, you still retained that slightly unfavorable idea about them?

A. I had no idea these defendants were coming up on trial.

Q. When you came here you got that idea?

A. Yes, sir, after I came here.

Q. You came with a slight unfavorable impression?

A. Yes

Q. Did you read any other papers?

A. No, sir, not since the Judge told us not to, particularly about articles on the case.

Q. Since you were called, have you retained that slight unfavorable impression?

A. No, sir, I cannot say so.

Q. Was it removed?

A. Yes, sir, my mind is clear.

Q. So that at present the defendant starts off at scratch with you?

A. Yes, sir.

The Court: Those in charge of the prisoners will see that they abstain at all times from conversation with other persons. There must be no violation of this rule. This is bearing upon court-room discipline; it does not affect the trial of the case?

[fol. 2115] Q. Are you employed now in any way?

A. No, sir, only what I do in investigating work.

Q. Have you a personal interest in it?

A. Yes, sir, I expect to get money out of it.

Q. Your employment is along that line?

A. Yes, sir.

Q. Is it contested litigation?

A. Yes, sir, as far as I know.

Q. May I know how long you have been employed in any concern?

A. Ten years.

Q. How long were you investigating this claim?

A. About five years now.

Q. Are you married?

A. Yes, sir, thirty years.

Q. Any children?

A. No, sir.

Q. As you heard the prospective jurors being questioned over a period of days, did you form any idea with respect to this case?

A. No.

Q. Did you favor either side?

A. I did not.

Q. Did you?

A. No, sir.

Q. Did you partake in any political campaigns?

A. No, sir.

Q. Do you know anyone at all connected with the Police Department or the District Attorney's office?

A. No, sir.

Q. Or with any investigating agency?

A. No, sir.

Q. Are you a member of any law enforcement society?

A. No.

Q. Or any society for the prevention of crime?

A. No, sir.

Q. Did you ever have occasion to make a complaint [fol. 2116] against anyone in the District Attorney's office or the Police Department?

A. Never.

Q. Were you ever a witness in any criminal prosecution?

A. No, sir.

Q. Or in any civil litigation?

A. No, sir.

Q. Are any of the names that were read by Mr. Turkus or spoken of by Mr. Turkus, familiar to you?

A. No, sir.

Q. Reles, and all the way down?

A. No, sir.

Q. Have you any prejudice against people who are charged with crime?

A. No, sir.

Q. Are you in accord with the principles of law that an indictment filed in this court against a defendant is purely an accusation and has no weight or evidentiary value or any probative force? Are you in accord with that principle?

A. Yes, sir.

Q. Do you believe in the principle of law that every defendant is presumed innocent until he is found guilty under this charge beyond a reasonable doubt?

A. Yes.

Q. Do you believe in the principle of law that the presumption of innocence is fixed in favor of the defendant?

A. Yes, sir.

Q. And that it is so substantial that the enforcement of this presumption of innocence is at the very foundation of the administration of our law?

A. Yes, sir.

Q. You are in full accord with that?

A. Yes, sir.

[fol. 2117] Q. Do you believe, then, that when a defendant pleads not guilty he denies each and every allegation against him in this case?

A. Yes, sir.

Q. That means that he denies he is an accomplice of any person?

A. Yes, sir.

Q. So when a man comes here and says, "I am an accomplice," or a group of men come here and say that, you would be the one to find out whether or not he is an accomplice, won't you?

A. Yes, sir.

Q. He may admit it—his own participation, as has been

well said by another lawyer, but you are the one to find out whether or not he is telling the truth with respect to who is his accomplice?

A. Yes, sir.

Q. And so, will you take into consideration that if a person comes here and says that he is an accomplice of Buchalter, that he never saw or spoke to Buchalter, will you take that into consideration in considering whether or not that person is telling the truth with respect to his being an accomplice of Buchalter?

A. Yes, sir.

Q. In other words, he may claim he is, but there may be no truth in it?

A. Yes, sir.

Q. You have had experience, I take it, in judging whether or not a man tells the truth on given occasions?

A. Yes, sir.

Q. You have had experience to judge men who on some occasions tell partly the truth and partly lie?

A. Yes, sir.

[fol. 2118] Q. Sometimes they may have, in order to tell the truth about themselves, another motive to lie about someone else?

A. Yes, sir.

Q. You will consider that too?

A. Yes, sir.

Q. And if, after he has finished, and it is drawn from him and he admits that all this time he has been a moral bankrupt, a crook, a murderer, all along down the line, you will look upon him with suspicion, won't you?

A. Yes, sir.

Q. You will weigh every bit of testimony he gives?

A. Yes, sir.

Q. Always keeping in mind the presumption of innocence?

A. Yes, sir.

Q. And if you find that that person has some reason, some grudge, some idea for revenge, or any other reason to falsify even part of his story, you will be on the alert to find out whether that is so or not?

A. Yes, sir.

Q. If your dislike for him is based upon the fact that he has falsified, you will show that dislike in weighing his testimony?

A. Yes.

Q. You have heard that, assuming we get to the point of accomplice and it is believed by you, you will have to come to another point?

A. Yes, sir.

Q. You will want to know where the source of the corroborating testimony comes from, and if the prosecution should offer a group of men or a man whose background is no better than and conceivably worse than the accom-[fol. 2119] plice's, will you weigh his testimony very, very carefully?

A. Yes, sir.

Q. You will not swallow it?

A. No, sir.

Q. And what is the weight to be given to corroborating testimony would be for you to decide; is that correct?

A. Yes, sir.

Q. So if a man takes the stand and says he participated in the shooting of Rosen and the police come and say they found the body where it is alleged to have been shot, that is not corroboration against the defendant, you understand that; that may be corroboration up to the fact he is telling the truth about himself, but it does not tie up in any wise the defendants; you understand that?

A. Yes, sir.

Q. And all this time while the case is going on will you keep in mind the other principle of law which is provided for here, that it is the District Attorney's job to prove the accusation and nobody else's?

A. Yes, sir.

Q. Are you in accord with that?

A. Yes, sir.

Q. And there is still another principle, that the burden shall never shift in any phase of this case to the defendant; are you in accord with that?

A. Yes, sir.

Q. In other words, no defendant need prove his innocence; you understand that?

A. Yes, sir.

Q. And of course you will keep in mind this invisible portiere, the presumption of innocence, which surrounds the defendants, as a barricade which the District Attorney must [fol. 2120] throw down by believable evidence?

A. Yes, sir.

Q. And if the Court shall charge you that the failure of the defendant to take the stand shall form no unfavorable inference against him, will you take into consideration, if the defendant Buchalter does not take the stand or call people in his behalf, in considering his innocence or guilt, will you do that?

A. Yes, sir.

Q. You understand the Court will tell you he need not do it, but will you expect him to do it despite the Court's charge?

A. No, sir.

Q. The Court will tell you further that proof must be beyond a reasonable doubt—no lawyer has a right to try to define that "beyond a reasonable doubt," so that you may believe a person is guilty, you may have a suspicion that he is guilty, you may have an idea he is guilty, but that is not enough, you understand that?

A. Yes, sir.

Q. It must be beyond a reasonable doubt, and if you find one doubt for which you can ascribe a reason which arises from the evidence, will you give it to the defendant?

Mr. Turkus: I object; that is not a proper instruction.

Q. The exact legal language is, if you find a reasonable doubt as to the defendants' guilt which arises out of the evidence, will you give it to the defendant?

A. Yes, sir.

Q. And there may be testimony offered which is subject to two interpretations, one of innocence and one of guilt. [fol. 2121] For example, there may be testimony as to associations between some of the defendants and other people. If you decide that that association is an innocent one, of course, you will give it that interpretation?

A. Yes, sir.

Q. And if there is a doubt whether there is innocence or guilt, and the Court tells you in such event you must give it to the defendants on the basis of innocence, you will do that?

A. Yes, sir.

Q. When you don't know whether it is an innocent or a guilty one, and the Court shall tell you in that event you still must interpret it as beneficial to the defendants and as an innocent one, will you do that?

A. Yes, sir.

Q. It has been brought out that the defendant Buchalter is incarcerated for a period of forty to seventy-seven years. I brought that out to find out whether you or any other juror might be prejudiced against a man who has been convicted and punished. Would you?

A. No, sir.

Q. You understand that has nothing to do with this case?

A. Yes, sir.

Q. We seek no sympathy by virtue thereof, but we do not want any prejudice against him. You will not be prejudiced against him?

A. No, sir.

Q. You understand that his character here is not in issue unless he chooses to make it an issue?

A. Yes, sir.

Q. And if he does not choose to make it an issue, you will [fol. 2122] not consider it in any respect?

A. No, sir.

Q. Other lawyers have indicated to you, without binding themselves, that they may offer an alibi. Without promising anything to you, sir, if it should develop that some defendant offers a defense and our defendant does not, will you hold that against our defendant?

A. No, sir.

Q. You understand that each one is being tried separately?

A. Yes, sir.

Q. You are in accord with the principles that evidence as given against one person is binding only against that person unless his Honor charges you otherwise?

A. Yes, sir.

Q. There may be evidence here which applies to A, which is absolutely not believed as to another. If that is the fact, you will consider it?

A. Yes, sir.

Q. Mr. Turkus has said to you that an argument has not three times the force if it is repeated three times. That is true, but sometimes in the retelling of an argument it may lose its force—we cannot control that. I have a right to speak for my client, Mr. Rosenthal for his, and Judge Talley and Mr. Cuff for theirs. You will not, because of the necessity that the same point of view is applicable to all of us—you will not let the repetition of these argu-

ments, each one giving it sincerely for his client, lose its force because it is repeated?

A. No, sir.

Q. Mr. Turkus has made inquiry from the jurors—I don't [fol. 2123] know whether he addressed you or not—he said, "Do you find any fault with the District Attorney accepting testimony of an accomplice?" You are to understand that we are not here to find fault with the District Attorney or with defendants counsel or with defendant. This is not a fault-finding body at all—but the fact that the District Attorney has chosen to accept the testimony of an accomplice is not binding on you—you have got to decide whether you accept that testimony.

A. Yes, sir.

Q. So his position in the matter is wholly unimportant. The District Attorney has also made inquiry about the fact—he said, "Would you fail to do your proper duty in this case?" Of course, there is nothing you could do to the accomplice—did you hear that—you understand there is nothing you could do to the accomplice, in any event, because he is not indicted.

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Do you understand that if the Court shall so charge, and will you accept it, that the question of punishing the accomplice is in nobody's power any more—because the District Attorney, as a matter of law, has given the accomplice immunity in this case and he can no longer try him—will you take that into consideration if his Honor so charges you?

[fol. 2124] Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. If it develops in the future here that that is the fact and the Court says that it is an item for you to consider as a reward for his testimony, his failure to be indicted, and his complete immunity, when he admitted the commission of this crime—will you take that into consideration in weighing the testimony?

A. I will.

Q. If you find the evidence of any person giving testimony here because of a certain type of treatment he has been receiving at the hands of the authorities which resulted in his falsifying, will you take that into consideration?

A. Yes, sir.

Q. If you find that a man has committed eleven murders, and some committed six, and since then they have been living in a hotel, have taken automobile rides, attended baseball games, had the privilege of seeing their wives, will you take that into consideration?

A. Yes, sir.

Q. In other words, you shall, as a juror, investigate the truth here as you would investigate it in your own case?

A. Yes, sir.

Q. And if, out of that treatment, you find a situation—the treatment of these people—that there is a physical possibility of contact between one another, talking to one [fol. 2125] another, and perhaps the possibility of the concoction of a story, will you take that into consideration?

Mr. Turkus: Objected to.

The Court: Objection sustained.

Mr. Barshay: Exception.

(At 1:00 p. m., a recess was taken. Talesmen and jurors admonished as to their demeanor during recess. Defendants remanded.)

(Recess to 2:00 p. m.)

Afternoon Session—Trial Resumed

(All defendants were represented by counsel)

CHARLES F. WEMMELL was examined as to his qualifications to serve as a juror.

By Mr. Climenko:

Q. Mr. Wemmell, I understand that you knew Mr. David Price.

A. Yes.

Q. When is the last time that you saw Mr. Price?

A. About six years ago in the County Court.

Q. Have not talked to him at any time since?

A. No.

Q. At one time you worked for that printing firm at 260 Ninth Avenue?

A. Yes, sir.

Q. As a salesman?

A. That is right.

Q. Have you ever been employed in any other capacity besides the printing business?

A. Well, when I was young, about twenty years old.

[fol. 2126] Q. What was your business?

A. I was in the photographing line as a salesman.

Q. In the last few years you have been engaged from time to time in the investigation of that estate——

A. That is right.

Q. Have you experienced any difficulties in your work along the lines of that investigation?

A. Yes, quite a lot.

Q. Have you, in the course of that investigation been represented by one *one* attorney?

A. He is not working for me; he is working for somebody else.

Q. Have you during the course of that investigation consulted with the Public Administrator in New York County?

A. Not directly.

Q. You had no dealings with him yourself?

A. No, I have not.

Mr. Climenko: That is all.

By Mr. Rosenthal:

Q. Mr. Wenamell, you have been in the court considerably during the examination of the other men on the panel, have you not, sir?

A. Yes.

Q. You say that you have had no representation on this estate proposition. Has the person who has representation the same interest that you have? Is that what you mean by it?

A. Yes. It is on the other side of the fence.

[fol. 2127] Q. You mean adverse?

A. Yes.

Q. Have you had any unpleasant experience with any lawyer involved?

A. No, not at all.

Q. The reason why I ask you that, in answer to Mr. Climenko you said that you encountered difficulties.

A. I mean to say by that that I could not get the data I wanted; you understand what I mean?

Q. You mean from the lawyer?

A. No, just my own investigation.

Q. By that you do not mean that any authorities have prevented from procuring the data?

A. No.

Q. You mean that in searching for the information that you would like to have?

A. That is right.

Q. You have been unable to attain any success?

A. To a certain extent, but not complete.

Q. You understand that each of the defendants here are entitled to a separate determination at your hands—you understand that?

A. I do.

Q. And the defendant whom I represent, Mr. Louis Capone, who is seated in the rear there, may, in the wisdom of his attorney, myself, and my associates take the stand in this case. The mere fact that he is a defendant, would that in any wise cause you to brand his testimony as being untrue?

A. No.

Q. You understand that the truth from him is just as [fol. 2128] forceful as the truth from any other source?

A. Yes.

Q. He may also call witnesses in his behalf, and you heard me discuss the question of alibi, or have you heard me?

A. Yes, I have.

Q. You understand that even though a defendant may offer an alibi showing his presence elsewhere at the time the crime was alleged to have been committed, that that does not place any burden or shift the burden over to him to prove his innocence, do you understand that?

A. I understand.

Q. Do you also understand, sir, that if the evidence of the alibi in itself is sufficient to create a reasonable doubt in your mind as to his guilt, that then it would be your duty to resolve that doubt in his favor the same as any other doubt?

A. Yes.

Q. And you find no fault with a proposition of that kind?

A. I do not.

Q. When you were going to school you said you lived in the East New York section?

A. That's correct.

Q. Since your leaving the East New York section have you followed with any interest articles that appeared in the newspapers in respect to that particular section?

A. No, I have not.

Q. Have you, prior to your coming into the box to serve as a juryman, ever heard of the name of Abie Reles or Levine or Maione?

A. No.

[fol. 2129] Q. So that the name Reles as you sit here is a name that you have not heard prior to the time of your coming into court; is that right?

A. That is right.

Q. I think you said you read the morning *Times* and the afternoon——

A. *World-Telegram.*

Q. Have you read any articles in the *World-Telegram* in respect to any of the defendants at all?

A. As I stated before, before I was on the panel I read something.

Q. Was the subject-matter of what you read anything concerning the defendant himself or merely concerning the alleged crime involved in this case?

A. Concerning the crime itself.

Q. By that do you mean that it merely stated that the defendants are accused of having participated in this killing that took place on such-and-such a day in such-and-such a place?

A. Yes.

Q. But other than that you read nothing at all?

A. No, sir, did not.

Q. So that as you sit here your mind is free and open on the subject at issue; is that correct?

A. Yes.

Q. Do you know Captain Bals?

A. I do not.

Q. Or Lieutenant Osnato?

A. No.

Q. Or Detective Meehan or McDonough or McCarthy or Swift?

A. No.

Q. Have you any immediate relations or close friends [fol. 2130] on the police force?

A. I have not.

Q. Have you any acquaintanceship with any of the Assistant District Attorneys presently employed by Mr. O'Dwyer?

A. I have not.

Q. Have you ever been present at any lectures of any character dealing with crime?

A. I have not.

Q. The mere fact that the defendant may know one or more of the individuals who are called by the District Attorney or may have been in their company at some time, would that in itself prejudice you against the defendant to the extent that you could not be fair and impartial?

A. No, it would not.

Q. On the question of an accomplice, you realize that when an accomplice takes the stand he may be telling the truth concerning what he did; is that right?

A. That is right.

Q. But it is also true that he may be telling a falsehood in so far as other people are concerned; is that right?

A. Yes.

Q. Do you understand that your duties as a juryman do not so much apply to whether or not the accomplice is telling the truth concerning himself, but as to whether he is telling the truth concerning other people, the defendants, more particularly. Do you understand?

A. Yes.

Q. Do you understand further than that, if the accomplice were to go on and say, "I, the accomplice, fired a [fol. 2131] shot and killed So-and-so Rosen at his candy store on such and such a day," and then other policemen go on the stand, or witnesses and say, "We found Rosen in front of the candy store with a bullet in him," and a doctor goes on and says, he was dead as the result of that bullet, that is not the corroboration which the law requires. That may corroborate his statement that the man was shot and killed, but it would not corroborate under the law the statement as to whether these defendants in any wise aided in it. Is that clear to you?

A. Yes.

Q. You understand, then, that in addition to not only one accomplice, but as many as may be called, there must

be other evidence in the case, independent in its nature, which would tend to connect the defendant with the crime. Is that clear to you?

In the event—I do not know whether you heard me discuss it or not—in the event that it should transpire that this so-called other evidence emanates, whether it be in the form of admission or otherwise, from the mouths of individuals who themselves will be forced to admit that they committed numerous crimes of every type for which they have not been punished, for some of which they never will be punished, at least some of them, will you take that as well as any other thing that may develop in the course of their testimony in consideration in determining the motive that they may have in attempting to shift the blame [fol. 2132] or accuse the defendants on trial?

A. I will.

Q. And if you find that the motive is of such a nature as to raise a reasonable doubt in your mind as to whether he is telling the truth when he makes the statement, whatever it may be, would you resolve that doubt in favor of the defendant?

A. I would.

Q. And if that were the only evidence in the case, would you then hesitate to acquit the defendants?

A. I would.

Q. You say you would hesitate. You mean by that that you would not hesitate, don't you?

A. Yes.

Q. Do you understand, sir, that under our law that where testimony appears in a trial, that may be open to two reasonable interpretations, the one interpretation indicating that the man may be guilty and the other interpretation indicating his innocence, that it will be your duty, if instructed by the Court, to disregard the inference that might be drawn of guilt and you would be compelled as a juryman to accept that one which points toward his innocence; do you understand that? You have no fault to find with that proposition of law?

A. No.

Q. And if the Court were to charge you at the conclusion of the trial that where certain portions of the evidence are susceptible of two interpretations, one of which indicates guilt and the other innocence, it is your duty to disregard

the inference of guilt and accept the one of innocence, you [fol. 2133] would do that, wouldn't you?

A. I would.

Q. You have been asked by Mr. Turkus whether or not you would courageously and without fear or hesitation find a verdict of guilt in the event that you were convinced under the rules of evidence that the defendants were guilty. You were asked would you hesitate or be afraid to bring in a verdict of Not Guilty?

A. I would not.

Q. Have you actually sat on a criminal case?

A. Yes, about four years ago.

Q. In the County Court?

A. I did.

Q. Before what judge?

A. I can't recall. I think it was Judge Fitzgerald.

Q. And there you were charged by the Judge the questions of law; is that right?

A. Yes.

Q. And the case went to determination by the jury?

A. We were deliberating, and the defendants, I guess, in the meantime got cold feet and pleaded to a lesser degree.

Q. I did not intend to ask you anything about the verdict. I mean was it placed in your hands?

A. Yes, it was.

Q. For deliberation?

A. Yes.

Q. But it never came to an actual deliberation?

A. No.

Q. Is that the only time that you sat on a criminal jury?

A. Yes, a criminal case.

Q. You were called at other times but were excused because you knew the lawyer?

A. I have been serving ever since I have been maybe [fol. 2134] twenty-five.

Q. Mostly in civil courts?

A. That is right.

Q. Your only jury service in criminal cases was in this one particular instance where you actually did not find a verdict; is that right?

A. Yes.

Q. You know that it will be your duty, you understand, under certain circumstances whether if it develops in this case that there are a particular type of people who testify

who may or may not be accomplices, it will be your duty under the instructions of the law in that event to determine actually whether they are or not. Is that clear to you?

A. Yes.

Q. Have you heard the discussion which I have had with the other men in respect to the question that the Judge in some instances tell you that you must determine that a man is an accomplice? Have you heard that?

A. Yes.

Q. In other instances the Judge will leave it to your discretion based upon your determination of the evidence. That is clear? Now, merely because the District Attorney may claim that a man is not an accomplice or merely because the Court may pass that question to you to determine, would that fact in any wise influence you in giving a fair determination of what you believe to be his testimony as to whether he is an accomplice or not?

A. No, it would not.

Q. And if you were to determine he was an accomplice, [fol. 2135] would you under the instructions of the Court then seek for the other evidence which is necessary before you would attempt to convict?

A. I would.

Q. Do you know of any reason at all which has not been reached by questioning that would prevent you from being fair and impartial?

A. No at all.

Q. Just one question was called to my attention. Because of your knowledge of Mr. Price and the fact that he went to school with you, have you with any interest followed the cases which he has been interested in in the newspapers or in any of the magazines at all?

A. Not at all.

Q. You are unacquainted with his success as a lawyer?

A. I am.

Mr. Talley: No further questions of this talesman.

Mr. Turkus: There are two or three questions I would like to put to the prospective talesman that have come about as the result of other questioning.

By Mr. Turkus:

Q. Did you tell Mr. Barshay, Mr. Wemmell, that you have not engaged in any occupation or pursuit for the last ten years?

A. Yes, I have done things since the last ten years.

Q. I understood you to say to him you have been unemployed for ten years.

A. Oh, no, no, I did not mean that.

Q. What I gathered was, from his questions, that you said you had been unemployed for ten years and that five [fol. 2136] of these years you had been investigating this lawsuit.

A. About five years now to the present time.

Q. Then you have been unemployed for five years?

A. That is right.

Q. And these five years have been devoted to the investigation of this bank account?

A. That is right, off and on.

Q. Did you find there were any obstacles put in your path in that investigation?

A. Naturally they would be.

Q. Were they put in your path by some individual or group of individuals?

A. No.

Q. Some corporation or some inside agency?

A. No.

Q. What were the obstacles?

A. I just could not find the information I wanted to find, that is all.

Q. Did anybody put those obstacles in your path?

A. No, they didn't.

Mr. Turkus: I am going to exercise a peremptory.

The Court: The Court thinks it wise to ask two or three questions of one of the talesmen, but will stop if there is [fol. 2137] any objection. Is that understood?

Mr. Barshay: No objection.

The Court: Mr. Cummings, you are with the Aetna?

Mr. Cummings: General accident.

The Court: Twelve years, did you say?

Mr. Cummings: I did not say before, but I have been with them eighteen years.

The Court: That is the only employment you have had in eighteen years?

Mr. Cummings: That is all.

The Court: That has not included any work as an officer of any kind, has it?

Mr. Cummings: No, sir.

The Court: I mean as a peace officer or private detective?

Mr. Cummings: No.

The Court: And you have never been connected with any police department?

Mr. Cummings: No.

The Court: There is nothing to do then, the panel having been exhausted, but wait until the first court day of next week, when the additional panel will be here, and I trust the jury will be completed in short order.

(To jury) Gentlemen, you may go. Be back on Tuesday morning at ten o'clock. Monday is a holiday.

[fol. 2138] Please do not discuss the case, let nobody talk to you about it; keep your minds open.

Mr. Barshay: We would like to speak to the Court for about two minutes, Judge.

The Court: Come right up. The new panel is being drawn at three o'clock.

(Counsel conferred with the Court at the bench.)

The Court: (to jury) Particularly, gentlemen, do not under any circumstances, either in the court-room or out, discuss the case or visit among yourselves. The jury may go. The defendants are remanded.

The Court's instruction yesterday had application only to Capone being not permitted to have a surplus quantity of poisonous medication in his possession, that is, any lethal or deadly quantity. It involved no suspicion that he contemplated suicide, as was implied by what was stated by one of the counsel in court, but in ordinary common sense no man should be permitted to be tried on a criminal charge having in his possession unnecessarily, for the purpose of medication, sufficient quantity of poison to destroy life. Neither in this nor in any other case can that be permitted, but apparently the impression has gone forth that the Court has countermanded the requirement of the physician as to this defendant's medication. That is untrue. The follow[fol. 2139] ing is the language of the Court's direction, quoting from the record: "The defendant Capone shall not

be permitted to have on his person at any one time during the progress of this trial any more medication than is necessary for his present needs, that no lethal quantity shall be permitted." The word "lethal" means deadly, destructive of human life. This does not authorize any court attendant or any member of the court staff to take away medication. That is beyond the Court's power. The Court directed that Dr. Nash communicate with the prison physician who gave this excessive quantity of poisonous medicine to this defendant and to state the Court's instructions in regard to limiting the defendant's possession to that required for present needs as medication.

Another thing for the record, because of the Court's ruling at one time, interrupting the examination of a talesman, that no prisoner shall be allowed to have conversation with other people in the court-room, this does not apply to conference with counsel, but was because one of the prisoners was endeavoring to hold interview with a gentleman in the press box during court session, which cannot be permitted in any court during any trial.

(Adjourned to Tuesday, October 14, 1941, at 10:00 A. M.)

[fol. 2140] Brooklyn, N. Y., October 14, 1941.

Trial Resumed

(Excuses of talesmen were heard—those drawn from the additional panel.)

(By direction of the Court, three talesmen were seated in the box: Harry M. Ryan, No. 3028; Alfred Elfendein, No. 3038; William J. Koehler, No. 3054.)

Harry M. Ryan, a talesman, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. I will address the questions through you in a tone audible to the other jurors, so they may remember the questions when it comes their turn and answer, and we will not waste time. We are anxious to expedite the jury selection if we can.

You understand that this is a charge of murder in the first degree?

A. Yes, sir.

Q. Is there anything about the nature of the charge of murder in the first degree which would impair your ability to serve as a fair and impartial juror?

A. No.

Q. May I proceed with the understanding you have no scruple against capital punishment, either conscientious or otherwise?

A. No, sir.

[fol. 2141] Q. You are listed on the trestle board as living at 3801 Eighteenth Avenue?

A. Yes, sir.

Q. Is that in the Bensonhurst section of Brooklyn?

A. No, sir.

Q. Have you lived in that district for a number of years?

A. Twelve years.

Q. You are listed on the trestle board as a clerk by vocation, without any specific occupation listed.

A. New York Telephone Company.

Q. Have you been there for a number of years?

A. Since 1924.

Q. May I go along with the understanding that you have no connection with anyone in the garment or clothing trade or clothing industry in Manhattan?

A. Yes, sir.

Q. No connection at all in any form with anyone in the Brownsville or East New York sections of Brooklyn?

A. No, sir.

Q. Or on the Brooklyn waterfront?

A. No, sir.

Q. Do you know any official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Do you know any official of any trucking or teamsters' union?

A. No, sir.

Q. And, specifically, any official connected with the clothing trucking industry or anyone interested in the trucking of clothes after they have been cut and after they have been sewed into garments?

A. No, sir.

[fol. 2142] Q. The defendants at the bar, Buchalter, Capone, and Weiss, are represented by nine lawyers. When I say nine, I do not find any fault with the number of counsel, you understand that?

A. Yes, sir.

Q. They can have as many as they desire, and nobody can find any fault with that, that is up to them. Buchalter is represented by former Assistant District Attorney Hyman Barshay, former Assistant United States Attorney Bertram Wegman, and his partner, Mr. Jesse Climenko. Do you know any of those three who represent Buchalter?

A. Only, as I said before, I was a juror in a case in which Mr. Barshay was.

Q. Was that a case in this court?

A. Yes, sir.

Q. How many years ago was that?

A. Quite a few, about three or four?

Q. Was it a capital case?

A. Yes, sir.

Q. Did the case go to a conclusion—I mean did the Judge charge the jury on the law?

A. Yes, sir.

Q. With respect to the other counsel who represent the remaining defendants, Weiss is represented by former General Sessions Judge Alfred Talley, former Assistant District Attorney James I. Cuff, and former Assistant United States Attorney Murray Kriendler; do you know any of those three?

A. No.

Q. Capone is represented by Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg. Do you [fol. 2143] know any of those?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. I know several lawyers.

Q. Are they specialists in criminal cases?

A. I don't know at the present time. I know some members of the District Attorney's office.

Q. Do you know Judge O'Dwyer intimately, personally?

A. No, sir.

Q. Do you know some members of his staff?

A. Yes, sir.

Q. Who do you know?

A. I know one, Mr. Rooney, and I know Mr. Foley. I spent two weeks vacation with Mr. Rooney.

Q. You know Mr. Barshay, having seen him as a prosecutor?

A. Yes, sir.

Q. And you know various Assistants in our Office?

A. Yes, sir.

Q. None of whom are personally connected with this case. Is there anything about your knowledge of these men which will preclude you from doing justice in this case by your verdict?

A. No, sir.

Q. Having served prior on a criminal case, you received the instructions of law from the Judge?

A. Yes, sir.

Q. Do you remember who the judge was?

A. Several of them.

Q. At any rate, you received instructions on the doctrine of reasonable doubt and the presumption of innocence, and as to all the legal rights that the defendant has on the trial [fol. 2144] of a criminal case?

A. Yes, sir.

Q. In this case you apply it to the facts in the case?

A. Yes, sir.

Q. If selected as a juror you must take the law implicitly from Judge Taylor and apply that to the facts in this case. If accepted will you do that?

A. Yes, sir.

Q. It has been said in the questioning of the other prospective talesmen by one of counsel for the defendant Buchalter that he has been heretofore convicted of crimes and is presently serving a long jail term for these offenses, as a penalty for the commission of these crimes. Would you relax or deviate from a proper result in this murder charge simply because he has been convicted of other crimes which he has committed?

A. No, sir.

Q. It has been properly pointed out by one of the attorneys representing Capone that the defendants at the bar are here to meet one charge, the charge in this indictment, which charges the killing of a man named Rosen, and by the same token the duty of the District Attorney is only

that and no more, to establish guilt beyond a reasonable doubt of the charge in the indictment; do you understand that?

A. Yes, sir.

Q. If selected, will you devote your mental faculties to ascertaining whether these defendants at the bar, under the rules of law as given by the Judge, are guilty of murder in the first degree, or are they innocent of the crime charged? [fol. 2145] A. Yes, sir.

Q. Part of the State's case will rest upon the testimony of accomplices. I don't know whether or not you had any discussion in the prior case in which you served on accomplice testimony. Now let me explain at the outset that an accomplice is one who was one of the perpetrators of the crime. Does that make it clear?

A. Yes, sir.

Q. Accomplice testimony has certain rules of law. For example, the Judge will charge you that the testimony of such an individual must be accepted with great caution.

A. Yes, sir.

Q. If accepted, will you apply that rule to accomplice witnesses?

A. Yes, sir.

Q. Do you find any fault with the District Attorney of the county, Judge O'Dwyer, or with the prosecution of an indictment wherein the prosecutor, in order to solve the case, breaks the case from the inside, accepts the testimony of an accomplice, and uses it against the other perpetrators of the crime?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you find any fault with either the prosecution or the prosecutor in doing that?

A. No, sir.

The Court: You understand that the question does not [fol. 2146] imply that the man was a principal, but that he may explain himself?

Q. I do not mean to imply by any question to have you prejudge the case that this Rosen murder case has been broken from the inside by my question—that is your job. When you hear the evidence we give you in this court

it will be for you, as jurors, to say whether the District Attorney broke this case from the inside and has the guilty culprits at the bar of justice. That is your job.

A. Yes, sir.

Q. In applying this rule which the Judge gives you as to accomplice testimony, and necessarily when you apply the rule you have to use every piece of information that can be gathered in the court-room, as to the believability of an accomplice.

A. Yes, sir.

Q. For example, as you can readily imagine, himself being one of the perpetrators of the murder, has a background that is not so good. In other words, he may have a past criminal record—he may have associated with criminals all his life and may have committed other crimes, and there may be various things brought out to attack his believability. Will you keep uppermost in your mind that whatever test you apply to an accomplice witness is done for the sole purpose of ascertaining is the accomplice witness telling the truth about the defendants and himself and any other combination or group participating in the crime; is that clear?

[fol. 2147] A. Yes, sir.

Q. No matter what test you put to the believability of the accomplice, no matter what rules of human guidance to use to find out what is going on in this man's mind, is he telling the truth—that will be uppermost in your mind—what you want to know is does he speak the truth with regard to this murder and the connection of these defendants with him in the commission of the crime.

A. Yes, sir.

Q. As a matter of fact, you may detest him—that is the one test to apply: Is he telling the truth? Not only about himself, but about the men on trial; is that clear?

A. Yes, sir.

Q. Will you devote your faculties to that, if selected as a juror, to find that out?

A. Yes, sir.

By the Court:

Q. What line of business did you say you were in?

A. The New York Telephone Company.

Q. How many years?

A. Since 1924—seventeen years.

By Mr. Turkus:

Q. Having had experience in another case, you have had the experience of reasoning out problems with other jurors in the case?

A. Yes, sir.

Q. In that case in which you sat you came to a conclusion?

A. Yes, sir.

Q. Will you, if accepted as a juror in this case, talk the [fol. 2148] matter over sensibly and logically with your fellow jurors in the case?

A. Yes, sir.

Q. Will you endeavor by your verdict to do justice in this case?

A. Yes, sir.

Q. With respect to the evidence in the case, there may be some discussion by the defense lawyers, and if they do not touch it, there will be by Judge Taylor in his instructions to the jury, about the allocation of evidence. If you receive certain rules from the Judge in regard to applying evidence as against the defendant to which it belongs, you will see obviously from certain instructions that some part of the evidence may apply to a single defendant. If you see that is obvious, from the instructions of law, will you apply that evidence to that particular defendant?

A. Yes, sir.

Q. And from other evidence in the case—You understand that the prosecution is not built around one witness, there are a series of witnesses which establish this case, and you will see from certain parts of the testimony very clearly and obviously that portions of the testimony will apply to all three of the defendants. Some things will apply to two, some things to one. In the case where it applies to one will you apply it to one?

A. Yes, sir.

Q. Where it applies to two, will you apply it against the two against whom that evidence is allocated?

A. Yes, sir.

[fol. 2149] Q. When it applies to all three, will you apply it to them?

A. Yes, sir.

Q. Will you use common sense and understanding to find

out whether what the witnesses say in this court of justice as against these men on trial is true?

A. Yes, sir.

Q. Will you devote your mental faculties to find out whether, under the rules of evidence, the guilt of the defendants has been established beyond a reasonable doubt?

A. Yes, sir.

Q. And whether or not they are innocent?

A. Yes, sir.

Q. After you have heard all the evidence and you are satisfied beyond a reasonable doubt that there are three guilty men at this bar of justice, Buchalter, Capone, and Weiss, will you say so by your verdict?

A. Yes, sir.

Q. Will you say that fearlessly and courageously?

A. Yes, sir.

Q. And without any hesitation?

A. Yes, sir.

ALFRED ELFENDEIN, No. 3038, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Do you live in Flatbush?

A. Yes, sir.

Q. Have you lived in Flatbush for a number of years?

A. Quite a few. Two years on Ocean Avenue.

Q. What number on Ocean Avenue?

A. 485

[fol. 2150] Q. Is that near Beverly Road?

A. No, sir, near Caton.

Q. 771, what street is that?

A. Between H and G.

Q. You are listed on the trestle board as a manufacturer. What is the product?

A. At that time I was manufacturing—I am a general contractor now.

Q. What were you manufacturing when you were manufacturing?

A. Paints.

Q. Where was your place of business when you were manufacturing paints?

A. 47 Sheriff Street.
Q. How long were you there?
A. Quite a time.
Q. How many years ago?
A. Eight years ago.
Q. Is that Sheriff and Willett?
A. Sheriff and Delancy.
Q. You say you are a general contractor now?
A. Yes, sir.
Q. Is that of paints?
A. No, sir, general contractor.
Q. Do you do construction work?
A. Yes, sir.
Q. Have you been on the lower East Side—how many years were you there?
A. About nine years.
Q. Did your business bring you in contact with customers in Brownsville or the East New York section of Brooklyn?
A. Yes.
Q. There are various names you may or may not be familiar with as a result of that. While you were engaged in this business did the name of Harry (Pittsburgh Phil) Strauss mean anything to you?
A. No, sir.
Q. Or Martin Goldstein?
A. No, sir.
[fol. 2151] Q. Or Jake the Bum?
A. I have heard of him.
Q. Or Whitey Krakower?
A. I heard the name.
Q. Is the name Lepke familiar to you?
A. No, sir.
Q. Or Gurrah?
A. No, sir, outside of what I have read in the paper about him.
Q. The names of the various persons that were in the painting industry, are those names familiar to you?
A. Yes, sir.
Q. Did you have any contact in the painting industry with union officials?
A. Occasionally I did.
Q. Was one of them Welner?
A. No, sir.

Q. Who are the officials you came in contact with?

A. That is quite a while ago. There was one there but I do not remember the name—he was a delegate of a local.

Q. Since your name appeared on this jury panel, specifically since you received your notice, did anybody speak to you about the case?

A. No, sir.

Q. Did you maintain any business contact in Brownsville, or East New York?

A. Yes, sir.

Q. That would be occasioned by your delivering paint in that area?

A. Yes, sir.

Q. Did you have many accounts in Brownsville?

A. Yes, sir.

Q. How many years ago was that?

A. I should say six or seven years.

Q. Are you familiar with the corner of Saratoga and Livonia?

A. Yes.

[fol. 2152] Q. And Skillman and Livonia?

A. Yes, sir.

Q. Were you familiar with the candy store at the corner of Saratoga and Livonia Avenue run by a woman sometimes called Midnight Rose?

A. No, sir, I never went in there. I believe I have a faint recollection of the store.

Q. While you were in the Brownsville and East New York territory, in contact with your customers, did you hear any discussion where names were mentioned?

A. No, sir.

By the Court:

Q. You were a paint manufacturer?

A. Yes, sir.

Q. Was that a factory or a store?

A. A factory; we manufactured on Sheriff Street.

Q. Near where?

A. The old Robert Hoe Building.

Q. You are now living in the Fisk Terrace section for how long?

A. Two years.

By Mr. Turkus:

Q. Mr. Englander lives there?
A. Yes, sir.
Q. Do you belong to local associations?
A. I do.
Q. Are you active?
A. No, sir, not very.
Q. These things were never up for discussion?
A. No, sir.
Q. There were no talks about it?
A. No, sir.
Q. You have no prejudice against capital punishment?
A. No, sir.
Q. Is there anything familiar to the name of Mendy Weiss?
A. I have heard the name mentioned.
[fol. 2153] Q. Is there anything familiar about the name of Sam Schurum Katz?
A. No, sir.
Q. Or Ben Siegel?
A. No, sir.
Q. While you were in the paint business did you have any union difficulties?
A. At times I did.

By the Court:

Q. Do you know a Mr. Phair, Joe Phair; he lives at your corner.
A. No, sir.
Q. P-h-a-i-r?
A. No, sir, I don't think I do.
Q. I ask you because he has been for several times foreman of the Grand Jury here.
A. No, sir.
Q. That is the corner of Glenwood Road and 17th.
A. Yes, sir.

By Mr. Turkus:

Q. Was that difficulty in connection with any teamsters' union or delivery union, trucking union?
A. No, sir.
Q. With the painters' union?

A. Yes, sir, indirectly, to an extent.

Q. At this time, when you had difficulty with these conditions, were you visited by any representative of the union?

A. No, sir.

Q. The ironing out of the difficulty depended upon somebody else?

A. Yes, sir.

Q. As a general contractor do you have any connection in the Brownsville or the East New York section of Brooklyn?

A. No, sir.

Q. Did your painting business bring you in contact with [fol. 2154] people on the Brooklyn waterfront?

A. No, sir.

Q. Do you know any persons on the Brooklyn waterfront or have you had any contact with them?

A. No, sir.

Q. Is the name of Albert Anastasio familiar to you?

A. No, sir.

Q. Do you know anybody engaged in the clothing trucking business, that is, the transportation of clothing?

A. I do not.

Q. Or any manufacturer of men's or ladies' clothing, either in the clothing district or the garment district?

A. I do not.

Q. I mean in Manhattan.

A. No, sir.

Q. Have you had any such contact in the past?

A. No, sir.

Q. As a result of having been in the painting business, as you have described, on the lower East Side, and your familiarity with certain names, and your contacts in Brownsville and East New York, is your mind free and open in this case?

A. Yes, sir.

Q. Have you heretofore served as a juror in any type of case?

A. I have.

Q. Has it been a criminal case?

A. Yes, sir.

Q. Was it in this court?

A. Yes, sir, the County Court.

Q. Do you recall who the Judge was?

A. Judge O'Dwyer.

Q. That must have been about two years ago?

A. Yes, sir, I kept no record.

[fol. 2155] Q. You are not supposed to tell us the case, but were any of the lawyers who are in the court-room now counsel in that case?

A. No, sir.

Q. Did you say it was a capital case?

A. A murder case, yes.

Q. Do you know any of the nine lawyers whose names I stated to Mr. Ryan when I was questioning him?

A. No, sir.

Q. Do you know anyone employed in their law offices?

A. No, sir.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know any official of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Is the name of Murray Weinstein or Samuel Katz connected with the Clothing Cutters Union, Local No. 4, affiliated with the Amalgamated Clothing Workers of America, familiar to you?

A. No, sir.

Q. Is the name of Bruno Belia, an organizer for the Amalgamated, familiar to you?

A. No, sir.

Q. Or Salvatore Marazzino?

A. No, sir.

Q. Did you ever hear of Philip Orlofsky, one-time manager of Local No. 4 of the Cutters Union?

A. No, sir.

Q. Is the name of Max Silverman or Woltie Goldis familiar to you?

A. No, sir.

Q. Did you have any contact with people in Sea Gate?

[fol. 2156] A. No, sir, except one party whom I do know.

Q. What business is that person in?

A. He is a Clerk of the court.

Q. One of our courts in this city?

A. Yes, sir.

Q. Is there anything familiar to the name of William or Willie Alberts, a one-time bondsman?

A. No, sir.
Q. Or Emanuel Buchalter?
A. No, sir.
Q. Or Philip Kowas?
A. No, sir.
Q. Did you ever hear the name of Bellanca or Tosca?
A. No, sir.
Q. Or Terry Burns or Abie Slabo?
A. No, sir.
Q. Do you know David Price, a lawyer, a member of the bar?
A. I heard him try a case.
Q. Was that the case before Judge O'Dwyer?
A. No, sir.
Q. A different case?
A. Yes, sir.
Q. Were you a juror in that case?
A. Yes, sir.
Q. You have served more than once on a criminal case?
A. Yes, sir.
Q. Do you recall how many years ago the case was tried in which Mr. Price was counsel?
A. About five years ago.
Q. Was that a murder case?
A. No, sir.
Q. Do you know Mr. William Kleinman, who is now a Captain in the United States Army, at one time associated as a partner with Mr. Price in the practice of the law?
A. I was in the case that he was defending himself.
[fol. 2157] Q. That is the only acquaintanceship you have had with Kleinman, was seeing him in court?
A. That is right.
Q. Do you know Judge O'Dwyer, the District Attorney of the county?
A. No, sir, I don't know him socially.
Q. You have heard of him?
A. Yes, sir.
Q. You were a juror in the court when he was a judge?
A. Yes, sir.
Q. That question is intended to find out whether somebody is an intimate friend of Judge O'Dwyer and goes out with him socially—do you know any member of his staff?

A. I know some of Judge O'Dwyer's staff from seeing them in court.

Q. Do you know any of them socially?

A. No, sir.

Q. Specifically, do you know Assistant District Attorney Klein?

A. No, sir.

Q. Or Louis Joseph, who is sitting here with me?

A. Outside of seeing him in court.

Q. My name is Turkus. I don't believe you know me.

A. No.

Q. Did any of these cases in which you served as a juror have, as a part of the testimony, the testimony of accomplices?

A. I think they did.

Q. Do you understand that an accomplice is one who himself is one of the perpetrators of a crime?

A. Yes, sir.

Q. In this case part of the testimony will come from just that type of an individual, one of the perpetrators of the crime charged in this indictment. The prosecutor, [fol. 2158] Judge O'Dwyer, in order to solve this case and break the case from the inside has accepted testimony of accomplices.

Mr. Cuff: I object to the form of the question.

The Court: Alleged accomplices. Reframe your question.

Q. There will be testimony from an individual in this court known under the law as an accomplice. An accomplice is himself one who has participated in the commission of the crime, do you understand?

A. Yes, sir.

Q. What I want to know is, do you find any fault with the prosecutor of a county who, in order to solve a murder case, accepts testimony of one who is an accomplice, and uses it against the defendants on trial?

Mr. Barshay: I object to the question.

The Court: "Who is an alleged accomplice." It has to be estabished that he was an accomplice.

Q. We will include the word "alleged." Do you have any fault to find with any such prosecution?

A. No, sir.

Q. There will be certain rules or tests which the Judge will give you with respect to the believability or credibility, to be applied to the testimony of accomplices. Do you follow me?

A. Yes, sir.

Q. Will you apply the tests that the Judge gives you to be applied to such individual?

A. Yes, sir.

Q. Will you keep uppermost in your mind that purpose of applying all of these tests to an accomplice witness, [fol. 2159] every rule that the law says should be applied and every rule that your mind and common sense tells you should be applied, to weigh the believability of the accomplice, to find out does the accomplice tell the truth not only about himself as a participant in the crime, but about these defendants and their participation in this group or combination killing; do you understand that?

A. Yes, sir.

Q. Will you, if accepted as a juror, devote your mental faculties to finding out if you heard the proof with respect to these defendants and their group participation in the Rosen murder?

A. Yes, sir.

Q. In all legal cases there are rules of evidence. Part of the evidence in the case may apply and emanate from one source only against one defendant, some may apply against the three, some may apply against two; is that clear?

A. Yes, sir.

Q. Will you take the rules given by the Judge and apply them with common sense and understanding to weigh that portion of the allocating evidence in the case?

A. Yes, sir.

Q. Where you see it fits against one, will you apply it against that one?

A. Yes, sir.

Q. And where you see it applies against more than one, will you apply it against either the two or three against whom it does apply after listening to the instructions of the Judge?

A. Yes, sir.

[fol. 2160] Q. It has been brought out by one of the lawyers for Buchalter that he has been heretofore convicted of crimes and is presently serving a long jail term as a penalty for the commission of those crimes.

A. Yes, sir.

Q. I want to know, in view of the fact he is presently in jail for past offenses and other crimes he has committed, would you relax from your duty as a juror in this criminal charge because he is in jail for having committed other offenses, or would you deviate from the proper result in this case?

A. No, sir.

Q. It has been properly brought out by one of the defendants for Capone that the defendants are here to meet only one charge, the one charge in the indictment.

A. Yes, sir.

Q. By the same token, the duty of the District Attorney only goes that far too, to establish guilt beyond a reasonable doubt on this charge in the indictment and that alone.

A. Yes, sir.

Q. Will you keep uppermost in your mind, if selected as a juror, that all the legal tests the Judge gives you to apply to a witness, and all the common sense rules you have in your own mind, and all the things you have learned in your past experience, will all be devoted to find out whether, under the rules of evidence, the gilt of the defendants has been established, or whether they are innocent?

Mr. Barshay: I object to the form of the question. It [fol. 2161] leaves out "beyond a reasonable doubt."

The Court: It has to be proved beyond a reasonable doubt.

Q. You understand the prosecutor does not say he will establish guilt beyond any hope or any surmise—his obligation is—the obligation he undertakes in this case is to establish guilt beyond a reasonable doubt. If you are satisfied that guilt is established beyond a reasonable doubt, will you reflect that in your verdict?

A. Yes, sir.

Q. Coming back to the point where we had objection from counsel, I said to you that no matter what the rules are that the Judge gives you to apply to a witness in a case, no matter what common sense and other understanding you apply to all the witnesses in the case, that uppermost in your mind there has to be determined one fact—Are these defendants, Buchalter, Capone, and Weiss, guilty of murder in the first degree, and has that been established to

your satisfaction beyond a reasonable doubt, or are they innocent?

A. Yes, sir.

Q. Will you undertake that job, if selected?

A. Yes, sir.

Q. And find that out?

A. Yes, sir.

Q. And is there any reason why, if your mind is satisfied beyond a reasonable doubt that there are three guilty men at this bar of justice, Capone, Buchalter and Weiss, is there any reason why you cannot say so fearlessly and without [fol. 2162] hesitation?

A. No, sir.

Q. Is there anything that I have failed to make clear to you in my questioning which goes to your ability to sit in this court as a juror and do justice with this case?

A. No.

William J. Koehler, No. 3054, was then interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Mr. Koehler, you are listed as living at 817 Avenue R.

A. Yes, sir.

Q. And your business is insurance appraiser?

A. Yes, sir.

Q. Marine insurance would refer to shipping?

A. No, sir, cargoes.

Q. You appraise the value of a cargo?

A. Only when damaged.

Q. Does your work bring you in contact with lawyers?

A. No, sir.

Q. I don't say that with any disparagement of the legal profession, because we are all lawyers. I mean I want to find out whether there may be some nature of friendship you may have in the case.

A. No, sir.

Q. You heard me mention the names of nine lawyers?

A. Yes, sir.

Q. Do you know any of the nine?

A. No, sir.

Q. Do you know anybody connected in their law offices? [fol. 2163] A. No, sir.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. No, sir.

Q. Does that hold true with respect to the District Attorney? Do you know Judge O'Dwyer or any member of his staff?

A. I have seen Cohen try a case.

Q. Is that Charlie or John?

A. I don't know that.

Q. At any rate, having been a juror in the case, that does not affect your ability to do justice in this case?

A. No, sir.

Q. Where you live in Flatbush, that is between Coney Island Avenue and Ocean Parkway ——

By the Court:

Q. You are a block behind the motion picture theatre on Kings Highway?

A. Yes, sir.

By Mr. Turkus:

Q. Have you lived in that district for a number of years?

A. Twenty-one years.

Q. May I go along hurriedly with you with respect to any connection with the Amalgamated Clothing Workers of America, do you know anybody connected with that organization?

A. No, sir.

Q. Or anybody in the clothing or garment industry?

A. No, sir.

Q. Or clothing truckers?

A. Trucking, but not clothing.

Q. Would the truckers be United States Trucking Com- [fol. 2164] pany or one of those large trucking outfits?

A. Flour.

Q. Is the name of Max Silverman familiar to you?

A. No, sir.

Q. Or Goldis, Wolfie Goldis?

A. No, sir.

Q. What has been your experience with the trucking?

A. We had a warehouse.

Q. That was the only connection you had with flour trucking?

A. Yes, sir.

Q. You had more than that?

A. Yes, sir.

Q. Did you testify against them?.

A. No, no, I was called on the case, but they excused me. I happened to know something about it.

Q. You knew something about the flour trucking?

A. Yes, sir.

Q. When you were called on the case in which this industry was involved, you were excused?

A. Yes, sir.

Q. That was the limit of your connection with the matter?

A. Yes, sir; I did not know them socially.

Q. He is not a friend of yours?

A. No, sir.

Q. I am sorry if I did not make myself clear, but I understood you——

By the Court:

Q. Do you belong to any local civic organization?

A. No, sir.

Q. That particular place where you live, that is part of the Homecrest development of twenty years ago?

A. Yes, sir.

Q. That is not a local organization?

A. I don't belong to any.

[fol. 2165] By Mr. Turkus:

Q. Is the name of Buchalter, Emanuel Buchalter, familiar to you?

A. Only what I have seen in the press.

Q. Is the name of Philip Kowas familiar to you?

A. No, sir.

Q. Are you in sympathy with the enforcement of the penal law of the State?

A. Yes, sir.

Q. Mr. Koehler, if accepted, will you give the defendants every legal right that the Judge tells you in his charge they should have?

A. Yes, sir.

Q. With respect to accomplices, have you any bias or prejudice against either the prosecutor of the county or against the prosecution of an indictment wherein a part of the testimony emanates or springs from accomplices in the case?

A. No, sir.

Q. Will you, Mr. Koehler, if accepted as a juror, devote your mental faculties and apply all the tests the Judge gives you to the believability of the accomplice?

A. Yes, sir.

Q. Will you use the every-day common sense and business experience you have in weighing the believability, not only of the accomplice but of every witness in the case?

A. Yes, sir.

Q. Would you keep uppermost in your mind that common sense and reason, to apply the test to the accomplices or to any witness as a matter of fact, to find out does he tell the truth?

A. Yes, sir.

Will you, if accepted as a juror, find out whether the [fol. 2166] accomplice speaks the truth about the defendants and their criminal participation in the crime charged?

A. Yes, sir.

Q. And will you devote your mental faculties to see whether or not the accomplice speaks the truth about the group participation of the defendants and himself in the commission of this crime?

A. Yes, sir.

Q. As I pointed out to Mr. Ryan and his associates, it has been brought out by one of the attorneys for Buchalter that his client has been convicted of other crimes and is serving now a jail term for this offense? Would you in this case relax your duty as a juror or devise from a proper result in the case simply because he is paying the penalty for other crimes?

A. No, sir.

Q. Will you decide whether he is guilty of murder in the first degree, he and all these defendants in the case with him, upon the evidence you hear in court?

A. Yes, sir.

Q. As has been properly brought out, the obligation of the defendants is that of meeting the crime charged in this indictment, the Rosen killing.

A. Yes, sir.

Q. That is their obligation. Do you understand the obligation of the District Attorney is only co-extensive and no more, to establish guilt beyond a reasonable doubt on this indictment.

A. Yes.

Q. Will you take every legal rule the Judge gives you that benefits the defendants and give them the benefit of it?

[fol. 2167] A. Yes, sir.

Q. After you have given them every benefit the law of the land says they should have, and after you have heard all the evidence, if your conscience is satisfied beyond a reasoable doubt that three of them are guilty of murder in the first degree, will you say that by your verdict?

A. Yes, sir.

Q. Without fear or hesitation?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Ryan, did you read about this case in any newspaper?

A. Yes, sir.

Q. May I know in what newspaper?

A. Principally the Brooklyn *Eagle*.

Q. Did you read about it often?

A. I did.

Q. Did you read about the defendants?

A. Well, I must have read about the defenda ..s when I read about the case, yes, sir.

Q. By virtue of that reading, have you gained some impression or opinion?

A. I have.

Q. Is that impression or opinion detrimental to the defendants?

A. Yes, sir.

Q. I take it that opinion goes to the guilt or innocence of the defendants or any of them?

A. I would not say that.

Q. Does it prejudice you against them?

A. Not at all. I have not heard the evidence.

[fol. 2168] Q. Is it a strong impression that you gained by virtue of reading the *Eagle*?

A. Yes, sir.

Q. Is it an impression which will have to have some evidence to remove it?

A. I think it will.

Q. You will need evidence to remove that impression?

A. Yes, sir.

Q. And if no evidence is forthcoming to remove that impression, it will still remain with you?

A. That is true.

Q. Is it presently with you?

A. That is right.

Q. Having had experience as juror, and Mr. Turkus having made certain statements which are in accord with the law, that the defendants need not prove their innocence, you, in reply to my question, still say that unless evidence was forthcoming here, the impression which you have will remain?

A. Yes, sir.

Q. Well, sir, I take it then that the impression which you have would affect the verdict in this case?

A. I think it would, because I followed the case very closely in the newspaper until about a week ago.

Q. And you say unless it was forthcoming from the defendants your mind would be influenced to the extent that you would not be able to render an impartial verdict?

A. I don't think I could.

Mr. Barshay: I challenge for cause.

The Court: Try the challenge.

[fol. 2169] HARRY M. RYAN, No. 3028, residing at 3801 Eighteenth Avenue, Brooklyn, New York, was then sworn on the challenge.

By Mr. Barshay:

Q. Now that you are under oath, would you give the same answers to the questions that you gave when you were in the box, if I asked them in the same way?

A. Yes, sir.

By Mr. Rosenthal:

Q. Just to get your answer definitely: It is impossible to give a fair and impartial verdict in this case; is that right?

A. That is right.

By Mr. Turkus:

Q. I am going to make this very short, because I think we can understand it very, very clearly. The obligation of the prosecutor is to establish guilt beyond a reasonable doubt of the men on trial, upon evidence produced in court.

A. Yes, sir.

Q. Of course, by no stretch of the imagination could any prosecutor take a newspaper and throw it into the lap of a jury, and say, "Here, convict on that newspaper story."

A. I understand.

Q. The prosecutor has to bring witnesses in court to establish guilt by believable evidence beyond a reasonable doubt?

A. Yes, sir.

Q. You have read certain newspaper articles in the *Eagle*?

[fol. 2170] A. Yes, sir.

Q. Have those articles been written up in connection with the merits of the Rosen case?

Mr. Barshay: Objected to as a conclusion.

Mr. Turkus: Question withdrawn.

Q. Have those articles been written as to alleged facts in the Rosen case?

Mr. Rosenthal: I object. This is not a trial; this is a challenge.

The Court: Objection overruled. This particular case.

A. This particular case is the one I am referring to, as the one I followed in the newspaper for about a month, I believe.

The Court: Challenge sustained.

Alfred Elfendein, No. 3038, was then examined as to his qualifications to serve as a juror.

By Mr. Barshay:

Q. Did you read about this case?

A. Yes, sir, I did.

Q. Did you read it in any particular newspaper or group of newspapers?

A. A newspaper.

Q. Did you read it for any length of time?

A. I have—I have an opinion.

Q. Did you read the Daily Mirror?

A. No.

Q. In the Daily Mirror did you read any instalments [fol. 2171] about this case?

A. I believe I did.

Q. Did you read more than one instalment?

A. Yes, sir.

Q. Did you notice at the end of each article there was some statement about there being a further one?

A. Yes, sir.

Q. Were you impressed by those articles?

A. To an extent I was.

Q. Did you read something about this case in other periodicals?

A. Yes, sir.

Q. Were you impressed by those?

A. Yes, sir.

Q. Did it concern this case?

A. It did.

Q. Did you gain any impression by virtue of that reading?

A. It gave me a thought.

Q. You describe it as a thought?

A. Yes, sir.

Q. Is that thought with you now?

A. I would say yes.

Q. Is it prejudicial to the defendants?

A. No, sir.

Q. Is it in favor of the defendants?

A. I would not say it was.

Q. Is it detrimental to the defendants?

A. No, sir.

Q. Did you believe the accuracy of what you read?

A. What is that?

Q. Did you accept the truth of what you read in this paper mentioned or any other papers?

A. Did I accept it as the truth?

Q. Yes.

A. I don't think I did.

Q. When you say, "I don't think," does that imply a [fol. 2172] doubt in your mind?

A. That is right.

Q. In other words, you don't know whether it is true and you don't know whether it is untrue?

A. That is right.

Q. And yet it left a thought with you?

A. Yes.

Q. Is that thought detrimental in any way to the defendants?

A. I do not think it is.

Q. Can you be sure about it, whether it is detrimental or not?

A. If I would be on the jury I would decide that—naturally, I read the paper.

Q. Just speak a little louder.

A. I read the paper because it was interesting reading.

Q. You wanted to maintain an interest, didn't you, and read further?

A. Yes, sir.

Q. I take it that you completed every instalment or most of the instalments that were published in the paper.

A. Yes, sir.

Q. I take it that the instalments included the names of some of the defendants?

A. Yes, sir.

Q. And is it a fact that you gained some thought which sufficiently interested you with respect to any of the defendants to get the next day's paper and read it carefully?

A. I would not say that.

Q. Maybe the following day, skip a day?

A. Whenever I did have the paper I would pick up the article and read.

Q. Didn't that leave an impression with you which is detrimental to the defendants or any of them?

[fol. 2173] A. I would not say it did.

Q. But you cannot say it did not, can you?

A. No, sir.

Q. Your mind is not made up on it?

A. No, sir.

Q. Would it require some evidence here to remove whatever impression or thought or idea you had?

A. Yes, sir.

Q. Would you expect that to come from the defendants?

A. As far as my impression right now of what I read in the newspaper, I have not come to any conclusion. Now, that is as far as I will say.

Q. But despite that you said you would accept some evidence to remove the thought, no matter what its degree may be.

A. Evidence in deciding the case one way or another, but that particularly what is in my mind.

Q. Would you expect the evidence to come forth from the defendants or someone on their behalf?

A. Naturally.

Q. That is your understanding, naturally you would expect it to come forth from the defendants or someone in their behalf, isn't that so?

A. Yes, sir.

Q. You are quite conscious of the principle of law that the defendants need not prove themselves innocent?

A. Yes, sir.

Q. And you are quite conscious of the fact and are familiar with that principle when you make that answer to me?

A. Yes, sir.

Q. And unless it comes forth from the defendants or someone in their behalf, that thought in your mind, whatever it may be, will still be present?

A. The thought I had, yes, sir.

[fol. 2174] Q. That has something to do with this case?

A. I would not say it did.

Q. You told me you read about this case.

A. That is right.

Q. My inquiry was addressed only to this case; I did not speak of any other.

A. Yes, sir, but of course you brought in the conclusion—I have not drawn any.

Q. Let us get each other straight. You have not drawn any conclusion, but you have an idea which you say is detrimental to the defendants?

A. I would not say detrimental.

Q. It is not beneficial to them, is it?

A. No, sir.

Q. It is not to their benefit, is it?

A. No, I would not say it was.

Q. Then it must be against them, is that right?

A. Well, it is not in their favor and it is not to their harm.

Q. Then tell me—you yourself said you would require some evidence forthcoming from the defendants or from someone in their behalf despite your knowledge of the prin-

ciple of law that they need not prove anything at all or call a witness?

A. That is right.

Q. Isn't that consistent with the thought that unless something by way of evidence comes from them you would retain your thought that you have now against them?

A. Well, again I say I have not drawn any conclusion on what I have against them right now.

[fol. 2175] Q. It may not be a conclusion, but it may be a thought or an idea. Let me put it this way: Is there something that you would expect the defendants to prove or disprove in this case?

A. No, sir.

By the Court:

Q. You moved into that house two years ago?

A. Yes, sir.

Q. Where did you live before that?

A. 485 Ocean Avenue.

Q. That is around Prospect Park?

A. Caton Avenue, that is right.

Q. How long did you live there?

A. I think it was six years.

Q. And before that?

A. At the corner of Caton and Ocean.

Q. How long did you live there?

A. Two years.

Q. And before that?

A. 1013 Avenue J, for five years.

Q. Well, now, you never belonged to any civic association?

A. No, sir.

Q. Did you attend any clubs where you heard cases discussed?

A. No, sir.

Q. Did you attend any organizations where cases were discussed?

A. No, sir.

Q. Or any lectures given by Assistant District Attorneys?

A. No, sir.

Q. Did you belong to Beth Temple when you lived on Ocean Avenue, the men's club?

A. Yes, sir.

Q. They had speakers?

A. Yes, sir, but I was not a member there; I have gone [fol. 2176] there occasionally.

Q. Did you hear anything discussed in regard to this case?

A. No, sir, I did not.

Q. Or any of Judge O'Dwyer's cases?

A. No, sir, outside of the fact that a couple of us fellows would get together and have a conversation at my house.

Q. That was social?

A. Yes, sir.

Q. There was nothing by way of propaganda?

A. No, sir.

Q. No discussion of this case?

A. No, sir.

By Mr. Barshay:

Q. I am just trying to find out whether in the back of your head, sometime or some place or now, there is anything against the defendants that you would require proof.

A. I would not say there. I am just trying to explain. I read that article in the paper from the standpoint of reading. I read only a version of it. I would not condemn anybody on what I read.

Q. So it did not influence you, in any event?

A. No, sir.

Q. Now, the Judge will tell you that the defendants need not prove their innocence or disprove any charge against them, or explain any accusation against them. I take it that you will have no trouble in following that instruction?

A. No, sir.

Q. Mr. Turkus has spoken of these names. Are you familiar in any wise with any one of them at all?

A. Outside of what I have mentioned.

[fol. 2177] Q. So that the people involved here who will testify will cause you no embarrassment?

A. No, sir.

Q. The mention of those names, I take it, will not influence you unless and until they take the stand and show that they are a part of this case or have something to do with this case?

A. That is right.

Q. In other words, the mere reading of the names means nothing to you?

A. That is right.

Q. Do you intend to partake in this coming political campaign?

A. No, sir.

Q. Have you ever been a member of the County Committee or something like that?

A. Never.

Q. May I know the experience you have had on a blue ribbon jury?

A. I just had a blue ribbon jury about four times.

Q. Did you actually serve as a juror in those cases?

A. In two.

Q. In two of the cases you decided the guilt or innocence of that defendant?

A. I did.

Q. That was in Kings County?

A. Yes, sir.

Q. One you mentioned yourself?

A. Yes.

[fol. 2178] Q. May I know the name of the other?

Mr. Turkus: I object. He wants to know the name of the case in which this talesman served as a juror.

The Court: Sustained.

Mr Barshay: May I argue the point? The District Attorney is in full possession of the name of the case in which this man served or any juror served, and I think we ought to have an equal right to know it.

Mr. Turkus: The District Attorney has not in his possession all that information. That is a misstatement of fact.

Mr. Barshay: That is not a misstatement of fact.

Mr. Turkus: Now I say it is wilful, if you repeat it.

Mr. Barshay: It is not only not wilful; it is true, because the District Attorney has in his possession a series of blue cards which show where every juror in this court has had prior service and the manner in which he voted. If this juror is excluded, it is accidental, but the fact remains that he has that system and has always had that system. We should have equal rights.

Mr. Turkus: Something must have happened to that system before certain Assistants went out of office, because I have not any such system with regard to this jury.

Mr. Talley: What have you on that chart, Mr. Turkus?

Mr. Turkus: The name and address.

[fol. 2179] The Court: Why not show it?

Mr. Turkus: I will show it to the other counsel.

Mr. Barshay: He is prejudiced against me. Show it to my friend.

The Court: Mr. Barshay apparently assumes that the same practice prevails as when he was an Assistant District Attorney.

Mr. Barshay: I do not have that presumption.

The Court: Just show the card, so counsel may see it.

(Card handed by Mr. Turkus to Mr. Talley. Mr. Talley, Mr. Cuff, Mr. Rosenthal, and Mr. Barshay examine card.)

Mr. Barshay: I will let your Honor examine the card and see whether or not I made any misstatement.

Mr. Turkus: Will you Honor inquire from Mr. Joseph when he wrote it on the card, right now?

Mr. Rosenthal: The card has been erased.

Mr. Turkus: When I saw the card it was blank.

The Court (examining card): This does not state the name of any case. It simply states what the talesmen said when under examination by Mr. Turkus—that he had served in a capital case and that Judge O'Dwyer presided in that case.

Mr. Barshay: That only proves what I said, that the system still prevails.

[fol. 2180] Mr. Turkus: That does not prove what he charged at all. That was written on the card right now. Mr. Barshay wanted to give the implication that I have something in my possession which I did not want this juror to answer. I did not know he had served on two cases before I heard it for the first time now.

The Court: The question was as to the name of the case. The objection is sustained. Counsel asked leave to argue it and then this squabble began. Let the incident be considered closed.

Mr. Barshay: May we have a ruling with respect to future cards, if there are any?

The Court: You are not required to show your records to the District Attorney, and the District Attorney is not required to show his papers to you.

Mr. Barshay: I am willing to show my records.

The Court: I do not care whether you are or not. The Court cannot require it.

By Mr. Barshay:

Q. Were they both capital cases?

A. No.

Q. Was Mr. Turkus one of the lawyers in any of the cases?

A. No.

Q. Was Mr. Klein?

A. No, sir.

Q. You said you knew Mr. Price by seeing him in court.

A. Yes, sir.

[fol. 2181] Q. In that case was Mr. Klein associated with the defendant's counsel?

A. Yes, sir.

Q. You understand the Klein I am speaking of?

Mr. Turkus: I object to the question.

The Court: The question is not finished.

Mr. Turkus: I will object to it after it is finished.

Q. You understand the Mr. Klein we are speaking of, whom I asked if he was associated in that case with Mr. Price—he is now the associate of the Assistant District Attorney in this transaction, with Mr. Turkus.

A. I don't know. I know of one man by that name whom I know just by seeing him.

Q. I am just asking that for the purpose of inquiring and finding out whether or not you may be influenced by that fact.

A. No, sir.

Q. I take it you know none of the facts other than what you read and which you say just left you with no idea detrimental to the defendants?

A. That is right.

Q. You know none of the people?

A. That is right.

Q. Mr. Turkus started off by asking you whether or not you have any fault to find with the District Attorney who accepts the testimony of an accomplice. You understand that the jury is not here to find fault with any people, but simply to determine on the evidence the guilt or innocence of the defendants?

A. Yes, sir.

Q. I take it that the fact that Judge O'Dwyer's name is [fol. 2182] mentioned will not cause you to be influenced

to the point where you may use it as evidence; that is, his reputation, being District Attorney, will not influence you in this case?

A. No, sir.

Q. And the fact that the District Attorney so often asks you to accept the testimony of an accomplice will also not influence you?

A. No, sir.

Q. The point is, will you accept the testimony of this so-called accomplice?

A. Yes, sir.

Q. You understand that the grand jury can indict an innocent man?

A. Yes, sir.

Q. You understand further that the indictment here is simply a charge, is an accusation?

A. Yes, sir.

Q. Are you in accord with the principle of law that an indictment is not a proof of guilt and that it has not weight in this case?

A. Yes, sir.

Q. Are you in accord with the principle of law which says that when a defendant says he is not guilty his plea of not guilty denies every single accusation against him?

A. Yes, sir.

Q. That includes the charge that he is nobody's accomplice, or that he committed the crime or that he participated or counseled or aided or advised in any way, shape, or manner the commission of the crime?

A. Yes, sir.

Q. Are you in accord with the principle of law which says that when a plea of not guilty is introduced the job becomes [fol. 2183] that of the prosecutor to prove the defendant's guilt beyond a reasonable doubt by competent and believable evidence?

A. Yes, sir.

The Court: Gentlemen, dinner will be provided.

Do not discuss the case nor let anybody talk to you about it; keep your minds open. We will resume at two o'clock.

Before anybody goes out of the room, the defendants are remanded.

(Recess until 2:00 P. M.)

AFTERNOON SESSION—TRIAL RESUMED

(All defendants were represented by counsel.)

Mr. Turkus: I believe there was something the juror wished to address to the Court. Is that correct?

Mr. Elfenbein: Yes.

The Court: You may proceed. You may find out what it is.

By Mr. Barshay:

Q. Mr. Elfenbein, you were just about to address the Court. Do you want to say anything?

A. When his Honor asked me do I belong to any organizations, I mentioned no. I did not mention that I belong to the Masonic organization.

The Court:

Q. Well, that would not be discussing this case.

A. That was all, sir.

By Mr. Barshay:

[fol. 2184] Q. Mr. Elfenbein, do you believe that you can follow the instruction of the Court, who shall tell you in words or in substance that the presumption of innocence is a substantial right to a defendant?

A. Yes, sir.

Q. And that it remains with him throughout the trial and until twelve of you unanimously agree that the evidence has convinced you beyond a reasonable doubt to the contrary?

A. Yes, sir.

Q. That is like an invisible fortress that surrounds each defendant and is evidence in a case in favor of the defendant. Do you believe in that principle of law?

A. Yes.

Q. Mr. Elfenbein, can you accord that presumption of innocence to the defendant?

A. Yes, sir.

Q. Are you in accord with the principle of law that the burden of proof is upon the prosecutor throughout the entire stages of the trial and never shifts for a single second to the defendants?

A. Yes, sir.

Q. And so that if the defendants or any of them should in the wisdom of the counsel who represent the respective defendants refrain from taking the stand or offering testimony through other witnesses, and the Court shall tell you that by reason of the silence you may draw not one unfavorable inference against him, will you follow that instruction of law?

A. Yes, sir.

Q. And even if you believe that a defendant is guilty, [fol. 2185] if you think he is guilty, if you suspect he is guilty, but if you are not convinced beyond a reasonable doubt as to his guilt you must acquit. Are you in accord with that principle of law, sir?

A. Yes, sir.

Q. If chosen as a juror, sir, will you carry that out to the letter and spirit?

A. Yes, sir.

Q. There may be evidence here presented which may be interpreted in two ways, one in the direction of innocence and, on the contrary, the same piece of evidence may be seen in the light of guilt. If the Court shall tell you that that is the manner in which you see that evidence, one in the direction of guilt and one in the direction of innocence, you must give it the innocent interpretation, you are bound to do so under the law, will you follow his Honor's instruction?

The Court: Not evidence. If from such evidence as the juryman finds to be true such evidence is consistent with innocence, but if there is evidence one way and evidence another way, the juryman has to find out which is true. That is for him to decide.

Mr. Barshay: The Court is absolutely correct.

Q. Will you follow that instruction of the Court?

A. Yes, sir.

Q. And if there is a doubt which way you may believe that evidence, you still must give it in the direction of the [fol. 2186] defendant?

A. Yes.

The Court: I would not say evidence; I would say fact.

Q. Do you understand that, sir?

A. Yes, sir.

Q. You will give the benefit of it to the defendant?

A. Yes, sir.

Q. Testimony may be presented—and we are assuming these things now—you may not accept them unless they prove themselves from the stand—that one or more people will take the stand and shall claim under oath that they are accomplices in the commission of this crime. Will you, if the Court instructs you that you must with suspicion, with caution, with care, weigh the evidence that comes from the person who says he is an accomplice, will you, sir, follow that instruction to the letter?

A. Yes, sir.

Q. In other words, he may be telling the truth with respect to himself, and he may not be telling the truth with respect to the fact that the defendant Buchalter is his accomplice. It will be for you to decide, won't it?

A. Yes.

Q. But in view of the fact that he is an accomplice there is a special test that you must give his testimony. Is that so?

A. Yes.

Q. And so if, in addition to the fact that he admits out of his own mouth that he is an accomplice, there will come the further proof that he or they, whatever the situation, have at one time denied their complicity under oath in this [fol. 2187] very case, will you take that into consideration in judging whether or not he is telling the truth with respect to the defendant Buchalter?

A. Yes, sir.

Q. And if, in addition to that, you find that these people have a background steeped in crime, such as murder eleven times, robbery and burglary and perjury and shylocking and extortion, the more demerit marks they admit out of their own lives, will you with greater caution weigh the testimony that comes from such people?

A. Yes.

Q. Will you look to find out whether or not the person who gives that testimony has a motive to give it, what induces him to give it, and why is he giving it? Will you do that, sir?

A. Yes, sir.

Q. And if you find that he has been treated, or they have been treated, awaiting this trial, by living in hotels, going to baseball games, seeing their women, their wives, at the

hotel, getting hotel food, taking rides, will you look to see whether that treatment induces them to falsify with respect to the defendant Buchalter?

A. Yes, sir.

Q. Will you also take into consideration in deciding whether or not they or he claim to be accomplices of Buchalter that they have never seen or spoken to Buchalter about this or any other case? Will you do that?

A. Yes, sir.

Q. If you find that as the result of their activity here they shall remain unpunished for the crimes they themselves admit, will you take that into consideration to see whether or not that induced them to falsify with respect to the defendant Buchalter?

[fol. 2188]

A. Yes, sir.

Q. I am sure the Court shall tell you—to go one step further, that even by the greatest stretch of the imagination or if for any reason you decide that the accomplice is telling the truth, there still can be no conviction unless his testimony——

The Court: Finish.

Mr. Barshay: May I?

Mr. Turkus: I am just telling the juror not to answer.

Mr. Barshay: I will reframe it.

Q. If the Court shall tell you that assuming you do believe the testimony of the accomplice, but there is no other evidence in the case which you believe tends to connect the defendant Buchalter with the commission of the crime you must acquit, assuming that to be the state of facts, will you acquit, sir?

A. Yes, sir.

Q. And so the mere fact that if a person says that he participated in the shooting of Rosen and the police come or doctors come or people come and say, "Here, we were at the place this alleged accomplice claims Rosen was shot. There was a body of Rosen found dead," that is not corroboration that Buchalter had anything to do with it. That merely corroborates the fact that he himself partici-

[fol. 2189]

pated in the shooting, meaning the accomplice, but if there is not any other testimony to connect Buchalter with the commission of the crime, or tending to connect, you will acquit, won't you?

A. Yes, sir.

Q. Now, Mr. Elfenbein, I take it you understand from your past experience that not every person who raises his hand to tell the truth does so, you understand?

A. Yes.

Q. So you become a searcher of the truth. And if the other evidence which may be offered to tend to connect the defendant Buchalter with the commission of the crime, if you find from the witness stand that the person who gives that testimony, or people who give that testimony are themselves tainted with a criminal background, such as murder and robbery and extortion, will you look carefully before you accept that testimony?

A. Yes, sir.

Q. And the same principles with respect to the truth or the falsity of their testimony you will apply to them, won't you?

A. Yes, sir.

Q. Men may come here and give testimony that will have an application only to one defendant. The trial may be long. It may have an application to another defendant. You may even be given release from the Court that a piece of testimony in question is not binding upon a given defendant. Will you be able to keep that straight in your mind, even if it takes a long time to try this case and not [fol. 2190] use the evidence given against one and use it against the other unless the Court so tells you? Do you think you can keep that in mind?

A. Yes.

Q. You understand, do you not, that while they are being tried together now, in reality each one is getting a separate trial and that this is merely a matter of convenience. You understand? And with respect to each defendant you must render a separate and distinct verdict. Do you agree with that?

A. Yes, sir.

Q. Will you do that?

A. Yes, sir.

Q. Rightfully, Mr. Turkus said that counsel for the defendant Buchalter has brought out with respect to the other jurors the fact that Mr. Buchalter is now incarcerated for a term of from forty-four, I think, to seventh years in some prison. We brought that out, and we acquaint you with that fact now. Will it, that, in and of itself, prejudice

you against the defendant in a manner which would preclude you from rendering to him a fair trial?

A. No, sir.

Q. As Mr. Turkus says, this has nothing to do with the case. You understand that?

A. Yes, sir.

Q. And by no stretch of the imagination will there linger any prejudice in your mind against him by virtue of that?

A. No, sir.

Q. Should the Court tell you that the character of any defendant, any defendant charged with a crime, is never an issue in the case—he may be a man of bad character, of bad reputation—that has nothing to do with the case unless [fol. 2191] we choose to make it an issue by offering good character testimony, otherwise you may not consider it. Will you follow that instruction?

A. Yes, sir.

Q. That is fair, isn't it?

A. Yes, sir.

Q. Now, from the questions of other counsel put to other jurors, it was indicated that some may offer a defense of alibi. But I am asking you this: In the event that some offer a defense and in the event our client, Buchalter, fails to offer a defense, will you be influenced by his failure to do so?

A. No, sir.

Q. Each person stands on his own, you understand?

A. Yes, sir.

Q. I take it you understand the rule, too, if the Court so charges you, that one accomplice can never corroborate another accomplice. Are you in accord with that?

A. Yes, sir.

Q. There may be a time, Mr. Elfenbein, when someone may say he is an accomplice, the Court shall tell you as a matter of law he is, and then you will follow the principles that I outlined before, but there may come a time when the Court will leave to you for your decision to decide whether or not a given person is or is not an accomplice. Will you use your independent judgment on that?

A. Yes, sir.

Q. No matter how much he may claim he is not, if the contention is that he is, or the evidence leads you to believe that he is an accomplice, you will say so, and if you find

[fol. 2192] that he is you will want other evidence in the case which tends to connect the defendant with the commission of the crime; are you in accord with all those principles?

A. Yes, sir.

Q. It takes courage to render a verdict in any case, especially one highly publicized, such as this is, especially a verdict which reflects the truth in this case in your own independent judgment.

Mr. Turkus: I object to the form of the question. It takes no such thing.

The Court: Finish your question.

Mr. Barshay: I will reframe it.

Q. I said it takes courage, sir, to render a verdict in a case which reflects the truth according to the evidence in this case. Have you that courage?

Mr. Turkus: I object to it.

The Court: Sustained as to form.

By the Court:

Q. Mr. Juror, will you decide the case on the evidence and render a verdict according with the evidence and whichever way that may lean?

A. Yes, sir.

Q. If it be for conviction or acquittal?

A. Yes, sir.

Q. Will you have the courage?

A. Yes, sir.

By Mr. Barshay:

Q. And will you exercise it in this case if chosen as a juror?

A. Yes, sir.

[fol. 2193] Q. Any place is there in the back of your head any thought at all which would preclude you from rendering a decision based upon the evidence in this case?

A. No.

Q. You are sure about that? So can the defendant Buchalter trust the keeping and the preservation of his legal rights in your hands?

A. Yes.

Q. No doubt about that?

A. Yes.

Q. Mr. Koehler, have you read about this case at all?

A. In the *Tribune* and *World-Telegram*.

Q. I have it you said you were familiar with some of the people whose names were mentioned by Mr. Turkus. In consequence of reading it, hearing it, or knowing the people, have you formed any idea with respect to the defendants?

A. These people?

Q. Yes.

A. No.

Q. Have you formed any impression about the case itself?

A. No.

Q. Did you believe the truth or accuracy of whatever you heard or read?

Mr. Turkus: Objected to. The juryman has already said he formd no opinion or impression in regard to the case or the defendants, so he has merely read headlines.

The Court: He did not say that in response to Mr. Barshay's questions.

Mr. Turkus: Yes, he did, right now.

[fol. 2194] The Court: I did not so understand.

By the Court:

Q. Is that a fact, you have come to no conclusion?

A. No, I have not read enough about it.

Q. You formed no opinion?

A. No.

By Mr. Barshay:

Q. Did you form an impression, which is somewhat less than an opinion?

A. That is pretty hard to say, Mr. Barshay.

Q. Some people do and some don't.

A. No.

Q. In other words, I am seeking to find out whether there lurks in your mind something which is detrimental to the defendant. As the result of your experience with flour merchants or trucking merchants or others you seem to be familiar with, if they should become part and parcel of this

case, would that raise a prejudice in your mind against the defendants?

A. I prefer not to answer.

Mr. Turkus: Your Honor——

Mr. Barshay: Your Honor, may I call to your attention the answer given by this juror?

The Court: Yes.

Mr. Barshay: He said he would prefer not to answer the question as I put it to him.

The Talesman: He wants me to go to my impressions of these people and other people who I met.

Q. (Pending question read.)

[fol. 2195] The Court: How can he answer that?

Mr. Barshay: It is quite conceivable, sir, from a list of names Mr. Turkus read, especially one, that the gentleman may or may not have so great a prejudice against that one as it may overflow onto the defendants. I do not know. If it does not, he can tell me.

The Court: Your question does not assume which side of the fence such evidence would affect.

Mr. Barshay: I am assuming now that I am speaking of the evidence which shall be forthcoming from the prosecution.

The Court: You mean if any of those people should be connected up?

Mr. Barshay: That is right.

The Court: With the defendant?

Mr. Barshay: That is right. If I did not make myself clear——

By the Court:

Q. The question is, whatever opinion you may have of these people——

A. Yes.

Q. —would you see to it that you were not prejudiced against the defendants by reason thereof?

A. No, but he is leading me to believe that what I know of the other people I should be governed — what I think of these people.

The Court: No, he does not want you to.

[fol. 2196] Mr. Barshay: Just to the contrary.

The Talesman: Then O. K. That is different.

By Mr. Barshay:

Q. I take it you said you had certain prejudices against people.

A. I had certain business experiences with these people which were not of the best.

Q. And is detrimental to those people?

A. To those people.

Q. You maybe did not follow me. Assuming that those people against whom you may have had a prejudice, assuming that they should become a part and parcel of this case and connected with any of the defendants here, I am trying to find out will that prejudice which you may have against those people inure to the detriment of the defendant?

A. No.

Q. You understand?

A. Yes.

Q. Under no condition?

A. No.

Q. Especially, sir, with respect to the name Silverman. I do not know whether he will or will not play a part in this case. That will not affect you whatever?

A. No.

Q. How much experience have you had as a juror?

A. I have been called many times but have not served.

Q. May I know how many times you did serve?

A. Probably ten—no, it would not be ten; seven, I think.

Q. And can you tell me how many capital cases you were a juror in?

A. I think they were all capital cases.

[fol. 2197] Q. And would you say from memory that each of the cases came to a conclusion in the form of a verdict one way or the other?

A. Yes.

Q. Your most recent experience has been how long ago?

A. Not within three years.

Q. And in any of those cases, Mr. Kohler, was I the prosecuting attorney? I have been in the office from 1929 to January 1, 1940, which includes the time that this case has happened. You never came across me?

A. No.

Q. Now, in any of the defense counsel that you met, was Mr. Turkus or Mr. Klein associated in any manner?

A. No.

Q. Did you say you know anybody in the D.A.'s office slightly or socially or in any way whatever?

A. No, just remember having been called for a case only.

Q. Did you know Charles Cohen, prosecutor?

A. I knew a Mr. Cohen, but I did not know he is a prosecutor.

Q. If it was a homicide case it was Mr. Charles Cohen.

A. Then I know who he was.

Q. That has nothing to do with this case?

A. No.

Q. Mr. Koehler, do you intend to participate in the forthcoming election?

A. No.

Q. Are you a member of any political club?

A. No.

Q. Are you a member of any Grand Jurors' association?

A. No.

Q. Were you ever a Grand Juror?

A. Federal Grand Jury.

[fol. 2138] Q. How often?

A. Once.

Q. Have you personally been a victim of any crime?

A. No.

Q. Has any member of your family ever been the victim of any crime?

A. No.

Q. Are you prejudiced against people charged with crime?

A. No.

Q. I take it you received so often the instruction on the principles of law that I need not go into each of them separately?

A. No.

Q. Are you still in accord with them?

A. I am.

Q. Would you consider it to the detriment of the defendant Buchalter if it was developed here that he is now incarcerated for a long period of time?

Mr. Turkus: I object to the form of the question.

The Court: Sustained.

Mr. Barshay: Exception.

Q. If the Court shall tell you that the fact that he is incarcerated for a long period of time shall be used by you only in weighing the believability of his credibility if he should take the stand, and for no other purpose, would you follow that?

A. Yes.

Q. Was your Federal service recent?

A. Not within fifteen years.

Mr. Barshay: No further questions.

By Mr. Rosenthal:

[fol. 2199] Q. Mr. Elfenbein, you say you are now a general contractor?

A. Yes, sir.

Q. Have you any current job?

A. Yes, sir.

Q. What type of work and where?

A. Corporation work.

Q. In what locality?

A. New York Avenue and Prospect.

Q. When you were in the painting business over on Sheriff Street you answered Mr. Turkus that you had a number of customers in the Brownsville and East New York section; is that correct?

A. Yes.

Q. Did that take you into that section very often?

A. Probably about once every ten days.

Q. And what would you do, go to various storekeepers there to sell them paint?

A. Houses, contractors.

Q. You sold to the contractors, not to the stores?

A. That is right.

Q. And you dealt with a number of paint contractors which were located in the Brownsville-East New York section?

A. That is right.

Q. Covering what period of time was it that you would visit Brownsville and East New York and go to the homes of these contractors? How many years?

A. Since 1923, '24.

Q. Up until about four years ago?

A. Say probably around five years ago.

Q. And since that time when you went out of the paint business, did you continue to go to the Brownsville and East [fol. 2200] New York section?

A. No, sir.

Q. Have you any acquaintances in that particular section?

A. No, sir.

Q. So that in so far as any visits to Brownsville or East New York is concerned, they would be confined to more than five years ago; is that right?

A. About that.

Q. You answered Mr. Turkus that you heard certain names whom he mentioned to you, I think one he called Jake the Bum. Is that the name?

Mr. Turkus: You know the name.

Mr. Rosenthal: You must be acquainted with my mind.

Mr. Turkus: I am acquainted with the record in a certain case.

Mr. Rosenthal: I am acquainted with the record in a lot of cases that you had.

Mr. Turkus: That is good. Learn some more.

Q. By the way, let me just reframe, as long as I am reminded, Mr. Koehler: You said you were present in the Silverman case and you were called as a juror.

A. Not in the Silverman.

Q. Did you meet Mr. Turkus, who represented Silverman on that trial?

Mr. Turkus: I was assigned by the Judge.

Mr. Rosenthal: I object to Mr. Turkus making any statements unless he is asked questions.

[fol. 2201] Mr. Turkus: I resent Mr. Rosenthal trying to make an improper record. I was assigned by the Judge after the Bar Association had submitted a list of ten names, and I had to try the case for nothing. Let us keep the record straight.

Q. He mentioned the name of Midnight Rose, Rose Gold. Did you know him when he represented Rose Gold, Midnight Rose? He was not assigned to that case, Mr. Koehler.

Mr. Turkus: No, Mr. Barshay finished it.

Mr. Barshay: It is not finished.

Mr. Turkus: He is finishing it.

Mr. Barshay: I have a pride in every client I represent, and I have no reflection on any lawyer who represents any defendant, assigned or retained.

The Court: One at a time.

Mr. Rosenthal: You ain't the only one who can cast aspersions.

The Court: Please.

Mr. Turkus: You Honor, may we have that remark stricken from the record?

Mr. Rosenthal: I submit that is a proper remark in view of the statement uncalled for by Mr. Turkus while I am questioning a juryman.

Mr. Turkus: Mr. Rosenthal addressed a remark to me.

The Court: Everybody kindly be quiet and seated while the Court speaks. This is a long trial and is strain on all [fol. 2202] counsel, but all counsel are distinguished counsel and know how to try a case. It is important we all maintain poise, or we will have no speed at all within reason in finishing with this jury, and I have got to work you overtime, much as I dislike it, in order to make up for such time as we lose in this manner. Let everybody try to deal with one another pleasantly. Try again.

M. Rosenthal: May I submit to the Court that Mr. Turkus be instructed that when I am addressing a juryman he should not make any interjections?

The Court: Don't start in again.

Q. I will continue questioning you, Mr. Elfenbein. What I say to him is not concerned with you. You heard certain names which he mentioned which you say were familiar to you; is that correct, sir?

A. Yes, sir.

Q. Were those names or did those names become familiar to you by reason of your business in Brownsville? Is that how you became acquainted with them?

A. Yes, indirectly so.

Q. Did you have any dealings whatsoever with the particular individuals that he mentioned?

A. No, sir.

Q. Were persons who were customers of yours the persons that had dealings or communicated with you certain things?

A. That is right.

Q. About these individuals. Whoever or whatever they may be, were they individuals who indirectly or directly [fol. 2203] concerned you or your particular line of business at that particular time? Let me make it clear. You said you had trouble, I think, with some union.

A. No, I had no trouble.

Q. Or the people whom you were dealing with had trouble with the union and that prevented you from delivering paint to them; is that right?

A. That is right.

Q. By reason of those facts were these people whose names Mr. Turkus mentioned to you directly or indirectly involved in these troubles that you had in connection with your business?

A. They were.

Q. And because of the mention of these names by Mr. Turkus, has any inference arisen in your mind that these particular individuals have any connection whatsoever with this case?

A. No, sir.

Q. Well, it has not been explained to you, the manner in which an indictment has been found, nor has anybody questioned you as to your familiarity with the fact that an indictment is an accusation merely against the defendant and is no proof of the crime. Is that clear to you?

A. Yes, sir.

Q. Is it also clear to you that at this particular time the defendant is not apprised of the exact proof or nature of the proof which the District Attorney seeks to adduce upon the trial of the case to prove his guilt to your satisfaction beyond a reasonable doubt? Is it clear?

A. Yes, sir.

Q. Having mentioned these names to you, I must assume [fol. 2204] that Mr. Turkus has something in his mind. Is that clear?

A. Yes, sir.

Q. If it should develop— Excuse me, it might be funny for you to have something in your mind, if it so laughable.

Mr. Rosenthal: I submit, your Honor, when I ask questions Mr. Turkus starts laughing. Whether it is the joke that I said he had something in his mind I do not know.

Mr. Turkus: Will your Honor again give the admonition?

Q. Assuming, sir, that something develops in this case, whether any of those particular individuals he mentions are called as witnesses, or whether some part of the proof should involve any of those persons whom he named and whom you say you have knowledge of, would that in any wise affect your judgment in so far as determining the proof in this case is concerned?

A. No, sir.

Q. You could leave your impression as to the particular individuals outside the jury room without in any wise permitting it to detract from what you hear from the witnesses on the stand and from that alone, is that right?

A. Yes, sir.

Q. In addition to that, I think you said that you came in contact with certain union officials; is that right.

A. Yes.

Q. Was that also in the line of your particular business that you came in contact with union officials?

A. Yes, sir.

Q. Did you have any difficulty of any character, sir, with [fol. 2205] these union officials in any wise, either directly or indirectly?

A. No, I would not say I did.

Q. Of course, the only way— I am not trying to unnecessarily pry into your business—the only way we could find out whether you did or not is by your telling. You say you would not say. Is there any doubt in your mind as to whether you did or did not have any trouble either directly or indirectly with any of them?

A. If a job was held up on account of union trouble, I could not make deliveries of material. If you call that trouble, then it is trouble.

Q. Did it cause you to gain any adverse impression as to any of these persons who were officials of the union?

A. No, I would not say that.

Q. Either as to the justice or injustice of the delay of calling the strike?

A. I did not feel good about it.

Q. That impression that you gained, assuming something were to transpire in this case regarding unions or union officials, judging from the questioning of Mr. Turkus in which he has asked about Amalgamated Clothing and various names of various individuals who are supposed to be attached to the various unions, would that fact, the

knowledge which you gained or the fact of your having been held up in any wise enter into your deliberation either subconsciously or consciously in determining what weight you will give to any witness or witnesses on the stand in this trial?

[fol. 2206] A. No, I don't think it would.

Q. You say you don't think it would. Does that imply a doubt in your mind?

A. No.

Q. As to whether or not there would creep into your deliberation the unpleasant experience or experiences that you may have had by reason of the nature of your business? Does that imply a doubt?

A. There is no doubt in my mind at all now at this point.

Q. At this point we have not gone any place, Mr. Elfenbein.

A. No doubt in my mind at all.

Q. You said you don't think, and that is the reason why I want to be clear on the subject. Assuming that in the course of this trial witnesses are called by The People or by the defense—it may be either—who may have some connection or attachment with certain unions, even to the extent of being officials of that particular union, would the difficulties which have arisen in your life by reason of the things that you have just mentioned be of such a nature that you would permit that impression that you have gained to influence you in determining what weight you are going to give to the testimony of people attached to the union in this trial?

A. No, sir.

Q. In addition to that, sir, you had many accounts, you say, in Brownsville?

A. Yes, sir.

Q. Did you have any difficulty in collection of various [fol. 2207] accounts in Brownsville?

A. Yes, sir.

Q. Did you have any unpleasant experiences in relation to the accounts which you had in Brownsville?

A. No.

Q. Other than the failure to collect money, which, of course, is unpleasant to anybody, that is, when it is justly due you. In any event, was any of your experience in connection with your dealings in Brownsville of such a nature

that you would be in any wise influenced in your determination in so far as individuals who may or may not reside in Brownsville are concerned if they were called as witnesses?

A. No, sir.

Q. You also said that you were familiar with Saratoga and Livonia Avenues. You told Mr. Turkus that too, didn't you?

A. Yes, sir.

Q. You did not recall whether, I think you used the name of Midnight Rose or Rose Gold in questioning you about that particular corner or Livonia and Saratoga Avenue—you recall his asking you?

A. That is right.

Q. You don't happen to have any acquaintanceship with Midnight Rose or Rose Gold by any means, do you?

A. No.

Mr. Rosenthal: He is smiling again. That is because he is——

Mr. Turkus: May we have that remark stricken from the record?

Mr. Rosenthal: All right, I withdraw it.

Q. In any event, sir, you are familiar with the particular [fol. 2208] corner of Saratoga and Livonia Avenue—you told Mr. Turkus that?

A. I knew of that crossing offhand, but I am not familiar. I could not tell you what is on this corner or that corner.

Q. Then when Mr. Turkus asked you whether you were familiar with the corner and you said yes, by that you meant that you know the location?

A. That is right.

Q. But you are not familiar with what particular places are on any of those corners?

A. No.

Q. Am I correct in that?

A. Correct.

Q. Is your knowledge of that particular corner of such a nature that in the event that upon this particular trial that particular corner is mentioned in the evidence by one or more witnesses, that your knowledge would in any wise influence you in the determination of this case?

A. No, sir.

Q. You served as a juror in a capital case; is that right?
A. Yes.
Q. Have you served more than once?
A. Yes.
Q. As a juror in a capital case?
A. Yes.
Q. How often have you served as a juror in a capital case?
A. Twice.
Q. When was the last time? Just approximately, what year and where was it?
A. It was in the County Court.
Q. Let me put it this way: Of course, you did not know that—when, other than that particular one, did you—was [fol. 2209] it that you served as a juror in a capital case?
A. Before Judge Fitzgerald.
Q. How long ago was that?
A. I guess about two years ago.
Q. Was it since Judge O'Dwyer became District Attorney or was it prior to his being District Attorney?
A. I think since Judge O'Dwyer became District Attorney.
Q. Judge O'Dwyer became District Attorney in January of 1940.
A. Oh, no. This, I guess it might have been about a year and a half. I can give you the name of the case.
Q. You are not supposed to, according to the Court's ruling, name cases. Can you tell us who the Assistant District Attorney was?
A. Yes, Gottesman.
Q. Then that was before. Sidney Gottesman?
A. Yes.
Q. That was before January, 1940. Did that case go to a conclusion?
A. Yes, sir.
Q. Have you been called to serve on the jury since Judge O'Dwyer has become District Attorney but not actually served?
A. I have been called—summoned to appear, but have not been called.
Q. When you say "summoned to appear," did you actually appear in court and were you excused?
A. That is right.

Q. Either by reason of the fact that the panel was completed before your name was called——

A. That is right, sir.

Q. When was it that you were called the last time to ap-
[fol. 2210] pear on a special panel?

A. I think it was about seven months ago.

Q. Before what Judge?

A. I don't remember that.

Q. Your memory seems to be better as to past than present. Seven months ago is a short time. Can you give us any idea who the judge was? Was it Judge Fitzgerald?

A. No.

Q. Judge Taylor?

A. I think in that particular case I was summoned to appear and then I got a letter postponing the appearance. That is what that was, the same as I got here a month ago, I got summoned to appear and then I got a letter following that I would be notified when to come again.

Q. Did you ever actually appear in the court and sit through the examination of jurors except this one?

A. No, sir.

Q. You merely received a notice to appear?

A. That is right.

Q. And then subsequently got a notice that you would be notified in the event that they required your appearance, and then you were not notified any more about it. Am I right in that statement?

A. That is right.

Q. With the exception of that episode of seven months ago, when before then did you actually come?

A. Besides that I got one to appear on September 8th, I think it was this month, and then got a letter not to come.

Q. Were those the only two occasions when Judge
[fol. 2211] O'Dwyer was District Attorney?

A. Yes.

Q. That you got these notices?

A. That is right.

Q. And on neither occasion did you actually appear in court in answer to those notices?

A. No, sir.

Q. Mr. Turkus made a slight error, but he did not know it. Captain Kleinman is now Major Kleinman. He was

made a major a few days ago. You said you knew Mr. Price?

A. I do not know him. I made a mistake if I said I know him.

Q. You said that you knew him by reason of the fact that he was an attorney in a case about five years ago when you were a juror.

A. That is right.

Q. Is that your only acquaintanceship with Mr. Price?

A. That is right.

Q. And you have never met him socially since then?

A. No.

Q. Have not had any dealings with him?

A. No, sir.

Q. You also said that you knew a clerk of the court down in Sea Gate. May I inquire his name?

A. Marker.

Q. Do you know what court he is attached to?

A. I do not know.

Q. It is not a criminal court?

A. No, I don't think so.

Q. I think you further stated that you had read a number of articles of a series in the *Daily Mirror*. Is that correct?

A. One paper.

Q. Whether you bought it or whether you picked it up, you did say to Mr. Barshay that you had read a number [fol. 2212] of articles in a series of articles written in the *Mirror*.

A. Not particularly the *Mirror*, but I read several papers.

Q. We will come to the other papers in a minute. Is it a fact that you read a number of articles published in the *Daily Mirror* in connection with the alleged series in which the names of one or more of these defendants were mentioned?

A. Yes, sir.

Q. And how recently was the last of those articles which you read in *The Mirror*, approximately?

A. A couple of weeks ago or so.

Q. And did you also read the head-notes to those particular articles, the black, bold-face type that was in the *Mirror*?

A. Yes, sir.

Q. Did you also read on the bottom, "Continued in our next. See Tomorrow's edition," and so forth and so on?

A. Yes, sir.

Q. By the way, are you in any wise related to the Elfenbein of Elfenbein's Bakery?

A. No, sir.

Q. These articles which you read in the Mirror, would you say there were about six or seven instalments that you read or more?

A. In any particular paper?

Q. In the *Mirror*.

A. I only read it when I got the paper for nothing.

Q. Sometimes it makes better reading when you get it for nothing. How often did you get it for nothing? Six [fol. 2213] or seven times?

A. In the space of a couple months, six or seven times.

Q. What other papers do you regularly read that you think enough of to buy?

A. The *Post*.

Q. And do you read any articles in the *Journal-American*?

A. *Post* and *Herald-Tribune*.

Q. You did not read anything about the life of O'Dwyer——

A. I have.

Q. That is the *Journal*.

A. I happened to read that.

Q. Did you read the series of those articles in the *Journal*?

A. No, sir.

Q. Were the names of any of the defendants mentioned in any of the articles that you read in the *Journal*?

A. I don't recall that, sir.

Q. Then you say you read the *Tribune* and *Telegram* and the *Post*; is that right?

A. *Herald-Tribune* and *Post*.

Q. In the articles that you read at times, was the Rosen case discussed in any of the newspaper articles?

A. I don't think I recall reading about that.

Q. You are not sure as to whether it was or it was not?

A. No, sir.

Q. Were you impressed by the articles that you read in these various papers in so far as they mentioned the names of any one of the defendants?

A. No.

Q. They made no impression on you?

[fol. 2214] A. It made an impression from the standpoint —but no impression——

Q. I want to see if I am correct in my assumption when I say in answer to Mr. Barshay you said that the thought which you had was of such a nature that you would expect evidence to come from the defendant to remove that thought. Did you say that to Mr. Barshay?

A. What was that again?

Q. When Mr. Barshay asked you as to whether or not you had an impression——

A. Yes, sir.

Q. Do you recall you hesitated and said you would not say it was an impression, you said it was a thought?

A. Yes.

Q. And then further on you said you would expect evidence to come from the defendants to remove that thought. Did you say that to Mr. Barshay?

A. By that I mean there might have been some opinion that I have gotten.

Q. That is what we are trying to find out. You say there might have been some opinion that you had gotten?

A. That is correct.

Q. In other words, rather than express yourself by saying you had a thought, the fact is that you now say that you might have an opinion of and concerning some of the defendants; isn't that true?

A. I would have to have an opinion of them, no matter what I read, regardless of anything.

Q. Have you an opinion of and concerning any one of the defendants?

A. As far as what I have read, an opinion on that one thing that I have read.

[fol. 2215] Q. In other words, you accepted what you read to be the truth and so formed an opinion, isn't that right?

A. No, I did not accept it as the truth. I felt, after all, I would have to read something else or go more thoroughly into it——

Q. I want to see. I am not trying to in any wise have you make statements which either I do not understand or me make statements that you do not understand. I am trying to see whether our minds agree on the wording that we use. You say or have said to me now that by reason of what you read you might have an opinion of and concerning some

of the defendants, one or more of the defendants. Am I right in that statement?

A. An opinion as far as a person being implicated.

Q. Yes. That is, you have an opinion in so far as the defendants or whoever it was that you read of the defendants being implicated. Isn't that your word?

A. Yes.

Q. And by implicated, you mean implicated in this particular crime?

A. Yes, sir.

Q. And your opinion which you say you might have as to the implication of one or more of the defendants in this particular crime is of such a nature that when you answered Mr. Barshay you told him that you would expect evidence to come from the defendants to remove what you then said was a thought and which you now say might be an opinion; isn't that right, sir?

A. Yes.

Q. And that is the state of your mind in so far as the [fol. 2216] particular defendant or defendants are concerned in respect to this particular case, isn't that right?

A. That article gave a certain thought in that paper, but I do not agree with that thought that is in the paper.

Mr. Turkus: I apply a challenge for implied bias on the answers given.

The Court: We cannot try that because it is an interruption. The case is now under examination by Mr. Rosenthal.

Mr. Rosenthal: In any event, Judge, in view of the statement of the District Attorney I will accede and refrain from further questioning.

The Court: Try the challenge.

Mr. Rosenthal: And allow him the challenge.

The Court: Do you challenge? The District Attorney cannot interrupt the challenge.

Mr. Rosenthal: All right, I will do it to save time. I challenge for implied bias.

Alfred Elfenbein, residing at 771 East 17th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Rosenthal:

Q. Mr. Elfenbein, you were asked certain questions by three counsel while you were in the chair?

A. Yes, sir.

Q. If those questions were repeated, would you substan-
[fol. 2217] tially give the same answers?
A. Yes, sir.

Mr. Barshay: No questions, your Honor.
Mr. Turkus: No questions.
Mr. Cuff: None from us.
Mr. Turkus: None by the District Attorney.
The Court: So far as the Court's mind is concerned, it views the answers as insufficient. I think counsel should try to get down to the point to find out whether or not this talesman has any impression or opinion which is prejudicial to the defendant which he could not lay aside in deciding the case. There has been no direct approach to that point. This gentleman seems to be an intelligent man.

By Mr. Talley:

Q. Mr. Elfenbein, our effort is to get fair and impartial jurors in this trial, as you know.

By the Court:

Q. You know that is very important. You have read a series of articles. What you mean by "impression," we don't know. Just what you may mean by sort of opinion, we don't know. Whether you believe or disbelieve newspaper articles we don't know, but it is necessary to give the defendants a square trial.
A. Yes, sir.
Q. Everybody is entitled to that, and there must be no cold deck at the start.
A. Yes, sir.
Q. And that is what Judge Talley is going to question
[fol. 2218] you on.
A. Yes, sir.

By Mr. Talley:

Q. Whether you believe these stories that you read or not, you did form an impression?
A. Yes, sir.
Q. With respect to some of these defendants or all of them, as the result of that reading, didn't you?
A. Yes, sir.
Q. And that impression you have as you sit here listening to me question you. That is true, isn't it?
A. That is right.

Q. If you were selected as a juror, you would commence your consideration of this case with that impression in your mind?

A. Yes, sir.

Q. And that impression is unfavorable to these defendants, isn't it?

A. Yes, sir.

Q. And something would have to happen to remove it, wouldn't it?

A. Yes, sir.

Q. And that something would be evidence given upon that witness stand upon which you are now sitting; isn't that right?

A. Yes, sir.

Q. And that evidence would necessarily have to come from the defendants or from some witness testifying in their behalf, isn't that so?

A. Yes, sir.

The Court: Sustained.

Mr. Talley: I think that is sufficient on the challenge.

[fol. 2219] By Mr. Rosenthal:

Q. Mr. Koehler, I have a lawyer named Koehler in my office whose father lives in Elmhurst, Long Island. I want to see whether there is any relationship.

A. From Queens Village.

Q. One of the family comes from Queens Village. His name is Herbert Koehler.

By the Court:

Q. Was your grandfather a lawyer?

A. No, sir.

Q. That was asked for a reason, because James P. Koehler, who recently died, at the age of eighty-eight, was a well-known Brooklyn lawyer and was secretary of Mayor Gaynor.

A. My father is eighty-six and he is still alive.

By Mr. Rosenthal:

Q. You were acquainted with Max Silverman, I think.

A. I knew of a Max Silverman.

Q. And I think you mentioned some trucking company which you did business with. Flour trucking, was it?

A. (The only part of answer audible from the jury box was "insurance companies" and "Luckman trial.")

Q. In other words, did you know personally the Luckmans?

A. They had one end of the warehouse in which we had an office in Stone street.

Q. In that way you came in contact with them?

A. Yes, sir.

Q. In a more or less neighborly fashion, both occupying [fol. 2220] the same building?

A. That is it.

Q. And you would bid the time of day as you passed by? At any rate, you were in the same office building or same warehouse. By reason of that, I think you mentioned also to Mr. Turkus, something about other truckmen. You were not only familiar with this——

A. In the handling of so much merchandise for insurance companies, it must be trucked, and those trucking companies worked for our concern.

Q. In other words, the salvaged goods that you paid for you would truck to some warehouse in order to salvage?

A. Quite correct. And those truckmen were hired.

Q. You would be subrogated to your insurer's right, and you would take the goods. The only reason I am asking is by reason of the various questions that Mr. Turkus has asked of other jurymen. Were those other truckers in any wise associated with the clothing industry, I think is the question.

A. No, sir.

Q. Was there any question of union activities?

A. We never had any trouble.

Q. May I know the last time that you were called to serve on a capital case, whether you actually served or not?

A. I have not served, and I am guessing when I say it, not within three years, but I have been called twice a year since.

Q. When you say you were called,——

A. For instance, my last call was in May.

Q. Of this year?

A. Yes, sir.

Q. And when you were called in May, did you actually sit [fol. 2221] in court?

A. No, the panel was exhausted before it reached my name, I mean the panel was completed.

Q. By that I mean were you present during the examination of jurors?

A. Yes, sir.

Q. And sat in court for——

A. Not very long.

Q. Until the jury was picked? Was that a capital case?

A. I don't remember.

Q. That would be in May of this year. Do you know before what judge that was?

A. Leibowitz, and the same Mr. Cohen that I mentioned was the assistant.

Q. You were also then called about last month, is that it?

A. Yes, I have been called on practically all those Amen cases, perjury.

Q. That was in the Supreme Court?

A. I have been called——

Q. Let us confine ourselves to the County Court. Were you called last November in the County Court, or did you mean——

A. Well, I don't know. I don't remember. It was over in Fulton Street, first floor.

Q. Supreme Court? Judge MacCrate? What I am interested in is what capital cases, if any, you were called, even tho you did not actually serve within the last two years, since Judge O'Dwyer has been District Attorney.

A. I don't remember any names.

Q. Can you remember any judge?

A. I just mentioned Leibowitz.

Q. I mean outside of him, and I do not mean Judge Mac- [fol. 2222] Crate. I am talking now about capital cases within the last two years in this court.

A. I think before Judge Fitzgerald, but what the case was——

Q. Did you sit through the examination of the jurors?

A. I sat until I was excused.

Q. Mr. Tarkus has asked other jurymen whether the names of Martin Goldstein or Phil Strauss were familiar to them. Were those names familiar to you?

A. When you say "Martin Goldstein"—Buggsy Goldstein.

Q. Is that name familiar to you?

A. I think Mrs. Goldstein married people next door to [fol. 2223] us. There is some relationship there.

Q. There is relationship as between Mrs. Goldstein and the next-door neighbor on Avenue R?

The Court: Who is Mrs. Goldstein?

The Talesman: Buggsy Goldstein's wife. You mentioned the name Martin Goldstein. I did not know that.

Mr. Rosenthal: He calls him Martin (Buggsy) Goldstein.

Mr. Turkus: I do not call him that. That is what he is.

The Court: Please stop quarreling.

Q. By reason of this episode, have you in any wise followed with any interest the name of Martin (Buggsy) Goldstein?

A. No.

Q. Have you read about him in the paper?

A. Who? Goldstein?

Q. Yes.

A. I knew that he was executed.

Mr. Rosenthal: I am going to challenge this juryman.

The Court: Try it.

(William J. Koehler, of 817 Avenue R, was duly sworn.)

Mr. Rosenthal: Did your Honor get the last answer?

The Court: I did not.

Mr. Rosenthal: Will you have it read, and then tell the jury to disregard it?

(Last answer read.)

By Mr. Rosenthal:

Q. Mr. Koehler, you are now under oath, and if the ques-
[fol. 2224] tions that were addressed to you were re-addressed, would you make the same answer?

A. I would.

Mr. Turkus: There is no ground for challenge on that.

The Court: Any other counsel for defendant wish to question?

Mr. Rosenthal: May I discuss it at the bench with your Honor?

The Court: No.

Mr. Barshay: No questions on our part, sir.

The Court: Any questions, Judge Talley?

Mr. Talley: No, sir.

The Court: Overruled.

Mr. Rosenthal: We respectfully except.

Mr. Barshay: Respectfully except.

Mr. Rosenthal: I am not going to ask any more questions.

Mr. Talley: No questions.

Mr. Turkus: Mr. Koehler is satisfactory to The People of the State.

Mr. Rosenthal: Reserving all the exceptions taken as far as each defendant is concerned, we peremptorily challenge.

(The following talesmen were called and took seats in the [fol. 2225] jury box: Sol M. Goldschlager of 852 Greene Avenue; Thomas W. Madigan of 147 Hawthorne Street, and Arthur P. Kennedy of 1461 East 49th Street, Brooklyn).

By Mr. Turkus:

Q. Mr. Goldschlager, you look familiar to me. Were you on any jury since I have been a District Attorney?

A. Yes, I was.

Q. Did you sit through the trial? Was it one of those cases that went to conclusion?

A. I was excused.

Q. You got as far as you are now and then you did not complete the service?

A. That is right.

Q. Greene Avenue, is that called the Jefferson section?

A. Bushwick.

By the Court:

Q. Your number is around Tompkins.

A. Around Stuyvesant.

Q. What number?

A. 852. It is Greene corner Stuyvesant. Tompkins is the 600 numbers.

By Mr. Turkus:

Q. Was it in April or May of 1940 when you came into the box on that case where I was Assistant District Attorney?

A. That is right.

Q. Were William W. Kleinman and David Price defense lawyers in that case?

A. That is right, and also Sidney Rosenthal and I think Leo Healy—I am not sure that he was in it. No, he was not in it.

[fol. 2226] Q. Let us see if we got the situation right. There was Kleinman and Price for one defendant and Rosner and DeFoe for the second defendant?

A. That is right.

Q. And then thereafter Mr. Rosenthal came into the case, is that how you got his name?

A. That is right.

By the Court:

Q. Isn't there a Turkish bath right down there on Sumner Avenue around Kosciusko?

A. No.

Q. Where is that bath?

A. I think there is a Turkish bath on—the nearest one I know is Manhattan Avenue near Broadway.

Q. I am talking about Sumner Avenue.

A. I don't know about it.

Q. It is only a few steps from where you are.

A. Not that I know of. I lived on that one block about eighteen years and I never heard of a Turkish bath on Sumner Avenue.

Q. There is one down there somewhere on Sumner or Throop. There was some trouble down there. I did not know whether you might have known about it.

A. I very seldom go up that way in all those years.

Q. You now nothing about the case apparently?

A. Only what I read in the papers.

Q. The case I have in mind?

A. About that, no.

By Mr. Turkus:

Q. Is there any familiarity with the names of Maione, Harry (Happy) Maione, and Frank (The Dasher) Abban-
[fol. 2227] dando, gained by something that you may have heard when you were awaiting call to the jury box in that other case?

A. Yes.

Q. In order to get right down to something that may save time, without my going through a complete examination, after you came to court and you reached as far as the jury box in that case which you told me about, did you read about that case thereafter?

A. Yes, I did. I followed it up very closely. In fact, I only read about it the other day.

Q. You saw that article in the *News* the other day?

A. Yes.

Q. Let me ask you this: As you sit there in the jury box now, if you were taken on this jury could you be fair to these defendants on the Rosen charge?

A. I don't think so.

The Court: Any challenge?

Mr. Cuff: Challenge for cause.

The Court: Try the challenge.

Sol M. Goldschlager, residing at 852 Greene Avenue, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Goldschlager, you were a prospective talesman, were you not, in April or May of 1940, in a case of The People of the State of New York against certain defendants? In that case I, Turkus, was the Assistant District Attorney, and Messrs. Kleinman and Price and Rosner and DeFeo were the defense lawyers is that correct?

A. Yes.

[fol. 2228] Q. You got as far as the jury box and you were questioned by both the Assistant District Attorney and the defense lawyers?

A. That is right.

Q. You did not serve as a juror in that case?

A. No, I did not.

Q. You did follow that case with interest thereafter?

A. I did.

Q. And in response to a question that I put to you subsequent to that did you reply that you could not be fair to these defendants on the trial of the Rosen case?

A. That is right.

The Court: Any questions?

Mr. Cuff: None.
The Court: Sustained.

By Mr. Barshay:

Q. Is that because of what you read in the paper?
A. Newspapers and from hearsay.
The Court: Sustained.

By Mr. Turkus:

Q. Mr. Madigan and Mr. Kennedy, we will do this expeditiously because we have been at this job a long time. I will try to ask the questions of Mr. Madigan, and if you will listen to them, then I can go over your questions very quickly. Mr. Madigan, where do you live?
A. 147 Hawthorne Street.
Q. What section of Brooklyn is that?
A. Flatbush.
[fol. 2229] Q. Have you lived there for a number of years?
A. Yes, sir.
Q. Is Hawthorne Street in the vicinity of Parkside Avenue?
A. Yes, sir.

By the Court:

Q. Between Bedford and Rogers?
A. Yes, sir.

By Mr. Turkus:

Q. What is your profession or vocation, Mr. Madigan?
A. An architectural consultant.
Q. Are you in business for yourself in the practice of your profession?
A. No, I work for the Central Hanover Bank & Trust Company.
Q. I think I can go along rapidly with some of these questions. Has business in the past or in any other way have you come in contact with anyone in the clothing center or the garment center in Manhattan?
A. No.
Q. Or with any clothing truckers, especially in the clothing field; they truck clothes.
A. No.

Q. Are you familiar with the names of any officials of the Amalgamated Clothing Workers of America?

A. No.

Q. Do you have any contacts presently or have you had any in the past with persons in the Brownsville-East New York section of Brooklyn?

A. No.

Q. Or the Brooklyn waterfront?

A. No.

Q. There are nine lawyers here representing these three defendants. Can I say to you, as I said to another prospec- [fol. 2230] tive talesman, I do not mention the number to find any fault with the number of counsel in the case; defendants can have as many or as few lawyers as they choose; that is their right when they are tried in court. Do you know any of the nine whose names I mentioned? Did you hear me mention them?

A. I do not know any of them to speak to, if that is what you mean.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. No.

Q. With respect to the District Attorney, who is Judge O'Dwyer, do you know him personally?

A. No.

Q. Or do you know intimately or personally any Assistant District Attorney on the staff?

A. No.

Q. I take it I may assume with you that you are in sympathy with law enforcement?

A. Yes.

Q. If selected as a juror in this case will you endeavor conscientiously to arrive at a just result?

A. Yes.

Q. Have you heretofore served as a juror in any criminal case?

A. Yes.

Q. Was it in the County Court?

A. Yes.

Q. And was it within recent years?

A. Approximately three years ago.

Q. Were any of the lawyers in that case in court now?

A. No.

Q. Did the case go to a conclusion?
A. Yes.
Q. Did you have the benefit of listening to the Judge's [fol. 2231] instruction on the law?
A. Yes.

By the Court:

Q. Do you know Mr. Geoghan?
A. I just know him by sight.
Q. He lives in your immediate locality?
A. That is right.
Q. Do you both belong to the same club?
A. No. I did belong to the club.

By Mr. Turkus:

Q. Part of the testimony in a criminal case frequently emanates from an accomplice. An accomplice is one who is a perpetrator in the commission of a crime with the other defendants. Do you, sir, find any fault either with the District Attorney of the county, Judge O'Dwyer, or with the prosecution of an indictment wherein the testimony of an accomplice or one of the perpetrators of the crime is used against the remaining defendants?
A. No.
Q. You will be instructed by the Judge on the law with respect to accomplices. You will be instructed not only as to the tests that you apply to the believability of an accomplice, but also on the principle of law that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice. Will you follow that instruction of law?
A. I will.
Q. And conscientiously endeavor to apply it to the facts of this case? Assuming that the Judge should tell you in his charge to the jury that the accomplice need not be sup- [fol. 2232] ported and corroborated in every detail of his testimony, but if there be independent proof which is believed by the jury and which tends to connect the defendants and each of them with the commission of the crime, that the jury may find that to be sufficient corroboration, will you take that instruction of law?
A. I will.

Q. Is it clear to you as I said it to you?

A. That is right.

Q. Now, it may appear—and of course it will, in connection with an accomplice—that an accomplice himself admits his participation in the commission of crime, so that he admits he has committed the crime. It may develop that he has associated with criminals throughout all his lifetime, that he has participated in other crimes. Or, for example, it may be argued that he has a motive to testify. All of those are items that you consider, and you can properly consider in connection with weighing the believability of an accomplice. Do you follow me in that?

A. That is right.

Q. Will you keep uppermost in mind that all the tests that you apply to an accomplice or the tests that you apply to any witness, is to determine is that individual speaking the truth about these men on trial. And will you, if accepted as a juror, devote your mental faculties to ascertain that?

A. I will.

Q. Will you devote your mental faculties to ascertain [fol. 2233] does this accomplice speak the truth, not only about his participation, but about their participation as a group in the commission of this murder?

A. I will.

Q. It may be that you may not like an accomplice, as a matter of fact, you may dislike him because of his background, but will you bear in mind that it is not the test whether you like him or whether you dislike him; the test is does he speak the truth about this group or combination which participated in the commission of the crime. Do you understand that?

A. Yes.

Q. And will you, sir, if accepted as a juror, do that, find out if he speaks the truth about him?

A. I will try.

Q. It has been brought out by one of the lawyers who represents Buchalter that Buchalter has and is presently serving a long jail term for crimes he has been convicted of. What I want to know is this: Solely because Buchalter is being punished for other crimes for which he has been convicted, would you relax or deviate from a proper jury result on this murder charge?

A. No.

Q. It has also been brought out by one of the lawyers for Capone, and properly so—it applies to all the defendants—that defendants on trial are to meet only the accusation or the indictment in the charge for which they are being tried. Is that clear to you?

A. That is clear.

Q. And by the same token the duty of the District At-
[fol. 2234] torney goes that far and no further, to establish guilt beyond a reasonable doubt on this specific charge and no other; do you understand that?

A. Yes.

By the Court:

Q. Any prejudice against capital punishment?

A. No, sir.

By Mr. Turkus:

Q. In its every aspect will you take the law from the Judge?

A. Yes.

Q. If accepted as a juror, will you deliberate with the other jurymen with common sense and understanding?

A. I will.

Q. And will you bear uppermost in your mind and devote your mental faculties to this issue, aad that is the only issue in the case, have The People of the State of New York established guilt of murder in the first degree against Buchalter, Capone, and Weiss beyond a reasonable doubt, or are you satisfied the defendants are innocent? Will you devote your mental faculties to finding out that single issue in the case?

A. Yes.

Q. Should The People of the State of New York by the competent and believable evidence that they will present in this court-room, and the people that you will hear and see, satisfy you beyond a reasonable doubt that they are three guilty men, guilty of murder in the first degree—Buchalter, Weiss & Capone, and we satisfy you of that beyond a reasonable doubt, will you say that in your verdict?

A. I will.

[fol. 2235] Q. And will you say so without hesitation and without fear?

A. I will.

Q. Is there any reason under the sun why you cannot render justice in this case?

A. No.

Q. Mr. Kennedy, do you reside at 1461 East 49th Street?

A. Yes, sir.

Q. Is that called the East Flatbush section of Brooklyn or is it Flatbush?

A. Some people call it Flatlands.

Q. Have you lived there for a number of years?

A. Yes, sir.

Q. More than five?

A. No.

Q. That is a quiet, residential neighborhood, isn't it?

A. Yes.

Q. Did you ever live in any other part of Brooklyn before you lived in Flatlands?

A. Ocean Parkway.

Q. You are listed here as an assistant general agent. Is that correct?

A. Yes.

Q. By whom are you employed?

A. Bull Steamship.

Q. Do they have offices in Manhattan?

A. Manhattan and Brooklyn.

Q. Where are you employed, in Manhattan or Brooklyn?

A. I am employed in New York, but I have occasion to come here twice a week.

Q. Is the name Albert Anastasio familiar to you?

A. I have heard it mentioned around.

Q. Did you ever personally come in contact with Albert [fol. 2236] Anastasio?

A. No, sir.

By the Court:

Q. Bull Steamship Company, and I think also Mr. Bull himself have sort of reciprocal relationship with the Savannah Line and the Eastern Steamship; am I right?

A. Yes, sir.

Q. And also the line that goes down to Norfolk. Do you have anything to do with those steamship companies?

A. Old Dominion.

Q. In the handling of freight. You never heard of Anastasio?

A. I have heard of him.

By Mr. Turkus:

Q. And you did tell me that you had no contact with him of any kind?

A. Heard of him.

Q. Your duties, then, bring you into connection with merchandise on the Brooklyn waterfront?

A. Yes, my duty is to get freight for the boats. I go out and call on the trade.

Q. Do you have anything to do with the handling of the freight on the docks?

A. No, sir, not directly.

Q. In other words, to make sure I understand it clearly, and pardon me if I do not understand your duties exactly we cannot know everything—you call upon customers who have freight to deliver, and you secure their trade?

A. That is right.

Q. For the steamship line that you represent?

A. Exactly.

Q. And those would be merchants throughout the city, [fol. 2237] manufacturers?

A. That is right.

Q. Does business bring you into contact with any clothing manufacturer?

A. Yes, sir.

Q. Which manufacturer, do you know his name?

A. The one up on 34th Street and 8th Avenue, I think it is Tutman. They make children's dresses.

Q. Do you come in contact with anyone in your business who manufactures men's clothing?

A. Yes.

Q. Who is that?

A. Hochberg.

Q. Where is his place of business?

A. East 19th Street, I think.

Q. Off Fifth Avenue?

A. Somewheres there.

Q. Do you know the trade name that he uses?

A. I really do not know.

Q. Did you ever come in contact with Raleigh Clothes?

A. No.

Q. Have a place down in Baltimore, had one at 200 Fifth Avenue, New York.

A. These are only people who have freight off the West Indies.

Q. So that the freight you solicit is freight going to the West Indies?

A. That is right.

Q. Does your livelihood depend upon the good will of anybody in that clothing industry?

A. Yes.

Q. Do you know any clothing truckers?

A. Express company. They deliver, they truck a lot of clothes.

Q. Clothing trucking is a specialty.

[fol. 2238] A. I know.

Q. There are certain clothing truckers. Do you know some of these clothing truckers who are engaged in that line?

A. I know of some of them.

Q. You mean you do not deal with them personally?

A. No.

Q. Did your business there bring you in contact with any union officials in connection with the manufacture of garments?

A. No.

Q. Or with the distribation of clothing?

A. I never had occasion.

Q. How many of these accounts have you got in this clothing district?

A. I would say about a dozen up there in the midtown section, in the garment section.

Q. And have you been going there for a number of years?

A. Yes, for the last thirteen.

Q. Is the name of Lepke a familiar name to you?

A. Definitely.

Q. Gurrah a familiar name?

A. Yes, I heard it.

Q. Curley Holtz?

A. I don't remember.

By the Court:

Q. Were you a witness in this court once?

A. Not a witness; I was a juror.

Q. A case involving a truckload of tobacco?

A. No, sir.

By Mr. Turkus:

Q. I am going to get down to business as fast as I can with you, Mr. Kennedy. For a number of years now you [fol. 2239] have been going into the clothing and garment centers, you have a familiarity of the name of Lepke and Gurrah. Is the name of Weinstein a familiar name to you, or Katz, local officials?

A. No.

Q. Are the names of people who are in the fur industry familiar to you?

A. No.

Q. While you have been going into this garment district did you hear anything said about Lepke or Gurrah?

A. Yes, most uncomplimentary.

Q. Just be careful. We have taken a long time in getting the jurors we want, and we have to be very cagey with this.

The Court: Is there a challenge?
Mr. Barshay: Yes.
The Court: You have an opinion, haven't you?
The Talesman: Certainly have.
The Court: Try the challenge.

Arthur R. Kennedy, residing at 1461 East 49th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Kennedy, in substance, when you were sitting in Chair 12, the following was elicited in response to questions: That you are in the steamship line as an assistant general agent, that your business presently and has in the past brought you in——

[fol. 2240] By the Court:

Q. Were your answers all true?
A. Yes.

The Court: Any questions?
Mr. Barshay: No questions.
The Court: Counsel for defense?
Defendants' Counsel: No.
The Court: Sustained.

By Mr. Barshay:

Q. Mr. Madigan, you live in that large apartment house?
A. I live in a private house.
Q. Is that right next?
A. Second house away.
Q. Do you know police officials who live on that block?
A. No.
Q. Mr. Madigan, have you read about this case?
A. I have some time ago.
Q. How long ago?
A. The beginning of the trial.
Q. May I know the papers you read?
A. The *Sun*.
Q. Any other?
A. Brooklyn *Daily Eagle*.
Q. Did you read about it more than once?
A. No, I cannot say that I did.
Q. Did you form an opinion in respect to what you read?
A. No, I just glanced through the paper, that is all.
Q. Did you form any impression about anything you read at all?
A. No.
[fol. 2241] Q. Have you read, by any chance, the life of Judge O'Dwyer in any paper?
A. No.
Q. Did you hear any lectures about crime and its prosecution by any Assistant District Attorney or public official?
A. Three or four years ago on juvenile delinquency, if that is what you want to know.
Q. I cannot guess at what you heard, but I know there are lots of lectures given around town. Do you know who gave it?
A. Mr. Geoghan himself.
Q. I think you said you knew Mr. Geoghan.
A. I knew of him.
Q. Did you ever hear any speeches on the radio with respect to crime?
A. I may have listened to them.
Q. Did they impress you so that your judgment would be influenced against people charged with the commission of crime?
A. No, I would not say that.

Q. Did you form any impression about this case or the people involved therein as you sat here listening to other jurors being questioned?

A. No.

Q. You said you had experience before. May I know whether it was in a civil or criminal case?

A. It was a criminal case.

Q. Was it an Extraordinary Term over in the Supreme Court?

A. Supreme Court.

Q. Mr. Amen prosecuted, or someone in his office?

A. Todd.

Q. Was it Max Silverman?

Mr. Turkus: I object to it. Mr. Barshay is going into [fol. 2242] a specific case.

Mr. Barshay: Your Honor, if that was the matter, the only reason I am going into it is that name was mentioned by Mr. Turkus, otherwise I would not. He said no, so there is no use pressing the question.

Mr. Turkus: I won't press it.

Q. Did that case come to a conclusion?

A. Yes.

Q. Was anybody in this court here counsel in that case?

A. Not that I know of.

Q. Mr. Cuff?

A. No.

Q. Do you recall whether Mr. James I. Cuff was a witness in that case?

A. I do not. I heard of Mr. Cuff.

Q. In other words, if he were a witness, you would remember him?

A. I would.

Q. I think you said the charge was perjury. Was there another charge involved in that case? Do you know anyone in the Police Department?

A. I know policemen, if that is what you mean.

Q. They may be connected with this case. That is the reason we want to know.

A. Policemen?

Q. Patrolmen?

A. Yes.

Q. Have any of them spoken to you about this case?

A. I have not seen them in some time.

Q. Do you know anybody at all connected with the prosecutor's office in any way whatever?

A. Not that I know of.

Q. Or, especially, do you know Mr. Turkus, Mr. Joseph, [fol. 2243] Mr. Klein?

A. No.

Q. Do you belong to any political organization?

A. No.

Q. Did you?

A. No.

Q. I thought you said you once belonged to that club. Did you belong to the club on Bedford Avenue at one time?

A. I did.

Q. Do you intend to participate in the forthcoming election?

A. No.

Q. At any time did you serve as a grand juror?

A. No.

Q. Were you ever the victim of a crime?

A. No.

Q. Other than the experience you told me about, have you had jury experience?

A. Called for cases, been called to the court.

Q. As a special juror?

A. Yes.

Q. But never served?

A. That is right.

Q. Were you ever examined?

A. Yes.

Q. I take it you were excused?

A. Yes.

Q. May I know how often?

A. This is about the fourth or fifth time in the past three years, I would say.

Q. Did you ever belong or do you now to any society for the prevention of crime?

A. No.

Q. Or to any law enforcement agency?

A. No.

Q. How long have you been with the bank, sir?

A. Going on seven years.

Q. Does any State agency, to your knowledge, use your bank as a depository?

A. I could not tell you.

[fol. 2244] Q. In other words, you confine your activity to the architectural part?

A. Yes.

Q. Have you ever heard of the defendants?

A. Saw it in the papers.

Q. Our client's name is Louis Buchalter. Has the fact that he is referred to as Lepke prejudiced you?

A. No, sir.

Q. Does the fact that it will come out that he is now incarcerated for a period of years, forty-four to seventy, will that prejudice you?

A. No, sir.

Q. Against him?

A. No, sir.

Q. Now, is there present in your mind any thought, idea, expression of opinion or expression of any kind or nature which is detrimental to the defendants or any of them?

A. No, sir.

Q. Are you in accord with the principle that they are presumed innocent under the law of the charge pending against them?

A. Yes.

Q. Do you believe that the Grand Jury can indict an innocent man?

Mr. Turkus: I object.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. Are you of the opinion that because a Grand Jury found an indictment against a man, charging him with crime, that there must be something to the charge?

Mr. Turkus: Objected to. That is a legal question.

The Court: Question of law. An indictment is just an accusation.

The Talesman: An accusation?

The Court: You know it is not evidence?

[fol. 2245] Talesman Madigan: It is not evidence?

The Court: Will you follow the instructions of the Court that it is not evidence?

Talesman Madigan: I will.

Q. In keeping with the Court's instructions, now may I ask: Do you believe it is possible for a Grand Jury to accuse by indictment a person who is innocent?

Mr. Turkus: Object to it.

The Court: Sustained. If the Grand Jury did not accuse innocent people, there would be no acquittals.

Mr. Barshay: I respectfully except to that remark. Your Honor has a right to say what he thinks, and I ask for the declaration of a mistrial.

The Court: It is utterly absurd.

Mr. Barshay: I respectfully except to that remark and I will go ahead. Let the record show my exception.

The Court: Proceed. The Court is patient and wants it appreciated. A great many questions are asked which in the Court's notion are objectionable. The examination is unduly prolonged, and the Court must maintain the greatest patience and courtesy to counsel.

Mr. Barshay: Respectfully except.

The Court: No matter how the Court feels about it, the Court has to submit and be patient to attorneys. Kindly proceed. There has been summation here. There has been [fol. 2246] charge on law. It has gone far beyond anything I have ever heard of in my life in relation to the examination of talesmen preliminary to trial. Exception to all counsel for defense. Now proceed.

Mr. Barshay: I have no further questions.

By Mr. Talley:

Q. Mr. Madigan, do you understand that an indictment does not import guilt, it is merely an accusation in writing?

A. I do.

Q. And that it must be supported by evidence that will satisfy a jury beyond a reasonable doubt before a verdict of conviction can be had?

A. That is right.

Q. That is quite plain?

A. Yes, sir.

Q. And after the Court charges you with respect to what is and is not a reasonable doubt, if you have a reasonable doubt, a doubt founded on reason, a doubt for which you could give a reason if required, if you have such a doubt as to the guilt of any of these defendants, will you resolve that doubt in their favor?

A. I will.

Q. Do you understand that the presumption of innocence, which is a substantial right under our process and forms of law, accompanies every defendant that comes into a criminal trial right up to the time the case is submitted to a jury?

A. Yes, sir.

Q. And do you understand, Mr. Madigan, that the Dis-[fol. 2247] trict Attorney, representing The People, has the burden of proof throughout the trial and that that burden never shifts at any time from the shoulders of The People, represented by the District Attorney, to the defendants in the case?

A. That is right.

Q. That is quite plain to you?

A. Yes.

Q. And if the Court charges you on these matters, as he will, whether you agree or do not agree with the law as charged by the Court, you will follow those directions, will you not?

A. Let me get that straight. I did not quite get that question.

Q. I am glad you called my attention to it, because I tried to speak in words of one syllable. I do not know whether I succeeded. If the Court charges you that the presumption of innocence always rests with the defendants up to the conclusion of the trial, and that the burden of proving the guilt of those defendants rests not upon the defendants, but always upon the District Attorney, representing The People, will you follow that advice on the law from the Court and be guided by it in arriving at your verdict?

A. I will do that.

Q. That is plain, isn't it?

A. That is right.

Q. From anything that you have read or any conversation that you have had, do you come into this court with any impression as to these defendants, or any of them?

A. No.

Q. So far as you are concerned, they are strangers to you [fol. 2248] in every respect, is that right?

A. That is right.

Q. You read nothing about this particular charge against them, did you?

A. Not that I remember.

Q. Did you read anything about them in connection with any other matter?

A. I said I read in the paper some time ago.

Q. Tell me again.

A. I said I read something in the paper about a month ago, but I don't just remember what it was about now.

Q. Did that article that you read, or articles that you read, leave any impression on your mind with respect to these defendants?

A. No, I would not say that.

Q. Are you quite sure that it did not?

A. That is right.

Q. When you say, "I would say not," that does not mean you have any doubt as to your own mental status?

A. No doubt at all.

Q. No doubt there is nothing you read or heard that in a :y way has left an impression on your mind as to these defendants?

A. That is right.

Q. Is there any reason that you know of which possibly you have not been interrogated, why you could not give these defendants a fair and impartial trial?

A. No reason.

Q. If the testimony, as indicated by the District Attorney, will rest very largely upon the testimony of accomplices, will you require that The People support the testimony of those accomplices by independent evidence not con- [fol. 2249] nected with the accomplices that will tend or have a tendency to connect these defendants with the commission of the crime?

Mr. Turkus: I object to the preamble of the question.

By the Court:

Q. Assuming that the Court shall charge you that you should do that, will you follow that instruction?

A. I will follow the instructions of the Court.

By Mr. Barshay:

Q. And you will require that burden and obligation to be fulfilled by the District Attorney before you would arrive at a verdict in this case; is that right?

A. That is right.

Mr. Barshay: I have no further questions.

By Mr. Rosenthal:

Q. Mr. Madigan, have you any relation, Frank Madigan?
A. I have a brother.
Q. Is he in the real estate business?
A. No.
Q. There is a Madigan court clerk. Is he any relation to you?
A. No.
Q. You said you were called as a special juror four or five times in the last three years. Is that right?
A. That is right.
Q. Was that in the County Court?
A. That is right.
Q. Did you actually attend in court on each of those occasions?
A. I believe I did.
Q. Can you tell me when was the last occasion, approxi-
[fol. 2250] mately and who was the judge?
A. Judge Brancato.
Q. How long ago?
Q. You were one of the lawyers. I can't tell you.
Q. That was not a capital case. I was one of the lawyers before Judge Brancato in a capital case? You must be in error.
A. No, I am wrong.
Q. The occasion that you are speaking about was about nine months ago?
A. I just don't remember.
Q. Approximately?
A. Between the season.
Q. When other than that were you called as a special juror, actually attend court, in the last two years?
A. Each time I was called I had to attend.
Q. I don't want you to take offense. I merely ask you for an approximate time and the judge. Did you appear before Judge Taylor in the last two years?
A. No, I never appeared before Judge Taylor.
Q. Did you appear before Judge Fitzgerald in the last two years?
A. I believe I did.
Q. Was it a capital case you appeared in?
A. I think it was. The other three times were capital cases.

Q. You sat in the room while the other jurymen were being questioned; is that correct?

A. Well, one case.

Q. Was the time when you were in before Judge Fitzgerald around May of last year?

A. I think it was.

Q. And do you recall, or would you recall whether Mr. [fol. 2251] Turkus was the Assistant District Attorney?

A. I would not recall that.

Q. Do you recall whether Mr. Turkus was the Assistant District Attorney at any time within the last two years when you appeared?

A. No.

Q. When you say you don't remember, I assume you mean you cannot recall whether he was or whether he was not: is that correct?

A. That is right.

Q. In the article which you read prior to your being called for jury service, was there any mention, to the best of your recollection as to the particular charge on which the defendants now stand trial?

A. I don't remember.

Q. Can you tell me about how recent was the last time that you read any article?

A. I told you it was about a month ago.

Q. Do you read the *Mirror* at all, sir?

A. If I happen to pick it up, I read it.

Q. Do you recall whether you read any articles in the *Mirror* dealing with any of the defendants here?

A. (Answer inaudible.)

Q. The articles which you read in the newspaper, did you form any impression whatsoever as to any of the defendants on trial?

Mr. Turkus: I object to it.

The Court: Overruled.

Mr. Turkus: The juror has said he does not even remember what he read.

[fol. 2252] Mr. Rosenthal: I said in the newspapers.

Mr. Turkus: He has already said that.

The Court: Not to Mr. Rosenthal.

Mr. Rosenthal: I do not know that he said it to anybody.

Mr. Turkus: Yes, he did.

Q. So as to make it clear to you, Mr. Madigan, just the same as Mr. Turkus has a job here to perform, do you realize that each and every attorney here has a particular, separate job to perform here?

A. Yes.

Q. I merely represent one defendant, Mr. Capone, and whatever questions I address to you or any other juryman is with an idea of finding out on behalf of my client whether I consider that he can get a fair deal; is that clear to you? And is it clear that when Mr. Barshay gets up he is interested in the defendant Buchalter and his questions are addressed in that direction; is that clear?

A. Yes.

Q. And when Judge Talley gets up, his is directed to defendant Weiss, and he has a duty to perform as to him; is that right?

A. Yes.

Q. You do not find any fault with having to answer three different lawyers representing three separate people, do you?

A. No.

Q. You understand, sir, although you have not been in the court-room here, that each one of these men, although being tried together, each one is entitled, in fact, individu- [fol. 2253] ally to a separate trial at your hands? Do you understand that?

A. Yes.

Q. And each one is entitled to a separate determination according to the way the evidence from the witnesses apply to that particular individual; is that clear?

A. That is clear.

Q. So if I do, sir, happen to address a question to you a second time, you will not take offense at me for that reason, will you?

A. No, sir.

Q. Now then, may I ask whether or not by reason of anything that you may have read you have formed any impression one way or the other in so far as any of the defendants are on trial, irrespective of the particular case for which they are being tried?

A. I have not formed an opinion.

Q. So that your mind is clear and open at this time?

Mr. Rosenthal: I have no further questions.

Mr. Barshay: No further questions.

Mr. Turkus: Mr. Madigan is satisfactory to The People of the State.

Mr. Rosenthal: Peremptory.

(The following talesmen were then called and took their places in the jury box: Benjamin Cohn, of 359 Crown Street; John D. Butt, 1373 Dean Street; Frederick G. Harris, 224 Lincoln Road.)

The Court: Mr. Cuff, you will have to cancel your dinner [fol. 2254] engagement. It is nearly half past four and not a single juror has been selected. We are going to sit late.

By Mr. Turkus:

Q. Mr. Cohn, do you live at 359 Crown Street?

A. Yes, sir.

Q. Is that called the Crown Heights section?

A. Yes, sir.

Q. Have you lived in the Crown Heights district for a number of years?

A. Yes, sir.

Q. How many years?

A. Fourteen years.

Q. Did you live in any other section of Brooklyn?

A. Previously.

Q. Yes?

A. Carroll Street.

Q. Would that be on the other side of the park in the Crown Heights section?

A. Right near Albany Avenue.

Q. You are listed as by profession being an architect; is that correct?

A. Yes.

Q. Do you practice your profession for yourself or are you employed?

A. For myself.

Q. Where do you maintain your office?

A. 191 Joralsmon Street.

Q. Have you had a Brooklyn office for a number of years?

A. Yes, sir.

Q. More than ten?

A. Yes, sir.

Q. As an architect do you draw plans for various builders throughout the city?

A. Yes, sir.

Q. Did you draw any plans or have any contacts with [fol. 2255] people in the Brownsville-East New York section of Brooklyn?

A. Years back.

Q. How many years ago was that?

A. About fifteen or more.

Q. Are you presently in contact with any builders who either have their places of business in Brownsville-East New York or who engage in construction work in that area? Are you presently in contact with those people?

A. Yes.

Q. Do you see them in your every-day course of business?

A. Yes.

Q. Are you dependent, in earning your livelihood on the good will of these people?

A. Yes, sir.

Q. Are these builders who have dealings with electrical contractors and with painting unions?

A. That is right.

Q. Do you come in contact with union officials in the building trades?

A. Not much.

Q. How recently have you had any contact with people in the Brownsville-East New York area, those people upon whom you explain to me you are dependent for your livelihood?

A. I did not do any work for quite a while. I know someone on Herzl Street.

Q. What is that, a builder who lives on Herzl Street?

A. Yes.

Q. Is this a one-man office, or have you partners, or how does it work?

A. I am in charge of the office now. My brother is ill, so I take care of it; I have one employee.

[fol. 2256] Q. Did anybody in your business experience talk to you about Brownsville and East New York? For example, I know that is very broad. I will make it a little more specific—about people in the painting union or people in the electrical union?

A. Occasionally we talk about different unions; nothing specific.

Q. In anything that you have heard, is the name of Martin (Beggsy) Goldstein a familiar name to you?

A. I heard of that name.

Q. The name of Harry (Pittsburgh Phil) Strauss? The name of Albert Anastasio?

A. No.

Q. Gesuele Capone?

A. Yes.

Q. Do you come in contact with union officials in the Plasterers Union?

A. I have not had much occasion.

Q. Would the familiarity of the name Gesuele Capone, is that due to some plasterer's contracts?

A. I know the name.

Q. What did you say?

A. Probably through plasterers.

By the Court:

Q. Is it more than a name to you? Do you know who the person is?

A. No.

Q. All you know is it has a familiar sound?

A. That is right.

By Mr. Turkus:

Q. Has it been something that you heard in the discussion of your business? That is what I am driving at. Or [fol. 2257] is it just a familiar name as it is said?

Mr. Turkus: I think there is a question of bias.

The Court: He said he cannot place it.

Q. Mr. Cohn, if you will speak up loudly, all the lawyers must hear the answers.

By the Court:

Q. Where is your office?

A. 191 Joralemon Street.

Q. Been there how long?

A. About six or seven years.

Q. And what particular builders are your stock lines?

A. I have various.

Q. What do you specialize in, any particular section?
A. No, not particular, Brooklyn, Queens.
Q. All over!
A. Yes.

By Mr. Turkus:

Q. Were you in any other profession or vocation before you were an architect?
A. No, sir.
Q. Does your business bring you into contact with members of the bar, lawyers?
A. I know lawyers. Sometimes we have to make a selection.
Q. What I am specifically anxious to know is this: In this case do you know any of the nine lawyers, did you ever meet any of them through business in any way? I will tell you who they are if you have forgotten the names. Have you forgotten them?
A. I don't recognize any of them exactly.
Q. Is the name of Hyman Barshay, a former Assistant [fol. 2258] District Attorney, is that familiar to you?
A. I have heard the name, yes.
Q. Did you ever have any business with him or his law associate, a man named Gittelson?
A. I don't think.
Q. Or Mr. Bertram Wegman, a former Assistant United States Attorney, and his partner, Mr. Climenko? They represent Buchalter. Did you ever do business with those lawyers?
A. No.
Q. Or anybody in their law offices? With respect to the defendant Weiss, he is represented by a former Judge of the Court of General Sessions, Judge Talley, former Assistant District Attorney Cuff, and former Assistant United States Attorney Kriendler. Did you do any business with any of those three lawyers?
A. No, sir.
Q. Or anyone in their offices?
A. No.
Q. With respect to Capone, he has Mr. Sidney Rosenthal, Mr. Leon Fischbein, and Mr. Emanuel Rosenberg. Do you know any of those three lawyers through business?
A. I heard of them but I do not know them.

Q. Do you know any lawyer, any member of the bar who specializes in the defense of criminal cases?

A. I don't think so.

Q. Since you received your notice, did anybody speak to you about the case?

A. No, sir.

Q. Did you ever hear any discussions about the Rosen case, the killing of a man named Joseph Rosen? Did you ever hear anything from any of your business contacts?

A. No.

[fol. 2259] Q. Have you ever served on a jury before, Mr. Cohn?

A. Yes, sir.

Q. Has it been in a criminal case?

A. No, sir.

Q. A civil case?

A. Yes.

Q. Was it in the Supreme Court?

A. That is right.

Q. How long ago?

A. About two years.

Q. Were any of the lawyers in the court-room in that case, any of the lawyers who are here now?

A. No, sir.

Q. Is your hearing good?

A. I think so.

Q. It is imperative that the jury——

By the Court:

Q. Have you any feeling against capital punishment?

A. Not particularly, but——

Q. Have you such a feeling against capital punishment that it would prevent you from finding a verdict of guilty if the evidence indicated the defendants' guilt of murder in the first degree?

A. I don't like to see anybody punished.

By Mr. Turkus:

Q. I do not hear you.

A. I don't like to punish anybody.

Q. Nobody relishes punishment. We have all got a job to do here. I have got a job to prosecute them and the jury

has got a job, if I prove them guilty beyond a reasonable doubt, of doing their duty courageously. If you have something in the back of your mind about capital punishment or any kind of punishment, now is the time to talk up.

[fol. 2260] A. I am not in favor of capital punishment.

By the Court:

Q. Would it prevent you from finding a verdict of guilty if the defendants are proven guilty of murder in the first degree?

A. Well—If it is proper evidence, I guess I would do the right thing.

By Mr. Turkus:

Q. I think you said to the Judge that you are not particularly in favor of punishment.

A. Yes.

Q. Would that enter into your mind when you are deliberating the case, your feeling that you are not particularly in favor of punishment?

Mr. Barshay: I object to that question.

The Court: Overruled.

Mr. Barshay: Respectfully except. It is not a correct statement of the law.

Q. Will you give me an answer, sir? Did you lose the question?

A. Yes, sir.

Q. (Question read.)

A. It may prejudice me.

Q. Yes. So that, as it has been brought out by one of the lawyers for Buchalter that he has been convicted of past crimes and he is serving a long jail sentence, would not that feeling that you have cause you to relax your duty in this case?

A. It would.

Mr. Turkus: Challenge.

[fol. 2261] The Court: Try it.

BENJAMIN COHN, of 359 Crown Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Turkus:

Q. Mr. Cohn, if I were to repeat the questions that I put to you about your dependency upon certain builders in Brownsville and East New York for a livelihood and about punishment and about relaxing your duty as a juror, would you make the same answers?

A. Yes, sir.

Q. And would those answers be true?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Cohn, if the Court shall tell you that punishment has nothing to do with this case and you must not even discuss it or consider it, will you follow that instruction of the law?

A. I understand that.

The Court: What?

The Talesman: I guess I would.

The Court: Talk out loud. We cannot be telling you all the time to talk out.

The Talesman: I cannot speak.

The Court: You can if you wish.

Q. Do you understand my question?

A. No.

Q. If the Judge shall tell you, if you are taken as a juror, that the question of punishment is not for you, you must not consider it, it is fixed by law, you have nothing to do with it, [fol. 2262] will you follow that instruction of law?

A. Yes, I will.

Q. You won't consider it?

By Mr. Turkus:

Q. Mr. Cohn, didn't you tell me that you are not particularly in favor of punishment?

A. That is right.

Q. And didn't you tell me as you sat there in Seat 10, that, as it has been pointed out by one of Buchalter's lawyers that he has been convicted of past crimes and he is now

serving a long jail term, that you would relax your duty in that case as a juror?

Defense Counsel: I object to it. That has nothing to do with this challenge.

The Court: Overruled.

Defense Counsel: Exception.

Q. Was your answer yes?

A. I did not hear you.

Q. It has been pointed out by one of Buchalter's lawyers that he is presently paying the penalty for other crimes that he has been convicted of and that he is going to be in jail for a long time. Is that clear to you?

A. Yes, sir.

Q. And am I correct in understanding you to say that you are not in favor of punishment?

A. Yes.

Q. And am I further correct that you said that you would be inclined to relax your duty in this charge, having in mind that Buchalter is being punished for other crimes?

Mr. Climenko: If your Honor pleases, I object to that [fol. 2263] upon the ground that it assumes a state of facts not in the record as to this talesman.

The Court: Overruled.

Mr. Climenko: Exception.

Q. Is that correct?

A. Yes.

Q. If that is your state of mind, Mr. Cohn, that you are against punishment and that you would relax your duty, how can you lay that state of mind aside?

A. I am against capital punishment.

Q. You are against capital punishment?

A. Yes.

Q. And you have a conscientious scruple?

Mr. Cuff: Am I entitled to a ruling on my objection?

A. Yes.

The Court: Overruled.

Mr. Turkus: The talesman has now stated he has a conscientious scruple against capital punishment. I press the challenge.

The Court: Any more questions?

By Mr. Barshay:

Q. You signed an affidavit qualifying as a special juror, did you not, Mr. Cohn?

A. Yes, sir.

Q. And did you read it before you signed it?

A. Yes, sir.

Q. And there were you asked the question whether you have any conscientious scruples against capital punishment and did you say in that affidavit you did not?

A. (No answer.)

[fol. 2264] Q. Do you remember that?

A. I am not in favor of capital punishment. Of course, if the Judge rules, I would follow out his Honor's—, whatever he wanted.

The Court: You understand a murder trial is not a debating society.

(Talesman speaks to the Court.)

Mr. Barshay: No further questions.

The Court: Sustained.

By Mr. Turkus:

Q. Mr. Butt and Mr. Harris, I will try to make these questions as brief as I can, and if Mr. Harris will listen to you when you make your responses, and if you have any disagreement with his answers, when I come to you you tell me, and we will know where we are and try to get through this thing quickly. Mr. Butt, you live at 1373 Dean Street?

A. That is right.

Q. What do they call that district?

A. Bedford.

Q. Have you lived there for a number of years?

A. About twenty-five years.

Q. With respect to your vocation or your profession, it says "V. P." I assume that means vice-president?

A. That is right.

Q. What kind of a corporation is that?

A. The Seamans Bank for Savings.

Q. Have you been connected with the banking institution [fol. 2265] for a number of years?

A. Three years.

Q. Prior to that time what was your business?

A. I was in the real estate.

Q. In business for yourself?

A. That is right.

Q. And where was your office?

A. 522 Fifth Avenue.

Q. In Manhattan?

A. Manhattan.

Q. What I am particularly desirous of knowing is this: whether any of the prospective talesmen have had any contacts with manufacturers of men's or ladies' clothing or with clothing truckers, any personal contacts. Have you?

A. No, sir.

Q. Or any personal contacts with people in the Brownsville-East New York section of Brooklyn?

A. No, sir.

Q. May I go along with the understanding that both of you gentlemen are in sympathy with law enforcement?

A. That is right—right.

Q. I have mentioned the names of these nine lawyers that represent these three defendants at the bar. I repeat to you, as I did to another juror, that I do not make mention of the number of lawyers because I find any fault with it. Defendants on trial here have rights of employment of as many or as few counsel as they choose, or whatever talents they choose that these lawyers have, so I do not mention that for any fault finding, but merely to find out if there is any acquaintanceship with any members of the bar who [fol. 2266] are defense counsel in this case. Do you know any of the nine?

A. I do not.

Q. Or do you?

A. Personally, no.

Q. Do either of you gentlemen know any member of the bar who specializes in the defense of criminal cases?

A. No. No.

Q. Mr. Harris, I will just get to you for a minute. 224 Lincoln Road, that is Flatbush?

A. Yes.

Q. Have you lived in the Flatbush district for a number of years?

A. Yes, I have.

Q. You are listed as a credit manager.

A. Secretary and treasurer of the company.

Q. And what is the nature of the company's business?
A. Wholesale coffee, tea, and spices.

By the Court:

Q. Whereabouts?
A. 190 Franklin Street, New York City.
Q. Hudson Street?
A. It is a block over from Hudson Street on Greenwich and Franklin.

By Mr. Turkus:

Q. Mr. Butt, do you know the District Attorney of the county, Judge O'Dwyer?
A. No, sir.
Q. Or do you know any Assistant District Attorney on his staff?
A. No, sir.
Q. Specifically, do you know Assistant District Attorney Joseph, Klein, or Turkus?
A. No, sir.
Q. It has been pointed out here by one of the lawyers for [fol. 2267] the defendant Buchalter that his client has been convicted of other crimes, the commission of other crimes, and is presently paying the penalty for these offenses. Would you, if selected as a juror, permit yourself to deviate from a proper result in this case solely because Buchalter is in jail for other offenses?
A. No.
Q. Will you, if accepted as a juror, try the question of guilt or innocence for murder in the first degree on the evidence that you get in the court-room?
A. Yes.
Q. With respect to another point brought up to other talesmen by another of the defense lawayers, which applies to all the defendants, that they are here to meet the charge of murder in the first degree alleged in this indictment, and that alone, and that is properly stated to the jury, they are here to meet that one issue. By the same token do you understand that it is only the duty of the District Attorney, no more and no less, we cannot go further, and we cannot stop short, to establish guilt of that murder charge beyond a reasonable doubt?
A. Yes.

Q. What I want to find out, Mr. Butt, is whether you have any prejudice against either the District Attorney of the county or against the prosecution wherein the prosecutor has accepted the testimony of an accomplice and breaks or solves a murder case from the inside. Do you have any prejudice either against the prosecutor or against the prose-
[fol. 2268] cution of the indictment?

A. No.

Q. When I use the expression about solving a case or breaking it from the inside, you are not to gather from any statement of mine that this case has been broken or solved from the inside. That is what the District Attorney of the county must prove to you from the witnesses in the court-room; you understand that?

A. Yes.

Q. But that is the only way I can phrase the question, or the only way the defense lawyers can phrase the questions is to state it in simple language so that the jurors will understand them as they speak. Nothing that either of the lawyers say on either side in this preliminary or voir dire examination is proof. You cannot convict the man on what counsel says. You convict him on what is produced in that chair and what documents and what witnesses you have got to establish a case, or exhibits. So that I can go along with you, Mr. Butt, can I not, that you have no inherent bias or prejudice or no fault to find either with the prosecutor or with the prosecution in which accomplice testimony is used; is that correct?

A. That is correct.

Q. Now, with respect to the believability of an accomplice, there will be rules of evidence that the Judge will give you, or tests, as they are called, to apply to that type of witness. Do I make myself clear? There will be tests given by the Judge that you apply to the believability of an ac-
[fol. 2269] complice witness. For example, the Judge will indicate to you by his charge that a man who himself admits he was a participant in the crime, his testimony must be weighed carefully and cautiously. Will you apply all the tests that the Judge gives you to the accomplice witness in the case?

A. (No answer.)

Q. Or haven't I made myself clear?

A. Yes.

The Court: That is a matter for the defense to ask.

Mr. Turkus: It is something that I want to go beyond in my question. I have got to do it that way.

Q. What I want to find out—that was a preliminary question, preliminary to this—that no matter what rules you apply to the believability of an accomplice witness, that the purpose of applying those tests is to find out does he tell the truth. Is that right?

A. Yes.

Q. And will you, if accepted as a juror, apply every conceivable, logical test to find out does the accomplice tell the truth?

A. Yes.

Q. Not only does he tell the truth as to himself, but as to them, does he tell the truth as to them? Does he tell the truth as to them as a group or combination participation in the killing of the victim named in the indictment. Is that clear to you?

A. Yes.

Q. That the purpose of applying every test that you get from the Judge and every common-sense test and rule that you have from your own experience is to find out does this [fol. 2270] accomplice speak the truth about this group or combination who killed Rosen. Do you understand that?

A. Yes.

Q. And will you, if accepted as a juror, devote your mental faculties to find that out?

A. Yes.

Q. Now, the Judge will tell you either in words or substance that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice. Is that clear to you? In other words, the Judge will tell you as a matter of law if that is all the prosecutor had you have got to dismiss the case, you have got to find them not guilty. But he will also tell you other things about corroboration. For example, should he charge you this in words or substance, the prosecution need not establish by independent proof each and every detail of an accomplice's testimony; that the prosecution need not do; is that clear to you?

A. Yes.

Q. And if he continues to explain to you that the obligation of the prosecution is to have independent evidence which is believed by the jury and which tends to connect the

defendants and each of them with the commission of the crime, if he gives you that instruction of law, will you follow that?

A. Yes, sir.

Q. And will you, with common sense and understanding, apply it to the facts in this case?

A. Yes.

Q. Doing a job as juror in a criminal case is the doing of one thing. It is not a hard task intellectually.

[fol. 2271] Mr. Barshay: I object to that statement.

The Court: I don't see, at the conclusion of this case, how anything can be left to the Court to charge, the jury is so thoroughly instructed on the law before they are even accepted.

Mr. Turkus: All right, I will withdraw the law.

Q. Even if I say it, that does not make it the law with you, only when Judge Taylor says it.

Will you devote your mental faculties to ascertain have The People of the State of New York established beyond a reasonable doubt the guilty participation, group and combination participation of these defendants in the killing of the victim named in the indictment?

A. Yes.

Q. That will be your job if accepted as a juror. Will you, sir, if accepted as a juror, conscientiously endeavor to do justice by your finding, by your verdict?

A. Yes.

Q. After you hear all the evidence in the case and you discuss the case with the other jurors, if your mind is satisfied beyond a reasonable doubt that Capone, Buchalter, and Weiss are three of the killers of Joseph Rosen, as we charge in this indictment, and you are satisfied of that beyond a reasonable doubt, will you say it in your verdict?

A. Yes.

Q. And without fear and without hesitation?

A. Yes.

Q. Mr. Harris, would you have any bias or prejudice against the use by a prosecutor of accomplice testimony?

[fol. 2272] A. No, I would not.

Q. Will you take all the rules and tests the Judge gives you, and the common-sense rules that you apply to weighing the believability?

A. Yes.

Q. Will you apply it to that type of witness and find out does he speak the truth about the group or combination that participated in the murder of the victim named in the indictment?

A. I would.

Q. And will you devote all your faculties to the determination of whether guilt has been established beyond a reasonable doubt, of these three men, or whether they are innocent of the charge? Will you do that?

A. Yes.

Q. Will you, sir, by your verdict, endeavor to do justice in the case?

A. I would, yes.

Q. I believe you said that you know neither the District Attorney nor any member of his staff by way of Assistant District Attorneys.

A. I do not.

Q. That you know none of the defense lawyers in the case?

A. I have seen them in court here.

Q. With respect to the fact that there is only one charge here which the defendants meet and only one charge which the prosecutor has to establish, namely, this indictment, do you feel the same as Mr. Butt does?

A. Yes.

Q. And do you feel the same as he does in regard to all the responses, substantially; do you feel you would have [fol. 2273] answered the same as he did if I put the questions to you?

A. Yes.

Q. If I establish to your satisfaction beyond a reasonable doubt that Capone, Weiss, and Buchalter, are three of the killers of Joseph Rosen, will you say that in your verdict?

A. I would.

Q. Without fear and without hesitation?

A. Right.

The Court: We are going to take a recess for fifteen minutes. Everybody be seated. First the jury will go out. Do not discuss the case, gentlemen, and do not mingle in the corridor.

Defendants remanded.

(A short recess was then taken.)

[fol. 2274] Trial Resumed—(5:15 P. M.)

The Court: A situation has arisen which requires that the Court exclude all members of the panel. While absent from the court-room, do not discuss the case. You may retire with the officer.

(The jury and talesmen then left the room.)

The Court: I will have to ask that all other members of the panel step outside. All members of the panel are excluded.

Now that nobody is here except the defendants and counsel and the officials of the court staff, the Marshal will kindly take the stand and be sworn.

ARTHUR G. JAEGER, residing at 3545 Eighty-ninth Street, Jackson Heights, Borough of Queens, City and State of New York, was duly sworn.

By the Court:

Q. Captain Gannon, the chief court attendant of this court, has made a report to the Court concerning which the Court desires to make a record. He states that you have informed him that you are under instructions from Washington not to let the prisoners be in court after four o'clock any day. Is that true?

A. Well, it is not true. I informed Captain Gannon—I informed Mr. Turkus. I received a phone call Saturday [fol. 2275] morning at five minutes past nine. I was not there. I was told to phone back. That is the message that was left. I phoned back as soon as I got in the office. That I did at ten minutes past ten. I had a conversation with Mr. Bennet for about half an hour with reference to this case.

Q. State the full name and official position.

A. James Bennet, Director of Prisons, Department of Justice, Washington, D. C.

Q. What was the phone call? Was it the voice of the Director of Prisons, who claimed he was Mr. Bennet?

A. Right. It was with reference to the manner in this court. He did not like the idea that prisoners were transported in the dark, and he told me that at four o'clock I

could come in here and take the prisoners out, which I should do if it would be dark by the time I get them over to the House of Detention.

Q. Did you tell him that the prisoners had been taken, without handcuffs, to a public restaurant after dark?

A. I did not tell him that, no, sir; he knew that.

Q. So the instructions are you are to walk into the court and break up the trial by taking out the prisoners?

A. If I saw fit.

Q. You are the super-judge?

A. That I don't know.

Q. Do you know Mr. Bennet?

A. I never saw him.

Q. Do you know his voice?

A. Well, I have spoken with him on many occasions.

[fol. 2276] Q. Very often?

A. Yes, sir.

Q. You never met him?

A. No, sir, I have not.

Q. Have you any written instructions?

A. I had when these negotiations were being made.

Q. Have you any written instructions on what you have just testified to?

A. No, sir.

Q. That the Judge is to be a rubber stamp and you are to walk in here and take prisoners out?

A. No, sir, I have not. The only thing he told me was that I was responsible for these prisoners while they were up here in New York.

Q. Except when they are dining in Joe's Restaurant?

A. Except when they are in the House of Detention.

The Court: That is your responsibility, and I have mine. Mr. Gannon also reported that tomorrow morning the prisoners could not be here, according to you, because at 10:30 o'clock they were to be arraigned in the Federal Court.

The Witness: That is only one.

Q. Which defendant.

A. Emanuel Weiss.

Q. Who gave you instructions?

A. Mr. Scilleppi, of the United States Attorney's office.

Q. Did you tell him they were on trial before this Court?

A. Yes, sir.

Q. What did he say?

A. He said it would be necessary for them to be here before Judge Campbell at 10:30.

[fol. 2277] Q. Mr. Scileppi is a well-known lawyer, and he has practiced successfully in this court, and he is a gentleman; that does not sound like Mr. Schileppi. Your instructions, sir, are that while the trial is on the authority of this Court as to details of the trial and as to hours, is supreme. If that is in conflict with the authority of yours while these defendants are on trial, you will be guided accordingly, or you will simply have to take what is coming to you. You will so report to your superior.

Mr. Turkus: May I address the Court at the bench?

The Court: No. If the Department of Justice wants to break up this trial, there will have to be something more than a telephone message to somebody whom he has never met. There will be an official order, and the responsibility will be placed, and the public will know where that responsibility is and be entitled to know the reason why.

Bring back the jury.

(The jury and talesmen then entered the court-room.)

By Mr. Barshay:

Q. Mr. Butt, do you know a person named Harry Butt, a projectile expert in the Police Department?

A. No, sir.

Q. Now, have you read about this case at all?

A. No, sir.

Q. You never saw it mentioned in any newspaper at all?

A. No, sir.

Q. Have you read about the defendants in any newspaper?

[fol. 2278] A. Not recently.

Q. At any time?

A. Some time ago.

Q. Did you read extensively about it?

A. No, sir.

Q. More than one article?

A. No, sir.

Q. By virtue of what you read did you form an opinion with respect to that one?

A. No, sir.

Q. Or did you form an idea or impression with reference to him?

A. No, sir.

Q. Did you ever hear the name discussed?

A. No, sir.

Q. Or the names of the other defendants?

A. No, sir.

Q. Did you form an impression with respect to this case? Or to the defendants, while you were listening to the other jurors being chosen?

A. No, sir.

Q. Have you had prior service?

A. No, sir.

Q. In any case at all?

A. No, sir, I have been called.

Q. You never have been called?

A. I have been called, but I have not served.

Q. May I know if you were called more than once?

A. Just once.

Q. Were you examined?

A. I was examined.

Q. Was it a capital case?

A. Yes, sir.

Q. Did any of the participants in this trial participate in that case?

A. Not as I know of.

Q. Any impression you gained in that case, when you were questioned, which would result to the detriment of any of the defendants in this case?

[fol. 2279] A. No, sir.

Q. In reference to Buchalter, or the name of Lepke, does that fact weigh against him?

A. No, sir.

Q. Is there any question that I put to any juror here, or any answer any juror made which would in any wise influence you in this case?

A. No, sir.

Q. I take it that you find fault with neither side for trying to get jurors who will be fair and impartial and just?

A. Yes, sir.

Q. Sometimes when we have an argument, that is by-play, and has nothing to do with the case, you understand?

A. Yes, sir.

Q. Now, Mr. Wegman, Mr. Climenko, and myself represent Mr. Buchalter, just us three, nine do not represent him, so that now you tell me there is nothing that you know of or that you have heard that will preclude you from rendering an impartial verdict here, am I correct?

A. Yes, sir.

Q. And especially the fact if it shall be developed that Mr. Buchalter is now serving a sentence of forty-four to seventy years?

A. No, sir.

Q. If the Court shall tell you that character is no part of this case, unless the defendants should offer good character in evidence, I take it you will follow that instruction?

A. Yes, sir.

Q. Does the fact that a person has been killed prejudice you against anyone?

A. No, sir.

[fol. 2280] Q. You gave that considerable thought, which you have a right to do, but your answer is positively no?

A. Yes, sir.

Q. You understand it is merely an accusation, that is all?

A. Yes, sir.

Q. It has no force whatever, no probative force whatever?

A. Yes, sir.

Q. And when the defendant interposed a plea of not guilty, as he did in this case, it became a question for you to decide, whether or not the District Attorney proves guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Now, there must be nobody here to prove his innocence—you understand that?

A. Yes, sir.

Q. When Mr. Turkus said that we must try the issue of guilt or innocence, I think I have an idea—I know what he meant—he meant the right thing, but let us see whether or not we understand each other. We need not prove ourselves innocent; our guilt you must decide; the law presumes we are innocent. When I say "We", I speak of the defendants. You must decide whether or not the District Attorney has sustained the burden of proof beyond a reasonable doubt. That is the only issue, not one of guilt or

innocence, but is he guilty beyond a reasonable doubt, to your satisfaction?

A. Yes, sir.

Q. That obligation you are willing to undertake?

A. Yes, sir.

Q. Keeping in mind that throughout the trial the pre-
[fol. 2281] sumption of innocence surrounds him until the District Attorney has sustained the burden?

A. Yes, sir.

Q. At no time shall you require the defendant to prove, either through himself or through witnesses, his own innocence?

A. Yes, sir.

Q. In other words, the burden shall never shift to the defendant?

A. Yes, sir.

Q. And at the conclusion of the case when the Court charges you that the failure of the defendant to take the stand shall draw no unfavorable inference against him in your mind, you will follow that instruction?

A. Yes, sir.

Q. The presumption of innocence you will consider as part of the evidence in favor of the defendant?

A. Yes, sir.

Q. There was propounded to the jurors a question as to whether or not you find fault with Judge O'Dwyer for accepting the testimony of an accomplice. Now, nobody finds fault with him for doing that—that is his job. The point is, do you, under the light of cross-examination, under the light of all the evidence, will you accept the testimony of the accomplice? That is the issue, isn't it?

A. Yes, sir, as I understand it; I don't know so much about it.

Q. It is not what any other person accepts, it is you; that is an obligation you must assume. Are you willing to do that?

A. Yes, sir.

Q. It is a simple one. Are you willing to do it?

[fol. 2282] A. Yes, sir.

Q. Free of any sympathy, free of any prejudice, free of any bias, free of consideration as to who prosecutes this case or who defends it?

A. Yes, sir.

Q. You will weigh any witness's reputation or character or anything at all, and with respect to Judge O'Dwyer, I take it he is not going to be a witness—I don't know.

A. Yes, sir.

Q. You also understand that none of the lawyers are witnesses in this case at all?

A. Yes, sir.

Q. The District Attorney presents his side, and the wisdom of counsel will decide whether or not they will present their side?

A. Yes, sir.

Q. From all indications—I don't say this of personal knowledge—the proof shall come forth from a person who claims to be an accomplice. Do you understand why I use the words "who claims to be an accomplice"?

A. Yes, sir.

Q. A plea of Not Guilty on Mr. Buchalter's part puts the District Attorney to that proof, whether or not he is an accomplice of Buchalter's. He may claim it, but the proof may be otherwise—that will be up to you.

A. Yes, sir.

Q. He may come here or they may come here and say that they participated in the commission of a crime—that makes him a principal—and it is for you to say whether he was or not.

A. Yes, sir.

Q. And in deciding whether or not he was an accomplice [fol. 2283] of Buchalter, will you take into consideration the fact that some place else, in another court, under oath, he said that he did not know anything at all about this case, in judging whether or not he is telling the truth here?

A. Yes, sir.

Q. That is part of the test you will give to the person who applies for credit from you?

A. Yes, sir.

Q. Will you also take into consideration when he says, "I am an accomplice of Buchalter," the further fact, if it is true—don't take my word for it now, until it comes from the witness stand—if it is true that he ever spoke or had seen Buchalter in all his life? You will take that into consideration?

A. Yes, sir.

Q. In other words, the mere fact he comes here and says, "I declare myself to be an accomplice of Buchalter," you

will accept only when you put his testimony to a search light and consider it carefully?

A. Yes, sir.

Q. Now, there will be the testimony of those who will come here for the purpose of giving other evidence which tends to connect the defendant Buchalter with the commission of this crime. If you find it comes from people who had, out of their own mouths, admitted to you under oath that they have committed not one, but eleven murders, and have gone unpunished, and one has committed six murders and gone unpunished, that they have lived lives of crime, which includes every conceivable crime from A to Z—will [fol. 2284] you weight their testimony with a great deal of care before you accept it?

A. Yes, sir.

Q. In other words, just as much as Judge Taylor shall be the judge of the law, you shall be the judge of the truth or falsity of the facts?

A. Yes, sir.

Q. You shall be a searcher for the truth, is that right?

A. Yes, sir.

Q. We ask no favor when we say to you at the end of the entire case, "If you find from the evidence a reason for doubt as to the guilt of the defendant or the defendants, you must give it to that defendant or defendants."

A. Yes, sir.

Q. And no matter how much they believe that they did it or participated in it, no matter how much you shall suspect, you will use the test initiated by the Judge, that is, from the evidence beyond a reasonable doubt, as to the guilt of the defendants?

Mr. Turkus: I object to that question.

The Court: If the Court charges you that the defendant must be acquitted unless proved guilty beyond a reasonable doubt, will you follow that instruction?

The Witness: Yes, sir.

Q. Evidence may come forth from people, which is binding only on a particular defendant. I say that to you knowing that you already hear/ often enough that some of it will bind one defendant.

A. Yes, sir.

Q. And will bind two or sometimes three, I don't know, [fol. 2285] but do I take it that you will consider the evi-

dence offered against one person as binding only against him, unless and until his Honor shall charge you that you may?

A. Yes, sir.

Q. I take it that you also understand by this time that, while the trial is of the three together, each one here really is being tried separately, and you must give a verdict with respect to each one based upon the evidence in this case, and not as a group?

A. Yes, sir.

Q. To sum it all up, can the defendant entrust to you the preservation of every legal right given him by the law?

A. Yes, sir.

Q. And will you do that?

A. Yes, sir.

By Mr. Barshay:

Q. Mr. Harris, have you read about this case?

A. Some time ago I did, casually.

By the Court:

Q. Do you know Frederick Harris at Warren and Greenwich Streets?

A. No, sir, I do not.

Q. You look something like him, but he would be old enough to be your father.

A. No, sir, I do not know him.

By Mr. Barshay:

Q. Did you read the *Mirror* by any chance?

A. No, sir.

Q. Did you read any other paper?

A. I read it in the morning.

Q. May I know what you read?

A. The *World-Telegram* and the Brooklyn *Eagle*.

[fol. 2286] Q. In those papers did you read anything at all about the facts in this case or the defendants generally?

A. You mean the case at the present time?

Q. Yes.

A. No, sir.

Q. Or the defendants generally?

A. No, sir.

Q. The casual reading that you had, did that leave with you an impression or an opinion with respect to the defendants?

A. No, sir, it did not.

Q. Or any idea or thought?

A. No, sir.

Q. Did anything you heard, or is there anything in your mind at all which results in bias against the defendants?

A. No, sir, I don't think so—there is no doubt about it.

Q. Have you had prior service?

A. Yes, sir.

Q. In a capital case?

A. Yes, sir.

Q. May I know how long ago?

A. I think the last time was in December.

Q. May I know the name of the Judge?

A. Judge Fitzgerald.

Q. Were any of the lawyers involved in this case?

A. It would be hard for me to say because I recall quite a few faces around here from having been in court before. I think Mr. Barshay and Mr. Turkus. Just what case or how they were connected, I could not say.

Q. I take it you have never seen me as a defense counsel?

A. No, sir.

Q. You are not mistaking me for Mr. Klein?

A. No, sir.

[fol. 2287] Q. Is there any opinion you formed, because of your jury service here, or being present here, which can be construed by you to be detrimental to the defendants?

A. No, sir.

Q. Before Judge Fitzgerald—were you called as a juror?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. May I know how many?

A. I served about one and a half years before that one in December, and then possibly eight or nine months prior to that.

Q. Have you ever been a grand juror?

A. No, sir.

Q. Or a Federal juror?

A. No, sir.

Q. Have you been the victim of any crime?

A. No, sir.

Q. The defendant's name is Louis Buchalter. He has been referred to as Lepke. That has nothing to do with the case?

A. Nothing whatever.

Q. The number of counsel present at the tables has nothing to do with the case?

A. No, sir.

Q. Are you going to take any action in this coming election?

A. I don't think I will. I might say that Mr. Murphy, a candidate, is a friend of mine.

Q. Have you ever discussed this case with Mr. Murphy?

A. No, sir.

Q. By any chance—as to prospective jury service?

A. I only got it at half past eight.

Q. In any event, you will weigh the evidence here and [fol. 2288] nothing at all with reference to Judge O'Dwyer?

A. Yes, sir.

Q. Can Buchalter entrust his legal rights to your consideration?

A. Yes, sir, why not?

Mr. Talley: I think I can ask a few questions collectively.

By Mr. Talley:

Q. You understand that the burden of proving the guilt of these defendants is always upon the District Attorney, representing The People?

A. Yes, sir.

Q. And the Court will charge you that that burden never shifts at any time during the progress of this case from the shoulders of The People to the defendants.

A. Yes, sir.

Q. The Court will further charge you that it is no obligation under our law for a defendant to take the stand in his own behalf.

A. Yes, sir.

Q. My question to both of you is this: If in the judgment of counsel, or otherwise in this case the defendants do not take the stand, or any of them do not take the stand, will you attach any unfavorable inference against them solely because of the fact they do not take the stand?

A. No, sir.

Q. You are quite sure of that, because it is a common right that our law gives to a defendant?

A. Yes, sir.

Q. And I want to be sure that that principle of law is in your mind. Can I rely upon that?

A. Yes, sir.

Q. Neither from reading nor conversation nor from any [fol. 2289] other source, have you any impression as to any of these defendants?

A. No, sir.

Q. Any interest you may have as a result of your acquaintance with my friend Charles Murphy, who is interested in the election of Mr. O'Dwyer, that will not have any influence upon you in determining this case? It is an important case to the District Attorney, particularly at the present time. You would not be influenced?

A. The only reason I brought that out was that I heard Judge O'Dwyer's name mentioned so many times I did not know just what it was all about.

Q. That is all right. We do not want any juror in this jury box who is going to be influenced in his determination of the guilt or innocence of these defendants by the fact that the District Attorney who has presented this indictment is a candidate for Mayor; that is the important thing. I understand from you that you are not in the slightest degree influenced by that consideration.

A. Right.

By Mr. Rosenthal:

Q. You said in answer to questioning that you read about one defendant—I don't know how long ago you read about him; can you remember?

A. I cannot remember.

Q. Was it an isolated item you read, or a continuous series, and have you any impression at all of the contents or over what period of time you read it?

A. No, I have not.

Q. Was there anything which you read, irrespective of [fol. 2290] the hazy idea you have, that has in any wise formed an impression in the back of your mind?

A. No, sir.

Q. Do you realize that the defendants are not being tried on newspaper reading?

A. Yes, sir.

Q. And that when a defendant, whether it be this defendant or any other defendant, is indicted by the Grand Jury, by the presentation of evidence to them in secret, that that is merely an accusation against the defendant?

A. Yes, sir.

Q. You understand further that the moment a defendant, upon being arraigned upon that indictment, walks into court and says, "Not guilty," that he then raises all the issues which are presented in that indictment and which must be substantiated by evidence of a nature which will establish that defendant's guilt beyond a reasonable doubt?

A. Yes.

Q. You do not find any fault with that principle of law?

A. No, sir.

Q. So I may take it, then, that the mere fact that the defendant has been indicted, as these defendants have been, raises no presumption in your mind as to the guilt of that particular defendant?

A. No, sir.

Q. And, to use an expression which has been used during the selection of this jury, as far as these defendants are concerned, they start off at scratch; is that right?

A. Yes, sir.

Q. Now, then, I don't know whether you have been asked if you know either Mr. Turkus or Mr. Klein or Mr. Joseph, [fol. 2291] who are active participants on behalf of the District Attorney, do you know any one of them?

A. No, sir.

Q. You have already answered—I might switch just a moment from Mr. Butt to Mr. Harris—was Mr. Turkus the prosecutor in the case that you sat on in December of 1940?

A. No, sir.

Q. You saw him there on the side of the defense, he then represented a defendant in a criminal case, and now you see him on this side. You saw Mr. Barshay when he was on the other side of the defense and now he is on this side.

A. Yes, sir.

Q. Well, you realize, and I do not say it facetiously, that every lawyer is sworn to protect his client?

A. Yes, sir.

Q. The indictment, under the law, does not enter into consideration in your determination of the guilt or innocence of any client?

A. Yes, sir.

Q. Whether it be The People of the State of New York, of which you are a part, and I am a part, and the defendant is a part——

A. Yes, sir.

Q. And only because of the fact of what has been brought out, you understand, and it must be clear to you, that Judge O'Dwyer is not on trial in this court at this time, nor is he——

Mr. Turkus: I object to the use of such words.

Mr. Rosenthal: I will withdraw the question and put it this way to the juror:

[fol. 2292] Q. We are not trying the issue of Judge O'Dwyer against the defendant, so that the entity of Judge O'Dwyer enters into this case?

A. No, sir.

Q. I think you understood me—you are to determine this case from what you hear from sworn witnesses, and not from what you think of Judge O'Dwyer and whether you think he would make a good Mayor or a better District Attorney, or what you think of lawyers who are representing the defendant?

A. Yes, sir.

Q. That is the way you will take this case in the event you are accepted as a juror?

A. Yes, sir.

Q. Now then, Mr. Butt, you said you served once, was it, on a special panel; do you recall?

A. Yes, sir.

Q. About how long ago?

A. Probably about a year ago.

Q. Was it while Judge O'Dwyer was District Attorney or prior?

A. I don't know.

Q. Can you recall what judge it was?

A. Judge Fitzgerald.

Q. Was that around December of 1940?

A. I think so.

Q. The reason I am asking you that is because Mr. Harris said he served in December of 1940.

A. I don't recall.

Q. You both met at that time, did you?

A. No, sir.

Q. Now, there is nothing that happened at that time which would in any wise influence or prejudice you one way or the other?

A. No, sir.

Q. Now, I want to get straight in my mind—when Mr. [fol. 2293] Barshay asked you regarding whether or not the fact that a person has been killed, as unquestionably the proof will be in this case, that Rosen was killed, by a gunshot wound—whether that would prejudice you. You hesitate a little before you answer. Is there anything in your mind that, by reason of your hesitation, makes you doubtful as to whether you are prejudiced? Of course, we are all prejudiced against killings—the idea is if the question did not imply prejudice against killings, and if there should be a prejudice against the defendants, we are entitled to know it. Of course, nobody will contend in this case, not even defense counsel, that Rosen was not killed or that he was not killed by a gunshot wound, or more than one, but I want to know whether, in hesitating about prejudice, whether there was a thought in your mind that you were prejudiced against anybody that was killed.

A. No, sir—it was the prejudice against killing.

Q. But that natural prejudice, which we all must have, in no wise affects your ability to fairly determine whether the defendant was in any wise connected with it?

A. No, sir.

Q. Have you any relatives on the police force?

A. No, sir.

Q. Or any close friends who are officials of the Police Department?

A. No, sir.

Q. The names of people were mentioned over and over again, but I will mention them now in view of the fact that [fol. 2294] during this long questioning of jurors some were not present, so they are unfamiliar at this time with some of the names. Do you know Captain Bals of the Police Department, Frank Bals?

A. No.

Q. Or Lieutenant Osnato?

A. No, sir.

Q. Or a detective named Meehan, or McDonough, or Carson or Swift?

A. No, sir.

Q. Other men who have preceded you in the jury box have been asked by Mr. Turkus also as to whether they heard the names of Harry (Pittsburgh Phil) Strauss and Martin (Buggsy) Goldstein, and a number of others. Have you heard of those names?

A. In the newspapers.

Q. Other than reading in the newspapers, have you ever discussed those persons with anybody at any time?

A. No, sir.

Q. The District Attorney has indicated in his prior questioning of jurors that, in attempting to prove the guilt of these defendants, he will rely upon what he calls an accomplice or accomplices as part of his case. Is that clear to you?

A. Yes, sir.

Q. The case you sat on, Mr. Harris, has there ever been any instructions on the law to you by the Court on the question of accomplice testimony; in other words, have there ever been so-called accomplices who testified, and you had the benefit of the Court's instructions as to the law?

A. I don't believe so.

[fol. 2295] Q. You understand, Mr. Butt, having never served on a jury before, I use the word "sole" with you as one of the twelve men who are the sole judges of all of the facts in this case; that is your job.

A. Yes, sir.

Q. You understand that no matter what I say or what other counsel may say, which includes the District Attorney, and it also includes the Judge, as to the facts in this case, they can only be accepted by you as facts if that interpretation agrees with your interpretation of what the witnesses said on the stand. You are not bound to accept anything as a fact from anybody in this court room other than what you believe concerning the testimony.

A. Yes, sir.

Q. On the other side, irrespective of what your opinion on the law may be, there a Judge is supreme—you may like or dislike a law, like in former times a great many people disliked prohibition—but whether you like it or dislike it, when you are sworn as a juror you must accept what the Judge tells you is the law in applying it to the facts in the case?

A. Yes, sir.

Q. You find no fault with that?

A. No, sir.

Q. Now, in the event that the Court were to charge you as the law in this case as well as in any case, because if it is charged as the law in this case it means it is the law of our State in every case, it is an exception—if the Court were to charge you that our law is that whether one accomplice [fol. 2296] or one hundred or one thousand, and so on ad infinitum, were to testify in the case, that the weight of all this accomplice testimony is no greater than the weight of one—in other words, one cannot corroborate the other—you would find no fault with that instruction on the law?

A. No, sir.

Q. And you would follow it implicitly?

A. Yes, sir.

Q. The time may come when the Court may not be able to say to you, as a juror, that "This man is an accomplice as a matter of law." I want to make myself clear, when I say it quite loudly, so that possibly the greater part of the men in the room may hear it, so I will not have to repeat it. The Court may say to you in this case, "Gentlemen of the jury, I charge you that Mr. So-and-so, who is a witness for The People, is an accomplice as a matter of law." Is that clear?

A. Yes, sir.

Q. Now, in that event it will then become your absolute duty to accept that law, and when you go into the jury room, in discussing the evidence of that particular individual, start off with the knowledge that in accordance with our law no person can be convicted on his testimony, even if it were believed, unless there was other believable evidence tending to connect the defendant with the crime. Do I make myself clear?

A. Yes, sir.

Q. Now then, a situation may arise—we have no way of ascertaining it at this time—where a dispute may arise from [fol. 2297] the testimony of some individual who is called to testify. In that event the Judge may say to you, not as an individual, but collectively, as a jury: "I charge you that you may find from the facts that so-and-so is an accomplice."

Do you understand the difference? Do I make myself clear? If I do not, I will try to explain. In one instance

the Judge says to you, "This man I charge you as a matter of law is an accomplice." There you have no alternative but to accept that as final and conclusive and start off with the knowledge that, as a juryman, you must find other evidence of a believable nature tending to connect the defendant with the crime.

A. Yes, sir.

Q. In the other instance, where there is a dispute, the man himself may on the stand deny he is an accomplice, but you may from his every action and what he testifies he did or what part he played, determine as a question of fact that he actually was an accomplice.

A. Yes, sir.

Q. Now then, merely because of the fact that the Judge does not charge you that he is one, as a matter of law—assuming in all instances what I say to you is the law, as will be charged by the Court—will not preclude you as a question of fact from determining a man is an accomplice if you determine that he is?

A. Yes, sir.

Q. Do you understand that if, then, you determine a man is an accomplice as a fact in your jury room, then the test, [fol. 2298] the same test, is applied to his testimony as would be applied to the testimony of an accomplice whom the Judge charged you was an accomplice as a matter of law?

A. Yes, sir.

Q. Now, the District Attorney has explained, as has Mr. Barshay, that no man can be convicted on the uncorroborated testimony of an accomplice, even though that testimony was believed.

A. Yes, sir.

Q. You may say to yourself, "Now, how can we convict in the event there were other testimony?" Your job, then, is to find whether there is other believable testimony tending to connect the particular defendant with the crime. Is that clear?

Mr. Turkus: I object.

The Court: Objection overruled

Q. Now then, if the Court were to instruct you that where a man is an accomplice, whether he be an accomplice as a matter of law, charged to be so by the Court to you, or

whether you find him an accomplice as a question of fact, that that man's testimony must be viewed with you by caution and suspicion, will you do that?

A. Yes.

Q. Now, the District Attorney may rely—and there again we are in the dark at this time—upon alleged other testimony, possibly so-called admissions, which means that the defendant possibly is accused of having said to one of his witnesses, "I, the defendant, did commit this crime."

[fol. 2299] A. Yes, sir.

Q. And say to you, "That is the evidence we rely upon as being evidence that connects this defendant." Now, if such happens to be the case, and even if such does not happen to be the case—and this applies to all testimony that may be offered—in the event you find that this testimony comes from individuals who were individuals of unsavory character, who had committed a number of murders, admittedly—whether the accomplice says that under examination by the District Attorney or under cross-examination by counsel—for some of which he never will be punished because he has immunity; has committed numerous other crimes, including perjury, having sworn under oath in a court similar to this before a jury falsely, committed perjury, will you, together with all the other things that you may use as a test of whether or not the man is telling the truth, utilize these things in determining what, if any, motive that particular individual may have in testifying falsely concerning the defendant I represent?

A. Yes sir.

Q. You can understand that a man may tell the truth about himself and lie about someone else?

A. Yes, sir.

Q. You can understand that a man may receive treatment of a character which he was not used to, such as being kept in a hotel with other witnesses for the prosecution, in a place where they can consort together, go out and play [fol. 2300] baseball with detectives, take walks along the boardwalk at Long Beach and other places and be allowed to see their wives and be with them and other things of that character——

Mr. Turkus: I object to the summation. The case will be tried after the jury is sworn.

By the Court:

Q. Gentlemen, will you take into consideration any and every inducement that may enter into the head of a person that gives testimony, in weighing its value?

A. Yes, sir.

Q. Including special treatment, for whatever that is worth?

A. Yes, sir.

By Mr. Rosenthal:

Q. You will listen, if accepted, to the testimony of these people who are called to testify for The People?

A. Yes, sir.

Q. And, as Mr. Turkus said, you will listen to the cross-examination, and if you are called as a juryman you will learn then what "special treatment" the Judge has inferred or I have inferred in my question, and whether or not it has any effect on the testimony that is given concerning these defendants. That is fair enough?

A. Yes, sir.

Q. I take it you never sat on a Grand Jury.

A. No, sir.

Q. Do you understand that these defendants are being charged with a particular crime on which the defendant Capone is represented by me? I am prepared to meet the issue which is to be raised, namely, whether or not he par-[fol. 2301] ticipated in this crime. They are not being tried by newspaper publicity or anything of that kind, nor is any campaign issue or anything of that kind connected with it. Do you feel you can give them a fair determination at your hands on the issue and on the issue alone, if you are accepted?

A. Yes, sir.

Q. Now, never having sat on a jury before, do you understand that your duty is, wherever it is physically possible, to sit in harmony and accord with the other eleven jurors?

A. Yes, sir.

Q. Do you understand further that that does not mean that you are to subordinate your opinion to that of any other person?

A. Yes, sir.

Q. Assuming you were to work in harmony with the other men, having formed an opinion which is based on your

own conscience as to what you believe the evidence to be, but that the opinion you formed is not in harmony with a great many of the others, you understand your duty would be then to openly discuss the foundation of the opinion you formed?

A. Yes, sir.

Q. And to politely listen to what they say is the reason for their opinions?

A. Yes, sir.

Q. You will do so if you are accepted?

A. Yes, sir.

Q. If, after listening to the reasoning, you are not convinced that their logic is as good as yours—in fact, you seem to think your logic is better, would you, simply because of the fact you never sat on a jury before, and somebody [fol. 2302] else may have, or because of the lateness of the hour, business pressure, or anything else, subordinate your opinion to your friends', or would you retain your opinion as long as it remained your opinion based upon your conscience?

A. I would.

Q. If you were convinced, after listening to reasoning, and your conviction was not changed, you would retain your opinion irrespective of the opinion of others?

A. Yes, sir.

Q. You would not be afraid of being charged with being arbitrary or anything else, if you had an opinion formed on your conscience?

A. No, sir.

Q. Because, and there is no hesitation about this fact, this case—simply because of the fact there has been publicity in this case—would you feel afraid to come in with a verdict of "Not Guilty" in the event you are not convinced according to the rules of law laid down by the Court that these men are guilty?

A. No, sir.

Q. Now, counsel for one of the defendants said that as to him, his client, he may or may not take the stand. It may develop, as far as the defendant represented by myself is concerned, that defendant will take the stand, in the wisdom of his lawyer. You are not of the opinion that, when a man takes the stand, because he has been accused of a crime, that he necessarily is lying?

A. No, sir.

Q. Because he is a defendant in the case?

A. No, sir.

Q. Of course you will, in determining what value you will [fol. 2303] give to his testimony, take into consideration, like you would the accomplice, the fact that he has an interest. Certainly he has. He is here resisting a charge against him. But if you once determine that, irrespective of the interest, he was telling you the truth, would you hesitate to give the same value to the truth from him as you would from any other source?

A. No, sir.

Q. It may further develop that not only will the defense take the stand, but witnesses will take the stand on his behalf. It has been discussed before you were summoned as a juryman, the question of alibi. I suppose you are familiar with the term? There is nothing mysterious about the word "alibi". In law it means that people will take the stand to prove that this particular defendant was elsewhere at the time it is alleged in the indictment this crime was committed. Now, if the Court were to charge you that the burden of proof never shifts from that side of the case over to this, you will accept that as the law?

A. Yes, sir.

Q. Merely because of the fact that the defendant does go forward—and let me interrupt myself—under our law you understand the defendant need never offer any proof, need never take the stand, need never bring a witness, need never do anything, he can stand mute, and still it would be your duty to compel the prosecutor to establish him guilty beyond a reasonable doubt, to your satisfaction before you could [fol. 2304] convict. Now, merely because of the fact that, in the wisdom of his attorney this defendant whom I represent may offer proof, would that, knowing now that the principles of law do not compel any evidence to be offered to negative the charge, would the mere fact that he offered proof be any different conception of the law and make you change what the Court has told you is the law?

A. No, sir.

Q. If the Court were to charge you that if the evidence of an alibi offered by a defendant in any criminal case is sufficient in your mind to create a doubt as to whether the defendant committed the crime, where, if no alibi was offered, any doubt would not exist, would you accept that as the law?

A. Yes, sir.

Q. And if the evidence of the alibi were to establish in your mind a reasonable doubt as to whether my client Capone had anything to do with this particular thing, would you resolve that doubt in his favor if you were instructed by the Court that all reasonable doubt must be resolved in favor of the defendants? Would you give him the benefit?

A. Yes, sir.

Q. And if you were further instructed that where there is evidence which is open to two different conceptions—in other words, where the evidence may on the one hand point toward guilt and on the other hand toward innocence, where the evidence is open to those two conceptions, it is your absolute, bounden duty, disregarding the conception of [fol. 2305] guilt, to take the one of innocence, would you accept that as the law?

A. Yes, sir.

Q. Irrespective of the fact that these three men are being tried together, you understand that each one of these men in reality is being tried separately?

A. Yes, sir.

Q. It is a matter of convenience that they are being tried together?

A. Yes, sir.

Q. And that where the evidence applies to one particular individual, in accordance with the charge laid down by the Court as the law, that it can only be used against that individual, and that you may have in this case nine separate types of verdict, from guilty down to innocence as to all, and guilty as to one, two or three, and that each one is entitled to a separate deliberation at your hands if you are accepted as a juror?

A. Yes, sir.

Q. And you will do that?

A. Yes, sir.

Q. Another thing: Questions of law may arise—and I am being a little more loquacious with you—where, at the conclusion of The People's case the Court may say, "I deny the motion to dismiss the complaint," or, at the conclusion of the defendants' case; you understand that those denials, if you are instructed by the Court, have no force or weight as far as you are concerned, and are merely questions of law, and that no unfavorable inference can be drawn by you because of these denials?

A. Yes, sir.

[fol. 2306] Q. Now just a couple of other things so that we may make clear to you about an accomplice, so-called. Mr. Turkus asked one of the men whether he had objection to the District Attorney solving a case, and he has used the name of this person—he has used the name of Judge O'Dwyer when he asked the question—that he solved the case from the inside, and used accomplice testimony. You heard that?

A. Yes, sir.

Q. I know he does not mean to infer that question as directed to a particular person now serving the people of Brooklyn. He asked that as a general question. You understand that?

A. Yes, sir.

Q. Now, do you realize that a man, a so-called accomplice, as he says, who is aiding in the so-called solution, as he says, may absolutely be telling the truth about his having shot and killed somebody and be telling an absolute falsehood as to his connection with others?

A. Yes, sir.

Q. You understand further the test in this case is not whether you believe the accomplice is telling the truth about himself, but whether the accomplice is telling the truth about the defendant, and there is other evidence tending to connect the defendant with the crime?

A. Yes, sir.

Q. Do you further understand that this so-called independent evidence—I withdraw that.

If the Court were to instruct you that the so-called independent evidence, outside of the accomplice testimony, is no [fol. 2307] proof that there was a crime—in other words, to make it clear, an accomplice goes on and says, "I shot him with a .38 calibre gun and I left him on such-and-such a street in an automobile"—or out of an automobile or any way it was, and then a policemen should come in and say, "I found the body of a man at the place where the accomplice said he was," and the Medical Examiner comes in and says he was dead, was shot and laying on the floor, that may show you, you understand, what the accomplice is saying about himself; is that clear?

A. Yes, sir.

Q. But if the Court should instruct you that that in no wise shows you that any one of these defendants partici-

pated in the crime, you would follow that instruction without hesitation?

A. Yes, sir.

Q. Is there any reason, after this long questioning by four separate counsel, that you know of that you cannot sit as a fair and impartial juryman? We have no way of reading your mind. I know there is one reason why you would like to get off. You are a delegate to a convention, I remember that, but I am not implying that is a reason, as good a reason as it may be, I mean outside of that reason—I am forestalling your answer—outside of that reason is there any reason you cannot serve?

A. No.

Q. Mr. Harris, you have had prior jury experience?

A. Yes, sir.

[fol. 2308] Q. And you have heard evidence in court before?

A. Yes, sir.

Q. Now, you said you are a close personal friend of Mr. Murphy, who is Judge O'Dwyer's manager.

A. He is on the board of directors of an association of which I am president.

Q. Is this association actively engaged in the campaign?

A. No, sir, not at all.

Q. There seems to be some doubt in your answer to the question by Mr. Barshay as to whether or not you intended to be active politically in the forthcoming campaign. I don't know whether I misunderstood your answer, but you did answer, "I don't think," which implies a doubt. In other words, you are only too willing to be asked, and if you are asked you will unhesitatingly and actively participate in the coming election?

A. Yes.

Q. Do you know Judge O'Dwyer personally?

A. No, sir.

Q. In the *World-Telegram* or the *Eagle* or the *Tribune* did you read any articles at all about the life of Judge O'Dwyer?

A. No.

Q. Have you discussed with Mr. Murphy or Judge O'Dwyer——

A. (Interrupting.) No.

Q. Of course the question in this case is not a question of the political career of Judge O'Dwyer—have you discussed

with anybody since Judge O'Dwyer came into office the activities of Judge O'Dwyer?

A. No, sir.

Q. Did you hear any speeches at any time over the radio?

A. No.

[fol. 2309] Q. Have you heard Judge O'Dwyer speak?

A. Yes.

Q. Has he, in any of his talks you heard, in any wise discussed his activity as a District Attorney?

A. No, sir.

Q. Would you feel, in view of the fact that you were merely waiting to be asked to actively engage in the forthcoming campaign, in any wise embarrassed in the jury room in the event that a situation were to arise where on the question of guilt or innocence of any one of the defendants on trial the jury were of the opinion that the verdict, the proper verdict in this case should be Not Guilty? Do you understand the question?

A. No.

Q. I say, in view of the fact that you would be willing to politically campaign for Judge O'Dwyer in the coming election, do you feel you might be embarrassed in the jury room in the event that the time came when, in discussing the evidence, the jury were of the opinion that there should be a verdict in this case of Not Guilty?

A. No, sir.

Mr. Rosenthal: No further questions.

Mr. Turkus: Mr. Butt and Mr. Harris are satisfactory to The People of the State.

[fol. 2310] Mr. Talley: Mr. Butt is satisfactory to the defendants. Mr. Harris is challenged by the defense.

(John D. Butt thereupon took Seat No. 10 in the jury box.)

(At the direction of the Court two more talesmen were called to the box: Max Woolf, No. 3027; Harry A. Aldridge, No. 3053.)

The Court: The Court will have to, without the presence of the panel, make an announcement about a legal point pertaining to conflict of jurisdiction. The jurors are admonished as to their demeanor. The Court now recesses until ten o'clock tomorrow morning.

Now the other members of the panel may go until ten o'clock tomorrow.

(In the absence of the jurors and talesmen, the following ensued:)

The Court: Now, the Court has ascertained by inquiry that the defendant Weiss will not be required in the Federal Court before Judge Campbell tomorrow morning. Nor does there appear to be any disposition on the part of the Federal Court to disturb the orderly progress of this trial. I was sure there was a mistake in the information conveyed to the Marshal. The Court is persuaded that the reason for the objection or alleged objection from the voice that [fol. 2311] came over the telephone is probably based upon some complaint that the late return of the defendants to the Federal House of Detention disturbs the ordinary process of meal hour at five o'clock. The fact that two of the defendants were taken, unmanacled, to Joe's Restaurant, where judges and other citizens dine, and where I could not dine that night because of the presence of the defendants, is sufficient answer to any complaint on the part of the Federal authorities that it is not safe for Uncle Sam to transport prisoners after dark.

Now, on the legal point: The Court decides as follows: When the authority of any prison wherein a defendant is serving a sentence produces such defendant in court for the purpose of trial on another charge, the prisoner's right of supervision and restraint is thereby in all respects yielded and subordinated to the authority of the trial court for all details of trial procedure.

That finishes what the Court states to be its finding as to the law.

To permit a Marshal at will to flaunt the Court by taking prisoners out during the progress of the trial would be preposterous.

Now, as to this particular case and the reason for night sessions: The difficulty in completing the selection of a jury [fol. 2312] necessitates long court hours. That is the only reason the Court, reluctantly, is obliged to overwork counsel and, temporarily, to put the defendants to inconvenience in regard to their meal hours.

After the jury shall have been sworn, the sessions will be from 10 until 4. Counsel have heretofore received the

Court's assurance on that point. It is a reasonable ruling, first, because counsel do not wish to go to Manhattan after the day's work in order to confer with their clients. It must be done in the pen. Secondly, because following such daily conferences, which are reasonable and necessary for the proper defense of the indictment, will enable the defendants to be taken back to the House of Detention in time for the regular meal hour without upsetting the placidity of that organization.

In the meantime, however, the question of mealtime convenience will have to be subordinated as trivial to a public necessity, which is that of completing this jury without further undue delay. It is hoped this will not consume more than one or two additional days. I think it can be stated with fairness by the Court, because the Court practiced law for twenty years as trial counsel, that short court hours in the selection of a jury tends to over-questioning [fol. 2313] and constitutes a form of filibuster; but when counsel work long hours they realize the value of time.

Mr. Climenko: May I most respectfully, on behalf of the defendant Buchalter, take an exception to so much of your Honor's remarks——

The Court: You may take exception to all.

Mr. Climenko: No, I take an exception to so much of your Honor's remarks as refer to the incident in connection with the meal at Joe's Restaurant. In connection with that exception, I merely want to say that the controversy of jurisdiction is one which has not been engendered by anyone on behalf of any defendant. I also except to so much as refers to filibustering.

The Court: The Court will permit you to take exception, but will not permit debate. The Court has made a ruling and you have your exception.

(At 7:40 P. M. the court adjourned until Wednesday, October 15, 1941, at ten o'clock a. m.)

[fol. 2314] Brooklyn, N. Y., October 15, 1941.

Trial Resumed

Harry A. Woolf, a talesman, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. In making responses to the questions, will you be kind enough to keep your voice up so that the stenographer can make a record and counsel may hear your responses?

A. Yes, sir.

Q. How long have you lived at your present address?

A. About two and a half years.

Q. Prior to that where did you live?

A. Brighton Beach.

Q. How many years did you live there?

A. About fifteen years.

Q. Did you live in any other section of Brooklyn?

A. Williamsburg, prior.

Q. You are listed as an assistant manager.

A. In the Metropolitan Life Insurance.

Q. Does that mean you are a steady assistant?

A. Yes, sir.

Q. Where is your office?

A. Flatbush and Church.

Q. Do you go out with your various men to help them close contracts?

A. Yes, sir.

Q. I take it you supervise the activities of a half a dozen or more men in that field?

A. Yes, sir.

Q. Does your daily business bring you in contact with [fol. 2315] various people throughout Brooklyn?

A. Yes, sir.

Q. Do you have contacts in Brownsville or in the East New York section?

A. No, sir.

Q. Did you ever have any there?

A. No, sir.

Q. Do you know people who are in business in the garment center in Manhattan?

A. A neighbor of mine is a delegate in the Amalgamated Clothing Workers.

Q. What is his name?

A. Isidore Hollander.

Q. Is the name Murray Weinstein a familiar name to you?

A. I heard his name mentioned.

Q. Have you heard it mentioned by this neighbor?

A. Yes, sir.

Q. Is the name Samuel Katz, associated with the Amalgamated Clothing Workers of America familiar to you?

A. No, sir.

Q. Have you had many talks with your neighbor about the Amalgamated?

A. No, sir.

Q. In the event that the name of Murray Weinstein should figure in the testimony in this case, would you be in any wise embarrassed by jury service?

A. No, sir.

Q. Is there anything you have heard about Murray Weinstein that might prejudice you in the case?

A. I have not heard anything.

Q. So that the limit of your knowledge as to Murray Weinstein is the familiarity of his name as the result of this delegate?

A. Yes, sir.

[fol. 2316] Q. Are you on very friendly terms with Mr. Hollander?

A. No, sir; he is not there any more, he moved.

Q. For how long were you neighbors?

A. A little over a year.

Q. Do you know any firms or corporations that manufacture clothing, either men's or women's clothing?

A. No, sir.

Q. Through anything you may have heard, are the names of any of the other officials of the Amalgamated Clothing Workers of America familiar to you?

A. No, sir, with the exception of his brother; he has a brother I know.

Q. So you know both of the Hollanders by name?

A. I don't know the other one at all.

Q. You know one?

A. He being a neighbor there by me, yes, sir.

Q. One of the Hollanders was a neighbor of yours, and did you visit each other?

A. Yes, sir.

Q. Did you spend some time at each other's home?

A. Oh, yes.

Q. Your wives were friendly?

A. Yes, sir.

Q. Do you still maintain that sociability with Mr. Hollander?

A. No, sir.

By the Court:

Q. What Hollander is that?

A. Isidore Hollander, an offic of the Amalgamated Clothing Workers of America.

By Mr. Turkus:

Q. Is the name of Bruno Belia, an organizer, familiar to [fol. 2317] you?

A. No, sir.

Q. Or Salvatore Marazzano?

A. No, sir.

Q. Is the name of Tosca familiar to you, or that of Abie Slabow?

A. No, sir.

Q. Do you know any officials of Local 240 of the Clothing Drivers & Helpers Union?

A. None.

Q. Did you ever know any officials connected with any teamsters' union?

A. No, sir.

By the Court:

Q. Where you live, is that the new section that used to be the Brighton Beach Race Track?

A. No, sir, further down, just before that——

Q. It runs from Ocean Parkway to Coney Island Avenue?

A. Yes, sir, just two blocks.

Q. Out toward the Coney Island Hospital?

A. No, sir, about three blocks below.

Q. South?

A. Yes, sir.

Q. Which side of Neptune Avenue?

A. Well, Neptune Avenue runs parallel, the same way.

Q. South or north?

A. South.

By Mr. Turkus:

Q. The Dewey investigation was handed down several months after Judge O'Dwyer took office?

A. Sometime in May, 1940.

Q. Did you hear any discussion by Mr. Hollander or anyone in connection with the O'Dwyer investigation or this indictment?

[fol. 2318] A. No, sir.

Q. In anything you have discussed or heard, is the name Lepke familiar to you?

A. I read it in the newspaper.

Q. Did you hear anything from Hollander in regard to the name Lepke?

A. No, sir.

Q. Is the name Gurrah familiar?

A. No, sir.

Q. Going along with any possible contact you may have had in the clothing district, do you know any manufacturer of women's or men's clothing?

A. No, sir.

Q. Anyone in the distribution of clothing?

A. No, sir.

Q. Do you know anybody connected with any union officials in the clothing trucking end?

A. No, sir.

Q. Is the reading you have had concerning the name Lepke of recent origin?

A. Yes, sir.

Q. Does it leave you with an impression?

A. Some impression.

Q. Has it been reading matter in connection with the recent indictment?

A. Yes, sir.

Q. You say you have some impression?

A. Yes, sir.

Q. Is that an impression that is detrimental to the defendants?

A. It may be.

Q. I am trying to save time, and, while this is a matter of the defense counsel to go into, it would be senseless for me to go through a lengthy voir dire if you are going to be, for some reason, unable to sit in the box, so I will pursue [fol. 2319] this line of inquiry. When you say, "It may be," that denotes some sort of doubt in your mind. Is there any doubt?

A. When I read about the case, naturally, at that time, I had my mind set in regard to it.

Q. How long ago was that?
A. A couple of weeks ago.
Q. So that, based upon the reading matter, you formed a definite opinion?
A. Yes, sir.
Q. Did that opinion go to the guilt or innocence of the defendants?
A. Yes, sir.
Q. Was it that kind of an opinion that is detrimental to the defendants?
A. Yes, sir.
Q. Is it an opinion that would require evidence on their part to remove?
A. Yes, sir.
Q. Even if you were instructed by the Judge that the defendants have no burden, is your opinion so strong you would still require evidence?
A. No, sir, I don't think so.
Q. As you sit in the box, do you believe you can give these defendants a fair trial?
A. I think so.

By the Court:

Q. You can lay aside your impression?
A. Yes, sir.
Q. Disregard it?
A. Disregard it.
Q. Are you positive?
A. Positive.

By Mr. Turkus:

Q. Have you ever had any prior jury service in criminal cases?
A. Ten years ago.
Q. Was it in the County Court of Kings County?
A. Yes, sir.
[fol. 2320] Q. Are there any lawyers in the court-room who were in that case?
A. No, sir.
Q. Do you recall the name of the judge?
A. Judge Nova.
Q. Do you recall the name of the prosecutor?
A. Abe Kesselman.

Q. Was he the prosecutor?

A. No, sir, he was the defense lawyer—Judge Sabatino.

Q. In the trial of a criminal case the Judge utters the law to the jury and he tells the jury of the constitutional rights that every defendant has in the court-room.

Q. I am here to see that these defendants get every constitutional right they are entitled to, no more and no less.

A. Yes, sir.

Q. As you sit in the box can you give them that—no more and no less than they are entitled to?

A. Yes, sir.

Q. Is the only impression, the one you say you can lay aside, formulated upon newspaper reading exclusively?

A. Yes, sir.

Q. At any time since the O'Dwyer investigation did anybody speak to you about any of the defendants in this case?

A. No, sir.

Q. The charge being murder in the first degree, the prosecutor must inquire as to whether you have any scruples, conscientious or otherwise, against capital punishment.

A. None at all.

[fol. 2321] Q. It has been brought out by one of the lawyers for Buchalter, that he has been convicted of other crimes and is presently serving a long jail term. What I want to know is would you relax your duty as a juror solely because a man has been convicted of other crimes and is presently paying the penalty for the commission of those offenses?

A. No, sir.

Q. Would you deviate from what is a proper result in this murder charge because of his present incarceration?

A. No.

Q. Have you been in the insurance business for some length of time?

A. Sixteen years.

By the Court:

Q. Are you a member of the "1245"?

A. No, sir.

Q. That meets up the block from the bank building where you are located?

A. No, sir.

Q. Is Donald Sinclair a friend of yours?

A. No, sir. I know him well, he was the manager

Q. You knew him well?
A. I have heard of him, he was with our company.
Q. He is dead now two years.
A. Yes, sir.
Q. Who is the present manager of your office?
A. Mr. Demitrot(?).
Q. You say Mr. Demitrot is your manager now?
A. Yes, sir.
Q. How many assistant managers are there?
A. Five.
Q. How many collectors?
A. Thirty-five.
Q. The assistant managers have charge of a number of [fol. 2322] collectors?
A. Yes, sir.
Q. Mr. Demitrot is now there?
A. No, sir; he is there about six years, at Flatbush and Church.

By Mr. Turkus:

Q. I got to the point where I was endeavoring to ascertain whether your livelihood in any particular depends upon the good will of any union official or anyone connected with the clothing industry or the distribution of clothes.
A. No, sir.
Q. I have spoken of various names as I went through this voir dire with each juror. Is there any familiarity with any of the names I mentioned?
A. No, sir.
Q. Do you have any connections inside of Sea Gate?
A. No, sir, but I have a cousin of mine.
Q. What is his name?
A. Cook.
Q. Do you know anybody named Max Silverman?
A. No, sir.
Q. A one-time resident of Sea Gate?
A. No, sir.
Q. A one-time official in the flour trucking game?
A. No, sir.
Q. Is the name of Wolfie Goldis at all familiar?
A. No.
Q. Or the name of William or Willie Alberts, a one-time bondsman, is that name familiar?
A. No.

Q. Has your reading been extensive about the Dewey and O'Dwyer investigations?

A. Not too extensive.

Q. But those names are familiar to you by newspaper reading?

A. Yes, sir.

Q. Is the name of Emanuel Buchalter a familiar name to [fol. 2323] you—not Louis, but Emanuel?

A. No, sir.

Q. Or Philip Kowas?

A. No, sir.

Q. As I explained to you, the Judge will charge you on the presumption of innocence, the doctrine of reasonable doubt, the burden of proof, and other rules necessary for a jury to apply to the proof in a criminal case. Will you, if accepted as a juryman, conscientiously endeavor to apply those instructions of law to the facts in this case?

A. Yes, sir.

By the Court:

Q. Do you belong to Rabbi Geller's congregation?

A. No, sir. I belong to the Brighton. He is not with us.

Q. You belong to the temple?

A. The temple?

Q. The one on Ocean Avenue?

A. No, sir, the one on Neptune Avenue and East 6th Street.

Q. Is that Rabbi Geller?

A. Yes, sir, but he is not there any more.

Q. Have you had any talks or overheard any talks there?

A. No, sir, I was not present at the talks.

Q. You do not belong to the men's club?

A. No, sir.

By Mr. Turkus:

Q. I take it you are married and reside with your family at the address given?

A. Yes, sir.

Q. Do you know whether or not the manager of your branch ever served on any one of these juries since Judge O'Dwyer has been District Attorney?

The Court:

[fol. 2324] Q. Rabbi Geller used to have a congregation on Neptune Avenue east of Ocean Parkway, a short distance from your house?

A. I know him.

By Mr. Turkus:

Q. You may have heard some discussion about accomplices. You have heard the lawyers and the Judge and possibly the prosecutor speak about accomplices?

A. Yes, sir.

Q. Is your understanding of the word "accomplice" that it is one who himself has participated in the commission of a crime?

A. Yes, sir.

Q. Do you find any fault with the District Attorney of the county or with the prosecution wherein, in order to solve a murder, that is, to break a case from the inside, the testimony of one of the participants is accepted and used against the other participants on trial?

A. No.

Q. Do you find any fault either with the prosecutor availing himself of that kind of testimony or with the prosecution which employs it?

A. No, sir.

Q. With respect to an accomplice, you will be given certain rules or tests to apply to that witness from the standard of ascertaining his credibility or believability. Do you understand?

A. Yes, sir.

Q. In addition, from your experience in life, you have gathered other tests which you apply to people in determining whether they speak the truth?

A. Yes, sir.

[fol. 2325] Q. Will you bear uppermost in your mind that common sense and apply the tests that have come down through the years, aside from the accepted rules, to find out does this accomplice not only speak the truth about his participation, but does he speak the truth about the group or combination participation of the defendants with him in the commission of the crime? Is that clear?

A. Yes.

Q. If accepted, will you devote your mental faculties to finding out not only does this accomplice speak the truth concerning himself, but does he tell the truth about the group or combination participation of the defendants in the commission of the crime?

A. Yes.

Q. It may well be that you may not like an accomplice. When you see him on the stand, you may not like him. As a matter of fact, you may detest him. I do not know your personal feelings toward him, nor do I care. May I understand that it is not whether you like him or not that counts—it is whether he tells the truth about these defendants that counts?

A. Yes, sir.

Q. For example, if you find that an accomplice speaks the truth about the defendants and that under the law the Judge gives you there is corroboration, and you are satisfied the defendants at the bar of justice are guilty, just because you do not like the accomplice, you would not acquit three defendants who are guilt of murder, first, would you?

A. No, sir.

[fol. 2326] Q. Will you bear uppermost in your mind that that it is not our personal like or dislike for accomplices; we are here to do a job for The People of the State of New York and for the defendants on trial, and to ascertain are they guilty under the rules of evidence, or are they innocent.

Mr. Climenko: I object to that as a misstatement of the law.

The Court:

Q. If the Court should charge you that in order to convict, the defendants would have to be shown to be guilty beyond a reasonable doubt, will you follow those instructions?

A. Yes, sir.

By Mr. Turkus:

Q. In other words, when we get through with this case, if you have a reasonable doubt about the guilt of the defendants, you go ahead and acquit them. All I want to know is this: When we get through with all the evidence

in the case, if you find they are guilty beyond reasonable doubt, you will convict them, do you understand?

A. Yes, sir.

Q. And whether you like an accomplice or do not like him, as long as you are satisfied beyond a reasonable doubt that these three men are three of the killers of Rosen.

A. Yes, sir.

Q. There may be some talk, and there has been by one of the defense lawyers, about what the charge is here—that is, that the defendant—and that applies to all defendants—are here to meet one charge, the charge in this indictment. [fol. 2327] That is all they are here to meet. I want to know if you understand, by the same token, the District Attorney is here to establish the guilt of the defendants on only one charge and nothing else. We are both limited to that charge in this indictment.

A. Yes, sir.

Q. Another of the defense lawyers has spoken to the other jurors about character evidence—that the character of the defendants is not at issue. He has properly said that. The character of a defendant is never in issue unless the defendant himself chooses to put it in issue by putting on witnesses who will testify to his good character. Then the District Attorney can bring witnesses that can tell you about his bad character, if that be the case. So that character does not figure in a criminal case unless the defendant elects to put it before the jury.

A. Yes, sir.

Q. So we are not here to determine character, we are here to determine the guilt or innocence of the defendants under rules of law. Now, with respect to the allocation of evidence—You will get rules from the Judge, and when you hear the rules you will understand that, obviously, a piece of testimony may apply to one defendant alone. You see, the prosecutor cannot prove his case except by witnesses, piece by piece. The jury is the only "witness" that has common sense. So, during the course of the testimony, under the rules the Judge gives you, parts of the testimony [fol. 2328] will apply to all defendants and parts of it will apply to one or more, and it will be your job, as a juror, to put the evidence where it belongs and against the defendants whom it hits.

A. Yes, sir.

Q. Will you, if accepted, do that?

A. Yes, sir.

Q. As I go along, is there anything in the back of your mind, is there anything in the manner in which you earn your livelihood or in the past experience that you have had, that would prevent you from doing your job as a juror in full faith to The People of the State and giving the defendants everything the law says they should have?

A. No, sir.

Q. Will you, if accepted as a juror, by your verdict endeavor to do justice in this case?

A. Yes, sir.

Q. If, after you have heard every piece of evidence in the case and you have talked the case over with the other jurors with common sense and understanding, and after you have devoted your mental faculties to finding out whether what you heard in the court-room is the truth about these defendants, and after you are satisfied of their guilt beyond a reasonable doubt, will you reflect that in your verdict?

A. Yes, sir.

Q. And there is no reason why you cannot say so without fear and hesitation, if you find them guilty?

A. Yes, sir.

Q. If you are satisfied as to their guilt, you will pronounce that verdict?

A. Yes, sir.

Q. Can I take your word for that?

A. Yes, sir.

By Mr. Turkus:

Q. (To Mr. Aldridge, juror in box) What do they call that [fol. 2329] section where you live?

A. Flatbush.

By the Court:

Q. East 33rd Street and Glenwood Road—that is Vanderveer Park?

A. Yes, sir.

Q. You are between Foster and Glenwood?

A. Between Glenwood and Avenue H.

Q. You voted at the corner of 31st Street and Glenwood Road?

A. November 1st last, I have been there.

Q. Do you belong to any local organization?
A. St. Stephens Church.
Q. That is at the corner of 31st Street?
A. On Newkirk Avenue and 29th Street or 28th Street.
Q. That is your old parish?
A. I am still a member of the men's club there.
Q. Has that a men's club?
A. Yes, sir.
Q. Have you heard any discussions there on this case?
A. Mr. Kopff is a member.
Q. That is years ago?
A. Yes, sir, some years.
Q. That is St. Stephens Lutheran Church?
A. Yes, sir.
Q. Have you discussed this case with anybody?
A. No, sir.

By Mr. Turkus:

Q. I believed that you explained to Judge Taylor that you have rather recently moved in that neighborhood.
A. Yes, sir.
Q. Where did you live before that?
A. 2415 Newkirk Avenue, right off Bedford.
[fol. 2330] Q. Is that likewise Flatbush?
A. Yes, sir.
Q. Did you live there for a number of years?
A. Three.
Q. Prior to that you lived in some other section——

By the Court:

Q. You are a neighbor of Mr. Von Lahn?
A. I don't recall the name.
Q. He lives on one of those corners and he belongs to St. Stephen's Church.
A. I don't recall the name. I know very few neighbors. I am in the house with Mr. Downey; I don't mingle with neighbors.

By Mr. Turkus:

Q. I inquired as to whether you lived in a different section of Brooklyn than Flatbush.
A. In the last twelve years I lived in Flatbush.

Q. You are listed as a manager, without any further designation.

A. Manager of an insurance brokerage office.

By the Court:

Q. I made a mistake about Mr. Von Lahn; he lives on Foster Avenue and 24th Street, a block away from you.

By Mr. Turkus:

Q. What insurance brokers are you employed by?

A. S. Greenwald.

By the Court:

Q. How well do you know Mr. Downing?

A. Since I moved in this house in November, 1940.

[fol. 2331] Q. You know he is a retired police lieutenant?

A. Yes, sir.

Q. Did he ever talk to you about the case?

A. I would say no, your Honor. I mean now and then a name might come up, but we never discussed it.

Q. Has he ever discussed Judge O'Dwyer?

A. I mean occasionally an article may show in the paper and it may start up for a few minutes, and then it would shift off to another conversation.

By Mr. Turkus:

Q. Have these talks made any impression on you about this case?

A. Not those talks, but I have got an impression.

Q. Then Mr. Kopff lives right near you?

A. Yes, sir.

Q. That is near your old address?

A. Yes, sir.

Q. Did you visit his house?

A. Never.

Q. You have some impression from Barney Dowd?

A. I have, a thought.

Q. You rent part of his house?

A. Yes, sir.

Q. Have you talked to other members of the police force?

A. No, I have not.

Q. Are you talking about the same man? Do you mean Captain Barney Dowd?

A. Retired.

Q. The man who was in charge of the Tom Dewey investigation in Manhattan?

A. I don't know that; he has been retired two years.

Q. Is this Downs?

A. Downs.

Q. I thought you were speaking of Barney Dowd; I had [fol. 2332] not known he had retired, so I was confused. You speak of a lieutenant in the police named Downs?

A. Yes, sir. I understood he was a captain.

Q. Was he a uniformed or detective captain?

A. He was in uniform there and at times he was in plain clothes.

Q. He may have been a detective captain, in charge of some squad, do you know?

A. That I would not know.

Q. You have indicated that you have got some impression. I don't want to go through any lengthy voir dire if you are going to remain with us, if that is the kind of an impression you carry with you, as you indicated you attach, and you had some knowledge from other sources other than the conversation with this police lieutenant, am I correct?

A. Yes.

Q. Was it with any law enforcement agent who spoke to you?

A. No, sir, it is mostly reading matter; and, another thing, I have insurance which may affect people I know. In this case I made an impression.

Mr. Rosenthal: I understand this man originally made an excuse at the time of his application—he said he was prejudiced, so instead of wasting any further time I will challenge him now, to save time.

Harry H. Aldrich, residing at 1595 New York Avenue, Brooklyn, New York, being sworn on the challenge, testified as follows:

[fol. 2333] By Mr. Turkus:

Q. As I understand, you are in the insurance business.

A. Yes.

Q. Your business has brought you in contact with people in the garment or clothing industry?

A. Yes, sir.

Q. And that there you have heard certain things in reference to one or more of the defendants on trial?

A. I have heard the name mentioned in various conversations. Whether there is any connection, I don't know.

Q. Have you heard the name of Lepke in the garment district?

A. Yes, sir.

Q. Have you heard the name of Gurrah?

A. Well, no.

Q. Shapiro?

A. Yes, sir, I have heard of Shapiro.

Q. In addition to that you have had some discussions with a retired police officer?

A. I would say yes.

Mr. Rosenthal: I don't see any sense in going through a long examination.

The Court: Yes.

Mr. Rosenthal:

Q. Mr. Aldridge, you applied, when you were originally called, to be excused on the ground you were prejudiced.

A. Yes, sir.

Q. Does that prejudice extend to any one of the defendants in this case on trial?

A. I would say it does.

Q. And it would necessitate evidence of a character to [fol. 2334] remove that prejudice from your mind as to these defendants?

A. I would consider it would take a lot of evidence.

Mr. Rosenthal: Challenge for cause.

The Court: Challenge sustained.

By Mr. Barshay:

Q. Mr. Woolf, do you know anyone at all in the District Attorney's office?

A. No, sir.

Q. Have you personally ever been the victim of any crime?

A. No, sir.

Q. Have you read something about the defendants in the newspapers?

A. Yes, sir.

Q. I take it you are a fair enough man to say that it is unfair to form any impression about people by just reading about them?

A. Yes, sir.

Q. I would not want to be judged that way, nor you would not want to be judged that way?

A. No, sir.

Q. Nevertheless, people sometimes do get impressions, whether they want to have them or not—you volunteered you had?

A. Yes, sir.

Q. As you entered the jury box did you have that impression which is adverse to any of the defendants?

A. I did not give it a thought.

Q. Has reference to the defendant Buchalter by the name of Lepke influenced you in any way?

A. No, sir.

[fol. 2335] Q. Does the fact that you know a man named Hollander, who has something to do with the Amalgamated, influence you in any respect?

A. No, sir.

Q. It is a fact that other jurors while being questioned in your presence, some of them have certain ideas—does that influence you at all?

A. No, sir.

Q. Your mind with respect to the guilt or innocence of any of the defendants is not set?

A. No, sir.

Q. Will you give us your word of honor that the defendants will start off from scratch if you are chosen as a juror?

A. Yes, sir.

Q. And the testimony shall come forth from witnesses here, that is the only testimony you will listen to and decide upon?

A. Yes, sir.

Q. If, as a matter of fact, something should creep in your mind as a result of what you read or heard, you will dissipate that?

A. Yes, sir.

Q. And subordinate any thought you had about this defendant to the testimony in this case?

A. Yes, sir.

Q. To sustain our form of government, as Mr. Turkus has told you, we must get twelve men who start out with neither thought nor favor on either side.

A. Yes, sir.

Q. And the only way we can find out is by our questions to jurors to search their minds in advance because, while in reality you have nothing to do with punishment, the fact [fol. 2336] remains if you are convinced beyond a reasonable doubt they are guilty, the law fixes a punishment for you, and that is death.

Mr. Turkus: I object to that.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Have you ever had any experience with members of the Police Department?

A. No, sir.

Q. The District Attorney starts off with the finding of the indictment. You have heard of that before?

A. Yes sir.

Q. That is the paper which starts the trial—an accusation; that is all it is.

A. Yes, sir.

Q. Do you agree with that?

A. Yes, sir.

Q. The Grand Jury heard the witnesses on one side only, and voted the indictment and filed it in this court, and said they accuse, through the District Attorney——

Mr. Turkus: I object to that.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. When this paper is filed here—and the Judge is going to tell you this——

The Court: The indictment is only an accusation; you cannot bring a person to trial without the accusation being put in writing.

The Talesman: Yes, sir.

[fol. 2337] Q. He came here and said, "Not Guilty." That made the accusation. So when Mr. Turkus said to you, "The defendants are here to meet the charge," I have an idea what it meant, but I want you to get it straight—that

meant the charge. Now he must come forward with the proof. We meant it when we said, "Not guilty."

A. Yes, sir.

Q. We do not have to meet it by proving ourselves innocent or by convincing you we are innocent or offering any facts to show he is innocent.

A. Yes, sir.

Q. You are in accord with that?

A. Yes, sir.

Q. He must prove his case in a certain fashion prescribed by law. To put it simply, he has to call witnesses whom you believe—whom you believe, not what he accepts—not what he accepts—not that anyone else accepts—but whom you believe after you hear them testify on direct and cross-examination. You as an individual are the only one to determine—you as our part of this jury—whether or not the District Attorney is offering the quality of proof that you, as a juror, should accept. Now, no one can evade that problem. I don't intend by that to say that you should argue in your jury room with any juror, because I hope the jurors act harmoniously, but if you, as an individual, do not see the evidence in the same light, after you use the common sense and understanding which you have—your province is to decide it from the evidence. You follow me?

A. Yes, sir.

[fol. 2338] Q. The law goes further than what I told you—it says every defendant is presumed to be innocent under the law—that goes to these defendants here—they are presumed to be as innocent of this charge as you *are* I am.

A. Yes, sir.

Q. And you are in accord with that?

A. Yes, sir.

Q. That presumption of innocence you must give them throughout the entire trial.

A. Yes, sir.

Q. Will you do that?

A. Yes, sir.

Q. You understand that this presumption is the very foundation of the administration of criminal law?

A. Yes, sir.

Q. When he said, "Not guilty," everything included in the main charge or the subdivision, that he is an accomplice, and ending with he aided, counseled or advised in the commission of this crime, by his plea of Not Guilty he puts it at

issue and causes him (indicating the District Attorney) to assume the burden of proof on every one of these allegations.

A. Yes, sir.

Q. And you will make him do that?

A. Yes, sir.

Q. And you will make him do it beyond a reasonable doubt?

A. Yes, sir.

Q. That is a definition which you shall get from the Court; no lawyer is permitted to define it. You will follow that law?

A. Yes, sir.

Q. Your ideas about what the law should be or was, will all be subordinated to what the Court shall tell you?

A. Yes, sir.

[fol. 2339] Q. When the District Attorney comes forth with evidence, you will look upon the people who give it and say, "Who is he? What is he? Shall I believe him or shall I not believe him?"

A. Yes, sir.

Q. You will find if he is a man, if he is an honest man, who has no motive to falsify, has not been induced by some favor or treatment to falsify, and will you accept his testimony?

A. Yes, sir.

Q. That will be up to you?

A. Yes, sir.

Q. Then we come to the other part. Supposing the District Attorney—I don't know, but suppose—presents to you people who are entirely free of any clean background, who had all their lives, they will say, lived a life of crime, existed on a life of crime, robbed, cheated, murdered and perjured, shylocked and extorted—each one of these demerit marks added on to that person's background—you will with greater care look upon his testimony?

A. Yes, sir.

Q. The worse he is, the greater caution you will use?

A. Yes, sir.

Q. Because the Court shall tell you that with suspicion you must look upon the testimony of an accomplice; you understand?

A. Yes, sir.

Q. Mr. Turkus defined to you the meaning of the word "accomplice" as one who "participates in the commission of a crime." You will have a definition from the Court, [fol. 2340] and as he propounded it to you I will take the liberty to say that that is not my idea of an accomplice—one who participates in the commission of a crime is a perpetrator. Now he comes to the point that he exculpates somebody else and then he becomes more brazen and claims to be an accomplice to that somebody else.

Mr. Turkus: I object to this.

The Court: That is a matter for the charge. Objection sustained.

Q. In other words, if someone comes here and says, "I am an accomplice," you will find out, use your own judgment, based upon the two principles I have given you, whether or not he is really an accomplice—he may claim to be, but you are not bound to accept it, are you?

A. No, sir.

Q. You will want to know why does he say he is Buchalter's accomplice—what motivates him—is it revenge or what other motive? Is it to escape the punishment for a murder that he himself has committed?

A. Yes, sir.

Q. Those are the tests allowed by law and given to you.

A. Yes, sir.

Q. He may be telling the truth, I don't know, that he participated in the commission of the crime, but, on the other hand, it will be for you to decide whether or not he is lying with respect to any participation of Buchalter in the commission of this crime. That will be for you to decide.

A. Yes, sir.

[fol. 2341] Q. You will take into consideration that at some time or other this person, under oath, when asked about the very thing as to whether he participated or was an accomplice in this case, he said that he was not. You will take that into consideration?

A. Yes, sir.

Q. I guess you will take into consideration every important fact, and among others whether these men who now claim or who will claim to be accomplices of Buchalter have ever spoken to or seen him.

Mr. Turkus: Objected to as repetitious.

The Court: Objection sustained. I will state more specifically my viewpoint is that in the examination of jurors it is not permissible to educate them on legal questions. It is only permissible to find out whether they are fair and impartial, and disinterested. The questions asked here are largely matters for summation and matters for the Court to charge, and those matters are not permissible on preliminary examination. The reason the Court has not interrupted is because it would only create disorder because of dissension by counsel with the Court's view in the matter, and I prefer an orderly trial. I am obliged to sustain an objection when an objection is made based on that policy. That seems to be the fault here and the reason why it has taken so long to select a jury.

I think you have seen by the Court's questions that the [fol. 2342] Court has taken the viewpoint that the question of finding out the source of the information or discussion that a juror may have had with people outside, or from reading papers or otherwise is, according to the Court's notion, the uppermost point to be considered.

Mr. Barshay: I just wanted you to know that I pursued this line of inquiry right through, without objection.

The Court: That is the only reason you got away with it. I say that with due respect.

By Mr. Barshay:

Q. In any event, without going into great detail, you will take everything into consideration before you say to the person—in your own mind, of course—"Your testimony I believe," or "Your testimony I must reject and I will reject"?

A. Yes, sir.

Q. Of course, you understand, because Mr. Turkus said that the District Attorney is expected to use testimony of an accomplice to solve a crime, that is not proof—that will have to come from the witness stand before you accept it—nothing is so hard as proof.

A. Yes, sir.

Q. When you come to the point of whether one accomplice corroborates another—the Court shall tell you one cannot corroborate another—you understand that?

A. Yes, sir.

Q. Some man or some group of people may claim they are not accomplices, and others may contend they are. The [fol. 2343] Court gives you the privilege, the right, and the duty to decide whether they are or not. You will take everything into consideration to find out whether they are or whether they are not?

A. Yes, sir.

Q. But if the Court shall tell you as a matter of law that someone is an accomplice, then there will be no quarrel with that—that you will accept?

A. Yes, sir.

Q. If you find that all the testimony comes from accomplices, you will look for corroboration tending to connect the defendants with the commission of the crime?

A. Yes, sir.

Q. Because if you believe an accomplice alone, assuming you do, that is not enough. You agree with that law, and you will follow it as his Honor charges it to you?

A. Yes, sir.

Q. You will want to know, who are they that come here and tell you and give evidence which tends to connect the defendants with the commission of the crime? What have they in mind? What do they hope to gain?

A. Yes, sir.

Q. What are they going to get for it?

A. Yes, sir.

Q. And no matter how many times they deny having hope for reward, it will be for you to decide whether they do *or do* or do not?

A. Yes, sir.

Q. You will want to know, "What is the background of the corroborating testimony? Are they murderers, robbers, thieves? Are they escaping punishment? Do they hope to escape?" You will consider all that?

A. Yes, sir.

[fol. 2344] Q. Not every man comes here to tell the truth that swears he will.

A. No, sir.

Q. So you become a judge, a searcher for truth, you judge the facts, you accept or reject them as you see fit.

A. Yes, sir.

Q. That is all from the People's side. Now, the defendant may take the stand and he may not—I do not know at present. If he does not, and the Judge tells you you may

not use that against him, I take it that you won't use it against him by any stretch of the mind or imagination, nor would you let it creep into the case?

A. Yes, sir.

Q. If some juror, by any chance, should say, "Well, why didn't he take the stand?" you will reasonably call it to his attention?

A. Yes, sir.

Q. You must not use it against him?

A. Yes, sir.

Q. If some should decide to take the stand and others should not, that rule still applies. It is for their lawyers to decide how to handle the matter, as they see fit.

A. Yes, sir.

Q. So evidence may come forth from people that is only binding on X, Y, or Z, and the Judge will tell you it is not binding on anybody else, and you will not use it to bind anybody else unless the Judge says you may, and if the case takes for trial a week or two or three or six, you will keep that in your mind?

A. Yes, sir.

Q. Maybe some facts here are subject to two interpreta- [fol. 2345] tions, innocence and guilt. If they are subject to two, and the Court tells you you must, under the conditions, give it the innocent interpretation, you will not have any trouble following that law?

A. No, sir.

Q. If there is a doubt in your interpretation you still must give it to the innocent one?

A. Yes, sir.

The Court: That does not mean that if one person says one thing which means guilt, and another person says another which means innocence, that you shall resolve it in favor of innocence; but if the fact is established and it is consistent with innocence, then it cannot be viewed as evidence of guilt.

By Mr. Barshay:

Q. That is clear?

A. Yes, sir.

Q. There may come a question of association between one party and the defendant Buchalter. If that fact causes you to believe that it is an innocent association, or you are doubtful, you will give it the innocent interpretation?

A. Yes, sir.

Q. These three men are being tried together, but in reality they are getting separate trials. You must render a separate judgment in each case. Will you do that?

A. Yes, sir.

Q. When Mr. Turkus speaks of group, combination, group, as he used it, you still must decide each defendant's guilt separately and definitely keep in mind the allocation [fol. 2346] of evidence as against each one?

A. Yes, sir.

Q. You are not to decide the guilt or innocence of any man under the law—the Court will tell you that—you are here merely to decide whether or not the District Attorney has proven anyone guilty beyond a reasonable doubt.

Mr. Turkus: I object to the preamble, because, as a matter of fact, that is what the jury does—determine the guilt or innocence.

Mr. Barshay: As a practical fact, that is, but not as a legal proposition, and I am asking the jury to take the law from the court.

The Court:

Q. Will you take all instructions on the law from the Court?

A. Yes, sir.

The Court: The objection is sustained.

Mr. Barshay: Exception.

Q. After all the explanations have been made to you, is there somewheres in the back of your mind the fact that before you came into the jury box you had a set idea about this case?

A. No, sir, it is not a set idea.

Q. Or whatever it was.

A. A thought.

Q. You in your mind now can say, "If I take the oath to be a fair and impartial juror, I will keep that oath"?

A. Certainly.

By Mr. Cuff:

Q. What papers do you read?

A. The *News*, the *Mirror*.

[fol. 2347] Q. I understood you to say you had read about this case and about these defendants.

A. Yes, sir.

Q. And up to a couple of weeks ago your mind was set, definitely set?

A. Not definitely. Well, I read it, I had an opinion about it.

Q. See if I recall it exactly. If I do not, correct me. I think I have it noted here you said you had your mind set a couple of weeks ago.

A. Yes, sir, that is not definite.

Q. See if I can get it right. I am not trying to pry into your business or anything except to find out what word I heard, and as to whether or not you will make a fair and [fol. 2348] impartial juror.

A. Yes, sir.

Q. You used the word "set" yourself?

A. Yes, sir.

Q. Do you understand the word "set" to mean "firmly fixed"?

A. No, sir.

Q. It does not mean that to you?

A. No, sir.

Q. How long did you continue to read the *Mirror* about this case?

A. Once or twice.

Q. Did you read these other articles that appeared in the *Mirror* about this case and about these defendants or some of them?

A. No, sir.

Q. Will you tell me when you read the *Mirror*?

A. A couple of weeks ago, just glanced over it, I just read about the case—well, I read and in my mind, you know, I had a thought.

Q. You say now there was only one article you read?

A. Not the full article, just a part of it: I was not very much interested.

Q. Was it only one article?

A. As far as the papers are concerned, I do not read full articles.

Q. Was it only one article or part of only one article which you read?

A. Part of one or two.

Q. How many articles did you read in the *News* about this case or about these defendants?

A. I just glanced over it. If I had a little spare time I would go to that page and read it, not intentionally.

Q. In any event, no matter how you read it, whether [fol. 2349] casually or not intentionally, you did get a set idea in your mind then?

A. Yes, sir.

Q. Did you see the article in the *Mirror* in which at the bottom of the page it said there would be another article the next day?

A. No, sir.

Q. When you came into court, when you were summoned to attend in court, you had that set idea in your mind, didn't you?

The Court: Are you using the word "set" as you understand the meaning or as the witness has testified to his understanding?

Mr. Cuff: I am using the word the witness used. I am not using it in any particular sense. I am using the word the witness used, and I think I have a perfect right to do so.

The Court: He has explained the meaning of the word; he has shown by his answer to you his understanding of the word "set" is not in accordance with its common acceptance; therefore I shall have to rule you cannot go any further as to the use of the word "set."

Mr. Cuff: I understand I cannot use the word the witness used?

The Court: Yes. It only tends to confuse the record in the event of a subsequent review.

Mr. Cuff: I note an exception.

[fol. 2350] By Mr. Cuff:

Q. This doubt you had in your mind, did you have it in your mind when you were summoned to appear here?

A. I did not know what case was on when I was summoned to appear here. I had it in mind.

Q. You had it in mind when you came to court yesterday morning?

A. Yes, sir.

Q. You had it in mind when you got in the jury box last night?

A. No, sir.

Q. When did you put it out of your mind?

A. When I was sitting here yesterday.

Q. You put it out of your mind definitely?

A. Yes, sir.

Q. It was not because of anything you heard?

A. No, sir.

By Mr. Rosenthal:

Q. Mr. Woolf, is it clear to you that me and my associates represent one defendant—I want to get set in my mind the answers you gave to Mr. Turkus—and if I am wrong in anything I say you said, you correct me—you told him, didn't you, that you were a neighbor of the delegate of the Amalgamated Clothing Workers Union?

A. Yes, sir.

Q. Whose name was Hoilander?

A. Yes, sir.

Q. And you visited him and he visited your house. I assume you played cards together with each other?

A. Yes, sir.

Q. You were very friendly?

A. That is right, friendly.

Q. Friendly as neighbors, as one visiting one another's [fol. 2351] house, and your wives visiting one another?

A. Yes, sir.

Q. In the course of the conversations you had with Mr. Hollander, whose brother you also know——

A. No, I don't know his brother at all.

Q. He had a discussion, his brother with you?

A. I know he was his brother.

Q. You knew that through him?

A. Yes, sir.

Q. You also heard discussed the name of one Murray Weinstein whose name was mentioned here, discussed by Mr. Hollander?

A. Yes, sir.

Q. You were asked by Mr. Turkus whether you had read about the defendant and you said you had read about him in the paper.

A. Yes, sir.

Q. Let us start there. What papers had you read about him?

A. In the *News*.

Q. Over what period of time did you read about him?

A. Well, maybe once or twice, about a couple of months.

Q. Did you read the *Mirror*?

A. Not always.

Q. Did you glance at any article in the *Mirror*, or had you forgotten about it when I recalled it—had you forgotten about having read the *Mirror* or some parts of the articles in the *Mirror* when you were questioned by Mr. Barshay and Mr. Cuff?

A. No, sir, I told them I read it in the *Mirror*.

Q. You read, you said, about this particular case in the paper?

A. Yes, sir.

[fol. 2352] Q. And as a result of what you read, you told Mr. Turkus that you had some impression?

A. Yes, sir.

Q. Then you next told him, if I recall correctly, in answer to his question, that that impression which you had gained was detrimental?

A. That is right, yes, sir.

Q. Then, if I recall, he questioned you, when telling you he did not want to go into a long question, if finally there would be some objection, and he asked you about whether that impression you had was in respect to this case, and your answer was, "My mind was set in regard to this case"?

A. That is right.

Q. When you said to Mr. Turkus, "My mind is set in regard to this case," what did you mean by the word "set"?

A. I meant that at the time I read the papers I thought, according to my knowledge of the case, from the reading that the defendants were guilty.

Q. So that is what you meant when you said, "My mind was set"?

A. Yes, sir.

Q. At the time you read this paper concerning the guilt or innocence of one or more of the defendants on trial in this case?

A. Yes, sir.

Mr. Rosenthal: I challenge the talesman for implied bias.

The Court: Try the challenge.

Max Woolf, of 623 Crawford Avenue, Brooklyn, New York, was then sworn as a witness on the challenge.

[fol. 2353] By Mr. Rosenthal:

Q. Before you were sworn you were asked a number of questions by Mr. Turkus and myself and other counsel.

A. Yes, sir.

Q. And you made a number of replies?

A. Yes, sir.

Q. Were the answers that you gave to the questions true?

A. Yes, sir.

Q. Now, up until the time, then, that you sat in the jury box that impression or opinion you had, your mind was set with respect to this case, existed?

A. Until I came into the court-room.

Mr. Turkus: In view of the record made by Mr. Cuff and Mr. Rosenthal with regard to a set opinion, the District Attorney does not oppose the challenge, but as a matter of fact, consents to it.

The Court: I take this view: If a man simply says he has formed an adverse impression from reading articles or newspaper reports, that logically leads to a conclusion which is prejudicial to a defendant, but it does not mean that a man is so stupid as to think that newspapers always tell the truth. But thereafter, when a man says that he is willing to serve as a juror and put aside, even though he cannot forget definitely, absolutely put aside that impression and decide the case on the merits and upon the evidence only, then he may qualify. But this man has gone further than that, I am afraid. I do not think it is safe to have him on the jury, and for that reason, in this particular case, I am sustaining the challenge.

[fol. 2354] (Annette Rich, No. 3089, and Wilbert Pagnod, No. 3118, called as talesmen.)

Mr. Turkus: Your Honor, with respect to the lady prospective juror in the case, counsel for both sides have indicated their admiration for ladies as jurors, but owing to the fact they will be locked up together, in order to safeguard their reputation we ask that she be excused.

The Court: As counsel have decided this, all the Court can do is to go along with them. It is based upon a sensible assumption. The lady is excused by consent of counsel.

Mr. Turkus: May that apply to all the ladies, so they will not be kept here unnecessarily?

The Court: Only if counsel agree on it right now.

Defense Counsel: Yes, we do.

The Court: The Court accepts that only because counsel agree and only upon the basis stated, in spite of the fact that the Court has found that in many cases wisdom has been used by a jury in the disposition of cases based upon the fact that ladies have been on the jury. The ladies may go.

(The clerk then announced that all ladies on the present panel were excused from further service.)

(Kennon T. Phillips, No. 3035, called as talesman.)

[fol. 2355] By Mr. Turkus:

Q. Mr. Pagnod, do you reside at 552 63rd Street, Bay Ridge?

A. Yes, sir, between 5th and 6th Avenues.

Q. You are listed as a soap manufacturer.

A. Yes, sir.

Q. Where do you manufacture?

A. No. 89 Warren Street, New York.

Q. Are you financially interested in that concern?

A. Yes, sir; quite so.

Q. Have you been engaged in the manufacture of soap for a number of years?

A. About thirty-five.

Q. How long have you lived in Bay Ridge?

A. About twenty-three years.

Q. Does your business, in the distribution of your product, or in any way—do you ship by rail?

A. Rail and boat.

Q. Do you have anything to do with truckers?

A. Yes, sir, expressmen.

Q. Does your business bring you in contact with any teamsters' union or trucking union officials?

A. No, sir.

Q. Do you operate your own trucks or hire them?

A. We hire them.

Q. Would it be somebody like United States Trucking Company?

A. The express would pick it up and take it to the car.

Q. Is there one particular man who is all the time on your side?

A. Yes, sir.

Q. So may I go along with the understanding you have no [fol. 2356] business or other contact with any union officials or any teamsters of said union?

A. We have deliveries coming in.

Q. Does that bring you in contact with union officials or outfits?

A. No, sir.

By the Court:

Q. What soap concern is it?

A. Pagnod Company.

Q. Where is the factory?

A. 89 Warren Street, New York City, between West Broadway and Greenwich Street.

By Mr. Turkus:

Q. For years you have been in the manufacturing of soap. Have you maintained your factory at 89 Warren street?

A. Yes, sir.

Q. Have you had some other location?

A. We were at 248 50th Street, Brooklyn, between 3rd and 2nd Avenues.

Q. How many years have you been in Manhattan?

A. About twenty years.

By the Court:

Q. Isn't that the Whitmore Building at 89 Warren Street?

A. I think it belongs to the bank, the Bank of Manhattan Trust Company.

Q. It is a very old building?

A. Yes, sir.

By Mr. Turkus:

Q. Does your business presently or in the past bring you in contact with anyone on the Brooklyn waterfront?

A. No, sir.

Q. Is the name of Albert Anastasio at all familiar to you?

A. No, sir.

By the Court:

[fol. 2357] Q. How far from 4th Avenue do you live?

A. I live between 5th and 6th on 53rd Street.

By Mr. Turkus:

Q. Is any portion of your business livelihood at all dependent upon the good will of any union officials?

A. No, sir.

Q. Are you depending, for the source of your supply of material upon the good will of any union officials?

A. No, sir.

Q. How many employees have you in your factory?

A. Five girls, a brother, and myself.

Q. Have you heretofore served as a juror in criminal cases?

A. No, sir; I was called but not served.

Q. Did you get as far as the jury box?

A. Yes, sir.

Q. Was there an examination similar to this?

A. Yes, sir.

Q. Was that recent?

A. In the Supreme Court.

Q. Were you excused by one side or the other?

A. Yes, sir.

Q. Were any lawyers in court present in that case?

A. No, sir.

Q. There are nine lawyers who represent three defendants. In mentioning the number of nine, I have no fault to find with the number of counsel; they can have as many as they want to to protect their rights in court; do you know any of these nine men who represent these three defendants or anyone connected with them?

A. No, sir.

Q. Is the name of Mr. William W. Kleinman familiar to you?

A. No, sir.

[fol. 2358] Q. Or David Price?

A. He was a counselor, I think he was in the Luckman case with Amen.

Q. You do not know him personally?

A. No, sir.

Q. Do you know anyone personally who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know District Attorney O'Dwyer?

A. No, sir.

Q. Or any Assistant on his staff?

A. No, sir.

Q. With respect to capital punishment, have you any scruples conscientious or otherwise, against capital punishment?

A. No, sir.

Q. You understand when I speak of "capital" cases I speak of murder cases?

A. Yes, sir.

Q. Is there any reason why you cannot sit as a juror in this murder case?

A. No, sir.

Q. Do you understand the Judge will instruct you that the question of punishment must not enter into the deliberations of the jury in deciding the question of guilt or innocence—will you follow that instruction?

A. Yes, sir.

Q. May we go along with the understanding that you are in sympathy with law enforcement?

A. Yes, sir.

Q. Have you had any contact, in any shape, manner, or form, with people in Brownsville or the East New York area of Brooklyn?

A. No, sir.

Q. Or on the Brooklyn waterfront, or in the clothing or garment industry?

A. No, sir.

Q. Or in the clothing trucking industry?

A. No, sir.

[fol. 2359] Q. Do you know any of the Amalgamated Union officials?

A. No, sir.

Q. There will be certain instructions of law given by the Court in respect to a criminal case. Will you follow all those instructions conscientiously and apply them to this case?

A. Yes, sir.

Q. The Court will charge you on the presumption of innocence, the doctrine of reasonable doubt, the burden of proof and other matters which are mandatory for the Court to charge you on in criminal cases; is that clear?

A. Yes, sir.

Q. In other words, there are certain benefits that accrue to defendants who are charged with crime, legal benefits that the law of the land says a defendant must have. Will you give to the defendants every legal right the law says they should have, no more and no less?

A. Yes, sir.

Q. Part of the testimony in this case will emanate from accomplices. I take it you understand what I mean by "accomplice," without going into any long narrated discussion.

A. Yes, sir.

Q. Substantially, he is one who himself is a participant in the commission of the crime charged?

A. Yes, sir.

Q. The first inquiry I want to find out from you is your state of mind with respect to any possible bias or feeling or prejudice against the prosecutor of the county, Judge O'Dwyer, who, in order to solve a murder case, accepts the [fol. 2360] testimony of an accomplice and uses it against others who committed the crime. Have you any fault to find with the prosecutor for doing that, or have you any bias or prejudice against him for accepting such testimony?

A. No, sir.

Q. With respect to the prosecution of an indictment wherein the testimony of an accomplice is used, do you find any fault or have you any bias or prejudice against such prosecution?

A. No, sir.

Q. There will be legal tests that the Judge will give you that will apply to weighing the believability of that type of witnesses.

A. Yes, sir.

Q. In other words, an accomplice says he himself was one who was involved, and his testimony is subject to certain tests which the Judge will give you.

A. Yes, sir.

Q. Is it clear to you that the purpose of applying these tests the Judge gives you on the law as to accomplice witnesses is to ascertain, "Does that person speak the truth?"

A. Yes, sir.

Q. Is your frame of mind such that you understand that even a bad man can at times tell the truth?

A. Yes, sir.

Q. So that no matter who the accomplice is or what his criminal background may be or has been, what hopes he may have kindled in his own breast, the whole test is, Does he speak the truth about the crime participation, as a group, by these defendants, in the killing of the victim named in the indictment?

A. Yes, sir.

[fol. 2361] Q. If accepted, will you use your common sense and understanding to find out does that person speak the truth about this group or combination and the part that each one of them played in the commission of the murder?

A. Yes, sir.

Q. Do you understand in certain cases the prosecutors take certain safeguards with respect to witnesses they are going to use?

A. Yes, sir.

Q. In other words, will you weigh all of the evidence and everything that you hear in court, with common sense and understanding?

A. Yes, sir.

Q. Do not accept anything that any of counsel tell you in open statements in lieu of proof; don't accept anything the prosecutor tells you in lieu of proof. When I say to you that Judge O'Dwyer has broken the case from the inside, I must necessarily employ that language to find out your state of mind. You find out whether or not a case is broken from the inside when you get all of the proof in the case; do you understand?

A. Yes, sir.

Q. All I want to find out now is that you do not have some inherent bias or prejudice against the use of accomplice testimony as would cause you to reject it no matter what the circumstances were, because obviously if you did that you could not do justice to the People of the State.

A. Yes, sir.

Q. As to whether or not the District Attorney of the county sustains his burden of proof of establishing guilt [fol. 2362] beyond a reasonable doubt, you don't take my word for that; you listen to the testimony.

A. Yes, sir.

Q. In other words, do you understand that I am not here to find out whether you like a witness or you do not like an accomplice witness—that is not our purpose—our purpose

is to find out does he speak the truth about these men on trial.

A. Yes, sir.

By the Court:

Q. How long have you been in the soap business?

A. About thirty-five years I have been in it. My father was in it before.

Q. You make toilet soap?

A. Yes.

Q. You cater to the drug-store trade?

A. Retailers and wholesalers.

Q. How long have you lived in that section of Brooklyn?

A. About eight years in one house.

Q. Before that?

A. I lived on 58th Street between 7th and 8th Avenue.

Q. You always lived in the same section?

A. Yes, sir.

Q. Are you American born?

A. Yes, sir.

Q. I ask that because you gave a French pronunciation.

A. My father was French; my mother Irish.

Q. I see your first name is William. That is not French.

The Court: Go ahead.

By Mr. Turkus:

Q. In that case in the Supreme Court where Mr. Amen [fol. 2363] was the special prosecutor, were you excused for some knowledge of a particular defendant on trial, or was that some other case?

A. I was challenged by the defendant; I was satisfactory to Mr. Amen.

Q. I want to find out whether the excuse was one because of knowledge of a particular defendant. If it was I would have to find out the name of that defendant.

A. No, sir.

Q. It has been brought out here by one of the lawyers for the defendant Buchalter that his client has been convicted for other crimes, and I have got to go into this because I must find out your state of mind. Would you, because he is in jail for a long time, for other offenses that he has been convicted of and now being punished for, would that relax

your attitude toward The People of the State on this murder charge, because he is in prison for some other offense?

A. No, sir.

Q. Would you deviate from a proper, just result in this murder charge because he has been convicted of past offenses?

A. No, sir.

Q. In other words, will you, if accepted, decide the question of guilt here upon the evidence that you hear in court?

A. Yes, sir.

Q. When you mention the name of Mr. Amen, Mr. Joseph calls my attention to the fact that Mr. Todd was the special prosecutor for this Luckman case; it may have been Mr. Todd?

A. It was before Judge MacCrate.

[fol. 2364] Q. Then it was Mr. Amen, you were right.

A. It may have been one of them that hung over, I am not familiar; I think Judge MacCrate did handle the Amen special investigation.

Q. Is your frame of mind such that, in your inquiry for the truth, whether you like or dislike an accomplice in the case, if you are satisfied beyond a reasonable doubt that these three, as a group, participated in the murder of Rosen, whether you like or dislike the accomplices, that like or dislike is not to be reflected in your verdict—it is whether you believe what they say is the truth—do they speak the truth about the group or combination part that each one of these men played in the commission of the crime?

A. Yes, sir.

Q. In other words, if you are satisfied beyond a reasonable doubt as to the guilt of the three defendants, you do not release them because you do not like accomplices?

A. That is right.

Q. You will be charged, in words or substance—substantially the Judge may say to you that there can be no conviction upon the unsupported or uncorroborated testimony of an accomplice.

A. Yes, sir.

Q. And no matter how believable the man who participates in the commission of the crime is, no matter how much you believe his story, if the prosecution had nothing else, the Court would have to charge you to release the defendant.

A. Yes, sir.

[fol. 2365] Q. That is the law of our State.

A. Yes, sir.

Q. Should the Judge, when he charges you about corroboration, say the following, in words or substance, will you follow it, namely, the burden is upon the prosecution to corroborate the testimony of an accomplice, and is not to corroborate each and every item of the accomplice's testimony, but the corroboration may be deemed sufficient by the jury when it comes from an independent source, and by "independent source," it means a source other than accomplices.

A. Yes, sir.

Q. Which tends to connect the defendants with the commission of the crime, will you follow that instruction of law?

A. Yes, sir.

Q. Will you apply your experience to the facts in the case?

A. Yes, sir.

Q. With respect to the allocation of evidence, as I have explained to another juror who preceded you in the jury, the prosecutor does not prove his entire case through any single witness; it is through a series of witnesses that he establishes a case.

A. Yes, sir.

Q. One witness may testify as against one defendant, and another may implicate two, and three may be implicated all of the defendants. Rules will be given to you by the trial judge and the manner in which to apply the testimony as against the defendants. Will you use your common sense and understanding and where, subject to the rules, it [fol. 2366] hits one defendant, will you apply it against that defendant?

A. Yes, sir.

Q. And where, with common sense and understanding, the application of the rule hits all three, will you apply the testimony against the three?

A. Yes, sir.

Q. To sum it all up, if, at the end of this case, your mind is satisfied from the proof adduced in this court-room that in this court-room there are three of the group who killed the victim named in the indictment, and you are satisfied of that beyond a reasonable doubt, will you say so?

A. Yes, sir.

Q. Is there anything in your background, your present business connections, or anything, that I have not inquired about, which would prevent you from fearlessly and without hesitation rendering such a verdict if you are satisfied as to guilt beyond a reasonable doubt?

A. No, sir.

Q. And if you are satisfied beyond a reasonable doubt as to their guilt, will you say that in your verdict?

A. Yes, sir.

By Mr Turkus:

Q. Mr. Phillips, were you a juror in one of those cases where I was prosecutor before?

A. No.

Q. At any rate, we did not meet as jurymen and prosecutor in one of the cases I tried for Judge O'Dwyer?

A. No, sir.

Q. You reside on Farragut Road?

A. Yes, sir.

Q. Is Farragut Road in Flatbush?

A. Vandeveer Park.

Q. That is quite a residential neighborhood?

A. Yes, sir.

[fol. 2367] Q. Have you lived there for a number of years?

A. Twenty.

Q. You are listed as a clerk for somebody.

A. The Guaranty Trust Company.

Q. At its New York office?

A. That is the main office.

Q. Are you a bank teller?

A. No, sir, I am a correspondent.

Q. Have you been with the bank for a number of years?

A. Yes, sir, for twenty-one years.

Q. I think I can go along with you very rapidly. I don't suppose that through any business contacts you come in close association with anyone in the garment district of Manhattan or the clothing center?

A. No, sir.

Q. Or in the clothing trucking?

A. No, sir.

Q. Do you know any union official of the Amalgamated Clothing Workers of America Union or any trucking union?

A. No, sir.

Q. Were any of the names I mentioned to the other prospective jurors at all familiar to you by way of business contact?

A. No, sir.

Q. Have you had any connection of any kind or description in the Brownsville or East New York areas?

A. No, sir.

Q. Have you heretofore served as a juror in criminal cases?

A. Yes, sir.

Q. Was that recent?

A. About three years ago.

Q. That was in 1939, you figure?

[fol. 2368] A. No, I think it was in 1940.

Q. Do you remember the judge?

A. O'Dwyer.

Q. That would be in 1939, Judge O'Dwyer took office as District Attorney January 1, 1940.

A. That would make it close, yes, sir.

Q. Did you receive the benefit of Judge O'Dwyer's instruction on the law in that case?

A. Yes, sir.

Q. Was that a capital case? I mean, was it a murder case?

A. No, sir.

Q. Were any lawyers in the court-room in that case?

A. No, sir.

Q. Do you know any of these nine lawyers representing the defendants at the bar?

A. No, sir.

Q. Or anyone connected with their offices?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you have any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. If accepted, will you exclude the question of punishment in deliberating in this case? That is what the Judge will tell you is your job.

A. Yes, sir.

Q. The same as the Judge, the same as the prosecutor, the same as the defense counsel, the jurors have a job to do

in the case, a job to do in consonance with their duty toward The People of the State and the defendants at the bar?

A. Yes, sir.

[fol. 2369] Q. The business of the jury is to do that job without fear, without favor, without sympathy, without prejudice?

A. Yes, sir.

Q. If accepted, will you render a verdict in consonance with justice in the case?

A. Yes, sir.

Q. I assume you are in sympathy with law enforcement?

A. Yes, sir.

Q. With respect to accomplice testimony, you heard me discuss with Mr. Pagnod and the other gentleman?

A. Yes, sir.

Q. Is there anything you would have said differently, if you had made the responses instead of Mr. Pagnod?

A. No, sir, nothing whatever.

Q. You have no prejudice or bias against the use of accomplice testimony?

A. No, sir.

Q. You will look the testimony over and find out if he speaks the truth about this group and combination and the part that each of these defendants played in the case?

A. Yes, sir.

Q. And you will apply the tests which will be given to you?

A. Yes, sir.

Q. No matter whether you like them or not, that is not the point, the point is does the accomplice speak the truth about them?

A. Yes, sir.

Q. With respect to corroboration, will you take the law from the Judge?

A. Yes, sir.

Q. In its every aspect, to constitute corroboration?

A. Yes, sir.

[fol. 2370] Q. Now, it may be—I don't say it will happen, but it may—that three of the lawyers may sum up—each lawyer has a right to sum up for each defendant—I have no fault to find with them, they are entitled to have every safeguard the law of the land gives them, certainly no less, and, of course, no more?

A. Yes, sir.

Q. You will give them all attention?

A. Yes, sir.

Q. The lawyers in arguing the case may or may not adhere, each with the other, on the same argument. For example, they may or may not agree with themselves that everybody in the case is an accomplice, and maybe they will not, I don't know—but just because you hear an argument three times, it will not have three times the force because you hear it repeated?

A. No, sir.

Q. I merely want to call that to your attention. You may hear certain arguments repeated, and properly so; each lawyer has a right to defend his client to the limit of the law of the land; with that nobody can find fault; so no matter what they say, if they repeat the arguments, I want you to bear in mind that it is still the same argument, no matter how many times you hear it?

A. Yes, sir.

Q. Do you feel the same as Mr. Pagnod does, upon the fact that the defendant Buchalter, having been convicted of another crime and presently serving a jail term, has no part to play in whether or not he is guilty or innocent of this charge?

[fol. 2371] A. Yes, sir.

Q. You will not relax or deviate from a proper result because he is paying the penalty for other offenses he has been convicted for?

A. No, sir.

Q. With respect to one statement that was called to the attention of the jury by one of the lawyers, and properly so, each defendant has to meet a single charge in this indictment, that is all they have to meet—what is charged in this indictment.

Q. By the same token, that is all the prosecutor can do; he can go no further. He can only establish the guilt on this indictment beyond a reasonable doubt. The law does not permit less or more.

A. Yes, sir.

Q. So the proof is limited to the charge in this indictment.

A. Yes, sir.

Q. And the prosecutor, by believable evidence, which he brings into this court of justice, must establish to your satisfaction beyond a reasonable doubt that these three men at the bar, Buchalter, Capone, and Weiss, are three of a

group that took part, collectively took part, in the murder of the victim named in the indictment, will you reflect that in your verdict?

A. Yes, sir.

Q. Will you say it without fear or hesitation?

A. Yes, sir.

By Mr. Talley:

Q. Have you formed any impression at all about this case [fol. 2372] or these defendants?

A. No, sir.

Q. Have you read anything about the case?

A. I have seen it in the paper.

Q. Has your attention, as you saw it, created any impression in your mind about these defendants or anyone connected with this case?

A. No, sir.

Q. Does that apply also to you, Mr. Pagnod?

A. Yes, sir.

Q. Did you read anything about the case?

A. Only the headlines.

Q. And did you read any articles in the *Mirror?*

A. I don't read the *Mirror.*

Q. Did you read any series of articles pertaining to these defendants in this case directly?

A. No, sir.

Q. So both of you gentlemen come into this court without any preconceived notion as to the guilt or innocence of these defendants?

A. Yes, sir.

Q. The Court will charge you that the burden of proof in this case, as in every criminal case, rests always with The People—the burden is on the District Attorney, representing The People, to prove the guilt of the defendants.

A. Yes, sir.

Q. And that there is a presumption of innocence under our law, a fundamental right to every man charged with crime?

A. Yes, sir.

Q. And that there is a presumption of innocence in favor of every defendant that comes into a criminal court?

A. Yes, sir.

[fol. 2373] Q. That is simply another way of saying, "The People must prove guilt." We do not have to come into

a criminal court because we are charged with a crime, and say, "We are innocent" and prove our innocence. That is not our type of administering justice. The law is The People must prove the guilt of everybody it charges with crime, whether by indictment or otherwise.

A. Yes, sir.

Q. My question to you is, Will you require the People to sustain that burden throughout this case?

A. Yes, sir.

Q. I can rely upon your doing that?

A. Yes, sir.

Q. Following that same theory of our law as to the presumption of innocence and the burden of proof, there follows the natural corollary that the defendant is not required to explain anything or testify to anything or to take the stand.

A. Yes, sir.

Q. That is one of the privileges of our law—not a privilege, but a right—and it is for the protection of innocent men rather than for the protection of guilty men?

A. Yes, sir.

Q. The Court will charge you that if these defendants or any of them choose not to take the stand, you, as jurors, are not to indulge in any unfavorable inference against them because of their failure to take the stand.

A. Yes, sir.

Q. And will you follow that proposition of law?

A. Yes, sir.

Q. And will you, Mr. Pagnod?

A. Yes, sir.

Q. Be guided in arriving at your verdict by those in [fol. 2374] structions as to the law?

A. Yes, sir.

Q. The District Attorney in one of his questions suggested that when an accomplice takes the stand, as they will in this case, that he may say, "Yes, I did commit this murder," or, "I did not engage in it—I did participate in it." If that type of witness takes the stand, you gentlemen of the jury are to determine whether they tell the truth or not?

A. Yes, sir.

Q. And that all the jurors are concerned with is to ascertain whether the accomplices are telling the truth about

these defendants. I say to you, gentlemen, that is not a correct statement of the law—that you are concerned, necessarily, with something more than that—much more than that. That is, you must ascertain, you must be satisfied that what these accomplices say about these defendants must be corroborated, supported, backed up, sustained by testimony that is entirely independent of their testimony. That the Court will charge you again as part of our American law.

A. Yes, sir.

Q. And the Court will further charge that unless that testimony of an accomplice is backed up and supported by testimony independent of what they say or what they say some defendant said to them, that you must acquit these defendants. The Court will charge you that in very plain, succinct language, as Judge Taylor charges juries. My question is to you two gentlemen, will you agree now to definitely follow that instruction of law, to require that addi- [fol. 2375] tional, outside, supporting, corroborating evidence before you convict?

A. Yes, sir.

Q. The Court will charge you that unless you do find that evidence you must acquit. My question to you is, will you acquit without fear or reluctance these defendants under that instruction of law if this case is built up of testimony of accomplices and lacks in your opinion and judgment corroborating evidence that our American law requires: will you acquit them?

A. Yes, sir.

Q. The Court will charge you again that you are the sole judges of the facts in this case, the sole judges of the facts. You have no right to be influenced by what you think the Court thinks from the facts.

The Court: I will let you go to dinner now, gentlemen. Please do not discuss the case, let nobody talk to you about it, keep your minds open. Be back at two o'clock. In the meantime, everybody remain seated. The jury will go out first. The other members of the panel will now leave.

(After the jurors and talesmen leave the room:)

The Court: For the record, to complete it on this point: United States District Attorney Harold Kennedy called this morning during the court session in reference to an

apparent conflict in jurisdiction. The following are the conclusions of the Court from the assurance given:

There was apparently a misunderstanding by the United States Marshal concerning his instructions from Mr. [fol. 2376] Bennet. There is no disposition by the Federal authorities to interfere in the trial of this case, and with the discretion of the trial judge. The Federal authorities are concerned only in the matter of there being at all times adequate police guard while the prisoners are over here. That has been at all times provided and is being at all times provided, and the proper instructions in regard thereto were given some time ago by the Court to the captain of the court officers—concerning the police at all times—so the incident may be deemed closed.

Mr. Talley: Has this Court assumed the responsibility of seeing these men are properly fed? That important thing must not be overlooked, and apparently there has been some conflict with that.

The Court: I will take that up with you later. That is a detail the Court is not required to rule on now.

The defendants are remanded.

(A recess was then taken until 2:00 P. M.)

[fol. 2377] Afternoon Session—Trial Resumed

(All defendants represented by counsel.)

(The examination of Wilbert Pagnod and Kennon T. Phillips was resumed.)

By Mr. Talley:

Q. Mr. Pagnod, outside of anything that has been asked by the District Attorney or by myself, do you know of any reason why you cannot sit as a fair and impartial juror in the trial of this case?

A. No, sir.

Q. Mr. Phillips, do you know of any reason why you cannot sit as a fair and impartial juror?

A. No, sir.

Mr. Talley: I have no further questions.

By Mr. Climenko:

Q. Mr. Pagnod, I will address my questions to you first. Have you read about the case or any of the people in it at any time?

A. No, sir. I seen the heading, but I never noticed the reading.

Q. You never read any article about any of the defendants?

A. No, sir.

Q. And you never read any article about this case?

A. No, sir.

Q. Is that the same answer that you would make, Mr. Phillips?

A. Correct.

Q. Never read anything about any of the people in this case?

A. Just headlines.

[fol. 2378] Q. You understand this is a case to be tried in this court and that the consideration by the jury of it is wholly apart from any other thing that may be going on in New York at this time, do you understand that? In other words, the fact we have a political campaign going on at this moment is a matter which has no connection with the case, is that right?

A. Yes.

Q. And that the defendants and all of them are presumed to be innocent, you understand that?

A. Yes.

Q. And I take it that you understand also that the fact that one of the nominees for an elective office of the City of New York happens to be the District Attorney of Kings County is a factor which would not have any effect in your thinking about the case as jurors, were you selected; is that correct?

A. Yes.

Q. That is something which is entirely foreign to the case here that will be presented to the jury—correct?

A. Right.

Q. And it is something which you will not permit to enter into your minds or your consideration of the case were you selected as jurors, is that correct?

A. Yes.

Q. The fact that the Assistant District Attorney in questioning talesmen such as yourself about your capacities for fairness may have mentioned certain names, the mere fact that he has mentioned those names would not in and of itself affect your thinking about the case at all, would it?

A. No, sir.

Q. For instance, Mr. Turkus has asked for some weeks [fol. 2379] now all talesmen as they have taken the box whether they were acquainted with the name of a gentleman named Petofsky. Whether or not you are acquainted with him is not what I am interested in, and the mere fact that he has mentioned those names would not affect your consideration of this case, would it?

A. No, sir.

Q. Assuming there were no other reference to that particular name at any time in the future; is that correct? Or the fact that he has mentioned the names of officials of unions, if those names don't play any part in the proof of the case once we get to the point of actually swearing witnesses, the mere fact that he has mentioned names of officials or of a particular union, that would not affect your consideration of the case at all, would it?

A. —.

Q. That would merely have been the announcement by Mr. Turkus of the name of a union official prior to calling any particular witness, isn't that so?

A. Yes.

Q. And it would be something which would be dismissed by you jurors entirely from your consideration, is that so?

A. Yes.

Q. And so with respect to the name of a union lawyer by the name of McGuire—have you ever heard of that name?

A. No.

Q. Nor have you?

A. No, sir.

Q. Or with respect to the name of a lawyer called Louis Waldman, have you ever heard of him?

A. No, sir.

Q. The fact that those names may or may not have been mentioned in the past and they have no part in the trial of this case, that is a fact which has nothing to do with the [fol. 2380] merits here, is that so?

A. Yes.

Q. You have been asked something with respect to accomplice testimony, and I think that Mr. Turkus has tendered to you a definition of accomplices. Assuming that an accomplice should take the stand and offer testimony in this case, and assume that the Court should instruct you that the testimony of any accomplice is to be regarded with suspicion by you as jurors, would you have any difficulty in following that instruction?

A. No, sir.

Q. In other words, to strip that of its legal verbiage, if you were told that a man who takes the stand and says, "Yes, I participated in a particular crime," is a man whose word you must look into very carefully and with suspicion before you accept it, that that is one of the rules of law for the guidance of jurors, you would have no difficulty in following that instruction; is that so?

A. Yes.

Q. And if you found that the accomplice, in addition to being an accomplice, is a man who had the most urgent reasons to falsify, will you take that into consideration in determining whether or not he is telling the truth; is that so?

A. Yes.

Q. Mr. Phillips, that would be your response too, I take it?

A. Yes.

Q. So also if you find that the accomplice was a person who had a record of being unable to tell the truth or at least of having wilfully falsified in court before, you will take that into consideration in determining whether or not [fol. 2381] you could accept his word, is that so?

A. Yes.

Q. And as jurors you would scrutinize whatever was offered to you by way of testimony with at least the same degree of care that you would use in passing on the merits of a matter affecting your own interest, isn't that so?

A. Yes.

Q. Because, in any event, even though the Court will instruct you that punishment is not a matter for the jury to determine, you realize that this is what Mr. Turkus has called a capital case, and a matter of vast importance in the sense that it requires your honest, deliberate consideration; is that so?

A. That is right.

Q. And a matter involving as careful consideration, per-

haps, as anything that may ever come before you in your life; is that correct?

A. Yes.

Q. You realize also that the function of jurors is to pass on the facts and, in other words, it is the duty and the obligation of you and your fellow jurors to decide who is telling the truth and who is not, and you realize also that that is a function which you as jurors do not divide with anybody else. You and your fellow jurors are the only judges of the facts and in ascertaining what the facts are you work independently of anybody else in the court-room. It is your judgment, and nobody else's judgment can be a substitute for yours—you realize that?

A. Yes.

Q. And you realize also that each one of you is under an [fol. 2382] obligation to consult with your fellow jurors, but that you are each under an obligation to adhere to your individual opinion in the event that your fellows cannot persuade you by argument based on the evidence that they are right and you are wrong. You understand that?

A. Yes.

Q. So it is the obligation of the members of the jury, and the individual members of the jury, in the event that they are not so persuaded, to adhere to their own individual opinions; you understand that?

A. Yes.

Q. This is not such a situation as may confront, let us say, the members of a board of directors where it is required that perhaps some people give in to others.

Mr. Turkus: I object.

Mr. Climenko: I have not finished my question.

Mr. Turkus (to talesmen): Will you refrain from answering, gentlemen?

Q. This is a situation in which you are under an obligation under your oath not to sacrifice or give up your own opinion unless it is done in consequence of reasonable argument, based on the evidence, advanced by fellow jurors. You understand that this is that type of situation?

Mr. Turkus: Objected to, the analogy between a board of directors. This is going into a purely legal proposition which the Court must charge.

The Court: Sustained.

[fol. 2383] Mr. Climenko: Exception.

Q. You do understand that you have an individual responsibility to pass on the facts and that that individual responsibility goes to the point of your maintaining your point of view unless you were convinced by the arguments of your fellows and unless those arguments are based on the evidence; is that correct?

A. Yes.

Q. Is there any reason why, in this particular case, which by intimation is one which has received a good deal of public attention in the press, at least,—is there any reason why you would have the slightest feeling of restraint in returning a verdict of Not Guilty if, after hearing all of the evidence and hearing the able counsel for the District Attorney, the Assistant District Attorney, you harbor a doubt, a reasonable doubt, about the guilt of the defendants or any one of them, would you be under any restraint about saying that you had such a reasonable doubt and saying it in the form of a verdict of Not Guilty?

A. No, sir.

Q. None whatsoever? You would not have any hesitation about doing that?

A. No, sir.

Q. You would not have any fear about doing that? Now, there has been reference to your obligation to The People of the State of New York. You understand, of course, do you not, that The People of the State of New York is a phrase by which is referred to all of us, the Court, the District Attorney, the defendant, the lawyers, and themselves. That makes up The People of the State of New [fol. 2384] York. You understand that?

A. Yes.

Q. And that your obligation to The People of the State of New York in that sense is your obligation intelligently and courageously to discharge your duty as jurors under your oath, is that so?

A. Yes.

Q. And that under that obligation, first you must give to the defendants the benefit of the doctrine of their presumption of innocence. You understand that?

A. Yes.

Q. You are also under the obligation to The People of the State of New York to say "Not Guilty" if you entertain

a doubt as to the guilt of the defendants or any one of them; do you understand that?

Mr. Turkus: That is bad law.

Mr. Climenko: Reasonable doubt, is what I meant.

The Court: Sustained.

Q. You understand that you are also under a duty to The People of the State of New York, in the event that you entertain a reasonable doubt about the guilt of the defendants or any one of them, to return a verdict of Not Guilty?

A. Yes, sir.

Q. That is your duty to The People of the State of New York, and neither one of you feel any hesitation about your intellectual courage to perform that duty if that is the decision which you come to; is that right?

A. Yes.

Mr. Climenko: Thank you.

By Mr. Fischbein:

[fol. 2385] Q. Mr. Pagnod, you realize that lawyers ask a lot of questions simply to get your present state of mind?

A. Yes.

Q. You know we have no quarrel with your answers, no matter what your answers may be, so long as we can finally determine what your state of mind may be. Then we are satisfied. Is there anything in your state of mind at the present time——

A. No.

Q. —which would in any way preclude you from being fair to The People of the State of New York and to the defendants on trial?

A. No, sir.

Q. You have heard Mr. Sidney Rosenthal refer to the fact that he together with his associates—I am one of Mr. Rosenthal's associates—represent the defense of Louis Capone. Do you feel that you would be able, under the instructions of the law as his Honor will tell you the law is in this case, to take just that portion of the testimony adduced in this court room which applies to the defendant Louis Capone, and consider that evidence separately and distinctly as though you were trying three distinct cases here?

A. Yes.

Q. You feel you can do that?

A. Yes.

Q. Of course, we are not kidding ourselves. We realize that this case together with other cases have received a great deal of publicity and that is why there were headlines as you have spoken about in the papers. I believe you have spoken about it too, Mr. Phillips,—certain headlines that you have seen in the newspapers. Because of that publicity [fol. 2386] we also appreciate the fact that sometimes defendants are on the unpopular side of the lawsuit, and this, in the strict sense, is a lawsuit where these defendants are brought forward to meet certain charges. Now, coming back to Mr. Turkus's statement: He made a statement to the effect that you won't accept the opening statement of counsel in lieu of testimony or in lieu of evidence. Do you remember that statement that Mr. Turkus made?

A. Yes.

Q. The law provides that The People of the State of New York by their representative, the lawyer that they have retained to represent them, must, by law, make an opening statement. Now all we have before us is an indictment, a short-form indictment, charging each of the defendants with participation or with actual shooting and killing of one Rosen in 1936. We don't have—you can appreciate that—that is the law—his Honor will tell you that that is the law we don't have to say one word during the course of the entire trial, that the burden rests solely upon the prosecution and only with the prosecution to prove the guilt of the defendants beyond a reasonable doubt. If his Honor tells you that that is the law, whether you agree or disagree with the law, do you feel that you would accept it and apply it to the facts in this case?

A. Yes.

Q. In view of that, if that is the law—I am sure that I am not misquoting it, will you still feel, because of the [fol. 2387] statement made by Mr. Turkus on the voir dire, that do not accept the opening statement of counsel in lieu of testimony, do you feel that because of that statement you are expecting some sort of testimony coming from any one of these defendants or the defendant Louis Capone, whom I and my associates represent?

A. I don't get the question.

Q. I withdraw the question.

Mr. Turkus: That is a legal question.

Mr. Fischbein: I withdrawn the question. I will put it in this form:

Q. Because of the headlines that you have read and because of things that you may have heard or statements that you may have heard in the court-room, and also with respect to the statement that "Don't accept anything in lieu of testimony," do you feel at this time that you cannot serve as a fair juror unless the defendants or any one of them come forward with some sort of proof to satisfy you with respect to their innocence or with respect to the creation of a reasonable doubt?

Mr. Turkus: I object to it. That is a legal question.

The Court: Sustained.

Mr. Fischbein: Exception.

By the Court:

Q. Mr. Pagnod, if the Court should charge you that defendants don't have to prove anything, will you be able to lay aside anything that is in your head at the present time concerning the case and decide the case fairly upon the evi- [fol. 2388] dence?

A. Yes, sir.

Q. Without being influenced by anything that you have read or heard?

A. Yes, sir.

By Mr. Fischbein:

Q. Is your present state of mind such that you will not require any sort of proof coming from the defendants?

A. Yes.

Q. In other words, if the defendants do not offer any proof to rebut any testimony that is adduced by The People, do you feel that you can weigh the evidence solely upon what you have heard adduced on behalf of The People?

A. Yes, sir.

Q. You realize, do you not, Mr. Pagnod, that your commitment is to The People of the State of New York, that you give the defendants a fair and impartial trial?

A. Yes, sir.

Q. You realize that The People of the State of New York do not want a conviction no matter what the evidence is; you realize that?

Mr. Turkus: We do.

Mr. Fischbein: No matter what the evidence is. Except. I will supplement that with this statement:

Q. Except that if the proof is such that establishes in your mind and to your satisfaction beyond a reasonable doubt on the testimony and upon the evidence that you believe, that the defendants are guilty; in that case you will bring in a verdict of guilty, will you not?

A. Yes.

Q. But, on the other hand, you realize that The People of [fol. 2389] the State of New York demand from you that in the event you are not satisfied of the defendants' guilt beyond a reasonable doubt, they demand of you to acquit the defendants. Will you do that?

A. Yes, sir.

Q. You realize, do you not, and I speak to you, too, Mr. Phillips, that a reasonable doubt can arise from the character of the evidence or from the character of the person who supplies the testimony? You realize that? Or the lack of evidence sometimes creates a reasonable doubt. You appreciate that, can you not?

A. Yes.

Q. So that in the event we have certain individuals taking the stand who are produced here by the prosecution, will you say, after listening to them and after their cross-examination, after their direct examination, you say to yourself, "Well, I don't believe that man under oath," after hearing everything, you realize that that could create a reasonable doubt?

A. Yes.

Q. You realize——

Mr. Turkus: That is a bad instruction of law, Judge.

The Court: Sustained

Mr. Fischbein: Exception.

Mr. Turkus: It will give the juror an improper impression of the law, possibly.

Q. You did say you will follow this instruction: That a reasonable doubt could exist from the lack of evidence or from the character of the person who gives the evidence? [fol. 2390] A. Yes.

Q. You realize that suspicious circumstances is not evidence?

A. Yes.

Q. Or do you realize loud talk in a court-room is not evidence?

A. Yes.

Q. It is just that portion of a person's testimony which you honestly and conscientiously can say, "I believe." That is the evidence in the case.

Mr. Turkus: I object to it. There is something there about loud talk that was ambiguous.

The Court: Sustained.

Q. The loud talk I am referring to—if you should find that either side, whether it is for the prosecution or the defense, if you should find either side, one on one side appealing to prejudice and one on the other side appealing to sympathy, you will disregard that, will you not?

A. Yes, sir.

Q. You won't let prejudice enter into your verdict?

A. No, sir.

Q. Or into your deliberations?

A. No.

Q. You realize that these defendants are entitled to twelve fair, impartial verdicts, based upon the evidence in this case and nothing else?

Mr. Turkus: That is bad law. There are not twelve verdicts in the case.

Mr. Fischbein: Twelve individual verdicts, I said.

[fol. 2391] Mr. Turkus: That is not the law.

The Court: A verdict based upon the decision of twelve individual minds.

Mr. Fischbein: That is right.

Q. Collectively it would make up your verdict?

A. Yes.

Q. We are entitled to twelve minds meeting upon common ground and coming to a conclusion based upon the evidence in this case. And the defendants are entitled to that individual opinion and verdict based upon the evidence.

A. Yes.

Q. Assuming, Mr. Juror, that other jurors voted contrary to the manner in which you voted, you won't change your ballot solely because others vote contrary to the manner in which you vote and because of force of numbers, because they outnumber you? That won't be a reason that you would give for changing your ballot?

A. No, sir.

Q. You would insist upon being persuaded by fair and reasonable argument?

A. Yes, sir.

Q. Before you change your opinion?

A. Yes, sir.

Q. Before you change your ballot or vote?

A. Yes, sir.

Q. Was there any impression created in your mind as the result of seeing police officers outside this court room?

A. No, sir.

Q. You feel that Mr. Capone could rely upon you and upon your word that if you are selected as a juror in this case you would consider the evidence in this case carefully [fol. 2392] and that you would render a verdict solely upon the evidence in this case?

A. Yes, sir.

Q. And that if you did not believe an accomplice who says he is an accomplice, a person who says, "I killed Joseph Rosen; I killed him on the 13th day of September, 1936," the fact that he says that he killed that person and then he goes on to recite a story that So-and-so and So-and-so participated in the murder with him, would you, solely because he implicates himself in that murder, accept that testimony as true?

A. No, sir.

Q. Merely because the prosecution offers a witness to you as a witness and because that witness is offered to you by the prosecution, would you start out with the assumption that that witness must be telling the truth?

A. No, sir.

Q. You would apply all the tests that you have heard recited here before accepting the testimony of anybody?

A. Yes, sir.

Q. You would find out whether he is interested?

A. Yes.

Q. Whether he has a motive for giving his testimony in this court room?

A. Yes.

Q. You would take into consideration the opportunities that witnesses had to speak together with respect to the facts in this case?

A. Yes.

Mr. Clinenko: Your Honor, there are two additional questions which I would like to put, if I may.

By Mr. Climenko:

[fol. 2393] Q. Gentlemen, assuming that it should be testified to as a fact during the course of this trial that the defendant Louis Buchalter is presently under a sentence by reason of convictions for offenses having nothing to do with this case, for a period of imprisonment that runs somewhere from forty to seventy years, is that a fact which would prejudice you against Mr. Buchalter in the trial of this action?

Mr. Turkus: That is not properly worded. It has a right to prejudice a juror under certain circumstances. The question does not take them into account.

The Court: Sustained.

Q. Assuming that you should learn in the course of this trial that the defendant Louis Buchalter is already, and in connection with other offenses independent of this case and having nothing to do with it, under a sentence of imprison-[fol. 2394] ment for a period of forty to seventy years, would that circumstance prejudice you against that defendant in the course of your deliberation?

Mr. Turkus: The question is still bad as to law.

The Court: Yes. Supposing the Court should charge you that upon the evidence that was adduced in the course of the trial there was nothing that justifies an inference of guilt or a prejudice because of the present conviction and sentence of such defendant and simply disregard it, would you follow the instruction of the Court?

Talesman Pagnod: Yes, sir.

The Court: Will you, Mr. Phillips?

Talesman Phillips: Yes, sir.

Q. Then those prior convictions would not affect your thinking about this case at all?

A. No, sir.

Mr. Turkus: I object to it and I ask it be stricken and the jurors told to disregard it.

The Court: Yes. There might be something come up which would make it relevant. The Court would have to charge on that at the proper time.

Mr. Climenko: Then I would like to rephrase the question, if your Honor pleases.

The Court: I don't think I would pursue it, if I were you.

[fol. 2395] Mr. Climenko: I adopt your Honor's suggestion.

The Court: It is very difficult to express without getting confused and confusing the jury.

Mr. Climenko: Very well, your Honor, I want to drop the subject then and ask about the other questions that I said I had in mind.

Q. Gentlemen, it is conceivable that in the course of the trial of this case you as members of the jury may in a sense be incarcerated for the duration of the case. Aside from the fact that that may prove to be a circumstance of come inconvenience, would it be a circumstance that you would permit in any sense to become the source of prejudice against the defendants?

Mr. Turkus: There is an objection to the use of the word "incarcerated." This jury will not be incarcerated.

Mr. Climenko: If your Honor pleases, I think everybody understood the sense in which I used it.

Mr. Turkus: I cannot help that. It is not said right.

The Court: I did not hear the question.

Mr. Climenko: May I withdraw the question?

The Court: Yes.

Q. Gentlemen, assume during the course of the trial of this case and under the Court's administration of the court, under the Judge's administration of the court, you were kept together as a group while the case is in progress until such time as you reach a verdict; would you permit that [fol. 2396] circumstance, if it should develop into becoming a circumstance, to become a source of any prejudice against the defendants or the source of any ill will or any ill feeling against the defendant or any one of them?

A. No. No.

The Court: Don't you think if the jury dislike the Court's ruling, it would take it out on the Judge, rather than on the defendants?

Mr. Climenko: I don't think anybody would do that.

The Court: It impresses me as being a somewhat superfluous question.

Mr. Climenko: Well, it may be, but it was one that presented itself to my mind.

Q. And then the last question that I wanted to address to both of you gentlemen, are you acquainted to any extent

of intimate friendship with any member of the Police Department of the City of New York?

A. (By No. 11) I have a cousin in The Bronx.

Q. Is he a patrolman?

A. Yes.

Q. Anyone else?

A. (By Mr. Phillips) Relationship, did you say?

Q. Do you entertain a feeling of intimate friendship?

A. I play poker with one now and then.

Q. Have you ever talked about the case with your police friend, this case?

A. Never.

Q. The fact that each of you, in turn, has as a friend a [fol. 2397] member of the staff, would that in any way color your thinking about the case?

A. No. No.

Q. Or instil in your mind, a prejudice against somebody or sympathy for somebody or feeling of partisanship with anybody, simply because police officers may testify?

A. No.

Q. It is a circumstance, you realize, which is entirely foreign to any issue in this case and that you must relegate outside of your mind; is that right?

A. Yes.

Mr. Barshay: No further questions.

Mr. Turkus: Mr. Pagnod is satisfactory to The People of the State of New York. Mr. Phillips is a peremptory.

Mr. Fischbein: Peremptory by the defense.

Mr. Barshay: All defendants join.

Mr. Cuff: All counsel join.

May Counsel address your Honor at the bench on a matter that we think may facilitate selection?

The Court: Is it necessary to do that now, or can it wait?

Mr. Cuff: It can wait, but I thought it better be done at this time.

The Court: Concerning one juror?

Mr. Cuff: Yes.

The Court: Let it wait for the present.

(The two following talesmen were called and took their places in the jury box: Harry Rosenblatt, of 36 Kenilworth [fol. 2398] Place, and Julius Baker, of 2110 Westbury Court.)

By Mr. Turkus:

Q. Mr. Rosenblatt, is Kenilworth Place Flatbush?
A. Yes.
Q. Have you lived in Flatbush for a number of years?
A. About twenty years.
Q. You are listed here as a special representative, without any further indication of what line of work you are in.
A. Standard Brands, food products.
Q. Who is the head of that here in Brooklyn? Have they a Brooklyn branch?
A. They have a Brooklyn agency, yes.

The Court: Sales?
Mr. Rosenblatt: Yes, sir.

Q. Who is the head of the company in the Brooklyn office?
A. The Brooklyn manager is Ranney.

By the Court:

Q. Is not Ed Schmidt the chief salesman?
A. Mr. T. L. Smith is the president.
Q. You are between Farragut and Glenwood?
A. Yes, sir.
Q. Do you belong to the South Midwood Residents Association?
A. No, sir.
Q. Any local association?
A. None at all.

[fol. 2390] By Mr. Turkus:

Q. (To Mr. Rosenblatt) Prior to your connection with Standard Brands, what line of business were you in?
A. Dress line.
Q. Manufacturer of dresses?
A. Selling for a manufacturer.
Q. You had an office in the garment district?
A. Yes, sir.
Q. Is the name of Lepke a familiar name to you?
A. It is.
Q. Gurrah?
A. Yes.
Q. Hyman Curly Holtz?
A. No.

Q. How many years were you in the dress business?

A. About six.

Q. And I take it then that would embrace up to about 1932?

A. Yes.

Q. You were there then when there was a general stoppage on truck deliveries?

A. I don't think so.

Q. Just got out prior to that?

A. I was out-of-town salesman. I do not know much that was going on in the city.

Q. You were six years in the garment district, but as the result of being there for six years, have you an impression about the name of Lepke or Gurrah?

A. Not from that industry.

Q. Have you some impression from some other?

A. Presently I have an impression.

Q. Does that impression go as far as an opinion?

A. No. I met the defendant about eight years ago.

Q. Which one?

A. Mr. Buchalter.

[fol. 2400] Q. In connection with business?

A. No, just casually; never saw him since.

Q. In the garment district?

A. No. My end of the business is catering to bakers.

Q. Then you know about flour truckmen?

A. Yes.

Q. The name of Max Silverman is familiar?

A. Yes.

Q. Wolfie Goldis?

A. Yes.

Q. And your livelihood is earned now in connection with Standard Brands?

A. Yes.

Q. That is the way you earn your livelihood? Without going into an extended voir dire, do you feel it would be more fitting that you be not a juror in the case?

Mr. Climenko: I object to the form of the question.

Mr. Turkus: The juror has pointed out that he met the defendant Lepke on an occasion; that through his present association with his employment he deals with bakers; that he knows the name of Wolfie Goldis, Max Silverman, the flour trucking; that he has been in the——

The Court: What was the question?

Mr. Turkus: The question is whether he feels it is not fitting for him to be a juror in the case.

The Court: Are you prejudiced?

The Talesman: No, sir.

Q. What firm did you represent, Mr. Rosenblatt?

A. In the dress business?

[fol. 2401] Q. Yes.

A. Kaylor, Jr. was the last.

Q. The circumstances that you met the man known as Lepke, were those social?

Mr. Climenko: If your Honor pleases, I object to that question upon the ground that the talesman, in referring to the incident, said that his name was Mr. Buchalter, and I know of no reason for the prosecutor at this point and in reference to that incident, to adopt that alleged alias.

The Court: It has already come in by common usage. Overruled.

Mr. Climenko: I except to the ruling, to your Honor's observation about common usage.

The Court: I have heard counsel for defense use it.

Mr. Climenko: I have not, your Honor.

The Court: I have.

Mr. Climenko: I except to your Honor's ruling, and I submit to your Honor that no counsel for defendants have used that name.

The Court: Take your exception.

Mr. Climenko: Exception.

Q. I take it, Mr. Rosenblatt, in the discussion you lost the question.

(Pending question read.)

A. Yes, in some extent. I happened to be at a place with some friends of mine. One person introduced me.

Q. Where was this place that you met? Was it a home?

A. No.

[fol. 2402] Q. Was it a social function?

A. No, a night club.

Q. Was this man in company with others when you met him, the man you call Buchalter?

A. He did not make that much impression.

By the Court:

Q. Not asking about impression. You met him in a night club. Did you drink with him?

A. No, sir.

Q. Did you eat with him?

A. No, sir.

Q. Members of the same party?

A. No, sir.

Q. To what extent did the meeting go?

A. Just was introduced to him and that was all.

Q. Just an introduction?

A. That was all.

Q. Six years ago?

A. No, about eight years ago.

Q. And for eight years you remember a simple introduction?

A. It is my business, sir, to remember those things.

Q. Everybody you meet?

A. Most everybody.

Q. Wasn't there something more than a single introduction?

A. No, sir.

The Court: Is there a challenge here?

Mr. Turkus: Implied bias.

The Court: Try it.

(HARRY ROSENBLATT, of 36 Kenilworth Place, was duly sworn.)

By Mr. Turkus:

Q. Mr. Rosenblatt, when you were seated in Chair 11, you very frankly told the prosecutor that you had met the de- [fol. 2403] fendant Buchalter in a night club; is that correct?

A. Yes.

Q. And that you were introduced to him there?

A. Yes.

Q. That was at a time when you were associated with merchants who dealt with flour, isn't that right?

A. That is true.

Q. Were you introduced to him by people in the flour trucking business?

A. No, sir.

Q. People in your line of business?
A. In the baking business.
Q. You are familiar with the names of Wolfie Goldis——
A. I am.
Q. —Max Silverman?
A. I am.
Q. And that familiarity comes through baking trucking unions, that is, flour truckmen unions?
A. Yes.
Q. You have an impression about the name of Lepke?

Mr. Rosenthal: Object to it. He said he had none.
The Court: Overruled.
Mr. Rosenthal: Exception.

Q. Didn't you tell me you had an impression about the name of Lepke?
A. No.
Q. Do you associate the name of Lepke with Buchalter?
A. Yes.
Q. You are familiar with the name Gurrah?
A. Yes.
Q. You earn your livelihood by dealing with people who buy flour?
A. I do.
Q. That is one of your commodities?
A. I do.

Mr. Turkus: Challenge for implied bias.
[fol. 2404] The Court: Any questions?
Mr. Rosenthal: No questions.
The Court: Sustained.
Mr. Cuff: Exception.
Mr. Climenko: Exception, if your Honor pleases.

By Mr. Turkus:

Q. Mr. Baker, are you related to a Mr. Baker who is connected with the Brooklyn Bar Association?
A. No.
Q. 2110 Westbury Court, is that Flatbush?
A. Right.
Q. You are listed as being in the millinery business.
A. Yes.
Q. Has that been your occupational endeavor all your adult life, or have you been in other business?
A. The last thirteen years.

Q. Where do you maintain your place of business?

A. Flatbush Avenue.

Q. Is your place of business next to Mr. Beldor, the jeweler?

A. It is within that vicinity.

Q. You are on the block between Church Avenue and Albemarle Road?

A. Parkside and Westbury Court.

Q. Is that a retail establishment where you sell ladies' hats?

A. That is right.

Q. Are you in business for yourself?

A. Yes.

Q. What business were you in before that?

A. An accountant.

Q. Did you have any connections of any kind, nature, or [fol. 2405] description, or do you have any now, with anybody in the garment or clothing districts in Manhattan?

A. No, sir.

Q. Or with clothing truckers?

A. No, sir.

Q. When you were an accountant did you have an office in Manhattan?

A. No, I was a free lance.

Q. What was the name of the firm that employed you?

A. Touche Niven & Company.

Q. Where was their office?

A. 42 Broadway.

Q. Do you know whether they had any accounts in the garment district in Manhattan, clothing trucking?

A. No, sir.

By the Court:

Q. What was the name of the concern?

A. Touche Niven, an English concern.

By Mr. Turkus:

Q. And other than the time that you lived in the Flatbush section of Brooklyn where did you live?

A. Previous to that I lived on Schenectady Avenue.

Q. That is in the Brownsville-East New York section, isn't it?

A. Right off East New York Avenue.

Q. How many years did you live there?
A. Two years.
Q. Do you have any friends who live in that Brownsville-East New York area now?
A. No, sir.
Q. Do you maintain any contacts there?
A. No, sir.
Q. Are all your accounts local accounts now of the Flatbush Avenue business?
A. They come from all over.

[fol. 2406] By the Court:

Q. Where is your millinery business?
A. On Flatbush Avenue between Parkside and Westbury Court. It is directly opposite Winthrop Street.

By Mr. Turkus:

Q. While you lived in the Brownsville-East New York area of Brooklyn, did you become familiar with any of the names that were here mentioned?
A. No, sir.
Q. Have you ever heard the name of Lepke?
A. I heard it.
Q. The name of Gurrah?
A. I read it.
Q. The name of Martin (Buggsy) Goldstein?
A. I read that.
Q. Pittsburgh Phil Strauss?
A. I read that.
Q. What papers do you customarily read?
A. New York *Sun*.
Q. Any morning paper?
A. Not particularly. Sometimes the *Times*.

By the Court:

Q. What is the name of your Millinery business?
A. May Millinery Shop.
Q. Is that near the Patio Theatre?
A. About two blocks.

By Mr. Turkus:

Q. Did you ever hear any of those names discussed by anyone?
A. No, sir.

Q. The reading, how recent was that?

A. What is that?

Q. How recent was it that you read of these names?

A. I probably read it a week ago, that there was a trial on, had been a trial.

[fol. 2407] Q. Had you done any reading prior to that?

A. Yes.

Q. Was that in connection with Judge O'Dwyer's investigations in Brooklyn?

A. I have read about his investigation.

Q. And in that reading matter, did you read of any of the names of these defendants?

A. Yes.

Q. As the result of anything that you have read, have you any impression in your mind?

A. No, sir.

Q. And so, as you sit in the jury box, your mind is free from impression regarding these defendants?

A. Yes, sir.

Q. Since you received your jury notice, did anybody speak to you about the merits of the case?

A. No, sir.

Q. Have you any scruple, conscientious or otherwise, about capital punishment?

A. None.

Q. Have you served as a juror heretofore in any criminal case?

A. Yes, sir.

Q. In this court?

A. Yes.

Q. How long ago was that?

A. I think I served about two years ago before Judge Fitzgerald.

Q. Were any of the lawyers for the defendants in the court-room now in that case?

A. I think Mr. Fischbein was one of the attorneys.

Q. Do you remember who the Assistant District Attorney was?

A. McGuire? McCarthy?

Q. Do you know whether or not it was an indictment that was presented by Judge O'Dwyer?

A. I do not know.

[fol. 2408] Q. Could the lawyer have been Mr. McGough?

A. That is it.

Q. Did that case go to a conclusion?

A. It went to the jury.

Q. Is that the only experience you have had as a juror?

A. No, sir.

Q. Have you had other experience in a criminal case?

A. Yes.

Q. In the County Court?

A. County Court.

Q. How long ago was that?

A. I should judge about four or five years ago.

Q. Do you remember the name of the judge?

A. Judge Nova.

Q. And were any of the lawyers in this case associated with the defense of the case in which you sat as a juror?

A. I don't think so.

Q. There are nine lawyers here representing these three defendants. Representing the defendant Weiss we have a former judge of the Court of General Sessions in Manhattan, Judge Talley, and a former Assistant District Attorney of Brooklyn, James I. Cuff, and former Assistant United States Attorney. Do you know any of those three lawyers?

A. No, sir.

Q. Anyone connected in their law offices?

A. No, sir.

Q. With respect to the defendant Buchalter, we have here a former Assistant District Attorney from Brooklyn, Mr. Barshay. Do you know him?

A. I only know him from being called on a panel about four months ago.

[fol. 2409] Q. Was that a case that was being prosecuted by Mr. Rooney?

A. I do not know who was prosecuting it, but Mr. Fischbein and Mr. Barshay were defending three prisoners.

Q. In addition to Mr. Barshay, we have a former Assistant United States Attorney, Wegman, representing the defendant Buchalter. Do you know him?

A. No, sir.

Q. Or his partner, Mr. Jesse Climenko?

A. No, sir.

Q. With respect to Mr. Capone, we have Mr. Rosenthal, Mr. Fischbein, and Mr. Rosenberg as his counsel. Do you know them?

A. No, sir.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. No, sir.

Q. As you are sitting in the jury box, is your mind free and open to receive evidence in the case?

A. Yes, sir

Q. Have you heard the other discussions that we have had with prospective jurors in regard to the testimony which emanates from an accomplice?

A. I did.

Q. Do you have any fault to find with the prosecutor who breaks a case from the inside, solves a murder by the use of accomplice testimony?

Mr. Talley: Object to the question.

The Court: Overruled.

Mr. Talley: Exception.

Q. Do you find any fault with the employment or the use of accomplice testimony in a prosecution?

A. No, sir.

[fol. 2410] Q. I take it, Mr. Baker, you understand as I go along that anything that I say by way of questioning on the voir dire is not to be accepted as proof in the case in lieu of testimony; do you understand that? That goes too with all the speculations that defense counsel may imply in connection with what the proof will be in this case. Do you understand that?

A. Yes.

Q. Do you understand an accomplice is one who participated in the commission of the crime?

A. Yes.

Q. Will you follow the Judge's instruction of law with regard to the tests that you apply to accomplice testimony?

A. Yes, sir.

Q. In any of the cases in which you sat as a juror before was there accomplice testimony?

A. No, sir.

Q. Would you have any difficulty in following the instruction of law that there can be no conviction upon the unsupported testimony of an accomplice?

A. Yes.

Q. I think you meant by that no. Would you have any difficulty in following the Judge's instruction of law that

there can be no verdict of guilt predicated upon the unsupported testimony of an accomplice? You will follow that?

A. Yes.

Q. Should the Judge tell you in words or substance that when you come to corroboration the jury cannot expect the prosecutor to establish, by independent proof, corroboration of every detail of the accomplice's testimony, will you [fol. 2411] follow that?

A. Yes.

Q. And if the Judge tells you that independent evidence, if believed by the jury, may be deemed to be sufficient support or sufficient corroboration of an accomplice if it tends to connect the defendants with the commission of the crime, will you accept that definition of law?

A. Yes.

Q. Will you endeavor to apply it to the facts in this case?

A. Yes.

Q. Since an accomplice is one who himself was engaged in the commission of the crime charged in the indictment, there is something right there that is against him, a black mark that can be used against him in weighing his believability. Do you appreciate that?

A. Yes.

Q. There may be other factors that may be brought out as tests to find out is the accomplice telling the truth. Will you bear in mind that no matter what tests you apply to the accomplice, whether it be if he has a motive or whether it be if he has a criminal background, or no matter what the test is that you apply to him, the common sense application of the test rule is, Does this accomplice tell the truth about them and their participation as a group in the commission of this murder? Do you follow that?

A. Yes.

Q. And if accepted as a juror, will you apply your talents and find that out?

A. Yes, sir.

Q. Now, as I have told you, since there can be no convic- [fol. 2412] tion upon the unsupported testimony of an accomplice, even if you believe the accomplice you have got to look for more, that there be that evidence which tends to connect the defendants with the commission of the crime: do you understand me as we go along?

A. Yes.

Q. It may be after you hear an accomplice testify you may not like him; as a matter of fact, you may dislike him—I do not know what your feeling may be about the individual—but will you bear in mind that the question is not whether we like or dislike the individual who comes here, the thing is, does he speak the truth about their guilty participation as a combination in the killing of the victim in the indictment. Do you follow that?

A. Yes, sir.

Q. And will that be the way you will devote your mental faculties in this case?

A. Yes.

Q. For example, you may be satisfied as to the guilt of these defendants beyond a reasonable doubt, the three of them as a combination, and their participation in this crime, you may be satisfied of that beyond a reasonable doubt, yet you may not like the accomplice, you may be angry with him, I may not know what your feeling is about it, but do you understand if you find these men guilty of murder in the first degree because of their combination participation in the crime, and you are satisfied of that beyond a reasonable doubt, whether you like or dislike the accomplice, whether [fol. 2413] he gets the kind of punishment that you think he ought to get or he does not, the test is, Are you satisfied beyond a reasonable doubt as to their guilt? Do you follow me on that?

A. Yes.

Q. In other words, you do not release three men whom you find guilty because you do not like the accomplice or you cannot punish him.

Mr. Barshay: I object to that question, especially that part of it which says, "because you cannot punish an accomplice."

The Court: Sustained.

Q. At any rate, if you find three guilty men at the bar of justice, if you find that beyond a reasonable doubt, you don't release them or find them not guilty because you do not like the accomplice; do you understand that?

A. Yes.

Q. Do you have any scruple, conscientious or otherwise, about capital punishment?

A. No.

Q. It has been brought out by one of the lawyers for the defendant Buchalter that he has been convicted of other crimes, serving a very long jail sentence, a number of years he has mentioned, I believe forty to seventy years, some such figure. Would you relax your duty as a juror to The People of the State of New York in this case because of conviction for other offenses and present incarceration, as penalty for those offenses?

A. No.

Q. Or would you deviate from a proper result in the case?

A. No.

[fol. 2414] Q. It has been brought out by one of the lawyers—it applies to all the defendants—it applies with equal force to the prosecution—that there is an indictment here setting forth a specific charge, that that is the charge the defendants meet, and, by the same token, that is the burden of the District Attorney, to establish guilt on that charge and that charge alone. Do you follow that?

A. Yes, sir.

Q. The District Attorney cannot go beyond that, cannot establish things not in the indictment, nor can he establish less than the indictment. His obligation is to establish the charge in the specific indictment beyond a reasonable doubt. Do you follow me on that?

A. Yes.

Q. It has been pointed out by another one of the lawyers for the defendant Buchalter that character does not become an issue in the case until and unless the defendant puts character in issue. That is the legal way of saying it. There is nothing complicated about it. The District Attorney cannot go into any defendant's character unless the defendant himself puts witnesses on the stand who purport to say he has got a good character, and if they do that, then the District Attorney can bring his witnesses about that defendant's character; otherwise the District Attorney can offer no evidence as to the bad character of a defendant. Do you understand that?

A. Yes.

Q. If accepted as a juror in this case, will you reason [fol. 2415] and use common sense?

A. Yes, sir.

Q. We are here now to decide under the laws of evidence as given to you by the Judge, has there been established in this court of justice the guilt of these defendants beyond

a reasonable doubt on this murder charge, and if accepted will you devote every one of your mental faculties to find out have they been established guilty beyond a reasonable doubt or are they innocent?

A. Yes.

Q. Nobody expects any juror to be a rubber stamp or to substitute opinions of somebody else for his own. You have got a mind, and I take it if accepted as a juror you will use it; is that correct?

A. Yes.

Q. By the same token, we do not want to get anybody on the jury who will obstinately or arbitrarily prevent a verdict from coming about because he is opinionated. I do not mean to be offensive or embarrassing to anybody when I say it, but I want to know will you sit down and reason the thing out with common sense and understanding with the other jurors in the case?

A. Yes.

Q. And if I establish, that is, The People of the State of New York, either through Judge O'Dwyer or any Assistant he has got in the court-room, satisfies you from the evidence in the case that these three men are three of the killers of Rosen, and you are satisfied of that beyond a reasonable doubt, will you say it in your verdict?

A. Yes, sir.

[fol. 2416] Q. Is there anything in your past life or in your present business connections, any way in which you earn your livelihood now or have in the past, which would make you hesitant in finding such a verdict?

A. No, sir.

Q. Or afraid to do so?

A. No, sir.

By Mr. Barshay:

Q. Mr. Baker, from anything you read, from anything you heard, from anything you have seen, is there somewhere in the back of your head an impression adverse to any of the defendants?

A. No.

Q. Do they start off at scratch with you?

A. Yes.

Q. Are you actively engaged in any political organization?

A. Last Sunday night, Parkside Democratic Club, I became a member—I met——

Q. Before that you—(inaudible).

Q. Did you talk to him in any wise?

A. No, sir.

Mr. Turkus: Please the Court, to save time I am going to exercise a peremptory challenge.

(The following talesmen were called and took their places in the jury box: Roland M. Robert, of 106 Columbia Heights; Harry Marcus of 23 Brighton 8th Place.)

By Mr. Turkus:

Q. Mr. Robert, you live at 106 Columbia Heights?

A. At present 97 Columbia Heights.

Q. That is the downtown Heights section of Brooklyn. [fol. 2417] Have you lived there for a number of years?

A. In the section, yes, about six years.

Q. What is your business?

A. Life insurance.

Q. Are you in business for yourself, Mr. Robert?

A. No, I am with the New York Life Insurance Company.

Q. Is your work inside, or is it outside work?

A. Inside.

Q. And how many years have you been employed by the insurance company?

A. Eleven years.

By the Court:

Q. Main office?

A. Yes.

By Mr. Turkus:

Q. Is that at 346 Broadway, Manhattan?

A. That is at 51 Madison Avenue.

Q. I think I can go through some of these questions with rapidity with you, Mr. Robert. In your past business experience or presently do you have any contact with anyone engaged in the manufacture of clothing, be it men's or women's?

A. No, sir.

Q. Or with the trucking of clothing?

A. No, sir.

Q. Are you familiar with the names of any union officials in the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Do you know any officials of any clothing trucking union?

A. No, sir.

Q. Or any teamsters' union?

A. No.

Q. Do you have any contacts by way of business or otherwise in the Brownsville-East New York area of Brooklyn?

A. No, sir.

[fol. 2418] By the Court:

Q. How old a man are you, Mr. Robert?

A. Thirty-four.

Q. And what is the nature of the work you do with the New York Life?

A. I am in the disbility benefits division, handling claims for disability benefits.

Q. You make the settlements?

A. We handle all the correspondence and make the investigations, and the medical examinations.

Q. Do you yourself do the investigating, or do you just do the clerical work?

A. No, sir, clerical work.

Q. Before you went with the New York Life where were you employed?

A. I was a student before that.

Q. What line?

A. Student at college.

Q. What line of studying?

A. A.B. degree.

Q. I thought you said you were thirty-four years old. How old did you say you were?

A. Thirty-four.

Q. Then you were studying for the A.B. degree up to the age of twenty-eight?

A. No, until twenty-two.

Q. In those six intervening years were you occupied?

A. I have been with the New York Life for eleven years.

Q. Then from the time you were twenty-five you have been with the New York Life?

A. No, since I was twenty-three.

Q. What college did you go to?
A. Amherst College.
Q. Are you a married man or single?
A. Single.
Q. Live with your family or alone?
[fol. 2419] A. Alone, with a room mate.
Q. Are you a native of Brooklyn?
A. No, sir.
Q. Where do you come from?
A. Massachusetts.
Q. Whereabouts?
A. Holyoke.
Q. And how long have you lived in Brooklyn?
A. Six years.
Q. And always on Columbia Heights?
A. Yes.
Q. Being a single man living on Columbia Heights, I assume you belong to some association where you go and meet people and become occupied off hours?
A. No, sir, I don't.
Q. No men's clubs?
A. No, sir.
Q. Not even the Presbyterian Church down on the Heights?
A. No, sir.
Q. You just sit in your room and go to movies?
A. A little more than that.

By Mr. Turkus:

Q. Is there anything about the names of any of these unions that I have spoken of with the other prospective jurors, anything with clothing or garments or Brownsville-East New York that I should know?
A. No, sir.
Q. I take it, sir, that you have no scruple, conscientious or otherwise, about capital punishment?
A. No, sir.
Q. It has been brought out by one of the lawyers that Buchalter has been convicted of other crimes and he has got a long jail term to serve because of those offenses that he has been convicted for. What I want to know is this: [fol. 2420] Would you be inclined to relax any idea that you have about capital punishment or relax your duty as a juror in this case because of his present incarceration?

A. No, sir.

Q. Would you permit that present incarceration to cause you to deviate from a proper result?

A. No, sir.

Q. Are you in sympathy with law enforcement?

A. Yes, sir.

By the Court:

Q. Have you pursued any line of study since leaving college?

A. Only in connection with life insurance.

Q. Have you taken any course in the N. Y. U. or elsewhere?

A. I have taken course with the Life Management Association.

Mr. Turkus: Your Honor, it may be necessary to take a recess at this time.

Mr. Rosenthal: May I address the Court?

Mr. Turkus: It is important that it be done.

The Court: We will have to take a recess for fifteen min- [fol. 2421] utes. First the defendants are remanded. The jury may retire to their room. Kindly do not discuss the case, gentlemen. All other talesmen may go until a quarter of four.

(A fifteen-minute recess was thereupon taken.)

(All talesmen were excluded from the court-room.)

Harold Edward Spille, attached to the Long Island College Hospital, Brooklyn, New York, being duly sworn, testified as follows:

By the Court:

Q. Are you the ambulance surgeon for the Long Island College Hospital?

A. Yes, sir.

Q. And pursuant to a call sent about a half an hour ago, did you come with the ambulance and did you in this building, in the medical room, examine the defendant Capone?

A. Yes, sir.

Q. Did you find him, upon such examination, to be normal or abnormal?

A. Normal.

Q. Did you find anything the matter with him?

A. No, sir. He had a mild hypertension, which would be not unusual for his age.

Q. That is a chronic condition?

A. Apparently, yes, sir.

Q. By "hypertension," you mean a mild arteriosclerosis?

A. Not necessarily.

Q. What do you mean?

A. Just that his systolic blood pressure seemed a little elevated.

[fol. 2422] Q. And is that reasonable for a person of his age?

A. Perfectly reasonable.

Q. Did you find him to be suffering from an angina attack?

A. Not at the time I saw him.

Q. Did you find any evidence observable that he had recently or immediately before you arrived been suffering from one?

A. There was no way that I could tell whether he had had one now or three days before.

Q. A few minutes before?

A. There was no evidence.

The Court: The Court will read from a communication from the Department of Correction dated October 12, 1941, re Louis Capone, addressed to the judge of this court, the following:

"Kindly be advised that we are still carrying out the same routine treatment in a modified form. Since the public press has seen fit to criticize the Tombs medical staff unkindly, unmercifully, and unjustly, the Acting Commissioner of Correction, Honorable Peter F. Amaroso, M. D., has ordered that the inmate be examined by a Tombs physician each morning before leaving for court, and that if the inmate needs medication, the physician is to administer it in person and said medication is to be swallowed in the presence of the physician; that the inmate is to receive no medication to take with him, and that we will resume the respons-
[fol. 2423] bility upon his return from court. This order went into effect October 10, 1941. Therefore, should any

pills of whatever kind he found on the person of Louis Capone while in court, these pills were not given by the Tombs physician, but were obtained through other channels.

"Respectfully yours, "Andrew J. Torre, M. D., "Acting Chief, Medical Staff."

This is on the City Prison, Manhattan, letterhead of the Department of Correction.

Following receipt of this communication the Court phoned Dr. Torre to come over here, and during yesterday morning's session Dr. Torre sat on the bench and conference was held between him and me. I told him that I wanted him to request the Commissioner to modify the order so as to permit the defendant to be supplied each day, upon leaving for court, with sufficient medication for that day, to cover the contingency of a possible angina attack, that I regarded the order as too stringent, as it would leave the defendant, in event of an angina attack, without any discretionary medication.

Today, when the defendant appeared, he gave outward appearance of being ill and was led from the court-room. Dr. Nash's office was notified, but he was out, and immediately an ambulance was summoned from the Long Island [fol. 2424] College Hospital. The doctor on the stand made the examination.

The report from Dr. Nash concerning the quantity of drug found on the person of Capone when he was examined several days ago contains the following—this was October 10th, last Friday——

"He produced two cardboard boxes used in dispensing medicines, one labeled 'Nitroglycerin' and one without identification label, which Capone told me were one-half grain tablets of luminal. Each carton contained about twenty tablets. He, Capone, informed me that these tablets were given to him by Dr. Torre, Prison Physician, at the jail. In a phone conversation on Saturday, October 11, 1941, Dr. Torre informed me that he prescribed only the daily requirement necessary, which, in his opinion, was one or two of each tablet daily, that he must have accumulated the daily allowance if those in his possession were what has been prescribed at the Tombs. This leaves the inference open as to whether the excess quantity was obtained from outside source.

I think it is already on the record that during night session of last week when, following a request by defendants' counsel for an adjournment, this defendant requested water for the purpose of taking medicine, he was seen to take two tablets of the luminal. Half an hour later he [fol. 2425] developed symptoms which the Court, of course, was not competent to diagnose. Upon going up to the cell, to the pen, he took a nitroglycerin tablet. He apparently did not require or receive, nor did he request, any medical treatment on that occasion, and was transported back to the Tombs without any trouble at all, and apparently he had no trouble in walking upstairs to the mezzanine and walking all the way across the building to the pen that night, which would seem to the lay mind to be inconsistent with an angina attack.

The information orally given by Dr. Nash is that these luminal tablets are double-dose tablets, that is, the ordinary dose for the individual is one-quarter of a grain; enough for two tablets would be a quadruple dose and would account for that condition.

The Court is now writing a letter to Dr. Torre, so as to make a record of it, requesting that the oral instruction given to Dr. Torre yesterday when he was in court shall be followed so that the defendant Capone will be provided hereafter, if the Department permits it, with a discretionary dose of his required medication, to be taken to meet the needs of any real or imagined angina attack.

Mr. Rosenthal: I would like the privilege of asking the doctor a question, with your Honor's permission.

[fol. 2426] The Court: You have the permission.

By Mr. Rosenthal:

Q. Is it true, Doctor, that with an angina attack, that if you come a number of minutes later it would be impossible for you to determine it?

A. It depends on the length of time that you arrive.

Q. And is it true also that an angina attack can be fatal?

A. It is a hard question to answer.

Q. Let me ask you this, Doctor, and this is without any discourtesy to you —

The Court: The Court will take judicial notice that it is a common cause of death. The doctor was here about fifteen or twenty minutes after the recess.

Q. Have you had any experience, Doctor, at all, with angina attacks?

A. I have seen a few cases.

Q. You are not admitted yet? You are in training, is that it?

A. That is right.

Mr. Rosenthal: That is all.

The Court: Thank you, Doctor. Call back the jury.

Until and unless the Department of Correction permits a discretionary quantity to be carried each day upon leaving the Tombs prison, the Court will be prepared to summon the ambulance in any event of real or imaginary or feigned attack.

Mr. Rosenthal: Might I ask this, then, in view of what [fol. 2427] has occurred—I am not looking for any delay—if we adjourn now it will give me an opportunity to communicate with the Commissioner before they leave, so as to try to rectify this condition before the court session tomorrow, so that the condition then would be remedied rather than have a recurrence. I am not a physician, but as the defendant appears to me, he does not appear—and as I say, I say this only as a layman—to be in a physical condition to proceed at this time. It is now close to half past four, and by five o'clock these offices will be closed.

The Court: Dr. Nash is on his way down. Dr. Nash will have the required medication, and will sit here in court and administer it in event of any attack. The Court will resume.

In view of the history of the case, the Court does not feel justified in granting your request.

Mr. Rosenthal: I only did it for expediency. It does not make any difference to me. I can stay here all night.

Mr. Barshay: May we have some idea how late we work today?

The Court: You made no progress today.

Mr. Cuff: Couldn't you tell us how late we will be?

[fol. 2428] The Court: See what progress we make. The Court is kind hearted when the occasion justifies it.

Mr. Cuff: I am not finding fault with you, your Honor. I am just trying to find out how late we are going to work.

Mr. Talley: I join in the request that we suspend, if your Honor pleases.

The Court: One ruling is enough. Unless the purpose of it is to put the Court on the spot with the press in the

event anything untoward happens. I think the situation is sufficiently clarified to stand truthful and fair publication.

Mr. Talley: Judge, there is a juryman here named John J. McNulty, who is a friend of mine, a college mate of my brother's.

The Court: Is he prejudiced?

Mr. Talley: I think he might be. I know he would not be accepted by the District Attorney, and I thought he might just as well be excused now.

The Court: In view of the time lost, supposing we proceed, and we will take this up some other time.

(The jurors and talesmen returned to the court-room.)

The Court: Proceed.

(Mr. Turkus resumed the questioning of the talesmen in the box).

[fol 2429] By Mr. Turkus:

Q. Mr. Robert, I think I got to the part where you told me that you were in sympathy with law enforcement, that you had no scruple, conscientious or otherwise, against capital punishment.

A. That is right.

Q. I take it that while you have been in this jury room here, you have heard other questions put to other prospective talesmen in regard to accomplice testimony. Have you heard that?

A. Yes, sir.

Q. I will try to make this very brief with you, Mr. Robert. You have had the intellectual background that you told the Judge and the business experience that you disclosed to him, eleven years in one company; is that right?

A. Yes, sir.

Q. Will you use common sense and understanding in applying the rules of evidence and the tests that the Judge gives you in regard to accomplice testimony?

A. Yes, sir.

Q. As you are seated in the box now, have you any bias or prejudice or any fault to find either with the prosecutor of the county or with the prosecution of an indictment wherein accomplice testimony forms part of the evidence?

A. No, sir.

Q. As to these tests, will you keep uppermost in your mind that what you want to ascertain is, Does the accomplice tell the truth about a corrupt partnership of the defendants in the commission of the crime charged in the indictment?

A. Yes, sir.

Q. In other words, do you understand, sir, that there can [fol. 2430] be no conviction upon the unsupported testimony of an accomplice, and that the Judge will charge you on the law, and it is your duty to acquit if that is all there was in the case?

A. Yes, sir

Q. Of course, there is other evidence in the case. The Judge will talk to you about other evidence in the case. He will tell you in words or substance that it need not support or need not corroborate every detail of the accomplice's testimony. Is that clear to you?

A. Yes, sir.

Q. In other words, the Judge will very plainly indicate to you that the law is that there need not be corroboration of every meticulous, every detailed point of the testimony, but that the jury may find corroboration sufficient under the law if it believes the other evidence and it tends to connect the defendants with the commission of the crime. Is that clear to you?

A. Yes, sir.

Q. If accepted as a juror, will you apply that rule of law to the facts of this case?

A. I will.

Q. And will you keep uppermost in your mind that we want to find out does the accomplice speak the truth about the participation and the part that each of these defendants, Buchalter, Capone, and Weiss played in this murder, and is there other evidence in the case which you believe which tends to connect Weiss, Buchalter and Capone with this murder? Is that clear to you?

A. Yes.

[fol. 2431] Q. And will you devote your mental faculties to the ascertainment of those facts?

A. I will.

Q. Do you understand from the other questioning that character of defendants is not in issue in a criminal case, which means that a prosecutor may not offer evidence of a

defendant's bad character unless the defendant first comes forward with evidence purporting to show he has a good character?

Mr. Talley: I object to that, if your Honor pleases. I think it is coming dangerously close to the prohibition against certain comments, against certain happenings in the trial, and I do not think that question should be asked.

Mr. Turkus: It has been asked by defense counsel of other talesmen who were accepted.

The Court: When the defense counsel asks it the next time, you object. Sustained.

Q. Another one of the defendants' lawyers has pointed out that the obligation of the defendant is that of meeting the specific charge in the indictment. Do you, Mr. Robert, understand that the burden of the District Attorney is no more and no less? I cannot go further; I can establish guilt beyond a reasonable doubt on this indictment and this indictment alone; do you understand that?

A. Yes.

Q. That is all I have to do as prosecutor here, establish guilt beyond a reasonable doubt on this charge here; do you understand that?

A. Yes, sir.

[fol. 2432] Q. Have you heretofore served as a juror in any type of case?

A. I have never served.

Q. Taking the law completely from the Judge in its every aspect——

By the Court:

Q. Any prejudice against capital punishment?

A. None, sir.

By Mr. Turkus:

Q. There is nothing mystifying about jury experience or jury service. You are here to find out, has The People of the State of New York established guilt of these defendants on this indictment beyond a reasonable doubt, and will you by your verdict endeavor to do justice in the case?

A. I will.

Q. And if you are satisfied beyond a reasonable doubt that there are three guilty men in this court-room, Weiss,

Capone, and Buchalter, and that their guilt has been established to your satisfaction beyond a reasonable doubt, will you reflect that in your verdict?

A. Yes.

Q. Is there anything in your background, in your present business connection, or any experience that you have had which would cause you to hesitate or be fearful in pronouncing such a verdict?

A. No.

Q. Mr. Marcus, do you live at Brighton Beach?

A. That is right.

Q. Have you lived in that section of Brooklyn for a number of years?

A. I have.

[fol. 2433] Q. More than five? Have you lived in any other district of Brooklyn?

A. No.

Q. So that you have resided in the Brighton Beach section——

A. Eighteen years.

Q. Did you live in some other section of Brooklyn before that?

A. No, sir.

Q. Or some other section of the city?

A. No, sir.

By the Court:

Q. Where did you come from?

A. I originally came from the Bronx.

By Mr. Turkus:

Q. Are you an insurance broker by occupation?

A. That is right.

Q. Do you work for yourself?

A. That is right.

Q. And where is your office?

A. 170 Broadway, New York.

Q. Do you maintain a large office staff there?

A. No.

Q. Are you an individual broker?

A. That is right.

Q. Then you personally solicit your business in various parts of the city?

A. That is right.

Q. Does business bring you in contact with people in the garment district?

A. No, sir.

Q. Clothing district?

A. No, sir.

Q. Or clothing truckers?

A. No, sir.

Q. Were any of the names of the union officials that I mentioned familiar names?

A. No.

[fol. 2434] Q. Do you have any contacts, directly or indirectly, in the Brownsville-East New York section of Brooklyn?

A. No, sir.

Q. Were any of the names that I mentioned to the other prospective talesmen at all familiar to you?

A. No, sir.

Q. Is the name of Lepke a familiar name to you?

A. No.

Q. The name of Gurrah?

A. No, sir.

Q. The name of Weiss or Capone at all familiar?

A. No, sir.

Q. What kind of insurance do you handle?

A. I handle everything but life.

Q. Then you handle general insurance with the exclusion of life insurance?

A. That is right.

Q. Do you have any contacts on the Brooklyn waterfront?

A. No, sir.

Q. Where do you get the bulk of your business?

A. Around my neighborhood.

Q. Around Brighton Beach?

A. That is right.

Q. Have you read anything of the investigations of Judge O'Dwyer?

A. Yes, sir.

Q. Have you retained the recollection of any of the reading matter?

A. Yes, some of it.

Q. Do you know whether you read of this particular case?

A. Yes, I did.

Q. Do you have any impression from the reading matter?
A. Yes, sir.
Q. Is the impression strong enough to be an opinion?
[fol. 2435] A. Well, I imagine it would be.
Q. Is it an opinion that goes to guilt or innocence?
A. Yes.
Q. Is it detrimental to the defendants?
A. It is.

Mr. Barshay: Challenge for cause.
The Court: Try the challenge.

HARRY MARCUS, residing at 23 Brighton 8th Place, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Mr. Marcus, if asked the same questions now under oath as you were asked before, would you answer the same way?
A. I would.

Mr. Barshay: That is all.
The Court: Any questions?

(No questions.)

The Court: Sustained.

By Mr. Talley:

Q. Mr. Robert, will you be good enough to tell me again what your line of business is?
A. Life insurance.
Q. With the New York Life, did you say?
A. That is right.
Q. What particular work do you do there?
A. Handling of correspondence in connection with disability claims.
Q. You do not make the investigation yourself, do you?
A. No, I do not.
[fol. 2436] Q. That is done by other employees who bring in their reports to you?
A. That is correct.
Q. Upon which your correspondence is based; is that it?

By the Court:

Q. Do you dictate the correspondence?
A. Yes, sir.

By Mr. Talley:

Q. Mr. Roberts, have you read anything about this case or any of the defendants in it?
A. I have.
Q. Might I ask in what papers you read anything about them?
A. The *Tribune*, possibly, and the *World-Telegram*.
Q. Did you read any articles that ran in the *Mirror*, a series of days?
A. No, sir.
Q. Did you read in the New York *Journal* the serials they had about the life of Judge O'Dwyer?
A. No, sir.
Q. From anything that you read, did you form any impression or any opinion about this case or these defendants?
A. No, I have not.
Q. Neither an impression nor an opinion?
A. No.
Q. Are you acquainted with the District Attorney or any members of his staff?
A. No, sir.
Q. Have you ever been the victim of a crime yourself?
A. Never.
Q. You never served on a jury, either criminal or civil?
A. Never. I have been called.
Q. Were you called in any criminal case?
A. Yes.
[fol. 2437] Q. Were you excused from service after being examined as you are being examined now?
A. That is right.
Q. How long ago were you called?
A. Approximately eight or nine months ago.
Q. And how often have you been called?
A. This is the third time.
Q. The Court will charge you that the burden of proving the guilt of these defendants is always on the District Attorney and that every defendant in our courts comes into court with a presumption of innocence in his favor. If you

are so charged, as you will be by this Court, will you follow those directions implicitly?

A. I will.

Q. The Court will charge you that under our forms of law the burden never shifts from The People in a criminal case to the defendants, and they are required to explain nothing. The burden of proving their guilt is always on The People. If it should develop that these defendants or any of them do not take the stand and you are charged that you are not to indulge in any unfavorable inference against them because of their failure to take the stand, will you follow that direction?

A. I will.

Q. From the questions of the District Attorney, we, representing defendants, are led to believe that the case will depend primarily upon the testimony of accomplices, that is, persons who admit their complicity in this crime and [fol. 2438] will testify against these defendants. Will you scrutinize with care and suspicion the testimony of men who admit that they are accomplices?

Mr. Turkus: Objected to as to the preamble.

The Court: Overruled.

Mr. Turkus: Did your Honor hear the word "primarily"?

The Court: Yes, it does not amount to anything.

Mr. Talley: Isn't it so?

Mr. Turkus: It is not.

Q. What is your answer?

A. I lost the last part of the question.

By the Court:

Q. Will you scrutinize with care the testimony of an accomplice, view it with suspicion and accept it with caution?

A. Yes.

By Mr. Talley:

Q. And if these so-called accomplices admit upon the stand that they have been guilty of crimes other than their admission in connection with this crime, will you take into consideration the fact that they are confessed murderers, confessed perjurers, confessed criminals, in weighing the value of their testimony?

A. Yes.

Q. You don't think you will have any difficulty in doing that?

A. No, sir.

Q. The Court will charge you that you cannot bring in a [fol. 2439] verdict of conviction, or guilty, unless you are satisfied beyond a reasonable doubt as to their guilt. If you have a reasonable doubt in your mind as to their guilt, that is, a doubt for which a reason could be given, a doubt founded upon reason, a doubt such as a man may have about the ordinary affairs of life, if you have such a doubt, will you give the benefit of that doubt to these defendants?

A. Yes.

Q. And you will have no fear or reluctance or hesitancy in bringing in a verdict of Not Guilty against all or any of these defendants after you hear all the testimony, if you have a reasonable doubt in your mind as to their guilt; is that correct?

A. That is correct.

Q. You know nobody connected with this case, do you?

A. No one.

Q. Are you taking any part in the campaign that is being waged for the District Attorney for Mayor?

A. No, sir.

Q. Do you contemplate taking any part in the campaign between now and November?

A. No, sir.

Q. Do you know of any reason that has not been adverted to here by the District Attorney or myself, why you could not sit as a fair and impartial juror in the trial of this case?

A. No, sir.

Q. Will you try and do exact justice between The People on the one hand and the defendants upon the other?

A. I will.

By Mr. Rosenthal:

[fol. 2440] Q. Mr. Robert, you say you were called eight or nine months ago for jury service?

A. That is right.

Q. Was that on a special panel?

A. Yes, sir.

Q. Before what judge?

A. Before Judge Taylor.

Q. And was Mr. Turkus the Assistant District Attorney?
A. He was.
Q. Were you examined in the box on that occasion?
A. Yes.
Q. Was I one of the attorneys in the case?
A. You were.
Q. Were you excused at that time?
A. I was.
Q. You were in the court throughout that particular trial, that is, throughout the examination of the jurors?
A. Until the time I was excused.
Q. Since that time have you read any articles in any of the papers either concerning that case or this case?
A. Yes.
Q. As the result of what you may have read in the newspapers have you formed any impression at all as to the guilt or innocence of these defendants?
A. No, I have not.
Q. Do you hold any resentment by reason of the fact that you were excused from service in the particular case that you were called before that?
A. No, I do not.
Q. How long before that particular case were you called on a special panel?
A. That was the only special panel I was called on.
Q. You have not been called again in between that time and this time?
A. No.
[fol. 2441] Q. When prior to that time were you called?
A. I believe it was the winter of 1940.
Q. Was that a capital case?
A. No.
Q. Who was the judge?
A. Judge Brancato.
Q. Were any of the attorneys in court here now attorneys in that case?
A. No.
Q. Did you actually serve in that case?
A. No, I did not.
Q. Were you called to serve in that case?
A. Yes.
Q. Were you excused at that time also?
A. Yes.

Q. The fact of your having been excused then, has that left any impression upon you that would be adverse to any defendant?

A. No.

Q. Have you read a great many articles since the time that you were called for service as a special juror in respect to the so-called investigation of Judge O'Dwyer?

A. No, I have not.

Q. You said you had read some articles, did you not?

A. Yes.

Q. Were the articles that you read confined to those two papers, the *Tribune* and *World-Telegram*?

A. That is right.

Q. At any time did you read any articles at all in the *Mirror*?

A. No.

Q. Did you ever discuss with any person any of the defendants on trial here?

A. No.

Q. Did you ever discuss, after your being excused from jury service, the fact of your being excused?

A. No, I did not.

[fol. 2442] Mr. Rosenthal: I have no further questions.

Mr. Barshay: No questions, your Honor.

Mr. Turkus: Mr. Robert is satisfactory to The People of the State.

Mr. Rosenthal: Peremptory.

(Sidney Berman, No. 3090, and Hans Hinze, No. 3089, were called and took their seats in the jury box. The talesmen were then questioned.)

Mr. Turkus: It is four hours since lunch, Judge. May I know how long you intend to go on?

The Court: I think we will get along much nicer if we remember the way we used to practice when I tried cases. Don't watch the clock; keep it behind you.

Mr. Turkus: If you only eat a sandwich, you get hungry.

The Court: I summed up a case at eight o'clock in the evening without a sandwich.

Mr. Turkus: I summed up a case before you and I almost collapsed before I finished it.

The Court: Take care of all collapses as they come.

Mr. Turkus: That is not a plea for any sympathy.

By Mr. Turkus:

Q. Mr. Berman, do you reside at 36 Plaza Street, and you are an insurance broker?

A. That is right.

Q. Plaza Street is up near Prospect Park, isn't it? Do you know a member of the bar by the name of David Price? [fol. 2443] A. He lives in my building.

Q. Do you know him?

A. I have met him in the court the last time I was called.

Q. Was that a case when I was prosecuting?

A. I don't think so.

Q. Do you meet Mr. Price occasionally?

A. I see him in the building, in the elevator.

By the Court:

Q. Have you ever been on the Grand Jury?

A. No.

Q. Or on a Grand Jury panel?

A. No.

Q. Has any relative of yours by the name of Berman?

A. My brother Hyman might have been; I would not know.

Q. On one of the Grand Jury panels?

A. I would not know.

Q. I am going to ask you a question, but I cannot avoid it. Was there a little difficulty connected with that?

A. No. My brother is president of the Brooklyn Society for Ethical Culture.

Q. That is all right, but there was a man by the name of Berman who was linked up with some incident which could have a bearing on your qualification. I will ask this, and it won't mean anything to you, but it will to me. Has at any time your insurance license been held up?

A. Never.

Q. Or your brother's?

A. Never.

By Mr. Turkus:

Q. What I want to know is this: Since you met Mr. Price [fol. 2444] in court have you met him in the house?

A. No.

Q. At any time since you know him have you discussed any criminal case with him?

A. I met him one day and asked him the outcome of the case that he had been trying. He told me and that was the end of that.

Q. Was that one of the O'Dwyer cases?

A. No, it was a case involving fraud against an insurance company.

Q. Being in the insurance business, naturally you were curious?

A. That is right.

Q. Did you ever meet Mr. Price in court at any time where I was the prosecutor?

A. I don't think you were the prosecutor on this case.

Q. No, I have only been handling a certain type of case.

A. Then I never met you.

Q. Have you served as a juror in any type of case?

A. No.

Q. This would be your initial experience?

A. That is right.

Q. Have you been on this special panel for some time?

A. I was called once, but earlier this year.

Q. And did you get as far as where you are now?

A. Yes, except it was in the witness chair.

Q. They were examining the jurors individually?

A. That is right.

Q. Who was the judge in that case, do you recall?

A. Yes, Judge Fitzgerald.

[fol. 2445] Q. And Mr. Price was one of the defense lawyers?

A. That is right.

Q. Do you remember who the prosecutor was? Was it Mr. Rooney?

A. A good-looking fellow.

Q. If you are taken as a juror, you don't want to know whether I am good looking; you want to know if this case is good looking.

The Court: In view of the lateness and the anxiety of counsel to watch the clock, economize. Maybe the Court will be good-natured in a few hours.

Q. Have you lived in any other district of Brooklyn beside that Prospect Park section?

A. In that vicinity for the last seventeen years.

Q. Where do you maintain your office?

A. 16 Court Street, Brooklyn.

Q. And are you in business yourself?

A. With my brother, under the name of Hyman Berman & Brother.

Q. Is that the brother you mentioned?

A. He is the president of the Brooklyn Society of Ethical Culture.

By the Court:

Q. That is on Prospect Park West?

A. That is right. That is where the school is too.

By Mr. Turkus:

Q. That is in the vicinity of that 8th Avenue Temple?

A. The Society?

Q. Yes.

A. The Society House is 500 First Street.

[fol. 2446] Q. Does your business, Mr. Berman, bring you in contact with various lawyers?

A. No, not my business. I know various lawyers.

Q. Is Mr. Price's former partner, William W. Kleinman, who is now in the United States Army,—is that a familiar name?

A. Yes, I have heard the name.

Q. Do you know William Kleinman personally?

A. No.

Q. There are nine lawyers in this case. I don't stress the nine.

A. I recognize one name. Bertram Wegman I recall, was in a high school fraternity of mine. We both went to Manual and were in the same fraternity.

Q. You got out of Manual in '20 or '21?

A. No, I am only thirty years old. He was away before me.

Q. Is he a friend of yours?

A. No.

Q. Did you meet him in the fraternity?

A. The fraternity is out of existence, I would say.

Q. Any of these other lawyers, do you know any of them?

A. Mr. Barshay, I think, lives in the neighborhood, and I have seen him occasionally in the neighborhood drug store on Underhill Avenue.

Q. Any of these other lawyers?

A. No. I do not know whether Mr. Rosenthal was with

Price that day. I do not remember seeing his face, but there was someone looked like him. Might have been Sidney Gottesman.

By the Court:

[fol. 2447] Q. You are right at the Union Temple?

A. I beg pardon?

Q. You live right by Union Temple?

A. Yes, sir.

Q. And I assume you go to the men's club meetings there?

A. I am a member of the men's club.

Q. You had lectures there on crime?

A. No, I have never heard one.

Q. Nothing on this subject?

A. Nothing.

Q. In connection with the O'Dwyer work?

A. No. I have only been to several meetings, and they never had lectures when I was there.

By Mr. Turkus:

Q. Is your acquaintanceship with Mr. Barshay limited to meeting him in the drug store on occasion in the neighborhood?

A. I don't think I have ever been introduced to him, but I have seen him.

Q. Do you come in contact with other lawyers?

A. Yes.

Q. Other lawyers that you know?

A. Yes.

Q. Do you know whether they specialize in the defense of criminal cases?

A. I don't think they do.

Q. Would you describe them as general practitioners?

A. That is all.

Q. Do you know Mr. Gittelson, who is associated with Mr. Barshay?

A. No.

Q. Do you know where Mr. Barshay's law office is located?

A. No.

[fol. 2448] Q. Do you know where Mr. Wegman's law office is located?

A. No.

Q. Or Mr. Price's law office?

A. I think it is 66 Court Street.

Q. Do you deal with any members of the bar in insurance matters? In other words, do you solicit any of their business?

A. No. Occasionally a bond will be written, and our name will be put on as broker by some of my lawyer friends.

By the Court:

Q. A bail bond?

A. No, administration bond.

By Mr. Turkus:

Q. The type of insurance that you are engaged in excludes bail bonds?

A. Absolutely.

Q. There is nothing wrong about bail bonds. Bail is something that is allowed in certain cases, and everybody should have it. What I was trying to find out, Mr. Berman, was this: Whether you had contact with a certain group of lawyers that I ought to know about.

A. I understand.

Q. I am not trying to be offensive or embarrassing to you. Have you been in the insurance business for a number of years?

A. Yes, twelve years.

Q. So that would bring you on up to when you left school?

A. That is right. I went with my brother. He has been over thirty.

Q. Do you know the District Attorney of the county, [fol. 2449] Judge O'Dwyer, personally?

A. No.

Q. Or any Assistant on his staff?

A. No.

Q. Is there anything about that casual acquaintanceship that you have had with Mr. Barshay and Mr. Wegman and Mr. Price that would in any wise embarrass you in rendering jury service in this case?

A. Not at all.

Q. Do you realize, sir, this is an important issue, important to The People of the State of New York and important to the defendants as well?

A. Yes.

Q. Would you be embarrassed if you met Mr. Barshay in the future if your findings were against his client or the other defendants?

A. No.

By the Court:

Q. I take it your membership in Union Temple includes gymnasium and swimming pool contacts?

A. No, I am not a member of the Temple. I am just a member of the men's club.

Q. Just when they meet and have discussion?

A. Yes.

Q. That is Rabbi Tedestes(?)?

A. A very good friend of mine.

By Mr. Turkus:

Q. There is this point of capital punishment that the District Attorney is obliged to go into. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No.

Q. In this particular case it has been pointed out, and the attention of the jury has been directed, each one of [fol. 2450] them, by defendants' counsel, one way or the other, that the defendant Buchalter serves a long jail term presently, having been convicted of other offenses. Would you be inclined to relax your thoughts in connection with capital punishment because he is serving a long jail term?

A. No.

Q. Or would you be inclined to relax from a proper jury verdict in this case because of that long jail term?

A. No.

Q. Or deviate from a proper result?

A. No.

Q. Your insurance business, is that gathered from any particular location or any particular industry, or is it general in its nature?

A. General.

By the Court:

Q. Who tends to it when you are away.

A. My brother.

By Mr. Turkus:

Q. Does your business bring you in contact with anyone engaged in the manufacture of clothes?

A. We have one account, ladies' coats and suits, my brother-in-law.

Q. Your brother-in-law is in that business?

A. That is right.

Q. What is his name?

A. Sam Dick.

Q. Do you know the trade name?

A. Samuel H. Dick, Incorporated.

Q. Sometimes his clothes have a name?

A. Not that type of business. I know what you mean.

Q. He manufactures ladies' garments?

A. Yes.

[fol. 2451] Q. And he manufactures those garments in the garment or clothing district of Manhattan?

A. 37th Street, 38th.

Q. Off Broadway?

A. Off 7th Avenue, 246 West 38th.

Q. How many years has he been in that bu-iness?

A. Well, he has been under different names from time to time.

Q. The manufacture of clothing.

A. I would say ten years.

Q. Do you have any contacts in the garment or clothing district?

A. No.

Q. Is the name of Lepke a familiar name to you?

A. Yes.

Q. The name of Gurrah?

A. Yes.

Q. Shapiro, Gurrah? The same individual, you know that?

A. Yes.

Q. From anything that you have heard from your brother-in-law, if you have heard anything, or anything that you have read, have you an impression about those names?

A. No.

Q. Is the name of Hyman (Curley) Holtz a familiar name?

A. No.

Q. Is your brother-in-law the one chiefly interested in this manufacture of ladies' clothes?

A. Yes.

Q. I take it it is really a one-man business that has been incorporated?

A. That is right.

Q. You supply insurance to him in the conduct of his business?

A. Yes.

Q. I take it that would be compensation, fire, and theft?

A. Burglary, and so forth.

[fol. 2452] Q. When you say your brother-in-law, is he married to your sister?

A. That is right.

Q. In what manner did the names of Lepke and Gurrah become familiar to you?

A. I read it in the newspaper.

Q. Did you ever hear anything said by your brother-in-law?

A. Never.

Q. Are you on good terms with him?

A. Very good.

Q. Did you follow either the Dewey or the O'Dwyer investigations with any degree of interest, in the newspapers?

A. Neither of them.

Q. I take it that your brother-in-law handles the product from the raw state, that is, taking the goods, having it designed into garments, manufacturing the garment, and then distributing it through the truckers?

A. Except that the garment is manufactured by contractors and brought into his place and then distributed, and not as a rule by trucking, because his customers would be out of town mostly, and the larger departments stores in New York. I think a lot of it goes railway express.

Q. Do you know whether he has any Pennsylvania accounts?

A. I don't, no.

Q. In connection with the members of the bar that you know, Mr. Berman, did any of them speak to you about any of the individuals now in the court-room?

A. No.

Q. Did you ever hear any discussions about any of these [fol. 2453] three defendants?

A. No.

Q. Capone, Weiss, or Buchalter? Do you have any other connection, clothing trucking, clothing of any kind, nature or description that we have not discussed?

A. No.

Q. Do you have any accounts in the Brownsville-East New York section?

A. No.

Q. Would you say your business is confined chiefly to Manhattan or to Brooklyn?

A. Manhattan.

Q. Were any of the names of union officials at all familiar to you?

A. No.

Q. Weinstein, Katz?

A. No.

Q. Any familiarity about the name of Bellanca or Belia?

A. No.

Q. Or Tosca?

A. No.

Q. Or Hyman (Curley) Holtz, Whitey Deutch?

A. No.

Q. When is the last time that you have seen your brother-in-law?

A. Sunday.

Q. Was that after you received your notice?

A. Yes.

Q. Did you have any reading knowledge of any of the names of individuals in Brownsville, East New York, like Harry (Pittsburgh Phil) Strauss, Martin (Buggsy) Goldstein?

A. I have seen the names in the paper.

Q. Did you ever hear their names discussed by anyone?

A. No.

Q. Did you live in any section of Brooklyn other than the [fol. 2454] Hill section?

A. Schenectady Avenue.

Q. That is East New York?

A. Eastern Parkway. I would not call it East New York.

Q. That would be in the vicinity of Dubrow's, the Famous Restaurant?

A. It would be up even higher than that, but that goes back many, many years.

Q. Do you travel through the borough in the discharge of your duties?

A. Yes.

Q. Have you been to the Famous Restaurant, Dubrow's Restaurant?

A. No.

Q. Does business bring you into the garment or clothing district?

A. Other than my brother-in-law's place, no others.

Q. Any business bring you into contact with the Brooklyn waterfront?

A. No.

Q. Do you know the District Attorney of the county or any member of his staff?

A. No.

Q. And I believe you told Judge Taylor that you attended no discourses or lectures upon the apprehension of criminals and their prosecution?

A. No.

Q. Not having served as a juror before, will you take the law implicitly from the Judge if accepted in this case?

A. Yes.

Q. Did you hear the discussion I had about accomplice testimony?

A. Yes.

Q. Would you have made different response?

A. No.

Q. Were the matters that I discussed, were they clear and [fol. 2455] understandable to you?

A. Yes.

Q. Is there any reason, by way of business or something that I failed to elicit by any response, that would go to your qualification to sit as a juror in this case?

A. No.

Q. If I satisfied you from the believable evidence in the case that the guilt of these defendants has been established beyond a reasonable doubt, would you hesitate to reflect that in your verdict?

A. No.

Q. Would you do so fearlessly?

A. Yes.

Q. There is nothing that I failed to bring out by questioning that would go to your ability to be a fair and honest and conscientious juror and discharge your duties to the

People of the State of New York and all of them: is that correct?

A. That is correct.

Q. Mr. Hinze, were you a juror in any case that I tried as a prosecutor?

A. Yes, two.

Q. And you sat through both cases?

A. No, I was called and examined by you this year.

Q. Do you remember whether I said "Satisfactory" when I examined you?

Mr. Barshay: That is objected to.

Mr. Turkus: I want to save time. If I did I am going to say "Satisfactory" now.

A. You accepted me.

Mr. Turkus: All right, then. That settles it. I do [fol. 2456] not have to go into any discussions.

Mr. Fischbein: He was challenged for cause.

Mr. Turkus: By me?

Mr. Fischbein: No.

Mr. Turkus: If he was satisfactory to me once, he is satisfactory forever. That is the end of it.

By Mr. Barshay:

Q. You were satisfactory, Mr. Turkus says, to him on two other occasions?

A. Yes.

Q. Did that find favor with him in your eyes to the point where you may be influenced in this case?

A. No.

Q. Of course, Mr. Fischbein said that someone challenged you for cause in the other case.

A. Mr. Rosenthal.

By the Court:

Q. Were you an importer?

A. No more. I used to import machinery. Now I am a machine dealer, domestic machines.

Q. What kind of machines?

A. Printers' machines.

By Mr. Barshay:

Q. You were called only a short time ago as a blue ribbon juror?

A. Yes.

Q. How long ago?
A. In May.
Q. Of this year?
A. Yes, those two young fellows.
Q. And before that?
A. Silverman case.
Q. That was a special jury and you were satisfactory to Mr. Turkus when he was the attorney in that case?
A. Yes.
[fol. 2457] Q. No matter which side you are on, you are satisfactory to Turkus.
Mr. Turkus: He must be a good juror.
Q. Did you sit in the Silverman case as a juror?
A. I was called.

By the Court:

Q. Did you act as a juryman?
A. No, I did not. I have been called on the jury for eight years on the average of twice a year.

By Mr. Barshay:

Q. Were you examined by Mr. Turkus in the Silverman case?
A. Yes.
Q. Were you examined by Mr. Turkus in the last case?
A. Yes.
Q. And before that were you on any other jury?
A. Yes.
Q. May I know?
A. I was not examined.
Q. How many times did you serve as a juror?
A. Eight years ago.
Q. The name of Max Silverman, according to Mr. Turkus's questioning, may be prominent—I do not know—in this case. He was a defendant in a case where you were called and examined as a juror. Would that affect your judgment here?
A. No.
Q. Is there something that you have heard or read when Mr. Silverman was in the court-room which would influence you in any direction in this case?
A. No.

Q. Would you be more likely to believe him or less likely [fol. 2458] to believe him if he should be a witness in this case, by virtue of the experience you had?

Mr. Turkus: I object to that. That is speculation.
The Court: Sustained.
Mr. Barshay: Respectfully except.

Q. You formed some idea because of what you read?
A. Never read this case.
Q. You said you read——
A. The headlines.
Q. What paper, please?
A. Evening *Sun*.
Q. Any other paper?
A. *Times*.
Q. Read them more than once?
A. *Times* in the morning.
Q. I mean did you read about this case more than once?
A. On occasion.
Q. On occasions you saw the name Lepke?
A. Headlines.
Q. On many occasions?
A. No. I saw his picture in the paper.
Q. Did you see it in *P. M.*?
A. No, I never read it.
Q. Did you see it in some other newspaper? More than once?
A. No.
Q. Over a period of time? Over a long period of time?
A. Say two months.
Q. And as you saw it from time to time and saw headlines with respect to it, did you get some idea with respect to him?
A. Well, yes.
Q. Be fair with me.
A. Yes.
[fol. 2459] Q. And that idea was unfavorable too?
A. Yes.
Q. It was? And it still is unfavorable?
A. At the present time, yes.
Q. Nothing has happened which would remove that unfavorable thought that you had concerning him?
A. No.

Q. And you would expect, consequently, that something should happen in the course of the trial by way of testimony which would remove that unfavorable idea that you have?

A. Yes.

Q. And I take it you would expect someone on behalf of defendant to offer that kind of testimony?

A. Yes.

Q. And if not you will still remain with that unfavorable impression?

A. Yes.

Q. And I take it that goes to the guilt or innocence of the man.

Mr. Barshay: I challenge him.

The Court: Try the challenge.

HANS HINZE, of 902 Ditmas Avenue, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Barshay:

Q. Now, under oath, if asked the same questions, would you make the same answers?

A. Yes, sir.

By Mr. Furkus:

Q. Would you, sir, if you were instructed by the Court that a defendant need offer no proof in a criminal case, would you accept that instruction of law?

A. Yes.

[fol. 2460] Q. And if you were told by the Judge in a criminal case that it is the duty of the District Attorney to establish guilt beyond a reasonable doubt, and his obligation and burden alone, would you follow that instruction of law?

A. Yes.

Q. And if the Judge were to tell you that a defendant may seat himself at a counsel table and remain mute—by remaining mute, I mean by saying nothing, offering no evidence and sitting still, and that no inference unfavorable to him could be drawn against him from the fact that he remained mute, would you follow that instruction of law?

A. Yes.

Q. Now, understanding that a defendant has no burden or obligation, is your impression that you have gathered one that you can put aside and decide this case on the evidence?

A. Yes, sir.

Q. And have you got the mental willpower and the understanding where you can lay aside some impression you have gathered from a newspaper and decide the case on the evidence?

A. Oh, yes.

Q. And if accepted as a juror, will you decide this case on the evidence?

A. Oh, yes.

By the Court:

Q. Are you sure you can completely disregard it and decide the case upon the evidence?

A. Yes.

Q. Will you promise that you will?

A. Oh, yes.

Mr. Rosenthal: May I ask a couple of questions?

[fol. 2461] The Court: Yes.

Q. You recall me, sir?

A. Yes, sir.

Q. You were called as a juryman on a special panel about nine months ago?

A. Yes, sir.

Q. At that time you were challenged for cause, were you not?

A. I don't remember.

Q. The same way as now?

A. Yes.

Q. And the judge excused you and sustained the cause, is that correct, sir?

A. I presume so; I don't remember.

Q. Don't you recall whether or not at that time you were excused by the Court because of the fact that you had gained an opinion which was adverse at that time to those defendants?

A. No, not at all. At that time I had just started a new business after losing my import business, and I was needed in the business—it is a one-man business—and I asked the

Judge to excuse me because I had to go West the following week on very important appointments to gain some agencies. Now I recall that.

Q. You were called on the stand, weren't you?

A. Yes, sir. Each juror was called on the stand.

Q. And you were sworn on the stand?

A. Yes, sir.

Q. And do you recall whether or not counsel did not at that time say that he challenged you for cause?

A. I don't remember.

Q. Do you recall whether or not the Judge did not sustain at that time the cause?

[fol. 2462] A. I remember the Judge said, "You are excused."

Q. In this case you have an opinion that goes to the guilt or innocence of these defendants, have you not?

A. Formed an opinion?

Q. Yes.

A. Yes, as I testified.

By the Court:

Q. Do you understand the question? Have you formed an opinion—You are not listening.

A. Yes.

Q. Have you formed an opinion as to whether or not these defendants are guilty of this charge?

A. Of this charge?

Q. Yes, exactly.

A. No, I have not.

Q. Do you know anything about this charge?

A. Yes.

Q. Have you read about this charge?

A. No.

Q. You have not read about this charge?

A. I read about it four or five months ago.

Q. Did you read headlines?

A. Those two papers that I read.

Q. Did you read headlines about the alleged murder of Joseph Rosen?

A. No, sir.

Q. Did you read anything about the alleged connection of these defendants with that murder?

A. No.

By Mr. Rosenthal:

Q. Do you understand English well, Mr. Hinze?

A. Yes.

Q. Did you understand me when I asked you the question whether you had formed an opinion as to the guilt or in-
[fol. 2463] nocence of these defendants——

A. From what I had read?

Q. Yes.

A. Months ago.

Q. Certainly from what you had read.

A. Yes.

Q. And when you told me that you had formed an opinion concerning these defendants——

A. Only one, because I only read about one.

Q. As to one of the defendants. All right, put it that way. When you told me that you had formed an opinion as to one of these defendants on trial on this charge, did you mean it when you said yes?

A. No, I answered the Judge no, afterwards, because the Judge put it in a different way and I understood it better.

Q. You have a fixed opinion now as to the guilt or innocence of one defendant on trial here, haven't you?

A. No.

Q. Have you an opinion at all as to the guilt or innocence?

A. No.

Q. Of one of the defendants on trial?

A. No.

Q. When you answered Mr. Barshay, also, you said you had an opinion as to the guilt or innocence—just a minute—as to the guilt of one of the men on trial here. Didn't you say that?

A. Yes, as to the general—what would we call it—behavior, what kind of a man he is in general, not upon the guilt of a man.

Q. Then you have an opinion—let us put it this way—as to the character of one of the men on trial?

A. That is it.

[fol. 2464] Q. And that opinion——

A. Is not favorable.

Q. Is unfavorable?

A. Unfavorable.

Q. You are prejudiced against that particular individual, are you not?

A. Yes.

Q. And as you sit here now you are prejudiced as against that particular individual, aren't you?

A. Yes.

Q. It would take some evidence on his part to remove that prejudice from your mind, wouldn't it?

A. Yes, sir.

Q. You told me a few minutes ago that you would lay that completely aside and disregard it. Now you tell counsel that you would not, it would require evidence to remove it. You do not seem to know what you are talking about. Challenge is sustained.

By Mr. Barshay:

Q. Now, Mr. Berman, I have been going to that Sam's drug store for upwards of eleven years. Nine of those years I was Assistant District Attorney. Did you see me there during those years?

A. I don't think so.

Q. Did you ever speak to me in your life?

A. No.

Q. Do you ever remember me addressing you or speaking to you?

A. No, you addressed my wife, but not me.

Q. To your knowledge, do I know your wife?

A. At a Giant's baseball game, you sat in the box.

Q. But before that I did not know your wife?

A. I was not to that game.

[fol. 2465] Q. That was the last game of the Giants and Brooklyn Dodgers in Ebbets Field?

A. Yes, sir.

Q. We happened to have the same box?

A. Yes.

Q. And are you the man who- I later met in that drug store?

A. You saw.

Q. That is what I mean. Were we introduced at all?

A. No.

Mr. Barshay: I just want to state for the record that I have never seen or spoken to this man to my knowledge other than what he just stated, and I never met his wife before, and I did not know she was his wife.

Q. You won't hold that against my client, will you?

A. No.

Q. You belong to the Union Temple men's club, I think, with Assistant District Attorney Charles M. Cohen. Do you know him?

A. I do not know him.

Q. Do you know he belongs to that?

A. No, I do not.

Q. You live in the same house as candidate for County Judge Goldstein?

A. No, he lives 50 Plaza Street.

Q. Do you know of him?

A. Yes, I know of him from a business standpoint, not socially.

Q. Did you ever discuss, while discussing business, any of his work?

A. Only life insurance.

Q. And while he was an Assistant District Attorney, did you know him?

A. This all happened this year, the last six months.

Q. From your knowledge of any of the names mentioned, [fol. 2466] myself, Price, Charles M. Cohen, Assistant District Attorney, City Court Judge Goldstein, would that influence you with respect to the guilt or innocence of these defendants?

A. No.

Q. You said you read about the names.

A. Yes.

Q. Often?

A. No.

Q. By virtue of reading, did you form any opinion with respect to them?

A. No, my reading would go back to the original investigation, you might say in the beginning of '40, perhaps, and since then I have read nothing about it.

Q. Do you retain any of the facts that you read about it in '40?

A. Not at all.

Q. Then did you form any impression with respect to the defendants?

A. At that time?

Q. Yes.

A. I might have had an opinion at that time, but it has been since banished from my mind.

Q. And presently are you free of any prejudice?

A. Yes.

Q. Bias, or sympathy in this case?

A. Absolutely.

Q. Have you ever served as a juror?

A. Never.

Q. You said that your brother might have been a Grand Juror. Is that what you said?

A. I said that, but now that I think about it I don't think he was.

Q. Were you personally the victim of any crime?

A. No.

Q. Do you know any intimates in the Police Department?

A. No.

Q. Do you know anyone at all connected with Judge [fol. 2467] O'Dwyer's office?

A. I might say a friend of mine is a police captain.

Q. May I know his name?

A. Henley (?), two brothers.

Q. I know they have nothing to do with this case. One is in the Telegraph Bureau.

A. That is the answer.

Q. As you sat here and heard the other jurors being questioned, Mr. Berman, were you influenced in any direction whatever?

A. No.

Q. So, knowing none of the people involved and none of the facts in this case, as you say, may I ask you whether or not you are in accord with the principle of law which gives to a defendant a very substantial right known as the presumption of innocence.

A. Yes.

Q. And do you believe that the defendants sitting here now just as innocent under the law, presumed innocent under the law, as any person in this court-room?

A. That is right.

Q. And when they said, "Not guilty," it meant they denied anybody's accusation against them?

A. That is right.

Q. That is, they denied—speaking for my client—denied that he is anybody's accomplice and denied that he participated in the commission of the crime in any way whatever?

A. Yes.

Q. And you will use that presumption as evidence in this case?

A. Yes.

Q. And do you know further that when he said that, by his plea of Not Guilty in reality he said to the District At-[fol. 2468] torney, "Now, with competent and believable evidence, quality evidence, you go ahead and prove what you said in the indictment."

A. That is right.

Mr. Turkus: Both of those are bad instructions of law.

Q. Well, I am not giving you instructions of law.

Mr. Turkus: That is what they amounted to.

Q. You take them from the Court.

Mr. Turkus: Just a minute. I object to it.

The Court: Sustained.

Q. Mind you, Mr. Berman, at no time am I instructing you with respect to law. You take that from his Honor.

The Court: Every lawyer in the case has done a great deal of instructing as to the law. That is the reason the case has not been completed by this time.

Q. While I am trying to qualify you to find whether you will follow the law as his Honor shall give it to you, I may use different language, but you understand it now, that the burden of proof is with him. Maybe that will meet Mr. Turkus's objection. The burden of proof, when he assumes it, when the trial starts, is something that he assumes for all purposes and for all times, and never shifts to the defendant. You understand that?

A. That is right.

Q. In other words, the defendant need not explain any charge or accusation or piece of evidence against him. Do you believe he can sit there silently and from his silence [fol. 2469] you may draw no unfavorable inference; is that correct?

A. That is correct.

Q. And if, perchance, some juror may say, "Well, why did the others take the stand and explain? Mr. Buchalter didn't," you kindly call to their attention reasonably the instructions of the Court. Each counsel can plan his defense in a manner he sees fit. And don't take this on my

part as a promise that Mr. Buchalter will not take the stand, but if he does, you will treat him like every other witness, won't you?

A. Yes.

Mr. Turkus: Just a minute. That is bad instruction.

Mr Barshay: I am not giving him instruction.

Mr. Turkus: I do not care what you call it. He is getting the juror to promise that if Mr. Buchalter takes the stand he will be treated like any witness. He is not entitled to be treated like any other witness.

Mr. Barshay: I object to that remark.

Mr. Turkus: No, you are forgetting something very important.

The Court: Regardless of the remark, the Court sustains the objection.

Mr. Barshay: My objection?

The Court: I think it is beyond the scope.

Mr. Barshay: You sustain my objection, sir? There are two objections at the same time.

The Court: Only one.

[fol. 2470] Mr. Barshay: I have an objection to Mr. Turkus's statement.

The Court: You cannot object to the statement.

Q. There are rules which govern a man's taking the stand as a witness in his own behalf. His Honor shall outline them. You will follow them?

A. Yes.

Q. One of them shall be that you may take into consideration the fact that on a previous occasion, only for the purpose of testing his credibility and for no other purpose, his past conviction; will you do that? He may even say to you, and I think he will, that the defendant is an interested witness as a matter of law. You will follow that instruction?

A. Yes.

Q. In all other respects, you will give him the same test as any other witness, won't you?

A. Yes.

Q. Are we clear on that point?

A. Yes.

Q. That is what I meant from the very beginning. You won't be prejudiced against him by virtue—You won't believe him less by virtue of those two convictions, if you find

from all the evidence that you can believe the testimony that he gives?

The Court: Do I understand you are asking—What is that question?

(Pending question read.)

The Court: You mean if the witness takes the stand and shows he has criminal convictions, that the juryman may not consider it?

[fol. 2471] Mr. Barshay: I do not say that. Just the opposite. I say he may consider it and still believe he is telling the truth.

The Court: Of course, he may believe it.

Mr. Barshay: There is no quarrel.

The Court: Otherwise there may be no issue to submit to the jury.

Mr. Barshay: Exactly what I urge.

By the Court:

Q. You understand, Mr. Juryman, in view of what has been asked—and it is quite far afield of what is proper in examination of a talesman—when a man takes the stand you are entitled to know if he is a convict and you are entitled to consider that in determining whether or not he is worthy of belief. If the Court so charges you, will you follow it?

A. Yes, sir.

By Mr. Barshay:

Q. You heard that very often throughout the days that you have been here, isn't that so?

A. Yes.

The Court: No further on questions of law. You will only work longer.

Q. Now with respect to the person who claims he is an accomplice, his Honor will charge you quite differently, and without taking the province of the Court, briefly I may say to you you must look with suspicion and caution and care [fol. 2972] with respect to him. He has a special way of being tested. Will you do that?

A Yes.

Q. First you will want to know whether he is an accomplice, won't you?

A. Yes.

Q. Then you will want to know why he is giving his testimony, won't you?

A. Yes.

Q. Then you will want to know whether he has a motive to give the testimony, won't you?

A. Yes.

Q. Then you will want to know whether or not he expects any reward for giving such testimony, won't you?

A. Yes.

The Court: I wish some objections would be made. We would have had this jury selected two or three weeks ago if there had been more objections.

By the Court:

Q. Will you follow all instructions of the Court?

A. Yes, sir.

Q. On questions of law?

A. Absolutely.

Q. Strictly?

A. Definitely.

The Court: You cannot try the case on every point of law that may come up.

Mr. Barshay: I cannot understand. All along we have questioned the prospective jurors along this line.

The Court: It has made a farce in the selection of the [fol. 2473] jury, a public scandal.

Mr. Barshay: I object to your Honor addressing that to the defense.

The Court: I have said all I am going to say.

Mr. Barshay: And I take an exception to it.

The Court: Very well, make it double-barreled. Now go ahead.

I tell you right now, when you get through those seats are going to be filled again. The examination is going to continue. There has been no juryman selected today, and the Court is not going to be influenced in the matter of time.

Mr. Barshay: Just a second. I take an exception to that remark. It seems to me that every time, at the close of the day, when I continue to question a juror——

The Court: Never mind what it seems to you. Will you kindly proceed with the case?

Mr. Barshay: I am trying to.

The Court: And stop trying to goad the Court into reversible error, because the Court will not be goaded. You will be the loser in the long run of any altercation in which you involve the Court.

Mr. Barshay: It seems sometimes the Court tries to involve me in an argument.

The Court: The Court has its wits, is not angry, is not [fol. 2474] provoked, and is not losing its head. Now please proceed.

Mr. Barshay: I just want it known, your Honor, that I questioned a juror the same way only two hours ago, and there was not a single word either from the District Attorney or Your Honor.

The Court: You will please proceed. You are out of order.

Mr. Barshay: Respectfully except.

By Mr. Barshay:

Q. I take it this argument on my part won't influence you one way or the other in this case?

A. No.

Q. I am sure you feel, as a juror, that counsel can make a reasonable effort in qualifying prospective jurors; correct?

A. Yes.

Q. From all the evidence in the case, taking into consideration the background of the person who claims to be an accomplice and all other things with respect to him, let us say for the sake of argument you do believe, if the Court shall tell you that you cannot convict upon the uncorroborated testimony of that person, assuming you do believe him, will you follow that?

A. Yes.

Q. And you will want independent proof, independent of this alleged accomplice's testimony, to find out whether or not he is corroborated? Won't you expect that?

A. Yes, sir.

[fol. 2475] Q. And if it comes from a source no better than that of the accomplice, you will consider that, won't you?

A. Yes.

Q. And you will weigh it carefully. And the same rule will apply as to the defendant, if they have prior convictions or prior admissions of commissions of murders and other crimes, you will weigh carefully their testimony before you say, "I believe such independent evidence," and call it corroboration; will you do that?

A. Yes.

Q. And if you find that they have a motive for giving such testimony, you will use that as a rule in measuring whether you accept it or not?

A. Yes.

Q. And if you find that their testimony has been given because of some inducement, admittedly or not, held out to them, if you believe it, you will weigh that, too?

A. Yes.

Mr. Turkus: I object to that. That question is ambiguous. I do not know whether it is if you believe the accomplice or you believe the inducement.

Mr. Barshay: I am past the accomplice stage, Mr. Turkus.

The Court: Sustained.

Mr. Turkus: It has been sustained, so pass it some more.

Q. If you believe that a person who offers testimony tending to corroborate an alleged accomplice gives such testimony because he expects something for it, if you believe it, will you consider it?

Mr. Turkus: I object to the form of the question.

The Court: Overruled.

[fol. 2476] Q. Will you do that?

A. I will consider it.

Q. Now, Mr. Turkus has said something about finding fault with the District Attorney who solves a case from the inside. I take it you understand that your job as a juror is not to find fault with any individual in the case, merely decide on the evidence. And I take it that because the District Attorney or some Assistant accepts the testimony of an accomplice, you are not to be influenced by that?

A. No.

Q. You will be the one to decide whether you shall, isn't that so?

A. Yes.

Q. Each defendant here is entitled to a separate trial.

even though they are being tried together. Can I have your promise that you will consider the evidence given with respect to one defendant only against the defendant whom it applies to unless the Court shall charge you otherwise?

A. Yes.

Q. And no matter how long the trial takes, you will keep that principle in mind?

A. Yes.

Q. The fact that the District Attorney opens to the jury first—we don't have to if we don't want to—will not influence you in believing what he says to be evidence in the case unless later it becomes evidence from the witness stand?

A. Yes.

Q. In other words, remarks from here are not evidence. Mr. Turkus has also said to some jurors, because three lawyers may use the same argument on you you should [fol. 2477] not think that the argument is stronger. By the same quality of reasoning, Mr. Berman, sometimes when an argument is repeated it loses its weight. You understand that?

A. Yes.

Q. But you also understand that each counsel has a right to urge his argument in the light in which he sees it, irrespective of any other; is that so?

A. Yes.

Q. And I shall take it you won't allow it to lose weight because it is repeated by other counsel?

A. That is right.

Q. And if it aids you and coincides with your interpretation of the evidence, you will so regard it. So, Mr. Berman, you promise to listen to whatever law the Court shall give, but after reasoning with your fellow jurors as to the facts, listening to their explanations, having formed your own opinion, will you be the exclusive judge of the facts and of the believability of every witness yourself?

A. Yes.

Q. And can Mr. Buchalter entrust to you the preservation of his legal rights?

A. Yes.

Q. And if you fail to be convinced beyond a reasonable doubt, I take it you would not hesitate to say so?

A. Yes.

By Mr. Rosenthal:

Q. Mr. Berman, I do not know whether you were asked whether you know Mr. Turkus or Mr. Sol Klein, who is now an Assistant District Attorney and who was formerly with David Price.

Mr. Turkus: He was not. He has handled some appeals for Price, but he never was in his office.

[fol. 2478] Q. Did you say that you knew Mr. Kleinman?

A. I do not know Mr. Kleinman nor Mr. Klein nor Mr. Turkus.

Q. Have you ever at any time heard any speeches, either over the radio or in any men's club or association with respect to crime?

A. No.

Q. I take it that this inspector that you know, or captain, is his son a lawyer?

A. His son is a lawyer out in Queens. I do not know him very well.

Q. You have never discussed any police matter?

A. No.

Q. Have you ever sat on a criminal case to conclusion?

A. No.

Q. When the Judge charged the jury on the law? You realize, or do you realize, that the fact that the defendants have been indicted raises or should raise no presumption in your mind of their guilt? As you sit in the jury box now is your mind such that you would start off at scratch, and is your mind further such that you will compel the District Attorney, through witnesses whom you believe, to prove to your satisfaction beyond a reasonable doubt the guilt of each of these defendants?

A. That is right.

Q. You understand that the Judge, whether you like it or not, will tell you the law, which is binding in this case. And you understand, whether anybody else likes it or not, that your duty is to determine the facts, irrespective of what anyone may say, and I include in that all lawyers for [fol. 2479] The People and defense, and include the Judge also. You understand that?

A. Yes.

Q. In so far as the defendant—I do not know whether you were present in court when I explained that the defendant represented by myself and associates is the defendant Capone. So far as the evidence, or my examination of

any witnesses is concerned, or my placing in evidence any proof, it is on behalf of that defendant. Is that clear?

A. Yes.

Q. You do not feel, sir, that merely because three men are seated together here on trial, that necessarily that means that these three men are involved in the crime charged, do you?

A. No.

Q. The time may come when the Court will charge you that certain evidence adduced by witnesses is applicable to one or more defendants, or to all, and do you understand that then your job will be to see to it in the jury room that you only permit discussion as to any particular defendant in accordance with the instructions of the law given by the Court as far as the particular testimony applicable to him?

A. Yes.

Q. You find no fault with that?

A. No.

Q. The bringing of men together and trying them as one has not got the effect upon you that you feel that necessarily—I don't try to infer that anyone is guilty here—each attorney takes care of his own client and knows the facts in so far as his client is concerned, you understand, and so by making a statement, which I intend to make, it [fol. 2480] is no reflection upon any of the other defendants or what their defense may be, which is known to them exclusively. That is clear?

A. That is right.

Q. You don't feel that because one of a group may be guilty that necessarily because three are on trial that the three must be guilty?

A. No.

Q. And you, if you are called or accepted as a juryman, will see to it that in so far as the proof against my client is concerned, that it convinces you beyond a reasonable doubt as to his guilt before you convict him?

A. Yes.

Q. Any statement that I may make in the short examination that I will give you as to law, is with no intent on my part to invade the province of the Judge; is that clear?

A. Yes.

Q. The only purpose that I may have in mind in even talking about the law is to ascertain whether you as a

citizen, with a perfect right to have an opinion of your own, have a different idea as to the law, which would suborn the idea or the law as charged by the Court. That is the only reason, is that clear?

A. Yes.

Q. In accordance with our law, no man can be convicted of a crime on the uncorroborated testimony of an accomplice, even though you do believe that the accomplice is telling the truth. Is that clear to you?

A. Yes.

Q. Now, then, assuming that after listening to the charge of the Court, that the Court instructs you that that is the [fol. 2481] law, and in looking through the evidence and sifting it you were unable to find other evidence of a nature which tends to connect the defendant with the crime, would you hesitate to acquit the defendant?

A. No.

Q. The Court will further charge you that corroboration does not consist of one or more accomplices saying the same thing. One accomplice is no better than a hundred accomplices; is that clear to you?

A. Yes.

Q. So that in searching the evidence, if the Court were to charge you that that is the law, you would not feel that because more than one accomplice has told you the same story, that that is the evidence which is required by law, if you were instructed by the Court that the evidence must be independent of that given by accomplices, no matter how many they are—would you, sir?

Mr. Turkus: It is not a complete definition of the law. It is not adequate.

The Court: Hearing the question, I do not know what it means. Sustained.

Mr. Rosenthal: I respectfully except. If your Honor had heard the question before, then the meaning would be clear to your Honor as to what——

[fol. 2482] The Court: Please do not argue.

Mr. Rosenthal: I respectfully except.

Q. If you were charged by the Court that independent evidence must be of a nature that comes from a source other than that of accomplices, no matter how many, would you follow that instruction, sir?

Mr. Turkus: I object to it. It is not an adequate definition.

The Court: Sustained.

Mr. Rosenthal: Respectfully except.

Q. Do you find any fault——

The Court: I do not know, gentlemen, if you understand the Court's viewpoint. There are so many things that, as points of law, may or may not be embraced in the Court's charge, it is not permissible in examining talesmen to take any and every question of law that the human mind can think of and ask a juryman as to whether he will follow it in the event the Court so charges. I cannot believe that law in this state permits the examination of talesmen to go so far afield. It wears out those who are in the box, makes them wish that they had not been accepted, before the taking of testimony begins. If you can reasonably get this jury assembled and start the testimony rolling, the case won't take long. The Court has to sit here and watch and count [fol. 2483] peremptory challenges, knowing that once the peremptory challenges, on either side, are exhausted, the jury will be very quickly assembled. Up to date, including those who have been accepted tentatively, adding to that the peremptory challenges on both sides, we have had enough to fill this box four times over.

Now, please proceed, and now that you know the Court's point of view, it may possibly expedite. If it does not, the Court will still be patient and see to it that no reversible error is recorded by due exception on the record.

Mr. Rosenthal: May I respectfully except to your Honor directing your remarks to defense counsel, when the District Attorney has taken as much time as all defense counsel put together?

The Court: I said "gentlemen." That includes the District Attorney.

Mr. Turkus: I did not take as much time as the nine of them at all.

The Court: That was plural. I want no argument about it. Please proceed. You are just going to use more time, and you are not going to let the Court lose its head. It won't do it in this case.

By Mr. Rosenthal:

Q. In the event, sir, that it appears that the prosecution offers evidence—I am asking you this because there has been

[fol. 2484] brought out by the District Attorney—in the form of an accomplice, and you are instructed by the Court that no man could be convicted on the uncorroborated testimony of an accomplice, even if you believe the accomplice, and that he could not be convicted unless there were other evidence independent in its source tending to connect the defendant with the crime, would you follow that instruction of law?

A. Yes.

Q. And if you were unable, after looking through the evidence, to find evidence of a character that satisfied you that it was independent in its nature, would you hesitate to acquit the defendant?

A. No.

Q. It may appear that in the wisdom of counsel, myself as attorney for Capone, that the defendant will take the stand. Have you any feeling that because a man is charged with crime that he, the defendant, necessarily would tell you an untruth? Have you any such innate feeling? Do you feel, sir, that the truth from the defendant is just as valuable as the truth from any other source?

A. Yes.

Q. And if the defendant were to take the stand—let me withdraw that and put it this way: You have heard from Mr. Turkus and others the fact explained that at no time does the defendant have to prove his innocence. At all times the People must establish the guilt. With that knowledge and that thought in mind, have you any opinion, sir, that because the defendant takes the stand that the burden would [fol. 2485] shift over to him to prove his innocence?

A. No.

Q. The defendant may also offer proof that at the time this crime is alleged to have been committed, that he was elsewhere, in the form of other witnesses. That is what we call in law an alibi. If such proof were offered, and the Court were to instruct you that under such circumstances, if the alibi witnesses raised a doubt in your mind as to the guilt of the defendant, a reasonable doubt, I should say, in your mind as to the guilt of this defendant, that that reasonable doubt, the same as any other reasonable doubt, must be resolved in his favor and you must acquit, would you follow that law?

A. Yes.

Q. Do I make clear to you the statement that I made?

A. Yes, sir.

Q. The fact that any defendant may know or have met or even been out with some of The People's witnesses, the mere association, without your belief in the fact that the particular defendant participated in the crime, would that prejudice you against him?

A. No.

Q. There are certain police officers, Lieutenant Osnato, Captain Bals, Detective Paddy Meehan, McCarthy, Swift, who may have some association with this case. Do any of those names strike a responsive chord?

A. (No answer.)

Q. The District Attorney has asked you about whether you find fault with the District Attorney who solves the case [fol. 2486] from the inside by using an accomplice. Do you remember that?

A. Yes.

Q. That does not raise the inference in your mind that this particular case has been solved, because some person who calls himself an accomplice has told the District Attorney that these defendants are involved?

A. Only the method.

Q. In other words, the question as to whether or not, in so far as these defendants are concerned, the case has been solved, is one for you to determine; isn't that right? It is for you to determine what force or weight you will give to this man who now calls himself an accomplice of the defendant, testimony, is that right? In doing that, if you are told by the Court that in all cases where accomplice testimony is used that you must, whether you like it or not, view the testimony of that accomplice with suspicion, caution, and wariness before you accept it as true, will you do that?

A. Yes.

Q. And if you are further told by the Court that in viewing the testimony of any witness, whether it be an accomplice or one who allegedly is supplying the independent evidence, that you have a right to take into consideration, among other things, the motive, if any, that the person has in making the statement that he does, what promise has been made to him, for instance, for any crimes that he may have committed for which he does not expect to receive any punishment, and any other fact which will enable you to determine whether or not that person is likely to be tell-

[fol. 2487] ing the truth about the defendants when he testifies, will you do that?

A. Yes.

Q. It is not your impression, sir, or is it your impression, that because a so-called accomplice takes the stand and tells you that he, the accomplice, shot somebody and killed him, and because some policeman goes on the stand and shows that he found the body of that man, and somebody shows that he was shot, that necessarily that particular individual is telling the truth about the defendants? Is that your impression?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Rosenthal: I respectfully except.

Q. Do you understand, sir, that whereas the accomplice may be telling the truth about himself, he may be lying as far as other people are concerned?

A. Yes.

Q. Never having sat on a jury before, do you understand that you are entitled to form your own opinion as to what the evidence is? Is that correct?

A. Yes.

Q. Having formed an opinion, it is your duty to listen to others as to their opinion. You understand that also?

A. Yes.

Q. Having reasoned with your fellow jurymen, if you come to the conclusion that the opinion which you have formed is the correct opinion, and they are unable to reason logically that you are wrong, would you, because of [fol. 2488] your inexperience as a juryman, lateness of hour, or any other reason, suborn your opinion to those of the others?

Having been asked whether you have any fear or hesitation in coming in with a verdict of Guilty if you were convinced beyond a reasonable doubt of the guilt of the defendant, let me ask you whether or not, in view of the publicity that may have been given to this case, you have the courage and fortitude to come in with a verdict of Not Guilty if you are not convinced beyond a reasonable doubt of the guilt of these defendants. Have you that courage?

A. Yes.

By the Court:

Q. May I ask, was your father in the insurance business?
A. No.
Q. Did you know David Berman?
A. No. We have no relation by the name of Berman.
Q. This man would be about seventy-six.
A. No.
Q. He was in your line of business. Do you know who I mean?
A. No.

Mr. Turkus: Peremptory.

The Court: Why didn't you say that an hour ago? I knew you were going to say it. Call two gentlemen.

(The following talesmen were called and took their places in the jury box: Joseph J. Slonim, 74 Beaumont Street; John J. Dempsey, 2144 East 13th Street.)

Mr. Turkus: I ask the Court to recess for the supper hour.

[fol. 2489] The Court: No. You brought this on yourself. You should have exercised your challenge at the time you decided you were going to. Get a glass of Coca-Cola for Mr. Turkus.

Mr. Turkus: Never mind.

The Court: Get a cup of water.

Mr. Turkus: It is four hours since we have had lunch.

The Court: All right. Take it on tae chin.

By Mr. Turkus:

Q. Mr. Slonim, I take it that you have heard a lot of questions here?
A. Right.
Q. Have you heretofore served as a juror in a criminal case?
A. I did.
Q. More than once?
A. Yes, sir.
Q. Was any of the cases recent?
A. I served the early part of this year.
Q. What judge was that?
A. Brancato.
Q. Were any of the lawyers in this case defense lawyers in that case?
A. No, sir.

Q. Do you recall the name of the Assistant District Attorney who prosecuted?

A. No.

Q. Was it a murder case?

A. Yes.

Q. Did the case go to a conclusion?

A. The defendant took the plea before it went to the jury.

Q. You sat in other criminal cases?

A. Yes, sir.

Q. More than two?

A. In every court with the exception of Judge Leibowitz.

[fol. 2490] Q. Then you know what it is all about?

A. I do.

Q. You are listed here as an Assistant Vice-President. Is that a corporation?

A. Trust Company.

Q. You have been in the banking business long?

A. Thirty-six years.

Q. It should not be too difficult for you to get over this thing with me very quickly. Does business bring you into contact with firms or individuals in the garment and clothing business?

A. It does.

Q. Does your livelihood as an Assistant Vice-President depend upon the good will of any of those manufacturers?

A. Of all customers.

Q. One of the defense lawyers wants to know if you know Judge Liebowitz.

A. Very well, personal friend.

By the Court:

Q. You are a neighbor?

A. Right.

Q. Down at Manhattan Beach?

A. Manhattan Beach.

Q. You visit at one another's homes?

A. Right.

By Mr. Turkus:

Q. Getting back to this clothing and garment district business, do you know any officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. I take it, then, that you have some customers who deposit money with the Manufacturers and manufacture clothing?

[fol. 2491] A. Other wearing apparel.

By the Court:

Q. Mr. Dempsey, I am trying to place you. You know me, don't you?

A. Well, I have seen you before.

Q. Sheepshead Bay?

A. Right.

Q. You were a new man. What business were you in?

A. Lawyers Mortgage Company.

Q. What position did you hold there?

A. Inspector.

Q. That was for Mr. Fair over on——

A. Madison Avenue.

Q. When I knew you, that was downtown?

A. Montague Street.

Q You were an inspector of buildings for the purpose of appraisals?

A. That is right.

Q. On applications for mortgage loans. When did you retire?

A. About three years.

Q. What section did you cover on your inspections?

A. Brooklyn, Kings only.

Q. All over?

A. And then later on The Bronx and Manhattan.

Q. Did you inspect as to the condition of the premises or as to the appraisal value?

A. Both.

Mr. Barshay: May we take a minute of the Court's time at the bench, Mr. Turkus and myself? We may save a lot of time.

The Court: Come right up.

(Mr. Turkus and Mr. Barshay conferred with the Court at the bench.)

The Court: This is strictly one exception to the rule of [fol. 2492] challenge by consent, but it is to save time. Mr. Slonim is excused by consent of both sides. Right?

Mr. Climenko: That is correct.

Mr. Talley: Yes.

The Court: Call another gentleman to take his seat.

(Henry Gierie, No. 3083, was called and took Seat No. 12 in the jury box.)

Mr. Turkus: (to Mr. Joseph) Send for Mr. Klein to take over.

The Court: Are you actually too tired?

Mr. Turkus: You don't think I am playing a game with you. You know I am under a doctor's care.

The Court: Please, we will have dignity.

Mr. Turkus: Yes, your Honor.

The Court: The Court is displeased at the way the three last examinations were prolonged unnecessarily when the Court was persuaded of what you intended to do, but I will, nevertheless, forgive you for it.

All counsel, everybody, wants an adjournment. But the defendants will remain seated and counsel remain here a few minutes longer.

(To jurors) Gentlemen, kindly be in your place at ten o'clock. Do not discuss the case, let nobody talk to you about it. Keep your minds open. Read nothing. Do not listen to the radio about it.

[fol. 2493] (The jury left the court-room.)

The Court: All other talesmen may go until ten o'clock tomorrow morning.

Philip I. Nash, M. D., of 3100 Ocean Parkway, Brooklyn, New York, being duly sworn, testified as follows:

By the Court:

Q. You are the former president of the Kings County Medical Society?

A. I am, your Honor.

Q. And have been for many years the medical head of the Coney Island Hospital?

A. Thirty years.

Y. Have been practicing how many years?

A. Going on forty years, seven years professor of clinical medicine, Long Island College of Medicine.

Q. And are you Medical Assistant to the District Attorney?

A. I am, your Honor.

Q. This afternoon the defendant Capone exhibited what might or might not be interpreted as symptoms of angina, whereupon the court recessed and an ambulance was summoned from the Long Island College Hospital, the surgeon arriving about fifteen minutes later and making his examination. The surgeon has testified that he found the defendant to be normal at the time of his examination in all respects except that he found a certain amount of hyperten- [fol. 2494] sion, which is not unusual in people of his age. Can you state with reasonable certainty whether the defendant under those conditions would or would not at the time of such examination show symptoms of having had an angina attack within the preceding fifteen or twenty minutes?

A. He would, your Honor.

Q. Will you state what those symptoms would be?

A. If his pain was relieved, he would be in the state of collapse. His blood pressure would have dropped from hypertension to hypotension.

Q. That means it would have gone down instead of up?

A. Gone down instead of up, and his heart rate would not necessarily be slower. It may be a little rapid, but the rythm would be irregular

Q. Would he be able to appear normal upon examination and to return to court, walk down a flight of stairs and resume the trial?

A. Not after a coronary thrombosis or an angina attack.

Q. How long would the collapsed condition continue?

A. For hours.

Q. For several hours?

A. For several hours.

Q. Dr. Torre was here yesterday following a letter received by him concerning instructions from the Department of Correction. Those instructions were, briefly, that medication was to be given as indicated upon the defendant Capone leaving for the court every morning, but he was not [fol. 2495] permitted to carry any on his person for discretionary use in court. When Dr. Torre was here I requested him to get in touch with Commissioner Goldman and ask for the authority to provide sensibly against any contingency by providing the defendant Capone each morning

with a sufficient quantity of medication to be used in the defendant's discretion in event of any real or imagined attack. I ask you now if you will be so good as to get in touch with Dr. Torre at once and urge him to press the Commissioner for favorable action upon that request, so that a reasonable amount of medication may be provided to the defendant to carry on his person tomorrow morning and thereafter each morning. Will you do that, Doctor?

A. I will, your Honor.

The Court: Thank you.

Mr. Rosenthal: May I ask the doctor a question?

The Court: Yes.

By Mr. Rosenthal:

Q. Would you take the responsibility that this man does not need medication, Doctor?

A. That he does not need medication?

Q. Yes.

A. I did not say——

Q. I am asking you will you accept the responsibility that he does not need medication? That is the only question I want to ask you.

A. I would not say that you did not or I did not or any-[fol. 2496] body else. No, I would not say that of anyone in the court-room.

Mr. Rosenthal: That is all I want to ask you, Doctor.

By the Court:

Q. Did you, upon your examination of the defendant last week—I think it was Thursday, when you had him in the medical room and gave him a heart and coronary examination, did you find any evidence whatever of angina pectoris or coronary disease?

A. I did not.

Mr. Rosenthal: May I ask him a question?

By Mr. Rosenthal:

Q. Did you advise the Court that the Court better not sit late hours with this defendant, that it would be better that this man was not put under a strain of late hours?

The Court: He based that upon the hospital report.

Mr. Rosenthal: I ask the doctor——

The Court: I am telling you.

Mr. Rosenthal: If I have no right, I won't ask any questions.

The Court: The doctor gave such advice to the Court in chambers, in chambers, in the absence of the press.

Mr. Rosenthal: I am asking now that the Court has made it public.

[fol. 2497] The Court: Don't interrupt the Court. And you know as well as the Court what was said, and you are not going to put the Court on the spot. Will you please remain silent while the Court is addressing you? The doctor gave that advice upon your calling his attention to your information that upon an electrocardiogram there was a report of coronary trouble, and you know that as well as I do, and the Court——

Mr. Rosenthal: In view of the fact that we have——

The Court: The Court has done its best to be conscientious in this decision, but will not be fooled by any apparently sham attacks, particularly in view of the sham that was pulled before the Court with tablets which were counted by the clerk one night last week, which was a quadruple dose of luminal producing a luminal toxic effect, which was pronounced in the press as being a cardiac attack.

The Court now recesses.

Mr. Rosenthal: Whatever this man took, he took under the instruction of physicians over whom he has no control.

The Court: I won't quarrel with you. I strongly suspect that he was handed the medication.

Mr. Rosenthal: There is no basis for that.

The Court: Because it is denied at the jail that it was given by the physicians. They strongly deny——

[fol. 2498] Mr. Rosenthal: May I ask——

The Court: You will be silent. He had enough of the medication to kill several persons.

Mr. Rosenthal: May I ask the doctor——

The Court: You may not ask anything now. You will come to order, because I strongly suspect a trick, and all the Court wants to do here is to see that the Court is not put on the spot with false reports and misleading reports in the press as to the Court's sincerity and desire to act as an impartial judge, but not be fooled.

Mr. Rosenthal: There is no basis——
The Court: The Court has recessed.
The defendants are remanded.
Mr. Rosenthal: And I except to it.

(An adjournment was thereupon taken to Thursday, October 16, 1941, at 10:00 A. M.)

[fol. 2499] Brooklyn, N. Y., October 16, 1941.

Trial Resumed

By Mr. Turkus:

Q. Mr. Gierie, is that the pronunciation?
A. Yes, sir.
Q. Do you reside at 3717 Avenue R?
A. Yes, sir.
Q. You are listed as an assistant superintendent. Is that with the City of New York?
A. The Guaranty Trust Company of New York.
Q. Has that been your business for a number of years?
A. All my life.
Q. I take it while you were seated with the other prospective jurymen you heard me address certain questions about the Brownsville and the East New York sections and the garment and the clothing industries?
A. Yes, sir.
Q. And the clothing truckers?
A. Yes, sir.
Q. Is there anything about those items that the District Attorney should know?
A. No—I know someone in East New York, a policeman: at the present time he is out on Empire Boulevard.
Q. He is a detective or a patrolman?
A. Patrolman, Gierie. He does not figure in the case at all.
Q. Have you heretofore served as a juror at any time?
A. Yes, sir.
Q. In the Supreme Court?
A. In the County Court.
Q. On criminal cases?
A. Yes, sir.

[fol. 2500] Q. Was it since January 1, 1940?
A. Yes, sir.
Q. Do you remember the name of the Judge?
A. Judge Taylor.
Q. Were any lawyers in the case present who are now in court?
A. No, sir.
Q. Did you actually serve on the jury?
A. No, sir.
Q. Were you examined by me?
A. Yes, sir.
Q. Did I say you were satisfactory?
A. Yes, sir.

By Mr. Turkus:

Q. Mr. Dempsey, what is your business?
A. Retired.
Q. What was your business?
A. Lawyers Mortgage Company, inspector.
Q. You must speak up loudly, so we can get it on the record. Do you live in East 13th Street?
A. Yes, sir.
Q. Is that in Flatbush?
A. They call it Sheepshead Bay.
Q. Have you lived there for a number of years?
A. In that section about fifteen years.
Q. Have you beea retired a number of years?
A. About three.
Q. Are you engaged in any occupation whatever?
A. No, sir.
Q. How long were you with the Mortgage Company?
A. Thirty-two years.
Q. While with the Mortgage Company, what work did you do? Was it appraisal?
A. Inspecting buildings, investigating.
Q. Did your business bring you in contact with the Brownville or East New York section?
A. All over the city.
Q. Is there anything that has come to your attention [fol. 2501] while you had business for the Title Company that either by way of hearsay or information you heard anything about the defendants?
A. No, sir.

Q. Or about any of the names I mentioned?

A. No, sir.

Q. Did you hear the examination with regard to accomplice testimony?

A. Yes, sir.

Q. Do you have any different feeling than any other juror?

A. No, sir.

Q. Will you if accepted as a juror devote your mental faculties to finding out does the accomplice speak the truth about the defendants at the bar and is there other evidence tending to connect them with the commission of the crime?

A. I don't get that.

Q. Part of the testimony in this case will come from one who is known in law as an accomplice.

A. Yes, sir.

Q. Do you understand an accomplice is one who is himself implicated in the commission of the crime?

A. Yes, sir.

Q. I say to you that part of the testimony in the State's case will emanate from such source, will come from one of the men who was in on the commission of this crime.

A. Yes, sir.

Q. I want to know whether you have any bias or prejudice either against the prosecutor of the county, Judge O'Dwyer, or against the prosecution of an indictment wherein the testimony of one who himself worked in a group or combination to kill the victim named in the indictment, if you have any fault to find or any prejudice against that kind of a prosecution.

[fol. 2502] A. No, sir.

Q. Don't take my word for it that the case was broken from the inside. That will be your job to find out, if that is not so when you hear the evidence. Let me tell you this: Are you prepared to give these defendants everything the law of the land says they shall have, no more and no less?

A. Yes, sir.

Q. That is our job. Our job is prosecutor, your job is to determine the question of guilt, giving the defendants everything they are entitled to, certainly not less, obviously not more?

A. Yes, sir.

Q. After hearing all of the evidence in the case, if you have a reasonable doubt, you will say it, I am sure?

A. Yes, sir.

Q. But if you are satisfied beyond a reasonable doubt, when you hear the evidence, that Judge O'Dwyer will present in this court, will you have any fear or will you hesitate to render that kind of a verdict which reflects the finding of guilt?

A. No, sir.

Q. Is there anything I should know about your qualifications to sit on this jury?

A. Well, I would like to have you ask me questions personally if I am not prejudiced.

Q. Have you a prejudice against the defendants?

A. I have no prejudice against them; I think I can give them a square deal, as far as the man in jail is concerned, but I cannot get out of my mind that it will only end one way, the case.

[fol. 2503] Mr. Barshay: I will challenge him without question.

The Court: Try the challenge.

JOHN J. DEMPSEY, residing at 2144 East 13th Street, Brooklyn, New York, sworn on the challenge.

By Mr. Turkus:

Q. When you were seated in Seat No. 12 in the jury box you made certain responses, when I asked you whether there was anything I should know, and you told me something about prejudice.

A. Yes, sir.

Q. I do not want to repeat my questions, nor do I want to repeat your answer, but would you say the same thing now that you are under oath?

A. Yes, sir.

Mr. Climenko: No questions, your Honor, from the defense.

The Court: Challenge sustained.

Mr. Talley: Will your Honor see me at the bench for a moment in regard to the selection of the jury? It is rather important.

The Court: Yes.

(All counsel and Mr. Turkus appear before the bench and confer without the hearing of the panel.)

By the Court:

Q. Mr. Gierie, you are an assistant superintendent?

A. Yes, sir.

Q. What does that mean?

A. Taking care of all the property the Guaranty Trust [fol. 2504] Company owns and occupies, and as far as alterations are concerned, and taking care of all the help.

Q. You are the man that has charge of the buildings?

A. One of them; the superintendent and my boss has charge of all buildings.

Q. Are you in one of the branches?

A. I am downtown, in the main office. We take care of the Fifth Avenue office, too, and our other office at 60th Street, and we have a group of buildings downtown, about seven or eight.

Q. That would be just about the same as Superintendent of Public Buildings in Brooklyn, the Deputy Superintendent in charge of different buildings?

A. Yes, sir.

Q. You are not connected with the banking business?

A. No, sir, they feed me, that is about all.

Q. You don't object to that?

A. No, sir.

Q. When you were questioned—this is just yes or no—when you were questioned in the case several minutes ago as to whether or not you knew certain names, did these names register in your mind?

A. Yes, sir.

Mr. Barshay: We challenge.

The Court: Try the challenge.

Henry Gierie, residing at 3717 Avenue R, Brooklyn, New York, was sworn on the challenge.

By Mr. Talley:

Q. You were asked some questions by His Honor?

A. Yes, sir.

[fol. 2505] Q. Before you were sworn?

A. Yes, sir.

Q. Now, having been sworn, if you were asked the same questions by the Court or by counsel, would your answers be the same?

A. Yes, sir, the same.

By Mr. Turkus:

Q. Could you, if accepted on this jury, render justice by your verdict and give the defendants every benefit which the law of the land says they shall have?

A. Yes, sir.

Q. Can you decide this case justly and impartially to both sides?

A. Yes, sir.

The Court: Well, the Court, of course, has to divorce the record and consult its own recollection. My notion is there might be implied bias. It is reasonable to assume there may one develop. He says there is one present now, and therefore this man should be executed. I sustain the challenge.

(By direction of the Court, the following talesmen were then called: Moe Hiller, No. 3093; James A. Long, No 3088.)

Moe Hiller, was then examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You reside in President Street?

A. Yes, sir.

Q. You look somewhat familiar to me. Have we met as juror and prosecutor before?

A. Yes, sir.

Q. Was Mr. Rosenthal also involved in the case where [fol. 2506] you were involved as a prospective juror?

A. I have a slight recollection he was; I am not positive.

Q. That has been since Judge O'Dwyer was District Attorney?

A. Yes, sir.

Q. Do you remember the names I mentioned in the voir dire?

A. Yes, sir.

Q. They call it the voir dire. That is a French term. It means to speak the truth. I have a recollection of seeing this man as a juror.

By the Court:

Q. Do you live up near Albany Avenue?

A. No, sir, between New York and Nostrand.

Q. 1239 President Street?

A. Yes, sir.

Q. That is the south edge, what is known as Spotless Town?

A. That is what they term it on the next block. I believe the next block is Spotless Town.

Q. What is your business?

A. I am in the wholesale line.

Q. What line?

A. Ribbons.

Q. Do you belong to the Parkway Democratic Club?

A. No, sir.

By Mr. Turkus:

Q. The case in which Mr. Rosenthal was counsel, was that recently? Do you remember what month?

A. I think it was the early part of this year.

Q. Was I the prosecutor in the case?

A. Yes, sir.

[fol. 2507] Q. Are any of those names familiar to you that we discussed with the prospective jurymen?

A. No, sir.

Q. None are familiar to you at all?

A. No, sir—you mean names of any particular case?

Q. Yes.

A. No, sir.

Q. Were there other names, like Abbandando, the Dasher?

A. I don't remember the names you mentioned.

Q. I think you got as far as you are now, you were examined by both the prosecutor and the defense?

A. Yes, sir.

Q. And did I peremptorily challenge you?

A. I think you did.

Mr. Turkus: Then we will not waste any more time.

By Mr. Turkus:

Q. Mr. Long, you reside in the Park Slope?

A. Yes, sir.

Q. Have you lived in that district a number of years?

A. Over twenty-four years.

Q. You are listed as a secretary. By whom are you employed?

A. Horace Butler.

Q. Is he a lawyer?

A. An architect.

Q. Have you been with him a number of years?

A. Sixteen.

Q. You heard the questions I addressed to the other jurymen. Is there anything you know now about Brownsville or East New York or the garment trade or garment industry?

A. No.

Q. Do you feel the same as the other prospective jurors who have been accepted did, about acomplice testimony?

A. Yes, sir.

[fol. 2508] Q. If accepted in this case, will you give the defendants at the bar every legal right they are supposed [fol. 2509] to have? The judge will tell you they are to be given the benefit of every right in our law of the land that inures to the defendants.

A. Yes, sir.

Q. If, after hearing all the evidence in the case, you have a reasonable doubt, you will say so by your verdict?

A. Yes, sir.

Q. After you hear all the evidence in the case, if you are convinced beyond a reasonable doubt that these three men are guilty participants in the murder of Rosen and that they each played a part in the combination or group as set forth by the witnesses that are produced, will you say it in your verdict without fear or hesitation?

A. Yes, sir.

Q. Now, is there anything we should know about which disqualifies your sitting as a juror in this case?

A. I think I am prejudiced.

Mr. Barshay: I challenge the talesman.

Mr. Turkus: Let me finish with him.

Q. Is there something that you have read in the newspapers?

A. I have read in the newspapers, but not the entire articles.

Q. Is there anything you have read in the newspapers about these defendants that sticks in your memory?

A. No, sir.

Q. Are there things you have heard in court which prejudice you?

A. No, sir.

The Court: Is it a desire to get back to your work?

[fol. 2510] A. No, sir.

Q. We all have our jobs to play in this world. I have the job of being prosecutor. I have got to present the evidence of the People of the State of New York in criminal cases; that is my job.

Mr. Barshay: I object.

The Court: A jury has to be found—gentlemen have to be found who are willing to give service, so please have that in mind and consult the actual condition of your mind only in giving answers to each question.

The Talesman: That is what I am doing.

By Mr. Turkus:

Q. You did say to me that you would give the benefit to these defendants of every law of the land which was charged you they should have?

A. Yes, sir.

Q. If at the conclusion of the case, if you have a reasonable doubt, after hearing all the evidence, you would give them the benefit of that doubt?

A. Yes, sir.

Q. You did say that if you found they were guilty beyond a reasonable doubt you would say that?

A. Yes, sir.

Q. Wherever you got this prejudice from, can you take that prejudice and lay it aside and decide this case on the evidence you hear in the court-room?

A. I don't think so.

Mr. Barshay: I challenge the talesman.

The Court: Try the challenge.

[fol. 2511] (James A. Long, residing at 466 Fifteenth Street, Brooklyn, New York, was sworn on the challenge.)

By the Court:

Q. That is between 6th and 7th Avenues?

A. 8th and 9th.

Q. Do you belong to the 12th Assembly District Democratic Club?

A. I belong to a club.

Q. Have you heard any talk there about this?

A. No, sir.

Q. What club is that?

A. The Ancient Order of Hibernians, the same that Mr. Rooney and Mr. O'Dwyer belong to.

Q. They are officers of the club?

A. No, sir, they are members.

Q. You would not let that influence you?

A. No, sir.

Q. You would not convict a man to accommodate some officers of a club?

A. No, sir.

Q. Do you know Mr. Cuff?

A. I do.

Q. Did you meet him at the Half Moon Hotel?

A. No, sir.

Q. The dinner?

A. No, sir, I was not there; I did not go to that.

Q. Do you remember the dinner?

A. Yes, sir.

By Mr. Rosenthal:

Q. Now that you have been sworn, would you make the same answers as you made when you were sitting in the jury box, to Mr. Turkus?

A. Yes, sir.

By Mr. Turkus:

Q. The answers you made to the questions of Judge Tay- [fol. 2512] lor, if those questions were to be repeated would you make the same answers now?

A. The same answers.

The Court: Some of the answers given in the box were not audible.

By the Court:

Q. Will you be able to put aside every notion you have in your head that will work against any of the defendants and give the defendants a square trial on the evidence?

A. No, sir, I don't think so.

The Court: Challenge sustained.

MOE HELLER, a talesman, was then examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Are you sure, Mr. Heller, there was a peremptory challenge by me in the case where Mr. Rosenthal was?
A. Quite sure.

Mr. Turkus: I will exercise a peremptory challenge now. There is no use of wasting time.

[fol. 2513] (Examination of CLEMENT S. JACOBUS—not sworn.)

By Mr. Turkus:

Q. Mr. Jacobus, do you reside on Clinton Avenue?
A. Yes, sir.
Q. Are you a real estate broker?
A. Yes, sir.
Q. In business for yourself?
A. Yes, sir.
Q. Where is your office?
A. No. 26 Court Street.
Q. Did you hear the question in regard to the clothing garment center in Manhattan, and about the Brownsville and East New York section in Brooklyn, and the water-front?
A. Yes, sir.
Q. Have you heretofore served on any jury?
A. Yes, sir.
Q. Has it been in this court?
A. I do not recall the name or what year—I was not on the jury, though.
Q. You never reached the jury box?
A. No, sir.
Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. No, sir.
Q. Do you know any of the nine lawyers in the case or anyone in their office?
A. No, sir.

Q. Do you know any lawyer who specializes in the defense of criminal cases?

A. No, sir.

Q. Do you know Mr. Barshay, who says he has an office in the building where you have your office?

A. I do not know him.

[fol. 2514] Q. There are just a few simple things I want to know about, and we can go along very hurriedly. Will you take the law exclusively from Judge Taylor in its every aspect?

A. Yes, sir.

Q. Judge Taylor tells the jury what the law is, and the jury applies the law to the evidence in the case.

A. Yes, sir.

Q. Will you take the law Judge Taylor gives you with common sense, and apply it to the facts in this case?

A. Yes, sir.

Q. After hearing all the evidence in the case, if you have a reasonable doubt about guilty participation in the commission of this murder charged in the indictment by all the defendants or any one of them, you will give the defendants the benefit of that reasonable doubt?

A. Yes, sir.

Q. By the same token, if Judge O'Dwyer presents the evidence in this case—you do not form any opinion about what the evidence is from anything you hear in this voir dire—either by the defendants or the District Attorney—you only form your opinion when you get all of the evidence. After you get it, if you are satisfied beyond a reasonable doubt that these three defendants are guilty of murder in the first degree and that each one took a part in this combination or group to kill the victim named in the indictment—that is what you hear here in open court—will you say so?

A. Yes, sir.

Q. With respect to the accomplice part of the testimony in this case, which will come from accomplices—and if you have any prejudice, you just let me know and I will go along [fol. 2515] quickly, and if you have none, let me know that too. Now, will you take all the tests the Judge gives you to find out does this accomplice in the case speak the truth about the part that each of these defendants played in the

group or combination murder of the victim named in the indictment?

A. Yes, sir.

Q. And do you understand that is the reason you apply the test, to find out does he speak the truth about their participation in this matter, and is there other evidence aside from the testimony of the accomplice which tends to connect these defendants and every one of them with the commission of the murder?

A. Yes, sir.

Q. And will you apply your mental faculties to that determination?

A. Yes, sir.

Q. Now with regard to another point brought out by one of — defense lawyers, that his client has been convicted of other crimes and is serving now a jail term, would you relax or deviate from your duty as a juror in this case on account of that?

A. No.

Q. Is there anything that I should know as prosecutor which would affect your qualifications to sit as a juror and render a verdict in consonance with justice?

A. No, sir, I do not know of anything.

(John J. Dunphy was then questioned by Mr. Turkus.)

Q. You reside up near the Park Slope?

A. Yes, sir.

[fol. 2516] Q. Have you lived in that neighborhood for a number of years?

A. About six years.

Q. Prior to that where did you live?

A. In Flatbush.

Q. You are listed as treasurer.

A. Of a shipping company. They are forwarders—custom truckers.

Q. Does your work keep you inside of the office?

A. Yes, sir.

Q. You handle the checks and the money and such things?

A. Yes.

Q. Is there anything the prosecution should know about any possible contact or connection with people in the garment or clothing industry or clothing trucking industry?

A. No, sir.

Q. Or in connection with Brownsville or East New York section?

A. No, sir.

Q. Or with Albert Anastasia or anybody on the Brooklyn waterfront whose names have been mentioned?

A. No, sir.

Q. Have you ever sat as a juror in any criminal case?

A. No, sir.

Q. Will you take the law implicitly from the trial judge?

A. Yes, sir.

Q. And will you, with common sense and understanding, apply the law to the case at bar?

A. Yes, sir.

(Talesman Jacobus was then interrogated by the Court.)

Q. How long have you lived there?

A. Ever since I came to Brooklyn in 1909. I lived at 92 Gates Avenue for ten years.

[fol. 2517] Q. That is between Grand and Gates?

A. On the corner of St. James Place.

Q. How long have you been in the real estate brokerage business?

A. Since 1938.

Q. And before that?

A. I was with the Lawyers Mortgage Company for twenty years.

Q. On Liberty Street?

A. On Montague Street.

Q. The Brooklyn office?

A. Yes, sir.

Q. For how many years?

A. Twenty-six, about.

Q. You came from what town?

A. Springfield, Massachusetts.

Q. You are not a friend of Professor Jacobus of the Theological Seminary?

A. No, sir.

(Talesman Dunphy was further interrogated by Mr. Turkus as to his qualifications.)

Q. Mr. Dunphy, have you heard the discussion with the jurors who have been accepted, in connection with accomplice testimony?

A. Yes, sir.

Q. Do you understand it is not whether you like or dislike accomplice testimony, it is whether you believe he speaks the truth as to the part each man played in the commission of the crime?

A. Yes, sir.

Q. And whether you like or dislike the accomplice, if you believe his story and you believe, *under the instructions of* law, it has been corroborated by other evidence which tends to connect the defendants with the commission of the crime, [fol. 2518] will you find the defendants guilty of murder in the first degree—you do not acquit defendants because you do not like accomplices, you understand that?

A. Yes, sir.

Q. Is there any question I put to the other talesmen who have been accepted that you would answer any differently?

A. I do not know of any.

Q. Is there any reason why you cannot give these defendants at the bar of justice every legal right that the law of the land says they should have?

A. No, sir.

Q. And after you give them every legal right they have, and after you hear all of the evidence in the case, if then you have a reasonable doubt about their guilt, will you say so?

A. Yes, sir.

Q. And, on the other hand, if after hearing all of the evidence in the case that Judge O'Dwyer brings into this court room, you are satisfied of their guilt of murder in the first degree beyond a reasonable doubt, will you say that in your verdict without any fear or hesitation?

A. Yes, sir.

Q. Is there anything the prosecutor of this county should know about your qualifications to render a verdict in consonance with justice in this case?

A. No, sir.

(Mr. Jacobus was then interrogated by Mr. Talley.)

Q. Mr. Jacobus, prior to your being called I think you said that you sat, in the spring of this year, as a juror. Did you sit as a juror in a criminal case?

A. No, no criminal case.

[fol. 2519] Q. You did sit as a juror in a civil case?

A. Yes.

Q. A case of damage for injuries?

A. Yes, sir.

Q. The Court will charge you that in a criminal case the rules are essentially different than those prevailing in a civil court. When I say "rules", I mean the law governing the conduct of a criminal case, and the rights that are accorded every person charged with crime under our American system of law—they are quite different. You will be *instructed by the learned* Court, if this case goes to the jury, as to what those principles are. The Court will instruct you that every defendant is presumed to be innocent until his guilt is proven. A defendant charged with a crime in an indictment, which is simply an accusation in writing, is not required to prove his innocence, but, on the contrary, the People, when they bring in an indictment, undertake the task to prove that guilt. You understand that?

A. Yes, sir.

Q. Will you require the People in this case to prove the guilt of these defendants before you bring in a verdict of "Guilty" against them?

A. Yes, sir.

Q. And the law goes further in this particular, not to shield the guilty, but to protect the innocent—that is the basis of these rules of criminal law—if the Court charges you that it is the law that not only must guilt be proven to the satisfaction of the jury, but it must be proven beyond a reasonable doubt—and the Court will charge you what rea- [fol. 2520] sonable doubt is—will you give the defendant, or the defendants, the benefit of such doubt when you come to consider the evidence in this case?

A. Yes, sir.

Q. You have not any doubt in your mind you can do that now?

A. No, sir.

Q. Some testimony—we do not know what it is going to be—we of the defense—but the District Attorney has indicated by his questions that certain accomplices, so-called, will be presented here and their evidence given before you; they will testify, we can rightfully assume, of their participation in this crime charged in this indictment. The Court will instruct you that it is the law that the testimony of such person, who himself accuses himself of the crime, and then testifies as to the participation of others, must be scrutinized with great care and caution to see whether they are telling the truth, to see whether, in the giving of their testimony, they may not be actuated by motives of self-

preservation, looking out for themselves, disregarding the truth and the rights of others. Now, if such testimony is presented, will you agree with me now that you will regard such testimony with the care and suspicion and caution that the law says a juryman should regard that type of testimony?

A. Yes, sir.

Q. Have you read anything about this case or any of these defendants, or anything connected directly or indirectly with the matters we are here to try?

[fol. 2521] A. I have seen names in the paper, but I do not know anything about the case, I have not read enough.

Q. You read something about some matters that are associated with this indictment in this case?

A. I have seen names in the paper.

Q. Might I ask you what paper you ordinarily read?

A. The Tribune and the Sun.

Q. When you can buy them on the stand?

A. I buy them.

Q. You have not bought them the last couple of nights?

A. No, sir.

Q. Did you read any articles in the Daily Mirror?

A. No, sir.

Q. Did you read in the Journal-American the story of the life of Judge O'Dwyer?

A. No, sir.

Q. Did you discuss this case of these defendants with anybody?

A. Only in connection——

Q. Since you have been called to the jury room?

A. Yes, sir.

[fol. 2522] By Mr. Talley:

Q. Did you form any impression, Mr. Jacobus, about any of these defendants, with respect to their guilt or innocence?

A. No, sir.

Q. Or with respect to their character and reputation?

A. No, sir.

Mr. Turkus: I object to the question whether the man has formed any opinion as to their character or reputation.

The Court: Objection overruled.

A. I have seen their names in the papers.

Q. Is that vague or definite?
A. Vague.

By Mr. Talley:

Q. It has left an impression in your mind about them or some of them, hasn't it?
A. Yes.
Q. Is that impression you have about them or any of them an unfavorable impression?
A. Yes, sir, it is.
Q. Is that impression which you have formed one that you would require some evidence in this case to dispel?

Mr. Turkus: I object, because character evidence is in a different category.
The Court: Yes.
Mr. Talley: I am not speaking of character evidence.
Mr. Turkus: That is what the juror is speaking of.
[fol. 2523] The Court: It is a difficult point to rule on. I have ruled on it before in this case.

By the Court:

Q. Supposing the Court should charge you not to give any attention to it, would you be able to lay it aside?
A. Yes, sir.
Q. And to decide the case on the evidence?
A. Yes, sir.
Q. And not be influenced by it in any way?
A. No, sir.
Q. And not require any evidence to remove it?
A. No, sir.
Q. You cannot put a thing out of your mind, but you can disregard it?
A. What the evidence proves to me.
Q. You are supposed to decide the case fairly upon the evidence, because the scales of justice must be evenly balanced.

Mr. Turkus: He may take the People's evidence.

Q. Could you lay it aside entirely and try the case upon the evidence alone?
A. Yes, sir.

By Mr. Talley:

Q. If the evidence was such, you could dispel that impression and put it aside?

A. Yes, sir.

Q. And the converse of that is, if the evidence is not present, you would go in the jury box with that impression on your mind? That is the exact situation, isn't it?

Mr. Turkus: Objected to as leading and suggestive.

The Court: It is obvious you cannot put a thing out of mind at will.

By Mr. Talley:

[fol. 2524] Q. Let us speak as plainly as language will permit. If you are accepted as a juror in this case, you will begin consideration of the case with an unfavorable impression in your mind about these defendants or some of them. That is true, isn't it.

A. Yes.

Q. Before that impression is removed something will have to transpire in this court-room, will it not? What I mean is some evidence will have to be given?

Mr. Turkus: I object. That is an ambiguous question.

The Court: Judge Talley's examination of the juror is quite impressive; that is very much to the point. I think it is clear that Judge Talley means to abstractly obtain an unfavorable impression. It is in reference to whether or not he can disregard it and lay it aside. The objection is overruled.

Q. (Question repeated by the reporter.)

A. Yes, sir.

Q. To get rid of that impression, you would expect such evidence to come from the defendants, wouldn't you?

A. Yes, sir.

Q. And unless such evidence was produced, you could not disregard the impression that you have now as you are talking to me?

A. No, I have that impression.

Mr. Talley: I challenge for implied bias.

The Court: Try the challenge.

(Clement S. Jacobus, residing at 464 Clinton Avenue, Brooklyn, New York, was sworn on the challenge.)

[fol. 2525] By Mr. Talley:

Q. Before you were sworn, you answered certain questions put to you by me?

A. Yes, sir.

Q. Now that you are sworn, if I asked you the same questions, would your answers be the same?

A. Yes, sir.

By Mr. Rosenthal:

Q. You understood Judge Talley when he asked you whether the impression you have in your mind would take some evidence on the part of the defendants in this case to remove?

A. To disprove?

Q. Yes, to remove.

A. Yes, sir.

By Mr. Turkus:

Q. Did I understand you correctly when you discussed the proposition with Judge Talley that you understood that impression goes to character and reputation?

Mr. Climenko: I object. It assumes a state of facts not in the question.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. Yes, sir.

By the Court:

Q. Have you formed any opinion as to whether or not the defendants or any of them are guilty of this specific alleged crime?

A. I have an unfavorable——

The Court: Repeat the question.

[fol. 2526] Q. (Question repeated by the reporter.)

A. I have not formed any opinion; I have an unfavorable bearing in my mind from the headlines I have seen in the paper, that is all.

Q. And you told us that was vague?
A. Yes, sir.
Q. You told us that while it could not be dispelled from your mind other than by evidence, you could and would lay it aside and disregard it?

The Court: You know a judge may or may not have inside knowledge of the facts in the case, and he is disqualified, because he has to be fair. Now, a man of common intelligence may or may not be able to measure up to that moral requirement to disregard impressions and decide on the evidence in a case. The question is, are you able to do so?
The Witness: The impression is not so deep I could not do that.

Q. Will you do it?
A. Yes, sir.

The Court: Challenge overruled.
Mr. Talley: Exception to all counsel for the defendant.

(Mr. Jacobus steps back in the jury box.)
(Mr. Jacobus is interrogated from the jury box by Mr. Talley.)

By Mr. Talley:

Q. Mr. Jacobus, despite the little examination we have [fol. 2527] had here, it would take evidence to remove this impression from your mind?

Mr. Turkus: I object. That has been determined.
The Court: Sustained. That has been tried and disposed of. No more questions on that point by any counsel.

Q. Are you acquainted with Judge O'Dwyer or any members of his staff?
A. No, sir.
Q. Are you taking any part or do you contemplate taking any part in the campaign, on one side or the other?
A. No, sir.
Q. Outside of the matters that have been inquired into, do you know of any reason why you cannot serve as a fair and impartial juror in this case other than what you have indicated?
A. I don't know of any.

Q. Do you think, despite what you have read in the newspapers, you can judge this case impartially and without prejudice or bias?

Mr. Turkus: I object to that as having been already determined.

The Court: Objection sustained.

Mr. Talley: That is not the same question.

The Court: The Court has ruled.

Mr. Talley: I take exception.

Q. I did not hear Mr. Jacobus in his statement as to what his business was. May I ask you that question again?

[fol. 2528] A. Real estate broker.

Q. Operating in Brooklyn or in Manhattan?

A. In Brooklyn.

Q. Where is your office?

A. 26 Court Street.

Q. Are you engaged in business on your own account or are you associated with someone?

A. On my own account.

Q. Do you buy and sell real estate or do you rent it or have charge of real estate?

A. A little bit of all.

Q. Have you any friends on the Police Department, or close associates?

A. No, sir.

Q. Any member of your family in the Police Department?

A. No, sir.

By the Court:

Q. You are a member of the Hill Association?

A. Yes, sir.

Q. Has there been any talk there about Judge O'Dwyer's investigation?

A. I don't think they had any meeting; I have not had any notice of a meeting.

By Mr. Talley:

Q. Have you heard any political talks on the radio in connection with this campaign?

A. No.

(Mr. Dunphy was then interrogated as to his qualifications by Mr. Talley.)

By Mr. Talley:

Q. Have you read anything about this case?

A. Yes, sir, I have.

Q. Have you formed any impression about this case or [fol. 2529] about any of the defendants as a result of your reading?

A. Just from reading the newspaper I have sort of an unfavorable opinion of these defendants.

Q. That opinion goes to the question of their guilt or innocence?

A. I should say so.

Q. Would that require some evidence in this case, if you are accepted as a juror, to remove that impression you have about them?

A. Yes, sir, it would.

Q. You do not think you could remove it unless you heard evidence, to take it out of your mind?

A. Yes, sir, that is right.

Mr. Talley: This juror is challenged for implied bias.

The Court: Try the challenge.

(John J. Dunphy, residing at 406 St. Johns Place, Brooklyn, New York, was sworn on the challenge.)

By Mr. Talley:

Q. If I asked you the same questions that I inquired about when you sat in the jury box, now that you are sworn, would your answers be the same?

A. Yes, sir.

Q. Is it your feeling that you could not lay that impression aside which you have formed with respect to the guilt or innocence of these defendants?

A. Unless I had the evidence to offset that opinion.

Q. You could not lay it aside?

A. I should not say so.

[fol. 2530] By Mr. Rosenthal:

Q. You have sat in court and heard the various instructions given to prospective jurors as to the law?

A. Yes, sir.

Q. You were listening carefully and heard those various instructions?

A. Yes, sir.

Q. Notwithstanding the fact that you understand that law given from the Court and what those different principles are as to the presumption of innocence, reasonable doubt, and all those things, you make the statement conscientiously, that you made to Judge Talley?

A. Yes, sir.

Q. So that the impression you now have, or opinion which you have of or concerning some of the defendants is of such a nature that it will take evidence on their part to remove it before you would be able to lay aside the impression or opinion which you formed. Is that a correct statement of fact?

A. Yes, sir, that is so.

Q. This statement is made by you, notwithstanding the fact that you have been told that the defendants need at no time prove their innocence?

A. Yes, sir.

Q. That at all times it is incumbent upon the People to establish their guilt beyond a reasonable doubt?

A. Yes, sir.

Q. But notwithstanding that, your impression, formed in your mind is of a nature that it will take some evidence upon the part of the defendants before you will remove it from your mind?

A. Yes, sir.

[fol. 2531] Q. That impression which you have you cannot lay aside unless the defendants bring forth such evidence to your satisfaction; is that correct?

A. Yes, sir.

By Mr. Turkus:

Q. Have you ever sat as a juror before? I believe you said no.

A. That is right.

Q. There are instructions of law—— Did you ever sit as a juror in any case at all, in any type of litigation?

A. In just a minor case in the Magistrate's Court some years ago.

Q. You mean the Municipal Court—they do not have juries in the Magistrate's Court.

A. It was in the minor court.

Q. Which would be the Municipal Court?

A. Yes, sir.

Q. What papers do you usually read?

A. The *Times* and the *Sun;* once in a while I run across a type of news in some other paper, but I buy those two regularly.

Q. So that the impression you have stated to counsel has been formed from reading the *Times* and the *Sun?*

A. Yes, sir.

Q. And no other paper?

A. Well, I have stopped to get a shine or something like that, and I might pick up the *News* and read it, or some other paper.

Q. That would be by mere casual reading?

A. Yes, sir.

Q. Casual reading?

A. Yes, sir.

[fol. 2532] Q. From any of that reading you've done so far, do you know any of the alleged facts in this case?

A. No, sir, I don't know any of the facts.

Q. As you are sitting there now, can you remember one newspaper that reported the murder?

Mr. Barshay: I object.

The Court: Objection overruled.

A. No.

By the Court:

Q. Do you recall now the person who was alleged to have been killed?

A. Yes, Rosen.

By Mr. Turkus:

Q. You have heard that in court?

A. I heard that in court, and I would say in the paper, but I did not recall until I heard it here.

Q. What I am trying to find out is, isn't this the situation, that whatever you have read is so hazy in your mind

you do not know when it happened, how it happened, or how it is alleged to have happened?

Mr. Barshay: I object to the question.

The Court: Objection overruled.

Mr. Barshay: Exception.

A. That is true, yes, sir.

By the Court:

Q. Does your impression from the newspaper go any [fol. 2533] further than the fact that the defendants have been indicted and are accused of the murder of Rosen?

A. Yes, sir, that is true.

Q. Is that as far as it goes?

A. Yes, sir.

Q. You know that from being called they are accused of the murder of Rosen?

A. Yes, sir.

Q. Did you read anything in the newspaper about the alleged facts of the case which caused the impression to form that these defendants were therefore guilty of the murder of Rosen?

A. Repeat that, please.

Q. You say you read that they were accused.

A. Yes, sir.

Q. Of the murder of Rosen.

A. Yes, sir.

Q. Of course, you knew that the moment you got in court?

A. Yes, sir.

Q. The fact they are on trial, does that form any impression in your mind that they are guilty?

A. Oh, no.

Q. Does the fact you read in the paper they are accused of the murder of Rosen form any impression that they are guilty?

A. Not necessarily.

Q. Yes, or no.

A. No, sir.

Q. What is this impression?

A. Just from reading in the paper the various defendants, their names.

Q. You have heard their names in court.

A. Yes, but I was talking about newspaper articles I have read at various times.

Q. Have you read of any alleged evidence in the case? [fol. 2534] A. No, sir, I have not.

Q. Which justifies you in forming an impression as to whether they are guilty or not?

Mr. Climenko: I object to the form of the Court's question.

The Court: Objection overruled.

Mr. Climenko: Exception.

A. No, sir, I have not seen any evidence in the case at all.

Q. Am I correct in concluding that you have simply formed an impression they are accused of the murder of Rosen, and that they are presently on trial?

A. Yes, sir.

Mr. Climenko: Objected to as argumentative.

The Court: Objection overruled.

Mr. Climenko: Exception.

Q. Does it go any further than that?

A. No, sir.

Q. You cannot lay that aside because that is the fact, they are on trial under that accusation?

A. Yes, sir.

Q. If you have any unfavorable impression which goes to the question of guilt or innocence, which according to your own statement you have never had anything to indicate, will you put it aside and judge it fairly and squarely from the evidence in this case?

A. I will.

Mr. Climenko: I object.

The Court: Objection overruled.

Mr. Climenko: Exception.

[fol. 2535] By Mr. Turkus:

Q. Mr. Rosenthal has pointed out that the defendants are here to meet one charge only.

Mr. Barshay: I object to that as argumentative.

Mr. Turkus: They are here to meet only one charge, the charge in this indictment.

Q. Do you understand that?
A. Yes, sir.

Mr. Barshay: I object to it.

Q. Whether Mr. Barshay has himself pointed out that one of the defendants has been convicted of other crimes.

Mr. Barshay: I object. It has never been pointed out to this man at all.
Mr. Turkus: To the other talesmen.
It has nothing to do with my question. May I complete my question?
The Court: There will be no ruling until the question is finished.

Q. I will reframe the question. When questioning other prospective talesmen, some of whom have already been examined—I believe every one who has been examined—Mr. Barshay has indicated that Buchalter has been convicted of other crimes in the past for which he is presently serving a long jail term. I have asked other jurors whether they would relax or deviate from their duty as jurors, knowing that he is presently incarcerated. Do you remember those questions?

[fol. 2536] Mr. Barshay: I object.
The Court: Objection overruled. The man was in court throughout, and repeatedly that question was asked.
Mr. Barshay: It has nothing to do with this challenge. That is the point I make.
The Court: Objection overruled.
Mr. Barshay: Exception.

By Mr. Turkus:

Q. So may we go along with the understanding that all of the matters you have read have nothing to do with the charge in this case at all?
A. That is true.
Q. The Judge will instruct you on the law that that is your duty, to find out from the evidence in this case whether the guilt of the defendants on this charge, the murder of a man named Joseph Rosen, has been established to your satisfaction beyond a reasonable doubt. Can you follow that instruction of law?
A. Yes, sir.

Q. Can you apply that instruction of law to this case?

A. Yes, sir.

Q. And should the Judge further instruct you the burden of proof is always on the District Attorney and the defendants have no burden of proof at all, will you follow that instruction?

A. Yes, sir.

Q. Should the Judge tell you further that the defendants need not offer evidence or take the stand, and that if they [fol. 2537] fail to take the stand no unfavorable inference can be drawn against them, would you follow that instruction?

A. Yes, sir.

Q. In short, will you decide the question of guilt or innocence on this charge upon the evidence you hear in this court, applying the law the Judge gives you?

A. Yes, sir.

Mr. Rosenthal: May I ask a question, just in the nature of rebuttal?

The Court: No, you had your chance.

Mr. Rosenthal: Does the court rule I may not requestion?

The Court: I have ruled.

Mr. Rosenthal: May I respectfully except.

Mr. Talley: I except to your Honor's ruling not to ask this talesman any further questions. May I as——

The Court: You may not resume your trial of the challenge unless there is something new brought out which is in the nature of rebuttal—something entirely new which you did not or could not bring out in your own questioning on the trial of this challenge.

Mr. Barshay: With respect to my client, there is something new, I think.

The Court: What is it? I will rule on it.

Mr. Barshay: May I proceed?

The Court: Yes.

[fol. 2538] By Mr. Barshay:

Q. Now, there has never been addressed any particular question with regard to prior conviction or incarceration of Mr. Buchalter while you were in the box?

Mr. Turkus: I object.

The Court: Objection sustained. The Court takes notice of the fact that he has been in court throughout repeated

questioning by you of the other talesmen on that point, and must have heard it.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. I tell you now as the Judge has already and Mr. Turkus has already said, and I am referring to Buchalter, there may come a time when Mr. Buchalter shall take the stand and you have a right to use the fact of his prior conviction and incarceration in deciding whether or not you should accept or reject that testimony. Now, because of your state of mind that you came here with, and you said you had at present, when you were examined by Mr. Turkus, would the fact he has been convicted on two occasions and is now incarcerated for a long time cause you to accept from the District Attorney less proof with respect to him, or would you require from him more proof if he did not have those convictions?

Mr. Turkus: I object to the question.

The Court: Objection sustained.

[fol. 2539] Mr. Barshay: Exception.

Mr. Talley: I wish to inquire of this talesman with regard to matters that he answered in reply to your Honor's questioning.

The Court: If it is in the nature of rebuttal as distinguished from resumption, the question may be put.

Mr. Talley: I don't understand the term "rebuttal" in connection with an examination of talesmen. Rebuttal has to do with the presentation of evidence which rebuts evidence previously given, but here this talesman tells me one thing in the box and then when he takes the stand tells you something entirely different. I am confused as to his state of mind. I want to straighten it out, which is the purpose of my examination.

The Court: A ruling has been made.

Mr. Talley: I respectfully take exception to your Honor's refusal to permit me to further examine this talesman on the substance of challenge.

By Mr. Rosenthal:

Q. I have this question to address to you—do not answer until the Court rules. When I addressed you and asked you

certain questions and you made certain answers, did you understand the questions which I addressed to you and did you answer them to the best of your ability?

Mr. Turkus: I object.

[fol. 2540] The Court: Objection sustained.

Mr. Rosenthal: Exception.

The Court: Challenge overruled.

Mr. Talley: Exception to all defendants.

(Mr. Dunphy resumes his seat in the box.)

(Mr. Jacobus, a talesman, was then interrogated by Mr. Barshay.)

By Mr. Barshay:

Q. Mr. Jacobus, I speak on behalf of the defendant Buchalter. Do you know him at all?

A. No, sir.

Q. He has been referred to here by the prosecutor and others by the name of Lepke. Do you know him under that name?

A. No, sir.

Q. Did you read about him?

Mr. Turkus: I object. This was the subject-matter of a challenge.

The Court: Sustained.

Mr. Barshay: I have not quesioned this man at all. I except.

The Court: You all tried it.

Mr. Barshay: I am not going on the point of challenge now, that is past. I adhere to your Honor's ruling on that point.

The Court: You may have your exception.

By Mr. Barshay:

[fol. 2541] Q. May I know whether you were ever the victim of any crime?

A. Only a traffic violation.

Q. I said the victim of any crime.

A. No, sir.

Q. Do you know anybody in the Police Department?

A. No, sir.

Q. Do you know anyone at all in Judge O'Dwyer's office?

A. No, sir.

Q. May I know who is associated with you in your firm?

A. No one.

Q. May I know what floor you are on?

A. The 23rd.

Q. Does anyone share the office with you?

A. Yes, sir.

Q. Any lawyers share offices with you?

A. Frederick W. Rowe; I am in the same office.

Q. Anybody else?

A. No, sir.

By the Court:

Q. Frederick W. Rowe was a former Congressman?

A. Yes, sir, Republican.

Q. And certainly he is not campaigning for Judge O'Dwyer's election; is that right?

A. That is right.

Q. He is connected with some bank, isn't he?

A. He is a trustee.

By Mr. Barshay:

Q. Anybody else in the office with you other than Mr. Rowe?

A. No, sir.

Q. Is Mr. Rowe active in campaigning against Judge O'Dwyer?

[fol. 2542] A. No, sir.

Q. Is he still active in politics, to your knowledge?

Mr. Turkus: I object.

The Court: He may answer.

A. I don't know.

Q. Have you discussed Judge O'Dwyer with Congressman Rowe?

A. No, sir.

Q. Have you discussed your prospective jury service with him?

A. Not discussed; I told him I was called for jury service.

Q. Was there any opinion expressed with respect to this case?

A. No, sir.

Q. Have you served on a jury, actually?

A. Yes, sir.

Q. Was it in a capital case?

A. No, sir.

Q. Were you ever a member of the Grand Jury?

A. No, sir.

Q. Do you belong to any societies for the prevention of crime?

A. No, sir.

Q. Any society for the enforcement of law?

A. No, sir.

Q. Were you ever a juror in any case, civil or criminal, where Mr. Turkus or Mr. Klein were lawyers?

A. No, sir.

Q. Are you prejudiced by virtue of the fact that some person has been killed?

A. No, sir.

Q. Did you know Rosen?

A. No, sir.

Q. At the time this was alleged to have occurred, did you read about it then?

A. I don't remember reading it, but I may have.

[fol. 2543] Q. While you were sitting here, none of the things which you may have read recur to you, do they?

Mr. Turkus: I object. This has been gone over on the challenge.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. You know that under our law each defendant is accorded the presumption of innocence?

A. Yes, sir.

Q. You believe in that?

A. Yes, sir.

Q. Do you believe that is a substantial presumption, a substantial right for every defendant?

A. Yes, sir.

Q. Do you feel you must use it as evidence in favor of a defendant?

A. Yes, sir.

Q. The presumption of innocence is so strong, the Court will tell you you may use it as evidence in favor of the defendants. Will you do that?

A. Yes, sir.

The Court: I have ruled "should have probative force," but there is quite a question about that, yet the usual words, "probative force," even they may be debatable.

Mr. Barshay: I take my quotation from Chief Justice White of the United States Supreme Court. I take it precisely from him; that is the only reason I use it.

The Court: Many years ago I had a discussion with [fol. 2544] the late Justice Stapleton on that very point, as to precisely what Judge White meant. We will not go any further on that. It is purely a legal argument with prospective talesmen. The question is whether he will follow the instructions of the Court, whether he believes in it or not.

The Witness: Yes, sir.

By the Court:

Q. Will you follow the instructions of the Court on the law without question, whether you agree with that law or not?

A. Yes, sir.

Mr. Barshay: I take it you will prohibit me from the use of that sentence, "presumption of innocence"?

Mr. Turkus: That has been answered.

Mr. Barshay: May I address the Court?

The Court: You have your answer; you have the Court's ruling, and you have the elucidation by the Court which the Court now regrets having made, because it simply leads to further loss of time.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. Do you agree with the principle which says that when a man pleads "not guilty" to a charge set forth in the indictment he creates for the District Attorney a burden which he must sustain beyond a reasonable doubt, and that burden is to prove the defendant guilty beyond a reasonable [fol. 2545] doubt?

Mr. Turkus: I object.

The Court: Objection sustained. It is not necessary that every talesman or every judge or every lawyer should agree with the law in all its respects. The talesman said he would follow the instructions of the Court as to the law.

Mr. Barshay: Exception.

By Mr. Barshay:

Q. You understand that every person in the jury box has a right to his own opinion?

A. Yes, sir.

Q. That opinion may go, even if it is a prejudicial one, he has a right to it?

A. Yes, sir.

Q. You understand we are searching for prospective jurors whose minds are free?

A. Yes, sir.

Q. Now, my client, I tell you now, is incarcerated for a period of from forty-four to seventy-seven years. Some people have a right to be prejudiced against such a person. Is that one of the items which causes you to form an unfavorable impression of him?

Mr. Turkus: I object to again going over the challenge.

The Court: Sustained.

Mr. Barshay: Exception.

Q. By virtue of that fact, if he should take the stand, [fol. 2546] would you be influenced in disbelieving him because of that fact?

Mr. Turkus: I object. That is a legal question.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Would you less readily accept his testimony even though on the entire evidence he may be telling the truth, because of that fact?

Mr. Turkus: Objected to.

The Court: Sustained.

Mr. Barshay: Exception.

Q. Would you reduce the quality of evidence necessary to prove him guilty beyond a reasonable doubt by virtue of that fact?

Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Barshay: Exception.

Q. Would you expect him to come forth with proof to prove his innocence by virtue of that fact?

Mr. Turkus: Objected to.
The Court: Sustained.
Mr. Barshay: Exception.

Q. Would you increase in any way the burden on the part of the defendant in any degree because of that fact?

Mr. Turkus: Objected to.
[fol. 2547] The Court: Sustained.
Mr. Barshay: Exception.

Q. Would you lessen the burden on the part of the District Attorney because of that fact?

Mr. Turkus: Same objection.
The Court: Sustained.
Mr. Barshay: Exception.

Q. You have heard that the District Attorney intends to present people here who will claim they are accomplices—you have heard that?

A. Yes, sir.

Q. Now, assuming the man comes here and says that he participated in the commission of this crime, and in addition to that he has also admitted on the stand that he has lived a life of crime and committed other murders other than this, burglary, is an ex-convict—would you weigh that person's testimony with caution and care?

Mr. Turkus: I object. He is asking a legal point.

The Court: If the Judge should tell you that the testimony of an accomplice must be viewed with suspicion and accepted with caution and then only if corroborated by sufficient other evidence that tends to connect it with the defendant in the commission of the crime; would you follow those instructions?

The Witness: Yes, sir.

Mr. Barshay: I respectfully except to the Court's [fol. 2548] ruling.

Q. Will you look a bit further than the accomplice? Supposing in your opinion the testimony which comes

forth from people who claim to give evidence tending to corroborate the accomplice, that testimony by virtue of the fact that it comes from a murderer, an extortionist, criminal, ex-convict, has little weight or no weight whatever, will you then take the instructions of the Court with respect to that?

Mr. Turkus: I object to the form of the question.
The Court: Objection overruled.

A. Yes, sir.

By the Court:

Q. Will you take the instructions of the Court in that and in all other respects?
A. Yes, sir.

By Mr. Barshay:

Q. If the Court should tell you that if one person is an accomplice and he is supported only by another accomplice, that that is not corroboration, will you take that ruling from the Court?
A. Yes, sir.
Q. Now, there may come a time when some person may claim he is not an accomplice, and it will be up to you to decide whether he is or he is not. Will you do that?
A. Yes, sir.
Q. No matter what he claims, if you find from the evidence that he is an accomplice, you will require that his testimony be corroborated, won't you?
A. Yes, sir.
[fol. 2549] Q. In other words, if the Court shall tell you that one accomplice cannot corroborate another, you will follow that?
A. Yes, sir.
Q. Now, a man may come here and say, "I committed this crime." That may be true or it may not. That will be for you to decide. Are you willing to look into that to find out whether or not he is telling the truth with respect to whether or not Buchalter is his accomplice?
A. Yes, sir.
Q. In other words, he may be telling the truth about himself and still be lying with respect to Mr. Buchalter,

and that will be for you to determine and keep in mind at all times. Will you look with suspicion on his testimony?

A. Yes, sir.

Q. Will you take into consideration that together with all the other evidence in the case, the fact that the so-called man who now claims he is an accomplice of Buchalter has never seen or spoken to him in his life?

Mr. Turkus: I object to the form of that question.

The Court: Objection sustained.

Mr. Barshay: Exception.

Q. Now, Mr. Turkus has addressed you with respect to finding fault with the District Attorney who solved a case from the inside. Do you understand that neither side—or counsel from neither side are witnesses in this case?

A. Yes, sir.

[fol. 2550] Q. We are not witnesses to this crime, you understand that?

... Yes, sir.

Q. We are merely presenting what we have—is that correct?

A. Yes, sir.

Q. You are not here to find fault with either side, the prosecution or the defense, you know that?

A. Yes, sir.

Q. At the same time, I take it, you will not throw into the scale his evidence, or lend it greater weight because Judge O'Dwyer, according to Mr. Turkus, claims to have broken this case from the inside? That has nothing to do with the weight of the testimony, has it?

A. No, sir.

Q. I take it, because Mr. Turkus claims to have accepted the testimony of the accomplice, that would not influence you in any respect, because he accepted it?

A. No, sir.

Q. The point is, Will you accept it? Isn't that so?

A. Yes, sir.

Q. You are not bound to accept anything I say or anything he says or anything that anybody offers; is that right?

A. Yes, sir.

Q. For it becomes testimony when it is given on the witness stand, subject to direct and cross-examination, and you will give it every conceivable test outlined by the Court?

A. Yes, sir.

Q. Testimony may come here from people which is binding only with respect to one person, two persons, or three [fol. 2551] persons, depending upon the person who gives the testimony. If the Court shall tell you it binds only one defendant, and you may not use it against another, will you adhere to that instruction?

A. Yes, sir.

Q. If it binds two, and does not bind the third, will you adhere to that instruction?

A. Yes, sir.

Q. If the trial should take a long time, you will still keep that instruction in your mind?

A. Yes, sir.

Q. You appreciate that only for convenience are these three men being tried together, when in reality you are giving them separate trials? Do you appreciate that?

A. Yes, sir.

Q. Some of the defendants, through their counsel, have indicated that they may offer a defense in the case—one said an alibi; I don't recall what the other said. Assuming that particular defendant or defendants does offer testimony, I take it you will follow the Court's instructions that because of that you still may draw no unfavorable inference against them—in other words, each counsel can do with respect to his client as he seems wise and correct with respect to his defendant?

A. Yes, sir.

Q. The District Attorney speaks first. He opens up to the jury. He presents his side of the case. Can I have your word that you will keep your mind open and not form a definite conclusion with respect to rejecting or accepting that person's testimony because it comes to you first, but [fol. 2552] that you will wait until the entire case is over before making up your mind?

A. Yes, sir.

Q. In summation the District Attorney speaks last. Counsel speak before him. We are three counsel, who shall sum up in behalf of their respective defendants. Mr. Turkus has said a repetition of the argument three times would not or should not increase the weight of that argument. You recall that?

A. Yes, sir.

Q. He did say that because the argument is repeated three times it does not necessarily mean it has three times the force. You agree with that?

A. Yes, sir.

Q. On the other hand, do you appreciate that when counsel sum up for their respective defendants they have a right to discuss the evidence as they see fit and as they view it, and that it may coincide with another counsel who shall follow?

A. Yes, sir.

Q. And will it lost force with you because it may appear three times in summation?

A. No, sir.

Q. So if you find it helps you in deciding this case and it coincides with your own view of the evidence, you will accept it no matter how many times you hear it?

A. Yes, sir.

Q. You never served as a juror before. Were you ever called?

A. Yes.

Q. Were you ever examined by the District Attorney or by counsel for the defense?

A. No, sir.

By the Court:

Q. What business are you in, Mr. Dunphy?

[fol. 2553] A. Freight forwarding and custom brokers.

Q. What is the firm of custom brokers?

A. The Dumont Shipping Company, 11 Broadway, New York.

Q. How long have you been in that line of business?

A. Eight years.

Q. And before that?

A. I was secretary for B. F. Yoakum.

Q. He is dead?

A. Yes, sir, he died in 1929.

By Mr. Barshay:

Q. Have you at any time discussed crime or investigations of crime—have you heard any lectures on crime?

A. No, sir.

Q. Do you intend to partake in this forthcoming election?

A. No, sir.

Q. Do you know any of the gentlemen here at the prosecutor's table?

A. No, sir.

Q. At any time have you had the misfortunte of being the victim of any crime?

A. No, sir.

Q. Do you know the family of Rosen, or did you know Rosen himself?

A. No, sir.

Q. Were you ever a Grand Juror?

A. No, sir.

Q. Did you read about the case when it first happened?

A. I don't recall.

Q. None of the facts here refresh your recollection?

A. No, sir.

Q. Presently, for any reason whatever, is there in your [fol. 2554] mind any prejudice against the defendants?

Mr Turkus: I object. The challenge has been already tried.

The Court: Sustained.

Mr. Barshay: I am asking him a general question.

The Court: The challenge has been tried.

Mr. Barshay: I am not going into the challenge.

The Court: The objection has been sustained.

Mr. Barshay: Exception.

(Mr. Rosenthal then examined Mr. Dunphy.)

By Mr. Rosenthal:

Q. I believe the questions I am about to ask, in view of the various objections to questions by Mr. Barshay and the sustaining of them by the Court are such that the Court will take some attitude as to this question——

The Court: The Court has ruled consistently on all questions of law.

Mr. Rosenthal: If that be so, we protest over the ruling so far as it concerns my client and also over the overruling of challenge made. I will ask no questions, but reserve my exception.

The Court: All right.

Mr. Barshay: May I say for the record, in behalf of the defendant Buchalter, with respect to the questioning of the juror known as Mr. Dunphy——

[fol. 2555] The Court: No speeches. You have taken your exception. No building up of the record for the benefit of the press.

Mr. Barshay: I except. I spoke to the Court, and not to the press.

The Court: All right, the Court is speaking to you.

Mr. Turkus: Mr. Jacobus and Mr. Dunphy are satisfactory to The People.

Mr. Talley: We reserve our exceptions on the challenges to both Mr. Jacobus and Mr. Dunphy. We wish to make that very plain to your Honor on the record. We do reserve our exceptions in that respect. The defendants peremptorily challenge Mr. Jacobus and Mr. Dunphy.

(Talesmen James L. Edghill, No. 3041; and Mr. Louis F. Stites, No. 3095, were called to the box.)

James L. Edghill, was interrogated as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You live at 158 Linden Boulevard?
A. Yes, sir.
Q. Is that between Flatbush and the other street?
A. Yes, sir.

By the Court:

Q. You are right near Bedford?
A. A half a block from Bedford.
Q. There is a political club on the corner?
A. Yes, sir. Democratic club.
[fol. 2556] Q. Do you belong to it?
A. No, sir.
Q. You have heard no talks about this case?
A. None at all.
Q. Have you given it any thought?
A. No, sir.
Q. You are not taking any particular activity in any political campaign?
A. No, sir.

By Mr. Turkus:

Q. Were you present in court when I addressed the other jurors about possible contacts with the clothing and garment industries?

A. Yes, sir.

Q. Is there anything the prosecutor should know about any contacts you have had there?

A. No, sir.

Q. In the Brownsville or East New York areas or the Brooklyn waterfront?

A. No, sir.

Q. Do you have any scruples, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. Have you heretofore served as a juror in any criminal case?

A. In the Federal Court.

Q. Has that been recent?

A. I guess about five or six years ago.

Q. Were any of the lawyers in that case in court now?

A. No, sir.

Q. Do you know any of the nine lawyers representing these three defendants?

A. I don't know any of them personally; I do remember seeing—think I have—only one or two in the County [fol. 2557] Court.

By the Court:

Q. That does not affect you in any way?

A. No, sir.

By Mr. Turkus:

Q. You are in sympathy with law enforcement?

A. I am.

Q. Did you hear that part of the testimony in this case will come from accomplices?

A. I did.

Q. And you understand that the State's case cannot be proved by one witness; there will be a series of witnesses?

A. Yes, sir.

Q. Do you have any bias or prejudice against accomplice testimony as would cause you to reject it under all circumstances?

A. I have not.

Q. Would you substantially make the same answers as the other jurors did, if accepted, with regard to accomplice testimony?

A. I would.

Q. Will you take every instruction on the law from Judge Taylor in this case?

A. I will.

Q. And conscientiously endeavor to apply it to the facts in this case?

A. Yes, sir.

Q. Do you understand it is not whether you like or dislike an accomplice, it is whether he speaks the truth about the guilty part that each of the defendants played in this crime?

Mr. Tally: I object to the form of the question.

The Court: Objection overruled.

[fol. 2558] Mr. Talley: Exception.

A. Yes, sir.

Q. If you are satisfied by all of the evidence, after hearing everything, if you have a reasonable doubt you will give it to the defendants?

A. Yes, sir.

Q. Will you give to them everything that the law of the land says they should have by way of protection in this case?

A. Yes, sir.

Q. After you give them everything and after you hear all the facts in this case, if your mind and conscience tells you that the District Attorney of this County has established their guilt of murder in the first degree beyond a reasonable doubt, will you say it in your verdict without fear or hesitation?

A. I will.

Q. Is there anything I should know about your ability to render a just and conscientious verdict in the case?

A. I know of none.

LOUIS F. STITES, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. You reside just off the Parade Grounds?
A. Right opposite Diamond #1.
Q. Where is your place of business?
A. At my home.
Q. You conduct your business from your house?
A. Yes, sir.
Q. Is that buying and selling jewelry?
[fol. 2559] A. No, sir, I just deal in jewelry wherever I can get something.

By the Court:

Q. You mean you handle memoranda goods?
A. Yes, sir.
Q. You go to the street, get the goods on memorandum, and carry them in your pocket?
A. I have been in the jewelry business for about twenty years.
Q. You have no store?
A. No, sir.
Q. How long have you been doing this?
A. Ever since 1931, when we went out of business. We used to travel.
Q. For what house?
A. Stites.
Q. On John Street?
A. Yes, sir.
Q. Do you buy at pawnbrokers' auctions?
A. No, sir.
Q. You do not pawn jewelry?
A. No, sir.
Q. You are a broker?
A. Yes, sir.

By Mr. Turkus:

Q. Have you heretofore served as a juror, Mr. Stites?
A. Yes, sir.
Q. Have you been examined by any counsel in some of the cases?
A. Yes, sir.

Q. Was it since Judge O'Dwyer was District Attorney?

A. I think Mr. Geoghan was District Attorney.

Q. Do you remember whether any of the lawyers who ar[illegible] in court were present in that case?

A. No, sir.

Q. At any rate, I was not the prosecutor?

A. No, sir.

Q. None of the defense lawyers were in that case?

A. No, sir.

Q. Did you hear the discussion about accomplice testi-[fol. 2560] mony which I have had with the other jurors?

A. Yes, sir.

Q. If accepted, would you substantially give the same answers they did?

A. Yes, sir.

Q. May I go along with the understanding that you have no bias or prejudice against either the District Attorney of the county, Judge O'Dwyer, or against the prosecution of an indictment where part of the testimony comes from accomplices?

A. No, sir.

Q. Do you understand that the tests which the Judge will give you; are all common-sense rules to apply to the believability of an accomplice, to find out does he speak the truth, not only about himself, but about them and the part they played in the commission of this crime?

A. Yes, sir.

Q. Regardless of their background, I know you will consider every vicious, criminal act or crime any accomplice may have committed, and that you will adopt the rules of law the Judge gives you in considering the testimony.

A. Yes.

Q. And will you keep in mind it is not whether you like or dislike an accomplice that counts. It is, Does he tell the truth about the part these men played in the murder of the victim named in the indictment?

A. Yes, sir.

Q. Will you further follow the instructions of the Court that there can be no conviction upon the unsupported testimony of an accomplice?

A. Yes, sir.

Q. The Judge may tell you in words or substance—I may [fol. 2561] not use the same words as the Court, but substantially he will instruct you that it is not the burden of the

supporting testimony to corroborate and support every detail that is given by an accomplice, but that it is sufficient, if believed by the jury and it tends to connect the defendants with the commission of the crime. Will you follow that instruction of law with common sense and apply it to the defendants in this case?

A. Yes, sir.

Q. It may be you dislike an accomplice—I don't know what your personal feeling may be against any of these witnesses, with that I can find no fault; but I want to find out if you are satisfied as to their guilt beyond a reasonable doubt, the three of them, I want to make sure that you will not acquit them because you do not like the accomplice.

Mr. Barshay: I object.

The Court: Objection overruled.

Q. How do you feel about that, if you are satisfied they are three guilty men, and their guilt has been established beyond a reasonable doubt, you will not discard that because you do not like the accomplice—do you care to answer?

By the Court:

Q. You may acquit if you do not believe an accomplice.

A. That is right.

Q. But you may not acquit simply because you don't like his looks.

A. Yes, sir.

[fol. 2562] By Mr. Turkus:

Q. When we get through with this case and you have heard the evidence, everything that Judge O'Dwyer produces, if you entertain a reasonable doubt, after you hear it all, you will give the benefit of that doubt to the defendants?

A. Yes, sir.

Q. If you are satisfied of their guilt beyond a reasonable doubt, would you convict them without fear and without hesitation?

A. Yes, sir.

Q. Is there anything that I should know about your ability to render justice in this case?

A. Not as I know.

(During the examination of Mr. Stites a recess was taken until 2:00 P. M., the jury and talesmen instructed not to discuss the case nor let anybody talk to them about it, and to keep their minds open and to read nothing about it. The defendants are remanded.)

[fol. 2563] Afternoon Session—Trial Resumed

(All defendants represented by counsel)

(Examination of James L. Edgehill and Lewis F. Stites continued.)

By Mr. Barshay:

Q. Mr. Edgehill, have you read about this case?
A. I have seen mention of it in the newspapers.
Q. Have you seen it mentioned in any particular paper?
A. In various papers.
Q. Did it include the *Journal?*
A. No.
Q. The *Mirror?*
A. No.
Q. The *News?*
A. I saw the *News* once in a while.
Q. The *Evening Telegram?*
A. I rarely take that.
Q. Did you read about it more than once?
A. I have not read it in any detail. I have seen the headlines. I am familiar with some of the names.
Q. But it did occur more than once, didn't it?
A. I have seen it several times.
Q. Some magazines have published items too. Have you ever looked at them?
A. I have never read anything in any magazines.
Q. Sometimes things about this matter have been mentioned on the radio. Have you ever heard it?
A. I don't think so. I don't recall.
Q. Did you ever hear it discussed?
A. No.
[fol. 2564] Q. You were here the three days waiting for the other jurors to be questioned?
A. Yes.

Q. Have you formed any impression with respect to this case?

A. No.

Q. Have you formed any impression with respect to the defendants?

A. No.

Q. Did you get any idea about them at all at any time or at any place?

Mr. Turkus: That is objected to. It has just been answered that he has formed no impression about any of the defendants or the case.

The Court: That is what he said.

Mr. Barshay: I have now reduced the impression to an idea,—some thought.

Mr. Turkus: I object to it in that form.

The Court: Some what?

Mr. Barshay: Some thought about the defendants.

The Court: Sustained.

Mr. Barshay: Respectfully except.

Q. As the result of looking at those headlines or any other observation that you may have had here or elsewhere, is there in your mind some bias with respect to them?

A. There is not.

Q. You said you had been a Federal juror.

A. I served in the Federal Court.

Q. More than once?

A. Twice.

[fol. 2565] Q. How long ago?

A. I imagine about six and a half years ago.

Q. Have you ever been a Grand Juror?

A. No.

Q. Have you ever been the victim of any crime?

A. No.

Q. Do you know anyone in Judge O'Dwyer's office?

A. I do not.

Q. I take it you said you knew none of the counsel.

A. Not personally. I have seen some of them.

Q. That would not have any effect on your judgment in this case whatever?

A. Not at all.

Q. The fact that some of us once held office, the fact that Mr. Turkus once practiced law and now it is the reverse, has nothing to do with this case, you understand?

A. I do.

Q. Mr. Turkus said that you should consider every piece of evidence that Judge O'Dwyer will present. I do not know whether or not Judge O'Dwyer will personally present any evidence, but I do not know whether Mr. Turkus meant it in just that way, but I want from you this fact, you will not use the integrity or the reputation or the standing of Judge O'Dwyer in weighing the testimony in this case?

A. I will not.

Q. It has nothing to do with this case at all except that he is the district attorney of the county; you understand?

A. Yes.

Q. You understand personally that neither the Judge nor his Assistant guarantee the truth of any person's testi- [fol. 2566] mony here as individuals? You understand?

A. Right.

Q. The defendant whom we represent has, by virtue of some prior actions, now been incarcerated for a period of forty-four to seventy-seven years, something like that. In the minds of some people that may arouse a prejudice. I can understand it. Would it arouse a prejudice in your mind against him?

A. No, it would not arouse any prejudice in my mind against the defendant in this case. A certain amount of law enforcement——

Q. Can you tell me just what you mean by the last part of your answer?

Mr. Turkus: I object to that, because that goes into a legal discussion. In certain instances the defendant's incarceration may be considered by the jury.

Mr. Barshay: I did not ask him that.

The Court: I did not hear the last part.

Mr. Turkus: The juror said he would have no prejudice in this case, but that he believes in law enforcement.

Mr. Barshay: He did not say he believes in law enforcement. Let him repeat it and we will find out what he meant.

(Answer read.)

Mr. Barshay: I would like to know what the juror meant by it.

Mr. Turkus: This was a question addressed to the prior conviction of the defendant Buchalter. In certain in-
[fol. 2567] stances those may be considered by the jury under proper instruction by the Court.

The Court: The answer is ambiguous in that respect. You may explain.

Q. Of course, his Honor shall tell you just how you may use that in judging the testimony, if he should take the stand, and only then. If he does not take the stand you cannot even consider it. You understand that?

A. I understand.

Q. Now may we have from your mouth, please, any explanation or what you intended to say with respect to law enforcement, adding it on to the answer you made.

A. Well, as a citizen I naturally disprove of crime generally.

The Court: Everybody does.

A. But it would not prejudice me in serving and giving a square and honest decision as I could in the jury in any criminal case. I would judge it on the evidence alone and on the instructions.

Q. Now we understand, sir. So that the prejudice which every person has against the commission of crime would not enter your deliberation with regard to the proof in this case; is that so?

A. Definitely.

Q. And if he should take the stand you will follow the instructions of the Court to what extent you may be able to use his present convictions, is that so, only to that extent as the Court shall tell you you may and no further?
[fol. 2568] A. I have no opinion at the present time.

Q. If he should take the stand, because of his prior conviction you will accept his testimony subject to the rules as his Honor shall give them to you; is that so?

A. I will.

Q. And that natural prejudice that people have will be dissipated with respect to weighing his testimony; is that so?

Mr. Turkus: Just a minute. That is bad law.

Mr. Barshay: What is bad law? I did not give him any law, your Honor; I asked him to follow the instructions of the Court with respect to the law.

By the Court:

Q. Will you follow the instructions of the Court in the event of the defendant taking the stand as to how you may consider his prior conviction as impeaching his testimony as a witness?

A. I will, sir.

By Mr. Barshay:

Q. And no other, sir, isn't that so?

A. Right.

Q. So that you will judge him on the merits of this case and by no other standards?

A. Exactly.

Q. I take it, encompassed in your belief in the enforcement of the law is the belief in the presumption of innocence?

A. Correct.

Q. Do you believe now that this man here is presumed innocent under the law of this charge as any person in this world?

A. I do.

[fol. 2569] Q. And do you believe further that presumption remains with him until twelve of you unanimously, after a consideration of every bit of evidence in this case, decide that it is overcome or it has not been overcome beyond a reasonable doubt?

A. I do.

Q. Should the defendant fail to take the stand, fail to call a single witness, fail to explain a single accusation against him, and the Court shall tell you you must not draw any unfavorable inference by reason thereof, you won't hold it against him?

A. I will not.

Q. Should anyone say, "Well, the others took the stand, why didn't he?" you will call that law that the Court shall give you to their attention, isn't that so?

A. Yes, correct.

Q. Now, with respect to you, sir, have you had any prior experience in criminal courts?

A. I have had experience with Alexander & Green six years.

Q. How long are you with them?

A. About six years, from 1898 to———

By the Court:

Q. Was Mr. McIntosh head of the firm then?

A. No, Mr. McCall, H. M. Alexander and Mr. McCullough, William C. Denning, and Mr. Pearson.

By Mr. Barshay:

Q. Did you study law?

A. I studied, but I never graduated.

Q. Did you ever study criminal law?

A. No, sir, more corporation.

[fol. 2570] Q. Did you come in contact in that firm with people who practiced criminal law?

A. Naturally.

Q. Did you discuss it with them?

A. No.

Q. Did you hear them discuss it among themselves or sometimes when briefs were discussed in the office, did you participate?

A. But not criminal work.

Q. Did you ever investigate cases?

A. No, I took care of the stipulations, diaries, used to go to court, and different things like that, regular law clerk.

Q. You were managing attorney, in other words?

A. No, there was four or five of us did the same kind of work.

By the Court:

Q. You had a whole floor then?

A. Yes, sir, except we had a private library.

Q. That was in the Trinity Building then?

A. No, sir, 120 Broadway.

The Court: That burned down.

By Mr. Barshay:

Q. Did you read about this case, sir?

A. Yes, sir, in the *Eagle* and New York *Times*.

Q. More than once?

A. Yes, on several occasions, talked it over home—not this particular case, but some of the defendants in this case.

Q. And by virtue thereof did you come to any conclusion?

A. Yes, sir, naturally.

[fol. 2571] Q. And did that conclusion go to their guilt or innocence?

A. That we thought they were guilty—that was the case before? This is a different case.

Q. You said you came to some conclusion.

A. You know how we discuss things.

Q. Perfectly all right. I quarrel with no man who expresses his opinion. Even if it is against me, that is still his right. And, having come to that conclusion, I take it you carried it into the jury box as you sit here?

A. Yes, sir, but that won't——

Q. We will get to that. In other words, the opinion that you formed, based on newspaper reading, with no explanation, without accepting the truth or falsity of the accusation, you came to a conclusion— And so that conclusion was detrimental and prejudicial to the defendants?

By the Court:

Q. Was that simply a logical deduction based upon an assumption as to the truth of the newspaper report?

Mr. Barshay: I object to the word "logical."

The Court: Sustained. It may have been illogical. I did not mean that. I should have used another word.

Q. Did you assume that the newspaper report was true?

A. Well, yes, sir, you know how you can believe.

Q. Was that an opinion on your part that it was true?

A. Yes, sir, just a general opinion.

[fol. 2572] Q. Or was it simply an opinion based upon an assumption as to accuracy for the purpose of forming the impression?

A. Well, it formed an impression.

Q. I take it you are a man of experience in one of the biggest law firms in the city, and you have had a rich experience since then. You are a man of intelligence, and you know that you cannot swear to the truth of anything just because you read it in the newspapers.

A. I did not say it was the truth. I just read it.

Q. Did you read about this particular case?

A. No, sir, about other cases in there that led up to this case.

Q. Not this case?

A. Not this case.

Q. Have you formed any opinion as to the guilt or innocence of the defendants in this case?

A. No, sir.

By Mr. Barshay:

Q. Was this case mentioned?

A. No, I don't think it was.

Q. You said it led up to this case. Then it must have been mentioned, sir.

By the Court:

Q. Do you know the name of this case, the man who was killed.

A. No, sir.

Q. Or the date on which the alleged killing occurred?

A. No, I do not know that.

Q. Do you know anything other than that these defendants are being tried for having killed somebody at some time?

[fol. 2573] A. I only knew what I read about the other one being sent away to prison for a long term.

Q. That has been discussed freely here. You mean you assumed he was guilty then, because he was convicted?

A. That had something to do with it.

Q. What we want to find out is whether you can judge this case upon the evidence and the evidence alone.

A. Yes, sir. What I read would have nothing to do with this case at all, none whatever.

Q. And, having been in a law office, you surely know that the prior conviction and imprisonment is not competent except for the purpose of impeachment in the event only that the person takes the stand as a witness?

A. Yes, sir.

Q. You know that rule?

A. Yes, sir.

Q. You will abide by that?

A. Yes, sir.

Q. You will give the defendants a square deal?

A. Absolutely.

Mr. Mr. Barshay:

Q. What I am driving at is, perhaps subconsciously you may let the conclusion which you formed, even though it

may be unfounded, you may let that conclusion creek into the judgment in this case in deciding the guilt or innocence.

A. I don't think it would.

Q. When you say, "I don't think it would," is there a doubt?

A. It would not creep in. This case I will listen to the [fol. 2574] man who is giving the evidence.

Q. Would you expect the District Attorney to come forth with less proof because of some opinion you may have about something else?

A. No, sir.

Q. Would you expect the defendant to make some explanation here with respect to the charge here, or come forth with some evidence?

A. No.

Q. Would you judge him more harshly by virtue of some conclusion you have?

A. No, I would go just by the evidence.

Q. Would you allow any sentiment at all to creep in in deciding this case by virtue of some fact or facts or some conclusion or opinion that you had in some other matter?

A. No.

Q. I take it you are in accord with the principle which says that one man can be tried for one charge at one time.

A. Yes.

Q. No matter what else you may think, if he is not proven guilty beyond a reasonable doubt by evidence which you believe here you must acquit him?

A. Yes, sir.

Q. You will acquit him?

A. Yes, sir.

Q. If that is the fact?

A. Yes, sir.

Q. I take it you, too, sir, won't allow the integrity and the reputation of the District Attorney of this county to enter into this case by way of influencing your judgment?

A. No.

Q. And you won't let the fact that Mr. Buchalter is now serving a prison term influence you in this case otherwise [fol. 2575] than instructed by the Court?

A. Not in this case unless the Court instructed me.

Q. And if he does not take the stand, you may not even consider it in this case at all in any respect; you understand that?

A. Yes, sir.

Q. Even you have heard about accomplice testimony. Now I am addressing these questions collectively both to Juror No. 11 and to you, without repetition. If the Court shall tell you that no accomplice can have his testimony accepted unless and until you weigh it with suspicion, with care, and with caution, and only then?

A. Yes, sir.

Q. And you must also look further than that. If he has a criminal background, which he admits, or he does not admit, but which the evidence tells you he has, you will look into that too?

A. Yes.

Q. And with every demerit mark, sir, that you find that this witness has, so much more caution will you use with respect to accepting or rejecting his testimony?

A. Yes, sir.

Q. And if other accomplices come here and are no better than the first, you will use the same rule with respect to them, won't you?

A. Yes. Yes.

Q. And one accomplice cannot corroborate another. Do you agree with that?

A. Yes.

Q. And if some man says he is not an accomplice and the evidence in your mind shows that he is, you will so decide, [fol. 2576] won't you?

A. Yes, sir.

Q. And if you find that any person has a motive for giving testimony and declaring himself in the manner in which he does, and you find there is such motive, and that motive induces the falsity of his testimony, you will consider it, won't you?

A. Yes.

Q. No matter what that motive may be?

A. Yes.

Q. And if it is a hope of escaping punishment for crimes which he committed or getting some reward, you will consider that, too?

A. Yes.

Q. And if you find out of the evidence that the witness or witnesses have received treatment of a nature to which he is not ordinarily accustomed and that fact induces him to testify, will you consider that?

A. Yes.

Q. And will you?

A. Yes.

Q. In other words, we will shed light as best we can on every witness who takes the stand, accomplice or not, and you shall find your own way in determining the truth or falsity; will you?

A. Yes.

Q. And if other testimony comes here, other witnesses, which tends to connect the defendant with the commission of the crime, the law as given by the Court shall say to you, "I se certain standards in measuring the truth or falsity of their testimony," you will follow it?

A. Yes.

Q. You will obey that law, won't you?

A. Yes.

[fol. 2577] Q. And if this other independent testimony comes from murderers and extortionists and convicts and pimps and shylocks and draft-dodgers, you will consider that, too, won't you? This is not talk. Don't accept it until you hear it as truth from the stand. So out of all that you find a reasonable doubt, the Judge says a reasonable doubt, you must give it to the defendant, and you will?

A. Yes.

Q. And you will too?

A. Yes.

Q. If by any chance—— Well, I would not say by any chance. I take it that the Court in its wisdom will keep you gentlemen together throughout this trial. That is a matter of procedure for the Court. You won't charge that to the defendants, will you?

A. No, sir.

Q. You, sir?

A. No.

Q. As far as you know and as far as I know, if you should take your oath as jurors to render an impartial verdict in this case, will you keep your oath?

A. Yes.

Q. And you owe no obligation to anybody in this case except to do your duty as a juror, eminently impartial to both sides?

A. Yes, sir.

By Mr. Cuff:

Q. Mr. Edghill and Mr. Stites, I will address my questions, as Mr. Barshay did, to you both together, so there won't be any repetition if I can avoid it. I gather from what you said, Mr. Stites that you have, up to the time you [fol. 2578] took your seat in the jury box, an unfavorable impression about the defendants or some of them. Is that right?

A. Yes.

Q. You have it now?

A. I have it now.

Q. Would you mind telling me how long that impression has remained in your mind?

A. Since I first started to read about it.

Q. That does not give us any idea.

A. About a year and a half.

Q. You had this unfavorable impression?

A. Yes.

Q. Entertain it now, been in your mind for a year and a half?

A. Not about this case.

Q. I am addressing my questions now to your impression. I am not talking about anything else, just your impression which you say you have kept in your mind for one year and a half at least, is that right?

A. Yes.

Q. It has not grown any weaker in that time, has it?

A. Yes, I did not think about it.

Q. Have you changed your mind about it since you first formed it?

A. I have not changed my mind; I did not think about it.

Q. I am not asking you that. I say that impression has not grown any fainter or weaker, has it, in the year and a half?

A. No, sir.

Q. And each time you took up a newspaper and found some article about these defendants in it you read it in the

[fol. 2579] light of that impression which you had previously formed?

A. Yes, sir.

Q. And each succeeding newspaper or whatever it was, magazine, that you read, deepened the impression as it was formed originally, didn't it?

A. Yes, sir.

Q. So that it continued to grow stronger rather than weaker as the year and a half went by, isn't that the fact, honestly speaking?

A. Yes, sir.

Q. In the paper that you read the articles contained statements that were in your mind construed by you as detrimental to the defendants or some of them in this case, isn't that right?

A. I don't get the first part of it.

Q. The articles which you read and which helped to form in your mind this unfavorable impression that you have told us about, did they contain statements or expressions of opinion that were detrimental to these defendants?

A. Yes, sir.

Q. And you accepted those statements and those expressions of opinion that you read in those papers as true, did you not?

A. I did not know anything about it.

Q. You did accept them as true? Did you tell Mr. Barshay that as you sit in the jury box now you regard these defendants and all of them as innocent men, presumed to be innocent in this case?

A. In this case until the trial, until I get the evidence.

Q. Do you honestly believe, Mr. Stites, and I am only seeking your Honest opinion, so as to ascertain the state [fol. 2580] of your mind—do you honestly believe that after entertaining this unfavorable impression about the defendants or some of them for a year and a half that you can do what the law says you must do, give the benefit of the presumption of innocence to these defendants and each of them, one hundred per cent?

A. No, I would not.

Q. You don't think you can?

A. Not the way it is now, no, sir.

Mr. Cuff: Challenge for cause.

The Court: Try the challenge.

LEWIS F. STITES, residing at 10 Westminster Road, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Cuff:

Q. Mr. Stites, before you were sworn I asked you a series of questions.

A. Yes, sir.

Q. And you made answers to them?

A. Yes, sir.

Q. If those questions were put to you now in the same fashion would your answers be the same?

A. They would.

Q. And do those answers reflect the true state of your mind as you express it?

A. Yes, sir.

Mr. Cuff: That is all. I press the challenge.

The Court: The trouble is that due to some of the answers being inaudible, the Court does not know what they were.

Mr. Turkus: On the basis of the record made by Mr. Cuff and Mr. Barshay, the District Attorney will not oppose [fol. 2581] the granting of the challenge.

The Court: He may not oppose it, but I cannot allow challenge by consent.

Mr. Rosenthal: He said the present state of his mind is such that even though the law is that a defendant is presumed to be innocent, that that is not the frame of mind in this case at this time. That is in substance——

Mr. Cuff: That is what he said substantially. May we have the answer read?

The Court: Is that correct?

The Talesman: What was that?

The Court: Please listen. Mr. Rosenthal will say it again.

Mr. Rosenthal: Let me ask it in the form of a question.

By Mr. Rosenthal:

Q. Mr. Cuff just asked you a series of questions. This is Mr. Cuff, who just addressed you.

A. Yes, sir.

Q. In response to his question, isn't it a fact that you said in substance that in this trial here you could not give the defendants the benefit of the presumption of innocence which arises in their favor? Is that what you answered?

A. I did not understand that. This trial has not taken place yet.

Mr. Cuff: May we have the question and the answer read?

(Question and answer read.)

The Court: Sustained.

[fol. 2582] By Mr. Cuff:

Q. Now, Mr. Edghill, I gather from what you told Mr. Barshay and Mr. Turkus that you will strive in every way to apply the rules of law that his Honor will give you for your guidance in the jury room in considering the evidence and in arriving at a just determination in this case; is that right?

A. Correct.

Q. Now, if his Honor charges you that you and the eleven other men who will be selected as jurors in this case are the sole and absolute and exclusive judges of the fact, that no one, not even his Honor, can invade that province of yours, will you see to it that you are guided by that instruction and that you will, uninfluenced by anybody but your own consideration of the evidence and your discussion with your fellow jurors, decide the facts in this case?

A. I will.

Q. If you reach the conclusion honestly and fairly, after giving that careful consideration to the evidence, under the rules that his Honor will give you for your guidance, if, I say, you should reach the conclusion that there is a reasonable doubt as to the guilt of the defendants or any one of them, and that that is a doubt that is based upon the evidence or lack of evidence, will you have any hesitation in giving that doubt, the benefit of that doubt, to the defendant or defendants to whom it applies and vote not guilty?

A. No.

Q. Assume that you have reached that reasonable doubt based upon your consideration of the evidence and reason-[fol. 2583] able discussion with your fellow jurors based upon the evidence in the case fails to convince you that you are wrong, will you for any reason surrender your judgment, other than for any reason other than reasonable argument and consideration of the evidence, if his Honor tells you that you must give to the defendants the benefit of your individual judgment in your verdict?

A. I will not.

Q. Neither the lateness of the hour nor the number of men who may be against you on that question will influence you so long as you are honest in your entertainment of that reasonable doubt, is that right?

A. Correct.

Q. And if you are selected here may I rest assured, so far as my client is concerned, that no consideration other than the credible evidence in this case, the evidence that you believe after giving it the consideration that it is entitled to, will influence your vote; is that right?

A. Positive.

Mr. Cuff: That is all.

By Mr. Rosenthal:

Q. Mr. Edghill, when Mr. Barshay was questioning you he asked you whether you knew any of the lawyers and you said no, except from seeing them around the court-house, or some answer such as that. You meant around this court-house?

A. Yes, in the County Court.

Q. Have you been called as a juror before in the County Court?

A. Six or eight times in the past seven or eight years. [fol. 2584] Q. And when was the last time that you were called?

A. I think the last time was toward the end of last year or early this year in Judge Fitzgerald's part.

Q. Toward the end of last year or the early part of this year? Judge Fitzgerald's court?

A. Yes.

Q. Were you actually examined at that time?

A. No, I have only got as far as the jury box once.

Q. You went as far as the jury box and you were excused by one of the counsel?

A. I was excused by mutual consent.

Q. Was Mr. Turkus the attorney in that case?

A. I don't think so.

Q. Can you recall who the defense counsel was? Was it any one of the lawyers in the court-room?

A. I was not in the case, so I do not know whether——

Q. What I thought you said was that you had gotten into the jury box.

A. Yes.

Q. Was it a capital case, a murder case?
A. Yes, a re-trial.
Q. Were you called on a special panel?
A. Excuse me—the case I was excused on——
Q. You are not allowed——

Mr. Turkus: I waive.

Q. Will you give me the name?
A. The case was six men charged with murder.
Q. That was more than a year ago: That was before [fol. 2585] Judge O'Dwyer became District Attorney.
A. That is right.
Q. That was the last time you were called?
A. No, I have been called several times since.
Q. Then you misunderstood me. I asked when was the last time you were called.
A. The last time on this panel was either early this year or December last year.
Q. The question I asked you was in reference to the last time you were called, which was December of last year or January of this year. Did you actually get called to the jury box at that time?
A. No.
Q. You were merely on the panel?
A. On the panel; my name was not drawn.
Q. Was Mr. Turkus the Assistant at that time?

Mr. Turkus: I did not try any case in December or January.

Q. Was that before Judge Fitzgerald, that is, this last time?
A. Yes.
Q. And was that a capital case also?
A. Yes.
Q. Were you present in the court-room during the discussion between the Assistant District Attorney and the prospective jurymen and defense counsel at that time?
A. I was in the court-room two days.
Q. Do you recall who the Assistant was then?
A. I don't.
Q. You don't recall who the defense counsel was?
A. I can tell you what the case was. I don't recall who——

[fol. 2586] Q. In examining the jurors we are supposed to refrain from any discussion of the facts of other cases. For that reason, in a round about way, we lawyers try to find out in our own mind whether we can figure the case. I don't want to ask you questions we are not supposed to discuss. Something might happen which might prejudice the other men and make us start all over again.

A. I don't recall who the counsel were.

Q. And how long before that time were you called to serve, approximately?

A. About three months. That case was postponed. I got five notices postponed. Finally it was called off.

Q. So when you said you were called four or five times in the last three years, you mean, I assume—and if I am wrong, correct me—that you were originally called and the case was continuously postponed?

A. No, I only considered that as one.

Q. When then before that one was it that you were called to serve?

A. The year before last, 1939.

Q. That was before Judge O'Dwyer was District Attorney. That was while Judge O'Dwyer was on the bench, was it? 1939, must have been.

A. Yes.

Q. Did you sit in any of these cases in the County Court at all, actually participating in the trial as a juror?

A. No.

Q. So your only actual service as a juryman has been in the Federal Court?

A. And the Supreme Court.

Q. Those were civil cases?

A. Then I was on the Anner.

Q. That was in the Supreme Court?

A. I did not serve on the jury.

[fol. 2587] Q. You were called, but did not get into the box?

A. I got into the box but was challenged.

Q. In any of the cases that you served on in the Federal Court, was the question of accomplice testimony ever a part of the case?

A. No.

Q. So that in so far as the question of accomplices are concerned, the discussion as to accomplice testimony in so far as you are concerned, I should say, is confined to what

you heard in this court in the last couple of days that you have been here; am I right in that assumption?

A. Right. No, I heard that in other cases instructions of the jury.

Q. In other words, while you were seated there you heard instructions to jurymen who were other than yourself?

A. Yes.

Q. Who were actually serving, and you listened?

A. Right.

Q. Of a similar nature to what you heard here today: is that correct?

A. Right.

Q. You have read concerning one or more of these defendants, you say, in various newspapers. And in the reading matter which you have seen did you read it to such an extent that it in any wise formed any impression in your mind?

A. No, I only glanced it over.

Q. You have never served as a Grand Juror?

A. No, sir.

Q. And in glancing over the matter which you read, was it just a cursory reading, or did it form any impression of any character on your mind?

[fol. 2588] Mr. Turkus: Objected to. That has been answered. The talesman said it was a cursory reading.

Mr. Rosenthal: This is the first time the word has been used.

Mr. Turkus: Didn't you use the word?

The Court: Overruled.

By the Court:

Q. Did it form any impression as to the guilt or innocence of the defendants?

A. None at all, no, sir.

By Mr. Rosenthal:

Q. You feel here at this time that so far as all the defendants are concerned, that you could be fair and impartial to both sides, taking the law from the Court and applying that law to the facts as you see them: is that correct?

A. I do.

Q. You understand that each one of these defendants, although they are being tried together, are entitled to a separate trial at your hands; you understand that?

A. I do.

Q. I appear, together with my associates, for the defendant Capone. That is clear to you?

A. Yes.

Q. Each defendant has his own counsel or counsels. The mere fact there happens to be nine counsel in the court room here does not in any wise act to the detriment of the defendants in your mind, does it?

A. In no way.

Q. In the case of the defendant Capone, who I represent, in the judgment of his counsel we may put in a defense, in [fol. 2589] other words, the defendant may take the stand. Now, merely because he is a defendant, would that in and of itself make you disbelieve him if he took the stand?

A. No.

Q. Of course, you understand that, the same as with any other witness, you have a right, when you are determining what weight you are going to give to the testimony of a witness, to determine what interest or motive he may have to testify. You understand that?

A. Yes.

Q. As well as his actions and demeanor on the stand and his background, everything, anything that will aid you in your mind to solve the main issue, namely, Is the person telling the truth? Now, if the defendant offer himself as a witness and you, a juror, having that in mind, and you believe he was telling the truth, you would give the same value to his testimony, would you not, as you would give to any other person you believed; am I correct?

A. Correct.

Q. The word "alibi" has been used. I do not know whether it has been discussed while you have been a prospective juryman or not. Have you heard it discussed?

A. (Answer inaudible.)

Q. It may be possible that the defendant may offer proof of what is termed in law an alibi, which simply means, in plain language, that there will be individuals who will take the stand and testify to the fact that the defendant was not at or near the scene of the particular crime at the time it is alleged that it happened. Do I make myself clear?

[fol. 2590] A. Perfectly.

Q. If the Court were to instruct you—and the only reason I am talking anything about the law to you is this, that you understand, as a human being, that you have a right to your own opinion in your own mind. Some of us object to certain law, and we subordinate the law to our own opinion. Is that right? Some people on prohibition. Is that right?

A. Yes.

Q. The purpose that I have in mind in questioning you is that you may disagree on particular points, and on those points, if they arise in this trial, you might in your own mind feel you would be prejudiced. Do I make myself clear to you?

A. Yes.

Q. For that reason, any question that I may address in which I say anything about the law is merely to ascertain whether or not you feel competent, if you are accepted as a juror, to follow those instructions of law and subordinate your own opinion, whatever it may be, to the law itself. Is that clear?

A. Yes.

Q. If proof of an alibi is offered and the Court were to say to you that the law of our land is that no man has to prove his innocence and that no man has to offer anything in his behalf, he does not have to take the stand, he does not have to call any witness, and whether he does or he does not, the burden never shifts from the District Attorney to establish his guilt to your satisfaction beyond a reasonable doubt, before you can convict; assuming that the Judge tells you [fol. 2591] that, does the mere fact that I have mentioned to you that the defendant may take the stand and offer proof, in any wise lead your mind to believe that under circumstances of that character the burden would shift over to our side?

A. It does not.

Q. If the Court were to instruct you that where evidence of an alibi is offered, if that evidence is of sufficient import to your mind to raise a reasonable doubt as to whether the particular defendant who offers the evidence did actually participate in the crime, that doubt, like any other doubt, must be resolved in favor of the defendant and you must acquit, would you follow that law?

A. I understand.

Q. On the question of accomplices, I believe Mr. Turk asked a question—and I don't recall whether the Court

addressed any remarks particularly to you along the same line as to the fact that no man can be convicted on the uncorroborated testimony of an accomplice. Is that clear?

A. Yes.

Q. If the Court were to charge you that the corroboration, the other evidence, is not evidence of a number of accomplices accusing these defendants, but must come from an independent source, you would follow that instruction?

A. I will follow the instructions of the Court.

Q. You understand that the accomplice may be telling the truth about himself and at the same time telling an untruth as to the others. Is that true?

A. Yes.

Q. And do you understand further that your job is not to [fol. 2502] find out whether he is telling the truth about whether he, the accomplice, so-called, committed the crime, but your job is to find out whether he is telling the truth about any one of these defendants when and if he accuses that particular defendant of having helped, aided, or participated in the crime itself. Is that clear to you?

A. Yes.

Q. You understand further that if the Court were to charge you that the independent evidence outside of the accomplice testimony is not proof that actually a crime was committed to make myself clear, that if the accomplice says, "I shot the man, and he dropped in front of such a place, and he died in an automobile," a policeman takes the stand, a coroner or medical examiner, and says, "We found the man dead with a gunshot, in an automobile," that does not prove that any one of these defendants helped him; is that true?

A. Yes.

Q. Do you understand that the proof which you must look for if you are accepted as a juryman is independent proof which will tend to connect the particular defendant with the crime? Is that clear?

A. Yes.

Q. You find no fault with any law of that character?

A. None whatever.

Q. And if you are instructed by the Court on the proposition, if it does arise, of that character, you will strictly adhere to it and follow it; is that correct?

A. I understand.

Q. It may be, sir, that the District Attorney may con-
[fol. 2593] tend—and before you were accepted on the jury this has been repeated a number of times—we have no way of ascertaining at this time what the District Attorney contends, therefore we address certain questions to you that may or may not subsequently come into the evidence; is that clear to you?

A. Yes.

Q. It may be that the District Attorney may contend that this independent evidence consists of an alleged oral statement or admission which the one or more of these defendants are supposed to have made to somebody whom he will call as a witness, the District Attorney, and who will go on the stand and say, "I spoke to the defendant. He, the defendant, said to me that he helped commit the crime." Do I make myself clear so far?

A. Yes.

Q. If such happens to be the case will you, in determining what weight you will give to that testimony, determine the source from which it comes?

A. Yes.

Q. And if you find the source from which it comes is one where the particular individual has a motive, whether it be the desire for revenge, whether it be the desire to escape punishment for murders that he, the witness, may have committed, or whether it be any other desire, whatever the motive may be to testify falsely, will you, in considering his testimony, judge from all the surrounding facts and circumstances whether or not he is telling the truth when he makes the statements accusing the defendant?

A. I will.

[fol. 2594] Q. It may be, sir, that you in your wisdom, after listening to all the evidence, may come to a conclusion one way or the other which is adverse to a majority of the members of the jury. If that time does come you understand that your duty would be to reason and tell the other remaining jurymen the reason for your coming to the conclusion that you do; is that right?

A. I understand.

Q. And you understand further their duty is correspondent to your duty, ultimately they are to reason with you and tell you their reason, is that clear?

A. Yes.

Q. If after that, after reasoning with the other men, the opinion which you formed on your conscience is one which remains with you, would you, merely because of lateness of hour, the length of time of the trial, the fact that numbers are against you, or for any other reason except the fact that you have been convinced that you are wrong in your logic, would you change your opinion merely because of those facts?

A. No.

Q. You have been asked, or most of the jurymen have been asked whether you would fearlessly or courageously find a verdict of guilty if the evidence warranted it, and you rightly said yes. On the other hand, because of publicity having been given to this case, do you feel that it is your bounden duty to find a verdict of guilty if the evidence does not warrant it?

A. No.

Q. You know that you owe just as great a duty to these [fol. 2595] defendants, who are a part of the State of New York, as you owe to the People of the State of which they are a part and you are a part; you understand that?

A. I do.

Q. And you understand that your bounden duty, if you are convinced of the fact that The People have failed beyond a reasonable doubt to prove the guilt of these defendants, is to fearlessly and courageously announce that fact in your verdict, just the same as you should fearlessly and courageously and without hesitation announce an adverse verdict; you understand that?

A. I do.

Q. You have that courage, haven't you?

A. I hope so; I believe so.

Q. Do you happen to know Captain Bals of the Police Department, Lieutenant Osnato or Detective McDonough, Detective Swift, Detective McCarthy—do you happen to know any of those?

A. No.

Q. Have you any close friends who are in the Police Department?

A. No, I have not. I only know two to come in contact with.

Q. Two patrolmen?

A. In Headquarters.

Q. Two men from Police Headquarters?
A. Yes.
Q. What Police Headquarters?
A. Manhattan.
Q. Would you mind telling me the names of the two men?
A. Captain Frank Upton of Missing Persons Bureau.
Q. And who is the other man?
A. I think he is Lieutenant Kane.
[fol. 2596] Q. I don't want to pry into your business. And if you have any objection to disclosing this, don't think I am unnecessarily curious. You say you came in contact with these men in a business way. May I ask what you mean by that?
A. I was connected with the—Welfare work.
Q. Was it in connection with that particular work that you came in contact with them?
A. Yes.
Q. You have no social acquaintance?
A. None at all.
Q. They have not visited you or you them?
A. No.
Q. And you have never discussed police duties with them?
A. No.
Q. That was the real purpose of my inquiry.
A. No personal acquaintance.
Q. That you never discussed police. Mr. Turkus has made mention about the fact as to whether you had any objection to the District Attorney breaking a case from the inside by using the testimony of an accomplice. Do you recall that?
A. Yes.
Q. You don't assume from the statement that he makes here that it is a fact that this case has been broken from the inside so far as it affects the defendant? That is your job. You understand that the fact that a particular individual tells him or tells Judge O'Dwyer or the Grand Jury that he, that indivdual, actually shot and killed Rosen and then accuses these three men of being a party, it is no proof that what he may have told the Grand Jury or Mr. Turkus or Judge O'Dwyer is the truth other than it affects [fol. 2597] him, the particular individual; is that right?
A. Right.

Q. Now then, if you find that that particular individual, the so-called accomplice, has committed a number of murders, and if he admits to this one, this one in itself, and if he testified before the Grand Jury, the Court will tell you he gets immunity, he cannot be prosecuted——

Mr. Turkus: That is bad law.

Mr. Barshay: But it is the law.

Mr. Rosenthal: It may be a bad law, but it is good law.

Mr. Turkus: It is bad law the way you say it.

Mr. Rosenthal: Let me withdraw it.

Q. Let me put it this way generally: This particular individual who calls himself now an accomplice, it may develop, has committed a number of murders for which the individual wishes to escape punishment to himself. It may develop. So that the statement of Mr. Turkus to you about the solution from the inside does not have any weight or effect on you as you go into this jury box?

A. No, naturally I do not know anything about the case.

Q. I am not trying to ask you any tricky questions. I just want to see whether or not, because he tells you something, you start off with the assumption that it is true. You do not start off with the assumption that anything he has told you, not under oath, is the truth, do you, any more than anything I have told you?

[fol. 2598] A. Naturally not.

Q. You understand that your province is to take the truth as you see it only from the witness stand and from no other place?

A. Right.

Q. And do you understand further that whatever your verdict may be, if it is based on your conscience, that it is your verdict and it is your conscience and it is your oath, and nobody can be heard to complain whether it be the defendants or any other person. You understand that?

A. I understand.

Q. Have you any reason that has not been reached by questioning by any of the counsel or the Court that in your mind as you sit here would pervent you from acting as a fair and impartial juror? Do you know of any reason at all?

A. No reason.

Mr. Rosenthal: No challenge for cause.

Mr. Turkus: Mr. Edghill is satisfactory to The People of the State.

Mr. Barshay: The gentelman is satisfatcory.

(James L. Edghill took Seat No. 11 in the jury box.)

(Arthur A. Fisher, of 5822 Eighth Avenue, was called and took Seat No. 12 in the jury box.)

Mr. Talley: Will your Honor see me at the bench with the District Attorney for a moment?

The Court: Yes.

(Mr. Talley and Mr. Turkus conferred with the Court at the bench.)

[fol. 2599] By Mr. Turkus:

Q. Mr. Fisher, do you reside at 5822 Eighth Avenue?

A. Yes.

Q. Is that commonly called Bay Ridge?

A. Yes.

Q. Have you lived there for a number of years?

A. Just three years.

Q. You are listed here as a secretary. By whom are you employed?

A. Real estate.

Q. When you qualified as a special juror were you working for somebody else?

A. No, I was working for myself as a real estate man.

By the Court:

Q. Local man?

A. Yes, local.

Q. In that neighborhood of the Long Island Railroad cut?

A. Yes. We have been there since 1917. We do business on Eighth Avenue.

Q. You rent property and manage it?

A. That is right.

Q. How long have you been doing that?

A. Since 1917 in that particular spot, 5718 Eighth Avenue, Brooklyn.

Q. Before you went into business, weren't you in some office downtown?

A. No, I was not.

Q. Do you belong to a civic organization?
A. I do not.
Q. May I ask how old a man you are?
A. Fifty-four.
Q. Born in Brooklyn?
A. I was raised in Brooklyn.
Q. Before you went in the real estate business, what business were you in?
A. I was in the wire business.
[fol. 2660] Q. Whereabouts?
A. In Taafe Place.
Q. That is off Willoughby Avenue?
A. Two blocks down, Flushing Avenue.

By Mr. Turkus:

Q. Mr. Fisher, I assume that you were in court when as prosecutor I spoke about the garment industry and the needle trades and the clothing industry. Is there anything in your present business connection or past business connection that brings you into contact with any manufacturer of garments?
A. None whatsoever.
Q. Or anyone that delivers clothing, that is, clothing truckers?
A. No.
Q. Do you have any contacts presently, or any in the past, with anybody in Brownsville or East New York?
A. None at all.

By the Court:

Q. May I ask who takes care of your business while you are on the jury?
A. We have a corporation. There is four of us in it, my brother-in-law and two other men.
Q. What is the name of the company?
A. J. P. Harrigan, Inc.

By Mr. Turkus:

Q. Is there a Mr. William Harrigan in the firm?
A. No.
Q. Or is he one of the relatives?
A. No.

Q. Because there was a William Harrigan who was a law clerk in my office.

A. No.

The Court: When I asked you if yea were downtown I [fol. 2601] was thinking of Jim Fisher.

Q. Have you served as a juror heretofore in a criminal case?

A. Yes, sir.

Q. Was that in recent years?

A. Yes, last December, Judge Fitzgerald.

Q. Do you recall who the prosecutor was?

A. Not the name.

Q. Were any of these defense lawyers engaged in the defense of that case?

A. No, I do not know any one of them.

Q. Do you know any member of the bar who specializes in the defense of criminal cases?

A. I do not.

Q. I was not the prosecutor in the case?

A. You were not.

Q. I assume that you are in sympathy with law enforcement?

A. Yes, sir.

Q. Is there anything concerning any of the names that were mentioned that you should call to my attention?

A. No.

Q. Did you hear certain names mentioned from time to time—And part of the testimony in this case will emanate or come from one who is known under the law as an accomplice. The best way I can say it in plain English is it is one who himself has participated with others in the commission of crime and the crime charged in this indictment. Is there anything about the nature of a prosecution which rests in part upon the testimony of an accomplice which causes you to have any bias or prejudice against the prosecution?

A. No, sir.

Q. Do you have any bias or prejudice against the prosecutor, Judge O'Dwyer, who, in order to solve a murder, [fol. 2602] has accepted the testimony of an accomplice and uses it against the other perpetrators of the crime?

A. No.

Q. In the case in which you sat was there accomplice testimony, one of the men testifying against his former associates in the commission of the offense?

A. No.

Q. The Judge will charge you as to the rules of law that you apply to an accomplice witness. He will tell you these rules to guide you in ascertaining whether the accomplice speaks the truth. Is that clear to you?

A. Yes.

Q. Will you bear in mind that every test that the Judge gives you to apply, or every test that your ordinary common sense dictates to you should be applied to an accomplice witness is done for the sole issue of ascertaining does that accomplice speak the truth, not only about himself but about these other men who perpetrated the crime with him? Do you understand that?

A. I understand.

Q. Will you, sir, if accepted as a juror, devote your mental faculties to ascertaining does the accomplice who testifies here speak the truth about the group part that each one played as a combination, the part that each defendant played in the commission of the crime? Do you follow that?

A. Yes.

Q. And will you devote your mental faculties to find that out? It may be that you may not like an accomplice, as a matter of fact, you may dislike him intensely, but do you understand, Mr. Fisher, that that is not the test here, [fol. 2003] whether you dislike him or like him; do you understand that?

A. Yes.

Q. For example, you may feel that this accomplice tells the truth and you may feel that in addition to the accomplice's testimony there is other evidence from an independent source coming within the confines of the admonition that the Judge gives you, other proof which tends to connect each one of these defendants with the commission of the crime, and you may believe that beyond a reasonable doubt. If you feel that way, and your state of mind is such, is it not, that you would not acquit three guilty men because you do not like an accomplice?

A. No.

Q. Something has been said here by one of the lawyers who represents the defendant Buchalter that Buchalter

has been convicted of other crimes and is now serving a long jail term as penalty for those offenses. I want to know from you, is your state of mind such that you may relax your duty as a juror in this case or deviate from a result that is proper and just because he is presently incarcerated?

A. No.

Q. It has been pointed out too by one of the defense lawyers, and properly so, that the defendants at the bar of justice are required to meet the specific charge in the indictment, and this indictment is for the murder of a man named Joseph Rosen. By the same token, do you appreciate that the duty of the District Attorney is, and the law only permits this, that he establish guilt beyond a reasonable doubt on the charge and this charge alone: [fol. 2604] do you understand that?

A. Yes.

Q. In other words, we have no more to do and no less to do. The law does not permit less and it does not permit more. Do you understand that?

A. Yes.

Q. Having served in a prior case— Was it a capital case? By that I mean was the charge murder in one of its degrees.

A. Murder in the first degree.

Q. I take it, then, that you understand that the Judge in that case, as in this case, charged on certain benefits or rights that every defendant accused of crime must have in a criminal case. In this case, no matter what you heard in the other case, I assume it will be the same thing, because the law is settled in these cases, will you take the law implicitly from Judge Taylor?

A. Yes.

Q. In its every aspect, and with the intelligence that you have derived from your every-day business experience, apply it to the evidence in this case?

A. Yes.

Q. Should the Judge in substance charge you—I do not know whether he will use this language, but he may use similar language—should he charge you that the independent proof or the corroborative proof that is required need not support the testimony of the accomplice in its every detail, but it may be deemed sufficient by the jury, when believed, if it tends to connect the defendants and

each of them with the commission of the crime, will you [fol. 2605] accept that definition of law?

A. Yes.

Q. And apply it to the facts in this case?

A. Yes.

Q. Will you keep uppermost in your mind, and will you devote your mental faculties to this determination of this issue: Have these defendants and every one of them, Buchalter, Capone, and Weiss, been established guilty beyond a reasonable doubt or have The People failed to establish their guilt and are they innocent? Will you give to these defendants everything that the law of the land says they have given them, everything, the presumption of innocence, the doctrine of reasonable doubt, the burden of proof, and every rule of law and every safeguard that Judge Taylor will give you? Will you do that?

A. I will.

Q. Will you do this, too: After you hear all the evidence in the case, and every bit of it, if, after you hear it all, and then you have a reasonable doubt in your mind as to their guilt, acquit them; will you do that?

A. Yes.

Q. But after you get all the evidence in the case, and if your mind is satisfied that there are three guilty men here who operated as a combination and played the part that the witnesses in this case say they did in the commission of the Rosen murder, and you believe it beyond a reasonable doubt, will you tell us that in your verdict?

A. Yes.

Q. Without fear and without hesitation?

A. I will.

[fol. 2606] Q. Is there anything I should know about your qualification to sit here and do justice with your verdict?

A. Nothing. I have an open mind.

By Mr. Talley:

Q. Mr. Fisher, have you read anything about this case?

A. Nothing, practically, at all.

Q. Have you read anything that made any impression upon your mind, directly or indirectly, in any way?

A. No.

Q. That affects the guilt or innocence of these defendants?

A. No.

Q. As far as your mind is concerned, then, it is entirely open?

A. It is.

Q. To hear the evidence and pass upon it and decide accordingly?

A. Yes.

Q. If after hearing all the evidence you have a reasonable doubt in your mind as to the guilt of these defendants, will you acquit them without fear or hesitation?

A. I will.

Q. The court will charge you that they are presumed to be innocent until their guilt is established by evidence that satisfies the jury beyond a reasonable doubt. That is our American law. Will you give them that presumption?

A. I will.

Q. The court will charge you that if accomplices are called to testify against these defendants, or men who say they are accomplices, who will try and satisfy you that they are accomplices, if the Court charges you that the evidence of an [fol. 2607] accomplice must be corroborated by evidence quite independent of their testimony, will you insist upon that kind of evidence being presented and believed by you before you will vote to convict these defendants?

A. Yes.

Q. Have you sat in any other homicide case than the one you spoke of about last November?

A. No.

Q. That is the first and only time you sat in that type of case? And in that case there was a determination by the jury, was there?

A. Yes.

Q. Did you ever hear of these defendants before you came into this Court?

A. No.

Q. And you read nothing about them?

A. Nothing to speak of.

Q. When you say——

A. I saw the name of Lepke in the paper. That is about all I can remember.

Q. Did you read anything about it, having seen his name?

A. No.

Q. Did you read anything about either of the other two defendants in connection with that article that you read?

A. No.

Q. Did you form any impression at all from your reading of the name of Lepke in the papers, about him?

A. I did not even read it.

Q. You have no impression and you had none at any time?

A. I had none and I have none.

Q. Is there any reason that you know that we have not interrogated you about—And Lord knows we have interrogated you about enough.

A. I heard all the questions.

[fol. 2608] Q. Is there any reason that you know why you cannot sit as a fair and impartial juror in the trial of this case?

A. Nothing whatsoever.

Q. Any reason that you know that would prevent you from doing exact justice?

A. No.

Q. Between The People on one side and these defendants upon the other?

A. No.

Mr. Talley: I have no further questions.

By Mr. Fischbein:

Q. Mr. Fisher, you have been in the court-room for the past three days, have you?

A. Yes.

Q. And you have listened to questions propounded by Mr. Turkus and by the other lawyers who represent two of the other defendants?

A. Yes.

Q. And you have heard Mr. Turkus mention certain names of people in Brownsville, East New York?

A. Yes.

Q. You have heard him also mention names of individuals that come from the garment center?

A. Yes.

Q. You heard him speak, did you not, of some people that are connected with certain unions?

A. Yes.

Q. The fact that Mr. Turkus has mentioned those names, has that in any wise influenced you in so far as your mind

is free from prejudice or bias or sympathy at the present time?

A. No.

Q. It has not? Have you been impressed, sir, by anything that was stated in the court-room, anything at all? In [fol. 2609] other words, what I mean by that, Mr. Fisher, have you an impression which goes to your ability to serve as a fair and impartial juror by reason of anything that may have taken place in this court-room by way of questions or anything else?

A. No. I heard all the questions and I have an open mind.

Q. Prior to serving last December before Judge Fitzgerald, have you ever had any other jury service?

A. No.

Q. That was the only time that you were selected? That was the only time you served?

A. That was the only time I was ever really called.

Q. And prior to December of last year, have you ever been questioned by any lawyers or by any prosecutor?

A. No, I was always excused before.

Q. Before you were called to the jury box?

Mr. Climenko: No questions.

Mr. Turkus: Mr. Fisher is satisfactory to The People.

Mr. Climenko: May it please your Honor, the defendants challenge the gentleman peremptorily.

Stuart Andrews, No. 3037, of 153 East 29th Street, Brooklyn, New York, was called and took Seat No. 12 in the jury box.

Mr. Climenko: May it please your Honor, all defense counsel respectfully request an opportunity to be heard before your Honor on a matter which all defense counsel deem of concern to themselves.

[fol. 2610] The Court: Is that the same matter I have just discussed?

Mr. Climenko: If it may be in the absence of the jury.

The Court: It won't be necessary for you all to come up. I just want to be enlightened. You come up, Judge Talley.

Mr. Talley: The same matter.

The Court: You can be the spokesman.

Mr. Talley: I would rather one of these other gentlemen was.

Mr. Climenko: Will your Honor permit two of us to come up?

The Court: Yes.

(Mr. Turkus, Mr. Rosenthal, and Mr. Climenko conferred with the Court at the bench.)

The Court: (To Juror No. 8) Mr. Strober, for reasons which are not to be discussed in open court, all counsel have agreed to excuse you, and the Court thinks the reason is sufficient. It does not reflect on you in any way at all.

Mr. Strober: I understand.

The Court: You know the reason?

Mr. Strober: I know.

The Court: Perfectly honorable, but it is believed [fol. 2011] advisable that you should not be embarrassed.

Mr. Strober: I appreciate that.

The Court: The other gentlemen may move up. Call one more.

John J. Rourke of 1288 East 34th Street, was called and took Seat No. 12 in the jury box.

By the Court:

Q. Mr. Andrews, you are a salesman for what line of merchandise?

A. Envelope manufacturers, folding carton manufacturers.

Q. What concern?

A. P. L. Andrews Corporation.

Q. You are down on White Street, New York?

A. No, sir. The plant is in Glendale, Long Island, and my sales office is in New York City.

Q. Isn't that in Manhattan?

A. No, that is another firm, that is the H. P. Andrews firm.

Q. Harold Andrews?

A. Harold Percy, I believe.

Q. They moved to Manhattan?

A. That is correct.

Q. You live between Tilden Avenue and Beverly?

A. Yes, sir.

Q. One of those Calder houses?
A. That is correct.
Q. Where is your office located?
A. At 1328 Broadway.
Q. And you have been connected how long?
A. About twenty years.
Q. And before that?
A. I served in the American Expeditionary Forces dur-
[fol. 2612] ing the war. Been with the organization since I returned from France.
Q. What outfit were you in?
A. 106th Infantry, 27th Division.
Q. And before that?
A. I left school to join the Army.
Q. Do you belong to the Legion?
A. I am a member of the Veterans of Foreign Wars.

By Mr. Turkus:

Q. Mr. Andrews, the Judge has brought out your background in great detail and saved me all that bother. I can get right down to this point now. There is nothing in your background that brings you into contact with the garment industry, the needle trades, or the manufacture of clothes?
A. Not at all.
Q. No clothing truckers?

By the Court:

Q. Just one question. In making these cartons and paper boxes, you fill orders telephoned to your concern from various dealers in marchandise in the Borough of Manhattan?
A. Yes, we serve the large manufacturer or various industries throughout the country, not directly connected with the garment trade.
Q. You do include the garment trade?
A. No, it would not.
Q. What particular kinds?
A. Well, for the packaging of drugs and foods and textiles, hosiery. That is about as close an approach as we make to the garment trade.
Q. None of the light paper boxes?
A. No.
Q. All the heavy cartons?
[fol. 2613] A. No, quite the contrary, ours is more the smaller units. Ours is a package house.

Q. They are more sturdy than used in garment trade?

A. Quite the contrary. Your garment boxes are a large size type of box. Ours is a smaller unit, more of a counter unit, so to speak.

By Mr. Turkus:

Q. And the work that you do is sales representative?

A. That is right.

Q. In regards to Brownsville or East New York, can I go along—no contacts there of any kind, nature, or have you?

A. Not familiar at all with the section.

Q. Did you ever serve as a juror in any type of litigation?

A. To the various minor cases in years past.

Q. Were they civil cases, Mr. Andrews?

A. Those were. I served on one criminal case.

Q. Has it been in this court?

A. No, it was two years or more ago, still in the old building.

Q. It may not have been a criminal case, because we have been here more than two years in this building. Unless it was years ago, when it was in Oxford Street, that would be considerably more than two years ago, but it does not make any difference. I no not care whether you served or you have not served; will you take the law from Judge Taylor if you serve in this case?

A. I certainly will.

Q. Every aspect you will take?

A. Right.

[fol. 2614] Q. And will you, with common sense and reason, apply it to the facts in this case?

A. Right.

Q. Is there anything as prosecutor that we should know about your qualifications to sit?

A. Nothing I can think of.

Q. Part of the testimony in this case, as has been indicated to every juror who has been accepted, will emanate from an accomplice. I take it that by now you understand what an accomplice is?

A. Correct.

Q. Have you any bias against Judge O'Dwyer, the prosecutor of the county, or against the prosecution wherein part of the testimony will emanate from an accomplice?

A. None at all.

Q. Will you apply all the tests that Judge Taylor gives you and that your common sense dictates to you should be applied to an accomplice witness to ascertain does he speak the truth about these men on trial and about the part that each one of them played as a group or combination in the killing of the victim named in this indictment?

Mr. Climenko: I object to that question.

The Court: Qualify your question.

Q. Don't think that anything that I say is evidence in the case. You will get your evidence from witnesses here. What I want to know is this: Whether you will devote your mental faculties to find out whether the accomplice in the case not only speaks the truth about these men on trial and the part that each of them, we allege, played in the [fol. 2615] commission of the murder charged in the indictment.

A. Right.

Q. And will that be the way you devote your mental faculties to see whether or not you are getting the truth from that accomplice or that associate of theirs when he speaks about them?

A. Exactly.

Q. Now, as I said to other jurors, you may not like an accomplice. My feelings toward an accomplice or your feelings toward an accomplice mean little. Our job is, to find out does he speak the truth about them, as we have discussed. Do you understand that?

A. Yes.

Q. If you feel that these men on trial are guilty of murder in the first degree and that has been established to your satisfaction beyond a reasonable doubt, is your state of mind such that you won't acquit them because you do not like an accomplice? You won't acquit three guilty men because you do not like the accomplice, would you?

A. No, of course not.

Q. It has been pointed out by one of the lawyers for Buchalter that Buchalter has been convicted of other crimes and as penalty he is serving a long jail term for those crimes. Would you relax your duty or deviate from a proper result in this case because of his present incarceration in jail?

A. No.

Q. Will you devote your mental faculties to ascertain is he guilty or innocent and are these other defendants guilty or innocent of the crime charged in this indictment?

A. Absolutely.

[fol. 2616] Q. You will be told by the Judge that there cannot be a conviction upon the unsupported testimony of an accomplice. I won't go into any detailed discussion of it. The Judge will tell you the law after you hear all the evidence, and that is the time you can use it. You cannot use it yet. You do not know what the case is all about, but I want to know this: If he tells you that the law of corroboration does not require the prosecution to establish and corrobate in detail everything the accomplice says, but that the supporting testimony, if believed by the jury, may be deemed sufficient if it tends to connect the defendants with the commission of the crime, will you follow that instruction of law?

A. I will.

Q. It has also been pointed out by one of the lawyers for these defendants, and it applies to all the defendants and it applies to every criminal case, the defendant meets only the charge in the indictment. The prosecutor establishes that charge and that alone. That is all he is allowed to do under the laws of evidence. Will you devote your mental faculties to find out, do we establish guilt here of this Rosen indictment beyond a reasonable doubt?

A. Yes.

Q. After you hear all the evidence in the case, Mr. Andrews, and after you hear everything that Judge O'Dwyer will submit to this Court and jury bearing upon the guilt of these defendants, if you entertain then a reasonable doubt about their guilt, you acquit them, do you understand that?

A. Yes.

[fol. 2617] Q. And after you get all the evidence in this case, if you are satisfied beyond a reasonable doubt that there are three guilty men here, three of this combination or group who participated in the murder of Joseph Rosen as charged in this indictment, will you find them guilty without fear and without hesitation?

A. I will.

Q. Is there anything I should know as prosecutor before I pass on, as to your qualifications?

A. Nothing that I can think of.

Q. Mr. Rorke, do you live at East 34th Street?
A. I do.
Q. Is that Flatbush?
A. Yes.
Q. Have you lived there for a number of years?
A. Five years.
Q. And before that time where did you live?
A. Avenue K, always in the Flatbush section.

By the Court:

Q. That is near M or L?
A. It is between Avenue K and Avenue L.
Q. Near the Nostrand Avenue subway station?
A. About four or five blocks.
Q. It is up towards the Highway?
A. Two blocks from the Highway.
Q. Switchman for what?
A. New York Telephone.
Q. Employed for how long?
A. Twelve years.
Q. How old are you?
A. Thirty-two.
[fol. 2618] Q. This is your first position?
A. No, sir.
Q. Before that what line were you in?
A. I was employed by the Chatham & Phoenix Bank.
Q. In what capacity?
A. I was teller when I left. Started as clerk.
Q. John Street and Broadway?
A. Bowery and Grand Street.
Q. Branch?
A. Branch office.
Q. Are you married or unmarried?
A. Married.
Q. Who is taking care of your house when you are away on jury service?
A. Wife, I guess.
Q. She won't fret about it, will she?
A. I don't think so.
The Court: All right, go ahead.

By Mr. Turkus:

Q. All right, Mr. Rorke, the Judge has simplified my questioning of you, too. I take it from your background that

I can forget all about any connection with the garment industry, clothing industry, union officials of the Amalgamated or any of those other things that I inquired from other jurors; is that correct?

A. Yes.

Q. Exclude Brownsville-East New York?

A. Yes.

Q. Do you have any scruple, conscientious or otherwise, against capital punishment?

A. No, sir.

Q. In sympathy with law enforcement?

A. Yes, sir.

Q. I accepted as a juror, will you do justice by your verdict in the case?

A. Yes, sir.

[fol. 2619] Q. Will you give to these defendants everything that the Judge says they should have, the benefit of every law of the land and every constitutional right and safeguard?

A. Yes.

Q. And if, after you hear all the evidence in this case, if you then have a reasonable doubt about the guilt of any one of them, you will acquit that one or all of them; will you do that?

A. Yes.

Q. And if I satisfy you—and I say I, as representative of Judge O'Dwyer, the District Attorney of the County—if the evidence produced here by him in this court-room satisfies your conscience that these three men are guilty of murder in the first degree, that each one played a part in the commission of this murder, played a part as a combination or group that is charged in the indictment, will you say that in your verdict without fear or hesitation?

A. Yes, sir.

Q. Do you find any fault with the prosecutor of the county, or do you have any prejudice against the prosecutor, Judge O'Dwyer, who, in order to solve a murder case, accepts the testimony of an accomplice? We have been over that many times. If you have any bias or prejudice, tell me about it.

A. (No answer.)

Q. All these rules and tests that your common sense will tell you that you should apply to an accomplice witness, the care, caution, and suspicion and every vicious or immoral

act an accomplice may have committed during his lifetime, [fol. 2620] those are all tests to find out does he speak the truth, not only about himself, but about them. Do you understand that, Mr. Rorke?

A. Yes.

Q. As I discussed with all the other jurors that have been accepted here, it is not a question of whether you like the accomplice or whether you dislike him or whether anybody likes him. In criminal cases sometimes you have to deal with accomplices. The test is, if you are satisfied from the evidence in this case beyond a reasonable doubt that here are three guilty men, three who participated in the murder, you do not acquit them because you do not like an accomplice, do you understand?

A. Yes.

Q. That sentence of the defendant Buchalter, will that cause you to relax or deviate from the proper determination in this case?

A. No.

Q. You understand the rule that the defendants meet the one charge in the indictment, that is all the prosecutor can establish, guilty beyond reasonable doubt of this charge here?

A. Yes.

Q. Is there anything I should know as Judge O'Dwyer's representative in this prosecution, about your qualification or ability to sit here and do justice in this case?

A. I am a nephew of Inspector Rorke.

Q. Inspector Rorke does not figure in this case. All that I want to know is this, from you, Mr. Rorke, whether [fol. 2621] the Inspector is your uncle or not; we are here trying these three men on a charge of murder in the first degree; if after you get all the evidence in the case, if then you entertain a reasonable doubt about their guilt or any one of them, will you resolve that to the benefit of the one against whom you have the doubt, where there is a doubt? If, on the other hand, you are satisfied from the evidence that the District Attorney of the county presents in this court-room, that they are guilty and you believe it beyond a reasonable doubt, will you say it?

A. Yes.

Q. Is there anything that would prevent you from rendering a just verdict under your oath?

A. No.

By Mr. Climenko:

Q. Mr. Andrews, I will address my questions to you first and I will stand here so as to make sure that I talk loud enough to you and you to me, so our friends further in the court-room can hear us. You did on one occasion serve as the juror in a criminal case?

A. Yes.

Q. A couple of years ago?

A. Yes, as I recall.

Q. But I do not recall from your answer whether that was a capital case.

A. It was.

Q. Mr. Turkus was not the Assistant District Attorney in that case?

A. No, he was not.

Q. Do you remember who the Judge was?

A. I believe it was Judge Fitzgerald.

[fol. 2022] Q. And you are not clear as to whether the trial was held in this building or not?

A. No, I am not. It goes back a couple of years.

Q. You cannot recall, as you sit here now, just what year it was, although you think it was at least two years ago?

A. I believe it was. I was called many times since, but I have not gotten as far as the jury box.

Q. You understand from my questions which I put to you as attorney at this moment for the defendant Buchalter, that I am inquiring only for the purpose of trying to ascertain whether you can sit impartially in the trial of this case. Have you read about this case at any time?

A. I have, in the usual cursory reading of the newspapers.

Q. Have you also read about the defendants at any time?

A. Just what would appear in those articles which I might have glanced through.

Q. May I ask—I am trying to get directly to the point—did any of the matter which you read appear in the *Mirror, Daily Mirror?*

A. I never read it.

Q. So we can exclude that altogether. The other tabloid is the *News*. Do you ever read that?

A. No.

Q. Then there is the Hearst paper in New York called the *Journal-American.*

A. Another one.

Q. You never read that at all? I take it then that your morning paper is either the *Times* or the *Tribune* and your [fol. 2623] evening paper is either the *Post* or the *Sun* or the *Telegram?*

A. I see the *Sun* and *Telegram.*

Q. Do you read a publication that is called *P. M.?*

A. No.

Q. Never read anything about this case in that paper?

A. No.

Q. Did you ever read through from beginning to end any particular so-called story about this case or any of the people who are named in this indictment?

A. No, I have not.

Q. So then I may assume as a fact that whatever reading you have done in connection with this matter is purely a desultory and casual reading that really confronted you?

A. That is it.

Q. You never looked to read about this case?

A. No.

Q. And if you saw a headline about it, it made that much of an impression upon you and then you went on to other matters as to which you were more interested; is that correct?

A. Yes.

Q. Of course, you realize that this is a case that has received newspaper attention, but I can take it as a fact from you, Mr. Andrews, that you were not a person who read with interest about this case?

A. No, none.

Q. And I can also take it as a fact that you did not have any impression about this case in consequence of any newspaper reading?

A. None.

Q. Is that correct?

A. That is correct.

Q. Have you ever at any time heard about the defendants or any of them?

A. No.

[fol. 2624] Q. And I am now asking you apart from newspaper reading.

A. None.

Q. Then may I assume you have no impression, not only do you not have any impression about the case but you have no impression about the defendants or any of them?

A. None whatsoever.

Q. And you are acquainted with the precepts of our law, the fact that all defendants are presumed to be innocent? You understand that?

A. I do.

Q. That the indictment, as the lawyers says, has no probative effect?

A. Yes.

Q. Which means now that the mere fact that a charge has been made is in no sense and to no extent and to no degree proof of that charge?

A. That is right.

Q. And at the same time that the charge is made the defendants are presumed to be innocent thereof; is that correct?

A. Yes, as I understand it.

Q. And assuming that the Court instructs you, were you to be sworn as a juror here and act as a juror in the trial of this case, that the presumption continues from the beginning to the conclusion of the case.

A. Right.

Q. That these defendants are presumed to be innocent of that charge, you will have no difficulty in following that instruction?

A. None at all.

[fol. 2625] Q. Because that is a concept of law with which you are thoroughly in accord; is that correct?

A. That is right.

Q. Assuming that you were to be sworn as a juror and act as one in this case, you understand, of course, that it will be your duty as a juror to decide as to the honesty of persons who take the stand?

A. Yes.

Q. Roughly, then, the function of the Judge is to instruct you as to the law?

A. Right.

Q. The Judge is the sole judge of the law, and you and your fellow jurors are the sole judges of the facts?

A. Right.

Q. That in a very rough way is the distribution of labor in the trial of a case, you understand?

A. Yes.

Q. You understand also no one can divide the responsibility with Judge Taylor as to the instructions as to law?

A. Right.

Q. That is Judge Taylor's own province, you understand that?

A. Yes.

Q. By the same token, you understand that it is the jurors' undivided responsibility to pass upon the facts?

A. Right.

Q. You understand that?

A. Yes.

Q. You also understand, I take it, that in assessing the honesty or dishonesty of any witness who takes the stand in this case, that you are to employ your general intelligence and all of the standards which you normally employ in the discharge of the duties of your every-day life; is that correct?

A. Right.

[fol. 2626] Q. And so, in consequence of that, if a man takes the stand and admits that on former occasions he has committed perjury, that on other occasions in other courts, of jurisdiction equal to this, when he solemnly swore that he would tell the truth and he then proceeded to lie in violation of that oath, you will take that into consideration as a circumstance in determining whether or not you are going to take his word in this case; is that correct?

A. Yes.

Q. That is certainly a test that you would employ in your normal, every-day life, is that so?

A. Yes.

Q. By the same token, if a man takes the stand in this case and it becomes apparent to you, either because of questions which Mr. Turkus puts to him or questions which counsel for the defense puts, that powerful motives are operating upon that man to perhaps cause him to tell a lie, to deviate from the truth, you will take those circumstances into consideration in deciding whether or not he is telling the truth, isn't that so?

A. I should have to be the judge.

Q. Certainly. You will employ those same standards whether that particular witness be produced by the District Attorney or by anybody else, isn't that so?

A. Right.

Q. The mere fact that a witness is called to the stand by the District Attorney is not necessarily an earnest in your mind of the truth of what he says, isn't that so?

A. That is right.

[fol. 2627] Q. He has to be subjected to all of the normal tests of credibility or honesty that you would attach to anybody with whom you conduct a transaction in your normal life; isn't that so?

A. That is right.

Q. Of course, the Court will instruct you that punishment is not for the jury, as it is not, but you realize that this is a serious issue because this is what we call a capital case; correct?

A. Yes.

Q. And, that being so, you will attach to your job as a juror of sifting false from the truth the same degree of importance that you will attach to anything affecting your own interest; is that so?

A. Right.

Q. In other words, the obligation to find the truth is a very sacred, solemn one in this case; is that correct?

A. It is.

Q. Mr. Turkus has said to you and to others—he has asked you this question: Supposing an accomplice takes the stand, you won't reject his story because you don't like him? You remember that question?

A. Yes.

Q. Of course, nobody expects that you as a juror or anybody else in this court-room in any other capacity needs to develop an affection with respect to a witness. You understand that, of course.

You also understand that the word "like" may be used in a different sense, in the sense of respect, for instance? Isn't that so?

A. That is correct.

[fol. 2628] Q. So if on a general appraisal of the personality and character of an accomplice, as it is revealed by his direct examination and the facts that come out in his cross-examination, you come to the conclusion that you so dislike

that man, so dislike that man that you would not take his word——

Mr. Turkus: I object to this. This is going into a psychological discussion.

Mr. Climenko: Oh, No, it is only a question of language, language that you used.

The Court: Sustained.

Mr. Climenko: Exception.

Q. In other words, you realize that whether or not you take a man's word depends on whether or not you respect him to that extent, isn't that so?

Mr. Turkus: Objected to. You do not have to respect any accomplice.

The Court: Sustained.

Q. Do you realize that you may so disrespect a man that you cannot take his word because of his own acknowledgments and admissions about himself?

Mr. Turkus: Objected to. That is not the test. Does he tell the truth about these men? That is the test.

The Court: Sustained.

Mr. Climenko: Exception.

Q. Do you realize, Mr. Andrews, that in deciding whether [fol. 2629] or not you can take a witness's word you must take into account everything that that man says about himself? Isn't that so?

By the Court:

Q. You must consider it. You will consider it for what it is worth?

A. Absolutely.

Q. Use common sense?

A. That is it.

By Mr. Climenko:

Q. You will apply the same standards of common sense in appraising the honesty or trustworthiness of any witness as you would apply to him in the course of your own business affairs. You realize, of course, that it is your obligation under your oath to respect that portion of the criminal law of the State of New York which requires a jury to vote Not Guilty if, after hearing the whole of the

case, he entertains a reasonable doubt about the guilt of the defendant. You understand that?

A. I understand.

Q. You understand that these defendants nor any one of them are required to demonstrate their innocence to you, you understand that?

A. I do.

Q. That being so, you will not hold it against any particular defendant or all of them if that should prove to be the case, that they do not themselves either adduce any testimony through other witnesses or themselves take the stand? You understand that?

A. I do.

[fol. 2630] Q. Correct?

A. That is correct.

Q. And you understand also that you have both an individual duty as a juror and a collective duty, that your collective duty, which I will come to first, is one to come to your own conclusions about the testimony and then discuss it with your fellow jurors?

A. Right.

Q. To try to come to an agreement with them if you can through the use of your mental processes and theirs, too, isn't that so?

A. That is right.

Q. You also have an individual obligation, and that is that in the event that through reasoning in connection with the evidence you cannot come to agreement with them, you will adhere to your own conscientious conclusions; you understand that?

A. That is correct.

Q. It may prove a hardship for you to do that, in the sense that you may find yourself in a minority, or you may find that the hours of deliberation become a burden to everybody in the jury room. Will you abrogate your own opinion because of such consideration or inconvenience?

A. No.

Q. Have you heard any lectures on crime by any members of the staff of the District Attorney?

A. None at all.

Q. Are you acquainted with any members of the police force?

A. I am. I perhaps should have mentioned this to Mr. Turkus.

Q. Yes?

A. It slipped me for a moment. My next door neighbor is a plain-clothes patrolman. Through him I met some [fol. 2631] of his friends. I thought it should be brought out, at least now.

Q. It is not too late. I take it that that acquaintanceship is the casual kind that one normally has with a next-door neighbor. You do not class it as an intimate friendship?

A. We are rather intimate friends.

Q. May I know his name?

A. Francis P. Garvey.

Q. He is a patrolman?

A. Plain-clothes patrolman.

Q. Is he assigned in Brooklyn?

A. In New York, with Inspector Henry——

Q. Is that a specialized squad?

A. I don't believe so, simply plain-clothes patrol.

Q. Have you met other friends of his on the force?

A. Yes, I have.

Q. Do you recall their names?

A. One of them is Edward Meyer. He is a plain-clothes patrolman in the Borough Hall section of Brooklyn, and he is the only fellow intimately.

Q. So those are the only three whose acquaintance that you have you think it is important to mention?

A. That is it. I just mention it.

Q. Have you gone out socially with these gentlemen?

A. Yes.

Q. Spent evenings in their company?

A. That is right.

Q. Entertained them at your home?

A. Yes.

Q. I will ask this general question about it all as best I can: Is there anything about the fact that you have en- [fol. 2632] joyed the friendship of those gentlemen, been intimate with them, have you had any experience in consequence of that intimacy which would in any way color your thinking as a juror about this case?

A. None.

Q. Has this case ever been mentioned during the course of your friendship and being with those gentlemen?

A. No, I don't believe so.

Q. That brings me to something else. You have been asked whether, if you were convinced beyond a reason-

able doubt of the guilt of the defendants, you would, without reservation, vote for a verdict of guilty.

A. That is right.

Q. By the same token, this is a case which you realize has been discussed, even though you have not been particularly interested in it, and you are a personal friend of members of the police force. Now, is there anything in that fact which you have just been good enough to tell me about, anything else which I have not asked about, in the background of your family life, your business life, your general attitude, which would cause you to be reticent about returning a verdict of Not Guilty if at the conclusion of the entire case you should entertain a reasonable doubt about the guilt of the defendants or any of them?

A. Nothing.

Q. Mr. Andrews, there is just one thing I am interested in, and I will try to make that as short as possible. You have been here since Tuesday morning?

[fol. 2633] A. No, the Court excused me until this morning.

Q. There have been made mention of names of members of unions. You have not heard the names of any union officials?

A. None mentioned here today.

Q. The fact that those names have been mentioned would not influence you one way or the other, particularly if their names were never again referred to once the trial actually started.

A. No.

Q. Assume that you were chosen as a juror and the trial began and the Court in the proper discharge of his duties as judge presiding over this trial should determine that the jury ought to be kept together during the time that the case goes on, during the duration of the trial; are you confident that you would not even unconsciously let that fact militate in your mind against the defendants or any one of them?

A. Not at all. I rather expect that. Not with pleasant anticipation.

Q. No.

A. Still and all, it would not prejudice me.

Q. It is not a circumstance——

A. It is one's duty.

Q. The fact that the Court thinks that is necessary is not a circumstance that you would permit to color your thinking about the defendants or any one of them?

A. It will not.

Q. You know that pretty soon the people of New York City will vote for a Mayor and the District Attorney of Kings County is happily the nominee of his party, in that campaign. You have heard that?

A. Yes.

[fol. 2634] Q. And the District Attorney is a person who enjoys the regard of his fellow citizens in Kings County. The mere fact that his reputation may be what it is is a circumstance which you realize has nothing to do with the virtues or the merits of this case; is that correct?

A. Yes.

Q. The mere fact that you may like or dislike the Democratic nominee for Mayor of New York City is a circumstance which cannot have any part in thinking about this case. We are agreed on that proposition?

A. I am.

Q. The mere fact that the District Attorney happens to be a nominee for elective office is a circumstance which does not enhance the credibility of any witness that Mr. Turkus calls to the witness stand; isn't that so?

A. That is correct.

Q. And the mere fact we have the accident of a political election coming within the next three weeks is a circumstance which has nothing to do with this case whatsoever? You would not permit it to enter into your deliberation?

A. I would not.

Q. Something has been said about the fact that the defendant Mr. Buchalter has been previously convicted of crime. You realize, do you not, that the only issue in this case, is the charge in this particular indictment. You realize that?

A. That is true.

Q. Nothing about any prior conviction has anything to do with the charge here; you realize that?

A. I do.

Q. The mere fact that such a charge is made is, as we said before, not proof. On the contrary, the defendant is [fol. 2635] presumed to be innocent, and that presumption attaches to Mr. Buchalter in spite of and independently of

any prior conviction. You realize whatever conviction he may have been subject to in the past is something he has paid the penalty for or is paying the penalty for, and the fact that he has such a conviction is a circumstance you would not permit for one moment to enter into your thoughts about him and his innocence or guilt in this case; is that correct.

A. That is correct.

Q. Because any other mental approach would not be giving him a fair deal in the trial of this case, isn't that so?

A. That is correct.

Q. Do you know of anything—because I want to shorten this—do you know of anything as you sit here now which gives you any mental reservation about your acting as a fair juror in this case without sympathy to our client or without any prejudice against him? Do you know of any reason that you cannot act fairly in that sense?

A. No, I don't.

Mr. Climenko: Thank you.

By Mr. Barshay:

Q. Mr. Rorke, do I understand that you are related to a police inspector?

A. I am.

Q. And may I know his full name?

A. Thomas H. Rorke.

Q. Where is he assigned.

A. Assigned in Brooklyn, in charge of traffic in Brooklyn.

Q. How long has he been in the department, do you know?

[fol. 2636] A. Thirty-some-odd years, I guess.

Q. So that he has held many posts, to your knowledge?

A. To the best of my knowledge, the past ten years or twelve years he has been in various traffic posts.

Q. Do you see him often?

A. Occasionally.

Q. You take pride in his advancement as a police inspector, naturally?

A. Purely his accomplishments.

Q. That is correct. Have you discussed any police work [fol. 2637] with him at any time?

A. Never discuss any police work.

Q. Haven't you at any time heard him discuss his work?
A. No, sir.
Q. He has friends in the police department, I take it, whom you know?
A. Personal friends?
Q. Yes, any way you put it.
A. None that I know of.
Q. Did you ever meet anybody in the police department through him?
A. No, sir.
Q. Have you told him that you had received a jury notice?
A. No, sir.
Q. You were a juror, rather, a prospective juror, on a prior occasion in this court?
A. Yes.
Q. That was a blue ribbon jury?
A. That is right.
Q. Mr. Turkus was the prosecutor?
A. That is right.
Q. At that time, sir, you were questioned by Mr. Turkus?
A. Yes.
Q. Thereafter that fact came out, did it not?
A. Not while Mr. Turkus was——
Q. It came out?
A. It came out during the questioning.
Q. Then the lawyer for the defendant questioned you, too?
A. That is right?
Q. And I am not assuming too much to say that he questioned you almost along the same lines that the jurors were questioned here in respect to prejudice and so forth?
A. Yes.
Q. And some of the names that you were questioned [fol. 2638] about were some of the names that you heard here while you were sitting here waiting to be called?
A. That is something I had not been paying much attention to, names that have been mentioned.
Q. You heard the name "Buggsie" Goldstein then?
A. No, I did not hear it then.
Q. You heard it here? Did you hear the name Maione?
A. Of course I heard that.

Mr. Turkus: Just a minute. We are getting it confused, whether it was heard then or now.

Mr. Barshay: We are not getting confused.

Mr. Turkus: I am getting confused.

The Court: I understand Mr. Barshay is asking if the gentleman remembers if those names were mentioned when he was called for jury service on the previous case.

Q. That is right?

A. The first name that he mentioned was not mentioned on the previous occasion.

Q. Do you remember any of those names?

A. No, sir, I do not.

Q. You mentioned one you did remember.

A. Maione, yes, of course.

By the Court:

Q. Do they mean anything to you?

A. No, sir, they do not.

By Mr. Barshay:

Q. Well, about how many names would you say that [fol. 2639] were mentioned then that you recollect as being mentioned here today or yesterday or the day before?

A. One of the defendants.

Q. Maione? And one of the defendants at the present time?

A. Maione.

Q. Was mentioned then, too?

A. That is correct.

Q. Was Pittsburgh Phil Strauss mentioned then?

A. No, sir. I don't believe the questioning had gotten that far with the defense when the question arose as to my having any relations in the police department. When that question arose I was immediately excused.

Q. And thereafter did you follow the case with interest in the press? Did you read about it?

A. Only to the effect of the decision that was arrived at.

Q. I do not know whether you remember all the counsel in that case.

A. I do remember two of them.

Q. I was not one?

A. Just Mr. Rosenthal was there of the present group and Mr. Turkus.

Q. Do you feel any resentment then because you were excused, not for any personal reason, but because of this relationship with a police inspector?

A. No.

Mr. Barshay: Now, with your Honor's permission, may we see you for a minute?

The Court: Yes.

(Mr. Turkus, Mr. Talley, Mr. Barshay, and Mr. Fishbein conferred with the Court at the bench.)

[fol. 2640] By the Court:

Q. Mr. Rorke, how close are you to your uncle, the inspector? How intimate? Some relatives never see one another or care.

A. He only lives two blocks from me. I might happen to pass him on the street. I don't make it a point to go and visit him.

Q. Do you visit one another's homes?

A. No, sir. I mean, if we happen to be in the neighborhood he might drop in or I have reason to go over and borrow some tool I will go over.

Q. Do you visit at one another's homes?

A. No, we do not make it a point.

Q. At Christmas do you have get-together parties?

A. No, sir, he has his own family to maintain over there?

Q. How is that?

A. He has his own family there.

Q. The families are not very close?

A. I would not say they are close, but by the same token they are not far apart, either.

Q. They are not enemies. Well, at any rate, there is a feeling of distance, apparently, because you don't intermingle in one another's homes; you don't entertain one another?

A. No, sir.

Q. Have you ever discussed police matters with your uncle?

A. Just in so far as traffic problems that might come up.

Q. Not in connection with any of Mr. O'Dwyer's work?

A. No, sir, I have never discussed it at all.

Q. He has never expressed any opinion to you on that?
[fol. 2641] A. As I said on this previous occasion, I mention the fact that I was called for jury and that I had been turned down. He said "I guess you are not sorry for that," and that was the end of the conversation.

Q. That was just a congratulation?

A. That is right. I happened to meet him on the street.

Q. You have not formed any opinion concerning any of these defendants from any contact with your uncle or his family?

A. Oh, no, sir, not at all.

Q. Is there any reason why it would embarass you with your uncle and his family for you to render a verdict which reflected your own conclusion?

A. Not that I know of.

Q. Independently arrived at?

A. Not that I know of, no.

Q. You are under no obligation to your uncle?

A. No, sir, none whatsoever.

Q. You would not care whether he liked it or not?

A. That is quite right.

Q. You mentioned something before—I will put it this way—was there anything connected with that other case in connection with any one of these defendants that caused you to have an impression adverse to one of these defendants?

A. No, sir.

Q. Just yes, or no.

A. No, sir.

Mr. Talley: If your Honor pleases, I offer a challenge for implied bias in this case.

The Court: Try the challenge.

[fol. 2642] John J. Rorke, residing at 1288 East 34th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Talley:

Q. Mr. Rorke, you are a nephew of Police Inspector Rorke?

A. That is correct.

Q. Police Department, New York City. And you live within a block of him?

A. About two blocks.

Q. And see him frequently and talk with him frequently?

A. I do not see him so frequently. If I happen to be passing in the street, say hello, and that's the extent of the conversation unless something else comes up.

Q. And you visit his house occasionally?

A. Very seldom.

Q. Does he come into yours?

A. Very seldom.

Q. But he does come in?

A. He has been there, yes.

Q. You were called as a juror in the spring of this year, were you not, in May, five or six months ago you say?

A. That is correct.

Q. And that was a homicide case?

A. No, a capital case.

Q. Murder case. Murder and homicide.

The Court: Was I the Judge.

The Witness: Yes, sir.

Q. And Mr. Turkus was the prosecutor in that case?

A. That is correct.

Q. And one of the counsel now engaged as counsel to the defense was counsel for one of the defendants?

A. Mr. Rosenthal.

[fol. 2643] Q. And Mr. Rosenthal challenged you as a juror, did he not?

A. He did not challenge me, that is, I was not put in the box here. He was questioning me.

Q. Yes. And after you were questioned he presented a challenge?

Mr. Turkus: No, he did not.

A. No, he did not present a challenge.

Q. Who did?

A. Not as I understand a challenge. In my estimation a challenge is when I am put in the box.

By the Court:

Q. Do you attribute your excuse to either of the counsel in the case?

A. Yes, sir.

Q. Do you charge it against one particularly?

A. Yes, I would charge it against one who was questioning.

Q. Do you carry a grudge?

A. No.

Q. Does it make a particle of difference?

A. Not a particle of difference.

Q. You would not be sore on counsel?

A. Of course not.

By Mr. Talley:

Q. Speak up.

A. As I remember this thing, it was a Friday night. It was a week—I believe your Honor wanted to get the jury chosen that night.

Q. It is not necessary, Mr. Rorke. All we want to have on the record——

The Court: We don't need to go into that detail.

[fol. 2644] Q. All we want upon the record is that you were challenged when you were called as a juror in that case, were you not?

A. I do not understand what you mean by a challenge.

Q. You were excused from serving, weren't you?

A. Yes, sir.

Q. At the request of one of the defendants' counsel in that case?

A. That is correct.

Q. You were not excused as the result of any statement made by the District Attorney, were you?

A. No, sir.

Q. So that he was not responsible for your being excused; it was something that was said by Mr. Rosenthal, a counsel in this case, to the Judge, that resulted in your being let out of the jury box?

A. That is correct.

Q. A rather circumlocutious way of putting it, but that is about it, isn't it? In that case there were certain names that you remembered, were there not?

A. Yes, sir.

Q. And at least one of those names you have heard since you have been called in this case, isn't that so; just yes or no?

A. That is right, yes, sir.

Mr. Talley: I submit——

Mr. Turkus: I have not finished.

Mr. Talley: I submit, appealing to the discretion of the Court, that my challenge should be sustained in this case.

The Court: Any other counsel for defense?

Mr. Cuff: We all join.

The Court: Any other counsel wish to question the talesman?

[fol. 2645] By Mr. Rosenthal:

Q. Mr. Rorke, there were other defense counsel in that particular trial in which you were called, is that right?

A. I believe there was one other that I remember.

Q. And in the course of questioning it developed that your uncle at that time was Police Inspector Rorke?

A. That is correct.

Q. And at that time weren't you questioned also as to your association, that is your friendship, with your uncle and how close it was? Do you recall?

A. No, sir, I was not.

Q. You were not asked any questions concerning how close you were to your uncle or how often you saw him?

A. No, sir.

Q. That is your recollection?

A. That is correct.

Q. You were living then a short distance away from him?

A. Same situation.

Q. Did you prior to May of this year see your uncle more often than you did subsequent?

A. No, sir.

Q. You do see him practically three or four times a week, don't you?

A. No, sir; I have not seen him now in two months or more, I don't believe.

Q. Did you follow with any interest the development of the trial where you were excused?

A. The previous trial?

Q. Yes, where you were excused. Did you read newspapers?

A. I just made it a point to——

Q. Please——

Mr. Turkus: He is answering you, because he has an-
[fol. 2646] swered when he was in there. I object to him being shut off.

Mr Rosenthal: I want to know whether he read newspapers, without quoting what he may or may not have read in the newspapers.

Mr. Turkus: He stated before, as he was about to state now—I am not going to say what it was—let him say it.

The Court: Overruled.

Q. Did you read any newspapers in connection with the evidence in that trial?

A. No, sir, I did not.

Q. At any time?

A. No, sir.

Q. So that you read nothing about the progress of that trial until its conclusion?

A. That is correct, sir.

Q. Did you converse with anybody as to that trial?

A. Just the point that I had been chosen as a talesman for it.

Q. Other than with your uncle, did you converse with any other person?

A. People at my place of business, yes.

Mr. Rosenthal: That is all.

The Court: Any other counsel for defense?

Mr. Climenko: No, thank you.

By Mr. Turkus:

Q. Is the name that you speak of, Mr. Rorke, the name of Maione?

Mr. Rosenthal: I object to any mention. There was an objection at the time that one of the counsel——

The Court: Sustained.

Mr. Turkus: There is a record made here by Judge Tal-
[fol. 2647] ley and he asked him about whether there was a name. If I am precluded from going into it, you are leaving the record open with something that is not explained here. I don't want to leave it that way.

Mr. Rosenthal: At the time that counsel for defense asked the privilege of this Court to permit them to direct attention of prospective talesmen in the jury box as to a

name or names. I recall distinctly Mr. Turkus objecting and the Court's sustaining and I think it is highly improper for the District Attorney after urging an objection to thereupon disregard it in the presence of an entire panel after eleven men are chosen and deliberately mention a name in this court-room.

Mr. Turkus: That is a stage play.

Mr. Rosenthal: I object to that statement. Please, I am addressing the Court.

Mr. Turkus: Please don't push.

Mr. Rosenthal: I don't do what you do.

Mr. Turkus: You just pushed me.

Mr. Rosenthal: And you are not telling the truth.

Mr. Turkus: You are deliberately stating a falsehood if you state you did not push me.

The Court: Please!

Mr. Turkus: There is a record here, Judge, I am concerned about.

The Court: I can hear only one at a time.

Mr. Turkus: Let him get through with it.

[fol. 2648] The Court: At this time I will hear Mr. Rosenthal. You mean that you were examining this talesman and asked him concerning names; that the Court sustained an objection?

Mr. Rosenthal: No, sir; I did not say that. I said when prospective talesmen were in the box, Mr. Barshay at the time asked permission to direct the particular juryman's attention to what name of a particular jury he had sat on. Mr. Turkus objected on the ground that it was bringing out a specific thing and the Court sustained it.

The Court: I see the point.

Mr. Turkus: And there was another juror, but I waived that when Mr. Rosenthal wanted to ask it.

The Court: Objection is sustained.

Mr. Turkus: Judge, may I point this out to you? Judge Talley brought out that there was a name mentioned in the other case that he heard here now and there is nothing on the record——

The Court: Pardon me. The point is quite clear. It involves the revelation of the name of the case and the Court must rule impartially as to both sides, so the objection is sustained.

Q. Let me ask you two more questions and we will be through with this. Mr. Rorke, do you owe your uncle anything?

A. No, sir.

Mr. Talley: I object to that question. I would not like to have that asked of myself.

Mr. Turkus: Please don't be so sensitive.

[fol. 2649] Q. If you are satisfied beyond a reasonable doubt that they are guilty, will you say it in your verdict?

Mr. Cuff: I object to that as already answered.

The Court: Sustained.

Q. If you are not satisfied of their guilt beyond a reasonable doubt, will you say it?

Mr. Cuff: I object to that for the same reason.

The Court: Sustained.

Mr. Turkus: Then that is all I want to ask.

Mr. Talley: We press the challenge.

The Court: I will have to overrule you, Judge

Mr. Talley: We all except to your Honor's ruling in this instance.

The Foreman of the Jury: Your Honor, some of the jurors have asked for a five-minute recess.

The Court: We will take a fifteen-minute recess.

[fol. 2650] Do not discuss the case.

Let the defendants be remanded first.

(A fifteen-minute recess was thereupon taken.)

(5:00 P. M.)

TRIAL RESUMED

Mr. Talley: Counsel desires to confer with your Honor at the bench. May we do so?

The Court: Yes.

(All counsel and Mr. Turkus appear before the bench, and the following takes place, without the hearing of the panel):

Mr. Talley: Counsel are now presented with this condition: that they have only one more of the challenges left.

If the peremptory challenge has got to be exercised, if it is against the eleventh juror, that will leave us without a challenge for the twelfth juror. I did not feel we would be justified in putting upon the record, in our challenge to Mr. Rorke, now sitting in the twelfth seat, the fact that the name he stated in his examination that he had heard mentioned in the Maione trial, in which he was called as a juror and challenged peremptorily by one of the present counsel in this case, was the name of one of the three defendants in this case. We wish to put upon the record now that the [fol. 2651] basis of our challenge was not only his relationship to the Police Inspector in the New York City Police Department, but also that he had sat in a court-room as a prospective juror in a case in which was mentioned to him during the course of his examination, and I assume the examination of other talesman, the name of the defendant Capone, who is a defendant in this case.

I want to call your Honor's attention to the fact that many, if not all, of our peremptory challenges were compulsory, so to speak, after your Honor had denied our challenges for cause or implied bias, or on whatever ground the challenges were made; so we are now faced with the situation of having exhausted or of being about to exhaust our peremptory challenges and being unable to serve a peremptory challenge against Talesman Rorke, who was examined a few minutes ago.

The Court: Is that all?

Mr. Rosenthal: One thing I want to add is some of the voluntary peremptory challenges that were taken and caused us to use up our peremptory challenges I consider were involuntary, so that your Honor is faced with a situation under authority of The People vs. McQuade and People vs. Greco. The People vs. McQuade is in 110 N. Y., at page 290 or thereabouts. For that reason exception was taken [fol. 2652] to the exhausting of peremptory challenges by us—necessary to be taken by us.

Mr. Barshay: Counsel for the defendant Buchalter joins in exactly what Judge Talley and Mr. Rosenthal have said as if they said it separately and independently.

The Court: You have exercised, I understand, twenty-nine peremptory challenges.

Mr. Rosenthal: That is right.

The Court: And possibly several were following the Court's overruling challenges for cause. The rest were

without any trial of a challenge for cause, but that is neither here nor there.

The Court is not interested in these cases for the reason that the Court has done its best to be fair in the trial of these challenges and believes its decisions to be correct and that they will stand up on appeal.

The matter that Judge Talley mentioned in relation to the name of one of the defendants in this case was, of course, included in the Court's ruling upon the last challenge. It was one point on which the Court had considerable difficulty in coming to a decision, and believes it to be accurate. I do not see what difference it makes. The Court viewed the challenge as being for all purposes of bias, consequently considered the point of alleged bias that developed. I think, now, counsel having had their say, we should let it stand.

[fol. 2653] Mr. Rosenthal: May I make this observation——

The Court: No more argument after the decision.

Mr. Rosenthal: I just wanted to make mention of the fact that——

The Court: You cannot build up a record by comments after the Court has made a decision.

Defense Counsel: Exception to all defendants.

The Court: Resume examination of talesmen.

Mr. Talley: There are no further questions as to Mr. Andrews (talesman).

The Court: Any further questions by any other counsel for the defense?

Mr. Talley: No further questions with respect to Mr. Andrews for the defense.

[fol. 2654] The Court: You may resume questioning as to Mr. Rorke.

Mr. Rosenthal: May I note an exception on the record.

John J. Rorke (examination continued):

By Mr. Barshay:

Q. Mr. Rorke, we are serving as the legal machinery, each counsel contending what he claims is his legal right. I take it that will not influence your judgment against our defendant?

A. No, sir.

Q. The fact, on legal motions, on legal argument, the Court has ruled in the manner in which it did, you will not hold that against us or resent it in any way?

A. No, sir.

Q. I take it it will be fair enough to say that every defendant who comes to trial in this court is entitled to be represented by counsel, who makes the best fight they know how for their client.

A. Yes, sir.

Q. The fact that at some time or other some lawyer excused you in another trial has nothing to do with this case—the fact that when a motion was made with respect to this case, you had nothing to do with that—as though it never happened—you will consider the evidence in this case just as fairly and equitably and squarely as you know how?

A. Yes, sir.

Q. At no time and no place will you allow it to prejudice [fol. 2655] you in any way?

A. No, sir.

Q. Pardon me for repeating it, because this is my cause. Do you belong to any organization of any nature?

A. No.

Q. Do you intend to participate at all in the forthcoming election?

A. No, sir.

Q. Do you know anyone at all in Judge O'Dwyer's office?

A. You mean officials?

Q. Yes.

A. No, sir.

Q. Do you know anyone on the clerical staff?

A. I did know one there—whether he is still there I do not know.

Q. May I know his name?

A. O'Sullivan.

Q. I don't know whether he will be in this case, but if he is, will it influence you in any way whatever?

A. No, sir.

Q. Because he merely reported what transpires, if he did report.

A. I understand.

Q. Do you know Mr. Turkus or Mr. Klein?

A. No, sir.

Q. Mr. Klein is not here now, but he will be here during the course of the trial—do you know him?

A. No, sir.

Q. He may have appeared in the matter in which you were questioned before; do you recall that—a very short fellow.

A. No, sir.

Q. I take it that all the argument you have heard while sitting here, between counsel and Mr. Turkus, will have nothing to do with the case? Sometimes it is of a legal nature—sometimes we get a little personal—but that does [fol. 2656] not matter at all when it comes to consider the guilt or innocence of the defendant.

A. I know that.

Q. Just as well as I was on this side of the table and he was on the other, and he fought just as hard for his case then as he does now.

A. Yes, sir.

Q. Speaking for Mr. Buchalter, you have heard, and I must repeat, that he is now incarcerated for a long time because of some previous crime. Some people may have a prejudice against people in that position. They may not take his word. Would you be prejudiced against him by virtue of that?

A. No, sir.

Q. The issue here is the only one which you shall decide?

A. Yes, sir.

Q. Whatever happens, happens?

A. Yes, sir.

Q. Do you believe in according to him as well as to the other defendants what the law gives him as a matter of substantial right—the presumption of innocence?

A. Yes, sir.

Q. Do you believe the indictment is, by its language, simply an accusation against Mr. Buchalter of the commission of a crime, and has no weight whatever?

A. I do.

Q. And when he said, "Not guilty," he put every charge against him and every bit of evidence that is to be presented against him, in issue for you to decide?

A. Yes, sir.

Q. And by his plea of not guilty he has said, "I am not an accomplice of anyone," do you understand?

A. Yes, sir.

[fol. 2657] Q. The mere fact that a man comes here and claims he is an accomplice of Buchalter does not make it so unless by evidence you are convinced of that fact?

A. Yes, sir.

Q. And that person may be telling the truth, as has been well said by other counsel, about his own participation in it, but somewhere, for some reason, he has a motive in saying he is an accomplice of Buchalter. You will be the one to find out whether there is a reason—whether there is a motive for such testimony.

A. Yes, sir.

Q. And you may come to the conclusion, if you see fit after judging him or liking him or disliking him, whatever you may think, that he may be saying the truth concerning himself but absolutely falsifying about Mr. Buchalter.

A. Yes, sir.

Q. And among other things, you may take into consideration his background, his hope of regard, the treatment he has been accorded, the fact that he did at one time say he was not an accomplice, and the fact he never even saw Mr. Buchalter, will you take those things into consideration?

A. Yes, sir.

Q. Even then, if the Court shall tell you to view that testimony with a great deal of care and suspicion—the law says that, will you do that?

A. Yes, sir.

Q. Then the law demands of you that you must go further. Should you even believe the testimony of the accom- [fol. 2658] plice that is not enough. Corroborate that man's testimony, says the law to the District Attorney, by independent evidence, independent of him, which tends to connect Mr. Buchalter with the commission of this crime. Will you do that?

A. Yes, sir.

Q. Otherwise you will acquit him?

A. Yes, sir.

Q. Then will you look to the source from which comes the so-called corroborating testimony?

A. Yes, sir.

Q. If it comes from a polluted or criminal source, from criminals who have a motive, you will consider that?

A. Yes, sir.

Q. If you disbelieve it and out of that disbelief you find a reason for doubt, you will say so by your verdict?

A. Yes, sir.

Q. If you disbelieve it and out of that disbelief you find that there is a reasonable doubt, the District Attorney has failed to prove his case beyond a reasonable doubt, and you will say so by your verdict?

A. Yes, sir.

Q. And of course that will be "Not guilty"?

A. Yes, sir.

Q. Some counsel have indicated quite clearly that they may offer testimony on behalf of their defendants, no matter what that testimony may be. We may offer testimony on behalf of Buchalter or may not. But if the Court shall tell you we need not, either by him or through witnesses, you must not draw any unfavorable inference by virtue thereof. Will you follow that law?

A. Yes, sir.

[fol. 2659] Q. You will not expect him to explain any single accusation against him?

A. No, sir.

Q. Because, without a single word forthcoming from the defendant, the duty always remains with the prosecution. Do you agree with that?

A. Yes, sir.

Q. So Mr. Buchalter, if you are chosen as a juror, can we rely upon you for the preservation of every right that the law gives him?

A. Yes, sir.

Q. You to be the sole and exclusive judge of every fact in the case and you to take the law from his Honor at the proper time?

A. Yes, sir.

Q. Applying both together, you not yielding to anyone with respect to the fact, and taking the law from his Honor, then, if there is a reasonable doubt, will you have the courage to give it to Mr. Buchalter?

A. Yes, sir.

Q. No doubt about it?

A. No, sir.

Mr. Rosenthal: I have no questions and rest on the record.

Mr. Turkus: Mr. Andrews is satisfactory to The People of the State, and Mr. Rorke is satisfactory to The People of the State.

Mr. Talley: Mr. Andrews is challenged peremptorily [fol 2660] by the defense.

Defense Counsel: All join.

(Mr. Rorke was then seated as Tentative Juror No. 11.)

Mr. Turkus: Your Honor, since we have only one more juror to get and two alternates, may I respectfully suggest we adjourn.

The Court: I would like to complete, if possible, the jury tonight and get them sworn; then we can accommodate counsel by having the alternates selected tomorrow.

Mr. Turkus: That would mean a night session?

The Court: No, it would not.

Mr. Turkus: I have only had a sandwich at one o'clock; I cannot eat more when I am working.

The Court: Call one more gentleman.

(Victor H. Heatley, of 183 Lafayette Avenue, Brooklyn, New York, No. 3081, a talesman, was then called to the jury box and examined as to his qualifications.)

Mr. Rosenthal: I am supposed to be in court at nine o'clock in the morning, and I must contact my office and have some substitute go there.

The Court: You had a half an hour and a fifteen-minute declared recess; you had plenty of time to contact your office.

Mr. Rosenthal: I cannot contact my office in the courtroom.

The Court: Please proceed.

[fol. 2661] By Mr. Turkus:

Q. Do you reside at 113 Lafayette Avenue?

A. Yes.

The Court: May I ask a few questions?

Mr. Turkus: Yes.

By the Court?

Q. Where is your place of business?

A. No. 5 Beekman Street, New York City.

Q. Is your business mostly in bonds?

A. No, sir; it is a personal business entirely. I have friends, corporations and lawyers; I get bonds for them.

Q. Is that your own business?

A. I am with W. T. Jones.

Q. How long have you been in that business?

A. Since 1924.

Q. How old are you?

A. Fifty-eight.

Q. Before that what line were you in?

A. The Federal Reserve Bank, United States Government.

Q. How long were you in the Federal Reserve Bank?

A. About two years.

Q. In what capacity?

A. I was with the clearing department, they cleared checks.

Q. Is that when Mr. George W. Davis was one of the governors

A. No, sir, I think Mr. Kern was.

Q. There is a board of governors?

A. Yes, sir.

Q. Or trustees?

A. A board of governors, I think, Judge; I don't think they have trustees.

[fol. 2662] Q. The board of governors is right. You had experience then in investments?

A. Yes, sir.

Q. For lawyers who handled estates?

A. Yes, sir.

Q. Have you had any business experience besides that?

A. I was with the Government in the Shipping Board before they assigned it to the Department of Justice. That was in 1923. They had an embezzlement case and they could not get the evidence, so they put it into my office. That was in 1923.

Q. What position did you have in the Shipping Board?

A. I had charge of all the labor along shore, but the man who was there previously to me had embezzled about $2,000.

Q. You mean you had charge of the workmen along shore?

A. Yes, sir, the men who take care of ships, and do all the heavy work.

Q. You mean you had direct charge of the stevedores?
A. Yes, sir.
Q. How long ago was that?
A. 1921, 1922, and '23.
Q. That is twenty years ago?
A. Yes, sir, about that.
Q. You did not, at that time, I assume, contact any names that have been mentioned here?
A. No, sir, I do not know any.
Q. 183 Lafayette Avenue is near Adelphi Street?
A. Yes, sir.
Q. Is that a private house?
A. Yes, sir.
Q. Are you married?
A. Yes, sir.
Q. Have you any children?
A. No, sir.
Q. Do you occupy the whole house?
A. Yes, sir.

[fol. 2663] By Mr. Turkus:

Q. Have you heretofore served as a juror?
A. I have been called in January, on the panel, but my name was not called.
Q. Was that in the Supreme Court?
A. Yes, that is correct.
Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. No, sir.
Q. Are you in sympathy with the law enforcement?
A. Yes, sir.
Q. Did you hear me speak to the other talesmen about possible contacts in the clothing and garment truckers and the Brownsville and East New York area?
A. I don't know any of them.
Q. Do you know any of the nine lawyers representing the defendants?
A. No, sir.
Q. Do you know any member of the bar who specializes in criminal cases?
A. No, sir.
Q. Did you hear the discussion about accomplices?
A. Yes, sir.

Q. Do you feel the same as the jurors who have been accepted?

A. No, sir.

Q. A different feeling?

A. Yes, sir.

Q. You have an entirely different feeling?

A. Yes, sir.

Q. Maybe I don't understand you. Do you have any bias or prejudice?

A. Yes, sir, I have.

Q. Would you close your ears to the testimony?

A. That is different. You would have to prove it very [fol. 2664] conclusively.

Mr. Turkus: Challenge.

The Court: Try the challenge.

Victor H. Heatley, residing at 183 Lafayette Avenue, Brooklyn, New York, was duly sworn on the challenge.

By Mr. Turkus:

Q. Judge Taylor put certain questions to you as to your background and as to your present connection with stevedores.

A. Yes, sir.

Q. Would you make the same explanation under oath?

A. Yes, sir.

Q. Would you make the same response to me about accomplice testimony?

A. Yes, sir.

Mr. Turkus: I press the challenge.

By the Court:

Q. Maybe I did not understand you. Did you say you had a prejudice in this case?

A. No, sir, on the type of the defendants.

Q. Have you a prejudice against the defendants?

A. Yes, sir, of that type—a particular type is the one that I am very much prejudiced against.

Q. Would that affect your decision in this case?

A. Yes, sir, I start off very much so.

Defense Counsel: No questions.
The Court: Challenge sustained.

[fol. 2665] JACK COHEN, No. 3063, residing at No. 23 East 91st Street, Brooklyn, New York, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Are you related to Assistant District Attorney Cohen?
A. No, sir.
Q. You live in Brownsville?
A. East Flatbush.
Q. You are practically in Brownsville?
A. Yes, sir.
Q. That street begins at Utica?
A. It is right off the corner of Utica Avenue and East New York, right off that corner.
Q. How many years have you lived on the fringe of Brownsville?
A. Two years.
Q. Prior to that where did you live?
A. 675 Empire Boulevard.
Q What district is that?
A. That is Crown Heights.
Q. You are listed as being in the coal business.
A. Yes, sir.
Q. For yourself?
A. Yes, sir.
Q. Where do you maintain your office?
A. Varick Avenue, in Brooklyn.
Q. Do you make coal deliveries throughout Brooklyn?
A. Yes, sir.
Q. Among people in Brownsville?
A. Yes, sir.
Q. Are the names Maione, Abbandando, Goldstein, Strauss, familiar names to you?
A. I read about them in the newspaper.

[fol. 2666] By the Court:

Q. Is that coal business a bushel business or tonnage?
A. Delivered by the ton.

Q. What is the name of the concern?
A. Harbor Coal Company.
Q. Where is that?
A. 157 Varick Avenue, Brooklyn, Newtown Creek.

By Mr. Turkus:

Q. Your trucks, in pursuance of your business, go into Brownsville and East New York?
A. Yes, sir.
Q. You have read about the names I mentioned, in the newspapers?
A. Yes, sir.
Q. Have you heard discussions about them in Brownsville or the East New York area?
A. No, sir.
Q. Having lived in that neighborhood, did you follow Judge O'Dwyer's investigation with any degree of particular interest?
A. No, sir.
Q. Now, Mr. Cohen, you have lived on the fringe of that neighborhood and have gone in the district on business; have you heard the names of the defendants in this case?
A. Not through business, through the newspapers I heard the names.
Q. Have you heard the other names, Goldstein, Strauss, Pittsburgh Phil?
A. No, sir, only through the newspapers.
Q. You never heard any discussion?
A. No, sir.
Q. Have you any bias against the defendants?
A. No.

[fol. 2667] Mr. Turkus: Challenge peremptorily.

Harry L. Yakel, No. 3092, was examined as to his qualifications to serve as a juror.

Mr. Barshay: May I again ask for a recess? This is the last juror to be chosen, and the strain will be greatest upon us in view of the situation that develops.
The Court: Proceed.

By Mr. Turkus:

Q. Yakel—is that a correct pronounciation of that name?
A. Yes, sir.
Q. You live on Albany Avenue?
A. Yes, sir.
Q. What do they call that district?
A. Vandeveer Park section.
Q. You are an architect by profession?
A. Yes, sir.
Q. Have you been an architect for years?
A. I obtained my registration in 1923.
Q. I take it since you have been engaged in business you have been an architect?
A. Yes, sir.

By the Court:

Q. You are between what streets?
A. Avenue I and Avenue H.
Q. That is right by the Long Island Railroad cut?
A. The cut runs through at Avenue H.
Q. You are south of the cut?
A. Yes, sir.

By Mr. Turkus:

[fol. 2668] Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. No, sir.
Q. Have you sat in any criminal case where there has been accomplice testimony given?
A. No, sir.
Q. The testimony of one defendant against the other?
A. Not in an accomplice case.
Q. Do you find any fault with the District Attorney, Judge O'Dwyer, or with the prosecution of an indictment wherein the testimony of an accomplice is received and used against the other confederates in a crime, or alleged to have committed a crime?
A. Due to my association with the Police Department.
Q. You say you have some association with members of the Police Department?

A. Yes, sir, the sergeant in the Brownsville station—I think he was there two years ago—I have not seen him in six months now.

Q. Did he tell you anything about this case?

A. At one time, along about last fall, I got a call to Flushing Avenue and he told me something about——

Mr. Rosenthal: I object to his going into any details of a conversation.

The Court: Yes, objection sustained.

Mr. Rosenthal: I challenge him for cause.

Mr. Turkus: No objection, of course.

The Court: Try the challenge.

[fol. 2669] Harry L. Yakel, residing at 1754 Albany Avenue, Brooklyn, New York, was sworn on the challenge.

By Mr. Rosenthal:

Q. You are now under oath.

A. Yes, sir.

Q. You made certain answers in regard to your personal acquaintanceship with a sergeant in the Police Department in Brownsville and a certain conversation which would prejudice the defendants in this case; is that right?

A. It would.

Q. And it goes to the question of their guilt or innocence on this charge, is that correct—the prejudice which exists in your mind?

A. To an extent.

Q. That is true?

A. Yes, sir.

Mr. Turkus: No questions.

The Court: Challenge sustained.

Harry Weisberg, No. 3119, called as a talesman, was examined as to his qualifications.

By the Court:

Q. You live around Avenue J?

A. Between L and M, East 21st Street.

Q. What is your business?
A. Banking.
Q. What bank?
A. Kuhn, Loeb & Company.
Q. How long have you been with them?
A. Thirty-six years.

Mr. Rosenthal: If your Honor please, this is a friend of mine. He was excused on a previous trial in which I was [fol. 2670] counsel, and at other times by this very Court. He would be very embarrassed if he had to sit.

The Court: Don't you realize the difficulty the Court would be in if it violated its determination not to allow more by consent.

Mr. Rosenthal: This is not consent. Mr. Turkus can ask him one question and he will tell him that he would be embarrassed if he sat on a case in which I am the attorney. He said it before. I withdraw the statement to the Court.

The Court: Personalities do not count. In rural districts lawyers know every juryman and every juryman knows every lawyer. It makes no difference. Go ahead.

Mr. Turkus: Judge, I am exhausted. I cannot go on any more. I cannot talk any more. I am tired out. I can't stand it any more.

The Court: You have a complex.

Mr. Turkus: All of us feel the same way, your Honor. This has gone on for weeks.

The Court: The Court is working as hard as counsel. The Court, I am sure counsel will agree, asks altogether too many questions. That, of course, makes the Court tired. Now, in addition to that, the Court has to be on the alert as to every question and answer, so as not to slip up on a ruling. The Court is not tired now.

Mr. Rosenthal: The Court is younger than counsel. I [fol. 2671] have been in the court-house since nine o'clock this morning.

The Court: I ask you to reconsider, and I will thank you very much if you do it.

Mr. Turkus: All right.

By Mr. Turkus:

Q. Mr. Rosenthal said you were a prospective juror in another case where he was counsel.

A. I don't think so.

By the Court:

Q. Would the fact that you know Mr. Rosenthal affect your decision?

A. It might, your honor.

Q. Would you be able to lay it aside and decide the case on the merits?

A. Possibly. There is one more angle. I am a member of the men's club, the 8th Avenue Temple, your Honor asked some jurors about that.

Q. Who spoke there?

A. Mr. Turkus.

Q. What was that about?

A. I was treasurer of the men's club at the time.

Q. Was that about Judge O'Dwyer?

A. No, sir.

Q. Was it anything about this case?

A. Yes, sir.

The Court: All right, challenge for implied bias. Try the challenge.

Harry Weisberg, residing at 1348 East 21st, Brooklyn, New York, sworn on the challenge.

By Mr. Turkus:

Q. When the Court asked you about the embarrassment [fol. 2672] of service, you replied you had some thought in your mind, and then you volunteered that you heard a discussion at the 8th Avenue Temple, which I gave at a time when you were present.

A. Yes, sir.

Q. That was a lecture concerning the apprehension of criminals and their prosecution?

A. Yes, sir.

Q. Do you feel as a result of certain matters you heard in that speech that you have a bias against the defendants which would preclude you from being fair?

A. It is quite likely it would.

The Court: As long as there is no question about counsel ——

Mr. Rosenthal: I just want to ask him one question for the record.

By Mr. Rosenthal:

Q. The bias does not extend to me?
A. No.

The Court: I will sustain the challenge.

Benjamin R. Corning, No. 3062, a talesman, was examined as to his qualifications to serve as a juror.

By Mr. Turkus:

Q. Do you live in Bay Ridge?
A. Yes, sir.
Q. You are an engineer?
A. Yes, sir.
Q. I take it you have some background by way of a college degree?
A. Columbia.
[fol. 2673] Q. How old are you?
A. Thirty-seven.

The Court:

Q. Who are you employed by?
A. New York Telephone Company.

By the Court:

Q. How long have you been employed by the Telephone Company?
A. Twenty-one years.
Q. That has been your life occupation?
A. Yes.
Q. You live in the Fort Hamilton Section. Is that a house or an apartment?
A. That is a two-family house.
Q. Are you married?
A. Yes, sir.
Q. Any children?
A. No, sir.
Q. Are you under any embarrassment in serving here on account of your wife being alone?
A. Well, I don't like to leave her alone, naturally.

Q. You have in-laws?
A. I have a brother-in-law.

By Mr. Turkus:

Q. Have you any scruples, conscientious or otherwise, against capital punishment?
A. No, sir.
Q. Are you in sympathy with law enforcement?
A. Yes, sir.
Q. Have you ever sat as a juror in a criminal case?
A. Yes, sir.
Q. Did the case come to a conclusion, and by that I mean did the Judge charge the jury on the law?
A. I think he did.
Q. Were any of the lawyers in that case in this case now?
A. No, sir.
Q. Will you take the law exclusively from the trial judge [fol. 2674] in this case?
A. Yes, sir. I recall about six months ago, by Judge Leibowitz, Judge Healy was counsel.
Q. You were called as a juror in a part that Judge Leibowitz presided over, and Judge Healy was one of defense counsel?
A. Yes, sir, I was picked as No. 1 and challenged.
Q. I was not the prosecutor?
A. No, sir.
Q. It has been brought out by one of the lawyers for the defendant Buchalter that he has been convicted for other crimes and that he is now in jail serving a jail sentence. Would you relax or deviate from a proper result in this case because he is in jail for one of the crimes he has committed?
A. No, sir.
Q. It has also been brought out by one of the lawyers for the defendants that the defendants are here only to meet one charge. Do you understand that is all the District Attorney in law can do, establish guilt beyond a reasonable doubt on this charge and this charge alone?
A. Yes, sir.
Q. If I accepted you as a juror, would you endeavor to do justice in this case?
A. I will try, yes, sir.

By the Court:

Q. Has anything you heard in court caused a prejudice in your mind in relation to either side of the case?

A. No, sir.

By Mr. Turkus:

Q. In the case in which you sat as a juror, do you say that was years ago, when you actually sat as a juror?

A. Yes, sir, that was a murder case, Judge Brancato [fol. 2675] was the judge. Mr. Kleinman was the Assistant District Attorney.

Q. Do you know any of these nine lawyers in this case?

A. I saw Mr. Barshay in the court-room at that time, I think.

Q. Is your acquaintance with Mr. Barshay limited to the time when you, as a juror, saw him in the court representing The People?

A. Yes, sir.

Q. Is that the limit of your acquaintance with Mr. Kleinman?

A. Yes, sir.

Q. In a criminal case, in every criminal case, as you understand from your experience, the defendants have certain rights, and the Judge charges certain legal safeguards, the presumption of innocence, the doctrine of reasonable doubt, the burden of proof on the District Attorney, and other matters which the Judge will charge you on the law. Will you take every one of the Judge's instructions and apply them to the facts?

A. Yes, sir.

Q. And after you hear all the evidence in the case, if you have a reasonable doubt about their guilt, will you say so in your verdict?

A. Yes, sir.

Q. Have you any bias or prejudice against the prosecutor of the county, Judge O'Dwyer, or against the prosecution wherein a murder case is solved from the inside, by the acceptance of an accomplice's evidence?

A. No, sir.

Q. Will you apply all the rules and tests to an accomplice witness, to find out does he tell the truth, I don't mean about [fol. 2676] his own share in the commission of the murder, but the part which each defendant played?

A. Yes, sir.

Q. If accepted, will you devote your mental faculties to ascertaining whether the accomplice speaks the truth about the part that each defendant, as a group or combination, played in the commission of this murder?

Mr. Barshay: I object as to the form.

Mr. Turkus: Alleged murder.

The Court: Allowed as qualified.

Q. You understand, when I tell you a case is broken from the inside and I tell you the defendants played certain parts in the commission of a murder, that is not evidence? I am telling you that now in order to find out your state of mind, to see if there is any prejudice. Do you understand it is your job to find out whether or not the case is solved from the inside and whether or not these defendants did play the part that we charge in the indictment they played in the commission of this murder? You do not accept any statement of the prosecutor in lieu of testimony you hear in court?

A. No, sir.

Q. It may be you may not like the accomplice. I don't know what your reaction is. I am not sworn here; you are sworn, and all my personal belief about an accomplice is not what really concerns. We are concerned with, Does he speak the truth, not only about himself, but them.

A. Yes.

Q. If you find from the evidence that these three men [fol. 2677] are guilty of murder in the first degree, you will not acquit them because you do not like the accomplice, will you?

A. No, sir.

Mr. Barshay: I object to the form of the question.

By the Court:

Q. If the case is proven beyond a reasonable doubt, will you convict?

A. Yes, sir.

Q. If not proven beyond a reasonable doubt, will you acquit?

A. Yes, isr.

Q. Do you know of any reason why you cannot make a fair and impartial juror?

A. No, sir.

Q. And make an intelligent decision upon the evidence and the evidence alone?

A. No, sir.

Q. Is there any reason why you cannot or won't make a fair and impartial juror and try the case upon the evidence and the evidence alone?

A. No, sir.

By Mr. Talley:

Q. Have you read anything about this case or any of these defendants?

A. I have read the headlines.

Q. Did you read any of the articles the headlines of which you say you read?

A. I read an article in the *Telegram*.

Q. In any other paper?

A. I read the headlines, that is all.

Q. Did you read anything in the *Mirror*?

A. No, sir.

Q. Did you read the *Journal-American*, the life and career of Judge O'Dwyer?

A. No, sir.

[fol. 2678] Q. Have you talked to anybody about this case or about these defendants?

A. No, sir, I just had a little conversation that had no bearing on the case.

Q. Was it about this case?

A. I have mentioned it in conversation.

Q. Was it about these defendants or any of them?

A. Well, maybe I should elaborate a little bit. I go home at night, and certain people know I am on this panel—they found out—and they ask me certain things about it. I did not speak an awful lot about it.

Q. When were you served with your notice to appear in this case?

A. On Saturday at about four o'clock.

Q. You have had much time since then to talk about the case?

A. No, sir.

Q. Have you formed any impression about the guilt or innocence of these defendants as a result of the conversation, casual or otherwise, as a result of your reading?

A. No, sir.

Q. You haven't any impression about any of these defendants; is that right?

A. Yes, sir.

Q. The Court will charge you that the burden in a criminal trial rests upon The People to prove the guilt of the defendants and to prove it beyond a reasonable doubt; would you require that degree of proof before you would find a verdict of guilty?

A. I understand.

Q. If you have a reasonable doubt, the Court will charge [fol. 2679] you that guilt must be proven beyond a reasonable doubt—if you have a reasonable doubt as to the guilt of any of these three defendants, will you give these defendants the benefit of that doubt and acquit them?

A. Yes, sir.

Q. There isn't any question in your mind that you will do that under these circumstances?

A. No, sir.

Q. The law requiring that The People must prove the guilt of the defendants means, in another way, that the defendants are not called upon to prove their innocence, you understand?

A. Yes, sir.

Q. And they are not called upon to testify—to prove their innocence, or to rebut anything said by The People—you understand that is our law?

A. Yes, sir.

Q. And if it should happen, under advice of counsel or otherwise, that any of these defendants shall not take the stand, will you indulge in any unfavorable inference against them in case they do not take the stand?

A. No, sir.

Q. You realize that is one of their rights?

A. Yes, sir.

Q. It has been indicated here by the District Attorney that the evidence, or some of it, against these defendants will come out of the mouths of accomplices—that is, men who say they had a part in the commission of the killing, the subject of the indictment. The Court will charge you that your obligation, your duty, is to scrutinize the testimony of an accomplice, or one who says he is an accomplice, or [fol. 2680] one whom you find from the testimony and the facts, whether he denies it or not, is an accomplice. If

the Court charges you to scrutinize that kind of testimony with care and caution and suspicion, would you view their testimony in that regard?

A. Yes, sir.

Q. Now, the Court will charge you further that before you can convict upon the testimony of an accomplice, whether it be one or one hundred, that such testimony coming from the mouth of an accomplice, must be corroborated, supported, and backed up by some other evidence which is independent of the testimony of the accomplice. Before you convict upon testimony of such an accomplice, will you require that that further independent evidence will be produced by the District Attorney?

A. Yes, sir.

Q. Do you know of any reason why you cannot sit as a fair and impartial juror on the trial of this case?

A. No, sir.

Q. You haven't any prejudice or feeling against the defendants?

A. No, sir.

Q. The Court will charge you that they are presumed to be innocent until guilt is proven beyond a reasonable doubt, and you will give them that presumption, that legal right that every citizen has?

A. Yes, sir.

Q. The presumption of innocence you will give to them?

A. Yes, sir.

Q. You will not be afraid to bring in a verdict of Not [fol. 2681] Guilty with respect to these defendants if you are not satisfied beyond a reasonable doubt of their guilt?

A. That is right.

Q. Do you know Judge O'Dwyer?

A. No, sir.

Q. Are you contemplating taking any part in the campaign in which Judge O'Dwyer is a candidate?

A. No, sir.

Q. Are you a member of any organization, so far as you know, that is taking part in the campaign to elect Judge O'Dwyer?

A. No, sir.

Q. So you have no activity at present, or no concentrated activity with respect to this Mayoralty election?

A. That is right.

By the Court:

Q. You are not a member of the family of Erasmus Corning?

A. No, sir, mother and father were born in Nova Scotia.

Mr. Climenko: If your Honor please, may I respectfully request we recess at this time? May I state the reason for my request?

The Court: No, this is not a reviewable matter at all.

Mr. Climenko: May I merely state it is now twenty-five minutes to seven, but I had other reasons for making the exception, and I take an exception to your Honor's ruling that I may not state those reasons.

By Mr. Climenko:

Q. You started working for your company when you were [fol. 2682] sixteen?

A. Yes, sir.

Q. Now, do you belong to any club or association formed in connection with the company you work for?

A. No, sir—The Pioneers, that is, a man who has twenty-one years' service becomes a Pioneer.

Q. That is just seniority?

A. Yes, sir.

Q. That is not an association in a sense other than it brings men together?

A. Yes, sir, they have meetings, but I have not been with them yet.

Q. You are just qualified, you have not become intimate as yet?

A. That is right.

Q. You do not belong to any other social association connected with your corporate employer?

A. No, sir.

Q. Have you heard any lectures on crime in general?

A. No, sir, not to my knowledge.

Q. I don't mean necessarily in connection with your employment, but have you listened to lectures on crime?

A. No.

Q. Are you acquainted with any member of the Police Department of the City of New York?

A. No.

Q. You do not have any members of that particular group in your friendship?

A. Only one, I bowled with him; I met him occasionally, bowling.

Q. May I know his name?

A. Carey.

Q. Do you know his rank?

A. No, sir.

Q. He is just a bowling acquaintance?

[fol. 2683] Q. You bowled a game with him, I understand?

A. I have known him for about six months.

Q. What I am interested in knowing is whether or not, in connection with the acquaintanceship with Officer Carey you have discussed matters coming before him in his capacity as a police officer.

A. No, sir.

Q. What is his rank, by the way?

A. I could not say what his rank is; I know he is a member of the Police Department.

Q. Have you and he ever talked about this case?

A. No, sir, it is six months maybe; I have not seen him for six months.

By the Court:

Q. Have you and he ever talked about any criminal case?

A. No, sir, strictly bowling.

By Mr. Climenko:

Q. That has no bearing on your decision in this case?

A. No, sir.

Q. Judge Talley asked you if you read about this case, and I understood you to say you simply read the headlines.

A. Yes, sir.

Q. You did not read the contents of any article below the headlines?

A. Except the one in the *Telegram*, that was Tuesday of this week.

Q. You did not read the *Mirror* or the series of articles which it ran sometime between July and August of this year?

A. No, sir.

Q. You did not read the series of articles which appeared in the *Journal?*

A. No, sir.

[fol. 2684] Q. Have you discussed this case other than the discussion you told Judge Talley about, with those people who know you are on the panel?

A. No, sir.

Q. Have you ever heard discussions by other persons?

A. I heard them speak about it, yes, sir.

Q. Within a week or so?

A. Yes, sir.

Q. Were those discussions in which participants, through the discussions, voiced or expressed an opinion about anybody named in the indictment in this case?

A. Yes, sir.

Q. You have heard other people express opinions about one or more of the defendants in this case?

A. Yes, sir.

Q. Were those opinions expressed by persons who purported to have an opinion as to the guilt or innocence of the defendants, one or more of them, in this case?

A. Yes, sir.

Q. How late was the last of these discussions you ever heard?

A. About two nights ago.

Q. Will you tell me where this discussion took place?

A. In a candy store where I buy the paper on my way home, as I left here.

Q. Is that candy store near here?

A. Near where I live.

Q. In other words, is it a place you usually patronize, where you go to buy confections or newspapers?

A. Yes, sir.

Q. Do you know the participants in this discussion?

A. Yes, sir.

Q. Are they friends of yours?

A. Yes, sir.

[fol. 2685] Q. And they have been your intimate friends for some time?

A. I know one of them.

Q. He is a fellow whom you respect generally?

A. Yes, sir, I respect.

Q. I mean he is a fellow you respect.

A. I would not say that I respect him.

Q. You do not always believe friends on every subject but this man is a friend of yours?

A. Yes, sir.

Q. A good enough friend of yours——

Mr. Turkus: (interrupting) I object. They have been going over this fishing trip for the third time.

The Court: For a man who is trying to save time there have been lots of questions.

By the Court:

Q. Was anything said in the candy store which would influence your opinion in the decision of this case?

A. No, sir; he expressed an opinion.

Q. Does that influence you?

A. No, sir.

Q. Did you pay any attention to him?

A. Not particularly, no, sir; I cannot say I did.

Q. Do you know the candy store man?

A. This man is not the candy store man.

Q. He is a customer?

A. Yes, sir.

Q. What was his business?

A. He works in the fur line; I think he models fur goods.

[fol. 2686] Q. Did he give you what appeared to be information that had any bearing on this case?

A. He claimed he knew certain things, I don't know just what they are.

Q. Did he go into details?

A. No, sir; he mentioned certain things.

Q. Did he apparently try to talk to you as a partisan for the prosecution?

A. I would not say that; I think he just spoke what he thought.

Q. Did you participate in the discussion?

A. No, sir, not to any length.

Q. Did you ask him for more?

A. No, sir.

Q. Are you able to lay all that aside?

A. I think so, yes.

Q. Do you know so—that you will lay it aside?

A. I can, yes, sir.

By Mr. Climenko:

Q. You understand I am not to pry into your personal affairs, you know I would not presume to ask you about the identity of your friends. I am a lawyer representing a defendant in this case; you know that?

A. Yes, sir.

Q. So that there isn't any possibility that you may be offended by the tone of any question I ask you?

A. Yes, sir.

Q. There is nothing personal about any of these questions I put to you. I am here under an obligation as a lawyer at this moment to ask you on these matters, which were I to ask you about outside of the court-room might sound dif- [fol. 2687] ferently?

A. Yes, sir.

Q. But because of the circumstances we are in at this moment and because of this obligation on me at this moment, you understand, these questions are not offensive?

A. Yes, sir.

Q. The gentleman you spoke to in the candy store you frequent, you understand I am not being offensive about it, but simply because I feel it is my duty to do it: now, the gentleman whom you met in the candy store you frequent expressed an opinion about a defendant in this case within the last two days?

A. Yes, sir.

Q. Now, did he know that you had a notice to appear here as a member of this panel?

A. Yes, sir.

Q. He had learned that a few days before this discussion took place, is that correct?

A. Yes, sir.

Q. Was that discussion you had with him two days ago the first conversation of a series on the subject?

A. That is the only time I had that talk.

By the Court:

Q. Did you tell him you did not want to listen to it?

A. I did not get that far, I don't think.

Q. Did it last any length of time?

A. No, sir. He expressed an opinion, and I did not go any further.

Q. Just a few words?

A. Just a little more than a few words.

Q. Then it was dropped?

[fol. 2688] A. Yes, sir, and I went on another conversation.

By Mr. Climenko:

Q. You volunteered that your friend had something to do with the fur business. What did he do, model fur coats?

A. Modeled fur coats.

By the Court:

Q. He was a workman?

A. Well, I suppose you would call him a fur dealer.

Q. I mean, was he the owner of the business?

A. No, sir, I cannot answer that question; I did not know him well enough for that.

By Mr. Climenko:

Q. You first talked to him two days ago?

A. Yes, sir.

Q. Did you talk to him on any prior occasion?

A. Not about this.

Q. When first did he know you had a notice to appear as a member of this panel?

A. It happened that I was out fishing with him on Saturday.

Q. Did you tell him you had a notice to appear as a member of this panel?

A. I did not know it myself until I got home.

By the Court:

Q. Let us get down to the point. You went fishing with the man. Did he do any talking with you along the lines of evidence in this case—we are entitled to get an answer.

A. No, sir, I did not know I was on the ticket.

[fol. 2689] Q. Whether you knew it or not, did he talk to you and plant seed of belief in your mind?

A. Well, that question was a leading question he asked me——

Q. Did you form any impression as to the guilt or innocence of the accused, from what he said?

A. No, sir.

By Mr. Climenko:

Q. Did he tell you anything about any of the defendants in this case?
A. Yes.

By the Court:

Q. Did he mention them by name?
A. Yes, sir.

Mr. Climenko: I challenge.
The Court: Try the challenge.

Benjamin R. Corning, residing at 138 Ninety-sixth Street, Brooklyn, New York, was sworn on the challenge.

By Mr. Climenko:

Q. Now that you are sworn, if I were to repeat the different questions which I put to you before you were under oath, would your answers be the same?
A. Yes, sir.

Mr. Turkus: No questions.
The Court: Challenge sustained.

(William C. Link, a talesman, was called to the jury box.)

The Court: Gentlemen, you may go until tomorrow morning at ten o'clock. Please remember the previous admonition. Do not discuss the case nor let anyone talk to you about it. Keep your minds open. Particularly, in connec- [fol. 2690] tion with my admonition, do not listen to the radio or any campaign speeches tonight. Defendants remanded.

All other talesmen excused until ten o'clock tomorrow morning.

(After the departure of talesmen and jurors, the Court made the following statement:)

The Court: The purpose of this is to simplify and complete the record in regard to the good faith of the Court in relation to the defendant who claims to be ill but who may be shamming.

A letter by the Court, delivered by messenger last night at the close of the court session, to the Tombs, 101 Centre

Street, City Prison, directed to Dr. Andrew J. Torre, acting chief, Medical Staff:

[fol. 2691] "Dear Sir:

"This confirms my oral request to you yesterday on the occasion of your visit at the County Court. I request that you endeavor forthwith to procure a modification of the Acting Commissioner's order of October 10, 1941, so as to permit Louis Capone on each occasion when leaving for the court to be supplied with sufficient medication to be used, in his discretion, for the day's possible needs. The order of the Acting Commissioner permitting no medication whatever to be carried is in my judgment too stringent, in view of the diagnosis. The Court cannot afford, in the light of the report, to take any chance on the defendant's dying, due to coronary attack, for want of medication.

"Yours truly,

"(Signed by the Court.)"

The Court noticed today, both this morning and this afternoon, that this particular defendant chews gum very actively and constantly, and every few seconds opens his mouth, apparently swallowing air. This may have some bearing on the attack.

Court adjourned.

(Whereupon an adjournment was taken to Friday, October 17, 1941, at 10:00 A. M.)

[fol. 2692] Brooklyn, N. Y., October 17, 1941.

Trial Resumed

William C. Link, a talesman, examined as to his qualification as a juror.

By Mr. Turkus:

Q. Do you reside on Remsen Street?
A. Yes, sir.
Q. That is on Columbia Heights?
A. Yes, sir.
Q. You are listed as a radio producer?
A. Well, I was a radio producer——

Q. You look familiar to me; I think you were on one of the panels in one of the murder cases I prosecuted?

A. Yes, sir.

Q. Mr. Rosenthal was one of the lawyers in that case?

A. Yes, sir.

Q. Is my memory correct, did you write the script for "The District Attorney?"

A. No, sir, I did not.

Q. Did you have something to do with that program?

A. No, sir, at times I have been called in consultation on various programs; that was one of the programs.

Q. What business are you in?

A. I am a radio announcer.

The Court:

Q. What station?

A. A free lance, your Honor; no particular station; all stations.

Q. Before you went in the radio business what was your profession?

A. I was director of a radio school of technique for the Federal Service; prior to that I was a radio announcer; and prior to that I was manager of the Packard Motor Car Company.

[fol. 2693] By the Court:

Q. On Atlantic Avenue?

A. No, sir, 63rd Street and Broadway, New York.

Q. What school was that?

A. The Federal Theatre Radio School of Technique; I was director of that school, teaching actors and actresses.

Q. That is a W. P. A. proposition?

A. That is what they say.

By Mr. Turkus:

Q. I think you got as far as the jury box in the last case, was that in 1940—September of 1940?

A. March, I think.

By the Court:

Q. When you say you were a director in the school I assume you have had theatrical training?

A. I trained various actors and actresses in technique.

Q. What experience have you had on the stage?

A. None whatever.

Q. You had theatrical training?

A. I had theatrical training in radio technique but nothing as to the stage.

By Mr. Turkus:

Q. While you were examined the last time did you hear certain names mentioned in that examination?

A. I heard some names mentioned in that case.

Q. Did you hear the name of Harry (Happy) Maione?

[fol. 2694] A. Yes, sir.

Q. And Frank (The Dasher) Abbandando?

A. Yes, sir.

Q. The name of Martin Bugsy Goldstein?

A. I do not recall that name.

Q. And Harry Pittsburgh Phil Strauss?

A. Yes, sir.

Q. And other names?

A. I can not recall all.

Q. Do you know whether you heard the name of any defendant in this case?

A. I don't recall, no, sir.

Q. Did you follow the case thereafter with any degree of curiosity?

A. Not to any great extent except I wanted to find out what became of the case on the last day of the trial.

Q. Is there anything that you have gained by virtue of having been in the court, or anything you read, which would form a prejudice in your mind?

A. None whatever.

Q. I take it that you have sat through all the examinations we have had of prospective talesmen here?

A. Yes, sir.

Q. Would you answers be substantially the same if I went through the questions I put to the other talesmen whom we have accepted?

A. Yes, sir.

Q. For example, going into accomplice testimony, you understand by now that part of the testimony in this case will emanate from accomplices. Was there any discussion we had the last time you were called as a juror?

A. I believe there was.

[fol. 2695] Q. Do you have any bias or prejudice, or any fault to find with the District Attorney of the County, Judge O'Dwyer, or with the prosecution, concerning the testimony of accomplices as used against the remaining defendants in the case?

A. No.

Q. Will you, if accepted in this case, devote your mental faculties to finding out does this accomplice speak the truth about other men who were in the commission of crimes with him?

A. Yes, sir.

Q. And do you understand, from our examination, there can not be a conviction upon the unsupported testimony of accomplices?

A. Yes, sir.

Q. For example, no matter how believable a story of the accomplice is, implicating or involving his confederates, the law says there must be other evidence in the case which tends to connect the defendant with the commission of the crime, will you follow the instruction of law, and with common sense and understanding apply it to this case?

A. Yes, sir.

Q. If the judge should charge you, in substance—I may not use the exact language he uses, but in substance, that it is not the burden of the District Attorney to corroborate every item of the accomplice's testimony but that supporting evidence, if believed by the jury, may be deemed sufficient when it tends to connect the defendant and each of them with the commission of the crime, will you follow the instructions of law and apply the same to the facts in this [fol. 2696] case?

A. Yes, sir.

Q. Do you understand it is not whether I dislike an accomplice or whether you dislike him, it is not our personal feeling about him, the test is does he speak the truth about his confederates and the part they played as a group or combination in the commission of the murder alleged in the indictment?

A. Yes, sir.

Q. For example, you will be told, in substance, that you shall weigh the testimony of an accomplice with care and caution, and view it with suspicion—and the other tests you shall apply—which is all done for the common sense

purpose of finding out does he tell the truth not only about himself but about them?

A. Yes, sir.

Q. So now you know what test to apply, motive test, the criminal records of defendant's associations, no matter what those are, those are the rules you use to say "Does he speak the truth about them in the part that each of them played in this group or combination that perpetrated this alleged crime?"

A. Yes.

Q. It has been stated by one of the lawyers for Buchalter, that his client is now presently serving a long jail term for the commission of other offences and convictions. Would the fact that he is paying a penalty for other offences sway you in your deliberations in this trial in the proper determination of this case?

A. No.

[fol. 2697] Q. Would you relax or deviate from a proper jury verdict in this case becaase he is in jail now?

A. I would not.

Q. Is there anything in this examination that as a prosecutor I should know as to your qualifications and ability to sit on this trial and render a verdict in consonance with justice?

A. I do not know of any.

Q. Is there anything that occurred in the examination of jurors in the case in which I was prosecutor and Mr. Rosenthal was one of the defendant's lawyers that affects your ability to sit here impartially?

A. None whatever.

Q. In that case I believe you came as far as now—that is, you got in the box?

A. Yes.

Q. Were you excused by one side or the other?

A. Yes, sir.

Q. It was not a cause challenge, was it, that is for any disability on your part?

A. No, sir.

Q. Is there anything by way of your excuse there that would prejudice you one way or the other?

A. No, sir.

Q. Have you served as a juror in any criminal case in the past?

A. No.

Q. There is nothing mysterious about jury duty; you are called here to determine the question of guilt or innocence of men on trial?

A. Yes, sir.

Q. And to that you will apply the law that the judge gives you and the common sense you have gathered through [fol. 2698] your every day walks of life?

A. Yes, sir.

Q. Very frankly, if, when you hear all the evidence of the case, if, after you have heard everything that Judge O'Dwyer produces in this court, if then you entertain a reasonable doubt, you would give that benefit to the defendants?

A. Yes, sir.

Q. Would you give them everything that the law of the land says they should have, and what the law of the land is as to the defendants on trial, Judge Taylor will tell you, and no one else. He tells the law. Will you give them everything under the sun that they are entitled to have by way of constitutional and other safeguards in a court of justice?

A. Yes, sir.

Q. And after you give them everything the law demands they should have, and after you heard all the evidence, should you be convinced beyond a reasonable doubt that here there are three guilty men, three who participated and played a combination part with a group—a part in the killing of the victim named in this indictment—will you say so by your verdict?

A. Yes, sir.

Q. Will you say so without fear or hesitation?

A. Yes, sir.

Q. Is there anything about your background or the present manner in which you earn your livelihood that would make it embarrassing or impossible for you to pronounce such a verdict?

A. No, sir.

[fol. 2699] By the Court:

Q. What stations have you broadcasted on?

A. In New York?

Q. Yes.

A. WEAF, WJZ, WOR, WMCA.

Q. Practically all?

A. Yes, sir.

Q. You get your employment as a free lance from advertising?

A. Advertising agency, yes, sir.

Q. You are put on in order to make the announcement and refer to advertising matter?

A. Yes, sir.

By Mr. Turkus:

Q. When I addressed the omnibus question to you was there anything I should know, I had in mind the garment district, the clothing district, the clothing truckers union, officials of the amalgamated union, the Brownsville section, East New York, and the Brooklyn water front. I direct your attention to that, and I ask you is there anything which brings you in contact with them in any shape or form?

A. None whatever.

By Mr. Barshay:

Q. Do you know anyone at all in the District Attorney's office?

A. No, sir.

Q. Do you know anyone connected with the Police Department?

A. No, sir.

Q. Personally, were you ever the victim of any crime?

A. No, sir.

Q. Do you write scrip too?

A. No, sir, I do not.

Q. Do you really act as an announcer?

A. Years ago I was in the production field; I arranged programs.

[fol. 2706] Q. In any scrip you saw or heard, the experience you got from dealing with this case, of course, aided you in your work but with respect to this case you know nothing?

A. No, sir.

By the Court:

Q. How old a man are you?

A. Forty-one.

Q. Then before you went into the Federal you were giving instructions at school, and you had considerable experience?

A. Yes, sir.

Q. Can you tell us one of the lines you were identified with?

A. Well, my experience, before I went to the Federal Theater, was gained first at WNYC. I became program director.

Q. How long ago is that?

A. Mr. Bohnsack was there, you probably know him.

Q. He was there a great many years?

A. I was there just about a year before he retired.

Q. Mr. Bohnsack was then in it about thirty years?

A. I don't know how long; I knew him only two years.

Q. Before that what line were you in?

A. Before that I conducted a school for diction and stage.

Q. For how long?

A. Two years.

Q. And before that?

A. Before that, I was a salesman, manager of the Packard Motor Car Company, for about eight years.

Q. Before that?

A. Before that I was with the United States Line, on the S. S. Manhattan; the entertainment part.

Q. You ran the entertainment part?

A. Yes, sir.

[fol. 2701] Q. For how many years?

A. About a year.

Q. Before that?

A. Before that, I was not doing anything; the Packard Motor Car Company was my first job.

By Mr. Barshay:

Q. Did you read anything about this case?

A. Not very much, just the headlines.

Q. Did that leave you with any impression?

A. No, extraordinary impression.

By the Court:

Q. Pardon me, have you got your school at Carnegie Hall?

A. No, sir.

By Mr. Barshay:

Q. But whatever they were, were they in any respect unfavorable to the defendants?

A. Not unfavorable, no; no impression whatever in that regard of guilt.

Q. Then we start at scratch with you?

A. Yes, sir.

Q. Any experience you have had as a juror leaves you with no bias towards them whatever?

A. No, sir.

Q. Mr. Turkus said to prospective jurors and to you that you were to judge fairly the evidence presented in this court by Judge O'Dwyer. I take it, he being part of the whole—I don't know whether Judge O'Dwyer will personally present the evidence—but, assuming he does, would that add weight to the believability of the evidence with respect to you?

A. No, sir.

Q. You understand that they are lawyers just as we are; they present to you what they have to the best of their ability?

[fol. 2702] A. Yes, sir.

Q. And Judge O'Dwyer's presentation of the proof here is no personal guarantee as to its truth—Judge O'Dwyer's presentation of testimony is no guarantee as to its truth?

A. I understand.

Q. He does not underwrite the truth of anything, neither does Mr. Turkus?

A. That is right.

Mr. Turkus: That is an ambiguous way to put it—by placing a witness on the stand the District Attorney vouches for his credibility.

Mr. Barshay: That is a legal conclusion, but you do not personally guarantee the man is not telling the truth.

Mr. Turkus: We are not in the insurance business, if that is what you mean.

Q. In other words, if, subconsciously, there is an attempt to permit the weight of Judge O'Dwyer's integrity and reputation to be used by way of evidence, you will not allow it?

A. No, sir.

Q. He would not want you to—do you believe you can accord to the defendants the presumption of innocence?

A. Yes, sir.

Q. That is a substantial right which everyone is permitted in court?

A. Yes, sir.

Q. When the defendant says not guilty, they in effect, say "You, Mr. District Attorney, present here proof which [fol. 2703] we believe, not any kind of proof, but proof which we believe." And when a defendant pleads not guilty he puts in issue the indictment. The language says "we accuse". It has no force other than to start a trial. You understand that?

A. Yes, sir.

Q. And when Buchalter said "not guilty", he said "I am not an accomplice or anyone; I am not part of any combination; I am not part of any group; I deny the accusation," that denial has weight, you understand?

A. Yes, sir.

Q. The burden remains with the District Attorney to prove the accusation alleged?

A. Yes, sir.

Q. He need not prove a single thing—he need disprove not one accusation in this case, you understand?

A. Yes, sir.

Q. So that when the District Attorney comes to present his proof you will want to know who is the person or persons who gives such proof—why do they give it—who are they—what do they expect for giving it?

A. Yes, sir.

Q. Is that a fair question?

A. Yes, sir.

Q. The same as any business man applying for credit, or even if he applies for a job—you want to know who he is and what he is, and what is the background of the man?

A. Yes, sir.

Q. And the cleaner the background the better the chance of accepting his testimony?

A. Yes, sir.

Q. And if it is a rotten background the more carefully you will look at this man in accepting or rejecting his testimony?

A. Yes, sir.

[fol. 2704] Q. That is a fair standard?

A. Yes, sir.

Q. So if the court shall tell you that you, as a juror, in searching for the truth should look for light, and will want to know what kind of a man he is, and is he an accomplice, and if he is an accomplice you must use a different stand-

ard—you must look upon it with caution and care—will you do that?

A. Yes, sir.

Q. Because you can understand, by the very definition given of an accomplice, if in his testimony in this case he is receiving immunity, he is not going to be punished for the crime he has committed; therefore, when someone has a reason for it, you, as a juror, have the job to find that reason.

Mr. Turkus: Objected to.

The Court: Objection overruled.

A. Yes, sir.

Q. Of course, if you reject his testimony—assuming now that you believe him, you have got to say to yourself, "Is he telling the truth about himself", and then, "Is he telling the truth about Buchalter?

A. Yes.

Q. He may be about himself, I don't know, but with respect to that you shall listen to the testimony and if it comes out here under oath that at a time and place he said he was not an accomplice to anyone, will you consider that?

A. Yes, sir.

Q. Will you consider, too, the fact that if it comes out here that at no time did he see Buchalter, in deciding whether or not he now claims to be Buchalter's accomplice?

A. Yes, sir.

[fol. 2705] Q. And find out whether or not he has committed murder or other crimes or robberies, or how he lived?

A. Yes, sir.

Q. How he has been treated since his incarceration, where he lived and what he ate, whom he saw, where he went, what entertainment he received, you will want to find out whether those things motivated him to falsify to you?

A. Yes, sir.

Q. Because he raised his hand to tell the truth does not necessarily mean that he is telling the truth?

A. No, sir.

Q. That is why if you are chosen for a juror you are to determine—you will wait until the entire case is finished and not make up your mind with respect to it until the conclusion?

A. Yes, sir.

Q. Of course you know by now if the testimony of the accomplice, should you believe it, standing alone is not sufficient for you to convict, and you will acquit?

A. Yes, sir.

Q. Corroborating testimony must be absolutely independent of the accomplice's testimony, you understand that?

A. Yes, sir.

Q. Are you in accord with that?

A. Yes, sir.

Q. There may be corroboration that someone has been killed at a place mentioned in the indictment, but that does not connect the defendant with the commission of the crime, that is not corroboration, you understand?

Q. That may corroborate him as to the killing, but not as to the defendant Buchalter's connection with the killing—[fol. 2706] that is a vital problem for you to decide?

A. Yes, sir.

Q. So when we offer testimony, it is the good faith you want to know of the man who gives it, what is he, who is he, what is the background, what is the motive, what can he hope to gain by giving such testimony; is he telling the truth with respect to Buchalter?

A. Yes, sir.

Q. And if at all that there is a reasonable doubt as to the guilt or innocence of Buchalter, you must acquit, will you do that?

A. Yes, sir.

Q. And Buchalter will not have to explain anything to you?

A. Yes, sir.

Q. Of course if he chooses to take the stand you can judge according to the instructions of his Honor, you will follow that, but I must ask you that now. I have elicited that not to gain your sympathy but to find out whether you are prejudiced against a man who is in that posit'on. You have a right to be if you want to.

A. I am not prejudiced.

Q. Mr. Tarkus wisely said that has nothing to do with this case, nevertheless it may prejudice some people, but if you have any, that has no place in the jury room. You say you have no prejudice?

A. Yes, sir.

Q. If others take the stand and he does not take the stand, that still would not affect his guilt or innocence?

A. No, sir.

Q. If he chooses to remain off. So, before you find out whether he is part and parcel of the group combination you [fol. 2707] will have to see whether or not that is brought out from the evidence—not from anything anyone says from here but from there (indicating witness stand)?

A. Yes, sir.

Q. You shall hear again as you heard before that one accomplice cannot corrborate another nor one hundred cannot corroborate each other. If they are accomplices they have no greater force with respect to corroboration. You know that?

A. Yes, sir.

Q. Now, some man may come here and say that he is not an accomplice—I do not know what the evidence will be—but if the Court shall leave it to you to decide whether he is or is not, will you follow the standard outlined by his Honor in deciding whether he is or is not?

A. Yes, sir.

Q. On the other hand, if the Court tells you as a matter of law someone is an accomplice with respect to him, you have a rule to follow and you must accept him as an accomplice if the Court tells you he is?

A. Yes, sir.

Q. And you must then look for other evidence tending to corroborate him?

A. Yes, sir.

Q. Can Mr. Buchalter as an individual depend on you and entrust to you his keeping and preservation?

A. Yes, sir.

Q. Without any sympathy or bias or prejudice?

A. Yes, sir.

Q. I take it you will consider your oath on that?

A. Yes, sir.

By Mr. Cuff:

Q. You told Mr. Barshay that as a result of reading which [fol. 2708] you indulged in concerning the case here you did not form any extraordinary impression?

A. Yes, sir.

Q. I did not get what that impression was, I would like you to tell me whether you formed any impression or not?

A. When I said extraordinary impression, I meant my impression would be an ordinary impression.

Q. What I am trying to find out is whether you did form any impression respecting the case of the defendants?

A. No, sir.

Q. So when you said you did not form any extraordinary impression, you meant you did not form any impression?

A. Yes, sir, that is correct.

Q. What papers do you usually read?

A. The World Telegram and the Tribune.

Q. Do you read the Mirror?

A. No, sir.

Q. Now?

A. No, sir.

Q. Did you read articles in the World Telegram?

A. Not many of them but just the headlines and probably two or three lines below.

Q. As a result of those readings did you form any impression with respect to this case of the defendants?

A. None.

Q. And if you are selected as a juror, I assume you understand that you with the other eleven men who will make up the jury have the sole right to determine what the facts are and where the truth lies in the case?

A. Yes, sir.

Q. And if his Honor should instruct you, and I think he [fol. 2709] will, that each juror must make up his mind after considering the evidence under the rules of law that his Honor will give for your guidance as to what the facts are and then find accordingly, will you do that?

A. Yes, sir.

Q. If, after giving careful scrutiny to the evidence which you will be instructed to give, you reach the conclusion that there is a reasonable doubt in your mind, a doubt which is based upon evidence or lack of evidence, will you have any hesitancy in reflecting that doubt in your verdict of not guilty in so far as the defendant or defendants are concerned?

A. No, sir.

Q. Do you realize that if you are selected as a juror, under your oath you must determine and find according to the way you regard the facts?

A. That is right.

Q. Without fear or favor or prejudice or bias.

A. Yes, sir.

Q. And can you do that?

A. Yes, sir.

Q. You were asked if you had any hesitation under certain given circumstances of returning a verdict of guilty, I ask you if you would have any hesitancy, any fear, any reluctance, in returning a verdict of not guilty if you found, after careful consideration of the evidence and a discussion with your other jurors that the prosecution had failed to establish to your satisfaction beyond a reasonable doubt that the defendants are guilty?

A. No, sir.

Q. Assuming that you have a reasonable doubt and his Honor should instruct you that it is your duty to reflect [fol. 2710] that reasonable doubt by your vote in the verdict, would you, unless you were convinced by reasonable argument and careful consideration of the evidence, give up your determination by reason of the fact that there were several more men against you, or would you by reason of the lateness of the hour or the length of time give it up?

A. No, sir.

Q. You would stick to it so long as you were not convinced that you were in error?

A. Yes, sir.

Q. I have your assurance that you will do that?

A. Yes, sir.

Q. His Honor will instruct you that these defendants, any of them, have a perfect right to remain silent; that the presumption of innocence inures to their benefit and the prosecution must establish their guilt of this crime charged in this indictment beyond a reasonable doubt. Assuming they do not take the witness stand will you draw any unfavorable inference against them by reason of that fact?

A. No, sir.

Q. You will follow the Court's instructions?

A. Yes, sir.

Q. You will give to them the benefit of that presumption, that substantial right, presumption of innocence all through this trial, every minute of the time you are deliberating and until you twelve men agree the prosecution has sustained the burden beyond a reasonable doubt?

A. Yes, sir.

By Mr. Rosenthal:

Q. I have addressed you before when you were in the jury box in another case—have you had any actual jury service? [fol. 2711] A. None whatever.

Q. So that this is the first time, if you are accepted, that you shall have actually served on a jury?

A. Yes, sir.

Q. Now, you understand that just the same as I am an advocate for a cause, Mr. Turkus is an advocate at present for the State of New York—the District Attorney?

A. Yes, sir.

Q. Did you know him when he was a lawyer practicing criminal law?

Mr. Turkus: I object to that. Mr. Rosenthal seems to want to make a record that I do not want.

The Court: You should be proud of it. Objection overruled.

Q. Now, let us be serious, you understand that in the presentation of a criminal case it is never the duty of a defendant to explain anything?

A. Yes, sir.

Q. Now, the law, of course, you will have to take from the judge; will you do that?

A. Yes, sir.

Q. It may be that you may differ in your conception of what the law is, but whether you differ or do not differ your province is not to invade the judge's province, which is to tell you what the law in this case is?

A. Yes, sir.

Q. You feel you will be able to do that?

A. Yes, sir.

Q. Now, then, on the other hand, just as the judge is supreme on the law, you are supreme on the facts and your interpretation of the same, and what weight you will give to [fol. 2712] any fact?

A. Yes, sir.

Q. I might tell you when I sum up, if the case goes that far, what I think the facts are; and, in contradiction to what I may say, Mr. Turkus will get up and tell you an entirely different story about what he thinks. The judge of course will tell you he has no right to comment whatever on the

facts and has no opinion whatever. But irrespective of that, no matter what anybody may say, you are—and when I say "you", I mean the entire jury—you are the ones who will determine what value you will give to testimony of any witness on the stand. Is that clear?

A. Yes, sir.

Q. And that you will do?

A. Yes, sir.

Q. Now, although you will be told that the law is that a defendant need never take the stand or need never offer any proof in order to establish his innocence, nevertheless, on behalf of the defendant whom I represent, together with my associate, it may be that I will offer it and that the defendant will take the stand, and in addition to the defendant taking the stand that witnesses will take the stand on his behalf. With that thought in mind and with that knowledge, do you feel that really because the defendant is charged with crime and offers himself as a witness that the truth from him has any less weight or value than the truth from any other source?

A. No, sir.

Q. Of course, you will, like with any other witness, in [fol. 2713] determining what weight you will give to the defendant's testimony, take into consideration that he is a defendant and has an interest at stake, but after weighing whatever interest that may be, and his actions and his demeanor, and whatever may transpire when he is on the stand, if you feel he is telling you the truth, then in your mind it is established that the truth from him has just as much weight as the truth from any other source. Am I right?

A. Yes, sir.

Q. Some of these questions might be repetitious because I do not know how many of the questions were asked when you were in the court room. Proof may be offered in this case of what is termed in law as an alibi. There is no mysterious meaning as to that word, either in law or outside of law. It means that a witness will take the stand who will adduce to the fact where the defendant was at the time this crime was said to have occurred. Now, if you are told by the Court that a reasonable doubt is a doubt that arises in your mind from any circumstance that develops in the case—it may arise by the offer of evidence of an alibi—if

that alibi evidence raises a doubt in your mind as to whether the defendant participated in the crime—am I clear so far?

A. Yes, sir.

Q. Will you follow the instructions?

A. Yes, sir

Q. Now, you understand, sir, if that instruction is given you by the Court that it is not incumbent upon the defendant because he offers evidence to establish the fact to your [fol. 2714] satisfaction beyond a doubt, that the burden does not shift from that side of the table at any time, you understand?

A. Yes, sir.

Q. So in determining the question of witnesses who are called by the defense will you keep in mind the fact that when you are testing what weight you will give to their testimony that all that is required upon the part of the defendant is not to prove that he was somewhere else but to prove sufficiently to your mind which will raise a reasonable doubt where, in the absence of such proof, maybe a reasonable doubt would not arise. Is that clear?

A. Yes, sir.

Q. You would have no difficulty in following the judge's instruction, if it was given by the Court?

A. No, sir.

Q. The mere fact that I have examined you before in some other case has no weight of any character?

A. No, sir.

Q. It may appear to be silly, but sometimes jurymen get the impression one way or another—but I think you were excused by the People and another gentleman was excused by the defendant—were you excused by the People?

A. Yes, sir.

Q. I meant whether you were excused by the People or by the defendant—Mr. Turkus and myself are not on trial—we are presenting the evidence, one on behalf of the People, that which has been given to him by witnesses whom he will produce, and me on behalf of the defendant on what he has told me and what evidence I have to produce.

A. Yes, sir.

[fol. 2715] Q. And our entity should not enter into the mind of any juror?

A. Yes, sir.

By the Court:

Q. When you were with WNYC, I take it you were employed by the City and not by advertisers?

A. By the City.

Q. Did you go out the same time as Mr. Bohnsack?

A. I went out a few months before he did.

Q. Well now, have you any prejudice against the present City Administration?

A. None whatever.

Q. Nothing that would make you conduct yourself in favor of Judge O'Dwyer in this case?

A. No, sir, my mind is absolutely free.

By Mr. Rosenthal:

Q. I was just going to ask a question whether or not you have any intention of actively participating in the forthcoming political campaign?

A. No, sir.

Q. No broadcasting?

A. No, sir.

The Court:

Q. You have never broadcasted on the crime cases?

A. No, sir.

By Mr. Rosenthal:

Q. So I can abbreviate this, were you in court when the question was discussed with the other jurymen about the fact that no man can be convicted on the uncorroborated testimony of an accomplice?

A. Yes, sir.

Q. When the explanation was made as to the fact that [fol. 2716] even though a man may go on the stand and say I am an accomplice, he may be telling the truth concerning himself, but that is not the issue you have to decide. The issue is whether he is telling the truth about the defendant?

A. Yes, sir.

Q. Now, in taking into consideration not only the testimony of the so-called accomplice but any witness who may be called, whether it be for the defense or for the prosecution, will you scrutinize his testimony to such an extent that

you yourself will first formulate in your own mind whether or not he has a motive for testifying falsely in this court about the defendant?

A. I will.

Q. Now, if that would not be sufficient, once having established, if you do so establish, the fact that he has, will you then scrutinize sufficiently to ascertain whether in your opinion that motive is of such a character as would lead him to falsify?

A. Yes, sir.

Q. Now then, to go further than that, if you determine after those two premise that motive is of such a character as would lead him to falsity, so you would be unable to place credence on his testimony, will you, in determining what weight, if any, you will give his testimony, take these facts into consideration?

A. Yes, sir.

Q. Now, in considering not only that, you understand you also have a right to consider whether any particular individual called to the stand has been previously on the stand [fol. 2717] under oath and questioned, and committed deliberate perjury in respect to certain matters, or falsified under oath?

A. Yes, sir.

Q. In a court of similar jurisdiction to this, in determining what weight you will give this testimony?

A. Yes, sir.

Q. In other words, if you found a man has lied, putting it bluntly, under oath, under similar circumstances, to what he has testified to now under oath, you would consider that carefully?

A. Yes, sir.

Q. Merely because the District Attorney may get up and tell you that the man is not an accomplice, or merely because the Court does not charge you as a matter of law that the man is not an accomplice—you see that is how I am in difficulty as to whether you heard these things discussed—that does not preclude you, if the Judge tells you under certain circumstances you may. So that there may come a time when the judge will tell you, "I charge you, Mr. Juryman," or "Gentlemen of the jury, this man is an accomplice as a matter of law," if he charges you that way you will definitely view his testimony as an accomplice.

Now then, there may come a time when the judge may say to you, "Gentlemen of the jury, there is a question here that is left to you to determine as to whether or not this man is an accomplice." In other words, it is a disputed question, "so I leave it to you to determine." Then it will be the province of the jury to go into the jury room and before going over the testimony of this man and determining what [fol. 2718] weight they will give to it, determine to themselves whether under all the circumstances he is or is not an accomplice?

A. Yes, sir.

Q. The judge will probably charge you that once you have determined whether by virtue of the fact he has said the man is an accomplice as a matter of law or you find him an accomplice as a matter of fact, once you determine that fact that he is an accomplice, then, whether believed or not, no man can be convicted on his testimony or their testimony unless there is other independent evidence tending to connect the defendant?

A. Yes, sir.

Q. Never having sat on a jury before, that is a juror sitting in a jury room, do you understand that your duty as a juror is to view the evidence as you see it, as your mind reasons it?

A. Yes, sir.

Q. But that does not mean that after once having come to a determination in your mind that you should foreclose other people from discussing that and their reasons?

A. That is right.

Q. However, your duty as a juryman is that after listening attentively and trying to have your ideas agree with others, argument pro and con, discussing reasons why you have come to determination and listening to reasons which they make, if after all of that discussion you have not been convinced that the foundation of your reasoning is wrong, it is your absolute duty to retain that opinion?

A. Yes, sir.

[fol. 2719] Q. If perchance such a circumstance does arise, have you the fortitude to retain your opinion irrespective of your inexperience in a jury room, irrespective of the lateness of the hour, business, numbers against you or any other outside extraneous cause, have you that fortitude?

A. Yes, sir.

By the Court:

Q. Do you live at 36 Remsen Street?
A. Yes, sir.
Q. That is between Montague Terrace and Hicks?
A. Yes, sir.
Q. Now some of those houses are still private dwellings?
A. Quite a few.
Q. Others have been made into apartments?
A. Yes, sir.
Q. Others are rooming or boarding houses?
A. Yes, sir.
Q. Do you live alone?
A. No, sir, I live with my wife. We live in a renovated house which was a private house, turned into an eight unit apartment.
Q. You occupy one of the apartments in one of the houses that have been reconstructed?
A. Yes, sir.
Q. There have been no home discussions about this case?
A. None whatever.
Q. Of course you have entered into boarding house table discussions?
A. I never lived in a boarding house.
Q. I asked you that because some of those are boarding houses?
A. I realize that.
Q. Where such topics are discussed at the table?
A. Yes.

[fol. 2720] By Mr. Rosenthal:

Q. Of course it is ridiculous to attempt to say this case has not had some publicity—you have read headlines?
A. Yes, sir.
Q. Now, do you understand these defendants—I am not referring to that purposely—but these defendants are not being tried because Judge O'Dwyer is trying to become Mayor—that is not the issue. Have you the power—and I only ask you this question because of what the District Attorney has said—have you the power not to consider whatever publicity may have been given to this case, if when you raise your hand and take an oath to act as a conscientious juror you are unable in your own mind to say that the People have established these defendants or defendant

whom I represent or all of them—to come in here without any fear of hesitation, without any worry, without any criticism that someone might try to make light of your verdict—and say "Not guilty," if the defendant has not been proven guilty beyond a reasonable doubt?

Mr. Turkus: I object, that is summation.
The Court: Objection overruled.

A. I have.

By Mr. Turkus:

Q. Mr. Rosenthal has seen fit to bring out that it was the prosecutor who excused you in the last case.

Mr. Rosenthal: I object to that. Mr. Turkus brought out from the other man who excused them, so what is the [fol. 2721] difference?
The Court: Why argue about it?

Q. At that time I believe you were identified with a program of some sort?
A. Yes.
Q. Do you understand that that may have been a question of propriety at that time?
A. Yes, sir.
Q. In other words, there is no resentment because The People excused you?
A. No, sir.

Mr. Turkus: Mr. Link is satisfactory to The People of the State.
Mr. Rosenthal: We rest on the record.
The Court: Before selecting the alternates, of course, the oath will have to be administered to the jury. This question is asked of all twelve members of the jury: Since you were tentatively accepted by both sides at the conclusion of your examination, you have been repeatedly cautioned by the Court not to discuss the case, not to let anybody talk to you about it, not to read the newspapers or otherwise read about it, not to listen to the radio about it. I am going to ask each one of you gentlemen individually if you have strictly followed those instructions.

(Mr. Stevens, Mr. Prentice, Mr. Murphy, Mr. Day, Mr. Gill, Mr. Cummings, Mr. Hall, Mr. Cross, Mr. Butt, Mr.

Edghill, and Mr. Rorke each answered individually, "I have.")

The Court: Mr. Link, I do not have to ask you; you [fol. 2722] were only accepted this morning.

Mr. Rosenthal: May I suggest to the Court that one other question be asked: Has anything happened in any way that would change any of the answers they have given?

The Court: The question is now: Has anything happened to change your viewpoint in regard to the case in the meantime, to change your attitude as impartial jurors? If so, raise your hand.

(Juror No. 9, Mr. Butt, raises his hand.)

The Court: This will have to be at the bench, and not in the hearing of the jury.

(Counsel for the defense and Mr. Turkus appear before the bench with Mr. Butt.)

(Mr. Butt was questioned by the Court without the hearing of the jury, as follows:)

By the Court:

Q. What has happened?

A. There has just been a great conviction on my part towards prejudice in this case.

Q. Based upon what?

A. Based upon the various questions that have been asked in court.

Q. Nothing outside of the court-room?

A. Nothing outside of the court-room, no, sir.

Q. You know that the questions that are asked jurors or talesmen do not indicate in any way the guilt or innocence of the accused. Are you sure this is not just a design to go [fol. 2723] back to the savings bank?

A. No, sir, it is not. It is more important. I realize it, too. There has been great prejudice in my mind about the case. All last night I thought about it. I have not talked about it to anybody.

Q. Do you mean it would prevent you from rendering a fair and impartial verdict?

A. I am afraid so.

The Court: What do you say, gentlemen? You cannot try this challenge. This has to be done quietly, without the presence of the jury. Do all of you consent?

Mr. Barshay: All of the defendants consent.

Mr. Rosenthal: Of course, reserving any exceptions we have taken heretofore.

The Court: Precisely. This is in fairness to the defense. The man has a feeling in his mind which he has frankly expressed. The Court believes it to be an honest one.

(JOHN E. COLEMAN, called as a talesman, was examined as to his qualifications by Mr. Turkus.)

Q. Where do you live?

A. I live at 308 East 8th Street.

Q. That is in Flatbush?

A. Yes, sir.

Q. I take it you did reside on St. Johns Place?

A. Yes, sir.

Q. You are listed as a business representative. What outfit do you represent?

A. The Brooklyn Edison, eleven years.

Q. Prior to then did you engage in any occupation?

A. Yes.

[fol. 2724] Q. What was your work then?

A. Manager for the Kelvinator Refrigerator.

By the Court:

Q. You live on Nostrand Avenue?

A. I did, your Honor, between New York and Brooklyn.

By Mr. Turkus:

Q. Are you married?

A. Yes, sir.

Q. Have you lived in Brooklyn most of your life?

A. Yes, sir, all of my life.

Q. I take it you have listened to the questions and are a little tired of hearing them.

A. I did not.

By the Court:

Q. There is a little church there at Beverley Road near your street?

A. One on the corner of East 8th and Beverley. I am in the middle of the block.

Q. Do you belong to that men's club?

A. No, sir.

Q. Have you attended any meetings?

A. No, sir.

By Mr. Turkus:

Q. Have you been engaged as a juror in the trial of any criminal case?

A. Not heretofore.

Q. Have you been ever called for jury service?

A. Yes, sir.

Q. Has it been since Judge O'Dwyer was District Attorney?

A. Yes, sir.

Q. Was it in any case in which I was prosecutor?

A. No, sir.

Q. Was it in any case in which any of these lawyers were [fol. 2725] defense counsel?

A. I don't believe so.

Q. Have you any conscientious scruples or otherwise against capital punishment?

A. No, sir.

Q. Is there anything in your background that we need know in connection with your possible contact with the garment clothing section or the garment truckers, or the Brownsville-East New York section, or the Brooklyn waterfront?

A. No, sir.

Q. Or with any union officials of the Amalgamated, or the Clothing Truckers Union, have you had any contact with them?

A. No, sir.

Q. I take it you are in sympathy with law enforcement?

A. Yes, sir.

Q. Do you know of any member of the bar who specializes in the defense of criminals?

A. No, sir.

Q. As you are sitting there, is there any reason why you cannot be a fair and impartial juror in the discharge of your duty to the People of the State of New York and to these defendants?

A. No, sir.

Q. You do not get any idea about the trial of a case from questions that are either asked you by the prosecutor or the defense lawyers; you get your ideas and impressions and conclusions when the case starts and you hear the evidence.

A. Yes, sir.

Q. But in order to examine a juror as to his state of mind it is necessary to ask certain questions, for example, have you heard the discussion about accomplice testimony?

A. Yes, sir.

[fol. 2726] Q. Have you heard the discussion about the legal rights which accrue to every man charged with crime?

A. Yes, sir.

Q. In this particular case, will you take the law implicitly from Judge Taylor, the trial judge?

A. Yes, sir.

Q. Take the law from him, and your obligation as a juror is to apply it with common sense and understanding to the testimony you get in court?

A. Yes, sir.

Q. Will you use your mental faculties in doing that?

A. Yes, sir.

Q. You have had experience as a business representative?

A. Yes, sir.

Q. And you talked things over with them logically?

A. Yes, sir.

Q. Will you use the same common sense and logic when you talk the case over with the other jurors?

A. Yes, sir.

Q. Will you give to these defendants on trial the benefit of everything the law of the land says they should have, the presumption of evidence, the doctrine of reasonable doubt, every legal thing that can be given to them and for their benefit? The Judge will tell you about it. Will you give it to them?

A. Yes, sir.

Q. Will you, after hearing all the evidence in the case, if then you have a reasonable doubt as to their guilt, acquit them?

A. Yes, sir.

Q. Now, by the same token, when you get all the evidence [fol. 2727] in this case, and your conscience is satisfied beyond a reasonable doubt that these are three guilty men, three who played the part in the commission of this crime, a group or combination, which witnesses will tell you about in court, will you say that in your verdict?

A. Yes, sir.

Q. There is one little thing I want to go over very hurriedly and then I will be through. There will be testimony in this case which will emanate or come from accomplices. Do you understand by now what an accomplice is?

A. Yes, sir.

Q. You have no illusion about accomplices?

A. No, sir.

Q. Do you understand that we apply the legal test, the common sense test, in conjunction with the believability or credibility of an accomplice?

A. Yes, sir.

Q. And that test, with respect to an accomplice, is a little different. The Judge will tell you what those tests are.

A. Yes, sir.

Q. Will you keep in mind, no matter what the tests you apply are, whether it be, Has he got a motive? or, Has he a past criminal record? Has he been steeped in crime and criminal association all his life? You apply all those tests to find out does he speak the truth, not only about himself but about them?

A. Yes, sir.

Q. Will you devote your mental faculties to find out does the accomplice in this case speak the truth about them and the part that each one played as a group or combination in [fol. 2728] killing the victim named in the indictment?

A. Yes, sir.

Q. Something has been brought out here by one of the lawyers, and he has very properly said it is not by way of sympathy and certainly not intended to prejudice, but the fact remains the man has been convicted of other crimes and is presently serving another jail term. Having in mind that he is presently in jail, would you relax your duty as a juror in this case simply because he is paying the penalty for other offenses for which he has been convicted?

A. No, sir.

Q. Would you be sympathetic or would you deviate from a proper consideration of the case because of the fact he is in jail?

A. No, sir.

Q. Of course, it has been brought out by a lawyer of the defense that there is an indictment here that the defendants are to meet—the only charge in the indictment; by the same token the District Attorney is permitted by law to put in evidence to establish the guilt of these defendants beyond a reasonable doubt.

A. Yes, sir.

Q. Now, is there anything that, as prosecutor of this indictment, I should know as to your qualifications to sit here as a juror?

A. No, sir.

Q. Has anything happened in your past experience or in the present manner in which you earn your livelihood which would in any way embarrass you or cause you to hesitate in rendering a verdict of guilty, if that is what you feel should be rendered after hearing the evidence?

[fol. 2729] A. No, sir.

Q. May I leave you with this understanding: that you will discuss the case with common sense and reason with your other jurors, and that you will render a verdict that reflects justice in the case?

A. Yes, sir.

By Mr. Talley:

Q. I was not able to hear your answer with respect to the business you were in.

A. The Brooklyn Edison.

Q. How long have you been with the Brooklyn Edison?

A. Eleven years.

Q. Have you read anything about this case?

A. Yes, sir, read quite extensively about it.

Q. May I ask you what paper you read?

A. The *World-Telegram* and the *News*.

Q. Did you read the continued story printed more than one night about this case?

A. No, sir.

Q. Did you discuss this case with anybody?

A. No, sir.

Q. Since you have been called as a prospective juryman, did you talk it over with anybody?

A. No, sir.

Q. With the family or anyone else?

A. No, sir.

Q. As the result of the article you read, have you formed any impression about these defendants?

A. In reference to this case?

Q. In reference to the defendants, apart from this?

A. I have read the paper, my normal course of reading. [fol. 2730] Q. In the normal course of reading and as a result of it, did you form any opinion about the guilt or innocence of these defendants?

A. No, sir.

Q. Did you form any impression about them one way or the other which you think might be a handicap or advantage to them as you sit as a juror in this case?

A. No, sir.

Q. You have no impression unfavorable to them at the start?

A. No, sir.

Q. You have not sat as a juror in a criminal case before?

A. No, sir.

Q. Nor in a civil case?

A. Yes, sir, I have sat in a civil case.

Q. The Court will instruct you as to the law here. You will find the rules of law as far as the conduct of a criminal case is concerned, vastly different than that of a civil case. The Court will instruct you that in the matter of proof there is a difference. In a civil case the jury must be satisfied by the fair preponderance of evidence, and if the scale tips a little bit to one side or the other, that is enough. But the Court in this case will charge you that you cannot bring in a verdict of guilty, for instance, against these defendants or any of them, unless you are satisfied beyond a reasonable doubt—beyond a reasonable doubt—as to their guilt. And the Court will instruct you as to what a reasonable doubt is. In a word, he will say it is the kind of a doubt a man might [fol. 2731] have about any of the ordinary affairs of life, but it must be based on reason. You must be able to give a reason for it. My question to you is, after hearing all of this testimony and giving it the consideration which you think it deserves, if you have a reasonable doubt in your

mind as to the guilt of these defendants, will you give them the benefit of that doubt?

A. Yes, sir.

Q. There is no question in your mind but you will be able to do that?

A. No, sir.

Q. You would not hesitate because of things you read in the newspaper or things that might be said by my friend, the Assistant District Attorney, to bring in a verdict of "Not Guilty" against these men if you were not satisfied they were guilty?

A. No, sir.

Q. Outside of anything you have been asked by either Mr. Trukus or myself, is there any reason you can think of that would prevent you from sitting as a fair and impartial juror in the trial of this case?

A. No, sir.

Q. The District Attorney has made it plain that part of his case, at least, will be made up of testimony of accomplices. That is, men who say they participated in the crime, and they will testify against these defendants. They may be men of bad reputation, crooks, criminals, murderers, and the Court will charge you that it is your duty in scrutinizing or weighing the testimony of that type of witness, an accomplice in the crime, who has testified, the motive he has for testifying against somebody else whom he says is in [fol. 2732] the crime, too; the Court will advise you that that type of testimony must be scrutinized with great care and great caution and suspicion as to whether or not such a man is telling the truth. Will you be extremely careful to apply that test, that acid test, to accomplice testimony when it is produced in this trial?

A. Yes, sir.

Q. And you will judge for yourself whether or not a man who has committed murders and has committed robberies and admits it, and has perjured himself under oath on previous occasions, whether he is the type of a man you want to believe on anything. Will you regard his testimony in that way?

A. Yes, sir.

Q. You will discuss this matter with your fellow jurors frankly and fairly?

A. Yes, sir.

Q. But if your mind is not changed and your conscience is not satisfied, and you are not satisfied beyond a reasonable doubt of their guilt, you will not be afraid to stand on your opinion, no matter what the other gentlemen in the jury room may do?

A. Yes, sir.

By Mr. Barshay:

Q. While you were sitting here did anything occur in the court-room to cause favor or prejudice to either side?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. I take it you realize as well as anyone else the extreme importance of getting an impartial jury?

A. Yes, sir.

[fol. 2733] Q. So that now there is no prejudice in your mind, or anything at all which would preclude you from giving Mr. Buchalter a fair trial?

A. Nothing.

Q. And, above all, the fact that he is now incarcerated for a period, a long term of years, that fact alone would not cause you to relax in your duty to be fair to him?

A. No, sir.

Q. We do not want any sympathy, we simply want to know whether a juror would feel prejudiced against a person because he is in that position.

A. I understand.

Q. Some people would, and they have a right to if they want to. You said you had no prior experience?

A. No.

Q. You did have some experience as a civil juror?

A. Yes, sir.

Q. Whatever the instructions on the law are, you will be guided here only by what the judge tells you?

A. Yes, sir.

Q. You can understand it is possible for a Grand Jury to indict an innocent man?

A. Yes, sir.

Q. And that the indictment here is an accusation?

A. Yes, sir.

Q. And the defendant, by his plea of "Not Guilty," leaves the job for you to decide?

A. Yes, sir.

Q. When he says, "Not Guilty," he means he denies every accusation that the People accuse him of, every single one of them; do you understand?

A. Yes, sir.

Q. And no matter who may claim he is an accomplice, [fol. 2734] Mr. Buchalter's plea of not guilty puts that at issue, and then it is for you to decide whether or not that person is telling the truth. Now, in every case, willingly or not, there may creep in atmosphere.

A. Yes, sir.

Q. Sometimes atmosphere results by the procedure in court, by the bringing of these men into court having them handcuffed. That has nothing to do with their guilt or innocence?

A. No, sir.

Q. Sometimes reference to the defendant by a name like Lepke, would that influence you?

A. No, sir.

Q. A man who is charged with crime is presumed to be innocent; that is all you are concerned with. If a man comes here and says, "I am an accomplice of Mr. Buchalter," will you search to find out whether they are hoping to get something for saying it?

A. Yes, sir.

Q. Is he one of a group who will come here and try his utmost to put in any kind of testimony, will you look into that?

A. Yes, sir.

Q. The mere raising of his hand and saying, "My conscience is now being cleared; I am telling the truth now," you will not swallow that alone?

A. No, sir.

Q. The rules that apply to accomplice testimony as given by his Honor, you must look upon with care and caution—you will take that seriously?

A. Yes, sir.

Q. And if someone else comes and says he is an accomplice and corroborates him, that would not be enough unless [fol. 2735] there is other evidence independent of those people's testimony which tends to connect the defendants with the commission of the crime?

A. Yes, sir.

Q. You will take into consideration, if he declares himself to be an accomplice of Buchalter, that in fact he never saw that accomplice, if that should be the fact?

A. Yes, sir.

Q. And if someone comes here and claims he is not an accomplice, and the evidence shows he is, it will be for you to decide whether he is telling the truth?

A. Yes, sir.

Q. It may be that a bad man can tell the truth sometimes, and he may be telling the truth about himself and lying about Buchalter—that is possible?

A. Yes, sir.

Q. That is why the law has said it should be weighed with caution and suspicion; you have heard that, and you agree with that?

A. Yes, sir.

Q. If the other evidence which tends to connect the defendants comes from a polluted source, a criminal source, which may have a motive, you will weigh their testimony with a great deal of care before you accept it?

A. Yes, sir.

Q. And do you agree with the proposition of law that the burden of proof is always with the defendant—that he has no burden at all—you understand that? It is for the District Attorney to establish; it never shifts. Do you agree with that?

A. Yes, sir.

Q. And that no accusation made against Buchalter need [fol. 2736] be explained by him under our law, and that is the law, and you say you are in sympathy with it?

A. Yes, sir.

Q. He may take the stand—it will be up to his lawyer—but if he does not you may not hold that against him. If others do take the stand and he will choose to remain silent, that would not influence you with respect to him?

A. No, sir.

Q. He is getting a separate trial here, you understand?

A. Yes, sir.

Q. Whatever is binding upon him you will consider being binding upon him, and if it is not, you will not consider it?

A. Yes, sir.

Q. Mr. Turkus, by full evidence, competent evidence, will have to prove he is part and parcel of any scheme—that will be his job—mere association alone is not sufficient, you un-

derstand, and if the proof is subject to two interpretations, one of guilt and one of innocence, the Court will give you instructions on the law with respect to that, and will you follow the same?

A. Yes, sir.

Q. The law says that every defendant is entitled to a fair trial at your hands. Will you give it to Mr. Buchalter?

A. Yes, sir.

By Mr Rosenthal:

Q. Have you ever sat in a jury?

A. No, sir.

Q. You say you were called?

A. Yes, sir.

Q. When is the last time?

A. The last one, Judge Leibowitz.

[fol. 2737] Q. Were you excused after you got in the jury box?

A. I was asked and I answered.

Q. Have you had any discussion at all about this case?

A. No, sir.

Q. Have you formed any impression of any character in the court-room?

A. No, sir.

Q. Your mind is clear now as to the fact that you can sit here as a fair and impartial juryman and take the evidence from the witnesses?

A. Yes, sir.

Q. And the law from the Court as he gives it?

A. Yes, sir.

Q. Were you seated in a part of the court-room where you could hear the questions I addressed to the other jurors?

A. Yes, sir.

Q. Did you follow the questions in your own mind as to whether your answers would be similar ones?

A. Yes, sir.

Q. And would they?

A. Yes, sir.

Q. There is no necessity for repeating them then. Your answers, if all of those questions were addressed to you, would be similar to the answers given by the others?

A. Yes, sir.

Q. Now, is there any reason at all that has not been urged by my questioning on the part of anyone, by the Court, Mr. Turkus, or any member of the defense, which would in any wise incapacitate you from sitting as a fair and impartial juror?

A. The only thing is it might be inconvenient at home.

Q. That is something you will have to talk to the Judge [fol. 2738] about. Let me ask you this: When you say "inconvenient," what does your family consist of?

A. My wife.

Q. Is your condition at home of such a nature that if you were sworn as a juryman here your mind would be at home with your wife, and thereby detract your mind from the consideration of the testimony?

A. No, sir.

Mr. Rosenthal: The juror stated his wife was alone at home, but I asked him the legal question, which, of course, he answered properly, so anything your Honor may want to do is up to your Honor.

By the Court:

Q. You mean you cannot serve because you will have to be home?

A. I would not use that expression. My wife is living home. I am janitor of the house. We have no oil burner. It would mean somebody would have to take care of that.

Q. You could have saved a lot of time if you had stated that at first.

A. In the first place, it was never asked of me. It was asked about the defendants and the case. I could not say that would have some bearing.

Q. Is there anybody else home?

A. No, sir.

Q. When you say "janitor," do you mean you take care of an apartment?

A. I live in a two family house; there is a tenant on the second floor.

Q. You own the house?

A. Yes, sir.

Q. Is there anybody else living there?

[fol. 2739] A. There are people upstairs, tenants, and my wife.

Q. The oil burner requires no attention.
A. I said I haven't any oil burner.
Q. You have nobody to go down to attend to the coal?
A. No, sir.
Q. Who attends to it during the day?
A. It is of the type that in the morning it is sufficiently set until I am home in the evening.
Q. Your wife never attends to it?
A. No, sir. We have only been in the house a little over two months.
Q. Well, most of those two-family houses are in localities where there are people who attend to furnaces.
A. I believe there is such a thing in the neighborhood, but I would have to make some arrangements, if I were to serve, to have him take care of it.
Q. We want to know if you can do it; we want to know now.
A. Yes, sir, I can do that.
Q. There is a man who can come in and do it?
A. Yes, sir.

By Mr Turkus:

Q. Are you going to be worried about home conditions?
A. No.

Mr. Turkus: Satisfactory to the People of the State.
Mr. Rosenthal: We rest on the record.

(The twelve jurymen were then sworn by the Clerk.)

The Court: It appearing to the satisfaction of the Court that a statutory ground exists, the Court directs that two [fol. 2740] alternate jurors be impaneled and sworn.

Now, the Court will permit Counsel for the defense to try to agree on whether they desire that the challenges as to each of the alternates be applied as against each separately or be used as a whole against both. The Court will be agreeable to whichever decision counsel for defense shall make. The statute is capable of either interpretation.

Mr. Barshay: If your interpretation is that we may take it as a whole, we would like to do so.

The Court: That is a total of six challenges on these two, collectively.

(Frank C. Moffat, No. 3106, and Thomas C. Smith, No. 3109, were then called as alternate jurors.)

The Court: Now, these two gentlemen are at present regarded as No. 1 and No. 2 in the order in which they were called, but should No. 1 be excused and No. 2 remain, No. 2 will become No. 1. Is that understood? Is it agreeable?

Mr. Rosenthal: Yes, sir, that is very agreeable to the defendants.

The Court: Because, should the alternates have to be used, they will have to be used in the order in which they are so designated—No. 1 first, No. 2 second.

[fol. 2741] (Mr. Moffat and Mr. Smith were then examined collectively as to their qualifications.)

By Mr. Turkus:

Q. Mr. Moffat, you are in the insurance business?

A. Yes, sir.

Q. And Mr. Smith, you reside on East 23rd Street?

A. Yes, sir.

Q. Are you a salesman?

A. I am a manager, vice-president.

Q. Your jobs may be, more or less, to go right along with the entire case and then, I hope there will be no casualty, you may go home after hearing the case.

Mr. Moffat, how long have you lived at your present address?

A. Eighteen years.

Q. You have been in the insurance business a number of years.

A. Thirty-odd.

Q. In business for yourself?

A. Yes, sir.

Q. Mr. Smith, have you lived in Flatbush for a number of years?

A. Yes, sir.

Q. Have you been in business for a number of years?

A. Twenty-one years.

Q. Nothing about your knowledge of the crime that the District Attorney should know about?

A. No, sir.

Q. Do you know any of the officials of the Amalgamated Clothing Workers of America?

A. No, sir.

Q. Have you had any contacts in the Brownsville and East New York areas of Brooklyn or on the Brooklyn waterfront?

A. No, sir, I know people in Brownsville.

[fol. 2742] Q. Do you visit those people socially?

A. A couple of times.

Q. I take it you have listened to the questions put to the other gentlemen who have been examined?

A. Yes, sir.

Q. Do you feel any differently about any responses they made? Would you answer them any different?

A. No, sir.

Q. Or would you, Mr. Smith?

A. No, sir.

Q. Can I go along with the understanding that you have no bias or prejudice either against the prosecution or the prosecutor for using the testimony of an accomplice?

A. Yes.

Q. You have heard me define accomplice testimony?

A. Yes.

Q. And if there is other evidence in the case which tends to connect the defendants with this murder, and the part which each played in this particular homicide, if that is established to your satisfaction beyond a reasonable doubt, will you vote for conviction?

A. Yes.

Q. Will you give the defendants every presumption, every legal right?

A. Yes, sir.

Q. And after you hear all the evidence, if you feel then there is a reasonable doubt as to their guilt, will you vote for their acquittal?

A. Yes, sir.

Q. If you feel they have been established guilty beyond a reasonable doubt, is that the kind of a verdict you will render, without fear or hesitation?

A. Yes, sir.

By the Court:

[fol. 2743] Q. Mr. Moffat, you live on the block with that colored church?

A. No, sir, that is between Gates and Putnam.

Q. Is that No. 379 or 279?

A. 379.

Q. You are a block from the Church of the Nazarene?

A. Where the Church of the Nazarene was on Lefferts Place is two short blocks.

Q. Putnam Avenue begins at Grand and Fulton?

A. Fulton and Cambridge.

Q. You are between there and Gates?

A. Yes, sir.

Q. That is a rather long block?

A. Yes, sir.

By Mr. Talley:

Q. I did not hear your business, Mr. Smith.

A. Securities, Gardner, Kelly & Company.

Q. Mr. Moffatt, have you read anything about this case?

A. Yes, sir.

Q. Have you also, Mr. Smith?

A. Yes, sir.

Q. Mr. Moffatt, as a result of anything you read, have you formed any impression or opinion as to these defendants or as to this case?

A. I would say I got sort of a general impression, it is not anything very definite.

Q. Is the impression you have formed an impression unfavorable to these defendants?

A. As regards this particular case I don't think so. Newspaper stories do not enter into that.

Q. They are not always true?

A. No, sir.

Q. Any impression or opinion that has been created in [fol. 2744] your mind or formed in your mind, which you think would take evidence to remove as the case progresses?

A. No.

Q. These defendants would not start off with a handicap; they would not be carrying weight at the start because of any impression you may have gained from a newspaper?

A. No, sir.

Q. You are sure?

A. Quite sure.

Q. Mr. Smith, what reading—or what papers did you read about this case?

A. The *Tribune*, the *Times*, the *Sun*, the *Evening Telegram*.

Q. Did you read several articles in which their names were mentioned or in which this case was referred to?

A. Yes.

Q. Did you form any opinion or impression with regard to them or the case, or anything connected with it, as a result of reading these articles?

A. I formed an impression.

Q. Was it an impression unfavorable to these defendants?

A. It was.

Q. Do you think it would take evidence to remove that impression?

A. I do.

Q. So, very frankly, so far as you are concerned, they would start off with a bit of a handicap?

A. Yes, sir.

Q. The only thing that would remove that impression from your mind is evidence in the case?

A. Yes, sir.

Q. And you would expect that evidence to come from the defendants, wouldn't you?

A. Yes.

Q. Mr. Smith, you have a like impression?

[fol. 2745] A. My impression goes to the character of the defendants.

Q. You mean by character, what you gathered from reading the newspaper?

A. Yes, sir.

Q. On the assumption that what you read in the newspaper was true?

A. I don't know whether the newspapers are true or not, but that was my impression.

Mr. Talley: Challenge for cause.

THOMAS C. SMITH, residing at 714 East 23rd Street, sworn on the challenge.

By Mr. Talley:

Q. You were asked some questions before you were sworn. Now, having been sworn, were the same questions to be asked of you would your answers be the same?

A. They would.

By Mr. Rosenthal:

Q. You have sat in the court-room for a number of days?
A. Yes, sir.
Q. You have heard the instructions to the other jurymen on the law?
A. Yes, sir.
Q. You heard the Court state that at no time does the defendant have to establish anything?
A. Yes, sir.
Q. And, notwithstanding that fact, you have candidly stated the impression you have at this time is of such a nature you could not lay it aside and give these defendants a fair and a square deal?
A. Yes, sir.
Q. That is with full knowledge of the admonition which [fol. 2746] the Court has given to other persons who have preceded you in the box?
A. Yes, sir.

By Mr. Turkus:

Q. Is there anything in the reading matter which you read, as to who was killed in this case?
A. No.
Q. Or where he was killed?
A. No.
Q. Or how he was killed?
A. No.

The Court: Challenge sustained.

By Mr. Talley:

Q. Mr. Moffat, you have heard the questions put to the other gentlemen for the last few days?
A. Only for today.
Q. Have you served before on any criminal case?
A. Yes, sir.
Q. In this court?
A. Yes, sir.
Q. When did you last serve?
A. It was—I don't know the date—about a year ago, I think, was the last jury I was called on.

By the Court:

Q. Where is your insurance place of business?
A. 151 William Street, New York.
Q. Is it general insurance?
A. Yes, sir.
Q. Fire?
A. Yes, sir.
Q. What is the name of the concern?
A. Moffat & Blank.
Q. How long have you been in business?
A. Thirty-three years.
Q. Do you do much business with the garment trade?
[fol. 2747] A. No, sir. Some, not much.
Q. Are you married or unmarried?
A. Married.
Q. Do you live in a flat or a house?
A. Yes, sir.
Q. Will your wife be alone while you are serving?
A. Unless some friends stay with her.
Q. That could be arranged?
A. Yes, sir.

By Mr. Talley:

Q. That service you had with the Amen investigation, that was in the Supreme Court?
A. No, sir. We were there for a couple of days and I think they all pleaded guilty.
Q. You didn't really serve on the jury?
A. No, sir, not in that case; I was called. The jury was called, and the case was dismissed.
Q. Have you ever been called to sit as a juror in a trial in this building, in the County Court?
A. Yes, sir.
Q. How long ago was that?
A. Possibly a year and a half.
Q. Before what judge, if you remember?
A. I don't recall.
Q. Was it a murder case?
A. It was.
Q. Did you hear the instructions from the Court with regard to that case?
A. Yes, sir.
Q. You say that was approximately two years ago?

A. Approximately a year and a half or two years ago.

Q. Was Mr. Turkus, my handsome friend, the District Attorney, in that case?

A. No.

Q. Were any counsel you now see around this court-room [fol. 2748] in that case?

A. Barshay was.

Q. Did you form any impression about Mr. Barshay that was so unfavorable that you could not give the defendants a fair trial in this case?

A. No, sir.

Q. Did you ever serve in a Grand Jury?

A. No, sir.

Q. From your previous service you must know that the Court will charge you, before you can arrive at a verdict of conviction, that you must be satisfied of the guilt of the defendants beyond a reasonable doubt, and that the presumption of innocence always exists in favor of any defendant when he comes in a criminal court?

A. Yes, sir.

Q. Will you accord to that defendant and to each of them that presumption of innocence?

A. Yes, sir.

Q. Will you require The People to undertake that burden?

A. Yes, sir.

Q. Will you require them to satisfy you beyond a reasonable doubt before you vote Guilty against these defendants?

A. Yes, sir.

Q. The burden being always on The People to prove the guilt of the crime which is alleged in the indictment, which you know is nothing more than an accusation in writing and does not import guilt in any respect whatsoever?

A. No, sir.

Q. If, in an endeavor to sustain the indictment, the People produce accomplices here—you know what an accomplice is?

A. Yes, sir.

[fol. 2749] Q. Who will testify with respect to these defendants, will you scrutinize the testimony of a man who admits he is an accomplice?

A. Yes, sir.

Q. Not only that, but should he admit he is guilty himself of countless murders, many murders, and has on previous

occasions sworn to tell the truth and lied, will you scrutinize that kind of testimony with great care and great caution and great suspicion before you give it credence?

A. Yes, sir.

Q. Then the law requires, and it is a protection for the innocent more than it is for the guilty—the law requires, where accomplice testimony is produced, the jury may not convict upon the testimony of an accomplice unless there is some other independent evidence produced apart from the accomplice that tends to connect the defendants with the commission of the crime. Will you require, if selected as a juror, that independent testimony, before you give any attention to the testimony of the accomplice?

A. Yes, sir.

Q. And, the burden being always on The People to prove the guilt of a defendant, it is not required that a defendant take the stand in his own behalf or offer any defense; you understand that?

A. Yes, sir.

Q. And that it is the law, and you will be so charged by the Court, that if a defendant does not take the stand and testify, that no jury may indulge in any unfavorable inference as to him because he has not taken the stand. Will [fol. 2750] that be your position, if selected?

A. Yes, sir.

Q. Is there anything you know of which we have not interrogated you about, is there anything in your mind that you think might in any way interfere with your being a fair and impartial juror in this case?

A. No, sir.

Mr. Turkus: Satisfactory to The People.

(Mr. Moffat was challenged by the defense peremptorily.)

(JOHN J. MCNULTY, No. 3065, was then called and seated as Alternate Talesman No. 1.)

Mr. Talley: I wish to advise the Court that this gentleman is an old friend of mine and my brother. He was a college classmate of my brother, and I wish to advise the Court and the District Attorney of that in advance.

The Court: He still may be fair.

(George A. Fairbrother, No. 3032, was then called as Alternate Talesman No. 2.)

By Mr. Turkus:

Q. Mr. McNulty, do you know Judge Talley for a long time?

A. Yes, sir.

Q. Were you interested in his campaign when he wanted to be the Democratic nominee for Mayor?

Mr. Talley: I object; that is absurd. The time of the Court should not be taken up with such questions.

Mr. Turkus: You know it has nothing to do with the case, [fol. 2751] but you put it in in reference to Judge O'Dwyer.

Mr. Talley: It has nothing whatever to do with the case, and I did not put it in.

The Witness: I am always interested in anything Judge Talley is interested in.

Q. If you are called, will you be embarrassed or prejudiced?

A. I would not be embarrassed.

By the Court:

Q. You are in what line of business?

A. Transfer agent in the Guaranty Trust Company.

Q. You have been with the Guaranty Trust Company how long?

A. Thirty-eight years.

Q. Is that a responsible position?

A. It is.

Q. It means that a man who has it is a man of brains, judgment, and a man who also has strength of mind; am I right?

A. Yes.

Q. You can disregard friendship in deciding questions of fact?

A. I can.

Q. It is the same as a banking officer, disregarding friendship in deciding whether to make or not to make loans?

A. Yes, sir.

Q. In other words, have a glass eye?

A. Yes, sir.

Q. You live between Avenue J and K?

A. Yes, sir.

Q. How long have you lived there?

A. Twenty-four years.

Q. Do you belong to any organization that has discussed [fol. 2752] Judge O'Dwyer's activity in the District Attorney's office?

A. No, sir, I do not.

Q. Have you formed any prejudice in the case?

A. No, sir.

Q. Any opinion?

A. I have read about it. I have my opinions, but they have not been fixed.

Q. Have you formed any opinion as to the guilt or innocence of the defendants or any of them on this charge?

A. I could not say on this charge, because I don't know what the charge is.

Q. Is there anything on your mind that, as a man of intelligence and independent thought, you cannot put aside in deciding this issue strictly upon the evidence, as an impartial juror?

A. I could.

By Mr. Turkus:

Q. What is your relationship toward Judge Talley?

A. I went to school with Eddie.

Mr. Talley: That is my brother.

Q. Would the fact that Judge Talley and I had a tilt just now, and we may have more before the case is over, would that be inclined to prejudice you against The People?

A. No, sir.

Q. Is your friendship with his brother such that you would have the slightest embarrassment in rendering the verdict which you think proper on the evidence, even though it affects Judge Talley's client adversely?

A. I don't want to be subject to any criticism. I know him.

Q. I want to know your state of mind.

[fol. 2753] A. My state of mind is that I have read a little about it, and, of course, naturally I have an opinion. I will wait to see what the evidence is and see if that will take the opinion away.

Q. Is that opinion detrimental to the defendants?

A. It is.

Q. You say something will have to take it away? The defendants do not have to do anything.

A. I know that.

Q. Was that opinion formulated by you from reading the press?

A. That is correct.

Q. Have you had any discussion with any member of the bar in regard to the investigations of Judge O'Dwyer?

A. No, sir.

Q. You say you have an opinion which is adverse to the defendants?

A. Adverse, so far as you have to show proof to take it out of my mind.

Q. I am certainly not going to offer any proof that is going to reform jurors.

A. Then it is the opposite of what I said.

Q. You would expect proof from the defendants?

A. Yes, sir, proof from you.

Q. I am the prosecutor. You say your opinion is adverse to the defendants.

A. Of course, I have my opinion about them, but I feel if they are on trial it is up to you to prove them guilty.

Q. Would you expect any evidence from the other side to remove the impression you gathered?

A. Absolutely not.

Q. Were you here when we had a previous discussion [fol. 2754] about the various types of witnesses?

A. I was not listening very carefully.

Q. Mr. Fairbrother, you reside in Coney Island?

A. That is the old Gravesend Section.

Q. Have you lived there for a number of years?

A. Sixteen.

Q. You are listed as assistant dispatcher. Is that with the railroad company?

A. The Brooklyn Edison Company.

Q. Have you been there for a number of years?

A. Yes, sir.

Q. Have you heard the questions we have asked the other jurors?

A. Yes.

Q. Would you make any different responses than the jurors who have been accepted?

A. No, sir.

Q. Do you find any fault with the District Attorney of

the county, Judge O'Dwyer, in the prosecution of an indictment wherein the testimony of an accomplice is used?

A. No, sir.

Q. Have you served as a juror in connection with criminal cases before?

A. No, sir.

Q. You will receive the law from Judge Taylor, which you will apply with your common sense and understanding to this case?

A. Yes, sir.

Q. You understand we are trying a case of murder. Is there anything I should know about you that I have not asked?

A. No, sir.

By the Court:

Q. What are you a dispatcher for?

A. Workmen and material, Brooklyn Edison Company. [fol. 2755] Q. I don't see how they can get along if they have so many jurors here—How long have you been with them?

A. Fifteen years.

By Mr. Turkus:

Q. Mr. McNulty, is there anything the People of the State of New York should know about your ability to sit as an impartial juror?

A. No, sir. I don't know whether the fact I take care of subpoenas in my office—I have about five on my desk now.

Q. For the criminal court?

A. Yes, sir. I look after forgeries and raised certificates and all this stuff that takes place all over the country.

Q. That brings you in cooperation with the District Attorney?

A. I am called before the Grand Jury and other boards.

Q. Do you mean Mr. Dewey's office?

A. Mr. Dewey's—very few here.

Q. Your work brings you in close contact and association with various courts throughout the country—there is nothing about your friendship with Judge Talley's brother that is going to be at all embarrassing to you?

A. That is right.

Q. Now, both of you gentlemen, if, after hearing the evidence in the case, if you really have a reasonable doubt as to their guilt, turn them out. After I get through with the evidence which Judge O'Dwyer presents, after you hear it all, you talk it over among yourselves, and if you are satisfied yourselves that there are three guilty men, each of them, [fol. 2756] who played a part in this combination or group as charged in the indictment, would you say so by your verdict and without any hesitation?

A. Yes, sir.

Mr. Barshay: We peremptorily challenge Mr. McNulty.

By Mr. Talley:

Q. Mr. Fairbrother, have you sat on a jury in a criminal case before?

A. Conspiracy case.

Q. That was a criminal case, prosecuted by the District Attorney?

A. Yes, sir.

Q. In this court?

A. In the Supreme Court.

Q. In this county?

A. Yes, sir.

Q. How long ago was that?

A. A few years ago.

Q. Have you read anything about this case?

A. No, sir.

Q. In none of the papers?

A. No, sir.

Q. Have you discussed the case about the defendants?

A. No, sir.

Q. With anyone?

A. No, sir.

Q. Have you formed any opinion or impression about the case?

A. No, sir.

Q. Or about these defendants, of any sort whatsoever?

A. No, sir.

Q. So that the case and these defendants are both entirely foreign to you?

A. Yes, sir.

Q. The Court will charge you that The People are re-

quired to prove the guilt of any defendant brought into a [fol. 2757] criminal court beyond a reasonable doubt. That means that the defendant is never called upon at any time to make any answer or explanation, because the burden is always on The People to prove guilt.

A. Yes, sir.

Q. If selected, will you require The People to sustain that burden they undertake from the time they file the indictment?

A. Yes, sir.

Q. If you have a reasonable doubt in your mind, after hearing all the case and considering all of the evidence, will you give the benefit of that doubt to the defendants?

A. I will.

Q. If the defendants do not take the stand, or some of them do not take the stand, and the Court instructs you you are not to indulge in any unfavorable inference against them because of their failure to take the stand, will you act accordingly and not hold any inference against them because they do not, under advice of counsel or otherwise, take the stand?

A. Yes, sir.

Q. Have you been sitting here for the last two or three days?

A. This is the fourth day.

Q. You have heard the questions asked about accomplice testimony?

A. Yes, sir.

Q. And you understand generally that proposition?

A. Yes, sir.

Q. If an accomplice, the men who say they are accomplices in this crime, testify against these defendants, will you scrutinize their testimony with care and caution and [fol. 2758] suspicion and try to ascertain whether they are not telling the truth because of any consideration they are expecting from testifying?

A. Yes, sir.

Q. The law requires, in addition to the testimony of such accomplice, corroboration—that there be some evidence independent of the testimony of the accomplice, coming from a good independent source, which will tend to connect the defendants with the commission of the crime, before the

jury can possibly find them guilty. Will you strictly abide by that direction as the Court will give it to you?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. Do you know of any reason of any kind why you could not sit as a fair and impartial juror in the trial of this case?

A. No, sir.

By Mr. Barshay:

Q. In the case you sat on, on that jury, was the name Max Silverman prominently mentioned?

A. Yes, sir.

Q. You heard that name often during that case?

A. Yes, sir.

Q. Mr. Turkus has made inquiry of the other jurors with respect to the same name many times, so I have a right to assume that he played a part in this case; I don't know. Would the fact that Mr. Turkus was counsel once for Mr. Silverman—does that fact in anywise cause you to be influenced in your judgment in this case?

A. No, sir.

Q. Now, if Mr. Turkus should produce him in this case—[fol. 2759] I don't know whether he will or not, would it embarrass you, or would you be free from prejudice?

A. Yes, sir.

Q. Is there any other case where you have sat on a jury?

A. No.

Q. Since 1936 have you been a Grand Juror?

A. No.

Q. Have you formed any impression at all with respect to this case?

A. No.

Q. Did you read about it at all?

A. No, sir, I did not read anything.

Q. Not even about the defendants?

A. No, sir.

Mr. Turkus: Mr. Fairbrother is satisfactory to The People.

(Challenged peremptorily by the defense.)

(William Earle, No. 3091, was then called as Alternate Talesman No. 1, and William R. Shaw, No. 3084, was called as Alternate Talesman No. 2.)

Talesman Shaw: If this trial is going to be a long one, I don't think I have the right mental attitude. I have sickness at home.

The Court: What is the trouble?

Talesman Shaw: Well, my wife and my mother, they are all alone.

The Court: You say there is illness at home?

Talesman Shaw: Yes, sir, my mother is very sick and has been sick for two or three years; I don't know whether she will survive.

[fol. 2760] The Court: Your presence is required?

Talesman Shaw: At night it would help a lot.

The Court: What is it, paralysis?

Talesman Shaw: No, sir, just old age, I guess, she is only eighty-two.

The Court: There is no one else at home except your wife?

Talesman Shaw: No one else.

The Court: We have ten in addition to this gentleman. Will it be agreeable to the defense if this gentleman were returned to the box at another time, holding him in reserve for a possible emergency, to avoid the drawing of another panel?

Mr. Barshay: It is agreeable to me to have him out of the box or to be placed in the box, if necessary.

Mr. Talley: That is agreeable all around.

(Talesman Shaw was then temporarily excused.)

(Mr. J. J. Conaty, No. 3058, was then called and seated as Alternate Talesman No. 2.)

By Mr. Turkus:

Q. Mr. Earle, have you lived at your present address for a number of years?

A. Yes, sir.

Q. Are you married?

A. No, sir.

Q. A bachelor?
A. Yes, sir.
Q. You are listed as a clerk.
A. Yes, sir.
Q. Have you been with your employer for a number of years?
A. Twenty years.
[fol. 2761] Q. Mr. Conaty, you live in Flatbush?
A. Yes, sir.
Q. Have you lived there a number of years?
A. Nine.

By the Court:

Q. You are the branch manager of what?
A. The Aetna Casualty Insurance Company, 16 Court Street, Brooklyn.

By Mr. Turkus:

Q. Do you know any of the nine lawyers who represent these defendants, or any member of the bar who specializes in criminal cases?
A. Mr. Price.
Q. How well do you know him?
A. Since 1914.
Q. Have you discussed any of these cases with Mr. Price?
A. No, sir.
Q. Do you know him well enough to let him influence you?
A. It would not influence me.

By the Court:

Q. Mr. Earle, what concern are you with?
A. Metropolitan.
Q. Which branch?
A. The main office.
Q. Madison Avenue?
A. Yes, sir, and 23rd Street.
Q. How long have you been with them?
A. Twenty years.
Q. What particular line of work do you do?
A. Accounting and auditing.
Q. You are living near Kings Highway?
A. Yes, sir.

By Mr. Turkus:

Q. I will address these questions collectively to save time. Have you heard mention of the fact that the District At- [fol. 2762] torney inquired from the other talesmen whether they had any relations or contact in the garment trade, men's clothing or women's clothing, or the clothing trucking? Have either one of you had such contact?

A. No, sir.

Q. Are any of those union officials I inquired about, have you had any connection with them directly or indirectly?

A. No.

Q. Or in the Brownsville or East New York section or the waterfront?

A. I may have some brokers in Brownsville, but I don't know.

Q. Does that bother you?

A. It does not bother me.

Talesman Earle: May I interrupt? I have been under the care of a doctor, and I brought a certificate to the Judge.

Mr. Turkus: This is acute, according to the doctor's certificate.

The Court: You are under a doctor's care now, and taking something for it?

Talesman Earle: No, the care would be that I would have to stay in bed for about three days in order to get rid of it.

The Court: We do not want to draw another panel. Is it agreeable to allow him to step out? This gentleman, if he goes home, will have to go to bed.

Defense Counsel: That is agreeable.

The Court: Mr. Earle, go home and go to bed, and we [fol. 2763] will let you know if you are needed.

(William H. Fullman, No. 3031, was then called as Alternate Talesman No. 2.)

The Court: Gentlemen, we will now take a recess and resume at 2:00 P. M. Please do not discuss the case; let nobody talk to you about it; keep your minds open.

The defendants are remanded.

Mr. Talley: May I be excused at two o'clock?

The Court: Counsel will agree among themselves as to who will be present at two o'clock.

Mr. Talley: Will the opening take place this afternoon?

The Court: The opening address on both sides requires preparation and a little rest over the week-end. It is not to be rushed into.

(Recess taken until 2:00 P. M.)

[fol. 2764] AFTERNOON SESSION—TRIAL RESUMED

(All defendants represented by counsel)

(Examination of William H. Fullman and J. J. Conaty was continued.)

By Mr. Turkus:

Q. Mr. Fullman, just before lunch you wanted to tell me something.

A. I wanted to tell you since the first of September I have been unemployed and prior to that for fifteen years I was with the *World-Telegram* in the advertising department.

Q. Does that fact——

A. I read all the papers about the case, so I would be prejudiced.

Defense Counsel: Challenge for cause.

The Court: I have not heard a word.

Mr. Turkus: This gentleman was with the *World-Telegram* for fifteen years in its advertising department, has read all the newspaper articles in connection with the case, and has a prejudice against defendants.

By the Court:

Q. Does it go to the formation of an opinion as to the guilt or innocence?

A. Yes, sir.

Q. Of any of the defendants in this case?

A. Yes, sir.

Q. On this charge?

A. Yes, sir.

Q. It cannot be laid aside?
A. No, sir.

The Court: Try the challenge.

[fol. 2765] William H. Fullman, residing at 1497 East 34th Street, Brooklyn, New York, being duly sworn, testified as follows:

By Mr. Fischbein:

Q. Mr. Fullman, certain questions were asked by Mr. Turkus and you made certain responses and then Mr. Turkus made a general statement to His Honor for the record. Then Judge Taylor asked you certain questions. If those questions were asked again, would your answers be substantially the same as you have given?
A. Yes, sir.

Mr. Fischbein: Press the challenge.
The Court: Sustained. Proceed with the examination of the other talesmen.

By Mr. Turkus:

Q. Mr. Conaty, did you follow the questions that were put to the talesmen who were accepted?
A. I did.
Q. You saw what I was driving at when I was questioning them, is there anything I should know about your qualifications?
A. I do not know of anything except that you did ask a question as to Mr. Price.
Q. Mr. Price had been the lawyer in one of the cases I tried against him, and I wanted to know whether there was such a close acquaintanceship as would prejudice you in this case.
A. No.
Q. Did you ever talk to Mr. Price about any of the cases?
[fol. 2766] A. No.
Q. Are you in accord with the other talesmen on the accomplice proposition?
A. Yes.

Q. No bias or prejudice against the District Attorney for the use of that testimony?

A. No.

Q. You will use your mental faculties to find out does the accomplice tell the truth about them?

A. Yes, sir.

Q. Have you served as a juror in any criminal case?

A. About sixteen or seventeen years ago.

Q. There is nothing mysterious about it. You have an issue to decide here: Are they established guilty under the evidence, or are they innocent of this murder charge? Do you understand?

A. I do understand.

Q. Will you accord to these defendants every law of the land that the Judge says they should have?

A. Yes.

Q. Burden of proof and so forth?

A. All of them.

Q. If, after you hear all of the evidence in the case, if then you entertain a reasonable doubt about any one of them, give them the benefit of it. Will you do that?

A. Yes.

Q. On the other hand, after you hear everything that Judge O'Dwyer presents to this Court and jury in connection with the Rosen murder case, if you are satisfied beyond a reasonable doubt that they are three guilty men, three of the group who played a part in the commission of this murder, will you say so in your verdict?

A. I shall.

[fol. 2767] Q. Is there anything that could stop you from saying that?

A. Nothing.

By Mr. Cuff:

Q. Mr. Conaty, by the same token, if after you hear all of the evidence and receive the instructions on the law from His Honor, after discussing it with your fellow jurors, you are satisfied that there is a reasonable doubt as to the guilt of the defendants or any one of them, will you have the fortitude and courage to reflect that in your verdict, to report that in your verdict of Not Guilty?

A. I shall.

Q. And if you do entertain such a reasonable doubt as I have described, one that is based upon the evidence or lack

of evidence, and his Honor should instruct you, as I think he will, that whenever a juror makes up his mind, after carefully considering the evidence and discussing with his fellow jurors, that he is in doubt or has any reasonable doubt as to the guilt of the defendant, that he must, it is his bounden duty to reflect that by voting "Not Guilty," will you do that?

A. I shall.

Q. You appreciate, do you not, that you are not responsible to any individual for your verdict in this case; is that right?

A. That is right.

Q. And that you owe the same duty, the same obligation, to each side in this case, that is to decide this case fairly on the evidence as you view it. That is true, is that right?

A. That's right.

[fol. 2768] Q. Might I ask, your office is here on Montague Street, is it not?

A. Court and Montague.

Q. Is that the Aetna Casualty & Surety Company?

A. It is.

Q. Have you ever discussed this case or any of its aspects with any of the people in the office of any District Attorneys?

A. I have not.

Q. And I do not know whether anybody asked you, but I should like to know whether you have read any of the articles that have appeared in any of the papers about the case or about the defendants or any of them.

A. When you say an article, do you mean a syndicated article?

Q. I mean the news items.

A. I have read a few news items, but not as a continued proposition.

Q. I appreciate that. In other words, you mean you did not follow it out with any acute interest?

A. That is correct.

Q. So as to look for it from day to day, but you did read news items and the articles as they appeared from day to day as part of your daily reading in the newspaper?

A. No, I did not.

Q. How many papers would you say you read about this case or the defendants?

A. After reading the first or second news items in one of the papers that I read, I decided to refrain from it.

Q. Was that before you were called?

A. Oh, yes.

Q. And you did not know then that you were going to be summoned on this panel?

A. That is right.

[fol. 2769] Q. Did you read any of the articles in the *Mirror*?

A. I did not.

Q. You do not read the *Mirror*?

A. No, sir.

Q. Now, as the result of that reading was there any impression formed in your mind?

A. Only the impression that I did not want to continue reading them.

Q. Was there any impression about these defendants that was adverse to them?

A. No, it was the subject-matter.

Q. You did not want to read about it at all. And as you sit here now, can you give me the assurance that if you are selected you will be able to, despite anything you have read, accord to the defendants on trial here to the fullest extent the benefit of the presumption of innocence which the law says must be given to every defendant? You will do that?

A. I will do that.

Q. You appreciate that that is just as much a part of our law as any other part of the Penal Law of the State of New York, do you?

A. I do understand.

Q. And you are in favor, of course, of the enforcement of all law?

A. I am.

Q. And do you also believe that you can, with courage and fortitude consider this evidence under the rules that His Honor will give you for considering the evidence and decide it fairly and squarely as between The People on the one hand and the defendants on the other?

A. I can.

[fol. 2770] Q. Mr. Turkus has referred to accomplice testimony. I do not want to waste much time about it. I assume you know what an accomplice is?

A. Yes, sir.

Q. Have you ever served on a jury before?

A. Yes, sir.

Q. In a criminal case?

A. Yes, sir.

Q. How long ago?

A. Sixteen years ago.

Q. Since that time you have not been called on a criminal case?

A. I have been called many times, three or four times a year.

Q. You have not served? Have you been on the special panel all that time?

A. Not a special panel. Just prior to '26 or '27—I would not be positive of it, it may have gone back a little further than that. When I said sixteen or seventeen years, it might have gone a little further than that. Judge Dike was sitting.

Q. Your name is familiar to me. Do you recall ever being called on any panel at a time when I was an Assistant District Attorney trying cases in Judge Dodd's office? I know your name is very familiar to me.

A. I have been around a long time.

Q. But you don't recall being on a panel?

A. I could have been, Mr. Cuff, but I don't recall.

Q. In any event, have you been recently called as a member of the special panel?

A. I was called this spring.

Q. And did you come to court?

A. Yes, sir.

Q. Did you reach the jury box, I mean to be examined? [fol. 2771] A. There have been so many of these cases—just give me a chance.

Q. Take your time.

A. The last case I think Judge Leibowitz was sitting and I think that we were sworn in the chair. I think on that particular case I was excused with the consent of both sides and with the Court's consent, by reason of the fact that my brother had previously qualified on the same jury ahead of me, and I did not ask—he was not asked whether or not he would be embarrassed if I sat on the jury.

Q. Was Mr. Turkus the prosecutor in that case?

A. No, he was not.

Q. Do you remember the name of the prosecutor?
A. No, I would not. It was not Heffernan.

Mr. Turkus: It may have been McGough.
The Talesman: He had a cultured voice.

Q. Mr. Conaty, on any of the other panels where you received a summons were you examined in the Jury box? I am leaving out this last one before Judge Leibowitz.
A. Yes, in many of them.
Q. And in any of those other cases were any of the lawyers who are here today either for the People or for the defendants involved that you can recall?
A. Possibly Mr. Barshay, but I think he was the only one.
Q. As the result of all of those calls, I am sure they did not leave anything in your mind that would prevent you from being absolutely fair and being able to carry out in full your obligation that you would assume when you take [fol. 2772] your oath as a juror if you are selected?
A. Certainly not.
Q. Referring to the accomplices, I am not going to waste much time trying to talk about law, but if His Honor tells you that when an accomplice testifies in a case and you come to consider the evidence of that accomplice, that you must regard it and weigh it with the mental attitude of suspicion, that you must accept it with care and caution, will you do that?
A. I shall do it.
Q. And if it shall develop during the course of the trial that the accomplice is a man of depraved character, who has committed numerous crimes, will you consider that in weighing his credibility, or his ability in your mind to tell the truth in any case or in this case? Will you do that?
A. I shall.
Q. You understand, do you not, Mr. Conaty, that no defendant can be convicted of any crime upon the testimony of an accomplice alone?
A. I understand that.
Q. You know that the rule of law is that before there can be a conviction on the testimony of an accomplice there must be independent evidence, and I mean by that evidence coming from someone who is not an accomplice, which you believe and which tends to connect the defendants with the commission of the crime and if his Honor shall charge that,

will you see that that rule of law is adopted and applied to the evidence so far as you are concerned when you are discussing it in the jury room?

A. I shall.

[fol. 2773] Q. As to any witness who may be called, if it should develop that the witness or witnesses who are relied upon for this independent evidence sought to be used as corroborating the accomplice, if it should develop that those witnesses or that witness has committed murder many times, perjury, extortion, and almost every other crime mentioned in the law, and His Honor tells you that it is your duty to take into account the character of that witness as thus shown and to weigh his evidence with great care, caution, and suspicion, will you do it?

A. I will.

Q. You appreciate, do you not, Mr. Conaty, that where there is testimony by men of that type, men whose characters are utterly depraved, that you may find a reasonable doubt based upon the type and character of witnesses of that kind? Is that the fact? Maybe my question is a little complicated.

Mr. Turkus: I object to that.

Mr. Cuff: I withdraw it.

Q. If the witnesses, including the accomplice and corroborating witness, are men of depraved character, that you find unworthy of belief, and that raises a reasonable doubt in your mind as to the guilt of the defendants or any one of them, will you reflect that?

A. You are asking two questions, I think Mr. Cuff.

Q. No, just one. There are two classes of witness-.

Mr. Turkus: I am going to object to it. That is a legal question.

[fol. 2774] By the Court:

Q. Suppose you put it this way: Mr. Conaty, you are a practical man and a man of wide experience. You deal with people every day, and you are accustomed to judging whether people tell the truth or not. Will you take into consideration anything and everything that has to bear with the credibility of a witness?

A. I shall, your Honor.

Q. Including his criminal career, the fact that he is a criminal; is that one of the elements you will take into consideration?

A. Yes, that is one of the elements.

Q. And if he has been convicted, the fact of previous conviction?

A. That will be another one.

Q. Anything and everything?

A. Yes, sir.

Q. That makes common sense in determining if the man tells the truth?

A. That is right.

By Mr. Cuff:

Q. Now may I ask this question as supplementing what his Honor asked: Let us assume that it develops on the trial that a witness or witnesses admit the commission of many murders for which they have not been convicted. Will you take that into consideration too?

A. Yes, because I think that is one of the elements to test a man's character and believability.

Q. That is right; that is a perfect answer. And my question before was a little long, but it meant just this: That I am going to ask you simply now: If that type of witness [fol. 2775] and testimony raises a reasonable doubt in your mind, will you reflect it in your vote? If the character of the witness?

A. No, Mr. Cuff, I am not getting you right. Perhaps their credibility might be tested or perhaps weighed with care and caution, as you said.

Q. That is right.

A. Just because of that, should not raise in my mind a reasonable doubt, because the witnesses are a type that I would have to go to the extreme to weigh.

Q. I don't mean that. I mean if, after considering that they testified to and then considering their character, their depraved character, there arises in your mind a reasonable doubt as to the truth of their testimony, will you reflect that in your verdict?

A. Yes.

Q. I may not have made myself very clear, but that is just what I meant. You appreciate, do you not, that your responsibility when you take an oath as a juror in a crimi-

nal case is to weigh the evidence carefully, discuss it reasonably with your fellow jurors, and then to reflect in your vote your conscientious view of the evidence as to guilt or innocence; is that right?

A. Yes.

Q. And if you arrive at the conclusion, after giving all that consideration that I referred to and discussing with your fellow jurors that there is a reasonable doubt as to the guilt of the defendants or any of them, can I rely upon your assurance that you have the courage and the fortitude [fol. 2776] to abide by that determination until such time as you are convinced by reasonable argument based upon the evidence in the case, or the lack of it, that you are wrong?

A. Yes, you have that assurance.

Mr. Cuff: Thank you.

By Mr. Fischbein:

Q. Mr. Conaty, when was the last time that you were questioned other than the time you were questioned before his Honor Sam Leibowitz?

A. Three months or four months.

Q. Was it during the time that Judge O'Dwyer or after the time Judge O'Dwyer became the District Attorney of this county?

A. I think it must have been.

Q. It was after he became District Attorney?

A. After he became District Attorney.

Q. Did you ever hear mentioned the names of Maione or Abbandando during the time that you were in the courtroom while other jurors were being questioned?

A. No, sir.

Q. And you say that you read certain newspaper articles, but you did not follow the syndicated articles, is that correct?

A. That is correct.

Q. What newspapers have you been reading those articles in?

A. I read the *Times* in the morning, *Sun* and *Eagle* at night.

Q. And you read the *Daily Eagle* or the Brooklyn *Daily Eagle* regularly?

A. I do.

Q. And have you followed with interest any of the work [fol. 2777] of Judge O'Dwyer?

A. Only in a general way.

Q. And you, of course, realize and appreciate the fact that these three defendants are entitled to a fair and impartial jury of their peers?

A. I do understand.

Q. And you also appreciate the fact that even if a person has the slightest doubt in their mind as to their ability to be a fair and impartial juror, they should tell us that?

A. That is right.

Q. And there is no law that could compel any man to serve if he has any sort of a doubt as to his ability to render a fair and impartial verdict on the evidence in this case, uninfluenced by any bias or prejudice or any sympathy?

A. I understand.

Q. That is right, too. And by reading of these articles you say that in a general way you got a general impression or formed some general idea as to the defendants or any of the elements of this case?

A. I think I was more specific than that. I said it did not take me long to find out that it was a subject-matter I did not care to continue reading.

Q. Was that because you expected to become a juror in this case?

A. That did contribute to it.

Q. That was one of the reasons?

A. Yes.

Q. Will you tell me when you stopped reading these articles?

A. Shortly after they appeared.

Q. In this case?

A. In this case.

[fol. 2778] Q. And you appeared, I believe, on Monday?

A. Tuesday.

Q. And you say that shortly after you appeared?

A. No, I did not; I said after they appeared, the articles.

Q. In other words, after the articles started to appear in the newspapers, you read a few articles, then you stopped reading them?

A. That is right.

By the Court:

Q. Was that because you knew you were on the special panel and you knew you might be called?

A. No, not alone, your Honor. That did contribute to it, but it was because I don't care to read subjects of this kind. It is very discouraging home.

Q. Do you belong to any man's club?

A. I do not, sir, not as such, I mean not as a men's club of any church. I belong to a men's club.

Q. That is Holy Cross, isn't it?

A. No, St. Francis of Assisi.

Q. I think you are at Holy Cross parish.

A. No, I am on this side of it. I am north of it. I am nearer Maple Street than Midwood.

Q. You are near Rogers Avenue?

A. It is nearer Bedford; it is between Bedford and Rogers, but it is one door east of Bedford.

Q. Then you must be on the north.

A. Northeast.

Q. On the northeast side of the street.

A. On the north side of Midwood Street.

[fol. 2779] Q. But nothing has been discussed in connection with Judge O'Dwyer's work at any of those meetings at St. Francis of Assisi?

A. I cannot answer that because I have not attended any of them.

Q. You have not heard any of them?

A. I have heard nothing.

Q. Do you know Mr. Kopf?

A. I do not know Mr. Kopf, no.

Mr. Fischbein: That is all.

Mr. Turkus: Satisfactory to the People of the State.

Mr. Climenko: Challenge peremptorily.

(The following talesmen were called and examined: Frank J. Melke, of 386 Bergen Street, and Charles D. Hertz, of 1121 Lafayette Avenue.)

By Mr. Turkus:

Q. Mr. Melke, were you in another case where I was prosecutor?

A. That is right.

Q. You gave me a response that required a challenge for cause?

A. That is right.

Q. And that was sustained by Judge Taylor?

A. Yes, sir.

Mr. Turkus: This juror was in another case that I tried. The response that he gave required a challenge for cause, which was sustained by your Honor.

The Court: I cannot be expected to remember the details of that challenge.

Mr. Turkus: I don't want anything said that is going to [fol. 2780] make any trouble. Excuse me; I think it was Judge Fitzgerald who sustained the challenge.

The Talesman: Last September.

The Court: That has nothing to do with this.

Mr. Turkus: If you do not want to entertain a challenge for cause, I will exercise a peremptory. He cannot serve.

The Court: Do you know the reason? Do you remember it?

Mr. Turkus: Sure.

The Court: Has it anything to do with this case?

Mr. Turkus: Absolutely.

The Court: All right; it is up to you.

Mr. Turkus: I don't care how you count it, whether it is cause or peremptory.

The Court: I will count it against you.

Mr. Turkus: All right, fine.

The Court: Call another gentleman.

(Carl M. Gilt, of 108 East 39th Street, was called and took Seat No. 2 as an alternate juror.)

By Mr. Turkus:

Q. Mr. Hertz, do you live at 1121 Lafayette Avenue?

A. That is so.

Q. What do they call that section?

A. Bushwick.

Q. Are you in the investment business?

A. That is right, investment counsel.

Q. In other words, you counsel people on securities and [fol. 2781] bonds?

A. That is correct.

Q. Are you in business for yourself?
A. That is correct.
Q. Have you been in this business for years?
A. Five years.
Q. Prior to that what was your occupation?
A. Worked for a brokerage house.
Q. What was the name?
A. E. A. Pierce & Company.
Q. Are they still in business?
A. Consolidation.

By the Court:

Q. Where is your office?
A. 1121 Lafayette Avenue, my home.
Q. At your home?
A. That is correct.
Q. You are not downtown?
A. No, sir, my home.
Q. You are near what avenue?
A. Lafayette Avenue between Broadway and Bushwick.
Q. You are near the hospital?
A. Yes. Yes.
Q. The hospital is north of you and the Episcopal Church is south of you?
A. North.
Q. North, too.

By Mr. Turkus:

Q. Mr. Hertz, have you been called for jury service since Judge O'Dwyer was District Attorney?
A. Yes, several times.
Q. And you reached the box, did you not?
A. In the Halpin case I was challenged by Assistant District Attorney Cohen, because he had been a customer in one of the concerns where I was employed, one of the brokerage houses. That was in 1929, and for that reason, why, he excused me.
[fol. 2782] Q. And were you in another panel in another case?
A. Oh, yes.
Mr. Fischbein: Your Honor, will the Court instruct this juror not to mention the name of the case?
The Court: Yes.

Q. Were you impaneled as a juror in another case?

A. Yes, sir.

Q. And were you examined by the District Attorney and counsel for the defense?

A. No, I did not get to the box.

By the Court:

Q. Mr. Hertz, have you an office there or is that just your home?

A. It is my residence and office, for the last twenty-eight years.

Q. Have you mortgage investor broker?

A. No, securities and bonds.

Q. I was wondering how you get customers.

A. I am an investment counselor in an advisory capacity.

Q. Have you a sign out?

A. No. I have my own clientele over a number of years.

Q. You mean that people you know come to your home?

A. Private clients; that is correct.

Q. And you attend to investments for them?

A. That is correct.

Q. Have you a business card?

A. I don't think I have one with me. I might have. I have my own personal card, but I have not got a business card with me.

[fol. 2783] Q. I am trying to figure out, because you are not in the financial district. Is your method of business to advise as to speculations on a commission basis?

A. On a fee.

Q. That is, if there is a profit you get a part of it?

A. Yes, sir.

Q. And that applies to both listed and unlisted securities?

A. That is correct.

Q. New issues?

A. Sometimes.

Q. Securities listed on both boards?

A. On the Curb and on the Stock Exchange mostly.

Q. Lafayette Avenue between Broadway and Bushwick, that is a street of private homes, isn't it?

A. One or two apartments. Majority of them are private homes.

Q. Do you occupy a private home?

A. I own a private home for the last twenty-eight years, my own home.

Q. I am trying to place the block. Aren't those a number of three-story, frame fronts?

A. That is correct.

Q. With bay windows that come out to a point?

A. There is one or two on the block, one or two, not more.

Q. And the Episcopal Church is to the left on the north?

A. That is right.

Q. On Bushwick Avenue?

A. That is right.

Q. And the late Mayor Hylan lived very close?

A. Two blocks away.

Q. On Bushwick Avenue?

A. That is correct.

[fol. 2784] Q. On the west side of the street. And if you go far enough north of Bushwick Avenue you find a brewery. I was thinking of the Frank Brewery.

By Mr. Turkus:

Q. Mr. Hertz, were you on a jury panel in the spring of this year?

A. Yes.

Q. Did you reach the jury box?

A. No.

Q. Do you recall who the District Attorney was in that case?

A. Cohen was the District Attorney in one, and I think Mr. Barshay in the other.

Q. Do you know him?

A. Only from court. Weren't you the attorney in the Hicks case?

Mr. Barshay: No.

Q. Have you any prejudice in this case one way or the other?

A. To be honest with you, I have.

Q. Is it a prejudice that inures to the detriment of the defendants?

A. I imagine so.

Q. You see, defendants, no matter who they are, are entitled to have a jury that is going to deal with their case

fairly and squarely. If you have a prejudice against them, let me know, and we will know what to do.

A. I have a prejudice that I don't think can be removed.

Mr. Barshay: Challenge the juror, to save time.

CHARLES D. HERTZ, of 1121 Lafayette Avenue, Brooklyn, New York, being duly sworn, testified as follows:

[fol. 2785] By Mr. Barshay:

Q. When questioned by Mr. Turkus, you made certain answers. Now, under oath, sir, will you make the same answers?

A. Yes, sir.

Mr. Barshay: That is all.

The Court: I did not hear those answers.

Mr. Turkus: He said he had a prejudice against the defendants which he could not set aside.

Mr. Cuff: Could not be removed.

The Court: Sustained.

Mr. Turkus: May we take another one?

The Court: No.

By Mr. Turkus:

Q. Mr. Gilt, you are an electrical engineer?

A. Yes.

Q. Employed by yourself or some utility?

A. Consolidated Edison.

Q. I take it you have been with them a number of years?

A. Five years.

Q. May I go along with the understanding that engineering has been your profession since you have been employed?

A. That is right.

Q. You live in East 39th Street. That is Flatbush?

A. Vanderveer Park section.

Q. You heard questions I addressed to the other talesmen about the garment industry, clothing truckers, Brownsville-

[fol. 2786] East New York, Brooklyn waterfront?

A. Yes.

Q. Anything I should know about any possible contact you have there?

By the Court:

Q. What concern are you with, Mr. Gilt?
A. Consolidated Edison.
Q. How long have you been with them?
A. About five years. Prior to that I was with the Brooklyn Edison.
Q. How long have you been with the Brooklyn Edison?
A. About fourteen years.
Q. You live not far from the Kings County Hospital?
A. Quite a long ways. I am near the new Brooklyn College. Between Glenwood and H.
Q. I must have the wrong address. What address are you?
A. 1008 East 39th Street.
Q. I have 108. You live in Vanderveer Park?
A. That is right.
Q. Near Glenwood Road?
A. Between Glenwood and H.

By Mr. Turkus:

Q. To make this very snappy, Mr. Gilt, do you understand that part of the testimony in this case will come from accomplices?
A. Yes.
Q. Have you understood from the instructions given by the lawyers that you cannot have a conviction upon unsupported or uncorroborated testimony of an accomplice?
A. Yes.
[fol. 2787] Q. Do you have any bias or prejudice against a case which includes the testimony of an accomplice, or against a prosecutor for employing it in the prosecution?
A. No, sir.
Q. Will you use common sense and understanding to arrive at the facts in this murder case?
A. Yes, sir.
Q. Do you understand that you may not meet people in this room that you ordinarily meet in every-day business?

By the Court:

Q. You do not belong to St. Stephens?
A. What is that?
Q. The club of St. Stephens?
A. No, I do not.

By Mr. Turkus:

Q. Do you understand that there are various tests that you apply, tests that the Judge gives you and tests that you use your common sense about to see whether a witness tells the truth; do you understand that?

A. Yes.

Q. With respect to an accomplice, because he himself was one of the perpetrators of the crime, the law goes further and gives you the tests of care, caution and suspicion. The Judge will tell you about that. Will you keep your mental faculties alert to the effect that every test you apply to an accomplice witness is applied to test is he speaking the truth, not only about his own participation but the part that they played in the commission of the alleged murder; do you understand that?

A. Yes.

Q. Is there any reason now, as to why you cannot do that [fol. 2788] with common sense and understanding?

A. Not that I know of.

Q. Is there anything I should know as prosecutor about your ability to be a just and conscientious juror?

A. Not that I know of.

Q. In this case, if after you hear all the evidence, if then you have a reasonable doubt about the guilt of these defendants or any one of them, give him the benefit of it, or whoever you have the reasonable doubt about. Will you do that?

A. Yes.

Q. On the other hand, after you hear what Judge O'Dwyer presents in this court-room and you are satisfied that these three men in a group or combination together with others killed the victim named in this indictment and you believe it beyond a reasonable doubt, will you say it in your verdict without fear or hesitation?

A. Yes, sir.

By Mr. Fischbein:

Q. Mr. Gilt, have you read any newspaper accounts with respect to this case?

A. Very little.

Q. Or with respect to any one of the defendants?

A. No.

Q. By reason of the reading of these newspapers have you gained any sort of impression or opinion with reference to this case?

A. No, sir.

Q. May I know what newspaper you read generally?

A. *Times* and *Sun* and to a small extent *Eagle*.

Q. When you say to a small extent the *Eagle*, do you read it two or three times a week?

[fol. 2789] A. We take it regularly, but I don't read it for news items.

Q. In other words, the news items that appeared in respect to this case in the *Eagle*——

A. I don't recall that I read any of them.

Q. You, of course, appreciate, Mr. Gilt, that these defendants are entitled to twelve men or fourteen men, two alternates, who will fairly and honestly decide the issues in this case on the evidence?

A. Yes, sir.

Q. And these twelve men, of course, must be convinced beyond a reasonable doubt only as to the guilt, not the innocence, only as to the guilt of the defendants or any one of them, before they can vote for a conviction. You appreciate that? You, of course, being a college man, I take it, you know that a man who has any sort of an opinion, regardless of how slight the opinion may be, that opinion may subconsciously creep into the deliberations, may interfere with the calm, cool, deliberations of the juror after all the evidence has been submitted. That is true, is it not? With respect to the slight reading that you have indulged in in regards to this case, have you any opinion at all which may in any way at all interfere with your calm, cool deliberation of the facts in this case?

A. I believe not.

Q. Mr. Turkus spoke about accomplice testimony. You, of course, know what an accomplice is?

A. I do.

Q. In other words, some man is going to come in here and [fol. 2790] say, "I am the murderer," or, "I participated in the killing of the man mentioned in the indictment." Will you take that one fact alone into consideration, the fact that he admits under oath that he is a murderer? Would you take that fact into consideration in determining whether or

not that man speaks the truth with respect to people that he seeks to involve?

A. Yes.

Q. In his testimony. I have your word as to that?

A. Yes.

Q. And as you go down the line of the years, of his background, you find out he has committed murder after murder, and has committed perjury time and time again, and he has committed larcenies and burglaries and robberies with a gun—will you take those facts into consideration?

A. Yes.

Q. And with each vicious act of his life you will feel that his testimony should be more carefully scrutinized than the testimony of any other witness who may take the stand in this case?

A. Yes.

Q. The worse a man is, the worse his background may be, the more you will carefully weigh the testimony that that man offers to you, which he is expecting you to accept as evidence in this case. Will you not do that?

A. Yes.

Q. His Honor will tell you that on the uncorroborated testimony of an accomplice you cannot convict. You will follow that rule of law, I take it?

A. Yes.

Q. And of course, assuming, for the sake of argument, [fol. 2791] that you believe, after listening to the testimony of a man who says, "I am a murderer, or one of the murderers of Joseph Rosen," assuming you believe that witness, and, that witness being an accomplice, and assuming that the other evidence that is introduced to corroborate the testimony of the accomplice by way of the other evidence that is required by law, and you don't believe that corroborating evidence, and his Honor will tell you that if you don't believe the corroborating evidence which tends to connect the defendants or any one of them with the commission of the crime, you must acquit, even if you believe the testimony of the accomplice, will you have the courage to do just that?

A. Yes.

Q. Is there anything that has happened in the court-room since you have been here—and I believe you have been here since Tuesday——

A. Yes, sir.

Q. —which would interfere with your calm and cool deliberation of the facts in this case?

A. Not that I know of.

Q. You realize, do you not, Mr. Gilt, the fact that you are the 13th juror. You are not superstitious, are you?

A. No.

Q. I did not believe you were. But, you know, sometimes it has happened, it has happened in the past when the 13th juror move right into the box and becomes one of the jurors, he is called upon to deliberate upon the facts in this case, and that is why we are just as careful with the selection of [fol. 2792] the 13th and 14th jurors as we are with any other juror who has qualified up to the present time. By reason of having been in this court-room, has anything occurred which may in the slightest way interfere with your cool and calm deliberation of the facts in this case?

A. Not that I know of.

Q. You realize and appreciate the fact that no juror should permit prejudice to enter into his verdict; is that correct?

A. Yes.

Q. And you will agree with me, will you not, that we must as jurors, disregard any attempt to influence the jurors' verdict by the use of any innuendoes or any gesture which may create a prejudicial atmosphere in the court-room or prejudice the minds of the juror?

Mr. Turkus: That is objected to.

Mr. Fischbein: That is only a preamble to what I expect to lead up to, Mr. Turkus. I am going to lead up to it now.

Q. The fact of Mr. Turkus, by a gesture of his thumb and refers to the defendants as "they," that would not be part of the testimony to be considered in this case?

Mr. Turkus: Not the thumb.

Mr. Fischbein: All right.

Q. I have your word, have I not, Mr. Gilt, that if you are selected, you will unhesitatingly, if convinced only beyond a reasonable doubt, bring in a verdict of Guilty?

A. That is right.

[fol. 2793] Q. And, by the same token, if the proof offered to you, if after separating the wheat from the chaff, so to speak, in this case, and you come down to the bone of the

testimony which you consider is the evidence, you find that the proof does not persuade your mind beyond a reasonable doubt as to the guilt of any one of these defendants, you would not hesitate to acquit?

A. No, sir.

By Mr. Cuff:

Q. Mr. Gilt, if the corroborating evidence offered by the prosecution in this case—and by that I mean, I think you know now that independent evidence that does not come from anyone who is an accomplice—you understand that, do you?

A. Yes.

Q. If that corroborating evidence comes from witnesses whose character is proved out of their own mouths to be depraved to the last degree, if it is shown that they have committed murders, robberies, burglaries, extortion, and even perjury, that is, swearing falsely in a court of record under oath, and if, by reason of that depraved character you have doubt about their ability to tell the truth in this case, and his Honor should instruct you that it is your duty to give the defendant or the defendants the benefit of that doubt, and to acquit them, will you have any hesitation in doing so?

A. Say that again.

Mr. Turkus: That is a long, complicated, legal question.

Mr. Cuff: It is not half as long as some that you ask.

Mr. Turkus: All right, I am sorry.

[fol. 2794] Mr. Cuff: If the witness does not understand it, I will try to reframe it so as to make it clear. I won't use that preamble again that I used first, but I say:

Q. If the corroborating evidence—you know what I mean by that?

A. Yes.

Q. —comes from men of utterly depraved character, who have admittde out of their own mouths that they are guilty of many murders, that they have committed robbery, burglary, extortion and even perjury, that in swearing falsely in another court of record under oath, and that raises in your mind a doubt as to their ability to tell the truth, or that they are telling the truth in this case, and his Honor

should instruct you that in that case it is your bounden duty to acquit, will you hesitate?

Mr. Turkus: That is objectionable. That is not a proper question.

By the Court:

Q. Will you, in event of the Court giving you instruction to that or any other effect, follow the instruction of the Court?

A. I will follow the instruction of the Court.

By Mr. Cuff:

Q. Now, Mister, I am going to ask you again: If that sort of testimony so impresses you that you cannot believe it, and his Honor should instruct you that it is your duty to acquit; will you do so?

A. Yes.

[fol. 2795] Q. That is all I wanted to find out, and I think that is what my question intended to convey.

You were asked by Mr. Turkus whether you had, if you were convinced of the guilt of these defendants beyond a reasonable doubt, whether you would without hesitation, fear, or reluctance, return a verdict of guilty. On the other hand, if you are not satisfied of their guilt or the guilt of any one of them beyond a reasonable doubt, that is, if you have a doubt based upon the evidence or the lack of it as to the guilt of any one or all three of these defendants, do you have the courage, the fortitude, and the will power to reflect that in a "Not guilty" verdict?

A. Yes, sir.

Q. I understood you had no impression about this case from any reading; is that right?

A. That is right.

Q. And you know what the presumption of innocence is, by this time, I believe?

A. I believe so.

Q. You do know, too, do you not, that it is a very, very substantial right of every defendant in a criminal case under our law; is that right?

A. Yes.

Q. And that if his Honor so instructs you, as I am sure he will, that it is your duty, and every juror's, to give to

each one of these defendants the full benefit of that presumption of innocence, that substantial right, will you do so?

A. I will.

Q. And will you so regard these defendants from the [fol. 2796] time you are sworn as a juror, throughout the trial, taking the evidence while you are deliberating on it in your jury room and until twelve of you agree that guilt has been established beyond a reasonable doubt—will you do that?

A. Yes.

Q. Because I think his Honor will charge you that is the law of this state and that is a part of our Penal Law, our Code of Criminal Procedure, under which we try these criminal cases. You realize, do you not, Mr. Gilt, that each juror must decide for himself, after weighing the evidence, all the facts and circumstances connected with the witness who gives the testimony, after discussing it reasonable with his fellow jurors, that it is the individual obligation of each juror to make up for himself, under his oath, his mind as to what is the truth? You realize that?

A. Yes.

Q. If after giving that consideration and after that discussion and after applying the rules of law that his Honor will give you for your guidance, you are satisfied that there is a reasonable doubt as to the guilt of a defendant or all three defendants, and if his Honor should charge you in that event that you must reflect that in a "Not guilty" verdict despite the number that may be opposed to you, despite the lateness of hour, despite any other consideration except the evidence in this case, will you do so?

A. Yes.

Q. And you will not be swayed from that decision by any consideration, fear, or circumstance except such as you [fol. 2797] find in the evidence in this case that you believe; is that right?

A. Yes.

Q. And I have your assurance on that solemnly?

A. Yes.

Mr. Cuff: Thank you.

By Mr. Climenko:

Q. I understand that you work for the Consolidated Edison?

A. That is right.

Q. And I heard that it was in the capacity as an engineer, but I do not know just what that means. Do you map out projects for them?

A. I have the designing and planning for the present distribution system.

Q. Is that the industrial?

A. Generally in industrial system, our own system.

Q. Are you the department head?

A. Borough head.

Q. Were you to serve here, that would not cause any embarrassment to your company, even though you are so well staffed?

A. I have a good assistant.

Q. The work could go on, even though you hold that kind of position?

A. It has to.

Q. You were asked some question about your reading as to this case, and I understand it has been purely casual; is that right?

A. That is correct.

Q. But of necessity you did see something in the papers somewhere, sometime about this case or about some of the people named in this indictment; is that true?

A. Yes.

[fol. 2798] Q. And that would be in one of the regular newspapers, because you do not read the tabloids; is that right?

A. Yes.

Q. Even though you may have seen several such articles, I have the impression from what you told me other lawyers who examined you that you were not sufficiently interested in those articles to read them through; is that correct?

A. I think that is correct.

Q. Whatever is the fact.

A. I cannot recall reading any articles.

Q. You understand that if in any sense questions are deemed personal, I cannot apologize to you for making them, because it hapens to be my duty, you understand?

A. Yes.

Q. Is it your recollection that you did not read these articles through?

A. That is my recollection.

Q. Because at no time when they came to your attention, so to speak, at no time were you sufficiently interested in the story that they purported to tell?

A. That is right.

Q. And nothing that you have read has made so clear an impression at the time, or do you have so clear a recollection of anything you may have seen as to have caused you to form an impression about this case or about any of the persons now in this indictment?

A. That is correct.

Q. That is clear? So that so far as reading is concerned, you have no preconceived notion?

Mr. Turkus: Objected to. That has been answered three [fol. 2799] times now.

Mr. Climenko: Your Honor, I am trying to do it in an omnibus form.

The Court: Overruled.

Q. You have no impression?

A. No.

Q. I ask these questions on behalf of my client, Mr. Louis Buchalter. You have heard his name before, have you not?

A. Yes.

Q. I am distinguishing now between your reading and what you may have heard. Have you heard his name before, before you came into this court?

A. No, not before I came into court.

Q. You never heard his name before?

A. Not that I know of.

Q. So now I may take it that at no time have you either yourself participated in a conversation in which his name was mentioned, nor, if you did not participate, did you overhear such a conversation; is that correct?

A. That is correct.

Q. If there is by any chance any inaccuracy about that, I can form the impression that the conversation that you might have heard was of such slight consequence that it made no impression upon you whatsoever. That is clear?

A. Yes.

Q. So neither by reading nor through conversation nor through listening to a conversation do you come here,—you got your notice to appear in this court-room,—with any preconceived notion about the case or any of the defendants?

A. That is correct.

[fol. 2800] Q. You realize, of course, even though you don't have an impression from any of those sources, that this is a case which, in a sense, received public attention—you realize that?

A. Yes.

Q. And do you realize also that the District Attorney of this county is a gentleman who at the present time is the recipient of a great deal of public attention by reason of the circumstance that his name is brought to the public in a capacity other than that of his holding that office? You know that, don't you?

A. Yes.

Q. And Mr. Turkus has referred to the possibility of the submission of evidence in this court-room by the District Attorney, whom he names as Judge O'Dwyer. You heard that?

A. Yes.

Q. So that the District Attorney is the District Attorney, he holds the title of Judge by reason of the fact that he once was a judge and he is a candidate of his party for the high position of Mayor of this great city. You know all of those things?

A. Yes.

Q. You realize also, do you not, that if you were to act as a juror here you would have to deal impartially as between the defendants on the one hand and the District Attorney on the other; is that correct?

A. That is correct.

Q. And may I understand, without going into the details or breaking up the question, that it is your notion that in no sense are you to place upon the credibility or the be-[fol. 2801] lievability or the honesty of any witness called by the District Attorney, a larger degree of value than you would ordinarily give him, simply because, as it happens, the District Attorney at the moment is a man who holds that job, once was a judge, and now is a candidate for Mayor?

A. That is right.

Q. You understand that that has got nothing to do with the consideration by a juror of the issues in a capital case?

A. Right.

Q. And that would not for one moment enter into your consideration?

A. No.

Q. Of the merits of the honesty of the witnesses who were produced here?

A. Correct.

Q. Do you understand that? The question has been asked before. So as to finish with it once and for all: The mere fact that Mr. Turkus says that Judge O'Dwyer will call a witness does not for one instant confuse you about the integrity of the witness as contrasted with the integrity of Judge O'Dwyer; is that so?

A. That is right.

Q. Because the witness is one man and Mr. O'Dwyer is another is that right?

A. That is.

Q. And it is very clear to you that Mr. O'Dwyer does not for one moment say to you, "Take my word for it the fellow is telling the truth"?

A. That is right.

Q. So you won't be confused at all by the unusual, unique and pleasant position that the District Attorney of Kings [fol. 2802] County occupies at this moment; is that right?

A. That is right.

Q. Nor would you for a moment permit the fact that there is an impending City election on our hands to becloud your notion as a juror; is that correct?

A. That is correct.

Q. Are you acquainted with any member of the police force?

A. I just have a speaking acquaintance with a policeman on our block.

Q. I don't mean it in that sense, as perhaps you may have gathered. Do you number among your friends, those that you cherish as friends, members of the police force?

A. No.

Q. Are you acquainted with any members of the District Attorney's staff?

A. No, not that I know of.

Q. Neither here nor in New York?

A. No.

Q. Is that correct?

A. Yes.

Q. Have you at any time in the past served as a juror in a criminal case?

A. Not in a criminal case.

Q. Only in a civil case?

A. Civil case.

Q. You realize, without going into the differences, that there are differences in the duties of a juror in a civil case as contrasted with a criminal case?

A. Yes.

Q. You understand that. Now, without bringing it to your attention specifically, if you were instructed by the Court as a matter of law that under your oath as a juror you could not return a verdict of guilty unless you were satisfied of guilt as against the defendants or any of them [fol. 2803] beyond a reasonable doubt, would you have any difficulty in following that instruction of law?

A. No.

Q. In other words, if the matter were put to you the other way, would you as a juror, under your oath, would you be under an obligation as sacred as the oath itself, as sacred as the gravity of the issues which are presented in a capital case—that is not language to you, either, is it, you understand what I mean by it—that you would be under that kind of obligation to return a verdict of Not Guilty if after hearing all of the testimony and after hearing the learned and able Assistant District Attorney argue what he considers the merits of his case, if after all that you entertained a reasonable doubt about the guilt of the defendants or any of them, then as to the defendants or any of them you would be under an obligation to say "Not Guilty," would you have any difficulty in following that instruction of law?

A. No.

Q. Now, even though in this particular case you know that you are dealing with a case which has public attention, you would not have any such inability or any trace of inability to return such a verdict if you entertained such a reasonable doubt as to the guilt; is that right?

A. That is right.

Q. And you understand, do you not, that that is the approach that if after hearing everything you do entertain a doubt, a reasonable doubt based on the evidence, you must return a verdict of Not Guilty? That is the way your mind [fol. 2804] must approach the proof in this case. You have no quarrel with that, because that means that you may not as a juror sit here and anticipate or expect proof of innocence; you may not require that of the defense; is that right?

A. That is right.

Q. So far as you are able to search your own mind, you know of no disability or impediment, you have no reservation about your ability along the lines of the law as you have heard it referred to in these various questions both by Mr. Turkus and the other lawyers, you have no hesitation about your ability to act fairly, without prejudice, without sympathy, be fair as a juror in this case?

A. That is right.

Mr. Climenko: Thank you, sir.

Mr. Turkus: Satisfactory.

Mr. Fischbein: Will your Honor permit me to ask one or two more questions?

The Court: All right.

By Mr. Fischbein:

Q. In view of the fact, Mr. Gilt, that the burden of proof in a criminal case never shifts, if we as the lawyers representing Louis Capone, put in a defense of alibi, and if that alibi creates a reasonable doubt in your mind, will you resolve that doubt in favor of the defendant?

Mr. Turkus: If the Judge tells him that.

Q. Would you do that? Would you follow that instruction of law?

A. A reasonable doubt as to guilt?

[fol. 2805] Q. As to his guilt.

A. Yes.

Q. In other words, you would not demand of the defendant to sustain the burden of establishing to your satisfaction beyond a reasonable doubt the alibi that may or may not be interposed?

A. No.

Mr. Fischbein: That is all.

Mr. Turkus: Still satisfactory.

Mr. Barshay: Satisfactory.

The Court: Take Seat 1. (To the Clerk): Give the regular jury oath.

(Carl M. Gilt, of 108 East 39th Street, was sworn as Alternate Juror No. 1.)

(George K. Ormond, of 1190 East 34th Street, was called and examined as to his qualifications.)

By Mr. Turkus:

Q. Mr. Ormond, you live at East 34th Street?

A. Yes.

Q. That is Flatbush. You are an electrical contractor?

A. Yes.

Q. In business for yourself?

A. Yes.

Q. Do you have anything to do with Brownsville, East New York, the garment district, the clothing district, the Brooklyn waterfront?

A. No.

Q. In any way in which you earn your livelihood, do you come in contact with anybody in those industries or in those districts?

A. No.

[fol. 2806] Q. Is there anything as prosecutor that I should know about your qualification to be a fair and impartial juror?

A. No.

By the Court:

Q. Where is your place of business?

A. 1609 Flatbush Avenue.

By Mr. Turkus:

Q. Are you in business for yourself, Mr. Ormond?

A. Yes, sir.

Q. Do you know any of the lawyers in the case?

A. No.

Q. Do you know the District Attorney of the County, Judge O'Dwyer, or any member of his staff?

A. No.

Q. Do you have any bias or prejudice about accomplice testimony that I should know about?

A. No.

Q. If accepted in the case, will you use common sense and understanding in weighing the believability of an accomplice witness and of the proof that you hear in the case?

A. Yes.

By the Court:

Q. You have a retail store, too, haven't you?

A. Well, I had. I simply have desk room at the present in this other store, radio store. I have nothing to do with

the store. I had a radio shop in Newkirk Plaza. Maybe you remember the place.

Q. That is Eisenberg's?

A. I was up the street a few doors for about fifteen years.

Q. Competition drove you out?

A. Eisenberg was too much for me.

[fol. 2807] By Mr. Turkus:

Q. Do you understand it is not whether you like or dislike the accomplice; does he speak the truth about the defendants? Do you understand that is what you are here for?

A. Yes.

Q. That you are going to devote your mental faculties to find out are they guilty of this charge, or are they not? You will get the rules from the Judge, apply them to the facts in the case, use common sense and understanding, talk the case over. Is there anything I should know about your ability to be fair?

A. I don't think so.

Q. Have you served as a juror before?

A. I have.

Q. Have you been here while we went over all these discussions?

A. No, I just came in today. I was out of town.

Q. All right. You have been around for a long time. Will you use common sense in this case and do justice with your verdict in the case?

A. Yes.

Q. Give the defendants everything the law of the land says they should have. The Judge will tell you what it is, the presumption of innocence, the doctrine of reasonable doubt, the burden of proof, give them everything the law of the land says they should have. Of course, no more and no less; is that right? Give them everything they are entitled to. And if after you hear all the evidence in this case, if then you have a reasonable doubt about their guilt, come right in and say so. Will you do that?

[fol. 2808] A. Yes.

Q. Now, on the other hand, by the time all this evidence comes before you that is in this case and you hear it all and you hear the law and you talk it over with the other jurors, if then your mind tells you these are three of a group or combination that played a part in killing the victim named

in this indictment, can I count on you to come in here and say so?

A. Yes.

Q. Nothing in the world to stop you, is there?

A. No.

By Mr. Cuff:

Q. Mr. Ormond, have you ever served on a jury in a criminal case—actually served?

A. Yes.

Q. How long since the last time?

A. A year ago last August. It was just a robbery case.

Q. Any of the lawyers that are here now in that case?

A. None.

Q. As the result of anything you read or any talk you had with anybody about the defendants or this case, have you formed any impression?

A. I have not read anything about it.

Q. You do not know a thing about it?

A. Nothing.

Q. So, if you are selected, you are going to start off at scratch, you are going to be able to listen to the evidence in this case with an open mind, and with a mind that is directed toward deciding where the truth lies?

A. Yes.

Q. And I can rely on it? I understand, then, that there [fol. 2809] is nothing in the world that would sway you from serving in this case and rendering a verdict that you under your oath of office and on your conscience would regard as a just verdict; is that right?

A. Yes.

Mr. Cuff: Thank you.

By Mr. Fischbein:

Q. Mr. Ormond, I am going to ask you just one question. Do you feel that if you are accepted as a juror in this case the defendant whom I represent together with my associates, Mr. Louis Capone, could depend upon you to give him a fair and impartial trial?

A. Yes.

Q. You realize further, do you not, that once I sit down now I am not going to ask you any more questions, nor will the lawyers ever speak to you until the conclusion of the

case. Do you feel now any reluctance to serve as a juror in this case?

A. No.

Q. Is there any reason in the recesses of your mind which may interfere with your calm and cool deliberation of the facts in this case?

A. No.

Q. Have you ever served in a capital case as a juror?

A. No, I have not.

Mr. Fischbein: That is all.

By Mr. Barshay:

Q. Sir, have you read about this case?

A. No, I have not.

Q. Have you heard about it?

A. (Answer inaudible.)

[fol. 2810] Q. Have you read about the defendants?

A. No. I might have seen his name in print.

Q. You have formed no impression?

A. No.

Q. So Mr. Buchalter can leave in your hands to preserve, every legal right given to him by law?

Mr. Turkus: There is one question I am required to ask.

By Mr. Turkus:

Q. Have you any scruple, conscientious or otherwise, against capital punishment?

A. No.

Mr. Turkus: Satisfactory.

Mr. Barshay: Satisfactory.

The Court: Swear the gentleman. The same oath as the jury.

(George K. Ormond, of 1190 East 34th Street, sworn as Alternate Juror No. 2.)

The Court: The other members of the panel are excused with thanks.

(To the jury): Gentlemen, of course, there has been a great deal said about this case being a very lengthy case. It may not be as long as you are afraid it will be, but from now on, having taken the oath and in order to prevent the

jury from obtaining any impressions from outside, it will be necessary to house the jury. Instructions concerning the housing of jurors are in form which is in the possession of the captain of court attendants. That will be given to the stenographer to make a part of the record in this case. The captain of court attendants will inform you as to what those instructions are.

[fol. 2811] So far as this afternoon is concerned, those who have been chosen will have to, of course, get certain equipment from their own homes. You can take that up with the captain of the court attendants. Where it is feasible to do so, you may send home for such things as you need. Where it is necessary that you go home and pick out the things that you need, a Court officer will accompany you. This will take some time. There will be an abundance of time in which to get settled. In the meantime, you get acquainted. But I must caution you above all things, do not at any time in conversation discuss this case. Do not at any time in conversation even discuss, critically or otherwise, the procedure or anybody connected with the case. The important thing to do is to keep your brains and consciences on the evidence and give a fair and impartial verdict.

Ample and reasonable recreations will be provided, of course. You will be advised later as to what these are. If there is any difficulty in connection with the housing because it comes suddenly, then take it up through the captain of the court attendants and he, in turn, will take it up with the Court. In the meantime you may leave the box, and from now on the captain of the court attendants will take care of the jury.

Mr. Cuff: May I ask your Honor to say to the jury——

[fol. 2812] The Court: Yes.

Mr. Cuff: The fact that they are put to this inconvenience is not to be considered as against either the people or the defendants.

The Court: Not at all. It is in fairness to the defendants that your mind shall remain in its present condition. Nobody at home, no one you shall meet, nothing that you shall read, nothing that you shall hear on the radio, shall be permitted by any possible chance to have any effect on the condition of your verdict.

You may retire, gentlemen.

(The jury retired from the court-room.)

The Court: Monday morning at ten o'clock. Counsel have had a long and strenuous battle, lasting five weeks. This will allow a breathing spell for come-back, and also for the preparation of the opening addresses concerning the evidence to be presented. The Court intends from now on to see that counsel are not overtaxed. The working hours will be from 10 to 4. That will allow time for conference without the necessity of counsel going over to Manhattan to the House of Detention or to the Tombs. It will not be too great a strain on any of the defendants, and I will allow them to return to their respective institutions in time for the regular evening meal. It is important throughout the [fol. 2813] case that nobody shall become so overworked that quality of the work will be impaired.

The defendants are remanded.

Mr. Cuff: Judge, may I, now that the selection is over, ask that the wife of the defendant and his brother be permitted to see him here?

The Court: No. The Court is not a jailer. I said that repeatedly. So that it won't be sensationalized as a news set-up, they have ample opportunity to continue their visits at these institutions, and it is not necessary that they shall ask the Court to take over the duties of a jailer.

Mr. Cuff: No, they did not think that, Judge.

The Court: I am trying the case. I am not preventing them from seeing their relatives. They can see them *ad lib.* but they will see them the same as anybody else when they are under confinement.

(Whereupon an adjournment was taken to Monday, October 20, 1941, at 10:00 A. M.)

[fol. 2814] Rules and Regulations Governing the Custody of Jurors While at Hotels During the Progress of a Trial

1. All Jurors must be kept together at all times and their rooms must be so located that they may be kept segregated at all times from other guests.

2. All Room Telephone service must be discontinued while Jurors are in their rooms.

3. All urgent telephone calls for any juror must be transmitted by the Attendant in charge.

4. All packages or letters must be censored by the Attendant in Charge.

5. All urgent conversations with friends or relatives must be in the presence and hearing of the Attendant in Charge.

6. All newspapers (or magazines which are allowed by permission of the court) must be deleted of all references to the case on trial or other matter that might unduly influence the Juror.

7. Radio will be allowed only in the room set aside as a recreation room and will be under the supervision of an attendant.

8. There must be an attendant on watch at all times in the corridor of the hotel where the jurors are segregated and allow no one to enter the room of any juror unless by special permission of the Court of the Attendant in Charge. [fol. 2815] 9. All requests or complaints made by the jurors must be submitted in writing and presented to the Court.

10. No attendant will allow any extra privilege to any juror unless specifically ordered by the Court or the Chief Court Attendant.

11. Medical requirements shall be met. An attendant shall as needed accompany a juryman on visits to his own physician.

(Sgd.) John F. Lantry, Chief Clerk.

(Sgd.) Thomas F. Gannon, Chief Court Attendant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

No. [illegible]

LOUIS BUCHALTER,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

I. MAURICE WORMSER,
J. BERTRAM WOLFSON,
JESSE CLEMENTS,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

LOUIS BUCHALTER prays that a writ of certiorari issue to review the judgment of the County Court of Kings County of the State of New York entered December 2, 1941, convicting petitioner of the crime of Murder in the First Degree. On October 30, 1942, that judgment was affirmed by the Court of Appeals of New York, which is the Court of last resort of that State. Petitioner moved for a reargument in the Court of Appeals, which, on November 25, 1942, was denied.

Statement

In April, 1940, while petitioner was a prisoner of the Federal Government, incarcerated in the United States Penitentiary at Leavenworth, Kansas, serving a sentence of imprisonment for a term of fourteen years, which had been imposed upon him in the United States District Court for the Southern District of New York in December, 1939,

an indictment was returned in the County Court of the County of Kings, State of New York, wherein petitioner, with others, was charged with the murder of Joseph Rosen on September 13, 1936. In addition to the sentence which he was then serving, petitioner was under sentence for a term of thirty years to life, imposed upon him by the Court of General Sessions of the County of New York, State of New York, in March, 1940, the service of which sentence was to commence upon the expiration of the Federal sentence.

In May, 1941, petitioner was transferred from the Federal penitentiary at Leavenworth, Kansas, to the Federal Detention Headquarters in the City of New York, and thence taken into the County Court of the County of Kings for arraignment on the indictment, charging him with Murder.

Simultaneously with the announcement of the indictment against him, the prosecutor commenced the use of every available method to have him prejudged by the community in which ultimately, in September 1941, he was brought to trial. So successful were these efforts that, when the trial actually began, it was only a pretense of a trial. By September 1941, he had been characterized repeatedly in every important newspaper circulated in the City of New York as society's most vicious enemy, the arch criminal of his time, a racketeer who had extorted millions and was intent on extorting billions from the business and industrial community of New York, as the arch assassin who employed the members of a notorious group of murderers, first to kill all who opposed his unbounded predatory schemes, and then all who, however innocently, might have been witnesses of his acts of violence (see newspaper clips submitted herewith). The District Attorney permitted himself to be quoted repeatedly by the most staid of the metropolitan papers, *The Times*, *The Sun*, *The Herald-Tribune*, to the effect that he, the District Attorney, was jubilant because he had an iron clad case of murder against the

petitioner. Newspaper articles which assumed petitioner's guilt of murder as charged by the indictment, quoted the District Attorney in discussing the case. The attack on petitioner, the complete devastation of the presumption of innocence to which he was entitled even during the trial, let alone before its beginning, was carried by the prosecution to the point of releasing announcements to the press to the effect that petitioner had actually acknowledged his guilt of the crime charged in the indictment and, in order to avoid execution, was bargaining with the District Attorney to turn state's witness against men who held high office in the Governments of the City of New York and the United States.

While these attacks on petitioner were proceeding, newspaper propaganda, especially in Brooklyn, idolized the District Attorney for his attack on petitioner. These separate newspaper campaigns, one in attack upon petitioner, the other in praise of the prosecutor, reached their climax in September, 1941, when petitioner's trial began. The prosecutor had then become the Democratic candidate for the office of Mayor of the City of New York. His political opponent, the incumbent Mayor, Mr. LaGuardia, was supported by the American Labor Party, in whose membership the Amalgamated Clothing Workers' Union was an important factor. In at least one of its aspects, petitioner's trial represented an attack upon that Union. Petitioner contends here, as he contended below in the Courts of New York, that the prosecutor succeeded in creating assurance of his guilt in the minds of the community in which he was to be tried before his trial began, and that in consequence he received not a fair trial, but only a simulacrum thereof.

In an effort to obtain a fair trial, petitioner applied (R. 76 *et seq.*) to the Supreme Court of New York for a change of venue, and in support of that application submitted a few of the many hundreds of inflammatory, prejudicial articles which had been circulated against him. These, therefore, are part of the record and quick reference is

here made to some of them (the articles themselves forming a part of the record are submitted in the same photostatic forms in which they were presented at *nisi prius*). While inclusion of these excerpts will extend the length of this petition, counsel does so in the hope that the effect will be to serve the convenience of the Court.

The Sunday edition of the *New York Daily News* published April 7, 1940, printed a three-page resumé of the alleged scope of the activities of a group of professional murderers. Purporting to quote the District Attorney, the paper said:

> "All in all, O'Dwyer figures, Crime Corp. eliminated seven of the 11 witnesses against Louis (Lepke) Buchalter and Jacob (Gurrah) Shapiro in District Attorney Dewey's investigation of their racket activities."

The paper said of the crime charged in this case:

> "Joseph Rosen, slain in his Brooklyn candy store in September, 1937. Rosen had been a truck fleet operator, but was driven from business by rackets. The Lepke-Gurrah combination was said to fear his testimony in front of District Attorney Dewey and for that reason contracted to have him killed. Pittsburgh Phil Strauss and Happy Maione were arrested in this case, and soon were freed."

Much of the article purports to quote the District Attorney. It carries his disclaimer of political ambition (*sic*). At about the same time, the *News* revealed that the District Attorney had been informed by the Federal Bureau of Investigation that petitioner employed the same murder syndicate, that witnesses "delivered murder contracts from Lepke (petitioner) to Albert Anastasio, also a fugitive. 'If Workman can be induced to talk', an official said, 'both Lepke and Anastasio will die in the electric chair'." Then one month after the indictment, in May, 1940, prosecutors of both Kings County and Bronx County in metropolitan

New York began to be quoted as being certain of petitioner's guilt of many murders. On January 3, 1941, the *New York Herald-Tribune* quoted Samuel J. Foley, District Attorney of the Bronx, about the murder of one Pean: "We now have a clear picture of the entire set-up", Mr. Foley said. "I believe Lepke ordered the disposition of Orlovsky and the job was bungled. There is no doubt the murder was done on the order of the gang chieftain."

On June 4, 1940, the *Daily Mirror*, after stating that the District Attorney of Kings County was at Monticello, New York, where he had brought witnesses to testify about the murder of one Yuran, said:

> "Yuran, a wealthy dress manufacturer, whose body buried in quicklime, was found at Loch Sheldrake in April, was killed on orders of Louis (Lepke) Buchalter with whom he had been indicted in New York for industrial racketeering, authorities said."

On May 16, 1940, the *New York Times*, after referring to Mr. O'Dwyer's presence in Sullivan County at the excavation of Yuran's body, said:

> "Yuran is believed to have been slain by the murder ring at the behest of Lepke in the summer of 1938, at which time Lepke allegedly was directing a 'war of extermination' against all potential witnesses in Mr. Dewey's inquiry."

Petitioner was removed from the Federal Penitentiary at Leavenworth, to the Federal Detention Headquarters at New York City in May, 1941, pursuant to a writ *ad prosequendum* sought by the District Attorney of Kings County and consented to by the Attorney General of the United States. This was made the subject of new, completely artificial, propaganda circulated even by the most conservative elements of the press. On May 25, 1941, the *New York Sun* said:

"Reles is Taken to Hospital.

Fear of Accusing Lepke as Witness at Trial Blamed for Pleurisy Attack.

The prospect of testifying against such an underworld big shot as Louis (Lepke) Buchalter has made Brooklyn's star informer, Abe (Kid Twist) Reles, severely ill.

Reles, whose testimony has already sent four men to the death house at Sing Sing, has become so unnerved by the realization that he soon will be required to accuse Lepke in the same way that he has had to be taken to a private sanitarium in Manhattan, seriously ill of pleurisy, The New York Sun was informed today.

There can be no doubt that it was fear of facing Lepke in open court that brought on Reles's relapse, it was said. He has been suffering from a serious disease for several years and six months ago doctors gave him only two years to live. It is said that for this reason District Attorney William O'Dwyer speeded up prosecution of the murder syndicate and made swift moves to get Lepke back from the Federal Penitentiary at Leavenworth, Kan., to stand trial for the murder of Joseph Rosen, a Brooklyn shopkeeper, in 1936. Reles is the kingpin of the District Attorney's case against Lepke.

* * * * * *

Reles has been District Attorney O'Dwyer's star witness both in the trial of Harry (Happy) Maione and Frank (The Dasher) Abbandando, and in the trial of Harry (Pittsburgh Phil) Strauss and Martin (Buggsy) Goldstein, all of whom are now awaiting death at Sing Sing.

Reles showed no particular compunction about testifying against Maione, Strauss, Abbandando and Goldstein. He was of their caste in gangland, but when he takes the stand against Lepke he faces the czar of the underworld realm. It was Lepke, according to the testimony, who ordered the killings which the murder syndicate did for a price, based on a very elaborate scale of rates.

One informant of The New York Sun said that it was like the office boy testifying against the boss. The mere thought of the ordeal was too much for Reles, he asserted."

The same newspaper account, certainly by advisement, since it could not have been through inspiration, said of the charge confronting petitioner:

"Lepke is under indictment for the shooting of Rosen in front of the latter's stationery store at 725 Sutter Avenue, the Bronx, on September 13, 1936. Rosen had written a letter to District Attorney Thomas E. Dewey in New York county offering to give evidence in the prosecution of the trucking racket of which Lepke was the czar. Rosen was struck down by twenty-two bullets."

The District Attorney of Kings County assured the newspapers, who in turn assured the public, that petitioner was guilty not only of the crime of murder in contriving the assassination of Joseph Rosen, but of other murders. On April 14, 1940, the *Daily News* said of petitioner:

"Prison to Chair, Plan for Lepke.

Aids of Kings County District Attorney William O'Dwyer revealed yesterday they will move to rescue Louis (Lepke) Buchalter from his lifetime sentence in prison. They hope to electrocute him instead.

The deposed industrial racketeer, they declared, has now been linked definitely to two killings perpetrated by Brooklyn's murder ring. On the strength of the evidence, O'Dwyer will move to have Lepke brought back from the Federal Penitentiary in Lewisburg, Pa., to stand trial for his life.

The final tie-up between Lepke and the murder mobsters has been provided, according to O'Dwyer's men, by a former member of the gang. Significantly, Assistant District Attorneys Louis Aldino and Edward A. Hefferman went to Sing Sing late in the afternoon to interview a prisoner. This was the third time they had been closeted with the convict, who is said to be talking freely.

The murders for which Lepke will be called upon to stand trial are those of Morris Diamond, business manager of Local 138 of the Teamsters Union, and Joseph Rosen, candy store proprietor, who had been forced out of the trucking business by the Buchalter combine.

Diamond was fatally shot at 69th St. and 18th Ave., Brooklyn, last May 25, after he had been questioned about truck racketeering at the offices of the Manhattan District Attorney. He was under subpoena for a second appearance when he was slain.

Rosen also had been quizzed by the authorities and was to be interrogated again when four gunmen entered his store at 725 Sutter Ave., Brooklyn, on Sept. 13, 1936. They pumped bullets into him and fled."

The prosecutor not only assured the public of petitioner's guilt, but proceeded to quote a purported acknowledgment by him of guilt. On October 31, 1940, the *New York World-Telegram* said that Mr. O'Dwyer announced to the press that he had developed an iron-clad case of murder against petitioner; that he had discussed the facts of the case with petitioner at Leavenworth, and that petitioner having acknowledged his guilt to the District Attorney had agreed "to buy his life by turning state's evidence as the far lesser Abe Reles and small fry of Murder, Inc. already have done". The article continued:

"It is known that Mr. O'Dwyer and Captain Frank C. Bals, who commands detectives working on the Murder, Inc., case, left Brooklyn together on Oct. 22 for Kansas City.

And today it was reported that Mr. O'Dwyer made two secret journeys to Leavenworth to talk with Lepke before he and Captain Bals returned to the city last Monday.

Previous Report.

It had been previously reported that Lepke probably would talk if that was the only way he could escape the chair, but today's information is the first definite report from a source of such reliability that Lepke's singing was assured.

The argument that convinced Lepke to spill all he knows, to bring to light the deepest secrets of the big shots of the underworld and their alliances with politics, is reported to have been the first degree murder indictment obtained against him by Mr. O'Dwyer.

Mr. O'Dwyer's investigation of Murder, Inc., revealed evidence that Lepke had given 11 murder contracts to this syndicate of retailers of homicide and that seven of the murder orders had been executed satisfactorily.

The indictment against Lepke was for one of these crimes—the slaying of Joseph Rosen to shut his mouth so he could not testify against Lepke.

Victim of Extortionists.

Rosen was forced out of the trucking business by Lepke's extortionists. He was reduced to running a small candy shop at 725 Sutter Ave., Brooklyn. That was where he was killed Sept. 13, 1936. He had a subpoena to appear before the Dewey grand jury in his pocket when gunmen walked in and fired 22 bullets into his body.

Even this did not shake Lepke's silence, as far as could be learned. But then Assistant District Attorney Louis Aldino obtained important corroborative evidence against Lepke and the five men indicted with him for the Rosen Murder. The nature of this evidence is still a closely guarded secret, but it was important enough to cause Mr. O'Dwyer, to exclaim jubilantly:

'At last I've got Lepke and Capone on their way to the chair;'

And whatever the evidence was, it is reported, it was enough to convince Lepke that his only chance to escape frying in the hot seat was to sing—and sing loud."

The *World-Telegram* story of October 31, 1940, was not a reporter's "scoop". The same story appeared that evening in the conservative *New York Sun* under these headlines:

"Lepke to Blow Underworld's Lid Off Soon.

Racket Boss Is Reported as Fearful of Death in Electric Chair.

O'Dwyer Shapes His Case.

Brooklyn District Attorney is Gathering Evidence About Candy Shop Murder."

The *Mirror*, a tabloid, on the same day carried this headline:

"Report Lepke Will 'Sing' to Escape Chair."

And said:

"Louis (Lepke) Buchalter was officially reported last night to be ready to buy his life by revealing to District Attorney O'Dwyer of Brooklyn all he knows about the underworld.

The report became public following disclosure that O'Dwyer and a high police official have made two secret trips to Leavenworth prison to talk with Lepke.

O'Dwyer recently had the racketeer indicted on the charge of directing the murder of Joseph Rosen in Brooklyn in 1936, one of the 'contract' slayings of the Brooklyn Murder Syndicate. Rosen, formerly in the trucking business but later owner of a small candy store at 725 Sutter Avenue, had been subpoenaed by a Dewey Grand Jury investigating Lepke's activities, when gunmen entered his store and shot him 22 times.

Lepke, under a Federal sentence of 14 years for smuggling dope, and facing an additional 30 years as a trucking racketeer, was declared ready to break his stubborn silence after learning O'Dwyer has obtained important evidence against him in the Rosen murder. Realizing that O'Dwyer is determined to send him to the chair, Lepke decided to follow the example of Abe Reles, former executive of the Murder Syndicate, and 'sing'.

He is said to be ready to tell the inside story of crime as Big Business. 'Big Shots' hitherto immune may be exposed. Officials who have made integrated

criminal operations possible on a nation-wide scale are to be identified publicly, Lepke is said to have promised.

Indicted with Lepke in the Rosen murder was Louis Capone, now in Raymond St. jail, Brooklyn.

'*At last I've got Lepke and Capone on their way to the chair,*' O'Dwyer was reported to have declared before Lepke decided to talk. No hint was forthcoming from O'Dwyer's office last night whether he is willing to bargain with the kingpin racketeer.

Capone is described as the go-between who handed out the Lepke 'contracts' to the Brooklyn syndicate. According to one report, he contributed the corroborative evidence in the Rosen murder."

On April 15, 1940, the *New York Mirror* said of a then current murder trial, that the crime had been committed at petitioner's direction. The article said in part:

"The specific charge is the slaying of George Rudnick, a police informer, found stabbed 54 times with an ice pick, in his car on Jefferson Ave. between Central and Evergreen Aves., Brooklyn. In a pocket of Rudnick's coat was a letter, signed by an investigator, thanking Rudnick for 'the information your gave me'. Authorities assert Louis (Lepke) Buchalter ordered the killing and that the letter was put there on Lepke's order as a threat to other informers."

On April 15, 1940, the *Times*, in an article based on an interview with the District Attorney of Kings County, referred to petitioner's co-defendant in this case, Capone, as "the go-between who accepted orders from Lepke and other gangsters for murders they wanted performed and passed the orders on to the actual killers". The article said that Penn had been murdered because gangsters had confused him with Orlovsky, "a witness against Louis (Lepke) Buchalter in District Attorney Thomas E. Dewey's investigation of Lepke's racket empire".

On April 13, 1940, the *New York Mirror* said:

"Lepke Linked to Syndicate Killing.

Louis (Lepke) Buchalter was directly implicated yesterday in a Brooklyn murder syndicate execution, according to an announcement from District Attorney O'Dwyer's office."

The article quoted an affidavit supposedly in the possession of the prosecutor which charged petitioner with the murder of one Diamond.

On April 16, 1940, the New York press again purported to relate secret proceedings in the office of the District Attorney of Kings County, and said in part:

"Meanwhile, the puppet-master Louis (Lepke) Buchalter was spot-lighted today in new developments in the Brooklyn probe into Murder, Inc., when a 'singing' ghost linked the racketeer to still another murder.

Now Linked to Three.

Buchalter was connected Saturday with two killings, either of which may lead to first degree murder indictments and eventually to the Sing Sing death house. A third was uncovered yesterday and linked to the arch-plotter and today the whole force of Kings County District Attorney William F. O'Dwyer's inquiry was turned on strengthening his case against Lepke.

Mr. O'Dwyer's men were out today to locate two key witnesses to fill in the details in the picture painted of Lepke's homicidal past. One of the witnesses is a former school teacher turned racketeer and the other one of Lepke's former errand boys.

* * * * * *

Teacher-Gangster.

The first witness sought by Mr. O'Dwyer's men, the former school teacher, abandoned his profession to turn racketeer and link himself with Lepke. He turned on Lepke after a friend of his was slain.

The second man was a bail bondsman who served Lepke as an errand boy."

Petitioner asserts that the references, in this and many similar articles, to missing witnesses were falsely and calculatedly made for the purpose not only of preparing public sentiment against him, but as a prelude to the introduction upon his trial of the witness Rubin whose perjury was important in the establishment of a *prima facie* case against petitioner.

On May 20, 1940, the *New York Mirror* quoted an official as asserting that the authorities had received conclusive proof of "a direct tie-up between the Brooklyn Murder Syndicate and Louis Lepke Buchalter * * * ."

On August 6, 1940, the *Mirror* quoted the trial assistant for the District Attorney as assuring a Supreme Court Justice that a female witness could not be released for fear that "she too might be executed on orders from Lepke". Petitioner was then, as he had at all times since 1939 been, in the custody of Federal authorities.

On May 16, 1941, petitioner was arraigned upon the indictment on which he was subsequently tried. On that same day the *New York World-Telegram* said of him:

"LEPKE WOULD TELL OF U. S. CRIME RING.

Official, Labor Chief Might
Be Implicated.

Louis (Lepke) Buchalter is negotiating to turn informer and betray the inmost secrets of the magnates of crime who dominate the rackets of America, the World-Telegram learned today.

This newspaper learned that squealers have informed District Attorney William O'Dwyer that Lepke was in a position to deliver a nationally prominent labor leader on a murder charge, a noted public official of New York City on a conspiracy charge, and a close relative of a very high federal office holder as a front man for at least two of the six men credited with controlling racketeering throughout the United States.

Before he was laid by the heels on a federal dope ring conviction Lepke was one of the most powerful

racketeers in the country, a member of the highest council of the rackets industry. And if Lepke really talks, the lid's off the underworld.

The status of the negotiations remained a closely guarded secret today, but the World-Telegram learned that already there have been a series of conferences between representatives of District Attorney William O'Dwyer of Brooklyn and Lepke's relatives and attorneys.

Lepke's price is freedom from prosecution on the murder charge he now faces in the Murder, Inc., debacle in Brooklyn and commutation of the 30-to-60-year sentence hanging over him for extortion in the flour-trucking industry in Manhattan, the World-Telegram is informed.

If he got his price Lepke would be a free man when he finished his federal term at Leavenworth. He will be eligible for parole from Leavenworth in about nine years.

Calls Price Too High.

However, District Attorney O'Dwyer is understood to feel that Lepke's price is too high. It is understood that it has been suggested to his representatives that the best deal Lepke could hope to get would allow him to plead guilty to murder in the second degree in the Brooklyn case and serve the 20-to-life term on his plea concurrently with the 30-to-60-year term in the flour-trucking racket. This would make Lepke eligible for parole in about 17 years. He is now about 43" (R. 83-4).

The *Mirror* and the *News* carried the same story the next day.

Thus the prosecutor's office, on the very eve of the date originally set for his trial, falsely claimed that petitioner had confessed to the prosecutor his guilt of this murder, and as being willing to implicate high City and Government officials in an effort to avoid the punishment of death which, according to all the newspapers, he acknowledged was his own due.

Public sentiment and prejudice were thus deliberately and wrongfully aroused.

When petitioner was brought in for arraignment in the Kings County Court, he was manacled, and a cordon of police had been placed around the Court House, as well as in the corridors, and in the courtroom. Newspaper photographers were admitted in the courtroom and were permitted to take photographs throughout the actual arraignment. Naturally, all this resulted in sensational publicity. The arraignment was adjourned so that petitioner might confer with members of his family in an effort to obtain counsel. But the nature of the custody in which petitioner was held was such that the courtroom resembled an arsenal, and even the Court was moved to express criticism on the score that the measures were so extreme as to prevent him from having any consultation with members of his family (S. M., Arraignment, May 9, 1941, 3-6).

On the adjourned date, the dramatic performance was repeated, except that this time counsel appeared with defendant, and the number of armed guards had been reduced somewhat. But the newspaper photographers were again present in force and again permitted to take photographs of the actual proceedings. Perhaps in fear that the reduction of the number of guards might diminish the extent of the publicity, the Assistant District Attorney took the occasion to make a speech, wholly irrelevant to the arraignment, in which he said, obviously for the benefit of the many newspaper reporters present, that a "milestone" had been reached in law enforcement and that petitioner whom he described by an alias ("Lepke") used throughout the newspaper publicity, had at last been brought before the bar of justice to answer for his crimes (S. M., Arraignment, May 16, 1941, 4). The result sought for was achieved: widespread and prejudicial publicity continued.

In July, 1941, petitioner was advised that the trial would begin on August 4, 1941. By that time, it was apparent that Mr. William O'Dwyer, the then District Attorney of Kings County, would be nominated by the Democratic party as its candidate for Mayor of the City of New York.

In this situation, and believing that because of the unprecedented inflammatory publicity directed against him, he could not obtain a fair trial in Kings County, and that the probability of the candidacy of the District Attorney for the office of Mayor would further minimize the possibility of a fair trial by casting the entire case into the arena of local politics, petitioner's attorneys moved for a change of venue (R. 76 *et seq.*). The motion was denied (R. 167, 168). No separate, intermediate appeal from that decision was available under the New York Criminal Code. The reason assigned by the Justice of the Kings County Supreme Court for the denial of the motion was (R. 165, 166) that it was to be assumed that the publicity adverse to petitioner was state-wide, and, therefore, ran the implication, no less prejudiced vicinage than Kings County could be found. The motion was denied, although out of two hundred residents of Kings County interviewed at random by a trained investigator, a member of the Bar whose integrity was beyond dispute, one hundred and sixty-four said unhesitantly that they believed petitioner guilty, only two professed to hold the opinion that he was not guilty, and only thirty-four asserted that they had no set opinion of his guilt or innocence (R. 112 *et seq.*). The names and addresses of the persons interviewed were given (R. 116 *et seq.*).

On August 4, 1941, the case was called for trial at the County Court of Kings County before Hon. Franklin Taylor, a Judge of that Court (S. M. 2). A Special or "Blue Ribbon" Panel of two hundred and fifty talesmen had been called. By this time, the District Attorney had been nominated for the office of Mayor. Judge Taylor, who was to preside at the trial, also was a candidate for re-election. Had the case proceeded to trial at that time, it might well have been concluded before the political campaign had actively begun. Before the District Attorney's candidacy for Mayor had become a fact, the District Attorney had desired the case to be tried in August. When,

in August, however, his candidacy had become a fact, he preferred to begin the trial in September. When application was made by the District Attorney for adjournment of the trial until September 15, 1941 (S. M. 35), counsel for defendants, including petitioner, objected (S. M. 38 *et seq.*), and stated pointedly to the Court that they were ready to proceed with the trial on that day (S. M. 38, 39); that they feared that, if the case was adjourned until the middle of September, the time of beginning the active political campaign, it would become a "*political football*" (S. M. 39-45); and that, if the Court desired to serve the convenience of jurors by adjourning the trial until after the heat of the summer, it ought, in fairness to the Court's own reputation, postpone it until the first day after the Election (S. M. 43). The sincerity of counsel was matched by the dissimulation of the presiding Judge who said, in words eloquent for their superficial aspect of fairness and memorable for their complete lack of it (S. M. 54):

> "The Court will grant the motion for a continuance of the trial until after Labor Day, but it cannot go over until after election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable."

On August 5, 1941, at the time when petitioner's counsel protested against further delay, they indicated to the Court that more delay involved the risk of more newspaper attacks upon defendants, and particularly upon petitioner (S. M. 50-53). The Judge assured counsel that the delay would be helpful because it would give the community an opportunity to forget the prejudice engendered by newspaper hostility. This was belied at once by immediately succeeding events.

On August 25, 1941, a tabloid newspaper, the *New York Mirror*, began the publication on a page specially devoted to residents of Kings County, of a "series" of daily articles which asserted that petitioner had been guilty of twenty-seven murders, including the murder of Rosen, the victim

referred to in this indictment. They described petitioner in lurid terms, as the leader of a notorious group of murderers, who had made countless millions of dollars from his criminal activities. These articles completely destroyed any possibility that a fair trial could be accorded petitioner in Kings County. Their circulation was restricted to Kings County; they appeared in a special edition procurable only in Brooklyn. The degree of their prejudicial quality, the extent to which the reader would be incensed against petitioner by them, cannot be described. But since they comprise a part of the record, they are available for the inspection of the Court.

Some excerpts from this series are included here, for the convenience of the Court. The headline and the introductory paragraph, which constitutes the sub-title, of the opening article on August 25, 1941, said:

> "Murder, Inc. Expires as Lepke Goes on Trial.
>
> Today, Arthur Mefford presents the first installment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.' the Brooklyn Killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail:"

The article said in part:

> "For weeks the underworld had been buzzing with reports that Lepke feared for his life. That $50,000 reward was real money, and most of the fugitive's pals were rats of his own kind, men who would kill even one of their own for far less than that.
>
> The underworld, too, said that Lepke feared he might eventually fall before the barking guns of law enforcement officers, just as Dillinger and many others of the nation's public enemies had died.

Former racket associates—triggermen and muscle men—knew that Lepke was not near as tough—personally—as he was reputed to be. He was a man whom the New York police accused of 27 murders, cold-blooded gangland assassinations, but never had they been able actually to place him on the scene with a gun in his hand.

'Lepke hires his killing done,' had always been the police excuse for turning him loose.

* * * * * *

Everybody knew that Lepke was on the spot, and nobody knew it better than the fugitive himself. For months it had been whispered that prison bars would look like a sanctuary to the man who had drained millions from industry through labor strikes and countless millions more from vast dope-peddling interests.

All that bothered Lepke at this stage of his evil career was the possibility he would not be given the opportunity to make his way safely into some official haven."

The second article started with this paragraph:

"'Big Shot' Surrenders to Tinkle of Broken Glass.

Murder, Inc., the bloody handed ring of New York mobsters which made killing a profession, is as dead as any of its 83-known victims. Brooklyn's crusading District Attorney William O'Dwyer, has seen to that. And Louis (Lepke) Buchalter, erstwhile Public Enemy No. 1, who employed the mob to handle his cruel 'trigger work,' soon stands trial for the murder of an honest, hard working candy store owner. In yesterday's instalment of this intimate, complete story of 'Lepke's' amazing rise to gangland's throne, was told of the intricate underworld arrangements made through Walter Winchell, Daily Mirror columnist, for his surrender."

This article ended with these questions in bold-face type:

"Who is this Lepke? Where did he come from? How did he get the name Lepke; rise to an underworld

throne? The answer to these questions are in tomorrow's issue of the Daily Mirror's Brooklyn Section. Don't miss it!"

Other headlines in the series read:

"LEPKE PUTS LABOR RACKETS ON BIG BUSINESS BASIS.

Louis (Lepke) Buchalter, big boss gangster who never raised his voice, but whose soft-spoken orders packed a terrific wallop—and death if they were disobeyed—was a Lower East Side graduate of the Prohibition Era Crime School. How he started his deadly reign, first clashed with the law and formed his unholy alliance with Jacob (Gurrah) Shapiro, skimpy-brained but strong-muscled ghetto hoodlum; and how he virtually defied the authorities for two decades until he surrendered to head G-Man J. Edgar Hoover, through the collaboration of Walter Winchell, famous Daily Mirror columnist, has been related in three earlier instalments of this intimate, inside-fact article."

"LEATHER TRADE DRIVEN OUT OF CITY BY LEPKE GREED.

How Louis (Lepke) Buchalter, soft-spoken big-shot racketeer, rose from his humble Lower East Side tenement home to New York's underworld throne on a ladder runged with bloodshed and terrorism, and how as America's Public Enemy No. 1—with a reward of $50,000, dead or alive—on his head, he surrendered to G-Men through Walter Winchell, famous Daily Mirror columnist, have been related earlier in this true fact narrative. Yesterday's instalment told of his tie-up with 'Little Augie' Orgen, once powerful East Side mob leader, and of Little Augie's sudden death in a rain of lead while walking along a ghetto street with his bodyguard, the later gang-slain Jack (Legs) Diamond."

The installment on August 30th began with the headline:

"LEPKE BRINGS MURDER AND VIOLENCE TO FUR TRADE."

And proceeded in part as follows:

"Louis (Lepke) Buchalter, described by New York's famous racket buster, Tom Dewey, as America's No. 1 Public Enemy; a hoodlum who, through widespread bloodshed and terrorism extorted millions of dollars annually from the city's legitimate business men, soon will go on trial in Brooklyn on a first degree murder indictment. He is charged with hiring killers to slay Joseph Rosen, fur trucker whom he forced out of business, in Rosen's humble candy store. Lepke feared Rosen might appear as a witness against him in connection with the trucking racket—one of the many he dominated. Brooklyn's fighting District Attorney, William O'Dwyer, will try to prove Lepke hired the infamous crime syndicate, Murder, Inc., to kill Rosen. The story continues:

By Arthur Mefford.

So long as Brooklyn's fighting District Attorney William O'Dwyer is not worried about the eventual outcome of Louis (Lepke) Buchalter's forthcoming trial for the murder of Joseph Rosen, we shall drop the subject for the time being to get back to Lepke's earlier racket activities."

On September 1st, two weeks before the opening of the trial, an article in the series was printed under the headline:

"'Bath of Lye' Persuaded Furrier to Bow to Lepke.

The entrance of Louis (Lepke) Buchalter, boss hoodlum, into New York's multi million dollar fur industry, and the reign of slashings and bludgeoning and acid throwing which he inspired, has already been related in earlier instalments of this inside story of the gangster once described as America's Public Enemy No. 1. Only a few of the legitimate business men ruined by Lepke and his mob had the courage to defy him. And of these, old Julius Bernfeld was the bravest. How Lepke, now facing the electric chair on a murder indictment, singled out old Julius to make an example of, was related yesterday."

The headline and introductory paragraph on September 2nd said:

"Lepke, Freed in Fur Plot, Moved In on Truck Union.

Louis (Lepke) Buchalter's bid to dominate the entire New York business world hit a snag, temporarily, after his ruthless gangsters had seared the eyes out of old Julius Bernfeld. Greatly to his surprise, Lepke now facing trial on a first degree murder indictment in Brooklyn, found himself and his pal, 'Gurrah' Shapiro, on trial in Federal Court for conspiracy in the fur racket. But he knew all the answers—he thought. Government witnesses were terrorized to the point where even Judge Knox, presiding, called them liars from the bench. Lepke grinned at the Court's discomfiture."

The September 4th story, referring to itself as "factual", began:

"With Greed as Creed Lepke Peddled Snow.

Louis (Lepke) Buchalter, soon to face a jury in Brooklyn on a first-degree murder indictment, made one very disastrous failure during his long career as boss of New York's underworld union rackets. That was when his hired killers failed to make sure ex-schoolteacher Max Rubin was dead when they shot him through the brain as he emerged from a Bronx subway station. Rubin, who had served Lepke faithfully for almost two years, recovered, though surgeons said he was doomed to die. A bullet through his brain didn't still his tongue, however. He told District Attorney Dewey all he knew of Lepke's racket activities, and gave the Federal authorities their first tip that Lepke was in the drug racket."

And ended:

"Lepke imported dope, not by the ounce, but by tons. How the Government finally proved Max Rubin's revelations of this comes as a big surprise—a literal 'bang,' in tomorrow's installment, exclusive in the Daily Mirror."

On September 5th, Mefford's article began:

"Blast in Dope Plant Bares Lepke's
Ties to Smugglers.

Lepke wasn't satisfied with having extorted millions out of unions and employers alike in the city's vast garment manufacturing and trucking trades. Even after the first disastrous failure of his entire career of crime—the recovery of ex-schoolteacher Max Rubin from the effects of a bullet through the brain he didn't worry, so powerful were his political connections. Rubin revealed many of his racket operations, including Lepke's venture into counterfeiting, and then dope smuggling, but couldn't furnish proof. How his story was corroborated follows:"

And ended:

"How did Lepke corrupt U. S. officials to make his dream empire of dope come true? Read the answer in tomorrow's Daily Mirror."

The series proceeded to quote witnesses in the custody of the prosecutor as about to testify to petitioner's guilt in his impending trial. These articles are not only lurid beyond description, but convey to the public the assurance of petitioner's guilt at the same time that they depict him, altogether untruthfully, of having committed many other crimes. The fact that he had never been convicted of any of those crimes is acknowledged only insofar as the acknowledgment is urged as a tribute to the ability and honesty of the Brooklyn prosecutor whose assurance of his own ability to convict petitioner of the crime of murder was broadcast.

Because the *Mirror* stories removed all possibility of a fair hearing for petitioner in Brooklyn at a time when the articles were still being published, a new motion for a change of venue was made because of their publication, and because their circulation was limited to Kings County (R. 155 *et seq.*). The motion was denied, without opinion (R. 175, 176).

The very application for a change of venue received only the pretense of a hearing, not even the pretense of consideration. The petitioner was compelled to proceed to trial at a time when the issues in the case would—as the prosecutor well knew—become subordinated to the issues of a political campaign in which both the prosecutor and the presiding Judge were candidates for election. Time and place were manipulated by the prosecution to prevent a fair trial—to afford only the "form" of one.

On September 15, 1942, the "trial" began in the sense that the process of impanelling a jury was started (S. M. 58, 65, 66). Five weeks passed before a jury was impaneled (R. 181-192). When a jury was impaneled, it was neither fair nor impartial. Although the case had been ordered tried before a "Blue Ribbon" panel which is supposedly composed only of talesmen who have sworn to their ability to disregard newspaper impressions, yet an original panel of 250 was exhausted and a new panel of 100 was required before the selection process had been completed (S. M. 2019-2024). In the course of their interrogation, at least one-half of the talesmen called readily admitted that so fixed was their opinion, so strong their prejudice against petitioner in consequence of hostile newspaper propaganda, that they could not sit as impartial jurors. Petitioner asserts here, as he did in the Court of Appeals of New York, that those talesmen, who ultimately were selected as impartial, were prohibited by the Court from expressing their true state of mind, were inhibited by the Trial Judge from admitting the prejudice against petitioner and his co-defendants which had been instilled in their minds by newspaper and local hostility.

Talesmen were threatened with excoriation by the Trial Judge if they admitted prejudice against petitioner.

The process of selecting a jury began at a slow pace. Most of the talesmen said that they were prejudiced and could not sit impartially in the hearing of the case. The Judge himself said that the *Mirror* articles, particularly,

were "RAISING HAVOC WITH THE JURY" (S. M. 614). Suddenly the Court apparently became aware that the leisurely pace of selecting a jury was the subject of adverse newspaper comment. The tempo at once changed. When talesmen asserted that they could not sit impartially because they were prejudiced against defendants the Judge said to the defense that the mere fact of asking about the talesmen's prejudices "is clearly establishing an escape medium for the juror if he does not want to serve. You are putting the words in his mouth. * * * You are doing the thinking for the talesmen" (see Fitzgerald, S. M. 335-6; also Kendy, S. M. 430). A talesman who asserted his inability to be fair was charged with "unwillingness to serve". Another heard himself thus described by the Judge: "i don't think this man is mentally fitted to sit on a jury" (Cone, S. M. 439). This same characterization was also applied to still another talesman who was ordered by the Court to "get out" (Herrick, S. M. 542). Defense counsel remonstrated that these remarks were calculated to intimidate talesmen and prevent a free revelation of their prejudices (Herrick, S. M. 543), but similar judicial comment was repeated in the presence of the panel. Talesmen who said that they would be embarrassed to serve because of friendship with the prosecution or defense counsel were berated as "wholly unfit to have a job as a juror", and as being hostile "to the Court's questions" (Rosenthal, S. M. 726-7). When a talesman was peremptorily challenged by the prosecution the Judge read into the record some prepared remarks on the abuse of the exercise of peremptory challenges (Cleary, S. M. 1295-6; also Kendy, S. M. 426), and his comments were so worded as to furnish the basis for a newspaper story, which sounded as though he was criticizing the defense for deliberately delaying the process of selection, and was so reported.

During the course of the jury selection all thirty peremptory challenges accorded to petitioner and his co-defendants were exhausted before the tenth juror was

selected. The Trial Judge erroneously overruled ten challenges for cause tendered by the defense against talesmen who obviously had been prejudiced against petitioner and his co-defendants. (The Trial Judge invoked a completely different standard in relation to the challenges proffered by the prosecution and erroneously sustained at least six challenges for cause offered by the prosecution.) In consequence petitioner and his co-defendants were prevented from offering peremptory challenges against the two talesmen, Rorke and Link. They were obviously prejudiced against petitioner and his co-defendants. Link had been on the "*Mr. District Attorney*" radio series (S. M. 2689); Rorke was the nephew of a prominent local police official (S. M. 2063).

Link had been excused by Mr. Turkus, the trial assistant (S. M. 2688, 2689), in an earlier murder trial, because at that time Mr. Turkus said that he thought that Link's employment by the radio program "*Mr. District Attorney*" would make it unfair as against defendants in that case for him to sit as a juror. In the voir dire examination of Link in this case Mr. Turkus, interrogating Link at a time when Mr. Turkus knew that defendants had exhausted their peremptory challenges, said in effect to Link: "Would you be prejudiced against me because in the earlier case I thought that you would be unfit as a juror since you might not have been able to be fair to the defendants?" (S. M. 2689). Link said that he would not be prejudiced against the prosecutor and so he was seated.

Rorke was chosen against the background of the knowledge of the trial assistant that in that same earlier case, Rorke, too, had been a talesman (S. M. 2603, 2610), had there heard the name of Capone, one of petitioner's co-defendants in this case, and had been excused on a peremptory challenge (S. M. 2612) by defendants in that case because of his close relationship with a high police official.

Petitioner asserts that, in consequence of the unwarranted insistence by the prosecution that the case be tried at a place where it was impossible for him to obtain a

fair trial since the community had been conditioned against giving him that, and at a time when the issues in the case were deliberately subordinated to the exigencies of a political campaign, the effort to obtain an impartial jury became a laborious futility. Five weeks were spent in the meaningless mouthing of fine phrases about lack of prejudice when, in reality, every talesman called was obsessed by a prejudice springing from his own literacy, originating in attacks sponsored by the prosecution and so ingeniously conveyed, so dramatically expressed, that no human being could fail to be affected. Though all the trappings of a fair trial were present in the examination and selection of the jury, the effort to select an impartial jury, assuming that such men existed, was successfully subverted by the Trial Judge, who used exhibitions of simulated temper to stop talesmen from admitting the prejudice they entertained and who spoke in terms of helpless self-righteousness against the exercise by defense counsel of that minimum degree of acumen which showed itself in the use of peremptory challenges. And by unjustly overruling challenges for cause the Trial Judge ultimately set the stage for the seating as jurors of men who, because exposed to the influence of professional association and family relationship, should never have sat upon the trial of a capital case.

Petitioner asserts that a fair jury was not impanelled *because it could not have been impanelled in the County of Kings in September, 1941.*

The trial itself deteriorated into a mere sham. Before it started the trial assistant, Mr. Turkus, had assured petitioner's brother, Dr. Emanuel Buchalter, that petitioner ought to make a "deal" with the prosecution. Mr. Turkus said to Dr. Buchalter (R. 11): "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation." He assured him that local prejudice against petitioner was so strong that the mere making of the charge against petitioner would result in his conviction. It is true that Mr. Turkus denied (R. 123, 124) that he had made that statement, but it is significant that he

contented himself with a mere denial; he did not cause any investigation of the incident; no charge of perjury was lodged against petitioner's brother. Mr. Turkus later became a candidate for County Judge, and largely based his own campaign on the conviction of petitioner.

In proving a prima facie case against petitioner the People relied only on witnesses who, with one exception, had confessed to the prosecutor participation in the murder of the victim or in other murders committed in Kings County. Despite the confessions by these witnesses of murder, they had not been indicted. For more than a year before the trial they had been in police custody, not at a jail, but at first-rate hotels (R. 761, 762, 1776, 1876, 1877, 2230, 2231), and some of them had been kept together (R. 1023-7). They were, therefore, witnesses who took the stand under the heaviest possible dominance; they knew that upon satisfactory performance as witnesses depended their lives. Each expressed the hope that the prosecution would spare his life; all denied that any promise had been made to them. They had received only a threat from the prosecution, and the threat was that should they tell ever so small a lie they would certainly be sent to the electric chair. So the prosecution presented those witnesses as men who could not tell a lie (R. 797, 799, 2343) because they had been assured of *death* were they to fabricate. These witnesses were Berger, Tannenbaum and Bernstein,—all three notorious professional malefactors.

The witness Rubin was the exception. He had not confessed murder to the District Attorney. But he admitted, as he took the stand, that such was his hatred of petitioner that his sole purpose in life was to live for the day when petitioner would be executed (R. 1494, 2399-2401).

In substance the People's case charged that petitioner had directed Berger to identify the victim Rosen to the defendant Weiss (R. 1804-5, 1807, 1811, 1964, 1974, 2053) and that Weiss, through defendant Capone, had arranged for Bernstein to steal an automobile and, after Weiss and others had shot Rosen, drive the assassins from the place

of the shooting. Bernstein, who was on the stand for about a week, never mentioned petitioner. He said that instructions to steal an automobile were given him by Capone, in the company of Weiss, on Friday, September 11, 1936 (R. 702-3, 1166-8), at *one* o'clock in the afternoon (R. 1160-4). Berger testified that he had not been directed by petitioner to identify the victim to Weiss, the alleged assailant, until *six* o'clock on that same day (R. 1962-4), and that it was *nine* or *ten* o'clock in the evening before Weiss traveled with Berger from Manhattan to Brooklyn in order to see Rosen (R. 1971-4), and that it was not until about *ten* o'clock that night that Weiss spoke to Capone (R. 2182), presumably for the purpose of having Capone instruct Bernstein to steal an automobile.

There was, therefore, grave and irreconcilable inconsistency between the testimony of these two key witnesses, Bernstein and Berger. The Trial Judge in his charge in effect instructed the jury to disregard the inconsistency and to assume that petitioner had done earlier preparatory work (R. 3975-7, 3989-90).

Other inconsistencies in the testimony of prosecution witnesses were nullified by the Court's charge in which the jury was told to disregard cross-examination because it was "hit or miss stuff" (R. 3903).

These witnesses, who were ready to testify to anything under the impulse of self-preservation, frequently were confronted with prior contradictions from the records of other cases in which they had testified. They apparently had been schooled to acknowledge earlier testimony at the same time that they refused to recall what it was. Each of them, when his attention was directed to earlier testimony, anticipated the question with the same pat answer: "If it's in the book, I said it." The Trial Judge told the jury that that answer ought to be accepted as frank and truthful for the reason that even defense counsel found it necessary to refer to the stenographic transcript for the exact language of the proceedings of the previous day (R. 3894). Thus the jury was told that memory should

not be expected to be better for experienced facts than for narrated matter. And this consciously false psychological instruction was given for the purpose of extricating the prosecutor's witnesses from their many past and present perjuries.

Since the prosecution admitted that petitioner had no part in the actual commission of the alleged murder (R. 240), it became important to attempt to prove motive. For that purpose the prosecution called the witness Rubin, who testified (R. 1284 *et seq.*) about the reputed assistance rendered to the Amalgamated Clothing Workers Union by gangsters (R. 1290, 1296-1300, 1306), and then to petitioner's alleged motive as against the victim Rosen (R. 1322-67). On his direct examination he ascribed to petitioner fear that the alleged victim, Rosen, might incriminate petitioner in the commission of a misdemeanor (R. 1364-5), and that, therefore, petitioner had expressed impatience with Rosen (R. 1365) and that by innuendo petitioner had threatened Rosen. Throughout a long cross-examination of that witness, the prosecution suppressed a prior contradictory statement of the witness. It made a veiled reference to the possibility that a prior statement might have been given, by the question as to whether, on a prior occasion, Rubin had told the truth to other prosecutors (R. 1486). The form of the question was objectionable and objection to it was sustained. No further effort was made by the prosecution to reveal the existence of such a prior contradictory statement. But such a prior contradictory statement *did* exist, which completely exculpated petitioner from the guilt asserted against him by Rubin's testimony on his direct examination when first called as a witness, and in which statement Rubin had assured the authorities that petitioner was not implicated in this crime. And that statement had been made at a time when Rubin was accusing petitioner of many other crimes, and had conceived his hatred of petitioner. About a week after he had first been called, Rubin was recalled as a prosecution witness (R. 2371), and then as a slight concession to petitioner's

demand (R. 2377) the fact of the existence of this prior statement was revealed, and a portion of the statement was dictated by the Trial Judge into the record (R. 2381-8).

Then, to avoid the whole force of this proof, the Trial Judge assured the jury that it could assume that the prior exculpatory statement was a lie and that the witness' testimony incriminatory of petitioner, was true (R. 3947). He told the jury that the "lie" was excusable, citing "Les Miserables" as a parallel (R. 2404-6). He did not permit the jury to consider whether the exculpation might have been truthful, and the testimony false.

As the prosecution witnesses were called, it developed that they were in custody at local hotels, some of them at the same hotel (R. 1022-7, 2338-40, 2349), and although they said they were denied an opportunity to confer with each other in advance of their testimony, yet the factual situation, as developed on cross-examination, indicated the possibility, even the probability, of such preparatory conferences. The Trial Judge instructed the jury that they must assume that such opportunity did not exist; that they must assume that such conferences did not take place (R. 3956).

The credibility of these witnesses depended greatly on whether they had been promised rewards for their testimony. Despite their denial of such promises, the jury might have assumed that such promises had been made, and to a not negligible extent might have resulted in an effort on the part of these confessed murderers to shape their testimony in a way which would satisfy the prosecution.

The District Attorney, in summation, which counsel for the defendants were restrained from interrupting under penalty of being held in contempt of court (R. 3860), was permitted to pledge his personal integrity on his assurance to the jury that such promises had not been made, that rewards would not be forthcoming (R. 3829, 3830). Aside from the impropriety implicit in such a personal pledge, the fact is that it was false, for rewards were made soon after the end of the trial. Each of the murderers was

turned loose,—scot free—free of any charge; each was given substantial sums from the public funds.

The prosecutor also was permitted to tell the jury in summation, and when defense counsel were under the same restraint, that everybody knew that the defense was false, and no one knew it better than defense counsel, who were the recipients of tainted money which they had received from their clients as fees (R. 3803), and that if defense counsel would not acknowledge it, at least every lawyer spectator in the courtroom was sure of it (R. 3804). Again, by the technique of referring to his opening to the jury and repeating portions of that opening and asking the jury to answer for themselves whether the defendants had brought anyone to court to dispute portions of prosecution testimony (R. 3785, 3786 *et seq.*), the trial assistant was permitted to destroy the constitutional immunity, which is the same in New York as in the federal courts.

Petitioner should have been afforded at least an opportunity to offer a defense. He, however, was denied even the pretense of such an opportunity.

The murder alleged in the indictment was said to have occurred on September 13, 1936. Before that date, petitioner had already been indicted for alleged violation of the Sherman Anti-Trust Act, for which he was tried in the United States District Court for the Southern District of New York, in October and November, 1936. Petitioner, at that time, and for several months before September, 1936, had been the subject of continuous surveillance by police officers of the City of New York. It was the theory of the prosecution, in the present case, that petitioner had contrived the murder of the victim by directing Berger to identify the victim to the co-defendant Weiss (R. 1804-5, 1807, 1811, 1964, 1974, 2053). It was further contended that petitioner received an oral report of the murder from Weiss in the presence of Tannenbaum (R. 2223-4). These alleged conversations, in direction of the murder and in expression of approval of the murder, were said to have been carried on by petitioner immediately before and after

the date of the murder, at an office at 200 Fifth Avenue, New York City.

Petitioner contended, upon the trial, that official police reports existed, regularly kept by police officers of the City of New York, recording their surveillance of petitioner during this period, and that reference to the contents of those reports (if unexpurgated) would demonstrate that, as police officers of the City of New York knew and recorded at that time, petitioner did not see or talk with the witnesses thus produced against him upon the trial (R. 2140-56). Petitioner caused these official police reports, known as "D.D.4's", to be subpoenaed, and produced at the court (R. 2155-6), and requested an opportunity for his counsel to offer them in evidence or at least to examine them so that the names of the police officers could be learned and their identity established, to the end that they could be subpoenaed and caused to testify as to their knowledge of petitioner's activities during the period in question (R. 2140-56). Upon the objection and opposition of the prosecutor, the Trial Judge refused to permit petitioner's counsel to see these reports (R. 2152) and refused himself to look at them even for the limited purpose of revealing to petitioner's counsel the identity of the police officers (R. 2149-50). As a main reason for the refusal, the Court said that the reports were "confidential", and that to reveal their contents would result in communicating to defense counsel confidential information about other crimes (R. 2149).

The Trial Court's charge to the jury was so unfair that it was characterized by Judge Loughran, in his opinion in the Court of Appeals review of this case, as an argument and summation for the prosecution.

In the State of New York, appeals to the court of last resort, the Court of Appeals, in capital cases, are mandatory, and that tribunal is obligated by the New York State Constitution to review the facts as well as the law in a capital case.

That review was not afforded petitioner by the majority of that Court.

The vote for affirmance in the Court of Appeals was four to three. Two opinions were written for affirmance, one by Judge Conway in which Judges Finch and Lewis concurred, the other by Chief Judge Lehman. The Chief Judge did not concur in Judge Conway's opinion.

Judge Conway's opinion contains not a judicial review of the facts, but a review, as Chief Judge Lehman said in a part of his opinion which he himself italicized, of the "facts *which the people claim* were established by the testimony of these witnesses". Judge Rippey (dissenting) said that Judge Conway's opinion was "a summary of the contentions of the people".

The opinion of Judge Conway became an opinion for affirmance because Chief Judge Lehman cast his vote for affirmance. But, in doing that, Chief Judge Lehman admitted that the errors itemized by Judge Loughran in his dissenting opinion had been stated "with characteristic restraint". Those errors received no consideration in the opinion of Judge Conway.

Chief Judge Lehman acknowledged the gravity of the many errors and defects in the case, and said that Judge Loughran had set forth "some". He wrote: "I might have been unwilling if I had been a member of the jury to concur in the result", saying, flatly, that "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendant's guilt from my mind."

The three dissenting Judges expressed their grave doubt of petitioner's guilt. Thus affirmance followed expression of doubt by an actual *majority* of the Court, in a State where it has always been considered the sacred duty of the Court (in accord with all civilized procedure) to reverse if a majority of the Court entertained doubt of guilt.

Thus, although petitioner's appeal resulted in the publication of extensive opinions by the Court and he was accorded all the outward indicia of a review, he was in fact given only a semblance of it.

Lest this be thought an extravagant commentary on the review accorded petitioner in the State Court of Appeals, petitioner refers to some of those errors analyzed in the opinion of Judge Loughran, the existence of which were acknowledged by the Chief Judge, and the content of which was nowhere refuted in the opinion of the other three Judges who voted to affirm. Judge Loughran said, among other things, that the Trial Judge's comments on the discrepancies between the testimony of Bernstein on the one hand, and Berger and Rubin on the other, invaded the province of the jury. "Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the people as matter of law. This was obvious error." He said that the Trial Judge invaded the province of the jury by assuring the jury that it could accept Bernstein's testimony that "witnesses were not" afforded preliminary opportunity to confer about their testimony. "The Judge was without power so to invade the province of the jury." He said that the Trial Judge erred in permitting the prosecutor to ask the jury to consider whether the defendants had testified in contradiction of prosecution witnesses. "Since none of the defendants was a witness, the whole point of that argumentation was its erroneous accent upon the assertion by them of their constitutional privilege against compulsory self-incrimination. In our judgment, the exception taken thereto was valid."

He said that the Trial Judge erred in permitting the prosecutor to lend his personal integrity to the support of prosecution witnesses. "*A majority* of this Court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument might have unduly prejudiced the jury against the defendants." He said that, although the Judge was obligated to deal fairly with all facts, he had expressly disavowed any intention so to do, at the same time that he instructed the jury to disregard cross-examination, and that "as an inevitable consequence of these conceptions of his function, the Judge's treatment

of the proof took on the character of a summation for the people. We will not say such a charge was right." He noted that defendant had proved lack of motive, but that the Trial Judge disregarded defendant's proof and instructed the jury that there was adequate proof of motive as against petitioner, and said: "The Judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again there should have been a presentation of both sides of the issue—and the question of the weight of the evidence also should have been submitted to the jury."

Judge Loughran said that the Trial Judge in consequence of his errors, in consequence of his invasion of the jury's function, had in effect extorted from the jury a finding of petitioner's guilt. "On the whole we find ourselves unable to perceive how the basic finding of Buchalter's distant connection with the actual shooting of Rosen can be taken to have been made *by the jury alone*. • • • We do not see how the conviction of the defendants can be affirmed without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the Trial Judge in his charge *may entirely ignore the evidence and the contentions of the accused* unless in the end some request is made for a different handling of the issues."

Judge Rippey, who came to the Court of Appeals with the profound experience of a Federal District Judge's latitude in the trial of criminal cases, thus characterized petitioner's "trial":

> "I also agree with Judge Loughran that the trial was unfair. *In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable*

doubt. It does not follow that a new trial should be ordered. There was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed. In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt." (Italics supplied.)

Of all this Chief Judge Lehman said:

"As Judge Loughran has, in my opinion, completely demonstrated, the Trial Judge erred at times in ruling on evidence and at times usurped the function of the jury to draw inferences from the evidence and to determine facts. * * * The errors and defects in this case are, it seems clear to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded. * * * I might wish that the charge had been different * * * I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the Trial Judge."

And the Court of Appeals refused to review the question of whether petitioner had been tried before a fair and impartial jury, and whether a change of venue should have been granted.

The widespread attack against petitioner generated by the prosecution before he was brought to trial thus also prevented him from obtaining a fair review of the judgment of conviction.

Petitioner does not here assert that the mere incidence of these errors as such or even their collective existence as mistaken legal rulings in the course of a single trial constitutes the basis for the granting of this petition. Importance is attached to them only to show that in a case where, because of the contrivance of its being held in a hostile community, at a time when hostility originally

engendered by newspaper attacks of unprecedented fury was, if anything, exaggerated by the projection of a political campaign into the case, what seemed inevitable at the beginning of the trial—the impossibility of a fair hearing—became the manifest fact during the course of the trial and attended the case even upon its consideration in the State Court of last resort.

There never was even a remote chance that petitioner could secure a fair trial in Kings County in the Fall of 1941. In the selection of the jury there was the first proof that all petitioner could secure would be the outward mechanics of a trial,—not a fair trial. When, during the course of the trial, the Trial Judge by his rulings prevented petitioner from recourse to official records in order to present his defense, usurped the functions of the jury in appraising the credibility of witnesses, substituted unfounded and unwarranted inferences for evidence, and belittled the defense, the unfairness of the Trial Judge became self-evident. When, further, in the course of the case, the Trial Judge prevented so much as a protest against the prosecutor's accusation that the defense was a fraudulent fantasy and that defendants' counsel had consciously accepted tainted money and, at the same time, assured the jury that no promises had been made to prosecution witnesses, further proof was furnished that the trial was conducted only as a mere matter of form. When the Judge, instead of charging the jury on the law, used the function of a charge to argue that the record proved petitioner's guilt, even the outer pretense of a fair trial had collapsed.

Jurisdiction

The jurisdiction of this Court is invoked under Section 344(b), Title 28, U. S. C. (Sec. 237 of the Judicial Code as amended).

The judgment of the County Court of Kings County of the State of New York, as affirmed by the Court of Appeals in that State, is a final judgment, not further reviewable in any Court of the State of New York. The Federal questions herein presented and urged were raised in the State courts, as is evidenced by the statement in the remittitur of the Court of Appeals of the State of New York, as follows:

> "Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court."

These Federal questions are succinctly set forth in petitioner's brief in support of his motion for a reargument in the Court of Appeals, which is a part of the record before this Court, and which shows that these points were all urged below in the first instance and at first opportunity.

These Federal questions are of substance, and as the brief in support of this petition will develop, were decided in a manner not in accord with the applicable decisions of this Court (Rule 38, subd. 5[a] of the Supreme Court of the United States).

Questions Presented

1. Whether petitioner has been deprived of due process of law by a denial of motions for a change of venue from a place where public opinion had been irrevocably prejudiced against him by a lengthy series of newspaper articles

and interviews, and where local passions were inflamed and where prospective jurors had been conditioned to assume his guilt;

2. Whether petitioner was denied due process of law by the refusal of the Court of Appeals of New York to review the rulings of the Trial Judge upon the challenges to prospective jurors and to jurors impaneled, where, by the State Constitution, the Court of Appeals is required to review the facts as well as the law upon an appeal in a capital case; and whether a State statute declaring that the rulings of the Trial Judge upon the challenges to special jurors are not reviewable is constitutional.

3. Whether petitioner was denied due process of law by the refusal to make available to him certain official records of the Police Department of the City of New York so as to permit him to call as witnesses police officers of the City of New York, to the end that such officers might be examined concerning their observations at a time and place vitally material to the charges against petitioner.

4. Whether petitioner was denied due process of law by the repeated unfair rulings and comments of the Trial Court during the cross-examination of witnesses for the prosecution, and by the rulings, comments, charge and conduct of the Trial Court, belittling the defense and improperly construing for the jury the probative force of evidence adduced, so that the jury was misled.

5. Whether petitioner was deprived of due process of law by the refusal of the Trial Court to rebuke and repress improper, prejudicial and untrue statements by the prosecuting attorney in his summation to the jury.

Reasons Relied On for Granting the Writ

Petitioner submits that, although he entered the trial burdened by the reputation of being a notorious enemy of society, yet civilized society, as represented by the State of New York, could well have afforded him a fair and impartial trial, pursuant to due process of law,—the more so because petitioner came into court already under prison sentences extending over his natural life.

Petitioner was deprived of a fair trial because, although there was no need for it, he was tried in a county whose residents had been astutely conditioned to believe him guilty before the trial began. He was tried at a carefully selected time when the trial itself could be exploited in the interests of a local political campaign in which both the prosecutor and the Trial Judge were candidates for high elective offices. He was tried before a jury which was not impartial. During the course of his trial, the prosecutor was permitted to make untrue representations of fact. At the conclusion of the trial, the Judge delivered a summation in the guise of a so-called charge, which, in the opinion of at least three Judges of the Court of Appeals of New York, constituted a vigorous and unfair argument for conviction. On review, the Court of Appeals of New York declined even to consider the question of whether the jury had been impartial. It declined also to consider whether petitioner had been deprived of an opportunity to present his defense out of documents in the possession of the prosecution itself, and which petitioner asserted, if unexpurgated, would conclusively *prove his innocence.*

All of the reasons why this petition ought be granted can be reduced to this:

That it is a paradox of the administration of the criminal law that the security of good and honest men against abusive persecution is only so strong as their insistence that bad men charged with the commission of heinous crimes be accorded a fair hearing before conviction. Peti-

tioner was denied a fair hearing, and it is no answer to say that he came to court with an ominous past record. He was entitled to a fair trial on this charge, for which his life was at stake. He was deprived of that fair hearing, denied the due process of law. Unless the answer to each of the Questions Presented is "No", this Court should rule that, under the Federal Constitution, sinner as well as saint is entitled to the benefit of the basic constitutional securities and guaranties when he comes to judgment.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS BUCHALTER,
Petitioner,
By I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
JESSE CLIMENKO,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.

LOUIS BUCHALTER,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The four (4) opinions of the Court of Appeals of the State of New York upon the appeal to that Court are reported officially in Weekly Adv. Sheets No. 189, Dec. 12, 1942, 289 N. Y. 181. The *per curiam* opinion of that Court denying the motion for reargument of the appeal, has not yet been reported officially.

Jurisdiction, Questions Presented, Etc.

Reference to the statute under which the jurisdiction of this Court is invoked, and a statement of the questions presented, as well as a statement of the case, will be found in the petition.

Summary of Argument

Forcing the petitioner to trial at a place where and a time when a fair trial was impossible violated due process of law. Motions for a change of venue were timely made, and should have been granted. Failing that, the motion for an adjournment of the time of trial until after the election campaign should have been granted. The public clamor for the conviction of the petitioner, which undoubtedly was instituted and engineered by the prosecution, and thereafter uncontrolled, was aggravated by requiring the trial to proceed during the course of the campaign of the Trial Judge for re-election and the heated campaign of the prosecuting District Attorney for election to the office of Mayor of the City of New York.

The petitioner was denied due process of law by the overruling of challenges to prospective jurors and to jurors impaneled, which were based upon the bias, the lack of impartiality, and the preconceived opinions of such prospective jurors and jurors impaneled. The refusal of the Court of Appeals of New York to review such rulings by the Trial Court was a denial of due process of law, because under the Constitution of the State of New York, a defendant in a capital case, as this was, is entitled to a review by the Court of Appeals of the facts as well as the law; furthermore, since the petitioner raised the question that he had been denied due process of law by the failure to impanel a fair and impartial jury it was the duty of the State Court of Appeals to examine the substance of rulings of the Trial Judge upon the challenges, as well as the form thereof, to ascertain whether, in fact, due process of law was denied.

The petitioner was denied due process of law by the rulings of the Trial Judge, sanctioned by the majority of the State Court of Appeals, which removed from the consideration of the jury certain fundamental questions of fact and substituted for the judgment of the jury thereon

the opinions and views of the Trial Judge, to the end that the jury was misled and the Trial Judge became the arbiter of facts as well as law.

Petitioner was denied due process of law by the refusal of the Trial Judge to rebuke the prosecutor and instruct the jury to disregard improper statements by him in his summation, and by the implied approval by the Trial Judge of the injection by the prosecuting attorney, in his summation, of the issue of his personal integrity and his untruthful assurance to the jury that no promises or inducements were or would be given to the witnesses for the prosecution in return for their testimony.

The petitioner was denied due process of law by the refusal of the Trial Judge, sustained by the majority of the Court of Appeals, to accord the petitioner access to official records of the Police Department of the City of New York which had been produced at the trial.

Petitioner was denied due process of law by the failure of the Chief Judge of the New York State Court of Appeals to vote for a reversal of the conviction although the Chief Judge had, as he expressed in his opinion, a reasonable doubt of the guilt of the defendants, since under the precedents and authority of the Court of Appeals, a judgment of conviction in a capital case must be reversed if there is a reasonable doubt of guilt.

ARGUMENT

I

"Due process of law" as guaranteed by the Fourteenth Amendment encompasses the assurance of a fair trial in the courts of a State.

The questions presented upon the facts, as stated in the petition, must be examined in the light of basic principles. These principles are here enunciated as a preface to the presentation of petitioner's argument.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, Mr. Justice Cardozo, speaking for the majority, held that the procedure there involved did not offend "due process" because in accord with State law, and that the possibility of prejudice to a defendant from that State law was "gossamer". It will be here urged that the procedure below was offensive to local law as well as to the concept of due process of law under the Fourteenth Amendment of the Constitution which Mr. Justice Cardozo described (loc. cit., p. 122):

> "Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof."

How much the more so when the pressure of the proof in this case was so light that an actual majority of the State Court of Appeals expressed their own reasonable doubt of guilt, and one of the Judges said the proof was so inadequate as in his opinion to require a dismissal of the indictment!

Mr. Justice Roberts in his dissenting opinion in the case cited, speaking for the minority, expressed the rule thus (p. 127):

> "In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life."

And at page 137:

> "But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be ob-

served; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

The Fourteenth Amendment in its guaranty of due process against invasion by the States, covers those cases where privileges and immunities which are of the essence of liberty and justice have been invaded. *Palko* v. *Connecticut*, 302 U. S. 319.

II

Due process of law was denied by the refusal to change the place of trial or, at the very least, to postpone the time of trial.

It has been shown in the petition that the indictment of petitioner was obtained in April, 1940, of a murder alleged to have been committed in September, 1936. For more than a year there was a deliberate, studied effort to inflame the prejudices of the populace of Kings County against petitioner. This cannot be doubted by one who examines the samples of the newspaper articles which are part of the record.

In a county with a populace exceeding two and a half million persons, it might well be assumed that there were some who might not have been familiar with the name and reputation of a particular alleged malefactor; here it was shown that a trained investigator of unimpeachable integrity questioned 200 persons chosen at random in that community. Every one of them was familiar with the charges against petitioner. Every talesman who was examined had heard and read of the alleged activities of petitioner, and was familiar with the charge against him in the instant case.

Thus, there was accomplished, in this cosmopolitan and extensive community, a result as insidious as the incitement to violence in a village. And this was not a result

unlooked for by the prosecuting attorney; it is beyond cavil that he was responsible for this propaganda.

When the stage had been sufficiently set, when over a long period of time the collective mind of the community had been sufficiently conditioned,—more than a year after the indictment was obtained,—the application was made to bring petitioner from the Federal Penitentiary at Leavenworth, Kansas, to the County Court of Kings County to answer the charge of the indictment.

It had been reported earlier in the press that petitioner had acknowledged to the District Attorney his guilt of this crime. That, of course, was a lie. As the time of trial approached, the District Attorney undertook to make assurance doubly sure that none might consider the possibility of petitioner's innocence. He caused to be circulated fresh stories of attempted bargaining by petitioner for the privilege of pleading guilty to a lesser degree of murder, for which privilege he would pay by giving evidence against prominent people. That was a lie.

The "wild-west" atmosphere of the courtroom on the first arraignment was calculated to and did create a further impression in the public mind that petitioner was a horrendous creature. The flamboyant utterances of the prosecutor at the second arraignment added further color to the picture.

The pressure of the fixed opinion of an entire city is not much different in its effect upon jurors, at least psychologically, from the presence of a mob.

The time originally fixed for the commencement of the trial was before the active period in the election campaigns of the District Attorney and the Trial Judge. So, although all the defendants asked either that the trial commence immediately or, if adjourned at all, that such adjournment be until after Election Day, a time was set so as to bring the trial into the very midst of the political campaign.

Then the fires of publicity were rekindled, particularly in newspapers extensively circulated within the County of Kings, but not distributed outside its borders.

All of this having been shown, it was a clear abuse of justice and a denial of due process of law to refuse to change the place of trial, or, at the very least, to postpone the time of trial. *Quinn* v. *State*, 54 Okl. Cr. 179, 16 Pac. (2d) 591, 593-594; 54 Harvard Law Review 679; *People* v. *McLaughlin*, 150 N. Y. 365, at 375-376.

The demeanor, utterances, rulings and charge of the Trial Judge, to which reference has been made in the petition and specific instances of which will hereinafter be discussed, demonstrate that he, too, was imbued with a deep prejudice against petitioner, no doubt enhanced by the coincidence of his own campaign for re-election. Apposite, therefore, is the language of Mr. Chief Justice Taft in *Tumey* v. *Ohio*, 273 U. S. 510, at page 532:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

III

A fair and impartial jury was not impaneled. A fair and impartial Judge did not preside at the trial.

As petitioner had anticipated and had argued in seeking a change of venue, it did indeed prove impossible to impanel a jury free of prejudice and bias. The facts having been set forth in the petition, they are not reiterated.

The defendants were compelled to exhaust their peremptory challenges to exclude jurors against whom challenges for cause had been erroneously overruled. The State Court of Appeals refused to examine these rulings on the ground that the rulings of the Trial Court upon such challenges were, by statute, not reviewable. But that holding is clearly erroneous and itself a denial of due process

of law as well as that due process of law was denied by the original rulings in the Trial Court.

The prosecutor opposed review of these rulings on appeal, and on the appeal, and on the motion for reargument, the Court of Appeals said that because petitioner's counsel had "consented" to the impanelling of a special jury such review was foreclosed.

This was wrong both on the facts and on the law.

Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the Court at *nisi prius* in granting the motion for a special jury misstated the fact in recording that there was consent. All that petitioner's counsel said (Affidavit of Hyman Barshay, par. 6) was that he did not object to so much of the motion as asked that a special jury be summoned.

(And the section of the statute relied on below (Judiciary Law, Sec. 749aa, subd. 7, printed in the appendix) says only that such rulings on challenges for "actual bias" shall be final. The rulings complained of were *not* upon such challenges, but for "implied bias" and for prejudice.)

If extended to the scope given that section by the State Court of Appeals, then measured against the requirements of the New York State Constitution (Art. VI, Sec. 7, printed in the appendix), that provision of the special jury statute is repugnant to the Fourteenth Amendment. The failure to object to the motion is not a waiver of that privilege of petitioner.

To say that petitioner "consented", because his attorney did not oppose the motion for a Special Jury, to waive his right to a review of the rulings upon the challenges to prospective jurors and to jurors who were actually impanelled, and to rely upon such so-called "consent" to avoid such review, is tantamount not only to an acknowledgment that the rulings were as wrong as petitioner charges, but also to an assertion that petitioner could and did waive his right to a fair and impartial jury.

Even if petitioner himself had formally consented—as he had not—the law does not permit a waiver of so fundamental a right. At least, prior to the decision of this case, that is what the New York State Court of Appeals had held. *People ex rel. Battista* v. *Christian*, 249 N. Y. 314, at 318;

> "* * * the rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public, fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, is binding upon the individual and cannot be disregarded by him."

Nothing is more fundamental than the right to trial by an impartial tribunal. The Constitution of the State of New York (Article I, Sec. 2, printed in the Appendix) specifically forbids the waiver of trial by jury in a capital case.

The New York Court of Appeals is required to examine the facts as well as the law on an appeal in a capital case, such as this was, and the right of appeal in a capital case is guaranteed by the New York State Constitution, Article VI, Section 7. *People* v. *Crum*, 272 N. Y. 348. Whether the Trial Court has been properly constituted is certainly a question both of fact and law.

Due process of law is not satisfied by a mere adherence to form. The substance must be examined. *Norris* v. *Alabama*, 294 U. S. 587; *Whitney* v. *California*, 274 U. S. 357.

If the ruling below is correct then due process of law would be satisfied although impaneled upon the jury were close associates of the prosecuting attorney; due process of law would become an empty phrase. *Cf. Brown* v. *New Jersey*, 175 U. S. 172.

The strictures of the Trial Judge undoubtedly interfered with a free expression of the prejudice which may have been entertained by many of the jurors impaneled. Perhaps the turn of mind of the Trial Judge may be deduced from his conduct during the impaneling of the jury. It

is also shown by his full justification and approbation of an insulting outburst by one of the self-confessed criminals brought to the witness stand by the prosecuting attorney who, from the stand, called one of defense counsel, a distinguished former Judge of the Court of General Sessions of New York, "a filthy swine" (R. 2416). Particularly apt is the opinion of the Supreme Court of Pennsylvania, *per* Maxey, *J.*, in *Commonwealth* v. *Petrillo*, 338 Penna. 65, 12 Atl. (2d) 317, at page 331:

> "The language just quoted is not in keeping with that 'orderly proceeding adapted to the nature of the case', which this court said in Com. v. O'Keefe, 298 Pa. 169, 172, 148 A. 73, 74, was a part of that 'due process of law' which in this country is a traditional safeguard of an accused. In Powell v. Alabama, 287 U. S. 45, 55, 53 S. Ct. 55, 60, 77 L. Ed. 158, 84 A. L. R. 527, the Supreme Court of the United States, in an opinion by Mr. Justice Sutherland, declared that trials for felonies such as charged in this indictment should proceed 'in the calm spirit of regulated justice'.
>
> " * * * There is no other case which calls for such strict impartiality on the part of a trial judge and such fearless adherence by him to these 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102) as those cases which have been sensationalized in the public press. In all such cases there is much public *prejudgment* and this is always adverse to *any* of those at whom the finger of accusation points. Anyone mentioned as *in any way connected* with those accused is in the public mind already condemned. No trial judge should permit his judgment and sense of good taste to be warped because of his official participation in a 'front page' case." (The emphasis is the Court's.)

IV

The Trial Judge deliberately invaded the province of the jury and misled it.

Due process of law requires that the jury be permitted to decide questions of fact. In New York State, a Trial Judge is required to refrain from expressing an opinion on the facts. *People* v. *Ohanian*, 245 N. Y. 227, at 232-233. In deciding whether due process of law was had, this Court may consider whether the proceedings below were consonant with the law of the State. *Snyder* v. *Massachusetts*, 291 U. S. 97.

Some few examples of this aspect of the misconduct of the Trial Judge which were not corrected by the Court of Appeals have been indicated in the petition and will not be repeated beyond an enumeration which leads inevitably to the conclusion that these were not just mistakes of law, but something more sinister:

1. The jury was instructed to disregard patent inconsistencies between the testimony of the witness Bernstein on the one hand and the witnesses Berger and Rubin on the other, and to assume that there was no inconsistency; instead of being permitted to treat that inconsistency as impairing the credibility of these witnesses.

2. The jury was instructed to consider as false a prior exculpatory statement by the People's witness Rubin and to take as true his testimony in the case on trial, and even worse, to treat the falsity of the prior statement as justified and as having no impeaching effect upon the witness' credibility; instead of permitting the jury to treat the prior exculpatory statement as true, if it so found, and the testimony in the case on trial as false.

3. The jury was instructed to assume the People's witnesses had not conferred in advance of the trial; considering what was elicited on cross-examination of these witnesses the jury should have been allowed to consider whether there had in fact been such pre-trial conferences, and, if satisfied that there were such, to consider whether that impeached the credibility of the witnesses.

4. The Trial Judge sanctioned grossly improper (and in at least one instance untruthful) statements and arguments by the prosecutor in his summation. *Cf. Berger v. United States*, 295 U. S. 78.

5. The Trial Court omitted all reference to the facts elicited on cross-examination of the prosecution's witnesses, belittled that cross-examination and communicated to the jury his view that it was entitled to have little, if any, weight in their deliberations.

This experienced Trial Judge knew better than those rulings would indicate. But his judgment was warped. In *Commonwealth v. Petrillo*, 338 Penna. 65, 12 Atl. (2d) 317, at page 332, it was said:

> "The law confers on no judge the power of *pre*-judgment. A defendant charged with crime is not likely to receive a fair and impartial trial, if the judge from the beginning exhibits an attitude which conveys to the jury the impression: 'Here is a man guilty of an atrocious murder but of course we have got to go through the *form of a trial* before we send him to the electric chair.'" (Emphasis is the Court's.)

V

Depriving the petitioner of an opportunity to offer evidence in his defense was a denial of due process.

As shown in the petition, there were certain records of the Police Department of the City of New York which, if unaltered, might have demonstrated that certain meetings which prosecution witnesses testified had occurred, had, in fact, never taken place. If the falsity of the testimony of the prosecution's witnesses regarding these alleged meetings had thus been established, petitioner's innocence of the crime charged would have been demonstrated.

Petitioner had subpoenaed these records. They were produced in Court by the Police Department pursuant to the subpoena, but delivered to the prosecuting attorney who refused to permit petitioner access thereto. The Trial Court refused to permit petitioner to offer these records in evidence, refused to permit petitioner's counsel to examine the same, refused to allow them to be counted, refused himself to examine them, and refused to allow petitioner's counsel to ascertain the identity of the police officers who were engaged in maintaining surveillance of petitioner's whereabouts during the time in question, so that petitioner was denied an opportunity to seek out these officers in order to obtain their testimony to refute the prosecution's witnesses.

Upon the appeal, the opinions of the members of the Court of Appeals omitted all reference to the error alleged by petitioner to have been committed in this respect. Upon the motion for re-argument, however, the *per curiam* opinion said that the majority of the Court had examined those records and did not believe that they were entitled to much weight as evidence.

It was not for the Court of Appeals, or at least for the majority of the Judges of that Court, to decide whether or not this evidence had or lacked weight; that was a

question for the jury to decide. Nor is it explicable how the majority of the Court of Appeals could have known what would be the testimony of the police officers who made those reports, had it been possible for petitioner to summon those officers as witnesses at the trial. The situation is not dissimilar from that in *Saunders* v. *Shaw*, 244 U. S. 317, where a defendant had been deprived of an opportunity to offer evidence, and a majority of the State Appellate Court thought the evidence of no force. Mr. Justice Holmes, writing for this Court for reversal, said (p. 319) of this idea that the evidence was of no force:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The refusal of the State to make available to the defendant evidence in its possession constitutes a denial of due process of law. *Mooney* v. *Holohan*, 294 U. S. 103.

VI

Requirements of due process of law were ignored in the decision of the New York State Court of Appeals.

Under this heading it is not intended to review those errors involving a denial of due process of law to which reference has been made in this brief, nor to repeat the argument that the refusal to correct those errors was an abuse of due process of law on the part of the New York State Court of Appeals.

What is here urged is that, upon the very face of the opinions rendered in that Court, controlling and compelling authority requiring a reversal of the conviction even if all other errors are disregarded, was ignored by the learned Chief Judge whose vote was the deciding factor.

Due process of law is denied a defendant if the judgment of a State Court is a departure from the clear requirements of State law. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Pyle* v. *Kansas*, 87 L. Ed. 154, Adv. Op., Dec. 21, 1942.

The Chief Judge said in his opinion that the incriminating testimony came from "witnesses whose credibility has been irretrievably impeached" and that evidence from so polluted a source had "failed to remove reasonable doubt of the defendants' guilt from my mind".

The most recent interpretation of the pertinent provisions of the Constitution of New York upon this subject is found in *People* v. *Crum*, 272 N. Y. 348, in which opinion the present Chief Judge, then an Associate Judge, concurred. The then Chief Judge of the New York Court of Appeals (Crane, *J.*) there said (p. 350) that the Constitution of New York, Article VI, Sec. 7, requires the Court of Appeals to review the facts in a capital case, and explained:

> "A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. *We are obliged to weigh the evidence and form a conclusion as to the facts.* It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of *such weight and credibility* as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.
>
> "A reading of this record causes me to hesitate. I am not convinced. *I have a reasonable doubt* which I shall attempt to explain and which, in my judgment, *compels us to reverse this conviction* and grant a new trial." (Emphasis added.)

Being left with a reasonable doubt and doubting the credibility of the prosecution's witnesses—the vote of the Chief Judge for affirmance here, measured against the requirements of his office, as enunciated in *People* v. *Crum*, *supra*, operated to deprive the petitioner of due process of law.

CONCLUSION

In *Commonwealth* v. *Petrillo*, *supra*, from which several quotations have been excerpted, after stating that every accused in an *American* court of justice is entitled to a fair and impartial trial (p. 332) and "It is the duty of the Appellate Courts to see to it that every defendant gets such a trial", the Court said that the Fourteenth Amendmen of the Constitution of the United States (as well as the Constitution of the Commonwealth of Pennsylvania—and it may be noted that that is equally true of the Constitution of the State of New York) guarantees (p. 333) "in substance, to one accused of crime not only the forms but also the *fundamentals* of a fair trial." Until the present case was decided, the New York State Court of Appeals held true to those principles.

> "*Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime*" (Pound, *J.*, later Chief Judge, in *People* v. *Barbato*, 254 N. Y. 170, at 178).

Those great principles, that Court had said, "must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a *great criminal*, and yet be invoked for the purpose of sheltering an innocent man. *In the eye of the law all are innocent until convicted in accordance with the forms of the law and by a close adherence to its rules*" (Peckham, *J.*, in *People* v. *Sharp*, 107 N. Y. 427, at 476-477).

But *not* in this case. Shackled not alone by the manacles with which he was led into the courtroom, burdened not only with prison sentences covering the balance of his natural life, this petitioner carried upon this trial the

opprobrium of the carefully manufactured hostility of the community in which he was tried, the onus of having his fate determined by a jury improperly and unfairly selected and predisposed to a belief in his guilt. Tried before a Trial Judge whose prejudice and animus were so deep-rooted as to extend to and impale defense counsel, this petitioner was met even in the New York State Court of Appeals with a departure from the established doctrines of that Court.

As stated recently by Mr. Chief Justice Stone in *Hill v. State of Texas* (316 U. S. 400):

> "Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

In sum, there was no due process of law below. A writ of certiorari should issue.

Respectfully submitted,

J. Maurice Wormser,
J. Bertram Wegman,
Jesse Climenko,
Counsel for Petitioner

APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

ARTICLE I, SECTION 2

TRIAL BY JURY; HOW WAIVED.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.

ARTICLE VI, SECTION 7

JURISDICTION OF COURT OF APPEALS.

The jurisdiction of the court of appeals, except where the judgment is of death, or where the appellate division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders final judgment or a final order thereon, shall be limited to the review of questions of law; but the right to appeal shall not depend upon the amount involved.

Appeals may be taken to the court of appeals in the classes of cases enumerated in this section.

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(The remainder of this article is omitted as not relevant.)

New York Judiciary Law

SECTION 749-aa. SPECIAL JURORS IN CERTAIN COUNTIES.

* * * * * *

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

* * * * * *

Judicial Code of the United States

SECTION 237, AS AMENDED, 28 U. S. C., SECTION 344.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

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Supreme Court of the United States

OCTOBER TERM—1942

No. 610

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

ARTHUR GARFIELD HAYS,
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ALFRED J. TALLEY,
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Supreme Court of the United States

OCTOBER TERM—1942

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, EMANUEL WEISS, respectfully represents the following:

Summary Statement of Matter Involved

Your petitioner, together with Louis Buchalter and Louis Capone, was convicted of murder in the first degree in the County Court, Kings County, New York State, on December 2, 1941 and was sentenced to be executed.* On an appeal to the Court of Appeals of the State of New York, the judgment of conviction was affirmed by a divided court. The defendant is under sentence of death as a result of a

* A stay of execution was granted by the order of Mr. Justice Roberts dated Dec. 5, 1942.

trial which, viewed in its entirety, was so grossly unfair that he was denied due process of law. The terse statement of Judge Rippey, dissenting in the Court of Appeals, is (R. 4090; 289 N. Y. 243):

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration of the jury of their defenses. * * *."

There were four opinions written by members of that Court (R. 4030-4091; 289 N. Y. 181). Of the seven Judges of the Court of Appeals, two (Finch and Lewis, JJ.) concurred in an opinion for affirmance by Judge Conway (R. 4030; 289 N. Y. 181), who found no substantial error in the proceedings.

Judge Loughran, with whom Judge Desmond concurred, wrote for reversal (R. 4078; 289 N. Y. 181), saying at page 242:

> "We do not see how the conviction of the defendants can be affirmed, without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the trial judge in his charge may entirely ignore the evidence and the contentions of the accused unless in the end some request is made for a different handling of the issues.
>
> * * * * * * * *
>
> "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

Judge Rippey, in a separate opinion, voted not only to reverse, but to dismiss the indictment as well (R. 4090; 289 N. Y. 181). He said at page 243:

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact

as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. * * * In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt."

Of particular interest is the opinion of Chief Judge Lehman, who cast the deciding vote (R. 4069; 289 N. Y. 222). The Learned Chief Judge concurred in the affirmance with obvious reluctance, expressing the gravest doubts relative to the fairness of the trial. He wrote (R. 4073; 289 N. Y. 181, at p. 225):

"The errors and defects in this case are, it seems clear to me, many. Judge Loughran* has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment, tainted with errors and obtained through violation of fundamental rights. Only careful, I might almost say prayerful, consideration can remove that hesitation."

Again at page 230 (R. 4077-4078):

"True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly

* Who wrote for reversal.

disregarded. Even so, I conclude that in this case the errors viewed as part of a long trial could not have affected the verdict.

* * * * * * *

"I cannot refrain from repeating in conclusion that I find the errors and defects numerous and I have hesitated long in reaching the conclusion that they may be disregarded, especially since three of my associates are convinced and have argued persuasively that they affect the substantial rights of the defendants. I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the trial judge. Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects affected the verdict. Even if I were entirely convinced of the defendants' guilt I should vote to reverse if I found room for doubt that the jury would have reached the same conclusion if all error had been avoided. Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

The remittitur recites (R. 4095):

"Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necesarily decided by this Court."

A motion for reargument, reference to which will be made hereafter, was denied by the Court of Appeals (R. 4121).

Question Presented

The question presented is whether petitioner Weiss has been deprived of his liberty and life without due process of law. Petitioner does not urge any error in the assess-

ment of evidence which is within the State's function. (Cf. *Hill* v. *Texas*, 316 U. S. 400, 406.) The complaint is not of the commission of mere error, but of wrongs so fundamental that the proceedings in the State Court were a mere pretense of a trial which rendered the conviction and sentence void. (*Brown* v. *Mississippi*, 297 U. S. 278, 286.)

Tested by an appraisal of the totality of the facts in the case at bar (*Betts* v. *Brady*, 316 U. S. 455, 462), the record discloses that petitioner Weiss has been deprived of the constitutional guarantee of the due process of law, and that he was not in fact accorded a trial consonant with the safeguards of the Constitution of the United States, the Constitution of the State of New York, and those basic criteria of fairness which lend life to the concept of due process.

A. The trial was held in a locality and at a time when the members of the community were inflamed by the public press to a degree that Weiss was deprived of a fair trial.

B. The verdict was not that of the jury because the trial judge in his instructions had withdrawn from that body's consideration factual determinations which lay solely in the jury's province.

C. The assurances given by the prosecutor to the jury that the witnesses who, by their own admissions were accessories to the murder, but who had not been indicted, would be brought to justice after defendants had been convicted, and the withholding of information having a bearing upon the truthfulness of the prosecution's witnesses contributed to a result which violates the elementary principle that "criminal proceedings are instituted with the object, not alone of securing convictions, but of getting as near to the truth as possible on the question of the guilt or innocence of the accused." (*Centoamore* v. *State*, 105 Nebraska 452, 455.)

D. The Trial Judge, by his harsh rebukes and repression of defendants' counsel, and by interference with their

examinations, cross-examinations and objections, prevented counsel from adequately presenting petitioner's case; during the examination, he interposed excuses tending to condone palpable perjury committed by the murderers and gangsters who gave the testimony incriminating the defendants. The testimony so given, to quote the statement of Chief Judge Lehman in the Court of Appeals, was "impeached, if not completely destroyed", by cross examination. Yet, at the trial, this very cross-examination was discredited in the eyes of the jury by the Trial Court.

E. The Trial Judge refused to allow petitioner's counsel to examine police records which were in Court in possession of the District Attorney and which petitioner believes contained substantial evidence in his favor but of the contents of which petitioner is still wholly ignorant.

F. The Trial Judge in his charge (R. 3949-3950) told the jury respecting petitioner's alibi, merely that they should acquit if they believed his alibi, thus depriving petitioner of the benefit of the fundamental principle that an accused is presumed innocent until proved guilty beyond reasonable doubt.

The Trial and its Setting

Joseph Rosen was shot and killed on Sunday, September, 1936. Some three and a half years later, in May, 1940 (R. 21-24), the Grand Jury indicted petitioner Weiss, Louis Buchalter, Louis Capone, Philip Cohen, James Ferraco and Harry Strauss for the crime.* The trial was set for August 4, 1941 (R. 24, 178) and was then adjourned until September 15, 1941, when it actually commenced (R. 24, 181).

---

* A severance was granted to Cohen, Ferraco had not been apprehended at the time of trial, and Strauss had been executed for the murder of Irving Feinstein.

During this interval between the issuance of the indictment and the commencement of the trial, there was engendered a wave of public hysteria, which mounted in intensity and reached a crescendo on the very eve of the impaneling of the jury. Mob psychology, which infected the proceedings, did not take the simple form of physical violence against the person of the petitioner Weiss. More subtly, but with equally devastating effect, he was engulfed in a maelstrom of public excitement and passion, brought about by a newspaper campaign directed against the defendant Buchalter.

Some fertile brain had conceived the gruesome slogan "Murder, Incorporated" to describe an indeterminate group of criminals accused of committing murder for hire. The defendant Buchalter and one Shapiro, it was said, employed "Murder, Incorporated" when they wanted slaying done. "Murder, Incorporated" became a catchword in the newspapers to describe this indefinite combination of individuals whom the militant District Attorney of Kings County was pursuing, and through whom he sought to reach "Lepke" Buchalter and "Gurrah" Shapiro.

As early as October, 1940, there appeared in a newspaper a story which said in part (R. 87):

> "But now Lepke faces the electric chair as a result of the smashing of Murder, Inc. by District Attorney William O'Dwyer of Brooklyn."

Another portion of the story (R. 89) quotes Mr. O'Dwyer as exclaiming "jubilantly":

> "At last I've got Lepke and Capone on the way to the chair."

In November, 1940, there was a statement in a newspaper (R. 90) that Buchalter was officially reported "last night to be ready to buy his life by revealing to District

Attorney O'Dwyer of Brooklyn all that he knows about the underworld".

This atmosphere of hostility was intensified and made a matter of even greater public interest when the Honorable William O'Dwyer, then District Attorney of Kings County, was acclaimed as a possible nominee for the candidate for the office of Mayor of the City of New York. According to the "Daily Mirror" of July 10, 1941 (R. 91):

> "One reason given yesterday for O'Dwyer's first place position is that he 'seems to be the only man who could best LaGuardia'. The Brooklyn prosecutor is expected to strengthen his candidacy further by a successful prosecution of Louis (Lepke) Buchalter, due to go on trial Aug. 4 for the murder of Joseph Rosen, ex-member of the Murder Syndicate, 'erased' as an informer."

These, and statements of similar import, continued to fill the public prints.

In July, 1941, applications had been made by the petitioner Weiss and by Buchalter and Capone for a change of venue (R. 76-109).* These were denied (R. 165, 167). Capone had moved for a severance of the indictments and the granting of a separate trial to himself (R. 31-54). This was denied (R. 29).

The case came on for trial on August 4, 1941 (R. 178-90. Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (S. M. 31.)**

---

* References to similar applications by Weiss and Capone appear in the District Attorney's affidavit and the opinion of the Judge (R. 125, 126, 165).

** The record of the proceedings on August 4th and 5th and the examination of the venire on the voir dire are not in the printed record, but are contained in the typewritten report which, by stipulation, was made part of the record in the Court of Appeals and has been filed in this Court. The letters "S. M." refer to this typewritten portion.

The District Attorney asked that the trial be put over until September 15th (S. M. 35). To this, counsel for Weiss objected. He asked that if the case went over, the continuance be until the November Term, pointing out that the District Attorney had been nominated for the office of Mayor and that the case would become "a football of a political situation in the County and City" (S. M. 40). Counsel stated to the Court that, in a shop near the Court House, large placards appeared advertising a newspaper and referring to the appearance therein of a life story of the District Attorney (S. M. 41); that tacked on telegraph poles throughout the City and on sides of trucks in large letters were references to a story identified with this very trial (S. M. 41). Mr. Talley, counsel for the petitioner Weiss, also presented (S. M. 53) to the Court a copy of the "New York Journal-American" of August 5, 1941, and called attention to a page which was headed

> "Bill O'Dwyer—Life Story of the Man Who Smashed Murder, Inc."

An application was then and there made by counsel that there be a severance as to Weiss (S. M. 24).* This motion was denied (S. M. 28).

The Trial Court continued the case until September 15, saying in a memorandum (R. 177):

> "The Court will grant the motion for a continuance of the trial until after Labor Day, but it cannot go over until after election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable. No prejudice can come from trying the case before election because sensibly no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case."

The hysterical utterings of the newspapers reached a climax in a series of articles published by the "Daily

---

* Mr. Talley referred in his motion to the fact that the judge presiding at the trial was also a candidate for election (S. M. 42, 43).

Mirror" commencing August 25, 1941, and continuing through a part of the trial (R. 159).

We need refer only to the caption which prefaced the first of these series. It reads:

> "Murder Inc. Expires as Lepke Goes on Trial
>
> Today, Arthur Mefford presents the first instalment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.', the Brooklyn killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail:"

It is not surprising that the impaneling of a jury was made difficult by such publications. Between the 15th of September and the 24th of that month, 24 veniremen were examined. Of them, 3 had been excused because of acquaintanceship with the District Attorney or his associates; one had said he would not accept accomplice testimony. Only one juror had been accepted as satisfactory to both sides. Of the remaining 19, 14 had derived some impression from reading the newspapers. Of these, 10 had formed an impression adverse to the defendants, and of these 10, 2 had formed an impression that they were guilty.*

Little wonder that the Court stated at the beginning of the afternoon session on September 24 (S. M. 614):

> "You are requested not to talk about the case. Let nobody talk to you about it. Please read nothing, especially The Mirror. Those Mirror articles which

* The remaining five veniremen were, for one reason or another, challenged peremptorily and the record is not clear as to any impressions they may have gained from the newspapers.

> are still being published seem to be raising havoc with the jurors in this case, and there is no way of the court stopping them under the law."

Eventually, after 135 prospective jurors had been examined, and after the defendants had exhausted their 30 peremptory challenges and the State 18, a jury was chosen. The fitness of the last two, chosen over the protest of the defendants, was doubtful. Of the jurors examined after the court's admonition on September 24, a large number either said that they had not read or that they had formed no impression from the newspaper articles.

We need not question the good faith of the jurors who served. Whether it was possible for them, in the midst of this maelstrom, to act calmly and deliberately is another question. With the howling of the sensational press in their ears to the point that the Judge was compelled to take notice of it at the trial, we say that justice required at least a calm, deliberate and dispassionate presentation of the case to neutralize the clamor in the community. The proceedings should, therefore, be viewed against the backdrop of their inception.

The tension and excitement which prevailed was heightened and sustained by the theatrical methods pursued at the trial. For the purpose of this petition, we believe it to be sufficient to refer to but one of a number of them. When the witness Bernstein was called to the stand on behalf of the People, he was preceded by a court attendant and was followed by three men known to be detectives (R. 686). Two of them had their badges on (R. 687). An objection by counsel for Buchalter elicited the statement by the prosecuting attorney (R. 687):

> "Mr. Turkus: Is the objection to the protection of the witness?"*

---

* It should be borne in mind that the motive alleged for the killing of Rosen was that the victim threatened to inform on Buchalter.

Counsel for Capone asked for a mistrial because of the atmosphere created by having two police officers standing in an unusual position next to the jury box while the witness testified and having two court officers, one standing directly behind the witness and the other to his left. In this motion, the defendant Weiss joined (R. 687). The Court, in denying the motion for a mistrial, described the scene as follows (R. 688-689):

> "The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial."

Before commencing his cross-examination, counsel for petitioner Weiss asked for the removal of the court officer who stood within six inches behind the witness chair, and of the two detectives who, having escorted the witness to the chair, stood in sight of the jury (R. 764). He referred to the fact that there were numerous detectives in the courtroom and uniformed policemen outside (R. 765). Counsel also objected to the fact that the three defendants had been brought into the courtroom manacled to police officers and that they had been unmanacled only after the jury were in their seats and the defendants had been seated in the courtroom (R. 766-768). Although the Judge said that he would not permit defendants to be manacled when seated in the courtroom, he excused the procedure in bringing them there by saying (R. 767):

> "The Court: These defendants have been brought into this court-room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor, down a public staircase, and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say."

The District Attorney's Assurances to the Jury

It was the case of the prosecution that the petitioner Weiss, together with one Harry Strauss, wielded the weapons which killed Joseph Rosen; that the defendant Buchalter had ordered the murder, and the defendant Capone had prescribed the route which an automobile was to follow and had aided the culprits in their escape.

No one saw Weiss and Strauss fire the shots which killed Rosen. No reputable person identified Weiss as the slayer.* According to the story, Weiss did not know Rosen. Consequently, the District Attorney presented an array of confessed criminals to prove his case. Two of them said they were participants in the murder. One, Bernstein, said he was the driver of the automobile in which Weiss had gone to Rosen's store and in which he escaped after the shooting (R. 741). The other, named Berger, said that on instructions from Buchalter he had gone with Weiss to Rosen's store on the night before the shooting so as to identify the victim (R. 1807). Rubin was a messenger whom Buchalter dispatched to summon Berger for his orders (R. 1367). Tannenbaum said he was present when Weiss reported the results of his mission to the defendant Buchalter (R. 2223). Tannenbaum also said that Weiss talked to him about the murder on a later occasion (R. 2226).

Bernstein, Berger and Tannenbaum were all, by their own confession on the stand, despicable characters, steeped in a life of crime. They had committed or participated in every variety of crime from thievery to perjury to murder. They had had the opportunity, during a long but comfortable detention in a hotel by the authorities, to concoct

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* Mrs. Rosen, the wife of the deceased, was called to identify petitioner Weiss as the man who had come into her store the night before the murder (R. 245, 259, 262). So far from credible was her testimony that it was stricken out at the end of the trial (R. 3533-3534).

a story damning the defendants for the purpose of saving their own miserable skins. If the stories testified to by Bernstein and Berger were true, they were equally guilty of the crime with which the petitioner was charged. The Trial Court instructed the jury that they were accomplices as a matter of law although they were not joined in the indictment. All of these witnesses had admitted their criminal exploits.

Obviously, the District Attorney recognized that the jury might wonder that neither Bernstein nor Berger had been indicted for the murder. This might raise a doubt in the minds of the jury whether they were telling the truth, or were buying absolution by choosing Weiss as the culprit to stand in their place, and satisfy the District Attorney's desire to reach Buchalter and Capone.

To a jury already conditioned against the defendants and inflamed against Weiss because of the veiled insinuation that he was a part of Murder, Incorporated, the District Attorney gave the following assurances (R. 3830):*

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

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* Judge Lehman, referring to this statement (R. 4076; 289 N. Y. 229) said: "In those words there is implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts."

(The records of the County Court, as disclosed to the New York Court of Appeals in Weiss' brief, show that the witnesses Berger and Bernstein were later released. This fact raises doubt as to the good faith of the prosecutor.)

And at page 3821:

> "Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it. And that ends it."*

Again we observe that any one factor is merely an integral part of the pattern by which petitioner Weiss was deprived of a fair trial and of due process of law.

The Trial Court's Instructions to the Jury

The taking of testimony commenced on October 20, 1941 (R. 226), and continued until November 25, 1941 (R. 352), a period of some five weeks. Counsel for the defendants addressed the jury for two days (R. 3543-3780). On Saturday, November 29, the District Attorney summed up to the jury the entire morning and part of the afternoon session (R. 3782-3860). The Court commenced its charge at 3:20 in the afternoon (R. 3871) and the jury retired for its deliberations at 10:15 that evening (R. 3992). Within four and a half hours, it brought in its verdict adjudging all three of the defendants guilty of murder in the first degree (R. 3993).

The instructions to the jury had provided the *coup de grace*. Rarely, we submit, has there been a charge to the jury so one-sided, so damaging, and so obviously a direction to convict.

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* Judge Loughran said: "A majority of this court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument may have unduly prejudiced the jury against the defendants" (R. 4086, 289 N. Y. 238).

We do not dwell upon errors of law or deficiencies in the charge which are beyond the scope of this Court's review. The instructions transcended mere error and deprived petitioner of due process when the Court withdrew from the jury matters solely within their province and when he crystallized only those elements of the case which were damaging to the petitioner. Considerations which might have tipped the scales in defendants' favor were minimized and ridiculed by the Court.*

(1) Weiss had tendered an alibi to the effect that on the night of September 12, a time when he was supposed to have been with Bernstein at the scene of the crime, he was actually attending a birthday party for his brother. Five witnesses testified to this and their testimony covers almost 400 pages of the Record (R. 3070-3454). Yet, the Court's charge was entirely silent on this alibi. Counsel for petitioner requested the Court "to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi." He urged that if the alibi raised a reasonable doubt, the defendant was entitled to acquittal. The Court refused to charge as requested, and the instructions given were prefaced by the casual remark (R. 3949):

> "The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:"**

* Judge Loughran said (R. 4087; 289 N. Y. 181 at page 239): "As an inevitable consequence of these concepts of his function, the Judge's treatment of the proofs took the character of a summation for the People. We will not say such a charge was right."

** During the summation the Trial Judge said (R. 3773): "The charge has been prepared * * *."

The gist of charge then given is contained in the following language (R. 395): "Obviously, if the alibi is true, then he was not where it is claimed he was, but, if the alibi is untrue, it does not amount to anything."* The question of reasonable doubt was completely disregarded.

(2) A vital weakness in the People's case had been developed on cross examination. The witness Bernstein had testified that on Friday, September 11, he was sitting in his car, in Brooklyn, chatting with Harry Strauss when petitioner Weiss, the defendant Capone, and Cohen appeared upon the scene (R. 699). These three individuals then left, accompanied by Harry Strauss, and returned in about three-quarters of an hour. It was upon their return that Bernstein was instructed to steal an automobile which was the vehicle thereafter used in the murder (R. 4042).

Rubin testified that on the same day he had a conversation with the defendant Buchalter, at the latter's office, 200 Fifth Ave., N. Y., and that Buchalter complained about Rosen's talking. Rubin volunteered to see one Weinstein for the purpose of persuading Rosen to be silent; that he later returned, told Buchalter that nothing could be accomplished, whereupon he was dispatched to summon Berger (R. 1366).

Berger testified that Rubin transmitted the summons, whereupon he, Berger, went to see Buchalter at his office

* The accuracy of the instructions, when given, were a matter of dispute in the Court of Appeals. Judge Conway said: "As to the defendant Weiss, his defense in substance was an alibi. The court properly charged as to that defense" (R. 4058; 289 N. Y. 181 at page 210).

Judge Rippey said: "I agree with all that Judge Loughran has said concerning the errors committed during the progress of the trial, that such errors were prejudicial and cannot be overlooked. Reference might have been made to other errors. Among those was the charge substantially to the effect that the burden rested upon Weiss to establish his innocence on the basis of his alibi defense" (R. 4090; 289 N. Y. 181 at page 242).

at 200 Fifth Avenue. From there, Buchalter took Rubin to the East Side of New York where they met petitioner Weiss and where the instructions were given that Berger point Rosen out to Weiss. It was in consequence of these instructions that Berger took Weiss to Rosen's store and identified him (R. 1807, 1811).

The obvious inference from the testimony given on direct examination is that the events followed in sequence, that when Buchalter discovered that nothing could be done to silence Rosen, he determined to have him killed and thereupon set the wheels in motion towards that end.

On cross-examination, however, the witnesses enmeshed themselves in a tissue of inconsistencies, and what is later referred to as a "time table" became significant.

Bernstein said that his meeting with the petitioner Weiss and the others took place about one o'clock in the afternoon (R. 872). Three-quarters of an hour later, he was instructed to steal the automobile (R. 901). This was at least an hour before Rubin had made his report to Buchalter. Rubin's testimony is that he saw Buchalter about one o'clock (R. 1646) and it was about two hours later that he returned from the conference with Weinstein and that Buchalter told him to fetch Berger (R. 1660). This discrepancy was further emphasized when Berger testified that it was about five o'clock when Rubin called upon him (R. 1944). It was after that time that Berger went with Buchalter to the East Side and discussed the identification with Weiss (R. 1945, 1961, 1962, 1964).

When, where and how was the crime planned? Was it before the one o'clock meeting between Bernstein and petitioner in Brooklyn? Was it planned even before Buchalter, the alleged instigator, had spoken to Rubin in the office at 200 Fifth Avenue, New York? Or was the crime determined upon only after three o'clock, when Rubin returned

and reported to Buchalter that Weinstein could do nothing to stop Rosen's talking?

Upon argument to the jury, counsel for Weiss obviously drew blood when he hit at this vulnerable spot (R. 3680-3681). The District Attorney countered by suggesting that (R. 3828):

> "Preliminary details could be—someone could be sent to Brownsville and arrange for the car before the actual 'fingering'. What flaw in the People's case is that? What kind of logic is that? You could even do that on the 'phone, and say, 'Get a car right away'."

Here, then was an obvious question for the jury. Did the time table stand up, or did it fall? The Trial Court, however, withdrew this question from the jury. He said (R. 3906-3907):

> "In view of the fact that this was particularly discussed in reference to hour of the day, and it was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which preceded the pointing out, that that proved that the testimony did not hitch.
>
> "Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.
>
> "Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

"Apparently, in the argument that was offered, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled."

During the taking of the exceptions (the jury had been excused by the Court), it was pointed out to the Judge that according to the testimony the time of the original conversation between Buchalter and Rubin had been fixed at one o'clock (R. 3976).

When the jury was recalled, the Court said (R. 3989-3990):

"I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: 'Sometime about one o'clock, I imagine, in the afternoon.'

My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with

the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—*and I think this is accurate and will hold and will not be error*—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails. *I am not afraid of that charge.* There is an exception to all of the defendants on this modification."* (Italics ours.)

This is but an illustration of the devastating effect of the Court's instructions. Matters which were adduced in vague terms upon direct examination were crystallized and made specific on cross examination. Yet, the Trial Judge, in instructing the jury, reversed the process. He said (R. 3903):

> "Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

* As to this, Judge Loughran said:

"Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the People as matter of law. This was obvious error" (R. 4080; 289 N. Y. 181 at page 233).

> "**Unless there be an outstanding point come out on cross-examination, the Court would only ten' to confuse and mislead the jury if it attempted to discuss it.**"

(3) This disparagement of cross-examination and the attempt of the Trial Court to bolster the credibility of the People's witnesses permeates the entire charge. Referring to impeachment by reference to testimony given before the Grand Jury, the Court said (R. 3899-3900):

> "Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it may take ten weeks to get all of the evidence before a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. You will just disregard it. The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here. Bear that in mind. Don't be misled by that argument."*

* One might compare this instruction, for example, with the testimony of Bernstein on cross-examination (R. 1266-1267):

> "Q. You testified that on both occasions, the night before and the morning of the killing, that *Weiss distributed* the guns? A. Yes, sir.
>
> "Q. That was true, wasn't it? A. Yes, sir.
>
> "Q. Now were you asked these questions in your testimony before the Grand Jury and did you make these answers: * * *
>
> "Q. What did you do with the guns when you opened the package? A. *Harry* opened the package and gave Mendy a gun, Jimmy a gun, and he took one himself.'
>
> "Were you asked those questions and did you make those answers? A. Yes, sir.
>
> "Q. And the Harry that you referred to in your testimony was *not* Weiss; it was *Harry Strauss*, wasn't it? A. It is a mistake, sir."

(*Note continued on following page*)

One witness, Magoon, had brazenly asserted on cross-examination that never in his life had he told anything but "little white lies" (R. 2514). However, the jury were not permitted to consider this obvious exaggeration in its bearing upon the witness' credibility. The Court admonished the jury (R. 3898-3899):

> "Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark —it might better be characterized as a fool remark— by one of the witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule. I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule."

Another example relates to the impeachment of witnesses when they were confronted with prior statements. A stock answer seems to have been along the line:

> "If it is in the book, it is so" (R. 3894). "If it is in there, I said it". (see R. 2334, 2335.)

The Court instructed the jury (R. 3894):

> "The usual method is to say, 'On such and such an occasion were you asked the following question

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(*Note continued from preceding page*)

There should also be considered, in connection with this charge, the testimony of Tannenbaum during which the following appears from the cross examination (R. 2345):

> "Q. Didn't you testify before the Federal Grand Jury that you only knew Mendy Weiss slightly? A. Yes, sir.
> "Q. That was false, you say now? A. Yes, sir.
> "Q. That was a deliberate false statement you made to the Federal Grand Jury? A. It was."

> and did you give the following answer?' Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, *but to put a burden upon him of remembering the exact text of question and answer is an unholy thing.* We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, 'Answer yes or no,' about something that he testified to a long time before, *you get a normal response* sometimes, 'If it is in the book, it is so.' There is a concession of the accuracy of the minutes the witness is not disputing. I am just calling your attention to it. That is a matter of application of sound common sense." (Italics ours.)

(4) The excitement to which we have referred as coloring the atmosphere of the trial even crept into the Court's charge and colored not only his thinking but his instructions to the jury.

In the examination of Bernstein, the *prosecuting attorney* had elicited on direct examination that the witness had been confined since the time of his surrender to a detective in a hotel. He and others were in a separate suite to which access could be had "only through certain methods" (R. 762). The doors were barricaded and there were detectives present armed with machine guns and shot guns. There was an arrangement of mirrors so that the detectives could see people coming through the corridor and there was a peephole in the door (R. 762-763). Objections were made to this testimony and exceptions taken by the defendants (R. 762-763). (Berger was also placed in custody in a hotel, R. 1877, as was Tannenbaum, R. 2231.) The housing of witnesses was the subject of comment by counsel for the defendants in their addresses to the jury. The Court, in its instructions to the jury, said (R. 3900-3901):

> "There has been considerable confusion in the argument, so far as your receptivities are concerned

mentally, on the question of the housing of witnesses. Gentlemen, I charge you the District Attorney does not house those witnesses. The District Attorney has not charge of those witnesses. Those witnesses are in custody under a court order, which the jury may not question, because you don't know the reason why that order was made in each case, *and I would not dare to tell you; I would not be allowed to tell you.* Sufficient unto the judgment of the Court which had the facts before it, such orders were made because the Court deemed it, to be a case where the witnesses should not be kept in the House of Detention or in prison. I am not permitted to tell you the reasons. They were not guests of any hotel, as alluded to by the summation. Don't fool yourselves on that. They could not come and go; they could not mingle with anybody; they could not go out to take a walk. They were prisoners, held under rigid guard. All of this argument about their having eaten fare provided by the hotel instead of fare sent up from Raymond Street Jail will be disregarded. They were held prisoners in the hotel, and, of course, they had to get their food in the hotel, in their rooms." (Italics ours.)

After exception was taken to this portion of the charge by counsel for Weiss (R. 3980) in the absence of the jury, the Court, when the jury was recalled, said (R. 3991):

"On Weiss, my attention is called to the fact I used the word 'dare' in connection with 'I would not dare to state to you the reason the Court had for housing witnesses in hotels.' The word 'dare' was not intended to mean that I was afraid, or that there was anything about it of such an appalling nature that you should feel it was something that would make you shudder if it was revealed. The word 'dare' means that, under the rules of evidence, if I dared to tell you that, *I believe it would be regarded or might be regarded by an appellate tribunal, in the contingent event of this case having to come up for review, as reversible error. To*

*avoid that, I withdraw the word 'dare.'"** (Italics ours.)

Any doubt of the emotional reaction of the Court as communicated to the jury is dissipated by his statement in excusing the necessity of the prosecutor's production of unsavory witnesses. He said (R. 3903-3904):

> "When rogues fall out, it is a wise man's delight; so, while the Court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now?"

Again an exception was taken in the absence of the jury (R. 3974). This obviously damaging expression was not cured by the Court's statement when the jury was recalled (R. 3989):

> "At one place during the charge I quoted an old saw, 'When rogues fall out, wise men delight'. That was intended to have general application. It was not intended as calling the defendant names, but, lest it be misunderstood as having specific application to the de-

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* We need not speculate on the influence which caused the Court to make his earlier remarks. He said, in the absence of the jury (R. 3973-3974):

> "The Court: I could not possibly tell the jury the real reason, but the danger of assassination is the reason, as is well known. There would be no trial here had those witnesses been kept in the jail. So far as Bronx County Jail is concerned, that is a Bronx County matter, not subject to order here, and that is a thoroughly modern jail. There is no comparison between that and the Raymond Street Jail or the old Tombs where these witnesses had to be kept had they not been housed in hotels. An experience in another case shows it would be utter folly to send any material witness to Queens County Jail because of what happened in the Maione-Abbandando case, involving the bribery of the lone jailer at night."

> fendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it.'"*

Petitioner does not controvert the fact that the Trial Judge did recite, in some instances correctly, in others erroneously, those standard rules of law which are required in a criminal case. He told the jury that the burden lay on the People to prove its case beyond a reasonable doubt (R. 3929-3930; 3883); that no inference could be drawn from the failure on the part of the defendants to take the stand (R. 3927); and that the jury were the judges of the credibility of the witnesses (R. 3903). In their setting, however, these statements were mere platitudes and shibboleths which the jury could well infer were only for the purpose of the record and should not interfere with what they were actually instructed to find.

Petitioner urges, as a majority of the Court below found, that these were grievous errors which were not objectionable merely as infringement upon the law or deficiencies in practice. The tenor of the instructions and the statements made therein, your petitioner urges, resulted in a withdrawal of the case from the jury and in the direction of a verdict of guilt.

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* The majority of the Court of Appeals merely quote this in answer to the contention that the "rogues" epigram charge was error (R. 4030; 289 N. Y. 181). But Judges Loughran, Desmond and Rippey wrote (R. 4086; 289 N. Y. 238):

> "Although the jury were brought back from their deliberations and advised to disregard the epigram last quoted from the charge, we are still left with the vexed question whether the belated admonition of the court sufficed to remove the obvious intimation which was conveyed to the jury by so pithy a dictum from the bench. (Cf. *People* v. *Robinson*, 273 N. Y. 438.)"

It has well been said: "When an idea once gets into a juror's mind, nothing on earth will get it out again."

The Denial to Petitioner of Access to Information Available to the Prosecutor

An essential link in the People's case was anchored upon the instructions alleged to have been given by the defendant Buchalter that Berger identify Rosen for Weiss. The claim is that on September 11, 1936, Berger, in response to a summons conveyed by Rubin, visited Buchalter's office at 200 Fifth Avenue, New York City (R. 1804, 1945); that Buchalter and Berger then left this building together at about five o'clock in the afternoon (R. 1805, 1960), proceeding to the East Side where they conferred with Weiss (R. 1806-1807, 1961-1964).

It appears that during the period in question Buchalter was under surveillance by representatives of the New York Police Department. The defendants had subpoenaed the records of the Police Department, which were brought to Court and apparently turned over to the prosecuting attorney (R. 1880-1883, 2140-2141). Defendants' request that they be permitted to examine these reports was refused (R. 2148-2154). The reports were thereupon sealed and marked as an exhibit for identification (R. 2155). What these reports disclose, petitioner has no way of knowing.

On the application for reargument to the Court of Appeals, that Court examined these reports. A fair inference from its opinion (R. 4120) is that the surveillance by the police officials was a fact. The Court expressed the opinion that the information disclosed by the reports was inconclusive because only the lobby of the building at 200 Fifth Avenue was under observation and the defendant Buchalter could have and did on occasion evade the observers.

Yet Berger's testimony, if not a larger portion of the People's case, may well have been subject to impeachment by the results even of this limited surveillance. Upon cross-examination the witness revealed

that when he and Buchalter left 200 Fifth Avenue on September 11, they walked out of the front entrance of that building (R. 1960). They crossed the street and hailed a taxicab which was passing by. Buchalter was not in disguise (R. 1959).

The information contained in the police reports, therefore, might have had probative value from one of two aspects. If the report disclosed that at about five o'clock on September 11, 1936, Buchalter was at a place other than 200 Fifth Avenue, then clearly Berger's story would be false. This would amount to affirmative contradiction.

If, on the other hand, the reports revealed that detectives were actually stationed at the entrance to 200 Fifth Avenue, and that Buchalter did not emerge from that entrance accompanied by another person, the evidence, while negative, might well have probative force in impeaching Berger's testimony.

In either aspect, we submit, the defendant should have had access to these reports, the contents of which were known to the District Attorney.

These reports might well have controverted or at least cast doubt upon Tannenbaum's story that some three or four days after September 11, Weiss visited Buchalter and "confessed" the shooting, and that he made the same "confession" when the witness and Weiss went from Buchalter's office to a restaurant (R. 2223, 2224 2225).

This question of surveillance was argued to the jury on summation by defendant Buchalter's counsel (R. 3589-3593). The attorney for the People answered (R. 3828):

> "Somebody says Dewey's detectives and police surrounded the whole place. If there had been that kind of surveillance of Lepke, they would have caught him—I don't mean that—I mean the law enforcement would have caught them red-handed, the whole bunch of them."

Thus, the defendants and the jury were obliged to speculate, whereas the District Attorney *knew*, or was in a position to know what the reports revealed. Fairness demanded that even if the entirety of the report could not be revealed to counsel, those portions of the report directly pertinent to the trial should have been made available to the defendants.

The Trial Judge's Constant Interference with Presentation of Defenses, His Numerous Rebukes and Repressions of Defendants' Counsel, Preventing Adequate Defense

This point, addressed to the essential unfairness of the whole trial in respect of all the defendants, was presented to the Trial Court as follows (R. 2602-2603):

> "* * * At this time I move for the withdrawal of a juror and the declaration of a mistrial.
>
> "The Court: On what ground?
>
> "Mr. Rosenthal: Upon the ground that the action of the Court toward defense counsel and upon the observations of this Court throughout this trial as to the testimony of various witnesses and what the import of their testimony is throughout the trial, being an invasion of the jury's province.
>
> "The Court: Gentlemen of the jury, disregard that.
>
> "These are just tactics trying to set the jury against the Court, thereby lessening the authority of the Court with the jury—giving the Court instructions.
>
> "Mr. Rosenthal: I except to that observation.
>
> "The Court: The motion is denied.
>
> "Defense Counsel: All except."

Because the number of these interferences by the Trial Judge is a main factor here—showing studied and systematic disparagement of the defense—it is impossible, within the limits of necessary brevity, to do more than cite salient examples.

Twice, for example, the Court came to the rescue of the People's witnesses by endeavoring to excuse flagrant perjury (R. 2358, 1712). People's witness Tannenbaum had been forced to admit that he had signed and sworn to a false affidavit when charged with murder in Sullivan County, New York (R. 2323-2330). The Trial Judge thereupon interposed a question suggesting that this was justifiable perjury. This is shown by the following excerpt from Tannenbaum's re-direct examination (R. 2358):

> "Q. (By the district attorney) At any rate, at the time you entered the plea of not guilty and signed Defendants' Exhibit 2, you were then a defendant resisting conviction on the indictment therein alleged, namely, the killing of one Irving Ashkenas, is that right? A. Yes.
>
> "The Court: You were then fighting to save your own life, is that it?
>
> "The Witness: Yes, sir."

On other occasions, the Trial Judge made repeated efforts to save the People's witnesses from damaging admissions which would militate against their credibility. A striking illustration appears during the cross-examination of the witness Bernstein, when defense counsel inquired into his knowledge that an automobile stolen by him was to be used in connection with the murder. He was asked *by the Court* (R. 1181):

> "Q. Then the impression was, if the car was found, it was stolen for the purpose of stripping? A. Yes, sir.
>
> "Q. And not for the purpose of committing any other crime? A. Yes, sir."

Defense counsel then inquired (R. 1181):

> "Q. What were you trying to conceal, if the car was found, so as to make it look as if it was only for stripping and not for any other purpose?"

Thereupon the Court prevented a response by interrupting and asking (R. 1182):

> "Q. (Interrupting) Just answer the next question yes or no—Did you have a suspicion as to what Strauss wanted the car for?"

Counsel objected, stating (R. 1182):

> "Mr. Rosenthal: I object.
> "The Court: The objection is sustained. I thought you wanted that evidence.
> "Mr. Rosenthal: I don't want words put in the witness' mouth. I wanted him to tell me, not have your Honor ask him a question which would call for yes or no—I want him to tell the jury the reason. I don't want the reason furnished.
> "Mr. Turkus: I object to that.
> "The Court: It does not penetrate the Court's skin. Go ahead."

After some sparring without any responsive answer by the witness, the Court again intervened (R. 1184):

> "By the Court:
> "Q. Was that the reason? A. I did not know there was to be a murder or I would never have him take out the radio of the car."

So at last the witness answered the unanswered question in the way the Judge intended it should be answered.

On the vitally important issue of the "time table", almost invariably the Judge gratuitously protected and bolstered the People's witnesses adversely to petitioner (R. 1974-1975, 1972-1973, 1964, 1658, 2173, 2179). For instance, during the cross-examination of the People's witness Berger by Mr. Barshay, the following occurred (R. 1974-1975):

> "Q. And the best time you can give us is 9:30? A. Between 9:30 and 10. I left that place 9:30, to the best of my recollection.
>
> . . . . . .

"Q. How much time did you spend in Brownsville near the vicinity of Sackman and Livonia, Saratoga and Livonia, and Rosen's candy store, all together?

"Mr. Turkus: I object to it as already answered to the best of his recollection.

"The Court: His testimony shows it is all guesswork.

"Mr. Barshay: He has fixed himself the time as between 9:30 and 10.

"The Court: Pardon me, he has not fixed the time. The Court won't discuss that.

"Q. Mr. Witness, did you say between 9:30 and 10?

"The Court: *I know what he said, but the Court knows it means nothing.*

"Mr. Barshay: I take an exception to the Court's remarks.

"The Court: Now proceed.

"Mr. Barshay: And I ask for the withdrawal of a juror and the declaration of a mistrial.

"The Court: On what ground?

"Mr. Barshay: On the ground of prejudice, when the Court said that does not mean anything.

"The Court: You mean to have a withdrawal of a juror because the Court will not agree with you that guessing as to time is accurate?

"Mr. Barshay: No, sir, that is not my point.

"The Court: I think it is. Denied.

"Mr. Barshay: Exception, sir."

The Judge constantly accused defendants' counsel of "manufacturing a record" (R. 3870, 3867), of attempting to make a "padded record" (R. 3865), and of being "disorderly" (R. 3869, 3868). One of many examples of this sort of thing, is the following statement of the Court to one of petitioner's counsel, Judge Talley (R. 2170-2171):

> "The Court: You are distinctly rude and uncivil. The Court refuses to be goaded to the extent that you are obviously trying to goad the Court at this or any other time. The Court will be patient to the utmost and take it on both cheeks from counsel. Now please proceed."

In many instances, the moment counsel so much as attempted to state a ground for any objection, the Judge rebuked them with repeated statements beginning with the words "do not argue" (R. 1281, 1524-1525, 2744, 3049-3050, 3054). A sample of this, from R. 3866, is this animadversion:

> "The Court: Do not argue. This is all out of order. It has never been done in any trial before. I have indulged you to the utmost throughout this trial, and that is the only reason I am allowing you to do it."

During cross-examination of the People's witnesses, if any matter had been so little as barely touched on previously in the cross-examination, the Trial Judge sustained objection to any repetition whatsoever of such matter* (R. 2405, 2065, 1653, 2064, 295, 300, 302, 665, 675, 676-677, 877, 922, 1055, 1082, 1136, 1173, 1176, 1886, 1490, 1212, 1226, 1231, 1510, 1513, 2303).

Others of the more important instances, of various types, akin to the foregoing, are to be found on record pages 2073-2075, 2135-2138, 2170-2171, 2951-2952, 2955, 3229-3230.

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* Regarding this, Judges Loughran and Desmond said in the Court of Appeals (R. 4084-4085; 289 N. Y. 237):

> "We think these exceptions are not without merit. Mr. Wigmore says: 'Repeating precisely the *same allocable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, *after an original false answer* or *refusal to answer*, is a process which not only savors of intimidation and browbeating but also tends to waste time. Nevertheless, when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference. * * * Simple as the expedient seems, it rests on a sound psychology; and the annals of our trials demonstrate its power.' (3 Wigmore on Evidence (3d ed.) § 782, p. 146. See, also, 1 Chamberlayne, The Modern Law of Evidence, § 553.)"

2967-2968, 3025-3026, 1883, 654-659, 1209, 2066, 2503, 2131, 1273, 1511, 1512, 1187-1188, 1113-1114. These are only a few of the whole number of like instances which may be noted in reading the record.

People v. *Becker*, 210 N. Y. 274, 311, 289-312, remarkably resembles the case at bar and is strikingly apposite.

Grounds Upon Which the Jurisdiction of this Court is Invoked

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 937); 28 U. S. C. A. Section 344(b), such petition being one to review the final judgment of the Court of Appeals of the State of New York, the highest Court of that State in which a decision could be had, rendered October 30, 1942 (R. 4094-4097).

The judgment affirmed a conviction and judgment for sentence of death (R. 218-221); and in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Amendment of the Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his life and liberty without due process of law "and", as certified by the Court of Appeals, "this point was considered and necessarily decided by this Court" (R. 4095), this point having been specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss (R. 4120).

Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein, tested by an appraisal of the totality of the facts in this case (*Betts* v. *Brady*, June 1, 1942, 316 U. S. 455, 462), the petitioner was deprived of his life and liberty without due process of law.

See:

Mooney v. *Holohan* (1935), 294 U. S. 103, 112-113;
Powell v. *Alabama* (1932), 287 U. S. 45, 57-73;
Moore v. *Dempsey* (1923), 261 U. S. 86, 90-91;
Hysler v. *Florida* (1942), 315 U. S. 411, 413;
Hill v. *Texas* (June 1, 1942), 316 U. S. 400, 406;
Brown v. *Mississippi* (1936), 297 U. S. 278, 286;
Chambers v. *Florida* (1940), 309 U. S. 227, 236-241;
Frank v. *Mangum* (1915), 237 U. S. 309, 335-336;
Lisenba v. *California* (December, 1941), 314 U. S. 219, 236-237;
Ward v. *Texas* (June 1, 1942), 316 U. S. 547, 550.

WHEREFORE, petitioner Weiss prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirm-

ing the judgment in this cause may be reversed and that the petitioner Weiss may have such other and further relief in the premises as this Court may deem proper.

Dated, December 31st, 1942.

EMANUEL WEISS,
Petitioner.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ALFRED J. TALLEY,
JOHN SCHULMAN,
M. M. KREINDLER,
HARRY G. ANDERSON,
SAMUEL BADER,
GERALD WEATHERLY,
of Counsel.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM—1942

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinions Below

The four opinions of the Court of Appeals of the State of New York are printed in the record (R. 4030-4091) and are officially reported in the weekly advance sheets No. 189, December 12, 1942, 289 N. Y. 181. The opinion *per curiam* of the Court of Appeals denying the motion for reargument has not as yet been officially reported, but appears in the record (R. 4120-4121).

Statement of Jurisdiction, Questions Presented, and Facts

The statement under which the jurisdiction of this Court is invoked, of the questions presented, and of the factual matter relevant to this application, appear in the petition to which this brief is annexed.

Argument

Petitioner urges that he has been convicted for the crime of murder and has been sentenced to death as a result of a trial so grossly unfair that he was denied due process of law.

The basis of his plea may be stated in the language employed by this Court in *Brown* v. *Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial. * * *"

POINT I

The petitioner was deprived of his liberty and life without due process of law by a proceeding which was a trial only in form and not in substance.

This Court has recently said that the guarantee of due process is not formulated in a set of hard and fast rules, but that "Asserted denial is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462).

Basic criteria are whether there has been "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" (*Chambers* v. *Florida*, 309 U. S. 227, 236-237) and whether "civilized standards for the trial of guilt or innocence" have been observed (*Hysler* v. *Florida*, 315 U. S. 411, 413).

> "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."
>
> "The law * * * is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 105, 122).

There is no due process within the meaning of the constitutional guarantees "if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong" (*Moore* v. *Dempsey*, 261 U. S. 86, 91).

If the absence of fairness so fatally infects a trial as to constitute a deprivation of due process, then it lies within the jurisdiction of this Court to reverse the action of the State Court (*Hill* v. *Texas*, 316 U. S. 400)—this for the purpose of translating into living law and maintaining the constitutional shield for the benefit of every human being subject to our Constitution (*Chambers* v. *Florida*, 309 U. S. 227, 241). This protection extends to all persons, regardless of belief in their guilt or innocence, since "Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous" (*Hill* v. *Texas*, 316 U. S. 400, 406). The vitality of our system of law meets its test when challenged by an individual who may lack the Court's sympathy.

Petitioner Weiss was, under the Constitution and Laws of the State of New York, entitled to a trial by jury (Constitution of the State of New York, Article 1, Section 1, Appendix A). It was a privilege he could not waive even by his own affirmative act (Constitution of the State of New York, Article 1, Section 2, Appendix B; *Cancemi* v. *People*, 18 N. Y. 128).

In New York State, a person indicted for murder may not plead guilty and may not be condemned to death except after trial before a jury (*People* v. *La Barbera*, 274 N. Y. 339, 343).

By the statutes of the State, guilt at the trial must be established beyond a reasonable doubt and all questions of fact lie within the province of the jury (Code

of Criminal Procedure of the State of New York, Section 389, Appendix H; Penal Law of the State of New York, Section 1041, Appendix C; Code of Criminal Procedure of the State of New York, Section 419, Appendix D).

The New York Court of Appeals has held that:

> "Both by statute and common law, they" (the jury) "are the exclusive judges of all questions of fact and every essential element of a crime presents a question of fact, whether there is any conflict in the evidence or not" (*People* v. *Walker*, 198 N. Y. 329, 334).
>
> *People* v. *Pignataro*, 263 N. Y. 229, 240.

In *Smith* v. *Western Pacific Ry. Co.*, 203 N. Y. 499, a civil case, the Court said (p. 503):

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

Despite these standards of fairness recognized by the State of New York, the record in this case discloses a conviction and death sentence resulting from a trial which disregarded the fundamental guarantees which underlie a jury trial. The Chief Judge, who, with obvious misgivings, cast the deciding vote for affirmance, said in most explicit terms that (R. 4077-4078; 289 N. Y. 181):

> "* * * the Court in the charge instructed the jury as a matter of law upon some questions of fact which only the jury had the right to determine, and I may **add parenthetically that** I doubt whether I would agree with the inferences drawn by the Trial Judge even if he had been the trier of the facts."

The very concept of trial by jury presupposes that there will be a presentation of issues of fact to that body and that the defendant will be judged only on the evidence

presented in accordance with law, free from passion, prejudice, excitement, and tyrannical power (*Chambers v. Florida*, 309 U. S. 227, 237).

The record in the case at bar cannot be squared with principles of due process as pronounced by this Court. It discloses that the proceedings were dominated by passion, prejudice and public excitement. Before the trial commenced and during its continuance, newspaper articles had poisoned the public mind against the defendants and had virtually convicted them without trial. Because Weiss was jointly indicted with the defendant Buchalter, he was tried not for the crime charged but indirectly upon an accusation that he was a member of "Murder, Inc." In the public mind, anyone accused with Buchalter was presumptively a member of that gruesome crew.

This public hysteria invaded the courtroom itself. The Trial Judge was perforce obliged to take cognizance of it in impaneling the jury. The articles appearing in the press, and particularly in the Daily Mirror, were, he said, "raising havoc with the jurors in this case." Men called for duty in a special "blue ribbon" panel had prejudged the defendants before a single witness had been called.

Public clamor was more than ever aroused when the District Attorney, whose assistants were prosecuting the case, became a candidate for public office. He was acclaimed as the nemesis of Murder Inc. The prosecution of the defendants had become, as counsel for Weiss protested, "a football of a political situation".

One may conjecture that with careful observance of decorum, restraint and impartiality at the trial, the crushing effect of this hostile atmosphere might have been to some extent allayed. Yet, we find the trial attended by theatrical effects which increased instead of subduing the tension. The defendants were brought into the courtroom manacled to police officers, the process of

removing these manacles took place within sight of the jury; witnesses called by the People were attended by armed guards, giving the implication that this was necessary for the witnesses' protection.*

The prosecuting attorney added fuel to the flames when he assured the jury that the unsavory characters called on behalf of the prosecution would meet their just deserts after they had served their purpose. Even the Trial Judge was not immune to the excitement which had been created, and his emotional reaction to the case was communicated to the jury. It would have been a strong-minded jury, indeed, which could have resisted the hostility thus engendered.

In this setting, it is impossible to say that the petitioner Weiss had the fair trial to which he is entitled as a matter of fundamental law.

Weiss, it is true, was represented in Court by counsel of his own choosing. His lawyers might as well not have been there. Efforts to preserve his rights were frustrated by the Trial Judge. Arguments made by his counsel in summation, based on the evidence adduced, were belittled, derided and disparaged. The jury were virtually told to disregard them.

The language of the Court of Appeals in *People* v. *Becker*, 210 N. Y. 274, 311, is singularly appropriate in this case:

> "Under the rulings of the court the defendant did not have that manner of trial which the law guaranteed to him. His counsel was hampered and embarrassed; his case was discredited and weakened; full and impartial consideration by the jury was impeded and prevented. He never had a fair chance to defend his life and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture."

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* This suggestion was made explicit by the prosecutor (see petition page 11).

Reference has been made in the petition to the disparagement of cross-examination both while testimony was being adduced and in the charge. An important purpose of assuring to a defendant charged with crime the right to be represented by counsel is to enable him to subject his accusers to cross-examination by persons skilled in that art.

In *People* v. *Becker*, 210 N. Y. 274, the Court quoted from Wigmore on Evidence (2 Wigmore on Evidence, § 1367) the principle (p. 305) that:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

It was held that the deprivation of the right to cross-examine witnesses is a denial of a substantial right. What does it avail a defendant in a criminal case to have counsel, if that counsel's usefulness and function is destroyed by the Court?

The travesty in the proceedings reached its climax when the Trial Judge instructed the jury. Again and again he determined questions of fact for the jury and instructed them in respect of these issues as though they were questions of law. This is not a problem of mere "error" or one of the latitude to be afforded a Trial Judge in his charge to the jury. It was a perversion of the function of a Judge presiding at a criminal trial. Notwithstanding the latitude allowed Judges in many jurisdictions to comment upon evidence, it is a universal and fundamental rule under our system of law that the instructions must be fair, impartial and unbiased.

This Court, in *Hickory* v. *United States*, 160 U. S. 408, 423, repeated what it considered to be the well founded rule that:

> "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided."

In *Minner* v. *United States*, 57 Fed. (2d) 506, the Court, in commenting upon the rule that a judge need not be a mere automatic oracle of the law, but a living participant in the trial, said (p. 513):

> "But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."

Judge Kenyon, writing for a unanimous court reversing the conviction in *Weare* v. *United States*, 1 F. 2d 617 (cited with approval in *People* v. *Ohanian*, 245 N. Y. 227, 232), said at page 619:

> "The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinion of

> the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts,* but he is precluded from giving a one sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

A similar statement appears in *People* v. *Becker*, 210 N. Y. 274, 307-308.

In this connection, we recall to the Court that portion of the petition which refers to the failure of the Trial Judge to mention Weiss' alibi in the body of his instructions. Whether the charge subsequently given by him at the request of counsel was or was not correct as a matter of law is immaterial for the present purposes. Of importance is the fact that a vital and material part of Weiss' defense was treated so casually (*Cf. Powell* v. *Alabama*, 287 U. S. 45, 56).

Again we mention only briefly the failure on the part of the prosecuting attorney and the Trial Judge to make available to the defendants on trial for their lives, Police Department reports which might have had a bearing upon the trial of the People's case. It is obviously difficult for Weiss to argue the relevancy and materiality of those reports. The defendants do not know what information they disclose. Yet, they were reports on the surveillance of the defendant Buchalter and it may well be that the information therein contained would greatly weaken if not completely refute Berger's story about the occurrences on September 11, 1936, and Tannenbaum's story of a "confession" made in his presence at 200 Fifth Avenue after Rosen was murdered.

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* The contrary is true in the State of New York.

The Court of Appeals, in denying reargument, said that the records in question were examined by it and that the so-called surveillance amounted to very little.* "It was of the entrance and lobby of the office building and not of the floor upon which the defendant Buchalter had his office. The reports established that the defendant could and did elude the police at will" (R. 4120).

But Berger testified that on September 11, when he and Buchalter went from the latter's office to the East Side of New York for the purpose of meeting Weiss, they went out of the main entrance of the building.

We submit to the Court that there is little difference in principle between a prosecutor's withholding of relevant information and his presentation of false testimony (Cf. *Mooney* v. *Holohan*, 294 U. S. 103, 112-113). Both result in the deprivation of a fair trial. This is not a case where the information was sought in advance of trial (*People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24). A witness was on the stand, the records had been subpoenaed and were within the jurisdiction of the Court. We submit that particularly in a capital case, fairness required that they be made available to the petitioner. In *People* v. *Walsh*, 262 N. Y. 141, 150, the Court of Appeals quoted with approval Judge Cooley's statement in *People* v. *Davis*, 52 Mich. 569:

> "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

"Criminal proceedings", said the Court in *Centosamore* v. *State*, 105 Nebraska, 452, 455, "are instituted with the object, not alone of securing convictions, but of getting as near to the truth as possible on the question of the guilt or innocence of the accused."

* But that was a question of fact for the jury. The defendants were entitled to this evidence and the jury to consider its weight.

Finally, the record discloses that in the Court of Appeals, a majority of the Judges,—Loughran, Desmond, Rippey, JJ., and Lehman, C.J.,—were not convinced beyond a reasonable doubt of the guilt of the defendants. That Court, upon appeal capital case, is obliged to weigh the evidence and form a conclusion as to the facts.

> *People* v. *Crum*, 272 N. Y. 348, 350;
> Constitution of the State of New York, Article VI, Section 7, Appendix G.

Despite the doubt expressed, the judgment was affirmed.

Conclusion

We cannot refrain from expressing the thought that the printed word, setting forth legal argument, seems impersonal and remote from the human side of the questions involved. The concept of due process is not based on abstract theory; it is the very foundation of our way of life. We all feel more secure in our daily lives in the knowledge that we in the United States are protected by the law from judgments based on hysteria and passion, even from the tyranny of men's emotions, and that our property, and certainly our lives, are safe against deprivation except after fair trial where the facts are determined by a jury of our peers. As opposed to a society based on apprehension and fear, where no man can be sure where he stands or how he will fare, ours is a society of freedom and security where individuals, whatever their status—even "bad" men—are protected against public clamor and official vindictiveness by constitutional guaranties. This applies even to a lowly individual in the death house under sentence of execution. We submit that the presumption of innocence prevails until after judgment of guilt on fair trial by an impartial judge and jury. It is unthinkable that a man may be marched to

the electric chair, strapped in, and his life snuffed out by the State, not because of what he did, but because of the way he was tried.

> "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life" (Roberts, J., in *Snyder* v. *Massachusetts*, 291 U. S. 97, 127).

If, as the record shows, the trial was had in a hostile atmosphere; if the important witnesses for the prosecution were gangsters, thugs and murderers who had every reason even that of life itself to perjure themselves; if these despicable characters had every opportunity to correlate the story; if the court explained and minimized their perjuries; if the prosecutor improperly assured the jury that the criminal witnesses of the prosecution would suffer punishment; if important evidence was excluded and improper evidence of a highly prejudicial character admitted; if the trial judge disparaged cross examination by which in the words of Judge Lehman the testimony of the chief prosecution witnesses was "impeached, if not completely destroyed"; if the attorneys for the defendants were browbeaten by the Court and arguments made by them were discredited; if the trial Judge usurped the functions of the jury by improperly instructing them on questions of fact; if the trial was one in form rather than in substance—if all of these things are true, can it be said that these defendants had a jury trial at all? If it be a fact, as stated by Judge Rippey, that the defendants under the circumstances here did not have "even a remote outside chance of any free consideration by the jury of their defenses", is there not a deprivation of due process as guaranteed by the Fourteenth Amendment?

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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Appendix A

Article 1, Section 1 of the Constitution of the State of New York

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

Appendix B

Article 1, Section 2 of the Constitution of the State of New York

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

Appendix C

Section 1041 of the Penal Law of the State of New York

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

Appendix D

Section 419 of the Code of Criminal Procedure of the State of New York

On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

Appendix E

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

Judicial Code of the United States,
Section 237 (b), as amended, 28 U. S. C. A.,
Section 344 (b)

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Appendix G

Article VI, Section 7 of the Constitution of the State of New York

Jurisdiction of Court of Appeals

The jurisdiction of the Court of Appeals, except where the judgment is of death, or where the appellate division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders final judgment or a final order thereon, shall be limited to the review of questions of law; but the right to appeal shall not depend upon the amount involved.

Appeals may be taken to the Court of Appeals in the classes of cases enumerated in this section.

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(The remainder of this article is omitted as not relevant.)

Appendix H

Section 389 of the Code of Criminal Procedure of the State of New York

A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1942

LOUIS CAPONE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY OF THE STATE OF NEW YORK FOR A REVIEW OF A JUDGMENT OF SAID COURT CONVICTING PETITIONER OF THE CRIME OF MURDER IN THE FIRST DEGREE; AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK FOR A REVIEW OF AN ORDER OF SAID COURT AFFIRMING THE AFORESAID JUDGMENT OF CONVICTION.

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PETITION

LOUIS CAPONE, the petitioner, by his attorney, prays that a writ of certiorari issue to review the judgment of the County Court of Kings County, State of New York, entered December 2, 1941, convicting petitioner, together with two co-defendants, of the crime of Murder in the first degree (R.pp. 222-3), and the affirmance of said judgment of conviction on October 30, 1942, by the court of Appeals of the State of New York (which is the court of last resort in said state), by a vote of four to three, with one of the dissenting judges voting to dismiss the indictment against the petitioner (R.p. 4091). A motion for a reargument

was denied by the Court of Appeals on November 25, 1942 (R.p. 4121). A stay of the execution of judgment against the petitioner was granted by Honorable Owen J. Roberts, one of the Associate Justices of this Court, by order dated December 5, 1942.

STATEMENT

Petitioner was indicted in May, 1940, by the grand jury of Kings County of the State of New York for the crime of murder in the first degree (R.p. 21). After being held in custody for sixteen months, the trial commenced on September 15, 1941. It continued until and was concluded on November 30, 1941, upon which day petitioner was convicted (R.p. 3993) on December 2, 1941, petitioner was sentenced to the punishment of death in the mode and manner prescribed by law (R.p. 3997). From this judgment of conviction the petitioner appealed to the Court of Appeals of the State of New York (R.pp. 11-12) which affirmed the judgment of the lower court by a vote of four to three. Four separate opinions were rendered by said court, (R.pp. 4030-4091).

QUESTION PRESENTED

Whether the fact that all the defendants were prejudged by the community in which the trial was held by reason of an extremely intensive prejudicial and inflammatory newspaper campaign, the denial of a motion for a change of venue despite this condition, the continuous denials of motions by petitioner for a severance (R. pp. 2191, 2240, 2377, 2683, 2698, 2703, 2706, 2715, 3540, s.m.pp. 12, 13, 27, 59-60*) the make-up of the jury, the atmosphere

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*Smp. refers to typewritten transcript of all proceedings had prior to opening to jury.

in the courtroom, the prosecuting attorney's misconduct which was permitted and condoned by the trial court, and the unfair attitude of the trial court throughout the trial, were such deviations from prescribed trial procedure as to result in a trial so unfair that it constituted a mere pretense of one, and deprived the petitioner of his rights to a fair and impartial trial guaranteed by the United States and State Constitutions, and culminated in his ultimate conviction without due process of law, all of which required a reversal of the judgment of conviction?

STATUTES INVOLVED

The statutes involved are as follows:

1. Constitution of the United States, Fourteenth Amendment, Section 1;
2. New York State Constitution, Article 1, Section 2; Article 1, Section 6;
3. Section 749-aa of the Judiciary Law of the State of New York, subdivision 7.

HISTORY PRECEDING TRIAL AND DURING SELECTION OF JURY

The three petitioners were jointly indicted with Harry Strauss, alias "Pittsburgh Phil," James Feraco and Philip Cohen (Little Farvel), for the murder of Joseph Rosen, by shooting him on September 13, 1936 (R.p. 21). There is no suggestion that defendant Capone took part in the actual shooting.

When the indictment was found, or very soon thereafter, the petitioner was in custody, as were all of the prosecution witnesses who testified to matters allegedly concerning him. At that time there was no apparent valid reason for any delay of the trial as to him and the State of New York could have given him a fair trial. Instead,

petitioner was held in custody for a period of sixteen months before the case was actually moved for trial. In the interim, however, and immediately following the finding of the indictment, numerous newspaper articles appeared, most of them condemning petitioner's co-defendant Buchalter as a czar of crime and alleging him guilty of the murder in the instant case and many others, while at the same time idolizing the district attorney of Kings County who was being groomed as the Democratic candidate for Mayor of the City of New York.

In one article, in the New York Times on April 15, 1940 (prior to the indictment of Capone), based on an interview with the District Attorney of Kings County, he (the district attorney) referred to Capone as "the go-between who accepted orders from Lepke and other gangsters for murders they wanted performed and passed the orders to the actual killers" (R.pp. 97-8). Thereafter, on October 31, 1940, a similar article appeared in the New York Daily Mirror. These articles continued in various newspapers down to the date of and through the entire trial of the petitioners.

The wide extent, the intensity and the inflammatory nature of this publicity can be amply gathered from the few excerpts of these newspaper articles which are set forth in the petition and brief of the petitioner Buchalter. The evil in this action by the press was to inflame the entire community against the petitioners and condition it to think of them as guilty men; in other words, the result was that the petitioners were prejudged by the populace from which the jury which was to determine their guilt or innocence was to be drawn. Though this means was more subtle and orderly, it was no different in final result from being "rushed to conviction through • • • jury and judge being swept to the fatal end by an irresistible wave of public passion • • •."

But even though a small portion of this unprecedented flow of prejudicial, inflammatory propaganda directly mentioned petitioner, the balance thereof could not help but redound to the detriment of petitioner if he went to trial with his co-defendant Buchalter, against whom the great bulk of passion-arousing publicity was directed. If a joint trial were held in the face of this publicity, this petitioner realized that his fate, regardless of the proof against him, rested with Buchalter; that he would not have the benefit of the presumption of innocence; and that a conviction, again regardless of the proof, would result—though not by due process of law. Consequently, in June, 1941, petitioner moved for a severance of the trial as to him, setting forth the above as one of the grounds for his application (R.pp. 31-64). Such motion was denied, without prejudice, however, to a renewal thereof before the trial court (R.pp. 29-30). No appeal could be taken from this order under the Code of Criminal Procedure of the State of New York, but it was brought up for review on appeal from the judgment (R.p. 12).

In July, 1941, petitioner was advised that the trial would begin on August 4, 1941. By that time it was apparent that Judge O'Dwyer, the then District Attorney of Kings County, would probably be nominated by the Democratic Party as its candidate for Mayor of the City of New York. In this situation, and believing that he could not receive a fair trial because of, as previously stated, the unprecedented inflammatory publicity principally directed against his co-defendants, and that the candidacy would further minimize the possibility of a fair trial by casting the entire case into the arena of local politics, the petitioner herein joined in a motion made by the petitioner Buchalter for a change of venue. This motion was denied. The reason assigned by the Supreme

Court justice was that adverse publicity was statewide. No appeal could be taken from this order under the Code of Criminal Procedure of the State of New York, but it, too, was brought up for review on appeal from the judgment (R.p. 12).

On August 4, 1941, the case was called for trial before Judge Taylor (s.m.p. 28). There was a blue ribbon panel of 250 talesmen. The district attorney had then actually been nominated for the office of Mayor of the City of New York (s.m.p. 40). The trial judge was then a candidate for re-election (s.m.p. 43). Although the district attorney had requested a trial in August, before becoming a candidate, on August 4, 1941 an application was made by him for an adjournment to September 15th. Counsel for all of the petitioners strenuously objected to any adjournment, and stated they were ready to proceed with the trial on that day, and that they feared if the case were adjourned to the middle of September, when the active political campaign had started, it would become "a political football," and that if the Court desired to serve the convenience of jurors, a postponement should be granted until after election (s.m.p. 39-53). The court, however, refused to grant the request, and set the trial, over objection and exception, for September 15th, assuring counsel that the delay would be helpful because it would give the community an opportunity to forget the prejudice engendered by news hostility (s.m.p. 53-57).

However, a new series of articles appeared in the "Daily Mirror" (Brooklyn edition). These articles resulted in a renewal of the motion for a change of venue, which was denied without opinion. These matters are more fully set forth in the petition of the defendant Buchalter, and are, therefore, omitted herein, although made a part hereof.

On September 15, 1941, the application for an adjournment was again renewed, counsel for the petitioner herein requesting the adjournment in order to familiarize himself with the case and because of the impending Jewish Holy Days (s.m.p. 60). This motion was denied (s.m.p. 61).

Counsel for the petitioner thereupon renewed the motion for a severance, which was also denied (s.m.p. 59-60). This decision was not appealable, but was brought up for review in the appellate court (R.p. 12). Throughout the trial the motion for a severance was continuously renewed, and continuously denied.

The process of impaneling the jury commenced on September 15, 1941, and continued for a period of five weeks. This blue ribbon panel of 250, composed only of talesmen who had sworn that they were able to disregard newspaper impression, was exhausted, and a new panel of 100, having similar qualifications, was required before the selection process had been completed. At least one-half of the talesmen readily admitted that so fixed was their opinion and so strong their prejudice against "one or more of the defendants" in consequence of hostile newspaper propaganda that they could not sit as impartial jurors.

It is contended that the talesmen ultimately selected as impartial were prohibited by the court from expressing their true state of mind, and were inhibited by the trial judge from admitting their prejudice. Talesmen were threatened with excoriations by the trial judge if they admitted prejudice.

Under Sections 360 and 373 of the Code of Criminal Procedure of the State of New York the defendants collectively were entitled to thirty peremptory challenges of jurors. These thirty peremptory challenges were exhausted after nine jurors had been selected. The court erroneously overruled ten challenges made by defendants for cause

to talesmen obviously prejudiced. The court invoked a different standard for the prosecution and erroneously sustained at least six of the challenges.

The record will disclose that not one of the peremptory challenges exercised collectively by the defendants was due to any direct statement made by the prospective juror as to any implied prejudice against the petitioner Capone. The law, however, compelled petitioner Capone to join in with the co-defendants in excusing him. However, after the thirty challenges were completely exhausted, the two jurymen Rorke and Link were seated in the jurybox. They were obviously prejudiced. One was connected with the Mr. District Attorney program on the radio, and the other was a nephew of a prominent police official. Link had been previously excused by the same trial assistant in an earlier murder trial in which petitioner's counsel was the attorney for one of the defendants because, as then stated by the trial assistant, his employment would make it unfair to the defendant for him to sit on the jury. However, on this trial, where the thirty peremptory challenges had already been exhausted, he asked, in effect, whether the talesman would be prejudiced against him because *he* had excused him (Link) in the earlier case on the ground that he might be unfair to the defendant. Receiving a negative reply, Link was seated. Rorke was chosen against the background of the knowledge of the trial assistant that in this same earlier case Rorke, too, had been a talesman and had heard the name of the petitioner herein, and had been peremptorily excused because of his relationship with a New York police official. Thus this defendant was confronted with the first situation arising in the trial whereby he could and would have exercised peremptory challenges upon the denial of the court to excuse these talesmen for cause but was prevented from doing so, due to the failure to grant him a severance.

Petitioner respectfully asserts that a fair jury was not impanelled because it could not have been impanelled in the County of Kings in the month of September, 1941.

ATMOSPHERE SURROUNDING THE TRIAL

Coupled with the adverse publicity prior to the trial, during the selection of the jury and thereafter, the atmosphere in the courtroom throughout the trial unquestionably prejudiced the jurors' minds against the defendant.

On the very eve of the trial, there appeared in the Sunday Mirror, August 3, 1941, the following:

"LEPKE WILL GO TO TRIAL TOMORROW."

> "A heavy police guard will be stationed in Brooklyn tomorrow when Louis (Lepke) Buchalter goes to trial on first-degree murder indictment."
>
> • • • •
>
> "A police sergeant, 15 policemen and an unspecified number of plainclothes men have been detailed to guard the courtroom, corridors and the outside of the building." (R.p. 63)

With this prelude the trial subsequently began and the court immediately assumed the appearance of an armed camp, which continued throughout the trial. The existence of this condition is substantiated by objections made by defense counsel throughout the trial.

As soon as the People's star witness, the criminal, Sol Bernstein, was called to the stand, the following ensued:

> "Mr. Barshay: With your Honor's permission, may the record show that when this witness, Mr. Bernstein, came into the court room from your right he was preceded by a court attendant and he was followed by three men who I know to be detectives.

The Court: All right.

Mr. Barshay: Will your Honor note my objection to that proceeding?

The Court: I did not see it. I take your word for it.

Mr. Cuff: Two of them have their badges on now.

Mr. Turkus: Mr. McDonough is one of them; Mr. Harrington is another one standing to your Honor's left.

Mr. Cuff: May I have the name of the other gentleman who follows?

Mr. Turkus: Detective James Bell.

Mr. Cuff: And the court officer, to whom I have no objection. Mr. Meek.

Mr. Trukus: Is the objection to the protection of the witness?

Mr. Barshay: I object to the comment of Mr. Turkus. That was an unfair comment, and I ask the court to direct the jury now to disregard that and admonish Mr. Turkus not to repeat any such thing. There is no intimation that this witness in this court room or in any other place in this world needs any protection.

Mr. Turkus: You will know that before the case is over.

Mr. Barshay: I object to that comment.

The Court: The jury will disregard all side play.

Mr. Barshay: Side play on the part of the District Attorney, sir.

The Court: Please—

Mr. Barshay: May you say that, please?

The Court: Whichever side it comes from. The matter calls for no ruling.

Mr. Barshay: I ask your Honor——

The Court: You are dictating to the record. That is your right, but there is nothing that calls for a ruling. I do not know what it means, so please do not argue. Just proceed.

Mr. Barshay: Exception.

Mr. Rosenthal: May I have a ruling? In view of the atmosphere created insofar as the defendant Capone is concerned by having two police officers standing in an unusual position next to the jury box while the witness is testifying and the two court officers, one standing directly behind the witness and the other to his left, I ask for a mistrial upon the ground of prejudicial conduct against the defendant Capone.

Mr. Cuff: Defendant Weiss joins in that motion.

The Court: To get the record absolutely straight, let us have a survey of relative locations.

Mr. Rosenthal: All right, sir, I will take your Honor's statement as to where they are.

The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial.

Mr. Rosenthal: I respectfully except.

Mr. Cuff: I except.

Mr. Barshay: May I make a motion for the withdrawal of a juror and the declaration of a mistrial on the ground that Mr. Turkus made a prejudicial remark?

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I ask for the removal of the court officer that has been stationed directly behind the witness——

The Court: Denied.

Mr. Talley: —as he sits in the witness chair. He has not been there during the testimony of any other witness, and I object to this stage setting upon the entrance of this witness. I do not know what he is going to testify to, if anything, but I object to this display that has been occasioned be-

cause I regard it all as prejudicial to the defendant whom I represent and as unnecessary and unprecedented.

The Court: The court officer, George Meek, who is personally assigned to me as a judge of this court, in my chambers only, his place is right there or any place else that the court sees fit to put him, and it is nobody else's affair. Motion denied.

Mr. Talley: Does your Honor contend his place is directly behind the witness chair while the witness is testifying or about to testify?

The Court: Proceed.

Mr. Talley: I except to your Honor's refusal to grant my request." (R.pp. 686-90)

Thereafter, while the same witness was on the stand, the following occurred:

"Mr. Talley: Before I commence to examine this witness, I request your Honor to remove the court officer who stands within six inches behind the chair of the witness. I ask your Honor to remove from the sight of the jury the two detectives who escorted this witness to the witness chair. There is another officer standing, in uniform, immediately alongside of the witness chair. I have no objection to his standing in that general vicinity, but the other display I ask to be removed, as prejudicial to these defendants and interfering with proper cross examination and prejudicial to the defendants in this court room. There are plenty of detectives in this court room and there are other uniformed policemen who are kept outside of the court room. These three defendants are brought in here, in sight of the jury, in chains, literally in chains. There are three or four officers sitting alongside of these defendants, and I object to this display as unnecessary, unprecedented, and here for no other reason than to prejudice the jury, against these defendants. I ask that they be re-

moved, and that we proceed in a legal, judicial manner in the conduct of this trial from now on, and that we take away this theatrical display.

Mr. Rosenthal: I join in that motion.

The Court: Anything by the defendant Buchalter?

Mr. Barshay: We join in the motion.

The Court: All right, for the purpose of the record—the set-up is the usual one which is followed in this court in all cases so far as the Court can recall. When witnesses are brought in, in custody, detectives who are charged with the custody—that is, detectives or other officers or jailers who are charged with the custody, stand back in the corner, substantially out of sight of the jury, but close enough not to lose technical custody. Then the two attendants of this court stand, first the Judge's personal attendant, directly behind the prisoner witness, and next another one, in a position where he can guard the door, which is directly to the left of the witness stand and which opens into the Judge's chambers, and provides a means of escape. There is nothing unusual about this, so that is not considered seriously, and it is denied.

Did I understand you to say the defendants are brought in in chains?

Mr. Talley: Yes.

The Court: You mean they are manacled?

Mr. Talley: Yes, sir, manacled with these officers who are with them.

The Court: At the present time?

Mr. Talley: No, the manacles are removed when they come in the court room, but not before; when they are seated and not before; and your Honor requires the jury to be in their seats so they can see this spectacle of how these men are brought in.

The Court: Do you impugn the Court's honor? The Court does not require the jury to be in their seats in order to see 'the spectacle,' because the Court is not aware of it; and the Court has not been aware of it until you just informed the Court

to that effect. This compels, being before the jury, a ruling in the presence of the jury and that is, so far as the custodianship is concerned, until the defendants enter the court room and are seated it is not within the Court's jurisdiction, and is not under the Court's direction. That is a responsibility that is elsewhere charged. But at no time during the trial will the Court permit any defendant to sit here menacled, (sic) and, so far as the Court is informed by you, the defendants have not sat here manacled. That is overruled.

Mr. Talley: My objection is to their being brought into your court room menacled, (sic) and as soon as they enter the court room the manacle or manacles are kept on them until they are seated. Then they are removed. As soon as recess is declared the manacles are then put on and they are taken out, not merely with these three detectives who are sitting alongside of them now, but also preceded and followed by uniformed court attendants. Your Honor has direction of what happens in this court room, and it is what happens here that I object to, not what they do outside the courtroom and not in the presence of the jury.

The Court: These defendants have been brought into this court room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor, down a public staircase, and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say. Denied.

Mr. Talley: Exception. I take an exception to your ruling and also to your comment, as being prejudicial to these defendants.

I am now asking for my own information and not for any other reason, I beg to assure the Court: Are you going to continue to permit these defendants to be brought into this court room manacled, the manacles being kept on them until they are seated in their chairs?

The Court: The Court is not under examination as a witness and declines to answer the question. Please proceed with your examination.

Mr. Talley: Exception." (R.pp. 764-8)

While the witness Rubin was on the stand the following occurred:

"By Mr. Talley:

Q. Before this witness leaves the stand, may I have the record indicate that during the entire course of his testimony, a uniformed court officer stood directly behind his chair, within a foot, in the back of it; that two uniformed--another uniformed court officer stood within a few feet from him at the end of the jury box—and that during the entire testimony there was always a detective with a badge exposed on the lapel of his coat, standing also at the end of the jury box?

The Court: Well, the set-up is perfectly proper. The two uniformed court officers are here legally, and the Court refuses to conduct the court without proper discretion and place court officers where it sees fit. It is none of counsel's business, and the jury will disregard it.

Mr. Talley: I submit——

The Court: Do not interrupt. There is a detective against the exit door, between the court room and the public hallway.

Mr. Cuff: About two or three feet away from the jury box.

The Court: I will say he is almost in contact with it—behind the jury box—to one end; and that he is properly there. That door is going to be guarded at all times during this or any other trial this Court is engaged in. Now, the witness will be taken away.

Mr. Talley: I also ask your Honor to remove the picture which stood behind the witness chair through the entire course of this trial. It is en-

tirely unnecessary and was never once referred to by this witness, who has been on the stand three days. I don't think it belongs there.

The Court: Let us have the number of the exhibit.

Mr. Turkus: That is People's Exhibit 2 in evidence.

The Court: It is not prejudicial in any way, and the Court was unaware of its presence.

This might create an impression on the record which, upon reading, would make it seem that the defendants were not having a fair trial. That is nonsense. Take the exhibit away—turn it the other way. The jury is not supposed to see exhibits, apparently. It is quite large, is on an easel, and requires a man to lift it.

Now the record is the way it should be as to accuracy and fairness.

Mr. Talley: Exception." (R.pp. 1755-6)

While the witness Blanche Weiss was on the stand the following occurred:

"Mr. Talley: While there is a change in the guards, may I ask the Court to direct the officer to stand back from the witness, not directly behind the witness as the last officer did? May we have the court officer removed, or if he stands there, that he stand back against the wall and not against the chair of the witness?

The Court: That is incorrect in several details. He is behind the witness and almost flat against the wall.

Mr. Talley: The last officer who was just relieved stood within three inches of the back of the chair of this witness.

The Court: You should have called the Court's attention to it then.

Mr. Talley: I did not want to interrupt.

The Court: If your observation was accurate. It occurred to me just as was just stated." (R. pp. 3362-3)

GENERAL OUTLINE OF THE CASE

On September 13, 1936, at about 6:45 A.M., Louis Stamler, who resided across the street from Rosen's candy store (R.p. 328), heard a shot (R.pp. 322-3), looked out of the window and saw a car pull away from there. As the car pulled away he saw a bleeding man lying on the floor of the candy store (R.p. 329). He then looked back at the moving car and memorized its license number (R.p. 323). He ran down to the candy store, where he saw Rosen, the proprietor, on the floor. He yelled "Police!" and Patrolman Cappadora arrived in answer to the call (R.p. 325). He gave the policeman the number of the car and described it as a dark car (R.p. 326).

Patrolman Cappadora then notified the Telegraph Bureau to broadcast an alarm for a black sedan bearing license L-16-67 with three or more men in it and further notified the station house of what had happened (R.p. 335). Shortly thereafter an ambulance surgeon pronounced Rosen dead (R.p. 337). The body was removed to the Kings County Morgue (R.p. 338) where it was identified by Patrolman Cappadora (R.p. 338) and the deceased's son (R.p. 485).

An autopsy by Dr. Marten, Deputy Chief Medical Examiner, disclosed seventeen bullet holes in the body, some of which were entrance and others exit holes (R.p. 343). The cause of death was bullets perforating the skull, brain and lungs (R.p. 347).

PEOPLE'S THEORY OF THE ALLEGED MOTIVE

It was the contention of the prosecution that through the manipulations of the defendant Buchalter, Rosen had been forced out of a partnership in a clothing trucking business; that Rosen bruited it about in the clothing market that Buchalter had forced him out of business; that

because of Rosen's complaints in the industry Buchalter obtained a job for him with a trucking concern, which lasted a short time; that efforts by Rosen to obtain another position failed; that Rosen then opened a candy store at 725 Sutter Avenue, but still vociferously complained about what Buchalter had allegedly done to him and threatened to go to Thomas E. Dewey, Special Prosecutor appointed by the Governor to investigate racketeering, and tell what he knew about Buchalter; that Buchalter, through an intermediary, attempted to silence Rosen by giving him money to leave town; that Rosen left town, but returned in a few days and again threatened to appear as a witness before Dewey; and that Buchalter, exasperated at Rosen's continued threats, ordered his execution to silence him forever (R. pp. 234-9).

The defendant Capone was not connected or involved in any of the foregoing. Therefore, whether the People's evidence proved or failed to prove this theory will not be analyzed or discussed herein at length. However, all such evidence as to alleged motive, even though concededly not applicable to Capone, was of such prejudicial character that it indubitably affected the jury's consideration as to him and unduly prejudiced his rights to a fair trial.

The record of the testimony is voluminous. Comparatively little of it involved the petitioner. The mass of it so colored the trial and the error was so constant that the entire testimony appears in this transcript. For present purposes, however, a brief resume of pertinent testimony appears sufficient.

Proof in attempted substantiation of this motive, the events leading up to the commission of the crime and its eventual execution was presented through the witnesses Max Rubin, Paul Berger and Sol Bernstein.

1. MAX RUBIN

Though we quote his testimony, objections and exceptions were taken on behalf of Capone to the entire line of questions asked of him on the grounds that it was not binding on Capone, was too remote and extremely prejudicial (R.pp. 1289-90, 1311, 1351, 1377, 1381, 1388, 1394-5, 1745).

Max Rubin was an associate of Buchalter and, from 1932 to 1936, did work for him in connection with different unions and trade associations (R.pp. 1303-4). He was also the business agent of the Clothing Drivers and Helpers Union (R.p. 1305).

In October, 1936, Rubin fled the jurisdiction and went into hiding because of the investigation then being conducted by Special Prosecutor Dewey (R.pp. 1381-1420, 1685-1700, 1725-6). In this trial he insisted that the Rosen killing was another factor in causing him to flee (R.p. 1701). He admitted, however, that when he fled he had in mind the penalties he might pay in Manhattan; he felt there was nothing in Brooklyn for which he could be penalized (R.pp. 1725-6). But to reconcile his present stand, he contended that though there was nothing in Brooklyn to make him fearful, he was afraid of being framed by the Brooklyn district attorney (R.p. 1726). In August, 1937, he surrendered himself to Dewey by first sending his attorney, Edward C. Maguire, there to make arrangements; he did not send, nor did he personally go to Brooklyn at that time (R.pp. 1468-9, 1470, 1731-2). Towards the end of September, 1937, he testified before the Dewey Grand Jury (R.pp. 1478-9)—apparently telling all he knew. Because of being shot on October 1, 1937, Rubin was provided with a twenty-four hour police guard (R.p. 2392).

While under this guard and, on December 16, 1937, when he was talking freely to Dewey's men, he was questioned in Dewey's office by Assistant District Attorney McCarthy from Brooklyn with reference to the Rosen case in the presence of Dewey's assistant, Frank Hogan (now District Attorney of New York County), a detective and a stenographer (R.pp. 2392-3). Though the defense requested this statement for the purpose of cross examining the witness, the trial court only permitted the defense to have a portion hereof, on he ground that some of the balance was speculative and opinionative (R.pp. 2377-8, 2386-8). The portion of the statement which was made available to the defense disclosed that McCarthy offered Rubin complete immunity in the Rosen matter, but that Rubin rejected the offer because he was not involved in it; that Rubin denied any knowledge of the murder; that he did not implicate Buchalter, though he went out of his way to give assurance that he would if he could; and that when he fled the jurisdiction it was not on account of the Rosen shooting (R.pp. 2379-86). Rubin admitted having made all the answers contained in his statement to McCarthy (R.pp. 2394-2399). He contended, however, that this statement was untrue (R.pp. 2402-3); that despite the fact that at the time he was under twenty-four hour police guard and despite the fact that at the time he was telling Dewey everything he knew about Buchalter, he gave untrue answers to McCarthy through fear of Buchalter (who was a fugitive at the time), because he was shot following his testimony before the Dewey Grand Jury (R.pp. 2419-20).

The next time Rubin had contact with any Brooklyn official was in March, 1940, a month after he testified against Buchalter in another case in New York County (R.p. 1735). At that time he spoke to Inspector McDer-

mott and District Attorney O'Dwyer (R.pp. 1487-9). What he spoke about is not disclosed by the record. On September 25, 1941, after this case had been on trial for ten days, and over a year after the finding of the indictment, he specifically testified with reference to the Rosen case before the grand jury (R.p. 1736). But as the indictment had been found more than a year previously, the only palpable purpose for which Rubin testified before the grand jury was to obtain immunity.

Rubin's narrative, briefly, is as follows:

Over objection and exception that the matter was entirely too remote and wholly unconnected with the crime charged, he traced the leadership and internal affairs of the Amalgamated Clothing Workers Union since 1923 and was permitted, also over objection and exception, to name certain individuals who, without any official connection with the union, were on its "payroll," and to state that some of them had disappeared or were dead (R.pp. 1293-1320). The named individuals, other than being known to the witness, played no other part in the case. They were obviously gangsters, and in bringing their names into the case despite the fact that they weren't even remotely connected with it, makes it manifest that the district attorney's purpose was to cover the entire proceeding with an aura of union gangsterism and thereby prejudicially influence the jury's deliberations by subtly recalling to their minds all the lurid newspaper accounts for many years past relative to gang killings and depredations. Thus, though the decease of those named was not connected with Capone and had absolutely no bearing on the issue in this case, the district attorney in this manner was permitted to introduce highly prejudicial and inflammatory extraneous matter.

To continue with the narrative, Rubin then told about

the incidents in 1932 which allegedly led to Rosen's expulsion from business (R. pp. 1321-1338); about obtaining a job for Rosen with a trucking concern at $100 a week (R. pp. 1339-42); about the discharge of Rosen from his position about a year later for stealing (R. pp. 1342-3); about the unsuccessful efforts made to obtain another job for Rosen (R. pp. 1343-5); about Rosen's continuous complaints until some time in 1935, after the appointment of Dewey (R. pp. 1345-9); about then obtaining a new job for Rosen, after he had been out of work for sixteen months (R. pp. 1349-50); and about learning some months thereafter that Rosen had opened a candy store in Brownsville (R. p. 1350).

Rubin then recounted that in June, 1936, Buchalter complained that Rosen had threatened to go down to Dewey's office (R.p. 1355); that he made various efforts to placate Buchalter by telling him that Rosen was harmless; that in September, 1936, Buchalter made the same complaint to him about Rosen; that he further attempted to "straighten the thing out"; that he apparently failed in his mission; and that he was then instructed by Buchalter to inform one, Paul Berger, that he, Buchalter, wanted to see him (R.pp. 1356-67).

Other than the foregoing, the balance of Rubin's testimony concerned his peregrinations to avoid Dewey's investigations and, as he now claimed, being involved in the Rosen matter and his contacts and conversations with Buchalter relative thereto. It is significant to note, however, that in all his testimony relative to union affairs and the events leading up to the crime, ***Rubin did not implicate Capone in the slightest.*** The only mention he made of Capone's name was then he testified, over objection and exception, that he saw Capone in 1932 or 1933 in the company of Buchalter and Buggsy Goldstein (R.pp. 1461-2) and had a fleeting glance of him in 1935

when Capone went in and out of a room (R.p. 1463). On both occasions he did not speak to nor was he introduced to Capone (R.p. 1752), and Capone's presence had nothing to do with the instant case (R.p. 1752). He never saw Capone after this last occasion in 1935 (R.p. 1462).

Though Rubin's testimony obviously did not implicate Capone, still it seriously prejudiced him, particularly in the manner in which Capone was mentioned. For here again the prosecutor demonstrated his persistent efforts to have the case tried on newspaper gang stories rather than the indictment. When Rubin stated that he saw Capone in 1932, which certainly was not in connection with the Rosen matter, he was immediately asked who was with Capone at the time. Rubin replied that it was Buchalter. But this did not satisfy the prosecutor. He immediately asked who else was there, and Rubin promptly said, "Buggsy Goldstein" (R.p. 1462). As Goldstein had no connection with the instant case, it is impossible to discern what relevancy or legitimate function the prosecutor's persistent question had except to prejudice Capone by recalling to the jurors' minds a notorious case, which they must have read about, resulting in the execution of said Goldstein (*People* v. *Goldstein*, 275 N. Y. 376).

Because of the incompetency of Rubin's testimony against petitioner and particularly because of its extremely prejudicial nature, a motion for a severance was again made, but was denied.

2. PAUL BERGER

Paul Berger, too, was an associate of Buchalter's (R. p. 1801). He also was permitted, over objection and exception, to trace the affairs of the clothing union since 1927 and to name men unconnected with the case, who were obviously gangsters (R.pp. 1781-95).

Berger, himself, is a vicious character. He was on the union payroll as a "slugger" and strong-arm man, and blandly admitted beating up a good many people for years (R.pp. 1786, 1796, 1907, 1910-17, 1921, 2070-1, 2163). He readily admitted that on two occasions he pointed out Rubin to men who were intent upon killing him, of which intention Berger was aware at the time he did the pointing (R.pp. 2053, 2186-9).

Berger, like Rubin, also testified before the grand jury after the trial had begun and he, too, obtained immunity by refusing and failing to sign a waiver (R.pp. 1890, 2159, 2167).

Berger's story of the events before the killing commences at the point where Rubin's terminates. Berger testified that pursuant to Rubin's summons he saw Buchalter; that Buchalter took him to the defendant Weiss; that Buchalter told him to point out Rosen to Weiss; that he and Weiss departed from Buchalter and went to Brooklyn where he pointed out Rosen to Weiss (R.pp. 1803-11).

Berger protested vehemently, with a fine show of injured innocence, that he did not know he was pointing out Rosen so that he could be killed (R.pp. 2053, 2076, 2163-4); he thought Rosen was to be beaten up (R.pp. 2076-7). He readily admitted, however, that on the two occasions he had arranged to point out Rubin, he knew it was for the purpose of killing him (R.pp 1838, 2053, 2054, 2076, 2188-9). Although available, Berger was not arrested until June 5, 1941 (R.p. 1875).

Berger testified that he would not hesitate to lie in order to save himself from the electric chair or even from any trouble (R.pp. 2190-1).

Again because of the incompetency of Berger's testimony against petitioner and because of its prejudicial nature, a motion was again made for a severance and also denied.

3. SOL BERNSTEIN

Bernstein was the principal witness for the prosecution. He drove the death car and knew before he embarked on the venture that a murder was to be committed (R.p. 826).

Bernstein, who is thirty years old, has not done any honest work since he was eighteen (R.pp. 690-1). In 1930, at the age of nineteen (before he claims to have known Capone) he pleaded guilty in the County Court to unlawful entry, although charged with a felony (R.p. 938), and received a suspended sentence (R.p. 692). In October, 1933, he stole an automobile without anyone's assistance, and first pleaded guilty to a felony, but was then permitted to withdraw his plea and plead guilty to a misdemeanor (R.pp. 941-4), for which he again received a suspended sentence (R.p. 693). Although when first questioned by counsel for Weiss about this episode he denied the presence of guns in that car (R.p. 842), he finally was compelled to admit that there were guns and ropes to tie a person with in the car and that he was in the company of two stick-up men and the guns were to be used in the event of resistance (R.pp. 1044-6).

Though he claimed that he was not present at and did not know that a certain murder of one Yuran was committed in the mountains, he admitted helping to dispose of the murdered body (R.pp. 778-9, 1086-1102).

He went to California at the request of one Strauss, a co-defendant who had been previously executed on a conviction for another murder, to kill one Gangy Cohen (R.p. 1063). (This is the same Cohen against whom Bernstein testified on a first degree murder trial, which testimony Bernstein admitted, at the instant trial, was perjurious, which will be discussed in the brief to be submitted with the petition herein.) Bernstein also accompanied a notorious burglar and crook to California

and paid the attorney's fee for this crook when he was apprehended for a crime (R.pp. 1063-4, 1067-8). He also drove one, Fat Cooperman, to a doorway where he was killed, and although Bernstein protested that he had nothing to do with the murder, he admitted that he had not accidentally met Cooperman to take him home (R.pp. 1125-28).

Bernstein became a usurer, gambler and bookmaker at an early age, and, in fact, as he put it, "I was not an angel, does that satisfy you?" (R.pp. 786-7). He borrowed upwards of $50,000 from the Food Dealers Association for the use in his shylock business (R.p. 820). He was a strong-arm man in a gambling place in Florida (R.p. 965), and he threatened people who owed him money in the usury business and did not pay (R.p. 966). He conducted a candy store as a blind for his loan shark business, in which store burglars and other criminals congregated (R.pp. 1077-9). He followed carnivals and worked as a shill* for so long a time he could not remember (R.pp. 1068-70). He admitted he stole seventy-five automobiles (R.p. 825), and committed numerous other crimes, such as murders and "schlamming jobs" (R.p. 777). Schlamming, he explained, was beating someone over the head with a lead pipe (R.p. 1187).

Bernstein was not indicted for his confessed part in the Rosen murder (R.p. 780), since he testified before the grand jury (R.p. 797) without signing a waiver of immunity (R.p. 878). Although he acknowledged he knew he could not be prosecuted for this particular crime, he protested, with a too apparently assumed naivete, that he expected no consideration whatever for his testimony

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* A shill is a decoy or lure to entice victims into a crooked gambling game (R.p. 809).

(R.p. 877). He was granted immunity by testifying before the grand jury in the Yuran murder case (R.p. 1047). Aside from being held as a material witness he was not then charged, as he sat in the witness chair, with the commission of any crime (R.p. 1178). Since his surrender in April, 1940 (R.pp. 757-8), he has been confined to various hotels with some of the other prosecution witnesses (R.pp. 761-2).

On April 24, 1942, six months after he gave his testimony in the instant case, this professional criminal, a murderer, was discharged by the Kings County Court on the motion of District Attorney O'Dwyer. He goes scot-free! In addition, by way of reward, he received the sum of $2,223 of taxpayers' money, presumably as fees for being held as a material witness. It should be noted, however, that the amount of fees payable to a material witness in New York state is wholly discretionary with the County Judge before whom the matter is presented, and that during the entire period Bernstein was held as a material witness he was maintained at first rate hotels.

Bernstein testified that two days before the murder, in the presence of the petitioner herein, one Strauss instructed him to steal an automobile (R.pp. 702-3), and to return on the following day (R.p. 703); that on the following day he and the petitioner drove this automobile over a certain route which was being demonstrated by the petitioner, and which route the petitioner instructed Bernstein to follow to make the "get-away" after a murder was committed in a certain candy store pointed out by the petitioner (R.pp. 715-6); that on the following day he met all the co-defendants but the petitioner, the murder was committed, Bernstein drove the stolen automobile over the "get-away" route, at the termination of which he was met by the petitioner and another

co-defendant, and all the persons involved then drove away in different cars, abandoning the stolen automobile (R.pp. 732-51).

The foregoing is a succinct digest of Bernstein's testimony as given on direct examination. On cross examination, however, innumerable falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance were developed and cooly and unconcernedly admitted by Bernstein to such an extent that it would be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis Capone's guilt or innocence depends on Bernstein's word. In fact, though Bernstein stoutly maintained that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, he admitted that since that time he testified falsely in the Gangy Cohen trial, which was a first degree murder case. To quote from the record:

> "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir. I knew I was doing wrong." (R.pp. 797-8)

The full extent of these perjuries will be set forth in greater detail in the brief to be submitted simultaneously herewith.

The most glaring incident of Bernstein's deliberate perjuries and effrontery occurred when, at the beginning of his cross examination, Bernstein unequivocally stated (in order to demonstrate that the witnesses housed in the same hotel did not have an opportunity to confer on their testimony or to concoct a story) that since he had been placed in custody at the hotel he never wrote any letters to anyone, was not permitted to write or send out letters and never gave any to a detective, his wife or to any other person to mail (R.p. 975). However, much later in his

cross examination, when asked to write certain words and names, he realized that he was "caught in his own trap" and quickly admitted that he had written about four or five letters (R.pp. 1238-40).

Aside from the fact that the admission that these letters were written and mailed exploded the prosecution's tacit contention that the witnesses were under twenty-four hour surveillance and had no opportunity to concoct a story, the contents of the letters themselves (which the trial judge refused to admit into evidence for consideration by the jury) clearly demonstrate the viciousness of Bernstein's character, for the letters contained dire veiled threats to inform on certain people unless his, Bernstein's demands for money were met.

ONLY ALLEGED CORROBORATION AS TO PETITIONER: SEYMOUR MAGOON

To supply the necessary statutory corroboration of the self-confessed accomplice Bernstein, the prosecution introduced testimony by one, Seymour Magoon. He is equally as vicious, depraved and mendacious a criminal as Bernstein, though somewhat more cunning. He admitted to participation in two separate murders (R.p. 2470). He has followed a criminal career during his attendance at public school and continuously since that time (R.pp. 2513-4). He stole innumerable automobiles, shot two men—but protested that they did not die—, had beaten into unconsciousness a police officer, and had indulged in various other criminal activities. At the time of the trial, though he had confessed to two murders, no indictments were pending against him (R.pp. 2510-1). He declared that he would like to save himself from the electric chair, and in an effort to do so, he was testifying in the instant case (R.p. 2483). In fact, he expected a little

help for giving his testimony and was so told by district attorneys O'Dwyer and Foley, provided he told the truth (R.p. 2482). He protested, however, that he would not lie to save his own life. Asked whether he ever lied in his life, he replied, "only little white lies" (R.pp. 2514-5). This witness supplied an alleged admission as corroborative evidence in another murder case, tried about a year before this one. (*People* v. *Goldstein*, *supra*.)

He testified that in April, 1939, he spoke to petitioner with reference to a man named Friedman (R.pp. 2446-7). According to Magoon, he asked Capone whether he, Capone, thought it advisable that he (Magoon) work on the Friedman thing, because he hung out about a block away and thought he would be recognized (R.pp. 2460-1). At this point, upon being asked, Magoon stated that this was *all of the question* he asked of Capone (R.p. 2461). Upon stating that this was the finish of his question to Capone, Magoon was immediately excused from the court room while a lengthy discussion ensued among counsel and the court (R.pp. 2461-9). After an appreciable length of time, during which the jury was excused from the court room (R.p. 2463), and at the conclusion of this discussion, Magoon returned to the stand. He was thereupon asked the following question:

> "After you asked him that question, did he say anything to you? Did he, Capone, say anything to you?"

And despite the fact that before being excused from the stand Magoon had stated that the question he testified to was all of the question he asked Capone, this time he irresponsively interpolated as follows:

"I have not finished my answer on that." (R.p. 2469) He thereupon added the following to the question he testified he asked of Capone:

"I says, 'I hung out about a block away and it is sort of off Sutter Avenue.'" (R.p. 2469)

To this Capone replied, according to Magoon, "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." Magoon then replied that he was not worried; he was just asking advice (R.p. 2469).

In addition, Magoon also testified that in the Fall of 1938, two years after the murder, he was instructed in the presence of petitioner to follow the witness Rubin, ostensibly for the purpose of assassinating him (R.pp. 2434-53). On one occasion, when Magoon reported his progress, the petitioner, according to Magoon, stated "that Rubin is hurting Lep, and we got to hit him in the head and get rid of him" (R.pp. 2453-4). That was all that the petitioner said during the conversation (R.p. 2454). Magoon's task was then terminated when he reported that Rubin had a police bodyguard (R.pp. 2456-8). Parenthetically, it should be noted that the motivating reason for what the trial court called "the attempted assassination of Rubin" was in no manner connected with Rosen. Aside from the fact that the record fails to disclose any knowledge on the part of Rubin as to Capone's alleged connection with the crime, it is quite apparent, from the statement attributed to Capone, even if what Capone stated were true, that his only interest in the matter was to deflect harm from "Lep."

That, in brief, is all of Magoon's testimony which concerns Capone, excepting the circumstances under which it is alleged he disclosed the above information to the District Attorney.

In May, 1940, just as he completed a term for vagrancy, Magoon was taken to and lodged in the Concourse Plaza Hotel in the Bronx (R.pp. 2532-4), where he spoke

with District Attorney Foley (R.p. 2536), but did not tell Mr. Foley anything about the Rosen case (R.pp. 2539-40). Approximately two days after his first conversation with Mr. Foley, he spoke with Mr. O'Dwyer. At that time, somebody—he does not know whether it was a stenographer—was writing in a book (R.p. 2542). He did not, on this occasion, say anything about the Rosen case (R.p. 2543). A couple of months later, he was again questioned by somebody from the District Attorney's office in Brooklyn (R.p. 2544). During these two months, he was never asked any questions by the Bronx officials relative to the Rosen case, nor did he volunteer anything (R.p. 2546).

In July, he was taken to the Brooklyn District Attorney's office, where O'Dwyer, Klein and Heffernan were present (R.pp. 2546-7). While being questioned, somebody was writing—he does not know whether it was a stenographer (R.pp. 2547-8). But when these statements were called for, the prosecutor stated that there were no such statements (R.p. 2549). However, he signed many papers, which contained the substance of his questioning by O'Dwyer (R.pp. 2550-1). On this occasion, in July, 1940, he was not asked any questions about the Rosen case, nor did he volunteer anything about it (R.p. 2550).

Between July, 1940, and January, 1941, he was questioned by the Brooklyn District Attorney's office more than twelve times (R.pp. 2552-3). On some of these occasions, he saw somebody writing on paper (R.p. 2554). It was between January and June, 1941—he could not fix the date any better—that he first mentioned anything about the Rosen case (R.p. 2554). At that time, Turkus, Klein and a few others were present, and someone was writing while he was being questioned. He was questioned for a few hours and during that entire time, somebody was writing with a pencil (R.p. 2556). Again, these statements

were called for and again the prosecutor stated he did not have them (R.p. 2557). This should be compared with the testimony of Bernstein and Tannenbaum, both of whom testified that they were questioned about the Rosen case almost immediately after their arrest in the early part of 1940 (R.pp. 1185, 2335-7).

Altogether, Magoon spoke to the District Attorney's office about the Rosen case six or seven times; the last time was four or five months before he testified (R.p. 2564). However, he never testified before the grand jury about the case (R.p. 2562).

From the foregoing, two significant facts stand out: (1) that although arrested prior to the finding of this indictment (R.p. 2432), he did not testify before the grand jury; and (2) although he testified that he had made and signed a statement for the District Attorney of Kings County, the production of which was requested by defense counsel, the trial assistant stated to the court there was no such statement in the files (R.p. 2549).

The first item is of signal significance for the reason that it is quite apparent that insufficient evidence was submitted to the grand jury for the finding of the indictment. As Magoon was the only witness submitted by the prosecution through whom an attempt was made to supply the necessary statutory corroboration of the accomplice Bernstein, it is difficult to understand how the indictment could have been found without such proof being presented to the grand jury. In this connection it should be noted that though Magoon was never called before the grand jury (R.p. 2562), Rubin and Berger testified before that body while the trial was in progress (R.pp. 1736, 1880).

The second item is of equal importance. Magoon either told the truth with reference to the written statements he made for the District Attorney or he deliberately lied

about them. If he told the truth, the failure of the District Attorney to produce such statements or to explain why they were not produced is a strong indication that such statements would have been beneficial to the defense and detrimental to the prosecution and would constitute a suppression of evidence on the part of the district attorney.

Even though his pertinent testimony to the issue was brief in nature, yet glaring inconsistencies appeared between his testimony given in the Nitzberg trial, the Goldstein-Strauss trial, and between his direct and cross examination. See R.pp. 2572, 2580-1, 2439, 2586.

Taken in the light of his testimony that he evaded the law since he was a boy attending public school and his protestations that he never told anything but "little white lies," very little credence, if any, can be given to his testimony.

How ridiculous it is to assume that one so versed in crimes (including murders) since childhood, should seek anyone's advice as to what he should do when setting out to commit a crime! How peculiar it is that although Magoon was arrested and in custody for about a year and was questioned on innumerable occasions by the Brooklyn District Attorney, he made no disclosure of his supposed knowledge of the Rosen case until the expiration of that time! How strange it is that although he claimed to have made a signed statement regarding this crime, none now exists! How odd it is that Rubin and Berger should have been called before the grand jury while the trial was in progress, but not Magoon!

ONLY OTHER WITNESS MENTIONING CAPONE'S NAME: ALLIE TANNENBAUM

This witness' previous nefarious record will undoubtedly be described in the brief of the co-defendants. According to Magoon, who knew him since 1933 or 1934, Tannenbaum was a member of the so-called "Combination", and was seen by him frequently during the years 1933, 1934 and 1935, at the "corner" of Saratoga and Livonia Avenues, Brooklyn (R.pp. 2525-6). Tannenbaum and principal witness Bernstein, in 1937 or 1938, together, transported Yuran's dead body in a truck in the mountains (R.pp. 1087, 2228). Tannenbaum and witness Magoon were together in the Friedman murder (R.pp. 2229, 2434-5).

The only reason he is here mentioned is that when asked by the district attorney when he met Capone for the first time, lo and behold, he answered, "Not until the year 1938"—over two years after the murder of Rosen (R.p. 2234). He at no time heard the name of Capone mentioned, although allegedly present at a number of conversations in respect to the Rosen murder.

Take this testimony in connection with Rubin, who states he never saw Capone again after the supposed fleeting glance in 1935 (R.p. 1462), and we destroy what little doubt may still be left as to the falsity of the testimony of both Magoon and Bernstein regarding the alleged participation of Capone in this crime.

However, prejudicial error was committed by the trial court in permitting Tannenbaum, over objection and exception, to testify concerning persons whom he alleged he saw Capone in company with two years after the crime, since association so far distant from the date of the crime has no bearing and is incompetent therefor (R.pp. 2234-6).

As with the previous witnesses, whose testimony is analyzed herein, the only purpose for which this testimony

could be adduced was to create a prejudicial atmosphere against defendant Capone, and thus deprive him of a fair trial.

ARGUMENT

As the evidence now appears, the People's proof, if believed, shows that the persons allegedly involved had some connection with a Union, *but not Capone*, and that Bernstein, Strauss, Reles, Goldstein, Magoon, Rubin, Tannenbaum, Farvel Cohen and others all left town, *but not Capone*. Moreover, there is no proof of any mention of appellant Capone to Rubin, Berger or Tannenbaum by anyone, according to their stories. Although the District Attorney asked practically all of the witnesses called by co-defendants Buchalter and Weiss as to whether they were acquainted with various persons, including the other two defendants, not one was asked whether they knew the petitioner Capone.

In conclusion, Berger testified he would lie to save himself from the electric chair or any trouble (R.pp. 2190-1); Tannenbaum would like to escape the chair (R.p. 2341); and Magoon wants to escape the chair (but would not lie to do so), and "expects a little help for giving his testimony" (R.p. 2482) and further, in an effort to escape the chair he is testifying in this case (R.p. 2483).

SPECIFICATION OF ERRORS TO BE URGED

Petitioner was convicted of the crime of murder in the first degree and was condemned to death, not by due process of law, but in violation of his constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution, in that:

(a) The conduct of the trial throughout was so grossly unfair as to leave petitioner without even a remote outside chance of any free consideration by the jury of the evidence, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled to until his guilt is established by legal evidence beyond a reasonable doubt;

(b) Petitioner was deprived of his fundamental right to a fair trial by the denial of numerous motions for a separate trial, which compelled him to go to trial with a co-defendant against whom unprecedented inflammatory and prejudicial propaganda had been so extensively circulated so that an unbiased and unprejudiced jury could not be selected, which bias and prejudice redounded to the detriment of the petitioner herein;

(c) The denial of a change of venue to a community other than in which the trial was held was tantamount to being "rushed to conviction through * * * jury and judge being swept to the fatal end by an irresistible wave of public passion, so that no trial in the true sense was afforded (him)" and resulted in the trial being a mere semblance or pretense of one and not a trial by due process of law;

(d) Petitioner was deprived of his fundamental right to a fair trial in that, by reason of the inflammatory and prejudicial propaganda and notoriety which had been disseminated in the community in which the trial was held, and by reason of the erroneous rulings by the trial court on challenges as to the impartiality of talesmen, an unprejudiced and impartial jury was not obtained;

(e) The New York Court of Appeals erred in holding that the petitioner was not deprived of a fair and impartial trial by a jury composed of his peers;

(f) The New York Court of Appeals erred in holding that the atmosphere created both before

and during the trial by the presence of armed guards did not deprive the petitioner of his right to a fair and impartial trial guaranteed by the United States and State Constitutions;

(g) The New York Court of Appeals erred in holding that the misconduct of the prosecuting attorney, permitted and condoned by the trial judge, while an abuse which should have been strictly controlled, was not prejudicial to the petitioner and did not deprive him of a fair trial;

(h) The New York Court of Appeals erred in affirming a judgment based upon evidence admittedly—"not strong", without proper corroboration of the discredited and unreliable co-conspirator and where throughout the trial the prosecuting attorney had misconducted himself so as to deprive the petitioner of the fair trial to which he was entitled;

(i) The New York Court of Appeals erred in affirming a judgment where the unfair attitude of the trial court throughout the trial was such deviations from prescribed trial procedure as to result in a trial so unfair that it constituted a mere pretense of one.

REASON FOR GRANTING THE WRIT

It appears that the proof adduced by the prosecution against the petitioner was so weak as not to satisfy the standard set by the weight of authority in criminal cases. Further, while the proof was weak it came principally from the lips of a discredited and concededly unreliable accomplice, who although guilty of several murders, was permitted to go scot-free within a short period after the verdict was rendered against the petitioner. The alleged corroboration was furnished by an equally unreliable and discredited murderer who was never even indicted for his various crimes. His alleged corroboration, however, was wholly insufficient. This was an error of law which should be rectified.

The prejudicial atmosphere created before and throughout the trial rendered it impossible to procure a fair and impartial trial, and rendered utterly without force the presumption of innocence to which every person charged with criminal offense is entitled to until his guilt is established by legal evidence beyond a reasonable doubt. The inflammatory and prejudicial newspaper articles printed both before the trial and during the selection of the jury (while the prospective jurymen were at liberty), coupled with the armed guards present in the courtroom throughout the trial, and the petitioner's entry in and departure from the court room in manacles during the various recesses, aggravated the situation and further prevented the rendition of the verdict by a fair and impartial jury. In view of these circumstances the denial of a motion for a change of venue and the denial of various motions for a severance was an error of law which should be rectified.

The failure of the trial court properly to pass upon the qualifications of the prospective jury and in denying the motions of defense counsel to excuse a substantial number of prospective jurymen for cause, thereby exhausting the peremptory challenges accorded him by law, and at the same time using a different standard sustaining a substantial number of the prosecution's challenges for cause in the case of jurymen who would have been satisfactory to the defense, constituted an error of law which should be rectified.

The trial court in the instant case also permitted and condoned actions upon the part of the prosecuting attorney which prejudiced the defendant and prevented him from securing a fair and impartial trial. The trial court further aggravated this condition by refusing to permit defense counsel to object or except, in the presence of the jury, to the inflammatory and unfair statements of the

prosecuting attorney during summation, thereby depriving the jury of the knowledge of the improprieties of same. This taken into consideration with the obvious failure of proof explains the reason for the conviction of the petitioner.

The unfair attitude and statements of the trial court so prejudiced the rights of the defendant that he was further prevented from securing a fair and impartial trial. This taken into consideration with the obvious failure of proof further explains the reason for the conviction of the petitioner.

The course of the trial sanctioned by the Court of Appeals of the State of New York was so contrary to the usual and proper course of trial procedure that this court's power of supervision is petitioned to rectify the error. The injustice of permitting the judgment below to stand will appear clear.

These reasons have all been more fully developed and set forth in the brief annexed hereto and made a part hereof.

WHEREFORE, it is respectfully requested that a writ of certiorari issue to the County Court of Kings County of the State of New York for a review of a judgment of said Court convicting petitioner of the crime of Murder in the First Degree; and to the Court of Appeals of the State of New York for a review of an order of said Court affirming the aforesaid judgment of conviction.

Dated: December 31, 1942.

LOUIS CAPONE,
Petitioner

By Sydney Rosenthal
Attorney

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The County Court of Kings County wrote no opinion. The Court of Appeals of the State of New York handed down four separate opinions which are annexed to the record (R.pp. 4030-4091).

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered October 30, 1942. The jurisdiction of this court is invoked by reason of the deprivation of petitioner's rights under the Constitution of the United States, Fourteenth Amendment, Section 1; New York Sate Constitution, Article 1, Sections 2 and 6; and the constitutionality of Section 749aa of the Judiciary Law of the State of New York, subdivision 7. The constitutional questions were raised and passed upon in the court below (R.pp. 4098).

QUESTIONS PRESENTED, STATUTES INVOLVED, ETC.

A statement of the questions presented, the statutes involved, specification of errors to be urged, and a statement of the case will be found in the petition.

STATEMENT

The record below consists of 4029 printed pages in addition to 2783 pages of typewritten voir dire. In view of the length of such record, this brief and petition have been condensed so far as is consistent with a proper presentation of the questions involved, and at the same time preserve the rights of the petitioner.

ARGUMENT

I.

The main facts in the testimony involving Capone have

been set forth in the petition. They have, however, there been stated in a manner most favorable to the appellee. Still, it must appear obvious that the proof against Capone was extremely weak, even if credible.

The trial court admitted: "in mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses" (R.p. 3918). Judge Rippey of the Court of Appeals of the State of New York was of the opinion that "there was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed" (R.p. 4091). Judge Loughran of the Court of Appeals of the State of New York, one of the dissenting judges, stated "there is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone": and further, "No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testimony." (Referring to Bernstein (R.p. 4085). His opinion was concurred in by Judge Desmond. Chief Judge Lehman, one of the affirming judges, stated: "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendant's guilt from my mind" (R.p. 4078). Even in the prevailing opinion of Judge Conway, concurred in by Judges Finch and Lewis, it was stated, "The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believed the testimony of a witness who corroborated the accomplices. That witness was a criminal. The court properly left to the

jury the question whether they would believe or disbelieve him. That was peculiarly a jury question. We cannot say that the jury was bound as a matter of law to disbelieve him" (R.p. 4069).

This evidence emanated from the mouths of the witnesses Bernstein and Magoon. To evaluate properly their testimony, however, the inconsistencies, discrepancies and admitted perjuries therein contained are herewith set forth verbatim. This is done so as not to burden this court with the task of referring to the numerous such instances cited in the record. We will here clearly demonstrate the many falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance in Bernstein's testimony, which we believe are of such a nature that it would be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis Capone's guilt or innocence depends on his word. The mendacity of this witness was so obvious that the admonition in *People* v. *Kress* (284 N. Y. 542, 549) that an accomplice's testimony should be regarded "*with suspicion*" and "accepted only with caution" would be doubly applicable to him, if, indeed, it would not warrant disregarding his testimony entirely.

Although he testified that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, his testimony before the grand jury in the Rosen case was given prior to his testimony on the trial of Gangy Cohen in the Mountains. In regard to the testimony given in the Gangy Cohen case, he was asked:

> "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong." (R.pp. 797-8)

We will now set forth some of the glaring contradic-

tions between (a) his present testimony and testimony in the Cohen trial; (b) his present testimony and that given before the grand jury in the Rosen case; (c) contradictions not developed between grand jury and present testimony; (d) between his direct and cross-examination on this trial; and (e) contradictions in testimony on cross-examination.

We have no way of ascertaining the story he gave to District Attorney O'Dwyer since it was contended on the trial that he was never asked to put it in writing or make any statement, nor was any stenographer ever present when he was questioned (R.p. 1003). Contrast this fact with the written statements taken from Muggsy Cohen (R.p. 3063), defendant's witness Nat Sobler (R.p. 2847) and people's witness Rubin, taken by Assistant District Attorney McCarthy.

(a) Bernstein's Contradictions between present testimony and testimony in Cohen case.

(1) In the Cohen murder trial, he swore to tell the truth, but he did not (R.pp. 968-9; 1051-2); (2) he there swore that he never kept a bank account, but that was not the truth (R.pp. 969-972); (3) he there swore that he never threatened anybody, but that was not true (R.pp. 996-8); (4) he there swore that he never used an alias, and here admitted using numerous aliases (R.pp. 979-81; 1103); (5) he there swore he did not know the notorious Buggsy Goldstein, and here admitted he did know him (R.pp. 1019-20); (6) he there swore he knew the notorious Reles well, but here not so well (R.pp. 1027-8); (7) he there swore he stole one or two cars and was a reformed thief—here he was not reformed and admitted stealing 75 cars up to 1940 (R.pp. 1052-3; 827-8; 1047); (8) he there swore he had only seen one gun in his life and that was in the

year 1937, but here admits it was untrue (R.pp. 1056-9; 1061-3); (9) he there swore he had no business with the witness Tannenbaum (in the instant case), and here admitted having gone on criminal jobs with him (R.pp. 1085; 1087; 1091; 1104); (10) he there swore that he had pointed out the location of the axe used in another murder, but here denied same (R.pp. 1104-6); (11) he there swore he was never connected with Rosen or any other murder, but here admitted that he was (R.pp. 1111-13).

(b) Bernstein's contradictions between testimony in Grand Jury and this trial.

(1) Before the grand jury he swore that he drove the automobile along the route and Capone rode with him, and on the trial, he claimed Capone drove the car (R.pp. 1115-17; 1224-6); (2) before the grand jury, he swore that he rode with Capone at seven o'clock at night and here, stated it was four o'clock daylight (R.pp. 1227-8); (3) On this trial swore Capone told him to steal the license plates and Strauss said nothing, but before the grand jury, swore Strauss told him to steal the license plates and Capone said nothing (R.pp. 721-2; 1228-30); (4) before the grand jury stated that one Joe Pilch brought the guns over to the car, and on this trial secreted that fact (R.pp. 726; 1230-33)*; (5) on this trial claimed defendant Weiss had written the address of co-defendant Cohen's apartment on a slip of paper, and before the grand jury stated it was deceased Strauss (R.pp. 729; 1263-4); (6) on this trial stated co-defendant Weiss in-

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* Bernstein's equivocation regarding Pilch was evidently due to Pilch then being in custody as a material witness and the probability that he would not corroborate him. Pilch's testimony would have shown Capone's presence or absence from that meeting

structed him to return the stolen car to the garage; before the grand jury said it was deceased Strauss (R.pp. 729; 1264); (7) on this trial stated Weiss distributed guns, but before grand jury stated Strauss opened package and distributed guns (R.pp. 1266-7); (8) on this trial stated he told Capone about the theft of the car, but before the grand jury said it was Strauss he told (R.pp. 715; 1228).

(c) Contradictions (not developed on trial) between testimony and grand jury testimony.

By reason of a hurried, disconcerted reading of the grand jury minutes in the presence of the trial jury, because of the trial court's unwarranted refusal, over objection and exception, to grant counsel a reasonable recess in order to read same so that he might be in a position to cross-examine properly on that point, numerous other contradictions and changes were not brought out. A few of these instances are as follows: (1) Here he stated that on Saturday night Weiss told him to drive the car to Bradford Street where Capone had shown him (R.p. 726). In the grand jury, however, it was Strauss who told him this (People's Ex. Z-1 for Iden., p. 19); (2) here he stated that at 5 a.m., in Farvel Cohen's house, Weiss told him to get the car and meet them in the park (R.pp. 731-2); before the grand jury, it was Strauss (People's Ex. Z 1 for Iden. pp. 22-3); (3) here he stated that on the morning they were waiting for Rosen to open the store, Weiss told him to get the car and stop it in front of Rosen's store with the motor running (R.pp. 740-1). Before the grand jury, it was Strauss (People's Ex. Z-1 for Iden., p. 24); (4) here he stated that on the way over the bridge, after the stolen car was abandoned, Weiss gave him the gun (R.p. 746). Before the grand jury, Weiss never gave him the gun (People's Ex. Z-1 for Iden., p. 28).

Note—These changes are not just inadvertent, excusable errors. On the contrary, they evidence a studied effort to inculpate the defendants on the trial at any cost.

(d) Contradictions between direct and cross-examination.

(1) On direct examination he had testified that his first stolen automobile was without orders from anybody. On cross, however, contended that he had received orders to steal the car, and then, confronted with his previous testimony, admitted he had received no such orders (R.pp. 958-62); (2) He first stated he only heard that Herschel Bernstein was a crook, and thereafter admitted that he knew he was a notorious burglar and ace thief (R.pp. 1067-8); (3) he first stated that he did not know there were any guns in the car at the time of the theft, to which he pleaded guilty in 1933, and finally, admitted this was untrue (R.pp.1044-6).

(e) Contradictions in testimony on cross-examination.

His constant denial of writing letters while in custody and his final admission are more fully referred to hereafter.

The theory of the prosecution was that the witnesses called by them had no opportunity to concoct their stories; that Bernstein had become sanctified the minute he became a People's witness, and from then on could not lie and, in fact, had lost all of his vicious propensities.

In order to establish these facts, Bernstein testified that he was kept under surveillance twenty-four hours a day (R.pp. 829, 831), even to the extent of a detective sitting at his bedside while he slept (R.p. 1026), and had absolutely no opportunity to communicate with the outside world (R.pp. 975-6). Of course, the prosecutor did not call any police officer or credible person from an outside

source to establish that fact. Bernstein's final admission that these letters were written and sent out by him exploded the prosecution's theory that there was twenty-four hours surveillance over all the witnesses and no opportunity to concoct a story. The following are the letters:*

"THE HALF MOON HOTEL
near Sea Gate—Brooklyn, New York,
Esplanade 2-3800
Paul E. Fulton, Manager Walter Mc McKeean
as Trustee for Certificate Holders

Sunday.

Ben

I'm writing to you to show this letter to Cherry. I've waited long enough. I've been promised by you but you never lived up to it. So there is no sence of me taking your word. Now you are saying why I'm bothering you and not Malley. Well I'll tell you you are in the bussiness. There was money left over and you took care of it. Do you remember the last place I saw you in Jackie Leonards house. I had a talk with you. I asked your advise what to do. You told me to look out for yourself what did I get with them guys. Do you remember when I said I'm not going to talk when I gave myself up. Do you know why I turned rat on account of you and the rest that I've been together. So all of you wouldn't get in any trouble. I guess you are saying what kind of trouble can I get in. Do you know everytime somebody breaks there is plenty he talks about. Take for instance me they want me to tell everything I did and what

* The County Clerk erroneously failed to incorporate these letters in the printed record and the were considered by the Court of Appeals (See opinion by Loughran, J.) Because of their importance, the contents will be transcribed at length with the curse words deleted therefrom

ever I know. I'm standing up and keeping my mouth shut for what?"

(Defendants' Ex. P for Identification.)

(Emphasis by author.)

Sunday.

"Whitey

This is the last time I'm writing. You done me a favor you left $5 dollars with my wife. Now I found out why Mr. *Cherry* is so *brazen*.

I haven't got anything on him. You told my wife *10* years ago he fooled around with me I can't get him in any trouble. So now I see why I've been f—— around with that money he's in *bussiness, shylocking*. So he thinks that Im *dead fish*. Well it is a funny thing here I'm in trouble for being a *s*——. But *g*—— *damened* I'll make sure that Mr. Cherry will be the other *s*——. I'm just going to give a hint what I can do to *Mr. Cherry*. Well one instant. He forgets that he got plates with me in a——draw your answer. Do you know how many guys are pinched just for conversation. Why do you make me write like that I don't want to hurt you. Again I wan't to know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that *away*. So *Cherry* you [illegible] *making* me do this that I don't want all for $200 dollars. I just wan't to remind you *years* don't mean nothing to me. Because I'm just as good as dead. *Cherry* if my wife tells me she didn't get that money please go out of *town*.

Sol."

(Emphasis by author.)

(Defendants' Exhibit R Identification.)

Sunday

"Whitey

What the hell is this are you having me on sure thing? Is Cherry asking for trouble? Listen I wan't to remind him does he forget he is involved in a——he knows what I mean. And does he for-

get we done a lot of things together that I can give plenty of trouble? Lets be smart about this say he wants to be a wise guy and takes a lawyer what will it cost? Don't think I don't know what is going on I know Cherry is got a new *buddy Pete* the *Pollack* so you see I know a little. Now I'm raising it to $300 dollars and 5 every week. I want to tell you stop trying to outsmart me because I'm really burned on Cherry for the way he treated my wife in Weiners Bar Grill. Why didn't he take the whole floor so everybody can hear him. To-day is Sunday if my wife don't get that money when she comes to visit me. As true as my *mother* may she rest in *peace* Im going to make so much trouble for you that $300 will be only a *spit*. And you Whitey don't you go over my wifes house if you dont bring that money.

Sol.

P. S. And no payments. This time it is going to be one way or the other."

(Emphasis by author.)

(Defendants' Exhibit S Identification.)

These letters were definitely material to the issues involved, as they would not only have exploded the prosecution theory that there was no opportunity for the witnesses to concoct a story between themselves, but would definitely have established they were not under strict surveillance to the extent that they could not only write letters in peace, but could mail them to the outside.

Further, these letters would have clearly demonstrated that the halo placed on Bernstein was but a figment of the imagination and would have placed him in his true light before the jury—as a vicious unprincipled scoundrel, who, even while in custody, did not hesitate to threaten the outside world.

This error cannot be overlooked, and was of such a serious nature that it warranted a reversal. It was further aggravated by the Court's refusal to charge Ca-

pone's request in respect to opportunity among witnesses to converse and concoct stories, to which exception was taken.

"The Court: I will read that because I have a different ruling. It reads, 'I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them.'

The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.

Mr. Rosenthal: May I respectfully except?

The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.

Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.

The Court: I find that it is not. I find it is all guesswork.

Mr. Rosenthal: Then I respectfully except.

The Court: The jury is not permitted to guess.

Mr. Rosenthal: May I respectfully except.

The Court: You go by evidence, not by guesswork. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.

Mr. Rosenthal: I don't want to enter into any discussion with your Honor, excepting that I have a different view and it is too late and I don't want to enter into a discussion as to the fact. I merely except.

The Court: That would be sloppy police work, to permit discussion" (R.pp. 3955-6).

The Court, by its ruling therewith, erroneously invaded the province of the jury, and further aggravated the error by its comments in respect to the reasons for denying the request to charge. Here the Court refrained from permitting the jury to pass upon the question because, as it claimed, "it is all guess work," but under almost similar circumstances when it came to the life of the defendant, the Court was content to leave it to the jury.

SUMMARY OF BERNSTEIN'S TESTIMONY

To enumerate all the faults, admitted perjuries, inconsistencies and discrepancies in Bernstein's testimony would be impractical in the ordinary limits of a brief. We believe so much thereof as will be necessary to conclusively establish to this Court that he admitted committing perjury in the Cohen trial in the Mountains (which was also a capital case) and in this trial, to such an extent that even the Court was moved to label him as having "lied" before the jury, has been set forth in the preceding subdivisions. All his changes of testimony were for the patent purpose of implicating the defendants on trial at whatever cost. Truth played no part in his discourse. A mere cursory comparison between his testimony at the trial and before the grand jury will conclusively demonstrate the conscious consistent effort on his part to substitute the names of Capone as well as Weiss for Strauss, who had already been executed.

In view of all that has already been pointed out as to Bernstein's credibility, it would be gilding the lily to add

thereto, since the contents of these letters will clearly demonstrate that Bernstein still is the vicious character he was before he gave himself up and assumed a mantle of reform and truthfulness.

In conclusion, the following quotations taken from the record will clearly demonstrate that he testified untruthfully, knowing it was wrong, in the Mountains where a man's life was also at stake and that he deliberately lied on this trial where Capone's life is at stake; and despite his protestations of telling the truth before the grand jury, the testimony given on this trial is irreconcilable to that given before that body. We quote:

> "By the Court: Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong.
>
> Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong" (R.pp. 797-8).
>
> • • • •
>
> "Q. You say you are telling the truth on this trial? A. All of the truth, and I told the Grand Jury the truth too" (R.p. 877).

Told grand jury truth about everything before he was a witness.

> "Q. Did you or didn't you? A. I told the grand jury the truth about everything in this case long before I was a witness." (R.p. 797)

> "By the Court: The rest of the letter must be submitted before the Court can pass on it. He has admitted now that he lied. You do not have to establish that." (R.p. 1249)

> "• • • It is established that the witness testified under previous cross that he did not send out a letter and now he admits that he did.

Mr. Talley: Your Honor has stated from the bench that this witness has testified falsely with regard to sending the letters.

The Court: Yes.

Mr. Talley: Your Honor stated—I think the language was that he had lied before this jury.

The Court: Yes, that is obvious." (R.p. 1261)

The only other testimony against Capone was that of Magoon. His testimony on the trial has been amply quoted in the petition.

We feel that this evidence against Capone was insufficient as a matter of law for submission to the jury and the indictment should have been dismissed.

Though mindful of the fact that this court is loathe to inquire into or overrule a determination of fact by the highest court of a sovereign state, a short discussion of the proof against petitioner is, nevertheless, herein set forth to demonstrate how substantially the unfair trial petitioner received erroneously influenced his conviction.

The New York State Constitution, Article VI, §7, so far as applicable, provides:

> "The jurisdiction of the Court of Appeals, except where the judgment is of death, • • • shall be limited to the review of questions of law;"

In construing the authority vested in it under this section, the Court of Appeals held:

> "'This,' said the court in *People* v. *Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did.' A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a

> reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." (*People* v. *Crum*, 272 N. Y. 348, at 350)

Even though the Court of Appeals of the State of New York apparently affirmed the judgment of conviction, it was only an affirmance in form, rather than in substance. Though the Chief Judge cast a deciding vote for affirmance, his opinion, even on the facts, is a brief for reversal. He stated, "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind." In fact, his opinion appears to be for reversal, until almost the end thereof when he votes for affirmance despite the admitted lack of proof beyond a reasonable doubt, despite the recognized serious errors of law and despite the acknowledged unfair tactics of the district attorney. For that reason, the following discussion of the facts is set forth.

Despite the voluminous record—the testimony of thirty-six witnesses and the introduction of fifty-seven exhibits (none of which exhibits directly affected Capone)—tersely summarized, the People's proof against Capone consisted of the testimony of the self-confessed accomplice Bernstein, whose testimony has been set forth briefly in the petition annexed hereto, and the criminal Magoon, who furnished the alleged corroboration consisting of a supposed conversation had with the petitioner approximately three years after the occurrence, and whose testimony has also been set forth in the petition.

To characterize the testimony of either Bernstein (who did not hesitate to testify falsely in both this trial and in another capital case—'knowing he was doing wrong') or the "little white" liar Magoon, would be superfluous after a reading of the matters regarding them, hereinbefore set forth. Suffice it to say that both are equally unworthy of belief. But in order to sustain the conviction, it would be necessary to label both these witnesses, contrary to conscience and human experience, as truthful*; for if either witness is not entitled to any credence, the other witness must perforce fall and the conviction fail. If Bernstein is disbelieved—and, indeed, it is impossible to understand how any other conclusion can be reached—the conviction cannot be sustained even if Magoon's testimony be believed; for Magoon's testimony, in that event, would not be sufficient in itself to warrant a conviction. And conversely, if Magoon is disbelieved, the conviction must also fall even if Bernstein is believed: for then Bernstein's testimony would lack the necessary corroboration. Under these circumstances, the trial court should have dismissed the indictment against Capone on his motion, on the grounds herein set forth, first made at the end of the People's case and renewed after the defendants had rested (R.pp. 2714-5; 3538-40). By submitting the question of his innocence or guilt to the jury, the trial court, in effect, held that both Bernstein and Magoon could be believed. This was contrary to the credible evidence and erroneous as a matter of law.

But even if we assume, arguendo, that both Bernstein and Magoon are to be believed, still there was insufficient evidence for submission to the jury. Bernstein was an

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* Although this argument is advanced, we do not concede Magoon's testimony, in any event, furnished the necessary corroboration.

accomplice as a matter of law, and the trial court so charged (R.p. 3888). Therefore, his testimony required corroboration (*Code of Criminal Procedure of the State of New York, Sec. 399*). Magoon's alleged conversation, it is contended, does not furnish the legal corroboration required, does not constitute an admission nor does it sufficiently tend to connect Capone with the commission of the crime.

To hold that this alleged conversation by Capone constituted corroboration, it would be necessary irresistibly to conclude that the words "on the" meant "implication in" and that "Rosen thing" meant "Rosen murder." In making this determination, however, one is struck by the utter inconceivability of Capone making such an assertion. The only witness who connected Capone with the crime was Bernstein, and according to him, the only time Capone was on Sutter Avenue was on the day before, in a moving closed car which, with all other traffic, passed by Rosen's store. If this be true, there certainly was not any danger of being recognized and connected with a murder which took place on the following day. How ridiculous, therefore, to conclude that Capone meant that he was implicated in the Rosen murder when he told Magoon that he was "on the Rosen thing" and was not recognized. Even assuming he made this oral statement, it certainly did not mean the murder, or being implicated in it, for the people's proof discloses that he was never on Sutter Avenue under circumstances to fear recognition. This is further borne out in the summation of the prosecutor who also conceded that Capone did not hang out around Sutter Avenue and that there was not much of a chance of his being "made." We quote in part from the summation:

> "• • • Why let me show you how cunning was this Capone in this Rosen case, as disclosed by the

evidence. His lawyer said he did not hang around Sutter Avenue. You can bet your bottom dollar he did not. When he drove around there, it was not in his car—it was in Bernstein's car (R.p. 3831).

• • • •

Did he leave any opening other than being with Bernstein on Sutter Avenue? So what? If Capone had been seen riding on Sutter Avenue with Bernstein—so what? (R.p. 3831).

• • • •

• • • But he admitted, 'I worked on the Rosen thing, and I was not made.' He was not the man because when he went by on Sutter Avenue it was in Bernstein's car—there wasn't much of a chance of picking him, or his being made. It is true he was not 'made,' and there was not much of a chance—he did not leave much room. The slip-up Capone made was in trying to do Lepke a favor a second time, to kill Rubin, • • •." (R.pp. 3853-4)

All the salient factors necessary to constitute an admission are absent from the instant case.

In conclusion it is respectfully urged that in view of the discussion from every possible angle of the evidence against Capone, there is no conceivable theory under which the learned trial court would have been justified in submitting this case to the jury. The conclusion that the court was in error in so doing, becomes all the more fortified when we consider in what light the court regarded Magoon's supposed corroborative evidence. We illustrate:

When first asked as to whether it was the intention of the court to permit the jury to speculate on what the word "thing" meant as related to Rosen, the Court stated,

> "I have thought carefully on that point. In fact, I have thought a bit while lying awake nights during this trial" (R.p. 3540).

While charging the jury, the Court spoke of paucity of the corroboration. We quote:

> "Now as to Capone—and please pay strict attention, gentlemen, on this point; it is quite important. In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone." (R.p. 3918).

Requested to charge on the weight of the testimony of Magoon and Bernstein in so far as it affected Capone, the Court confessed being "a little puzzled" about the language of Magoon and labeled it as being "too indefinite." We quote:

> "• • • I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, 'What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made.' I think that is too indefinite." (R.p. 3962)

These expressions lead the writer to believe that the Court was of the opinion the case could be submitted to the jury on Magoon's testimony concerning the witness Rubin. This, of course, would be clearly erroneous, for nothing in that testimony tended to connect Capone with the crime charged in the indictment.

As to the Rubin episode, after reviewing all the People's evidence and instructing the jury as to which parts thereof would be applicable to the individual defendants, the court charged specifically, in reference to Capone, what

evidence may be used as corroboration of the accomplice Bernstein, as follows:

> "Now, what is it? It comes down to Magoon. It depends on whether or not you believe that Magoon told the truth when he gave the testimony which I shall now refer to. If you believe he told the truth and you accept it as evidence tending to connect Capone with the commission of the crime, then it will be sufficiently corroborative, according to your finding, and you will then, if you accept the testimony of the accomplice witnesses in the light of this alleged corroboration, apply it against Capone." (R.pp. 3919-20).

The Court then reviewed two items of Magoon's testimony involving Capone. One was the "tailing" of Rubin wherein Capone is alleged to have stated on one occasion when Magoon reported his progress, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him." (This occurred in the fall of 1938, two years after the crime.) And the other was the conversation in which Capone is alleged to have said, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made" (R.p. 3920). As to those two items, the Court said:

> "Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration" (R. p. 3920).

The Court then emphasized Magoon's testimony relative to tailing Rubin (the first item submitted by the court as corroboration), because of the "great importance of this feature of the case," by reading all the direct testimony on the subject (R.pp. 3921-2). After reading same, the Court further charged:

"Gentlemen, I think that is the text applicable thereto, unless there was something on cross examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses. (The court meant two items.)

If you believe that testimony, and it is for you to say whether you believe it or not, then you may ask yourselves is it sufficient as tending to corroborate Berger and Bernstein. If it is, you may convict. If you do not believe it, or, believing it, you don't deem it sufficient as tending to connect, you will have to acquit Capone, because if Capone was in a huddle there and was a conspirator in the proposed trailing or tailing of Rubin for the purpose of another attempt at assassination, then that may be used as evidence of guilt on the part of Capone" (R.p. 3926).

An exception was taken to the instruction permitting the jury to consider this Rubin episode as against Capone (R.pp. 3985, 3986-7).

In conclusion, as to the probative force of Magoon's entire story, Judge Loughran of the New York Court of Appeals, aptly stated:

"(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: 'I worked on the Rosen thing and it was right on Sutter Avenue and I was not made.' In the declared opinion of the trial judge, the statement so

reported by Magoon was 'too indefinite' to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the murder of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of this court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. See *People* v. *Crum*, 272 N. Y. 348. On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. (*Law* v. *Merrills*, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, (3rd ed.) § 2094, p. 468). Magoon was not a reputable witness. He is a self confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision of Bernstein of his original evidence against Capone. For the purpose of this opinion only, we shall assume that the finding of Capone's guilt is not against the weight of the evidence; but we stress this phase of the record as a strong contradiction of any assertion of the conclusive quality of the proof for the People" (R.pp. 4082-4083).

II.

THE CASE WAS NOT TRIED BEFORE AN IMPARTIAL JURY. THE COURT ERRONEOUSLY SUSTAINED CHALLENGES FOR CAUSE MADE BY THE PEOPLE AND ERRONEOUSLY OVERRULED CHALLENGES FOR CAUSE MADE BY THE DEFENDANTS. THE DEFENSE WAS PREJUDICED BY THE COMPULSORY ACCEPTANCE OF THE LAST THREE JURORS, AFTER THEIR PEREMPTORY CHALLENGES EXHAUSTED. THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 2 AND 6 OF NEW YORK STATE CONSTITUTION.

The questions involved in this point are based on the *voir dire* which does not appear in the printed case on appeal. An application that it be so included was made to the Chief Judge of the Court of Appeals, who, however, directed that instead of printing the same a typewritten copy was to be filed and delivered to defense counsel for the purpose of bringing it up for review. This copy consists of 2783 typewritten pages, and was only furnished to defense counsel shortly prior to the argument of the appeal in the Court of Appeals. No opportunity was afforded to defense counsel to move to correct the many deletions and inaccuracies which were encountered in preparing this argument. Reference will, therefore, be made in this point, where necessary, to the alleged deletions and inaccuracies in the record.

At the commencement of the trial the panel consisted of 250 talesmen. It was found necessary to draw a panel of an additional 100 talesmen, which panel was practically exhausted by the time a jury was finally selected. A vast number of these talesmen were excused because of prejudice against the defendants. Many of the peremptory

challenges exercised by the defense were because those talesmen, after evidencing a knowledge of the case, contended that they had formed no opinion—which did not justify a challenge for cause. (See voir dire of talesmen William C. Pape, Emanuel Camachi, Thomas G. Jones, Thomas E. Finn, Carl A. Ryder, Frank X. Butler, Thomas W. Madigan, Frederick G. Harris, Wilfred Pagnod, Roland M. Robert and Steward Andrews.) All these talesmen read news items about the case or a series of articles dealing particularly with these defendants, which appeared in the New York Mirror (122-3; 44-9; 1441; 1943-4; 2209-2213; 2254; 2246; 2405; 2590).* This reading matter caused the forming of an impression—but it did not amount to an opinion (132-3 450-1).

The defense exhausted all thirty peremptory challenges to which it was entitled. Ten of these were exercised when challenges for cause were overruled. After the exhaustion of the thirty peremptory challenges by the defense, three jurors were seated. As to those, either a challenge for cause was overruled and an exception taken, or the defense rested on the record.

The prosecution used eighteen peremptory challenges. Of the challenges for cause by the prosecution, it is contended herein that six of them were improperly sustained, to the prejudice of the defendants.

The process of selecting a jury began at a slow pace. Most of the talesmen said that they were prejudiced and could not sit impartially in the hearing of the case. The Judge said that the "Mirror" articles, particularly, were "*raising havoc with the jury*" (614). And though the court had admonished the talesmen not to read the articles in the Daily Mirror, a copy of that newspaper was found,

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* All references to voir dire are to pages in the typewritten transcript

as pointed out to the court by one of counsel, "on the very front seat of the court room, where jurors were assigned to sit" (s.m.p. 448-9). A good deal of time was lost because of recesses for religious holidays, Primary Day, afternoons devoted to other judicial work, and at least two adjournments to permit counsel to recover from colds. Suddenly, the Court apparently became aware that the leisurely pace of selecting a jury was the subject of newspaper comment. The tempo changed. When talesmen asserted that they could not sit impartially because they were prejudiced against defendants, the Judge said to the defense that the mere fact of asking about the talesmen's prejudices "is clearly establishing an escape medium for the juror if he does not want to serve. You are putting the words in his mouth. • • • You are doing the thinking for the talesmen" (Fitzgerald, 335-6; also, see Kendy 430). A talesman who asserted his inability to be fair was charged with "unwillingness to serve." Another heard himself thus described by the Judge: "I don't think this man is mentally fitted to sit on a jury" (Cone, 439). This same characterization was also applied to still another talesman who was ordered by the Court to "get out" (Herrick, 542). Defense counsel remonstrated that these remarks were calculated to *intimidate talesmen* and prevent a free revelation of their prejudices (Herrick, 543), but similar judicial comment was repeated in the presence of the panel. Talesmen who said that they would be embarrassed to serve because of friendship with the prosecution or defense counsel, were berated as "wholly unfit to have a job as a juror," and as being hostile "to the Court's questions" (Rosenthal, 726-7). When a talesman was peremptorily challenged by the prosecution, the Judge read into the record some prepared remarks on the abuse of the exercise of peremptory challenges (Cleary,

1295-6; also, Kendy, 426), and his comments were so worded as to apparently furnish the basis for a newspaper story, which sounded as though he was criticizing the defense for deliberately delaying the process of selection, and was so reported.

The errors committed in the selection of the jury, which will be discussed herein, will be subdivided as follows:

A—Erroneous overruling of defense challenges for cause;

B—Erroneous sustaining of prosecution's challenges for cause; and

C—Seating of jurors who were challenged for cause after defense exhausted thirty peremptory challenges.

A

1—JOHN R. HAMILTON (201-239)

He was an accountant employed by the National Carloading Corporation (202). When asked by the prosecutor: "Do you sit in the jury box free from prejudice?" his answer was: "As far as I can tell, yes, sir." (210). Later, when questioned by one of the defense counsel, he stated he had read an article concerning one of the defendants in the "Daily Mirror," about the same time that he had been called as a juror, approximately a month ago (212-213). We quote from his examination:

> "Q. Without mentioning his name, did it prejudice you against that particular defendant? A. *I don't think so.*
>
> Q. You say you don't think so. I take it that implies some doubt in your mind. Am I correct? A. *It is hard to dissociate the impression.*
>
> • • • • •

Q. And the impression, I take it was an unfavorable one to that defendant, isn't that so? A. It would be, yes, the way the article was written.

• • • •

Q. And that impression still remains with you? A. Yes, sir.

Q. And that is an impression that is prejudicial to that particular defendant? A. Yes, sir.

Q. And if you were sworn as a juror, it would need some proof or evidence to dissipate that impression is that so? A. I am afraid so." (214)

He then stated in substance that the article seemed to be the truth, to the prejudice of the defendant, and he has not completely eliminated that prejudice (213).

"Q. Do you feel that in deliberating, in pondering over the guilt or innocence of the defendants on trial in the Rosen case, that you could banish any impression that you received from the one reading of that newspaper? A. I think I could." (218)

• • • •

"Q. If you took an oath to be a fair and impartial juror, ready to render a verdict without sympathy or prejudice, and you felt the way you feel now, you would be violating that oath, would you not? A. I don't think so." (221)

He believed that he could discount the prejudice if the defendant took the stand, but it would require an effort on his part. He was then questioned by the Court as to whether he could set the prejudice aside:

"Q. Would you be able to do that? A. I believe so.

Q. Can you give us your promise that you would? A. Yes, sir, I would make every effort." (224)

Ever since he read the article in "The Mirror," the prejudice has remained with him (225) and it caused an impression in his mind, so that he accepted the truth of the facts stated therein without any substantiation on anybody's part (228-9).

> "Q. So that if the trial lasts about four or five or six weeks, you will still reserve that impression until such time; is that so? A. Yes.
>
> Q. And you will be sitting in that box, in that jury box and all the time you will hear this testimony and somewheres in the back of your head will be that impression, waiting for you to either use it or not use it; is that so? A. Yes." (232)

The talesman was then challenged for cause, and the challenge was overruled, and an exception taken (232-3). He was questioned by another counsel for defense:

> "• • • In the ordinary case, if you knew nothing about the individuals or the case, there would not be any question but what you could sit as a fair and impartial juryman without any prejudice against the individual on trial is that right? A. That is right.
>
> Q. But in this particular case, you have a prejudice created by what you read and what you believed when you read it as to the character of one of the men; is that right? A. That is right" (236)

He admitted having answered Mr. Barshay (one of defense counsel) that he had reserved his prejudice or impression until the question of character came in issue and meant by that that if some people came to the stand as witnesses for The People and made detrimental statements as to the defendant's character, that would lend greater weight to his bad character because of what he had read in "The Mirror" (237).

"Q. In other words, because of what you read in 'The Mirror' as to his character, if anybody got on the stand as The People's witness and accused him or said things detrimental to his character, it would have a greater weight because of what you have read? Is that what you just said? A. Purely in that one line." (237)

He was again challenged, and reiterated under oath that if the question were repeated, his answer would be the same (238).

He was then questioned by the Court:

"Q. Are you willing, in that event, in this case, if sworn as a juror, to completely set aside any impression you may have from what you have read? A. On character alone?

Q. On character alone? A. Yes, sir.

Q. Are you sure that you can? A. Yes, sir, I am sure." (239)

The Juror was again challenged for cause. The challenge was erroneously overruled, an exception taken, and the defense was compelled to challenge peremptorily (239).

We call attention to the different standard utilized by the Court in determining the qualifications of at least two other prospective jurymen, one of whom was challenged by the defense, and the challenge sustained, and the other, by the prosecution, and the challenge sustained.

In the case of *Woolsey W. Conlin* (67-108), he stated that he had formed an impression from reading newspapers which would be difficult to remove though he would try. He further stated, however, that he would not require a greater amount of evidence on the part of the de-

fendants to be produced than otherwise would be necessary in order to establish their innocence, or a lesser amount of credible evidence on the part of the People in order to establish their guilt (107). However, on further questioning, he stated that he was quite sure that he could dismiss what he read from his mind. But asked whether that implied that he had a doubt, he said, "Yes, sir" (107). The prosecutor then attempted to establish he could lay aside his impression and decide the guilt or innocence of the defendants on the evidence he heard in the courtroom and on the Judge's charge of the law, but the Court held that if the answer to the question is "Yes," it would contradict his other answers, and sustained the challenge.

In the case of the instant talesman, however, the juror had evidenced a prejudice which he only *believed* he could remove, and that the prejudice remained with him and would remain during the entire time that the trial continued. But after he had been challenged on two occasions, the Court asked him whether he would be willing to set aside the impression, (although in the Conlin instance he refused to permit the prosecutor to ask a similar question) and upon procuring an affirmative answer, overruled the challenge made by defense.

In the case of *Samuel Silfen* (1557-1565), the prosecutor challenged the prospective juryman because he stated that the name of Buchalter is familiar as that of a dentist, *whom he does not know personally*, but who his mother-in-law used as such (1559). This dentist never visited the home of his mother-in-law, and the relationship was solely that of dentist and patient. He then stated that he had a slight impression as to the guilt or innocence of the defendant from matters which he had read in the press, which would require evidence to remove, and was there-

upon challenged by the prosecutor (1560-1). However, when questioned by defense counsel, he stated that if the Court were to charge various questions of law, he would accept the same from the Court, and was willing to undertake to lay aside the slight impression he had and make every effort to dismiss it from his mind (1564). The Court, nevertheless, sustained the challenge made by the prosecution (1565).

2—SAMUEL F. STRONGIN (894-928)

He was employed as an audit clerk for the Metropolitan Tobacco Company, and lived in Brownsville, the section in which the murder was committed, four out of the last five years, at Grafton Street near Livonia Avenue (895), about two blocks from Rose Gold's place (897), which was situated at Saratoga and Livonia Avenues (896).* He was familiar with this corner, knew the name of the proprietor, and patronized the store (896-7). He had known and heard various things about the persons who hung out or congregated at that corner and has seen and heard various things which made an impression upon him (896).

> "Q. And you have heard in that area the mention of various names that you have heard mentioned by the lawyers in the case? Having lived in Brownsville for four out of the last five years, you have some impression about this case, haven't you? A. Persons, yes." (896)

At the time Rosen was murdered, it was a topic that concerned the neighborhood and he supposes he did dis-

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* This is the store and corner alleged to be the hangout for the so-called combination

cuss the subject with people, friends of his, and so on (897). At the time of the commission of the deed, there was a big write-up and it was the subject of discussion in places that he visited, and he was inclined to accept the truth and accuracy about what he read and heard at face value, and probably formed some conclusion with respect to them, but feels, however, that he could lay aside any impression which he had (907-8).

> "Q. Would you require a lesser amount of proof from the District Attorney by virtue of what you heard or read? A. That may be true.
>
> Q. So that, can we go one step further and say you may want some explanation forthcoming from the defendant? A. I believe so.
>
> Q. You have already heard, sir, up to this very minute many times repeated that a defendant need not come forth with any explanation of any charge against him? A. Yes, I know that.
>
> Q. You had that in mind when you answered my question? A. Yes." (909)

He explained that what he meant by his previous answer was that the defendant need not necessarily provide the reason, but that *somebody on their behalf* should. He admitted being clear on the subject that the defendant might remain silent and no unfavorable inference could be drawn against him therefore (909-910). He reiterated:

> "Q. You still expect that something should be forthcoming from someone on behalf of the defendant in explanation of the charge; isn't that so? A. I answered that before.
>
> Q. What? A. I say I did answer that before.
>
> Q. And you still are of that opinion, isn't that so, sir? A. Yes." (910)

He protested, however, that he could enter the trial with an open mind, and first claimed that he had been led into making the previous answers, although he subsequently admitted, knowing from his presence in the court and having listened to preceding jurors being questioned, that he was not led into the answers by defense counsel (910).

> "Q. Knowing that, sir, without being led into it, yet you said you would require someone to offer some testimony. Didn't you say that? A. I did. Q. That is not fair, is it? A. I am aware of the conflict. I realize that, but I still stick to my previous answer." (911)

He further admitted that he passed Rose Gold's store practically every night, his company sold them tobacco and other products, and he had a definite opinion of the character of the people who hung around the corner, and if their names became a part and parcel of the case, he would have a prejudice against them which would apply either to persons in the prosecution or defense (912-13). The Court then inquired:

> "Q. Reles and Strauss?* A. That's right." (913)

Then questioned by another of defense counsel, he admitted that he knew the individuals whose names had been mentioned by the prosecution and defense counsel and had formed an opinion as to the character of these particular individuals, and that opinion may have amounted to a prejudice against these individuals (922).

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* It must be remembered that Strauss was a co-defendant in the case at bar.

"Now, isn't it a fact, candidly, Mr. Strongin, that because of your knowledge, first hand knowledge, of the particular location and of some of the people or things that may transpire in this trial, either the amount of the evidence which the prosecution would have to adduce is less or more, or the amount which the defendants would have to produce is less or more than what it would be if you did not know any of the individuals, any of the surroundings, any of the locality? Isn't that true, sir? A. True to a certain extent. Q. Yes, the fact is that you would permit, subconsciously or otherwise, in the juryroom, your knowledge, gleaned from a knowledge of the neighborhood and some of the individuals, to creep into your deliberations, as honest as you are. A. Consciously I would not. Q. But there is that possibility of your mind being in that situation? That is why you said you had a prejudice, isn't it? A. That is true." (923).

The talesman was then challenged for cause and admitted under oath that if the questions were repeated, his answers would be the same, but in answer to the prosecution stated that he could try the case on the evidence, free from any impression or opinion and on the testimony adduced on the trial (923-5).

The challenge was thereupon overruled, and an exception taken (925). Whereupon, defense counsel sought to question the talesman further in view of the answer given to the prosecutor, but the court proclaimed that the challenge had been fully tried and refused to permit further examination, and an exception was taken (926). The talesman was then asked whether he had not stated in answer to Mr. Barshay's question that the amount of evidence that would have to be produced in this case, either by the People or the defendant, would be different

because of his knowledge of the individuals and whether he was not fully cognizant of his answer when he made it, and he stated, "Yes," and he meant it when he made that answer (926-7).

The talesman was again challenged (927), and the Court overruled it, with the following statement:

> "* * * The Court understood the talesman. His prejudice, so-called, relates as he stated in the course of his questioning to a proposed witness for the People, but does not activate against the defense. The challenge is overruled." (927-8)

An exception was taken, and the juror peremptorily challenged by the defense (928).

The overruling of this challenge constitutes one of the most glaring examples of error committed by the Court throughout the entire selection of the jury. This prospective juryman was not only acquainted with Brownsville, but patronized the store at the corner frequented by the so-called combination, read a big write-up about the crime in question, discussed it, accepted as the truth what he had heard, formed a conclusion that would require evidence on behalf of the defendant to dissipate, and even was acquainted and prejudiced against the deceased defendant Strauss, and admitted that it would require a lesser amount of proof from the District Attorney by virtue of what he had heard or read. Merely because he stated in conclusion, in answer to the prosecution's question, that he could try the case on the evidence free from any impression or opinion (924-5), the challenge was overruled. The Court erroneously refused to permit defense counsel to question the talesman further in view of the contradictory answer given to the prosecutor, but proclaimed that the challenge had been fully tried, to which exception was taken.

Compare the ruling above to the ruling of the Court in respect to the talesman Nathan Jellin (783-825), who was challenged by the prosecutor for cause on implied bias because he stated that conditions in Brownsville, in reference to certain persons who hung around the corners, were terrible (823), to which challenge counsel for the defense consented (824). Here the Court insisted on the challenge being tried (824), and although the talesman was merely asked thereafter as to whether his responses would be the same, to which he answered "Yes," the court immediately sustained the challenge (825).

In another instance, upon the examination of talesman Benjamin Bergman, Jr. (2049-58), the prosecutor challenged for implied bias, "because of his knowledge of the conditions on the corner there" (2058), notwithstanding the fact that he had absolutely no prejudice against the defendants (2055); that even though he knew the particular corner and had patronized it as a customer on occasions, it would not affect his ability to pass on the evidence in the case nor would he be embarrassed by jury service (2057). Having in mind that in the instant case of Strongin he had stated that he not only knew Reles and Strauss, but had a distinct prejudice against Strauss, we quote the following from Bergman's questioning:

> "Q. As you sit in the jury box now have you any impression about Harry (Pittsburgh Phil) Strauss?
> • • •
> A. I have.
> Q. Is it one that is derogatory to him? A. It is.
> Q. That name will figure in the testimony—I just tell you that as a thought—that is about as far as I can go. Have you some idea about Abe Reles?
> • • •
> A. I have not." (2057)

In spite of the ability of the talesman to be fair, the Court erroneously sustained the challenge, saving the exercise of a peremptory challenge by the People.

3—JAMES F. NAGLE (1122-1171)

He resides at 80 Willow Street and is employed as a salesman by Timm & Behrens, a real estate firm (1122-3). In reply to prosecutor's questions, he testified as follows:

> "Q. If you are charged, as you undoubtedly will be by the Court, that even if you believe an accomplices' testimony, if you believe every word he says, that the defendant's participated in the murder, • • • and you believe everything he says, if there was no other supporting evidence, the law is that you would have to acquit; would you follow the Judge's instructions?
>
> The Court: Without corroboration?
>
> Q. If there was no corroboration? A. If I was convinced they were guilty, I would do it very reluctantly." (1126-7)

He then stated he would follow the Judge's instructions of law if the Judge charged that in addition to the testimony of accomplices there must be, before there can be a conviction, other evidence tending to connect the defendants with the commission of the crime. However, when questioned by defense counsel, he testified as follows:

> "Q. Did I also understand you correctly, in respect to a question that was asked by Mr. Turkus, of you, that even if you believed an accomplice's testimony to be a hundred per cent true, that in accordance with our law, it would be encumbent upon you to acquit the defendant, that your reply to that question was that you would under those

> circumstances do so, with great reluctance? A No, that I would accept the ruling of the Court with reluctance." **(1133).**

When asked whether he had formed any impression about the case, "from any source whatever," he replied, "Possibly from scanning the headlines, I have had an impression," which impression was detrimental to the defendant, but which he *thought* he would be able to discard during the general course of the trial (1130-31). However, when questioned by another defense counsel, he stated that through some contacts he had in East New York, a section adjacent to Brownsville, he heard discussions concerning crime in that locality; and that those discussions, coupled with what he read, caused an impression adverse to the defendants (1133, 1137). He protested, however, that the impression did not go towards the guilt or innocence of the defendants and was not such as would remain in his mind and activate him in determining that question; there was no doubt in his mind as to his ability to remove that impression (1139-41). He then testified as follows:

> "Q. Mr. Nagle, something would be required in the course of the trial to change the impression? A. Only the ordinary course of the trial.
>
> Q. What in the ordinary course of the trial, do you think would happen, would you require in order that that impression might be removed? A. Only the general testimony given; that is all.
>
> Q. Then it would require some testimony, whether it was general or specific, to remove the impression? A. Possibly.
>
> Q. Not 'possibly.' Actually, is not that the situation? A. No, I think I could cast it aside if I was accepted in the box." (1142)

Finally, to reach a determination after the contradictory replies of the talesman, the following occurred:

> "Q. Mr. Nagle, let us be perfectly fair with each other. I am trying to be fair with you. There have been so many questions asked upon this subject, I am a bit confused as to just what your state of mind is. I will put the question plainly to you: Have you or have you not an impression as to the guilt or innocence of these defendants at this moment? A. I have a slight impression.
>
> Q. And that impression is detrimental to the defendants or some of them? A. Yes." (1143-4).

This impression, he stated, would have to be dissipated during the trial, only after someone gave him testimony as a basis for laying it aside (1152, 1154). He would not expect the District Attorney to furnish such evidence.

Though he protested that he knew of no reason why he could not sit as a fair and impartial juror on the trial of the case (1149), he, nevertheless, testified as follows:

> "Q. Should the Court so charge you, will you follow the instructions of the Court and draw no inference of guilt against the defendant for his failure to take the stand? A. I would, sir, very reluctantly." (1148)

He stated he did not agree with such instruction (1148) and that his reluctance to accept the Court's charge was not based upon the impression he had of the connection of one of the defendants (1149). At that point, he volunteered: "No, my reluctance would be more or less, that a person accused of a crime should be willing to get up and——" The Court then interrupted the talesman and refused to permit him to continue (1149), to which an exception was taken (1150).

He was then challenged for cause and stated under oath that he still retained an impression unfavorable to one of the defendants in the case (1160). He then stated to the prosecutor that he could and would lay aside this impression (1165-6). However, when defense counsel sought to ascertain whether that impression would only be laid aside if and when evidence is produced by a defendant to cause it to be laid aside, an objection by the District Attorney was sustained to which an exception was taken (1166). The challenge was then erroneously overruled, to which an exception was taken, and the talesman was peremptorily challenged by the defense (1170).

The erroneous refusal to sustain this challenge for cause is comparable to the analysis given in respect to the talesman John R. Hamilton. (See pp. 66-69 of this brief).

The discussion as to the erroneous refusal to permit further questioning of the prospective talesman after the court and prosecutor had presumably succeeded in rehabilitating him will be discussed in the analysis at the conclusion of this point.

4—EDWARD GRODEN (1171-1220)

He was auditor of the First National Bank (1171). He had heard District Attorney O'Dwyer speak at meetings many times; knew Assistant District Attorney Rooney very well, and worked for Judge O'Dwyer and was a booster of his (1182). *He believes in causes sponsored by O'Dwyer and is positive that O'Dwyer's office would not bring about an indictment unless they felt sure* (1182-3). He would not say that he is free from bias or prejudice against the defendants, but it is not based upon the particular case but on the general set-up as a whole (1183). He read some of the articles in "The Mirror" about these

defendants and had formed an opinion of the defendants which is detrimental to them (1184-5), and although he was biased and prejudiced, it would not take less evidence to convince him of the guilt of the defendants (1185).

He had discussed criminals with Assistant District Attorney Paul Lockwood many times, and as a result of his association with Lockwood, had a bias against people charged with crime, and in this case, had a prejudice against one of the defendants who had been convicted of crime and is incarcerated for a long time (1187), insisting, however, that the prejudice could be laid aside and that his faith in Judge O'Dwyer would not influence him (1188-9).

From reading the "Mirror" articles, he formed an absolutely unfavorable impression of defendants but it would not take some evidence to remove that impression. Asked what would remove it from his mind, he replied, "I don't think anything would remove it" (1207).

He was then challenged for cause. The challenge was erroneously overruled on the ground that "he has not said it would affect his judgment in this case" (1208). An exception was taken, and the talesman was peremptorily challenged (1220).

Compare the ruling in the instant case with that of Morris Leibowitz (345-377; 409-410) who had merely met District Attorney O'Dwyer as a member of some political club, but would not be prejudiced because of that fact. After a thorough questioning, he was tentatively seated in the box as prospective juryman No. 1 (377). On the next court day, however, the following discussion about the fitness of this juryman took place:

> "Mr. Turkus: I had a discussion with Judge O'Dwyer as regards this talesman (Leibowitz); he

is to be of assistance to him in the campaign and it might have some implication on a verdict to be rendered in the case. Under the circumstances, I am going to challenge for cause.

The Court: Do counsel for the defense wish to try the challenge?

Mr. Talley: No, we do not.

The Court: It is unanimous?

Mr. Talley: Yes, all the defendants join in it.

The Court: Then there is nothing to try and the Court has to sustain the challenge. Of course, there has to be ground for it. I am of the opinion that notwithstanding the apparent absolute honesty of this talesman and the fact that he would be an excellent foreman for this jury, he would be in an embarrassing position in the jury room as foreman of the jury in expressing any opinion on this because of his political connection. Challenge sustained." (409-410)

Again, compare the instant talesman with Sidney J. Flamm (1470-74), who stated that he had been arranging some radio political talks for Judge O'Dwyer's representatives and felt, in answer to a leading question by the prosecutor, that because of that fact it would be more fitting and proper that he not be on the jury. Whereupon the prosecutor stated:

"I think so too. I don't want anybody in who would be embarrassed because of that kind of a connection.

The Court: You mean he is challenged?

Mr. Turkus: Yes.

The Court: Try the challenge." (1473)

Whereupon, the challenge was tried on the ground aforementioned. No questions were asked by defense counsel, and the court sustained the challenge (1474).

As to the instant talesman, further comparison should

be made with the talesman Sam Silfen, whose challenge for cause by the People was erroneously sustained. (See pp. 100-101 of this brief.)

5—PAUL F. BATTERSON (1251-1288)

He read about the case in the "World-Telegram" (1276), but did not gain any impression from reading the article. Asked whether he gained an impression against the defendants from any other source, he replied, "I have heard of the defendants before I was ever called for jury duty" (1276). The impression which was formed in his mind was unfavorable to the defendants and he still had it (1277).

> "Q. And would it require some measure of testimony to remove that impression from your mind, if accepted as a juror? A. I have an impression of the defendants, but I would not hold that against them were I put on the jury.
>
> Q. But you would enter the jury box with that impression in your mind, wouldn't you? A. I will probably always have the impression." (1277)

The impression which he gained he possibly heard from the radio's unfavorable comment concerning the defendants (1279). Asked whether with his unfavorable impression, should an issue be raised as to the truth or falsity of a statement made by one of the defendants under oath, could he lay it aside without allowing it to weigh on his mind in determining the issue, he replied, "I would set aside any impression that I have before judging the man's guilt or innocence" (1284-5).

The talesman was then challenged for implied bias, but the challenge was erroneously overruled, and an exception noted, and a peremptory challenge exercised (1287-8).

6—JOHN J. ROSE (1361-1393)

He resides at 246 East 32nd Street, Brooklyn, N. Y., and is employed as an electrical engineer by the New York and Queens Electric Light and Power Company (1361). In reply to the prosecutor, he stated that there was nothing which would prevent a fair verdict at his hands (1366).

When first questioned by one of the defense counsel, he stated that he read various news items and two or three articles about Judge O'Dwyer (1367). Asked whether they caused him to form an impression with reference to the case or the defendants, he replied "I had a very slight impression with regard perhaps to his character, but not with regard to the merits of the case," and that such impression was an unfavorable one (1367-68). He insisted that he could dissipate that impression as it did not have any bearing on the particular case (1368). The impression he had was that the defendants were members of Murder, Incorporated (1371). He then stated:

> "Q. Consequently you are prejudiced against them by reason thereof? A. Not prejudiced, no, sir.
>
> Q. Well, I will say an impression detrimental to them? A. Yes, sir." (1371)

He again insisted that this impression was "not regarding the case; only as to their character." Despite this, however, he stated that this wouldn't affect his judgment if the defendants should put their character in issue (1372). He then stated that having had that impression, he would take his seat in the jury box, if selected, with that impression still in his mind (1382). But, in answer to the Court, he replied that, as he stated before, he could lay aside and disregard that impression (1383).

He read articles in the New York Journal concerning the life of O'Dwyer. He read those articles after he was called for jury service in spite of the fact that the Court admonished the prospective jurors not to read anything about the case (1386, 88). The group he referred to was mentioned in the article (1387). He accepted what he read as true (1383).

He was then challenged by the defense for cause and under oath stated that the impression which he then had as he sat in the jury box, is one of detriment concerning the character of the defendants on the trial as members of the group he mentioned (1391-92). The challenge was overruled and an exception taken thereto, and the talesman was peremptorily challenged by the defense (1393).

Compare the Court's attitude as to the instant talesman with that assumed when talesman *Herman F. Bell* (1688-1706) was examined. This talesman admitted that he had read newspaper articles since he had been called for jury duty, but upon re-questioning by the prosecutor stated that the articles did not leave any impression in his mind as to the guilt or innocence of the defendants. However, the court ruled as follows:

> "The Court: The Court feels this way about it: According to my recollection, the instructions were given on August 4th—I believe that was the date. Apparently this man did not hear the instructions, but nevertheless, it was important that that instruction be observed in order to get an impartial jury. This was not a simple, casual reading of one article, or glancing at the headlines, but was done for the purpose of obtaining information, and it would not make a nice-looking record if this man were taken on the jury. The challenge is sustained." (1706)

It will be noted that an admonition had been given to the panel not to read any newspapers. The instant talesman admitted, however, having done so. He further admitted that he had an impression as to the defendants being members of Murder, Inc. Nevertheless, the challenge was overruled.

In addition, the challenge exercised in the instant case is comparable to the talesman *Hamilton*. (See pp. 66-69 of this brief.)

7—**JOSEPH J. FLANAGAN** (1895-1919; 1939-1942; 1960-3; 1970)

He was employed by the Public Service Electric Company (1896). He got a slight impression unfavorable to the defendant from newspapers which he has had all the time he has been in Court (1967). *It would require evidence of proper weight to remove this slight impression.*

He read articles in "The Mirror" which helped to form the impression. They were special articles related to the particular case (1907). He believes, if selected as a juror, that he would have to have evidence to remove that "unfavorable impression" and that is his honest impression (1908). He was thereupon challenged for cause by defense (1908) and stated that although he had been sitting in the courtroom listening to the remarks of all counsel with respect to the law and has heard the Judge instruct on a number of cases as to the law of our State, the true and correct condition of his present frame of mind is such that it goes to the guilt or innocence of the defendant due to the fact that he read articles regarding the guilt of the defendant and that is his honest state of mind (1909).

Questioned by the prosecutor, he stated that he is not anxious to get off the jury, but that was his opinion, although he could dispel the impression and have will power

enough to give a fair decision in the case; that whatever reading he did, is hazy in his mind (1911). He read some articles about the career of O'Dwyer which mentioned the defendant (1912), and he could dispel the impression which he had. However, when further asked whether he absolutely will dispel it, he replied, "I believe I have the will power" (1912).

After it was urged by defense counsel that the ability to dispel was based on belief and therefore the challenge for cause should be sustained, the talesman changed his answer so as to imply that he didn't think he would require any evidence to dispel the impression and he would not allow it to influence him (1912-14), and that when he had previously made the statement that the defendants would have to offer proof, he had lost sight of the fact that the defendants need never prove anything (1916).

> "Q. When you were next asked by Mr. Turkus, did you then say that you 'believed' that you could dispel the impression? A. I meant I thought I had the will power.
>
> Q. You 'thought' you had? A. Yes, sir.
>
> Q. That implied a doubt, didn't it? A. Well, I guess everybody has some doubt to some extent of their will power.
>
> Q. I just want to get your state of mind. That implied a doubt when you answered that question, isn't that true? A. It may have to a slight degree.
>
> Q. Then Mr. Cuff questioned you, you recall, and when he questioned you, you used the word again that you 'thought' you would be able to dispel, didn't you? A. Yes, sir.
>
> Q. That implied a doubt also, didn't it? A. I suppose so." (1916)

Further questioned by defense counsel, he admitted that when he used the word "thought," that implied a doubt and he further admitted that the impression went slightly

to the guilt or innocence of the defendants. Questioned by the Court, he stated that he did not *think* he would need evidence to remove this opinion (1917); he thought he had the will power to dispel it, which he supposed implied a doubt (1918).

> "Q. That was the state of your mind when you were first questioned by Mr. Turkus, when you were questioned by Mr. Cuff, when you were questioned by myself and when you were questioned by the Court? A. That is right." (1918)

He finally stated, in answer to the prosecutor, he has the will power to lay aside the impression that he had and will do so (1918). The challenge was then overruled and an exception taken by the defendants (1919). Prior to his final discharge as a juryman, the question was asked of him whether the quality of evidence that would be necessary for the District Attorney to produce would be less than would be ordinarily true were he sitting in a case where he did not have any impression against the defendant. An objection to this question was erroneously sustained and an exception taken (1960-63). (This question will be discussed in the analysis at the conclusion of this point.)

A peremptory challenge was exercised by the defendants (1970).

Compare with the analysis under talesman *Hamilton*. (See pp. 66-69 of this brief.)

8—WILLIAM J. KOEHLER (2131-6; 2162-7; 2169-71; 2188-93)

He is an insurance appraiser (2131) and knew something about the flour trucking industry, and was called as a juror in the Silverman case and was excused (2133).

He read about this case in the "Tribune" and "World-Telegram" (2162), but it was hard to say whether he formed an impression from what he read (2163). He had been called as a juryman in about seven capital cases. He has been on practically all of the Amen cases involving perjury (2199). He had come in contact with Max Silverman and Luckman, who had one end of a warehouse in which he had an office (2188). He knew Martin "Buggsy" Goldstein and thought "Mrs. Goldstein married people next door" to him (2191-2).

> "Q. By reason of this episode, have you in anywise followed with any interest the name of Martin (Buggsy) Goldstein? A. No.
>
> Q. Have you read about him in the paper? A. Who? Goldstein?
>
> Q. Yes. A. I knew that he was executed." (2192)

Upon this answer, the juryman was challenged for implied bias, and the challenge was erroneously overruled, an exception taken and a peremptory challenge exercised (2193).

The error in overruling this challenge was particularly prejudicial to the defendant Capone, for it subsequently appeared in the course of the trial, through the witness Rubin, that the prosecution intended to bring into the case the name of Martin "Buggsy" Goldstein as having been in company with the defendant Capone prior to the killing of Rosen.

9—CLEMENT S. JACOBUS (2482-4; 2485-6; 2487-96; 2508-22; 2523)

He is a real estate broker (2482) and has read and seen names in the "Tribune" and the "Sun," but does not

know anything about the case (2489-90). He has an impression which he formed that is unfavorable to the defendants, but could lay it aside (2491-91a). If accepted as a juryman, he will begin consideration of the case with an unfavorable impression in his mind about the defendants, or some of them, *and some evidence will have to be given to remove that impression.*

> "Q. To get rid of that impression, you would expect such evidence to come from the defendants, wouldn't you? A. Yes, sir.
>
> Q. And unless such evidence was produced, you could not disregard the impression that you have now as you are talking to me? A. No, I have that impression." (2492)

Challenge was thereupon made for cause, and he reiterated his statement under oath (2492-3). Further questioned by defense counsel, he answered:

> "Q. You understood Judge Talley when he asked you whether the impression you have in your mind would take some evidence on the part of the defendants in this case to remove? A. To disprove?
>
> Q. Yes, to remove. A. Yes, sir." (2493)

He was then questioned by Mr. Turkus, and stated that the impression went to the character and reputation of the defendants (2493).

Then questioned by the Court as to whether he had formed an opinion of the guilt of the defendants on this specific crime, he stated he had not formed an opinion, but had an unfavorable bearing in his mind from the headlines he had seen in the paper, but that the impression was not so deep that he could not disregard it (2493-4).

The challenge was thereupon erroneously overruled, and defense counsel attempted to further question the talesman on the answers given subsequent to their questioning, but permission was refused, and exception taken.

Counsel for Capone protested the ruling and the overruling of the challenge and noted an exception (2522). A peremptory challenge was exercised by defense counsel (2523).

Compare with analysis under talesman *Hamilton*. (See pp. 66-69 of this brief.)

10—JOHN J. DUNPHY (2484-5; 2486-7; 2496-2508; 2522-3)

He was treasurer of the Customs Truckers (2485). He had read about the case in the newspapers and has a sort of an unfavorable opinion of these defendants which goes to the guilt or innocence, and would require some evidence to remove, if accepted as a juryman, and he does not think he could remove it unless he heard evidence (2496-7). He was challenged for implied bias, and sworn, and stated that unless he had evidence to offset his opinion, he could not lay aside the impression which he had formed as respect to the guilt or innocence of the defendants (2497).

He further stated that he sat in court, heard the various instructions given to prospective jurors on the law, and notwithstanding that fact and the different principles which he understood as to presumption of innocence, reasonable doubt, and all the other things, his statement to Judge Talley was true, so that the impression or opinion which he had concerning some of the defendants was of such a nature that it would take evidence on their part to remove before he would be able to lay aside the impression or opinion which he had formed. He acknowledged that he had made this statement, notwithstanding the fact

that he had been told that the defendants need at no time prove their innocence but that it was incumbent upon The People to establish their guilt beyond a reasonable doubt (2498-9). Questioned by the prosecutor, he said the impression which he had formed had been based on reading the "Times," the "Sun," the "News" and other papers (2499).

Questioned by the Court, he said he recalls that the person who is alleged to have been killed was Rosen (2500). Further questioned by the Court:

> "Q. Does the fact you read in the paper they are accused of the murder of Rosen form any impression that they are guilty? A. Not necessarily.
>
> Q. Yes or no? A. No, sir." (2501)

The Court further, by leading questions, procured the answer that the impression which he formed was that they were presently on trial, accused of the murder of Rosen —and went no further than that; that he would set aside the unfavorable impression; decide on the evidence and could follow the instructions of the court (2502).

After the Court and prosecutor had concluded asking the leading questions, which resulted in the answers hereinbefore set forth (2504-5), counsel for Capone asked whether he could ask one question in the nature of rebuttal, but the Court refused to permit it, and an exception was taken (2505). The Court, subsequently seemingly changed its ruling when counsel for Weiss questioned the propriety thereof, but then again refused to permit further questioning, and a further exception was taken (2507). Counsel for Capone, thereupon, asked the following question:

"Q. I have this question to address to you—do not answer until the court rules. When I addressed you and asked you certain questions and you made certain answers, did you understand the questions which I addressed to you and did you answer them to the best of your ability?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Rosenthal: Exception." (2507-8)

The challenge was then overruled, and an exception taken (2508).

On the general question, counsel for Capone again sought to question the talesman, but was refused permission, protested the ruling and took an exception (2522).

Exception was taken to the overruling of the challenge, and a peremptory challenge exercised (2523).

Compare with analysis under talesman Hamilton (pp. 66-69 of this brief).

B

1—ALBERT ROSENTHAL (719-727)

He was a fraternal brother of Mr. Wegman, one of the counsel for defendant Buchalter, and at the suggestion of Mr. Wegman and the prosecutor, approached the trial judge to be excused on that ground, but the Court reserved decision until he was actually in the box (719). The last time he saw Mr. Wegman was quite a long time ago (719). The Court thereupon ruled that he would have to be questioned (720).

He stated he had a high regard for Mr. Wegman and had watched his progress in the profession, and thought it was proper to apprise the District Attorney of the fact that he knew him (720). Although he would rather not

serve, he does not know whether it would be embarrassing or not, but he does not think he would pay any greater respect to the argument emanating from Wegman than from any other lawyer in the case, but merely thought it was proper to ask to be excused when he knew one of the defense counsel (722).

Questioned by the Court as to whether he would like to avoid jury service, he said he knew his obligation and even though he would like to avoid it, he would not do it at the expense of doing what he is not supposed to do (722).

Questioned further by the prosecutor, he said if it came to a close question he certainly would not intentionally be inclined to favor Mr. Wegman; in fact he might bend over backwards (724-5). Whereupon, the following took place:

"By the Court:

Q. What is your business? A. Manufacturer.

Q. You presented an application to be excused from jury duty? A. I did not.

Q. What is your concern? A. The Simplex Button Works, Inc.

Q. You are engaged in war work? A. Not extensively; we do a little.

Q. You have no contract to make buttons for soldiers' clothing? A. No, sir, that is a different type of a button.

Q. You mean an electrical button? A. No, sir.

Q. What are they? A. Buttons for ladies' garments, among other things.

Q. What is your position there? A. Up to about October of last year, I was supervisor of production.

Q. What is your position there? A. I do everything, check credit——

The Court: The Court will ask no further questions because the hostility on your part to ques-

tions of the Court is obvious.

The Witness: May I correct that impression, if I seem to have given it.

The Court: The whole courtroom is being upset by your attitude and the attitude of counsel. If one counsel challenges for cause, I will excuse for cause.

Mr. Turkus: Challenge on the ground of implied bias.

The Court: I will excuse him. The Court is being upset by the attitude of counsel and of the talesmen. He may leave. I want no repetition of this. There will be no beating around the bush or substitute for excuses by consent.

Mr. Talley: We don't hear you. We would like to hear you.

The Court: Proceed." (726-7)

In comparison to the ruling above, this Court should note the ruling made in respect to talesman Groden (pp. 80-83 of this brief), who was challenged for cause by the defense because of his close association with District Attorney O'Dwyer who, he was positive, would not bring about an indictment unless he felt sure; who further had read articles about the defendant in the "Mirror," was biased and prejudiced, and had formed an impression unfavorable to the defendants, which he did not think anything would remove from his mind. Nevertheless, the Court overruled the challenge.

Further, compare the ruling of the Court in the case of the instant talesman with the Court's ruling in the ten instances cited in subdivision "A" of this point.

2—BENJAMIN PROTTER (825-88; 965 976)

He has been in the real estate business in France and also is a writer (825), and has a brother, Mannie Protter, who is an attorney (825). He resides with his mother

at 772 Linden Boulevard, Brooklyn, which is his address, but he is staying at the Maryland Hotel for two reasons —one was that when he came back, his mother had not returned from the country, and the second reason was that after he had been called for jury duty, he thought it best to remain away until the question of his services was decided, but he had voted from Linden Boulevard at the Primary Elections, two weeks before (826-7). His lawyer-brother lived at a separate address, which he did not know exactly, nor did he know his brother's clientele or contacts, nor had he ever discussed the business of the Brooklyn Waterfront with his brother (830). He neither knew any of the lawyers, or anyone connected with the District Attorney's office or any of the various persons or organizations mentioned by the district attorney (831-4). His state of mind was such that he could render a fair verdict and nothing interfered with his ability to be a fair and impartial juryman (842-3). He was then asked by the prosecutor as to whether he had ever heard the name of "Peter Panto" and he replied in the negative (843). He would have no prejudice against the prosecution (846).

Questioned by defense counsel, he stated that he did not even know whether his brother ever had a criminal case, and has not heard a thing or read anything about this case or the defendants (851; 853-4).

After the questioning had finished, the prosecutor stated there was a point of law that he must check up in the Judiciary Law on the question of jurisdiction (884-5), and then stated, "I am going to exercise a peremptory challenge. Your Honor has overruled my challenge on residence." The Court, however, assured the prosecutor that he did not understand that he had made a challenge and asked whether he meant the challenge on the question of residence, and stated that he wanted to look

up the law and would submit anything he found on the following morning, after he had an opportunity to check it (886-8). The juryman then tentatively took his seat in the box. On the following day, the Court excused the talesman, and made a detailed statement as to the alleged activities of the talesman's brother in regard to an investigation of a murder of one, Peter Panto (965-6-7), and an exception was taken (967). Thereupon, the prosecutor made a statement for the record in respect to this murder (970-71), and a motion was made, because of the statements of both the Court and the prosecutor, on behalf of the defendant Capone for a mistrial (971-2). The talesman was then again sworn and stated that the answers which he had given on the prior day were true, and reiterated that he did not know whether his brother represented the Brooklyn Waterfront interests, and they had only been distantly friendly, had political differences, and there was not the usual cordiality between them as exists between brothers (973-4-5). He finally stated that he was absolutely free from any prejudice or bias of any kind, had spoken to no one in respect to the case, and would render a fair and impartial verdict based upon the evidence, free of any prejudice, bias or discussion with any member of his family or anyone except the jurymen who were sworn with him (975-6). The Court thereupon stated:

> "So far as the residence is concerned, that challenge is overruled. So far as the other one is concerned, the Court believes that the sitting of this talesman on the jury will create a problem of implied bias which will remain throughout the trial and may affect the result." (976)

He thereupon sustained the challenge, and an exception was taken on behalf of the defendants (976).

Here again is another glaring example of the Court's failure to afford the defendants a fair trial. Protter said that he had no prejudice against defendants or against the prosecution. It was developed by the Assistant District Attorney, however, that Protter had a brother who was a lawyer. Protter had not lived in close association with the members of his family. On the contrary, for many years he had been a resident of Paris and had returned only before the beginning of the present war in 1939. When he resumed his residence in this country, he did not live with his brother. Yet, the Judge took the occasion of this relationship as an excuse for saying in the courtroom that there was a possibility that Protter might have been influenced by the circumstance that his brother, as representative of a Labor Union, had been interested in the murder of Panto. Up to that point, even the most inflammatory tabloid writers had not suggested any connection between defendants and that homicide. The Judge said that he had gleaned the idea from the "Brooklyn Eagle." Finally, he sustained a challenge for implied bias against Protter tendered by the District Attorney (965-976). From the Judge's language, one would derive the notion that the District Attorney was really afraid that Protter would be prejudiced *against the defendants*. Therefore, the Judge had brought the Panto case into this trial. The defendants were confident that Protter was not biased against the defense. Protter was sure that he was not interested in the Panto case. Nobody in the courtroom was concerned about the Panto murder, but the learned Judge nevertheless found a reason for suggesting in the courtroom, before a second juror had been tentatively selected, that defendants could be linked with the murder of Panto! So the Judge, who was afraid that newspaper reading would hamper the selection of a fair jury, thus created more newspaper

hostility, did it without sound reason, and having done it, said and ruled that Protter—who was acceptable to the defendants—could not sit because of "a problem of implied bias." The net result of the Judge's activities was that the prosecution was spared the exercise of a peremptory challenge!

3—WALTER C. PETTERSON (1531-1554)

He was employed by the New York Telephone Company (1547), and there was nothing about the nature of the charge that would prevent him from acting fairly as a juror (1548). He was then asked the following question by the District Attorney:

> "Q. Sir, have you any fault to find or any bias or prejudice against the prosecution for taking one of the perpetrators of the crime and using him as a witness against the others? A. I have nothing against the prosecution, but it would be hard for me to believe the testimony of a confessed accomplice." (1548)

The question was then repeated and an objection taken thereto. The court then asked the talesman whether the prejudice against the testimony of the accomplice is so strong that he would rule it out even though it were corroborated? The talesman replied, "Yes, sir, it would be hard for me to believe that sort of testimony." A challenge was made by the People (1549).

Questioned by the defense on the challenge, he stated he had served on criminal and civil juries and would, to the best of his ability, follow the charge as given by the Judge irrespective of what his own opinion was; and if the Judge were to charge him that an accomplice's testimony should be viewed with suspicion and caution, he

would do so. If he were further told that there must be other evidence besides the testimony of an accomplice, which would tend to connect the defendant with the crime, he would have no difficulty in following that instruction and, to the best of his ability, he would follow the law in respect to accomplices and the necessity of their testimony being corroborated (1550-2). After counsel for the defense had concluded, the Court asked

> "whether or not the prejudice that you have stated is such that you would not give the prosecution a fair, intelligent attitude as to whether or not an accomplice is telling the truth?"

The answer was:

> "It is in my mind."
>
> "Q. Speak out loudly, so counsel can hear you. A. It is in my mind. It would be hard for me to believe that type of testimony." (1554)

The Court thereupon sustained the challenge, to which the defendants excepted. (1154)

The answers of this talesman when first qestioned were correct as a matter of law (1548). (See *People* v. *Kress*, 284 N. Y. 452, 459.)

Comparison should be made with the ten overruled defense challenges contained in subdivision "A" of this point.

4—SAMUEL SILFEN (1557-65)

He is a department store manager for the United Cigar and Whelan Drug Stores, and has no connection with anyone in the clothing district or Brownsville—East New York area (1558-9). The name of Buchalter is familiar as that of a dentist *whom he does not know personally*, but his mother-in-law used him as such (1559). This dentist never visited the home of his mother-in-law, and

the relationship was solely that of dentist and patient (1559-60). He has a slight impression which goes to the guilt or innocence, from matters which he read in the "press" or heard about, which would require evidence on the part of the defendants to remove (1560-1). He was thereupon challenged by the prosecutor (1561).

Questioned by defense counsel—he had heard the Court speak of presumption of innocence and every juryman must accept the law from the Court, with which he agrees, and if the Court charges that the defendants in this case are presumed to be innocent under the law, he would accord that presumption to them (1562). If the Court were to charge that no unfavorable inference could be drawn from the failure on the part of defendants to take the stand and they need offer no proof of their innocence, he would accept that law from the Court (1562-3). He is willing to undertake to lay aside the slight impression he has and accept the law from the court, and will make every effort to dismiss from his mind this slight impression (1564).

The challenge was thereupon sustained (1565).

Comparison should be made with the ruling in respect to talesman Groden. (See pp. 80-83 of this brief.)

5—BENJAMIN COHN (2223-2233)

He is an architect (2223), and some time ago, had contact with builders who have their place of business or were engaged in construction work in Brownsville, East New York section (2224). He heard the name of Martin "Buggsy" Goldstein, but not the name of Strauss or Anastasia, but has also heard the name of Gesule Capone, but it is nothing more than a name to him (2225). Thereupon the prosecution stated:

"I think there is a question of bias." (2226)

He did not recognize the name of any of the nine lawyers for the defense, although he had heard the name of one of them, Mr. Barshay; he never heard any discussions about the Rosen case, but he does not like to see anybody punished, and is not in favor of capital punishment (2228-9). (He was not properly asked as to whether he had any conscientious scruples against same.) Questioned by Mr. Turkus:

> "Q. I think you said to the Judge that you are not particularly in favor of punishment? A. Yes.
> Q. Would that enter into your mind when you are deliberating a case, your feeling that you are not particularly in favor of punishment?" (2229)

This was objected to as not being a proper question or correct statement of law, and it was overruled, and an exception taken, and the answer was:

> "It may prejudice me.
> Q. Yes. So that, as it has been brought out by one of the lawyers for Buchalter that he has been convicted of past crimes and he is serving a long jail sentence, would not that feeling that you have cause you to relax your duty in this case? A. It would." (2229)

He was thereupon challenged by the People (2230), and in answer to questions propounded by defense counsel, stated as follows:

> "Q. If the judge shall tell you, if you are taken as a juror, that the question of punishment is not for you, you must not consider it, it is fixed by law, you have nothing to do with it, will you follow that instruction of law? A. Yes, I will." 2230-1)

Thereupon, Mr. Turkus re-questioned the talesman and

asked him whether he had not said that in view of the convictions for past crimes of Buchalter, he would relax his duty as a juror, to which an objection was made on the ground that it had nothing to do with the challenge. This objection was overruled, and an exception taken (2230-1).

> "Q. Was your answer yes? A. I did not hear you." (2231)

Over objection and exception, he admitted having stated that because of the previous crimes for which Buchalter was sentenced, he would be inclined to relax his duties (2231-2). The following then occurred:

> "Q. If that is your state of mind, Mr. Cohn, that you are against punishment and you would relax your duty, how can you lay that state of mind aside? A. I am against capital punishment.
> Q. You are against capital punishment? A. Yes.
> Q. And you have a conscientious scruple? A. Yes." (2232)

Whereupon, the challenge was again pressed.

Questioned by defense counsel, the talesman admitted signing a qualifying affidavit as a special juror (2232-3). He was then asked:

> "Q. Do you remember that? A. I am not in favor of capital punishment. Of course, if the Judge rules, I would follow out his Honor's, whatever he wanted.
> The Court: You understand a murder trial is not a debating society.
> (The talesman speaks to the court.)
> Mr. Barshay: No further questions.
> The Court: Sustained." (2233)

Compare with the ruling in respect to talesman Koehler. (See pp. 88-89 of this brief.)

6—HARRY ROSENBLATT (2367-73)

He is a special representative for the Standard Brands Food Products (2367), and prior to that was selling for a manufacturer in the dress line, out of town, and did not know much about what was going on in the City (2368). However, the names of Lepke and Gurrah are both familiar to him, and he has an impression which does not go as far as an opinion (2368). He casually met the defendant Buchalter about eight years ago (2368-9). Asked by the Court, he stated he was not prejudiced (2369).

The circumstances under which he met Buchalter was while he was with certain friends of his one of the persons introduced him at a night club, but Buchalter did not make much impression (2370-1).

Questioned by the Court, he said he did not drink with him, he was not a member of the same party, he was merely introduced and that was all; and it was about eight years ago and there was nothing more than a single introduction (2371). Whereupon, the Court stated:

> "Is there a challenge here?
> Mr. Turkus: Implied bias.
> The Court: Try it." (2371)

The talesman was sworn and stated that the introduction was at a time when he was dealing with merchants who dealt in flour, but it was not one of those merchants who introduced him (2371).

> "Q. Didn't you tell me you have an impression about the name of Lepke? A. No.
> Q. You associate the name of Lepke with Buchalter? A. Yes.

Q. You are familiar with the name Gurrah? A. Yes.

Q. You earn your livelihood by dealing with people who buy flour? A. I do.

Q. That is one of your commodities? A. I do.

Mr. Turkus: Challenge for implied bias.

The Court: Any questions.

Mr. Rosenthal: No questions." (2372)

The challenge was thereupon sustained, and exceptions were taken thereto (2373).

It should be noted that this challenge for implied bias was sustained because the juryman earned a livelihood by dealing with people who buy flour, and although he had no impression of any character detrimental to the defense, and he was not biased against the People, the challenge was sustained. As a standard of comparison, see analysis under talesman Groden (pp. 80-83 of this brief).

THE LAW

Under subdivision "A" of this point we have fully discussed and analyzed the overruling of the challenges for cause made by the defendants, necessitating the exercise of ten peremptory challenges. It is contended that in each one of these cases the defendants established, upon cross examination, that actual bias existed in the minds of these talesmen because of reading articles, the presence of impressions formed as to the guilt or innocence of the defendants, knowledge and adverse opinions as to the deceased defendant Strauss herein, and various other prejudicial causes therein expressed by the individual talesmen.

The Code of Criminal Procedure of the State of New York defines actual bias as the existence of such a state of mind on the part of the juror, in reference to the case, or to either party, as satisfies the Court that the juror cannot try the case impartially and without prejudice to

the substantial rights of the party challenging (Sec. 376).

In the case of *People* v. *McQuade*, 110 N. Y. 284, the Court said at page 301:

> "* * * Now, as formerly, an existing opinion by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is *prima facie* a disqualification, but it is not now as before a conclusive objection, provided the juror makes the declaration specified, and the court, as judge of the fact, is satisfied that such opinion will not influence his action. But the declaration must be unequivocal. It does not satisfy the requirement of the statute if the declaration is qualified or conditional. It is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict. * * * Fairly construed, their declaration of their belief that they could render an impartial verdict was qualified by a doubt and was not sure and absolute."

In most of the aforementioned overruled challenges, the talesmen had definitely expressed an opinion and had further expressed a doubt as to their ability to overcome such prejudicial opinion without a different quality of evidence than in the ordinary case. In an attempt to overcome this testimony of the talesmen given on cross examination by defense counsel, either the court or the prosecutor sought from the talesmen a categorical answer to the effect that they could disregard this prejudice.

In the case of *State* v. *McCoy*, 33 So. 730 (Supreme Court, Louisiana), the defense challenged a juror named Meaux for cause, on account of imperfect acquaintance with the English language and on the further ground that

he had formed an opinion on the merits of the case which would require strong evidence to overcome. The Court denied the challenge. Defense challenged him peremptorily. Before the jury was completed, the defense exhausted its peremptory challenges.

Examination of the juror disclosed:

1. That he had heard of the crime;
2. That he had formed an opinion which could be changed by witnesses;
3. That he could try the case strictly on the evidence from the witnesses;

On Cross-examination:

4. That he had formed an opinion which would require strong evidence to overcome;
5. In determining the case, his mind would be influenced by his present opinion;

By the Court:

6. His opinion is not a fixed opinion;
7. It would give way to testimony;
8. He feels he could disregard the opinion and decide the case strictly on the evidence.

The Court said:

"Taking the whole of the examination of this witness together, the most that can be made of it is that he had formed and expressed an opinion that it would have required strong evidence to overcome; that his mind was not in a condition to be influenced solely by the evidence to have been submitted on the trial, and that it would have been influenced to a great extent by the opinion formed already; but that, nevertheless, he could have gone into the jury box and, as we take it, if the evidence proved strong enough to overcome it, have disregarded that opinion and have decided the case upon such evidence. We do not consider that he would have made a good juror, and are of the opinion that the challenge for cause should have been sustained. *People* v. *Casey*, 96 N. Y. 115;

Rizzolo v. *Com.* 126 Pa. 54, 17 Atl. 520. The fact that, having been challenged peremptorily, he did not sit on the jury, does not cure the difficulty, inasmuch as it appears that all of the defendant's peremptory challenges had been exhausted before the jury was obtained. *State* v. *Fouchy*, 51 La. Ann. 229, 25 South., 109."

It was said in *People* v. *Casey*, 96 N. Y. 115, at pp. 122-3, by Earl, J.:

"• • • When persons called to sit as jurors are otherwise incompetent from actual bias, they must be required to make the declarations specified in the section of the Code quoted. They need not make those declarations literally, but they must make them in substance; that is an absolute prerequisite; and then if there is nothing in their further examination materially impeaching such declarations, the court may receive them as jurors, if satisfied that their opinions and impressions will not influence their verdict."

In *Grand Lodge A. O. U. W.* v. *Taylor*, 99 Pac. 570 (Supreme Court, Colorado), the juror Dietz was challenged for cause. The trial court denied the challenge. The Juror was peremptorily challenged. The Court said:

"We think the court should have excused this juror from the panel, as his examination, taken in its entirety, shows bias for plaintiff, and that, as to him, defendant would be required to prove its affirmative defense by a greater preponderance of the evidence than the law requires. The defendant is in a position to urge this point because it had exhausted all its peremptory challenges before the panel was filled, and one of the jurors peremptorily challenged was Dietz."

It will be further noted that in the questioning of these

talesmen by the District Attorney and Court, in most instances the Court either attempted to exact a promise from the talesman to the effect that he would lay aside his prejudice, or the prosecutor attempted to exact a promise that the talesman would follow the law as given to him by the Court.

In *People* v. *Wilmarth*, 156 N. Y. 566, it was held that such questioning was insufficient to qualify the talesman. At page 568, Parker, Ch. J., said:

> "We will now turn to the record for the purpose of ascertaining whether Hollenbeck made such a declaration as the statute calls for; for if he did, the determination of the trial court, that he was a properly qualified juror, has evidence to support it, and it may not be reviewed in this court. But if he did not, then the court erred as a matter of law in overruling the challenge interposed by the defendant.
>
> A question was asked by the district attorney which presents the appearance of having been intended as a compliance with the statute. It reads: 'Q. In spite of any prejudice or any opinion you might have, you would go into the box and decide the case upon the evidence that was given here under the law as laid down by the court, would you not? A. I would.'
>
> It will be observed that the question did not call for the belief of the juror, nor did it direct his mind to the inquiry which the statute demands, whether, in his opinion, he believed that such an opinion or impression would not influence his verdict. The statute calls for the belief of the witness upon two subjects: *First*, whether the opinion or impression which the juror has will influence his verdict; and, *second*, whether he can render an impartial verdict according to the evidence. The question put omitted entirely to inquire of him whether he believed that the opinion or impression

he had would not influence his verdict. The statute not only requires such inquiry, but it is a most important feature of its provisions. It directs the attention of the witness to the fact that he is expected to make a careful analysis of his opinions or impressions, and then to declare on oath his belief as to whether they will influence his verdict. This was entirely omitted, as we have seen; the question did not even attempt to cover anything except the succeeding provision of the section, which is that the juror believes he can render an impartial verdict according to the evidence. And as to that provision, the belief of the witness was not asked, nor was an equivalent expression employed, as in *People* v. *Martell* (138 N. Y. 595). Instead, the witness was asked whether he 'would decide the case upon the evidence?' The question suggested to him his duty, and, as an upright man, he readily promised to do it. But such a promise is not in compliance with either the letter or the spirit of the statute, which seeks, *First*, to direct the mind of the juror to a careful introspection, to the end that he may be able advisedly to declare on oath his belief whether the opinions or impressions which he has will influence his verdict; and, *second*, whether he can render an impartial verdict according to the evidence. This statute is the outcome of many years of experience of lawyers and judges in the trial of criminal causes, and it should not be frittered away by a recognition on the part of the courts of loose or ill-considered substitutes as equivalents."

Under Sections 383 and 384 of the *Code of Criminal Procedure of the State of New York* the right is given to either side to examine the talesmen under the rules of evidence applicable to the trial of other issues, governing the admission or exclusion of testimony. The error committed by the court was aggravated by the refusal to permit defense counsel to indulge in recross-examination of

the talesman after perfunctory questions had been asked by either the court or district attorney, which seemingly dispelled the prejudice expressed by the juror in his cross-examination by defense counsel. (We cite: Flannagan, 1960-3; Jacobus, 2522; Dunphy, 2505-8; 2522). Although these three talesmen had definitely expressed prejudice to defense counsel prior to being challenged for cause, which as aforstated was presumably dispelled by the pro forma questions asked of them by the court or the prosecutor, defense counsel had no opportunity to question further. It needs no citation of law to convince this Court that the elementary rules of evidence permit recross-examination of any witness on seeming contradictions established on redirect examination. But notwithstanding this refusal to permit defense to recross-examine, an entirely different standard was established in those cases where the prosecutor had challenged for cause and defense counsel had dispelled same. In such case, the prosecutor was permitted to re-examine.

In the cases aforecited the courts have universally held that where a talesman had formed an opinion which would require strong evidence to overcome, it would be grounds for his disqualification. However, the Court erroneously ruled on several occasions during the course of the examination of talesmen that counsel had no right to ask of the talesman questions similar to the following:

> "Do you feel, sir, that because of your condition or state of mind that the quality of evidence that would be necessary for the District Attorney to produce in this case would be less than would be ordinarily true were you sitting in a case where you did not have any impression against the defendants?" (1960)

Moreover, the Court's remarks in the presence of the

jury relative to the alleged abuse of the exercise of peremptory challenges (Cleary, 1295-6; also, Kendy, 426) further aggravated the conditions and deprived the defendants of procuring a fair and impartial jury. How unjust this accusation of the Court was can readily be ascertained by a perusal of the testimony of talesman *Gillespie* (1742-1861) who stated that he had found a body in the rear of his building, which he attributed to "Murder, Inc.," had found the dead body of Mrs. "Legs" Diamond in one of his buildings, and who further stated that Mr. Moorehead, the Chief of the Indictment Bureau in the District Attorney's Office, was an acquaintance of his, but against whom the defense did not even present a challenge for cause, but excused peremptorily.

In *People* v. *McQuade, supra*, at p. 294, it was said:

> "• • • Both the prosecution and the accused may reject, on peremptory challenge, a qualified juror without assigning cause. The right of peremptory challenge was originally given to the accused that he might exclude from the jury a juror against whom he entertained a prejudice, although not founded upon any reason which would disqualify him. So, also, where he has a preference in favor of a juror legally selected and qualified to sit, who is not peremptorily challenged by the prosecution in the first instance, the observance of the statute secures to the accused his presence on the jury."

At page 293:

> "• • • The right of peremptory challenge given to an accused person is a substantial right. BLACKSTONE says: 'It is full of tenderness and humanity to prisoners, for which the English laws are justly famous.'"

The standard set up by the Court in overruling the challenges of the defendant was entirely different from the standard utilized in sustaining the six challenges urged by the People and contained in subdivision "B" of this point.

The talesman *Rosenthal* was merely an acquaintance of one of the counsel, which under the law is not a valid cause for challenge (See *People* v. *McQuade, supra*), but the challenge was sustained.

The talesman *Protter* stated he had absolutely no bias whatsoever, but the Court interjected that his brother, who was a lawyer, had represented some waterfront interests, and the challenge for cause was sustained.

The talesman *Petterson* merely stated that he would exercise caution before accepting the testimony of an accomplice, and the challenge for cause was sustained.

The talesman *Samuel Silfen*—his mother-in-law had used a dentist named Buchalter, whom he did not know personally, but the challenge was sustained for cause.

The talesman *Benjamin Cohn* had heard the name of Martin "Buggsy" Goldstein and the name of Gesule Capone (not the defendant), which was nothing more than a name to him, and although against capital punishment, would accept the law, but the challenge was sustained.

Lastly, the talesman *Harry Rosenblatt* had been casually introduced to the defendant Buchalter eight years before, but it had left no impression. His challenge was sustained.

In no one of the six cases aforementioned was there any legal case of implied bias or actual bias established by the prosecution which would warrant the Court in sustaining the challenge. However, the erroneous rulings of the Court saved the prosecution six peremptory chal-

lenges. The sustaining of these challenges were erroneous as a matter of law.

We have dealt with the question of the challenges exercised by the defense prior to their exhausting the thirty peremptory challenges alloted to them. Prior to dealing with subdivision "C" in relation to the talesmen *Rorke*, *Links* and *Coleman*, we would like to call attention to certain circumstances concerning two of the jurymen who had been seated in the jury box as jurors "8" and "10" respectively.

Juror No. 8, *Philip Strober*, upon his examination, had made known his acquaintanceship with Irving Feinstein and Feinstein's deceased brother, "Puggy" Feinstein. (See *People* v. *Goldstein & Strauss*, 285 N. Y. 376). He was tentatively permitted to remain in the jury box. At that time, the defendants had exhausted but nineteen of their peremptory challenges. Although the Court had been requested on several occasions to remove this juryman, it was not until the defendant had exhausted twenty-nine peremptory challenges (2578) that the Court excused this juryman from the box.

John D. Butt had been seated in the jury box as Juryman No. 10, and upon the removal of Strober, became juryman No. 9. He was the Vice-president of the Seaman's Bank for Savings, and throughout his questioning had stated that he had never read about the case and had formed no opinion or impression nor had he ever heard the names of the defendants discussed (2246-54; 2258-60; 2261-3). He remained in the jury box for a number of days and until the jury box was completed, at which time it was suggested by counsel for the defendant Capone that the Court inquire whether anything had happened that would change any of the answers previ-

ously given by any member of the jury. Whereupon, this juryman raised his hand, and a discussion ensued at the bench, at which time he stated: "There has just been a great conviction on my part towards prejudice in this case," although he had spoken to no one since his entry into the jury box. The Court thereupon stated that the challenge could not be tried and it had to be done quietly, without the presence of the jury, and asked counsel whether they all consented, which was agreed to; defendants' counsel reserving the exceptions which had theretofore been taken (2690; 2691).

C

1—JOHN J. RORKE (2586-9; 2603-27)

He is a nephew of Inspector Rorke, who has been on the police force for thirty odd years, assigned to Brooklyn traffic (2588; 2603). He had been a prospective juror on a blue ribbon panel in which Mr. Turkus had been the prosecutor (2605). At that time, he did not hear the name "Buggsy" Goldstein, but, of course, he heard the name "Maione" when he was previously questioned. The other names, however, do not mean anything to him (2605-6).

Questioned by defense counsel, he stated he had been excused as a juryman in the Maione case* (2607).

> "Q. Well, about how many names would you say that were mentioned then, that you recollect as being mentioned here today or yesterday or the day before? A. One of the defendants.
>
> Q. Maione and one of the defendants at the present time? A. Maione.
>
> Q. Was mentioned then too? A. That is correct.
>
> • • • •

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* The Maione case was a murder trial in which counsel for this petitioner appeared for the defendant Maione.

Q. And thereafter did you follow the case with interest in the press? Did you read about it? A. Only to the effect of the decision that was arrived at.

Q. I do not know whether you remember all the counsel in that case? A. I do remember two of them.

Q. I was not one? A. Just Mr. Rosenthal was there of the present group and Mr. Turkus." (2606-7)

At this point counsel requested the Court's permission to approach the bench, and a conference was held as to this juryman's qualifications, in view of his having been called in the Maione case and excused by defense counsel. For some reason, this conference has been omitted from the record. After the conference, however, the court asked the talesman a number of questions as to whether he had formed any opinion concerning any of the defendants and whether he had any impression because of the prior case that he had been called as a juryman, and he answered in the negative. A challenge was thereupon made on the ground of implied bias (2609). He was examined upon the challenge and stated that he had been called as a juryman about five or six months ago, in a murder case in which Mr. Turkus was the prosecutor and Mr. Rosenthal was one of the counsel for the defense, and he was challenged as a juror by Mr. Rosenthal (2610-11).

"By the Court:

Q. Do you attribute your excuse to either of the counsel in the case? A. Yes, sir.

Q. Do you charge it against one particularly? A. Yes. I would charge it against one who was questioning.

Q. Do you carry a grudge? A. No." (2611)

He admitted that certain names were mentioned in that case, and at least one of those names he heard since he was called in this case. Questioned further as to whether he followed the developments of that trial with any interest, after he was excused, he answered, "I just made it a point to——" (2613).

The challenge was thereupon overruled, and an exception taken. (2617).

2—WILLIAM P. LINKS (2660-89)

He as a radio producer and was on one of the panels of one of the murder cases that Mr. Turkus prosecuted and in which Mr. Rosenthal was one of the attorneys. At the time, he had stated that he was the radio announcer on a program known as "Mr. District Attorney", and had been called into consultation with reference to the script thereon (2660). He has trained various actors and actresses in technique (2661). When called as a juror in the previous case, he heard some of the names mentioned in the case, among which were Maione, Abbandando, Strauss, but does not recall whether he heard the names of any of the defendants in this case (2661-2).

> "Q. Did you follow the case thereafter with any degree of curiosity? A. Not to any great extent except I wanted to find out what became of the case on the last day of the trial." (2662)

He was not excused on a cause challenge on the last trial, and was not prejudiced one way or the other, because of his having been excused peremptorialy (2665). He read headlines about this case but it did not leave any extraordinary impression (2669). He had been excused by the People in the other case (2682). Mr. Turkus thereupon questioned him:

"Q. At that time I believe you were identified with a program of some sort? A. Yes.

Q. Do you understand that that may have been a question of propriety at that time? A. Yes, sir.

Q. In other words, there is no resentment because The People excused you? A. No, sir." (2689)

Mr. Turkus thereupon stated the talesman was satisfactory, and, the peremptory challenges having been exhausted, the defense rested on the record. A similar discussion with the Court in respect to this talesman was had, as hereafter set forth.

3—JOHN E. COLEMAN (2691-2707)

He was a business representative of the Brooklyn Edison Company (2691), and questioned by one of the defense counsel, said he had read quite extensively about this case in the "World-Telegram" and the "News." He stated, however, that he would be impartial although it was inconvenient for him to serve because of conditions at home (2697).

The People announced that he was satisfactory, and the defendants, having exhausted their thirty challenges, rested on the record (2707).

The three jurymen, *Rorke, Links* and *Coleman*, who actually served on this case as jurors numbered "10," "11" and "12," mentioned in Subdivision "C" of this point, were all questioned subsequent to the exhaustion of the thirty peremptory challenges accorded to the defendants.

As to the juryman *Rorke*, his examination is fully set forth under subdivision "C" (pp. 115-117), but the record

is barren as to the discussion with the Court relative to the challenge made by the defendants for cause. This challenge was made before the Court, without the hearing of the jury, because of the situation with which the defense counsel were confronted. This juryman had been summoned as a talesman in the Maione-Abbandando case and had been peremptorily challenged by the present defense counsel for Capone. He had heard the name of Capone, and had followed the verdict in that case. He was the nephew of a prominent Police Inspector which presented a question of implied bias far more critical than anything displayed in the examination of *Protter, supra,* against whom the People's challenge for cause was sustained. Nevertheless, the Court, overruled the challenge and an exception was taken.

As to juryman No. 11, *William P. Links,* the typewritten record is also incomplete. Like *Rorke,* he had been called to serve on the jury in the Maione case, but had been excused by the District Attorney who stated in that case that because of the connection of said Links with the radio program known as "Mr. District Attorney," he, the prosecutor, did not consider he would be a fair juror to the defendant. A similar discussion was had as to a challenge against Links, without the hearing of the jury, but the Court did not entertain same, and the very same prosecutor who, in the Maione case, considered this man to be prejudiced against the defendant, announced he was satisfactory to the People. Whereupon, the defense excepted and rested on the record. (This exception does not appear in the typewritten record.)

As to the 12th juryman, *John E. Coleman,* upon questioning, he said he had read quite extensively about this case, but protested, however, that he would be impartial. Having no further peremptory challenges, defense counsel rested upon the record.

The law laid down in the cases heretofore cited definitely establish the fact that the defendants were deprived of a fair and impartial jury for the following reasons:

1. Ten defense challenges for cause were erroneously overruled, necessitating ten peremptory challenges;
2. Six challenges for cause made by the People were improperly sustained, depriving the defendants of the presence of those individuals upon the jury, or saving to the prosecution the exercise of six peremptory challenges; and
3. After the defendants had exhausted their thirty peremptory challenges, two biased jurors were improperly permitted to remain and deliberate on the guilt or innocence of the defendants.

The pragmatic proof that the defendants were deprived of a trial before a fair and impartial jury is found unequivocally in the fact that the defendants found themselves unable to exercise peremptory challenges against *Rorke* and *Link*. (*People* v. *Casey*, 96 N. Y. 115, 123).

It may be contended by the learned district attorney that the allowances or disallowances of the challenges by the trial court are not subject to review by reason of the provisions of Section 749-aa of the Judiciary Law of the State of New York. Subdivision 7 of that statute, so far as pertinent here, provides.

> "Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not

be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final."

It surely cannot seriously be contended that this statute would preclude this court from reviewing the rulings of the trial court as to challenges where they lead to a conviction without due process of law in contravention of the Fourteenth Amendment of the Constitution. The district attorney surely cannot contend that even if such rulings lead to the impanelling of so prejudiced and biased a jury (who, incidentally, had already formed an opinion as to the guilt of the person on trial), as to result in a trial which was one only in form, that such action could not be reviewed. Such contention would be specious. If there were any merit to such contention, a prejudiced court could deny a defendant a trial and only grant the pretense of one. This court undoubtedly has jurisdiction, regardless of any statute providing for the finality of a ruling by a state court, to review such ruling where it is claimed that it abridged or denied a constitutional right. Therefore, such portion of the Judiciary Law of the State of New York as provides for the finality of the allowance or disallowance of challenges is in contravention of the Constitution and should be declared unconstitutional.

III.

Under the facts in this case, and the prejudice created against the defendants because of the adverse newspaper publicity, coupled with the atmosphere in the courtroom, and the condition of the prospective juror's mind, the Court's constant refusal to grant a severance to defendant Capone utterly deprived him of a fair and impartial trial, and granted him but a mere pretense of one. If

the facts in this case do not warrant a severance, we doubt whether any case within the annals of criminal law will warrant one.

It cannot be gainsaid that the numerous errors committed upon the trial, plus the abundance of prejudicial evidence admitted, but not in any wise applicable to defendant Capone, was of such a nature that the jury must have been unduly influenced to such a degree that it could not dismiss such prejudice from its mind and fairly determine the issue, thus depriving the petitioner of his constitutional rights to a fair and impartial trial, and affording him but a pretense of one.

Although we quote from the minority opinion in *People* v. *Fisher*, 249 N. Y. 419, at 432, we do so for the reason that the facts affecting Capone in this case peculiarly fit the wording of Chief Judge Lehman. We quote:

> "Certainly jurors are not accustomed to weigh evidence in that manner, and I confess that neither legal training nor long judicial experience has given me the ability to do so. The jury might perhaps separate the issues raised by each defense and consider only the competent and relevant evidence bearing on those defenses, but it seems clear to me that in weighing the credibility of the testimony against Fisher, they could not and did not ignore knowledge derived from other evidence which lent credibility to that testimony. In the final analysis the confession of Dreitzer and the admissions of Helfant led inevitably to the conviction of Fisher, and if the testimony relevant to Fisher's guilt had been weaker and his own testimony stronger, the result would have been the same."

Prior to the trial (June 5, 1941) a motion was made for a severance (R.pp. 31-54) which was denied without prejudice to renewal before the trial court (R.pp. 29-30).

This motion was orally renewed before the trial court on August 4, 1941.* (s.m. pp. 12-13), and a further affidavit, dated the same day, was submitted in support thereof (R.pp. 55-64). This motion was denied (s.m. p. 27) and an exception taken (s.m.p. 28). On September 15, 1941, before the trial court, after defendant "Farvel" Cohen had moved for a severance, to which the District Attorney consented,** (s.m.p. 59), the application of Capone was again renewed on additional papers (Mirror articles s.m. p. 59) but was denied (s.m.p. 60).

Subsequently, and throughout the trial, motions were constantly renewed for a mistrial and severance. (See testimony of Tannenbaum, R.p. 2240; Rubin, R.p. 2377; Aman, R.p. 2683; Bell, R.p. 2698; Ryan, R.p. 2703; Winne, R.p. 2706; end of People's case, R.p. 2715; end of entire case, R.p. 3541 and on sentence R.p. 3996).

Thus, throughout the trial, the jury had a parade of witnesses, none of whom referred to Capone, but who constantly testified to matters which would have been excluded were Capone on trial alone. Days were devoted to talks of Union activities and alleged gangsterism commencing in 1923 (thirteen years before the killing of Rosen) coupled with the names of persons, living or dead, none of whom ever knew or saw Capone or had any connection with the issues involved. (See testimony of Berger (R.pp. 1781-95 et seq.), Rubin (R.pp. 1293-1320 et seq.), Mrs. Rosen (R.pp. 246-56), Harold Rosen (R.pp. 466-83), and Sylvia Greenspan (R.pp. 567-84). The flight of Rubin and alleged flights of Buchalter (charged as not connected with this case) and Weiss were prejudicial to Capone, although not admissible if he were on trial alone.

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* This motion is also omitted from printed record. Reference to unprinted stenographer's minutes.

** Previously denied by trial court on August 4th (s.m.p. 27).

(See testimony of Rubin (R.pp. 1381-1420, 1685-1700 et seq.), Maguire (R.p. 1761), Berger (R.pp. 1814-25 et seq.), Aman (R.pp. 2607-86), Bell (R.pp. 2687-98), Ryan (R. pp. 2699-2703), Winne (R.pp. 2704-06), Malone (R.pp. 3493-3508), Whalen (R.pp. 3509-17), and Newman (R.pp. 3518-21); also, People's Exhibits Nos. 33 to 57 inclusive). At the opening of the trial, counsel for Buchalter admitted he was then serving a long term prison sentence. In summation, Buchalter's counsel admitted and condemned his past activities and the vicious circle domineering the Unions (R.pp. 3546-7), and after counsel for Capone had concluded summation, the District Attorney reminded the jury of the statement of Buchalter's counsel and further named Buchalter as "the Czar of the industrial rackets with a half a million dollar take (R.pp. 3783, 3801). Spoliation of evidence was charged as to the alleged shooting of Rubin (R.pp. 3882-3).

These are some of the major happenings which permeated the atmosphere during the trial, and taken together with the notoriety surrounding the co-defendants, fully discussed in the motions for a Change of Venue (R.pp. 110-175) (the denial of which is also urged as a Specification of Error, and is fully discussed in the petition and brief of the co-defendant Buchalter), plus the fact that practically all of the prospective jurymen examined, as well as the twelve men who finally constituted the jury, had heard about defendant Buchalter or Weiss or both, and you find a situation unparalleled in any case heretofore reported.

The error was substantial and deprived defendant of a fair trial at the hand of his peers. Moreover, the motion made before the trial for such relief was predicated on the ground that a denial thereof would deprive petitioner of a trial guaranteed to him by the Constitution of the United States (R. pp. 36-7; 42-3). Thus was a

constitutional question presented and passed upon by the court below.

IV.

THE COURT'S UNWARRANTED INVASION OF THE PROVINCE OF THE JURY THROUGHOUT THE TRIAL, ITS CHARGE, AND DURING THE REQUESTS TO CHARGE. UNWARRANTED RESTRICTION OF CROSS-EXAMINATION BY DEFENSE COUNSEL AND CONDUCT THROUGHOUT THE TRIAL DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

It was upon the veracity of the testimony of Bernstein and Magoon, and that alone, that the jury was compelled to determine the issue involved as to Capone. For that reason, counsel for Capone in his summation to the jury called their attention to the various major discrepancies and contradictions which permeated the testimony of both, including Bernstein's affirmance of the fact that where Cohen's life was at stake in the mountains he lied, "knowing that he did wrong" and Magoon's statement that since childhood he had indulged in "little white lies." Unquestionably, the trial court must have felt that the summation had made a definite effect upon the jury, for throughout the charge the Court indulged in what might be termed a second summation for the People in an attempt to destroy the effect thereof. The Court's invasion of the jury's province particularly affected Capone's right. It can easily be seen why the jury convicted, despite the paucity of evidence, when we analyze the charge and note the deft manner in which the court sought to and succeeded in destroying the effect of the summation. Nor did the Court permit the jury to hear the exceptions to the charge noted by defendants' counsel. In effect, the court's charge deprived the jury of exercising its free will in judging the effect of the contradictions contained

in the testimony of the witnesses Bernstein and Magoon.

(A) The Court informed the jury that cross examination was a "hit or miss; it is blank cartridge shooting;" and that no two people can agree on its fairness (R.p. 3903). Exception taken thereto (R.p. 3981).

(B) The Court thereupon went on to explain to the jury that it was "an unholy thing" to expect witnesses to remember answers given on previous trials and characterized it as a "normal response" for a witness, when confronted with his previous testimony, to answer, "If it is in the book, it is so" (R.p. 3894-5). Exception taken (R.pp. 3985). This charge was particularly applicable to the defendant Capone since it applied to answers given by the witnesses Bernstein and Magoon, and was dwelt upon in summation by Capone's counsel (R.pp. 3726, 3728-9).

(C) The Court emphasized Magoon's answers in relation to the "little white lies" and warned the jury "not to let the decision of so important a case as this turn on a question of mockery or ridicule • • • of a specific witness for a stupid answer such as that." This portion of the charge was specifically directed at Capone's counsel, who discussed the question in his summation, and is particularly applicable to the defendant Capone as it involved the so-called corrroborating witness Magoon (R.pp. 3750-1; 3753).

(D) The Court instructed the jury to disregard matters in regard to the alleged recollection concerning testimony the witness had given before the grand jury as compared to that given at the trial (R.pp. 3899-3900). This portion of the charge was also directed at counsel for Capone, as reference to accomplice Bernstein's discrepancies between the grand jury minutes and the testimony on the trial was called to the jury's attention in the course of his summation (R.pp. 3733; 3744-5): This erroneous

instruction is also particularly prejudicial to Capone since it involved the credibility of the admitted accomplice's testimony.

(E) The Court further charged the jury in connection with the discrepancy existing between the testimony of the People's witnesses Berger, Rubin and Bernstein regarding the alleged meeting between Bernstein and Capone in respect to the theft of the automobile in preparation for the crime. The invasion of the jury's province, by the trial court, to determine the credibility of the witnesses in respect to any alleged fact involves the rights of all defendants, but like in the other instances quoted, it particularly involves defendant Capone since the veracity of the testimony of the accomplice Bernstein was again questioned.

Coupled with the court's criticism of counsel in its charge to the jury (R.p. 3896), to which exception was taken (R.p. 3986), and the fact that it is elementary law that, when submitted to a jury, the credibility of all witnesses is exclusively within their province, the unwarranted invasion by the court of that inherent right deprived defendant of his right to a fair trial.

(F) The Court unjustly curtailed the cross-examination of counsel for Capone on numerous occasions and refused to permit counsel to examine the witness on matters which were either brought out on direct examination or on previous cross-examination on behalf of other defendants. At the same time, in many instances the trial court made disparaging remarks either about the purpose of counsel or the materiality of the evidence sought to be adduced, and at various times invaded the province of

the jury and gave the Court's interpretation of the import or meaning of the testimony and the ability of the witness to testify concerning certain matters.

Both Court and prosecutor sought refuge in the magic word "Repetitious" to bar the right of proper cross-examination, the Court holding that if the prosecutor had originally asked the question, it would be repetitious to cross-examine the witness thereon and elicit, if possible, a contradictory reply, which would thereby tend to destroy the witness' credibility.

The instances are so many that, for the sake of brevity, we merely quote some of the pages from the record. (Bernstein's testimony: 1131-4; 1139; 1169; 1175; 1176; 1177-8; 1180; 1194; 1195; 1198-1200; 1201-2; 1227-8; Mc-goon's testimony: 2532; 2586-9.)

(G) The Court unwarrantably restricted cross-examination of People's witnesses on questions (a) directly affecting their credibility and (b) tending to show what consideration was being given to them for their testimony. Objections and exceptions were taken thereto (R.pp. 1094-5; 1136-9; 1144; 1146; 2531-2; 2597-8.)

(H) Numerous instances appear throughout the trial where the Court also invaded the right of the jury by interpreting the witnesses' answers and ability to answer (R.pp. 3894; 3898-9).

These actions persisted until counsel for defendant Capone finally moved for a mistrial on the ground "that the action of the Court toward defense counsel and upon the observations of this Court throughout this trial as to the testimony of various witnesses and what the import of their testimony is throughout the trial, being an invasion of the jury's province" (R.p. 2603.)

(I) The court adopted a unique method of concentrating attention upon every circumstance which might be re-

garded as pointing to guilt and yet, disregarding the numerous circumstances developed on cross-examination which would negative such inference. Under the pretext that the court wished to assist the jury by segregating all of the incriminatory matter against the several defendants, the court restricted its review of the facts (R.p. 3903, et seq.) to a recitation of all of the incriminatory statements made by Bernstein and Magoon against the petitioner. Exceptions to this charge were made in the absence of the jurymen since the court refused to permit their presence during counsel's exceptions thereto (R.p. 3968).

(J) The Court erroneously charged on reasonable doubt (R.p. 3930) and further damaged the interest of defendants on a request to charge by asserting, "I think it is up to you not to hook me that way" (R.p. 3959).

(K) The Court further damaged the interest of the defendant in its main charge by stating, "When rogues fall out, it is a wise man's delight" (R.p. 3903), and then very naively offered to withdraw the remark saying, "It is just one of those things that do not amount to anything" (R.p. 3974).

(L) The Court upon being requested to charge that "one accomplice cannot corroborate the testimony of another accomplice" aggravated conditions by modifying its charge and stating: "I will modify it in this respect. He may not corroborate it, standing alone, to an extent sufficient to entitle the jury to accept the other accomplice's word. The corroboration by outside testimony which tends to connect the defendant with the commission of the crime must come from a non-accomplice, but the testimony of every accomplice witness, other than aforesaid, may be considered by the jury for what probative value it is worth, but not as sufficiently corroborative to accept

another accomplice's testimony." This charge was definitely erroneous (*People* v. *Nitzberg*, 287 N. Y. 183; *People* v. *O'Farrell*, 175 N. Y. 323 at 327).

(M) The Court erroneously admitted testimony of the witnesses Rubin and Berger with reference to union activities and gangsterism commencing in the year 1923 which seriously prejudiced the rights of defendant Capone (R.pp. 1293-1321; 1781-1802). This testimony was in nowise connected with the Rosen killing, but, nevertheless, a motion for a mistrial was denied (R.pp. 1492; 1877).

In respect to the foregoing, even Chief Judge Lehman, who voted for affirmance, admitted in his opinion:

> "True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded." (R.p. 4077-8).

Judge Loughran, one of the dissenting judges, in his opinion fully agreed with the above contentions of the defendant Capone (R.pp. 4078-4090).

The summation of the district attorney conveyed to the jury an erroneous accent upon the assertion by the defendants (none of whom took the stand) of their constitutional privilege against self-incrimination, and his actions throughout the trial and during summation were highly improper, inflammatory and prejudicial to the in-

terest of the defendant Capone, and prevented the jury from a fair deliberation of the issues involved.

Our system of jurisprudence has maintained one proposition as a beacon of our enlightenment—that a defendant accused of crime is entitled to a fair and impartial trial. This has been scrupulously maintained by our appellate courts when individuals, always human, have by attack on public welfare become blinded to justice by the desire for vengeance in the name of public interest.

Berger v. *U. S.*, 295 U. S. 78;
Graves v. *U. S.*, 150 U. S. 118;
Wilson v. *U. S.*, 149 U. S. 60;
Hall v. *U. S.*, 150 U. S. 76;
People v. *Malkin*, 250 N. Y. 185;
People v. *Slover*, 232 N. Y. 264.

That the prosecuting attorney in any case has much to do with the manner of conduct of the trial and that he can influence the atmosphere of such trial is clear. That there is a burden upon the district attorney as a quasi-judicial officer to aid and maintain the proper judicial atmosphere, and in doing so, to prosecute the defendant solely on the facts of the case and by legitimate methods is well recognized. Improper questions, statements not based upon evidence, browbeating of witnesses, and excessive argumentativeness is forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the district attorney is recognized as a public officer who has apparently no interest in the case and who is at heart an altruist and interested solely in obaining justice.

A study of the record in the instant case discloses that this defendant did not receive the fair and impartial trial

to which every defendant is entitled. It also discloses that the prosecuting attorney went beyond the limits of non partisanship and impartiality and attacked the defendant and the case with the virulence and venom of the nearly barbaric advocate who tilted in the lists for the case of his principal. But the age of defenders and trials by combat have long since gone. Our civilization at least in its penal law and procedure prides itself on having through evolution clearly annihilated primitiveness and barbarity. Yet, occasionally as here, our consciousness of civilization is pricked by ugly throwbacks.

The entire summation of the District Attorney constituted an appeal to passion and contained numerous errors which seriously prejudiced the rights of this defendant. Although it is customary to object to these statements when made, counsel for all defendants were instructed and admonished by the Court that the District Attorney's summation was not to be interrupted (R.p. 3782). When one of defense counsel disobeyed this admonition, he was admonished by the court that there would be no further interruptionsbut that all exceptions would have to be taken at the conclusion of the summation (R.p. 3821). The objections were, therefore, made after the conclusion of the summation and under the further instructions from the court, in the absence of the jury (R.p. 3860), thereby depriving the jury of the knowledge of counsels' objection to various portions of the summation. The reason for the failure to interrupt the district atorney was then stated (R.p. 3864), and a motion for a mistrial made briefly setting forth the grounds therefor (R.pp. 3864; 3869-70), since the court informed counsel that it was not proper and would serve no useful purpose to enlarge thereon (R.pp. 3939; 3861-4; 3865-9).

With the evident intent of inducing the jury to believe that the testimony of the accomplice Bernstein in relation to his narration of the details of the crime itself and the participants therein was true, the District Attorney utilized over one-third of the summation in enumerating facts which were peculiarly within the knowledge of said accomplice and could not be disputed by the defendant, but which did not tend to connect him with the crime.

At the outset, he directed the jury's attention to the fact that thirty-five witnesses and fifty-eight exhibits were introduced (R.p. 3784), and urged them to analyze and reason as "I will take you through the opening statement, sentence by sentence, paragraph by paragraph, to refresh your recollection, if that, indeed, needs any, that every fact stated therein has been conclusively proven and that the guilt of Lepke, Capone and Weiss has been established beyond a shadow of a doubt" (R.p. 3785). Thereafter, constantly using the phrase, "Continuing with the opening and representation of the proof that the District Attorney of this County said would be submitted to you," or words to like effect, he narrated in detail how a uniformed officer, hearing the cry of "Police—Murder," quickly ran to a civilian, then into the candy store and there found Rosen, describing in detail the condition of Rosen in the store (R.pp. 3785-6); how the police officer questioned the tailor across the street and received the license of the automobile; how the police officers, ambulance surgeon, medical examiner arrived; the taking of photographs by detectives at the scene, the removal of the body and its identification by the son (R. pp. 3786-7). He described in detail the course of each bullet (R. pp. 3787-8), the recovery of same and how they were turned over to the Police Department (R.p. 3788). He described the abandoned automobile and the photo-

graphs taken of it (R.pp. 3789, 3790). He described what the operator of the newsstand saw and how the abandoned Chevrolet was stolen (R.pp. 3790-1), even stating, "Didn't we bring from Peoria, Illinois, the owner of that automobile?" • • • and the policeman that received the alarm? • • • and the picture designating "the very spot where the car was stolen from?" (R.p. 3792). He described the theft of the license plates, how the detectives found the broken padlock, and how the owner of the car testified regarding their theft (R.pp. 3792-3). He described the investigation of the police for fingerprints (R.p. 3793). He then described the finding of the gun by a citizen, the delivery of it to a police officer (R.p. 3794) and its subsequent delivery to the Ballistic Bureau (R.pp. 3795-6), whose examination and findings on the various bullets he described in detail (R.pp. 3796-7). He then described and exhibited a photostatic copy of the appointment of Special Prosecutor Dewey (R.p. 3801) and, also, read the entire indictment to the jury explaining that he had informed them in the opening that an indictment had been found—and wasn't it TRUE? (R. pp. 3805-6).

He continuously reminded the jury of the fact that he was reading sentence by sentence from his opening and constantly interrupted his summation and interjected the word "True?"—and asked, "Is there a single word, in the representation of proof that has not been established beyond a shadow of doubt?" He would also ask of the jury whether there was *anyone in the courtroom* who could deny each and every one of these facts had been proven?

All of these facts, which he was impressing upon the jury as true, were in nowise disputed by the defendant Capone, did not tend to connect him with the crime and were peculiarly within the knowledge of the accomplice

Bernstein. The error was further aggravated by the statement made by him (after narrating all of these undisputed circumstances) to the jury, "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody say to you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?"; and as to the other circumstances relating to the police officer, the tailor who turned in the alarm, the grocer, the medical examiner, the ambulance surgeon, the owner of the stolen car, the owner of the stolen plates and the newsstand operator, he further inquired of the jury whether there was any one person in the courtroom that could deny that each and every fact therein stated had been proven. This portion of the summation was intended to convince the jury that since the District Attorney had, in effect, undisputably corroborated the testimony of the accomplice Bernstein in these factual details, thereby demonstrating his truthfulness concerning same, therefore, the remainder of Bernstein's testimony tending to connect the defendant with the crime must likewise be true.

The defendant Capone rested upon the People's case. In the course of summation, the District Attorney made the following statement:

> "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody say to you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?" (R.p. 3806)

This statement was highly improper and accomplished by indirection what the District Attorney could not openly and directly state, to wit: that the defendant did not take

the stand or offer any proof in his own behalf. At the conclusion of the summation, the defendant Capone took exception, in the absence of the jury, to the reference herein made (R.p. 3870). As stated by Judge Loughran in the instant case, "This was a direct violation of the defendant's constitutional rights against self incrimination" (R.p. 4086).

We have established that over one-third of the summation dealt with the factual testimony not connecting any of the defendants with the crime. Much of the remaining time was spent in dealing with the activities of the Union and Rosen's and Rubin's travels and activities. Constant reference was also made throughout the remainder of the summation to what other persons in the courtroom, exclusive of the jury, as well as other lawyers in the courtroom seated in the opposite jury box, thought, according to the prosecutor, about the guilt of the defendant and as to whether any of them were in doubt as to the representation of proof the District Attorney claimed he had presented (R. pp. 3786, 3790, 3792, 3793, 3794, 3797, 3804).

At another point in the summation, he referred to the Goldstein and Strauss case, alleging that Judge Talley had lifted a part of his summation therefrom without benefit of the author (R.p. 3784). During the course of his summation, he exhibited the gun to the jury, and was told by the court to lay it aside.

He referred to the pay received by defense counsel as "tainted money" and stated that if defense counsel did not know that it was a hopeless case when they received their retainer, there is no lawyer in the courtroom that does not know it now, thereby implying that defense counsel knew that the defendants were guilty (R.p. 3804).

After his mention that the Rosen murder was a challenge to Judge O'Dwyer and his entire staff (R.p. 3807), he described how the police swept down on Brownsville and the people scattered to the four winds. He then inquired of the jury whether they thought that "Judge O'Dwyer sat down and out of seven million people in New York City or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt" (R.p. 3807).

He raised a false issue regarding the integrity of the District Attorney and his office by stating that Judge O'Dwyer, he and others who had something to do with the case were accused of murdering or attempting to kill the defendants (R.pp. 3803-4), and later requested the jury to use their head and imagine what went on in the District Attorney's office when the District Attorney saw a challenge like the Rosen case and other matters he wanted to investigate (R.pp. 3814-5). He reiterated, "Judge O'Dwyer and the rest of his staff—would they sit by and let Rubin or anybody pick three people out of seven million and send them up on a false murder charge?" (R.p. 3856), again pitting the integrity of the District Attorney's office against the guilt or innocence of the defendants. Finally, he conveyed to the jury the District Attorney's firm belief in the guilt of the defendants, using the following language, "for if they had not been three of the killers of Rosen, you would not have been sitting here" (R.p. 3820).

In an attempt to justify Bernstein's falsehoods relating to his opportunity to write letters, he referred to the desire of Bernstein to protect some employee in the hotel (there being no evidence to that effect), and he referred to the right of convicts in Sing Sing to write letters (R.p. 3809).

He assured the jury that they did not have to worry about what was going to happen to the witnesses in this case, and stated:

> "Don't let anybody fool you with Christmas-present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the courts and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want" (R.p. 3879).

It will be remembered that soon after the trial both Bernstein and Berger were set scot free, and paid considerable money by the State for the time spent in first class hotels as material witnesses. It would be fantastic to believe that the prosecuting attorney was telling the truth, when he made the foregoing statements to the jury, that he actually did not know that these murderers were to be set free.

He further emphasized the error committed by the Court in respect to the charge of attempted spoilation of evidence on the part of Capone by referring to same as evidence of his guilt (R.p. 3839).

He made improper references to defendants and defense counsel (R.pp. 3818, 3839-48).

During the trial, the District Attorney was permitted to prove the alleged association of the witness and of the defendant with Martin "Buggsy" Goldstein, Harry "Happy" Maione, Frank "the Dasher" Abbandando and Abraham Reles (R.pp. 698-9; 2431-2), although these named persons had no connection with the case at bar.

The evident purpose of introducing this testimony was

to prejudice the defendant in the eyes of the jurors, at least two of whom had been called in the case of *People v. Maione and Abbandando* and knew the result thereof. The question of the qualifications of these two jurors, Rorke and Link, has been previously discussed herein.

A summary finds that the prosecuting attorney in his zeal was guilty of almost every act of misconduct which has many times been proclaimed error:

> "Altercations between counsel, including imputation as to veracity, interjection of prejudicial matter by way of remarks during the trial, asking incompetent questions, merely for purpose of prejudice, the improper browbeating of witnesses, • • • improper argument to the jury." 26 Ruling Case Law 1022.
>
> "Persistence of the prosecuting attorney in asking improper questions in order to prejudice the jury may amount to such misconduct as to require a new trial." (Citing:) *State* v. *Greenland*, 125 Iowa 141; *Baldwin* v. *State*, 11 Oklahoma Criminal Reports, 228; *State* v. *Roscon*, 119 Iowa 390; Corpus Juris, Vol. 16, p. 1143.
>
> "A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. • • • Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit • • • To bring forward in argument an assertion of fact • • • is to become a witness; and to be a witness without being subjected to cross examination is to violate the fundamental principle of the Hearsay rule." 3 Wigmore Evid. 837.
>
> "The same general principle governs the putting of questions to witnesses. The jury may under

> certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question." Id. 850.

That the misconduct of counsel for the prosecution during the trial prejudiced the defendant and his case so as to deprive him of a fair and impartial trial is clear. *Johnson* v. *U. S.*, 131 C. C. A. 613, 3 Wigmore Evid. §1808; *Berger* v. *U. S.*, supra, *Graves* v. *U. S.*, supra, *Hall* v. *U. S.*, supra, *Wilson* v. *U. S.*, supra.

CONCLUSION

The jurisdiction of this Court is invoked by reason of the denial to the petitioner of his constitutional rights to a fair trial as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. This point was previously raised in the Court below where it was considered and necessarily passed upon. (See Remittitur of the Court of Appeals R.pp. 4028).

It is contended on all of the foregoing specification of errors that a Writ of Certiorari for a review of the judgment of conviction herein should issue. The judgment of conviction herein was not obtained by due process of law; it resulted from the mere pretense or semblance of a trial. This departure from the proper course of trial proceedings was grossly unfair and improper and calls for this Court's power of supervision over such proceedings. As was said by Mr. Justice Roberts of this Court in *Lisenba* v. *California* (decided by Supreme Court of the United States, October Term, 1941):

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In

order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.'

To the same effect see

Moore v. *Dempsey*, 261 U. S. 86;
Norris v. *Alabama*, 294 U. S. 589.

It is respectfully submitted that the prejudicial and inflammatory newspaper publicity directed against the petitioners herein prior to the trial; the denial of the numerous motions for a severance made on behalf of this petitioner; the atmosphere in the courtroom and the conduct of the trial; the seating of a prejudiced and biased jury; the conduct of the trial judge; and the misconduct of the prosecutor, condoned and permitted by the trial Court, was as much a denial of due process of law as the domination of a Court by mob violence, since in such case, while there is the form of a hearing, a hearing in substance, within the meaning of due process of law, is denied.

It is therefore respectfully prayed that a Writ of Certiorari issue to the Court of Appeals of the State of New York and the County Court of Kings County of the State of New York, for a review of the judgment of conviction convicting the petitioner herein of the crime of murder in the first degree.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

No. 610

EMANUEL WEISS, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

No. 619

LOUIS CAPONE, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' BRIEF

Opinions Below

The four opinions written in the Court of Appeals of the State of New York are reported officially, 289 N. Y. 181. The *Per Curiam* opinion of that Court denying the motion for reargument is reported officially, 289 N. Y. 244.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 344(b), Title 28, U. S. C. (Sec. 237 of the Judicial Code, as Amended),* on the ground that petitioners were denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States* in that they were deprived of due process of law in the proceedings below. The petitions for a writ of certiorari were denied by this Court by order filed February 15, 1943. Thereafter, on March 15, 1943, this Court granted a petition for rehearing, vacated the order denying certiorari and granted the petition for a writ of certiorari.

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* Appendix, *infra*, pp. 80, 82

Statement of the Case

Joseph Rosen was murdered on September 13, 1936.* In May, 1940, petitioners (and others who were not tried) were indicted of the crime. In September, 1941, the trial began. In December, 1941, they were convicted of murder in the first degree, and sentenced to death.

"The theory of the prosecution's case was that the defendant Weiss was one of the slayers; that the defendant Capone was one of those who had arranged for the murder, who had laid out the route to be taken by the automobile used in it and that he and others were waiting with two cars at the other side of the trestle on Junius Street, to assist in the escape of the slayers; that the defendant

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* In the prosecution's brief submitted to the New York Court of Appeals, what the People claimed to have proved regarding the discovery of the crime was thus stated (the figures in parentheses which are part of the following quotation have reference to the folios of the printed record on appeal):

"On Sunday, September 13, 1936, at about 7 o'clock in the morning, a police officer's attention was attracted by the cry of a man standing in the middle of the street, shouting, 'Police! Murder! Help!' Upon responding to the call the officer was directed to a small candy store located at 725 Sutter Avenue, Brooklyn. Inside the store lay the proprietor, Joseph Rosen, flat on his back, his face, neck and shirt drenched with blood, his body riddled with seventeen bullet holes (999-1007, 1928-29).

"The man whose cry summoned the police officer was a tailor who lived across the street from the Rosen candy store. At about 6:45 o'clock that morning he heard a shot; he ran to the window, saw an automobile driving away from in front of Rosen's store, and at the same time observed Rosen's body lying on the floor. Fortunately, the tailor memorized the license number of the automobile and quickly ran to the street to call for help. He then reported his information to the police officer, who immediately sent out an alarm for a black sedan bearing license number L-19[illegible]7 and carrying three or four occupants (965-80, 1002-05).

"Later that morning the wanted automobile was found abandoned on Van Sinderen and Livonia Avenues near an L. R. T. and B. M. T. railroad station, at which there was a trestle or footbridge leading to the other side of the railroad tracks (1138-49). The operator of a newsstand at the station testified that at about 7 o'clock that morning the automobile came speeding around the corner of Livonia

Buchalter, referred to as Lepke by the witnesses throughout the trial, had ordered the death of Rosen through fear that he would testify against him in the so-called Dewey investigation, involving racketeering and extortion" (Conway, *J.*, R. 4031).

No witness saw the actual murder.

The entire case against petitioners depended upon the testimony of the witnesses Bernstein, Rubin, Berger, Tannenbaum and Magoon.* Bernstein was the only one who

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and Van Sinderen Avenues, 'screeching' as it made the turn, and then came to a sudden stop. Four men, he said, emerged from the automobile, walked by his newsstand and then up toward the trestle or footbridge. He could not, however, identify any of the men (1152-77).

"At about 11 o'clock on the same morning a pedestrian discovered a gun lying in the grass near the sidewalk quite some distance away from Rosen's candy store. The gun was turned over to the Ballistics Bureau of the Police Department (1190-1219, 1228-29). The ballistics expert also had in his possession eight spent bullets which were found at the scene of the crime (1238-41). Two of these bullets were removed from the victim's head and neck (1054-61, 1079); four others were pried out of the floor directly beneath the body; another was extracted from the floor near the body, and still another, which passed through the wall of the candy store, was recovered in the millinery shop next door (1090-1124).

"The ballistics expert found that four of these bullets had been fired from the gun found by the pedestrian and that the others had been fired from a gun of similar make (1283-1302). Further examination disclosed that the serial numbers of the gun had been mechanically removed and that the obliteration was so thorough that all scientific means generally employed to reveal those numbers were of no avail (1259-67). In addition to the obliteration of the serial numbers it was also discovered that the gun had received other mechanical treatment after it had left the factory. At the muzzle end of the barrel a thread had been cut for the attachment of a 'silencer' to muffle the sound of a report. The 'silencer' was not affixed to the gun, but the threading for it was covered by a 'collar' (1244-47)."

* Rubin, Berger and Tannenbaum did not implicate Capone; Bernstein and Magoon did not mention Buchalter; Rubin said nothing about Weiss. Although it does not appear in this Record, it is a matter of official Court Record in New York that each of these witnesses has gone scot-free, except Tannenbaum, who was permitted to plead guilty to manslaughter, whereupon sentence was suspended.

said he was at the scene of the crime, although he did not see the shooting. Rubin and Berger testified regarding preparation; Tannenbaum and Magoon testified to alleged admissions. Of this, and of these individuals, the Chief Judge of the New York Court of Appeals, who voted to affirm, said (R. 4070-71): "There can be no question that the only proof against these defendants comes from witnesses who in their testimony against these defendants proved their own guilt of the murder of Rosen and from other witnesses who, though denying guilty complicity in the Rosen murder, admitted guilty complicity in other murders and hideous crimes."*

Bernstein, described by the dissenting Judges below (R. 4079) as "* * * a former perjurer who perversely and flagrantly lied again to the jury on this present trial" "* * * was the chief of the prosecution witnesses." He is an admitted murderer with a long record of nefarious activities. His testimony was that, early in the afternoon of September 11, 1936, he was an onlooker at a street corner meeting of petitioners Weiss and Capone with Strauss and Cohen (the latter two, named as defendants in the indictment, were not tried). Upon instructions then given by Strauss, Bernstein stole an automobile which he later used to drive the alleged murderers to and away from the scene of the murder. He said he was taught the "get-away" route by petitioner Capone. In effect, he purchased immunity by testifying.**

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* This sentence, which appears in the Record, and was contained in the opinion as filed, has been deleted from the official report (cf. 289 N. Y. 222).

** The dissenting Judges said (R. 4081-82): "For more than a year prior to this trial Bernstein had been kept in custody at a hotel as one of a group described by him as members of 'the mob'. The main contention of the defense was that Bernstein's testimony against the defendants had been there fabricated by this group in an endeavor to shift the incidence of the death penalty for the killing of Rosen. This contention went to the heart of the People's case. (*People* v. *Becker*, 210 N. Y. 274, 308-309.) As an answer, Bernstein testified that during his confinement in the hotel he was under surveillance day and night by the police. Though that testimony was uncorroborated, the trial judge refused to let the jury pass

Rubin, an admitted liar and extortionist, who expressed intense hatred for Buchalter (R. 1494), was called as a witness to provide proof of motive for the murder. The substance of his testimony was that Rosen had been forced out of business by Buchalter; that with the appointment of Special Prosecutor Dewey, Buchalter became worried over the possibility that Rosen might furnish Dewey with information; that on September 11, two days before the murder, Buchalter had made threats against Rosen; that after Rubin reported his inability to placate Rosen, Buchalter then sent him to summon Berger, and that subsequent to the murder Buchalter had induced Rubin to flee from the jurisdiction.

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upon its credibility. More than that, the judge certified to the trustworthiness of that testimony in this way: 'You cannot lock criminals together when they are waiting their turn to be called to testify and let them put their heads together and maybe plot something behind the backs of the police. That would be sloppy police work, to permit discussion.' The judge was without power so to invade the province of the jury.

"On cross-examination, Bernstein denied any letter had been written or sent by him while he was in custody at the hotel. Confronted then with three letters written in his own hand upon the hotel stationery, he owned he had lied. The quality of these documents is exhibited by the following excerpt: 'Do you know how many guys are pinched just for conversation. Why do you make me write like this. I don't want to hurt you. Again I want to know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that away. So *Cherry* you are *making* me do this that I don't want all for $200 dollars. I just want to remind you *years* don't mean anything to me.' (The emphasis was first hand.)

"The trial judge refused to receive these letters in evidence. Here again there is need to remember how the case for the People hangs on the credibility of Bernstein as a witness. Once more there is need also to keep in mind the theory of the People that at the hotel Bernstein was never free to consort with others in respect of his role upon this trial. In both aspects, these letters were proximately relevant evidence on the side of the defendants. We think the text thereof should have been put before the jury. (See *People* v. *Becker*, 210 N. Y. 284, 298.)

"After Rosen had been killed but before the trial of the present case, Bernstein was a prosecution witness on a trial held at Monticello, Sullivan County. On that trial, he tried to swear away the life of one Gangy Cohen who was there accused of another murder.

It was shown, however, that in December, 1937, when Rubin would have implicated Buchalter if he could (R. 2400-01), as he had already implicated him in other crimes, he had made a statement to Mr. McCarthy (then an Assistant District Attorney of Kings County), who questioned him about the crime, in the presence of Mr. Hogan (then an Assistant District Attorney, and now District Attorney of New York County), in which Rubin completely exculpated Buchalter of any complicity in the Rosen murder.*

As regards his former testimony in the *Cohen* case, Bernstein was examined on the present trial as follows: 'Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong. Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong. * * * Q. Were you asked these questions and did you give these answers? A. My mind is very clear. Go ahead. * * * *"Question:* And you had nothing to do with any murder on any occasion? *Answer:* That is right." Q. Were you asked that question and did you give that answer? A. Yes, sir.'

"It was manifestly the duty of the trial judge to warn the jury specifically of the necessity of wariness on their part in consequence of this confession by Bernstein that where another life depended on his oath he had corruptly suppressed his participation in the murder here ascribed by him to two of these defendants. (Cf. *Dunn* v. *People*, 29 N. Y. 523.) The judge said: 'The answer given to the question you have just read in the other trial could be viewed as being meant to be true if the witness considered it referred to the actual shooting. It would be untrue in relation to his being a principal under section 2 of the Penal Law, in the other ways than killing.' This animadversion was very much in the nature of a charge to the jury. (*People* v. *Wood*, 126 N. Y. 249, 260.) In our judgment, the exception taken thereto is valid."

* To quote the dissenting opinion below (R. 4088-89): "When counsel for Buchalter requested that the jury be directed to take notice of Rubin's contradictory statement to Mr. McCarthy, the trial judge said: 'On the second point of that request, he (Rubin) did not testify before McCarthy at all. He was not under oath. That is not perjury. That is a contradiction and he has explained it. He says he had been shot through the head because of testifying before the Dewey grand jury, and he was afraid to give McCarthy any information about the *Rosen* case. I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before Mr. McCarthy. If

Berger, a confessed participant in numerous crimes of violence, was held on his own story to have been an accom-

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it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction, admittedly so before McCarthy, really amounts to anything at all. He was under no obligation to give any evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory.' This argument in support of Rubin's credibility was inadmissible. Evidence of a prior self-contradiction by a witness, 'is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief.' (Shaw, C. J., in *Commonwealth* v. *Starkweather*, 10 Cush. (Mass.) 59, 60.) Hence the fact that Rubin had not sworn to his contradictory statement to Mr. McCarthy was immaterial. (3 Wigmore on Evidence (3rd ed.), § 1044, p. 727.)

"Rubin's testimony was offered to show the alleged motive for this crime,—fear lest Rosen vent a business grievance by instigating criminal prosecution of Buchalter. To the same end, members of the family of Rosen endeavored by their testimony to show his prominence in the commercial field in which Buchalter was active in labor affairs; but the trial judge struck out that testimony as being 'too sketchy to have any value as evidence.' As a result there was no contradiction of witnesses for Buchalter who testified to the indifference of Rosen's success as a man of business. In that state of the case, Buchalter at least was entitled to have the jury consider whether he was right in his claim of the absence of any compelling reason why he should have been greatly afraid of the enmity of so inconspicuous a person as Rosen. (*People* v. *Becker*, 215 N. Y. 126, 135.)

"On this issue, the trial Judge in his charge said to the jury: 'So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities.' But the next phrase of the judge was this: 'That is enough as motive evidence, if you find these facts to be established to your satisfaction, reasonably.' The judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again, there should have been a presentation of both sides of the issue,—and the question of the weight of the evidence also should have been submitted to the jury."

plice in the Rosen murder. He testified that late in the afternoon of September 11, 1936—two days before the murder—he was instructed by Rubin to call at Buchalter's office at 200 Fifth Avenue, New York City (R. 1804). He went there, and then with Buchalter went to see Weiss.

His story was that he received instructions to point Rosen out to Weiss. He and Weiss went to Brooklyn late that evening. From the testimony of both Rubin and Berger it appears that Buchalter's alleged decision to have Rosen killed was not made until after 5 o'clock in the afternoon of September 11, 1936.

This is in conflict with Bernstein's testimony. Bernstein had fixed the time when he saw Weiss in Brooklyn (R. 1165) at not later than 1 o'clock that same afternoon (R. 1160-61), and said it was then that the order had been given to him to steal the murder car (R. 1166-67). The manner in which the Trial Judge dealt with this conflict in the "time table" is discussed in the Argument, *infra*, pp. 67-69.

Tannenbaum and Magoon were "corroborators". (Cf. *People* v. *Nitzberg*, 289 N. Y. 523.)

Tannenbaum, a confessed professional murderer who led a life of crime since youth, said that he had been present in the office at 200 Fifth Avenue, New York City, where he had heard Buchalter talk with Rubin on September 11, 1936, and again when he heard Weiss report the murder on September 14 or 15.

Records of the New York City Police Department containing reports made by police officers who had Buchalter under constant surveillance during the time in question (as well as long prior and long subsequent thereto) were of material importance to the defense to refute the stories told by Tannenbaum, Berger and Rubin. These reports were subpoenaed by the defendants, were brought to court and were withheld by the prosecutor. The Trial Judge refused to permit defense counsel to see them; he refused to look at them himself or even to have them counted (R. 2148-54). The effect of the suppression of this evidence is discussed in the Argument, *infra*, pp. 54-59.

Magoon's contribution to the People's case was his testimony that, in April, 1939, two and a half years after the murder, Capone had said to him: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." It was held that this statement could be taken as corroborative evidence tending to connect Capone with the crime charged.*

The dissenting Judges below said (R. 4083): "Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin." Magoon was a professional auto thief, who participated in several murders.

In respect of all these witnesses the Chief Judge of the Court of Appeals said (R. 4070-71):

> "* * * in any discussion of the questions presented upon this appeal we should bear in mind that all the essential facts which the People claim demonstrate beyond reasonable doubt the guilt of these defendants are proven, if at all, only by the testimony of degraded criminals whose credibility is impeached, if not completely destroyed, by a cross-examination in which they admitted a callous disregard of every law, human and divine—including the provisions of both the penal law and of the divine commands against bearing false witness against their neighbors."

Our purpose is not to argue about the weight or the character of the evidence adduced, or even to demonstrate how justified was the reasonable doubt of guilt entertained by a majority of the Court of Appeals, and the belief of one of the Judges of that Court that there was not enough to have warranted submission of the case to the jury.

Petitioners would have been convicted on practically no proof; they were for all practical purposes convicted before the trial began, because of the propaganda, the atmosphere in the courtroom, and the composition of the jury. All that was done at the so-called trial was directed to the single end that by no possible chance might the jury be

* This statement is discussed in the supplemental brief of petitioner Capone.

diverted from a predestined verdict of guilt. To judge this, the totality of the proceedings below must be viewed in perspective.

The Propaganda

In advance of the arraignment, a newspaper campaign began with lurid stories that the prosecutor had visited petitioner Buchalter in the Federal Penitentiary, with details (all false) of Buchalter bargaining for his life to escape the consequences of this crime, of which, of course, it was taken for granted he was guilty.

Calculated to condition the collective mind of the community was the conduct of the first arraignment of Buchalter, at which the court room resembled an armed camp (V. 2-3).* The Court (not the Trial Judge) was moved to protest at the manifest impropriety—yet in that very protest gave expression to the common, induced belief that Buchalter was a bad and dangerous man who required closest guard. What purpose other than to fan the flames can be ascribed to the speech of the prosecutor on the adjourned date of the arraignment (V. 6), and again at the final arraignment (V. 9-10), for surely those remarks were not germane to the proper conduct of the proceedings.

Part of the Record in this Court is the compilation in photostat form of some small part of the newspaper stories which preceded, accompanied and followed each step along the path of this case up to and during the selection of the jury.

Some few examples are given to indicate their tenor.

As early as October, 1940, there appeared in a newspaper a story which said in part (R. 87):

> "But now Lepke faces the electric chair as a result of the smashing of Murder, Inc. by District Attorney William O'Dwyer of Brooklyn."

* N. B.—The designation "V." is used to distinguish pages in Vol. VI through VIII, from pages in the preceding volumes, which are designated "R."

Another portion of the story (R. 89) quotes Mr. O'Dwyer as exclaiming "jubilantly":

> "At last I've got Lepke and Capone on their way to the chair."

In November, 1940, there was a statement in a newspaper (R. 90) that Buchalter was officially reported "last night to be ready to buy his life by revealing to District Attorney O'Dwyer of Brooklyn all that he knows about the underworld".

On May 16, 1941, the day Buchalter was arraigned, the *New York World-Telegram* carried this story:

> "LEPKE WOULD TELL OF U. S. CRIME RING.
> Official, Labor Chief Might
> Be Implicated.
>
> Louis (Lepke) Buchalter is negotiating to turn informer and betray the inmost secrets of the magnates of crime who dominate the rackets of America, the World-Telegram learned today.
>
> This newspaper learned that squealers have informed District Attorney William O'Dwyer that Lepke was in a position to deliver a nationally prominent labor leader on a murder charge, a noted public official of New York City on a conspiracy charge, and a close relative of a very high federal office holder as a front man for at least two of the six men credited with controlling racketeering throughout the United States.
>
> Before he was laid by the heels on a federal dope ring conviction Lepke was one of the most powerful racketeers in the country, a member of the highest council of the rackets industry. And if Lepke really talks, the lid's off the underworld.
>
> The status of the negotiations remained a closely guarded secret today, but the World-Telegram learned that already there have been a series of conferences between representatives of District Attorney William O'Dwyer of Brooklyn and Lepke's relatives and attorneys.
>
> Lepke's price is freedom from prosecution on the murder charge he now faces in the Murder, Inc., debacle in Brooklyn and commutation of the 30-to-60-

year sentence hanging over him for extortion in the flour-trucking industry in Manhattan, the World-Telegram is informed.

If he got his price Lepke would be a free man when he finished his federal term at Leavenworth. He will be eligible for parole from Leavenworth in about nine years.

Calls Price Too High.

However, District Attorney O'Dwyer is understood to feel that Lepke's price is too high. It is understood that it has been suggested to his representatives that the best deal Lepke could hope to get would allow him to plead guilty to murder in the second degree in the Brooklyn case and serve the 20-to-life term on his plea concurrently with the 30-to-60-year term in the flour-trucking racket. This would make Lepke eligible for parole in about 17 years. He is now about 43" (R. 83-4).

The *Mirror* and the *News* carried the same story the next day.

Thus the prosecutor's office, on the very eve of the date originally set for trial, was said to have claimed that Buchalter had confessed to the prosecutor his guilt of this murder, and was willing to implicate high City and Government officials in an effort to avoid the punishment of death which, according to all the newspapers, he acknowledged was his own due.

In an affidavit filed on behalf of Buchalter it was said (R. 86-7) that it was the fact (which the District Attorney should acknowledge) that neither he nor his representatives had ever conferred with the District Attorney or anyone connected with the District Attorney; that the reported conversations never took place; that Buchalter had never acknowledged guilt; that he had never attempted to bargain with the District Attorney. This was not denied or disputed by the prosecutor.

This atmosphere of hostility was intensified and made a matter of even greater public interest when the District Attorney was acclaimed as a likely candidate for the office

of Mayor of the City of New York. According to the *Daily Mirror* of July 10, 1941 (R. 91):

> "One reason given yesterday for O'Dwyer's first place position is that he 'seems to be the only man who could beat LaGuardia'. The Brooklyn prosecutor is expected to strengthen his candidacy further by a successful prosecution of Louis (Lepke) Buchalter, due to go on trial Aug. 4 for the murder of Joseph Rosen, ex-member of the Murder Syndicate, 'erased' as an informer."

These, and statements of similar import, continued to fill the public prints.

In July, 1941, applications had been made by petitioners for a change of venue (R. 76-109). Their counsel had prognosticated that a fair trial could not be had in that community. These motions were denied (R. 165-167). The Court said: "It is inconceivable that in a cosmopolitan community such as Kings County, with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence." The Court also expressed the opinion that the publicity was so widespread that Kings County was not likely to be more prejudiced than anywhere else.

The case came on for trial on August 4, 1941 (R. 178-179). Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (V. 31). As the Trial Court then said: "This jury situation is unprecedented. It is practically a run-out" (V. 44). He attributed the reluctance of jurors to serve to the hot weather, but subsequent events support the inference that this was not the reason. The case was adjourned until September 15th, when the trial commenced.

In the interim, however, on August 25, 1941, the New York *Daily Mirror* began the publication of a vicious series of articles, *restricted in distribution to Kings County.* These articles were published every day thereafter, and continued for some time even after the trial commenced and while the jury was being selected. (These articles are

referred to at R. 159, and are included in the sheaf of photostats submitted to this Court as part of the Record.) The following caption and preface of the first article is merely indicative of their lurid tenor:

> "MURDER INC. EXPIRES AS LEPKE GOES ON TRIAL
>
> Today, Arthur Mefford presents the first instalment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.,' the Brooklyn killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail:"

On September 8, 1941, a new application for change of venue was made, based largely on these articles (R. 155-174). It was denied, without opinion (R. 175-176).

The Jury

It is not surprising that the impaneling of a jury was made difficult by such publications.

The unprecedented flow of inflammatory and prejudicial newspaper publicity, before the trial and during the selection of the jury, conditioned the community to believe that the petitioners were guilty. This resulted in a panel so infected with the virus of prejudice, that it was impossible to obtain a fair and impartial trial, as can be found conclusively from a cursory reading of the *voir dire* examinations of the talesmen. Seldom—if ever—could there be found such unanimity of expressions of prejudice in advance of a trial as was voiced by the talesmen drawn from every part of the community.

This prejudice was played upon, and advantage taken of, the newspaper "build up" which, even if not induced or engendered by the prosecutor, was not denounced or

deplored by him. The prosecutor having successfully opposed a change of venue and having a Trial Judge who expressed himself as powerless to prevent this propaganda (although the simple expedient of a change of venue would have afforded a solution), no device was overlooked to obtain the benefit of its full effect upon the jury which had been exposed to its insidious and prejudicial force.

With the trial proceeding in the County of Kings, full use was made by the prosecutor of the newspaper stories, which had alleged the association of one or more of these petitioners with various notorious characters, by asking talesmen and witnesses about acquaintance with such mouth-filling names as, e.g. (R. 2925 et seq.), "Charlie the Bug", "Toots Feinstein", "Shimmy Salles", "Yeggy Feinberg", "Joe Strawberry", "Dimples Wilensky", "Cuppy", "Wolfie Goldis", "Dutch Schultz", for the implications to be derived therefrom, without any evidence of their connection with the case.

Between the 15th of September and the 24th of that month, 24 veniremen were examined. Of them, 3 had been excused because of acquaintanceship with the District Attorney or his associates; one had said he would not accept accomplice testimony. Only one juror had been accepted as satisfactory to both sides. Of the remaining 19, 14 had derived some impression from reading the newspapers. Of these, 10 had formed an impression adverse to the defendants, and of these 10, 2 had formed an impression that they were guilty.

Little wonder that the Court stated at the beginning of the afternoon session on September 24th (V. 460):

> "You are requested not to talk about the case. Let nobody talk to you about it. Please read nothing, especially The Mirror. Those Mirror articles which are still being published seem to be *raising havoc with the jurors in this case*, and there is no way of the court stopping them under the law." (Italics supplied.)

Even the Court was influenced by statements which had appeared in the newspapers. The record shows that after

a talesman, Protter, had been examined, the Court called attention to the fact that Protter's brother was chairman of a committee which had investigated the murder of one Peter Panto. He said that it was possible that the murder of Peter Panto might at some time during the course of the trial be in some way connected or involved (V. 722). His statement was (V. 723):

> "The Court: The Court got its information from the newspapers, particularly the Brooklyn *Daily Eagle* publication, following the examination of this talesman."

Mr. Turkus, the prosecutor, remarked (V. 724):

> "Before you bring in the talesmen may I say that there was a newspaper article, and the newspapers have been replete with conferences with Marcy Protter and a certain group had with the District Attorney in connection with the Peter Panto case. As a matter of fact, in a newspaper which was printed over recess there was a statement made that it was divulged by the District Attorney, Mr. O'Dwyer, in proceeding with the Panto investigation, that the defendant Weiss was implicated in the slaying of Peter Panto. *That was in the press over recess.* There have been many such articles. There were many articles in the press too, prior to this case, in connection with the alleged participation of the defendant Weiss in the Peter Panto killing. Now, this prospective talesman said that the reason——" (Italics supplied.)

The prosecuting attorney interposed a challenge to Protter both because of his residence and on the ground of bias and was sustained on the latter ground. Defense counsel objected, and moved for a mistrial (V. 725):

> "Mr. Talley: In view of the fact that the defendant Weiss was brought into this matter by the Assistant District Attorney two or three days ago, the defendant Weiss in connection with the Panto case, I want to note a further exception to your Honor's reference to that case as being extremely prejudicial to the defendant Weiss. The same newspaper that printed this story

last week will have ample opportunity to print the story of your Honor's reference to the Panto case in connection with this talesman. I want it noted, in view of the fact that I am appearing for Weiss, that the exception which has already been expressed to your Honor's remarks likewise be joined in by me."

• • • • • • •

"Mr. Rosenthal: In behalf of the defendant Capone, in view of this discussion which has been now engaged in, in view of the District Attorney's statement of what is alleged in the newspapers to have been divulged by Mr. O'Dwyer's office to the newspapers, and in view of your Honor's statement, I now ask for a mistrial in so far as the defendant Capone is concerned. And I renew my motion for a severance, which was heretofore made."

The Record shows that Protter would have made a fair and impartial juror (see *infra*, pp. 22-23).

As an indication of the temper of the community, the sworn statement of Mr. Stevens, the first juror to be accepted, and who actually served, is most significant. The record shows (V. 369-370):

"By Mr. Climenko.

"Q. Mr. Stevens, did any of your office associates attempt to prejudice you against any defendant in this case? A. I would not say they attempted to prejudice. The remarks they started to make, if I had interpreted them as such, might have prejudiced me; in other words, if I had accepted what they were saying as facts and absorbed them as such, I could have possibly been prejudiced.

• • • • • • •

"Q. The statements that you heard under those circumstances were prejudicial against that particular defendant; is that correct? A. That is correct, yes."

He said further (V. 387):

"My feeling is this: that frankly I would rather not serve on this jury, but if I am called upon to serve, it seems to me such a terrific responsibility that I can't understand why people who——

"Q. Who know nothing about it? A. Can attempt to influence a man who might have to make such a grave decision."

The record discloses that the Trial Court, instead of being careful to mitigate petitioners' obvious predicament, took the opposite course, and added to the almost insurmountable obstacle in the path of a fair trial by his rulings on challenges for bias. These rulings extinguished whatever chance petitioners may possibly have had of an impartial consideration of the evidence.

The Trial Judge in his zeal to force the selection of a jury under these adverse conditions, became impatient with and critical of both jurors and defense counsel.

When, for example, the prospective juror Samuel Cone honestly testified (V. 328-330) that he would not accept testimony of an accomplice even if it were corroborated, the Court, dismissing him, said (V. 330): "I am sustaining the objection because I don't think the man is mentally fit to sit on a jury." Joseph O. Herrick, another juror, testified that he was acquainted with the prosecutor Mr. Turkus and that his honest opinion was that this might prejudice him because of his belief in that gentleman's integrity. The Court said (V. 406): "I sustain the challenge, upon the ground that the man is wholly unfit to have a job as a juror. Get out." When defense counsel attempted to object to this strictures, the Court said (V. 406): "Sit down please. This gentleman will leave at once and there will be perfect order until he gets out of this room."

It requires little imagination to recognize the effect of the Court's language upon the remaining prospective jurors. No man likes to be told in a public tribunal that the expression of an honest opinion is a sign of mental unfitness. Nor is it. Objection was made by counsel, who said (V. 406-407):

"I wish to have the record show that I object on behalf of all counsel to your Honor's statement to the talesman who has just been excused, upon the ground

> that it has a tendency to prevent a fair expression of opinion on the part of talesmen, and it will be difficult, and I think it makes it difficult for us, to get the fair and impartial jury that we are seeking."

Not only did the Court become impatient with the talesmen, but he rebuked defense counsel for exercising their legal right of peremptory challenge. The Court said (V. 959-960):

> "We are going to work late. I am not prepared to say how late. That depends upon future conduct. If capricious conduct in peremptory challenges is indulged in on either side it will have a bearing upon the length of time in which the Court will work."
>
> "By the ardency of the protest just rendered by defense counsel, the Court is prompted to say something it had not intended to say, and that is, that this morning has been wasted by the excusing of two obviously competent and unbiased jurors. The Court, in its opinion, views these as capricious exercise of peremptory challenges.
>
> "Mr. Climenko: To which remarks the defense takes exception.
>
> "The Court: Which will do you no good whatever, either now or at any time."

When counsel objected to the observations of the Court in respect of a juryman's alleged answer to a question, he was unjustly accused of "fighting back with the Court on rulings" (V. 864) and was admonished by the Court to proceed expeditiously, as time was being wasted and "it is becoming a public scandal" (V. 864).

Obviously, these comments were so worded as to place upon the defense the onus for deliberately delaying the process of the selection of the jury, which was actually caused by the prejudice in the community. At every opportunity the Court accused the defense of wasting time and indulging in dilatory tactics (e. g., V. 847, 1066, 864, 959-960). Although the Court was prompt to accuse the defense of delaying the selection of the jury, a cursory reading of the record will demonstrate how much time was

consumed by the Trial Court in asking irrelevant questions of almost every talesman called for examination (e. g., V. 926-927, 929, 778, 779-780, 697, 729).

At the commencement of the trial, the panel consisted of 250 talesmen. It was found necessary to draw a panel of an additional 100 talesmen, which was practically exhausted by the time the jury was finally selected. A number of these talesmen were excused by the Court because of expressed prejudice against petitioners. Peremptory challenges had to be exercised by the defense directed to talesmen who, although they denied that they had formed an opinion, nevertheless disclosed that they had read newspaper items about the case, or the series of articles which appeared in the New York *Mirror*.*

A "special jury" was ordered drawn for this case. To this no objection was interposed by petitioners. That failure to object has been held by the Court of Appeals to have constituted a consent to waive appellate review of the rulings of the Trial Court upon challenges for actual bias. As a result, petitioners were deprived of any consideration of those factors which made impossible the selection of a fair and impartial jury. The New York Court of Appeals has thus held that New York State provides no corrective process in the case of a "special jury" even though tainted with actual bias. (That subject is discussed in the Argument, II, *infra*.) Talesman after talesman asserted that so strong an opinion had been formed from newspaper reading that it could not be put aside. This was no "special jury" at all within the meaning of the statute. This jury was selected only after repeated efforts of the Trial Judge to induce talesmen to abjure prejudice whether or not actually entertained. It is certainly a matter of fair doubt that any informed resident of Kings County was entirely free of at least a subconscious prejudice in this case by reason of the unprecedented propaganda

* E. g., Talesmen Pape (V. 99, 108), Camachi (V. 338, 356), Ryder (V. 1065, 1075, 1083), Butler (V. 1429-1431, 1437-1438), Robert (V. 1776).

Against this background must be viewed the action of the Trial Judge on challenges for cause, which will be subdivided as follows:

(a) Overruling defense challenges for cause;

(b) Sustaining prosecution challenges for cause, where none existed; and

(c) Seating a juror who was challenged for cause after defense had exhausted all their peremptory challenges.

(a)

Defense challenges overruled

The talesmen John R. Hamilton (V. 162, 175, 177), Samuel F. Strongin (V. 679, 681, 684-685), James F. Nagle (V. 844-846), Edward Groden (V. 878-879, 881), Paul S. Batterson (V. 946, 948), John J. Rose (V. 1014, 1012-1013, 1018), Joseph J. Flanagan (V. 1411-1413), Clement S. Jacobus (V. 1834-1837) and John J. Dunphy (V. 1840-1841) stated, upon examination: that they were prejudiced against one particular defendant or the group with which he was reputed to have been associated; that this prejudice was created by radio reports and the reading of newspapers since being called to serve as jurors;* that this prejudice would either remain during the hearing and consideration of the evidence in the case and could not be removed, or that it would require an effort to disregard it; and that the prejudice could only be removed or dissipated by the introduction of proof by the defendants or someone on their behalf, or that because of it less proof would be required from the prosecution in order to convict.** These

* The Trial Court had admonished the talesmen not to read any newspaper items relative to the case. Nevertheless, some of the talesmen continued to read a series of articles which appeared in the Daily Mirror (V. 1258, 1261-1266, 1026-1029).

** A detailed analysis of the examination on *voir dire* of these talesmen may be found in the Petition on behalf of Capone, pp. 66-93.

latter expressions gain significance when it is realized that they were made by the talesmen with the knowledge that a defendant need not prove his innocence, and that no unfavorable inference may be drawn from his failure to testify (e. g., V. 158, 164, 175; 681; 848, 854-855; 876, 880; 937, 944).

The refusal to sustain the challenge in Groden's case is startling since he said that he worked for and was a "booster" of William O'Dwyer, the District Attorney, and that he was positive that O'Dwyer's office would not bring about an indictment unless they were sure (V. 877-878); Strongin stated that he lived near what he called the "hang-out" of the so-called combination and that he was prejudiced against those individuals, among whom was included Strauss, a co-defendant who had been executed (V. 683-684, 670-671); and Koehler stated that he knew "Buggsy" Goldstein, a notorious character who had been executed and with whom an attempt was made to link the defendant Capone (V. 1616-1617).

Though these rulings manifestly made more difficult defense efforts to obtain an unbiased jury, the gravity of the prejudice instinct therein is accentuated when comparison is made with the rulings on challenges for cause by the prosecution.

(b)

Prosecution challenges sustained

Benjamin Protter had lived in France until the early part of 1939 (V. 619, 651); he knew none of the numerous names mentioned as being connected with the case (V. 652, 645, 620, 621, 640, 624, 622-623, cf. 637); and his state of mind was such that he could be a fair and impartial juror (V. 728, 626-627, 631). He was tentatively selected as a juror, but on the following day a challenge by the prosecution was sustained, at which time the Court and prosecutor made detailed statements concerning the alleged activities of the talesman's brother, an attorney, in the investigation of the murder of one Peter Panto, involving the Brooklyn waterfront (V. 722-724). The tales-

man testified under oath that he had never heard of the name Peter Panto (V. 631); that he did not even know whether his brother ever had a criminal case (V. 638, 621, 653), or whether he represented any waterfront interests; and that, in fact, he had been only distantly friendly with his brother, had political differences with him, and that the usual cordiality existing between brothers was lacking (V. 726-727, 621, 632, 631, 652, 638). Nevertheless, the prosecution's challenge for cause was sustained (V. 728).

Walter C. Petterson was excused upon a challenge by the prosecution (V. 1149, 1151) for the reason that he stated that it "would be hard for me to believe the testimony of a confessed accomplice" (V. 1147), despite his assurance that he would follow the instructions of the Court as to the weight to be given an accomplice's testimony and as to corroboration thereof (V. 1150, 1149). Even though the talesman's reply was a correct statement of the law—that an accomplice's testimony should be viewed with suspicion and caution (*People* v. *Kress*, 284 N. Y. 452, 459)—the prosecution's challenge was sustained. This ruling should be compared with that which relates to the talesman Nagle, where a defense challenge for cause was overruled (V. 868) though he had said that he would accept "very reluctantly" the instructions of the Court that corroboration of accomplice testimony was required to convict and that no inference of guilt could be drawn from a defendant's failure to take the stand (V. 841, 855).

Samuel Silfen was excused upon the prosecution's challenge (V. 1157, 1160). He stated that the *name* Buchalter was familiar to him as that of a dentist *whom he did not know personally*, but whom his mother-in-law visited (V. 1156). The relationship between his mother-in-law and this dentist was solely that of dentist and patient (V. 1156). Beyond that, neither his mother-in-law nor he knew anything more about this dentist. Nevertheless, the prosecution's challenge was sustained. This ruling should be compared with the ruling on the defense challenge to the talesman Groden (*supra*, pp. 21-22).

Benjamin Cohn was excused upon a prosecution challenge for cause (V. 1645, 1648) when he stated that he had heard of the name of Martin "Buggsy" Goldstein and the name of Gesule Capone, which was no more than a name to him (V. 1642). He also stated that he was not particularly in favor of capital punishment, but said that regardless of his feelings, he would follow the instructions of the Court (V. 1646, 1644-1648).

Harry Rosenblatt was also excused on a prosecution challenge (V. 1748, 1747) when he stated that about eight years previously, while with a group of friends at a night club, he was casually introduced to Buchalter; that Buchalter did not make any impression on him; that he was not a member of and did not drink with Buchalter's party; that he was merely introduced and that was all, and that he was not prejudiced (V. 1745-1747). This ruling should also be compared with the Court's ruling as to the talesman Groden (*supra*, pp 21, 22).

Albert Rosenthal (V. 539) was a fellow fraternity member of Mr. Wegman, one of the counsel for the defendant Buchalter, but he had not seen him for a long time (V. 539). He stated that he would not intentionally favor Mr. Wegman; in fact, he might bend over backwards (V. 542, 543). For no discernible reason, the Trial Court accused the talesman of hostility (V. 544). This situation should be compared with that in the case of the O'Dwyer "booster", talesman Groden.

(c)

The last three jurors

The following jurors were impanelled after all peremptory challenges allowed to the defense had been exhausted (V. 1928-1930).

John J. Rorke (V. 1928, 1982, 1918, 1900), a nephew of a police inspector assigned to traffic (V. 1918, 1921-1923), had been called as a talesman in another murder case (People v. Maione and Abbandando) in which counsel for peti-

tioner Capone had appeared for defendant Maione, and Mr. Turkus, the prosecutor here, had appeared for the People (V. 1923, 1919-1920, 1963). Rorke admitted that during his voir dire examination in the earlier case, he had heard mentioned the name of one of the petitioners (presumably Capone) in connection with that of Maione (V. 1929, 1919, 1923-1927); that he had there been peremptorily challenged by defense counsel (V. 1923-1924, 1921, 1922); and that he had followed the developments of that trial in the newspapers to ascertain the outcome (V. 1920). Nevertheless a defense challenge for cause was overruled (V. 1928).*

William C. Links (V. 1959), a radio producer, had also been examined as a talesman in the Maione case (V. 1960-1961). At that time he had stated that he had been called into consultation with reference to a radio program called "Mr. District Attorney" (V. 1960). He had heard the names Maione, Abbandando and Strauss mentioned in that case (V. 1961), and had been excused from the jury by the prosecutor (V. 1961).** He, too, followed the newspapers "to

* Although during the course of his examination, a conference was held at the Bench (which is not reported in the Record, V. 1921), it is significant to note that the prosecutor stood silently by at this challenge, knowing at the time that he would adduce testimony that petitioner Capone was allegedly associated with Maione and Abbandando. When Magoon was on the stand, the prosecutor asked whether he knew Maione, Abbandando, petitioner Capone and numerous other persons. Upon an affirmative reply, the prosecutor further asked whether the named persons were associated and what the name of the association was. Magoon answered that they were; that the association was known as the "Combination" (R. 2423-5). That this testimony would be adduced, counsel for petitioner could not reasonably anticipate, as Maione was in no wise connected with the Rosen case.

** The prosecutor stated (V. 1987, 1960) he had excused Links in the Maione case because he felt that, by reason of Links' connection with the "Mr. District Attorney" radio program, it was not altogether proper that Links serve as a juror. But here, when all the defense peremptory challenges had been exhausted, Links was satisfactory to the prosecution.

The discussion in the footnote concerning Rorke is equally applicable to Links.

find out what became of the case on the last day of the trial" (V. 1961).

John E. Coleman (V. 1983) had read quite extensively about this case in the "World-Telegram" and the "News," but claimed he would be impartial (V. 1987, 1990, 1993). As all defense challenges had been exhausted (V. 1928-1930) the defense rested on the record (V. 1995).

These last three jurors were selected after petitioners had exhausted all of their peremptory challenges. Of the thirty peremptory challenges allowed petitioners collectively, ten were exercised because of the Trial Court's refusal to sustain challenges for cause; eleven because of expressed prejudice against petitioners, with the reservation that it would not interfere with a determination; and one other (Myron Gillespie) who, although he had read all about petitioners and the instant case, and protested that it had left no impression (V. 1295, 1340), nevertheless testified as follows (V. 1341):

> "Q. Well, have you formed an impression with respect to the defendants, irrespective of this case? A. To be honest with you, I find it a tough question to answer." *

Nothing could more clearly demonstrate the prejudice which affected the jurors, even before the first witness was sworn, than the following excerpt from the record relating to Juror No. 9, Mr. Butt, the Vice-President of a Bank (V. 1981-1982):

> "The Court: Before selecting the alternates, of course, the oath will have to be administered to the jury. This question is asked of all twelve members of the jury: Since you were tentatively accepted by

* This talesman insisted he would be impartial (V. 1309-1310) even though he had found a body in the rear of his building which he attributed to "Murder, Inc." (V. 1301), had found the dead body of Mrs. "Legs" Diamond in one of his buildings (V. 1302), and was well acquainted with Mr. Moorehead, the Chief of the Indictment Bureau in the Kings County District Attorney's office (V. 1339-1340).

both sides at the conclusion of your examination, you have been repeatedly cautioned by the Court not to discuss the case, not to let anybody talk to you about it, not to read the newspapers or otherwise read about it, not to listen to the radio about it. I am going to ask each one of you gentlemen individually if you have strictly followed those instructions.

"(Mr. Stevens, Mr. Prentice, Mr. Murphy, Mr. Day, Mr. Gill, Mr. Cummings, Mr. Hall, Mr. Cross, Mr. Butt, Mr. Edghill, and Mr. Rorke each answered individually, 'I have.')

"The Court: Mr. Link, I do not have to ask you; you were only accepted this morning.

"Mr. Rosenthal: May I suggest to the Court that one other question be asked: Has anything happened in any way that would change any of the answers they have given?

"The Court: The question is now: Has anything happened to change your viewpoint in regard to the case in the meantime, to change your attitude as impartial jurors? If so, raise your hand.

"(Juror No. 9, Mr. Butt, raises his hand.)

"The Court: This will have to be at the bench, and not in the hearing of the jury.

"(Counsel for the defense and Mr. Turkus appear before the bench with Mr. Butt.)

(Mr. Butt was questioned by the Court without the hearing of the jury, as follows:)

By the Court.

"Q. What has happened? A. *There has just been a great conviction on my part towards prejudice in this case.*

"Q. Based upon what? A. Based upon the various questions that have been asked in court.

"Q. Nothing outside of the court-room? A. Nothing outside of the court-room, no, sir.

"Q. You know that the questions that are asked jurors or talesmen do not indicate in any way the guilt or innocence of the accused. Are you sure this is not just a design to go back to the savings bank? A. No, sir, it is not. It is more important. I realize it, too. *There has been great prejudice in my mind about the case. All last night I thought about it.* I have not talked about it to anybody.

> "Q. *Do you mean it would prevent you from rendering a fair and impartial verdict?* A. *I am afraid so.*" (Italics supplied.)

Butt was excused.

It is certainly doubtful, then, whether any member of this jury started out entirely free of at least a subconscious prejudice. And there is at least doubt that the exposure to this prejudice did not continue after the trial had begun and while the jury was supposedly segregated and immunized from further such assaults,—cf. R. 3760.

The Physical Trappings of the Trial

The trial then commenced. Petitioners were brought into the court room manacled to police officers. The process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box (R. 766-768). The defendants were seated in court surrounded on all sides by officers. Objection made by counsel for the defense to this procedure was disregarded (R. 764-765). Witnesses for the prosecution, when on the witness stand, were surrounded by police and court officers (R. 764). When defense counsel moved for a mistrial because of this show of force, the Court, in denying the motion, partly described the scene as follows (R. 688-689):

> "The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial."

It needs no imagination to follow the insidious suggestion to the jury. Rosen was murdered because he threatened

to inform. The witness is now an informer. Because of that the witness must be protected against the individuals on trial.* Therefore the individuals on trial must necessarily have been the murderers of Rosen.

The Conduct of the Trial Judge

Throughout the trial, the Court's constant participation in, and interruptions of, the examination of witnesses and his interpretations of their answers, served to bolster the case for the prosecution and to belittle the defense. Solely as illustrative of this, typical instances are quoted:

The Court more than once came to the rescue of the People's witnesses by endeavoring to excuse flagrant perjury. For example, Tannenbaum had been forced to admit that he had signed and sworn to a false affidavit when charged with murder in Sullivan County, New York (R. 2323-2330). The Trial Judge thereupon interposed a question suggesting that this was justifiable perjury. This is shown by the following excerpt from Tannenbaum's redirect examination (R. 2358):

> "Q. (By the district attorney) At any rate, at the time you entered the plea of not guilty and signed Defendants' Exhibit 2, you were then a defendant resisting conviction on the indictment therein alleged, namely, the killing of one Irving Ashkenas, is that right? A. Yes.
>
> "The Court: You were then fighting to save your own life, is that it?
> "The Witness: Yes, sir."

On other occasions, the Trial Judge made repeated efforts to save the People's witnesses from damaging admissions which would militate against their credibility. A striking illustration appears during the cross-examination of the witness Bernstein when defense counsel inquired into his knowledge that an automobile stolen by him was to be

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* On one occasion, the prosecutor asked (R. 687): "Is the objection to the protection of the witness?"

used in connection with the murder. He was asked *by the Court* (R. 1181):

> "Q. Then the impression was, if the car was found, it was stolen for the purpose of stripping? A. Yes, sir.
> "Q. And not for the purpose of committing any other crime? A. Yes, sir."

Defense counsel then inquired (R. 1181):

> "Q. What were you trying to conceal, if the car was found, so as to make it look as if it was only for stripping and not for any other purpose?"

Thereupon the Court prevented a response by interrupting and asking (R. 1182):

> "Q. (Interrupting) Just answer the next question yes or no—Did you have a suspicion as to what Strauss wanted the car for?"

Counsel objected, stating (R. 1182):

> "Mr. Rosenthal: I object.
> "The Court: The objection is sustained. I thought you wanted that evidence.
> "Mr. Rosenthal: I don't want words put in the witness' mouth. I wanted him to tell me, not have your Honor ask him a question which would call for yes or no—I want him to tell the jury the reason. I don't want the reason furnished.
> "Mr. Turkus: I object to that.
> "The Court: It does not penetrate the Court's skin. Go ahead."

After some sparring without any responsive answer by the witness, the Court again intervened (R. 1184):

> "*By the Court.*
> "Q. Was that the reason? A. I did not know there was to be a murder or I would never have him take out the radio of the car."

So at last the witness answered the unanswered question in the way the Court intended it should be answered.

On the vitally important issue of the "time table", almost invariably the Court gratuitously protected and bolstered the People's witnesses adversely to the petitioners (R. 1974-1975, 1972-1973, 1964, 1658, 2173, 2179). For instance, during the cross-examination of the People's witness Berger by Mr. Barshay, the following occurred (R. 1974-1975):

"Q. And the best time you can give us is 9:30? A. Between 9:30 and 10. I left that place 9:30, to the best of my recollection.

• • • • • •

"Q. How much time did you spend in Brownsville near the vicinity of Sackman and Livonia, Saratoga and Livonia, and Rosen's candy store, all together?

"Mr. Turkus: I object to it as already answered to the best of his recollection.

"The Court: His testimony shows it is all guesswork.

"Mr. Barshay: He has fixed himself the time as between 9:30 and 10.

"The Court: Pardon me, he has not fixed the time. The Court won't discuss that.

"Q. Mr. Witness, did you say between 9:30 and 10?

"The Court: *I know what he said, but the Court knows it means nothing.*" (Italics supplied.)

"Mr. Barshay: I take an exception to the Court's remarks.

"The Court: Now proceed.

"Mr. Barshay: And I ask for the withdrawal of a juror and the declaration of a mistrial.

"The Court: On what ground?

"Mr. Barshay: On the ground of prejudice, when the Court said that does not mean anything.

"The Court: You mean to have a withdrawal of a juror because the Court will not agree with you that guessing as to time is accurate?

"Mr. Barshay: No, sir, that is not my point.
"The Court: I think it is. Denied.
"Mr. Barshay: Exception, sir." *

The Court constantly accused defendants' counsel of "manufacturing a record" (R. 3870, 3867), of attempting to make a "padded record" (R. 3865), and of being "disorderly" (R. 3869, 3868).

The Conduct of the Prosecutor

The prosecutor must have known that the testimony of the widow and children of the deceased was so fantastic as to be beyond the Trial Court's considerable capacity for credence. Yet they were put before the jury to enhance, by the sympathy which their bereavement naturally induced, the prejudice against petitioners who were accused as the cause of their sorrow. Weeks later, their testimony was stricken from the record (R. 3525-3534), but by that time their appearance on the witness stand had had full effect on the jury.

Time after time officials of the Amalgamated Clothing Workers of America were brought into the court room in the custody of police officials, and placed before the jury to be identified by the witnesses—but to no legitimate purpose whatsoever, for these officials were not contemplated witnesses, were not charged with complicity, and their identity was not in the least in dispute. The real reason? It may have had something to do with the then

* Additional examples similar to the instances just quoted are to be found at R. 2073-2075; 2135-2138; 2170-2171; 2951-2952; 2955; 3229-3230; 2967-2968; 3025-3026; 1883; 654-659; 1209; 2006; 2603; 2131; 1273; 1511; 1512; 1187-1188, 1113-1114. There are many others.

Both Court and prosecutor sought refuge in the magic word "repetitious" to bar the right of proper cross-examination, the Court holding that if the prosecutor had originally asked the question, it would be repetitious to cross-examine the witness thereon and elicit, if possible, a contradictory reply, which would thereby tend to destroy the witness' credibility. The instances are many. A few are referred to: R. 1131-1134; 1139; 1169; 1175; 1176; 1177-1178; 1180; 1194; 1195; 1198-1200; 1201-1202; 1227-1228; 2532; 2586-2589. See, also, pp. 66-67, *infra*.

current campaign of the District Attorney for election as Mayor of the City of New York, or it may have been for the effect upon the jury of seeing that these union officials were apparently in custody.

The prosecutor's summation added fuel to the flames of prejudice and passion. For example:

No one disputed that Joseph Rosen had been murdered; that was at most in issue only technically. Nevertheless there had been paraded before the jury all the gory details; and lest the macabre tale as related by the respectable witnesses—not one of whom connected petitioners with the crime—should lack some horrifying force, the prosecutor dwelt upon it *ad nauseam* in summation, and coupled his review and embellishment with repeated references to the absence of contradiction of these undisputed facts, thus subtly and by indirection commenting on the failure of the defendants to testify.*

To overcome the natural reluctance of a jury to convict on the testimony of witnesses of the stripe of Bernstein, Rubin, Berger, Tannenbaum and Magoon, obviously given to buy absolution for their own crimes, the prosecutor assured the jury (R. 3830):

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valu-

* E.g. (R. 3785-86): "he saw a ghastly sight. There on the floor of this little candy store lay the proprietor, Joseph Rosen, flat on his back, with his arms outstretched, his face, neck and shirt were drenched with blood, pools of blood flowed from the body in the direction of the counter. Scattered newspapers were strewn on the floor. The body was at an angle; he was facing toward the rear; feet facing toward the front and side, legs spread apart. The eyes of the corpse were wide open, staring toward the ceiling. That is paragraph number one. Has that been proven beyond the shadow of doubt? Is there one person in the court room that can deny each and every fact therein stated has been proven?"

able pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

Some further examples of his transgressions of the bounds of fair summation are set forth in the margin.* These were sanctioned and approved by the Trial Judge. The question is whether these were merely "regrettable", as was said by the Chief Judge of the Court of Appeals, or were calculated to deprive petitioners, as was said below by Rippey, J., "of any remote outside chance of any fair consideration by the jury".

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* R. 3788: Reference to race; R. 3794: Appeal to the court room audience; R. 3802: Charging defense counsel with an effort to confuse and "finagle" the jury; R. 3803-04: Stating that defense counsel were paid with tainted money; asserting his own great integrity and making the issue to be decided by the jury the integrity of the District Attorney, saying that if the defendants are not guilty the District Attorney and his staff should be tarred and feathered, run out of town on a rail and put in jail, and that every lawyer in the court room (necessarily including defense counsel) knew the defendants were guilty; R. 3810: Characterizing one of defense counsel as "the wiliest of lawyers", and insinuating a conspiracy among counsel for these defendants and counsel for other defendants for ulterior purposes; R. 3814-15: Offering his own testimony as to facts; R. 3820: Accusing defense counsel of sabotaging investigation; R. 3821: Injecting again the issue of his own integrity; R. 3828: Denying there had been police surveillance of Buchalter, thus abusing the more emphatically the harm done defendants by the suppression of the police reports (cf. Argument, III, *infra*); R. 3829: Charging defense counsel with desiring to have the witness Bernstein "cut up"; R. 3830: Again injecting the issue of his integrity and the integrity of the Court as assurance that the accomplice witnesses would not receive absolution (as a matter of fact, they later did); R. 3845: Referring to an exhibit not in evidence, and criticizing a private in the army for wearing his uniform; R. 3850: Referring to a prospective juror (not chosen) who had seen Buchalter in a night club; saying that defendants got a fair and impartial trial because "they got an indictment; they got nine lawyers * * *"; R. 3856: Saying no decent man would stand for the defendants; R. 3859-60: Saying it would be monstrous and unthinkable that any verdict other than guilty of murder in the first degree would be returned.

On the motion for a change of venue this prosecutor was quoted (R. 111) as having said: "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation." While he denied so stating, the Record evidences the accuracy of the quotation.

The Court's Charge

The Court's charge capped the climax. It is discussed in the Argument (*infra*, pp. 67-75). The charge was both a condemnation of petitioners and an apologia for the prosecution.

For example: At one point (R. 3903-3904) he let slip the phrase, "When rogues fall out, it is a wise man's delight".*

Referring to the attack upon the credibility of the witness Magoon, who, when he was asked on cross-examination whether he ever lied in his life, replied, "Only little white lies" (R. 2514-2515), the Court said (R. 3898-3899):

> "Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark —it might better be characterized as a fool remark— by one of the witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule, I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule. It must be decided on a basis of reason. I dare say there is not one of us who has not at some time or other made a foolish break which caused him to lose face due to the ridicule of others; but ridicule, gentlemen of the jury, is a childish trait. This case has to be decided by grown-up serious men, who will decide it upon an adequate comprehension of the record. Ridicule is an emotional reaction. It works contrary to reason. It is a bad substitute for reason. It is primeval. That is why I say it is childish. It is something that appeals to and activates the immature mind, but does not and should not affect intelligent men whose minds are mature."

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* After exception had been taken (in the absence of the jury), the Court, when the jury was recalled, said (R. 3989) that he had not intended to call the defendants names. The damage had already been done.

Specification of the Errors to be Urged

Petitioners urge that error was committed to their manifest prejudice in the proceedings below whereby they were deprived of due process of law in that:

I. The trial was held in a poisoned atmosphere in which a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had. In a situation where the prejudice against petitioners was bound to affect the jurors, the physical trappings of the trial were such as to amplify and vitalize that prejudice.

II. The Court of Appeals should have reviewed the action of the Trial Court which prevented the impanelling of an impartial jury by its rulings upon challenges for actual bias. The right to such review was not waived by petitioners' consent to be tried before a "special jury". The rulings of the Trial Court prevented the impanelling of a fair and impartial jury; and an impartial jury is essential to due process of law. In this case, the State of New York failed to supply a corrective process for this denial of due process.

III. Evidence relevant and material to the defense, in the possession of the prosecution, was suppressed by the State. Petitioners were thus deprived of a fair opportunity to present their defense. They were likewise deprived of an opportunity of adducing proof that evidence offered by the prosecution was in fact perjurious.

IV. The Trial Court's usurpation of the province of the jury by the resolution of issues of fact against petitioners in its charge to the jury as well as by comments during the course of the trial, the attitude of the Court toward the defense throughout the trial, and the summation of the prosecutor wherein, among other unprofessional things,

he made improper promises to the jury concerning the future treatment of confessed criminals who had testified for the prosecution, and wherein he purported to give testimony, all combined to deprive petitioners of the right to fundamental fairness in the trial.

V. Petitioners were not accorded a trial by an impartial judge and an impartial jury; and the State, through the prosecutor, misused its power.

VI. In the case of petitioner Capone, the denial of a severance of the trial. The argument on this subject is contained in the supplemental brief submitted on behalf of that petitioner.

ARGUMENT

*Was the trial so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses?**

Due Process of Law

Although this Court has refrained from defining comprehensively the concept of "due process of law" (*Twining* v. *New Jersey*, 211 U. S. 78), it has uniformly adhered to the minimal standard that the accused must be accorded a fair opportunity to meet the case of the prosecution. *Twining* v. *New Jersey*, 211 U. S. 78; *Tumey* v. *Ohio*, 273 U. S. 510; *Adams* v. *United States*, 317 U. S. 269; *Glasser* v. *United States*, 315 U. S. 60; *Pyle* v. *Kansas*, 317 U. S. (Dec. 7, 1942).

A State is at liberty to prescribe the mode of procedure by which this opportunity to defend will be afforded. *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Hurtado* v. *California*, 110 U. S. 516. It may choose one method in preference to another, despite novelty or departure from

* Dissenting opinion of Rippey, J. (R. 4090).

tradition, so long as the essential requirements are met. Cf. *Palko* v. *Connecticut*, 302 U. S. 319.

Though the method chosen by the State meets the minimal standards, if in the actual administration of the law these criteria are disregarded, the defendant is deprived of his constitutional rights, and a judgment of conviction cannot stand.

In *Brown* v. *Mississippi*, 297 U. S. 278, the Court said (p. 286):

> "• • • The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Hebert* v. *Louisiana*, 272 U. S. 312, 316."

A primary requisite of due process of law is that the trial be before an unbiased and impartial tribunal. The Judge, it has been said, must have no interest other than the pursuit of justice (*Adams* v. *U. S.*, 317 U. S. 269, 275, citing *Tumey* v. *Ohio*, 273 U. S. 510). The jury must be impartial and competent to afford a fair hearing (*Jordan* v. *Massachusetts*, 225 U. S. 167; *Brown* v. *New Jersey*, 175 U. S. 172; *Hayes* v. *Missouri*, 120 U. S. 68; *Reynolds* v. *United States*, 98 U. S. 145; *Glasser* v. *United States*, 315 U. S. 60, 85-86; *Patton* v. *United States*, 281 U. S. 276).

In *Moore* v. *Dempsey*, 261 U. S. 86, this Court, employing in part the language of *Frank* v. *Mangum*, 237 U. S. 309, stated (261 U. S. 90-91):

> "If in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that 'if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.'"

The minimal requirements of the constitutional guarantee of due process of law are:

(1) A fair and impartial jury, free from influences extraneous to the proof adduced at the trial. This means just what it says; that when the jurors enter the jury box, their minds will not have been prejudiced, surely not poisoned against the defendants. The influence of newspaper articles and the failure of the State to provide remedial process raise the question of due process. Not only this, but the defendants are entitled to a jury that will throughout the trial remain free from improper influences extraneous to the proof. Thus, if the Court is unfair or the State is unfair, if, for instance, the Court prompts witnesses or condones perjury, or decides questions for the jury, or if the State, through the prosecutor, makes improper statements to the jury, deceitfully promises punishment of criminal witnesses, or if both the Court and the State surround the proceedings with a show of force which may affect the jury, all of such things may well tend to subject the jury to improper influences, so that it cannot be said that the defendants are tried by a fair and impartial jury.

(2) An impartial Judge. No contention is made here that this Court should consider mere error as a deprivation of due process of law. However, if errors are so gross, so continuous, so regular and so marked, that the record shows that the Court itself is prejudiced, the result might well be that the defendants have not been accorded due process of law. This may be due to prejudice by the Trial Judge or it may be due to overzealousness, or it may be that the Judge has made up his mind that the defendants are guilty and imposes his views upon the jury. It can hardly be questioned that even though a record seems to be simon-pure, yet, if a Judge had received a bribe, a verdict perforce would be set aside. On the other hand, there may be no bribery; the Judge may honestly have a fixed point of view from the outset and the record may

show this, not because of any error of law into which the Court may fall, but because regularly and from the beginning of the trial, his rulings were such as to show that he was prejudiced. We have already indicated his inconsistent and discriminatory rulings on the challenges to jurors. The dissenting opinion of Judge Loughran* recited facts which show that the Trial Judge practically instructed the jury that it should not pay too much attention to the inconsistencies in the time-table which the defendants claimed upset the prosecution's theory; that the Judge practically told the jury that the prosecution's witnesses had had no chance to collaborate on their stories; that the Judge refused to admit letters of supreme importance on this issue; that he put words in the mouth of witnesses; and that he condoned perjuries. All of these matters will be taken up hereafter. The point we make here is that the record shows that the Judge was not impartial.

(3) Fairness in the use of the State's power. If the State, through the prosecutor, withholds or suppresses evidence, or if it uses unfair means to influence the jury, there has been a denial of due process. The importance of the evidence withheld by the State, with the sanction of the Trial Judge, will be discussed hereafter. Again referring to Judge Loughran's opinion, it appears that the prosecutor made it clear that inferences should be drawn from the failure of the defendants to take the witness stand. The State staged the trial with trappings of power and of armed force, so as to impress the jury with the fact that the defendants were desperadoes; manacles were removed from the defendants in the courtroom and in the presence of the jury; the State surrounded the "informer" witnesses with police officers to protect them, as suggested by the prosecutor, from the defendants. Perhaps more

* The opinion of Judge Loughran was concurred in by Desmond and Rippey, *JJ.*, but the facts he related were confirmed in the opinion of Chief Judge Lehman (R. 4073), who said: "The errors and defects in this case are, it seems to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded."

shocking is the fact that the prosecutor practically bribed the jury by promising them, on his integrity as a prosecutor, that if they would convict the defendants, the State would see to it that the vicious witnesses for the prosecution would get their just desserts.

This would have been bad enough if said in good faith. It becomes utterly abhorrent in view of the fact that these self-confessed murderers were afterwards let off scot free and recompensed.*

It is impossible, when referring to a fair trial, to draw a fine line of demarcation between the functions and acts of the Court, the prosecutor and the jury. Prejudicial conduct by the Court, and improper acts on the part of the District Attorney, sanctioned by the Court, which, in turn, affect the impartiality of the jury, must be taken together. The basic question is whether or not the trial was fair, whether the minimal requirements have been met. In other contexts, this Court has recognized the necessity for consideration of all elements of a situation and has sometimes spoken of a "bundle of rights". Here, it is not amiss to say that there was a *bundle of wrongs.*

As Judge Loughran said (R. 4090): "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

Petitioners submit that they were not "fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" (*Chambers* v. *Florida*, 309 U. S. 227).

I

The Jury Was Not Impartial

(A) The Jury as Selected

Counsel disclaim any intention of urging that newspaper publicity, as such, caused a denial of due process of

* The official records with respect to these men will be submitted, if permitted by this Court, upon the argument.

law. That publicity may not have been the fault of the State. But when the effects of the newspaper stories reached into the courtroom and tainted the trial proceedings, the State was under an obligation to provide adequate corrective process. It is the failure of the State to provide this corrective process which we urge as the denial of due process.

Because of the damning newspaper articles, petitioners had asked for a change of venue, which was twice denied (*supra*, pp. 13, 14). The failure to grant the motions for change of venue may not in itself furnish the basis of a claim of deprivation of due process. *Barrington* v. *Missouri*, 205 U. S. 483. But the denial of these applications is a part of the record which must be re-lived in order to appreciate the atmosphere in which the petitioners were condemned. Cf. *Johnson* v. *United States*, Frankfurter, *J.*, 317 U. S. (Feb. 15, 1943).

The record on the *voir dire* discloses that even before any evidence had been adduced, the petitioners faced at best an uphill struggle before a jury selected from a panel mentally conditioned to convict. While the jurors said they were unbiased, and swore to act impartially, it is clear that their frame of mind was such that they did not "stand indifferent between the parties." *Coughlin* v. *People*, 144 Ill. 140, 163; *Reynolds* v. *United States*, 98 U. S. 145, 154. Under conditions such as these, events at the trial take on increased importance.

It has been seen that Mr. Stevens, who was sworn and acted as a juror, was faced with the necessity of staving off prejudicial influences. There can be no assurance that, despite his commendable efforts, he was not subconsciously affected, particularly since he still faced the prospect of justifying himself to his co-workers, should he vote for a verdict of acquittal.

Mr. Butt, who was accepted as a juror and then excused, developed a feeling of prejudice even before a word of testimony had been adduced. Whether Mr. Butt was more sensitive than the others who had been tentatively selected,

or whether he had a greater realization of his prejudice than the others cannot, of course, be known. His action demonstrates that there was some taint in the atmosphere of the courtroom.

The Trial Judge gave voice to the "havoc" which the Mirror articles were wreaking in the jury panel. He, himself, acted upon a report which he read in the newspapers about the Panto case and the connection of petitioner Weiss with it. The prosecutor's challenge of Protter, for bias, was sustained not because of anything which occurred in the courtroom, but because of something which the Court had read in a newspaper in the midst of the trial.

Prejudice from without was thus taking its toll in the courtroom. Petitioners' prediction had come true. An impartial jury could not be obtained.

In order that a jury might be selected, the Court overruled challenges for cause which should have been sustained. It was therefore necessary for petitioners to use up their peremptory challenges where challenges for cause should have been sustained. A jury was selected only after the Court had browbeaten talesmen, thereby leading others in the panel to deny prejudice to avoid criticism. The last three jurors put into the jury box would obviously have been challenged peremptorily if the Court had not theretofore forced the defense to exhaust all of their peremptory challenges.

Under these circumstances, it cannot fairly be said that the defendants were tried before a truly impartial jury. One's eyes must be closed to reality to believe that in this milieu it was possible to obtain a jury which stood indifferent between the State and the petitioners.

If the Court itself obtained and was influenced by information from the newspapers, can it be said that the jurors and prospective jurors were entirely free from that influence? Were these petitioners convicted upon proof of the charge laid in the indictment, or upon matters *dehors* the record? Cf. *DeJonge* v. *Oregon*, 299 U. S. 353, 362.

The language of the Court in *Stephens* v. *People*, 38 Mich. 739, 743, is particularly apt in this case:

> "Under such circumstances it is idle to inquire of jurors whether or not they can return just and impartial verdicts; the more clear and positive were their previous impressions of guilt the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has [*sic*]* established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so."

True, the twelve men who took their places in the jury box swore that they would render an impartial verdict and said they would judge fairly between the State and the petitioners. But as the Court said in *Coughlin* v. *People*, 144 Ill. 140, 184:

> "* * * Whatever may be the weight ordinarily due to statements of this character by jurors, their value as evidence is in no small degree impaired in this case by the mode in which they were, in a certain sense, forced from the mouth of the juror. The theory seemed to be, that if a juror could in any way be brought to answer that he could sit as an impartial juror, that declaration of itself rendered him competent. Such a view, if it was entertained, was a total misconception of the law."

Again at page 186:

> "Nor should a defendant be compelled to rely, as his security for the impartiality of the jurors by whom he is to be tried, upon the restraining and controlling influence upon the juror's mind of his oath to render a true verdict according to the law and the evidence. His impartiality should appear before he is permitted to take the oath. If he is not impartial then, his oath cannot be relied upon to make him so. In the terse

* The word "not" seems to have been omitted by the reporter.

> and expressive language of Lord Coke already quoted, the juror should 'stand indifferent as he stands unsworn'."

Petitioners urge that they were deprived of their constitutional guarantees by the failure of the Court to intervene to prevent this travesty upon justice. The spirit which permeated the panel was no different from that of the mob which this Court condemned in *Moore* v. *Dempsey*, 261 U. S. 86. There (p. 91) "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and the State Courts failed to correct the wrong". Here was the same vice, but in more subtle form. Yet the same result—deprivation of due process of law—ensued. Men may, if they are strong-willed and courageous, resist an open show of force. The mob spirit which is engendered in the mind is not so easily repelled, because the individual may have no consciousness of being prejudiced. When the fact of the prevalence of the hostility towards the petitioners became apparent, there was no longer the possibility of a trial by reason. From that moment, the proceedings became a sham.

In *Simon* v. *Craft*, 182 U. S. 427, 436, this Court said:

> "• • • The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form."

Cf. *Avery* v. *Alabama*, 308 U. S. 444, 446; *Powell* v. *Alabama*, 287 U. S. 45, 58.

It is no answer for the State to say that the petitioners were wicked men and had brought upon themselves the hostility of the community. Nor is it an answer to say that the ends of justice can be served only by a speedy trial and a conviction even though in that process the rights of defendants are trampled upon. While speed in the administration of justice is desirable, *fairness* is essential.

As this Court said in *Chambers* v. *Florida*, 309 U. S. 227, at 240:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end."

In *State* v. *Nash*, 7 Iowa, 347; the Court wrote (pp. 371-372):

> "An excited state of public feeling and opinion is always the most unfavorable for the investigation of truth. Not only should the mind of the juror be wholly without bias and prejudice—it should not only be free from all undue feeling and excitement in itself—but it should be, as far as possible, removed from the influence of prejudice and feeling, and excitement in others. A circumstance of small importance in itself, may often, in the midst of a community stirred by passion and excitement, serve to turn the scales of justice."

Petitioners earnestly urge that because of the contamination of the jury before whom they were tried, they were deprived of their right to be heard before an impartial tribunal.

(B) The Physical Trappings

The entire trial was so staged, with the sanction of the Court, as to impress the jury with the idea that petitioners were desperate and violent characters.

Petitioners were brought into the court room manacled to police officers. The process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box (R. 766-68). Thus the State manufactured and placed before the jury mute but telling testimony that it considered petitioners to be not men who must be proven guilty, but desperate characters of whose guilt there was no doubt. Objection made by counsel for the defense to this procedure was disregarded.

In his brief in opposition to the petitions for the writ of certiorari, the District Attorney attempted to excuse this procedure by saying (p. 34):

> "* * * It is enough to say, concerning petitioners being manacled to police officers when brought to and from the courtroom, that Buchalter and Weiss were formerly fugitives from justice and at the trial were Federal prisoners in the custody of a United States marshal. They and Capone, as the record shows, were desperate criminals."

The Trial Court, however, gave another reason. It said (R. 767):

> "The Court: These defendants have been brought into this court-room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor down a public staircase and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say."

Neither reason can justify this prejudicial display before the jury.

Standing alone, the manacling of a defendant in a criminal trial is not necessarily ground for condemnation of the judgment. It may be justified where defendants are violent or disorderly in the proceedings or where they give evidence of an intent to escape during the course of the trial. *State* v. *Rice*, 347 Mo. 812; *State* v. *Kring*, 64 Mo. 591. In this case, where there was not even any intimation of violence or disorderliness by petitioners at the trial, and no indication that they would attempt to escape, this show of force in the presence of the jury must be considered as part of the mosaic which reveals the unfairness of the trial. To use the language of the Court in *State* v. *Kring*, 64 Mo. 591, 593:

> "* * * When the court allows a prisoner to be brought before a jury with his hands chained in irons,

and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of the officers."

It is no excuse that the court room was not adapted to the trial of criminal cases. Part of the concept of due process of law, we submit, is that a State must furnish a seemly place for trial. The appropriate remedy was not this unwarranted exhibition before the jury. At least, the manacles could have been removed before the jury was brought in.

If, on the other hand, the excuse of the District Attorney be considered, the vice of the practice is clearly disclosed. Manifestly, the prosecutor was communicating to the jury the impression that the defendants must be guilty, otherwise they would not be in chains.

Intensifying the spirit of condemnation which the State's officers engendered by all the foregoing, there was likewise the close surrounding of the witnesses by numerous attendants and guards. This condition was graphically described as follows (R. 764-65):

"Mr. Talley: Before I commence to examine this witness, I request your Honor to remove the court officer who stands within six inches behind the chair of the witness. I ask your Honor to remove from the sight of the jury the two detectives who escorted this witness to the witness chair. There is another officer standing, in uniform, immediately alongside of the witness chair. I have no objection to his standing in that general vicinity, but the other display I ask to be removed, as prejudicial to these defendants and interfering with proper cross-examination and prejudicial to the defendants in this court-room. There are plenty of detectives in this court-room and there are other uniformed policemen who are kept outside of the court-room. These three defendants are brought in here, in sight of the jury, in chains, literally in chains. There are three or four officers sitting alongside of these defendants, and I object to this display as unnecessary,

> unprecedented, and here for no other reason than to prejudice the jury against these defendants. I ask that they be removed, and that we proceed in a legal, judicial manner in the conduct of this trial from now on, and that we take away this theatrical display."

This request was denied (R. 766).

Considered in the light of all of the proceedings at the trial, these matters cannot be disregarded. Even if the jury entered upon its duties conscientiously intending to be impartial, the insidious influence of theatrical display must have weighed when the jury came to consider its verdict.

(C) Prejudice Created by Court and Prosecutor

This subject is discussed under IV, *infra*.

II

The Right to an Impartial Jury Was Not Waived

This case presents the further question whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may unwittingly be waived and lost.

(A)

It is an essential part of due process of law in the State of New York that the trial of a capital case must be by jury, and the jury cannot be waived. Article I, Section 2, New York State Constitution*; *People ex rel. Battista* v. *Christian*, 249 N. Y. 314. "Though a state may, apparently, deny an accused person a jury trial entirely, if one is granted, the selection of the jury must be conducted in a manner calculated to secure an impartial body * * *." Natting, *The Supreme Court, The Fourteenth Amendment*

* Appendix, *infra*, p. 80.

and State Criminal Cases, (1935) 3 U. of Chicago Law Review 244, 247-248.

Petitioners sought review of obviously improper rulings by the Trial Court upon challenges for actual bias. But the Court of Appeals in refusing to review said (R. 4121) that because petitioners consented to be tried before a special jury "a majority of this court is of the opinion that he thereby consented also to the statutory provision* that rulings of the trial court upon challenges for actual bias are final and not appealable."

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* N. Y. State Judiciary Law, § 749aa, subd. 7, Appendix, *infra*, p. 83.

In *Spies* v. *Illinois*, 123 U. S. 131, this Court held that on its face the Illinois statute did not deny due process by providing "that it shall not be a cause of challenge that a juror has read in the newspapers on account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence." But the Court also ruled that a denial of due process under the Fourteenth Amendment could result from "the actual administration of the rule of the statute by the court." At page 170 the Court said:

> "We proceed, then, to a consideration of the grounds of challenge to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated."

The Court then quoted at length these jurors' statements on *voir dire* (pp. 170-179), and concluded (p. 179) that "the question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence." The final decision by this Court was (p. 180) that the trial court's rulings were not "so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime." Clearly this holding demonstrates that even in the face of a similar statute a question of the denial of due process may arise from a trial court's rulings on the qualifications of a talesman.

The District Attorney may in this connection refer to *Hayes* v. *Missouri*, 120 U. S. 68, and *Brown* v. *New Jersey*, 175 U. S. 172. The attack in each of these cases was upon the validity of the statute itself, and it was "not even suggested that the jury by which the accused was tried was not a competent and impartial one" (120 U. S. 68, 71).

Consent to be tried by a special jury cannot be tortured into a consent to be tried by a contaminated jury. The panel was so infected by prejudice and bias that there was little, if any, likelihood of obtaining a fair and impartial jury. If, in this situation, recognized by the Trial Court in his comment that the newspaper articles were "raising havoc with the jurors", it was not his duty to declare a mistrial and permit renewal of the motions for a change of venue, then at the very least he should have allowed the widest scope to the investigation of the state of mind of each juror. Indeed, at the outset he had promised to do so, saying (V. 49):

> "It will be difficult to select a jury in this case. There is no doubt about that. The Court will allow abundant latitude to all counsel to make searching examination of every member of the panel who is drawn, for the purpose of determining whether such member has any prejudice that will prevent a fair and impartial trial of these defendants."

When it became apparent that such examination would inevitably disclose such prejudice on the part of almost every prospective juror, not only did he improperly restrict that examination, but, by his comments and strictures, he virtually bludgeoned the venire into abjuring prejudice and bias in order to qualify.

Where it is charged, as here, that rulings of the Trial Judge prevented the proper examination of the talesmen upon challenges for bias, it is no answer to say that the local statute makes such rulings immune from review. The Fourteenth Amendment's guaranty of due process would be idle words were its purpose so easily circumvented. How otherwise would a defendant be guarded against an admittedly hostile jury?

A fair and impartial tribunal is essential to due process. To say, as is implicit in the decision below, that a consent to trial by special jury carries with it a consent to surrender the right to question the fairness and impartiality of the

jury impanelled, is not consonant with any concept of due process.

A waiver of so fundamental a right can never result from inference or as a consequence of a failure to object to a trial by a "Special Jury". "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser* v. *U. S.*, 315 U. S. 60, 70; *Johnson* v. *Zerbst*, 304 U. S. 458, 464. Any act of the Legislature which prescribed a trial by a jury which was not unbiased and impartial "would be a violation of one of the essential elements of the jury referred to in and secured by the Constitution." *Stokes* v. *People*, 53 N. Y. 164, at 171.

When petitioners' counsel below interposed no objection to trial by special jury, they had a right to assume that every talesman called would be qualified under the statute,* which provides: "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression."

Upon the *voir dire* examination there was conclusive proof that the talesmen summoned for this case did not meet these qualifications. Yet the "majority of" the Court of Appeals has ruled that a provision** of the special jury statute forbids a review of the rulings of the Trial Judge.

In an earlier case that Court, having held that the right of jury trial cannot be waived (*People* v. *Cosmo*, 205 N. Y. 91, at p. 96), said: "It must follow that if the right itself cannot be waived neither can there be a waiver of anything that is essential to the full benefit or protection which the right is designed to safeguard."

An appellate court cannot be precluded by such a statute from a review of the rulings of the Trial Court upon challenges for prejudice, because otherwise there could be no preservation of "the fundamental idea that no man's life

* N. Y. State Judiciary Law, § 749aa, subd. 2, Appendix, *infra*

** *Idem*, subd. 7, Appendix, *infra*.

* * * be forfeited as criminal punishment * * * until there had been a charge * * * fairly tried in a public tribunal free of prejudice, passion, excitement and tyranical power." *Chambers* v. *Florida*, 309 U. S. 227, 236-37. A "properly constituted tribunal" is essential to due process (*Backus* v. *Fort*, 169 U. S. 557, 569) and, where jury trial is required as in New York, there can be no such tribunal unless the jury be impartial.

There can be no doubt that this jury was not properly impanelled, because the rulings upon the challenges for actual bias were clearly erroneous under New York law. *People* v. *McQuade*, 110 N. Y. 284, 293, 294, 301; *People* v. *Casey*, 96 N. Y. 115, 122, 123; *People* v. *Wilmarth*, 156 N. Y. 566, 568. These rulings would have been reviewable but for the "special jury" statute. *People* v. *Crum*, 272 N. Y. 348. Under the authorities just cited, a review must have resulted in a reversal of this conviction.

(B)

On the motion for reargument of the appeal petitioners emphasized (R. 4105-06) the point that the rulings of the Trial Judge deprived petitioners of due process of law, and that the refusal of the Court of Appeals to review those rulings constituted a further denial of due process.

If this were a matter merely of State law, the construction announced by the Court of Appeals on the motion for reargument might be final. *Howard* v. *Fleming*, 191 U. S. 126. But on the elementary principle that State Courts are charged with the duty of protecting rights guaranteed by the Federal Constitution (*Mooney* v. *Holohan*, 294 U. S. 103, 113), the Court of Appeals, despite the statute, should have examined the rulings of the Trial Court on challenges for actual bias to determine whether by such rulings petitioners were deprived of "due process of law".

If the Court of Appeals was by statute barred from considering the rulings of the Trial Court on challenges, and this denial of review was itself no violation of the constitutional rights of petitioners, yet the question of the effect

of such rulings is still one for this Court to consider. The State may, for instance, provide that the judgment of a trial court be final and not subject to appellate review. Nevertheless, on the issue of due process of law, a constitutional question would still exist whether the judge and jury were impartial and whether the trial was fair. No state statute can deprive the defendant of that federal constitutional right and this question persists irrespective of any limitation placed upon the appellate jurisdiction of any state tribunal.

III

Relevant Evidence Was Suppressed

"In the fair administration of the criminal law", where evidence in the possession of the prosecution was not made known to the defense, a "conviction cannot stand" (Opinion of the Court of Criminal Appeal, per Lord Chief Justice Hewart, in the case of *Edward Guerin*, 23 Cohen's Criminal Appeal Cases 39, 43).*

For the prosecution to suppress and to deny a defendant access to evidence is undoubtedly a denial of due process. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213. That issue is presented by the record in this case.

Tannenbaum testified that on September 11th he had visited petitioner Buchalter at an office in the building at 200 Fifth Avenue, New York City; that there he overheard the conversations between Buchalter and Rubin, to which Rubin had testified, i. e., Buchalter's expression of purpose to have Rosen silenced. Tannenbaum said he was also there when Weiss reported the murder to Buchalter.

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* In this case the Court held also that a conviction must be reversed where the jury had been apprised of defendant's bad character, even though that disclosure had been made by the defendant's own counsel in consequence of certain newspaper publicity.

Berger said that in response to Buchalter's summons, communicated by Rubin, he went to that office; that he and Buchalter (undisguised) then left the building together, through the lobby and front entrance, and entered a taxicab en route to the meeting with Weiss (R. 1959-60).

During the period when these occurrences were supposed to have taken place, Buchalter was under constant surveillance by police officers of the New York Police Department. Petitioners, during the course of the trial, had served a subpoena on the Police Department to produce the official reports of this surveillance.

At the conclusion of the direct examination of Berger, defense counsel called for these official reports (R. 1880-1883). The prosecutor acknowledged that they had been turned over to him by the Police Department. The Court, however, refused to direct the prosecutor to produce them. Later, the request was renewed (R. 2140-2156), and, although the reports were in court, the Trial Judge, upon the prosecutor's objection, refused to permit defense counsel to examine them, refused to examine them himself or to have them counted, and refused to permit any disclosure whatsoever of their contents.

This point was raised on the original appeal to the Court of Appeals, but no mention of it appears in any of the opinions. It was urged again on the motion for reargument. The *Per Curiam* opinion denying the motion for reargument (R. 4120) stated that the Court had examined these police records, that the surveillance amounted to very little, since it was of the entrance and lobby of the office building, and that Buchalter could and did elude the police at will.

What these reports disclosed, petitioners have no way of knowing. Whether they were complete or not, petitioners cannot know. Berger's testimony, and perhaps that of Tannenbaum and Rubin, may well have been subject to complete destruction or at least impeachment by the results of even such limited surveillance.

The information contained in the police reports, even if it relates only to the lobby and entrance, might have had

probative value from one of two aspects. If, for example, the reports disclose that at about five o'clock on September 11, 1936, Buchalter was at a place other than 200 Fifth Avenue, then clearly Berger's story would be false. This would amount to affirmative contradiction.

If, on the other hand, the reports reveal that police officers were actually stationed at the entrance to 200 Fifth Avenue, and did not see Buchalter emerge from that entrance, or that if he did he was not accompanied by another person, the evidence, while negative, might well have probative force in impeaching Berger's testimony.

Defendants should not have to demonstrate that the suppressed evidence *would* have changed the result; it should be enough that it *might* have. Surely no one can say with certainty that the jury might not have been influenced by the reports of the police officers who were shadowing Buchalter, thereby corroborating the testimony of the defense witness Shapiro.

It is one thing to say, as did the majority below, that certain errors did not have influence. It is a quite different matter to assume that the suppressed evidence would have had no effect.

This Court has said, *Edwards* v. *United States*, 312 U. S. 473, 482:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body."

And in *Saunders* v. *Shaw*, 244 U. S. 317, in answer to a contention that the excluded evidence was of no importance, this Court said at 319:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

Lord Chief Justice Reading for the Court in *The King v. Sagar* (1914) 3 K. B. 1112, said (p. 1115) that excluding evidence admissible in law "prevented the prisoner from putting forward a substantial part of his defense * * *. It is impossible to say * * * that, if the evidence which was wrongly excluded had been admitted, the jury would have come to the same conclusion. Consequently, the conviction must be quashed."

Not only were petitioners deprived of the essential right of cross-examination of the prosecution witnesses, Rubin, Tannenbaum and Berger, in respect of any disparity between the testimony of these witnesses and the reports of the police officers, itself a deprivation of due process of law, but the petitioners were deprived of a fair opportunity to present their defense affirmatively.

It was important to that defense to demonstrate that the stories told by Rubin, Tannenbaum and Berger concerning the visits to Buchalter at 200 Fifth Avenue, New York, were false. For that purpose the defense called the witness Shapiro. In view of the scurrilous attack upon this witness by the cross-examination of the prosecutor, it was important to have the corroboration of his testimony which these police reports might have supplied.* If the reports themselves were inconclusive, they would at least have identified the police officers who conducted the surveillance of Buchalter. These officers might then have been called to testify.

The only corroboration of the accomplices' evidence against Weiss, and the only evidence at all against Buchalter, revolved wholly around the occurrences at 200 Fifth Avenue. With the most cogent proof available in these police records and by the police officers, petitioners were not permitted access to that proof.

In his brief in opposition to the applications for the writs of certiorari, the District Attorney argued that it was not

* And to prevent just such an unwarranted assertion that the police surveillance was a fiction, as in fact was made by the prosecutor in his summation (R. 3828).

error to suppress this evidence because counsel for the defense could not say that the reports *were required* for cross-examination, but could only say that they *might be* (Brief, p. 32). He also urged that the petitioners might have called the Police Commissioner as a witness to reveal the names of the officers who made the reports (Brief, p. 33).

There is no merit to these contentions. Defense counsel, not knowing what the reports contained, could not represent to the Court that they would actually be used. The envelope which was delivered might not even have contained the reports on the surveillance during the critical period. Only the representatives of the State knew what was in those reports. The Trial Judge did not even take the trouble to look at them or let them be counted.

As for calling the Police Commissioner as a witness, the District Attorney should know that this would have been improper. To call a witness, not for the purpose of giving testimony about the facts of the case but merely to reveal the names of other possible witnesses, would have subjected defense counsel to criticism indeed. The reports themselves were in Court and there was no reason why they should not have been made available to the defense. The Trial Judge could have provided safeguards, if any were needed, to prevent information extraneous to the case from being disclosed.

The opportunity to present a defense is of the essence of due process of law. Whether a fair opportunity so to do is afforded the defendant when he is denied access to evidence in the possession of the prosecution, is not a novel question.

The applicable principle has been enunciated in *State v. Wood*, 127 Me. 197, 200; 142 A. 728, 730, where it was said:

> "A trial before a jury is an investigation of matters of fact, its sole purpose being to ascertain the truth. All competent evidence tending toward that result should be produced. It is the plain duty of prosecuting officers to make every effort to present all of the facts and to assist the respondent in his effort to do the same.

> The state is not endeavoring to prove the respondent guilty. It is endeavoring to ascertain whether or not he is guilty. It is not only within the power of the court to take such action as shall tend to bring before it all that may assist in the search for truth but it is its duty to do so. Any other theory of law, any different course of conduct on the part of the court, would cause judicial proceedings to receive and merit the contempt of all right-thinking citizens."

Cooley, *C. J.*, for the Supreme Court of Michigan, in *People* v. *Davis*, 52 Mich. 569, 573-574; 18 N. W. 362, said:

> "• • • the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the State has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called."

See also, *Centeamore* v. *State*, 105 Neb. 452, 455; Cf. *People* v. *Walsh*, 262 N. Y. 140, 150.

In *Curtis* v. *State*, 46 Tenn. 9, 11, the principle was thus enunciated:

> "The duty of the Attorney for the State, is to adduce all the legitimate proof of the prisoner's guilt; but it is not his duty to endeavor to secure a conviction to which he is not entitled under legitimate evidence and fair practice. And if a defendant can not be convicted under this rule, the State has no interest to have him convicted. The Supreme Court of Michigan reversed a criminal case, for the reason that the District Attorney, knowing of evidence which would make in favor of the defendant, did not place it before the jury. Prosecuting officers must discharge their duty to the State, but not resort to strategems to deprive the prisoner of his legal rights."

IV

The Trial Judge Assumed the Role of a Protagonist for the Prosecution; His Conduct and that of the Prosecutor Misled the Jury

(A) *The Prosecutor's Actions*

In addition to the other matters discussed elsewhere in this brief:

(1) In his summation to the jury, the prosecutor said (R. 3830):

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

Is it within the power of the State so to impose upon and deceive the jury? In such assurance there was, as the Chief Judge said (R. 4076): "implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts." What purpose was there in this promise other than to induce the jury to accept testimony which otherwise it would have been loathe to credit?

Any individual on the jury might well have rejected the testimony of Bernstein, Rubin, Tannenbaum, Berger and Magoon, who were attempting to purchase absolution from their confessed crimes by implicating or accusing the petitioners. The testimony of these witnesses was particularly suspect because of their vicious records and an inherent lack of plausibility. Testimony obtained for a consideration offends any person's natural sense of justice.

When, therefore, the prosecutor pledged the State's integrity and the integrity of the Court (*the Court sitting silently by*), for the proposition that no such absolution had been or would be granted these witnesses, he was offering an inducement for credence and for a conviction.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba* v. *California*, 314 U. S. 219, 236. Whether true or false, this statement by the prosecutor was fundamentally unfair. The fact is it was false. Each of these witnesses has received his reward for the testimony given. None has paid penance for his admitted crimes.

This Court has held that a conviction obtained by imposition or fraud on the part of the prosecutor cannot stand. *Mooney* v. *Holohan*, 294 U. S. 103. It has been held that conviction on a plea of guilty induced by fraud on the part of the prosecutor constituted a deprivation of due process of law. *Smith* v. *O'Grady*, 312 U. S. 329; *Lyons* v. *Goldstein*, 290 N. Y. 19. The deceptive statement made by this prosecutor in his argument to the jury should not be condoned any more than the presentation of testimony known to be perjured.

(2) The overzealousness thus illustrated was characteristic of the prosecutor's entire address. It was an appeal to the prejudice and passions of the jury, but the Trial Court admonished defense counsel that "There must be no interruption at any time during the summation" (R. 3782). Further, the Trial Court would permit objections to the People's summation only after its conclusion, and then only in the absence of the jury (R. 3782, 3860-3861, 3864, 3868; cf. 3543). In contrast with the Court's instructions that there should be no interruption of the prosecutor (R. 3782), was the Court's previous statement at the beginning of the summations of the defense that there should be no interruption unless "anything of sufficient importance arises that really justifies an interruption of counsel" (R. 3543).

More than one-third of the summation was directed to the fact that a murder had been committed, of which there was no dispute. The real issue was whether petitioners were implicated in that crime. After assuring the jury, at the outset of his summation, that he would take them through his entire opening statement, sentence by sentence, to refresh their recollection and show that every fact had been conclusively proven, the prosecutor then described in gruesome detail the condition of the corpse, the identification of the automobile, one of the murder weapons, and numerous other items peculiarly within the knowledge of the admitted liar Bernstein, but in nowise connected with petitioners except through Bernstein's testimony. At the conclusion of the prosecutor's recital of each of these details, he would interject, "True? • • • Is there a single word in the representation of proof that has not been established beyond a shadow of a doubt?" or words to like effect (R. 3784-3806). Despite the rule in the State of New York that the failure of a defendant to testify may not be the subject of comment (*People* v. *Watson*, 216 N. Y. 565, 568-569), the prosecutor continued by asking (R. 3806):

> "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?"

Whoever the murderers actually were, or whoever instigated the murder, this merely established Bernstein's complicity in the murder, but did not connect petitioners therewith. Yet the prosecutor, by his argument, created an impression that petitioners' failure to take the stand and deny Bernstein's complicity in the crime was an admission of guilt on their part.*

* The dissenting Judges agreed. "This was a direct violation of the defendants' constitutional rights against self-incrimination" (R. 4086).

Although there is much authority to the contrary, this Court has said that while it is not inherent in the concept of due process of law, immunity from compulsory self-incrimination "should, must, and will be rigidly observed where it is secured by specific constitutional safeguards." *Twining* v. *New Jersey*, 211 U. S. 78, 113. New York does secure that immunity by just such a safeguard. New York State Constitution, Art. I, Sec. 6 (Appendix p. 81, *infra*). This immunity, in New York, includes as an integral part, the right to protection from adverse comment on a defendant's failure to take the stand. *People* v. *Watson*, 216 N. Y. 565, 568-569.

Perhaps, standing alone, invasion of this right is not open to argument here because the decision of the Court of Appeals must be accepted as a final ruling that the law of the State of New York has not been violated. *Patterson* v. *Colorado*, 205 U. S. 454, 459; *Rawlins* v. *Georgia*, 201 U. S. 638, 639; *Burt* v. *Smith*, 203 U. S. 129, 135. But the violation of petitioners' right in this respect is nonetheless a part of the picture of the conduct in this case which, taken as a whole, shows a denial of due process of law.

(3) Without being sworn, and without subjecting himself to contradiction or cross-examination, the prosecutor during summation uttered statements as of fact when there was absolutely no evidence in the record to support them. An example was his attempt to justify the falsehood of Bernstein, who originally denied and subsequently admitted writing letters while confined in a hotel as a material witness (R. 975-976, 1247, 1256, 1259). In an attempt to justify the flagrant falsehood necessarily shown by this conflicting testimony, and although no such excuse was offered by the witness, the prosecutor said (R. 3869):

> "Well, he wrote letters. • • • What is wrong about that? Sholem, this misguided man, wanted to protect some employe in the hotel and he denied it until they brought here the photostatic copies of letters. Then he had to admit it."

It is inherent in our jurisprudence that it is fundamentally unfair to offer evidence against an accused without subjecting such evidence to the test of cross-examination as part of the opportunity to answer the accusation. The right to cross-examine adverse witnesses is what is meant by the constitutional right of an accused to "be confronted with the witnesses against him." Wigmore on Evidence (3rd Ed.), Vol. V, p. 128. New York, by its Constitution, Article I, Section 6 (Appendix, p. 81, *infra*), guarantees that right against statutory or judicial invasion. But this protection availed petitioners nothing; for the prosecutor, in his final word to the jury save for the equally prejudicial instructions of the Trial Judge, was allowed to inject into the case these elements which petitioners were given no opportunity to answer.

(4) The prosecutor put in issue his own integrity and that of the District Attorney; charged defense counsel with receipt of tainted money and with the knowledge that petitioners were guilty (R. 3803-3804); charged that there was not a lawyer in the court room who did not know of petitioners' guilt; and assured the jury that petitioners were the murderers (R. 3807, 3820-3821, 3856). Numerous other instances of the unrestrained excesses of the prosecutor in summation are indicated in the footnote on page 34, *supra*. Their effect was aggravated by a charge which (R. 4087) "took on the character of a summation for the People."

(B) *The Trial Judge's Actions*

(1) The Trial Judge recognized at the opening of the trial that "When the human mind registers, it is not likely to readily forget its impressions" (V. 49). During the selection of the jury, he sought to impress the talesmen with the feeling that he had some community of interest with them—this was done by questions about such irrelevant matters as their genealogy, acquaintances and business, church, fraternal and social affiliations, and the general

character of and landmarks about the vicinity of their homes or business (e. g.,—out of at least 125 instances—V. 120, 369, 467, 507, 999, 1397). The bond thus created between the Court and the jury was turned against petitioners by the Court's comments throughout the trial. By these comments the jury was made to believe that the Court's efforts to administer justice fairly were being frustrated by the deliberate attempt of defense counsel to obstruct justice (e. g., R. 783, 884, 948, 993, 2170-2171, 2592). Two typical instances follow:

(R. 2170-2171)

> "You are distinctly rude and uncivil. The Court refuses to be goaded to the extent that you are obviously trying to goad the Court at this or any other time. The Court will be patient to the utmost and take it on both cheeks from counsel. Now please proceed."

(R. 2603)

> "Gentlemen of the jury, disregard that. These are just tactics trying to set the jury against the Court, thereby lessening the authority of the Court with the jury—giving the Court instructions."

(2) By methods sometimes direct, sometimes subtle, the Trial Judge virtually told the jury that admissions wrung from prosecution witnesses on cross-examination were of no consequence. Illustrative of this type of animadversion is the Court's comparison of Rubin's draft evasion in the First World War with the historic refusal of William Penn to enter military service (R. 1512). The Trial Court provided an explanation by which to reconcile inconsistent testimony which Bernstein had given as a prosecution witness in an earlier murder trial: in the so-called "Gangi Cohen" trial, Bernstein had denied being involved in any murders (R. 1111-1113). This was contrary to the testimony given in the present case. The Court said (R. 1113-1114):

> "The answer given to the question you have just read in the other trial could be viewed as being meant to be

true by the witness if he considered it referred to taking part in the actual shooting. It would be untrue in relation to his being a principal under Section 2 of the Penal Law, in the other work than killing."

Damaging indeed was the Court's reference to a prior statement made by Rubin exonerating Buchalter of any complicity in the Rosen murder. He suggested to the jury (R. 2404-2406) that the prior statement was false and that its falsity was commendably akin to the white lie told by the priest's sister in Victor Hugo's "Les Miserables". This had a double vice: It not only excused the perjury itself, but it also assumed that Rubin's testimony in the present trial was unquestionably true, and that it was the prior statement which was false. The jury was not left to decide which one of the two inconsistent statements was true and which one was false. The Court decided that for the jury, against petitioners.

Other instances where the Court cancelled the effect of the cross-examination of prosecution witnesses, or neutralized it by interpreting answers, appear at R. 779, 782-783, 819-820, 846, 870, 872, 884, 903, 933, 991, 1021, 1035, 1060, 1164, 1172, 1177, 1205, 1216-1217, 1224, 1231, 1232, 1236, 1251-1253, 2498, 2512, 2538, 2580, 2589, 2591-2593, 2597-2598.

The Judge, moreover, arbitrarily refused to permit defense counsel to examine on matters elicited on direct examination, or brought out on co-defendants' cross-examination (e. g., R. 2405, 2065, 1653, 2064, 295, 300, 1055, 1082, 1136, 1510, 1513)*; made disparaging remarks about counsel's purposes in their inquiries and about the materiality of evidence sought to be adduced (e. g., R. 1974-1975, 3870, 3867, 3865, 3869, 3868, 2170-2171); and unduly restricted cross-examination on questions (a) tending to show the consideration being given to the witness for his testimony (R. 1138, 1144, 1146-1147), and (b) otherwise directly

* See also, R. 1131-1134, 1139, 1159, 1175, 1176, 1177-1178, 1189, 1194, 1195, 1198-1200, 1201-1202, 1227-1228, 2532, 2569-2571, 2571-2572, 2577-2578, 2586-2589.

affecting witness' credibility (R. 1094-1095, 1136-1139, 1155, 1232-1233, 2530-2532, 2569-2571, 2577-2578, 2597-2598).

While the Trial Judge need not be an automaton, and may participate actively in the trial, he is not justified in being a protagonist for the prosecution. Enough has surely been shown to make it clear that by the trespasses upon its province, this jury was effectively prevented from according the petitioners the full and fair hearing "due process of law" requires.

(C) *The Charge*

(3) This course of conduct during the trial culminated in a charge which constituted the *coup de grace*. The Trial Judge revealed his state of mind and purpose in his charge when he boldly said, "* * * I think this * * * will hold and will not be error" (R. 3990). Does that not plainly suggest that the Court counted on the jury to convict, as otherwise, of course, there would not be an appeal?

The charge must be read as a whole to appreciate how gravely it invaded petitioners' rights and the concept of fundamental fairness. No excerpt can serve as more than a slight indication of how issues of fact were resolved against petitioners and how the Judge himself gave testimony of matters not otherwise proved.

The jury was invited by the Court to assume that the obvious discrepancy between the testimony of Rubin and Berger, on the one hand, and Bernstein on the other, concerning the "time table" (p. 8, *supra*) might be reconciled by a speculation that Buchalter had made full arrangements for the murder, even before he knew that Rubin's mission to Weinstein for the purpose of placating Rosen had failed. The Court said (R. 3906-3907):

> "In view of the fact that this was particularly discussed in reference to hour of the day, and it was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which

preceded the pointing out, that that proved that the testimony did not hitch.

"Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.

"Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

"Apparently, in the argument that was offered, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled."

When the attention of the Judge was called to the fact that the testimony did not support any such assumption, he "corrected" the error with an even more damaging instruction, i. e., that the argument of defense counsel attacking the "time table" must be disregarded because there was lacking any basis for an assumption that Buchal-

ter *had not* communicated his orders earlier in the day. The Court said (R. 3989-3990):

> "I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: 'Sometime about one o'clock, I imagine, in the afternoon.'
>
> "My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this * * * —that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails."

This was, in effect, directing the jury to disregard the conflict in the testimony because petitioners had not proven affirmatively the absence of communication between Buchalter and Weiss before 1 o'clock on September 11, 1936. He used the excuse of avoiding speculation to force the jury to take as a fact what was pure speculation.

Under the pretext of "segregating" evidence against the individual petitioners for the purpose of assisting the jury, the Judge restricted his review of the facts (R. 3903 *et seq.*) to a recitation of only the incriminating testimony given by the prosecution witnesses, Bernstein, Rubin, Berger, Tannenbaum and Magoon. He quoted questions and answers from the record, without referring to the cross-examination which destroyed the force of the testimony of these witnesses (e. g., R. 3903, 3909-3910, 3914, 3916).

In a word, the Court prepared a statement of the case particularizing the damning proof but omitting all countervailing material. A more one-sided charge can hardly be imagined.

The charge was particularly unfair because of its disparagement of cross-examination. The Court's excuse for this omission was that recollection of the cross-examination was "your [the jury's] job". Almost in the same breath he invited the jury to disregard cross-examination completely by saying (R. 3903) that "while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss: it is blank cartridge shooting."

Had the Court been entirely consistent in omitting all reference to cross-examination, the unfairness might not have been so prejudicial. However, it should be noted that the Court did refer to cross-examination for the purpose of excusing and explaining material which impeached the credibility of prosecution witnesses or contradicted their stories.

For example, regarding the conflict of Bernstein's testimony on the trial as against that before the Grand Jury (R. 1266-1267), the Trial Judge said (R. 3899-3900):

> "Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it may take ten weeks to get all the evidence before

a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. *You will just disregard it.* The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here. Bear that in mind. *Don't be misled by that argument.*" (Italics supplied.)

We have already noted (p. 35, *supra*) the Court's rescue of Magoon (R. 3998-3999) from his reference to "little white lies" by branding the summation of counsel in this respect as childishness which "should not affect intelligent men whose minds are mature."

Practically all the prosecution's criminal witnesses were cross-examined concerning statements made by them under oath within a few months prior to the trial inconsistent with their present testimony. As if rehearsed, a stock reply was always given, "If it is in the book [meaning the record being read from], it is so." The purpose of this examination was to establish prior inconsistent statements and thus attack the credibility of the witness. This proper purpose was frustrated when the Court charged (R. 3894):

"Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is *an unholy thing.* We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, 'Answer yes or no,' about something that he testified to a long time before, you get a normal response sometimes, 'If it is in the book, it is so.' There is a concession of the accuracy of the minutes the witness is not disputing." (Italics supplied.)

The apology for the prosecution was made complete when the Court in his main charge said (R. 3903):

> "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. *When rogues fall out, it is a wise man's delight*; * * *" (Italics supplied.)

The unfairness of this statement was aggravated rather than corrected when the Court, after exception had been taken, said (R. 3989):

> "That was intended to have general application. It was not intended as calling the defendants names, but, lest it be misunderstood as having specific application to the defendants as rogues, the court withdraws and apologizes for it. It was not so meant. Just disregard it."

Whether the statement was error which was cured by the apology is not the question here. We urge that the comment demonstrates the innate prejudice which was in the Court's mind and which colored the entire trial.

It was the contention of the prosecution that the witnesses called by them had no opportunity to concoct their stories. In substantiation thereof, Bernstein testified that he had been under twenty-four-hour surveillance (R. 829-831), with a detective sitting at his bedside while he slept (R. 1026), and that he had had absolutely no opportunity to communicate with the outside world (R. 975-976). Subsequently, on cross-examination, Bernstein was forced to admit that he had written a number of letters of a scurrilous and threatening nature (R. 1247, 1256, 1259).* These letters (which were erroneously excluded) were definitely material and would have exploded the prosecution's contention. It should be noted that not a single police officer who guarded these witnesses was called to testify. Not-

* The contents of these letters are set forth in petitioner Capone's original petition, pp. 48-50; see also, this brief, footnote on pp. 4-5.

withstanding this proof, the Court charged as follows (R. 3955-3956):

> "The Court: I will read that because I have a different ruling. It reads, 'I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them.'
>
> "The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.
>
> "Mr. Rosenthal: May I respectfully except?
>
> "The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.
>
> "Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.
>
> "The Court: I find that it is not. I find it is all guesswork.
>
> "Mr. Rosenthal: Then I respectfully except.
>
> "The Court: The jury is not permitted to guess.
>
> "Mr. Rosenthal: May I respectfully except.
>
> "The Court: You go by evidence, not by guess work. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.
>
> * * * * * *
>
> "The Court: That would be sloppy police work, to permit discussion."

The lack of judicial balance between the State and the petitioners is again shown by the Court's treatment of the defense of alibi tendered by Weiss.

The alibi was to the effect that on the night of September 12, a time when he was supposed to have been with Bernstein at the scene of the crime, he was actually attending a birthday party for his brother. Five witnesses testified to this and their testimony covers almost 400 pages of the record (R. 3070-3454). Yet, the Court's charge was entirely silent on this alibi. Counsel for petitioner requested the Court "to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi." He urged that if the alibi raised a reasonable doubt, the defendant was entitled to acquittal. The Court refused to charge as requested, and the instructions given were prefaced by the casual remark (R. 3949):

> "The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:" *

No adequate opportunity for defense (cf. *Twining* v. *New Jersey*, 211 U. S. 78, 112) has been afforded where, as here, the last word of the Court, the final instructions to the supposed triers of the fact, removed from their consideration, and determined adversely to the defense, issues of fact vital to the decision of the case.

As was said in *People* v. *Ohanian*, 245 N. Y. 227, 230:

> "The judge's repeated comments and his charge assumed the falsity of the defense. The practical effect of them may be viewed as morally depriving the jury of its freedom of action and as coercing it into reaching such a verdict as perhaps it might not otherwise have rendered."

In the poisoned atmosphere at this trial, even the outward manifestations of fairness gradually disappeared as the trial proceeded. Particularly apposite to this case is the

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* During the summation the Trial Judge said (R. 3773): "The charge has been prepared * * *."

language of the Supreme Court of Pennsylvania, per Maxey, *J.*, in *Commonwealth* v. *Petrillo*, 338 Penna. 65 (12 Atl. (2d) 317, 331):

> "• • • There is no other case which calls for such strict impartiality on the part of a trial judge and such fearless adherence by him to these 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102) as those cases which have been sensationalized in the public press. In all such cases there is much public *prejudgment* and this is always adverse to *any* of those at whom the finger of accusation points. Anyone mentioned as *in any way connected* with those accused is in the public mind already condemned. No trial judge should permit his judgment and sense of good taste to be warped because of his official participation in a 'front page' case." (The emphasis is the Court's.)

The Trial Judge here, however, did permit his judgment to be warped. He did unmistakably communicate to the jury his personal belief that these petitioners were guilty. Again quoting from *Commonwealth* v. *Petrillo*:

> "The law confers on no judge the power of *pre*-judgment. A defendant charged with crime is not likely to receive a fair and impartial trial, if the judge from the beginning exhibits an attitude which conveys to the jury the impression: 'Here is a man guilty of an atrocious murder but of course we have got to go through the *form of a trial* before we send him to the electric chair.'" (Emphasis is the Court's.)

This is no question of form; it is one of substance. The right to be heard is more than just the right to speak (often even that was barred in this case). It is an empty form if the speech is to deafened ears; and no less so if the mind of the hearers is closed to reception, or directed to reject perception.

As one of the dissenting Judges (Rippey, *J.*) said (R. 4090):

> "• • • the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses."

CONCLUSION

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

Four of the seven judges in the Court of Appeals remained unconvinced of petitioners' guilt (cf. *People* v. *Crum*, 272 N. Y. 348, 350). Three expressed firm belief that the judgment of death should be reversed because, "that fundamental fairness" being absent, these petitioners did not have a fair trial.

There can be no fundamental fairness where the scales of justice at the outset of a trial are weighted against the defendants, or where the evenness of balance is disturbed during the trial by factors apart from the quality of the evidence adduced.

The State of New York has deprived petitioners of their liberty, and, unless this Court intervenes, will deprive them of their lives, without due process of law. There was a complete disregard of those criteria which this Court has announced to be the minimal standards for the administration of justice in a civilized community. The verdict was predestined by the wave of hysteria which engulfed the jury, the Trial Judge and the prosecutor. In the face of this hysteria, the machinery of justice in the State of New York, usually amply adequate to safeguard the rights of

persons accused of crime, broke down. Processes ordinarily sufficient for the administration of justice (see *People* v. *Becker*, 210 N. Y. 274) failed entirely in this case.

The Court of Appeals did not say that the jury was impartial; it held that, because of a local statute, the question of fairness in the selection of the jury could not be reviewed. It did not say that the contents of the police records were irrelevant to the issue; the holding was that they were inconclusive. These two elements, if nothing else were present, furnish justification for petitioners' contention that the State failed to provide corrective process for the violation of a right guaranteed by the Federal Constitution.

There was complete disregard of the concept that "whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime" (*People* v. *Barbato*, per Pound, J., 254 N. Y. 170, 178).

But there is far more in the record to support the contention of petitioners. They submit that the record demonstrates, as they undertook in their petitions for writs of certiorari to show:

A) That the trial was held in an atmosphere which precluded the selection of a fair jury;

B) That the essential witnesses for the prosecution were self-confessed gangsters, thugs and murderers who had the most compelling motive, that of saving their own lives, to perjure themselves in accusing petitioners;

C) That these criminals had every opportunity to correlate their stories;

D) That the Court explained, minimized and condoned their perjuries;

E) That the surroundings of the trial conditioned the jury toward conviction; there was a show of force in the

court room; the defendants wore manacles which were removed only in the presence of the jury; the witnesses were surrounded by police officers;

F) That important evidence was suppressed and petitioners were denied access thereto;

G) That the Trial Judge disparaged cross-examination by which, in the words of Chief Judge Lehman, the testimony of prosecution witnesses was, "impeached, if not completely destroyed"; that the attorneys for petitioners were belittled by the Court, and arguments made by them were discredited;

H) That the prosecutor improperly and deceitfully assured the jury that the criminal witnesses for the prosecution would receive their just desserts; that, in summation, the prosecutor was permitted to interject the issue of his personal integrity and to charge defense counsel with being devil's advocates hired with tainted money. These "foul blows" could neither be stopped nor answered; the Judge forbade all interruptions.

I) That the Trial Judge usurped the functions of the jury.

The trial was one in form, not in substance. The prosecutor misused his power as an instrumentality of the State. Neither the jury nor the Judge was impartial.

A printed Record makes a case appear remote from the human factors involved. The concept of due process is not based on abstract theory; it is the foundation of our way of life. We all feel more secure in our daily lives in the knowledge that we in the United States are protected by the law from judgments based on hysteria and passion, even from the tyranny of men's emotions, and that our lives and property are safe against deprivation except after fair trial before a fair tribunal. As opposed to a society based on apprehension and fear, where no man

can be sure where he stands or how he will fare, ours is a society of freedom and security where individuals, whatever their status—even "bad" men—are protected by constitutional guarantees against public clamor and official vindictiveness. The presumption of innocence prevails until judgment of guilt has been rendered after fair trial by an impartial Judge and jury. It is unthinkable that men may be deprived of their lives, not because of what they did, but because of the way they were tried.

"Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." *Hill* v. *Texas*, 316 U. S. 400, 406.

Respectfully submitted,

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with him on the brief.

APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

ARTICLE I, SECTION 2.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.

New York State Constitution

ARTICLE I. SECTION 6.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Judicial Code of the United States

TITLE 28, U. S. C., SECTION 344 (SECTION 237 OF THE JUDICIAL CODE, AS AMENDED).

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

New York Judiciary Law

SECTION 749aa. SPECIAL JURORS IN CERTAIN COUNTIES.

* * * * * *

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or

who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

• • • • • •

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

• • • • • •

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

No. 610

EMANUEL WEISS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

No. 619

LOUIS CAPONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' REPLY BRIEF

The Court having granted permission for the submission of a reply brief, our effort will be to dissect and answer the statements in the respondent's brief, in the order there set forth, so that the Court may determine whether the picture portrayed therein is accurate.

There has been submitted to the Court a memorandum on behalf of the petitioners comparing some of the statements made on argument by the prosecutor, with excerpts from the record which establish their inaccuracy and misleading nature.

Except where required for clarity, repetition of anything set forth in the petitioners' briefs and memorandum will be carefully avoided.

REPLYING TO RESPONDENT'S BRIEF, PAGE 6:

In footnote 3 respondent disputes our statement that testimony of members of the Rosen family was stricken. There may be some confusion, but the last word of the Court was (R. 3913):

> "Berger's testimony is also applicable to Buchalter on the alleged events leading up to and caus-

ing the Rosen murder. Others who have testified for the People on this point are Rubin, Sylvia Greenspan, nee Rosen, and, very slightly, by Harold Rosen, and also by the decedent's widow. I shall not review this. It covers quite a ramified field, but I charge you as follows:

> "*The testimony by members of the Rosen family as to the financial status of the business is too sketchy to have value as evidence. For that reason it has been stricken out.*" (Emphasis added.)

The testimony of Maguire, Aman and Bell did not relate at all to the murder of Rosen, but was merely offered in attempted proof of flight from which an inference of guilt might be drawn. But this testimony was *not connected with the crime charged.*

Unquestionably, not a single one of these witnesses' testimony was in any wise applicable to Capone.

REPLY TO PAGE 7:

Respondent says: "In connection with investigations that were being conducted by the authorities Mr. Maguire, in Buchalter's presence, advised Rubin not to become a fugitive from justice (R. 1761). Buchalter disagreed and told Mr. Maguire that, 'if witnesses are not available investigations collapse' (R. 1762; 289 N. Y. at p. 189)."

The record shows, however, that this alleged statement was made in the abstract and was totally disconnected from the Rosen case. Maguire's testimony on this point is fully quoted on pages 2 to 6 of petitioners' MEMORANDUM. Moreover, the record discloses that Buchalter did not disagree with Mr. Maguire's advice. Maguire testified (R. 1775):

> "Q. He never said to you, in your presence, or to Rubin, in your presence, 'Get out of the jurisdiction!' A. He did not."

REPLY TO PAGES 9 AND 10:

At the bottom of page 9, running over to page 10, and in footnote 5 on page 10, respondent says that the witness Rubin denied he knew anything about the Rosen case because of "overpowering fear". The Trial Court refused to permit petitioners' counsel to see the actual statement made by Rubin to McCarthy, and made available only clipped excerpts therefrom. But the Trial Judge gave his interpretation of what was contained in the rest of this statement which we have never seen. He said (R. 2378): "The witness also failed in any way to implicate Lepke. On the other hand he did go out of his way to give assurance that if he could he would. • • • The witness did name two men as probably active participants in the killing, whose names are included in this indictment as probable killers." The Judge did not disclose the names of these two men to counsel.

Thus Rubin was willing to charge two others named in this indictment with the crime, even though he testified (R. 2384):

> "Q. You don't know anything about the Rosen murder at all? A. No."
>
> • • • •
>
> "Q. I am giving you immunity. A. I don't need immunity. I was never taken into anybody's confidence on any murder cases. That was always one thing. Where I got that other stuff from was from general conversation."

If Rubin was really overpowered by fear at that time, as now claimed, why did he accuse as "*probably active participants*", two persons (unknown to us) who are named in this same indictment and who were allegedly criminal associates of petitioners?

REPLY TO PAGE 13:

In footnote 9 on this page, Respondent has distorted the fact. Petitioners had nothing to do with the printing of the Record, and certainly did not seek to omit the affidavits mentioned. But the Respondent has wilfully omitted from the quotation supplied in the footnote, the very next sentence in the same paragraph of the Buchalter petition and brief from which he has taken the excerpt. The purpose of the omission is obvious. Respondent's insinuation is destroyed by the sentence he omitted, which we quote (Buchalter Petition and supporting brief, for certiorari, p. 50):

> "All that petitioner's counsel said (Affidavit of Hyman Barshay, par. 6) was that he did not object to so much of the motion as asked that a special jury be summoned."

And that sentence was strictly accurate.

REPLY TO PAGE 14:

Respondent says, speaking of an affidavit by counsel for petitioner Buchalter: "After quoting many newspaper clippings his counsel admitted under oath that the district attorney was not responsible for the notoriety. * * *" But we quote the very next sentence of the affidavit, as follows (R. 108):

> "But the fact is that they were circulated to the public with the apparent approval of the officials quoted."

In another part of the affidavit, after quoting a newspaper statement that Buchalter was reported bargaining with the District Attorney for his life, counsel said (R. 86-87):

> "It is a fact, which the authorities should be very willing to acknowledge as such, that the defendant has not conferred with them, that there has been no discussion of a bargain between the defendant's attorneys or other representatives of the defendant with the District Attorney of Kings County or any of his associates or employees."

This acknowledgement was *never* made.

REPLY TO PAGES 15-17:

In respondent's reference to the statement by Buchalter's counsel that "We are as ready as we will ever be and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute," respondent omits the context preceding it, which is most material and is fully quoted on page 11 of petitioners' MEMORANDUM.

The suggestion in the footnote on page 17 (#12) that "it is significant that Shapiro was not called as a witness" is misleading. It was never said by Buchalter's counsel that Shapiro was wanted as a *witness*.

THE JURY PANEL

REPLY TO PAGES 18 and 19:

Respondent at the foot of page 18 quotes a statement of the Court, "Should a new panel be desired, counsel for all the defendants should agree on that" (V. 45), and continues on page 19 with a statement that petitioners did not accept the Court's offer to discharge the panel. The inference of his statement is that we are *now*, for the first time, complaining about the prejudice. Respondent fails, however, to state the preliminary discussion with respect to the Court's offer to draw a new panel, in which petitioners urged that any new panel would be infected with the same prejudice, and in which the Court admitted the newspaper articles would be remembered "a year from

now." (See petitioners' MEMORANDUM, Item 4, pp. 7-10). The Court stated that he "would not entertain any application for the drawing of additional talesmen as long as these articles are published." The fact is, however, that the MIRROR articles continued until September 28th—two weeks after the commencement of the trial.

A complete answer to this contention of the District Attorney is found in the fact that in reality a new and additional panel of 100 talesmen was drawn in order to complete the jury. In this second panel were the jurymen Rorke, Links, Coleman, Butt (who was excused after having been drawn), and Andrews. This panel appeared before the court on October 13th (V. 1556), and the very first person examined—Harry M. Ryan (V. 1556 et seq.)—was challenged for cause for the reason that he had followed the case closely in the newspapers and could not give a fair and impartial verdict. The challenge was sustained (V. 1577-9). The next talesman to be examined—Alfred Elfendein—also had read the articles in the DAILY MIRROR, and expressed prejudice. He was challenged for cause, which was sustained (V. 1579; 1612-14).

Besides these two challenges for cause because of bias against petitioners there were ten additional challenges for cause—Wolff (V. 1682-94, 1698-1712), Aldrich (V. 1694-8), Marcus*, Hinze (V. 1790-4), Gierie (V. 1818-9, 1822-3), Dempsey (V. 1813, 1819-22), Long (V. 1824-27), Stites (V. 1862-4, 1876-9), Yakel (V. 1940-2) and Corning (V. 1945-58)—which were sustained against those talesmen who appeared, of the 100 summoned. As to another, Jacobus, the Court overruled the challenge and petitioners were compelled to exercise a peremptory challenge. Eight peremptory challenges were exercised: Koehler (V. 1573-7, 1596-1600, 1601, 1614-18), Pagnod (V. 1713-22, 1729-33),

---

* Not in index (V. 1769-71)

Jacobus (V. 1828-30, 1831, 1834-9, 1848-59), Dunphy (V. 1830-2, 1839-48), Fisher (V. 1891-99), Roberts*, Harris** and Madigan***.

In any event, how could counsel, on August 4th, forecast what the answers of these so-called special talesmen would be, and how much prejudice would be displayed by them?

THE TRIAL JURY

REPLY TO PAGES 19 AND 20:

Respondent states that the first nine jurors were pronounced "satisfactory to the defendants," and emphasizes that this was done "when their peremptory challenges had not yet been exhausted"; and that "it is inconceivable that if there were the slightest doubt about the fairness of any one of these jurors that counsel would have deliberately refrained from excusing him peremptorily." By reason of the refusal to change the venue, and the propaganda, petitioners were compelled, in proceeding to trial, either to accept the least undesirable of the men called, or, upon exhaustion of their 30 peremptory challenges, to accept the next twelve men against whom, despite apparent cause, their challenge would not be sustained. The choice was not of satisfactory jurors, but of those least prejudiced against petitioners. The argument advanced by the Respondent has no merit. If carried to its logical conclusion, petitioners would have exhausted the thirty peremptory challenges and might then have been compelled to accept 12 persons of the type of Rorke, Links and Coleman. Of course the result would have been the

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* Not in index (V. 1758-61; 1766-69; 1771-76)

** Not in index (V. 1653-4; 1663-80).

*** Not in index (V. 1630-40).

same; but counsel should not be criticized for their optimism.

Respondent implies that the word "satisfactory" as used by counsel means that the jurors were really satisfactory to the defense. This is a dissimulation. In reality, the word "satisfactory" as used in trial practice in New York means merely that counsel has no legal ground for challenge and does not desire to exhaust one of his few and valuable peremptory challenges.

An analysis of the difficulty in procuring the jury completely refutes Respondent's contention. The selection of the Jury commenced September 15th. The first juror was not accepted until September 24th.

(In the following analysis the numerals in parentheses refer to the order in which talesmen were called.)

(1st juror selected Sep. 24)

Up to the point of 1st juror, 18 talesmen had been examined:
12 were excused for cause (1, 2, 3, 5, 6, 7, 11, 12, 13, 14, 16, 17)
3 peremptorily by defendant (4, 8, 18)
1 excused by court (9)
2 peremptorily by People (10, 15)

Total peremptory challenges—Defendants 3
People 2

(2nd juror selected Oct. 2)

Between 1st and 2nd jurors, 22 talesmen had been examined:
11 were excused for cause (20, 21, 23, 25, 28, 29, 31, 32, 33, 36, 37)
3 peremptorily by defendant (30, 34, 38)
4 excused by court (22; 2 men following 36, 39)
4 peremptorily by People (24, 26, 27, 35)

Total peremptory challenges—Defendants 6
People 6

(3rd juror selected Oct. 6)	Between 2nd and 3rd jurors, 9 talesmen were examined:
	2 were excused for cause (46, 49)
	4 peremptorily by defendant (41, 44, 45, 47)
	1 excused by court (42)
	2 peremptorily by People (43, 48)
	Total peremptory challenges—Defendants 10
	People 8
(4th juror selected Oct. 7)	Between 3rd and 4th jurors, 9 talesmen were examined:
	4 were excused for cause (51, 57, 58, 59)
	3 peremptorily by defendant (53, 54, 56)
	2 excused by the Court (52, 55)
	Total peremptory challenges—Defendants 13
	People 8
(5th juror selected Oct. 7)	Between 4th and 5th jurors, 10 talesmen were examined:
	6 were excused for cause (62, 64, 65, 66, 67, 68)
	2 peremptorily by defendant (69, 70)
	2 peremptorily by People (61, 63)
	Total peremptory challenges—Defendants 15
	People 10
(6th juror selected Oct. 8)	Between 5th and 6th jurors, 2 talesmen were examined:
	2 were excused for cause (72, 73)
	Total peremptory challenges—Defendants 15
	People 10
(7th juror selected Oct. 8)	Between 6th and 7th jurors, 5 talesmen were examined:
	1 was excused for cause (78)
	4 peremptorily by defendant (75, 76, 77, 79)
	Total peremptory challenges—Defendants 19
	People 10

(8th juror selected Oct. 8)	Betwen 7th and 8th jurors (8th was Stoler who was subsequently excused on *Oct. 16th*) 3 talesmen were examined:
	1 was excused for cause (81)
	1 excused by the Court
	1 peremptorily by People (83)
	Total peremptory challenges—Defendants 19
	People 11
(9th juror —later 8th— Oct. 9)	Between 8th and 9th jurors (9th later became 8th) 7 talesmen were examined:
	3 excused for cause (87, 90, 91)
	2 peremptorily by defendant (86, 89)
	1 excused by the court (85)
	1 peremptorily by the People (88)
	Total peremptory challenges—Defendants 21
	People 12
(10th juror— later 9th— selected Oct. 14th)	Between 9th (later 8th) and 10th (Butt) (later 9th) jurors, 16 talesmen were examined:
	12 excused for cause (93, 94, 95, 96, 97, 98, 100, 101,* 1, 2, 4, 6, 7)
	2 peremptorily by defendant (3, 5)
	1 peremptorily by the People (99)
	Total peremptory challenges—Defendants 23
	People 13
(11th juror— later 9th— selected Oct. 16)	Between 10th (Butt—later excused) (later 9th) and 11th (later 9th) 19 talesmen called:
	8 were excused for cause (10, 11, 14, 17, 19, 21, 22, 24)
	5 peremptorily by defendant (9, 12, 16, 25, 26)
	2 excused by the court (woman following 11, 20)
	4 peremptorily by the People (13, 15, 18, 23)
	Total peremptory challenges—Defendants 28
	People 17

* This was the last talesman of the original panel; numerals following refer to the second panel

(11th juror—later 10th—selected Oct. 16)	Between 11th (later 9th) and 11th (Rorke, later 10th) 3 talesmen were called: 1 was excused for cause (28) 2 peremptorily by defendant (29, 30)
	Total peremptory challenges—Defendants 30 People 17
(12th juror—later 11th—selected Oct. 17)	Between 11th (Rorke, later 10th) and 12th (Links, later 11th) 5 talesmen were examined: 4 were excused for cause (32, 34, 35, 36) 1 peremptorily by the People (33)
	Total peremptory challenges—Defendants 30 People 18
(12th juror selected Oct. 17)	No talesmen examined between Links and Coleman the last two jurors.

Analysis of the use of the 30 peremptory challenges afforded to the petitioners:

10—Judge refused to excuse 10 talesmen on challenges for cause, compelling exercise of 10 peremptory challenges—Hamilton (V. 152-181); Strongin (V. 669-695); Nagle (V. 837-868); Groden (V. 868-904); Batterson (V. 926-954); Flanagan (V. 1403-21; 1435-7; 1448-50; 1454); Koehler(V. 1573-77); 1596-1600; 1601-2; 1614-18); Jacobus (V. 1828-30); 1831; 1832-9; 1848-59); Dunphy (1830-1; 1831-2; 1839-48; 1857-9);

11—against talesmen deemed by counsel prejudiced, but who said their impressions would not affect their deliberations—Camachi (V. 338-40); Jones (V. 568, 570, 571, 573); Finn (V. 748, 751); Ryder (V. 1065-6; 1075-6; 1077-8); Butler (V. 1438-9); Madigan (V. 1630, 1636); Harris (V. 1663-4, 1666); Pagnod

(V. 1730); Roberts (V. 1772, 1776); Pape (V. 99-100);

1—Gillespie—a friend of Head of Indictment Bureau and owner of building where body of wife of notorious gangster was found whose death he attributed to Murder, Inc. (See Main Brief, footnote on p. 26).

8—No reason noted.

30—Total.

Approximately 140 talesmen were examined over a period of five weeks. They were dealt with in the following manner:

Defendants' peremptories	30
People's peremptories	18
Jury (12 and 2 alternates)	14
Sustained for cause*	69
Alternates excused	9
	140

It will be noted that only eight of petitioners' peremptory challenges were exercised without a reason appearing. Of the jurymen who actually sat upon the case—Day (V. 1113) read about the case, but had not since he was called; Gill (V. 1208) read generally about O'Dwyer on crime, and discussed the case in a casual way with a superior; Edgehill (V. 1865) read, but not in detail. Links (V. 1966, 1971-2) had formed no "extraordinary impression"; and Coleman (V. 1987) had read extensively. So that, in addition to Rorke there were five men who sat upon the jury who admitted they had in some way become familiar with the instant case.

* Three names are not in the index to Vols. VI, VII and VIII.

As a last word, the Court in its charge stated to this jury that "the fundamental statutory purpose of the special jury is to get men who are above the average of both intelligence and character." Counsel excepted to this definition and requested that the court advise the jury that "once they have been called, irrespective of their intellect, that they then become the same as any ordinary juryman, so that they don't get a sense of exaggerated ego about their actions." The Court refused so to do.

REPLY TO PAGES 20-23:

The simple answer to Respondent's query, "why did not counsel use one of their twenty-seven peremptorily [sic] challenges" against the juror Stevens? has already been given. He was the nineteenth talesman called, and by comparison with those preceding him, seemed least unsatisfactory.

THE LAST THREE JURORS

REPLY TO PAGES 23-26:

Respondent contends that petitioners could have challenged Rorke peremptorily, instead of using the last peremptory challenge against Andrews. Respondent, ignoring the Record, asserts that Andrews' "fairness was at no time questioned." It is said to be evident "that petitioners with full and unrestricted power to challenge Rorke chose to have him as a juror."

This sophistry is illuminating. Andrews* had been summoned to the jury box before Rorke. Andrews had read about the defendants in the "Sun" and "Telegram" (V. 1908-9). When questioned by the prosecutor, Andrews had failed to disclose his close and intimate friendship with a

* His name does not appear in the index to the record of the voir dire.

number of police officers. He excused this failure by saying it had slipped his mind for the moment.

He entertained these men at his home and went out with them socially. When asked, "has this case ever been mentioned during the course of your friendship and being with those gentlemen?" he answered, "*No, I don't believe so*" (V. 1914-15).

But since he asserted that he had formed no opinion, basis for a challenge for cause was lacking. Petitioners' trial counsel would have been guileless indeed had they voluntarily accepted Andrews as a juror. Moreover, none could have anticipated that the Court would overrule the challenge for cause against Rorke when no peremptory challenges were left to petitioners. In fact, this, in substance, was specifically called to the attention of the Court by one of petitioner's counsel, who cited *People v. McQuade*, 110 N. Y. 284, as the basis for the exception (V. 1929).

On pages 25-26 respondent says that the jurors Links and Coleman were fair. We answer this on page 25 of petitioners' main brief.

On page 24, Respondent states that the talesman Rorke was challenged by the defense for "'implied bias' (V. 1922). Mr. Rorke was not disqualified under any of the grounds specified by statute as constituting implied bias," referring to the N. Y. Code of Criminal Procedure, 377, which provides that "a juror can only be challenged for implied bias for eight specific reasons, 'and for no other'," set forth in the appendix. This assertion is reiterated on pages 39 and 40 of Respondent's brief. The Prosecutor would have this Court believe that the juror Rorke was challenged only for "implied bias," because of his relationship with the police inspector. The baseless inference is suggested, by the quotation on page 39 from the Per Curiam opinion of the Court of Appeals, that that

Court actually passed on this challenge, since it was said to be for "implied bias." But of course the challenge was not made and could not have been made on that ground. The truth is that from the outset of this trial the Court, the Prosecutor and all counsel mislabelled challenges as for implied bias when actual bias was really meant. Actually, there was not a single challenge for implied bias (as defined by statute) throughout the voir dire. But on challenges for actual bias, frequently the word "implied" was inadvertently used instead of "actual."(See V. 554, 617, 725, 728, 862, 867, 908, 953, 1029, 1186, 1324, 1451, 1474, 1518, 1612, 1711, 1747, 1823, 1836, 1840, 1922, 1944). Finally, the Court, on this very challenge against Rorke, stated (V. 1930):

> "The Court viewed the challenge as being for all purposes of bias, and consequently considered the point of alleged bias that developed."

In so ruling, the Court said it "believes its decisions to be correct and that they will stand up on appeal." This statement by the Court was in line with similar statements assuming there would be a conviction and appeal (R. 3875; 3967; 3990).

THE COURT'S CONDUCT IN THE SELECTION OF THE JURY

REPLY TO PAGES 25-27:

In an effort to controvert our contention that the Judge bludgeoned the talesmen into abjuring prejudice, Respondent cites what the Trial Judge said about giving defense abundant latitude (at the beginning of the trial, V. 49), and then says that the Judge took precautions against prejudice after the jury had been selected (V. 1981-82). Respondent then makes the bald statement that "No greater latitude could have been given defense counsel than was allowed in this case." The prosecutor is en-

tirely silent about the innumerable instances noted in petitioners' main brief, showing the contrary to be the fact. It is no answer to our contention to say merely that over four weeks were consumed in questioning jurors, and that "the transcript is over 2000 pages." That indicates, as is the fact, that prejudice was indeed rampant.

REPLYING TO PAGE 28:

Respondent argues that the Trial Court was fair because Mr. Butt, the juror who developed a prejudice after he had been seated in the box, was excused by the Court, who said: "This is in fairness to the defense."

However, the Court was ready to have the oath administered to the jury after he had asked each juror individually whether he had followed his instructions and had received from each the answer, "I have" (V. 1981-2). This answer was given by Mr. Butt, as by each other juror. Were it not for the fact that one of the counsel for petitioners then suggested that the Court ask whether anything had happened which in any way would change any of the answers the jurors had given when examined, the oath would have been administered. When that question was asked, Mr. Butt disclosed to the Court his prejudice, leaving the Court no choice but to excuse him as a juryman. Yet the Court seemed to think it was a *favor* to the defense.

It needed a forceful character to acknowledge this prejudice after he had sworn when he qualified as a special juror that he would not be influenced, and again when he was examined as a juror in this case. How many of the remaining jurors lacked the moral strength to express their true opinion in view of their previous oaths is the question that persists. True it is that had it not been for the question which petitioners' counsel asked the Court to propound, Butt would have remained on this jury.

REPLY TO PAGES 40 AND 49:

Respondent states that the holding of the Court of Appeals by virtue of the Judiciary Law that "the rulings of the Trial Court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict. Hence, Respondent says, a false issue is raised respecting whether the decision of the Court of Appeals deprived petitioners of "the right to question the fairness and impartiality of the jury empaneled." The true contention of the petitioners appears on pages 49-53 of the main brief and will not be reiterated.

At page 48, Respondent cites the case of *Stroud* v. *U. S.*, 251 U. S. 15, 20. This case, however, supports the contention of petitioners that the overruling of a challenge for bias, even though the talesman did not sit upon the jury, is reviewable. In that case the defendant was entitled to 20 peremptory challenges and was overruled on one challenge for cause, necessitating the exercise of one of his peremptory challenges. The Court, however, granted him 22 peremptory challenges, which were two more than the number allowed by statute. This Court held at page 21:

> "Thus his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground."

In addition, the Court there had excluded from the jury all persons residing within Leavenworth County, where appellant claimed prejudice existed on account of comments in the public press. In the instant case, the Court did not grant any additional challenges, but in fact over-

ruled ten proper challenges for cause. Nor did the Court in the case at bar exclude the citizens of Kings County, where the propaganda was circulated. The jury was exclusively composed of residents of Kings County.

SUPPRESSION OF EVIDENCE

REPLY TO PAGES 29-33:

On page 30 respondent quotes the Trial Judge's statement, regarding these records, as follows (R. 1882):

> "If you wish you can have it marked for identification and then offer it in evidence, and if there is an objection, the Court will rule."

Not only was this not an expression of willingness to receive the reports in evidence, but this incident took place on *November 10* when the records were not in Court and could not even be marked for identification (R. 2141, 1882-3. Further discussion ceased until *November 12* when the records *were* in Court (R. 2141). Then the Court refused to allow petitioners' counsel to examine them and refused even to look at them himself (R. 2140-2153).

The record shows (R. 2147):

> "Mr. Wegman: We want to see these records for two reasons: First, because in order to lay a foundation we ought to be able to cross-examine these witnesses as to places and times indicated by these records and, secondly, to call the police officers who witnessed—"

(R. 2152-3):

> "The Court: The Court is not going to say any more because I do not propose to have any record that will cause an appellate court to think that that is what activates my ruling, but I am telling you it is just arrant hearsay. *You are not going to be permitted to have the inspection and I am*

not going to hear anything more." (Italics supplied.)

• • • •

"Mr. Barshay: First, your Honor, I do not know of any law which makes these police records private records. My understanding is that they are public records and I cite to you as authority the case I tried, People against Behan, where he was indicted for stealing public records, and I contended under the law there that they were private records, being under the same impression then as your Honor is now. I was overruled by the Court and the indictment was sustained and we had to go to the jury on the question of fact. Now, second, I do not know which police officers, your Honor, to subpoena because unless I know which police officer said he followed him and reported to his chief that he did follow him and said in that report whom he saw the defendant Buchalter with, at what place, at what time, at what date, I am in no position to subpoena the entire Police Department of the City of New York. Third, under the law, the law presumes that an officer of the City of New York does his duty honestly and faithfully and not that he does it by hearsay and, if in Mr. Turkus' possession or in the Police Department's possession there is evidence which gives the lie to any witness offered in this court room, as a public duty he owes it not only to the defendants but to the community to produce it.

"Mr. Turkus: Nobody finds fault with that statement. There is another——

"The Court: The Court will permit no more post mortem.

"Mr. Barshay: I take exception.

"The Court: A long time back the Court made its ruling.

"Mr. Barshay: Exception."

All questions concerning the materiality of these reports would have been obviated had the Trial Judge ex-

amined them himself. Instead, he left it to the prosecutor alone to judge the import of the documents (R. 2146), accepting the District Attorney's statement of what they contained.* There is no merit in the suggestion that confidential information not relevant to the case would have been improperly revealed. The Court could have, as he did in relation to Rubin's statement to McCarthy (R. 2378-88), taken the precaution to prevent the revelation of confidential matter, and at the same time disclose to the defendants that portion of the reports which was material and relevant to the present case.

Replying to Mr. Turkus' contention on the trial, as quoted on page 31 of respondent's brief, that these were confidential reports, we point out that these reports were not private papers or notes of the District Attorney. They were subpoenaed from the Police Department. They were public records. Nor were they papers that were not admissible in evidence. These factors distinguish the case from *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, which concerned what the Court called "merely mnemonic instruments whereby the prosecutor may be better able to elicit evidence hereafter."

In the *Lemon* case, supra, the Court referred to *Rex* v. *Hallam*, 4 T. R. (Durnford & East) 691, decided in 1792, which it called the "point of departure" in any discussion of the subject. There the question was whether the defendant should have access to a report of a Board of

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*When the Judge examined pertinent documents, they were found to be material. For example, he made available to the defense, after demand and some dispute (R. 1218-1221), the Grand Jury testimony of the witness Bernstein. The Court found therein no contradictions of his testimony at the trial (R. 1222). But there were many which were of vital importance. It was found that before the Grand Jury, Bernstein had ascribed to one Strauss (who was executed between the time of the Grand Jury testimony and the time of this trial) many acts which at the trial he said were done by either petitioner Capone or petitioner Weiss. E.g., R. 721-2, cf. 1228-30; 729, cf. 1263-4; 1266-7; 715, cf. 1228. See also, Capone's Petition for Certiorari, p. 46.

Inquiry which had examined witnesses in India. The Court said: "The practice on common law indictments and on information on particular statutes shows it to be clear that this defendant is not entitled to inspect the evidence on which the prosecution is founded *till the hour of the trial.*"

Why should not the defense, in the interests of justice, have access to police reports which might be beneficial to their case? Why the secrecy? What is the public policy involved? It was suggested that lawyers, officers of the Court, might make use of information in the reports to help other criminals. The supposition is abhorrent and revolting. A state should not be permitted to value the secrecy of police records more than human life and liberty.

These reports were admissible in evidence (although hearsay at common law) by virtue of § 374-a of the New York Civil Practice Act, made applicable by the Code of Criminal Procedure, § 392. They are in the same category as hospital records, the introduction in evidence of which was held proper in *People* v. *Kohlmeyer*, 284 N. Y. 366, Cf., *Nardone* v. *U. S.*, 308 U. S. 338, 340, where the Court said: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land."

We submit, however, that the question whether these reports were admissible under the New York statutes is not necessarily determinative of the question before this Court. The concept of due process would require that they be admitted anyhow, and that any State law that would prevent defendants from having access thereto would violate the Federal Constitution.

The Court of Appeals in ruling on the suppression of this evidence (Resp. Br. p. 32-33) *did not say the reports*

were confidential, did not say they were irrelevant, did not say they were inadmissible as hearsay, or for any other reason, but held merely that they were inconclusive. That ruling was made without giving petitioners any opportunity to examine the reports so that the materiality might have been demonstrated.

SHOW OF FORCE

REPLY TO PAGES 33-37:

On pages 33 and 34, the respondent quotes from the summation of Buchalter's counsel (R. 3546-7; 3584-5; 3589) and says: "the stubborn fact remains that his disclosures far outweighed the conjectural prejudice which petitioners claim arose from the fact that they were brought to and from the courtroom in manacles." That same excuse was offered for the newspaper publicity. Respondent thus seeks to excuse the prejudicial effect of both the publicity and the manacling by pointing to the summation of counsel, which was a tactic of desperation made necessary by the exigencies of the situation created by that very publicity and manacling. Cf. case of *Edward Guerin*, 23 Cohen's Criminal Appeal Cases, 39.

On pages 36 and 37, respondent characterizes as "a figment of their imagination" petitioners' argument that the surrounding of prosecution witnesses by police and court officers was an "insidious suggestion to the jury" that these witnesses needed protection. The district attorney argues that this was no more than the usual procedure. He somehow overlooks the fact that when the defense objected to this show of force, the prosecutor asked (R. 687):

> "Is the objection to the protection of the witness?"

PROSECUTOR'S SUMMATION AND THE COURT'S CHARGE TO THE JURY

REPLY TO PAGES 37-38:

Petitioners join in respondent's request that this Court read the summations of all counsel, portions of which are contained in petitioners' MEMORANDUM at pages 12-16. We invite particular comparison between the prosecutor's summation and the summation of Capone's counsel which immediately preceded it. The intemperate excesses of the prosecutor's summation, which the respondent calls "overforceful expression," were in sharp contrast to the calm analysis of the summation which the prosecutor attempted to answer.

It is difficult to understand the result below since, as Judge Loughran said (R. 4086):

> "*A majority of this court* is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument *may have unduly prejudiced the jury against the defendants.*" (Emphasis ours.)

On page 38 respondent quotes three brief excerpts out of a charge which covers over sixty pages of the record. These excerpts should be compared with those quoted on page 35 and pages 67-74 of petitioners' main brief. The objectionable and unfair material in the charge—e.g., "When rogues fall out" (R. 3903-4), "little white lies" (R.3898-9), the "time-table" episode (R. 3906-7; 3989-90), "segregating evidence" (R. 3903, 3909-10, 3914, 3916), cross-examination "hit or miss" (R. 3903), "disregard" Grand Jury testimony (R. 3899-3900), to expect recollection "is an unholy thing" (R. 3894), "sloppy police work" (R. 3955-6), and alibi charge (R. 3949),—did not merely indicate a lapse or mistake, for the charge had been carefully prepared, as the Judge himself stated (R. 3773).

Of course the Court paid lip service to the proprieties, but he made sure to vitiate all possible chance that the jury might decide the case fairly. It was no cure for the prejudicial conduct of the trial and the prejudice inherent in the charge that he told the jury not to be prejudiced—at the same time that he misled them.

The Court unconsciously exposed his state of mind while delivering the charge, when an exception was taken to that portion relating to a certain prosecution witness. He said (R. 3970):

> "The Court: Didn't I make a blanket charge covering all witnesses on that point? Yes, I did, distinctly.
>
> "Mr. Climenko: At some point your Honor did.
>
> "The Court: Yes, I did, and that covers a multitude of sins. * * *"

THE DEFENSE

REPLY TO PAGES 38-39:

Respondent's reference here to petitioners' failure to take the stand is a resort to the same tactics as were employed upon the trial. (See petitioners' main brief, pp. 62-63.)

On page 39 respondent says, "Capone offered no defense whatever." The view of Capone's counsel was and is that no defense was necessary. (See petitioner Capone's supplemental brief.)

REVIEW BY THE COURT OF APPEALS

REPLY TO PAGES 40-41:

Respondent quotes from Chief Judge Lehman's opinion, but does not quote (R. 4078): "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind."

Chief Judge Crane, for the New York Court of Appeals, said in *People* v. *Crum*, 272 N. Y. 348, 349-50:

> "The Constitution of this State in article VI, section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This,' said the court in *People* v. *Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did.' A review of the facts meaas that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.
>
> "A reading of this record causes me to hesitate. I am not convinced. I have a reasonable doubt which I shall attempt to explain and which, in my judgment, compels us to reverse this conviction and grant a new trial."

ARGUMENT

REPLY TO PAGE 51:

Respondent says that the charge fails to present any Federal question, and that the claim was not raised below. In *Green Bay &c. Company* v. *Patten Paper Company*, 172 U. S. 58, 67-68, this Court said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. * * * 'If it appear from the record, by clear and nec-

> essary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment, without deciding it, that will be sufficient.' *Powell* v. *Brunswick County*, 150 U. S. 433, 440; *Sayward* v. *Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226."

See also: *Honeyman* v. *Hanan*, 300 U. S. 14; *Whitney* v. *California*, 274 U. S. 357, 360-362; *Cissna* v. *Tennessee*, 246 U. S. 289, 293-294; *Mallinckrodt Chemical Works* v. *St. Louis*, 238 U. S. 41, 49; *San Jose Land & Water Company* v. *San Jose Ranch Co.*, 189 U. S. 177, 179-180; *Capital City Dairy Company* v. *Ohio*, 183 U. S. 238, 244; *Rector* v. *City Deposit Bank*, 200 U. S. 405, 412; *Dewey* v. *Des Moines*, 173 U. S. 193, 199.

The opinions of the Court of Appeals of New York, as well as the remittitur, show that the Federal question of a fair trial was directly involved. See also, petitioners' MEMORANDUM, pp. 1-2. In respect of the charge, in the Motion for Re-argument below, it was squarely claimed that there was a violation of "due process." The points were also made *at the trial itself*, although counsel did not specifically refer to the Fourteenth Amendment, because the Judge said he did not want the reasons for the exceptions assigned (R. 3969). See R. 3869-70, 3985-6, 3996-7. Similar objections and exceptions in respect of the conduct of the trial appear throughout the Record.

DENIAL OF SEPARATE TRIAL TO CAPONE

REPLY TO PAGES 48-49:

In support of the contention that the denial of this petitioner's motion for a separate trial does not raise a question of due process, Respondent cites the case of *Stilson* v. *United States*, 250 U. S. 583. That case, however, is

not applicable to, or determinative of the question here presented. It involved the question of whether, where a severance had been denied, a ruling in a federal case that a peremptory challenge by one defendant should apply to all co-defendants was a violation of the Sixth Amendment of the Federal Constitution; and it was held that such a ruling as to a peremptory challenge was not a violation of any constitutional right. It was not held, however, that the denial of a severance in a State Court does not constitute a denial of due process.

Here our claim of deprivation of due process arising from denial of severance is not based on Capone's being forced to join others in peremptory challenges. It is claimed that this is one of the integral parts of the complete pattern woven through the trial—all of which taken together precluded a fair consideration of the evidence against *him*.

In addition, the District Attorney has it appear that this motion for a severance was denied before the trial by another Judge. This motion was not so denied; it was denied *without prejudice to renewal before the Trial Court* (R. 31-54). It was this Trial Judge who denied the numerous motions for a severance, enumerated on page 17 of this petitioner's supplemental brief.

THE QUESTION BEFORE THIS COURT IS NOT ONE OF MERE ERROR BUT OF DENIAL OF DUE PROCESS

The District Attorney would confine the doctrine of due process to the specific facts of those cases which have been considered in this Court.

We do not ask the Court to extend the doctrine of due process beyond the real meaning of the law which it has announced. We recognize the rule stated in the opinion of Mr. Justice Holmes in *Rawlins* v. *Georgia*, 201 U. S. 638, 639, that

> "If the State Constitution and laws as construed by the State Court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

In this test lies the distinction between error and deprivation of due process. What we claim in this case is that New York State could not by its constitution or by its statutes enacted pursuant to the constitution, authorize what happened in this case.

No state constitutional provision or other law could, within the limits of the Fourteenth Amendment, authorize a departure from those elements of fundamental fairness essential to due process. No state enactment could authorize a prosecutor to say to a jury that he was sure the defendants were guilty and that in reaching its verdict the jury should rely upon his good faith and integrity. That would make the issue depend not upon the evidence, but on faith in the honesty of public officials. That sort of thing has often been condemned. Convictions have been reversed because the district attorney called the defendant a "cold-blooded killer" (*Commonwealth* v. *Capalla* (1936), 322 Pa. 200, 205-206), and where he declared in effect that he would not prosecute men concerning whose innocence he had the slightest doubt (*People* v. *O'Regan* (1927), 221 App. Div. 311, 338).

See also *Commonwealth* v. *Ronello* (1916), 251 Pa. 329, 339; *People* v. *Black* (1925), 317 Ill. 603, 619; *People* v. *Rothe* (1934), 358 Ill. 52, 56; *People* v. *DeMartine* (1923), 205 App. Div. 80, 84; *People* v. *Bigg* (1941), 297 Mich. 58, 68.

Any such hypothetical statute would violate the concept of due process. Yet this is exactly what the District At-

torney did in this case. Said Prosecutor Turkus (these excerpts are from different parts of his summation):

> "A hopeless case—if they did not know it when they got their retainer, there is no lawyer in the court room that does not know it, when all of the evidence was in, that there are three guilty men at this Bar of justice" (R. 3804).
>
> "Do you think that when the investigation went on Judge O'Dwyer sat down, and out of seven million people in New York City, or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt?" (R. 3807).
>
> "Don't let anybody insidiously try to get you thinking about punishment. That is not your responsibility. It is their responsibility, for if they had not been three of the killers of Rosen, you would not have them sitting here" (R. 3819-3820).
>
> "Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it" (R. 3821).
>
> "Is the pay I get from the County of Kings tainted, in comparison to what pay they have gotten from Lepke, Capone and Weiss?" (R. 3803).

The defense had taken the position that Bernstein and the other criminals had concocted their stories. The District Attorney assumed that this charged *his Office* with a "frame-up" and then presented the issue of his own integrity, saying (R. 3803-3804):

> "Is there a million dollars that would make me, a young man with the blood of life going through my veins, understanding all that it means to live and breathe—is there a million dollars that would make me frame the three of them? * * * these lawyers * * * Think of it, accusing Judge O'Dwyer and Burt Turkus and Sol Klein and Lewis Joseph and every law enforcement agent that had something to do with this case, of murder, of an attempt to kill them. That is what it is, if one-fiftieth of their insinuations are true as to the manufacturing of this case, sticking witnesses together to compare notes, and framing them. If one-fiftieth is true, take O'Dwyer, Turkus and the rest of us, tar and feather us, and run us out of town on a rail, and put us in jail. That is where we belong—not here representing the People of the State of New York." (R. 3803-3804).

Criticism was made by the District Attorney that petitioners rely upon decisions such as *Moore* v. *Dempsey*, 261 U. S. 86. He claims that such cases are not apposite because no physical violence was directed toward the defendants or toward the jury. But "* * * violence is not the only form of force; it comes in subtle disguises." Petitioners did not coin the phrase that the Mirror articles were "raising havoc with the jurors." That is the language of the Trial Judge after twenty-four prospective jurors had been examined (V. 460). Havoc raised with the jury panel is destructive of due process irrespective of the source of the contamination; it is the fact of the havoc that matters, not the means by which it was brought about.

The District Attorney argues that formalisms were uttered by the Judge which properly stated the law; that the jury were told that they must consider the facts in reaching their decision. Unfortunately, however, the passion and prejudice instilled during the course of a long trial and by the major portions of the charge cannot be

exercised by general, placid passages in the charge. The mischief remains.

The argument of the District Attorney that the acts of the prosecutor may be ignored is no different from the contention of the State in *Mooney* v. *Holohan*, 294 U. S. 103, that acts of the prosecutor cannot in themselves constitute a denial of due process. This Court, however, has held that the prosecutor is part of the machinery of justice of the State. The prosecutor in this case permitted his name to be used without objection or action on his part, without disclaimer or public denial, in articles which raised havoc with the jury, and in others upon which reliance was placed in the court room by the Court. It was therefore in part his action, and hence the State's action, which prevented an impartial jury from being selected. It was the State, acting through the prosecutor and the Court, which failed to provide the corrective process required by the Fourteenth Amendment. The Court threw up its hands, declared itself to be wholly impotent in the circumstances; and, without any rebuke to the newspapers or to the District Attorney, permitted the trial to proceed. Cf. V. 542, 837.

There was a newspaper story on May 16, 1941, the day Buchalter was arraigned (pages 11-12, petitioners' Main Brief) to the effect that Buchalter was trying to buy his life by making confessions. Denials by Buchalter (R. 86-87) were of no avail, but a public disclaimer by the District Attorney might have stifled any such publicity. Despite request therefor, there was no disavowal (R. 91, 86-87).

When denial of due process has been the issue, this Court has examined and made its own determination of the facts, even though they were disputed, and even though those facts had been found against the petitioners. In *Chambers* v. *Florida*, 309 U. S. 227, the Court found a confession had been extorted even though the jury had

found against the petitioners on that issue and the courts of the State had sustained the findings; so also in *Ward* v. *Texas*, 316 U. S. 547, 550. In *Powell* v. *Alabama*, 287 U. S. 45, this Court held there was no adequate representation by counsel, despite the contrary finding of the State Court. In *Lisenba* v. *California*, 314 U. S. 219, the Court examined the facts, and it did likewise in *Avery* v. *Alabama*, 308 U. S. 444.

In these cases as well as others, this Court weighed the facts, not concerning the guilt or innocence of the petitioners, but of the denial of due process. In some it held that due process had been denied. In others the holding was that the defendants' constitutional rights had not been infringed. In all instances, this Court appraised the actualities—the substance and not the form of what took place at the trial.

Just what is the substance of the right guaranteed under the Fourteenth Amendment? As this Court said through Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 325:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence."

The substance of due process is a philosophy of justice and a conception of a way of life. It is "of the very essence of a scheme of ordered liberty." (*Palko* v. *Connecticut*, supra.)

Surely it is a part of such a scheme that a criminal trial is not for the purpose of finding that the defendant is guilty, but of finding *whether* he is guilty. Where, as in this case, the jury panel was obviously subjected to and influenced by propaganda which the Court and the prosecutor made,

no attempt to stop, where the selection of the jury was obviously prejudicial to the petitioners, where acts of the Judge and acts of the prosecutor were directed to obtaining a conviction irrespective of the means which might be employed, one cannot say that there was an investigation of the guilt or innocence of these petitioners and therefore a trial by reason.

What is the State's obligation under the Fourteenth Amendment? The State is charged with the duty of providing a fair and impartial tribunal, prepared calmly and dispassionately to appraise the facts and only the facts bearing upon the guilt or innocence of the persons charged with crime. That tribual does not consist of the Judge alone or of the jury alone. Judge, jury, prosecutor and defense counsel are all part of that tribunal. See *Johnson* v. *Zerbst*, 304 U. S. 458. The Judge must rule impartially and fairly. The jury must be unprejudiced. The prosecutor may not use his position as part of the tribunal and as the representative of the State in a manner so as improperly to influence or to impose upon the jury. By the same token, the defendants are entitled to present their defense by counsel. The mere fact that they are represented by counsel is not enough. Counsel should be entitled to cross-examine witnesses fully and to reveal the truth by showing that witnesses are testifying falsely. Destruction of the prosecution's case is as much a defense as the production of affirmative evidence to combat the accusation. The persistent, continuous and uniform efforts on the part of the Court in this case to destroy the function of defense counsel by bolstering witnesses whose perjury was revealed by cross-examination, by repression of counsel, and disparagement of their argument to the jury upon the facts, was in effect a deprivation of the right of counsel. What purpose is there in providing a defendant with the right to counsel if a court is permitted to tell

the jury that they are not to be "misled" by counsel's proper argument?

We do not urge that casual comment by a court, or occasional expression of opinion on some fact constitutes bias or partiality. A different view should be taken when there is a uniform, persistent course of conduct by which every factor favorable to the prosecution is emphasized and stressed by the Court, where every factor damaging to the prosecution is minimized, excused and condoned. In such a case it would be ignoring actualities to say that there has been a fair and impartial tribunal.

The District Attorney's admission that the trial was not "faultless" is a masterpiece of understatement. He argues that the matters complained of were mere irregularities and errors solely within the purview of the State courts and not cognizable in this Court. The difference between mere error and denial of due process, we submit, lies in the measuring rod and the subject matter which is being measured. Error is measured by the application of State law. A State may provide the kind of tribunal before which the defendant is to be tried. It may be a Judge sitting alone or it may consist of a Judge and a jury. The State may prescribe the rules of substantive law by which conduct is to be judged. A State may also prescribe the rules of evidence which govern the trial. The question whether the rules have been adhered to is one for the State Court to determine. A departure from these rules, whether it be a statute of the Legislature or law as announced by the courts, is error with which this Court is not concerned.

However, if a State law is obnoxious to the Fourteenth Amendment, it cannot stand. This Court has recognized that it is not only the law as written by the Legislature which must be measured by that Amendment, but the law in action. The law which is measured in any specific case by the yardstick of the Constitution is not the statute

enacted by the Legislature alone. It is the statute as it is construed by the Court, and as it is administered in the trial by the Court, by the District Attorney, by the jury Commissioners or by the other agencies of the State. As this Court said in *Spies* v. *Illinois*, 123 U. S. 131, 170, it will consider the processes by which a person is convicted of crime

> "to see if in the actual administration of the rule of the statute by the Court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated."

The events which improperly influenced the jury, the actions of a biased judge, and the efforts of an overzealous prosecutor are therefore not mere errors. The Court of Appeals of the State of New York (despite vigorous dissenting opinions) has held that there is no prejudicial error in the record. Therefore, according to the laws of the State of New York, what happened at this trial is proper. This Court is now asked whether the law in the State of New York which permitted these things to happen is consonant with the Constitution. To revert to the statement in *Rawlins* v. *Georgia*, 201 U. S. 638, 639, the question is "whether a State could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms."

We urge that the Constitution forbids a State to sanction a trial such as the one which resulted in the present judgment.

CONCLUSION

Decisions of this Court, particularly in recent years, have set a standard for the conduct of criminal trials in the United States. It is not difficult to observe a pattern which would bring our procedure in line with the traditions observed in England. In many of our courts we

find the same fairness and decorum that characterize English practice. The warnings issued by the Supreme Court in recent decisions apply to trials of other kinds. The practices that have heretofore been condemned, such as mob domination of a trial (*Moore* v. *Dempsey*, 261 U. S. 86), the manufacture or suppression of evidence (*Mooney* v. *Holohan*, 294 U. S. 103), the wringing of confessions by third degree methods (*Chambers* v. *Florida*, 309 U. S. 227; *Brown* v. *Mississippi*, 297 U. S. 278), the denial of full benefit of independent counsel to a defendant (*Powell* v. *Alabama*, 287 U. S. 45)—such things would be unthinkable in a criminal court in England. The condemnation of such practices by our Supreme Court have raised the standards of our State courts nearer to those of British Courts.

Can one conceive of a British Court permitting newspaper publicity which would poison prospective jurors against defendants? If that were done, would any judge say that he could do nothing about it? Would a prosecutor to whom are attributed in the press statements condemnatory of the defendants, fail to disavow any such statements?

Certainly, an English prosecutor would never inject the question of his own integrity into a case; would never use that as a basis for convicting men; would never suggest, in effect, that if the defendants were not guilty, he and his associates should be tarred and feathered and run out of town on a rail for trying to frame innocent men. A British barrister would never suggest, untruthfully, that criminal witnesses had not received immunity, and would later receive their just desserts. Certainly such a suggestion would not be followed by the release of the criminal witnesses.

This Court must either approve this trial as having met the standards of fairness implicit in due process of law, and thus permit trials of this kind to continue, or, by

stamping this as an unfair trial, set standards for future State trials which will more nearly approximate Anglo-Saxon traditions. If this Court fail to reverse this judgment, the result will be treated by over-zealous judges and by over-ambitious prosecutors all over the land as an approval of methods displayed in this record. Already, among lawyers in New York, this case is discounted as representing "Buchalter law," as opposed to the noble conception cut in stone on the facade of this building, "Equal Justice Under Law."

In a civilized country, even men reputed to have led evil lives are entitled to fair trials; and on fair trials—and scrupulously fair trials—rests the protection of the innocent. What happens to these individuals, whether they live a little longer or not, is not the important question from the point of view of public policy. After all, life at most is short. The individual is mortal. But the law is eternal, and what the Court does here will influence public policy in these United States as long as our Government endures.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1942

No. 610

EMANUEL WEISS,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER WEISS

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The weight of respondent's attack upon the petition is directed to the sufficiency of the record to support this Court's jurisdiction (see Respondent's Brief, pp. 38-39, 46-47), and this reply shall be confined to that contention.

Inherent in respondent's argument is the outmoded—indeed, never accepted—conception that constitutional privileges are preserved only by magic incantation couched in technical terms.

For that reason, the District Attorney would limit the terms of the remittitur to specific points argued in petitioner's brief presented to the New York Court of Appeals. No regard is thus given to the cumulative force of the points which were raised and which culminated in counsel's argument that

> "A fair trial according to law is a substantial right. Such a trial is more than an adherence to prescribed forms. Implied in that right is that the trial tribunal

> will respect the constitutional rights of the accused; that the fundamental rules of evidence shall not be departed from; that the prosecuting officer shall discharge his duties fairly and not seek a conviction by unfair means. Finally, it implies that the trial court's charge to the jury should be the safeguard of fairness and impartiality and the guarantee of judicial indifference between the contending parties. The trial here falls far short of these standards." *

On this theory, respondent also disregards the issue upon which the divergence arose in the Court of Appeals. For example, Lehman, Ch. J., said (Record 4073, 289 N. Y. 225):

> "The errors and defects in this case are, it seems clear to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights."

The learned Chief Justice reluctantly reached the conclusion that despite the errors and defects in the trial, the total result did not violate the fundamental right of due process. The dissenting Judges, however, stressed the element that the trial as a whole was not a fair one and thus brought within the orbit of consideration the question of due process.

At page 4090 of the Record (289 N. Y. 242), there is the statement of Judges Loughran and Desmond:

> "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

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* Weiss brief in the Court of Appeals, page 77, under heading "Conclusion."

And, finally, at pages 4090-4091 of the Record (289 N. Y. 243), the language of Judge Rippey is:

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. * * * In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt."

Can it therefore be gainsaid that, even if the explicit statement in the remittitur be disregarded, the question of fundamental fairness—due process under the Fourteenth Amendment as construed by this Court—was necessarily involved, considered and decided in this case by the Court of Appeals?*

We respectfully submit that the conclusion urged in petitioner's brief in the Court of Appeals presented an issue of due process not only in its specific reference to the "constitutional rights of the accused," but also in its

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* Moreover, in the brief presented by counsel for Buchalter, upon the motion for re-argument in the Court of Appeals, and which was adopted by counsel for Weiss (see R. 4120), the point that due process of law was denied to the defendants in contravention of the 14th Amendment of the Federal Constitution, was squarely raised. That brief is part of the record before this Court (R. 4113-4114; 4105).

The point was necessarily passed on because the Court of Appeals wrote an opinion Per Curiam on the motion for re-argument (289 N. Y. 244), which is likewise printed in the record (R. 4120-4121). Even under the authority of the cases cited in respondents' brief (page 47 bottom), it suffices if the Federal question is raised on the motion for re-argument and passed on.

description of the attributes of fair trial, and in its claim that "the trial here falls far short of these standards." This issue is not made less a part of the record, as the District Attorney seems to argue, because counsel failed to state in *haec verba* that the constitutional rights referred to were those under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This Court, in *Green Bay &c. Company* v. *Patten Paper Company*, 172 U. S. 58, 67-68, said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. * * * 'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' *Powell* v. *Brunswick County*, 150 U. S. 433, 440; *Saycard* v. *Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226."

Even in *Honeyman* v. *Hanan*, 300 U. S. 14, the very case mainly relied on by respondent, this Court, in distinguishing from that case the case of *Whitney* v. *California*, 274 U. S. 357, said (300 U. S. 23):

> "* * * The Court of Appeal of the State, as an addition to the record, entered an order stating that the question whether the California Criminal Syndicalism Act and its application were repugnant to the Fourteenth Amendment to the Federal Constitution was considered and passed upon by the court. While this court said that the record did not show that the defendant had raised or the state court had decided a federal question except as it appeared from that order, the record did disclose facts indicating the presence of the federal question which the order of the state court said was actually presented and decided, and accordingly jurisdiction was entertained * * *."

See also:

Whitney v. *California*, 274 U. S. 357, 360-362;
Cissna v. *Tennessee*, 246 U. S. 289, 293-294;
Mallinckrodt Works v. *St. Louis*, 238 U. S. 41, 49;
San Jose Land & Water Company v. *San Jose Ranch Co.*, 189 U. S. 177, 179-180.

And see the other cases cited by respondent (Brief, pp. 46-47), namely:

Capital City Dairy Company v. *Ohio*, 183 U. S. 238, 244;
Rector v. *City Deposit Bank*, 200 U. S. 405, 412;
Dewey v. *Des Moines*, 173 U. S. 193, 199.

We urge, therefore, that not only from the remittitur, but also from the brief submitted by petitioner Weiss to the Court of Appeals, and from the opinions written in that Court, it is manifest that the question of due process appears by "clear and necessary intendment" and that "the State Court could not have given judgment without deciding it."

Respectfully submitted,

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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1942

LOUIS CAPONE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

OPINIONS BELOW

The trial court's charge to the jury appears at R. 3871-3931. Otherwise, the County Court of Kings County of the State of New York wrote no opinion.

The opinions of the Court of Appeals of the State of New York (the State court of last resort) appear at R. 4030-4091 and are officially reported in 289 N. Y. 181. The Per Curiam Opinion of that court denying the motion for reargument is reported officially, 289 N. Y. 244.

JURISDICTION

The jurisdiction of this court is invoked under Section 344 (b), Title 28, U.S.C. (§237 of the Judicial Code, as amended).*

The judgment of the County Court of Kings County of the State of New York, entered on December 2, 1941, as affirmed by the Court of Appeals, by order dated October 30, 1942, is a final judgment not further appealable

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*Appendix, *infra*, pp. 23, 24.

in any court of the State of New York. The federal question herein presented and urged is based on the denial to petitioner of his rights to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.* This question was raised and passed upon in the courts below (R. 36-7; 42-3; 4098).

The petition for a writ of certiorari was filed in this court on January 4, 1943, and was denied by order filed on February 15, 1943. A petition for a rehearing was filed on March 10, 1943. On March 15, 1943, by order filed, the petition for a rehearing was granted, the order denying certiorari was vacated and the petition for a writ of certiorari to the County Court of Kings County, State of New York was granted.

STATEMENT

Petitioner was indicted in May, 1940, by the Kings County Grand Jury, New York State. Soon thereafter petitioner was in custody, as were all of the prosecution witnesses who testified to matters allegedly concerning him. There was no apparent valid reason for any delay of his trial and, at that time, the State of New York could have accorded him a fair one. Instead, petitioner was held in custody for a period of sixteen months before the case was actually moved for trial. In the interim, and immediately following the finding of the indictment, numerous newspaper articles appeared, most of them condemning petitioner's co-defendant Buchalter as a czar of crime and alleging him guilty of the murder in the instant matter as well as many others, and at the same time idolizing the District Attorney of Kings County who was being groomed as the Democratic candidate for Mayor of the City of New York.

A statement of the entire case (pp. 2-35, main brief),

*Appendix, *infra*, p. 23.

including the adverse newspaper propaganda; the voir dire examination of the talesmen; the physical trappings of the trial; the conduct of the trial judge; the conduct of the prosecutor, and the court's charge, is contained in the main brief of all petitioners.

The record of the testimony is voluminous. Comparatively little of it sought to involve this petitioner. The mass of it so colored the trial and so constantly prejudiced the rights of this petitioner as to prevent a fair and impartial consideration by the jury of the evidence, and deny to him the due process guaranteed by the Constitution.

PEOPLE'S THEORY OF THE ALLEGED MOTIVE

The contentions of the prosecution were that through the manipulations of defendant Buchalter, Rosen had been forced out of a partnership in a clothing trucking business; Rosen bruited it about in the clothing market that Buchalter had forced him out of business; because of Rosen's complaints in the industry Buchalter obtained a job for him with a trucking concern, which lasted a short time; efforts by Rosen to obtain another position failed; Rosen then opened a candy store at 725 Sutter Avenue, but still vociferously complained about what Buchalter had allegedly done to him and threatened to go to Thomas E. Dewey, Special Prosecutor appointed by the Governor to investigate racketeering, and inform; Buchalter, through an intermediary, attempted to silence Rosen by giving him money to leave town; Rosen left town, but returned in a few days and again threatened to appear as a witness before Dewey; and that Buchalter, exasperated at Rosen's continued threats, ordered his execution to silence him forever (R. 234-9). This petitioner was not connected or involved in any of the foregoing. However, all such evidence as to alleged motive,

even though concededly not applicable to petitioner, was of such prejudicial character that it indubitably affected the jury's consideration as to him.

Proof in attempted substantiation of the motive, the events leading up to the commission of the crime and its eventual execution was presented through the witnesses Max Rubin, Paul Berger and Sol Bernstein; Tannenbaum and Magoon supplied alleged corroboratory admissions. Of these five persons only Bernstein and Magoon sought to implicate this petitioner.

BERNSTEIN'S IMPLICATION OF PETITIONER

Bernstein's* direct testimony, succinctly digested, follows: Two days before the murder, in the presence of this petitioner, one Strauss instructed him to steal an automobile (R. 702-3), and to return on the following day (R. 703); he returned at the appointed time and he and petitioner then drove this automobile over a certain route pointed out by petitioner, and which he instructed Bernstein to follow to make the "get-away" after a murder had been committed in a designated candy store (R. 715-6); on the following day he met co-petitioner Weiss and others (but not petitioner) and the murder was committed; Bernstein then drove the stolen automobile over the "get-away" route, at the termination of which he abandoned the stolen automobile and was met by the petitioner and co-defendant Cohen, who were awaiting their arrival with automobiles (R. 732-751).

On cross examination, innumerable falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance were developed and coolly and unconcernedly admitted by Bernstein, to such an extent that it would

* His vicious background is set forth in the petition for certiorari (p. 25-27).

be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis petitioner's guilt or innocence depends on Bernstein's word. In fact, though Bernstein stoutly maintained that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, he admitted that since that time he testified falsely in a prior first degree murder trial, knowing he "was doing wrong" (R. 797-8).*

Summarizing in the words of Judge Loughran (R. 4079):

> "The testimony of Bernstein is all-important. He was the chief of the prosecution witnesses.
>
> • • • •
>
> • • • At his own word, Bernstein is a long-time professional criminal. As we shall see in a moment, he is a former perjurer who perversely and flagrantly lied (fol. 4068) again to the jury on this present trial. By the doubtful testimony of a witness of such low moral fibre, uncertainty concerning the guilt of the defendants is produced • • •."

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* The full extent of these perjuries were fully set forth in the petition and brief submitted on the application for a writ of certiorari (pp. 43-54).

MAGOON'S ALLEGED CORROBORATION*

His direct testimony follows: In April, 1939, (two and a half years after the murder) he spoke to petitioner with reference to a man named Friedman (R. 2466-7). Petitioner was asked by him whether he thought it advisable that he (Magoon) work on the Friedman thing, as Magoon had hung out about a block away and thought he might be recognized (R. 2460-1). At this point Magoon stated that this was *all of the question* he asked of petitioner (R. 2461) and was immediately excused from the court room while a lengthy discussion ensued between counsel and the court, in the absence of the jury (R. 2461-9). After an appreciable length of time, Magoon returned to the stand. He was thereupon asked the following question (R. 2469):

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* As Judge Loughran said (R. 4082-3):

"(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: 'I worked on the Rosen thing and it was right on Sutter Avenue and I was not made.' In the declared opinion of the trial judge, the statement so reported by Magoon was 'too indefinite' to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the murder of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of the court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. See PEOPLE v. CRUM, 272 N. Y. 348.) On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. LAW v. MERRILLS, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, (3rd ed.) § 2094, p. 468.)"

> "After you asked him that question, did he say anything to you? Did he, Capone, say anything to you"?

Despite his complete answer given before recess, he now irresponsively interpolated as follows (R. 2469):

> "I have not finished my answer on that."

and thereupon added (R. 2469):

> "I says, 'I hung out about a block away and *it is sort of off Sutter Avenue.*'" (Italics ours.)

To this petitioner replied, "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." Magoon then replied that he was not worried; he was just asking advice (R. 2469).

In the fall of 1938, two years after the murder, in the presence of petitioner, he had been instructed to follow Rubin, ostensibly to assassinate him (R. 2434-53). At a later date there was a conversation with reference to Rubin at which petitioner and others were present and at which petitioner merely stated "that Rubin is hurting Lep, and we got to hit him in the head and get rid of him" (R. 2453-4). Magoon subsequently reported that Rubin had a police bodyguard, and his task immediately terminated (R. 2456-8). Parenthetically, it should be noted that the motivating reason for what the trial court called "the attempted assasination of Rubin" was in no manner connected with the Rosen murder.

That, in brief, constitutes all of Magoon's testimony concerning petitioner, except the development on cross examination of the circumstances under which he allegedly disclosed the above information to the District Attorney.

In May, 1940, just as he completed a term for vagrancy, he was lodged in a hotel in the Bronx (R. 2532-4), where

he spoke with District Attorney Foley of that County (R. 2536), but did not mention anything about the Rosen case (R. 2539-40), nor was he asked, nor did he volunteer anything to the Bronx officials about Rosen at any time thereafter (R. 2546).

Approximately two days after his first conversation with Mr. Foley, he spoke with Mr. O'Dwyer, but did not mention anything about the Rosen case (R. 2542-3). A couple of months later (in July) he was taken to the Brooklyn District Attorneys' office and again questioned but was not asked about the Rosen case nor did he volunteer anything about it (R. 2544, 2546-7, 2550). While being questioned somebody was writing—he does not know whether it was a stenographer (R. 2547-8). He signed many papers which contained the substance of his questioning by District Attorney O'Dwyer (R. 2550-1). The defense called upon the district attorney to produce these statements, but the prosecutor, after equivocating on two occasions, that he was "quite certain" that none existed, finally stated there was no such statement (R. 2549, 2559).*

It is significant to note that the first time he ever mentioned anything about the Rosen case (R. 2554) was some time between January and June, 1941 (about seven months to a year after being taken into custody), although previously questioned by the Brooklyn District Attorney's office more than twelve times (R. 2552-3).**

Little credence, if any, can be given to this self-con-

---

* Magoon either deliberately falsified about signing statements, or the failure of the District Attorney to produce them is a strong indication that they would have been beneficial to the defense; and would constitute a suppression of evidence. For other instance of suppression see main brief (pp. 54-59).

** This testimony should be compared with that of Bernstein and Lamenbaum, both of whom testified they were questioned about the Rosen case early in 1940 (R. 1185, 2335-7).

fessed murderer who successfully evaded the law since a boy attending public school but protested that he never told anything but "little white lies." and maintained strict silence as to his alleged knowledge of Rosen's murder for more than seven months after his arrest. As Judge Loughran said (R. 4083):

> "Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone."

ALLIE TANNENBAUM

He was the only other witness to mention petitioner's name. According to Magoon, who knew him since 1933 or 1934, Tannenbaum was a member of the so-called "Combination," and was seen by him frequently during the years 1933, 1934 and 1935, at the "corner" of Saratoga and Livonia Avenues, Brooklyn (R. 2525-6). Tannenbaum and principal witness Bernstein, in 1937 or 1938, together, transported Yuran's dead body in a truck in the mountains (R. 1087, 2228). Tannenbaum and witness Magoon were together in the Friedman murder (R. 2229, 2414-5).

The sole reason for mentioning Tannenbaum is his admission, when questioned by the prosecutor, that although present at a number of conversations with reference to the Rosen murder, he at no time heard petitioner's name in connection therewith. In fact, he had never seen or

heard of this petitioner "until the year 1938"—over two years subsequent to the Rosen murder (R. 2254).*

Despite the voluminous record—the testimony of thirty-six witnesses and the introduction of fifty-seven exhibits (none of which exhibits directly affected petitioner)—tersely summarized, the People's proof against petitioner consisted solely of the testimony of the self-confessed liar accomplice Bernstein and the criminal Magoon, who furnished the alleged corroboration consisting of a supposed conversation had more than two and a half years after the occurrence.

As to the complete proof presented against petitioner, the trial court admitted (R. 3918): "In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon the comparative paucity of the corroboration from non-accomplice witnesses." Judge Rippey of the New York Court of Appeals was of the opinion that (R. 4091): "There was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed." Judge Loughran, one of the dissenting judges, stated (R. 4085): "There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone"; and further, (referring to Bernstein) (R. 4085), "No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testi-

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* Bernstein and Magoon alleged that petitioner was a leading member of the so-called "Combination." If so, Tannenbaum would certainly have known him. His testimony completely destroyed whatever doubt may be left as to the falsity of Bernstein's and Magoon's testimony regarding petitioner's alleged participation in the crime.

mony." His opinion was concurred in by Judge Desmond. Chief Judge Lehman, one of the affirming judges, stated (R. 4078): "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind." Even in the prevailing opinion of Judge Conway, concurred in by Judges Finch and Lewis, it was stated (R. 4069): "The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believes the testimony of a witness who corroborated the accomplices. That witness was a criminal."

SPECIFICATION OF ERRORS TO BE URGED

Petitioner urges that error was committed to his manifest prejudice in the proceedings below whereby he was deprived of due process of law in that:

I. The trial was held in a poisoned atmosphere and a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had. The jury was improperly impanelled. In a situation where the prejudice against petitioner was bound to affect the jurors, the physical trappings of the trial were such as to amplify and vitalize that prejudice.

II. The Court of Appeals should have reviewed the action of the Trial Court which prevented the impanelling of an impartial jury by its rulings upon challenges for actual bias. The right to such review was not waived by petitioner's consent to be tried before a "special jury." The rulings of the Trial Court prevented the impanelling of a fair and impartial jury; and an impartial jury is essential to due process of law. In this case the State of New York failed to supply a corrective process for this denial of due process.

III. Evidence material and relevant to the defense, in the possession of the prosecution, was suppressed by the State. Petitioner was thus deprived of a fair opportunity to present his defense. He was likewise deprived of an opportunity of adducing proof that evidence offered by the prosecution was in fact perjurious.

IV. The Trial Court's usurpation of the province of the jury by the resolution of issues of fact against petitioner in its charge to the jury as well as by comments during the course of the trial, and the summation of the prosecutor wherein, among other unprofessional things, he made improper promises to the jury concerning the future treatment of confessed criminals who had testified for the prosecution, and wherein he purported to give testimony, all combined to deprive petitioner of the right to fundamental fairness in the trial.

V. The denial of petitioner's numerous motions for a severance of his trial amounted to a forfeiture of his rights to a fair and impartial consideration of the evidence against him.

ARGUMENT

The minimal requirements of the constitutional guarantee of due process of law are fully discussed in the main brief (pp. 37-41).

The first four specifications of error, as applied to all petitioners, are likewise discussed therein (pp. 39-75). Additional factors affected this petitioner's rights, utterly depriving him of a semblance of due process, viz:

THE JURY

Two of the jurymen, Rorke and Links (See main brief, pp. 24-26), had been examined as talesmen in a prior murder trial (*People* v. *Maione and Abbandondo*) in which counsel for this petitioner had appeared as counsel for Maione and the People were there represented by the same prosecutor as herein. Both jurors had then heard petitioner's name mentioned, as well as that of many others, and had followed the verdict in the previous case. Rorke had been peremptorily challenged by the defense, and Links by the prosecutor, who had then felt that Links could not be a fair juror by reason of his connection with a radio program known as "Mr. District Attorney." All defense peremptory challenges had been exhausted at the time these two persons were permitted to remain on this jury.

Having succeeded in seating these two men on the jury, the prosecutor, with the consent of the court, was permitted to adduce testimony, wholly unconnected with the issue, to the effect that this petitioner had been associated with Maione and Abbandando and numerous other persons (R. 698-699; Magoon, R-2423-5; Tannenbaum, R. 2234-6).

Whether the court and prosecutor purposely permitted this irrelevant prejudicial testimony to be introduced, or not, is immaterial. The fact remains that Rorke and Links had prior knowledge of the persons so named, and of their execution for crime.

Coupled with the argument advanced in the main brief, there remains little question that Rorke and Links were in no position (consciously or unconsciously) to accord to petitioner the fair and impartial consideration of the evidence as guaranteed by the Constitution.

THE PROSECUTOR'S SUMMATION

Serious as were the prosecutor's derelictions against all petitioners throughout the trial,* his summation reached the zenith of impropriety against this petitioner particularly when, among other things, he unjustly characterized petitioner's counsel as "the canniest, the wiliest of lawyers" (R. 3810, 3855), "a great detective" (R. 3830) and a "mental juggler" (R. 3836), and further charged that the summation of petitioner's counsel was a "pay off" to co-petitioners (R. 3839-40):

> "Because one counsel sits at one table and the other at another table, is that a separation of these three? Let me show you how each one of the defenses were put in, and then you can consider the summation of Mr. Rosenthal and see if he did not pay back for what Lepke and Mendy did for Capone in the defense."

Condemning petitioner's counsel on the one hand, he wrongfully sought to influence the jury by self-praise (R. 3821):

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* Discussed in main brief. A glaring example (not therein discussed) occurred during Rubin's testimony. He was asked whether he had ever seen petitioner before and replied that he had in the year 1932 or 1933. He was not introduced to him nor does he know where he saw him, but remembers he was in the company of Buchalter (R. 1461-2). [Admittedly, this occasion had no connection with this case (R. 1752).] The prosecutor was not satisfied with this reply and asked who else was present and thereupon received the reply that one "Buggsy" Goldstein was there at the time (R. 1462). He also had a fleeting glance of the petitioner in 1935 (R. 1463), but not in connection with this case (R. 1752). These were the only mentions of petitioner's name by Rubin throughout his testimony. As the incidents recited and the presence of Buggsy Goldstein had no relevancy to this case, the prosecutor could have had no reason to introduced this testimony except to prejudice the jurors' minds by recalling to them a notorious case which they must have read about resulting in the execution of said Goldstein (PEOPLE v. GOLDSTEIN, 285 N. Y. 376), thus further carrying out his persistent efforts to have the case tried on newspaper gang stories rather than the indictment.

> "I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way *with any of you* to make *you* feel that I had discredited *you* or myself or any member of the public." (Italics supplied.)

THE JUDGE'S CHARGE

Whatever semblance of a trial remained after the prosecutor completed his inflammatory summation characterizing this petitioner and his counsel, was completely destroyed by the court's unfair charge, a substantial portion of which was devoted to neutralizing the effect upon the jury of counsel's cross examination and summation dealing with Bernstein and Magoon (on whom rested the entire case against this petitioner).

Having first charged that "direct examination goes right to the point, and cross examination * * * is largely hit or miss" (R. 3903), the Court proceeded to destroy the argument regarding the letters (offered as evidence of opportunity to concoct a story) which Bernstein was forced to admit he sent while in custody. In that respect the Court charged, in substance, that the jury must accept as a fact that police surveillance prevented concoction, for its lack, even though no proof had been offered to substantiate Bernstein, would be "sloppy police work" (R. 3956).

In the portion of the charge referring to Magoon, the court emphasized his (Magoon's) testimony because of the "great importance of this feature of the case" by reading all the direct testimony on the particular subject (R. 3921-2). The court said (R. 3926):

> "Gentlemen, I think that is the text applicable thereto, unless there was something on cross examination applying to it."

No mention was subsequently made of any part of the cross examination, except to disparage its worth and discount counsel's analysis in summation.

The court's attack on the summation of petitioner's counsel as to the legitimate inferences which could be drawn from Magoon's claim that he only told "little white lies" was to the effect that the judge did not want the jury to be misled by counsel's summation, as the reasoning was "childish," and "should not affect intelligent men whose minds are mature" (R. 3898-9).*

Throughout summation petitioner's counsel referred to and drew legitimate inferences from the stock answer of prosecution witnesses when confronted with previous contradictory testimony: "if it is in the book, it is so." The court nullified the effect of this cross examination and summation by charging that it would be an "unholy thing" to expect a witness to remember his previous testimony, and that it was a normal response for a witness to reply: "If it is in the book, it is so" (R. 3894).

Petitioner never stood one iota of a chance to have his fate properly determined despite "the paucity of the evidence" when we analyze the court's charge and note the deft manner in which the effect of cross examination and summation was destroyed. The jury was prevented from exercising its free will in judging the contradictions in the testimony of Bernstein and Magoon. Unquestionably, the court must have concluded that the cross examination of these witnesses, and the summation with respect to them, had a telling effect upon the jury, which the prosecutor's summation had failed to dispel. To rectify this omission, "the charge took on the character of a summation for the People" (R. 4087) and was tantamount to a direction of a verdict of guilty against this petitioner.

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* See main brief for court's entire statement (p. 35)

SPECIFICATION OF ERROR V

Research fails to disclose a situation similar to the instant case. If the failure to grant the severance did not amount to a forfeiture of petitioner's rights to a fair and impartial trial, we doubt whether a deprivation of due process for that reason can arise within the annals of criminal law.

Prior to the trial (June 5, 1941), a motion for a severance was made (R. 31-54),* and denied without prejudice to renewal before the trial court (R. 29-30). This motion was orally renewed on additional papers before the trial court on August 4, 1941 (V. 21;** R. 55-64) and denied (V. 29). On September 15, 1941, on the consent of the prosecutor, a severance was granted against defendant Farvel Cohen (V. 47),*** but denied as to petitioner (V. 47). At intervals throughout the trial similar motions were repeated.****

Prior to the commencement of the trial it became obvious that regardless of the lack of evidence against petitioner, his conviction was a foregone conclusion if he were compelled to stand trial with the co-petitioners, because of the intense prejudice which was rampant against them. The petitioners were all deprived of a fair and impartial trial by reason of the inordinate amount of lurid inflammatory newspaper publicity which preconditioned the community to think of them as guilty men. The greater

*It was urged in that motion that the failure to grant a severance would be a violation of petitioner's constitutional rights (R. 39-7); and the prosecutor admitted in his brief in opposition to the petition for a writ of certiorari that the constitutional question was thus raised (See prosecutor's brief, p. 37).

**V. refers to printed record of *voir dire* examination.

***Previously denied by trial court on August 4, 1941 (V. 29).

****S. testimony of Berger (R. 2191), Tannenbaum (R. 2240), Rubin (R. 2577), Aman (R. 2685), Pell (R. 2698), Ryan (R. 2703), Winne (R. 2706), end of people's case (R. 2715), end of entire case (R. 3541), and of sentence (R. 3896).

part of this publicity was directed against petitioner Buchalter. That it, nevertheless, prejudiced petitioner cannot be gainsaid. Thus was petitioner saddled with a burdensome handicap which prevented a fair consideration of the evidence presented, uncolored by whatever prejudice existed against co-petitioners.

A casual examination of the *voir dire* discloses that the thirty peremptory challenges accorded defense collectively were exhausted because a majority of the talesmen had read about one or the other of the co-petitioners.

Under §360 of the Code of Criminal Procedure of the State of New York* this petitioner was unable to exercise his free choice but was compelled to join therein. Thus were all thirty peremptory challenges exhausted. The injustice to petitioner thereupon became apparent. The jurors Rorke and Links were then seated in the box.** Petitioner's hands were tied. The court refused to excuse these men. For the first time the necessity for petitioner to exercise a peremptory challenge arose, to no avail. The denial of the severance was the direct cause of this condition and unquestionably prevented a fair consideration of the evidence.*** Thus the trial began.

For weeks a parade of witnesses testified about prejudicial matters which must necessarily have been excluded had petitioner been granted a severance.

Rubin was permitted to trace the leadership and internal affairs of the Amalgamated Clothing Workers Union since 1923 and to name certain individuals who had either disappeared or were dead and, without official connection, were on the union's "payroll" (R. 1293-1320). These persons and events were not even remotely connected with the case, nor was it claimed that petitioner had any con-

* See appendix, p. 24

** For discussion see p. 13 supra

*** See discussion p. 17 supra

nection with the activities disclosed, or had any knowledge of or connection with the persons named.* He further recounted his peregrinations in order to avoid the investigation of Special District Attorney Thomas E. Dewey, but in nowise implicated this petitioner.

Rubin testified he had been shot in the head by an unknown person (R. 2373). This inflammatory testimony, although admittedly inapplicable to petitioner (R. 3917), and inadmissible in a separate trial, nevertheless, must have prejudiced his rights. Summarizing, Rubin could not have properly testified as a witness had a severance been granted.

Berger similarly traced the affairs of the Clothing Union since 1929 and named men unconnected with this case who were obviously gangsters. He, likewise, would not have been a competent witness against petitioner.

A portion of the testimony of Magoon regarding his "tailing" of Rubin could not have been properly elicited had petitioner been granted a severance.

Mrs. Rosen (R. 246-256), Harold Rosen (R. 466-483), and Sylvia Greenspan (R. 567-584), were in nowise connected with the petitioner. The flight of Rubin and the alleged flights of Buchalter (charged as not connected with this case) and Weiss were extremely prejudicial to petitioner, although not admissible if he were on trial alone.*

* It is obvious that it was the prosecutor's purpose to cover the entire trial with an aura of union gangsterism and thereby subtly affect the jurors' deliberations by recalling to their minds all the lurid newspaper accounts of past years relative to gang killings and depredations.

* See testimony of Rubin (R. 1381-1420, 1685-1700 et seq.), Maguire (R. 1761), Berger (R. 1814-25 et seq.) Aman (R. 2607-86), Pell (R. 2687-), Ryan (R. 2699-2703), Winne (R. 2704-06), Malone (R. 3493-3508), Whelan (R. 3509-17), and Newman (R. 3518-25), also People's exhibits [illegible] 33 to 37 inclusive.

Thus as the evidence unfolded, the People's proof, if believed, tended to show that the persons allegedly involved in this crime had some connection with union activities, *but not petitioner*; that Rubin, Bernstein, Strauss, Reles, Goldstein, Magoon, Tannenbaum, Cohen and others had left town, *but not petitioner*; nor was there any proof that petitioner's name had been mentioned by anyone to either Rubin, Berger or Tannenbaum. Moreover, although the prosecutor cross-examined practically all of co-petitioner's witnesses as to whether they were acquainted with various named persons, including the other petitioner, no inquiry was made as to this petitioner.

Further serious prejudice resulted during the summation. Counsel for co-petitioner Buchalter admitted he was serving a long prison sentence* and condemned Buchalter's past activities and the vicious circle domineering the unions (R. 3546-7). These facts could not have been disclosed in a separate trial, but after the conclusion of petitioner's counsel's summation, the prosecutor dwelt upon the statement of Buchalter's counsel and designated Buchalter as "the czar of the industrial rackets with a half a million dollar take" (R. 3783, 3801).

The recitation above constitutes some of the major happenings which could not have permeated the atmosphere were petitioner on trial alone. The legal evidence against petitioner was insufficient (R. 4090-1). Thus, the numerous errors committed, plus the inapplicable prejudicial evidence admitted because of a joint trial were of such a nature that the jury must have been unduly influenced to such a degree that it could not enter upon a free and open deliberation of the evidence presented against this petitioner.

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* The jury's attention was also called to this fact at the commencement of the trial (V 282).

CONCLUSION

The jurisdiction of this court is invoked by reason of the denial to petitioner of his constitutional rights to a fair trial as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

It is respectfully submitted that the judgment of conviction herein was not obtained by due process of law, that it resulted from the mere pretense or semblance of a trial by reason of the prejudicial and inflammatory newspaper publicity directed against the petitioners prior to the trial; the failure to grant this petitioner a separate trial; the atmosphere in the courtroom and the conduct of the trial; the seating of a prejudiced and biased jury; the conduct of the trial judge; and the misconduct of the prosecutor, condoned and permitted by the trial court. This was as much a denial of due process of law as the domination of a court by mob violence, since in such case, while there is the form of a hearing, a hearing in substance, is denied.

> *Moore* v. *Dempsey*, 261 U. S. 86;
> *Norris* v. *Alabama*, 294 U. S. 587.

Four of the seven judges in the Court of Appeals remained unconvinced of petitioners' guilt. Three expressed firm belief that the judgment of death should be reversed because these petitioners did not have a fair chance to defend their lives.

> "*Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime*" (*People* v. *Barbato*, 254 N. Y. 170, 178). (italics supplied.)
>
> "Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." *Hill* v. *Texas*, 316 U. S. 400, 406.

Here fundamental fairness was sacrificed; form alone was preserved. This judgment cannot stand unless the concept of due process be aborted.

Respectfully submitted,

SYDNEY ROSENTHAL,
Counsel for Petitioner Capone

BENJ. J. JACOBSON,
Of Counsel.

APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judicial Code of the United States

TITLE 28, U. S. C., SECTION 344 (SECTION 237 OF THE JUDICIAL CODE, AS AMENDED).

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title,

right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

New York State Code of Criminal Procedure, § 360

When several defendants are tried together they cannot sever their challenges, but must join therein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioners seek a review of the judgments of the County Court of Kings County, State of New York, dated December 2, 1941, convicting them of the crime of Murder in the First Degree. Upon appeal to the Court of Appeals, the highest court of the state, the cause was heard and, after due deliberation, the judgments of conviction were affirmed, the remittitur being filed on October 30, 1942 (R.

4091-4099). Thereafter, petitioners made a motion for reargument of the appeal (R. 4099-4100) and for a stay of execution of the sentence (R. 4120). The motion was denied on November 25, 1942 (R. 4120-4121).

On December 3, 1942, a hearing was had before the Honorable Charles Poletti, then Governor of the State of New York, to determine whether there was any reason for extending clemency. Before decision thereon could be made, petitioners applied to Mr. Justice Roberts of this Court for a stay of execution pending their applications for writs of certiorari. The stay was granted on December 5, 1942. No decision has therefore been made on the application for clemency.

Questions Presented.

Buchalter contends that he was denied due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution, because of (Buchalter's Pet., pp. 39-40, 47, 56):

1. the denial of his motions for a change of venue to a place "outside the City of New York" (R. 76-77, 155, 165, 175) where, as he alleges, "public opinion had been irrevocably prejudiced against him by a lengthy series of newspaper articles and interviews, and where local passions were inflamed and prospective jurors had been conditioned to assume his guilt";

2. the denial by the trial court "to postpone the time of trial";

3. "the refusal of the Court of Appeals of New York to review the rulings of the trial judge upon the challenges to prospective jurors and to jurors impaneled;"

4. "the refusal to make available to him certain official records of the Police Department of the City of New York so as to permit him to call as witnesses police officers of the City of New York, to the end that

such officers might be examined concerning their observations at a time and place vitally material to the charges against petitioner;"

5. "the repeated unfair rulings and comments of the trial court during the cross-examination of witnesses for the prosecution, and by the rulings, comments, charge and conduct of the trial court, belittling the defense and improperly construing for the jury the probative force of evidence adduced, so that the jury was misled;"

6. "the refusal of the trial court to rebuke and repress improper, prejudicial and untrue statements by the prosecuting attorney in his summation to the jury;" and

7. "the decision of the New York State Court of Appeals" in which "requirements of due process of law were ignored".

Weiss (Petition, pp. 5-6) and Capone (Petition, pp. 36-38) urge substantially the same contentions, except that Capone also adds that he was deprived of his constitutional rights by:

8. the denial of his motion for a trial separate from Buchalter, who, as Capone's counsel alleged in the application for a severance, "is a person of national prominence * * *, whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42); and

9. the affirmance by the Court of Appeals of "a judgment based upon evidence admittedly 'not strong', without proper corroboration of the discredited and unreliable co-conspirator".

Record Facts Material to the Questions Presented.

General Outline of the Case.

Petitioners "were represented by able counsel during a trial which lasted about eleven weeks. The record of the trial consists of more than four thousand pages in addition to the twenty-seven hundred pages containing the examination of talesmen" (R. 4030; 289 N. Y. 181, 182). In these lengthy proceedings petitioners were "zealously—even hotly—defended by experienced counsel" (R. 4072; 289 N. Y. at p. 224, per Lehman, Ch. J.).

Buchalter tells us that the trial was "a mere sham" (Petition, p. 27). The record, however, shows that at every stage of the proceedings the requirement of due process of law was fully observed. Indeed, with the single exception of Capone's obviously flimsy assertion that under "the Constitution of the United States" he was entitled to a separate trial (R. 36-37), the able counsel for petitioners never complained, either prior to or during the trial, of any deprivation of a right, title, privilege, or immunity under the Federal Constitution. The record facts in this respect will be treated more fully hereafter in support of our contention that there is no jurisdiction to review the questions presented. For present purposes, we confine ourselves to a general outline of the case, which we believe will help to reveal the lack of merit to the claims now made.

The facts—not newspaper gossip or distorted paraphrasing of the record—are set forth with reasonable fullness in the majority opinion of Judge Conway (R. 4030-4069; 289 N. Y. 181-221) and need not here be repeated in detail.

Briefly stated, the evidence established that in July, 1935 the Governor of the State of New York appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into "all acts of racketeering" and "all organized crime". Mr. Thomas E. Dewey was designated to conduct the investigation as special prosecutor (R. 1370-1375, Peo's. Exh's. 33 and 34).

At that time Buchalter, referred to by the witnesses throughout the trial as Lepke, was a leader of organized crime, who for years had thwarted apprehension and punishment. It is unnecessary to discuss the evidence showing his defiant criminality. It will suffice to quote the admissions of *his own counsel* in summation to the jury. "Lepke", he said, "was not just an ordinary racketeer" (R. 3589). At the time of the Dewey investigation he was being looked for "as king of the flour racket and king of the crime racket" against whom there were "thousands of complaints in extortion totaling a half a million dollars" (R. 4032; 289 N. Y. at pp. 184-185).[1]

Far more significant than counsel's admissions, however, was Buchalter's technique of circumventing the law as revealed by him to the people's witness Edward C. Maguire, a member of the Bar. It was:

> "If witnesses are not available, investigations collapse" (R. 4037, 4038; 289 N. Y. at pp. 189, 191).

In line with this method of preserving his criminal organization Buchalter ordered his henchmen to kill Rosen, because Rosen refused to stay away from the State of New York while the Dewey investigation was on and threatened to disclose how Buchalter with the aid of corrupt labor union officials had deprived him of his clothing-trucking business (See facts discussed in Judge Conway's opinion, R. 4033-4045; 289 N. Y. at pp. 185-198). Buchalter's order was carried out by Weiss, Capone and others; Weiss fired the shots, Capone planned the escape (Id.).

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1. The jury was apprised of these facts by Buchalter's counsel, not the district attorney, in an attempt to induce the jury to believe that Buchalter, having committed only "a possible misdemeanor" against Joseph Rosen and having many more serious charges to worry about, would have no motive to order Rosen's death (R. 4031-4032). The fact, however, remains that any impression a juror might have received about Buchalter from casual reading of newspaper stories faded into insignificance when faced with such disclosures by one who represented Buchalter's interests.

Nor was this all. After successfully thwarting the investigation for about one year, Buchalter was faced with the refusal of Max Rubin, "a key witness in the trial of the instant case" (R. 4064), to continue to remain in hiding outside of the City of New York. As a warning, Buchalter asked Rubin how old he was, and, on being told, said, "It was a ripe age" (R. 4037-4038). Thereafter Weiss was informed that Rubin was "squealing" (R. 4039). In the words of the majority opinion of Judge Conway,

> "Lepke (Buchalter) as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, * * *. From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Lepke's statement to Mr. Maguire that, 'If witnesses are not available, investigations collapse'" (R. 4064; 289 N. Y. at pp. 216-217).

Accordingly, a few days after Rubin testified before the grand jury he was shot through the head as he was walking to his home (R. 4049, 4050). The shooting was planned and directed by Weiss (R. 4039-4040).

Fortunately, however, Rubin survived. Thereupon, Weiss enlisted the aid of Capone and a new plan was evolved "to get rid of him". But Rubin was then under police protection, and so their plan was abandoned (R. 4040, 4041-4042).

In so far as the defense is concerned, none of the petitioners took the witness stand. Capone offered no defense whatever. As to Buchalter, Judge Conway said (R. 4058; 289 N. Y. at pp. 210-211):

> "* * * so weak was his defense that great harm might have been occasioned to Lepke if the court had attempted to analyze the testimony of the witnesses called by him."

And Chief Judge Lehman in his concurring opinion added (R. 4075; 289 N. Y. at p. 227):

> "Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony."

Finally, before the judgments of conviction were affirmed the Court of Appeals permitted six hours of oral argument, accepted voluminous briefs filed by petitioners (R. 4115), deliberated on the case from June to the end of October (R. 4091-4092) and wrote exhaustive majority and dissenting opinions which show a most careful and conscientious consideration of the points then raised.[2]

Judge Conway held that reversible error was not committed, that the guilt of Buchalter and Weiss "was clearly established", and that Capone's guilt "was peculiarly a jury question" which was "properly left to the jury" (R. 4069; 289 N. Y. at p. 221). The ultimate findings of Chief Judge Lehman should also be noted. He said:

> "Joseph Rosen was killed on September 13, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the nefarious purposes of the gang. * * * The accusing witnesses *and the defendants* were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac.[3] * * * The ver-

2. We are told by Buchalter that, "although petitioner's appeal resulted in the publication of extensive opinions by the court and he was accorded all the outward indicia of a review, he was in fact given only a *semblance* of it" (Petition, p. 34).

3. For example: one of Buchalter's regular employees admitted participation in *six* murders and crimes such as slugging, strikebreaking, throwing "stink bombs" and robbery (R. 4040, 4041); one of Capone's employees participated in two murders, shot several persons, committed several assaults, and stole fifty or more automobiles (R. 4041).

dict of the jury rests, it is plain, on the conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on this appeal may have affected that appraisal. * * * I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as a part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm" (R. 4069, 4076, 4077, 4078; 289 N. Y. at pp. 222, 228, 229, 230).

The Time of Trial.

Buchalter asserts that "Time and place were manipulated by the prosecution to prevent a fair trial" and that he was tried "at a carefully selected time when the trial itself could be exploited in the interests of a local political campaign" (Petition, pp. 24, 41).

Let us see.

The indictment was filed on May 28, 1940 (R. 25). At that time Weiss was a fugitive from justice (R. 4040; 289 N. Y. at p. 192). Buchalter was serving a term of imprisonment in the Federal Penitentiary at Leavenworth, Kansas, under a sentence of the United States District Court for the Southern District of New York (R. 126). It was not until April 6, 1941, that Weiss was apprehended by agents of the United States Bureau of Narcotics in Kansas City, Missouri, where he was hiding out under an assumed name (R. 4040; 289 N. Y. at pp. 192-193).

Immediately upon Weiss' apprehension the district attorney requested the Attorney General of the United States for his consent to the production of Buchalter for trial in Kings County. The Attorney General gave his consent on April 25, 1941. Thereupon, habeas corpus proceedings were promptly instituted, and Buchalter was transferred to New York City (R. 127).[4]

On May 9, 1941, he was brought to the County Court of Kings County to be arraigned on the indictment. He requested that he first be permitted to confer with members of his family, who were in the courtroom, "about getting counsel" (S.M., May 9, 1941, pp. 1-2).[5] The prosecuting attorney said, "I take the position that he is entitled to have counsel at all stages of the proceedings" (S.M., id. p. 1). The request was granted, and then the court was informed that Buchalter desired an adjournment so that he could "get counsel to appear for him on the arraignment". This was consented to, and the matter was adjourned (S.M., id. pp. 5-6).

Twenty days later he appeared by counsel of his choice, who refused to submit to the jurisdiction of the court, stating, "defendant stands mute" (S.M., May 29, 1941, p. 2). The prosecuting attorney objected to any further delay. He said:

> "The arraignment has been adjourned now three weeks. It is about time that issue was joined to the end that a trial date may be fixed" (S.M., id. p. 7).

Thereupon, a plea of not guilty was entered by the court and, over the objection of Buchalter's counsel, the trial of

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4. This was in accord with the decision of *Ponzi* v. *Fessenden*, 258 U. S. 254.

5. The transcript of the proceedings of May 9, 1941, and of other proceedings hereafter referred to, particularly the examination of talesmen, are not in the printed record, but are in typewritten form on file with this Court. The letters "S.M." refer to those transcripts.

the case was set down for July 14th (S.M., id. pp. 10-12). In noting his objection counsel urged that,

> "the case ought to go over until *September*" (S.M., id. p. 11).[6]

Buchalter's next move was to sue out a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking to be transferred back to Leavenworth. He contended, among other things, that the Attorney General had no right to order his removal to New York City for the purpose of standing trial in Kings County. The writ was dismissed on June 19th, an opinion being written by District Judge Conger (R. 127). Thereupon, counsel applied to the Circuit Court for leave to appeal from the dismissal of the writ and for a stay of the trial pending the determination of the appeal. The application was heard by Judge Learned Hand, who denied the request, stating that the arguments made in support thereof were "absurd" (S.M., August 4, 1941, pp. 20-21).

Soon thereafter (June 23, 1941) the district attorney made a motion for an order directing the drawing of a panel of special jurors to attend at the trial on July 14th, the date originally fixed by the court (R. 127). The affidavit in support of this motion stated that the district attorney intended to proceed with the trial "*not later than July 14, 1941*" (See certified copy printed in Appendix hereto).[7] Counsel for petitioners consented to be tried by a special jury (R. 4068; 289 N. Y. at pp. 220-221), but objected to the date of trial upon the ground that it would

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6. Ultimately, the trial did not commence until September 15th (R. 177).

7. The affidavit submitted in support of the motion for a special jury, the answering affidavits and the order of the court were not printed in the record. Because of their importance we obtained permission from the Clerk of this Court by letter dated Dec. 24, 1942, to file certified copies and to print them in the Appendix to our brief.

not afford them sufficient time to prepare their defense (R. 128). On behalf of Buchalter and Weiss affidavits were filed requesting, for the second time, that the trial be set for *September*. We quote from the affidavit of Buchalter's counsel, sworn to June 25th (see Appendix):

> "13. I respectfully request that the trial of this case be set for a day not earlier than the first week of September. All of the intervening interval between that date and today is needed for the preparation of the defense."

Similarly, counsel for Weiss in the last paragraph of his affidavit said (see Appendix):

> "and deponent respectfully asks that the case be set down for trial for some time in the month of September, at which time deponent will be properly prepared for trial."

As a result of these requests the court, in granting the motion for a special jury—to which counsel had consented—directed that a panel of two hundred and fifty talesmen be drawn, and adjourned the trial date to August 4th (R. 128, certified copy of order printed in Appendix). The provisions of said order were, after timely notice to petitioners, complied with on July 8th, a Justice of the Supreme Court presiding at the selection of the panel (R. 128).

Eight days later, however, the people were faced with a new dilatory move, which was designed to delay the trial for several months. For despite their previous consent to proceed to trial before a special jury drawn from the citizens of Kings County, pursuant to which two hundred and fifty talesmen were already drawn and notified to appear in court (R. 128, 165), petitioners decided to apply for a change of venue to a place "outside the City of New York" (R. 76-77). The controlling facts concerning their application will be discussed hereafter. At this point, it suffices to note that after a full hearing in the Supreme Court their motions were denied (R. 167-168), the opinion

of the court holding that there was "no merit" to their contentions (R. 165-166).

This brings us to a series of obstructionist tactics the likes of which are rarely encountered. We shall try to state the facts as briefly as possible.

When the case was called for trial on August 4th, the district attorney stated he was "ready" (S.M., p. 2). Counsel for Weiss said, "defendant Weiss is ready" (Id.). Counsel for Buchalter, however, said,

> "This defendant refuses to answer ready, because he has not been afforded a reasonable opportunity to properly prepare his defense. He, by virtue of that, maintains that he cannot receive a fair trial" (S.M., p. 3).

In support of this position counsel asserted that they "deemed it necessary" to interview Buchalter's former associate, Jacob Shapiro, who was then a Federal prisoner and who "could and would give information *vital and essential to the defendant's defense*"; that to enable them to use Shapiro as a witness they sued out a writ of habeas corpus in Atlanta, Georgia, but that the Federal Director of Prisons caused Shapiro's transfer to Springfield, Missouri, "*as a device to avoid an order on the writ*" (S.M., pp. 3-6). It was further contended that an application was made to the Federal Director of Prisons for permission to interview Shapiro but that such permission was "bluntly" refused (S.M., pp. 6-7); and that although the Attorney General of the United States turned Buchalter over to the state authorities for trial, "he has deprived him of the opportunity to prepare and present his defense" (S.M., p. 17).[8]

8. The trial court and the district attorney agreed to arrange with the Attorney General of the United States to have Shapiro transferred to a Federal prison in New York City where he could be interviewed (S.M., pp. 36-38). The record does not disclose the result of whatever steps were taken. But it is significant that Shapiro was not called as a witness and that no claim has ever been made, not even in the present petitions, that the defense was deprived by either the Federal or State authorities of an opportunity to interview or call Shapiro as a witness.

In the course of this argument counsel for Weiss changed his mind and said, "I answered ready on Weiss, but I join in the application that has just been made" upon the ground that "Buchalter has not been permitted to confer with Weiss and vice versa, in the detention pen in which they have been confined since their arrest" (S.M., p. 11).

The court denied the motions and marked the case ready for trial (S.M., p. 28).

Thereafter an unprecedented situation developed. Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (S.M., p. 31). In evaluating this condition the trial court said:

> "This jury situation is unprecedented. It is practically a run-out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit to that position. To arbitrarily combat it would smack of coercion and would tend to undermine that quality of jury service which is essential for a fair trial of this case" (S.M., pp. 53-54).

Moreover, it was apparent that with thirty peremptory challenges and an unlimited number of challenges for cause available to each side (N. Y. Code Crim. Proc. § 373), a jury could not be obtained out of the limited number of talesmen willing to serve. That this was so is evident from the fact that when the trial did begin a panel of 250 was exhausted and a new panel of 100 was required before the selection of a jury was finally completed (S.M., pp. 2019-2024). Under these circumstances the prosecuting attorney suggested that the case be adjourned until September (S.M., p. 35).

When the court indicated that it would grant the request, counsel for Buchalter, who, as we have noted, had previously urged that the case be set down for September and who, only a few hours before, had refused to answer ready upon the ground that the defendant had "not been afforded a reasonable opportunity to properly prepare his defense" (S.M., p. 3), suddenly announced that

he was fully prepared and opposed the adjournment in these words:

> "*We are as ready as we will ever be* and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute" (S.M., p. 39).[9]

Thereafter, counsel for Weiss thought of the idea of using the fact that the trial judge was a candidate for re-election and the district attorney a candidate for mayor as a reason for requesting that the trial either proceed immediately or else be adjourned *for three months* until after election (S.M., pp. 39-43). This appealed to Buchalter's counsel who joined in the request, stating, "The counsel for defendant Buchalter join in the comments of Judge Talley and adopt his reason for requesting an adjournment as our own" (S.M., p. 43).

The trial court in adjourning the case until September 15th said:

> "Any delay of trial in any case involves hazards in relation to witnesses, in relation to evidence. Therefore any delay of any trial must be weighed against those hazards. No prejudice can come from trying the case before election because, sensibly, no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case" (S.M., p. 54).

The Place of Trial.

We have seen that on June 23, 1941, the district attorney made a motion for an order directing that the case be tried by a special jury in the County Court of Kings County. This motion was made pursuant to the provisions of Section 749-aa of the New York Judiciary Law (R. 127), which permits the defendant or the district attorney to

9. In view of the foregoing facts, Buchalter's statement at page 17 of his petition that, "The sincerity of counsel was matched by the dissimulation of the presiding Judge", is indeed ironical.

apply for such a jury where the subject matter of the indictment "has been widely commented upon" (Id. subd. 4; R. 173). To qualify as a special juror the statute (subd. 2) provides (R. 4068; 289 N. Y. 181, 221),

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * * or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his behalf shall not create any presumption against him."

We have said that petitioners consented to be tried by such a jury drawn from the citizens of Kings County, but objected only to the date of trial. The order granting the motion recites (certified copy printed in Appendix):

> "* * * and Hyman Barshay, Esq., attorney for the defendant, Louis Buchalter, alias 'Lepke'; James I. Cuff, Esq., attorney for the defendant Emanuel Weiss, alias 'Mendy Weiss'; Saul Price, Esq., attorney for the defendant, Philip Cohen, alias 'Little Farvel'; and Leon Fischbein, Esq., attorney for the defendant, Louis Capone, *appearing and consenting to the granting of the motion for a special jury* * * *."

The opinion of the court denying petitioners' subsequent motions for a change of venue stated, among other things, the following (R. 165):

> "Upon a motion by the District Attorney for an order directing the trial before a special jury on July 14th, 1941, the moving defendant, as well as the defendants, Weiss and Capone (who seek similar relief in separate motions), *consented to a special jury* and objected solely to the trial date inasmuch as it would not permit sufficient time to prepare."

And the Court of Appeals, in reviewing the decision of the Supreme Court, found that,

> "Each of the defendants *consented* to be tried before such special jury" (R. 4068; 289 N. Y. at pp. 220-221).

Now comes Buchalter's petition wherein, at page 50, he tells us that,

> "Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the court at *nisi prius* in granting the motion for a special jury *misstated the fact* in recording that there was consent."

The final answer to this reckless assertion is to quote from the affidavit filed with the court below by Buchalter's counsel (certified copy printed in Appendix). He there said:

> "6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury."

Counsel for Weiss likewise consented. In his affidavit he said (printed in Appendix):

> "That deponent does not oppose the application for the trial of the indictment before a special jury, but deponent does oppose that part of the application which seeks to have the trial set for July 14, 1941. * * *."

Pursuant to these consents, the order directing the impanelling of a special jury of 250 talesmen was, after due notice to petitioners, duly complied with (R. 128, 165).

Eight days later Buchalter made a motion in the Supreme Court to transfer the trial to a county "outside the City of New York" (R. 76-77, 165). He urged that he could not receive a fair trial in the City of New York because of the fact that for "the past two years" he received widespread

notoriety by newspaper, *radio* and magazine" (R. 77, 121) "as societies most dangerous enemy", as the "master mind" of all criminals, and as "a vicious racketeer" who not only directed the murder of Rosen but of many others (R. 76-109).

Weiss and Capone joined in the motion, their argument being that because of the unfavorable newspaper and radio notoriety received by Buchalter, they, as co-defendants, would be indirectly affected by the alleged prejudice against Buchalter if they were to be tried together in any county of the City of New York (R. 129, 4123-4126).

Significantly, not a single affidavit of a resident of the community was submitted to show that there existed any prejudice which would prevent a fair and impartial trial. The record shows that the applications were based solely upon the speculation and surmise of counsel and the report of a hired investigator whose affidavit was patently worthless (see Justice Daly's opinion, R. 166). The affidavit of Buchalter's brother, discussed at page 27 of Buchalter's petition, was even worse than the one submitted by the hired investigator. In that affidavit the brother asserted that an assistant district attorney who was assigned to try the case, but whose name he did not disclose, told him that "current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction" (R. 111). It was evident from the very wording of the alleged statement that it was concocted to meet the occasion. The two assistant district attorneys who were assigned to try this case denied under oath that they ever uttered, in words or substance, any such statement (R. 123-124, 131).

At all events, after a full hearing was had in the Supreme Court the motions were denied with an opinion holding that they were devoid of merit (R. 165-168).

Later, a second application, based solely upon additional newspaper clippings, was made by Buchalter before a different Justice of the Supreme Court, who likewise denied the motion (R. 155-163, 175-176).

Consonant with other reckless accusations throughout his petition Buchalter asserts, at page 24, that his second application for a change of venue "received only the pretense of consideration".[10] The order of the court, however, recites,

> "* * *, and after hearing Jesse Climenko, Esq., attorney for the defendant in support of said application, and Burton B. Turkus, assistant district attorney, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the court, it is * * * ordered etc." (R. 176).

It would be unnecessary to discuss other facts relating to the motions for a change of venue, were it not for the omissions and inaccuracies in the petitions filed in this Court. In view of the extreme length of the record, we think it will be of help to call attention to some of them.

1. Each petitioner, in slightly different language, conveys the impression that the notoriety received by Buchalter through the newspapers "commenced" with the finding of the indictment and was particularly evident in Kings County (Buchalter's Pet., pp. 2-3; Weiss' Pet., p. 7; Capone's Pet., p. 4).

The fact is that because of his criminal activities for many years Buchalter received widespread publicity as a gangster-chieftain throughout the country (R. 129-130). It did not commence in 1940, but long antedated the present indictment. The New York Times Index reveals that the notoriety given to Buchalter's record in crime dates back to at least the year 1935 (R. 45-54, 129-130). Every time, and it was often, that he or his associates came into conflict with the law, an alert press naturally commented upon it.

10. We have already noted that at page 34 of his petition Buchalter makes a similar accusation against the Court of Appeals where, he says, he was given "only a semblance" of a review. It seems that the courts of the State of New York have formed an unholy alliance against Buchalter.

We select but a few examples from reports in the New York Times.

In 1935 and 1936 Buchalter was under investigation by District Attorney Dewey as the controller "of all major rackets" (R. 45-46). In October, 1936, the United States Circuit Court of Appeals affirmed the conviction of Jacob Shapiro but reversed that of Buchalter (R. 46). In September, 1937, Buchalter and Shapiro were named in an extortion indictment (R. 46). In November, 1937, Buchalter and Shapiro were sought in connection with an anti-trust prosecution involving the fur industry, resulting in the Government posting a reward for information leading to their arrest (R. 46). In June, 1938, testimony given in a court proceeding revealed the use of "threats and pressure" against dealers in the fur industry and that "payments were made to Buchalter and Shapiro" (R. 47). In July, 1939, District Attorney Dewey requested an increase in the amount of the reward offered for the apprehension of Buchalter, who was then wanted in connection with the "Garment and Bakery Racket Cases" (R. 47). In August, 1939, Buchalter surrendered to the Federal Bureau of Investigation (R. 48). In the same month he was arraigned on a Federal indictment charging him with "narcotics smuggling" (R. 48). In December, 1939, during Buchalter's trial in the Federal court a witness sought by the Government was found "slain" (R. 50). That month Buchalter was convicted (R. 51). In January, 1940, he was transferred to New York County to be tried on the charges pending against him; he refused to plead to the indictment until the Federal courts denied his application to prevent the state prosecution (R. 53). And in March, 1940, he was again convicted (R. 52).

It is thus apparent that the notoriety given to Buchalter's criminal activities did not commence in May, 1940, when the present indictment was found. Nor can it be said that the newspaper comments were limited to any particular

locality. As was said by Mr. Justice Daly in denying the motions for change of venue (R. 165-166),

> "It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners in the city and state of New York."

In short, to quote from the affidavit of counsel for Capone filed June 5, 1941, on his application for a separate trial,

> "The defendant Louis Buchalter, alias Lepke, is a person of national prominence * * * whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42).

So too, counsel for Weiss in a similar application on August 4, 1941, stated (S.M., p. 25):

> "Louis Buchalter, generally known as Lepke, is hailed throughout the press *of not only this county* but of the city *and I dare say the country at large*, as the leader of a band, etc."

In the final analysis, therefore, the sole question on the motions for change of venue was whether because of newspaper comments there existed in the County of Kings such prejudice and passion as to prevent a fair trial. Upon that question Mr. Justice Daly said (R. 165-166):

> "After a careful consideration of the application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. * * * 'If newspaper articles furnished ground for removal, no defendant could ever be tried for a spectacular crime' in the county of indictment. (*People* v. *Brindell*, 194 App. Div. 776.) * * * It is inconceivable that in a cosmopolitan community such as Kings County,

with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence."

Such a jury, we shall soon prove, was in fact obtained.

2. In discussing the newspaper notoriety Buchalter charges that "it is beyond cavil" that the prosecuting attorney "was responsible for this propaganda" (Pet., p. 48) and that,

> "Petitioner contends here, *as he contended below in the Courts of New York*, that the prosecutor succeeded in creating assurance of his guilt in the minds of the community in which he was to be tried * * *" (Pet., p. 3).

A sufficient answer to this accusation is to be found in the affidavit of Buchalter's counsel on his application for a change of venue. He there said:

> "Thus the question of whether reporters whose statements appear under their signature and who purported to quote the District Attorney of Kings County or his associates were unauthorized so to do, *is not a problem presented on this application.*
>
> * * * * *
>
> *No doubt many of the quotations attributed to the District Attorney of Kings County and his various aides as set forth in the exhibits annexed to this affidavit, were improper in the sense that they were made without authorization*" (R. 87, 108). (Italics ours.)

3. Finally, Buchalter also charges at page 37 of his petition that,

> "the Court of Appeals refused to review the question of whether * * * a change of venue should have been granted."

This accusation is amazing. We quote from the opinion of Judge Conway (R. 4068-4069; 289 N. Y. at pp. 220-221):

> "Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants' claim for a number of reasons.
>
> In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, 'No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *.'
>
> The motion was addressed to the sound discretion of the court. We are not prepared to say on this record that its denial was an abuse of discretion (*People* v. *Hyde*, 75 Misc. 407 [opinion by Mr. Justice Lehman, now Chief Judge of this Court]; aff'd., 149 App. Div. 131; *People* v. *Brindell*, 194 App. Div. 776, 781; *People* v. *Hines*, 168 Misc. 453, 470; *People* v. *Savvis*, 69 App. Div. 604). This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance."

And in denying the motion for reargument the court said (R. 4120-4121):

> "This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter of law by the County Judge in denying the motion for a change of venue. The majority of the court is of the opinion that the discretion was properly exercised."

We need make no further comment.

The Trial Jury.

1. Buchalter insists that "every talesman called was obsessed by a prejudice" and repeatedly asserts that "a fair jury was not impaneled" (Pet., pp. 27, 41, 49). Capone takes the same position (Pet., pp. 37, 63). Weiss limits his argument to "the fitness of the last two" jurors, stating that their fitness "was doubtful" (Pet., p. 11).

The record shows that the first nine jurors who participated in the verdict were pronounced "satisfactory to the defendants":

1.	Charles E. Stevens,	S.M. p.	522
2.	Chester T. Prentiss,	" "	1038
3.	Charles A. Murphy,	" "	1352
4.	David N. Day,	" "	1530
5.	Henry T. Gill,	" "	1647–1648
6.	James B. Cummings,	" "	1738
7.	George B. Hall,	" "	1861
8.	Harold S. Cross,	" "	2014–2015
9.	James R. Edghill,	" "	2566

These jurors, it is to be noted, were pronounced acceptable by the able defense counsel *when their peremptory challenges had not yet been exhausted.* Indeed before the next prospective talesman was question the defense *still had one more peremptory challenge* (S.M., pp. 2618, 2619, 2620). The statement in Buchalter's petition at pages 25 to 26 that their peremptory challenges "were exhausted before the tenth juror was selected" and the statement in Capone's petition at page 118 that the last three jurors "were all questioned subsequent to the exhaustion of the thirty peremptory challenges accorded to the defendants" are *not* correct.

We proceed to prove it. After the ninth juror was accepted two prospective jurors (Mr. Andrews and Mr. Rorke) were called for questioning. The examination of Mr. Andrews failed to disclose the slightest basis for interposing a challenge for cause (S.M., pp. 2579-2585, 2589-2603). He stated that he had formed no impression about the case or about the defendants (S.M., pp. 2591-2592) and that he knew of no reason which would prevent him from presiding as a fair and impartial juror (S.M., p. 2603). Under these circumstances the defense counsel did not interpose any challenge for cause but merely stated that they had no further questions to ask (S.M., p. 2621).

But before Mr. Andrews was challenged peremptorily, the questioning to determine the fitness of Mr. Rurke was commenced. It developed during his examination that he was the nephew of a police inspector "in charge of traffic" (S.M., p. 2603).[11] He stated that he had no impression adverse to any defendant (S.M., p. 2609), that if accepted as a juror he would "do justice" by his verdict (S.M., p. 2586) and that there was nothing to prevent him from rendering "a just verdict" under his oath (S.M., p. 2589).

As to this juror both Buchalter and Capone now state that he was "obviously prejudiced" (Buchalter's Pet., p. 26; Capone's Pet., p. 8). That they did not want him we have no doubt for they challenged him on the ground of alleged "implied bias" (S.M., p. 2609). Under the New York Code of Criminal Procedure, section 377, however (see Appendix), a juror can be challenged for implied bias for eight specific reasons, "and for no other". Mr. Rorke was not disqualified under any one of these statutory grounds. Counsel for the defense therefore appealed "to the discretion of the court" (S.M., p. 2612). The court, however, properly overruled the challenge (S.M., p. 2617).

Counsel thereupon had a discussion with the court, but not within the hearing of the jurors, which is recorded at

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11. Buchalter prefers to describe him as the nephew "of a prominent" and "high police official" (Pet., p. 26).

S.M., pages 2618-2620. In this discussion counsel urged that if their challenge for implied bias was not sustained they would be compelled to use their last peremptory challenge, which would leave them without the power of peremptorily challenging the other juror (S.M., pp. 2618-2619). The court, however, adhered to its original decision. Whereupon Mr. Rorke was again questioned. In this second examination Mr. Rorke stated that he would accord the defendants the presumption of innocence (S.M., p. 2624), that if chosen as a juror the defendants could rely upon him "for the preservation of every right that the law gives" them (S.M., p. 2627) and that if there should be a reasonable doubt of guilt in his mind he would give the defendants the benefit of such doubt (S.M., p. 2627).

If, as is now claimed, Mr. Rorke was "obviously prejudiced", why did not counsel use their peremptory challenge against him! Instead, for no reason whatever, they peremptorily challenged Mr. Andrews (S.M., pp. 2627-2628) whose fairness they at no time impugned.

We now come to Mr. Link who was the eleventh juror. He too, say Buchalter and Capone, was "obviously prejudiced" (Buchalter's Pet., p. 26; Capone's Pet., p. 8). His examination appears at S. M., pages 2660-2689. A reading thereof shows that there is not a single word to suggest any bias or prejudice. The statement of Buchalter in his petition at page 26 that "Link had been on the 'Mr. District Attorney' radio series" is misleading. The fact is that he was a radio announcer who had been consulted in connection with a fiction program called "Mr. District Attorney" (S.M., p. 2660). Typical of this man's qualifications to serve as a juror are his answers to the concluding questions put to him by counsel for Buchalter. We quote from the record (S.M., p. 2675):

> "Q. Can Mr. Buchalter as an individual depend on you and entrust to you his keeping and preservation?
> A. Yes, sir.

Q. Without any sympathy or bias or prejudice? A. Yes, sir.

Q. I take it you will consider your oath on that? A. Yes, sir."

And on questioning by counsel for Weiss he said (S.M., p. 2677):

"Q. Do you realize that if you are selected as a juror, under your oath you must determine and find according to the way you regard the facts? A. That is right.

Q. Without fear or favor or prejudice or bias? A. Yes, sir.

Q. And can you do that? A. Yes, sir."

None of the counsel challenged him for bias, actual or implied. Having used up their peremptory challenges, they merely said, "We rest on the record" (S.M., p. 2689).

As to the twelfth juror, John E. Coleman, the record shows that he was eminently qualified to serve. Two illustrations will suffice. Upon being questioned by counsel for Buchalter the juror said (S.M., pp. 2700-2701, 2704):

"Q. While you were sitting here did anything occur in the courtroom to cause favor or prejudice to either side? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. I take it you realize as well as anyone else the extreme importance of getting an impartial jury? A. Yes, sir.

Q. So that now there is no prejudice in your mind, or anything at all which would preclude you from giving Mr. Buchalter a fair trial? A. Nothing.

* * * * *

Q. The law says that every defendant is entitled to a fair trial at your hands. Will you give it to Mr Buchalter? A. Yes, sir."

And under questioning by counsel for Capone (S.M., p. 2705):

"Q. Have you had any discussion at all about this case? A. No, sir.

Q. Have you formed any impression of any character in the courtroom? A. No, sir.

Q. Your mind is clear now as to the fact that you can sit here as a fair and impartial juryman and take the evidence from the witnesses? A. Yes, sir."

It is thus evident that there is no basis whatever for the assertion that petitioners were not tried by a fair and impartial jury.

2. But "the Court of Appeals", says Buchalter at page 37 of his petition, "refused to review the question of whether petitioner had been tried before a fair and impartial jury".

This is not correct. The opinion of the Court of Appeals denying his motion for reargument said (R. 4121):

> "This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, Cons. Laws, ch. 30, art. 18-B;) the defendant appeared by attorney and consented to be tried before such special jury, a majority of this court is of the opinion that he thereby consented also to the statutory provision that rulings of the trial court upon challenges for actual bias are final and not appealable."

We have noted that only Mr. Rorke was challenged for implied bias and that as to Mr. Link and Mr. Coleman the petitioners, having exhausted their peremptory challenges, merely "rested on the record" and made no challenge for bias, actual or implied. Consequently, the holding of the Court of Appeals that by virtue of the Judiciary Law the "rulings of the trial court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict.

Conduct of the Trial.

1. *As to alleged supression of evidence.*

At page 30 of his petition Buchalter says:

> "Throughout a long cross-examination of that witness (Rubin), the prosecution suppressed a prior contradictory statement of the witness."

Let us look at the record. It shows that on *direct* examination of the witness Rubin, the prosecuting attorney, of his own volition, produced Rubin's prior inconsistent statement, questioned the witness concerning it, and then offered it for identification only because counsel for the defense objected to any examination as to its contents. We quote from the record (R. 1485-1486).

> "Q. Did Mr. McCarthy, the former Assistant District Attorney of Brooklyn, ask you questions about the Rosen case?
>
> Mr. Barshay: I object to it as not binding on this defendant.
>
> The Court: Overruled.
>
> Mr. Barshay: Exception.
>
> The Court: Just yes or no.
>
> The Witness: Yes.
>
> Mr. Turkus: *I ask that this be marked for identification.*
>
> (Papers marked People's Exhibit Z-16 for identification.)

Q. Do you know whether or not the questions and answers that were made at that time were reduced to writing? A. They were.

> Mr. Barshay: Same objection.
>
> The Court: Overruled.

Q. Is People's Exhibit Z-16 for identification a transcript—

Mr. Talley: I object to that, if your Honor please, as not proper examination under any circumstances.

The Court: Sustained.

Q. Does the date December 16, 1937, refresh your recollection as to the specific time when you were questioned? A. Only that you told me that was the date. I had forgotten it. It was in December.

Q. Did you in December of 1937, tell former Assistant District Attorney McCarthy *the truth* in that statement that you gave him?

Mr. Barshay: I object to it, your Honor, and I object to the form of the question. It is a self-serving declaration.

The Court: Sustained. The paper itself is not competent. Under the law it may be used only for examination to establish a possible impeachment—."

After thus repeatedly blocking the efforts of the prosecuting attorney to establish that his witness had made a prior contradictory statement, which was helpful to the defense, it is indeed brazen audacity to accuse him of suppressing the statement and, in addition, to charge that,

"No further effort was made by the prosecution to reveal the *existence* of such a prior contradictory statement" (Buchalter's Pet., p. 30).

We have not failed to note that the prosecuting attorney is charged with suppressing the statement during "cross-examination of the witness". But, here again, the record is barren of even a suggestion of any attempt to withhold from the defense the statement already marked for identification. In fact, after a lengthy cross-examination (R. 1492-1748), counsel for Buchalter concluded the interrogation as follows (R. 1748):

"Q. I forgot one question: Other than the statement you made to McCarthy, referring to one of the exhibits for identification by Mr. Turkus, in 1937, did you at

any time make a statement to Mr. McCarthy—yes or no? A. No, sir.

Q. You mean that at no time did you talk to McCarthy when a stenographer was present? A. Only that one time.

Q. That is the only time? A. Yes, sir."

But at no time during this examination, for reasons known only to defense counsel, was any request made to be permitted to examine the statement.

Later, the *prosecuting attorney* recalled the witness, and at the conclusion of direct examination Buchalter's able and experienced counsel asked the court whether they "had a right to see the statement" (R. 2377), the *existence* of which they now claim had been suppressed. The court then examined the statement, revealed the material and relevant contradictions by dictating them to the stenographer (R. 2381-2386), and said (R. 2391):

"The Court: This refers to the deposition taken by Assistant District Attorney McCarthy, who was one of the Assistants under Mr. Geoghan in an investigation that was made before Judge O'Dwyer came into office as District Attorney of this County. *You, Mr. Turkus, offered it in evidence, and it was objected to and excluded, but was marked for identification.* The Court has read parts of it to determine what is fair to allow counsel for the defense to see, for the purpose of further cross-examining this witness. Those parts have been revealed to counsel, and counsel have the right now, to cross-examine on those points."

2. *As to alleged deprivation of an opportunity to offer evidence in defense.*

At page 32 of his petition Buchalter says:

"Petitioner should have been afforded at least an opportunity to offer a defense. He, however, was denied even the pretense of such an opportunity."

In an attempt to support this complaint he relies upon the trial court's refusal "to make available to him certain official records of the Police Department of the City of New York" (Pet., p. 46; see also Weiss' Pet., pp. 28-30) which are known as "D.D. 4's". He states at page 33:

> "Petitioner contended, upon the trial, * * * that reference to the contents of those reports (if unexpurgated) would demonstrate that, as police officers of the City of New York knew and recorded at that time, petitioner did not see or talk with the witnesses thus produced against him upon the trial."

The lack of substance to the foregoing is demonstrated by the record facts. They are as follows:

Immediately before the cross-examination of the people's witness Berger, a request was made for the police reports. When the court ruled that the defense was not entitled to them, counsel for Buchalter said:

> "Mr. Barshay: * * * Whether or not the D.D. 4's had anything to do with this case, they are only concerning the movements of the defendant Buchalter in the years 1935, 1936 and 1937 in Manhattan and have absolutely no bearing upon this case" (R. 1881).

Later, in the absence of the jury, and while the witness Berger was still under cross-examination, the request for the police reports was repeated. At that time counsel for Buchalter said:

> "* * * If your Honor pleases, those are not records having to do with this case as a case but rather are they records having to do, as I understand the situation, with the work of the Police Department of the City of New York during the period from about September of 1935 to the end of 1936 in respect to the surveillance by agents of that department of one of the persons on trial" (R. 2141-2142).

The court then made the following inquiry:

> "The Court: Are they required in connection with the examination of this witness?
> Mr. Climenko: *They may be, your Honor,* * * *" (R. 2142).

Thereafter, the court asked the prosecuting attorney the following questions:

> "The Court: I am asking you this: Do they contain any Q's and A's by witnesses in this case?
> Mr. Turkus: They do not.
> The Court: Do they contain any depositions by witnesses in this case?
> Mr. Turkus: They do not.
> The Court: Are they purely police reports?
> Mr. Turkus: They are police confidential reports of activities of the Police Department.
> The Court: No depositions?
> Mr. Turkus: No depositions.
> The Court: No admissions?
> Mr. Turkus: No conversations, no admissions that I could find. They are about three inches thick" (R. 2146).

It is also to be noted that these reports were of investigations, made by police officers, of the movements of various underworld characters (R. 2142-2143).

Finally, the trial court, in denying the request, said:

> "The Court: If a policeman took the stand and testified otherwise, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling, but that is not present at this moment. Now as it stands, in addition to the fact that these are privileged and confidential under the law, they are hearsay" (R. 2151).

At no time did the trial court preclude petitioners from offering any defense they pleased. At the end of the people's case petitioners were free to call the Police Commissioner, or anyone else in authority, to reveal the names of the officers who made the reports and then to call such officers to testify on any competent matter. As we have noted the court specifically informed defense counsel that "if a policeman took the stand * * *, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling" (R. 2151). But counsel failed to do so, and the reason for it is revealed by the finding of the Court of Appeals which examined the police reports. The court said (R. 4120):

> "This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The records in question were deposited with this court at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. *The reports established that the defendant could and did elude the police at will.* The ruling of the trial court was correct." (Italics ours.)

3. *As to alleged restriction of cross-examination.*

Capone tells us that there was "unwarranted restriction of cross-examination by defense counsel" (Pet., p. 125; see also Weiss' Pet., pp. 5-6, 44). The fact is, as stated by Chief Judge Lehman, the "cross-examination of the important witnesses continued for days and no summary could be entirely satisfactory" (R. 4075; 289 N. Y. at p. 227). And the record shows that Bernstein's cross-examination occupies 504 pages (R. 768-1272); Berger's 288 pages (R. 1883-2134, 2156-2191, 2201-2203); Rubin's 273 pages (R. 1492-1754, 2391-2402); Magoon's 131 pages (R. 2472-2603); Tannenbaum's 110 pages (R. 2245-2353, 2368-2370).

4. *As to "armed guards", manacles, and "cordons of police".*

Petitioners make extravagant statements concerning the "atmosphere" in the courtroom. They complain that in being brought into the courtroom they were "manacled to police officers" and were "unmanacled only after the jury were in their seats and the defendants had been seated" (Weiss' Pet., p. 12). They also complain that the people's witnesses—such as Buchalter's employee Tannenbaum, a six-time murderer (R. 4040, 4041), Capone's employee Magoon, a two-time murderer (R. 4041), his employee Bernstein, an accomplice to the murder of Rosen (R. 4042), and Rubin, who was promptly shot through the head when he testified before the grand jury (R. 4049, 4050)—were brought into the courtroom by men "known to be detectives", who "had their badges on" and who were permitted to remain during the trial (Weiss' Pet., pp. 11-12; Capone's Pet., pp. 9-16).

A full description of the so-called "atmosphere" appears in the record at pages 686-690, 764-768, 1755-1756, and need not here be repeated. It is enough to say, concerning petitioners being manacled to police officers when brought to and from the courtroom, that Buchalter and Weiss were formerly fugitives from justice and at the trial were Federal prisoners in the custody of a United States marshal. They and Capone, as the record shows, were desperate criminals. [12]

In so far as the protection afforded to witnesses is concerned we add the information imparted by the trial court to defense counsel, in the absence of the jury (R. 2138):

> "At one time the situation was so desperate here that in trying a case it was deemed necessary to get an

12. For similar situations where such precautions were held to be proper see *Kelly v. Oregon*, 273 U. S. 589, 591; *State v. Temple*, 194 Mo. 237, 248; *People v. Kimball*, 5 Cal. Rep. [2] 608.

armored bank car with armed police outriders in order to escort one witness here because it was indirectly reported that there was a scheme on to block traffic and to assassinate that witness on his way to the jail. That witness is reported to have committed suicide this morning by jumping out of the eighth story window of a hotel."

5. *As to the charge to the jury.*

Petitioners place great stress upon alleged errors in the charge to the jury, which they claim were tantamount to a "direction to convict". Their argument is, in the main, based upon isolated excerpts, paraphrase and inference. The charge, as given, appears at pages 3871-3991 of the record. The parts criticized are discussed in the majority and dissenting opinions of the Court of Appeals (R. 4030-4091; 289 N. Y. 181-243). We need only add that the trial court repeatedly instructed the jury, with great emphasis, that they were the sole judges of the facts, that the credibility of witnesses was for them to determine (R. 3871, 3880, 3890, 3902, 3903), and that,

"The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy (R. 3871).

* * * * *

The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both— fairly, without prejudice or sympathy to either the defendants or to the people of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of a case in court, according to the accepted standards, means (R. 3872).

* * * * *

As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice" (R. 3873).

Jurisdiction to Review.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C. A. Section 344 (b).

In an attempt to bring themselves within the requirements of the statute, petitioners Buchalter and Weiss resort to very adroitly worded statements which we shall prove to be without foundation. Let us first quote what they say.

Buchalter asserts, at page 39, the following:

"The Federal questions herein presented and urged were raised in the State courts, as is evidenced by the statement in the remittitur of the Court of Appeals of the State of New York, as follows:

'Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.'

These Federal questions are succinctly set forth in petitioner's brief in support of his motion for a reargument in the Court of Appeals, which is a part of the record before this Court, and which shows that these points were all urged below in the first instance and at first opportunity."

In a similar statement Weiss says, at page 35, that,

"in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Amendment of the

> Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his life and liberty without due process of law 'and', as certified by the Court of Appeals, 'this point was considered and necessarily decided by this Court' (R. 4095), this point having been specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss (R. 4120)."

Capone makes the bald assertion that "the constitutional questions were raised and passed upon in the court below", and, as proof, also cites the remittitur of the Court of Appeals (p. 41).

Now, as to the facts. None of the petitioners, upon whom rests the "burden to show affirmatively" that this Court has jurisdiction (*Gorman* v. *Washington Univ.*, 316 U. S. 98, 101), supports his statement by pointing to any part of the record other than the recital in the remittitur and their brief on the motion for reargument. (See requirements of Rule 12, subd. 1, par. 3 of this Court, Revised Rules adopted Feb. 13, 1939.) The reason for this is that in the courts of first instance, with the sole exception of Capone's claim that under "the Constitution of the United States" he was entitled to a separate trial (R. 36-37), the petitioners never asserted any Federal right. The record of the trial will be searched in vain for a single instance "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States" (Judicial Code, sec. 237 (b) as amended). Nor is there any indication that the courts of first instance ever decided a Federal question.

Thus, the first fact is that Buchalter's statement that "the Federal questions herein presented and urged were raised in the State *courts*" and "were all urged below *in the first instance*" is untrue.

We now turn to the proceedings in the Court of Appeals. In that court, petitioners presented every conceivable point

that could be made in their behalf. Buchalter's brief was 166 pages in length (R. 4115). He raised ten points.[13] Of those, he selected only two as involving an alleged Federal question. Those two points dealt with the denial of the motions for a change of venue and the granting of the motion for trial by special jury (Buchalter's Court of Appeals Brief, Points II and III). As to all other points, he made no claim that they presented a denial of a right under the Federal Constitution.

Weiss' brief to the Court of Appeals was 78 pages in length (R. 4115). He raised ten points. In none of them did he assert any Federal right, except that as to the motions for change of venue he adopted and incorporated by reference the argument made in Buchalter's brief (Weiss' Court of Appeals Brief, Point Eighth).

Capone's main and supplemental briefs covered 284 pages (R. 4115). He raised ten points. Of those, the one dealing with rulings on challenges to jurors was presented as involving a denial of a Federal right, and another incorporated by reference Buchalter's argument as to the refusal to change the venue (Capone's Court of Appeals Brief, Points Five and Nine). The remaining points made no reference whatever to the Federal Constitution.

It is also to be noted that the exhaustive majority and dissenting opinions of the Court of Appeals make no mention of any Federal question (R. 4030-4091; 289 N. Y. 181-243).

Consequently, the recital in the remittitur, that "the point" was raised that there was a denial of constitutional rights under the Fourteenth Amendment and that "this point was considered and necessarily decided", must be construed as referring only to the three points where a Federal

13. The briefs on the appeal to the Court of Appeals have not been made part of the record before this Court. In view of petitioners' reliance upon the ambiguous recital in the remittitur, which was filed before the motion for reargument was denied, as supplying the basis for this Court's jurisdiction, it is essential to refer to those briefs to make clear the meaning of the remittitur.

question was raised, namely, denial of motions for change of venue, trial by special jury, and rulings on challenges to jurors.

Buchalter's contention, therefore, that "the Federal questions herein presented and urged were raised in the State courts, *as is evidenced by the statement in the remittitur*", is not in accord with the facts.

Turning to the motion for reargument, it will be recalled that Weiss, after quoting the recital in the remittitur that "this point was considered and necessarily decided", says:

> "This point *having been* specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss."

The quoted statement is misleading, because the remittitur was filed long *before* the motion for reargument was made and decided. The remittitur is dated October 30, 1942 (R. 4091-4098). The motion for reargument was made on November 12, 1942 (R. 4099), and was denied on November 25, 1942 (R. 4120). The remittitur, therefore, cannot possibly be deemed to refer to the alleged Federal questions sought to be raised *for the first time* in the motion for reargument.

Finally, the motion was not entertained, and the memorandum opinion denying it made no reference to any Federal question. Buchalter's contention that the brief in support of his motion for reargument shows that the questions presented "were all urged below in the first instance *and at first opportunity*" does not square with the facts. The motion for reargument was a reiteration of the points originally urged, except that where claim of having been deprived of a Federal right was not made before, it was now supplied as an afterthought. This was undoubtedly done for the purpose of attempting to create a jurisdictional basis for review by this Court.

SUMMARY OF ARGUMENT.

The errors assigned are without merit. They deal with matters which involve only the law of the State of New York, and do not present a Federal question. The recital in the remittitur cannot confer jurisdiction on this Court to review alleged errors concerning which no Federal right was asserted. The claims made in the motion for reargument are worthless as a basis for this Court's jurisdiction, because the motion was denied and the purported Federal questions there raised for the first time were not passed upon.

ARGUMENT.

I.

The guaranty of due process of law does not furnish a right to have decisions of state courts reviewed upon the ground of alleged erroneous findings of fact or erroneous determinations of law concerning state matters. In determining whether there is any basis for the claim that petitioners were denied their constitutional rights "we must remember that the Fourteenth Amendment does not limit the powers of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial". (*Avery* v. *Alabama*, 308 U. S. 444, 446-447.) "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose." (*Sauer* v. *New York*, 206 U. S. 536, 546.)

When federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded". (*Lisenba* v. *California*, 314 U. S. 219, 239.) Such a right is invaded where a defendant in a capital case is denied representation

by counsel (*Powell* v. *Alabama*, 287 U. S. 45), or where by the active conduct or the connivance of the prosecution a conviction is obtained through the use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227), or where the trial is dominated by mob violence in the courtroom, so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86).

The case at bar is outside the scope of those decisions. Petitioners were represented by able and experienced counsel, who were given ample opportunity to prepare their defense. The trial lasted about eleven weeks. The widest latitude was given in the selection of the jury, which, as we have demonstrated, resulted in obtaining a fair and impartial jury. Equally wide latitude was given to the defense in the cross-examination of the people's witnesses and in summations to the jury. And upon appeal to the Court of Appeals petitioners were given a full and conscientious hearing. In short, at every vital stage of the proceedings due process of law was had.

The criticism directed against the trial judge seems to be based on the notion that trial judges should be reduced to the humiliating position of having no right to say or do anything in a jury trial except to rule in monosyllables on questions presented by counsel, that they should do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds, or even prevent them from taking an unfair advantage by misleading the jury by false suggestions and the like.

"The trial judge is," however, "something more than a mere automaton." (*People* v. *Ohanian*, 245 N. Y. 227, 232.) He "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function, as at common law, is an essential factor in the process for which the Federal Constitution pro-

vides". (*Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 95.)

Trial by jury can never be an effective means for administering justice as long as it is characterized by appeals by able advocates to the emotions of untrained men with the judge muzzled and relegated to the side lines and not allowed any substantial part in the trial except to say "yes" or "no" to propositions drafted by counsel and used by them for partisan effect.

The notion that a jury, called upon to render a verdict on disputed facts and subjected to the obfuscating arguments of opposing counsel, are unable to reach a fair decision because the court seeks to help them by analysis and comment is absurd. The court has been trained to understand and clarify factual as well as legal intricacies, penetrate the devices of counsel and observe where the truth is apt to be. To deprive him of the right to aid the jury in arriving at a just verdict on the evidence would emasculate his usefulness. As was said by Dean Ezra Thayer (quoted in Wigmore on Evidence [3rd ed.] sec. 2551-a, p. 510):

> "In a long trial, perhaps involving hard questions of expert judgment, the business of weighing conflicting testimony is a serious task for men unused to analysis or to abstract ideas; and a system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal Tyranny or lay magistrates, is today a senseless perversion."

The criticism of the trial judge for permitting petitioners to be manacled to police officers while being brought to and from the courtroom is certainly unwarranted. Where, as here, the defendants on trial for murder are desperate and dangerous criminals, such precautions must be taken to prevent their escape. (*Kelly* v. *Oregon*, 273 U. S. 589; *State* v. *Temple*, 194 Mo. 237; *People* v. *Kimball*, 5 Cal. Rep. [2d] 608.) It is specious to contend that by so doing

their constitutional rights were violated. The words of Judge Cooley, a great judicial interpreter of the organic law, are quite pertinent. He said (*People* v. *Murray*, 52 Mich. 291):

> "I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any others; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct."

And this Court in a situation analogous to the one at bar said (*Kelly* v. *Oregon*, 273 U. S. 589, 591):

> "Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the warden of the penitentiary, inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody, in order that he might fully make his defense, and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely free from custody (citing cases). There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit."[14]

The same is true of the complaint against the presence of detectives in the courtroom when the people's witnesses were testifying. We have already stated the facts controlling this situation. It is pertinent here to quote the considered judgment of an eminent committee of the American Bar Association in their report on "Improvements In The Law

14. It is to be remembered that at the trial Buchalter and Weiss were Federal prisoners.

of Evidence (Reports of the Section of Judicial Administration at Annual Meeting for July 25-27, 1938):

> "10. *Intimidation of Witnesses.*
>
> In most of the large cities there is probably more or less intimidation of witnesses in felony cases. This, when it exists, is the supreme disgrace of our justice. It is well-known to all that the success of the 'racket' is due chiefly to the lack of proof caused by the intimidation of witnesses. This intimidation takes place either in the court premises or outside of them.
>
> (A) In the *court premises* it is the duty of the judge to install arrangements for protecting the witnesses, and also to instruct and require his bailiffs to exclude from the courtroom and its premises known bullies and touts. All this part of the remedy comes home to the judge's responsibility."

II.

We further maintain that, apart from the lack of merit to the points raised by petitioners, none of the questions presented is reviewable.

1. The denial of the motions for a change of venue does not involve a Federal question. "Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282.) In the *Barrington* case, just cited, the defendant applied for a change of venue on the ground of local prejudice. His motion was denied, and he was convicted of murder in the first degree. This Court in dismissing his application to review for want of jurisdiction said (p. 485):

> "*In our judgment no Federal question was involved.* Were this otherwise it would follow that we could de-

> cide in any case that the trial court had abused its discretion under the laws of the state, although the supreme court of that state had held to the contrary."

2. The same holds true of the denial of Capone's motion for a severance and of the motions for a three-month adjournment. "In the course of trial, * * *, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for a continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed." (*Avery* v. *Alabama*, 308 U. S. 444, 446; *Franklin* v. *South Carolina*, 218 U. S. 161, 168.)

In *Davis* v. *Texas*, 139 U. S. 651, the defendant was convicted of murder. In dismissing a writ of error this Court said (pp. 652-653):

> "The fifth error relates to the action of the trial court in refusing a continuance, and the sixth, to the action of that court in respect to that refusal upon the motion for a new trial. * * * It was for the court of appeals to determine whether the discretionary power of the trial court had been so abused as to amount to error, and whether its reconsideration, upon the motion for a new trial, of the refusal to continue called for revision. * * * *The matter was for the state courts to decide, and their action presents no federal question.*"

3. We have demonstrated in our statement of the facts that a fair and impartial jury was impanneled. Petitioners also contend that by reason of alleged erroneous rulings on challenges for cause to jurors who were excused peremptorily, they were improperly compelled to exhaust their peremptory challenges. This contention does not present a Federal question, even though the last two trial jurors were selected after petitioners had used up their thirty peremptory challenges. (*Spies* v. *Illinois*, 123 U. S. 131, 168-180.) As was said in *Brown* v. *New Jersey*, 175 U. S. 172, 175):

> "* * * the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained' *Hayes* v. *Missouri*, 120 U. S. 68, 71."

4. The charge to the jury did not present any Federal question. No claim was made at the trial that it violated the Federal Constitution. Nor was any such claim made or decided by the Court of Appeals. The charge, therefore, is not reviewable here. As stated in *Franklin* v. *South Carolina*, 218 U. S. 161, 172.

> "The supreme court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to plaintiff in error which would warrant a reversal by this court. *These rulings were upon questions of general law, concerning which no Federal right was asserted and denied, as is essential to enable this court to review the judgment of a state court.*"

5. Finally, it is to be remembered that the prop upon which this Court's jurisdiction is invoked is the vague recital in the remittitur and the briefs submitted on the motion for reargument.

The remittitur, however, cannot confer jurisdiction to review questions which were not raised. (*Honeyman* v. *Hanan*, 300 U. S. 14; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 244.) Obviously, "a point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it". (*Dewey* v. *Des Moines*, 173 U. S. 193, 200.) Since in the case at

bar the alleged errors concerning the conduct of the trial were never set up or claimed to be in violation of the Federal Constitution, the recital in the remittitur can have no bearing at all as to them. For it is settled law that "the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise". (*Rector* v. *City Deposit Bank Co.*, 200 U. S. 405.) As this Court said quite recently (*Honeyman* v. *Hanan*, *supra*, 300 U. S. at p. 22):

> "Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the Federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the Federal question was properly raised and was necessarily determined."

As to the motion for rearguument, which was denied without passing upon the alleged Federal questions there raised for the first time, it suffices to say:

> "This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision. *Locher* v. *Schroeder*, 149 U. S. 580, 585; *Pim* v. *St. Louis*, 165 U. S. 273. It is true that we have also decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so."
>
> *McCorquodale* v. *Texas*, 211 U. S. 432, 437.
> *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399.

III.

The petitions for writs of certiorari should be denied.

Respectfully submitted,

THOMAS CRADOCK HUGHES,
Acting District Attorney,
Kings County, N. Y.

HENRY J. WALSH,
SOLOMON A. KLEIN,
Assistant District Attorneys,
Of Counsel.

Appendix.

Affidavit for Special Jury and Trial Date.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs.

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF KINGS, }

SOLOMON A. KLEIN, being duly sworn, deposes and says:

That he is an Assistant District Attorney in the office of the District Attorney of Kings County and that the sources of his information and the grounds of his belief are the records and files of said office.

An indictment, No. 23855, was filed in the County Court of Kings County, on May 28, 1940, charging the above named defendants with the crime of Murder in the First Degree for the killing of one Joseph Rosen on September 13, 1936, by shooting and killing him with revolvers. A copy of said indictment is hereto annexed and marked "A".

On May 28, 1940, the defendants Capone and Strauss

were arraigned in the County Court of Kings County and entered separate pleas of not guilty to the said indictment. The defendant Strauss has recently been electrocuted for the commission of another murder. The defendant Feraco has as yet not been apprehended. On December 2, 1940, the defendant Cohen was arraigned in the County Court of Kings County and entered a plea of not guilty to the said indictment. On April 11, 1941, the defendant Weiss was arraigned in the said court and likewise entered a plea of not guilty. On May 29, 1941, the defendant Buchalter was arraigned in the said court and a plea of not guilty was entered for him.

The District Attorney intends to move the trial of the said indictment in the County Court of Kings County, Part II., before Hon. Franklin Taylor, not later than July 14, 1941.

Deponent is fully familiar with the facts and circumstances involved in the case against the aforesaid defendants and states that a special jury is required to try the issues for the following reasons:

The case is one of great importance and intricacy, involving proof that the defendants are guilty of the crime of Murder in the First Degree, committed with premeditation, deliberation and intent. This proof consists not only of voluminous and complicated testimony by lay witnesses, but also of expert testimony of a technical nature. The trial will also involve intricate and unusual questions of law. In addition to the complicated questions of fact and intricate questions of law, the circumstances concerning the case are such as to render it one of extreme importance both from the standpoint of the people as well as of the defendants.

Deponent further states and fully believes that the due, impartial and efficient administration of justice in this case will be advanced by having the trial herein before a special jury instead of an ordinary jury.

That no previous application for the relief herein sought has been made.

WHEREFORE, deponent prays for an order directing that the trial herein be had before a special jury in accordance with the statute in such case made and provided, and for such other and further relief as the court may deem just and proper.

SOLOMON A. KLEIN.

Sworn to before me this
23rd day of June, 1941.

CHARLES T. SCHACK
Notary Public
Kings County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original Motion for Special Jury filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Buchalter's Answering Affidavit.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs.

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HYMAN BARSHAY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York.

2. On May 28, 1941, I was retained as counsel for the defendant, LOUIS BUCHALTER.

3. On that day I filed a special notice of appearance on behalf of that defendant, my client.

4. On behalf of the defendant, LOUIS BUCHALTER, the jurisdiction of this Court to try him under the pending indictment has been questioned and a proceeding is now pending in the United States Courts wherein the question of the jurisdiction of this Court to try that defendant under the indictment referred to in the caption herein is sought to be questioned.

5. Reference is made to the question of the jurisdiction of this Court only for the purpose of indicating that my appearance in limited opposition to this motion is not to be construed as a waiver of the contention heretofore asserted on behalf of that defendant that this Court is without jurisdiction to try that defendant under this indictment.

6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury.

7. I note, however, from the affidavit of Solomon A. Klein, submitted in support of the motion, that the District Attorney intends to move the trial of this case "not later than July 14, 1941". I oppose that aspect of this motion and for the following reasons:

I cannot be adequately prepared on behalf of my client for the trial of this action on July 14, 1941.

As heretofore stated, I was retained on behalf of the defendant, LOUIS BUCHALTER, on May 28, 1941. Nevertheless, I was not permitted to confer with him until June 17, 1941.

The defendant, LOUIS BUCHALTER, is in the custody of the Attorney General of the United States. The Director of Federal Prisons, Mr. James V. Bennett on May 30, 1941, informed my associates in this case, that I would not be permitted to consult with the defendant. That announcement was made by telegram addressed to J. Bertram Wegman, the contents of which stated:

> "Regret we cannot permit Mr. Barshay interview Buchalter."

Thereafter, on return of a writ of habeas corpus issued by the United States District Court for the Southern District of New York, as I am informed, the United States District Court for the Southern District of New York, instructed an Assistant United States Attorney in the office of the United States Attorney for the Southern District of

New York, to obtain the consent of the Federal Director of Prisons for permission to allow me to see my client. I was afforded that opportunity for the first time on June 17, 1941.

8. My client, LOUIS BUCHALTER, is charged with murder in the first degree and the affidavit of Solomon A. Klein, submitted in support of this motion, states that this case "is one of great importance and intricacy, involving proof that the defendants are guilty of the crime of Murder in the First Degree, committed with premeditation, deliberation and intent. This proof consists not only of voluminous and complicated testimony by lay witnesses, but also of expert testimony of a technical nature. The trial will also involve intricate and unusual questions of law. In addition to the complicated questions of fact and intricate questions of law, the circumstances concerning the case are such as to render it one of extreme importance both from the stand point of the people as well as of the defendants".

9. I cannot prepare this case for trial in less than a month. There are only twenty-two working days between June 17, 1941, the day when I was permitted access to my client, and July 14, 1941, the day when the District Attorney seeks to set as the date of trial. I respectfully submit that in view of the complicated nature of this case as proved by the District Attorney himself, through the affidavit of his assistant, it is physically impossible to prepare the case in that time.

10. I have spoken to the defendant personally on three occasions since June 17, 1941. The facilities at the Jail at best are insufficient for long conferences. Other prisoners are entitled to the use of the same counsel room and a two hour stay is the longest for one day, without trespassing on the time of others. There are thousands of pages of testimony of other trials that I must read. There are numberless witnesses that I must interview both in and out of town. Even the help of my associates is insufficient to

properly prepare in so short a time. Intricate questions of law must be searched and prepared. The Court will understand the many things necessary to be done in a case of this magnitude. This time of the year many people take vacations and it therefore takes a longer time to reach them. Their convenience must be served as well as mine. I have already encountered three such situations in this case.

11. If it is impossible to prepare the case within that time, the setting of the date by the District Attorney involves the imposition of a gross injustice upon my client and great hardship upon me. As the situation is posed by the District Attorney's moving affidavit, the District Attorney has worked on this case and has had for the purposes of preparation, a period of at least fifteen months. The District Attorney asserts, by necessary implication, that I ought to be required to complete my preparation for the defense in twenty-two working days. I am certain the District Attorney does not want any man on trial for his life to be represented by counsel inadequately prepared to try the case.

12. No reason is given in the moving affidavit as to the necessity of trying this intricate, important and involved case before a special jury in the midst of the summer. No tenable reason could be proffered in support of that aspect of this application. If it be said, as it formerly has been said in informal discussion that the trial must proceed on that date by reason of the insistence of subordinates of the United States Attorney General, then I respectfully submit that I ought have an opportunity to solicit an expression of opinion from the United States Attorney General or his subordinates. I am reasonably certain that the Attorney General of the United States can be made to understand that the trial of a State murder case should not be had under conditions which would deprive the defendant of a reasonable opportunity to prepare his defense. This defendant is in a sense the ward of the Attorney General. I

am certain that the Attorney General or any of his subordinates would want that the defendant be given an opportunity for the preparation of his defense.

13. I respectfully request that the trial of this case be set for a day not earlier than the first week of September. All of the intervening interval between that date and today is needed for the preparation of the defense.

HYMAN BARSHAY.

Sworn to before me this
25th day of June, 1941.

HARRIET COHEN
Notary Public
Kings County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original affidavit filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Weiss' Answering Affidavit.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JAMES I. CUFF, being duly sworn deposes and says that he is the attorney for EMANUEL WEISS, one of the defendants in the above entitled indictment, and your deponent has been retained to represent the said defendant as trial counsel in the trial of the indictment against him.

That deponent was retained by the said defendant on June 11, 1941, and duly filed his Notice of Appearance in the Office of the Clerk of the County Court, Kings County on June 12, 1941.

That deponent does not oppose the application for the trial of the indictment before a special jury, but deponent does oppose that part of the application which seeks to have the trial set for July 14, 1941, for the reason that it will be physically impossible for deponent to properly prepare the case for trial in the limited time at deponent's disposal.

Since deponent was retained in this case he had prior commitments for trials in the Supreme Court which oc-

cupied most of his time, and practically the only time that deponent has been able to devote to the case since June 12, 1941, up to the present time was during the evenings, except for the few times that deponent has been able to interview his client in the Federal Detention Prison at 427 West Street, Borough of Manhattan, City of New York.

The proper preparation of this case for trial will involve the interviewing of a very large number of possible witnesses and the examination of voluminous documents and records of other trials in which deponent believes that many of the witnesses that will be called on this trial appeared as witnesses and gave testimony.

Deponent intends to devote himself exclusively to the preparation of this case between now and the time that it is reached for trial, but from what deponent has ascertained to date has firmly convinced him that there will not be sufficient time at his disposal to do the work that it will be necessary for him to do in order that the defendant's interests may be properly, fully and sufficiently protected at the trial and his defense properly and fully presented.

Deponent believes that this Court might take judicial notice of the fact that the case is one of great importance, and that it is such as to require a tremendous amount of time and labor in order that the defendant's interests might be fully protected and his defense fully presented at the trial.

Indeed, the affidavit of Mr. Klein submitted in support of the application states that the proof to be submitted on behalf of the prosecution consists of voluminous and complicated testimony of lay witnesses and in addition there will be expert testimony of a technical nature. He also states that the trial will involve intricate and unusual questions of law. In this deponent agrees with Mr. Klein and wishes to add that in so stating he puts the case very mildly.

Deponent's sole desire is to see that his client's interests are fully and properly protected and this cannot be done unless deponent has sufficient time to make the necessary investigations and interview all of the persons who might

be called as witnesses on behalf of deponent's client, and deponent is certain that there will not be sufficient time at his disposal even if he should devote himself exclusively to this work day and night until July 14, 1941.

The affidavit of the District Attorney does not present any good or sufficient reason why it should be necessary to start the trial of this case on July 14, 1941, and deponent submits that it will not be for the best interests of the defendant to have the case tried a the time specified which will be during the very hottest period of the summer.

WHEREFORE deponent asks that in considering this motion that the Court give due consideration to the situation in which deponent finds himself, and to the utter impossibility of deponent properly preparing the case of his client for trial in the limited time at his disposal, and deponent respectfully asks that the case be set down for trial for some time in the month of September, at which time deponent will be properly prepared for the trial.

JAMES I. CUFF.

Sworn to before me this
25th day of June, 1941.

CLAIRE SCHUTZ
Notary Public
Queens County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original affidavit filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk

Order Granting Motion for Special Jury.

At a Term, Part I, of the County Court of Kings County held at the Court House thereof, 129 Schermerhorn Street, Borough of Brooklyn, City of New York, on the 2nd day of July, 1941.

Present: Hon. PETER J. BRANCATO, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

The plaintiffs having applied to this court for a special jury to try the issues arising in the above entitled action and the said motion having duly come on and been heard on June 26, 1941, and the District Attorney of Kings County, by Burton B. Turkus, Assistant District Attorney, of counsel, having appeared in support thereof, and Hyman Barshay, Esq., attorney for the defendant, Louis Buchalter, alias "Lepke"; James L. Cuff, Esq., attorney for the defendant, Emanuel Weiss, alias "Mendy Weiss"; Saul Price, Esq., attorney for the defendant, Philip Cohen, alias "Little Farvel", and Leon Fischbein, Esq., attorney for the defendant, Louis Capone, appearing and consenting to the grant-

ing of the motion for a special jury but opposing the trial date, namely, July 14, 1941, and due deliberation having been had,

NOW on reading and filing the notice of motion dated June 23, 1941; the affidavit of Solomon A. Klein, duly verified June 23, 1941; a copy of the indictment herein and the pleas thereto, and on proof of due and timely service of the said notice of motion and affidavit, submitted in support of said motion, and upon all other papers and proceedings heretofore had herein, it is on motion of William O'Dwyer, District Attorney of Kings County,

ORDERED, that the said motion be, and the same hereby is, in all respects granted and that a special jury be empanelled to try the issues arising upon the above entitled action and that the trial of the above entitled action be had before such special jury, and it is further

ORDERED, that the said special jury shall be drawn pursuant to the provisions of the statute in such case made and provided at the Office of the County Clerk, Department of Jurors, Room 407, Municipal Building, Borough of Brooklyn, City of New York, on July 8, 1941, at 9:30 A. M., and that the number of such special jurors to be drawn shall be 250 and they shall be required to attend a Trial Term, Part II., of the County Court of Kings County, before the Hon. Franklin Taylor, County Judge, on August 4, 1941, and upon such subsequent days as they may be directed by the court.

Enter:

PETER J. BRANCATO,
County Judge.

Granted
Jul. 2, 1941

FRANCIS J. SINNOTT
Clerk.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original Order filed in my office July 21, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Section 377 New York Code of Criminal Procedure.

"§ 377. Grounds of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action or having complained against, or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror." (L. 1881, ch. 442, sec. 377 in effect Sep't. 1, 1881.)

FILE COPY

MAY 6 1943

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

THOMAS CRADOCK HUGHES,
Acting District Attorney,
Kings County,
New York.

SOLOMON A. KLEIN,
HENRY J. WALSH,
EDWARD H. LEVINE,
Assistant District Attorneys,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

Opinions Below.

The petitioners were convicted of the crime of Murder in the First Degree in the County Court of Kings County, State of New York, after a trial which lasted eleven weeks (R. 4030). On appeal to the Court of Appeals, the highest court of the state, the judgments of conviction were affirmed by a divided court. Exhaustive majority and dissenting opinions were written which are officially reported in 289 N. Y. 181-243. Thereafter, petitioners made a motion for reargument which was denied with a *Per Curiam* opinion officially reported in 289 N. Y. 244.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended [28 U. S. C. A. Sec. 344 (b)] upon the claim that petitioners were denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The facts in relation to the requirements of this statute were set forth at pages 36-39 and 46-47 of our brief in opposition to the petitions for a writ of certiorari. They need not here be repeated. It suffices to note that on February 15, 1943, this Court denied certiorari, but one month later, upon an application for rehearing, the order was vacated and certiorari was granted.

Questions Presented.

Petitioners' "Specifications of Error to be Urged" (Brief, pp. 35-36) raise the following questions:

1. Whether the trial "was held in a poisoned atmosphere in which a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had."

2. Whether the trial court "prevented the impaneling of a fair and impartial jury" and whether the Court of Appeals arbitrarily refused to review rulings on challenges for actual bias.

3. Whether "evidence relevant and material to the defense, in the possession of the prosecution, was suppressed by the State."

4. Whether the trial court's charge to the jury and comments during the trial and the prosecuting attorney's summation "combined to deprive petitioners of the right to fundamental fairness in the trial."

5. Whether the denial of Capone's motion for a trial separate from Buchalter and Weiss deprived him of due process of law.

Statement of the Case.

In July, 1935, the Governor of the State of New York appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into "all acts of racketeering" and "all organized crime." Mr. Thomas E. Dewey was designated to conduct the investigation as special prosecutor (R. 1370-1375, Peo.'s Exhs. 33 and 34). At that time the petitioner Buchalter, referred to by the witnesses throughout the trial as Lepke, was a leader of organized crime who for years had thwarted apprehension and punishment. In the language of *his own counsel* in summation to the jury, "Lepke was not just an ordinary racketeer" (R. 3589); he "was being looked for by Dewey as king of the flour racket and king of the crime racket" against whom there were "thousands of complaints in extortion totaling half a million dollars" (R. 3584-3585; 289 N. Y. at pp. 184-185).[1]

Buchalter had on his payroll professional murderers (R. 2211, 2213-2214, 2228, 2232, 2245-2246), "sluggers", strike-breakers (R. 1796-1798, 1906-1907, 1917, 1921, 2228), and collectors of extortion moneys (R. 1990-1992). In this group was his chief aide, the petitioner Weiss (R. 2213, 2215-2216, 2365-2366) who, together with Harry Strauss, a member of an underworld association known as "The Combination," of which petitioner Capone was one of the leaders (R. 2425-2427, 2565-2566), fired the shots that killed the deceased in the case at bar (R. 740-741, 4042-4043; 289 N. Y. at pp. 194-195).[2]

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1. The jury was apprised of these facts by Buchalter's counsel, not by the prosecuting attorney, in an attempt to induce the jury to believe that Buchalter, having committed only "a possible misdemeanor" against Joseph Rosen and having many more serious charges to worry about, would have no motive to order Rosen's death (R. 4031-4032; 289 N. Y. at p. 184).

2. Strauss was not on trial, having been previously convicted and executed for the commission of a separate murder (R. 3041; 289 N. Y. at p. 193).

Another member of the organization was the people's witness Tannenbaum who up to the time of his arrest was Buchalter's employee for nine years (R. 2232; 289 N. Y. at p. 193). He took orders from Buchalter and Weiss and from "Gurrah" Shapiro (R. 2215-2216, 2365-2366; 289 N. Y. at p. 193). Shapiro was Buchalter's partner (R. 1329). In the course of his employment Tannenbaum's salary increased from thirty-five to one hundred and twenty-five dollars per week (R. 2214). In addition to being a slugger and strike-breaker in the clothing district (R. 2211, 2228), he participated in six murders and helped to "dump the body of a dead man" for "disposition" and "concealment" (R. 2228, 2245-2246).

The witnesses Magoon and Bernstein were Capone's employees (R. 2425-2427; 289 N. Y. at pp. 193, 194). Magoon's salary started at forty dollars a week and later rose to seventy-five (R. 2567). He always obeyed "orders and instructions" from his superiors (R. 2427-2428). He participated as the "wheel-man" in two murders, delivered the car to be used in still another murder, and helped to dispose of an empty gasoline can, the contents of which had been used to burn the body of the victim in a murder committed by Strauss and others (R. 2470-2471; 289 N. Y. at p. 193; see also *People* v. *Goldstein and Strauss*, 285 N. Y. 376).

As for Bernstein, he performed many "jobs" for Capone (R. 695) and committed crimes whenever he got "orders from the mob" (R. 768, 770, 776, 777). He helped bury a dead body (R. 778-779), and in the instant case drove the "get-away" car under orders and instructions of Capone and Weiss. Capone taught him the route and aided Weiss and the others to make their escape after the murder was committed (R. 714-716, 720-721, 745-748; 289 N. Y. at pp. 194-195).

The record further shows that the witness Paul Berger and one Danny Fields acted not only as Buchalter's agents in the collection of extortion money (R. 1990-1992) but also as intermediaries between Buchalter and corrupt labor

union officials affiliated with the Amalgamated Clothing Workers of America (R. 1317-1320, 1800-1801; 289 N. Y. at p. 186). Buchalter and his partner Shapiro were on the union payroll for many years (R. 1299, 1800-1801, 1943). They participated in determining who should have control over certain of its Locals, who should occupy office, and how strikes should be conducted (R. 1796-1801, 1310-1316). One of the union officials who was kept in office as business agent through Buchalter's domination was the witness Max Rubin (R. 1313-1314; 289 N. Y. at pp. 185-187).

To render their control and influence over the union more profitable, Buchalter, Weiss and Shapiro acquired various interests, as undisclosed principals, in concerns engaged in the manufacture and transportation of clothing, which the union officials permitted to be conducted as non-union shops (R. 526, 1323, 1628, 1634, 1932, 1934, 2968-2969).

Competition by other non-union concerns would, of course, lessen Buchalter's profits. One of such competitors was Joseph Rosen's clothing-trucking company. It operated in competition with the Garfield Express, a non-union concern in which Buchalter became a partner. Consequently, in the course of a general stoppage of all trucks carting clothing in and out of New York City, Buchalter forced Rosen out of business, and the Garfield profited materially (R. 4033-4034; 289 N. Y. at pp. 186-187). The meeting at which Rosen was ordered to give up his business is briefly described in the opinion of Judge Conway as follows (289 N. Y. at p. 186):

> "Buchalter told Rubin he wished to see Rosen and they met at the office of one Weiner, a former business associate of Buchalter. Rubin, Danny Fields and one Gurrah were present. Rosen told Buchalter that the Pennsylvania business was the only thing he had in the N. Y. and N. J. Co., and that if that were lost that he would lose everything. Buchalter then said that he wished to see Rosen's books. In response to a telephone message, they were brought by Rosen's

daughter, Sylvia, who was a witness upon the trial.[3] Buchalter and Gurrah then went over the books and told Rosen what business he could not take. Rosen said he would be ruined. Rubin told him 'not to hit his head against a stone wall.' Buchalter then promised that they would do something for him and Rosen left."

This brings us to Buchalter's efforts to thwart investigation of his criminal activities. His technique of circumventing the law was revealed by him to Mr. Edward C. Maguire who was the attorney for the Local of which Rubin was business agent. Mr. Maguire was a witness for the people (R. 1757-1775) about whose testimony petitioners' brief says nothing.

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3. At page 3 of petitioners' brief the statement is made that:

"The *entire* case against petitioners depended upon the testimony of the witnesses Bernstein, Rubin, Berger, Tannenbaum and Magoon.". (Italics ours.)

And at page 32:

"The prosecutor must have known that the testimony of the widow and children of the deceased was so fantastic as to be beyond the trial court's considerable capacity for credence. Yet they were put before the jury to enhance, by the sympathy which their bereavement naturally induced, the prejudice against petitioners who were accused as the cause of their sorrow. Weeks later, *their testimony was stricken from the record* (R. 3525-3534), but by that time their appearance on the witness stand had had full effect on the jury." (Italics ours.)

These statements are in direct conflict with the record facts. In addition to the witnesses named by petitioners, Rosen's daughter and three other witnesses (Maguire, Aman and Bell), whose testimony will later be discussed, supplied highly material proof. The testimony of Rosen's daughter concerning the conference at which Buchalter ordered her father to give up his business appears at pages 564-584 of the record. It was not adduced for "sympathy" or "prejudice" but in corroboration of similar testimony given by the witness Rubin (R. 1329-1332). Nor was it stricken from the record. A motion to strike this testimony was expressly denied (R. 3529). The same is true as to the testimony of Rosen's son (R. 3526-3528).

In connection with investigations that were being conducted by the authorities Mr. Maguire, in Buchalter's presence, advised Rubin not to become a fugitive from justice (R. 1761). Buchalter disagreed and told Mr. Maguire that,

> "If witnesses are not available, investigations collapse" (R. 1762; 289 N. Y. at p. 189).

It was in line with this policy that Buchalter, after Mr. Dewey was appointed by the Governor of the State to investigate "all acts of racketeering" and "all organized crime," sent money to Joseph Rosen with instructions to leave the city and to stay away until he was told to return (R. 1360; 289 N. Y. at pp. 187-188). Later, when Buchalter learned that Rosen threatened to go to Mr. Dewey, he said to Rubin:

> "Well he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all" (R. 1365; 289 N. Y. at p. 188).

On the same day Buchalter gave the necessary instructions to his chief aide Weiss and to his employee Berger (R. 1804-1807). Within forty-eight hours Rosen's body was found riddled with seventeen bullet holes (R. 343).

As we have already noted Buchalter's orders were carried out by Weiss, Capone, Berger, Bernstein and others. Weiss together with Strauss fired the shots; Capone aided in planning the murder and in the escape. On the day following Rosen's death Weiss rendered his report to Buchalter who expressed his satisfaction with the way the job was done (R. 2222-2224). In short, as Chief Judge Lehman said:

> "Joseph Rosen was killed on September 13, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the ne-

> farious purposes of the gang. * * * The accusing witnesses *and the defendants* were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac" (289 N. Y. at pp. 222, 228).[4]

The foregoing facts do not yet complete the background of this case. It is necessary to note what happened to witnesses other than Rosen. Danny Fields, who it will be recalled was present with Rubin at the meeting where Buchalter ordered Rosen to give up his business, fled from the Dewey investigation on Buchalter's instructions (R. 1942, 1956, 1978). Fields is no longer alive (R. 1319). Rubin, too, was sent away by Buchalter to hide out until the investigations in Manhattan and Brooklyn were over. Buchalter sent him to Salt Lake City, New Orleans and to various other cities throughout the country (R. 1383-1419, 1814-1821; 289 N. Y. at pp. 189-190).

But that was not all. After successfully keeping Rubin away for about a year, Buchalter was faced with Rubin's

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4. Petitioners stress the depraved character of some of the people's witnesses, a fact which was quite apparent to the jury and of which they were frequently reminded. The crux of the matter is that "in fixing the blame for such a crime as we are here considering the state is not likely to discover witnesses of high character" (*People* v. *Cohen*, 223 N. Y. 406, 422). These witnesses were petitioners' employees. "In the very nature of things horrible events such as the one narrated in this record are not witnessed, except it be by mere chance, by people of savory history and clean, moral lives. This record shows that an awful crime was committed in defiance of law for some specific purpose and pursuant to a deliberate plan. The crime was neither an accident nor the result of heated passion. To determine who were the persons guilty of the crime there was no choice of witnesses. It was necessary to take the testimony of such persons as saw the occurrence and of those who had knowledge of facts leading up to the homicide" (*People* v. *Seidenshner*, 210 N. Y. 341, 358).

refusal to continue to remain in hiding outside the State of New York. Rubin, however, was "a key witness in the trial of the instant case" (289 N. Y. at p. 216). As a warning to Rubin, Buchalter asked him how old he was, and, on being told, said, "It was a ripe age" (R. 1424, 4038). Thereafter Weiss told Berger that "We got some information that Max Rubin is squealing and he has got to be hit" (R. 1838, 4039, 4064). Capone told Magoon, "Rubin is hurting Lep (meaning Buchalter), and we got to hit him in the head and get rid of him" (R. 2453-2454). In the words of the majority opinion of Judge Conway:

> "Defendant Buchalter's efforts to keep the witness Rubin out of town, as indicated in Rubin's testimony, indicate that Buchalter as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, or any charge which might lead the District Attorney to the uncovering of those responsible for the Rosen murder. * * * From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Buchalter's statement to Mr. Maguire that 'If witnesses are not available, investigations collapse'" (289 N. Y. at pp. 216-217).

Accordingly, a few days after Rubin testified before the grand jury he was shot through the head, the bullet entering the back of his neck and emerging at the bridge of the nose in close proximity to the right eye (R. 2371-2375). The shooting was planned and directed by Weiss (R. 1838-1845, 1854, 1859-1860). Fortunately, however, Rubin survived.

About one month after Rubin was released from the hospital he was questioned by an assistant district attorney of Kings County concerning the Rosen murder. Due to overpowering fear engendered by the almost successful attempt

to kill him. Rubin denied that he knew anything about the case (R. 2408, 2419-2420).[5]

That Rubin's fear was fully justified is further evident from the fact that when Weiss learned Rubin came out of the hospital alive, he resolved to "catch up with him" (R. 1855) and enlisted the aid of Capone and Capone's "Combination" in a second attempt to kill him (R. 2434-2436, 2446-2447, 2453-2454; 289 N. Y. at p. 194). But Rubin was under police protection and their plan had to be abandoned (R. 1868, 2458-2459; 289 N. Y. at p. 192).

In June, 1937, Buchalter told Berger that "things were getting too hot" and that he (Buchalter) would have to go away (R. 1831; 289 N. Y. at p. 192). The following month he disappeared (R. 2271). Rewards were then posted by the Federal and State Governments for information leading to his arrest (R. 46, 47, 48). It was not, however, until August, 1939, that Buchalter decided to surrender to the Federal Bureau of Investigation (R. 1889), as a result of which he was convicted in the United States District Court for the Southern District of New York and was sentenced to a term of imprisonment in the Federal Penitentiary at Leavenworth, Kansas (R. 126).[6]

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5. At page 6 of petitioners' brief we are told: "It was shown, however, that in December, 1937, when Rubin would have implicated Buchalter if he could (R. 2400-01), as he had already implicated him in other crimes, he had made a statement to Mr. McCarthy * * * in which Rubin completely exculpated Buchalter of any complicity in the Rosen murder." The reason for Rubin's prior statement should, however, be added. As he explained: "I had just been shot in the head. I went to the Grand Jury, where anybody (*sic*) knew where I was. I was shot in the head" (R. 2408), and gave "untruthful answers to Mr. McCarthy due to fear of Lepke" (R. 2420). In view of this fact coupled with Rubin's knowledge of the reason for the murder of Rosen, we can readily understand why he then "exculpated Buchalter of any complicity in the Rosen murder".

6. The Federal trial, just as the trial at bar, was preceded and accompanied by wide newspaper publicity. See, *e. g.*, R. 45-51, containing the New York Times headlines as collated in its Index under Buchalter, an exhibit filed by counsel for Capone.

In March, 1940, Buchalter's employee Tannenbaum was arrested (R. 2315) and by court order was placed in police custody as a material witness (R. 2231, 2346). Weiss then informed Berger that "It looks like Allie (Tannenbaum) is talking and I will have to duck" (R. 1872, 1875). Shortly thereafter Weiss fled from the State. He was apprehended a year later by agents of the United States Bureau of Narcotics in Kansas City, Missouri, where he was hiding under an assumed name and other disguise (R. 2607-2698).

The Attorney General of the United States then consented to the production of Buchalter and Weiss for the purpose of standing trial in Kings County upon condition that they "should at all times remain in the custody of the United States Marshal of the Eastern District of New York until the conclusion of the trial" (R. 126-127).[7]

Proceedings Prior to Trial.

On May 9, 1941, Buchalter was brought to the County Court of Kings County to be arraigned on the indictment. He requested permission to confer with members of his family, who were in the courtroom, "about getting counsel". Permission was granted. He then requested an adjournment for one week "within which to get counsel to appear for him on the arraignment". This was consented to, and the matter was adjourned (V. 1-4).[8]

On the adjourned date he appeared by counsel who stated that "the defendant stands mute", and, upon the ground that there was a serious question as to the court's jurisdiction to be considered, requested another adjournment for two weeks. Again, the request was granted on consent (V. 4-8).

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7. This was in accord with this Court's decision in *Ponzi* v. *Fessenden*, 258 U. S. 254.

8. The designation "V" is used to distinguish pages in Volumes VI through VIII from pages in preceding volumes which are designated "R".

At the third appearance Buchalter refused to plead to the indictment, his counsel stating "We seriously doubt that this Court has any jurisdiction to try this defendent" (V. 8). This time the prosecuting attorney objected to any further delay. A plea of not guilty was then entered by the court and the case was set for trial for July 14th, six weeks thence (V. 11-13). Whereupon, counsel objected that six weeks would not give them "adequate opportunity to prepare for the defense" (V. 14).

Buchalter's next move was to sue out a writ of habeas corpus in the United States District Court seeking to be returned to Leavenworth. He contended that the Attorney General had no right to order his transfer to Kings County. The writ was dismissed, an opinion being written by District Judge Conger (R. 127). Thereupon, he applied to the Circuit Court for leave to appeal and for a stay of the trial. The application was denied by Judge Learned Hand (V. 25-26).

Soon thereafter the district attorney made a motion for an order directing the drawing of a panel of special jurors to attend at the trial on July 14th, the date originally fixed by the court (R. 127). This motion was made pursuant to the provisions of Section 749-aa of the New York Judiciary Law which permits the defendant or the district attorney to apply for such a jury where the subject matter of the indictment "has been widely commented upon" (R. 127, 173; Appendix, *infra*). Subdivision 2 of that statute provides, in part, as follows:

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *." (Appendix, *infra;* quoted by Court of Appeals 289 N. Y. at p. 221.)

As stated by Judge Conway, "*Each of the defendants consented to be tried before such special jury*" (289 N. Y. at pp. 220-221; see also R. 127-128, 165). Counsel for Buchalter submitted an affidavit in which he said:

> "6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury."

Counsel for Weiss likewise consented. In his affidavit he said:

> "That deponent does not oppose the application for the trial of the indictment before a special jury, * * *."

Accordingly, the court order after reciting that counsel for each defendant

> "appeared and consented to the granting of the motion for a special jury."

directed that a panel of two hundred and fifty talesmen be drawn, and, since counsel claimed that they needed more time to prepare for trial, the order postponed the trial date to August 4th (R. 127-128).[9]

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9. Petitioners failed to cause their affidavits and the court order to be printed in the record. Instead, this Court was told in Buchalter's petition for certiorari that,

> "Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the court at *nisi prius* in granting the motion for a special jury *misstated the fact* in recording that there was consent."

In view of that statement we obtained permission from the Clerk of this Court, by letter dated Dec. 24, 1942, to file certified copies of the motion papers and court order and to print them as an Appendix to our brief in opposition to certiorari. Petitioners, therefore, do not now repeat their former assertion, but characterize their unequivocal consent as "a failure to object" (Brief, p. 52).

After notice to petitioners, the provisions of said order were complied with, a Justice of the Supreme Court presiding at the selection of the panel (R. 128). But despite their consent to proceed to trial before a special jury drawn from the citizens of Kings County, pursuant to which two hundred and fifty talesmen were already drawn and notified to appear in court (R. 128, 165), petitioners decided to apply for a change of venue to a place "outside the City of New York" (R. 76-77).

Buchalter urged that he could not receive a fair trial in the City of New York because for "the past two years" he received widespread notoriety by newspaper, radio, and magazine, "as society's most dangerous enemy", as the "master mind" of all criminals and as "a vicious racketeer" (R. 76-109, 121). After quoting many newspaper clippings his counsel admitted under oath that the district attorney was not responsible for the notoriety, stating,

> "No doubt many of the quotations attributed to the District Attorney of Kings County and his various aides as set forth in the exhibits annexed to this affidavit, were improper in the sense that they were made without authorization" (R. 108).[10]

Indeed, the publicity given to Buchalter's long record of crime dated back to at least the year 1935 and was nation-wide in scope (R. 36, 42, 45-54, 129-130, 165-166; V. 28).

Weiss and Capone joined in the motion for a change of venue, their argument being that because of the unfavorable notoriety received by Buchalter, they, as co-defendants,

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10. In Buchalter's petition for certiorari (p. 48) the accusation was made that "it is beyond cavil that he (the prosecuting attorney) was responsible for this propaganda". The brief now filed modifies the accusation. Although the expressions "propaganda" and "newspaper campaign in advance of arraignment" are still retained (p. 10), petitioners reluctantly concede that the "publicity may not have been the fault of the State" (p. 42).

would be indirectly affected by the alleged prejudice against him (R. 129, 4123-4126). Capone has maintained this position despite the subsequent admission by his counsel, in a sworn affidavit seeking a separate trial, that,

> "The defendant Capone has been practically unheard of in the newspapers and has received no publicity which would cause members of a jury to consider him a sinister or notorious character" (R. 56).

Significantly, not a single affidavit of a resident of the community was submitted to show that there existed any prejudice which would prevent or hinder a fair and impartial trial. The applications were based upon the speculation and surmise of counsel and the report of a hired investigator whose affidavit was patently worthless (see Justice Daly's opinion, R. 166). The affidavit of Buchalter's brother, a sentence of which is quoted in a footnote at page 34 of petitioners' brief, was even worse than the one submitted by the hired investigator. In that affidavit the brother asserted that an assistant district attorney assigned to try the case, whose name he did not disclose, told him: "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation" and that "current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction" (R. 111). It was evident from the very wording of the quoted statements that they were concocted to meet the occasion. The two assistant district attorneys assigned to try this case denied under oath that they ever said, in words or substance, any such thing (R. 123-124, 131).

At all events, after a full hearing was had in the Supreme Court the motions were denied with an opinion that they were devoid of merit (R. 165-168). Later, a second application, based solely upon additional newspaper clippings, was

made by Buchalter before a different Justice of the Supreme Court who likewise denied it (R. 155-163, 175-176).[11]

Finally, on August 4th the case was called for trial. The district attorney stated he was "ready" (V. 15). Counsel for Weiss said, "defendant Weiss is ready" (V. 15). Counsel for Buchalter, however, said,

> "This defendant refuses to answer ready, because he has not been afforded a reasonable opportunity to properly prepare his defense. He, by virtue of that, maintains that he cannot receive a fair trial" (V. 16).

In support of this position counsel stated that they "deemed it necessary" to interview Buchalter's associate, Jacob Shapiro, who was then a Federal prisoner and who "could and would give information *vital and essential to the defendant's defense*" (V. 16); that to enable them to interview Shapiro they sued out a writ of habeas corpus, but that the Federal Director of Prisons caused Shapiro's transfer to Springfield, Missouri, "*as a device to avoid an order on the writ*" and "bluntly" refused to grant permission for an interview (V. 17-18). It was further contended that although the Attorney General of the United States turned Buchalter over to the state authorities for trial, "*he has deprived him of the opportunity to prepare and present his defense*" (V. 23).

Thereupon, the trial court and the prosecuting attorney agreed to arrange with the Attorney General of the United

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11. The statement in Buchalter's petition for certiorari (p. 37) that "the Court of Appeals *refused to review* the question of whether * * * a change of venue should have been granted" is in direct conflict with the written opinions of that court. The question was expressly reviewed on the original appeal (280 N. Y. at pp. 220-221) and on the motion for reargument (280 N. Y. at p. 245), and on each occasion it was held that the question had been correctly determined.

States to have Shapiro transferred to a Federal prison in New York City where he could be interviewed (V. 33-35).[12]

After the court marked the case ready for trial, it developed that 26 jurors failed to appear and that 129 jurors offered either legal excuses or asked to be relieved from jury duty because of summer vacation commitments (V. 30-31). Under these circumstances the prosecuting attorney suggested that the case be adjourned until September (V. 33) which was the month originally requested by defense counsel (V. 13). When the court indicated that it would follow that suggestion, counsel for Buchalter, who, only a few hours before, refused to answer ready upon the grounds that they had "not been afforded a reasonable opportunity to properly prepare" for trial (V. 16), suddenly announced that they were fully prepared and opposed the adjournment in these words:

> "*We are as ready as we will ever be* and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute" (V. 35-36).

The court in deciding to postpone the trial until September 15th said:

> "This jury situation is unprecedented. It is practically a run-out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit to that position. To arbitrarily combat it would smack of coercion and would tend to undermine that quality of jury service which is essential for a fair trial of this case" (V. 44).

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12. The record does not disclose the result of whatever steps were taken. But it is significant that Shapiro was not called as a witness and that no claim has ever been made, not even now, that the defense was deprived by either the Federal or State authorities of an opportunity to interview or call Shapiro as a witness.

The Jury Panel.

Petitioners tell us that newspaper publicity "resulted in a panel so infected with the virus of prejudice, that it was impossible to obtain a fair and impartial trial" and that they were compelled to select a jury "from a panel mentally conditioned to convict" (Brief, pp. 14, 42).

We shall soon demonstrate that a fair and impartial jury was in fact selected. Let us first consider an important fact concerning the panel.

When the case was marked ready for trial on August 4th and before it was postponed to September 15th, Judge Talley, one of the counsel for Weiss, called the court's attention to some newspaper items about the case (V. 40). In response, the court said:

> "The Court: There is just a little matter referred to by Judge Talley and that is in relation to this present panel being influenced by these newspapers. I take it that you mean that on account of being on the panel their attention, their interest, will be particularly directed?
>
> Mr. Talley: It undoubtedly has been directed.
>
> The Court: I submit this for consideration. In the event of the case being continued until after the extremely hot weather and until bearable trial weather, regardless of when it is, *that if all counsel for the defense agree, then the Court would be agreeable to drawing of additional talesmen and upon those talesmen coming here the Court will then, the counsel for all defendants agreeing, discharge the present talesmen*, but those talesmen will not have to be drawn right away and their attention would not therefore be particularly directed, their interest would not be particularly directed, by being drawn as talesmen, to the stories now being carried in the New York American" (V. 41).

Later, when the court postponed the trial it again said:

> "Should a new panel be desired, counsel for all the defendants should agree on that" (V. 45).

At no time, however, did counsel for petitioners accept the court's offer to discharge the panel. If, as they now complain, the panel was "so infected with the virus of prejudice that it was impossible to obtain a fair trial", why did not counsel take the opportunity given to them by the court to obtain a new panel? The obvious answer is that counsel knew they could, and in fact did, select from the panel a fair and impartial jury.

Let us see.

The Trial Jury.

Throughout their brief petitioners repeatedly assert that they were not tried by a fair and impartial jury (pp. 20, 36-37, 41, 43, 46, 51, 77). What are the facts?

(a) *The First Nine Jurors.*

The record shows that the first nine jurors who participated in the verdict were pronounced "satisfactory to the defendants":

1.	Charles E. Stevens,	V.	356–391
2.	Chester T. Prentice,	"	752–776
3.	Charles A. Murphy,	"	983–1000
4.	David N. Day,	"	1112–1119, 1133
5.	Henry T. Gill,	"	1207–1221
6.	James B. Cummings,	"	1232–1238, 1288
7.	George B. Hall,	"	1310–1315, 1377
8.	Harold F. Cross,	"	1477–1487
9.	James L. Edghill,	"	1859–1891

These jurors were pronounced "satisfactory" by able and experienced counsel *when their peremptory challenges had not yet been exhausted.* Indeed, before the next talesman

was questioned the defense *still had one more peremptory challenge* (V. 1928-1929). None of the nine jurors above listed was challenged for bias, actual or implied. And it is inconceivable that if there were the slightest doubt about the fairness of any one of these jurors that counsel would have deliberately refrained from excusing him peremptorily.

This brings us to a consideration of the facts in relation to petitioners' argument concerning the foreman of the jury, Charles E. Stevens. At pages 17-18 of their brief petitioners quote a clipped excerpt from the *voir dire* examination of Mr. Stevens, namely, that after being served with a notice to appear as a juror his office associates made some prejudicial remark about one of the defendants. Concerning this incident he told defense counsel that "if I had accepted what they were saying as facts and absorbed them as such, I could have possibly been prejudiced, * * * but if I am called upon to serve, it seems to me such a terrific responsibility that I can't understand why people who know nothing about it can attempt to influence a man who might have to make such a grave decision".

These excerpts are described by petitioners as "most significant" and at page 42 of their brief the following statement is made:

> "It has been seen that Mr. Stevens, who was sworn and acted as a juror, was faced with the necessity of staving off prejudicial influences. There can be no assurance that, despite his commendable efforts, he was not subconsciously affected, particularly since he still faced the prospect of justifying himself to his co-workers, should he vote for a verdict of acquittal."

We are constrained to say that the foregoing distorts the record to an amazing degree. The entire examination of Mr. Stevens appears in Volume VI at pages 356-391. At the time he was questioned petitioners had used only three of their thirty peremptory challenges given to them by law (V. 108, 181, 356; N. Y. Code of Crim. Proc. § 373). Mr.

Stevens was not challenged for cause, and a reading of his examination shows that no such challenge could fairly be interposed. If, as is now claimed, Mr. Stevens "was faced with the necessity of staving off prejudicial influences" and "the prospect of justifying himself to his co-workers should he vote for a verdict of acquittal", why did not counsel use one of their twenty-seven peremptorily challenges, instead of announcing "satisfactory to the defendants" (V. 391)? The conclusive answer appears in the record. We quote from the examination of Mr. Stevens conducted by Buchalter's counsel:

> "Q. Were you in any wise influenced by the making of that statement or those statements by your associate or associates? A. No, I resented their making them.
>
> Q. You resented their making them? A. Yes.
>
> Q. Did you express your resentment? A. Well, I said that I felt that the men were entitled to trial and that until they were judged guilty I did not see how anybody could make loose, irresponsible statements, such as I considered theirs to be.
>
> Q. You said then that you thought that that was an unjust thing for anybody to say? A. In substance, yes.
>
> Q. That was your feeling about it? A. Yes.
>
> Q. You particularly resented those statements being made to you in view of the fact that your associates already knew that you had been summoned here as a prospective or possible juror in the trial of this case? A. That is right.
>
> Q. Is that right? A. Yes.
>
> Q. And, having that in mind, you were quick to express your resentment of these prejudicial remarks; is that correct? A. Yes.
>
> * * * * *
>
> Q. Because you felt that that was an un-American statement to make, did you not? A. Yes.
>
> Q. And you are in favor of the policies of the law that a fair trial must be accorded all men; is that correct? A. That is correct.

Q. And you felt that that kind of talk was unjust and unfair and illegal; is that correct? A. That is correct.

Q. Because it might possibly prejudice a defendant and deprive him of a fair hearing upon a trial; is that correct? A. Yes, sir.

Q. And that is your state of mind now, as you sit here? A. It is.

Q. And were you sworn as a juror you could approach the issues in this case without any prejudice against any defendant; is that correct? A. I feel sure I could.

* * * * *

Q. Reverting for a minute to those conversations that you had with your associates at the United States Envelope Company, were the participants in that conversation or those conversations your superiors? A. No, they were my equals. In other words, in the same capacity as I am.

Q. They were sales representatives? A. That is right, other types of the company.

Q. You would not feel beholden to anybody for the propriety of your verdict in a case of this kind, would you? A. I did not hear the question.

Q. I say you would not be beholden to anybody for the propriety of your verdict in a case of this kind, would you? A. No, I would not.

Q. In other words, in a matter of this kind you swear to do your honest duty, assuming that you are chosen as a juror; is that correct? A. That is right.

* * * * *

Q. Would you feel reluctant to do your sworn duty by reason of the fact that somebody having nothing to do with the administration of justice, somebody who by accident was an associate of yours in a commercial firm, in your place of employment, somebody had perhaps intimated that he would not have agreed with that—would that influence you at all? A. It would have no bearing on the matter.

Q. Assuming that you did bring in a verdict of Not Guilty, you would not be reluctant to meet with your associates again, would you? A. No reason why I should be.

Q. You would not feel reluctant to bring in such a verdict because it might be in the back of your mind that, having done it, brought in a verdict of Not Guilty, it involved a certain mental courage on your part to meet with these co-employees who possibly harbor a different view? A. It would have no bearing on the matter at all" (V. 370-374).

It is no wonder, therefore, that at the end of the examination defense counsel announced that Mr. Stevens was

"Satisfactory to the defendants" (V. 391).

(b) *The Last Three Jurors.*

Petitioners say that the last three jurors "were selected after petitioners had exhausted all of their peremptory challenges" (Brief, pp. 24, 26). That is not correct. We proceed to prove it.

After the ninth juror was accepted two prospective jurors (Mr. Andrews and Mr. Rorke) were called for questioning. The examination of Mr. Andrews failed to disclose the slightest basis for interposing a challenge for cause (V. 1900-1904, 1908-1918). He stated that he had not formed any impression about the case or the defendants (V. 1909-1910) and that he knew of no reason which would prevent him from presiding as a fair and impartial juror (V. 1918). Under these circumstances counsel did not challenge for cause but merely stated that they had no further questions to ask (V. 1930).

But before Mr. Andrews was challenged peremptorily, the questioning to determine the fitness of Mr. Rorke was commenced. It developed during his examination that he was the nephew of a police inspector "in charge of traffic" (V. 1918). He stated that he had no impression adverse

to any defendant (V. 1922), that if accepted as a juror he would "do justice" by his verdict (V. 1906) and that there was nothing to prevent him from rendering "a just verdict" under his oath (V. 1907).

Defense counsel, however, challenged him for "implied bias" (V. 1922). Mr. Rorke was not disqualified under any of the grounds specified by statute as constituting implied bias.[13] Counsel, therefore, appealed "to the discretion of the court" (V. 1925).

When the challenge was overruled a discussion was had, not within the hearing of the jurors (V. 1928-1930). In this discussion counsel urged that if their challenge for implied bias was not sustained, they would be compelled to use their last peremptory challenge, which would leave them without the power of peremptorily challenging the other juror (V. 1928-1929). The court, however, adhered to its original decision. Whereupon Mr. Rorke was again questioned. In this second examinaton Mr. Rorke stated that he was not prejudiced, that he would accord the defendants the presumption of innocence, that if chosen as a juror they could rely upon him "for the preservation of every right that the law gives", and that if there should be a reasonable doubt of guilt in his mind he would give them the benefit of such doubt (V. 1932, 1934).

Thereafter, Mr. Andrews, *whose fairness was at no time questioned*, was peremptorily challenged by the defense (V. 1935). It is thus evident that petitioners, with full and unrestricted power to exclude Mr. Rorke, chose to have him as a juror. That there was no basis to challenge him for cause we have already demonstrated.

We now come to Mr. Link, who was the eleventh juror. His examination appears in Volume VIII at pages 1959-1981. A reading thereof shows that there is not a single word to suggest bias or prejudice. The innuendo conveyed

13. Under the N. Y. Code of Criminal Procedure, § 377 a juror can be challenged for implied bias for eight specific reasons, "and for no other" (Appendix, *infra*).

at page 25 of petitioners' brief by the statement that Mr. Link "had been called into consultation with reference to a radio program called 'Mr. District Attorney'" is unwarranted. The fact is that he was a radio announcer on a *fiction* program called "Mr. District Attorney" (V. 1960, 1977). Typical of this man's qualifications to serve as a juror are his answers to the concluding questions put to him by counsel for Buchalter. We quote from the record:

> "Q. Can Mr. Buchalter as an individual depend on you and entrust to you his keeping and preservation?
> A. Yes, sir.
> Q. Without any sympathy or bias or prejudice?
> A. Yes, sir.
> Q. I take it you will consider your oath on that?
> A. Yes, sir" (V. 1971).

And on questioning by counsel for Weiss, he said:

> "Q. Do you realize that if you are selected as a juror, under your oath you must determine and find according to the way you regard the facts?
> A. That is right.
> Q. Without fear or favor or prejudice or bias?
> A. Yes, sir.
> Q. And can you do that?
> A. Yes, sir" (V. 1972-1973).

None of the counsel challenged him for bias, actual or implied. They merely said, "We rest on the record" (V. 1981).

As to the twelfth juror, John E. Coleman, the record shows that he was eminently qualified to serve (V. 1983-1995). Two illustrations will suffice. Upon being questioned by counsel for Buchalter the juror said:

> "Q. While you were sitting here did anything occur in the courtroom to cause favor or prejudice to either side?
> A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. I take it you realize as well as anyone else the extreme importance of getting an impartial jury?

A. Yes, sir.

Q. So that now there is no prejudice in your mind, or anything at all which would preclude you from giving Mr. Buchalter a fair trial?

A. Nothing (V. 1990).

* * * * *

Q. The law says that every defendant is entitled to a fair trial at your hands. Will you give it to Mr. Buchalter?

A. Yes, sir" (V. 1993).

And under questioning by counsel for Capone:

"Q. Have you had any discussion at all about this case?

A. No, sir.

Q. Have you formed any impression of any character in the courtroom?

A. No, sir.

Q. Your mind is clear now as to the fact that you can sit here as a fair and impartial juryman and take the evidence from the witnesses?

A. Yes, sir" (V. 1993).

Here again counsel said, "we rest on the record" (V. 1995), but made no challenge.

It is thus clear that there is no basis whatever for the assertion that petitioners were not tried by a fair and impartial jury.

The Court's Conduct in the Selection of the Jury.

At page 20 of petitioners' brief the statement is made that "This jury was selected only after repeated efforts of the trial judge to induce talesmen to abjure prejudice

whether or not actually entertained". And at page 43 of their brief they say: "A jury was selected only after the court had browbeaten talesmen, thereby leading others in the panel to deny prejudice to avoid criticism".

This startling accusation is devoid of any sound support and is based solely upon fanciful imagination. The record shows that immediately before the questioning of jurors began the court said:

> "The Court will allow abundant latitude to all counsel to make searching examination of every member of the panel who is drawn, for the purpose of determining whether such member has any prejudice that will prevent a fair and impartial trial of these defendants" (V. 49).

That this was done is overwhelmingly proved by the record. Approximately four weeks were consumed in questioning of jurors. The transcript is over two thousand pages (Vols. VI to VIII). No greater latitude could have been given defense counsel than was allowed in this case. Finally, as conclusive proof of the complete lack of substance in petitioners' accusation, we find that before administering the oath the court took the following precaution to avoid any possibility of any juror having become biased or prejudiced after he was selected:

> "The Court: Before selecting the alternates, of course, the oath will have to be administered to the jury. This question is asked of all twelve members of the jury: Since you were tentatively accepted by both sides at the conclusion of your examination, you have been repeatedly cautioned by the Court not to discuss the case, not to let anybody talk to you about it, not to read the newspapers or otherwise read about it, not to listen to the radio about it. I am going to ask each one of you gentlemen individually if you have strictly followed those instructions.
>
> (Mr. Stevens, Mr. Prentice, Mr. Murphy, Mr. Day, Mr. Gill, Mr. Cummings, Mr. Hall, Mr. Cross, Mr.

Butt, Mr. Edghill, and Mr. Rorke each answered individually, "I have.")

The Court: Mr. Link, I do not have to ask you; you were only accepted this morning" (V. 1981-1982).

Thereafter the court, pursuant to counsels' suggestion, asked the following question:

"The Court: The question is now: Has anything happened to change your viewpoint in regard to the case in the meantime, to change your attitude as impartial jurors? If so, raise your hand.

(Juror No. 9, Mr. Butt, raises his hand.)

The Court: This will have to be at the bench, and not in the hearing of the jury" (V. 1982).

Mr. Butt was then invited by the court to state what had happened. He replied that "*Based upon the various questions that have been asked in court*" he developed a "conviction towards prejudice in this case" which he was "afraid" would prevent him from rendering a fair and impartial verdict (V. 1982). The court then excused the juror stating,

"This is in fairness to the defense. The man has a feeling in his mind which he has frankly expressed. The Court believes it to be an honest one" (V. 1983).

Thereafter, another juror was chosen in Mr. Butt's place.

The Trial.

Petitioners suggest that they were subjected to "a speedy trial" where their rights were "trampled upon" (Brief, p. 45). The fact is that the trial lasted eleven weeks (R. 1030). In these lengthy proceedings petitioners were "zealously—even hotly—defended by experienced counsel" (289 N. Y. at p. 224, per Lehman, Ch. J.). "Buchalter and

Weiss were each represented by two attorneys, each of whom was permitted by the court to participate actively in the trial" (289 N. Y. at p. 183, per Conway, J.). At every stage of the proceedings the requirement of due process of law as guaranteed by the Federal Constitution was fully observed. Indeed, with the single exception of Capone's obviously flimsy assertion that under the Constitution of the United States he was entitled to a separate trial (R. 36-37), the able counsel for petitioners never complained, either prior to or during the trial, of any deprivation of a right, privilege or immunity under the Federal Constitution.

They now come to this Court and complain about several rulings during the trial which they claim deprived them of due process of law. We proceed to state the facts as to each of those complaints.

(a) *As to the Alleged "Suppression of Evidence".*

Immediately before the cross-examination of the people's witness Berger, a request was made for official records of the Police Department of the City of New York, known as "D. D. 4's". These records were reports made by police officers of the movements of various underworld characters including Buchalter (R. 1881, 2142-2143).

The court's denial of permission to inspect those reports, it is claimed, constituted a suppression of material evidence. Petitioners say (Brief, p. 57):

> "Not only were petitioners deprived of the essential right of cross-examination of the prosecution witnesses, Rubin, Tannenbaum and Berger, in respect of any disparity between the testimony of these witnesses and the reports of the police officers, itself a deprivation of due process of law, but the petitioners were deprived of a fair opportunity to present their defense affirmatively."

Now, as to the facts.

When the court ruled against the requested inspection of the reports, counsel for Buchalter said:

> "Mr. Barshay: * * * Whether or not the D. D. 4's had anything to do with this case, they are only concerning the movements of the defendant Buchalter in the years 1935, 1936 and 1937 in Manhattan and have absolutely no bearing upon this case.
>
> The Court: I know nothing about it. * * * If you wish you can have it marked for identification *and then offer it in evidence*, and if there is an objection the Court will rule.
>
> Mr. Barshay: *May we have them marked for identification?* * * *" (R. 1881-1882).

Later, in the absence of the jury, and while the witness Berger was still under cross-examination, the request for the police reports was repeated. At that time counsel for Buchalter said:

> "* * * If your Honor pleases, those are not records having to do with this case as a case but rather are they records having to do, as I understand the situation, with the work of the Police Department of the City of New York during the period from about September of 1935 to the end of 1936 in respect to the surveillance by agents of that department of one of the persons on trial" (R. 2141-2142).

The court then made the following inquiry:

> "The Court: Are they required in connection with the examination of this witness?
>
> Mr. Climenko: *They may be, your Honor,* * * *" (R. 2142).

Thereafter, the court asked the prosecuting attorney the following questions:

> "The Court: I am asking you this: Do they contain any Q's and A's by witnesses in this case?

Mr. Turkus: They do not.

The Court: Do they contain any depositions by witnesses in this case?

Mr. Turkus: They do not.

The Court: Are they purely police reports?

Mr. Turkus: They are police confidential reports of activities of the Police Department.

The Court: No depositions?

Mr. Turkus: No depositions.

The Court: No admissions?

Mr. Turkus: No conversations, no admissions that I could find. They are about three inches thick" (R. 2146).

When the court asked Buchalter's counsel what he desired to have done so that the court could make an intelligent ruling (R. 2146), he replied:

> "Mr. Wegman: These records of the police department show the report of these police officers as to where the defendant Buchalter was, and with whom he spoke, and who spoke to him, over the period of time as to which these witnesses have testified. It is important for the purpose of contradicting the testimony of the witness Rubin and of the witness Berger to show that the police department's own records indicate that their testimony could not have been true" (R. 2147).[14]

Later, another counsel for Buchalter said they wished to inspect the reports

> "*to see whether or not there is something in those records which would dispute the truth of their (Rubin's and Berger's) allegations*" (R. 2151).

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14. In the brief filed with this Court it is said at page 55: "What these reports disclosed, petitioners have no way of knowing. Whether they were complete or not, petitioners cannot know."

Finally, the court, in denying the request said:

> "The Court: If a policeman took the stand and testified otherwise, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling, but that is not present at this moment. Now as it stands, in addition to the fact that these are privileged and confidential under the law, they are hearsay" (R. 2151).

At no time did the court preclude petitioners from offering any defense they pleased. At the end of the people's case petitioners were free to call the Police Commissioner, or anyone else in authority, to reveal the names of the officers who made the reports and then to call such officers to testify on any competent matter. As we have noted the court specifically informed defense counsel that "if a policeman took the stand * * *, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling" (R. 2151). But counsel failed to do so. Instead, they preferred to attempt in summation to induce the jury to draw an unfavorable inference against the prosecution because it did not call the police officers as witnesses (R. 3589-3592). And they also obtained an instruction from the court that "the jury may draw no unfavorable inference because of the defendants' failure or neglect to call any particular witness" (R. 3933).

The reason for the defense strategy is revealed by the finding of the Court of Appeals which examined the police reports. The court said:

> "This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The ruling was correct on the facts presented. (See *People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24.) The records in question were deposited with this court

> at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. *The reports established that the defendant could and did elude the police at will*" (289 N. Y. 244 at p. 245; Italics supplied).[15]

(b) *As to the alleged "show of force".*

1. Under a heading called "The Physical Trappings of the Trial" petitioners complain that they "were brought into the courtroom manacled to police officers" and that "the process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box" (Brief, pp. 28, 46). This, it is contended, was "manufactured" by the State and "placed before the jury" for the purpose of conveying the belief that petitioners were "desperate criminals".

That petitioners were desperate criminals was conclusively established by the evidence and did not need any further support. As stated by Chief Judge Lehman, the evidence showed that petitioners "were members of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer" (289 N. Y. at p. 228). Indeed, the evidence was so strong that even "counsel for the defense did not attempt to picture the defendants as honest, law abiding citizens" (*Idem.*). We quote from the summation of Buchalter's counsel:

> "I said I did not represent an angel, I meant just this: *I condemn the defendant Buchalter's past life with as great vehemence as I possess.* I am not in

15. In this connection it is significant that in summation to the jury Buchalter's counsel said: "What right have we to assume that the police assigned to do their duty were not watching *at least the front entrance of number 200 Fifth Avenue, the side entrance or the one in the rear.*" (R. 3592)

sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid because some of them hoped, by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. *I condemn every act of the defendant Buchalter's past life* (R. 3546-3547).

* * * * *

So, gentlemen do you get my point—that Buchalter, who was being looked for by Dewey *as king of the flour racket and king of the crime racket*—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible misdemeanor? I say, 'Possible misdemeanor' at the hands of Rosen. * * * What was there that Buchalter had to fear at the hands of Rosen *with thousands of complaints running to Dewey in extortion totaling a half a million dollars?* (R. 3584-3585).

* * * * *

You know that Lepke (Buchalter) was not just an ordinary racketeer" (R. 3589).

True it is that Buchalter's counsel told these things to the jury for the purpose of showing that "the position of the defendant Buchalter was so important that it was incredible that there was any reason for the defendant Buchalter to order or direct Rosen's death" (289 N. Y. at p. 184). None the less, the stubborn fact remains that his disclosures far outweighed the conjectural prejudice which petitioners claim arose from the fact that they were brought to and from the courtroom in manacles.

Moreover, the precautions taken to prevent their escape were proper,[16] and would hardly have been noticed by the jury had not defense counsel directed attention to it. We quote from the record:

> "The Court: * * * Did I understand you to say that the defendants are brought in in chains?
>
> Mr. Talley: Yes.
>
> The Court: You mean they are manacled?
>
> Mr. Talley: Yes, sir, manacled with these officers that are with them.
>
> The Court: At the present time?
>
> Mr. Talley: No, the manacles are removed when they come in the courtroom, but not before; when they are seated and not before; and your Honor requires the jury to be in their seats so they can see this spectacle of how these men are brought in.
>
> The Court: Do you impugn the Court's honor? The Court does not require the jury to be in their seats in order to see 'the spectacle,' because the Court is not aware of it; and the Court has not been aware of it until you just informed the Court to that effect. This compels, being before the jury, a ruling in the presence of the jury, and that is, so far as the custodianship is concerned, until the defendants enter the courtroom and are seated it is not within the Court's jurisdiction, and is not under the Court's direction. That is a responsibility that is elsewhere charged. But at no time during the trial will the Court permit any defendant to sit here manacled, and, so far, as the Court is informed by you, the defendants have not sat here manacled" (R. 766-767).

In connection with the court's ruling it is to be recalled that the Attorney General of the United States consented to the production of Buchalter and Weiss for trial in Kings

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16. For similar situations where such precautions were held to be proper see *Kelly* v. *Oregon*, 273 U. S. 589, 591; *State* v. *Temple*, 194 Mo. 237, 248; *People* v. *Kimball*, 5 Cal. Rep. (2d) 608.

County upon condition that they "should at all times remain in the custody of the United States Marshall" (R. 126-127).[17]

2. Petitioners also assert that "witnesses for the prosecution, when on the witness stand, were surrounded by police and court officers" and that the "insidious suggestion to the jury" was that these witnesses had "to be protected" against petitioners (Brief, pp. 28-29).

To begin with, the witnesses referred to were the murderers Bernstein, Tannenbaum, Berger and Magoon, all of whom were petitioners' employees and were held in police custody. Secondly, the description that they were "surrounded by police" is misleading. The court accurately described the scene as follows:

> "The Court: In the courtroom, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I presume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial" (R. 688-689).

And finally, the jury was informed that this was not an exceptional set-up and that it was the usual practice followed in all cases for the purpose of preventing escape of witnesses in police custody. The court said:

> "The Court: All right, for the purpose of the record —*the set-up is the usual one which is followed in this court in all cases so far as the Court can recall.* When

17. As was said in *Ponzi* v. *Fessenden*, 258 U. S. 254, at p. 260, "The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer."

witnesses are brought in, in custody, detectives who are charged with the custody—that is, detectives or other officers or jailers who are charged with the custody, stand back in the corner, substantially out of sight of the jury, but close enough not to lose technical custody. Then the two attendants of this court stand, first the Judge's personal attendant, directly behind the prisoner witness, and next another one, in a position where he can guard the door, which is directly to the left of the witness stand and which opens into the Judge's chambers, *and provides a means of escape. There is nothing unusual about this*, so that is not considered seriously, and it is denied" (R. 765-766).

The "insidious suggestion to the jury" complained by petitioners is thus a figment of their imagination.

(c) *As to the prosecutor's summation and the court's charge to the jury.*

Petitioners' arguments in this respect are based upon isolated excerpts, paraphrase and inference, without regard to the arguments they presented in their summations which occupy over two hundred pages of the record (R. 3543-3782). A reading thereof shows that counsel for petitioners appealed to every possible prejudice that might influence the jury and had in it every technique to confuse and divert the jury from the real issues in the case. It would unduly prolong the length of this brief to discuss their many transgressions. We think it suffices to say that an examination of the summation by the prosecuting attorney shows it to be a fair reply to the arguments made for the defense. It must be remembered that eleven weeks of anxiety and strain would necessarily strike occasional sparks from the temper of counsel and give momentum to overforceful expression. Under such conditions it would be too much to expect summations to be couched in the carefully weighed and measured language of judicial opinions. Indiscreet statements were bound to occur.

As for the court's charge to the jury, it appears at pages 3871-3991 of the record. The parts criticized are discussed in the majority and dissenting opinions of the Court of Appeals (289 N. Y. 181-243). We need only add that the trial court repeatedly instructed the jury, with great emphasis, that they were the sole judges of the facts, that the credibility of witnesses was for them to determine (R. 3874, 3880, 3890, 3902, 3903), and that,

> "The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy (R. 3871).
>
> * * * * *
>
> The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both—fairly, without prejudice or sympathy to either the defendants or to the people of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of a case in court, according to the accepted standards, means (R. 3872).
>
> * * * * *
>
> As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice" (R. 3873).

(d) *As to the defense.*

In view of petitioners' reliance upon Judge Rippey's dissenting opinion wherein he said that the conduct of the trial deprived petitioners "of any free consideration by the jury of their defenses", it is well to note that none of the

petitioners took the witness stand. Capone offered no defense whatever. In the case of Buchalter, Judge Conway said (289 N. Y. at pp. 210-211):

> "* * * so weak was his defense that great harm might have been occasioned to Buchalter if the court had attempted to analyze the testimony of the witnesses called by him."

And Chief Judge Lehman in his concurring opinion added (289 N. Y. at p. 227):

> "Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony."

Review by the Court of Appeals.

Petitioners contend that the Court of Appeals arbitrarily refused to review the rulings on challenges for "actual bias" and they urge that this presents a question "whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may unwittingly be waived and lost".

These contentions present a non-existent issue. The opinion of the Court of Appeals denying the motion for reargument said (289 N. Y. 244, at p. 245):

> "This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, art. 18-B; Cons. Laws, ch. 30) the defendants appeared by attorney and consented to be tried before such special jury. A majority of this court is of the opinion that they thereby consented also to the statutory provision (Judiciary Law, § 749-aa, subd. 7) that rulings of the trial court upon challenges for actual bias are final and not appealable."

We have seen that only Mr. Rorke was challenged for "implied bias" and that as to Mr. Link and Mr. Coleman petitioners merely "rested on the record" and made no challenge for bias, actual or implied. The other nine jurors were pronounced "satisfactory to the defendants". Consequently, the holding of the Court of Appeals that by virtue of the Judiciary Law the "rulings of the trial court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict. Petitioners' contention, therefore, that the decision of the Court of Appeals deprived them of "the right to question the fairness and impartiality *of the jury impanelled*" (Brief, pp. 51-52) raises a false issue.

Finally, the opinions of the Court of Appeals show a most careful and conscientious consideration of the case. Briefly stated, the majority of the court held that petitioners were found guilty upon legally sufficient evidence and that they had a fair and impartial trial. Judge Conway, in whose opinion Judge Lewis and Judge Finch concurred, found after a detailed analysis of the facts (289 N. Y. at pp. 185-198) that the guilt of Buchalter and Weiss "was clearly established" and that Capone's guilt "was peculiarly a jury question" which was "properly left to the jury" (289 N. Y. at p. 221).

In a separate opinion Chief Judge Lehman pointed out that in reviewing a capital case the Court of Appeals must determine not only whether the verdict is against the weight of evidence but also "whether justice requires a new trial" (289 N. Y. at p. 223). He further noted that it was the court's "duty to determine whether errors or defects, if any, have tainted the jury's verdict and may have deprived the accused of his right to a judgment of a jury of his peers, arrived at after a fair trial conducted in accordance with the law" (289 N. Y. at p. 224). After thus describing the extent of the review given to the case Judge Lehman held that although there were "errors and defects", they

could not have had the effect of depriving petitioners of a fair trial. He said (289 N. Y. at pp. 229-230):

> "The verdict of the jury rests, it is plain, on its conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on the appeal may have affected that appraisal. * * * I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as a part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

ARGUMENT.

"It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record" (*Glasser* v. *United States*, 315 U. S. 60, 88). This "regrettably familiar phenomenon" (*Idem*) is given fresh point in petitioners' briefs. Not only are important facts having a direct bearing on the questions presented omitted, but by faulty paraphrasing and in some instances misguided distortions of the record the realities of the trial are beclouded and submerged while occurrences of little importance in their setting are magnified far beyond their true significance. We find that, in the main, petitioners' arguments rest on isolated excerpts wrenched from their

context and considered without any regard for what preceded or followed.

To evaluate their contentions in true perspective and to perceive more sharply the precise issues involved it is, of course, essential to "re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions" (*Johnson* v. *United States*, 317 U. S. —, Decided Feb. 15, 1943, 87 Law ed., Adv. Op., 496, 503). "Asserted denial (of due process of law) is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462).

When thus tested there is no room for fair argument that petitioners were denied due process of law, which, as applied to a criminal case, means the failure to observe that fundamental fairness "essential to the very concept of justice" and that "the acts complained of must be of such quality as necessarily prevent a fair trial" (*Lisenba* v. *California*, 314 U. S. 219, 236).

The guides for decision are clear. Such unfairness exists where an accused in a capital case is denied the right to be represented by counsel (*Powell* v. *Alabama*, 287 U. S. 45); where by the active conduct or the connivance of the prosecutor a conviction is obtained through the use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227); where in the selection of jurors to be called for service discrimination is practiced because of race, color or creed (*Norris* v. *Alabama*, 294 U. S. 587); where an accused is subjected to a trial under a system by which the judge is paid for his service only when he convicts the defendant (*Tumey* v. *Ohio*, 273 U. S. 510); or where the trial is dominated by mob violence in the courtroom so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86; compare *Frank* v. *Mangum*, 237 U. S. 309).

The case at bar is outside the scope of those decisions. In their brief, counsel for petitioners rely on several of the

cases above cited and quote excerpts therefrom, such as the one in *Moore* v. *Dempsey (supra)* where this Court in holding there was a denial of due process of law said that "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion and that the state courts failed to correct the wrong".

But "Sentences in judicial opinions are misleading if taken out of their context and read as if they were the gist of the decision. Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority" (*People* v. *Nebbia*, 262 N. Y. 259, 270). As was said by Mr. Justice Cardozo:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 114).

Petitioners' version of the case at bar may appear to fit the words used by this Court in other situations, but, garbled as that version is, it cannot be made to fit the facts of those cases. Thus, for example, the above quoted statement from *Moore* v. *Dempsey* was "wrought under the pressure" of the following uncontradicted facts as stated in the opinion of Mr. Justice Holmes (261 U. S. 86, at pp. 89-90):

> "* * * the committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. * * * the petitioners were brought into court, informed that a certain lawyer was appointed their counsel, and were placed on trial before a white jury, —blacks being systematically excluded from both grand

and petit juries. The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had no preliminary consultation with the accused, called no witnesses for the defense, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour, and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. * * * no juryman could have voted for an acquittal and continued to live * * *, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob."

It requires a gross distortion of the facts for petitioners to say, at page 44 of their brief, that "*The spirit which permeated the panel was no different from that of the mob which this Court condemned in Moore* v. *Dempsey*"—a panel which we have shown counsel for petitioners deliberately refrained from discharging although given the opportunity to do so by the trial court. In view of the facts in the case at bar we say that the foregoing assertion, as well as many others of similar quality, is shocking and represents a desperate attempt to set free vicious leaders of organized crime.

The fact that Buchalter, because of his breath-taking criminality for many years, received wide notoriety by press and radio as "society's most dangerous enemy" does not justify the claim that he and his associates were tried in "a poisoned atmosphere" where they could not receive a fair trial. "If newspaper articles furnished ground for removal, no defendant could ever be tried for a spectacular crime" in the county of indictment (*People* v. *Brindell*, 194 N. Y. App. Div. 776, 781). Moreover, the newspaper comments were not limited to the city of New York. We quote

from the affidavit of counsel for Capone, filed June 5, 1941, on his application for a separate trial:

> "The defendant Louis Buchalter, alias Lepke, is a person of national prominence * * * whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42).

So too, counsel for Weiss in a similar application on August 4, 1941, said:

> "Louis Buchalter, generally known as Lepke, is hailed throughout the press of not only this county but of the city and I dare say the country at large, as the leader of a band, etc." (V. 28).

And Mr. Justice Daly in denying the motions for change of venue held:

> "It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners in the city and state of New York" R. 165-166).

The record further shows that experience in the Boroughs of Manhattan and Brooklyn has proved that its citizens do not become "poisoned" by newspaper stories. "In the much publicized case of *People* v. *Hines*, the pretrial newspaper accounts concerning the corrupt and criminal alliance of Hines with the underworld were much more constant and voluminous than the newspaper items printed with reference to the case at bar" (R. 134). In answer to the contention that because of such publicity Hines could not receive a fair trial in New York County, Mr. Justice Pecora said:

> "Any resident in this county must recognize the fact that it has a most cosmopolitan population, eminently fair and tolerant in its sentiments. That its people are capable of using discrimination in the formation

> and exercise of their individual judgment has often been demonstrated at the polls where they have voted in large majorities against predominating newspaper opinion and exhortation" (*People* v. *Hines*, 168 N. Y. Misc. Rep. 453, at p. 470).

In the final analysis, therefore, the sole question on the motions for a change of venue was whether there existed in the County of Kings such prejudice as would prevent a fair trial. Upon that question petitioners were given a full hearing in the Supreme Court on two successive occasions before different Justices of that court (R. 155-163, 175-176). In denying the motions Mr. Justice Daly said:

> "After a careful consideration of the application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. * * * It is inconceivable that in a cosmopolitan community such as Kings County, with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence" (R. 165-166).

Such a jury, we have demonstrated, was in fact obtained. The first nine jurors were pronounced by petitioners as "satisfactory to the defendants" at a time when they had not exhausted their peremptory challenges. Two of the other jurors were not challenged for bias, actual or implied. And the third, although challenged for "implied bias", was seated as a juror when petitioners had it in their power to excuse him by using their last peremptory challenge against him. Instead, they used that challenge against a juror whose fairness they at no time impugned.

Now come petitioners and tell us that "While the jurors said they were unbiased, and swore to act impartially, it is clear that their frame of mind was such that they did not 'stand indifferent between the parties'" (Brief, p. 42). Such

clairvoyance must surely be envied, but hardly trusted. For, "While bias, as has been said, is 'an elusive condition of the mind', that consideration affords no ground for extreme and fanciful tests" (*United States* v. *Wood*, 299 U. S. 123, 150). As was recently observed by this Court, per Frankfurter, J.:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustce and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States*, 317 U. S. 269, 281).

In Buchalter's petition for certiorari it was claimed (p 37) that "the Court of Appeals refused to review the question of whether * * * a change of venue should have been granted". To eliminate any possible doubt, we quote from Judge Conway's opinion:

> "Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants' claim for a number of reasons.
>
> In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, 'No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *.'
>
> The motion was addressed to the sound discretion of the court. We are not prepared to say on this record

that its denial was an abuse of discretion (*People* v. *Hyde*, 75 Misc. 407 [opinion by Mr. Justice Lehman, now Chief Judge of this Court]; aff'd., 149 App. Div. 131; *People* v. *Brindell*, 194 App. Div. 776, 781; *People* v. *Hines*, 168 Misc. 453, 470; *People* v. *Sarris*, 69 App. Div. 604). This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance" (289 N. Y. at pp. 220-221).

And in denying the motion for reargument the court said:

"This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter of law by the Justices of the Supreme Court in denying the motions for a change of venue. A majority of the court is of the opinion that the discretion was properly exercised" (289 N. Y. at p. 245).

Surely, this decision does not involve a Federal question. "Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282.) In the *Barrington* case, just cited, the defendant applied for a change of venue on the ground of local prejudice. His motion was denied, and he was convicted of murder in the first degree. This Court in dismissing his application to review for want of jurisdiction said (p. 485):

"*In our judgment no Federal question was involved.* Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the state, although the supreme court of that state had held to the contrary."

The same holds true as to the denial of Capone's motion for a separate trial. Both under Federal and State law

the granting or denial of such a motion is discretionary (*Stilson* v. *United States*, 250 U. S. 583; *People* v. *Doran*, 246 N. Y. 409, 424). It certainly does not raise a question of due process of law under the Fourteenth Amendment.

So, too, the claims concerning challenges for cause against jurors who did not participate in the verdict and concerning the non-reviewability of rulings on such challenges do not present a constitutional question. A right of review by appeal is not an essential element of due process of law (*McKane* v. *Durston*, 153 U. S. 684, 686; *Reetz* v. *Michigan*, 188 U. S. 505, 508). It rests entirely with the legislature. Thus subdivision 7 of section 749-aa of the New York Judiciary Law, abolishing the right of appeal on challenges to special jurors has been held constitutional (*People* v. *Dunn*, 157 N. Y. 528). Since in the instant case petitioners were in fact tried by a fair and impartial jury they have no basis for complaint (*Spies* v. *Illinois*, 123 U. S. 131, 168-180). As stated in *Brown* v. *New Jersey*, 175 U. S. 172, 175:

> "* * * the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained' *Hayes* v. *Missouri*, 120 U. S. 68, 71."

The criticism against the trial judge seems to be based on the notion that trial judges should be reduced to the humiliating position of having no right to say or do anything in a jury trial except to rule in monosyllables on questions presented by counsel; that they should do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds, or even prevent them from taking an unfair advantage by misleading the jury by false suggestions and the like.

"The trial judge is," however, "something more than a mere automaton." (*People* v. *Ohanian*, 245 N. Y. 227, 232.) He "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function, as at common law, is an essential factor in the process for which the Federal Constitution provides". (*Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 95.)

Trial by jury can never be an effective means for administering justice as long as it is characterized by appeals by able advocates to the emotions of untrained men with the judge muzzled and relegated to the side lines and not allowed any substantial part in the trial except to say "yes" or "no" to propositions drafted by counsel and used by them for partisan effect.

The notion that a jury, called upon to render a verdict on disputed facts and subjected to the obfuscating arguments of opposing counsel, are unable to reach a fair decision because the court seeks to help them by analysis and comment is absurd. The court has been trained to understand and clarify factual as well as legal intricacies, penetrate the devices of counsel and observe where the truth is apt to be. To deprive him of the right to aid the jury in arriving at a just verdict on the evidence would emasculate his usefulness. As was said by Dean Ezra Thayer (quoted in Wigmore on Evidence [3rd ed.] sec. 2551-a, p. 510):

> "In a long trial, perhaps involving hard questions of expert judgment, the business of weighing conflicting testimony is a serious task for men unused to analysis or to abstract ideas; and a system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal tyranny or lay magistrates, is today a senseless perversion."

Moreover, the charge to the jury fails to present any Federal question. No claim was made at the trial that it violated the Federal Constitution. Nor was any such claim made or decided by the Court of Appeals. The charge, therefore, is not reviewable here. As stated in *Franklin* v. *South Carolina*, 218 U. S. 161, 172.

> "The supreme court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to plaintiff in error which would warrant a reversal by this court. *These rulings were upon questions of general law, concerning which no Federal right was asserted and denied, as is essential to enable this court to review the judgment of a state court.*"

The criticism of the trial judge for permitting petitioners to be manacled to police officers while being brought to and from the courtroom is certainly unwarranted. Where, as here, the defendants on trial for murder are desperate and dangerous criminals, such precautions must be taken to prevent their escape. (*Kelly* v. *Oregon*, 273 U. S. 589; *State* v. *Temple*, 194 Mo. 237; *People* v. *Kimball*, 5 Cal. Rep. [2d] 608.) It is specious to contend that by so doing their constitutional rights were violated. The words of Judge Cooley, a great judicial interpreter of the organic law, are quite pertinent. He said (*People* v. *Murray*, 52 Mich. 291):

> "I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any others; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct."

And this Court in a situation analogous to the one at bar said (*Kelly* v. *Oregon*, 273 U. S. 589, 591):

> "Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the

warden of the penitentiary, inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody, in order that he might fully make his defense, and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely free from custody (citing cases). There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit."

The same is true of the complaint against the presence of detectives in the courtroom when the people's witnesses were testifying. We have already stated the facts controlling this situation. It is pertinent here to quote the considered judgment of an eminent committee of the American Bar Association in their report on "Improvements In The Law of Evidence (Reports of the Section of Judicial Administration at Annual Meeting for July 25-27, 1938):

"10. *Intimidation of Witnesses.*

In most of the large cities there is probably more or less intimidation of witnesses in felony cases. This, when it exists, is the supreme disgrace of our justice. It is well-known to all that the success of the 'racket' is due chiefly to the lack of proof caused by the intimidation of witnesses. This intimidation takes place either in the court premises or outside of them.

(A) In the *court premises* it is the duty of the judge to install arrangements for protecting the witnesses, and also to instruct and require his bailiffs to exclude from the courtroom and its premises known bullies and touts. All this part of the remedy comes home to the judge's responsibility."

As to petitioners' request for permission to inspect the police department reports, it was clearly an attempt to go "upon a tour of investigation, in the hope that they would find something which would aid them" (*Arnstein* v. *United States*, 296 Fed. 946, 950). It is settled law, however, that "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered" (*People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 29; see also, *Goldman* v. *United States*, 316 U. S. 129, 132).

Conclusion.

That the trial was not faultless may be conceded, but "we cannot expect perfection on the trial of a criminal case" (*People* v. *Wilcox*, 245 N. Y. 404, 406). As stated by Chief Judge Lehman in the case at bar, "It is difficult, perhaps impossible to avoid all error upon such a trial" (289 N. Y. at p. 230). "The due process clause", however, "does not impose upon the States a duty to establish ideal systems for the administration of justice" (*Ownbey* v. *Morgan*, 256 U. S. 94, 110). Nor does it limit "the powers of the States to try and deal with crimes committed within their borders" or "bring to the test of a decision of this Court every ruling made in the course of a State trial" (*Avery* v. *Alabama*, 308 U. S. 444, 446-447). "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose" (*Sauer* v. *New York*, 206 U. S. 536, 546). And when federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded" (*Lisenba* v. *California*, 314 U. S. 219, 239).

We submit that such is not the case here. Petitioners were represented by able and experienced counsel, who were given ample opportunity to prepare for trial. The trial lasted eleven weeks. The widest latitude was given in the

selection of the jury, which resulted in obtaining fair and impartial jurors. Equally wide latitude was given to the defense in the cross-examination of the people's witnesses and in summations to the jury. And upon appeal to the Court of Appeals petitioners were given a full and conscientious hearing. In short, at every stage of the proceedings due process of law was had.

The words of Mr. Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S. 97, at p. 122, are quite apt here:

> "The constitution and statutes and judicial decision of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a fair trial because opinions may differ as to their policy of fairness. * * * There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

For the foregoing reasons the judgments below should not be disturbed.

Respectfully submitted.

THOMAS CRADOCK HUGHES,
Acting District Attorney,
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SOLOMON A. KLEIN,
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Assistant District Attorneys,
Of Counsel.

Appendix.

New York Judiciary Law.

"§ 749-aa. Special jurors in certain counties.

1. * * * * *

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. * * * * *

4. Application for [illegible] jury. Whenever an issue of fact has arisen in any civil or criminal action triable by a jury empaneled within the provisions of this section, the [illegible] attorney of the defendant, if in a criminal action,

or either party in a civil action may apply for a special jury to try such issue. * * * Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. * * *

5. * * * * *.

6. * * * * *.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. * * * * *.

9. * * * * *.

10. * * * * *."

Section 377 New York Code of Criminal Procedure.

"§ 377. Grounds of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action or having complained against, or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror." (L. 1881, ch. 442, sec. 377 in effect Sep't. 1, 1881.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR REHEARING OF APPLICATIONS FOR WRIT OF CERTIORARI

I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
Counsel for Petitioner Buchalter.

ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
Counsel for Petitioner Weiss.

SYDNEY ROSENTHAL,
Counsel for Petitioner Capone.

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LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE, Petitioners, against THE PEOPLE OF THE STATE OF NEW YORK, Respondents.	Nos. 606, 610, 619

PETITION FOR REHEARING OF APPLICATIONS FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

COME NOW Louis Buchalter, Emanuel Weiss and Louis Capone and respectfully petition this Honorable Court for a reconsideration of their several petitions for a writ of certiorari to review the judgment of the County Court of the County of Kings, State of New York, as affirmed by the Court of Appeals of the State of New York, whereby your petitioners were adjudged guilty of murder in the first degree, and sentenced to death.

The several petitions were submitted under numbers 606, 610 and 619, respectively, of the October Term, 1942, and were denied by order filed February 15, 1943. The stay of execution, theretofore granted by Mr. Justice Roberts, was vacated. No new date of execution has yet been set; petitioner Buchalter is still a prisoner of the United States of America, confined at Federal Detention Headquarters at New York City; petitioner Weiss and petitioner Capone

are prisoners of the State of New York, confined at Sing Sing State Prison, Ossining, New York.

Counsel for petitioners are not unmindful that full consideration was given to the petitions. Yet they are so convinced that there was a denial of due process in this case, that they believe the failure so to demonstrate was due to fault on their part. In an effort to present a comprehensive review of the proceedings below, the very volume of the matters discussed may have obscured the fundamental problem sought to be presented.

Counsel recognize that while this Court is reluctant to review the administration of justice in the several States, it has repeatedly acted when it believed that fundamental due process had been denied. In this case, the belief that this has occurred arises from no single incident. In other contexts, this Court has recognized the necessity for consideration of all of the elements of a situation and has sometimes spoken of a "bundle of rights". Here it is not amiss to suggest that there has been a "bundle of wrongs".

A fair trial before an unbiased tribunal is the keystone of the structure of justice assured by the Fourteenth Amendment to the citizens of the several States.

Counsel recognize, moreover, the natural reluctance to grant a writ because such action might lead to a plethora of criminal cases in which writs might hereafter be sought.

But this is an unparalleled case; it really has no counterpart. Rarely, if ever, does a case arise where a trial is so grossly unfair that judges of the State Court are moved to say that the defendants had been deprived of "*even a remote outside chance of any free consideration by the jury*".

If this Court can be convinced:

(A) That the trial was held in a poisoned atmosphere, one which in all probability precluded the selection of a fair jury;

(B) That the physical trappings of the trial—for example, the unmanacling of the defendants in the presence of the jury, and the proximity of guards to the witnesses while they testified—were calculated to intensify the hostile atmosphere;

(C) That witnesses for the State were confessed criminals and murderers who had had the opportunity to frame their stories to save their own lives;

(D) That evidence which might have tended to contradict these witnesses was suppressed;

(E) That, by the Trial Judge's charge, cross-examination was derided and the jury was led to condone attempted perjuries by the prosecution's witnesses;

would it then say that what occurred at this trial was not bad enough to warrant its intervention? The petitioners' plea is that they be given the opportunity to convince this Court that these and other factors as well precluded a fair trial.

Nearest in analogy to this case is *People* v. *Becker*, 210 N. Y. 274, to which particular attention is invited, because counsel could not more forcefully present the argument here than was stated by the opinions of the Court in that case. There the New York Court of Appeals intervened. Here the judgment of death was affirmed, despite the fact that an actual majority of the Court of Appeals expressed at least a reasonable doubt of guilt.*

Is there so little merit to a claim of denial of due process where three-sevenths of the Court below said that petitioners were deprived of even *"a fair chance to defend their lives"?* Is such a case so free from doubt that this Court will not hear argument on the merits?

---

* In a later case decided by that very Court, *People* v. *Nitzberg* (decided January 21, 1943, not yet officially reported, printed in New York Law Journal, front page, February 17, 1943), it saw fit to denounce the principal witnesses for the prosecution, two of whom were, as here, Tannenbaum and Magoon.

The Chief Judge of the Court of Appeals voted to affirm because, he concluded, the errors at the trial did not affect the verdict. Perhaps that may be, but for a reason different from that assigned by the Chief Judge; this jury was preconditioned to believe that these defendants were guilty, and the Trial Court confirmed that belief by communicating unmistakably to the jury his own conviction of guilt, his own view that the trial was but an irritating and tiresome formality. And the learned Chief Judge apparently did not measure that unfairness by the standard of "due process"; apparently he did not take into account the lurid articles in the local newspapers which, as even the Trial Judge recognized, raised "*havoc with the jurors*" (S. M. p. 614, September 24, 1941).

The other three judges of the Court of Appeals who voted for affirmance spoke through Judge Conway. They found no error. They thought the summation of counsel for Buchalter made immaterial the denunciatory newspaper stories; they failed to perceive that such a summation was an expedient made necessary by the exigencies of the atmosphere created by those very newspaper stories.

I

This case presents directly the question whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may be unwittingly waived and so lost.

This would seem to be a matter meriting review by this Court.

On the appeal below, it was contended that such bias and prejudice permeated the entire panel that no fair trial jury could have been chosen, and that the rulings of the Trial Judge foreclosed any possibility of proper examination and selection of jurors for the trial.

The majority of the Court below, however, in the per curiam opinion denying the motion for reargument (R. 4121), said that no review was permissible of the rulings of

the Trial Court upon challenges for actual bias. It did so in reliance upon a local statute making such rulings of the trial judge final and not reviewable upon appeal.

In this, the majority of the Court below fell into grave error of Constitutional Law which this Court should correct.

The consent, if such it can be called, to be tried by a special jury cannot be tortured into a consent to be tried by a contaminated jury. It is crystal-clear that this whole panel was so infected by prejudice and bias that there was little, if any, likelihood of obtaining a fair and impartial jury. If in this situation, recognized by the Trial Court, as witness his comment that the newspaper articles were "raising havoc with the jurors", it was not his duty on his own motion to declare a mistrial and permit renewal of the motions for a change of venue, then at the very least he should have allowed the widest scope to the investigation of the state of mind of each juror—as indeed at the outset he had promised to do. Not only did he improperly restrict that examination, by his comments and strictures he bludgeoned the talesmen into abjuring prejudice and bias in order to qualify.

Where it is charged, as here, that error intervened to the prejudice of defendants in the rulings of the trial judge which prevented the proper examination of the talesmen upon challenges for actual bias, it is no answer to say that the local statute makes such rulings immune from appeal. The Fourteenth Amendment's guaranty of due process would be idle words were its high purposes so easily circumvented. How, then, would a defendant be guarded against an admittedly hostile jury?

This case is not dissimilar to *Moore* v. *Dempsey*, 261 U. S. 86. There (p. 91) "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and * * * the State Courts failed to correct the wrong". Here it was the same vice, but in more subtle form. Yet the same result—deprivation of due process of law—

ensued. Indeed, the evil is the greater when subtlety replaces violence, because men can, if strong of will, defy and disregard armed threats. They can seldom escape the insidious effect of community-wide prejudice—for its very nature is such that they are ignorant of their being seized and affected by it.

A fair and impartial tribunal for the trial is of the essence of due process. To say, as is implicit in the decision below, that a constructive, as distinguished from an actual, consent to trial by special jury carries with it a consent to give up the right to question the fairness and impartiality of the jury impanelled is not consonant with any concept of due process. And this holding by the Court of Appeals of New York is the more remarkable since New York State does not countenance waiver of trial by jury in a capital case. Article I, Section 2, N. Y. State Constitution; *People ex rel. Battista* v. *Christian*, 249 N. Y. 341. So the startling inconsistency now develops that New York insists upon a jury, but if it is a "special" jury, will not allow inquiry into whether that jury has been properly chosen.

Here, specifically, the highest court of a state has refused to review rulings upon challenges to jurors for actual bias, because a state statute precludes such review. Thereby due process was denied, because in the first instance the Trial Court precluded a demonstration of bias, and the State statute has been said to be a bar to correction of this fatal defect. Unless this Court correct this error, this "hard case" has made "bad law" indeed.

II

Evidence in the possession of the prosecution was earnestly claimed to have been suppressed. The majority of the Court of Appeals indirectly sanctioned that suppression by saying, on reargument, that the evidence was not conclusive.

Is "due process of law" to be determined by such criteria?

The majority of the judges of the Court of Appeals held that certain errors at the trial could be disregarded because it did not think those errors were sufficient to prejudice the jury. But, when it came to consider the refusal of the Trial Court to allow the defendants free access to available evidence, the majority of the judges decided that it probably would not have made a difference—thus usurping, doubtless inadvertently, the province of the jury.

Defendants should not have to demonstrate that the suppressed evidence *would* have changed the result; it should be enough that it *might* have. Surely no one can say with certainty that the jury might not have been influenced by the reports of the police officers who were shadowing Buchalter, thereby corroborating the testimony of the defense witness Shapiro.

It is one thing to say, as did the majority below, that certain errors did not have influence. It is a quite different matter to say that the suppressed evidence would have had no effect.

It is as repugnant to the concept of a fair trial for the prosecution to withhold evidence which might have helped the defense as it is for the prosecution to use evidence which it knows to be false. (Cf., *Mooney* v. *Holohan*, 294 U. S. 103.)

III

The dissenting judges in the Court of Appeals emphasized that while the form of a trial had been observed, the substance and essence of fair play were lacking.

"Fair play" connotes protection against the interposition of extrinsic factors, of extraneous influence. For example, it is not observed where, as here, the prosecutor was allowed in summation to interject the issue of his personal integrity, and to disparage, if not condemn, defense counsel as devil's advocates hired with tainted money. This factor of extraneous influence seems to be the common thread

tying together the various decisions of this Court touching the issue of due process.

In short, the distinction between mere error in the trial and a deprivation of due process of law is the difference between a venial mistake or error of judgment and a failure to provide a safeguard against foul blows.

To appraise individual errors each by itself and to examine "in isolation abstract questions of evidence and procedure" cannot be a fair test whether "due process" was had. To deny a petition for a writ of certiorari here is "to acquiesce in low standards of criminal prosecution". (Frankfurter, J., in *Johnson* v. *U. S.*, decided February 15, 1943, Law Ed. Adv. Op. Vol. 87, p. 503.)

Counsel appreciate that this Court may be hesitant to review a case which received careful consideration by the New York Court of Appeals. But the very divergence of the opinions of the Judges of that Court shows that there was almost an equal division on the question of the fundamental fairness of the trial. Not long ago petitioners would have had the right of direct appeal to this Court. Appeal is nonetheless a privilege they should be accorded where there is such strong doubt that they received a fair trial.

When dissenting judges of such distinction feel that there has been only lip service to fair play (which is all "due process" really means), the case surely is one which involves such fundamental principles as to warrant its review by this Court.

Rare, indeed, are those cases of so close a division on such an issue in the highest court of a State. This Court is not asked to set a precedent for unlimited review of criminal cases from State Courts. But, if cases could come to this Court by certificate from a State Court, it is clear that this case would be so certified, not simply because the majority below remained burdened with a reasonable doubt of guilt, but for a far more important reason.

There is here, certainly, reasonable doubt whether these petitioners received a fair trial. No judgment, especially of death, ever should go unreviewed in this Court where there is reasonable doubt of that.

WHEREFORE, your petitioners, by counsel whose signatures are subscribed, pray that their petitions for a writ of certiorari may be reconsidered.

Counsel certify that this petition is presented in good faith and the sincere belief that it has merit, and not for the purpose of delay.

And your petitioners will ever pray, etc.

LOUIS BUCHALTER, Petitioner,
by I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
Counsel.

EMANUEL WEISS, Petitioner,
by ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
Counsel.

LOUIS CAPONE, Petitioner,
by SYDNEY ROSENTHAL,
Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 606, 610, 619.—October Term, 1942.

606	Louis Buchalter, Petitioner, *vs.* People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.
610	Emanuel Weiss, Petitioner, *vs.* People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
619	Louis Capone, Petitioner, *vs.* The People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.

[June 1, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners were convicted of first degree murder in the County Court of Kings County, New York, after a trial lasting over nine weeks. The printed record consists of over twelve thousand pages. The judgments were affirmed by the Court of Appeals of the State.[1] Numerous errors were there assigned. Four opinions were written, two of which dissented from the judgments of affirmance, as to which the court divided four to three. In his concurring opinion the Chief Judge said that he agreed with one of the dissenting opinions that errors and defects occurred in the trial which could not be "disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights." His conclusion was, however, that the errors did not affect the verdict. Two dissenting judges were of opinion that such substantial error was committed as to require a reversal. One judge was of opinion that the conduct of the trial was so grossly unfair as to leave the defendants without a remote chance of free consideration of their

[1] 289 N. Y. 181; rehearing denied 289 N. Y. 244.

defenses by the jury; so unfair as to deprive them of the presumption of innocence and the requirement of proof beyond a reasonable doubt.

The remittiturs of the Court of Appeals recited that the appellants in brief and argument raised the point that they had been denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States and that this point was considered and necessarily decided. The same contention was the basis of the petitions for certiorari.

The petitioners rely not on any one circumstance but insist that they were not afforded a fair and impartial jury free from influences extraneous to the proofs adduced at the trial; that they were deprived of an impartial and unbiased judge to preside at the trial and that the prosecutor resorted to unfair methods to influence the jury.

This court granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument. As the opinions rendered in the court below state the facts and discuss the alleged trial errors in detail we need not restate them.

The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land."[2] Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee.[3] But the Amendment does not draw to itself the provisions of state constitutions[4] or state laws.[5] It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring

[2] Hebert *v.* Louisiana, 272 U. S. 312, 316. See also: In re Kemmler, 136 U. S. 436, 448; Caldwell *v.* Texas, 137 U. S. 692, 697; Lisenba *v.* California, 314 U. S. 219, 236.

[3] Moore *v.* Dempsey, 261 U. S. 86; Powell *v.* Alabama, 287 U. S. 45; Brown *v.* Mississippi, 297 U. S. 278; Avery *v.* Alabama, 308 U. S. 444; Chambers *v.* Florida, 309 U. S. 227; White *v.* Texas, 310 U. S. 530; Smith *v.* O'Grady, 312 U. S. 329; Ward *v.* Texas, 316 U. S. 547.

[4] Rawlins *v.* Georgia, 201 U. S. 638; Patterson *v.* Colorado, 205 U. S. 454, 459; Hebert *v.* Louisiana, *supra*, 316.

[5] Leeper *v.* Texas, 139 U. S. 462; Rawlins *v.* Georgia, *supra*.

to the test of a decision in this court every ruling made in the course of a trial in a state court.[6]

The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury such assertion raises no due process question requiring review by this court.[7]

The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that ~~they~~ the were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings.

Finally, the petitioners assert that the prosecuting officer, by suppression of evidence, and by statements in his addresses to the jury, was so unfair as to deprive the trial of the essential quality of an impartial inquiry into their guilt. The point as to the alleged suppression of evidence is without merit. Certain documentary evidence was in court. The judge ruled that the

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[6] Avery v. Alabama, *supra*, 446-447; Leeper v. Texas, *supra*; Howard v. North Carolina, 191 U. S. 126, 136, 137; Burt v. Smith, 203 U. S. 129, 135; Barrington v. Missouri, 205 U. S. 483, 488; Ughbanks v. Armstrong, 208 U. S. 481, 487; Caldwell v. Texas, *supra*, 697; Hebert v. Louisiana, *supra*, 316.

[7] Hayes v. Missouri, 120 U. S. 68, 71; Spies v. Illinois, 123 U. S. 131, 168; Rawlins v. Georgia, *supra*; Franklin v. South Carolina, 218 U. S. 161, 168.

prosecuting officer need not submit it to defense counsel for examination. If there was error in the ruling it was error of the court. Upon motion for rehearing the Court of Appeals examined the papers and found that they were not of significance in respect of any issue in the case. No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the state,[8] was shown.

The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

As we have recently said, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.[9]

The judgments are affirmed.

Mr. Justice BLACK, substantially agreeing with these views, is of opinion that the petitions should be dismissed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[8] Mooney v. Holohan, 294 U. S. 103.

[9] Adams v. McCann, 317 U. S. 269, 281.